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THE JAPANESE LAW IN ENGLISH: SOME THOUGHTS ON SCOPE AND METHOD

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Japanese law is a fledgling topic of comparative law in this country. The rapid growth of bilateral business and the integration of the United States and Japanese economies in recent years suggest the need for increased attention to this area. This Article first examines the prewar antecedents and the postwar developments of Japanese law in English in this country. It then reviews the present law school environment for the study of Japanese law as a comparative law subject. Finally, it briefly addresses three key issues basic to the development of this subject.

I. HISTORICAL BACKGROUND

Little attention was given to the study of Japanese law in English before 1945 because Japan was viewed as distant and exotic.[1] Among foreigners, only John Henry Wigmore[2] and Joseph

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1. For pre-World War II materials by outstanding Japanese comparativists, see K. ASAKURA, THE DOCUMENTS OF THE IRIKI (1929); K. ASAKURA, THE EARLY INSTITUTIONAL LIFE OF JAPAN (1903); N. HOZUMI, LECTURES ON THE NEW JAPA-

E. de Becker[3] wrote major projects of lasting value in English. Other useful prewar books and articles appeared occasionally,[4] but bilingual lawyers in Japan and the United States competent to read Japanese law and write in English were as rare before World War II as they are now. Because of their Germanic cast the Japanese codes are comprehensive, different, and difficult, espe-

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NESE CIVIL CODE AS MATERIAL FOR THE STUDY OF COMPARATIVE JURISPRUDENCE (1912); LEAGUE OF NATIONS ASS'N, COMMERCIAL CODE OF JAPAN: ANNOTATED (Takayana Gi Kenzō ed. 1931-32).

2. *See* Henderson, *Japanese Legal History of the Tokugawa Period: Scholars and Sources*, in CENTER FOR JAPANESE STUDIES OCCASIONAL PAPER No. 7. (U. Mich. comp. 1957), which describes Wigmore's early work as:

> one of the most remarkable products of Western legal scholarship in Japan was the English translation of the *Minji kanrei ruishū* and the *Tokugawa jidai minji kanreishū* supervised by John Henry Wigmore. Wigmore's work was carried out in two stages, the first during his stay (1889-1892) at Keiō University and the second under the sponsorship of the Society of International Cultural Relations (Kokusai Bunka Shinkōkai) between 1935 and 1941. During the first period he translated parts of both the *Minji kanrei ruishū* and *Tokugawa jidai minji kanreishū* and had them printed with an introduction on Tokugawa institutions as "Materials for the Study of Private Law in Old Japan," 20 TRANSACTIONS OF THE ASIATIC SOC'Y OF JAPAN, Supplement (1892). It should be noted that this translation of the *Minji kanrei ruishū* was from the original Japanese report, while the Japanese printed copy of 1877 is abridged.
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> In 1935 Wigmore came to Japan for two months at the invitation of the Kokusai Bunka Shinkōkai and organized a team of translators who in the following six years sent him their translations to be edited in Chicago. By 1941 the translation project was completed. The material translated in this fashion was organized by Wigmore as follows: Part 1. Introduction; Part 2. Contract: Civil Customary Law; Part 3. Contract: Legal Precedents; Part 4. Contract: Commercial Customary Law; Part 5. Property: Civil Customary Law; Part 6. Property: Legal Precedents; Part 7. Persons: Civil Customary Law; Part 8. Persons: Legal Precedents; Part 9. Procedure: Legal Precedents; Part 10. Vocabularies and Indexes.

Id. at 105. *See generally* J. WIGMORE, LAW AND JUSTICE IN TOKUGAWA JAPAN (1969) (contains all the translations by Wigmore; except parts 4, 8-B, and 10, referred to by Henderson, *supra*).

3. J. DE BECKER, ANNOTATED CIVIL CODE OF JAPAN (1909) (reprinted by U. Pub. of Am. in 1979); J. DE BECKER, COMMENTARY ON THE COMMERCIAL CODE OF JAPAN (1913) (3 vols.); J. DE BECKER, THE PRINCIPLES AND PRACTICE OF THE CIVIL CODE OF JAPAN (1921) (reprinted by U. Pub. of Am. in 1979).

4. Nearly all of the literature, useful and otherwise, in foreign languages on Japanese law from 1867 to 1973 is listed in AN INDEX TO JAPANESE LAW: A BIBLIOGRAPHY OF WESTERN LANGUAGE MATERIALS, 1867-73 (R. Coleman & J. Haley comps. 1975).

cially considering their wholly non-Western setting. Only minor traces of Anglo-American law had found their way into the Japanese codes before 1945.[5] The minimal interest in Japanese law is understandable given the United States prewar Atlantic bias and the European slant of comparative legal studies in the United States.

