JAPAN & THE RULE OF LAW

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INTRODUCTION

Japan's code-based legal system is primarily modeled on the civil laws of Germany and France. The Constitution, also, is the product of western influence, namely that of the United States which acted as a bearer of the values of the Allied Forces at the end of World War II. These legislative instruments form the nation's "written" or "received" law and purport to provide a consistent normative structure of all- inclusive rules. Under Japanese law the provisions of the Constitution of 1947 are inviolable even by legislative means. To this end, the courts are empowered to scrutinize the constitutionality of all laws, ordinances and administrative decrees. The rule of law is fundamental to Japan's (written) legal system.

In addition to the written or "formal" law, there is a body of disparate unwritten extra-judicial norms, or "living" law. Living law includes those long-standing practices, customs and informal social norms representative of Japan's indigenous legal tradition. It is the operation and practical application of living law by government authorities, the courts and Japanese citizens alike, which creates a gap between the law as it is written, and the way that it is practiced and enforced on a day to day basis. The 'marriage' between indigenous law on the one hand, and Japan's received law and western derived jurisprudence on the other, is in many ways uneasy.

Indigenous legal norms may be characterized as influencing the overall effectiveness of received law by "supplementing, opposing, modifying or even undermining" it.[1] Two examples that demonstrate this characterization are the practice of administrative guidance (or gyousei shidou) and the enforcement of Japan's

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1. Masaji Chiba, *Legal Pluralism: Toward a General Theory Through Japanese Legal Culture* 54 (Tokai Univ. Press 1989).

criminal law and procedure. Although similar examples may be found in legal systems throughout the world, the more pronounced institutionalized application of indigenous law as well as its acceptance by the judiciary, has led academics to criticize the Japanese as failing to uphold the rule of law.[2] Such criticisms are refutable because they essentially involve the imposition of a western concept to judge a legal system which, despite resembling others in the west, operates within a framework of pre-existing indigenous laws. In short, the use of the rule of law as an apparatus of evaluation denies the importance and influence of the distinctly non-western environment within which Japan's current legal system operates.

EXAMPLE ONE: ADMINISTRATIVE GUIDANCE

The term gyousei shidou is not an official or scholarly term.[3] It is used in business and political circles and cannot be found expressly mentioned in any statutes.[4] Thus, there is no precise definition in which the exact connotation of gyousei shidou can be easily expressed.[5] Hiroshi Shiono[6] defines the concept as:

> ". . .administrative actions taken by administrative organs, although without legal binding force, that are intended to influence specific actions of other parties. . .in order to realise an administrative aim."

Administrative guidance takes the form of directions (shiji), requests (youbou), warnings (keikoku), suggestions (kankoku) and encouragement (kanshou).[7] The ability of a ministry or government agency to issue these forms of guidance is sometimes mentioned in statutes, but most frequently it is not. Some examples of legislation that *do* provide for bureaucratic intervention through gyousei shidou are the Marine Transport Law, the Petroleum Business Law, and the Architects' Law.[8] In none of these acts, however, are the words "gyousei shidou" actually mentioned.

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2. Meryll Dean, *Administrative guidance in Japanese law: A Threat to the Rule of Law*, 1991 J. BUS. L., 398-404.

3. Yoriaki Narita, *Administrative Guidance*, 2 LAW IN JAPAN: AN ANNUAL 45 (ed., 1968).

4. Mitsuo Matsushita, Administrative Guidance and Economic Regulation in Japan, presented at *The Asian Studies Association of Australia Third National Conference* Brisbane (1980).

5. Narita, *supra* note 3, at 45.

6. Hiroshi Shiono, *Administrative Guidance, in* PUBLIC ADMINISTRATION IN JAPAN 204 (Kiyoaki Tsuji, ed., 1984).

7. Narita, *supra* note 3 at 47.

8. The Marine Transport Law (Law No. 187, 1949); art. 3, 10 The Petroleum Business Law (Law No. 128, 1962); The Architects' Law (Law No. 202, 1950).

