1. Introduction: who rules Japan?

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1. CONTEXT: CIVIL JUSTICE REFORM

‘The first thing we do,’ wrote Shakespeare in *Henry VI*, ‘let’s kill all the lawyers’. Four hundred years later, Japan embarked on a decidedly anti-Shakespearian strategy – the reinvention of Japan from a bureaucratic-led administrative state (eg, Upham, 1987) to a law-led judicial state. A central plank of this strategy, according to the 2001 report by the Justice System Reform Council (‘Recommendations of the Justice System Reform Council – For a Justice System to Support Japan in the 21st Century, the Justice System Reform Council’), was tripling the population of lawyers (*bengoshi*), judges and public prosecutors. But the Council’s reform blueprint went further than this. Aimed at bringing the legal system closer to the people (Foote, 2007), the Council proposed reconceiving legal education from generalist undergraduate degrees to specialist legal training at dedicated postgraduate law schools. Ex ante

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1 For an overview of Japan’s legal system, see Abe and Nottage (2012).
2 To qualify as such, a candidate must pass a national bar examination (*shiho shiken*), complete a 12-month training programme (including secondments) at the Legal Research and Training Institute administered by the Supreme Court of Japan, and then successfully apply to the Supreme Court or the Ministry of Justice (MoJ) if the candidate wishes to start a career as a judge or prosecutor respectively. The number permitted to pass the examination each year is set essentially by the Court, the MoJ and the Japan Federation of Bar Associations, and remains low even compared with other countries (such as France and Germany) which share the civil law tradition of a career judiciary and procuracy with quite tight state control over entry into the legal profession. For a comparative overview of Japan’s ‘gatekeeper’ system for the legal profession, see generally Anderson and Ryan (2009).
3 Initially, only graduates from the new postgraduate law schools were entitled to sit for the bar examination. In 2011, however, the MoJ allowed candidates to bypass law school if they passed the Law School Equivalency Exam (‘LSEE’) (Bar Examination Act (Law No 140 of 1949), art 5). Despite
administrative action would give way to *ex post* judicial relief. Ordinary citizens would be involved in judging cases. The court system would receive capacity-boosting investment in technical research expertise to support the speedy resolution of intellectual property disputes. Access to justice would be widened; execution of judgments and legal remedies strengthened and expanded.

Ostensibly, the rationale for this reform effort was to invest greater democratic legitimacy in the justice system. The overhaul of legal education and increase in lawyer numbers, for example, was aimed at promoting wider access to legal advice, including specialist, globally relevant commercial advice to Japanese industry. The involvement of ordinary citizens in legal decision making was designed to improve popular understanding of, and engagement in, the legal system (Anderson and Nolan, 2004). And the shift from *ex ante* regulation by public authorities to *ex post* relief through the judicial system (Masujima, 2006) was geared towards embracing a brave, new deregulated world, substituting direct socio-economic ordering for indirect control on freedom of action through enforcement of legal standards.

Investment in a more robust justice system is, of course, a self-evident good. Politically, a healthy legal system is essential to defending the rule of law: it secures democratic values of government accountability, freedom and other important public values in increasingly complex societies (Anleu and Prest, 2004, p. 2). Socially, it reinforces shared community standards as well as promoting social change (Haley, 2002, p. 121; Tanase, 2010). Further, by enabling individuals to access justice and invoke the law, the legal system safeguards an ‘important symbol of active citizenship’ (Thornton, 2000, p. 337). Economically, it provides the basis for a secure, stable and predictable environment for a modern-day market economy by enforcing bargains, protecting property rights and facilitating different modes of investment (Jayasuriya, 1999, pp. 3–7).

On deeper inspection, however, the Council had a more prosaic goal: the economic imperative to revitalise a lifeless economy in the new globally competitive order. In the opening chapter of its report, for example, the Council highlights Japan’s ‘difficult conditions’, especially early predictions the LSEE would place pressure on the law school system (Matsui, 2012, p. 30; Sugiura, 2012), this is unlikely given that the LSEE is onerous (Jones, 2012) with pass rates of 1.8 per cent in 2011 and 3 per cent in 2012 (Steele and Petridis, 2014, p. 99).

