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Introduction: Comparing National Styles of Regulation in Japan and the United States*

ROBERT A. KAGAN

The articles in this issue generally reinforce conventional images of American regulation as often adversarial and legalistic and of Japanese regulation as more informal and cooperative. They also suggest that, in regulating pollution and occupational safety in larger firms, Japan’s regulatory style is equally effective and more economically efficient than the American approach. But Japan’s style appears less effective when regulation requires changes in elite attitudes, as in the realm of workplace equality for women. Moreover, developments in Japan’s financial sector reveal ways in which informal regulation can result in undue deference to business and political interests.

I. INTRODUCTION

In the social-science literature on governmental methods of regulation, the United States and Japan generally are viewed as polar opposites. Regulation of business in the U.S. is described as adversarial and legalistic, in Japan as non-legalistic and non-adversarial (Aoki & Cioffi 1999). Daniel Okimoto (1989:158) writes that:

Thanks in part to the interpenetration of public and private domains ... government-business relations in Japan are informal, close, cooperative, flexible, reciprocal, nonlitigious, and long-term in orientation.

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Viewed comparatively, Okimoto adds, most business-government relations in the U.S. "can be characterized as formal, distant, rigid, suspicious, legalistic, narrow, and short-term oriented" (ibid.:158). In a cross-national study of environmental policy and industrial innovation, David Wallace (1995:xviii), a British scholar, concludes:

> In the United States, an adversarial approach to public policy has exacerbated the tensions which accompany environmental issues. Political toughness has found expression through poor relations between policy-makers and industry, leading to an inflexible and costly regulatory structure.

In Japan, in contrast, Wallace (ibid.) observes that

> A web of communication, backed by formal processes of information exchange, allows for flexible, adaptive environmental goals which progress from indicative, trial targets, through to local and then national ordinances.

These contrasting pictures of national regulatory style give rise to several questions. First, in view of the pressures for change in both countries unleashed by a more competitive global economy, are the conventional images of American and Japanese regulatory styles overstated or eroding? Second, to the extent that these contrasts persist, what impels the United States and Japan – two democratic capitalist nations whose basic regulatory policies often are similar – to continue to employ such different legal methods of implementing those policies? Third, what are the economic and social consequences of different national styles of regulation? The articles in this issue explore these and related questions.

II. COMPARING REGULATORY SYSTEMS: POLICY VERSUS PROCESS

Any comparison of national methods of environmental regulation must be set against a background of transnational commonalities. In an increasingly integrated global economy, national regulatory systems, at least in economically advanced democracies, have rather similar goals and standards (Shapiro 1993; Unger & Van Waarden 1995). Linked by international networks, national environmental groups, anti-tobacco activists, and women's rights organizations make similar demands on governmental officials. Multinational enterprises often lobby for harmonization of national laws concerning financial transactions, bank safety, patent protection, product standards, and access to markets (D. Vogel 1995; S. Vogel 1996). National regulatory officials visit other countries, sharing information and ideas. Policy analysts in different nations use similar economic models to assess the relationship between regulation and economic efficiency and to criticize regulations that harm national competitiveness and economic growth. International treaties mandate identical national laws concerning disposal
of wastes in the ocean, elimination of ozone-depleting chemicals, protection of intellectual property, testing of new pharmaceuticals, and many other regulatory policies.

Consequently, according to a study by respected scholars at Resources for The Future, "[a]lthough U.S. environmental regulations are arguably the most stringent in the world, the differentials between U.S. standards and those of our major industrialized trading partners are not very great . . ." (Palmer, Oates & Portney 1995:130). That is the message conveyed by Kazumasu Aoki's article in this issue comparing a Japanese manufacturer's experience with water pollution control requirements in Japan and the U.S. Substantive similarity has been noted in many other areas of regulatory law and policy (Badaracco 1985; Schwartz 1991; Kagan & Axelrad 2000).

Cross-national convergence in regulatory policy, however, is far from complete. In each country, regulatory policymaking and implementation remain subject to particularistic domestic political pressures. National legal traditions, political structures, industrial organization, and cultural attitudes—all of which shape regulatory rules and institutions—resist homogenization. Compared to Japan's ambiguous equal opportunity law, U.S. law provides women with much more explicit and extensive rights to equal employment opportunity (Gelb 2000). American regulations designed to limit exposure to second-hand tobacco smoke in restaurants, workplaces, universities, and stores are far more restrictive than Japan's (Levin 1997; Vogel, Kagan & Kessler 1993). Japan has much tougher regulatory restrictions on opening large discount stores (Upham 1993). Japan's labor law, as described by Kazutoshi Koshiro's article in this issue, provides Japanese workers with more comprehensive protections than U.S. law concerning "abusive exercise of the employer's right to discharge" (Koshiro 2000:354) and mandates a larger array of specific legal protections for unorganized workers. U.S. law, on the other hand, provides broader protections for the right to strike.

