

## **Why Do We Miss the Wood for the Trees? A Response from a *Nihon-hô* Scholar**

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### I. BACKGROUND COMMENTS

Some distinctive aspects in Japanese legal society, particularly in academic society, appear to be the cause and background for the limited impact of Japanese law study by foreign scholars. As is common with this type of observation, however, I should admit that the whole of the description below depends on my own experiences and simple ideas, not based on any quantitative data.

#### *1. Black-letter Law Doctrine, Comparative Law, and Legal Writing*

In Japan, many legal articles and materials describing foreign law appear in periodical indexes monthly. However, in Japanese legal academic society, due to the strong influence from legal positivism, reference to foreign law has been provided as mere knowledge for enacting and/or interpreting a law. In Japan, the role of comparative law is limited to informing about a different legal culture and to teaching it in classrooms, not to look at our own law and legal system from another perspective. The reason for such a tendency lies partly in the style and the concept of a legal thesis in Japanese law faculties. The main interests of Japanese scholars in legal academia are basically in legal interpretation of articles in legislation, etc. The authors, such as students in masters and doctoral courses, need to concentrate on filling out their draft theses by

referring to a lot of foreign materials concerning relevant legal issues. Comparative legal study in Japan has been developed as one of the tools for legal interpretation, not as a guide to look at our own law from a broad perspective. As a result, these authors only refer to foreigners' literature that focus on discussing legal interpretation of each specific article, not to literature concerning Japanese characteristics.

## 2. *Intuition and Images in Academia*

When Japanese academics read Japanese law studies by foreigners, by intuition, they generally sense the "orientalism" indicated in *Nottage's* paper.<sup>1</sup> Although Japanese academics have not made careful observations by reading and checking all the literature by foreign scholars of Japanese law, such an intuition is generally shared. This is reinforced by other impressions. One, for example, is that any foreigner could not reach a true understanding of Japanese systems. Another one might be that any foreigner could not recognize the highly complicated background of Japanese society. These impressions that we have towards studies by foreigners make Japanese academics evade references to foreign studies in their research papers. Therefore, Japanese academics believe foreigners' works cannot give any insight into their own society.

## 3. *Perspectives on Law*

As just mentioned, the core of legal academics' works lies in legal interpretation of articles or provisions of legislation. Japanese legal literature tends to be micro-theory oriented rather than basic-theory oriented. So the main target of Japanese academic research is the trees, not the wood. Japanese legal academics are expected to describe characteristics of a tree well, not to consider the wood made up of the trees. Japanese appreciation of academic works is, at a result, always motivated towards looking at the small parts and details, not towards sketching the big picture. Thus, grand-theory oriented foreign materials would not be helpful to their works. In parallel, in a Japanese classroom, the purpose of many courses is based on learning analytical attitudes and concept-based understanding of law. Students do not learn to look at law as a whole, adopting a critical attitude.

## 4. *Academic Evaluation*

This traditional attitude in Japanese legal academia has established a peculiar framework for academic evaluation. Japanese scholars are evaluated on (a) the ability in legal interpretation of legal texts; (b) the ability to understand foreign language(s) to acquire knowledge of foreign law; and (c) originality in finding a new legal problem and presenting a solution against it. In this evaluation, the ability to grasp a total image of

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1 In this volume, *supra* at 17.

Japanese law concerning legal issues, and to present the background, would be recognized as less important. The more reference to foreign law, the greater the evaluation which can be given to a legal academic. But we do not care for different perspectives from foreign scholars because we believe overseas suggestions without mention of interpretation discussions (*kaishaku-ron*) is meaningless for Japanese concerns.

##### 5. *Philosophy of Legal Scholars*

In Japanese legal academic society, there is a tendency to describe an idealised model of a law, which the teacher believes the law should be, not to teach law in action. There is also a tendency in which he/she propounds his/her dogmatic interpretation of a law, having nothing to do with actual law practice and, in some cases, court decisions. Law professors spend their time primarily on discussing idealised law, not on surveying law in action. This tendency leads to their academic attitude of ignoring a discussion of how a law is working now, and emphasizing how a law should be administered or interpreted from the teachers' viewpoint. Because of such idealistic views, they lack concern about the literature by foreign scholars because the majority of them just describe real aspects of the current Japanese law, and do not support any ideal vision for the law.

## II. EXCEPTIONS

However, I believe such characteristics of Japanese legal academia need not be an absolute barrier in considering the impact on Japanese society from foreign works. In fact, outside of legal society (narrowly or conventionally defined), there are many works which have influenced Japanese society. Particularly in the 1990s, we had many remarkable books by foreign authors.

