

# TRANSFORMATION OF JAPANESE LEGAL SYSTEM IN THE GLOBAL ERA: DEPARTURE FROM ASIAN DEVELOPMENTAL STATE MODEL?

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SUMMARY: I. *Introduction*. II. *The Method of Development Jurisprudence Law and Development in the Globalization Framework*. III. *Globalization and Transformation on Law in Japan*. IV. *Conclusion*. V. *References*.

## I. INTRODUCTION

In the harsh impact of the on-going globalization, East Asian countries have been forced to transform their political, economic and social systems drastically, all of which have result in radical law reform. Japan is not an exception. This paper aims at examining this process focusing on recent Japanese Law Reform. For this purpose, in part II, I will propose a theoretical framework for the comprehensive understanding of the legal systems of Asian (and probably non-Western) countries and their transformation process in the globalization. First, I will discuss the idea of three types of law (indigenous law, imported (transplanted) law and development law) and principles (community, market and command), by which we may realize that different legal principle should be identified among the political, economic and social dimensions of societies. Second, I will present the idea of three different concepts of law, “law as rule”, “law as institution” and “law as culture”. By applying these concepts, I believe, we may grasp the multi-layered structure of national legal system more clearly.

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Part III will deal with the transformation process of Japanese legal system under the globalization. First, I will examine the historical development of Japanese legal system in a long range perspective from the evolution of proto state system to the end of the 1990s briefly. This will give the background knowledge in order to understand the drastic law reforms going on to meet the fierce globalization since the end of the 20th century. Second, I will discuss major topics of constitutional and legal reforms of the contemporary Japan, dividing into political, economic and social dimensions.

## II. THE METHOD OF DEVELOPMENT JURISPRUDENCE LAW AND DEVELOPMENT IN THE GLOBALIZATION FRAMEWORK

### 1. *Three Types of Law and Legal Principle*<sup>1</sup>

#### A. *Three Types of Law*

When we glance at legal phenomenon in Asian and other non-Western countries, it is easily recognizable that there are three types of law, namely, “indigenous law”, “imported or implanted (western) law”, and “development law”. Indigenous law is seen in the customary law, originated into the pre-colonial or pre-modern traditional proto-state system. This type of law is still regulating peoples’ daily life effectively, although its major parts were taken place by the modern Western law which was introduced during colonial rule or modernization at the formal level, and degraded into informal customary law.

Imported (Western) law is either imposed on their colonies by the Western colonial powers, or imported by independent states like Japan, Thailand and China in order to achieve the modernization following the Western model (forced Westernization).<sup>2</sup> Needless to mention, this type of law

<sup>1</sup> See Yasuda, Nobuyuki, *Three Types of Law: A New Paradigm for the Law and Development Studies*, APEC Discussion Paper Series, num. 37, Nagoya, APEC Center, Nagoya University, 2000 and “Law and Development in Southeast Asian Perspective: Methodology, History and Paradigm Change”, in Antons Christoph (ed.), *Law and Development in East and South-east Asian Countries*, London, Curzon/Routledge, 2003 on more detailed arguments on three laws and legal principles.

<sup>2</sup> These countries were forced to modernize or westernize their legal system in order to have an equal international relationship with Western “civilized” states, by the amendment of unequal treaties consisting of extraterritoriality of these States.

constitutes the whole formal/state legal system even now. Not only specific laws and codes, but also government mechanisms like legislatures, executive and judiciary are based on this law. Further, the political idea of democracy and human rights also developed within the soil of Western political thought.

Development law is a group of law evolved in the process of state-building in the era of post-independence of these countries mainly after the World War II. The most extreme example of this law, however, we can identify it with the socialist legal system initiated in the Soviet Union after the Russian Revolution in 1917. It is true that these laws have same formality as imported law, but it should be differentiated from the latter in substance in its policy oriented nature. This type of law generally gives government, especially the executive, very wide discretionary power, and restricts and sometimes prohibits of judicial review, although imported law is generally to be implemented through the judicial decisions.

### B. *Three Types of Principle*

These three types of law are just a grouping of various laws on the basis of their origin; pre-colonial, colonial and post-colonial era. It is essential to create more operative and functional concepts from these three types of law, in order to examine and understand the nature of contemporary legal system and to discuss its future direction of the legal systems of these countries. This is why I propose three types of legal principles, namely, community, market and command principles (see table 1).<sup>3</sup>

<sup>3</sup> See Yasuda, *op. cit.*, footnote 1. Matei, Ugo, "Three Pattern of Laws: Taxonomy and Change in the Worlds Legal System", *American Journal of Comparative Law*, num. 45, winter, 1997, proposes a similar idea, when he categorizes three patterns of law, 1) rule of professional law, 2) rule of political law, and 3) rule of traditional law, each equivalent to imported law, development law and indigenous law. However, it seems difficult to apply these concepts of "law" for the examination of domestic or international legal systems, because these express the law itself, but not the nature of law, although he defines them as "hegemonic pattern of law", p. 16.

Table 1. THREE TYPES OF LEGAL PRINCIPLES

<i>Principles</i>	<i>Community principle</i>	<i>Market principle</i>	<i>Command principle</i>
Type of Law	Indigenous or customary law	Imported (modern Western) law	Development (socialist) law
Model social action	One for all, all for one	Voluntary exchange of goods	Compulsion by superior
Core sphere or dimension	Communal society (community)	Economic society (economy)	Political society (State)
State model	(Commune State) Proto-States	Modern capitalist State/Colonial States	(Former) socialist State/Developmental States
General pattern of norms	Not clear, depending on community feeling	Supplying clear interpretation rules to solve disputes	Giving discretionary power to the authority
Typical branch of law	Family/religious law	Civil and commercial law	Public (political) law
Nature of disputes settlement	Amicable settlement (mediation or reconciliation)	Adjudication by third party (like courts)	Reconsideration by authority
Basic value for the settlement	Identification (solidarity)	Legality (justice)	Reasonableness (fairness)
Typical settlement Agent	Community mediation or conciliation center	Judicial Courts	Administrative tribunal
Basic Value	Fraternity	Liberty	Equality

## Similar Trichotomy

<i>Name</i>	<i>Community principle</i>	<i>Market principle</i>	<i>Command principle</i>
Unger, R. (1986)	Customary-inter-action law	Legal order and legal system	Bureaucratic law

<i>Name</i>	<i>Community Principle</i>	<i>Market Principle</i>	<i>Command Principle</i>
Nonnet and Selznick (1977)	Responsive law	Autonomy law	Strict law
Kamenka and Tay (1980)	Gemeinschaft type of law	Gesellschaft type of law	Bureaucratic-administrative types of law
Ghai Yash (1986)	Custom	Market	State and its law
Miller (1976)	Primitive	Market	Hierarchy
Pollani, P. (1977)	Reciprocity	Exchange	Redistribution
Paul Tillich (1954)	Love	Justie	Power
Ugo Mattai (1997)	Rule of Traditional Law (Oriental View of the Law)	Rule of Professional Law (Western Legal Tradition)	Rule of Political Law (Law of Development and Transition)

SOURCE: Unger, R. M., *Law in Modern Society; Toward a Criticism of Social Theory*, New York, The State Press, 1976; Nonnet, P. and Selznick, P., *Law and Society in Transition, Towards Responsive Law*, New York, Harper Colophon Books, 1978; Kamenka, Augen and Tay, A. E., *Social Traditions, Legal Traditions* in Kamenka & Tay (eds.); Edward, Arnold, *Law and Social Control*, London, 1980; Ghai, Yash, *Land Reform and Paradigm of Development: Reflections in Melanesian Constitutions*, in Sack, P. (ed.), *Legal Pluralism Proceedings of Canberra Law Workshop VII*, Research School of Social Science, ANU, 1986; Miller, D., *Social Justice*, Oxford, Clarendon Press, 1976; Poloya, K., *The Livelihood of Man*, by H. W. Pearson, (ed.), New York, Academic Press, 1977; Tillich, Paul, *Love, Power and Justice*, Oxford University Press, 1954, Mattai, Ugo, "The Pattern of Laws: Taxonomy and Change in the Words Legal System", 45 A, *J. Comp. L.*, Winter 1997.

### a. Community Principle

Indigenous law can be traced back conclusively to various norms of the primitive communities where people lived together totally as like a body bonded by the strong feeling of solidarity. From this we can deduce the "community principle", which is the most natural and primordial norm of human society. Nowadays, such feeling of togetherness is per-

ceived in the family and more widely any kind of communities, religious, local, ethnic, nation, regional, or even global, where people live together with a firm feeling of shared value among them. This principle, however, is difficult to articulate in clear linguistic terms because of its informal and ambiguous nature, which is embedded in the contextual relationship in a society.<sup>4</sup> In this sense, the community principle is very far from or even opponent to the modern law concept based on the market principle which I will examine next.

Therefore, this principle operates effectively in a family and religious law and can be extended to a local or ethical community law in the modern society. Its most important value is the fact that people live together, so that the disputes on this norm tend to be solved by the consensus of the relevant community members through the conciliation process.

It is true that this principle is observable in all non-Western developing societies, where the feeling of symbiosis still exists resiliently, as expressed in the culture of “harmony”. Further, it is expected to play an increasingly important role in the 21st century global society, when we witness that such terms as “solidarity”, “unity”, “cooperation”, “live together” and “tolerance” become key words not only in the local community, but also in the global society.<sup>5</sup>

### *b. Market Principle*

The imported (modern Western) law is still a core of the formal legal systems all over the world.<sup>6</sup> This type of law reflects typically the capitalist contractual society. The basic principle of this law, I call, the “market principle”, because we can see it in the exchange activities at market. This relation should be horizontal and equal among independent individuals having their own will (individual autonomy), which is nothing but the contractual relation. It is easily observed that this principle plays a key role in the civil and commercial law field. However, it also covers all legal field including political law and family/community law in the

<sup>4</sup> This is why Unger calls the equivalent concept to this principle “customary/interaction law” in Unger, R. M., *Law in Modern Society; Toward a Critical Social Theory*, New York, The State Press, 1976.

<sup>5</sup> This is expressed typically in the United Nations Millennium Declaration in 2000.

<sup>6</sup> This is very true after the collapse of former socialist states based on the command principle in the end of the 1980s.

modern society. For example, the modern Constitution, the core of political law, is based more or less on the social contract idea, and family law is constructed on the contractual concept in various aspects. These show that the modern law system itself based totally on the market principle.

In the field of modern (civil and commercial) law, all disputes should be solved through the adjudication by the judiciary, the neutral and impartial third party institution which is constituted by the independent, integrate and qualified experts of law, and which decides “who wins the right”. This judicial process seems only the way to legitimize the dispute solutions among equal and independent peoples as the realization of “justice”. This concerns the “rule of law” state ideology, which becomes important in the law reforms of non-Western countries in on going globalization era.<sup>7</sup>

### c. Command Principle

The command principle comes from development law, because generally this type of law gives the government to command the people to do or not to do. It is observable in the public law relation as a whole, although this relation is “marketized” or “contractualized” substantially in the modern state. Former socialist state legal systems show the best illustration, because of its vertical order and obedience relation. The socialist regime had been corrupted by the market force under the growing “market globalization” from the 1980s and collapsed in the end of this decade. However, this principle still continues to be a key reason of state, because it is essential for any authority (state) to redistribute the commonwealth to the people, and “command” should be indispensable for it, as we see in the modern “welfare state”.

This principle is observed naturally in “public law” of the civil law jurisdiction, though the “rule of law” has invaded this field. The nature and method of the dispute solution seem still different from the ordinary ju-

<sup>7</sup> The “rule of law” is wildly propagated by the World Bank, International Monetary Fund and other international donor group. It is interesting to know that this is based on “property rights” which is a key of the “market principle”. See Upham, Frank, *Mythmaking in the Rule of the Law Orthodoxy*, Working Papers, Carnegie Endowment for International Peace, 2002, on the skeptical view on the “rule of law” in development perspectives.

diciary based on the market principle. This takes a form of the petition from a subject (inferior) to the state (superior) for the reconsideration of its disposition or imposition. Because of this nature, many civil law countries still maintain special procedures for administrative law managed by the special court. Further, the rationale is not based on “(legal) justice”, but rather on social or political justice which can be characterized by “fairness”.

By the market globalization, this principle narrows its effective scope for the market principle, but it would be still important for the global governance requested by on-coming “social globalization”, in mixture with community principle.

### *C. Three Dimensions of Society*

Society itself is a holistic reality, but it is possible to set up its three dimensions, communal, economic and political, from the above three legal principles of community, market and command. This is even convenient in order to design the legal policies at local, national and international level.

The communal dimension is appeared in the peoples’ daily communal life, where people are born, live together with producing and reproducing goods and next generations. Needless to mention, this is managed basically on the community principle, although the production and distribution become the main task of an economic field, and the redistribution of wealth and power is the matter of a political field. But it is true that community field forms still the base of the society as a whole, because it bonds the people and strengthens the solidarity of people within the society through shared value, language and culture. The core of the field is a family, but is expanded to local, national and global communities although the community principle is diluted with other two principles. This field has been scaled down through the capitalist modernization (marketization), and this caused serious social problems like world-wide poverty and deterioration of environment. Social development aims to solve these problems by optimizing the solidarity of people at local, national and global level.

The economic dimension is the field of market activities of the people. Historically, market was limited to the narrow area of the exchange of the surplus, but it widened and deepened its scope in the process of capi-

talist modernization of Western society, and now covers not only the production and distribution, but also the consumption and reproduction process, because of its calculative market rationality. The modern society is a market society where everything can be a target of the commercial transaction. But even in economic dimension of the society, we can perceive that other different two principles operate although it would be limited. For example, in a factory, there should be the cooperation among workers based on community principle, as well as direction and control mechanism based on command principle from the side of management. However, all should be regulated by various contractual relation based on market principle. It is true that the narrow calculative rationality produced various social problems through disregarding the value out of the market (actually society as a whole). Nevertheless, the aim of economic development is to achieve the optimization of material wealth of the people by deepening and widening the market, although it should be regulated by other values.

