THE VIRTUES OF TRIANGULAR COMPARISON. LOOKING AT JAPANESE LAW THROUGH ITALIAN LENSES

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Japanese law has often been depicted in a highly stereotypical and Orientalist way. The reasons are manifold. The lack of direct access to Japanese sources, limited direct exchange with local experts, and sometimes even the stance of influential insiders rank among the most significant factors. Post-war studies by American scholars addressed this problem, but created another: some overemphasized peculiarities of Japanese law without adequately considering that those characteristics are not unique to Japan, but are found in many civil law systems of continental Europe.

As Italian jurists, we do not find the Japanese system especially exotic or strange. Japan is a civil law jurisdiction, affected, as many others, by hybridizations with the American model. Notably, the development of Japanese law shares remarkable similarities with that of Italy. In this paper we address the historical development of contemporary Japanese law, some perduring stereotypes and myths about the Japanese legal system, and demonstrate how an 'Italian' perspective can be suited to analyse Japan.

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I. INTRODUCTION: THE PERILS OF 'EXTREME' COMPARISON

Comparative law is one of those areas of legal research where a mindset open to surprises, counter-intuitive hypotheses and unexpected findings is essential in order to engage in meaningful analysis. These unexpected findings do not necessarily concern the other system under investigation. Sometimes comparative law scholars, through the study of foreign systems, reveal truths concerning their own systems. This is because the study of the other system implies a critical view on one own's categories and *forma mentis*. Without this mindset, the results of the comparison would be marred by a contraposition between the usual and the exotic, the close and the far, the dominant and the submissive. Most comparative law scholars know this, but still, this kind of mistakes is always lurking.

This problem was clearly visible in comparative law handbooks written in the mid-twentieth century, such as those by Arminjon, Nolde, Wolff (1950),[1] David (1964),[2] and Zweigert and Kötz (1977).[3] These texts give great attention to the legal systems of Europe and North America, and tend to relegate all other models in a marginal section, a sort of cabinet of curiosities. It would be unfair to attribute this decision to just Eurocentrism, or to an unambiguous sense of superiority of the Western Legal Tradition:[4] there are indeed other reasons. First, handbooks are inevitably a simplification of reality. They should not be considered as materials for legal research, but as tools to acquire an introductory knowledge. Second, the authors of these books all came from a Continental European background, and were naturally more prepared to deal with legal systems they were familiar with, rather than distant ones. Third, for Western scholars it was difficult to access primary sources of legal systems which did not use a European language such as English, or French, or Spanish as their official language. Finally, it was already true at that time that most nations of the world had converged – at least formally, limiting the analysis to the legislative formant – towards either the Civil Law or the Common Law model, hence it made sense to study Western models in detail and to briefly mention what the specificities and exceptions of systems outside of Europe or North America were at the national, regional, local, or cultural level.

Decades have passed, and comparative law embraced a more progressive, open approach to legal diversity. The cultural turn[5] alerted the entire community on the inevitable shortcomings that any other technical tool of comparison (institutional, functional, economic, etc) would entail, and several authoritative voices pointed

[1] P. Arminjon et al, *Traité de Droit Comparé* (Paris: R. Pichon et R. Durand-Auzias, 1950).

[2] R. David, *Les grands systèmes de droit contemporains* (Paris: Dalloz, 1964).

[3] K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (Amsterdam, New York, Oxford: North-Holland Publishing Co, 1977).

[4] A.V. Gambaro, 'Western Legal Tradition', in P. Newman ed, *The New Palgrave Dictionary of Economics and the Law: Volume 1-3: A-Z* (London: Palgrave Macmillan UK, 2002).

[5] R. Cotterrell, 'Comparative Law and Legal Culture', in M. Reimann and R. Zimmermann eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2nd ed, 2019).

out in painful detail the perils of legal orientalism.[6] Moreover, scholars of legal pluralism showed that the study of systems must go beyond the law in the books, and accept the complexity of the co-existence of a plurality of legal orders.[7] The misrepresentation of distant systems as exotic or 'extraordinary' should be long gone.[8] But it is not.

In this paper, we first deal with the problems of misrepresentation of Japanese law and why some perduring myths about the Japanese legal systems are so hard to dispel. In this regard, we then discuss some specific problems related to the issue of languages in comparative law. We then examine how the abundance of information on Japanese law has, paradoxically, contributed to the consolidation of stereotypes rather than to their dismissal. In the third and central part of the paper, we offer our critical reflections about the privileged position that Italian scholars may have in the debate on Japan in comparative law. We then offer some conclusions, mostly aimed at provoking further research on the topic.

II. THE EVOLUTION OF MODERN JAPANESE LAW

1. The Arrival and the Reunion

Japan is often considered one of the most striking success stories of comparative law.[9] Indeed, during the Meiji Period (1868-1912), the Japanese legislator successfully used the study of foreign laws as a tool to modernise the local system and to make it compliant with the standards of civilization that the Western powers presented as their own.[10] As it is well-known, the Japanese first devoted their attention to the French legal system, then found the German model to be a more appropriate source of inspiration.[11] The first phase of legal modernization was turbulent, and the Meiji oligarchs did not really employ a theoretically sound comparative law methodology since they felt strongly the pressure to modernize the Japanese

[6] V. Taylor, 'Beyond Legal Orientalism', in Id ed, *Asian Laws Through Australian Eyes* (Sydney: Law Book Company, 1997); T. Ruskola, 'Legal Orientalism' 101 *Michigan Law Review*, 179 (2002); C. Tan, 'On Law and Orientalism' 7 *Journal of Comparative Law*, 5 (2012).

[7] J. Griffiths, 'What Is Legal Pluralism?' 18 *The Journal of Legal Pluralism and Unofficial Law*, 1 (1986); B.Z. Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' 30 *Sydney Law Review*, 375 (2008).

[8] E. Örücü, 'Comparatists and Extraordinary Places', in P. Legrand and R. Munday eds, *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2011).

