

Western Law in Japan: the *Antimonopoly Law* and other Legal Transplants

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I. INTRODUCTION

THIS PAPER IS A BRIEF HISTORY of the Japanese experience with legal transplants. It pays particular attention to Japan's *Anti-monopoly Law* and the events surrounding its creation. The law, which was the product of the American Occupation of Japan after World War Two, provides prime fodder for a case study of legal transplants, in part because substantial literature on the subject exists. It is not hard to see why. Japanese competition law is topical because of the post-Cold War interest in legal harmonisation, especially in the field of economic law. It is political because of successive trade disputes, particularly those between the United States and Japan.

Study of the *Antimonopoly Law* does provide some answers to policy and political questions, though the moral seems to be a mixed one. We know, for instance, that most of the economic powers of the "developed" world have had antimonopoly laws for decades; and we know that, to some degree, these laws sprang from the same source, or rather were developed with an eye to what had been achieved in other jurisdictions, particularly the United States, the innovator in this field of law. But the philosophies behind the formal statute law vary, and so does enforcement. If this essay has a practical conclusion, it is that goals such as greater international legal harmonisation may be attainable, but only if scholars and policy-makers learn more about the actual operation of competition regimes in the various countries.

Current preoccupations and political needs are not, however, the only issues that mold the academic literature on Japan's *Antimonopoly Law*. It is equally in their handling of the method and philosophy of comparative law that authors

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distinguish themselves from each other. Indeed, debates about the Occupation lead in a fairly direct order to one of the oldest problems of legal philosophy, the relationship between particular laws and practices and universal values and norms. The issue is old and has inspired some magnificent controversies, first put to paper, perhaps, by Sophocles. His *Antigone*, with all the indignation of a human rights protestor, argued the existence of a natural law, while the King more or less agreed with Hegel's dictum that whatever is should be. The question comes up, it seems, at times of great change, revolution, or war. Thus, during the French Revolution debate, Thomas Paine stood for the rights of universal man, Edmund Burke (drawing from the legal philosophy of Montesquieu) for the prerogatives of historic communities, which, he admonished us to remember, shape the lives of actual, particular men. The Enlightenment was for reason and mankind; Romanticism backed culture and nationhood. Cosmopolitan Thibault promoted civil rights based on natural law, while his opponents, Savigny and the "historical school", defended the variety of local culture, denouncing foreign implants (in this case, from revolutionary, universalist France), which they thought were destined to be abstract in the context of an organic society.

The participants in the Occupation had to deal with the question of universal and particular. Some were quite candid. General MacArthur, the man who ran the Occupation, stated:

History will clearly show that the entire human race, irrespective of geographical limitations or cultural tradition, is capable of absorbing, cherishing and defending liberty, tolerance and justice, and will have the maximum strength and progress when so blessed.¹

Scholars of the Occupation have had to decide if MacArthur's legal reform bears out his catholic idealism. Opinions have varied. T.A. Bisson, who was part of the Occupation and wrote one of the first books on the antitrust reforms in Japan, concluded that in economic matters:

... occupation policy hewed close to the line of American ideology and experience. In the wider field, it equated democracy with the individualism characteristic of the American tradition ... No account, seemingly, was taken of the root of these American concepts, no question raised in regard to the congeniality of the soil into which they were being transplanted ... A competitive economy, regulated by the government to maintain competition, Japan did not know.²

¹ Alfred C. Oppler, *Legal Reform in Occupied Japan* (Princeton, NJ: Princeton University Press, 1976) at viii [hereinafter *Oppler*].

² Quoted from, Eleanor Hadley, *Antitrust in Japan* (Princeton, NJ: Princeton University Press, 1970) at 15 [hereinafter *Hadley*].

The representation here is of an Occupation that perhaps did not realise how “American” its ideals were, and a Japan that was an inherently hostile environment for any grafts based on western individualism, grafts such as a law designed to encourage and perfect competition. Scholars and politicians have taken up this interpretation when they have needed to explain the failures or limits of the Occupations’ reforms: Japan was East, America West, and so of course the two could not really meet. Others have claimed that arguments about Japan’s “uniqueness” and “separateness from the west” are exaggerated, particularly when they are used to suggest that Japan has imported only the brand names of foreign law, entrusting the production of content to native resources and inclinations. Legal scholar Hiroshi Oda argues,

... in Japan, during the modern period, foreign law was imported and accepted fairly smoothly without any significant resistance. The gap between modern codes based on foreign law and social reality in Japan has not been as great as believed by foreign observers.³

Antimonopoly Law scholarship has marked the frontline of the “uniqueness” controversy.

Contention has centered on the law because it was perhaps the Occupation’s least successful legal reform. It was, more certainly, the change the Japanese most resisted, as a former commissioner of the Fair Trade Commission, the enforcement body of the *Antimonopoly Law*, once stated.⁴ Indeed, a commonplace of literature on international commerce is that Japan has never enforced the letter or the spirit of the *Antimonopoly Law*. The United States government has endorsed the idea, citing lax prosecution as a reason for its trade deficit.

Academic authors are left to explain the apparent impotence of the *Antimonopoly Law*. Quite often, again, they point to the “uniqueness of Japan.” Japan was different from the West: an Asian country, influenced by Confucian ideas of order, community, and authority; an intense economic upstart, which strictly coordinated its energies to catch up with the western industrialised world, but remained in some ways an amateur, lacking a mature sense of economic freedom. The presence of market concentration and the absence of greater competition were, according to this notion, pure distillates of Japanese culture. Robert A. Fearey, who served as an American foreign service officer in Japan, concluded:

... the nation’s social and economic structure have in the past worked, and ... continue to work, against the growth of the competitive system. There can be no question

³ Hiroshi Oda, *Japanese Law* (London: Butterworths, 1992) [hereinafter Oda].

⁴ Alex Y. Seita & Jiro Tamura, “Historical Background of Japan’s Antimonopoly Law” (1994) 1 U. Ill. L. Rev. 115 at 167 [hereinafter Seita].

also...that the Japanese character is in many ways better adapted to a collaborative, hierarchical system than a competitive one.⁵

But the uniqueness theme is best developed in *Antitrust in Japan*⁶ by Eleanor M. Hadley, an economist who participated in the Occupation and then made the *Antimonopoly Law* the focus of her academic career. She criticises the quote above, however her only explanation for the insufficiencies of Japan's American-inspired antimonopoly regime is that Japanese culture was inimical to it. She also paints Japanese culture in broad strokes, layering on the contrast between it and the West or the United States:

In Japan, however, with its Confucian heritage, power is not something feared or distrusted ... Power is not viewed as a problem.⁷

Discussing the statist character of modern Japan, she asserts,

In Japan there was no assertion of business leadership; there was no awareness of the extent to which market forces are capable of directing production and distribution.⁸

One wonders how Japan managed to become a rich, capitalist country despite itself.

