

## In Defense of “Japanese Law”

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- I. Scholars and the Development of the Law
- II. Comparative Law as Outlier
- III. Japanese Law: The Periphery of the Periphery is the Center
- IV. Conclusion

My perspective is from the world of “Japanese Law,” the term used in the CAPI Japanese Law Colloquium to denote scholars writing on Japan in the English language. In fact this world consists of two rather distinct regions, North America and the anti-podean zone.<sup>1</sup> (Does this make me a propodean? Or merely a podean?) The flavor of scholarship in these two regions is somewhat different. The antipodes seem to be more oriented toward black-letter concerns, whereas in American law schools the emphasis is less on doctrine than on broader theoretical and empirical concerns. One might say that the American “world” is more inclined to the economic analysis so important in American legal scholarship generally, while the antipodes lean toward a modest form of post-modernism.

I want to respond in these comments to the suggestion in *Nottage*’s paper that Japanese law scholarship in the United States may be overly theoretical in orientation.<sup>2</sup> I do not contest his characterization of this “world” as devoting relatively little attention to black-letter law and relatively more to theoretical concerns. I do, however, disagree that this should be considered a tendency to “over-theorize.” In these comments I will describe how this theoretical orientation came about and defend it as producing more interesting, influential and therefore important scholarship, with greater potential to shape the broader field of comparative legal studies. I do so from an explicitly American perspective and do not pretend to have mastered the Australian or New Zealand literature.

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1 I note that the United Kingdom has played a relatively limited role as a source of Japanese legal scholarship, though not of course in broader contributions to political economy (see, e.g. the work of *Ronald Dore*).

2 L. NOTTAGE, *Japanisches Recht, Japanese Law, and Nihon-hô: Towards New Transnational Collaboration in Research and Teaching*, cf. *supra* at 17. Nottage subsequently refined his critique to argue that in some respects the U.S.-based scholarship is under-theorized as well.

## I. SCHOLARS AND THE DEVELOPMENT OF THE LAW

To set the stage, let me make some general comparative comments on the role of legal scholarship. The role played by legal scholars in the English-speaking world is quite different from that played by counterparts in Japan or other countries in the civil law tradition. In the civil law world, scholars have reportedly played a central role in the development and transmission of the law, such that *Merryman* could argue that “the civil law is a law of professors”.<sup>3</sup> This notion is rooted in Roman law and more recently in the “reception” in the middle ages of Roman law principles by scholars from all around Europe in the great Italian universities. As these scholars brought back the newly rediscovered *ius commune* to their respective homes, the scholars had an explicit role in articulating and developing legal norms. The civil law, at least at the outset of its recent reincarnation, was literally scholars’ law, having been uncovered by scholars after centuries of disuse.

One can see echoes of this process in the Meiji reception of German and French law, where scholars took a leading role in debating and defending different institutions to be adopted. Various schools competed and various arguments were articulated about the merits of different legal traditions. Ultimately, though it was the legislature that adopted the new codes, scholars played an important role, as they had in other countries in the civil law world.

This is not to assert that the role of scholars was uniform throughout the civil law world. Of course scholars had different roles in different countries. One hypothesis is that where the state was strong, as in post-revolutionary France, the legislator assumed a dominant role and there was less room for an important role for scholars in articulating doctrine. Where the state was relatively weak, as in the territories that became modern Germany, scholars played the major role in the reception of Roman law principles. Scholars thus had a legitimate role in the legal system in many cases, though their relative strength differed from place to place.<sup>4</sup>

Contrast this story with English legal history. The common law was historically the exclusive province of fraternities of practitioners organized around the Inns of Court. The judges were the acknowledged experts in finding law, and judges were exclusively drawn from the ranks of senior practitioners. Practitioners in turn learned the law through an apprenticeship system. One might read law at Oxford or Cambridge but this education was neither necessary nor sufficient for success in the legal world. Scholars devoted attention to particular doctrinal principles exemplified in cases, but their influence was not nearly as great outside academia as that of their counterparts on the continent.

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3 J.H. MERRYMAN, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (1969) 60.