[9] I. Giraudou, 'Le Japon: une figure du droit comparé?', in P. Brunet et al eds, *Rencontre Franco-Japonaise Autour Des Transferts de Concepts Juridiques* (Paris: Mare & Martin, 2014); L. Nottage, 'The Development of Comparative Law in Japan', in M. Reimann and R. Zimmermann eds, n 5 above.

[10] A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2008), 62.

[11] W. Röhl ed, *A History of Law in Japan since 1868* (Leiden: Brill, 2005).

system as quickly as they could.[12] However, within a few years into the Meiji Restoration, the Japanese legislator had already carried out comparative analyses of several systems, including the most prestigious models of Continental and Common law. The fact that the modernization of Japan had to take an idealized West as its reference point[13] made the Meiji elite expert of comparative law: Japanese scholars studied foreign languages and went abroad to study law, foreign experts (*oyatoi gaikokujin*)[14] were invited to the country to act as legal advisors to the Imperial government. Japanese scholars compared the laws of France with those of Prussia, studied how judicial precedents worked in England and in the United States (US). They tried to extract the most useful lessons to create their own original system.[15]

It is during the Restoration that Japanese law took the shape that we can see today. In the span of just forty years, the Meiji oligarchs were able to move Japan from a post-medieval system based on the old Chinese Imperial model and Confucian philosophy to one resembling the most advanced jurisdictions in Continental Europe.

This incredible achievement was first stressed in 1904 by a most talented Japanese jurist and comparative law scholar, Nobushige Hozumi. In the paper that he presented at the International Congress of Arts and Science, during the Universal Exposition of 1904 in Saint Louis, he stressed two important points. The first is as follows:

> '(T)he new Japanese Civil Code is the result of the comparative study of laws, and offers in its turn, valuable materials for the study of comparative jurisprudence.'[16]

This sentence is widely cited in the comparative law literature. We can draw two lessons from this quotation. The first is that Japanese legal scholars were not ashamed of their three decades of selective reception; on the contrary, they boasted of it as the result of a discipline that was still young and in flux at the time.

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[12] H. Owada, The Encounter of Japan with the Community of Civilized Nations (Leiden: Universiteit Leiden, 2006), available at https://hdl.handle.net/1887/12611 (last visited 30 May 2025).

[13] T. Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (Cambridge: Cambridge University Press, 2010), 31-32.

[14] H.J. Jones, *Live Machines: Hired Foreigners and Meiji Japan* (Vancouver: University of British Columbia Press, 1st ed, 1980).

[15] S. Ono, 'Comparative Law and the Civil Code of Japan (I)' 24 *Hitotsubashi Journal of Law and Politics*, 27 (1996); Id, 'Comparative Law and the Civil Code of Japan (II)' 25 *Hitotsubashi Journal of Law and Politics*, 29 (1997); M. Dogauchi, 'Historical Development of Japanese Private International Law', in J. Basedow et al eds, *Japanese and European Private International Law in Comparative Perspective* (Tübingen: Mohr Siebeck, 2008); B. Jaluzot, 'Les Origines Du Code Civil Japonais' 20 *Zeitschrift Für Japanisches Recht/Journal of Japanese Law*, 121 (2015).

[16] N. Hozumi, *The New Japanese Civil Code, as Material for the Study of Comparative Jurisprudence: A Paper Read at the International Congress of Arts and Science, at the Universal Exposition, Saint Louis, 1904* (Tokyo: Tokyo Printing Co, 1904), 12.

Moreover, they also considered themselves ready to engage in the international academic debate, and the legal sources of the Japanese system worth of being studied on a global scale. In this sense, Japan was already positioning itself not only as a receiving country, but also as one that can innovate and that can be taken as a model.

The second widely cited quotation is the following:

> 'What I have said above, will suffice to show that the new Japanese Civil Code stands in a filial relation to the European systems, and with the introduction of Western civilization, the Japanese civil law passed from the Chinese Family to the Roman Family of law.'[17]

This passage quite evidently shows how much awareness there was about the reception, and about the idea of the shift from one sphere of influence to another. The fact that by the end of the nineteenth century Japan had adopted all the major features of the legal systems of the civil law tradition determined that, in the comparative law debate – notwithstanding a long and heated controversy about the extent of the alleged lingering influence of the Confucian tradition –[18] with the reforms of the XIX century Japan's transition from the Chinese family to the civil law family would become virtually undeniable.[19]

Hozumi's views on the Civil Code, and his life in the early period of modern Japanese jurisprudence are paradigmatic of the patterns that permeate throughout all Japanese legal history. The reception of foreign models and institutions was the approach taken by Japan in pre-modern times, during the quick but thorough modernization of the Meiji period, and it is still alive nowadays.

Looking at the sources of Japanese law, a continental jurist finds no significant surprises: the so-called 'six laws' (*roppō*),[20] the fundamental sources of the legal system, look similar in structure as those of most civil law countries such as France, or Germany.

This historical conjuncture left a deep mark on the Japanese approach to legal study and research. The education of Japanese scholars is not considered complete or valuable unless it includes a sometimes substantial amount of time spent

[17] ibid 19.

[18] J.O. Haley, 'Introduction: Legal vs. Social Controls' 17 *Law Japan*, 1 (1984); Id, *The Spirit of Japanese Law* (Athens: University of Georgia Press, 2006); A. Ortolani, 'Il Giri e La Mentalità Giuridica Giapponese' *Rivista Di Diritto Civile*, III, 371 (2009); Id, 'Nihonjin No Hōishikiron No Saikō' *DCMNSV Working Paper no* 13–01 (2013); S. Givens, 'The Vagaries of Vagueness: An Essay on Cultural vs. Institutional Approaches to Japanese Law' 22 *Michigan State International Law Review*, 839 (2013).

[19] F.K. Upham, 'The Place of Japanese Legal Studies in American Comparative Law' 1 *Utah Law Review*, 639 (1997); A. Ortolani, 'Legal Systems and Legal Families: Italy and Japan in Comparative Perspective' *Italian Law Journal Special Issue. Hybridizations, Contaminations, Triangulations: Itineraries in Comparative Law Through the Legal Systems of Italy and Japan*, 7 (2018).

