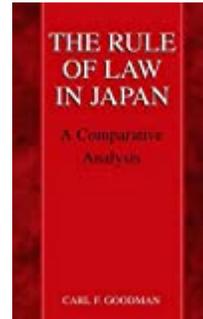




Carl F. Goodman. *The Rule of Law in Japan: A Comparative Analysis.* The Hague: Kluwer Law International, 2003. x + 391 pp. \$105.00 (cloth), ISBN 978-90-411-8903-5.



Reviewed by Rick Castberg (University of Hawai'i at Hilo)

Published on H-US-Japan (November, 2004)

What You See May Not Be What You Get

Every chapter in this important new addition to comparative law contains a section with the title above. In these sections, Carl Goodman questions common assumptions or clarifies misconceptions based on cultural differences. These relatively short sections add considerably to the understanding of the differences in the rule of law between Japan and the United States, which is the subject of this volume.

The chapters in this volume are arranged both by issues, such as separation of church and state, and by substantive law, such as contracts and criminal law. In addition, there are chapters on the judiciary and legal profession in both nations. The format in each chapter is the same: the issue/law in the United States is presented, usually in historical context, followed by the same issue/law in Japan, then "What You See May Not Be What You Get," followed by selected cases or examples, and discussion. This approach works quite well. Considerable emphasis is placed on cultural and historical explanations for differences in law between the two countries, which is essential if one wants to understand why, for example, sexual equality is guaranteed by the Japanese Constitu-

tion but is something quite different in practice (see pp. 89-103).

It is not completely clear why Goodman has selected the topics and areas of law that he has, although it is likely that they represent the areas of law with which he has the most familiarity. The book, for example, examines the constitutional issues of separation of church and state and of equality and discrimination, but omits freedom of speech, association, and of the press. It is not as though these have been non-issues in Japan. Demonstrations, some of which turned violent, were common in Japan during the 1960s, and continue, more peacefully, today. These demonstrations produced several significant court rulings. The same is true of press freedom issues. Although this is not a constitutional law text, and cannot be expected to cover every area of law, these omissions are curious. Chapter 1, however, makes it clear that the text "attempts to compare Japanese and American legal principles in selected areas." It does that quite well.

Chapter 2 explores the foundations of the two legal systems, describing the British common law origin of

the U.S. system, and the Kamakura and Chinese origins of Japanese law, which, after the Meiji Restoration, was heavily influenced by Western law. Goodman questions the notion that Japan adopted a Western legal system. He concludes that while the West developed a rule of law system, Japan developed a rule by use of law system, which better fit Japanese culture (p. 24).

The third chapter, on “Constitutional Ideology,” describes the American origins of the current Japanese Constitution and notes the similarities and differences of the two documents. Many of the differences are a function of constitutional interpretation rather than American intent. Structurally, of course, the American system is a presidential model based on federalism, while that of Japan is parliamentary and unitary, with an independent judiciary. What makes this chapter so interesting is the examination of what the American drafters of the Constitution intended compared to how the Constitution works in practice. Provisions that appear to be mandatory, Goodman notes, are viewed as directional and subject to legislative, rather than judicial, enforcement (p. 52). Article 9, the controversial provision renouncing war, is discussed in a separate chapter.

Chapter 4 covers the separation of church and state. Goodman relates that many Japanese consider themselves both Buddhist and Shinto, as opposed to Americans who, if they are religious at all, belong to one denomination. He further notes that the Meiji rulers created “State Shintoism,” which was used to rally the population during World War II. Although the war ended almost sixty years ago, visits of elected officials to Yasakuni Shrine still generate a great deal of controversy, both in Japan and in its neighbors, despite the fact that State Shintoism no longer officially exists. Several court cases in both the United States and Japan are discussed. I think this chapter would have been strengthened had there been a discussion of “organized” religion in the two countries, as such a discussion is probably the best way to explain Japanese religions to Americans. Americans frequently equate religious practices with going to church on Sunday, while for the Japanese religious practices might include attending a temple or shrine, but not on the same day every week, and observing a variety of religious festivals and events over a year’s period.

Equality and discrimination are covered in Chapter 5. Inasmuch as these issues are quite salient in both nations, this chapter is one of the longest in the book. Both the United States and Japan have long histories of discrimination, but the nature of their discrimination is quite differ-

ent. Japan, of course, does not have a diverse population, so discrimination has often been based on factors other than race. Goodman discusses discrimination against the Ainu, an indigenous ethnic group; the Burakumin, who are racially and ethnically identical to other Japanese; resident Koreans, and aliens; and the manner in which the Diet and the courts have handled issues arising out of this discrimination. This is in stark contrast to the United States, which has a long constitutional history and a great deal of legislation, all designed to reduce or eliminate discrimination. Goodman notes that the United States tries to integrate discriminated groups into the general population, while Japan attacks the problem by attempting to raise the social and economic status of its discriminated groups. In the end, however, he concludes that “in neither country do you get what the Constitution promises” (p. 88). Discrimination based on gender is also covered in chapter 5, and while Goodman notes that the Japanese have done much to remedy such discrimination, “as a matter of fact women are still subject to discrimination in Japan” (p. 102).

