



Reading material for Harald Baum and his colleagues: The researchers use extensive studies of literature, including commentaries on Japanese civil law, to analyze the legal reality in Japan.

Debating the Japanese Approach to Dispute Resolution

The Japanese are far less likely to settle their disputes in a court of law than Europeans or Americans. Is this a product of their mentality? Do they know of better ways of resolving conflict? Or are they lacking in legal alternatives? These are some of the questions being explored by **Harald Baum** and his colleagues in the Japan Unit at the **Max Planck Institute for Comparative and International Private Law** in Hamburg.



TEXT BIRGIT FENZEL

Let there be eternal peace and friendship between His Majesty the King of Prussia and His Majesty the Taikun of Japan, their heirs and successors..." The agreement reached 150 years ago between the Prussian envoy Friedrich zu Eulenburg and his Japanese host, and enshrined on January 24, 1861 in the German-Japanese Treaty of Amity, Commerce and Navigation, laid the foundation for a bilateral relationship that has borne many fruits – not least among them an enthusiastic following in Japanese society for “Baumkuchen” (tree cake) and other classics of German culture. Conversely, there are few households in Germany that do not own goods imported from Japan.

For a long time, Japan was Germany's most important economic and trade partner by far in the Asian region. It has since come to share this role with China. Despite this fact, experts lament a lack of interest in the old friend across the seas. “Especially our knowledge of Japanese law, in Europe at least, is still not commensurate with the country's sustained economic and political importance,” says Harald Baum, a legal expert and founding editor of the Journal of Japanese Law at the Max Planck Institute for Comparative and International Private Law in Hamburg. Under his leadership, scientists in the Japan Unit are studying, documenting and analyzing the diverse origins and development of the

Japanese legal system in order to close this gap in our knowledge.

THE GERMAN CIVIL CODE AS A MODEL

For the scientists in Hamburg, whose primary focus is on a comparative study of the law, the country offers exciting insights into how norms that originated in the West are applied in a different culture and social system. As Professor Baum points out, *déjà vu* is a common feeling among legal experts studying Japanese law. Among the examples he cites are civil law, which mirrors many aspects of its German counterpart, and financial market law, which includes many familiar features of the US legal



system. In fact, many of the seemingly familiar sections of Japanese law derive from the adoption of Western law, a process that, according to legal historians, took place in two main thrusts.

The first of these came at the end of the 19th century, during the time of the Meiji Restoration. The then new government was convinced that a new legal system was required in order to efficiently modernize the economy, and it looked to the West for inspiration and reform. French, English and above all German law provided the model they sought. “In the space of just three decades they established a new, fully functional legal system with all of its attendant institutions,” says Harald Baum, describing the impressive pace at which the Japanese reformers progressed. “It was a major cultural achievement that has yet to be equaled.”

The fact that German legal experts in particular find many familiar passages in Japanese civil law is something Baum attributes to the work of two reform commissions that formulated the new laws on the government’s behalf and took as their model the German groundwork for the Civil Code. The reformers chose to give preference to German law rather than its French counterpart, on which the reform process had initially been focused. In Harald Baum’s opinion, there were not only

political, but also technical reasons for their choice. “Back then, the German Civil Code that was just emerging was considered to be more modern than the French Civil Code, which was almost a hundred years older.”

LEGAL IMPORTS IN A DIFFERENT CULTURAL ENVIRONMENT

The numerous elements of US law, in contrast, were not imported until much later. This second great reception of Western law in Japanese history was, however, rather less voluntary. In the process of “democratizing” the Japanese economy after World War II, the Allies broke up the huge family-owned industrial concerns, implemented a land reform, created a new constitution and refashioned large parts of the country’s commercial law. “All of this took place under strong American influence, and often directly mirrored the laws of the United States, which, in some cases, were adopted word for word,” explains Professor Baum.