[20] ie, the Constitution, the Civil Code, the Penal Code, the Code of Civil Procedure, the Code of Criminal Procedure, and the Commercial Code, all firstly enacted in the period 1880-1899.

studying a foreign legal system. In relation to this, Japan is one of the few highly developed countries that routinely commissions comparative law studies and uses them as an aid in drafting new legislation.[21]

It was because of the following developments that Japanese jurists increasingly started looking to the other side of the Pacific Ocean rather than to the Old Continent.

2. Stars and Stripes

With the signature of the instrument of surrender on the *USS Missouri* in the Tokyo Bay on September 2, 1945, Japan formally accepted defeat. The surrender was already announced on August 15 by the Emperor himself, but the executing of the formal document triggered several significant legal consequences, most notably the occupation of the country. General Douglas MacArthur, the Supreme Commander of Allied Powers (SCAP) assumed the control of the occupation, and immediately started working on legal reforms to make Japan a peaceful, democratic, and capitalist country. Contrary to the fears of many, the Japanese 'embraced defeat',[22] and cooperated with the occupying forces.[23]

The most significant legal product of the Occupation was the Japanese Constitution of 1946. Formally a mere amendment of the 1889 Meiji Constitution, in reality the new document completely overhauled the system, implementing principles such as the respect of human rights, gender equality, pacifism, and even the right to pursuit one own's happiness: a celebration of individualism at odds with the Confucian tradition.[24]

The American influence on Japanese law was undeniably important, but it did not change the fundamental structure of the system. Japan remained a civil law system, based on codified law. The monopoly on legislation belongs to the Diet, and judicial precedent is not formally a source of law. What indeed did change was the deference that Japanese jurists started to pay to American law.

There are many stories revealing of this shift. In the framework of fostering friendly relationships between the US and Japan, a consortium of American and Japanese universities established, in 1954, an exchange program: Japanese jurists (mostly fluent in English) would spend some time studying in US Law Schools, while American lawyers (mostly not fluent in Japanese) would give and attend lectures and conferences in Japanese universities. The final product of this program was a conference held at Harvard University, which produced the most influential

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[21] D.S. Law, 'Judicial Comparativism and Judicial Diplomacy' 163 *University of Pennsylvania Law Review*, 927 (2015).

[22] J.W. Dower, *Embracing Defeat: Japan in the Wake of World War II* (New York: W.W. Norton & Company, 2000).

[23] Y. Miwa and J.M. Ramseyer, 'The Good Occupation? Law in the Allied Occupation of Japan' 8 *Washington University Global Studies Law Review*, 363 (2009).

[24] C.P.A. Jones ed, *The Annotated Constitution of Japan: A Handbook* (Amsterdam: Amsterdam University Press, 2023).

textbook on Japanese law for decades: a collection of essays written by the program's participants and edited by Arthur Taylor von Mehren.[25] The importance of this book, in a period when sources on Japanese law were scarce, could hardly be overestimated. For example, the chapter on dispute resolution, written by Takeyoshi Kawashima and praising the Japanese favour for non-confrontational solutions, became the mandatory reference for generations of comparative lawyers.[26] In the words of J. Mark Ramseyer:

> 'Through a simple chapter in a 1963 book, Kawashima also dominated the field of U.S. scholarship on Japanese law. Four decades later, his is a chapter many of us still teach. Four decades later, it still captures the stereotypes many students bring to the study of Japanese law.'[27]

What is particularly important for the present analysis, however, is mentioned in the introduction of the book. Celebrating the success of the program, one of the participants asserted that '(t)oday one cannot be a "serious" scholar of law in Japan without dealing with the American law of one's field.'[28]

Of course, also during the turbulent years of Meiji Restoration some aspects of the US model were studied and appreciated. The American version of Common law had been considered a possible option for imitation, but later discarded for a plurality or reasons (including the difficulty of mapping a few centuries of judicial decisions to extrapolate rules). French law and German law remained important sources of inspiration for the Japanese jurists, and even today (2024) many Japanese scholars are fluent in either French, German, or both.[29] And brilliant pieces of comparative law analysis by Japanese jurists were still written in French or German, while conversely, European scholars occasionally produced works on Japan.

But three elements drastically changed in recent times. First, the US model became the benchmark against which legal developments would be measured. Second, Japanese lawyers (practicing attorneys in particular, but also law professors) considered a period in an Ivy League institution an almost necessary step for a successful legal career. Third: the US version of the Common law became the preferred term of comparison in analyses involving Japanese law on one side of the equation.

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[25] A.T. von Mehren ed, *Law in Japan: The Legal Order in a Changing Society* (Cambridge: Harvard University Press, 1963).

[26] T. Kawashima, 'Dispute Resolution in Contemporary Japan', in A.T. von Mehren ed, n 25 above.

[27] J.M. Ramseyer, 'John Haley and the American Discovery of Japanese Law' 8 *Washington University Global Studies Law Review*, 213 (2009).

[28] D.F. Cavers, 'The Japanese American Program for Cooperation in Legal Studies', in A.T. von Mehren ed, n 25 above, xxxii.

[29] G.F. Colombo, 'Japan as a Victim of Comparative Law' 22 *Michigan State International Law Review*, 731, 747 (2014).

