

# The Rule of Law in the Reform of Legal Education : Teaching the Legal Mind in Japanese Law Schools

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# The Rule of Law in the Reform of Legal Education : Teaching the Legal Mind in Japanese Law Schools

James R. MAXEINER\*

## Introductory Remarks

I would like to thank your faculty and Kansai University for so generously sponsoring my visit here. Professors Yamanaka and Imanishi are responsible for my coming to Kansai in the first place. Professors Kubo and Takeshita arranged for my addresses today. Professors Takigawa and Yamanaka have literally taken me by the hand to assure that I find my way about Japan. All of you have been terrific hosts. I am having a very productive and happy visit. Nothing is lacking. I only hope someday to return your kindness.

I would like to note, too, that Professor Yamanaka and I met in Munich over twenty years ago when we were both fellows of the Alexander von Humboldt Foundation. The spirit of the Humboldt Foundation is behind this talk today.

## 1. Introduction

This must be an exciting time to be a law professor in Japan! According to national policy “greatly increasing the legal population is an urgent task.”<sup>1)</sup> A new legal training system is being established and at its “core” are to be the new law schools.<sup>2)</sup> Within fifteen years, the legal population is to increase by 150% or more—from about 20,000 now to 50,000 or more lawyers, judges and prosecutors in 2018.<sup>3)</sup> You are needed. And there is nothing better for one’s self-confidence than to be needed.

This rapid increase in the number of lawyers means that in only a few years,

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1) Justice System Reform Council, Recommendations of the Justice System Reform Council For a Justice System to Support Japan in the 21st Century, June 12, 2001, Chap. III, Part 1, 1.

2) *Id.* at Chap. III, Part 1.

3) *Id.* at Chap. III, Part 1, 1. In this talk I refer to all three branches of the profession as „lawyers.“

lawyers trained under the new system will account for the majority of all lawyers in Japan. Your country has quite literally charged you with the task of building the legal profession.

This is such an exciting development for legal education that even a foreign visitor such as myself cannot resist commenting on it. I realize that I know no Japanese and have little knowledge of Japanese law and history. Yet I request your indulgence and ask that you allow me—as an outsider—to comment on these developments. Much of what I have to say may be obvious to you. But I hope that I may either bring to you new insights or perhaps just confirm for you conclusions that you have already reached.

My perspective as an outsider is somewhat different from that of other outsiders in two respects. I am reasonably familiar not only with my own legal system, the American, but also with the other foreign legal system most closely followed in Japan, the German. Moreover, my perspective is not only that of a scholar, but also that of a practitioner who has been active in international practice. In fact, I have spent more time as a practitioner than as a scholar. My practice career has spanned three principal areas of practice, as a government lawyer for the United States Department of Justice, as a private lawyer for international law firms in New York City, and as in house Associate General Counsel of a major American corporation.

## **2. My thesis summarized**

Here in summary is my thesis today:

- a. The Rule of Law is at the heart of the present legal reform.
- b. There is an international consensus about basic elements of the Rule of Law.
- c. Legal methods are central to the Rule of Law. But different legal methods are used to realize the Rule of Law.
- d. Teaching legal methods, i.e., teaching to think like a lawyer, is at the heart of that which is professional in legal education.
- e. The present legal reform invites you to teach legal methods. It is my opinion, as an outsider, that you should seize the opportunity to do that—even more than before—and you should work actively to develop the future Rule of Law in Japan.

I intend to address these points sequentially. In some instances, I will draw upon examples from Germany and the United States and discuss my imperfect understanding of Japanese law.

### 3. The Rule of Law is at the heart of the present legal reform

The Rule of Law is at the heart of the pending legal reform. The Justice System Reform Council Report could hardly be clearer on this point. Chapter I states :

... [T]his Council has determined that the fundamental task for reform of the justice system is to define clearly “what we must do to transform both the spirit of the law and the rule of law into the flesh and blood of this country, so that they become ‘the shape of our country.’...<sup>4)</sup>

The theme of the Rule of Law runs like a leitmotif through the entire Report. The Report notes that the Rule of Law is an “essential base” for converting from an advance control system to an “after-the-fact review/remedy type society”<sup>5)</sup> that permits each and every person to “break out of the consciousness of being a governed object and [to] become a governing subject, with autonomy and bearing social responsibility...<sup>6)</sup>

### 4. International consensus on some basic elements of the Rule of Law

The Rule of Law is central to the legal systems of Japan, Germany and the United States. In Germany it is referred to as the *Rechtsstaatsprinzip*, but the two concepts are substantially the same.<sup>7)</sup> There is an international consensus as to some of the basic requirements of the Rule of Law: law should be clear. It should be publicly promulgated and prospective. Law should be stable. A mechanism for its implementation should permit a predictable decision in the individual case. Law must be capable of guiding those subject to it, and, for law to be capable of guiding the subject, it must also protect the individual from arbitrary use of power to make and apply law. When the Rule of Law is safeguarded, the subject can rely on the law and can foresee application of state power.<sup>8)</sup>

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4) *Id.* Chapter I. (Further in Chapter I: “This reform of the justice system aims to tie these various reforms together organically under “the rule of law” that is one of the fundamental concepts on which the Constitution is based. Justice system reform should be positioned as the “final linchpin” of a series of various reforms concerning restructuring of “the shape of our country.”)

5) *Id.* Chap. I, Part 3, 3.

6) *Id.* Chap. I.