Moreover, even when national laws articulate similar norms, domestic regulatory styles often differ, producing cross-national variation in regulatory outcomes. Under the rubric "regulatory style," one might include such matters as the detail, specificity, and complexity of the statutes and regulations that embody general policy; the degree to which regulations are made and enforced through informal dialogue with regulated entities and industry associations (as opposed to more formal interaction); the frequency with which courts and litigation are employed in implementing and challenging governmental policy; the severity of legal penalties actually imposed on violators; and the finality, uniformity, and predictability of case-by-case regulatory decision making.

It is in this realm of regulatory processes that the United States appears to diverge most dramatically from other economically advanced democracies, and especially from Japan. In the socio-legal literature concerning national styles of regulation, regulatory programs in the U.S. are often described
as tending toward legalistic, adversarial, and deterrence-oriented models (D. Vogel 1986; Kagan & Axelrad 1997). Regulated enterprises often contest regulatory penalties and regulatory policies in court. Public advocacy organizations often sue regulatory agencies for failure to enact regulations on time, for making regulations or issuing permits that are insufficiently stringent, or for lax enforcement (Bardach & Kagan 1982; Shapiro 1988; Melnick 1992).

A whole chain of consequences ensues. In the regulatory process in the U.S., courts and legal penalties play a significant role. Not infrequently, regulation is pervaded by an adversarial spirit. Regulatory policies and practices often become politically controversial. Hence regulatory law and administrative styles often change when different political parties achieve electoral victories. To regulated enterprises, therefore, regulatory requirements often appear malleable and uncertain.

Regulatory programs in Japan, in contrast, have a reputation for relying on more informal, nonlegalistic ways of exercising state authority. Whereas the American administrative rule-making process is formal and “judicialized,” Japanese regulatory policies are formulated through informal interaction between governmental bureaucracies and well-organized industry associations. Regulatory policies are implemented through informal “administrative guidance” (Young 1984). Government regulators, Joseph Sanders states, rarely find it necessary to bring lawsuits against regulated entities in order to ensure compliance with their orders. In contrast to the U.S., Sanders continues, “it is rare for a firm or any other group to sue the government claiming that a ministry’s directives exceed its authority” (1996:371). In Japanese regulation, accordingly, lawyers, courts, and legal penalties play a relatively insignificant role.

Mark Ramseyer (1999) has complicated the picture of a Japanese regulatory regime exempt from judicial review. Japanese courts, he has noted, repeatedly have overturned municipal “administrative guidance” that, without statutory authorization, required developers to donate substantial land or money in order to get a land use or building permit. Nevertheless, viewed in comparative perspective, legal challenges to governmental regulations are statistically infrequent in Japan. One reason is that regulated enterprises and their industry associations often play an important role in formulating regulatory policies, as emphasized by the articles in this issue by Kazumasu Aoki and by Curtis Milhaupt and Geoffrey Miller. Ramseyer (1999) suggests an additional reason: in Japan’s parliamentary political structure, dominated by the national bureaucracy and an almost continuously powerful Liberal Democratic Party (LDP), regulatory bureaucrats have faced strong incentives not to deviate from policies favored by the LDP, and judges have faced strong incentives to defer to those bureaucratic decisions. Conversely, it is the political fragmentation of the American political system that produces adversarial legalism as a mode of policy implementation in the U.S. (Kagan 1995, 1996).
III. PROBING THE CONVENTIONAL IMAGES OF NATIONAL STYLES OF REGULATION

Regulatory style is not monolithic in either Japan or the U.S., as shown by the articles in this issue, among others. Yoshinobu Kitamura points out that during the 1970s, after a new director of Water Pollution Control for Tokyo was appointed by a socialist governor, the number of formal administrative enforcement orders increased immediately (only to decline after his resignation). Joyce Gelb notes that Japanese women's rights advocates, frustrated by the failure of administrative guidance to produce significant change in employment practices, have brought lawsuits seeking judicial remedies against workplace discrimination. Moreover, as noted earlier, Ramseyer (1999) has shown that Japanese real estate developers repeatedly have taken left-of-LDP local governments to court, challenging administrative guidance that imposed extortive conditions on land-use permits. Daniel Foote (1996) has shown that Japanese judges have taken an active role in developing a complex body of rules in the realm of labor law (in contrast with the courts' posture in other regulatory policy arenas). Some observers describe a recent trend toward "legalization" of Japanese financial regulation, as internal regulatory failures and pressures from abroad have pushed the government to clarify the legal basis for its actions (Mabuchi 1993; S. Vogel 1996). More generally, Milhaupt and Miller in this issue, referring to the slowdown in Japan's economy, argue that "[c]onsensus breaks down when high growth ends; legal rules and procedures will substitute for cooperation when consensus proves unattainable" (2000:246).

