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# ADMINISTERING JUSTICE IN A CONSENSUS-BASED SOCIETY

*Koichiro Fujikura\**

**AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX.** By *John O. Haley*. New York: Oxford University Press. 1991. Pp. x, 258. \$39.95.

## I

In *Authority Without Power*,<sup>1</sup> Professor John Haley<sup>2</sup> attempts to explain significant Japanese paradoxes:

Japan is notable as a society with both extraordinary institutional continuity along with institutional change; of cohesion with conflict, hierarchy with equality, cooperation with competition, and above all else a manifest prevalence of community control with an equally strong impulse toward independence and autonomy. . . . It is a nation where political rule appears strong but also weak; governance centralized but also diffused; the individual subservient but also achieving; the social order closed but also open. [p. 4]

Professor Haley develops a thesis that Japan's society and its legal system is one of "authority without power" and "law without sanctions." His pairing of these words, usually understood as almost synonymous in the Western legal and political lexicon, serves as the key for his analysis of the Japanese legal system. The author has succeeded in constructing a theoretical package to explain those paradoxes of Japanese law and society often puzzling to Western observers, and in doing so he presents a plausible overall picture of the Japanese legal system. To provide a general account and analysis of any legal system is a formidable intellectual undertaking, but Haley's picture of Japan's legal system should be quite persuasive to Western readers, and it is certainly fascinating to Japanese readers.

Professor Haley argues that, by the mid-nineteenth century, Japanese society had well-established institutions and processes for three basic paradigms of societal control: "[first] the administrative

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1. This review reflects views expressed by participants in a minisymposium on Professor Haley's book held on December 16, 1992, at the University of Tokyo. I am especially indebted to comments made by members of a Western panel: Professor Richard Minear of the University of Massachusetts, Professor Mark Ramseyer of the University of Chicago Law School, and Professor Malcolm Smith of the University of Melbourne Law School.

2. Professor of Law and of Asian Studies and Director of the Asian Law Program at the University of Washington.

processes of a centralized bureaucratic state, [second] the adjudicatory institutions for a system of judicial governance, and [third] arrangements of indirect governance based predominantly on community-based consensual or contractual patterns of social control exemplified by the rural *mura* or village" (p. 18).

Some legal historians are certain to dispute the relevance of Haley's paradigms and interpretations. Nevertheless, many Japanese legal scholars may find his bold attempt revealing, for they generally perceive Japan's contemporary law and legal institutions as the product of a wholesale adoption of Western legal systems since the Meiji Restoration, a time when Japan apparently made a clean break from its own legal traditions and institutions.<sup>3</sup> Haley's paradigms may also be revealing for those who still labor under the popular assumption in the United States that no such thing as "law" exists in Japan.

Haley depicts three paradigms that effectively challenge these elementary assumptions about Japanese law and society. His contribution and the book's strength can be found in the first part, in which he provides, using bold strokes and drawing from existing works, a concise description of Japanese legal history from the seventh century on and develops his dynamic for understanding Japanese law and society.<sup>4</sup> He is less successful, however, in applying this dynamic to his carefully chosen contemporary subject areas in the book's second part.<sup>5</sup> His paradigms, apparently serving their intended purposes, often prove troublesome and unsatisfactory in analyzing the role of law in contemporary Japanese society. In concrete cases, Haley's paradigms seem to prove too much or too little and seem to invoke more than dispel untested assumptions.

Before discussing the three interrelated paradigms and the

3. What is the real importance of the old Japanese law to the modern law of Japan? As will be seen, the modern state law has no connection with the former Japanese law. The modern law considers itself rather as an heir of Western law. . . . It could therefore be said that the history of Japanese law is, for the present at least, a luxury.

YOSIYUKI NODA, INTRODUCTION TO JAPANESE LAW 39 (Anthony N. Angelo trans. & ed., 1976).

4. Other recent and concise works in English on Japanese legal history include: RYOSUKE ISHII, A HISTORY OF POLITICAL INSTITUTIONS IN JAPAN (1980); CARL STEENSTRUP, A HISTORY OF LAW IN JAPAN UNTIL 1868 (1991).

5. The book consists of two parts. Part I is captioned "Continuity with Change: The Historical Foundations of Governance and Legal Control in Japan" (p. 17) and includes historical accounts and an analysis of the development of the Japanese legal system from the seventh century A.D., when Japan began selectively adopting aspects of China's legal system, to the Meiji Restoration of 1868, when Japan, in an apparent abandonment of its traditional system, began adopting features of the civil law systems of continental Europe, drawing primarily from German and French codes.