The lack of official provision for the bureaucrats' use of administrative guidance has meant that it is considered not to be legally binding. On this basis, compliance with the guidance is explained as voluntary co-operation, and if a party does not comply there is (allegedly) no sanction on which the bureaucrats can rely. However, as several of the examples below illustrate, in everyday practice parties are often coerced to comply with administrative guidance.

There are three basic types of gyousei shidou - reconciliatory, promotional and regulatory.[9] The most frequently used and important type of guidance, at least in terms of controversy and attention from scholars, is regulatory administrative guidance.[10] Such guidance aims at 'persuading' parties to act or refrain from acting when the government agency deems it not to be in the interests of the party concerned, nor in those of the public at large.[11]

Regulatory administrative guidance may be issued at different levels, usually to companies and industries, and occasionally to individuals. The most common examples of regulatory administrative guidance are incidents between government agencies and private corporate bodies. One of the most famous of these is the Sumitomo Metals incident. The ordeal began in an environment where the worldwide demand for steel had slumped and several Japanese steel companies were facing bankruptcy. In July of 1965 the Ministry of International Trade and Industry (MITI) and the Iron and Steel Federation established an informal production cartel which all of the Federation's member companies were directed to join. They successfully convinced the Fair Trade Commission that such actions did not breach the Antimonopoly Law.

Sumitomo became a member of this cartel but later, in November of 1965, decided that it would leave the cartel and not comply with MITI's guidance. In response, MITI intervened and used the Foreign Trade Control Law to decrease Sumitomo's import quota for coking-coal, which was an essential component for the making of steel. "By using legitimate statutory power in a seemingly unrelated area of competence, MITI was able to enforce indirectly that which it had no power to do directly."[12] Sumitomo initially threatened legal action against MITI on the

9. Mitsuo Matsushita, *The Legal Framework of Trade and Investment in Japan*, *in* 27 HARV. INT'L L. J. 376 (1986).

10. Dean, *supra* note 2 at 399. (It is this type of gyousei shidou which will be discussed in the remainder of this part of my essay. The use of "administrative guidance" from herein refers to regulatory administrative guidance.)

11. Shiono, *supra* note 6 at p. 205.

12. Dean, *supra* note 2 at 400.

grounds that its right to manage its own internal affairs had been infringed by MITI's unlawful coercion. However, after having alienated itself from the other steel companies and in acknowledgment of the difficulties of defying MITI's orders, Sumitomo eventually re-entered the cartel and 'orderly competition' was restored. As Meryll Dean recognized, this was the first time that the "all-encompassing coercive power of administrative guidance had been openly challenged."[13]

Another example of gyousei shidou, indeed an even more blatant one, is the guidance that has stemmed from local municipalities, after the failure of the central government to act.[14] This has been especially prevalent in matters relating to the Building Standards Law. Municipal governments have found that the Building Standards Law is not assertive enough in its attempt to preclude the building activities of developers from ruining the living environment of local residents. As a result, several cities, such as Musashino[15] drew up their own guidelines for developers. These were not ordinances as local governments have no power to issue any laws pertaining to this matter. In Musashino, a builder began constructing an apartment complex without following the city's guidelines. In response, the municipal government cut off the developer's water supply. The dispute ended when the builder agreed to follow the guidelines and had its water supply re-connected.[16] Even though this example, as well as the Sumitomo incident, did not result in legal action, it is clear that gyousei shidou can have force equal to that of law. As illustrated, compliance with gyousei shidou is often ensured through means which are nothing less than coercive.

The numerous legal actions that *have* been brought to the courts, particularly relating to the use of gyousei shidou in the regulation of construction, have given judges ample opportunity to enunciate the legal status of this form of administration. As Yoshikazu Shibaike notes "even without a basis in law, administrative guidance. . .has been found lawful in the courts."[17]

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13. *See id.* at 400.

