

【研究ノート】

American Adversarial Legalism as a Legal Culture: A Japanese Experience in WI with Comments of Prof. Stewart Macaulay

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Introduction

In *Adversarial Legalism : The American Way of Law*, Professor Kagan asserts that American law has a distinctive feature of adversarial legalism, which is a method of policy making and dispute resolution with two core characteristics: *formal legal contestation* and *litigation activism*.¹ He defines the former as “competing interests and disputants readily invoke legal rights, duties, and procedural requirements, backed by recourse to formal law enforcement, strong legal penalties, litigation and/or judicial review”, and the latter as “a style of legal contestation in which the assertion of claims, the search for controlling legal arguments, and the gathering and submission of evidence are dominated not by judges or government officials but by disputing parties or interests, acting primarily through lawyers”². Formalistic manner of decision making process and accumulation of participatory authority are intertwined, and they distinguish American law from other legal systems, especially that in Japan.

Japanese legal style stands at the opposite poles of American Adversarial legalism. The Japanese are reluctant to solve problems in the formal proceedings, the bureaucracy play an essential and important role in legislative process and law enforcement, on the other hand, courts are hierarchical system dealing with limited legal disputes, and they usually do not function as a policy making machinery. People use formal resolution only as a last resort. I would like to call

this legal style in Japan as Japanese paternalistic legalism.

Prof. Kelemen & Mr. Sibbitt, emphasizing the promotion of transparency and disclosure as additional features of American legal style, further asserted, “Japanese legal style is becoming Americanized in important respects”³, and Prof. Kelemen argued that American adversarial legalism is spreading across the EU with the progress of European integration⁴. He categorized Japanese law in western European countries group⁵.

Prof. Sanders explained these characters in Japanese law in terms of tort law⁶, and Prof. Kelemen & Mr. Sibbitt presented examples in Securities Law and Products Liability Law⁷. I think that research in contract field is much more profitable, because contract law deals with matters of our every day life, so it is possible for us to compare two different legal cultures at the most fundamental structure of societies⁸.

It is often said that there is a deep gulf between legal cultures in the U.S. and in Japan. The difference seems to gradually disappear, but it still remains. From my experience in my short stay at Madison⁹, I’ll sketch it and I would like to think about American Adversarial Legalism from a viewpoint of different legal culture.

1. My experiences at Madison

a. Experience 1

My first experience is about the payment of rent of apartment. On the 4th of December, 2010, I visited the manager’s room of apartment to pay rent. She didn’t accept my check and said that you should look at the announcement on the door and that you should pay extra 5% of rent. I went back my room quickly and read the lease agreement. Reading the agreement, I realized that the deadline of monthly payment was on the first day of the month and the penalty clause was included. Of course it is my fault not to read the written contract thoroughly. I had a mistaken idea of the deadline of monthly payment, because, three months

ago, I paid the rent on the 3rd of the month, she said nothing and accepted my payment.

The manager was right in saying that I should pay rent with penalty in American Society. But what she said to me caused offense to my feelings. I thought that she had to explain the important article of payment and how to pay during her absence in the manager's room at the time of making lease contract, or at least at the time when I paid late payment three months ago.

In Japan, the lease contract of apartment also contains the penalty clause for late payment. But landlords usually do not order their tenants extra payment if the delay is short time and they had reasons in delay. In the old days, landlords and tenants were like parents and children. Now this idea disappears, but the relation between landlord and tenant has a special meaning. It is more than contractual relation which has core element of rent payment. As a landlord, I would write my tenant a letter to press for payment of the rent if she or he didn't transfer rent payment at my bank account for one or two months. Responding my letter, the tenant usually transfer demanded money at my account immediately. If she or he doesn't reply my letter or continue to be delayed after accepting my letter, I will file a suit at the court. The reason for not to demand penalty payment for the first time delay is that it destructs the relation between landlord and tenant and that to claim penalty payment does not meet the cost.

