

# ABHANDLUNGEN

## Legal System and Legal Culture in Japan

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### I. PROBLEMS PRESENTED

#### 1. *Positivistic Approach versus Comparative Legal Culture*

*Léontin-Jean Constantinesco* asserted in his legal essay that many scholars of comparative law consider modern Japanese law to belong to the Continental European law, that is, the civil law system, rather than to the circle of Eastern law.<sup>1</sup>

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1 LÉONTIN-JEAN CONSTANTINESCO, Über den Stil der "Stiltheorie" in der Rechtsvergleichung: *ZvglRWiss* 78 (1979) 154, 171. ("Für Zweigert und Kötz zählt auch das japanische Recht zu diesem [fernösterlichen] Rechtskreis, obwohl für die Mehrzahl der Autoren das japanische Recht heute eher zum kontinental-europäischen Rechtskreis gehört."). It seems to me, however, that in this context the basic approach of *Zweigert* and *Kötz* is closer to that of comparative legal culture (as opposed to comparative positive law), rather than that of *Constantinesco*.

Though they classify Japanese law under “Law in the Far East”, *Konrad Zweigert* and *Hein Kötz* in their introduction to comparative law pointed out that:

“It is true that for a long time the many codes which were enacted in Japan based on the European model had very little influence on the realities of legal doctrine there, but it now appears that the traditional distaste for written rules of law and litigation is so much on the wane that it can no longer be classified in the family of oriental systems.”<sup>2</sup>

Even Japanese scholar *Hiroshi Oda* maintains, “Japanese law is part of the Romano-Germanic family of law, with some elements of US law.”<sup>3</sup>

Can we say, however, that the traditional distaste for litigation is on the wane to the degree that Japanese law can “no longer be classified in the family of oriental systems”, or that it belongs to, or is “part of Romano-Germanic family of law” (civil law system), with “some elements of US law”?

It seems to me that Japanese law and legal order both in academic writings and in action is too complicated to be classified by specific legal culture (*Rechtskultur*), legal system (*Rechtskreis*) or legal family (*Rechtsfamilie*), though this depends upon the definitions and/or classifications used. In any case, Japanese law offers comparative law scholars a fascinating model of a symbiosis or hybrid of several different “ideal-types” of legal culture and legal system.

## 2. *Analysis of a Non-Litigious Society*

First of all, the problem of avoiding litigation has rarely been analyzed in depth, even though it is “a central element of the Japanese legal culture.” Recently, however, the late *Christian Wollschläger* analyzed litigation rates per capita in imperial Japan and in the postwar phase of economic expansion, and concluded that “[t]he low demand for civil justice is a genuine element of legal culture” to the extent that “it distinguishes the practical operation of law from Western nations.” This is “the Japanese aspect of Japanese law.” According to the historical judicial statistics “[t]he low demand for civil justice could be traced back to the 18<sup>th</sup> century for metropolitan courts” and

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2 KONRAD ZWIEGERT and HEIN KÖTZ, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* (3. Aufl. 1996) 65 (“Gewiß war es früher richtig, daß die zahlreichen Gesetzbücher, die man in Japan nach kontinentaleuropäischen Mustern in Kraft gesetzt hat, keinen nennenswerten Einfluß auf die japanische Rechtswirklichkeit gehabt haben. Heute aber scheint es so, als schwäche sich in Japan die traditionelle Geringschätzung geschriebener Rechtssätze und die lebhaftige Abneigung gegenüber allen Formen der offenen gerichtlichen Auseinandersetzung mehr und mehr ab, und das bedeutet, daß die Zuordnung Japans zu einem “fernöstlichen” Rechtskreis aufgegeben werden muß.”), *Introduction to Comparative Law* (Tony Weir transl. 3<sup>rd</sup> ed. 1998) 66.

3 HIROSHI ODA, *Japanese Law* (2<sup>nd</sup> ed. 1999) 7, 9. Although he sets limits to “for the purposes of this book” (substantive Japanese legal system) and recognizes that “there is a gap between the law in books and the law in action”, that is, between legal system and legal culture.

“[s]ocial attitudes toward law which continue from an agrarian feudal state are indeed the only basis for explaining the stable secular development of litigation in Japan as well as the wide distance from Western nations.”<sup>4</sup>

Traditionalists have explained the low litigation rates as a product of Japanese culture or the “fundamental Japanese concern for consensus and harmony”, while the others have emphasized such elements as a shortage of lawyers, costs of litigation, ineffectiveness of remedies, etc. Wollschläger’s findings “confirm the traditionalist explanation of the avoidance of litigation as it was laid down in *Takeyoshi Kawashima*’s historical approach”.<sup>5</sup>

### 3. *Is Japanese Law Part of the Civil Law System?*

As to the second issue the late Professor *Yoshiyuki Noda* commented in his legal essay on *René David*’s view in *Les Grands Systèmes de Droit Contemporains* [Major Legal Systems in the World Today] (1964) as follows:

“[T]he current system of law in Japan can be considered the offspring of German and French law. And in that sense, Japanese law belongs to the Romano-Germanic family [civil law system] under Professor René David’s classification. In terms of structure [legal system], there is no room for dispute.”

Professor *Oda*’s view seems to be similar.<sup>6</sup>

In terms of structure (legal system, academic writings or written law), as far as Japanese *private* law (especially the structure of the Civil Code) is concerned, it might be possible to categorize it within the Romano-Germanic legal system, that is, the civil or Continental legal system, yet, is it also possible to say, however, that the structure of Japanese *public* law, particularly the Japanese constitutional system after World War II that is based on the judicial review of constitutionality, belongs to the civil law system.

One might well classify Japanese constitutional law within the common law system [Anglo-American legal system]. The same could be said of other pieces of public law, such as criminal procedure, anti-trust, labor law, etc. This indicates that Japanese law

4 DANIEL H. FOOTE, *Resolution of Traffic Accident Disputes and Judicial Activism in Japan*, *Law in Japan* 25 (1995) 19, 39; CHRISTIAN WOLLSCHLÄGER, *Historical Trends of Civil Litigation in Japan, Arizona, Sweden, and Germany: Japanese Legal Culture in the Light of Judicial Statistics*, in: Harald Baum (ed.), *Japan: Economic Success and Legal System* (1997) 89 et seq., 134.

5 TAKEYOSHI KAWASHIMA, *Dispute Resolution in Contemporary Japan*, in: Arthur T. von Mehren (ed.), *Law in Japan: The Legal Order in a Changing Society* 41 et seq. (1963); TAKEYOSHI KAWASHIMA, *Nihon-jin no hō-ishiki* [The Legal Consciousness of the Japanese] (1967); HARALD BAUM, *Emulating Japan?*, in: Baum (*supra* note 4) 17.

6 RENÉ DAVID, *Les grands systèmes de droit contemporains* (1964) 16 (= *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (John E.C. Brierley transl. 1966); YOSHIYUKI NODA, *Nihon ni okeru hikaku-hō no hatten to genjō* [Comparative Jurisprudence in Japan – Its Past and Present], Part II 90 (1973) *Hōgaku Kyōkai Zasshi* 14 (= *Law in Japan* 9 (1976) 9); ODA (*supra* note 3) 7-9.

with respect to its structure can be categorized within the civil law system only as far as private law is concerned. With respect to constitutional and public law (except general administrative law and the Criminal Code), it should be categorized into the common law system or the American legal family. Professor *Akira Mikazuki* insisted that in the changes witnessed in the structure of the legal system after 1945, the shift from the civil law system to the common law system is not only quantitative but also qualitative, particularly in the area of public law. According to Professor *Hideo Tanaka*, reform of the Japanese legal system was primarily modeled after the American model in such fields as constitutional law, criminal procedure, habeas corpus, role of counsel in civil procedure, rule-making power of courts, corporation law, corporate reorganization, bankruptcy, antitrust law, securities regulation, regulatory commissions, the rule of substantial evidence in administrative law, labor law, etc. These statutes, in quality as well as in quantity, substantially affected “the basic structure of Japanese law.”<sup>7</sup>

Thirdly, if we look at the function and/or culture of Japanese law, it is not a simple matter of classifying it as a part of the Romano-Germanic legal system or the Anglo-American legal system. It could be argued whether these systems when transplanted into Japanese law, really took root, and whether Western law became law in action, namely, ‘living law’ in Japan and was implemented in practice into the legal process, administration of justice, performance and execution, in the same way as in Western countries. Professor *Noda* pursued this problem, saying as follows:

“Seen from the viewpoint of function”, one wonders, “if Japanese law is in fact a member of this [Romano-Germanic] family of law.” It would suffice merely to emphasize that

“a difference in the concept of law is not an inconsequential element in creative differences between legal systems. The characteristic of a nation’s mentality that underlies its concept of law is perhaps ultimately genetically determined. As genes are highly stable, so is mentality; then the concept of law, too, is difficult if not impossible to change. Hence, when a nation has adopted foreign law on a massive scale, no matter how faithful it may be to the original model, the adopted law is bound to undergo an assimilation and transformation at the subliminal level to fit it into the nation’s ‘mentality’.”<sup>8</sup>

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7 HIDEO TANAKA, *Nihon ni okeru gaikoku-hô no sesshu: Amerika-hô* [Impact of Foreign Law in Japan: American Law], in: M. Itoh (ed.), *Gendai-hô: Gaikoku-hô to Nihon-hô* [Contemporary Law: Foreign Law and Japanese Law] (1966) 290-300. See also Symposium: The Reception in Japan of the American Law and its Transformation in the Fifty Years since the End of World War II, *Law in Japan* 26 (2000) 1-74.