Before World War II, neither Wigmore nor de Becker had any formal support for their study of Japanese law outside of Japan. In addition, at that time no course in Japanese law was offered in this country. Even during the Occupation after the war, only a few United States lawyers familiar with the Japanese law and language staffed General McArthur's headquarters, Supreme Commander for the Allied Powers (SCAP), to assist in certain revisions of Japanese law. Alfred C. Oppler,[6] a naturalized American from Germany, was a leading Occupation figure although he was neither a United States lawyer nor a Japanese linguist.[7] One of the participants most qualified in Japanese law and language, Thomas L. Blakemore, an Oklahoma lawyer, obtained his Japanese training at Tokyo University after law school before World War II began. Professor Kurt Steiner,[8] another figure involved in the revisions, completed his legal training in Europe and acquired a command of the Japanese language at the United States Army Military Intelligence Japanese Language School at the University of Michigan and Fort Snelling, Minnesota. Other United States lawyers with some knowledge of the Japanese language were in SCAP, but virtually none of them, except Blakemore, had a Japanese legal background. Despite the dearth of Japanese experts on the staff, many of the reforms they helped institute may be judg-

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5. *See, e.g.*, 1 MINPŌ (Civil Code), Law No. 89 of 1896 and Law No. 9 of 1898, art. 43 (1950) ("a juristic person has rights and duties, subject to the provisions of laws and ordinances and within the scope of its objects as determined by the articles of incorporation or by the act of endowment"). This statute originated from English case law regarding *ultra vires*. Takenuchi, *How Should We Abolish the Ultra Vires Doctrine in Corporation Law?*, 2 LAW IN JAPAN: AN ANNUAL 140, 143 (D. Henderson trans. 1968); *see also* Kitagawa, *Damages in Contracts for the Sale of Goods*, 3 *id.*, 43, 56 (D. Henderson, L. Hurvitz & K. Sono trans. 1969); 3 MINPŌ (Civil Code) art. 416 (1950) (embodies the principle of *Hadley v. Baxendale*).

6. Oppler was the Chief of the Courts and Law Division in the Government Section of SCAP.

7. *See* A. OPPLER, LEGAL REFORM IN OCCUPIED JAPAN (1976).

8. *See* Steiner, *Postwar Changes in the Japanese Civil Code*, 25 WASH. L. REV. 286 (1950).

ed a success, especially in constitutional law and related areas.[9]

After World War II, selected United States legal institutions were introduced into the Japanese system, but the basic civil law orientation of the system remained unchanged. In some fields, however, the influence of United States legal concepts was profound; the impact of United States constitutional law was especially strong.[10] For the first time, the Japanese Constitution became justiciable law. Although several major regulatory statutes covering antitrust, securities regulation, and labor relations were modeled after United States statutes,[11] the Japanese practices under these statutes became uniquely Japanese. Major amendments to the Civil Code and the Code of Criminal Procedure were required to reflect constitutional changes, such as provisions favoring equality of the sexes and protecting suspects.[12] Many revisions were made in the Commercial Code to comport with United States law on shareholders' rights in corporations. Lesser revisions were also adopted for the Criminal Code and the Code of Civil Procedure. Overall, reforms during the Occupation (1945-1952), although important, were probably not as influential in creating interest in Japanese law in the United States as was the recent emergence of Japan as a leading manufacturing and trading partner.

II. THE LAW SCHOOL ENVIRONMENT

Law schools and faculties have an important role to play in stimulating student interest in Japanese law. By establishing new specialized programs of study, the law school can create a favorable environment for the study of the Japanese legal system and thus affect the overall awareness of the Bar in this area.

For many years, Japanese law had no place in United States law schools and received little attention from practitioners. After

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9. For views concerning the need for constitutional revision, see J. MAKI, JAPAN'S COMMISSION ON THE CONSTITUTION (1980).

10. THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-67, (D. Henderson ed. 1969).

11. *E.g.*, Yushutsu nyu Torihiki Hō (Export and Import Trading Act), Act No. 299 of 1952 (patterned after United States antitrust laws), *partially reprinted in* 3 ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES, ch. J (1973).

12. *See* LEGAL REFORMS IN JAPAN DURING THE ALLIED OCCUPATION (1977) (collection of seven articles from 23-27 WASH. L. REV.).

1945, the Bar and United States law schools began to show an increased interest in Japanese law. Prior to 1962, the activities in this area centered on the collection of Japanese legal materials by libraries and the instigation of legal exchange programs. Harvard, the University of Washington, and several other law schools began in this period to acquire and maintain Japanese law books. In addition, the University of Washington published several articles covering important postwar legal reforms in the Far Eastern Section of the *Washington Law Review*.[13] A significant legal exchange program which spurred activity to acquire knowledge of Japanese law was the Ford Foundation's sponsorship of *Japanese-American Program for Cooperation in Legal Studies*. The law schools of Harvard, Michigan, and Stanford exchanged scholars with Japanese law schools. As an outgrowth of the program, the exchange participants became leaders in kindling further interest in the area. Another product of the program was the publication of a useful, multiauthored volume surveying various Japanese law topics.[14] In addition, United States professors, judges, and lawyers sporadically visited Japan and occasionally published articles in English about their experiences.

Comparative law in general plays a minor role in specialized educational institutions such as United States law schools because of the practice-oriented outlook of law students. A comparative law course must compete with all of the other perspective courses such as international law, legal history, and jurisprudence. In order to attract students who by necessity are more inclined to enroll in "bar examination-oriented" courses of study, the university must offer comparative law courses that emphasize both the professional and practical aspects of the subject area. Japanese law is but one area of comparative law and is a relatively new entrant in the field. These conditions help to limit comparative law courses in many law schools to a single survey course that contrasts the Anglo-American common law with the civil law of France and Germany. As a general rule, the comparative studies programs have not emphasized the professional problem-solving approach to substantive private law, a focus essential to a trans-Pacific practice.