A first example is "*Ten'nô no yuku kuni de*" (In the Realm of a Dying Emperor/ Japan at Century's End)" by *Norma Field* (Professor at the University of Chicago),<sup>2</sup> published in 1994. She described three stories of people she had interviewed. These people were definitely isolated from Japanese community, especially from the mainstream who adopted a conservative political attitude and traditional religious mindset. The stories in her book are sketched during a period of mourning the death of Emperor *Hirohito*. One of the stories is about Mr. *Motoshima*, former Mayor of Nagasaki City. A right-wing terrorist shot him because he said in public that the Emperor Hirohito was responsible for World War II. At that period, no Japanese authors could write a story in favor of Mr. Motoshima from fear of being attacked. Yet Professor Field interviewed and presented a critical view on a situation in which someone might be unsafe, even in a generally orderly country, if he/she would mention a specific topic. Her work can remain prominent as a memory of the *Shôwa* era, because even at such abnormal period

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2 N. FIELD, *Ten'nô no yuku kuni de* (Misuzu Shobô, 1994).

she could sketch Japanese society with philosophical detachment. She was also successful in describing quite unique parts of Japanese society untouched and evoked even by Japanese writers. Finally, she was able to interlace small pieces into a big picture.

A second example is “*Yakuza*”, published by *David Kaplan* and *Alex Dupllo* in 1991.<sup>3</sup> They wrote a very complete history of Japanese organized crime (*Yakuza*). In my view, the crucial aspect of this book is that they were able to show the connection between the Liberal Democratic Party (*Jimintô*) and these criminal organizations, and the dirty activities of the organizations as a “solution” for many political issues in Japanese modern history. It was a further great success because they were able to establish that the left wing activists were almost equal to the *Yakuza* organizations. After the book was highly welcomed around the world, many publishers in Japan sought to get the translation rights. However, at the last stage of this business, over ten publishers abandoned the idea of getting the title except the present publisher. The reason was that the book mentioned figures who are central for making clear some of mysteries of Japanese modern history. No Japanese authors could describe those points, even if they knew about them. Fortunately, however, Japanese can now learn about the strong connections between organized crime with politics through the book that was translated.

These two works demonstrate that the intuition, that foreigners cannot develop a deep comprehension of Japan, is a misunderstanding. They have succeeded in showing many great insights at the core of Japanese society, which even Japanese could not mention and reveal. These foreign writers were able to describe Japanese society and history in detail. One of the important points we should not neglect is that these works above have been published in Japanese language after being published in English, and so we could come across the books in a Japanese bookstore and read them. Needless to say, these works are completely commercially based publications. It might be slightly difficult to compare these works with academic works in law reviews and legal magazines. But, I hope we could learn from these two unique publications the importance of translated material.

### III. SUGGESTIONS

As the examples above show, foreigners’ insights sometimes could be superior to those of Japanese. The question is how to discover the foreigners’ perspective and how to engage with them. We have to find good ways and good forums to introduce such insights to Japanese legal academia. The key solution, I believe, is to establish human and digital networks.

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3 D. KAPLAN/A. DUPLLO, *Yakuza* (Daisan Shokan, 1991).

### 1. *Promoting Collaborative Work with Japanese Scholars*

The first step is very simple. It must provide a good chance for Japanese scholars to find another perspective from foreign scholars when they have collaborative academic projects. Most of Japanese scholars have no chance to read the research and thoughts of foreign Japanese law scholars. As mentioned at the outset, generally they hope to meet suitable legal professionals – rather than academics – in order to get knowledge of a delimited part of a foreign law for their research. There is generally no incentive for Japanese scholars to investigate Japanese law study from abroad. However, collaborative work could and must become a sophisticated solution for breaking such dominant scholastic attitude in Japanese legal academia. The reason is that Japanese scholars could become proud of having such projects if they could achieve fruitful results, and in an age of the Internet all participants can easily exchange information and their opinions.

### 2. *Digitalizing Japanese Law Material on the Internet*

As Nottage mentioned in his paper, we are getting a lot of web-based materials relating to Japanese law,<sup>4</sup> although it has lagged behind corresponding sources available in Australia and the United States. I would like to show what's going on now and what is still expected nowadays.

First, on the governmental side, we already have a special search engine for searching governmental information,<sup>5</sup> which from April 2001 includes full texts of primary and secondary legislation. Second, on the non-governmental side, CAPI Colloquium attendee *Frank Bennett* (from Nagoya University) has launched a "Japan E-Law Newsletter" issued by e-mail for free most weekdays. Third, outside Japan, there are some remarkable efforts for providing broader Japanese law related materials via the web. One example is Project DIAL, in the Australasian Legal Information Institute,<sup>6</sup> managed through support from the Asian Development Bank.

However, at the moment, we still lack full text databases of and lower court decisions produced by public sites. We also do not have online law reviews as in the United States and other countries.