7) Neil MacCormick, *Der Rechtsstaat und die rule of law*, *Juristenzeitung* 1984, 65; Neil MacCormick, *Questioning Sovereignty* 9 (1999); Erhard Denninger, “*Rechtsstaat*” oder “*Rule of law*”—*was ist das heute?*, in *Festschrift fuer K. Luederssen* (2001).

8) See Lon Fuller, *The Morality of Law* chap. 2 (2<sup>nd</sup> ed. 1969); Gustav Radbruch, *Rechtsphilosophie* ✓

The Rule of Law is not an absolute value. Its demands all too soon conflict with the ability to generalize in rules. Gustav Radbruch observed the tension: "Legal security requires positive law, but positive law demands application without regard to its justice and utility."<sup>9)</sup> At times the Rule of Law gives way to other interests, namely to justice or utility (i.e., general welfare). Examples are the use of general clauses and of retrospective legislation.<sup>10)</sup> Different legal systems have different ways to permit this needed flexibility. But if that flexibility becomes too great, the Rule of Law is at risk.

## 5. Legal methods are central to the Rule of Law

The Rule of Law is concerned with how the law is actually applied, that is, with legal methods. What is a legal method? It is a way to reach a substantive decision of a legal question.<sup>11)</sup> Legal methods bring law and facts together to govern a concrete case. Legal methods are concerned with two principal aspects of law: how law is stated and the mechanisms by which law is applied.<sup>12)</sup> In the United States one speaks of rules and of courts or judicial process. In Germany, one speaks of *Orientierungs-* and of *Realisierungssicherheit*. I suspect that similar distinctions are made here in Japan.

Most lawyers have only a vague idea of differences in legal methods.<sup>13)</sup> Legal methods are rarely taught comparatively. One learns one's own legal method

↘ § 9 (8<sup>th</sup> ed. 1973); Ken Takeshita, *The Modernization of the Japanese Legal System*, 19 *Kansai University Review of Law and Politics* 1, 8-9 (1998); Keiichi Yamanaka, *Staatsraison versus Rechtsstaat. Zur verfassungshistorischen Bedeutung der Otsu-Affaere*, 29 *Verfassung und Recht in Uebersee* 215 (1996); Swiss Constitution of 18 April 1999, Art. 5 ("Grundlage und Schranke staatlichen Handelns ist das Recht.")

9) Radbruch, *op. cit.* at 166.

10) See James R. Maxeiner, *Policy and Methods in German and American Antitrust Law: A Comparative Study* 12-13 (1986); James Maxeiner, *Rechtspolitik und Methoden im deutschen und amerikanischen Kartellrecht: eine vergleichende Betrachtung* Kap. 2 (1986).

11) See 1 Fikentscher, *Die Methoden des Rechts in vergleichender Darstellung* xix (1975-1977), 4 *id.* 121; James R. Maxeiner, *Policy and Methods*, *op. cit.*; Gutram Rahn, *Rechtsdenken und Rechtsauffassung in Japan dargestellt an der Entwicklung der modernischen japanischen Zivilrechtsmethodik* 3 (1990).

12) Cf. John Owen Haley, *Authority Without Power: Law and the Japanese Paradox* 5 (1994) ("By definition, all legal systems, Japan's included, comprise two primary elements—norms and sanctions—and the related institutions for making and enforcing legal rules.")

13) Elsewhere I have sought to increase awareness of foreign legal methods. See James R. Maxeiner, *U.S. "methods awareness" for German Jurists*, in Bernhard Grossfeld *et. al.*, (eds.), *Festschrift fuer Wolfgang Fikentscher* 114 (1998); *Legal Methods Awareness and Japan in an Era of Global Electronic Commerce*, An Address to the Faculty of Law of the Ritsumeikan University, Kyoto, Japan, June 19, 2003.

when one learns to “think like a lawyer”. The idea of the “legal mind” is found around the world, but it does not mean the same thing everywhere. Lawyers work with their own legal methods without thinking about them.<sup>14)</sup>

Legal systems of different countries use different legal methods to realize the Rule of Law. Some systems place comparatively more emphasis on the role of rules while others place comparatively more emphasis on the role of courts. Some are more willing to allow the Rule of Law to give way for individual justice, while others are more likely to allow departures from the Rule of Law for interests of the general welfare. These differences are apparent in a cursory examination of legal methods in Germany, the United States and Japan.

#### **a. German Legal Methods**

The classic subsumption model is at the heart of German legal methods.<sup>15)</sup> In the German model, law is a system of rules. In German understanding jurisprudence is a “science of norms.”<sup>16)</sup> The legal rules are part of an abstract legal order that governs all behavior. The legal order is a structure of ought-norms. The idea of their message is not to describe facts, but to prescribe conduct.<sup>17)</sup> This objective order is contrasted to subjective rights of individual subjects. A rule of law takes the form of a statement. Hence it is called, in German, a *Rechtssatz* (i.e., “law-sentence”). A complete legal norm consists of two parts: a *Tatbestand* and a legal consequence (*Rechtsfolge*). The *Tatbestand* is an abstract description of a particular situation. The legal norm takes the form: whenever the *Tatbestand* (T) is realized in a concrete factual situation, then a certain legal consequence (R) applies. This is the major premise. The minor premise is that this particular factual situation S fulfills the requirements of the *Tatbestand* T, that is, it is a case of T. The conclusion then logically follows that for the factual situation S, legal consequence R applies.