8 NODA, (*supra* note 6) 9-10; JIRO KAMISHIMA, *Naze “nihon-jin to hô” ka* [Why “The Japanese and Law”?], in: J. Kamishima / T. Sawaki / K. Tokoro / T. Awaji (ed.), *Nihon-jin to Hô* [The Japanese and the Law] (1978) 8. See also GUNTRAM RAHN, *Rechtsdenken und Rechtsauffassung in Japan* (1990); HARALD BAUM, *Rechtsdenken, Rechtssystem und Rechtswirklichkeit in Japan: RabelsZ* 59 (1995) 258; GUNTRAM RAHN, *Westliche Gesetze – Japanischer Geist: Das Recht in Japan (Einflüsse traditioneller Denk- und Verhaltensweisen auf das japanische Recht)*, Schriftenreihe der Deutsch-Japanischen Gesellschaft in Bayern e.V. 3; JOHN OWEN HALEY, *The Spirit of Japanese Law* (1998).

It might be true that Japanese law was “westernized” after the *Meiji* Restoration (1868), especially after World War II (1945), but neither then nor now has it become “Western law” in action. If so, to which group (legal culture, legal system and legal family) does it belong? This is the question this essay tries to answer.

#### 4. *Methodology of Comparative Legal Culture*

For this purpose, then, what is the basic methodological approach of comparative law? So far it has been said that “[t]he basic methodological principle of all the comparative law is that of functionality” (*Konrad Zweigert*). It is true that the methodological principle of functionality is useful for distinguishing the civil law system from the common law system within the “droit occidental [western law]”, that is to say, within the same legal cultures. Between Japanese legal culture and western legal culture, however, the functional approach has its limits.

Comparing Western systems of law to systems of other cultures, in the words of Professor *Leopold J. Pospisil*, “dramatically illustrates the ethnocentric character of law.” Insights deriving from “cultural comparison” are necessary in order to “supplement the important, but ethnocentric, approaches to law that have developed from sociology, philosophy, and jurisprudence.” Ethnology of law is “the only discipline that is capable of making the study of law and theories arising from it scientific.” Only this discipline can eliminate ethnocentric bias and take all relevant facts into account. The other three fields are handicapped in this respect, “because they arbitrarily concentrate their efforts on the study of Western law only,” thus restricting their studies to one of the thousands of possible forms that law can take. It allows us to see law or legal order “not simply as Western law, and not simply as a system of rules separate from culture, but as a dynamic process whose function is culture-bound and whose structure is multivariate.”<sup>9</sup>

## II. THE OLD STRATUM OF JAPANESE LEGAL IDEAS

### 1. *Indigenous Legal Ideas as Basso Ostinato of Japanese Law*

Before the highly developed Chinese culture and civilization were introduced to Japan, the old stratum of Japanese ideas had been formed (*Masao Maruyama*). What were the indigenous legal ideas [Rechtsdenken] and the traditional legal culture in ancient Japan? The Japanese legal historian, *Shô Ishimoda*, has pointed to “*setchû no ri*” [an idea of compromise], “*rihi wo ron sezu*” [an idea of no inquiry into the rights and wrongs],

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9 ZWEIGERT and KÖTZ (*supra* note 2) 33; LEOPOLD J. POSPISIL, *Ethnology of Law*, (2<sup>nd</sup> ed. 1978) Preface and 1-2. See also PAUL W. KAHN, *The Cultural Study of Law* (1999) 1-6; DAVID M. TRUBEK, *Toward a Social Theory of Law on the Study of Law and Development*, Yale L.J. 82 (1972) 1. I shall discuss this issue in a separate paper.

“*tōka no gensoku*” [a concept of equilibrium], “*sōgō shugi*” [a concept of reciprocity] as the “old stratum” of Japanese legal culture. They formed the Japanese mentality and have remained as “basso ostinato” in the value system and way of thinking of the Japanese people. Recent research by ethnologists or cultural anthropologists tells us that these indigenous Japanese ideas were shared by traditional societies in the Southern Pacific in ancient times. According to *John Henry Wigmore*, two different streams of people migrated to the Japanese island, not from the Chinese region, but from “the Manchurian and the Malayan regions.”<sup>10</sup>

The characteristics of Japanese mentality seem to be the basis of legal conception or legal consciousness (*Rechtsauffassung*). The elements characterizing the mentality of a people could be reduced not only to political, economic and social circumstances, but more basically to such external elements as geographical and ecological conditions and such internal elements as characterological conditions. The political, economic and social changes had influence only on the conscious part of mentality, while geographical, ecological and characterological elements are rooted in the unconscious. Both these elements do not change easily. Economic and social changes are presupposed to occur “within a fairly short space of time, four or five hundred years at most,” while ecological and psychological elements change much more slowly. Possibly, “they may dwell almost unchanged over thousands of years, because ecological elements are relatively constant and psychological elements are, in all probability, subject to the laws of heredity.”<sup>11</sup>

Japan is situated in a special geographic location.

“On the one hand it is isolated in the Pacific and, being at some distance from the continent, was free from foreign invasion. On the other hand the distance from the continent was not so great as to prevent all communication.”

In other words, geographic distance of Japan to the continent is neither too near (e.g., Korea) nor too far (e.g., Micronesia or Melanesia), enabling them to accept only those influences from the Asian continent and Chinese laws that were suitable to their new conditions, without fearing invasion and domination. According to *Masao Maruyama*, Japan’s geographical position is conducive to receiving high cultural impulses without being swallowed up by them. It has afforded the Japanese people the independence to

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10 MASAO MARUYAMA, *Rekishi ishiki no “kosō”* [“The Old Stratum” of historical Consciousness], in: *Rekishi shisō-shū* [Collected Works on Intellectual History] 6: *Nihon no shisō* [Japanese Ideas] (1972) 3-6; *Bessatsu* [Special Volume], KATŌ SHŪICHI and MARUYAMA MASAO *Taidan: Rekishi ishiki to bunka no patân* [Colloquy between Katō Shūichi and Maruyama Masao, Historical Consciousness and Patterns of Culture] (1972) 1-16; SHŌ ISHIMODA, *Rekishi-gaku to “nihon-jin ron”* [History and “on Japanese”], in: *Kodai-hō to Chūsei-hō* [Ancient Law and Medieval Law] (1989) 287-300, 339-345; JOHN H. WIGMORE, *A Panorama of the World’s Legal Systems* (1928) 461.

11 YOSHIYUKI NODA, *The Far Eastern Conception of Law*, in: René David (ed.), *The Different Conceptions of the Law*, *Int.Enc.Comp.L.* (1975) 120.

remodel foreign cultures and civilizations, while obstinately preserving the identity of their own indigenous culture and civilization.<sup>12</sup>

The geographic isolation helped to create a sort of greenhouse condition, which facilitated the fostering of national homogeneity. Geography and climate, according to *Jôken Nishikawa* who was a statesman as well as astronomer and calendar specialist in the mid-*Tokugawa* period (1648-1724) and *Isaiah Ben-Dasan*, influence life in many ways, but certainly “the most vital and far-reaching of their effects is on agriculture.” Most of Japan is located in what is called the monsoon area. Agriculture demands that farmers live in one fixed place.

“The absolute necessity of adhering to a tight agricultural schedule and the importance of adjusting both that schedule and other agricultural activities to the geographical nature of the locale. The harvest time in Japan is fixed; therefore, every aspect of farming must be calculated from that time. ‘One day’s delay means one month’s evil fortune’. A single day of delay must be made up with a life-and-death frenzy of activity, for even that small lag spells the difference between a one-hundred-percent crop and a zero crop. Inevitably typhoons come at harvest time; consequently, the rice seedlings must be planted in March, transplanted to the paddies during the rainy season, and harvested before the storms can spoil the crop. In light of this rigid schedule, the Japanese attitude that each task has its appointed time and that no negligence can be permitted is scarcely surprising.”

Around 1500, eighty-five percent of the population of Japan farmed the land. This means that for over ten thousand years,

“the vast majority of the Japanese people were subjected to the rigorous training inherent in campaign style agriculture. As a result, no people on earth are as good at setting dates and, working back from them, establishing second-by-second schedules. Campaign-style agriculture has given the Japanese one more distinguishing trait: a sense of the unity of all the people of the nation.”

The fact that approximately eighty-five percent of the population farmed the land meant that

“at any given period of the year, almost everyone was doing the same kind of work. When the season came to transplant the rice seedlings into the paddies, the entire farming population was engaged in that activity. The exigencies of campaign-style agriculture forbade a going-my-own-way attitude.”

Collaboration happens easily, without being organized by an act of will or an exterior force. Society is not artificially constructed by men, but given to them naturally and spontaneously. Related to this is the unanimity of opinion the Japanese favor so highly, in contrast to the Jewish distrust of unanimous verdicts and decisions.

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12 YOSHIYUKI NODA, *Introduction au droit japonais* (1966) (= *Introduction to Japanese Law*, Anthony H. Angelo transl. 1976) 5 (citation in this legal essay); MASAO MARUYAMA, *Genkei, kosô, shitsuyô teion* [Archetype, Old Stratum and *Basso Ostinato*], in: KIYOKO TAKEDA, *Nihon bunka no kakureta kata* [Undisclosed Matrix of Japanese Culture] (1991) 91, 139-40; JIRÔ KAMISHIMA, *Kindai nihon no seishin kôzô* [The Structure of Spirit in Modern Japan] (1961).

