



## Introduction

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This special issue has its origin in the Third Annual Conference of the Japanese-Italian Association for the Study of Comparative Law (*Nichi-I Hikakuhō Kenkyūkai*). The general topic of the Conference was ‘*Hybridizations, Contaminations, Triangulations: Itineraries in Comparative Law through the Legal Systems of Italy and Japan*’, and it was based on two preliminary assumptions: a certain degree of ‘mixture’ in contemporary legal systems; and the virtues of ‘triangular’ comparison. It also wanted to promote the use of different standpoints and methodologies (institutional comparison, cultural comparison, law and economics, etc), and welcomed inputs from different countries. Before describing the content of this issue it is therefore important to provide readers with the theoretical framework behind it.

On the first point: after decades of struggle and debate, comparative law scholars seem to have finally agreed on the fact that basically all contemporary legal systems show elements of hybridization between civil law, common law and other legal traditions. Moreover, the very idea of ‘mixture’ has been subject to scrutiny and has arrived at a more critical, nuanced stance.<sup>1</sup> According to this perspective, every legal system is, to some extent, ‘mixed’: how the blend is composed, however, is different. In this regard Italy and Japan are very good case studies: both countries solidly fit within the Continental legal tradition and they both have a complex history of legal imports which is still going on today with reforms inspired by the American model. This trend extends across a broad range of fields including corporate law, criminal procedure and even legal education. While the existence of this tendency in itself seems to be unquestionable, its critical assessment and the evaluation of its impact may differ among scholars viewing it from different countries.

On the second point: while any comparative law expert worth their salt is

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<sup>1</sup> E. Öricü, ‘What is a Mixed Legal System: Exclusion or Expansion?’ 12(1) *Electronic Journal of Comparative Law*, (May 2008), available at <https://tinyurl.com/y9n2ampx> (last visited 15 November 2018); S.P. Donlan, ‘The Mediterranean Hybridity Project: Crossing the Boundaries of Law and Culture’ 4 *Journal of Civil Law Studies*, 335-396 (2011); M. Bussani, ‘A Pluralist Approach to Mixed Jurisdictions’ 6 *Journal of Comparative Law*, 161-168 (2011); S. Thomson, ‘Mixed Jurisdictions and the Scottish Legal Tradition: Reconsidering the Concept of Mixture’ 7 *Journal of Civil Law Studies*, 51-91 (2014).

very well aware of the importance of having a *tertium comparationis*, the issue is particularly interesting in the case of comparative studies on Italy and Japan. For example: when scholars from Italy start their study of Japanese law, most of them (there are a few notable exceptions, some of whose are represented in this Special Issue) will not be able to access primary sources in Japanese. They will need to rely on materials written in English, hence experiencing from the very outset of their academic interest one of the other key issues in comparative law: the problem of translation and accessibility of diversity.<sup>2</sup> More so, the use of English to compare two *civil law* jurisdictions is particularly dangerous and ineffective. The usage of common law lexicon forces the interpreter to work their way through the perils of ‘lost in translation’ and to reflect on the origin, nature, and function of legal institutions belonging to different systems. If we compare, like many of the authors represented here did, two civil law jurisdiction using English, the language of common law, we need to triangulate translating not only words, but categories, from one system to the other, and back again. This triangular<sup>3</sup> linguistic and comparative exercise is also very useful to prevent the naïveté that seems to affect even some of the most experienced scholars: it leads to careful reflections about balancing and giving proper weight to institutional, functional, and cultural aspects. As has already been pointed out, both the desire to look for similarities and the anxiety about assessing differences may distort the comparative lens, leading analyses to overestimate the importance of either formal or informal factors.<sup>4</sup> In the cases of both Japan and Italy,<sup>5</sup> that has often taken the form of an oversimplification of real or allegedly ‘cultural’ aspects. However, if one looks carefully, many unfamiliar features are considered as such just in the eye of the beholder.

In light of the above reflections, all authors provided their contribution to this broader discussion, tackling either aspect, or both, from different angles. This issue showcases several essays, from different areas of law, and involving both micro and macro-comparison issues.