This latter element created a distortive phenomenon: in a legal family-based taxonomy, despite the recent influences, the US and Japan belong to two different groups, and they share little similarities. The problem is that many American scholars (in the past, but even today) tended to overemphasize the differences between the Japanese system and the US model, and to attribute such differences not to technical reasons pertaining to the Common law/Civil law divide, but to alleged cultural peculiarities of Japanese society.[30]

3. Comparing Law, Comparing Cultures

Comparative law has always been marred by a certain degree of ethnocentrism. After all, the very activity of comparison entails putting something known, familiar, in reference with the 'other.' What is dangerous, and difficult to eradicate, is the tendency to attribute differences among Western legal systems to technical or historical reasons, while attributing them to 'culture,' 'uniqueness' or other exotic reasons when dealing with systems outside of the Western Legal Tradition. The following anecdote reported by Frank Upham is revealing of this attitude:

> 'It occurred at the 1985 meeting of the American Association of Comparative Law. The Association had chosen to meet at the University of Washington so that Asian law could be a focus of attention. John Haley, who perhaps more than anyone else has tried to bridge this intellectual divide, and Arthur Rosett, who has championed the teaching of Asian law at UCLA, addressed the group on "Teaching Japanese Law as Comparative Law." They argued that it was possible to teach the basic civil law course through a single country, Japan. The response of one of the leading comparativists in the audience, one of those whom Rosett remembered as "the hecklers from the East," was incredulity: that it was unthinkable to try to teach the civil law tradition through Japan because "Japan has a distinct culture." Since it is unlikely that the speaker believed that Germany and France do not have distinct cultures, the conclusion must be that the civil law system is not a system outside of the particular cultural context in which one studies it. In other words, if one wants to compare law, it must be Europe. Otherwise, one has to compare law and culture. Hence we have articles about Japanese law that do not get beyond *giri* and *ninjō*.'[31]

Of course, this story is about something happening in 1985. Almost forty years have passed, and such attitude should have completely disappeared from comparative law gatherings. Yet, we could find many instances of this attitude even in recent times. In a paper written in 1999, Yoshihiro Hayakawa complained about how Japanese arbitration law and practice was depicted in one of the most popular arbitration handbooks used in American law schools: arbitrators almost

[30] S. Givens, n 18 above.
[31] F.K. Upham, n 19 above, 652.

forcing parties to settle their cases, unequal treatment of foreign parties, and the overall importance of preserving harmony.[32]

Japanese scholars have contributed to this phenomenon, although this happens because they have often written to explain in which ways Japan differs from the United States. It is true that in a distant past, and even sporadically later, Japanese scholars focused on the uniqueness of Japan,[33] but when Kawashima claimed that the Japanese are not confrontational, he thought about American legal practice as a term of comparison.[34] When Ōta explains the features of the civil procedure reform of 1996, he explains how civil litigation in Japan is different from that in the United States.[35]

It is already problematic when scholars use culture (more often than not carefully avoiding to provide a definition of what they exactly mean by culture: as noted among legal scholars by Cotterell, one of the most complex words to define in the first place)[36] to explain social behaviours, such as avoiding confrontational means of dispute resolution, or attaching importance to apologies in the framework of legal issues. But it is much more troublesome when this is done to explain technical features of a system. A few examples will clarify the matter.

As it is well known, when it comes to evidentiary matter in civil litigation, the United States have a peculiar system which often calls for a discovery procedure. Each party must provide the other access to all the documents falling into specific categories. This procedure is often cumbersome, involves the exchange of thousands (at times millions) of documents, and amounts to a significant part of the whole litigation costs. In most civil law jurisdictions, on the contrary, a party must already possess the evidence they intend to base their claim on *before* they bring the dispute to the court. If a document is missing, the party must go through the judge, who may order the other party disclosure: the request, however, must be narrow, defined, and provide a convincing explanation on why the specific document is needed (and why the requesting party did not have it in the first place). It is clear that the US and civil law jurisdictions have a radically different view on what is the 'best' way to deal with this matter.[37] Japan, being a civil law country, opts for the more limited approach to evidence production. However, this choice is often explained not mentioning the influence of the German model on Japanese civil procedure, but referring to the legendary Confucian aversion to litigation: by preventing parties to access evidence, the Japanese legislator wants to discourage

[32] Y. Hayakawa, 'The Distorted Image of the Japanese System of International Commercial Arbitration' 5 *JCAA Newsletter*, 1 (1999).

[33] N. Hozumi, *Ancestor-Worship and Japanese Law* (Tokyo: Z.P. Maruya & Co, 1901).

[34] T. Kawashima, n 26 above.

[35] S. Ōta, 'Reform of Civil Procedure in Japan' 49 *The American Journal of Comparative Law*, 561 (2001).

[36] R. Cotterell, 'The Concept of Legal Culture', in D. Nelken ed, *Comparing Legal Cultures* (Dartmouth: Aldershot, 1997), 13-21.

[37] J.H. Langbein, 'The German Advantage in Civil Procedure' 52 *The University of Chicago Law Review*, 823 (1985).

bringing disputes to courts, as they create disturbance in the social harmony. It is possible to legitimately claim that civil law systems are pro-respondent and aim at discouraging litigation: but nobody would dare to attach a Confucian reason behind the procedural system of France or Germany.

Another example: one of most frequent criticism moved towards Japanese judges is that they are 'detached from society.' The reason lies with the path to a judicial career in Japan: after completing their education and passing the exam to access the legal professions (*shihō shiken*), prospective judges, prosecutors, and attorneys undergo a training period with the Legal Training and Research Institute, and after that they begin their respective careers. This means that a judge in Japan (with some exceptions, most notably those working in the summary courts) is normally a professional who started working straight of their studies, and sits on the bench until their retirement age.[38] The US commentator may see that again as a problem, and a product of hierarchy and societal obedience: the Japanese legislator wants to keep judges insulated from society so that they will just obey directives coming from above in a neo-Confucian fashion, and not respond to request coming from below, from the people. Again, this criticism fails to understand that the career path of Japanese judges is not unique to the Archipelago, but it is shared by most civil law jurisdictions. While to American eyes it may seem undesirable that persons entrusted with adjudicating disputes do not have previous experience as practicing attorneys, a civilian would not normally share this view. In civil law countries, rather than problem solvers or interpreters of societal needs, judges are seen as bureaucratic elite. Japan is no exception to this.[39]

We are not claiming that culture (however defined) could play an important role in institutional design: quite the contrary. Our criticism is rather the opposite, ie that culture is too important to be reduced to a few schematic if not stereotypical traits. When assessing difference, and the reasons behind them, the comparative lawyer should not play the amateur anthropologist, but either engage in serious interdisciplinary research or focus on law and avoid making broad claims about culture.

4. 'Language is the Muscle of Comparative Law'[40]

The dominance of US scholars in the study of Japanese law, and more broadly the adoption of English as a lingua franca of academia, created a distortion for comparative lawyers in general. As it is well known in the field, the issue of translation is one of the most complex when approaching a different legal system.

