

LAW, NORMS, AND LEGAL CHANGE: GLOBAL AND LOCAL IN CHINA AND JAPAN

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The editors of the *Michigan Journal of International Law* have boldly brought together four articles and commentary that focus on different aspects of the same problem in China and Japan: the relationship between domestic legal change and foreign and/or “international” law and regulation, “soft” agreements, norms, or even cultural practices. The compilation is bold in part because scholarship on change in East Asian law and legal systems often suffers from one of two defects. First, it often focuses on purely domestic phenomena in only one system, ignoring the comparative connections. Second, scholars often attack the problem from an exclusively comparative perspective, setting up two apparently different systems, one “developed” and the other “backward” or “unsophisticated,” with accompanying commentary on how they clash or how the latter “conforms” or “measures up” to the former.

The authors in this issue instead raise questions about relationships and processes that place rather earth-shaking developments in China and Japan over the past 50 years within the wider global context. Those questions are difficult; the authors strive to avoid easy portrayals of legal imperialism or externally-imposed/internally-ignored norms while wading fearlessly into provocative debates about political, economic, and cultural influence. The questions also are timely because of the sheer scope and volume of legal system change in Japan and China over the past 50 years and the now acknowledged importance of powerful Japan and newly-resurgent China in the global economic, political, and legal order (however defined).

This issue also represents a bold move because neither of us (Howson works on China, West on Japan) had any formal role in instigating or editing the compilation. The work is entirely student-driven, and we think the initiative and the finished product reflect nicely Michigan Law School’s century-long history with Chinese and Japanese law.

The editors have assembled here four articles that offer unique perspectives on law and norms in China and Japan. We offer no new insights into their accounts in this introduction. Instead, we briefly describe the four articles and then raise a few conjectures about how they might fit together.

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Randy Peerenboom's *What Have We Learned about Law and Development? Describing, Predicting, and Assessing Legal Reforms in China* is another building block in his now voluminous *oeuvre* addressing the implementation of "rule of law" (contrasted with "rule of man" or "rule by law") in the People's Republic of China.¹ A flurry of recent scholarly literature, front-page journalism, and more than a few pundit commentaries have addressed the extent to which the "rule of law" exists or even matters in transitional China.² In other writings, Peerenboom has sought to address, in great detail, what "rule of law" in the PRC context might be, seeking most famously to distinguish between "thick" and "thin" theories of rule of law, and evaluate China's 25-year-old program of "legal construction" accordingly. Peerenboom now advances his prior work by questioning what actually constitutes legal "reform" (at least in the Chinese context), speculating on how it comes about, and then providing ideas about how to evaluate it—for Chinese consumers of the constructed system or international actors (whether states or individuals) studying or seeking to spur developments inside the PRC.

Peerenboom concludes, among other things, that there neither is nor should be a single approach to law and development and that the various metaphors we use to describe reform—horizontal (foreign or domestic source) or vertical (top-down)—may be misleading or flatly wrong. Instead, he argues strongly for an "inductive" (or bottom-up) inquiry into the phenomenon of legal change in the Chinese circumstance and demands that policymakers and outside observers carefully evaluate on a case-by-case basis which is better: the borrowing of legal reforms from abroad or modification of existing local institutions. In the most compelling sections of his article, Peerenboom speculates on the way in which locally-inspired mechanisms (such as the much-maligned adjudicative committee or "individual case supervision" tools used in the Chinese