By its very nature, the resulting amalgam of legal systems makes Japanese law an attractive field for scientists such as Harald Baum and his colleagues in Hamburg to conduct their comparative studies in. Their work is by no means redundant simply because many sections of German and Japanese law

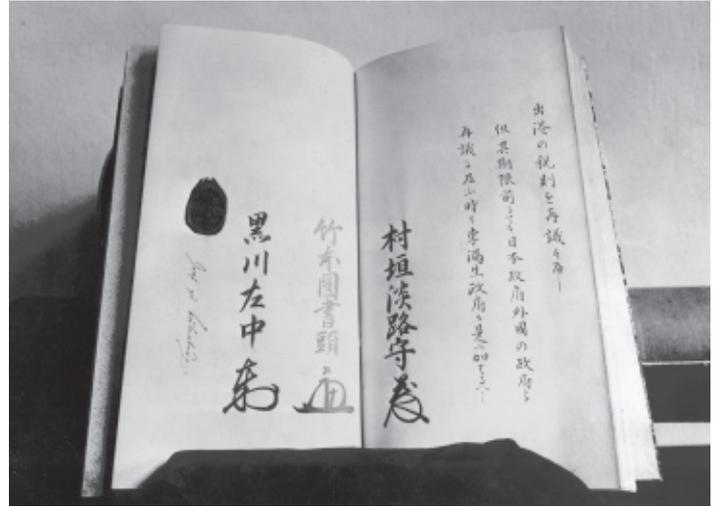
coincide. “We must not forget that these familiar features of modern Japanese law are imports that are being applied in a cultural, socio-political and social environment and value system that differ markedly in their traditions from those of the countries of origin,” Baum emphasizes.

Nevertheless, proponents of his discipline are still faced with the question of how to approach a comparative study of Japanese law in a manner that will provide a meaningful interpretation of the legal reality in the world’s fourth-largest island nation. For a long time now, there has been a lively debate among international experts over the fundamental methods by which future legal comparisons should be drawn. “It’s a question of whether, over and beyond traditional functional comparisons, it is also necessary to compare legal cultures,” explains Baum.

Comparisons can be made to serve variously accentuated goals. On the one hand, in legal practice, when a German court decides a case, it is frequently necessary to consider how a specific social problem, circumstance or situation is dealt with under a foreign legal system – for example when it comes to ruling on maintenance payments for the children of a divorced couple, one of whom is a foreign national living abroad. Often, particularly in the Euro-

Modernism and tradition exist side by side in Japanese cities. The two facets are tightly interwoven: in technology, the country has a lead over almost every other nation, yet in other areas, tradition still prevails. Legal experts dispute the extent to which traditional attitudes dictate the Japanese approach to litigation (left).

Documentary proof of German-Japanese friendship: An original copy of the 1861 treaty of amity and commerce between Prussia and Japan, signed by Count Friedrich zu Eulenburg (right).



pean legal area, lawyers find the same or similar solutions as those that apply in their own domestic law. In this functional approach, a comparison is generally directed at the common features of the systems in question.

However, a comparative study of a foreign legal system can go further than this to facilitate a fundamental understanding of another legal culture. In this case, the rules of law are considered as a condensed version of the culture in question, and the legal system as a social subsystem that cannot be studied in isolation from its social environment. Taking this view of a foreign legal system, it is more likely to be the differences that take center stage.

“Bearing in mind that the traditions of Japanese law are fundamentally of non-European origin, it is preferable, in my opinion, to broaden one’s perspective to include the cultural and institutional context,” says Harald Baum. After all, the members of the Japanese reform commission at the end of the 19th century did not simply copy Europe’s legal templates and translate them. Instead, they used a broad comparison of legal systems as a basis and integrated elements of differing systems into newly drafted codes of law that took traditional values into account. The researcher cites the motto of the Meiji government’s legal re-

formers: “Wakon yōsai – Japanese spirit, Western knowledge.”

Together with his colleague Moritz Bälz, Professor of Law at Frankfurt University and co-editor of the *JOURNAL OF JAPANESE LAW*, he recently edited a comprehensive reference book of Japanese commercial and economic law. The two scientists devoted an entire chapter to a two-fold consideration of legal realities from two perspectives.

THE JAPANESE RARELY GO TO COURT

On the one hand, there is the question of how the Japanese conduct themselves in cases of dispute. Their behavior differs from that of most Europeans and Americans insofar as the Japanese are far less likely to take disputes to court. Legal experts use the term “litigation density”: there is a far lower density of litigation in Japan in terms of both disputes between citizens and conflicts between citizens and corporate enterprise. “The courts hand down far fewer business-related judgments than in Germany and, above all, in the US,” explains Baum.