Chapter 6, on the judiciary, is well done and includes discussion of several important Supreme Court decisions, including the voting rights apportionment cases, where the Court found significant disparity in voter representation but refused to overturn the elections in question. The chapter covers the training of judges, the structure of the judicial system, and judicial review in both countries.

The following chapter, on the legal profession, while quite short, does a good job of describing the differences in education and training of lawyers in Japan and the United States, which in turn explains in large part why their roles are so different in each country. Prosecutors, who exercise more power in Japan than in the United States, are covered in the chapter on criminal law. Goodman describes quite well the differences between the two systems and briefly describes the new system of training legal professionals that begins this year.

Chapter 8 deals with Article 9 of the Japanese Constitution, the renunciation of war, and the issue of military power and responsibility. Because of Article 9, of course, the role of the military in the two countries is quite different. Part of the chapter deals with the constitutional interpretation of Article 9, while the rest covers command and control, terrorism, political challenges, and constitutional transformation. The last issue is perhaps the most noteworthy, as recent policy decisions in Japan, with respect to the military, show that, while the wording of Article 9 remains unchanged, its interpretation is in the

process of changing.

The chapter on treaties is rather short and, unfortunately, does not cover the Status of Forces Agreement (SOFA), which has been in the news frequently over the past ten years with respect to Japanese jurisdiction over crimes committed by U.S. military personnel and their dependents. Under SOFA, for example, Japan has jurisdiction over crimes committed by U.S. military personnel off base and jurisdiction over crimes committed by U.S. civilians (including military dependents) on and off base. This situation creates a number of problems for both the Japanese and Americans. Even with this omission, however, Chapter 9 is helpful in comparing and contrasting the manner in which the two nations enter into treaties.

The chapters on corporate matters (10), contracts (11), and civil litigation (12), will be of interest to those interested in conducting business in and with Japan. The last chapter will also appeal to those interested in comparative law, as it describes in some detail the origins of the two systems, both feudal but quite different in form and content. These chapters also shed considerable light on the cultural differences in the respective workplaces of the Americans and the Japanese.

Chapter 13, one of the longer chapters, covers criminal law and procedure. Although more recent (post-1998) studies of various aspects of the Japanese criminal justice system are not cited, nevertheless the chapter is comprehensive, explaining quite well some of the more unique aspects of the Japanese criminal justice system. I would have liked to have seen something on organized crime and official corruption, as both have significant political implications, but those topics have been adequately dealt with elsewhere. The chapter is most valuable in discussing criminal procedure in both countries, and how procedure is to a large extent shaped by the culture, social as well as legal, of each nation. Those unfamiliar with the Japanese system will be surprised by its combination of strictness and leniency. There is also a well-written discussion of prosecution in Japan. Overall, this is an excellent chapter.

Administrative law is covered in Chapter 14. What stands out in this chapter is “what you may see may not

be what you get,” at least in Japan. While both Japan and the United States would seem to have very similar systems of administrative law, Japan has stricter standing requirements, thereby restricting the administrative review process to a relative smaller percentage of the population. For example, only administrative “dispositions” may be challenged in a *Kokoku* suit (the most common administrative lawsuit), and many actions by administrative agencies are not “dispositions.” Litigants are further handicapped by the shortage of lawyers in Japan. It is obvious that Goodman has experience in administrative law, as this is not only one of the more comprehensive chapters, it is one of the best explained.

The next-to-final chapter, “Unifying Factors,” summarizes and ties the previous chapters together and puts them in cultural perspective. The sections of this chapter are subtitled “Harmony and Balancing of Societal Interests vs. Individual Rights,” “The Common Sense of Society vs. Strict Interpretation,” “Group vs. Personal Interests,” and “Substantive Justice.” The subtitles illustrate quite well the content of this chapter. There is also a short conclusion, chapter 16, which takes a brief look into the future of the rule of law in Japan.

Overall, this is an excellent volume, but I do have some complaints. The price of the volume is quite high, restricting this valuable addition to the literature to libraries and a few specialists. It would make an excellent text or supplemental text for comparative law courses or higher-level social science courses on Japan, but the price may prove a deterrent to many. Footnoting is extensive, but the footnote system is ponderous and consistent neither with U.S. legal nor social science citations. As such it takes up a great deal of space in the book. More importantly, the book lacks a bibliography. This is a frustrating omission and difficult to understand in the era of word processing. Finally, the index is not detailed enough to find topics quickly.

The complaints are minor irritations, however, compared to the valuable contributions made by this book. This book is highly recommended for those interested in Japanese law, and, for that matter, in Japan as a whole, as a great deal can be learned about Japan and the Japanese from this volume.

If there is additional discussion of this review, you may access it through the network, at:

<https://networks.h-net.org/h-us-japan>

Citation: Rick Castberg. Review of Goodman, Carl F., *The Rule of Law in Japan: A Comparative Analysis*. H-US-

Japan, H-Net Reviews. November, 2004.

URL: <http://www.h-net.org/reviews/showrev.php?id=9985>

Copyright © 2004 by H-Net, all rights reserved. H-Net permits the redistribution and reprinting of this work for nonprofit, educational purposes, with full and accurate attribution to the author, web location, date of publication, originating list, and H-Net: Humanities & Social Sciences Online. For any other proposed use, contact the Reviews editorial staff at hbooks@mail.h-net.org.