1. See e.g., RANDALL PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW* (2002).

2. See, e.g., Howard W. French, *Chinese Turn to Civic Power as New Tool*, N.Y. TIMES, Apr. 11, 2006, at A1; Joseph Kahn, *At a Secret Meeting, Chinese Analysts Clashed Over Reforms*, N.Y. TIMES, Apr. 6, 2006, at A14; Joseph Kahn, *A Sharp Debate Erupts in China Over Ideologies*, N.Y. TIMES, Mar. 12, 2006, at A1; Joseph Kahn, *When Chinese Sue the State, Cases Are Often Smothered*, N.Y. TIMES, Dec. 28, 2005, at A1; Joseph Kahn, *Deep Flaws, and Little Justice, in China's Court System*, N.Y. TIMES, Sept. 21, 2005, at A1; Phillip P. Pan, *In China, Turning the Law Into the People's Protector*, WASH. POST, Dec. 28, 2004, at A1; Joseph Kahn, *Chinese Advocates of Reform Seek Help From Deng's Spirit*, N.Y. TIMES, Aug. 21, 2004, at A1; Joseph Kahn, *Let Freedom Ring? Not So Fast. China's Still China*, N.Y. TIMES, May 3, 2004, at A3; Phillip P. Pan, *Chinese Leaders Speak of Reform, But How Quickly?*, WASH. POST, Mar. 14, 2004, at A14; John Pomfret, *Execution Reveals Party's Grip in China; Case Highlights Flaws in Legal System*, WASH. POST, Dec. 23, 2003, at A12; John Pomfret, *Defense Lawyers in China Find State Is Judge and Jury*, WASH. POST, Dec. 31, 2002, at A1.

court system) may actually contribute pragmatically to real “rule of law” and thoroughgoing reform, notwithstanding virulent criticism heaped on such mechanisms by Chinese academics and reformers and foreign observers alike.

Takao Tanase’s *Global Markets and the Evolution of Law in China and Japan* provides a useful bridge between Peerenboom’s China “rule of law”-focused article and the two Japan-focused pieces that complete the issue. Tanase begins by examining the premise that the development of law in both states historically has been undertaken by copying Western models (or, in the Chinese case, Western models via Japanese importations). He then argues based on parallel developments in China and Japan that imitation or direct importation, even in an increasingly “globalized” world, is not the only possible path: law in both states evolves as a product of both market competition and indigenous culture. In this way, Tanase on Japan and China is in complete agreement with Peerenboom on China, in that they both seek to privilege the inductive, or “bottom-up,” process of legal transformation in programs of reform. At the same time, Tanase puts great weight on “extralegal” norms, practices, and expectations being determinative in the way a formal legal system is rendered.

Like Tanase, Eric Feldman in *The Culture of Legal Change: A Case Study of Tobacco Control in Twenty-First Century Japan* also looks at how law has been imported into Japan, and he offers yet another explanatory peg: norms come first, followed by a desire to “conform” to those norms, which brings about formal adoption by the state. Looking at the legal control of tobacco and smoking in Japan, Feldman shows how a series of laws enacted in 2000 came about largely as the result of changing norms. The changes in those norms arose directly from an earlier—and rather violent—norm shift in the West. (Critically, the external norm shift with respect to tobacco and smoking culture was absolutely opposed and contradictory to the prevailing norm in Japan.) As in the past, Japan imported those norms into its own system, they resonated there, and they took shape as law. Feldman does a masterful job of tracing the story of this process, while offering important ideas about why Japan desired conformity with the external norm and why it sought to import the norm into the formal legal system.³

Chuck Whitehead expands on the theme of external or international (global) norms, and compliance with or defection from the same in the Japanese case, in *What’s Your Sign? International Norms, Signals, and*

3. This piece dovetails nicely with Feldman’s work on norms of private enforcement in a closed system. See Eric A. Feldman, *The Tuna Court: Law and Norms in the World’s Premier Fish Market*, 94 CAL. L. REV. (forthcoming 2006).

Compliance. Whitehead examines international administrative law regulation of the banking industry and, necessarily, a different class of players and issues than those Feldman analyzes.⁴ He looks specifically at Japan's formal adoption and then incomplete or at least difficult implementation of the Basel Accord, which (among other things) set a minimum percentage of capital to risk-weighted assets. The Accord is non-binding, and Japan could have defected at any time, but instead it chose to comply, at least in part, with the Accord's eight percent minimum, even in the face of economic difficulties and a sudden loss of asset value (for banks and all other actors). In broad strokes, Whitehead's conclusion is similar to Feldman's: foreign or international norms, and a desire to conform with the same or be *seen* to be conforming with the same, directly influenced legal developments in Japan.