Reading the exaggerations of Hadley's book, one catches a sense of surprised disappointment and suspects that the author, during her year and a half in Japan, had learned hard lessons about the problems of reconciling universal values and particular practices. In any case, her reasoning on this point is too simple. Arguments about Japan's basic approach to matters such as competition, community, and authority are only so helpful in elucidating the country's reaction to the *Antimonopoly Law*. National tendencies are by their definition broad and abiding inclinations, and so can hardly give a full account of something as particular and malleable as a single law—and the history of the *Antimonopoly Law* has been dynamic. Nor does reference to a few essential differences between Japanese and American culture make clear why the Japanese greeted more positively other Occupation legal reforms, many of which were more momentous, novel, and "American" than economic regulation. Finally, even if "Asian values" go some distance in explaining the Japanese reception of the law, this is an empty lesson for practical purposes. Japanese culture is not a problem trade negotiators and law reformers can solve.

⁵ Robert A. Fearey, *The Occupation of Japan, Second Phase: 1948–1950* (New York: 1950) [hereinafter *Fearey*].

⁶ Hadley, *supra* note 2.

⁷ *Ibid.* at 18.

⁸ *Ibid.* at 390.

Indeed, the best literature on the *Antimonopoly Law* spends less time talking about fundamental Japanese mores and viewpoints, but stresses instead points such as the following. First, we do not know enough about the law, its enforcement, and its impact on the behavior of Japanese companies. Ignorance and the hazards of cross-cultural judgments both preach caution. Second, perhaps the best available description of Japan's relationship to the *Antimonopoly Law* is this: ambiguous and fluid. The Japanese have kept the law on the books, ignored it somewhat, enforced it somewhat, legislated around it, and made it more stringent. In the past 20 years, they even seem to have begun to think seriously about why it is there. Third, the history of the *Antimonopoly Law* shows that it may be the multiplicity of small differences rather than great variations of cultural climate that make legal transplants so difficult. Success in supranational legal reform requires well-informed law reformers, as well as flexibility and attention to detail. Indeed, the best writers on the subject have traits in common with the best lawgivers of the Occupation: a strong desire to know the facts and a common sense awareness of the complexities of matching universal aspirations to particular situations.

II. MODERNISATION AND THE FIRST TRANSPLANT

STUDYING THE *ANTIMONOPOLY LAW* is difficult for many reasons. One of these is that it requires tools that are not in the possession of every legal scholar, tools such as economic training and a considerable knowledge of the culture and legal systems of Japan, the United States, and continental Europe. For instance, the general success of the Occupation (which also requires explanation) is impenetrable unless one recognises the volume of "western" law that the Japanese had themselves introduced in the 70 years that preceded the Occupation. Similarly, many of the particular difficulties of the *Antimonopoly Law* will elude explanation if one does not understand that Japan had, to a large extent, turned itself into a civil law jurisdiction, while the model for the *Antimonopoly Law* derived from a common law country, the United States. Finally, both the successes and the limitations of the Occupation may have had something to do with skills that the Japanese had developed decades before the Occupation, in making alien law models serve native purposes.

For these reasons, Japan in the last quarter of the 19th century would receive some attention. It was at this time that Japan adopted *en masse* the civil law tradition of continental Europe; it was also when Japan began to develop the concentrated industrial structure that was to be the object of the *Antimonopoly Law*. In 1871, direct Imperial rule over all of Japan was reestablished. The new regime wiped away the feudal pattern of local "domains" and replaced the martial Shogunate control with cabinet government and a senate. In order to con-

solidate this state formation, the government of the Meiji era (1868-1912) sought to comprehensively rework Japan's legal system, which had grown pluralistic and regionally diverse. Ostensibly Chinese, Japan's old codes had been covered with successive stratum of feudal and Shogunate amendments, creative jurisprudence, and customary law.⁹ In the space of 30 years, Japan put together most of the bricks and mortar of a civil legal system: first criminal, procedural and court codes, and then a constitution and a comprehensive civil code. Much of this law still stands, and much of it was revised during the Occupation.

The Japanese, in carrying out this audacious transplant, were careful, thorough, and sophisticated. Early in the process, there were clumsy efforts to introduce direct translations of French codes, but the policy was soon superseded by a commitment to develop laws that were "appropriate and practical."¹⁰ The settled pattern of this novel legislative process included fact-finding missions in Europe and North America, numerous consultations with foreign authorities, initial drafts negotiated between imported experts and local specialists,¹¹ and finally a review by the Imperial Diet.¹²

Unlike other Asian countries importing law during the period, Japan had the autonomy to be choosy; likely, one reason for the general success of the transplant was Japanese selectivity. Eclectic rather than slavish, the Japanese behaved like legal consumers, picking through the Dutch, Belgian, Italian, French, and various German codes as well as the English common law,¹³ and choosing according to their own needs and desires. Indeed, when raised expectations sparked the Popular Rights Movement, the French model, with its radical associations, lost ground to German ones, and the final constitution reflected the German Constitution of 1871 and the Prussian Constitution of 1850.¹⁴

Supranational law reform was, thus, political, as the Japanese government clearly understood. But it was theoretical too. The old debate between Savigny and Thibault came to life once more. Japanese educated in the natural law tradition of France naturally promoted French codes, while those influenced by

⁹ Oda, *supra* note 3 at 16.

¹⁰ *Ibid.* at 134.

¹¹ During this period, the Japanese government was spending approximately 5% of its budget to bring in foreign expertise and to subsidise Japanese students abroad. Seita, *supra* note 4 at 128.

¹² Oda, *supra* note 3 at 133.

¹³ One of the authors of the Civil Code claimed that it was the result of "comparative jurisprudence." *Ibid.* at 9.

