

## Comparative Law, Asian Law, and Japanese Law

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### I. INTRODUCTION

This paper stems primarily from two thought-provoking suggestions put to me in the mid-1990s. One, appropriately enough given my hosts for this talk, came from *Veronica Taylor*. In her key chapter entitled “Beyond Legal Orientalism”, in *ASIAN LAWS THROUGH AUSTRALIAN EYES*, *Taylor* identified certain deep-rooted problems within the discipline of comparative law as underpinning the rise of “Asian law” scholarship, while recognising that:<sup>1</sup>

The burden of proof lies with “Asian law” academics to show that this new professional boundary marker is not simply comparative law in a different guise, nor an attempt to construct an exclusive, mythical body of knowledge which we seek to interpret and control.

This New Zealander – ironically, now, a recent immigrant to Australia – was honoured to join the enterprise, implicitly assuming the mantle of an Asian law scholar to contribute a work on “Japanese Contract Law, Theory and Practice”.<sup>2</sup>

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<sup>\*</sup> This is a somewhat revised and updated version of a presentation at the “Law, Transition and Globalization” lecture series hosted by University of Washington, Seattle, 28 May 2002; abbreviated also for the session on “Japanese Law: In and Out of Asia, or the World”, at the Law & Society Association’s Annual Meeting, Vancouver, 30 May 2002; and for a seminar of the Globalisation Research Cluster at the University of Sydney Law Faculty, 25 May 2002. I thank Professor *Veronica Taylor*, Director of its Asian Law Center, for inviting me to the University of Washington; and participants in the talk there, and the sessions in Vancouver and Sydney. For further help and inspiration, I thank *Kent Anderson*, *Peter Drysdale*, *Tom Ginsburg*, *David Johnson*, and *Leon Wolff*. All of them should take credit for any good parts and rightfully disclaim responsibility for the bad parts.

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1 V. TAYLOR, *Beyond Legal Orientalism*, in: ID. (ed.), *Asian Laws through Australian Eyes* (1997) 47.

2 L. NOTTAGE, *Contract Law, Theory and Practice in Japan: Plus Ça Change, Plus C’est La Même Chose?*, in: Taylor (ed.), *supra* note 1, 316.

However, a second suggestion around the same time pointed in a rather different direction. At the first of two international workshops in which I participated at the Oñati Institute for the Sociology of Law, one of *Lawrence Friedman's* comments on my paper – reporting on some empirical research comparing contract planning and renegotiation in New Zealand, Japan and the US<sup>3</sup> – was that I probably did not consider myself a “Japanese law specialist”, but rather a comparativist with a special interest in Japan. At the time, I was quite taken aback by this remark, but I now think he is probably right.

Contrary to more recent suggestions by *Taylor*,<sup>4</sup> it may therefore be more productive to view Japanese law in an increasingly broad perspective, engaging in dialogue with a reinvigorated discipline of comparative law, rather than straining to fit Japanese law within “Asian law” scholarship.

## II. THE RESILIENCE OF COMPARATIVE LAW

As a discipline, comparative law appears to have weathered quite well its fin de siècle malaise, just as our computers survived the hype about Y2K.<sup>5</sup> Some of the older scholars or their acolytes may have realised that “many of the death blows to comparative law” over the 1990s were indeed “self-inflicted”, as colleagues as well as “outsiders” began voicing concerns about:<sup>6</sup>

- Eurocentrism;
- Private law emphasis;
- Weak methodological foundations (mostly aimed at “best solution” unification, inspired by natural law or utilitarianism);
- Dilletantism;
- Positivism; and
- Irrelevance to policy-making.

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3 L. NOTTAGE, *Bargaining in the Shadow of the Law and the Law in the Light of Bargaining: Contract Planning and Renegotiation in the US, New Zealand, and Japan*, in: Gessner (ed.), *Changing Legal Cultures II: Interaction of Legal Cultures* (1998) 113. See also L. NOTTAGE, *Economic Dislocation in New Zealand and Japan: A Preliminary Empirical Study*, in: *Victoria University of Wellington Law Review* 26 (1997) 59; ID., *Planning and Renegotiating Long-Term Contracts in New Zealand and Japan: An Interim Report on an Empirical Research Project*, in: *New Zealand Law Review* (1997) 482.

4 V. TAYLOR, *Spectres of Comparison: Japanese Law through Multiple Lenses*, in: Tom Ginsburg et al. (eds.), *The Multiple Worlds of Japanese Law: Disjunctions and Conjunctions* (2001) 15; also in: *Zeitschrift fuer Japanisches Recht* 12 (2001) 11.

5 For a typical example of British humour in the latter respect, in the otherwise deadly serious journal of the London Court of International Arbitration, see the “article” (possibly the shortest ever published!) following L. NOTTAGE, *The Vicissitudes of Transnational Commercial Arbitration and the Lex Mercatoria: A View from the Periphery*, in: *Arbitration International* 16 (2000) 75.

6 TAYLOR, *supra* note 1.

To be sure, especially in Europe, one response has been largely to dust off some mainstream comparative law methodologies. Their validity has been proclaimed once more, precisely in efforts to compare (still mostly black-letter) private law, albeit in more sustained projects with more plausible implications for policy-making. A good example is the revival of the exercise of uncovering a “common core” of Western contract law, promoted initially by émigré comparatist *Arthur Schlesinger* at Cornell in the 1960s. The ideal is now pursued by *Rudolfo Sacco* and disciples like *Ugo Mattei* from Trento, to provide grist for (voluntary) harmonisation and perhaps (mandatory) unification of private law in the European Union.<sup>7</sup> Cynics might argue that this initiative is driven primarily by the foible of academics for attractive venues at which to exchange ideas – Trento is in northern Italy, although not as pretty as Oñati in the Basque Country! – or the dynamics of the current market for academic positions in Europe and even further afield. But the result does seem to be that scholars involved in such projects are reclaiming lost ground, receiving commissions for comparative studies from national and transnational bodies,<sup>8</sup> which had been going to law firms which grew rapidly – most noticeably in Europe – from the 1980s.<sup>9</sup>

Some participants remain very focused on their own legal systems, uninterested even in a simple restatement of the comparative law methodology which underpins the projects they have been roped into. Nonetheless, while mainly contributing an exposition of their own law to the project and leaving the hard work of comparison to project leaders, some do bring back insights for rethinking their own law, and for them and others there is more potential to become committed comparatists.<sup>10</sup> Crucially, such

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7 See L. NOTTAGE, *Convergence, Divergence and the Middle Way in Harmonising or Unifying Private Law*, EUI Working Paper in Law No. 2001/1, available through <[www.eui.it](http://www.eui.it)> (2001), Part II. A; with a greatly expanded and updated version forthcoming in: *Annual of German and European Law* 1 (2003).

8 See, e.g., CHR. V. BAR, *The Study Group on a European Civil Code*, in: *Tidskrift utgiven av Juridiska Föreningen i Finland (JFT)* (2000). But note the European Commission's recent engagement of a large, originally English law firm to undertake work comparing recent developments in product liability in Europe: <<http://www.lovells.com>>.

9 The largest law firm in the world was created in 2000 through the merger of an English firm, *Clifford Chance*, with a German firm: <<http://www.cliffordchance.com>>. See generally M. GALANTER, *Law Abounding: Legalisation around the North Atlantic*, in: *Modern Law Review* 55 (1992) 1.