In the United States, conversely, adversarial legalism is not universal. Some American regulatory agencies emphasize flexible and cooperative rather than legalistic and punitive modes of enforcement (Rees 1988; Fiorino 1996; Michael 1996; Freeman 1997; Kagan 1994). In recent years, political leaders have campaigned for office promising more regulatory responsiveness and flexibility, and they have appointed regulatory agency officials who promise to implement such changes.

For the most part, however, the articles in this issue confirm the contrasting images of Japanese and American regulatory style. Compared to the Japanese regulatory programs examined, the parallel U.S. regulatory programs are significantly more legalistic, adversarial, and punitive, as the following summaries demonstrate.

A. CONTRASTING STYLES OF ENVIRONMENTAL REGULATION

Providing a unique "ground-level" perspective on environmental regulation, Kazumasu Aoki (2000) examines the experience of a company that manufactures identical electronic parts in the U.S. and in Japan and has regular interactions with Japanese and American water pollution regulation regimes. American effluent control regulations, company officials told Aoki, are
more detailed, complex, and changeable than the Japanese regulatory requirements. Because of the jurisdictional and legal complexity of the American regulatory system, environmental managers in the company's U.S. plant are far more fearful than their Japanese counterparts of being found in violation and of being the target of regulatory fines. In the U.S. plant, regulatory compliance is seen in terms of keeping up with and abiding by the law. In the company's Japanese operation, legal obligations remain more in the background, and compliance is seen in terms of implementing the company's "voluntary plan" for pollution reduction, which is more stringent than the law requires.

Yoshinobu Kitamura (2000), a leader in empirical research on field-level environmental enforcement in Japan, notes that local water pollution control officials in that country are committed to a philosophy of informal enforcement. Believing that it is more effective to treat violators as erring students than as amoral deviants, officials often assert that they have "failed" when they must turn to formal legal sanctions. Even when they catch a "midnight dumper" of industrial wastes, a knowingly illegal act, the inspectors usually emphasize informal instruction, pressures, and threats in order to extract agreements to comply in the future. Only when a pollution control violation acquires wide publicity, Kitamura says, do inspectors issue formal orders.

Why is Japanese environmental regulation much less legalistic than American regulation? Kitamura emphasizes a number of factors, ranging from regulatory officials' preference for cooperative action to various aspects of the legal system, intra-agency organizational relationships, and the agencies' task environment. One important contrast is that Japanese inspectors appear to enjoy more de facto discretion and autonomy than their American counterparts. Aoki (2000) points out that officials in the regional offices of the U.S. Environmental Protection Agency review and sometimes "overfile" lenient decisions by state and local regulators. In Japan, according to Kitamura, the national government rarely overrides local regulatory decisions or attempts to change their enforcement style.

In the U.S., Aoki notes, data concerning each firm's effluent is available to the public, and environmental advocacy groups often have brought lawsuits for damages against violators (2000). Conversely, Kitamura states that in Japan, "citizen participation concerning regulatory enforcement is usually not an option.... [C]itizen suits ... are not institutionalized in the regulatory laws" (2000:314); and not many NGOs are enforcement-oriented, partly because "the Japanese legal system provides little incentive for lawyers to participate in the market of regulatory enforcement" (ibid.:314).

American regulatory enforcement officials usually are specialized, spending their careers in particular regulatory agencies. Japanese inspectors, Kitamura (2000) tells us, typically rotate through various municipal government departments and thus tend to adopt a sense of responsibility for local economic development. Hence unless a violation results in very severe
environmental harms, they are disinclined to call for severe formal penalties that may have adverse economic impacts on a local employer and that will divert limited local governmental resources into complicated legal proceedings. Perhaps most important, Kitamura's research indicates that Japanese inspectors believe that a consultative, educational style will generally work and result in better compliance. American regulators, confronting a more diverse and competitive population of regulated businesses, seem to have no such faith—or believe that their legal and political overseers may not allow them to act on faith alone.

B. REGULATING THE EMPLOYMENT RELATIONSHIP

Richard Wokutch and Craig Vansandt (2000) delineate a similar divergence in the regulatory styles of Japanese and U.S. occupational safety inspectors. In an innovative study, Wokutch compared occupational safety and health regulation in Japanese motor vehicle assembly plants and in their U.S. subsidiaries. He found that, compared to inspectors from the Japanese Labor Standards Bureau, U.S. safety inspectors (from the U.S. Occupational Safety and Health Administration or its state-level equivalents) are much more likely to issue formal citations and to fine companies for regulatory violations. American companies, in response, legally contest citations much more often than Japanese companies. Whereas Japanese workplace safety inspectorates have shown slow but steady increases in personnel and have been insulated from political trends, Wokutch and Vansandt (2000:375) observe that, in the U.S., "safety and health regulatory policies have often been heavily affected by short-term political trends, resulting in cutbacks or increases in [agency] funding or not-too subtle messages from elected officials to lighten up or tighten up on penalties" (see also Scholz & Wei 1986; Wood & Waterman 1991).