14. Shiono, *supra* note 6 at 203.

15. G. Foljanty-Jost, *Informelles Verwaltungshandeln: Schlüssel effizienter Implementation oder Politik ohne Politiker?* [Informal Means of Administration: The Key to More Efficient Implementation or Politics Without Politicians?], *in* IM SCHATTEN DES SIEGERS: JAPAN ÖKONOMIE UND POLITIK SUHRKAMP VERLAG, DEUTSCHLAND 176 (Menzel ed., 1989).

16. *Yamaki Kensetsu Kabushiki Kaisha v. City of Musashino* 18 Hanrei Jiho 803 (Tokyo Dist. Ct., Dec. 8, 1975) in M. Young, *Administrative Guidance in the Courts: A Case Study in Doctrinal Adaptation*, *in* LAW AND SOCIETY IN CONTEMPORARY JAPAN: AMERICAN PERSPECTIVES 98-99 (John O. Haley ed., 1988).

17. Y. Shibaike, *Guidelines and Agreements in Administrative Law* in LAW IN JAPAN: AN ANNUAL, 63 (ed., 1986). Shibaike cites the following cases as authority:

In 1984, the Supreme Court's decision in the well-known *Oil Cartel case* discussed the status of administrative guidance in relation to the Antimonopoly Law.[18] In this case, the member companies of Japan's Association of Oil Companies agreed to restrict the refinement of crude oil. The Ministry of International Trade and Industry formulated and enforced policies regarding the supply of oil products. MITI's directions were carried out via the use of administrative guidance. The Association, in compliance with the guidance, dispensed the agreed upon quantities of crude oil to each of the member companies. The Fair Trade Commission declared these actions constituted an illegal cartel. The question arose whether the cartel could be found illegal if, as the companies contended, they were merely complying with MITI's administrative guidance. The Supreme Court found the cartel not to have been based on gyousei shidou at all and held that the cartel was illegal. Importantly, however, the court took the opportunity to state in obiter dicta:[19]

> "administrative guidance which does not have an explicit legal basis *can be justified*, if it is made in a reasonable and socially acceptable way *and does not contradict the fundamental purposes of the Anti-Monopoly Law*. . .[and seemingly in contradiction] A cartel on price which seemingly contravenes the Anti-Monopoly Law should not be considered illegal if it is formed as a consequence of administrative guidance." [italics added]

Thus, the informal non-legal practice of administrative guidance could conceivably prevail even if it were in contravention of written laws. Notably, the absence of discussion of the concept of the rule of law suggests that it was of little concern to the judges.

Further, in *K.K. Daiyou Kensetsu v Nerima Ward* the Tokyo District Court ruled:[20]

> "It is premature to conclude that it is not permissible to promote administrative guidance only because there is no specific provision in the law. . .If we consider the obligations of the administration toward people, it is not proper to conclude that administrative guidance. . .should be banned only because it is not based on a statutory authority."

Yoshida v. Tokyo Metropolis and Nakano Ward, 15 Hanrei Jiho 886 (Tokyo Dist. Ct. Sept. 2, 1977); *K.K. Fuji Entaapuraizu v. Tokyo Metropolis*, 52 Hanrei Jiho 894 (Tokyo Dist. Ct. Dec. 19, 1977); *Gourmei Kaisha Nakatani Honten v. Tokyo Metropolis*, 79 Hanrei Jiho 928 (Tokyo Dist. Ct. July 3, 1978); *K.K. Daiyou Kensetsu v. Nerima Ward*, 18 Hanrei Jiho 952 (Tokyo Dist. Ct. Oct. 8, 1979); *Gômei Kaisha Nakatani Honten v. Tokyo Metropolis*, 73 Hanrei Jiho 955 (Tokyo Dist. Ct. Dec. 24, 1979).

18. The Law on Protection of Private Monopoly & Ensuring of Fair Trade, (Law No. 54, 1947).

19. Hiroshi Oda, JAPANESE LAW 354 (1992).

20. *K.K. Daiyou Kensetsu v. Nerima Ward* 18 Hanrei Jiho 952 (Tokyo Dist. Ct. Oct. 8, 1979), cited in Shiono, *supra* note 6 at 209.

