THE 'WHALE WARS' COME TO THE JAPANESE COURTROOM: COMPARING APPROACHES TO ACTIVISM

TREVOR RYAN[*]

ABSTRACT

This article describes the domestic context of Japan's decision to recall its whaling fleet before the anticipated end of the 2010-11 whaling season. The political economy that drives Japan's research whaling program has recently been subject to new levels of scrutiny. The article outlines the circumstances surrounding the trial of the 'Tokyo Two', two Greenpeace activists convicted in Japan of trespass and theft committed in the course of a unilateral investigation into allegations of embezzlement in the whaling industry. It argues that this trial seems to have had a significant impact on the level of transparency afforded to Japan's whaling industry. The article analyses the trial of Pete Bethune, an environmental activist from New Zealand convicted in a Japanese court of a number of offences committed in the course of obstructing the Japanese whaling fleet in the Southern Ocean. It then concludes that a comparison of the two trials has some important lessons for the theory and practice of activism and may shed some light on the future of the 'whale wars'.

I INTRODUCTION

On 18 February 2011, Japan's Minister of Agriculture, Forestry, and Fisheries announced an early end to Japan's research whaling season in the Southern Ocean 'to avoid any injury or threat to life of the crew members and property of the fleet caused

[*] Assistant Professor, University of Canberra.

by the continued illegal attacks and sabotage by Sea Shepherd Conservation Society.'[1] Immediately, Sea Shepherd hailed this decision as a vindication of its obstructionist anti-whaling activities.[2] Other possible factors behind the decision may include pressure from the international community, such as Australia's decision to take Japan to the International Court of Justice over the issue.[3] In my view, the increasingly dangerous confrontations between whalers and Sea Shepherd were a less pivotal factor than either the Japanese Government or Sea Shepherd would have the international community believe. In this article, I trace Japan's domestic developments that better explain the decision. I also discuss the role that Sea Shepherd may have played in providing a pretext for the Japanese whaling industry to 'ride out' its domestic problems and resume whaling at a more opportune time.

This is also an article about justice. Analysis of the Japanese justice system is an integral component of my argument. I argue that the Japanese courtroom has been a site for Sea Shepherd and another conservationist organisation, Greenpeace, to pursue their anti-whaling agendas. The approaches of these two organisations have been different, yet some commonalities exist. For example, both have attempted to use criminal justice in an instrumental way that transcends the individuals involved. This

[1] Institute of Cetacean Research, 'JARPA II Research Vessels to Return Home' (Media Release) <http://www.icrwhale.org/pdf/110218ReleaseENG.pdf> at 6 May 2011.
[2] *Hopes Japan's Whaling Suspension Could be Permanent* (17 February 2011) Radio National AM Program <http://www.abc.net.au/am/content/2011/s3141069.htm> at 6 May 2011.
[3] For a summary of this action and the surrounding circumstances, see: Donald Rothwell, *Australia v. Japan: JARPA II Whaling Case before the International Court of Justice* (2010) Hague Justice Portal <http://www.haguejusticeportal.net/eCache/DEF/11/840.html> at 2 July 2010.

article compares these two approaches, concluding that the Greenpeace approach has been more successful.[4]

This article proceeds as follows. First, I describe the domestic context of Japan's decision to recall its whaling fleet before the anticipated end of the 2010-11 whaling season. The Japanese Government's stated reason was that the continuing violent activities of anti-whaling protesters made it impossible to guarantee the safety of the crew members of the whaling fleet.[5] The subtext is that the political economy that drives Japan's research whaling program has recently been subject to new levels of scrutiny. Second, I outline the circumstances surrounding the trial of the 'Tokyo Two', two Greenpeace activists convicted in Japan of trespass and theft committed in the course of a unilateral investigation into allegations of embezzlement in the whaling industry. I argue that this trial seems to have had a significant impact on the level of transparency afforded to Japan's whaling industry. Third, I analyse the trial of Pete Bethune, an environmental activist from New Zealand convicted in a Japanese court of a number of offences committed in the course of obstructing the Japanese whaling fleet in the Southern Ocean. Finally, I conclude that a comparison of the two trials has some important lessons for the theory and practice of activism and may shed some light on the future of the 'whale wars'.

---

[4] This article builds on my previous article, Trevor Ryan, 'Sea Shepherd v Greenpeace? Comparing Anti-Whaling Strategies in Japanese Courts' (2009) 7 *New Zealand Yearbook of International Law* 131.

[5] Institute of Cetacean Research website, above n 2.

II THE DOMESTIC CONTEXT OF JAPAN'S ABORTED 2010-11 WHALING SEASON

The International Convention on Whaling permits Japan to conduct lethal research whaling and to sell surplus whale meat.[6] Given that the enterprise is conducted under scientific rather than commercial auspices, it presumably must have limits of scale. Australia's position reflects commentary that Japan's current quotas may constitute an abuse of rights.[7] In short, Japan's research whaling could be regarded as *de facto* commercial whaling. Accordingly, Sea Shepherd claims that its obstructionist activities have damaged the profitability of Japanese whaling by restricting supply.[8] It seems, however, that the recent decision to call the whaling fleet back early is as much a matter of demand (or lack of it) as supply. In recent years, the unsold frozen supply of whale meat in Japan has steadily increased, imposing significant costs in its own right. This is despite a gradual decrease in the size of the catch. In other words the sales of whale meat that, with government subsidies,[9] substantially funds the research whaling program have significantly declined in recent years. These two factors have dealt a significant blow to the finances of the Institute for Cetacean Research, the quango directly responsible for overseeing Japan's research whaling. To

---

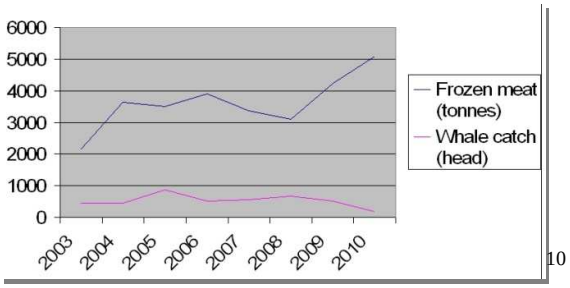
[6] 'Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit…': *International Convention for the Regulation of Whaling*, 2 December 1946, Article VIII(1).

