The Multiple Worlds of “Nihon-hô”

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I. Introduction

Among the three worlds of Japanese legal studies (“Japanese law”, “Japanisches Recht”, and “Nihon-hô”) identified by Luke Nottage,1 “Nihon-hô” stands out as having a distinct character: it is multi-layered. I will start out in Part II by explaining what I mean by this. This perspective is important in assessing whether “Japanese law” and “Japanisches Recht” have had limited impact on “Nihon-hô”. Today, we all know better than to compare Japanese business people/business practices with U.S. lawyers/law when we compare attitudes toward contracts in the two countries.2 Veronica Taylor and Nottage

I. I NTRODUCTION

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1 L. NOTTAGE, Japanisches Recht, Japanese Law, and Nihon-hô: Towards New Transnational Collaboration in Research and Teaching (in this volume, supra at 17). He develops on V. TAYLOR, Spectres of Comparison: Japanese Law Through Multiple Lenses (in this volume, supra at 11). I suspect that the worlds of Japanese legal studies are not limited to these three. For instance, judging from the nationalities of foreign students studying law in Japan (and especially in the case of Korea and Taiwan, judging from the history of pre-WW2 colonization), I imagine that Korea, China, and Taiwan have substantial amount of literature on law in Japan.


* I am grateful to the participants of the CAPI (Centre for Asia-Pacific Initiatives) Colloquium “The Multiple Worlds of Japanese Law: Disjunctions and Conjunctions” (University of Victoria, April 3, 2001) for the helpful comments I received at the colloquium and at the online discussion which took place before and after our face-to-face encounter. I would also like to note that I had only limited access to Japanese law materials (both in the Japanese and English language) during the preparation of this essay. Citations remain arbitrary.
are both well aware of this.\textsuperscript{3} But they seem to make a similar mistake by comparing wrong “worlds”. After assessing the interaction of the “worlds” of Japanese legal studies (maybe too) optimistically in Part III, I will then cast a critical light on the autism that plagues “Nihon-hô” in Part IV. Nonetheless, I will try to end in an upbeat mood.

Before I proceed, I must mention my background. I live in the world of “Nihon-hô”, and “\textit{minpô}” [Civil Code] in particular. I have had several encounters with the world of “Japanese law”, but mostly that produced in the United States. I also regretfully confess that the world of “Japanisches Recht” has been truly foreign to me. Thus, I must almost totally exclude reference to “Japanisches Recht” in the following comments.

II. \textbf{THE ANATOMY OF “N\textit{ihon-hô}”}

1. \textit{Primary and Secondary “Nihon-hô”}

When Taylor and Nottage mention the world of “\textit{Nihon-hô}” they are referring to the body of academic literature on law in Japan written in the Japanese language. This is “academic” in the sense that it may have no immediate practical consequences. However, there is another layer of “\textit{Nihon-hô}” which is the law as it is practiced in Japan. I use the term “practice” broadly. It encompasses the activities of actors such as legislatures, the legal profession, bureaucracy, and even private citizens in so far as they have practical legal consequences on people’s lives. It includes both the formal and informal enforcement of law. This layer of “\textit{Nihon-hô}” is the “primary \textit{Nihon-hô}”. The academic “\textit{Nihon-hô}” is “secondary \textit{Nihon-hô}” (“Primary” and “secondary” as used in, e.g., “cases are primary material and law reviews are secondary material.”)

2. \textit{Secondary “Nihon-hô” with an Internal Standpoint}

The ultimate objective of “secondary \textit{Nihon-hô}” as a collective is to influence the actors in the world of “primary \textit{Nihon-hô}”. However, individual works may not necessarily be intended to affect the actors. For example, the extensive comparative law articles written by virtually every Japanese legal academic are rarely intended to be used by practitioners. (If they are, they have problems with their presentation.) They are mostly intended to serve as building blocks and to give insights for further studies, which in

turn will affect the actors. In this sense, it is useful to distinguish two sub-layers of “secondary Nihon-hô”.

A typical example of the first sub-layer is the bulk of kaishaku-ron papers. They are characterized by their immediate concern of influencing “primary Nihon-hô”. In other words, they have “internal standpoints”. These are addressed directly towards the legislators, judges, attorneys, prosecutors and other legal professionals. This can be attested by the fact that academics do not hold a monopoly in this field of writing. Contributors to this sub-layer include many practitioners (judges, attorneys, prosecutors, corporate legal department (hômubu) staff members, etc.). This sub-layer may be named “applied legal studies”, or “jitsuyô hôgaku”, but in this paper, I will simply refer to it as “secondary-internal Nihon-hô”.