¹⁴ Oppler, *supra* note 1 at 55.

the "historical school" of Germany and England pressed German models and were more likely to discount the transplant project as a whole.¹⁵

In turn, this debate between the Japanese reformers goes on in the literature of today. The magnitude of the legal transplant removes any suggestion that it was "organic," but authorities disagree on the degree to which the new law was abstract. The late 19th century law reform is widely considered to have been part of a somewhat frantic and forced effort to "catch up" to the "west,"¹⁶ and since it was "forced," it was not real. Indeed, shadowing the appearance of liberalism, some argue, was the reality that the Japanese felt the need to act as a tight unit and bend the rules of economics and public policy in order to catch up.¹⁷

It may be, as Professor Oda argues, that the new laws fit Japanese society reasonably well because it was "ready" for them. Since money lending had long been central to the economy,¹⁸ banking law was no abstraction; and given the developing market for land, western laws based on "ownership" were not so distant from social reality.¹⁹

Indeed, not only because of its standard of living is Japan now bound together with other nations in clubs, such as the G8, that we tend to think of as "western." Japan shares with these other countries a similar pattern of development. Oddly enough, in the depiction of Japan and the west as foes, the cardboard cutout character is the west, especially the United States. Liberal, established, industrialised, purely capitalist, such a "west," if it has ever existed, was just in its early childhood when Japan imported European law. In 1871, central "Imperial" government was reestablished in Japan, but also in Germany. The Germans too gave some meat to their new political skeleton by compiling a civil code; they finished two years after the Japanese.²⁰ When Germany unified, the ink was still wet on the constitutions that had created Canada and Italy. The Americans, who had just reestablished their own federation after the Civil War, had only made a start at controlling their western territory. Their slaves had been free just a few years, as had Russia's serfs.

¹⁵ Oda, *supra* note 3 at 134.

¹⁶ Hiroshi Iyori, "A Comparison of US—Japanese Antitrust: Looking at the International Harmonisation of Competition law" (1995) 4 *Pacific Rim Law and Policy* 61 at 63; Yoshio Kanazawa "The Regulation of the Corporate Enterprise" in Arthur Taylor von Mehren, ed., *Law in Japan* (Cambridge: Harvard University Press, 1963) at 480 [hereinafter *Kanazawa*]; Seita, *supra*, note 10 at 125 [hereinafter *Seita*].

¹⁷ Hadley, *supra* note 2, at 13, 35

¹⁸ The banking industry was emerging on the American model: Seita, *supra*, note 4 at 128.

¹⁹ Oda, *supra* note 3 at 8.

²⁰ *Ibid.* at 135.

In each of these countries, economic engines were warming for industrial “take off,” but in 1871, the United Kingdom was the only established industrial power. Naturally, all of these other countries felt a certain desire to “catch up” and many people felt that closing the gap required special economics: “national plans,” “national policies.” The result was protectionism and an invigorated imperialism. As well, in most of these countries, there were innumerable cultural and political forces—from lingering aristocratic values to reforming and agrarian populism—that wanted to put a brake on individualism and “pure” capitalism, as Confucianism is said to have done in Japan. A theme of this essay is that in both the study and practice of legal transplants, it is important not only to understand the recipient but also the donor.

Representation of the United States in much of the literature leans toward caricature. In fact, the country was no exception to “catch-up” thinking and policy. Scholars and economists who suggest, as Hadley²¹ does, that the American tradition is synonymous with Adam Smith’s capitalism should re-read the “catch-up” economics of Alexander Hamilton’s *Report on Manufactures* or the mid-century work of Friedrich List, who proposed a catch-up projectionist program for both his native German and his adopted United States.²²

In short, like Japan in the Meiji years, most of the present-day G8 countries were concerned with solidifying central authority and preparing for economic modernisation. The tension between the sense that national modernisation required special national action and the knowledge that modernisation in general involved more scope for individual economic freedom—this tension was international. Arguments about the uniqueness of modern Japan are exaggerated. Perhaps, then, not just geography and ancient cultural heritage define a country’s legal culture, but also its pattern and present stage of development. In any case, both Japan’s importation of European law and the similarity of its modern experience to countries, such as Italy and Germany, are strong reasons to identify Japan with the *Rechtskreis* Roman-German.²³

III. FROM CONCENTRATION TO OCCUPATION

When industrial “take-off” did occur in Japan, it seemed miraculously vigorous, at least in comparison with the “normative” English experience, but something similar was happening in Germany and the United States. Indeed, it was already

²¹ Hadley, *supra* note 2 at 61, 448.

²² See, Edward Mead Earle, “Adam Smith, Alexander Hamilton, Friedrich List: The Economic Foundations of Military Power” in Peter Paret, ed., *Makers of Modern Strategy* (Princeton: Princeton University Press, 1986).

²³ This is the opinion of Oda, who notes that scholars have put Japanese law under several headings: Chinese, European, German, Roman, and American. Oda, *supra* note 3 at 7.

becoming clear that every new generation of industrial revolutions, *whether in Asia or the West*, would be faster than the last. One feature of the new economies that contemporaries found so striking was the enormity of modern enterprise. Taking advantage of the economies of scale created by new political confederations and distance-shrinking technological advancements, firms explored the efficiencies (and monopoly possibilities) of greater and greater size. It was the age of plutocrats and corporate giants, — Krupp, Standard Oil and, in Japan, *zaibatsu*, — the conglomerates that became the principle target of the economic law reforms of the Occupation.

In researching this paper, the author has found no statistical data to show that Japanese industry was, in general, more concentrated than the other second-generation industrial economies—a fact that indicates what the field really needs is reliable economic information. However, impressionistic evidence suggests that concentration accelerated in the 1920s and 1930s. It is difficult to judge these matters because forms of concentration differ. In any case, while broad cultural factors may in part explain the degree and peculiarities of Japanese industrial concentration, there were particular reasons as well.

One particular factor was the mishandling of a seminal privatisation project. The Japanese government promoted many of the earliest industrial experiments, a policy in accordance with “catch-up” mercantilist economics. It played a dominant or considerable role in shipbuilding, mining, the manufacture of machinery and building materials, telegraphs, and the defence industry.²⁴ However, in 1880, nodding to orthodox economics, the government sold off its industrial holdings, excepting only the natural monopolies such as rail. Prices were low and the result was a dozen or so nascent conglomerates.²⁵

Japan was clearly unique in that its “gilded age” industrial titans were neither enormous single corporations, like Standard Oil in the United States, which monopolised a particular market, nor medium *mittelstand* producers bound together for the purpose of discriminating against consumers, as in Germany. Rather, they were conglomerates, federations of various industrial, commercial, and financial enterprises, which, as a group, stretched over many markets.²⁶ The conglomerates were something like mutual aid societies (a reason why some found this form of concentration to be a kind of socialism or corporatism), often ruled with a heavy dose of coercion. The virtue of belonging to one was access to the services of the other members, usually at a considerable discount. The defenders of the *zaibatsu* no doubt thought that these combines created real efficiencies by exploiting scale. Of course, market entry for a firm that

²⁴ Kanazawa, *supra* note 16 at 481.

²⁵ Oda, *supra* note 3 at 343.

²⁶ Hadley, *supra* note 2 at 23.

did not have such associations could be difficult, and the stress on established connections could be, in the final instance, at the expense of "rational" firm interests and market efficiency.