This is where the second perspective from which Baum and his colleagues view Japanese legal reality becomes important: the issue of how the law is implemented in the relationship between

the state and corporate enterprise in matters of business, such as the admission of new financial products. At least until a few years ago, this field was mainly the preserve of bureaucrats whose influence and scope were and still are considerable.

“Anyone who wants to export to Japan or set up or take over a business there should have a clear understanding of the role and importance of bureaucrats and their ability to influence the proposed project,” the expert stresses. At least until fairly recently, Japanese business affairs have been conducted not so much under the guidance of the country’s laws as at the discretion of its administrators. “The process is predominantly informal and, as such, lacks transparency, and is rarely subject to legal jurisdiction,” says Baum.

To this day, this informal application of the law is often decisive in current practice, even if it does not take place on quite the same scale as before. Sometimes it takes the form of written decrees, but usually it is a matter of verbally communicated “suggestions.” These are not of any legally binding nature, but are nevertheless complied with for fear of sanctions of some other kind. It may be that permits will be denied in other matters, or that transactions become mired in other bureaucratic impediments. >

“This form of ex-ante regulation has, however, been cautiously replaced for some years now by the ex-post control of market behavior by the courts,” observes Harald Baum. In the latter case, access to the courts and the efficiency with which justice is served play a special role. For this reason, the major process of judicial reform that began in Japan a few years ago is essentially aimed at drastically increasing the number of legal practitioners.

Impetus for the reforms was provided by the sustained structurally induced economic crisis that has afflicted Japan since the early 1990s. The

close interaction between bureaucracy and business that had long functioned successfully was no longer effective in the open market conditions engendered by a globalized economy. The valiant reform of this regulatory model was intended to help Japan overcome its economic crisis.

WHY ARE CONFLICTS OFTEN RESOLVED OUT OF THE COURTS?

In the private sphere, the Japanese still rarely resort to the courts. Even though the Civil Code has made provision for them to do so for 100 years now, it

scarcely occurs to them to go to court over the height of their neighbor’s fence – a not uncommon occurrence here in Germany.

Just why the Japanese evidently prefer to settle private conflicts out of court has long provided legal experts with food for thought – and for argument. “A sometimes quite intensive debate has been raging for over 40 years,” says Harald Baum. It was triggered, he adds, by a paper published by the legal sociologist Takeyoshi Kawashima in the 1960s. His relatively short exposition on “Dispute Resolution in Contemporary Japan” has influenced practically

“We should stand by our programs as far as possible”

Earthquake, tsunami, nuclear meltdown – the catastrophic events in Japan had a deep impact on Harald Baum and his colleagues at the Max Planck Institute for Comparative and International Private Law, not least because many of the staff in the Japan Unit feel not just a professional but also a personal bond with the country.

Mr. Baum, there were a variety of festivities and events planned for this spring to celebrate the 150th anniversary of the official treaty of friendship between Germany and Japan, some of which were due to take place under the auspices of your department – what will happen now?

Harald Baum: All of us who are deeply involved with Japan and know and appreciate the country are of course particularly affected by the tragic events that have taken place. Our thoughts are with our many friends and colleagues and their families who live there. I have been impressed by

the disciplined manner in which the Japanese are dealing with the after-effects of the disaster. Under these circumstances, it is indeed difficult to celebrate and proceed with the symposia we were preparing this year in Germany and in Japan to mark “150 years of friendship Japan-Germany.” On the other hand, our Japanese friends have asked us to stand by these programs as far as possible, to demonstrate that life, including academic life, goes on. From this perspective, the various joint events, which focus on aspects of law, would seem to offer an opportunity for us to express our sustained commitment to the country and its people. With this in mind, all of the events in Germany, at least, will be held as planned.

Have there been any program changes?

Yes, there was a three-day comparative law symposium set to be held in Tokyo in mid-April with the participation of the German

Ministry of Justice and other organizations. It was intended as an academic centerpiece in Japan, but after careful consideration, and in consultation with our Japanese partners who co-organized the event, and not least on their recommendation, it has been postponed until the fall.

To what extent were your partners in Japan directly affected by the disaster?

