

JAPAN AS A VICTIM OF COMPARATIVE LAW

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“Your boy is different, Mrs. Gump”

“Well, we are all different”

(Forrest Gump, 1994)

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INTRODUCTION

Japan has a very peculiar place in the framework of comparative law in general. It is often praised as a case of successful ground for legal transplants, as it was able to adopt and adapt Western (whatever that means) legal models in a Confucian (again, whatever that means) country. On the other hand, its depiction is more than occasionally stereotypical, based on old and surpassed scholarship which over-emphasizes Japanese “cultural uniqueness.” The general picture of Japan in comparative law scholarship has been defined as “schizophrenic.”¹ Of course there are many reasons behind this

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situation, and in this paper I will try to explain why Japan has been, and still is, a “victim” of comparative law.

The starting point of this analysis is one of the most widely accepted and well-known descriptions of the relationship between law and society in Japan, a picture that everybody even slightly familiar with Japanese law studies will immediately recognize. In 1976, an extremely influential book stated with no hesitations that “Japanese do not like law,”² especially when it came to dispute resolution. Law, the author explained, is something external to Japanese social order and therefore, notwithstanding the significant imitation of Western legal models, the underlying traditional, social norms prevailed. Hence this bold statement was made.

Although this passage is well-known, fewer scholars know that the book was originally published in France ten years earlier³ and even fewer ventured to read the preface to the English edition, where the author plainly admits:

I have said that the Japanese do not like to have recourse to litigation as a means of dispute resolution. But after the publication of the French edition, there have been many social events which seem to indicate that in this respect a remarkable change may be taking place in the Japanese mentality. Almost every day the newspapers are full of reports about actions brought to the courts claiming damages for loss caused by public nuisances of all sorts, motorcar accidents, etc. Under such circumstances, is it legitimate for us to leave intact the descriptions given in Chapter 9? The best way of course would have been to drastically modify this section, if possible. But such a modification would exceed the limits of our present scheme, and furthermore it is prudent not to pass hasty

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¹ Andrea Ortolani, *Il giri e la questione della mentalità giuridica giapponese*, 3 RIVISTA DI DIRITTO CIVILE 371, 381 (2009) (It.).

2. YOSHIUKI NODA, INTRODUCTION TO JAPANESE LAW 160 (Anthony H. Angelo ed., trans. 1976) (1966).

3. Jacques Robert, *Les Japonais et le pouvoir*, in INTRODUCTION AU DROIT JAPONAIS (vol. XIX 1966) (Fr.).

judgement on so sudden a change in the mental aspect of a nation. . . . Without exaggeration we can say that we are now indeed seeing a rush for litigation.⁴

So why did the easy and somewhat stereotypical depiction make its way into most comparative law books while the more subtle, complex and critical remark in the introduction is known only to a limited number of scholars in Japanese law?

I. JAPANESE LAW AND COMPARATIVE LAW: THE ORIGINS OF THE PROBLEM

The remark above leads us to a first preliminary reflection. In comparative law studies it is very uncommon for a researcher to have an “average” knowledge of Japanese law. Usually there is a great divide between a handful of individuals with a broad expertise in the field for whom Japanese law is their main (or at least one of their main) research interest and the rest of the world, composed of scholars who have limited (usually during undergraduate studies in comparative law) or no exposure to the legal system of Japan. Only very rarely does a scholar of Japanese law venture into writing about general comparative law problems⁵; on the other hand, quite often scholars of comparative law theory (whether methodology, epistemology, systemic studies, legal families, etc.) touch, albeit incidentally, upon Japanese law topics. The results are, of course, highly influenced by the lack of specific preparation on the subject, so it may happen that otherwise wonderful scholars become shallow (or at least naïve) when it comes to Japan. Scholars of Japanese law and general comparative lawyers do not communicate as intensely as would be necessary for healthy cross contamination; and so, the special knowledge about Japan is kept among a

4. Noda, *supra* note 2, at xii.

5. Frank Upham, *The Place of Japanese Legal Studies in American Comparative Law*, UTAH L. REV. 639, 639 (1997).

restricted group of people, often perceived from the outside to be as quirky as “a club of collectors of poisonous mushrooms.”⁶

A second preliminary reflection is that the approach to Japanese law is heavily influenced by higher education, and so a second great divide appears that could roughly be represented through a juxtaposition of the “Continental European” model and the “Common Law” approach. In (continental) Europe, law studies are traditionally conducted at the undergraduate level and there is virtually no possibility of receiving a “mixed” university education (for example, an undergraduate degree in Japanese studies and a master’s degree in law). Although the Bologna Process⁷ is shaping the higher education in a form resembling the Anglo-Saxon approach (*i.e.* 3-years Bachelor and 2-years Master), most Continental European countries have rejected this approach in faculties that lead to a registered profession (like attorney-at-law, notary public, medical doctor, architect, etc.). In other words, students may be able to get a degree (whether undergraduate or graduate) in law and another one in a different subject, but unless they get *both* undergraduate *and* graduate education in law they will be unable to become judges, prosecutors or attorneys. Of course this makes a law degree much less enticing. Wrapping up with a brutal generalization, it is acceptable to say that most continental European jurists dealing with Japanese law therefore lack the deep preparation in Japanese studies that more flexible systems of higher education allow. On the other hand, though, European scholars generally possess a deeper knowledge of formal law.⁸

6. GABRIELE CRESPI REGHIZZI, DIRITTO COMMERCIALE E ARBITRATO IN CINA. TRA CONTINUITÀ E RIFORMA I (Renzo Cavalieri ed. 1991) (It.) (defining the attitude towards scholars of Chinese Law in the 1980s).

