Japanisches Recht, Japanese Law, and *Nihon-hô*: Towards New Transnational Collaboration in Research and Teaching

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Germany has seen an impressive revival in teaching and research in Japanese law – Japanisches Recht – since the 1980s.[1] This was underpinned by the rapid expansion of the Japanese economy, and trade and investment links with Germany. Yet the revival in Japanisches Recht scholarship did not concentrate overly on commercial law. Broader coverage, a first important characteristic of this body of knowledge, now allows it to be quite firmly anchored in the academic community and legal profession in Germany. A second strength of this scholarship has been its ability to deal also with "black-letter" Japanese law (*kaishaku-ron*), at least in some areas of law which have borrowed from Germany and still share similar concepts and structures (private law, administrative law, etc). This tendency has been reinforced as more and more German scholars and practitioners, especially younger ones, have improved their fluency in the Japanese language. Thirdly, however, Japanisches Recht scholarship has remained rather weak in its broader methodological foundations. On the one hand, there remain traces of "legal orientalism",[2] a tendency to overly stress the uniqueness or sometimes "Asian" roots of Japanese law and practice.[3] This is often related to the perception that Japanese law and its legal system remain "pre-modern", with a deep disjunction between the ("modern") "law in books" and the ("traditional") "law in action". That perception remains deep-rooted despite evidence from Anglo-American socio-legal studies, in particular, that such gaps are to be found even in the advanced industrialised democracies of the West. On the other hand, Japanisches Recht scholarship has been characterised by a reticence to grapple fully with the English language literature on the law in Japan.

The latter, "Japanese law" scholarship has also developed strongly over the last two decades. The United States took an early lead and remains the major "producer" of this scholarship.[4] But it has been followed by Canada and the Antipodes (especially Austra-

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1 H. BAUM/L. NOTTAGE, Japanese Business Law in Western Languages: An Annotated Selective Bibliography (Littleton 1998).

2 V. TAYLOR, Beyond Legal Orientalism, in: V. Taylor (ed.), Asian Laws Through Australian Eyes (Sydney 1997) 47.

3 E.g. K. ZWEIGERT/H. KÖTZ, Introduction to Comparative Law (3rd ed., Oxford 1996); cf. H. LESER, Einführung in die Rechtsvergleichung (Hagen 1999).

4 F. UPHAM, The Place of Japanese Legal Studies in American Comparative Law, in: Utah L.Rev. 689 (1997).

lia), and more recently by the United Kingdom. One feature of this scholarship, however, has been a rather heavy concentration on commercial law. Corresponding gaps in the literature have become apparent, and these become more problematic particularly in the light of the persistent economic slowdown in Japan. Some of the writing is occasionally rather superficial or incestuous, perpetuating fallacies or inaccuracies[5] or adding little by way of original material or ideas.[6] Part of the reason for this, at least in the US, is student-edited journals. Another is relative difficulty in accessing and using more black-letter Japanese law material. This is especially problematic in the US, where the number of teachers and students of "Japanese law" has grown most strongly, but the proportion of those truly fluent in Japanese has not risen noticeably. Even those researchers fluent in Japanese have participated only to a limited extent in the quite vigorous exchange of views in Japan's law journals and academic meetings. When more black-letter law material has been referred to, this has tended to be only to the extent necessary to develop some broader theory.[7] Thus, a second characteristic of the "Japanese law" scholarship especially in the US – relative disinterest in black-letter law material – is connected to a third: a tendency to over-theorise or over-generalise. Such tendencies certainly have produced an exciting range of perspectives on Japanese law and society: instead of "traditional culture", a stress on "institutional barriers" to bringing suit,[8] or informal "elite management" of disputes and social ordering,[9] or predictability of substantive outcome in at least some spheres of civil litigation.[10] Yet the still limited numbers of "Japanese law" scholars, combined perhaps with the nature of the US law school tenure system, have encouraged younger scholars to relate their research perhaps overly to broader theoretical schools.[11] Some more established scholars have responded with attempts to develop competing "grand theories".[12] This has been so

5 E.g. A. BERNSTEIN/P. FANNING, Weightier than a Mountain: Duty, Hierarchy, and the Consumer in Japan, in: 29 Vand.J.Trans.L. 45 (1996); cf. L. NOTTAGE/Y. WADA, Japan's New Product Liability ADR Centers: Bureaucratic, Industry, or Consumer Informalism?: ZJapanR No. 6 (1998) 40; L. NOTTAGE/M. KATO, Product Liability, in: V. Taylor (gen. ed.), Japan Business Law Guide (North Ryde, Singapore 1999/2000).