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[38] D.H. Foote, *Na mo nai kao mo nai: Nihon no saiban ha kawaru no ka* [Faceless Nameless Judiciary: Will Japanese Judiciary Change?] (Tokyo: NTT Shuppan, 2007).

[39] D. Law, 'The Anatomy of a Conservative Court: Judicial Review in Japan' 87 *Texas Law Review*, 1545, 1556 (2009).

[40] G. Crespi Reghizzi, 'L'Arbitrato e la Comparazione Giuridica', in V. Bertorello ed, *Io Comparo, Tu Compari Egli Compara: Che Cosa, Come, Perché?* (Milan: Giuffré, 2003).

Contract in English, *contrat* in French, and *contratto* in Italian may translate the same word, but they do not exactly describe the same legal institution.[41] The same kind of problems applies, of course to the study of Japanese law. One may translate *shingisoku* as '(principle of) good faith,' but an US-trained lawyer would understand the concept of 'good faith' very differently from their counterparty on the opposite side of the Pacific Ocean, who, unsurprisingly, would have a view much closer to the 'principio di buona fede' of an Italian jurist, which in turn is the product of centuries of dialogue among Continental European legal scholars, first in Latin and then in their respective vernacular languages. Something that may appear as a careful and attentive exercise of translation may result in the distortion of legal institutions.[42]

One of the problems with the study of Japanese law is that just a handful of non-Japanese scholars possess the necessary language skills to access original sources, and even fewer can *start* their learning process directly on texts written in Japanese. Almost everybody starts using a third language. After World War II the study of Japanese law from abroad was primarily conducted in English: hence, the overwhelming majority of sources was using the language of Common law to study a civil law jurisdiction. The consequence is clear: the risk of 'lost in translation' is already very high when translating radically different languages or when addressing radically different legal systems. Doing *both* at the same time makes mistakes much more likely.

The other consequence is that papers written in English for an international audience that, until the emergence of critical mass of scholars of Japanese law in Europe,[43] was primarily an American audience, invest a significant amount of space and energy in explaining how the Japanese systems is different from the US version of the Common law. Two recent publications are good examples of this phenomenon.

In 2015 John Mark Ramseyer published 'Second-Best Justice', a collection of writings based on some of his previous papers.[44] The book is based on the idea that the American system aims at achieving perfect justice, but in practice inevitably fails and delivers a mediocre result. Japanese law, on the other hand, is not designed to achieve a perfect situation, but a satisfactory one: the practical result is in line with the design, and the 'second-best justice' provides the Japanese people with a reasonably good system. The point is that many of the features of Japanese law that Ramseyer praises are not peculiar to Japan, but are shared

[41] A. Candian et al eds, *Property - propriété - Eigentum: corso di diritto privato comparato* (Padova: CEDAM, 1992).

[42] V. Grosswald Curran, 'Comparative Law and Language', in M. Reimann and R. Zimmermann eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 1st ed, 2006).

[43] G.F. Colombo et al, 'The State of Japanese Legal Studies in Europe' 25 *Zeitschrift Für Japanisches Recht/Journal of Japanese Law*, 5 (2020).

[44] J.M. Ramseyer, *Second-Best Justice: The Virtues of Japanese Private Law* (Chicago, London: The University of Chicago Press, 2015).

with several civil law jurisdictions, and a product of the German (and French) influence on Japanese law. It is true that the law of Japan is not identical to that of Germany, or France, and it is true that the specific formulation of a given rule may be unique to the Japanese system, but nothing strikes the reader as different enough to create a fracture with the civil law model.

More recently, in 2018, one of the leading foreign experts of Japanese law, Colin Jones, published together with Frank Ravitch 'The Japanese Legal System', a comprehensive, clear, and relatively concise treatise.[45] The book is well written and easy to read, but many passages deal explicitly with the fact that the book is intended for an American reader, and therefore focus specifically on how Japanese law is different from the Common law. The authors venture to say that one of the most significant barriers to the understanding of Japanese law is the Continental influence on the system. It is refreshing and laudable to see how Jones and Ravitch are well aware and underline the fact that Japan is a civil law country, and not a mysterious part of the 'Orient', where regulations and statutes are not important and people resort to filial piety and social obligations. At the same time, the Continental reader (again, not the primary target audience of the book) is left to wonder about the complexities of their own system, and why a Common law jurist may find them difficult to understand.

The Italian comparative lawyer falls into this last category: a Continental reader trying to understand Japanese law. Now let us discuss why they are in a convenient position to embark in this venture.

III. ITALIAN LAW, JAPANESE LAW, COMMON LAW[46]

1. A Journey Through History, Until Nowadays

This special issue is dedicated to the Italian legal culture and tradition. It is therefore time to look more closely at the presence of Italian law in Japan.

Normally, jurists are especially well-equipped to understand and study another country's system when their own domestic legislation has influenced it. The French lawyer easily understands Belgian law. The German scholar has no significant difficulties in grasping the general features of the Greek system. The claim that the Italian lawyer is in a good position to understand Japan might suggest that Italian law had a significant impact on the shaping of Japanese law. But this is not exactly the case. Italian law did not have a profound influence on

[45] C.P.A. Jones and F.S. Ravitch, *The Japanese Legal System* (St. Paul: West Academic Publishing, 2018).

[46] This § is also based on G.F. Colombo and A. Ortolani, 'La cultura giuridica italiana in Giappone', in K. Gesuato ed, *Ricerca, Scoperta, Innovazione: L'Italia Dei Saperi* (Tokyo: Istituto Italiano di Cultura, 2014); A. Ortolani, 'The Italian Legal Model Outside of Europe: Japan' *Osservatorio Del Diritto Civile e Commerciale*, I, 177 (2014).

the Japanese legal system. In fact, in the formation phase of the contemporary Japanese system Italian law was not a prestigious model, or one that could be taken by Japanese jurists as inspiration for imitation. As already mentioned, modern Japanese legislation was largely inspired by the French model first, then by the German and finally by the American model after the Second World War. This does not mean that the influence on the legislative formant, was absolutely negligible, as it will be explained later.