[7] Rothwell, above n 4; Andrew Hoek, 'Sea Shepherd Conservation Society v. Japanese Whalers, the Showdown: Who is the Real Villain?' (2010) 3 *Stanford Journal of Animal Law & Policy* 159, 171; Donald K. Anton, 'Dispute Concerning Japan's JARPA II Program of "Scientific Whaling" (Australia v. Japan)' (2010) 14(2) *The American Society of International Law Insight* <http://www.asil.org/insights100708.cfm>.

[8] Donald Rothwell, above n 3.

balance its accounts, the Institute has presumably had to scale down its operations, which comprise domestic and international promotional activities in addition to actual whaling and research.

Figure One: Frozen Whale Meat vs Whales Caught in the Southern Ocean



[10]

The Director of the Institute has acknowledged the dire future of the whaling industry without further subsidies.[11] However, the current political climate in Japan is not conducive to increased subsidies. First, with rapid ageing and a bloated public debt, the competition for public finances has become fiercer than ever. Second, in 2009 a new government displaced a fifty-year-old administration that had developed intimate (and at times corrupt) ties with the bureaucracy and industry.[12] A third, related change

---

[9] In 2010, sales from whale meat contributed about AUS$52 million to the Institute's finances. Subsidies accounted for AUS$9.2 million: Institute of Cetacean Research website, http://www.icrwhale.org/H22syushi.pdf, accessed 6 May 2011.

[10] Data from: Japanese Government statistics portal <http://www.maff.go.jp/j/tokei/kouhyou/suisan_ryutu/index.html>; Fisheries Information Service Centre <http://www.market.jafic.or.jp/suisan>; Institute for Cetacean Research website: <http://www.icrwhale.org/02-A.htm>. For catch figures, 2010 represents the 2010-11 season.

[11] *Whale industry in Trouble, but New Moves Afoot* [kujira gyoukai kibishii joujyou shita demo arata na ugoki],(27 December 2010) Suisan Keizai Shinbun <http://www.suikei.co.jp/newsfile/NFindex.htm> at 29 April 2011.

[12] Jeff Kingston, *Japan's Quiet Transformation: Social Change and Civil Society in the Twenty-First Century* (Routledge Curzon, 2004) 95.

is a tightening of the rules on 'golden parachutes' from government ministries and agencies to quangos and industries supervised by those ministries.[13]

Within this broader political and economic context, a fourth factor has catalysed increased scrutiny of the subsidies and golden parachute practices that have characterised the whaling industry. This factor is the trial of the Tokyo Two, discussed below. In the wake of this trial, on 22 December 2010, the Fisheries Agency announced that it had disciplined five members of its staff for infringing the ethical code for public servants.[14] This was because they received whale meat from staff they had supervised of the private company (Kyodo Senpaku) that conducts Japan's research whaling. Two of these had paid for the meat below market value and later sold it. The Fisheries Agency claimed that the amounts were small, amounting to less than AUS$800 over 10 years. Nevertheless, the senior official responsible for supervising these members of the Fisheries Agency, Jun Yamashita (also an advocate for Japan's whaling program in Parliamentary committees and on the world stage) was reprimanded and has since resigned.[15] Perhaps most indicative of the new sensitivity to perceptions of opaque accounting and personnel practices, the Institute has changed its disclosure format. Instead of listing the general background of its board members, the Institute now only lists previous jobs in government. Since November 2010, for the first time, this column is blank: there are no golden

[13] PM & Cabinet of Japan Website (2011) <http://www5.cao.go.jp/kanshi/setsumei.pdf> at 6 May 2011.
[14] 'Research Whaling- Fisheries Agency: Three Staff Warned for Receiving Souvenir Whale Meat' [chousa hogei: omiyage no geiniku juryou, sanshokuin o keikoku], *Mainichi Newspaper*, 23 December 2010
[15] Fisheries Agency Website (2011) <http://www.jfa.maff.go.jp/j/org/outline/meibo/index.html> at 29 April 2011.

parachutes to disclose.[16] Though one can only speculate, it appears more than coincidence that this 'spring cleaning' in one of the pillars of Japan's whaling industry occurred only two months after the verdict was handed down in the trial of the Tokyo Two.

III THE 'TOKYO TWO'

The trial of the Tokyo Two—Junichi Sato and Toru Suzuki—was, for prosecutors, a simple case of trespass and theft.[17] For Greenpeace, however, the trial of two of its members had greater significance. It was part of a wider anti-whaling campaign that targeted consumers on the one hand while investigating and exposing embezzlement in the whaling industry on the other.[18] In this section, I explain how the Tokyo Two were able to turn the criminal courtroom into a forum of wider significance.

Japan is not unique in having a tradition of courtroom conflicts reflecting wider social, political, and economic battles. However, according to some, the Japanese courtroom has been *primarily* a site of such battles, especially in fields such as product liability, environmental, and minority rights litigation.[19] This position is

---

[16] Institute of Cetacean Research Website (2011) <http://www.icrwhale.org/YakuinList.pdf> at 29 April 2011.
[17] 'Whale Meat Theft, Greenpeace Guilty, Court Rejects Defence on Four Points' [geiniku settou, gureenpiisu yuuzai 4souten bengogawa shuchou sake] *Mainichi Newspaper* (Japan), 7 September 2010.
[18] Whaling on Trial (28 April 2010) Greenpeace International <http://www.greenpeace.org/international/en/publications/reports/whaling-on-trial> at 6 May 2011.
[19] See Frank K Upham, *Law and Social Change in Postwar Japan* (Harvard University Press, 1987); Luke Nottage, *Product Safety and Liability Law in Japan: From Minamata to Mad Cows* (Routledge, 2004); Kouichiro Fujikura, 'Litigation, Administrative Relief, and Political Settlement for Pollution Victim Compensation' in: Daniel H Foote (ed) *Law in Japan: A Turning Point* (University of Washington Press, 2007).

related to the argument that—for cultural, structural, or rational choice reasons—the courtroom has not been a significant source of dispute resolution in other fields, contract and general torts for example.[20] The strategy of such 'political' litigation is to raise the profile of an issue in the national media. The ultimate goals of litigation may be quite diverse. They may include securing reparations, exposing and preventing injustice, extracting an apology, or compelling the government to personally or vicariously establish a compensation scheme for harm suffered.