Japan's law governing labor union representation, collective bargaining, and unfair labor practices was modelled on the U.S. National Labor Relations Act (Gould 1984). Labor politics and patterns of labor relations have been quite different, however. Relations between some unions and management in Japan have been contentious and legal disputes under the labor law are not uncommon. Nevertheless, as Professor Kazutoshi Koshiro's article shows, litigation concerning compliance with labor law is much less common than in the U.S. For example, until the early 1970s, Koshiro tells us, local unfair labor practice cases filed with labor relations commissions exceeded 1,000 a year, but this decreased to 270 to 350 annually in the last decade (Koshiro 2000).

The United States, in contrast, has experienced a much higher rate of legal disputing concerning the regulation of labor-management relations, and that rate has increased in recent decades. Unfair labor practice charges filed with U.S. National Labor Relations Board offices averaged some 5,000 a year from 1950 to 1957, and then rose steadily to 12,000 in 1960, 20,000

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in 1970, and 44,000 in 1980—although the annual number of collective bargaining negotiations, representation elections, and work stoppages remained about the same (Flanagan 1987:33).  

With respect to individual disputes, Koshiro points out that Japanese law provides workers with comprehensive rights against unjustified dismissal. And Japanese courts, like American courts, have played a creative role in developing restrictions on the employer's right to discharge (Foote 1996). Nevertheless, litigation in Japan is far less frequent and threatening to employers than in the U.S., where employers face a bewildering array of particularized anti-discrimination acts and common law theories of unjust dismissal, and where lawsuits can lead to very large monetary penalties (Olson 1997).  

In Japan, Koshiro's article indicates, the overwhelming majority of individual employment-related issues are channeled into local government inspection offices (some 20,000 a year) and industrial relations advice and conciliation offices (some 80,000 a year). Lawsuits, by contrast, "take a long time and are costly" (Koshiro 2000:358). In 1995, 1,506 civil lawsuits concerning labor law were filed; a large proportion of those were resolved, at the courts' encouragement, through conciliation. By contrast, in California alone, researchers estimated that 1,000 wrongful termination cases were filed in 1986. Nationwide in that year, the average jury award in wrongful termination cases was $208,000, and the employer's legal defense fees averaged $81,000 (Dertouzos, Holland & Ebener 1988). In the mid-1980s, some 9,000 employment discrimination cases were filed annually in federal courts (double the rate a decade earlier); most of these involved allegations of wrongful termination (Donohue & Siegelman 1991).  

A similar contrast between American adversarial legalism and Japanese nonlegalistic approaches to regulation prevails with respect to laws concerning employers' obligations to provide equal employment opportunities for women. In the U.S., anti-discrimination complaints most often are dealt with informally by corporate "human resources departments" and by government civil rights agencies, both of which generally emphasize conciliation. However, these institutions operate in the shadow of an easily mobilized system of private litigation that can and often does impose large money damages on employers—damages that can amount to many millions of dollars when entrepreneurial lawyers bring class-action lawsuits on behalf of all of a company's female employees. Activist judges have played a significant role in expanding women's rights to equal opportunity and to freedom from sexual harassment (Mezey 1992; Gelb & Palley 1996; Gelb 1989). Employers in the U.S. perceive law and litigation concerning treatment of female employees and job applicants as an ever-present possibility and as a considerable threat (Olson 1997; Edelman, Abraham & Erlanger 1992).  

In contrast, the Japanese system for implementing women's rights to equal employment opportunity, as described by Joyce Gelb, emphasizes informal
governmental pressure. Although litigation and judicial decisions, beginning in the 1960s, were crucial in challenging discriminatory employment practices, Japan's 1985 Equal Employment Opportunity Law (EEOL) provides no private right of action, no significant legal penalties for violations, and diverts women's claims of discrimination into voluntary mediation processes. Policy development is entrusted to the Ministry of Labor's Women's Bureau, which has proceeded by promulgating rather cautious administrative guidance. Gelb notes that even in a case in which the Osaka Equal Opportunity Mediation Commission indicated that Sumitomo Metals had violated female employees' rights to equal treatment, the government body did not demand any immediate remedy.

On the other hand, in this policy area, a strain of adversarial legalism exists in Japan (although it is decidedly less vigorous than the American version). Frustrated by the ineffectiveness of the informal administrative regulatory method, Japanese women have turned to litigation to enforce and expand their legal rights. Bypassing the EEOL, women's rights advocates have based many claims on the Constitution and the Labor Standards Act. They have been successful in some high-profile cases (Gross 1994). In 1997, the Diet enacted amendments to the EEOL, effective in 1999, that more explicitly prohibit discrimination (although the new law does not significantly strengthen enforcement provisions). Nevertheless, Gelb's account suggests that when significant segments of the public or well-organized interests believe that Japan's informal, cooperative regulatory style is failing to achieve regulatory goals, they can and sometimes will demand formal legal rules and remedies.

