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Sheathing the Sword of Justice in Japan: An Essay on Law Without Sanctions

Law in Japan, writes Kawashima Takeyoshi, is like an heirloom samurai sword; it is to be treasured but not used.[1] The simile is apt. No industrial nation has weaker formal law enforcement. Sanctions taken for granted in the West, in Europe as well as in the United States, either do not exist or remain unused in Japan. Although the contrast between Japan and the United States is the most stark, because differences between the two often reflect features unique to the United States rather than Japan, the contrast with Germany is even more instructive. What is important, however, is not simply the comparison itself but the consequences that the differences suggest.

At the outset several general propositions should be stated. It should be emphasized, first, that no set of formal legal sanctions, short perhaps of a regime of absolute terror, can be perfectly effective in any society. All legal orders rely predominately on voluntary compliance with the law. The absence of effective sanctions and the consequent need to rely totally on voluntary conformity with legal norms reduce, however, the legal order to a purely customary one in which community consensus controls. Legal rules and standards remain vital or change and die out depending upon the aggregate effect of individual whim or the efficacy of nonlegal customary or "social" sanctions as a substitute. Moreover, the range of formal sanctions available in any legal order is quite limited. The catalogue of rewards and punishments at the disposal of the formal institutions

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1. Kawashima Takeyoshi, *Nihonjin no hōishiki* (Legal consciousness of the Japanese) (Iwanami, 1967), p. 47.

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of a legal system is short. There is little besides "life, liberty and property" against which they can be invoked. Only the infliction of physical pain (or denial of its relief) can be added as a theoretical possibility, then excluded in most Western-based legal systems as a matter of public policy. In no legal system are the available legal sanctions completely effective. All are subject to significant limitations.

Finally, again at least in Western-based legal systems, the formal categories of law relate only in part and imperfectly to particular sanctions available and their severity. We speak of civil versus criminal versus administrative sanctions to denote both the persons—private individuals or the government agencies as private litigants, police and prosecutors, and administative officials—who possess the discretion to activate and control the course of the sanctioning process as well as the variety of sanctions (including remedies) that can be imposed—attachment of property, imposition of a fine, or imprisonment. The effect is to give those who exercise such discretion the ability to disregard and not enforce legal norms they do not accept. On their attitudes and views depends the efficacy of legal rules, the living law.

I. The Lack of Formal Sanctions

Few meaningful sanctions or effective legal remedies exist at all in Japanese law. Although other jurisdictions share some of the limitations of Japanese law, none share so comprehensive a failure to provide effective sanctions or remedies for violation of legal norms. In civil cases in Japan, as elsewhere, the ultimate formal sanction is to attach property. The propertyless or those who are able to hide what they have—for instance, by false registration of land—are thus beyond the law's reach. Even those with accessible assets, however, are not easily subjected to legal compulsion. For example: in Japan as in other civil law jurisdictions, such as Germany and France, the general remedy for a breach of contract is a court order to the breaching party requiring performance. In the case of a sale of personal property, say a painting, should the seller violate his duty to deliver the painting, in theory the buyer can obtain a court decree ordering the seller to hand it over. Only if the buyer, as plaintiff, knows where the painting is actually located and can direct the bailiff there without interference can the court order be effectively enforced. Otherwise, the buyer is able only to recover damages to compensate for the monetary loss, which must be proved and can be

enforced only if the seller has property that can be attached. A sale of land is easier to enforce. All land is registered and a court judgment effecting the prerequisites for a registry transfer of title is possible. To force an obstinate seller off the land even after title has been transferred can be a costly and time-consuming effort. What on the surface appears to be an effective remedy may in reality be of little avail.

Nor do the government and other public authorities in Japan have more effective means to enforce the law. Several years ago at a dinner in Toyko with several former students and other University of Washington graduates, I happened to sit next to a Japanese lawyer whose father is a prominent psychiatrist. Our conversation turned to the topic of his father's practice; he mentioned that it was tax audit time and thus his father was exceptionally busy. "I suppose," I said, "that quite a few taxpayers seek psychiatric relief." "Oh no," he quickly responded. "Psychiatrists are busy with tax collectors not taxpayers." My surprise showed, so he went on to explain. In the case of small firms, more often those that belong to trade associations affiliated with one of the opposition parties, especially the Communist Party; tax auditors are frequently barred from even entering the premises by members of the association and others who surround the building and block the entrances. Incredulous I asked, "What do the auditors do?" "See their psychiatrists," he replied.

