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Special Issue

# *Hybridizations, Contaminations, Triangulations: Itineraries in Comparative Law Through the Legal Systems of Italy and Japan*


edited by Giorgio F. Colombo

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## *Hybridizations, Contaminations, Triangulations: Itineraries in Comparative Law Through the Legal Systems of Italy and Japan*

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# Introduction

Giorgio F. Colombo*

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.[1]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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[1] E. Örücü, '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.[2] 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[3] 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.[4] In the cases of both Japan and Italy,[5] 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 21st century, and a lucid recognition of their inevitable shortcomings, the paper

[2] 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.

[3] 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).

[4] T. Ruskola, 'Legal Orientalism' 101 *Michigan Law Review*, 179-234 (2002).

[5] 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'.[6] 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 multicommunitarism could not be more relevant in the present conjuncture. Globalization is a fact, but, as already pointed out by Teubner,[7] 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

[6] U. Eco, 'Dell'impossibilità di costruire la carta dell'Impero 1 a 1', in Id, *Il secondo diario minimo* (Milano: Bompiani, 1992).

[7] 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.

# Legal Systems and Legal Families: Italy and Japan in Comparative Perspective

Andrea Ortolani*

**Abstract**

This article analyses the role and the significance of taxonomies in modern comparative law, taking the classification of Italy and Japan as examples.

The first part explains the concepts and purposes of taxonomies in science and in comparative law.

The second part analyses the reasons why Italy and Japan are often classified as civil law countries as well as the significance for comparative law scholars and Japanese law specialists in particular of calling Japan a civil law country.

The final part reviews the latest trends in taxonomic projects in comparative law and offers legal taxonomic pluralism as an approach to mitigate the problem of contradictory taxonomies.

## I. Introduction

This article is divided into three parts.

The first part reviews the concepts and purposes of taxonomies and includes examples of the use of taxonomies in science and in comparative law.

The second part reviews the reasons Italy and Japan are often classified as civil law countries as well as the significance for comparative law scholars, and Japanese legal scholars especially, of calling Japan a civil law country.

The third part reviews the latest trends in taxonomic projects in comparative law and offers an approach to mitigate the problem of contradictory taxonomies.

## II. What are Taxonomies?

### 1. Taxonomies in Science

Most, if not all, cultures name and classify things and concepts. Classifying things is the implicit foundation of cognitive processes.[1] It is crucial to the

* Assistant Professor of Comparative Law, Keio University, Faculty of Law. The author wishes to express his gratitude to Cynthia Walker (LLB, Cambridge University, Visiting Scholar, Harvard Law School) for the tremendous editorial work she did for this article.

[1] P. Lambe, *Organising Knowledge: Taxonomies, Knowledge and Organisational Effectiveness* (Oxford: Chandos Publishing, 2007); G.C. Bowker and S.L. Star, *Sorting Things Out: Classification*

gathering and communicating of information.[2]

Taxonomies are an important part of natural history and science. The system devised by Carolus Linnaeus in the eighteenth century is firmly established as the way of naming and classifying species of animals and plants.[3] In the same century, Georges Louis Leclerc de Buffon's thirty-sixth volume *Histoire naturelle* (published 1749-1789) offered a dynamic account of the earth's formation as well as the changes over time and distribution over the globe of animals, plants and minerals.[4] A century later, Darwin's theory on the origin and evolution of the species advanced these natural history projects greatly by providing an explanation of how living beings change in time.

The Linnaean taxonomy and Buffon's natural history, together with Darwin's evolutionary theory, were spectacularly successful and were received and adopted well beyond the fields in which they were developed.[5] They, or at times their vulgarized versions, had a considerable impact on social sciences, including jurisprudence and comparative law.[6] The influence of Linnaeus, Buffon and Darwin is evident in two types of inquiries commonly performed by comparative law scholars.

The first, echoing closely the Linnaean taxonomic project, is the synchronic analysis, in which legal systems are analysed and sorted into groups and subgroups. These groups and subgroups are then labelled with various names, producing as a result a map of the world's legal systems.

The second is the diachronic analysis, in which the inquiries focus on the evolution of legal systems. This approach is influenced by Linnaean taxonomy insofar legal taxonomies are taken as the starting point of the inquiry. However, this approach recalls Buffon's *Histoire naturelle* when it adds historical and

*and Its Consequences* (Cambridge, Massachusetts-London: The MIT Press, 2000); K.D. Bailey, *Typologies and Taxonomies: An Introduction to Classification Techniques* (Thousand Oaks: SAGE Publications Inc, 1994).

[2] P.L. Farber, *Finding Order in Nature: The Naturalist Tradition from Linnaeus to E.O. Wilson* (Baltimore, Md: Johns Hopkins University Press, 2000), 1.

[3] W. Blunt and W.T. Stearn, *Linnaeus: The Compleat Naturalist* (London: Frances Lincoln Publishers Ltd, 2004); P.L. Farber, n 2 above, 1.

[4] T. Hoquet, *Buffon: Histoire naturelle et philosophie* (Paris: Honoré Champion, 2005); P.L. Farber, n 2 above, 19.

[5] Hayek claims that it was in fact Darwin who borrowed the concept of evolution from the social sciences and applied it to biology: F.A. Hayek, *Law, Legislation and Liberty, Volume 1: Rules and Order* (Chicago: University of Chicago Press, 1978), 22. This first borrowing is not widely known, probably because of the spectacular success of the theory of evolution in biology or of the discredit around the idea of 'social Darwinism'. Therefore, the notion of evolution by natural selection is nowadays associated with Darwin and not with the 'Darwinians before Darwin' as Hayek refers to the eighteenth century moral philosophers and the historical school of law and language, citing August Schleicher and Max Müller: ibid 23, fn 33.

[6] H.P. Glenn, 'The Aims of Comparative Law', in I.M. Smits ed, *Elgar Encyclopaedia of Comparative Law* (Cheltenham: Edward Elgar Publishing, 2nd ed, 2012), 67; R. Michaels, 'The Functional Method of Comparative Law', in M. Reiman and R. Zimmermann eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), 339-382.

geographic dimensions to the picture. There are also frequent references to the Darwinian theory of evolution. Sometimes they are explicit.[7] Sometimes they are not explicit or even intentional. Yet the mere use of keywords such as 'evolution' or 'adaptation' in legal writings cannot fail to evoke Darwin's evolutionary theory.[8]

Comparative law does not rely on one dominant taxonomy or one original theory of legal evolution in contrast to how the majority of natural science scholars recognize those based on Linnaeus and Darwin. There are many ways of classifying the world's legal systems and of explaining their evolution. Some have been borrowed from Linnaeus and Darwin,[9] but the different methodologies have produced different results.

Limiting this inquiry to modern taxonomies, we can see that the civil law and the common law group are present in most, if not all, recent taxonomies.[10] The Islamic law group is another quite ubiquitous one. All comparative legal scholars are familiar with other groups such as African, Confucian or Eastern Asian, Hindu and Socialist law. It was not always like this: the fathers of comparative law identified fewer groups, mostly due to their lack of knowledge about non-European law. More groups have been identified as the discipline of comparative law has expanded. Undoubtedly, still more groups will be identified.[11]

Japan is often defined as a civil law country.[12] Even the authors who stress the distinctiveness of Japanese culture and its influence on the law of the

[7] E.D. Elliott, 'The Evolutionary Tradition in Jurisprudence' 85(1) *Columbia Law Review*, 38-94 (1985); H. Hovenkamp, 'Evolutionary Models in Jurisprudence' 64 *Texas Law Review*, 645 (1985); M. Zamboni, 'From Evolutionary Theory and Law to a Legal Evolutionary Theory' 9 *German Law Journal*, 515 (2008); M. Barberis, 'Evolutionist Jurisprudence (Legal Epistemology)' *Encyclopedia of the Philosophy of Law and Social Philosophy* (Dordrecht: Springer, 2017), 1-7.

[8] The evolution of the common law is sometimes explained in Darwinian terms. It is seen as a process of elimination of the least efficient rules through adjudication, just like species evolve eliminating of the least adaptive traits through natural and sexual selection. M. Barberis, ibid 7.

[9] See n 11 below.

[10] As noted by Pargendler, it was not always thus. The *summa divisio* between civil law and common law emerged in the twentieth century: M. Pargendler, 'The Rise and Decline of Legal Families' 60 *The American Journal of Comparative Law*, 1046 (2012).

[11] It is of course impossible to cite here all the works that presented legal taxonomies. Some reviews of the literature on taxonomies can be found in: L.J. Constantinesco, *Traité de droit comparé* (Paris: Economica, 1983), III; C. Varga, 'Taxonomy of Law and Legal Mapping: Patterns and Limits of the Classification of Legal Systems' 51 *Acta Juridica Hungarica*, 253-272 (2010); M. Pargendler, ibid; M. Siems, *Comparative Law* (Cambridge: Cambridge University Press, 2014), 72.

[12] The statement is commonly found in the literature, especially that written by Japanese scholars and is deemed so obvious that it often comes without a citation. See, for example, among recent works in English by Japanese scholars: J. Shimizu, 'Common Law Constitutionalism and Its Counterpart in Japan' 39 *Suffolk Transnational Law Review*, 1-46 (2016); S. Matsui, 'Constitutional Precedents in Japan: A Comment on the Role of Precedent' 88 *Washington University Law Review*, 1669 (2011); M. Kamiya, 'Chosakan: Research Judges Toiling at the Stone Fortress' 88 *Washington University Law Review*, 1618 (2011); Y. Hasebe, 'The Supreme Court of Japan: Its Adjudication on Electoral Systems and Economic Freedoms' 5 *International Journal of Constitutional Law*, 299 (2007).

archipelago do not deny that from the second half of the nineteenth century the Japanese legal system has been by and large modelled on Western patterns and that now shares many features with European legal systems.[13] While Japan is sometimes a 'victim' of these characterizations,[14] it is useful to assess whether this view is correct, and if so, what information that it conveys.

## 2. Usefulness of Legal Taxonomies

Since most comparative law textbooks divide legal systems into groups, many law students acquire their first notions about the world's legal systems according to those groups.

While it is obvious that every legal system possesses some special characteristics or original institutions, most legal systems have features that are similar or equivalent, when not identical, to those of other legal systems. Therefore it is more practical to start learning about foreign law by focusing on what legal systems have in common, thus creating a map of the world's legal systems based on the similarities between systems.[15]

After having identified some groups and built a rough map of the various groups,[16] the next step should be to focus on the similarities and differences among legal systems within the groups, ie on the original traits of each legal system. By adding details, one can obtain a deeper and more accurate picture of each group.

Thus, legal taxonomies serve a distinct didactic purpose, as they greatly simplify the description of the world's legal systems.[17] Three other reasons also support the utility of creating and maintaining legal taxonomies.

The first basic reason is related to the identity of a particular system. By claiming that a certain national legal system belongs to a certain group, the identity of that legal system is clarified. Finding differences between legal systems or, more broadly, between cultures is an effective way of establishing a community's or nation's identity.

The second basic reason is practical. A search for a correct division into groups is justified for the practical reason that it can help predict the success of

[13] For a recent example, H.P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford-New York: Oxford University Press, 5th ed, 2014), 345. More nuanced: J.H. Merryman and R. Pérez-Perdomo, *The Civil Law Tradition* (Stanford: Stanford University Press, 3rd ed, 2007), 4.

[14] Japan is often seen as an exotic legal system. The abundance of literature on it makes it easy for the non-specialist to discuss Japan as an ornamental example or counterpoint. For the specialist of Japan, however, such literature often just adds superfluous noise or perpetuates surpassed clichés. See G.F. Colombo, 'Japan as a Victim of Comparative Law' 22 *Michigan State International Law Review*, 731-753 (2013).

[15] G. Danneman, 'Comparative Law: Study of Similarities or Differences?', in M. Reiman and R. Zimmermann eds, n 6 above, 383–419.

[16] See M. Siems, n 11 above, 73.

[17] K. Zweigert and H. Kötz, *Introduction to Comparative Law* (Oxford: Oxford University Press, 1998), III.

legal transplants. It has been suggested that transplants have a higher probability of success when made between countries that share common features and are classified together in the same group.[18]

However, this may not always be the case. Many historical examples show that transplants may occur between legal systems that are commonly classified in different groups and not believed to share the same legal culture.[19] Japan is an example of this type of reception.

A third basic reason for the popularity of taxonomies can be found in the fact that the very act of naming and classifying things should indicate an understanding of and competence about what is named and classified, ie a certain field of knowledge.

Finally, taxonomies and divisions into groups may also be related to the physical nature of books and to long-established conventions of how books are structured. Books are made of pages which are conventionally organized into paragraphs, chapters, sections, etc. As the contents need to mirror that structure somehow, it is natural to have legal systems also divided into paragraphs, subparagraphs, chapters, etc and then classified into larger groups such as civil law, common law, etc. This way legal families will coincide with sections or larger parts of books, and mundane elements such as editorial conventions may exert a subtle influence on how the contents are conceptually arranged.

## 3. Problems with Legal Taxonomies

The International Congress of Comparative Law of 1900 in Paris transformed comparative law scholarship into a modern and mature branch of jurisprudence. Many participants at the Congress saw the search for a taxonomy of the world's legal systems as a central mission for the young science of comparative law.[20]

Scholars painstakingly started looking for the soundest methodologies and the most convincing criteria into which to divide the world's legal systems. These methodologies and criteria had to be grounded on firm theoretical foundations and have clear explanatory value.

However, many criteria have been followed in the history of comparative law: *quot capita, tot sententiae*.[21] Distinctive aspects of the groups of legal systems include historical features and development, geography, structural features of the legal systems, and various aspects of the culture of which the legal system is a part.

[18] M. Siems, n 11 above, 73; U. Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' 45 *The American Journal of Comparative Law*, 5-44 (1997). On transplants in general see M. Graziadei, 'Legal Transplants and the Frontiers of Legal Knowledge' 10 *Theoretical Inquiries in Law*, 723-743 (2009); A. Watson, *Legal Transplants: An Approach to Comparative Law* (Athens: University of Georgia Press, 1993).

[19] A. Watson, *Society and Legal Change* (Philadelphia: Temple University Press, 2nd ed, 2010).

[20] M. Pargendler, n 10 above.

[21] 'Many heads, many opinions'.

Some scholars propose complex taxonomies based on more than one criterion.[22]

Taxonomies presented in the past are regularly revised by younger generations of scholars who present new taxonomies, which in turn are abandoned by following generations, etc. The search for the one convincing and conclusive taxonomy of the world's legal systems reminds one more of the endless task of Sisyphus rather than the Popperian ideal of marginal scientific progress through falsifications and refutations.[23]

Divergences emerge not only in the methodologies and results of the inquiries but also about which term is the most accurate and should be used to define the groups of systems resulting from the classification.[24] Legal families, legal systems, *grands systèmes de droit*,[25] and legal traditions[26] are among the most common.

The list is made more complex by the multiplicity of languages used by comparative law scholars. In fact, while 'family' can be translated into the French '*famille*', the German '*Familie*', the Italian '*famiglia*' and the Spanish '*familia*' relatively easily and with relatively little loss of information between the languages, it is not always so easy or straightforward to translate 'legal family', 'legal tradition' or '*grand système de droit*' into a language such as Japanese. The opposite is also true: translating '*hozoku*', '*hoken*', or '*hotaikei*' poses specific problems for the comparative law scholar who keeps an eye on Japan.

