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Different Roads to the Rule of Law: Their Importance for Law Reform in Taiwan

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Different Roads to the Rule of Law: Their Importance for Law Reform in Taiwan

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Abstract

Talk of law reform is in the air throughout East Asia. Whether in Beijing or Tokyo or here, law reform is spoken of in terms of strengthening the "Rule of Law." But what is the Rule of Law? Different legal systems have different roads to reach the Rule of Law. These different roads are noticeable mainly in the different emphases different systems place on two critical elements in the realization of the Rule of Law State, namely rules and the machinery for implementing the rules, *i.e.*, courts and administrative agencies. The Rule of Law makes demands on both the legal rules themselves and on the institutions charged with implementing the law. Fulfillment of the Rule of Law requires both rules and institutions. But among those countries that have the Rule of Law, there are noticeable differences in how their rules and institutions contribute to fulfilling the Rule of Law.

While there is considerable knowledge in Taiwan about western models of the Rule of Law, Taiwanese scholars who look abroad to consider the Rule of Law, should be aware of differences in how the Rule of Law is implemented among the countries they consider as models. The road to the Rule of Law is unique for each state. Thus, after exploring the experiences of the German, American and Japanese systems, Professor Maxeiner points out how infirmities in the Rule of Law necessarily cause you to have to choose among roads to the Rule of Law and to suggest how

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these choices may affect law reform. He would like to s tress that these differences among legal methods demonstrate that there is no *one* right road to implement the Rule of Law. Taiwanese reformers should not seek for a preferred foreign choice, but to develop their own solution that works best for Taiwan.

I. Introduction

Talk of law reform is in the air throughout East Asia. Whether in Beijing or in Tokyo or here, law reform is spoken of in terms of strengthening the "Rule of Law." Scholars from Beijing ask whether they can have the Rule of Law without democracy.[1] In Tokyo, the Justice System Reform Council identifies the goal of reform as "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." …[2] Here in Taiwan scholars consider the current state of the Rule of Law as one measure of a political and legal transformation to a liberal democratic country.[3]

But what is the Rule of Law? The Rule of Law is seen as the "very foundation of human rights."[4] It assures that law is equally binding on all, prevents arbitrary action, and guarantees a realm of freedom and protection of human dignity against tyran-

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[1] *See* Wei Pan, *Toward a Consultative Rule of Law Regime in China*, 12 Journal of Contemporary China 3 (2003). According to Randall Peerenboom, "Nowadays, it is virtually impossible to open any Chinese newspaper without seeing reference to rule of law." China's Long March Toward Rule of Law 1 (2002).

[2] 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, Chapter I. Available on the Internet at http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html (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 serious of various reforms concerning restructuring of "the shape of our country.")

[3] Tsung-fu Chen, *The Rule of Law in Taiwan*, in The Rule of Law: Perspectives from the Pacific Rim, Mansfield Dialogues in Asia 107 (2000). Available on the Internet at
http://www.mcpa.org/rol/09chen.pdf.

[4] Tsung-fu Chen, *op. cit*., citing Franz Michael, *Law: A Tool of Power*, Human Rights in the People's Republic of China 33 (1988).

nical oppression."[5] In its broadest sense the Rule of Law incorporates fundamental approaches to structuring society, namely the form of economy (*e.g.*, free market) and political system (*e.g.*, liberal democracy).[6] So understood just what constitutes the Rule of Law is likely to be subject to considerable disagreement.

