Kent's World:*
A Personal Approach to the Various Worlds of Japanese Law

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I want to make my contribution to the discussion of the various worlds of Japanese legal studies a personal rather than academic one.[1] Thus, I write this in my informal voice. My decision to use this approach reflects the fact that after reviewing most of the contributions I can see trends and classifications, but I also see personalities and individual choices. In short, I see groupings based not on geography but personal decisions proudly and admittedly influenced by (1) the background of the writer, (2) her present environment, and (3) his intended audience.

I accept *Nottage*'s categories.[2] In fact, I picked up the gist of his notions while I was a law student and came to refer to it as "hard law" (e.g., *kaishaku-ron*, Japanisches Recht, etc.) and "soft law" (e.g., Japanese Law, Law and Society, etc.). I read an article recently where *Alan Stone* of Harvard made a similar distinction in a totally different context using the terms "small 'l' law" and "big 'L' Law" respectively.[3] I have minor differences with Nottage's characterization of *Nihon-hô*, but I think my concerns in this area are sufficiently addressed by *Sono*.[4] I also note at the outset that I do not have the language ability or background to comment on the Japanisches Recht world as it is derived from German scholarship.

Like *Wolff*, I first considered the issue by asking myself to which "world" I belonged and then wondering if I fit within any. I am an American; I went to an American law school; and I look predominately at commercial subjects; thus, I should be part of the

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* With due apologies to *Dana Carvey* and *Mike Myers*. See Wayne's World (Paramount, 1992).

** I have received numerous helpful comments particularly from the editors and other submitters to T. GINSBURG/L. NOTTAGE/H. SONO (eds.), The Multiple World of Japanese Law: Disjunctions and Conjunctions (Victoria BC 2001), where this article was published before. All errors and omissions are of course mine alone.

1 I know there is a citation out there that supports this approach, but given my informal voice I take this stance without academic backing – egads!

2 L. NOTTAGE, Japanisches Recht, Japanese Law, and *Nihon-hô*: Towards New Transnational Collaboration in Reseach and Teaching (in this volume, *supra* at 17).

3 A.A. STONE, Teaching Film at Harvard Law School, in: 24 Legal Stud. Forum 573, 573-73 (1999). *Judge Edwards*, noted below, makes a similar distinction between "practical" and "impractical" research, but I avoid those pejorative distinctions. See H.T. EDWARDS, The Growing Disjunction between Legal Education and the Legal Profession, in: 91 Mich.L.Rev. 34, 35-36 (1992).

4 H. SONO, The Multiple Worlds of "*Nihon-hô*" (in this volume, *infra* at 50). When I refer to *Nihon-hô* in this essay I believe I refer to Sono's "Secondary External Standpoint" category.

"American School". On the other hand, I also went to law school in Japan and England; I teach in Japan and just accepted a position in Australia; and I generally write with a more doctrinal approach than typifies the American School. Am I a hybrid, sui generis, miscategorized? Does it matter?

If forced to make a declaration, I would have to include myself in the world that has been variously labeled Japanisches Recht, hard law, small "l" law, Antipodean,[5] *kaishaku-ron*, and so on. Now before all of you fellow American scholars start to feel sorry for me thinking I have failed to see the light, let me note that I enjoy what you do, why you do it, and what its significance is. My decision to take a more doctrinal road, however, is a conscious choice.

If you want to find the true roots of my approach I guess you might need to look all the way back to my formative years. (You were warned that this was going to be a personal narrative!) I grew up in Alaska where the population prides itself on "roughness" and disdains almost any kind of "sophistication."[6] That is a part of me and I often have found myself unconsciously reacting against "theorization," "academia," "refinement," and so forth. In short, I was and continue to be to some degree anti-intellectual believing more in what my grandfather, a farmer turned lumberman, would call hard labor for real people. Alaska also instilled in me a strong skepticism of pretentious Lower-48ers (i.e. those from the Continental United States) preaching theory to unknowingly naive locals actually living and thriving in the state.

