

## THE SPIRIT OF JAPANESE LAW

THE SPIRIT OF JAPANESE LAW. By John Owen Haley. Athens, GA: University of Georgia Press, 1998. Pp. 280.

*Reviewed by Kenneth L. Port\**

No one familiar with Japanese law requires an introduction to John Haley or his work. With the unfortunate passing of Dan Henderson (a mentor and friend to one and all in the field of Japanese law) in December of 2000, Haley sits as the senior statesman of a small group of American legal academics who focus their academic careers on various aspects of the Japanese legal system.

Although one certainly can quibble with some aspects of the book, Haley has accomplished something very important here: he communicates the role of the process of law in Japan as manifested in judicial opinions. His synthesis of a large number of cases into an interesting read really must be applauded.

The book clearly is not written for the few American legal academics that study and write about Japan. It obviously is meant for those more casually interested in the subject of Japanese law. To be sure, Haley thoroughly grounds the work in a detailed analysis of interesting cases that serve to satisfy his thesis. There is nothing superficial about the work. However, in order to complete the work in two hundred pages and write to what then becomes essentially a non-technical audience, Haley is forced to paint with broad strokes.

This is not a bad thing. In some ways, it is refreshing. Some work produced by American legal academics is so fraught with jargon and insider-speak that the work becomes impenetrable to all but the specialists of that particular narrow field. Here Haley does an admirable job of communicating aspects of the Japanese legal system to academics of other disciplines and non-academics alike. The work, general as it is in places, is accessible and interesting even if you already know the conclusion.

After introducing the structural nature of the Japanese legal system, Haley paints a rather compelling picture of law in Japan. Law in Japan, we are told, is a communitarian construct where there is great "judicial deference to community values."<sup>1</sup> Law is a "somewhat suspect but respected mechanism

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1. JOHN O. HALEY, THE SPIRIT OF JAPANESE LAW 196 (1998).

of state control in a communitarian society.<sup>2</sup> Law in Japan does not play the same coercive role dictating and sanctioning specific conduct as it does in other countries. Enforcement mechanisms are weak and often not utilized. As a result, in order to obtain the highest degree of compliance possible, both judicial opinions and public laws try to find the common ground or, that magic word, “consensus” regarding any specific subject.<sup>3</sup> Although one does hunger for more specificity when reading *The Spirit of Japanese Law*, Haley does wonders in opening up a wide range of judicial opinions to support the point that Japan is a communitarian state, and that the judiciary reinforces communal norms in its opinions.

Regardless, there is some very interesting data that Haley does not delve into. This may be because of page restrictions or because it does not fit the thesis of presenting the spirit of Japanese law as portrayed by the judiciary. The existing data does not necessarily contradict Haley’s conclusions about Japanese law; however, the reader may want to know Haley’s view of the data. For example, in the section describing the Japanese Supreme Court, Haley puts a very vague and positive spin on data regarding the composition of the Court and their educational backgrounds.<sup>4</sup> Haley’s analysis of the implications would be very interesting. That is, Haley states that 121 people have served as Supreme Court justices since 1947—the date that the first Supreme Court was impaneled under the new constitution written by U.S. Occupation forces under the specific direction of General MacArthur.<sup>5</sup> Haley provides data regarding the birth dates and education of the sitting justices in 1997.<sup>6</sup> He implies that the Supreme Court is made up of a balance of individuals with views representing a wide spectrum of this “communal” society.<sup>7</sup>

2. *Id.* at 20.

3. *Id.* at 39.

4. *Id.* at 109-14.

5. *Id.* at 114. This, in itself, is a startlingly large number for the American reader. By contrast, in the United States, there have been a total of 108 Supreme Court justices since promulgation of the U.S. Constitution, including 30 justices (9 sitting in 1947 and 21 subsequently appointed) since 1947, which is the same time period Haley considers in his calculation. See THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1995, 544 (Clare Cushman ed., 2d ed. 1995). The twenty-one justices appointed after 1947 graduated from eleven different law schools. See THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 252-64 (Lee Epstein et al. eds., 2d ed. 1996). There are structural reasons why there have been so many Japanese Supreme Court Justices. Most importantly, they do not serve life terms. The average age of appointment is sixty-three and mandatory retirement is at age seventy. This fact alone means that the nature of the institution is significantly different from the U.S. Supreme Court where justices are appointed for life and, typically, serve for long periods of time. No such culture exists within the Japanese Supreme Court.