7. *Welcome to the EHEA Official Website!*, EUROPEAN HIGHER EDUCATION AREA, <http://www.ehea.info> (last visited Feb. 12, 2014) (stating “[a]s the main objective of the Bologna Process since its inception in 1999, the EHEA was meant to ensure more comparable, compatible and coherent systems of higher education in Europe”).

8. *See generally* Luke Nottage, *Japanisches Recht, Japanese Law, and Nihon-hô: Towards Transnational Collaboration in Research and Teaching*, 12 J. JAPANESE L. 17 (2001) (Ger.)

Irrespective of university training, however, it is also true that the Civil lawyer and the Common lawyer look to Japan through very different Kantian “blue lenses.” A lot of features of Japanese law perceived as “peculiar” by American (or Canadian or Australian) scholars are completely normal to somebody with a Continental European background. For instance, there is no notion of contempt in Japanese courts. The same may be said for courts in Italy. Appellate courts can review the merits of a dispute. So it is in Germany. There is no full discovery in civil litigation. So it is in France. It seems that, with very few exceptions, what has been highlighted as “Japanese” in the English-speaking world is not really Japanese, but mostly related to Common law or Civil law issues. Lack of knowledge among comparative law scholars, lack of communication between specialists of Japan, and the general community of comparative law and a study background that makes it difficult to have a deep understanding of Japanese law and society are the factual premises that led to the “victimization” of Japan in comparative law. This is not, however, the complete picture.

Japan also suffers from an “unlucky setting” in the history of comparative law. Law is, as most human activities are, highly influenced by trends and fashions. Japan had its economic boom in the 1980s and early ‘90s, but even before that it was growing at a “Chinese” pace. The business community was looking at the country with a mix of fear and admiration, and books predicting the rise of Japan as the world’s leading country were written.⁹ This interest towards Japan, however, did not result in a corresponding interest in comparative law about Japan; language barriers, underdeveloped legal exchange and the widespread belief that the Japanese legal system was not so interesting after all (maybe in a purely “fox-and-the-grapes” fashion) because “Japanese do not like law” prevented the development of a structured scholarship on Japanese law in the framework of general comparative law. Specific legal knowledge about the

available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=837024.

9. See generally EZRA VOGEL, *JAPAN AS NUMBER ONE: LESSONS FOR AMERICA* (1979).

country remained with those few who were willing and equipped to overcome these difficulties.

Compared with the present situation in the late booming country, *i.e.* the People's Republic of China ("PRC"), the bad luck of Japan is extremely evident. It is enough to remember that in the 1980s there was no Internet to find laws or judgements, while now most Chinese laws and basically all the important decisions of the People's Supreme Court of China are available in English (unofficial) translation. Even looking at the practical problems of doing fieldwork research in Japan, think about how expensive a flight was, say, from Paris to Tokyo in 1985 compared to a flight from Paris to Beijing today, or how expensive it once was to make and receive international phone calls to and from Japan.

The lack of widespread interest towards Japanese law was not limited to academics, as the professional world (at least in Europe) was also stuck to the image of Japan as a far and unwelcoming place. And so, to use the Italian example, no less than five law firms have an office in China, plus many more have a "China desk." No more than two have (or ever had) a Japan desk or an office in Japan.

Of course I am not maintaining that there were no developments in the study of Japanese law in recent years; to the contrary, a wide and structured scholarship developed in many countries, mainly in the United States, Canada, Australia¹⁰ and Germany.¹¹ What I would like to underline is that the development in *Japanese law studies* did not result in a significant increase of the importance of Japanese law in *comparative law in general*.

10. See THE AUSTRALIAN NETWORK FOR JAPANESE LAW, <http://sydney.edu.au/law/anjel/> (last visited Jan. 31, 2014) (detailing a scholarly initiative by Australian universities to help other better understand Japanese law).

11. See *Journal of Japanese Law: Zeitschrift für Japanisches Recht*, GERMAN-JAPANESE ASS'N OF JURISTS, <http://www.djjv.org/Englisch/index.html> (last visited Feb. 12, 2014) (providing access to the only law journal outside Japan entirely devoted to Japanese law).

II. THE WEIGHT OF JAPANESE LAW IN GENERAL COMPARATIVE LAW SCHOLARSHIP

The attempt to give a “quantitative” measure of Japanese law in general comparative law studies was attempted by a leading scholar in the field. In 1997, in a landmark article about the relationships between comparative law and Japanese law¹² (often quoted by comparative lawyers) Frank Upham did a useful exercise to weigh the relative importance of Japan in comparative law by counting the articles on Japan in a review he considered the most representative in the United States, the *American Journal of Comparative Law*. I moved from his effort and covered the years from 1997 to 2013. Also, I extended my analysis to another influential, English based, journal. The results were ambiguous and fascinating at the same time.

