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Law Across Borders: What Can the United States Learn From Japan?†

By ERIC A. FELDMAN*

The question posed to the speakers on this panel is whether the “West” can learn from the “Rest.” As an outsider to the American Society of Comparative Law, and to the field of comparative law generally, I must confess that I am somewhat puzzled by that query. For one, I tend to think in categories that are far less inclusive or broad than “West” and “Rest.” Although I research, write, and teach about the American legal system, which I assume is part of the category “West,” I would never claim to have expertise on all aspects of that system. Nor do my learned law faculty colleagues generally make claims to expertise about the American legal system writ large. Instead, American legal academics are a community of specialists, and pretending to possess expert knowledge of more than a few subfields of American law appropriately invites ridicule.

Further complicating the picture is the fact that my knowledge of other nations that are members of the Western legal tradition – Italy, Germany, Spain, and many others – is even more sketchy. And I am on even shakier ground when it comes to that amorphous category labeled “the Rest.” How delighted I would be if I could claim expertise in the legal system of Iran, or Pakistan, or Bhutan, or Cambodia, all of which I assume constitute the “Rest” rather than the “West.” But sadly, those are places about which my legal knowledge is rather basic. In fact, the only non-Western nation about which I have any detailed knowledge is Japan, and, as it is with the U.S., my expertise is selective and incomplete.

† Remarks from *The West and the Rest in Comparative Law*, 2008 Annual Meeting of the American Society of Comparative Law, University of California, Hastings College of the Law (Oct. 2-4, 2008).

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My discomfort with the categories “West” and “Rest” is further illustrated by the difficulty of categorizing Japan. While the Japanese system clearly has its roots in what would seem to be the archetype of non-Western law (i.e., Eastern, Chinese), its legal history over the past 150 years reveals significant Western roots, with a heavy dose of the civil law tradition (particularly French and German) in the late nineteenth century and an influx of common law ideas and institutions during the postwar U.S. Occupation in the mid-twentieth century. As a result, I am envious of those on the previous panel; the question they were asked, can the “Rest” learn from the “West,” is straightforward. Japan is Exhibit One for the proposition that countries that are generally considered non-Western can and do learn from nations that are part of the Western legal tradition.

As a concession to my own zone of comfort, my comments will be more specific than whether the “West” can learn from the “Rest.” I will take the charge quite literally with regard to whether lessons can be learned, but focus only on Japan and the United States and what the United States may usefully learn from the structure and substance of the Japanese legal system. Before I offer nine specific suggestions, however, one additional general comment is necessary, because it seems to me that there is a critical issue our panels have ignored. It involves not learning *from* other places but learning *about* them. I worry that by focusing on learning *from* rather than learning *about* we are simply assuming that we can learn about the legal rules and practices of other nations accurately and in detail. But more than other legal scholars, comparativists surely know how frequently other legal systems are misunderstood, or only partly understood, and how easily such misapprehensions can derail the process of trying to learn something useful from another legal system.

So I think we need to show humility in our ability to learn *about*, and even more so in our ability to learn *from*. At the same time, we need to do a much better job getting law students interested in studying other legal systems so that they can clearly distinguish between actual “lessons to be learned” and mere bias, projection, and misunderstanding. It is in that spirit that I offer you a somewhat random list of what I think the “West” (the United States) can learn from the “Rest” (Japan).

I. Depoliticize the Selection of Judges

There is a good deal of debate over judicial independence in Japan, but even those who have expressed concern about a lack of independence do so in a narrow band of cases. Japan follows a system of training judges that is quite different from that in the United States, though it is similar to those in some European nations. Aspiring legal professionals must take an entrance exam to study at the government's Legal Training and Research Institute. Those who pass become judges, prosecutors or attorneys. Although the question of which path to pursue depends to some extent on individual preference, the best and brightest students get a tap on the shoulder inviting them to become judges. They come up through the judiciary working with senior judges who mentor them in everything from trial procedure to settlement negotiation. The result is a highly professionalized judiciary drawn from the top students at Japan's best universities. Such a system has its faults; currently, Japan is thinking about adding another track in which seasoned senior professionals could become judges, which is seen as a way of addressing the homogeneity of the bench. Compared to the politicization of many U.S. judicial appointments, and the money being poured into judicial elections by parties with a clear financial interest in the outcome of cases that will be heard by the elected judge, a system in which members of the judiciary are not elected or politically appointed is something that could be a valuable contribution to the operation of the American legal system.