The political dimension of the society is nothing but the field of governance where the power is gained and mobilized to achieve the political aims. It is true that the power sometime belongs to the market side such as the capitalist, landowners and merchants, or other time to the community side, the workers, peasant and consumers. The political society is the place where those sections of people fight for the gain of power in cooperation with others, although this process is now regulated by various constitutional or legal institutions. In this sense, it is the field of coordinating the market force and community force, two driving forces of human history. Therefore the political development aims at optimizing the power of people through achieving “good governance”.

## *2. Three Layered Structure of Law*

The concept of three laws and legal principles as well as three dimensions of society concern the something like a nature of value, and therefore, are not adequately effective in order to examine the structural aspect of legal system, which is the special nature of law. This is why I propose three layered structure of law, composed of “law as rule”, “law as institution” and “law as culture”. This distinction is important especially for the understanding the legal structure of Asian and other non-western developing countries.

## A. *Three Concepts of Law*

### a. Law as Rule

Law is generally defined as “a rule or a system of rules recognized by a country or community as regulating the actions of its members, and enforced by the imposition of penalties” (OECD). First, it is a code of behavior, what I call “law as rule”.<sup>8</sup> Law as rule is an essential component of any legal system, especially of modern states. It takes both written and unwritten form, but must be expressed in the clear and articulate linguistic form. This relates to another nature of modern law, “enforceability”.

As we see in the general definition of law, the enforceability or nature of command is a fundamental element of law, though law as rule itself is just an abstract expression and does not guarantee its actual enforceability, which should be realized by “law as institution”. The reason why the clarity and articulateness of law is required in modern law is to prevent state authorities (especially enforcement authority) from abusing their power and making arbitrary interpretation of law.

As mentioned above, law as rule is just a neutral and linguistic precept, although it is expected not only to realize its substance (in substantial law), but also to regulate the whole process of this realization (in procedural law). This process should be achieved by legal professions through the mobilization of their specialized knowledge and art of law.

### b. Law as Institution

Law as rule is a formal and neutral concept, and it never goes beyond an abstract linguistic message to the related authorities and citizens. It does not necessarily secure its effectiveness for the enforcement unless suitable institutions like a judiciary and other state authorities take action in the enforcement process. Therefore, it is essential for us to come into the next definition of law at a more institutional level, on which law functions as an enforcing norm or rule in the actual context of society.

<sup>8</sup> I define “rule” rather in formal and neutral term, in contrast to “norm” which seems to attribute more wider meanings including culture and value.

“Institution” has drawn increased attention by lawyers and economists who are interested in development studies when they emphasize the importance of institutional building or capacity building for development perspectives.<sup>9</sup> Here, we can understand “law as institution” at two different stages: enactment and enforcement.<sup>10</sup>

“Law as institution at the enactment stage” relates to the legislative process of law including the institutional framework for controlling this process. Written law or statute, the typical example of “law as rule” is enacted through the formal procedure of legislature. The law at this stage functions to mold the peoples’ wills or social norms into the law as rule, through the various arguments and debates, in and out of legislature, where the latter is crystallized to clearly defined the message of the sovereignty. This concept can be extended to the rule-making institutions, as well as to those of local governments.

Law as institution at the enactment stage has not been dealt with properly by lawyers and legal scientists, with a few exceptions made by constitutional scholars, because traditionally it has been a major topic of political science and therefore beyond legal scholarship and thought. It is true, however, that this process should be regulated and controlled through law in the modern rule of law states. This is why, since the collapse of major socialist regime, many transition countries have taken a step to legalize the legislative process either by legislation or through the process of judicial review.<sup>11</sup>

<sup>9</sup> There is no clear definition of “institution”, but almost all recent literature on development studies deal with “institutional building” as a magical tool to solve any problems and difficulties concerning development. World Bank, *Building Institutions, for Markets*, World Development Report, 2002: 6, defines “institution” simply as “rules, enforcement mechanisms and organization”, and differentiate from “policy”, but it does not distinguish among “law as rule” and “law as institution” clearly, though this is essential in order to measure the effectiveness of law.

<sup>10</sup> Rokumoto, Ho-shakaigaku, *Sociology of Law*, Tokyo, Yuuhikaku, 1986 pp. 135-136, categorizes six legal institutions (houtekikikou) legislative, judicial, legal service, investigating (police), regulatory and enforcement.

<sup>11</sup> China enacted the Legislation Law in 2000 which aims to regulate this process. For the judicial review, not only in transition states such as Russia and others, some Asian states such as Thailand and Indonesia established Constitutional Courts in the process of the post-1997 crisis Constitutional reform, as well as setting up the Administrative Courts, which aim to institutionalize constitutional or legal control over the legislative and administrative process.

Law as institution at the enforcement stage is a main target of legal science and jurisprudence, not only because at this stage, law as rule realizes and concretizes itself as a fully effective law through the enforcement by the state (sovereignty) power, but also because, in modern states, this process is monopolized by the judiciary dominated by judges and other legal professions like advocates and prosecutors, all of whom are educated and trained in specialized legal educational facilities, and qualified by the knowledge and technique to interpret law as rule.

The special nature of modern law contrasted with other norms is to be interpreted or constructed by the formalized and specialized process of application of law. In this process, law as rule is enunciated as what it really means, through the decision of the authoritative institution (mainly and finally of judiciary) in the specific and concrete circumstances, and it produces a binding force not only between the parties but also among all members of a society through their concretized order. In other words, through this process, law as rule metamorphoses itself into law as institution, which creates actually enforceable law at the concrete level within the “formal” legal system. This is why law as institution at this level is the core of the formal legal system, on which legal professions mobilize their legal technique to accomplish “justice”.<sup>12</sup>

### c. Law as Culture

“Law as rule” and “law as institution” are closely interwoven and form the substance of the “formal legal system”.<sup>13</sup> It would be difficult to distinguish one from the other clearly. What we can say is that the former is concerned more with the linguistic, normative or dogmatic aspect of law, while the latter includes the social and institutional phase of law including various enactment and enforcement institutions. Both laws jointly form the “formal legal system”.

<sup>12</sup> The affinity among market system and judiciary or more generally (formal) legal system, is discussed by legal sociologists, such as Max Weber who discusses the relation between rational system and capitalism. This is why I name “market principle” as the basic concept characterizing the modern legal system. (See table 1).

<sup>13</sup> For the distinction between formal law (legal system) and informal law, see Chiba, *Legal Pluralism, Towards a General Theory through Japanese Legal Culture*, Tokai, Tokai University Press, 1989.

However, these two concepts of law are not adequate to understand the legal system as a whole, especially in non-Western countries. First, the legal system is relatively independent and autonomous from other field of society especially in modern society. By this reason, the sociology of law which aims at understanding the relationships between law (legal system) and society has become one of the important branches of jurisprudence. Second, in non-Western countries, formal legal systems comprised both by law as rule and law as institution are based on Western modern law, which were imported during colonial rule and in the course of Western-modeled modernization. Due to the nature of the imposition of Western law in this process, formal legal system could not reach the heart of the society of these countries. There has been a deep gap between imported formal legal system and cultural and traditional values of the people. The latter form a part of informal law which binds peoples' behavior, although often unrecognized or unjustified by state formal law.

The informal law, originating in the pre-colonial or pre-modern (traditional) proto-states, has survived and regulated the peoples' daily life tenaciously although it has often lost the support of the state power. More importantly, it frequently conflicts with and even confronts the formal legal system. This is why we need to set up the concept of "law as culture" and to inquire into it when we examine the comprehensive national legal system of these countries. Law as culture is similar to those defined as "the peoples' attitude towards law",<sup>14</sup> but this is a more ambiguous concept and includes its institutional aspect, such as informal mechanism to deal with these laws and norms.<sup>15</sup>

### *B. Three Layered Structure of Law*

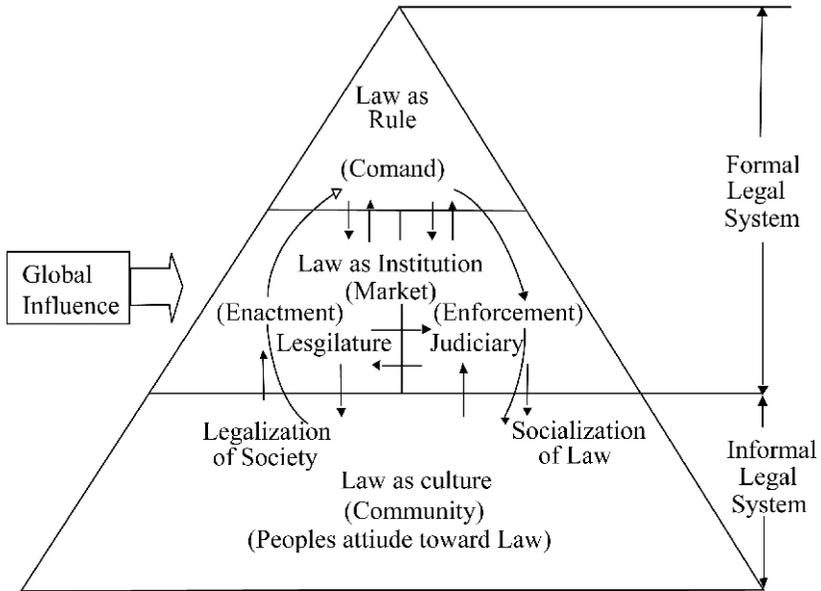
We can now draw the picture of three layered structure of a national legal system, especially of non-Western countries, applying these con-

<sup>14</sup> Friedmann defines "legal culture" as "idea, attitudes, expectations and opinions about law, held by people in some given society". Friedmann, Lawrence, "Is there a Legal Modern Culture?", *Ratio Juris* 7, 1994.

<sup>15</sup> A typical example is "informal ADR mechanism" to solve disputes within the community. These mechanisms are now institutionalized as "community based ADR" through the legislation in some Asian countries, such as "Barangay Justice System" in the Philippines, "Mediation Boards" in Sri Lanka and "Lok Adalat" in India. See CDG, USAID, Center for Democracy and Governance, *Alternative Disputes Resolution Practitioners' Guide*, 1998, among various studies in this field.

cepts of law as culture, law as institution, and law as rule, from bottom to top, as shown in figure 1.

### STRUCTURE OF NATIONAL LEGAL SYSTEM



There is “law as culture” at the bottom of the pyramidal structure of a national legal system and it forms rather informal but fundamental parts of it. In Western countries, law as culture has a historically and culturally common background with laws as rule and institution, and forms the matrix for them, because the latter have evolved from the former endogenously. There is no serious cultural discontinuity among them.<sup>16</sup>

In non-Western countries, however, there is no cultural homogeneity and continuity among them. The basic concepts of laws as rule and insti-

<sup>16</sup> It is true that there is a certain difference in basic attitudes toward law between legal profession and common people even in Western countries, as Friedmann distinguishes it between internal and external legal cultures. Cotterrel, Roger, “The Concept of Legal Culture” in Nelken, David (ed.), *Adapting Legal Cultures*, Oxford, Hart Publishing, 2001, p. 18. But this difference reflects technical nature of law in the same culture, although we cannot disregard the multi-culturalization of Western society caused by post-war immigrant movements, mostly from non European countries.

tution were imposed or transplanted from Western countries under the colonial rule and/or in the process of modernization, while law as culture has been based deeply on their own traditional and indigenous values.<sup>17</sup> This cultural discontinuity between formal law (law as rule and institution) and informal law (law as culture) has caused serious problems of national legal system of these countries, as legal pluralists have discussed.<sup>18</sup>

“Law as institution” is defined in two different stages: enactment and enforcement. Law as institution at the enactment stage pumps up the peoples’ will based on law as culture, and molds it into law as rule. In the contemporary state system, law as institution at this stage has a certain continuity with law as culture, even in non-Western countries, because the legislative process reflects naturally the “peoples’ will” through the elected members of legislature as well as growing civil societies in the democratic state ideology and practices.<sup>19</sup> This process can be characterized by “legalization of society”, if we regard that the social convention or aspiration is crystallized into a legal form (law as rule) in this process.<sup>20</sup> This is especially important in the context of non-Western countries, because through this process, the imported formal law (law as rule) would be amended and rooted adapting to the soil of these countries.<sup>21</sup>

It should be remembered that, in non-Western countries, the channel between law as institution and law as culture is much narrower compared with that of Western countries, because of the stark cultural discontinuity between the transplanted formal legal system and the cultural reality of

<sup>17</sup> This is why I emphasize the categorization of “imported law” and “indigenous law”, The former is defined as an equivalence to Western modern law typically based on “market principle”, and latter rooted in its own soil based on “community principle”. (Yasuda, 2003, *op. cit.*, footnote 1).

<sup>18</sup> See Chiba, *op. cit.*, footnote 13 and also Griffiths, John, “What is Legal Pluralism?” *Journal of Legal Pluralism and Unofficial Law*, num. 24, 1986, for the more theoretical aspects of legal pluralism.

<sup>19</sup> By civil societies I mean just NGO and other voluntary groups who has been playing an increasingly important role in the political and social field, not only in developed but also developing nations. In the latter context, see World Bank, *The State in Changing World Development Report*, 1997.

<sup>20</sup> It is true that this process can be characterized also by “socialization of law” as well, when we regard that people are trained and educated themselves through various public debates on newly introduced laws.