We have since been able to make contact with all of our Japanese colleagues with whom we regularly cooperate. Fortunately, they and their families are all doing as well as can be expected under the circumstances. While the same might not, perhaps, be said for colleagues working in the natural sciences with large-scale equipment that is dependent on energy supplies, no concerns have reached us from our fellow legal researchers about projects that have been interrupted and cannot currently be continued.

every Western publication on the nature of Japanese law that has appeared since, even if the majority of authors are united in rejecting his theses.

In Baum's opinion, Kawashima was essentially advocating a cultural explanation. "In his view, for reasons of tradition, the Japanese have a less conflict-oriented awareness of the law and they don't define their actions and relationships in the form of enforceable legal positions in the same way that Europeans or Americans do." According to Kawashima, their behavior is prompted instead by the need to find a balance of interests and preserve social peace.

His theory reflects the sense of right and wrong that prevailed in Japan under the Tokugawa regime – a feudalist era of Confucianism in which the law was considered to be decreed and implemented solely by the state. "Private disputes were regarded as moral flaws with which the government concerned itself only in exceptional cases," explains Baum, describing the legal mentality that prevailed into the mid-19th century.

Against this background, Kawashima regarded the reluctance of his fellow countrymen to resort to the courts as "pre-modern." However, he anticipated that, as Japan became a more

modern and international society, its appreciation of the law would change accordingly.

Other legal experts, on the other hand, attribute the national reluctance to litigate to the Japanese judicial system itself. Chief among them is the American specialist in Japanese law John Owen Haley, who voiced his criticism of Kawashima's cultural approach as early as 1978. "In an article that has since acquired classic status, he provocatively rejected Kawashima's theses as pure myth," says Harald Baum.

In place of the vague concept of a legal mentality derived from tradition,

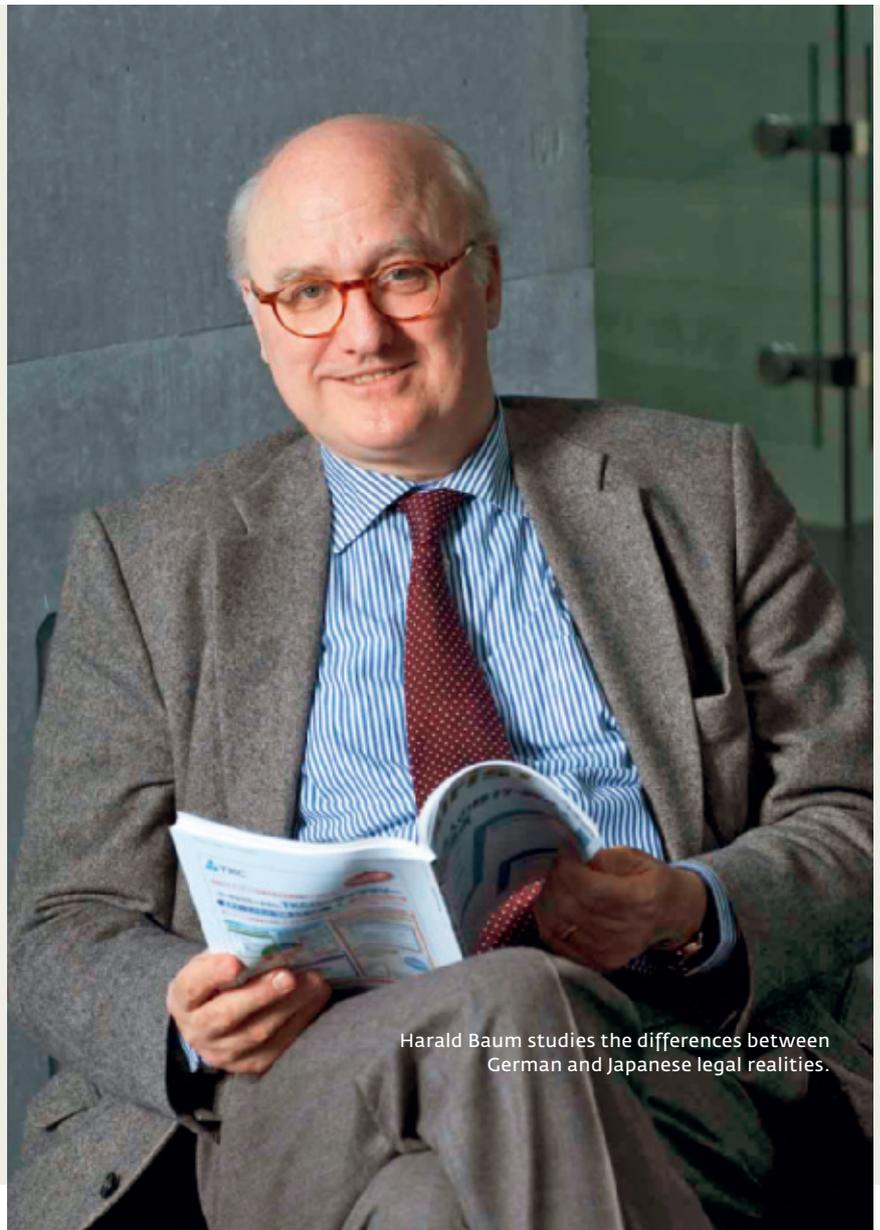
How is your joint work proceeding?

