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Hybridization: A Study in Comparative Constitutional Law

John McEldowney*

Abstract

Viewing constitutional law from a global perspective informs us about trends and concurrences that might otherwise go unnoticed. The main focus for this paper is how a new European legal tradition is being forged from two of the most influential Western traditions, the common and civil law. The term hybridization is used to refer to this phenomenon whereby there is convergence between different legal systems. This does not necessarily alter national sovereignty or substitute one system over another. It cannot be measured by success or failure of one legal system over another. It is a common sharing that is best understood through an understanding of the constitutional and legal culture of different countries. In the first instance this hybridization was driven by private law. This has now given way to a European Administrative Law with important constitutional consequences, particularly for the role of courts and institutions. The hybridisation process in the European Union provides an important example for comparative law. The Treaty of Lisbon is the most recent manifestation of how convergence of legal systems in 27 Member States may be achieved while maintaining elements of national and legal sovereignty at the level of the Member State. It holds lessons for the study of constitutional law and its analysis in a global environment. Human rights similarly may provide an overarching framework that permits hybridization while retaining national societal influences. In that context Japan is a useful case study that similarly shows how adaptation may be accommodated through importing different legal systems while retaining national cultural and societal attitudes. Hybridization requires legal transfers to be studied but equally to recognise the constitutional, legal and cultural consequences of change.

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INTRODUCTION

Hybridization in constitutional terms means transposing ideas and concepts from different legal systems, partly as a part of modernisation but also as a consequence of globalisation. In the previous century, it manifested itself in the import and export of legal systems as a consequence of re-building after the Second World War but also a reorientation of cultures and legal systems to adapt to the prevailing social order. It is remarkable how the fluidity of change has given rise to many common phenomena; trade and market conditions gave rise to globalisation of different markets across many sectors of economic activity including financial and banking. Constitutional scholars¹ have not always appreciated the significance of hybridization.² National sovereignty is often unimpaired by the process leaving the general constitutional framework intact. Often, hybridization as a phenomenon is left to be studied in the context of comparative law³ or international

1. P.P. Craig, *Constitutions, Property and Regulation*, PUB. L. 538 (1991).

2. *See generally id.*

3. *See generally* K.Z. ZWEIFERT & H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW (Tony Weir, trans., Oxford University Press, 3d ed. 1998); *see also* ERIC DESCHEEMAER, THE DIVISION OF WRONGS: A HISTORICAL COMPARATIVE STUDY (Oxford University Press 2009).

law.⁴ It is also part of a debate over what David Nelken calls “the sociology of legal adaptation.”⁵ One focus is on the study of how best to use legal adaptation to engineer results. Another focus is on how law is inseparable from the social and cultural context in which legal rules operate. In terms of legal effects, evaluating how legal transplants work is part of understanding changes in society.⁶ The outcome of the debate on why and how to study legal transitions and borrowing from one legal system to another is also relevant. Lawrence Friedman suggests that it is important to think about the study of the processes of diffusion, borrowing and imposition of law. Adopting Friedman’s solution allows the study of the relationship between States and the emergence of commonalities resulting from either shared values—such as human rights and the market economy, or finding that economic growth may encourage legal and social reforms.⁷ The Anglo-American tradition has come under the influence of continental Europe and the on-going transformation of legal systems in a period of globalisation.

Common lawyers are particularly curious about the influence of the civil law as it is generally expected to have major potential for altering the way the common law will develop. Civil lawyers seem less concerned about how common and civil law systems adapt and change, though it is generally accepted that techniques of the common law may be usefully employed in the civil law.⁸ Lawyers from the common law

4. Roger Cotterrell, *The Concept of Legal Culture*, in *COMPARING LEGAL CULTURES* 13 (David Nelken, ed., Dartmouth University Press, 1997). See also Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 *STAN. J. INT’L L.* 65 (1996); see generally Lawrence M. Friedman, *The Concept of Legal Culture: A Reply*, in *COMPARING LEGAL CULTURES* 33-40; see also W. Ewald, *Comparative Jurisprudence II: The Logic of Legal Transplants*, 43 *AM. J. COMP. L.* 489, 498-510 (1995).

5. See generally David Nelken, *Towards a Sociology of Legal Adaptation*, in *ADAPTING LEGAL CULTURES* 7-54 (David Nelken & Johannes Feest, eds., Hart Publishing 2001).

6. W. Ewald, *Comparative Jurisprudence II: The Logic of Legal Transplants*, 43 *AM. J. COMP. L.* 489, 498-510 (1995). This approach is taken by Ewald and Watson in seeking to look at law and lawyers rather than law in society. See also ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (University of Georgia Press, 2d 1983). See generally Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 *U. PA. L. REV.* 1121 (1983); ALAN WATSON, *ROMAN LAW AND COMPARATIVE LAW* (University of Georgia Press, 1991).

7. Lawrence M. Friedman, *Some Comments on Cotterrell and Legal Transplants*, in *ADAPTING LEGAL CULTURES* 92-94 (David Nelken & Johannes Feest eds., Hart Publishing: Oxford 2003); Comment on Roger Cotterrell, *Is there a logic of Legal Transplants?*, in *ADAPTING LEGAL CULTURES* 71 (David Nelken & Johannes Feest eds., Hart Publishing: Oxford 2003).

8. Jean-Bernard Auby, *Collection Droit Administratif: Transatlantic Perspectives on Administrative Law*, Address the at the Administrative Law Discussion Forum, University of Montpellier, France (May 2008). I am very grateful to Thomas Perroud,

tradition find that in the process of law reform acceptance of the civil law tradition is enhanced by the imports of codes. Codification facilitates the export and import of ideas. Common methodologies provide readily adaptable ways to assist the transportation process. Considering the significance of hybridization is particularly important today as many common problems in the way the citizen and government engage may be more readily understood outside the national legal system. It is argued that constitutional lawyers ought to take account of the constitutional implications for hybridization, not to engineer the results but more to consider how best to evaluate what the process has achieved. Different ways of holding government to account and ensuring due process are matters that may become more clearly understood by studying how legal systems have many common principles. Influences that shape the sharing of values and legal principles are also worth examining as seemingly common procedures may be differently interpreted and applied. The processes of transplanting and borrowing common and civil law systems must also be examined in the context of the rise in Islamic law and in Islamic countries this adaptation of different legal systems is worth examining.

The organisation of the article is as follows: The historical foundations of hybridization are first considered illustrating that it is not a recent phenomenon, but one that has been ongoing for several centuries. Next consideration of the European Union (EU) is explained as a good example of how hybridization processes are at work. The coming into force of the Treaty of Lisbon in November 2009, makes the EU topical since the Treaty of Lisbon came after the failure to implement an EU Constitutional Treaty. This is indicative of how hard it is to lead with change focused through Constitutional adaptation rather than through the convergence of common legal principles and procedures. In the EU context particular attention is given to the value of human rights and how human rights may be adapted into the constitutional fabric of the United Kingdom consistent with UK sovereignty.

Japan is a clear example of how the process of hybridization has taken shape since the Second World War. As we shall see in more detail below, evaluating the Japanese experience provides a useful case study and this forms the last section. Finally some conclusions are advanced addressing concerns about how hybridization may ultimately change the dynamics of how legal systems in a constitutional sense adapt and absorb changes while preserving their own essential characteristics.

HISTORICAL BEGINNINGS: CONVERGENCE AND DIVERGENCE IN COMPARATIVE LAW

It has already happened in European legal history that diffusion and convergence have led to the hybridisation of ideas that later formed basic legal doctrines. Assimilation and merger were significant influences in the transformation of the law of contract. James Gordley's, *The Philosophical Foundations of Modern Contract Doctrine* shows how underlying the common law and civil law systems are many similarities in terms of legal concepts and doctrinal structures.⁹

Contract law is a good example because it transposes national boundaries and is primarily driven by economic forces that in turn may influence legal rules. David Ibbetson traces the emergence of the law of restitution by noting how trade in the modern world was largely influenced through the contract of sale.¹⁰ In the early medieval European world while sales were important, the transfer of reciprocal gifts by both parties was more significant. The mark of a relatively undeveloped economic system, gifts became a simple trading device that spread throughout the trading world and eventually found source in the early written laws of Norway and Sweden. Finding legal form took time. The use of oaths became common place and various forms of pledges or tangible objects allowed the debtor and creditor to rely on promises. Sharing common obligations or experiences was also frequently used in creating a bond or ensuring reliability. Writing down such agreements took time but may be traced back to the middle of the second century AD. The law distinguished between obligations that arose of some wrongdoing (delict) as distinct from contract (as it then became). Justinian's *Institutes* catalogued various wrongs and also various contractual obligations. As the English common law took shape it fell under many influences—specifically borrowing from Roman law and at times assimilating ideas and writings—filling in gaps and fitting changes in the rules to modern circumstances. Adaptation and change; removing anomalies and inconsistencies; responding to new ideas and recognising changing economic circumstance were all at work. One remarkable part of changing circumstances was the codification movement in evidence from the 18th and 19th centuries in England. This ambition is still to be

9. See generally JAMES GORDLEY, *THE PHILOSOPHICAL FOUNDATIONS OF MODERN CONTRACT DOCTRINE* (Oxford: Oxford University Press 1991).