In Germany judges apply law to facts. They learn the skill of drafting a judgment, the so-called “relationship” or “judgment technique” (*Relationstechnik* or *Urteilstechnik*). Foreign jurists learning German law are advised: “A German judgment is supposed to appear as an act of an impartial as well as impersonal public authority furnishing the official and objective interpretation rather than being based on the personal opinions of the deciding justices. . . . The typical

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14) See, e.g., Karl N. Llewellyn, *Praejudizienrecht und Rechtsprechung in Amerika 2* (1933), translated as *The Case Law System in America 2* (M. Ansaldi transl. 1989) (“Handling precedents is a matter of tradecraft, an art one learns from experience. . . . One learns this from study, from the practice of law, in general from life as a lawyer. But little thought is given to *what* one is learning.”).

15) Karl Larenz, *Methodenlehre der Rechtswissenschaft* 150 (5<sup>th</sup> ed., 1983).

16) *Id.* at 187.

17) Reinhold Zippellius, *Einfuehrung in die juristische Methodenlehre* 12 (3d ed., 1980).

German judgment strives after the ideal of deductive reasoning.<sup>18)</sup> The two principal substantive parts of the judgment are the *Tatbestand* and the *Entscheidungsgründe*. The *Tatbestand*, as it appears in a judgment, is a short statement of the parties' legal claims and assertions of fact.<sup>19)</sup> From the *Tatbestand*, it should be possible to determine quickly who is seeking what, from whom, on what ground and to determine which matters are in dispute and which are not.<sup>20)</sup> The *Entscheidungsgründe* is a summary of the considerations for the decision.<sup>21)</sup> It is to evaluate and subsume the concrete facts of the *Tatbestand* under the abstract elements of the applicable norm.<sup>22)</sup>

The highly-stylized German judgment is designed to assure that the parties understand the grounds for the court's decision.<sup>23)</sup> Ideally the judgment will convince the party losing the lawsuit that that loss is the correct outcome.<sup>24)</sup> At a minimum, the judgment should persuade the loser that the process was rational. The party affected by the judgment should be enabled to rationally reproduce the grounds for the decision. He should recognize, that not arbitrariness, but rational argumentation determined the judgment.<sup>25)</sup> In this way the parties are guaranteed the constitutional right to equal treatment under the law (Article 3) and the constitutional right to be heard (*rechtliches Gehör*, Article 103(1)).<sup>26)</sup> The judgment also controls the judges.<sup>27)</sup> If judges fail to subsume the facts of the case under the applicable law properly, their decision is subject to correction on appeal. The judgment demonstrates whether the judges understood the losing party's position; through its impersonal and colorless nature, it demonstrates the judges' neutrality.<sup>28)</sup>

### ***b. American Legal Methods***

The American legal system emphasizes the judicial process more than rules. While the German legal system is expected to provide an objectively correct legal

18) Reinhard Zimmermann, *An Introduction to German Legal Culture*, in Werner Ebke & Matthew Finkin (eds.), *Introduction to German Law* 1, 21 (1996).

19) ZPO [Zivilprozessordnung] § 313 II; Egon Schneider, *Der Zivilrechtsfall in Pruefung und Praxis* 186 (6th ed., 1974).

20) Schneider, *op. cit.* at 185.

21) ZPO § 313 III.

22) Guenther Schmitz *et al.* (eds.), *Die Station in Zivilsachen* 90 (1986).

23) Baumbach/Lauterbach/Albers/Hartmann, *Zivilprozessordnung* § 313, margin no. 33 (53d ed., 1995).

24) Kurt Schellhammer, *Die Arbeitsmethode des Zivilrichters* 241 (7th ed., 1984).

25) Peter Raisch, *Juristische Methoden vom antiken Rom bis zur Gegenwart* 121 (1995).

26) Baumbach/Lauterbach/Albers/Hartmann ZPO § 313, margin no. 33.

27) Schellhammer, *op. cit.* at 242; Schmitz *et al.* *op. cit.* at 83.

28) Schneider, *op. cit.* at 178-79.

answer, the American legal system is expected to provide procedures to resolve disputes about what subjective rights are. The focus of American legal methods is dispute resolution. The concept of legal order in the German sense of an abstract order that governs all behavior has disappeared.<sup>29)</sup>

Rule skepticism dominates American legal thinking and legal instruction. A half century ago, Professor and later U. S. Attorney General Edward Levi in the classic work on legal method in the United States, denied that the subsumption model applies in America: “[I]t cannot be said that the legal process is the application of known rules to diverse facts.”<sup>30)</sup> Much of American legal theory is concerned with upholding departures from rules. One characteristic of the American legal system is said to be the “open modification of the rule to allow purposes or policies to be taken into account.”<sup>31)</sup> A foreign observer, my German *Doktorvater* Wolfgang Fikentscher, has noted the positive side of this approach to rules: “The program is not rule antagonism, but flexibility of rules and adaptability of the system in order to meet . . . the need of the hour.”<sup>32)</sup> There are many areas in American law where there are “legitimate departures from rules,” e.g., “jury nullification” (where juries are permitted to decide against the law) and “prosecutorial discretion” (where prosecutors are permitted to decide when to enforce laws).<sup>33)</sup> American legal scholars see these departures from rules as virtues that permit decision makers to take into account individual circumstances that would be insufficiently appreciated by rule-bound decisions.<sup>34)</sup>

The American legal system places great weight on values related to the fairness of the process. It is especially concerned that the parties have notice of all

29) See James R. Maxeiner, *U. S. “methods awareness” op cit.*

30) Edward Levi, *An Introduction to Legal Reasoning* at 3 (1949).

