GLOBALIZATION WITHOUT CONVERGENCE: AN ANALYSIS OF THE HARMONIZATION OF INTELLECTUAL PROPERTY LAWS ACROSS THREE DIFFERENT LEGAL REGIMES

A

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typing of the numerous drafts of my research paper, and to my children, Katherine and Robert, to whom I dedicate my efforts.
ABSTRACT

Globalization has created pressures on nations to conform their societies, culture, political ideologies, and laws in order to engender parity and facilitate economic trade, foreign direct investment and technology transfers. Multilateral trade and global economic alliances like the World Trade Organization ("WTO") have demanded that member nations conform their business practices and laws to achieve a "level playing field." In order to accomplish this, the WTO has adopted and relied considerably on convergence theory. This theory maintains, in part, that the harmonization of laws such as those dealing with intellectual property ("IP") will make the global marketplace more efficient and fair and benefit participating nation economies.

However, merely harmonizing IP laws may be insufficient to create a "level playing field" for trade and commerce. In order for convergence theory to work, not only must IP laws be harmonized, but more importantly, the respective legal regimes of the signatory countries must also be conformed.

This research analyzes the harmonization of IP laws across three different legal regimes. In particular, I focus on the regimes of America, Japan and the Philippines, which have harmonized their IP laws in accordance with the WTO requirements. Using legal case studies I conducted personal interviews of selected judges and justices from each legal regime to identify their mental processes used in judicial decision making. The research yielded results which indicated that given similar laws and facts, jurists from each legal regime use unique mental processes not used by jurists of other regimes. This finding was corroborated by the significant variations in judicial outcome between
regimes, and the lack of uniformity of outcome across all regimes. From this finding, I conclude that legal regimes appear to serve as a moderator of judicial outcome.

Based on my conclusion, the mere harmonizing of IP laws without concomitant changes to the legal regimes of member nations may not yield similar judicial outcomes. Consequently, the underlying use and reliance on convergence theory by WTO may not work and should be reevaluated in light of this research.
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As I sat thinking about all the research materials I had gone through and the numerous theories I had considered to formulate my research question, I reflected on my legal career and knew for a fact that predicting how judges arrived at decision making was a difficult thing to do. Having been asked to predict on many occasions how a judge would decide a pending case for my client made me appreciate the difficulty of forecasting how judges think. From my experience, every judge viewed the facts and law differently. Each flavored the case with his or her own brand of biases, knowledge and experience and, yes, even ignorance. The challenge of structuring research that could examine the mental process of judicial decision making preoccupied my thoughts. How could I research the judicial decision making process across three legal regimes?

Then it dawned on me. I related back and remembered some of my favorite foods I enjoyed while growing up. Years later when I tried to prepare the same foods they never quite tasted the same. Were the handed down recipes incomplete or the instructions inaccurate? No, I realized that the dishes never tasted the same because there was something unique in the selection and preparation of the ingredients, application of the spices and flavors; and cooking process. My attempts to prepare the same dishes failed because I did not share the same tastes and techniques of cooking as the original chef, my mother.

Taking this concept a bit further . . . I thought what would happen if I selected three chefs from three different countries, each born and raised locally, educated and trained in cooking their respective culinary cuisine, and gave each chef the same recipe
for a selected dish and asked them to cook it. Would the dishes look the same? Would they even taste the same? My supposition was that it would not.

Each chef would probably bring their own sense of taste and culinary artistry gained from their background, culture, training and experience. To some chefs, certain ingredients called for by the recipe may hold more significance than others and they would be emphasized in the cooking process. To others, their individual preferences for using certain spices could also differ. All of these personal preferences would result in a shift in taste, texture and smell.

The thought of cooking recipes gave me the idea to use case studies in my interviews of jurists. I would ask each jurist to use a case study (like a recipe, blending law with fact) to read, think about and yield a finished product i.e., judicial decision. If it was anything like the food dishes that I had prepared, judicial outcomes amongst regimes should vary. This is because jurists, like the chefs, process the facts and legal issues in their own way. It stood to reason that like the foods I had prepared, judicial decision making also incorporated the personal values, mental processes, culture and sense of fairness of the jurists.

The research confirmed my initial suspicion. If using the same recipe did not yield the same taste in food, then how could using the same law yield the same judicial outcome . . . some food for thought.
CHAPTER 1
INTRODUCTION

Globalization is not just some economic fad, and it is not just a passing trend. It is an international system – the dominant international system that replaced the Cold War system after the fall of the Berlin Wall. (Friedman 2000, 45; de Soto 2000, 210).

1.1 Statement of Purpose

The purpose of this research is to better understand the impacts of the global convergence theory and its consequence i.e., harmonization of laws, on three different legal regimes. Multilateral trade organizations like the World Trade Organization have embraced convergence theory as the panacea to bringing about fair trade and commerce amongst its member nations. The resulting trade agreements are based on the "norm that the harmony or uniformity of laws is the ideal for the free flow of goods and services globally" (Sassen 2006, 241). It is hoped that results from this research may improve our understanding of whether convergence theory actually accomplishes what the multilateral trade organizations believe it does i.e., create a "level playing field" for trade and commerce, through uniformity of legal rights and obligations, consistency, and predictability of legal outcomes.¹

Multilateral trade agreements have required its signatory nations to standardize or homogenize i.e., harmonization, their laws to one standard model in the field of intellectual property. In order to accomplish this objective, the model law must be transplanted to various countries each having their own legal regime and indigenous law. The effects of transplanted law on the receiving countries can be studied through a close

¹This is consistent with the modernization thesis of Max Weber. That is, the formal-rational law enables predictability and risk-calculation, which is a requisite for investment of capital.
examination of how the new laws are interpreted, used and enforced within each respective legal regime. The results of my research may also consequently indicate what role, if any, legal regimes play in the receptivity to transplanted laws.

Legal regimes are developed and chosen by countries based on many factors. These factors include historical events, as well as economic, cultural and social influences. In this study of differing legal regimes connections to some of these factors are logically present. I, therefore, studied how the context of these factors affects jurists who make decisions in each of the legal regimes examined. Research in this area is nascent and results from this effort could validate various theories pertaining to the presence of a nexus between law and culture.

The significance of this research may influence how multinational corporations decide on whether to locate in a particular country based on its laws and the structure of its legal regime. For these corporations, decisions on foreign direct investment ("FDI") and legal protection of its proprietary assets could perhaps benefit from considering the results of this research. IP laws are quite important to multinational corporations who wish to avoid unauthorized acquisitions of their proprietary assets in foreign markets. This is a major consideration for manufacturing companies and industries heavily dependent on research and development. At the heart of the WTO's agenda is the protection of intellectual property rights to facilitate cross border commerce. This trade organization has attempted to achieve this goal through convergence of law over the objection of economically certain economically less developed countries.²

² For example, India, a signatory to the TRIPS Agreement, has opposed patents for pharmaceuticals because they inflate costs making important life threatening medicines unavailable to the poor. The Battle of Seattle at WTO’s meeting in November 1999, signaled a growing underground opposition to
The pressure placed on WTO members (particularly the smaller, economically less developed countries) to conform their laws to a set of universal standards promulgated under the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") is based on an overriding assumption that convergence is beneficial i.e., one size fits all (Maskus 2000, 2; Arup 2000, 16; Guillen 2001, 3). Convergence theory is based on the general assumption that similarly drafted IP laws and the rights generated thereby have the same meaning amongst member countries, and therefore, will produce similar findings or outcomes. In order to test the validity of this theory, I propose to study the effects of convergence on IP laws in WTO member countries, which have a different type of legal regime i.e., United States, Philippines, and Japan. Specifically, I focused on how dissimilar legal regimes affect judicial decision making given identical facts and laws. If convergence theory is correct, then judicial interpretation, reasoning, analysis i.e., the judicial decision making process, should be consistent across all three legal regimes tested with minimal variation.

My research design is centered about in-depth interviews of jurists selected from all three venues. From these interviews, I expected to yield a "thick description" of how laws are perceived, interpreted and acted upon, but more significantly the associated globalization from different segments of society (i.e., women's groups, environmental groups, social justice organization, etc. (Held and McGrew 2007).

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1Arup (2000). Convergence theory tends to suggest that nation states must offer the same regulatory regime if they are to meet the expectations of global suppliers (Guillen 2001). Conventional wisdom has it that the world is undergoing rapid globalization and that this process compels countries, industries, and firms to converge toward a homogeneous organizational pattern of "best practice" or "optimal efficiency" – those who fail to conform are doomed to fail in the global economy.
meanings given to laws by jurists from each respective country and legal regime (Geertz 2000, 9-11).

1.2 Research Questions and Limitations of Research

The purpose of this research is to determine whether differences in legal regimes play a role in how judicial decisions are made in IP cases. In short, I will be examining whether legal regimes moderate judicial decision making. My investigation will look at how jurists perceive the facts as presented; how they formulate the legal issues in a case; how they interpret and give meaning to relevant laws and facts; how they administer or apply the laws; and how they fashion remedies or otherwise dispose of legal cases before them. In short, my analysis will explore the mental processes jurists use in decision making.

The research utilizes a qualitative approach in examining a judge’s experience in a role that he or she may play as the administrator, interpreter and implementer of the “rule of law.” As such, I present generalized assumptions of what is anticipated in the process of judicial decision making across three different types of legal regimes in the United States, Japan and the Republic of the Philippines. The following are the research questions presented by this research:

Q1: Given harmonized IP law and similar facts, whether judicial decision making across three different legal regimes produce identical outcomes.

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4Geertz describes “thick description” as an analysis of data which attempts to sort out structures of signification. “Doing ethnography is like trying to read (in the sense of “construct a reading of”) a manuscript – foreign, faded, full of ellipses, incoherencies, suspicious emendations, and tendentious commentaries, but written not in conventionalized graphs of sound but in transient examples of shaped behavior.”
Q2: Whether legal regimes moderate judicial decision making and outcome.

Q3: Whether cultural and historical events influence and shape legal regimes.

The harmonization model for this research design is set forth in Figure 1.

1.3 Definitions

The following terms are used repeatedly throughout this proposal and are defined below:

1. "National culture" - relatively enduring personality characteristics and patterns that are modal among adult members of the society (Inkeles 1997).

2. "Rule of law" - is just one way of perceiving the meaning of political events. It is a philosophy of law that is defined as “not the rule of men” or “not the rule by law” (Kahn 1999, 67). It is a social practice: it is a way of being in the world. To live under the rule of law is to maintain a set of beliefs about the self and community, time and space, authority and representation. It is to understand the actions of others and the possible actions of the self as expressions of these beliefs. Without these beliefs, the rule of law appears as just another form of coercive governmental authority (Kahn 1999, 36). In contrast to the “rule of law” are legal philosophies followed in Communist countries where law can always be changed at the arbitrary whim of the ruler or ruling group. This is justified on the grounds that internal and external conditions vary and the ruler must steer the course of the state according to his judgment of the situation. Law becomes whatever is decreed by the ruler or ruling group. This is referred to as the “rule by law” or “rule of men” jurisprudence. It is manifested by the overt norm that the ruler or ruling
HARMONIZATION MODEL

Figure 1 (Original chart by author)
group alone has the authority to make, revise, revoke, proclaim, adjudicate, execute, violate and suspend any law (Fu 1996, 64-137).

3. “Legal regime” - is an operating set of legal institutions, procedures, personnel and rules. These include, but are not limited to, the courts, judges, justices, law clerks, jurisprudence, administration, legal education, research and training institutions, rules of procedure, laws, etc. There are four basic major legal regimes in the world. They are the civil law system, the common law system, the socialist law system and religious based legal systems (e.g., Islamic law). Within the four major systems are different editions of the same system (Merryman 1985, 1-2).

4. “Convergence” – a movement from diversity to uniformity. It is the movement of countries to become more homogenized, standardized and unified from a social, cultural, legal, political and economic standpoint brought about by globalization (Sassen 2006, 241-242; Guill'en 2001, 1-6).

5. “Harmonization” - where a country changes its laws to become more similar, standardized, and unified in nature to the laws of another country or those laws promulgated by multilateral trade agreements (Maskus 2004, 568-569).

6. “Divergence” – the mirror image of convergence. It is the movement of countries to retain and promote their individuality and differences from other countries (Held and McGrew 2007, 117-136) (see also, Coughlin 2001).

7. “Stare Decisis” - (Lat. To abide by, or adhere to, decided cases). A doctrine developed primarily as part of the common law system, but adapted by other legal regimes in a limited fashion. It is a policy of courts to stand by precedent and not to disturb settled point. This doctrine stands for the proposition that when a court has once
laid down a principle of law as applicable to a certain set of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same (Black’s Law Dictionary 1968, 1577).

8. “Jurisprudence” - The philosophy of law, or the science which treats of the principles of positive law and legal relations. It is that science which ascertains the principles on which legal rules are based (Black’s Law Dictionary 1968, 992).

9. “Legal Transplants” - The moving of a rule or a system of law from one country to another or from one people to another (Watson 1993, 21).

1.4 Limitations of Research

Some of the limitations of this research are lodged in the assumptions made as part of the review of judicial decisions and interview of judges. First of all, every jurist selected for the interviews were at the time of their interview presently retired or, in the case of U.S. judges, had attained senior judge status. This was done to facilitate more open and candid responses to the interview questions as I assumed retired or senior jurists would not be as concerned about reprisal from supervisors or criticism for their remarks. In addition, in order to facilitate candid and open discussions, the identities of all interviewees were kept confidential pursuant to University of Hawai‘i research policy.

An obvious weakness of the interview process was whether the responses obtained from interview subjects were truly candid or offered to fit the expectation of the interviewer. In addition, since research was conducted in Japan and the Philippines, English language translation and interpretation issues as to accuracy were always present despite affirmative steps to mitigate such occurrences.
Secondly, all jurists were selected from the national level of the respective judiciaries rather than state, regional or provincial levels of the court systems. This was to provide some degree of consistency in judicial service, stature and familiarity with national laws (i.e., IP laws are generally found at the national law level). By way of limitation, the scope of this research was focused only at the national level of each legal regime and did not include local or state legal institutions of the respective judicial systems. Jurists from the United States were all senior judges and from the Federal District Court system.

However, in the case of the Japanese jurists, all had retired from the same level of the Japanese court system. Of the five jurists selected, all of them finished their careers in the Tokyo High Court, some achieving chief judge or presiding judge status. I was unsuccessful at securing interviews of justices of the Japan Supreme Court.

In the case of the Philippines, I was not able to secure all of the judges from the same level of the judiciary. Four judges retired from the Court of Appeals, one from the regional trial court level, one from the Sandiganbayan (anti-corruption court), and one from the Supreme Court.

The views expressed by jurists who retired from different courts or levels of the judiciary may reflect differences in personal views taken on any subject. This variation may be a limitation of my research as it may reflect views or opinions held only by judges of a specific court level of the judiciary.

Another limitation of this qualitative research method included the relatively small sample size of interviewees. In total, seventeen judges and justices were interviewed for this research. This may be an insufficient number of interviewees for
quantitative analysis and a statistically based attribution of results and conclusions to an identified population. However, the sample size was deemed sufficient for the qualitative nature of this research methodology (See Research Methodology, Chapter 4). As part of the hermeneutic approach to qualitative research, meanings are derived from a close analysis of interview transcripts. However, an inherent weakness of this process is the plurality of meanings derived by some researchers who are involved in the act of interpreting and deriving meaning from words. Also present are the biases and cultural values and background of the researcher involved in interpreting the results. Therefore, dissimilar interpretations of the same text are possible, albeit they probably do not occur as frequently as assumed (Kvale 1996, 210). I attempted to be mindful of my biases while conducting and analyzing the research data so that such influences would be minimized. However, I realized that total elimination of these ingrained influences was not possible.

1.5 Dissertation Outline

To facilitate a better understanding of the text, a brief outline of the contents of this dissertation is set forth below:

Chapter 2 begins with some explanations and definitions of the globalization process and convergence theory. It is followed by a discussion of legal harmonization and the process of transplanting law to other countries. The chapter concludes by defining the various interpretation, meanings and philosophy of law, which serves as a basis of how lawyers and judges are educated in their respective countries.

This is followed by Chapter 3, which describes the legal regimes chosen for this research. Major differences between the regimes are pointed out here. Also discussed is
the role of jurists as part of a legal regime, as well as their sense of authority and independence.

A detailed discussion follows in Chapter 4 of the qualitative research methodology and interview process utilized in this research. The discussion includes how the case studies used in the interview sessions were developed and pre-tested.

The methodology chapter is followed by Chapter 5 which examines each case study separately and sets forth the findings made. An examination of how jurists mentally processed the facts of each case and how they dealt with the judicial dilemmas presented. Hypotheticals were also posed during some of the case studies and the effects of these changes are also discussed.

Chapter 6 analyzes my findings by grouping traits or characteristics attributable to judicial decision making which were identified as common to all legal regimes. In addition, certain unique traits or characteristics involved in judicial decision making which were prevalent in one or two legal regimes are identified. In this chapter, a comparison was conducted between the findings made to the outcomes or decisions for each case study. This comparison was done to determine whether any patterns or trends could be identified. Patterns found are further discussed and form the basis for the conclusions reached in this research.

The dissertation concludes with a summary of my results and some ideas for future research.
CHAPTER 2
GLOBALIZATION: CONVERGENCE AND DIVERGENCE

This chapter discusses convergence theory and how it has been embraced by multilateral trade organizations and global alliances like the WTO. The theory serves as the basis for requiring harmonization of IP laws by the member nations of WTO and the signatories to TRIPS. It promises a "level playing field" for trade and commerce by promoting uniformity and standardization of IP laws. Whether convergence theory as adopted by the WTO actually accomplishes its objectives is debatable and has encountered resistance from various segments of the world community, as well as developing countries and economically less developed countries who value their diversity and differences.

2.1 The Globalization Process

The world has witnessed significant growth since the 1980s with worldwide gross domestic product ("GDP") increasing by an average of 3.3 percent from 1980 to 1990, and 2.8 percent from 1990 to 2003. World trade volumes set a record high in 2004 increasing by 10.2 percent. All developing regions are now rapidly surpassing their average growth rates of the 1980s and 1990s (2005 Global Economic Prospects: Trade, Regionalism and Development; World Development Indicators 2005, 198-200). GDP per capita in all developing countries rose by 30 percent between 1981 and 2001 (2004 World Development Indicators). Some attribute this remarkable economic growth to the end of the Cold War, while others rationalize this phenomenon as a realization and belief that dealing with the world as a single marketplace can produce better efficiencies and returns than a fragmented one. Many have labeled this phenomenon as "globalization."
While this concept encompasses the financial, manufacturing and service arenas, it also embodies the rubric of society, culture, law and politics, as well.

During the later part of the 20th century and entering the 21st century, civilization witnessed a diachronic movement by organizations to traverse geographic, economic, political and cultural boundaries. Society began its march toward globalization and the process continues unabated. Increased awareness of activities and events in other parts of the world came about through a breakthrough in information technology (i.e., Internet, Web, fiber optics, digitization, compression technology, miniaturization, cellular phones, personal computers, etc.), mass media news coverage (e.g., CNN, BBC, etc.) and improvements in the educational systems of economically advanced countries (e.g., better trained and educated teachers, computers, and other electronic teaching aids, open access to knowledge and information, etc.).

However, some believe that globalization is not a new master process or world order. After all, the civilizations of the world have for centuries (since the circumnavigation of earth by explorers during the age of discovery) moved toward globalization through the exploration and the establishment of trade and commerce, expansion of religious teachings and philosophies, military conquests, and the migration of peoples and cultures to foreign soil to seek a better life and more opportunities (Mark 2001, 3). Regardless of the debate, old or new, the phenomenon continues, and continues at a faster rate and by larger magnitudes (i.e., financial impacts and trade) than ever before witnessed.

In retrospect, the Cold War brought about nationalistic beliefs of good and evil or “friends” and “enemies.” After its passing, the modern world of globalization converted
the foregoing friends and enemies into "competitors" (Friedman 2000, 12). Today, our zeitgeist is based on the proliferation of a free market economy and the democratization of information through emerging technology. Civilization is manifesting an epochal transformation process.

Typical organizational structures found in societies like bureaucracy and patrimony is in this modern era being replaced or supplemented by new forms of organizational structures that are built on flexibility and innovation. These new organizational structures are designed to take advantage of capital intensity, knowledge, creation, innovation, and development and transfer of technology (Nonaka and Nishiguchi 2001). They rely on networks, which broaden their base of operations and scope of services. The introduction of these recent structures has also engendered a new motivation by countries to converge (Francesco and Gold 1998, 197). Although most nations have constructed their legal, economic, and political systems to be unique to their needs, globalization has propelled nations to unify through treaties and agreements. In essence, the legal, economic and political infrastructure of each individual nation must now change so that its infrastructure can accommodate the infrastructure of other nations.

In the late nineteenth century, globalization was developing along the lines of national borders. That is, each nation's legal institutions developed and operated within the confines of its borders. International law was used to describe those laws which facilitated commerce, trade, and international relations among various nation states. The current global movement has transcended national boundaries making the concept of autonomy of the state and national sovereignty an abstraction (Nelken and Feest 2001, 117). Sassen has described this process as "denationalization" (Sassen 2006, 1). "A
good part of globalization consists of an enormous variety of micro-processes that begin to denationalize what has been constructed as national—whether policies, capital, political subjectivities, urban spaces, temporal frames, or any other of a variety of dynamics and domains. Sometimes these processes of denationalization allow, enable, or push the construction of new types of global scalings of dynamics and institutions; other times they continue to inhabit the realm of what is largely national” (Sassen 2006, 1).

According to Sassen, in order to understand the transformation of civilization into globalization, it is critical to study the processes of denationalization, which includes the creation of global infrastructure i.e., national legislatures and judiciaries, electronic financial markets, changes in the relationship of the citizen to the state, etc. (Sassen 2006, 2). Denationalization, however, also disrupts existing meanings and systems. Through restructuring of national systems to make way for globalization, existing frameworks and arrangements can also be destabilized (Sassen 2006, 2-3). Therefore, any study of globalization should examine both what national systems have changed and what have not changed. Sassen criticizes most globalization studies, which simply describe the process as one of increasing interdependence; creation of global institutions and multinational corporations. These studies do not attempt to explain what globalization actually is (Sassen 2006, 4). Consistent with Sassen’s concerns, this research examines one aspect of her denationalization process which is the effect of harmonization of IP laws amongst WTO nations.

2.2 Divergence: Global Inequality and Resistance

The pressure to converge brought on by globalization has been prompted by the larger economic powers of the world such as the United States and Europe. The
imposition of a unified law on intellectual property has been seen as forcing less
developed nations to adopt transplanted law as their own in order to participate in global
trade. Essentially, transplanted laws represent the hegemony of the economically
powerful nations.

The imposition of a state hegemony upon a local domain is not new. During the
six centuries of the Ottoman Empire, Islam was used to fight the Christian West. The
Islamic religion left its mark on all institutions of state. The Ottoman Empire produced
an embracing, hegemonic culture centered about Islam. Under Islamic views, law and
religion were not considered as separate entities. At the heart of the Islam religion was
Islamic law.

As international trade with other countries grew, resistance to state hegemony also
increased at the local levels. Many localized ethnic and religious groups throughout the
Ottoman Empire revolted to gain more rights. A variety of extralegal, ad hoc norms, and
law like but illegal practices emerged. The Ottomans were forced to change the law to
make it more harmonious with prevailing social reality. The move to diverge from the
imposed state hegemony was seen as a conscious resistance to transplanted laws

Economic globalization is a primary force in shaping patterns of global inequality
and exclusion. They have brought about a significant effect on the life chances and
material prospects of households, communities and nations in the world. It has also had
an effect on global stability and order. It is no secret that the WTO is used by the more
powerful nations to annul some of the typical protections that the poorest countries have
received and to advance the trade liberalization agenda. This has resulted in growing
resistance from economically less developed countries in the G77 (Group of seventy-seven developing countries) for reforms to both the rules and institutions of global economic governance (Held and McGrew 2007, 117-136). Until economic parity can be reached between the rich nations and the poor, divergence, in the form of resistance to convergence, will remain present.

2.3 Leveling the Global “Playing Field”: Intellectual Property Laws

The global economy is enormous and no one country controls that economy. There are, however, a small group of countries that exert a major influence on the global marketplace. Today, each country within the global economy brings with it a unique competitive strength within certain product lines (e.g., electronics, steel, automobiles, etc.) or service market areas (e.g., high technology, architectural, engineering, design, medicine and health services, etc.).

Yet, despite this uniqueness or market advantage, economic parity has become a major issue amongst many countries. According to Steers and Nardon, international trade increased by more than 600 percent in the past thirty years, however, some countries have benefited significantly more than others (Steers and Nardon 2006). As of 2004, approximately 60 percent of global exports were generated by only eleven countries, which include Japan, U.S., Canada, China, Germany, France, Italy, Netherlands, Belgium, South Korea and the United Kingdom. Exports are seen as critical to the economic well being of a country as they support its manufacturing and service sectors (Steers and Nardon 2006, 5). Countries that lack sufficient exports or the capability to export their services or products face economic stagnation and high

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5 Although China ranks 5th in percentage increase in GDP worldwide, its exports lag behind Japan which ranks 4th in world GDP. (Pocket World in Figures, 2007, The Economist).
unemployment potential. In order to avoid this, they must look beyond their borders to lure in manufacturing and service businesses (Nihon Keizai Shimbun 2005).  

According to the World Trade Organization in 2006, the volume of world merchandise trade grew by 8 percent while world gross domestic product recorded a 3.5 percent increase. World merchandise trade has grown by twice the annual growth rate of output since 2000. The real merchandise exports of the United States grew above the world average, at 11 percent, and China’s trade expanded by 22 percent (www.wto.org, 2007). Concomitant with the global free market economy is the desire of countries to attract foreign capital and knowledge. There are, however, many obstacles to global integration. Laws and policies that protect national industries from competition or subsidize their activities manipulate patterns of trade and prevent other countries (especially developing countries and economically less developed countries) from reaching their full potential. It has become apparent that in order to create an attractive environment for the infusion of foreign capital, countries need to stabilize their political systems, provide their citizens with freedom to be mobile, and create transparent governmental regulatory environments. These characteristics have the ability to lower financial uncertainty and risk and thereby increase predictability in business decisions as a consequence of open and stable financial, political and legal environments. It follows that the type of laws and legal regime (i.e., a system of laws, dispute resolution processes, enforcement mechanisms, etc.) adopted by a particular country may be a critical factor that induces or facilitates capital flows and knowledge transfers.

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6The government of Japan aims to increase FDI in Japan by 26.4 trillion yen over the next ten years by promoting the sale of Japanese businesses.
The present research recognizes that convergence has placed pressures on countries to harmonize their IP laws in an effort to prevent misappropriation or "theft" of intellectual property. While the global marketplace has created an insatiable appetite for the exploitation of a firm's proprietary asset abroad, multinational companies must assess the risk of their unauthorized use. These proprietary assets generally include a firm's skill, expertise, knowledge, process, design, etc. They encompass the creative genius of human intellect, producing invention, design, know-how, art, or in short, any potentially valuable human product that is separable from a physical state. Generally, proprietary assets are protected by the IP laws of the inventor country, and are afforded additional protection if made subject to similar laws in the foreign country. As world trade in goods and services has significantly increased with the emergence of the age of information technology, the importance of protecting intellectual property has become a major issue in global trade and commerce.

It is highly plausible that FDI is positively correlated with stronger IP laws, which are consistent with the minimum legal requirements promulgated under TRIPS. This may be particularly true in the human-capital and technology intensive machinery and transport equipment industries (Nunnekamp and Spatz 2003, 38-39). This trend may be present in developed countries, as well as in developing countries (Rapp and Rozek 1990; Maskus 1999). However, the mere adoption by countries of IP laws to create patent rights does not guarantee that these countries will benefit. In fact, it is estimated that 90

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7The term "theft" should be used judiciously. From the perspective of some countries, the unauthorized copying, manufacturing, distribution and sale of intellectual property is morally justified (e.g., in the case of pharmaceuticals... to help all mankind prevent sickness or death) or ethically rationalized (e.g., where the subject of the copied material or product was in the public domain to begin with... e.g. native music or art, etc.).
percent of patents issued in developing countries are not utilized, in part, because the information disclosed by patent holders is oftentimes incomplete, which intentionally prevents exploitation of such information to produce new products by others. Existing data does not demonstrate a causal relationship between stronger IP laws and greater technology transfer and FDI (Pugtach 2006, 181).

However, studies have shown a strong positive correlation between the strength of IP right and investment in research and development ("R&D") and economic development (Maskus 2000, 471-506; Kanwar and Evenson 2001, 1-22). It seems that the ability to create a monopolistic advantage is a critical factor in the decision to invest in R&D. It follows that a strong legal framework increases the cost of imitation and reduces the risk for a foreign firm to face competition in the marketplace from the producers who have businesses in that area and produce the cheaper imitation or copied items (Varsakelis 2001, 1066-1067). Countries that have large innovative business concerns and technology exports prefer strong IP rights both in their own country and in the country that they export to. Less innovative countries that are technology importers will tend to prefer weaker IP rights. Multinational corporations will typically prefer stronger intellectual property venues (Davis 2002, 2). However, other studies indicate that harmonization of IP laws (i.e., especially patents) under TRIPS is not a universal panacea for economic development of all countries (Kumar 2002, 1-52).

In principle, stronger IP rights could increase FDI, technology transfers, etc., expanding innovation and diffusion of knowledge. On the other hand, exclusive rights created by patents, copyrights, etc., allow holders of such rights to withhold technology transfers to particular markets and raise the costs of (uncompensated) imitation (Maskus...
2003, 2). It is clear that there may be differing policy considerations between developed countries, which account for the majority of innovation and patents and developing countries, which must import such technologies and knowledge. In fact, a weaker patent system employed by Japan facilitated absorption, transfer and diffusion of technology and contributed to the total factor productivity growth during the period 1960-1993 (Kumar 2002, 5).

One of the underlying assumptions of TRIPS is that harmonization of IP laws amongst member nations will promote increases in transfers and dissemination of technology thereby producing social and economic welfare. Hence, the call for international standardization in intellectual property rights has assumed the characteristics of an international “public good” (Kindleberger 1986, 1). Harmonization was also expected to establish a multilateral framework for international business competition in this century. The goals of this multilateral framework were to (a) “to alter significantly the balance of negotiating power in favour of the transnational enterprises compared to that of the governments of host countries, both developed and developing”; and (b) “to limit the economic sphere for government” i.e., its ability to intervene and regulate sectors of FDI and technology transfer (Sideri 1994, 2). However, since stronger intellectual property rights leads to transfer of income from consumers in the markets in which the intellectual property is protected (favoring the inventor or producer), mostly located in developed countries, the harmonization of intellectual property regimes has tended “... to cause a redistribution of welfare away from Third World countries in favour of the most industrialized ones” (Sideri 1994, 7). That is, social and economic benefit to economically less developed countries will give way to the profit-motivated
actions of the more powerful countries. In the wake of the harmonization of IP laws, the above referenced “public good” is now being questioned (Buscaglia 2000). 8

The global economy has brought with it the accompanying pressures via trade agreements and treaties for global partners to harmonize or standardize their laws in intellectual property in order to facilitate trade and FDI (Weyer 1996). Inadequate treatment and enforcement of IP rights has been considered a major factor that has distorted trade amongst WTO members (Arup 2000, 64). This research seeks to investigate the effect of harmonization of IP laws on judicial decision making across three different legal regimes and its potential impact to the WTO.

The current trend of globalization has brought with it certain structural and legal effects on the liberal-democratic culture of trade and commerce and on those remaining cultures of Europe and Asia that are rule-oriented nation states. The legal and structural manifestations of globalization are like the “proverbial elephant touched by a number of blind people: a different kind of animal ‘emerges’ from touching the trunk as compared to the tusk, the ears, the body, the feet, the tail. Globalization and its local manifestations are perceived and experienced differently depending on where and how one comes into contact with it and whether one observes it from the core or the periphery, from above or below” (Nelken and Feest 2001, 117–118). Perhaps understanding the nature of the “elephant” i.e., the law, may be important as a first step to contemplating what we are dealing with.

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8Buscaglia (2000). A study focusing on harmonization in Latin America countries; McCalman (1999). “Reaping What You Sow: An Empirical Analysis of International Patent Harmonization,” University of California; Keely. This study concludes that stronger intellectual property protection is not always welfare-enhancing, even in developed countries. Tensions exist between producers and users of intellectual property and the economics of intellectual property is complex.
The inner order of human society is not only the original but, even in our
time, the basic form of law. A formal legal rule not only arises much later,
it is still also today largely derived from the inner order of society. To
understand the origins, the development and the nature of law one must
therefore research above all the order of societies. (Ehrlich 1913, 29).

The next section involves a closer examination and discussion of the pressures to
harmonize IP laws and the incorporation of convergence theory by the WTO.

2.4 Global Convergence: Harmonizing Intellectual Property Laws

At the Uruguay Round (1986-1994) of the General Agreement on Tariffs and
Trade ("GATT") in 1994, the members (including nations, countries, and territories)
reached a milestone agreement by creating the WTO. In February 1997, an agreement
was reached on telecommunication services with sixty-nine governments as parties to
that agreement. In the same year, some forty governments successfully concluded
negotiations for tariff-free trade in information technology products. WTO has over 150
members (nations, countries, territories) accounting for about 90-97 percent of world
trade. Decisions are made by a consensus of its members on various issues at Ministerial
meetings held every two years.

One of the more important bodies formed under WTO is the Intellectual Property
Council, which reports to the General Council (comprised of ambassadors and other
delegation members from each member nation).

The GATT negotiations now serve as a guide for trade in goods used by WTO.
The Uruguay Round engendered new rules for dealing with trade in services, intellectual
property, dispute settlement, and trade policy reviews. The Rounds promulgated some
thirty agreements and separate commitments (referred to as "schedules") made by
individual members. At the Uruguay Round, the members recognized the need for
internationally agreed trade rules for IP rights to promote more order and predictability in the world marketplace, and to also develop a viable system for the settlement of disputes. In order to accomplish this, the disparities or gaps in the way IP rights were treated and dealt with internationally needed to be narrowed. The resulting accord was called the Agreement on Trade-Related Aspects of Intellectual Property Rights or TRIPS, which was signed on April 1994, and made effective on January 1, 1995 (General Agreement on Tariffs and Trade). Under the TRIPS Agreement, the member signatories agreed to provide a mechanism for obtaining IP rights and for enforcing those rights via a legal forum. The TRIPS Agreement established a minimum level of IP protection that each nation would have to provide fellow WTO members. The principal belief held by WTO is that society benefits in the long run when IP rights encourage innovation, creativity and invention and engender rewards to the inventor.

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. “Objectives,” TRIPS Agreement, Article 7.

The foundation of the TRIPS Agreement is two-fold. First, it promotes non-discriminatory treatment by fostering national treatment (i.e., treating one’s own citizens and foreigners equally), and from a global perspective it fosters “most-favored nation” treatment (i.e., Article 3:1, TRIPS provides that each “Member shall accord to the nationals of other Members treatment no less favorable than it accords to its own

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9GATT was not an officially constituted “international organization” but a treaty, which prompted ad hoc meetings.
nationals" for the protection of intellectual property). Secondly, the TRIPS Agreement attempts to promote technical innovation and the transfer of technology through more uniform IP protection. However, the issue of whether global harmonization of IP rights is a positive influence to developing countries is still the subject of vigorous debate (The World Bank 2001).

"TRIPS rests on the norm that the harmony or uniformity of laws is the ideal for the free flow of goods and services globally... some of the implications of WTO law are the denationalizing of specific components of national law" (Sassen 2006, 241-242).

In general, as it pertains to patents specifically, TRIPS calls for the following minimum protections to be incorporated into the IP laws of its signatories:

1. Patent protection must be available for at least twenty years.

2. Governments can refuse to issue a patent for an invention if its commercial use is prohibited for reasons of public order or morality.

3. Permits governments under certain circumstances to issue "compulsory licenses" allowing a competitor to produce the product or utilize the process under license. (This is to encourage the patent holder to actually work the patent. In some instances, patent holders chose not to develop their inventions because they lack sufficient financial resources or use their inventions to "block" other inventions from being manufactured and sold. The blocking position provides the patent holder with leverage to ask for and receive significant sums of money in settlement of litigation or for licensing fees).

4. Patents covering a production process also cover the product produced.

5. Trade secrets and other types of "undisclosed information" which have commercial value must be protected against breach of confidence and other acts contrary to honest commercial practices, provided that reasonable steps were taken to keep the information secret.

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10 The World Bank has acknowledged in the arena of intellectual property laws that "one size does not fit all."
6. The owner of a copyright, patent or other form of intellectual property right can issue a license for someone else to produce or copy the protected invention, work, design, etc. Under certain circumstances, governments can take steps to prevent anti-competitive licensing which abuses the intellectual property right.

7. Governments must ensure that intellectual property rights are enforced under their laws, and that penalties for infringement are tough enough to deter further violations. Procedures must be fair, equitable and economical. Judicial appeals must be made available and courts must be empowered to order the disposal or destruction of pirated or counterfeit goods.

(Part II, TRIPS Agreement; see also www.WTO.org).