Secondly, I did not come to Japanese legal studies as an Orientalist. Where many people end up in the area because of an interest in one of the traditional arts such as *karate* or *ikebana* or one of the modern arts such as *anime*, *manga*, or business theory in the 80s, I ended up in the area because I couldn't get into the Russian class I planned to take as a freshman in college. It was only after three years of studying the language and spending a year in Nagoya that I began to have any interest in "things Japanese."[7] The

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5 I think *Tom Ginsburg* unfairly reviews the British contribution to the literature when he dismisses it to consider only the Antipodean material. See T. GINSBURG, In Defense of "Japanese Law" (in this volume, *supra* at 27). Granted most of their work is not available on databases like Lexis, but there are a number of people writing and publishing on Japanese legal topics from the United Kingdom, not to mention the notable efforts of the Oxford University Press in establishing the Modern Japanese Law Series edited by Professors *Oda*, *Rudden*, and *Kato*. See, e.g., H. ODA, Japanese Law (2nd ed. 2000); M. DEAN, Japanese Legal System (1997); A. WOODIWISS, Law, Labour, and Society in Japan (1992); J. BANNO, The Establishment of the Japanese Constitutional System (1992) (transl. by J.A.A. Stockwin); F. BENNETT, Building Ownership in Modern Japanese Law: Origins of the Immobile Home, in: 26 Law in Japan 75 (2000) (of course Bennett is an American, now living in Japan, but much of his published writing was while he was at University of London's School of Oriental and African Studies).

6 It is hard to capture what it means to be an Alaskan (used in the non-ethnic sense), but for the closest I have found see, J. MCPHEE, Coming into the Country (1985).

7 This of course is a reference to the classic Orientalist's work, B.C. HALL, Things Japanese: Being Notes on Various Subjects Connected with Japan for Travelers and Others (1893).

significance of this introduction is that I tend to find myself looking for similarities rather than differences. This also means that I reject one of the basic assumptions of the Orientalists and their more recent and enlightened descendants, namely, that Japan is a hard or impossible place to understand without a lot of broad-based edification. I am willing to address these more comprehensive questions to the extent that I need to give my audience the necessary context and background to follow my specific topic or to refute common misperceptions, but for my own writings I do not intend to dwell on this area.

With this background I entered the joint JD/MA (Asian Studies) program at Washington University (at St Louis). I ended up there because, reflecting my Alaskan background, they were willing to pay for it and I had no money and, reflecting my opportunistic attitude, I was merely looking to get the degrees and return to the business world. At Wash U my first exposure to Japanese law was through Visiting Professor Dan Henderson's introductory course on the subject, and I attribute this to being perhaps the most significant event in my eventual alignment. As his former students can attest, Professor Henderson's approach to teaching Japanese law was much more "hard law" oriented than I later experienced observing the subject taught by other American scholars.[8] In Professor Henderson's class we did such things as read Japanese cases, compare them with similar decisions in the United States, and dissect the *Roppô* "system" (e.g., knowing to address an agency contract issue by starting in the Commercial Code, then moving to the Civil Code, Contract Book, and finally concluding with the Civil Code, General Book).[9]

Shortly after that class, I spent a year and a half as a research student at Kobe University. This experience, despite *Setsuo Miyazawa*'s presence and influence, drove me even further into a doctrinal approach.[10] I wanted to look at adhesion contracts. So my thought was to start from the English language sources available on Japanese contracts in general and adhesion contracts in specific, and then to use those to work into the Japanese language sources. Unfortunately, despite finding lots of English sources on the use and non-use of contracts in Japan, I could not find much treatment of substantive contract law issues in English.[11] Thus, I began and completed my project solely using

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8 Professor Henderson's teaching approach is reflected to a degree in his class materials. See D.F. HENDERSON ET AL., Law and the Legal Process in Japan (1968, 2nd ed. 1978, 3rd ed. 1988).

9 See J.O. HALEY, Educating Lawyers for the Global Economy, in: 17 Mich.J.Int.L. 733, 737-38 (1996) (book review *Yanagida* et al., *infra* note 23) (discussing Professor Henderson's Japanese law course).