The trial of the Tokyo Two falls within this tradition. A whaling industry insider contacted Sato and Suzuki in January 2008.[21] The insider claimed that others in the industry routinely embezzled whale meat from the research program with the collusion of public officials. Greenpeace Japan launched an investigation into these allegations in 2008. This investigation led Sato and Suzuki to a delivery depot in Aomori prefecture in Japan's North. The two entered the depot and confiscated a box containing 23.5 kg of prime cuts of whale meat. They presented this is to the Tokyo Prosecutors Office as evidence that whalers were siphoning whale meat from the annual catch. After initially launching an investigation into the claims, Japan's procuracy dropped this investigation and instead arrested Sato and Suzuki in an operation of a scale and nature that seemed disproportionate to the alleged offence. Indeed, Amnesty International and a United Nations committee expressed concern that the operation and detention could be perceived as state harassment of a non-

[20] See Eric Feldman, 'Law, Culture, and Conflict: Dispute Resolution in Postwar Japan' in Daniel H Foote (ed) *Law in Japan: A Turning Point* (University of Washington Press, 2007).
[21] 'Whaling on Trial', above n 18. The facts of the investigation are taken from this source and various Japanese news reports.

government organisation.[22] Sato and Suzuki were charged with trespass and theft and on 6 September 2010 sentenced to one year's imprisonment with labour, suspended for three years.

Sato and Suzuki perhaps did not anticipate (or deliberately precipitate) the arrest. Yet had they conducted a survey of the case law and the charging practices of Japan's prosecutors, they may have been able to predict the outcome. Japan's superior courts have typically been unsympathetic to persons accused of property crimes committed in the name of a higher cause, such as pacifism, freedom of expression, or conservationism.[23] This is not to suggest that Japanese courts are more positivistic or legalistic than Australian or other courts. Japanese courts have often invoked community standards in matters such as those relating to the very offences of which Sato and Suzuki were convicted.[24] The courts have tended to find that committing property damage or trespass to achieve certain goals (even of a public interest nature) exceeds a level condoned by community standards.[25]

Despite the case law, Sato and Suzuki have consistently demonstrated that their goals transcend what many may regard as 'success', namely an acquittal. These goals include changing community standards by attracting sustained media attention to their cause. Though initially more successful on the international stage,[26] after the passage

---

[22] *Report of the Working Group on Arbitrary Detention* (16 February 2009) UN Human Rights Council <http://www.unhcr.org/refworld/docid/49b7b4d62.html> at 6 May 2011.
[23] Ryan, above n 5, 147-151.
[24] Ibid.
[25] Ibid.
[26] See: *Tokyo Two: Online March for Justice* (21 August 2010) Greenpeace <http://www.greenpeace.org/international/en/campaigns/oceans/whaling/ending-japanese-whaling/whale-meat-scandal/tokyo-two-march-for-justice> at 6 May 2011.

of two years Greenpeace managed to raise significantly the domestic profile of the trial and the related allegations of embezzlement. Sato and Suzuki's legal team were methodical in mounting a legal defence that centred on Greenpeace's investigative activities into the alleged embezzlement.[27] Despite the conviction, through incremental successes in the admission of evidence, Sato and Suzuki were able to transform the court into a national and international forum for their allegations to be heard and tested.[28] They succeeded in opening up the trial to hear evidence from an international expert (Professor Dirk Voorhoof of the University of Ghent) in whistle-blower laws, freedom of expression, and the right to information. Perhaps more importantly, they succeeded in having whaling industry whistle-blower testimony admitted as evidence.[29] Though only partially successful, shrewd use of recently strengthened evidence, procedure, and freedom of information rules persuaded the court to test these allegations. This was despite clear reluctance on the part of prosecutors to divulge what information was gathered in the aborted investigation into the allegations of embezzlement.[30]

Admittedly, Sato and Suzuki's defence team failed in the conventional sense of securing an acquittal. Nevertheless, failure to acquit is not necessarily the mark of a poor defence lawyer in Japan. Japan's conviction rate is notoriously high.[31] Despite

---

[27] Ryan, above n 5, 162-167.
[28] Ibid.
[29] Ibid.
[30] 'Report from the 'Greenpeace Whale Meat Trial', *Japan Alternative News for Justice and New Cultures* (Japan, online) 19 February 2010) <http://www.janjannews.jp/archives/2678536.html> at 6 May 2011.
[31] Koya Matsuo, 'Development of Criminal Law Since 1961' in: Daniel H. Foote (ed) *Law in Japan: A Turning Point* (University of Washington Press, 2007) 325.

widespread condemnation and valid concerns,[32] some of the factors behind this conviction rate, such as meticulous investigations and prudent charging decisions, may actually increase the quality of justice in Japan.[33] It is in this light that the individual procedural and evidential victories throughout the trial should be noted. These victories are clearly attributable to the quality of legal representation, which reflects the organisational strength of Greenpeace.