Finally, legal systems are always evolving. Today's mapping can easily become outdated tomorrow because of reforms, revolutions, or small, incremental changes in any of a legal system's formants.[27]

## III. Italy and Japan as Civil Law Countries

### 1. Italy and the Civil Law Tradition

Italy has long been considered a civil law country. While Italy as an independent and unified state emerged only in the second half of the nineteenth century, the Italian legal tradition predates the proclamation of the Kingdom of Italy in 1861.

Italy and the civil law tradition are generally seen as inextricably linked for

[22] J. Husa, 'Legal Families', in J.M. Smits ed, n 6 above, 491-504.

[23] A reference to Popper and the idea of progress of science through marginal improvements is found also in M. Siems, *Comparative Law* (Cambridge UK: Cambridge University Press, 2014), 74.

[24] In order to take a neutral approach, this article up to this point has used the expression 'legal system' to mean the formal law of a state, and did use the term 'group' as a neutral synonymous of legal tradition, grand système de droit, legal family.

[25] R. David, *Les Grands Systèmes de Droit Contemporains: Droit Comparé* (Paris: Dalloz, 1964).

[26] P. Glenn, n 13 above.

[27] R. Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)' 39 *The American Journal of Comparative Law*, 1-34 (1991); Id, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)' 39 *The American Journal of Comparative Law*, 343-401 (1991).

historical and geographical reasons. The consensus among legal historians and comparative law scholars is that the civil law tradition itself originated in the Italian peninsula. From the eleventh to the thirteenth century, Italian jurists were among the most prestigious in Europe. Their methodology, known as the *mos italicus*, was the standard method of studying law for centuries. The way of organizing legal education conceived in the Bologna Law Faculty was adopted in all continental Europe. Legal scholarship was a European phenomenon, and its language was Latin. No political entity represented Italy as a whole: any reference was simply geographical. One could argue that it is not possible to talk of an 'Italian tradition' since there was no 'Italian' legal system. However, starting at the latest from the publication of legal treatises in Italian in the seventeenth century,[28] it seems undeniable that Italy had a distinct legal tradition despite its political fragmentation and the absence of a formal legal system applicable to the entire peninsula.

Over time foreign law influenced the Italian legal tradition, especially French and German law and jurisprudence.[29] Comparative legal research shows what were the formants most affected and in what periods. In recent years, the influence of Anglo-American law has been more pervasive.

However, the reforms in several areas of Italian law through provisions inspired by Anglo-American law have not been sufficient to alter the general perception of Italy as a civil law country. In the many mappings of world legal systems in comparative law history, when Italy is not classified as a civil law country, it is because it is absent from the picture or because the name of the family is not 'civil law' but 'French' or 'Romano-Germanic' family. The substance does not change: these classifications are subsets or substantially equivalent to what lately is conventionally called the civil law family. At the moment there are no classifications where Italy is part of the Islamic family, the Far Eastern tradition, or even the common law family.[30]

## 2. Japan as a Civil Law Country

The profound political and social changes known as Meiji Restoration transformed Japan from an agricultural, poor and secluded country into a

[28] The first major works in jurisprudence written in the Italian language are those written in mid sixteenth century by G.B. De Luca: A. Padoa-Schioppa, *A History of Law in Europe: From the Early Middle Ages to the Twentieth Century* (Cambridge-New York: Cambridge University Press, 2017), 291. It is worth noting that some of the oldest existing documents written in the Italian language are legal documents: the 'Placiti Cassinesi', four short judicial opinions written between nine hundred and sixty and nine hundred sixty-three.

[29] R. Sacco, 'Modèles français et modèles allemands dans le droit civil italien' 28 *Revue internationale de droit comparé*, 225-234 (1976).

[30] More on this later. See also M. Siems, 'Varieties of Legal Systems: Towards a New Global Taxonomy' 12 *Journal of Institutional Economics*, 579-602 (2016), in which Italy is a part of the 'European legal culture' cluster.

modern industrialized state.

The legal system was revolutionized. In three decades, Japan built a fully functional, modern legal system and enacted its first modern Constitution, codes and statutes covering all areas of law. Japan was able to do so thanks to the tireless work of its young elites and to the valuable assistance from foreign legal advisers invited by the government.

The literature on the birth of the modern Japanese legal system in the Meiji period is extensive. It shows that for the most part it was not a process of creation of original institutions and rules, nor it was a meticulous and fine-tuned adaptation of the existing laws to the new social order. It was by and large a massive adoption of foreign models, with two exceptions.

The first exception was the obvious need to adapt the imported rules to the local needs. The elites wanted to modernize and strengthen the country, without granting too many civil rights and liberties to the people. This was evident in areas such as family law and successions, or in the constitutional law provisions on the Emperor's powers and on civil liberties.

The second exception was the lack of a fully developed legal lexicon in the Japanese language. The Japanese intellectuals and legal scholars of the time had to create the words to express the legal concepts of foreign legal science that they were introducing. The creation of a refined lexicon proved to be a more difficult task than the mere translation of the words needed to draft the Constitution of the young Meiji state.

The legal systems taken as models were the continental European legal systems, in particular the French and German systems.[31] These gave the Japanese legal system the appearance of a continental European legal system.

The classification of modern Japan as a civil law country has been proposed since early times. Nobushige Hozumi, one of the leading figures in the legal modernization of Japan,[32] was among the first proponents of this view. In a paper presented at the International Congress of Arts and Science of 1904 in Saint Louis, he explicitly addresses the issue of the position of the Japanese Civil Code among the legal systems of the world.[33] After having identified

[31] This is a well-known, and generally uncontroversial fact. The literature is extensive.

[32] N. Hozumi was born in rural Japan in 1855. After attending a governmental elite school, he was sent to England to study law in 1876. There, besides attending lectures, he was admitted to Middle Temple and qualified as a barrister in 1879. Hozumi then moved to Berlin to study German law for a year and went back to Japan in 1881. In 1882, he was the first Professor of Jurisprudence at the Imperial University of Tokyo, and the first doctor of laws in Japan in 1888. In the 1890s he was one of the three drafters of the Civil Code of Japan. He was appointed to the Japanese House of Peers (*kizokuin*) and to the Privy Council (*sumitsuin*). See H. Aoki, 'Nobushige Hozumi: A Skillful Transplanter of Western Legal Thought into Japanese Soil', in A. Riles ed, *Rethinking the Masters of Comparative Law* (Oxford, UK-Portland, Oregon: Hart Publishing, 2001), 129-150.

[33] 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, Ltd, 1904).

> 'seven Great Families of Laws namely, (1) the Family of Chinese Law, (2) the Family of Hindu Law, (3) the Family of Mohamedan Law, (4) the Family of Roman Law, (5) the Family of Germanic Law, (6) the Family of Slavonic Law, (7) the Family of English Law',[34]

he states that with the legislation of the Meiji period 'Japanese law was at that time rapidly passing *from the Family of Chinese law to the Family of European laws*'.[35] A few paras later, after a brief summary of the achievements of Japanese legal science in the 1890s, Hozumi states 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'.[36]

This conviction is repeated in the conclusion: 'Within the past thirty years, Japanese law has passed from the Chinese Family of Law to the European Family'.[37] Hozumi qualifies his position in the final lines, stating that 'the Code is only a skeleton of law' and that 'Law is national or territorial, but the science of law is universal, and is not confined within the bounds of any state'.[38] However, the general message one gets from his paper is that the transition of Japan from the Chinese to the European family was completed.

The idea of Japan as a civil law country became commonplace in the early 20th century.[39] Even the authors who stress the uniqueness of Japanese culture and the influence of centuries of indigenous tradition on the law of the Japanese archipelago, do not deny that the modern Japanese legal system has been modelled on Western patterns and that it now shares many of its features with archetypical civil law systems such as France or Germany.[40]

The characterization of the Japanese legal system as the result of the adoption of continental laws was, and still is, influential in a different but very profound way: for decades the most brilliant young legal scholars of Japan overwhelmingly chose France or Germany as their destinations to spend a period of study abroad. They became professors of law with solid backgrounds in French or German law, breeding new generations of scholars who again specialized in French or German law. This was for decades a self-reinforcing loop that is only recently

[34] ibid.
[35] ibid (italics in the original).
[36] ibid 19 (italics in the original).
[37] ibid 71.
[38] ibid 73.
[39] Some of the most straightforward paras on the civil law-oriented character of Japanese law in the first half of the 20th century can be found in K. Takayanagi, 'Contact of the Common Law with the Civil Law in Japan' 4 *The American Journal of Comparative Law*, 63 (1955).
[40] n 11 above.

apparently partially losing its influence.[41]

There are also works in which comparative scholars do not classify Japan as a civil law country. In these mappings, Japan is sometimes a member of the Confucian or Mongoloid family or sometimes of the far Eastern tradition.[42] The geographical location of Japan is an indisputable fact, and it influences the perception and image of its legal system. Sometimes, the distinction is made between the Japanese legal system, modelled on Western patterns, and the Japanese legal culture, categorized among non-Western legal cultures in the subset 'Asian legal culture'.[43] These classifications clearly focus on the persistence of pre-modern traditions as components of the current legal system.

Japan was under American military occupation from 1945 to 1952. The current Okinawa prefecture was under American control until 1972. A large part of modern statutory Japanese law finds its origins in American influences and was drafted following American models. The current Constitution is the typical example. Other areas of statutory law (eg criminal law, criminal procedure, antitrust law, as well as the court structure) were – at least on paper - deeply influenced by American law.[44] This may be not enough to classify Japan as a common law country, but it surely adds important details to the understanding of the Japanese legal system.[45]

### 3. Italy and Japan: Two Civil Law Countries?

Although there appears little room for discussion as to whether or not Italy is a civil law country, can Japan also be called a civil law country? Clearly, Japan is not a common law country, nor a country of the Islamic, Talmudic or Chthonic legal traditions. Thus, it would appear that Japan can be called a civil law country

[41] Of course, English and American law have been studied in Japan since early times. In addition to classes in French and German law, top Japanese universities have had chairs or classes in English or Anglo-American law. However, especially in the first half of the 20th century, professors with a background in continental law were the majority. Often the French and German legal doctrines were seen as directly applicable to Japan, while the common law doctrines were considered extraneous and not directly applicable to Japan.

[42] See M. Siems, n 11 above.

[43] M. Van Hoecke and M. Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' 47 *International and Comparative Law Quarterly*, 495-536 (1998).

[44] See T. Kinoshita, 'Introduction The Reception in Japan of the American Law and Its Transformation in the Fifty Years since the End of World War II' 26 *Law in Japan,* 1-13 (2000), and all the arts featured in the special section 'The Reception in Japan of the American Law and Its Transformation in the Fifty Years since the End of World War II' 26 *Law in Japan*, 14-74 (2000).

[45] A short, balanced depiction of the Japanese legal system and its influences is made by H. Oda, *Japanese Law* (Oxford: Oxford University Press, 2009), III, 1-9. See also the excellent analysis of the binding force of precedents in Italy and Japan made by Colombo in G.F. Colombo, 'Nomophilacy and Beyond: Comparative Reflections on Judicial Precedents by Supreme Jurisdictions in Italy and Japan' 2 *European Journal of Comparative Law and Governance*, 281-315 (2015).

because there are no better choices available.

However, such a reference to Japan is often followed by references to the persistence of the Confucian cultural background or to the undeniable fact that the Japanese archipelago lies in East Asia. A statement like 'Japan is a civil law country but…' is not wrong, but it seems to convey too little information.

Japan could perhaps be put in a class on its own. However, a legal family made of only one country does not appear to be a convincing example of taxonomy.

This reflection on Japan leads us to review the importance and role of taxonomies in comparative law and to search for possible solutions to the conundrum of taxonomies as 'useful but wrong'.

## IV. New Approaches to Taxonomies

### 1. Recent Trends

Comparative law is a discipline that still cannot provide results for what a century ago was seen as one of its fundamental goals. On the contrary, the more comparative law progresses, the further from reaching conclusive results it appears to be. This has led some prominent comparative law scholars, including early proponents of the taxonomic project, to acknowledge its limits or to declare its failure.[46]

Other scholars have not given up and have advanced new perspectives on taxonomies and new approaches. The debate has never ceased. In fact, new approaches to the traditional, list-based approach to taxonomies have produced interesting, innovative results. Ugo Mattei[47] and Werner F. Menski[48] have proposed visual representations of legal systems. Jaakko Husa has proposed a singular taxonomy based on a matrix[49] although in his latest works he seems to take a different and more nuanced approach to taxonomies and legal families.[50]

In the recent comparative law literature on taxonomies and legal families three trends are recognizable.

The first trend is the attempt made, primarily by economists, to measure the relationship between legal institutions and economic development. This approach produced the highly controversial body of literature going under the

[46] L.J. Constantinesco, n 11 above, 153; M. Siems, n 11 above, 88.

[47] U. Mattei, n 18 above.

[48] W.F. Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge: Cambridge University Press, 2006).

[49] J. Husa, 'Classification of Legal Systems Today – Is It Time for a Memorial Hymn?' 12 *Revue Internationale de Droit Comparé,* 54 (2004).

[50] J. Husa, 'Family Affair – Comparative Law's Never Ending Story?' *Annuario Di Diritto Comparato e Studi Legislativi*, 25 (2014); Id, *A New Introduction to Comparative Law* (Oxford-Portland: Bloomsbury Publishing, 2015); Id, 'The Future of Legal Families' *Oxford Handbooks Online: Law* (Oxford: Oxford University Press, 2016), 1.

label of 'legal origins' or 'law and finance'.[51] The weaknesses and limitations of this literature have been already discussed by others.[52] Among comparative law scholars there is a general scepticism over the methodology and results of this approach. What is relevant to point out here is that, according to the 'legal origins' literature, legal taxonomies are the starting point of the analysis rather than the original result of an innovative approach. Legal families are taken for granted, not questioned critically. In brief, this line of research does not help us find new approaches to taxonomies.

The second trend is the adoption of quantitative methods in comparative law research. This is perhaps affected by the literature on legal origins[53] and is part of a general trend towards a wider, more refined use of quantitative methods in the social sciences. Of course, legal scholars have known statistics and used them in their analysis for decades. Especially in the Anglo-American world, the economic analysis of law has long been a well-known and widespread approach to legal studies. However, the application to comparative law of more refined quantitative and empirical approaches is relatively recent.[54] Mathias Siems writes of 'numerical' comparative law[55] to stress how numbers can be used to measure what so far comparative lawyers analysed and described through qualitative methods. Examples of where this approach has been applied would include the thoughts on the impact of foreign ideas or the similarities between and differences among legal systems.

Siems has proposed a legal taxonomy based on a number of variables from certain datasets that he has then combined using the method of network analysis.[56] The result is a legal mapping made of four clusters: the European legal culture cluster, the rule by law cluster, the mixed legal systems cluster, and the weak law-in-transition cluster.

[51] The literature on the topic is now too extensive to be cited properly. The first paper of this current is usually considered R. La Porta et al, 'Law and Finance' 106 *Journal of Political Economy* 1113–1155 (1998). See also R. La Porta et al, 'The Economic Consequences of Legal Origins' 46 *Journal of Economic Literature*, 285-332 (2008).

[52] For a review of the literature, see N. Garoupa et al, *Legal Origins and the Efficiency Dilemma* (New York: Routledge, 2016); M. Schmiegelow and H. Schmiegelow, *Institutional Competition Between Common Law and Civil Law: Theory and Policy* (Heidelberg: Springer, 2014). See also the works collected in *Annuario di diritto comparato e di studi legislativi 2012* (Napoli: Edizioni Scientifiche Italiane, 2012).