The Rule of Law is also used in a narrower sense that emphasizes its formal aspects. In this sense the Rule of Law is concerned with those requirements imposed on law at a technical level and without regard to its material content. For law to function satisfactorily as an ordering mechanism in society, it must meet these requirements collectively, even if it cannot always meet each individually. Here there *is* an international consensus on the essential elements.[7] Law should be clear. It should be publicly promulgated and prospective. Law should be stable. A mechanism for implementation should permit a predictable decision in the individual case. All these requirements help law fulfill an ordering role. They make voluntary compliance with the law possible. Lon Fuller called these requirements "the internal morality of law."[8] Gustav Radbruch derived them from the principle of legal security of the *Rechtsstaat's* concept of law (*Rechtsidee*).[9]

These requirements mean that law can guide those subject to it and protect persons subject to the law from the arbitrary use of the power to make and apply law. When the Rule of Law is safeguarded, subjects can rely on the law and can foresee application of state power. The securing of the Rule of Law was an important concession the bourgeoisie sought from the absolutist state; it made economic development possible. For much the same reason, people in East Asia and people who do business in East Asia promote the Rule of Law. Yet the purpose of the Rule of Law is limited. Protection of the Rule of Law in this formal sense only

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[5] *Id.*

[6] Randall Peerenboom calls these "thick" theories of Rule of Law. *A Government of Laws: democracy, rule of law and administrative law reform in the PRC*, 12 Journal of Contemporary China 45, 51-52 (2003).

[7] Peerenboom, Government, *op cit.*, at 51. He refers to this as a "thin" theory of Rule of Law. He seems to express skepticism whether they are really necessary for legal systems to function effectively as a system of laws.

[8] Lon Fuller, The Morality of Law Chap. 2 (2nd ed. 1969).

[9] Gustav Radbruch, Rechtsphilosophie § 9 (8th ed. 1973). Translated in The Legal Philosophies of Lask, Radbruch, and Dabin (1950).

assures the integrity and the regularity of the application of the legal rules as such; it does not assure that these rules serve either justice or utility. A state might be governed by the Rule of Law, yet be morally bankrupt.[10]

Even in a morally exemplary state—perhaps especially in a morally exemplary—the Rule of Law should not be an absolute value. Its demands all too soon conflict with the ability to generalize in rules. 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.[11]

Different legal systems have different roads to reach the Rule of Law. These different roads are noticeable mainly in the different emphases different systems place on two critical elements in the realization in any Rule of Law State, namely rules and the machinery for implementing the rules, *i.e.*, courts and administrative agencies. The Rule of Law makes demands on both the legal rules themselves and on the institutions charged with implementing the law. Fulfillment of the Rule of Law requires both rules and institutions. But among those countries that have the Rule of Law, there are noticeable differences in how they their rules and institutions contribute to fulfilling the Rule of Law.

While there is considerable knowledge in East Asia about western models of the Rule of Law, my impression is that there is less awareness of differences in how the Rule of Law is implemented among the various states that have it. This is hardly surprising. Even active participants in international legal relations often overlook these differences.[12] Frequently in my practice career I have seen American lawyers assuming essential similarities with European legal systems that do not exist and similarly Euro-

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[10] Lie Junning, *Cong fazhiguo dao fazhi ("From Rechtsstaat to rule of law"), in* Dony Yuyu and Shi Binhai (eds.), Zhengzhi Zhongguo [Political China] at 233 (1988), as cited by Peerenboom, Government, *op. cit.* 52.

[11] *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).

[12] *See* James R. Maxeiner, *U.S. "methods awareness" for German Jurists*, *in* Bernhard Grossfeld *et al.* (eds.), Festschrift für 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.

pean lawyers assuming comparable similarities with American systems. In the practice world the result of such misunderstanding may be a disappointed client and a terminated transaction. In the world of law reform, it might be a social disaster.

My point today is that Asian scholars, who look abroad to consider the Rule of Law, should be aware of differences in how the Rule of Law is implemented among the countries they consider as models. The road to the Rule of Law is unique for each state.

It may be presumptuous for an American law professor to address Asian jurists on how they should examine foreign legal systems. One thing that has impressed *this* American law professor is the depth of interest among Asian law professors in foreign law and legal systems. You and your colleagues immerse yourselves in foreign legal systems as a matter of course. Almost no American law professors do that. A colleague of mine pointed out that there are far more law professors in Taiwan with German Dr. jur. degrees than there are in the United States. You and your colleagues are familiar with one or more foreign languages and cultures. Few American law professors know even one language other than their native English. You and your colleagues seek to learn from foreign legal systems. Few American law professors even consider that they might learn from foreign legal systems.[13] As a result of your deep interest in foreign law, you know how deceptively similar and yet strikingly different foreign legal systems can be. What could I add?