Part II is entitled "Cohesion with Conflict: The Containment of Legal Controls" (p. 81) and deals with four carefully selected aspects of the contemporary Japanese legal system: "Lawsuits and Lawyers: The Making of a Myth" (ch. 5); "Policemen and Prosecutors: Crime without Punishment" (ch. 6); "Bureaucrats and Business: Administrative Power Constrained" (ch. 7); and "Hamlets and Hoodlums: The Social Impact of Law without Sanctions" (ch. 8).

problems they pose in their application, one must first examine some critical principles that the reader must apply to assess a book of this nature — a book in which the author, from a comparative perspective, tries to construct a general theory for understanding a foreign legal culture within the context of the society's history, culture, and ideology.

First, any effort to build an overarching, general theoretical framework to explain another society and its law, especially Japan, though inspiring and stimulating, is suspect and bound to produce distortions and myths. In developing paradigms in the historical context, one must always ask critical questions such as what the connection is between history and contemporary Japan and how direct an influence one can see, for example, between a pre-World War I Japanese village and a modern Japanese village. Without establishing a reasonable connection between historical facts and contemporary problems, any general theory tends to produce loose and slippery interpretations.

Second, one faces an evident risk in relying on excessive contrasts and overstatements in any two-sided comparison, especially between Japan and the United States. Any finding of inscrutable nature in one society may reflect extremity in the other. Haley, aware of this risk, tries to broaden his comparisons by referring to Germany, the United Kingdom, and Korea as much as possible.<sup>6</sup> Despite the author's caveat,<sup>7</sup> however, the book overemphasizes distinctions and peculiarities, rather than similarities and common elements, of Japanese law and legal institutions that reflect opposite characteristics from those found in American law and legal institutions.

Third, the author often relies heavily upon cultural explanations. Granted that "legal systems are themselves self-defining, cultural belief systems" (p. 4) and cultural explanations are useful in developing a general understanding of the Japanese legal system, cultural explanations are difficult to substantiate or disprove. Analyzing cultural differences in terms of rational human behavior and the various institutional constraints affecting individual decisionmaking may prove more productive.

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6. The author's intention is indeed ambitious and goes beyond a simple two-sided comparison.

As a study of a legal order in a specific context, this book is intended to expand understanding of the function and limits of law in society. Japan's legal order thus becomes the focus for a broader exploration of the interrelationships of law, social order, and change. . . . The purpose of this book therefore is twofold: to use Japan as a window to law and law as a window to Japan.

P. 4.

7. At the outset, however, it is important for the reader to appreciate the stark contrast with the United States and to guard against a common fallacy of viewing Japan from a totally American perspective. Differences do exist but the United States has no greater claim as model or standard for comparison than Japan. Both societies represent extremes of a kind. Neither reflects the norm, if indeed any norm does exist.

P. 14. One might ask: "If no norm exists, how could there be paradox?"

According to Haley, the historical development of Japan's legal system can be divided into two broadly defined periods. "Each features an abrupt infusion of foreign ideas and institutions followed by a gradual process of indigenous adaptation" (p. 17). The first period, during which Japan developed what the author calls an "ambivalent tradition" (p. 17), is "characterized by the tensions between the ideas and institutions derived from early imperial Chinese law and those forged by native Japanese political and social forces" (p. 17). The second period is characterized as a period of "[r]eception, adaptation, and containment of Western law" (p. 18), starting with the French and the German codes and legal institutions soon after the Meiji Restoration in 1868. During this second period, "Japan experienced the institutional transformation of its legal order into a modern, predominately German-derivative, civil law system as well as the adaptation and ultimate containment of Western legal institutions during the first half of this century . . ." (p. 18). The author maintains that "[t]he process continued in postwar Japan, commencing with military occupation and the imposition of American-inspired constitutional and regulatory reforms" (p. 18).

Haley develops his three paradigms against the backdrop of these two broadly defined periods. The first paradigm is that of the administrative state with pervasive authority but with little coercive power, in which law was public, serving as an instrument of the state, and devoid of moral authority (pp. 19-32). Japan adopted this administrative state tradition from China in its first reception of foreign law during the seventh century. Japan borrowed both the concept of the state as a political unit, with authority to rule vested in an imperial institution, and methods of centralized bureaucratic governance. The imperial rulers wielded enormous authority, but this authority did not carry a consummate degree of state power; state authority tended to be much broader than state coercive power. Also, in the Chinese tradition, law and morality were essentially separated; laws were not, in and of themselves, moral commands. Private law, in the Western sense, was not developed.

Borrowing selectively from this Chinese system, Japan instituted land tenure, taxation, penal codes, and other administrative regulations and procedures. Moreover, Japan began to develop indigenous legal institutions. Beginning with the Kamakura *bakufu* (literally "tent government") in the thirteenth century and lasting throughout the Tokugawa *bakufu* in the seventeenth and eighteenth centuries, Japan established an effective and efficient administrative state with well-developed institutional structures and a sophisticated bureaucratic government.

