

COMMON LAW EDUCATION IN JAPAN: PAST, PRESENT, AND FUTURE

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Since Japan established a Western-style legal education in late nineteenth century, the foreign law education including the common law education has been its integral part. Even during the dominance of German law in Japan's legal academia in early twentieth century, comparative studies of common law flourished. On the other hand, ironically, the American law boom in the post Second World War era did not necessarily produce high-quality academic works. Now, Japan's common law education sees a dramatic change, because of the establishment of practice-oriented graduate law schools. Most law schools offer a common law or American law course for answering the globalisation of legal practice. In this article, possible positive and negative effects of this new boom of common law or American law education are examined.

I INTRODUCTION

Since Japan adopted Western style legal education after the Meiji Restoration, foreign law courses have been an integral part. As a latecomer to Western legal systems, Japan has needed sophisticated examples to imitate. French law, German law, and common law have been its favourite models for studying.

The establishment of American style graduate level law schools in 2004 changed the legal education system dramatically. Has the foreign law study changed? If so, how? This article provides a concise history of common law education and its current situation at the undergraduate and graduate levels in Japan.

II TRADITION OF FOREIGN LAW EDUCATION

After the end of a two-century border closure by the Tokugawa Shogun regime, Japan was suddenly exposed to imperialist Western powers in 1853. The government leaders tried to keep Japan independent and avoid colonisation like other Asian countries. As an interim measure, the Tokugawa Shogunate government had to make unequal treaties with Western countries. They included

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provisions for consular jurisdiction over foreigners' cases exclusive of Japanese jurisdiction, and denying Japanese autonomy over tariffs.

After the Meiji Restoration in 1868, the new Emperor's government started negotiations with Western countries for amendment of the treaties. However, those government leaders realised that the establishment of a Western-style legal system in Japan was a precondition for amendment. At the same time, the swift Westernisation of Japan was considered to be beneficial for establishing its status among imperialist powers.

Japanese leaders started studying Western laws. Young students were sent to Western countries, and Western legal scholars were invited to Japan. Under the modern education system, undergraduate legal education was established. But there was no modern Japanese law to study yet. Rather, research into foreign laws was indispensable for creating Japanese law. However, each legal educational institution became specialised in a particular foreign law. The Ministry of Justice School of Law was established as a school for French law in 1872 (and merged with the University of Tokyo in 1885), and the University of Tokyo was originally established as a school for common law in 1877. German law was yet underdeveloped. Those Japanese students were smart, diligent, and ambitious. Even during the Tokugawa Shogunate's regime, the basic education system had been established and a narrow channel for learning Western civilisation through the Netherlands had been kept. The students absorbed Western laws rapidly from such teachers as a French professor, Gustave Boissonade at the Ministry of Justice, and two Americans, John Henry Wigmore at Keio Gijuku University and Henry T Terry at the University of Tokyo. Japanese students made up Japanese legal terms by translating such Western legal terms as freedom or liberty, rights and duties, and democracy, whose concepts had been virtually unknown in Japan. It was a difficult task, but Chinese characters, whose compounds are apt to create new words, were helpful in their task.

Common law was studied closely, but soon it was realised that it was difficult to be transplanted because of its case law basis. Japan needed Westernised law quickly. And Japanese leaders wanted a visible Westernised law to show the maturity of the Japanese legal system. So, Japanese codification was mostly based on French codes. But the first French-influenced Civil Code of 1890 was doomed by opposition from traditionalists and rivalry between the French school and the English school. Newly developed, more dogmatic, and well-organised German law then became preferable for Japanese government leaders, and its influences began to override those of French law and common law. So, many codes and the Imperial Constitution of 1889 were drafted on German models.

Even after the codification project was completed and legal terms were settled in the 1890s, studying foreign laws was not useless, because students needed to interpret provisions of the new codes and foreign works were considered to be highly relevant. However, at this stage, three factors began dominating in Japanese legal education.

First, as Japan's law teachers became competent, the reliance on foreign teachers was diminishing, if not disappearing. Therefore, even when foreign laws were taught by using foreign materials, they

began to be taught in the Japanese language. Nobushige Hozumi, a professor of the University of Tokyo and Middle Templar, proudly recollected this later in his essays.¹ It was in accordance with the traditional style to learn Chinese culture in Japan. However, the emphasis on reading written materials may explain the notoriously poor communication skills of Japanese lawyers, who tend even now to shy away from speaking up at international meetings.