I know little of East Asian legal systems. I know no Asian language. But I do know well the two foreign legal systems that are most studied here, the German and the American.[14] It is my

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[13] It is quite the contrary in the United States, where provincialism prevails. Some sixty-five years ago Karl N. Llewellyn, cautioned against identifying the foreign origin of a legal idea for fear that identification with another system would kill it in the American. Stefen A. Riesenfeld, *Reminiscences of Karl Llewellyn, in* Rechtsrealismus, Multikulturelle Gesellschaft und Handelsracht: Karl N. Llewellyn und Seine Bedeutung Heute 11, 14 (Ulrich Drobnig & Manfred Rehbinder eds., 1994).

[14] *Cf.* Joseph L. Pratt, *The Two Gates of National Taiwan University School of Law*, 19 UCLA Pac. Basin L. J. 131, 145 (2001) (noting that on this law faculty, of 53 faculty members, nineteen have law degrees from German, eleven from American, ten

hope that I can contrast those two systems in a way that will add to your understanding of both.

I shall also be bold enough also to make some remarks about that the Japanese legal system. It seems to be—after the American and the German systems—the foreign legal system most studied here. While I have no first hand knowledge of the Japanese legal methods, this past summer, when I had the pleasure of being Visiting Scholar at Kansai University in Osaka Japan, I had the opportunity to speak with our colleagues there about how the Rule of Law is implemented in Japan.

What I plan for the next few minutes is to discuss the different roads that the German and American systems take to the Rule of Law. I would like to then point out how infirmities in the Rule of Law necessarily cause you to have to choose among roads to the Rule of Law and to suggest how these choices may affect law reform. I would like to stress that these differences among legal methods demonstrate that there is no *one* right road to implement the Rule of Law. Your goal should be—as I am sure you all recognize—not to select a preferred foreign choice, but to develop your own solution that works best here. Your foreign study informs but does not dictate your work.

II. Legal Methods as the Road to the Rule of Law

When we speak about implementing the Rule of Law in a formal sense, what we are talking about are legal methods. Legal methods are concerned with how one relates an abstract legal idea to a factual situation in order to decide a concrete case.[15] They include how one states the law and how one applies it. What I hope to make you more aware of are differences in legal methods between the American Rule of Law State and the German *Rechtsstaat*. While in substance, the two systems are both firmly dedicated to the Rule of Law,[16] the roads that they take to reach the

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from Japanese, two from French, and one each from English and Swiss universities.)

[15] See 1 Wolfgang Fiketscher, Die Methoden des Rechts in vergleichender Darrstellung 13 *et seq*. (1975).

[16] *See* Neil MacCormick, *Der Rechtsstaat und die rule of law*, Juristenzeitung 1984, 65 (finding no material difference between the Rule of Law and the *Rechtsstaat*).

Rule of Law are strikingly different. Their legal methods are not the same. Oddly, these legal methods are rarely studied comparatively.[17] This may explain why foreign legal methods can be so easily overlooked.

Jurists work with their legal methods without thinking about them. Karl Llewellyn observed of American jurists that they learn handling precedents, i.e., a principal common law legal method, as "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."[18] When an experienced jurist goes abroad to study another legal system, this lack of awareness of legal methods can be dangerous. It is all too easy to substitute for one's lack of knowledge of the foreign system the knowledge that one already has of one's own.[19] Yet different legal methods may produce very different results even with very similar substantive law.[20]

The jurist studying foreign law should begin by studying legal methods. The foreign jurist ought to learn what it means to think like a jurist in the foreign system.[21] But a jurist studying foreign law usually has a particular area of law that he or she is anxious to learn about. It is the rare jurist who has the time and interest to tackle the foreign system as system. Moreover, the jurist who wants to focus on legal methods in foreign law study is apt to encounter frustration. Legal methods are often taught interstitially in substantive law courses or in extra-university professional settings rather than in university courses denominated legal methods.