In the *American Journal of Comparative Law* Japan ranked first, together with the People’s Republic of China, with 15 entries in the relevant period. So, *prima facie*, Japanese law appears to be very interesting to comparative lawyers. However, in evaluating those results, it is necessary to highlight that more than half of those contributions (8 out of 15) were part of a special issue, titled “Law in Japan.”¹³ In the period between 1997 – 2013 there was only one other special issue not devoted to a technical problem in law,¹⁴ but to the legal system of a

12. See generally Upham, *supra* note 5. It is often quoted because it is contained in a special issue of the Utah Law Review collecting papers presented in a conference involving mainly comparative lawyers rather than country specialists.

13. See Kahei Rokumoto, *Japanese Law Symposium: Law and Culture in Transition*, 49 AM. J. COMP. L. 545, n.4 (2001).

14. See Stephen B. Bubank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 56 AM. J. COMP. L. 675 n.4 (1997); See also Nils Jansen & Ralf Michael, *Beyond the State? Rethinking Private Law: Introduction to the Issue*, 56 AM. J. COMP. L. 527 n.3 (2008); See also Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism—Introduction to the Special Issue on Comparative Family Law* 58 AM. J. COMP. L. 753 n. 4 (2010); Samantha Besson, *Evolutions in Antidiscrimination Law in Europe and North America: Evolutions in Non-*

population — the 1997, n. 2 (Spring) issue about a “Symposium on Gypsy Law.” This special issue is composed of eleven articles, which would put Romani law as the fourth most studied system in the period (the third being German law). I would hesitate, to say the least, to affirm that the law of the Gypsies is considered particularly important by mainstream comparative law scholarship. So the analysis leaves us with this doubt: is Japanese law often studied because it is a main subject in contemporary studies (as is probably the case with the PRC) or because it is still perceived as a bizarre object, deserving a special issue as a kind of “affirmative (scientific) action” towards a disadvantaged subject?

To gain another perspective from the other side of the Atlantic Ocean (but keeping inside the Common Law world), I did the same exercise on another representative journal of comparative law published in the United Kingdom, the *International and Comparative Law Quarterly*, covering the period between 1952 and 2013. In this case, however, the analysis was made more complicated by the fact that, being a publication devoted to comparative *and* international law, many articles on Japan were not technically focusing on Japanese law, but instead dealt with some public international law issue involving the country. I therefore decided to exclude those articles. However, other scholars may have a different opinion and come to different results from the same exercise.

In the span of 51 years, there were only ten entries on Japan. Considering that the journal has a British perspective, it is no surprise that English speaking countries and (former and present) countries of the Commonwealth were given great attention. So it does not make very much sense to measure the relative weight of Japan by comparing it with countries like the United States (70 entries), Australia (64), Canada (42) or India (36). Equally, it is probably not particularly interesting to compare Japan with some “juggernaut” countries in comparative law, like Germany (86,

including East Germany) or France (76). Still, Japan has been given less attention than Israel (22), Sweden (15) and Poland (13). Japan is lagging behind the PRC (18), notwithstanding the fact that for many years during the Mao period (and especially during the years of “legal nihilism”) there was a widespread belief that it was just impossible to make legal research about China.¹⁵

I decided to expand my analysis and not to limit it to reviews. Therefore, I dealt with handbooks of comparative law, too. I particularly focused on Japan’s position in the systemic partition of the world into “legal families.”

Of course handbooks are not intended for research, but just for educational purposes and most comparative lawyers are well aware of the fact that the legal families theory is outdated, Euro-centric, and probably kept alive to have a handy tool to easily teach students some history of comparative law. So, theoretically speaking, a handbook should not be used as a reference for research. True as it might be, those kinds of texts are of great importance in the academic education of researchers, especially when it comes to “exotic” legal systems. As I mentioned before, unless somebody decides to specialize in a country, the handbook of comparative law, encountered during their undergraduate studies, will be their only exposure to that system.

In order to select which texts to analyse I checked on the Internet the syllabi of about 50 comparative law courses taught in the USA and in Europe, and considered for these purposes only those texts which adopt a systemic or country-based approach.¹⁶ The results may appear narrow, as most instructors

15. The pioneers of legal research on the PRC had very hard times finding materials. One of the first books on the subject, JEROME A. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE’S REPUBLIC OF CHINA, 1949–63: AN INTRODUCTION* (1968), was largely based on interviews to refugees in Hong Kong and newspaper articles, from which Cohen tried to develop a more structured and consistent picture.

16. My analysis does not take into account the most widely used textbook for comparative law courses. *See generally* UGO MATTEI, TEEMU RUSKOLA & ANTONIO GIDI, *SCHLESINGER’S COMPARATIVE LAW: CASES, TEXT, MATERIALS* (7th ed. 2009).

prefer to rely on a specifically designed set of materials rather than on institutional handbooks.

I selected the textbooks by David (and Jauffret-Spinozi),¹⁷ Glendon-Carozza-Picker,¹⁸ Glenn,¹⁹ and Zweigert and Kötz.²⁰ The approach of those texts towards Japan is interesting indeed.

David puts Japan in Part Four, under the heading “Other Conceptions of Law and the Social Order,” in Title III, “Law of Far East” (together with China).