10. DAVID IBBETSON, *AN HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS* 284-92 (Oxford University Press 2001).

realised in the present century but it is evidence of the influence of continental and codified systems on the common law.¹¹

In the last century the Uniform Commercial Code composed of restatements, model codes and co-operation through uniformity of practice took shape in the United States “to provide an orderly statement of the general common law of the United States.” In effect the Commercial Code created harmonisation and simplification that overrides many local exceptions and practices. In Europe, it is through the European Union that many private law ideas embracing unification and harmonisation have taken shape.

There are some countries that have created hybrid legal systems—Japan is one example where early Chinese influences that created a Japanese common law have given way to late 19th century codes drawn from France and Germany. After the Second World War Japan’s constitution drew on many Anglo-American values that are accompanied by Western attitudes to law and legal issues.

THE EUROPEAN UNION AND A COMMON EUROPEAN LEGAL CULTURE

The European Union offers an example of how idealism and ideas may be transposed into operating doctrines and principles. Hybridisation is at the heart of this endeavour. Underlying this are certain assumptions including that there is a common set of principles and concepts genuinely on offer to all Member States; that ultimate codification or assimilation is desirable and achievable; and finally that despite national and cultural differences, a common European legal culture will dominate. This has led to an intense debate between euro-sceptics and pro-euro enthusiasts. In terms of the future direction and debate the pros and cons of Europe under a unified legal system are being challenged and discussed. Yet the evidence suggests that much has already taken place to bring into existence a European private law.¹² There is currently a movement in favour of a European Civil Code or more precisely a Code of Contract law. The Common Frame of Reference currently being developed is an example of the methodology used to bring together different sets of assumptions and create general rules and principles in a single document. The idea is to provide some general restatement of the law containing legal principles, rules and guidance for interpretation and supplementary

11. See Oreste Pollicino, *The New Emerging Judicial Dynamics of the Relationship between National and the European Courts after the Enlargement of Europe*, 76 Jean Monnet Working Paper 14/08 (2008), available at <http://centers.law.nyu.edu/jeanmonnet/papers/08/081401.html>.

12. See generally Jan M. Smits, *Convergence of Private Law in Europe: Towards a New Jus Commune?*, in *COMPARATIVE LAW: A HANDBOOK* (Esin Orucu & David Nelken eds., Hart Publishing 2007).

notes. This is largely juridical in form and is practical rather than theoretical or academic. The unity of the European Union may not be taken for granted and despite differences in perspectives considerable progress has been made spanning different sectors from government led initiatives to private sector input and from non-governmental institutions or private individuals. There is a long historical legacy that goes back to the codification movement which has met with varying degrees of success. There are many examples where the EU has addressed issues common to its Member States. In the development of the financial service industry there is the Lamfalussy Process permitting the EU Parliament and Council to adopt legislation containing core values and guidelines that allow specific regulators to coordinate and enforce common rules and procedures in each of the Member States.¹³ Another example is the development of EU administrative law, also with common procedures and principles.¹⁴ Comparative administrative law has great potential. It can provide insights that improve regulatory systems, lead to improvements in institutions and in decision-making more generally. Procedural and institutional improvements may flow as well as a better understanding of agencies, their design and accountability.¹⁵ There is also a Social Justice Study Group intent on advancing common rules and procedures. The aim in all these projects is to provide an inclusive method of agreeing common principles even though in many Member States there is resistance to replacing too much national legislation with EU law. Taken together this represents a varied and diverse approach in competition and consumer law particularly, which may ultimately form a common law of Europe. As Zweigert and Kötz recognise:

Comparative law must go beyond national systems and provide a comparative basis on which to develop a system of law for all Europe; it can do this by taking particular areas of law such as contract, tort, credit arrangements, company law and family law and showing what rules are generally acceptable throughout Europe and whether they are developing on convergent or divergent lines.¹⁶

13. See generally Financial Services Authority, Lamfalussy, <http://www.fsa.gov.uk/Pages/About/What/International/european/lamfalussy/index.shtml> (last visited February 10, 2010).

14. See generally PAUL CRAIG, EU ADMINISTRATIVE LAW (Oxford University Press 2006).

15. Paul Craig, *Democracy and Rulemaking Within the EC: An Empirical and Normative Assessment*, in LAWMAKING IN THE EUROPEAN UNION 43-50 (Paul Craig & Carol Harlow eds., Kluwer Law International 1998). See generally Mario P. Chiti, *Forms of European Administrative Action*, 68 LAW & CONTEMP. PROBS. 37 (2004).

16. Zweigert & Kötz, *supra* note 3, at 29-30.

This may result in a European Civil Code, though this will depend on the political and practical considerations of its application. It is inevitable that constitutional questions will arise—for example resolving different forms of accountability; ensuring good decision making and determining how Member States and the EU are best able to cross-fertilize decision-making. At the heart of such questions lies the fundamental role of the European Court of Justice and how judges are able to engage within an adequate constitutional framework. It is clear that constitutional lawyers have an important role in understanding how best to study legal and social changes that are a manifestation of the hybridization process. Describing processes and changes is important. Equally important is setting out the balance of powers between the citizen and the state in terms of the framework of government accountability. The observations that may come through the lens of the hybridization process are important. Comparing and evaluating; analysing the absorption of change; understanding the interaction between law and social, economic and political cultures are valuable lessons to be gained. Measuring success or failure is not as important as recognizing that law and legal rules may not always drive forward change but come as a response to it. The examples of the European Union and Japan, discussed below, raise questions as to how important law really is when changes are clearly driven through economic and political pressures.¹⁷ Not all imports are successful and many are viewed differently in the context of different legal systems. The hybridization process is a road map that allows discourse and discovery. The degree to which different legal transplants take place and are recognised within the country changes with time as does their interpretation. The Constitutional lawyer will always recognise the apparent ease with which laws may be transplanted, but they do not always take effect. As Harding has noted, “[I]n spite of extensive legal transplantations, we should not expect the end result to be a mirror image of Western law.”¹⁸

The Treaty of Lisbon (2009)

The Treaty of Lisbon came into force on December 1, 2009 and provides a good example of the hybridization process.¹⁹ It illustrates

17. See generally Paul Kirchhof, *The Balance of Powers Between National and European Institutions*, 5 EUR. L.J. 225 (1999).

18. Andrew J. Harding, *Comparative Law and Legal Transplantation in South East Asia*, in ADAPTING LEGAL CULTURES 220 (David Nelken & Johannes Feest eds., Hart Publishing: Oxford 2003).

19. See generally Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1, available at <http://eur-lex.europa.eu/en/index.htm> (follow “Treaties” hyperlink; then

how different legal systems can enter a dialogue through processes and procedures that provide common approaches while preserving specific national differences.²⁰ The Treaty of Lisbon was first concluded by the 27 Member States in Portugal on 19th October 2007 and signed on 13th December 2007.²¹ The Treaty amends the Treaty Establishing the European Community (TEC), now renamed the Treaty on the Functioning of the European Union (TFEU) and the Treaty on European Union (TEU).²² Consequently the main amended text of both Treaties are to be found in the main text of the Treaty of Lisbon. The Treaty on European Union is split into six titles and the Treaty on the Functioning of the European Union is split into seven parts. There is a separate document, the Charter of Fundamental Rights which is not in the text of the treaties but is part of the primary law of the European Union. There are also 39 Protocols attached to the Treaty of Lisbon containing more detailed provisions that are legally binding. Finally there are 65 declarations that are not legally binding but provide an indication of the political intention behind the Treaties.

follow “Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007” hyperlink); *see also* EUROPA-Treaty of Lisbon, http://europa.eu/lisbon_treaty/index_en.htm; The LISBON TREATY: EU CONSTITUTIONALISM WITHOUT A CONSTITUTIONAL TREATY? (Stefan Griller & Jacques Ziller eds., Association of Austria Publications 2008); European Union Committee, The EU Reform Treaty: Work in Progress, 2006-7, H.L. 180; European Union Committee, The Treaty of Lisbon: An Impact Assessment, 2007-8, H.L 62-I, 62-II.