10 One example suggested to me by *Kent Anderson* is *Sir Roy Goode*, very much rooted in the English commercial law tradition. Indeed, that is evident from his denigration recently of the notion of an autonomous *lex mercatoria*: compare R. GOODE, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, in: *Arbitration International* 17 (2001) 21, with K. P. BERGER (ed.), *The Practice of Transnational Law* (2001); reviewed by NOTTAGE, *Journal of International Arbitration* 19 (2002) 67. Yet even *Goode* has come to realise that English contract law could benefit, for instance, from a general right to suspend performance (rather than having to risk terminating) when the promisee has reasonable grounds for concerns about whether the promisor will confirm: R. GOODE, *Commercial Law in the Next Millennium* (1998).

individuals appear to be involved in comparative studies in significantly greater numbers and to a much greater extent, or at least figure much more prominently in these, than the comparative law dilettantes of the 20<sup>th</sup> century. This claim awaits empirical verification, but at least the impression of a growing importance accorded to the study of foreign law – and therefore, even if indirectly, comparative law – can be judged against the output of some of these projects. In Europe, for example, we find not only detailed academic treatises on specific areas of law,<sup>11</sup> and condensed sets of normative propositions aimed at a wider audience such as the Principles of European Contract Law, which may evolve directly into a mandatory European Civil Code or at least become a much more ambitious source of soft law along the lines of the American Restatements.<sup>12</sup> Perhaps more importantly, a series of comparative law casebooks is becoming available, albeit belatedly, to the burgeoning numbers of law students on exchange around the EU.<sup>13</sup>

Of course, many of these results are far from convincing, especially for comparativists who try to pay more than lip service to the need to locate black letter law rules in a broader socio-economic context. The work towards a European Civil Code proceeds in an empirical vacuum – or, more precisely, in disregard of some excellent empirical studies into contract law “in action” in different EU member states.<sup>14</sup> It also exhibits an almost a priori disinterest in the possibility of rules being underpinned by different principles, values or reasoning patterns,<sup>15</sup> arguably linked to differences in legal history and contemporary institutional structure.<sup>16</sup> You do not need to be a card-carrying legal sociologist or jurist to be unconvinced that knowledge has been hugely enhanced as a result, or – more importantly for the long-term viability of projects generating these works – that they can be readily transferred into the policy-making context. Likewise, casebooks ostensibly modeled on those used in the US turn out to have much less contextual material than the better ones there.<sup>17</sup>

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11 See, e.g., H. KÖTZ / A. FLESSNER, *European Contract Law, Vol 1: Formation, Validity, and the Content of Contracts, Contract and Third Parties* (1997); CHR. V. BAR, *The Common European Law of Torts, Vol 1: The Core Areas of Tort Law, Its Approximation in Europe, and Its Accommodation in the Legal System* (1998).

12 NOTTAGE, *supra* note 7; C. SCHMID, *Legitimacy Conditions for a European Civil Code*, in: *Maastricht Journal of European and Comparative Law* 8 (2001).

13 See, e.g., W. VAN GERVEN, *Casebooks for the Common Law of Europe: Presentation of the Project*, in: *European Review of Private Law* 4 (1996) 67.

14 *Cf.*, e.g., S. DEAKIN / J. MICHIE (eds.), *Contracts, Cooperation and Competition* (1997).

15 *Cf.*, e.g., J. GIBSON / G. CALDEIRA, *The Legal Cultures of Europe*, in: *Law and Society Review* 30 (1996) 55; R. BROWNSWORD, *Individualism, Cooperativism and an Ethic for European Contract Law*, in: *Modern Law Review* 64 (2001) 628.

16 See generally P.S. ATIYAH / R.S. SUMMERS, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (1987).

17 M. REIMANN, *American Private Law and European Legal Unification: Can the United States Be a Model?*, in: *Maastricht Journal of European and Comparative Law* 3 (1996) 217.

On the other hand, these new textbooks are being used by students who now spend significant amounts of time immersed in different countries, allowing them the opportunity to add their own context to the black letter rules. It would be better for the instructors to provide more guidance on how to do the latter, either through published or even unpublished (mimeographed) “cases and materials”. But this quite recent initiative is much better than nothing, and at least starts getting students thinking about comparing a range of legal systems, as opposed to reading about a foreign law, even if the object of comparison in the different legal systems is restricted. In addition, especially in Europe, we have seen powerful arguments for very different approaches to comparative legal analysis, ranging from epistemological postmodernism,<sup>18</sup> legal sociology with postmodernist sympathies,<sup>19</sup> discourse theory underpinned by empirical observations,<sup>20</sup> and so on. These more contextual approaches tend to conclude that there is (and perhaps should be) more divergence among the legal systems compared. This challenges the “convergence bias” characteristic of much mainstream comparative law scholarship over the 20<sup>th</sup> century, in turn arguably linked to its original aim of unifying law worldwide.<sup>21</sup> That bias may also explain the observed tendency for comparativists restricting themselves to black-letter law analysis to conclude that there is great hope for harmonisation and even unification of law. Yet even such comparativists can instead acknowledge the potential for differences, despite – or even because of – “legal transplants” or

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- 18 P. LEGRAND, What “Legal Transplants”?, in: D. Nelken / J. Feest (eds.), *Adapting Legal Cultures* (2001) 55. For a compelling critique of this general position, see A. PETERS / H. SCHWENKE, *Comparative Law Beyond Post-Modernism*, in: *International and Comparative Law Quarterly* 49 (2000) 800. Cf. also V. GROSSWALD CURRAN, *Cultural Immersion, Difference and Categories in US Comparative Law*, in: *American Journal of Comparative Law* 46 (1998) 43.
- 19 G. TEUBNER, *Legal Irritants: Good Faith in British Law and How Unifying Law Ends up in New Divergences*, in: *Modern Law Review* 61 (1998) 11; cf. D. NELKEN, *Beyond the Metaphor of Legal Transplants? Consequences of Autopoietic Theory for the Study of Cross-Cultural Legal Adaptation*, in: J. Pribin (ed.), *Law’s New Boundaries: The Consequences of Legal Autopoiesis* (2001) 265. *Nelken* correctly points out an ambivalence in *Teubner’s* systems-theory approach, with postmodernist affinities (see also G. TEUBNER, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, in: *Law and Society Review* 23 (1989) 727), and his appeal here to empirical work into “varieties of capitalism”. O. GERSTENBERG, *Justification (and Justifiability) of Private Law in a Polycontextural World*, in: *Social and Legal Studies* 9 (2000) 419, further identifies a more general tension between the former, and *Teubner’s* at least implicit normative stance.
- 20 See, e.g., CHR. JOERGES, *The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective*, in: *European Law Journal* 3 (1997) 378.
- 21 On the latter, see generally K. ZWEIGERT / H. KÖTZ, *Introduction to Comparative Law* (1998). Welcoming four recent trends in comparative law – closer interaction with legal philosophy, legal history, cultural studies, and economics – one contemporary comparativist reiterates how the discipline must recognise and appreciate diversity while searching for commonality: E. ÖRÜCÜ, *Shifting Horizons for Comparative Law in the New Century*, in: *Asia Pacific Law Review* 8 (2000) 115.

borrowing of legal concepts.<sup>22</sup> And scholars who take a very broad approach, such as *Lawrence Friedman* in comparing “legal culture”, sometimes conclude that convergence is overwhelming.<sup>23</sup> I myself perceive and try to tread a “middle way”.<sup>24</sup> Similar tendencies are apparent in a ballooning literature comparing constitutional law and regulation.<sup>25</sup> The end result is now the rich tapestry of comparative law approaches illustrated in the Figure below, even though much of this has been generated in Europe and without much overt methodological innovation.

	<b>Rules-Plus</b>	<b>Law in Context</b>
<b>Convergence</b>	<ul style="list-style-type: none"> <li>• <i>Lando</i> (recently)</li> <li>• <i>Markesinis</i></li> <li>• <i>Zimmermann</i> (recently)</li> <li>• <i>Trento</i> group</li> <li>• <i>Kötz</i> (in practice)</li> <li>• <i>Casebook</i> project</li> <li>• <i>Zweigert/Kötz</i> (in practice)</li> </ul>	<ul style="list-style-type: none"> <li>• <i>Friedman</i></li> </ul>
<b>Divergence</b>	<ul style="list-style-type: none"> <li>• <i>Watson</i></li> </ul>	<ul style="list-style-type: none"> <li>• <i>Collins</i> (recently)</li> <li>• <i>Joerges</i></li> <li>• <i>Teubner</i></li> <li>• <i>Curran</i></li> <li>• <i>Legrand</i></li> </ul>

On the whole, therefore, comparative law still remains wedded to “getting on with the job”, still largely pursuing new or extended “projects” in a Weberian “bureaucratic” mode.<sup>26</sup> Yet the discipline is engaging more thoughtfully and constructively with its traditions,<sup>27</sup> and thus encouraging work also in new or renewed directions. Comparative

22 Compare A. WATSON, *Aspects of Reception of Law*, in: *American Journal of Comparative Law* 44 (1996) 335, with R. ZIMMERMANN / S. WHITTAKER (eds.), *Good Faith in European Contract Law* (2000). Cf. E. ÖRÜCÜ, *Law as Transposition*, in: *International and Comparative Law Quarterly* 51 (2002) 205.