Many residents of the “world of Japanese law” will consider this literature boring. To some degree, I share that sentiment. However, subjective tastes aside, there are many jobs out there that are boring but indispensable. Somebody must do this. If lawyers don’t, who will?

3. Secondary “Nihon-hô” with an External Standpoint

In contrast to applied legal studies (“secondary-internal Nihon-hô”), the second sub-layer can be named “basic legal studies”. Although the final goal of basic legal studies is also to affect various actors of “primary Nihon-hô”, these studies do so only indirectly. Rather, this sub-layer intends to exert direct influence on “applied legal studies”, which in turn will influence “primary Nihon-hô”. A typical example, but not the only one, is the so-called kiso hôgaku. It consists of traditional interdisciplinary subjects such as legal philosophy, legal history, legal sociology/law and society, comparative law, and the new “Law-and” areas such as Law and Economics, Law and Negotiation, Law and Feminism, etc. Another example of basic legal studies is the descriptive analysis of case law, which tries to identify the state of specific areas of law (e.g., Ichiryûsha’s “Sôgo Hanrei Kenkyû” [Comprehensive Case Studies] series). These studies are all philo-
sophical or empirical in approach. The boundary between the basic and the applied may be blurred at times (just in the way the American “Restatements” of various areas of US law are not always mere restatements), but their immediate concern is to understand, interpret, and explain the function of law. In that sense, they have an “external standpoint”. For them, law is a subject of observation. Hence I will refer to this sub-layer as “secondary-external Nihon-hô”.

III. INTERACTION

1. “Japanese Law” as Secondary-External

When we compare the multiple worlds of “Nihon-hô” classified above with the world of “Japanese law” posited by Taylor and Nottage, it is apparent that “Japanese law” in most cases has no intention to influence “primary Nihon-hô”. It is secondary in nature and external in standpoint. Given this characteristic, it is understandable that “Japanese law” delivers very little “kaishaku-ron”, which is essentially internal in its standpoint. Of course, “Japanese law” may have its own practical agenda: i.e., to influence, for example, “primary U.S. law” or to provide practical legal advice to Americans interacting with Japan. Titles such as “Doing Business in Japan” and “Law and Investment

standpoint that is even external to “secondary-external Nihon-hô”. They are collections of works that analyze the history and state of “minpô gakusetsu [academic commentary on civil law]”.


T. GINSBURG, In Defense of “Japanese Law” (in this volume, supra at 27) offers an alternative (and not mutually exclusive) explanation. His explanation covers the reason why one U.S. variant of “Japanese law” literature is more theoretical than “Japanisches Recht” scholarship. My explanation doesn’t. However, to me, it rather suggests not a flaw in my theory but the rather puzzling purpose of “Japanisches Recht” world, as I understand it from NOTTAGE, supra note 1. I must leave this for further exploration in the future.

in Japan” tailor also to this market, which flourished in the 1980s. Also, many “Japanese law” writings, although driven by their general interest in Japan, are written in a fashion to affect the “primary U.S. law”. However, their practical message portion is not directed to the world of “Nihon-hō”. Thus, “Japanese law” intersects with “secondary Nihon-hō” only to the extent that they share the external standpoint. And even then, they do not completely overlap because they have different purposes.

2. Little Impact?

If so, the question of what impact “Japanese law” has had on “Nihon-hō” should be asked primarily with regard to “secondary-external Nihon-hō”. The contention by Taylor and Nottage that “Japanese law” has had little impact on “Nihon-hō” does not distinguish the multiple worlds of “Nihon-hō”. When the right question is asked, a whole new picture emerges.

First of all, works of “Japanese law”, especially those that are translated into Japanese, have been extensively quoted in “secondary-external Nihon-hō”. Mark West’s work on sôkaiya [corporate racketeers] takes up substantial time in Kyûshû University’s corporation law lectures. Haley and Ramseyer’s work on litigation rates are standard references, profiled for instance in a popular textbook on the Japanese judicial system. As a result, they presumably have influence over “secondary-internal Nihon-hō”, and may eventually have impact on “primary Nihon-hō”, too.