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4 For an early critique of the reforms focused on post-graduate law schools, see Nottage (2001).
5 Available at http://japan.kantei.go.jp/policy/sihou/singikai/index_e.html.
in the management of the political economy, and the need to restore ‘rich creativity and vitality to this country’. The report goes on to suggest that state-based economic planning must give way to a more participatory market economy built on open and transparent rules. ‘The justice system,’ the report submits, ‘should be positioned as the “final linchpin” of a series of various reforms concerning restructuring of the shape of our country’. By 2001, when the report was released, Japan’s ‘lost decade’ of economic stagnation was entering its second decade. With the 1990s marred by crippling financial crisis, a spate of corporate insolvencies, ongoing scandals in Japan’s premier economic ministries, rising unemployment, and low to negative growth, policymakers responded with successive legislative reforms aimed at restructuring public administration and private governance of the economy. A restructured bureaucracy, ‘Big Bang’ financial reforms and large-scale reform of Japanese corporate law (Aronson et al, 2015) are representative examples of this reform effort. The 2001 report was the latest in big-picture reforms aimed at re-energising the Japanese economy.

A law-led approach to economic revival, however, is unusual. Prevailing orthodoxy, after all, suggests that lawyers inhibit economic growth (Milhaupt and West, 2003, pp. 453–4, 456–7). For example, some empirical studies (especially in the United States) have shown an inverse relationship between the number of lawyers and the vibrancy of the economy. Lawyers, many economists conclude, are a drag on the economy. Unlike entrepreneurs and engineers, lawyers do not generate wealth; they are rent-seekers who contribute complexity and other costs to completing transactions. The Council, therefore, was surprising in perceiving law as a boost to, rather than a drag on, economic revival.

There are many ways to evaluate the Council’s proposals. One is to critically analyse the Council’s recommendations themselves: the strengths, weaknesses, gaps and emphases. Another is to investigate the extent to which the recommendations have been translated into legislative action and, in the process, achieved the hoped-for democratic and economic benefits. In the wake of the release of the Council’s report, a burgeoning literature has certainly explored these two lines of inquiry.

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6 Despite this orthodoxy, as Milhaupt and West (2003) argue, lawyers can contribute to economic growth by, for example, reducing transaction costs (see also Spigelman (2006)).

7 This in line with the growing literature in Western languages on broader issues such as the changing conception of law in Japan (Baum et al, 2013, pp. 67–82) and Japanese courts and the legal profession (Baum et al, 2013, pp. 93–111). See also Levin and Mackie (2013) and Vanoverbeke et al (2014).
An example of the former is Upham (2013). In a wide-ranging reflection on the ideological flavour to the Council’s recommendations, in particular the implementation of the saiban’in lay adjudication models in serious criminal trials, Upham (2013, pp. 570–4) notes that popular participation in the judicial system might achieve greater social trust and democratic participation in the judicial arm of government; but, equally, it comes at the expense of rule-of-law considerations such as judicial neutrality, objectivity and accountability. Upham (2013, p. 576) further cautions Japan against forsaking its commitment to substantive justice in its rush to become a ‘procedurally rich legal system’, a distinctly American obsession. Wilson (2013), in a different vein, explores a gap in the Council’s report – namely, citizen participation in civil trials. In his paper, he argues that the achievements in lay adjudication of criminal proceedings could profitably be extended to civil lawsuits. This is an idea also explored by Fukurai (2013). In a comprehensive review of lay participation in criminal trials, Fukurai (2013) does more than describe how civil participation in criminal trials was enacted into law and evaluate the extent to which popular participation has achieved procedural reforms to police powers and prosecutorial practices; he also reflects on the prospects of expanding the new adjudicative system to civil and administrative cases.