In this case and in the *Oil Cartel case*, the courts justified their rationale through notions of law, order and public duty. The Japanese authorities' attitudes to administrative guidance are demonstrative of the nation's overall ambivalence with respect to systemic inconsistencies between formal written law and its pillar - the rule of law, on the one hand, and practical reality on the other.

In particular, the emphasis by Japan's courts on the social acceptability of decisions, as opposed to due process and procedural fairness in administrative guidance cases, is in stark contrast with western countries' "reverence" for the procedural formalities of the law.[21] Evidently, while the rule of law is embedded in the *jurisprudence* of Japan's civil law system, one cannot thereby presume that it is also so deeply rooted in the legal practice of the nation.

The administrative tool, gyousei shidou, is one mechanism reflective of the country's pre-existing legal norms which sits uneasily with the Roman-Christian legal tradition underlying Japan's codes and Constitution.[22] A similar situation can be identified in Japanese criminal law enforcement.

EXAMPLE TWO: JAPANESE CRIMINAL PROCEDURE & THE RIGHTS OF THE ACCUSED

In Japan's Constitution and Code of Criminal Procedure[23] there are numerous provisions which purport to protect the rights of the accused. However, in spite of the legislative measures, the everyday practices of Japanese police and prosecutors show a system of only marginalized rights for the criminally accused. With respect to search, seizure, detention, arrest and interrogation, courts uphold a range of practices that have the ironic effect of invalidating the substance of the constitutional and code provisions. Further, the internal workings of the criminal trial process and the role of judges arguably defies the constitutional provisions for an open and public determination of justice by the courts. These factors combine to demonstrate the prevalence of institutionalized derivation from the rule of law in Japan.

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21. Young, *supra* note 17 at 967.

22. Chin Kim and Craig M. Lawson, *The Law of Subtle Mind: The Traditional Japanese Conception of Law*, *in* 28 INT'L & COMP. L. Q. 491, 512 (1979).

23. KEISOHO, (Law No. 131, July 10 1948).

SEARCH & SEIZURE

Under Article 35 of the Constitution of Japan,[24] citizens have the right not to have their homes, papers and personal effects searched or seized without a warrant issued with adequate cause. However, the substance of this provision has largely been eroded both by broad statutory exceptions and judicial decisions. For example, in *Japan* v *Sakai*,[25] the Supreme Court held that the Police Duties Law[26] vested police with power to stop, question and search anyone in relation to a criminal investigation without a warrant, and more broadly, that police were authorized to take all reasonably necessary steps to confirm their suspicions of criminal activity. In effect, the courts have engendered a situation whereby the Constitution's attempt to guarantee minimum rights for citizens has been overruled. William B. Cleary and Yasuhiro Hirakawa assert that in reality, the Police Duties Law has diluted Article 35 of the Constitution, empowering authorities to "conduct searches in the absence of probable cause."[27]

DETENTION & ARREST

Procedural time limits are prescribed such that a person may be detained for a maximum of 28 days.[28] However, in practice, an accused person may be detained for lengthy periods before actually having formal charges filed against him/her. As Rajendra Ramlogan asserts, it appears that the police and prosecutors are able to circumvent the effect of these provisions where the suspect "voluntarily" accompanies them for questioning.[29]

An often-cited authority is the *Tanakawa Green Mansion Murder Case*.[30] In this case, a man was leaving his company dormitory one morning when he was confronted by four police officers and asked to accompany them for questioning. The suspect agreed and he was subsequently interrogated from early

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24. KENPO, art. 35 provides:
("The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause and particularly describing the place to be searched and things to be seized, or except as provided by Article 33.
2. Each search and seizure shall be made upon separate warrant issued by a competent judicial officer.")

25. (Sup. Ct. J., June 20, 1978), 32 Keishuu 670.

26. The Police Duties Law, (Law No. 163, 1954).

27. Maneobu Hirakawa, 89 Jurisuto 24-25, *in* William B. Cleary, *Opinion of a Scholar: Criminal Investigation in Japan*, 26 CAL. W.L. REV. 123, 133 (1989).

