

USALI Perspectives

In Search of a Rule of Law Model? Try Japan

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Many US citizens were disappointed by the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, but only one had reason to be personally betrayed by the result, Republican Senator Susan Collins of Maine. In order to get her vote in his confirmation battle, Justice Brett Kavanaugh promised Collins that he would not vote to overturn *Roe v. Wade*. Then he did. Justice Samuel Alito years earlier made the same promise to the late Senator Ted Kennedy, and similarly broke it.

A politicized judiciary is foundational to the US legal system, not aberrational. It is the reason I argue that -- constant preaching about the "rule of law" notwithstanding -- the US is a poor exemplar of it. Japan is a much better model. My topic is not abortion, therefore, but the relative degree of "rule of law-ness" of the US and Japan.

Although many developed countries, including Japan, have legal reform programs as part of their diplomacy, the US is the only one that makes

engendering a rule of law legal system in benighted countries a core aspect of its foreign policy. The US government, both the Executive and Congress alike, promotes the rule of law ideal, presumably with confidence that the US exemplifies precisely that ideal. Most citizens interested in the subject likely would agree that the US at least aspires to the rule of law. Going a step further, it is also likely that most observers of any nationality will be surprised by my claim that, at least between Japan and the US, it is Japan that should be seen as a model for the rule of law, if indeed such models are needed or useful.

There is an immediate and insurmountable obstacle to making such a claim: the definition of the rule of law, which may be as elusive as those of “love” or “beauty,” perhaps particularly so for lawyers. I will use here the dual metric of whether courts follow rules and the underlying political question of whether the populace wants them to do so. Our righteous rhetoric notwithstanding, the US answer to both is clearly negative. Whatever we say or think about law and rules, we have not structured our legal systems to promote rule following. Over half of the states select judges, who in some instances do not even have to be legally trained, via popular elections — some partisan, some non-partisan. The creation of the federal judiciary is not as directly political, and the nominees are generally

of high quality in terms of training and experience. To argue that the process is guided solely by candidates’ legal ability, however, would be farcical. If it were, media reports of exchanges such as those between Collins and Kavanaugh and Kennedy and Alito would be implausible, and discussions of judicial decisions would not consistently include reference to the identity of the president who appointed the judge.

The political valence of the Japanese judiciary could not be more different. Judges are almost universally appointed at an early age from among the best and brightest of law school graduates. They are then regularly transferred to different parts of the country and assigned different areas of law, becoming eventually members of a tight bureaucracy, more similar to the career military or State Department Foreign Service than any federal or state judiciary. They generally serve until retirement. They move up the bureaucracy with constant training and evaluation intended to inculcate the practice of following “the rules” as interpreted by the General Secretariat of the Supreme Court, itself a self-selected elite of the legal elite. The selection of the fifteen justices of the Supreme Court is different. They are appointed by the Cabinet, and the unvarying practice has been for five to be career judges while the rest consist of private attorneys,

former government lawyers including prosecutors, legal academics, and one diplomat. The result has been characterized as a “nameless, faceless judiciary.”

Of course a “nameless, faceless judiciary” can hold strong political preferences and biases, and the conventional wisdom is that the Japanese judiciary is conservative. I have argued elsewhere that in this case the conventional wisdom is mistaken and that the Japanese judiciary has quietly had a fundamentally progressive influence on Japanese society. For the purposes of this essay, however, let’s assume that I am wrong and that the Japanese judiciary is conservative. That alone does not mean it cannot or will not follow the rules. It means simply that the inevitable ambiguities in the rules will be resolved with a conservative bias. More importantly, in the context of a talented, stable, and disciplined bureaucracy, the rules will be interpreted and applied consistently. The rules will, in other words, be followed, and when the rules are changed through the legislative process,

the new norms will also be bureaucratically interpreted and followed. From the perspective of my simplified definition above, this is as close as a society is likely to get to the rule of law. It is a dramatic contrast to the American judiciary.

It does not follow that the Japanese judiciary is “better” than the US one by some abstract jurisprudential standard. Nor does it mean that the US would be better served by a Japanese-style judiciary, or Japan less well served by an overtly political one where elections to the national Diet are partially determined by the candidates’ promises regarding judicial appointments. Indeed, recent reforms have attempted to make the Japanese judiciary more responsive to popular opinion.

What it does mean, however, is that when we describe the United States as a paradigm, even a failed one, of the rule of law, we are ignoring a much more suitable model. We also threaten to render “the rule of law” as elusive as “love” or “beauty”: in other words, analytically worthless.



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