REZENSIONEN / REVIEWS

WILHELM RÖHL (ed.), *History of Law in Japan Since 1868*

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This monumental historical analysis of all the major fields of modern Japanese law is a reliable and very useful text particularly for academic research by legal scholars and law students. It can also be recommended to researchers from other disciplines, and even legal practitioners or policy-makers needing to put in broader context the now rapidly evolving legal system in Japan. It follows on from "A History of Law in Japan until 1868" by Carl Steenstrup. That was published in 1991 as Volume 6 in the same Handbook series, which generally provides historical perspectives mostly in German on socio-economic developments in Japan.

The expert contributors to this latest Volume 12 are mostly German academics, joined by practitioner Lorenz Ködderitzsch and Osaka City University Professor Eiji Takahashi. The editor's Preface by Dr. Dr. Röhl, a retired judge, suggests as a guiding theme some wisdom from Confucius (Analects, Book 1 Chapter XI): "*Onko Chishin* – research into the past assists us to understand the future". Raising the question of when "a historical description of law which verges on the present state of affairs actually comes to an end", the Preface states that the basic philosophy was not to produce yet another "reference book on the law in force today, but instead to describe the road towards the laws of today" (p. vii). The book largely succeeds in this aim, filling an important gap in English language studies of Japanese law, and should join the shelves of any significant collection of works in this field. This review essay concludes by noting other ways in which the world of such studies might be brought even closer to the world of Japanese law scholarship in the German tradition. First, however, it outlines the impressive scope of this work, highlighting Japan's deep roots in German law itself as well as other legal traditions. After all, a detailed book deserves a detailed review.

Chapter One, by Wilhelm Röhl, begins with "Generalities" – an uncommon term in English legal writing, but one describing an interesting attempt to set the stage for specific areas of law covered in the remaining nine chapters. Part 1.1 on "Periods of Development" sets out, almost in note form, debates particularly in the Japanese language literature over when the modernizing reforms characterizing the Meiji Era (1868-1912) actually began. It also sketches some possible subsequent historical divisions (pp. 6-10), such as (i) "preparation of the legal system" (1868-88), (ii) its establishment (1889-1914), (iii) its rearrangement (1915-31), and (iv) its collapse (1932-45), followed by its revival under the 1947 Constitution (reproduced at pp. 74-95, although

now readily available online). Part 1.2 turns to "The Scope of Japanese Law", dealing not with what it has come to encompass, but its territorial reach, including the institutionalization of Japanese law in Hokkaido and in proliferating overseas territories beginning with Taiwan in 1895.[1] Part 1.3 describes "Types of Rules and Promulgation", tracing how laws were referred to and issued in the earlier Tokugawa Era, as opposed to early Meiji and under the new Constitution. Part 1.4 summarises "Foreign Influences", particularly the rise of German law over the French and Anglo-American law during the Meiji period, which increasingly collided "with indigenous Japanese legal thinking which, being concrete and intuitive, competed with the abstract and discursive direction of German *"Begriffsjurisprudenz* (conceptional [sic] jurisprudence)*"* (p. 28). The heavy infusion of American law during the Occupation (1945-52) is also touched upon, but not the further doses some commentators believe characterise Japan's latest round of whole-scale law reforms since the 1990s.[2]

Overall, the important introductory Chapter does help set the historical scene, but it delves into many issues that will tend to interest readers already quite familiar with Japanese law, rather than complete novices. It could also have been made more user-friendly for them by explaining key terms used, such as "the diet" (p. 1: usually capitalized, i.e. the Parliament or legislature), the *bakufu* (p. 3: Tokugawa Era central government), and *tennô* (p. 4: the Emperor). Similarly, Chapter One might have been followed by Röhl's Part 9.4 of Chapter Nine ("Procedural Law") outlining especially the pre-War development of "The Courts of Law", and then his concluding Chapter Ten on "Legal Education and the Legal Profession" (with more on judges, public prosecutors, Ministry of Justice staff, and lawyers – narrowly defined, not other quasi-lawyers such as judicial scriveners or *shihô shoshi*). Moreover, the contours – and perceptions – of courts, the legal profession and legal education have been extensively revisited since the late 1990s, in the shadow of whole-scale reforms of civil and criminal justice recommended by the Prime Minister's Judicial Reform Council in 2001.[3]