10 See, e.g., S. MIYAZAWA, Policing in Japan: A Study on Making Crime (1992) (transl. by F. Bennett); S. MIYAZAWA ET AL., *Gendai shihô* [Modern Legal System] (4th ed. 2000).

11 I freely admit that part of the problem was the lack of my research skills, at the very least I should have secured a copy of Z. KITAGAWA (ed.), Doing Business in Japan (1980, updated). Nonetheless, my lack of Japanese research skills, I think, were also a function of the Japanese Law bias of the American approach under which I had trained. Thus, the sources

Japanese sources. As an academic exercise and for my language training this perhaps was an advantageous turn, but I was frustrated by the inefficiency of it all.

After law school I began practice for a large firm in Honolulu, Hawaii, and this further confirmed my preference for a more substantive approach. Practicing in Honolulu in a firm with a multitude of fluent Japanese speakers and even more who had either worked in Japan or taken Japanese Law and Society courses, little to no value was placed on fluency in the broad theoretical questions of Japanese Law. To put one's Japanese legal knowledge to work in this setting required being able to either explain (1) American legal rules and concepts to Japanese or (2) Japanese legal rules and concepts to Americans.[12] This meant hard law. Servicing Japanese clients was relatively easy – as an American trained lawyer it simply meant translating what you knew into Japanese. Servicing U.S. clients dealing with Japan was more difficult. As long as things remained extremely obtuse and theoretical (e.g., "No, Japanese really aren't that adverse to lawsuits") or extremely narrow on my personal knowledge (which was for practical purposes limited to adhesion contracts and Art. 90 of the Civil Code) then I was okay, but anything in between caused problems. I would have been well served by a desk copy of *Oda*'s book companioned by a collection from *Wagatsuma-sensei*.[13]

At this point, I made another shift that furthered my belief in a hard law approach to comparative law. Despite my original intentions upon entering law school, I found that what really excited me was thinking about the law more than servicing it. Thus, I returned to school for my LL.M. at Oxford. Going to England was again more opportunistic than planned: Oxford had no application fees and their late application deadline was the only one I could meet that year. Once there I found the English approach to law in general and comparative law in specific precisely in line with what was becoming my preferred methodology. As is best described in *Atiyah* and *Summers*' well-known book, the English approach is much more formalistic than the substantive style of American jurisprudence.[14] This appealed to me both intuitively and as a practitioner. I wanted rational and predictable rules on which people could base their ex ante decisions. Oxford also made me consider and adopt a stricter standard to my own legal reasoning which thereby made me less willing to throw out entire lines of cases on "substantive rationale," as American courts and academics are more willing to do. I firmly believe that this way of dealing with the law is more difficult than the American method, but

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that I did find were from that school. See, e.g., W. GRAY, The Use and Non-Use of Contract Law in Japan: A Preliminary Study, in: 17 Law in Japan 98 (1984).
I must note my debt here to the valuable essay by the Australian *Malcolm Smith* on Japanese legal research for foreigners at the end of H. TANAKA, The Japanese Legal System (1976) 833.

12 The failure of theoretical law teachings such as Japanese Law to help practitioners is one of the main themes of Judge Edwards' arguments. See EDWARDS, *supra* note 3.

13 See ODA, *supra* note 5. See, e.g., H. WAGATSUMA, *Minpô kôgi* [Lectures on the Civil Code] (multi-volume).

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

the American approach makes up for that by requiring interdisciplinary fluency and deriding any value to formalistic reasoning.

