THE SOURCES AND PROPONENTS OF 'TRADITION' AND 'MODERNITY' IN JAPANESE LAW

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> We were ... wrong to think that contemporary institutions are either legacies from the past or innovative ruptures with it. Rather, they are the current moment through which past is linked to present, and present to future. How they are linked, and by what forces, are the central questions of cultural analysis. (R.J. Smith 1989: 723).

Japan's legal system, based largely on adaptations of Chinese codes throughout most of its history, took on a new complexity following the Meiji Restoration of 1868 and the attendant desperate search for Western models for the new Japanese law and constitution (Hozumi 1912; Siemes 1968). A second seismic shift occurred in 1945 following Japan's defeat in World War II, when the Allied Occupation forces assumed responsibility for extensive legal reforms based primarily on U.S. codes and its Constitution, and the American understanding of the function of the law.

All three periods -- the earlier Chinese, the Meiji, and the Occupation -- have been dealt with extensively, as has the general topic of Japan's highly syncretic, pluralistic legal system (Coleman and Haley 1975; Haley 1984; McKnight 1987; von Mehren 1963; Wainwright 1919). For the Meiji period to some extent, but to a much greater degree for the Occupation, there is available a kind of material of peculiar fascination for the anthropologist. It is information in the form of autobiographies, diaries, retrospective accounts, transcripts of press interviews, minutes of meetings of government bodies, and private papers of many kinds (Anonymous 1977; Cohen 1987; Oppler 1976; Redford 1977; Takayanagi 1961;

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Ward and Sakamoto 1987). Their fascination lies in what they tell us about the motivations of actions engaged in the process of promoting adoption of new laws and the reform of old ones, as well as their perceptions of what was "traditional" and what was "modern" about the legal system undergoing reform.

What these sources reveal with astonishing clarity is that the pluralistic Japanese system, a combination of indigenous, Chinese, European (especially German), and U.S. elements, must be viewed as something far more complex than the mere combination of traditional and modern elements. Indeed, it turns out that in some circumstances the aim of conserving tradition was shared by reformer and conservative alike, and further that the appeal to modernity was not the exclusive prerogative of progressives and often was used by traditionalists to justify their position. These odd relationships were particularly marked in the first thirty years of the Meiji period (1868-1912), when men often called the "Modernizers" couched their revolutionary program in highly conservative, traditionalist terminology. Concerned to buttress their claim to legitimacy, for example, proponents of the entirely new and alien idea of popular sovereignty, who actually based their position on the writing of Rousseau and the study of English practice, quoted liberally from Mencius in their polemics (Jansen 1970: 111).

Turning now to the Occupation period (1945-1952), sources recently made available make it clear that the Americans, in their effort to overhaul the Japanese legal system, became engaged in sharp disputes of unanticipated kinds and found allies as well as opponents in unexpected quarters. The disagreements, as might be expected, often were between the Americans on the one hand and the Japanese on the other; in such cases, the contest was unequal in the profound sense that the two parties were victor and vanquished. Yet with remarkable frequency, reformists of both nationalities were pitted against their conservative compatriots. On many occasions, American reformers were sought out in secret by their Japanese counterparts who wished to enlist their support in their struggle against Japanese traditionalists. Disputes within the American (and Japanese) groups often were as acrimonious as those between them, and sometimes considerably more so because their antagonisms were so long-standing.

The outcome of the ideological, philosophical and political debates was less clear-cut that might be predicted. That is to say, the contention was not necessarily between victor and vanquished at all, but rather between bi-national alliances of those who would defend or attack the *status quo* . Oppler (1976: 77) describes one of the liberal Japanese scholars with whose help he undertook to reform the judiciary as "a kind of spiritual ally," in the struggle against powerful forces arrayed against any such reform on the Japanese side. It is also clear that the *status quo*, perceived by some of its defenders as "Japanese tradition", was correctly viewed by its attackers as the result of what in fact had been a radical

departure from tradition at some time in the not-to-distant past. The importance of the Prussian influence in the drafting of the Meiji Constitution has been superbly documented (Siemes 1968), for example, and the debate over certain provisions of the Meiji Civil Code affecting the family was so intense that it was not until 1898, 30 years after the new government had been instituted, that it was finally promulgated (Hozumi 1912; M. Smith 1907)!