Once the initial shock wore off, our work essentially continued with the usual professionalism. This, too, reflects the impressive discipline displayed by our Japanese partners, from whom we have not heard a word of complaint.

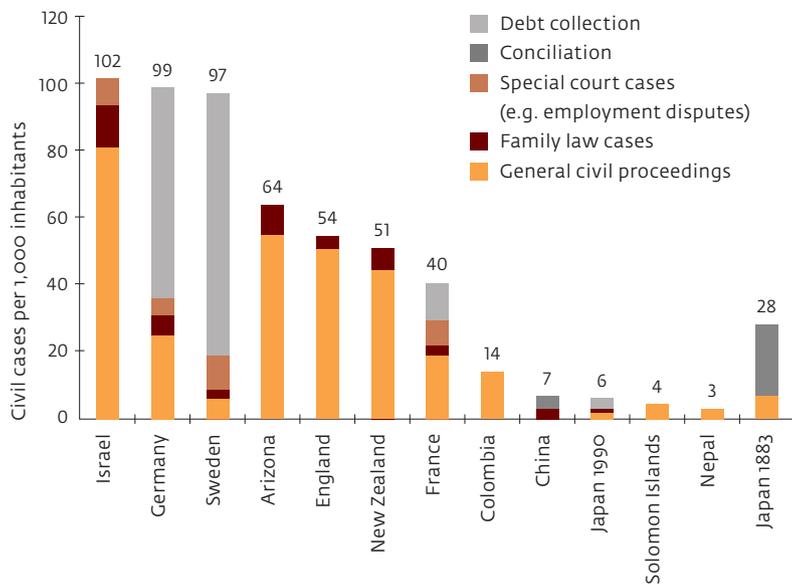
What aid and support can you offer your Japanese colleagues? Are there any concrete projects?

Of course we are all concerned with how best to help. At the institute, we suggested to our Japanese colleagues who work here that they should extend their stay. However, without exception, they politely declined, citing the duties they must attend to in Japan. Likewise, the offer to switch the symposium I mentioned earlier to Germany in order to relieve some of the burden on our colleagues in Japan was noted with due thanks, but nevertheless declined. Various German-Japanese organizations, among them the German-Japanese Association of Jurists, have set up accounts to enable their members to make donations as a means of offering at least some support for the traumatized victims at the heart of the devastation who have lost everything.

Interview: Birgit Fenzel



Harald Baum studies the differences between German and Japanese legal realities.



Compared with the citizens of other industrialized countries, the Japanese rarely turn to the courts to resolve their conflicts. This is confirmed by the above graph showing the density of civil litigation in selected countries, as well as a breakdown of the types of cases. Why there were more disputes settled in Japanese courts in 1883 than in 1990 is one of the questions Harald Baum and his colleagues would like to answer.



Haley points to specific institutional impediments that prevent the Japanese from enforcing their rights through litigation. In Haley's interpretation, the tradition of seeking consensus rather than going to court developed, not of its own accord, but as a result of skilled socio-political management.