C. REGULATING FINANCIAL INSTITUTIONS

In Japan and the United States alike, government is deeply involved in the regulation of banks, securities firms, home mortgage lending institutions, and other financial services companies. In both countries, governmental regulatory policy has been designed to forestall the failure of financial institutions and to supplement market allocations by encouraging private lending to farmers and home-buyers. Yet in this area, too, national styles of regulation differ, as indicated by two articles in this issue, Milhaupt and Miller's analysis of the Japanese "jusen" problem and Edward Rubin's parallel analysis of the U.S. savings and loan problem.

As Milhaupt and Miller (2000:250) point out, "Japanese financial regulation is characterized by infrequent direct reliance on laws and legal institutions." Policies are developed and conflicts are resolved via informal negotiation between among the national Ministry of Finance (MOF) and associations (gyoka) of major firms in each segment of the financial industry (banks, securities firms, etc.), and between the MOF and broader interests represented on consultative committees (shingikai). Pursuant to a regulatory system
modeled on the American regime (and imposed on Japan during the American occupation), Japan has restricted commercial banks, trust banks, securities firms, and so on, to separate markets. But unlike the U.S., in Japan the government bureaus responsible for each segment are part of the overarching MOF, which coordinates policy among the sectors (including cross-subsidization of weaker institutions) through informal negotiations. Even when financial disaster strikes, as in the case of the huge losses incurred by home mortgage lenders (jusen) following the collapse of Japan’s real estate bubble in 1990, efforts to reallocate the losses, as described by Milhaupt and Miller, were conducted through informal administrative and political bargaining, not by recourse to litigation.

Adversarial legalism does not pervade the U.S. regulation of financial institutions as much as it does some other areas of regulation, yet U.S. regulation is still far more legalistic than Japan’s process. Historically, American financial markets have been decentralized and fragmented, partly because small-town bankers and populist politicians used law to restrict expansion by Wall Street bankers (Roe 1991; Litt et al. 1990). Financial institutions, like other regulated entities, have enjoyed easy access to courts to challenge regulatory decisions. Legislators and regulatory officials, in response, elaborate the precision of statutes and regulations in order to make them more legally defensible. Popular suspicion that governmental regulators will be “captured” by major financial institutions has further increased the legal formality of interactions between the industry and governmental policymakers.

In contrast to the MOF’s centralized oversight of sectorial “regulatory cartels” (as Milhaupt and Miller call them), regulatory authority over the U.S. financial system is highly fragmented. Different governmental bodies have responsibility for regulating securities sales, national banks, state-chartered banks, savings and loan associations, deposit insurance funds, bank holding companies, and so on. Each agency operates under its own particular statutes and regulations, and is subject to detailed oversight by different legislative subcommittees, which multiplies the body of formal legal rules.

Whereas Japan dealt with the jusen problem via closed-door negotiations, Rubin (2000) notes that the collapse of American savings and loan institutions led to an explosion of new laws (including one which he calls “one of the most ferocious regulatory statutes in U.S. history” (ibid.:296)), as well as to legal prosecutions of savings and loan officials and to hundreds of civil lawsuits seeking to recoup financial losses. In contrast to Japan, shifts in American policy toward financial deregulation repeatedly have been either stimulated or slowed by lawsuits and judicial appeals (S. Vogel 1996:223–30). Thus Milhaupt and Miller refer to the regulatory policymaking process in the U.S. as characterized by “ex post” legal accountability, in contrast with Japan’s system of “ex ante” accountability through intensive consultation with regulated entities.
What can be said about the social and economic consequences of the contrasting Japanese and American methods of regulation? This is a large and difficult question, admitting of no easy answers. Whatever those answers may be, they surely vary across regulatory programs and across types of regulated companies. What methods of regulation "work best" in controlling some businesses may not work for others. What will "work best" in regulating businesses in Japan may be very different from what will work in the United States, with its very different business culture and industrial organization. The costs and benefits of particular regulatory programs are both conceptually and empirically difficult to assess objectively. And it is still more difficult to separate out the effects of regulatory style from the consequences that flow from regulatory policies. The essays in this issue, therefore, can cast only some scattered and diffuse light on the consequences of contrasting regulatory styles.

A. CONFLICTING HYPOTHESES

The conventional wisdom is that Japanese regulation, viewed in comparative terms, tends to be quite effective, in the sense that it (a) induces high levels of compliance, and (b) does so without frequent recourse to legal sanctions and without high levels of legal conflict. Moreover, some observers believe that Japan's comparatively nonlegalistic regulatory style, with its strong emphasis on "voluntary" self-regulation by the business community, is economically efficient because it entails business-government dialogue in formulating regulatory standards and allows for flexibility in adapting those standards to particular companies, sites, and situations.

On the other hand, some theorists of regulation would speculate that the Japanese regulatory style, with its emphasis on closed-door cooperative relations, will almost inevitably result in "capture" of regulators by the dominant firms in the regulated industry, which would in turn lead to overlenient or anticompetitive - and hence economically inefficient - regulation. Secrecy, the infrequent resort to strong legal sanctions, and the lack of formal accountability and participation mechanisms might also lead to ineffectiveness.