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[17] The principal exception is Professor Fikentscher's Methoden des Rechts in vergleichender Darstellung (5 vols., 1977-1999).

[18] Karl N. Llewellyn, Präjudizienrecht und Rechtsprechung in Amerika 2 (1933), *translated* as The Case Law System in America 2 (Michael Ansaldi, transl., 1989).

[19] *See* James Maxeiner, *Die Gefahr der Übertragung deutschen Rechtsdenkens auf den US-amerikanischen Zivilprozeßrecht*, Recht der Internationalen Wirtschaft (RIW) 1990, 440.

[20] *See*, *e.g.*, James Maxeiner, Policy and Methods in German and American Antitrust Law: A Comparative Study 1986.

[21] *See* William Ewald, *Comparative Jurisprudence (I),* 143 U. Pa. L. Rev. 1889, 1896 (1995).

III. Different Legal Methods

The German and the American systems use different legal methods to realize the Rule of Law. Comparatively speaking, the German system places more emphasis on the role of rules while the American places more emphasis on the role of courts.

a. German Legal Methods

For German jurists there exists 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."[22] This objective order is contrasted to subjective rights of individual subjects.[23] The legal order forms a unity.[24] The norms are interrelated. Taken together they form a system.[25] While it may be that the ideal cannot be realized, nevertheless the goal is a system organized as if a single plan governed. Different laws should mesh with each other: none should command contrary action.[26]

The classic subsumption model is at the heart of German legal methods.[27] 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* is realized in a concrete factual situation, then a certain legal consequence applies. This is the major premise. The mi-

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[22] Reinhold Zippellius, Einführung in die juristische Methodenlehre 12 (3rd ed., 1980) ("The legal order is a structure of ought-norms. The idea of their message is not to describe facts, but to prescribe conduct.")

[23] Fikentscher, *op. cit.*, vol. 1, at 1. Compare Karl Engisch, Einführung in das juristische Denken 24 (7th ed., 1977). 24 ("Legal usage distinguishes between Objective Right and Subjective Right. Objective Right is the legal order, the aggregate of legal rules, the norms, that a few moments ago we formulated as imperatives. Subject Right is an entitlement (*Berechtigung*)."

[24] *See* Karl Engisch, Die Einheit der Rechtsordnung (1935, reprint 1987).

[25] *See* Claus-Wilhelm Canaris, Systemdenken und Systembegriff in der Jurisprudenz (1969).

[26] Peter Raisch, Juristische Methoden vom antiken Rom bis zur Gegenwart 148-49 (1995).

[27] Karl Larenz, Methodenlehre der Rechtswissenschaft 150 (5th ed., 1983).

nor premise is that this particular factual situation fulfills the requirements of the *Tatbestand*, that is, it is a case of the *Tatbestand*. The conclusion then logically follows that for the factual situation, the legal consequence 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 German judgment strives after the ideal of deductive reasoning."[28] The two principal substantive parts of the judgment are the *Tatbestand* and the grounds for the decision (*Entscheidungsgründe)*. The *Tatbestand*, as it appears in a judgment, is a short statement of the parties' legal claims and assertions of fact.[29] 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.[30] The grounds for the decision are a summary of the considerations for the decision.[31] They are to evaluate and subsume the concrete facts of the *Tatbestand* under the abstract elements of the applicable norm.[32]

The highly-stylized German judgment is designed to assure that the parties understand the grounds for the court's decision.[33] Ideally the judgment will convince the party losing the lawsuit that that loss is the correct outcome.[34] 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,

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

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

[30] Schneider, *op. cit.* at 185.

[31] ZPO § 313 III.

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

[33] Baumbach/Lauterbach/Albers/Hartmann, Zivilprozeßordnung § 313, margin no. 33 (53d ed., 1995).