20. Prior to the Treaty of Lisbon three major Treaties formed the main primary law of the European Union. The Treaty of European Union (TEU) introduced by the Maastricht Treaty; the Treaty establishing the European Community (TEC) and the Treaty Establishing the European Atomic Energy Community. There was a fourth Treaty Establishing the European Coal and Steel Community which expired on 23rd July 2002 after fifty years. There have been numerous other Treaties and Inter-governmental agreements. The Treaty of Lisbon replaced the abandoned Constitutional Treaty of 2004 after France and the Netherlands refused to ratify it in mid-2005.

21. The Treaty must be ratified by all Member States and from 13 December 2007 until December 2009 the process of ratification took place according to the different constitutional arrangements in force in each Member State. Ireland required a referendum and this was unsuccessful in June 2008 when the vote was against ratification. A further referendum took place on 2nd October 2009 and this was successful with a turnout of 58%, 67.1% voted in favour.

22. *See* Treaty on European Union, July 29, 1992, 1992 O.J. (C 191) 4-5 (repealed by the Treaty of Lisbon). *See also* Treaty on the Functioning of the European Union, Sept. 5, 2008, 2008 O.J. (C 115) 2-6 [hereinafter TFEU Treaty] (previously known as the Treaty on Establishing the European Community). The Treaty of Lisbon provides a new institutional structure for the EU with a Permanent President and Foreign and Security Secretary. There are also new Treaty amendment procedures and a legal personality for the EU. There are three distinct competences within the EU. Exclusive competence where only the EU may act; shared competence where the Union and Member States may act and finally where the Union may carry out actions to support and co-ordinate the actions of the Member States.

The Treaty of Lisbon retains the pre-existing process begun in the Treaties of Amsterdam and Nice that prepared the European Union for its enlargement and attempted to provide greater coherence and efficiency in its organisation. The main text of the Treaty of Lisbon ensures that there is a transfer of the various competences under the European Communities to the European Union. The pragmatic development of the various competences of the European Union received specific direction from the European Court of Justice (ECJ). In constitutional terms the ECJ has forged its role as having primacy of law over Member States. Under the Treaty of Lisbon, the European Community ceases to exist and is replaced by the European Union. The legal order is formed around 27 Member States each with their own distinct legal systems but with a convergence around the EU. The ECJ is a quasi-constitutional court for the EU, covering the English common law system, even though the ECJ has strong roots in the civil law tradition shared by most Member States. Preserving some degree of national sovereignty is a delicate balance. A good example is to be found in Article 12 of the amended Treaty of European Union (TEU) and in Protocols 1 and 2 of the Treaty of Lisbon. Taken together these provisions ensure that national parliaments are brought into the legislative process of the European Union (EU). Two new Protocols, Protocols Nos. 1 and 2 of the Treaty of Lisbon have the intention of involving national parliaments in the following way. All legislative proposals will be sent to the national parliaments and parliament's opinion may be expressed in terms of the principles of subsidiarity and proportionality. There is an eight-week time limit for reply. National Parliaments are also involved in the general *passerelle* clauses and in the evaluation procedures of Eurojust and Europol.²³ The implications of the Treaty of Lisbon for national parliaments will be an interesting area for future study. It will provide diverse inputs into the legislative process. This is likely to come under diffuse influences in terms of public service provision and the interpretation of the margin of discretion residing with Member States. It will also reflect different legal cultures and political ideologies represented in each of the national Parliaments.

23. See TEU Treaty art. 48(6). *Passerelles* makes it possible for the scope of qualified majority voting and the ordinary legislature procedure to be extended without amending the treaty in force. The general *passerelle* is to be found in Article 48(6) TEU and allows the European Council acting under unanimous voting to amend Part 3 of the Treaty on the Functioning of the European Union so that the Council may act by qualified majority in that area. See also TEU Treaty art. 16 (amended by the Treaty of Lisbon article 35); TEFU Treaty art. 238; TEU Treaty protocol no. 11 (amended by the Treaty of Lisbon); Hayes-Renshaw, et al., *When and Why the EU Council of Ministers Votes Explicitly*, 44 J. COMMON MKT. STUD., 161 (2006).

Treaty of Lisbon and Some Implications for Human Rights

The role of human rights is fundamental in the way legal systems, including within the European Union engage in dialogue. Rights are often overlooked in terms of studying divergent and convergent legal influences. The Charter of Fundamental Rights (hereinafter the Charter) has gone through a gestation period. The original intention was to bring together all the rights of citizens in Member States and in June 1999 Member States agreed to make fundamental rights part of a newly drafted Charter of Fundamental Rights to become applicable in the EU. In 2001 the Nice Treaty included the Charter of Fundamental Rights as an aspirational statement of goals to be achieved by the EU. A revised version of the Charter was signed between the Commission, the EU Parliament and the Council in December 2007. Article 6 of the new Treaty of the European Union (TEU) makes the necessary link between the Charter and the European Union. However, from its inception and prior to the Treaty of Lisbon, the Charter, as previously indicated, had an aspirational status, but did not have legally binding effect. The Charter has legal effect under the Treaty of Lisbon, but the UK and Poland fall under Protocol 7 of the Treaty of Lisbon, discussed below.²⁴ The influence of the Charter, even in the UK and Poland cannot be underestimated. It has become embedded in the culture of rights within the EU and is influential in how the Commission undertakes its legislative role. The setting up of the Fundamental Rights Agency to offer a form of pre-legislative scrutiny is indicative of this influence. The Court of Justice (ECJ) has also been influenced by the Charter even before the December 1st, 2009 effective date as of the Treaty of Lisbon, which has been treated in many ways as equivalent to a source of international law. In a number of headline cases the ECJ has acknowledged this influence and has felt duty bound to promote its application in relevant cases.²⁵ This underlines how, even though during the period when the Charter was not legally binding, the Charter was regarded as influential and significant. This will develop further, now that the Treaty of Lisbon has come into force and will give the ECJ an

24. See generally Lisbon Treaty protocols; See also EUROPA-Treaty of Lisbon, http://europa.eu/lisbon_treaty/index_en.htm. Protocols provide more detailed provision on specific areas that are generally found in the main text of the Treaty. There are 39 protocols attached to the treaties and they are also legally binding. The protocols are attached to the main text of the Treaty of Lisbon.

25. See Case C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, 2007 E.C.R. I-3633; Case C-305/05 *Ordre des Barreaux Francophones et Germanophones & Others v. Conseil des Ministres*, 2007 E.C.R. I-05305; Case C-540/03 *Parliament v. Council*, 2006 E.C.R. I-5769.

important role in determining on a case-by-case basis how to interpret the Charter integrated into European Union law.²⁶

HUMAN RIGHTS AS A DOMINANT FORCE

It is unsurprising that human rights have become a dominant influence in shaping hybridization.²⁷ There is a universal sense that the theory and practice of human rights is an important basis for development. The Universal Declaration of Human Rights and various related international conventions are fundamental. Human rights and principles of democracy have provided enormous influence in post-independence constitutional developments in many countries. In the United Kingdom, the Human Rights Act 1998 has become a pivotal part of the common law. In the European Union, the European Court of Justice (ECJ) in Luxembourg has had to consider how within the EU human rights are best considered. Most Member States follow the European Convention on Human Rights and the European Court of Human Rights at Strasbourg. There is a potential for the two courts to integrate and come to a common understanding on rights.

Initially, the EC institutions did not address human rights directly. Gradually, however, the ECJ began to develop its own strategy despite initial resistance to using human rights to interpret Treaty provisions.²⁸ This has gradually given way to a more liberal recognition of rights that are common to the various Member States.²⁹ Rights are considered consistent with the overall objectives raised by the European Community. In this approach there is a degree of deference to national courts. In *Bosphorous v. Ireland*, the ECJ accepted that adequate protection had been afforded through the Irish Supreme Court and it was unnecessary to go beyond the protections within the Member State provided that they were adequate.³⁰ What has been less clear is the extent to which Treaty making arrangements within the EU will advance human rights. The Maastricht Treaty failed to settle this matter. The Treaty of the (?) European Union provided that human rights (Article 6(2) EU) were a fundamental principle of EU law and that within the fields of Justice and Home Affairs, there should be a human rights

26. See TEU Treaty art. 6 (providing that human rights are fundamental to the EU).

27. A. W. Brian Simpson, *HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION 15-20* (Oxford: Oxford University Press 2001).