Second, Japan adopted the Westernised legal system and Westernised legal concepts, but they were transplanted into the traditional soil of Japan. A slogan, *wakon yosai* (Japanese soul and Western knowledge), indicated that the adoption of a Western legal system was for the rapid modernisation of Japan. The Japanese used the new legal system as a tool but it is doubtful that they understood the background behind those legal concepts. Even now, the mind-set of Japanese lawyers and judges remains typically Japanese.

Third, although students of the University of Tokyo were divided into three classes according to mandatory foreign law courses (French law, German law and common law), teaching on Japanese law were dominated by German law influence. Law professors interpreted codes of Japan by reference to German legal theories. Still, it is doubtful that comparative perspectives on German law were well understood, because German law references were often selective and out of context, being just for the benefit of interpretation of codes of Japan.

Under these conditions, common law education became more academic, because it has little relevance to Japan's codes. The Trusts Law of 1922 and Jury Law of 1923 were limited and anomalous products influenced by the common law. The former was used sparingly, and the latter soon became dormant. At the University of Tokyo, two professorships on English law were kept, because of its origin as a common law institution, while one professor was appointed each for French law and German law. Professors of English law could teach comparative viewpoints emphatically, because they did not have to care about interpreting the laws of Japan. Thus, there was a small but solid basis to impart common law perspectives to future leaders of Japan, despite the dominance of German law in legal academia in Japan. This era is classified as "the Age of Self-Consciousness" in the history of comparative law in Japan and was represented Naojiro Sugiyama in French law and Kenzo Takayanagi in common law, both of whom were professors of the (Imperial) University of Tokyo.²

1 Nobushige Hozumi *Hoso Yawa [Nightly Stories on Law]* (Iwanami Shoten, Tokyo, 1980) 172 (Yuhikaku, Tokyo, 1916). Hozumi was the highly regarded founder of common law studies in Japan.

2 The year 1916 was the end of "the Age of Quest" and the beginning of "the Age of Self-Consciousness". Hideo Tanaka *Eibei Ho to Nihon Ho [Common Law and Japanese Law]* (University of Tokyo Press, Tokyo, 1988) 366; Yoshiyuki Noda "Nihon ni okeru Hikaku Ho no Hatten to Genjo (1) [The Development and the Current Situation of Comparative Law in Japan]" (1972) 89 *Hogaku Kyokai Zassi [Journal of the Jurisprudence Association]* 1241, 1247. Professor Anthony H Angelo translated *Introduction to Japanese Law* (University of Tokyo Press, Tokyo, 1976), a textbook authored by Noda, a professor in French law and comparative law of the University of Tokyo.

The defeat of Japan in the Second World War changed the situation dramatically. Democratic reforms were implemented in politics, the economy, and society. American law influences were visible in the new Constitution and the Codes of Criminal Procedure. American law, which had been a marginal appendix to English law, became a popular topic to study. This situation led to mixed results in the short term. Many articles on American law written by law professors and practitioners became abundant in law journals. However, there were not many high-quality articles among them. Most of them were practical, convenient and shortsighted works, and often included anecdotal and episodic impressions of authors without a solid basis in understanding the American law background. When the boom of American law studies faded in 1955, Masami Ito, a professor of the University of Tokyo and later justice of the Supreme Court, lamented the poor quality of those articles in his textbook.³ After 1955, however, Japan gradually began to see many superb works on American law, thanks chiefly to exchange programs for academics and practitioners between the United States and Japan and the publication of reliable English-Japanese law dictionaries.⁴

The post-Second World War reforms created many new universities and law faculties. Law faculties became producers of law graduates, who were in strong demand from governments and businesses as career-track employees. Curiously, the increased popularity of legal education caused more emphasis on Japanese law studies and less on foreign law studies. Although young academics keep the tradition of writing a dissertation studying foreign laws in depth and using them for interpretations of Japanese laws, the great majority of law graduates do not care much for foreign laws, because their future employers do not demand them.

