

DANIEL H FOOTE (ed.), *Law in Japan: A Turning Point*

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Never judge a book by its cover, we are told. But the handsome design for this book should favourably predispose readers. By editing 25 chapters and adding a detailed Introduction focusing on Japan's program of judicial system reform unveiled from 2001, Daniel Foote has performed a major service primarily for the world of 'Japanese Law' scholarship. This world encompasses the study of law in Japan penned primarily by, and for, native English speakers. Since half the contributors are jurists from Japan, though, his book may also add to the world of '*nihon-hô*', being the study of law in Japan primarily in Japanese and for local consumption. It contributes less directly to the world of '*japanisches Recht*', mainly by and for native German speakers.¹ However, this review may encourage that world's inhabitants to delve into this rich book. They will find already chapter 1 by former Munich University Professor Carl Steenstrup, outlining "New Knowledge Concerning Japan's Legal System Acquired from Japanese Sources by Western Writers Since 1963". That offers one of this book's most sustained entrees into the *nihon-hô* literature, as well as confirmation of the admirable interest in Japanese legal history maintained by German writers.²

Foote's Preface reminds us that 1963 marked the publication of Arthur von Mehren's edited collection, *Law in Japan: The Legal Order in a Changing Society* (Harvard University Press). This followed a conference held in 1961 at Harvard Law School, centred on presentations by twelve leading scholars from Japan. Both events "represented the culmination of the Japanese American Program for Cooperation in Legal Studies, a program that began in 1954, enabled by support from the Ford Foundation" (p xii). They helped, in turn, to establish Japanese legal studies in the US,³ in particular initially at Harvard, the University of Michigan, and the University of Washington (UW). The conference and the book provided one major inspiration for the present book, which followed a conference at UW in August 2002. The other motivation was to commemorate the work and life of Dan Fenno Henderson, the doyen of Japanese law studies

1 L. NOTTAGE, *Japanisches Recht, Japanese Law, and Nihon-hô*, in: ZJapanR / J.Japan.L. 12 (2001) 17-21; and in: T. Ginsburg / L. Nottage / H. Sono (eds.), *The Multiple Worlds of Japanese Law* (Victoria 2001) 20-24.

2 See also W. RÖHL (ed.), *History of Law in Japan Since 1868* (2005), reviewed in: ZJapanR / J.Japan.L. 22 (2006) 283-291 and 292-294.

3 F.K. UPHAM, *The Place of Japanese Legal Studies in American Comparative Law*, in: *Utah Law Review* 2 (1997) 639-656.

at UW, the US and the 'Japanese Law' world generally. Sadly, he died in March 2002, but the conference and now this book were dedicated to him. Appendix A contains a Tribute written by Foote, and Appendix B lists 'Selected Writings of Dan Fenno Henderson' compiled by Robert Britt, UW's longstanding Librarian for its Japanese Law collection.

Foote notes that one difference between this book and von Mehren's is that some fields of law have increased in importance (p xiii). Consumer law would be one such area, but this book instead extends coverage to include environmental law (by Koichiro Fujikura), health law (Robert Leflar), intellectual property (Naoki Koizumi and Toshiko Takenaka), and insolvency law (Kent Anderson and Makoto Ito). Further, the first two are now grouped within Part II covering "The Individual, the State and the Law", including public and criminal law. Although both deal partly with the private law of torts, Fujikura also looks at the bureaucracy's role in addressing pollution, while Leflar emphasises Japan's relatively strong tradition of using criminal prosecutions to address serious medical error. Intellectual property and insolvency are found in Part III, encompassing "The Law and Economy", including also contract law (Takashi Uchida and Veronica Taylor), corporate law (Hideki Kanda and Curtis Milhaupt), dismissals under labour law (Ryuichi Yamakawa), competition law (Harry First and Tadashi Shiraiishi) and tax law. Part I introduces "The Legal System and Law's Processes", including a second chapter on legal history (criminal trials in the early Meiji Era, by Nobuhiko Kasumi). This Part also covers dispute resolution generally (by Eric Feldman), civil procedure (Yasuhei Taniguchi), the judiciary (John Haley), the rise of large corporate law firms (Yasuharu Nagashima and Anthony Zaloom), legislative process (illustrated by financial markets deregulation, by Yoshiro Miwa and Mark Ramseyer), and legal education (Kahei Rokumoto).