28. See Case 4/73 Nold, 1974 E.C.R. 491.

29. Case C-94/00 Roquette Frères, [2002] E.C.R. I-9011. See also *Chappel v. United Kingdom* (1990) 12 Eur. Ct. H.R. 1 (1990); *Casey v. United Kingdom* (1991) 13 Eur. Ct. H.R. 189 (1991); *Case 11/70 Internationale Handelsgesellschaft* [1970] E.C.R. 1125 (1970).

30. *Bosphorus v. Ireland*, 42 Eur. Ct. H.R. 1 (2006).

dimension. Nevertheless, within the interpretation of Community law, the ECJ developed principles that have a human rights resonance. Proportionality, equality and fairness were interpreted as part of the nature of the Communities. The Treaty of Nice moved the agenda to the next stage by providing, as indicated above, an aspirational Charter of Fundamental Rights of the European Union, drafted in June 1999. The result was a common commitment as a Declaration of 15 personal representatives of the Heads of State or Government of the Member States and 16 members of the European Parliament and 30 members of national parliaments. The Charter containing 53 articles makes fundamental rights and freedom central for the EU citizen. In March 2007, the EU Agency for Fundamental Rights was established as an Agency of the EU, to provide advice and assistance to EU institutions and to support human rights.

Taken together these steps represent important and significant stages in the development of EU law catalysed by the recognition of human rights. The hybridization process is continuous and likely to provide greater integration of legal rights into the different legal cultures in Europe, particularly in light of the new text of Art. 6 of the Treaty of the European Union, which provides that “[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”³¹

The Charter of Fundamental Rights (The Charter)

The main intention behind the Charter of Fundamental Rights was to convey all of the rights of European Citizens in the Union in a single document.³² After many revisions, the Charter was signed by the Presidents of the Commission, the European Parliament and the Council on 12th January 2007. Article 6 of the old Treaty of European Union (TEU) made reference to the Charter and links the TEU to the Charter giving it aspirational status.

The Treaty of Lisbon takes matters a step further by revising Article 6 TEU. Article 6(1) provides that the Charter will have the same legal values as the Treaties. While not extending any of the competences of the Union, it stipulates under the new Article 6(3) that “the Union shall respect fundamental rights.”³³ The important point is that the Charter, including explanations and interpretation, falls under the jurisdiction of

31. TEU Treaty art. 6.

32. See The Charter of Fundamental Rights, Dec. 14, 2007, 2007 O.J. (C 303) 1, 17.

33. See PAUL CRAIG, ADMINISTRATIVE LAW 606-10 (Sweet & Maxwell, 2008).

the Court of Justice. While the explanations and interpretations do not have the force of law, they are nonetheless influential. The nature of the Charter is wide ranging and contains over 50 rights, freedoms and principles. There are six titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice.³⁴ There is a great deal of ambiguity over their interpretation especially in terms of rights and principles. This is particularly important as rights are regarded as directly enforceable whereas principles may only be justiciable under Article 52(5). The distinction, such as it is, is likely to form the case law of the ECJ.

Principles may not be directly enforceable rights but they cover matters that are likely to be the subject of litigation and therefore become interpretation aids in the way the ECJ considers EU law. This is especially so in the context of the duty of the Court to take account of revised Article 6(3) TEU for the Union to respect fundamental rights. Charter rights are broadly expressed and often provide economic and social expectations, such as Article 35, the right of access to health care. Very often such Articles may draw on pre-existing rights or obligations found in other Treaties or in other parts of EU law. While rights may be so general as to require little substance, such as Article 28 on the right of collective bargaining and action, their significance should not be underestimated. While no new rights are established and such rights must be in accordance with national law, this opens up questions of interpretation and emphasis.³⁵ Though it is probably common ground amongst many commentators that the Charter may not extend EU law, it leaves unanswered, however, how influential it may become when interpreted. Particular concerns about the reach of Article 28 to create a right to strike have so far been exaggerated. The ECJ may decide to exercise self-control over how the right to strike applies and may respect national limitations and restrictions while acknowledging the right itself. It remains to be seen how the ECJ gives interpretation on a case by case basis. UK courts will also have to wait and see how interpretations are reached by the ECJ.³⁶

34. *Id.* at 609.

35. See Migration Watch UK, *The European Reform Treaty Impact on Asylum and Immigration Policy*, March 14, 2008, <http://www.migrationwatchuk.com/BriefingPaper/document/82>. See also HOUSE OF LORDS: EUROPEAN UNION COMMITTEE: THE TREATY OF LISBON: AN IMPACT ASSESSMENT, 10th Report session 2007-08 H.L. Paper 62-II, available at <http://www.publications.parliament.uk/pa/ld200708/ldselect/lddecom/62/62ii.pdf>.

36. Address by Rt. Hon Lord Goldsmith QC, *Human Rights and Civil Liberties*, Address to the Liberty Annual Conference: (Jun. 2, 2002). See also Address by the Rt. Hon Lord Goldsmith QC, *The Charter of Fundamental Rights*, Address to the BIICL (Jan. 15, 2008); HOUSE OF LORDS: EUROPEAN UNION COMMITTEE, THE TREATY OF LISBON: AN IMPACT ASSESSMENT, Report, 10th Report session 2007-08 H.L. Paper 62-I. ¶¶ 5.69- 5.83.

The Charter and the Treaty of Lisbon

The rationale for giving the Charter legal status and binding effect under the Treaty of Lisbon is well supported by most commentators.³⁷ As the Charter is influential, it is preferable for this to be recognised in law. This assists legal advisors in setting the terms of their advice to clients, allows the arguments about rights to be adjudicated on its merits, and brings positive advantages to European citizens in the way the law develops. It is, however, unusual to give a document with aspirational status recognition in a Treaty providing it with binding effect. In terms of legal effect, this means that EU institutions have to give attention to the fundamental rights of the Charter. Irrespective of Member States, this is important as there are many instances where EU institutions will change their behaviour because of the Charter and its legal binding status. This is a positive development in terms of setting controls on EU institutions; enhancing standards and improving rights for citizens over institutions whose accountability in the past has been open to question.

The question of whether new or additional rights are created by the Charter is unclear.³⁸ It is unlikely that there will be a major change in the ECJ's behaviour because of the change of status given to the Charter. It is clear that the jurisprudence of the ECJ is likely to be influenced by the Charter and this is an important point to consider. The possibility of challenging acts of Member States and EU institutions is open, even though some lawyers doubt that this is very likely.

Protocol 7 UK and Poland

Protocol 7 is the result of pressure from Poland and the United Kingdom.³⁹ The Protocol states that the Charter does not extend the ability of the Court of Justice to find laws within the two countries "inconsistent" with the Charter. There is a further "opt out" namely that nothing in Title IV of the Charter relating to solidarity, namely workers rights will create any additional rights to those already granted in the two countries.⁴⁰ The question arises as to whether the Protocol is an actual opt out or simply a guide to interpretation? There is no clear answer. The Government's intention appears to be that the Protocol is there to

37. Some substantial reservations are made about the Charter in Sir Francis Jacobs, *THE SOVEREIGNTY OF LAW: THE EUROPEAN WAY* (HAMLYN LECTURES) 150, 151 (Cambridge University Press, 2007).

38. There is a useful discussion in chapter 5 EUROPEAN UNION COMMITTEE, *THE TREATY OF LISBON: AN IMPACT ASSESSMENT, REPORT, 2007-8 H.L.* 62-I.