Instead, in Chapter Two, Röhl launches into an analysis of "Public Law". Part 2.1 on "Constitutional Law" focuses mainly on the 1899 Meiji Constitution (helpfully reproduced at pp. 60-73). The longer Part 2.2 on "Administrative Law" ranges broadly over (a) the organisation of government, (b) general substantive law principles emerging from early case law, and (c) more specific regulation (taxation, police powers and responsibilities, promotion of culture and education, etc.).

Chapter Three covers the Civil Code in five parts. In Part 3.1, Ronald Frank carefully details the legal and political debates resulting in its enactment, mostly adopting German structure and concepts (even before the German codification of 1900) but drawing also on broader comparative law study. He also explains key concepts in the

1 See also WANG (2000); DUDDEN (2005).
2 KELEMEN / SIBBITT (2002).
3 See eg. UPHAM (2005), JOHNSON (2002) and NOTTAGE (2006).

"General Provisions" part of the Code, tracking groups of Code provisions, such as legal capacity (Articles 1-32). Overall, he joins many other scholars in concluding that this first part or Book "has proven to be a remarkable achievement of legal scholarship and legislative genius. Promulgated first in 1896 it remains in force largely unaltered in form and substance to the present day" (p. 204). Frank does touch on a few amendments in 1947 (notably codification of case law development of general principles requiring rights to be exercised in good faith, and not allowing them to be abused); but does not mention the whole-scale "modernisation" of the Code language (and a few concepts) enacted in 2004. In Part 3.3 of this Chapter, he continues with a survey of key concepts in Book 3 of the Code on the "Law of Obligations", including general matters (such as what can be the subject of a private law obligation), contracts, unlawful acts (torts) and unjust enrichment. In Part 3.2 on "Property Law – Real Rights", Book 2 of the Code also promulgated in 1896, Hans Peter Marutschke adds a description of key concepts, but spends more time on a thoughtful analysis of the tensions between German and French law thinking impacting on this area of Japanese law. In Parts 3.4 and 3.5, Petra Schmidt turns to "Family Law" and the "Law of Succession", respectively Books 4 and 5, but enacted (after further controversy) in 1898, when the entire Code was brought into effect. She adds even more useful contextual background to pre-modern family relationships in Japan, explaining how the Code acknowledged some features while redirecting others.

Chapter Four, by Harald Baum and Eiji Takahashi, continues this trend, linking "Commercial and Corporate Law" to developments in the economy and new business activities. "The Early Years" (1868-99) resulted in a Commercial Code of 1899 again modelled more closely on German law than earlier legislation drawing also on French law. The "Rise and Fall" (1900-45) saw the emergence of the *zaibatsu* (corporate groups), the first of several amendments to the Code responding to corporate frauds and the like, and enactment of separate legislation for closely-held companies (*yûgen kaisha*). The latter was also based on a German model, but 46 years after the (*GmbH*) legislation enacted there, which probably helps explain – despite considerable popularity in incorporating *yûgen kaisha* – why even smaller companies tended to keep incorporating as stock corporations (*kabushiki kaisha*) under the Code. In Part 4.4, Baum and Takahashi describe Japan's "Reconstruction and Economic Miracle" between 1946 and the 1980s, noting the Occupation-led introduction of stronger minority shareholder rights in corporate law and the dissolution of the *zaibatsu*, but their partial reconstitution as looser *keiretsu*.[4] They also track Code reforms in 1962 (to improve reporting), 1974 (to increase powers of statutory auditors – a German law inspired monitor of corporate behaviour, additional to directors), and 1981 (to revitalize shareholders' meetings). A brief concluding section, on "The Structural Crisis of the 1990s", notes some more radical attempts to change corporate law (and economic activity) by allowing more