Foote adds helpful potted summaries of the various chapters at the start of each Part (although this is not readily apparent from the Table of Contents), and many of the authors take as a springboard some points or themes from the 1963 volume. Von Mehren had also provided such summaries for the similarly entitled Parts, although he had concluded each with a longer Commentary. Instead, in this volume, Foote adds an Introduction focusing on the Judicial Reform Council's 2001 recommendations for comprehensive reforms to criminal and civil justice, as well as legal education and the profession in Japan.

A second more significant difference highlighted by Foote in his Preface concerns the authorship of the various chapters in this book. The Harvard conference and volume involved comprehensive surveys of Japanese law fields by leading law professors and judges from Japan, most at or from the University of Tokyo (Todai). Each was assigned an "editorial collaborator", being either a well-established US law professor (eg Nathaniel Nathanson for Masami Ito, on constitutional law) or an up-and-coming US lawyer (eg Richard Rabinowitz for Takaaki Hattori, on Japan's legal profession). Their "assistance" was also noted at the outset of the relevant chapter, as well as help

provided by others (eg lawyer Rex Coleman, who provided footnotes for von Mehren to add to the chapter by Kenzo Takayanagi on 1868-1961 legal history in Japan, assisted by lawyer Thomas Blakemore).

By contrast, Foote's present volume reflects the institutionalisation of the Japanese Law world particularly within US universities, with a variety of American professors contributing in various ways. Seven of the chapters ended up co-authored, particularly in Part III. In two others, each professor covered different topics within the same field: constitutional infrastructure (by Kazuyuki Takahashi) and "pacifism" and media freedom (Lawrence Beer). For others, mostly also in Part II, one prepared the main paper and another wrote shorter comments: administrative law (Katsuga Uga, followed by Tom Ginsburg), criminal law (Koya Matsuo, followed by Joseph Hoffmann – David Johnson's ensuing chapter is longer and quite distinct), and tax law (Hiroshi Kaneko, followed very briefly by Christopher Hanna). Finally, "in a few cases" – presumably those authored solely by Japanese or US professors – Foote reports that one of the original conference presenters "prepared a chapter, with the collaborator offering comments and suggestions in advance of the conference, along with oral remarks at the conference" (p xiv).

Unfortunately, especially for those who did not attend the conference in 2002, it is not always clear from the chapters who those informal collaborators were. There may have been greater scope for sole authorship particularly by leading Japanese scholars, helped formally by identified early-career assistants, including perhaps some translated works. As well as building up the next generation of Japanese law specialists,⁴ that would have provided more direct voices from the world of *nihon-hô*, especially for those with limited capacity or time to access its voluminous literature in Japanese. Such voices provide, to my mind, one of the main reasons for the enduring allure of the original Harvard volume; despite the "assistance" of their collaborators, most of the content seems to come from the Japanese authors. The voices of Japanese experts came through even more clearly in the direct translations of works by other leading and up-and-coming Japanese professors, particularly by American lawyers or professors, that were subsequently published in *Law in Japan: An Annual*. That was last published on a regular basis in the late 1990s, and has only been partially replaced by the *Journal of Japanese Law (J.Japan.L.)*. The *J.Japan.L.* does not publish many direct translations of works by Japanese jurists translated, either, but it is open to those able to share their world by writing in any Western language.

Thus, because the present book did not contain formal translations or assistance even for the Japanese sole authors, as well as having many co-authored works, it may be somewhat biased towards the "internationalists" (especially the Anglophones) within the *nihon-hô* world. That may seem a speculative and odd gripe, except that it points

4 Cf. K. ANDERSON, The New Generation: Milhaupt and West on Japanese Economic Law, in: *Michigan Journal of International Law* 27 (2006) 985.

towards a third but debatable connection between this book and its Harvard predecessor. That original project was framed by the ‘second wave’ of modern law reform in Japan: the Occupation reforms to basic legal institutions, public law, and private or commercial law. Arguably, these were comparable to the ‘first wave’ importation (and adaptation) of Western law in the late 19th century Meiji era. The Harvard volume emphasises the magnitude of the second wave, and then often asks whether it will finally achieve the desired socio-legal “enlightenment” of Japan. Similarly, Foote’s Introduction suggests that although in many fields “from the 1960s through the 1980s change was incremental ... the 1990s and first few years of the twenty-first century have witnessed pathbreaking change” (p xx). Although many are quite circumspect, most contributors seem to agree that a turning point had been reached. This is particularly true of those writing on business law topics (in Part III, but also Nagashima and Zaloom), although Anderson and Ito conclude that the changes to insolvency law and practice certainly do not amount to ‘Americanisation’. Takahashi also stresses some major changes already to Japan’s constitutional system, while both Uga and Ginsburg identify considerable momentum towards significant administrative law reform. Johnson instead notes major consistencies in criminal justice but, like Hoffman, notes the emergence of pressures towards a new emphasis on retribution.

