

# Washington International Law Journal

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Volume 26  
Number 1 *Special Issue on the Japanese  
Constitution*

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1-1-2017

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### **Recommended Citation**

Daniel H. Foote, Book Review, *A Review of Who Rules Japan?: Popular Participation in the Japanese Legal Process*, 26 Wash. L. Rev. 137 (2017).

Available at: <https://digitalcommons.law.uw.edu/wilj/vol26/iss1/8>

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## **A REVIEW OF WHO RULES JAPAN?: POPULAR PARTICIPATION IN THE JAPANESE LEGAL PROCESS**

**Daniel H. Foote<sup>+</sup>**

Who Rules Japan? is a valuable addition to the literature on Japanese law. Seven substantive chapters explore important recent developments in a wide range of fields. The ten authors—including leading experts in criminal justice, labor law and other fields—all are highly qualified and all have undertaken extensive research. Each of the chapters breaks new ground; and collectively they provide a wealth of new information, new methodological approaches, and new theoretical insights.

To summarize briefly, Leon Wolff, Luke Nottage, and Kent Anderson (who also served as editors for the entire volume) begin the book with a thoughtful Preface and Introduction (Chapter 1), in which they set out the overall framework and identify certain unifying themes. Those themes include the impact of reforms that grew out of the 2001 recommendations of the Justice System Reform Council (JSRC), with a special focus on “the extent to which the 2001 reform program has *transformed* the Japanese state—from an administrative state in which powerful elites ‘ruled’ over the economy, to a judicial state in which citizens participate more freely in public life and the law ‘rules’ over clashes of interests.”<sup>1</sup>

Turning to the substantive chapters, the second, by David T. Johnson and Satoru Shinomiya, discusses the lay judge (*saiban'in*) system—a lay participation system for serious criminal cases with mixed panels of professional and lay judges—that went into effect in 2009. In order, the successive chapters consist of: an examination of the new labor dispute resolution tribunal system, by Takashi Araki and Wolff; a detailed study of *shōmu kenji* (the lawyers who represent the government in civil and administrative litigation), by Stephen Green and Nottage; a consideration of changing approaches to regulation in the field of welfare law, placing

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<sup>1</sup> WHO RULES JAPAN?: POPULAR PARTICIPATION IN THE JAPANESE LEGAL PROCESS, 5 (Leon Wolff, Luke Nottage & Kent Anderson eds., 2015) [hereinafter WHO RULES JAPAN?].

regulation of childcare and retirement pensions in a broader theoretical framework, by Trevor Ryan; an examination of prison reform, by Carol Lawson; an examination of the rise of private enforcement of competition law by litigious reformers, by Souichirou Kozuka; and an exploration of the interconnections between law and popular culture, by Wolff.

While Johnson and Shinomiya provide important insights regarding the lay judge system, by now that system has been the subject of numerous books and articles both within and outside Japan. All the other chapters address topics that have not received much attention outside Japan. Indeed, I would submit that topics such as *shōmu kenji*, prison reform, and the interconnections between law and popular culture have not received sufficient attention even within Japan.

Each of the chapters highlights recent changes to the Japanese legal system. Collectively the essays provide a striking picture of the broad range of reforms the Japanese justice system has undergone over the past decade or two. As mentioned above, the Introduction frames the book in part as an examination of the impact of the 2001 reform program announced by the JSRC. Many of the reforms discussed in the individual chapters—including the lay judge system, the Labor Tribunal system, and the elimination of a statutory prohibition that prevented licensed lawyers (*bengoshi*) from assuming full-time employment in governmental bodies—arose directly out of JSRC recommendations. Others were not directly tied to those recommendations. Thus, for example, the debate over prison reform has deep historical roots, but the actual trigger for the recent reforms was a scandal that came to light in late 2002. While the process of competition law reform occurred contemporaneously with the JSRC deliberations, that topic was not part of the Reform Council's agenda. As those and other chapters discuss, however, whether directly rooted in the JSRC recommendations or not, many of the reforms reflect common threads, including a shift in attitudes toward how law is produced in Japan.