[34] Kurt Schellhammer, Die Arbeitsmethode des Zivilichters 241 (7th ed., 1984).

that not arbitrariness, but rational argumentation determined the judgment.[35] 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)).[36] The judgment also controls the judges.[37] 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.[38]

The German legal system approach of an abstract order applied to individual cases seeks to eliminate all but preprogrammed departures from stated legal rules. Rather than permit judges or administrators to depart ad hoc from legal rules, the German ideal is to write the norm in such a way as to provide for a valuing by the judge or administrator in the individual case. In other words, the norm is to grant a bounded discretion to the judge to make a decision. That decision may be based either on the claims of justice or the needs of public policy in the particular case. Where the decision is to be founded on interests of public policy, that decision should be subject to political control.[39]

b. American Legal Methods

The American legal system emphasizes judicial process more than rules. The American legal system is expected to provide procedures to resolve disputes about what subjective rights are. The focus of American legal method is dispute resolution.

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

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[35] Peter Raisch, Juristische Methoden vom antiken Rom bis zur Gegenwart 121 (1995).

[36] Baumbach/Lauterbach/Albers/Hartmann ZPO § 313, margin no. 33.

[37] Schellhammer, *op. cit.* at 242; Schmitz et al. *op. cit.* at 83.

[38] Schneider, *op. cit.* at 178-79.

[39] *See* James R. Maxeiner, Policy and Methods in German and American Antitrust Law, *op. cit*., *passim*.

in America: "[i]t cannot be said that the legal process is the application of known rules to diverse facts."[40] According to my *Doktorvater* Fikentscher, "there is no American teaching of subsumption of facts under a norm is, because no memorandum (*Gutachten*) and judgment technique have been developed."[41] Far from developing a theory that subsumes facts under law, Anglo-American civil procedure, that is, that branch of the legal system where law is necessarily applied to facts, is concerned with *separating* law from facts. The purpose of this separation is to permit two different decision-makers to decide two different kinds of questions, namely judges to decide questions of law and lay juries to decide questions of fact.

In modern American litigation, the judge determines the legal rules, while the jury finds the facts and applies the legal rules to these facts.[42] The judge thus is the law-giver and not the law-applier. American judges seem to like it that way for it permits them to make policy.[43] It is this creative function in law-giving that has so fascinated legal scholars around the world.

The jury finds the facts and applies the law to the facts, after the parties have presented their case and the judge has instructed the jury in the applicable law. The jury is to evaluate the parties' evidence and determine whether the party seeking relief has established each and every element of each and every cause of action raised. The reality is, however, frequently different. Juries often do not comprehend the elements of causes of action and may just decide for the party they favor.[44]

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[40] Edward Levi, An Introduction to Legal Reasoning 3 (1949).

[41] Fikentscher, *op. cit*., vol. 2, at 262. He attributes this to an absence of a theory that covers both case law and statute law. Case law results from decision of concrete disputes between parties. By its nature, it focuses on the substantive claims in the individual cases. Statute law, on the other hand, partakes more of the form of a command and is, therefore, more formalistic.

[42] *See* Skidmore v. Baltimore & Ohio Railroad Co., 167 F.2d 54, 60-61, 64 n. 25b. (2d Cir. 1948) (Jerome Frank, J.).

[43] *See* Posner, *op. cit*., p. 34-35 and Charles Wyzanski, Whereas—A Judge's Premises 6 (1965).

[44] *See* Skidmore v. Baltimore & Ohio Railroad Co., *op. cit*.; C. May, *Perspectives on Judicial Speech: "What Do We Do Now?*: Helping Juries Apply the Instructions, 28 Loy. L.A. L. Rev. 869 (1995) (with copious further references).

In any event, how a given jury actually does apply law to facts in a give case is unknown. The jury's verdict is "general," that is, it is merely a statement of decision. The German equivalent would be a judgment that consisted solely of the formal statement of the judgment *(Urteilsformel)*. The jury's decision is, as Jerome Frank put it, "as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi."[45] Because of the general nature of the verdict, errors in determination of facts, understanding law of, or application of law to facts largely cannot be determined[46] and usually cannot be corrected on appeal. American appeals do not consider whether the decision of the lower court was correct, but whether the procedure followed there was proper and whether the law was properly stated. "If the American jury system promises anything, it is not a fair outcome, only a fair process."[47]

Thus 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 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.