6. See HALEY, *supra* note 1, at 113.

7. *Id.*

That, however, is not the case at all. The Japanese Supreme Court represents the elite of the elite. In the twenty-year period between 1970 and 1990, fifty-four people served as justices on the Japanese Supreme Court.<sup>8</sup> Of those fifty-four individuals, all were male.<sup>9</sup> Forty-two (78%) graduated from Tokyo University's law department.<sup>10</sup> Five (9%) graduated from Kyoto University, four (7%) graduated from Chuo University, two (4%) graduated from Tohoku University, and one (2%) graduated from Kyushu University. Of the fifteen sitting members of the Japanese Supreme Court on the date of this writing, seven graduated from Tokyo University, five graduated from Kyoto University, one graduated from Nagoya University, and one graduated from Chuo University.<sup>11</sup> All fifteen were born between the years of 1932 and 1936 and therefore were teenagers or young adults during the postwar Occupation.<sup>12</sup> That is, nearly every one of the 121 Supreme Court justices Haley references went to either Tokyo University or Kyoto University and the great majority of these attended Tokyo University. It would be interesting to hear how this obvious data, some of which Haley references, fits into his thesis regarding law as communitarian construct.

On one hand, it appears that the judiciary Haley relies on to reflect the spirit of Japanese law is, in fact, the community of the most elite. On the other hand, that conclusion may be unfair. The reader is left to reach his/her own determination, as Haley does not provide one. Again, this may be the point of the work: briefly describe the judicial system and not provide an in-depth critique. With the information on the table, the reader is encouraged to come to his or her own conclusions. For example, in any given society, if virtually all of its Supreme Court justices graduate from one university, have the same professors, study the same materials, and have similar socioeconomic backgrounds that allowed them to gain admittance to that prestigious school in the first place, is it that surprising that their judicial opinions would represent a common and consistent view of society? Which communitarian viewpoint do these justices represent?

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8. LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990 app. 1, at 645-50 (1996).

9. Hisako Takahashi, appointed in 1994, was the first female justice to sit on the Japanese Supreme Court. The second, Kazuko Yoko, was appointed in December of 2001.

10. Haley says this number is "over two-thirds" when explaining how many of the "law's actors" graduated from Tokyo University. HALEY, *supra* note 1, at 42.

11. See Justices of Japan, at [http://courtdomino2.courts.go.jp/shokai\\_e.nsf/View01?OpenView](http://courtdomino2.courts.go.jp/shokai_e.nsf/View01?OpenView) (last visited May 21, 2002).

12. This fact may appear to be tangential, but being a child in war-torn Japan, and then a teenager or young adult during the postwar Occupation, must effect one's concepts of self, society, propriety, and nation. Haley's failure to address this issue gives the unintended impression that the judges are inhumane.

Furthermore, Haley very interestingly claims that “Japanese judges thus form a remarkably autonomous bureaucracy . . .”<sup>13</sup> He defends this point by pointing out that the Japanese judiciary has created a system whereby dissent is punished through internal means (largely decisions regarding promotion) and that, contrary to what others have argued, the judiciary is free of national politics.<sup>14</sup> Thus, he concludes, the judiciary is remarkably autonomous.

Haley uses a description of the so-called Miyamoto affair as evidence of the autonomous judicial bureaucracy. In 1971, an assistant judge by the name of Yasuaki Miyamoto was not recommended for promotion to full judge by “the administrative arm of the Supreme Court.”<sup>15</sup> This was highly unusual because Judge Miyamoto had served his ten years and virtually all other judges who had served ten years were recommended to the cabinet for reappointment as full judge.<sup>16</sup> In effect, the Supreme Court fired Miyamoto without a hearing, without due process, and without following the constitutionally required impeachment process.<sup>17</sup>

Haley explains that the Supreme Court treated Miyamoto this way because he was a member of the Seihyōkyō, or Young Lawyers League, that many believed had communist foundations. Haley further explains that the establishment judiciary “would not tolerate any significant departure from an essentially moderate-to-conservative approach to legal change and judge-driven social reform.”<sup>18</sup> The interesting part of this and the reason I point it out here is that Haley does not use this as an example of an insular group of elitist jurists harshly protecting their own political agenda, but rather as an example of the “remarkably autonomous bureaucracy.”<sup>19</sup> It is a judiciary that polices, promotes, and punishes its own autonomously.