More common (and typical of law reform critiques the world over) are evaluations of the gap between reform ideal and the reality of implementation. For example, the Council’s report recommended a new system of graduate legal education, more generous national legal examination pass rates of 70–80 per cent (compared with historic rates as low as 3 to 5 per cent), and the overall tripling of the population of legal professionals. Graduate schools debuted in April 2004 amid buoyant student expectations about career prospects in law. However, the interest was short lived: there was already a marked drop in applications for entry in the 2005 academic year. According to a survey by Asahi Shimbun (18 November 2004), 44 of the 46 law schools that had stopped accepting applications had received fewer applications than the previous year. Twenty law schools saw their applications halve. At one law school, the number of new students nosedived to 10 per cent of the previous year’s total. Some law schools subsequently closed, and many others remain at risk.8

8 Himeji Dokkyo University Law School announced in May 2010 that it would not enrol new students in 2011. Omiya Law School and Toin University of
The reasons why some students were avoiding the new law schools were straightforward. For one, law school adds a further two to three years of legal training compared with pre-2004 undergraduate law degrees (Nottage, 2005). Tuition fees are comparatively high, even in public universities; and the pass rate for the new national bar examination was revised downwards from the 70–80 per cent as envisioned, to 48 per cent in 2006 and 23 per cent in 2011. A key stakeholder in setting the annual number of successful candidates, the Japan Federation of Bar Associations (2009), has pressed strongly to reduce even further the numbers and therefore the pass rate. Although no longer impossible odds, the risks of failure are still palpable. Despite early assessments by Milhaupt and West (2003) that Japanese graduates from elite universities are increasingly preferring private practice over civil service, their data only confirm that more Japanese are entering the legal profession at the rate allowed by the Japanese government. At worst, the drop in law school applications shows that any trends they identify among elite students may not reflect the attitudes of the general student population.

However, this book explores the reform effort from a different angle. It evaluates the extent to which the 2001 reform programme 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.

This is an important perspective. For long, scholars, economists, political scientists and lawyers alike have debated the power dynamics underlying the management of the Japanese administrative state to explain the twists and turns in Japan’s economic fortunes – from its soaring economic growth in the period following World War II, especially during the 1970s and 1980s, to its meltdown and listlessness since the 1990s. The question has been asked in different ways. In the 1970s and 1980s, the question was usually posed as: who orchestrated Japan’s economic miracle in the sixties and seventies? In the 1990s and 2000s, the question was usually reframed as: who is accountable for the policy failure that has plunged Japan into financial crisis and long-standing recession? Yet the core issue remains the same – who governs Japan? (Johnson, 1995).

Yokohama School of Law announced a merger from April 2012. See also Foote (2011, pp. 51–52) Matsui (2012, p. 27); and Steel and Petridis (2014, pp. 100–101).
This question has elicited strikingly divergent views. Some, for example, maintain that Japan’s bureaucracies dominate the policymaking process and exert an all-powerful influence over the economic management of the nation (eg, Kaplan 1972; Campbell, 1977; Johnson, 1982; Zysman, 1983; Anchordoguy, 1989; van Wolferen, 1989; Kato, 1994; Keehn, 1997). A leading proponent of this view is Chalmers Johnson (1982) who, in his path-breaking study of the (then) Ministry of International Trade and Investment from the late 1970s, paints a picture of an omnipotent Japanese developmental state that planned, engineered and effected Japan’s post-war economic success by exercising control over industry. Assessing the recent reforms, including those impacting on related core post-war institutions such as the lifelong employment system, Haley (2005) emphasises significant continuities since the 1990s. Others, such as Ramseyer and Rosenbluth (1993), instead rely on a rational choice paradigm of the interaction between politicians and bureaucrats to submit that bureaucrats have long regulated according to a political script. They suggest that because the Liberal Democratic Party (LDP) has formal veto power and control over civil servant promotions and salaries, the bureaucracy in reality implements policies in the shadow of its political leaders. At the central government level, moreover, the LDP retained control of the (more important) lower House of Representatives from 1955, until losing power during 1993–4 and 2009–12 – with the Democratic Party of Japan struggling over the latter period to expand political control over the bureaucracy (Nottage, 2011).

Law has not been ignored in the debate over who rules Japan. Indeed, contributors to the governance debate have turned to Japanese law to ground their theories on the Japanese state. For example, Carlile and Tilton (1998) argue that the inability of the Japanese legal system to provide firms and individuals with proper channels to challenge informal government policy has allowed a ‘developmentalist ideology’ – one in which bureaucrats are entrusted with responsibility to manage the nation’s development and security – to prevail unchecked. This means, concurs Henderson (1973, p. 195), that ‘[r]ather than a rule of law, a rule of bureaucrats prevails’ in Japan.