We find several themes in the articles particularly intriguing. First, the two articles about Japan are primarily about norms and how they are translated, or not, into the domestic legal system—or at least the restraints on domestic actors. The two articles about China are primarily about “rule of law,” substantive law, and formal legal institutions. This is a somewhat odd turnabout, as it is Japan that is usually understood to have strong legal institutions: a strong civil law tradition, a strong judiciary, and an independent bar. China is perceived to be far weaker in the legal institutional context. We think these contrasting focuses are an indication of the different stages of China and Japan in their respective versions of legal system development. While China is grappling with the most basic questions surrounding “rule of law” (substantive, institutional, and increasingly *political*), Japanese developments since World War II demand an analysis of phenomena that might be more sophisticated, mature, or engrained.

The focuses of these articles directly reflect what is happening on the ground in China and Japan (and with the two states as actors in the international system) as well. Japan appears to be becoming more legalistic: it is expanding the size of its bar, the number of lawsuits is rising, court opinions are becoming increasingly important, and private parties are using contracts to structure their relations more now than in the past. Within this mix, people—not just scholars—are struggling to figure out how the old norms fit and how the new law might reflect new norms. For China, the dynamics are slightly different. There can be little doubt that people in China (like in Wisconsin⁵ and Shasta County, California⁶) con-

4. For another take on Basel norms, see Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 EUR. J. INT'L L. 15 (2006).

5. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

6. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

tinue to rely heavily on norms to structure various kinds of relations—familial, economic, transactional, and so on—while at the same time diverting many interactions into the new legal system. Accordingly, Chinese people—and not just scholars, but Party members, government officials, commercial actors, legal professionals, and citizens—are attempting to determine how the law—a new variable introduced only in 1979 but increasingly present with the “legal construction” program and China’s interaction with the world—fits into the preexisting scheme of norms.

Second, and perhaps most importantly, the authors in this issue propose differing but related mechanisms for domestic legal change in Japan and China and the relationship between that change and external forces. These external forces range across a wide spectrum, from foreign states intent on seeing domestic legal change in Japan and China inspired by pure “reform” goals (i.e., improving administration and governance, ensuring some notion of justice in the domestic system, and securing compliance with public international law obligations), to the ever-globalizing international trade economy and capital markets, to those pushing a neoliberal “free markets under law” approach to economic development, and so on. The external agendas are many, just as the responses inside China and Japan are varied. To (over)simplify, Peerenboom reviews the interaction of foreign and domestic variables but seems to reassert the primacy of indigenous factors. Tanase points to the role of culture in determining which legal changes will “stick.” Feldman focuses his attention on imported norms, and Whitehead focuses on “network norms” among large players and the desire for conformity, real or perceived. Who is right? We think a choice is unnecessary. All of these factors are important; the question for these and future scholars is simply the degree to which these factors matter in varied situations—always taking account of history, economic development, and cultural predispositions.

Third, we are struck at something the articles do not address: a concept which might tentatively be labeled “Asian law.” As always, if we step back far enough from the painting, we can see patterns begin to form—a revelation of little surprise to those who know Japan’s history of wide borrowing from China starting in the Tang Dynasty or China’s more recent borrowing, specifically in the legal sphere, from Japan (incorporating, in turn, German civil law). Still, we find little that can be positively identified as “Asian” in these pieces: what is definitively “Asian” about Peerenboom’s adjudicative committees, Feldman’s tobacco use and regulation, Whitehead’s participation in capital adequacy norms, or Tanase’s judicial bureaucracy? In each case, the broad outlines of underlying “Asian” norms