23 L. FRIEDMAN, *The Horizontal Society* (1999); ID, *Some Comments on Cotterrell and Legal Transplants*, in: D. Nelken / J. Feest (eds.), *Adapting Legal Cultures* (2001) 93. He might protest that he is not a comparative lawyer, but a comparative legal sociologist, but I would suggest that he is a comparativist with a particular interest in empirical phenomena!

24 L. NOTTAGE, *supra* note 7.

25 See, e.g., P. BEAUMONT / C. LYONS / N. WALKER (eds.), *Convergence and Divergence in European Public Law* (2002).

26 See generally A. RILES, *Introduction: The Projects of Comparison*, in: ID (ed.), *Rethinking the Masters of Comparative Law* (2001) 1.

27 *Ibid.* (indicating that her edited work aims to break out of the fashionable urge simply to critique old models). Cf. A. RILES, *Wigmore's Treasure Box: Comparative Law in the Era of Imagination*, in: *Harvard International Law Journal* 40 (1999) 221 (concluding more unhelp-

law is rebuilding from some of its strengths, including a “rich network of intellectual, personal and institutional influences”, and its eclecticism:<sup>28</sup>

[Its] project is sometimes critical, sometimes utopian, and most often one of mundane institution building, and it is these different modalities that give the discipline its depth and structure.

Opportunities are thus being presented and grasped, in the wake of internal as well as external criticism,<sup>29</sup> as for instance in the (also rather practical) discipline of international law.<sup>30</sup> Comparative law’s growing diversity can be seen as a sign of strength, not weakness, just as in the (also contested) discipline of legal sociology.<sup>31</sup> Part of that diversity includes an interest in empirical research, which offers considerable unfulfilled promise.<sup>32</sup> Yet comparative law was remarkably prescient in exhibiting skepticism towards the modernist premises of much 20<sup>th</sup> century social science,<sup>33</sup> and should continue to play a strong role in exploring the normative side to inquiry into social phenomena involving the law.<sup>34</sup> The reformulations and applications of more orthodox comparative law methodologies allow space for more ambitious or original approaches along the latter lines.<sup>35</sup>

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fully that comparativists could just juxtapose legal phenomena (like *Dean Wigmore* in his *Panorama of the World’s Legal Systems* or the museum at Northwestern University Law School), leaving us mainly to draw our own conclusions).

28 RILES, *supra* note 26, 6.

29 G. BERMAN, *The Discipline of Comparative Law in the United States*, *Revue internationale de droit compare* 4 (1999) 1040.

30 *Cf.*, e.g., S. WRIGHT, *International Human Rights, Decolonisation and Globalisation: Becoming Human* (2001) (sharply criticising the discipline and legacy of international law, but thus – perhaps unintentionally – identifying aspects which offer new hope). More generally on the ability to turn a crisis into an opportunity, in the legal sphere, see Z. KITAGAWA, *Dai-gaku, hōgakubu, hōritsu gakubu: watashi no kikiron to kōkaron*, in: *Jurisuto* 972 (1992) 111.

31 *Cf.* generally D. ENGEL, *Making Connections: Law and Society Researchers and Their Subjects*, in: *Law and Society Review* 33 (1999) 3.

32 See, e.g., D. NELKEN, *Towards a Sociology of Legal Adaptation*, in: D. Nelken / J. Feest (eds.), *Adapting Legal Cultures* (2001) 7. *Cf.* also T. GINSBURG, *Rethinking the Masters of Comparative Law* (Book Review), in: *Law and Politics Book Review* 12 (2002) 205.

33 RILES, *supra* note 26.

34 *Cf.* generally J. HABERMAS, *Between Facts and Norms* (*William Rehg*, trans., 1996).

35 A major development is the establishment of his own publishing house by *Richard Hart*, longstanding editor for Oxford University Press. He has published numerous innovative works in comparative legal studies (e.g. A. RILES (ed.), *Rethinking the Masters of Comparative Law* (2001); D. NELKEN / J. FEEST (eds.), *Adapting Legal Cultures* (2001); P. BEAUMONT / C. LYONS / N. WALKER (eds.), *Convergence and Divergence in European Public Law* (2002), as well as more traditional yet influential works (e.g. B. MARKESINIS, *Always on the Same Path: Essays on Foreign Law and Comparative Methodology*, Volume II (2001)). The most daring new journal in Europe is probably the *Maastricht Journal of European and Comparative Law*; but the *Modern Law Review*, long the most interdisciplinary of “top-tier” English law journals, now also devotes increasing space to comparative studies.

### III. BEYOND ASIAN LAW?

If the corpse of comparative law is twitching again, what does this mean for Asian law? If *Taylor* is correct in linking the two disciplines – if Asian law filled the gap to become “the new comparative law”<sup>36</sup> – then, by reverse logic, the rise again of comparative law may be linked to a decline in Asian law. At least, it should create a serious challenge to Asian law as a new discipline.

At first glance, there seems little evidence that Asian law is losing ground. It did experience a lull in the 1970s in the US, but that was due to some peculiarities of that main (non-Asian) source of Asian law scholarship. The opening of the People’s Republic of China and the reform of socialist states in Asia contributed to renewed efforts to truly understand the law in Asian countries.<sup>37</sup> By some measures, these have continued unabated over the 1990s. For example, we have seen not only special issues of law journals,<sup>38</sup> but also the inauguration of several new ones. Yet closer examination reveals that the latter provide a shaky foundation for the development of Asian law as a discipline. The COLUMBIA JOURNAL OF ASIAN LAW was renamed this in 1996, having started life in 1987 as the JOURNAL OF CHINESE LAW. Its website’s “mission statement” remains ambivalent. The journal “provides a forum for legal practitioners [sic] and scholars from China, the United States, and elsewhere to discuss the broad range of issues that relate to law in China”, but “welcomes multidisciplinary [sic], historical and comparative manuscripts, as well as those describing and analyzing aspects of contemporary Asian law and practice”.<sup>39</sup> No indication is provided as to how these might interrelate, or what constitutes or distinguishes Asian law, and only the Fall issue (13/2, in 1999) deals seriously with law outside China.<sup>40</sup> The ASIAN LAW JOURNAL was inaugurated in 1993 at Boalt Hall (University of California, Berkeley), but has almost nothing to do with the law in Asia! It is overwhelmingly devoted to issues directly

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36 TAYLOR, *supra* note 1, 48. This notion has parallels with the singularly unpersuasive attempt by mediators to claim that arbitration is not Alternative Dispute Resolution (ADR), drawing on the established reputation of arbitration to raise the profile of mediation as a new professional field, while co-opting the remaining “goodwill” in the term “ADR”. Cf. generally L. NOTTAGE, *Is (International Commercial) Arbitration ADR?*, in: *The Arbitrator and Mediator* 20 (2002) 83.

37 W. GRAY, *The Challenge of Asian Law*, in: *Fordham International Law Journal* 19 (1995) 1 (also at <[http://www.fordham.edu/ILJ\\_Online/whitgray.htm](http://www.fordham.edu/ILJ_Online/whitgray.htm)>).

