

# THE ROLE OF LAW IN CONTEMPORARY JAPANESE SOCIETY

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"Was it not you who said so often in those days, 'I shall make you free'? But now you have seen those 'free' men," the old man adds suddenly with a pensive smile. "Yes, this business has cost us a great deal," he goes on, looking sternly at him, "but we've completed it at last in your name. For fifteen centuries we've been troubled by this freedom, but now it's over and done with for good. You don't believe that it is all over? You look meekly at me and do not deign even to be indignant with me? I want you to know that now — yes, today — these men are more than ever convinced that they are absolutely free, and yet they themselves have brought their freedom to us and humbly laid it at our feet. But it was we who did it. And was that what you wanted? Was that the kind of freedom you wanted?"<sup>1</sup>

## **I INTRODUCTION**

A similar debate between the traditionalists and the modernists<sup>2</sup> is conceivable when one tries to analyse the role of law in contemporary Japanese society.

Some would describe Japan as a State with a perfect body of law, which was fully developed in one century: the reception of law, begun by the Meiji Government, abolished the feudal samurai regime of Japan in 1868, and was then followed by a reasonably systematic reception of Western

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1 Fyodor Dostoyevsky *The Brothers Karamazov* (translated: David Magarshack, Penguin, Harmondsworth, 1958) bk 5, ch 5.

2 The reference to the traditionalists and the modernists refers to a literary dispute between the *Anciens* and the *Modernes* in France which, at the end of the seventeenth and beginning of the eighteenth centuries, engaged the supporters of antiquity with those who believed in the superiority of modern authors. This reference is important in the context because this dispute concerning the attitude to be taken by French literary figures in respect to the Greek and Roman classics, evokes another between Japanese jurists in relation to the legal classics of Romano-Germanic law.

legal ideas — first French, then German, and finally American. On reflection, this modernist image implies a hypothetical declaration of membership of the Romano-Germanic family of law. It also fits well with the classic image of Japan with its amazing economy and technology, and is somewhat reminiscent of the old story of a golden archipelago at the end of the orient described by the Italian voyager Marco Polo at the beginning of the fourteenth century.

Others, however, would note the persistence of traditional Japanese attitudes and customs, which leads to a certain dysfunction in the State law, a body of law that was borrowed from the classical European model. They talk about this with a certain dreamy optimism of a rosy western-style legal future, or, in a tone of desperation, reaffirm that truly the "East is East".<sup>3</sup>

Whatever the position taken in this debate, it is useful to begin by considering the exact meaning of the word "law", and to draw attention again to the somewhat deceptive role of translation.

Duguit would have been happy about this. The Japanese word *hoo*, used to translate law, *droit*, or *Recht*, describes only objective law. In fact, leaving aside the meaning of "the supreme Buddhist laws" (*dharma*), the Chinese character used for *hoo* meant originally *nori*, which is "commands ordered from on high, either by a divine being or by the Emperor". *Nori* also has a derivative meaning of "means, method, or standard", because etymologically, the commands of the Chinese Emperors were given to their officials as standards for their work.

With these three meanings, both traditional and current, the average Japanese has received through translation the esoteric neologism *hoo* equals law. Curiously, the word *shohoo* (commercial law) also means "methods of sale", and *akutoku shohoo* signifies "aggressive sales tactics". In such a

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3 A comparison of the tone of the statements by writers is interesting. Yoshiyuki Noda states that: "The Japanese do not like law" (Yoshiyuki Noda *Introduction to Japanese Law* (University of Tokyo Press, Tokyo, 1976) 160), and Takeyoshi Kawashima says that: "The survival of a premodern attitude to law in Japan is an obstacle to progress" (Takeyoshi Kawashima *Nihonjin No Hoishiki*, La Conscience du Droit chez les Japonais [*The Law Consciousness of Japanese*], 1967 report by A Bellenger). In contrast, Hiroshi Oda writes: "For the purpose of this book it is sufficient to point out here that Japanese law is part of the Romano-Germanic family of law with some elements of American law". "Contrary to the views of the leading comparatists, it is meaningless to put Japanese and Chinese law in the same category on any basis except a geographical one" (Hiroshi Oda *Japanese Law* (Butterworths, London, 1992) 6). On the matter generally see Ichiro Kitamura "Une Esquisse Psychanalytique de L'homme Juridique au Japon" 791 and following, reproduced with addenda in *Etudes de Droit Japonais* (Société de législation comparée, Paris, 1989) 25 and following. Some of the matters dealt with there are repeated here, particularly in the first part, in order, among other reasons, to present those ideas from a different perspective.

Among the most recent American works see Frank K Upham *Law and Social Change in Postwar Japan* (Harvard University Press, Cambridge (Mass), 1987); John Owen Haley *Authority without Power: law and the Japanese paradox* (Oxford University Press, New York, 1991), John Owen Haley *The Spirit of Japanese Law* (University of Georgia Press, Athens (Ga), 1998); Koichiro Fujikura (ed) *Japanese Law and Legal Theory* (New York University Press, New York, 1996).

situation it would be quite difficult for a non-lawyer to appreciate the new and fourth meaning of *hoo* in the exact European sense of the word 'law'.

In the form of government commands and means of administration, *hoo* does not include any subjective notion of right, a notion which did not exist in Japan before the reception of Western law. In fact, such was the situation at the end of the nineteenth century that translators had to create a word, *kenri*, by the combination of two Chinese characters meaning "power" and "interest". Thus uninitiated Japanese rarely have an integrated European idea of law (which has both subjective and objective connotations), and even lawyers in Japan often confuse *hoo* (law) and *horitsu* (legislation).<sup>4</sup>

The various manifestations of Japanese law lead to the question of whether in reality the Japanese continue to live out their original notion of *hoo* (*dharma/nori*/method) under the generalised appearance of the rule of law, in the sense of justiciable law. If the answer is in the affirmative, the rule of law would remain largely symbolic.

An affirmative answer would also provide a fine illustration of the celebrated hypothesis of non-law (*non droit*) advanced by Dean Carbonnier.<sup>5</sup> Indeed, there is non-law to the extent that law has withdrawn in favour of other forms of normativity, such as morality, custom, or religion, and does not regulate situations that it would be expected to regulate according to the normal European view of things.

Here, the attempt is to distinguish areas of law from those of non-law on the basis of sociological and jurisprudential principles. For this purpose it is useful to adopt the distinction which is sometimes made by legal philosophers, between the functions and the characteristics of law. According to this distinction, law appears as a norm for social and political organisation and for the behaviour of the subjects of law, and also as a norm of justice by virtue of which judges decide cases submitted to them.<sup>6</sup>

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4 *Horitsu* is translated in French as *loi*, in its sense of statute law.