<sup>21</sup> In this sense, law as institution both at enactment and enforcement stage is something to be a playing field where law as rule (legal element) and law as culture (social element) interact each other.

these countries.<sup>22</sup> More importantly, the drastic wave of market globalization since the 1980s has reduced the possibility of integrating this channel, and has tended to widen the gap between law as rule and law as culture. Globalization has forced many developing countries to enhance to rather hasty law reforms only to adjust global standards which have been constructed on laws and rules of Western developed countries, without considering the real needs and adaptability of these developing countries.<sup>23</sup>

“Law as rule”, which is mainly the product of legislature, is at the apex of the layered structure of national legal system. This law reflects a universal nature in its form of abstract and general normative precepts. For this reason, this law is more disconnected with law as culture. As we examined, law as rule does not have any real effectiveness or enforceability as law, although it takes a form of order.

Law as rule comes down to “law as institution at the enforcement stage” and realizes itself in more concrete form, while it is required to meet social reality during this process. Law at this stage takes a form of more concrete rules through the interpretation or application of law as rule by legal institutions, typically a judiciary. As we discussed above, law at this stage is the most important part of national legal system, operated and managed by “lawyers” who should have professional knowledge and casuistic technique of law.

Through the process to transforming from law as rule into law as institution, the former becomes a more concrete and effective norm by mixing with and melting into law as culture of society. We can charac-

<sup>22</sup> In addition, the authoritarian political systems persisted in these countries possibly limits this channel due to the lack of representative democracy. This is also a result of weak nature of transplanted Western system.

<sup>23</sup> This is evident in various law reform movements of post-socialist transition East European countries, as well as of East Asian countries after the 1997 crisis, and is why the topic of “legal transplants” have become crucial agenda for the theory for New Law and Development Movements. See Nelken, David and Feest, Johannes (eds.), *op. cit.*, footnote 16, for various arguments on the theories of legal transplants, especially under current globalization. Berkowitz *et al.*, “The Transplant Effect”, *American Journal of Comparative Law*, vol. 51, winter, 2003, analyzes its effectiveness using concepts of (transplanted) formal legal order and informal legal order, pp. 172-184, and concludes by saying, “this process will undoubtedly take longer than the design and enactment of optimally designed laws”, and further “yet after two hundred years of for the most part unsuccessful legal transplants, more patience with the development of legal institutions seems to be in order”.

terize law as institution at enforcement stage as the process of “legalization of society” because, by this process, the society is expected to legalize itself through the adaptation of law as rule and to transform law as culture, while we can characterize it by “socialization of law” when we pay attention to that law as rule would be amended or changed by the reality of society (law as culture).

It should be noted that the old paradigm of the Law and Development Movement during the 1960s and 1970s was focused substantially on the aspect of “law as rule” but rather neglected the importance of the institutional aspect of law (law as institution). The finding of the importance of this aspect is the achievement of the New Law and Development Movement (NLDM), which started from the early 1990s. The problem with NLDM seems that it might fail to show how law as institution relates to law as culture. In other words, it seems that they still define the institution as a formal legal institution based on neo-classic theory which reflects market system and methodological individualism, and does not concern itself adequately with the informal system based on its cultural tradition.<sup>24</sup> It is important to understand how laws as norm and institution (formal legal system) interact with law as culture (informal legal system or legal culture), because the effectiveness of a national legal system depends on how these laws are integrated into a unified legal system.

### 3. *Globalization and Law*

No one can deny we live now facing with fierce globalization of economic, political and social system, although there are various views in understanding what is “globalization”.<sup>25</sup> I understand that present wave of globalization was initiated in the 1980s by the regeneration of “market

<sup>24</sup> World Bank, 2002, *op. cit.*, footnote 9. This is a common tendency of the Western New Institutional Theory. For instance, North, a most distinguished scholar in this field defines institutions as “the framework within which human interaction takes place... perfectly analogous to the rules of the game in competitive team sport”. North, Douglass C., *Institutions, Institutional Change and Economic Performance*, Cambridge, Cambridge University Press, 1990. However, he seems to deem “the rules of game in the competitive team sport” rather as universal one beyond time and space, which is understood essentially in modern “rational” concepts, although he discussed the importance of tradition or informal institutions.

<sup>25</sup> There are many writing on the globalization, see Santos, Boaventura de Sousa, “The Process of Globalization”, *Eurozine*, 68/14, December, 2002.

force”<sup>26</sup> as a result of information technology revolution started in the 1970s. This revolution has facilitated massive and prompt movement of people, goods, information, financial assets and services all over the world beyond state borders. This movement has not only vitalized economic activities beyond nations states, but also has enabled the wide communication of political and societal views and opinions at global level.

Therefore, we can understand that current globalization emerged at the economic level as “market globalization”, which forced to transform the government mechanism from bureaucratic system based on command principle to the market oriented system. The governments of Western developed countries have shifted their basic economic and social policy from heavy burdened welfare state model to more economized or cheap government model through the radical privatizations and deregulations. The United States Reagan administration and United Kingdom Thatcher government led this direction through the drastic policy change in the early 1980s,<sup>27</sup> and after two decades, Japan started struggling for the same way as we examine in part III. We witness that “state system” based on “command principle” which was the dominant paradigm of the 20th century world system is now losing its effectiveness slowly but steadily.

So, can we conclude that the 21st century is an era of the market as we experienced in the 19th century? I am skeptical to this conclusion, because we see another wave of globalization coming after the market globalization, as Santos and Rodriguez-Garavavito characterize it by the “Counter-Hegemonic Globalization”. I call it “social globalization” in contrast with on-going “market globalization”.<sup>28</sup> Social globalization is not appear its clear shape yet, but we can perceive its existence in increasing importance of No Governmental Organizations in world politics as typically witnessed

<sup>26</sup> See Yasuda, 2003, *op. cit.*, footnote 1, pp. 31-35, on the concept of “market force” with its symmetric “community force”. Both are dynamited concepts of market and community principles, and it is effective concepts not only to explain globalization but also to draw the dynamic process of human history as a whole.

<sup>27</sup> We can observe this vital change of economic and social policy of Thatcher Government of United Kingdom to the harsh “marketization policy” such as privatization and deregulation, which was justified in order to adapt “market force” through the 1980s, in sharp contrast with those of the Labor Government of the 1970s based on state oriented welfare model.

<sup>28</sup> See Santos, Boaventura de Sousa and Rodríguez-Garavito, César, “Law, Politics and the Sabaltem”, *Counter-hegemonic Globalization*, 2005, <http://www.ces.fe.uc.pt/bss/documentos/chapter1.pdf>.

in various movement concerning the United Nations Millennium Development Goal. They are opposing fiercely against the violence of market force created by Transnational Corporations in cooperation with the new market oriented “States”.<sup>29</sup>

Counter-hegemonic globalization movements are composed by the complex of diversified social interests like labor movements, feminists, ecologists, minority and indigenous peoples’ movements, etcetera, and it is difficult to define it by a single or universal term, but easy to perceive that all are motivated by the social value based on “community principle”, and driven by “community force”.

The 21st century will be an era of “community” much more than the era of “market” or “state”.

### III. GLOBALIZATION AND TRANSFORMATION OF LAW IN JAPAN

#### 1. *Historical Development of Japanese Legal System*

In this section, I will trace the socio-legal history of Japan using three types of state, namely proto-state, modernizing state, and developmental states under my framework of historical development of non Western legal system, although I use the term “modernizing state” in the place of “colonial state”. This is because Japan has not any experience of colonial rules. But basic nature of two state concepts is not so diversified, because Western law were “imposed” exogenously in both cases.<sup>30</sup>

##### *A. Proto-State Paradigm*

It is said that the first Japanese constitutional document is the 17 articles Constitution promulgated by the Shoutoku Prince in 604 AD. It is

<sup>29</sup> We can evidence that World Social Forum (WSF) started its activity at Porto Alegre in Brazil in 2001, organizing various anti (market) globalization groups, and symmetrically opposing the World Economic Forum (WEF) based at Davos which seemingly intends to build a global society on the side of market globalization.

<sup>30</sup> It is true that Japan is something different form other non-Western countries, because there is no clear distinction between modernizing states and developmental States in the real history, although history tells us that developmental state policies actually started early in the 20th century, far before the end of the World War II when other non-Western countries started this paradigm. Yasuda, 2003, *op. cit.*, footnote 1, pp. 35-45. In this paper, however, I discuss the developmental states in Japan as in the post-World War II.

rather the moral and ethic code influenced by Buddhist and Confucianist philosophy which was imported from China and Korea. In the early 8th Century, the comprehensive Code<sup>31</sup> was introduced from then the Imperial China. Since then, the Chinese state crafts were continuously imported into Japan, by which it created the formal State system imitating the Chinese one for a while.

Japan, however, started indigenizing its system from the 10th Century when it lost the regular official communication with the Continent. Especially since 1192 when the Kamakura Warrior (Samurai) government was established, the Japanese state system was transformed gradually from the centralized aristocratic bureaucrat polity of Chinese model, to the decentralized feudalistic Samurai government based on the indigenous model. The indigenous Samurai polity was matured during the Edo Shogunate government established in 1600. During this period (1600-1868), Japan witnessed the prosperous and inward development, as the rigid isolation policy avoided any military conflict with foreign countries. Through this period, Japanese polity shaped rather its own particular state system, although it continuously interfaced with neighboring East Asian proto States like China and Korea.<sup>32</sup> We may, therefore, conclude that the proto State constitutional system in Japan was characterized by the mixture of its indigenous (Samurai) and influenced East Asian (mainly Chinese) state craft.

### *B. Modernizing State Paradigm*

The Western Powers reached the East Asian region in the early 19th century and exercised overwhelming hegemonic power by and large within the area throughout this century. In the midst of the crucial Western movement, Japan started the modernization-Westernization of its state system after the harsh Civil War of 1868, by which the Edo Shogunate Government was defeated by the modernist Meiji Government.

It is a well-known fact that the modern state building was first started with importing systems from the United Kingdom and France, because both had a strong influence to the Japanese politics during the revolution-

<sup>31</sup> The Taiho Code was promulgated in 701.

<sup>32</sup> Only China, Korea and Dutch were allowed to have regular communications during this period.

ary moment.<sup>33</sup> Its constitutional and legal system, however, was designed by adapting the German model, a late-comer of the modern European states, which started its state building actually in 1871, defeating the French Second Empire. Not only the Meiji Imperial Constitution promulgated in 1889, but also major Codes including Civil and Commercial Codes were drafted by the substantial influences of German advisors. Germany was thought to be a good model to learn because its semi-feudalistic and authoritarian nature was suitable to the conditions of Japan then.

Along with the importation from western states, the indigenous and traditional value was also embedded in the modern constitutional and legal system, as we can see the peculiar position of the Emperor under the Meiji Constitution,<sup>34</sup> as well as a collectivistic and paternalistic family system in the family law.<sup>35</sup> However, no one can deny that German law and jurisprudence influenced overwhelmingly on the modernization and further development of Japanese Constitutional and Legal system in the pre-World War II era. It was characterized by the authoritarian and semi-feudalistic nature, reflecting political, economic and social structure at that time.

It is notable that Japanese law was transplanted to other East Asian nations directly or indirectly during this period. Japan colonized Taiwan in 1895 by the cession from China (then Chin Empire), and Korea by the deprivation of sovereignty officially in 1910 from then the Ri Dynasty of Korea. In these two colonies, substantial parts of Japanese law were introduced by its direct rule. In contrast, China started the modernization and westernization of its constitutional and legal system by its own initiative after the Revolution of 1911. It is interesting that the revolutionary government of China also decided to codify various codes according to the German model. In this process, Japanese law was

<sup>33</sup> France reigned by the Napoleon junior had strong influence to the Shogunate old regime, while the new power created by the revolution (Restoration) were assisted by the British government.

<sup>34</sup> He is thought to be a descendent "living god" of Japanese nation, as seen in article 1 of the Constitution of Empire of Japan (CEJ) which read "The Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal (stress added)". This deva-raja mind structure of Japanese would cause them to miserable tragedies of the World War II.

<sup>35</sup> Family was regarded as quasi corporate body which is dominated and managed family chief succeeded generally by the eldest son. This idea is based on Samurai law influence by Chinese Confucianism.

referred and introduced, because many Japanese leading professors were invited to assist the drafting process of the Codification of new Chinese law. This is an example of indirect and rather voluntary reception of Japanese law to the East Asian region.<sup>36</sup>

*C. Democratization and Americanization of Japanese Law in the Post-World War II*

Japan accepted the Potsdam Declaration and surrendered to the Allied Powers unconditionally in the miserable ruin of the nation in 1945. Since then, Japanese political, economic and social systems were liberalized and democratized radically through the various directions of the Allied Occupying Powers led by the United States.<sup>37</sup> The most important political reform was to promulgate the New Constitution of 1947, which had been drafted first by the American lawyers in English. This Constitution is, however, one of the most idealistic constitution of the post-World War II era, not only by its liberal and democratic nature, but also in the absolute pacifism shown in article 9, which declare in the following terms;

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.  
2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

In addition, this Constitution addresses the revolutionary changes from the former Meiji Imperial Constitution in various aspects, among which followings should be noted;

<sup>36</sup> Due to the Civil War in China then and consequent Japanese Invasion, these codes were not rooted in the Chinese soil. Further, the Peoples Republic of China (PRC) created in 1949 declared all such laws should be repealed because those are against the socialist or communist state ideal. It is interesting, however, that these codes were brought to Taiwan with Nationalist (Komintang) Government defeated by PRC, and become the present Taiwan law.

<sup>37</sup> See Dower, John W., *Embracing Defeat, Japan in the Wake of World War II*, New York, Norton and Company-The New Press, 1999, on the social and political background of these reforms.