One might say that these are exceptions and that most “Japanese law” literature is ignored. Maybe so. But then, secondly, how many “secondary-external Nihon-hō” have significant impact on “secondary-internal Nihon-hō” or “primary Nihon-hō”? I am not
proud about this, but my “secondary Nihon-hô” writings have had little impact on any other sub-world of “Nihon-hô”.\textsuperscript{17} I would also say that very few Japanese scholars have had or will have a direct impact on “primary Nihon-hô” in their lives. With regard to the limited impact “secondary Nihon-hô” actually has had on “primary Nihon-hô” in particular, Makoto Ibusuki attributes this to the tendency among many Japanese scholars to write about the “ideal” with little regard to actual practice.\textsuperscript{18} However, writing about the “ideal” may have been true in the 19th century and up until 1960s, when an important role of legal scholars was to guide the courts. In those days, arguably, Japan adhered closely to the civil law tradition of “professorial law”.\textsuperscript{19} However, since then, the courts and the bar have grown strong and their expertise has expanded. Accordingly, the role of professors has diminished. Even their presence in various government councils (shingi-kai) is largely symbolic, and they are no longer power players in the field of policy-making or law-making.\textsuperscript{20} (I hereby sadly report the death of professorial law tradition in Japan!) Today, no scholar in good conscience can write about law disregarding its practice. (However, I admit that Ibusuki’s point may hold true to the field of criminal law in which he specializes as a criminal procedure professor.) Thus, I speculate that the reason that we have little influence is not in our attitude, but in the strength and resources that legal practitioners have already gained. In other words, the world of “primary Nihon-hô” is becoming increasingly independent. The relative qualitative dilution of Japanese scholars may be an additional reason.

If this is so, the impact that “Japanese law” has had on “Nihon-hô” is quite remarkable. Also consider the quantity of “Japanese law” in comparison to that of “secondary Nihon-hô”. “Japanese law” has a much higher batting average.\textsuperscript{21} So my point here is: patience, please!

\textsuperscript{17} One modest exception is a piece I wrote on the relationship between private law and competition law: H. Sono, Dokkin-hô ihan kôi no shihô-jo no kôryoku-ron oboegaki: keshôkin hanbai toka-yakuten keiyaku no kaiyaku jirei wo sozai ni [A Memorandum on “The Validity of Contracts in Violation of Antimonopoly Law”: With Reference to Cosmetic Distributorship Cancellation Cases]: 38 Kanazawa Hôgaku 263 (1996).

\textsuperscript{18} M. Ibusuki, Why Do We Miss the Wood for the Trees: A Response from a Nihon-hô Scholar (in this volume, supra at 43).

\textsuperscript{19} As outlined in Ginsburg, supra note 9.


\textsuperscript{21} Then, why is it that “Japanese law” scores better? It probably is because they make more
IV. THE AUTISTIC “NIHON-HÔ”

1. Globalization and the “Worlds”

So far, I have proceeded on a very conservative assumption that “primary Nihon-hô” is the main concern and problem for Japan. To put my assumption in general terms, primary laws are matters of each jurisdiction, and each sovereign nation state. Yet this view is increasingly obsolete in the age of globalization. The problem of “gaikoku-hô jimu bengoshi” [foreign law solicitors] has attracted a lot of attention from non-Japanese, for example, and many “Japanese law” articles were written to influence “primary Nihon-hô” on this issue. There, the standpoint of “Japanese law” no longer remained external.

Moreover, there is a growing body of “primary global/transnational law”. In that world, we all share “internal standpoints”, and legal studies (secondary law) of various countries start to converge. At a regional level, this is most vividly seen in Europe today.

2. Autistic “Nihon-hô”

The question I pose at this point is whether “Nihon-hô” is ready for this. I must answer in the negative. But I believe early diagnosis will lead to cure. I will give one symbolic example, although I should mention that my expertise limits my analysis to the area of private law.

In November 1998, two major symposia were held consecutively in Tokyo and Kyoto commemorating the 100th anniversary of the Japanese Civil Code [Minpô-ten]. These centennial symposia were entitled “Legislation and Private Law in the 21st Century” interesting and provocative points. Why Japanese don’t write that way is a question Ibusuki eloquently answers using the metaphor of “the wood and the trees” (supra note 18).