To complicate matters further, when the Occupation began, no policy decision had been taken that suggested either the desirability or necessity of restructuring the entire Japanese legal system. Forced to assume the formidable assignment of doing just that, the archives reveal, the Occupation reformers frequently had only the most elementary understanding of the basis of the Japanese legal system, which perhaps most of them not unexpectedly tended to view as traditional in its entirety. It is not that they were the stereotypically uninformed American, ill-trained for their jobs, although some surely were. In the event it was all very much an *ad hoc* operation, particularly in its initial phases. For example, virtually all the successful moves to improve the legal position of Japanese women originate in the work of a 22-year-old, Austrian-born woman who had lived in Japan from the age of five until she immigrated to the United States at the age of 15, and was chosen for the job primarily because she was fluent in the Japanese language (Pharr 1977: 130-132; 1987: 230-231). Other reform-minded women in the Occupation forces, intent on eradicating what they saw as gross gender inequality, soon found allies among Japanese women activists who for decades had fought to achieve aims now clearly achievable with the help of the Americans. Needless to say, few Japanese males in positions of political, academic or economic power welcomed these reforms, which General MacArthur himself cites as among his proudest achievements: "Of all the reforms accomplished by the occupation in Japan, none was more heartwarming to me than this change in the status of women" (quoted in Redford 1977: 137).

In the archives and reminiscences, mixed motives, conflicting perceptions, amateurism, and acrimony abound. For their part, many Japanese participants in the process rejected the ideological position taken by the occupiers, but acquiesced in their demands for reform simply for want of other options. Others viewed the crushing defeat in the war as a heaven-sent opportunity to seize on the presence of reform-minded Americans to advance causes they themselves had been championing in vain for decades. The result, not surprisingly, is a mix of continuities, compromises and complete breaks with the past. Equally unsurprisingly, as soon as the Occupation ended in 1952, many laws enacted during that period came under attack as alien and therefore irrelevant to the Japanese context. Other laws said to have been imposed by the conqueror are today vigorously defended by their Japanese partisans (often on the political left!) as representing the last bulwark against the conservative government's

chipping away at guarantees of individual liberty and its protection under the law. And, least surprising of all, there are major disagreements across the political spectrum in Japan about the degree to which "tradition" was or was not destroyed by the reforms.

For our examples, let us take two major legal reforms of the Occupation period. One is the 1947 Constitution, the other the Civil Code of 1948. Although the Americans tried to suppress the now well known fact, the Japanese Constitution is a translation from the English provided by the Americans (Redford 1977: 58). There can be no clearer explanation for its swift promulgation by the Japanese government so close on the heels of the surrender to the Allied Powers. Nonetheless, many articles and provisions of this crucial document are the outcome of heated debate within American circles as well as Japanese ones, and frequent confrontation between members of both (McNelly 1987). Traditionalists have continued to argue, as they did from the outset, that it contains much that is totally foreign to Japan's traditional political culture. Perhaps it is so, but it has not been revised for the more than forty years since it was adopted. In any event, the Meiji Constitution, which they hold to embody much of that traditional political culture, is as Prussian in conception as its framers could manage to make it.

What kind of Constitution did the Americans produce? A bluntly stated answer is provided by McNelly (1977: 160):

> [I]t obviously reflects the New Deal liberal bias of the lawyers who composed the SCAP [Supreme Commander for the Allied Powers] draft. Chapter Three of the Japanese Constitution goes far beyond the American Bill of Rights (the first ten amendments to the United States Constitution) in enunciating principles of equality, civil and political liberties, and the rights of the accused. On the other hand, it does not contain a long list of economic and social rights advocated by the socialistically inclined *American and Japanese drafters* [emphasis supplied]. For better or for worse, the Japanese Constitution is a New Deal liberal constitution, but not a socialist constitution.

That the "New Dealers" had enormous influence on Occupation policy is not in doubt. Indeed, one of the most detailed published reminiscences by a participant is sub-titled "The American Occupation as New Deal" (Cohen 1987). The reader will have noted, however, that this unambiguous characterization is too simple by far. It fails to take account of one of the great puzzles of the whole enterprise -- after all, the SCAP mentioned above was none other than General Douglas

MacArthur, not widely known for his unwavering defense of New Deal principles. Nor does it mention that Alfred C. Oppler (1976), a major figure among the legal experts in the Occupation whose memoirs are essential reading for anyone interested in the subject, was in fact a German-born liberal who found himself in frequent conflict with those Japanese legal scholars whose own training was in pre-war German jurisprudence and who were devoted to the *Rechtsstaat* principles of the Meiji Constitution. These men saw no reason whatsoever to revise the existing Meiji Constitution, or for that matter to do much more than reinterpret the legal codes in place at the end of the war. Ultimately the power of the conqueror prevailed, as they must have known it would, but in the end they salvaged the one thing they deemed of paramount importance -- the emperor's position, although altered to that of symbol of the state, was constitutionally guaranteed. An odd outcome indeed for a New Deal constitution.