Yet, such perceptions of change are perhaps not unexpected on the part of Japanese professors proficient in English, writing solely or jointly, let alone (almost exclusively) American professors looking in on contemporary Japan. The tendency may be particularly strong among those based in Tokyo, since it is both the nation’s economic centre and the hub for law reform initiatives. Deliberative councils (*shingi-kai*) or other law reform bodies are set up to study possible amendments to the law, of course, so they rarely recommend no change. Law professors appointed part-time to these bodies are also predominantly from the Kanto area, and current or former Todai professors remain prominent. This backdrop makes it intriguing that of 16 law professors from Japan contributing to this volume, seven are Todai professors (including Foote) and five are Todai emeritus professors. Three others are from Keio University in Tokyo (pp 639-41). Admittedly, Miwa is professor of economics at Todai, and Fujikura chose an unusual career out of Todai. We also cannot just assume that all these law professors sit on law reform bodies and also therefore tend to perceive that more changes are already afoot in Japanese law. Still, such perceptions seem more likely to emerge compared to analyses from professors outside the Kanto area, who furthermore may write less often in English.

More emphasis on continuities certainly seemed to emerge from the Sho Sato Japanese Law conference held in 2005 in Berkeley. That is apparent from the diverse contributions to its subsequent volume,⁵ as well as the online proceedings from the day

5 H. SCHEIBER / L. MAYALI (eds.), *Emerging Concepts of Rights in Japanese Law* (Berkeley 2007) (scheduled for review in the next issue of the *Journal*, the *Eds.*)

revolving around draft translations of selected works by (then) Kyoto University Professor Takao Tanase.⁶ Such developments may even portend a broader ‘neo-cultural turn’ in Japanese Law studies, especially in the English-speaking world.⁷

The “turning point” emphasis in Foote’s present book may also be related to its timing. Most of the chapters do not appear to have been significantly updated between the 2002 conference and the 2007 publication date. A major exception is Fujikura’s compelling spotlight on a 2004 Supreme Court judgment belatedly upholding the government’s shared responsibility for the infamous Minamata Bay mercury poisoning. Understandably, Foote argues that “the primary focus on this work is on the major themes that have animated Japanese law over the past four decades and ongoing trends” (p xiv). However, an appraisal of both will be influenced by the cut-off point, and 2002 witnessed the revival of Japan’s macro-economy. Politically, this was followed by Prime Minister Junichiro Koizumi’s resignation on 26 September 2006, in favour of more conservative successors (Shinzo Abe and, after only one year, Yasuo Fukuda). Thus, Japan may now be turning back from the more laissez-faire rights-based liberal model that certainly gained traction over the 1990s, seemingly crowned by the judicial system reforms recommended in 2001 and largely enacted by 2004. Another recent edited volume canvassing corporate governance in Japan concludes instead that the country is experiencing more of a “gradual transformation”. This is also found in other post-industrial democracies, including Germany, but change is achieved through somewhat distinctive modalities.⁸

Nonetheless, Foote’s present work does succeed in identifying key issues in most major areas of contemporary Japanese law, and it succinctly offers enough detail for novice and experienced reader alike to begin to assess the authors’ views on continuity versus change. The book connects back to the earlier generation of scholarship from the Harvard conference, and broadens the platform for informed debate among current and future generations. A major challenge it leaves, perhaps, is for another conference and volume that brings in also the world of *japanisches Recht*, as well as additional parts of the Japanese Law world (including more within Australasia) and of the *nihon-hô* world itself. Maybe we should converge again on Berlin,⁹ or on neutral ground in Japan somewhere between Tokyo and Kyoto.

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- 6 L. NOTTAGE, Translating Tanase: Challenging Paradigms of Japanese Law and Society, in: Sydney Law School Legal Studies Research Paper No. 07/17 (2006), at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=921932
 - 7 L. NOTTAGE, The Neo-Cultural Turn in Japanese Law Studies, in: Victoria University of Wellington Law Review (2008) forthcoming [Festschrift for Tony Angelo].
 - 8 L. NOTTAGE / L. WOLFF / K. ANDERSON (eds.), Corporate Governance in the 21st Century: Japan’s Gradual Transformation (Cheltenham 2008).
 - 9 H. BAUM (ed.), Japan, Economic Success and Legal System (Berlin 1997).