My coursework also led me to see the benefits of a more doctrinal approach. Perhaps most influential was a comparative law class looking at English, German, and American tort and contract law taught by Professors *Basil Markesinis* and *Christian von Bar*. With my comparative law background based on the US/Japan diametric, this course impressed me with how much could be done through a hard law comparison of court and legislative treatment of universal issues. Surprisingly, in this class we even looked at the quintessential Japanese Law question of litigiousness. This was enlightening because the discussion was largely devoid of cultural and social baggage and the focus was more on why rates were high in the United States and Germany than why they were low elsewhere.[15] I have no doubt that a course such as this is much more difficult to teach and prepare as it requires significant research into locating comparable primary sources, translation of materials, and familiarization with contextual differences.[16] However, for me personally, I found it more rewarding because we were forced to go beyond one-dimensional and exclusive socio-legal reasons, whether those be cultural, structural, or systematic, and consider whether any divergences might be based on legalistic, policy, or jurisprudential differences.[17] This class also introduced me to Markesinis' prolific

15 Among the conclusions were that the high rates resulted from: elected judges, civil juries, contingency-fee lawyers, and lack of nationalized medicine in the U.S.; and extremely quick and cost effective resolution through courts in Germany. See B.S. MARKESINIS, The Law of Torts: A Comparative Introduction (3rd ed. 1997). In other words, the defining theory was a mix in both jurisdictions, but emphasis on the *Ramseyer* rationale in the United States and the Haley reasoning in Germany. See, e.g., J.O. HALEY, The Myth of the Reluctant Litigant, in: 21 Law in Japan 19 (1988) (arguing inefficient legal systems for low litigation rates in Japan); J.M. RAMSEYER/M. NAKAZATO, The Rational Litigant: Settlement Amounts and Verdict Rates in Japan, in: 18 J. Legal Stud. 263 (1989) (arguing predictable legal resolutions for low litigation rates in Japan).

16 I originally planned to teach a Japan/US comparative course on this model, but gave up for the traditional Japanese Law and Society course when I was pressed from preparation time. It is still my long-term goal to put together the material to do this class.

17 My preference for this approach also ties back into my non-Orientalist orientation noted above. I felt in this class that we were able to deal with German, English, and American law on an equal and non-centric level. Whereas on the other hand, I often pick up a subtle sense that for much of the Japanese Law and *Nihon-hô* comparative writings, Japanese law is being treated as behind or not yet an equal to Western laws. This is of course most obvious in *Kawashima*'s theory of evolutionary change, but I often sense it in more modern work affirmatively rejecting the Kawashima tradition. See E.A. FELDMAN, The Ritual of Rights in Japan (2000) (I cite this work not as an example of this tradition, but for providing the best explanation yet of what exactly Kawashima was saying). I must confess that I think the numerous study trips made by Japanese academics throughout the world and those published results contribute to this attitude. In contrast, US legal scholars are sent throughout the world to educate it on the glorious accomplishments of American thought. See F. COULMAS, White Guys to the Rescue, in: Japan Times, August 8, 2000, at 15 (book review of J.M. HENNING, Outposts of Civilization [2000]) stating: "Many American politicians or diplo-

writings on comparative methodology with which I largely, though do not completely, agree.[18]

I have a feeling that my narrative has run too long and no one has made it this far. Thus, I will end my story shortly. In 1999, I came to Hokudai as an associate professor and at this point I first began to think maturely (?) about what kind of scholar I wanted to be and for whom I wanted to write. A few years earlier, I had had a conversation with an aspiring Japanese Law scholar and I told him that if he got a job in the academy my only request was that he include at least a portion of each article that could be used by practitioners. He laughed at me and said something to the effect of "Kent, I am only writing for about ten people and I don't really care who reads it beyond that." At the time, I was understandably a bit disappointed by this response, but I think I now understand the logic of the statement. More importantly, the writer's subsequent sterling success has proven the wisdom of this stance. Yet, when I set off on my own career a few years later, I tried to remain true to my earlier beliefs. That is, in my writings I have tried, at a minimum, to include at least some information that will be useful to practitioners. This has resulted in articles that admittedly serve two goals and therefore sacrifice the strength of a unified theme. It has also brought criticism from those whose opinions I value the most in the Japanese Law world. Nonetheless, I have "stuck to my guns" hoping to serve a different audience to some extent.[19]

Do not misunderstand me. What I am setting out to do is not legal translation. Nor is my objective merely to line up Japanese law on one side and a foreign law on the other and point out the similarities and differences (an approach that I think largely characterizes a significant portion of the comparative writings in the *Nihon-hô* world).[20] No, my paradigm is to take a universal problem or a specific problem of a specific foreign

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mats [or academics] would be proud rather than hesitant to confess that they are missionaries at heart. They are convinced that the U.S. way of life is superior to all others and that they have a calling to spread this truth far and wide. The world would be a better place, they think, if only it were like the United States."