Notably, these essays do not find an “Americanization” of Japanese law. In the one essay that directly addresses the issue, Kozuka flatly rejects

the thesis that enforcement of Japanese competition law has become Americanized. The fact the other essays did not even address the question reflects what, in my view, is another strength of this collection: the perspectives of the authors. Much of the English-language literature on Japanese law has been produced by Americans. While there are many notable exceptions, much of that literature in turn reflects either explicit or implicit comparisons with the United States, even though, on a global level, frequently the United States that is the outlier. In contrast, Who Rules Japan? was organized by the Australian Network for Japanese Law (ANJeL) and only one (Johnson) of the ten authors is based in the United States. In the Preface, the editors address the question of whether a uniquely Australian style or perspective on Japanese law scholarship exists. As with the editors, on the basis of the essays in this volume, I could not discern any uniquely Australian perspective. Yet the absence of even implicit American perspectives is noteworthy.

All the chapters deal with important issues. All are thoroughly researched, with reference to both Japanese- and English-language sources, including: broad theoretical works. Several chapters include original interview research and the chapter-by-chapter bibliographies are valuable research tools in their own right. The chapters are all well written, insightful and engaging. Finally, from my own experience editing a collection of essays on Japanese law, I commend the editors for their superb job in editing this collection.

Two chapters especially stood out: those on the Labor Tribunal system and prison reform. Among the reforms that grew out of the JSRC recommendations, the Labor Tribunal system is one of the great success stories. The new system was influenced in part by European models and by the existing labor relations commission model in Japan: tripartite bodies with public interest, labor, and management representatives who resolve collective disputes. As with the labor relations commissions, the new Labor Tribunals are tripartite, with a professional judge and two lay experts, one of whom is recommended by Rengo (Japanese Trade Union Confederation) and the other by Nippon Keidanren (Japan Business

Federation). In contrast to the labor relations commissions, the Labor Tribunals handle individual work-related disputes. Although the deliberation process leading up to the introduction of the new system “endured heated discussion and deadlock among its labour and management representatives”,<sup>2</sup> the new system has been widely accepted by workers, management, lawyers and the judiciary. In addition to being a success in its own right, the Labor Tribunal system has helped spur broader changes, including “a reconsideration of how justice should be dispensed in employment relations,”<sup>3</sup> a reconsideration of other aspects of enforcement of labor law norms, and enactment of a new Labor Contracts Law. The Labor Tribunal system is a distinctly Japanese innovation, yet its success suggests other nations might learn from the dispute resolution model it employs.

The chapter on prison reform is another highlight. The chapter places the recent reforms in context by setting forth a brief history of Japanese corrections together with a thoughtful but concise examination of both the positive evaluations and longstanding criticisms of the Japanese correctional system. The chapter then turns to an examination of the Nagoya Prison incidents—assaults by guards on prisoners, leading to the deaths of two prisoners and serious injuries to a third—that first came to light in late 2002 and served as the catalyst for reform. Notably, “it was the arrests and trials . . . at Nagoya District Court [of eight guards who took part in the incidents,] rather than the incidents themselves that caught public attention worldwide.”<sup>4</sup> As Lawson observes, “Japan’s prison system operated in strict secrecy until the Nagoya Prison incidents.”<sup>5</sup> The revelations that resulted from the arrests and trials, together with the media scrutiny that followed, “dramatically changed the management of information flowing in and out of Japan’s prisons . . . [T]his means that ordinary Japanese citizens are gaining detailed knowledge of life in prison.”<sup>6</sup> Lawson continues: “If information is power, this change, more

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<sup>2</sup> *Id.* at 52.

<sup>3</sup> *Id.* at 59.

<sup>4</sup> *Id.* at 145.

<sup>5</sup> *Id.* at 146.

<sup>6</sup> *Id.* at 132.

than any other feature of the reforms, represents a potential transfer of some power over Japanese prisons from the hands of powerful elites to the hands of the Japanese people.”<sup>7</sup> Nonetheless, she convincingly demonstrates that the public outcry influenced the *timing* of the reforms; but she concludes that the *contents* of the reforms were in keeping with the model that “it is Japan’s political, economic and bureaucratic elites who actually negotiate among themselves to form policy, with no more than reference to public opinion.”<sup>8</sup> Following a detailed examination of the deliberations and substance of the reforms, Lawson concludes:

It would be naïve to suggest that these events are evidence of grassroots participation in the ‘production’ of law – in drafting the detail of the new prisons regime, or that the new regime represents global best practice in corrections. However, it is clear that for a brief time public opinion gained the upper hand in Japan, and dictated the timing of the reforms. So the relationship between law and social change in Japan in the new millennium is indeed increasingly dynamic and in at least some fields, the mobilisation of public opinion is becoming a key determinant of success.<sup>9</sup>

For me the above two chapters stood out, but readers with other interests probably would choose different chapters as their highlights. In sum, this book is a rich resource, containing essays on topics likely to appeal to a wide range of readers.