- it declares the Nations /People Sovereignty in contrast with the Emperor Sovereignty in the old Constitution. It also introduces the radical universal suffrage including female voting rights, while the Emperor, a former living god and sovereign holder, declared himself as just a “human being” and became a “symbol of the nation” (article 1 of the CJ).
- it guarantees the comprehensive Basic Human Rights “as eternal and inviolate rights”,<sup>38</sup> which consist of both of the political/liberal and social/economic rights.
- it democratizes and liberalizes the government structures radically on the basis of the British Parliamentary System which had been introduced originally in the former Constitution.
- it introduces the American styled judicial mechanism which was more independent and strengthened its power by the introduction of the judicial (constitutional) review.<sup>39</sup>

Needless to mention, drastic political reforms were directed by the Occupying Power in various field, and military and ultra nationalist personnel were purged from political office.

At the economic level, the democratization was focused on the radical change of semi-feudalistic military dominated economic and social structures. Among various reforms, three Major Economic Democratizations of post-World War II Japan are well known and important. *The First* is the drastic agrarian land law reform. The agricultural landholding structure in the pre-World War II was characterized by the semi-feudalistic and paternalistic landowner-tenant relations, which had caused a wide economic disparity among people and hampered the poor section of people to think in democratic and liberal way. By this reform, all lands owned by absentee land owners were taken over and redistributed to the small peasants, and the ceiling of land holding was fixed.

*The Second* is what is called the Zaibatsu Kaitai (Dissolution of Industrial Houses). It was understood that the aggressive and militaristic nature of then Japanese economy had resulted from its peculiar corporate structure, where large companies had been owned exclusively by the limited wealthy industrial families called Zaibatsu. By this reform, major

<sup>38</sup> Article 11 of the CJ. In contrast, the CEJ had provided only for “The Rights and Duties of Subjects” in chapter 2, which stipulated that these rights could be restricted by ordinary legislation.

<sup>39</sup> Article 81 of the CJ.

Zaibatsu groups were ordered to dissolve themselves and disperse their corporate ownerships to public widely. As a result of this reform, the Anti Monopoly Act (AMA), actually the first Anti-monopoly law in Asia, was enacted in 1947. Further, the Company Law (which was a part of Commercial Code) was amended simultaneously with this reform, by which its major legal structure were shifted from German model to American one substantially especially in its management and capital structures.

*The Third* point of the reform concerns the recognition and liberalization of trade union movements. These movements had been suppressed cruelly by the pre- and mid- World War II authoritarian and military government, which led the nation and people to the miserable War, in resonance with the severe suppression on the freedom of expression. This reform was resulted from serious reflection to such unhappy history of the pre and mid World War II in Japan, and its influence is not only limited to economic sphere, but also impact strongly on the political and social democratization in Japan.

All these reforms related closely to the democratization of social system, but in this context, it should be specially noted on the family law reform. The family system of the pre World War II Japan had been characterized by the paternalistic and collectivistic structure. The family property constituted a collective body which had been managed and inherited by a family chief generally succeeded by its eldest son. The collective and paternalistic structure was abolished completely and the modern individualistic family law based on equal footing of both sexes was introduced.<sup>40</sup>

#### *D. Developmental State Legal System in the Post-World War II Japan*

In 1951, Japan recovered its independent sovereignty by the conclusion of the San Francisco Peace Treaty. Since then, thanks to the pacific

<sup>40</sup> This ideal is expressed in article 24 of the CJ, which stipulates that “Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis, and 2) With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes”.

provision of the Constitution, it has developed its economic and social system rapidly and smoothly, not only through the avoidance of any involvement of war and military conflicts often occurred in this region,<sup>41</sup> but also by the successful allocation of its resources to the economic and social development saving the military expenses. Since the early 1960s, Japanese economy has recorded an unhistorical growth. Its GNP per capita increased from US\$ 385 (7th in the world) in 1960, to US\$ 3,652 (5th) in 1975, to US\$ 9,033 (3rd) in 1985, to US\$ 26,219 (1st) in 1993.<sup>42</sup>

It is true that the rapid growth was accomplished not only by the external political and economic climate surrounding Japan characterized by the Cold War regime, but also through the particular method of political and economic management. During this period, the political situation of Japan was rather stabilized under the long term domination of the LDP (the Liberal Democratic Party) of the Diet, which took a policy to develop its domestic economy in the long perspectives, while they delegated strategies the international political power, especially in the security and military matters to the United States. Through this, the LDP Government could mobilize their energy and resources exclusively to the economic and social development of Japan.

It is also important to note that the method of economic management was of particular nature. It is a kind of mixture between market based liberal economy typically seen in the United States and the state oriented command economy similar to then Soviet Socialist block. The former was an essence of the post-World War II reforms by the United States, but the latter was originated rather in the War economic management during the World War II, than in the communist styled rigid planning model. This is what Chalmers Johnson defines as “developmental state”,<sup>43</sup> and formulated the basis for the success of “Japanese System” in the

<sup>41</sup> There have been many wars surrounding Japan such as the civil war in China (1945-1949), the Korean War (1950-1953) and the Vietnam or Indo-China War (the early 1960s -1975). Thanks to article 9 of the CJ, Japan has been never involved these Wars. It should be noted that Japan had never sent any military organization to the War field till sending troops to Iraq in 2003.

<sup>42</sup> Kousei-Hakusho, White Paper on National Welfare, 1996. <http://www.hakusho.mhlw.go.jp/wpdocs/hpaz199601/b0027.html>.

<sup>43</sup> Johnson, Chalmers, *MITI and Japanese Miracle: Growth of Industrial Policy*, Tokyo, Charles E. Tuttle, 1986. The concept of “developmental state” is more effective to explain the countries destined to develop their political, economic and social development, which actually means developing countries generally.

1980s.<sup>44</sup> This model is actually a kind of corporatism composed of three major actors, namely the LDP (politician), bureaucrats and (big) industrialists. Needless to mention, these three actors were bonded by the communal (crony) feelings based on the Asian mind structure of harmony,<sup>45</sup> rather than either on the horizontal market based contractual relations or on the vertical order-obedience command relation. This particular method enabled policy makers to adjust macro economic management more flexible from the long range perspectives, free from the short eye market consideration, as well as to secure its micro level management more efficient through mobilizing feeling of workers participation to the efficient production.<sup>46</sup>

E. *The Failure of Developmental State  
and “The Lost Decade” of the 1990s*

Japan’s developmental state model assured the tremendous success from during the 1960-80s, and Japan became a center of the rapidly growing East Asian Region,<sup>47</sup> one of the Tri-Poles of world economies in the mid 1980s. It should be noted that this Pole enjoyed economic prosperity during the 1980s, while the United States and Europe, other two of Tri-Poles were forced to continue a bitter struggle to transform their economic systems to meet the evolving globalization through deregulation and privatization. I characterize this Asian economic development model by the term of the Asian-type “community capitalism” which is differentiated from the Western originated genuine “market capitalism”. Simplified comparative table between two capitalisms is shown as follows:<sup>48</sup>

<sup>44</sup> See Vogel, Ezra, *Japan as Number One Lessons for America*, Cambridge, Harvard, University Press, 1979.

<sup>45</sup> As Johnson and others point out, an “industrial policy” which was main instrument to achieve the national economic goal was based on the mutual tacit understanding among these actors, but not on a law or government order.

<sup>46</sup> This is what called “Japanese Management” which includes the Quality Control circle movement, the Toyota factory management, the seniority model of promotion and the whole life employment system and etcetera.

<sup>47</sup> Since the 1970s, Four Tigers Korea, Singapore, Taiwan and Hong Kong and other Association of Southeast Asian Nations achieved their rapid economic growth, substantially through Japanese Official Development Aid and direct investment, and formed loosely condensed East Asian Economy.

<sup>48</sup> See Yasuda, 2001, *op. cit.*, footnote 1, pp. 119-135.

<i>Genuine Market capitalism</i>	<i>Community capitalism</i>
Westerd (Anglo-Saxon) model	Asian model
Hunting and commercial type	(Rice growing) agricultural type
Monotheism	Polytheism
Competition	Cooperation
Individualism	Communalism (group consciousness)
Financing and services	Manufacturing
Legal and contractual relations	Nonlegal interpersonal relations
(rule of law)	(rule of man)
Tranparency and openness	Closeness and exclusiveness
Accountability (explicit explanation)	Tacit understanding (full trust)
Neutral government (market stata)	Positive government (developmental state)

On the heyday of the “Bubble” in the end of the 1980s, however, Japanese economic and political systems suffered suddenly from the serious dysfunction. This means that the Asian-style Community Capitalism lost its paradigm when it faced a fierce wave of market globalization, which was based on strong “market force” regenerated by the IT revolution from the 1970s, strengthened its energy by the structural adjustment of the Western countries like the United States and United Kingdom, and grown up as the global market capitalism. It is even a symbolic when the LDP was forced to retreat from the government by the general election of 1992 in the middle of the burst of bubble, and the consequent political muddle delayed to take effective steps to overcome this economic crisis, although the LDP came back to the power in the cunning way in 1994.

Throughout the 1990s, the political turmoil continued and even deepened, which led to the serious stagnation of national economy. The community capitalism, once admired by the successful economic growth of Japan and East Asian countries, lost its paradigm, but it was difficult to change it because it had been rooted deeply in the soil of business culture and value based on communal feeling of “harmony” among people. It should be noted that other East Asian economies which had common nature of the community capitalism collapsed suddenly in 1997. These evidenced that this type of capitalism can not sustain in the circumstance

of the on-going market globalization without radical transformation, because it is based on the closely organized personal relationship, in contrast with the open and depersonalized global transaction system of market capitalism.

## *2. Constitutional and Legal Reform of the New Millennium in Japan*

It is true that there were various efforts to overhaul Japanese systems in order to meet the on-going globalization even during the “a lost decade” in the 1990s, but all were not fully successful, because of the political chaos, the economic depression and more importantly the loss of confidence of the people to the Japanese system.<sup>49</sup> After all in 2001, the populist Koizumi Government appeared at the political stage suddenly and incidentally, and declared decisively its intention to achieve the radical structural reform of “Japanese system”, namely “Japanese styled developmentism”.<sup>50</sup>

This drastic change has responded to and been motivated by the formidable globalization which has been sweeping all over the world since the 1980s. It has forced Japan as well as other East Asian countries to transform its economic and social system radically.<sup>51</sup> This is the third revolutionary wave compelling Japan to adopt the radical reform of political, economic and social structures in Japanese modern history. The first was to start “modernization” after 1868 by Meiji revolutionary government, and the second was to carry its “democratization” after the defeat of World War II.

I will examine briefly this millennium reforms, dividing into three dimensions of the society, namely political, economic and social, applying my theoretical framework proposed in the part II.

<sup>49</sup> During the 1990s, serious corruption scandals were reported not only on the politician, but also of high ranks bureaucrats, who had ever been gained the good reputation of their morality, diligence and integrity.

<sup>50</sup> It is even symbolic that Koizumi took over the power, shouting out “achieve radical structural reform or destroy our LDP!”. He has not been a core member of any faction of the LDP, which made him possible to implement many drastic reforms, without considering any political compromise with faction leaders of the LDP, a typically traditional manner of Japanese politics.

<sup>51</sup> This effort can be summarized as a slogan “from big and expensive government to small and cheap one”, “from public government to private business” and “from state to market”. Japan has adapted Reagan —and Thatcher— like policies two decades later of their reforms.

### *A. Political Dimension*

There have been substantial impacts of globalization even in the political field all over Asian countries, although it has been motivated and operated mainly in the economic field. This can be summarized as liberalization of the political system or “political marketization”, based on the Anglo-American “rule of law” state model, and their political reforms show a close affinity with the economic liberalization such as deregulation and privatization relied on the neo-classic economic theory of Western advanced countries, especially in the United States.

It should be noted, however, that this political liberalization has caused also a kind of nationalism especially in the East Asian region, as we witness in the political tension among Japan, China and Korea, all of which are in the process of transformation of political and economic system to the same direction.

I will deal hereinafter with three topics, namely a) move of Constitutional Amendment, b) political and administrative reforms including local government reform and c) judicial reform.

#### *a. Constitutional Amendment: Move to the New Constitution*

As I mentioned in the previous chapter, the Japanese Constitution was promulgated in 1947 as the most brilliant result of the post-World War II Reforms. This formulated the base for the rapid and successful political, economic and social development. It is true, however, that this Constitution has been condemned as “the foreign made Constitution imposed by the United States Occupying Power”, not only by the ultra right-wing nationalists, but also by the mainstream of the conservative members of the LDP. They have insisted to have “our own Constitution” based on the nationally inherited feeling and value, which essentially involves the amendment of two articles, namely article 1 on the Emperor and article 9 on the Renunciation of War.<sup>52</sup>

It was extremely difficult, however, to initiate this procedure, because the Constitution imposes a strict requirement on its amendment. Article 96 of the Constitution requires 2/3 majority vote of all members of both

<sup>52</sup> The Amendment of the Constitution including two articles has been the long life agenda of the LDP since it was founded in 1955 by the amalgamation of major conservative parties.

Houses of Diet and the national referendum. It was impossible when we see the fact that post-World War II politics in Japan was characterized by the strange two political party dominant regime, which the LDP kept more than simple majority regularly, but could not gain more than 2/3 of the Diet, while then the Socialist Party (SP), a main opposite and strong proponent for the Constitution then, maintained the minimum 1/3 steadily together with other pro-constitutional groups.

This political balance disappeared drastically in the political turmoil of the 1990s. The SP lost peoples confidence when it enter the coalition suddenly and strangely with its ever strong opponent LDP in 1994, while newly evolved opposite parties or groups were not necessarily against the constitutional amendment. When Koizumi took over the prime minister in 2001, more than 2/3 of the Diet members, either of the LDP or substantial members of the new opposite Democratic Party (DP) showed their sympathy with the Constitutional amendment, although there were wide variation among them on what and how they amend it.