The second example is the 1948 Civil Code, which superseded the Meiji code only after an extremely complicated series of negotiations, confrontations, and revisions. (Unlike the Constitution, it has since undergone repeated minor revision.) The task of drafting the new code was left far more to the Japanese than was the case with the Constitution. In Japanese circles, as had been the case fifty years earlier, efforts to draft the sections on family law provoked especially strong disagreement among legal experts and political figures. At issue then and now was the fate of the traditional "family system". It has been pointed out that family law reform in Japan has always involved a more complicated set of disagreements than suggested by the simple dichotomy "conservative" and "progressive". Steiner (1987: 207) argues that what existed was a continuum with the progressives at one end taking the position that the family system was "an outdated feudalistic remnant or a prop to a specifically Japanese type of fascism. Their concern was to make it clear that the reform constituted a break with the past...". At the other were the conservatives who "wanted to salvage as much of the principles underlying the family as seemed possible in the circumstances, while they deplored the 'feudalistic features' of the system...". And between the two extremes were those who welcomed compromise.

Steiner's characterization of the continuum of views about the family system is compelling, given that he was in the middle of the long, drawn-out drafting process and writes from that personal experience. It is important, therefore, to give wide circulation to his summary of what factors, influences, and points of view went into the making of the present Civil Code of Japan

> Did 'the Americans' coerce 'the Japanese'? Or were the reforms a cooperative effort between 'the Americans' and 'the Japanese'? The view that nationality and only nationality

> determined the participants' views is often reinforced by reference to the fact that, after all, one group constituted the occupiers and the other the occupied. An exclusive concentration on nationality as the only significant variable neglects a multitude of human factors ... [and] ... leads not only to assumption of a homogeneity of views and attitudes on the part of the occupied population that is very dubious, but also to a similar assumption regarding views and attitudes within the Occupation.

Then Prime Minister Yoshida, for one, disapproved strongly of what he called the idealistic "civilians in uniform", the New Dealers who wanted to democratize Japan. He was well disposed, of course, toward the soldiers and practical men who, in his view, saw the need to prevent social unrest and guarantee order (Steiner 1987: 211).

The new code, in the opinion of extreme conservatives, represented a complete rupture with the past and the end of an era of continuity stretching from the dawn of Japanese history to the end of World War II. Interestingly enough, the Meiji Civil Code of 1898 had occasioned just such expressions of despair (M. Smith 1907). For the less conservative the new code was the imperfect embodiment of what the Meiji code *ought to have been*, and would have been had not the traditionalists of the time won all the major battles over its key provisions. For a smaller number of Japanese, the new code, like the Meiji one, remains a betrayal of their hopes for a truly democratic society, containing as it does echoes and residual provisions related to the "house" system that they had tried to eradicate altogether. For their part, the Americans involved in the process of guiding the formulation of the new Civil Code early in the Occupation assumed that the Meiji code embodied tradition (read feudal, fascist, anti-democratic principles); the new one, they believed, would sweep away all those elements and replace them with a revolutionary document that would facilitate the emergence of a democratic family.

Are the Constitution and Civil Code, then, a mix of tradition and modernity? Of course they are, but the exact nature of the mix lies in no small part in the eye of the beholder. Is the Constitution ultimately protective of traditional values, or does it support thoroughly modern ones? Does the Civil Code subvert tradition or uphold it? Careful reading of the sources that reveal in part how both documents came to be, coupled with an assessment of how they are viewed today, suggests that as far as contemporary Japanese are concerned the issue of "tradition" vs. "modernity" has become moot. There is so much variation among the members of that society with respect to the definitions of the two terms that the distinction between them blurs the more closely one attempts to define it.

Ultimately we cannot resolve the question of the precise nature of the mix that makes up this particular pluralistic legal system, for the mix is constituted of elements that resemble moving targets more than fixed elements in an equation. Historical, social and cultural contexts all have played roles in shifting the targets about to constitute patterns that defy easy placement on any linear scale of tradition and modernity. By looking back to see what participants in the process of making the law said they were trying to accomplish in creating the mix, we may gain some insight into the character of what they wrought. The case of Japan is especially valuable, I submit, for we now have access to rich documentation of all sides of the debates that have erupted from time to time over the past 120 years over what kind of law the society required and who was to devise it.

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