6 E.g. J. COHEN, The Japanese Product Liability Law: Sending a Pro-Consumer Tsunami through Japan's Corporate and Judicial Worlds, in: 21 Fordham Int.L.J. 108 (1997).

7 E.g. the "communitarian spirit" of Japanese law: J.O. HALEY, The Spirit of Japanese Law (Athens, London 1998).

8 J.O. HALEY, The Myth of the Reluctant Litigant, in: 4 J.Japan.Stud. 359 (1978).

9 F. UPHAM, Law and Social Change in Post-War Japan (Cambridge 1987).

10 J.M. RAMSEYER, Reluctant Litigant Revisited: Rationality and Disputes in Japan, in: 14 J.Japan.Stud. 721 (1988).

11 E.g. "law and economics": C.J. MILHAUPT, A Relational Theory of Japanese Corporate Governance: Contract, Culture, and the Rule of Law, in: 37 Harv.Int.L.J. 3 (1996); M. WEST, Legal Rules and Social Norms in Japan's Secret World of Sumo, in: 26 J.Leg.Stud. 126 (1997).

12 Compare e.g. J.M. RAMSEYER/E. RASMUSSEN, Judicial Independence in a Civil Law Regime: The Evidence from Japan, in: 13 J. of Law Econ. & Org. 259 (1997) with

particularly in the US, where Japanese law scholarship has tended to overlook the Anglo-Commonwealth literature – and, all the more so, the Japanisches Recht scholarship.[13]

Not surprisingly, in view of the rather distinctive features of studies of Japanese law in Germany and the US (in particular) over the last two decades, this literature has had only a limited impact on mainstream studies of Japanese law within Japan ("*Nihon-hô*"[14]). This indifference goes beyond the difficulty many Japanese legal academics might have in accessing and reading literature in German or English on Japanisches Recht or Japanese law. Rather, Japanese academics following the more black-letter law tradition often find that the Japanisches Recht writing adds little to that tradition. Those drawing on an impressively strong tradition of socio-legal scholarship, on the other hand, find the theoretical frameworks or debates e.g. in the US to be peculiar to that academic environment. This situation is exacerbated by the fragmentation of another otherwise impressive tradition in Japan, comparative law scholarship. In particular, those studying German law and developments there almost never follow "Anglo-American" law, and vice versa.

Nonetheless, Japanisches Recht, Japanese law, and *Nihon-hô* scholarship all have strengths which should be combined to form a new paradigm for the study of law in Japan into the 21st century. First, even commercial law topics need to be grounded in a solid understanding of broader legal institutions and processes. Secondly, all of this should grapple with both black-letter law and broader theoretical frameworks, in ways which make sense to scholars drawing primarily on the literature and academic discourse whether it be in German, English or Japanese. Ultimately, that will mean researching and even teaching something about the legal systems of Germany, and the US along with those jurisdictions following the English law tradition, when dealing with Japanese law. Thirdly, therefore, a new paradigm calls for Japanese law scholarship set in a much broader comparative context. Fortunately, the growing volume of law-related material available through the internet, including Japan,[15] makes this undertaking increasingly feasible.

J.O. HALEY, Judicial Independence in Japan Revisited, in: 25 L. in Japan 1 (1995), or FOOTE's forthcoming book (stressing instead pervasive "judicial activism").

13 But see e.g. J.O. HALEY, Error, Irony, and Convergence: A Comparative Study of the Origins and Development of Competition Policy in Postwar Germany and Japan, in: B. Großfeld et al. (eds.), Festschrift für Wolfgang Fikentscher zum 70. Geburtstag (Tübingen 1998).

14 V. TAYLOR, Spectres of Comparison: Japanese Law and Research, in: Proceedings of the 2nd Japanese Law Online Symposium (Nagoya, 25 January 2000); revised for this volume.

15 L. NOTTAGE, Japanese Business Law in Cyberspace: Preliminary Usage Patterns for the "Japanese Law Links" Webpages, in: 1/1 Aust.J. Asian L. 91 (1999).