Glendon-Carozza-Picker decides not to deal with Japan and mentions the country three times, to inform readers that it has a civil code based on the German BGB, has a Parliament and that Japanese judges receive specific training. As for systemic issues, Japan is set within the Civil Law tradition.

Glenn only marginally deals with Japan in the chapter devoted to the Confucian Legal Tradition, specifically under “Western Law in East Asia.”

When it comes to divide the world into “legal families,” Zweigert and Kötz include Japan in the broad “Other” family (subsection “Law in the Far East,” together with China).

Glendon-Carozza-Picker and Glenn basically chose not to discuss Japan in detail. Although this is questionable, at least from a Japanese law scholar’s perspective, neither of those books presumes to be encyclopaedic. I am not in the position to judge whether Japan was excluded because the authors did not think it was important for their systemic analysis or because they felt unprepared to properly deal with the subject.

Generally speaking, in both David and Zweigert and Kötz, Japan is dealt with using a historical perspective, underlining the

17. This book has been translated in several languages (English and Italian included) and is still widely used in European universities. *See generally* RENÉ DAVID & CAMILLE JAUFRÉT-SPINOSI, *LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS* (11th ed. 2002) (Fr.).

18. *See generally* MARY ANN GLENDON, PAOLO G. CAROZZA & COLIN B. PICKER, *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* (3d ed. 2008).

19. *See generally* H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* (4th ed. 2010).

20. *See generally* KONRAD ZWIEGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* (3d ed. 1998).

three major influences on Japanese law by the Chinese Imperial (VI century), European (XIX century), and American (second half of the XX century) models. A feature of these handbooks is that they tend to compare “apples and oranges,” *i.e.* Japanese law *in action* with Western law *in the books*. I do not think that is necessarily wrong to spend words on the legal culture and the legal practice of a country (although I do believe that the sociologist of law and the legal anthropologist are far better equipped than the comparative lawyer to perform this task). What is striking is that this is limited to jurisdictions, like Japan, perceived to be somehow “exotic.” It would be fair to discuss the importance of *giri* in a chapter about Japanese law only if the author(s) would spend a similar effort to discuss, for example, the importance of corruption in Italy and its incidence on the legal system.

Another notable feature of those texts, and more evident as their first edition is quite old (David, 1965 and Zweigert and Kötz, 1977), is that the bibliography they refer to is often not recent. Both David and Zweigert and Kötz still heavily rely on “traditional” texts, like Noda and Kawashima.²¹ When it comes to update those textbooks, the curators seem to prefer a brushing up and some addenda rather than a comprehensive rewriting. This is understandable, given the purpose of the handbooks and the fact that it would be unfair to ask their curators to possess the knowledge to properly update chapters about some dozens of countries. Nevertheless, the result is somehow contradictory: a chapter on the Japanese legal system largely based on the importance of Confucian culture and emphasizing the reluctance towards litigation does not mix well with a conclusion that maybe those aspects were overemphasized and in reality things are (or may be) different.²²

21. Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 41 (1963).

22. Also, it should not be underestimated that social sciences, maybe less openly than hard sciences, do evolve and some theories become outdated. While in the 1960's the “cultural” theory about Japanese law was almost

This whole debate, however, could even be irrelevant: as mentioned before, the legal theory is probably outdated.²³ Moreover, comparative law is now struggling with some huge epistemological (or even philosophical) problems²⁴ that are forcing scholars to rethink the conceptual framework under which comparative law research has been carried out until very recent times.

Another phenomenon that may be observed in comparative law is that the systemic or country-based approach is fading, leaving room to a comparison mostly based on very specific legal problems and institutions in various jurisdictions. To say it using the comparative law lexicon, micro-comparison is overcoming macro-comparison.

Given these evolutions, should we still try to examine Japan under the lens of traditional comparative law, putting the country into some “legal family”? Does Japan qualify as a system of the “Far East” or should it be more appropriately set in the Civil Law tradition?²⁵ Or should we read Japan as a “mixed” legal system?²⁶

unchallenged, now only a restricted number of scholars among Japanese law experts still rely on that theoretical framework.

23. Zweigert, *supra* note 20 at 299 (warning readers that the “doctrine of legal families should not be taken so seriously”).

24. Pierre Legrand, *European Legal Systems Are Not Converging*, INT’L COMP. L. Q., 45, 1, 52, 80 (1996) (proposing a popular theory that legal systems are ultimately incomparable, because behind each country there is a cognitive cultural framework. According to this author, this is also the reason why legal systems are not converging, although it may appear otherwise).

25. HIROSHI ODA, JAPANESE LAW 7 (3d ed. 2011) (stating “[j]apanese law is part of the Romano-Germanic family of law, with some elements of US law”); *see also* JOHN HENRY MERRYMAN, ROGELIO PERÉZ PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 4 (3d ed. 2007).

26. As is well-known, a mixed legal system is a system in which elements of continental civil law and Anglo-American common law co-exist. Examples can be found in Scotland, Israel, South Africa, Louisiana, Quebec. According to some scholars, Japan is also one of those systems. *See* Isabelle Giraudou, *Le Japon: une «figure du droit comparé»* in TRANSFERTS DES CONCEPTS JURIDIQUES EN DROIT PUBLIC, (Pierre Brunet & Hajime Yamamoto (eds.)); (2013) (Fr.); *see* NODA, *supra* note 4, at xii.