TOO GREAT A BURDEN ON THE COURTS

On the one hand, until the legal education reforms a few years ago, the number of licensed attorneys and judges was kept artificially low by the fact that

only very few applicants were admitted to the central judicial training institute. All young jurists in Japan who wish to work as judges, prosecutors or attorneys are required to undergo training at this institute in Tokyo following their university education, as in Germany.

"For decades, the pass rate in the entrance examination was less than 3 percent of each year's applicant cohort," explains Baum. As a result, the population is, to this day, massively underprovided with lawyers in many areas of Japan and especially in the provincial prefectures, severely impeding their access to the courts. The fact that the

courts work very slowly because they are overloaded serves as a further deterrent to potential litigants. It is also very expensive to hire a lawyer.

Haley's theories as to why the Japanese shy away from litigation, despite being shared by various other Japanese legal sociologists, were initially disputed. However, 20 years after they were first published, they were officially confirmed by a representative survey commissioned by the Japanese government in cooperation with the Japanese Federation of Bar Associations and the Japanese Supreme Court. Just 18.6 percent of those interviewed were content with the way the civil justice system in Japan worked, and only 22.4 percent regarded the system as sufficiently accessible. The main reasons cited for this general dissatisfaction were the high costs of litigation and the excessive time required for cases to be heard.

THE NUMBER OF ATTORNEYS IS PRESCRIBED

Harald Baum considers a third explanation for the relative lack of litigation to be interesting, if not entirely accurate: the reluctance to go to court has also been claimed as proof, not of the weakness, but of the strengths of the Japanese justice system. The institutions designed to find extrajudicial solutions to conflicts render much litigation superfluous. The parties, it is claimed, are thus able to resolve a dispute faster and at lesser cost. What's more, the end result is often the same as that of going to court, says Harald Baum. "For that reason, in some, but not all, areas of the law, the avoidance of litigation is simply a rational economic alternative rather than the expression of a specific legal mentality."

For Harald Baum, the explanation for the comparatively low litigation density lies somewhere between these three positions. He is convinced that institutional and cultural factors interact with one another in a dialectical process, or at least serve to complement one another. Whether he is correct in this assessment will be revealed when the practical reforms of Japan's legal training system bear fruit. The number of successful candidates passing the en-

trance examination for legal internships has already risen from fewer than 1,000 per year to more than 2,000. The target is to reach 3,000 interns per year.

“It’s worth noting, however, that despite the fundamental change they are aiming for in the resolution of conflict, the authors of these judicial reforms still have no faith in the market for legal services,” adds Baum. Instead of, as in other industrial countries, al-

lowing the market to determine the rise or fall in the number of licensed attorneys, they continue to set fixed targets.

For Harald Baum and his colleagues researching in the field of comparative law, the question now is whether the reforms that have been introduced since 2000 will usher in Kawashima’s expected era of legal modernity. They are aimed at simplifying access to justice, making the litigation process

more efficient and stimulating a culture of constructive argument. “It is likely to be too soon yet to reliably estimate whether the goals of the reforms have been achieved and whether any sustained changes have occurred in the Japanese attitude to litigation,” Baum warns. “Social change, especially where it affects institutions, takes place very slowly, and often in unforeseeable ways.” ◀

GLOSSARY

Ex-ante and ex-post regulation

These terms describe two differing regulatory strategies. In the first case, access to the market by future participants and/or the introduction of new products are controlled in advance (ex-ante) by the state, which demands qualifications of both a professional and a personal nature. In the second case, market participants are controlled retrospectively (ex-post) by the courts when civil suits arise.

Meiji Restoration

1868 was a year of upheaval in Japan and marked the beginning of modernization as the country was opened up. The shogunate regime that had governed the country for nearly three centuries and kept it hermetically sealed off from the outside world was deposed by reformers who restored the Emperor (Tenno) to all positions of power – thus “Restoration.” The economy, society and justice system were all comprehensively reformed.

Comparative law

The study of the legal systems of differing countries. This usually takes the form of a so-called functional comparison, which investigates how a given social problem is resolved in other systems of law. The process concentrates mainly on the common features of legal solutions. Alternatively, from another perspective, researchers may focus on the differences in how norms are implemented in other legal systems. In this case, there is typically a greater emphasis on anthropological, cultural and other institutional aspects.

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