

An Overview *of* Japanese Law *for Translators*

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Introduction

The best in-depth introduction to the Japanese legal system in English language that I have found is *Introduction to Japanese Law* by Yosiyuki Noda¹, originally published in 1966 in French as *Introduction au Droit Japonais* then translated-edited into English by Anthony H. Angelo. To better understand the many nuances of Japanese law, readers should read the entire book for themselves. It's worth it. For the purpose of this ongoing research paper, however, only major themes and the most salient points (in my view) will be summarized to lay a strong foundation for the topic.

It's not a requirement to be a lawyer to be a legal translator. Formal legal training certainly helps in deciphering legal codes more effectively. Yet the matter of translating the meaning of a legal text from one *legal family* to another requires sufficient understanding of the unique legal systems involved. For example, in translating 'deed poll' from English to Japanese for a client's change of name—a legal document which only exists under Common Law—I spent the better part of an hour trying to find a clear Japanese equivalent. In the end I used katakana to simply replicate the sound of the foreign legal term in Japanese. However I would have had to take another approach had the target language been Mandarin. This is just an example of the types of decisions legal translators make and familiarity with many written laws is just not enough to avoid costly mistakes. This paper is to help myself and anyone in need to become well-informed by seeing the bigger picture. It seems to me there is a lack of translated material on the subject of *understanding* Japanese law.

The diagram on the following page highlights the main points to be explored during our dissection of Japan's legal history. Firstly, the accumulated traditions which shaped Japanese society during the majority of its history is the 'nucleus' for development of law in Japan. This goes for any nation; studying history gives amazing insight into our current world system. Without looking into Japan's past, studying its current legal system will have significantly less contextual meaning. Out of the centuries of tradition at the invisible core of Japanese law, the next major developments occur during the Meiji Era as Japan embraces western law. It is from here that the legal system in Japan begins to resemble what it is today but the process is long and complex. In what appears to be an attempt to harmonize established custom with European ideas, Japan operates as an empire under the Tenno Regime until the end of World War II when a new constitution is enacted which signifies a radical break from the imperial system in force since the Meiji Era. The legal system constructed upon The Constitution of Japan in 1946 will be the first focus of this paper.

Once a good foundation on the history, structure and character of Japanese law is established, attention will shift to how to use the information gathered for better translation of Japanese legal documents.

Introductory Diagram: The Development of Japanese Law



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1. History of Law in Japan until 1868

It is unknown how long Japan has been inhabited. The first report of Japan is found in Chinese texts written during the Han Dynasty. First century A.D. Japan seems to be comprised of approximately 100 clans that fought among themselves. The clans were grouping themselves into about 30 regions by the second century, then united under Queen Himiko of the state of Yamatai by the beginning of the third century. Himiko, according to the Chinese chronicles, seemed to be the ancestor of the imperial family. The foundations of Japan found in the *Kojiki* and *Nihonshoki*—traditions handed down within Japan from the eighth century—claim Japan's beginnings date from 660 B.C. Only God knows the true story, but suffice it to say that from the inception of known Japan, its history is divided into broad periods. Yosiyuki relates that law and legal thought developed spontaneously and unconsciously in pre-1868 Japan. Modern Japanese law is also perceived as an heir of the Romano-Germanic family of law, having legal codes originating completely in western law and Roman law; not in early Japanese law. Yosiyuki proposes that although there is no definite form to Japanese law or legal thought before the Modern Era (1868 onwards), there is no break in the continuity of unseen factors which play an important role in the social life of the Japanese people today. In my own words, though Japan's current legal system is completely based on western law, the character of Japanese was already well-formed before the reception of western law. Due to such strong pre-existing characteristics, Japan fully adopted western law then fully adapted it.

2. Assimilation of Japan into Western Law

After centuries of feudalism, the emperor and the shogun, Japan is forced to open itself to outside influence or face invasion. Yosiyuki painstakingly describes the difficult process of Japan's artificial implantation of French and German legal systems into its own law. Much confusion follows when attempting to apply these foreign-grown rules in a country so different to any European nation of the time. Many concepts are 'untranslatable' or incompatible with customary laws deeply entrenched in Japanese society. Yosiyuki explains, "While Japan succeeded in faithfully and skilfully imitating the French and German legal systems, its own culture could not help but give an original character to the system that was received."