4 See also WEST (2001).

deregulation and market-oriented solutions, driven by deepening economic stagnation over Japan's "lost decade".[5] The authors do not mention the important 2002 amendments to the Code, maintaining a hybrid system of corporate governance by allowing large companies either to retain a strengthened corporate auditor system, or to switch to a more Anglo-American system involving committees of directors (mostly outsiders) making or monitoring key decisions.[6] Further reforms in 2005 have consolidated the *yûgen kaisha* and *kabushiki kaisha* under a new Corporations Act.[7] However, corporate law has been subjected to particularly numerous reforms over the last decade, as in other countries including Germany, and this book generally aims at a broader historical perspective on such developments. As it stands, this Chapter forms an excellent basis for analysing these and many other recent changes and their likely impact on corporate activity in Japan.

Chapter Five on "Intellectual Property and Anti-Trust" is another strong section of the book, effectively integrating statistics and broader contextual material with an outline of key legal concepts and developments. Unlike the other chapters, Christopher Heath begins with a Part setting out "Literature (General)", namely some more "classic" reference books on Japanese intellectual property law (not on anti-trust). Those listed in English, rather than German or Japanese, will be useful to most readers; and reference can also be made to several recent works by Heath and Ganea.[8] Other Parts end with further "Literature" (including pp. 542-3 for anti-trust). In Part 5.1, Heath adds an intriguing overview of "Inventive Activity, Intellectual Property and Industrial Policy", showing for example that "in contrast to many other civil and commercial laws, Industrial property laws in Japan were not enacted due to foreign pressure or in order to have a negotiating tool against foreign nations, but were rather perceived to be in Japan's own interest" (p. 405). This helps explain quite steady increases in IP protection in Japan, and indeed perhaps now its keenness to "export" such protection particularly to Asian countries through Free Trade Agreements. However, Part 5.2 on "Patent Law", for example, suggests how painstaking this process has been. Part 5.3 on "Utility Model Law" also shows how Japan continued to experiment with foreign borrowings, taking from Germany this protection for "petty patents" (inadequately protected by design law), although the inspiration for legislation on patents was originally French and then US law. Peter Ganea adds Part 5.4 on "Design Law", even more heavily influenced by international law (namely the Paris Treaty of 1883) and strengthened notably in 1998. In Part 5.5, Heath turns to "Trade Mark Law", pointing out that Japan's 1884 Act favoured the German approach, protection for those "first-to-file", over the US (and French) "first-to-use" approach.

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5 See also FUJITA (2004).
6 NOTTAGE / WOLFF (2005).
7 TAKAHASHI / SHIMIZU (2005).
8 HEATH (ed.) (2004); GANEA (ed.) (2005).

In "Unfair Competition Law" described in Part 5.6, however, Japan repeatedly delayed until new obligations under the Paris Convention forced enactment of narrowly circumscribed legislation in 1934 (strengthened in 1993, drawing on case law developments). This foot-dragging was justified by the government because other countries were also slow in extending protection, but also because Japanese industry in the early 20th century was still at the stage of imitating and copying, with domestic consumers preferring foreign goods (p. 485). By contrast, Japan acceded to the Berne Convention and enacted copyright legislation in the late 19th century both to renegotiate unequal treaties granting Convention states like Germany extra-territorial jurisdiction over their nationals on Japanese soil, and to develop its own publishing industry.