In January 2000 one year before Koizumi came out, the House of Representative set up the Research Commission on the Constitution (HRRCC) to “conduct broad and comprehensive research on the Constitution of Japan”. Initially, the HRRCC was constituted by fifty members representing seven parties and political groups of the HR proportionally and chaired by Nakayama Taro, the LDP MP.<sup>53</sup> Simultaneously, the House of Councilor (HC) also established its own Research Commission on the Constitution (HCRCC) for the same purpose. These agendas were not to research for the purpose of the Constitutional amendment but just to research the present situation of the Constitution, although no one can deny that the amendment was a hidden agenda. Two commissions of the Diet made a comprehensive research on the Constitution, including visiting foreign countries, public hearing in major cities and asking the scholars and experts to research and advice. After its designated five years of research work, both commissions submitted the voluminous report to the president of each House in April 2005.<sup>54</sup> These reports never expose their specific and

<sup>53</sup> See HRRCC, Interim Report 2002, p. 5, in [http://www.shugiin.go.jp/index.nsf/html/index\\_e\\_kenpou.htm](http://www.shugiin.go.jp/index.nsf/html/index_e_kenpou.htm).

<sup>54</sup> 673 page of HRRCC Report (Japanese) can be seen in [http://www.shugiin.go.jp/itdb\\_kenpou.nsf/html/kenpou/houkoku.pdf/\\$File/houkoku.pdf](http://www.shugiin.go.jp/itdb_kenpou.nsf/html/kenpou/houkoku.pdf/$File/houkoku.pdf), and 298 page of HCRCC Report (Japanese) seen in <http://www.sangiin.go.jp/japanese/kenpou/houkokus-yo/pdf/honhoukoku.pdf>.

definite proposal of the amendment<sup>55</sup> of Constitution, but show various different views confronting opinions fairly on all parts of the Constitution.

On a parallel with the Diet activities, the LDP activated its own move towards the constitutional amendment. Its project team published the "Preliminary Draft for the Constitutional Amendment" in June 2004.<sup>56</sup> In early 2005, Koizumi, the LDP president and prime minister who belongs to the rights wing and a strong proponent of Constitutional amendment declared that the LDP should prepare the draft of Constitutional amendment by November, same year, the memorable 50th anniversary day of the LDP. This is confirmed by the Party Program published for the general election of September 2005, which mentions it clearly, as well as the enactment of "Constitutional Amendment Procedures Law" in the 24th item among a hundred and twenty programs. Main opposition, the Democratic Party does not submit any proposal for it, but not necessarily oppose to the amendment itself, although some criticize the rights wing nationalist favor of the LDP.

It is too early to conclude what, when and how the Constitution would be amended, but we can observe fairly that people have started thinking it necessary to review and overhaul the 45 years old Constitution if necessary, despite of their deep sympathy with this Constitution based on three major principles, 1) people-national sovereignty, 2) respect for basic human rights and 3) absolute pacifism.

For these key issues, following arguments have been going on.<sup>57</sup> First, the sovereignty problem concerns the status of the emperor, on which right wings are proposing to amend article 1 in order to clarify his or her status to be a "national head", from that of present position of "national symbol". Now, however, the idea of "national symbol" is rooted deeply in the people feeling, and only a few right-wings insist to substitute "national head" for "national symbol".<sup>58</sup>

<sup>55</sup> But it is strange that the LDP never disclosed what contents should be incorporated in the new Constitution.

<sup>56</sup> It published more detailed "Draft" in September 2004, but cancelled it when the fact that a Self Force Uniform participated directly in it drafting was disclosed.

<sup>57</sup> There are other important topics which include the strengthening the executive especially prime ministers power and establishment of the Constitutional Court and etcetera.

<sup>58</sup> A current and more urgent debate for the Imperial House is whether the new Constitution should have a clear provision admitting "Empress", because at present imperial families have only female decedents but no male.

Second, it is true that human rights provisions have become out of date and insufficient to meet new global situations and necessary to incorporate so called “a new kind of Human Rights” such as a right to environment and privacy rights and etcetera. In addition, the ultra right-wings have criticized that the present American imposing Constitution is too liberal and individualistic, and insisted that it is essential to stipulate the duty or responsibility of the people to the state or public general, as well as to incorporate any provision concerning the respect for national values or patriotism. Some of them proposed that “Yasukuni Shrine”, a specialized shrine for the worship of the unknown soldiers, should be maintained by the government. It causes a delicate problem on the relationship between state and religion, strictly separated by the present Constitution.<sup>59</sup>

Third, the absolute pacifist provision incorporated in article 9 has produced the “unconstitutional situation” paradoxically, because Japan maintains a rather large scale de fact military called “Self Forces” (SF). This has become a serious political issue when the Koizumi Government dispatched the SF to Iraq responding to the United States request in 2003, because section 2 of article 9 prohibits decisively from “belligerency of the State”.<sup>60</sup> Main issue is whether it can be justified to maintain the absolute pacifism in the changing global situation which may request us to use the force to keep the peace in cooperation with international society, as we witness in the “war against terrorism”. Not a few Japanese start accepting the idea of sending peace keeping force (PKF) abroad with the strict restriction and the clear framework of international cooperation such as the consensus or request of the United Nations. For this purpose, it would be essential to clarify it in the Constitution. However, the rectification of the absolute pacific provision may cause serious conflicts with neighboring Asian countries, because they are wary of the revival of the pre-and mid-World War II militarism of Japan. This suspicion can

<sup>59</sup> Further, “Yasukuni” issue has produced the serious political confrontation between Japan, and China and Korea when Koizumi expressed his intention to visit it for the worship on the anniversary day of the end of the World War II, because this shrine deifies the executed serious World War II war criminals. See Hiroshi, Hosi, “Yasukuni: What draws Koizumi to the Shrine” originally appeared in the June 20 edition of the weekly *AERA* magazine. (IHT/Asahi: July 22, 2005) <http://www.asahi.com/english/Herald-asahi/TKY200507220291.html>.

<sup>60</sup> The SF cannot fight with military force against any powers, so that it is guarded by Dutch and later British troops in Iraq.

be justified when many Japanese politicians including Koizumi himself visit Yasukuni Shrine blatantly, where the major war criminals executed for the crime against the peace and humanity judged by the Tokyo War Tribunal were deified among the unknown soldiers of all wars Japan committed past.

In sum, it is not clear what Constitutional amendments would be proposed actually at present, although some private organizations have published their concrete proposals. However, as we can see typically in the LDP slogan “create our own Constitution but not foreign made!” or “return to the proper nation”, this movement shows a close affinity with the revival of old style “nationalism”.<sup>61</sup> This seems strange when we witness that the same government has been proposing more and more “liberal” economic policies, as we examine later.

#### *b. Political and Administrative Reform*

Even during the 1990s, political and administrative reforms were a critical issue in Japan. There had been serious political corruption cases of the dominant LDP politicians exploded in the end of the 1980s. The LDP Government started political reforms, but, shortly after, it was defeated for the first time after the long history of the LDP dominance of the House of Representatives. Newly taking over the power, the Hosokawa Coalition Government, defined itself as the “government of political reform” and enhanced it, consisting of a package of new political financing restrictions and major changes in the electoral system, which led to the landmark of political reform legislation in January 1994.

By this reform, *first*, the electoral system for the HR was drastically changed from what is called the “medium-sized district system” or “multi-member district” (MMD) to the “small sized district and proportional representative system”. The old MMD had been criticized as a cause of corruption and increasing electoral costs, because candidates

<sup>61</sup> Japan has faced serious problems with neighboring China and Korea, not only in how to settle the liability on what it committed in the pre-, mid, War period, but also in the territorial disputes of small islands on the borders. This might be an example of the strangely accelerated “nationalism” under the globalization, but it seems that a key issue for solution is how we can reach the common and shared understanding on the East Asian modern history and culture.

were forced to compete excessively with same party colleagues.<sup>62</sup> *Second*, the Law of Political Financing Restrictions originally enacted in 1950 was amended to strengthen the control and to ensure transparency of the income and expenditure of political parties and politicians. *Third*, the public financial assistance to the political parties was introduced by the Law of Assistance to Political Parties (Law number 5 of 1994). It is true that these election reforms have been transforming the Japanese political culture gradually from the rather traditional Asian styled patron-clientism to the more individualistic modern party politics, although it has caused some confusion in the process of transformation.<sup>63</sup>

On a parallel with the political-electoral reforms, financial and administrative reforms must be mentioned. The sudden burst of the “bubble” left Japan a huge amount of public deficit. This has requested the government to cut down its expenditure drastically, which means shifting from “the large developmental government to “the small and efficient government”. For this purpose, the government had carried out various policies in the latter part of the 1990s, which led to formulate “the Charter of Administrative Reform (CAR)” in December 2000. This Charter declares comprehensive reforms on: 1) the radical reform of administrative organization and mechanism, 2) the enhancement of decentralization, 3) the enhancement of regulatory reforms, 4) the computerization of administrative business and the realization of “digital government”, and 5) the implementation of reforms of central government offices.<sup>64</sup>

Since 2001 when Koizumi became prime minister, the administrative and financial reforms have been accelerated in their speed and scope. A recent relevant document summarized their directions by: 1) the deregulation reform, 2) the financial system reform, 3) the tax and revenue re-

<sup>62</sup> See “Japan Electoral Reform”, <http://www.aceproject.org/main/english/es/esyip.htm> and Haley, John O., “Heisei Renewal or Heisei Transformation: Are Legal Reforms Really Changing Japan?”, *Faculty Working Papers Series*, Washington, University in Saint Louis, 2004, pp. 3-5.

<sup>63</sup> The General Election in September 2005 was characterized by the first election where the Party Secretariat of the Koizumi LDP has exercised the extremely centralized power, as they parachuted down its own candidate down in the constituencies where the LDP members had opposed to the Post Privatization Bill.

<sup>64</sup> The Cabinet Decision on the Charter of Administrative Reforms, <http://www.soumu.jp/gyoukan/kanri/gyokakutaikou.html>. This Charter stipulated to establish the Head-quarter of the Enhancement of Administrative Reforms headed by the prime minister within the Cabinet.

form, and 4) the expenditure reform.<sup>65</sup> Among them, the privatization of the public or government services like the post office and the highway corporations relates to all areas of structural reforms, and became a key political issue in the general election of September 2005, when Koizumi dissolved the HR suddenly after the House of Councilors rejected the Post Office Privatization Bills passed by the HR a few weeks ago.<sup>66</sup>

Other important branch of administrative reforms concerns the decentralization and local government reform. The Japanese local administration followed the French model originally, and were controlled and regulated by central government. This system was changed substantially toward the American local autonomy model by the post-World War II reform, but the central government continued exercising the strong influence on the administrative and financial matters of local governments.<sup>67</sup> However, the decentralization has become an urgent concern of administrative reforms, because the central government has lost the financial and administrative capacity to support the local government. This reform has been implemented through what they call “the trinity reforms package”, which consists of: 1) lessening the subsidies from central government, 2) reduction of tax revenue allocated to local and 3) delegation of taxation power to the local.<sup>68</sup> Along with these financial reforms, it is notable that fierce mergers and amalgamations of the municipalities have been implemented by the strong initiative of central government.<sup>69</sup>

Apart from the radical change at the policy level, the administrative law reform started with the enactment of APL in 1993 (Law number 88

<sup>65</sup> Keizai-zaiseiunei tokouzoukaikaku nikanssuru kihonnousinn 2005. (The Basic Principle on Economic and Financial Management and Structural Reforms).

<sup>66</sup> He expressed clearly that this election should have the nature of national referendum asking whether pro or con to these Bills.

<sup>67</sup> What is commonly mentioned “30% local autonomy” shows its reality that 70% of local governance matters are controlled totally by the central government. On the outline of local government in Japan, see CLAIR (2002) <http://www.clair.or.jp/j/forum/series/pdf/j01.pdf>. See also Yagi, Kinno, *Decentralization in Japan Policy and Governance*, Working Paper, num. 30, Keio University, 2004.

<sup>68</sup> Cihou-bunnken-suisinn-kaigi (The Council for Decentralization Reform), *Local Sannmi-ittaikai-kaku-nituiteno-ikenn* (Opinion on the Trinity Reform) <http://www8.cao.go.jp/bunken/030606iken/030606iken.pdf>.

<sup>69</sup> The number of municipalities is expected to decrease from 3,232 in 2000 to 1,822 in 2006. Naikaku (Cabinet Office), 2005, *Kokomade-susunnda Koizumi-Kaikaku* (How Advanced the Koizumi Reform), p. 20. <http://www.keizai-shimon.go.jp/explain/pamphlet/0404.pdf>.

of 1993). This law is important because it for the first time regulates the notorious “Administrative Guideline” (gyousei-sidou) administration, and formalizes the administrative procedure more in detail, such as on the hearing in case of adverse disposition and on complaint. The administrative guideline is defined as (informal) guidance or advice but not “disposition” by the administration. This practice had given the administration de facto wide discretionary powers free from the judicial review. Many admit that this measure had been the main engine of Japanese developmental state to achieve the economic development toward a desirable national target, although it bears serious problems in the “rule of law” principle and lack of transparency. New Law declares that an administrative guideline should be “realized solely on voluntary cooperation” and that the administration agency “shall not treat any person in negative way as a result of non-compliance” (APL article 32). It is pointed out, however, that the administrative law in Japan including the APL has not developed yet from the viewpoint of “rule of law” principle and the transparency and accountability of the administration, not only in comparison with the United States, but also in contrast with Korea and Taiwan which started administrative law reform simultaneously with Japan.<sup>70</sup> We can expect that the rapid deregulation and privatization under the Koizumi government will need more drastic change in this field, as we can see in the judicial reform.