More held the mature *zaibatsu* together than any inconstant advantages to single members. One cohesive force was situated at the top of the conglomerate structure, the family. A family controlled most *zaibatsu*, and loyalty to it was one reason that separate corporations would act in the interest of the conglomerate.²⁷ The family typically held a large interest in a few "first-line" subsidiaries, the most important of which were usually holding and trading companies. A *zaibatsu* holding company would retain stocks of many other companies.²⁸ It would not always need to have a majority position in these enterprises because the trading company, whose job was to centralise buying and selling in the combine, could also exert influence, making it easier or harder for a company to bring its products to market and acquire materials. Carrots and sticks also came from financial institutions within the *zaibatsu*.²⁹ In addition, companies tied themselves together by holding each other's stock and sharing directors and other appointees. These directors typically had contractual obligations to consult *zaibatsu* supervisors before important decisions.³⁰

This supra-corporate architecture did result in a few enormous conglomerates. Some have argued that the Japanese economy as a whole was not concentrated. The manufacture of textiles and most consumer goods was, it seems, the domain of small producers. The *zaibatsu* thrived in heavy industry, mining, metallurgy, and chemicals, where both the economies of scale and the need for large investment were most evident.³¹

In these areas, the trend was size. At the end of the Second World War, the largest of the *zaibatsu*, Mitsui, encompassed approximately 300 companies (depending on the criterion for "control"), which employed somewhere between two to three million people in Asia.³² Mitsui was one of the Big Four, the *zaibatsu* that drew the most water in the economy, because they were the largest and carried the dense weight of big financial institutions. Besides the Big Four, there were six other important *zaibatsu*.

Concentration increased before and during the Second World War for two main reasons. First, the government, again importing Western ideas, encour-

²⁷ Hadley, *supra* note 2 at 80; Seita, *supra* note 4 at 140.

²⁸ *Ibid.* at 62.

²⁹ Seita, *supra* note 4 at 142.

³⁰ Hadley, *supra* note 2 at 84.

³¹ Seita, *supra* note 4 at 132, 138.

³² Hadley, *supra* note 2 at 9, 26.

aged and legislated cartels, so that competition in particular markets was restrained. Second, as the fighting in Asia progressed, the government pushed firms to consolidate; it even forced mergers.³³ Heavy government regulation is typical of countries at war, but this economic autocracy must have seemed a confirmation of a populist's worst fears of government and big money. The United States, for various reasons, including populist fears, decided to break up the system and give Japan an antimonopoly regime.

IV. OCCUPATION AND CIVIL LAW

ACCORDING TO THE GENERAL OPINION, in Japan and elsewhere, the American Occupation of Japan was a success. American law reform initiatives, for the most part, seem to have served Japan well. Since the country flourished within the postwar framework, there have been few efforts to undo the Occupation's legacy. The *Antimonopoly Law* perhaps blemishes this otherwise remarkable success. The law's reputation may be a victim of exaggeration and trade politics, but there is little reason to doubt that this graft did not take quite as well as the others. Why? Most explanations focus on the Japanese. However, since these were the same people who accepted the other reforms, "cultural resistance" is only so illuminating. It may be more fruitful to examine first the aims and methods of the Americans. Indeed, the contrasting fortunes of the American legacy stem from a division of labour—and approach—within the Occupation legal reform effort. A small group of skillful lawyers were responsible for most of the Occupation's legal reform, while others dealt with the antitrust program, generally with less competence and, finally, less consistent support from the American authorities.

The United States occupied Japan between 2 September 1945, and 28 April 1952. Allied Powers Headquarters had titular authority. It was the Americans, however, who had possession of the country and real power was in the hands of the Supreme Commander Allied Powers (SCAP), a post filled by an American during the entire period. The Americans had established goals for the Occupation at an early date, since they had already confronted a similar situation in Germany. The *Postdam Declaration*, which fixed the conditions of surrender, put the Japanese on notice that the Americans would pursue democratisation, demilitarisation, and disarmament.³⁴ These principles translated into the following activities: purging militarists from government and the economy; reeducation;

³³ Kanazawa, *supra* note 16 at 481.

³⁴ Hadley, *supra* note 2 at 12.

redistribution of land; raising the status of women; encouraging unionisation; breaking up conglomerates; and fostering democratic institutions.³⁵

The most fundamental change was also the earliest. The Japanese had begun working on constitutional revision after surrendering and, under pressure from SCAP, the government submitted an essentially liberal constitution to the Diet. It adopted the law in 1946. An intense period of legal reformation followed. Japan's body of laws had to come into line with the new constitution, since it provided for judicial review. SCAP gave supervision of this work to two men who were uniquely qualified. One was Thomas Blackmore, an American lawyer and civil servant who spoke Japanese and had studied Japanese law, the other was Alfred C. Oppler. Blackmore went on to become a practicing lawyer in Japan.

Oppler deserves attention because he appears to have been quite good at his unusual job. His nomadic background must have given him a superior appreciation of legal cultures. He was a German born in Alsace-Lorraine; his parents were Christian converts from Judaism. The family had to leave Alsace-Lorraine after the French annexation, and Oppler became a bureaucrat and judge on administrative and disciplinary courts in Berlin. When the Nazis came to power, he lost his posts because of his Jewish grandparents. Emigrating to the United States, Oppler eventually found work with the federal government and helped prepare the occupation of Germany.³⁶

Oppler's story indicates that whatever profound issues accompany transplant law making, it is still law making and factors such as bureaucratic arrangements and personality count. Oppler joined SCAP as an advisor but was soon in charge of law revision. He had a secure, well-defined position in the organisation and enjoyed considerable autonomy.³⁷ As well, his mandate—to ensure that Japan's laws became constitutional—was distinct, well accepted, and too urgent to easily revoke or alter. Oppler himself brought three strengths to his job. First, he knew more about the civil law than the common law. In particular, he understood civil law systems of implementation and administration, having been a civil servant and a judge. As well, though he respected the American political system and philosophy (they had saved his life), he did not automatically associate good law or a just society with specific American institutions and practices.³⁸

Second, he had a subtle and historical approach to this problem of universal and particular values; and, since he came from a country with a similar modern

³⁵ Oda, *supra* note 3 at 33.

³⁶ Oppler, *supra* note 1 at 10.

³⁷ *Ibid.* at 66.

³⁸ Oppler, *supra* note 1 at 35.

history, he had the ability to make fine judgements about what was possible in Japan. Commenting on the universalist sentiments of MacArthur quoted above, Oppler stated:

I feel that this statement needs some qualification. First of all, while liberty, tolerance and justice are ideals worth fighting and even dying for, the capacity to absorb, cherish and defend them is not necessarily inherent in the entire human race, but depends on the degree of development in a given society.³⁹

On the other hand, he complained that "historicist" critics of the Occupation were guilty of "overgeneralization regarding a nation."⁴⁰ He was certain that Japan was capable of democracy, because, as in Germany, liberal currents ran through the country's diverse modern history.