Finally, in Chapter Five Part 5.8 on "Anti-trust Law", Heath shows how competition law was heavily influenced by early German law and policy favouring cartelisation. Japan also did not experience an indigenous mid-20th century counter-reaction like that promoted by German "Ordo-liberals" in post-War Germany, reinforced by European Union law.[9] However, Heath indicates that competition law has also been enforced more strictly in Japan especially since the 1990s. While amendments in 2000 and 2003 reinstated the use of holding companies, outright exemptions from the Anti-Monopoly Act were drastically reduced in 1997, and private injunctive relief was introduced in 2000 (pp. 536-42).

In Chapter Six, Marutschke is back with a shorter outline of "Labour Law". His treatment is divided into developments before World War II (including unionism and the Factory Act), and after the War.[10] Occupation era reforms included the Trade Union Act revisions of 1949, prompted by Occupation forces and the new Constitution, but also scholars like Izutarô Suehiro; a new Labour Relations Adjustment Act for mediation or arbitration of trade union related disputes, modeled on the Wagner Act in the US; and the Labour Standards Act 1947, stipulating for example minimum standards for all individual and collective employment contracts. Among subsequent reforms, however, only passing mention is made of the frequently debated (and amended) 1985 Equal Employment Opportunities Act (p. 568).[11]

In Chapter Seven, Röhl returns with a description of "Social Law". After "a short historical reminiscence" (Part "I") on hospitals and disaster relief in the Tokugawa Era, he focuses on social security or insurance schemes (Part 7.2, including other references to the Factory Act: p. 589) rather than social welfare law (Part 7.3), again with a strong interest in early Meiji developments. Likewise, in Chapter Eight on "Penal Law", Karl-Friedrich Lenz details the process leading up to enactment of the current Criminal Code of 1907, again influenced by German rather than French law. The rest of his chapter

9 HALEY (2001).
10 See also GORDON (1985).
11 Cf. eg UPHAM (1987); MILLER (2003).

sketches reforms since 1921, ending – rather abruptly – with a "Timetable" of significant events in Japanese criminal justice from 1868 to 1973 (pp. 625-6).

Chapter Nine is a joint effort to cover "Procedural Law". Part 9.1 by Ködderitzsch covers "Administrative Litigation and Administrative Procedure Law", arguing that administrative law focused initially on the substantive law or validity of administrative action, influenced especially by German law, and is still only slowly developing more US-style concern for procedural safeguards. However, he sees the 1993 Administrative Procedure Act and the 1999 Administrative Information Disclosure Act as innovative approaches to address problems with excessively informal norm generation or enforcement by the bureaucracy. Ködderitzsch concludes with a call now "for Japan to address the remaining deficiencies with respect to court litigation of administrative matters", which have remained at very low levels even compared to Germany. In fact, these have been partially addressed by 2004 amendments to the Administrative Case Litigation Act, prompted by the Judicial Reform Council recommendations. As another plank in that program, the Civil Procedure Code was further reformed in 2003,[12] in addition to its much broader revisions in 1996 mentioned only very briefly by Röhl in Part 9.2 on "The Law of Civil Procedure" (p. 680).[13] Again, his main interest is in the early Meiji reforms in this area, resulting in the Code being enacted in 1890 with strong parallels to the German Code of 1877.

Next, in Part 9.3, Schmidt covers "The Law of Criminal Procedure", comparing legislation in 1880 along French lines, the 1890 "Meiji Code", the 1922 "Taishô Code" (drawing even more on German law while paying more attention to the rights of the accused before and during trial), and the 1946 Code revamped strongly along Anglo-American lines. She also mentions the 1923 Jury Act, which was suspended in 1943 (pp. 702-4). That is now being revived in (continental European) form as the 2004 Lay Assessor Act, entering into force in 2009, which will involve randomly selected laypeople deliberating with professional judges on both verdict and sentencing for serious crimes.[14] Consequential amendments to the Criminal Procedure Code were also enacted in 2004. Lastly, as an Appendix to Chapter Eight (pp. 755-69), Röhl describes "Enforcement of Penalty – The Prison System", as it developed over the Taishô (1912-1925) and especially Meiji eras.