### c. Judicial Reform

The Judicial Reform was accelerated drastically in 1999 when the Cabinet established the Judicial Reform Council (JRC) under the Law concerning Establishment of Judicial Reform Council (Law number 68, 1999).<sup>71</sup> After 63 meetings, public hearings in major cities and foreign researches, the Council submitted a comprehensive reform proposal titled “For a Justice System to Support Japan in the 21st Century” (herein-

<sup>70</sup> See Ginsburg, Tom, “Dismantling the ‘Development State’? Administrative Procedure Reform in Japan and Korea, Japanese Law Symposium”, *American Journal of Comparative Law*, vol. 48, 2001, for the comparative research of Administrative Procedure Law Reform among Japan and Korea.

<sup>71</sup> See <http://www.kantei.go.jp/foreign/judiciary/> for the agenda of JRC.

after cited as JRRC) in June 2001.<sup>72</sup> It recommended drastic reforms of Japan's Judicial System being worn away nearly for 100 years function with patchy amendments, "to transform the *excessive advance-control/adjustment type society to an after-the-fact review/remedy type society*" (stress added).<sup>73</sup> These proposals were incorporated in the Judicial Reform Implementation Law of 2001, which provides for "Judicial Reform Promotion Plan" and established the "Judicial Reform Implementation Headquarter", the main machine for the implementation of the Plan. The Headquarter initiated to design and implement the whole structure of the plan, under which various reform laws were adopted and legislated by the Diet in 2003 to 2005.<sup>74</sup>

The JRC recommended three major reforms, namely, 1) the construction of a justice system responding to public expectations (Coordination of the Institutional Base), 2) How the legal profession supporting the justice system should be (Expansion of the Human Base), and 3) the establishment of the popular base, and these proposals have been adopted substantially by the subsequent legislation. Therefore, it is convenient to examine the progress of judicial reforms briefly, by these three items.

### 1) The Construction of a Justice System Responding to Public Expectations (Coordination of the Institutional Base)

Japanese society was and is characterized by the nature of non-litigation preference, where people prefer harmonious dispute settlement and dislike to go to Court adjudications, although scholars attribute this phenomenon to different reasons.<sup>75</sup> However, since the 1980s, this situation has been changed gradually,<sup>76</sup> probably because the economic development

<sup>72</sup> See <http://www.kantei.jp/foreign/judiciary/2001/0612report.html> for the full English version of this recommendation.

<sup>73</sup> JRRC, chapter 1, part 1. Needless to mention, this is nothing but the shift of the state model from command oriented developmental states to market oriented rule of law states.

<sup>74</sup> The Headquarter was finally dissolved itself on November 30, 2004, after the substantial part of reforms was accomplished.

<sup>75</sup> There are mainly three reasons mentioned, namely, 1) pre-modern mind structure of people, 2) rather primordial legal culture irrelevant to the modernity, 3) developmental governmental policy preventing people from accessing to the Court for their "rights".

<sup>76</sup> The number of civil cases brought to District Courts has increased more or less 100,000 in the 1970s to 165,792 in 2003.

during this period transformed Japanese society from the developmental model to the more market based civil society. The judicial system could not meet this change, although there have been substantial reforms of procedure laws in the 1990s, such as enactment of the new Civil Procedure Code in 1996.

JRCR declares to enhance the “legalization of society” and proposes various measures to meet the global transformation. One is Court reforms which aim not only “to reduce the current duration of proceedings by about half by enhancing the content of proceedings, with the intention that users can obtain proper, prompt and effective remedies”,<sup>77</sup> but also to create new types of Court and comprehensive ADR mechanism in order to make people access more easily to the proper justice system. As a result, in addition to various Court procedure reforms, the Intellectual Property High Court was established at Tokyo, separated from the Intellectual Property Division of Tokyo High Court, by the Law establishing Intellectual Property (IP) High Court (Law number 119 of 2004).<sup>78</sup> Needless to mention, this is to meet the global IP strategy, a core of the on-going globalization.

Other major reform concerns the establishment of more comprehensive ADR mechanism. Traditionally, there have been various formal and informal ADR institutions in Japan, which plays a more important role in disputes settlements than the regular courts. But the ADR institutions have been criticized, due to the lack of transparency in the settlement process and the absence of liaison among ADR institutions and with the formal judiciary. Adopting these proposals, the Comprehensive Legal Support Law (Law number 74 of 2004) was enacted in 2004, by which the Japan Judicial Support Center (JJSC) shall be established by 2009. JJSC will coordinate activities of various ADR institutions including local governments, bar associations and other legal profession societies, and promote the para-legal services in the cooperation with these institutions.<sup>79</sup> These can be characterized by the formalization of informal ADR mechanism and the mobilization it in order to widen the scope of national justice system.

<sup>77</sup> JRCR, chapter 1, part 3, 2 (1).

<sup>78</sup> See <http://www.ip.courts.go.jp/eng/index.html> on the IC High Court.

<sup>79</sup> In the same year, ADR Promotion Law (Law 151 of 2004) was enacted, which aims at promoting private ADR mechanisms by giving the limited legal effect on the solution and etcetera. See [http://www.nichibenren.or.jp/en/activities/meetings/20041201\\_1.html](http://www.nichibenren.or.jp/en/activities/meetings/20041201_1.html).

## 2) How the Legal Profession Supporting the Justice System Should Be (Expansion of the Human Base): Establishment of New Law Schools<sup>80</sup>

In order to achieve the more effective and accessible justice above mentioned, it is essential to increase the quality and quantity of the legal professions. However, it is difficult to conclude that the legal education in Japan has met this requirement. The Law Faculty education of the pre-World War II aimed mainly to create good and effective legal bureaucrats like judges, prosecutors and other legal-executive officers, and did not pay attention so much to other legal profession like attorneys, because they were deemed to be inferior and subordinate to these bureaucrats machinery controlled by the Ministry of Justice.

The post-World War II reform introduced some American systems in order to modernize and democratize it but with very limited ways. What was done is to establish the integrated mechanism for the recruitment of three legal professions, namely judges, public prosecutors and attorneys, and for the common judicial training, both controlled and administrated by the Supreme Court, the newly established apex body of independent judicial branch under the new Constitution.<sup>81</sup>

There are 90 Law Faculties in various Universities which have more than 40,000 undergraduate students enrolled every year, but they supply the rather general education and few professional knowledge and skill. In order to practice in legal professions, the candidates shall pass the National Judicial (Bar) Examination (NJE) implemented by the Supreme Court, while NJE is completely open to all populations having a minimum standard of education. This examination was so competitive that only 500-1000 could pass it among 200-330 thousand applicants. The serious problem was that the young who want to be lawyers exhaust their energy and capacity to pass it. It is said that candidates are forced to spend more than 8-10 years to learn dull and trivial legal knowledge which are not necessarily useful for the practice.<sup>82</sup> The candidates who passed

<sup>80</sup> See <http://www.aals.org/international2004/Papers/Aizawa.pdf> on Law School Reform. See also Haley, *op. cit.*, footnote 62, pp. 5-8.

<sup>81</sup> See chapter 5 of Japanese Judicial System of JRC of 1999 in <http://www.kantei.go.jp/foreign/judiciary/> on a brief outline of judicial administration.

<sup>82</sup> The Statistics shows that the average age of successful applicants is 26-28. The number is increasing rapidly from 1,000 in the end of 1990s, 1,500 in 2004, and expectedly 3000 after 2007 when the new Law Schools will produce their graduates.

the (NJE) are to be trained for 2 years (1.5 years after 1998) practical training course at the Judicial Training College.

After this training period, each candidate chooses to enter one of three different legal professions, but once then, changing profession especially from the attorney to the judicial bureaucrats like judge and prosecutors is regulated strictly, although it has been liberated gradually since the 1990s.<sup>83</sup>

The JRC recommended to introduce a new type of graduate Law School suggested by the United States practices in order to overhaul this outdated training system. This led to the enactment of the Law concerning the Coordination among Law School Education and Judicial Examination (Law number 139 of 2002) and other laws, which aims to produce more effective and capable legal professions not only in legal techniques, but also in the deep legal mind. New Law Schools opened in 2004 as a Graduate School, either affiliated to existing Law Faculties or as independent school, and are offering 2 years (for law graduates) or 3 years (for no law graduates) course, of which methods are modeled on the those of United States. In 2005, there are 74 Law Schools (23 national, 2 local government and 49 private) having 5,825 students.<sup>84</sup>

### 3) The Establishment of the Popular Base: Peoples' Participation to Judicial Process

Actually, the jury system was institutionalized in 1923 under the influence of democratic movements of that time, but abolished in 1943 during the World War II.

The JRC recommended strongly to create the mechanism of peoples' participation especially in the criminal justice. It did not show any concrete design but proposed that the participation should not limit in deciding whether guilty or not like in the United States jury system, but involves whole process of trial including fact findings, application of law and punishment.

Adopting this recommendation, the Law concerning Criminal Justice Participated by judicial members (saibann-inn) (Law number 63 of 2004)

<sup>83</sup> Total number of judges, prosecutors and attorneys are 3,191, 2,204 and 20,240 in 2004.

<sup>84</sup> [http://www.mext.go.jp/a\\_menu/koutou/houka.htm](http://www.mext.go.jp/a_menu/koutou/houka.htm). It is now expected that only one third of graduates will pass the new national examination, although JRC planned 70% of them should pass it.

was enacted in 2004, and will come in force in 2009. This law provides for the selection, the power and duty of judicial members who are recruited widely from the public and for their participation in the whole process of the criminal justice composing a bench together with professional judges. The bench is generally composed by 9 members, of which 3 are professional judges (one should be the Chair), and 6 judicial members recruited from the public for certain criminal trials.

Now, the preparatory processes are going on, but some research exposed that common people show their hesitation to be involved in this process.<sup>85</sup>

In sum, we witness that the drastic changing process is going on for Japan's judicial system for the 21st century, as well as in other political field. It is very true that this transformation has been forced to meet the globalization, which mainly influences on the economic field, and has been "legalizing" society toward more liberal and democratic direction. Needless to say, this direction connects with the "marketization" of society, as I mentioned in part II. However, we cannot disregard the different aspect of this reform as we saw in the creation of comprehensive ADR mechanism. This will possibly cause the "socialization" of legal system.

### B. *Economic Dimension*

All the current reforms aim at changing radically its political, economic and social structure, in order to overcome the long and serious stagnation Japan experienced after "bubble". This depression was not due to the regular business cycle, but caused by the more serious structural defects of the "developmental state" system of Japan based on community capitalism. In this context, Japan should transform itself from the "state oriented control/regulation system" to "market oriented rule based society". It is true that this transformation is essential for Japan to meet and survive in the circumstance of present market based globalization. All political reforms aim to build the political infrastructure for this purpose.

Now, I will examine economic reforms, dividing into two major topics, 1) privatization of highways and post office and 2) recent major eco-

<sup>85</sup> *Yomiuri*, a Japanese News Paper, reported its public opinion survey in 2005 shows that 70% of its target is negative to take a part in jury trials. "In reform bid, Japan opts for trial by jury", *Christian Science Monitor*, June 4, 2004. <http://www.csmonitor.com/2004/0604/p06s02-woap.html>.

conomic law reforms. Both relate each other, although the former concerns more with the financial and administrative structure connecting much with political reform, while the latter relates more to legal issues on how to design the market friendly legal system.

#### *a.* The Privatization of Highways and Post Office

There have been four major waves of the privatization of public enterprises in Japan. The first is the privatization of government undertakings of 1880-1890. These enterprises had been established by the Meiji government for the model of Western modern factories, and were transferred to a few limited merchant families, by which they had a chance to develop their business to the later “Zaibatsu”.

The second wave occurred in the 1945-1950 by the post-World War II reform, as we saw typically in the Dissolution of Zaibatsu. Along with this, many government-owned enterprises which had been established to enhance the war economies were privatized. Those publicly dispersed or privatized enterprises, we can understand, have been playing an important role for the post-World War II economic development in Japan.

The third wave was in the 1980s, which was called the “Nakasone (then Prime Minister) “Minkatu” (revitalization by using private business)”. By this, three major government enterprises, namely Japan National Railway (JNR), National Telegraph and Telephone (NTT) and Japan Tobacco Corporations (JTC) were privatized by the public issues during more than 10 years. This policy adopted the model of the privatization and deregulation done by the United States under the Reagan administration and by the United Kingdom under the Thatcher government. It is true that the privatization of these enterprises aimed at solving the serious debt problem especially in the case of the JNR, by introducing more rational and efficient management through the privatization. It achieved its aim more or less successfully, and the privatized enterprises become major private companies in Japan.<sup>86</sup>

<sup>86</sup> See on general view of the privatization in Japan, Tamamura (n. d.), “Actual State and Effect of Privatization in Japan” <http://www.jftc.go.jp/eacpf/05/jicatext/sep10.pdf>. and American Chamber of Commerce Japan, (ACCJ), Applying Global Best Practices to Privatization in Japan, 2004, [http://www.accj.or.jp/document\\_library/Privatization/PTFgeneralE.pdf](http://www.accj.or.jp/document_library/Privatization/PTFgeneralE.pdf).

