

The Functions of Japanese Hybrid Legal Culture: Western and Japanese Law

By Katsuta Aritsune



Photo: Kyodo News Service

Introduction

During a lengthy historical process Japan has absorbed various external cultures, forming a hybrid culture (according to Kato Shuichi) on the foundations of the Jomon and Yayoi civilizations. The law is no exception. Approximately 1,300 years ago Japan adopted *ritsu-ryo* codes from Tang China and again at the beginning of the Meiji era (the latter half of the 19th century) adopted modern Western laws. The adopted laws were those considered universal at the time, worthy of the term "legal culture." The adjective "gray" applies to this hybrid nature. As the Japanese language is often vague, this also symbolizes the frequent incorporation of gray areas. Up to now this hybrid character has been scorned for its ambiguity, in a matter of speaking, and has been poorly rated as non-Western and premodern.

Adoption of modern Western law: universality and international character of Western legal concepts

Commodore Matthew C. Perry's arrival in Japan rendered communication between Japan and the West inevitable and in order to standardize the laws for the modern nation-state and lay the groundwork for the revision of unequal treaties following the Meiji Restoration, Western laws, especially those of France and later Germany, were adopted, laying the foundation for the present constitutional state. The study of law in Japan was subsequently tremendously influenced by German jurisprudence up to 1945, but during this time the German laws of the Weimar Republic were not adopted. The incorporation of 19th century Western laws later continued, signifying the beginning of the process of internationalization. Recently, this internationalization could be noted in the Maekawa Report, the Equal Employment Opportunity Law for Men and Women, Product Liability Law, and var-

ious types of deregulation.

From the recent situation a sarcastic way of putting it might be that "internationalization" is seen to be equal to "saying 'yes' in English." This shows the strength of the present American influence. Being ground in theories promoting individual freedom and against the backdrop of overwhelming military power in the 19th century, Western culture acknowledged its own universality. Japanese also considered this a model for Japan and its emulation was national policy during the Meiji era. However, imitation of imperialism then led to failure in World War II.

Still, especially in its post-war modernization, it must be said that Japan achieved success in its development. The forced introduction of American laws during the Allied occupation promoted the realization of the previously adopted 19th century ideology of individual rights, and 20th century Western laws were additionally introduced. However, as I will explain below, until the opening of the country to the outside world in 1858, Japanese possessed a completely different perception of the law than Western Europe, and experts have often pointed out that there have been many problems related to recognition of individual rights even though it has been 100 years since the adoption of Western laws.

Certainly, the question of whether each individual Japanese has evolved into an independent citizen cannot be readily affirmed. Even so, postwar economic development has raised it to a position of economic superpower battling for the number one or two spot in the world and looking at a longevity rate that is the highest in the world, per capita GDP, the crime rate, and equality of income, it is difficult to describe Japan as an underdeveloped nation. However, this was because Japanese selectively adopted suitable Western systems, assimilating them in Japanese fashion, and was not the result of complete internationalization, that is, the application of completely Western-style legal systems. Even when adopting transcendental culture a country possessing a different legal culture assim-

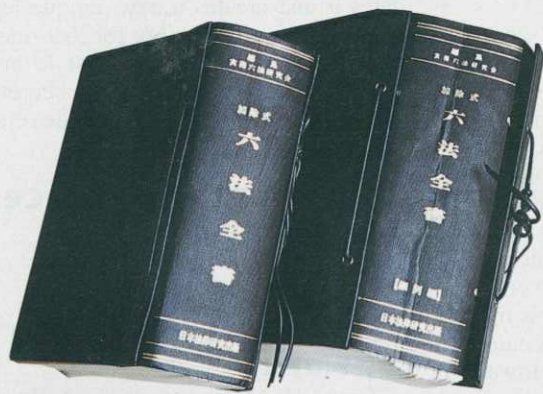
lates it and creates a new, unique legal culture. It is all the more for that reason that the merits of Japanese-style management were praised as the secret to Japan's erstwhile economic development.

Important differences in Western and Japanese legal concepts (particularly from the 17th century onward)

From the time of ancient Rome, European legal concepts developed around the resolution of individual disputes. The basis was the achievement of intentions as well as the recovery of forced losses. A trial, or public authority, was also an institution established by the populace for resolving disputes. In comparison, a respect for and submission to the hierarchical nature of society based on the Chinese Confucian social philosophy of the virtuous emperor, determined Japan's system of legal doctrines and the accepted wisdom of the law as the stern command of the ruler. In Japan, which adhered to that tradition, it could even be said that the law consisted only of criminal and administrative codes. The general populace had no status other than as an object of dominion.