5 Jean Carbonnier *Flexible Droit* (8 ed, LGDJ, Paris, 1995) 23 and following.

6 From the nineteenth century onwards, German authors in particular such as Merkel or Ehrlich had discovered two phenomena from the point of view of the subjects of State law. Firstly, "norms of behaviour" whose purpose was to regulate or command the subjects of law to do or not do something, and secondly, "norms of sanction or coercion", whose purpose was to sanction the behaviour of the subjects of law through State organisations or State institutions. The distinction maintained by Duguit between "normative rules of law" and "constructive or technical rules of law" may be considered as a variation on this theme (Léon Duguit *Traité de Droit Constitutionnel* (3 ed, E de Boccard, Paris, 1927) 105 and following). A similar conception could be that put forward by HLA Hart between "primary rules of obligation" and "secondary rules of recognition, of change, and of adjudication" (HLA Hart *The Concept of Law* (2 ed, Clarendon Press, Oxford, 1994) 79 and following).

According to this tripartite division, modern Japanese law functions very well as a norm for the organising society, but it is stifled to a certain extent as a norm for the behaviour of the subjects of law, and it suffers from partial dysfunction as a norm of justice.

These three aspects of law in Japan are now considered.

## **II FULL EXPANSION OF LAW AS AN ORGANISATIONAL NORM**

Law, as the most important technique for the organisation of a political society, is fully developed in Japan. There can be no doubt that Japan is a State governed by law (*Rechtsstaat*). But the Japanese notion of law has two characteristics: it is predominantly publicist and dirigiste, and also has a flexible nature which presents the character of soft law.

### **A The Public Law Characteristic**

By way of contrast with French law, Japanese law had, and still has, a public law character in the sense of a means of domination and of administration.

The legal tradition has been constantly linked to criminal, administrative, and economic law. This characteristic was already apparent at the time of the *Ritsuryo* regime (from the 7<sup>th</sup> century to about the 10<sup>th</sup> century) which was borrowed from the Chinese; *ritsu* and *ryo* mean criminal and administrative codes, amended occasionally by *kyaku* (specific laws) and supplemented by *shiki* (application decrees). It was also the same with the ordinances of the Shogunate of Tokugawa (1603–1868): *hatto* determined the status of samurai, nobility, and temples, *osadamegaki* corresponded to a code (officially only for the private use of judges) of penal law and procedure, and there were also *kinrei* (prohibitions), *juregaki* (edicts and advisory notes), and *tasshi* (circulars).

The law's aim was the maintenance of the peace, and assuring public security and the economic management of the country. On the one hand it presented a political framework designed essentially to guarantee the social and political organisation of the state, and on the other hand, to repress acts

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From a more functional point of view (that is as far as the objects of law are concerned), the Swiss jurist Walther Burckhardt spoke of the division between "Verhaltensrecht" — or more properly "a rule of conduct" — and "Verfassungsrecht" — a rule which determines the structure and the mode of operation of groups and organisations, both public and private— Walther Burckhardt *Methode und System des Rechts mit Beispielen* (Zurich, 1936) 132 and following, cited in Jean Dabin *Theorie Générale du Droit* (Dalloz, Paris, 1969) No 64, 77. It is quite common for Japanese legal philosophers to follow the tripartite distinction that is presented here by adding to the distinction of Burckhardt a third category of rule of law, which a judge must follow in the appreciation of a case and in the resolution of conflicting relationships between the subjects of law. See S Kato *Hotetsugaku Gairon* [*Treatise on the Philosophy of Law*] (Yuhikaku, Tokyo, 1976) 375 and following.

In the final analysis it suffices here to recall the three first characteristics of the rule of law which Henri Mazeaud spoke about: "The rule of law is a rule of social conduct... sanctioned by constraint (which presumes a state structure), and is binding for the judge (except in the case of equity)", Henri Mazeaud *Leçons de Droit Civil* (1 ed, Montchrestien, Paris, 1955) bk 1, vol 1, nos 10–12, 20–22.

which disturbed the public order and to regulate abusive or excessive practices which might take place in private activities.

It is therefore not surprising that in spite of the appearance of a general upheaval, the systematic reception of Western law contributed in an efficacious manner to the reinforcement and modernisation of the State, which had been centralised for a long time and which was highly management-oriented. This was done by sweeping away the hierarchical feudal system by a sort of legalist revolution, which cost little and transformed semi-patrimonial offices into a modern State bureaucracy.

Thanks to this transformation of law, Japan benefits from the full expansion of the situation of a state of law, with legislation organising the administration and various commercial and professional activities. Particularly because of the advice of Prussian lawyers such as Mohl and Gneist at the end of the 19th century, and because of the repeated reference by academic lawyers to German legal theory, the State and law machinery is fully elaborated and maintained according to the Kelsenite pyramid model.

However, this law did not fully reach the "social" level. Indeed social welfare, organised by the State itself and not by an autonomous body, constitutes one of those areas of public service where in the event of a financial crisis the budget is reduced first. A system of private insurance has just been introduced to guarantee the care of the aged and the sick. It is expressly stated that guaranteed care must be the top priority through a "family security system" (care for the weak by the members of their family, and in particular by the mother of the family). Also, there is guaranteed care by way of "social security" (insurance against illness etc taken individually by a company or group of companies). Social security remains logically at the level of a right to assistance. Does this law for the poor not risk exposing the very poverty of law itself?

However the predominance of the public idea of law seems to produce a certain atrophy or asphyxiation of private law. Historically, the very word that corresponds to private law, *shihoo*, had a pejorative sense. It meant "a secret arrangement made within a small community to the detriment of the general community", and was strictly forbidden by the Shogunate. Indeed, *shi* or *watakushi* still translates both as "I", "me", and as "private, secret, arbitrary, and contrary to public order".

More than one institution of European origin has been thus paralysed in the field of private law (civil law, commercial law ...). For example, the matrimonial property regime is almost dead: even at the legislative text level, there are only seven articles on this subject (articles 755 to 762 of the Civil Code). But what is even more striking is that there are only five or six marriage contracts concluded each year in all of Japan. All the other couples are deemed to be married under the regime of separation of property, but how many of them know that?

It is therefore normal to find that the rules of private law are perceived in the same way as those of public law, that is to say as regulations which the individual has to comply with, without discussion, in the conduct of his or her affairs.

Thus of the three million or so existing commercial companies which existed in Japan in 1997, 54.9 per cent were in the form of private companies, while public companies limited by shares made up 41.7 per cent. But in reality, most small public companies are either one person or family businesses.<sup>7</sup> The form of the public company was adopted because it had already been adopted by others, as though it were an institutional formula to take up and, furthermore, because it would produce a more representative impression than that of the private company. Conversely, in the few large public companies, most of the shares (72.1 per cent) are held not by individual investors, but by corporations which are linked to each other or which are holding companies, including banks. By this method of mutual support (*mochiai*) they form a sort of *Konzern*. This phenomenon is called *keiretsu* or "group of companies".<sup>8</sup> Individual investors content themselves with a small share of the profit in the name of "stable dividends". The general meeting of the shareholders takes place each year almost everywhere on the same day of the month of June and ends everywhere a half hour later, unless some mafia-like rabble-rousers disturb the meeting in order to acquire some pocket money as the price for peace. The most important moment of official decision in corporate life is thus a ceremony without the slightest trace of any notion of exercise of rights by the shareholders.