This all seems perfectly true and accurate. However, what is missing is an analysis regarding the implications of having a judiciary that is so autonomous that it essentially can expel members, as it did in the Miyamoto case, in an extra-constitutional manner and still remain a legitimate source of information regarding the communal state.

Regarding the legal profession in Japan, Haley provides a very interesting

13. HALEY, *supra* note 1, at 108.

14. See J. MARK RAMSEYER & FRANCES MCCALL ROSENBLUTH, JAPAN’S POLITICAL MARKETPLACE 164-70 (1993), noted in HALEY, *supra* note 1, at 107.

15. HALEY, *supra* note 1, at 106.

16. Article 80 of the Japanese Constitution reads in relevant part as follows: “All such judges shall hold office for a term of ten (10) years *with privilege of reappointment . . .*” KENPŌ [Constitution], art. 80 (emphasis added).

17. Article 78 of the Japanese Constitution reads in relevant part as follows: “Judges shall not be removed except by public impeachment . . .” KENPŌ, art. 78.

18. HALEY, *supra* note 1, at 107.

19. *Id.* at 108.

historical description of specific individuals who were important in shaping the concept of the role of lawyers in Japan and how lawyers in Japan, as in America, do not always enjoy a positive popular reputation.<sup>20</sup> Most importantly, Haley weighs in on an important point he made well-known in 1978: there are many more “law actors” in Japan than generally are recognized.<sup>21</sup> Once again, a little data would have helped. Consider the following chart:

**Legal Profession in Japan**  
(numbers as of Jan. 1, 2002)

Japanese Name	English Equivalent	Duties	Number
Bengoshi	Lawyer	Private representation of individuals or corporations before a court of law or other legal body	18,897 (10% female) <sup>22</sup>
Benrishi	Patent Attorney	Prosecuting applications for a patent on behalf of individuals or corporations before the Japanese Patent Office	4,662 <sup>23</sup>
Gyosei Shoshi	Administrative Scrivener	Administrative law specialists prepare documents for submission to gov. bodies; document submission; counsel clients on administrative law	34,414 <sup>24</sup>

20. *Id.* at 51-58.

21. John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359 (1978).

22. Outline of the Japan Federation of Bar Associations, *at* <http://www.nichibenren.or.jp/en/about/index.html> (last visited May 7, 2002). In Tokyo alone, the growth of the bar has been rather rapid as follows:

Year	Men	Women (%)	Total
1951	1,395	1 (0.05%)	1,396
1955	1,512	3 (0.2%)	1,515
1960	1,702	17 (1.0%)	1,719
1970	2,386	66 (2.7%)	2,452
1980	2,802	120 (4.1%)	2,922
1990	3,260	221 (6.3%)	3,481
2000	3,593	432 (10.7%)	4,025

See Members Profile, Tokyo Bar Association, *at* <http://www.toben.or.jp/english.html>.

23. The Japan Patent Attorneys Association, *at* <http://www.jpaa.or.jp>.

24. The Japan Federation of Gyoseishoshi Lawyer's Associations, *at* <http://www.gyosei.or.jp>.

Japanese Name	English Equivalent	Duties	Number
Shiho Shoshi	Judicial Scrivener	Preparation of documents for submission to court	17,075 <sup>25</sup>
Zeirishi	Tax Attorney	Dispensing legal advice regarding tax filings, preparing filings, and structuring transactions to minimize tax liability	65,144 <sup>26</sup>
Koshonin	Notary Public	Authenticating documents, signatures, and dates	545 <sup>27</sup>
Shakaihoken-romushi	Certified Social Insurance and Labor Specialist	Focuses specifically on issues concerning social insurance and labor law	25,000 <sup>28</sup>
Sha-in	Employees of corporate law departments	Rep. of corp. from licensing, leasing, contracting, etc. (J.D. holders in the United States)	400,000 <sup>29</sup>

Total: 583,001<sup>30</sup>

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25. The Japan Federation of Shiho-Shoshi Lawyer's Association, at <http://www.shiho-shoshi.or.jp>.