The second paradigm is that of the adjudicatory state, or judicial governance, which began with institutions developed to resolve dis-

putes, particularly among warrior-vassals, and developed into a means by which the Kamakura *bakufu* and later Shogunates ruled (pp. 33-49). During the feudal period, the "idea of the supremacy of law as command had begun to take hold," and "[a]dherence to codified prescriptions and procedures of the past and basic elements of procedural fairness had become integral to legitimate rule" (p. 49). Codified procedural rules distinguished between adjudication initiated by petition and persecutions brought by authorities. Thus, civil actions as opposed to criminal actions were recognized for the first time.

With the development of an adjudicatory mechanism, Japanese law and legal institutions began to take on a Western look. Japan's experience resembled that of other Western European nations where adjudicatory institutions developed after the collapse of a centralized political power — in the Western context, the Roman Empire, in the case of Japan, imperial rule from Kyoto. In Europe, these institutions developed within the Roman law tradition, in which legal systems recognized private civil law. In Japan, well-established adjudicatory institutions with progressive case law and developed procedures grew in the field of private law, resembling the growth of common law in England. However, the government generally discouraged ordinary citizens from using law to resolve disputes, and private disputes were largely left to be resolved by members of the village communities.

The third paradigm is that of the *mura*: a quasi-independent and quasi-autonomous village (pp. 51-65). The *mura*, a product of the late sixteenth century, was an exclusive community of peasants. It functioned as a self-contained economic and administrative unit. Village officers were named and became responsible for managing their villages, and the headman was accountable to the ruling authorities for any misdeed by village members. Villagers were subject to registration, tax, public work-labor obligations, and other regulatory controls designed to maximize revenue yields and restrict social and geographic mobility. In reality, however, villages retained a remarkable degree of autonomy in the face of pervasive regulations and controls by the central authorities.

So long as peace prevailed and taxes were paid, there was little to draw official attention and scrutiny. . . . By suppressing intra-community quarrels and satisfying formal fiscal obligations, a village community could restrain or avoid unwanted official regulation. The consequence was an institutional structure that in allowing evasion of official legal controls also promoted external deference and internal cohesion. In effect the village had the security of the administrative state along with the freedom of the outlaw. [p. 61]

The desire and need to maintain mechanisms of self-governance for social control is substantial when the goal is to maintain independence from a central authority that exercises coercive power. The village community developed its own mechanisms of control, including

the psychological sanction of collective displeasure, ostracism, and expulsion. Community sanctions became real deterrents to wrongdoing in Tokugawa Japan. This community control over sanctions "also meant that the community had a significant degree of control over the viability of legal norms. . . . Only the rules and standards the community was willing to enforce by the threat or application of sanctions could be effectively implemented within its confines" (p. 62).

By the mid-nineteenth century, the *mura* paradigm was firmly established with its effective mechanisms of informal control to maintain order within the village and to guard against the intrusion of the formal legal sanctions exercised by the administrative state and judicial institutions.

At this point, Japan experienced its second reception of foreign law — European law. The consequence of the Meiji legal reform is of special importance because the Napoleonic code and the German civil code introduced into Japan were primarily concerned with private law and were essentially products of liberal states in nineteenth-century Europe. The adaptation of the civil code created a number of repercussions. First, the civil code introduced a system of rules, based on a very different concept of law, into Japan. The scope of law under the civil code was significantly broader than the Japanese were accustomed to under the traditional law exercised by the administrative state, judicial institutions, and in the informal *mura*. Japan began imposing legal rules that regulated behaviors previously left untouched, or at least ignored. For example, landlord-tenant relations, never outside the scope of law, were regulated much more comprehensively under the civil code. In addition, the Meiji legal reform introduced law and institutions in which no dichotomy between authority and power existed.

Japan then began the process of absorption and adaptation, a process that produced some intended as well as unintended consequences. In general, however, the reform conflicted with traditional modes of social ordering. Coercive power gradually separated from the state, while the state retained its authority. The reach of civil law and legal institutions was contained by limiting ordinary citizens' use of courts and by utilizing traditional methods of dispute-resolution. Consequently, Japan developed into a state that, by all ostensible criteria, has as broad an authority as any modern industrial state; conversely, in terms of its coercive power and the use of its authority, Japan is relatively weaker than most industrial states. Thus, a vacuum has been created where state authority extends but no coercive power reaches. The vacuum has been filled, in part, by a reemergence of non-legal social controls. This revived traditional scheme relies upon necessity of consensus as the means of decisionmaking and of informal coercion, and on the use of law as a part of the process of reaching

consensus. In this process, law often appears to provide a goal as well as a tool to prompt people to reach a consensus. The paradigm of the *mura* is still prevalent in contemporary Japan.