When the WTO Agreements took effect on January 1, 1995, “developed countries” had one year to conform their IP laws and practices to conform to the TRIPS Agreement. “Developing countries” and transition economies were given five years (i.e., until 2000 unless the developing country did not afford patent protection when TRIPS was made effective, then it had ten years to provide the protection), and “economically less developed countries” had eleven years (i.e., until 2006) to comply. In June 2002, the WTO council approved extensions for compliance in the case of pharmaceutical patents to January 1, 2016 (Marshall 1997). This extension has attempted to accommodate those countries which have been in technical breach since 2000 (Sampson 2001, 72).

Article 63.2 of the TRIPS Agreement requires members to notify the WTO of the laws and regulations made effective by that member under the Agreement to assist WTO in monitoring compliance.

IP laws in reality attempt to create private rights in knowledge, a commodity in abundant supply. The rights create and vest exclusive ownership (i.e., monopoly) on varying types of knowledge, allowing holders of the IP rights to prevent others from
using that knowledge. In essence, IP rights create an artificial scarcity of certain knowledge and products. Patent rights provide an incentive for inventors to invest in future inventive activities. However, these rights can inhibit the rapid dissemination of existing knowledge, and create monopolies in products and knowledge. This has been referred to as the "paradox of patents" (Robinson 1956).

Despite the consensus by members of the WTO that patent law harmonization was a positive objective, scholars like Correa and Musungu (2002) have taken issue with this conclusion. They have urged that the initiative to harmonize patent laws worldwide was conceived without serious analysis of its impact on development, and that further harmonization of patent laws at the highest level does not seem to be in the best interest of developing countries, but rather suits the economic interests of the larger economies, notably the United States and the European Union (Correa 2002). In fact, other scholars have advocated that globalization can produce divisive effects, polarizing the skilled workers from the unskilled, and those who are information rich from those who are information poor (Arup 2000, 20).

Empirical evidence in reality has demonstrated that countries with strong IP capabilities (generally the more developed nations) will not only improve their terms of trade by becoming an exporter of IP related products, but will benefit from higher prices due to their monopoly over the IP related product (Vernon 1957; Chinn and Grossman 1990). In contrast, countries with weak IP capabilities are likely to benefit most by not entering into multilateral trade agreements, but instead by exploiting the imitation of IP protected products within their own domestic economies. Data has corroborated the
above statement by indicating that global ownership and commercial use of IP rights is dominated by the United States, the European Union and Japan (Pugtach 2006, 180).

i. **Typology of Harmonization**

As the pressures to converge escalate due to the advance of globalization, countries have acceded to the WTO to harmonize their laws in order to create uniformity and, therefore, predictability and parity amongst the members of trade and economic consortiums. Economic analysis and studies abound on this subject. Yet, studies on the possible effect of legal regimes on the consistency of IP legal decisions and its potential nexus to national culture are nascent.

At this juncture, one should distinguish between two types of legal harmonization. The first is “harmonization in form,” which involves the adoption of similarly written laws (i.e., rules on the books) pertaining to a particular subject area e.g., intellectual property, corporate governance, civil liberties, etc. This can be distinguished from “harmonization in fact” where the interpretation, administration and implementation of the law (i.e., in some cases, notwithstanding the written text of the statute, rule or regulation) are consistent with the legal objectives being sought by the adopted change. Harmonization, in reality, is where the substance or “spirit of the law” (i.e., intended objectives of the law) is being followed despite the presence or absence of consistent, accompanying legal text.

The present research will attempt to demonstrate that legal regimes may be a significant moderating factor in explaining why convergence utilizing “harmonization in form” does not necessarily yield the expected results in all countries. In other words, I posit that similarly worded statutes or rules in separate jurisdictions may be given
different meanings because of variations present within their respective legal regimes
thereby yielding disparate results. Language and linguistics i.e., the specific rubric
governing the use of words in a statute or rule, is an important aspect of national culture
and may be embedded within a country’s legal regime. If this hypothesis is correct, then
as discussed previously, “harmonization in fact” may be a more effective means of
accomplishing the stated objectives of the WTO and other trade organizations, which
embrace convergence theory.

Why is this relevant to our study of globalization? As mentioned previously,
compliance with the harmonization timeframes established under TRIPS has engendered
a great deal of pressure on developing and economically less developed countries.
Failure to meet this timetable may result in major economic consequences or even
sanctions. This may inevitably force countries to adopt similarly worded IP statutes and
rules that “facially” satisfy the enumerated legal norms promulgated under TRIPS, but in
fact, substantively possess very different meanings, resulting in unanticipated outcomes.11
In essence, a kind of “faux” harmonization compliance has been prompted because of the
required timetable for compliance under TRIPS. Perhaps the stated focus of TRIPS
should not be on legal conflation, but rather, an approach which recognizes variations in
legal regimes and their potential influence on results.

2.5 Harmonization: Transplanting Law to Other Legal Regimes

The underlying premise of convergence theory is that laws can be transplanted in
any country. Scholars believe that legal rules cannot be transplanted from one culture to
another (Nelken 2002, 19-34; Nelken and Feest 2001). Anthropologists today believe

11 The term “facially” means that a rule or law “on its face” is legal or illegal or has the appearance of
satisfying a legal requirement or standard on its own terms (Smith, 2000, 194-195).
that the close relationship between law and society has a substantial effect against the transfer of law from one society to another, unless the two societies are similar in nature. “Only legislation can make radical changes, because reliance on authority is an almost necessary ingredient in subordinate lawmaking. The different sources of law have different impacts on legal change, but at all times and in all places the approach of the lawmakers is affected by their particular legal culture. Part of the culture is the choice of systems that are appropriate to borrow from, the approval of or disdain for foreign law. This culture has to be understood and injected into the equation before one can begin to erect a theory of law and society” (Watson 1993, 108). A number of anthropologists believe that law as a culturally based construct can never be transferred completely to another society (Menski 2006). Other anthropologists, however, recognize that some transfer of law is possible between societies, but that a “complete legal union is neither possible nor desirable” (Watson 1993, 100).

On the other side of the isle are the “transferists” who eagerly advocate and profess the transferability of law as a panacea to achieving global parity in trade and commerce. They see the transplanting of law as akin to successful human organ transplants where organs connected to a foreign body eventually become part of that body (Watson 1993, 27). According to Menski, the current transplant debates continue, but are inconclusive as to whether convergence is beneficial to globalization conflicts (Menski 2006, 53).

There are many examples of where transplants have not worked. The movement for transplanting law has been supported by the West, where Anglo-American law has
served as the model to emulate and assimilate by economically less developed countries. This movement has in some quarters met with strong and persistent resistance.

Let us examine the case of the English speaking West Indies. The laws of King George II imposed upon the East Indies permitted slavery by laws promulgated in 1688. The British West Indies colonies in the Caribbean were the oldest industrial colonies of the West outside Europe. The West Indian colonies were populated with introduced populations (e.g., Caucasians from Europe, African slaves, etc.) and its society conformed to European requirements with peculiar intensity and pervasiveness. Slaves were used to work the plantations to produce sugar for export to Great Britain, Europe and the Americas. Slaves in West Indies challenged the laws permitting slavery by bringing legal action in court. This ultimately resulted in those laws protecting the institution of slavery being changed in 1834 to ban it (Lazarcus-Black and Hirsch 1994, 252-269).

Another example concerns the laws of India. In 1955, the Indian legislature abolished polygamy for Hindus. In reality, however, Hindu polygamy has been to date legally condoned and regulated by the Indian courts. During the post colonial period of India’s independence, its court struggled with the inherited British legal system, which was inconsistent with local custom and traditional ways. In a statement of judicial independence, the Indian Supreme Court wrote:

We have to part company with the precedents of the British-Indian period tying our non-statutory areas of law to vintage English law, christening it “justice, equity and good conscience.” After all, conscience is the finer texture of norms woven from the ethos and life-style of a community and since British and Indian ways of life vary so much the validity of an Anglophilic bias in Bharat’s justice, equity and good conscience is questionable today. The great values that bind law to life spell out the text
of justice, equity and good conscience and Cardozo (referring to U.S. Supreme Court Justice Benjamin Cardozo) has crystallized the concept thus: "Life casts the mould of conduct which will someday become fixed as law." Free India has to find its conscience in our rugged realities—and no more in alien legal thought. In a larger sense, the insignia of creativity in law, as in life, is freedom from subtle alien bondage, not a silent spring nor a hothouse flower. (Rattan Lal v. Vardesh Chander 1976).

Understandably, India, despite its membership in the WTO, has opposed legal harmonization of IP laws under the TRIPS Agreement especially in the area of pharmaceutical patents.\(^\text{12}\)

In fact, the United States filed a complaint against India concerning the manner in which India had complied with the provisions of TRIPS in establishing a "mail-box" system to be set up for the filing of patent applications (Article 70:8, TRIPS). As a developing country, India had a grace period of four years to implement the substantive protections of the Agreement (Article 65:2, TRIPS). The "mail-box" system was adopted to ensure that patent applications made during the transitional grace period preserved their eligibility for patents until the time came for India to apply for substantive protections. The WTO panel held that India’s system engendered legal uncertainty about how patent applications, which were “in the pipeline,” would be treated when the time

\(^{12}\) In the 1970’s, India struggled to improve its ability to provide better health care for its citizens. Most of the country lay in poverty and could not afford medical services or pay for the cost of simple medicines. The Indian government decided that it had to do something drastic or its people would continue to suffer and die. In response, the Indian legislature in 1972 amended its intellectual property laws to lift the restrictions on patent infringement, and thereby opened the doors for Indian drug manufacturers to copy patented medicines (both local and external to India) so long as the engineering process to manufacture the pharmaceutical was changed. Many India based pharmaceutical manufacturing companies sprang up and produced a variety of generic drugs needed by Indian people, as well as other customers around the world. The cost differential between patented drugs and generic drugs was significant. ARV drugs, for example, necessary to forestall the effects of HIV cost $10,000 in the United States. The same drugs manufactured in India cost $77 and is, therefore, more affordable by the poor, albeit some cannot even afford that price. However, due to the pressure to converge prompted by the WTO, India amended its intellectual property laws in 2005 and passed a new patent law prohibiting the copying of patented medicines. This has caused a great deal of concern and controversy on the impact of the IP law change to the poor and sick in India and other less developed nations.
came for India to decide on substantive issues of patentability. Article XVI:4 of the
WTO Agreement mandates that each member will "ensure the conformity of its laws,
regulations and administrative procedures with its obligations as provided in the annexed
Agreements." On appeal, the appellate body of WTO upheld the initial decision of the

Other countries which were initially slow to comply with the provisions of the
TRIPS Agreement were placed on the WTO watch list. These countries were Thailand,
South Korea, Taiwan, Brazil, Philippines and China (Arup 2000, 179-181). Why did
some of these countries delay their attempts to comply with the substantive provisions of
TRIPS? A possible explanation for this opposition to harmonize is discussed in the next
section.

2.6 Legal Harmonization: A Cultural Perspective

A novel approach to the study of harmonization of law is from a cultural and
societal perspective. Such an approach would require one to begin a discourse on the
relationship or "fit" between law and society and to develop methods for examining how
this varies culturally. This examination is likely to reveal considerable variations in the
extent to which law conditions social action or "penetrates" society (Nelken and Feest
2001, 14). In other words, transplanted law must "fit" the country to which it is
introduced if it is truly to be effective. However, sociologists have long realized that the
"fit" is never perfect. A lag and lead relationship exists between law and society. Law is
generally out of phase with social change, whether it is behind or ahead of it (Renner
1949).
Culture has been characterized as being a set of timeless resources or dimensions to be internalized in the "civilizing" process through which persons are socialized and manifested into a national persona (Sarat and Simon 2003, 12). However, newly emerging perspectives in the study of culture have linked it to issues of social stratification, power, and social resistance (Sarat and Simon 2003, 13).

Law and legal studies have only recently been integrated into cultural analysis and study. However, much has already been written about the interrelationship between law and culture from an anthropological perspective. Scholars in the fields of anthropology, sociology, and law have examined the cultural lives of law (Sarat and Simon 2003, 13). From the perspective of Clifford Geertz, "law, rather than a mere technical add-on to a morally (or immorally) finished society, is, along of course with a whole range of other cultural realities from the symbolics of faith to the means of production, an active part of it . . . Law . . . is, in a word, constructive; in another, constitutive; in a third, formational" (Geertz 1983, 218). Treating law as a cultural reality means looking at how law lives in our imagination, its symbols, signs, meanings, etc. (Sarat and Simon 2003, 13). "Legality is not sustained solely by the formal law of the Constitution, legislative statutes, court decisions, or explicit demonstrations of state power such as executions. Rather, legality is enduring because it relies on and involves commonplace schemas of everyday life" (Ewick and Silbey 1998, 17).

From a symbolic perspective, law is associated with power i.e., according to Marxist doctrine, a tool of domination when deployed by the modern nation-state (Lazarus-Black and Hirsch 1994, 60). According to other anthropologists, the definition of law has been viewed in terms of its essential characteristic i.e., it is the "socially
approved use of force” (Moore 2000, 220-221). Legal power establishes social relationships through the categorization of people; it legitimizes a view of social order; and manipulates the cultural understandings and discourses (Lazarus-Black and Hirsch 1994, 1-2). Legal power is social control (Garth and Sarat 1998, 8). It is never neutral, that is, classes of people within a society rely on law to recognize hierarchical or other arrangements of power, conflict (power vs. resistance) is pervasive and endemic in every society, that those that make and administer laws create a hegemony of behavior and belief, and that changes in the law acknowledge the distribution of power and privilege within a society (Lazarus-Black and Hirsch 1994, 5).

Culture has always been a weapon of the powerful (King 1997, 99-100). The creation of “custom” has been used by the powerful to expropriate from and subordinate the weak. As a result, the oppressed have fought against such efforts i.e., cultural resistance. “...[C]ulture is neither an autonomous nor [an] externally determined field, but a site of social differences and struggles” (Sarat and Simon 2003, 13-14). One of the venues for a display of legal power and cultural resistance is the courtroom. It is here that rules of law are used or legal systems resorted to in a manner that can be considered a deployment of political power. The “rule of law” is intended to temper violence, warfare, and conflict. As Foucault states in “Nietzsche, Genealogy, History”:

Rules are empty in themselves, violent and unfinalized; they are impersonal and can be bent to any purpose. The successes of history belong to those who are capable of seizing these rules, to replace those who had used them, to disguise themselves so as to pervert them, invert their meaning, and redirect them against those who had initially imposed them; controlling this complex mechanism, they will make it function so as to overcome the rulers through their own rules. (Foucault 1971, 95-96).
Beneath the facade of legalistic culture is a silent battle for domination by those in power. It is a constant tug of war over culture’s organization and what it represents from a historical perspective (Leonard 1995, 142-143). By itself, legal rules mean next to nothing. They are nonsensical. “They are verbal formulae, partly conveying a wished-for direction and ideal” (Sarat and Simon 2003, 221). According to Jerome Frank, a legal realist, “Law is a complete body of rules existing from time immemorial and unchangeable except to the limited extent that legislatures have changed the rules by enacted statutes. Legislatures are expressly empowered thus to change the law. But the judges are not to make or change the law, but to apply it. The law, ready-made, pre-exists the judicial decisions” (Frank 1963, 35). What gives law its power is, in part, its popular conception as an “adjudicative vehicle generalized and preexisting, a whole cloth already in place in advance of any application to specific cases” (Sarat and Simon 2003, 221). By virtue of its preexistence to adjudication, law carries with it a sense or expectation of providing a protective guarantee. As aptly summarized by Geertz, “... adjudication consists in a willed disciplining of wills, a dutiful systematization of duties, or an harmonious harmonizing of behaviors – or that it consists in articulating public values tacitly resident in precedents, statutes, and constitutions – contributes to a definition of a style of social existence (a culture, shall we say?)” (Geertz 1983, 218). As a secular value, our conception of the rule of law is based on both reason and will.

Formerly, culture was looked at as a thing existing outside of social relations, a timeless set of resources internalized to make us all behave in a manner that made us socially acceptable (Sarat and Kearns 2003, 3). Today, culture is linked to an inquiry of questions on social stratification, power, and social conflict. “[C]ulture involves power
and helps produce asymmetries in the abilities of individuals and social groups to define and realize their needs. And culture is neither an autonomous nor externally determined field, but a site of social differences and struggles" (Johnson 1986, 39).

If one imagines a man as an animal suspended in webs of significance, he himself has spun, culture are the webs, and the analysis of it is not an experimental science in search of law, but an interpretive one in search of meaning (Geertz 2000, 5). “Culture is public because meaning is.” Culture consists of “socially established structures of meaning . . .” (Geertz 2000, 12-13). “[L]aw is local knowledge not placeless principle and that it is constructive of social life not reflective, or anyway not just reflective, of it, lead on to a rather unorthodox view of what the comparative study of it should consist in: cultural translation” (Geertz 2000, 218).

In later writings, Geertz went on to define law as “a distinctive manner of imagining the real” (Geertz 1983, 184). “Our gaze,” he states, “focuses on meaning, on the ways . . . (people) make sense of what they do —practically, morally, expressively, . . . judicially—by setting it within larger frames of signification, and how they keep those larger frames in place or try to, by organizing what they do in terms of them.” From his remarks, one can surmise that, “law is inseparable from the interests, goals, and understandings that deeply shape or comprise social life” (Sarat and Kearns 2003, 6). Sarat and Kearns, postulate that law . . . “does more than reflect or encode what is otherwise normatively constructed; . . . law is part of the cultural processes that actively contribute in the composition of social relations.” “Law is part of the everyday world, contributing powerfully to the apparently stable, taken-for-granted quality of that world
and to the generally shared sense that as things are, so must they be” (Sarat and Kearns 2003, 6-7).

Law helps us understand ourselves, and our relationship to others in our world. “Litigants, clients, consumers of culture, and others bring their own understandings to bear; they deploy and use meanings strategically to advance interests and goals. They press their understandings in and on law and, in so doing, invite adaptation and change in the practices of law” (Sarat and Kearns 2003, 8).

Coombe describes the role of “legal regimes” as shaping (albeit not determinative of), “the social meanings assumed by signifying properties in public spheres” (Coombe 1998, 26). The meanings she refers to are socially produced in an arena, which does not present a “level playing field” to its participants. There are inequities in material resources available, as well as channels of communication. She goes on to state that “intellectual property rights” supports this inequity by legitimizing new sources of cultural authority and giving the holders of IP rights priority in the contested fight to fix social meaning (Coombe 1998, 26). As globalization moves forward, those who hold IP rights are granted judicial and socially endorsed monopolies over public meaning (e.g., corporate trademarks communicate certain intended meanings). When these monopolies are contested, intellectual property becomes an arena for connotative struggle i.e., “contested culture” (Coombe 1998, 26-27).

Courts serve as significant sites “for the creation and imposition of cultural meanings” (Lazarus-Black and Hirsch 1994, 36). Typically, at the conclusion of evidentiary hearings, judges identify problems and promulgate rulings, which impart new cultural meanings (Lazarus-Black and Hirsch 1994, 36). According to Sally Merry,
Court hearings are highly ritualized events. Consequently, the interpretations they provide gain saliency from the authority and legitimacy the court is able to convey. The procedures, personnel, and organization of the court itself enact a drama, which conveys messages about social hierarchy, authority, and order. Features of class, gender, and race add in subtle but significant ways to the authority of the judge and court personnel. If judges belong to the dominant racial group and speak with the accent of educated people, these features of social hierarchy contribute to the authority of their pronouncements (Lazarus-Black and Hirsch 1994, 36).13

Some scholars have even taken the position that, not only are courts and judges involved with culture, they are also engaged in a culture war (Watson 2002, 3-14). Robert Bork attributes the decline in American culture to an activist U.S. Supreme Court’s decision on social/cultural issues as part of this culture war. According to Bork, law is a central element in Western culture and it deserves recognition as a cultural element more than it has been given. Law assists in creating and reinforcing culture. For the last fifty years, the U.S. Supreme Court has supported the idea that courts are not and should not be governed by the Constitution. They cite the Constitution only to justify their decisions, but the rationale of those decisions is nowhere to be found in the actual Constitution. Bork believes that the cultural agenda of the liberal left is at work in the courts. He cites as examples the support of radical feminism; free speech as justification for vulgar and obscene language; and that religion has become a hostile target of the courts. Bork also sees the increasing irrelevance of the ideal of the rule of law. Bork states, “[T]he reality is that the rule of law is central to the practice of democracy. The

13Chapter 1, “Courts as Performances: Domestic Violence Hearings in a Hawai‘i Family Court, Sally Engle Merry.
rule assumes the voters will choose who will enact rules, and judges will apply those rules as intended; that they will not declare them unconstitutional unless the Constitution rather clearly says they are out of bounds. Unless judges are able to contain themselves, to be faithful to the intended meanings of the laws and the Constitution, public debate, elections, and legislative deliberations will become increasingly beside the point.” (Watson 2002, 3-13).

In contrast to the above, there are positive changes to culture that courts have contributed toward. For example, after the civil war, the Emancipation Proclamation, and the 13th, 14th and 15th Amendments to the U.S. Constitution ended American slavery and gave blacks the right to vote. Yet, clearly, the old South who survived the war was in no mood for racial equality. The laws in various Southern states and local towns discriminated against blacks and forbid interracial marriages. The Northern states pressured the Southern states to abolish these laws, which resulted in a caste and class system, replacing slavery and promoting legal and social apartheid. Racial discrimination in the South was part of American culture. The decision in 1954 by the United States Supreme Court in Brown v. Board of Education (347 U.S. 483, 1954) was a landmark decision of the Court which ordered an end to segregated schools. This case marked the beginning of a new cultural change in America where racial discrimination was to become illegal. This case also represents how courts participate in the culture war to bring about positive changes to our society.

I have discussed above how legal decisions promulgated by jurists can significantly affect the lives of individuals and society in general. The process of judicial decision making includes the act of interpretation. Jurists are involved in interpretation
of facts and law to arrive at cultural meanings and significance. Nelken and Feest have recognized that "[A] significant part of the very real emotional and intellectual investment that presides over the formulation of the meaning of a rule lies beneath awareness, because the act of interpretation is embedded, ..." (Nelken and Feest 2001, 58).

2.7 Interpretation of Law: A Socio-Cultural Perspective

The act of interpreting is a subjective process. Some scholars have characterized the product of interpretation as the result of a particular understanding of the rule that is influenced by a series of factors, which would change if the interpretation occurred at a different venue or in a different time period. It is the product of a struggle between social and cultural power within a given society and within the legal community (i.e., judges, lawyers, law professors and scholars). The series of factors create an intangible framework which influences interpretive product by coloring and shading the interpreter’s subjective views. Nelken and Feest call interpretation an “intersubjective phenomenon.” “In other words, interpretation is the product of the interpreter’s subjectivity as it interacts with the network of all subjectivities within an interpretive community and within a society which, over time, is fundamentally constitutive of that community’s articulated values and sustains that community’s cultural identity” (Nelken and Feest 2001, 58-59).

i. Common Law Interpretation Process

In the adjudication process, interpreting statutes and codes are important. Under the common law system, judges are often engaged in uncovering the “will of the legislator” by “exploring his intentions,” as may become evident in examining other
surrounding statutes, the subject matter, and other interpretive sources (e.g., legislative record, etc.). The approach (commonly associated with the teachings of English jurist Sir William Blackstone) uses a flexible or fluid interpretive manner in attempting to recognize the "reason and spirit" of the law and the Aristotelian principle of "equity." The later principle is the power of "excepting those circumstances, which (had they been foreseen) the legislator himself would have excepted" (Vermeule 2006, 18-19).

In other words, under the common law system vis a vis civil law system, there is a basic belief that no matter how many laws are passed, they cannot possibly address every conceivable human life situation. Law, therefore, has limited scope and applicability. The words of a statute, if read literally (what is commonly referred to as "strict construction"), may not exactly "fit" the facts of the case presented. If read and applied strictly, the resulting outcome may yield an inequity or unfairness to one or more of the parties. In order to address this situation, the common law system allows judges to look beyond the mere words of the statute and interpret what the legislature intended when they drafted and enacted the law as written (e.g., this occurs with some regularity when the U.S. Supreme Court interprets the provisions of the U.S. Constitution . . . i.e., abortion, initiative and referendum, homosexuality, gun control, etc.). If the intended purpose of the law is deemed relevant and ergo, applicable to the facts and legal issues presented, then the judge is permitted to apply the statute consistent with that intent.

In summary, the accepted interpretive approach under a common law regime includes a flexible analysis of statutory language, based upon an intuitive understanding and empathy for the legislative intent or purpose in the context of the surrounding common law. It is assumed in this process that a true and accurate assessment of
legislative intent will be found and that, more importantly, legislators were acting reasonably and rationally. Blackstone preached that the law should not be read and interpreted literally because by doing so it could result in an absurd result. "[W]here words bear either none, or a very absurd signification, we must a little deviate from the received sense of them" (Vermeule 2006, 19).

ii. Civil Law Interpretation Process

A foremost critic of Blackstone was Jeremy Bentham who supported the civil law system. Bentham argued that common law adjudication was both incoherent and inconsistent with a rational legal order. He advocated precise and comprehensive codification of laws and expansion of the legislative authority that would engender more clarity, certainty and order to the law. Through increasing codification of laws, the need for adjudication would virtually be eliminated (as discussed previously, this was done historically to limit the powers of the judge in order to prevent judicial abuse) because citizens would merely consult the applicable code to ascertain their rights and obligations. However, Bentham was aware that a rule-bound legislative code could not resolve all cases that might arise under it i.e., there would be "gaps" in the code. Bentham fails to give any solution for courts to follow in this situation (Vermeule 2006, 21). This is a significant weakness of the civil law regime. Other legal scholars like H.L.A. Hart emphasized the fallibility of the legislator in lacking enough foresight to anticipate properly. Hence, legislators enact laws, "which both seek to disguise and minimize the need for . . . choice, once the general rule has been laid down" (Hart 1995, 124-136). Ronald Dworkin, on the other hand, challenges Hart's views by advocating an approach of "integrity." "Law as integrity asks judges to assume, as far as this is
possible, that the law is structured by a coherent set of principles about justice and
fairness and procedural due process, and it asks them to enforce these in the fresh cases
that come before them, so that each person’s situation is fair and just according to the
same standards” (Vermeule 2006, 28). Dworkin created a theory of law that viewed
adjudication as an enterprise of interpretation carried on with the aid of philosophy.
According to Dworkin, a judge begins with the standard legal materials (i.e., statutes,
precedents, etc.) and she is obligated to give those materials an interpretation that
satisfies the conventional requirement of “fit.” So an acceptable interpretation must “fit”
the text. In the cases above, more than one interpretation exists, the judge should choose
the interpretation that best “justifies” the legal materials – or that makes the law “the best
it can be” by reference to the best available political and moral philosophy (Dworkin
2006). The debate of legal interpretation continues amongst many legal scholars and has
evidenced the present uncertainty surrounding adjudicatory action. There are no
definitive rules or philosophy of interpretation to which jurists are bound.

What are the possible factors which affect jurists in their ability to think, reason,
and decide legal issues? One such factor is the philosophy and meaning of law, which is
explored in the following section.

2.8 The Multiple Meanings of Law

There are several theories, which attempt to define “law.” Sir William Blackstone
in his lectures on the English common law system, defined it as “a rule of conduct for
those who are to observe it, prescribed by those who prescribe it, commanding what it
commands, and forbidding what it forbids” (Menski 2006, 154). The hermeneutics of
law and its philosophy is commonly referred to as jurisprudence. Jurisprudence involves
an examination into the nature and workings of law; its relationship to justice and morality; and its connection to society. Amongst the many definitions of law, three major conceptualizations of law emerge. They are the natural law, positive law, and the socio-legal theories of law. The quest to find a legal definition for “law,” however, is polemic in nature, and there are many variations stemming from these major conceptualizations of law.

i. Natural Law

The origins of Natural Law stem from the beginning of civilization. It is a theory based upon the moralistic and religious underpinnings of reality (a belief based upon a philosophy that there is a higher being or force against which all human activity is measured). Olivecrona described Natural Law as a universal concept. “Even if it is ascribed to the will of God, it is supposed to have always existed. Its validity is not thought to be limited to a certain people or a certain time. The law of nature is timeless and universal” (Olivecrona 1971, 8). By the eighteenth century, Natural Law had become explicitly Christianized because of its influence from the predominant religion of Europe. Greek thinkers like Socrates (c.470-399 BC) “emphasized the existence and immutable nature of basic moral principles,” which laid the foundation for what was to become European Natural Law (Menski 2006, 137). Aristotle, another Greek thinker, expanded upon the concept of Natural Law by bifurcating it into two parts. One based on man’s reasoning ability, and the other, the laws of creation or of God. Man’s reasoning ability (i.e., his ability to distinguish between good and evil and to exercise free will) gave rise to the adoption of unjust laws or the abuses of the legal process. However, man’s reasoning ability gave him the power to dominate nature. The Greeks saw the
world as being uniform and men living as equals. “[I]t was an ideal law which could only become actual if men were purely rational. Its principles were ideal principles. Among these ideal principles was that of equality. By nature, and as reasonable creatures, all human beings were equal. By nature the woman was equal to the man, and the slave to the master. This was the teaching of Zeno” (Gierke 1950, xxxvi).

By the Renaissance and Reformation period (c.1300-1600AD), the priority of the State and God changed to a focus upon the individual, free will and human liberty. During this period, the Catholic Church witnessed reform and the birth of Protestantism. Natural Law began to incorporate a more pragmatic philosophy, which did not deny the existence of God, but postulated that man, through reason, could ascend to a higher standard of goodness. The birth of what some call the “social contract” theory emerged at this juncture (Freeman 2001, 111). “Individual rights to life, liberty and property had existed before there was any society; now they began to be seen as inalienable human rights which needed to be defended.”

In order to protect the individual from state abuse and lawlessness, the theory of “separation of powers” was advocated by philosopher Charles de Montesquieu (1689-1755). Montesquieu argued that liberty could only become secure if man’s actions and passions were structured according to the dynamics of the laws of nature. Nature indicates that politics be constructed with multiple powers and perspectives that check and balance the free movement of political will and passions. Nature and human nature demonstrate a need for independent, nonpartisan judicial power that secures the tranquility of each individual’s interior motions (Carrese 2003. 21).
Since the American legal regime adopted the English common law system, it has a logical connection to the Natural Law jurisprudence and Protestant teachings. The Philippine legal regime is a combination of these religious based systems. That is, it is a combination of American common law (Protestant), Spanish (Roman Catholic religion) civil law, and the Muslim Shari'a systems. As a result, I anticipate that judicial decisions in both the U.S. and Philippines are susceptible to influence from religious values or teachings under the aegis of the Natural Law.

ii. Legal Positivism

The nineteenth century brought about the evolution of positivism. That is, a separation of law from its former moral philosophy under Natural Law. Positive law is based purely on scientific fact and observation. Legal positivism had two basic propositions. First, the definition of “law” was not dependant upon moral or religious values. Secondly, law should only be defined through tangible formal existence i.e., legislation, case law and customary traditions. Proponents of positive law do not link it with any moral assessment in their definition (Olivecrona 1971, 7-23). Some scholars of jurisprudence have criticized positive law as circular in logic i.e., it is law because someone in authority says its law (Morrison 1997, 1). Other scholars have argued that positive law simply cannot exist. “No rules of law at all are the expression of the will of an authority existing prior to the law itself. What we have before us is a body of rules that has been slowly changing and growing during the centuries. It would be no use to call this body of rules positive law. The adjective ‘positive’ is entirely superfluous; it might be misleading because it is connected with the idea that the law is ‘posited’ in the sense of being the expression of the will of the lawgiver” (Olivecrona 1971, 77-78).
Despite this criticism, positive law has become the dominant Western legal ideology (Menski 2006, 153).

Since legal positivism emphasizes the superiority of legislative action in enacting laws, it is most appropriate for civil law systems. Civil law systems were developed to limit the role of judges by reducing judicial discretion and having them simply apply the appropriate statutory code. Japan's civil law system is the closest fit amongst the other legal regimes examined to a positive law system. If this is true, then evidence of limited judicial discretion and a strict reading of the law should be evident from Japanese jurists.

iii. Socio-Legal Theory of Law

Positivism marginalized the study of law and its relationship to history and society. During the twentieth century, the interpretation of law examined law as the product of numerous factors, including its historical and social context. The new science of sociology promoted critical thinking about legal systems. A pioneer in sociological jurisprudence, Rudolf von Jherling (1818-1892) saw law as part of human conduct. As described by Dias and Hughes, “[l]aw is only an instrument for serving the needs of society; its purpose is its essential mark and this purpose is to further and protect the interests of society. But the social impulses and interests of man are clearly not always in accord with his individual or selfish interests. The grave problem of society is to reconcile selfish purposes with social purposes, or to suppress selfish purposes when they clash dangerously with social purposes . . . This is done by the two principles of Reward and Coercion” (Dias and Hughes 1957, 411). The principles allow legal systems to reward those who follow the laws of society and to impose sanctions upon those who violate it. Jherling's studies emphasized that law operated in a social context, and that a
multitude of factors influenced the development of law (Menski 2006, 163). The area of sociological jurisprudence remains somewhat abstruse and parochial beyond its basic premise that society and law have an interrelationship.

The usefulness of attempting to define “law” has been debated. Natural law theories are viewed as nothing more than “religious positivism;” positivism is criticized for being too narrowly focused on rules; and socio-legal theories are criticized as being unclear (Menski 2006, 173). Perhaps it may be problematic to think of law as a self-contained, ordered system. Some believe that “law” in a global context can take a variety of forms, be engendered from a number of ways, and have as its genesis a number of quite different and potentially competing sources. In other words, law may be a combination of all three theories. What has been referred to as “legal pluralism.” “Law is always something particular, not just a generalized phenomenon, and it is culture-specific because its manifestations depend on socio-cultural settings that differ from place to place and through time” (Menski 2006, 179).

2.9 Philosophy of Law: “Rule of Law” and “Rule by Men”

It is important at this juncture to discuss two major legal philosophies. Each country’s legal regime generally adheres to or favors one philosophy over the other. As an ideology, the “rule of law” is grounded in both reason and popular will or consent. These two concepts work together, as well as separately. To us, the “rule of law” constitutes an expression of popular sovereignty, to wit the popular sovereign is none other than you and I viewed in our own collective identity (Kahn 1999, 13). To Montesquieu, the “rule of law” stood as the bulwark for liberty against despotism and
could only exist if the judiciary was independent of the sovereign and guided by judgment under law (Carrese 2003, 37).

Reason must be able to counter irrational will and vice versa. This is what keeps the “rule of law” working. The “rule of law,” however, is just one way to view the meaning of political events. In the words of John Adams, a nation, which adopts a rule of law system, is really “[a] government of laws and not of men” (Adams 1774, 1-177). The “rule of law” has been the legal architecture by which national state authority has been fortified so that it can institute economic protectionism at the national level. Today, in the global world, the “rule of law” has taken on the characteristics of a building block of the global economy and is critical to the opening of national economies (Sassen 2006, 13-14). The “rule of law” provides transparency, an outcome that is quite often constructed and contrived by the interests of certain groups (i.e., multinational corporations, etc.).

The contrary philosophy or negative counterpart to a “rule of law” system is a “rule by men” system or in a very extreme situation revolution. A “rule by men” system is venal and one where laws are not followed consistently, and where political or economic expediency dictates the outcome of legal matters. This outcome (from a “rule by men” system) could also include political maneuvering to obfuscate, divert, delay, derail or devalue laws applicability, authority, or interpretation in a specific case (Adams 1774, 68). China has often been used as an example of a “rule by men” jurisdiction because of the influence of the Communist Party on its judiciary and their decisions. However, recently China joined the WTO and has enacted over 200 new laws in an

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attempt to transition into a “rule of law” system and to open its national economy to the
global market place (Insoo 2007, 21-24).

Legal realists argue against the aforementioned popular conception. In contrast,
they believe that judicial decisions are not guided by rules, but by a combination of
factors, some social and some idiosyncratic, harnessed to no set protocol. In other words,
they are not subject to the “generalizability and predictability that legal rules presuppose”
(Sarat and Simon 2003, 220). U.S. Supreme Court Justice Oliver Wendell Holmes
commented on the notion of law’s predictability and rationale by stating that, “The life of
the law has not been logic; it has been experience” (Holmes 1881). The ability to
reconcile between reason and popular will clearly reside in judicial review. Courts
generally must adhere to defending the role of reason or demonstrate that their decision is
one, which is responsive to popular will. In essence, judges are educators and draftsmen
whose job is to convince the people to invest their will in the products of reason (Kahn
1999, 14-15). Courts succeed when the popular will consents to and approves of the
court’s articulation of reason (Kahn 1999, 15).

Commitment to a common legal order creates a nexus amongst the diverse
population of this community, and also links us to our predecessors and successors (Kahn
1999, 9). The sense of connectivity to our past and future generations through the law is
an important aspect of the “rule of law.” Like culture, it is passed from one generation to
another, our role in the present time is to improve upon our laws so that it can be passed
on to future generations in a more relevant and perfected form (Kahn 1999, 9). A form,
which has adapted to evolving values, beliefs, customs, rules, and other aspects of our
dynamic society and culture. Laws are constantly in reform to readjust and reconsider
the rules to keep it consonant with what reason reveals as rational. Correspondingly, there is always a place in legal order to correct the irrational (Kahn 1999, 11).

Consequently, amendment processes are normally included in statutes to adapt to changing circumstances and societal values.

There are, to my knowledge, no studies on how globalization and the pressures to converge toward a single body of law may be influenced by the specific legal regime of a respective jurisdiction. If what I hypothesize is the case, i.e., legal regimes are a reflection of national culture and moderate legal results, then organized efforts like TRIPS and the WTO must take diversity of legal regimes into greater consideration. Failure to do so may predictably result in misplaced reliance on harmonization of law as panacea for creating a fair and open global marketplace.