Ramseyer and Nakazato (1999, pp. 191–219) agree that law is the starting point for analysing Japanese governance. But they come to a radically different conclusion. The Japanese legal system, they submit, is a rational system of rules operating under the umbrella of a parliamentary democracy. Bureaucrats rule according to the whim of Japan’s political leaders. They do so because bureaucrats’ career destinations and salaries are controlled by the LDP. If they do not act within the ambit allowed by the LDP, the judiciary – also under the control of the LDP – will step in.
to enforce the LDP's policy preferences through judicial review. Further, the lack of a strong, consistent opposition to the LDP means it does not need to moderate its sanctions as seen in more robust two-party systems such as the United States, United Kingdom and Australia. Therefore, they conclude, Japanese law allows the LDP a stranglehold over public administration because the essential dynamic underscoring Japanese administrative law ensures an executive and judiciary loyal to LDP policy objectives. On this view, moreover, the Japanese judiciary should not be expected to act fully independently. Ramseyer and Rasmusen (2003) develop econometric studies to argue that judges indeed tend to rule in favour of LDP preferences in ‘politically charged’ cases, otherwise their judicial careers tend to suffer significantly. Yet there is no evidence of direct political influence on the judiciary, and other methodological problems have been highlighted (Upham, 2005).

Not all commentators, however, subscribe to one of these two positions – each of which, despite emphasising different drivers (elite bureaucrats versus LDP politicians), tends to see little change in Japan’s basic governance structures. A third group of observers, for example, see Japanese law as undergoing some significant transitions (Oda, 2009). They suggest that Japanese governance is undergoing a metamorphosis (Hollerman, 1988): from administrative fiat to rule by law. As Milhaupt and Miller (1997) contend, the end of high economic growth, financial instability and political transition mean that informal regulation based on consensus and cooperation is breaking down. In its place, legalism – represented by the growth of formal legal rules and procedures – is emerging. The reins of power, in short, are being handed over from the bureaucracy to the legislature. Partial support for this prognosis can be seen in the successive changes to corporate law and the transformation to governance practices since the 1990s (Nottage et al, 2008; Kingston, 2013).

The shift is not straightforward. Community and social norms in Japan reassert and redefine themselves as the legal system evolves (Tanase, 2010). Further, despite some reference or indeed indebtedness to analysis of Japanese law, contributors to the broader governance debate have largely neglected to take the opportunity to explore fully the implications of their findings for the control and management of the legal system itself. This book project, therefore, takes the debate full circle by returning the scholarly gaze to Japanese law.
2. THEMES: JAPANESE LAW ‘OF, FOR AND BY THE PEOPLE’?

To flesh out the full potential of the ‘who governs Japan’ debate, this volume adopts a broad perspective of what a rule-centred, as opposed to an administrative, state might be. In large part, such a shift is a democratic one – from elite control to popular participation. And so, borrowing from Abraham Lincoln’s Gettysburg address about democratic government, the book explores the extent to which the Japanese legal system is ‘of the people, for the people and by the people’.9

Under the rubric of law ‘by the people’, this book analyses the extent to which Japanese legal processes, especially adjudicative processes, are becoming increasingly open to civic participation. An important development in this respect is the 2009 commencement of the ‘saiban-in’ (lay assessor or quasi-jury) system, where members of the public serve alongside professional judges to hear serious criminal cases and determine sentences (for a now voluminous literature, see Baum et al, 2013, pp. 442–8). A similar trend is the introduction of a new Labour Disputes Tribunal, in which one representative from management and another from the union movement serve alongside a professional judge to hear common workplace-based disputes (Baum et al, 2013, pp. 353–62). These two trends open up the issue of whether legal decision making is returning to the people at the expense of legal elites such as judges. On the other hand, judges are still ‘loaned’ to the Ministry of Justice to help the government in its administrative, civil and criminal litigation. This suggests that both the judiciary and public prosecutors may not be opening up too quickly to new ideas, such as engaging outside bengoshi lawyers to resolve disputes involving the government both in and out of court. This system also has repercussions for how citizens engage in litigation against the government.