## II

I find Professor Haley's paradigms difficult to dispute. They are tightly packaged and designed to show that Japan maintains an effective bureaucratic government, sophisticated adjudicatory institutions and procedures, and various means of informal social controls that fill whatever void is created by law without sanctions; that official law's domain is narrow and contained while unofficial group-based controls are pervasive; and that these characteristics of Japanese law and society are traceable to and deeply rooted in its history and traditions.

One has little reason to disagree with the picture that emerges from these paradigms. This picture, needless to say, starkly contrasts with that painted of the United States. According to Haley's characterizations, law in Japan is narrowly contained, divorced from moral or ethical standards, and bereft of enforcement power. His interpretation of these characteristics is generally favorable for Japan, perhaps too favorable for the comfort of some Japanese readers.<sup>8</sup> Nevertheless, I find it difficult either to approve or disapprove of Haley's basic characterizations because his analyses are often based on cultural differences, for which no quantitative evidence is available. He contrasts his characterizations with the United States' legal system, and such characterizations are difficult to prove or disprove; those differences may depend on a particular field of law or problem under comparison, and may be a matter of degree. It may, however, be worthwhile to point out some examples where the author's strokes seem too heavy or overdrawn.

### A. "Crime Without Punishment" (ch. 6)

Among major industrial states in the postwar period, Japan alone has shown a substantial decline in its crime rate in almost all categories. However, a relatively small number of judges, prosecutors, and police officers serve its criminal justice system, leading to chronic criminal trial delays. Professor Haley notes that the criminal process in Japan moves along "two parallel tracks," — a key that makes the system work despite its severe institutional constraints (p. 125). The first track involves a formal institutional process governed by the criminal code and procedural rules, similar to other industrial states. Within this formal criminal process, however, considerable discretion is given to Japanese police, prosecutors, and judges. All of them exer-

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8. For example, after discussing the "dark side of social controls" and "law as *tatema*" in chapter 8, entitled "Hamlets and Hoodlums," the author concludes that "[f]or all the conflict, inefficiency, and dysfunction manifest in so many aspects of postwar Japanese social, political, and economic life, Japan maintains a remarkably just as well as stable social order." P. 191.

cise discretion in such a way that an extremely lenient criminal justice system has evolved.<sup>9</sup>

The fact that few offenders see the inside of a jail results from the informal "second track" of the Japanese criminal justice system. An emphasis on confession, repentance, and absolution characterizes this track. In addition to such standard considerations as the gravity of the offense, the nature and circumstances of the crime, and the age and prior record of the offender, the following elements may become determinative in the decision whether to report, prosecute, or sentence the offender: "attitude of the offender in acknowledging guilt, expressing remorse, and compensating any victims"; and "the victims' response in expressing willingness to pardon" (p. 129).

Haley argues forcefully that the Japanese second track may contribute to a reduction of crime and the rehabilitation of offenders. He concludes that the Japanese state has, in effect, abandoned the formal institutional process — the most coercive of all legitimate instruments of state control of crime — and has transferred its power to those who control informal social mechanisms (p. 128). "In contemporary Japan these powers thus reside with the society at large and its constituent, lesser communities of family, firm, and friends" (p. 138). He implies that effectiveness and efficiency result when the state abandons the formal criminal process and relies on informal social means of crime control. He clearly exaggerates his paradigms: state authority without power, law without sanctions, and group-based informal controls effectively filling a vacuum created by state institutional incapacity.

A state cannot maintain a legal order without the effective working of formal criminal processes. In Japan, the rate of arresting crime suspects remains high, "[p]revaling conviction rates [of those charged] hover at about 99.5%" (p. 128), and punishments meted out by courts are fairly standard for each crime category. A formal criminal law effectively controls crimes and maintains social order. Informal social controls work within the clearly defined and established legal system. These mechanisms work because of, not in spite of, the existence of the state's adequate enforcement power. Haley's analysis of the second track remains persuasive only insofar as it describes a supplementary role of the second track for the primary track.