In these circumstances, it is not clear that the notion of rights is well rooted in legal and judicial tradition. If Japanese are invoking them (more and more frequently at present), the legal rights they exercise are often not civil rights in the proper sense, but rather human rights in the broad sense. Indeed, an attempt is made to attribute the character of a substantial right to the Constitution from the fact that one can invoke means drawn from constitutional violation as a way to defend or quash a decision. The constitutional provisions are often called upon even in civil matters, particularly in difficulties between neighbours, of wrongs and illegal constraint within the family setting, within community settings, and in the work place.

This same attitude is found among the judges. Even if it is written in legislation that there is truly a right to do such-and-such, in the judgment the judge will use the following phrase: "Whereas after consideration of all the elements of the case, it is appropriate to grant the petitioner such-and-such right provided in the cited article, provided in the legislation..., so long as there are no special

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7 In 1992, 57 per cent of public companies (being 1,290,000) had a capital of less than 10 million yen and only 2.5 per cent had a capital of more than 100 million yen. Even after the reform which raised the minimum capital to 10 million yen, in 1997 there were only 37,798 public companies with a capital of more than 100 million yen out of a total of 1,225,923, that is to say 3 per cent. See Ichiro Kawamoto et al *Nihon no Kaishahoo* [*The Law on Commercial Associations in Japan*] (2 ed Shoji-hoamu-kenkyukai, Tokyo, 1998) No 16-2, 20, and in English "Japan" in Koen Geens (ed) *International Encyclopaedia of Laws, Corporations and Partnerships* (Kluwer Law and Taxation Publishers, Deventer, 1994) 31 and following.

8 See A Tunc *Keiretsu à la Française* in Zentaro Kitagawa, Hans Georg Leser, Tamotsu Isomura (eds) *Wege zum Japanischen Recht: Festschrift für Zentaro Kitagawa* (Duncker & Humblot, Berlin, 1992) 713 and following.

circumstances".<sup>9</sup> Doubtless, the phrase "it is appropriate" can be understood as a euphemism of caution, and "so long as ..." as a synonym of "in principle". Nevertheless, these stylistic expressions leave open the possibility of thinking that there is a realm of judicial appreciation, which allows derogation from categorical provisions of the law.

Furthermore it is not difficult to read in this phrase the hint of an ulterior motive of paternalistic "protection" or of an administrative order granted from the point of view of global opportunity, rather than the pure and simple consecration of a right whose necessary conditions have been properly fulfilled. The term "protection" is often seen in interpretation discussions of scholars and sometimes even in judgments.<sup>10</sup>

With this transposition of subjective law or right to the field of protection and considerations of general politics, the rights are themselves reduced to being only an interest which reflects the policies of protection of either a governmental or judicial nature. To set the right aside would be a considerable step in countries where it is often said that, "it's my right and I will hold to it", even when one is unsure whether it is one's right or not. The Japanese pattern of legal reasoning is considerably different from that of countries (like France) where the use of the notion of right is a thoroughgoing one.

Finally, the notion of *uttae* (litigation) also corresponds to this idea of protection. Etymologically it signifies the act of making a prayer, of imploring aid from one's superior. Even if this conforms with the idea of administrative challenge or of the accusation of criminals, it is much less in line with the idea of vindication of a right, or of a verbal duel before an arbitrator. In short, the courts appear as a "place of petition" addressed to the ruler. That, coupled with the contemporary development of a well-determined type of court case or "case of political vindication" (in relation to

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9 For example, "in the case of the sale of an unidentified thing, title in it is transferred to the purchaser as soon as the thing is identified, so long as there are no special circumstances" (Supreme Court, 24 June 1960, *Minshu*, vol 14, no 8, 1528). "In the event that the possessor of a thing has died, the person who acquires the right to the possession is the heir, so long as there are no special circumstances" (Supreme Court, 30 October 1969, *Minshu*, vol 23, no 10, 1881).

10 So much more so since it is generally advised in Japan, as a method of interpretation, to consider all the interests of all the possible interested parties in respect of a text, by comparing and measuring them. This is done in order to decide who among them is worthy of being protected in the particular circumstance. This leading theory which is known as the "comparison of interests" theory, is put forward to ensure precision and objectivity of the description. One editor has thus been able to state the principle of a case briefly as the following: "Even if the second acquirer of a chattel which had been the subject of a disguised sale between the original seller and the first acquirer was in bad faith in respect of the simulation, the third acquirer is *protected*, if that third acquirer was in good faith at the moment of contracting with the second acquirer, as a third party in the sense of article 94, paragraph 2" (Supreme Court, 25 April 1975, cited in *Hanrei Kihon Roppo* [*Principal Codes with Case Annotation*] (Iwanami, Tokyo, 1998).

pollution, the noise of bullet trains, or the harm produced by current technologies), only serves to demonstrate the persistence of the traditional image of justice in Japan.<sup>11</sup>

### ***B The Characteristic of Soft Law***

Though it is a tool of government, the law is not rigid or pitiless: on the contrary, it is rather flexible.

Legislation is much less common in Japan than in France. Most of the main Japanese codes have fewer than half the number of articles of their French counterparts. Thus the Japanese Civil Code has only 1,044 articles compared to the 2,283 of the French Civil Code. Each year the French legislature produces between 1,000 and 1,500 statutes and decrees, while in Japan the average number is only 500.

The small number of legislative rules inevitably means that there is a tendency to favour provisions of general import, and this therefore leaves a vast area of discretion, even autonomy, to the courts and to the administration.

Thus, leaving aside parricide and assisting suicide, homicide is dealt with in just one general provision (article 199 of the Criminal Code), which provides a range of penalties from death to hard labour for three years, with the possibility of suspended sentence in the case of condemnation to three years imprisonment. This amounts to an almost total absence of legal definition for the penalties: the assessment of the penalty for homicide is therefore left entirely to the judgement of the prosecutor and to the wisdom of the court.

More generally, the application of legal rules, few in number and indeterminate in content, depends substantially on the analysis of the facts of the case. This opens the door to casuistry and from that flows a certain factual orientation in the judicial assessment of cases. And it is perhaps in this that one finds the secret of the success of the Anglo-American method of distinguishing, compared with the continental system of codification, which, at the fringes of the legislation, allows the sociological specificities of Japan to be taken into account.

As for the administration, it is clear: it is the general pattern in all ministries that bureaucrats have recourse to the well-known procedure of *gyosei shidoo* (administrative guidance). Often operating outside the legal provisions, administrative guidance invites individuals to do or not to do a certain thing in order to achieve an administrative goal. Although it is theoretically possible to refuse to comply, those involved most often comply, either for fear of incurring the displeasure of

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<sup>11</sup> See Ichiro Kitamura "Une Esquisse Psychanalytique de l'homme Juridique au Japon" 791 and following, reproduced with addenda in *Etudes de droit japonais* in (Société de législation comparée, Paris, 1989) 49.



the authorities or because the individuals themselves appreciate this procedure precisely because of its flexibility by comparison with strict law.<sup>12</sup>

In giving this guidance, the administration often makes reference to internal directives, called "guidelines". This is true soft law. Taking account of the sociological reality of bureaucracy, it could be said that the law constitutes only a residual source of legal norms which, despite the weightiness of the legislative procedure, are ritually consecrated by way of exception only.