In view of Japanese law, the manager cannot demand extra 5% of rent payment. Special statute stipulates that the agency of landlord should explain tenant the important part of lease contract of the apartment including penalty clause at the making of contract¹⁰. She didn't explain it. Judging on the general clause of public order and morals in Japanese civil law¹¹, there is some doubt about the validity of the penalty clause itself, because the amount of penalty lacks the balance corresponding to the rent.

b. Experience 2

My second experience is about the trouble of my checking account. Last

November, I deposited \$1,200 in cash at the cash dispenser of a bank. I had had a receipt of the amount. Five days later, I was surprised to receive from the bank the ATM Deposit Adjustment Notice that my new adjusted amount was \$1,100, that is -\$100 from the amount of my deposit. I didn't realize what happened.

After accepting the notice, I went to the bank to ask the reason why \$100 disappeared. I met the responsible person of financial institution, and asked whether you had an evidence to prove that the amount of my deposit was \$1,100. She telephoned many divisions of the bank and finally answered me that we found \$100 paper money left in the cash dispenser, and that we would adjust the amount soon. I was also surprised to hear what she said. She listened to my explanation why the letter had no meaning in the banking system, but she never apologized for the defect dealing with the transaction.

In a financial institution in Japan, all staffs of the institution calculate daily transactions down to the last yen. If the account doesn't tally, they search for the error all night. They never send customers the letter which I received, because it shows that the staff of the bank is sloppy and that it is impolite to customers to send such letter. If the same problem happened in Japan, there is possibility for the bank to receive administrative guidance from the authorities supervising financial affairs.

c. Experience 3

My last experience concerns about the TV and the Internet provider contract. Last September, I found a company A which supplies the service at the lowest rate in the Internet. The company is an interstate one and acts as an agent of the regional company B. In the home page of A, customers were able to get a free modem, but A sent me an e-mail and charged the amount of the modem on the account of my credit card. As there was any other choice, I made contract with B. It contained the description of a free modem and \$100 cash back after six months' continuance of the contract.

As I found the charge of \$100 for the free modem in my credit card, I asked

the credit card company to stop payment. The credit card company inquired of A about the record of transaction between A and me, but A did not answer. So I only paid postal charge and got a free modem. Now I expect B to pay me back \$100 after the expiration of the contract next month¹².

Three examples show the baseline for American Adversarial Legalism.

2. Characteristics of Japanese Legal Style

a. The function of Contract and Contract Enforcement in Japanese society

As Prof. Kelemen & Mr. Sibbitt pointed out, in Products Liability Laws, “Law in book” in Japanese law was moving towards American Law, but “Law in action” has not been radically changed. In contract law sphere, Prof. Macaulay showed that no contracts were used in most business dealings, and informal rules had important roles in regulating transactions in the United States¹³. His insights are applicable to Japanese law, and such phenomena become institutionalized. Prof. Kawashima said that Japanese have no concept of contract¹⁴, but he argued only the reality of contact at the level of “Law in book”, and neglected the meaning of contract in the “Law in action”.

Formal rules in contract have important function in Japanese society, but they do not work formally. As I mentioned in my experience 1, even if there is a clause of penalty for late payment, landowners usually do not order to pay the amount on the condition that tenants pay the rent immediately. In a TV program, an agent of landowner visited tenant’s room of overdue rent to urge him to pay rent. In the case where the tenant answered him in a sincere attitude and explained the reason why he could not pay rent, the agent made a plan to repay the debt. In this stage, he never files a suit in the court. Nevertheless, if the tenant responds dishonestly, he will take an action in the formal proceeding.

As to the differences of Japan’s Civil Code from those in other western countries, Prof. Kawashima suggests several points¹⁵, one of them is “in practice the Japanese recognize partial obligation that carry some, but not

all, of the binding qualities of contract¹⁶. Japanese contracts usually contain “confer-in-good-faith” and “harmonious-settlement” clauses. Accordingly, when a contractual dispute happens, both parties negotiate and then determine their rights and duties. It is a matter of course for agents to fix the plan of debt repayment and not to demand payment of penalty for delay in only a day or two overdue in Japan.