Conflicting expectations also surround American adversarial legalism. On the negative side, it is often argued that adversarial legalism stimulates more resistance and evasion than does Japanese regulation, and that it squanders more resources in costly legal contestation and paperwork (Braithwaite 1985; Kagan & Axelrad 2000). At the same time, the deterrence-oriented American regulatory style might well be more effective in bringing about changes in business attitudes and practices or in gaining compliance from small firms that government officials cannot monitor regularly.

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The articles in this issue provide some support for each of those conflicting expectations. The patterns differ, however, for different types of regulatory programs.

B. ENVIRONMENTAL AND SAFETY REGULATION

Some researchers have concluded that during the 1980s, expenditures on pollution control equipment by Japanese manufacturers remained essentially flat, while expenditures by U.S. manufacturers rose steadily, reaching significantly higher levels than in Japan (U.S. Congress. Office of Technology Assessment 1994; Nivola 1997:77). That suggests that American pollution control law is more demanding and costly to comply with, an inference supported by officials in the multinational company studied by Aoki. Some of those additional expenditures in the U.S. may arise not only from the stringency of American environmental law but from the additional costs that stem from regulatory process in the United States. Aoki's case study suggests that compared to American adversarial legalism, the cooperative Japanese regulatory style provides a more efficient yet equally effective way of preventing water pollution, at least with respect to the regulation of large industrial companies. The American subsidiary of the company Aoki studied faced a more demanding and potentially punitive legal regime than its Japanese counterpart. It spent more time and money on lawyers, fines, legal conflict, and simply keeping up with regulatory requirements. But the American factory's pollution control measures were no more stringent than the Japanese plant's, and its control systems have been slightly less reliable. Moreover, the American subsidiary, its attention directed toward legal defense, lagged behind its Japanese equivalent in taking affirmative steps that go beyond legal requirements, such as instituting fail-safe measures, developing pollution reduction strategies, and installing environmental management systems that comply with ISO-14000 standards. Similar findings emerge from other case studies of environmental compliance in parallel Japanese and American factories (Aoki & Cioffi 1999).

Similarly, Wokutch and Vansandt conclude that although the Occupational Safety and Health Administration (OSHA) issues many more citations and fines than the cooperation-seeking Japanese workplace safety agency, motor vehicle assembly plants in Japan have lower rates of work-related injuries and illnesses than the factories that the same companies operate in the U.S. The Japanese factories, the authors conclude, do a better job of integrating safety and health concerns into the overall managerial system and shop-floor culture.

Why are these Japanese regulatory systems effective, even though they rarely resort to legal sanctions? Aoki points to two factors. One involves public opinion. Aoki suggests that in the wake of the Minimata Bay poisonings and the other major environmental crises of the 1960s and 1970s, major Japanese companies regard any possible serious legal violation or pollution incident as a potential public relations disaster.
The other explanation relates to business calculations. Japanese manufacturers are deeply committed to world trade and to direct investment in other countries. In a world in which environmental standards are likely to become more and more stringent over time, officials in the company Aoki studied – and in other Japanese multinationals (ibid.) – believe that developing the capacity to be a world leader in environmental protection is good business. Japanese environmental regulation, shaped and implemented by trade associations as well as by government agencies, supports that strategy by ensuring that all major competitors in Japan will be compelled to meet the same standards. If Japanese companies can move in lockstep toward effective pollution control and workplace safety, Japanese firms can present themselves to trading partners and to potential host nations as leaders in these aspects of corporate citizenship.

From that standpoint, it is noteworthy, as Wokutch and Vansandt found, that smaller Japanese factories that supply domestic Japanese motor vehicle manufacturers have much worse workplace safety records than do the big companies’ assembly plants. Moreover, this disparity is much greater than the safety gap between U.S.-based assembly plants and their American parts suppliers. This suggests that for small, less wealthy, domestically oriented businesses, the nonlegalistic Japanese regulatory approach may be less effective than the deterrence-oriented American regulatory style.