Andrea Ortolani deals with one of the true classics of macro-comparative law, ie the collocation of Italy and Japan in comparative law. After a deeply reasoned analysis of the use of taxonomies in comparative law in the 21<sup>st</sup> century, and a lucid recognition of their inevitable shortcomings, the paper

<sup>2</sup> V. Grosswald Curran, ‘Comparative Law and Language’, in M. Reimann and R. Zimmermann eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), 675-708.

<sup>3</sup> V. Taylor, ‘Spectres of Comparison: Japanese Law through Multiple Lenses’ 6 *Zeitschrift für Japanisches Recht*, 11-16 (2001); L. Nottage, ‘Japanisches Recht, Japanese Law, and Nihon-hô: Towards New Transnational Collaboration in Research and Teaching’ 6 *Zeitschrift für Japanisches Recht*, 17-21 (2001).

<sup>4</sup> T. Ruskola, ‘Legal Orientalism’ 101 *Michigan Law Review*, 179-234 (2002).

<sup>5</sup> G.F. Colombo, ‘Nomophilacy and Beyond: Comparative Reflections on Judicial Precedents by Supreme Jurisdictions in Italy and Japan’ 4 *European Journal of Comparative Law and Governance*, 281-315 (November 2015).

reflects on the consequences of a specific framing. The contribution moves elegantly between broad intellectual reflections and very practical conclusions, and provides very useful Cartesian ‘provisional morals’ to whoever would like to venture into the study of Japanese law. The substantial impossibility of being at the same time accurate and comprehensive reminds of the witty satirical story by Umberto Eco, titled ‘On the impossibility of drawing a map of the empire on a scale of 1 to 1’.<sup>6</sup> Eco describes an Empire in which cartographers want to create a perfectly accurate map of the Empire on a scale 1 to 1, including its people, animals, buildings, etc. They try to create a suspended map, but that would prevent rain from falling on the ground and would destroy agriculture; they try with a transparent map, etc, but nothing works. His conclusion is that a truly accurate 1 to 1 map is impossible. Probably we will have to accept the same conclusion for comparative law.

Antonello Miranda’s rich analysis of multiculturalism and multicomunitarism could not be more relevant in the present conjuncture. Globalization is a fact, but, as already pointed out by Teubner,<sup>7</sup> is not a well ordered Kantian phenomenon of homogenization, but rather some complex and messy movement with which we, as society, need to somehow deal.

Italy and Japan share the controversial privilege of being among the countries with the oldest populations. Yet, in Italy, this is tempered by immigration, while in Japan the lack of young immigrants will result in a sharp decrease in the population. With immigration comes the challenge of multiculturalism: the immigration debate in Europe, which unfortunately has taken a very gloomy turn, leaves us with some fundamental questions about pluralism. What should the legislator do in the face of cultural diversity? Should the State reclaim its role as unifier or even educator, or should it embrace diversity? And if so, to what extent? The ethical and legal dilemma is: should the State withdraw from regulating cultural expression? For example, in the eyes of a Muslim man, the act of praying five times a day and the possibility of having multiple wives may belong to the same area of exercise of a duty, in one case, and a right, in the other, in line with his religious belief. But for the State those are two radically different issues! The State may decide that one is good and the other is bad: but this is of course a decision based on an external perspective.

Pierluigi Digennaro deals with the regulation of disabled persons’ rights under labor law regulation. His essay dances between the recognition of similarities and diversities between Japan and Italy. Those legal systems are to some extent *prima facie* similar: an institutional comparison shows how regulation in both countries now looks alike, also under the influence of

<sup>6</sup> U. Eco, ‘Dell’impossibilità di costruire la carta dell’Impero 1 a 1’, in Id, *Il secondo diario minimo* (Milano: Bompiani, 1992).

<sup>7</sup> G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press, 2012).

international standards. However, there are striking differences in both the implementation and the effect the concerned legislation had in Japan and Italy. This solicits, of course, reflections based on grounds other than a mere – or, if one likes, dry – reference to the law in the books.