39. CRAIG, *supra* note 33, at 609.

40. See J.R. Shackleton, *Industrial Relations Reform in Britain Since 1979*, 19 J. LABOUR RES. 581-605 (1998).

establish that there can be no new rights and that the courts may not strike down any UK law. However, falling short of what is inconsistent allows the ECJ to read into the interpretation of UK law various parts of the Charter to render UK law consistent. This approach is well within the boundaries of interpretation and also in line with the EU's fundamental protection of rights, which the UK has affirmed in the TEU as well as under the Treaty of Lisbon. Article 2 of the Protocol acknowledges that the Charter is applicable to the extent that it refers to national laws and practices and to the extent that the rights or principles are recognised by the laws and practices of the UK. There are a number of other comments about the Protocol that may make its interpretation open to speculation. The lack of clarity in the Protocol provides support for the view that it is only there as an explanation of the various interpretations rather than a binding opt out. If the intention was to negotiate a fundamental opt out then this would be needed to be spelt out in full and contain a clear explanation of the nature of the opt out and its application. The ambiguity in the Charter between rights and principles also makes it difficult to know whether the Protocol has much meaning as the Protocol fails to make clear what is regarded as falling within the Charter and general principles and what is not. In any event there are pre-existing rights and obligations under EU law that are applicable to the EU and the Protocol does not limit their application to UK law. The general nature of the Protocol leaves a wide margin of appreciation for national courts and the ECJ to decide how it applies and its effect. It is likely that the overriding nature of EU law⁴¹ as accepted in the case law of the EU would be followed.⁴² Cases such as *Factortame* are influential.⁴³ *Costa v. E.N.E.L.* would apply as asserting the supremacy of the ECJ and EU law.⁴⁴

41. European Communities Act, 1972, c. 68, § 2(1) (Eng.) (providing that "rights, powers, liabilities, obligations and restrictions . . . are without further enactment to be given legal effect").

42. See Case 26/62, *N.V. Algemene Transport - en Expeditie Onderneming Van Gend en Loos v. Neder-Landse Tariefcommissie*, 1963 E.C.R. 1, 1963 C.M.L.R. 105 (discussing direct effect doctrine); Case 2/74, *Reyners v. Belgium*, 1974 E.C.R. 631 (discussing direct effect doctrine); Case 50/76, *Amsterdam Bulb v. Produktschap voor Siergewassen*, 1977 E.C.R. 137 (expanding the direct effect doctrine through Regulations). See also Case 152/84, *Marshall v. Southampton and South West Hampshire Area Health Authority*, 1986 E.C.R. 723; Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, 1990 E.C.R. I-4135, 1 C.M.L.R. 305 (1992); Case C-6/90, *Francovich v. Italy*, 1991 E.C.R. I-5357, 2 C.M.L.R. 66 (1993) (discussing horizontal and vertical effect in all three cases).

43. *R. v. Secretary for Transport Ex p. Factortame Ltd.*, 1989 2 C.M.L.R. 353; [1990] 2 A.C. 85 (H.L.) (U.K.); [1991] 1 A.C. 603. See also *M. v. Home Office*, [1994] 1 A.C. 377.

44. Case 6/64, *Costa v. E.N.E.L.*, 1964 E.C.R. 585.

European Court of Human Rights (ECtHR) and European Court of Justice (ECJ): Strasbourg and Luxembourg

The legal status given to the Charter and its overlap or interconnection with the European Convention on Human Rights (ECHR) may result in convergence between the two courts (Strasbourg and Luxembourg). EU accession to the ECHR is likely and would reduce room for inconsistencies of approach between the two courts.⁴⁵ Unlike the European Union, there is no mandate in the Strasbourg Court of Justice to unify human rights laws. The recognition is that rights may be calibrated in different ways in different cultures. However, the margin of appreciation doctrine, intended to give rise to different approaches in domestic law, has not been interpreted with enough flexibility to give rise to clear differences in approaches to human rights. This has weakened the ability of domestic courts to develop their own responses to rights, reflecting different legal, economic and social differences. There are three discernible trends: The ECJ has developed an increasing interest in taking account of the ECHR. This is clear from decided cases and judicial attitudes.⁴⁶ Furthermore, the ECJ is likely to make use of the Charter as an interpretation aid as well as a source of legal doctrine. The jurisdiction of both the ECtHR and the ECJ is likely to be addressed at some time in the future. It is clear that UK courts are free to refer to the Charter and interpret it as part of the general scope of fundamental rights.⁴⁷ By analogy it is clear that a similar approach to interpretation was evident with the ECHR before the Human Rights Act 1998.⁴⁸ The protocol does not prevent British courts from continuing in this way. Similarly, British courts draw on many international instruments as aids to interpretation when confronting human rights issues. The ECJ will have to operate on a case-by-case basis when deciding how to interpret the Charter. The existence of the Protocol may encourage the ECJ to interpret rights generally drawing the Charter into the fabric of the common law of the European Union. This will be

45. CRAIG, *supra* note 45, ch. 15.

46. N. Banforth, *Prohibited Grounds of Discrimination under EU Law and the European Convention on Human Rights: Problems of Contrast and Overlap* (2006-7) 9 C.Y.E.L.S. 1.

47. *R. v. East Sussex County Council and the Disability Rights Commission ex parte A,B,X and Y*, Eur. Ct. H.R. 167 (2003).

48. *See, e.g.*, Article 3 Prohibition Against Torture in *Ireland v. UK*, 2 Eur. Ct. H.R. 25 (1978); *Tyrer v. UK*, (1978) 2 Eur. Ct. H.R. 1 (1978); *McCann v. UK*, 20 Eur. Ct. H.R. 99 (1995) (finding an Article 2 Positive duty to protect life); *Osman v. UK*, 1998-VIII Eur. Ct. H.R. 3124 ; *Fox v. UK* 13 Eur. Ct. H.R. 157 (1991) (finding an Article 5 Right to liberty and security); *Brogan v. UK* 11 Eur. Ct. H.R. 117 (1988); *R. v Secretary of State for the Home Department ex p Brind* [1991] 1 A.C. 696 (finding an Article 10 Freedom of expression).

difficult to resist as inevitably the Charter will influence how the ECHR is interpreted and also the approaches taken by the two courts in Luxembourg and Strasbourg.

In the future British courts will have to decide how to interpret the Protocol. EU accession to the European Convention inevitably integrates human rights and it should be remembered that the EU must give primacy to fundamental rights. It is likely that the general direction of travel towards an integrated approach to human rights in the EU will be difficult to resist. The arguments in favour of this approach are convincing as the application of rights will still retain a margin of appreciation at Member State level. There is a need for clarity over the impact of the Protocol, the integration of the Charter into the EU, and the role of judges in the interpretation of rights. Lord Hoffman in his March 2009 lecture to the *Judicial Studies Board* alluded to this point in terms of the contribution of British judges to the development of Convention standards.⁴⁹ This is an important point as the English common law through its pragmatic and practical approach to legal problems may provide a useful analytical basis on which to balance rights between political and legal judgements.

In terms of hybridization of law and legal systems, it is also clear that the margin of appreciation between legal and political judgements over policy issues requires a fine balance. The former is nuanced in appointed judges while the latter is found in elected and accountable politicians. Constitutional lawyers will readily appreciate the need for both legal and political evaluations to be contained in a legal system. The United Kingdom's common law system places political analysis at the apex of the decision-making process. The point is readily understood in the context of planning law. The Secretary of State, an elected minister, has the final say. In *R (on the application of Alconbury Developments Ltd.) v. Secretary of State for the Environment, Transport and the Regions*, the House of Lords considered how rights set out under Article 6 of the ECHR may have an impact on how planning decisions are made.⁵⁰ Article 6 provides, "[E]veryone is entitled to a fair and public hearing within a reasonable time by an *independent and impartial tribunal*."⁵¹ An applicant for planning permission has a right of appeal to the Secretary of State against any refusal or condition of planning

49. Lord Hoffmann, Annual Lecture at Judicial Studies Board: The Universality of Human Rights (Mar. 19, 2009).

50. *R. (on the application of Alconbury Dev. Ltd.) v. Sec. of State for the Env't, Transport, and Regions*, [2003] 2 A.C. 295, 325 at ¶ 70 (D.C. 2001) (appeal taken from Q.B.).

51. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 221 (emphasis added).

permission. The planning system effectively gives the final say to the Secretary of State, an elected politician, who may include matters of policy as part of the overarching responsibility to ensure that policy issues are considered as part of the system.⁵² The Secretary of State's decision may be appealed to the High Court on the same basis as judicial review.⁵³ The appeal is seen as confined to legal issues, and the courts do not consider the merits of the policy behind the decision. The Secretary of State is, theoretically, responsible to Parliament for policy matters.

The House of Lords considered the full implications of human rights introduced under the 1998 Act for the planning system in *Alconbury* and concluded that the court should not have every aspect of planning law fall under the scope of review.⁵⁴ To ensure that the relevant human rights procedures are followed, it was sufficient that there should be a review of the legality of the decision.⁵⁵ It fell within the Secretary of State's remit, including policy matters, to determine appeals.⁵⁶ Thus, while the House of Lords recognizes the requirements of the Human Rights Act, this Act does not require judicial intervention in every aspect of the planning system, which is already susceptible to judicial review.⁵⁷ This illustrates the court's sensible case-by-case approach.