38 E.g. the *Fordham International Law Journal* in 1995; the *Melbourne University Law Review* in 1993.

39 See <<http://www.columbia.edu/cu/asiaweb/JAL006.htm>>.

40 *Lin* applies some theories developed for Japan to examine judicial independence in China, while four other articles review legal developments in Korea, Burma and Cambodia.



affecting Asian Americans in the US, such as discrimination against some of these groups.<sup>41</sup> The University of Hawai'i unveiled the ASIA-PACIFIC LAW AND POLICY JOURNAL in February 2000, with many useful articles describing and/or comparing developments in particular jurisdictions in Asia. However, the journal simply invites work within its "geographic scope", defined as "Asia and the Pacific Rim" (presumably excluding, therefore, Polynesian islands such as Hawai'i or New Zealand), without why that scope was chosen.<sup>42</sup> More expansive is the UCLA PACIFIC BASIN LAW AND POLICY JOURNAL, founded as early as 1982, which "focuses on international and comparative law issues concerning the nations located along the Pacific Rim, including Asia, Central and South Americas, as well as the islands in between",<sup>43</sup> although publications have focused overwhelmingly on Asia as opposed to the (rest of) the Pacific. The same appears to be true of the University of Washington's PACIFIC RIM LAW AND POLICY JOURNAL, inaugurated in 1992.<sup>44</sup>

Outside the US, there has also been little published discussion about the contours of Asian law, even as new journals have been established over recent years. Further, those from countries within the English law tradition have published works distinguished by much more black letter law analysis, compared to some of the US "policy journals" just mentioned.<sup>45</sup> Black-letter law exposition also appears to characterise many recently

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41 See <<http://www.boalt.org/ALJ/main.html>> (with a Flash presentation of the words "Reflect ... Connect ... Define" – the latter is particularly apposite!). Volume 3 does contain an article on expropriated property in China; Volume 4, on Hong Kong after 1997; and Volume 5, on Taiwanese copyright law. But clearly the journal uses "Asian law" in a very different sense to that discussed here. A more informative title, for a journal with a similar focus, is UCLA's *Asian Pacific American Law Journal* (<<http://www.law.ucla.edu/students/studentorgs/APALJ/>>).

42 See <<http://www.hawaii.edu/aplpj/3/Feb2002intro.html>>.

43 See <<http://www.law.ucla.edu/students/studentorgs/Pblj/index.html>>.

44 See <<http://www.law.washington.edu/PacRim/>>.

45 See, in particular, the *Asian Business Law Review* run since 1993 through Nanyang Technological University in Singapore, seemingly primarily for "lawyers and business professionals" (<<http://www.asiabizlaw.ntu.edu.sg/>>); the City University of Hong Kong's *Asia-Pacific Law Review* (<<http://www.cityu.edu.hk/cityu/dpt-acad/slwr.htm>>), inaugurated in 1993 and now published by Kluwer (<<http://www.kluweronline.com/issn/1019-2557>>). (Similarly, non-specialist journals in these jurisdictions seem to attract more black-letter law analyses of Japanese law: see e.g. K. TAKAHASHI, Foreign Law in Japanese Courts: A Comparison with the English Approach – Idealism versus Pragmatism, in: *Singapore Journal of Legal Studies* 2002, 489.) Compare the more ambitious methodological aims indicated by the *Asia Pacific Journal of Environmental Law* (<<http://www.kluweronline.com/issn/1385-2140>>), published since 1996; and a special issue introduced by T. KOTAKA ET AL., Taking Land: Compulsory Purchase and the Regulation of Land in Asia-Pacific Countries, in: *Asia-Pacific Law Review* 9 (2001) 103. Indeed, for a quite "orientalist" piece – running together Japan and communist China – in the last-mentioned journal (hosted by the City University of Hong Kong), see R. JAGTENBERG / A. DE ROO, The 'New' Mediation: Flower of the East in a Harvard Bouquet, in: *Asia Pacific Law Review* 9 (2001) 63.

published monographs on Asian law.<sup>46</sup> At a time when at least some comparativists are implying or proclaiming the need for more contextual approaches, the corpus of Asian law scholarship may – ironically – be becoming more positivistic in orientation, even within the academy.

An exception is the AUSTRALIAN JOURNAL OF ASIAN LAW, created in 1999 to “offer a common forum for ideas, debate and informed comment on current legal issues from the perspective of those whose legal scholarship and practice are focused in Asia”.<sup>47</sup> In their opening words to the first issue, the chief editors went on to state that they “define Asia broadly and continue to debate [their] mental and geographical boundaries”.<sup>48</sup> Unfortunately, no articles have been published in the journal that challenge those boundaries, for example by writing solely about Australian law!<sup>49</sup> The editors also recognised “the ways in which disparate parts of Asia are linked through commercial and family ties, and [that] perceptions of ‘Asian values’ and ‘Asian law’, however defined, challenge basic assumptions about nation, government, law and morality”.<sup>50</sup> Yet the first volumes have not examined the former, namely linkages within Asia,<sup>51</sup> and the latter appear only in passing in articles focused almost exclusively on individual countries in the region. On the other hand, perhaps these lacunae are inevitable for a journal still establishing itself. Already, the editors’ encouragement of work which takes a more theoretical or interdisciplinary focus, as well as that with more practical applications, appears to have borne fruit. There is also a healthy mix of commercial and public law writings.

Nonetheless, the paucity of sustained reflection and theoretical reformulation about the nature and scope of Asian law, or even the legal systems of sets of jurisdictions

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46 See, e.g., *Arbitration Procedure in Asia* (looseleaf since 1999, Sweet & Maxwell); A. GUTTERMAN / R. BROWN (eds.), *Commercial Laws in East Asia* (1997); M. PRYLES (ed.), *Dispute Resolution in Asia* (1997) (despite the editor’s interesting opening chapter – co-authored by *Veronica Taylor*: it is fairly obvious which parts she wrote!); Y. ZHANG / T. FUKE, *Changing Tax Law in East and Southeast Asia Towards the 21st Century* (1997). Non-commercial law topics seem to encourage a somewhat more contextual approach (see, e.g., Y. ZHANG (ed.), *Comparative Studies on Governmental Liability in East and Southeast Asia* (1999), but one wonders why this should necessarily be so.

47 M.B. HOOKER / T. LINDSEY / V. TAYLOR, Editorial, in: *Australian Journal of Asian Law* 1 (1999) 1. See generally <<http://www.law.unimelb.edu.au/ajal/>>.

48 IBID.

49 *Taylor*, for example, indicated in 1997 that Australia is an integral part of Asia (*supra* note 1, 60, 61 note 52).

50 HOOKER ET AL., *supra* note 47.

51 There is much useful work from political economists which (socio-)legal scholars could mine for such purposes. See e.g. D. KELLY, *Japan and the Reconstruction of East Asia* (2002). For an example of empirically-based theory-building not limited to Asia, compare e.g. R. APPELBAUM / W. FELSTINER / V. GESSNER (eds.), *Rules and Networks: The Legal Culture of Global Business* (2001).

within Asia, seems noteworthy over the last five years.<sup>52</sup> This might be seen as a sign of confidence, or premature for a still emerging discipline. However, applying the very critique made of comparative law, it is more likely to reveal problems which require attention and may otherwise result in terminal decline, despite the intensely practical advantages still of packaging some interests or expertise as “Asian law”.<sup>53</sup> In particular, the lack of ongoing reflection risks jeopardising:

- the optimal embedding of interest (especially research) in Asia’s law within rapidly evolving university environments;
- the ability to provide appropriate training and education for students from the region, including the growing numbers of legal specialists in Asia receiving training from richer countries’ Overseas Development Assistance programmes; and
- managing a relationship of mutual respect between the academy and law firms, which have been a major force in both Australia and the US in generating interest in the law of Asian countries.<sup>54</sup>

These difficulties may have been hidden by the renewed “pull of the policy audience”<sup>55</sup> following the Asian crisis in 1997. Yet that collapse in fact demonstrated the variety of economic and political arrangements in the region, in regulatory responses as well as the original conditions.<sup>56</sup> Ironically, despite a spate of conferences and workshops in the immediate aftermath of the Asian crisis,<sup>57</sup> its long-term effect may be to contribute to the ongoing “balkanisation” of Asian law.

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52 Interestingly, the recently inaugurated *Melbourne Journal of International Law* professes to address a shortage of material “dealing with the relationship between the Asia-Pacific region and both private and public international law”, but articles so far tend just to examine international law developments in or involving isolated Asia-Pacific nations, rather than seeking to build up some pan-Asian international law. (In international environmental law, moreover, developments remain noteworthy only at the sub-regional and global levels. See D. ROTHWELL, Millenium Editorial: Is There an Asia Pacific Environmental Law?, in: *Asia Pacific Journal of Environmental Law* 5 (2000) 307).

53 See further TAYLOR, *supra* note 1, 54-61.

54 J. CLIFT, A Sea Change in Government Attitudes to Asian Legal Systems, in: Taylor (ed.), *supra* note 1, 17; GRAY, *supra* note 37.

55 A. SARAT / S. SILBEY, The Pull of the Policy Audience, in: *Law and Society Review* 14 (1988) 765.

56 M. RHODES / R. HIGGOTT, Introduction: Asian Crises and the Myth of Capitalist Convergence, in: *Pacific Review* 1 (2000) 13; A. LUKAUSKAS, Financial Restriction and the Developmental State in East Asia - Toward a More Complex Political Economy, in: *Comparative Political Studies* 35 (2002) 379.