The relative success of the Occupation efforts to promote these blessings in Japan has various reasons, the principal of which was the maturity of the Japanese civilization and the fact that we merely pushed forward existing reforming and liberalizing trends ...⁴¹

Oppler's third virtue was his preference for negotiating change rather than imposing new fabrications. He recognised that the crucial point was enforcement. If the laws were to outlive the Occupation, the Japanese would have to come to see them as valuable and practical. After two months in Japan, he argued in a memorandum that,

We should promote long-range objectives by inspiration and advice rather than by pressure ... Although we may be inclined to consider the Anglo-Saxon legal system superior to the continental, we should resist any attempt to replace one hastily by the other. The Japanese would not be able to work an artificially imposed system which differed fundamentally from what they have practised up to the present time.⁴²

Thus SCAP and the Japanese, following these guiding principals, negotiated revisions to the civil and procedural codes. Their meetings seem to have been very similar to those of the Meiji law reform, where the Japanese and their European advisors debated options.

Shrewdness no doubt aided Oppler's idealism in advancing liberal causes in these negotiations. For instance, during discussions on the *Code of Criminal Procedure*, one of the statutes that changed the most, four Americans, according to Oppler, often shared the meeting-room with thirty Japanese; but Oppler was sure to have present natives allies, such as leaders of the civil liberties move-

³⁹ Oppler, *supra* note 1 at 36.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.* at 84.

ments.⁴³ In any case, the result of Oppler's consultations and stress on consensus were laws over which the Japanese could feel a sense of ownership and which reflected local needs and practices.⁴⁴

One reason for Oppler's general optimism was his calculation that the Japanese were ready to experiment; after all, the past had clearly failed them.⁴⁵ The idea may very well explain why a country looks abroad for legal models. Defeat, bankruptcy, and dissatisfaction may be the mothers of legal transplants. Perhaps then a problem with the antitrust program was that few Japanese were so certain that the economy had failed them. What is more certain is that the antitrust project did not enjoy the same skilful handling as the other law reforms.

V. DECONCENTRATION AND THE ANTIMONOPOLY LAW

AS WITH OTHER REFORMS, the Americans knew from a very early date that antitrust would be a part of their occupation policy, since they had already made this decision with regard to German cartels. However, one suspects that market concentration, like Japanese pacifism, was not something that really engaged the most important American policy-makers. The motives of the supporters of antitrust were certainly various and perhaps even a little confused. One reason for breaking the *zaibatsu* was simple revenge. Impressed in the minds of many was the notion that firms such as Krupp, I.G. Farben, Mitsui, and Mitsubishi had fueled, and profited greatly, from the bloodshed.⁴⁶ Others saw it as necessary to take the economic weapons from the hands of Japanese militarists. But most seem to have supported the antimonopoly law for political reasons. They equated enormous enterprise with totalitarian government, or were just hostile to big business.⁴⁷ Indeed, the Occupation, especially in its early days, is said to have had a New Deal mentality. One of the men who thought along these lines was T.A. Bisson, who worked on the antimonopoly programs.⁴⁸ Bisson's colleague, Eleanor Hadley, was one of the few people who justified the antitrust project on economic grounds, such as facilitating market access.⁴⁹

⁴³ Oppler, *supra* note 1 at 81.

⁴⁴ Oda, *supra* note 3 at 9.

⁴⁵ Oppler, *supra* note 1 at 116.

⁴⁶ Hadely, *supra* note 2 at 5.

⁴⁷ *Ibid.* at 4.

⁴⁸ Oppler, *supra* note 1 at 28.

⁴⁹ Hadely, *supra* note 2 at 5.

Thus, when the Americans began to direct reform in Japan, they had decided to do something about the *zaibatsu*, but they agreed neither on why or what. Shortly after the surrender, SCAP asked the Japanese government to prepare proposals. The result was the Yasuda Plan. It envisioned the creation of a Holding Company Liquidation Commission (HCLC) empowered to dissolve the holding companies of the Big Four.⁵⁰ MacArthur, who had no one to advise him on the issue, accepted the plan with the caveat that SCAP was free to pursue other antitrust operations. He later ordered the HCLC to be formed, and in September, 1946, it began to bust the fulcrum of the combines. The Commission was a more powerful tool than the Japanese intended for two reasons. First, the Occupation insisted that it act against all the major holding companies.⁵¹ Second, the Americans monitored the HCLC more closely than any other Japanese agency.⁵² Still, the HCLC program was likely the least controversial and most productive aspect of the antitrust program. 42 percent of Japan's total stock went through the hands of the HCLC, which passed most of the equity onto employees and the public.⁵³

While plans for the HCLC developed, MacArthur finally received some overall policy direction. During ten weeks in early 1946, the Edwards Commission studied the issue of industrial and corporate concentration. The Commission consisted of American market regulators, with the exception of the mission head. Corin Edwards was a professor of economics, but he too looked at the *zaibatsu* problem as primarily political. Concentration was undemocratic and encouraged militarism.⁵⁴ For these reasons it had to be fought. The Commission recommended the separation of the *zaibatsu* from their ruling families, the breaking-up of the large companies, and a law that would keep concentration from returning. The details of the commission's recommendations were ambitious; indeed, it envisioned an antitrust regime several steps ahead of the American system. When SCAP sent the report to an oversight committee for approval, it added that it did not have the resources to implement such a plan:

The basic question is whether the purpose of the Occupation is to establish an ideal economy here or whether it is merely to provide such introduction to democratic methods and the abolition of such menaces as to insure the disability of Japan to make future war.⁵⁵

⁵⁰ Seita, *supra* note 4 at 151.

⁵¹ *Ibid.* at 152.

⁵² Hadely, *supra* note 2 at 69.

⁵³ Seita, *supra* note 4 at 153.

⁵⁴ *Ibid.* at 149.

⁵⁵ Hadely, *supra* note 2 at 126.

If the Edwards Report was over-ambitious, it may also have been poorly informed. The commission did not have a financial expert and no one realised that in Japan banks played (and play) an important role in long-term investment and corporate decision-making. Thus, the Edwards Commission had few ideas on reform of finance.