4 R. VAN CAENEGHEM, *Judges, Legislators and Professors* (1987).

Even scholars who were influential, for example *Alfred Dicey*, lacked the systematizing orientation of their continental counterparts. The esoteric character of the common law writ system almost ensured that this would be the case. For the common law system had evolved out of particular writs designed for particular circumstances and never pretended to be a rationally-organized comprehensive system. What role could scholars possibly have in rationalizing that which was not intended to be rational? The task of developing the law was left for the most part to the judge and lawyer in the context of specific cases.

We come now to the United States, where various influences came together. On the one hand, the American common law orientation put scholars outside the day-to-day practical functioning of the law. Legal scholarship consisted of a kind of running play-by-play commentary on the action on the field, and the practical training of lawyers was primarily undertaken on the job. On the other hand there were strong European influences. 19th century American legal scholarship shared with the European tradition a quasi-scientific emphasis on systematization and codification.<sup>5</sup> But just at the same time that Europeans definitively shift toward the notion of legal science, Americans shift to a kind of pragmatist discourse about law as a policy field. The shift is epitomized in the work of *Holmes*, whose influence would be felt in both academic and practical spheres.

The problem with recognizing the policy orientation of law is that it provides no internal normative guidance as to what the law should be. Pragmatist discourse about law consisted of competing policy justifications. And competing policy justification is typically the realm of politics, not law. So it is only a short jump from pragmatism to legal realism, the assertion that law is merely politics.

The legal realist movement of the 1930s is the key moment in American legal scholarship. The legal realists wrote in an era of legislation, which differed in important ways from the common law tradition of judge-found law and the civil law tradition of scientifically-codified law. Legislation lacks the quasi-scientific rationality and generality of codification. It is undertaken to meet a particular need of a particular coalition and sometimes does not even bother to hide behind notions of the general good. It is thus not surprising that the legal realists viewed law as reflecting social interests and saw legal reasoning as indeterminate. If legal reasoning is indeterminate and epiphenomenal, then the implication for scholars is to focus on positive questions of how the law is created and what its impact is (sociological jurisprudence) or normative questions which are really questions of policy.

American legal scholarship since the 1930s is still trying to recover from the radical assertion of the legal realists. The leading reaction to realism was the so-called legal process school associated with Harvard Law School and the figures of *Hart* and *Wechsler*.

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5 C.C. LANGDELL, *Teaching Law as a Science*, in: 21 *Am.L.Rev.* 123 (1887). See generally T.C. GREY, *Modern American Legal Thought*, in: 106 *Yale L.J.* 493 (1996) (book review); *id.*, *Langdell's Orthodoxy*, in: 45 *U.Pitt.L.Rev.* 1 (1983).

What made law distinctive were its processes and institutions. And analysis of these processes and institutions could lead to normative conclusions about the proper location of authority and the structure of the process. Most importantly, these authors defended “neutral principles” and the nature of legal reasoning against the realist assertion that it was all politics and obfuscation. This shift toward process continues today by leading scholars who emphasize the “real” nature of legal reasoning.<sup>6</sup>

One reaction, then, to legal realism was to recoil and reassert that legal reasoning existed. But the notion of “neutral principles” was sufficiently problematic that critics would not remain silent. Beginning in the 1970s and accelerating in the 1980s, two leading schools of theory emerged. These were Law and Economics and Critical Legal Studies, which soon metamorphosed into distinct subfields of Critical Race Theory, Gay Legal Studies, Lat-Crit, and no doubt many others to follow. These large schools, Law and Economics on the one hand and Critical Studies on the other, are sometimes characterized as being challenges from the right and from the left, but in fact they were methodological critiques that fell upon opposite sides of the attempt to produce a “science” of law. The Crits were the direct heirs to the Legal Realists, and the Law and Economics scholars were those seeking to approach law with a systematic, unified theory with positive predictive capacity. Both these groups shared the underlying view that law is instrumental, legal reasoning indeterminate or insufficient, and law is the result of a political process. The normative implications differed but the conceptual framework was the same. Legal realism has triumphed so completely that we are unable to imagine another way of doing things.