In spite of the risks of arbitrariness and of violation of rights, it is true that this process contributes to the efficient implementation of economic policies.

The search for the economic or political opportunity seems to win out over the principle of law, and that is not without consequence as far as the behaviour of individuals is concerned.

### **III A CERTAIN STIFLING OF LAW AS A NORM FOR BEHAVIOUR**

As a norm for social behaviour, law sees human relationships as the object of its regulation.

By their nature, however, human relationships are of all things perhaps best able to resist changes in political, economic, and social circumstances. To explain the Japanese situation it is therefore necessary to consider the phenomenon of non-law. The atrophy or stifling of private law, particularly of family law, constitutes one of the natural consequences of the persistence of norms which used to regulate Japan before the arrival of law of foreign origin.

The question then arises: what are these norms which fill the void of law in Japanese society? Among the normative elements which, repulsing the newly arrived law, continue to channel and regulate interpersonal relationships, there are two which seem to be the most representative: morality and administration. It should be added immediately that public administration in its raw state can only be established with the help of efficacy, opportunity, and a spirit of service to the sovereign, without necessarily being imposed and controlled by the law. One only needs to recall the royal administration under the *Ancien Regime* of France, which was not the obvious object of the civil, Roman, or customary law, but was subject to the fundamental laws of the kingdom.

#### **A The Role of Morals or Civil Ethics**

As far as morality is concerned, it is not necessary to repeat that in European society the law is above all a body of norms of behaviour for individuals, having as its starting point Christian

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12 Yoshikazu Shibaike "Guidelines and Agreements in Administrative Law" (1986) 19 *Law in Japan* 63 and following; Russell Allen Yeomans "Administrative Guidance" (1986) 19 *Law in Japan* 125 and following. H G Sautter *Les Incitations Administratives au Japon: Instruments Extralégaux d'une Politique Industrielle concernée* (LLM thesis, Institut national des langues et civilisation orientales, 1981); H Shiono, "Administrative Guidance" in Kiyooki Tsuji *Public Administration in Japan* (University of Tokyo Press, Tokyo, 1984) 303 and following; A Morita, "Les Procédés Formels et Informels de l'Action Administrative" (1995) 73 *Revue Française d'Administration Publique* 85 and following.

morality with its notion of justice and love for one's neighbour. In contrast, it can be said that religion does not directly inform civil morality in Japan.

Christians make up only one percent of the total population in Japan. Most Japanese live out a sort of irenic religiosity and doubtless conserve animist sentiments. There is in effect a division of work between the gods: many families have two small altars in their homes, one Shinto and the other Buddhist.

Shintoism originally had as gods anything that gives rise to fear, appeals to a superhuman power, and generally presides over ancestral cults, and anything to do with the peace, happiness, and security of the nation. In this matter, Shintoism formally participated (from the Meiji era to the end of World War II) as part of the nationalistic doctrine, which created a Pope-like figure out of the Tenno. Buddhism, on the other hand, finds its area of influence particularly in providing consolation at time of death. Emphasising the uselessness of attachment to agonising desires in this changing world, it teaches resignation to either cosmic or social destiny (*dharma*), belief in the grace and pity (*jishi*) of Buddha and the Bodhisattva (apostles of Buddha), and the will to follow and live an ascetic life devoted entirely to serious work in order to become a Buddha in the next world.<sup>13</sup>

These two traditional religions are so deeply ingrained or institutionalised in customs with their seasonal rituals that they are scarcely perceived of as true religions (which have an initiator, doctrine, temple, conversion, devotion, and practices).<sup>14</sup> Rather, true religiosity is seen in the

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13 A Mori "Le Shinto" and "La Mystique du Bouddhisme Japonais" (1972) in Marie-Madeleine Davy (dir) *Encyclopedie des Mystiques* (Vol 4, Seghers, Paris, 1978) 353 and following, 389 and following. The author was right to speak of the "Japan religion" above and beyond the manifestations of diverse religions. According to the author, in reality even in the case of Japanese Christianity these religions are only sects, in the sense that they accept Japanese superiority, morality and norms and finally the strong belief in being Japanese, which is the very source of cohesion and morality of the people.

14 In addition to Christmas, a Christian festival which has curiously entered Japanese tradition without any implication of faith, and which has become purely a festival for children, is St Valentine's Day (14 February). This is a very interesting phenomenon for legal sociologists. It is a festival for lovers which in Japan was promoted by the makers of chocolate about 30 years ago, and was influenced both by American custom and by the precedent of Christmas, which is a huge business success in Japan for bakeries and cake shops. Now the custom of giving chocolates on 14 February has quickly become a strange nationwide phenomenon by virtue of its being one aspect of the sense of "giri" of salary earners. Women are now obliged to offer a "chocolate giri" to their superiors and to their male office colleagues to prove their cordial sentiment towards them because, according to the tradition, women can take the romantic initiative only on this day of the year. In turn, men, who are beneficiaries of this occasion must make a return present on 14 March on a day called "white day" (no one knows why "white"). Thus, a third season has been created for the social exchanging of gifts over and above *Ochuguen* (mid-July) and *Oseibo* (end of the year). This all poses the question - Are salary earners, sacrificial victims of the marketplace, so deprived of affection and attention that they have to accept such an infantile, pseudo-festival for lovers?

There is also a considerable market for Christian marriage celebrations, which can take place without any Christian commitment. This market seeks the solemnity of the occasion by sometimes going so far as to have the marriage performed a village priest in the Alps!

numerous sects called *shinko shukyo* (recently established religions), which have some greater importance in that they form a congregation of practising members led by a founder illuminated with a precise doctrine (from Soka-Gakkai till Aum).

Although it is clear that these religions help to encourage people to respect order and tradition, the fact is that no one is very aware of the depth of their penetration into the social ethic.<sup>15</sup> The latter presents more directly a characteristic of civil morality and is moreover supported by morality concerning personal relationships.

This social ethic is called *giri* and is discussed only briefly here; more can be read in the classic work by the late Professor Yosiyuki Noda.<sup>16</sup> The essence of *giri* goes beyond simple social courtesy. It consists of maintaining a very intimate link and a relationship of reciprocal confidence in personal, social, or business relationships. The link is always conditioned by the respect due to superiors and the protection due to inferiors. In obedience to *giri*, a person must be frank, sincere, and faithful in relation to the other, always seeking to fit in with the other's presumed intentions as if they were someone who was dear or close.

This is an interpersonal ordering system, pseudo-familial in nature. Even a pseudo-familialistic order must always take precedence over a legal relationship, and determines and to a considerable extent transforms the way it works. Private law has been the object of a considerable acculturation because the foundation of personal relationships between Japanese has not changed too much.

Take for example the areas of contract and tort.