The civil process offers little help. Civil fines may be provided as a sanction for violation of an administrative order or regulation, but collection will depend upon attachment or registry transfers—in other words, the private party's capacity to pay or willingness to abide by the court order despite refusal to obey the agency order.

In contrast, in the United States and most other common law jurisdictions, the courts' contempt powers make available in the civil process both the threat of prompt imposition of a fine of unlimited amount or imprisonment for an indefinite term, or both. By failing to obey a court order to deliver a painting, vacate land, or to obey an administrative order, the defendant faces the possibility that he will be fined whatever amount the judge believes will provide sufficient compulsion, or that he will be jailed until he complies. Although in many cases judges may be reluctant to resort to contempt, its threat is ever present, and its importance should not be underestimated. Judicially enforced subpoenas to compel disclosure of documents or other information provide only one of many examples of the critical role contempt plays in American public law

enforcement. Moreover, since agencies do not have contempt powers under American law, the courts perform an important supplementary role in administrative law enforcement. An agency anticipating that a party may disobey an agency order will seek an enforcing court order. Both orders will be identical in legal effect, both requiring the same conduct and both equally binding as a matter of law. The only difference is that the court order is backed by contempt. The importance of contempt is thus illustrated each time an American agency seeks a judicial enforcement order. Lacking contempt powers, Japanese courts have no role in civil enforcement of administrative regulations except in terms of appeals from agency actions. One consequence is that the Japanese judiciary tends to be less sympathetic to the government.

Judicial contempt is also unknown in other continental legal systems. It is viewed as too dangerous a power to place in the hands of the least accountable branch of government and as inconsistent with fundamental notions regarding the need for certain and legislatively-fixed penalties.[2] Nonetheless, German law at least has an analog to contempt. Under the German Code of Civil Procedure,[3] court injunctions can be enforced either through a fine up to 500,000 DM (approximately $250,000) or confinement up to two years. Moreover, administrative officials have the authority in most instances to enforce administrative orders by levying fines or attaching property without resort to the civil process or criminal proceedings.[4] There are no similar provisions in Japanese law.

Until the Allied Occupation and the postwar reform of Japan's legal system, administrative officials in Japan could resort to an extensive variety of sanctions under special legislation,[5] repealed in 1947 without effective substitute.[6] Moreover, the police had broad jurisdiction to adjudicate cases involving infractions defined as

2. See, e.g., Wolfgang Düren, *Contempt: Das Rechtinstitute des Contempt in der politischen Realität der USA* (Munich: de Smet, 1974). Also, *Grundgesetz für die Bundesrepublik Deutschland* (Basic law for the Federal Republic of Germany), 23 May 1949 (BGBI. S. 1) article 103.

3. *Zivilprozeß Ordnung* (Code of Civil Procedure), 30 January 1877 (RGBI. S. 83) as amended, article 890.

4. See Ernst Forsthoff, *Lehrbuch des Verwaltungsrechts* (Munich: G. H. Beck, 10th ed., 1973), pp. 290–296.

5. *Gyosei shikō hō* (Administrative enforcement law), Law No. 84, 1900.

6. The *Gyōsei daishikō hō* (Administrative execution by proxy law), Law No. 43, 1948, permits execution against property but does not authorize taking persons into custody. For a brief discussion in English on the background to this reform, see Government Section, SCAP, *Political Reorientation of Japan* (Washington D.C.,

"police offenses."[7] Today, however, the Japanese must rely almost completely on criminal prosecution for enforcement of court orders and of almost all public law. Most Japanese regulatory legislation, for example, includes provisions at the end for criminal penalties, both fines and imprisonment. These may appear to be adequate, yet in reality, they are rarely invoked. In over thirty years of antitrust enforcement, for example, there have been only six criminal prosecutions. Three were begun in 1949. The successful prosecution on September 26, 1980 of Japanese oil companies and their executives for illegal price-fixing in the Tokyo High Court[8] was thus an extraordinary event. One culls the statistics and records in vain to find more than a handful of prosecutions under other statutes. This dearth is only in part explained by limitations in applying criminal sanctions to economic misconduct found in most other jurisdictions or institutional barriers to effective enforcement, described below; it is also a product of the inherent incapacity of the Japanese legal system to rely effectively on criminal sanctions.

Confession, repentance, and absolution provide the underlying theme of the Japanese criminal process. At every stage, from initial police investigation through formal proceedings, an individual suspected of criminal conduct gains by confessing, apologizing, and throwing himself upon the mercy of the authorities.