This held sway until after the end of the 19th century. At the outset of the Meiji period the government established new laws as criminal codes. There was a tendency to make the penalties less severe than in China, but even after the adoption of Western laws and the tentative establishment of the modern state's system, the bureaucrats—successors to the samurai class—inherited the traditional ideology and, with the perception that the law was a means of maintaining order in society as a whole and a stable public livelihood, the protection of individual rights was left to bureaucrats' personal discretion.

Surveying the history of rights in Western Europe, these were always underpinned by the possession of power; the Roman *pater familias* possessed an egalitarian privilege to assert



The constitution, civil codes, commercial laws, penal codes, civil action laws, and criminal action laws are contained in these statute books.

his own rights, which were deemed to be the scope of the demarcation drawn between conflicting intentions, but which also sometimes involved naked strength, surmounting those limits with force. Western Europe pursued innumerable military conflicts to achieve this, further progressing to class struggles to overthrow the caste-based social order from modern times. Further, the constitutional basis for theories of self-defense through the use of weapons can clearly be seen in today's American society, where it is not uncommon to possess guns.

Japan, on the other hand, has historically and steadily developed an aversion to the use of weapons, beginning in 1588 with Toyotomi Hideyoshi's *katanagari*—confiscation of swords—and leading up to the present. Peasants had only hoes and scythes when they rioted and it could be said that once *hyonobunri*, segregation of warriors and farmers, occurred, Japanese lost the basis for assertion of their rights.

As far as religion is concerned, Japan has been a polytheistic nation from the outset, lacking a unique and absolute God. After the introduction of Buddhism and Taoism, foreign gods were assimilated as Japanese deities and the theory that these were a few among many gods was formulated. With this coexistence among numerous different deities, contention based on rigid, dialectical theologies was impossible from the outset. Further, following the

introduction of Chinese culture, Confucianism served as a guide for politics in Japanese social philosophy, but, selections from original Confucian texts, for example, lacked logical clarity so the meaning of many sections was left up to the reader's conjecture and did not stand up to logical analysis. The law did not employ elaborate logical precedents, consisting of unilateral orders from rulers and, as such, legal

expertise was seen to be an administrative secret. The custom of developing finely analytical discussion of the law, as well as legal studies, did not take root, nor was the training of jurists undertaken.

Process of developing liberal trade concepts

Until the beginning of the modern age in Western Europe there were commercial monopolies, referred to as guilds, linked to royal authority. However, popular revolts led to anti-monopolistic philosophies, the development of which began with political advocacy and then grew into an economic axiom. Trade liberalism then spread throughout Europe after the French Revolution and commercial organizations grew into stock corporations and trade unions. In less-advanced capitalist nations at the end of the 19th century there was some acceptance of cartels, but during the same period, based on common law trade restrictions and prohibitions, the U.S. pioneered the way toward anti-monopoly laws that would ensure free trade through antitrust laws, an epochal event from today's perspective.

Collusion (cartels): Japan-style collectivism and anti-monopoly laws

In Japan the foundation for collec-

tivism was created through the establishment of the *murauke* system of joint village responsibility and *kabunakama* (industry-specific trade associations) during the era of the shogunate just as free trade was beginning to be stressed in Western Europe. A feudal official's sphere of control (*han*—fief) functioned as a type of commercial organization imbued with the business principle of the "household (*ie*—family)." But the continued existence of the business unit was ensured by ignoring the Confucian principle of blood relationships. Merchants also adopted this management principle. Intra-industry trade associations formed by tradespeople remained firmly in place, even after the introduction of free trade philosophies from Western Europe at the beginning of the Meiji era. In addition, the industrialists' associations that served as the beneficiaries of the controlled economy and administrative guidance during wartime could be said to have formulated the framework of the miraculous postwar economic expansion.

Adam Smith described the business person's true desire, that a specific group monopolize business, when he said, "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."

Several years ago I wrote an essay on legal culture related to cartels and, along with the reaction to that article, had the impression that most Japanese had no awareness of the criminal aspects of cartels. In that essay I wrote, "If completely free trade is seen to be good, then Japan's high level economic growth was built on criminality." In actuality, regulations that should be abolished also create a framework of sorts for economic activities and can lead to collusion. As far as the future of Japan's liberal economy is concerned, this will hinder new business activities and the argument that it is protecting the future of new industries, which should appear through a *laissez-faire* process, is now also finally gaining the upper hand in Japan.