are identifiable, and authors like Tanase rightly focus our attention on deeper issues like the Japanese judiciary's respect for what he calls society's "autonomous ordering." But in each situation described in these articles lies a deeper lesson on which the authors agree: the relations of law and norms in Japan and China are anything but simple. Feldman's description of the importation into Japan of norms against smoking is necessarily more complex than explanations that rely on politics or economics alone. Tanase finds that "informed by modern critical theory, we in modern states view our law in a much more complicated manner."⁷ Whitehead notes that "[d]ifferent actors may interpret compliance with, or defection from, a global standard differently."⁸ And Peerenboom finds that at least in China, descriptive metaphors meant to describe the establishment of the rule of law "fail to capture the complexity of the situation."⁹

For some readers, this acknowledgment of complexity might sound like academic capitulation, a throwing up of hands when faced with the inability to accurately analyze and concoct coherent theses. We should keep in mind, however, that each of the authors is battling against some relatively deep-seated—and simplistic—views about Japan and China and their respective encounters with law. These wrong-headed ideas might include well-known refrains such as "Confucian China will/will not respect the rule of law" or "decisions about law in Japan are guided by norms of harmony." What each of these pieces brings us, then, is not just a more complex picture of law and norms in Japan and China but a more accurate one, informed by empirics, specific case examples, and appropriately tentative theory (or at least questions to ask that help divine theoretical constructs). Equally important, these articles try to tease out the true, observable relationship between the developing Chinese legal system and the far more established Japanese legal system, as well as the external orders (public, private, financial, commercial, or humanitarian) that unavoidably have some direct impact on the two systems. These efforts help elucidate both the past and the present, and they might have predictive value as well.

Now that the editors of the *Michigan Journal of International Law* have gathered this related scholarship in one place, what shall we do with it? First, we hope that policymakers, academics, and legal professionals—and not just those focusing on China and Japan—will study

7. Takao Tanase, *Global Markets and the Evolution of Law in China and Japan*, 27 MICH. J. INT'L L. 873, 893 (2006).

8. Charles K. Whitehead, *What's Your Sign—International Norms, Signals, and Compliance*, 27 MICH. J. INT'L L. 695, 741 (2006).

9. Randall Peerenboom, *What Have We Learned About Law and Development? Describing, Predicting, and Assessing Legal Reforms in China*, 27 MICH. J. INT'L L. 823, 862 (2006).

these articles to learn not only of the complexity of the situation but of the multitude of opportunities for continuing legal change.

Second, we urge scholars and commentators to view these pieces as a jumping-off point for future research. We suggest two potential lines of inquiry. First, the articles offer several new directions for study of China and Japan. In the case of China, for instance, perhaps the articles in this volume can push scholars to the next step of analyzing “rule of law” and what it means—or should mean—for participants in Chinese society and commerce alike. That analysis should include stories of the lives of ordinary people, such as citizens and commercial actors (or property rights holders), as well as big-picture, theoretical inquiries. Such work will inevitably lead to more penetrating discussions of a whole system of changes arising out of Chinese society itself, even if those changes sometimes take on the cloak of a foreign-imposed or recommended norm. In the case of Japan, the articles in this issue suggest the promise of studying Japan not as a monolithic cultural entity but as a complex system of norms shaped by a wide variety of forces. Perhaps more centrally, this issue shows the promise of comparative analysis between (and among) Asian systems themselves, rather than between an “exporting” West and a “receiving” East.

Second, although we are pleased to see the important focus on Japan and China, how universal are these ideas and how can they be applied even to what we assure ourselves are “developed” legal systems? Surely we would not expect culture to fill the same role in every legal system any more than we would expect underlying cultures to be similar in the abstract. Do other cultures have, and to what extent, a “conformity norm,” as Feldman suggests in the case of Japan? How do differing interest group politics lead to different outcomes in other systems? Do other societies institute pragmatic solutions to rule of law issues that initially seem to work against the purposes of “rule of law,” as Peerenboom suggests? In sum, will other societies create law and legal institutions in the same way as Japan and China?