It is also important to recognize that legal rights developed under the Human Rights Act of 1998 have the potential to shift Britain's constitutional arrangements in a new direction. The Court of Appeal in October 2001, in a series of significant judgments, outlined the significance of the Human Rights Act in terms of the powers of the courts to issue injunctions in matters of planning disputes.⁵⁸ Issues of proportionality need to be considered by the courts before an injunction may be exercised under the discretionary powers of the courts to issue

52. Section 77 of the Town and Country Planning Act 1990 amended by the Town and Country Planning (General Development Procedure) (Amendment) (England) Order 2009 (SI 2009/453). Circular 05/00 Planning appeals procedures (including inquiries into called-in planning applications). The Planning Inspectorate: Procedural Guidance: Planning appeals and called-in planning applications PINS 01/2009 (London, 2009).

53. Section 78 of the Town and Country Planning Act 1990 amended by the Town and Country Planning (Hearings and Inquiries Procedure) (Amendment) (England) Rules 2009 (SI 2009/455).

54. *R. (on the application of Alconbury Dev. Ltd.) v. Sec. of State for the Env't, Transport, and Regions*, [2003] 2 A.C. 295, 325 at ¶ 70 (D.C. 2001) (appeal taken from Q.B.).

55. *See id.* at 305.

56. *Id.* at 333, ¶ 97.

57. *Id.* at 300.

58. *S. Bucks Dist. Council v. Porter*, [2004] UKHL 33 (appeal taken from [2003] EWCA Civ. 687). *See also* Environmental Data Services, Report 323, 57, <http://www.ends.co.uk/index.htm>.

injunctions for threatened breaches of the law.⁵⁹ This is one example of the importance of the rights culture becoming an integral part of the judicial process.

Professor Ewing notes the danger of the unelected (judges) making important decisions over the elected (ministers):

We now have a constitutional system in which the output of the democratic process can avoid successful challenge and possible censure only if it can pass a test of democracy developed by a group of public officials who have escaped all forms of democratic scrutiny and accountability.⁶⁰

The essence of such a danger appears to be addressed in part by the self-limitations on judicial powers set out in *Alconbury*. The potential for conflict between the principle of democratic decision-makers and judges is at the centre of the *Alconbury* decision, as Lord Hoffmann explained:

There is no conflict between human rights and the democratic principle. Respect for human rights requires that certain basic rights of individuals should not be capable in any circumstances of being overridden by the majority, even if they think that the public interest so requires. Other rights should be capable of being overridden only in very restricted circumstances. These are rights which belong to individuals simply by virtue of their humanity, independently of any utilitarian calculation. The protection of these basic rights from majority decision requires that independent and impartial tribunals should have the power to decide whether legislation infringes them and either (as in the United States) to declare such legislation invalid or (as in the United Kingdom) to declare that it is incompatible with the governing human rights instrument. But outside these basic rights, there are many decisions which have to be made every day . . . in which the only fair method of decision is by some person or body accountable to the electorate.⁶¹

59. M. Purdue, *The Human Rights Act 1998, Planning Law And Proportionality* Vol. 6(3) ENVIRONMENTAL LAW REVIEW 161-173, 171.

60. K.D. Ewing, *The Unbalanced Constitution*, in SKEPTICAL ESSAYS ON HUMAN RIGHTS 116-17 (Tom Campbell, K.D. Ewing & Adam Tomkins eds., Oxford Univ. Press 2001).

61. R. (on the application of *Alconbury Dev. Ltd.*) v. Sec. of State for the Env't, Transport, and Regions, [2003] 2 A.C. 295, 325 at ¶ 70 (D.C. 2001) (appeal taken from Q.B.).

HYBRIDIZATION—A CASE STUDY OF JAPAN

Japan⁶² is a good example of how different legal systems may become intertwined with interesting results in terms of process, procedures and the role of law and lawyers.⁶³ The idea of Japan as a case study of the reception of foreign law is not new.⁶⁴ There are differences in opinion as how to interpret and recognise Japan's legal system. Some scholars favour an emphasis on the distinctive way Japan's culture adopts legal rules and applies procedures and processes in a unique way.⁶⁵ Others see the rules as little different from other legal systems that have adapted foreign imports and focus on the common nature of legal rules and their practices. This has given way to a long debate about law and its reception. Japan has not disappointed scholars who wish to follow different perspectives. It is one of the few developed industrial societies that built its development around legal changes that allowed economic growth within the parameters of Japan's national economy and

62. I am very grateful to Dr Michael Reddish and Michael Winning for their inspiration and ideas on Japanese law. Both have co-taught on the Japanese Law and Culture module at the University of Warwick. They have provided useful references on Japanese Law. I am greatly in their debt. I am also grateful to countless students of Japanese law who have enlivened my understanding as a response to the lectures delivered in the module. Final thanks to Professor Michiatsu Kaino of Waseda University, Tokyo for his support and friendship throughout many years.

63. See e.g., JAPAN: ECONOMIC SUCCESS AND LEGAL SYSTEM (Harald Baum ed., De Gruyter 1997); LAWRENCE BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990 (Univ. Wash. Press 1996); HERBERT P. BIX, HIROHITO AND THE MAKING OF MODERN JAPAN (HarperCollins 2000); KENT E. CALDER, CRISIS AND COMPENSATION (Princeton Univ. Press 1988); RON DORE, TAKING JAPAN SERIOUSLY (Athlone Press 1987,); JOHN O. HALEY, THE SPIRIT OF JAPANESE LAW (Univ. Georgia Press 1998); DAN FENNO HENDERSON, CONCILIATION IN JAPANESE LAW, TOKUGAWA AND MODERN (Univ. Wash. Press 1965), JOHN MAKI, COURT AND CONSTITUTION IN JAPAN (Univ. Wash. 1964); LAW IN JAPAN (A. Von Mehren ed., Harvard Univ. Press 1963); CHIE NAKANE, JAPANESE SOCIETY, REVISED EDITION (Penguin Publishing 1973); MASAO MARUYAMA, STUDIES IN THE INTELLECTUAL HISTORY OF TOKUGAWA JAPAN (Univ. Tokyo Press 1974); MASAO MARUYAMA, THOUGHT AND BEHAVIOUR IN MODERN JAPANESE POLITICS (Oxford Univ. Press 1963); YOSHIYUKI NODA, INTRODUCTION TO JAPANESE LAW (Univ. Tokyo Press 1976); T.J. PEMPEL, REGIME SHIFT (Cornell Univ. Press 1998); M. RAMSEYER & N. NAKAZOTO, JAPANESE LAW: AN ECONOMIC ANALYSIS (Univ. Chicago Press 1999); KOSEKI SHOICHI, THE BIRTH OF JAPAN'S POST-WAR CONSTITUTION (Westview Press 1998); HIDEO TANAKA, THE JAPANESE LEGAL SYSTEM (Tokyo Univ. Press 1982); RYUSAKU TSUNODA, SOURCES OF JAPANESE TRADITION (Columbia Univ. Press 1958); R. WARD & Y. SAKAMOTO, DEMOCRATIZING JAPAN (Univ. Hawaii Press 1987).

64. Takao Tanase, *The Empty Space of the Modern in Japanese Law Discourse*, in ADAPTING LEGAL CULTURES 187 (David Nelken & Johannes Feest eds., Hart Publishing: Oxford 2003).

65. See e.g., C. GLUCK, JAPAN'S MODERN MYTHS: IDEOLOGY IN THE LATE MEIJI PERIOD (Princeton Univ. Press, 1985); J. Mark Ramseyer, *The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 YALE L.J. 604 (1985).

business ethos. For many years Japan's lifetime employment, highly educated society and group culture succeeded in ways that far exceeded Western economies. The lesson from Japan's economic miracle has engaged economists and political scientists in an effort to explain and benefit from Japan's success.⁶⁶ Inevitably the legal system is likely to have a part to play in how Japan's economy developed.⁶⁷ It is not clear to what extent law and legal principles were a pivotal influence. It is clear that studying Japan's culture is the necessary first step in understanding why and how legal transplants have taken shape, especially in the context of the many social, political and economic transitions that Japan has undergone.⁶⁸

Japanese law has undergone at least three periods of adaptation to outside influences that are relevant to the hybridization process. In the early medieval period the pre-dominant influence came from Chinese Codes.⁶⁹ Roughly translated and adapted, they became a major influence, though their actual application and reliance is difficult to calculate. It is clear that the Chinese law had a unique quality for Japan. The influence extended beyond the formalities of law to Japanese culture. As John Haley suggests:

66. See EZRA F. VOGEL, *JAPAN AS NUMBER ONE: LESSONS FOR AMERICA* (Harvard Univ. Press 1979).

67. See Frank K. Upham, *Weak Legal Consciousness as Invented Tradition*, in *MIRROR OF MODERNITY: INVENTED TRADITIONS OF MODERN JAPAN* 48-64 (S. Vlastos ed., Univ. Cal. Press 1998).