Sato and Suzuki's incremental victories also reflect the fact that Greenpeace allied itself to a parallel movement in Japan's legal system, namely the broader movement for political rights and freedoms. Their defence team was led by Yuichi Kaido. Kaido is a protégé of the senior defence counsel in the seminal 1978 *Nishiyama* case.[34] In that case, the defence was also unsuccessful in overturning a conviction of eliciting classified information from a public servant related to a secretive deal between Japan and the United States. Activist lawyers like Kaido saw the trial of Sato and Suzuki as an opportunity to reopen the freedom of expression issues canvassed in that case.[35] There was therefore a natural fit between this broader movement and the Tokyo Two, as self-proclaimed investigators of questionable official conduct. Another factor that created space to reopen the issues considered in the *Nishiyama* case is the past decade of reform espousing liberal ideals such as the rule of law, accountability, transparency, and a civil society empowered by law.[36]

---

[32] See, for example: Norimitsu Onishi, 'Coerced confessions: Justice derailed in Japan', *New York Times* (New York) 7 May 2007.
[33] David Johnson, *The Japanese Way of Justice* (Oxford University Press, 2002) 138, 156.
[34] 32 Keishu 3, 457 (Supreme Court of Japan, 31/5/1978).
[35] 'Report from the 'Greenpeace whale meat trial', above n 31.
[36] Daniel H. Foote (ed) *Law in Japan: A Turning Point* (2007), xx; Katsuya Uga, 'Politics of Transparency in Japanese Administrative Law' in: Daniel H Foote (ed), *Japanese Law: A Turning Point* (University of Washington Press, 2007).

The alignment of goals between the key individuals and allied movements is evident in Sato and Suzuki's defence.[37] Their defence was that their act was one of investigation rather than theft. This had three pillars. First, they lacked the requisite intent to steal because their act was merely a temporary confiscation for the purposes of an investigation. Second, their act was necessary because the law enforcement institutions of the State had turned a blind eye to official wrongdoing. Third, the pair had a right under international human rights law, including the International Covenant on Civil and Political Rights, to investigate and expose official wrongdoing.[38]

Ultimately, the court did not accept these arguments. But, to reiterate, the crucial victory for the Tokyo Two lay in the Court's permission to lead evidence supporting each of these arguments, including testimony of Professor Voorhoof, two whistle-blowers, and DNA evidence relating to the movement of whale meat in Japan's research whaling program. On the basis of this, despite the conviction, the Court acknowledged that officials in Japan's whaling industry appeared to have behaved improperly. In short, the Court approved of the public interest goals of the defendants, while sternly rebuking their methods.[39] Because of this mixed message, it is unsurprising that the significance of the case remains hotly contested. Prosecutors are adamant that the case was a simple case of theft and trespass.[40] Naturally, Greenpeace

[37] 'Report from the Greenpeace whale meat trial', above n 31.
[38] In Japan, a ratified treaty need not be implemented through legislation to have domestic legal effect, depending on whether it is intended to have automatic effect: Kent Anderson and Trevor Ryan, 'Japan: The Importance and Evolution of Institutions at the Turn of the Century' in: E. Ann Black and Gary F. Bell (eds) *Law and Legal Institutions of Asia* (Cambridge University Press, 2011) 134.
[39] 'Report from the Greenpeace whale meat trial', above n 31.
[40] 'Whale meat theft, Greenpeace guilty', above n 18.

emphasises the implicit criticisms made by the Court of official misconduct.[41] In this author's view, the significant changes that occurred in this industry soon after the verdict demonstrate sensitivity to this implicit criticism within Japan's officialdom. These include officials within the Institute and the Fisheries Agency immediately responsible for overseeing research whaling, and possibly more senior officials and politicians from Prime Minister and Cabinet, the Ministry of Foreign Affairs, and Ministry of Fisheries and Agriculture. Each of these bodies has a stake in the domestic or international perceptions that surround the whaling industry.

Until and during the trial, the Fisheries Agency had largely succeeded in frustrating attempts to bring transparency to whaling research subsidies through freedom of information applications.[42] It had also succeeded in deflecting accusations of embezzlement by invoking cultural norms related to travel and gift giving (*o-miyage*).[43] It was only when this probing was stamped with the authority of a court that the admissions and apologies on the part of the Agency were forthcoming. The cultural change within the Fisheries Agency and the Institute brought about by this seemingly minor chain of events may be of such a degree to severely damage the momentum of the whaling industry and its vocal lobbyists. This may explain the temporary cooling off of Japan's whaling activities. This is not inconsistent, however, with Japan maintaining a longer-term goal of resuming commercial whaling on the basis of scientific assessments of whale populations.

---

[41] Greenpeace Japan, 'Whale meat trial, unjust sentence of 1 year with labour suspended (kujiraniku saiban, shikou yuuyotsuki choueki 1nen no futouhanketsu)' (press release, 6 September 2010) <http://www.greenpeace.or.jp/press/releases/pr20100906t2_html, accessed> at 6 May 2011.
[42] Greenpeace International, above n 19, 17.
[43] Ibid.

IV PETE BETHUNE

The case of Pete Bethune provides a natural comparison with that of the Tokyo Two due to the timing of the cases, the motivations of the defendants, the charges laid, and the outcomes. In both cases, anti-whaling organisations treated Japan's justice system as an instrument to pursue the larger goal of ending Japanese whaling. However, Sea Shepherd was much less successful in the contest with prosecutors about the significance of the trial. This may seem unusual, given that reporting in Australia, New Zealand, and Japan viewed the case as primarily a diplomatic issue surrounding whaling.[44] Indeed, the case represented the first opportunity for arguments relating to the legality of Japanese whaling to be heard in a Japanese court. To understand why Sea Shepherd failed where Greenpeace appears to have succeeded, it is necessary to examine the Bethune case in some detail.