28. KEISOHO, art. 205, 208. (Law No. 131, July 10, 1948). *See* Appendix for exact breakdown of time periods.

29. Rajendra Ramlogan, *The Human Rights Revolution in Japan: A Story of New Wine in Old Wine Skins? in* EMORY INT'L L. REV. 127, 163 (1994).

30. *Ikuhara v. Japan*, 38 Keishu 479 (Sup. Ct., Feb. 29, 1984).

morning until late at night for the next four days. The police arranged accommodations for him on the intervening nights - but even then his sleep was under armed guard and police occupied the adjoining room on the first night. The man was only allowed to leave when his mother arrived from a neighboring prefecture and pledged to the police that she would take responsibility for her son. The Supreme Court held that the suspect's accompaniment was "voluntary" under the legal meaning of the word, and that the resulting confession was consensual.[31] The court's decision in this case is itself arguably unconstitutional in that Article 38 of the Constitution provides that confessions made under circumstances of prolonged detention, or under a compelling environment should not be admitted to trial as evidence.[32]

The extent to which "voluntary" accompaniment need actually be voluntary is even more dubious when one considers that the courts have "endorsed the use of physical force to persuade [suspects] to comply with a request to assist in an investigation."[33] In this regard, the courts' broad interpretation of "voluntary" enables authorities to detain a suspect "voluntarily" without having to abide by the time restricting provisions. This tendency would seem to at least violate the liberal spirit of the relevant legislative provisions. As Daniel H. Foote suggests:

> "Although the courts do not force the police to proceed on a voluntary basis rather than through arrest, judicial willingness to accept even rather intrusive conduct as "voluntary" appears to represent tacit encouragement to police to proceed in this manner, even if the police may lack probable cause."[34]

INTERROGATION & CONFESSIONS

The Constitution provides suspects with two principal rights in relation to confessions. The first is the right not to incriminate one's self and the second is the right not to be coerced into confessing to a crime.[35] In Japanese criminal investigations there is considerable emphasis on confessions. Accordingly, interrogation during the detention or arrest period is crucial to the prosecution's case. The importance of confessions has led many

31. Daniel H. Foote, *Policing Japan*, 84 J. Crim. L. & Criminology 410, 421 (1993)(reviewing Setsuo Miyazawa, *Policing in Japan: A Study on Making Crime* (1992)).

32. Kenpo, art. 38, para. 2. ("Confession made under compulsory torture or threat, or after prolonged arrest or detention shall not be admitted in evidence.").

33. Ramlogan, *supra* note 30 at 170.

34. Foote, *supra* note 32, at 422.

35. Kenpo, art. 38 ("No person shall be compelled to testify against himself. [2] Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence. [3] No person shall be convicted or punished in cases where the only proof against him is his own confession."

academics to focus on the temptation for police to use force. Indeed, there has been a series of cases wherein prisoners on death row have successfully appealed convictions after proving that they were forced to make false confessions.[36] There is also a widespread tendency for police to refrain from taping interrogation sessions. Instead, detectives "literally compose all the statements while questioning and listening."[37] Setsuo Miyazawa indicates that despite compelling evidence of the pervasive use of forced confessions, the courts remain "reluctant. . .to exclude a confession on the basis of the illegality of the procedure itself."[38] Practices pertaining to interrogation and confessions illustrate the way in which the attitude of the courts has helped to create an "enabling environment" for investigators in Japan's criminal justice system.[39] Once again, the constitutional guarantees and indeed the very rationale for having a Code of Criminal Procedure have become second in priority to long-standing practices which pre-date the inception of Japan's written law.