31) P. S. Atiyah & Robert S. Summers, *Form and Substance in Anglo-American Law* 91 (1987). Roscoe Pound advocated an “equitable application of the law” which conceived of the legal rule “as a general guide to the judge, leading him toward the just result, but insist[ing] that within wide limits he should be free to deal with the individual case, so as to meet the demands of justice between the parties and accord with the general reason of ordinary men.” *The Scope and Purpose of Sociological Jurisprudence III*, 25 *Harv. L. Rev.* 489, 515 (1912).

32) 2 Fikentscher, *op. cit.* at 465.

33) Cass R. Sunstein, *Legal Reasoning and Political Conflict* 148, 153 (1996).

34) See, e.g., Mortimer R. Kadish & Sanford H. Kadish, *Discretion to Disobey: A Study of Lawful Departures from Legal Rules* (1973); Sunstein, *op. cit.*, substantially incorporating Cass R. Sunstein, *Problems with Rules*, 83 *Cal. L. Rev.* 953 (1995) (“One of my principal goals in this Article is to respond to a pervasive social phenomenon: extravagant enthusiasm for rules and an extravagantly rule-bound conception of the rule of law.”); F. Schauer, *Giving Reasons*, 47 *Stan. L. Rev.* 633, 634 (1995) (“at times it is better not to give reasons than to give them”); Guido Calabresi, *A Common Law for the Age of Statutes* at 180 (1982) (“One should recognize openly that courts are exercising the power to allocate legislative inertia and to decide whether statutes deserve a retentionist or a revisionist bias.”).



proceedings; that the judge and the jury are completely neutral and unprejudiced; that no proceedings take place without all parties' having the opportunity to be involved; and above all, that each party has a full, fair and ample opportunity to present "its case", i.e., its version of the whole matter. These factors legitimate the proceeding. Appellate review is concerned with whether the rules of procedure were followed and not with the actual factual findings. The system is designed to assure the fairness of the process more than the correctness of the result.<sup>35)</sup>

### c. *Japanese Legal Methods*

The form of Japanese legal methods is close to German methods. Reading Japanese scholars on Japanese civil procedure and legal methods, one might assume that there is a very close congruence.<sup>36)</sup> Much as in Germany, judges are trained in a technique of writing judgments to apply law to facts.

A German scholar, Gutram Rahn, however takes issue with this view. In his *Rechtsdenken und Rechtsauffassung in Japan dargestellt an der Entwicklung der modernen japanischen Zivilrechtsmethodik* (1990) Rahn concludes that Japanese jurists have rejected the German legal-subsumption method.<sup>37)</sup> In its place, he says, there is a method that is distinctly Japanese. Rahn's fundamental contention is that a legal judgment in Japanese understanding consists of two separate and independent acts. There is first an act of decision (*Entscheidungsakt*); it consists of a value judgment of all competing interests. Only after reaching that decision is the court then to justify that decision in its judgment in a separate act of justification (*Entscheidungsbegründung*). Unclear according to Rahn is the extent to which the court in justifying its decision is to explain and support its initial value judgment, who should win.<sup>38)</sup>

35) See, e.g., Schlesinger/Bradley, CBS Reports: Enter the Jury Room, first broadcast April 16, 1997 (transcript and video tape available) ("If the American jury system promises anything, it is not a fair outcome, only a fair process.")

36) See, e.g., Muneo Nakamura, *My Theory about Judgment*, first published in 1965, and *A Comparative Study of Judicial Process*, first published in 1958, both reprinted in Hideo Nakamura (ed.), Muneo Nakamura, *Collected Works on Civil Procedure* (1994); Hideo Nakamura, *Die japanische ZPO in deutscher Sprache Mit einer Einführung in das japanische Zivilprozessrecht* (1978).

37) Gutram Rahn, *op cit.* at 2.

38) *Id.* at 327 („Die moderne japanische Zivilrechtsmethodik umfasst zwei voneinander unabhängige Verfahrensschritte: den Entscheidungsakt und die Entscheidungsbegründung. Die Entscheidung selbst wird durch ein Werturteil getroffen dem eine Abwägung aller vom Rechtsstreit berührten Interessen vorangeht. Das Gesetz ist dabei nur ein unverbindliches Kriterium neben anderen. Entscheidend kommt es darauf an, dass das Werturteil dem gesunden Menschen verstand des japanischen Volkes entspricht. Im zweiten Verfahrensschritt wird die bereits getroffene Entscheidung als Mittel der Ueberzeugung aufgrund des Gesetzes juristisch konstruiert. Unklar bleibt, in welchem Umfang die ‚substantiellen‘ Entscheidungsgründe—Interessenabwägung und Werturteil—offenzulegen sind. Die Forderung nach Offenlegung wird im Prinzip erhoben, aber dem Ueberzeugungszweck der Begründung untergeordnet.“)

The court's value judgment, according to Rahn,<sup>39)</sup> is not to be an arbitrary decision. The judge is to weigh the interests of the parties to the law suit and of other parties interested to reach the correct conclusion. The written law is, in this decision, only one aspect of the harmony that is to be sought. The decision must not contradict the general understanding of the people (*gesunden Menschenverstand des Laien—shiroto no joshiki—素人の常識*).<sup>40)</sup> Whether the court is to lay open this value judgment explicitly is debated.<sup>41)</sup>

Other German scholars that are familiar with Japan agree with Rahn.<sup>42)</sup> An American, who presumably is not familiar with German legal methods, also supports Rahn's thesis. Carl F. Goodman is his new book, *The Rule of Law in Japan: A Comparative Analysis*, observes that frequently in Japanese law, "what you see is not what you get." According to Goodman, Japanese judges are to decide in "a way that is satisfactory to the Japanese public—in a manner consistent with cultural values, myths (if need be), and societal norms that may be different from norms that exist in the United States. . . . To be consistent with these values, a decision may not reflect a syllogistic analysis of abstract logic. A decision must take account of the circumstances in which the parties presently find themselves and legal rules must be pliable to reflect the context in which the parties and the rule exist."<sup>43)</sup>

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39) *Id.* at 366.