The experience of a long-time American resident of Tokyo is illustrative. His *bessō* or vacation home was destroyed by arson late one Sunday evening an hour or two after he and his family had left to return to the city. Learning that a few weeks earlier he had increased the insurance on the house, the local police asked him to meet with them the next day. Upon his arrival the police ushered him into a room reminiscent of an early James Cagney film—small table, uncomfortable wooden chair for him on one side, two or three policemen sitting or standing at ease on the other, glaring light overhead. What made the scene uniquely Japanese were the three portraits, at either side and facing him but tilted slightly to insure direct vision from where he sat. They were of Buddha, the Emperor, and Christ.

1952), pp. 226–227. See also Hosokawa Toshihiko, *Kōhōjō no saimushikō to kyōsei shikō* (Enforcement of public law duties and execution), *Minshōhō Zasshi,* Vol. 82, 1980, pp. 641–660.

7. See Walter L. Ames, *Police and Community in Japan* (Berkeley: University of California Press, 1981), pp. 9–11.

8. Japan v. Sekiyū renmei *et al.*, Case No. 2 (Wo) 1974 (Tokyo High Court, Sept. 26, 1980). All jail sentences were suspended. The defendants were acquitted in the companion case on the output restriction charge for lack of criminal intent.

Then in a somber but pleading voice the principal investigator said: "Now, Mr. —, why don't you just confess."

Such incidents illustrate the significance attached by the Japanese authorities to confession and apology.[9] I should note quickly that the confession does not provide a shortcut to conviction as in the United States. It does not save the police and prosecutor the time and effort of obtaining other evidence to prove guilt. There is no guilty plea in criminal cases in Japan; there is no plea bargaining. In every case brought, the prosecution must prove that a violation was committed by the defendant. A summary procedure that avoids oral hearings and defense is available and much used at the discretion of the prosecutor if there is confession, but for each case that goes to court the prosecutor must marshal evidence other than the confession to prove the accused guilty.

Held out to each suspect, however, is the promise of absolution if he does confess and apologize, and Japanese authorities respond in predictable fashion. Under article 248 of the postwar Code of Criminal Procedure (article 279 of the prewar code) the procurator may suspend prosecution after taking into consideration three factors: (1) the age, character, and environment of the offender, (2) the circumstances and gravity of the offense, and (3) the circumstances following the offense. The first two do not necessarily surprise us. To treat leniently a case involving a minor first offense would not be unusual in any legal system. In Japan, however, the third is equally, if not more, important. For the Japanese prosecutor the accused's attitude—in other words his willingness to confess and apologize—is critical to the decision whether to prosecute or not. In 1972, 94 per cent of all persons formally charged with a crime admitted guilt,[10] and in approximately 33 per cent of all cases involving non-traffic offenses prosecution was suspended.[11]

Judges repeat the pattern. The rate of conviction in the cases that do go to trial is currently 99.99 per cent.[12] In less than 3 per cent,

9. The best account of the role of confession and apology in the Japanese criminal process in English is in David H. Bayley, *Forces of Order: Police Behavior in Japan and the United States* (Berkeley: University of California Press, 1976), pp. 134–159.

10. *Ibid.*, p. 147.

11. Ministry of Justice of Japan, *1978 Summary of White Paper on Crime* (in English) (1978), p. 26. The prewar pattern is basically the same. Out of 228,693 from 1912–1916, 73,864 were suspended; from 1917–1921, 84,618 out of 307,035; from 1922–26, 105,575 out of 330,539; from 1927–1931, 150,562 out of 402,339. Richard Brever, *Die Stellung der Staatsanwaltschaft in Japan* (Berlin: Junker & Dünnhaupt, 1940), p. 125.

12. *1978 Summary of White Paper on Crime*, p. 23.

however, do the courts impose a jail sentence; and 87 per cent of these are terms of less than 3 years.[13] Moreover, the courts regularly suspend more than two-thirds of all jail sentences. In 88 per cent of all cases, all with confessions, the prosecution availed itself of the summary procedures described above.[14] The penalty in such instances is restricted by law to 200,000 yen.[15] In 65 per cent of these cases, however, the fines were less than 50,000 yen.[16] Consequently, the overwhelming majority of offenders in Japan confess and are either not prosecuted or are penalized by a fine of less than 250 U.S. dollars.

