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Dispute Resolution in Japan: Lessons in Autonomy

*John O. Haley**

When Japan is mentioned in the context of a discussion concerning dispute resolution, images emerge of a group-oriented society in which harmony is the prevailing norm, long-term relationships are nurtured with care, and resort to the court system is quite rare. Japan is usually depicted as a conflict-free society with low crime rates, community cohesion, and individual propensity to sacrifice personal interests for the benefit of family, firm and the community at large. Superficially, the contrast with North American society could not be greater. As an ethnically homogeneous society whose people have lived continuously within a territory somewhat smaller than the state of Montana for over two thousand years, Japan is considered so unique in its historical and cultural experience that it offers few if any lessons of value to North Americans.

I disagree. The United States has much to learn from Japan. Despite the obvious contrasts between Japan and the West, especially the continental, immigrant societies of North America, Americans have more in common with Japanese than is generally conceded. Japan's late entry into the "West European club of world powers" coincided with the United States' accession to the club. Americans often forget that both Japan and the United States achieved world recognition as industrial and military powers at the turn of the century by virtue of their defeating aging empires within their primary spheres of geopolitical interest. Since then, Japan and the United States have been bound together in peace, in war, and then as assertive, highly competitive, and remarkably interdependent states. Few other nations have had such resilient and adaptable political and economic institutions. The United States and Japan possess the most diversified and technologically stronger, market-based economies of all industrial states. (For example, over 50% of the West German GNP derives from a single industry.) The two nations share a postwar experience of stable constitutional governments and political freedom. In short, despite notable differences, both Japan and the United States are bound together and seem to achieve similar results.

These broad political and economic similarities are not coincidental. They result from a diffusion of both political and economic power that, despite fundamental differences in cause, Japan shares with its North American counterparts. Before you begin to worry that the preceding

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discussion is too far afield from the topic of dispute resolution, I should note that the Japanese patterns of law enforcement and dispute resolution exemplify both the contrasts in cause, and the similarities in effect, that characterize the comparison of Japan with Canada and the United States. Indeed, significant insights may be gained by examining these patterns of dispute resolution in relation to both formal and informal processes.

First, it should be emphasized that the formal, institutional framework for law enforcement and dispute resolution in Japan is a familiar one. A century ago, Japan completed the transformation of its legal system, transplanting the institutions of modern, continental European law. Thus, by the turn of century, Japan had established an increasingly influential legal profession, an independent judiciary, prestigious faculties of law, and as complete a codified corpus of legal rules as any European state. Japan was as successful in its reception of western law, by any measure, as it was in other efforts to adopt western ideas and institutions in other fields.

Japan's modern legal institutions have also worked quite well. Japanese judges enjoy the highest degree of public trust of any officials in Japan. The courts have long been arbiters of the most significant political and social issues. All available evidence indicates that in the widest variety of activities of daily life, the Japanese routinely seek judicial aid for the enforcement of legal rights. Although litigation rates in Japan are low compared with some industrial democracies, particularly the United States, they are higher than others, especially the Scandinavian states. More telling, civil dockets in Japan are generally more crowded than in Canada or the United States. Japanese judges face caseloads that are staggering by North American standards. The problems of justice in Japan are evidenced not in comparisons with other industrial democracies but in the increasing institutional incapacity of its postwar judicial system.

A very strong case may also be made that the Japanese system serves as a welcome model of judicial efficiency. Like other civilian systems, Japan has a career judiciary. There are no juries. Moreover, within the system, certainty of legal rules and decisional uniformity are fundamental values. Unlike most common law systems, considerable effort is made to ensure that judges throughout Japan decide like cases alike. Consistency in judgments in cases involving frequently litigated issues, such as claims arising out of automobile accidents, facilitates out-of-court negotiation and resolution in terms of the applicable legal rule, and this in turn encourages a process of indirect law enforcement without resort to court.

None of the preceding discussion should be taken to deny the existence of problems of the institutional capacity in Japan or their effects. Japan has fewer judges per capita today than it did in 1890. This dearth of judges, along with the attendant delays and the costs of litigation, pro-

duce discounted settlements. The results of out-of-court settlements may conform to the legal rules, but only after a reduction in the amount agreed upon by the costs of litigating. It must also be emphasized that efficiencies may not be achieved in cases involving rarely litigated disputes. Some parties may also quarrel with the legal rules being enforced. As United States studies have shown, low litigation rates reflect above all else the prospects of judicial vindication of legal rights. Judicial denial of the substantive validity of particular claims eliminates any incentives to litigate.

In the end, the primary lesson one learns from the Japanese experience of dispute resolution by means of the formal processes of judicial law enforcement seems to be the significant social benefits of certainty and uniformity, and the countervailing costs of the jury system in the United States. The Canadian experience with civil trials without juries thus deserves much greater attention in the United States.

My comments on this point should not be misunderstood to contradict conventional wisdom regarding the Japanese propensity to use informal means of dispute resolution or doubts about the efficiency of formal law-enforcing processes in Japan. Japan presents a multi-faceted paradox. It is a society characterized as much by conflict, competition, and conscious pursuit of individual self-interest as by cohesion, collusion, and collective efforts to realize community goals. To say that the formal process of law enforcement through litigation is relatively effective and efficient does not necessarily negate the proposition that extralegal mechanisms of social control and alternative, informal processes of dispute resolutions are not equally significant.