The foregoing theories on the definition of law and related philosophies of law are included as part of the education and training received by jurists who must administer the legal regimes and laws of their respective countries. As countries conform and harmonize their laws, the significance of judicial decision making becomes self-evident. The power of adjudication and the role of jurists emerge as a critical factor in optimizing the effectiveness of TRIPS to produce predictable and consistent judicial results from one country to another.

The next section discusses how the meaning of law and its related philosophies play a role in how jurists act and think.

i. The Role of Jurists in Defining Jurisprudence

Although the academic tautology of defining “law” may be interesting, the actual portrayal of jurisprudence may be manifested in a legal regime’s structure and how it
operates. Central figures in most legal regimes are jurists. Judges play a major role in establishing the structure of a regime, as well as its administration. They traditionally have had the ability to influence legal education standards and training requirements for both lawyers and their own. Montesquieu believed in an effective independent judiciary, yet one not so powerful as to pose a threat to balance and liberty (Carrese 2003, 37). The potential importance of judges in the debate on legal theories and the definition of law have been acknowledged by scholars. "[N]ot only does every jurist have his own notion of the subject-matter and proper limits of jurisprudence, but his approach is governed by his allegiances, or those of his society, by what is commonly referred to nowadays as, his 'ideology.' No doubt such ideological factors are frequently implicit rather than openly avowed" (Freeman 2001, 1). Judges play an important role in defining the jurisprudence of their legal regime. Therefore, it follows that the legal education and training of lawyers and judges may be a critical factor in how jurists view what law is and how it is applied. The various theories of law may be of particular relevance to those who must determine how law is applied and decisions reached in actual cases. It follows that the jurisprudence of any legal regime could be defined by what lay in the "hearts and minds" of its jurists. A critical observation of how judges act, think and feel on specific cases within different types of legal regimes may provide the data to work with in developing a model that differentiates legal regimes. Globalization has not focused on differences in legal regimes or jurisprudence. Instead, global trade and economic organizations have focused on the harmonization of law. Aligned with the comparatist's views, these global organizations are concerned only with the "existence of similar rules" and "not with how [they] operat[e] within . . . society" (Nelken and Feest 2001, 56).
A discussion of the three separate legal regimes used in this research and their development of IP laws follows in the next chapter.
CHAPTER 3
LEGAL REGIMES AND THE
GLOBALIZATION OF INTELLECTUAL PROPERTY LAW

This chapter examines three separate legal regimes selected for this research and the development of intellectual property laws in each respective venue. In particular, each legal regime studied is differentiated from a historical, cultural and philosophical perspective. Also included is a discussion of the role judges play in each legal regime as they define judicial philosophy and participate in the adjudication of cases.

3.1 Three Separate Legal Regimes

The various legal regimes came about through the historical evolution of the world into separate nation states, each with its own political ideology, and nationalistic emphasis on national characteristics and traditions. These traditions included deeply rooted, historically affected attitudes about the nature of law, the role of law in society and the polity, about the appropriate structure and organization of the legal system, and about the manner in which law is created, interpreted, applied, studied, perfected and taught. This tradition relates the legal regime to the culture of which it is a partial expression (Merryman 1985, 2).

In order to fully appreciate the nature of harmonization, one must first examine each legal regime and understand their differences and historical evolution. This requires a comparative analysis of American, Filipino and Japanese legal regimes from a cultural and historical perspective. By way of definition, the term “legal regime” as used in this research means that system or structure which interprets, administers and enforces the law of a jurisdiction. The system consists of an operating set of legal institutions, procedures, and rules (Merryman 1985, 1-5). Rules and statutes comprise the norms and
principles of the regime, and adjudication a judicial process (Allott 1980, 7). In addition to the statutes and rules, a legal regime includes its institutions, such as the courts, administrative offices, research and training facilities, publications (e.g., published court decisions, rules of procedure and practice, etc.), as well as its personnel (e.g., judges, justices, magistrates, law clerks, administrative clerks, bailiffs, etc.). (See Figure 2).

A brief typology is helpful in understanding the differences presented by each type of major legal regime. In the civilized world today, there are four basic, recognized forms or families of legal regimes or traditions. They are the civil law, common law, socialist (e.g., communism) law traditions and the religious based (e.g., Hindu law, Islamic law, etc.) legal systems. There exist multiple variations within each of these broad categories such that no two legal systems are identical in every respect. The discussion herein will focus mainly on common law and civil law systems as they developed in each of the three countries. Although the Philippine legal regime incorporated the Islamic or Shari'a system, no further discussion is provided on this system because it was beyond the scope of this research.

3.2 Common Law Regime of the United States

The American legal system is based on a legal framework established in England centuries ago. Classic common law jurists such as Sir Edward Coke claimed that reason can refine immemorial custom and that judgments at law can reconcile positive law with natural law. The common law judge works from precedent cases and maxims to make a decision that takes into consideration "reason gotten by long studie, observation

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15 The beginning of English law goes back to 1066 AD. with the Norman Conquest of England. After his defeat of the Saxons, William the Conqueror set about dividing and parceling out the lands of England to his men establishing the new English state. A feudal/military tenure system was implemented whereby individuals were vested with land in exchange for their loyalty or service to the king.
FIGURE 2

ELEMENTS OF A TYPICAL LEGAL REGIME

Jurisprudence

- Education of Lawyers & Judges
  - Regulating Lawyers (Licensing)
    - Post Education Training of Judges & Lawyers

National Courts

- Regional Courts
  - Municipal Courts

Supreme Court
- Appellate Court
- Trial Court
- Specialty Court

Legal Cases
- Records & Files
  - Sheriff
  - Publishing Case Decisions
    - Service of Process & Enforcement

Administration
- Judges
- Staff
  - Clerk of Court
    - Law Clerks
      - Disposition of Cases
        - Bailiffs
          - Administrative Personnel
and experience," a reason, "fined and refined by an infinite number of grave and learned men" (Carrese 2003, 26).

During the colonial period of American history, each colony had its own individualized legal system. Factors such a geographical isolation, character of each settlement, the absence of any oversight or control all had their effect in engendering separate legal systems. Each colonial legal system had "bits and pieces" of English law imported from England mixed with the indigenously developed local norms and practices of the area, and the norms and practices adapted from the settler’s religious or philosophical beliefs (e.g., Puritans, etc.) (Friedman 2005, 4-6). The basic legal system during and after the revolution was the common law. Although there was some consideration of the French civil law system (French and Spanish civil law had been the prevailing law along the Mississippi, New Orleans, St. Louis, Florida and Texas), the English common law system won out. Many jurists of the time characterized the common law as a "precious heritage" of their English past, and also, the foundation of their new freedoms that embraced the concepts of natural law (Friedman 2005, 67). The first Continental Congress in 1776 adopted the Declaration of Rights, which specifically stated that the colonies were "entitled to the common law of England" (Friedman 2005, 67). Many common law lawyers were the heroes of the revolution such as John Adams and Thomas Jefferson, which contributed to the acceptability of this system to the American people. Albeit, the common law of England had been adopted by the new Republic it had to be Americanized. For many years following independence, the various states struggled to determine which provisions of English law and the decisions of its courts should be kept, and which should be trashed because of its repugnancy to the
Constitution or indigenous state law. The paucity of published decisions from the American courts forced ordinary lawyers and judges to rely on published British decisions and legal treatises, which were relatively abundant.

By the nineteenth century, American law had changed significantly from its early English roots. The English legal system was the law of the gentry and was often used to control the common person. American law, in contrast, touched and served a greater number of individuals both rich and poor. Many Americans owned property unlike their ancestors in Europe, and therefore, there were more consumers of the law in America (Friedman 2005, 70). The law served to protect property rights and preserve order. To American citizens, the law “was something people used to further their ends, and when ends changed, so did means. Such a theory implied a more creative view of precedent. It meant asking, whether a rule or a doctrine made sense, and whether it met the needs of the here and the now” (Friedman 2005, 71).

The common law system evolved into what is sometimes referred to as the “Anglo-American” legal system. Under this system, the laws of a particular subject area develop and change over a period of time as decisions by U.S. courts interpreting the laws in that area are promulgated and legislative amendments passed. For instance, the laws in the area of technological know-how are largely made in the United States. To ascertain an understanding of what that law is, one must read through and analyze a multitude of court decisions. Since the judicial system of the United States is comprised of State and Federal courts, decisions rendered by these tribunals can sometimes be inconsistent and vague. For some, the common law system presents a difficult and confusing legal system to understand. However, despite its complexity, Great Britain,
United States, Ireland, Australia, Canada, New Zealand, and Hong Kong (SAR) utilize some form of common law legal regime.

A critical part of the American legal regime is its jurists and the structure of its judiciary. "In a common-law system, judges make at least some of the law, even though legal theory has often been coy about admitting this fact. American statesmen were not naïve; they knew that what judges believed, and who they were, made a difference. How judges were to be chosen and how they were supposed to behave was a political issue in the revolutionary generation, an issue whose intensity has rarely been reached since that time. State after state—and the federal government—fought political battles over issues of selection and control of the judges. The bench was not homogeneous" (Friedman 2005, 79-80). The Constitution gave federal judges a lifetime appointment to the bench. This may have attributed to the Federal court's stability because of the relatively long tenure of its judges. The only way to get rid of a federal judge was through impeachment. This virtually meant that the judge had to commit an act of "treason, bribery, or other high crimes and misdemeanors" in order to be successfully impeached (U.S. Constitution). To date, the use of the impeachment process has been difficult and rare.

An important aspect of the common law system is the doctrine of stare decisis. Precedents establish guides to future conduct and actions and take advantage of past experience without having to "recreate the wheel" so to speak. On the other hand, precedents can engender stereotyped "canned" procedures which may not fit every circumstance if applied by rote. The infinite variations of life necessitate the application of precedents in a creative and flexible manner to adapt better to new situations as they arise. The rigid adherence to precedent along with mechanical applicability can produce
laws which are rendered obsolete or unjust (Freeman 2001, 1380-1381). The modern day common law system treats judicial decisions as binding on future court decisions. However, a decision of a lower court can persuade, but not bind a superior court. In order to mitigate mechanical adherence to precedent and maintain flexibility, common law courts "determine the scope and limits of past precedents and whether to apply them to the fresh circumstances which have arisen, or to distinguish these from the facts and circumstances held to be material in previous cases" (Freeman 2001, 1382).

In contrast, the civil law system is usually based on a group of codes, so that the essence of the law is statutorily based, the judicial function is to apply the appropriate provisions of the code to a case. Although *stare decisis* is not a hallmark of the civil law system, precedents do have a bearing in the deliberations of the court. Judges will consider, albeit not be bound by, past decisions which have bearing on the issues before them, and under some civil law systems even be bound to follow the decisions of their higher courts (e.g., Supreme Court). "It has been said that the doctrine [*stare decisis*] is certainly not a source of civil law, but it is an authority. It has the greatest influence in those areas where there is no established jurisprudence, and persistent doctrinal criticism has sometimes prompted the abandonment of established jurisprudential positions" (Freeman 2001, 1386).

The next section discusses the development of IP laws in the United States.

i. **An Intellectual Property Regime: U.S. Law**

The paramount concept underlying the English law of property is the recognition of an individual's right to own, transfer, and use it. An individual's ownership rights to property also gave him the right to eject or exclude others from the property, and to seek
remedies against those who would trespass or attempt to transfer or possess the subject property. Patents, trademarks and copyrights are all forms of a property right under the general heading of intellectual property.

The U.S. patent laws have as its basis the U.S. Constitution, which grants to the Congress the authority:

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. [Emphasis Added]

(Article I, Section 8)

On August 18, 1787, both James Madison of Virginia and Charles Pinckney of South Carolina submitted proposals to the delegates of the Constitutional Convention to adopt a legal regime to afford inventors protection by means of patents. On September 5, 1787, the delegates of the Convention adopted the above language as part of the new nation’s Constitution (Patent Model Association, 3). On February 16, 1970, a legislative committee charged with drafting patent legislation by President Washington presented the bill to the House and Senate. After some deliberation, the bill was passed.

The U.S. Constitution was drafted during the industrial revolution in England, and logically English law (Statute of Monopolies, 1624) served as a model for the American legal regime to recognize and protect intellectual property. The first United States Patent Act was enacted on April 10, 1790 during the presidency of George Washington. The law vested an inventor with a fourteen-year period of patent protection and promulgated the responsibility of administering the Act to the Secretary of State.

There was no appeal from the decision of the Patent Board to deny or issue a patent. The Patent Board’s first members were Thomas Jefferson, Secretary of State,
Henry Knox, Secretary of War, and Edmund Randolph, Attorney General. Thomas Jefferson, as Secretary of State, was the first administrator of the U.S. patent system. The State Department was promulgated the responsibility of administering the patent laws. Jefferson wrote, “an inventor ought to be allowed a right to the benefit of his invention for some certain time. Nobody wishes more than I do that ingenuity should receive liberal encouragement” (Patent Model Association, 4). Jefferson, in fact, served as the first patent examiner on behalf of the Patent Board and issued the first patent on July 31, 1790 to Samuel Hopkins of Philadelphia, Pennsylvania. A total of fifty-five patents were granted under the original Patent Law of 1790 (Patent Model Association, 5).

The 1790 Act was subsequently repealed and replaced by a new law in 1793, chiefly attributed to the urgings and contributions of Thomas Jefferson. The 1793 Act eliminated the requirement that an invention be “sufficiently useful and important.” An application was no longer examined for its novelty and usefulness. Patents now were granted to virtually anyone who applied. The 1793 Act required for the first time that applicants for a patent had to submit a written description of the invention or process in clear and exact terms so as to distinguish it from all other things known before (sometimes referred to as “prior art”). The examination system was replaced by a registration system; which remained in effect for some forty-three years. It was then relatively easy to obtain a patent. Rights to patents under the 1793 Act were limited to U.S. citizens. This was later expanded to resident aliens, then followed by the total elimination of any restrictions on nationality or residency through a series of amendments occurring in 1800, 1832, and 1836. However, non-U.S. patent applicants continued to be
discriminated against by having to pay significantly larger filing fees than U.S. applicants.

The Act of July 4, 1836, established the U.S. Patent Office under the State Department, whose major responsibility was to examine applications for “novelty and usefulness” before a patent could be granted. This was a major change from the 1790 Act that abolished the previously used examination system. Applicants were now required as part of their claim not only to distinguish their invention from “prior art” but to point out the particular aspect, part, improvement or combination which they claimed as their own invention or discovery. Patents had now returned to the more rigorous examination process that was abolished in 1793. This Act served as the foundation upon which the patent law of today is based. It contained the following provisions:

1. Created the position of Commissioner of Patents, appointed by the President and confirmed by the U.S. Senate to be in charge of the Patent Office.

2. Patent protection was good for 14 years, subject to an extension of 7 years upon approval of the Board (comprised of the Secretary of State, Solicitor of the Treasury, Commissioner of Patents).

3. Appeals of decisions made by the Examiner of Patents were permitted to the Board of three disinterested persons appointed by the Secretary of State.

4. Application fees were $30 for U.S. citizens, $500 for British citizens and $300 for all other aliens.

16 Under the modern day Patent Act 35 U.S.C. §102, the standard of “novelty” is addressed by (§§ 102(a), (e), and (g)) which requires that a patent be denied if “the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent . . .” In such case, the applicant’s invention will be deemed “anticipated,” and thus lacking the necessary novelty to qualify for a patent. An invention is deemed “useful” (or “have utility”) if there is a current, significant, beneficial use for the invention or, in the case of a process, the product of a process. An invention may be denied a patent for lack of usefulness if it fails to operate as claimed in the patent application.
Subsequent amendments in 1837, 1839, 1842, 1861, 1865, 1870 and 1874 continued to refine the U.S. patent laws and to broaden its scope of protection. These refinements included expanding the scope of patent protection to designs (Act of 1842). The Commissioner of Patents was allowed to extend patents (Act of 1848). Patent protection was extended to seventeen years not including extensions (Act of 1861). This Act did away with discriminating fee schedules against foreign applicants, except in the case of citizens of foreign countries discriminating against the United States.

Perhaps the most important change occurred in the Act of 1870. This Act created protection for trademarks and copyrights. Appeals from the Patent Office were to be lodged with the Supreme Court of the District of Columbia. Other laws affecting trademarks were subsequently passed.\textsuperscript{17}

The United States became a member of the Paris Convention for the Protection of Industrial Property in 1887.\textsuperscript{18} The outcome of the Paris Convention was an agreement by its members to amend their respective patent laws to give applicants who were nationals or residents of one member state the right to file an application in their own country and have that date of filing become the date of filing in another member country. This was provided that the application was timely filed in the other member country.

Treaties such as the Paris Convention Treaty ("PCT") called for the uniformity of patent laws adopted by its members and allowed for international patent applications to

\textsuperscript{17}Trademark law is amended by Act of March 3, 1881; Trademark Act of February 20, 1905; legislation enacted on March 19, 1920; Trademark Act of July 5, 1946.
be filed. On January 24, 1978, the PCT entered into force. On that same day, U.S. laws implementing the PCT also entered into force. On June 1, 1978, the first international patent application under the PCT was filed with the United States Receiving Office.

The pressures to bring about global reciprocity, cooperation and harmonization of intellectual property regimes within regions had been assuaged through regional consensus and agreements. In addition, bilateral agreements between Japan and United States to cooperate in automating operations and disseminating patent technology were entered into in January 21, 1983. On October 17, 1983, the United States Patent and Trademark Office ("USPTO") hosted the first trilateral meeting with the European and Japanese Patent Offices to facilitate international exchange of computerized data by 1990. In 1983, Japanese inventors received 9,212 patents, the most of any foreign country. On October 16, 1984, a memorandum of understanding was entered into by and between the European Patent Office, the Japanese Patent Office and the USPTO to extend their cooperation in the field of intellectual property in order to support the progress of technology. In 1985, out of the 75,302 patents issued by the USPTO, a total of 32,539 or 43.9 percent went to foreign residents (Japanese inventors lead foreigners receiving patents by being granted 12,783 patents). This trend was again repeated in 1986 and 1987 where Japan received 13,644 and 17,288 patents respectively from the USPTO.

The U.S. patent law was continually refined and amended not only through periodic legislation, but though a series of court decisions rendered by the State and

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19 A final draft of the Patent Cooperation Treaty was executed by 20 nations on June 19, 1970. On November 26, 1975, following the promulgation of legislation implementing the Patent Cooperation Treaty, the treaty is ratified by the United States.
Federal courts since the early 1800's. As a common law regime, the interpretation of the U.S. patent law was derived not only from legislation but also from court decisions, which in some cases prompted subsequent legislation to reform the existing statutory law in order to bring about conformity. One example of such legislation was the 1952 revisions to the patent law, which served as the basic platform or foundation of the U.S. patent law today (U.S. Patent Act).

On November 29, 1999, President William Clinton executed the Intellectual Property and Communications Omnibus Reform Act of 1999 (Public Law 106-113). Prompted by the TRIPS Agreement, this Act probably made some of the most significant modifications to the patent laws of the United States since 1952.

The next section discusses the educational requirements and the process of selecting jurists for the judiciary of the United States.

ii. The Judiciary of the United States

Five interviews were conducted of jurists at the Federal District Court level. There are eighty-nine districts in the fifty states. All of the judges were of senior status and maintained offices located in their respective U.S. court districts. The judges were interviewed in their respective Federal Court chambers located in Honolulu, San Diego, and Los Angeles. The judges had an average age of approximately eight-six. This was the oldest average age of interviewees amongst the three countries (Philippine judges had an average age of seventy-four; and the Japanese had an average age of fifty-four). The average age between the U.S. judges and Japanese jurists was approximately one (circa thirty years) generation apart. This may have affected their level of understanding.
subjects dealing with high technology and advances in science (e.g., Internet, smart phones, digital photography, etc.).

Legal education in the United States requires completion of a four-year undergraduate program in any major in order to apply for law school admission. Law school programs are three years long and culminate in a Juris Doctor or LL.B degree. Advanced degrees in law are also available such as the LL.M and S.J.D. Upon successful completion of a law school program, a student is able to sit for a bar examination in any state. The bar examinations are not given (as they are in Japan and the Philippines) at the national level, but rather administered at the state level. As to matters of state law, a lawyer can only practice law in a state in which he has passed their examination and has been granted a license to practice. The bar examinations are generally administered by the highest court of each respective state i.e., State Supreme Court. However, attorneys may practice law involving only federal law in any state without passing that state’s bar exam. Federal practice is limited to matters involving a federal statute, regulation or the U.S. Constitution.

The judges and justices of the Federal District Court, Appellate Court, and Supreme Court are nominated by the President and confirmed by the United States Senate pursuant to the U.S. Constitution. Judicial nominees are often recommended by Senators or Representatives who are of the President’s political party. The Senate Judiciary Committee generally conducts the confirmation hearings on the nominees. Pursuant to the Constitution, the appointments are for a life term. The Administrative Office of the U.S. Courts, federal judiciary and Judicial Conference of the United States has no role in the nomination or appointment process. It is important to note that there
are no qualifications for becoming a federal judge under the Constitution. Informal
criterions, however, have been developed and are used by Congress and the Department
of Justice who recommend nominees to the President.

As mentioned above, all of the federal judges interviewed were of senior status.
Beginning at age sixty-five, a judge is eligible to retire at his or her current salary or opt
to take senior status after performing fifteen years of active service. This is commonly
referred to as the “Rule of 80” i.e., 65 plus 15 equals 80. The system makes allowances
for those judges aged sixty-five who do not yet have fifteen years of service. A sliding
scale of increasing age and decreasing service results in eligibility for retirement at age
seventy with a minimum of ten years of service. Senior judges, who essentially provide
voluntary service to the courts, handle approximately 15 percent of the court’s workload
on an annual basis.

3.3 Civil Law Regime of Japan

In contrast, civil law system is the oldest and most widely adopted amongst the
four basic legal regimes. Its origins can be traced back to Roman law as compiled and
codified under Justinian in the sixth century A.D. Roman civil law became widely used
and adopted by many countries in Western Europe, which today is deemed the home of
the civil law regime.

The second component of the civil law system is the canon law of the Roman
Catholic Church. Although canon law dealt with the universal laws of the spiritual
domain and ergo, the power and authority of the pope, there were areas in which its
jurisdiction overlapped with Roman civil law (i.e., family law, law of estates, criminal
The combination of Roman civil law and canon law is commonly referred to as *jus commune*.

The third and final component of the civil law system is commercial law. The commercial law of Western Europe had its origins in Italy at the time of the Crusades, when European commerce regained dominance in the Mediterranean region. The merchants of Italy formed guilds and established rules for the conduct of commerce (Merryman 1985, 13). Soon this law became international and spread in use throughout the commercial world. Consequently, this commercial law, as adopted by the European countries, was incorporated and merged into a civil law system in the eighteenth and nineteenth centuries.

Another source of law within the civil law system is custom. In a case where a person acts in accordance with custom under an assumption that it represents law, his actions will be found as legal under civil law regimes; provided, there are no statutes or rules to the contrary. Since custom engenders laws which are not legislative in character, this has caused problems for civil law jurisdiction. Hence, there has been a decreasing emphasis on this aspect’s importance to the civil law system (Merryman 1985, 23).

What becomes obvious is that the civil law system is more complex in its historical derivation and traditions than the “common law” system. However, the major distinction between the two systems does not end here. Rather, the most significant distinction between the two systems of law is their philosophical underpinnings. At the heart of the “common law” system is a secular natural law doctrine (i.e., not derived from a religious doctrine), which exposes certain ideas about man’s nature. These ideas emerged from the American Revolution and are embodied in the U.S. Declaration of
Independence (e.g., all men are created equal; individuals have certain rights and liberties as against government, the role of government is to secure and protect these individual rights and the notion of equality, etc.).

In comparison, the "civil law" system came about before and during the French Revolution when judgeships were a position which could be bought, sold and inherited amongst the aristocracy. The revolution brought down the aristocrat class and feudalism (Merryman 1985, 15). As a consequence, French intellectuals argued the novel notion that in order to have a rational democratic form of government, one had to separate governmental powers. In particular, this involved a bifurcation of the judiciary between the legislative and executive branches. The intended objective was to prevent intrusion of the judiciary into lawmaking or the execution of the laws, which had occurred amongst the judicial aristocracy before the French Revolution. Prior to the revolution, it was common to find French judges making their own laws and applying them as they pleased, usually in favor of the aristocrat class. This situation did not exist in America either before or after the American Revolution and, therefore, American judges were seen as a positive force protecting individual rights against governmental intrusions and the undesirable vestiges of a feudalistic society (Merryman 1985, 15).

Under the civil law regime, the exaggerated emphasis on the separation of powers doctrine created a separate administrative court system, inhibited judicial review of legislation, and limited the role or function of the judge to only interpret and to apply "the law" as it is technically defined in the applicable jurisdiction. It is assumed that whatever type of case that may come before a judge, some law would apply. The judge may not consult books or articles written by legal scholars or take note of prior judicial decisions.
In comparison, judges in a common law system can interpret and invalidate laws, consult books, articles and other scholarly works, and must take into account judicial decisions which are probative or relevant. Ostensibly, the role of civil law judges was relegated to a lesser or minor role relative to the role of judges in a common law regime (Merryman 1985, 23-24).

Japan has received several law transplants during its history. The first was the laws of Confucianism and Buddhism which molded the indigenous Japanese culture into a more systematic form. During the early 600 A.D., Crown Prince Shotoku accepted Chinese law and a Chinese Constitution. More than laws, the Chinese system presented Japan with political ideology and ethical ideals. The first article of the adopted Chinese Constitution read, “Wa (harmony) is to be most valued, and an avoidance of wanton opposition to be honored” (Chiba 1986, 304). The rule and absolute power of the Tenno (Emperor) was also promulgated through that Constitution. Up until the Meiji Restoration in 1868, these Chinese principles remained a part of Japan’s indigenous law. The Japanese reception of Chinese law was an interacting process between the received law and the indigenous laws of Japan. Examples of the Japanese indigenous laws were the laws pertaining to the warrior class or bushido and other social classes unique to Japan (shomin or commoner class; kuge or noble class). Each of these classes had their own special laws pertaining to marriage, family, contract, inheritance, etc. Other examples of Japanese indigenous law were the power of the Tenno to govern the country; the value of wa in human relationships; the principle of kazoku-seido (family system) and its extension to social groups; and the system of mibun kaiso-sei which maintained the hierarchical order of the family or defined a person by status (Chiba 1986, 307).
Elements of these indigenous laws still remain in Japan albeit not part of its formal modern legal system.

It was during the modernization period of Japan’s history that it began to look at various Western legal systems to emulate and replace their existing Chinese system. Such a legal system was adopted after the Meiji Restoration in 1868. Upon careful review and consideration of the varying forms of legal regimes, the Japanese decided to adopt a civil law tradition (i.e., Japanese felt that the English common law system was too complicated). Their skillful emulation of the laws of France and Germany incorporated them into a series of legal codes, which ultimately developed into the Japanese legal system (Noda 1976, 42-58). It is important to note that although the Japanese were able to assimilate the French and German civil law legal systems, as well as a Prussian style Constitution (“Meiji Constitution”), the culture of Japan created a certain degree of tension with their newly adopted system. After all, although laws can change instantaneously, those who must administer them and those to whom they are applied do not change that readily. The ability of the social norms and customs of Japan to be in sync with their new civil law system would be problematic for decades to come through the conclusion of World War II (Noda 1976, 58).

After the end of World War II, the American occupation forces believed that despite Japan’s Meiji Constitution (Dai-Nihon Teikoku Kempo) and civil law system, its

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20 In 1872, Georges Bousquet, advocate at the Paris Court of Appeals, was invited to come to Japan by the Imperial government. He educated Japanese lawyers at a special school of French law established in Japan. Bousquet stayed in Japan for four years teaching French law. In 1873, Gustave Boissonade, professor at the Faculty of Law in Paris, was also invited by the Imperial government to improve the Japanese legal system. Boissonade remained in Japan for twenty years drafting the Japanese codes on criminal law and procedure in 1877 and the civil code (only drafted a portion of the code) in 1889. The Commercial Code of Japan was drafted with the assistance of German jurist H. Roesler and enacted into law in 1891. The Civil Procedure Code was drafted by German jurist, Techow, in 1884 and became law in 1891.
government had ruled its citizens in a tyrannical and authoritarian manner. In their view, the despotic government under the aegis of Emperor Hirohito and his military leaders had deprived Japanese citizens of their individual rights and liberties. Japan’s Meiji Constitution and its existing legal system were considered to be merely “window dressing” by the Americans (Inoue 1991, 1). In light of the foregoing, the American occupation forces through the Supreme Commander for the Allied Powers, General Douglas MacArthur, pushed for a new constitution and democratization, which emphasized that the rights and liberties of the Japanese citizen could not be compromised by government. In contrast, the pre-war Meiji Constitution asserted the authority and responsibility of the government to decide what was in the best interests of the nation and the people as a whole (Inoue 1991, 2). Although the Meiji Constitution bestowed certain individual rights upon its citizens, these rights were deemed a gift from the Emperor and susceptible to compromise by the government with no limitation. Despite MacArthur’s replacement of the Meiji Constitution with the new Constitution of Japan (Nihonkoku Kempo), he maintained Japan’s existing civil law system (albeit the codes were replaced to be consistent with the new Constitution) and refrained from emulating the common law system of the United States.

Japan enacted most of its code provisions (horitsushu) in the 1890’s, which came from German law. Although some use Japan as an example of where legal transplants have worked well, others disagree. “[F]rom one perspective we have ‘the law’ in Japan but from another we do not. Making the picture more complex, some argue that Japan has a unique culture which resists the reception of law while others contend that such culture either does not exist or has been forged to deter reception” (Nelken and Feest
It is further argued in another chapter by Takao Tanase that although Japan ironically adopted laws and a legal regime from the west to modernize its economy, it virtually ignored the law so that it could modernize faster.\textsuperscript{21} It is as if the adoption of Western laws by Japan amounted to "window dressing" giving the appearance of modernity, but in reality Japan is not. "When we read the news of, for example, human rights infringement, corruption of bureaucrats or irresponsible conduct of business, we feel ashamed just as someone whose secrets are revealed. We are once again reminded that we are not modern. But when the people are reminded of the absence, the law as an embodiment of the modern is accorded special deference. The judiciary, legal professions, and even bureaucrats in Japan consciously or unconsciously exploit this authority of the modern to enhance their legitimacy" (Nelken and Feest 2001, 196).

Ostensibly, the laws and legal regimes of other countries have been successfully transplanted in Japan. However, if Tanase is correct, they serve as mere "window dressing" that creates the perception of modernity. In reality, the transplanted laws have not penetrated Japanese society. The reality of Japanese law lies beneath the surface hidden from view.

In the next section, the development of intellectual property rights in Japan is discussed.

i. \textit{An Intellectual Property Regime: Japan Law}

During its period of modernization in the mid-nineteenth century (Meiji Restoration, 1868), the Japanese sought acceptance by the world powers through the acquisition of a new legal regime replacing its archaic Confucian based system. The

\textsuperscript{21}Citing "the Empty Space of the Modern in Japanese Law Discourse," Takao Tanase, Professor, Graduate School of Law, Kyoto University, Japan.
Meiji Restoration brought about the abolishment of the feudal system that Japan had relied upon for centuries and adopted a modern system of government. One of the major goals of the new Meiji government was to eliminate all of the bilateral agreements it had signed with various European countries and the United States. The abolishment of these agreements ended the unfavorable advantages these agreements brought to the foreign signatories. The government’s efforts to abolish these bilateral agreements accelerated the formation of a new modern system of governance, including a patent system (Ichikawa 1965 and Yoshifuji 1971). Japan’s initial steps toward modernity required that it enlighten itself on the various legal regimes available throughout the world so that they could adopt one form for their own. As a consequence of investigating other regimes and laws in 1871, Japan adopted the Summary Rules of Monopoly (Senbai ryakukisoku) as Dajōkan Proclamation No. 175, which created its first rather crude form of patent system. The Summary Rules of Monopoly consisted of nineteen articles. Under this law, priority was given to the first inventor rather than the first to file the patent application. The patent grant involved a patent examination procedure (Doi 1980, 2). The Japanese people could not understand the patent system because of the prohibition against invention during the Tokugawa shogunate period. Consequently, they were not prepared to carry out the patent examination required under the law. The Summary Rules were subsequently suspended after one year of operation (Doi 1980, 3).

After the absence of any patent law protection for thirteen years, in 1885, the Patent Monopoly Ordinance of 1885 (Senbaitokkyo Joorei), was passed as Dajōkan Proclamation No. 7. This law was influenced by French and U.S. law. The law was designed as prototype legislation and was only to be in force for two or three years.
Under this law, any new and useful process or product was granted a patent. Medicines and drugs, however, were excluded from being patented. Similar to the U.S. patent law, the ordinance gave priority to the first inventor, not the first to file. The law required patent markings on all products granted a patent. Duration of patent protection was fifteen years and the patent was cancelable if the inventor did not work the patented inventions for more than two years without justifiable cause. (In the year 1885, 425 applications were filed and ninety-nine patents were issued) (Doi 1980, 4).

Once the government saw that the patent law worked, they quickly set about to fashion an improved patent law. In 1888, an improved version of the Patent Ordinance (Tokkyo Joorei) was enacted into law.

Under this ordinance, the inventor’s right to obtain patent was established. However, aliens had no right to obtain a patent. There was no appeal from the decision of the Patent Office to issue or deny a patent application.

At this time, patents granted to foreigners were disfavored because of the belief by patent abolitionists that the foreigners would acquire most of the patents and hinder the development of Japan’s domestic industry. The Patent Office opposed such isolationist thinking and sought to promote creative innovation and invention rather than to stifle it (Doi 1980, 4-5).

A few years later, Japan joined the Paris Convention on the Protection of Industrial Property, which prompted the Japanese to enact the 1899 Patent Law (Patent Law of 1899, Design Law, 2nd Trademark Law), modeled after the German legal system on patents.
The right of aliens was recognized for the very first time under the 1899 laws. An alien residing abroad had to appoint an agent domiciled in Japan. Also, an alien who filed an application in a country that was a member of the Paris Union, was given a priority of seven months for the filing of a similar application in Japan. Finally, temporary protection was afforded to products exhibited at exhibitions sponsored by the central and prefecture governments of Japan, as well as international exhibitions set forth in the Paris Convention.

Patent protection was kept at fifteen years. The Patent Law gave recourse from an adverse Patent Office decision to the Great Court of Cassation (the predecessor of the present Supreme Court) on the basis of grave error committed by the Patent Office (Doi 1980, 5-6).²²

By the year 1899, 1,691 (including 224 filed by aliens) patent applications were filed with 499 granted patent protections (of which ninety-eight were granted to aliens) (Doi 1980, 7).

By 1905, the Japanese government had enacted the Utility Model Law, which was patterned after German law. The Utility Model Law was intended to protect new and useful devices and processes that fell short of meeting the requirements under the Patent Law. The law provided that an invention could be registered if it met the requirements of novelty, utility and inventiveness, but the inventiveness requirement was complied with “when a device is such that it could have quite easily been made by a person having ordinary knowledge in the technical field to which such device pertains” (Matsushita and Schoenbaum 1989, 189). The policy behind the “novelty” requirement is to prevent a

²² The term “cassation” is derived from French law. It means to annul or reverse the force and validity of a judgment rendered by a sovereign authority.
second inventor from obtaining a patent monopoly if a previous inventor had already placed the invention in the public domain before the second inventor filed. Protection under the Utility Model Law was initially set at three years. Interestingly, priority under this law was given to the first to file, not the first to invent.

Further refinements to the Patent Law were made in 1909 to improve "employee's inventions, scope of prior act, alien's rights, scope of patent protection, licensing of basic patents for the benefit of dependent patents, and the duration of patents" (Doi 1980, 7).

The revisions made to the Patent Law in 1921 (as distinguished from the Utility Model Law) did away with priority instead to an applicant who had filed first. This superseded the 1899 Patent Law, and established the framework for Japan's existing patent law regime (Oda 1999, 338-339).

As stated previously, the 1922 Patent Law adopted by Japan utilized the "first to file" system, as distinguished from the "date of invention" system used by other countries such as the U.S. The "first to file" system was incorporated into the present Patent Law of Japan passed in 1959 (1959 Japan Patent Law and Law on Utility Models). This law has undergone a series of amendments, which commenced in 1975 (the introduced amendment called for the early disclosure and an examination-on-requirement systems). In 1975, the law was again amended to include pharmaceuticals and to recognize product patents. The 1978 revision added a provision to the 1959 Patent Law accepting international applications under the PCT (Japan ratified the PCT on October 1, 1978 under the aegis of the World Intellectual Property Organization "WIPO").

Of additional interest, in 1987 the Japanese single claim system was changed to a multi-claim system, which permitted more than one novel advance to be included in any
one patent application. A single patent claim represents one novel advance, which may be worthy of a patent grant. The ability to include several claims, which are related to an invention, into one patent application reduces the time and expense of processing several separate applications. The multi-claim system amendment was considered to be a significant change to the Japanese Patent Law by some (Sakakibara and Lee 1999, 7-15).