“Why do the Japanese favor unanimous decisions in form although well aware that some individuals may be secret dissenters? The answer is that to their way of thinking a unanimous decision is as good as any in theory because no rule is valid unless it conforms to a synthesis they have evolved from the relationship between man and the exigencies of existence.”<sup>13</sup>

The basic mentality of the Japanese people, which is relatively static, was formed not only by such external elements as the geography and climate, but also by such internal elements as psychological factors, particularly ethnic character elements. Based on *René Le Senne*, *Traité de caractérologie* [Introduction to Characterology] (1945), Professor *Noda* analyzed the Japanese mentality, concluding that “the Japanese people is made up, roughly speaking, of three groups of different characterological types.” The first group consists of persons of a sentimental type that must have originated in the north. The second group is made up of persons of a nervous type who must have originated in the south (especially societies such as in Micronesia, Melanesia and Polynesia), possibly sharing a common ancestor with the population of central and southern China (for instance, Yunnan, esp. Xishuangbanna), and probably contributed to the introduction of rice-growing in the Japanese Islands in the *Yayoi* period. The third group is made up of persons of a choleric type, who perhaps are descendants of a nomadic people from the northwestern steppes of Eastern Asia, who, though small in number, formed a political and cultural elite in the Nara period. According to *Namio Egami*, a Japanese historian on East-Asia, “this race of horseman [nomads] conquered Japan, probably towards the end of the fourth century, and established a powerful dynasty which reigned until the times of the present imperial family.” This choleric type cannot be found in Oceania (for instance, Papua New Guinea and other islands) and South-East Asia (for instance, Philippine, Indonesia, Malaysia, etc).<sup>14</sup>

The Japanese mentality reflects a varying combination of these three elements. As a whole, however, the Japanese people are of a predominantly emotional and inactive character, which makes them noticeably different from the Chinese whose national character is composed both of the apathetic and the sanguine types. The ‘*giri ninjō*’ [mutual obligations and human affection] or ‘*sōgō shugi*’ [a conception of reciprocity] might be a good example of emotional character. The mutual obligations fit into the Chinese form of rites in presupposing a hierarchical order of society. They are nevertheless very different on account of their essentially emotional character.<sup>15</sup>

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13 JŌKEN NISHIKAWA, *Hyakushō bukuro* [Lessons for the Farmers] (1898) (Iwanami Library ed. 1942) 153, 172; ISAIAH BEN-DASAN, *Nihon-jin to Yudaya-jin* (1971) 50-52, 105-110 (= The Japanese and the Jews, R. Gage transl. 1972, 45-50, 98-99); TETSURŌ WATSUJI, *Fūdo* [The Climate] (1935) 223 et seq.

14 NODA (*supra* note 11) 130; NAMIO EGAMI, *Kiba minzoku kokka* [The State of Horse-riding People] (rev. ed. 1994) 186 et seq., esp. 265-266, 303.

15 NODA (*supra* note 11) 124-25, 130, 133-34; WATSUJI (*supra* note 13) 199 et seq., esp. 219-222.

The Japanese conception of law could also be explained as a manifestation of emotional, sentimental and inactive mentality. “*Rihi wo ron sezu*” [no inquiry into the rights and wrongs] or the lack of norm consciousness and reluctance to litigate are typical examples of an inactive character. From time immemorial the Japanese people had no clear, visible norm consciousness. According to traditional Japanese thought “things become run off the rails if interfered with by an outside device; best results can be accomplished if they are left alone, unhampered.” Law was called ‘*nori*’, which meant declaration. Law was considered as “the will of the gods as declared by the person interceding between the gods and the people.” Running deep in the traditional Japanese minds is the Shintoism idea of “*kannagara no michi*” [as the gods wish it], that to let things take their own course is the best approach as everything will work itself out all right in the end, and that artifices should be avoided. This is the direct opposite of norm consciousness and is the unique trait of the Japanese character.<sup>16</sup>

Historically speaking, Japanese ideas have additional characteristics, which result from the policy of “*sakoku*” [isolationism] during 250 years before the *Meiji* Restoration (1868). This national isolation “assured Japanese thought of an excessive accentuation of its natural characteristics and had a great influence on the Japanese conception of law.”<sup>17</sup>

On the basis of the indigenous old stratum of Japanese ideas (further influenced by the policy of *sakoku* during the *Tokugawa* period), the foreign legal cultures were received and assimilated into the indigenous legal culture. There were great watersheds in the development of Japanese law: (1) the influence of Chinese and to some degree Indian legal thought in the 6<sup>th</sup> to 8<sup>th</sup> centuries, (2) the adoption of the European civil law system between 1880-1920, and (3) the Anglo-American common law system, especially the American system, after World War II.

## 2. *Influence of Chinese and Indian Legal Cultures on Japanese Law*

What is the real importance of indigenous Japanese legal ideas and Chinese legal thoughts to modern Japanese law? Some argue that modern Japanese law has no connection with the old ideas and considers itself rather as having its basis in Western law, particularly the code system of civil law countries. Can we say, however, that Japanese law is in fact a member of the civil law system if we see it from the viewpoint of function or culture?

One great advantage of codification is that lawyers soon become freed from having to refer to earlier sources of law and authorities thereof. Codification is apt to break historical continuity, an extremely valuable element in law (*Frederick H. Lawson*). Modern Japanese law is no exception. This does not mean, however, that traditional

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16 YOSHIYUKI NODA, *Nihon-jin no seikaku to sono hô-kannen* [The Character of the Japanese People and their Conception of Law]: *Misuzu* 140 (H. Tanaka transl. 1971) 2, 14-26.

17 NODA (*supra* note 12) 6.

Japanese law and Chinese law have no place in an extensive or profound study of contemporary law. There may be a marked break between indigenous Japanese law and modern Japanese law at the level of written law, but not at the level of living law. Compromise, administrator leadership, *giri* [mutual obligation] and *ninjô* [human affection], are good examples. They are still vital, and coexist with the modern codes modeled on the German Pandekten system (and partly the French Code Civil), and with American law (especially the Constitution and criminal procedure) after World War II.<sup>18</sup>

Although the origins of Japanese culture, law and governmental institutions are not exactly known, the culture can be traced to the *Jômon* period (an archaeological term designating the Japanese Neolithic cultural period extending from about 8000 B.C. or earlier to about 300 B.C.), and law and governmental institutions were presumed to have been shaped from the third to fourth centuries during the *Yayoi* period (extending approximately from 300 B.C. to A.D. 300) in their indigenous form. The governmental institutions of that period were “not influenced in any way by foreign civilization and in them is reflected the manner of thinking that is peculiar to the Japanese people”.

The old time Japanese considered torts as blemishes or blots that the gods detested, but that could be completely purified by religious behavior or conduct. Accused or condemned persons had to present offerings to the gods. The priest made a solemn or devout request (prayer) for purification and at times the bodies of condemned persons were washed. Wrongs came under the notion of *tsumi* [sin], which dealt at the same time with illness and plagues. “The people’s manner of thought was non-rigorous and simple, and they were by nature optimists.” According to the *Gishi wajin-den* in *Sangoku-shi* [Legend of the Japanese in San-kuo Chi (History of the Three Kingdoms)] “Japanese morals were very strong” and “there were few crimes or trials” even at that time.

In the first half of the third century (the latter part of the *Yayoi* period), *Himiko*, a shaman (chief priest, pontiff) of *Yamatai-koku*, served the gods and exercised a charismatic influence over the whole nation, which consisted of 30 mini-states. She declared the will of the gods, but did not execute it herself. Her younger brother helped her rule. This means that *Himiko* “reigned but did not govern” (authority without power). This archaic period, when religious influence was strong and foreign influence nil, could be characterized by a legal system of uniquely Japanese origins.<sup>19</sup>

It was after the *Yamato* Administration, located at *Kinai* in the middle of the *Honshû* where the imperial court was established in the 4<sup>th</sup> to 5<sup>th</sup> centuries, that Japan came under the influence of highly developed Chinese culture and civilization (Confucianism, Legalism and Taoism) and Indian culture represented by Buddhism. Chinese ideas came

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18 FREDERICK H. LAWSON, *The Rational Strength of English Law* (1951) 19; PAUL KOSCHAKER, *Europa und das römische Recht* (1948) 145; NODA (*supra* note 12) 39 (historical continuity), 174-183 (as to the rules of *giri*).

19 KÔICHI NAKAZAWA, *Shizoku-hô* [Law of Clan], in: H. Maki and A. Fujiwara (eds.), *Nihon Hôsei-shi* [Japanese Legal History] (1993) 7-28; NODA (*supra* note 12) 21-22; JUN'ICHI MURAKAMI, *Einführung in die Grundlagen des japanischen Rechts* (1974) 1-2.

to Japan in about the fifth century and Buddhism in the sixth century (538). They were hastily transplanted (as the melody) to Japanese culture (*basso ostinato*; obstinate bass) and played a decisive role in molding Japanese culture into more systematic forms.

It was in 604 that the *Kenpō jūshichi jōtei* [Constitution of Seventeen Articles (Maxims)] by *Shōaishi* [Prince of Saintly Morals] was promulgated. They were a statutory code of political and social morality, not rules of law in the strict sense.

The Constitution provides as follows (translation by *W. Aston* (1896)):

*Article 1*

*Wa* [harmony] is to be praised, and an avoidance of *wanton* opposition to be honored (in form Confucianism, in substance indigenous Japanese ideas, Buddhism and Taoism?).

*Article 2*

Sincere reverence to the three treasures, viz. Buddha, Dharma and Sangha (Buddhism).

*Article 3*

When you receive the commands of the *Tennō*, fail not scrupulously to obey. The Lord is Heaven, the official is Earth (Indigenous).

*Article 4*

The Ministers and functionaries should make decorous behavior their leading principle (Confucianism).

*Article 5*

Deal impartially with the suits, which are submitted to you (Legalism).