#### B. "Administrative Power Constrained" (ch. 7)

Professor Haley examines what he finds a distinguishing character-

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9. Large numbers of offenders identified by the police are never reported as suspects to the procuracy. Of those reported, most are convictable. Yet the vast majority are allowed to take advantage of summary proceedings that result in minor fines equivalent to a few hundred dollars. For many others prosecution is routinely suspended. Even though prosecution of those that remain seems tantamount to conviction in ordinary trials, sentences are generally suspended in more than half of all cases.

istic of the Japanese legal system: the Japanese bureaucracy carries seemingly limitless authority without even a relatively normal degree of coercive legal power.<sup>10</sup> He describes the Japanese administrative process as a form of consensual administrative management (p. 144). In the context of contemporary Japan, administrative agencies must achieve consent among those most directly affected by administrative policies and whose cooperation is necessary for the effective implementation of those policies. In this process of consensus forming, the regulators and the regulated negotiate in both the making and enforcement of policy. Those subject to governmental direction may gain a "significant and often determinative voice in the process of formulating and implementing policy" (p. 144). This process, in turn, leads to the legitimization of the consensus-derived policy through the institutional empowerment of the "private" bargainer.<sup>11</sup> Haley asserts that the prevalent use of administrative guidance reflects authority without power and fits the basic pattern of consensual governance (pp. 160-64).

This chapter describes the distinctive character of administrative agencies as their lack of enforcement power. Without legal power to implement their policies, Japanese bureaucrats cannot act coercively. They remain essentially weak. This characterization contrasts with Professor Upham's description of administrative agencies in *Law and Social Change in Postwar Japan*,<sup>12</sup> which characterizes the administrative agencies as active, assertive, and in the forefront of Japanese social change.<sup>13</sup> Haley concentrates on economic policies, while Upham focuses on such evolving fields as environmental protection and minority rights. Involved government agencies may have acted without legal enforcement powers in each area; however, administrative agencies do not lack legal means to implement their policies to the degree to which Haley asserts.<sup>14</sup> In addition, agencies can actively seek the passage of

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10. "In terms of *authority*, governmental activity in Japan tends to be as unlimited in scope as in a command economy. In terms of coercive *power*, however, government officials have only the legal powers granted to them by statute plus whatever extralegal levers of influence or persuasion may be available." P. 144.

11. Haley finds the basic form of consensual management at work in the Japanese government's reliance on cartels and trade associations in prewar and postwar economic policy. Pp. 144-53.

12. FRANK K. UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* (1987). For Haley's views on Upham's book, see John O. Haley, Book Review, 11 HARV. J.L. & PUB. POLY. 243 (1988). I find that the two books, despite their different approaches and focuses, complement each other well in presenting the Japanese legal cultural characteristics; both are essential for anyone interested in Japanese law and society.

13. Professor Chalmers Johnson expressed a similar view with regard to the leading role played by the Ministry of International Trade and Industry in evolving industrial policy in CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE* (1982).

14. The Administrative Substitute Execution Act of 1948 is a powerful legal tool that an administrative agency can rely upon when a party under a duty to perform does not satisfy its obligation. Gyosei dai shikko ho (Law No. 43, 1948). The agency itself can perform the duty in substitution or can employ a third party to perform the same duty. In either case, the agency can impose the cost of substitute performance on the original nonperforming party. This law is often

necessary and adequate legislation that enables them to implement their policies effectively. In the field of environmental administration, the Pollution Control Costs Allocation Act<sup>15</sup> and the Pollution-Victims Compensation Act<sup>16</sup> exemplify this power. In both instances, administrative agencies of the central as well as local governments assume active roles, backed by legal enforcement power, in assessing pollution control and remedial costs and imposing these costs on polluters.

Haley states that "Japan's dependency on consensus can be argued to have acquired from habit and expectation a particular and self-reinforcing legitimacy. In this context, formal law-making and law-enforcing processes . . . function in large measure as consensus-building processes rather than avenues for command and coercion" (p. 198). I find it difficult to disagree with this general cultural explanation. Nevertheless, I find the statement ambiguous as to how cultural elements matter at the level of individual decisionmaking and behavior. Haley contends that "the Japanese may be more tolerant of informal enforcement than Americans . . . because of shared attitudes or simply habit" (p. 165). He states that such cultural factors matter in situations where

the official or the private party or both would have acted differently out of self-interest but for a cultural imperative. Only if, for instance, the respondent to an official request complies even though doing so runs counter to economic or other gain could an attitude of submission and deference to authority be viewed as determinative. [p. 165]

I am unpersuaded, and troubled, by this statement's implication that a cultural imperative may work against the self-interest of parties involved. Haley makes a similar statement on determinative cultural factors in Chapter Five, to which I will return later.

### C. *"Lawsuits and Lawyers: The Making of a Myth"* (ch. 5)

Haley argues that the Japanese have historically been quite litigious. He is indeed one of the first scholars to question the myth of Japanese nonlitigiousness.<sup>17</sup> Contrary to Haley's implied projections, however, litigation rates in contemporary Japan continue to decrease

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used in the field of environmental cleanup. Before World War II, administrative agencies could impose administrative fines and exercise direct power, including detention and confinement, under the Administrative Enforcement Act (Gyosei shikko ho, Law No. 84, 1900). However, those powers were subsequently taken away.