Historically, the ethnocentric culture of Japan promoted a national policy of isolationism (only during the Tokugawa shogunate era) and an economic policy of protectionism. In regard to FDI, the legal regime of Japan prior to 1980 significantly discouraged foreign investment and capital transactions. In fact, some have characterized Japan as having had some of the most restrictive foreign exchange and investment laws of any major industrial country (Henderson 1981, 1). Prior to 1980, any proposed investment was subject to being evaluated on a case-by-case basis according to the principle of gensoku kinshi, which presumed that every transaction was prohibited unless specifically allowed by the appropriate governmental authority.

In 1980, however, the Foreign Investment Law (Gaishi ni Kansuru Horitsu 1950) was repealed and the Foreign Exchange and Foreign Trade Control Law (“Control Law”) (Gaikoku Kawase Oyobi Gaikoku Bōeki Kanri Hō 1979) was significantly amended to permit foreign investment and exchange transactions. The principle of gensoku kinshi was abolished and replaced by a positive principle that foreign investment transactions were permitted unless expressly prohibited.

The new Control Law covered (1) foreign investment controls; (2) foreign exchange controls; (3) foreign trade control both in goods and services, including transfers of technology. The Control Law governs “inward direct investments” by
foreign entities (including foreign individuals). For example, these include investments by a foreign entity to acquire a Japanese company or to opening a branch office, factory or any place of business. Both inbound and outbound technology transfer is regulated under the Control Law. Technology induction, the transfer of a foreign entities' intellectual property rights, know-how, or technical assistance to a Japanese individual or company is treated as a domestic direct investment. Outbound technology transfer is treated as a service contract.

Transfer of technological knowledge on an international basis was subject to several regulatory constraints in Japan. However, since the adoption of the Control Law many of the previous restraints have been eliminated. Nevertheless, there are significant negotiating provisions, which must be complied with especially in regards to technology transfer contracts. In addition to the changes made to the foreign investment laws of Japan, the barriers to FDI were reduced further by the aforementioned GATT/WTO and the TRIPS Agreement to the Japanese patent laws.

One of the more important aspects of Japan’s legal regime is its jurists. The next section discusses how lawyers in Japan are educated and become jurists.

ii. The Judiciary of Japan

There were five interviews conducted in Tokyo, Japan of the jurists located in that country. Of the five interview subjects, three were forty-seven years old, one was fifty-five years old, and the eldest was seventy-three. All five judges had retired from the Tokyo High Court. When compared to the age of jurists from the Philippines (seventy-one years old to eighty-three years old) and the United States (seventy-seven years old to ninety-two years old), there was a marked difference in the relative age of the Japanese
jurists. Jurists from Japan were much younger (i.e., as much as thirty to forty-five years) than their respective counterparts from the U.S. and Philippines. The reason for this may be that Japan’s judicial system is structured to receive most of their candidates for judicial careers immediately after undergraduate education and passage of the National Judicial Exam. As a consequence, new judges in Japan typically have no previous experience litigating cases or practicing law.

Today, Japan’s legal educational system has changed to be more similar to that of the United States by providing post-graduate professional law school education. For many years (prior to 2004), however, lawyers and judges in Japan were only required to obtain an undergraduate degree (in any major) and to pass the National Judicial Exam (shihō shiken). The professional graduate schools of law (three-year program resulting in a Juris Doctor degree) are intended to become the central institution for the training of the legal profession according to the Japan Federated Bar Association (http://www.nichibenren.or.jp/en/about/judicial_system.html). Upon passage of the bar exam, those successful were admitted to the Supreme Court Legal Training and Research Institute (shihō shūshūjo) for a year and one-half program of instruction and apprenticeship. After completion of the training, candidates were recruited and selected for a judicial career or to become a prosecutor. Upon graduation, those interested in a judicial career applied to the Supreme Court for an appointment as assistant judges. Assistant judges were appointed to ten-year tenure. At the end of the ten years, they would be eligible for appointment as full-time judges for another ten-year term. Generally, reappointment is routinely granted.
Japanese lawyers can also choose other careers or obtained legal positions in government or the private sector (Miyazawa 2001). The mandatory retirement age (sixty-five years of age for all judges, except Supreme Court Justices and Summary Court judges which is seventy) for Japanese jurists also may be a factor contributing to the relatively young age of the retirees. Under the current system, a Japanese jurist who retires at the age of forty-seven would have contributed over twenty years of service. In a study done in 2005, of seventy-one judges appointed in 1970, 74.6 percent were still on the bench twenty-six years later in 1996 (Haley 2005, 4).

All career judges are subject to assignment to courts anywhere in Japan usually for a period of three years at each post. Most newly appointed assistant judges are first assigned to either the Tokyo or Osaka District Court. A career judge will typically serve two or three posts at the district court level, family court level, rural branch court or high court. Some career judges will spend time doing administrative (jimusou kyoku) or research work for the Supreme Court in Tokyo. The highest position that can be held by a career judge is a chōkan (i.e., chief judge). A handful of retired chōkan of either the Tokyo or Osaka High Court will be appointed to the Supreme Court. A favorable career path for an ambitious young judge would be to have served several times in Tokyo in the General Secretariat (Haley 2005, 6).

Japan’s judiciary is unique in that it has a central personnel office along with the Supreme Court responsible for the recruitment, mentoring, assignment and promotion of all career judges within the system. The system of periodic spiraling assignments to judicial posts throughout the country and at all levels of the judiciary is a unique aspect of this legal regime. The Supreme Court nominates lower court judges and determines
whether judges whose ten-year term is expired should be renewed. The court also has rule-making authority which extends beyond procedural rules for the courts to include rules concerning the legal profession and the administration of the Judicial Branch (Goodman 2003, 110-113). Only Korea has a similar judicial system.

Japanese judges are known for extraordinary integrity. Judicial corruption is virtually unknown. Judges simply do not accept bribes. However, politics have had an influence on judicial administration. The cabinet's constitutional authority to appoint judges provides continuous potential for political interference. Individual judges operate under a constant cloud of potential political intrusion (Haley 2005, 23). In fact, in a study by J. Mark Ramseyer and Eric B. Rasmusen done on politically charged cases the results revealed that judicial decision making tended to be more conservative for such cases. The Liberal Democratic Party's long dominance of Japan's political structure has had its effect on appointments to the Supreme Court and hence the career path and decisions of judges under their aegis. Ramseyer and Rasmusen found that Japanese judges who flouted the ruling party in politically charged cases did worse in their political careers than other career judges (Ramseyer and Rasmusen 1999).

3.4 Hybrid (Civil Law/Common Law/Muslim Law) Regime of the Philippines

The laws of the Philippines are based on an Anglo-American common law system, which supplanted the Spanish civil law system (In re Shoop 1920). Although historically very similar to the development of Japanese law (adoption of a U.S. type Constitution and laws during the occupation period following World War II), the Philippine legal regime chose to become a hybrid common law system while Japan's legal regime became a civil law system. In actuality, the Philippine legal regime is a
mixed system, but primarily civil law. This can be attributed to its mixed historical past where Spanish and American legal regimes blended themselves into a uniquely Philippine hybrid system.

The legal history of the Philippines can be divided into ten periods. These periods are (1) the pre-Spanish period (prior to 1521 A.D.); (2) the Spanish period (1521 - 1898); (3) First Philippine Republic (Malolos, 1898 - 1941); (4) the American occupation (1901 - 1945); (5) the Philippine Commonwealth (1934-1944); (6) Second Philippine Republic (Japanese occupation 1942 – 1945); (7) Third Philippine Republic (1946 - 1972); (8) Martial Law period (Ferdinand Marcos, 1972 - 1986); (9) Provisional Government period (overthrow of President Marcos 1985-1987); and (10) Fourth Philippine Republic (President Corazon C. Aquino adopts a new Constitution, 1987 to present).

Philippine society during the pre-Spanish time was divided into four classes: the nobles, the freemen, the dependents, and the slaves. The nobles, consisting of the chiefs and their families had significant powers in the barangay and enjoyed rights that other classes of society did not. Next to the nobles were the freemen. They were composed of freemen and dependents who had earned their freedom.

The dependents were those that were doing service to the chief or the freemen in payment of an obligation. A dependent attained his low status by inheritance, failure to pay a debt, by purchase, or by committing a crime for which he was duly sentenced. The slaves were those captured in battle. The lines between classes were not fixed and any member could go up or down the social ladder depending on the attendant circumstances.

The barangay was the unit of government and consisted of from thirty to one hundred families. Each barangay was independent and was ruled by a chief (datu). The
chief had broad power and authority and exercised all powers of government. He was the executive, legislator, and the judge.

The source of law during the pre-Spanish period was comprised of the customs and practices of the inhabitants of the Philippine islands. Some laws were oral and handed down from generation to generation, and other laws were written and promulgated by the chieftain and his elders. Only a few written laws (i.e., Maragtas Code, Code of Kalantiaw, and Muslim law) have come down to the present because many of them were destroyed by the Spanish or by neglect.

The Maragtas Code (Circa 1200 A.D.) and Code of Kalantiaw (Circa 1433 A.D.) were promulgated by chiefs and consisted of simple codes of moral behavior. The Muslim influence came from the Indonesian group by way of the Sulu Archipelago and the Basilan Island and was centered about the southern islands of Mindanao and Palawan. The Muslim laws were based on the Koran.

The government of Mindanao was established like an Arabian caliphate and adopted laws called the "Luwaran" or the laws of Maguindanao. The other Moro Code (Muslim laws of Mindanao) was the Code of Sulu. This code was a guide for the government officials to follow the laws and rules of the State.

When the Spanish conquered the Philippines in 1565 A.D., they were unsuccessful in governing the Moros and could not impose Spanish law on these subjects. To this day, the government of the Philippines treats the Muslim population of Mindanao

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23 It is reported that the Maragtas Code, Code of Kalantiaw and Muslim laws were the only written laws which survived from before the Spanish rule (1521-1898). The Maragtas Code was written by Data Sumakwel of Panay sometime during the 13th Century. The Code of Kalantiaw was promulgated by Kalantiaw (third chief of Panay) in 1433 A.D. The Muslim laws were brought to the Philippines by Indonesian Muslims by way of Mindanao and Palawan. Their laws were based on the Koran and teachings of Mohammed.
separately from the rest of its Filipino citizens. This is the reason for the existence of the Shari'a courts within the current Philippine judicial system.

There were two kinds of Spanish laws enforced in the Philippines during their colonial rule. The first consisted of laws of Spain governing Spanish citizens which were applied to Philippine subjects by royal decree. The second comprised a body of law enacted by the Spanish government to govern their colonies. Up until 1811, there were several Spanish codes promulgated by various Kings and governmental officials. These codes, however, were not compiled into a single set of laws so they presented many problems of overlapping and inclusion of antiquated laws. The first compilation of Spanish Codes was completed in 1830 (i.e., Codigo de Comercio) and was modeled after the French Code of Commerce of 1807 and on the decrees of the court of Bilbao of 1737. This served as the commercial code of Spain for many years and was extended to the Philippines by royal decree on December 1, 1888.

The Spanish Criminal Code was codified in 1822 and revised in 1848. The criminal code was patterned after the French Penal Code of 1810. A revised version of this code was extended to the Philippines by royal decree in 1887.

Spain adopted a Civil Code (i.e., including laws on contracts, individuals, real property, etc.) in 1889 and was based primarily on the Code of Napoleon with some revisions. This code was applied to the Philippines by royal decree in 1889.

The Malolos Constitution took its name from the capital town of the Filipino revolutionary government located in the Province of Bulacan. A revolutionary government was formed under President Emilio Aguinaldo to seek independence from Spain. The Constitution was promulgated on January 21, 1899. The charter organized a
Filipino state called the Philippine Republic, sovereignty residing exclusively in the people. The Bill of Rights included religious liberty, freedom from arbitrary arrest and imprisonment, protection of private property, etc.

Judicial power was vested in one Supreme Court of Justice and in the other courts created by law. The President of the Supreme Court of Justice and the Solicitor-General were to be appointed by the National Assembly. They should be absolutely independent from the legislative and executive departments.

Admiral George Dewey’s victory over the Spanish warships in Manila Bay, followed by the capture of Manila by the American forces and the formal ratification of a peace treaty with Spain transferred Spanish sovereignty over the Philippines to the United States.

General Aguinaldo, President of the newly formed Philippine Republic, was not prepared to accept American sovereignty. Conflict broke out between Philippine rebels and American troops. Guerilla warfare took place for several years and the American government decided to transfer the military into a civil government as soon as conditions would permit.

In 1901, the U.S. Congress passed the Spooner Amendment which asserted its right to govern the Philippines. The President created four executive departments and established a new judiciary in the Philippines consisting of a Supreme Court, courts of first instance, and justice of the peace courts. The Spooner Amendment terminated military occupation and converted the governance of the Philippines into a civil government.
In 1902, insurrection by rebels had ceased and elections for seats in the Philippine Assembly were held in 1907. The Chief Justice and associate justices of the Philippine Supreme Court were appointed by the President of the United States by and with the advice and consent of the Senate. The Supreme Court of the United States had jurisdiction to review, reverse, modify or affirm the final judgments and decrees of the Philippine Supreme Court.

The Jones Law was passed in 1916 and superseded the Spooner Amendment. The law granted general legislative powers except as otherwise provided to the Philippine legislation.

The Philippine Independence Act, also known as the Tydings-McDuffie Law was signed by the U.S. President Franklin D. Roosevelt in 1934. It provided for the relinquishment of American sovereignty over the Philippines over a ten-year period during which the archipelago was under the regime of an all-Filipino commonwealth government. During the transition period, the U.S. Supreme Court maintained its ability to exercise final jurisdiction over important cases decided by the courts of the commonwealth.

In 1935, a new Constitution was passed which created an independent Philippine nation. The Philippine legislature was abolished in favor of a National Assembly. By way of amendment, the National Assembly was abolished in favor of a bicameral legislation, consisting of a Senate and a House of Representatives. This government lasted until the Japanese bombed Pearl Harbor in December 1941. Shortly thereafter, the Japanese invaded the Philippines. On January 1942, the Japanese forces occupied the
City of Manila and the Commander-in-Chief declared martial law over the districts occupied by the Army.

On October 14, 1943, the so-called Republic of the Philippines was inaugurated, but no substantial change was effected thereby in the organization and jurisdiction of the different courts that functioned during this period.

On February 27, 1945, General MacArthur turned over the Philippines to President Sergio Osmeña who started to gradually restore civil law authority over the country. This period was disrupted when President Ferdinand Marcos placed the entire country under martial law in 1972. This act set into motion a series of events that ultimately led to the overthrow of President Marcos in 1986 by the people of the Philippines.

The so-called People Power movement of February 1986 installed a new government under Corazon C. Aquino as President of the Republic. This Republic has continued in force until the present day under a new Constitution passed in 1987.

The complex and dynamic series of tonal events surrounding the development of law in the Philippines has made this legal regime difficult to label as a common law or civil law system. It is truly a hybrid system that incorporates both legal systems and the Muslim religious system as well.  

Today, the private law of the Philippines is derived from the Spanish Civil Code of 1889 (the Spanish Code was heavily influenced by the Napoleonic Code and Roman Law). The Spanish Penal Code of 1887 became the basis of the modern Philippine criminal code. In contrast, the commercial laws and laws of corporations of the

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24 This material was derived from lecture notes and materials of Perfecto Yasay, Jr., lecturer of Philippine law at the William S. Richardson School of Law, University of Hawai‘i.
Philippines are adopted from the laws of the United States. Also, the negotiable instruments law and insurance code of the Philippines are modeled after laws from the United States. The essence of the foregoing legal development is captured in a speech given by Senator Vincente Francisco and presented to the Francisco Law School in 1951.

The jurisprudence of our country has followed the general pattern of our culture, and is a unique hybrid of the European and the Anglo-Saxon disciplines and traditions. Despite recent reforms and revisions, our civil and commercial law is predominantly Spanish in substance, and our political and constitutional law profoundly American in inspiration. The body of our statutes is derived from the European school but our procedure, except for such [non-importable] features as the jury system, has been patterned on American practices and rules. (Adeva 1953, 8).

The legal regimes of the Philippines were chosen for this research because it is a combination of three different legal systems. It contains the civil law regime introduced early in Philippine history by the Spanish. The civil law system was then combined with a later introduced common law system brought by the Americans to the Philippines after the Spanish-American war. Finally, the Philippine legal regime includes a religious system based on Muslim law although this system was not included in this research.

The next section discusses the development of intellectual property rights in the Philippines.

i. An Intellectual Property Regime: Philippine Law

During the American occupation of the Philippine Islands, the Philippine legislature passed Act No. 3247 entitled “An Act to Prohibit Monopolies and Combinations in Restraint of Trade.” The Act supplemented the existing Penal Code, which still contained the above provisions of the Spanish Penal Code, and made the Philippine laws governing business competition similar to the Sherman Act of the United
States. This Act was later repealed in December 1930 and reconstituted into a Revised Penal Code made effective in 1932 and later revised in 1957 (Republic Act No.1956) (Catindig 2001).

These early laws dealing with monopolies and combinations in restraint of trade are relevant to the evolution of intellectual property laws in the Philippines as they paved a way for another form of monopoly to exist i.e., patent rights, copyrights, etc. In later years, the 1973 Constitution of the Philippines first recognized an exclusive right to persons who invented, wrote or created art. Later in 1987, the Constitution of the Philippines was redrafted to specifically recognize the right of individuals to intellectual property.

The State shall protect and secure the exclusive rights of scientists, inventors, artists, and other gifted citizens to their intellectual property and creations, particularly when beneficial to the people, for such period as may be provided by law.

Article XIV, Section 13.

The first laws creating intellectual property rights in the Philippines were enacted in 1947 via Republic Act No. 165, which established a Patent Office and recognized its authority to issue patents. Concomitant to that law was Republic Act No. 166, which established legal rights and protection for trademarks and trade names, and Presidential Decrees No. 49 (“Copyright Law”) and 285 (“Textbook Re-printing Law”), which addressed copyright protection. These laws were subsequently repealed and reconstituted into Republic Act No. 8293 on January 1, 1998, which stands today as the current Intellectual Property Code of the Philippines (“PIPC”).
In addition to the above, the Philippines entered into several treaties regarding intellectual property rights, including TRIPS. Other treaties still in effect in the Philippines are the Paris Convention for the Protection of Industrial Property, the Budapest Treaty in the International Recognition of the Deposit of Microorganisms for Purposes of Patent Procedure, and the Patent Cooperation Treaty, which was ratified by the Philippine Senate on February 5, 2001 (Belaro 2004, 13-15).

Since becoming a signatory of TRIPS in 1985, the Philippines attempted to comply with its mandated requirements. For instance, they overhauled the patent system from the “first to invent” to the “first to file” system, and liberalized registration of technology transfer arrangements so as to provide for voluntary licensing (Belaro 2004, 15). In regard to further measures intended on satisfying TRIPS, the PIPC also provides as follows:

i) that multiple claims maybe made in a single application (Sec.36.1);

ii) that the term of patent protection is twenty years from the filing date of the application (Sec. 54);

iii) civil and criminal actions may be brought against persons who infringe upon another’s patent (Sec. 76 and 84);

iv) compulsory licensing can be mandated by the Patent Office for not working a patent (Sec. 93.5);

v) applications will be kept confidential until published in the IPO Gazette, which shall occur after eighteen months from the filing date or priority date (Sec.44 and 45) (Intellectual Property Code of the Philippines).

It is apparent, that the Philippines have to a large extent harmonized its IP laws to the minimum requirements promulgated under TRIPS. The interpretation and
enforcement of these laws is within the purview of the Philippine judiciary. The next section examines the current educational training and appointment process for judges in the Philippines.

ii. The Judiciary of the Republic of the Philippines

There were seven interviews conducted in the Philippines. All of the interviews were conducted in Manila. The subjects ranged from judges who served at the Metropolitan Trial Court and Regional Trial Court levels (first and second tier courts) to justices of the Court of Appeals, Sandiganbayan (special court for anti-corruption cases), and the Supreme Court.

The legal education system of the Philippines is very similar to that of the United States. A four-year undergraduate program is required before entering a professional law school, which is also a four-year program (vis a vis law programs in the United States are three years long). After successfully completing a professional law school program (graduating with an LL.B degree), the student is then entitled to sit for the National Bar Examination. All judges and justices must be Philippine citizens. Justices of the Supreme Court or Court of Appeals must also be natural-born citizens. Supreme Court and Court of Appeal justices must be at least forty years old with fifteen years of practice. Regional Trial Court judges must be at least thirty-five years old and have at least ten years of practice. Metropolitan or Municipal Trial Court judges must be at least thirty years of age and have a minimum of five years of practice. Judges and justices are recommended to the President for appointment by a Judicial and Bar Council (Chief Justice, Secretary of Justice, two representatives of Congress, and four ex officio members appointed by the President). The Council submits three names for each
vacancy to the President to appoint. Unlike the American system, there is no legislative confirmation process (Judicial Reform Index for the Philippines 2006, 6-9).

Jurists of all courts hold office during "good behavior" until the retirement age of seventy, subject to removal and discipline by the Supreme Court. Unlike the Japanese judicial system, all jurists are appointed laterally during their legal careers (again similar to the United States) and there is no mandatory training program before entering the judiciary. During their careers, however, jurists are required to obtain periodic judicial training administered by the Philippine Judicial Academy.

A unique aspect of the Philippine judicial system is its specialty courts such as the Sandiganbayan, which handles governmental corruption cases like the recent conviction of former President Joseph Estrada. Decisions of the Sandiganbayan can be appealed to the Supreme Court. Also, unique to the Philippine judicial system is the Shari'a Courts which were created to serve the Muslim regions (e.g., Mindanao region) of the Philippine Islands. These courts interpret and apply the Muslim code on personal law matters (i.e., family law issues such as marriage, divorce, inheritance, etc.). Shari'a Courts exist at the first and second trial court levels, and has its own appellate level. The Shari'a Court is an example of a type of court found in a religious legal regime prevalent in countries heavily dominated by a single religion (e.g., Middle East countries) (Solamo-Antonio 2003, 1-28).

3.5 Comparison of Legal Regimes

At this point, it is important to understand some of the major differences between each respective regime. An outline of these differences is set forth in Figure 3.
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<td>- Career civil service track</td>
</tr>
<tr>
<td>Republic of the Philippines</td>
<td>Hybrid Law (common/civil/religious based systems)</td>
<td>Natural Law</td>
<td>Spanish-civil law (1521-1898) United States - common law (1901-1945) Muslim – Shari'a law (circa 1200 AD)</td>
<td>- <em>Stare Decisis</em></td>
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<td></td>
<td>- Laws of equity</td>
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<td>- No jury trial</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td>- Religious courts (Muslims only)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>- Tenured appointment till 70 years</td>
</tr>
</tbody>
</table>

**Figure 3**

(Original table by author)
The distinguishing feature of the common law regime of the United States is that it allows jurists to use principles of equity in interpreting law and reaching a decision. The principles of equity allow jurists additional flexibility and discretion to interpret the law and facts of a case in a way that does not work an inequity or unfairness to the parties. It allows judges to consider facts that judges from civil law systems are not permitted to do under a particular statute or code. The U.S. common law system also incorporates *stare decisis* or a requirement that jurists follow decisions of higher courts. Case law precedent (manifested through previous decisions) shapes the common law concomitant with existing statutory law.

The United States legal regime also allows parties a right to jury trial where both Japan and Philippine systems do not. Albeit, Japan will be adopting a jury trial system (*saiban-in*) on a limited basis (serious criminal law cases only) in May 2009. The Japanese jury system will incorporate six lay judges chosen to sit alongside three professional judges ([http://www.nichibenren.or.jp/en/about/judicial_system.html](http://www.nichibenren.or.jp/en/about/judicial_system.html)).

The American common law system also allows jurists to look to legislative intent when a statute in question is ambiguous. Japan’s legal regime does not allow for this examination into legislative intent. The Philippine legal regime, on the other hand, is similar to an American common law system and permits jurists to examine legislative intent.

Figure 3 outlines some of the more significant distinguishing features of each respective legal regime. One of the features listed indicates how judges are appointed to the judiciary of each country. Both American and Philippine judicial appointments are
made through a political process and generally attract attorneys who have had several years of active practice in the law prior to appointment. Japan's legal system recruits college graduates who have passed the National Bar Examination and perform well in their training institution. Japanese judges enter the judiciary at a relatively younger age, and generally do not have external legal experience prior to appointment.

The development of each legal regime's IP laws is also very different. For instance, in the case of the United States, the legislative intent of the IP laws is to reward innovation and creativity to the inventor by granting him an abbreviated monopoly. In contrast, the legislative intent underlying the Japanese IP laws is to benefit the economic development and industrialization of Japan. The inventor's welfare is secondary. (Some of the major differences of each regime's IP laws are set forth in Figure 4).

Although the TRIPS Agreement has served to eliminate some of the major distinguishing features set forth in Figure 4, other historical aspects of law such as the original legislative intent remain. This may be important to jurists who must interpret laws in the context of such legislative intent or objective.

3.6 Adjudication: The Role of Jurists

From a traditional perspective, judicial decisions are not themselves "the law," exactly, but rather mere evidence of what precedes and transcends "the law." William Blackstone, explained that the "decisions of courts . . . are the evidence of what is common law." (Smith 2004, 45-46). Law is a "language game;" it is the way lawyers and judges talk. Legal discourse is the law (Smith 2004, 50).

As mentioned previously, jurists play a critical role in defining what "law "means and in the legal regime in which they operate. They do this through their decision
### HISTORICAL DEVELOPMENT OF IP LAW

<table>
<thead>
<tr>
<th>Country</th>
<th>Origin</th>
<th>Purpose</th>
<th>Distinguishing Features</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>U.S. Const. art. I, § 8; U.S. Patent Act (1970)</td>
<td>Proprietary right to reward authors and inventors; foreigners pay higher fees</td>
<td>First to invent; multiple claim application; no compulsory cross licensing; 14 years plus a 7 year extension</td>
</tr>
<tr>
<td>Japan</td>
<td>Summary Rules of Monopoly (1871)</td>
<td>Patents not granted to foreigners until 1899; purpose of rules is to promote industry and commerce in Japan</td>
<td>First to file; single claim application; compulsory licensing; 15 year protection</td>
</tr>
<tr>
<td>Republic of the Philippines</td>
<td>Const. of the Philippines (1973); Republic Act 165 (1947)</td>
<td>Property right to reward inventors and artists</td>
<td>First to invent; compulsory licensing; multiple claim application; 17 year protection</td>
</tr>
</tbody>
</table>

The above table outlines some of the distinguishing features of each country’s IP laws prior to the founding of the World Trade Organization in 1995. As members of the WTO, the United States, Japan and the Philippines conformed their IP laws pursuant to the terms of the TRIPS Agreement before the year 2000. This was accomplished through several amendments to each respective country’s patent, trademark and copyright laws from 1995 to 2000.
making process, which involves the use of judicial discretion. It has been recognized that judges fill the gaps left by laws by using such judicial discretion (Freeman 2001, 1389-1391). To some judges, this is deemed to be acceptable "legislating," i.e., making up for the deficiencies in legislation and incapacity of the legislature (Freeman 2001, 1390).

There is no doubt that jurists need to exercise discretion in order to carry out their work. There are three reasons for this. First, the language that comprises statutes and codes are susceptible to multiple meanings. Judges must interpret the meaning of such statutes and codes to determine their applicability and relevance. Secondly, oftentimes laws contain generalized standards or criteria to gauge conduct. Standards such as "reasonableness, prudent, fair, offensive, just, bona fide, etc." are referred to often in statutes but are vague and can have different interpretations depending upon circumstantial context. For example, the term "reasonable" is used in various theories of law such as the rule of "reasonable certainty" used in assessing damages from future pain and suffering . . . i.e., as is reasonably certain to result from the injury received; or "reasonable cause" (knowledge of facts of a nature calculated to induce a belief in the mind of an ordinary intelligent and prudent businessman); and "reasonable and probable cause" (such grounds as justify any one in suspecting another of a crime justifying search, seizure and arrest) (Black's Law Dictionary 1968, 1431). Finally, inherent in the common law vis a vis civil law system, is a sense of indeterminacy and unpredictability. Although, stare decisis provides guidelines or ambits to future decisions, this has not hindered courts from overturning previous holdings, thereby creating new precedent. There is no question that judges exercise discretion. However, they do not have unbridled license to do as they
please. The real question, however, is the degree of discretion being exercised by each jurist in reaching a decision. Too much discretion can lead to accusations of unlawful "legislating" by the judiciary, while too little discretion can result in the mechanical application of the law resulting in injustice.

The powers of the judiciary are vested in its ability to adjudicate cases. The adjudicatory process is carried out by judges who attempt to resolve conflicts presented to them. "Judges are part of the legal order, that is part of a society in which human conduct is governed by rules. Ideally, rules enable society to function smoothly and efficiently. There are, however, conflicts. Judges are instituted as one of the ways in which society resolves such conflicts" (Freeman 2001, 1377). The adjudicative process is one of constant interaction between the judge, the lawyers, parties, witnesses, and the wider public. Some have argued that adjudication is a "social process of decision which assures for the affected party a particular form of participation, that of presenting proofs and arguments for a decision in his favour" (Freeman 2001, 1379). The judge considers many factors and employs different criteria which reflect varying attitudes toward the solution of the case before it. Underlying judicial reasoning are factors such as custom, tradition, historical development, sociological utilitarianism, and ethics (Freeman 2001, 1409). After all, judges are "socially situated individuals who interpret the law for a particular purpose and bring a particular set of sociological and ideological predispositions to their acts of understanding" (Freeman 2001, 1394).

For some, judicial actions embody an all too constant discourse in which the "rule by men" system is pitted against its counterpart the "rule of law." Judges are constantly accusing each other of failing to apply the law and instead applying their own views and
biases in the decisions they render. Judicial decision making is not limiting, but rather a process in which judges apply not only legal rules and principles, but bring into consideration their life experiences, societal norms, cultural values, etc. These judicial externalities may be drawn personally from the reservoir of shared knowledge in a national culture, a common pool of values, norms, beliefs from which all of us come from (Gaines 1991, 12).

3.7 Judicial Authority and Independence

The framers of the U.S. Constitution viewed the Judicial Branch as the least “threatening” of the three branches of the new government being created. Unlike the Executive or Legislative Branches, the Judicial Branch did not have the authority to initiate matters but was merely a responsive body that decided conflicts brought to it. Only matters of law (i.e., cases or controversies presenting a justifiable question) brought to the court by parties with adverse interests could be considered. The framers also provided life tenure to judges to insulate them from “political influence” along with an appurtenant process.

Although on paper the court’s authority seems confined and limited, over the years the court has maintained through its own decision that the Constitution vests it with the power of Judicial Review over legislative acts, and also to determine if the actions of the Executive Branch are consistent with the Constitution.25

25 In the landmark decision rendered by the United States Supreme Court, Chief Justice John Marshall in Marbury v. Madison (1803), declared that an act of Congress was unconstitutional. This was the first time the court had used its power to exercise Judicial Review over legislative acts. Justice Marshall is credited in Marbury at affirming the power of Judicial Review over the actions taken by other branches of government (Friedman 1985, 122-133).
When the power of Judicial Review is taken in conjunction with the equity power of the court to order federal or state officials to do an act, it becomes obvious that the Judicial Branch is quite powerful. The Judicial Branch has not only limited itself to negate unlawful action, but has become an active agent in social change (e.g., civil rights, public health, abortion, gun control, etc.).

This expansive power of the Judicial Branch has been connected to the manner in which judges are appointed. U.S. judges serve on the courts for very long periods of time because there is no mandatory retirement policy and appointment at a young age is possible. Since the President appoints judges, it is difficult to separate the "politicizing" of the judiciary especially when the Senate is an opposing party.

In contrast, Japan's judiciary is very different. For example, judges who are appointed to the Supreme Court generally serve very few years on the bench. In addition, the mandatory retirement age of seventy gives very little time for a judge to establish a judicial philosophy while on the bench. Supreme Court justices are appointed by the ruling political party (e.g., Liberal Democratic Party "LDP"), which has virtually been one party since the end of World War II. It is to the advantage of the LDP to appoint judges to the Supreme Court later in life and for short durations. This may be seen as a deliberate attempt to control the judicial philosophy and direction of the court by rotating out judges who do not rule in favor of LDP thinking. Moreover, since the Supreme Court controls the judicial Secretariat, LDP control of the Supreme Court also may control over the Secretariat. The Secretariat controls judge's promotions, reappointment (ten-year terms), salaries and placement. In addition, the Secretariat controls the civil service of the judiciary. Judges who head up the Secretariat generally wind up as appointees to the
Supreme Court. Despite the inherent lack of independence of the judiciary from political influences, Japan’s judiciary is respected by its citizens for its integrity and ethics.

Unfortunately, this cannot be said of the Philippine judiciary which has been plagued by an image of corruption (The Philippine Star, 2008). Political and economic influence is pervasive in the Philippine government at all three branches of government. In addition, unpopular decisions of judges have resulted in their assassination and other reprisals. Maintaining one’s judicial independence, integrity and ethics in the Philippines has presented many with difficult personal choices. The cloud of corruption and reprisals looms over judicial decision making in the Philippines more so than in the United States or Japan.

The power of Judicial Review is different for each region. As mentioned above, the courts in the U.S. have determined that they have the power to review legislative acts (i.e., Judicial Review). This is similar to the Philippines when the courts have interpreted laws and found them to be unconstitutional. Japan, however, has very narrow Judicial Review powers. In fact, Japan courts have rarely found legislative enactments to be unconstitutional except in harmless areas (e.g., Forest Preservation, Pesticides, etc.) (Goodman 2003, 113-121).

i. Litigation and Judicial Outcome

Although the focus of this research has been judicial decision making across three legal regimes, they are the end result of a litigation process. Each of the case studies used for the interviews assume that either there is a potential threat of possible litigation or that actual litigation has occurred. Litigation involves time and money and exposes parties to the risk of unknown financial consequences. The process of litigating is an affirmative
act on the part of the plaintiff and generally involves serious consideration of the strength and weaknesses of the legal regime where the suit is being brought. The effectiveness and usefulness of litigation may depend on the nature of the legal regime it occurs in.

For instance, many scholars have contended that litigation in Japan is perceived to be a threat to the political and social status quo, and that self-interest has led the Japanese upper classes or elite to take measures to discourage litigation. Therefore, the role of litigation in Japan has evolved very differently from that of the United States or the West. Japanese legalism is based on the elite’s attempt to retain some measure of control over the process of social conflict and modernity. One of the major ways in which this control is exercised is through the manipulation of the legal regime within which social change and social conflict occur. The Japanese government has, with varying degrees of success, attempted to prevent the development of litigation into an effective vehicle of social change (Upham 1987, 16-18). Other scholars have cited Japan’s culture as a major reason for the low litigation levels in Japan (Kawashima 1963, 41). Two cultural explanations have been cited. First, according to this hypothesis, litigation threatens a recognized national cultural trait of harmony and consensus. The Japanese define themselves by reference to a network of relationships within which they live and work. A Japanese norm is to preserve the peace and harmony of those relationships. Litigation brings into the open disputes and conflicts and disrupts the tranquil nature of those relationships. In deference to the norm, Japanese avoid litigation. Secondly, modern law deviates significantly from the social norms by which Japanese structure their relations. Modern law contains universalistic principles, whereas Japanese adhere to and prefer to
follow norms which are more emic in nature. Therefore, the Japanese are more inclined
to settle disputes by norms rather than through legal recourse.

Some scholars dispute this culture based hypothesis and insist that Japanese
plaintiffs avoid litigation not because of cultural norms, but because the judicial system is
slow and expensive. Most people anywhere prefer to settle matters of disputes out of
court whenever possible. In Japan, as elsewhere, the cost of going to trial usually
exceeds settlement costs. As a result, rational parties will try to settle cases out of court
and keep the money they would otherwise pay their lawyers (Ramseyer and Nakazato
1999, 91-96).

The assumed characteristics of the Japanese legal system has been its relatively
low number of lawyers per capita; the weak role of litigation in dispute resolution; an
apolitical judiciary; the absence of detailed contract agreements; and the informal
relationship between government and business. These characteristics have been used to
describe the Japanese legal system as one which has pre-modern social values and is
legally backward (Upham 1987, 206-207).

The American legal system has been criticized as being too formal and complex.
Americans have become overly dependant on its legal system to provide solutions for
many of its complex social, economic and political problems through an adversarial
process. A process can get away from itself by losing sight of the substantive issues in its
obsession to provide procedural fairness. This has resulted in a system which has
complex rules of procedure, significant delays, and enormous costs. The system has been
criticized for turning litigation into a self perpetuating institution, which in its thirst for
justice has lost sight of social reality.
An explanation for these significantly different descriptions or criticisms (depending on one's point of view) of the Japanese and American systems, was offered by one political commentator and former Ministry of International Trade and Industry ("MITI") official, Amaya Naohiro, who said,

Japan's history is much different from that of the United States. Japan did not establish the atomistic individual as the basic unit of society and rarely had individuals who "spun off" from society and lived by themselves. Today, as in the old days, the basic unit of Japanese society is not "atomistic" individuals, but "molecule-like" groups. These groups consist of "villages" and "families." One may consider "families" as monomers and "villages" as polymers. Individuals live as an organic element of their groups within this group structure.

The fundamental ethic which supports a group has been "harmony." Such American values as individual freedom, equality, equal opportunity, and an open-door policy can be considered "foreign proteins" introduced into the traditional body of Japanese society.