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13. *See* 23 WASH. L. REV. 151 (1948) to 27 *id.* 85 (1952), *reprinted as* LEGAL REFORMS IN JAPAN DURING THE ALLIED OCCUPATION (1977).

14. *See* LAW IN JAPAN, THE LEGAL ORDER IN A CHANGING SOCIETY (A. von Mehren ed. 1963).

Substituting Japan for France or Germany as the model for the "civil law" legal system may rectify the general academic orientation of comparative law courses and thereby engender more student interest in Japanese law. There are several arguments that support this change: (1) the materials are available in English; (2) Japanese law is arguably more important to the practicing bar than either French or German law because Japan has a much greater economic and business impact on the United States; (3) Japanese law may have more potential for intellectual contrast because of sharper differences in tradition and culture; and (4) it is "civil law," though sui generis.

Courses on international transactions[15] can be restructured to orient the student to the realities of international commercial practice. International or transnational transactions courses provide information on the laws of other countries, United States law, and occasionally international law, and equip the future lawyer with the skills to handle these transactions. Because most transactions confronting the legal practitioner are bilateral in nature, it is desirable to obtain a specialization in the pertinent laws of two significant trading countries. International transactions courses should mirror the realities of practice and should not try to include the laws of a variety of countries that deal with United States parties. Not enough law of any one country can be taught in such courses to be of much practical value. A bilateral approach to an international transactions course, such as United States-Japanese Transactions, is more appropriate for professional needs. This realization prompted the University of Washington to establish a LL.M. and Ph.D. program in United States-Japanese Legal Transactions.[16] In a post-J.D. program of this in-

15. Approximately 250 law professors teach such a course. AMERICAN ASS'N. LAW SCHOOLS, DIRECTORY OF LAW TEACHERS, 1982-83, at 882-85 (1982).

16. The essential assumptions of the program are:

(1) There is a need in both countries for practicing comparativists who are knowledgeable in both United States and Japanese law. It is unsound to presume to practice in such a specialty without a facile competence in both English and written Japanese.

(2) Entering students are assumed to have taken an introductory J.D. course on the Japanese or American legal system.

(3) Candidates must be trained in the law of their own country and be knowledgeable of the Japanese language.

(4) The content of the program is bilateral in orientation and will focus on the problems of United States-Japanese transactions for practicing

tensity, it is possible to grasp substantive law issues on a professional problem-solving level.

In addition to the establishment of the doctoral program in United States-Japanese Legal Transactions, the University of Washington School of Law in 1962 appointed a full-time, tenured specialist in "Asian" law to develop a comparative law program based on "non-Western" sources.[17] Japanese law is a major emphasis of the program and a coordinated set of six courses in Japanese law is offered annually to both J.D. and LL.M. students interested in the program.[18] Individual courses in Chinese law, Indonesian law, Islamic law, and Korean law[19] are also available. The overall grasp of Japanese law in the United States legal community should improve measurably as graduates continue to take places in the profession and the publications on Japanese law accumulate.[20]

III. Three Key Problems of Comparison

Issues relating to the concept of law in the culture, the role of law in the society, and the interplay of law and language must be confronted when investigating the law of a country as different as Japan. These issues become more acute in comparative jurisprudence because of the foreign language component. Any comparativist researching English translations of Japanese law must con-

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lawyers.

(5) Six courses are taught in English from course materials developed at the University of Washington and containing relevant United States, international, and Japanese legal sources in translation. The advanced courses for each quarter are: (1) Justiciability in United States-Japanese Disputes; (2) United States-Japanese Contract and Sales Problems; (3) United States-Japanese Corporate Relations; (4) United States-Japanese Tax Problems; (5) Japanese Administrative Law; (6) Government Regulation of Business in Japan. University of Washington School of Law, 1982-83 Bulletin 39-40 (1982) [hereinafter cited as U. Wash. Sch. L. Bulletin].

17. This writer was the appointed professor. Our interest was initially supported by a Ford grant at the end of 1961, which was to be devoted to "non-Western" law. We were, of course, aware that "Asian law" was hardly a rigorous term either, and for us it meant that our law school intended to base our "comparative law" on law from Asian, rather than European, sources.

18. *See supra* note 16 and accompanying text.

19. U. Wash. Sch. L. Bulletin, *supra* note 16, at 38-39.

20. *See, e.g.*, Law in Japan: An Annual (U. Wash. Sch. L. pub. 1967-date) (currently in its 15th vol.).

front these critical issues whether his interest is macrosystemic or microdoctrinal, and whether his focus is directed toward academia or legal practice.

A. Concept of Law in Japanese Culture

First, the idea of law itself must be examined.[21] Until the creation of the Great Court of Cassation in 1875, Japan had nothing resembling an independent judiciary, no tradition of justiciable law, and no separation of the judiciary from the administration. Even after 1875, the new courts handled only ordinary civil and criminal cases. Under the Meiji Constitution, which had become effective in 1889, a single administrative court with only token jurisdiction was established to hear administrative law cases.[22] Essentially, the political administration remained above the "law." When the new constitution took effect after World War II, the ordinary courts were empowered to hear all suits against administrative agencies as well as suits involving the constitutionality of legislation. The brief experience of only a century of justiciable law in civil cases and roughly thirty-five years in administrative and constitutional litigation has an important message for comparativists, especially in Japan where traditional social controls have been extraordinarily refined. Indeed, the traditional Japanese society was rule-ridden and behavior was minutely prescribed by society, not justiciable law.