Yet, it would be short-sighted to try to find evidence of the Italian legal model in Japan by limiting oneself to an analysis of Japanese legislation and looking for similarities with, or inspirations from, Italian positive law. Comparative law scholars know that the defining features of a legal system are not limited to its written laws formally passed by a legislative assembly or by other legitimate institutions. They also include other elements, including legal doctrine. In fact, sometimes the latter are more important than mere positive law. In Meiji Japan, foreign influence in some cases occurred directly, from foreign to domestic legislation or legal scholarship, through the work and efforts of Japanese scholars. In other cases, the influence was facilitated and mediated by the presence in the Archipelago of foreign legal advisors.

Among these foreign legal advisors, there was one Italian: Alessandro Paternostro.[47]

Paternostro was born in Alexandria in 1852. He graduated in law in Rome in 1875 and embarked on a university career. He first taught treaty history in Naples, then in 1882 was called to the University of Palermo as professor of constitutional law. Alongside his academic activity he cultivated political activity, and in 1886 he was elected to the Chamber of Deputies in the same district as the future prime minister Francesco Crispi, Palermo I. His political faith divided him from Crispi: Paternostro belonged to the radical left and disagreements and clashes soon arose with the prime minister. In 1888, Justice Minister Zanardelli received a request from Japan's ambassador to Italy to propose an expert in public law to work in Japan as a legal advisor. Zanardelli suggested Paternostro, Crispi approved, and Paternostro resigned from the Chamber of Deputies and willingly accepted the assignment.

Paternostro remained on the Archipelago for the three years stipulated in the original contract, extended to four at his own request, namely from December 1888 to December 1892. His activity developed in two spheres: on the one hand, he served the Japanese government as an advisor in diplomatic matters, on the other, he continued his academic activity by teaching courses in law.

It is not easy to assess what Paternostro's legacy was to Japanese legal science, and particularly his legacy as an *Italian* jurist. It should first be noted that

[47] M.G. Losano, 'Tre Consiglieri Giuridici Europei e La Nascita Del Giappone Moderno' *Materiali per Una Storia Della Cultura Giuridica*, I, 517 (1973); Id, *Alle origini della filosofia del diritto in Giappone: il corso di Alessandro Paternostro a Tokyo nel 1889* (Torino: Lexis, 2016).

Paternostro, to facilitate the task of his interpreter Mineichirō Adachi, most likely delivered his lectures in French, reinforcing French's status as a prestige language and thus confirming Italian in the rank of 'second-class' languages. From Losano's detailed analysis, there are no typically 'Italian' features in Paternostro's philosophy of law course.[48]

Paternostro's activity did not contribute significantly to the drafting of legal texts, and this is probably the main reason why he did not achieve the fame enjoyed by other Western legal advisors. His most important activity was therefore as a legal advisor for diplomatic and political matters. There are about a hundred opinions written by Paternostro for the government on parliamentary and international law. Among the most important and thorny issues on which he was asked to provide an opinion were: the right of the executive to amend the budget approved by parliament, the diplomatic response to the Otsu incident,[49] the problem of the amendment of the unequal treaties, and a case of interference by a minister in the smooth running of elections, which ended, as Paternostro suggested, with the removal of the minister.

Aside from Paternostro's contribution, as mentioned above, although Italian legislation was not a dominant model, there are nonetheless some traces of Italian law in Meiji Japan, even at the level of legislation.

Some Italian codes were translated, with astonishing speed. The Commercial Code was translated in 1880 from a French translation. The first Italian Civil Code of 1865 was translated in 1882 by Saburō Kōmyōji based on the French version by Joseph Orsier. It was consulted together with the French code in the drafting of the 'Boissonade civil code', although, as is known, eventually it was not adopted. In the same year, Théophile Huc's comparison between the Code Napoléon and the Italian civil code appeared in Japanese. The Italian military penal code was translated in 1888 by Sei Sakurai under the title *Itari rikugun ritsu* (Italian Army Code).

Finally, criminal law was an area in which the Italian jurists of the time were at the forefront. The Zanardelli code, named after the Minister of Justice who contributed to have Paternostro working in Japan, was seen as one of the best and most advanced examples of criminal legislation of the time. It was natural for the Japanese to be curious about it: a translation of the draft (of 28 May 1875) appeared in 1888 and the translation of the code itself was published very quickly in 1890, ie less than a year after its promulgation in Italy. It should be noted, however, that the criminal code of 1907 did not follow the Italian model but the

[48] ibid

[49] In 1891, a Japanese policeman attempted to kill the Russian Crown Prince Nikolai Aleksandrovic who was visiting Japan. The legal problem that arose was to strictly punish the perpetrator of the attack to avoid Russian reprisals, but without subverting the fundamental principles of the rule of law and criminal law, including the principle of non-retroactivity of criminal law and *nulla poena sine lege*. Indeed, the codes in force at the time did not provide a special sanction for the act of attacking members of foreign royal families, so the attacker could only be charged on the basis of the ordinary provisions on attempted murder.

German one.[50]

The circulation of the Italian legal model in Japan in the Meiji period was therefore not a phenomenon of significant dimensions. There was none of the typical reasons that usually underlie the circulation of legal models: there had been no military conquest, and physical distance prevented any appreciable circulation of people or important trade relations between the two countries. Distance, inconvenient access and lack of military projection were factors playing also against Germany and France, but these two countries had the prestige of their legislation or of their scholars on their side. Italy on the contrary, was completing its journey towards unity in the early years of the Meiji period, did not have sufficient international prestige, and its military forces were young and without the prestige of the French or of the Prussian armies.