The important thing in contractual negotiations is first of all to become friends, to establish a relationship of confidence between the parties by various means such as regular visits, dinners, karaoke parties, and business golf outings. This contact occurs first between the employees, then

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15 The situation is almost the same with Confucianism. Probably in ancient times, after having added to Buddhism funeral rites which were originally foreign to it, Confucianism (or rather neo-Confucianism developed by the Chinese philosopher Zhu Xi, 1130–1200) exercised a major influence on the ethic of samurai. It consolidated their feudal ideology during the Shogunate of the Tokugawa (1603–1868). It is true that, at the time, this official doctrine influenced popular mentality, and created a primordial reverence for parents and ancestors, which strengthened the Shintoism sentiment, and which continued on to support the nationalist attitudes of the Meiji government of 1868–1912. At the present time, it has been almost forgotten and even rejected by the present generation by the very fact of its formal links in the feudal regime. This is the reverse of the situation which pertains in South Korea. See Masao Maruyama *Studies in the Intellectual History of Tokugawa Japan* (translation Mikiso Hane, University of Tokyo Press, Tokyo, 1974); Peter Nosco (ed) *Confucianism and Tokugawa Culture* (Princeton University Press, Princeton (NJ), 1984); Josef Kreiner (ed) *The Impact of Traditional Thought on Present-day Japan* (Iudicium Verlag, Munich, 1996).

16 Yoshiyuki Noda *Introduction to Japanese Law*, above, 174–183; See also Ichiro Kitamura "Une Esquisse Psychanalytique de l'homme juridique au Japon" 791 and following, reproduced with addenda in *Etudes de Droit Japonais* (Société de Législation Comparée, Paris, 1989) 34.

between the executives. Once established, this *giri* relationship will dictate the respective rights and obligations before they take on any legal form.

There is something quite similar to this Japanese moral feeling in the legal rules of good faith and loyalty (*Treu und Glauben*) borrowed from the Germans. These principles have received many applications in the courts. The rules of good faith have almost come to occupy a place of general principle in private law, and what is more, they have had a privileged legislative position in article 1 of the Japanese Civil Code since 1947. This is one of the rare successes of transplantation of law in private law matters.<sup>17</sup>

In the same order of ideas, case law has taken into consideration this sociological reality by creating a theory called "the relationship of confidence". In the application of this theory, case law admits, for example, that for the protection of tenants in a weaker position than the owner, landlords cannot exercise their rights of termination of the lease, even where there has been an assignment of the tenancy or sub-letting by the tenant without consent. And this is so unless the action of the tenant is one which totally destroys the relationship of confidence which must exist between the landlord and tenant.

By comparison with the alimentary obligation in French law, it is to be noted that in Japan it would be inconceivable that a son would enter into a written support contract with retired parents, agreeing on the allowance of a particular number of loaves of bread, litres of milk, kilograms of meat and vegetables, for example. The fact of providing maintenance is an act so natural and so direct a consequence of *giri* and of respect due to parents that it would never be expressed in a legal form.

More typical is what happens between a tortfeasor and the victim of a traffic accident. Unlike French practice where the tortfeasor will probably deny all responsibility, the tortfeasor must above all seek an immediate pardon for the wrong. The person is obliged to take care of the victim's medical needs, to go and see the victim regularly, taking a small gift, in order to check whether the victim is getting better, and to take care of compensation matters. Mollified by these respectful activities and by sincere apologies, a victim will certainly be tolerant; on the contrary, without these activities, offence would surely be taken because the victim would have waited in vain for the respect and devotion of the *giri* debtor.

In this expectation there could be seen to be a pliant or passive consciousness of rights or a Japanese-style vindication of law. However, in the end, this fruitless wait for satisfaction of *giri* may become the basis for a claim before the courts: the relationship of confidence is ended or has been

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<sup>17</sup> Ichiro Kitamura, H Morita and A Omura "Rapport Japonais sur la Bonne Foi dans les Relations Entre Particuliers" in *Travaux de l'Association Henri Capitant* (Litec, Paris, 1992) t XLIII 141 and following, 301 and following; B Jaluzot *La Bonne Foi dans les Contracts: Etude Comparative de Droit Français, Allemand et Japonais* (thèse Lyon III, 2000; Dalloz, Paris, 2001).

aborted, and the victim declares war on the person who is now an enemy. The process appears to be like a substitute for vengeance for justice denied.

It is thus that in its role as a regulator of normal behaviour, law sees itself being somewhat supplanted by personal relationships filled with pseudo-sentimental behaviour of a socialised nature.

Nonetheless, it is worth noting that a phenomenon of legalisation of inter-personal behaviours appears to be part of the general effect of urbanisation. This phenomenon forces people to become more and more "business-like", and to that extent the traditional normative conscience exercises its power of cohesion with much more difficulty.

Such is typically the case in suburbs set up in a new city. Schematically, it could be said that where people find no common traditional framework for their normative reference, their only touchstone is the law.

That situation provoked a tragic sequence of events in 1983, known as the "case between neighbours".<sup>18</sup> The description itself implies that as a rule, neighbours avoid litigating. In this case, a mother in a new subdivision had gone to the shops and had entrusted her three-and-a-half year-old child to the care of her neighbour, who was busy spring-cleaning. The child was playing with the son of the neighbour in question, who was his friend at the crèche, but for some unknown reason, the child decided to go swimming in the pond opposite the neighbour's house and did not come back; he was found there drowned. After some hesitation, the victim's family abruptly instituted an action and the judge found the neighbour liable as well as holding the petitioner 30 per cent responsible for the loss. The judgment was reported by the media with a tone of reproach against the plaintiff. This stimulated public opinion to the point that anonymous threats were spontaneously addressed to the plaintiff, who was then obliged to discontinue the litigation. Opinion then turned against the defendant, and the defendant was obliged to withdraw the appeal which had been lodged. The plaintiff lost not only a child but also a job, and finally had to shift from the neighbourhood.

This tragic affair lends itself to several analyses: for example, the role of the barristers, the role of the press, the role of urbanisation, community morality, and the "fascism of good citizens". But what most shocked legal minds is that in spite of there being the appearance of the development of legal consciousness among citizens, the traditional view of law still holds a power sufficient to disarm and even derail the activity of the judicial machine.

### ***B The Role of Administration***

Law gives way not only to morals but also to administration.

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18 District Court, Tsu, 25 February 1983, Hanrei Jiho, no 1083, 125; See Ichiro Kitamura "Rapport Japonais sur l'Effectivité des Décisions de Justice" in *Travaux de l'Association Henri Capitant* (Paris, Litec, 1985) t XXXVI 156-157.

Since 1947, Japanese family law has undergone an almost complete liberalisation and equalising of the treatment of spouses, and did so much sooner than in Europe. However, in reality, family law is a captive of an administrative institution: the family register (*koseki*).

The family register is a civil status register created not by individuals, but by the nuclear family (a couple and their unmarried children), and records systematically the relationships and the changes of status of each member of the family. It is no exaggeration to say that this register is so well organised in its role of gathering information in family matters, that there is nothing much for civil law to do except for some detailed technical discussions sometimes of a very complicated nature.

Indeed in order to determine who are a person's heirs, one need only consult the record or records concerning the *de cuius*; all the genealogy is there. Similarly, in order to marry, to divorce, to adopt (at least an adult), or to dissolve an adoption, it is enough to declare this change of civil status at the town hall and to have it inscribed in the family register without any other substantial formality or any judicial control.<sup>19</sup>

Of course, this system of simple administrative declaration sometimes causes great difficulties, which result from a non-declaration (*de facto* marriage), false declarations, or abusive declarations (permitting in particular the unilateral repudiation of a wife). However, it enables much legal energy to be saved in the area of the major principles of family law. The substance is entrusted to amicable settlement between the interested parties, and the form to an official scribe. To this extent it is possible to speak of a family non-law.