The forth and current wave is the privatization of Highways and the Post Office which becomes a critical political issue in Japan under the Koizumi government which took over the power in 2001. Those should be distinguished from other three waves, because it is connected directly with the comprehensive reform of national-public financial structure in Japan. Total government debt balance has been worsen increasingly from more or less 200 trillion yen in 1990 to 781 trillion yen in 2004 (1.5 times of Gross National Product of the same year).<sup>87</sup> Substantial parts of the debt were caused by the notorious “Fiscal Investment Loan Program (FILP)” controlled by the Ministry of Finance with free hand from the Diet budget control.<sup>88</sup> Major sources of the FILP have been raised from the postal saving and insurance, and been invested in various inefficient government enterprises dominated by the government bureaucrats. Highway Corporations are one of them.<sup>89</sup> Therefore, in order to solve the public deficit problem radically, it is essential to reform the consuming side of fund, as well as of its producing side. The Koizumi government has decided to achieve this by the privatization of sides, one Highways and other the Post Office.

### 1) Highway Privatization

In 2002, the Promotion Committee for the Privatization of 4 Highways Related Public Corporations (a government advisory body) submitted the Recommendation, which strongly criticized their inefficient management due to the lack of competition and sense of economic rationality, and proposed their total privatization.<sup>90</sup> After the complicated negotiations among politicians, bureaucrats and local governors and other vested interest groups, the relevant privatization laws were enacted in 2004, which stipulates to change the organization of these corporations from

<sup>87</sup> See Tamamura, *op. cit.*, footnote 86, on the process of the privatization JNR and NTT.

<sup>88</sup> FILP is often called “Japan’s Second Budget”, which is never controlled by the Diet.

<sup>89</sup> In 2002, Highways Corporation was the 4th largest recipients of FILP (8%), following Local Governments (28%), Government Housing Loan Program (19%), National Life Finance Corporation (13%) Scher (n. d.) Policy Challenge and the Reform of Postal Savings in Japan, <http://www2.gsb.columbia.edu/japan/pdf/W211.pdf>, p. 12.

<sup>90</sup> The main points was too high toll fees and too much accumulated debts reached to 40 trillion yen. See <http://www.kantei.go.jp/jp/singi/road/kouhyo/1206iken.html>.

public corporation to separate private companies under a government own holding companies.

However, not a few discusses that these new laws are not adequately arranged to realize the true aim of the highways privatization.<sup>91</sup> Further, there has been harsh criticism on the implementing process of privatization when it has been exposed that the collusive bid-rigging scandals on the construction of highway bridges led to the arrest of the vice president off the Corporation, as well as that the former government/corporation officials and collusive partners companies were appointed as presidents of new companies.

## 2) Post Office Privatization

The Post Office in Japan has a long history of services for the people, not only on the postal service in the narrow sense, but also on the financial one like savings and insurances. Its business is divided into four categories, 1) over-the-counter service network, 2) postal service, 3) postal saving, and 4) postal insurance. All belong to the Post Services Agency of the Ministry of Internal Affairs and Communication.<sup>92</sup> As we see, the main target of privatization is its financial branch, namely, the postal saving and insurance each of which has 214 trillion yen deposits and 121.2 trillion yen insurance funds.<sup>93</sup> It was a critical political issue whether or how it will be privatized without financial disturbance as a result of sudden flow of such a huge amount to the market, as well as how to keep the universal post service mechanism even for the depopulated area.

In 2003, for the preparatory and transitional process of Post Office privatization, the Post Service Agency were separated from the Ministry and become the Japan Post, an independent public corporation.<sup>94</sup> In 2004,

<sup>91</sup> ACCJ, *op. cit.*, footnote 86, pp. 21-22, which pointed out that these were political influences of vested interest groups to construction of highways, the continuing government control on the management and etcetera.

<sup>92</sup> The Ministry of Post and Telecommunications was reorganized as the Ministry of Public Management, Home Affairs, Post and Telecommunications in 2001, which changed its name to the present one in 2003.

<sup>93</sup> *Asahi Shinbun*, August 8, 2005. It informs that its deposit amount is equivalent to total deposit amount of 3 major banks, and its insurance fund is total of 4 major insurance companies in Japan.

<sup>94</sup> See Amyx, Jennifer *et al.*, "The Politics of Postal Savings Reform in Japan", *Asian Perspective*, vol. 29, num. 1, 2005, on the privatization of Post Office till the end of 2004.

the Koizumi Cabinet decided “Basic Policy on the Privatization of Japan Post”,<sup>95</sup> although it had been initially planned to review the operation of the Japan Post in 2008. Following this decision, six bills concerning the Privatization of Post Offices were presented to the HR in 27 April 2005. These bills aim at privatizing the Japan Post, by establishing five private companies, 1) Postal Saving Bank, 2) Postal Insurance Company, 3) Postal Service Company, 4) Post Office (Service Network) Company and 5) Japan Post Company (a holding company of Postal Service and Post Office Companies), as well as provide for its process in detail.<sup>96</sup>

These bills met strong oppositions not only from opposite parties but also by a part of LDP members in the HR, for various reasons. Main of them is a strong pressure by the local post office masters as well as its trade unions, both of which exercise strong voting influence. Further, some say that it is too short time to discuss and conclude these important Bills. For example, it is not clear yet how the universal post service can be guaranteed after the privatization, and whether the postal saving bank and insurance companies can operate efficiently and profitably in competition with existing private banks and financial companies. The bills passed the HR with very narrow majority in July in the same year, but the House of Councilors rejected them. Koizumi dissolved the HR immediately. After the overwhelming victory of the election 11 September 2005, Koizumi LDP government presented the bills to the HR again. It is expected to become law without any difficulty.

In sum, the privatization especially of the Post Office is a key issue of the Koizumi government, partly because of Koizumi’s personal favor, and partly because of the strong request of the United States. It is undeniable, however, that it is one choice in order to meet ongoing globalization.

#### *b. Other Major Economic Law Reform*

The regulatory reform started with the establishment of the Regulatory Reform Committee of the Administrative Reform Promotion Headquarter in

<sup>95</sup> Provisional English Translation can be read in <http://www.keizai-shimon.go.jp/english/publication/pdf/040922japanpost.pdf>.

<sup>96</sup> The Headquarter of the Promotion of Post Office Privatization chaired by the Prime Minister and Post Office Privatization Committee would be established to enhance and supervise the privatization process which is expected to complete all procedures by 2017.

January 1998. This committee submitted the opinion for regulatory reform in December 2000, which includes comprehensive recommendations for the deregulation for almost all government sectors.<sup>97</sup> In April 2001, the Council for Promotion of Regulatory Reforms (CPRR) based on the private business initiatives was established to enhance more the regulatory reform. This council completed its work by proposing about 700 items of regulatory reforms in March 2004.<sup>98</sup> The work was succeeded by the new CPRR reorganized by the Cabinet Order. This council has been playing a core role for the regulatory reform, issuing show-cause questionnaires to the relevant ministries as well as publishing various specific recommendations on specific reforms.<sup>99</sup> It is impossible to examine all here, so that I will discuss two topics of recent economic law reform, namely, the competition law reform and the codification of new company law.

### 1) The Competition Law Reform

The competition policy of Japan started with the enactment of the Anti Monopoly Act (AMA Law 54 of 1947) in 1947, by the strong initiative of the Allied Occupying Power. This law was not enforced effectively for a while, because it was too idealistic to meet the economic and social structure of that time. However, the more matured economic system accomplished, the more widely and deeply the market mechanism functions in all economic fields. The turning point was probably the end of the 1970s when the Competition Policy was first thought to be superior to the notorious “Industrial Policy”, which led to a series of amendment of law in the 1980s.<sup>100</sup>

<sup>97</sup> Apart from general proposal, it proposes detailed regulatory reforms in 15 sectors, they are 1) information and communication, 2) environment, 3) competition policy, 4) legal services, 5) finance, securities and insurance businesses, 6) transportation, 7) energy, 8) distribution and agriculture, 9) housing, land and public works, 10) medical service, 11) welfare, 12) employment and labor, 13) education, 14) standard and security requirement, 15) public qualification. See on the English version of relevant documents on this committee, <http://www.soumu.go.jp/gyoukan/kanri/top.htm>.

<sup>98</sup> See on its activities in English, <http://www.soumu.gob.jp/gyoukan/kanri/top.htm>. and <http://www8.cao.go.jp/kisei/en/031222report/brochure.pdf>.

<sup>99</sup> See on the English version of full texts of it first Recommendation and Additional one, <http://www.kisei-kaikaku.go.jp/publication/2004/1224/item04122402e.pdf>. and [http://www.kisei-kaikaku.go.jp/publication/2004/0323/item040323\\_02e.pdf](http://www.kisei-kaikaku.go.jp/publication/2004/0323/item040323_02e.pdf).

<sup>100</sup> The amendment of AMA in 1977 strengthened the Cartel regulation by the introducing the “surcharge” against it.

However, it has become essential to reform competition law and policy more drastically, in order to meet the current market globalization. This is the reason why competition law reform has become one of the vital targets of regulatory reforms.<sup>101</sup> In 2003, the CRRC recommended the amendment of the AMA in order to accomplish more effective enforcement. This was adopted by the LDP Election Manifest of the same year. After the election, the Fair Trade Commission (FTC), the regulatory authority, prepared “Draft Proposal for the Amendment of the AMA” in December 2003. However, this proposal which intends mainly to raise surcharge against the cartel practices faced the furious opposition from the business world. After serious and complicated negotiations among the LDP, the FTC and business circles, the Amendment Bill was presented to the Diet in October 2004, which became the Law in April 2005.<sup>102</sup>

This Amendment concerns mainly with the enforcement and procedural matters of the AMA. *First*, it raises the surcharge rate on the regulation of unfair trade restriction about double to maximum 10% in case of large manufacturing enterprises. Further, the rate should be lessened when the violators stop it promptly, while the repeaters should be imposed higher rate.

*Second*, the leniency mechanism is introduced, by which the FTC shall reduce the surcharge wholly or partly if the violators submit the report on its commitment of violation before the FTC starts any formal investigation.

*Third*, the FTC gains the formal criminal investigating powers similar to the public prosecutors who monopolize public prosecution in Japanese Legal system. In addition, the criminal sanctions to various violations of substantial and procedural matters of the AMA are strengthened.

*Forth*, the trial procedures of the FTC are more formalized, so that the “rule of law” principles are accomplished in the FTC procedure, so that it becomes more a quasi-judicial authority.

<sup>101</sup> There have been strong pressures from international society like the United States and OECD. See United States *Annual Reform Recommendations from the Government of the United States to the Government of Japan under the United States-Japan Regulatory Reform and Competition Policy Initiative (24 October, 2003)* <http://japan.usembassy.gov/pdfs/wwwf-reform20031024.pdf>. and OECD *Review of Regulatory Reform Japan, Progress in Implementing Regulatory Reform* OECD (2004).

<sup>102</sup> See for the tentative English version of the full text of the AMA including the 2005 Amendment, [http://www.jftc.go.jp/e-page/legislation/ama/amended\\_ama.pdf](http://www.jftc.go.jp/e-page/legislation/ama/amended_ama.pdf).

In addition, it shall be noted that the administrative capacity the FTC has been widened and strengthened. The number of staff increased steadily from 471 in 1991 to 672 in 2004, and it becomes more independent authority when it was shifted from the Ministry of Public Management, Home Affairs, Post and Telecommunications to the Cabinet Office in 2003.

However, it would be difficult to conclude that competition policy and culture have rooted in the business practices of Japan, when we see the recent bid-rigging scandal of Highway Corporation, although the FTC is struggling seriously against this “culture”.<sup>103</sup>

## 2) The Codification of New Company Law

Japanese Company Law was incorporated originally in a Part of Commercial Code codified in 1898, which followed closely the German model, and has been continuously amended to meet economic and social development. It introduced the idea of American corporate law substantially by the post World War II Reforms, but the main part was still included in the Commercial Code and maintained the German Law based structure, while there are many relevant regulations such as securities regulations and corporate accounting in other special laws influenced by the American ideas.

Since the 1990s, various special laws as well as amendments of Commercial Code itself have been repeated in order to meet the global standards of “good corporate governance” based on the United States corporate practices. It has become essential to re-codify the Company Law in order to re-arrange it more consistently and coherently, as well as to change the Japanese usage from the old style to modern expression.

The Committee for Modernizing Company Law of the Legal Advisory Council, a major law reform machine under the Ministry of Law, started this difficult work with publishing the “Draft Proposal for the Modernization of Corporate System” in 2003. After one and half year working, the new Companies Bill was presented to the Diet in March, 2005, which became the Law in July 2005.

The Company Law forms now a voluminous comprehensive code which consists of 979 articles. It is true, however, that many articles are

<sup>103</sup> See “Bid rigging at Public Cost”, *Japan Times Editorial*, May 26, 2005, <http://search.japantimes.co.jp/print/opinion/ed2005/ed20050526a1.htm>. See also the FTC announcement on this: <http://www.jftc.go.jp/e-page/pressreleases/2005/june/050615.html>.

just transferred from the old Code with modern and easy Japanese usage. New innovations of this law are as follows. *First*, it makes people easy to utilize the law for their business. This includes the conversion of the (private) limited company formerly regulated by a separate law to a type of the general stock company. The minimum capital requirement which was 10 million yen in the case of the stock company and 3 million in the (private) limited company is taken away.

*Second*, it allows the company to adopt more flexible form of its management. The law liberalizes the process of “reorganization” of the company including merger and amalgamation, the requirement of raising capital by issuing shares, stock options and debentures and the return of the surplus to the shareholders. On the other hand, the liability of management is strengthened. Further, the winding up process is simplified.

*Third*, it creates various new mechanisms to accomplish the “good corporate governance”. The representative action is widened its scope in order to protect the fair interest of small shareholders. Now, the large companies shall establish the internal controlling mechanism for securing “compliance” of the management. Financial control mechanism is strengthened by the introduction of “treasurers” especially in the small and medium companies.