From this point of view, Italy offers a thought-provoking comparative framework with which Japanese scholars are often familiar. In fact, Italian law and in particular its codes were largely inspired by the French ones, which were the dominant models when Italy had to build a legal system for the newly unified country. This was happening in the mid-1860s, virtually at the same time in which Japan was in the process of restoring the Imperial power and was facing similar problems of modernising and unifying the legal system. At that time, Germany was not unified yet and it would not have a civil code ready until the end of the century. From this it follows that even Germany could not serve as a clear model for legislation. On the other hand, Germany was a doctrinal powerhouse and its scholars with their works were profoundly influential at a global level. Italy was particularly receptive of the influence of German doctrine. The result was a legal system in which laws written in the French style were read and interpreted by scholars and practitioners thinking in the German style.

This peculiarity makes the Italian system fascinating and, in some ways, unexpectedly familiar to the Japanese jurist. As mentioned above, the German and French models have long coexisted in Japan, with patterns of influence that resemble those seen in Italy: a legislation inspired by French models, especially in the early Meiji period, with a sharp and swift turn towards German scholarship.[51] These are the same patterns of influence that could be seen in Italy. In this sense, the Italian approach can provide the Japanese scholar with an excellent example for understanding legal drafting and interpretation.

With the dominance of German scholarship in Japan the early 20th century, Italian influence faded. After the defeat in the war and the occupation, many

[50] W. Röhl ed, n 11 above, 614.

[51] Z. Kitagawa, 'Development of Comparative Law in East Asia', in M. Reimann and R. Zimmermann eds, n 42 above; E. Hoshino, 'Influence of French Civil Law upon the Civil Code of Japan', in H Tanaka and M.D.H. Smith eds, *The Japanese Legal System: Introductory Cases and Materials* (Tokyo: University of Tokyo Press, 1976); Id, 'L'éritage de G. Boissonade dans le code civil et dans la doctrine du droit civil au Japon' *Revue Internationale de Droit Comparé*, II, 407 (1991).

reforms took the American model as inspiration.

However, the post-war period in Japan was also a period of fast development of comparative law, and it would be inaccurate to say that Italian law had no influence at all on the Japanese legal system.[52]

One area in which Italian law had a global influence, reaching well beyond its borders and even Japan was that of labour law. The Workers' Charter (*Statuto dei lavoratori*), and more generally Italian labour and union law are known, analysed and their importance is widely understood by scholars and politically engaged practitioners.[53] Other fields of the Italian legal system have been analysed in an unsystematic way, for different reasons. Interest in constitutional law was spurred by the similarities in the war and post-war history of the two countries: totalitarianism, war, defeat and a new Constitution drafted under the influence of the United States.[54] For the Japanese observer, the influence of the Catholic Church on Italian society made Italy, and in particular Italian family law an interesting model to analyse, and studies on family law compared the two countries from this starting point.[55]

From the 1990s interest in Italy increased further, in part for a growing Japanese curiosity towards legal systems so far considered as of lesser importance, in part for the growing interest in the European Union, of which Italy was a founding member.[56]

The most noticeable presence of Italian law in Japan is in criminal law and procedure, likely due to Japan's challenges with its inquisitorial legal system. Italy's shift from an inquisitorial to accusatory trial in its new code of 1989 was an example that sparked interest, and in 1997, the Ministry of Justice translated the Italian Code of Criminal Procedure. One of the major reforms of the Japanese legal system in the early 2000 was the introduction of a mixed jury in criminal cases. It was preceded by studies of foreign systems, with Italian law receiving special attention, to the point that some of the best studies on the Italian *Corte d'Assise* in the early 2000s have been published in Japanese.[57] Japan sought to create a unique system for its legal system, erasing traces of reference to foreign legal systems, even coining the quasi-neologism '*saiban'in seido*' to define the new mixed jury trial. Hence, it cannot be said that Italy was the direct inspiration for the reform,

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[52] For a survey of the major academic works focusing on Italian law in this period, see A. Ortolani, 'The Italian Legal Model' n 46 above, 184.

[53] K. Yamaguchi, 'Rōdōshakenshō'hō to sono go no Itaria rōshi kankei' [Workers' Charter Act and subsequent Italian industrial relations] 24(4) *Shakai kagaku kenkyū*, 77-128 (1973-03). The labour law specialist Koichirō Yamaguchi published extensively on Italian labour law since the late 1960's. More recently, Shigeru Wakita and Shin'ya Ōuchi are the two Japanese leading experts of Italian labour law.

[54] Several authors wrote extensively about Italian constitutional law. Among the first and most active: Toshiyasu Takahashi, Fumio Iguchi, Ken Ishida.

[55] Chiyo Matsuura is the author of dozens of articles on Italian family law, from 1969 to 2009.

[56] While there are many Japanese experts of EU law, this particular angle of research was recently explored in depth by Fumihiko Azuma.

[57] The leading expert of Italian criminal procedure is Takeshi Matsuda.

but it certainly was one of the systems that were most looked at.[58]

Besides criminal law and procedure, interest in labour law continued unabated, while other areas came to the attention of Japanese legal scholars: insolvency law,[59] consumer protection law,[60] and a renewed interest in Italian legal history, evidenced also by re-translations of classics.[61] Finally, another sign of the interest towards Italian law is the inclusion of Italy, together with the traditional 'prestigious' legal systems of France, Germany, United States and England, in the series of the Institute of Social Sciences of the University of Tokyo on judicial statistics.[62]

2. Triangular Comparison and Its Merits[63]

For the reasons mentioned above, an Italian comparative law scholar is well positioned to understand many features of Japanese positive law and its patterns of change. Among these, the recent adoption of the mixed jury is a good example for several reasons, including the fact that the jury is one of the most represented legal institutions in popular culture.