15. Kogai boshi jigyoji jigyoisha futan ho (Law No. 133, 1970).

16. Kogai kenko higai no hosho ni kansuru horitsu (Law No. 97, 1987), which in 1988 renamed and subsequently amended the original act, Kogai kenko higai hosho ho (Law No. 111, 1973).

17. John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAP. STUD. 359 (1978). The debate continues in J. Mark Ramseyer, *Reluctant Litigant Revisited: Rationality and Disputes in Japan*, 14 J. JAP. STUD. 111 (1988); Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263 (1989).

rather than increase (p. 97). Haley is in a position to explain a curious paradox: the Japanese like to sue, but, in fact, they do not sue, or they are becoming less likely to do so.

Haley explains that the Japanese do not litigate because litigation does not pay. He attributes this trend to three policy and institutional factors: (1) the government discouraged litigation and encouraged mediation, especially in the interwar years; (2) the lack of a jury system and the career judiciary foster a greater uniformity and certainty of result; and (3) the official registry systems for real property and family relationships preclude the need to use the courts in a wide variety of cases, including adoption, divorce, real property transfers, and succession (pp. 114-16). In addition, he relies on two cultural factors: mediation — the availability of third parties who can perform the role of mediator reduces the need to invoke formal judicial intervention — and interdependency — the extent of close interdependency relationships from family ties to business dealings precludes resort to the courts (pp. 115-16).

Haley criticizes the popular image produced by “impressionistic anthropology” that views the Japanese reluctance to litigate as a particular phenomenon of a culture that emphasizes social harmony and cohesion (pp. 114-15). Nevertheless, he feels he must add the above cultural factors to the institutional ones. He states that people go to court when they perceive that the “prospective outcome of a litigated case is more beneficial than other avenues of redress” (p. 116). In other words, people litigate when they have something to gain. However, Haley does not fully explain or justify the decision not to sue when a litigant has something to gain.

The individual decision not to sue involves essentially two scenarios: one does not litigate when it does not pay or one does not litigate even when it does pay. The former is a rational choice and needs no cultural explanation; the decision could be explained by some or all of the various institutional constraints that Haley mentions. The latter case, where one does not litigate even if one may benefit from doing so, seems nonrational or irrational and calls for some explanation, cultural or otherwise. I cannot accept that the latter case of irrational choice exists as a cultural pattern, and without an explanation of such behavior, Haley’s reliance on culture to justify irrationality is unconvincing.

Haley argues that the “use of apology and other customary practices” may preclude “the enforcement of otherwise applicable legal rules” (pp. 117-18). He cites, as an example, past acceptance by Japanese women of unequal treatment despite constitutional and statutory proscriptions regarding gender discrimination (p. 118). In this irrational choice case, “apology and other customary practices” seem inadequate and unsatisfactory to explain the decision not to sue,

especially because this explanation disregards existing institutional constraints that clearly deter a woman from seeking legal redress in such a situation.<sup>18</sup>

### III

Professors Hamilton and Sanders base their book, *Everyday Justice: Responsibility and the Individual in Japan and the United States*,<sup>19</sup> on a comparative and empirical study about responsibility and sanctions, which the authors regard as core aspects of legal culture. The book asserts that "it is a fundamental human impulse to seek restitution or retribution when a wrong is done, yet individuals and societies assess responsibility and allocate punishment for wrongdoing in different ways" (book jacket).

Based on the data collected from surveys conducted in Detroit, Michigan and Yokohama and Kanazawa, Japan, the authors compare both individual and cultural reactions to wrongdoing. They find decisions about justice are influenced by whether or not a social relation exists between the offender and victim; Americans tend to see actors in isolation, while Japanese tend to see them in relation to each other. The Japanese, mindful of role obligations and social ties, relate punishment to the goal of restoring the offender to the social network. In contrast, Americans punish wrongdoers by isolating them from the community. The authors suggest two models, "justice among friends" versus "justice toward strangers," as approaches to analyzing the processes of ascribing responsibility for wrongdoing and judging appropriate sanctions in modern society.<sup>20</sup>

Though Hamilton and Sanders' research focuses primarily on social psychology, the book informs and illuminates anyone interested in studying comparative legal culture. Its findings and analysis generally support some of Haley's assertions while refuting others. Specifically, Hamilton and Sanders view Japanese nonlitigiousness from a different perspective and offer more persuasive explanations.