While the natural answer would probably be at least critical, it seems that comparative lawyers, even when trying to approach new theories and/or methods for comparative law, still treat Japan the old way. Considering Japanese law unique, or even bizarre, and continuing to refer to the same sources (or derivative sources) that gave birth to the stereotype that “Japanese do not like law” is a path that Japan seems to have become dependent on.

It is very easy to find examples of this trend.

In 1997, in an attempt to update and give fresh energy to the legal families’ approach, Ugo Mattei tried to elaborate a new partition, based on three “patterns” of law, namely 1) rule of professional law, 2) rule of political law and 3) rule of traditional law.²⁷ This new conceptual partition was meant to create a “dynamic non-Western-centric classification,” and part of its intellectual manifesto was the idea that “Western centrism cannot be the foundation of a classification of legal systems that aim to cover the whole world”²⁸. Scholars of Japanese law would have been enthusiastic for such an approach, especially since Mattei expressly recognized that a new vision of legal families was solicited in part by the “increased importance and the extraordinary progress of Japanese law in the last thirty years.”²⁹

This enthusiasm would have started to decline when Japanese law experts learned that Japan was again put together with China under the heading “Rule of Traditional Law: the Oriental View of the Law.” Being well aware that Japan (and Eastern Asia) in general had been a victim of stereotypes based on “legal orientalism,”³⁰ the author tackles the issue directly, affirming

27. Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World’s Legal Systems*, 45.1 AM. J. COMP. L. 5, 10 (1997). (explaining the original version of such theoretical taxonomy, although the approach to this paper was widely commented, rethought and even amended by Mattei himself).

28. *Id.* at 19.

29. *Id.* at 10.

30. Veronica Taylor, *Beyond Legal Orientalism*, in ASIAN LAWS THROUGH AUSTRALIAN EYES, 47 (1997); Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179, 179-234 (2002) (regarding discussion on Chinese Law).

that the idea that Confucian societies are without laws is wrong, but somehow sticks to the notion (created by Rodolfo Sacco and very popular among Italian comparative lawyers) that Eastern Asian countries are systems “without lawyers.”³¹ As a result, he claims that the importance of “traditional law,” although under the surface, is still extremely important. He adds that: “Even in sophisticated areas of the law, such as corporate governance, it seems possible to detect an alternative Japanese way, explainable only in terms of rule of traditional law.”³²

Mattei’s theoretical framework is assisted by a sketchy graphical representation: in a triangle, the top left is “traditional law,” the bottom is “professional law” and the top right is “political law.” The proximity of a legal system to each of the corner is used to summarize the relative importance of each pattern. Japan is the closest system to the “traditional law” corner.

Of course a simplistic graphic representation does not completely reflect the elaborate thought of Mattei. Nonetheless, as it may easily be seen, Japanese law in 1997 was visually depicted as being more traditional than Islamic or Hindu law.

This is a recurring pattern in general comparative law studies dealing with Japan. To overcome the above-mentioned problems of legal comparison (Euro-centrism, problems in comparing cultural frameworks, etc.), many scholars advocate a broader cultural understanding of the various experiences in the world, including Japan. Yet, the new approach is often based on old categories and therefore heavily relies on cultural stereotypes.

To give another example: in 1998 Mark Van Hoecke and Mark Warrington proposed a move “towards a new model for comparative law.”³³ The approach was again very enlightened, respectful of cultural diversity, strongly against the Euro-centric

31. RODOLFO SACCO, INTRODUZIONE AL DIRITTO COMPARATOR 209-11 (5th ed. 2005) (It.).

32. Mattei, *supra* note 27, at 38.

33. See generally Mark Van Hoecke & Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 INT’L & COMP. L.Q., 495-536 (1998).

approach so often found in comparative law handbooks. Nonetheless, dealing with Japan, Van Hoecke and Warrington stumbled into the well-known stereotype about the reluctance to litigate, so we read: “Conflicts are preferably not brought to the court but solved through reconciliation. If there is a trial, each party has to make reciprocal concessions, so that it can, eventually, be terminated amicably.”³⁴ This conclusion comes with no surprise: the sources of Japanese law scholarship in that (for other aspects remarkable indeed) article are relatively old writings by Noda (1971) and Oki (1985), and the importance of Noda for the “culturalist” approach has already been remarked.

This approach kept on going in the 2000s. As already noted by Veronica Taylor,³⁵ in one of the most famous and widely commented and appreciated books on comparative law in the last decade³⁶ from one side there is surprise for the fact that Japanese law studies are put outside comparative law studies in general; yet, from the other side, Japan is still referred to as one of the “extraordinary places.”

The good intention to introduce some cultural understanding of different legal traditions still produces results that could sound at least a bit candid. In an article underlining the importance of comparative law education in universities³⁷ (with which I fully concur), in a passage dealing with the Chinese legal system (but it is fair to extend the reasoning to all post-Confucian societies, like Japan), we read:

And you must understand the impact in China still from traditional Chinese thinking. The Chinese like poetry and calligraphy and painting and money - basically they do like

34. *Id.* at 506.