[53] R. Michaels, 'Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law' 57 *The American Journal of Comparative Law,* 765-795 (2009).

[54] The Journal of Empirical Legal Studies started being published in 2004. The body of literature in this field is mostly published after the 2000s. See R.M. Lawless et al, *Empirical Methods in Law* (New York: Aspen Publishers, 2016); H. Spamann, 'Empirical Comparative Law' 11 *The Annual Review of Law and Social Science*, 131-153 (2015).

[55] M. Siems, 'Numerical Comparative Law: Do We Need Statistical Evidence in Law in Order to Reduce Complexity' 13 *Cardozo Journal of International and Comparative Law*, 521-540 (2005); M. Siems, n 11 above.

[56] M. Siems, n 30 above.

While this approach is stimulating, it also involves a certain degree of arbitrariness on the part of the researcher that inevitably is reflected in the results. This can be seen in crucial areas such as how laws and rules are converted into the numbers fed into the datasets, how the variables interact among them, or how the variables themselves are chosen. As recognized by the author himself, 'even when we identify community structures such as clusters, this does not deny possible ambiguities'.[57]

The third trend originates from a more refined understanding of the fundamental problem with any approach to taxonomies, ie the problem of definitions and scale. In creating the taxonomy, how should we define the basic unity of inquiry, ie the legal system? What are its boundaries? When the taxonomic project was launched, comparative law took it for granted that the comparison had to be made between national legal systems.[58] In 2018 this is no longer the case. An analysis of mixed and hybrid legal systems shows that state borders are not always the best markers of the boundaries between legal systems. Usually, a country's legal system encompasses many legal systems as the same legal tradition can often be spread among many countries.

On the other hand, it would be just as unreasonable to ignore the importance of national borders and legal positivism on the law of an area or people. It goes without saying that state power, jurisdiction and tribunals have a significant influence on how law is perceived and practiced in an individual community.

This dilemma is acute when discussing the Japanese legal system. The depictions of the Japanese legal system vacillate between Japanese law as a copy of the European models of the 1800s, on the one hand, and Japanese law as the archetype of a modern industrialized society's legal system. In the latter type of legal system traditional, informal rules take over and therefore deprive state law and written agreements of any value.

The comparative law scholar is then again faced with a choice. Should the scholar choose clarity over accuracy and conduct the analysis utilizing countries only? Such a choice would obviously be at the expense of a subtle analysis that could take into account regional differences within a country and differences in religious, social, economic, linguistic and cultural conditions. Should the scholar choose accuracy over clarity, thereby bidding farewell to any hope of building an easily understandable, practical taxonomy?

## 2. Legal Taxonomic Pluralism

The new trends mentioned above lead to original and insightful results, but additional new ways to classify legal systems will always be proposed. The existence of conflicting taxonomies of the world's legal systems seems unavoidable.

[57] ibid 598.

[58] M. Reimann, 'Beyond National Systems: A Comparative Law for the International Age' 75 *Tulane Law Review*, 1103-1120 (2000-2001).

However, these conflicting taxonomies result more from different starting points or the focus of the authors rather than from methodological flaws. Therefore, it is not possible to say which taxonomy is better than another.

Comparative law could profit from a complete review of the taxonomies proposed up to the present day, which would bring us closer to a better understanding of the differences and similarities among systems. Some attempts have been made,[59] but the review has been limited to mainstream sources in certain languages. These reviews are valuable but cannot be said to be complete. Hence, a complete review would be an important achievement and a rich source of information from which to start further research.

Unfortunately, there are two main reasons why a review of all taxonomies is far from being feasible. First, such a review would have to be addressed by a team of researchers in many countries and should cover all languages with comparative law materials. Coordination and translation problems might ensue. Second, because legal taxonomies are found in comparative law works in social sciences and humanities sources some already published papers could be overlooked. In addition, when the taxonomy is implied, eg 'Country A is a civil law country', there are no sources cited as the statement is considered so obvious that it does not need to be supported by a source. A complete mapping would therefore imply sifting through an enormous quantity of text.

It is possible to imagine that one day a complete review of taxonomies might be practical through advancements in computer-assisted techniques (optical character recognition, natural language processing, text mining, etc). Data could in turn be aggregated and combined in many ways. This would produce innovative results and new ways of representing groups of legal systems and their relations in space and time.

As it is not possible to evaluate which taxonomy is more accurate than another, the only solution left is to recognize the value of each taxonomy according to the perspective it wants to highlight. After all, each taxonomy is built to answer a certain question, and the answer is specific to the question (eg a geographical mapping or a phylogeny). A corollary to recognizing the specificity of each taxonomy is the impossibility of having a general, all-encompassing taxonomy of all the legal systems of the world. This is because each taxonomy would be limited to some aspects of the legal system.[60] Many taxonomies can coexist. This is not a fundamental contradiction and does not bring discredit to the entire discipline of comparative law. Some can be more revealing or more inspiring, but all contribute to a better understanding of the multiplicity of the law.

## V. Conclusion

[59] n 11 above.
[60] M. Van Hoecke and M. Warrington, n 43 above, 520.

Legal studies have embraced legal pluralism as a key to understanding that many rules operate at many levels in different legal systems.

From the classifications point of view, all taxonomies are an answer to specific questions. However, questions and points of view change over time. Legal taxonomic pluralism shows that contradictions exist because they are in fact different answers to different questions. Comparative law should embrace a pluralist approach to taxonomies as the key to understanding the many different classifications of legal systems.

# The Bleeding of Legal Rules Between Rights and Limits, in the Age of Migration Flows and the Crisis of the Nations

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**Abstract**

This paper assumes that the modern migratory flows, together with the enormous circulation of people and rules, still involve the 'bleeding' of alien principles and practices on the canvas of the host legal system. Accordingly the paper investigates the 'limits' beyond which the order ends up responding to the protection of its integrity and within which the same hosting system welcomes and transpires the 'discoloration' or contamination, evaluating the responses to the bleeding of 'alien' rules and assessing the degree of systematic coherence and 'holding'.

The paper looks at what happens in the legal system of the hosting society, namely to the 'reaction' to an 'imposition' or to the grafting of models incoming from a given society or social group. These cases of 'circulation not institutionalized' end up not so much with 'staining', but rather with the 'bleeding' of the original normative pattern, which may not return 'immaculate' and homogeneous as before. The paper also seeks to understand why some rules are accepted while others rejected; whether there is an 'instrument' other than the well-known economic analysis of the law that may measure the phenomenon; to what extent it is possible for the host system to 'react', to 'inhibit', or at least to 'limit' the 'bleeding' effect without renouncing to the respect of rights and freedoms recognised to all the people.

## I. Introduction: Movement and Enforcement of Legal Models and Social Changes

At the times in which the traditional practice (*Sati*) of burning widows on the death of their deceased husband was still widespread in India, the British wondered how it was possible to ban or limit this phenomenon without violating the principle of recognition of local traditions and rules. The typically 'British' solution was found by the Governor Charles James Napier, who argued against the local complaints who merely demanded respect for their religious rules in the country:

> 'Be it so. This burning of widows is your custom; prepare the funeral pile. But my nation has also a custom. When men burn women alive we

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> hang them, and confiscate all their property. My carpenters should all therefore erect gibbets on which to hang all concerned when the widow is consumed. Let us all act according to national customs'.

This paper assumes that the modern migratory flows, together with the enormous circulation of people and rules, still involve the *bleeding* of alien principles and practices on the canvas of the host legal system. Accordingly the paper investigates the limits beyond which the order (and its socio-cultural tradition, or its national spirit) ends up responding to the protection of its integrity and within which the same hosting system welcomes and transpires the *discoloration* or contamination, evaluating the responses to the bleeding of alien rules and assessing the degree of systematic coherence and holding.

My starting point is to assume that the theories of circulation of models and of legal transplants are correct. But, in my opinion those theories look at an idea of circulation of models in some way dialoguing between legal formants and the powers of states, and largely dominated by the equalization between state-nation-law; in particular, this is true for the theory of imitation and transplant of an alien legal model operated by the political and legal institutions of a country.

Instead, the paper looks at what happens in the legal system of the hosting society, namely to the reaction to an imposition or to the grafting of models incoming from a given society or social group. It is argued that the possible change of the composition of a social group, even to a minimal extent, determines a circulation of models outside or regardless of their actual and formal reception by the institutions, a conclusion that recalls the insights of the well-known theory of chaos. In my opinion, these cases of 'circulation not (yet) institutionalized' end up not so much with *staining*, but rather with the *bleeding* of the original normative pattern, which may not return immaculate and homogeneous as before. The paper also seeks to understand why some rules are accepted while others rejected; whether there is an instrument other than the well-known economic analysis of the law that may measure the phenomenon; to what extent it is possible for the host system to react, to inhibit, or at least to limit the *bleeding* effect. In other words, the paper questions whether, how, and to what extent, the law and society of a given state can react to contamination, without renouncing to the respect of rights and freedoms recognised to all the people. This is an actual and serious problem with a high rate of systematic and logical contradiction (I am thinking of the French ban on wearing a veil or being dressed on the beach, but also of the abolition of the crucifix or the *Presepio* (Christmas crib), *Halal* slaughtering, the practices of infibulation, the combination of weddings, polygamy, or polyandry, and so on).

The terrain here is slippery, especially if approached from a purely juridical-regulatory point of view. There is, in fact, the risk of creating monsters, such as the forced adoptions of the children of dissidents in communist (but not

only) systems or the automatic deprivation of parental responsibility in the case of parents who are terrorists or members of the mafia. In this sense, the systematic coherence and the holding of a system are questioned as such issues are likely to generate clashes between the formal respect of rules and the denial of rights. In other words, we are dealing with the 'dark side of the law', that is the perverse and negative effect of the apparent respect of rules.

These contamination phenomena have always existed and to a certain extent they are also dealt with by the authors of the theories of legal transplant and circulation of models and more recently also of those of the sustainable diversity and reconciliation of legal traditions. However, the theoretical explanations to the reception of a model external to the receiving system are usually related to economic or political justifications.

It is often said that a model has been received for its prestige. While this is true, it is then necessary to assess whether the prestige of the model does not lie in the political strength (which also means economic and military) of the country from which the model is received. In Japan, for instance, both the constitutional and the commercial law systems follow the common law model, in particular the American system. It must be noted, too, that Japanese legal system has also been deeply influenced by the reception of models from civil law systems (French, Italian, German) and for this reason fully belongs to the Western Legal Tradition. These transplants, however, are rarely the consequence of a free choice following by the undisputed '*prestige*' of the model; I would say that here it has also been very evident the weight of the political and economic strength of a given country in relation to another one.

We have a lot of examples in this sense and last but not least also the cases of 'reticular polity' (as defined by Antonino Palumbo), ie the imposition of external rules by extra-national entities on sovereign systems that in fact ... are very little sovereign: this is the case of the rules imposed on Greece by an entity that is not legally recognized or recognizable (the so-called 'economic Troika' a informal body composed by representatives of the European Commission, the International Monetary Fund and the European Central Bank) whose 'advice (...) hardly can be refused' as said the protagonist of the beautiful film by Francis Ford Coppola, 'the Godfather'.

## II. Purity versus Hybridization

The other aspect that I believe must be taken into account is the assumption (which is at the base of the theory of circulation of models and legal transplant but also at the base of sustainable diversity) that the models are to some extent unique and linked to a given legal tradition identifiable with a precise system connected with a state and therefore a nation. Patrick Glenn himself maintains that the juridical traditions evolve because of the circulation of ideas but each of

them remains solidly anchored to certain juridical values, so that in theory it should be possible to find an identifying nucleus of each tradition (assuming that the concept of juridical tradition can be precisely identified and defined).[1]

This is evident, too, if we look at all the classifications of juridical families in the doctrine: however while we speak of 'Roman-Germanic family' in reality we identify its ancestor in a single particular system ie French law, or rather, to be precise, in law of French People (the code Napoleon is in fact the 'Code of the French') and not in the 'Roman Law Tradition'.[2] But it is also evident even if we look at certain phenomena of reception of institutes, first of all, at the reception of the model of French codification: in the Kingdom of the two Sicilies first and in the Kingdom of Italy then, in fact, the Napoleonic code was literally translated, transplanting it into a reality quite different from that of imperial France.

Similarly, if we look at the common law area, it is easy to consider England and its legal system as the ancestor, but even if contemporary England seems to chase the United States, I find it rather difficult to think that its tradition is not based on values, concepts, and ideas that are typically British, so that Ugo Mattei[3] says that the rule of *stare decisis* is pure in the United States but no longer (and I would say that it has never been) in England.

Even in these cases, however, the model is acquired and imposed by a precise political institution or power and therefore by an elite, but not necessarily by the society that composes the state/nation. In these cases, too, it is assumed that the political institution represents the people as a whole and that there is a precise identification between institution-state and civil society. The public authority therefore speaks in the name and on behalf of society (I would say in the illusion generated by the theory of social contract), at least as far as the Western Legal Tradition is concerned, even if this delegation is also inherent in the Confucian thought of the sovereign's good job and so on, according to the different philosophies and beliefs. It never happened to me to read a study of a power or an institution that openly declares that it is operating for the evil of its own society.

By this I do not mean that the law is a superstructure, on the contrary. I

[1] For a strong criticism to the theory of Glenn see N.HD Foster, 'Introduction', in W. Twining et al, 'A Fresh Start for Comparative Legal Studies? A Collective Review of Patrick Glenn's Legal Traditions of the World' 1(1) *Journal of Comparative Law*, 100, 103 (2006): 'More generally, (Glenn) argues that the definition of a legal tradition in terms of a network of information is limited as regards law, and that the very concept of tradition as information is itself flawed'. W. Twining, 'Glenn on Tradition: An Overview', in Id et al, 'A Fresh Start for Comparative Legal Studies? A Collective Review of Patrick Glenn's Legal Traditions of the World' 1(1) *Journal of Comparative Law*, 107, 112-113 (2006), says that: 'Glenn is perhaps too dismissive of (the concepts of culture, system, legal family and civilisation), some of which are useful at different levels of generality' and that 'in order to transcend and compare legal traditions, Glenn needs an analytic concept of the "legal" '.

[2] More than in the law of Rome ... since there is a fine difference between the law of Rome kingdom compared to the republican and finally to the imperial law.

[3] U. Mattei, *Stare Decisis: il valore del precedente giudiziario negli Stati Uniti d'America* (Milano: Giuffrè, 2008).

would just like to observe that transplants of norms, circulation of models, flows of juridical traditions take place anyway. These often take place through the action of a public power, of an institution (of the state? the nation?) representing the society.

Accordingly Jürgen Habermas[4] says, the 'Nation' is born from a free social contract between 'peoples' (but what is a people?) that recognized themselves in a common Constitution so that even the concept of 'homeland' is modified and the 'patriotism' becomes 'constitutional': the Nation is therefore such from a political point of view while the Constitution contains a strong sense of belonging, a series of common institutions, a presumably constancy, and persistence over time etc.

However, this idea refers anyway to a power of a specific institution that apparently seems to be pure and identifiable.

In 'A theory of justice' of John Rawls,[5] for instance, the question of the protection of rights in a 'well-ordered society' is dealt with by using the old notion of the rule of law as an ideal type. In this sense, the rule of law requires the government to exercise its power in accordance with well-established and clearly written rules, regulations, and legal principles.