Turning to law ‘for the people’, this volume examines the extent to which law and legal institutions are accessible to, and utilised by, ordinary citizens. This builds on a long-standing debate in the legal literature about the relevance of law to Japanese lives. The Kawashima (1963) thesis – which still enjoys many adherents – claims that traditional values of harmony and group consciousness make law largely unimportant in resolving individual and community conflicts. Critics claim that institutional weakness, the elite manipulation of the legal institutions, and the cultural emphasis on consensus and cooperation mean that the law is largely irrelevant to everyday life. However, other scholars argue that the legal system is still vital in providing a framework for social order and conflict resolution.

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9 The famous speech by the US President was delivered in 1863 (http://voicesofdemocracy.umd.edu/lincoln-gettysburg-address-speech-text/).
system to control the pace and direction of social control, or rational bargaining in the shadow of law provide more convincing explanations of how the Japanese engage with law. A more recent strain of scholarship seeks to temper the strength of these criticisms by re-establishing, at least partially, the enduring relevance of socio-cultural values to Japanese legal behaviour (West, 2005; Tanase, 2010; Nottage, 2009). Despite calls to find ‘consensus’ in this debate (Haley, 2002), this volume reopens the inquiry in light of new trends and different case studies.

Lastly, law ‘of the people’ refers to the extent to which normative diversity and community values are inherent in legal processes and outcomes. This book project, therefore, asks whether law reform initiatives and administrative procedures are primarily the domain of public officials or are amenable to the voices and values of ordinary citizens. It also queries the extent that legal decision makers, especially in administrative and government organisations, enforce community standards, entrench an elite ideology or maintain a professional standard of dispassionate objectivity.

3. ARGUMENTS: OUTLINE OF BOOK CHAPTERS

In Chapter 2, Johnson and Shinomiya explore the ‘early returns’ of Japan’s adoption of a lay judge system (‘saiban-in’ system) for serious criminal trials (see also Iibusuki, 2010). Although Japan had earlier experimented with a jury system before the war (and sporadically after the war in US-occupied Okinawa), jury trials were uncommon and unpopular. As such, the new saiban’in system in twenty-first-century Japan represents a significant legal innovation by involving ordinary citizens, alongside professional judges, in determining both guilt and sentence in serious criminal trials. In their analysis of the first year of the new system, examining the saiban’in trials of the first 142 defendants, Johnson and Shinomiya note that the reform effort had a smooth debut. Despite early reservations among the public about participating in criminal trials, most Japanese citizens accepted the call to participate. More surprisingly, they were prepared to question witnesses in open court and participate in post-trial press conferences. At the same time, popular participation has not necessarily signalled populist (or harsher) justice. Sentencing data, for example, show that lay trials have not strayed too far from previous judge-only trials in handing down suspended sentences or imposing terms of imprisonment. Appeals data also show that the defence has lodged appeals to the Supreme Court in about
one-third of all cases, a pattern continued from previous years; the prosecution has not appealed at all.

Nevertheless, the authors point to emerging trends that might shift the dynamics in Japanese criminal justice. For example, greater public scrutiny of pre-trial processes, as well as growing penal populism and victims’ rights, might spell the decline of ‘benevolent paternalism’ in Japanese criminal justice. More immediately, the new lay judge system might place ongoing pressure to reform police powers and pre-trial investigation practices, meaning that courtroom advocacy rather than the ‘precise justice’ of carefully prepared dossiers might have a stronger bearing on the outcome of cases. The new system also spells some hope for a more invigorated defence bar, restoring some balance into a criminal justice system that has historically been tilted in the state’s favour.

In Chapter 3, Araki and Wolff look at another experiment in civic participation in formal adjudication: the new tripartite tribunal system for labour disputes. The tribunal exists within the Japanese court hierarchy; it is neither a specialist court nor a dispute resolution body annexed to the Ministry of Labour (as in some earlier schemes, for example to mediate disputes over equal employment opportunity). Tribunal decisions are made by three-member panels comprising a professional judge and a representative each from management and labour. The promise of the reform was to promote quick, flexible and expert advice on the disputes coming before it. After analysing the historical evolution of work-related dispute resolution in Japan prior to the 2004 reform and outlining the key operational features of tribunal justice, Araki and Wolff argue that lay participation has vastly improved the resolution of individual employment disputes. The empirical data reveal that the tribunal system has been very popular with disputants and has achieved an 80 per cent success rate in resolving disputes. A key part of its success has been the role of lay members who, drawing on their experience and practical knowledge, can fashion triple-S justice: speedy, specialist and suitable.11