Another broader movement, that is sufficiently diverse as to incorporate both economists and crits, is the Law and Society movement that grew out of sociological jurisprudence. This movement was also a direct descendent of the realist insight in that it asserted that the important focus of inquiry was not “law” itself but the social, political and economic structures that produce and are affected by law. What joined the diverse strands of the Law and Society Movement, at least in its first two decades, was not a theoretical orientation but a shared commitment to empirical work, with great tolerance for methodological eclecticism.

All these American developments have proved, I think, enormously influential in other parts of the English-speaking world and elsewhere. Law and society scholarship is now well-established in England, and law and economics has been increasingly influential on the continent, at least in economics departments. It is important in understanding why the flow of ideas went outward from America to remember that there was no intellectual revolution in England corresponding to the American realist insight. And anti-

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6 E.L. RUBIN, *The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions*, in: 109 *Harv.L.Rev.* 1393 (1996); *ID.*, *Legal Reasoning, Legal Process and the Judiciary as an Institution* (review of Cass Sunstein, *Legal Reasoning and Political Conflict*, 1996), in: 85 *Cal.L.Rev.* 265 (1997).

podean scholars until the last generation shared the general orientation toward the common law from England. This was of course natural given the continuing position of the privy council of the House of Lords as a court of last resort. The common law was intact and therefore traditional common law scholarly methods ought to be applied. The centrality of Oxbridge as the academic center of the Commonwealth surely played a role in perpetuating a traditional orientation. But younger scholars are beginning to take a more active role in empirical and theoretical work. Indeed, Australians are playing a leading role in the study of Asian law outside Japan.<sup>7</sup>

To summarize, American legal scholarship was distinctive in its early rejection of the quasi-scientific approach associated with doctrinal formalism. This rejection has led to an openness to interdisciplinary empirical work in the Law and Society vein, and new theoretical developments in the form of Law and Economics, the Legal Process school, and Critical Studies. American legal scholarship, at least at the elite universities, has accordingly been preoccupied with theoretical and empirical developments and less concerned with doctrinal developments. This orientation has received extensive criticism, including from a prominent appeals court judge.<sup>8</sup> But it shows no sign of changing soon.

## II. COMPARATIVE LAW AS OUTLIER

The story that I have sketched above helps to explain both the empirical and theoretical orientation of American legal scholarship. It is important to note, however, that most of these developments unfolded without having much influence on American comparative law scholarship. For much of the last century, the comparativist was an outlier in law faculties, reflecting, perhaps, American parochialism but also the biographical accident of his training. For the great postwar comparativists – *Schlesinger*, *Baade*, *Riesenfeld* – were refugees from Germany who had been trained in the classical methods of old world scholarship. They came to the United States and sat in their corners of the library reading German, Italian and French case law, producing work that was primarily focused on black-letter concerns and safely ignored the theoretical battles that raged around them with increasing intensity as they grew older. So English-language scholarship on comparative law in the United States has not shared the theoretical and empirical orientations of the rest of the legal academy. Comparative law has been a small island of continental scholarship in the New World. This explains not only its peripheral status in the legal academy but its own continuing methodological self-doubts.<sup>9</sup>

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7 See, e.g., K. JAYASURIYA (ed.), *Law, Capitalism and Power in Asia* (1998) and the new *Australian Journal of Asian Law*.

8 H.T. EDWARDS, *The Growing Disjunction Between Legal Education and the Legal Profession*, in: 91 *U.Mich.L.Rev.* 34 (1992).

9 See W. EWALD, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, in: 143 *U.Pa.L.Rev.* 1889, 1891 (1995); C.A. ROGERS, *Gulliver's Troubled Travels, or the*

### III. JAPANESE LAW: THE PERIPHERY OF THE PERIPHERY IS THE CENTER

Because of the euro-centrism of comparative law, Japanese law was always on the outside, and this led to its being unburdened with the baggage of the old world. The continental orientation of comparative law limited it conceptually and kept it in a black-letter mode. Japanese law, on the other hand, was developed by a group of people who had first-hand experience in Japan – *Henderson*, *Rabinowitz* and later *Haley* – and therefore a practical orientation. They were not interested in perpetuating generations of debates begun by *Savigny* and *Thibaut*. The leading scholars of “Japanese law” were also, of course, outsiders in Japan, and this enabled them to see through culturalist explanations that had proven so powerful as an instrument of Japanese self-understanding. Because it was implicitly comparative, without being trapped behind the lenses of mainstream comparative law, Japanese law always involved a law and society component. And so it is not surprising that law and society scholarship has been an important field for Japanese and American scholars to interact (see e.g. the work of *Tanase*, *Miyazawa*, *Rosett* and *Wagatsuma*). *Tanase*’s article in particular has achieved near canonical status in the law and society literature.<sup>10</sup> *Haley*’s body of work reflects this broad law and society orientation although he has not personally been a central player in that movement.<sup>11</sup>