57 For example, at the University of Melbourne’s Asian Law Centre in 1999; and at Thammasat University Law Faculty in Bangkok (with Kyushu University) in March 2000.

## IV. JAPANESE LAW: AUTISTIC OR AMOEBIC?

Where does Japanese law fit into this intricate dance linking comparative and Asian law? The scholarship on Japan's law involves the study of a legal system located in "Asia", on virtually any definition. But should it be grouped with "East Asian" law?<sup>58</sup> How far west does East Asia extend – to the Uigur area in the People's Republic of China, with its Muslim traditions creating close links with neighbouring "Central Asian" countries?<sup>59</sup> How far east – to Guam? Or is Japanese law better conceptualized as part of "North Asian law"? How far north does that extend? If North Asia incorporates Sakhalin Island in Russia, then do "legal" norms exist there which are still shared by the (arguably) indigenous Ainu people on Hokkaido Island in Japan,<sup>60</sup> so that we should distinguish "indigenous North Asian law" from the rest of Japanese law? What about Okinawa, in the far south of the Japanese archipelago? Clearly, geography in itself does not take matters very far.

One solution might indeed be a close analysis of "commercial and family ties" within such groupings,<sup>61</sup> to see how Japan could fit in. Yet there has been very little work in this direction, a rare exception being some interest shown by *Taylor* and *Ginsburg* towards Japan's recent "export" of legal expertise to developing countries in South-East Asia, and *Yoshitaka Wada's* mainly qualitative study of the contract practices of Japanese businesses in Thailand.<sup>62</sup> Instead, those researching or teaching East Asian law, like the late *Dan Henderson* at the University of Washington, have been

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58 *Cf.*, e.g., P.-L. TAN (ed.), *Asian Legal Systems: Law, Society and Pluralism in East Asia* (1997); GUTTERMAN / BROWN, *supra* note 46.

59 The latter remain a world apart, as I realised at a conference sponsored by Nagoya University on 17 February 2002. Of course there are some common experiences in modernisation, allowing for a lengthy time lag, between the new Central Asian states and Japan. But if this is of interest, then comparing Japan with Turkey – now insisting on its place at the European table! – seems likely to generate much more interesting work. *Cf.*, e.g., ÖRÜCÜ, *supra* note 22. The practical imperative of Overseas Development Assistance funding is probably the key factor for linking Central "Asia" with countries like Japan. More academically justified appears to be a course listed for 2001-2 by the Asian Law Center at the University of Washington, "Commercial Law in Eastern Europe and Central Asia", derived from a major research project for USAID.

60 See generally M. LEVIN, *Essential Commodities and Racial Justice: Using Constitutional Protection of Japan's Indigenous People to Inform Understandings of the United States and Japan*, in: *New York University Journal of International Law and Politics* 33 (2001) 419.

61 A. HARDING, *Global Doctrine and Local Knowledge: Law in South East Asia*, in: *International and Comparative Law Quarterly* 51 (2002) 35.

62 V. TAYLOR, *Whose Legal Development? Moral Dilemmas in the New Law and Development Movement*, Paper presented at the International Symposium on "Legal Assistance Projects in Asia and International Cooperation", Graduate School of Law, Nagoya University, 13-14 September 2000; T. GINSBURG, *Japanese Law and Asian Development*, Paper presented at the Law & Society Association conference, Vancouver, 27-30 May 2002; Y. WADA, *Globalization and Local Culture in Contracts: Japanese Companies in Thailand*, Paper presented at the Law & Society Association conference, Vancouver, 27-30 May 2002.

keenly interested in historical borrowings of legal ideas – from China to Japan, for example, underpinning the view that both countries share an enduring tradition of not creating “justiciable” rights for individual citizens.<sup>63</sup> Similarly, his student *John Haley* sharply distinguished “legal” from social norms,<sup>64</sup> possibly making it easier to then develop the view that a defining feature of Japanese law was a “communitarian” concern for preserving relationships.<sup>65</sup> *Haley* has not linked this rather opaque notion to underlying principles in other Asian legal systems, but *Nobuyuki Yasuda* has begun to do so from the other direction, emphasising the communitarian orientation of (mainly South-East) Asian legal systems.<sup>66</sup> In *Yasuda*’s view, this orientation – excuse the pun! – can remain. He asserts that communitarianism may grow through the expansion of NGOs, despite body blows dealt to the ideology of the “developmental state” following the Asian crisis in South-East Asia – and, one might add, Japan’s “lost decade” of economic stagnation over the 1990s. However, these ideas have yet to be pursued in depth, both theoretically and especially empirically, in relation to contemporary Japan in conjunction with its (as yet ill-defined) neighbours.<sup>67</sup>

In this vacuum, it is unsurprising that it remains popular to examine Japan through, for example, the lens of the “civil law tradition”.<sup>68</sup> The latter may always have been an over-abstraction, as early proponents – unlike some critics of the notion – were usually careful to acknowledge.<sup>69</sup> Distinguishing characteristics of the civil law tradition are also being undermined by regional and global developments, although the extent of this

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- 63 D.F. HENDERSON / P.M. TORBETT, Contract in the Far East: China and Japan, in: International Encyclopedia of Comparative Law, Vol. VII, Contracts in General, Ch. 6 (1992); D.F. HENDERSON, The Role of Lawyers in Japan, in: H. Baum (ed.), Japan: Economic Success and Legal System (1997) 27.
- 64 J.O. HALEY, Authority without Power: Law and the Japanese Paradox (1991). Cf. D.T. JOHNSON, Authority without Power: Haley on Japan’s Law and Politics, in: Law and Society Review 27 (1993) 619.
- 65 J.O. HALEY, The Spirit of Japanese Law (1998). Cf. also the views of *Takashi Uchida*, discussed in: NOTTAGE, *supra* note 2.
- 66 N. YASUDA, ‘*Ajiateki*’ naru mono ni tsuite: *ajia no jinken kenri gainen rikai no zentei to shite*, in: *Hokudai Hogaku* 52 (2001) 605.
- 67 But see e.g. T. GINSBURG, Dismantling the Developmental State? Administrative Procedure Reform in Japan and Korea, in: American Journal of Comparative Law 48 (2001) 589; and cf. T. GINSBURG, Does Law Matter for Economic Development? Evidence from East Asia, in: Law & Society Review 34 (2000) 829.
- 68 J. MERRYMAN / D. CLARK / J.O. HALEY, The Civil Law Tradition: Europe, Latin America and East Asia (1994). See also H. LESER, Einführung in die Rechtsvergleichung (1999).
- 69 J. MERRYMAN, The Civil Law Tradition (1985); H. Kötz, Taking Civil Codes Less Seriously, in: Modern Law Review 50 (1987) 1. Cf. A. MARFORDING, The Fallacy of the Classification of Legal Systems: Japan Examined, in: Taylor (ed.), *supra* note 1, 65.