Whatever one's position may be on the usefulness of distinguishing domestic "law" and "administration," or "custom" and "justiciable law" (or "law," "justice," and "politics"), it is misleading and confusing for comparativists to use, without stipulating definitions, the terminology of United States justiciable law (*e.g.*, court, judiciary, bar, bench, appeal, trial) when discussing a system without an independent judiciary. In addition, these terms must be used carefully in a discussion of a system having a brief and superficial experience with justiciable law to avoid exaggerat-

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21. The "east-west" contrast in the Japanese approach to "law" has been discussed at length by F.S.C. Northrup, Joseph Needham, and many others. For recent discussion of the literature, *see* T. STEPHENS, A COMPARATIVE STUDY OF THE INTRODUCTION OF THE "IDEA OF LAW" INTO CHINA, JAPAN AND INDIA (1978) (a M.A. thesis done at Brisbane, Austl.).

22. This new administrative court had only token jurisdiction. *See* Wada, *The Administrative Court Under the Meiji Constitution*, 10 LAW IN JAPAN: AN ANNUAL 1, 21-25 (1977).

ing the role of law. These words are value-laden for the English language reader and inevitably will attribute important characteristics to a system unless the entire legal culture is clearly explained.

After 1947, Japan formally committed to a constitutionalism similar to that of the United States and provided for judicial review of legislative and administrative acts by the ordinary courts. Because this tradition is of a relatively recent origin and the courts' review is not often used, the role of justiciable law remains correspondingly shallow. In many areas, Japan has employed nonlegal alternatives in social ordering. The United States comparativist must be careful not to assume too readily that these alternative ways are somehow primitive and inferior.

B. The Role of Law in Japanese Society

For historical reasons, even today the role of law in Japanese society is minimized. As used here, the word "law" has a special meaning: it connotes "justiciable law" or "lawyer's law," which implies a verbalized written rule, typically a statute, enacted by a legislature representing voters. This law is *justiciable* because a plaintiff can obtain a favorable judgment by filing a suit in a court, following proper procedures, and proving his claim by a preponderance of acceptable evidence. If the decision is not appealed or otherwise overturned, the plaintiff then may have that judgment executed through the courts and receive his remedy from the "law." An independent, impartial judge qualified in the law, notice of the fair hearing (due process) to the parties, observance of proper procedural steps, and access to a trained and licensed lawyer are crucial to the successful operation of justiciable law.

The apparatus of "justiciability" is rather unique, at least in the degree to which it is used in the United States. It was first imported into Japan only about a hundred years ago. This new alien system of law has been superimposed on a highly unusual society. Isolated from the world for two centuries, Japan became a decentralized system of small feudal domains, each made up of largely self-governing village communities of confucianistic family unity.[23] This kind of society produced a homogeneous, highly im-

23. For a capsule presentation of the pre-modern system in the Tokugawa era (1600-1808), see 1 D. HENDERSON, CONCILIATION AND JAPANESE LAW: TOKU-

mobile, collectivistic people, normally dependent on each other (within the family and the village) for their entire lives. Most community matters were settled communally without a formal "court." If the annual taxes were paid by the village to the overlord, who in turn paid tribute to the Tokugawa Shogun, the villagers were left alone in their dealings with each other.

Although the intricacies of this unique and isolated system cannot be fully explained in this Article, the significant feature to note is the decentralized mode of governance delegated from the Shogun coupled with the extreme density of society at the extremities of the village. Behavioral patterns, registries, and written rules and records were precise. On the whole, compliance by the Japanese people was remarkable because it was self-imposed by their own small, closed communities.

The Japanese people may not be described appropriately as "law-abiding" because the controls were more socially ingrained and enforced by immobility and communal adhesion than affected by external law. In the home, workplace, and neighborhood, behavior was so socially prescribed and enforced that state-imposed law was not only absent but quite superfluous in private dealings. It is critical for lawyers to understand that today Japan is still socially disciplined to a remarkable degree.

Despite the country's technological inferiority when opened to the west by Commodore Matthew Perry in 1853, Japan was already quite sociologically advanced, indeed quite "modern," if modern means adaptable to the rigors of late twentieth century industrial productivity. The workplace has become what the Japanese wryly call the "second village" because livelihood, welfare, and success in life depend on performance in the same workplace with the same people, ideally for an entire career. This concept of the workplace accounts for the immense corporate dedication of Japanese employees. Today, their ability to focus social energy on the task of improving corporate productivity to compete with rival corporations is incomparable. Japanese competitors also have a strong tendency to group together against foreign businesses.

