Spectres of Comparison: Japanese Law through Multiple Lenses

Veronica Taylor

I. SPECTRES OF COMPARISON

When we teach or research or practice that knowledge we call "Japanese Law" we are entering a field that is largely one of our own creation. "Japanese Law" exists in our minds and in our writings, but it maps very imperfectly the worlds of jurisprudence and legal practice, as they exist in Japan.[1] "Japanese Law" is not a neutral label; it comes with built-in inferences, drawn from our own locale and from those of colleagues with whom we share the "field". In effect, the images and reference points that we "fix" as emblematic of our country of study are "haunted" or shadowed by the concepts and images of other, European concepts and institutions. Once we become aware of the shadows, we can no longer matter-of-factly experience the setting for our study.

My guess is that most of us have had turning points or moments when our view of Japan and "Japanese Law" changed quite dramatically. At that moment, we became aware that we have been seeing "Japanese Law" through the prism of a particular set of theories or views, or experiences.

In "Spectres of Comparison", *Anderson* uses the analogy of an inverted telescope, through which you see new images of the target of your comparative study, which become ineradicable.[2] For Anderson, the defining moment was hearing *Sukarno* invoke the name *Hitler* with approval during a national address. Anderson experienced the destabilizing nausea of having his preconceptions and terms of reference completely inverted in an Indonesian setting by someone who knew European history as well as he did, but who chose to manipulate the image in a politically expedient way.

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1 The reflections in this essay were stimulated by two meetings convened by Professor *Kitagawa* in 2000 (Nagoya) and 2001 (Victoria, British Columbia) in connection with the Japanese Law Online (JALO) Project located at Meijo University in Nagoya. I acknowledge with gratitude the opportunity to debate these questions afforded to us by Professor Kitagawa and by *Luke Nottage*.

2 B. ANDERSON, The Spectre of Comparisons: Nationalism, Southeast Asia and the World (London 1998) 2.

My own turning point was an amicable debate with Professor *John Haley* about ten years ago, during which I became convinced that the "Japan" we had each spent time in was in fact two different countries. I had been working on aspects of immigration law and prostitution regulation in Japan at the time, and John Haley had not long since published "Authority Without Power".[3] I realized that I was looking down the alleyways of Japanese law and its enforcement rather than its tree-lined boulevards. I argued with him that Japanese law operated very differently at the margins to the way in which it is depicted in "Authority Without Power". Haley responded that this was true, but that it proved, rather than disproved his theory. Here is the sticking point - whether you think the exception proves the rule, or whether you think it points to 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. From such differences springs the variety that is essential for scholarship.

Anderson's insight, of course, is a product of a postmodern sensibility that has made its way into legal scholarship throughout the world. My intent in using it as a starting point for discussion was not to advocate a postmodern stance, or to open a festival of introspection, but simply to suggest that Japanese law as a field spread across several continents could be enriched by some consideration of its variety. I am delighted that the other essays in this collection take up the idea with such verve.[4] I found the contributions by *Luke Nottage*, *Hiroo Sono*, *Tom Ginsburg* and *Kent Anderson* particularly stimulating.[5]

The nature of classification projects is that we could debate forever our preferred taxonomies. I choose not to, in part because I find taxonomy (even with aesthetically appealing diagrams) a little reminiscent of turn of the century comparative law. What interests me about my colleagues' writing in this volume[6] is that the autobiographical narratives keep interrupting the clean lines of nationality, education, methodology or published work to date. One of the limitations of labeling (whichever marks of origin are selected) is that it fails to capture the multiple identities that most of us maintain. For those of us working outside the environment in which we were educated or in which we originally practised law, life as a "Japanese Law" scholar/practitioner is a life of adaptation. Nor will all of us produce a corpus of work that bears the hallmarks of a single approach or normative stance. We may change our minds, or discard ideas or approaches that no longer seem relevant. In this sense taxonomies of scholarship are historical artefacts - they may show where we have been, but may be unreliable roadmaps for the future.

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3 J.O. HALEY, Authority Without Power: Law and the Japanese Paradox (New York 1990).

4 This refers to T. GINSBURG/L. NOTTAGE/H. SONO (eds.), The Multiple World of Japanese Law: Disjunctions and Conjunctions (Victoria BC 2001). (*the editors*)

5 These contributions are also published in this volume, *infra* at 17, 50, 27, 36. (*the editors*)

6 *Supra* note 4. (*the editors*)

Regardless of how we classify the work of colleagues participating in this project and those beyond it, it seems to me that there is some shared ground, at least outside Japan (and its worlds of *Nihon-hô* described by Sono[7]).