Japanese law was thus uniquely positioned within the broader comparative law world to respond to new theoretical initiatives. Many of its leading scholars were in American law schools at a time of theoretical debate and increasing empirical orientation. Japanese law was law and society work without even trying. And like the law and society movement generally, it is tolerant of theoretical eclecticism. It has allowed scholars with broader insights to use Japan as a testing ground and place to develop broader concepts (see for example *Ramseyer*’s work on judicial independence<sup>12</sup> or *Milhaupt & West*’s concept of the “dark side of private ordering”<sup>13</sup>). This work is not merely armchair theorizing. For Japanese law scholars are perhaps uniquely fortunate among scholars of non-Western legal systems in the thoroughness of data available to linguistically-facile researchers. A trademark of Japanese law scholarship is the identification and exploitation of unusual and interesting data sets. *Ramseyer*’s work provides

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Conundrum of Comparative Law (Book Review of “Comparative Law and Economics” by U. Mattei, and “Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order” by Y. Dezalay and B.G. Garth), in: 67 *Geo.Wash. L.Rev.* 149 (1998); B. GROSSFELD, *The Strength and Weakness of Comparative Law* (1990).

10 T. TANASE, *The Management of Disputes: Automobile Accident Compensation in Japan*, in: *L. & Soc.Rev.* 651, 672, 690 (1990); see its inclusion in: R. ABEL, *The Law and Society Reader* (New York 1995).

11 J.O. HALEY, *The Spirit of Japanese Law* (Athens 1998).

12 J.M. RAMSEYER, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, in: 23 *J. Legal Stud.* 721 (1994).

13 C.J. MILHAUPT/M.D. WEST, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, in: 67 *U.Chi.L.Rev.* 41, 43 (2000).

many examples; West's papers on subjects from *sumo* to *sokaiya* are also noteworthy here.<sup>14</sup> Japanese law thus provides a testing ground for empirical approaches on which broader theoretical structures can be built.

Whereas Nottage sees this as an overly-theoretical orientation that may be a weakness, I see it as a great strength. Indeed it shows the broader potential for Japanese legal studies to change how we think about and practice comparative law scholarship. The empirical work in Japanese law set a new standard for comparative socio-legal work. The debate over the past three decades on the sources of relatively low litigation rates in Japan, mentioned by Nottage, is a perfect example of the potential of the approach. Rejecting cultural determinism, American scholars elaborated the institutional barriers to bringing suit in Japan<sup>15</sup> and then engaged in a debate about the sources and nature of these institutional barriers.<sup>16</sup> This well-known debate has enriched not only the study of Japanese law, but broader thinking about comparative legal studies. In my view it should be included in any course on comparative law. Japanese law thus has the potential to bring comparative law out of its shell by continuing to engage in exemplary empirical and theoretical work.

I should add that I believe the antipodean wrestling with Japanese law and post-modernism has also produced theoretical insights, though in my view they have helped expose the weakness of the post-modern approach. Perhaps in response to the paucity of method in comparative law, a number of comparative law scholars have recently begun to follow the interpretive turn in contemporary anthropology. This approach contrasts the external study of social phenomena with efforts to capture the internal understanding of social meaning. The difficulty of understanding legal phenomena from an "outside" perspective has been a recurring theme of post-modernists. By forcing legal phenomena into pre-existing and universal categories, it is claimed, the observer loses what is distinctive and meaningful about particular practices. Understanding the meaning of the practices within their cultural contexts is the goal of these comparativists.