During the hundred years of experience with imported western justiciable law, the Japanese have developed a sophisticated central bureaucracy, a system of administration, and a structure of private law based on imported codes. The legal literature pro-

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GAWA AND MODERN, chs. 2-3 (1965); Hiramatsu, *Tokugawa Law*, 14 LAW IN JAPAN: AN ANNUAL 1 (D. Henderson trans. 1981).

duced in this period — treatises, commentaries, and case law — is voluminous, systematic, and refined. The mix of social and legal institutions, however, remains subtle and elusive to the comparative lawyer with little exposure to Japanese society.

C. The Interplay of Law and Language

The third problem of the comparative method is the relationship of language to law. The language problem is both subtle and complex for the comparativist because of the difficulty of the Japanese language and the inherent parochialism of monolingual lawyers. If the foreign law is in another language and the lawyer is monolingual, he can hardly understand the nuances presented by the problem. The lawyer easily may suppose that "law" and its major concepts are quite platonic; that is, extant "things" in the real world to which his language assigns names. By equating *fuhō koi*, *keiyaku*, and *bukken* with English torts, contracts, and property, respectively, a lawyer could assume that he is in command of Japanese law and capable of applying it to his client's problem. This type of lawyer tends to be a chronic, unthinking "word substitutionist," who must obtain the assistance of the comparativist lawyer to avoid making irreparable errors.

As noted, the relationship between law and language is inherently imperfect even within a single system. In a Japanese comparative law practice, however, the difficulties of law and language inevitably are compounded by the problem of translating from a language, society, and culture as different as that of Japan.

The best way to approach the law/language problem in comparative law is by reviewing the problem first in the relatively simple setting of the United States judicial process. The term "interpretation" designates the many meanings that lawyers can find in any rule that is applicable to their particular case. On the other hand, "application" designates the single meaning of the law that is ultimately fixed in the court's holding.[24] Interpretation is the product of the client's interests, multiplied by his lawyer's ingenuity in using and abusing language. Multiple meanings are a normal quality of the abstract language used in statutes. Lawyers do not cause the interpretational malady suffered by a statute, they only exploit its symptoms.

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24. *See* Henderson, *Japanese Law in English: Reflections on Translation*, 6 J. JAPANESE STUD. 117, 120 (1980).

The rule of law and judicial process, which embody the interpretation and application problems accruing from the inherent imperfections in language, are now parts of a political value system embraced by both the United States and Japan. A modicum of understanding of the imperfections of technical language in a single legal system is but a first step for the comparativist working with Japanese law in English. Translation of laws from Japanese to English (or vice versa) compounds the problems of legal ambiguity. Even a simple description of a Japanese legal system in the English language is inevitably a comparative law study because foreign terms must be used to describe the Japanese concepts which exist only in Japanese law. Legal translation, being such a description, is necessarily a comparative law exercise. Translation of Japanese law into English requires sensitivity to structural and conceptual differences in the civil law and common law systems, as well as an awareness of the peculiarities of Japanese legal culture and the uses of law in Japanese society.

IV. The Japanese Code System

A. The Civil Code

Japan has an elaborate systematic code law originally derived from German and French models. The hierarchy of legal authorities used to interpret the code law is quite different from that of the United States. Precise terminology, specified in the Civil Code, runs throughout the Japanese system of private law, including the Commercial Code and the Code of Civil Procedure. Understanding and using the discrete code provisions without prior grounding in the system is risky.

The Codes are convenient once the whole system is learned. A Japanese lawyer normally can obtain a working solution to a legal problem by referring to the materials organized by code sections. The solution can be discovered in the Codes and related cases in a fraction of the time it takes to find an answer in the lawless case law of the United States, which is often accessible only through use of the "key-less, key-word" indices.[25]

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25. Given the flood of reported cases since his time, we can smile in appreciation of J. Story's words in 1821: "The habits of generalization . . . will do something to avert the fearful calamity which threatens us of being buried alive, not in the catacombs, but in the labyrinths of the law." J. Story, *Progress of Jurisprudence*, in Miscellaneous Writings 237 (1852).

Two standard topics of the usual law school course on comparative law are especially relevant to Japanese Code law. The first is the hierarchy of Japanese legal sources. The second is the systematic nature of Japanese Codes and their comprehensive coverage. Both topics are routine to comparativists because they are fundamental structural features that affect the application of codes in any civil law system. The meaning of any part of the Japanese Codes is influenced by its legal source hierarchy and the nature of its coverage. This dualism, however, can be overlooked easily by common law lawyers reading an isolated section in translation. The systematic character of the Codes makes it doubly difficult to render them intelligible in translated secondary sources. The Japanese author writing for a Japanese audience assumes a background that his English language reader may not possess. The necessary background is often too massive to supply in the form of footnotes or interstitial comments, but the Japanese insistence on comprehensive coverage and structural symmetry often makes any section considered alone incomprehensible without the proper conceptual background. This conflict contributes to the shortcomings of the translated secondary sources. Furthermore, Japanese law in English has additional problems not encountered in Japanese law in Japanese.

In most civil law countries, the civil code is subject only to the constitution.[26] In a sense the civil code stands as a dictionary, its General Provisions (*sōsoku*) providing grammar and vocabulary for the whole system in civil matters. For example, a sharp contrast exists between Japanese and United States property law. In Japan, the Civil Code,[27] subject to the Constitution,[28] controls all rights of ownership: "No real right can be created other than those provided for in this Code or in other laws."[29] No property rights, therefore, exist outside the statutory law. In the United States federal system, however, property law is the creature of state law. Each state's property law is derived from statutes, precedents, and concepts of feudal tenure which can be traced to

26. *See* LAW AND LEGAL PROCESS IN JAPAN 346-405 (D. Henderson & J. Haley eds. 1978).