The determinative factor for the judge, as for the prosecutor, in deciding the sentence to impose or whether to suspend sentence is the attitude of the offender. Confession is demanded and repentance rewarded. Japanese judges tell of a veteran of the bench who refused to permit convicted defendants to leave the courtroom even after sentencing until they had confessed and apologized. A primary purpose of trials in Japan, Japanese judges emphasize, is to correct behavior, not to punish. Nor, one might infer from the conviction rates, to determine guilt.

While the overall leniency of the Japanese criminal process for all categories of crime—assuming confession and apology—must be kept in mind, it would be a mistake to conclude that all offenders are treated alike. Although the differences are not as great in terms of sentencing, rates of prosecution differ widely depending upon the offense involved. For example, in 1968, prosecutors suspended 87.1 per cent of all cases involving abuse of authority by public officials, 81.2 per cent for negligent injury and manslaughter, 63 per cent for robbery, 52.4 per cent for larceny, 26 per cent for arson, 22.5 per cent for bodily injury, 8.4 per cent for homicide, and 6.9 per cent for traffic law violations.[17] These percentages are representative for other years as well.[18] While the average rate of prosecution for statutory crimes (conduct made criminal under various statutes

13. *Ibid.*, p. 24.

14. *Crime Prevention and Control National Statement: Japan* (Fifth United Nations Congress on The Prevention of Crime and Treatment of Offenders, 1975), p. 48.

15. Law for Temporary Measures Concerning Fine (*Bakkin to rinji sotchi hō*), Law No. 251, 1948, article 7.

16. *Crime Prevention and Control National Statement*, p. 48.

17. S. Dando, "System of Discretionary Prosecution in Japan," *American Journal of Comparative Law*, Vol. 18 (1970), p. 525.

18. See *Hōmusho hōmu sōgo kenkyūsho, Shōwa 55 nenpan hanzai hakusho* (1980 White paper on crime) (Tokyo 1980), pp. 140–143.

excluding the criminal code) is roughly 33 per cent, in 1977, 71 per cent of all pollution offenses; 66 per cent of bribery cases and 97.3 per cent of road traffic violations were prosecuted.[19] As noted above, the ultimate sentencing does not show this variance. In 93.2 per cent of all bribery cases, for instance, the court suspended sentences imposed by law.[20]

The criminal process also operates to provide compensation for victims. In this sense, there is an additional informal sanction. One indication of true repentance is the defendant's attempt to make matters right with the victim. Typically a monetary payment is made in return for a letter absolving the offender of further blame. Nothing in Japanese law requires such action, but it is a factor to show that an apology is real.[21] The sign of repentance remains the critical factor.

A Japanese attorney recently related to my law class at the University of Washington his experience in defending two American servicemen accused of raping a Japanese woman. She had charged the two with the crime in an affidavit to the prosecutor, but then left Japan with a third U.S. soldier. The affidavit was the sole basis of prosecution. The attorney advised the two defendants first to obtain a letter from the woman stating that she had been fully compensated and had absolved them completely. As advised the accused paid her 1,000 dollars and obtained the letter. The lawyer then argued that to convict the accused solely on the basis of the affidavit constituted an unconstitutional denial of a fair trial since they had had no opportunity to cross-examine the witness. After listening attentively to the argument, the judge leaned forward and asked the soldiers if they had anything to say. "We are not guilty, your honor," was the immediate reply. The lawyer cringed. Although few Japanese attorneys are as knowledgable as he about American law, it had not even occurred to him that the defendants might not offer apologies. The time and money spent on the letter were wasted. The judge sentenced the two soldiers to the maximum term of imprisonment, not suspended. More telling, Japanese students need only hear what the servicemen said to the judge to react. They know what happened next. Only Americans have to be told.

19. *Ibid.*, pp. 11, 12, and 19.

20. *Ibid.*, p. 12.

21. The idea of compensation is not unique to Japanese law; see, e.g., sections 437 and 438 of the New South Wales Crimes Act of 1900. But we tend to codify such systems and make compensation legally mandatory, a telling distinction as shown above.

The success of the Japanese system of criminal justice in terms of correction is unquestioned. Crime rates in all categories except for traffic violations are far lower than any other industrial nation and are decreasing. (In all others they are rising.) In only one respect do the Japanese and U.S. statistics coincide. The rate of recidivism is steady in Japan and, as a ratio of persons who commit further crimes after release from prison, is almost the same as in the United States.[22] The difference between the two countries is that less than two per cent of all those convicted of a crime ever serve a jail sentence in Japan as compared with more than 45 per cent in the United States. As a Japanese prosecutor told a prominent Philadelphian investigating Tokyo's low crime rate, "We do not believe in imprisonment; jails are the schools for crime."