The criticisms of the Japanese legal system as being backwards and having pre-modern social values have waned in light of Japan's economic success. Today, social commentators have advocated a legal system that preserves the social inter-connectivity which is perceived as Japan's unique cultural basis, and which is immune to the individualistic rights consciousness that previous legal and social scholars had considered a prerequisite to a modern democracy (Upham 1987, 205-207). In contrast, the individualistic cultural dimension of America is consistent with its concept of justice and its legal system. Individualism stresses personal freedom and choice. This is often equated to the freedom to act autonomously in pursuit of one's own values and ideals.

In the Philippines, litigation is a very slow process (it is acknowledged that Philippine culture may not be "time sensitive") (Hall 1990, 1-19; 137-157) and the lengthy delays before a decision is rendered by the court has contributed to a feeling that
justice is difficult to achieve in the Philippines except for the rich and those who can wait. Encountering long delays is especially predictable in controversial and high profile cases. For instance, the recent trial of deposed former President Estrada before the Sandiganbayan court on political corruption charges lasted almost six years. President Estrada remained under house arrest during this time. He was convicted on plunder charges on September 12, 2007, and sentenced to a maximum of forty years in prison for illegally amassing $12 million during his thirty months as President. The conviction could have been appealed to the Philippine Supreme Court, which probably would have taken several more years to reach a final holding in the case. Meanwhile, President Estrada albeit on house arrest, requested a pardon from President Gloria Arroyo citing the fact that hearings before the Supreme Court would “take a very long time” (The Philippine Star October 23, 2007). A few days later on October 25th, President Arroyo exercised her presidential power to grant an unconditional pardon. This event was met with mixed reaction and surprise. One civil society anti-corruption group (Barug Filipino) quickly responded by saying that the “rule of law” had been undermined by this “hasty pardon,” and that it signaled that government did not really care about anti-corruption and good governance (The Philippine Star October 29, 2007). Unfortunately, in the Philippines, the powerful, wealthy, and popular can sometimes navigate their way around the law. Meanwhile, the poor who are caught up in the legal system must comply and pay the price and suffer the consequences.
CHAPTER 4
RESEARCH METHODOLOGY

This chapter will discuss the design and methodology used to obtain the data for this research. A discussion of the particular qualitative research method employed for this research is followed by a discussion of the development of short case studies to use during the personal interviews of jurists from the three countries. This chapter concludes with a discussion on how the research was actually implemented in the field.

4.1 Characteristics of Hermeneutic Qualitative Research

Unlike quantitative research, qualitative research methodology does not produce findings arrived at by statistical analysis or other means of mathematical quantification. Rather, it involves the nonmathematical process of interpretation in order to uncover concepts and relationships in raw data and then organize these into a theoretical explanatory scheme (Strauss and Corbin 1998, 10-11).

It was determined that quantitative analysis was not particularly suitable for this research project. Since the objectives of the research were to explore and analyze the mental processes involved in judicial decision making, the use of survey questionnaires or other statistically based data collection methods would not have yielded the depth of meaning that would be needed. Qualitative analysis allowed probing to go beyond a simple yes or no answer and to uncover the rationale and mental process underlying each response given. If one thinks about it, lawyers are oftentimes involved in qualitative analysis as a part of their work. This happens when lawyers take depositions or cross-examine witnesses or when they fashion factual arguments that are incorporated into legal pleadings. Lawyers use their intuitive feelings about the causal relationship of
conflicts and use these findings to develop their arguments and legal strategy in order to prepare for a case. Qualitative analysis provided a better “fit” for this research design, which involved understanding the meanings and the mental processes involved in judicial decision making.

All research is informed by some theoretical understanding of human and social behavior. Therefore, the theoretical base or orientation (i.e., the way we view the world, and the assumptions we make on how it works) of the research is a very important aspect of the employed methodology (e.g., the manner in which data is collected, etc.). Through a comparative analysis of data gathered from the interviews of judges across three different legal regimes, the genesis of new theory would hopefully emerge.

The particular research methodology utilized for this project is the hermeneutic inquiry of data along an ethnographic backdrop. Although this is not an ethnographic study of the three countries in which data was collected, it does use ethnographic or cultural information to interpret the data. Ethnography is a theoretical base designed to study culture (Patton 2002, 81). It attempts to describe humankind's way of life, it constitutes “... a social scientific description of a people and the cultural basis of their peoplehood (sic) ...” (Patton 2002, 81). Findings from modern ethnography may be useful for the study of contemporary society and social problems e.g., technological diffusion, globalization, environmental degradation, poverty, etc. (Patton 2002, 81). Ethnographic information is utilized to bring to light the meanings that the cultural participants take for granted and then to depict the new understanding for the research audience (Bogdan and Biklen 2003, 27-28).
Concomitantly, hermeneutic inquiry is a theoretical approach which assumes that what "some thing means depends on the cultural context in which it was originally created, as well as the cultural context within which it is subsequently interpreted" (Patton 2002, 113). In general, hermeneutics involves the interpretation of texts or transcribed meanings (Polkinghorne 1983). What sets hermeneutics apart from empirical or more rational approaches is its ability to study a particular activity in the context in which it occurs rather as an abstraction or a set of casual relationships (Rudestam and Newton 2001, 40-41). Traditional areas of study using hermeneutic inquiry were texts of literature, religion, and law. However, the method has expanded to include discourse and action.

Interviews done as part of this research are in reality conversations about human life in the world. The oral discourse is then converted into text (i.e., written transcripts) and interpreted. Hermeneutics is very relevant and appropriate for interview based research because it elucidates the engendering dialogue contained within the interview, and then clarifies the subsequent interpretation process, which is really another dialogue with the text (Kvale 1996, 46). Unlike hermeneutic inquiry of finished texts (e.g., scripture, legal texts, literary works, etc.), hermeneutic inquiry of interviews involves both the generation and the interpretation of the text. The researcher is really a co-creator of text and through the dialogue can negotiate their interpretations with the subjects. Interviews are also tied to specific personal situations, which are developed spontaneously, unlike a book or literary work, and involve observations of the subjects while they are participating in the interview process (i.e., facial expressions, hand gestures, silence, etc.). Unlike finished texts, which generally consist of well articulated
thought out expressions, transcribed interviews contain responses which are vague, inconsistent, irrelevant, non-responsive, and repetitious “noise.” This “noise” must then be filtered and deciphered by the researcher to determine its significance in establishing meaning (Kvale 1996, 50). Hermeneutics provides a suitable approach for the study and analysis of research interviews involved in this project.

4.2 Research Design

My overall research design included the use of written case studies as part of the personal interviews conducted of retired judges and justices (“judges” preside at the trial court level or the fact finding level of the court system; “justices” preside at the appellate or supreme court level of a judicial system) in the national or federal judiciary of each country. For purposes of this paper, references made to “jurist” include judges and justices, unless otherwise distinguished.

The selected legal regimes were from countries that were members of the WTO and signatories to the TRIPS Agreement so that their laws in IP would be similar. Discussed below are the details of how each phase of the research was designed. These phases include: i) the selection of the three legal regimes and jurists; ii) development of the interview case study materials; iii) pre-testing of the case studies; iv) integration of case studies into the interviews; v) translation and transcription of interviews; and vi) analysis of interview data. The next section involves a discussion of how each particular legal regime was selected for this research which included their jurists.

i. Selection of Legal Regimes and Jurists

Three countries were selected for this research. As mentioned above, all legal regime countries had to be members of the WTO and must have harmonized their IP laws
in accordance with the TRIPS Agreement. The countries chosen were the United States, Republic of the Philippines, and Japan. Each country was a member of the WTO and had harmonized their IP laws in accordance with TRIPS.

All venues used in the research were personally familiar to the author as I had made numerous business trips to each venue over the last twenty years. Each of these countries advocated the "rule of law" jurisprudence, however, they utilize varying types of legal regimes. The design of this research was focused on testing how different legal regimes operated, and more particularly, how decision making was arrived at.

The United States utilized a common law system; the Republic of the Philippines a hybrid common law/civil law/Muslim law system; and Japan a civil law system. Each of these countries had created a separate judiciary from other branches of government pursuant to their respective Constitutions. The Philippines was the only jurisdiction that had recently created special courts to hear intellectual property claims, while Japan may be following soon. The legal regime of the United States has its historical genesis planted in English tradition. The legal regime of the Republic of the Philippines gained its historical underpinnings from Spanish rule and American occupation. Finally, the civil law system of Japan was based on a combination of French, German-Prussian laws, and an American style constitution.

Since all three countries had similar IP laws because of TRIPS, I selected IP law as the subject matter for all cases used during the interviews. The jurists from each legal regime needed to have served at the national level of the judiciary because they would have reason to decide cases involving national IP laws, which are the subject matter of harmonization under the TRIPS Agreement. Jurists at the local or provincial level of the
judiciary deal only with local laws and generally do not handle cases involving national IP law. The jurists selected were all retired from the bench or not sitting as full-time judges or jurists. I believed that full-time jurists would not be as candid with us in their responses because of potential adverse impacts to their careers from participating in the interviews. Also ethically, active jurists would be barred from discussing on-going cases before them. I attempted to identify jurists who had some background or experience in IP cases so they had some knowledge of the law relevant to each case presented.

Some of the jurists had extensive experience in handling IP cases, while others had only decided a few cases. The jurists were expected to have an understanding of the basic legal issues involved in each IP case but they were not required to have a high level of knowledge of IP law. This is because I was not examining their knowledge and proficiency in IP law. I selected the United States federal judges from the Ninth Circuit, which included the judicial districts of Hawai‘i, the Southern District of California and the Central District of California. The judges were selected from a list of retired jurists obtained from a Federal District Court publication, and also through the kind assistance of Ninth Circuit Court of Appeals Justice Richard Talman. All five U.S. jurists selected and interviewed held senior status at the Federal District Court level.

The Philippine jurists were chosen through the assistance of several Philippine lawyers and judges who provided introductions and assisted us in making the appointments for the interviews. The seven Philippine jurists consisted of retired justices of the Supreme Court, Court of Appeals and judges at the Regional Trial Court level.

Jurists from Japan were selected using a modified “snowball method.” Initial contact was made through a retired Supreme Court justice in Japan who referred me to a
retired judge who had handled many IP cases. From there, I was fortunate to have that judge refer me to another jurist who, in turn, provided the necessary introductions for others to complete my research. The five Japanese jurists interviewed consisted of jurists who served their judiciary at different levels during their careers (i.e., regional District Court, High Court, Court of Appeals and Supreme Court levels). All five Japanese jurists retired from the Tokyo High Court.

At a minimum, five jurists were arbitrarily selected to interview from each legal regime. The number varied to seven jurists in the case of the Philippines. Although I had desired to do more interviews in each country, financial and time considerations limited me to a relatively small number of interview subjects.

ii. Case Studies: Development of Interview Materials

I utilized written case studies as a vehicle to solicit responses from the interview subjects. Case studies consisted of fact patterns that were designed to pose certain legal issues and are commonly used in law schools to teach law students. In the United States, case studies are used in conjunction with the Socratic method of teaching. This method employs the use of questions (rather than lectures) posed by the professor to teach students legal reasoning and issue recognition. From a given fact pattern, students must first recognize the legal issues presented and then learn to discuss these issues with the applicable law and relevant facts of the case. I chose the case study method because of its potential familiarity to all of the jurists.

Fact patterns were modeled after actual cases (with the exception of Case Study No. 4) that presented "judicial dilemmas" to the interview subjects. The facts came from legal text books and periodicals, newspaper articles and other IP materials. I chose the
most current and controversial legal and ethical issues as the “judicial dilemmas.” The “judicial dilemmas” presented had no correct legal answer, but provided many sub-issues that could be used to question the jurists on during the interview sessions. In fact, subjects were told during their interview session that there was no “right or wrong” answers for any of the cases.

The case studies were also used to develop hypotheticals from to obtain more in-depth responses from the interviewees on certain sub-issues. The hypotheticals were used to determine if responses to certain questions would change when some aspect of the fact pattern was altered (e.g., instead of a cure for headache, I changed the facts to a cure for cancer). The case studies were assigned a numerical order and sequence from the easiest to the most difficult “judicial dilemma.” The sequencing rationale, however, was not disclosed to the interview subjects. “Judicial dilemmas” were used to require the subjects to think and respond beyond their comfort zone. They also provided an opportunity to explore a jurist’s social or cultural values, ethics and morality, etc.

A summarized version of each of the five case studies used in the interviews is set forth below. The full text of the case studies in English and Japanese are included in Appendix A.

1. Case Study No. 1. (“Legal Extortion”).

This case study presented a “judicial dilemma” where one party maintains patent rights (NTP) solely for the purpose of suing others (RIM) and making a profit from the nuisance caused by the suit. The use of patent rights by NTP (NTP does not manufacture or make other productive use of its patent rights) is not consistent with the legislative intent of patent law, which is to spur innovation and commerce. In fact, NTP uses the
patent rights it possesses to deter commerce by filing an infringement lawsuit against those who make productive use of its alleged intellectual property. Additional sub-issues were discussed with the interviewees such as the nature of the parties before the court i.e., large company versus small company; parties from different countries; and the social and economic impact of a judicial decision to immediately halt the sale and use of RIM’s popular smart phones in the U.S.

2. **Case Study No. 2.** ("Stolen Idea").

A “judicial dilemma” presented by this case was the use of legal protection afforded through trade name registration after a marketing concept is usurped from a former business client. Interviewees were asked to discuss concepts of “fairness” and “justice” in contrast to the concept of legal correctness. The legal principles of “equity” (not present in civil law regimes i.e., Japan’s legal system) was a theme running throughout most of the case studies. Under English common law regimes, a separate court of equity (Court of Chancery) were created to address “judicial dilemmas” where the applicable law was too rigid and if applied would inherently result in unfairness. “It was a court committed, in theory, to doing equity in the sense of higher justice, and also committed to doing equity in the sense of providing flexible approaches where the law had become too rigid” (Dobbs 1973, 24-25).

3. **Case Study No. 3.** ("Old Law, New Technology").

The present day application of law, which at the time of its original enactment, did not contemplate advances in technology can present unique settings for a “judicial dilemma.” The drafters of the laws on copyright did not contemplate digital photography and the creation of Internet auction sites like eBay. This case places the traditional use of
copyright protection (i.e., paintings) against the sale of these paintings via digital photographs on an Internet auction site. At issue was whether a copyright law violation was present. Also at issue in this case study was the nature and stature of the parties before the court i.e., the co-plaintiff being the son of the former Prime Minister. I also tested for the possible presence of judicial bias between government and the individual citizen.

4. Case Study No. 4. ("Picking the Low Hanging Fruit").

This case demonstrates the difficulty of distinguishing between information that lies in the “public domain” and that which is within the “private domain.” At the heart of the pharmaceutical mining controversy (i.e., where large pharmaceutical companies mine information from the legally less sophisticated to profit off of medicines discovered from “folk medicine” cures) is the issue of privatizing information in the “public domain” for profit. Sometimes economically less developed countries have residents who possess ancient knowledge of healing plants or other culturally based healing practices. These people serve as lucrative resources for researchers from major drug and pharmaceutical companies to find cures for modern day illnesses. Since the tribes or villagers are unaware of intellectual property rights, their cultural and ethnic heritage is unprotected from exploitation. The case presents ethical and legal dilemmas to a judge attempting to resolve the patentability of potential cures discovered from such efforts. Also at issue are the social and health impacts of privatizing information that can benefit humankind if made freely available rather than privatized for profit. This is contrasted against the significant cost of research and development and the expectation of a return on investment (i.e., innovation).
5. Case Study No. 5. ("Innovation or the Greater Good").

Perhaps the most provocative case study, this case highlights the conflict between law and humanity. Rice is a staple food for millions of people in Asia. However, rice lacks Vitamin A. This is very significant for 180 million children and women of child bearing age who suffer from Vitamin A deficiency in Asia (Kryder, Kowalski and Krattiger 2000, 1-56). At stake is the welfare of children and women of child bearing age in a less developed Asian country pitted against the legal right of commercial agricultural seed producers who are attempting to stop dissemination of biotechnological information necessary to produce a certain strain of vitamin A enriched rice (trademarked as "Golden Rice"). Interviewees were given this case study last because it presented a challenging and difficult "judicial dilemma" with no easy answer. The case places the moral issue of saving humanity squarely at odds with preserving legal rights and rewarding innovation.

iii. Pre-testing of Interview Materials

After each case study was initially drafted, they were pre-tested by using two attorneys and three retired jurists from the judiciary of the State of Hawai‘i. The attorneys were all licensed to practice in Hawai‘i and the jurists had served at the Circuit Court and Supreme Court of Hawai‘i before retiring. Questions were posed to each subject during separate sessions to determine whether the case studies presented any problems as far as how the stated facts were understood. The pre-testing sessions also resulted in redrafting the fact patterns to bring about clarity and to eliminate ambiguity. The pre-testing period also assisted us in determining whether the subjects were able to correctly recognize the "judicial dilemmas" presented and to gauge the degree of difficulty of each case study. I also timed the exercise to determine how much time
would be required from each respondent. It was assumed that the time allocated by each jurists to the interview would be limited as most of them were still employed by law firms, teaching institutions and universities. The American senior status judges all worked on a part-time basis for the judiciary and scheduling appointments required that the amount of time required for the interview be specified, which was estimated at one to two hours.

iv. Translation and Transcription of Interviews

All of the case studies were translated into Japanese for use in my interviews of Japanese jurists. Initially, the English version was translated into Japanese utilizing the translation services of Japanese language Professor John H. Haig, University of Hawai‘i, College of Languages, Linguistics and Literature. The Japanese version was then translated back into English by Mariko Lee, a native Japanese speaker and professional translator. This "back translation" technique went through several iterations until the translations were "de-centered" and closely matched (Brislin 1980, 389-444). During all of the interviews in Tokyo, I was accompanied by retired Professor Akio Nakazawa, Japanese language Professor, JAIMS Institute to perform simultaneous oral interpretation. I conferred often with Professor Nakazawa about the case studies and specific language translation issues, as well as his reaction to the interviews after they were concluded. Professor Nakazawa also later translated the Japanese tapes into English transcripts.

English versions of the case studies were used in the Philippines as it is the primary language utilized in law schools and by the Judiciary. Albeit, the Philippine language (i.e., the official National language is Tagalog) and provincial dialects are
sometimes used during trial or oral argument, the predominant language used in the court
system is English. Reported decisions of the Court of Appeals and Supreme Court are all
published in English. All judges were fluent in English so no translation service was
deemed necessary. As a preparatory step to the development of the case studies in
intellectual property law, background interviews were conducted in February 2006 of two
individuals in Manila to better understand Philippine culture and intellectual property
laws. They were Mr. Fred dela Rosa, Editor in Chief, Manila Times who served in
several high governmental positions during the Presidential administration of Ferdinand
Marcos. Mr. dela Rosa was instrumental in providing his insight during two separate
interviews into the evolution of Philippine history, society and culture since the 30’s to
present. The other individual was Mr. Ireneo M. Galicia, Deputy Director General,
Intellectual Property Office of the Philippines, who briefed me on the state of intellectual
property laws in his country after joining the TRIPS Agreement of the WTO.

v. How the Case Studies were Used During the Interviews

The interviews were conducted from August 2006 to March 2007 in the three
countries studied. I began by contacting each jurist and providing a brief explanation of
why the interview was needed. No disclosure of the research questions was made.
Prospective jurists were informed of my background in legal practice in Honolulu, as
well as my being a graduate doctoral candidate at the University of Hawai‘i. Copies of
the cases were not provided to the subjects in advance. Based on my request for an
appointment which was accompanied by a brief explanation of the research, the jurist
replied to my request. Several jurists responded in the negative because of a lack of
interest or time constraints. Obtaining appointments with jurists were at times
challenging for us. In fact, one jurist cancelled our appointment after I had already traveled to San Diego to meet with him. Obtaining appointments with jurists in Japan and the Philippines also presented challenges as it generally required an introduction from a third party reference.

The interviews took place in various venues. In the case of the Japanese jurists, I met with them at their place of employment. These retired jurists worked at law firms or at universities. Of the five jurists interviewed, three worked at prominent law firms in Tokyo and two at well-known universities in Tokyo.

The Philippine jurists were interviewed at their offices or at restaurants. Of the seven jurists interviewed, one worked at the Judicial Research and Training Institute as an instructor, four worked for law firms, two served as Commissioners for the Philippine Commission on Elections.

The American jurists were all senior status Federal District Court judges and interviews were scheduled through their personal secretaries or law clerks in their chambers. I interviewed one judge in the Hawai‘i District, three in the Southern District of California (San Diego) and one in the Central District of California (Los Angeles).

Although I tried to provide a gender balance with the interview subjects, I was unsuccessful in obtaining commitments from an equal number of retired female jurists. Female jurists at the senior status level or retired were not plentiful. Most female jurists were still serving on the bench on a full-time basis. However, I was able to secure one female jurist in the Philippines through the assistance of another female jurist on the Court of Appeals.
Interviews began with the appropriate introductions and execution of the University of Hawai‘i acknowledgment and waiver form. All jurists were informed that their interviews would be tape recorded and transcribed. They were also informed that their identities would be kept confidential and that the tapes would be destroyed after the research was completed. All interviews began with a series of questions on the jurist’s family and education. I asked questions on why they chose to become a lawyer and how they eventually ended up in the judiciary. I also asked about their parents, siblings and work or military experience before entering the judiciary.

Philippine and American jurists gave very detailed and, at times, lengthy accounts of their family, education, military and professional backgrounds. However, the Japanese jurists had to be questioned specifically on each aspect of their personal history. Their responses were brief and to the point. This may have been attributed to the reserve nature of Japanese jurists or perhaps they felt that their family background and upbringing had little to do with the subject matter of the interview.

I then began to talk about the cases. Interview subjects were given a few minutes to read one case at a time and asked if they had any problems understanding the facts. I then proceeded to ask a series of questions about that specific case. The cases were sequenced from Nos. 1 through 5. Case Study Nos. 1 to 3 were used to “warm up” the subjects and to get them comfortable with their personal thoughts on judicial philosophy, decision making and the interview process. I used these initial three cases to explore concepts like “fairness” and “justice” and what those terms meant to them. Each “judicial dilemma” was brought up during the interview and sub-issues were raised to determine what factors were deemed important to the jurists in their decision making.
New hypothetical scenarios were introduced from Case Study No. 3. This helped to gain more insight and depth into the subject matter and related sub-issues. Case Study Nos. 4 and 5 presented the most difficult “judicial dilemmas” and much of the interview was spent asking questions and discussing these two remaining cases.

After all five cases were completed, I stopped the tape. I then explained what the research questions were and the purpose of the research. Many of the jurists expressed a great deal of interest in what would ultimately result from my research, and even requested that copies of the final dissertation be sent to them.

vi. Multiple Sources of Information and Data Analysis

The research questions posed are hermeneutic in nature and are best answered by a research design that is qualitative in nature. I selected the interview process as the chief source of data gathering and study. The interviewing process provided access to the “context of people’s behavior and thereby provides a way for researchers to understand the meaning of that behavior . . . [It] allows us to put behavior in context and provides access to understanding their action” (Seidman 1998, 4). I used a standardized open-ended interview technique, which consisted of a set of questions carefully crafted and arranged with the specific goal of taking each participant through the same sequence and line of questioning (Patton 2002, 342-347). Legal case studies were used as the basis for each interview.

As a supplement to the above data source, a secondary source of data were reported (i.e., published) legal decisions rendered on intellectual property cases. Reported decisions of U.S. courts are readily available and accessible locally. Decisions of the Philippine courts were obtained from the courts themselves or from the law
libraries of the University of the Philippines, Ateneo University in Manila and other educational institutions. Philippine appellate decisions are reported in English. However, published decisions from Japan are in Japanese and must be translated into English.

However, one must be careful in placing too much reliance on the contents of written judicial decisions. Justice Oliver Wendell Holmes, an American jurist and legal philosopher, developed his theory of judicial function. His theory stood for the proposition that judicial decision making was an end-means process. That is, judges decide cases first and then rationalized them later. Holmes believed that judicial decisions were choices, often unconsciously made (i.e., software of the mind) between contending principles and that the decisions themselves were more revealing than the written opinions explaining them. Written opinions, therefore, offered rationalization for the largely unconscious process of choice (Novick 1995, 10). As Lon Fuller states, “... the written words of the reported decisions are merely the gateway to something lying behind them that may be called, without any excess of poetic license, ‘unwritten law’” (Smith 2004, 57).

A third source of data was documentary sources such as newspaper articles, law review articles, reports on the judiciary and trade magazine literature. A fourth source of data was identified as archival in nature such as court records, correspondence, exhibits, pleadings, etc. and examined for information relevant to a particular legal case or decision. The later sources of data were used as background information for this research and the development of the legal case studies.
Personal observations served the fifth and final source of information and data. These observations included the activities, behaviors, actions, conversations, interpersonal interactions, and organizational and process related actions. In addition to the subjects themselves, observations were made of various judicial department operations, chief clerks, bailiffs, secretaries and law clerks. The latter also revealed insight into the cultural issues related to the structure and process of the judicial administrative organization.

The transcribed tapes were analyzed by grouping together jurists’ responses by legal regime. Responses given to similar questions were plotted against all other regime responses. Then within each group of responses, patterns of similarity were identified. These patterns were then compared to other group patterns. Patterns which were common to all legal regimes were analyzed. In addition, patterns which were unique to only one or two legal regimes were also analyzed. The patterns identified were then compared with the judicial outcome or decisions registered by jurists in each case.
A summary of the results of the interviews are set forth in this section. The results are organized by individual case study and further discussed by relevant sub-issues brought out by that case. The sub-issues for each case study were used as a basis for interview questions to determine what factors or issues would be relevant to decision making. Although not all respondents were asked the same questions, the interviews generally centered about identifying similar aspects of each case that would be relevant to how that jurist would reach his or her decision.

### 5.1 Analysis of Interviews of Jurists

Each section begins with the text of the case study as presented to each jurist during the interview session. This is followed by an analysis of the judicial dilemma presented for that case and related sub-issues.


Research in Motion (“RIM”), the Canadian maker of the Blackberry handheld (“smart phone”) device was sued by a little known U.S. based company called NTP for patent infringement in November 2001. The dispute revolved around five (5) patents that NTP had registered in the United States, which related to the technology for sending emails wirelessly to a mobile device. RIM manufactures and sells its Blackberry smart phone, which is a wireless mobile device that uses certain technology covered under some of NTP’s patents. NTP has no significant assets other than the patents in question and has never commercialized them. RIM, on the other hand, has sold millions of the Blackberry smart phones and has made substantial profits off of its sales. A U.S. District Court is poised to issue an injunction on RIM in the U.S., which could be disastrous since seventy (70) percent of its revenues are derived from U.S. customers. This is despite the U.S. Patent and Trademark Office issuing a final decision that two (2) of the five (5) patents were invalid. What are your thoughts about this case? Is the patent law being used in this case to promote or deter innovation and research?
The judicial dilemma presented by the above case is one of "legal extortion." That is, where a party acquires a legal patent right and does not put it to productive use (e.g., manufacturing, distribution, licensing of patent, etc.), but simply "lays in wait" for the opportunity to bring a patent infringement action intended to stop another party from the successful manufacturing and sale of a product. The motivation of the patent holder is to use the legal system to stop or delay the sale of the product in order to force the manufacturer into settling the case. In the end, the patent holder hopes to walk away with a sizable cash settlement paid by the manufacturer or alleged infringer.

Legal regimes can handle this dilemma in different ways. Some legal regimes may characterize the actions of the patent holder as an abuse of the law situation, while other regimes may view such actions as an "enterprising investment." The case is used to generate responses from the jurist as to how they view the judicial dilemma, and what factors they would consider in reaching a decision in the case. Judicial dilemmas were designed and included to stretch the jurist's thinking and feelings about his or her legal regime and how they would deal with the situation. It was felt that this technique would reveal deeper insight into the mental processes of jurists rather than a fact pattern that could easily be answered by a straight forward application of law.

Set forth herein below is Table 5.1 which outlines the case study presented by judicial dilemma and sub-issues.
### TABLE 5.1

<table>
<thead>
<tr>
<th>Case Study Label</th>
<th>IP Right</th>
<th>Interview Topics</th>
</tr>
</thead>
</table>
| No. 1 "Legal Extortion" | (Patent) Smart phones | Judicial Dilemma:  
  - NTP holds patent right.  
  - NTP does not put patent to productive use.  
  - NTP uses its legal right to block RIM's use of patent in order to make a profit.  

Sub-Issues:  
1. Does the respective economic strength or size of the parties matter?  
2. Does the nationality of a party matter?  
3. Does the impact of a judicial decision on society matter?  
4. Should one be able to use the judicial system for profit?  

---

### i. Use of the Judicial System for Profit

Has NTP taken advantage of the legal system to create leverage over companies like RIM to maneuver into a lucrative settlement of its patent claims? This was the judicial dilemma presented in this case. In the actual litigation of NTP against RIM, a settlement was reached prior to judgment, which resulted in the sum of $612.5 million dollars being paid to NTP (www.eweek.com/article2/0,1895). Was this a case of patent extortion? Interviewees were asked what they thought about NTP's decision to bring this lawsuit. The reaction of the Japanese jurists was a feeling that they were constrained by the laws of intellectual property and could not consider the motives of NTP. Since the Japanese civil law system has no equitable law doctrine, the questionable intent of NTP could not be considered by a judge rendering a decision in an intellectual property case.
In light of this limitation, two of the Japanese jurists suggested that RIM could counter NTP’s lawsuit with a separate action based on the Japanese abuse of law statute where malicious intent and misuse of the law could be considered by a judge. However, this would require a separate legal claim not covered under the IP law.

Along a similar vein, one Philippine jurist clearly recognized what NTP was up to. In a candid statement, the jurist remarked that, “he’s (NTP) trying to block the . . . future of technology by the use of his patent rights . . . and that is not the intention of the patent . . . you are given a patent right so you can make use in a legitimate way.” (JP-6). This jurist expressed his frustration at the situation presented, but along with other Philippine interviewees felt his role was constrained to follow the law despite knowing that the legal system was being used by one of the parties to profit off the success of another.

American jurists, on the other hand, were uniformly cognizant of the fact that NTP was using its patent rights to profit through litigation. This did not seem to be of any real concern to any of the U.S. subjects. In fact, one of the jurists even commented that, “there are a group of lawyers who make money by just suing a big corporation and its going to cost that corporation more money to try (litigate) it . . . than it is to say what’s your price?” (JAm-2). The U.S. jurists also did not seem bothered by NTP’s nonuse of its patent right. In fact, one jurist saw things from another perspective, when he stated that,

If they (NTP) developed the patent, if they took the chance and it’s a tremendous . . . most patents don’t work out to make money for anybody. If they developed the money, spent the time and all that, then they get the benefits from it . . . and if people (RIM) are using it wrongfully, then they should pay for it . . . simple. (JAm-3).
The recognition of NTP’s actions, despite its possible misuse of the law, was aptly summarized by another U.S. jurist who said,

I’m one who feels that society is ruled by the laws that society makes for itself... to say that a person can buy a patent and hold them for the purpose of suing those who use their technology seems to me to be an enterprise that can... that’s an investment in what they (NTP) purchased and if they... and if somebody else (RIM) uses what they purchased whether they purchased it or not, if somebody else uses it, I think they have a right to make a determination as to... to what extent they (are able to) use it and to what their profits were and so forth and so forth and so on. I... I don’t see that it’s... I don’t see that it (NTP’s patent right) should be relinquished... (JAm-4).

It seemed clear that the ability to make a profit through a legal maneuver, despite a misguided objective, would not be objectionable to this American jurist.

It was observed that whether or not a question was asked of each subject as to how they would decide this case, almost all Philippine subjects gave an answer. Their decisions were evenly split between those that would impose an injunction against RIM and those who would not. However, in contrast, all of the Japanese jurists refrained from or avoided giving a direct answer on their ultimate decision in the case. The Japanese jurists exhibited a reserve and conservative demeanor throughout most of their interviews. Only one U.S. jurist made known his decision of imposing an injunction against RIM. It is not clear why Philippine jurists seemed to be confident and forthright in making known their decision in this case as compared to the Japanese or American jurists.
ii. **Large vs. Small Company**

Most jurists and especially the Japanese found the individual characteristics of the parties to be irrelevant. The case was designed to test for the reaction of the subjects to the “David vs. Goliath” profile of the parties. RIM was a major company producing millions of smart phones (“Blackberry” brand smart phone) for the U.S. and Canadian market. NTP was a very small company that did no business other than hold the several patents which were allegedly being infringed upon by RIM. The relative size of the parties (i.e., economic strength) was not an issue to most jurists, including the Japanese jurists. Two out of the seven Philippine jurists, however, found that the relative size of the parties was relevant to decision making. One Philippine jurist acknowledged this by stating, “... the big companies here are protected by their profits.” (JP-2). As discussed later in this chapter, this statement could be attributed to the ability of large corporations to influence judicial decisions. This may also be connected to the public perception that the Philippine judiciary is prone to economic and political corruption and favoritism.

iii. **Nationality of Parties**

In addition, the nationality of the parties (i.e., Canadian and U.S. companies) was also generally found to be irrelevant, except for some of the Philippine jurists who felt that this fact was relevant to their decision making. In fact, one Philippine jurist remarked that “I have to be bias toward my own country man,” (JP-1) signifying that if one of the parties was a Philippine company he would favor or be partial to that party over the other. However, American and Japanese jurists uniformly found nationality to be irrelevant. Only one U.S. interviewee remarked that, “Not really. Not ... I’ve ... I’ve been too
internationalized since then.” (JAm-1). Highly developed countries like Japan and the U.S. tend to be more international and global. Consequently, they may view national origin as being commonplace and, therefore, less important.

iv. Impact of Decision on Society

In the actual litigation case, one of the central points raised in news reports covering the RIM lawsuit brought in the U.S. District Court focused on the potentially detrimental effect to the American citizens and businesses if the judge issued an injunction stopping the sale and use of the smart phone. Should the impact of a court decision on society be a relevant consideration? The respondents from Japan uniformly felt that the social impact of a court decision was irrelevant. However, one Japanese respondent distinguished his two different responses between “formal” and “informal.” (JJ-4). He acknowledged that the answers could be very different. On an “informal” basis, he admitted that Japanese courts look at the impact of a decision on society. Therefore, when a lower court issues an unpopular or adversely impacting decision, the higher or appellate level courts may reverse the decision to address the societal impacts. He was, however, careful to caveat his remarks by stating that any reversal by the appellate court would have to be justified by law. In contrast, it was mentioned to him that American judges seem to consider all aspects of a case. He then responded by saying, “I think all the Japanese judges would all say the same thing, if it is not formal.” (JJ-4). That is, Japanese jurists silently considered the social impacts of their decisions. To the contrary, another Japanese jurist addressed the goal of the Japanese civil law system that, “all decisions must be systematized and consistent,” and, therefore, jurists should not be swayed by impacts to society.
In contrast, several of the Philippine jurists felt that the impact of their decision on society was a relevant factor without any distinction being made between “formal” or “informal” responses. In contrast, a U.S. jurist remarked that, “society is ruled by the laws it makes for itself . . .” (JAm-4) which seemed to convey a feeling that the impact to society was irrelevant. He believed that since society produced the law, it shouldn’t complain about its effect.

v. Summary

Although, the Japanese jurists felt constrained in their ability to do anything about “the case of the legal system for profit”, they exhibited some empathy and offered an alternative (i.e., bringing a separate claim under the abuse of right statute) course of action which would allow consideration of the motives of the parties or misuse of the law. The Philippine jurists were clearly aligned with their Japanese counterparts and exhibited frustration that although they realize that the legal system was being used improperly by NTP their ability to do anything about it was limited by the law. In contrast, American jurists felt that NTP’s use of the legal system to profit from was not uncommon and justified.

In regard to the nationality of the parties, the Japanese and U.S. jurists believed that nationality of the parties was irrelevant. However, the Philippine jurists did take notice of nationality and indicated that under certain circumstances (i.e., if a Philippine company was involved) it could make a difference.

On the issue of whether the impact of a judicial decision on society was a relevant consideration, the Japanese and U.S. jurists were aligned by believing that it should not
be a consideration. However, in contrast, the Philippine jurists believed that the impact to society of a decision was relevant and could be considered.

It is clear that there is no uniformity of beliefs held by jurists across all three regimes, albeit there are some alliances occurring amongst jurists across two legal regimes. In the next case study I examine additional sub-issues that address the limits of judicial discretion and authority.

**B. Case Study No. 2: Trademark – Infringement.**

Rojas Sportswear Co. ("Rojas"), a Philippine swimsuit maker, obtained a U.S. and Philippine trademark for its new swimwear line called “Mango Beach” in 1992. The name was tied to the distinct yellowish color of the swimwear and its design, which made customers look slimmer. The Mango Beach line of swimwear was publicized in fashion magazines and even sold for a brief time by Victoria Secrets catalogue, which is published by Victoria Secrets Catalogue, Inc., a United States corporation. In 1993, Victoria Secret Stores, Inc. began selling a yellow colored line of bikinis, which was named “Sweet Mango” and for which a trademark was obtained. The next year the Sweet Mango bikinis and other types of swimwear debuted in the Victoria Secret’s catalogue and stores. Rojas filed an action in U.S. court against Victoria Secret Stores and Catalogue alleging, in part, that the “Sweet Mango” mark, when applied to swimwear, infringed upon the “Mango Beach” swimwear. Rojas argued that there was a “possibility of confusion” between the marks. Victoria Secret contended that the applicable legal standard was “likelihood of confusion” and that there was no likelihood of confusion. How would you rule in this case? Explain.