27. 2 MINPŌ (Civil Code) arts. 175-398 (1950).

28. 3 KENPŌ Constitution art. 29 (1947).

29. The Civil Code states: "No real right can be created other than those provided for in this Code or in other laws." 2 MINPŌ (Civil Code) art. 175 (1950).

an English common law heritage. The *Eibun Hōrei-sha* (EHS)[30] translation of article 175 of the Civil Code is slightly misleading in using the term "real right" for *bukken* (rights-in-things).[31] "Real right" may cause monolingual lawyers to think of real estate as a platonic category instead of a common law ethnocentricity. *Bukken* includes both "real estate" (*fudōsan* or immovables) and personalty (*dōsan* or movables).

B. The Commercial Code

As compared to the Civil Code, the Japanese Commercial Code is "special law," meaning that it is first applicable to the problems within its scope. When problems are not covered by the Commercial Code, the more basic Civil Code applies unless there is some applicable customary law. For example, under the Civil Code,[32] some juristic persons (*hōjin*) are controlled by Commercial Code provisions concerning private interest juristic persons (*eiri-hōjin*). Public interest juristic persons (*kōeki hōjin*) are governed by the Civil Code. To determine the juristic status in Japan of a United States partnership,[33] one should consider, pursuant to the Civil Code,[34] whether a Japanese treaty[35] supplements the Commercial Code definition of private interest juristic persons

30. EHS is a useful compendium of translations of the major codes, statutes, and regulations.

31. *See supra* note 29.

32. 1 MINPŌ (Civil Code) art. 35 (1950).

33. The "foreign companies" (*gaikoku hōjin*) of 1 MINPŌ (Civil Code) art. 36 (1950), include United States corporations but not partnerships (not juristic persons). Japanese law does not have "partnerships" in the United States sense. Civil partnerships (*kumiai keiyaku*), *id.* art. 667, are similar but still quite different. Japanese "partnership corporations" (*gōshi gasha* and *gōmei gaisha*) are not like our partnerships because they have a juristic personality.

34. 1 MINPŌ (Civil Code) art. 35 (1950).

35. "As used in the present Treaty, the term 'companies' means corporations, *partnerships*, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit." (emphasis added). Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, art. XXII(3), 4 U.S.T. 2063, 2079-80, T.I.A.S. 2863. Article VII(1) provides for national treatment of foreign companies, *id.*; however, the effect of the treaty provision on partnerships, especially the effect of 1 MINPŌ (Civil Code) art. 36(1) (1950), is controversial among Japanese commentators. *See* Ryōichi, *Jōyaku ni yoru gaikoku hōjin no ninkyōp*, 57 KOKUSAIHŌ GAIKŌ 138, 161 (1958); Miyatake, Foreign Companies in U.S.-Japanese Business Corporation Law 77 (M. Tatsuta & D. Henderson eds. 1977) (U. Wash. mimeo).

and includes our kind of partnerships within the concept of *shōji gaisha* (trading companies). By only examining the Commercial Code[36] on this issue, a United States attorney may overlook the possibility that United States partnerships might also be affected.

The Commercial Code has its own General Provisions[37] (*sōsoku*) in Book I which may govern significantly those corporate matters presented in Book II. For example, a recent Supreme Court decision, *Fuji Rinsan Kōgyō K.K. v. Kiso Kanzai Shibai Kyōdō Kumai*,[38] illustrates the interconnected nature of the Commercial Code.[39] *Fuji Rinsan Kōgyō K.K.*, a corporation, sold all of its assets to a cooperative, but the cooperative did not take over the business activities of the transferor. The transferor, Fuji, sued to repudiate the transaction on the grounds that the sale had not been approved by a two-thirds vote of its shareholders, as required by the Commercial Code.[40] "Sale of assets," "business transfer," and "merger" transactions are major corporate changes that must be approved by a two-thirds vote of the shareholders and must provide dissenters the right to sell their shares at an appraised value.[41] Before the post-World War II amendments, a business transfer (*eigyō jōdō*) was defined narrowly in the General Provisions[42] of the Commercial Code to cover only those transactions in which the transferee had assumed the activities as well as the assets of the transferor. The court applied this narrow definition of a business transfer in its consideration of article 245, Shareholder Approval for a Business Transfer. The Supreme Court, in a nine to six decision, decided that shareholder approval

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36. SHŌHŌ (Commercial Code), Law No. 48 of 1899, art. 482 (1899), states: "[a] company which establishes its principal office in Japan or the chief object of which is to carry on business in Japan, shall, even though incorporated in a foreign country, comply with the same provisions as a company incorporated in Japan."

37. SHŌHŌ (Commercial Code) arts. 1-51 (1899).

38. Fuji Rinsan Kōgyō K.K. v. Kiso Kanzai Shibai Kyōdō Kumai, 19 Sai-han minshū 1600 (1965). *See* T. Shibukawa, Various Problems of Sale of Corporate Assets 24 (1979) (U. Wash. mimeo).