Pete Bethune is an environmental activist from New Zealand and was a member of Sea Shepherd from 2009, though has since become estranged from the organisation.[45] Bethune assisted Sea Shepherd in its obstructionist activities in the capacity of captain

---

[44] Mark WIllacy, *Brown Wants Australia to Retaliate in Whaling Furore* (2 April 2010) ABC News <http://www.abc.net.au/news/stories/2010/04/02/2863179.htm> at 6 May 2011; *Govt Under Fire Over Peter Bethune Case* (3 April 2010) TVNZ <http://tvnz.co.nz/national-news/govt-under-fire-over-peter-bethune-case-3446288> at 6 May 2011; 'Akamatsu Agricultural Minister Deal with This Strictly. The Stance Toward Sea Shepherd to Date has Merely Emboldened Them' (akamatsu noushou, kibishii shobun o ukete morau, ima made no taiou ga shii sheppaado o zouchou sasete kita) *Yomiuri Newspaper Online* (Japan, online), 13 March 2010.

[45] *Bethune Quits Sea Shepherd Over Lies* (10 October 2010) TVNZ <http://tvnz.co.nz/national-news/govt-under-fire-over-peter-bethune-case-3446288> at 6 May 2011.

and former owner of a futuristic powerboat in the Sea Shepherd fleet, the Ady Gil. He came to international prominence when the powerboat collided with one of the ships in the Japanese whaling fleet, the Shonan Maru II.[46] Bethune has since alleged that the captain of Sea Shepherd, Paul Watson, directed him to scuttle the Ady Gil after the collision to garner international sympathy.[47] At the time of the collision, Sea Shepherd reportedly owed Bethune US$700,000 for the purchase of the Ady Gil.[48]

On 15 February 2010, Bethune secretly boarded the Shonan Maru II to demand reparations and effect a citizen's arrest of the captain. The Shonan Maru II escorted Bethune back to Japan, where he was immediately arrested by the Japan Coast Guard and ultimately charged with a number of offences. These charges included trespass, but also charges relating to the obstructionist activities engaged in by Sea Shepherd members throughout the whaling season including assault and obstruction of business.

Just as Sato and Suzuki could have predicted their arrest with some foreknowledge of Japan's legal system, an informed observer could have predicted that Bethune's boarding of the Shonan Maru II could well eventuate in his conviction by a Japanese court. Japan has made numerous attempts to bring pressure on flag states and port states to restrain harassment and potentially dangerous behaviour on the part of anti-whaling protest ships.[49] These include measures taken through Interpol, the

---

[46] Both sides deny responsibility for the collision and neither Australia nor New Zealand authorities have been able to apportion blame.
[47] 'Bethune Quits Sea Shepherd Over Lies', above n 46.
[48] Tony Wall and Nicholas Coldicott, 'Home Alone', *Sunday Star Times* (New Zealand) 23 May 2010.
[49] Atsuko Kanehara, 'Legal Responses of Japan to the Impediments and Harassments by Foreign Vessels against Japanese Vessels During Research Whaling in the Antarctic Sea' (2009) 52 *Japanese Yearbook of International Law* 553.

International Whaling Commission, diplomatic representations, and formal requests under the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*. Japan recognises its limited ability to act unilaterally under the *United Nations Convention on the Law of the Sea*.[50] However, under that Convention (and in domestic law) Japan has jurisdiction over acts committed on the high seas on a Japanese vessel.[51] Indeed, Bethune's boarding had a precedent in 2008, in which two Sea Shepherd members were subsequently released to an Australian Government vessel. The incident in 2008 led to some debate in the Japanese Diet about how best to deal with similar future incidents in light of Australia's apparent reluctance to restrain such actions.[52] These debates even canvassed what charges could be laid against boarders.[53] There were also reports in the media that indicated a view among senior political and government figures that Japan should adopt a policy of arresting anti-whaling activists who board Japanese vessels,[54] presumably as part of guidelines issued by the Fisheries Agency.[55] In short, Bethune's arrest was in part the result of Japan's frustration with the failure of other states (including Australia and the Netherlands) to restrain Sea Shepherd's potentially dangerous conduct toward Japanese whaling vessels.

These factors relate only to the predictability of the arrest. It is trends in Japan's justice system and jurisprudence that make the conviction also unsurprising. The

---

[50] Ibid; *United Nations Convention on the Law of the Sea* (adopted 10 December 1982, entered into force 16 November 1994).
[51] Ibid, Article 92; *Criminal Code of Japan 1907*, s 1.
[52] Kanehara, above n 50, 568-72.
[53] Ibid.
[54] 'Akamatsu Agricultural Minister "Deal with this strictly", above n 45.
[55] Kanehara, above n 50, 568.

doctrine that has emerged from comparable cases in Japan's superior courts is consistent with a conviction in this case.[56] As already noted, political protest has rarely been a successful defence for trespass or vandalism in Japan. Moreover, the two-year suspended sentence Bethune received was consistent with the precedents relating to the charges laid.[57]

Despite the predictability of the conviction, it was not a *fait accompli*. The most contestable charges were those of assault and obstruction of business. The assault charge was admittedly difficult to defend in the face of meticulous video and photographic documentation of Sea Shepherd's activities by the whaling fleet.[58] Bethune admitted to launching bottles of butyric acid (rancid butter) at the Shonan Maru II.[59] The court accepted the evidence of crewmembers of the Shonan Maru II that this had caused actual bodily harm to at least one crewmember.

Japanese law has an equivalent to criminal recklessness in the common law.[60] Therefore, it was not necessary for the prosecution to demonstrate that Bethune intended to cause harm, merely that he had 'reconciled himself' with the possibility that his conduct would satisfy the requisite physical component of assault. Yet, despite the quality of photographic and video evidence presented, it was hardly

---

[56] Ryan, above n 5, 147-52.
[57] Ibid.
[58] See: *Illegal Harrassment and Terrorism against ICR Research* (2011) Institute of Cetacean Research <http://www.icrwhale.org/gpandsea.htm> at 6 May 2011.
[59] Information about the judgment and proceedings were obtained though: *Live Courtroom* (houtei raibu) (2010) Sankei News <http://sankei.jp.msn.com/court/court.htm>. While not an official court transcript, this service, introduced by Sankei News upon the inauguration of the new lay-assessor system, provides very detailed (albeit edited) accounts of the proceedings of trials of public interest.
[60] Ryan, above n 5, 151.

conclusive. This raises the question of why the defence team did not press harder to impugn the evidence of the alleged victims and the witnesses for the prosecution. Instead, Bethune unsuccessfully challenged the charge on the basis that he did not have the requisite criminal intent. I return to this apparent anomaly below.