35. Veronica L. Taylor, *Asian Law Takes a Japanese Turn*, Nagoya University, http://www.law.nagoya-u.ac.jp/cale2001/result/reports/asia_ac/2003/part1_sinpo2.html (last visited February 15, 2014).

36. *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS*, (Pierre Legrand & Roderick Munday, eds.) (2003).

37. See generally Ditlev Tamm, *From a European to a Global Approach: Reflections on the Position of Comparative Law in Legal Education*, 8 *U.S.-CHINA L. REV.* 56, 56-65 (2011).

these activities better than law and lawyers. I think that is still true even if on the surface it may appear different.³⁸

I would say it is impossible to disagree with this opinion. However, I would be curious to know whether anybody in the world would prefer law (and lawyers!) to art and money.³⁹

It would be easy if we could just dismiss all the above as inaccurate or shallow scholarship. But it is not possible. Some of the authors mentioned here are among the best active comparative lawyers, and their intellectual qualities are beyond question.

III. JAPAN AS A VICTIM: BUT WHO IS GUILTY?

So we are left with a victim, Japan. Now it is time to find who is guilty. Of course, as the title of this paper says, it is comparative lawyers, but they have “accomplices.”

I would identify three additional categories of culprits: Japanese scholars of the past, Japanese scholars of the present and foreign scholars of Japanese law.

As for the first category: one of the reasons behind the deep and widespread influence of the cultural stereotype about Japanese law is the fact that, for a very long time, there was just a handful of texts on the subject accessible to the general public. The fact that Kawashima and Noda had such a deep impact on comparative law studies on Japan came about because their writings were among the few written in Western languages (English and French). Being Japanese, they were believed to have provided a true and objective expression of a “collective thought” about law in Japan. Only a few times in the history of comparative law has such a restricted number of individuals had such a deep impact on the general scholarship.

Moreover, it is a fair assumption to believe that both Noda and Kawashima were interested in conveying an easy-to-understand and strong image of Japanese law, claiming a

38. *Id.* at 64.

39. Lawyers are a possible exception.

fundamentally different or “unique” legal mentality in Japan (compared to Western countries). It was not the first time in the relatively short history of Japanese modern legal studies that somebody had the primary purpose of demonstrating that Japan is different. One of the first studies on Japanese law available in English, a short book on the traditional features of Japanese family and inheritance law still in force after the 1898 Civil code, is opened by words stressing the difference (or maybe superiority?) of Japan compared to the Western world: “In Europe and America, Ancestor-Worship has long since ceased to exist, even if it was ever practiced.”⁴⁰ I am not necessarily claiming that scholars such as Noda and Kawashima were some kind of promoter of *nihonjinron* concepts in law: still, the importance of underlining the difference of the Japanese legal culture might have led to some over simplistic or even “promotional” depictions.

As for the second category: although in Japan comparative law *per se* is rarely taught in universities, Japanese legal scholars are probably the best comparative lawyers in the world. Due to the 150 year old tradition of studying foreign legal models, almost every Japanese law professor reads (and very often speaks fluently) at least one, but often more than one foreign language among German, English and French, and has a deep knowledge of a foreign jurisdiction among the most “prestigious”: France, Germany, England or the US. Also, it is remarkable how Japan is active in studying external models when it comes to update its legislation: I am not aware of any other highly developed country so willing to model a new law based on some foreign experience. The open-mindedness of the Japanese legislator is almost surprising.⁴¹ There are however, two main issues: first, the study of *foreign* law and the study of *comparative* law are separate (albeit related) legal disciplines in

40. NOBUSHIGE HOZUMI, ANCESTOR-WORSHIP AND JAPANESE LAW 1 (1901).

41. In a few occasions Japanese legislative advisors even ventured to Italy. For example, the *saiban'in seido* system is mainly modeled after the Italian (and French) experience.

terms of theoretical framework. Second (and more important), the comparative activity carried on by Japanese scholars is mostly directed inwards: there are more writings in Japanese on foreign legal systems than comparative essays in languages accessible to the non-Japanese public.⁴² This leads comparative lawyers other than Japanese law specialists to often rely on derivative sources, replicating the pattern discussed before.

Lastly, the small club of Japanese law scholars tend to discuss among each other, excluding comparative lawyers. As pointed out by Mattei as an outsider⁴³ and by Upham as an insider,⁴⁴ experts of Japanese law are a quite closed group, and they mainly dialogue with colleagues from Japanese studies. It is mostly in the field of micro-comparison that Japanese law scholars are able to establish a structured and fruitful cooperation with other lawyers (and law professionals). There are many successful examples of this synergy,⁴⁵ which, however, has not expanded to endow general comparative law with its benefits.

Japanese law scholars are also somehow perceived as exotic, if not quirky.⁴⁶ When they are invited to conferences dealing

42. See also Andrea Ortolani, *Japanese Comparative Law and Foreign Influences: a Preliminary Analysis* CENTRO DI DIRITTO COMPARATO E TRANSNAZIONALE, available at <http://www.cdct.it/Pubblicazioni.aspx>.

43. Mattei, *supra* note 27, at 8. (stating “[f]or instance, sinologists and Japanese law scholars discuss among themselves, rather than participate in the general enterprise of understanding law in a comparative perspective. I believe that such a marginalization has too high a cost for the comparative law community”).