II. Be Less Cynical About Apology

Defendants in the United States infrequently apologize, and when they do, the common perception is that they are seeking some sort of instrumental or material gain. In medical malpractice suits, for example, one of the hottest areas of research on law and apology, the general view is that doctors apologize less because they think that they did something wrong than because they see it as a way to avoid lawsuits. While apologies also have instrumental value in Japan, they are a far more common feature of legal conflict than in the U.S., and litigants frequently cite apology as an important outcome of their disputes. Further, apology in Japan generally facilitates the ability of parties to come to terms financially, and plays a critical role in "balancing the moral scales" of a conflict. A less cynical view of, and greater emphasis on, apology as a key

component of the resolution of legal conflict in the U.S., could facilitate the bridging of differences before they harden into irreconcilable animosity, and help heal the wounds that result from the bitter disagreements that lead people to court.

III. Take Vicarious Liability More Seriously

Vicarious liability in the United States works as a form of strict liability, with those held vicariously liable charged with the cost of accidents resulting from the carelessness of their employees or independent contractors. Because parties held vicariously liable are not seen as having acted negligently or inappropriately, it is rare for them to take moral responsibility for the harms inflicted on the injured party. The result is an attenuated view of responsibility in which even those who are held accountable for certain accidents can legitimately feel like what happened was not their fault. As a French court stated when describing the role of several government officials in the scandal over the transmission of HIV through the blood supply, "responsible, but not guilty."

In contrast, it is far more common in Japan for individuals only tenuously linked to accidents to take responsibility for the harms that occur on his or her watch. From plane crashes to tainted foodstuffs to defective products, company presidents regularly fall on their swords to accept responsibility for the injuries suffered by those whose misfortune brought them into contact with the goods or services of their companies. This is clearly not vicarious liability in the narrow sense, and I am not suggesting a specific doctrinal change. Instead, it appears that there are broad differences in who bears, or perhaps accepts, responsibility for a wide range of personal injuries in Japan and the U.S., and that there are certain advantages to Japan's approach.

IV. Rethink the Second Amendment

It is not my intention to invite a constitutional debate on the Second Amendment in the United States. Nor do I intend to simplify the complex relationship between laws that limit or outlaw the ownership or possession of firearms and the occurrence of violent crime. However, it is worth noting that Japan has what may be the most restrictive gun ownership law in the developed world, in conjunction with one of the lowest rates of violent crime. Those wishing to own a firearm in Japan must be hunters and can only

obtain shotguns – handguns, assault weapons, and other types of firearms are banned. Before obtaining a gun, people must go through a lengthy and complex licensing procedure, including a mental health component. Gun owners must store their guns in a locker, give police a map of their home showing where the gun is stored, and keep ammunition in a separate locked safe.

Gun related crimes in Japan are extremely low – a function of the small number of guns in society, the severe penalty for having an unlicensed firearm, and undoubtedly other factors. To the extent that violence and violent crime continues to be seen by Americans as a significant quality-of-life problem, the experience of Japan in minimizing that problem is surely worth examining.

V. Make Criminal Law Less Punitive

Current data indicates that there are approximately 2.2 million people who are incarcerated in the United States (approximately 1 percent of all adults). Japan's prison population, in contrast, is under 100,000 (approximately .08 percent of the adult population). While there are many reasons for that extreme discrepancy, at least part of the explanation is due to a difference in penal philosophy. While the Japanese are more interested in rehabilitation and reintegration, Americans seems more intent on punishment. Although there is no simple cut-and-paste way to emulate Japan's approach to criminal justice in the U.S., and no guarantee that importing Japan's strategy will have similar consequences in the United States, it is at least worth having a look at the emphasis on rehabilitation in Japan and asking whether it could be adapted to the U.S. context.

VI. Reform the Expert Witness System

One of the most controversial elements of civil justice in the United States is the expert witness system. Clients pay huge sums to so-called experts, many of whom peddle their views to the highest bidder, in a process that is highly unlikely to aid courts in their search for the truth. In cases that involve the U.S. government, like litigation against the savings and loan industry in the 1990s, the large payments to experts come from the public fisc.