This emphasis on process is accompanied by an emphasis that decision makers should reach fair decisions. That means that often their decisions are at odds with a rule. 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."[48] Fikentscher has noted the positive side of

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[45] Skidmore v. Baltimore & Ohio Railroad Co., 167 F.2d 54, 60.

[46] *Id*. 61.

[47] Schlesinger/Bradley, CBS Reports: Enter the Jury Room, first broadcast April 16, 1997 (transcript and video tape available).

[48] P.S. Attiyah & 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

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."[49] 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).[50] 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.[51]

The focus of the American legal system on process tends to make difficult legal consideration of those countless smaller matters that make up daily life. Process is expensive. The model for process is a formal proceeding: ideally, adversary presentation before a jury. Only the most important matters can count on getting such treatment. However much one admires adversary presentation and jury trial, one must acknowledge that adversary presentation and jury trial are features of only a small percentage of cases subject to litigation. The vast majority of cases in the formal system of litigation—well over 90%—settle without a jury ever being impaneled or a judge ever taking testimony. Moreover, most legal decisions never involve litigation at all. The persons subject to rules apply the rules to themselves or those charged with implementing rules enforce them without formal hearings. The American legal system deals imperfectly, if at all, with these,

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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).

[49] Fikentscher, *op. cit.*, vol. 2 at 465.

[50] Cass R. Sunstein, Legal Reasoning and Political Conflict 148, 153 (1996).

[51] *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."); Frederick 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 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.").

the most numerous of all legal decisions.[52] Mostly these decisions are controlled, if all, by the possibility that some of them might be subject to a formal process.

c. Japanese Legal Methods

When I turn to Japanese legal methods, I am an outsider looking in. I am dependent on the observations of others. The outward form of Japanese legal methods is very close to that of German methods. Reading Japanese scholars on Japanese civil procedure and legal methods, one might assume that there is a very close congruence.[53] 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. Rahn concludes that Japanese jurists have rejected the German legal-subsumption method.[54] 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.[55] The

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[52] *See* Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry (1969).

[53] *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).

[54] Gutram Rahm, Rechtsdenken und Rechtsauffasung in Japan Dargestellt an der Entwicklung der modernen japanischen Zivilrechtsmethodik 2 (1990).

[55] *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 Überzeugung aufgrund des Gesetzes juri-

court's value judgment, according to Rahn,[56] is not to be an arbitrary decision. The judge is to weigh the interests of the parties to the lawsuit 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).[57] Whether the court is to lay open this value judgment explicitly is debated.[58]

Other German scholars that are familiar with Japan agree with Rahn.[59] 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."[60]

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stisch konstruiert. Unklar bleibt, in welchem Unfang die ‚substantiellen' Entscheidungsgründe—Interessenabwägung und Werturteil—offenzulegen sind. Die Forderung nach Offenlegung wird im Prinzip erhoben, aber dem Überzeugungszweck der Begründung untergeordnet.")

[56] *Id.* at 366.

[57] *Id.* at 327.

[58] *Id.* at 345.

[59] *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 bestätigt 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 Rechtrfertigung der Entscheidung fallen auseinander. Ein richterliches Bedürfniss, eine Entscheidung juristisch unter Berufung auf eine Vorschrift sozusagen zu untermauern, scheint nicht zu geben.")

[60] Carl S. Goodman, The Rule of Law in Japan: A Comparative Analysis 2, 4 (2003) ("But to Japanese judges, whose experience is fundamentally different

Last summer in Japan I found little support for Rahn's thesis, either in theory or practice. Most Japanese jurists with whom I spoke insisted that Japanese judges are bound by the law and do not feel compelled first to make separate extra-legal value decisions. They told 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.[61] Japanese law professors informed me that in their classes they do not teach rule skepticism, but that the rules are binding and that judges decide according to these rules.