26. Japan Federation of Certified Public Tax Accountants Associations, at <http://www.nichizeiren.or.jp>.

27. See Japanese Notary Public's Association, at <http://www.koshonin.gr.jp/english/ekosho.htm>. Although a notary in the United States would never be considered a provider of legal services, under the German system adopted by Japan, a notary does provide legal advice and services to private clients. As such, the number of notaries is included here. A notary in Japan is a public official appointed by the Minister of Justice and who works in the jurisdiction of a Legal Affairs Bureau in which the government appointed him. A notary is a type of judicial officer who performs his duties independently and impartially and who provides legal advice to private individuals and corporations alike. The Ministry of Justice may appoint a judge, a prosecutor, or someone with profound knowledge of the legal system. In reality, most notaries are retired judges. Their average age at appointment is sixty and they face mandatory retirement at the age of seventy. The 545 notaries reported here work in 301 different notary offices spread out all over Japan. Their duties include attesting to signatures on documents, acknowledging the execution of documents, authentication of articles of incorporation, taking affidavits, administering oaths for the purpose of taking affidavits, executing deeds for conveyances, leases, loans and wills, serving writs on obligees described in deeds, certifying copies of notarial deeds, and fixing definite dates on documents.

28. Members Profile, Tokyo Bar Association, at <http://www.toben.or.jp/english.html>.

29. No official numbers of in-house law related workers are kept. One organization of larger corporations with legal departments (*Keiei Hoyu Kai*) three years ago reported their membership to be eight hundred corporations with fifteen thousand employees. See The Association of Japanese Corporate Legal Departments, at <http://www.la.mesh.ne.jp/~keiei/opinion/opinion7.html>. However, this number would include only *Kigyo Homu*, or official in-house legal department employees. The number of employees working in law-related jobs that would require a J.D. if performed in the United States is certainly much higher. This number is derived from information and belief colloquially distributed in Japan.

30. Any claim that compares the total number of legal professionals in Japan to other countries is ripe for dispute. Some of the individuals here play less of a legal function than others. Some say that if we include all of these disparate "legal professionals" in Japan in the calculation of total law providers, then it would only make sense to add to the number of "legal professionals" all paralegals and law

Accordingly, there are not only many more law students per capita in Japan than the United States as Haley points out,<sup>31</sup> but there are more law professionals as well.<sup>32</sup> This conclusion is in stark contrast with the Japan bashers of the early 1990s who made ridiculous claims such as that 70% of the world's lawyers were Americans.<sup>33</sup>

Haley's point seems to be that, although communal in nature, the existence and effect of law in Japan is underappreciated by Americans. The data represented in the table above would have helped to prove that law matters in Japan. Based on that data, one might even argue that it matters more to the Japanese than to Americans.

In Haley's famous 1978 article entitled *The Myth of the Reluctant Litigant*, Haley argued that there is less litigation in Japan than in the United States. This is not because the Japanese innately believe in communitarianism but rather because the Japanese legal system is flawed.<sup>34</sup> In *The Myth of the Reluctant Litigant*, Haley argued that a consensual paradigm emerged in Japan, not because of the instinctively cooperative

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clerks in the United States. On the Japan side, though, we also could add the significant number of Ministry employees who deal with law and legal policy on a daily basis, and if they were employed in a comparable American department certainly would be required to have a J.D. The most important point that the number comparison brings out is that neither I nor anyone else really can lay any claim to the absolute number of legal professionals in either country. My only point is to demonstrate that there are far more legal professionals in Japan than generally recognized. Haley is certainly aware of this. His comment on this data may or may not have ultimately helped his thesis. One way or the other, a comment on such data would have enriched his book.