ACCESS TO COUNSEL

Accused parties have a right to retain counsel in accordance with Article 34 of the Constitution and Article 76 of the Code of Criminal Procedure.[40] Nevertheless, during the 23-28 day detention period, suspects are frequently precluded from contacting attorneys. Lawyers can be, and usually are, excluded through the discretion of the prosecutor from attending clients' interrogation sessions.[41] Furthermore, the Supreme Court has legitimized the right of prosecutors to refuse to allow counsel to meet clients until investigations are completed and an indictment has been filed.[42] Consequently the supreme status of the constitutional

36. Daniel H. Foote, *Confessions and the Right to Silence in Japan*, Ga. J. Int'l & Comp. L. 415, 415 (1991); *See Japan v. Saitou*, 1316 Hanrei Jihou 21 (Sendai Dist. Ct., July 11, 1984); *Japan v. Taniguchi*, 1107 Janrei Jiho 13 (Takamatsu Dist. Ct., March 12, 1984); *Japan v. Menda*, 1090 Hanrei Jiho 3 (Kumamoto dist. Ct., July 15, 1983).

37. Setsuo Miyazawa, *Policing Japan: A Study on Making Crime* 21 (Gilbert Beis and Donald J. Newman, eds., Frank G. Bennet, Jr. with John O. Haley trans., State Univ. of N.Y. Press 1992) (referring here in particular to Setsuo Miyazawa's account of his first hand experiences of watching police in practice.)

38. *Id.* at 24.

39. *Id.* at 25.

40. Keisoho, art. 76, para. 1, no. 131 (1948) ("When the accused has been taken into custody, he shall immediately be notified of his right to appoint counsel."); Kenpo, art. 34, ("No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel. . .").

41. Christopher James Neumann, *Arrest First, Ask Questions Later: The Japanese Police Detention System*, 7 DICK. H. INT'L L. 253, 261 (1989).

42. Judgment of the Supreme Court 54 Hanrei Jihou 27, April 20, 1955.

provisions appears to have been eroded through judicial interpretation and customary practice.

TRIAL BY THE COURT OR TRIAL BY DOSSIER?

Japan's Constitution dictates that trials be conducted in a public fashion. Ostensibly, at least, this is normal practice. However, Takeo Ishimatsu, a former judge of the Osaka High Court, has criticized the way that criminal trials are carried out in reality:

> ". . .in their current state, criminal trials - and in particular the fact-finding that lies at the heart of trials - are conducted in closed rooms by the investigators, and the proceedings in open court are merely a formal ceremony. In a word, it is the turning of public trials into an empty shell."

Ishimatsu explains that ever since the Meiji era, all investigations were carried out by police and their findings were brought into court, essentially for "rubber-stamping." He argues, through first-hand experience, that judges continue to accept the (prosecutor's) evidence as contained in the court dossier, rather than conducting their own investigations as a tribunal of fact.[43] Ishimatsu contends that the functioning of Japan's criminal justice system represents the continuation of ingrained practices. Further, trial by investigators is regarded as an acceptable phenomenon among judges, investigators and citizens alike, because it is a custom based on years of tradition. Ishimatsu asserts:

> "You may all think that under the current Constitution and Code of Criminal Procedure it would not be possible to operate in this manner, since strict limits on arrests and the length of confinement, the right to refuse to testify, and judicially-enforced limits on compulsory interrogation are all provided, and at the trial level hearsay evidence is prohibited and the principles of oral testimony, direct testimony and the primacy of open court hearings have all been adopted. Nevertheless, that is not the case."[44]

Japan's criminal justice system is therefore another illustration of the prevalence of entrenched practice over the formal law of the nation. Given the disparity between law and practice, the question arises whether the rule of law is an appropriate theoretical framework through which the Japanese legal system can be understood.

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43. This may explain why Japan has a successful prosecution's rate of 99%.

44. Takeo Ishimatsu, *Are Criminal Defendants in Japan Truly Receiving Trial by Judge?* 22 Univ. of Tokyo: An Annual 143, 143 (1989).

IS THE RULE OF LAW AN APPLICABLE FRAMEWORK?

In order to address this issue it is first necessary to have a basic comprehension of the concept of the rule of law itself.