40) *Id.* at 327.

41) *Id.* at 345.

42) See, e.g., Axel Schwarz, *Vom Wert des Lebens und der Normen*, in Heinrich Menkhaus (ed.), *Das Japanische im japanischen Recht* 63, 76-77 (1994) („Die Betrachtung zum Zivilrecht: Allgemeiner Teil und Schuldrecht bestaetigt den Befund Gutram Rahns zur Methode der japanischen Rechtspraxis: Die Rechtsanwendung wird nicht durch die Wertung des Gesetzeswortlauts, sondern durch das Werturteil des Richters determiniert. Entscheidungsfindung und Rechtfertigung der Entscheidung fallen auseinander. Ein richterliches Beduerfniss, eine Entscheidung juristisch unter Berufung auf eine Vorschrift sozusagen zu untermauern, scheint nicht zu geben.“)

43) Carl S. Goodman, *The Rule of Law in Japan: A Comparative Analysis* 2, 4 (2003) (“But to Japanese judges, whose experience is fundamentally different from the American experience, the discretion is to be exercised in a way that is satisfactory to the Japanese public—in a manner consistent with cultural values, myths (if need be), and societal norms that may be different from norms that exist in the United States. To be consistent with these values, a decision may not reflect a syllogistic analysis of abstract logic. A decision must take account of the circumstances in which the parties presently find themselves and legal rules must be pliable to reflect the context in which the parties and the rule exist.” Further, “. . . [J]udges are now being asked to interpret laws, Codes and Constitutions written by other societies with other values and, in a sense forced on Japanese society. When these Codes, Constitutions and laws are deemed to conflict with fundamental Japanese values or with Japanese historic norms or with myths accepted by the Japanese it is natural for judges to read these laws in a way which is consistent with these norms, values and myths. More is involved here than a strained interpretation of words. If need be a wholesale re-writing of the law by the judge may be called for and written provisions of the law will be sacrificed for the 'greater Japanese' good.”)

Among your colleagues I have found little support, either in theory or practice, for Rahn's thesis. Most Japanese jurists with whom I have spoken insist that Japanese judges are bound by the law and do not feel compelled first to make separate extra-legal value decisions. They tell me that the national Legal Training and Research Institute does not teach that judges are first to evaluate the overall merits of the case outside the law, but teaches judgment techniques similar to German techniques.<sup>44)</sup> They inform me that in their classes they do not teach rule skepticism, but rules that they teach are binding.

A couple of your colleagues, however, have granted that Rahn's thesis just possibly might have some merit in civil procedure. They have hastened to add that it has no application to criminal procedure, which is subject to the strict rule of *nulla crime sine lege*. And while I have yet to find a Japanese scholar who has published a direct response in English or German to Rahn,<sup>45)</sup> I have found some publications by Japanese scholars in European languages that do tend to support Rahn's conclusions. Among them is one by my gracious host, Professor Yamanaka. In an article on the origins of the Rule of Law in Japan in the Otsu Affair of the 19<sup>th</sup> century, he reports that in Japan there is a widely held view that statutory law is only a façade ripe for interpretation.<sup>46)</sup> Takeyoshi Kawashima of the University of Tokyo in an address in the United States was more directly supportive of Rahn's analysis of Japanese legal methods. He told Americans that: "In Japan it is understood from the beginning of a legal enactment that the meaning of law is changeable and not definite. This appears to be a peculiarly Japanese characteristic of legal thinking."<sup>47)</sup> Kawashima made a very interesting criticism: "this semantic tradition in Japan is really contradictory to the basic values which are required for a modern, democratic society which needs predictable judicial decisions.

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44) Cf. Akira Ishikawa, Training, Appointment and Number of Judges, in Gottfried Baumgaertel, Grundprobleme des Zivilprozessrechts Band 2 (Japanisches Recht Band 19) 3-5 (1985) (describing the training received by judges); Jun'ichi Murakami, *Argumentation und Abwaegung*, in Heinrich Menkhaus (ed.), *op. cit.*, at 89, 90 (criticizing the Rahn thesis: „Liegt die Absicht der ‚Strukturierenden Rechtslehre‘ darin, die Erzeugung der Rechtsnorm als ‚rechtsstaatlich rueckgebundenen Prozess‘ zu begreifen, so waere sie in der japanischen Rechtspraxis nicht liecht zu verwirklichen, in der nach Schwarz ‚gesunder Menschenverstand‘ und ‚ausserrechtliche Argumente‘ eine entscheidene Rolle spielen. Im Gestalt des japanischen Richters einen ‚Rechtsbearbeiter‘ im Sinne der ‚Strukturierenden Rechtslehre‘ zu finden, waere dann ohne Zweifel unmoeglich. Der Richter wuerde vielmehr stets im normgeloesten Raum bewegen, den die ‚Strukturierende Rechtslehre‘ moeglichst begrenzen will.“).

45) The closest comment in that direction I have found is that of Jur'ichi Murakami, *op. cit.*

46) Keiichi Yamanaka, *op. cit.* at 235 ("In Japan herrscht immer noch die Vorstellung, dass das Gesetz fuer die Auslegung nur eine Fassade bilde. An sich sei das Gesetz nur unnuetzer Schmuck, es lebe erst in der Handhabung durch den Menschen.").