In summary, the few formal sanctions that do exist in Japan are rarely used. The lack of sanctions in the civil and administrative process is thus compounded by the disregard of those that are available in the criminal process.

II. Institutional Barriers to Effective Law Enforcement

Added to the lack of formal sanctions, however, are a variety of institutional barriers that diminish the efficacy of those that do exist. In all but a few cases the imposition of sanctions is a judicial task. An obstructive debtor can, in most instances, force formal adjudication of even the strongest claim. Yet even to enforce instruments, such as notarial deeds, that do not require a preliminary judgment or to collect a court award or an administrative fine may require further judicial assistance. No court can fulfill such tasks adequately unless it is accessible and can act promptly and efficiently.

On these counts the state of the judiciary in Japan is woeful indeed. Governmentally imposed restrictions limit total entry into the legal profession—private attorneys, government lawyers and judges—to less than 500 persons a year. As a result Japan has fewer lawyers and judges per capita today than it did in the mid-1920s. The number of judges has remained almost constant since 1890. Today there is approximately one judge for every 60,000 persons in Japan as compared to one judge for every 22,000 persons in 1890.[23] This is not, I must emphasize, the result of any lack of demand. Japanese

22. Bayley, p. 140.

23. J. O. Haley, "The Myth of the Reluctant Litigant," *Journal of Japanese Studies*, Vol. 4, No. 2 (1978), p. 382.

judges handle caseloads that would stagger an American judge—nearly double the number of cases decided by judges in "litigious" California and five times that of the Federal bench.[24]

Often overlooked is a similar lack of government lawyers—or procurators. All cases—civil, criminal, or administrative—in which the government of Japan or any public agency is a party requires involvement if not direct representation by the procuracy. (In the case of most minor local government cases, private attorneys are retained.) Yet there are only about 2,000 procurators. For purposes of comparison, Los Angeles County alone has more than 400 lawyers in its district attorney's office.

The comparison with Germany is even more revealing. With less than two-thirds of Japan's population, Germany has nearly six times as many judges as Japan (approximately 15,500 to 2,700) and the ratio of judges to the population has steadily decreased: from one judge to 6,080 persons in 1911, to one judge to 4,840 persons in 1951, and to one judge to 3,963 persons in 1979. There are also nearly three times as many private attorneys (approximately 28,800 to 10,000) in Germany today as in Japan, and a third more procurators (approximately 3,330 to 2,100).[25] It should be noted, however, that the German procurator (*Staatsanwalt*) handles only criminal cases. In administrative and civil cases the government is represented by private attorneys.

Aside from the shortage of judges, lawyers, and procurators, there are other obstacles to prompt and efficient justice in Japan. The continental system of disconnected hearings, trials *de novo* upon first appeal, the appeals of right to the Supreme Court rather than by court discretion, filing fees, bond posting requirements, stringent requirements of evidentiary proof, the unwillingness of judges to discipline lawyers for unnecessary delays—all combine to foreclose the courts as a viable means of obtaining relief. "The litigation of a small claim," say two of Japan's leading civil procedure scholars, "tends to be an economic disaster."[26] What is remarkable about the Japanese legal system is not that people are reluctant to sue but that they sue at all. Despite these hurdles, the demand for legal relief, for sanctions, strains the legal resources of Japan to their limits.

24. *Ibid.*, p. 381.

25. *Statisches Jahrbuch für die Bundesrepublik Deutschland,* 1959–1980; *Statisches Jahrbuch für die Deutsche Reich,* 1971, p. 336.

26. T. Kojima and Y. Taniguchi, "Access to Justice in Japan," in Cappelletti and Garth (eds.), *Access to Justice* (The Hague: Sijthoff, 1978), p. 692.

III. Substitute Sanctions

The dearth of formal sanctions is balanced by an enduring set of informal, extralegal means of compulsion. The most persuasive is "loss of face" or damaged reputation. Japanese explaining why the apology works as a means of inducing conforming behavior, almost invariably say that to apologize in public carries with it the stigma of loss of reputation.