The rule of law is a fundamental principle underlying western legal systems and jurisprudence. The exact meaning and scope of the concept remains elusive. Generally, it is a doctrine that embodies the values, institutions, procedures and principles inherent in "modern liberal democratic countries."[45] The rule of law embodies principles such as Ronald Dworkin's "government under law" as well as the notion of restrictions on legislative power. Manifest in the doctrine are also the principles of the rights and freedoms of the individual, and the application of inflexible, formal rules to the particulars of any number of different situations.[46]

There are two principal consequences that are generally heralded as flowing from the rule of law. Firstly, that government power is not exercised arbitrarily, and secondly, that the use of government discretion is constrained through the framework of the general law.[47] Seemingly, if (western) academics agree on any aspect of the rule of law, it is its status as being necessarily pervasive for the *proper* administration of government. This can be verified by the comments of politicians and statesmen. For example, the members of the House of Commons, as early as 1610, insisted to their King that there was no thing that the people held in higher esteem than to "be guided and governed by certain rule of law. . .and not by any uncertain or arbitrary form of government."[48] Others see the rule of law as synonymous with the maintenance of "civilised existence."[49] Although there are narrow and wide definitions of the rule of law, its historical ties with the concept of liberalism are undeniable.

The key deficiency emanating from the application of the rule of law to Japan's legal system is that the rule of law is an essentially western concept. It embodies the Roman civil law tradition and is laced with Christian moral connotations. It is because of its historical roots and value-laden character, that the rule of law is unable to account for the large gaps between the rationale, jurisprudence and meaning behind Japan's legal provisions, and the status of the law in reality.

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45. Geoffrey Walker, *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne Univ. Press 1988).

46. *Id.* at 9.

47. Stephen Bottomley et al., *Law in Context* 44 (THE FED'N PRESS 1994).

48. Walker, *supra* note 45, at 2.

49. *Id.* (quoting Jawarhalal Nehru, the first Prime Minister of India).

The widespread practice of administrative guidance and the operation of Japan's criminal justice system exemplify this phenomenon. Essentially, the importation of political and legal institutions into Japan during the Meiji Restoration and at the end of World War II, as well as their imposition "atop a sophisticated pre-existing legal and political order, [have] distorted the normal operating modes of these institutions."[50]

Evidently, the western-derived doctrine of the rule of law is incapable of appreciating the non-western situations and "unofficial" legal norms that exist in Japan. By acknowledging the "inherent cultural particularity"[51] of the rule of law one realizes that it cannot be considered universally applicable to all developed and modern societies.

As Masaji Chiba observes, a vacuum is created by the inability of western jurisprudence to account for attributes peculiar to non-western societies. He argues that such a void should be filled by a form of "jurisprudence proper for the observation and analysis of. . .a culturally plural complex of interacting transplanted law and indigenous laws."[52]

THE SEARCH FOR A NEW JURISPRUDENTIAL MODEL

There is no established alternative model of jurisprudence. This fact is itself the probable result of the traditional tendency to regard the prevailing rule of law-based jurisprudential model as universal in application. It is also illustrative of the traditional conception of law as a self-sufficient science that requires no input from outside fields of study, such as anthropology and sociology.[53] Yet, as is illustrated above, any jurisprudential model capable of accounting for the practical (as opposed to theoretical) operation of Japan's legal system should include the cultural factor as one of its underlying principles. Chiba's suggested model is one that recognizes "the three-level structure of law" - those levels being: *official law*, *unofficial law* and *legal postulate*.[54]

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50. Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923, 968 n. 165 (1984).

51. Chiba, *supra* note 1, at 54.

52. *Id.* at 55.

53. *Id.* at 3.

54. *Id.* at 173 (The explanation of the three types of law below is based on Chiba's own discussion of his model.).

OFFICIAL LAW

Japan's Constitution and other formal statutes fall within this category. Generally, official law is mandated "by the legitimate authority of the government of a state to have overall jurisdiction over the country." In addition, this category includes religious laws and customary practices that operate in consonance with state law and are partially absorbed into state law, yet derive their authority through tradition or culture. That is, official law does not necessarily rely on the direct sanction of the state for its validity. General examples are caste systems, Islamic Law, Hindu Law, and customary laws of marriage and family.