Complicated disputes are brought before the courts, but there is also a considerable amount of what could be called "non-justice", which is the judicial version of non-law.<sup>20</sup> For this reason, family litigation is regulated in principle either by way of conciliation or by way of a discretionary recommendation, which becomes final only after the agreement of the parties. The Family Court is there in order not to give judgment!

In the area of divorce this results in 91 per cent of couples dissolving their marriage by themselves, that is to say by simple declaration at the town hall after agreeing between themselves. Eight percent of divorces are settled before a conciliation commission, and the remaining 1 per cent

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19 Tadaki Matsukawa *La Famille et le Droit au Japon* (Economica, Paris, 1991) 25, 30, 63, 120, 123; DTC Wang, *Japon*; Berthold Goldman (ed) *Juris-Classeur Droit Comparé*, (Éditions Techniques, Paris, 1993) no 61, 79, 132, 139.

20 Based on Carbonnier's idea of "non-law", the idea of "non-justice" presumes a form of withdrawing or abstention from justice: the judge withdraws in order to make no judgment either formally or substantially in matters which are before the court. These matters are thus lost in a judicial void, or dealt with by other means of conflict resolution, where in Europe, the judge could or should normally deal with them from the point of the view of state justice. See J Carbonnier "L'hypothèse du non-droit" *Flexible droit* (8ed, LGDJ, Paris) 23 and following; Ichiro Kitamura "The Judiciary in Contemporary Society: Japan" (1993) 25 CWRJIL 263–291, esp 275 and following.

in court.<sup>21</sup> This non-law or non-justice relating to the family certainly does not operate only because of the interplay with custom. It also finds a solid base in the bureaucratic system relating to the family register. To borrow once more from the magisterial light of Jean Carbonnier, one could say that there exists "an administrative law of civil law" or a "civil administrative law", within which administrative law institutions, without losing anything of their nature, are put to use occasionally by the institutions of civil law.<sup>22</sup> Such is the case of the practices developed around the family register, which dictates family relationships and sometimes even the property relationships of Japanese couples. What is more, this civil administrative law is developed and refined, according to the brilliant formula of the late Bruno Oppetit, by way of a true "rescript", a series of answers from the Director of Civil Affairs of the Ministry of Justice to questions from the local administrators that have flowed in a constant manner for more than a century.<sup>23</sup>

Since 1952, in the absence of legislative reform, the administration of civil status has taken to itself the power not to receive abusive declarations, notably of divorce, at the prior request of one of the parties. Doubtless such a declaration would be able to be annulled in court but only at the end of a procedure which is almost by definition long, complicated, and burdensome. It is far quicker and more efficacious to not let the declaration get past the counter at the local town hall. One might add that Japanese are particularly attached to the idea that their register should not be "sullied" by unusual entries. This simple method is a godsend for women who are threatened with rejection by their husbands: in 1997 there were 40,163 requests to the local registrars that they not receive declarations relating to civil status, and 90 per cent of those related to divorce.

The situation of civil administrative law gives the impression of a certain dysfunctionality of law as a norm of justice.

#### ***IV THE DYSFUNCTIONALITY OF LAW AS A NORM OF JUSTICE***

There is also the important phenomenon of holding back or withdrawal in judicial activities in Japan. The judge does not state what the law is one way or another, and in the end there is a risk of

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21 Noboru Koyama and Ichiro Kitamura "La Conciliation en Matière Civile et Commerciale" (1988) *Journées de la Société de Législation Comparée* esp 278-279; *Etudes de Droit Japonais*, (Société de Législation Comparée), Paris, 1989) esp 248-249; Itsuyo Takizawa, "Quelques Aspects du Droit Japonaise de la Famille" (1990) *Rev Int Dr Comp* 915 and following, esp 924; *Etudes de Droit Japonais*, vol 2, 1999, 63.

22 Jean Carbonnier "Le Droit Administratif du Droit Civil" in Pierre Legendre *La Bureaucratie et le Droit*, numéro spécial de la *Revue Historique de Droit français et Etranger* (1975) 202.

23 Bruno Oppetit "La Résurgence du Rescrit", D 1991, Chron 105 and following; *Droit et Modernité*, (Paris, PUF, 1998) 153 and following.

committing a denial of justice. This phenomenon of non-justice - this flight from justice by the judges themselves - can be observed generally in all areas.<sup>24</sup>

#### *A Civil Justice*

In civil matters, non-justice results from the denial of the litigious nature of a considerable number of civil disputes.

This denial is normally left to the parties, who can choose from a whole range of alternative modes of dispute resolution, and particularly from various forms of conciliation. Over and above the extra-judicial conciliation organised by various private organisations, including insurance companies for traffic accidents, and the para-judicial conciliation worked out by administrative bodies such as for work disputes, the development of a sub-judicial conciliation must be emphasised. Sub-judicial conciliation is a procedure which is integrated into the activity of the courts but which is distinct from classical judicial conciliation. It is a sort of judicial mediation by a committee composed of two non-judges, and is supervised by a professional judge. This committee can propose a solution in equity or according to morality, and has the ability to derogate from law, subject only to overriding matters of public policy.<sup>25</sup>

However, the denial of the contentious nature of family disputes is more marked; it shows itself by way of an obligatory first attempt at conciliation at a sub-judicial level before the Family Court.

There is a whole series of incentives, both legislative and in case law, to settle matters amicably in order that the judges, who are relatively few in number (about 3000 for a total population of 123 million), can concentrate on the truly complicated cases. On the facts, a third of parties choose at the outset to use sub-judicial conciliation, and almost a quarter of the cases are redirected into, and end in, judicial or sub-judicial conciliation.

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24 For the detail see Ichiro Kitamura "Une Esquisse Psychanalytique de l'homme Juridique au Japon" 791 and following, reproduced with addenda, above. Professor Daniel Foote speaks of a "judicial activism" (Daniel Foote "Resolution of Traffic Accident Disputes and Judicial Activism in Japan" (1995) 25 *Law in Japan: An Annual* 19 and following). He is there referring to the fact that a group of specialist judges has made a joint study to identify and standardise the criteria for compensation for road accidents and that these criteria have greatly contributed to the resolution of problems not only in the context of litigation, but also and particularly in the context of extra-judicial negotiations. According to the present author, this is not a question of "judicial activism" in the proper sense of the term but a "an activism of judges acting as dogmatists or bureaucrats". What these excellent judges have done is the same as making a regulation, that is norms of an administrative nature, which rightly tend to reduce the number of cases that go to court.

25 Noboru Koyama and Ichiro Kitamura, "La Conciliation en Matière Civile et Commerciale" (1988) *Journées de la Société de Législation Comparée*; Ichiro Kitamura, "L'Avenir de la 'Justice Conciliatoire'" in *L'Avenir du Droit, Mélanges François Terré*, (Paris, PUF/Dalloz Ed. du Juris-Classeur, 1999) 801 and following.