47) Takeyoshi Kawashima, *Japanese Way of Legal Thinking*, International Journal of Law Libraries 127, 131(1979). Cf. Rahn, *op. cit.* at 18, 352.

Sooner or later we will have to change our traditional attitude toward the meaning of words, especially in our laws.”

Over and over again in its Report the Justice System Reform Council stresses the need for “predictable, highly clear and fair rules.”<sup>48)</sup> I think it is fair for me to ask you, does that not mean that the Commission has accepted the view of Kawashima that Japan should change its traditional attitude toward words in statutes? Does it not suggest that there might just be something to the argument of Rahn and Goodman? I express no view on the merits of Japanese legal methods—I still know too little about them—certainly the criticisms of Rahn and Goodman, which are not casual, but carefully worked through, suggest that there is need for Japanese jurists better to explain their methods to foreigners. And that is a need generally recognized in Report, when the Commission identifies as one reason for reform is its concern that Japan “occupy an ‘honored place in international society’ (the Preamble to the Constitution)”<sup>49)</sup>

## **6. Teaching legal methods is at the heart of the professional in legal education**

This brief sketch of legal methods shows that legal methods are different in different countries that all embrace the Rule of Law. Elsewhere I have addressed at length, that even though legal methods are quite different in Germany and the United States, yet in both countries the teaching of those methods is at the heart of what is professional in legal education.<sup>50)</sup> The lawyer’s craft is bringing law and facts together. Learning that skill is one aspect of legal education that many students find most exciting.

### ***a. Education of lawyers in Germany***

In Germany, the system of legal education was established to train civil servants for the State.<sup>51)</sup> All persons who wish to become legal professionals, whether as lawyers or as judges or otherwise, are trained as judges. The image of the judge colors the ideal of the legal professional. In Germany a person who wishes to become a lawyer must study for a minimum of seven to nine semesters

48) Justice System Reform Council, *op. cit.* at Chap. I, Part 2, 1.

49) Justice System Reform Council, *op. cit.* at Chap. I, Part 1.

50) *The Professional in Legal Education : Foreign Perspectives*, An Address to the Faculty of Law of the Himeji Dokkyo-University, Himeji, Japan, June 26, 2003 Himeji International Forum of Law and Politics, No. 38, 244 (2003).

51) See Reinhard Zimmermann, *An Introduction to German Legal Culture*, in Introduction to German Law 28 (W. Ebke & Matthew Finkin eds. 1996) ; Ranieri, *op. cit.* at 832 (“Das preußische Referendariatsmodell . . . prägt heute noch das deutsche Justiz- und Rechtssystem.”)

at a German law faculty and then may take the first state exam. Those students that do so successfully—and most do—are admitted to a two-year period of practical training sponsored by the courts of the various German states.

In Germany law students learn the substance of the law at the university. In their university studies students take courses in perspective, core and specialist knowledge. In the subsequent practical training period prospective lawyers learn practical skills. They learn the *Relationstechnik* of relating facts to law and of crafting judgments. Judges as classroom teachers didactically teach classes that lay out the fundamentals of this technique, while individual judges, at least in theory, tutor the aspiring legal professionals, the *Referendare* or interns, as apprentice judges. The interns learn how to take the substance of the law they learned at the university, how to conduct legal proceedings to determine facts, and how to justify in legal judgments their correct determinations of how law applies to particular cases. To some extent, they began this work already at the university.<sup>52)</sup> In short, they learn to do what a judge has to do. And it is the mastery of the techniques of applying law to facts (*Relationstechnik*) that defines the judge.<sup>53)</sup> The role of the German judge is to determine facts, to apply the law to those facts, and to state those conclusions in a formal judgment.

I myself have informally taken part in the classroom portion of the *Referendars'* training. I believe that the skills imparted in the *Relationstechnik* and the training to be a judge are valuable for all future jurists.

#### ***b. Education of lawyers in the United States***

In the United States the system of legal education was established to train lawyers for practice. All persons who wish to become legal professionals, whether as lawyers or as judges or otherwise, are trained as lawyers. The image of the lawyer as advocate colors the ideal of the legal professional

In the United States someone who wishes to become a lawyer must

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52) Fikentscher has explained it this way: in the university students learn the “non-litigious opinion style” and in the internship period the “litigious opinion style”. (*Stil des unstreitigen Gutachtens* and *Stil des streitigen Gutachtens* respectively). Interns learn to handle cases with varying sets of facts and subject to different claims, objections, replications, etc. They put the many different relevant non-litigious opinions into one litigious opinion from which they then extract a judgment: “the judge renders a decision, a judgment, and this decision is the litigious opinion turned upside down, namely, beginning with the outcome, continuing with the legal rules that support the claims, objections, rejoinders, and duplicas, and ending with the subsumption. This is presented claim by claim, objection by objection, rejoinder by rejoinder, duplica by duplica, the whole judgment being arranged by claims. By contrast, as has been said, the non-litigious opinion starts with an open question: Could the plaintiff have this claim?, continues with the subsumption, and ends with a ‘therefore.’”

53) *Accord*, Alfred Rinke, Einführung in das juristische Studium 135 (1977).

successfully graduate from an undergraduate college with a degree in almost any subject. Three years of law school study then follow. In the United States the system of university legal education began as a private substitute for an existing informal private system of apprenticeship training conducted by practicing lawyers. The apprenticeship system continued to exist alongside the university system for the entire nineteenth century and remained at least a theoretical possibility for much of the twentieth.<sup>54)</sup> Although today no law office training is required, relatively few students begin work independently as lawyers. More commonly they begin their careers as junior lawyers in law firms (associates) or otherwise as junior lawyers in larger organizations. The result is that most American law students graduate from law school with little practical training as lawyers and without certification as specialists. Most get their practical training in on the job work.