This approach does not have to be pushed very far to completely subvert the comparative enterprise. Once one is looking entirely at local context, the logical question then is, what is left to compare? "Law" itself is a pre-existing and universal category, encompassing a broad array of behavior and action, with specific local meanings. So why compare? If social phenomena such as law can only be understood as embedded in their local context, the very task of comparing two legal systems becomes problematic. All observations are only relatively situated. This trade-off of empiricism for relativism

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<sup>14</sup> M.D. WEST, *Legal Rules and Social Norms in Japan's Secret World of Sumo*, in: 26 *J. Legal Studies* 165 (1997); ID., *Information, Institutions, and Extortion in Japan and the United States: Making Sense of Sokaiya Racketeers*, in: 93 *Nw.U.L.Rev.* 767 (1999).

<sup>15</sup> J.O. HALEY, *The Myth of the Reluctant Litigant*, in: 4 *J.Japan.Stud.* 359 (1978).

<sup>16</sup> J.M. RAMSEYER *The Reluctant Litigant Revisited: Rationality and Disputes in Japan*, in: *J.Japan.Stud.* 111 (1988); J.M. RAMSEYER/M. NAKAZATO, *Japanese Law: An Economic Approach* (Chicago 1999).

certainly does not generate greater understanding for the development of broader comparative insights. The task of the scholar practicing interpretation becomes a kind of deep translation, but allows only descriptive insights and not theoretical generalization. Comparative law becomes foreign law and the prospect for useful theory dims. Japanese law scholarship illustrates the benefits to be had from an external approach, albeit one that is ready to experience what Taylor calls the “destabilising nausea of having [one’s] preconceptions and terms of reference completely inverted.”<sup>17</sup>

As a final point, one can illustrate the contribution of Japanese law by showing how it has undermined the taxonomic approach to comparative law generally.<sup>18</sup> The weakness of the taxonomic approach is particularly apparent in the conflation of the Chinese and Japanese systems under the banner of *Mattei’s* “traditional law” or *Zweigert and Kötz’s* “Far Eastern Law.”<sup>19</sup> That these societies share common cultural traditions, chiefly the influence of Chinese Confucian thought, cannot be challenged. But it is simplistic to conflate the two because of this common cultural element, ignoring all differences in institutional, economic, and political factors. One country has a nascent legal system less than two decades old in a transforming socialist economy with a one-party state, where corruption and particularistic legal arrangements continue to have an important, probably dominant, influence. The other has a legal system well-developed over the course of a century, with an established professional legal class, defined practices of constitutional adjudication and clear norms of legal autonomy from political or traditional interests. Indeed, Japanese law is often criticized for being too formalistically modern; the “traditional” epithet seems more appropriately directed at Japanese political structures than legal ones.

#### IV. CONCLUSION

Japanese law in the United States has combined an empirical orientation with engagement in broader theoretical debates. This combination has been particularly noteworthy given that broader comparative law scholarship has avoided both empirical and theoretical concerns. The interplay of theory and empirical orientation, along with an implicitly comparative perspective, has enriched legal scholarship generally. The approach of Japanese law deserves to be emulated by scholars of other countries and regions, and will hopefully contribute to other “worlds” of legal scholarship on Japan in years to come.

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17 V. TAYLOR, *Spectres of Comparison: Japanese Law and Research*, paper presented at the 2nd Japanese Law Online conference, Nagoya, January 25, 2000 (for a revised version see *supra* at 11).

18 See A. MARFORDING, *The Fallacy of the Classification of Legal Systems: Japan Examined*, in: V. Taylor (ed.), *Asian Laws Through Australian Eyes* (Sydney 1997).

19 U. MATTEI, *Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems*, in: 45 *Am.J.Comp.L.* 5 (1997); K. ZWIEGERT/H. KÖTZ, *An Introduction to Comparative Law* (2nd ed., Oxford 1987).



## ZUSAMMENFASSUNG

*Der Autor argumentiert, daß die englischsprachige Wissenschaft zum japanischen Recht in den Vereinigten Staaten keinesfalls als extrem theoretisch angesehen werden sollte; vielmehr hat sie eine herausragende Mischung theoretischer und empirischer Arbeiten hervorgebracht, die als Vorbild rechtsvergleichender Wissenschaft allgemein dienen sollten.*