18 See, e.g., B.S. MARKESINIS, Foreign Law and Comparative Methodology: A Subject and Thesis (1997). Nottage has prepared a useful summary of the various comparative approaches to legal research and characterized Markesinis' approach as "Rules-Plus" emphasizing convergence. See L. NOTTAGE, Convergence, Divergence, and the Middle Way in Unifying or Harmonising Private Law (European University Institute, EUI Working Papers, Law No. 2001/1).

19 The most obvious example from my own work is The Cross-Border Insolvency Paradigm: A Defense of the Modified Universal Approach Considering the Japanese Experience, in: 21 U.Pa.J.Int.Econ.L. 679 (2000), where I included an entire section comprehensively outlining Japanese insolvency law merely because I thought that it had not been adequately done in English yet.

20 See also T. TANASE, Prepared Comments at "Change, Continuity, and Context: Japanese Law in the Twenty-First Century" Symposium at University of Michigan Law School, Ann Arbor, Michigan (April 7, 2001) (making similar statements regarding the standard Japanese approach to comparative legal methodology).

state and see whether looking at how another country (I have not limited myself to Japan) deals with the same or a similar problem can add anything to the original debate.[21] In this way, I also hope to make contributions to a more "theoretical world," though even there I admit that I am generally writing for a specialized audience – e.g., bankruptcy or commercial law academics and policymakers – rather than the Asian Studies/Japanese Law guys, the Crits, the Economists, or any other "big 'L' Law" group. In this sense, I find comfort in Judge *Edwards*' criticism of current American legal academia.[22] Thus, in conclusion, I would categorize myself as a Common Law commercial lawyer who uses a comparative methodology to elucidate debates occurring in specialized practical legal fields.[23] If that places me within the Japanisches Recht, hard law, small "l" law, Antipodean, *kaishaku-ron* group, then I stand guilty as charged.

ZUSAMMENFASSUNG

Diese Abhandlung greift das Problem der verschiedenen Welten japanischen Rechts ausgehend von einem persönlichen Ansatz aus. Obgleich der Autor die von Nottage erstellten Kategorien akzeptiert, behauptet er, daß die Identifikation der einzelnen Gruppen weniger auf geographischen Faktoren denn auf persönlichen Eigenschaften und individuellen Entscheidungen beruht. Insbesondere behauptet der Autor, daß (1) der Entwicklungshintergrund, (2) das gegenwärtige Umfeld und (3) die anvisierte Leserschaft eines Autoren dessen Zugehörigkeit zu einer bestimmten Schule determinieren. Als Beleg für diese Schlußfolgerung skizziert der Autor seinen eigenen Hintergrund, Umfeld und beabsichtigte Leserschaft, um zu erklären, warum ein Amerikaner im Stil des sogenannten Nihon-hô schreibt.

21 See, e.g., id.

22 See EDWARDS, *supra* note 3. I did a quick search of the Edwards' article on Lexis and found 288 articles that cited to it suggesting that it has had some influence.

23 In the teaching arena, I think the two worlds of Japanese law may best be addressed by having two introductory courses – one on Japanese Law and Society which can be cross listed with social science faculties and a second substantive law course limited to law students on one's specialty along the lines of the textbooks by Yanagida et al. and Gresser et al. See Y. YANIGIDA ET AL., Law and Investment in Japan (2nd ed. 2000); J. GRESSER ET AL., Environmental Law in Japan (1981). It is my understanding that this is the format taken at University of Washington.