Nevertheless a couple of Japanese colleagues granted that Rahn's thesis just possibly might have some merit in civil procedure. They hastened to add that it has no application to criminal

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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.")

[61] *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 (criticicizing the Rahn thesis: „Liegt die Absicht der ‚Strukturierenden Rechtslehre' darin, die Erzeugung der Rechtsnorm als ‚rechtsstaatlich rückgebundenen Prozeß' zu begreifen, so wäre 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, wäre dann ohne Zweifel unmöglich. Der Richter würde vielmehr stets im normgelösten Raum bewegen, den die ‚Strukturierende Rechtslehre' möglichst begrenzen will.").

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,[62] I have found some publications by Japanese scholars in European languages that do tend to support Rahn's conclusions. Takeyoshi Kawashima of the University of Tokyo in an address in the United States was 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."[63] Kawashima added a very interesting criticism: "this semantic tradition is Japan is really contradictory to the basic values which are required for a modern, democratic society which needs predictable judicial decisions. Sooner or later we will have to change our traditional attitude toward the meaning of words, especially in our laws."

IV. Why the Road to the Rule of Law Matters

Recognition that there are different roads to the Rule of Law can help find a way that works best in Taiwan. It can help you recognize the strengths and weaknesses of foreign models and help you identify whether the foreign model might make sense here. Moreover, it may help you chart a course that in one area takes one route while a different way in another.

Your choice of roads to the Rule of Law, i.e., the legal methods you emphasize, has an obvious and immediate impact on basic elements of the legal system. In drafting laws and procedures, will you emphasize individualization of justice or consistency? In applying the laws, will you emphasize the fairness of the procedure or the correctness of the outcome? In training

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

[63] Takeyoshi Kawashima, *Japanese Way of Legal Thinking*, International Journal of Law Libraries 127, 131 (1979). *Cf*. Rahn, *op. cit*. at 18, 352; Yamanaka, *op. cit*. at 235 ("In Japan herrscht immer noch die Vorstellung, daß das Gesetz für die Auslegung nur eine Fassade bilde. An sich sei das Gesetz nur unnützer Schmuck, es lebe erst in der Handhabung durch den Menschen.").

legal professionals to implement this system, will you focus on the role of advocate or the role of judge?

Each of these subjects is material for a talk in itself. I would prefer, however, in the few minutes I have left, not to consider these subjects, but to point out that these choices are inevitable because of the limits of the Rule of Law. I would like to suggest circumstances under which one or the other road might be preferable.

The collective requirements of the Rule of Law—no matter which road you take—cannot be absolutes. All too soon they conflict with the ability to generalize in rules. Radbruch observed the tension: "Legal security requires positive law, but positive law demands application without regard to its justice or utility."[64] Even were knowledge of the present perfect, complete predictability would flounder on the rock of the problem of law in time. "Law must be stable, and yet it cannot stand still."[65] "The more law is laid down in precise statutory paragraphs, the faster it goes out of date."[66] Slavish attention to the Rule of Law would be concentration on the ordering function of law to the exclusion of law's other functions in the realization of justice and in the promotion of the general welfare.

The Rule of Law must at times give way. Or, looked at in another way, the Rule of Law must provide a mechanism to deal with the problem of law over time and the inevitable infirmities of legal rules. The Rule of Law must allow for law at times to be less clear, less predictable and less reliable so that questions of equity and policy and changes in time can be accommodated. Thus, even in a state totally oriented on the Rule of Law, there needs to be a legitimizing mechanism to reach decisions that cannot be encompassed by specific rules.[67]

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[64] Radbruch, *op. cit*., at 166.

[65] Roscoe Pound, Interpretations of Legal History 1 (1923).

[66] Oskar Adolf Germann, *Rechtssicherheit*, Schweizerische Zeitschrift für Strafrecht, 49, 257 (1935), reprinted in Oskar Adolf Germann, Methodische Grundfragen 54, 55 (1946).