Given this book’s many strengths, my concerns are more in the nature of quibbles. One concern relates to the title. The Preface informs us that the origins of the book lie in a workshop on the theme “Who judges Japanese law?”, chosen as a deliberate legal twist on the political science question: “Who governs Japan?” Clearly, the topics addressed in the book go beyond the theme of who judges Japanese law; and, as in Lawson’s discussion of prison reform, a number of the chapters either directly address or touch on aspects of the legal reform process. Yet from the title,

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 148-149.

<sup>9</sup> *Id.* at 157.

Who Rules Japan?, many readers might assume they will find a full-blown reexamination of the political science debate, with detailed consideration of the roles played by politicians, bureaucrats, business, and other interest groups. If so, they are likely to be disappointed or, perhaps, pleased, if they have had their fill of the political science debate.

Another quibble: the chapter on the lay judge system was originally written in January 2010, less than nine months after the system went into effect and six months after the first trials were held. As reflected in the chapter title, “Judging Japan’s new criminal trials: *early returns from 2009*” (emphasis added), the focus is squarely on the first few months of trials under the new system. The authors, Johnson and Shinomiya, are two of the most knowledgeable experts on the system. With the exception of the “no-show” rate for prospective lay judges, which was only 10% in 2009 but has gone up steadily ever since, most of their observations continue to ring true today. And their analysis of the likely impact of and challenges facing the new system is insightful. Given the many works on the lay judge system that have appeared in the interim, however, one can only wish either that this chapter had appeared earlier or that it could have been updated prior to publication.

Similarly, the chapter on government lawyers touches on the hiring of *bengoshi* by central government agencies and local governments for tasks other than litigation but describes such hiring as “interesting but quite small and gradual”<sup>10</sup>, in part presumably because the primary focus is on who represents the government in civil and administrative litigation and in part because of a lag between completion of the draft and ultimate publication. By comparison to Australia or the United States, one would likely view such hiring as still “quite small and gradual,” yet by 2015 over 130 *bengoshi* were working either on a permanent or seconded basis for central government agencies and over 50 more were working for local government bodies.<sup>11</sup> Moreover, both categories continue to rise steadily. In fact, for local government bodies the recent rise has been dramatic; the

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<sup>10</sup> *Id.* at 100.

<sup>11</sup> BENGOSHI HAKUSHO 2015 NENBAN [WHITE PAPER ON LAWYERS, 2015 ED.], 150-153 (Nihon Bengoshi Rengōkai [Japan Federation of Bar Associations], ed., 2015).

number has more than doubled over just the past year, reaching 134 as of October 2016.<sup>12</sup> These trends and their long-term implications would have been perfectly suited for inclusion in the chapter on government lawyers.

One last quibble: the final chapter, on the interrelationships between popular culture and the law, with special reference to the longstanding debates over Japanese litigiousness, raises fascinating issues and poses thought-provoking hypotheses. Having myself used popular culture and the law as a central organizing theme in my seminar on Mass Media and the Law at The University of Tokyo for over a decade, and having been involved in various research projects on litigation behavior and attitudes toward litigation for even longer, these topics are near and dear to my heart. Yet the topics are so complex and interwoven that a twenty-page chapter can scarcely do them justice.

In terms of popular culture, Wolff focuses on Japanese network television. Based on essentially anecdotal evidence—descriptions of television dramas and talk shows with comparisons between the pre-2000 and post-2000 periods—he asserts, “Not only has there been a quantitative difference in law-themed shows, there has been a noticeable qualitative difference in their narratives about the law.”<sup>13</sup> “Prior to the 2000s,” he states, “Japanese network television rarely resorted to lawyers as characters or courtrooms as dramatic settings.”<sup>14</sup> He even goes so far as to claim, “Law simply did not register in the popular imagination prior to the much-touted civil justice reforms in 2001.”<sup>15</sup> According to Wolff, “in the few television shows that did portray lawyers or the courts, the representations were overwhelmingly unflattering.”<sup>16</sup> In contrast, he argues, in the 2000s, “Law has become hip.” The number of legal dramas has increased greatly, and “[t]he heroes are lawyers . . . , prosecutors . . . , legal trainees . . . or judges.”<sup>17</sup> These changes in popular portrayals of