Even in Glenn's idea, each single 'legal tradition' (that is constituted also by also cultural, social, beliefs and myths) must be 'verbalized', in the sense that in order to be identified it is necessary to refer to precise political institutions representing and declaring it.

It is also necessary to declare the transflow of reciprocal influences without which it is difficult to understand whether and to what extent there has been mutual influence and, above all, 'peacefully sustainable' as Glenn himself maintains.

Among the main criticisms to Glenn, indeed, there is the accuse to be too theoretical and not to take into account the current state of western legal tradition and the reality of the facts. As stated by Nicholas HD Foster,

> 'anyone with knowledge of a field such as colonial law reception, law and development or Islamic finance, or indeed to anyone who has ever done a transaction with a major US law firm, the idea of a non-imperialist, multivalent and accepting Western law tradition seems unrealistically rosy'.[6]

Having said this, however, we must also admit that as long as we can isolate the legal system and everyone can boast a dose of 'own' autochthonous legal tradition (in Naples we have a nice way of saying that ...'even fleas have the cough', ie even those who are very small raise their voice assuming its diversity

[4] J. Habermas, *L'inclusione dell'altro. Studi di teoria politica* (Milano: Feltrinelli, 2013).

[5] J. Rawls, *A Theory of Justice* (Harvard MA: Harvard University Press, 1999).

[6] N.HD Foster, 'Kindling the Debate on Diversity: Chapter Ten of Legal Traditions of the World', in W. Twining et al, 'A Fresh Start for Comparative Legal Studies?' n 1 above, 175.

and originality) in reality I don't think we can say that today there really exists a 'pure' system. In my opinion, but it is also a matter of fact, we can say that all the legal systems are 'hybrids' in the sense that they have been contaminated by others, a bit like the 'cyborgs' that are not (entirely) robots but are also human depending on the amount of implants they have received.

As we have seen before, the models as English or French or Roman systems have lost their purity because, with a rebound effect, they have been influenced by the same systems that influenced them in a sort of loop (who is passionate about music knows very well that the rhythm and blues has influenced the Beatles and Rolling Stones that, in turn, ended up influencing the American rhythm and blues).

This is a historical and concrete fact to which no legal system escapes, as it is exemplified by, for instance, one can take a look at the history of the Italian law or English law. However, it must also be admitted that this phenomenon has increased in modern times by means of the disappearance of the *power* of states/nation. In reality, the phenomenon is twofold: on the one hand, there is the hybridization and contamination of all systems due to technological, political, economic and social changes; on the other hand, there is a real loss of decision-making and representative power of the nation that can no longer control its borders and exert its powers, not even the legislative one, in an absolute and sovereign way.

A few years ago, Professor Stefano Rodotà told us about the existence of a 'set of travel rights' ie the possibility for individuals to carry in their suitcases some rights wherever they went. This is a valid thesis and it is emblematic of the perception that the Western jurist has of the permeability or mobility of borders and of the relative impotence of state powers and also of the *futility* of national laws. To give an example, I think of the historical rule of 'territorial waters' that were once such because the nation concerned was 'physically' able to exercise its sovereignty by defending the coast with cannons, in the era of missiles it becomes ridiculous to think that six or twelve miles are an impassable limit. For this reason, nowadays, the respect of the territorial waters is a question of international politics. Phenomena like this one are today the more frequent than in the past: the Internet has literally skipped frontiers; technological development allows for an ease of movement that was previously unimaginable; the circulation of communication is also practically limitless; economic development and economic degrowth as local political choices create unexpected situations, above all uncontrolled and uncontrollable. There is enough to understand how, not only 'statutory law', but also the entire legal systems no longer have control over the recipients in a sort of 'orgy of globalization' that, rather than 'sustainable diversity' based on free choices, it seems forced hybridization due precisely to the crisis of the state/nation and the development of other (alternative and parallels) centres of power.

## III. Hybridization and 'Bleeding'

On the one hand, what emerges from the above is the presence of various levels of 'power groups' and decision-making groups that work side by side and sometimes replace the legislative and executive powers; on the other hand, we experience a breakdown of the unity of the people and of autochthonous interests as well as values. These, instead, are relegated to the background of many legal systems and are destined to fade.

I have recently travelled to Vietnam and I was very impressed to see wedding parties in 'Western style' with American dances and music, huge shops for electronic products and any other goods, large buildings, the incredible number of people who used iPhone continuously: all this in a country that is defined by itself as 'communist'... and where the organs of the State are still organized in the original way. In fact, I cannot think that the central power of the State has accepted, by accordingly amending its laws, the American model, even if the latter has so strongly influenced the way of life and also the rules followed by Vietnamese society.

Here more than hybridization we witness what I have called the *bleeding* (*stingimento*), that is to say the draining effect, of alien rules, values, myths, and fashions on the canvas of the autochthonous system.

With respect to hybridization or transplantation, the bleeding effect is essentially independent from the effective recognition or import by the 'powers' of the state. As we have seen, it can be done with the adoption by a given population or society of alien myths, fashions, cultures, rites, customs, languages, and habits.

I have already said of Vietnam, but the world is full of such bleedings not necessarily translated into explicit legal rules.

I think of, for example, the use of English as a *lingua franca* (even here, in fact, we are speaking English. Let's do an experiment and see who can tell me how it translates 'come here' into Turkish? Or in Latin? Yet in English everyone knows how to say that. And how do you say 'contract' or 'property' in Turkish or Aramaic?). We can also think of the economic and credit mechanisms or of the 'contractual business practices', ie the 'common customary rules' that are followed by companies regardless of (and often even in contrast to) the norms of the legal system in which they operate.

Today the phenomenon of bleeding has one more form that follows the renewed consistency of migratory flows.

Migration is not infrequent in history (as is the barbarian invasions). Many modern countries are the result of great migrations. The United States, for example, are (or perhaps it's better to say they were) a country that has its strength in being a melting pot. Italians are also the result of the stratification of many invasions. Japan, if I am not mistaken, has developed as a result of a Chinese or Asian influence, even though it has sometimes proved to be suspicious of *gaijin*.

But, even here, beyond the transplantation of legal rules, there has been a bleeding of alien rules on an autochthonous canvas. If we look well, Britons too are 'sons of an invasion' and of the stratification of cultures and different ethnic groups. In other words, no one can claim to be pure.

In the case of contemporary migratory flows, however, there is an element of novelty as these flows involve the creation of enclaves that remain either apparently separated from the local social group or, tend to maintain their own cultural and legal habits. This is probably the consequence of the short life span of migration and of the difficulties in choosing the country where to settle.

Examples of the first case are the Chinese communities in Italy that have their own rules, rites, and customs, and that tend not to open up towards the host society (at least at an early stage).

Examples of the latter type are, again in Italy, the Islamic religious communities coming from sub-Saharan African countries or Asia, which often ended up staying in Italy only because they could not migrate to the countries of Northern Europe.

There are also the large communities that have consolidated their presence and which, despite a reasonable degree of integration, maintain their traditions and rules. In these cases, the *bleeding effect* is consequent and functional to the growing and consolidation of the alien group.

This phenomenon is even more clear at the level of micro-comparison. Here too, we have two possible alternatives: on the one hand, there is a bleeding or rather a 'declared' hybridization, filtered by the powers of the state (I think not only of the legislative power but also, and I would say above all, of the judicial and executive power of the states, ie the public administration).

The second alternative consists of the real bleeding, ie the presence of alien rules followed by a given community regardless of native rules that are, anyway, touched.

Let me give an example to clarify the concept: in Palermo, there is now a large Pakistani community of Islamic religion. Some of them have begun to engage in small business activities gaining some stability. Obviously these people, (regularly immigrated), rent premises, someone bought an apartment in a condominium, etc. Of course, to do their business, to purchase a house, to rent a room, to buy and resell goods, they must comply with the Italian legal provisions ruling these relationships. But alongside this, the relations within the community are often governed by the specific rules of that social group. If the owner of the rented premises is Pakistani as the tenant is, regardless of the Italian rules, the agreement is often regulated 'in the Islamic way'. This, in turn, creates a sort of parallel reality. Obviously, since it is not possible to keep these two realities separate forever, they end up meeting each other and so alien rules 'lose color' by bleeding on the canvas of local and indigenous norms.

Thus change the way in which (all) people negotiate, change the opening

hours, change the competition with large shopping malls of small family businesses, change the 'food' and product rules (I am thinking of the *Halal* slaughtering issue), change the cost of labour and the commitment to work.

It goes without saying that in this situation we should ask whether and to what extent the host legal system can tolerate the bleeding (by declaring hybridization and thus integrating its own system) or cannot use the 'bleach' to wash its regulatory pattern.

## IV. Bleeding, Hybridization and Dynamics of Systems

As I said before, Glenn believes that a dialogue between systems based on mutual knowledge and tolerance is possible, even though he admits that each system has its own juridical 'tradition'. Apart from the criticism of this thesis and while admitting that there may be a coexistence of parallel systems, I strongly doubt that in this case, at the end of the day, there is not a minimal degree of *bleeding* or a deviation from the original purity of the regulatory pattern with the risk of its irritation or negative reaction.

When we try to understand why a legal transplant is a success, jurists draw the concept of efficiency from the economic analysis: the winning rule is the one that, by allowing the reduction of transaction costs, is the most efficient and convenient in the economic sense. I am not an economist and I am not very familiar with formulae and mathematics, but it does not seem to me that this type of analysis can be applied to all situations, especially when there are interests involved that are not purely economic. If it were so easy... in theory there should be no controversy.

In any case, it is difficult to understand the reason for the bearing of bleeding or hybridization or transplantation or the reasons for their rejection only on the basis of the alleged economic efficiency or inefficiency of the choice.

Who goes with the lame learns to lame or those who lie down with dogs get fleas, so having a daily attendance with a business economist colleague of mine and with ... my wife I did a kind of test: I asked both of them to tell me why our society should 'welcome' a foreign culture or a foreign rule. In fact, my question was more sneaky, because I had previously asked why, according to them, American music is so successful in Italy and why, so far, no one is subject to the Islamic prohibition (but once spread among Catholics) of listening to Rock and Roll.

The answer was almost identical: we follow an alien 'thing' if it is compatible with our habits but above all if we 'like' it (as my wife says) or improves our quality of life (as my colleague says) present or future (the Catholic promise of paradise for the poor, the Islamic promise of virgins; who knows what women think of it).

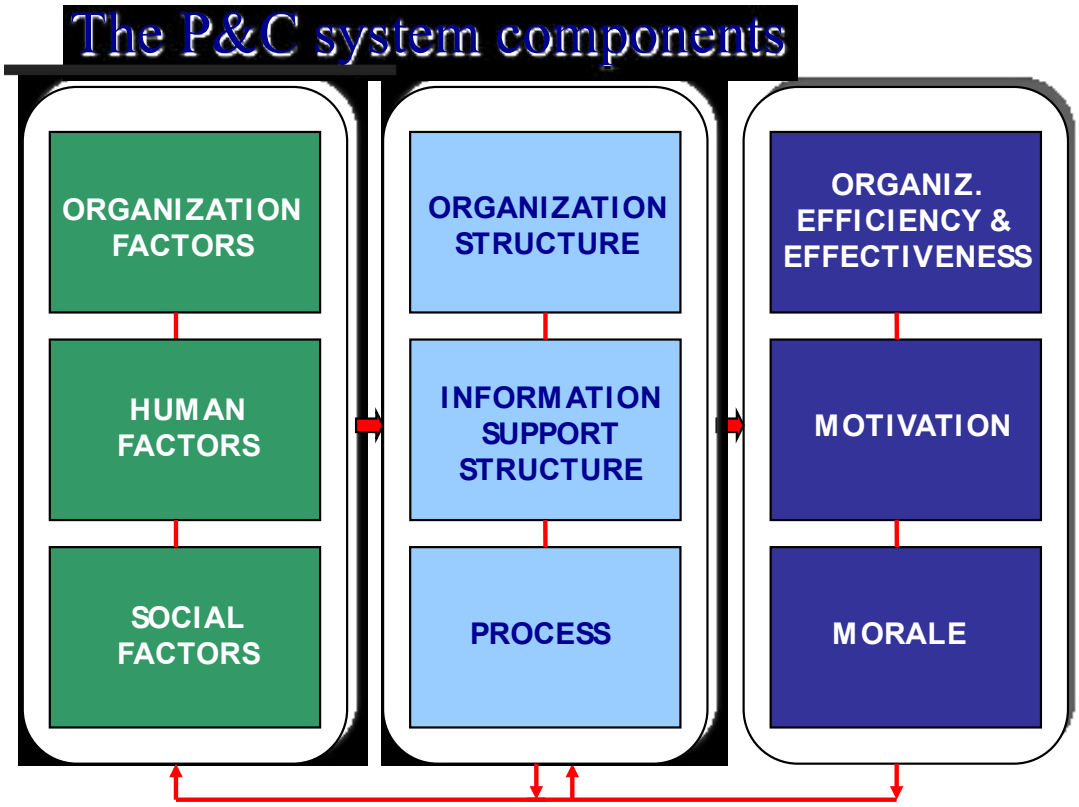
We reject what 'we don't like' or what we believe can worsen our quality of life.

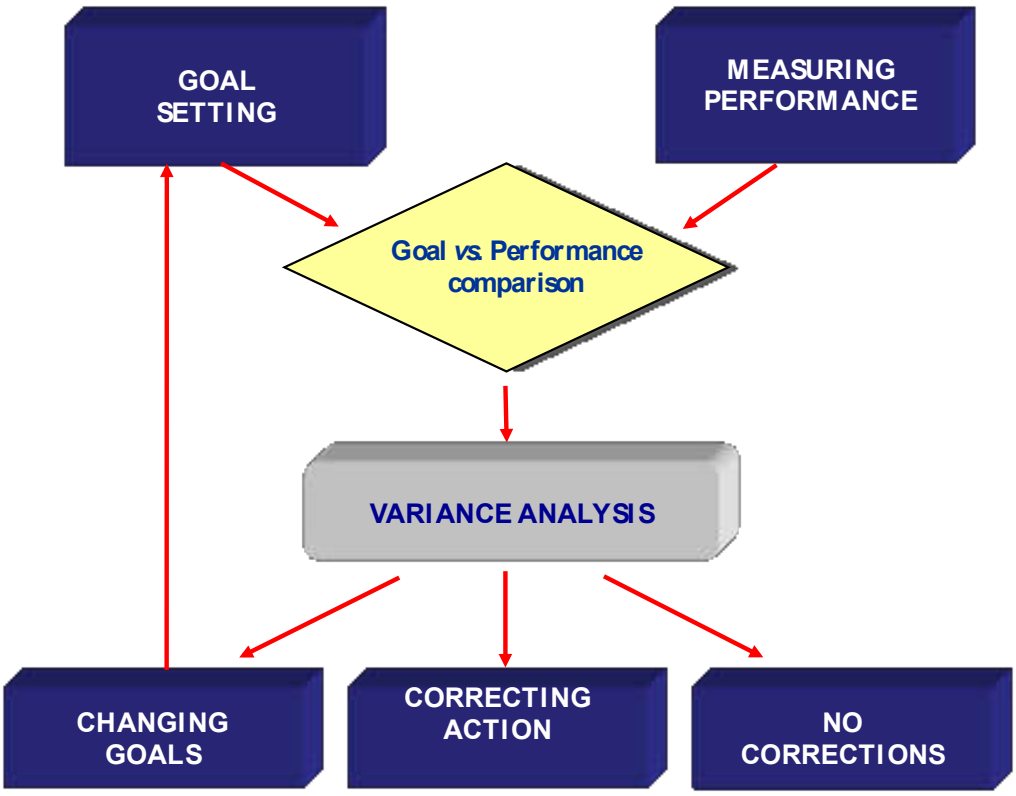
In this sense, 'the individual satisfaction' plays an important role in the

dynamics of systems and can help explain why we continue to use the 'discoloured' canvas instead of throwing it away or trying to clean it.