It is perhaps more revealing to consider a charge that Bethune did *not* contest—obstruction of business. As noted above, this was the first opportunity to have the legality of Japanese whaling aired in a Japanese court. Absent were the strategies employed in the Greenpeace trial of calling international expert witnesses, whistle-blowers, and a sustained attempt to portray the whalers as the 'true' wrongdoers. Admittedly, a key difference is that the allegations of embezzlement raised in the Greenpeace trial had a stronger foundation in domestic law. The legality of whaling in the Southern Ocean in international law is highly contested. A second difference is that Bethune was facing charges of a more serious nature with a higher sentence attached.

Both of these factors may have played a role in guiding the strategy of Bethune's Japanese lawyers. The thrust of Bethune's defence was consistent with an approach designed to elicit lenience from the court at the expense of using the court as an anti-whaling forum. This is likely related to advice from the Japanese defence team relating to the diverging punitive and lenient tracks of Japanese justice. A defendant is faced with the difficult reality that, once the powerful procuracy has made the crucial decision to charge, the probability of acquittal is very small. Game theory might suggest that under these conditions a defendant convinced that he or she is right or

innocent could nonetheless engage actively in the rituals of remorse and restitution so highly valued in the Japanese justice system.[61] The alternative is the punitive 'track' associated with not showing remorse. Of course, this is hardly a dilemma unique to Japan, and is probably *more* prevalent in jurisdictions such as the United States with an official plea-bargaining regime.[62] Nevertheless, there are signs that Bethune's Japanese defence team shepherded him toward performing these rituals. For example, on Bethune's initial appearance, the following exchange occurred:

> Bethune: ... first, I deny the charge of assault. I had no intention to cause anybody any harm. Also, I admit throwing a bottle containing butyric acid, but there are various circumstances forming the background to that which I would like to make clear during the trial. I admit to the infringement of the *Swords and Firearms Act*. I also admit to cutting a net.
>
> Tawada CJ: Do you also admit to the fact of trespassing upon the ship?
>
> B: I admit entering the Shonan Maru 2, but I had just cause to do so.
>
> CJ: [clarifying an apparent misinterpretation] Do you also admit to the fact of trespassing upon the ship having cut the anti-boarding net with a knife?
>
> B: Yes.
>
> Lawyer: [responding to the Judge] my client disputes the intent to assault, the causation, and the degree of harm incurred. He admits all the other facts.63

From this it might be inferred that despite apparent ambivalence on Bethune's part, his Japanese lawyers shepherded him toward a lighter conviction than the court may otherwise have imposed. This approach diverged significantly from that of Bethune's Sea Shepherd-funded American lawyers, who consistently impugned the

[61] Johnson, above n 34, 56.
[62] Ibid, 238.
[63] 'Live Courtroom', above n 60.

integrity of Japanese justice through the media.[64] This divergence in strategies may be related to a tenuous relationship between Bethune and Sea Shepherd, which unravelled in the wake of the trial. The court, in turn, played its role in the rituals associated with the lenient 'track' of Japanese justice. Indeed, the court recognised mitigating factors to a degree not warranted even by Bethune's own testimony. After castigating Bethune for his 'violent obstructionist acts', the Court commended Bethune's admissions of guilt with regard to the charges other than assault, his absence of a criminal record in Japan (which was hardly surprising), and his guarantee not to participate in anti-whaling activities in the Southern Ocean. Presumably to his Japanese lawyer's chagrin, any such guarantee was ambivalent at best:

> Prosecutor: ... please listen carefully to this question. When you responded to a question from your lawyer, you said that you would not again participate in a campaign in the Southern Ocean, didn't you?
>
> Bethune: Yes. I think I probably won't.
>
> P: When you say 'probably', does this mean you are undecided?
>
> B: I can't say what I will be doing in 20 years time.
>
> P: For what reason do you currently think that you will not participate in Sea Shepherd's activities again?
>
> B: there are other activities that I can participate in to protect the environment.
>
> P: Will you continue anti-whaling activities in areas beyond the Southern Ocean?
>
> B: At this stage, I haven't clearly decided what activity I will do.
>
> P: Will you continue to be a member of Sea Shepherd?
>
> B: I don't know.

[64] *Anti-Whaling Activist to be Made an Example – Lawyer*' (3 April 2010) Radio National AM Program <http://www.abc.net.au/am/content/2010/s2863525.htm> at 31 July 2010.

In summary, Sea Shepherd was not successful in turning the courtroom into a forum to press its anti-whaling agenda. This is due to a number of factors, including a clear early indication by the court that it was not amenable to such a strategy,[65] and the role played by Bethune's Japanese lawyers. Ultimately, however, there was little indication that Bethune was willing to risk his freedom for the anti-whaling cause. In this author's view, this is the defining difference between Bethune's case and the case of Sato and Suzuki.

V LESSONS FOR ACTIVISM?

In this section, I attempt to make some generalisations from a comparison between the Greenpeace and the Sea Shepherd trials in Japan. The first lesson is one about coordination. From the perspective of a state such as Australia, the question of how to stop Japanese whaling could be framed as a question of diplomacy, invoking concepts such as 'soft' and 'hard' power.[66] It could also be framed as an international 'regulatory' question: how best to achieve compliance with legal or other standards (aside from the question of whether there is consensus about those standards). There is certainly support in regulatory theory for a combination of approaches involving varying degrees of persuasion and compulsion[67] on the part of State and non-State

[65] Ryan, above n 5, 160.
[66] See Joseph Nye, *Soft Power: The Means to Success in World Politics* (Public Affairs, 2004).
[67] See Ian Ayers and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

parties.[68] Accordingly, the two cases considered in this article could fit within a wider spectrum of legal, diplomatic, economic, and political incentives and sanctions.