There are subtle disagreements of scholarly opinion on the character and ideological background of this Constitution. One argues that the constitution was mainly based on Confucianism and the ideas of the legalists, which were partly influenced by Buddhism, and was used for the admonition of civil servants.<sup>20</sup>

*Confucius* thought that the world of man greatly differed from the world of nature. An eternal hierarchy dominates the world of nature. The world of man must be construed after its example. The Confucianists wanted the world of mankind to be dominated by the principle of the rite. They believed that man was inherently good. This means that by elaborating the principle of the rite, imitating the natural laws and the example of his rulers, they could be made to see the need for virtuous conduct. In contrast, the legalists believed that man was intrinsically selfish, concerned only with advancing his personal interests, and therefore the social life of man should be strictly

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20 MITSUSADA INOUE, *Nihon ritsuryō no seiritsu to sono chūshaku-sho* [The formation of the Japanese *ritsuryō* and their Commentaries], in: *Nihon shisō taikai* [The Scheme of the Japanese Ideas]: *Ritsuryō* (1976) 743 et seq.; MASAO ŌKI, *Nihon-jin no hō-kannen* [Legal Conception of the Japanese] (1983) 152-154.

governed by written law. Their primary concern was to construe a well-ordered world. *Confucius* held that the differences of status in a hierarchical society should be seen as the higher harmony of the world, whereas the legalists believed that all men were equal under the law and that proper social behavior based on the social principles envisaged by the legalists should be taught firmly by constant repetition through severe penal sanctions. On the other hand, Taoism holds that the universe is dominated by a fundamental idea '*michi*' or '*dao*' [the way]. If one follows the way without interference from an arbitrary act of will, all is well. The idea of the *michi* is to take no action. All human action would be considered as a disturbance of the natural order.

Other historians insist that the fundamental ideas of the Constitution of Seventeen Articles emanated primarily from Buddhist and partly legalist ideas, rather than Confucianism (*Ryôsuke Ishii*). On the whole, however, the influence of indigenous Japanese ideas – Confucianism, Taoism, Legalism and Buddhism – on the Constitution is undeniable. In any event, Chinese ideas are but one of many factors that went into the development of the Japanese concept of law.<sup>21,22</sup>

The second landmark in Japanese legal history was during the *Taika* Reform beginning in 646, resulting in a strongly centralized and bureaucratic state. Under Chinese influence, several codes were drawn up and promulgated. This legal system was referred to as the *ritsu-ryô* system. The *ritsu* was a code of criminal rules of sanction and the *ryô* a code of admonitory and administrative rules. These codes exhibited a strong moral character based on Confucianism. The first code, however, was the *Ômi-ryo* (668-71?) and the second, the *Asuka kiyomihara-ryô* (689), both codified presumably without *ritsu* (criminal sanctions). This might possibly indicate that imperial power at that time was more concerned with administrative matters than with criminal affairs.

The first *ritsu* was the *Taiho ritsuryô* in 701, although no original manuscript exists. The *Taiho ritsu-ryô* is presumed to be almost identical to the Chinese Tang *ritsu* code. The fact that the punishments were much less severe in the Japanese code, however, is worthy of attention. Also important is the fact that the *ryô* was much simpler, for “the codified account was taken of the customs and social conditions peculiar to Japan”. The admonitory and administrative rules played a more important role in the Japanese *ritsuryô* regime. Under the control of public officials, people were educated with admonitory and administrative rules. As far as private law was concerned, a wide variety of dispute-resolution schemes were developed outside the courts. It was normal at that

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21 RYÔSUKE ISHII, *Nihon hôsei-shi gaisetsu* [Introduction to the Japanese Legal History] (1948) 70-71; NODA (*supra* note 12) 160; MURAKAMI (*supra* note 19) 15-19; ÔKI (*supra* note 20) 153-154.

22 MASAJI CHIBA, Three-Level Structure of Law in Contemporary Japan – The Shinto Society, in: Masaji Chiba (ed.), *Legal Pluralism: Toward a General Theory through Japanese Legal Culture* (1989) 303-305.

time for the parties to try local conciliation procedures first, in order to avoid social censure.

In 718 the *Yôrô ritsuryô* was proclaimed, of which copies exist. This *ritsuryô* code was revised and supplemented in the ninth century by supplementary laws called '*kyaku*', and application rules called '*shiki*'. Research on the *ritsuryô* was carried out with great zeal and many such commentaries as '*Ryô no gige*' (an official commentary on the *Yôrô ryô*) in 833 and '*Ryô no shûge*' (collection of theories on the *ryô*) were published, but again no commentaries or theories exist on the complementary criminal sanctions.

The *ritsuryô* regime, however, did not stay in favor for long, due to the considerable differences in legal culture and its cultural background between China and Japan. These differences made it difficult for the Chinese law and traditional Japanese law to be assimilated. "Most of the provisions soon fell into disuse," and beyond the statutory texts, "more and more usages of an administrative or judicial nature developed," with the result that the basic texts soon became obscure or were forgotten, although these codes were never formally repealed.<sup>23</sup>

In 1192, the centralized '*Bakufu*' government of the *bushi* [warrior] was established in the east at Kamakura by the *Seii taishôgun* [military Regent] *Minamoto Yoritomo*, who created the *Monchu-jô* [Office of Inquiry and Decision], a court of justice. In 1232 the moral customary law peculiar to the *bushi* class was codified by *Hôjô Yasutoki*, the *Gosei-bai shikimoku* or *Jôei shikimoku* [Ordinance of the period *Jôei*]. This ordinance consisting of 51 provisions contained "the embryo of a new legal growth." The spirit of this code was to inform the public of the nature of the law of *Bakufu* so that law and order would reign and the administration of justice would be fair, just and impartial. The code was based on reason rather than written legal principles. You could observe such new tendencies as deterrence from arbitrary decision (judgment), consistency of disposition, equity of the law, something like the "rule of law" ideal, and a judicial system. As a result, justice was dispensed promptly and cheaply.<sup>24</sup>

The *ritsuryô* regime was primarily based on administration, whereas the *buke-hô* [law for the warrior class] was based on custom and adjudication. *Hyôyo-shu* [the Supreme Council], a new judiciary institution, the members of which were required to guide their deliberations in the dispensation of justice was established by *Hôjô Yasutoki*.

Generally "the law of the period is of a customary nature, and morality occupies an important place in it." The law of the *buke* in particular is distinguished from others in this respect. The *kugehō* [law in imperial court] based on the *ritsuryô* regime was still common law in theory, but in practice its application was increasingly limited. Another customary law called *honjô-hô* was developed to support a manor system, and varied

23 NODA (*supra* note 12) 22-24.

24 ISHIMODA (*supra* note 10) 199, 213, 268, 292-295; SHIRO ISHII, *Nihon-jin no kokka seikatsu* [The Staatsleben of the Japanese] (1986) 79-92.

from manor to manor. In this period “the *bushi-dô* [Japanese chivalry] was formed in a spontaneous manner in the daily life of the *bushi*,” based on Confucianism. The legal system was more dominated by emotional rather than moral factors. It should be noted that in this period “Buddhism penetrated into the daily life of the people, the influence of which was very great on the *bushi*.”<sup>25</sup>

The *Kamakura* period (1192-1333) was followed by the *Muromachi* period (1338-1573), and in the first half of the 16<sup>th</sup> century *bunkoku* [small independent states] were established and the so-called *senjû daimyô* [feudal lords in the period of civil strife] came into power. Some of them enacted the so-called *bunkoku-hô* [statutes], such as *Imagawa kanamoku-roku*, *jinkai-shû* (Date), *Kôshû hatto no shidai* (Takeda), *Rokkaku-shi shikimoku*, etc., which evidenced a revival of indigenous Japanese legal ideas. ‘*Wayo setchû no hô*’ [law of compromise and conciliation], ‘*kenka ryô-seibai*’ [both parties are to blame] attitude toward law, ‘*rihi wo ron sezu*’ [no inquiry into the rights and wrongs], etc., are several examples.<sup>26</sup>

During the *Tokugawa* period (1603-1868), Japan reached a political state of perfect balance, economic prosperity and social peace. Feudal tenures continued and the *bushi* class dominated. In 1616 the policy of *sakoku* was adopted. Confucianism was dominant during this period, but in greatly modified form. By means of a comprehensive court system developed over the course of time, ‘private law’ disputes were mainly resolved by the out-of-court conciliation procedures between the parties or among the social groups. Alongside customary law, such public law codes as ‘*buke sho-hatto*’ [the general status code of the buke] of 1615 were promulgated. In the early 1700s *Tokugawa Yoshimune* appointed *Ôoka Tadasuke*, a baron of wonderful insight and shrewd justice, the *machi bugyô* [magistrate] of Edo and issued the *Aitai sumashi-rei* [Ordinance concerning the out-of-court settlement]. In 1742 *Kujigata o-sadamegaki* [Statutory Rules of Procedure], a kind of collection of legislation and precedents, was drawn up. Book II of this code contains rules relating to both criminal and civil procedure. The text of the code could only be consulted secretly by the three ‘*bugyô*’ who enjoyed important positions in the field of justice as the magistrates of the ‘*Bakufu*’ courts. The law of the period was also strongly influenced by Confucianism, which resembles the *ritsuryô* system. The legal consciousness of the people in this period was very keen, and law in this period was developed by professionals. It was influenced by the old Japanese idea of harmony and the Confucian ideas of deference and authority as well as Shintoism, Buddhism, and *bushi* customary law.<sup>27</sup>

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25 NODA (*supra* note 12) 30-31.