III A FRESH START OF COMMON LAW EDUCATION AT "LAW SCHOOLS"

While the German-style career judge and prosecutor system was maintained even after the Second World War, a uniform training system for lawyers was established. That is, all prospective lawyers had to pass the national legal examination and then take practice courses for two years at the Legal Research Training Institute⁵ (established under the Supreme Court) before starting practice as lawyers or being appointed as judges or prosecutors. The legal examination was open to everyone, in the sense that no educational background was required. But soon, it became extremely competitive because of the limited capacity of the Legal Research Training Institute and quantity control over lawyers' population. About five hundred, or two or three percent of applicants, could pass the examination, and in 2007, the combined number of lawyers, prosecutors, and judges was 27,398 (for Japan's general population of 127.7 million). Most law students believed that they had to attend a

3 Masami Ito *Amerika Ho Nyumon [Introduction to American Law]* (Nippon Hyoron Sha, Tokyo, 1961) 11-12.

4 Kenzo Takayanagi & Sanji Suenobu (eds) *Eibei Ho Jiten (Anglo-American Law Dictionary)* (Yuhikaku, Tokyo, 1952); Hideo Tanaka (ed) *Eibei Ho Jiten (Dictionary of Anglo-American Law)* (University of Tokyo Press, Tokyo, 1991).

5 Those trainees have been fully paid as quasi-government employees, but under the new law school system, that payment will be discontinued.

cram school to learn an answering technique, whose level is barely above the minimum for passing the legal examination, and spent several years and expensive tuition there. They sometimes skipped regular university classes. The results were older trainees at the Legal Research Training Institute, on average, and questionable qualification as lawyers.

After some patchwork reforms met with little success, a wholesale reform was proposed. This was the establishment of new graduate law schools. The proposal was included in the 2001 report of the government's Justice System Reform Council.⁶ Initiatives of the report were to restructure the whole legal system of Japan. For that purpose, it was supposed to expand the lawyers' population and reformulate their training system. The key of the proposal was the combination of more practice-oriented law school education and a much less competitive legal examination for graduates of those law schools with a shortened one-year practical training at the Institute. To maintain the quality of newly admitted lawyers, accreditation of new law schools was to be strict.

Actually, the law schools established were somewhat different from the original plan. Too many law faculties (and even universities with no law faculties) established their law schools because they wanted to pretend to be top-ranked schools. It is expected that 3000 applicants will pass the new legal examination in 2010, but 74 schools admit 5800 students every year. It means nearly a half of graduates cannot pass the legal examination. The passing rate for the legal examination at around 40 percent is a great improvement from the older examination system, but a far cry from the originally expected 70-80 percent. Quite a few schools try to attract students by offering make-up classes for legal examination preparation, and so now those schools become a sort of cram school. Businesses have been slower to hire newly-qualified lawyers than expected, although they strongly supported the reform of having more lawyers with knowledge on business-related law. Bar associations suddenly backpedaled from the reform because they fear a rapid growth in lawyers' population and jobless lawyers. There may be some school closures because of a loss of new students due to a poor record in the legal examination.

In any event, new law schools teach many mandatory basic law courses (which are legal examination subjects), required by accreditation institutions. There is another requirement for courses on foreign and comparative law, legal history, and philosophy and sociology of law. But most students are too busy in the mandatory courses to take seriously those theoretical courses.

However, the Reform Council Report had an emphasis on the globalisation of legal practice. From the standpoint of educating future lawyers who are supposed to do more transnational business work, many law schools set up an American law course. At the same time, because the traditional undergraduate legal education is intact and human resources are not increasing rapidly even if there are new practitioner-teachers at law schools, the number of undergraduate law students was reduced

6 The English translation of the report can be found at www.kantei.go.jp/foreign/judiciary/2001/0612report.html (last accessed 27 January 2009).

and the formerly congested undergraduate curriculum was loosened up by concentrating on basic courses – leaving advanced courses for the new law school level.

Therefore, the situation of common law education has changed dramatically by the establishment of the law schools. The Japanese American Society for Legal Studies,⁷ under the auspices of Suenobu Foundation,⁸ is surveying the current situation of undergraduate and graduate common law education in Japan. The findings are as follows:⁹

(a) Graduate Law Schools

Among 74 schools inquired, 63 schools answered.