Postwar Japan reflects a complex process of restrictive accommodation of western legal institutions and, most important, effective means of coercive law enforcement within a strengthened matrix of social controls. A denial of coercive state power despite recognition of persuasive state authority has produced a society ordered by a dynamic and remarkably stable system of reciprocal consensual relationships in which the parties not only have a determinative influence on the substance of the rules that guide their behavior, but also retain a significant degree of control over the enforcement of these rules.

It should be noted that legal sanctions are remarkably weak in Japan as compared to either common law or other civil law systems. Without judicial contempt powers or the usual penal analogies found in most continental legal systems, Japanese courts have few coercive powers at their disposal. The Japanese judiciary is not alone. Japan's postwar diets have rarely equipped administrative officials with effective coercive powers despite grants of pervasive authority to act. For administrative officials, the consequence is the necessity to obtain assent by those affected in the formulation of public policies and to bargain for compliance in their implementation. Japanese judges, on the other hand, similarly recognize that compliance with legal rules, and even court orders, is more volun-

tary than coerced. Hence, they too seek consensual responses in law enforcement. Reliance on mediated settlements in civil disputes is therefore also perceived by judges as the most effective way to achieve compliance with legally-imposed duties. In divorce cases, for example, judges frankly admit that they limit the parties to lump sum settlements out of recognition that court orders for support payments over time could be largely ignored to the judiciary's embarrassment.

While many people would recoil at the idea of so weak a judiciary, the Japanese do not. They are not at all appalled by the notion of government institutions that have pervasive authority without equally extensive coercive powers. They perceive that reliance on informal, extralegal means of dispute resolution has substantial benefits. This denial of effective coercion is as important for the Japanese as the Bill of Rights is for United States citizens. Both rest on concern for autonomy. The Japanese realize that adjudication in any form empowers the adjudicator-judge and consequently diminishes autonomy and control by the parties themselves. Arbitration, it should be noted, is even less attractive than litigation in domestic transactions for it lacks the certainty and procedural controls available in the event of a lawsuit.

Law in this environment represents the authority of the state to command divorced from the power of the state to coerce. While legal rules retain their normative value and influence, the state is forced to resort to the controlling mechanisms of community pressures and networks to ensure their implementation and enforcement. Officials must negotiate and bargain for consent; they must contract to enforce law.

Although largely aloof, the courts play a crucial role in the consensual process. By articulating the rules or conduct, they assist in establishing the parameters of these bargains.

Bereft of legal protection by the state, the average Japanese citizen looks to family, friends, and firm for redress, or accepts the lack of legal remedies in many situations as matter of course and takes the necessary precautions to minimize their risks. Few Japanese stationed abroad, for example, will lease their homes to outsiders despite extraordinarily high rents in the market place (a factor that surely contributes to the limited supply of available housing and high market rents). The courts do provide effective remedies in cases involving large enterprises with attachable assets, such as insurers and prominent individuals. But small firms are able to escape liability, an impunity that makes spot contracts a significant risk with any firm that lacks an established reputation. This induced reliance on one's own community rather than the state, in turn, reinforces existing community cohesion. In a society in which economic security so often depends upon collective cooperation, community bonds - whether those of the traditional hamlet or the modern corporate organization - are crucial to preserve and promote individual self-interest. As a result, Japanese society is characterized by a remarkable social density involving complex interpersonal networks held together by the con-

straints of mutual self-interest. These bonds of family, school, neighborhood, and firm not only encourage reliance on guarantors, go-betweens, and mediators for any array of social dealings, but they also enable a potentially formidable means of collective self-help. Refusals, deal boycotts, and other exclusionary practices - modern forms of traditional village ostracism or *murahachibu* - are normal, everyday practices. Within Japan's social and economic communities and networks, the applicable rules, that is, those which are actually enforced, tend to be those the community accepts. Unless the applicable legal rule is more advantageous to the community, or its proponents are independent enough to be able to withstand community disapproval, the community's rule, not the legal rule, is likely to prevail.

One consequence of such an environment is a dynamic reinforcement of individual dependency and community cohesion. Another is the further disempowerment of the state. Less dependent upon the state for security, the average person in Japan achieves an uncommon degree of freedom from state control as compared to other industrial democracies. Without a monopoly over the coercive mechanisms of social control, the state is left much weaker than in the West, while the firm and other social organizations enjoy considerably more powers relative to the individual. As one constitutional lawyer has written, in Japan the threat of tyranny comes more from society than the state.

While not suggesting that North Americans should emulate Japan in this regard, I would urge, at least in the United States, another look at the extent to which we deny self-help and the relationship of social cohesion to state power. Again, I would not be surprised to find that Canadians enjoy considerably greater freedom in this respect than their southern neighbors. As a result, I suspect, Canadians in turn are less preoccupied with the need for legal constraints on state power or social disintegration. As a result of stronger social bonds, and a more cohesive network of social relationships, Canadians are also able to resolve disputes out-of-court with greater ease and less cost than their neighbors to the South. The final lesson from Japan is thus one of autonomy. So long as basic political and social stability is maintained, individual freedom and autonomy seem greater within a system in which the state is less threatening because coercive power is more diffused.