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<sup>12</sup> Nihon Bengoshi Rengōkai [Japan Federation of Bar Associations], Ninkitsuki kōmuin tō ni kansuru tōkei [Statistics on Fixed-Term Public Servants et al.], <http://www.nichibenren.or.jp/recruit/lawyer/sosikinai/data.html> (viewed on Oct. 22, 2016).

<sup>13</sup> *WHO RULES JAPAN?*, *supra* note 1, at 199.

<sup>14</sup> *Id.* at 197.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 199.



lawyers and the law, he suggests, reflect (and perhaps have helped spur) a shift in which “attitudes to the law are warming.” In turn, he posits, “This attitudinal shift might go some way to explaining the upswing in litigation rates since the turn of the century.”<sup>18</sup>

Wolff’s premise is intriguing; and I welcome his efforts to explore the interrelationship between popular culture and the law. Yet many aspects beg for further in-depth study. The comparison between the pre-2000 and post-2000 periods, in terms both of quantity of shows and qualitative portrayals of lawyers and the law, calls for systematic research, rather than anecdotal accounts based on selected shows.

As Wolff himself observes,<sup>19</sup> moreover, popular culture extends beyond Japanese network television. It, of course, includes film and, especially noteworthy in the Japanese context, manga and anime, as well as novels, short stories, and even music. To offer just two examples of my own: from the world of film, *12nin no yasashii Nipponjin* (Twelve Kind Japanese),<sup>20</sup> a 1991 parody of *Twelve Angry Men*, was ahead of its time in posing the question of what it might look like if a jury system were introduced in Japan. That film, which won an award for best screenplay, proved popular and, after its run in theaters had ended, it was broadcast for some time on a major Japanese cable TV channel. From the world of manga, *Kasai no hito*, which ran from 1988 through 1996, was centered on an idealistic Family Court judge and included positive portrayals of dedicated lawyers. The manga itself was very popular, and it led to a 12-episode television drama series that ran in 1993, as well as single-episode television drama specials in 1996 and 2004.<sup>21</sup> As these isolated examples reflect, and as I’m sure Wolff would concede, it is a great overstatement to suggest that “[l]aw simply did not register in the popular imagination prior to . . . 2001.” For the same reason, whether the representations prior to 2001 were “overwhelmingly unflattering”

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<sup>18</sup> *Id.* at 201.

<sup>19</sup> *Id.*

<sup>20</sup> An overview of the film and the stage play on which it was based, in Japanese, appears at the following Wikipedia site: <https://ja.wikipedia.org/wiki/12人の優しい日本人>.

<sup>21</sup> An overview of the manga series and the television series and specials based on the manga, in Japanese, appears at the following Wikipedia site: <https://ja.wikipedia.org/wiki/家裁の人>.

warrants further objective investigation.

The impact of foreign (mainly U.S.) films and television dramas also bears consideration. Law-themed U.S. films have long been popular in Japan; by the 1990s, TV dramas such as *LA Law* and *Ally McBeal* (broadcast in Japan as *Ally my Love*) had become popular. In investigating the impact of popular culture on Japanese attitudes toward lawyers and litigation, it is worth considering what role those and subsequent U.S. films and TV dramas may have played. Still other complexities include the difficulties involved in assessing the interconnections between trends in popular culture and other developments in Japanese law and society, including a major increase in the number of lawyers, the introduction of the lay judge system, and other reforms, not to mention economic trends.

In Wolff's defense, he does not present his investigation and analysis as definitive findings. Rather, he frames his chapter as an effort "to reopen and refresh the debate" over Japanese litigiousness<sup>22</sup> and to suggest "new possible directions for future research into Japanese law and popular culture."<sup>23</sup> I fully agree that these are worthy themes deserving of further in-depth study. Perhaps ANJeL may take the broad and fascinating topic of popular culture and the law as the theme for a future collection.

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<sup>22</sup> WHO RULES JAPAN?, *supra* note 1, at 186.

<sup>23</sup> *Id.* at 201.