Prof. Kawashima explained the singularity in Japanese law in terms of “legal consciousness” as traditional¹⁷. His explanation was cogent in 1960s, but half century has passed since then; Japanese society and the Japanese itself have changed. We have to find another reason. I would like to value the Japanese way to solve a contract problem positively. The relation of landlords and tenants is a special one, and landlords have taken a role of providing the service of social security privately. This relationship is akin to friendship on which Prof. J. Leib bases his relational theory of contract¹⁸.

b. Administrative regulation of private trade in Japan

In addition to the flexibility of contractual enforcement, Japanese law has incorporated the administrative regulation scheme into statutes regulating private trade. Under the Building Lots and Buildings Transaction Business Act, real property agent has a duty to employ a qualified staff in doing business¹⁹, and the staff has to explain the important part of the contract, including the penalty clause in the apartment lease, to the other party in the process of negotiation²⁰. *If the agent doesn't obey the administrative regulation, it doesn't continue doing business. Breaching the regulation affects the effects of contract itself.*

With regard to my experience 2, I am able to explain that the same structure of administrative regulation of private trade exists in Japanese law. Financial institutions are controlled by the authorities supervising financial affairs strictly over a wide area of business. If the customer's account doesn't tall with bank account, it not only destructs the reliability of the bank but also violates the regulations of the authorities. Making a miscalculation over again leads to the

cancellation of license of the bank.

As Japan is a centralized state, the supervisory authorities are able to regulate private trade effectively. Real estate agent and financial institutions always have to take care of following the statutes and regulations in doing business. Administrative regulation of private trade is conducted under the policy of protecting consumers and customers. In a sense, freedom of contract is strictly limited.

c. Consumer Counselling Centers to prevent cheating trade practice

In American Society, freedom of contract between parties is literally guaranteed due to the absence of centralized and effective regulation of private trade field. In the negotiation process of contract, parties enjoy the freedom of negotiation and any legal liabilities occur during this process without exceptional case. Duty of good faith is imposed not on the formation but only on the performance²¹.

In the sphere of a consumer contract, there is room for a cheating practice to slip in the field of private trade. Above all, internet trade is a controversial field. In fact, Internet trade triggered my third experience. I think that there are more cheating trade practices in America than in Japan. In addition to the scarcity of effective regulation of the Internet trade, the fact that division of labor or specialization in the company within the company obscures who is the responsible of the trouble provides the foundation of having involved customers into tricky trade. In my experience 3, I telephoned many division of A about one hour, but I couldn't find the responsible person. Even if there are cheap and easy access formal proceedings, victims of deceptive trade suffer in silence. In the U.S., where freedom of contract is fully fledged, people who hesitate to take an action should carry a burden of paying debt against his will.

In Japan also, the Internet is full of tricky trade, many victims of fraud are reported. There is an important deference from the situation in the U.S. In Japan, nationwide police system and administrative consultation system work. The

victim is able to consult at the consumer center in the city hall. The center reports the case to the person who deals with it at the prefectural office. The competent authorities of consumer administration gather information of consumer victims on the Internet, and they promptly take an action to stop spreading of victims. In this way, nationwide administrative machinery takes an import role in solving problems involving consumer damage in Japan. Moreover, companies in Japan have taken a simple structure, and they put a person who deals with an inquiry from the outside in the responsible position.

3. The Americanization of Japanese Law came true?

As economic liberalization and the fragmentation of political authority had been progressed in Japan, Prof. Kelem & Mr. Sibbitt asserted that the Japanese law would be Americanized again. They based their assertion on the analysis of securities law and products liability law²². Prof. Haley, pointing out that Prof. Kawashima and Prof. Macaulay had reached the same conclusion of avoidance of using legally binding agreements in the business transactions both in the U.S. and in Japan in 1960s coincidentally, denied the notion of conversion between contract practices in both countries, in spite of Japan's advantage of transactional security and certainty²³.