With such decentralisation, however, comes a lack of coordination. There is no clear consensus of goals within the anti-whaling 'community'. Because there is significant contestation about the status of Japanese whaling under international law, an anti-whaling coalition cannot simply coalesce around a clear legal standard. International law experts are dubious about Australia's case in the International Court of Justice, even while conceding that the case has some legal merit.[69] Australia's position would be significantly weaker if it were to lose the case and even if it were to win, much would depend on Japan's response.

At a domestic level, an approach based on enforcement of a legal standard is more feasible (even by a non-state actor through private law). This occurred in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*,[70] in which HSI secured an injunction in the Federal Court of Australia against Japanese whaling in Australia's Whaling Sanctuary (created by Australian law). Nevertheless, the Court acknowledged the practical impossibility of enforcing this injunction.[71] As with the decision to take Japan to the ICJ, attempts to enforce such legal claims could even

[68] Peter N. Grabosky, 'Using Non-Governmental Resources to Foster Regulatory Compliance' (1995) 8 *Governance: An International Journal of Policy and Administration* 4, 527-8.
[69] Anton, above n 8.
[70] *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3; see Rachel Baird and Chantal Le Feuvre, 'They Said They'd Never Win: Humane Society International Inc v Kyodo Senpaku Kaisha Ltd' (2008) 11 *Asia Pacific Journal of Environmental Law*, 147.
[71] Ibid, 20.

jeopardise Australia's territorial claims.[72] Despite this legal uncertainty, anti-whaling bodies are united in their broad goal of ending Japanese whaling in the Southern Ocean. Regulatory theory (and common sense) tells us that a coordinated effort to bring about this goal is more likely to succeed than a divided effort.

As with many other movements in history, the division among anti-whaling bodies is one of means rather than ends. There is no doubt that non-State bodies have long had a role in contributing to norms of international law, even in a State-centric international community. However, it sets a dangerous precedent for a non-State body to use force unilaterally to enforce its agenda, whether based on positive law, natural law, or some other standard.[73] It is questionable whether the anti-whaling movement *can* be coordinated given the divide over appropriate means between Sea Shepherd and other non-state bodies, such as Greenpeace, which have denounced (or renounced) physical confrontation on the high seas.

The two trials considered by this article demonstrate that division with regard to means can be destructive of common goals. Japanese reportage of the Bethune trial eclipsed domestic media coverage of the Tokyo Two. Bethune's trial in Japan became a focal point for Japan's whaling lobby to inflame public sentiment over what was perceived to be a violent and dangerous anti-whaling campaign condoned by the Australian government. Arguably, this has deflected the attentive public's gaze away

[72] See: Donald K Anton, 'Australian Jurisdiction and Whales in Antarctica: Why the Australian Whale Sanctuary in Antarctic Waters Does Not Pass international Legal Muster and is also a Bad Idea as Applied to Non-Nationals' (2008) 11 *Asia Pacific Journal of Environmental Law*.
[73] Hoek, above n 8, 192.

from the practices within the whaling industry that the Tokyo Two were attempting to expose through their trial at great personal expense.

Second, the two cases may have lessons for political and environmental activism. 'Direct action' seems by definition antithetical to legal or political argument. Yet civil disobedience and direct action necessarily extends to action in the courts when an activist is apprehended by the State. The choice for such an activist is typically to either invoke and challenge the law through legal argument, or reject the law on the grounds of a higher natural law. The direct goal of the Tokyo Two is grounded in a view of natural law or morality (or at least contested international law) that values animal welfare and conservation. However, their indirect method at trial was to invoke the positive domestic law relating to freedom of information and expression, and embezzlement. In short, their physical, conviction-based activism in is inextricably linked to their legal activism, making the distinction a false dichotomy at least in these circumstances.

Bethune's choice seems to have been to avoid Japanese law, rather than invoke or reject it. As I have attempted to demonstrate, Bethune's (albeit ambivalent) approach was to elicit a lenient and quick response from the court, which duly occurred. Admittedly, the comparison is problematic given the graver charges faced by Bethune, who was also likely disoriented by a foreign legal system. Yet Bethune's strategy was consistent with the view that Sea Shepherd's method is not a brand of activism that is designed to extend its reach to the courtroom. For Japan's Institute of Cetacean Research, it is a brand of confrontational activism pioneered (and

maintained at least until 2006) ironically by Greenpeace in earlier days before the internal split from which Sea Shepherd emerged.[74] It is activism that at times poses a risk of injury to parties on both sides and therefore constitutes violence, even as defined narrowly by some animal rights activists.[75] Sea Shepherd members have opted for the 'quick and lenient' track of Japanese justice before in similar circumstances relating to Japan's dolphin catch.[76] Moreover, despite a pledge to the contrary, no member of Sea Shepherd boarded a Japanese whaling ship in the 2010-2011 whaling season. Bethune's trial in Japan appears to have been unplanned and exploited by Sea Shepherd only to the extent that Bethune could be portrayed as a victim in the international media.

As measured by the success of these two forms of activism, a conclusion might be ventured that a protest movement is more likely to achieve its goals if it coordinates various types of activism, including 'action' in the courts. Of course, much depends on context. In a repressive regime, for example, there may be little to gain from invoking the legitimacy of law and State institutions. Activism can test the limits of liberalism too. In the context of labour law, the activism of the labour movement has been crucial for the legal development of workers' rights. However, excessively confrontational or militant tactics can be counterproductive for the labour movement.