Examples of threats to reputation as an effective sanction abound. Antitrust enforcement provides one example. Firms will agree to Japanese Fair Trade Commission recommendations tacitly admitting their violation and subjecting themselves to possible damage actions, rather than prolonging the case because of fears of a damaged company reputation. This, however, may reflect more the weakness of the formal sanction—no damage action has been successful—than the strength of adverse publicity. A better example is found in the pollution and drug cases, where the primary hurdle delaying settlement was the plaintiffs' uncompromising demand for public apologies by the presidents of the firms involved. It was far easier apparently to reach agreement on the amount of damages than for the defendants to comply with such a demand. In the SMON litigation,[27] the one case involving a foreign party, I am told by the attorneys that the officers of the company were incredulous at this attitude by the Japanese plaintiffs and defendants. It was as if the amount of damages—over 100 million U.S. dollars—was of no consequence compared with the apology.

Adverse publicity is a tool of law enforcement in most countries. The threat of public condemnation is often the most effective means to force compliance that is available to an administrative agency. "Jaw-boning" by the President of the United States to keep a firm from raising prices, or labor from demanding wages in excess of a

27. The SMON (Subacute-Myelo-Optics Neuropathy) cases involved a nationwide series of suits against one foreign and two Japanese pharmaceutical companies and the Ministry of Health and Welfare for injuries attributed to the drug dioquinol. The principal reported cases include the following: Yagi v. Japan, Hanrei Jihō (No. 879) 26 (Kanazawa Dt. Ct., Mar. 1, 1978); Ōyama v. Japan, Hanrei Jihō (No. 899) 48 (Tokyo Dt. Ct., Aug. 3, 1978); Ochi v. Japan, Hanrei Jihō (No. 910) 33 (Fukuoka Dt. Ct., Nov. 14, 1978); Aoyama v. Japan, Hanrei Jihō (No. 920) 19 (Hiroshima Dt. Ct., Feb. 22, 1979); Ishikawa v. Japan, Hanrei Jihō (No. 950) 53 (Sapporo Dt. Ct., April 10, 1979); Iwada v. Japan, Hanrei Jihō (No. 950) 87 (Kyoto Dt. Ct., June 2, 1979); Ōki v. Japan, Hanrei Jihō (No. 950) 199 (Shizuoka Dt. Ct., June 19, 1979); Sasaki v. Japan, Hanrei Jihō (No. 950) 241 (Osaka Dt. Ct., June 31, 1979); Arai v. Japan, Hanrei Jihō (No. 950) 305 (Maebashi Dt. Ct., Aug. 21, 1979).

benchmark figure, is often little more than an exercise in the persuasive effect of adverse publicity. Officials enforcing antitrust laws in both the United States and Germany agree that adverse publicity is their most effective sanction.[28] Yet upon close scrutiny, where effective, a tangible financial loss rather than mere reputation is usually at stake. It is easy to understand why the threat by the Food and Drug Administration or the Department of Agriculture to release a report that a certain drug or food product may be hazardous is apt to cause consternation and a rapid, positive response by the manufacturers. Reputation is important because its loss involves other types of deprivation. Although the same argument may be said to apply to Japan, the role of reputation in Japan appears to be a more subtle and complex matter.

IV. The Social Impact of Sanctionless Law

Few of the many enigmas of Japan are as acute as the paradox it presents of a society so free from crime, rule-abiding and cohesive with such overt thuggery, widespread flouting of law, and virulent conflict. Although not the complete or even certain answer, such riddles begin to unravel by viewing Japan as a society of law without sanctions.

A legal order without effective formal sanctions need not grind to a halt. Legislators, bureaucrats, and judges may continue to articulate and apply, and thus legitimate, new rules and standards of conduct. The norms thus created and legitimized may have significant impact. To the extent no legal sanctions apply, however, their validity will depend upon consensus and thus, as "living" law, become nearly indistinguishable from nonlegal or customary norms. As to those norms the community accepts as necessary or proper, the absence of legal sanctions is likely to produce extralegal substitutes and to reinforce the viability of preexisting means of coercing behavior. Thus the legal order relies increasingly upon community consensus and the viability of the sanctions the community already possesses. The evolution of Japanese law exemplifies this process.