68. See YOSHIYUKI NODA, *INTRODUCTION TO JAPANESE LAW* (Anthony H. Angelo trans. and ed., Univ. Tokyo Press 1976); CURTIS J. MILHAUPT, J. MARK RAMSEYER, & MARK D. WEST, *THE JAPANESE LEGAL SYSTEM: CASES, CODES, AND COMMENTARY* (Foundation Press 2006).

69. There are three historical periods in Japanese history: The Tokugawa Period (1600-1868), the Meiji Period (1868-1912), and the modern democratic Japanese Constitution (1946 to the present day). Earliest law books may be found in the first century AD: chronicles of the "han dynasty" and drawn from Chinese books and codes. Japanese law from the 3rd to 4th century was derived from religious practice to know the will of the Gods. 7th century Japan followed Chinese examples of national cohesion, and the need for imperial and centralised power was under threat from powerful family dynasties. Codes were modelled on China. An agrarian society beset with a strong Confucian ideal that all land and persons were under the authority of imperial authority. Taxation was redistributive but authority was given to high standing officials. A military class emerged—the samurai transferring power from the centre to local and provincial warlords. The description of feudal rule is appropriate because of the tendency of large clans to gain control and this included land and its wealth. Japanese conceptions of law were linked to early religious and philosophical influences. The Shinto (Trans. "The way of the Gods" sacred practices and beliefs)—the Japanese were a divine race and connected to the practice of ancestor worship—a great spiritual and religious experience related to the forces of nature, land, sound, and inner control. Law is related to the will of the Gods. See SOKYO ONO, WILLIAM P WOODARD, *SHINTO: THE KAMI WAY* (Tuttle Publishing, 2003), JOHN K. NELSON, *A YEAR IN THE LIFE OF A SHINTO SHRINE* (University of Washington Press, 1996).

Japan's indigenous legal order reflected the imposition of Chinese imperial institutions and concepts of law and governance not as a result of external pressures as in other parts of Asia but rather by indigenous rulers in a kinship-based society in which both deity and rule remained particularistic. Between the fifth and eighth centuries these rulers recast tribal Japanese communities only partially into what they designed as a variant of a sinofield state. Their introduction of imperial Chinese law along with a written language, religion, technology and the arts recreated Japanese civilization. For a millennium law was in effect defined in terms of imperial Chinese notions.⁷⁰

Consequently the framework for the study of Japanese law requires an understanding of Japan's culture, religious beliefs and practices as well as formal law itself.⁷¹

The second major influence is generally described as the Meiji period. Japan was anxious to adapt its largely feudal society to a modern market economy. The adaptation of German and French Codes was undertaken first through translations and then through choices made in terms of the needs of Japanese society and its cultural requirements. The adoption of largely German Codes accorded with authority under the law and the concept of "rule by law" (*Rechtsstaat*). The latter provided an important underpinning to the Imperial Japanese Constitution 1889. Modern in construction and recognising an elected government and limited separation of powers between legislature and judiciary, the Meiji Constitution vested considerable powers in the Emperor, a divinity of power defined by hereditary male lineage. The Emperor had legislative powers and had authority to rule with supreme command of the army and the right to declare war, make peace and conclude treaties. The authoritarian order reflected in the Meiji Constitution preserved imperial power until Japan's defeat at the end of the Second World War. Part of the Meiji legacy endures through the various Civil and Criminal Codes and their procedural supplements, as part of the law relating to civil and criminal matters in Japan.

The third major influence that Japan came under was less out of choice and more of necessity. The closure of the Second World War and Japan's defeat left the General Headquarters of the United States with the necessity to engage in constitutional drafting.⁷² The Japanese

70. JOHN O. HALEY, *THE SPIRIT OF JAPANESE LAW* 7 (Univ. of Georgia Press 1998).

71. J. MARK RAMSEYER & MINORU NAKAZATO, *JAPANESE LAW: AN ECONOMIC APPROACH* (Univ. of Chicago Press 2000).

72. The United States Government through the objectives of the Potsdam declaration required constitutional reform. See State-War-Navy Coordinating Committee, *SWNCC-228: Reform of the Japanese Governmental System*, ¶ 1 (Nov. 27, 1945),

Constitution 1946 provided a rich Anglo-American influence into the heart of Japanese legal society. The three pillars in which the Constitution was based included the rule of law and individual human rights; the renunciation of war or pacifism (Article 9)⁷³ and the development of democratic government outside the control of the Emperor who became under the 1946 Constitution a symbol,⁷⁴ in marked contrast to his Imperial status in the Meiji Constitution (1889).⁷⁵ A further extension of Western democratic influence is that the 1946 Constitution defines sovereign authority in terms of the people of Japan rather than the Constitution itself. This is a clear shift in Japanese obedience from authority and law under an Emperor under the Meiji Constitution of 1889, to the democratic choices of the people in elected government. Under the 1946 Constitution, Japan has emerged as a democratic country with economic and industrial achievements that have made it the second largest economy in the world.⁷⁶

The effects of the 1946 Constitution are regularly debated in Japan. One focus is on the Rule of Law, a product of Anglo-American jurisprudence and the rule by law (*Rechtsstaat*), an influence from German law. The blend of universal principles found in the Rule of Law and Japan's own analysis of rights and liberties makes for an interesting analysis. Japan's attitude to rights is not comparable with the Western approach to individual rights of citizen's against state power. Constitutional lawyers will also readily recognise that the role ascribed to the Japanese Constitution to provide checks and balances on unlimited executive power through a superior status given to the Constitution is not necessarily well understood in Japan. The Japanese Constitution also has an element of paradox in its construction. Article 81 recognizes the concept of judicial review, vesting the Supreme Court as "the court of last resort with power to determine the constitutionality of any law, order, regulation or official act."⁷⁷ In contrast, Article 41 provides that

<http://www.ndl.go.jp/constitution/e/shiryō/03/059/059tx.html> (last visited Feb. 21, 2010). See also Hideo Tanaka, *A History of the Constitution of Japan of 1946*, in *THE JAPANESE LEGAL SYSTEM* (Hideo Tanaka & Malcolm D.H. Smith eds., Univ. of Tokyo Press 1976.).

73. KENPŌ, art. 9 ("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 a means of settling international disputes. 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 the belligerency of the state will not be recognised.")

74. HERBERT P. BIX, *HIROHITO AND THE MAKING OF MODERN JAPAN* (Duckworth 2000).

75. MEIJI KENPŌ (1889).

76. Percy R. Luney, *The Constitution of Japan: The Fifth Decade*, 53 *LAW & CONTEMP. PROBS.* Nos. 1 & 2 (1990).

77. KENPŌ, art. 81.

the Japanese Diet is the highest organ of state power and the “sole lawmaking organ” of the State.⁷⁸ The ability of Judges to “make Law” when interpreting it is open to conjecture. This point is particularly important when interpreting the Japanese Supreme Court where there are a relatively small number of cases.⁷⁹ Hybridization is an important way to examine legal and social processes at work that highlight many important developments. The role of examining the hybridization process is to perceive how change is adapted through different influences—some social and economic others legal and constitutional.

Another focus in Japanese legal studies is on the relatively low number of lawyers in Japan compared to equivalent countries and the small size of law firms that are mainly situated in Tokyo. Foreign lawyers are often confronted with many barriers to legal practise in Japan and there is hot debate about its apparently low litigation rates. Some Japanese scholars view this as due to apparent differences in attitude to

78. KENPŌ, art. 41.

79. To date there have been only eleven Supreme Court cases (10 reported and one recently decided and unreported decision) in which an official act has been held to be unconstitutional. They are as follows: 11 Keishu 1593 (Supreme Ct. Grand Bench, 28th November 1962), the case on confiscation from the third party; 3 Keishu 265 (Supreme Ct. Grand Bench, 4th April 1973); the criminal case on patricide; 4 Minshu 572 (Supreme Ct. Grand Bench, 30th April 1975), the case on restriction on establishing pharmacies; 3 Minshu 223 (Supreme Ct. Grand Bench, 14th April 1976), a case on equality of voting right for the House of Representatives; 5 Minshu 1100 (Supreme Ct. Grand Bench, 17th July 1985), a case on equality of voting right for the House of Representative; 3 Minshu 408 (Supreme Ct. Grand Bench, 22nd April 1987), the case on restriction on division of woodland in joint ownership; 4 Minshu 1673 (Supreme Ct. Grand Bench, 2nd April 1997), the Yasukuni Donation case; 7 Minshu 1 (Supreme Ct. Grand Bench, 11th September 2002 the case on restriction of state compensation for postal service; 7 Minshu 2028 (Supreme Ct. Grand Bench, 14th September 2005), the case on voting right of those who living abroad; 7 Minshu 1789 (Supreme Ct. Grand Bench, 4th June 2008), the case on nationality of an illegitimate child; (Supreme Ct. Grand Bench, 20th January 2010). The eleventh the case on *Sorachibuto* Shrine is unreported has not been published but was decided in 2010.