The judicial dilemma presented in this case study is whether the possible “unethical” actions of a party (i.e., stealing ideas) against a prior client is relevant to judicial decision making. For those regimes like Japan which cannot consider a party’s motive or intent in trademark infringement cases, this presents a more difficult dilemma. Some of the sub-issues developed for this case examined the relevance of the prior relationship between Rojas Sportswear Co. and Victoria Secrets Catalogue, Inc., which sold Rojas “Mango Beach” swimwear before developing its own similar line of
swimwear called “Sweet Mango.” I also looked into the possible connection between “fairness” and making “legally correct” decisions. I asked the jurists whether these concepts were connected or mutually exclusive. This line of questioning opened up the issue of how far judges could deviate from the law when unfairness resulted by the strict application of law. Finally, I examined how jurists viewed and treated laws which were “facially” unfair. Did they nevertheless blindly apply these laws without regard to any inherent unfairness?

Table 5.2 below outlines the judicial dilemma and sub-issues presented by Case Study No. 2.

Table 5.2

<table>
<thead>
<tr>
<th>Case Study Label</th>
<th>IP Right</th>
<th>Interview Topics</th>
</tr>
</thead>
</table>
| No. 2 “Stolen Idea” | (Trademark) Mango Beach vs. Sweet Mango | Judicial Dilemma:  
- Victoria Secrets “steals” a popular design and color of swimwear from Rojas, a former client. Sub-Issues:  
1. Can a “legally correct” decision lead to an unfair result?  
   i) Does the prior relationship of the parties matter?  
   ii) Can jurists go beyond the law in deciding a case?  
2. How do you handle laws which are unfair on their face? |

i. Fairness as an Outcome of Judicial Decisions

The subject case presents a likely scenario which involves the possible “theft” of a marketing concept and design by one party from another. However, the inherent subjectivity of the legal standard for trademark infringement i.e., likelihood of confusion,
makes it difficult to find clearly against one party or the other. In light of the presented “judicial dilemma,” interview subjects were questioned on what they felt was a fair result under the circumstances.

The Japanese jurists viewed the concept of “fairness” from a very narrow perspective. One jurist commented that,

... Japanese law disregards whether one party stole the idea of the product or not. There may be some other legal issue, but with regard to trademark infringement, it is irrelevant. (JJ-2).

When that jurist was asked what he thought “fairness” meant, he responded by saying that,

... fairness is the right of everyone to be equally protected. People of a certain social level or people of a certain nationality will not be treated disadvantageously. That is fairness. (JJ-2).

Although this response clearly addressed discriminatory treatment under the law, it did not speak to the issues of ethics or morality. From an ethical point of view, equal treatment under the law may not have a nexus to fairness. The same jurist was questioned further about whether his definition of fairness included “community values,” to which he responded affirmatively. It is apparent that this jurist felt that consistency and predictability were important aspects of judicial decision making. When asked whether a legally correct decision always yielded a fair result, he responded by saying that, “Under the Japanese Constitution, everyone must be treated fairly, so an unfair decision is unconstitutional, and is impermissible... so a legally correct decision is always fair.” (JJ-2). Albeit circular in nature, his answer is significant because it equates legal correctness (i.e., consistency with law) to fairness. Carrying his logic a step further,
an unfair decision must be illegal because an unfair decision is not permitted by the Constitution. Therefore, to this jurist the concepts of fairness and legal correctness were not mutually exclusive.

Based on the foregoing, the Japanese jurists would have wanted Victoria Secrets to prevail (so long as it met the legal requirements of registering its trademark) over Rojas, despite the fact that Victoria Secrets had "lifted" the idea and design from Rojas. Other Japanese jurists handled the judicial dilemma by referring to the civil law statute on abuse of rights. They felt that many Japanese judges would not be able to address the ethical issue presented strictly under the intellectual property law and so a claim against Victoria Secrets must be waged under tort law or under the abuse of right statute. Ostensibly, when an abuse of right is found by a judge, he is then able to adjust the damage award or penalties assessed. This particular cause of action affords a Japanese jurist some degree of flexibility to consider and adjust to external circumstances where he otherwise would not be able to under Japanese IP trademark law. This situation seems to highlight the relative rigidity of review and limited scope of consideration under Japanese law as distinguished from other regimes. It also demonstrates that the Japanese civil law system is very "compartmentalized" in terms of its comprehensive codes and the ability to file claims.

In stark contrast, Philippine jurists felt almost unanimously that the "prior relationship" between Victoria Secrets and Rojas was a very relevant consideration in their decision. One jurist commented that he has seen many cases where legal correctness would not necessarily yield a fair result. In such cases, he was guided by his judicial philosophy of,
I may bend the law, but I should not break the law. In other words, you really... you can adjust for the sake of justice or... what... what should... what your common sense... common sense would dictate you. As long as you don't violate and break the law, you can really bend it or... (JP-1).

A judge should be able to consider the morality of the situation in rendering a decision which is “acceptable and right.” This jurist equated being “acceptable and right” with being “moral” and just. Another jurist saw the factual situation as one in which, “... the act of Victoria was sort of a betrayal of the trust...” (JP-4). On the issue of “fairness,” one jurist stated that his judicial philosophy included the consideration of fairness only if the law did not squarely address the case.

It is only when the law is so clear that there is no room for me to... to not follow the law. In only that case would I say that the law prevails, but I would be influenced so much by the... by the rule of fairness. (JP-6).

When the law is not clear, a judge has the ability to interpret its meaning and intent and to apply the facts to that interpretive analysis. It is in the interpretation of law that jurists from the Philippines perceived their ability or flexibility to reach a fair result. “...[W]here there is room for interpretation, one should always be guided by the outcome based on fairness.” (JP-6).

Similar to their Philippine counterparts, American jurists viewed the “prior relationship” between the parties as being relevant to decision making. However, the American jurists took a different approach and viewed the unfairness issue through the principles of equity. As mentioned previously, civil law systems do not recognize the doctrine of equity and can only address cases before it through published law i.e., Japanese law is comprised of a series of comprehensive codes. One U.S. jurist addressed
this point by stating, “That would be an equity a judge might consider and the . . . the . . . there’s a kind of an element of unjust enrichment in these cases where . . . in these trademark cases where you . . . if someone is trying to capture something that is . . . the old Jewish idea of reaping where thou hast not sown, you know if you’re collecting something on somebody else’s effort.” (JAm-1). Another U.S. jurist mentioned his use of intuitive insight to understand what was really happening in a case.

I mean it’s . . . it’s difficult to say who’s right and who’s wrong . . . I mean it’s so close . . . and so you read a case and you get a gut reaction as to what is wrong here. Who is . . . who is trying to pull a fast one or who isn’t . . . (JAm-3).

This jurist referred to his intuitive capability as “gut reaction” or “street smarts” and attributed this ability to the various job experiences he gained before becoming a judge. This included being a taxi driver, bartender, dishwasher, etc. Citing diverse life experiences gained from employment, military service, travels, etc., before assuming a position on the bench was a prevalent topic of discussion with U.S. jurists. In fact, the U.S. jurist further commented that, “I think one of the problems of the young lawyers that I see coming through here, they have perfect educational backgrounds, but they have . . . they’re having a difficult time with street smarts because they haven’t learned what makes the world go round . . .” (JAm-3). Thus life experience seemed to be an important aspect of an American jurist’s ability to empathize and understand a case and, therefore, make a better decision.

ii. **Unfair Laws**

An important distinction should be made, at this juncture, between an “unfair law” and a law which is unfairly applied. There are laws which, “on their face” may be
considered unfair (i.e., gun control, abortion rights, religious symbols, gay marriages, etc.). This, however, is not the same as when a law, when "applied" to a particular set of facts, results in an unfair result. For this reason, American legal claims can be brought to challenge a law or statute "on its face" or "as applied."

When asked about "unfair laws," American jurists typically felt that they were required to follow the law, and that any unfairness which resulted was not their problem. In that context, unfairness and public policy considerations must be addressed by the legislature. When asked how community values affected the application of our "unfair law," a U.S. jurist responded by stating that,

If the public wants something ... if the public wants something they must secure it in a different way. Not from a judge ... the judge only interprets the law. He doesn't make the law. I mean he doesn't twist it. (JAm-4).

However, a second U.S. jurist indicated that he had run into several instances where he felt that the pertinent law was unfair, but despite the legislative prerogative, he ruled in a manner that reflected his sense of fairness, only to be later overruled by the Court of Appeals. He stated, "I have done what I thought was right ... I've had a couple of cases where I completely disagreed from the law and there was no reason to apply it, but it went to the [Ninth] Circuit and they said, look guy, here's the law, we make the law, you don't." (JAm-5). Japanese and Philippine judges seemed to feel that they could do nothing about an unfair law except to say it was a legislative matter. To do something about the unfair law would mean "bending the law," and that is prohibited.

iii. Summary

The judicial dilemma presented sets the stage for a discussion on what "fairness" means to the respondents. It is interesting that some of the Japanese jurists equated
fairness to legal correctness of a judicial decision. The underlying rationale behind this statement was that unfair decisions are not permitted under the Japanese Constitution. In this case, however, the facts reveal a high likelihood that Victoria Secrets' developing and marketing of the Sweet Mango swimwear was copied from Rojas' swimwear concept. Although the Japanese judges were aware of this, they felt restricted in their ability to consider the prior relationship of the parties in a trademark infringement case.

In contrast, both Philippine and U.S. jurists felt prior relationships of parties to be relevant to decision making in this case. The concept of fairness to the Philippine jurists included a consideration of motivation and intent. To the U.S. jurists, fairness included considerations under the doctrine of equity and whether one party was trying to pull "a fast one" over the other.

On the sub-issue of how to deal with laws that were unfair "on their face" both Philippine and Japanese jurists felt compelled to follow the law. U.S. jurists also acknowledged that they needed to follow the unfair law, but recognized that they had the independence to rule in accordance with what they thought would be fair in the case.

In this case, a common belief identified across all three regimes was that the role of a judge was to follow what the law required him to do. However, there was no agreement on the definition of fairness. This was especially true between U.S. jurists and Japanese jurists.

C. Case Study No. 3: Copyright – Social Status and Artist’s Infringement.

Kazu, a famous artist and son of a former Prime Minister, lives in a small town called Hatsu Village located within the jurisdictional limits of the city of Akaboshi. Recently, sales of his paintings have decreased and because of his high expense lifestyle, Kazu has stopped paying his taxes. The Hatsu Village tax office files a lien against Kazu’s assets and confiscates his paintings. In an effort
to pay down the outstanding taxes owed by Kazu, the Ha[tsu] Village tax office placed digital photos of Kazu's paintings on the Internet to auction them off. Meanwhile, the Hatsu Artists Guild, a non-profit artist group which manages the copyrights for member artists like Kazu, was tipped off by Kazu of the sale of his paintings on the Internet. The Hatsu Artist Guild asked Hatsu Village government officials to cease and desist placing photos on the Internet of Kazu's paintings, as they believe it constituted a violation of the copyright laws. Hatsu Village tax officials disagreed and continued to display photos of Kazu's paintings. The Hatsu Artist Guild then filed legal action against Hatsu Village tax office for violation of the copyright laws. Who do you believe should prevail in this case? Please discuss your thoughts on this case.

When technology out paces the law, a judicial dilemma can sometimes develop. The present day copyright laws were intended to cover writings and works of art. It never contemplated the technological advances leading to the development of digitized photography and the use of digitized photos on the Internet. When this technology was used by the Hatsu Village tax office to sell the paintings of Kazu to pay off his delinquent taxes, an infringement action was brought to stop the sale. In this situation, the copyright law does not seem to fit the facts. The possibility that jurists would look at other factors to decide the case was explored.

The sub-issues presented included whether the social status of Kazu (the son of the former Prime Minister) had any bearing on judicial decision making, and whether there were any biases or favoritism toward the government over a citizen. Most people recognize each citizen's obligation to pay taxes. Whether payment has been made or not is a "black and white" proposition. When the taxpayer is not challenging the tax itself but asserting another defense, there may be a natural tendency to believe that the taxpayer may be trying unlawfully to get out of his obligation to pay taxes.
The judicial dilemma and sub-issues for Case Study No. 3 are presented in Table 5.3 below.

**TABLE 5.3**

<table>
<thead>
<tr>
<th>Case Study Label</th>
<th>IP Right</th>
<th>Interview Topics</th>
</tr>
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<tbody>
<tr>
<td>No. 3 &quot;Old Law, New Technology&quot;</td>
<td>(Copyright) Works of art and digitized electronic images over the Internet</td>
<td>Judicial Dilemma: • The original copyright law did not contemplate its application to modern technology. Sub-Issues: 1. Does Kazu’s social status matter? 2. Is there a presumption that government is always right as against the individual?</td>
</tr>
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i. **Social Status of Party**

The main actor in this case study is an artist named Kazu who is the son of a former Prime Minister of Japan. Interview subjects were asked whether Kazu’s family relationship and social status would be a factor in their decision making. Japanese jurists without hesitation and unanimously stated that this factor was not relevant to their decision in the case.

Philippine jurists followed suit and responded in a similar fashion. However, one Philippine jurist in response to a question of whether Kazu’s family relationship would be a factor said, “Not to me, but to many judges in the Philippines maybe it would have a bearing, but as I said, as I said, I don’t owe any political favor to anyone so it won’t have a bearing to me.” (JP-4). This response hit on an issue that plagues the Philippine legal system i.e., judicial corruption and political influence. According to a study done by the American Bar Association of the Philippine legal system, “public perception of
significant judicial corruption remains and is itself an obstacle to the administration of justice” (Judicial Reform Index for The Philippines, 2006). The process in which judges are appointed has also engendered a culture of “gratitude” from the appointed judges to the appointing authority, which has added to this perception. Can justice be “bought or influenced” in the Philippines? Unfortunately, public perception is that it can be.

American jurists responded almost unanimously that Kazu’s family relationship was not a relevant factor. However, one American jurist shared his experiences serving as an American judge in American Samoa where U.S. legal system and the local traditional matai laws are administered together. The matai system is based on local Polynesian custom and tradition, and the laws pertain mainly to real property and family law. U.S. judges sit on a panel along with matai judges or elders and apply the appropriate law depending on the facts of each case. Under the matai law, “who you are” and “who your family is” may make a difference in how you are treated under Polynesian custom. For example, the son of a chief may be given special consideration over and above a common villager. Undoubtedly, Polynesian culture has influenced its localized legal regime. The Philippine situation is very similar to the Polynesian one. In the Philippines, family relationships are very important aspects of their culture. Individuals are identified by who they know and what family they are from. The American Bar Association in their research on the corruption factor present in the Philippine judicial system recognized that although Philippine jurists felt independent once appointed, “gratitude” to the appointing authority remained an issue (Judicial Reform Index for The Philippines 2006). This was referred to as the “plague of ships” which pervades the
Philippine culture through network of prominent families and other connections, i.e.,
"kinship, relationship, fellowship, friendship."\textsuperscript{26}

ii. Private Citizen versus the Government

The interviews also examined whether jurists favored government interests over the rights of private citizens. Although the actual plaintiff in the case was the Hatsu Artist Guild, there was no distinction made between the Guild and Kazu. In fact, during the interview sessions, questions posed of the subjects used Kazu in lieu of the Guild. I believe that Kazu’s assignment of his copyright interest to the Guild was a technicality which made no significance to interview subjects. In other words, they saw the Guild as representing the interests of Kazu against the tax office. Most of the Japanese jurists supported Kazu in his defense against the government action and would have enjoined the Hatsu Village tax office from posting pictures of Kazu’s artwork on the Internet. Does the support the Japanese jurist gave to Kazu indicate that his social status was important? In the earlier case studies, the Japanese jurists said social status was irrelevant. I discuss this point in more detail later in this section.

In contrast, Philippine jurists almost unanimously favored the side of the tax office. A majority of the U.S. jurists favored the tax office. I examine below what might be the reasons for these significant differences in legal regimes.

Under U.S. law, there is a judicial presumption favoring government action or positions because the courts do not desire to step into the “shoes of the government” as they generally lack substantive expertise in the area of dispute. However, this presumption can be rebutted, and overcome by a showing of arbitrariness or

\textsuperscript{26} Speech delivered by Chief Justice Artemio Panganiban to the Joint Meeting of Philippine Chamber of Commerce and Industry on February 15, 2006.
capriciousness, in the governmental act or actions on the part of government that are illegal per se. The ultimate decision depends on a showing of evidence at trial.

The introduction of Confucianism into Japan centuries ago helps to explain its population's respect for hierarchy. The Japanese deal with concepts of hierarchy in spatial references. This is especially true for personal names or pronouns. Avoiding direct use of a personal name, Japanese use spatial terminology to signify respectful distance, and consequently, a spatial reference can become honorific. For example, the literal equivalent for "Your Excellency" is "Lord Palace" (tonosama), the high status symbolized by the palace where the lord resides.

I suspect that Japanese jurists may have sided with Kazu because, in reality, his high social status did make a difference. This is despite statements by the jurists to the contrary. It is logical that because Kazu was the son of a former Prime Minister he retains an identifiable and higher level social status within Japanese society and may thus be given favored treatment. Since Japan is a hierarchical society, the government of Japan is generally viewed with high regard. I would have expected the Japanese jurists to have sided with the tax office as the Philippine and American jurists did. However, the Japanese jurists supported Kazu instead and this leads me to believe that another factor was being considered.

In direct contradiction to Japanese jurists, Philippine jurists sided with the government by refusing to find the tax office in violation of the copyright laws. The general sentiment expressed by Philippine subjects was that if you owed taxes, you had to pay them and the government could do whatever was necessary to collect on the amount owed. Here the attitude of the Philippine jurists was that government is supreme and
citizens should do what government wants them to do. This is consistent with the findings of Geert Hofstede in the area of “Power Distance Index” scores. The Philippine culture has a high Power Distance Index (“PDI”) rating which indicates a very hierarchical society and respect for those in power and of high status. (Hofstede 2001, 120).

iii. Summary

This case tested the limits of judicial authority. When the facts of a case are not squarely addressed by the law what can jurists do? The responses indicated that jurists examine the facts more closely when the law does not provide a good fit. Japanese jurists focused on whether the size of the photos on the Internet was large or small and whether the photos could have been copied for other non-authorized uses by those viewing the Internet site. The answers to their inquiries were not provided by the stated facts in the case.

In light of the above, the social status of Kazu was raised as a possible factor considered by the jurists. To the Philippine jurists, social status could be a relevant factor to judicial decision making. To both the American and Japanese jurists it was not relevant. Although in the case of the Japanese, I explored their responses in more depth given that four out of the five jurists sided with Kazu in this case.

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27 "Power distance" is a measure of the interpersonal power or influence between B and S as perceived by the less powerful of the two, S. The term “power distance” is taken from the work of the Dutch social psychologist Mark Mulder who defined “power” as “the potential to determine or direct (to ascertain extent) the behavior of another person or other persons more so than the other way round,” and “power distance” as the “the degree of inequality in power between a less powerful Individual (I) and a more powerful Other (O), in which I and O belong to the same (loosely or tightly knit) social system” (Hofstede 2001, 83). Hofstede defined “power distance” as a dimension of national culture. . . “The extent to which the less powerful members of institutions and organizations within a country expect and accept that power is distributed unequally” (Hofstede 2001, 98).
Another sub-issue was whether judges had a natural tenancy toward favoring governments over the individual citizen. The Philippine jurists’ responses seemed to indicate that this was the case for them. That is, citizens must pay their taxes. U.S. jurists also favored the government tax office. The Japanese jurists, however, favored the Hatsu Artist Guild which represented the interests of Kazu.

This case may be important from the standpoint that it is the only case in which the Japanese jurists voiced a decision (all but one jurist) and is the only case dealing with a Japanese fact pattern. Although the Japanese jurists responded that social status of Kazu was not relevant, their ultimate decision to support his case seemed to be contrary to that response. In addition, since Japan is a relatively high PDI country siding with government over a citizen, would seem reasonable. The Japanese jurists did not give any legal rationale on why Kazu would prevail in this case other than to talk about the size of the digital photo used by the Hatsu Village tax office. It is my belief that what the Japanese said about the irrelevancy of Kazu’s social status was an expected response, but did not reflect their true feelings. More discussion on this finding follows in the next chapter.

D. Case Study No. 4: Patent – Private vs. Public Knowledge

In August 2001, Dr. Science discovered a method of synthetically producing a medical compound formerly only extracted from bark of a tree growing only in South America. The compound was effective in treating headaches. He did not immediately file a patent application, but instead worked on related projects. In September 2002, Dr. Espino published an article in a Philippine scientific journal that, while not describing Dr. Science’s method as such, described the method as one obvious to a person with ordinary skill in the art when considered in
combination with earlier methods of synthesizing chemical compounds well known in the U.S. Dr. Espino also pointed out in his article that the Zuno tribe in South America had used the bark of this tree as medicine for its people for centuries for the treatment of headaches.

Dr. Science applied for a U.S. patent in November 2003. Should the application be granted? What if Dr. Science applied in November 2002? What if Dr. Espino had published his article in November 2000?

This case is representative of the conflict that exists between modern IP law and its applicability to societies in economically less developed countries. The judicial dilemma presented is where a party uses IP law to create a private property right (e.g., patent) from public knowledge (i.e., "folk medicine"), which he has obtained over those who are not aware of their IP rights. When parties are on unequal footing, issues of fairness and how law should be applied emerge. I discuss below some of the sub-issues presented by this dilemma. The sub-issues explore how jurists weigh the investment made by the IP holder in research and development against the unfairness or negative social impact resulting if the law is followed and the IP right is upheld. I used this case to test whether the magnitude of the benefit to society (i.e., headache cure vs. cancer cure) made any difference to jurists in rendering their decision. Finally, I tested whether cultural differences affected a jurist's view of reaching a fair decision.

Table 5.4 below outlines the above judicial dilemma and the sub-issues.
No. 4 "Picking the Low Hanging Fruit"

Judicial Dilemma:
- Should Dr. Science profit off of the "folk medicine" of the primitive Zuno Tribe?

Sub-Issues:
1. Should fairness or social impact be weighed against the investment backed expectations of the inventor?
2. Whether the level of impact of a judicial decision on society was a relevant factor to a jurist.

During the interview, it was brought to each interviewee's attention that an underlying controversy of this case study was that of "pharmaceutical mining." After explaining what the controversy was, a hypothetical was posed. The facts of the case were changed and the interviewee was told that a large pharmaceutical company's research team had entered the jungles of South America to secure information on a health cure from an indigenous people called the Zuno Tribe. The information led them to certain plants which contained substances that had a curative effect on headaches. The pharmaceutical company took the information back to their laboratory in the U.S. to analyze, which later led to a patent application for medicine to treat headaches.

Interviewees were asked to sit as a judge (in their country) and to preside over a case where the Zuno Tribe brought legal action to void the patent and seek damages.

Interviewees were then asked how they would handle such a case and what type of
decision they might render. They were then asked if their opinion would change if the
information taken from the Zuno Tribe led to the cure for cancer rather than head pain.

i.  **“A level playing field”: Advanced Country versus Primitive Country**

This case illustrates an interface between people of an advanced culture
contrasted with people from a primitive culture. The case also portrays a “playing field”
that clearly favors the advanced culture because of its better knowledge of intellectual
property law. An atmosphere of “unfair advantage” prevails and is demonstrated when
the party from the advanced culture takes information from the less advanced party to
profit from. Should ignorance of the law and the naivety of primitive people play to the
benefit of those who take advantage of it? This was the “judicial dilemma” presented to
the jurists in this case.

The responses of Japanese jurists in this case, as distinguished from their
responses in Case Study No. 2, were that a legally correct decision could engender an
unfair result. One may recall that in Case Study No. 2, one Japanese jurist said that this
could never occur because all legally correct decisions had to be fair. This shift in
position could be attributed to the factual differences presented in this case study versus
those in Case Study No. 2. In this case, the inherent unfairness is obvious from the
disparate social and economic levels of the parties (i.e., the primitive South American
Zuno Tribe vis a vis Dr. Science, a U.S. scientist) whereas, in Case Study No. 2, the
parties Rojas and Victoria Secret were relatively on equal footing from a business
sophistication and social status standpoint.
The Japanese jurists felt they were constrained by the law and could not consider
“fairness” unless the law allowed them to do so. In fact, one jurist admitted that, unlike
U.S. jurist who had a very high amount of leeway in interpreting their laws to achieve
fairness, Japanese jurists were, on the other hand, “... bound by the law itself.” (JJ-3).

However, the jurist went on to say that,

... in the process of, [we will] ... understanding the meaning of the
statute, like, we will ... we want to read the passage according to fairness.
When say, like this provision, there are two reasonable reading[s] of the
 provision of Japanese copyright (law), one (interpretation) is wide and the
other one is narrower, shall I say then,[that] we prefer to choose the one
which we believe would provide more fairness, or something. But limited,
even if we think that the [second] one is more fair, but it goes ... it is
outside the meaning of the statute, then it is prohibited. (JJ-3).

This Japanese jurist recognized that the size of the gap between legal correctness
and fairness determined whether he could adjust his decision. If the gap was too large,
the jurist would not be able to do anything unless a party brought a separate action under
the abuse of right statute to obtain relief.

On the other hand, Philippine jurists felt almost unanimously that the first to file
for a patent should prevail regardless of any benefit to humanity or the ignorance of the
law. In the hypothetical, they exhibited a lack of empathy for the plight of the Zuno
Tribe notwithstanding any resulting unfairness or regard for a “level playing” field. All
of the Philippine jurists stated that they would have ruled in favor of Dr. Science or the
hypothetical foreign pharmaceutical company.

In contrast, U.S. jurists clearly recognized the ethical and moral issues
surrounding the “pharmaceutical mining” issue, but had no common solution to deal with
it. One jurist stated that,
I don’t know whether there is a moral or ethical ... nexus, you know ... of exploiting ... it depends on how you get the initial information. If you get it by immoral means, then I think there’s a moral ... there’s a moral obligation to ... be fair about it, but I don’t know how you can enforce it. (JAm-1).

This jurist succinctly characterized the actions of the pharmaceutical company as, “... gathering the low hanging fruit.” (JAm-1). He likened this type of behavior to that of a “parasite.” In handling such a case for decision making, this American jurist indicated that “if somebody looks like to me that they’re behaving in a parasitical way, then I’m ... I’m a little bit more judgmental about ... I’m a little bit more skeptical about what their [they are] telling me then [than] I would be if I thought this was a completely umm ... umm ... sincere, non[un]prejudiced person trying to advance their point of view.” (JAm-1).

Some of the other U.S. jurists sided with the Zuno Tribe by citing certain legal arguments against patentability i.e., “naturally” occurring articles, “non-obviousness” or “prior public use.” All three of the foregoing legal arguments, however, involved facts which were not presented in the case study or posed hypothetical, and therefore, could not support a decision favoring the Zuno Tribe. I suspect that the jurists referred to these legal arguments in order to provide a way to support the Zuno Tribe’s case so that “fairness” could be achieved.

ii. Investment Backed Expectations: A Right to Profit

The basis for intellectual property law in the United States is to create an incentive for invention by rewarding the inventor with a monopoly. Its practical effect is to bring to the public marketplace a rich variety of products, services, and artistic works. In order to accomplish this goal, the law grants to the creator a property right in the
intangible products of creativeness, investment, and labor. The granting of a property right protects the inventor’s ability to obtain a return on his investment, which can motivate further development of products, services and expressive work product (Barrett 2004, 1). However, not all countries share the same purpose behind their intellectual property laws. Some countries place greater emphasis on the “natural right” authors and creators have in the product of their labor. Obtaining a return on their investment may be secondary to the economic and political interests of the citizens of that country.

Although membership in WTO and being a signatory to TRIPS has mandated similar intellectual property laws, it has not changed the underlying philosophical differences in the purpose each country attributes to its IP laws.

It was, therefore, not surprising that U.S. jurists brought up the concept of a return on investment to justify patent protection notwithstanding a product or medicine’s limited access to poorer countries. One American jurist stated that, “There has to be a balance, but you still got to get people to spend their money to dig for gold . . . there’s a lot of dry holes . . . you’ve got to get them to dig for oil, there’s a lot of dry holes that you don’t take into consideration.” (JAm-5). However, the American jurists also recognized the “natural right” that the Zuno Tribe had to the information and that a reasonable sharing of profits may be in order if the proper conditions existed. “In [terms of] justice and equity they should probably share the wealth with the people that originated the idea, but I don’t think they have to . . . ,” said another U.S. jurist. (JAm-1).

In contrast, Philippine jurists had no empathy for the Zuno Tribe, after all they could continue to practice their cultural medicine and use the bark of the tree to treat head pain. One Philippine judge even commented hypothetically that if a Philippine
pharmaceutical company filed for a patent, and had obtained the cultural information from a Philippine aboriginal tribe, the company would as a matter of practicality “buy up the tribe and feed them so their [patent] application will go through, . . .” (JP-4).

Japanese jurists, on the other hand, recognized that in all “fairness,” the Zuno Tribe should be able to make a profit off of their cultural information, however, under the present Japanese intellectual property laws, this was not possible.

iii. A Cure for Cancer: A Greater Benefit to Humanity

During the interview, a hypothetical was presented which slightly modified the facts by indicating that the cultural medicine obtained from the Zuno Tribe led to a cure for cancer. Would the nature and magnitude of the health benefit make a difference to judicial decision making? To a majority of Japanese jurists, the modification from head pain to cancer cure was relevant to the ultimate legal decision arrived at. In contrast, Japanese jurists had overwhelmingly responded in Case Study No.1, that the social economic impact created by enjoining RIM from selling its smart phones in the U.S. was irrelevant to decision making. I questioned why I heard different responses on relevancy between the two case studies. Did the gravity of a life and death impact of a cancer cure versus an economic impact contribute to the different responses? This is a possibility. That is, where the gravity of the judicial dilemmas increased (e.g., economic injury to a life and death situation) the initial statements of interviewees began to change. The inconsistency may illustrate that Japanese jurists’ responses cannot be generalized, but rather are dependant on the context of the issue and its magnitude.

Philippine judges, on the other hand, were almost unanimously insensitive to the change between a cure for headaches and cancer. They felt that the change was irrelevant
to their decision making. Likewise, this did not seem to make a difference to the American judges which seemed inconsistent with their responses on the importance of social impact.

iv. Cultural Differences and Notions of Fairness

In discussions involving notions of “fairness,” the subject of culture was repeatedly raised by several jurists. In other words, what constitutes “fairness” may be dependant upon what part of the world you live in. Although Japanese jurists recognized that community values are part of fairness, they also believed that the laws of a society embrace of those values, and therefore, fairness was achieved through law. In other words, society achieved fairness through judicial decisions which were consistent with law. Consideration of culture separate from law is not part of judicial decision making. If fairness is not achieved through consistency of law, then the laws should be abolished or changed.

In my mind, as long as there is a patent system, the result will be fair because the patent system is created in that society. If it is not good, it means the patent system should be abolished, (JJ-5) said one Japanese jurist.

Similar to the Japanese, Philippine jurists also did not believe cultural differences were relevant to judicial decision making. One Philippine jurist commented by saying that, “. . . as judges, we really have to apply the law even if it would violate local customs and traditions.” (JP-1).

To the contrary, U.S. jurists felt consideration and empathy for cultural differences were important to judicial decision making. One jurist cited the matai legal system in American Samoa while another jurist mentioned the Shari’a legal system, as
examples, of legal systems which were very much linked to the culture of their respective jurisdictions. It was even pointed out by one U.S. jurist that even judges within the United States had very different cultural perspectives which could affect their decision making.

Q: Do you think judges in Hawai‘i look at cases differently, then say judges in Florida or New York?

JAm-2: Oh, I think so. Yeah.

Q: . . . how do you see that? What’s the difference?

JAm-2: What do you say . . . in those jurisdictions in the south which had so many years of conflict in which the whites were mean to the blacks, there is still a lot of that feeling there.

JAm-2: . . . That doesn’t exist here.

Another American jurist cited the plot of a movie entitled “The Gods Must Be Crazy” which illustrated how events could be seriously misinterpreted by cultures unfamiliar with such events.28 American jurists seemed to understand that cultural differences could affect how one perceives “justice and fairness.”

This was aptly stated by another jurist,

. . . if the law is on the books and I’ve . . . my . . . my training, my judicial training is to enforce the law. Now where you have wiggle room as in the cases when the law is unclear and then the temptation is to lean more toward justice as you see it and that brings up then your childhood training, your culture is which you grew up and how . . . what you think about . . . (JAm-1)

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28 A 1980 film written and directed by Jamie Uys. The film is set in Botswana and South Africa. A coke bottle falls from an airplane flying over the plains of Botswana. A primitive Bushman Xi finds the coke bottle and thinks it has fallen from the gods in the sky. A series of strange events ensues when the Bushman sets out to return the bottle to the gods and gets into trouble as he encounters the modern outside world.
However, notwithstanding their sensitivities and empathy for cultural differences, U.S. jurists saw their role as carrying out what the legislature intended within the limits of the stated law. After all, "...we’re supposed to be a community or a nation state that’s run by law and not by individuals," said one jurist. (JAm-2). He was obviously referring to the “rule of law” philosophy, which is the core of the Anglo-American legal system.

v. Summary

A “level playing field” is clearly not present in this case. Those who are educated on IP rights take advantage over those who are not. The case centers itself about the jurists’ beliefs and definition of “fairness.” However, despite the Japanese jurists’ belief that the situation presented in this case placed the Zuno Tribe at a disadvantage, they were constrained by their role as jurists to make a “legally correct” decision.

In contrast, the Philippine jurists had no empathy for the unequal footing of the Zuno Tribe. Those who knew the law had every right to take advantage of it even if it resulted in unfairness. The U.S. jurists were clearly empathetic to the plight of the “underdog” i.e., Zuno Tribe although they recognized the right to make a return on one’s investment.

The hypothetical situations posed during the case changed the responses of the Japanese jurists. When the “folk medicine” turned from a cure for headaches to a cure for cancer, the Japanese jurists felt it was now very relevant to consider the impact to society. However, the Philippine and U.S. jurists did not seem moved by this hypothetical difference.
To some, the issue of “fairness” included culture. That is, fairness was defined by culture. U.S. jurists seemed very receptive to cultural differences and how this impacted what was fair or just. On the other hand, this factor did not seem important to the Japanese and Philippine jurists.

The last case presented the most difficult legal and moral dilemma to the interviews subjects. As expected, it caused the jurists to re-examine their role and responsibility as jurists to their country and fellow citizens.

E. Case Study No. 5: Plant-Genetic Resources for Humankind – Patent Infringement.

A private non-profit association, Rice for Children (“RFC”) has knowledge of the complex biotechnological process and products to produce an Asian strain of rice which contains Vitamin A. Vitamin A is very important for the physical development of children and women of child bearing age. The rice strain is especially important for poorer Asian countries where many millions of children are at risk for disease related to Vitamin A deficiency. As a service and benefit to humankind, RFC desires to provide Asian countries with free and open access to the biotechnological process and products to produce this variety of Vitamin A rice. However, due to the increasing complexity of IP laws and rapid expansion of plant biotechnology since the 1990s, the ability of RFC to provide countries with access to this valuable information has run into some major legal roadblocks. The private sector’s large R&D investment in plant biotechnology has resulted in many international patents in the area of rice strains. This information (held by companies in the United States, Japan, Taiwan, and Switzerland) is not freely available to the public and may legally prevent the free and open dissemination of Vitamin A biotechnological information to poor Asian countries, who desperately could use this information.

You serve as a judge in a poor Asian country that needs this rice. However, there are several patents in your country held by four (4) large foreign companies which are directly related to some of the processes used to develop the Vitamin A rice. RFC has been sued by the four (4) foreign companies on patent infringement for attempting to supply the biotechnological products and process information to your country. How will you handle this case? Who will prevail and why?
In this final case study, I examine how jurists see themselves in their role as judges. Within the context of that role, they discuss their ability to exercise judicial discretion and how they deal with the social impacts of their work. Finally, I examined how jurists viewed the harmonization of laws brought on by globalization in the IP area of law.

Table 5.5 below outlines the judicial dilemma presented and the sub-issues discussed.

**TABLE 5.5**

<table>
<thead>
<tr>
<th>Case Study Label</th>
<th>IP Right</th>
<th>Interview Topics</th>
</tr>
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<tbody>
<tr>
<td>No. 5 “Innovation or the Greater Good”</td>
<td>(Patent) Food</td>
<td>Judicial Dilemma:</td>
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<td></td>
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<td>• By upholding the patent right holder of a certain variety of rice, women and children in this poor country will suffer.</td>
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<td>Sub-Issues:</td>
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<td></td>
<td>1. What is the role of a judge?</td>
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<td></td>
<td>i) Judicial discretion and flexibility – limits of authority</td>
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<td>2. Globalization and legal regimes.</td>
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<td>i) Transplanting law</td>
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Case Study No. 5 was the last case and presented the most difficult “judicial dilemma” by making a legally correct course of action (insofar as judicial decision making is concerned) produce adverse consequences to women and children from an economically poor Asian nation. Intellectual property laws in most countries have two goals. The first, I mentioned previously, is to promote creativity. The second is to ensure that the public is free to access the new products, services and artistic works. These two
goals, however, are sometimes in conflict with one another. Granting property rights in a creation may actually hinder public access to them in two ways. First, the holder of the IP rights can prevent public access to the creation directly. This was illustrated in Case Study No.1 where NTP who held the IP right did not manufacture or produce a product from the patented technology. Instead, NTP used its IP right to profit over the efforts of others i.e., RIM, who used the technology in producing a product for public consumption. Another way in which public access to a creation can be hindered is when the holder of the IP right charges high (IP rights can generate monopolistic behavior) prices for its product or service thereby denying access to consumers who cannot afford such prices. Case Study No. 5 was intended to highlight the latter situation. Intellectual property laws generally attempt to reach a balance between these two competing goals through limitations in the law. For example, the length of patent protection is not forever, but limited to a twenty-year period. Therefore, economic access to products may not be barred forever. However, conflicts do occur and are sometimes elements of a legal case, which find their way before a judge for ultimate resolution.

i. The Role of Judges

When a difficult judicial dilemma is presented the facts and law may not provide any clear answers to resolve the dilemma. Instead, those interviewed in this case study recognized the dilemma and addressed it by speaking more about their role as judges rather than how they would decide the case.