1. Japanese Law Distinguished from Comparative Law

Virtually none of the contributors to this volume construct their world of Japanese law as a subset of the field "comparative law". Indeed Ginsburg[8] suggests that Japanese law stands as a substantive and methodological model for comparative law studies. Comparative law in the United States returns the compliment: if you look at any of the recent volumes of the *American Journal of Comparative Law* you will find much debate about the future of the discipline, but almost no mention of Japan, let alone Asia. Instead, the contributors to this volume seem to draw on insights and methodologies from adjacent fields (e.g. sociology, doctrinal law, postmodernist theory, economics, legal realism, law and society studies) that fit their preferred approach to Japan and comparative work.

Conspicuous by its absence, however, is any discussion of other Asian legal systems. The many worlds of Japanese law in this volume seem to be orbiting each other. As a matter of academic organization and politics this is fully understandable, but it may have some undesirable effects in future practice. Sono[9] correctly identifies some key issues such as the lack of preparedness within Japan to see Japanese law as globally relevant and interconnected with both international laws and the legal systems of other economies. My own view is that we will need to rethink the field as it is constructed outside Japan, as the boxes "Japan" and "Japanese Law" become increasingly linked to other jurisdictions and cross-border transactions. We can see this already 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. In short, Japan is no longer "four main islands" of law, and "Japanese Law" or a hybrid version of it can occur both inside and outside national boundaries. This is one of the reasons that I typically describe myself as an Asian law, rather than a Japanese law, specialist.

I have described elsewhere the way in which "Asian Law" was constructed as a discipline in Australia in a way that effectively displaced comparative law.[10] As it

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7 H. SONO, The Multiple Worlds of "*Nihon-hô*", *supra* note 4, at 47; cf. this volume, *infra* at 50 (*the editors*).

8 T. GINSBURG, In Defense of Japanese Law, *supra* note 4, at 29; cf. this volume, *infra* at 27 (*the editors*).

9 See *supra* note 7 (*the editors*).

10 V. TAYLOR, Beyond Legal Orientalism, in: V. Taylor (ed.), Asian Laws Through Australian Eyes (Sydney 1997) 47; ID., Asian" Contracts? An Indonesian Case Study, in: Milner/Quilty (eds.), Australia-Asia Perceptions: Episodes (Melbourne, Oxford 1997) 159-180; ID., Legal Longitude: Australia, Japan and Contemporary Legal Scholarship, in: Jain (ed.), Australasian Studies of Japan: Essays and Annotated Bibliography (1989-96) (Rockhampton 1998)

happened, the growth of other branches of Asian law in Australia complemented rather than threatened Japanese and Chinese law studies. A key element here is the strong lateral link between Asian Studies and Japanese Studies and their legal counterparts in that country. "Asian Law" specialists who work within the Australian system contend with the problem of multiple identities but are, I think, freed from some of the institutional constraints on scholarship that feature in the U.S. Law School model, such as the stylistic hegemony of the law review and evaluation of scholarship for appointment and tenure.

2. *Academic Publications and Practice-oriented Publishing*

Patterns of publishing in "Japanese Law" have tended to track some of the characteristics that Nottage, Sono and Ginsburg describe in this volume.[11] What we have ended up with, to a greater or lesser degree, are two distinct disciplines and bodies of scholarship: "Japanese Law" as researched and taught by (mainly) non-Japanese scholars outside Japan (in its many variations) and "*Nihon-hô*" in its many sub-branches as researched and taught by academics and practitioners in Japan.

A key element of the divide seems to me to be lack of genuine engagement. Although in person, scholars of Japanese law mix extensively within and outside Japan, by and large the Japanese language literature and the English language literature do not intersect. I accept Sono's argument that non-Japanese scholarship is extensively referenced and translated in Japan and can impact on the directions taken by *Nihon-hô* at its various levels. Despite this, and despite the prominence given to key Japanese articles published in western languages, however, I remain surprised at the lack of accurate and representative work available in both directions.

There are, of course, plenty of reasons why this is so. In the past the language barrier would certainly have been salient. An ongoing issue is differences in publishing culture and genres within Japan, the U.S., Europe and Australia. Some of this slippage, however, is generational, and as the contributions to this volume suggest, well on the way to being rectified.

The JALO Symposium in 2000 that preceded the conferences for this volume centered on prospects for, and problems with, locating and uploading primary materials on Japanese law. Access to the fundamental sources of Japanese law is still an important issue. Complementary ideas, such as Frank Bennett's on-line translation project,[12] will be critical if we are to make cases and legislation truly accessible to a wider range of users.

201-225; ID., The Transformation of Indonesian Commercial Contracts and Legal Advisers, in: Lindsey (ed.), Law and Society in Indonesia (Annandale, NSW 1999) 279-290 (*the editors*).

11 See *supra* note 4 (*the editors*).

12 See material on his DISTRA project at <*http://www.nomolog.nagoya-u.ac.jp/~bennett*>.

Free access to more information is an obvious public good, although it also has inherent drawbacks. We cannot, and do not seek to, control what end-users do with Japanese legislation, for example. However, simply releasing more primary "data" on Japanese law may in the short-term help entrench a kind of neo-positivism. For my students' generation, if something is not "on the net" it does not exist. Adjectival lawyers in the business of turning out "Japanese Law" of whatever kind need to take note.