*Finally*, the law recognizes a new type of companies called “Godo Kaisha (Partnership Company)”. This is equivalent to the “limited liability companies” in the United States, which can have more flexible management structure with limited liability. This type of companies is expected to be utilized by the financial and technical venture and service businesses.

The philosophy of the company law reform is characterized by the shift from “organization law” principle to “contract law” one or from “corporation” to “partnership”.<sup>104</sup> This reflects the essential nature of market based globalization.

In sum, economic reforms are naturally designed to build more effective market mechanism. Koizumi Government have tried this task through the radical privatization and economic law reforms, but it seems too early to conclude that this attempt is fully successful, because people cannot survive solely on the market mechanism. It is necessary to

<sup>104</sup> This is typically expressed in “a new corporation theory” which understands a corporation as “a bundle of contracts”.

examine what is going on in the social dimension where people actually live.

### *C. Social Dimension*

Society or community, we can define by the sphere where people are actually alive together, where they sustain their life without serious commitment with state and market. This is very true in Japan and other Asian societies, although the market invaded this area though the rapid modernization and capitalization. The post-World War II development in Japan seems to evidence a case of optimization of the community life and market economy, which achieved the most classless and equal society in the world, together with the rapid economic growth. In the early 1980s, “Japanese System” was at its heyday, and admired as one of the best society models, where population feel that all belong to the “middle class”.<sup>105</sup> However, this system crashed in the early 1990 when the economic bubble burst, due to the lack of resilient market rationality to meet the on-going harsh globalization. Since then, Japanese society has suffered from the long stagnation of the “lost decade”.

Entering the 21st Century, the restructuring of “Japanese System” started not only in the economic dimension, but also at the social level. This can be summarized by the marketization of society. This appeared in the announcement of “the Draft for Amendment of the Social Welfare Business Laws” in 1999, which recommended the privatization of social welfare systems.<sup>106</sup> This led to the amendment of various relevant laws, which deregulate the welfare businesses generally monopolized by the public sector enterprises and open to the private sector to enter in order to level up their service standard. The Koizumi government accelerated the speed and scope of the privatization of welfare services by the slogan of small and cheap government.

In July 2001, the Comprehensive Regulatory Reform Council (CRRC) set up by the Koizumi Government proposed the drastic deregulation and privatization in the six important social sectors, namely, medical, welfare and natures, human resources (labor), education, environment, and urban revitalization.<sup>107</sup> These areas had been considered naturally that pub-

<sup>105</sup> See Vogel, Ezra, *op. cit.*, footnote 44.

<sup>106</sup> [http://www1.mhlw.go.jp/houdou/1104/h0415-2\\_16.html](http://www1.mhlw.go.jp/houdou/1104/h0415-2_16.html).

<sup>107</sup> <http://www8.cao.go.jp/kisei/siryo/010724/honbun.pdf>.

lic sectors including local government should be responsible for. This proposal has been implemented following the detailed work schedules fixed by the relevant ministries under the supervision of the CRRC newly reorganized in 2003. There have been amendments of various relevant laws and regulations for this purpose.

As a result, many social services including education, medical institutions and day care centers have been privatized or set up by the private initiatives. It shall be noted, however, that the NPO enterprises have become more and more important in these businesses, fairly competing with genuine private companies.

Among the social sector reforms, the most urgent problem is how we design the pension scheme in the rapid aging society. It is essential to integrate or coordinate at least present three types of pension and medical insurance schemes, namely for public servants, private company employees and self-employed, but no future has drawn yet.

In sum, we have been facing the drastic change of the social protection system in Japan. Some insist that the market based mechanism on the “self help” idea under the small and cheap and government should be introduced more radically, while others propose the civil minimum social services should be secured on the basis of the welfare state idea. We cannot foresee which direction will be taken, but we can assure that the community but not State will become much more important in this field than the State and market in either way.

#### IV. CONCLUSION

It is strange that simplified marketization policies has overwhelmed the society in Japan, after the two decades of their experiences in Western countries, and when the global society has started noticing the society or community should not be neglected as we see in “World Social Forum”. The reason can be put in twofold. One is by the reason of the “lost decade” of the 1990s. Political and economic turmoil after the burst of bubble delayed the political decisions to carry out any radical reform. This is especially true when we consider that the collapse appeared in the heyday of Japanese System. We should note, however, that the electoral reform started in 1994 shaped the prerequisite of this radical movement, and exploded its effects suddenly in the general election in September 11, 2005 after experiments of two elections in 2000 and 2003.

Other reason relates more deeply to the Japanese system. As I characterized it by Asian typed “Community Capitalism” or “Developmental statism”, Japanese system is embedded in its long history of community bonded society, and it is difficult to transform it to more market oriented system based on individualism. Unprecedented depression during this decade, however, forged people to be more independent from companies which they had felt sympathy as the base of community and molded individualistic mind structure, through the unemployment especially of younger generation. One statistics shows the unemployment rate of age 25-34 increased 1.74% in 1992 to 5.06% in 2002 (if include NEET «no employment, education or training» 3.88% to 8.62%).<sup>108</sup> From this, it is observable that old Community Capitalism corrupted and lost its base. People are required to be more independent and self-help in the on-going market globalization.

Koizumi, probably a first populist in modern Japanese political history, appeared at the stage when the Japanese system exposed totally its failure. His simple but charismatic assertion caught the heart of people. When the Post Office Privatization Bills were rejected by the HC, he never hesitated to dissolve the HR, although there has no such constitutional convention. On the Election, he despatched so called the LDP “parachuted” candidates mainly composed by female elite to all constituencies where the LDP members had opposed the Bills. The gossip of these female candidates who called “female ninja” because they were sent to kill opposite former LDP members enlivened at all kind of media. Further, his argument technique of limiting issue in simple dichotomy such as “reform or not?” appealed to the people.

As a result, Koizumi LDP won a landsliding victory in the election. The Koizumi LDP gained more than 2/3 of the HR members which is requested for the Constitutional Amendment, although it needs the support of the coalition Komei Party in the HR. But why did the LDP get such historical victory? First, it is an evident effect of “small sized district and proportional representative system” introduced in the reform of 1994. As there are substantial numbers of the unaffiliated voter in Japan, small sized district system fluctuates the election result strongly.<sup>109</sup>

<sup>108</sup> <http://www8.cao.go.jp/youth/suisin/jiritu/04/siryu04-1.pdf>.

<sup>109</sup> The LDP gained 219 seats by 47.8% of total votes among 300 small districts, while the DP, main opposite, gained only 52 seats by 36.4% of total votes. *The Mainichi* (eve.), September 12, 2005.

Second, as we see in the female ninja candidate phenomenon, this election was for a first time mobilized the technique of market operation in every aspect. The Koizumi LDP election campaigns headquarter utilized carefully all media to manipulate voters to attract to their side. Some analysts mention that Americanization of election campaign technique introduced successfully for the first time.

Third, it is important to note that the voters' attitude has been changing clearly. Traditionally, the constituency is dominated by the family of local politicians who reigned for a few generations especially in countryside, as they call it "my village". But, the overwhelming victory of parachuted female "ninja" candidates shows that this communal polity has changed steadily.

All these evidence that old type Community Capitalism/ Developmental Statism might be destined to disappear from political, economic and social stages of Japan, but, it is also unrealistic to conclude that Koizumi style marketization policy would rule Japanese society for so long term, when we look at the movement of social globalization in and out of Japan.

## V. REFERENCES

- ACCJ (American Chamber of Commerce in Japan), *Applying Global Best Practices to Privatization in Japan*, 2004, [http://www.accj.or.jp/document\\_library/Privatization/PTFgeneralE.pdf](http://www.accj.or.jp/document_library/Privatization/PTFgeneralE.pdf).
- AMYX, Jennifer *et al.*, "The Politics of Postal Savings Reform in Japan", *Asian Perspective*, vol. 29, num. 1, 2005.
- BERKOWITZ, Daniel *et al.*, "The Transplant Effect", *American Journal of Comparative Law*, vol. 51, winter, 2003.
- CDG, USAID Center for Democracy and Governance, *Alternative Disputes Resolution Practitioners' Guide*, 1998.
- CHIBA, *Legal Pluralism, Towards a General Theory through Japanese Legal Culture*, Tokai, Tokai University Press, 1989.
- CLAIRE, 2002, <http://www.clair.or.jp/j/forum/serie/pdf/jo1.pdf>.
- COTTERREL Roger, "The Concept of Legal Culture", in NELKEN, David (ed.), *Adapting Legal Cultures*, Oxford, Hart Publishing, 1997.
- DOWER, John W., *Embracing Defeat, Japan in the Wake of World War II*, W.W., New York, Norton and Company-The New Press, 1999.
- FRIEDMAN, Lawrence, "Is there a Modern Legal Culture?", *Ratio Juris* 7, 1994.

- GINSBURG, Tom, “Dismantling the «Developmental State»? Administrative Procedure Reform in Japan and Korea, Japanese Law Symposium”, *American Journal of Comparative Law*, vol. 48, 2001.
- GRIFFITHS, John, “What is Legal Pluralism?”, *Journal of Legal Pluralism and Unofficial Law*, num. 24, 1986.
- House of Representative Research Commission on the Constitution Report <http://www.snugiin.go.jp/itan-kenpou.nsf/html/kenpou/houk-oku.pdf?file/noukoku.pdf>.
- HALEY, John O., “Heisei Renewal or Heisei Transformation: Are Legal Reforms Really Changing Japan?”, *Faculty working papers series*, Washington, University in Saint Louis, paper num. 04-05-01, 2004. <http://law.wustl.edu/Faculty/workingpapers/haley/japanchanging.pdf>.
- HISOSI, Hosi, “Yasukuni: What Draws Koizumi, to the Shrine” *AERA*, July 22, 2005, <http://www.asahi.com/english/Herakd-asahi/TKY200507220291.html>.
- HOECKE, Van Mark and WARRINGTON, Mark, “Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law”, *International Comparative Law Quarterly*, vol. 47, 1998.
- Japan Electoral Reform, <http://www.aceprojet.org/main/english/esyip.htm>.
- JOHNSON, Chalmers, *MITI and Japanese Miracle: Growth of Industrial Policy*, Tokyo, Charles E. Tuttle, 1986.
- KOUSEI, Hakusho, *White Paper on National Welfare*, 1996, <http://www.hakusho.mhlw.go.jp/wpdocs/hpaz199601/b0027.html>
- MATTEI, Ugo, “Three Pattern of Laws: Taxonomy and Change in the Worlds Legal System”, 45 *American Journal of Comparative Law*, winter, 1997.
- NAIKAKUHU (Cabinet office), 2005, Kokomade-Susunnda Koizumi-Kaikaku (How Advance the koizumi Reform), <http://www.keizai-shimon.go.jp/explam/p>
- NELKEN, David and FEEST, Johannes (eds.), *Adapting Legal Cultures*, Oxford, Hart Publishing, 2001.
- NORTH, Douglass C., *Institutions, Institutional Change and Economic Performance*, Cambridge, Cambridge University Press, 1990.
- Opinion of Trinity Reform, <http://www8.cao.go.jp/bunken/030606iken/030606iken.pdf>.
- ROKUMOTO, Ho-shakaigaku, *Sociology of Law*, Tokyo, Yuuhikaku, 1986.
- SANTOS, Boaventura de Sousa, “The Process of Globalization”, *Eurozine*, 68/14, December 2002, [http://www.ces.fe.uc.pt/bss/documentos/the\\_processes\\_of\\_globalization\\_in\\_eurozine.pdf](http://www.ces.fe.uc.pt/bss/documentos/the_processes_of_globalization_in_eurozine.pdf).

- , and RODRÍGUEZ-GARAVITO, César A., “Law, Politics and the Sabalterm”, *Counter-hegemonic Globalization*, 2005, <http://www.ces.fes.uc.pt/bss/documentos/chapter1.pdf>.
- SCHER, Mark J. (n. d.), *Policy Challenge and the Reform of Postal Savings in Japan*, <http://www2.gsb.columbia.edu/japan/pdf/WP211.pdf>.
- TAMAMURA (N. d.), “Actual State and Effect of Privatization in Japan”, <http://www.jftc.go.jp/eacpf/05/jicatext/sep10.pdf>.
- The Cabinet Decision on the Charter of administrative Reforms, <http://www.soumu.jp/gyoukan/kanri/gyokakutaikou.html>.
- UNGER, R. M., *Law in Modern Society; Toward a Critical Social Theory*, New York, The State Press, 1976.
- UPHAM, Frank, “Mythmaking in the Rule of Law Orthodoxy”, *Working Papers, Carnegie Endowment for International Peace*, 2002.
- VOGEL, Ezra, *Japan as Number One Lessons for America*, Cambridge, Mass., Harvard University Press, 1979.
- WORLD BANK, “The State in Changing World”, *World Development Report*, 1997.
- , “Building Institutions, for Markets”, *World Development Report* 2002.
- YAGI, Kinnosuke, “Decentralization in Japan”, *Policy and Governance Working Paper, num. 30*, Keio University, 2004.
- YASUDA, Nobuyuki, *Three Types of Law: a New Paradigm for the Law and Development Studies*, APEC Discussion Paper Series, num. 37, Nagoya, APEC Center, Nagoya University, 2000.
- , “South East Asian Law in Transition: The Law and Political, Economic and Social Change in the Post Crisis of 1997”, *Proceedings of the Roundtable Meeting, Law, Development and Socio-Economic Change in Asia*, 20-21 November 2000, Manila, IDE Asian Law Series num.1, 2001.
- , “Law and Development in Southeast Asian Perspective: Methodology, History and Paradigm Change”, in ANTONS, Christoph (ed.), *Law and Development in East and South-east Asian Countries*, London, Curzon-Routledge, 2003.