[67] Wei Pan, *op. cit*. at 9, argues that "Democracy emphasizes law *making*, laws are only fair when they are made with a relative majority's agreement. Rule of law emphasizes law *enforcement* as long as it is 'constitutional', namely, made in accordance with the basic law." But a Rule of Law state cannot divorce itself from

A great strength of the American legal method is that it can quickly deal with new and unforeseen issues. Individuals, on their own, in the context of dispute resolution, can raise these issues and compel decision. Process can substitute for rules. Rules can be bent when a legitimate need arises. Often a full hearing of both sides and a strictly neutral decision maker serve well to legitimate the individual decision. The decision maker chooses between the respective equities discussed before it.

This flexibility in confronting new matters leads to a great weakness of the American legal method. Even basic issues may never be fully resolved; they can be argued anew with each new application. Moreover, the very expense of adversary presentation assures that only the tiniest fraction of all legal issues will ever enjoy the application of the model. Those issues that do enjoy full adversary presentation may find themselves overwhelmed by the process and by what Roscoe Pound called the "sporting theory of justice, where "[t]he inquiry is not, what do substantive law and justice require … [but have] the rules of the game been carried out strictly."[68]

A great strength of German legal method is its ability to place a wide variety of factual situations consistently within a systematic whole. It well identifies decision makers and gives them criteria for decision. It can separate out legal decisions that should be made based on objective determinations from policy decisions that require political responsibility. Not surprisingly, Germany is the home of the systematic code. The code informs the citizens of how to conduct their lives even as it instructs judges and administrators how to decide cases. Thus it is well able to provide a mechanism for implementing a specific legal order. But there is a resulting weakness: rule dependence. When no rule is available, the course of decision is more difficult. If a legal rule is available, it can be hard to depart from it even when equity or policy might require it.

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law making, even in the process of law enforcement. It must have a legitimizing mechanism when the rule cannot be laid out beforehand.

[68] Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, originally published 1906, *reprinted in* 35 Federal Rules Decisions 273, 291 (1964).

Elsewhere[69] I have pointed out—following Radbruch—that there are two different types circumstances under which the Rule of Law may have to give way for other interests: namely justice (i.e., equity in the individual case) and policy (i.e., the general welfare of society).

The American method of adversary presentation works best when it is concerned with purely private concerns and the equities between two parties. It works considerably less well when confronted with questions of policy. Nearly a century ago Pound criticized the American method because it "tr[ies] questions of the highest social import as mere private controversies …"[70] In such cases the decision maker must make a policy decision that takes into accounts interests not before it. The answer called for may be subject to no objective standards and be defensible only as a political choice. Yet judges are not chosen to make political decisions.

German methods—when the political system is functioning—may be better suited to resolve policy issues. They can provide for taking into account interests before the decision maker and for interests not there represented. They can guide the decision maker, but bind the decision maker to political responsibility as well.

Of course, one of the reasons that American courts often undertake policy decisions is because the legislature has defaulted. The willingness to permit American courts to undertake these decisions also permits American legislatures to legislate before they have reached the optimal solution. Thus it seems that the United States is faster with a solution—legislative or judge-made—yet never is able to get it completely right. Germany is slower with a solution, but once it has one, is able to implement it consistently and smoothly.

When law reformers make a law, they should recognize whether they need to leave room in the statute for persons charged with applying the law to make policy or equity decisions. Where positive law cannot deliver a demonstrable decision, reformers should remember that independent judges who are not

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[69] James Maxeiner, Policy, *op cit*.

[70] Roscoe Pound, *Do We Need a Philosophy of Law*?, 5 Columbia Law Review 339, 346 (1905).

politically responsible are better guided by justice than by policy. The equity of the individual case, built on a thorough investigation of the facts, is the best basis for a reasonable judge-made law. Policy decisions, on the other hand, can be better made when they are recognized as such, are made by institutions created to make policy decisions, and are reached by decision makers who can appeal to political responsibility at a basis for their decisions.