Overall, therefore, this book presents a valuable and comprehensive picture of the historical development of law in Japan since it reopened itself to the world in 1868. Röhl's writings concentrate mostly on the early Meiji period, and other authors generally take their accounts only through to the late 1990s. However, all the studies succeed in providing crisscrossing and revealing historical bases useful not only for understanding the past, but also for assessing or anticipating contemporary events. The volume is

12 NOTTAGE (2005).
13 Cf. e.g. TANIGUCHI (1997).
14 ANDERSON / NOLAN (2004).

therefore quite unique, and complements other books that tend to focus on more recent developments.[15]

Styles also vary somewhat among authors, but this is unavoidable in a multi-author volume of this scale, and less noticeable for general readers (as opposed to reviewers) who most probably will only dip into one or two chapters at a time. Generally, however, the Chapters most likely to appeal to readers from the English-speaking world of "Japanese Law" studies, especially in the US, are those that incorporate more socio-economic context analysis alongside doctrinal "black letter law" analysis. The latter is a feature, and often a great strength, of Japanese law studies in the German-speaking world ("*Japanisches Recht*"),[16] along with some tendency still (apparent in some of the contributions by Röhl in this book) to explain differences in Japanese law compared to German law in terms of "traditional Japanese culture". Another distinctive feature of "Japanese Law" studies in English has been a greater focus on business law topics. This makes the more wide-ranging present volume a refreshing change. However, more weight might have been given to developments in the law of commercial transactions (e.g. the parts of the Commercial Code other than corporate law, and the raft of specific statutes enacted or amended especially since the mid-1990s), assuming that an aim was for these German writers to reach out to a broader Anglo-American audience. That readership might also have appreciated more emphasis on recent history, characterised by some as another round of more thoroughgoing "Americanisation of Japanese law".[17] However, detailing the legacy of the Meiji and Taishô eras – as this book is wont to do, perhaps overly so particularly in those parts authored by the editor – should give further pause to hasty over-generalisations about the current trajectory of law in Japan. At the least, this book could have added, even in separate opening or concluding sections as was done in Chapter Five, more reference to influential work in the "Japanese Law" world.[18] Much valuable literature is available in English as well as in German (or Japanese), often with somewhat different but complementary emphases, including some of the studies cited in this review.[19]

Consistent checking by a native speaker would also have assisted in packaging the book for English readers. Greater cross-referencing among chapters would have added further value, too, and some of the Index entries might have been rationalized (e.g. for "judge" and "law").

Nonetheless, in the English literature on Japanese law there is nothing really like this invaluable book.[20] It deserves to be added to any library with – or wanting to develop –

15 E.g. ODA (1999); MCALINN (ed.) (2007).
16 NOTTAGE (2001).
17 KELEMEN / SIBBITT (2002).
18 E.g. HALEY (1991), and the increasingly ambitious revisionist writings of RAMSEYER.
19 See also generally BAUM / NOTTAGE (1998).
20 Cf eg VON MEHREN (ed.) (1963) and FOOTE / TAYLOR (eds.) (2006), with less sustained historical analyses and more comparisons with US law.

even a shelf of good books in this field. Only those from the German tradition of legal scholarship, in all likelihood, would have had the persistence and eye to detail needed to produce such a rich and comprehensive work. It confirms the breadth and depth of contemporary *Japanisches Recht* scholarship,[21] despite Germany having only one Chair dedicated to Japanese law (at Marburg University, since 2000). We should be grateful for this latest valuable attempt by German scholars to reach out to the English-speaking world of Japanese Law studies.[22] Perhaps within the next decade, we may enjoy a successor volume on "Law in Japan Since 2000", further drawing together scholars in these two worlds – and from the rich world of scholarship mainly in Japanese within Japan itself (*nihon-hô*).[23]

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21 HALEY (1982) and HOHMANN (1996).
22 See also e.g. BAUM (ed.) (1997); HOPT et al. (2005).
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