C. REGULATION AND SOCIAL CHANGE

Gelb’s analysis of the Equal Employment Opportunity Law points to another limitation of the cooperative Japanese regulatory style. Although cultural resistance to a more equal role for women in the workplace is significantly greater in Japan than in the U.S., it nevertheless seems fair to say that American adversarial legalism has been more effective than Japanese informalism in fostering changes in employers’ attitudes and practices (Gelb 1989; Gelb & Palley 1996). Japan’s Equal Employment Opportunity Law (EEOL), Gelb’s article in this issue indicates, has had some symbolic and consciousness-raising effects. Still, ten years after the EEOL was put into effect, she reports that there have been only insignificant increases in the numbers of Japanese women in managerial positions. In response to the law, employers hired more women, but created a “two-track” system that excludes almost all women, however well-educated, from higher-paid, higher-responsibility career paths. More women than men have been relegated to the growing category of part-time employment. Labor Ministry officials have been reluctant to challenge employers’ stereotypes concerning the undesirability of investing in the training of women of child-bearing age. There is little doubt that the blatantly discriminatory practices that Gelb describes in Japan, if replicated by employers in the U.S., immediately would be confronted by costly lawsuits; such practices, therefore, have been curtailed, even if not eliminated in America.
One cannot explain the relative ineffectiveness of Japan’s EEOL by reference to the absence of organized complainants. As Gelb points out, women’s rights advocates frequently have organized meetings, brought lawsuits, and mounted demonstrations to protest gender discrimination. But unlike the pollution control and workplace safety cases discussed above, it seems that there has been no consensus among business leaders and top government officials that progress in instituting equal opportunity for women is important to Japanese companies’ worldwide competitiveness.

Gelb’s account of the regulation of employment discrimination suggests a broader generalization about Japan’s regulatory style. When policies and implementation mechanisms are developed through consultation with, and typically only with the consent of, affected industry associations, regulation is not likely to be effective when it calls for major changes in corporate values and habits (and those changes seem not to promise any financial benefit). Another example is provided by Mark Levin’s (1997) analysis of Japan’s regulatory approach to reducing disease and death from tobacco smoke. In Japan, warnings on cigarette packages, controls on advertising, and restrictions on exposure to secondhand smoke are far milder than those in the United States and in virtually all other economically developed democracies. In those countries, anti-tobacco and public health activists have pushed governments to take measures that override the interests of the tobacco industry and its allies (which often include governmental finance ministries, which count on tax revenues from tobacco sales) (Kagan & Vogel 1993). In Japan, anti-tobacco activists have been far less successful. In this sphere too, where effective regulation would require significant changes in the values and habits of Japan’s elites (and does not promise obvious competitive advantages to dominant business interests), the cooperative, non-rights-oriented Japanese regulatory style has been less effective than American adversarial legalism.

D. FINANCIAL REGULATION

Since the late 1990s, when the world’s attention was directed to grave weaknesses in Japan’s banking and securities industries (Chernow 1997; Strom 1997), few observers have been inclined to praise Japan’s system for regulating financial institutions. It is worth noting, however, that the financial regulators’ failures did not arise, as proponents of adversarial legalism might suspect, because Japanese regulatory officials lacked adequate legal authority or sanctioning capacity. Japanese financial institutions did not adopt a resistant stance toward the Ministry of Finance. By and large, they complied with MOF regulations. Rather, according to Milhaupt and Miller’s analysis, Japan’s financial problems stemmed from defects in the Ministry of Finance’s policies.

Milhaupt and Miller describe Japan’s system as a “regulatory cartel,” in which major firms in each financial services sector (banks, securities firms,
etc.) work closely with governmental officials in the MOF to implement regulatory policies that (1) limit competition and (2) provide security for financially weakened companies (thereby providing incentives that maintain cooperation and compliance). For decades, an intricate but informal, non-legalistic regulatory system worked effectively, providing stability in Japan's financial system, channelling loans to the industrial establishment and fostering housing development. Milhaupt and Miller tell us, however, that although the MOF comprehensively regulated virtually all other financial companies, the MOF had never exercised regulatory authority over the jusen, institutions originally set up to finance home mortgages. Hence the MOF did not seek to restrict jusen companies when they began to invest in the runaway commercial real estate market and to make higher risk corporate loans.\(^5\) Agricultural cooperatives fueled this investment pattern by funnelling large amounts of money to the jusen companies, but that was consistent, Milhaupt and Miller note, with governmental administrative guidance. Regulatory officials, it seems, did not adequately anticipate the devastating financial effects that these lending patterns would produce when the real estate bubble burst.

Like the savings and loan problem in the United States described by Edward Rubin, the jusen problem can be viewed more as a problem of ill-advised regulatory policies than as a problem of inadequate implementation of regulatory norms or standards — although there were elements of the latter in both cases, especially in the U.S. The jusen story does expose a fundamental vulnerability of the informal Japanese mode of regulation.

Why did the jusen companies' risky loans go unregulated? Many jusen managers, Milhaupt and Miller point out, were former MOF officials. Their largest stakeholders were the largest Japanese banks. Indeed, this structural capacity for informal monitoring and control, bolstered by interlocking business and governmental directorates, is precisely why Japanese regulation so often eschews formal, law-based regulation, avoiding the inflexibility of legalistic control. But in this regulatory arena, that strength became a weakness. The large banks, as Milhaupt and Miller tell the story, used their leverage to supplant the jusen companies' role in the home lending market and to divert jusen funds into riskier loans and loans that the banks were unable to make due to regulatory restrictions. The MOF, with its traditional responsiveness to major financial institutions, apparently looked the other way.