*rapprochement* is hotly contested.<sup>70</sup> Other ways of conceptualising and organising comparisons of Japanese law, without looking at other Asian legal systems – unless New Zealand is included in that rubric! – have also been suggested, drawing on the demonstration by *Patrick Atiyah* and *Robert Summers* that English law is centred on much more formal reasoning patterns and supporting institutions, than US law.<sup>71</sup> From this perspective, we can better appreciate why New Zealand appears to be experiencing significantly greater difficulties in moving away from a classical model of contract law, even compared to a country like Australia with a similar inherited tradition of English law but other more “American” features (for example in constitutional law). By contrast, Japanese contract law shares with US law some – but not necessarily the same – very substantive reasoning based features.<sup>72</sup> This framework provides more context for comparisons which might focus simply on the way in which particular rules may have been transplanted from US to Japanese law, for example in securities regulation or labour law after World War II.<sup>73</sup> Alternatively, we find scholars now comparing Japanese law with a different set of legal systems, to suit their particular purposes.<sup>74</sup> In addition, of course, there are innumerable studies comparing Japanese law with the “home law” of a particular scholar. However, a methodological criticism is that just

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- 70 Cf. B. MARKESINIS (ed.), *The Gradual Convergence: Foreign Ideas, Foreign Influences and European Law on the Eve of the 21st Century* (1993); C. PEJOVIC, *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, in: *Victoria University of Wellington Law Review* 32 (2001) 817; with R.C. VAN CAENEGEM, *European Law in the Past and the Future: Unity and Diversity over Two Millennia* (2002) 36-7; and especially P. LEGRAND, *European Legal Systems Are Not Converging*, in: *International and Comparative Law Quarterly* 45 (1996) 52.
- 71 ATIYAH / SUMMERS, *supra* note 16; P. ATIYAH, *Justice and Predictability in Common Law*, in: *University of New South Wales Law Journal* 15 (1992) 448; L. NOTTAGE, *Form, Substance and Neo-Proceduralism in Comparative Contract Law: The Law in Books and the Law in Action in England, New Zealand, Japan and the U.S.*, PhD in Law thesis, Victoria University of Wellington, 2002.
- 72 L. NOTTAGE, *Form and Substance in New Zealand, US and Japanese Law: What Role for Grand Theory in the World of International Contracting?*, in: *Proceedings of the 1995 Annual Meeting of the Research Committee on Sociology of Law (International Sociological Association), “Legal Culture: Encounters and Transformations”*, Sections Meetings 2 (1995) 203; ID., *Form and Substance in US, English, New Zealand and Japanese Law: A Framework for Better Comparisons of Developments in the Law of Unfair Contracts*, in: *Victoria University of Wellington Law Review* 26 (1996) 247; ID., *Contract Law and Practice in Japan: An Antipodean Perspective - Revisited*, in: *Hikakuhô Zasshi* 31 (1997) 55. See also ID., *Book Review: Willmott et Al., Contract Law*, in: *Journal of Contract Law* 18 (2002) 145.
- 73 Cf., e.g., A. BELLER / T. TERAJ / R. LEVINE, *Looks Can Be Deceiving: A Comparison of Initial Public Offering Procedures under Japanese and Us Securities Law*, in: *Law and Contemporary Problems* (1992) 77; W. GOULD, *Japan’s Reshaping of American Labor Law* (1984).
- 74 See, e.g., F. VENTER, *Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States* (2001).

taking two points of reference is always risky, because of the risk of too readily concluding (even when a metric is stated) that one system is “extremely different” or else “basically identical” from the other. This may explain a growing number of more ambitious comparative analyses.<sup>75</sup>

To a greater or lesser extent, these approaches draw on the discipline of comparative law as developed over the last century, except that they are increasingly committed to understanding Japanese law from within or in its own right, rather than projecting “legal orientalism” and normative preferences for an “ideal” model of law which does not necessarily hold in their home jurisdiction (or indeed anywhere).<sup>76</sup> Of course there are exceptions, such as *Ugo Mattei’s* bizarre eliding of Japanese and Chinese law some years ago.<sup>77</sup> Yet such misconceptions may follow not just from the (hopefully declining) influence of some earlier comparative law scholarship, but also – perhaps ironically – from the promotion of generic Asian law scholarship. Particularly in relation to Japan, therefore, it seems that advocates of Asian law scholarship have failed to discharge their “burden of proof”.<sup>78</sup> My sympathies therefore lie with *Mal Smith’s* protestations that he is “first and foremost a student of Japan”, and that great caution must be exercised in making the jump from Japan to Asia; but I would go further in questioning the usefulness now of “Asian legal studies” even “as a shorthand identification for a geographic location, which most people seem to recognise”.<sup>79</sup> It is unclear whether people do and in what ways, and encouraging such conceptions may have nefarious effects, or at least detract from more useful ways of looking at Japanese law nowadays.

To be sure, it is still helpful to examine the influence on Japanese law of the law or related institutions of imperial China, for instance. This may especially be true if an aim is to understand Japan’s “re-export” of modern law to Korea and Taiwan.<sup>80</sup> It may also

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75 See, e.g., GINSBURG, *supra* note 67; extended e.g. in: T. GINSBURG, Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan, in: *Law & Social Inquiry* (2002) 763.

76 See especially F. UPHAM, Ideology, Experience, and the Rule of Law in Developing Societies, Paper presented at the University of Michigan conference, “Change Continuity, and Context: Japanese Law in the Twenty-First Century”, Ann Arbor, 6-7 April 2001.

77 U. MATTEI, Three Patterns of Law: Taxonomy and Change in the World's Legal Systems, in: *American Journal of Comparative Law* 45 (1997) 5. In other respects, however, *Mattei* has made more sophisticated attempts to develop comparative law theory: see, e.g., *Mattei*, *Comparative Law and Economics* (1997).

78 *Supra* note 1.

79 M. SMITH, Australian Perspectives on Asian Law: Directions for the Next Decade, in: Taylor (ed.), *supra* note 1, 3, 4. Cf. TAYLOR, *supra* note 4, 17 (“I typically describe myself as an Asian law, rather than a Japanese law, specialist”).

80 For an excellent study of the latter, see T.-S. WANG, *Legal Reform in Taiwan under Japanese Colonial Rule, 1895-1945: The Reception of Western Law* (2000). It seems decidedly more difficult to compare Japan with the more undifferentiated legal system of the People’s Republic of China: cf. W. JI, Some Major Issues of Chinese Law: The Past, the Present, and the Future, Paper presented at the International Symposium on “Law in the Near Future and Asia”, International Institute for Advanced Legal Studies, Kyoto, 10 November 2001. But

provide a headstart or profound insights into Japan's slowly growing and diversifying programmes of technical legal assistance to South-East Asian countries, often with large populations of Chinese ethnicity. Yet the re-export to former colonies was complicated even in Japan's imperial era by varying degrees of compulsion and arbitrariness, arguably delaying the emergence of a "new constitutionalism" over recent decades.<sup>81</sup> And Japan's "legal ODA" to South-East Asia, characterised by incredible social diversity and encrustations of various influences on the legal systems in that area,<sup>82</sup> competes with efforts on the part of the US, continental Europe, Sweden, Canada, and even Australia.

Further, even if a clear influence of Japanese law can be traced to these Asian legal systems, and that can be shown to matter in local practice and/or ideology, that "Japanese law" may be nothing of the sort – or at least strongly imprinted by models derived from far beyond the region: US law, German law, EU law, or international instruments of various degrees of binding force (UN treaties and model laws, or semi-governmental initiatives such as those originating from UNIDROIT in Rome). This may account more for its "successful" relocation to a new legal environment. Such possibilities may be lost from view if Japanese (and Asian) law is not clearly placed in a much broader comparative perspective.

That approach, which tends to anchor Japanese law scholarship within the legacy of the comparative law enterprise,<sup>83</sup> also seems important for another reason. At least in some cases, it should be possible to show how Japanese law has independently influenced other contemporary Asian legal systems, because of the sophistication of Japanese law in deriving unique interpretations and applications from its overseas borrow-

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see M. YOUNG, Influence of Japanese Law, Legal Institutions and Legal Thought on East Asia, Paper presented at the International Symposium on "Law in the Near Future and Asia", International Institute for Advanced Legal Studies, Kyoto, 10 November 2001.