The first year of law school is the pride-and-joy of American law schools. While the courses are usually the same, it is not their substance that matters, but that students are taught to “think like lawyers.”<sup>55)</sup> The American case method of legal instruction trains students to identify a precise point in controversy and to argue for resolving that controversy favorably. It teaches them first to find the legal rule relevant to the instant controversy by distilling it out of a mass of precedents, and then second, to argue for a favorable resolution of that point.<sup>56)</sup> There is no need for the student to make a legal decision let alone to place such a decision in any kind of system outside of the context of the particular case. Legal argument is the end in itself.<sup>57)</sup> The case method has been subject to much

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54) *See generally* Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (1983); Alfred Zantzing Reed, *Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States*, Carnegie Foundation Bulletin No. 15 (1921).

55) *See* Josef Redlich, *The Common Law and the Case Method in American University Law Schools*, A Report to the Carnegie Foundation, Bulletin No. 8, at 24-25 (1914). Not all law students believe that they are being taught to think like lawyers. *See* Alan Watson, *Legal Education Reform: Modest Suggestions*, 51 *Journal of Legal Education* 91 (2001).

56) Redlich perceptively captured the essence of this method: “Under the old method law is taught to the hearer dogmatically as a compendium of logically connected principles and norms, imparted ready made as a unified body of established rules. Under [the case method] these rules are derived, step-by-step, by the students themselves by a purely analytic process which forbids *a priori* acceptance of any doctrine or system either by the teacher or by the hearer. In the former method all law seems firmly established and is only to be grasped, understood and memorized by the pupils as it is systematically laid before them. In the latter, on the other hand, everything is regarded as in a state of flux; on principle, so to speak, everything is again to be brought into question.” Redlich, *op. cit.* at 13.

57) Richard Stith, *Can Practice Do Without Theory? Differing Answers in Western Legal Education*, 80 *Archiv für Rechts- und Sozialphilosophie* 426, 433 (1994). (“An excellent student is one who /

criticism and now is rarely used in the same manner as originally.<sup>58)</sup>

The case law system of instruction was first introduced in 1870. It largely displaced the lecture method previously in use in law schools and vanquished law office study altogether. I believe that it did this, not because it taught law office skills better or the substantive law more systematically, but because it provided a better preparation for bringing the law and facts together. In other words, I think that it focused better on the kind of thinking that a lawyer must do in daily practice without regard to the specific type of practice that lawyer has.

## 6. The challenge of the Justice System Reform Council

Beginning April 2004 the system of legal education in Japan will change. Potential lawyers who have an undergraduate education in legal studies will spend two years, while those with an undergraduate education in another subject will spend three years in professional studies at a law school. They will then take an examination that will accept—as originally planned—some 70% to 80% of them, but in actuality possibly far fewer of them into the Legal Training and Research Institute in Tokyo. The lucky ones who are admitted will spend one year in practical studies mostly detailed as apprentices to civil courts, criminal courts, administrative agencies and private law firms.

The Report of the Justice System Reform Council places the law schools at the “core” of an “organically connected” system of legal training.<sup>59)</sup> The Report finds in the present system a “gap between education and actual legal practice.” It recommends that legal education, national bar examination and apprenticeship training all be connected as a “process.” The Report expects that law schools, as the core of the new system, are to be “professional schools providing education especially for training legal professionals . . .”<sup>60)</sup> They are to “build [ ] a bridge between theoretical education and practical education.”<sup>61)</sup>

The Report of the Justice System Reform Council in its direction that the

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can argue either side of a case with equal facility, who is trained to be a ‘hired gun.’”) This (as well as other aspects of the litigation system) helps explain two other features of American legal life. (1) The party with the better lawyer should win. (2) Counseling clients is not so much about whether particular action is within or outside law, but about who might argue that the proposed action is improper and whether they would have a colorable claim.

58) For representative views of how the case method is currently used, see David W. Leebron, *The Philosophy of Legal Education*, 19 *Nihon University Comparative Law* 115, 121-22 (2002); Paul D. Reingold, *Essay: Recent Trends in American Legal Education*, 15 *Kwansei Gakuin Law Review* 17, 19-20 (2001).

59) Justice System Reform Council, Chap. III, Part 2, 1.

60) *Id.*

61) *Id.* at Chap. III, Part 2, 2(1)b.

length of time that aspiring lawyers spend at the national Legal Training and Research Institute be reduced from what was originally two years to one year, states the expectation that law schools may pick up some of the instruction presently provided at the Institute. In particular, the Report suggests that law schools might cover what is now covered in the Institute's classroom type instruction in judgment drafting. It explicitly calls for ongoing readjustment of allocation of initial classroom instruction in judgment technique between the Institute and the law schools.<sup>62)</sup> One of the basic principles of the reform is that the apprenticeship training should be separately implemented.<sup>63)</sup>

The new bar examination may practically compel law schools to take on this responsibility. According to the Report of the Justice System Reform Council, the examination might become one "for which a long period of time is provided, based on example cases composed of diversified and complex facts, without necessarily being bound by traditional subject categories . . ."<sup>64)</sup>

So let me tell you what I would do, if I were you. Of course, my thoughts here are unburdened by knowledge of Japan or by having to live with the consequences. Still, allow me my speculation, even if you are now smiling to yourselves and thinking, "what can he know?"