Michela Riminucci's paper offers a European perspective on Japan, addressing the issue of 'indirect discrimination' in Japanese law. Her analysis is solidly rooted in the legislation, but from this institutional standpoint she is nevertheless able to draw some conclusions about a broader political attitude towards legislative process and the complex dialogue between rights, individual laws, and public opinion.

Pompeo Polito deals with a painfully relevant topic in the contemporary setting: in the world of technology, privacy itself has vanished, and a legal framework thought up for a physical, national, world struggles to regulate virtual, a-national phenomena. Through the analysis of the right to privacy in the American legal system and the right to one's own image in the Italian legal system, he shows the clear analogies between these legal institutions despite the differences in their origins.

Giacomo Mannocci also deals with a topic which became extremely relevant while this issue was being processed, ie the protection of citizens' privacy and the corresponding duties upon the public administration in Japan and Europe, due to the recent developments in free trade between the European Union and Japan. While the second prong of comparison is, formally, EU legislation, the author does not forget to address the peculiarities of Italy in this regard.

Matteo Dragoni pays homage to a truly triangular approach by analyzing software patents (and/or their absence) in the legal systems of Italy, Japan, and the United States. His analysis is enriched by some pragmatic remarks about the breadth of similarities and difference in a realm – technology – where ideas and products travel at dizzying speed, and how a legal artifact such as a patent may be able to survive, notwithstanding a different approach in its creation and protection.

Giuseppe Gennari and Takeshi Matsuda carry out a true international and inter-professional venture, by sharing elaborate views on the usage of scientific evidence in the criminal process in Italy and Japan, from a magistrate and a scholar's point of view. Their work, also based on the description of some highly debated and controversial cases in both jurisdictions, shows that notwithstanding an allure of infallibility, the usage of scientific evidence in courts needs to undergo significant improvement. This bears in mind the somehow frightening – but nevertheless inevitable – idea that this kind of science is not infallible and this is irrespective of legal styles or cultures.

Masaki Sakuramoto presents the current situation of consumer bankruptcy in Japan. Drawing a long arc, starting from the collapse of the Bubble Economy

in the early '90s and finishing in the aftermath of the 'Triple Disaster' of March 2011, the papers assesses the changes in the legislation, and provides the reader with extremely detailed statistics about the present landscape of consumer bankruptcy. The author, moving from what may look like a purely numerical analysis, is able to draw conclusions interweaving social perceptions and technical, legislative aspects.

Seiyo Kojima offers a highly technical and remarkably accurate analysis of social security in Italy and Japan, in light of the ideas of 'automatic benefit' and 'contribution-benefit relationship', respectively. One of the key aspects of the paper is how the author is able to offer – in the form of hypotheses – some insightful remarks about the role of law in society by building on a rigorous institutional comparison of contribution mechanisms in the concerned jurisdictions.

An issue aiming to be 'triangular' would have not been complete without the contribution of a scholar from the common law world: this role is fulfilled by Sean McGinty's essay on directors' remuneration in the corporate laws of Japan and Ontario. While the theme of course is fitting for a micro-comparative narrative, the author is able to properly set the different progression of the same rule in two apparently completely different legal systems under the lenses of macro-comparison, using his analysis as a tool to test the limits and recent evolutions of 'legal families' theory.

Finally, Franco Serena dives into one of the 'hot topics' in the scholarly debate in Japan: the reform of the Japanese Civil Code in light of the United Nations Convention on Contracts for the International Sale of Goods (CISG). One of the declared reasons behind the reform was to align Japan with international standards, and in this light the paper is able to clearly trace the direct influence of the CISG on some specific provisions.

In crafting this special issue we have tried to find a proper balance between thematic consistency and a wide offer of themes and suggestions: some papers deal with either Japan or Italy, or both. Some of them use these countries just as a mirror to reflect on broader issues in comparative law. If any reader is to find this balance inadequate, I assume full responsibility.

As Guest Editor and member of the Japanese-Italian Association for the Study of Comparative Law I am deeply grateful to the Italian Law Journal for hosting our contributions. In recent years, the academic exchange between Italy and Japan has been constantly strengthening, and this Special Issue is a further step in this exciting journey of mutual understanding and intellectual challenge.