Japanese jurists felt that their role was to uphold the Constitution and to protect the integrity of their legal system. This is notwithstanding any short term adverse effects caused by doing so. One Japanese jurist spoke extensively about rendering decisions
which he believed achieved fairness. However, he felt that he could not venture too far from the law in doing so. After all, if decisions merely mirrored what judges felt personally was fair, then consistency and predictability of legal result would suffer. He saw American judges as having much more leeway in determining “fairness” than Japanese judges who were expected to follow specific laws. When asked whether he thought Japanese judges wanted more freedom in their decision making abilities he said, “I think it really depends on each judge and some judges want more freedom.” (JJ-3).

When asked specifically what he personally desired, he responded by saying that he was most happy when a “mechanical” application of the law resulted in what he felt to be a fair result. However, when a result seemed unfair to him, he would attempt to “manipulate the application of law” to see if a fair result could be obtained. He saw this as a reason why, at least in trademark cases, resort to the abuse of right statute was a common occurrence. A possible example of an abuse of right case was illustrated in Case Study No. 1 which involved a patent holder NTP using its rights to “block” the productive use of phone technology by RIM so that it could position itself to receive significant sums of monies in settlement of its claim. The clear intent of the patent law was to promote the use and production of inventions in the public domain. It was not to allow patent holders to abuse the law by holding “hostage” or hindering those who acted in concert with that legislative intent.

Of all of the cases, it was Case Study No. 5 in which all of the Japanese jurists were observed to show more emotion and some discomfort in their responses. Interviews of the jurists on the previous case studies depicted a rather straight forward and unemotional approach to dealing with issues and a resolution of the case. Their behavior
during the earlier interviews seemed “in control” and in some way “mechanical.” It was
in Case Study No. 5 where for the first time some of the Japanese jurists displayed their
humanity and became more animated, candid and open while responding. Making this
case study the last one out of five was designed to gradually “open up” the responses of
the interviewee. As an example, one of the Japanese jurist’s candid remarks was,

... yeah, yeah ... that I should say that social benefit ... this situation is
very uncomfortable because patent law is very future oriented ... but at
the same time, we can’t really ignore the current situation, poor people
dying something like ... you ... if poor people are really dying, then rich
company which is the patent owner, demand very high licensing fee, or
something, and then ... it may have significant impact, and that is why we
need judges concerned and if we see a situation where poor people are
dying, then judges feel that we should stop the use of patent right over
poor people, but at the same time, then it will discourage the company
from future ... to do ... enough R&D for the future, and it’s an important
part of the whole thing. I hope it’s the last one (case study) ... it’s very
tough part. (JJ-3).

Another interviewee took himself out of his role as a judge in Japan and said,

If I were the judge of the poor country, I would not be able to avoid
finding a violation of the patent law, but I might insert a comment that
having such a law would be useful, or encourag[ing] settlement. Under
the civil law system, as long as there is a law, it cannot be violated.
However, if the country is a common law country, they may be able to
create a new judgment. (JJ-4).

Present throughout the five case studies was an acknowledgement by Japanese
jurists that their common law (i.e., U.S. judges, etc.) counterparts had more freedom and
leeway to interpret laws to reach a just and fair result. Another Japanese judge
commented on a comparison of the two legal systems by saying that,

In the case of Japan, it is the civil law system, the judges are limited and
even if they are allowed to consider abuse of right and power for
adjustment. If the changes are made, the Constitution requires the use of
legislative process to change the law in most cases. In the U.S., under the
precedential (common law systems rely on a precedent of case decisions to interpret law) system judges have more freedom and are even allowed to make rules. That is different. (JJ-5).

In contrast to Japanese jurists, Philippine jurists believed they had more flexibility in their role as judges. One Philippine jurist stated that although they had to follow the law, "... a lot of common sense has to come in to [too].” (JP-1). At the beginning, the jurists admitted that the impact of their decision on society was something they considered. “I think that I will be influenced very much, you know, by the social aspect of the decision,” (JP-6) stated one jurist. When asked further about what he meant by “social aspect,” he stated, “... the greatest good for the greatest number.” (JP-6). He continued, “... what I am telling you is that I will read the provisions of the applicable law and in interpreting this provision of law I will be guided by the concept of the greatest good for the greatest number ... I would be most reluctant to condemn a person who is trying to do good.” (JP-6). This philosophical sentiment was corroborated by two other jurists during their interviews. It was clear that Philippine jurists felt they had the requisite flexibility or discretion in their interpretation and application of the law to take social impact into account. The role of the Philippine judge was to achieve the greatest good for the greatest number. What one jurist defined to as the “public interest.” (JP-4).

In a similar manner, U.S. jurists expressed empathy for the plight of the poor and defenseless. Both Philippine and American jurists resorted to the use of equitable principles to deal with Case Study No. 5. "Well, there ... there are very strong equities in favor of the people of these countries and I would ... do what I could within the boundaries of the law to try to open that up to make that available to the people who really might not have it otherwise," said one U.S. jurist. (JAm-1). He went on to state,
“Unfortunately, I think in the United States the role of the judges is more restricted to enforcing the law and justice sometimes is in the eye of the beholder . . .” (JAm-1). As an example of this situation, he cited the Dred Scott case, which was a famous American case in which the Supreme Court of the United States recognized that human slavery was legal. (Dred Scott v. John F.A. Sandford 1857). The case was very controversial and is cited as an example of where a decision of the court was legally correct, but ultimately was found to be unjust, unfair and immoral. According to some historians, this decision served as a precursor for the American Civil War. During the interviews, the American jurists characterized law as being different from the concept of justice. “[W]e don’t dispense justice, . . . [j]ustice is dispensed by the legislature . . .” (JAm-2).

ii. Globalized Legal Regimes and the “Rule of Law”

Case Study No. 5 provided the subjects with an opportunity to reveal their perspectives and values on the marginalization of the poor and defenseless through the legal process. A sole Japanese jurist recognized that in order to maintain flexibility in his interpretation of the law, he “must take into consideration the benefit to the nation, and the balance between the strong and weak, to equalize.” Yet despite this, “you cannot issue a decision that ignores the core of the law.” (Jj-4). He then cited examples of courts in other Asian countries i.e., People’s Republic of China or Vietnam, where the core of the law was ignored, and therefore the study of IP cases was thought meaningless because decisions of the courts were influenced by the Communist Party (Kudo 2000). These two Asian countries have what legal scholars have referred to as “rule by men” systems, which are unpredictable and inconsistent.

29Scott and his wife were African slaves sold to Defendant Sandford. The Court held that African slaves, who are emancipated, were not “citizens” of a state as that term was used in the U.S. Constitution.
Corruption of a legal system can convert, to some degree, an otherwise “rule of law” legal regime to a “rule by men” system. In the Philippines, corruption of the legal system is a prevalent issue and during the interviews jurists were very careful to articulate corruption within the judiciary in an obfuscated fashion or to comment only about their own resistance to political favoritism or influence during their career. One Philippine jurist stated, “The . . . the big companies here are protected by their profits.” (JP-2). I understood this comment to mean that money can buy protection and influence in the Philippines so that big companies can stay out of trouble.

On the issue of corruption, U.S. jurists were very cognizant about the imperfections of judges and the decision making process. One jurist commented on this by saying that, “. . . if you trust the human frailty, judges have just as much human frailty as governors and presidents and admirals, generals, matai’s, anybody in a position of authority.” (JAm-1). In this case study, the subjects were asked to assume that they were a judge on the Asian country’s court. One U.S. jurist asked, “Am I elected or appointed?” (JAm-3). The inference being that accountability or political obligation (i.e., gratitude) may be a factor in his ability to rule. Philippine jurists and U.S. jurists felt that the Asian judge would most likely render a decision that allowed the people to have access to the information on the Vitamin A enriched rice. There was almost a presumption that Asian judges would favor their people’s welfare over what the law required.

In an attempt to empathize with both sides of the case (i.e., drug companies vs. poor people), American jurists talked about their life experiences and backgrounds. “[L]ife experiences is very important in deciding things because we make everyday
decisions . . . I’ve made a lot of decisions before I got here and its kind of the same process,” said an American jurist. (JAm-3). A second American jurist recounted his religious upbringing and the fact that his mother ingrained the Ten Commandments in him. “. . . as you get older, faith begins to take over logic.” (JAm-5). Life experiences, according to this interviewee, contributed toward making “a good judge.” (JAm-5). His ability to empathize for the plight of the poor and defenseless was in the form of an old bromide, “[h]e has to, what’s that saying, be a little drunk on Saturday night occasionally to understand how people down in the lower level live and what they do.” (JAm-5).

iii. Harmonization of Law and Globalization

On the subject of legal transplants and the harmonization of IP laws, jurists were asked what they thought about the WTO and harmonization of IP laws. One U.S. jurist responded by saying that,

I’m somewhat of an isolationist. I think the laws of this country are good for this country . . . [a]s a matter of fact, that’s why we have different countries with different laws. The laws of those countries suit those people. The laws of these countries suit these people. If you try to impose your law on people to whom they do not suit, or because . . . for whatever reason they’re just not culturally the same, it’s disputed of course . . . I may be in the minority, but I do not want to impose on another country our values and our laws . . . (JAm-4).

Jurists from the Philippines did not offer much comment on this particular issue. However, one Japanese jurist recognized that IP cases have become more globalized. He stated, “. . . national interests must be taken into consideration, however, the national interests, I think are more universal, and not country based.” (JJ-4). This jurists wanted to create an IP legal system which could be applied in all countries. However, he recognized that each country had differences in the way they developed and created
property rights so that the solution would not be simple. Another Japanese jurist felt that though the dissemination of IP law concepts, short term adverse impacts to a country could be avoided. He believed that local industry and the citizens of an economically less developed country would be expected to oppose IP rights. This, in his mind, accounted for the stance of many poor nations opposing the WTO’s efforts to harmonize IP laws. He also believed that only the jurists of those countries could protect the IP rights of foreign corporation.

iv. Summary

It was acknowledged repeatedly by the Japanese jurists that their U.S. counterparts under a common law regime had much more discretion to interpret the law and fashion the appropriate remedy or sanction to reach a fair result. The Philippine jurists, as well as the U.S. jurists both believed they had wider discretion and flexibility in their role as jurists than their Japanese counterparts. They both resorted to the use of the principles of equity to consider fairness and equity to the parties. The Japanese jurists were not as fortunate and were relegated to staying within the published law.

All jurists recognized that staying within the law and protecting their Constitution was the chief role they served. This was a common belief shared by jurists across all three regimes.

This chapter has analyzed the data and identified characteristics of jurists which are common to all three legal regimes, as well as those that are not. The distinction between universally shared characteristics and those which are not is an important one. These characteristics amount to some of the key mental processes involved in how jurists
reach their decisions. If differences exist, and they are significant, then it follows that
decisions resulting from one jurist’s mental process will not be the same as another jurist.

In the next chapter I group characteristics or traits that were found to be common
or universal amongst all three legal regimes and compare them to traits that were found to
be unique or specific to less than all regimes. I also discuss how the shared
characteristics and those not shared led me to my conclusion that the different legal
regimes may moderate judicial decisions differently. This has an obvious implication to
the validity of convergence theory and its call to harmonize law.
CHAPTER 6
DISCUSSION

Convergence theory has served as the driving force behind the move to bring about uniformity and predictability in IP cases throughout the member nations of the WTO. My data and findings indicate that legal reasoning and the decision making by jurists do vary by legal regime.

Each legal regime is structured from its own unique historical, political, moral, social and philosophical roots. The importance of the historical development of any legal regime has, in fact, long been recognized as significant by comparatists of law. Along these lines, I have discussed how shifts in political power, wars, and world commerce have moved nations to adopt one legal regime over another. Concomitantly, the transferability of rule or law from one jurisdiction to another has also occurred throughout history. However, comparisons of whether these transplanted laws yield similar results when processed through the receiving country’s legal regime are nascent. My research is an attempt to address that void.

I have found that although laws are transplanted from one country to another through multilateral agreements such as TRIPS, how those laws are interpreted and dealt with change from one jurisdiction to another. In some instances, where legal regimes significantly differ, similar laws may actually take on different meanings. These differences are produced because law is rooted in the past and is part of that collective human experience that nations share with their citizens. Historical events and the uniqueness of human experience have spurred the evolution of law and given them specific meanings that are consistent for that country, culture and timeframe. Variations
in interpretation of law and modifications made to transplanted law raise questions about the feasibility and desirability of promoting a global unified system of law. Perhaps it is less important that transplanted laws have a proper “fit” to where they are being moved, but more importantly, that we recognize the importance in the psychological value of having each country choose its own legal system (Watson 1993, 96-101).

Since legal regimes are unique creations unto themselves, it stands to reason that they may involve different ways of approaching law and resolving conflicts. My research findings indicate that this may be true. The implications of this research indicate that convergence theory falls short of providing uniformity and predictability of judicial decisions across three different legal regimes. Harmonization of law alone (as distinguished from legal regime harmonization) provides only a prima facie ability to provide consistent and uniform legal outcomes. Consistency may occur at only the initial stage of legal compliance before disputes reach the courtroom. If conflicts develop and litigation ensues, the results may vary as the dispute must now make its way through the legal regime to reach a resolution.

The key players in each legal regime are its jurists. Jurists function as finders of fact and interpreters of the law. It is their role to apply the laws of their country and to enforce them through their decisions. This research focuses on the mental processes utilized by jurists in reaching their decisions. In other words, how a judge analyzes the facts, determines what is relevant or not, and how he interprets and applies the law to reach that decision.
6.1 Identified Etics of Legal Regimes

I have found helpful in the analysis of the data to group those traits or characteristics of jurists which are shared or held in common across all three legal regimes and those which are not. Within the discipline of cross-cultural psychology, traits which are shared in common across all these regimes are called general characteristics or “etics.” They are traits common to jurists in all three legal regimes. In contrast, those traits or characteristics which are specific or unique to a particular legal regime are called “emics.”

The terms “etic” and “emic” used in this research adhere to the definitions of those terms in the field of cross-cultural psychology. This is not to be confused with the definitions of the same terms used in linguistic anthropology. (See Figure 5)

One of the first etics I identified was that jurists across the three legal regimes believed that their role was to act within the law. That is, to adjudicate cases consistent with the applicable and relevant laws. Judicial acts outside of the law could constitute “judicial legislation” or creating new law, which was deemed inappropriate by all jurists. The “separation of powers” doctrine is a basic premise underlying the U.S. Constitution, which is also present in the Constitutions of Japan and the Republic of the Philippines.

31 The term “emic” and “etic” were introduced into anthropology by linguist Kenneth Pike in 1954. In linguistics, a distinction is made between phonemic and phonetic classifications. The phonetic classification is universal and permits the characterization of any sound in any language. Phonemes, in contrast, are the sound units used only in a particular language. Therefore, the phonemic is the specific and the phonetic is the general. The suffixes “emic” and “etic” have been used by anthropologists for distinguishing the study of unique and specific whole from application of general, polycultural classification schemes (Hofstede 2001, 24-26). As Pike defines it, the emic focuses on the intrinsic cultural distinctions that are meaningful to the members of a given society. The native members of a culture are the sole determinants of the validity of an identified emic. In contrast, again according to Pike, an etic relies upon the extrinsic concepts and categories that have meaning for scientific observers. In the later case, scientists are the sole determinants of the validity of an etic.
THE EMICS AND ETICS OF THREE DIFFERENT LEGAL REGIMES  
(Why Convergence Theory Does Not Work)

"ETIC" (Culture General or Common Characteristics or Traits)

"EMIC" (Culture Specific Characteristics or Traits)

Figure 5

174 (Original table by author)
This doctrine prevents the judiciary from creating new law or "legislating." That being said, many court decisions have resulted in "new law" stemming from their interpretation of an existing statute or Constitution. For example, when the U.S. Supreme Court looked to the Constitution and determined that the doctrine of "free speech" included the content of pornographic films, it was arguably creating new law since the original framers of the Constitution probably never contemplated that free speech would cover such materials. Since there is no "bright line" test for determining when judicial decisions cross over into an act of legislating, it allows some jurists to develop "new law" when they deem it appropriate.

A second etic present in all three legal regimes was a variation of the general notion that "justice is blind." This traditional notion is symbolized in American jurisprudence by a statute of Lady Justice blindfolded and holding the scales of justice. An individual’s economic status, religion, political affiliation, race, gender, etc. should be irrelevant to the application of law and the dispensing of justice. As a general proposition, this belief held true amongst most of the jurists (except when I tested social status and nationality I got different results). Although my research did not investigate every personal characteristic of a party to determine which ones were relevant, I did test some of the more obvious and common characteristics like economic strength, cultural differences, social status and nationality. I determined that as a basic etic that all jurists believe that the personal characteristics of the parties "should" not matter in decision making. However, my findings indicate that in certain regimes Lady Justice does occasionally "peek under her blindfolds." This was certainly true when it came to social status and nationality.
A third etic I found across all three regimes was a belief held by all jurists that violators of the law must bear the consequences (i.e., sanctions, punishment, injunctive relief, monetary damages, etc.) as provided by law. Sanctions and remedies were clearly within the purview of the jurist. In other words, legal regimes were specifically designed to determine whether sanctions, if any, should be meted out to parties who violate the law. The legal regime design also provide jurists with the ability to adjust (in most cases) the type or amount of sanctions or remedies permissible under a particular statute. This mechanism allowed jurists to adjust the punishment or sanction to commensurate with the type or magnitude of the violation. For example, in Japan, judges generally cannot consider factors such as bad faith, unfair business practices, party’s intent, or motive in a patent infringement lawsuit. In contrast, American judges may consider such factors if they are attempting to fashion equitable relief under the same law. The limitation of the Japanese jurist is sometimes accommodated through his ability to adjust the sanctions according to his sense of fairness.

The fourth and final etic observed amongst all three legal regimes was the notion amongst jurists that their judicial role was to protect their Constitution for the benefit of the citizens of their country. Jurists saw themselves as stewards of the Constitution and the laws of the country. The Constitution of each country establishes a Judiciary and promulgates its authority and power relative to other branches of government. Although the Constitution of each regime may share commonalities (e.g., right of individuals to personal freedom), they also differ significantly in other areas. The differences can be seen in areas such as the appointment of judges, court structure, administration, tenure of judges, etc. Some of these differences contributed to the emics that are identified below.
6.2 Identified Emics of Legal Regimes

Based on the foregoing, I was able to identify four etics or common characteristics across the three tested legal regimes. In addition to etics, my findings also included emics which were present in less than all legal regimes. These are a unique or specific trait. In contrast to the four etics identified above, I was able to identify almost thirty emics from all three legal regimes. It is important to note that the identified emics are not fact, but beliefs held by jurists from their respective legal regime. To be more specific, I identified nine emics in Japan’s legal regime, thirteen emics in the legal regime of the United States and seven emics from the Philippine legal regime. The emics identified are discussed below and separated by legal regime.

i. Emics of Japanese Legal Regime

1. The power and authority of a judge to render decisions in Japan are more limited than those judges working in common law regimes. The power and authority of judges in Japan’s legal regime are consistent with those of a civil law system. That is, judges decide each case based on the relevant statutes or codes. Judges are prohibited to fashion equitable remedies or to consider a party’s intentions or motivations or other external circumstances if the statute does not allow for it. A legal assistant interpreting for one of the Japanese jurist explained the difference between the U.S. common law regime and Japan’s civil law regime. He stated that,

The difference, I think, between Japanese judges and American judges is the Japanese code is very comprehensive, because the civil law system is very compartmentalized in terms of lawsuits. So you file something here, but you have to bring another action here... whereas, in the U.S., the judges seem to look at the whole picture and say OK, wait a minute now, if the allegation does not include an unfair practice act in the complaint,
then the judge cannot rule on it, but he can put dicta, or words in his
decision that may help in a later action that alleges that.

For parties bringing legal actions in Japan this emic is important. Choosing the
right statute or code to bring a claim under (especially if externalities are to be considered
in a case) can be critical to the success of a case.

2. The concept of “fairness” was equated to decisions which are “legally
correct” by Japanese jurists. They felt that any decision which was legally correct or
proper had to be fair. One jurist was asked specifically “... does a legally correct
decision always yield a fair result?” He responded,

Under the Japanese Constitution, everyone must be treated fairly, so an
unfair decision is unconstitutional, and is impermissible... At the very
least, an unfair decision is not a decision recognized by the Constitution,
so a legally correct conclusion is always fair. (JJ-2).

Japanese jurists did not view “fairness” as mutually exclusive from law. In
contrast, American jurists saw “fairness” as a concept that went beyond the law. In other
words, determining whether a situation was fair or not could include consideration of
factors or circumstances that had nothing to do with the law. Hence, Japanese jurists
believed that since both concepts were connected it would be difficult to have a “legally
correct” decision that resulted in unfairness. This emic is an important factor for
attorneys who desire to fashion arguments based on fairness.

3. Japanese jurists felt the impact of their judicial decision on society or the
community should not be a factor to be considered in rendering a decision. So long as
the law was properly interpreted and applied, the social consequences flowing from any
adjudicative process should not be considered by the judge. Contrary to this emic, Philippine jurists felt the opposite. As one Philippine jurist stated,

I can only tell you what will influence me in making the decision. I think that I will be influenced very much, you know, by the social aspect of the decision. (JP-6).

Again, to an attorney bringing an action or defending it in Japan, arguments on the social or economic consequences of a judge’s decision may be ignored.

4. In a traditional civil law system, *stare decisis* is not utilized and, therefore, judges are not required to rely on or cite to previous decisions on the same legal issue. Although uniformity and consistency is preferred in a civil law regime, it requires that all judges apply and interpret a state or code similarly. This may be difficult to do without knowing how other judges at the same level or higher courts have ruled in similar cases. Judges normally obtain such information by speaking with other judges or by reading the written decisions of other courts (higher or lower in level). Although the decision of other courts on the same issue is not required to be followed or cited to in a civil law system, a judge may follow the rationale of that decision in order to achieve consistency and uniformity with other previous decisions. One Japanese jurist commented on the Japanese legal system by stating,

... in Japan, the case law does not bind the judge. But actually, we pay very high respect to the Supreme Court’s decisions. But some [decisions] ... it’s more authoritative, but actually [the] real effect is very similar to that. (JJ-3).

The Japanese have adopted a slightly modified version of the civil law regime because it adopts *stare decisis* on a limited basis to include only the decisions of their Supreme Court. The American and Philippine legal regimes have adopted *stare decisis*
on a wider scale by having to follow the decisions of all higher courts including their Appellate Courts and the Supreme Court. As a result, there may be more precedent to rely on in the latter jurisdictions. In Japan, precedent would be limited to the decisions of only the Supreme Court. If the Supreme Court has rendered no decisions or relatively few decisions on a specific legal issue, the ability to predict outcome may be hampered. Strategic legal decisions on the settlement of a case sometimes turn on the availability of prior case decisions to determine the weakness or strength of one's lawsuit or claim.

5. In Japan, the nationality of a party (corporation, individual, partnership, etc.) appearing before the court is not considered relevant by the judge. Highly developed countries with high standards of living are accustomed to dealing with international conflicts and issues. Japan is one of the most developed countries in the world and is very much part of the international business and social arena. This may be a reason for the presence of this emic.

In contrast, the nationality of parties in the Philippines was relevant to the jurists. The Philippines is an economically less developed country and international conflicts may not be as common place as in Japan. To a foreign corporation, this emic could influence its decision on selecting what venue to bring a lawsuit in.

6. Japanese jurists will not consider the motives or intentions of the parties in deciding a case unless the case is being brought under a statute or code which allows for that factor to be considered. This is despite the fact that it may be obvious that a party has acted in bad faith or utilized unfair business practices. Jurists in Japan must turn a “blind eye” to the presence of negative intentions or unethical behavior in deciding a case. Persons involved in a dispute where bad faith or other negative intent is present and
in which such factors have a bearing on the case must be sure to bring an action under the
proper code or statute if they want to have the judge consider those facts.

7. The business or personal relationship between parties can sometimes be a
primary reason for the development of a conflict or dispute. A breakdown of
relationships can motivate parties to take excessive legal action to retaliate against other
parties. Investigating the relationship between parties that existed prior to the breakdown
or conflict may be relevant to understanding what the "real" issues are and the motivation
of the parties. American jurists look for signs of what those real issues are to determine
how the case should be handled; how the parties should be positioned for settlement; and
how sanctions or damages could be assessed. An identified emic of the Japanese legal
regime is the fact that Japanese jurists do not consider as relevant the prior relationship of
parties involved in a present dispute. In the United States, judges have more leeway (as
acknowledged by the Japanese jurists) to consider prior relationships of parties. Judges
under a common law system use the doctrine of "equity" to avoid reaching legal results
which work an injustice or are unfair. In order to accomplish this, they may look into
evidence on motivation and intent. In preparing for trial in Japan, one would have to
decide whether evidence on prior relationship should be held back because of relevancy.

8. I identified as another emic of the Japanese legal regime that the social
status of parties appearing before the court may be relevant to decision making.
Although this may be true for all legal regimes, the differences lay in the degree to which
social status may affect decision making. Different countries place different weight on
personal characteristics such as wealth, prestige, and power. Countries that have a high
PDI place more importance on the social status of persons. As discussed previously,
power distance is a measure of the interpersonal power or influence between two parties as perceived by the less powerful of the two. On the PDI, Japan ranks above the United States but lower than the Philippines (Hofstede 2001, 83-91). One would expect from this index that social status in Japan would mean more or have more significance than in the United States. Therefore, a lawsuit involving someone of high social status may be considered differently by judges in Japan than in the United States.

In addition, if Case Study No. 3 had dealt with a lawsuit brought by an ordinary citizen against the government tax office, the latter party would probably be favored. From a historical and cultural perspective, the Japanese government has always had a prominent status in Japan society. In a high PDI country like Japan, one would expect that the power and authority of government would be superior to that of an ordinary citizen. However, in Case Study No. 3, the Japanese jurists favored Kazu, the son of a former Prime Minister (albeit through the Hatsu Artist Guild) over that of the government tax office. Kazu's high social status may have neutralized the power and authority of the tax office. If this is true, then social status does matter to Japanese jurists. This may be an important consideration in Japan when selecting parties to be named in a legal action or witnesses to testify.

9. Both Japan and the Philippines are relatively homogeneous societies. The United States, on the other hand, is more culturally and ethnically diverse. I identified as an emic that Japanese jurists did not believe that cultural differences between parties involved in a dispute were relevant. This is contrary to jurists in the United States who expressed an interest in and appreciation of cultural differences, and felt them potentially relevant to gaining insight into understanding the nature of a dispute. Homogeneous
societies may not appreciate cultural diversity as it is not something needed to survive in that society. I believe that the relative homogeneity of Japanese society is a reason for this emic.

ii. **Emics of the United States Legal Regime**

1. A significant emic identified in the case of American jurists is their appreciation of their ability to better understand different situations based on their own life experience and diverse employment backgrounds. Many American jurists are nominated for judicial positions after working for several years in the legal field. They are not career judges like the Japanese jurists who typically enter the judiciary directly after completing school. The American jurists acknowledged the importance of this formative period of their careers where they may have done legal or non-legal type work and learned to understand people and the world from a different perspective than as a judge. In fact, it is commonplace for American jurists to refer to their past in framing questions they pose to legal counsel. I inferred that this aspect of personal experience and empathy contributed toward an ability to better understand the factual circumstances involved in a case.

2. Under a common law system, American judges have more flexibility or rather broader discretion in their ability to apply the law to a case. This emic is, in part, due to the foundation of the common law system which provides judges with wider judicial discretion in order to create a better "fit" between law and its ability to deal with a multitude of varying real life situations. As mentioned previously, this aspect of the common law system separates it from the civil law system. For example, if a law is vague or ambiguous "on its face" a common law system judge may look beyond the
"four corners" of the statute to determine what the legislative intent behind that law is. He does this through an examination of legislative committee reports, hearing transcripts, and public testimony given to the legislative body, etc. The American jurist can also use the doctrine of equity to decide a case if the law as applied would result in an inequity or unfairness. Attorneys in the U.S. oftentimes will argue the ambiguity of the law and refer to the legislative intent behind the law if it helps the case.

3. A third emic identified for the American legal regime is the acknowledgement by its jurists that a legally correct decision (i.e., a decision which complies with the technical provisions of a statute or regulation) may not necessarily result in a fair outcome. The American jurists did not equate "fairness" or "justice" to a legally correct decision. That is, a legally correct decision could result in "unfairness" or "injustice." The Dred Scott case was pointed out as an example of this point. In Dred Scott, the United States Supreme Court held that the free descendants of slaves were not citizens, and said that slaves were property rather than persons. Many scholars believe that this decision (which prompted the American Civil War) albeit consistent with the laws at that time, created injustice and unfairness. The concepts of "fairness" or "justice" are difficult to define as they include ethical, moral and religious considerations. Differences in these concepts may arise on a national level, as well as on an individual level. For this reason, it becomes more important to assess a jurist's personal sense of fairness in the U.S. versus in Japan. As mentioned previously, the Japanese emic equates law to fairness. The differences on this particular emic could be extremely significant to litigants who wish to optimize their chances of prevailing.
4. American jurists exhibited in words and body language a sense of being free and independent thinkers. They expressed an appreciation of precedent but not to the extent that it “tied their hands” to think and act as they felt. This was not the case with jurists from Japan who repeatedly brought up the legal constraints to their authority and ability to do what they thought was right or fair. Philippine jurists were similar to their American counterparts on this emic. In cases where the law is clear and if applied would work against a client, the attorney will argue unfairness and inequity to give his client a chance of prevailing.

5. American jurists seemed to be somewhat insensitive to distinctions on the nationality of the parties appearing before them. The relatively high standard of living in the United States and the international and diverse character of its population may have desensitized American judges from making any distinction based on national origin except in cases which deal with jurisdiction or conflict of law questions. Although Japan and the United States seem to be aligned on this emic, the Philippines did not share this characteristic.

6. The impact to society that a judicial decision makes cannot be ignored by jurists in any legal regime because they are part of that community. However, the relative importance of that impact may vary from jurist to jurist. To American jurists, this factor seemed to be irrelevant so long as there was no unfairness or injustice. American judges refused to be swayed by public pressure just to make decisions that were popular. Perhaps their sense of personal independence gave them some immunity from considering social impact.
7. Another emic identified was that American jurists did not believe that using the legal system to profit from was necessarily a bad thing. In fact, they recognized that some people made a living from it (referring to attorneys who brought legal actions to hinder businesses or hold them hostage so that a profitable settlement might be reached). Patent infringement lawsuits provide a vehicle to enterprising plaintiffs who acquire or possess patent rights that are arguably within a larger line or assemblage of patents needed to manufacture a product. The plaintiff "lies in wait" so to speak, until someone else manufactures the product and becomes successful. Then a lawsuit is filed that generally places a "chilling" effect on product sales and the manufacturer must now consider the high legal costs of litigation and the uncertainty of what may lie ahead. In light of this, settlement of the lawsuit is oftentimes a reasonable alternative to pursue and the plaintiff is generally more than willing to withdraw his claims if generous.

8. The prior relationship between parties in a lawsuit is sometimes relevant to judicial decision making according to American jurists. Relationships are assessed by American judges to determine if bad faith or unethical conduct is involved. At times, an examination of the party's prior relationship can reveal disloyalty, breach of trust or even fraud. It is also a factor that can unveil the underlying motives or intentions of parties. American jurists believe that understanding the "real" reason (as distinguished from mere legal argument) of why parties are involved in a lawsuit can assist them in the handling of the case and fashioning an appropriate outcome.

9. An emic of the United States legal regime is the judicial doctrine present in cases involving governmental action. For example, whenever a plaintiff challenges the
decision made by a governmental body U.S. Courts will give the decision of that governmental body a “presumption of validity.” The presumption is justified on the basis that government agencies vis a vis the court have more expertise in the litigated subject matter and are closer to the situation, therefore, can make better decisions. Ergo, courts are reluctant to “second guess” the actions and decisions of the legislative and executive branches of government. It is only when government acts are deemed “arbitrary or capricious” or “clearly erroneous” or violate law does judicial intervention occur. In the case of challenges to a statute, courts will give legislative deference to its rationale unless it violates other laws. This American emic is also shared by the Philippine legal regime.

10. Another American emic is that U.S. jurists are not influenced by the social status of the parties appearing in a case before them. Social status tends to be important to cultures which are hierarchical in nature. These are societies in which people are placed into social classes or levels of importance or rank. According to Hofstede, human pecking orders are part of the “universal” level of human mental programming (Hofstede 2001, 8). However, this form of human dominance varies from one culture to another. The United States has a relatively low PDI, which is a measure of how important social status is. In fact, the U.S. is lower than the rankings of both Japan and the Philippines. Therefore, social status should mean less to an American than the Japanese or Filipino, which supports the emic that American judges do not give much consideration or weight to a party’s social standing.

11. American jurists perform a “balancing test” in cases where a judicial dilemma is posed. In the foregoing situation, the jurist would engage in a balancing of the relative strengths and weakness of both sides of the equation in order to reach a final
decision. In contrast, jurists from Japan do not utilize a balancing analysis and in most cases would uphold the legal right created by codified law regardless of outcome. As a consequence, American attorneys will argue both sides of the case to give the judge a sense of which way the balancing of interests should lean.

12. As an emic, American jurists seemed to display a high amount of empathy for cultural differences. I believe this emic exists because of the ethnic and cultural diversity of the United States. In order to survive successfully in the U.S., it is important to get along with other ethnic and culturally different groups. American jurists believe that understanding culture may give insight into the background of a case and how parties view a situation or conflict. (e.g., the significance of a Spanish Catholic cross located on government lands in San Diego). This in turn, can better prepare jurists in fashioning appropriate remedies and tailoring the law to better fit the facts. A measure of the lack of familiarity or probability that others will be perceived as dissimilar is called “cultural distance” (Triandis 1994, 237). It is logical to expect that “cultural distance” would be greater for homogeneous societies like Japan and the Philippines than in the U.S.

13. In the U.S., legal regime jurists must follow *(stare decisis)* not only the decisions of the Supreme Court, but usually of the Appellate Courts, as well. This is not the same for civil law system which generally has no *stare decisis* requirement.

iii. The Emics of the Philippine Legal Regime

1. Surrounding the Philippine judiciary is the public perception of corruption and favoritism. An identified Philippine emic is the conscious effort of judges to hold themselves out as educated, trained professionals who are undaunted by the temptation of political influence, graft or corruption for personal gain. Whether corruption is a reality
or not, any party litigating a case in the Philippines must consider this matter when analyzing their chances of prevailing. I note that individuals who assisted us in locating jurists to interview expressed concern that they needed to find jurists who would create "a good impression" for this research. It was inferred from this concern that there were certain judges that they did not want me to talk to because of the above perception. This emic was not shared by either the U.S. or Japanese jurists. As discussed in the Data Analysis chapter, the corruption factor can effectively trump all emics of a legal regime, if in fact, a jurist acts in a manner that is the result of corruption.

2. An identified emic of the Philippine legal regime was that nationality of the parties could be relevant and might affect decision making. An underlying sense of nationalism was present in some of the Philippine jurist responses when questioned on this topic. A party from a foreign country should bear this in mind when choosing the appropriate venue to file an IP lawsuit in. After all, having the "home court" advantage could be critical to success.

3. The Philippines rated the highest of all three venues in the PDI (Hofstede 2001, 87). It was, therefore, expected that Philippine jurists would take notice of the social status of the parties involved in a case. The Philippines also ranked high as a collectivist society (Hofstede 2001, 216-219). According to Triandis, in collectivist cultures the self is defined in terms of membership in in-groups which influence a variety of social behaviors (Triandis 1994, 165). Collectivist societies give priority to in-group goals as distinguished from individual achievement (Trompenaars and Hampden-Turner 1998, 59). Philippine society is composed of a tight knit network of relationships through family, friends and employment. Individuals in the Philippines are normally introduced
by who they are related to or who they know i.e., friends or mutual acquaintances. Typical of collectivist societies is that the group you belong to i.e., the in-group, defines your identity and social status. To Philippine jurists, who you are matters. In bringing a legal action in the Philippines careful consideration should be given on what parties you align yourself with either as plaintiff or defendant.

4. Similar to the American emic, Philippine jurists felt they had more judicial discretion than their Japanese counterparts. Of course, by way of limitation, they felt they must follow the law, but if fairness could not be achieved by a strict application of the law, then they could “bend the law” but not break it. In preparing a case to be litigated in the Philippines, one would probably use the same type of approach in the presentation of facts and arguments of law as used in American courts. Factors such as motivation, and prior relationship may be material to the disposition of the case, and should be included (if relevant) to take advantage of the wider judicial discretion.