My own dissertation, bringing together a decade of academic and practical encounters with Japanese law, can be seen as taking some first steps in this direction.[16] Although the main focus is on contract law (Part Two), it begins with a quite extensive comparison of the broader institutional framework of contemporary Japanese law (Part One). The latter underpins its more "substantive" orientation, which overlaps with that of US law, in contrast to more "formal" English and New Zealand law. The "form-substance" analytical framework, originally proposed by Atiyah and Summers[17] to tease out very significant differences between US and English law, is further developed (Part Three) by suggesting that contemporary Japanese law reveals "neo-proceduralist" tendencies, also noted in other industrialised democracies (such as Germany[18]). This suggestion draws in part on some comparative empirical research into planning and renegotiating long-term contracts (Chapter Four). Yet these broader foundations in legal theory and legal sociology are matched by black-letter law analysis of court judgments (especially Chapter Two) and contract law doctrine more generally (Chapter Three). Future research will expand the scope of comparison, adding new jurisdictions (including, hopefully, Germany[19]) and transnational legal orders.[20] While deepening the analysis of the broader institutional context in the various jurisdictions, the focus on contract law can be widened to include other areas of the law of obligations. Generally, my research will continue to take seriously both black-letter law and a variety of theoretical perspectives.

So much for individual research aimed at a novel paradigm in Japanese law scholarship. What else could be done, particularly in Germany, to bring together the three worlds of Japanisches Recht, Japanese law, and *Nihon-hô*? First, one could continue compiling selective bibliographies of materials related to law in Japan, in all Western languages,[21] and make these more accessible (e.g. in digital form). Secondly, one could invite to conferences etc even in Germany more Japanese law scholars from the US or Japanese who had hitherto only studied or had contact with English speaking countries. An exciting example of the potential here was the Berlin conference in 1995, "Japan:

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16 L. NOTTAGE, Form, Substance and Neo-Proceduralism in Comparative Contract Law: Law in Books and Law in Action in New Zealand, England, the US and Japan (PhD in Law thesis submitted to Victoria University of Wellington, New Zealand, on 2 September 1999).

17 P. ATIYAH/R. SUMMERS, Form and Substance in Anglo-American Law (Oxford 1987).

18 G. TEUBNER, Substantive and Reflexive Elements in Modern Law, in: 17 L. & Soc.Rev. 240 (1983); J. HABERMAS, Between Facts and Norms (Cambridge 1996).

19 See already, very briefly, L. NOTTAGE, Contract Law, Theory and Practice in Japan: An Antipodean Perspective, in: H. Baum (ed.), Japan: Economic Success and Legal System (Berlin 1997).

20 L. NOTTAGE, Educating Transnational Commercial Lawyers for the 21st Century: Towards the Vis Arbitral Moot in 2000 and Beyond: 66/2-66/4 Hôsei Kenkyû F1/F1; ID., The Vicissitudes of Transnational Commercial Arbitration and the Lex Mercatoria, in: 16 Arb.Int. 53 (2000).

21 As in H. BAUM/L. NOTTAGE, *supra* note 1.

Economic Success and Legal System".[22] Thirdly, more could be published in English in Germany. This is already a hallmark of the Zeitschrift für Japanisches Recht, which (following the apparent demise of Law in Japan: An Annual) is now the only law journal outside Japan focused on Japanese law topics. One might add to such literature at least abstracts in Japanese. Fourthly, in teaching Japanese law even in Germany universities one could prepare materials not only in German, but also English and Japanese (taking the latter, for instance, from journals in Japan aimed at undergraduate law students and hence easier to read). This would often involve explaining to German students not only how the law in Japan compares to that in their country, but also why an expert from the US, for instance, might see the topic in a particular light, something which might require a brief excursus into US law. Thus, teaching and research into Japanese law in Germany could be both broadened, and deepened through more contact with interdisciplinary approaches.

ZUSAMMENFASSUNG

In den vergangenen zwei Jahrzehnten war die Wechselbeziehung in Forschung und Lehre zum japanischen Recht zwischen Deutschland (Japanisches Recht), dem englischsprachigen Raum (Japanese Law) und Japan selbst (Nihon-hô) eher unzureichend. Der Autor plädiert für die Nutzung und Kombination der Stärken dieser drei Einheiten: die breitflächige Abdeckung und Ausrichtung auf Black Letter Law in Deutschland, innovative theoretische Perspektiven in den USA und die starke Tradition der Rechtsvergleichung in Japan.

22 Leading to a book edited by BAUM of the same name, *supra* note 19.