---

[74] *News (2000-2009)* (2010) Institute of Cetacean Research <http://www.icrwhale.org/News20012008.htm>; <http://www.icrwhale.org/eng/060108Release.pdf> at 20 July 2011.
[75] Jared S. Goodman, 'Shielding Corporate Interests From Public Dissent: An Examination of the Undesirability and Unconstitutionality of "Eco-Terrorism" Legislation' (2008) 16 *Journal of Law and Policy* 823, fn 6.
[76] Ryan, above n 5, 151.

This is because such tactics provoke a legislative and judicial backlash.[77] Precisely the same pendulum effect can be seen in relation to the animal rights movement. As a result, some jurisdictions have enacted 'eco-terrorism' legislation prohibiting both violent acts but also other methods of direct action including the infliction of economic harm for environmental goals.[78]

Moreover, the courts in a liberal society may not always be amenable to social activism. Some critical theorists have argued that genuine opportunities to transform a court in a liberal judicial system into a political forum or platform have been rare, even at the height of the various social movements of the 1960s and 1970s.[79] Indeed, the experience of civil rights lawyers in United States suggested that law in a liberal society can be an impediment rather than an instrument of change.[80] Direct and sometimes radical action was necessary for the attainment of civil rights. Meanwhile, critical theory is sceptical of a narrow use of the term 'violence', and instead characterises as violence the impact a liberal legal system can have on the marginalised.[81]

Nevertheless, defeat in the courtroom has at times radicalised lawyers to develop new critical approaches to practising and thinking about law, and develop capacity within

---

[77] Ahmed A. White, 'The Depression Era Sit-Down Strikes and the Limits of Liberal Labour Law' (2010) 40 *Seton Hall Law Review* 1, 4.
[78] Goodman, above n 75, 836-7.
[79] Eduardo R.C. Capulong, 'Client activism in progressive lawyering theory' (2009) 16 *Clinical Law Review* 109, 166.
[80] Leandra Zarnow, 'Braving Jim Crow to save Willie Mcgee: Bella Abzug, the Legal Left, and Civil Rights Innovation, 1948-1951' (2008) 33 *Law and Social Inquiry*, 1035; Takao Tanase, *Community and the Law: A Reassessment of American Liberalism and Japanese Modernity* (Elgar, 2010) 95-105.
[81] Capulong, above, n 78, 173.

the legal system to complement activism beyond the courts.[82] Capulong argues that even in a liberal regime, there is a symbiotic relationship between the 'progressive lawyer' and the activist client. Indeed, he argues that this is the primary mechanism by which the lawyer can effect fundamental social change.[83] There is, therefore, theoretical support for Greenpeace's strategy of coordinated action inside and beyond the courtroom. This approach can catalyse a mutual transformative effect on law *and* social practices (including whaling).

The third and final generalisation that might be made from these two cases is something that should be a platitude in comparative law if it has not become one already. Comparative law is no longer a language of categories that substitute for true understanding.[84] Contact with other jurisdictions benefits from mutual understanding. It was only with an insider's understanding of the Japanese legal system that Greenpeace was able to transform a small prefectural courtroom into a platform to advocate transparency in the Japanese Government's relations with the whaling industry. Sea Shepherd could not capitalise on its opportunity to do this in the Tokyo District Court. This was only partly because of an ambivalent champion. It was primarily because Sea Shepherd demonstrates little understanding of the legal, social and political context in Japan. It was because of this understanding that Greenpeace Japan has renounced physically confrontational methods. Instead, it has undertaken a coordinated effort to attack the political economy of whaling in Japan through an alliance with progressive lawyers. Of course, this understanding is in large part due to

[82] Zarnow, above, n 79, 1035.
[83] Capulong, above, n 78, 109.

the 'indigenisation' of Greenpeace to Japan, which presumably was also a strategic move of the organisation.

VI CONCLUSION

The above remarks are merely tentative generalisations that might be made from a comparison between two Japanese trials connected to whaling. The true causes of Japan's decision to call its whaling fleet back to Japan early in February 2011 can only be speculated upon. An informed guess suggests that the decision is related to internal reforms to the agencies responsible for implementing and supervising Japan's research whaling. Another informed guess suggests that these changes were catalysed by the airing and substantiation in the trial of the Tokyo Two of allegations of improper conduct within the partially taxpayer-funded research-whaling program. This is not to downplay other causal factors, which include Japan's change of administration, a decade of domestic law reform dedicated to liberal ideals such as transparency and the rule of law, Japan's dire financial situation, decreased consumer demand for whale meat, and international pressure. Yet, the timing of events suggests that the trial of the Tokyo Two was an essential catalyst for change despite the failure to secure an acquittal for the pair.

If a new era of transparency in Japan has indeed dawned, the days of Japan's subsidised research whaling program of the scale reached in the 2005-06 season may

---

[84] See Michele Graziadei, 'Transplants and receptions' in: *The Oxford Handbook of Comparative Law*,

be numbered. However, this does not necessarily change Japan's long-term goal of resuming sustainable commercial whaling. This author shares the doubts of others whether—even aside from the ethics of whale hunting methods—questions concerning the sustainability of whaling can be answered by science alone.[85] Nor do the historical contingencies that led to the creation of the International Convention on Whaling create clear norms in international law that can determine the dispute definitively. Nevertheless, unless a new paradigm emerges, Japan will likely continue to assert its rights (at least in principle) to conduct research whaling. The scale of whaling in the Southern Ocean will be determined by a number of factors, not least of which is the consumer demand needed to sustain the program. However, Japan, like all modern, liberal democracies, is a jurisdiction where force has no legitimacy unless supported by positive law. To the extent that a non-state party can have an impact on the scale of Japan's research whaling, it is those groups that can marshal the legitimating languages of positive law and science—rather than (mere) morality or force—that will succeed.

(Oxford University Press, 2006).

[85] Luke Nottage, *Whaling: What Can Law Add to Science, Economics, Ethics and Politics?* (4 July 2008) East Asia Forum <http://www.eastasiaforum.org/2008/07/04/whaling-what-can-law-add-to-science-economics-ethics-and-politics>, at 20 July 2011.