31. HALEY, *supra* note 1, at 41.

32. Haley is not alone in pointing this out and this is not a new fact. See, e.g., Masanobu Kato, *The Role of Law and Lawyers in Japan and the United States*, 1987 B.Y.U. L. REV. 627, 661 (providing data that revealed that as of 1984, there were 159,000 law students in Japan as compared to 120,000 law students in the United States).

33. Dan Quayle, Vice President of the United States, Address Before the American Bar Association (Aug. 13, 1991), in Federal News Service, Aug. 13, 1991, available at LEXIS, Individual Legal News, Federal News Service File. See also Saundra Torry, *Quayle and Curtin Generate More Heat Than Light in ABA Debate*, WASH. POST, Aug. 19, 1991, at F5 (quoting Vice President Quayle as stating that America has 70% of the world's lawyers); James Bishop, Jr., *Quayle vs. The Lawyers: The Hunt Is on for a Plump New Scapegoat to Blame for the Nation's Woes*, ARIZ. REPUBLIC, Dec. 8, 1991, at C5 (reporting that critics of the legal system claim that the United States has twenty times more lawyers than Japan per one hundred thousand people); Ward Blacklock, *Lawyer-bashing: It's Time to Turn the Tide*, 24 ST. MARY'S L.J. 1219, 1221 (1993), citing Ray August, *The Mythical Kingdom*, A.B.A. J., Sept. 1992, at 72 (arguing that the United States ranks thirty-fifth among all countries in per capita number of lawyers, and has only 9.4% of the world's lawyers, rather than the 70% suggested by Vice President Quayle). Some commentators have made it part of their career to dispel the myth that America has fewer legal professionals than commonly believed. See, e.g., Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633 (1994); Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998); Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77 (1993).

34. See Haley, *supra* note 21, at 359.

nature of the Japanese people, but because they lacked the actual ability to get involved in the legal system. They wanted to litigate, he argued, but the system would not let them. Haley pointed out the long delays in trials, the expensive filing fees required by plaintiffs, the lack of contingent fee arrangements, and the lack of a jury system. Coupled with these defects, Haley pointed out, is a Japanese society that is very interested in law and legal rights.

These facts led Haley in 1978 to the conclusion that the Japanese may want to litigate but are prevented from doing so by an impenetrable legal system. As such, I categorized him as a “revisionist.”<sup>35</sup> In 1978, it seemed that Haley was making the argument that Japan should revise its legal system to make it more accessible to average people. If it were more accessible, presumably more people would be able or willing to litigate.<sup>36</sup> It was not the inherent nature of the Japanese individual that was preventing Japanese from litigating, but rather the specific structural impediments within the Japanese legal system.

In *The Spirit of Japanese Law*, Haley’s thinking appears to have evolved some. Community now matters more. Law, in the form of judicial opinions, matters as well but more as a manifestation of the legal communal state. “Putting aside the question of causes, the effects of such a prevailing pattern of interrelationships seem clear—a community whose members share significant gains by continued cooperation, with significant barriers to withdrawal as well as to new entry.”<sup>37</sup>

Although Haley does recognize that the “community can indeed become the tyrant,”<sup>38</sup> *The Spirit of Japanese Law* seems to represent the kinder, gentler John Haley. Haley appears no longer to be so critical of the Japanese legal system and its structural impediments. He now seems to be far more accepting of the consensual hypothesis.

Be that as it may, Haley’s newest major work—which is as interesting and inspiring as the rest of his work—will open the doors to the Japanese judiciary for an audience heretofore excluded. Scholars and lay people alike who do not speak Japanese at last can objectively and accurately comprehend Japanese judicial thinking and analysis. This, in itself, makes the work an invaluable contribution.

35. See Kenneth L. Port, *The Case for Teaching Japanese Law at American Law Schools*, 43 DEPAUL L. REV. 643, 664-68 (1994).

36. That argument has won the day, interestingly enough, as Japan is now considering radical judicial reform specifically designed to include private “lay” people in the judicial process and make the judicial system more accessible to all Japanese people.

37. HALEY, *supra* note 1, at 208.

38. *Id.* at 211.