JOHN O. HALEY/TOSHIKO TAKENAKA (eds.)

Legal Innovations in Asia
Judicial Lawmaking and the Influence of Comparative Law

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This volume is based on a series of events staged to celebrate the 50th anniversary of the Asian Law Center (ALC) of the University of Washington School of Law, Seattle. As the readers of this journal hardly need to be told, the Center (formerly the Asian Law Program) has for decades been at the frontline of Asian legal studies, producing excellent research on – and leading scholars of – Asian law, not least Japanese law. This achievement is evidenced once more by the distinguished group of authors who have joined forces for this volume, most of them recruited from the ranks of alumni, former or present faculty members, or long-term partners of the Center. The result is a rich collection of contributions covering an impressive breadth of topics and Asian jurisdictions. As the title suggests, the recurring theme is how law in East and Southeast Asia has developed over time as a result of judicial interpretation and innovations drawn from the legal systems of foreign countries.

After a brief foreword by *Dongsheng Zang*, the ALC's present director, the two editors, *John O. Haley* and *Toshiko Takenaka*, outline the structure of the book, which consists of five parts: Part I details the history of the ALC. Part II is devoted to the role of comparative law in legal innovation. Part III examines judicial lawmaking in Japan, China, and Islamic Asia. Part IV looks into the influence of Japanese law on other Asian jurisdictions. Finally, Part V deals with legal innovations specifically in the area of intellectual property. This review cannot do justice to all the contributions. Taking into account the likely interests of readers of the Journal of Japanese Law as well as the limited expertise of the reviewer with view to Asian jurisdictions other than Japan, here I shall concentrate on the contributions related to Japanese law.

In Part I, three former directors, all of whom at different times were also students of what was then the Asia Law Program, recount the development of the Asian Law Center over fifty years. Given the Center's pivotal role in promoting Asian legal studies outside Asia, this amounts to more than a history of this unique institution; it simultaneously offers rare reflections on the genesis of the field as such. Nobody would be in a better position to do this than *John O. Haley*, whose contribution at the start of Part I covers the first four decades of the ALC.[1] He tells the story of the Asia Law Program since its

1 For his achievements in Japanese law, and on the occasion of one of the events celebrating the ALC's anniversary, Haley was awarded the Order of the Rising Sun by the Emperor of Japan.

establishment in 1961 as the first center outside of East Asia for research and teaching on East Asian law. This early phase is closely connected with the name of the late Dan Fenno Henderson, who was appointed as director in 1962. Henderson's pioneering efforts, later continued by Haley, not only laid the basis for the ALC's lasting success, including its prolific LL.M. and Ph.D. programs, but for considerable time substantially defined Asian legal scholarship outside of Asia. While never the exclusive focus of the Program, this is particularly true for Japanese law, as Haley vividly reminds us. *Veronica L. Taylor*, herself director in the period of 2000–2010, continues this account of the history of the Center in the second contribution. She focuses on the new challenges the ALC faced at the dawn of the "Asian Century", when legal education had to answer to a more kaleidoscopic legal world. Events such as the September 11 terrorist attacks and the financial crisis of 2007/2008, but also ongoing trends like changes in FDI and the recalibration of Asian economies left their mark also on the ALC's activities. Taylor describes the answers given under her directorship, which consisted in a broadening of the Asia Law Program's legal geography and a conception of Asia as an integrated legal and regulatory domain. While high-quality teaching anchored in East Asia – but attentive to other parts of the region – and world-class scholarship in Asian law remained the goals, the program fully transformed into an Asia Law Center. To conclude the account of the ALC's history, *Jon Eddy* covers the years of his tenure as director, 2010–2013, when the Center was forced to prioritize among its expanded activities. Similar to Japan's re-prioritization of its focus, the Center decided to re-focus on its long-term core competency Northeast Asia, but also to include that region's concerns regarding Southeast Asia. Eddy, furthermore, identifies as a future goal that North America must develop special expertise regarding "Asian" perspectives on "global" issues. This certainly holds true also for Asian legal research in Europe.

Part II consists of a sole but pointed contribution on the role of comparative law as a source of legal innovation (a recurring theme also in several of the other contributions). *Harald Baum* traces the transplantation of western law into Japanese law. Baum reflects on how to theoretically conceptualize such a process, and its implications in general, before sketching the Japanese experience. His contribution reminds us of the story, remarkable time and again, how Roman law concepts spanning both time and continents have found their way into present-day East Asia.

For experts of Japanese law, and especially for those from common law jurisdictions, the title of Part III, "Role of courts in Japan and legal innovations: Japan, China, and Islamic Asia", may come as a surprise. After all, Japanese courts in general hardly enjoy the reputation of being "activist". That the notion of the allegedly limited role of judges in the Japanese judicial system is an oversimplification at best is convincingly shown in the important piece jointly authored by *John O. Haley* and *Daniel H. Foote*. Both discuss numerous specific examples from a broad range of fields, including criminal law, constitutional law, corporate law, environmental litigation, and labor law. Their chapter takes a form similar to a Japanese *zadan-kai*, offering the advantage that the differences