If I were starting a law school in Japan, I would welcome taking on the responsibility of the Legal Training and Research Institute for teaching how to apply the law to the facts of a particular case. I would seek to let that training pervade the instruction that I offered throughout my two-year program. I think it is both an eminently teachable subject and one that students find interesting.

In my Japanese law school I would take care, however, to make sure that that training consider the application of the law not only from the perspective of the judge, but also from the perspective of a lawyer who is advocating a decision favorable to his or her client. While providing training in thinking like a lawyer, I

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62) *Id.* at Chap. III, Part II, 4(1) ("How the burden of legal education should be allocated between the group training (the first stage at the Legal Training and Research Institute) within the apprenticeship training program provided following the new national bar examination and the educational programs provided at law schools should continue to be readjusted as appropriate in the future as the law schools system is being developed and taking root.") *Cf.*, *id.* at Chap. III, Part 2, 2(2)d ("Law schools should provide educational programs that, while centered on legal theory that takes into account reasonable solutions to problems arising in the world of practice, introduce practical education (*e.g.*, basic skills concerning factual requirements or fact finding) with a strong awareness of the necessity of building a bridge between legal education and legal theory on the basis of systematic legal theory."); Masato Ichikawa, *Ritsumeikan University Proposal from Kyoto Private School of Law and Politics to Ritsumeikan Kyoto Law School*, 18 *Ritsumeikan Law Review* 23, 42 (2001).

63) Justice System Reform Council, *op. cit.*, at Chap. III, Part 2, 2(1)c.

64) Justice System Reform Council, *op. cit.* at Chap. III, Part 2, 3(2).



would try to avoid requiring every student to learn more than the fundamentals of the substantive law and of basic skills. I would not want to require that all students learn identical technical skills. I would try to leave students free to shape their future legal careers. Law school cannot possibly give them all the knowledge and skills that they will need. At best law school can only prepare them for a lifetime of learning.

I believe that good professional education in law should also be good scientific education. I think that legal education is at its best when its focus is on that which is enduring and general rather than on that which is temporal and overly specific. What endures are fundamentals of the substantive law, whether perspective, core or specialist knowledge, and above all, the key legal skill of thinking like a lawyer. Of course, to think like a lawyer, just as to practice any skill, requires substantive knowledge. A lawyer must know the basics of the legal system.<sup>65)</sup> The basics should be taught with attention to their historical and comparative law contexts. Armed with a basic knowledge of substantive law—including perspective knowledge—and educated to “think like lawyers,” graduates will be able to go out and learn new substantive law themselves.<sup>66)</sup> Since they will practice for forty or more years after they leave law school, law schools owe them nothing less.

One potential objection to taking on instruction in judgment techniques is that law schools may be unable to provide enough people able to teach judgment techniques and the legal mind. I think that objection underestimates the knowledge and skills that Japanese law faculties already have as well as their ability to gain new knowledge and skills. Japanese law faculties in their present work are already quite familiar with applying norms to facts. Even if they do not do so exactly as judges do, I think that they can acquire such additional knowledge and skills as might be required. Could they not arrange for the Legal Research and Training Institute to include law school faculty members in present classroom training or even for the Institute to create a special class for law faculty alone? If the Institute is unwilling, there are alternatives. If German legal methods are as close to Japanese ones as Japanese jurists have suggested to me, law faculty members with good German-

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65) Cf., Hans Peter Marutschke, *Juristenausbildung un Japan—aus deutscher Sicht*, 18 *Ritsumeikan Law Review*, 87, 89 (2001) („Die in Japan jetzt vorrangig gefuehrte Diskusssion um die Praxisorientierung der Juristenausbildung verkennt meines Erachtens, dass fuer eine gute praktische Anwendung des Rechts—und das soll ja in erster Linie das Ziel der Juristenausbildung sein—ein sicheres Verstaendnis der Grundlagen . . . vorhanden ist.“)

66) *Accord*, Peter Gilles & Nikolaj Fischer, *Juristenausbildung 2003—Zur neuesten Ausbildungsreformdebatte in Deutschland*, 20 *Ritsumeikan Law Review* 181, 200 (2003) (“dass das Leitbild fuer eine solche Juristenausbildung . . . zugrundeliegt, das gebildete und flexible einarbeitungsfaeheige Jurist sein soll, der weniger auf Wissen in moeglichst vielen Rechtsgebieten, sondern auf grundsatzliches methodisches Verstaendnis hin ausgebildet worden ist.”).

language skills could audit classes in Germany, much as I did twenty years ago. And, since such training in Germany is decentralized, there are many potential study centers. Even without going to Germany, there are numerous books that offer instruction in German legal methods. Finally, if your law faculties remain hesitant, I would remind them that the system of case law instruction that replaced law office training in the United States deliberately utilized professors who did not have practice experience.<sup>67)</sup>

Time does not allow me to address another important issue that you surely already are considering: what will be the relationship between the new law schools and the existing law faculties?<sup>68)</sup> Will the new law schools drain the old law faculties of resources? What will happen to legal scholarship? Will law schools, as they have in America, train practitioners with good skills in argumentation but little sense of system? That topic must await another day.

Goseicho arigatou gozaimasita  
御清聴, 有難うございました

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67) Cf. Justice System Reform Council, *op. cit.*, Chap. III, Part 2, 2(2)e (“As practitioner-teachers, not only those included in the legal profession within a narrow sense, but also those who are otherwise qualified, should be broadly recruited.”)

68) Justice System Reform Council, *op. cit.* at Chap. III, Part 3, 2(1)c. (Universities must “[c]learly define the relationship between education provided at law schools and education provided at law faculties of universities.”)