3. The Empire of Japan

The Empire of Japan refers to the regime under which the nation existed from the end of the Tokugawa Era (1868) until the enactment of a new Constitution at the end of World War II (1946). Under an emperor considered to be incarnate divinity, this time period in Japanese history is often characterized by rapid reforms in just about every aspect of life and nationhood. The tenno system is looked upon by some in light of the vicious political measures taken by the absolutist government. In others

there remains a certain nostalgia about the privileges of life under the empire. Yosiyuki concludes that most Japanese in the 1960's were positioned between these two viewpoints. I would assume that for later generations, who have no firsthand experience of life under the Empire of Japan, it remains a treasure in popular culture without the desire to recreate such conditions in the future.

4. A New Constitution—A New National Identity?

The Constitution of Japan enacted in 1946 marked the end of the Empire of Japan and the divinity of the emperor. This core statute still embodies the new identity embraced by Japan after the devastation of World War II upon which its current legal system is based. Much can be learned from and debated on regarding the Constitution; constitutional reform remains a very prickly subject in Japan for reasons too complex for brief commentary here. The first step is to read the entire Constitution for oneself and analyse the historical circumstances that brought it about. Perhaps also count the number of U.S. military bases dotting the landscape of Japan. The Constitution of 1946 didn't only give Japan a chance to cast off some destructive traditions and to reinvent itself. It is also a forced disarmament and a sudden imposition of foreign ideals which seem to still cause contention from time to time.

5. The Modern Japanese Legal System

a. The Legislature

Article 41 of the Constitution of Japan declares that the Parliament (the Diet) is the only law-making organ of the nation and then defines its structure. To read the Constitution of Japan or other statutes in bilingual translation, search the Japanese Law Translation website:

<http://www.japaneselawtranslation.go.jp/law/?re=02>

b. The Judiciary

Article 76 of the Constitution states, "The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law." Regulations regarding the work of public procurators and judges is also broadly outlined. There is a diversity of subsidiary legislation which regulates the system of courts, the different types of legal professionals and public officials in Japan.

c. The Executive

Article 65 of the Constitution states that executive power shall be vested in the Cabinet and goes on to outline its functions and operation.

d. The Legal Profession in Japan

The Japanese legal system is modeled after the French and German ones, which means legal training in Japan is similar to that of lawyers of the Romano-Germanic family of law. The main categories of Japanese legal professionals are:

- *Bengoshi* 弁護士 – loosely translated as attorney; one who takes on the defense of others. *Bengoshi* does not exactly correspond to barrister since he may represent parties in the way a solicitor does, and *bengoshi* are not accredited with the great respect that barristers enjoy in the UK. Also parties to court proceedings need not retain the services of a *bengoshi*.
- *Kensatsu-kan* 検察官 – public prosecutor
- *Saiban-kan* 裁判官 – judge

There exist legal specialists in Japan who undergo less training for certification:

- Patent agents (*benrishi* 弁理士) – specialist in patent law.
- Licensed tax accountant (*zeirishi* 税理士) – specialist in tax law and the Japanese tax system.
- Judicial scriveners (*shiho-shoshi* 司法書士) – person qualified to prepare legal documents, handle real-estate transactions, etc.
- Administrative scriveners (*gyosei-shoshi* 行政書士) – paralegal qualified to prepare legal documents on administrative matters, e.g. immigration.

e. Contemporary Japanese and the Law

According to Yosiyuki, an honorable Japanese civilian without legal knowledge or training will likely consider involvement with law to be undesirable and even detestable. He attributes this general dislike of resorting to legal proceedings to the Japanese concept of law as an instrument of constraint used by the state to impose its will. Even after reception of Japan's modern legal system, state law hardly ever functioned for the protection of individual rights, unlike most European countries.

The Japanese manner of thinking, Yosiyuki explains, favors a system of social rules of a non-legal nature to direct their lives which operate parallel to the clearly defined system of state law. The traditional rules that the Japanese obey are called *giri* 義理. Yet Yosiyuki is of the opinion that the system of a purely legal nature will slowly take deep root in Japanese social life. It is more than 50 years after his book was originally published, and this tendency towards preserving tradition can be seen in Japan's somewhat stagnant immigration law, among

other legislation I have yet to study. On the other hand, Japanese have displayed a great capacity for change; albeit on unique terms.