I have no more time to deepen this point, which requires particular knowledge of system dynamics analysis, but I would like to show you three slides that show the components of the planning and control system and an organizational system's model, from which it emerges clearly how the best results of a complex organization are obtained trying to achieve the individual satisfaction and the improvement of the quality of life individual and collective.

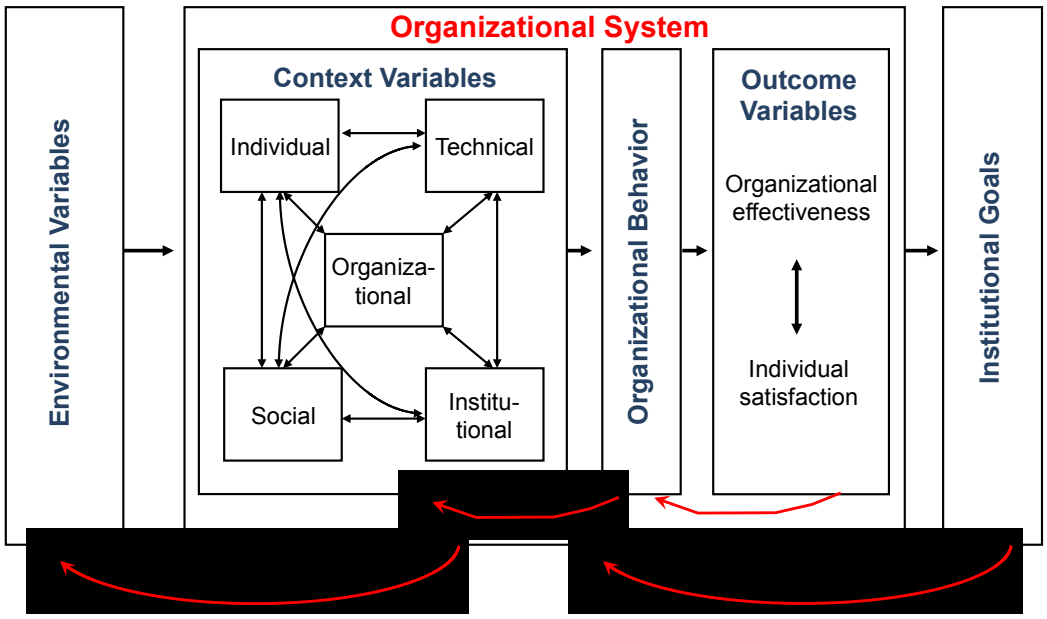
How and if really succeed... this is another problem.






## An Organizational System's model

*(adapted from Seiler, Systems Analysis and Organizational Behavior)*



Obviously the dichotomy 'like/doesn't like' or 'improves/does not improve' the quality of life has to be seen in a relative and not absolute sense. There is no universal category of 'beautiful' and what I like, with my cultural background, maybe be disliked by another person. However, there are things that people love or are considered 'beautiful' in relation to a given social group. From a juridical perspective, the concept of legal tradition comes back powerfully but this time as seen from below and detached from the restrictive idea of one state/ one nation/one population/one law.

The social context is also a legal context and the cultural background (in a broader sense) of a society influences the behavior of individuals and their perception of the quality of life, regardless of whether they are citizens or subjects of this or that nation or state. The legal tradition is composed by values and behavior shared in a given historical moment by that social group, not by values imposed or granted from the top by a more or less strong power.

I do not want to deal here with an issue that would take a long time and which is, of course, debatable. However, I will limit myself to observing that it is in the right of private individuals, ie in the right of interpersonal relationships and not in public or constitutional or criminal law that we find strong, very strong common values (universal?): property, contract, responsibility, succession, family are all institutions that, in the obvious variability of forms and organizations, are shared by the people and independent from the presence of an authority or a central power that 'recognizes' them and impose their observance. The private law rule has the characteristic of spontaneity and bilaterality making it independent from authority as a product of the same subjects that respect it.

If we add to these shared institutions the variables due to the cultural models that each social group develops together with the so called 'values' ie the principles that allow to achieve the best quality of life (for that particular social group and in that given historical period) we will have a clearer idea of what is the 'legal tradition' or the system of shared rules of the society.

## V. The Destiny of Bleeding. Public Order and Morality as Benchmarks

Having said that, we have some more elements to answer the question of whether and to what extent a system can accept the bleeding or should try to contain or remove it.

The key point is the coherence of the system. Coherence must be seen in two ways:

(a) endogenous consistency, ie coherence between the protection of recognised rights and the prohibitions or limitations imposed by the legislator on alien rules;

(b) exogenous consistency or 'assessment' of the degree of compatibility of alien rules with the principles of the hosting legal system.

If we stop only at the first aspect, the risk is that of the contradiction of the system. In this matter there are well known cases: I take up here the example of the French law which prohibits the 'ostentation of religious symbols' which in Italy we have, unfortunately, mimicked by ridiculous decisions forbidding the public exposition of the crucifix as the suppression of 'Merry Christmas' wishes in favour of a more politically correct 'Good Festive Season'. It is clear that there is here a systematic contradiction whereby, on the one hand, the legal system recognises and protects the right to profess one's religion and, on the other hand, prohibits the expression of one's beliefs through the use of religious symbols or, which I think is even worse, when requires not to wear a *burquini* on the beach.

In these cases, restrictive interpretations of laws are used to try to prevent a phenomenon, but they enter into blatant contradiction with the proclaimed principles and guaranteed rights.

Likewise, there is a strong risk of systematic contradiction in cases of deprivation of parental responsibility when parents are *Mafiosi* criminals or terrorists; the intention is (like in Italy nowadays) apparently good in the sense that the law (or better the courts), relying on best interest of the child, is concerned with 'taking away' the minor who is not yet trained and mature from an education to hatred or to bad acting. However, even here the contradiction is evident between the protection of the right-duty of parents to educate and to raise their children and the provision to do so according to what the law considers to be the child's best interest. With a very serious and concrete risk that construing literally the law it may be possible to justify the abduction of child of any political dissident or even of a simple system protester or a poor thief.

However, this is a typical flaw of civil law systems. Sometimes they are too much tied to the letter of the law and less capable than common law of looking at the 'heart' of problems and quickly adapting to social changes. And here we go into the second aspect, that of exogenous coherence.

Faced with the bleeding caused by alien rules, we can assess whether the new situation is in fact and concretely compatible with the principles of the legal system and therefore can be tolerated or incorporated within the legal system itself.

This phenomenon was widespread in the common law area but, as a result of the strong new migratory flows, it is now relevant in many civil law systems including the Italian one.

The case of the *Kafala* seems to me emblematic. According to Islam, parents, in agreement with each other, can entrust the child to someone who is able to care, instruct and maintain him in the event of their absence or impossibility. More recently, the child tends to be entrusted to a person residing in European countries in order to ask for 'reunification' and obtain an entry visa for the country of the caregiver.

France refuses to recognise *Kafala* because it considers the adoption as

strictly limited to the only hypotheses provided for by the law and therefore without looking at the 'purpose' for which both adoption and the *Kafala* aim. Furthermore French judges hold that in reality the *Kafala* is a way to circumvent immigration rules.

In the United Kingdom, judges, assessing the core of the institution and considering it essentially identical to the foster, found that the *Kafala* was in conformity with the law, upholding the request for reunification, rejecting it only when it was proved that it was an escamotage to obtain the entry visa and not a real custody.

In Italy, after conflicting decisions, the courts now hold the *Kafala* to be compatible with our legal system, as it corresponds in the substance to the adoption and therefore does not conflict with the principles of public order.

Other cases, especially of family law, are now widespread due to the number of migratory flows (I am thinking of the Romanian community, which represents one per cent of the population in Italy or the four million non-EU foreigners, ie ten per cent of the population).

The recent data on divorce between former spouses, when at least one of which is not Italian, show how widespread the phenomenon of the contamination between local and foreign rules is.

Similarly, in England it is possible to let the so-called 'Islamic courts' do on condition that the decisions taken by them are compatible with the general principles of English law.

We have reached the end of this long journey through which we had to run as Forrest Gump. The topic is complex and would require further in-depth and critical analysis.

In my opinion, however, a comparative conclusion can be made. As I said, the main problem with the rules is the assessment of compatibility or incompatibility with the legal system and the maintenance of the systematic coherence of the legal system itself.

If we look at the decisions or reactions of the French and Italian system (but I do not doubt that it is the same for all systems of the civil law area) it seems clear to me that the compatibility or incompatibility are assessed in terms of 'policy' rather than in terms of strict law, usually by using the 'negative' limit of public order.

If we look at the decisions and reactions of the English system, it seems to me that the assessment of compatibility or incompatibility is taken case by case and as matter of fact through the comparison made by judges (never monocratic and always of great experience) with the 'values' (of which the public order is only one of many elements) ie those principles of collective and social interest recognized by the communities: the sanctity of the person; the sanctity of property; national and social safety; social welfare; morality of the day; respect of tradition; the peaceful national and international coexistence; etc. Those values are not

'codified' but depend on social and historical changes.

I wonder if the English lesson is exportable at least in civil law systems. In my opinion, also in the civil law systems (and in the Italian one in particular), there are rooms for evaluating the tolerability of bleeding in order to ensure systematic consistency and, at the same time, adaptation to the new historical and social realities in accordance with the best quality of life for all associates. Indeed we too can refer to the 'general principles' in our legal system – as expressly stated by the Civil Code in Art 12 of the preliminary provisions – and we can in addition, refer not only to the public order but also to the concept of 'good custom or morality'.

Very briefly I remember here that public order has been defined as 'the set of fundamental juridical assets and of primary public interests on which is based the orderly and civil cohabitation in the national community' (Art 159, decreto legislativo 31 March 1998 no 112) and is seen in a negative sense, ie as a limit to any behaviour in contrast with the rules of the State. While 'good custom and morality', ie the set of principles and ethical-social values of a community,

> 'even more than public order and other elastic clauses of the legal system, requires a continuous contact between norms and the multiform variety of social life. So, far from having a unique, eternal and immutable content, the "good custom and morality" can be filled with correct contents only with reference to the historical-social-moral contingency of a community'.

In my opinion, it is precisely from the mixture of these three elements that it is possible for the interpreter to deduct in a more objective way what are the 'values' at the basis of society and of the legal system. Through them it is possible to assess whether and to what extent the alien rule bleeding the native normative pattern is or not compatible and therefore acceptable.

Like all closing clauses, the triad public order + morality + general principles of the order has a rubber nature that is sufficiently elastic to adapt to novelties but rigid enough to avoid alterations and contradictions.

I very well understand that even in these cases the assessment will always be an evaluation entrusted to an interpreter, a judge, a lawyer, a politician... with all the risks involved. However, I am confident that any system contains in itself the antidote to arbitrariness.

After all, as I say to my students, the most important rule in law is the '*Boskov*' (famous Serbian coach of many famous football teams) rule: game is over (penalty is) when the referee blows his whistle.

Ultimately, the most difficult but essential thing in law is to decide.

# Anti-Discrimination Legislation and Work Placement for Persons with Disabilities. A Comparison Between Italy and Japan

Pierluigi Digennaro*

**Abstract**

The essay provides a comparative overview of the laws concerning discrimination of disabled workers and the employment of persons with disabilities in Italy and Japan.

Both legal systems combine a quota-levy system with antidiscrimination dispositions. Also, Japan recently embedded a human-rights approach including a prohibition on workplace discrimination in order to comply with the UN Convention on the Rights of Persons with Disabilities.

Notwithstanding these similarities, there exist certain differences concerning not only the detailed provisions or procedures but also the general legal framework and the way in which international standards are arranged in the respective national systems.

The paper analyses the Italian and Japanese legal frameworks in the context of the general outline of the subject and also aims to provide a uniform basis for the future work of experts in the field.

## I. Introduction

The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) dates back to 2006.[1] Since its adoption, the UNCRPD has triggered the amendment of previous laws in the field of discrimination and employment of disabled people in many countries with important changes occurring in countries with different legal traditions such as, for example, Italy, Japan or New Zealand.

The UNCRP has also been ratified by the European Union (EU) and by each of the member States most of which already had specific laws regulating at least some of the issues that the UNCRPD takes into consideration while the EU itself had already set directives against discrimination as one of its historical pillars.

The UNCRPD is a major step forward in the transition from the conception of disability as a natural condition of physical or psychological impairment to a relational concept, resulting from the interaction between persons with impairments

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[1] United Nations Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened to signature 13 December 2006, entered into force 3 May 2008).

and attitudinal and environmental barriers.

This new conception of disabilities has probably been the most difficult directive to implement for national legislators because it affects the legal definition of disabilities in each legal system. Indeed, those definitions commonly developed in continuity with those included in previous legislation that often dates back to the First World War or even further back in time when disability was considered a matter of charity or assistance and, as such, as a financial burden on the State.

Scholars have identified two different policies in the field of employment for disabled persons, namely the '*equality of opportunity approach*' which is based on the recognition of civil rights for disabled people considered as a political minority and the '*employment quota approach*' which considers the disabled person only as a welfare recipient. This distinction reflects the difference between the social model and the medical model of disability with the second model reinforcing the '*separate treatment*' doctrine.[2]

The USA and Japan have long been considered as typical examples of those two ends of the spectrum of employment protections for the disabled.

I argue that this description of the different models which scholars have adopted is too categorical and is indeed difficult to reconcile with both the European model and that of Japan which has been profoundly reformed by recent amendments to the Act on Employment Promotion of Persons with Disabilities (AEPPD) in 2013 inspired by the UNCRPD.

Indeed, on the one hand, one of the issues with a quota system is that it commonly requires a clear-cut definition of disability in order to specify the target of the placement system explicitly, and this often results in the persistence of forms of '*certification*' of disability released by medical commissions or committees of experts.

As a result, also the idea of a disability based on a medical statement tends to endure.

However, on the other hand, all the European countries that first introduced the quota system after the First World War (for example Italy, France or Germany) coupled it with antidiscrimination provisions at a later stage so that the former is nowadays framed as a positive action aiming at boosting the participation of disabled persons in society and the labor market.

In other words, the quota system is a useful tool to rebalance the lack of opportunity that disabled people often have to face in the labor market, giving them a real chance to gain a more equal position in the society.

Moreover, a proper assessment of any legal framework also depends on the way the reasonable accommodation duty has been embedded and on what its function in it is. Indeed this duty plays a key role in the completion of the shift from the medical to the social approach to disability.

[2] Recently see, for example, K. Heyer, *Rights Enabled* (Ann Arbor: University of Michigan Press, 2015), 24-28.

This paper cannot analyze in depth all of these involved questions. However, it can furnish a contribution to the debate by providing an overview of the Japanese and Italian legislation on the matter of discrimination and placement of the disabled at work as a basis for future consideration keeping in mind the general outlines of the subject.

The comparison between Italy and Japan is of interest because the key elements of the most recent amendments introduced in the latter country, such as a broader definition of persons with disabilities under the law, the introduction of the prohibition of discrimination against persons with disabilities and the obligation to provide reasonable accommodation brought the Japan system much closer to a third group of mainly European countries which had already merged the quota system with dispositions against discrimination.