Nonetheless, there are now high expectations among Japanese publishers for innovations in digitalizing legal materials. As can be easily appreciated, even if commercially based, if such publishers disseminate their materials on the web, the resources could be useful in teaching students abroad. But needless to say, in this century, there remain great expectations for government and the courts to promote and develop their online

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4 M. IBUSUKI/T. YONEMARU, *Hôritsu-gaku no tame no Intânetto* 2000 [Law on the Net 2000] (Tokyo 2000).

5 Gyôsei Clearing System, URL <<http://www.e-gov.go.jp>>.

6 <<http://www.austlii.edu.au/au/special/dial>>.

legal resource dissemination system.<sup>7</sup> It should be primarily for Japanese, but also for foreign, academics.

### 3. *Creating Independent Academic Groups Based in Cyberspace*

To overcome the problems of distance, it must be useful to have discussion, exchange information and present tentative drafts in cyberspace. For example, "INT-JAL" (the International Japanese Law mailing list) might be an eye-catching name for a group around the world dedicated to this task. The important point is to invite Japanese colleagues into it and to ask their opinions against foreign scholars' perspectives. This informal exchange of ideas is not familiar among Japanese scholars yet. If, however, this communication could be successful, it can be a starting point for future collaborative projects and provide strong encouragement to learn from foreigners in order to consider own law.

### 4. *Having Trained Law Librarians for Japanese Law*

Needless to say, to get fruitful research into Japanese law, a researcher needs to obtain assistance from talented librarians. The Asian-American Law Librarian Caucus<sup>8</sup> is, I believe, one of the best resources in this field. But, unfortunately, I am not sure how many librarians are experts in Japanese law materials outside Japan. Even if the librarians of each law school are not experts, by taking training courses for Japanese law, it might be easier for scholars and students to learn Japanese law. I strongly recommend some excellent foundations, for example the Fulbright Program or the Japan Foundation, to set up a program for advancement of librarians' ability in foreign schools.

### 5. *Making Newsletters or Getting Space in a Commercial Legal Magazine for Advertising Japanese Law Studies*

Mail services can be very useful. One of them to which I subscribe, LSN Cyber-Law from SSRN.COM, is an excellent mail news edited by famous cyberlaw professors, *Lawrence Lessig* (Stanford), *Eugene Volokof* (UCLA) and *Peter Swire* (Ohio State). It reports the titles, author names and journals of articles concerning Cyberspace Law. It also contains the summaries of each article. If you could edit mail news concerning Japanese law study, it would be a great resource to find fruitful Japanese law study materials, not only for academics in Japan but all over the world. I welcome recent attempts to set up an "Asian Law" journal on this network. However, if one hopes to have a major impact on a society of a country, the person must do the work on the language of the country. It is desirable to publish it in English and Japanese. Even if it is

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7 "Calling for a Legal Information Dissemination System" (in Japanese)  
<<http://law.leh.kagoshima-u.ac.jp/STAFF/IBUSUKI/asahi01111.html>>.

8 AALLC, <<http://www.aallnet.org/caucus/aallc>>.

impossible to write the whole work in Japanese, abstracts in email news must be a chance to be prompt learning about foreigners' legal works.

#### IV. CONCLUSION

Through these endeavors, I believe, Japanese academia would have opportunities to learn of approaches different from their traditional style of looking at the trees instead of the wood. It could be an opportunity to induce a new attitude in their academic work. Fortunately, at this moment, many law faculties in Japan have exchange programs with foreign schools. It is increasingly common for faculty members of the latter to have courses on Japanese Law, and for Japanese academics to have a chance to speak introducing Japan and Japanese Law outside their country.

I suppose the endeavor, as presented above, should concentrate on engaging those people who need to prepare their task of changing their traditional view of legal work, into a new approach for looking at wood rather than the trees. If we can succeed in these attempts, the mainstream of Japanese legal society could receive a considerable impact over the future.

#### ZUSAMMENFASSUNG

*Diese Abhandlung ist die Erwiderung eines Nihon-hô Gelehrten (der in Japan ausgebildet wurde und vorwiegend in Japan japanisches Recht lehrt) auf die oben in diesem Heft abgedruckte Abhandlung von Luke Nottage, laut der das Studium des japanischen Rechts durch Ausländer nur wenig Einfluß auf die etablierte Nihon-hô Wissenschaft hat. Die Ausführungen beginnen mit einigen grundlegenden Aspekten japanischer Rechtswissenschaft. Im Anschluß daran stellt der Autor zwei ausländische Werke nicht-juristischer Literatur als Beispiele einflußreicher Werke in der japanischen Gesellschaft vor. Abschließend schlägt der Verfasser eigene Ideen für künftig weitreichendere Wirkungen ausländischer Forschungen zum japanischen Recht vor.*