Of the ten published cases, there are three on equality of voting rights; three on economic freedom, one on separation of the state and religion and another on patricide and its treatment compared to ordinary homicide, one on the restriction of state compensation for postal services and one on nationality law. The tenth case, the case on nationality of an illegitimate child; (Supreme Ct. Grand Bench, 20th January 2010) involving the Supreme Court decision to strike down an official act was made on June 6th 2008. The case concerned a nationality law of the Diet involving a challenge by ten plaintiffs born of a Filipino mother but with a Japanese Father. In each case the parents were not legally married and when the plaintiffs filed for Japanese nationality they were turned down. Under Article 14 of the Japanese Constitution, there is a guarantee of equality. There were estimated to be tens of thousand of Japanese children with similar claims. The Supreme Court considered that different attitudes to family life and parental rights now prevailed in Japan. The decision was by majority opinion. There was a general discussion as to how legitimacy might best be treated—through judicial discretion or through the need for legislation.

law such as found in the social-cultural background of the Japanese. Kawashima argues:

Traditionally, the Japanese people prefer extra-judicial, informal means of settling a controversy. Litigation presupposes and admits the existence of a dispute and leads to a decision which makes clear who is right or wrong in accordance with standards that are independent of the wills of the disputants. Furthermore, judicial decisions emphasize the conflict between the parties, deprive them of participation in the settlement, and assign a moral fault which can be avoided in a compromise solutions.⁸⁰

Kawashima's emphasis on compromise and the will of the parties underpins important elements of Japanese group culture and the preference not to lose face or avoid the primary intention of the parties. This construction of Japanese attitudes to law and authority claims a long inheritance back to earliest legal history and is reminiscent of the feudal society and agricultural roots of pre-industrial Japan. Kawashima's analysis is strongly contested by John Haley, who argues that the Japanese are no more reluctant to litigate than in any other society.⁸¹ Haley has found compelling evidence to show that reluctance to litigation may not be inferred from any cultural stereotype but from systemic and procedural causes, such as delays in trials, the relatively small number of lawyers, jurisdictional barriers that favour mitigation rather than litigation, and the limited range of remedies available from Japanese courts.⁸² However, the most serious limitation is the absence of court powers of contempt to enforce decisions.⁸³ The debate between Kawashima and Haley is indicative of the benefits of dialogue over the effects of hybridization in legal systems.⁸⁴ Kawashima's attempt to link Japan's social and economic culture to the apparently low litigation rate is not particularly successful in the light of Haley's analysis. Reconciling both approaches is possible if Kawashima is interpreted to highlight the importance of understanding Japan's culture. Haley shows how there are many aspects at work in the procedures and processes of

80. T. Kawahsima, *Dispute Resolution in Contemporary Japan*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 41-59 (Arthur Taylor von Mehren ed., Harvard Univ. Press 1963).

81. John O. Haley, *The Myth of the Reluctant Litigant*, 4 *J. JAPANESE STUDIES* 359 (1978).

82. N. Urabe, *Rule of Law and Due process: A Comparative View of the United States and Japan* in P. LUNEY AND K. TAKAHASHI, EDS., *CONSTITUTIONAL LAW* (University of Tokyo Press, 1993) 174-78, 180-83.

83. J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan* 18 *J. LEGAL STUDIES* 263 (1989).

84. Takao Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, 24 *LAW & SOC'Y REV.* 651 (1990).

the legal system. Haley suggests in *Authority without Power* that the relative weakness of many forms of law enforcement in Japan has a root in the separation of authority from power.⁸⁵ The consensual form of Japanese governance is based on a high dependence on informal mechanisms of social control and a dependence on extralegal mechanisms.⁸⁶

CONCLUSIONS

Global markets have been a major force in shaping the import and export of legal systems. Japan provides an example of how codes, translated from France and Germany, were used at the end of the nineteenth century during the Meiji period to speed up the economic process and engage with new technology. Sharing analytical ideas that may be used in a global setting is a dominant influence in approaching legal problems. In recent times, particularly suited to this approach are issues associated with climate change, the application of sustainable development and more recently issues connected with financial regulation. Privatisation and regulation have also provided the development of market-orientated institutional changes that have been applied throughout the world. Defining public goods and services and their delivery through private sector companies together with contracts and licenses set interesting points of comparison between common and civil law systems.⁸⁷ This is a reflection of the different constitutional traditions between the United Kingdom, for example, and France. What is the role of law and regulation in the adaptation of different ideas about regulation under privatised utilities? The question inquires into the extent to which hybridization is taking place and how different elements of universal and public services can be examined in differently constructed markets. Legal culture provides an open-ended way of exploring common experiences. War and economic emergencies are also part of an on-going debate on accountability and measures to prevent or deter corruption. Systems of regulation and criteria of effectiveness achievable objectives need to be considered for within the constitutional framework. Comparative law faces many challenges when confronted

85. JOHN O. HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* (Oxford Univ. Press 1991) [hereinafter HALEY, *AUTHORITY WITHOUT POWER*]. See also Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 *LAW & SOC'Y REV.* 461 (1986).

86. HALEY, *AUTHORITY WITHOUT POWER*, *supra* note 83, at 14. Japan's introduction of citizen juries in the Summer 2009 is indicative of forging links with the general public as part of the justice system.

87. T. Prosser, *Marketisation, Public Service and Universal Service*, in *ADAPTING LEGAL CULTURES* 223 (David Nelken & Johannes Feest, eds., Hart Publishing 2003).

by such issues. It must be rooted in an understanding of different legal techniques and analysis; it must be capable of comparing and analysing different procedures and legal cultures; and it must be capable of providing a critical analysis of what works best and why. Evaluating constitutional strengths and weaknesses requires an understanding of what accountability means. Constitutional scholars have a specific focus on drawing distinctions between legal, economic and political forms of accountability as well as their need to be distilled in a way that reflects the changing dynamics of the legal understanding of the comparative law of human rights. Hybridization—a process of operating convergent and even divergent ideas is common and at work across the world. The European Union affords a glimpse of how different processes combine to bring hybridization to reality. While policy is central to the work of the European Commission, implementation is devolved to many agencies, institutions, networks and contracting parties within Member States. There is no single overriding method; different layers of administration and structures have to be adapted in the process. There are, however, common themes that emerge. In many instances the main operating influences have come from the judiciary. In the United Kingdom the values of the rule of law are often called in aid of an analytical approach to rights. It is striking how within the European Union civil and common law methodologies are increasingly intertwined. In the United Kingdom the traditional oral approach to presenting cases has been carefully incorporated into a case management system for civil and criminal courts that pays increasing attention to affidavits and written skeleton arguments. Conversely in many civil law countries, particularly France there is an increasing recognition of the values of oral argument and presentation of issues. As enlargement of the European Union takes place Eastern and Western European legal systems are increasingly coming together. There is a “judicial dialogue” at work between the differing judicial values of the new entry countries and the common identity found in the European Courts in Luxembourg and Strasbourg. This encompasses the scope of EU law and also the increasing role of human rights.

Hybridization provides a setting for thinking about the processes at work in the import and export of ideas. It is an important way to examine legal and social processes that may point out many similarities and differences in experiences. Legal transplants do not always have to be successful or indeed achieve what may have been their original intention. The adaptation of different legal families, particularly the common and civil law provides a setting for future scholarship that addresses social, economic and political problems from different perspectives. The result may provide common understandings and novel

ways to meet the challenges of the future. Setting priorities and transposing ideas is the work of many different scholars. Constitutional scholars have an important role in explaining contradictions, outlining the restraints on the abuse of power, and ensuring that authoritarian systems are made more transparent and accountability.