- 81 C.-R. KIM, *Kankoku ni okeru nitte kyosenki no hōtaikei no seikaku*, in: Hokudai Hōgaku 52 (2001) 641; J.-H. JEONG, Korean Civil Law: Past, Present and Future, Paper presented at the International Symposium on "Law in the Near Future and Asia", International Institute for Advanced Legal Studies, Kyoto, 10 November 2001. See also generally D.-K. YOON (ed.), *Recent Transformations in Korean Law and Society* (2000).
- 82 A. HARDING, Global Doctrine and Local Knowledge: Law in South East Asia, in: *International and Comparative Law Quarterly* 51 (2002) 35.
- 83 Cf. F. UPHAM, The Place of Japanese Legal Studies in American Comparative Law, in: *Utah Law Review* (1997) 689 (stressing, at least at that time, that the two were worlds apart); V. TAYLOR, *supra* note 4, 17; T. GINSBURG, In Defense of Japanese Law, in: Ginsburg et al. (eds.), *supra* note 4, 29. Perhaps the disjunction has been particularly strong in the US and Australia. It does appear to characterise still the German scene (cf. T. GINSBURG / L. NOTTAGE / H. SONO, The Worlds, Vicissitudes and Futures of Japanese Law, in: T. Ginsburg et al. (eds.), *ibid.*, 1), where Japanese law remains fairly "ghettoised", but perhaps less so the Low Countries (cf. D. VANOVERBEKE, Japanese Law in the Low Countries and France: A Brief Outline of Changing Perceptions in a Changing World, in: Ginsburg et al. (eds.), *ibid.*, 25), certainly not New Zealand (albeit with a small sample size!), and probably not Korea (see, e.g., J.-H. JEONG, *supra* note 81).



ings<sup>84</sup> – or, put less kindly by *Hiroo Sono*, Japanese law's "autism" in regard to at least some global legal standards<sup>85</sup> – and because of its economic and sometimes even diplomatic clout in the region. Yet a litmus test as to whether this will truly advance Asian law, incorporating Japanese law, should be whether Asian legal systems are in turn influencing significantly the path of Japanese law. This may seem an unrealistic expectation, but it characterises the emergence of a broader "Commonwealth law" among former colonies and dependencies of the British empire. Especially over the last two decades, New Zealand, Australian and Canadian law have played important roles in shaping the course of the common law back in England.<sup>86</sup> There has also been a steadily growing influence of Japanese law back onto German law, at least in some fields.<sup>87</sup> Yet there is little evidence of such "re-re-export" back to Japan from Asian legal systems, as a broad comparative analysis can show.

In four areas that I happen to have looked into fairly closely, for example, Japanese law over the last decade seems to have been affected heavily by global or European developments. A major impetus behind Japan's Product Liability Law of 1994, and the Consumer Contracts Law of 2000, was European Union law. Developments in Asian legal systems in these two areas were occasionally noted in Japanese discussions leading to enactment, but often to support the argument that EU law provided a *de facto* "global standard" for Japan to follow.<sup>88</sup> World-wide trends appear to have been even more prominent in transforming Japanese law relating to international commercial arbitration, and corporate governance. For the former, the most important forces have been the 1985 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the 1985 UNCITRAL Model Law on International Commercial Arbitration, very recent deliberations of UNCITRAL Working Groups, and related links built up among institutions and personages in the world of international commercial arbitration. Japan is now involved in initiatives through APEC, and examining developments in legislative or arbitration institution rules in Asia – but also Oceania (Australia and

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84 See also M. YOUNG, *Influence of Japanese Law, Legal Institutions and Legal Thought on East Asia*, Paper presented at the International Symposium on "Law in the Near Future and Asia" (International Institute for Advanced Legal Studies, Kyoto, 10 November 2001).

85 H. SONO, *The Multiple Worlds of Nihonho*, in: Ginsburg et al. (eds.), *supra* note 84, 47.

86 See, e.g., M. SMITH, *The Use and Abuse of Foreseeability: Some Observations on Judicial Law Making in the Common Law System*, in: H. LESER / T. ISOMURA (eds.), *Wege zum japanischen Recht - FS Kitagawa* (1992) 523; M. RICHARDSON, *The Privy Council and New Zealand*, in: *International and Comparative Law Quarterly* 46 (1997) 908.

87 H. LESER, *Views from Western Countries*, Paper presented at the International Symposium on "Law in the Near Future and Asia", International Institute for Advanced Legal Studies, Kyoto, 10 November 2001.

88 L. NOTTAGE, *The Still-Birth and Re-Birth of Product Liability in Japan*, in: D. Nelken / J. Feest (eds.), *Adapting Legal Cultures* (2001) 147; updated with other works in L. NOTTAGE, *Product Safety and Liability Law in Japan: From Minamata to Mad Cows* (forthcoming in late 2003 from Routledge Curzon).

New Zealand) – partly with a view to enacting a new Arbitration Act in 2003.<sup>89</sup> At the policy-making level, however, this seems to constitute “Asia as afterthought”, partly again to develop arguments about a putative global consensus to guide domestic law reform. The same can be said of recent changes and discussions regarding corporate governance reform in Japan. For example, Anglo-American models with contemporary German influences resulted in promulgation of OECD Principles in 1999. These, together of course with the Asian economic crisis, have framed the debates in OECD “Asian Roundtables” on corporate governance in recent years.<sup>90</sup>

Admittedly, these examples are all taken from commercial law, which may say something about the influence I have received from an Anglo-Commonwealth-American academic environment.<sup>91</sup> Others under that influence appear to concur in the impact of world-wide developments and benchmarks in other areas of commercial law.<sup>92</sup> *Hiroo Sono* decries Japan’s “autism” or autarky in regard to global developments in general contract law.<sup>93</sup> But this appears to be an area of perceived “lawyer’s law” where conservatism and factionalism remains particularly strong, and some indirect influence is apparent. Further, such selective adaptation may even be preferable to wholesale importation, as has occurred in New Zealand (when it has finally got around to doing anything).<sup>94</sup> More generally, the influence of global developments is also apparent in

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89 L. NOTTAGE, *supra* note 5; Meijo University Institute for Socioeconomic Dispute Studies, Proceedings of the Symposium on International Commercial Arbitration in the Asia-Oceania Region, Nagoya, 22-23 February 2000 .

90 *Cf.* generally L. NOTTAGE, Japanese Corporate Governance at a Crossroads: Variation in “Varieties of Capitalism”?, in: North Carolina Journal of International Law and Commercial Regulation 27 (2002) 255; D. PUCHNIAK, The 2002 Reform of the Management of Large Corporations in Japan: A Race to Somewhere?, in: Australian Journal of Asian Law (forthcoming, 2003).

91 *Cf.* L. NOTTAGE, Japanisches Recht, Japanese Law, and Nihonhō: Towards New Transnational Collaboration in Research and Teaching, in: Ginsburg et al. (eds.), *supra* note 4, 20; also in: Zeitschrift für Japanisches Recht 12 (2001) 17.

92 *Cf.*, e.g., K. ANDERSON, Comparative Approaches to Continuing Legislative Reform: Considering Insolvency Law Reform in Japan and Several Common Law Countries, Paper presented at the International Symposium on “Law in the Near Future and Asia”, International Institute for Advanced Legal Studies, Kyoto, 10 November 2001 (noting however that at the end of the day, the new Japanese regime for cross-border insolvency declined to simply adopt the UNCITRAL Model Law; *see* also generally K. ANDERSON, The Cross Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience, in: University of Pennsylvania Journal of International and Economic Law 21 (2000) 679).

93 SONO, *supra* note 85.

94 *See* generally T. LINDSEY / V. TAYLOR, Rethinking Indonesian Insolvency Reform: Contexts and Frameworks, in: T. Lindsey (ed.), Indonesia: Bankruptcy, Law Reform and the Commercial Court (2000) 2, 5, 12-13. *Cf.* L. NOTTAGE, Trade Law Harmonisation in the Asia-Pacific Region: A Realist’s View from New Zealand - and a Way Forward?, in: New Zealand Law Journal 1995, 295, and New Zealand’s enactment of the UNCITRAL Model Law – belatedly in 1996, and by private member’s bill.

Japan's proposed reforms to its university and legal education systems, and perhaps even its overall system for administering justice.<sup>95</sup> Developments in Asia (and the Pacific) are proceeding in parallel, yet appear of little independent relevance to Japanese policymakers compared to events in Europe and the US. I would welcome any counter-examples to this trend, which furthermore could lead into an interesting debate about the relative merits of generalisation and particularity.<sup>96</sup>

Overall, I believe Asia's law still appears only indirectly on the screen in Japan, while the influence of global and probably especially EU law seems likely to continue to expand steadily. In addition, the influence of French, German and US law – in that broader context<sup>97</sup> – should remain very significant. Until this pattern changes, even unique legislative and institutional transformations in Japan are likely to have limited chances of profoundly shaping contemporary Asian legal systems, and thus of catapulting forward the discipline of Asian law, despite Japan's recent attempts to (re-)export Japanese law through ODA.