This is the most subjective part of the topic and merits a book of its own. Japanese legal thought is fluid and ever-changing though an underlying attitude that clings to tradition holds firm regardless of modernization. This may lead to frustrating and sometimes contradictory legal rules from an outside perspective. On the other hand, there is a resilience to the Japanese character that has managed to mix just enough novelty into its legal system to make the rules sustainable. A reactive—as opposed to proactive—approach to development of legislation is likely to continue in Japan. After all, law to Japanese, as I understand from Yosiyuki, remains a necessary evil to be avoided if possible.

f. Sources of Law

Yosiyuki states the sources of Japanese law as:

- Legislation – Written laws in various forms such as the six codes (the Constitution, the Civil Code, the Commercial Code, the Code of Civil Procedure, the Criminal Code and the Code of Criminal Procedure); other statutes; treaties or subsidiary legislation. Collections of legislation are available for purchase in volumes and reprinted annually.
- Custom and *Jori* – Custom may sometimes act as a subsidiary source of law which a judge applies only in the absence of legislation. *Jori* is rarely applied in Japan today, but refers to the general principles of law applied to fill gaps in legislation and custom. Yosiyuki describes *jori* as decisions of early Japanese judges based on common sense while their minds were still unaccustomed to modern legal reasoning.
- Cases and Legal Theory – Rules applied by the courts i.e. case law; the body of rules built up by judicial practice around a legislative text. Japanese case law can be studied through official or private collections of law reports. Legal theory refers to the research of jurists which acts as the theoretical basis for formation of legal rules, excites legislative activity and inspires judicial thinking. Legal theory is therefore basic to law and an indirect source of law.

Translation between Legal Systems

Japan has a mixed legal system, despite some sources declaring that it operates predominantly under Common Law or Continental Law. From the inception of Japan's modern legal system, it imitated the French and German legal systems which are core to Continental Law. Yet since the nineteenth century, Japan has also developed to incorporate elements of Common Law; particularly that of America. In my limited experience, this is most visible in the Companies Act of Japan and the influence of American-style corporations in Japan. Its current Constitution also brings its public and constitutional laws closer to America than European models.

Here is an apt synopsis of modern Japanese law:

The modern Japanese legal system is based on the civil law system, following the model of 19th Century European legal systems, especially the legal codes of Germany and France. Japan established its legal system when imperial rule to Japan was restored in 1868 as part of the Meiji Restoration. The Meiji Constitution was the organic law of the Japanese empire in effect from 1890 to 1945. After World War II, there was a major legal reform, and the 1947 Constitution was drawn up under the Allied Occupation, with significant American influence. The current Japanese legal system is a hybrid of continental and American law. Both the Civil Law concepts and the more recent Common Law influences are all effected by traditional Japanese values.²

The hybrid nature of the Japanese legal system makes it more complex for legal translation, even if the legal documents being translated are all grounded in Romano-Germanic Law or Common Law. Being a mixed legal system means that any translation of Japanese legal documents requires considerable skill to preserve the intended legal effect. Additionally, the Japanese preference to avoid litigation by non-legal solutions outside courtrooms (such as in conciliation rooms³ and other mediation) means that usual legal procedures or processes employed in other countries are much changed or avoided in Japan. A personal example is found in Japan's requirement for some foreigners to submit a certified signature or seal certificate to complete certain formalities before obtaining resident status in Japan. The majority of foreigners entering Japan do not own such a seal, nor can they easily obtain a certified signature certificate from their home country's consulate since many countries simply accept the signature sample in a passport as proof of an authentic signature. Legal translators will find many such impasses in creating documents of equal legal effect in regards to Japanese law.

The best way I have found to reconcile the many discrepancies between Japanese law and other systems of law is to understand the purpose of the legal document to be translated. By clearly understanding the aim of the source language legal instrument, the translator can

properly adapt its form and language to have the **equivalent legal force** in the legal system of the target language.

Law from a Japanese Perspective

Japanese legal thought was speculated on in the introduction from a personal point of view and by referencing the perspective of Yosiyuki Noda¹. This section is more objective; the aim being to help the legal translator put aside his naturally-biased legal thought to better interpret law from a Japanese perspective. This is more concerned with seeing Continental and Common Law from the lens of *giri* 義理 instead of skimming through Japanese law for the nearest equivalent of western legal thought. It requires the legal translator to step out of his familiar perceptions of law to understand how the same written law code will often carry alternative meaning because of its application in Japanese society.