The authors observe that, in comparing Japanese and American societies, scholars have persistently debated the relative importance of

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18. Some institutional and legal constraints under which women sued for employment discrimination are explored in Catherine W. Brown, *Japanese Approaches to Equal Rights for Women: The Legal Framework*, 12 LAW IN JAPAN: AN ANNUAL 29 (1979). The Equal Employment Opportunity Act of 1972 (Danjo koyo kikai kinto ho, Law No. 113) was substantially amended in 1985 (Law No. 45).

19. V. LEE HAMILTON & JOSEPH SANDERS, *EVERYDAY JUSTICE: RESPONSIBILITY AND THE INDIVIDUAL IN JAPAN AND THE UNITED STATES* (1992). The book certainly merits a full and detailed review by some competent specialist. I merely summarize some of its points relevant to Haley's book. The results of surveys in Japanese cities have been published in Japanese. ZENSUKE ISHIMURA ET AL., *SEKININ TO TSUMI NO ISHIKI KOZO* (1986). The Japanese data and findings are much more interesting and meaningful when compared and analyzed in this book with the counterpart data from the United States.

20. HAMILTON & SANDERS, *supra* note 19, at 203.

cultural and structural explanations for observed differences. The debate, the authors believe, has too narrowly centered on the issue of litigiousness, focusing on litigation rates as evidence of cultural values.<sup>21</sup> They find this debate, in which Haley has been one of the major contenders, confusing and misleading because it has failed to specify the particular decision under discussion. Disputants make many decisions while they move on to different levels in the "disputing pyramid."<sup>22</sup> Haley argues that a nonlitigious ethic is useful in explaining Japanese legal behavior only if the disputants reach settlements that do not reflect the expected value of a case. As Hamilton and Sanders point out, Haley seems to argue that, if culture matters, litigants should settle for less, and implies that cultural explanations of nonlitigiousness predict economically irrational behavior.<sup>23</sup>

Hamilton and Sanders view the issue of litigiousness as one that distorts the relations between legal culture and legal structure. They point out that the debate has tended to equate cultural explanations with microprocesses and structural explanations with macroprocesses, looking at cultural values within the narrow context of an individual's decision whether to sue while looking at the court structure as the environment within which that decision is made. The authors argue that "this is an error because it misconstrues the role of legal culture in shaping a legal system."<sup>24</sup>

According to the authors, the debate focusing on litigation rates has produced some questionable assertions: the Japanese legal system is fragile because it is under attack from those who want to litigate, and it is less than legitimate because the Japanese government elites have managed the legal system to discourage litigation in order to control the populace.

Hamilton and Sanders, basing their explanations on the survey data, provide a different perspective and suggest another possible explanation, which I find more persuasive. According to them, the Japanese express support for a less adversarial process and are more willing to forgo litigation, in order to create a collective benefit, an atmosphere of harmony and compromise. In such a society, the authors argue, those who insist on their legal rights may be seen as free riders, exploiting the collective benefit, and modern legal reforms in Japan

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21. *Id.* at 188-90.

22. "The disputing pyramid is a metaphor to describe the process by which a large number of injuries or other unfortunate outcomes become thought of as acts of wrongdoing, are transformed into claims, are pursued through legal or nonlegal channels. Some injuries generate no claims, some claims are dropped or not otherwise pursued, some are settled before suit, some suits are settled or dropped before trial, and some decisions are not appealed; the pyramid metaphor reflects the fact that the number of cases constantly decreases as claims move up through the system." *Id.* at 191.

23. *Id.* at 189.

24. *Id.* at 192.

can be interpreted as a "process of constant adjustments to thwart the corrosive impact of litigious free riders on a nonlitigious legal order."<sup>25</sup>

The authors suggest that Japanese society may choose to focus on citizens' preferences when they are concerned with community values (e.g., harmony, peace) rather than when they are concerned with individual problems. They state that, by doing so, Japanese society is not basing its choices on less valid or less legitimate components of legal culture; rather, the Japanese legal order legitimately attends to citizens' preferences by reflecting the concerns of a contextual self rather than the concerns of an individual self.<sup>26</sup> I find Hamilton and Sanders' explanation more pertinent to the issue of litigiousness than Haley's cultural factors.

In conclusion, the authors suggest two visions of responsibility and justice, one among friends and the other among strangers, "each originating in the nature and boundaries of everyday social relationships between people."<sup>27</sup> They find that Americans dispense more justice toward strangers, while the Japanese rely more on justice among friends. However, their data also show that "Japanese judge strangers much as Americans do, and would punish strangers at least as harshly; Japanese simply seem to deal with fewer strangers in their daily routine."<sup>28</sup> A simple statement like this one, supported by survey data, adequately explains apparent cultural characteristics and inclines toward a more productive comparison of substantive problems and laws between the United States and Japan.