UNOFFICIAL LAW

Unofficial law encompasses those laws which are "not officially sanctioned by any legitimate authority, but sanctioned in practice by the general consensus of a certain circle of people, whether within or beyond the bounds of a country."[55] Unofficial law is as a category capable of accepting cultural influences, and may be expressed by day to day practices, without needing to be expressed in written law. The definition of unofficial law is self-limiting in that its parameters include only those laws which influence, either positively or negatively, the effective operation of official law by supplementing, opposing, modifying or undermining it. Administrative guidance and the enforcement of Japan's Law of Criminal Procedure both fall within this category of law.

LEGAL POSTULATE

Chiba defines a legal postulate as a value, principle or value system "specifically connected with a particular official or unofficial law, which acts to found, justify or orient the latter."[56] Under the traditional model of jurisprudence, this category would include notions like positive law, natural law, equity and liberalism. Other examples are those social and cultural norms that underlie the structural basis or stratification of a society.

The three-level structure of law model is capable of more readily accounting for the operation of received and indigenous law in Japan. It is also able to explain the functioning of mechanisms like administrative guidance which do not have the legitimacy of being expressed in the written law of the nation. Chiba's model has the ability to encompass the cultural and environmental circumstances of any given legal system. In this way, its lack

55. *Id.*
56. *Id.* at 178.

of cultural particularity offers increased flexibility, making it a more appropriate framework for evaluating Japan's legal system.

CONCLUSION

An understanding of the gap between the operation of formal law and unofficial legal practices is important in several respects. First, the dichotomy is arguably a recurring phenomenon in Japan's politics and law. Therefore, by not presuming the operation of the rule of law in Japan, one can gain a more realistic understanding of the day-to-day functioning of the nation's institutions.

Secondly, an understanding of the existence of the structural dichotomy highlights the difficulty of applying an angular black and white framework like the rule of law to Japan's less clearly delineated legal system. On this basis, criticism that Japan's legal system does not in practice uphold the rule of law may be valid *but* is also inherently ethnocentric, because the rule of law is itself a Western framework of evaluation. Its historic ties with the Christian Roman legal tradition make it unable to account for the apparent irregularities of non-western legal systems. Further, by recognizing that the rule of law is not a universally applicable paradigm for evaluating the world's legal systems, it becomes easier to accept an alternative framework, like Chiba's, which is capable of conceptualizing a more pluralistic legal environment.

Finally, Japan is just one example of a nation whose legal system belies fundamental jurisprudential inconsistencies between received law and indigenous practice. When one considers that nations such as China, Malaysia, Vietnam and Singapore all operate within a legal system which is a hybrid of competing (and sometimes complimentary) transplanted legal values and indigenous norms, the need to go beyond the rule of law as an explanatory framework becomes even more apparent. Indeed, it is unacceptably ethnocentric to examine legal systems from a rule of law perspective in an age of increasing globalization.

APPENDIX

(i) Upon arrest: 48-hour period during which police decide whether the matter should be referred to a prosecutor or whether the detainee should be released.[57]

57. Keisoho, art. 205, para. 1, no. 131 (1948) ("When a public procurator has received the suspect delivered in accordance with provision of Article 203, he shall give the suspect an opportunity for explanation, and immediately release the suspect if he believes there is no need to detain him, or shall request a judge to detain him within twenty-four hours after he received the suspect, if he believes it necessary to detain the suspect.").

(ii) Upon referral to a prosecutor: 24-hour period during which the prosecutor decides whether to request commitment to a judge or release the detainee.[58]

(iii) So, all together, police have 72-hours in which to bring the suspect before a judge.[59]

(iv) The period between commitment and indictment can be extended twice for a period of 10 days each time and in special cases for a further 5 day period.[60]

58. *Id.*

59. Keisoho, art. 208. para. 2, no. 131 (1948) ("A judge may, if he deems unavoidable circumstances exist, extend the period prescribed in the preceding paragraph up request of a public procurator. Such total period of extention or extensions shall in no event be longer than ten days.")

60. *Id.*