39. The Japanese Commercial Code amendments of 1951, including the provison involved here (art. 245), were patterned after United States corporation law, especially the Illinois statute. *See* Blakemore & Yazawa, *Japanese Commercial Code Revisions*, 2 AM. J. COMP. L. 12 (1953).

40. SHŌHŌ (Commercial Code) arts. 245, 343 (1899).

41. *See, e.g.*, 2 AMERICAN BAR ASS'N., MODEL BUSINESS CORPORATION ACT ANNOTATED §§ 78-80 (1971).

42. SHŌHŌ (Commercial Code) arts. 24-29 (1899).

was not required because the transferee did not take control of the business activities, and allowed the sale to stand.

The requirement of shareholder approval was inserted in the Commercial Code in 1950, under the influence of United States law. A United States lawyer reading article 245 alone may not have anticipated the result in *Fuji*. He probably would expect that shareholder approval of the sale would be required as in United States law, based on the assumption that the whole purpose of importing article 245 from the United States into the Code was to protect dissenting shareholders against headstrong directors. In addition, the United States lawyer probably would not understand the meaning of *eigyō jōdō* in articles 24 through 29, which protects transferees from transferor competition. This case illustrates the influence of the *system* on Japanese interpretation.[43]

The laws of checks[44] and promissory notes[45] (commercial paper) are "special law" to the Commercial Code. The Code of Civil Procedure,[46] with many "special laws" of its own, is the enforcement auxiliary to all of the civil law, but is dependent on the Civil Code in many ways. The general forum[47] of the defendant, for example, is determined by his domicile (*jusho*), a term which is defined in the Civil Code,[48] not in the procedural law.

V. International Litigation in Japan

International litigation often focuses sharply on law/language issues. Regardless of which law governs, one party is always working with translated foreign law. When United States-Japan business issues are considered, the law inevitably is utilized to provide a common ground of interaction.[49] In some fields, for example in taxation, both Japan and the United States are subject to the same treaty law.[50] The rationality that law provides is particularly

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43. *See, e.g.*, Fuji Rinsan Kōgyō K.K. v. Kiso Kanzai Shibai Kyōdō Kumai, 19 Sai-han minshū 1600 (1969) (Matsuda, J., dissenting).

44. Kogitte-hō, Law No. 57 of 1933.

45. Tegata-hō, Law No. 20 of 1932.

46. Minji soshō hō (Code of Civil Procedure), Law No. 29 of 1890.

47. 1 Minji soshō hō (Code of Civil Procedure) art. 2 (1890).

48. 1 Minpō (Civil Code) art. 21 (1950).

49. *See* D. Henderson, Foreign Enterprise in Japan 291 (1973).

50. Convention on Double Taxation, Mar. 8, 1972, United States-Japan, 23 U.S.T. 967, T.I.A.S. No. 7365.

useful for interaction between foreigners because their domestic business lacks a common social milieu. This reliance on justiciable law in international business contrasts with the relatively shallow dependence on the Codes in local transactions by the Japanese themselves.[51]

In litigation the first question is always: which law governs the issues in dispute? As a result of complex differences in the United States and Japanese laws of jurisdiction,[52] the plaintiff may have an option to sue in either country, an option which may make the difference between victory or defeat because the same law may not govern in the courts of both countries.

If foreign law governs in a United States court, the translated English versions of Japanese statutes, cases, and commentaries are necessarily the materials which the English-speaking judge uses to discover the content of the applicable Japanese law. Parties often attempt to prove that their versions of the foreign law are valid by offering English versions of the Codes, and if needed, their own expert witness to interpret them.[53] In important cases, both parties use their own experts who give differing interpretations of the law. The differing expert opinions pose problems for the judge, who lacks the language competence necessary to find the correct interpretation on his own.[54] In this context an extraordinary stress is placed on the translated law; a single mistranslated word may result in victory or defeat.

Clarity is elusive in an English language discussion of Japanese Code concepts that are seldom identical to comparable United States legal concepts. Bilingual litigation is the ultimate form of the law/language problem in United States-Japanese comparative law methodology. Anyone concerned with the practical aspects of this type of litigation will soon be disenchanted after a few court experiences.

Several years ago, some rather technical rules concerning res judicata were nearly misapplied in a California court case because

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51. *See* D. HENDERSON, *supra* note 43, at 161.

52. For comparisons of United States and Japanese laws of jurisdiction, see Fujita, *Japanese Rules of Jurisdiction*, 4 LAW IN JAPAN: AN ANNUAL 55 (1970); 1 Justiciability in U.S.-Japanese Disputes, ch. IV (D. Henderson & Y. Fujita eds. 1970) (U. of Wash. mimeo).

53. *See* Henderson, *Proof of Foreign Law*, in 2 Justiciability in U.S.-Japanese Disputes, ch. VIII (1970) (U. of Wash. mimeo).

54. *See id.* In Japan, the problem of the adversary "expert" is avoided by the court's appointment of a single expert after hearing suggestions from the parties.

of an EHS mistranslation of a critical word, *shubun*, as "text" instead of "order" or "holding." The summary below briefly discusses the typical lawyer-related problems in the case presented by the differences between the civil law and common law doctrines of res judicata[55] (claim preclusion) and collateral estoppel (issue preclusion).