#### IV

Two strong trends in contemporary Japan should challenge Professor Haley's *mura* paradigm. These are urbanization and internationalization.

Increasing urbanization in Japan has already destroyed many social relationships that existed in the traditional *mura* model.<sup>29</sup> In urban settings, people are more isolated and alienated. They tend to seek more justice among strangers than among friends. Informal social controls become less effective because the web of personal relation-

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25. *Id.* at 193.

26. *Id.* at 195.

27. *Id.* at 216.

28. *Id.* at 217.

29. For example, see THEODORE C. BESTOR, *NEIGHBORHOOD TOKYO* (1989), which describes urban neighborhoods in contemporary Japan and effectively challenges assumptions such as Tokyo as a congeries of villages, displaying direct historical continuity with preindustrial village life, and as urban neighborhoods that are little more than administrative or political units. One should note, however, that the Miyamoto-*cho* described in the book is a distinctive community quite different from massively developed urban "new" towns and "residential cities" that dominate Tokyo.

ships that once existed is rapidly disintegrating. Business firms and workplace groups cannot substitute for the tightly knit personal relations of the *mura*. After all, these modern organizations have more definite purposes, such as profit seeking, that require different forms of commitment from, and place different obligations on, their members. Consensus for the good of the community becomes much more difficult to achieve.

Internationalization has also impacted Japan, challenging it to become a more open and transparent society. Increasingly, international transactions force Japan to face incorporation of diverse foreign elements into the society: international firms, foreign lawyers, and workers. The negative side of consensus governance has thus become apparent. Consensus governing has worked and is efficient simply because, once it is formed, participating parties are bound to honor the consensus result, and no formal enforcement costs are needed to implement agreed upon policy. The fewer the participants, the easier to obtain consensus. Consensus governing is effective because its process excludes many parties whose interests are affected once consensus is formed. Unfairness of consensual administration to those who do not have access to the decisionmaking process is apparent, and the costs of correcting unfairness have become great.<sup>30</sup> These developments should affect and change legal structural arrangements as well as culturally oriented behaviors based on the traditional *mura* model.

Some years ago, I spoke to a group of American lawyers attending a Japan-U.S. conference on legal and economic relations.<sup>31</sup> After describing the Japanese legal system in terms of several features that do not exist in Japan but are often taken for granted by American lawyers (jury system, contempt of court, a wide range of equitable remedies, pretrial discovery, punitive damages, class actions, and contingent fees, and so forth), one American lawyer stood up and demanded, "How can you do justice in a legal system like that?"

The Japanese legal system is certainly trying to achieve justice without some of the American legal fixtures. Oftentimes, it is indeed difficult to explain how we accomplish this, let alone to convince the American lawyers that a legal system without those basic features could work and be accepted as fair and legitimate.

Haley certainly provides both an answer to the above question and a way to look at Japanese law and society. His basic message is that

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30. Misusing coercive legal means in this context may sometimes incur disproportionate social costs. A glaring example of this is the construction of the Narita International Airport, which remains incomplete after 20 years because of organized protest and resistance by landowner-farmers. This example may support Haley's point that consensus forming is important for administrative agencies before implementing certain policies. See DAVID E. APTER AND NAGAYO SAWA, *AGAINST THE STATE: POLITICS AND SOCIAL PROTEST IN JAPAN* (1984).

31. The conference met in Tokyo in 1988. Papers presented at the conference were published in *UNITED STATES/JAPAN COMMERCIAL LAW & TRADE* (V. Kusuda-Smick ed., 1990).

there are other ways of administering justice different from those accepted in the United States. His paradigms, rooted in the historical past and traditions of Japan, have produced a persuasive overall image of law in a consensus-based society. Nevertheless, his paradigms may be faulted for attributing too much to culture, which is also subject to change, and for making his overall presentation of Japanese law and society too distinctive. Overemphasizing Japan's distinctiveness incurs a risk of reviving old myths about Japan that Haley effectively has begun to break down, myths based on an assumption that Japan is culturally unique.

I do not deny the usefulness and effectiveness of using cultural explanations, especially when one is presenting an overall view of a foreign legal system. I would adopt a very similar approach as Haley's if I were describing the American legal system. However, I find Haley's heavy emphasis on the distinctiveness of Japanese law and society to be a little dangerous. Also, I suspect that Haley's emphasis on some positive and favorable aspects of Japanese law and society may just be a reflection of his critical view of, and dissatisfaction with, the contemporary American legal system. Or, am I reading too much into or out of this book?

Professor Haley has written one of the most provocative books on Japanese law and society. The book challenges other comparative legal scholars to test, refute, amend, and change the author's general paradigms in each substantive law field as well as to engage in overall studies of Japanese legal culture.