26 ISHII (*supra* note 24) 79-82, 101-108; MURAKAMI (*supra* note 19) 4-8.

27 ÔKI (*supra* note 20) 197 et seq.; NODA (*supra* note 12) 32; MURAKAMI (*supra* note 19) 8-13; YOSHIKI SANADA, *The Culture Base of the Japanese as a Key to the Myth of the Reluctant Litigation in Japan, Conflict and Integration* 1988, 111 et seq.

*John Henry Wigmore* (1863~1943), the author of the three-volume work on *Panorama of the World's Legal System* (1928), and sixteen volumes on the law of the *Tokugawa* Shogunate, *Law and Justice in Tokugawa Japan* (1941), described the law and justice in the *Tokugawa* period as follows:

“The chief characteristics of Japanese justice, as distinguished from our own, may be said to be this tendency to consider all the circumstances of individual cases, to confide the relaxation of principles to judicial discretion, to balance the benefits and disadvantages of a given course, not for all time in a fixed rule, but anew in each instance – in short, to make justice personal, not impersonal.”<sup>28</sup>

From this one could argue that Japanese legal culture appears as a whole to be of an emotional and sentimental (gefühlsmäßig), pragmatic, nervous and inactive nature, rather than a rational one.

### 3. *Influence of the European Civil Law System after the Meiji Restoration*

In 1853 *Commodore Perry* of the American Navy arrived in Japan with a letter from President *Fillmore* to the Emperor of Japan, asking Japan to open her doors to the world. In 1858 Japan concluded the first unequal treaty referred to as *Nichibei shûkô tsûshô Treaty* (Japan-The United States Amity and Commercial Treaty) and similar unequal treaties with England, France, Russia and the Netherlands.

The process of legal westernization was adopted as the state's policy soon after the *Meiji* Restoration in 1868 in order to repeal the unequal commercial treaties imposed in 1858. The drafters at that time thought that it was much easier to achieve a rapid modernization by adopting a system of codified law. With the help of foreign jurists, a series of codes were drafted by 1872. The Penal Code and the Code of Criminal Procedure were drafted by *Gustave Emile Boissonade*, a French law professor, and promulgated in 1882. In 1890, the Code of Civil Procedure, which was a literal translation of the German *Zivilprozeßordnung*, was promulgated. The old Civil Code of 1890 was substantially modeled on the Napoleonic Code by *Boissonade*, though the original provisions relating to family and inheritance were radically revised to preserve the old household system. However, the code never came into effect and a new one was drafted that adopted the *Pandekten* system rather than the institutional French system, and also tried to incorporate traditional Japanese customs. The Code was particularly influenced by the first draft of the *Bürgerliches Gesetzbuch* [German Civil Code], but in substance, the influence of the French Code civil through *Boissonade's* draft could not be ignored. In 1898, the Japanese Civil Code was put into effect. After its promulgation many special statutes were enacted to supplement or modify the provisions concerning real rights and obligations in accordance with customary law. The following year the New Commercial Code, which was drawn up essentially along German lines, came into operation.

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28 JOHN H. WIGMORE (ed.), *Law and Justice in Tokugawa Japan* (1941) vol. 1, 40.

This series of codes was paralleled in the area of public law by a complete reform of the nation's public institutions.<sup>29</sup>

According to Professor *Zentaro Kitagawa*,

“the legal concepts, institutions and conceptual systems which we know today as German civil law science were built upon a overwhelming reliance on German civil law science. Because of this, a gap has clearly developed between the legal structures blueprinted in the Civil Code itself, and that which were been developed in accordance with civil law theory. We shall call this the ‘dual structure’ of the civil law. Such a dual structure can be seen in a great many institutions.”

This refers to the reception of theory, the legal phenomenon of which was a unique factor in the developmental process of the Japanese Civil Code and other codes which were modeled on the German Pandekten system.<sup>30</sup>

This sort of adoption could be called the ‘*Verrechtlichung*’ [legalization] of traditional Japanese law. Even if the particular models were adopted in their entirety, however, it is inevitable for those models to be assimilated with traditional Japanese ideas. The emperor [Tennô] system, the ‘*ie*’ [household] system, the wide discretionary power of administrators or prosecutors are but some of those instances. Further, even if the ‘*Verrechtlichung*’ was realized by codification, there would remain some areas, which could not be legalized. Conciliation procedures and administrative guidance are typical examples. Recently, in addition to these cases, extralegal matters would be brought to the court, asking the court to hand down a judgment on the dispute and to decide the dispute by judgment. The ‘Both parties are to blame’ attitude towards law, ‘clarification function’ of the trial court, protection of the employee from discharge, are some of those cases.

#### 4. *Influence of American Law after World War II*

Japan's acceptance of the Potsdam Declaration of 1945 and the occupation by the Allied Forces that followed had a major impact on the Japanese law. Since the Supreme Commander for the Allied Powers, General *MacArthur*, played a key role in the occupation, law reform was primarily modeled on the American legal system.

Reform of the Japanese Constitution was necessitated by Japan's surrender. Though the Japanese Constitution adopts the parliamentary system according to the British model, the judiciary is given greater status and independence in accordance with Ameri-

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29 EIICHI HOSHINO, *Nihon minpô-ten ni ataeta furansu minpô no eikyô* [Influence of French Civil Law upon the Civil Code of Japan], *Nichi futsu hōgaku* 3 (1965) 1 argues that “the first three books of the Civil Code are genealogically nearer to the French Civil Code than to the First Draft of the German Civil Code.”

30 ZENTARO KITAGAWA, *Gakusetsu keiju – minpô-gaku hatten no ichi-sokumen* [Theory Reception: One Aspect of the Development of Japanese Civil Law Science], *Shihō* [Private Law] 29 (1967) 251 (= Law in Japan 4, R. Lee transl. (1970) 1, 3).

can models. Judicial review, the abolition of separate administrative courts, rule-making power of the court, are other examples of this. As to human rights, the American Constitution and American constitutional precedents at that time served as models for many of the rights, except for ‘social rights’ guaranteed under Article 25 through 28, which were based on the Weimarer Reichsverfassung [the Weimar Constitution] of 1919. Art. 31 Japanese Constitution reflects the interpretation or construction of due process in the 4<sup>th</sup> and the 14<sup>th</sup> Amendments of the Constitution of the United States of America in *West Coast Hotel Co. v. Parish* (1937).<sup>31</sup> Art. 22 and 29 are related to the famous footnote four in *United States v. Carolene Products Co.* (1938) which formulated the so-called “double standard”.<sup>32</sup>

Criminal Procedure was also strongly influenced by American law. The adversary systems, the rules of evidence, especially the hearsay evidence rule are some examples. As mentioned above, labor law, antitrust law, independent regulatory commissions and the rule of substantial evidence, corporation, securities regulation, corporate reorganization, bankruptcy, habeas corpus, the function of counsel, etc., are also fields that were strongly influenced by American law.<sup>33</sup>

To sum up, Japanese law has its basis in four sources – indigenous Japanese law, Chinese law, civil law (German and French law) and common law (American law): a unique hybrid legal system.

### III. JAPANESE PEOPLE’S ATTITUDE TOWARDS LAW

#### 1. “*Verrechtlichung*” of the Traditional Japanese Society

What is the cultural style or character of Japanese law? There is a common element in the ways of thinking in Western legal culture. It is what *Rudolph von Jhering* called the ‘*Kampf ums Recht*’ (struggle for law and rights). This means that, though the goal of law is peace, one should struggle to achieve it, or that it is one’s duty to fight for one’s rights.<sup>34</sup> Western procedural law (civil law as well as common law) has been based on this duty. Western lawyers regard this view as a truism in contrast to their Japanese

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31 *West Coast Hotel Co. v. Parish*, 300 U.S. 379 (1937); *United States v. Caroline Products Co.*, 304 U.S. 144 (1938) (These cases were decided 7 or 8 years before drafting the current Constitution of Japan); TANAKA (*supra* note 7) 290-299.

32 Article 31: “No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law”. (The word “property” was omitted in this Article. Compare this Article with Amendments V and XIV of the Constitution of the United States).

33 Article 22 (1): Every person shall have freedom ... to choose his occupation “to the extent that it does not interfere with the public welfare.” Article 29 (2): Property rights shall be defined by law, “in conformity with the public welfare”. (Compare these two Articles with Articles 20 and 21).

34 RUDOLF VON JHERING, *Der Kampf ums Recht* (1872) 19; NODA (*supra* note 12) 62.

colleagues. In Japanese legal culture, the concept of rights is still too new to be deeply rooted. Law is a secondary and subordinate means of achieving social order. The Japanese tend to feel uncomfortable with a black-or-white or “all or nothing” type of adjudication.<sup>35</sup>

Because of its special geographical location, Japan was able to freely receive ideas and customs from foreign cultures and civilizations. This means that the Japanese have not known or experienced the challenge of foreign civilization in *Arnold J. Toynbee's* sense, that is to say, the “entweder – oder” (either-or) situation, to accept or to reject it. The distance from the Asian Continent made it possible for Japan to be free from foreign invasion from time immemorial until 1945, and yet the distance from the continent was not so great as to prevent all communication.<sup>36</sup> This geographic isolation helped to create the Japanese old ‘multi-strata’ of culture, the weakness of the spirit of challenge, confrontation or critical attitude,<sup>37</sup> and the tradition of ‘*mu-kôzô*’ (no structure).<sup>38</sup> In such greenhouse conditions, foreign ideas took root in the soil of Japan, and have grown, developed, and been transformed. Professor *Noda* compared the Japanese and Western ideas as follows:

“This pattern is in direct contrast with that of Europe, where nations have been fighting violently for thousands of years and where differing ideas have mixed with and complemented each other to form the basis of a single European type of thought. Though it is possible to speak of Oriental ideas, there is nothing in this conception or in those ideas which can compare with the cohesion found in European thought.”<sup>39</sup>

In traditional Japanese thought, one can observe principles of behavior deriving not from the law but from tradition. Consequently a dispute should not be resolved by naming a winner and a loser, but instead care should be taken not to have the other party lose face or honor. In this context *Ruth Benedict* distinguished two types of culture: one founded on the idea of shame and the other on the idea of sin.<sup>40</sup>

To quote from *Isaiah Ben-Dasan* again, the Jews

“regard obedience to divine law as the inevitable outcome of the God-man relation; the Japanese, on the other hand, believe in a law that transcends all codified law, and one that demands flexibility of attitude and adaptability to the human circumstances of the moment rather than unquestioning obedience to some abstract principle.”<sup>41</sup>

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35 DAN FENNO HENDERSON, *Conciliation and Japanese Law, Tokugawa and Modern*, 4-5 (1964-65) 4-5; NODA (*supra* note 11) 128; NODA (*supra* note 16) at 25.