I think that the Japanese calculate costs and benefits in shaping and maintaining their legal style unconsciously, and, contrary to the explanation of Prof. Kawashima as traditional in terms of legal consciousness, they have never preserved their positive attitude towards formal rules and access to justice only as traditional. While there has been a chance to change it during last five years in Japan, they have rejected to become positivists in legal services.

Upon the Act on Promotion of Judicial System Reform, which was enacted in 1999, new legal education system started in 2004 and new bar examination started in 2006. As the number of successful candidates has doubled or trebled, it caused a serious problem of oversupply of lawyers²⁴. This fact proves that the

Japanese do not demand to expand the number of lawyers rapidly, apart from the number of judges and official prosecutors.

4. Conclusion

In American Adversarial Legalism, ordinary people play an active role in the law and policy making. On the other hand, In Japan, the administrative organ bears an active role in law and policy making, people are making transactions with being alert for not to clash with the regulations and statutes. I believe that this contrast between the U.S. and Japan will not disappear in the near future.

5. Comments of Prof. Stewart Macaulay²⁵

Once again I enjoyed reading your paper about American and Japanese experience with the law. I was surprised by your experiences. Madison used to have reputation of a Midwestern place where people were friendly. On page 35, you talk about the division of labor and specialization that obscures who is responsible. I think that is a very important observation. Apartments, for example, once were often managed by the owner of the building. Now we have a management of particular units who is an employee. The employer- owner faces the problem of controlling its manager. The person who demanded the extra penalty for late payments may have had no discretion. The large organization may have thought that it was more important to control such people than to keep a good relationship with you. If the manager could excuse the penalty, then the manager might collect the penalty from you but put it in his or her own pocket. She or he would tell the apartment corporation that discretion had been exercised.

Banks, too, used to be local and focused on particular neighborhoods in town. The person who dealt with you had more power to decide how to function. Today American banks are very large impersonal corporations despite what they say

in their advertising. Moreover, over the past twenty to thirty years, American business (and many political leaders) have adopted the goal of what is called “efficiency”. They studied matters, and it may save money if certain errors are just accepted. This also has something to do with our limited regulation of consumer transactions. During the 1970s, we increased various kinds of regulation and attempted to give consumers rights. After the elections of Ronald Reagan as President, free market ideas were championed by the party in power. People should be responsible and self-reliant. Bad practices by sellers would hurt their reputations, and the “market” would punish them. We saved all of the transaction costs of regulation. These themes still are present in the legal culture of the country. Of course, other political groups still champion regulation. We are very inconsistent here.

Ordinary Americans seldom sue about personal matters. Litigation is just too expensive. One function of lawyers is to tell people that they cannot afford a legal means of solving problems. Moreover, we do hesitate to sue those with whom we have a close relationship. While it may be possible occasionally to sue someone and still continue such a relationship, it isn’t easy. Former husbands and wives sue each other only when the marriage has collapsed. Employees do not sue employers while the employees still have the job. Indeed, relation ties cause problems for employer for a recommendation. Just the fact that the solution was the litigation will be held against me by the prospective employer.

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本稿は、ウイソコンシン大学ロースクールの 2011 年春学期におけるマコーレー教授の法社会学の演習に出席した際に、授業中教材として Robert A. Kagan 教授の “Adversarial Legalism: The American Way of Law” が扱われたので、そこでの所説を出発点として、自己の経験を素材にしてマコーレー教授との間で議論をすることを通じて、日本法とアメリカ法との間にある共通のものと異質なものとを明らかにすることで、比較

法レベルで両者を架橋することをねらいとしている。

演習が行われて1週間後に自分の意見を整理したものをマコーレー教授に提出し、それについて同教授から1週間後に直接意見を記した書面を受けとった。本稿は、双方を併記した内容になっている。両者の意見は完全には一致していないことは明らかであり、同じ事象についても異なるバックグラウンドを擁している者の間では相違した見解となることを示しているが、いろいろな機会を捕まえて議論を積み重ねる努力を行っており、本稿もその一環にある。