10 Cf, eg, the Intellectual Property High Court established in 2005 (Matsui, 2010).

11 Cf also the Dispute Resolution Centre for Nuclear Damage Compensation (Rheuben and Nottage, 2013) established in the wake of Japan’s ‘triple disasters’ in 2011 (see also Butt et al, 2014). The Centre is an unusual hybrid, illustrating the gradual transformation in Japanese governance structures. Although set up and funded by the government, the staff and mediators are bengoshi or ex-judges (not officials) and generally facilitate out-of-court settlements between victims and the Tokyo Electric Power Company, based on guidelines derived primarily from an analysis of civil law liability principles.
In Chapter 4, Green and Nottage shift the gaze from adjudication to earlier stages in the dispute resolution process. In particular, they explore the extent to which litigation patterns involving the government have changed in light of the broader judicial reforms (see further Nottage and Green, 2011). The narrative of the Council’s report, as mentioned above, is boosting popular participation in the law: better civilian access to lawyers (by increasing lawyer numbers); a shift to ex post relief rather than ex ante ordering; and greater civic involvement in decision-making processes. Yet, apart from a few references recommending improvements to judicial review in administrative litigation, the Council’s report was largely silent on the role the government should play in defending or advancing state interests in the legal system. Green and Nottage argue that, consistently with the Council’s reform rhetoric of improved legal capacity and greater popular participation in the law, it would be reasonable to expect litigation involving the government to rise and the government to respond by increasing the number and range of expertise of government legal advisors, but this has largely not happened. Employing a mix of doctrinal analysis, survey data and their own interviews with government departments, Green and Nottage note only a gentle trend of transformation in government litigation and lawyering. This is despite legislative amendments (and liberalisation of judicial tests) to reduce, for example, the jurisdictional barriers to administrative lawsuits against the government. It also defies a broader trend of some high-profile cases against both central and municipal governments to publicise social issues and force social change.

Both ‘bottom up’ survey and interview data as well as ‘top down’ aggregate statistics show a continuing trend of relatively few lawsuits filed against the government which, even then, generally meet with limited success. This is attributable to a small pool of available expert administrative lawyers, the difficulty of accessing the reasons for public authorities’ decisions, and the absence of a dedicated court with expertise in government law. The supply of government legal services also remains largely unchanged. A small supply of specialist shōmu kenji prosecutors – supported by paralegals and a (slowly declining) number of judges on three-year secondments from the bench – remains the norm, although the Ministry of Justice is making greater use of outside counsel and a number of specialist disputes are delegated to other agencies and departments. Green and Nottage conclude that government litigation, although on the increase, is not likely to see immediate changes. The Ministry of Justice senses no need to make major changes to its staffing and practices, and budgetary constraints make it difficult to expand its pool of in-house specialists or external legal consultants.
In Chapter 5, Ryan collapses the distinction between the administrative state and the judicial state in Japan. Using welfare, especially aged care and child care as his two case studies, Ryan argues that the Japanese state is a mix of ‘regulatory proliferation’ and ‘liberal renewal’. In this respect, Ryan adds, Japan is no different from most other modern legal orders. With a declining fertility rate, a greying population and a reluctance to use immigration levels to boost the workforce, Japan faces a significant public policy issue: how to fund growing welfare expectations with a declining taxation base? Ryan argues that Japan has responded by blending public and private law. In particular, public-interest contracts linking government, private providers and welfare recipients have emerged in welfare areas such as nursing care, childcare provision and pension payments. This trend, Ryan argues, is not alien to Japanese legal tradition. Indeed, Japanese law has long embraced both legal formalism (such as contract validity) and context-specific justice (such as subjecting valid contracts to flexible tests like the good faith exercise of rights).12 Likewise, Japanese statutes contain both enforceable obligations as well as broad-brush policy goals, and have supplemented formal legal avenues of redress with ‘soft law’ options such as administrative guidance, industry regulation, accreditation standards and consumer education campaigns. For Ryan, Japan straddles both formal regulation and informal ordering. It is a hybrid: neither an administrative nor a judicial state. Nor is it simply transitioning from one to the other.