5. Philippine jurists were not concerned about the impact to society from their decisions. Consideration of “fairness” seemed to be localized to only the parties in a case rather than to the greater society. It has been found that there is a correlation between a high PDI and a country with lower education levels amongst its citizens (Hofstede 2001, 88). The Philippines has a high percentage poor and uneducated people in its population. In high PDI countries like the Philippines, the powerful are entitled to use their power to increase their wealth. This may be related to the corruption factor. Although, on the surface everyone is equal under the law, in reality the powerful generally win their cases (Hofstede 2001, 111-112). If the powerful always win their cases, then impacts to society are a subordinate consideration.
6. An expected emic was that Philippine jurists would consider the prior relationship of the parties relevant in deciding a case. This finding was confirmed. I believe that the collectivist nature of Philippine society made relationships amongst members of the group important. In light of this, relationships are relevant. Again, this may be an important consideration in preparing a case to litigate before a Philippine court.

7. Cultural differences amongst the parties were not considered to be relevant to judicial decision making. This was also not relevant to the Japanese jurists. Since both Japanese and Philippine cultures are somewhat homogenous in nature, this may account for the presence of this emic.

Parties that litigate IP cases in any one of the above legal regimes should be cognizant of the emics of that respective regime in order to properly structure their case and enhance their chances of prevailing. Failure to do so could prove fatal and incur significant delay or damages.

In addition to the above emic and etic comparisons, I also analyzed the outcomes across the five case studies and three legal jurisdictions. A summary of the results are set forth below:

<table>
<thead>
<tr>
<th>Case Study</th>
<th>Jurist</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>No. 1</td>
<td>Japanese:</td>
<td>(5) no decision</td>
</tr>
<tr>
<td></td>
<td>American:</td>
<td>(1) favored NTP</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(4) no decision</td>
</tr>
<tr>
<td></td>
<td>Philippine:</td>
<td>(3) favored NTP</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(3) favored RIM</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(1) no decision</td>
</tr>
<tr>
<td>No. 2</td>
<td>Japanese: (5) no decision</td>
<td>American: (4) favored Rojas, (1) no decision</td>
</tr>
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<tr>
<td>No. 3</td>
<td>Japanese: (4) favored Hatsu Artist Guild, (1) no decision</td>
<td>American: (3) favored Hatsu Tax Office, (2) favored Hatsu Artist Guild</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No. 4</td>
<td>Japanese: (5) no decision</td>
<td>American: (4) favored Zuno tribe, (1) favored Dr. Science</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No. 5</td>
<td>Japanese: (4) no decision, (1) favored foreign patent holders</td>
<td>American: (3) favored RFC, (1) favored foreign patent holders, (1) no decision</td>
</tr>
</tbody>
</table>

Based on the above generated outcomes, I make the following observations.

Judicial decision making is not uniform even within the same legal regime (not including
regimes in which all jurists registered a “no decision” response). In some situations, judicial outcomes were diametrically opposed to each other within the same regime and across regimes (see Case Study Nos. 3 and 4).

As mentioned previously, interview subjects were generally not prompted to answer how they would rule in a particular case. Rather, they, in most instances, volunteered responses on how they would rule. Notwithstanding the above, specific questions on how one would decide a case or which party should prevail was included within the text of the case studies (i.e., Case Study Nos. 2, 3, 4 and 5). I also note that most of the “no decision” responses from all jurists were registered in the first two case studies. By way of explanation, a “no decision” response was recorded when interview subjects did not offer any response, declined to respond or responded in a manner which did not lead to an identified decision favoring one party over another. For example, a response which would be recorded as an affirmative “decision” would be as follows:

Q: So as a judge, how would you rule?
A: I would enjoin publication on the Internet. (JJ-1).

A response which would be illustrative of a “no decision” would be as follows:

Q: On this particular fact pattern, how would he rule in this particular case? He can explain to me how he would analyze the case, if that’s helpful.
A: That’s easier. Easier than the decision. The first issue is whether Dr. Science loses a major criteria for getting his patent because of Dr. Espino’s paper. I assume I will analyze Dr. Espino’s paper. (JJ-5).
Another type of "no decision" response is as follows:

Q: ... what would you think to be perhaps the most important consideration that you might look at in terms of whether you would issue an injunction or not?

A: So while I can venture an opinion, I ... I would rather refrain from ... (JP-7).

I believe that "no decisions" may have occurred because of the subject’s initial anxiety and unfamiliarity with the expectations of the interview sessions. However, as the interview sessions proceeded, interviewees became more comfortable and I encountered fewer "no decision" responses.

The Japanese registered the highest number of "no decision" responses during the interviews. In particular, they registered "no decision" responses in four out of the five cases. The only case in which they gave an affirmative response to was in Case Study No. 3, which curiously dealt with Japanese parties. There may have been several reasons for the Japanese jurists' "no decision" responses. A principle reason may have been the existence of the "judicial dilemmas." The presence of the "judicial dilemmas" in each of the case studies (each presenting a different level or kind of dilemma) took the jurists outside of their comfort zone. One will recall many of the Japanese responses to various questions revolved about their limited judicial authority and the strict application of the law. The dilemmas required jurists to deal with ethical and moral issues that were either in conflict with applicable law or required consideration of facts not authorized by the law. Understandably, Japanese jurists exhibited the most discomfort when presented with these dilemmas, although they never answered the question directly they
nevertheless talked about related issues. The civil law system was not designed to handle judicial dilemmas or at least to handle them well. In contrast, common law system was designed to handle judicial dilemmas by such mechanisms as the doctrine of equity.

In addition, the culture of the Japanese did not make it any easier for the jurists to respond openly when presented with these dilemmas. Japan is considered a closed rather than open society, and this can promote more reserved behavior on the part of its jurists. Sharing personal thoughts (as distinguished from official judicial views) on interview questions may be deemed inappropriate behavior. This is also consistent with the Japanese cultural concepts of *honne* (true feelings, real motivation) and *tatemae* (outwardly expressed feelings, stated motivation) (Kodansha's Romanized Japanese-English Dictionary 2001, 153, 531). *Honne* sometimes reveals itself to the outside world by the eruption of a *hōgen* (irresponsible utterance) or a *shitsugen* (slip of the tongue). On the other hand, *tatemae* is what is shown openly and are statements which are consistent with Japanese norms (Hagstrom 2000). Japanese are generally collectivist in nature (Hofstede 2001, 212-215), and distinctions between (*uchī*) in-group and (*soto*) out-group members justifies a kind of favoritism for the former and its use of *honne*. Conversations with out-group members usually use *tatemae*, except for "close" friends (Hori 2004, 11). Since I was a stranger to the Japanese jurists, *tatemae* responses were expected.

During the interview, one Japanese jurist made a distinction between two different types of responses he had provided to my question. He labeled one response "formal" and the other "informal." I understood him to mean *tatemae* and *honne*. I was cognizant of the distinction between the two types of responses and used the "judicial dilemmas" to
make *tatemae* responses sound unreasonable or uncaring. It was my hope to solicit more *honne* responses by doing so. In the end, this strategy proved ineffective. Apparently, the Japanese jurists would only venture so far and decided in the end to remain silent.

I attempted to locate patterns of similar outcomes. In Case Study Nos. 3 and 5, Philippine and American jurists were aligned together on outcome. However, Japanese jurists did not respond in Case Study No. 5, and voiced their support for the opposing party in Case Study No. 3. Actually, to be more accurate, one Japanese jurist did register a response in Case Study No. 5, but it was not consistent with American and Philippine responses. In the remaining three case studies (Case Study Nos. 1, 2 and 4) the American jurists registered decisions which were not in agreement with the Philippine jurists and, therefore, uniformity across three regimes was not possible.

No patterns of similar outcome across all three legal regimes were observed. I, however, note that in Case Study Nos. 3 and 5, the American and Philippine jurists registered similar decisions. Unfortunately, the “no decision” responses registered by the Japanese jurists made us unable to determine if they would have been consistent with the American and Philippine outcomes. However, I did find that some patterns of similarity were present on an intra-regime basis. This supports and explains the presence of emics for each legal regime. That is, jurists from a legal regime thought similarly about how they arrived at a decision.

The data showed that consistent judicial decisions occurred more on an intra-regime basis than on a inter-regime basis given the same law and facts. From this, it was concluded that harmonization of law alone may not generate uniform legal results across different legal regimes.
This research also identified only four etics or common traits amongst the jurists from all three legal regimes. In comparison, there were twenty-nine total emics or specific traits identified. Emics are specific to one or two legal regimes, but not all. The emics to etics ratio (1:7.25) indicate that jurists from different legal regimes have more differences than similarities on how they mentally process the facts and the law in reaching decisions.

When these results were compared with the data on outcomes, it supported a finding that similarity of outcome occurred only on an intra-regime basis. This is an expected result since jurists from each legal regime used similar mental processes and shared the same beliefs on judicial decision making.

The research findings indicate that decision making processes on a legal regime basis are distinct and different. The determination by jurists of which facts were relevant or not or how law should be interpreted varied by regime. Convergence theory postulates that harmonization of laws will bring about similar, and therefore, predictable outcomes. However, this research has shown that harmonization of law alone may not bring about uniform judicial outcomes across three regimes. Other factors like the legal regime of each country may also affect consistency of judicial decisions.

Based on the foregoing, convergence theory as used by WTO under TRIPS may not work effectively or properly. Clearly, legal regimes appear to have a moderating effect on outcome. In order for convergence theory to work, legal regimes should also be harmonized in order to eliminate or reduce their emics. Creating uniformity of legal decisions across all legal regimes means more than changing its “legal software.” It may require changing the hard drive.
CHAPTER 7
CONCLUSION AND FUTURE RESEARCH

Law, like technology, is very much the fruit of human experience. Since law is so unique, global harmonization of law may not be possible (Watson 1993, 100-101). Yet, the goals of multilateral trade organizations like the WTO seek to promote a legal union amongst its member nations through the harmonization process. This research has focused on whether harmonization of law is the panacea for creating uniform and predictable legal resolutions to IP conflicts. I conclude that it is not. Legal regimes appear to moderate judicial outcome and each regime is unique to its culture.

This conclusion is based upon several findings made in this research. I will summarize these findings and relate them to convergence theory and harmonization of law.

I have identified four etics or common traits amongst the jurists across all legal regimes. These etics are shared traits or beliefs amongst all jurists.

1. The role of a judge is to act within the law and not go beyond it.

2. The notion that “justice should be blind” and that a party’s personal characteristics are not to be considered in making a decision.

3. A party who violates the law must bear the consequences imposed by the legal system.

4. The role of the judge is to uphold their Constitution for the benefit of the citizens of their country.

The etics provide an understanding amongst the jurists in all three regimes as to how the regimes of their country should function and the role that jurists play.
1. *The role of a judge is to act within the law.*

All jurists believed that their judicial role was to act within the scope of the law. To go beyond it would result in inconsistent and unpredictable outcomes. In some cases, jurists were concerned that to act outside the law would place them into the forbidden territory of legislating rather than interpreting the law. Of course, how each regime defined its limits differed.

2. "*Justice should be blind.*"

As a general proposition, the jurists believed that they should rule on the law and the facts presented. Consideration of the personal characteristics of parties should have no bearing or relevance to decision making. These characteristics include factors such as gender, age, nationality, economic standing, social status, etc. I note that this etic held true only as a general proposition. As for the Japanese and Philippine jurists, certain specific characteristics were deemed relevant to their decision making (i.e., social status and nationality).


Most jurists felt that the purpose of the legal regime was to ensure that citizens obeyed the law. If violations of the law occurred, it was the regime’s function and the role of the jurist to enforce the law. Those who violated the IP laws were vulnerable to sanctions or damages imposed by the court.


As a general proposition, all jurists believed that their role was to protect the Constitution and laws of their country. That being said, how they went about
protecting the Constitution and laws differed and resulted in some of the identified emics discussed below.

My findings also included the emics or traits held by jurists within a specific legal regime that are not shared by jurists from other regimes. The identification of these emics is important because they set jurists apart by legal regime. The existence of an emic indicates that law and fact are mentally processed through each legal regime in a different manner.

Twenty-nine emics were identified amongst the three legal regimes. Some of the emics were shared between two regimes but not all three. The emics identified by legal regime are as follows:

1. **Legal Regime of Japan.**
   
   A) Japanese jurists have less ability to deviate from a strict application of the law than their common law counterparts in the U.S. and Philippines.

   B) A "legally correct" decision must yield a "fair" result.

   C) Jurists do not consider the impact to society caused by their decisions.

   D) Japanese jurists must only follow the decisions of the Supreme Court.

   E) Jurists do not consider the nationality of a party for decision making.

   F) Under IP law, Japanese jurists cannot consider the motives or intentions of the parties.

   G) Jurists do not consider the "prior relationship" of the parties in decision making.

   H) Jurists do consider the social status of the parties in making decisions.
I) Jurists do not consider cultural differences between the parties in making their decisions.

The most important emic for the Japanese legal regime is the fact that it provides less flexibility and discretion to its jurists in the carrying out of their decision making function. This is supported by the other Japanese emics which indicate that Japanese jurists cannot consider external factors (with the exception of social status) present in a case (e.g., prior business relationship, motivation, etc.) as being relevant or significant to decision making. Cases in Japan must be tailored to fit within the applicable code or statute since decisions are restricted to the law.

2. **Legal regime of the United States.**

   A) American jurists believe that they are better able to make good decisions because of their diverse backgrounds and life experiences gained before becoming a judge.

   B) American jurists have greater flexibility and judicial discretion than their Japanese counterparts.

   C) Jurists believe that a “legally correct” decision may not necessarily lead to a “fair” or “just” outcome.

   D) Jurists believe that they are free to be independent thinkers in carrying out their role as judges.

   E) Jurists do not consider the nationality of the parties relevant to decision making.

   F) Jurists can consider the impact of their decisions on society.
G) Jurists believed that use of the legal system to profit off of is not necessarily a bad activity.

H) Jurists can consider the prior relationship of the parties in making their decisions.

I) Government action is given a presumption of validity.

J) Jurists do not consider the social status of the parties to be relevant to decision making.

K) Jurists use a "balancing test" when deciding a case involving a judicial dilemma.

L) Cultural differences amongst the parties may be relevant to decision making.

M) The decisions of the Supreme Court and appellate courts must be followed by lower courts.

There are significant differences in the emics between U.S. jurists and those of Japan. One of the more significant differences is in the greater amount of judicial discretion American jurists can employ in deciding a case. This is supported by the finding that the number of external factors which U.S. jurists can consider exceeds those considered by Japanese jurists. The ability to consider additional factors can affect judicial decision making.

3. Legal Regime of the Philippines.

A) Public perception of corruption and politicization of the judicial system.

B) Jurists do consider the nationality of the parties in decision making.
C) Jurists do consider the social status of the parties in decision making.

D) Philippine jurists have more judicial discretion than their counterparts in Japan.

E) Jurists do not believe that the impact of their decisions on society is important.

F) Jurists can examine the prior relationship between the parties.

G) Cultural differences are not a relevant consideration for Philippine jurists.

There are two significant emics for the Philippine legal regime. They are the public perception of judicial corruption and the ability of Philippine jurists to exercise wider judicial discretion than their counterparts in Japan. As previously discussed, the Philippine emic of corruption can have an overriding effect on all other emics and etics because decisions based on corruption are not reached through traditional mental processes utilized in judicial decision making. The other important emic is that the Philippine legal regime is similar to that of the United States in that principles of equity are available and allow jurists to look beyond the law under certain circumstances.

The emics or unique traits or beliefs held by the jurists of a particular legal regime are important because they are evidence of specific mental processes or beliefs that are employed to reach an outcome in that regime. My findings indicate that each legal regime has a number of emics. It follows that if the mental processes in which jurists go through in order to reach a decision vary, that outcomes will also vary. My preliminary conclusion is that based on the above enumerated emics for each legal regime that outcomes for those regimes would not be the same. In order to corroborate my
conclusion, I analyzed the outcome data from the case studies. The outcome data is illustrated in the following figures. (Figures 6, 7, 8, 9 and 10). The conclusions drawn from these charts are not statistically based and only reflect qualitative data based on the response of individual jurists.

The results of my outcome data indicated that the results were not uniform or consistent across the five case studies. In other words, jurists from all three regimes did not decide all of the cases in the same manner. I note, however, that Japanese jurists gave no responses to the question on outcome in four out of the five cases. The only case study in which the Japanese rendered a decision was in Case Study No. 3. Curiously, this was the only set of facts that dealt with Japanese parties. In Case Study No. 3, the decision of the American and Philippine jurists was in direct contradiction to that of the Japanese jurists.

Only in Case Study No. 5 was there a possibility of a uniform decision amongst all three regimes. Both American and Philippine jurists were in general agreement as to who should prevail. Unfortunately, all of the Japanese jurists but one, registered no response when questioned on their decision in that case. Oddly, the one Japanese response favored the party that the American and Philippine jurists did not. The three other case studies (i.e., Case Study Nos. 1, 2 and 4) indicated no pattern of similarity between the Philippine and American jurists and, therefore, offered no opportunity for uniform outcomes across three regimes.

I considered some of the possible reasons for the high number of no responses that were obtained from the Japanese jurists. For one, it is believed that the “judicial dilemma” presented in each case study took the Japanese jurists beyond their comfort
Case Study 1

FIGURE 6

(Original chart by author)
Case Study 2

FIGURE 7

(Original chart by author)

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Case Study 3

FIGURE 8

(Original chart by author)
Case Study 4

FIGURE 9
(Original chart by author)
Case Study 5

FIGURE 10

(Original chart by author)
zone. It forced them into a territory that the civil law system was not designed to handle. That is, an area in which judges must use their "gut reaction, common sense and street smarts" to analyze the facts, interpret the law, and fashion an outcome that addressed "fairness" to all parties. In order to attain a fair outcome, jurists must be allowed to consider evidence that would otherwise be deemed irrelevant or extraneous, and to also fashion remedies or sanctions that fit the situation. In contrast to the civil law system, the common law system is designed to accomplish that objective. In addition, it is also suspected that the cultural concepts of honne and tatemae discussed previously contributed to the Japanese jurist's discomfort and non-responses.

Analysis of the outcome data for the five case studies showed that there were no patterns of similar outcome existing across all three legal regimes. Patterns of similar outcome occurred only on an intra-regime basis. This finding is logically consistent with the presence of emics amongst the jurists of a single regime. If one uniformly trains and educates a group of decision makers their decisions should be more similar to one another than to the decisions of another group trained elsewhere and educated differently.

The emic data has shown that each legal regime is unique and special. Their uniqueness clearly outweighed the number of similarities or etics amongst the three regimes. How a jurist from a particular regime views the facts, interprets the law, and exercises its judicial discretion are all steps in the process of judicial decision making. When these steps are different, one can expect that outcomes will also be different. Notwithstanding whether similar laws are adopted by different countries, their legal regimes appear to moderate the results and outcomes.
From this conclusion, I assert that convergence theory embraced by multilateral trade organizations like the WTO (through the TRIPS Agreement) may not achieve uniformity and predictability of result. Although the “level playing field” sought after by the TRIPS and the WTO is a logical goal, it is seemingly only an illusion. Harmonization of law may not achieve that goal in isolation.

I believe that future research within this area is appropriate. Other areas may include the study of religious based legal regimes (e.g., Muslim and Hindu) and a socio-politically based legal regimes (e.g., the judicial system of Hong Kong P.R.C., which is British in origin, but heavily influenced by Communism and laced with Chinese traditions, socialist societies, etc.). These legal regimes are also found in countries which are signatories to TRIPS.

Additional research could also include studying the responses of each jurist across all five case studies to determine whether their respective responses were consistent or indicated any patterns based on personal or demographic data. In addition, more study may be called for in the area of dilemmas. That is, distinguishing “judicial decision” from other types of dilemmas and how subjects react to them when presented. More study could also be done in the area of corruption and how that impacts judicial decision making and legal regimes.

Since Japan and Korea have very similar legal regimes, a comparative analysis of these regimes may demonstrate cultural or other types of differences in judicial decision making. This research could validate whether harmonization of legal regimes (as distinguished from law alone) is also important to globalization policies and objectives.
As the globalization process continues, convergence theory will be relied on to push for harmonization of other areas. This could include areas such as financial standards for accounting practices, and laws dealing with corporations, securities, labor and tax. It is expected that many of these additional areas will generate disputes and conflicts which must be resolved through the legal process. Legal regimes, therefore, will need to be better equipped to handle conflicts in a predictable and consistent way if convergence is to work.

Research in Motion (“RIM”), the Canadian maker of the Blackberry handheld (“smart phone”) device was sued by a little known U.S. based company called NfP for patent infringement in November 2001. The dispute revolved around five (5) patents that NfP had registered in the United States, which related to the technology for sending emails wirelessly to a mobile device. RIM manufactures and sells its Blackberry smart phone, which is a wireless mobile device that uses certain technology covered under some of NfP’s patents. NfP has no significant assets other than the patents in question and has never commercialized them. RIM, on the other hand, has sold millions of the Blackberry smart phones and has made substantial profits off of its sales. A U.S. District Court is poised to issue an injunction on RIM in the U.S., which could be disastrous since seventy (70) percent of its revenues is derived from U.S. customers. This is despite the U.S. Patent and Trademark Office issuing a final decision that two (2) of the five (5) patents were invalid. What are your thoughts about this case? Is the patent law being used in this case to promote or deter innovation and research?

Case Study No. 2. (Trademark – Infringement).

Rojas Sportswear Co. (“Rojas”), a Philippine swimsuit maker, obtained a U.S. and Philippine trademark for its new swimwear line called “Mango Beach” in 1992. The name was tied to the distinct yellowish color of the swimwear and its design, which made customers look slimmer. The Mango Beach line of swimwear was publicized in fashion magazines and even sold for a brief time by Victoria Secrets catalogue, which is published by Victoria Secrets Catalogue, Inc., a United States corporation. In 1993, Victoria Secret Stores, Inc. began selling a yellow colored line of bikinis, which was named “Sweet Mango” and for which a trademark was obtained. The next year the Sweet Mango bikinis and other types of swimwear debuted in the Victoria Secret’s catalogue and stores. Rojas filed an action in U.S. court against Victoria Secret Stores and Catalogue alleging, in part, that the “Sweet Mango” mark, when applied to swimwear, infringed upon the “Mango Beach” swimwear. Rojas argued that there was a “possibility of confusion” between the marks. Victoria Secret contended that the applicable legal standard was “likelihood of confusion” and that there was no likelihood of confusion. How would you rule in this case? Explain.
Case Study No. 3 (Copyright – Social Status and Artist’s Infringement).

Kazu, a famous artist and son of a former Prime Minister, lives in a small town called Hatsu Village located within the jurisdictional limits of the city of Akaboshi. Recently, sales of his paintings have decreased and because of his high expense lifestyle, Kazu has stopped paying his taxes. The Hatsu Village tax office files a lien against Kazu’s assets and confiscates his paintings. In an effort to pay down the outstanding taxes owed by Kazu, the Hatsu Village tax office placed digital photos of Kazu’s paintings on the Internet to auction them off. Meanwhile, the Hatsu Artists Guild, a non-profit artist group which manages the copyrights for member artists like Kazu, was tipped off by Kazu of the sale of his paintings on the Internet. The Hatsu Artist Guild asked Hatsu Village government officials to cease and desist placing photos on the Internet of Kazu’s paintings, as they believe it constituted a violation of the copyright laws. Hatsu Village tax officials disagreed and continued to display photos of Kazu’s paintings. The Hatsu Artist Guild then filed legal action against Hatsu Village tax office for violation of the copyright laws. Who do you believe should prevail in this case? Please discuss your thoughts on this case.

Case Study No. 4 (Patent – Private vs. Public Knowledge).

In August 2001, Dr. Science discovered a method of synthetically producing a medical compound formerly only extracted from bark of a tree growing only in South America. The compound was effective in treating headaches. He did not immediately file a patent application, but instead worked on related projects. In September 2002, Dr. Espino published an article in a Philippine scientific journal that, while not describing Dr. Science’s method as such, described the method as one obvious to a person with ordinary skill in the art when considered in combination with earlier methods of synthesizing chemical compounds well known in the U.S. Dr. Espino also pointed out in his article that the Zuno tribe in South America had used the bark of this tree as medicine for its people for centuries for the treatment of headaches.

Dr. Science applied for a U.S. patent in November 2003. Should the application be granted? What if Dr. Science applied in November 2002? What if Dr. Espino had published his article in November 2000?
Case Study No. 5 (Plant-Genetic Resources for Humankind – Patent Infringement).

A private non-profit association, Rice for Children ("RFC") has knowledge of the complex biotechnological process and products to produce an Asian strain of rice which contains Vitamin A. Vitamin A is very important for the physical development of children and women of child bearing age. The rice strain is especially important for poorer Asian countries where many millions of children are at risk for disease related to Vitamin A deficiency. As a service and benefit to humankind, RFC desires to provide Asian countries with free and open access to the biotechnological process and products to produce this variety of Vitamin A rice. However, due to the increasing complexity of IP laws and rapid expansion of plant biotechnology since the 1990s, the ability of RFC to provide countries with access to this valuable information has run into some major legal roadblocks. The private sector’s large R&D investment in plant biotechnology has resulted in many international patents in the area of rice strains. This information (held by companies in the United States, Japan, Taiwan, and Switzerland) is not freely available to the public and may legally prevent the free and open dissemination of Vitamin A biotechnological information to poor Asian countries, who desperately could use this information.

You serve as a judge in a poor Asian country that needs this rice. However, there are several patents in your country held by four (4) large foreign companies which are directly related to some of the processes used to develop the Vitamin A rice. RFC has been sued by the four (4) foreign companies on patent infringement for attempting to supply the biotechnological products and process information to your country. How will you handle this case? Who will prevail and why?
事例研究 No.1 （特許権侵害 — David vs. Goliath）

ハンドヘルド装置（“smart phone”）、Blackberryの製造業者であるカナダのResearch in Motion（以下“RIM”）は2001年11月に世間であまり知られていないNTP社と呼ばれる米国に本拠のある会社に特許権侵害で訴えられた。論争はNTPが米国で登録した、ワイヤレスで電子メールをモバイル装置に送信する技術に関する5つの特許へと展開した。RIMはその中にいくつかのNTPの特許も含まれる、ある技術を使ったワイヤレス・モバイル装置、Blackberry smart phoneを製造、販売している。NTPは問題となっている特許の他には何ら主だった資産もなく、それらの特許を商品化することもなかった。一方、RIMは何百万台ものBlackberry smart phoneを販売し、その売り上げで相当な利益を得ていた。米国連邦裁判所はRIMに対して米国内での（販売）差し止め命令をまさに言い渡そうとしていた。その収入の70パーセントを米国の顧客から得ていたため、裁判所の判断はRIMにとって相当な損害となりうるものだった。この状況の最中、米国の特許・商標局はNTPの保有する5つの特許のうち2つを無効とする最終判断を下した。

さて、本件について、あなたのご意見はいかがなものでしょうか？本件に適用されている特許法は技術の革新と研究を促進するでしょうか？それとも抑止するでしょうか？
事例研究 No.2 （商標権侵害）

Rojas Sportswear 社（以下 Rojas）はフィリピンの水着製造業者で1992年に "Mango Beach" と呼ばれる新しい水着ラインでフィリピンと米国の商標を登録していた。その名前は着ている人をよりスリムに見せその水着の特徴的な黄色があった色彩とデザインに由来していた。Mango Beach ラインの水着はファッション雑誌で広告され、米国の法人、Victoria’s Secret catalogue 社が出版した Victoria’s Secret のカタログでも短い間、販売された。1993年に Victoria’s Secret Stores 社は黄色い色のビキニのラインの販売を開始し、その商品名を "Sweet Mango" と名づけ、商標を登録した。その翌年、Sweet Mango ビキニと他のタイプの水着が Victoria’s Secret のカタログや店頭でデビューした。Rojas は幾分、"Sweet Mango" の商標は "Mango Beach" 水着の商標権を侵害すると主張して、Victoria’s Secret Stores と Catalogue 社に対して米国の裁判所に訴訟を起こした。Rojas は双方の商標の間に "混同の可能性" があると主張した。Victoria’s Secret 側は適用される法的規範は "混同がありそうなこと" であり、そしてまだ混同がありそうなことはないとして争った。

さて、あなたは本件をどのように裁定されますか？ご説明下さい。
有名な画家であり、前総理大臣の息子であるKazuはあかほし市の行政管轄区域内に所在するはつ村と呼ばれている小さな町に在住している。最近、絵画の販売が減少したのと、その派手な生活ぶりからKazuは税金を納めることをやめてしまった。はつ村税務署はKazuの資産に対して先取特権を言い渡し、彼の絵画を没収した。Kazuが負う突出した税金を徴収する手段として、はつ村税務署はKazuの絵画を競売にかけるために彼の絵画のデジタル写真をインターネット・オークションに掲載した。一方では、Kazuのような芸術家のために彼らの著作権を保護する非営利団体、はつ芸術家団体はインターネット上での彼の絵画の販売についてKazuより知らされた。はつ芸術家団体は著作権法に違反する性質があると信じて、はつ村職員にインターネット上にKazuの写真を掲載することを中止するよう求めた。はつ村税務署職員はこれに同意せず、Kazuの絵画の写真をインターネット上に掲載し続けた。そこで、はつ芸術家団体は著作権法に違反するとして、はつ村税務署に対して訴訟を起こした。

さて、本件において、どちらが優勢だとお考えになりますか？あなたのご意見をお聞かせ下さい。
事例研究 No.4 （特許 - 個人 vs. 周知の知識）

2001年8月に、以前は南米のみに生息する樹木の樹皮からしか摘出されなかった頭痛の治療に効果のある化合物を合成的に製造する新しくかつ不明瞭な方法をScience博士は発明した。彼は直ちに特許出願を提出しなかった。しかし、そのかわりに関連プロジェクトに取り組んでいた。2002年9月、Espino博士はフィリピンの科学誌に論文を発表した。そこにはScience博士の方法を博士のものとして記述せずに、その分野の通常の技術のある人に対し、米国でよく知られている化学的化合物を合成する以前からの方法と併せて考えたときにその方法が明らかになるように記述した。Espino博士はまた南米のZuno族もこの樹木の樹皮を頭痛の治療薬として何世紀も使用しているとその彼の論文の中で指摘した。

2003年11月にScience博士は米国の特許を出願した。この出願は認められるべきでしょうか？もし、2002年11月にScience博士が出願していたなら、どうなっていたでしょうか？もし、Espino博士が2000年11月に彼の論文を発表していたらどうなっていたでしょうか？
事例研究 No. 5 （人類のための遺伝子学に関する植物の情報供給 — 特許権侵害）

民間の非営利協会、Rice for Children（以下 “RFC”）はビタミン A を含んだアジア種の米を生産する複雑なバイオテクノロジーの工程と生産品の知識を持っていた。ビタミン A は子供の身体的発育と妊娠、出産適齢期の女性にとって、とても重要だ。何百万人もの子供たちがビタミン A 欠乏に関係のある病気の危機にさらされている貧しいアジアの国々では、その米の品種は特に重要なものだ。人類への奉仕と利益として、RFC はアジアの国々に、このビタミン A の多様な米を生産するバイオテクノロジーの工程と生産品への、法律上制限のない自由なアクセスを供給することを強く願っていた。しかしながら、複雑さを増す知的財産保護法と１９９０年代からの植物バイオテクノロジーの急速な拡大のため、RFC がこの貴重な情報のアクセスを各国に供給する能力はいくつかの大きな法律上の障害に陥った。植物バイオテクノロジーへの民間セクターの多様な研究開発投資は米の品種の分野における多くの国際的特許に帰着することになった。この情報（米国、日本、台湾そしてスイスの企業に保有されている）は自由に一般に入手されず、このことは、この情報を必死に活用することのできる貧しいアジアの国々への、このビタミン A バイオテクノロジーの情報の法律上制限のない自由な普及を法律上、妨げるかもしれない。

あなたがこの米が必要な貧しいアジアの国で裁判官を務めているとします。しかしながら、ビタミン A 米の発育に使われる幾つかの工程に直接関係する、あなたの国内の４つの特許が外国の大企業に保有されています。バイオテクノロジー生産品とその工程情報をあなたの国へ供給しようと試みたと主張して、RFC は海外の企業 A 社から特許権侵害の罪で訴えられました。あなたは本件をどのように裁定しますか？どちらが優勢ですか？また、なぜ？
APPENDIX B

HUMAN SUBJECT ACKNOWLEDGMENT AND CONSENT FORM

1. Purpose of Research.

This research project is being conducted as a component of a dissertation for a doctoral degree at the University of Hawaii, Manoa campus, City and County of Honolulu, State of Hawaii, U.S.A. The purpose of this project is to learn how different legal regimes or systems may affect judicial decision-making on intellectual property cases involving similar facts and applicable laws. You are being asked to participate because you are or have been a judge who has rendered legal decisions in your respective country.

2. Interviews.

Participation in this project will consist of your answering a series of questions in an interview format. Legal case study hypotheticals will also be used in the interviews to solicit your opinions and responses to questions. Data from the interview will be summarized and organized into broad categories or patterns. No personal identifying information will be included with the research results. Each interview may take one to two hours approximately. Approximately, fifteen (15) judges will participate in this study. Interviews will be audio recorded for translation and transcription. Interviews conducted in Japan will be facilitated by a bilingual translator.

3. Confidentiality.

Research data will be confidential to the extent allowed by the laws of the United States. Agencies with research oversight, such as the University of Hawaii Committee on Human Studies, have the authority to review the research data. All records will be stored in a locked file in the researcher's office for the duration of the research project. All interview tape recordings will be destroyed upon completion of the project.


The investigator believes there is little or no risk to participating in this research project.

5. Use of Research Results.

Participation in this research may be of no direct benefit to you. It is believed, however, that the results from this project may help corporate decision-making in foreign direct investment and technology transfers. In addition, this research may help
multilateral trade organizations reexamine current policies favoring the harmonization of intellectual property laws by participants in the global marketplace.

6. No Compensation.

You will receive no compensation for time spent participating in this research project.

7. Voluntary Participation.

Participation in this research project is completely voluntary. You are free to withdraw from participation at any time during the interview process with no penalty, a loss of benefit to which you would otherwise be entitled.

8. Contact Information.

You may contact the researcher, Benjamin A. Kudo, at (808) 521-9500 or by email at bkudo@imanakakudo.com if you have any questions on the research project.

If you have any questions regarding your rights as a research participant, you may contact the University of Hawaii, Committee on Human Studies at (808) 956-5007.

The undersigned hereby acknowledges that he/she has read and understood the above information and agrees to participate in this research project.

Print Name: __________________________

Dated: ________________ By __________________________
研究参加への承認および同意書

1. 研究の目的

この研究プロジェクトは米国ハワイ州ハワイ郡・市に所在するハワイ大学マノアキャンパスにおける博士号取得のための学位論文の一環として実施されるものです。このプロジェクトの目的は異なった法的体制およびシステムが、類似した事実、適用法律が関わる知的財産保護法事案への司法の意思決定にいかに影響するかを学ぶためです。あなたは共々の国で司法の判断を下された裁判官であるか、もしくは以前に裁判官であったため、このプロジェクトへの参加を依頼されています。

2. インタビュー

このプロジェクトへの参加はインタビュー形式の一連の質問に対してあなたのご回答をいただくことになります。質問に対するあなたのご意見とご回答を引き出すために、法的事例研究の仮想的論法もまたインタビューの中で用いられます。インタビューから得られたデータは広範なカテゴリとパターンに妥当され、また系統立てられます。個人を識別できる情報は研究結果には一切含まれません。共々のインタビューは約1時間から2時間を要します。およそ15名の裁判官の方々がこの研究に参加されることになります。インタビューは翻訳と書き起こしのために音声録音されます。日本で行われるインタビューはパイリングガルの通訳者を介して行われます。

3. 秘密厳守

研究データは米国の法律で認められる範囲において秘密扱いにされます。ハワイ大学 Human Studies 委員会のような研究監督機関には研究データを閲覧する権限があります。全データは研究プロジェクトの存続期間中、研究者の事務所で施錠されたファイルに保管されます。全てのインタビューの録音テープはプロジェクトの完了時に破棄されます。

4. リスクの説知

研究者はこの研究プロジェクトに参加することは皆無リスクがないと信じています。

5. 研究結果の用途

この研究への参加はあなたにとって直接の利益はないかもしれませんが、しかしながら、このプロジェクトから得られた結果は外国への直接投資と技術移転についての企業の意思決定に役立つと信じられております。さらに、この研究は世界市場において、多国からなる通商組織が関係者によって知的財産保護法の協調を支持されている現在の方針を再検討するのに役立つことでしょう。

6. 無報酬

この研究プロジェクトへの参加にあなたが費やされた時間に対してあなたは、なんら報酬を受け取ることはありません。
7. 自由意志による参加

この研究プロジェクトへの参加は全ての自由意志によります。なんらペナルティーや、さらなる問題が発生するよう利用の損失を伴わず、インタビューの進行中いつでもインタビューへの参加をあなたから止めることができます。

8. 連絡先

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研究参加者の権利に関してご質問がありましたら、ハワイ大学 Human Studies 委員会、電話：米国、ハワイ（808）956-5007までご連絡下さい。

署名者は上記内容を読み理解した上で、この研究プロジェクトに参加することに同意したものと致します。

氏名：__________________________

日付：__________________________ 署名：__________________________
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