It took some time for the Edwards plan to become official policy, but the Occupation moved ahead with its concepts. By various laws and ordinances,⁵⁶ the Occupation divested the *zaibatsu* families of their stock; it also removed them, and over a thousand of their associates, from their posts as officers and directors. It was emblematic of the various and sometimes conflicting purposes of the antitrust program that the criterion for this purge was equivocal. Some wanted to remove directors and officers primarily on the basis of their role in binding companies, while the rationale for most of the purge was the clearing-out of nationalists and the punishment of monopolists.⁵⁷

During this time SCAP also ordered the HCLC to dissolve Mitsubishi Trading and Mitsui Trading. This act foreshadowed the passing of the *Deconcentration Law* in December of 1947. It and the *Antimonopoly Law* (April 1947) were the main pieces of legislation to come out of the Edward's report. The laws were "tough" and American hands mostly wrote them. SCAP rejected a Japanese proposal for an antimonopoly law and had its own staff draft the Kime Proposal. Unlike the civil law reforms, as far as this author can tell, the Occupation did not compromise or permit much negotiation on these laws. What discussion there was seems to have been antagonistic. Oppler reports that Hadley and Bisson did not get along with their Japanese interlocutors, and Hadley herself does not disguise her frustration with the Japanese government.⁵⁸ It is telling that many pages of Oppler's book are about the process of law reform, particularly communication and negotiation, while Hadley's book is mostly a justification of policy.

As a result of the lack of Japanese input, the *Antimonopoly Law* was largely an updated and strengthened version of the American antimonopoly regime. It drew heavily on the *Sherman Act*, the *Clayton Act*, and the *Federal Trade Commission Act* as well as established case law.⁵⁹ The stated purpose of the law was to guard against private monopolies, unfair competition, unreasonable trade restraints, and excessive concentration.⁶⁰ It provided for a quasi-judicial enforcement body, the Japanese Fair Trade Commission (JFTC). On many points, the

⁵⁶ Kanazawa, *supra* note 16 at 485.

⁵⁷ Hadley, *supra* note 2 at 90.

⁵⁸ Oppler, *supra* note 1 at 28. Hadely, *supra* note 2 at 68.

⁵⁹ Iyori, *supra* note 16 at 65; Kanazawa, *supra* note 16 at 485.

⁶⁰ Seita, *supra* note 4 at 170.

law was more stringent than its American precedents: cartels were banned outright; holding companies were prohibited; there were highly restrictive limits on inter-corporate equity and debt ownership, as well as interlocking directorships; all mergers, certain transfers, and long-term international contracts required approval; and the FTC had a discretionary power to eliminate disparities in bargaining power.⁶¹

We noted earlier that Oppler thought the times were favourable for reform, but one has to question the timing of this particular legislation. The Japanese, who had never before had an antimonopoly law, were to receive an experimental version, one which many would think harmful to efficiency. The transplant was to happen at a time when the Japanese were desperate to raise production, not fine tune points of business practice. Since the law was not the product of real negotiation, the Japanese leadership had no chance to domesticate it or even gain an idea of its utility. While we may think that economic laws, being so utilitarian, should pass easily through national barriers, in fact economics is hard to understand; and, obviously, the objects of economic laws, such as business practices, vary greatly from country to country. Without considerable consultation, the *Antimonopoly Law* was certain to confuse, even frighten. No doubt many Japanese suspected that the antitrust regime was a sort of Morgenthau Plan for Japan,⁶² a legal equivalent of the physical dismantling of Japanese heavy industry.⁶³ But in addition to the recipients' reluctance to receive, the donor of this transplant was not so sure if it really wanted to give, a fact that became clear when SCAP began to enforce the *Deconcentration Law*.

The *Deconcentration Law* was to set the stage for the *Antimonopoly Law* by dissolving companies of any great size. Originally, the HCLC planned to break up 325 companies, but a political debate in the United States on Occupation policy burst forth. Conservatives equated the *Deconcentration Law* with communism.⁶⁴ We noted earlier that supranational law reform can be political, and for a time Occupation policy was intensely partisan. Conservatives won the argument, in part because Cold War concerns began to dictate policy. The New Deal years of the Occupation ended, but the Occupation was left with the products of the earlier reforming enthusiasm. Thus, it was the Americans who began to interpret the antitrust legislation out of existence. The Draper-Johnston Commission undid the policy work of the Edwards Commission and led to SCAP appointing a Deconcentration Review Board. This board consisted not of regulators but executives, who, according to Hadley, "parachuted" into Japan

⁶¹ Iyori, *supra* note 16 at 67.

⁶² Hadely, *supra* note 2 at 11.

⁶³ See, Theodore Cohen, *Remaking Japan* (New York: Free Press, 1987) at 146.

⁶⁴ Hadely, *supra* note 2 at 132-146.

Japan and suffered from many of the same factual misconceptions as the reformers of the early Occupation.⁶⁵ In any case, they applied to the *Deconcentration Law* various guidance mechanisms that effectively sterilised it.

VI. THE JAPANESE ANTIMONOPOLY LAW

THE MOST CONTROVERSIAL ASPECT of this subject is what happened after Japan regained sovereignty. In some ways, it is also the area about which we know the least. The Americans had given Japan a law without explaining why and then left. While that much is fairly clear, it is more difficult to describe how Japan reacted to the law, because the question is more difficult to research. It also requires the western scholar, in assessing the reaction, to read the social signals of a foreign country. Impressionistic evidence, which is mostly what the literature offers, is problematic enough, but it is even more challenging when we have to question our understanding of the impressions themselves.

However, a few issues are well settled. One point, not often enough heard, is that the Occupation achieved much of what it wanted before it ended. Hadley's empirical study shows that the HCLC's actions fatally weakened the *zaibatsu*. According to her, the new *keiretsu* lacked powers of compulsion and were held together by weaker forces: president's clubs, company labels and advertising, flimsier links of personnel, and, finally, stockholding. Missing was the combination of holding and trading companies.⁶⁶ The *keiretsu* have to some degree rebuilt on a foundation that the Occupation did not realise it had to destroy credit. We noted above that, out of ignorance, the Occupation left the *zaibatsu* banks unmolested, and they have since played an active role in the corporate world. But Hadley has considerable evidence to show that they have not replaced the old holding companies. The banks have never wielded the same coordinating power and it has been too easy to access credit outside the *keiretsu*.⁶⁷ Indeed, while Japanese banks may have recently steered into troubled waters by approving loans on the basis of established connections rather than the likelihood of repayment and profit, Hadley's research leads one to ask whether borrowers have reciprocated the banks' loyalty.

Still, there is the charge that the *Antimonopoly Law* is law in name only. That is likely an exaggeration as the situation is more complicated. It is difficult to make an accurate assessment, however, because the question requires a thor-

⁶⁵ Hadley, *supra* note 2 at 172-174.

⁶⁶ *Ibid.* at 205, 219, 245.