TAYLOR, supra note 1, argues that Japanese law will increasingly be linked to other jurisdictions and cross-border transactions (e.g., in areas such as e-commerce; the activities of multinationals; the rise of multilateral and international law, and the regional transfer of law through legal aid development). Thus, she maintains that Japan is no longer legally insulated, and that Japanese legal studies can occur both inside and outside national boundaries. See also generally L. NOTTAGE, Practical and Theoretical Implications of the Lex Mercatoria for Japan: CENTRAL’s Empirical Study on the Use of Transnational Law, in: 4/2 Vindobona L.J. 132 (2000); forthcoming also in Revue Juridique Polynésienne and (translated in) Kokusai Shôji Hômu.
tury: Private Law in the Age of Internationalization”. Four panelists were invited from France, Germany, the United States (Richard Hyland), and the Netherlands (or rather E.U.: Ewoud Hondius). Incidentally, there were no Japanese. Further, both in Tokyo and Kyoto, time ran out with questions directed almost exclusively to the French and German panelists, who come from countries that had tremendous historical influence on all sub-worlds of “Nihon-hô”. (Some were really “boring” microscopic black-letter-law questions, such as “tell me about the concept of property damages”. Admittedly, this was at an occasion of the 100th anniversary of the Civil Code, and black-letter-law questions may have been welcomed, but my impression is that “secondary Nihon-hô” (or secondary minpô) is taking the Code approach too seriously. The panelists from E.U. and the United States, who were there to offer to look to the future, were virtually ignored.

In addition to this backward looking mentality, the frustration I felt with the symposium was its autistic nature. It strikes me as odd that in a symposium dealing with the “Private Law in the Age of Internationalization”, the topic of international unification or harmonization of law, or topics dealing with lex mercatoria, were not included. The most important instrument in this context is, of course, the UN Convention on Contracts for the International Sales of Goods (Vienna Sales Convention or CISG). It took effect in January 1988, and as of March 2001, nearly 60 countries are parties to it. CISG is starting to serve not only as a positive law applicable to international sales contracts, but also as a common framework of dialogue for lawyers who come from different legal traditions. The UNIDROIT Principles of International Commercial Contracts (1994) are also serving similar functions. They are a set of legal principles to be used in international commercial contracts in arbitration and possibly in courts. On the legal education front, the Willem C. Vis International Commercial Arbitration Moot, which takes place in Vienna every spring, has become an important vehicle in educating future lawyers in this field. We are therefore witnessing an emergence of a supranational

23 E. HOSHINO, Minpô no susume [A Recommendation of Civil Law] (Iwanami Shoten, 1999) is exemplary of this trend.
24 When Japan was commemorating the passing of one century, EU was looking into the new millennium. Ewoud Hondius’ paper was entitled “Finding the Law in a New Millennium: Prospects for the Development of Civil Law in the European Union”. Richard Hyland was also forward looking. He prepared an excellent paper entitled “Perspectives on Private Law Codification in America in the 21st Century” which he was not given time to present, even in part.
legal community. But when we look at Japan, we find that it is one of the only two major trading nations that have not even ratified CISG (the other being the U.K.). So "primary Nihon-hō" is not at all ready to take on the challenges of globalization.

Neither is "secondary Nihon-hō" ready. It is still obsessed with what we can "learn" from other countries. Little is done to jointly build primary global law.26 This is all the more shocking when we consider that Japan, with its scarce resources, cannot survive without international trade. The closing talk at the symposium given by an eminent Japanese civil law scholar, who is now a Supreme Court Justice, did mention CISG but in a very shocking way. He referred to CISG as an example of “Development of European Contract Law”. Then he maintained that as such, it should be given more attention as a subject of comparative law, together with Lando Commission’s “European Principles of Contract Law” and the UNIDROIT Principles. However, CISG, as well as the UNIDROIT Principles are not “European” developments; they are attempts in harmonization of (primary) international contract law. It is not “their” problem; it is “our” problem. Hopefully, things have improved in the two or three years since the incident, but the perception within “secondary Nihon-hō” may remain seriously distorted.

3. Demystification and Globalization

I conclude with a brief note about the impact “Japanese law” may have on the self-image of “Nihon-hō” in the age of globalization. The greatest contribution of the recent “Japanese law” literature is the message of “demystification” (as in the works by John Haley, Frank Upham, Mark Ramseyer and the younger generation).27 If Japan is no longer a mysterious society, “Nihon-hō” can no longer be excused from the responsibility to contribute towards building primary global law. I have a dream that one day the worlds of “Nihon-hō” will converge not only with “Japanese law” or “Japanisches Recht”, but also with the world of the global legal community.

26 Takashi Uchida has been making this point for quite a while. I vividly recall his breathtaking “stirring” at the 1998 Nihon Shihō Gakkai [Japan Association of Private Law] Symposium on “Obligation Law Reform” which took place a few weeks before the Centennial Symposium mentioned in the text. Most recently, see, T. UCHIDA, Keiyaku no jidai [The Age of Contract] 277-279 (Iwanami Shoten, 2000).

27 I have quoted Haley and Ramseyer’s work elsewhere in this essay. Accordingly, I will cite one work by Upham here: F. UPHAM, Law and Social Change in Postwar Japan (Harvard University Press, 1987).
ZUSAMMENFASSUNG