Among 63 schools, 53 schools have some common law related courses (including the history of the common law).

Among the 53 schools, 46 schools have one or more fulltime teachers for those courses.

Among 46 schools, 13 schools appoint a full-time practitioner-teacher for those courses.

Among the 53 schools, 16 schools have courses mainly taught in the English language.

Among the 53 schools, 18 schools appoint full-time or part-time teachers of foreign nationality for those courses.

(b) Undergraduate Legal Education

Among 126 schools inquired, 90 schools answered.

Among the 90 schools, 71 schools have some common law related courses (including the history of the common law).

Among the 71 schools, 61 schools have one or more fulltime teachers for those courses.

Among the 71 schools, 10 schools have courses mainly taught in the English language.

*Among the 71 schools, 13 schools appoint full-time or part-time teachers of foreign nationality for those courses.

7 Established in 1964 jointly by law academics and practitioners in Japan who are interested in American law and their counterparts in the United States who are interested in Japanese law. After the American side became inactive, the Society was reorganised in 2002 solely as a Japan organisation but with membership open to any nationals.

8 Established in 1923 by Sanji Suenobu, a professor in common law at the University of Tokyo, for financial supports to study and research common law.

9 The final report will appear on [2008-2] *Amerika Ho*, the biannual periodical of the Society.

*Among the 90 schools, 44 schools have a graduate school (other than law school) for advanced study of common law.

I would make these points. Teaching common law in the English language or by foreign teachers became rare during the twenty years before the end of the Second World War, and after that time those methods were sometimes used as experiments. The new law schools might make more use of those methods because one of the missions of those schools is to train young lawyers for transnational legal practice. A secondary education reform, which has more emphasis on spoken English in addition to written English, might be helpful for teaching younger students by those methods, compared with older generations who had difficulty in communicating in English, even if they were supposed to learn English from middle-school age.

Traditionally scarce, teachers of common law seem to be made up from practitioners who have practical experience in the American law field. A positive effect is to diversify the common law education. Those practitioner-teachers can give students a practical perspective on common law or American law. In any event, the success or failure of the common law course depends on its contents and methodology. The Society's survey aims for a surface comparison, and so it does not reveal the details of the contents and methodology of the common law course at each school. But a negative effect is the diminishing resource base for researchers in common law. Although many undergraduate schools answer in this survey that they offer some graduate research opportunity in common law, obviously only a handful of schools have enough foundation for educating future academics in common law at the graduate level. Since law schools emphasising Japanese law and practice have diverted human and financial resources from undergraduate programs, the environment for producing the next generation of academics in common law is not improved, if not damaged.

IV CONCLUSION

In 1994, Professor Tony Angelo of the Victoria University of Wellington was invited to teach a course called "principles of comparative law" at the University of Tokyo for its undergraduate and graduate law students. He taught the methodology of comparative law with reference to the classic textbook by René David,¹⁰ and also his own experiences as legal advisor in the southern hemisphere (especially in the South Pacific islands and Mauritius). Japanese students, who were accustomed to a domestic view of law, were exposed to global views of law and reconsidered Japanese law from a different perspective.

The University of Tokyo has never appointed a full-time professor for this course, and usually a professor from another university has been asked to teach this course for two or three academic years consecutively. However, while the interest of students in this course is solid, the faculty has difficulty in finding a distinguished teacher such as Professor Angelo with a global perspective fit for the

10 René David & John E C Brierley *Major Legal Systems in the World Today* (3ed, Stevens & Sons, London, 1985).

comparative law lectures, because younger academics in Japan tend to research fragmented subjects in detail, rather than broader theories of global or comparative law.

Whether the boom of common law education in Japan is just a re-enactment of the hollow American law boom in the post Second World War era is yet to be seen. No doubt, an experiment is worthwhile, so long as it is based on a conscious methodology. But the overemphasis on American law at law schools might be too simplistic an answer to the globalisation of legal practice, if those lectures teach just superficial aspects of American law and its relevance to Japan in politics and the economy, and lose sight of its background as common law. It is ironic that although the globalisation of legal practice and the importance of comparative law perspectives are emphasised in the law school reform, the schools in Japan suffer a shortage of talented comparative law teachers.