44. Upham, *supra* note 5, at 640 (1997) (stating that Japanese law scholars “more frequently consider themselves close colleagues of other American scholars of Japan than of other American scholars of foreign law, and even within the law school world are more likely to associate intellectually with colleagues working on areas of common interest in domestic law such as corporations or legal sociology rather with colleagues specializing in, e.g., French or German law”).

45. See generally Dan Puchniak, *The Efficiency of Friendliness: Japanese Corporate Governance Succeeds Again Without Hostile Takeovers*, 5 BERKELEY BUS. L. J. 195 (2008) (examining corporate law from the perspective of practicing corporate law attorneys).

46. CURTIS J. MILHAUPT ET AL., *JAPANESE LAW IN CONTEXT: READINGS IN SOCIETY, THE ECONOMY, AND POLITICS* vii (2001) (“Each of us teaches an

with general comparative law problems they are somehow *expected* to claim that Japan is different, unique, special.⁴⁷ When they do not, they face disappointment if not disbelief.⁴⁸

IV. PERSPECTIVES FOR A CHANGE

The situation depicted so far is not very promising. However, moving from this point I still think that Japanese law studies can perform an important role in comparative law in general.

As mentioned before, Japan is also one of the best countries in the world to observe comparative law in action and to see how competing models could help to shape a distinct legal system. But Japan has been widely studied as an “importer” of foreigner legal institutions and much less as an “exporter.”⁴⁹ Now Japan is extremely active in being the model for developing countries in Southeastern Asia and in the former Soviet Union area when it comes to designing their new legal institutions.⁵⁰ Japanese law scholars are well equipped to investigate this phenomenon, which is extremely fascinating for comparative lawyers in general.

introductory course on Japanese law – indeed, collectively we have taught it almost three dozen times. We teach it for a simple reason: we find it fun. Why else, after all?”) But I think it is a fair assumption to believe that a cultural fascination is, to some extent, behind most comparative law research.

47. Taylor, *supra* note 35, at 5.

48. Upham, *supra* note 5, at 639 (demonstrating that when using Japan to study the civil law model, one needs to look beyond the law to the culture behind it).

49. When it was studied as an importer, mostly in historical perspective with regard to South Korea, the short Republican experience in mainland China and Taiwan.

50. Nagoya University, for example, has a center, CALE (Center of Asian Legal Exchange) specifically devoted to this activity and has also established a wide network of representative offices in universities in Cambodia, Laos, Mongolia, Myanmar, Uzbekistan and Vietnam to provide legal education by teaching Japanese law to local students and public servants (including judges, prosecutors, etc.). The activities of CALE are also mentioned in Zentaro Ktagawa, *Development of Comparative Law in East Asia*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, 238-260 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

Japanese law specialists also have another important task, a deeply debated theme in contemporary comparative law is the issue of “Asian Values.” As is well known, this notion originally emerged in Malaysia and Singapore to assert the existence in East Asia of a common cultural and institutional framework and to claim that Western constitutionalism, essentially based on individual rights, was unfit for societies with a long tradition of collectivism.⁵¹ However, the debate sparked by this concept has since mutated and expanded, and while public law issues related to this theory have been well explored, now the new frontier is to be found in private and commercial law. There are ongoing studies to find or create a common basis of contractual or commercial practices fit for East Asia.⁵² While I believe that these research endeavors are scientifically worthwhile, I think that Japanese law scholars could be perfect watchdogs to ensure that the exploration is carried out with methodological scrupulousness without indulging in political rhetoric. After decades of exposure to claims about *giri* and *ninjō* they should have learned how to fight ideological assertions.⁵³

After all, experts of Japanese law (and Japanese experts of comparative law) are not in a bad position to leave a mark in comparative law. Apologizing in advance for any eventual omission, I count five experts of Japanese law in executive positions (either Committee members or Sponsor Members’ delegates) in the American Society of Comparative Law; the *Académie Internationale de Droit Comparé*, the most important association of comparative law worldwide, has no less than

51. Karen Engle, *Culture and Human Rights: The Asian Values Debate In Context*, 32 N.Y.U. J. INT’L L. & POL. 291, 311 (1999-2000).

52. For an example of the research financed by the JSPS under the “Asian Core Program” in 2007, see Tsuneo Matsumoto, *The Reception and Creation of Law in East Asia: Towards the Formation of the Basis for an East Asian *Ius Commune**, Graduate School of Law, Hitotsubashi (2007) available at http://www.jsps.go.jp/english/e-SCORE/projects_completed.html (last visited February 15, 2014).

53. Teemu Ruskola, *Where is Asia? When Is Asia? Theorizing Comparative Law and International Law*, 44 U.C. DAVIS L. REV. 879 (2010-2011) (describing how to identify “Asia” for the purpose of legal research).

seven members whose main or significant research interest is Japanese law, to which eighteen Japanese national members should be added. In the last conference of the *Académie* (Taipei, 2012) and in the forthcoming (Wien, 2014), Japan will have two General Reports: a privilege granted only to those countries that contribute greatly to comparative law studies.

The study of Japanese law is increasingly popular in Europe. Germany has a long tradition of Japanese law studies, but experts and university classes on the subject are appearing in France, the UK, Spain, and Italy.