Another risk is entrenching the selectivity of the "Japanese Law" field. We all have mental inventories of laws or cases that we would like easier access to, but our inventories are shadowed by priorities which we may not have ever articulated or questioned. What we need to ensure is that we are not simply archiving the past, important though that is. Our field should be Japanese law as (we think) it really is, not digital archaeology. One way out of these dilemmas is to focus part of the project on secondary sources. It is relatively easy (although time consuming) to archive much of the writing in English on Japanese law, but to limit ourselves to this literature would be risky, for the reasons made clear elsewhere in this volume. A better approach would be to select, display and possibly translate a range of scholarly and practice-oriented writing in Japanese. My personal favorite source for the latter is the journal published by *Shôji Hômu Kenkyû-kai*, NBL, now archived in CD-Rom format.

II. TILTING OUR PARADIGMS

As with the advent of the printing press, the price for democratization of knowledge will be intense pressure on the professional monopoly. One effect is likely to be the splintering or realignment of the field "Japanese Law". In real terms, I think that means expanding the scope of our definitions and looking at the operation of "Japanese law" within Japan much more broadly, but also considering the legal connections offshore, particularly in Asia. Nor is it too early to be explicit about how our field is likely to change as existing Internet and online resources on Japanese law become more sophisticated.

By way of example, I will briefly sketch a couple of developments that I think will be important for this field in the short-term. The first and most important is the rapidity of change within Japan itself. At no time since the Meiji period has there been such thoroughgoing reform of law and legal institutions within Japan. Maintaining the "relevance" of the discipline will be challenging in an environment, which beckons commentary and policy input from a wide range of non-law specialists.

A second is curriculum reform, both within and outside Japan. At the University of Washington, I am delighted to have inherited a strong emphasis on doctrinal competence in the laws of Japan. While we retain our survey courses and specialist courses, we have also taken the country labels off some of our subjects and now teach thematic courses such as *Contract Law and Practice in Asia*, using Japan as one of a number of country case studies. Our experience with students is that they remain interested in

Japan, but they want to know how Japanese law works in relation to, or in comparison with, other legal systems in Asia. (Whether Japan belongs in the category "Asia" and what "Asia" means are also themes that we debate fairly vigorously.) At a practice level too, the opposite is also true. It helps when fashioning insolvency law and policy for Indonesia, or when evaluating how anti-corruption law will fare in Vietnam, to know something about the fate of similar reforms in Japan.

A third development is a new journal, *Asian Law*,[13] which aims to be a worthy intellectual successor to *Law in Japan*. It has a broader focus than its predecessor, driven not simply by curiosity about what is happening in the legal systems of Malaysia or Burma, but by a strong belief that making sense of what is happening in Japanese law and practice requires us to think about how this might affect or be affected by developments elsewhere, particularly in Asia. It also aims to be a vehicle for engagement by legal scholars and practitioners in Asia with each other.

A fourth cluster of projects is the emergence of more electronic resources. Here I would include Professor Kitagawa's JALO project; the internet-based discussion leading up to this conference volume; exploratory work being done on software- and net-based translation, and an electronic law journal for Asian Law developed as part of the Legal Scholarship Network cluster of electronic journals produced at Stanford,[14] and edited by leading academics in specialist fields.

If some or all of these developments "take", then however we classify the "worlds" of Japanese law today, we can be fairly certain that they will be different, and perhaps virtual, worlds very soon. The challenges are many – this is a good time to be a Japanese law scholar.

ZUSAMMENFASSUNG

Das „Gespenst des Vergleiches" entstammt Benedict Andersons gleichnamigem Werk aus dem Jahre 1998. Die von ihm verfaßte Aufsatzreihe behandelt die Frage der Entstehung von Staaten und Nationalismus in Südostasien und wie es dazu kommen konnte, daß diese illusorische Region tatsächliche (wenn auch unzuverlässige) politische Substanz hat. Die aus Anderson zu schlußfolgernde postmoderne Einsicht ist, daß die Etiketten in keinem Falle neutral sind; das Japanische Recht ist eine Konstruktion mit eingebauten Interferenzen, die aus unseren eigenen Schauplätzen wie auch aus den von in unserem Bereich tätigen Kollegen hergeleitet werden. Die Bilder und Referenzpunkte, die wir als für unser Land emblemisch „fixieren", werden durch die Konzepte und Bilder anderer europäischer Konzepte und Institutionen „verfolgt" oder beschattet. Sind wir uns dieser Schatten erst einmal bewußt, können wir „Japanisches Recht" nicht länger tatsächlich erleben.

13 See <*http://www.federationpress.com.au/Books/ajal.htm*>.
14 See <*http://www.ssrn.com/lsn/index.html*>.