In the eyes of the lay reader, the word 'jury' conveys the highly emotional image of twelve citizens sitting in a courtroom, listening to lawyers passionately pleading in front of them, and observing the cross-interrogation of witnesses. In other words, the commonly held image of the jury is the American jury. This is in part a consequence of the dominance of American law in the popular legal imagination all over the world, which is in turn a result of the hegemony of the Hollywood movie industry. It is also in part due to the fact that the American trial by jury lends itself to more dramatic representations, compared to trials in the

[58] K. Anderson and L. Ambler, 'The Slow Birth of Japan's Quasi-Jury System (Saiban-in Seido): Interim Report on the Road to Commencement' 11 *Zeitschrift Für Japanisches Recht/Journal of Japanese Law*, 55 (2006); A. Dobrovolskaia, 'An All-Laymen Jury System Instead of the Lay Assessor (Saiban'in) System for Japan? Anglo-American-Style Jury Trials in Okinawa under the US Occupation' 12 *Zeitschrift Für Japanisches Recht/Journal of Japanese Law*, 57 (2007); M. Fujita, 'Necessary Conditions for Active Civilian Participation in Japanese Courts: Analysing Communication Networks in Two Mock Mixed Jury Trials' 14 *Zeitschrift Für Japanisches Recht/ Journal of Japanese Law*, 91 (2009); A. Ortolani, 'Reflections on Citizen Participation in Criminal Justice in Japan: Jury, Saiban-in System and Legal Reform' 15 *Zeitschrift Für Japanisches Recht/ Journal of Japanese* Law, 153 (2010); D. Vanoverbeke, 'The Jury System in Modern Japan: Revolution Failed?' 15 *Zeitschrift Für Japanisches Recht/Journal of Japanese Law*, 127 (2010).

[59] Masaki Sakuramoto studied extensively Italian bankruptcy law in comparative perspective with the Japanese.

[60] The Japanese expert on Italian consumer law is Keiko Tanimoto.

[61] Masao Kotani has been publishing widely on Italian legal history and legal culture since the early 1990's. He recently published a new translation of Beccaria's *On Crimes and Punishments*.

[62] Iwao Satō et al, *Yooroppa no shiho tokei II: Doitsu, Itaria, Nihon* [European Judicial Statistics Vol. 2: Germany, Italy, Japan] (Tokyo: Institute of Social Sciences, The University of Tokyo, 2010). An updated and renewed edition is forthcoming. It is also worth mentioning that the National Diet Library employs, among others, an Italian law specialist, Jun Ashida, for its legal section.

[63] G.F. Colombo, 'Introduction' *Italian Law Journal Special Issue. Hybridizations, Contaminations, Triangulations: Itineraries in Comparative Law Through the Legal Systems of Italy and Japan*, 1-6 (2018).

continental European tradition, where only in selected cases lay people sit with judges in so-called 'mixed juries'.[64]

Many lawyers and scholars without a specific interest in Japan might have an idea of the jury consistent with its dominant archetype at the global level. Hearing that Japan introduced a jury, one might expect that Japan chose to follow the model of the 'American' jury. Upon discovering that the Japanese jury follows a different model, a first reaction would be to explain the difference through culture:[65] the Japanese do not want citizens to truly express their opinion, because it is socially inappropriate to do so; the hierarchical Japanese society wants the State to retain control of the judicial process, and therefore conceived a mixed jury where judges play a central role. Again, these reasons are not necessarily wrong *per se*, and there may be some grains of truth in them, but the reaction of trying to find explanations in the 'culture' is revealing of a somehow lazy, albeit often well-meant, ethnocentric approach. On the other hand, an Italian comparative law scholar will recognize in the Japanese jury the model of the *Corte d'Assise*, will not find it surprising, and will possibly move on to look at possible explanations other than a reference to the 'Japanese culture.'

This leads to the main point and the conclusion of our paper: looking at Japanese law through Italian lenses.

After long decades of debate and attempts at advancing the correct and ultimate taxonomy of the world's legal systems, scholars in comparative law appear to have reached a consensus that virtually all modern legal systems exhibit elements of hybridization, blending aspects of civil law, common law, and other legal traditions.[66] Furthermore, the concept of 'mixture' has undergone rigorous scrutiny, leading to a more nuanced understanding of what does it mean to classify systems into groups. From this perspective, every legal system is, to some degree, 'mixed,' though the composition of each blend varies. Italy and Japan serve as excellent case studies in this regard. Both nations are firmly rooted in the Continental legal tradition and have a complex history of receptions, which continues today with additions inspired by the American model. This trend is evident across various fields, with the most evident examples being corporate law, criminal procedure, and no less importantly, legal education. While this trend is widely recognized, scholars from different countries may assess its significance and impact differently.

Any comparative law scholar understands the critical importance of having a *tertium comparationis*. This is particularly stimulating in the context of comparative studies between Italy and Japan. For instance, when Italian legal scholars begin to study Japanese law, those who lack direct access to primary sources in Japanese must rely on translated materials, mostly in English. This

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[64] R.K. Sherwin, *When Law Goes Pop: The Vanishing Line between Law and Popular Culture* (Chicago: University of Chicago Press, 2002).

[65] M. Dean, 'Legal Transplants and Jury Trial in Japan' 31 *Legal Studies*, 570 (2011).

[66] A. Ortolani, 'Civil Law', in M. Siems and P.J. Yap eds, *The Cambridge Handbook of Comparative Law* (Cambridge: Cambridge University Press, 2024).

immediately brings to the fore one of the key challenges in comparative law: the problem of translation and the accessibility of diversity. In particular, using English to compare two civil law jurisdictions is especially problematic because of the challenges it poses, both for the authors and the recipients of these works. The use of English implies not only the translation from Japanese into English, and then possibly again a silent translation into the native language of the reader, but also a legal translation from a civilian legal jargon into a common law one, and then again into the jargon of the reader, which may well be again a civilian one. The reliance on common law terminology forces interpreters to navigate the challenges of notions that get 'lost in translation' and to carefully consider the origins, nature, and functions of legal institutions from different systems. When comparing two civil law jurisdictions using English it is necessary to triangulate by translating not just words but also legal categories between different traditions. This triangular linguistic and comparative exercise is necessary to avoid the oversimplifications that can mislead even experienced scholars. It also encourages deeper reflection on the appropriate weighting of institutional, functional, and cultural aspects. As noted above, both the inclination to identify similarities and the anxiety over differences can distort the comparative lens, leading to an overemphasis on either formal or informal factors. In the cases of Japan and Italy, this may result in over-relying or oversimplifying real or perceived 'cultural' reasons behind the differences between the systems.

However, a closer examination reveals that in many cases the unfamiliar features are in the eye of the beholder.