In contrast, Japan's system of injecting expert opinion into complex litigation is inexpensive, experts are motivated by non-pecuniary factors, and the truth-value of their testimony is relatively

high. Japan has recently brought about several changes in the use of experts in the courtroom. "Expert commissioners," for example, serve as advisors to judges. The court can also call experts from panels of pre-registered and pre-certified professionals. Looking in more detail at what Japan has done and determining whether it has been effective ought to be the first step in the much-needed reform of the U.S. expert witness system.

VII. Teach Law Students About Legal Systems Other Than Their Own

Japanese law students not only spend a significant amount of time studying the Japanese legal system, but also learn a good deal about the French and German legal systems, the common law systems of the United States and United Kingdom, and the legal systems of their Asian neighbors. American law students provide a striking contrast. They are generally clueless about what differentiates civil law and common law jurisdictions, and they learn nothing, or close to nothing, about legal systems outside of the United States. Instead, they are often convinced – and their professors are too often complicit in affirming their conviction – that the substance and process of American law is a global model. Japan offers an alternative – as do many other nations – for how to escape some of the insularity that characterizes law and lawyers in the United States. Being interested in, and possessing knowledge about, legal systems around the world makes Japanese lawyers and scholars far more intellectually broad than their counterparts in the United States. And it makes them much more useful when domestic legal problems arise for which non-domestic solutions or responses already exist. We ought to emulate Japan by removing our blinders (and those of our students), becoming more curious about law outside the U.S., and being more willing to spend our time studying it. Although the pundits are surely correct about the power of globalization, in many ways legal systems have remained profoundly local, and we cannot avoid the hard work of digging into specific jurisdictions so as to understand how they operate.

VIII. Increase Public Entitlement Programs While Decreasing Civil Damage Awards

The media within and outside of the U.S. regularly vilifies the American legal system for being overly generous to plaintiffs in personal injury lawsuits. Although the criticisms are greatly exaggerated, and celebrated cases like the one involving a spilled cup of McDonald's coffee are almost always more apophrycal than real, it is true that damage awards in the United States are higher than those in most other jurisdictions, including Japan. Numerous factors contribute to the magnitude of U.S. damage awards, among which the financial needs of plaintiffs is critical. Many Americans involved in accidents lack sufficient health insurance, have only modest worker's compensation benefits, and do not have robust retirement plans. As a result, money for tangible damages like health care costs, and for intangible damages like pain and suffering, is necessary in order to make plaintiffs whole.

In Japan, on the other hand, damages are low and relatively predictable because they are calculated with reference to a guidebook that is used by all courts and lawyers throughout the country. Attorney's fees (only recently allowed to be billed on a contingency basis) are lower than in the United States. Pain and suffering damages rarely exceed (or even reach) \$500,000. Punitive damages are not permitted. Yet injured parties generally get the money they need if they win their claims, because the most urgent post-accident expense - medical care - is taken care of by Japan's system of universal health insurance. Perhaps Japan's combination of modest civil damages and generous social insurance contains a useful lesson for the U.S. as we continue to debate the virtues and vices of tort reform and begin the difficult process of reshaping our health care system.

IX. Be Eclectic and Cannibalistic - Send Study Teams To and Fro, Borrow From a Wide Range of Legal Systems

Since the Meiji Restoration in the late nineteenth century, the Japanese government has been sending teams of smart young lawyers around the world to study how other countries construct and operate their legal systems. Most recently, in the 1990s, groups of Japanese lawyers and law professors descended on destinations as diverse as Colorado, Copenhagen, and Cambridge to study how different jurisdictions educate lawyers, involve laypersons in

judicial decisionmaking, make accurate decisions in specialized areas like medical malpractice and intellectual property, and more. Based upon those observations, reports were written, committees were formed, political coalitions were built, and sharp debates arose. What emerged was a wide-ranging set of reforms to the Japanese legal system, constituting the most profound period of legal change in at least fifty years, and perhaps since the nineteenth century.

Such a process is inconceivable in the United States. When groups of lawyers and law professors go overseas, it is to tell others what Americans do and why our hosts should emulate it. When we study other legal systems, it is rarely with an eye to what we can borrow. The idea that the U.S. government should send teams of lawyers abroad in search of doctrines or procedures that could be transplanted to America would, even today, be laughed off Capitol Hill. But I submit that we would be well-served by acting more like Japan, replacing our arrogance with humility and being open to other ways of configuring our legal system.

This list is just a beginning, and I am sure that there are plenty of things that I have overlooked. I look forward to hearing the views of the other panelists, and to the general conversation that will follow.

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