The California suit was *Farmland & Development Co. v. Toho Co. Ltd.*[56] Hachitsuka (Farmland) and Yonemoto (Toho) had planned to export a United States film for showing in Japan. Hachitsuka, believing that Yonemoto had promised to obtain the necessary license for importing the film into Japan, bought through Farmland the rights to show the film in Japan for $14,000. Yonemoto, however, was unable to acquire the import license in Japan and the whole venture failed. Hachitsuka, having allegedly lost $93,000, sued Toho Corporation and Yonemoto in California on two separate legal theories: (1) breach of contract; and (2) tort (deceit). Yonemoto filed suit in Tokyo[57] to obtain a declaratory judgment[58] absolving him of tort liability and damages. Although he pleaded to negate the tort claim, Yonemoto failed to seek negation of the contract liability. Two independent suits, based on the same grounds and seeking opposite results, were pending on each side of the Pacific.

The Tokyo court found no tort liability and duly rendered a judgment that Toho was not liable to Hachitsuka in tort. The California action, however, sought damages on two theories, contract and tort, a key difference that determined whether the Japanese judgment for Toho precluded Hachitsuka's later California recovery. Because the Tokyo judgment was handed down before the trial in California, Toho lawyers asserted the Tokyo judgment as a res judicata defense to the California suit. The question was

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55. *See* Comment, *Litigation Preclusion in Louisiana: Welch v. Crown Zellerbach Corporation and the Death of Collateral Estoppel*, 53 TUL. L. REV. 875 (1979) (an apt example because Louisiana, a civil law (or mixed) state, requires a comparison of common and civil law differences).

56. No. 69-2762 (Los Angeles, Cal. Super. Ct. 1968) (no opinion was filed, thus the summary provided in the text is from the author's files).

57. Toho Inc. v. Hachitsuka Chieko, 16 Kakyū minshū 923 (1965), *reprinted in* 11 JAPAN ANN. INT'L L. 197 (1967) (English trans.).

58. In a declaratory action (*kakunin soshō*) seeking negative relief, the person who is normally the defendant becomes the plaintiff by requesting a declaration that he is not liable. *See generally* D. HENDERSON & T. HATTORI, CIVIL PROCEDURE IN JAPAN, ch. 7 (1983).

whether judicially determined facts underlying the Japanese tort judgment estopped Farmland from making contrary assertions in the contract claim in California.

Pursuant to California law, a foreign (Japanese) judgment bars the tort claim by res judicata and a previously litigated "fact" (here, no promise by Toho) necessary to such a judgment bars the contract claim by collateral estoppel. The California court, applying its choice of law rule, found that it must apply Japanese law and give the Japanese judgment the effect it would have had as a Japanese judgment under Japanese law. The critical question for the contract claim became: is there a doctrine of collateral estoppel (*sotenko*) in Japanese law?

To determine the scope of a declaratory judgment and the existence of collateral estoppel in Japanese law, the California court heard conflicting expert testimony on provisions of the Japanese Code of Civil Procedure. The English translation (EHS) of the pertinent provision of the Code, although clear, is a bit awkward: "As far as the matters contained in the text of a judgment which has become final and conclusive are concerned, they have *res judicata.*"[59] Because the findings of fact are included in the published text of the court's opinion, res judicata (*kihanryoku*) seemingly would result under the pertinent Code section. This, however, is not the law in Japan. The word "text" in the English translation is the EHS "English equivalent" for the Japanese word *shubun.* The *shubun,* which makes no findings of fact, is only a short order as opposed to the full text of the court's opinion. In this case the *shubun* read: "[I]t shall be confirmed that the plaintiffs [Toho and Yonemoto] are under no obligation to compensate for damages amounting to $93,000 due to the torts set forth in the annexed list. . . . The expense of the suit shall be borne by the defendant."[60]

Under California law, Japanese law may be proven by expert witnesses. To ascertain the meaning of the applicable Code of Civil Procedure section, Toho, the California defendant, offered the English translation of the section quoted above through his expert witness. The expert stated that the Code provision should be interpreted to give effect to the facts underlying a Japanese judgment. Although this is a view held by some professors in Japan, it is not Japanese law. The Supreme Court of Japan consist-

59. EHS § 199.

60. Toho Inc. v. Hachitsuka Chieko, 16 Kakyū minshū 923 (1965).

ently has refused to yield to the criticisms of several excellent young scholars and, following the opinion of Kaneko Hajime and other older scholars, has declined to make "collateral estoppel" a part of Japanese law.

This author was the plaintiff's expert on Japanese law at the California trial and had great difficulty opposing the defendant's expert. The California judge naturally tended to favor the expert interpretation which was similar to California's own collateral estoppel practice. By finding that the EHS translation of *shubun* was misleading and reviewing the supporting court cases and the writings of Professor Kaneko, the judge properly limited the effect of the Japanese judgment and held that the judgment barred only the tort claim by res judicata. The plaintiff was then given the opportunity to submit evidence of the contract.

This complex case illustrates the emphasis placed on legal language in litigation and the problems encountered when a language foreign to the law must be used to bridge two different legal systems. In bilateral lawsuits between Japanese and United States persons, genuine ambiguity frequently persists until the court actually speaks.