In short, what characterises these non-litigious and amicable procedures is the quest for conditions for peaceful co-existence of the parties to the litigation. It is not necessary to declare or establish who is right or who is wrong, particularly for parties who are, one may say, condemned to live in a close relationship with each other either in a family, profession, or neighbourhood. A conciliation agreement declares in substance that: "Unfortunately we have had a disagreement, but we agree to share the loss or the pain and our honour, and we will continue our relationship, or we will separate, as the case may be, in any case as friends".

It would be possible to try to explain this phenomenon of sub-justice in a slightly more objective manner from the point of view of the structure of norms. As has been seen, the Japanese legislator, a good or bad student of Portalis and of Montesquieu depending on one's viewpoint, tends to be brief and general in formulating legislation, does not go into too much detail, and sometimes even remains silent, particularly in family law matters. It is therefore appropriate to consider that this non-negligible area of non-law inevitably provokes the phenomenon of non-justice or of negotiated justice in the sense that the non-law sometimes lacks written rules of reference both for the parties and for the judges.<sup>26</sup>

The alternative methods of dispute resolution are favourably received in civil areas. The situation, however, is much more serious in the field of criminal law and public law.

### **B Criminal Justice**

In criminal law, academic writing is almost unanimous in stating the reality of non-justice by bureaucratisation, or particularly the prosecutorial control of criminal justice.<sup>27</sup>

The prosecutor does everything, with the result that there is scarcely anything substantial for the judge to do. In fact the essence of Japanese criminal procedure definitely lies in the enquiry and prosecution phases. The preliminary enquiry is conducted by the judicial police, who have considerable powers of coercion and interrogation. Then the prosecution is prepared in a meticulous and punctilious manner by the prosecution office, which makes maximum use of its ability to assess the appropriateness of prosecution.

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26 See N Mizuno "A Comparative Law View of Contemporary Japanese Civil Law: Family Law" (in Japanese) in Hironaka et Hoshino (dir) *Minpoten no Hyakunen [Centenary of the Civil Code]* vol 1 (Yuhikaku, Tokyo, 1998) 651 and following; N Mizuno "La notion de famille au Japon" *La famille au Japon et en France* (Société de Législation Comparée, Paris, 2002) 32-33.

27 See K Matsuo *Keijisoshoho [Criminal Procedure]* (vol 1, Kobundo, Tokyo, 1979) 15; H K Tamiya, "The Characteristic Japanese Features of Criminal Procedure" (in Japanese) *Hanrei Taimuzu* special issue, vol 7, 1980, 8 and following; M Mitsui, "Celebrating Thirty Years of the Code of Criminal Procedure and Justice provided by the Prosecutions Office" (in Japanese), 37 and following; Ryuichi Hirano, Diagnosis of the Current Code of Criminal Procedure (trans Daniel H Foote) (1989) 22 *Law in Japan: an Annual* 129 and following.

Therefore it remains for the judge only to verify that the accused is truly guilty. In reality, it is as if the first instance of a criminal trial amounted to an appeal against the decision of the prosecutor, and has an astonishing conviction rate of 99.9 per cent.<sup>28</sup>

Obviously that is too high. There are many academic criticisms of this practice. Above all, the methods of enquiry are seriously defective and sometimes even scandalous. Once an arrest has been made, the length of the suspect's detention is initially three days with the police, then, with the approval of a judge, 20 days maximum under the control of the prosecution. During these 23 days, interrogations continue, often day and night, usually without a lawyer. The right to a court-appointed lawyer exists only after prosecution before a court, not during the detention of the suspect. Even if the suspect has asked for a lawyer, contact with the lawyer is strictly limited by the prosecutor's office. Normally it is restricted to two visits for every ten days of detention, then to another visit in the case of the extension of the 10 day period. Each visit is limited to 15 minutes.

What is more, many of the procedures utilised by the police are so employed without any clear legal basis and without the express agreement of those involved. Thus, there are the scenes on television of systematic searches of vehicles, either the day before important state ceremonies, or daily at Narita airport. The case law, however, generally admits the "legality" of these processes.

It is only recently that the bar associations have set up a practice of the type "SOS Barristers" to protect against the risk of violation of the rights of suspects. Persons arrested can now call a lawyer on duty 24 hours a day.

There are two strong ideas behind the somewhat excessive police practices and the prosecutorial control of criminal process.

First, great importance is attached to a confession. This must be scrupulously substantiated, it must declare the motives for the act charged, and it must show the personal relationships of the protagonists. The whole context of the case must be examined and explained in such a way that it cannot be denied by the accused at the public hearing. The formal record of the confession is presented there as a matter of proof.<sup>29</sup>

Then there is the fact that people consider it more serious and damaging to be accused at a public hearing than to be interrogated or even detained by the police. This holds to such a point that they regard an acquittal as a declaration of the incompetence of the investigators.

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28 Compare with J Mark Ramseyer and Eric B Rasmussen "Why is the Japanese Conviction Rate So High?" (2001) 30 *Journal of Legal Studies* 53 and following.

29 On the judicial psychology of the enquiry between the police and suspects, Ichiro Kitamura "Une Esquisse Psychanalytique de l'homme Juridique au Japon" 791 and following, reproduced with addenda in *Etudes de Droit Japonais*, (Société de Legislation Comparée, Paris, 1989) 39.

In a word, for the public at large, justice is the police. There is even a sense, no doubt difficult to pin down, of a soft police state. This tolerates the presence of a subtle network of police antennae through the whole archipelago.<sup>30</sup> It accepts the visit of police officers in order to establish a domestic register for police use which has no legal basis (unless perhaps under some forgotten circular), and applauds the arrest of malefactors when the senior officer appears for a press conference as a triumphant general. Finally, this sense of a police state sets up a sort of continuous inculcation of this police spirit by way of television. Every evening certain channels broadcast programmes celebrating the police as heroes, in the form of ancient samurai officers or foreign Kojaks.

### C *Administrative Justice*

Finally, in administrative or constitutional disputes, non-justice arises from respect of the autonomy of parliament, or more substantially of the autonomy of government.

Under the Japanese system of control of constitutionality, which was inspired by the Americans and introduced into Japan in 1947, all courts have a constitutional control jurisdiction. The Supreme Court naturally has the last word, but it is very rare to have a declaration of unconstitutionality made there, except in murmurings in the opinions of minority or dissenting judges.

In fact, out of the 54,376 judgments delivered between 1950 and 1987 by the Supreme Court in civil and administrative matters, only 286 judgments dealt with questions of constitutionality (not only of legislation but also of Acts of State) and a finding of unconstitutionality was made in only 47 cases. Among those 47, 44 cases involved the same electoral law question. In the criminal law area there were only 256 successful challenges among the 129,279 judgments of the same period; since 1974, there has been no successful challenge in criminal matters. Only four legislative provisions have been declared unconstitutional by the Supreme Court.<sup>31</sup>

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30 David H Bayley *Forces of Order: police behaviour in Japan and the United States* (University of California Press, Berkeley, 1976); David H Bayley *Forces of Order: Policing Modern Japan* (2 ed, University of California Press, Berkeley, 1991).