36 NODA (*supra* note 12) 5.

37 HAJIME NAKAMURA, *Nihon-jin no shii hôhô* [The Ways of Thinking of the Japanese], in: Hajime Nakamura, *Tôyô-jin no shii hôhô* [The Ways of Thinking of the Eastern Peoples] (1962) 86-93.

38 MASAO MARUYAMA, *Nihon no Shisô* [Japanese Ideas] (1961) 11-28.

39 NODA (*supra* note 12) 5-6.

40 RUTH BENEDICT, *The Chrysanthemum and the Sword* (1967) ch. 10.

41 BEN-DASAN (*supra* note 13) 98-99.

This sort of behavior is much better suited to satisfy the emotional character of the parties than law. One of the principles of behavior known as '*giri*' [mutual obligation] is deeply rooted in the minds of the Japanese people. The behavior of the Japanese is still governed by this traditional concept which can be traced to '*sôgô shugi*' (an idea of reciprocity) or '*tôka no gensoku*' (an idea of equilibrium), which were traditional Japanese ideas existing before Chinese influence took hold.

Thus, even nowadays, '*giri*' [mutual obligation] is more binding as a behavioral code than legal rules and regulations. Importance is attached to sincerity, good faith, and a conciliatory attitude is always expected of the parties in dispute settlement. Legal rules and regulations in Japan are technically and ostensibly comparable with those of Western law. They may, however, be quite peripheral features, remote from the actual binding forces in real life.

## 2. Reception of German Legal Model in order to Keep Traditional Values

It is remarkable that the particular legal model of the German Pandekten system was adopted in its entirety for the express purpose of keeping the traditional '*tennô*' (emperor) regime and preserving the old '*ie*' (household) system. Since the Civil Code affected the social and economic life of the nation in all its aspects, it became a topic of heated discussion as to its merits and demerits. Lawyers and politicians debated which model should be adopted to preserve Japanese traditional values.<sup>42</sup> The traditional attitude of the Japanese people towards law was reflected in the selection of the appropriate legal system.<sup>43</sup>

But, it was inevitable that the Western legal model would not escape from being assimilated with traditional values, or from being amended or revised through the process of Japanization.

The Constitution of the Empire of Japan, 1889, was a good example. Its draft bore the stamp of the *Verfassung für den preußischen Staat* [the Prussian Constitution of 1850], and the Constitution was promulgated in 1889 as a gift of the Emperor to his subjects.

"Sovereignty resides in the *Tennô*, the hereditary monarch, not in the people. The Constitution takes scrupulous care to guarantee executive supremacy, which had been the policy of the *Meiji* government since the Restoration, by recognizing broad imperial prerogatives. This will strike the present generation of Western observers as highly anti-democratic, and political realists are apt to see in the document a selfish attempt to perpetuate, behind a Western Constitutional façade, the political powers of the oligarchs."<sup>44</sup>

42 SHIRO ISHII, "Verrechtlichung" of the Traditional Society (Lecture, 1990); KENZO TAKAYANAGI, A Century of Innovation: The Development of Japanese Law, 1868-1961, in: Arthur T. von Mehren (ed.) (*supra* note 5) 5-40.

43 HIDEO TANAKA, The Japanese Legal System (1976) 311; MURAKAMI (*supra* note 19) 38-52.

44 TAKAYANAGI (*supra* note 5) 6; MURAKAMI (*supra* note 19) 26-37.

The same could be said of the wide discretionary power Japanese public prosecutors have enjoyed in deciding whether or not to bring criminal cases to the court. Not only can they drop cases for insufficient evidence, but also decline prosecution because of the mutual benefit for both the accused and society. Cases are often dropped if the case is a first offense and the accused seems to show sincere repentance for his wrongful act in committing a crime.

The same ideas can be found in obtaining a ‘suspension of execution of sentence’ (*shikkô yûyo*) and in receiving a less severe penalty. Whether the offender has repented of his crime and whether he has made efforts to pay damages are important factors to be considered.<sup>45</sup> *Atsushi Nagashima*, Justice of the Supreme Court of Japan, in this context notes the following:

“Another, more important, aspect of the discretionary powers of the procurator is his role in rehabilitation. Before the second Code of Criminal Procedure [*Keiji sosho-hô*] (1922 c. 72, repealed in 1948 c.131) there was no provision giving procurators a discretionary power of non-prosecution. Nevertheless, it gradually became general usage for the procurator to decline prosecution of less serious crimes. Because the procurator carried out the investigation and disposition of the matter behind closed doors, the identity of the offender against whom prosecution was declined was rarely disclosed to the public; consequently, the offender could continue in the community as a good citizen rather than with the stigma of a criminal. This system contributed so much to the rehabilitation and re-entry of the offender into society that it was explicitly approved and extended in the second code. Even an offender who had committed a rather serious crime might be relieved from prosecution if he was a first offender, if the injuries caused by the offense were compensated for, and if there was a reasonable ground to believe that he would not commit another offense.”<sup>46</sup>

It has been one of the traditional practices of public officials to ‘make allowances’ [*tegokoro wo kuwaeru*] for the accused, which can be traced back to the traditional Japanese ideas of generosity and the administrative leadership in the *ritsuryô* regime of Chinese origin.

The third example is the ‘*ie*’ [household] system. The primary unit of Japanese society before World War II was the family rather than the individual.

“Under the Confucian ideology of filial piety [*ko*], a child is to obey his parents unconditionally, to gladden them in all ways, and to serve them in every aspect.”

“The relationship between parent and child, husband and wife, or eldest brother and younger siblings was that of superior and subordinate. Each family was in turn subject to the head of the ‘large family,’ or House. The patriarchal order of the family system extended beyond domestic life: political organization was also based upon a familial type of rule and subordination. The parent-child relationship was the symbol for all aspects of society.”

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45 SHIGEMITSU DANDO, *Keihô kôyô: soron* [Elements of Penal Law: General Parts] 421-424 (H. Tanaka transl., enlarged ed. 1972).

46 ATSUSHI NAGASHIMA, *The Accused and Society: The Administration of Criminal Justice in Japan*, in: Arthur T. von Mehren (ed.) (*supra* note 5) 297, 299.

This family system was incorporated as a legal institution in books 4 and 5 of the Civil Code of 1898.

“These books contain many rules which were already out of date at the time of writing of code. The ordinary family was already a nuclear one, composed of parents and children, except in remote areas where the concept of the large family still existed. Yet the code sought to maintain the extended family system headed by the head of the family [*koshu*] endowed with great power.”

Even nowadays, one may find the fictitious extension of the traditional *kazoku seidô* [family institution] among enterprises, social groups, as well as political organizations.<sup>47</sup>

These are some instances where specifically the German legal system was adopted in order to keep and maintain traditional Japanese values and ideas, however.

### 3. *Japanization of the Western Legal System by Extra-Legal Practices*

Even if “Verrechtlichung” was achieved through legislation by adopting a new legal system, some of the traditional extra-legal practices would nevertheless remain. ‘*Gyôsei shidô*’ [administrative guidance], is one of the typical examples.

This practice can be traced back to the administrative leadership before or in the *ritsuryô* regime. Professor *Yoriaki Narita* tried to understand and define administrative guidance as a

“series of operations by which administrative organs, in those matters which fall within their own specific duties, exercise influence over specific individuals, public and private juridic persons and associations through non-authoritative and voluntary means, and guide parties by means of their own agreement and cooperation towards the formation of a definite system, the goal which the administrative organs seek.”

He continues to argue as follows:

“From a legal point of view, a party is entirely free to comply or not to comply. However, our country’s structure still retains much of the old attitude to ‘respect the officials and downgrade the people’ [*kanson minpi*], and although actions of this sort may be called non-authoritative and voluntary, nevertheless, they exert upon parties essentially the same psychological pressure which would be caused by application of public authority. Thus it is not difficult to imagine that parties sometimes unwillingly comply with administrative guidance.”<sup>48</sup>

47 NODA (*supra* note 12), at 200-01; *See also* YOZO WATANABE, *The Family and the Law: The Individualistic Premise and Modern Japanese Family Law*, in: von Mehren (ed.) (*supra* note 5) 364, 368; MURAKAMI (*supra* note 19) 53-58.

48 YORIAKI NARITA, *Gyôsei shidô* [Administrative Guidance], *Law in Japan* 2 (1968) 45-46. *See also* KAZUO YAMANOUCHI, *Administrative Guidance and the Rechtsstaat (Rule of Law)*, *Law in Japan* 7 (1974) 22-31; MICHEL YOUNG, *Administrative Guidance in the Courts: A Case Study in Doctrinal Adaptation*, *Law in Japan* 17 (1984) 120; *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Resolution in Japan*, *Colum. L. Rev.* 84 (1984) 923.

