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Some Thoughts on Teaching Law in Japan

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An exercise I sometimes conduct with students is as follows: I ask them to imagine that for a one minute period they can pass any law or create any right which they think necessary. This is, I tell them, their chance to express and remedy what they consider to be inadequacies in the current legal system.

The exercise is a trap, of course. I am less interested in whatever changes they think are necessary, than in using the Socratic Method in connection with their responses to make them realize that in creating a new law or right they are seeking to restrict the freedom of others. I want them to understand that law is essentially something you do to other people. The student who wants stronger laws preventing cruelty to animals, for example, is not a person who is going to engage in such behavior herself: she wants the law to restrict what *other* people can do to animals.

I have to confess that as a rhetorical trap, the exercise often does not work as well with Japanese students. Part of this is may be because Japanese students - particularly at the undergraduate level - are not so accustomed to participatory classes. But even those that do answer often do so by expressing not a specific law that they desire, but a more generalized desire that "the government" "do more" about a particular issue; more assistance for the handicapped, for example.

These types of responses make my trap harder to spring, since I have to do so through the application of the taxation system; *i.e.,* the increased benefits the student wants the government provide will have to be paid for through taxes, limiting the freedom of others to spend their money as they wish. Thus, law becomes more something you do with other people's money.

To be fair, I have not done this exercise enough to really be able to draw any firm conclusions regarding any particular student demographic (I also want to be clear that nothing in this article is intended to be critical of any of my students, Japanese or otherwise). However my experience with this and other types of exercise makes me wonder if the Socratic Method is really useful in Japan, at least the way law is taught now, and the way the knowledge of law is evaluated on the

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Japanese bar exam.

In the United States, the Socratic Method is an effective educational tool for at least two reasons. Firstly, because of the sheer volume and variety of American law, case and statutory, state and federal, it would simply be impossible for any student to study and remember all of it, even if one limited the focus to core areas, such as constitutional law, and principal federal laws, and the principal laws of a particular state. Even if it was possible to educate students to the point of mastering federal law and the laws of a given state, it would render render unworkable the current system of "national" law schools, graduation from which qualifies a student to sit for the bar exam in any US jurisdiction. Thus, from an educational standpoint it is more efficient to focus on giving students a fairly basic understanding of widely applicable general principles of US law, while using the Socratic Method to imbue in them a set of intellectual tools that will enable them to work with and think about legal problems and the law, once they find out what the law actually is.

Secondly, because of the importance of case law in the American common law system, the Socratic Method is important because it forces students to develop skills in comparing and contrasting different cases in a line of precedents. Arguing why Case A should be resolved the same as (or differently from) Case B becomes instinctive. As a result, American lawyers are, I think, trained as if they are constantly participating in a law making process, since each case they take on may involve having to argue why it should be treated the same as or differently from those that came before. American lawyers are thus in the habit of arguing not just about what the law is, but what is should be.

By contrast, Japanese law is centered on several principal statutory codes (the constitution, the civil code, the criminal code, etc.) which, while not insignificant in volume, are of a finite quantity that probably borders on being knowable by a single person. Furthermore, what the law should be has traditionally been more the province of academic commentary rather than the arguments of lawyers in individual cases. Thus, it seems that students of law in Japan are more likely to learn about the subject as something that is generated entirely externally – by the government and academia, rather than an ongoing process in which they may be called to actively participate.

Thus, to the American lawyer-in training, law is a process which, though only vaguely defined through the process of legal education, is one in which they participate in shaping. In Japan, however, law may be a more strictly defined, pre-existing process, the details of which students are expected to know, though they may not be trained to participate in changing or shaping the process itself.

Certainly, based on my own experience representing Americans doing trying to do business in Japan, a common complaint about Japanese lawyers is that "they just tell us what the law is, not what we should do about it." However, this complaint may reflect not a qualitative difference between Japanese and American lawyers but rather a difference in what clients traditionally expect of their lawyers in the two countries. In Japan, lawyers are trained and expected to know what the law is, whereas in the United States they are expected to be able to find the law and use it as a starting point to figure out what to do next. Put another way, I think that to American lawyers "the law" is essentially a form of history,[1)] and they are charged with planning for the future, whereas in Japan law is more a part of an ongoing "present" that lawyers are responsible for reporting on.

This is, of course, a gross oversimplification of the difference between the legal professions in Japan and the United States. It does bring me back to my original point, which is that the Socratic Method may not actually be a useful tool in Japan, at least as a central feature in a law school curriculum. Students may actually be better served by a comprehensive set of lectures that cover all areas of the various principal codes, rather than a series of digressions focused on particular areas derived from interactions between student and professors.[2)]

After all, so long as after each bar exam the Japanese Ministry of Justice continues to send around commentaries on the exam questions explaining its views on what constitutes the "correct" understanding of the law, a legal education which engenders that understanding is likely to be of more use to students than the issue-spotting skills which are both fostered by U.S.-style legal education and rewarded on the essay portion of U.S. bar exams.[3)]

As a law professor who is also a U.S.-trained lawyer, I would like to continue thinking that the Socratic Method has some value in the training of Japan's legal profession, particularly in the context of the country's new law school system. At the same time, however, I think the manner and extent of its utilization should be reconsidered in light of both the many significant differences between the US and the Japanese legal systems, and the very different dynamics in bar pass rates that currently apply in Japan. These dynamics currently render bar pass rates one of the key criteria by which law schools are evaluated, meaning that it is much more important for law schools in Japan to teach for the bar exam than is the case for their U.S. counterparts. Accordingly, totally independent of the differences in the Japanese and U.S. legal system described above, the Socratic Method may be a luxury to which most Japanese law schools cannot afford to devote a significant amount of classroom time.

Perhaps this will change when the widely-expected reorganization of the nobly-conceived but poorly-implemented Japanese law school system has been completed, but only time will tell. In the meantime, I will continue to lay my traps for students and continue to hope that doing so is useful to them somehow.

Notes

1) And to the extent the law is case law, it is quite literally a form of historical document.
2) I am certainly not the first person to question the usefulness of U.S.-style teaching methods in Japanese law schools. *See,* Takahiro Saito, *The Tragedy of Japanese Legal Education: Japanese "American" Law Schools*, 24 WIILJ 197 (2006).
3) That the seemingly obvious conflict involved in the Ministry, which effectively controls the National Prosecutorial Agency, expressing a view as to the "correct" understanding of subjects such as criminal defense passes without comment is fascinating, at least to a U.S.-trained lawyer such as the author.