【註】

- 1 Robert A. Kagan, *Adversarial Legalism: The American Way of Law* 9 (Cambridge : Harvard Univ. P., 2001).
- 2 Id.
- 3 R. Daniel Kelemen & Eric C. Sibbitt, *The Americanization of Japanese Law*, 23 U.Pa. J. Int'l Enon. L. 269, 319 (2002).
- 4 R. Daniel Kelemen, *American-Style Adversarial Legalism and the European Union*, EUI RSCAS; 2008/37, <http://hdl.handle.net/net/1814/10031>.
- 5 See R. Daniel Kelemen & Eric C. Sibbitt, note 3 supra, 270; R. Daniel Kelemen note 4 supra, 5.
- 6 Joseph Sanders, *Adversarial Legalism and Civil Litigation: Prospects for Change*, 28 Law & Soc. Inquiry 719 (2003).
- 7 R. Daniel Kelemen & Eric C. Sibbitt, note 3 supra, 284-292.
- 8 See Shinichiro Michida, *Contract Societies: Japan and the United States Contrasted*, translated by Veronica L Taylor, 1 Pac. Rim L. & Pol'y J. 199 (1992).
- 9 I had stayed at for about 7 months from September 1, 2010 as a visiting scholar at University of Wisconsin Law School, East Asian Legal Center.
- 10 Building Lots and Buildings Transaction Business Act §35.
- 11 Japan's Civil Code §90.
- 12 Before the date when the contract expired, I telephoned the branch of company

B that I would not continue the contract and would like to accept \$100 after expiring the term of it. The person in charge of B answered me that the term of contract usually runs for two years, and she didn't know the contract term for 6 months and \$100 cash back.

- 13 Stewart Macaulay, *The Use and Nonuse of Contracts in the Manufacturing Industry*, 9 *Practical Lawyer* 13 (1963); Stewart Macaulay, *Non-contractual Relation in Business: A Preliminary Study*, 28 *American Sociological Rev.* 55 (1963); Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationship, Complexity and the Urge for Transparent Simple Rules*, in David Campbell, Hugu Collins, and John Wightman ed., *Implicit Dimensions of Contract*, 51 (Hart pub. 2003).
- 14 Takeyoshi Kawakami, ed., *The Legal Consciousness of the Japanese*, (Iwanami-Shoten, 1967); Partial translation by Charles R. Stevens, *The Legal Consciousness of Contract in Japan*, 7 *Law in Japan* 1 (1974).
- 15 Hiroshi Wagatsuma, Arthur Rosett, *Cultural Attitudes Towards Contractual Law: Japan and the United States Compared*, 2 *UCLA Pac. Basin L.J.* 76 (1983).
- 16 Id.
- 17 See Setsuo Miyazawa, *Taking Kawashima Seriously: A Review of Japanese Legal Consciousness and Disputing Behavior*, 21 *Law & Society Review* 219 (1987).
- 18 Ethan J. Leib, *Friend v. Friend: The Transformation of Friendship-and What the law has to do with it*, chapter 6 (Oxford Univ. P., 2011).
- 19 Building Lots and Buildings Transaction Business Act §15.
- 20 Id. §35 (9).
- 21 *Market Street Associates v. Frey*, 941 F. 2d 588, 595-596 (per Posner J.)(7th Cir. 1991).
- 22 R. Daniel Kelemen & Eric C. Sibbitt, note 3 *supra*, 269.
- 23 John O. Haley, *Rethinking Contract Practice and Law in Japan*, 1 *J. of East Asian & Int'l L.* 47 (2008), WUSL Working Paper No.08-04-01.
- 24 Japan has a population of about one hundred and twenty million and about thirty

thousand lawyers at the end of 2010. The number of lawyers increased more than five thousand for last five years.

- 25 I received the comments from Professor Stewart Macaulay on the 23rd of February, 2011. Prof. S. Macaulay is Professor of Law Emeritus, University of Wisconsin Law School, and he is internationally recognized as a leader of the law-in-action approach to contracts.

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