## V. CONCLUSIONS

The foregoing suggests it is time to move away from comparing Japanese law and society in relation to one or several nation-states, or even a region such as Asia, and towards locating it in a much broader context.<sup>98</sup> There may be a parallel to the burgeoning numbers of *bilateral* economic cooperation agreements involving Japan and other economies throughout the Pacific Rim as well further afield, seemingly facing difficulties in evolving into *regional* agreements, but arguably contributing to the expansion of *multilateral* arrangements spanning (much larger parts of) the globe.<sup>99</sup>

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95 L. NOTTAGE, Reformist Conservatism and Failures of Imagination in Japanese Legal Education, in: Asia Pacific Law and Policy Journal 2 (2001); J.S. EADES, Reforming Japanese Higher Education: Bureaucrats, the Birthrate, and Visions of the 21st Century, in: Ritsumeikan Journal of Asia Pacific Studies 8 (2001) 86.

96 Cf. V. TAYLOR, *supra* note 4, 16 (“... the sticking point – whether you think the exception proves the rule or ... the instability or selectivity of the paradigm being advanced, is a question of perspective. It depends on your normative position, your intellectual formation, the examples you are discussing, and also on differences in age and temperament”).

97 Cf. R.D. KELEMEN / E.C. SIBBITT, The Americanization of Japanese Law, in: University of Pennsylvania Journal of International Economic Law 23 (2002) 269. One of their “case studies” in support of “Americanisation” is product liability. But this is much better described as “Europeanisation”, in view of history, black-letter law, and societal impact: NOTTAGE, *supra* note 88.

98 For an precocious paper along these lines in relation to China, see J. WAINCYMER, China and the World Trading System, in: TAYLOR (ed.), *supra* note 1, 424. Cf. also P. POTTER, Globalisation and Local Legal Culture: Dilemma's of China's Use of Liberal Ideals of Private Property Rights, in: Australian Journal of Asian Law 2 (2000) 1.

99 Cf. P.J. LLOYD, New Regionalism and New Bilateralism in the Asia-Pacific, Paper presented at a “Globalisation research cluster workshop at the University of Sydney, 1 May 2002. This analogy is a very tentative one, as economists themselves are divided on empirical

If this is the trend, and it is to be encouraged, then important practical implications follow:

- Rather than establishing “Centres for Asian Law” or even “Asian and Pacific Law”, perhaps law faculties should establish “Centres for Asian, Comparative, and Global Law” or simply “Centres for Global Law”, or perhaps these should be university-level institutions to achieve better interdisciplinarity in research and teaching.<sup>100</sup> Such centres might better complement the growth of institutions focused on Japanese law, which should be encouraged too. If the latter seem too specialist, despite the urgent need now for a reappraisal of the bewildering variety of socio-legal reforms in Japan particularly since the mid-1990s, then a looser cross-institutional network may be appropriate. An innovative example is the Australian Network for Japanese Law (ANJeL), established in early 2003 by the Law Deans at the Australian National University, the University of New South Wales, and the University of Sydney; but actively seeking much broader involvement to promote research, teaching and community engagement with Japanese law.
- The proliferation of journals focusing on Asian law should also be questioned. Perhaps the risks of ghettoisation and mutual disregard should be minimised by (already burgeoning) contributions to the (growing numbers of) venues for broader comparative law scholarship. At least, Asian law journals should more actively encourage reflection on the boundaries of their field and how it relates with others.<sup>101</sup>
- Individual scholars with a particular interest in Japan should not be afraid to offer courses on Japanese Law, rather than Asian Law, even though substantive knowledge about Japanese law may not be the flavour of the decade among law firms and canny law students. Students can be encouraged to appreciate how Japan provides fertile ground for applying a range of *skills* in making comparisons among legal systems, in turn opening windows onto other legal systems (in trendier Asian countries, or other parts of the world altogether).<sup>102</sup> Scholars specialising in Japan could also

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patterns, let alone normative implications, of recent discussions involving free trade or other agreements.

100 Compare the different models implied by the Centre for Asia-Pacific Law at the University of Sydney, housed now in the Law Faculty (<<http://www.law.usyd.edu.au/>>); the University of Sydney’s Research Institute for Asia and the Pacific (<<http://www.riap.usyd.edu.au/>>); and the University of Melbourne Law Faculty’s Asian Law Centre (<<http://www.law.unimelb.edu.au/alc/>>).

101 This may be particularly appropriate for the new Asian Law journal on the Legal Scholarship Network (<<http://www.ssrn.com/lsn.index.html>>), as its online presence should allow for quicker and more open exchanges of views at various stages of maturity. Unfortunately, however, it only publishes abstracts of working papers, forthcoming articles, and recently published works.

102 See, for example, *Leon Wolff’s* course on Japanese Law taught at the Australian National University over 1998-2000; adapted for the University of Sydney in 2003.

develop more courses bringing in aspects of Japanese law focusing on a global context.<sup>103</sup> This means going a step beyond “mainstreaming” – adding a dash of Asian law to undergraduate courses.<sup>104</sup>

- Rather than Japanese ODA programmes for “Asian” jurists, taught by Japanese instructors imparting knowledge about Japanese law, there should be more multilateralism in terms of instructors (drawing them from a range of countries, not even necessarily the most “developed” economies), subjects taught (involving broader comparative and global law approaches), and participants (not necessarily originating from “Asia”, even broadly defined, but including for example those from countries with similar problems in emerging from the shadow of colonialism or communism).<sup>105</sup>

This paper should not be taken as a Panglossian acclamation of comparative law. One portion, perhaps indeed a major portion, of its tradition did – and does – generate the problems outlined above in Part II. But other portions can be – and are being – revived or developed. A middle way combining comparisons of black letter law and a variety of empirical or normative dimensions presents, perhaps, the most promising avenue to elucidate – not just wish for – new processes in the globalisation of law. As indicated in Part III, Asian law scholarship needs to engage more effectively with these phenomena, lest it attract the same criticisms it helped make so tellingly against the mainstream comparative law enterprise. This evolving tension is particularly important for those of us interested in Japanese law, as discussed in Part IV. There is no reason why we cannot be Japanese law scholars, Asian law scholars, *and* comparative law scholars.<sup>106</sup> But we need to be aware of and discuss repeatedly and frankly the shifting boundaries of these fields of knowledge and politics,<sup>107</sup> and act accordingly.

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103 See, for example, *my* new undergraduate course in International Commercial Transactions, focusing on an Australia-Japan case study: <<http://www.law.usyd.edu.au/~luken/courses.html>>.

104 The idea of “mainstreaming” was vigorously propounded by *Mal Smith* in Australia over the 1990s.

105 This is already partly the case in some Japanese government programmes, such as that that focused on ADR organised by the Ministry of Justice in February 2002. Like Professor *Shen Shibao* from Beijing regarding WTO law and dispute resolution, I presented seminars on transnational contract law and commercial arbitration, and ADR in Australia, New Zealand and England <<http://www.law.usyd.edu.au/~luken/arbitration.htm>>, alongside Japanese instructors who focused on dispute resolution in Japan.

106 See also TAYLOR, *supra* note 4, 16 (remarking on the “multiple dimensions most of us maintain” as Japanese scholars).

107 *Cf.* generally, *e.g.*, Y. DEZALAY / B. GARTH, The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars, in: D. Nelken / J. Feest (eds.), *Adapting Legal Cultures* (2001) 241.

## ZUSAMMENFASSUNG

*Nach einer Periode der Selbstzweifel ist die Rechtsvergleichung als Disziplin in den vergangenen fünf Jahre zu neuem Leben erwacht. Zwar ist der überwiegende Teil der vergleichenden Arbeiten nach wie vor auf das „black-letter law“ - also das geschriebene, akademische Recht - fokussiert, aber selbst diese Art der Rechtsvergleichung gewinnt an Bedeutung für diejenigen, die Regelungspolitik gestalten. Einige Rechtsvergleicher haben aber auch bereits begonnen, verfeinerte theoretische und empirische Ansätze zu entwickeln. Diese neue Entwicklung bildet eine wachsende Herausforderung für den „asienbezogenen“ Zweig der Rechtswissenschaft („Asian law scholarship“), der bislang von den Schwierigkeiten der tradierten Rechtsvergleichung profitiert hatte. Inzwischen erscheint insbesondere für Untersuchungen zum japanischen Recht eine umfassendere Betrachtungsweise vielversprechender zu sein, die Japan in einen Kontext zur globalen wie auch zur europäischen Rechtsentwicklung stellt und das Land damit in gewisser Weise aus der „asiatischen“ Einbindung herauslöst.*

*(Die Redaktion)*