The coincidence of Neo-Confucian values and the demands of

28. Observation to author by Professor Thomas C. Armitage, former director, Seattle Regional Office, Federal Trade Commission. On the German experience, see comments by Helmut Gutzler, former vice-president, Federal Cartel Office, in H. Gutzler, "Die Ermittlungstätigkeit des Bundeskartellamtes," *Grundlagen der Kriminalität*, Vol. 13, No. 1 (1974), p. 529.

polity ensured that Tokugawa justice remained as inaccessible as possible. The fragile equilibrium of the early Tokugawa settlement made indirect rule and local autonomy a necessity. Each unit of the society, the lesser communities and the whole—whether han, village, guild, or family—were left alone so long as taxes were paid and outward order maintained. This was in stark contrast with Angevin England where the monarchy achieved dominion by extending the king's justice, through greater access to the king's courts and by fashioning new and more effective remedies. In England the consequence was a common law for the nation and a vigorous judiciary as well as a central monarchy. In Japan, community autonomy and weak government remained hidden behind a veil of ritualized deference to authority.

It is unlikely that the draconian penalties that adorned the *ritsuryō* codes and that appalled nineteenth-century Europeans were ever as important as the simple group sanction of ostracism and expulsion, especially when joined to the notion of vicarious liability. Social control develops new dimensions when landlords are made responsible for the conduct of their tenants, community leaders for the activities of its members, or parents for the conduct of their children, and when expulsion from the community and its resources is an ever present threat.

The absence of formal sanctions in modern Japanese law has had direct impact on both the retention of these earlier forms of social control as well as the creation of new ones. Boycotts, refusals to deal, and other forms of modern *murahachibu* are among the most prevalent means by which social order is maintained. The Japanese financial clearinghouse, for example, has a rule that no bank is allowed to transact business of any type with any individual or firm that defaults twice on promissory notes or checks. Since no firm could long stay in business without at least a bank account, promissory notes in Japan are almost as secure as cash (and indeed are used as collateral).

The combination of refusals to deal and other forms of ostracism with vicarious liability produces an even more effective deterrent to nonconformity. One of the first graduates of a new university to be allowed even to apply for employment with a large Japanese manufacturer turned down an offer by a foreign firm, that in monetary terms amounted to more than he could ever expect to make, at least in part because he feared that such a display of "disloyalty" to the Japanese firm would result in its refusal to hire another graduate of that university.

Community or group cohesion is inexorably intertwined with such informal sanctions. Ostracism is not effective in a mobile society in which the benefits of membership in one group can be easily had by independence or by joining another. However, where one of the primary benefits of the community is its capacity to maintain stability and order, its ability to sanction reinforces its cohesion. Independence becomes a risky alternative and access to other groups becomes more difficult. Clientage too is the product of a demand for security by those who are unable to fend for themselves and whom the general community is unable to protect. In any society where the state fails to secure its citizens against lawlessness by those who exercise physical, economic, and social powers, there may be no choice but to attach oneself to those who can. The inability of the formal legal system in Japan to provide effective relief, to impose meaningful sanctions, thus tends to buttress the cohesion of groups and the lesser communities of Japanese society and to contribute to the endurance of vertical, patron-client relationships. The use of private mediators, the procuracy, and police in dispute settlement; the role of the *yakuza* and organized crime; the reliance on banks and other large enterprises; all fit this pattern of conduct.

Witness, for example, Japanese approaches to contracts. The literature is replete with descriptions of the Japanese penchant for informal, ambiguously worded agreements in which the parties rely more on "goodwill" and personal relations than carefully drafted documents. This is precisely the behavior one would expect where the parties anticipate that legal enforcement of the contract may be of no avail. Without legal sanctions, the words in a contract are just words, no matter how carefully drawn. Although the party whose bargaining power remains strong perhaps need not be concerned, the weaker party has little choice but to rely on the "fairness" or "benevolence" of the other. Thus both sides—strong and weak—come to the contract with the same conclusion: if the agreement is reduced to writing at all, a vaguely worded document will suffice. On the other hand, when dealing with a foreign enterprise that can be anticipated to enforce the contract in court, Japanese firms negotiate and draft with extreme care. They will make certain that every "t" is crossed and every "i" is dotted. Similarly, a Japanese firm will assiduously abide by adverse commitments to its contract partners in cases where sanctions—either informal, arising out of either their relative bargaining positions or the promise of an on-going relationship, or formal, such as the likelihood of legal action—are strong.

Yet where sanctions of either sort are weak, the same firm is just as apt to disregard indisputable contractual promises.