⁶⁷ *Ibid.* at 222.

ough study of court decisions, administrative behaviour, and business cultures. No one has written such a book.

But we can be sure of a few matters. There was no single Japanese response to the law but rather several, and the relationship continues to evolve. The Japanese government may not have liked the *Antimonopoly Law* when the Occupation presented it in 1947, but it did reflect American economic law, which was increasingly of interest to the Japanese.⁶⁸ Perhaps respect for the United States best explains what did not happen: the Japanese chose not to repeal the *Antimonopoly Law*. Rather, Japan's first independent act was to bring the law in line with the American statutes. Amendments, in 1949, made the approval requirements for mergers and international contracts less severe, and also allowed greater inter-corporate stock and debt holding.

These changes resulted partially from the pressure of American corporations eager to *facilitate* investment — which is, of course, an example of market entry.⁶⁹ Whatever the American government preferred, American business would, it seems, punish Japan if it did not find an appropriate amount of legal space in which firms could exploit economies of scale. But more changes followed. In 1953, following a German precedent, the Japanese again amended the *Antimonopoly Law*, this time to permit cartels in industries that were depressed or needed rationalisation. The amendments also removed the clause permitting the JFTC to act against companies whose market strength created disparities of bargaining power.⁷⁰

However, the real challenges to the *Antimonopoly Law* have been indirect. As Kenji Sanekata notes,⁷¹ there has been a tension between the spirit of the *Antimonopoly Law* and the *dirigiste* aims of what he calls “industrial policy.” The main antagonists in the debate have been the JFTC and the Ministry of International Trade and Investment (MITI). The MITI and industrial policy have certainly come out the better in several encounters. Since the end of the Occupation, the Japanese have passed laws that allowed cartels in certain markets; first in areas where it is not unusual, such as aeronautics, and then in markets where it may be harder to justify, such as textiles.⁷² Even more threatening was

⁶⁸ Oppler, *supra* note 1 at 81.

⁶⁹ Iyori, *supra* note 16 at 67.

⁷⁰ *Ibid.* at 68.

⁷¹ Kenji Sanekata, “Antitrust in Japan: Recent Trends” (1986) 20 U.B.C.L.R. 379 at 382 [hereinafter *Sanekata*].

⁷² Kanazawa, *supra* note 16 at 496–497. Note that the importance of these cartel laws can be exaggerated since they tend to have effect only during a single economic cycle. When the market again favours the producers, the cartel splits and new legislation is required. Haley notes that there has been little cartelisation since the mid-1970's: John O. Haley, “Compe-

the creation of cartels by the MITI issuing "administrative guidance." The Ministry has typically encouraged (often bullied) an industry into forming a cartel and then claimed that its "interpretation" of economic regulation rendered the cartel legal. Some commentators and the United States government have criticised the JFTC for a failure to champion the *Antimonopoly Law*, as well as lax prosecution.⁷³

However, we have surprisingly little information about the JFTC. While most authors tend now to agree that enforcement has had its high and low tides, they do not always concur on the timing.⁷⁴ Moreover, one must ask the skeptical question: how do we know if the JFTC is doing its job? How does one measure enforcement? John Haley argues:

there does not exist to my knowledge any credible evidence on the relative effectiveness of any competition policy enforcement regime ... no empirical data are available to correct profound differences in perceptions within any of these countries regarding the extent of anti-competitive behaviour in the others.⁷⁵

As Haley notes, the most popular measure of enforcement — prosecutions and litigation — makes little sense when dealing with Japan because of the stress on informal procedures. It is national differences of this nature, I would argue, that make judgments in comparative law (and thus supranational law reform) so difficult.

Equally true is that we do not know how common anti-competitive behaviour is in Japan, nor how Japan stands in relation to the United States. Odd logic is behind the assumption that business people in the United States accept the antitrust laws because so many companies submit to prosecution.⁷⁶ As Haley points out, assuming that corporate transgressions are rare because prosecutions are common is no different than calculating that crime rates must be low because the prisons are full.⁷⁷ As in other areas of Japanese life, social sanctions, such as the withholding of Imperial Honours, may have contributed greatly to reducing contravention of the *Antimonopoly Law*.⁷⁸ Any real knowledge of how the *Antimonopoly Law* works in practice waits on a study of its effects on businesspeople.

tion and Trade Policy: Anti-Trust Enforcement: Do Differences Matter?" 4 (1995) *Pacific Rim Law and Policy Journal* 303 [hereinafter Haley].

⁷³ See Haley's discussion on Laura Tyson: *supra* note 72 at 304, 306.

⁷⁴ Compare Kanazawa, *supra* note 16 at 493 and Seita, *supra* note 4 at 179.

⁷⁵ Haley, *supra* note 72 at 321.

⁷⁶ Haley makes this error: Haley, *supra* note 72 at 448.

⁷⁷ Haley, *supra* note 72 at 316.

⁷⁸ *Ibid.* at 317.

Some problems of enforcement *are* clear now, but one can see how they may have escaped the notice of American reformers dropped by parachute. A good example is the court system. The people who drafted the *Antimonopoly Law* perhaps did not realise, as Oppler must have, the ways in which Japanese courts, like many civil law tribunals, are different from their common law counterparts: the absence of a contempt power; reduced discovery; higher requirements of proof; less court discretion over criminal sanctions; greater deference to administrative bodies; as well as the more particularly Japanese factor of under-investment in legal infrastructure.⁷⁹ All of these factors may have reduced the degree of enforcement.

The Occupation may also not have realised the importance of bureaucratic status. The JFTC is a semi-independent body in the Prime Minister's Office. A little more clout may have helped the JFTC promote and defend the *Antimonopoly Law* in its battles with industrial policy and the MITI, a full ministry. We can also now see how some particular social and cultural factors have shaped the *Antimonopoly Law's* impact on society. For instance, Iyori notes that rules on long term contracts need strengthening because in Japan the tendency to continue a relationship is so pervasive: even when a contract ends and opportunities tempt the parties, both sides will feel obliged to renew.⁸⁰ The need for adjustment in this area would have eluded any but the most sensitive and best-informed American lawgiver. One suspects that a study of the relationship between the *Antimonopoly Law* and society would uncover many unexpected effects and unintended outcomes, both positive and negative.

Despite these difficulties and complications, other factors have aided enforcement of the *Antimonopoly Law*. For instance, in 1969 the MITI encouraged a merger between two steel companies. The JFTC allowed the merger with modifications, despite the fact that most economists thought an oligopoly would result.⁸¹ What is significant here is not the example of JFTC deference to the MITI, but the indication that there were groups in society — such as the economists — which had come to appreciate the *Antimonopoly Law*. Similarly, the growth of consumer advocacy has led to a greater status for the JFTC. Indeed, consumer anger over price fixing during the Oil Crisis resulted in the 1977 amendments, which strengthen the *Antimonopoly Law's* sanctions by adding a surcharge scheme. Few cartels, it seems, have emerged since the mid 1970s.⁸² Small and medium size businesses have also relied on the law for pro-

⁷⁹ *Ibid.* at 320.