For example, instead of simply translating an employment contract word for word into grammatically correct Japanese, a skilled legal translator will have considered the Japanese approach to contracts as a regulatory tool in work relationships. Considering the traditional mindset in Japan that to become part of a company is to join a family *for life*, the cold calculation of European or American employment contracts may cause offense. I dare you to search a Japanese dictionary for the translation of the verb “to fire”. One translation literally means “to decapitate”! Therefore, a legal translator who has some grasp of *giri* 義理 will be sensitive to how plain speech, which is encouraged in western legal traditions, can lead to shame in a Japanese context. As one Japanese client explained to me, even Japanese struggle to balance clarity of expression with appropriate respect when there is a hardened custom of vagueness forcing the parties to continually *read between the lines* 行間を読む. He would sometimes give me advice about my choice of words, describing the correction as ‘having more *Yamato* soul’.

For a translator simply wanting to complete a job reasonably well and get paid, this is not too important. Generally speaking, accurate meaning can still be transferred with less effort. However this attitude towards translation can never lead to excellence. Such a translator will also be limited in scope as serious clients will prefer a translator who comes close to translating *them*—not just their words.

Legal Instruments in Japan

Legal instrument is translated *nensho* 念書 in Japanese. It’s a very broad term that can encapsulate all types of legal documents. The legal instruments I see most often are:

- **Business documents** (incorporation documents, application forms, memorandums, employment contracts etc.);
- **Private documents** (births, deaths, marriages, proofs of ownership, personal identification, academic certificates, licences and other forms of attestation)

It is usually possible to find a direct Japanese equivalent of typical legal instruments. However attention must be paid to established norms of presentation. If in doubt, I find it more reassuring to search for a template from an official source or one created by a native Japanese person.

Japan is a Contracting Party to the Apostille Convention which can affect the due process of legal translations of public documents. Some professional translators reject to translate certain foreign documents without an Apostille. Even though it is not necessary for a legal translator to offer legal advice, incorrectly prepared legal documents will put a client at risk and may lead to serious losses (in time, money, business transactions, fines or other penalties under law). Therefore it is best to know the correct and up-to-date procedures for preparation and submission of legal instruments. After all, legal translators are selected *because* of their specialization in law.

It must also be verified whether the legal document needs to be translated by a certified translator or sworn translator such as those listed by the Japan Association of Translators **日本翻訳者協会** (JAT). It would be disappointing for the client to have to re-do the whole translation process (with all related fees) simply because the legal translator did not confirm the requirements of the parties receiving the legal document translation. Usually, translation orders for court documents, public documents, highly technical content and some academic certificates should only be accepted if you are confident the translation will be accepted as having appropriate legal force.

Drafting Japanese Legal Documents

Some acquisition of legal drafting skills will help any legal translator, though it may not often be required for him/her to write a legal text from scratch. In cases where there is no available precedent or existing form to satisfy the client's needs, a legal translator may have to resort to drafting a new document. However, high-quality templates and model clauses are hard to find in any language.

Aside from revising an established template to prepare a suitable legal document, it is possible to create one's own templates. That is to say, begin your own archive of commonly-used drafts. It's even possible to create a distinctive 'house-style' for your original documents. Just be sure the format chosen for templates works well with the legal tradition in which it must have effect. Seek professional help where possible. These measures can save drafting time when a client demands fast results yet provides vague guidelines. Text might also need

considerable adjustment to be understandable in the legal culture of the target language. Not all clients will know exactly what they need or how to achieve their goal. In such circumstances, a legal translator's understanding of the legal cultures and applicable laws will prove invaluable.

Japan, with its mixed legal system, will have legal drafting traditions from Continental Law, Common Law and its own Customary Law. Familiarity with precedents and forms of drafting within the mentioned systems is essential. An informative, interesting analysis on drafting contracts under Continental and Common Law systems can be found in the online book by Willem Wiggers on his website (<https://weagree.com>)⁴. For uniquely-Japanese drafting norms, working with an authentic Japanese template or alongside a competent Japanese professional is the best assurance of quality.

When drafting legal documents for use in Japan, opt for simple and clear Japanese with the appropriate level of respectful language. The ultimate goal is for the legal instrument to have its intended effect under Japanese law.

Conclusion

This research has been conducted using a qualitative approach, being more concerned with methodology than comparison of legal codes. I thought it more meaningful than offering an exhaustive legal glossary and drawing up complicated comparison tables of legal systems. The main idea is that knowledge of law codes does not guarantee effective legal translation, especially into a Japanese legal context which is hybrid and often influenced by subjective elements.

A translator's fluency in a language greatly depends on deep understanding of native speakers' culture. A legal translator takes translation a step further, being competent in matters relating to the legal culture or legal tradition of a language group.

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