The regulations of the two countries under scrutiny will be presented starting from the interpretation of the Constitutional provisions which enable the legislation on this subject. Some information about other dispositions more broadly related to disabled persons will be furnished although the focus will be on the anti-discrimination law at the workplace as well as on the mechanism of employment for disabled persons (the quota system).[3]

In the case of Japan, some clarifications related to the Japanese labor law peculiarities will be underlined to explain better the rationale underpinning certain provisions which might not be readily intelligible without such elucidations.

## II. The Italian Legal Framework

The Italian Constitution is probably the most prominent example of '*Social Constitutionalism*' and therefore it views work as the cornerstone of human development and as the foundation of the Republic.

Art 3 para 1 of the Italian Constitution contains the solemn proclamation of the equal social dignity of all the citizen and the principle of formal equality before the law irrespective of any personal characteristic.[4]

This principle 'has been applied by the Constitutional Court (…) as a complex principle that presupposes an evaluation of different personal and social conditions', so that any law is considered *reasonable* before the Constitutional Court if like cases are treated alike, and different cases are treated differently.[5]

[3] Both the quota systems of Italy and Japan shall be labeled as quota-levy system. Typically in this case a quota is set-and it is required 'that covered employers who do not meet their obligation pay a fine or levy which usually goes into a fund to support the employment of disabled people' (L.B. Waddington, 'Reassessing the Employment of People with Disabilities in Europe: from Quotas to Anti-Discrimination Laws' 18(1) *Comparative Labor Law Journal*, 62 (1996)).

[4] 'All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social condition'.

[5] See R. Del Punta, 'What Has Equality to Do with Labour Law' 18(2) *The International of*

Moreover para 2 of the same Art 3 places on the Republic the burden of removing

> 'obstacles of an economic and social nature, which constrain the freedom and equality of all citizens, impede the full development of human personality and the effective participation of all workers in the political, economic and social development of the country'.

In this framework, all the labor legislation and the anti-discrimination law are tools to implement Art 3 para 2 of the Italian Constitution and thus reach the substantive equality.[6]

The protection against all forms of discrimination that target persons with disabilities is ensured by two different legislative instruments, namely legge 1 March 2006 no 67, regarding measures for the legal protection of people with disabilities who are victims of discrimination, and decreto legislativo 9 July 2003 no 216 which implemented Directive 2000/78 /EC on equal treatment in employment and working conditions in the national legal system.[7]

Both of these regulatory instruments adopt the same concepts of direct and indirect discrimination as well as of harassment directly inspired by the European Directive.

As is well known, in the European framework, direct discrimination occurs when a person is treated less favorably than another is, has been or would be treated in a comparable situation on one of the protected grounds. Indirect discrimination, on the other hand, occurs where an apparently neutral provision, criterion or practice would put persons who belong to specific groups in which all the people share a particular characteristic at a particular disadvantage compared with other persons.

The above mentioned legge no 67/2006 exclusively addresses people with disabilities but has a wider scope compared to the decreto legislativo no 216/2003 in terms of field of application. The decree is designed to provide disabled persons with the full enjoyment of their civil, political, economic and

*Comparative Labor Law and Industrial Relations*, 197, 199 (2002).

[6] The Italian Constitution directly deals with disability at Art 38 where the latter is considered as an issue the welfare state has to cope with. In fact, under Art 38 'Every citizen unable to work and without the necessary means of subsistence has a right to welfare support. Workers have the right to be assured adequate means for their needs and necessities in the event of accident, illness, disability, old age and involuntary unemployment. Disabled and handicapped persons have the right to education and vocational training. The duties laid down in this article are provided for by entities and institutions established or supported by the State. Private-sector assistance may be freely provided'. For a correct interpretation of this article in conjunction with Arts 2, 3 and 4 (right to work) of the Italian Constitution refer to P. Digennaro, 'Right to Work and Placement of the Disabled in the Labour Market: The Italian Legal Framework' *Revista derecho social y empresa*, 143, 149-151 Suplemento n.1 Abril (2015).

[7] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

social rights through the prohibition of any discrimination in any field or sphere of social life and relations. Conversely, decreto legislativo no 216/2003 has a broader range of recipients since it regulates equality and the prohibition of discrimination against any individual on the grounds of religion, personal beliefs, disability, age or sexual orientation. However, it targets discrimination exclusively in the employment context from the hiring process and access to employment until the termination of the working relationship and includes any event related to it.[8]

A new article (Art 3-*bis*) has been added to the decreto legislativo no 216/2003[9] in order to guarantee the compliance of the Italian legislation with the European directive after the Court of Justice of the European Union (CJEU) found Italy to have failed in fulfilling its obligation to ensure the correct and full implementation of Art 5 of Council Directive 2000/78/EC.[10]

Therefore Art 3-*bis* decreto legislativo no 216/2003 introduced in the Italian system the reasonable accommodation duty for public and private employers. The provision refers directly to the definition of the reasonable accommodation included in the UNCRPD rather than to the Directive and does no more than implement the general principle without any further or more detailed regulations. As a result, Art 3-*bis* decreto legislativo no 216/2003 provides an ample space for a judge-made implementation law since Courts will need to design boundaries and define the significance of the embedded principle in concrete form by means of interpretation.

Alongside the anti-discrimination law, the system is still founded on the obligation of employers to hire a quota[11] of disabled workers and, in the event of

[8] In order to have a general overview of the state of the implementation of anti-discrimination law and directives in Italy refer to C. Favilli, 'Report on Measures to Combat Discrimination (Directives 2000/43/EC and 2000/78/EC Country Report)', 1 January 2014, available at https://tinyurl.com/y8xabgyd (last visited 15 November 2018).

[9] By means of Art 9, para 4 decreto legge 28 June 2013 no 73, converted into legge 9 August 2013 no 99.

[10] Case C-312/11 *European Commission* v *Italy*, Judgement of 4 July 2013, available at www.eur-lex.europa.eu.

[11] The Constitutional legitimacy of the system of compulsory employment which evolved after in the quota system was challenged already in 1960 in consideration of the assumed restriction of the economic initiative and of the organization and dimensioning of companies protected by Art 41 para 1 Constitution. Moreover, it was assumed that the costs of obligatory employment of persons with disabilities should have been a burden of the State in accordance with the provisions of Art 38 Constitution.

The Constitutional Court stated that the purpose of such kind of provisions are not to provide beneficiaries with charitable maintenance but to conclude a real employment contract which requires the performance of work and to offer disabled persons the way to still play a role according to their abilities. Those provisions are indeed necessary in order to remove the obstacles to the actual participation of all workers in the economical and social development of the country according to Art 3 Constitution and to fulfil the duty of solidarity entrenched in Art 2 Constitution (Corte Costituzionale 15 June 1960 no 38, and 11 July 1961 no 55). The Court clarified also that the quota system does not affect the economic organization of companies in

non-compliance, on the corresponding pecuniary sanctions to be paid to the 'Regional Fund for the Employment of Disabled Persons'. Subsidies are given to employers in order to favor the stable employment of the disabled and above all of those with severe disabilities.

Legge 12 March 1999 no 68 entitled *Standards for the Right to Work of Disabled People* which replaced the previous law on compulsory employment, namely legge 2 April 1968 no 482, led to a significant cultural and regulatory shift in Italy. While the earlier law was essentially based on numerical job placement, legge no 68/1999 introduced the concept of *'targeted'* employment.

The starting point of this legislative scheme is the obligation placed by Art 3 on both public and private employers, to hire disabled workers in a variable amount that depends on the total number of human resources of the company. Thus, if the company employs more than fifty employees, the quota is seven per cent; if it employs from thirty-six to fifty employees, the quota is two workers; finally, if it has between fifteen and thirty-six employees, to hire one disabled person is sufficient to meet the requirements.

Small businesses with fourteen or fewer employees have no obligation, but they receive economic incentives when they hire voluntarily.

The procedure establishes that potential employees who aspire to a job must enroll in appropriate lists held by the 'services for targeting employment'. In those offices, a file is opened for each person recording skills, capabilities, job preference, the kind and degree of disability. Every year, private and public employers will send to the public employment services a prospectus containing all the information related to the fulfillment of the quota such as the total number of the workforce employed, the number of disabled persons employed[12] and job positions and related tasks available to cover the quota if needed.

The idea is to facilitate a match between the effective demand for work and the supply of labor by comparing the information, and at the same time to introduce each disabled person not just to any job, but to an activity suitable for his or her skills and professional qualifications.

According to the previous version of the law, once the employer submits the request for the number of workers needed to meet the quota, the job center would then arrange the placement of the person according to the list-rank.

After the last reform, due to the decreto legislativo 14 September 2015 no 150, the process has changed in that the employer can instead select a group of

consideration of the modest imposition of small quotas compared to the total number of employees.

The Constitutional Court continued to refer faithfully to the above-mentioned reasoning also in the most recent rulings related to the quota system (order 23 December 1994 no 449 and order 21 March 1996 no 86). All the mentioned judgments are available on the official website of the Court (https://www.cortecostituzionale.it/actionPronuncia.do).

[12] A similar provision is included in the Art 43(7) of AEPPD, but the rationale behind the provision of this law differs if compared with the Italian one as will be clear after the comparison.

workers who have the required skills and want to adhere to the job offer from the list mentioned above.

The amendment was criticised by labor unions and associations of disabled persons because it enlarges the discretion of the employer as it sets the possibility to choose among workers as the basic option of the mechanism (while in the previous version it was an exception). This can lead to a marginalization of workers with more severe disabilities. Indeed there will be fewer chances for those people to be selected and the new procedure could create breeding ground for discrimination among disabled candidates.

The fulfillment of the obligation related to the pre-set quota can also be accomplished using a different tool which is available even to those employers wholly excluded from the scope of Art 3 of legge no 68/1999. This mechanism entails, on the one hand, a relationship between companies and Public employment services which sign a framework agreement and, on the other hand, a relationship between the employer and the disabled worker which sign the employment contract and who can enjoy a personalized plan of placement.[13]

The employer benefits from the more favorable management of the circumstances leading to compliance with the quota, planning the entry of disabled workers in its productive system a few at a time without concern about possible sanctions for non-compliance with the quota required by law.

Arts 12 and 12-*bis* legge no 68/1999 provide for different kinds of contracted tools which can be activated under some conditions and only to cover the quota partially.

There is not enough space here to describe the different features[14] of each instrument but what is important to underline is the general scheme which they share. The disabled worker is counted in the quota of the employer who activated the placement agreement even if the worker is placed in a 'hosting' workplace. The 'recipient' can be a social cooperative, a social enterprise or in any case an employer who is considered by the legislator to be more suitable for the employment of disabled persons.

I will comment on these specific tools at the end of the next section comparing them with a distinguishing legal device of the Japanese model.

## III. The Japanese Legal Framework

Art 97 of the Japanese Constitution states that fundamental human rights are 'conferred upon this and future generations in trust, to be held for all time inviolate'.

Moreover Art 14 Constitution adds that

[13] Art 11 legge no 68/1999.

[14] For a more detailed explanation refer to P. Digennaro, n 6 above, 159-164.

> 'all the people are equal under the law and there shall be no discrimination in political economic or social relations because of race, creed, sex, social status or family origin'.

The Japanese Courts have interpreted this provision over the years with the effect of enlarging its scope.

Hence, for example, the term 'social status' means status gained by birth, the term 'nationality' includes the concept of race, and the term 'creed' has been intended as to include both political and religious beliefs.[15]

At the same time, it is important to underline how the principles contained in Art 14 Japanese Constitution have traditionally been interpreted when in connection with the freedom of contract and hiring.

The prevailing academic view supported by a landmark decision of the Supreme Court[16] held that the latter 'provision does not tackle discriminatory treatment before the formation of labor contracts (ie, at the recruitment and hiring stage)'[17] but instead it has to be read in conjunction with Art 27 of the Japanese Constitution which imposes limitations on the employer only when fixed by law and related to the working condition (so the conditions which apply when an employment relationship already exists) or derived from the necessity to accomplish the right to work.

For this reason, for example, the legislative policy (ie, in particular, the quota system) promoting the employment of a category of persons such as the disabled person who finds more difficulties and barriers in finding jobs has been considered as an exceptional restriction of the hiring freedom based on Art 27, para 1 Japanese Constitution (right to work).

However, the most recent Japanese legislative policies show a trend toward strengthening the limitation on hiring freedom, above all those based on civil rights principles, such as the prohibition of discriminations. Suitable examples of the said trend are both the Equal Opportunity Law and the new amendments to the AEPPD which will be discussed below.

The more this tendency grows, the more difficult it will be to maintain the position that, with only some exceptions, the general rule based on the Constitution of Japan is the absolute freedom to choose the workforce. The ongoing process could lead in the future to reverse the situation, that is to

[15] T.A. Hanami et al, *Labour Law in Japan* (Alphen aan den Rijn: Kluwer Law International BV, 2nd ed, 2015), 147.

[16] Supreme Court, 12 December 1973, *Mitsubishi Jushi* v *Takano*, 27 Minshu 1536, where the Court stated that 'the Constitution's (…) Arts 22 and 29 et seq guarantee, as basic civil rights, the right of a business to exercise its property rights, business freedom, and other freedoms with respect to its broad economic activities. That is why the owner of a business, having the freedom to conclude a contract linked to his or her economic activities, can as a general rule hire any workers and employ them under any conditions for its own business (…)'.

[17] K. Sugeno, *Japanese Employment and Labor Law* (Durham: Carolina Academic Press, 2002), 148.

establish as the broad standard the existence of a general duty not to discriminate, which can be limited by some exceptions (as it is the case in the European legal framework).

As regards the ordinary law, prohibitions against discrimination are scattered in various acts.

Art 3 of the Labor Standard Act (LSA)[18] represents the most general provision mirroring the Constitutional guarantee since it prohibits discrimination by the employer in the workplace on the basis of nationality, creed or social status.

Moreover, Art 4 LSA prohibits discriminatory treatment because of sex with respect to wages.[19]

In 2006 an important amendment to Art 7 of the Employment Opportunity Law (EOL)[20] introduced, for the first time in Japanese labor Law, the concept of indirect discrimination.

There are two factors which limit the scope of this new instrument.

First of all, the EOL is a law explicitly targeting discrimination based on sex only.

Moreover, even within its specific field, the law covers only some practices specified in a decree of the Ministry of the Public Health and Labor which are regulated as forbidden indirect discrimination provided that the employer cannot demonstrate that there is a legitimate reason to take such measures.[21]

The Labor Policy Council Subcommittee on Disabled Employment[22] which was appointed to conduct studies at amending the (AEPPD)[23] discussed whether to introduce a provision also prohibiting the indirect discrimination of disabled workers.

The final opinion was negative because the Subcommittee held that indirect discrimination is a vague concept and also that the cases not falling under direct discrimination could be addressed by providing reasonable accommodation.

This implies that

> 'in other words, indirect discrimination is not considered to be prohibited

[18] Act 7 April 1947 no 49. It states that 'Employers shall not use the nationality, creed or social status of any workers as a basis for engaging in discriminatory treatment with respect to wages, working hours or other working conditions'.

[19] Art 4 LSA states that 'Employers shall not use the fact that a worker is a woman as a basis for engaging in differential treatment in comparison to men with respect to wages'.

[20] Act 1 July 1972 no 113 on Securing Equal Opportunity and Treatment between Men and Women in Employment.