Nor is the Japanese government immune from the effects of weak sanctions. The inability of government agencies to enforce the law by formal means forces reliance on an imperfect combination of consensus, voluntary compliance and, in some but not all instances, a variety of indirect carrots and sticks. In some contexts administrative law enforcement can be very effective, giving the impression of a monolithic and powerful bureaucracy that needs merely suggest to achieve obedience. Upon closer examination, however, few examples of such power exist apart from customs and immigration controls, areas in which government officials have little difficulty in obtaining actual possession of persons and property. (Consequently, government regulation is relatively effective in the areas of foreign trade, foreign enterprise, and immigration, hiding from most foreigners the inherent weakness of Japanese government over domestic conduct.) Administrative guidance is thus exemplary as a process of negotiation and compromise to achieve voluntary compliance dictated by government weakness rather than strength.

Trying to explain the difficulties of collecting debts in Japan to an exasperated foreign client, who wanted to recover the sales price of goods sold to a small Japanese firm, a Japanese attorney finally said, "You should just write it off. The fellow was untrustworthy and that's that." A Japanese banker, asked about the problems the bank had faced in foreclosing security interests, retorted, "We don't lend to people who default."

Such incidents illustrate the nexus between reputation and weak law enforcement. When sellers and lenders cannot expect to obtain relief in the event of default, either they do not sell on credit or make loans, or they take great care to ensure that they are not selling or lending to "people who default." In other words, one's reputation for trustworthiness can become a necessity of life. Furthermore, where the lesser communities and patrons provide the most important substitutes for formal sanctions, one's reputation will depend in part on affiliations and sponsorship. Thus in Japan, as most foreign businessmen and scholars know from personal experience, introductions are essential. Even law firms regularly, if politely, turn away potential clients who do not have proper introductions. Businessmen, government officials, libraries, and schools are often inaccessible without introductions.

Implied in such practice is a type of informal suretyship, that is, the reputation (but not formal legal liability) of the group and patron

depends in part on the conduct of the member and the client. In fact, few practices are more ubiquitous in Japan than the use of such suretyship. Letters of guarantee are unusually common as the prerequisite for an extraordinary variety of activities: immigration, loans, employment, and leases. One can hardly enter a legal relation in any context without having someone as guarantor. Such contracts have little legal significance despite (and to some extent because) of their breadth. Few would even think of enforcing most of these guarantees in court. They are demanded instead on the premise that the loss of reputation the guarantor suffers as a result of any misconduct of the person vouched for will itself restrain if not prevent such misconduct. In other words, reputation is vicarious. The conduct and reputation of the members of the group or the client affect that of the group or patron. Thus the benefits of group membership and clientage come to depend in part on the capacity of the group (including the family in extreme cases) or patron to deny access or expel those who damage reputation. Again the pattern repeats: such needs reinforce the cohesion of the group and the power of the patron and thus the effectiveness of the informal sanctions they wield.

It should be apparent that in this process the concern of the group or patron focuses on loss of reputation, not the conduct itself. To the extent that the group accepts the norm and wishes to enforce it for its own merits, there is no need to be concerned with reputation. To protect against loss of reputation, the group must enforce norms that other groups or the community at large see as legitimate and important regardless of its own attitude. As a result, it is not the misdeed that is condemnable but the loss of reputation resulting from outside knowledge of the misdeed. Consequently, one discovers in Japan that failure to abide by the law may be known to, but not condemned by, the group. Yet as soon as this becomes public, group condemnation follows. One result is a pattern of pervasive nonconformity masked by outward conformity. Legal rules may be outrageously flouted so long as all appear to be punctilious in their observance. Another result, however, is the capacity of formal legal norms to become effective without necessarily full consensus. To the extent that private litigation and especially the criminal process disclose violations of the law and reputation suffers, this threat may produce a positive reaction.

In conclusion, Japan is the paradigm of a society of law without sanctions. Features of Japanese society, both good and bad, that fascinate and intrigue, that seem so uniquely Japanese, can in the

end be explained by a very basic although longstanding fact: the inability of the formal legal system to provide effective sanctions. It is, I suggest, this fact that explains the ultimate enigma of Japan—its capacity to preserve outward cohesion and tradition within the context of rapid economic and technological change. The institutionalized legal system enables Japan to create new norms, to meet new demands, but their viability requires consensus and a process for sanctioning that continually reinforce the existing social structure. A final caveat: this process is not itself inexorable and unchangeable. To strengthen legal sanctions, to make the courts more efficient and judicial remedies more effective, or by any means to broaden the enforcement of law through the legal process, would inevitably corrode the social structure that now exists. What the Tokugawa shogunate did for Japan, a Henry II could undo.

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