31 See Tadakazu Fukase "Les Juges et les Grands Choix, Politiques et Administratifs: Droit Constitutionnel Japonais" (1988) *Journées de la Société de législation comparée* 470, *Etudes de Droit Japonais*, above, 378-379. Y Higuchi, *Kenpo [Constitutional Law]* (Seirin-shoin, Tokyo, 1998) 523. Yasuhiro Okudaira "Forty Years of the Constitution and its Various Influences: Japanese, American, and European" in Percy R Luney and Kazuyuki Takahashi (ed) *Japanese Constitutional Law* (University of Tokyo Press, Tokyo, 1993) 1-38, esp 16 and following. Taisuke Kamata "Adjudication and the Governing Process: political questions and legislative discretion" in Percy R Luney and Kazuyuki Takahashi (ed) *Japanese Constitutional Law* (University of Tokyo Press, Tokyo, 1993) 151-172. After this date, two decisions of non-constitutionality have been handed down. The first was in 1997: Supreme Court, 2 April 1997, *Minshu*, vol 51, no 4, 1673, concerning a local government official who had made an offering to a Shinto temple, dedicated to the memory of the soldiers dead in the war; the offering was paid out of departmental funds.

The same state of dysfunctionality appears in the administrative law area. In 1997 out of 1,564 cases decided at first instance there were 1,043 judgments of which only 22.1 per cent were for the plaintiff. If from this figure are excluded the 231 judgments relating to intellectual property, which are fundamentally of a civil law nature, the rate of successful challenge is only 11.9 per cent in respect of the 812 judgments given in purely administrative law matters.<sup>32</sup>

There could be several explanations for these patterns, and three will be considered here. First of all, many of the disputes are dealt with by other means such as conciliation or administrative involvement.

Then it should be noted that very limiting interpretations have been made of the conditions for the admission of appeals in administrative matters. A positivist tendency can be observed here in the interpretation of public laws in general. This is a subtlety which most frequently works in favour of the administration.

Finally, giving a favourable interpretation of this tendency of non-justice in public law, Judges are supposed to reason: Public officers are in general excellent and act in good faith, and do their best for the common good while dealing with many practical difficulties - how can one then reproach them for the inadequacy of their efforts by declaring the illegality or even the unconstitutionality of their actions, unless there has clearly been bad faith?

The notion of law is thus perceived in a public law manner, or as having practically an administrative content in Japan. One could therefore say that at the limit, in spite of the democratic thesis of superficial political apologists, there is really only a law of bureaucrats made by bureaucrats for bureaucrats.<sup>33</sup>

In this regard, it is possible to cite a representative example of administrative non-justice. In a celebrated case in 1981, where the inhabitants had demanded the prohibition of night flights at the airport of Osaka, it was 12 years after the request was made that the Supreme Court decided against the civil claim without deciding on the substance of the claim. They added this nice comment: "we reserve the question of whether such a claim might even have been able to be made by way of an administrative challenge".<sup>34</sup>

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Another judgment of the full Supreme Court of 11 September 2002 (Minshu, vol 56, no 7, 1439) has declared unconstitutional those provisions of the Post Office Act which exclude or limit the liability of the state where loss has been caused by the fault within the postal service in relation to a registered letter or a letter (such as a procedural or jurisdictional document) which was the object of a special category.

32 *Shiho Tokei Nenpo* [Yearbook of Judicial Statistics] (1997) Tables 80 and 91, 194 and 203; see also Itsuo Sonobe "Contemporary Administration and Administration Disputes" (in Japanese) (1983) 45 *Koho kenkyu* 150.

33 See Dan Fenno Henderson (1992) 1 *Pacific Rim Law and Policy J*, 1-9.

34 Supreme Court, 16 December 1981, Minshu, vol 35, number 10, 1369.

However, the defendant authorities had in principle stopped night flights before the judgment was pronounced and promised to follow this pattern voluntarily as part of the exercise of their public authority. The administration thus saved face, leaving open the question of whether the same measure could not have been taken voluntarily 12 years earlier.

A degree of non-justice results thus from the considerable respect given to legislative and administrative discretions. For exegetical judges, the law is everything — "literally a golden rule and supreme precept".<sup>35</sup> Therefore they want the legislature to intervene. But the legislature is not at all active and for its part the legislature awaits the accumulation of a body of case law. And the administration prefers to maintain this agreeable situation. Public opinion is resigned to all this, ignoring the legal subtleties, and just hoping for good policy. Except in the case of great upheavals, no one would do anything to upset this curious equilibrium.

## V CONCLUSION

Many Japanese jurists, particularly the modernists, would be shocked by the above remarks, but even in over-emphasising in this way, the right still exists to say that "the King has no clothes". The disquiet is not only that of the author. Indeed, a legal philosopher has noted that there is a double risk in the growing role of Japanese lawyers: on the one hand that of excessive legalism, and on the other, that of a naïve instrumentalism, which regards the law and justice as the means to certain political or socio-economic ends.<sup>36</sup>

A Japanologist under the pseudonym of Isahia Ben Dassin<sup>37</sup> made a prophecy on the fate of law in Japan, according to which the law would end up by reducing itself to a simple mechanism of approval, in the eventuality that the basic normative conscience sufficiently maintains its vigour. While emphasising the necessity to fundamentally restructure the basis of non-justice in constitutional matters, an eminent author alludes to the usefulness of conceiving of an "alternative mode" of resolving the various problems posed in the form of constitutional disputes.<sup>38</sup>

If Japanese lawyers are happy to state the success of their law in terms of political and social organisation, without being concerned about the effectiveness and the improvement of the system of rights of individuals, they must also state that the law that they apply is in reality only *hoo* of an

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35 Itsuo Sonobe, above.

36 S Tanaka "The Increasing Role of Lawyers and its Problems" (in Japanese) (1979) 700 *Jurist* 251.

37 Isaiiah Ben Dassin "The Legal Awareness of Japanese" (translated into Japanese by H Yamamoto) in *Koza Hikakubunka* (Anthology of Comparative Culture) vol 7 (Kenkyusha, Tokyo, 1976) 193.

38 Y Okudaira "The Special Nature of the Control of Constitutionality in Japan" (in Japanese) in *Gendai Nihon Shakai* [*Contemporary Japanese Society*] a series directed by the Institute of Social Sciences of the University of Tokyo, vol 5 (University of Tokyo Press, Tokyo, 1991) 407 and following, esp 409.

exclusively Japanese substance. This law, which is theirs, would be reduced to a sort of "vulgar Roman law" at the service of power and the Mandarins.

By comparison with the classical and European model of law, even if this power is a good power - a power of consensus and protection served by enlightened bureaucrats - it must not be forgotten that it is part of the role of lawyers to seek out those conditions which permit a truly legal humanism of a Japanese nature to be affirmed, take root, and be strengthened. Otherwise the law may always remain bare, like the backdrop of a drama entitled "the State governed by law", in which the actors spend their time talking idly about this mysterious state, while waiting for a true Godot.