Similarly, when it came to resolving and reallocating the financial losses of the jusen companies, the MOF deferred to the pressures exerted by the agricultural cooperatives, which exerted political influence in the Liberal Democratic Party, and failed to require the cooperatives to bear their fare share of the losses. Consistent with the norms of Japanese financial regulation, as Milhaupt and Miller describe it, major banks were compelled to provide economic help to the financially stressed jusen companies. Milhaupt and Miller write, "[the] MOF steadfastly rejected the idea of a

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legal solution, reiterating its position that a deal worked out among the parties was the best way to achieve a prompt resolution of the jusen problem.” By declining to compel any institution to write off its bad debts or allow it to fail, the MOF’s policies ended up deepening the financial crises both for the jusen and for the banks.

Ultimately, the Diet was forced to appropriate Y685 billion of taxpayer funds for liquidating the weakened jusen. A new law more explicitly instructed the MOF to take legal action to deal with unsound financial institutions, rather than forcing banks or the public to bail them out. Inspections of financial institutions, a new bill proposed, would be transferred to a new agency.

Milhaupt and Miller conclude that Japan’s “regulatory cartel” for financial institutions was characterized by a fatal “nontransparency” that frustrated critical outside review and accountability. In this regard, American adversarial legalism, with its intense insistence on public participation and legal scrutiny of the regulatory policymaking process, seems to provide distinctive advantages. The “judicialization” of administrative policymaking in the U.S. is justly criticized as highly inefficient. But it may well provide stronger checks against truly disastrous regulatory policies than do systems that rely on policymaking by closed networks of agency officials and industry insiders.

On the other hand, as shown by Rubin’s analysis of the U.S. savings and loan industry fiasco, American adversarial legalism is not immune to major regulatory errors. The availability of judicial review failed, as it almost inevitably will, to foil misguided congressional policies – such as the ill-thought-through deregulation of the S&Ls, huge increases in deposit insurance, and the failure to staff regulatory offices to meet the new needs. Adversarial legalism also failed to compel savings and loan regulators to insist on more stringent accounting standards. And adversarial legalism failed to block congressional intervention into administrative processes on behalf of politically influential constituents who complained about regulatory restrictions. In both Japan and the United States, in short, regulatory failure stemmed from political concessions to important financial institutions and from policymakers’ false hopes that tomorrow’s economic growth would eventually take care of today’s bad loans.

V. CONCLUSION

The articles in this issue tend to reinforce the conventional images of American regulation as more adversarial and legalistic and of Japanese regulation as more informal, cooperation-oriented, and nonlegalistic. They suggest that in some regulatory arenas – such as pollution control and occupational safety in larger firms – Japan’s regulatory style is at least as effective as the American approach, while it avoids the legal conflict,
procedural delays, and large expenditures on lawyering that reduce the efficiency of regulation in the United States. On the other hand, the informal Japanese approach is less effective than adversarial legalism whenever regulation, if it is to be effective, requires significant changes in the attitudes of business and governmental elites—as in the realm of equal employment opportunity for women. Moreover, developments in Japan's financial sector indicate that the cooperation-based Japanese regulatory method, while offering the virtues of responsiveness and flexibility, also creates a substantial risk of undue deference to powerful business and political interests, partly because the informal regulatory style lacks transparency and legal accountability.

The ostensible failure of Japanese regulatory methods in implementing the Equal Employment Opportunity Law and in encouraging financially sound practices by lending institutions has stimulated recourse to somewhat more legalistic alternatives. More generally, as global competition compels further changes in Japan's methods of governance and doing business, one might expect continuing pressures for more transparent and hence more legalistic modes of regulation (Kagan 1997). Yet movement toward more formal legal modes of regulation does not mean that Japan will turn to American-style adversarial legalism. Styles of regulation employed by the parliamentary and bureaucratic governments of Western Europe provide a more likely model. Indeed, the articles in this issue that examine regulation in the United States do not paint an entirely flattering picture of American adversarial legalism. In striving for improvements in their respective styles of regulation, Japan and the United States might be well advised to examine the virtues of each others' systems, but to strive to avoid their vulnerabilities as well.

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NOTES

3. Complaints of wrongful termination on grounds of discrimination filed with a federal administrative agency, the Equal Employment Opportunity Commission, reached over 70,000 in 1984, up from about 22,000 a decade earlier (Donohue & Siegelman 1991).
4. Legal success may mean different things in the U.S. and in Japan. Gelb reports than in two highly publicized sexual harassment cases, a publishing company

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and a company president were ordered to pay female employees $15,000 in damages. Conversely, in San Francisco, a jury awarded $50,000 in compensatory damages for sexual harassment to a female legal secretary who had been employed by the firm for less than two months, plus $7.1 million in punitive damages (reduced by the judge to $3.7 million) (Gross 1994).

5. Milhaupt and Miller tell us that the MOF did not officially exercise any regulatory authority over the jusen companies until 1991.

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