This relatively small but highly motivated patrol may finally build a bridge between Japanese law studies and general comparative law. Japan is no longer a far, exotic, mysterious country. Although a command of the Japanese language is necessary for those intending to carry out serious research on Japanese law, it is not difficult to access information about Japanese law written in Western languages.⁵⁴ What is needed is a way to apply the rigorous tools of comparative law to rebuild the general view about Japan. Scholars in the 1960s and 1970s were somehow justified in relying so heavily on Kawashima (although Henderson – and to a certain extent even Wigmore before him – had already shown that a different approach to Japanese law was possible)⁵⁵ but now there are no excuses. Now the problem is quite the opposite: comparative law needs to deal with an information overload on Japan,⁵⁶ and the challenge is to re-adjust the fundamental perception on the Japanese legal system, so that this flow of notions is properly funneled and is not instrumentally used to demonstrate Japan's "cultural uniqueness."

54. See generally *Introduction*, GROUP FOR THE LAW CONCERNING INT'L SALES OF GOODS AND INT'L SERVS. CONTRACTS, <http://www.law.tohoku.ac.jp/kokusaiB2C/introduction/> (last visited Jan. 29, 2014).

55. See generally DAN FENNO HENDERSON, *CONCILIATION AND JAPANESE LAW: TOKUGAWA AND MODERN*, Vol. II (1965).

56. Annalise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L L. J., 1, 221 (1999).

In my effort to fight stereotypes I may have been too direct. But, as Bruce Aronson has said, it is time to consider Japan “as a normal country.”

I am not claiming that “culture” is not important to understanding Japan. To the contrary, I have the utmost respect for a deep understanding of Japanese thought, society and history, and I think those elements are fundamental to truly understanding the legal system. It is exactly because culture is so important that it must be dealt with seriously: stereotypes are handy, easy to explain and to understand . . . and invariably wrong. That is why Japanese law scholars should also be the connection between comparative lawyers and other social scientists. Since it is too much to ask a lawyer to have a sound preparation in Japanese studies, a rigorous approach to cultural issues could be achieved by establishing a closer cooperation with anthropologists⁵⁷ and sociologists *strictu sensu*.

Other disciplines could help the Japanese law scholar to overcome sketchy depictions (such as the economic approach used by Ramseyer – and Nakazato -⁵⁸ did, maybe even excessively and falling into another over-simplification).⁵⁹ In some remarkable essays, Ginsburg and Hoetker have tried to explain the sharp increase in litigation in Japan also by

57. I am presently conducting research on the correlation between lease contracts and death. In Japan, if a previous tenant died in an apartment and the landlord fails to disclose the information, the tenant is entitled to unilaterally cancel the lease contract. The explanation, I am taught by my anthropologist colleagues, is that death makes the place “impure” and therefore defective, even from a legal point of view. Somebody could refer to this problem just as another strangeness of the Japanese. But even in the United States the debate about the “psychologically impacted houses” is still very vivid and often the approach to the problem is not very different than Japan. See generally Raffaele Caterina, *Storie di locazioni e di fantasmi*, (Rubbettino Soveria Mannelli ed.) 2011 (It.).

58. See generally J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263 (1989).

59. See Dan Puchniak, *A Skeptic's Guide to MIWA and Ramseyer's 'The Fable of the Keiretsu'*, 12 J. JAPANESE L. 273 (2007) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2257913.

employing purely economic factors.⁶⁰ The use of refined econometric tools could also help us to determine whether the litigation rate is directly correlated to economic conjunction even in the country of “context-based rationality”⁶¹ towards dispute resolution.⁶²

One final note and wish: as I mentioned at the beginning of this paper, scholars with a Continental background and researchers with a Common law legal education see different aspects of Japanese law. Some comparative joint research on Japan carried out by civil and common lawyers could help both to dismiss the respective lenses and produce some innovative results.⁶³

Stevens wrote: “The study of Japanese law can lend much greater perspective to the narrow European or European-derived focus of the typical legal comparativist.”⁶⁴ That was as early as 1971. I believe this is still true today.

60. See generally Tom Ginsburg & Glenn Hoetker, *The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation*, Ill. L. & Econ. Working Papers Series (2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=608582; see also Tom Ginsburg & Glenn Hoetker, *The Effects Of Liberalization On Litigation: Notes Toward A Theory In The Context Of Japan*, 8 WASH. U. GLOBAL STUD. L. REV. 303 (2009).

61. This very witty definition was created by Daniel Foote to summarize in a short and captivating expression the 50 years long debate about the Japanese approach to litigation.

62. In 2011 – 2012 as JSPS Postdoctoral Fellow at Ritsumeikan University I conducted a research on ADR in Japan. Part of my research consisted in a questionnaire submitted to law students, the first question of which was “how do you explain the recent increase in litigation in Japan?” The most popular answer was that the increase is due to the economic downturn (220 out of 504 interviewees, 43,6%).

63. There are already many good examples of how good this cooperation could be. See generally JAPAN: ECONOMIC SUCCESS AND LEGAL SYSTEM (Harald Baum ed., 1996) (demonstrating how beneficial cooperation can be).

64. Charles R. Stevens, *Modern Japanese Law as an Instrument of Comparison*, 19 AM. J. COMP. L. 665, 669 (1971).