[21] For an overview of the employment discrimination law in Japan see R. Sakuraba, 'Employment Discrimination Law in Japan: Human Rights or employment Policy?', in R. Blanpain et al eds, *New Developments in Discrimination Law* (Alphen aan den Rijn: Kluwer Law International, 2008), 233.

[22] The task of the Subcommittee was to express an opinion based on the content of three different reports released by three different research groups set up inside the Ministry of Health, Labour and Welfare to study the issue of possible revisions.

[23] Law no 123 of 1960.

> in Japan. The AEPPD is construed as adopting the position of distinguishing direct discrimination from indirect discrimination in terms of whether or not there is an 'intention to discriminate', it prohibits direct discrimination as discrimination in which there is an intention to discriminate'.[24]

The amendment of the AEPPD was a part of a broader policy pursued by the Japanese legislators which was aimed at paving the way for the ratification of the UNCRPD in 2013. Therefore this strategy also included the revision of the Service and Support for Persons with Disabilities Act, the enactment of the Act for Eliminating Discrimination against Persons with Disabilities (AEDPD) and, as the first step in 2011, the revision of the Basic Act for Persons with Disabilities (BAPD).

The latter law was conceived as an instrument of particular importance in order to reflect the objective of the UNCRPD as it had been the gate for both a new definition of 'persons with disabilities' able to mark a shift in favor of the social model,[25] and the concept of 'reasonable accommodation' which was established in a domestic law in Japan for the first time. Moreover, a prohibition of discrimination was included in Art 4 BAPD.

The AEDPD, in turn, is intended as a means to realize the provisions of the BAPD. Therefore it classifies discriminations against persons with disabilities in two categories: a) 'unfair discrimination treatment' which occurs in the case of refusing, restricting, or adding conditions to the provision of goods and service simply due to someone's disabilities without justifiable reason and b) a failure to provide a reasonable accommodation when a disabled person asks for it as long as providing reasonable accommodations does not imply an excessive burden.

While the prohibition against discrimination has a general scope, the duty to provide for a reasonable accommodation is imposed only on national and local governments since private businesses have an obligation to make endeavors only (Art 8).[26]

[24] H. Tamako, 'Reasonable Accommodation for Persons with disabilities in Japan' 1 *Japan Labor Review*, 21, 24 (2015). Compare with K. Tominaga, 'Kaisei Shogaisha Koyo Sokushinhono Shogaisha Sabetsu Kinshi to Goriteki Hairyo Teiko Gimu (Prohibition of Discrimination against persons with disabilities and the obligation to provide reasonable accommodation in the Amended Act on Employment Promotion etc of Persons with Disabilities)' 8 *Quarterly Jurist*, 27, 29 (2014).

[25] As far as the definition of disability is concerned Art 2(i) BAPD states that 'Person with a disability refers to a person with a physical disability, a person with an intellectual disability, a person with a mental disability (including developmental disabilities), and other persons with disabilities affecting the functions of the body or mind (hereinafter referred to collectively as 'disabilities'), and *who are in a state of facing substantial limitations in their continuous daily life or social life because of a disability or a social barrier*'. The subsequent letter (ii) specifies that "Social barriers' refers to items, institutions, practices, ideas, and other things in society that stand as obstacles against persons with disabilities engaging in daily life or social life'.

[26] A gradual and soft approach which combines a duty to make efforts (that is the so-called duty to 'endeavour') coupled with administrative guidance has been used often in social policy in Japan and above all in the case of anti discrimination policy as it was, for example, in the case of the equal employment policy concerning the elimination of sex discrimination. This

Notwithstanding this, it is important to point out that Art 13 AEDPD refers to the AEPPD all the competence in governing the measures to be taken by public bodies and private enterprises in order to eliminate discriminatory treatment against workers on the grounds of disability when they are in the position of employers. Therefore, new provisions to prohibit discrimination at the workplace, as well as a real duty to accommodate, were introduced in the AEPPD which became, for this reason, the all-embracing law which regulates all the aspects of employment and the right to work of disabled persons in Japan.

Effectively it is the AEPPD under Art 36 paras 2 and 3 which obliges employers to provide a reasonable accommodation unless it entails a disproportionate burden (so, in this case, it is not just a duty to endeavor).

Moreover Art 35 reinforces the prohibition against discriminatory treatment in terms of 'wages, the implementation of education and training, the utilization of welfare facilities and other treatments' while Art 34 specifies that with regard to the recruitment and employment of workers, employers shall provide equal opportunities for persons with and without disabilities. Therefore, the former article is devoted to avoiding discrimination after hiring while the latter to the recruitment process. The scheme is the same utilized in the Equal Employment Opportunity Act to avoid discrimination between men and women in employment.

For the reasons mentioned above related to the interpretation of the freedom of hiring under Japanese labor law, including in the Act an explicit provision in order to specify that excluding a candidate because of his/her disability is framed as discrimination, and is therefore prohibited, was necessary and of particular importance.

Turning to the analysis of Chapter 3 of the AEPPD dedicated to the employment promotion of disabled persons, the system is based on a quota-levy system.

Private companies, the bodies of State and local authorities are required to employ a legally prescribed minimum percentage of persons with physical intellectual or mental disabilities, the latter category having been included in the mandatory hiring as a result of the last reform in 2013.

The quota for private businesses itself rose from one point one per cent when the system was established in 1960[27] to two per cent in April 2013. From April 2018 the quota increased to two point two per cent, and it has been

particular approach must be considered as 'one of the most significant characteristics of the social policies in Japan' based on the idea that it is more effective than a direct legal intervention. A mandatory form of intervention is instead viewed as useful only in the case that the soft approach failed or when 'society has accepted new norms and direct legal intervention will no longer cause serious confusion' (see T. Araki, 'The impact of fundamental social rights on Japanese law', in B. Hepple ed, *Social and Labour Rights in a Global Context, International and Comparative Perspectives* (Cambridge: Cambridge University Press, 2002), 215, 234-235.

[27] At the time the quota was not mandatory and was limited to persons with physical disabilities.

determined that it will reach two point three per cent by the end of the fiscal year 2020.[28]

Indeed, on the 30 May 2017, the Labor Policy Council approved the decision to raise the quota to two point three per cent for the private sector employers, two point six per cent for national and regional public bodies and specified incorporate administrative agencies and two point five per cent for prefectural and local boards of education starting from 1 April 2018 to the 31 March 2023.

Notwithstanding this, to avoid an excessive burden on enterprises, it was decided to move gradually towards the final target by setting an intermediate step consisting of the following provisional rates: two point two per cent for the private sector employers, two point five per cent for national and regional bodies and specified incorporate administrative agencies and two point four per cent for boards of education. The transitional measure will be abolished by April 2021. As for the scope of application of the duty, the recipients were the employers with fifty or more employees after the last reform in 2013. However, by means of the same decision related to the quota, also the numeric threshold was downgraded to forty-five and half or more employees (with each part-time employee counted as half) from April 2018 with the provision of one more downgrade to fourty-three and half when the employment quota will be raised to two point three per cent.

In 1976 a levy-grant scheme was introduced to encourage the employment of disabled workers. In case of failure in fulfillment of the prescribed quota, enterprises with over one hundred regular employees are required to pay a levy of fifty thousand yen per month for each person under the quota. Conversely, employers that meet the quota receive adjustment subsidies amounting to twenty-seven thousand yen per month for each person over the quota or financial incentives (twenty-one thousand yen per month for each person over the quota for enterprises with one hundred or fewer employees).[29]

No penalty is charged to the government, local authorities and educational boards.

Moreover, the law also provides various kinds of subsidies for employers establishing or arranging working facilities or equipment for disabled workers or taking measures to assist, support or facilitate the disabled workforce.

There are two more features of the Japanese system which it is essential to mention.

[28] The specific timing will be discussed at a later stage by the Labor Policy Council which is an advisory panel to the Minister of Health, Labor and Welfare. Official documents related to the decisions mentioned here and onwards in the paper are available at https://tinyurl.com/y73sonoe (last visited 15 November 2018).

[29] About the levy-grant mechanism and in particular about the economic consequences and effectiveness of the employment quota system refer to Y. Mori and N. Sakamoto, 'Economic consequences of employment quota system for disabled people: Evidence from a regression discontinuity design in Japan' 1 *Journal of Japanese and International Economies*, 1 (2018).

Employers can establish 'special subsidiaries' to employ disabled workers. The workforce employed in the subsidiary is counted as recruited by the parent company for calculating its current employment rate under given requirements.

In this case, as well as with the case of the placement agreements provided for by the Arts 12 and 12-*bis* legge no 68/99 mentioned in the previous paragraph, the legislator of Japan considered that the advantages are considerable on both the sides. Indeed this tool should increase job opportunities for disabled persons and the workers should be surrounded by an ideal work environment while the employer is facilitated not only in fulfilling the quota and arranging the facilities, but should also be able to count on an improvement of the disabled worker's productivity.

In this sense, these tools can be compared with regard to the rationale behind them.

In both legal frameworks, those possibilities left to the employers have the effect of separating or 'segregating' the disabled workers and the workplace made for them from the rest of the workforce. The idea which emerges from these instruments is hardly distinguishable from the one which operated for years in many countries' separate school systems for disabled pupils, ie the needs of the disabled are considered different and better served in separate institutions.[30]

For this reason, these legal arrangments appear to conflict with the prohibition against discrimination and above all against the concept of reasonable accommodation, the philosophy behind which is the idea to make the general environment barrier-free in order to make possible a mutual integration between persons with and without disabilities.

Therefore, the removal of those legal institutions should be considered in order to focus attention and resources on the reasonable accommodation duty and the complete fulfillment of the quotas in the parent enterprises.

The last aspect to briefly present is the 'Hello Work' administrative agency, ie, the Japanese government's Employment Service Center which manages services for job-seekers, administers unemployment benefits and also, as regards the topic of this paper, has a role in introducing careers for disabled workers.

In particular, when a 'person with disabilities using welfare facilities (vocational aid center, small-sized workplace, special-needs school, etc) wishes to work for private companies, Hello Work' can provide support for employment in cooperation with the welfare facilities. In this case, a team provided by this government

[30] Italy has long been at the forefront in the field of inclusive education, as the Republic started to reform the school system to integrate the disabled students with the Legge 30 March 1971 no 118 but the complete abolition of separate schools for the disabled was the result of the Legge 4 August 1977 no 517. Conversely a move towards an inclusive approach to education in Japan is a still ongoing recent development. The Basic Act for Persons with Disability introduced the idea that children and students with disabilities should be able to receive their education together with children and students without disabilities insofar as possible along with the duty to accommodate, but the policy still needs to be fully implemented.

agency supports the person from preparation for employment to the settlement of the workplace.

## IV. Concluding Remarks

The comparison between the Italian and Japanese laws related to the employment of persons with disabilities shows that both these countries adopted a quota-levy system which shares a general structure. Both systems are based on economic penalties and incentives albeit with differences regarding the quota and the scope of the employer's obligation to employ persons with disabilities.

These differences are understandable if one compares the scale of the enterprises in the countries under scrutiny. While the production systems in both countries are classified as being dominated by small or medium-size companies, the data shows that the majority of Italian enterprises are smaller than Japanese firms and employ less than ten employees.[31]

Another relevant difference between the two models lies in the role of the Public Employment Service. In the frame of the legge no 68/99, all the process of employment in Italy is carried out under the supervision of public bodies, from enrollment in the list of disabled job-seekers until the placement of the employee, and the quota system is still crafted as an integral part of the Public Employment Service and walfare state. In Japan instead, public employment offices only control the fulfillment of the quota when the employer reports the employment situation of persons with disabilities annually. It can also order the employer to prepare a three-year plan to improve the situation and give guidance for its implementation.

The 'Hello Work' Service is triggered by a personal request of the worker and it is conceived as an additional help provided for disabled workers.

This said, at first glance one might consider that the Italian and the Japanese systems are now very similar since the Japanese legislator adopted reforms aiming at prohibiting discrimination.

The similarity specifically lies in the merging of the quota system with an antidiscrimination approach which is also a feature typical of many other European countries.

The analysis would not be correct if it considers only this external data related to the general scheme adopted on this issue because differences

[31] According to a survey by Istituto Nazionale di Statistica (Italian National Institute of Statistics; ISTAT), 'Struttura e dimensione delle imprese' 1 June 2011, available at https://tinyurl.com/yd6robkm (last visited 15 November 2018) the Italian productive system is characterized, on the whole, by the strong presence of micro enterprises: those with less than ten employees are almost four point three million, represent ninety-five per cent of the total and occupy forty-seven per cent of the employees. Those enterprises have no obligation to hire disabled workers as explained in the second section of this work and this factor hinders the efficacy of the quota system.

emerge as soon as the interpretation of this pattern explores under the surface.

The first differential factor has already been identified in the paragraphs above. Indeed the European countries, including Italy, share the application of the concept of indirect discrimination which does not coincide precisely with the reasonable accommodation duty even if both of those instruments were created to address external sources of discrimination apart from any possibly invidious intent of the employer.

Both the lack of a prohibition against indirect discrimination and the significant factor that under the long-term employment system in Japan, workers are not hired for particular duties or tasks or for particular positions, but are assigned during their career to various types of duties and positions based on the development of their job skills, could give room to a possible marginalization of disabled workers during the employment relationship notwithstanding their being formally accommodated. If such cases occur, the possibility of contrasting unfair employer's internal policy will probably rely on the doctrine of the abuse of rights which the Japanese Supreme Court has often used to protect employees.

The second difference is related to the definition of disability which, as stated in the introduction, is one of the primary tools of the shift from the medical approach to the social approach to disability.

In Italy, notwithstanding the fact that the definition contained in legge no 68/1999 is still entrenched in the old paradigm,[32] both because it preceded the international success of the social model and probably because of the perceived necessity of a clear-cut definition, it applies only for the quota system.

Instead, when a case of possible discrimination is at stake, the national courts are bound by a broad definition of disability with no need to ascertain any status declared by a State body or medical commission.

Indeed, in that case, the national courts have to conform to the CJEU interpretation of the Directives which in turn affirmed that the understanding of '*disability*' set out in the UNCRPD binds the CJEU.[33]

This entails that the disability will refer, in the same words of the CJEU,

> 'to a limitation which results in particular from long-term physical, mental or psychological impairments which in interaction with various

[32] As the social model is based on criticism of automatic and systematic segregation of the disabled and on the attempt to overcome the separate treatment doctrine, it must be said that in Italy some efforts in this direction date back to the 1970s.

As for the school system, for example, see n 30 above.

Moreover, the quota system has been considered as a form of integration rather than as a form to provide charitable maintenance already in Corte costituzionale, 15 June 1960 no 38 (see n 11 above).

[33] Joined Cases C-335/11 and C-337/11, *HK Danmark* v *Danskalmennyttigt Boligselskab, Dansk Arbejdsgiverforening*, Judgment of 11 April 2013 at para 32, available at www.eur-lex.europa.eu.

> barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers',

in other words, the CJEU retained the same definition of disability under Art 1 UNCRPD.

In the case of Japan, the Employment Promotion Act includes one definition only of disability which is valid in all the aspects related to the application of the law and additionally this definition does not coincide with the one embedded in Art 2 BAPD which was inspired by the social model of disability. According to Art 2 AEPPD, disabled persons are defined as

> 'those who because of physical, intellectual, mental disabilities or other impairments of physical or mental functions (…) are subject to a considerable restriction in vocational life, or have a great difficulty in leading a vocational life'

and insofar as they have a disability listed in an Annex of the law or an intellectual disability specified by the Ministry order.[34] Therefore the definition of persons with disabilities in the AEPPD is the same as the one in the Act on Welfare of Physical Disabilities. 'As a result, whether a person is covered by the Employment Promotion Act is defined by whether that person has a disability passbook'.[35]

Those two factors, namely a definition itself which still seems grounded in a vision of the disability as medical impairment and the link with the disability passbook, could frustrate the reform and drastically reduce its impact as a shield against discrimination.