The administrative guidance is something like an 'administrative style' in Japan. It is a sort of life style of administrative leadership. In Japanese society, administrative officials and agencies have much greater authority over various aspects of economic and social activities through informal and extralegal channels than in many other countries. Thus, various matters in the Western Legal Culture, which would be solved through the legal process in Japan are handled without recourse to the law. As mentioned above, administrative guidance does not have the force of law, but in practice amounts to the same as a government order. In 1993 the general principles and guidelines for this practice were incorporated in Chapter 4 of the Administrative Procedure Act.

The same explanation can serve for the extensive use of compromise or conciliation procedures for an amicable dispute settlement. This might be a reflection of the indigenous Japanese '*setchû no ri*' [an idea of compromise], '*rihi wo ron sezu*' [no inquiry into the rights and wrongs], etc. Generally speaking, conciliation is preferred to litigation in settling disputes and a conciliatory attitude is normally expected of the parties in cases of an informal settlement. Such an extralegal out-of-court conciliation is normally conducted by an elder in the local community. Subsequently, conciliation procedures were introduced not only in out-of-court settlements, but also in the formal legal process.

In local areas where a traditional consciousness of the village community remains, resistance to Western law has been very strong. The relationship between lessors and lessees, landlords and tenants, principals and contractors, etc. have been considered as being based on *giri* [mutual obligation] and *ninjô* [human affection]. Although the Civil Code of Japan regulates the rights and obligations of each side in almost the same way as the Civil Codes of France or Germany, practice is different in Japan than in those countries. The legislature tried to draft a substantive landlord and tenant relationships bill, but ultimately failed this trial failed because *giri-ninjô* relationships could hardly be controlled by modern legal thought. The legislature finally gave up drafting such a substantive bill and instead tried to draft a bill of conciliation procedure. In 1922 the Conciliation of Land-Lease and House-Lease Affairs Act, and in 1924 the Conciliation of Farm Tenancy Disputes Act were enacted and promulgated. In 1939 the Conciliation of Personal Affairs Act was enacted. The primary motive for introducing conciliation procedures in the 1920's and 30's was to revive the traditional respect for the spirit of *wa* [harmony], and to incorporate it into the legal process. After World War II, all cases relating to domestic affairs must undergo conciliation procedures under the Domestic Proceedings Act of 1947. The Conciliation of Civil Affairs Act of 1951 extended the scope of conciliation to cover all civil disputes.<sup>49</sup> The latter Act seeks to find an equitable and practicable solution according to traditional Japanese values based on mutual concessions made by the parties rather than legal solutions to civil cases. Even after the adoption of modern legal thought, which was based on rational Western principles

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49 TANAKA (*supra* note 43) 492-500.

incompatible with the idea of mutual obligations, law was unable to regulate the real social life of the Japanese people, and legal disputes have been and often are still settled outside the state law system. Even where the disputes are brought to court, courts operate less as instruments of decision than as organs of conciliation. In other words, the Japanese people not only hesitate to resort to a lawsuit, but also are quite ready to settle an action already instituted through conciliatory processes in the course of litigation. With this in mind, judges also are likely to hesitate, or at least not seek, to expedite judicial decisions, preferring instead to reconcile the litigating parties.

“The Japanese do not like the solution of a dispute to be too decisive or contrary to their native sentiment of what is right, and therefore a large number of cases are dealt with by way of conciliation.”<sup>50</sup>

It would be wrong, however, to exaggerate the Japanese preference for resolving disputes uncritically. Disputes arising outside of harmonious social groups, that is, those between such social groups, those between creditors and their debtors, those between big enterprises and consumers, particularly in the area of environmental law and products liability, have recently been brought to trial.<sup>51</sup> Nevertheless, even big corporations do not seek a legal solution to their disputes when the parties are enterprises with close business links. Even in the business world, therefore, relationships are imbued with *giri-ninjō*. The conciliation process is still carefully managed both formally and informally.<sup>52</sup>

The standard consultation clause in Japanese contracts is another example. The typical consultation clause says that “if in the future a dispute arises between the parties with respect to rights and duties stipulated in the agreement, the parties will settle all the disputes harmoniously and in good faith through consultation.” This is the so-called “good-faith” or “amicability clause”. This seems to indicate that a contract is often considered as a sort of tentative gentlemen’s agreement. To the Japanese conception of contract, if something goes wrong the parties should renegotiate the terms and conditions of the contract between themselves in good faith and amicably. Such a consultation clause would rarely appear in contracts or agreements in the Western legal system.<sup>53</sup>

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50 KAWASHIMA (*supra* note 5) 41; KAHEI ROKUMOTO, *Hō shakai-gaku* [Sociology of Law] (1986) 257-258; J. MARK RAMSEYER and MINORU NAKAZATO, *Japanese Law: An Economic Approach* (1999) 90-99; NODA (*supra* note 12) 207, 179-180. *See also* JOHN O. HALEY, *Authority without Power: Law and the Japanese Paradox* (1991) 85 et seq.; *idem*, *The Spirit of Japanese Law* (1998) 34-39.

51 KAWASHIMA (*supra* note 5) 45.

52 TAKAO TANASE, *The Management of Disputes: Automobile Accident Compensation in Japan*, *Law and Society Rev.* 24 (1990) 651.

53 TAKEYOSHI KAWASHIMA, *Nihon-jin no hō ishiki* [The Legal Consciousness of the Japanese] (1967) 87 (= *Law in Japan* 7 (1974) 1).

#### 4. *Endorsement of Indigenous Values by Case Law*

Last but not least, unwritten traditional rules are later endorsed and authorized by the courts. The courts now and then create and affirm a new rule of law under the guise of interpreting statutes or contracts. The doctrines of implied manifestation of will, of *reibun kaishaku* [construction of stereo-typed provision], are good examples. In *Harada v. Ishii* (1912), the issue was whether the lease of a piece of land for the purpose of building a house would expire according to a one-year termination clause. The Tokyo District Court held that a provision in a written contract providing for such a short period of time is merely a *reibun* [stereotyped provision], which is included without the parties intending to be bound by it, unless there are special circumstances showing a contrary intention. The court seemed to construe this lease contract itself as a kind of gentlemen's agreement not enforceable by means of technical interpretation of the agreement.<sup>54</sup>

In theory, custom is only a subsidiary source of law, but in practice it often operates *contra legem*, against the provisions of written law. These customary rules rooted in the traditions of thousands of years remain essential for understanding Japanese private and criminal law. The '*kenka ryô-seibai*' [both parties are to blame] attitude towards law is one example. In *Osada v. Japan* (1932), the Nagoya Court of Appeal held:

“A quarrel cannot be regarded as a situation in which one side is launching an unjust attack and the other is defending against such attack. There is no room for the concept of self-defense in acts committed by either party to a quarrel. In our country there is a proverb saying, ‘In a quarrel, both parties are to blame’.”

This case was set aside by Supreme Court decisions in 1948 and 1957. They held that there might be cases where a plea of self-defense is available in the context of the entire course of the quarrel. Even after these decisions, however, the plea of self-defense was available only in limited circumstances. Attention should also be given to the fact that Japanese courts have often applied the rule of contributory negligence with ease. Some scholars argue that this is a reflection of the ‘both parties are to blame’ attitude towards law, though partly modified by the special circumstances of traffic accident cases.<sup>55</sup>

The courts' *shakumei-ken* [clarifying function] is another example. Sec. 127 (now 149) Code of Civil Procedure provides that “[t]he presiding judge, in order to clarify the procedural relationships, may question the parties concerning matters of fact and law or urge them to present evidence.” Because the Code emphasizes the trial court's directive powers, Japanese doctrine continued to hold that the power to clarify was indeed a duty to clarify. The duty doctrine was endorsed by the *Daishin-in* [the Great Court of Judicature], which held that the failure to properly clarify a case was regarded

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54 *Harada v. Ishii*, Shinbun 801 (1912) 12.

55 *Osada v. Japan*, *Keishû* 1 (1932) 11. See also *Keishû* 793 (1948) 2; *Keishû* 31 (1957) 11; *Keishû* 1212 (1966) 20.

as an error of law material to the decision. In the post-war era, there was a movement away from these practices towards a more adversarial system. But it appears there has been something of a backlash judging by recent cases.

Industrial relations are the third example. Labor law has American features, but does not work in the same way as in the United States. Age-old paternalistic ideas color the practical operation of trade unionism in Japan.<sup>56</sup> A discrepancy between the law in the books and the law in actual operation is huge in the field of dismissal. The traditional master-servant relation has prevented the courts from permitting the easy dismissal by applying the traditional attitude of the Japanese in this respect.<sup>57</sup>

The same ideas could be found in granting the administration a large margin of discretion. In the so-called *Sunakawa* case (1955), the Supreme Court of Japan primarily relied on the doctrine of politics, holding that the stationing of American forces in Japan was constitutional. This could be interpreted as putting the administration outside the ambit of law. This case is an administrative precedent in which the primacy of policy was invoked so as to sidestep a decision on the merits of the case.<sup>58</sup>

In the above instances, it can be said that indigenous attitudes of the Japanese people towards law has been reflected in the context of statutory principles, legal rules, legal process, the administration of justice, etc.

#### IV. CONCLUSION

##### 1. *Cartesian Modern Western Law versus Postmodern Japanese Law*

Into which legal culture, legal system or legal family should Japanese law or the Japanese legal order (*Rechtsordnung*) be classified? The distinctive features, which divide Western law from Japanese law, have been considered to lie in the differences of the conception (*Auffassung*) and the role (*Rolle*) of law, legal process, administration of justice (including performance and execution of contract), etc.