in opinion of these two eminent experts of Japanese law become visible as well. Foote proposes categorizing judicial lawmaking into the classifications of top-down and bottom-up, whereas Haley, building on his earlier writings,[2] finds that many of the cases discussed are characterized by their tendency to confirm community. Referring to traffic accidents and insolvency procedures, Foote, furthermore, points out that Japanese judges at times engage in norm-building akin to administrative agencies. The piece is highly worth reading also with view to the remarkable tendency of the Japanese legislature to subsequently affirm standards developed by the courts. In a second piece within the same Part III, *Shigenori Matsu* offers a detailed analysis of the Japanese Supreme Court's 2013 decision overturning the ban on the online sale of over-the-counter drugs.[3] He not only describes the decision's background and examines its legal reasoning, but also illustrates how the Supreme Court, its oft-cited conservativeness notwithstanding,[4] is in some cases willing to change the course of society and politics through its judgments. By contrast, quite a different role is played by the Chinese courts as described in the contribution that follows, authored by *Dongsheng Zang*. Under the slogan of "harmonious society", procedural rules often push citizens into mediation and thus effectively deprive them of their formal legal rights. Interestingly, Zang observes that the tendency to force mediation upon parties and to justify this practice by a cultural myth strikingly resembles conciliation *(chōtei)* in prewar Japan. *Ryūichi Yamakawa's* excellent piece on the termination of fixed-term employment contracts fits nicely, meshing well with the contribution by Haley and Foote on judicial lawmaking and reflecting the importance of comparative law for legal innovation. Japanese courts, applying their abusive dismissal doctrine *mutatis mutandis* to fixed-term employment contracts, have restricted the employer's right not to renew a fixed-term employment contract. These standards in the meantime have even been affirmed by legislators in a 2012 amendment to the Labor Contract Act.[5] At the same time, European models also played a role in this case. In the final contribution in Part III, *Kyōko Ishida* deals with a topic rarely discussed in Western literature on Japanese law, namely the way how *pro se* litigants are treated by Japanese judges. Even though Japanese parties are often not represented by counsel, a systematic survey on this topic had never been undertaken prior to a 2011 survey by Supreme Court of Japan. Ishida introduces the reader to the survey's main findings and demonstrates that Japanese courts do in fact provide special care to *pro se* litigants. Yet she also shows that the pursuit of substantive justice, speedy proceedings, and procedural fairness tends to impose a heavy burden on judges in *pro se* cases.

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2 J. O. HALEY, The Spirit of Japanese Law (Athens, GA, 1998) 123 et seq.
3 Supreme Court, 11 January 2013, Minshū 67, 1.
4 See by the same author, S. MATSUI, Why Is the Japanese Supreme Court So Conservative?, Washington University Law Review 88 (2011) 1375.
5 *Rōdō keiyaku-hō,* Law No.128/2007.

The book's Part IV takes the transplant theme of Part II one step further by looking into the influence of Japanese law in Asia. *Tay-Sheng Wang* makes the start with Taiwan. Wang, who is *the* authority on the topic[6] and a good example of the numerous prominent alumni produced by the ACL over the many years of its existence, traces the influence of Japanese law not only in Taiwanese legislation, legal theories, and judicial decisions, but also in the legal lives of the Taiwanese people. Even if Taiwan law has developed its own characteristics after the democratization of Taiwan in the 1990s, comparative studies, as Wang emphasizes, remain significant for both countries. Next, *Kon Sik Kim* reviews the transformation of corporate law in the Republic of Korea. When the Korean Commercial Code was adopted in 1963 almost twenty years after Korea's liberation from Japanese control, the Code remained overwhelmingly influenced by Japanese law. It was the 1997 Asia financial crisis which served as a turning point, invigorating corporate law as a field in Korea and triggering far-reaching reforms. Kim concludes that with regard to the political struggles surrounding corporate governance reform today, Korea is becoming similar to other developed countries such as the US, Germany, and Japan. Less strongly connected with the theme of Part IV is *Donald Clarke's* contribution on judicial innovation in China. He starts off by stressing that the view that Chinese courts may not or do not innovate has never really been tenable. Clark supports this assertion with his examination of three examples drawn from corporate law: veil-piercing, misleading disclosures in securities law, and derivative actions. More intriguing is his convincing argument that innovation by Chinese courts is not always, as one might expect, plaintiff-friendly, instead being decisively defendant-friendly at times, especially in securities law. Finally, in the last contribution in Part IV, *Kurnia Toha* looks into the rather recent influence of Japanese law upon Indonesian law. While Japan has been the largest donor to Indonesia for decades, legal technical assistance has increased the influence of Japanese law in Indonesia for only about the last fifteen years. This has primarily been the product of legal experts being sent from Japan to Indonesia, the training of Indonesian legal staff in both Indonesia and Japan, and Indonesian law students attending Japanese universities. While the influence of US law remains stronger overall, one specific result of the Indonesian-Japanese cooperation is the court-connected mediation system introduced in 2008, which has been inspired by the Japanese *wakai* system.

Part V of the book, finally, is devoted to legal innovations in the field of intellectual property. For the reader of this journal, the first contribution by *Toshiko Takenaka* is of particular interest. She analyzes the role of Japanese courts in Japan's patent term extension reform. In *Takeda v. JPO*[7] the Japanese Supreme Court sided with the IP High Court against the Japan Patent Office (JPO) and thus helped, as Takenaka explains, to bring about a change in leadership in the setting of patent policy. Her contribution thus

6 See among others T.-S. WANG, Legal Reform in Taiwan under Japanese Colonial Rule (1895–1945) (Seattle 2000).

7 Supreme Court, 28 April 2011, Minshū 65, 1654.

not only gives another example of an active role being played by Japanese courts, but also takes up the second theme of the book by stressing the importance of comparative law for the interpretation of the Japanese Patent Act.

Even this brief review will likely have demonstrated that Haley and Takenaka have put together a remarkable volume. Building on the rich intellectual resources of the Asian Law Center as it has grown over five decades, they present yet another important contribution to scholarship on Asian law. It is hard to imagine a form more suitable for celebrating the Center's 50th anniversary.

Moritz Bälz[*]

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* Professor of Japanese Law and its Cultural Foundations, Goethe University Frankfurt.