⁸⁰ Iyori, *supra* note 16 at 82.

⁸¹ Sanekata, *supra* note 71 at 381.

⁸² Haley, *supra* note 72 at fn. 306.

tection against larger enterprises.⁸³ In short, some Japanese have come to associate their personal interest and the common good with antitrust law. For these reasons, popular pressure twice — in 1958 and 1983 — forced the Japanese government to drop plans to weaken the *Antimonopoly Law*, and the law's improving reputation has given the government an incentive to pay greater attention to its implementation.⁸⁴

The practice of "administrative guidance" suffered a blow, in 1980, when the Tokyo High Court ruled that MITI guidance could not render licit an illegal cartel. The MITI replied that administrative guidance is meant to be a short term, flexible, corrective measure and therefore does not create exceptions in law. *Obiter dicta* from the Supreme Court appeal suggested that administrative guidance might save an otherwise illegal act if it did not contradict the purpose of the *Antimonopoly Law* and was in the public interest. One way to interpret this statement is that the guidance would have to pass the "public interest test" of the *Antimonopoly Law*.⁸⁵ Still, most academic opinion is opposed to administrative guidance and the JFTC has become confident enough to protest vigorously against examples of it. The commission has succeeded, apparently, in moderating the practice to a considerable extent.⁸⁶

From a foreigner's point of view, the problem with unique Japanese practices, such as administrative guidance and an extensive reliance on informal procedures, is not so much that they weaken the law—as we have noted, a weak law may attract American businesses—but that they make it difficult to tell what, at any given moment, is the law. The importance of legal transparency and certainty was a central theme of the Structural Impediments Initiatives Talks (SIIT) between Japan and the United States. These talks, which began in 1989, have also helped to fuel what Sanekata calls the antitrust "revival" in Japan. In response to American concerns, the JFTC now publishes more guidelines, "consent" (negotiated or informal) decisions and relies increasingly on formal procedures.⁸⁷ The JFTC, at least, seems fairly interested in making Japan's antitrust regime work, and in a manner that is apparent to foreign governments and investors. Indeed, the one empirical work existing on the JFTC, Sanekata's essay, presents an agency that is active and increasingly strict,

⁸³ Sanekata, *supra* note 71 at 395.

⁸⁴ *Ibid.* at 391; Kanazawa, *supra* note 16 at 490.

⁸⁵ Oda, *supra* note 3 at 354.

⁸⁶ Sanekata, *supra* note 71 at 386 and 395.

⁸⁷ Oda, *supra* note 3 at 344; Haley, *supra* note 72 at 312.

though still somewhat hampered by a legal and public policy culture that has not come to a firm opinion on what to make of the *Antimonopoly Law*.⁸⁸

VII. CONCLUSIONS

THE SIIT DISCUSSIONS WERE an example of a Japanese tendency that surprises those who have not studied the legal history of the people: a willingness to allow foreigners to tell them how to write their own laws. Of course, the Japanese also know what to do with such advice: they do with it what they please. An easy error is to exaggerate the degree to which the Occupation denied Japan of its right to determine its laws. At some point, the Americans had to leave and the status of the legal reforms would depend on Japanese inclinations. In this regard, the post-war incorporation of American law was not so different from the Meiji reform. In both cases, a small group of reformers, looking to foreign models, pressed new legal structures on an old country. The country adapted somewhat, and the laws adapted somewhat.

One important factor did separate the Occupation from other eras of reform: the occupiers had to struggle more with the temptation simply to translate laws into Japanese and push them through the legislature. As the early reformers of the Meiji discovered, this is a crude method of legal reform.

A theme of this essay is that both the scholars and the lawgivers of the Occupation have faced the same question: what is good law-making in the context of supranational law reform? The two problems here are the nature of law and the nature of and of national differences. This essay has argued that the posting of the United States and Japan as foes has been a sort of intellectual handicap to seeing the real problem. The stress on big cultural contrasts between the United States and Japan is not as useful as recognising the many small differences that affect implementation.

In making this argument, the essay presents its own foes, Hadley and Oppler, who were both scholars and lawgivers. Oppler argued that every society has particular views of universal values as well as diverse and complicated institutions and practices to achieve these ends. Moral advancement may come from comparing and contrasting these values with those of other countries, but since laws exist in complex environments, it is less the main question of reform — the morality or utility of a rule — but more what is peripheral that makes the effort complicated. One may know a law by rote and yet have no idea how it will work as a transplant in a different legal culture. Thus, the reformer has to pay great attention to the process of reform. Oppler knew that the Japanese would one day regain its sovereignty, which meant doing its pleasure. His emphasis on discussion and consensus had the effect of drawing together Japanese

⁸⁸ Sanekata, *supra* note 71 at 379, 399.

inclinations and the Occupation's reforms. Consultation also offered a chance to bring the new rules in line with the means to implement them.

Oppler saw positive law in a practical way: the measure of a law is its effect. One suspects that Hadley and the others who worked on the *Antimonopoly Law* saw law as an expression of policy: a good law is one that reflects good economics. Perhaps they believed the *Antimonopoly Law* was rational economics and would speak for itself. But law transplants apparently do not work this way, and, of course, the antitrust tradition of the United States may not be perfect economics. In fact, when American scholars have doubted native institutions and felt the need to look abroad for models, some have recognised that the United States' antitrust system developed according to impulses and attitudes that were often irrational, and that the existing legislation is far from perfect.⁸⁹

Successful supranational law reform may begin with the recognition that no society has a monopoly on universal values. Moving toward more ideal practices through comparison and borrowing is possible, the case of Japan's *Antimonopoly Law* suggests this, but success depends on wise selection, flexible adaptation, and a high degree of concern for implementation. These activities involve criticism and creative thinking, and thus it is not surprising that all the successful legal imports in the history of Japan, from the Meiji Civil Code to the SIIT, have come from the same procedure: Japanese and westerners sitting in the same room and talking.

⁸⁹ When the Japanese and German style of banking was thought to be a key to their corporate success, Mark Roe wrote an article showing that the American antitrust and banking law was "contingent." He noted in particular the role of populism and interest politics in shaping the law: Mark J. Roe "A Political Theory of the American Corporation" *Columbia Law Review* (1991) 1 at 10. For specific criticisms of the law see: Haley, *supra* note 72.