In Chapter 6, prison policy and reform provides the backdrop for Lawson’s exploration of popular participation in law and social change. Lawson looks beyond public participation in formal legal processes to broader civic engagement in the ‘production of law’ and national governance. In her literature review of the theories of both the production and consumption of law and social change in Japan, Lawson rejects theories of a passive population. The Japanese people do not uncritically support the state because of cultural deference to authority or because executive organs have (and exercise) disproportionate power in public policymaking. At the same time, Lawson does not go so far as to support a view of liberal pluralism where grassroots activism and citizen outrage can force governmental action. Instead, she concludes that, in the context of prison reform following the Nagoya prison scandals in 2002–2003, public opinion, encouraged by strong media coverage, forced bureaucratic action for prisons reform. The content of the reform agenda, however, remained...

12 See also Pardieck (2013). On the well-advanced project for comprehensive reform of Japan’s Civil Code, see Kozuka and Nottage (2014).
firmly within bureaucratic control. The Ministry of Justice was able to mollify the public after an initial social panic, but the reforms have made only superficial gains and done little to address the human rights abuses of inmates, which sparked the panic. Lawson concludes that popular participation needs to broaden to embrace popular sovereignty. Ordinary citizens, even inmates and wardens, need to engage in an ongoing conversation about prisons policy and the way forward in balancing the competing goals of correction, rehabilitation and human dignity.

In Chapter 7, Kozuka identifies the ‘judicialization’ of anti-monopoly law enforcement. By ‘judicialization’, he means greater resort to the courts by private plaintiffs for the enforcement of anti-competitive practices. This is in contrast to claims in the literature of bureaucratic control. These claims include that enforcement of the Anti-Monopoly Act is ordinarily within the purview of the Japan Fair Trade Commission (JFTC); that private enforcement litigation – whether by way of anti-monopoly suits for damages or injunctive relief or by way of statutory torts – is unusual; and that the policy rationale to uphold the anti-monopoly statute is driven by ‘bureaucratic’ concerns for the national competitiveness of the economy rather than ‘legalistic’ determinations about individual rights and quantification of losses.

Drawing on an empirical analysis of taxpayer suits pursuing the tort liability of participants in bid rigging for local government procurement projects, Kozuka argues that competition law enforcement is entering a new era of judicialisation. More plaintiffs are filing competition law infringement cases, even municipal governments are resorting to court to recover losses arising from rigged bids for public works. In part, this trend is explicable on legal grounds, such as reforms to the Code of Civil Procedure (in effect from 1998) facilitating quantification of damages, and greater success with freedom of information requests to obtain information on bids and to recover investigative material by the JFTC in its pending cases. Equally significant is the willingness of activist lawyers, through citizen ombudsman networks, to pursue private enforcement action, motivated less by lucrative fee income and more by the greater good of forcing greater governmental accountability and fiscal responsibility. Importantly, however, judicialisation does not signal the ‘Americanisation’ of Japanese law (see also Oda, 2005; cf Kelemen and Sibbitt, 2002).

In Chapter 8, Wolff closes the volume with an unusual perspective on litigiousness in Japan. Noting a significant increase in law-themed

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television dramas and variety shows in Japan since the 2000s, Wolff explores the extent to which popular culture is a reliable guide to shifting legal consciousness in Japan. The extent to which the Japanese are prepared to assert their rights and engage in legal processes has occupied a significant corpus of academic commentary on Japanese law, especially since the publication of English translations of key works by Kawashima (1963) from the 1960s. Wolff’s chapter seeks to bring a new methodology – narrative analysis of popular culture sources – to address the same issue in more recent times.

Wolff defends popular culture on the basis that mass media images of the law, although rooted in fiction, parallel developments in the broader society because television shows need to resonate with audiences’ experiences and values to achieve commercial appeal. In his survey of law’s depiction on the small screen, both before and after the turn of the century, Wolff submits that the law is growing in popularity in Japan. Equally, although law attracts greater interest as a tool to remedy injustice and abuse of power, Japanese people remain cautious that resort to formal law still tends to be destructive of community and social relationships, a conclusion resonating with recent studies by leading commentators such as Tanase (2010).

REFERENCES

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