The core conception of Western modern law is based on the belief that modern societies achieve order primarily through law, that is, through a system of rules. It is the manifestation of Cartesian reason. The more law becomes a mechanism or an instrument to rationally advance towards specific goals, the more effective it will become. It has been emphasized in this context that the Western law could be represented by the "Rechtsstaat" or "rule of law" idea, trust in law and respect for lawyers, dispute settle-

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56 KÔJI TANABE, *The Processes of Litigation: An Experiment with the Adversary System*, in: Arthur T. von Mehren (ed.) (*supra* note 5) 73, 85-96.

57 TAKAYANAGI (*supra* note 5) 40; KUNITOMO KONISHI, "Shûshin koyô" no hôri [The Doctrine of "Life Tenure Employment"], in: KAMISHIMA / SAWAKI / TOKORO / AWAJI (ed.) (*supra* note 8) 257-270.

58 *Sakata v. Japan*, Keishû 3225 (1959) 13. See JOHN M. MAKI, *Court and Constitution in Japan* (1964) 298.

ment by litigation, etc. In contrast thereto, Japanese law as a part of the North-East Asian Legal Culture (China, Korea and Japan) could be characterized by virtue-oriented ideas, distrust in law and disrespect for lawyers, dispute settlement by conciliation, etc. Or one could say that Western law is characterized by the “Kampf ums Recht” [the struggle for law and rights] by *Rudolf von Jhering*, whereas Japanese law is characterized by moderation, passive virtues, peaceful settlement of dispute, etc.<sup>59</sup>

In Western legal culture, judges must always apply objective, impersonal schematic principles and rules of law, and are obliged to use an “entweder – oder” approach. This is partly based on the fact that Western peoples were subject to continuous life or death struggles throughout their long history. Their experiences produced an all-or-nothing approach (winner-takes-it-all approach), which will right one party at the expense of wronging the other. This is a rude and crude way of procedure for Japanese lawyers and businessmen. It is better for the Japanese to negotiate an amicable settlement rather than to litigate. Even if the compromise may not reflect the true legal position, it does not disturb the harmony of mutual human relationships. It would save the parties the pain of winning total victory or suffering total defeat.<sup>60</sup>

According to *Shô Ishimoda*, the conception of compromise, no judgment of right or wrong, “both parties are to blame” attitude towards law, the idea of equilibrium (blood feud, talio), the idea of reciprocity (gift), the rules of “*giri*” [a sense of reciprocal, but not synallagmatic, social obligation] and “*ninjô*” [human feeling or affection], etc. have been deeply rooted in the old stratum of Japanese national mentality and character from time immemorial.<sup>61</sup> The *giri* resembles the Chinese rites in form. It is nevertheless different because of their emotional character of the Japanese people. They are usually known as “*giri-ninjô*”. Japanese traditional society has been based on the premise to preserve an orderly social life by means of Japanese traditional concepts that are far better suited to satisfy the emotional character of the participants than the rational legal principles and rules.<sup>62</sup> These conceptions might be shared with the traditional societies in Southern Pacific countries (Micronesia, Melanesia and Polynesia), but not with China.

## 2. “Legal Culture”

The above distinctive features divide the Japanese legal system and legal culture from the Western legal system and legal culture.

Recently, the civil law system and the common law system have come closer. In both legal systems, the law has undergone the political and social influence of the Judeo-Christian morality, liberal legalism and economic structure of capitalism, which result-

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59 TRUBEK (*supra* note 9) 5, 8; ÔKI (*supra* note 20) 215.

60 ZWEIGERT and KÖTZ (*supra* note 2) 296.

61 ISHIMODA (*supra* note 10).

62 NODA (*supra* note 12) 179-182.

ed in essentially similar legal ideologies and mentalities. Henceforward, this reconciliation enables us to speak of one great western legal culture, that is, "droit occidental" [western law]. In marked contrast to this, we can enumerate a number of non-western legal cultures.

In terms of the legal culture, geographic conditions and ecological circumstances, national character or mentality based on genetic method of classification, etc., from which ideology, idea of the world and society (Weltanschauung), legal conception and role of law, etc. are derived, are constant elements that allow for a distinction between Western legal culture, (2) Islamic legal culture, (3) Indian legal culture, (4) Chinese legal culture, (5) Customary legal culture (Black-African, Oceanian, etc.). Religious tradition, liberal legalism, economic structure of capitalism, "Kampf ums Recht" ideal and other cultural backgrounds are quite foreign to the non-western legal cultures except the Islamic legal culture: The Islamic legal culture, which is closer to the Western Legal Culture, is the complex of divinely revealed rules which are in principle immutable, because the law is considered to have been revealed by God. In contrast, Western legal culture generally recognizes that the content of law changes. This is the crucial difference between the Islamic and Western legal cultures.<sup>63</sup>

### 3. "Legal System" and "Legal Family"

Among the North-East Asian legal cultures are (1) the North-Eurasia legal system and (2) the East-Asian legal system. The latter legal system can be divided further into (i) the Chinese legal family, (ii) the Korean legal family and (iii) the Japanese legal family. The concept of legal families is based on unique distinctive institutions, substantive legal rules, etc.

Among the Western Legal Culture there are two legal systems are: (i) the Civil law system, and (ii) the Common law system.<sup>64</sup> The Civil law system could be further divided into (1) the Romanic legal family, (2) the German legal family, and (3) the Nordic legal family. On the other hand, the Common law system could be divided into (a) the English legal family and (b) the American legal family. Since the Declaration of Independence, American law has gone through quite a distinctive development, since the United States has a written Constitution on which the federal structure and the judicial review are based: *Marbury v. Madison* (1803). There are no special courts such as constitutional or administrative courts.<sup>65</sup>

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63 LÉONTIN J. CONSTANTINESCO, *Rechtsvergleichung: Die rechtsvergleichende Wissenschaft* (1983) 254; DAVID (*supra* note 6) 14-20, *esp.* 19 ('droit occidental' [western law] concept); ZWEIGERT and KÖTZ (*supra* note 2) 297.

64 ARTHUR T. VON MEHREN, *The Civil Law System: An Introduction to the Comparative Study of Law* (2d ed.1977) 3.

65 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); ZWEIGERT and KÖTZ (*supra* note 2) 62 et seq., 233 et seq.

Every legal system and legal family should be understood in its own cultural, political, economic, social and historical context. “Only such a contextual, cross-disciplinary approach can facilitate a deep insight into the law in question.” According to *Lawrence M. Friedman* the traditional classification of legal orders or legal systems is helpful in many ways, but without an understanding or knowledge of legal culture, their structures and substance are merely “lifeless artifacts.”<sup>66</sup>

#### 4. *Japanese Law: “Westernized”, but not “Western Law”*

It is easy to see the gap between the structure and culture of the adopted legal system, and the traditionally Japanese one. For the Japanese, “rationalism”, that is, the spirit of Cartesian modern law was only “a beautiful borrowed garment, which a traditional psychology imbued with mystic sentimentalism.” The *homo juridicus* on which Cartesian modern law is based, is “a man who thinks mathematically and logically and has no concern for the delicacy of the subtle nuances of concrete life,” that is, *Lebenswelt* (real life). “The Japanese who were not used to the abstraction of objective things” are “embarrassed by a fashion of thought which admitted only two colors, black and white.”<sup>67</sup>

The revisionists, the rationalists, the informalists, etc. have argued against the idea that the Japanese law has culturally been determined. Each of their models or analysis goes far to explain Japanese law and each argument is persuasive in explaining one aspect of it. But ultimately, they are as confused as the five blind men and the elephant. Each model or analysis can observe one side of Mt. Fuji, but not the whole range of Japanese law. The above academics arbitrarily concentrate their efforts on the study of the Cartesian western model or analysis only, thus restricting their studies to one of the thousands of possible forms that law can take. My argument is no exception to this model or analysis, either.

Taking this limit or restriction into consideration, in this legal essay, I am trying to see Japanese law not simply as a system of rules separate from culture, but as a dynamic process whose function is culture-bound and whose structure is multivariate.

To which legal group (legal culture, legal system and legal family) does Japanese law thus belong? This article shows that Japanese indigenous law has been much influenced by the North-Eastern legal culture (Chinese legal system) and Western legal culture (Civil law system and Common law system), which are symbiotic and hybrid. Some scholars argue that modern Japanese law is not closely connected with indigenous Japanese law. That is to say, there is no historical continuity between indigenous Japanese law and modern Japanese law. Taking a look at the ‘living law’ in legal process,

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66 ANNETTE MARFORDING, *An Interdisciplinary Approach to the Study of Foreign Legal Systems*, RCSL 95 papers, supplement 4, *Legal Culture: Encounters and Transformations* (1995) 1; LAWRENCE M. FRIEDMAN, *Law and Society* (1977) 76.

67 NODA (*supra* note 12) 62.

administration of justice, etc., however, one can often trace the indigenous concepts of Japanese law, the traditional style of legal process and administration of justice.

The law in the books has been westernized to certain extent, and so has the mode of legal thinking and argument of Japanese lawyers. It is, however, nonsensical to imagine that the law in books reflects exactly the law in action in Japan. Both the written law and the living law are important to determine contemporary Japanese law, not either of them.

There has been a kind of tension between Japanese indigenous law and western law. Current Japanese law could be found somewhere between the Western legal system and Japanese legal culture. It is safer to say that Japanese law is a hybrid of westernized legal system and indigenous legal culture. Therefore, it is misleading to consider taking modern Japanese law out of the oriental group and classifying it with those systems, which have European and American origins. It is true that Japanese law has been “westernized”, but it was not and is not “western law”.