Outlook for legal culture in the 21st century

For the past 120 years Japan has considered both the material and philosophical aspects of the civilization created in Western Europe from the 19th century onward—models carved in stone—and has tried to absorb them. Much of this was through guidance from the government and the intelligentsia and it can hardly be thought that there were many aspects resulting from individuals' autonomous pursuit of freedom.

Particularly since World War II the philosophical aspects have been to some extent digested and protection of human rights, brought about through the democratization produced by U.S. occupation strategies, has to some degree been guaranteed. Especially from the material standpoint, Westernization has led to phenomenal growth and success in modernization that could be called a miracle. It also should not be forgotten that demilitarization was a precondition for evolution into an economic powerhouse. Individual standards of living have vastly improved. However, it cannot be said that the Japanese societal structure that has sustained this progress has evolved into a civil society composed of free citizens. It fundamentally depends on control and guidance from the powers that be (the samurai class in the Edo era, the military through World War II, and the bureaucracy ever since).

The system of bureaucratic control was inherited from the wartime establishment of the 1940s. Good examples include regulation of education and rice, along with administrative guidance. Collectively organized groups (individual organizations), for example, companies or same industry association subject to bureaucratic guidance or regulation, avoided competition among themselves in their economic activities and their production activities were based on mutual discussions. Minority opinions within the organization would be brought into line through persuasion by those in authority and those who still insisted on voicing different views would often be deemed heretics. Viewed

from a global perspective this was the result of the pursuit of isolationist coexistence and co-prosperity. To the extent possible, self-control was practiced in organizations' internal and external rivalry and competition. Lawsuits are extremely few in number compared to Western Europe and there is also a small number of judges and lawyers. This could be described as the introverted tendency of what Lee O-Young refers to as the "culture of miniaturization." In that sense, Japanese were not entirely faithful to Western culture's philosophy of thoroughly pursuing individual wishes. Above all, those who wield authority have rarely been aware of such a goal as protection of individual rights; rather, the priority was placed solely on the nation as a whole. Viewed in this fashion, Japanese society could be described as "quasi-capitalistic" and "quasi-socialistic."

For the present deregulation and free competition will certainly be widely promoted. In Japanese society, which has stressed individual rights very little, as well, lawsuits will probably increase in number from here on. For that reason, Japanese, who have historically had no affinity with systems of personal responsibility or emphasis on individual rights, will be quite bewildered and Japanese society will experience considerable turmoil. A great deal of time will probably be required yet for Japanese society to become as completely individualistic as in the West. Even so, it should also be noted at this point that the Western principles of emphasis on rights and free competition, particularly in the UK and U.S., were ideologies that each functioned on the premise of the frontier—a colonial empire and expansion into virgin territory.

Rudolph von Jhering's *Der Kampf ums Recht*, read by many Japanese law students, also exudes imperialist ideology. Free competition inevitably leads to the enrichment of the victor and impoverishment of the vanquished, but as far as global capitalism is concerned there are unfortunately not many frontiers left. Will the future be entrusted to what is referred to as neo-capitalism alone?

Coexistence, including the issue of resources and the population explosion, is being stressed incessantly. One would imagine that the 1972 Club of Rome's admonitions are not a thing of the past. From a legal perspective, as well, the ill effects of excessive lawsuits in Europe and the U.S. have also recently been pointed out and the merits of mediation have been strongly advocated. Have the citizens of the West, the standard bearers of modern civil society, lost the rationality that is their attribute? Seen in this way, systems for dispute resolution, for which Japanese have always employed mutual discussions, and has frequently been referred to as pre-modern, whose adoption could specifically be considered, respect for individual rights, include reducing the number of court cases by using pretrial hearings to divide suits into mediation proceedings and lawsuits and work-sharing through the use of rotation formulas employing data systems. This differs from the usual Western theories, but, surprisingly, it is possible that it could lead to a legal civilization with transcendental values on a global scale in the later 21st century, including Rhine capitalism. The experience of Japan, which, for these 130 years, has waved the flag of discarding Asian values for those of the West and has had considerable success mixing Western legal civilization, which is undergoing hard times, and Japanese legal culture which has had a bat-like existence (half bird, half beast), part of neither the Eastern nor Western world could conceivably contribute to the world's future. If combined with Japan's historical tradition of aversion to weapons and religious tolerance it could possibly open up new prospects for humanity's future, but at present this is an unrealistic argument. However, if such is not the case, the world of the 21st century will surely proceed down the path of interminable strife and grim chaos. ■

Katsuta Aritsune is professor emeritus at Hitotsubashi University in Tokyo and also a professor in the Faculty of Law at Surugadai University in Saitama prefecture.