[34] Art 2 AEPPD.

[35] H. Nagano, 'Recent Trends and Issues in Employment Policy on Persons with Disabilities' 5 *Japan Labor Review*, 5, 13 (2015).

# Indirect Discrimination in Japanese Law: A European Perspective

Michela Riminucci*

**Abstract**

In Japan, the equality principle is embodied in Art 14, para 1, of the Constitution, according to which all citizens are equal under the law and cannot be discriminated against on grounds of race, creed, sex, social status or family origin, in political, economic or social relations. As a corollary, Art 3 and Art 4 of the Labor Standards Act establish the principle of equal treatment. However, these principles are just a dead letter unless the State commits to implement them. Therefore, the aims of this paper are twofold: first, to clarify the content and application of anti-discrimination legislation in Japan, taking into consideration the criticism by external observers; second, to evaluate the effectiveness of the most recent reforms, including the one on indirect discrimination.

## I. Introduction

In the multi-level legal system of the European Union (EU), the principle of equality has gradually reached a paramount importance under the influence of the constitutional traditions of its Member States. Moreover, constant efforts, not only by national judges, but also by supranational and international courts such as the Court of Justice of the European Union and the European Court of Human Rights have contributed to the progressive definition of a heterogeneous set of legal instruments serving the principle of equality – eg, the prohibition of both direct and indirect discrimination. Similarly, in Japan, a country that has historically based its own legal system on European models, the principle of formal equality is entrenched in the Constitution of 1946.[1] Pursuant to Art 14, para 1, all citizens are equal under the law and cannot be discriminated against on grounds of race, creed, sex, social status or family origin, in political, economic or social relations.[2] Applied to the field of labor law, the principle of equal

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[1] This document was formally an amendment to the Constitution of the Empire of Japan (also known as Meiji Constitution) of 1889 (entered into force in 1890), although the text was entirely rewritten. To date, the Shōwa Constitution has never been amended.

[2] All Japanese legislation was consulted in its original language and its most recent version on the portal of the Ministry of Internal Affairs and Communications of Japan, available at http://www.e-gov.go.jp. All the translations are by the author, but the unofficial English translations uploaded on the *Japanese Law Translation* website of the Ministry of Justice of

treatment can perhaps be considered the main expression of the more general principle of equality before the law. In Japan, the equal treatment in the workplace is embodied in the Act 7 April 1947 no 49, also known as Labor Standards Act (LSA). According to Art 3 of the LSA, the employer shall not engage in differential treatment in terms of wages, working hours, or other working conditions on grounds of nationality, creed, or social status of the worker. Furthermore, the Art 4 of the LSA prohibits discriminating against women with respect to wages.

However, the above-mentioned principles are likely to remain a dead letter if they lack a true commitment to implementation by the State and its institutions. This issue is common to many legal systems. To overcome such difficulties, for instance, the Art 3, para 2, of the Italian Constitution establishes a duty for the State to remove existing economic and social obstacles that prevent citizens from developing as human beings and becoming truly equal under the law as ideally envisaged by its drafters. This principle is known as substantive equality, and it exists in Japan in the framework of *seizonken* (the right to a certain standard of living). Pursuant to Art 25 of the Constitution of Japan, in fact, all citizens have the right to live a decent life and the State has to strive for the improvement and promotion of social welfare, social security, and public health in all aspects of life. In Italy, like in other European countries and in Japan, such constitutional principles were codified after the Second World War.[3] Later these were also transposed into ordinary laws. The Japanese LSA is a clear example of this. Despite this formal legal recognition, the resulting framework both in Italy and in Japan often suffers from a lack of coordination between the various sources of law, with the consequence that the legal remedies put in place are not always effective. One of the most productive and controversial developments of the equality principle in labor legislation has been in the area of equal opportunity laws, but there is still much room for improvement, as many observers have been stressing for years that competitive advantages would derive from more effective implementation.[4]

The aim of this paper is twofold: first, it seeks to clarify the content of Japanese anti-discrimination legislation stemming from the constitutional principle of equality. To limit the enquiry, I will chiefly focus on the laws against discrimination on grounds of sex together with the interpretation of such norms operated by Japanese judges. A more comprehensive view – eg on the so-called

Japan, available at http://www.japaneselawtranslation.go.jp, have been used as a reference whenever possible.

[3] The current Constitution of Italy, as well, was drafted and entered into force after the Second World War (in 1947 and 1948, respectively). The Kingdom of Italy had a different fundamental law called *Statuto Albertino* that entered into force in 1848 and included the principle of equality in Art 24, but see section IV below on the weakness of pre-war constitutions.

[4] International Monetary Fund, *IMF Country Report no 16/223* (Washington, DC: International Monetary Fund, 2016), 25-39; Id, *IMF Country Report no 16/268* (Washington, DC: International Monetary Fund, 2016), 7.

Japanese traditional employment system – will be adopted whenever necessary. The paper further compares the Japanese legislation on such issues with similar norms in Italy and the EU. Legally, Japan shares many similarities with some European countries, and, therefore, it is interesting and fruitful to compare the different approaches to implementing the equality principle and their results. The second aim of the paper is to evaluate the effectiveness of the above-mentioned anti-discrimination legislation in Japan in terms of achievement of a fully-fledged equality of opportunity. In particular, I will discuss some of the issues pointed out in the 2016 concluding observations on Japan by the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) of the United Nations.[5] Obviously, this paper cannot completely ignore the cultural peculiarities of Japan, but an approach that is more centered on the efficiency of the institutional framework rather than alleged cultural differences will be preferred.

## II. Challenges in Approaching Japanese Law

For geographical and linguistic reasons, Japan is still perceived to be legally and culturally distant and inaccessible from Europe. Japanese scholars, however, beg to differ, since its legal system shares many similarities with those of some European countries, such as Germany, France, and Italy. One of the main difficulties that non-Japanese speaking scholars face in approaching Japanese law is that the majority of studies written in foreign languages are biased by a specific view, eg when the observer is wearing the glasses of the common law family, which includes the United States of America, the United Kingdom, Australia and others.[6] What happens is therefore that the criticism is directed to what is different, but not necessarily detrimental nor uncommon in other legal systems. Apart from the fact that the traditional differences between common law and civil law systems have been gradually challenged,[7] in recent years, a small group of European scholars, including some Japanologists, have started

[5] UN Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Seventh and Eighth Periodic Reports of Japan* (New York: UN Committee on the Elimination of Discrimination against Women, 2016), 11-12.

[6] G.F. Colombo, 'Japan as a Victim of Comparative Law' 22 *Michigan State International Law Review*, 731-753 (2013).

[7] Many new taxonomies have been proposed over time, eg one that distinguishes legal systems on the basis of which pattern of law (professional law, political law, traditional law) prevails in a given country, see U. Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' 45 *The American Jounal of Comparative Law*, 5-44 (1997). On the bright side, there was a try to overcome Western-centrism. However, traditional views remained strong in the case of Japan, which is usually considered a system where cultural aspects prevail over the law, as seen in R. David and C. Jauffret-Spinosi, *Les grands systèmes de droit contemporains* (Paris: Dalloz, 2002), 433. Yet, in the end, no classification will ever come close to true objectivity unless it is based on criteria that can be measured exactly in the same way by any person.

to study Japan also from the point of view of the law, which is outside the traditional areas of Japanese studies – art, history, international relations, literature, and religion. The main goal of these approaches is to attempt to free Japanese law from the bias that for many years favoured culture and tradition over law.[8] The same approach will be adopted in this paper.

## III. Terminology

Before moving on to the analysis of the existing legal framework, a few preliminary remarks on some terms used in this paper are necessary, in order to introduce the reader to a language that is, in fact, quite distant from European ones. Perhaps the most important issue to discuss here is whether the concept of equality existed in Japan, with a meaning that could be considered close to the current usage, before the Meiji Restoration of 1868 and the gradual introduction of European legal concepts. In the modern and contemporary European tradition, the principle of equality derives from the French Revolution and the Declaration of the Rights of Man and of the Citizen of 1789.[9] This is probably the most well-known legacy of the Enlightment in its attempt to step away from the inequalities of the Middle Ages, and its importance nowadays is widely recognized, especially from the point of view of human rights.[10,11] In the case of Japan, one may wonder if the word *byōdō* (equality) has the same meaning than in the Western world. This question is even more compelling in the light of the need expressed during the Meiji period[12] to redefine existing words[13] to adapt them to foreign concepts newly transplanted after the end of the *sakoku*[14] in the second half of the 19th century.

In the *Nippo Jisho* of 1603,[15] one of the most ancient dictionaries between

[8] D. Vanoverbeke et al, *The Changing Role of Law in Japan: Empirical Studies in Culture, Society and Policy Making* (Cheltenham and Northampton: Edward Elgar Publishing, 2014), 1-10.

[9] Especially Art 1 of the Declaration, according to which people are born and remain free and equal in their rights. Text in French consulted on the portal of the French Government, available at https://www.legifrance.gouv.fr.

[10] M.R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley, Los Angeles, London: University of California Press, 2008), 7-9.

[11] Although earlier notions of equality in terms of economic and social justice did exist. Ibid 35-40.

[12] Ibid 1868-1912.

[13] Perhaps the two most notorious examples in the legal field are *jiyū* (freedom) and *kenri* (right). See G. Ajani et al, 'Diritto dell'Asia orientale', in R. Sacco ed, *Trattato di diritto comparato* (Torino: Utet Giuridica, 2007), 24-43.

[14] Two centuries of almost complete isolation during which relations with foreign countries were limited.

[15] The anastatic copy published by Iwanami Shoten in 1960 was consulted, but the best version is probably the color edition by Bensei Publishing of 2013. A different Bensei edition is also on Google Books, available at https://tinyurl.com/y9nxkj4g (last visited 15 November 2018).

the Japanese and Portuguese languages, the term appears as *biŏdô* followed by the definition in Japanese *tairacani fitoxi* (equally alike).[16] This was translated into Portuguese as 'equality of things that are on the same level'.[17] In order to better understand this point, it is important to remember that the noun *byōdō* is of Chinese origin and it is written in both languages with two characters that mean 'flat' and 'similar'. This etymology, therefore, suggests the idea of a series of things having the same length. Curiously, the *kanji*[18] of *dō* in ancient China represented the bamboo tablets used in public offices, including courts, for writing. Even more interesting is the additional meaning of 'equality and justice',[19] which appears in the sentence *biŏdôni monouo vosamuru*,[20] translated as 'to govern with equality and justice'.[21] Therefore, the concept of equality not only already existed at least from the 16th century, but it seems that it already contained a reference at least to formal equality intended as a way of governing that was characterized as just because it treated all people in the same way. In the even more ancient *Dictionarium Latino Lusitanicum ac Iaponicum* of 1595[22] the term appears under *æquabilis* as *biŏdônaru coto* and under *æqualiter* as *biŏdôni*, so it seems that the Japanese term was associated to *æqualitas* (equality). The fact that a similar concept existed, however, does not mean that is was applied and interpreted as we would do today. Yet, it nevertheless represents a promising starting point for a more thorough understanding of the principle of equality, considering that the development of fundamental rights and human rights in Europe is often linked to earlier philosophical and religious ideas that where then refined by the Enlightenment movement.[23]

## IV. Constitutional Principles

As previously explained in the introduction, this paper analyzes the principle of equality as conceived in Japan and its application from the Constitution to

[16] Which can be romanized according to modern rules (modified Hepburn system) as *tairaka ni hitoshii*.

[17] *Igualdade de cousas que estão prainas*. Rough translation.

[18] Sinograph (character of Chinese origin) as used in written Japanese.

[19] *Equdade & iustiça*. Rough translation.

[20] In modern Japanese, *byōdō ni mono wo osameru*.

[21] *Gouernar com igualdade, & iustiça*. Rough translation.

[22] Available at https://tinyurl.com/ycmgtt78 (last visited 15 November 2018).

[23] It is also worth remembering that *byōdō* is a Buddhist term (in Sanskrit, *sama*) that originally signified calmness of the heart. It also appears in the well-known Lotus Sūtra with the meaning of universally fair, with reference to Buddhist teachings, since they hold for all living things. In the 8th century the meaning was expanded to include the capacity to take on other people's sins and pain, closely resembling the Christian idea of 'suffering surrogate' (*daijuku*, in Japanese), as Jesus Christ who suffered in order to save humanity. See H. Nakamura et al, *Iwanami bukkyō jiten* (Iwanami Dictionary of Buddhism) (Tōkyō: Iwanami Shoten, 2nd ed, 2002), 851; S. Mochizuki, *Bukkyō daijiten* (Great Dictionary of Buddhism) (Tōkyō: Bukkyō Daijiten Hakkōjo, 1936), V, 4358-4359.

labor legislation. While the concept of equality was present in pre-Meiji Japanese culture, some scholars have suggested that the Japanese version of this principle had different connotations from its European counterpart.[24] The paper, therefore, analyzes this alleged distinction from the point of view of the equality principle – which in truth is designed in different ways even within the borders of the EU.[25] I will focus only on the developments that followed the Second World War, although a wider study on the concept of equality as found, for example, in Japanese philosophies and religions could offer deeper insights. In particular, I will limit my analysis to what happened after the Shōwa Constitution, which was promulgated on 3 November 1946, and entered into force on 3 May 1947. This legal text, in fact, represents a stepping-stone in an extremely complex operation aimed at moving away from the dark years of Japanese imperial fascism.

In the context of the post World War II Japanese Constitution, the principle of equality was given a prominent role. The idea that all citizens are equal under the law is in fact a necessary premise for the establishment a democratic state, and, surely, at the time of the promulgation of the Shōwa Constitution, it had the potential to renew the image of the country in the international arena. The previous Japanese Meiji Constitution of 1889 was a weak fundamental law that needed to be drastically revised. Altough formally containing a bill of rights granted to the subjects of the *Tennō*,[26] the Meiji Constitution was characterized by an extensive use of clauses that made it possible to limit such rights whenever the executive deemed it necessary. In the past, and sometimes even nowadays, the Shōwa Constitution has often been described as a mere imposition by the Supreme Commander for the Allied Powers (SCAP) Douglas MacArthur and his staff that controlled Japan right after the Second World War. It is, however, clear from the documentation of its birth[27] that the contributions by Japanese politicians were many. With regard to Art 14 (equality principle), the SCAP seemed to have a very specific interest in the abolition of the feudal system and everything that was connected to it, as stated in MacArthur's three points.[28] Therefore, the initial aim of the Constitution's founders was more to dismantle the previous balance of power, rather than guaranteeing equality among citizens.

[24] T. Suami, 'Rule of Law and Human Rights in the Context of the EU–Japan Relationship: Are Both the EU and Japan Really Sharing the Same Values?', in D. Vanoverbeke et al eds, *The Changing Role of Law in Japan: Empirical Studies in Culture, Society and Policy Making* (Cheltenham and Northampton: Edwar Elgar Publishing, 2014).

[25] European Commission, *A Comparative Analysis of Non-discrimination Law in Europe* (Luxembourg: Publications Office of the European Union, 2017).

[26] Usually translated as emperor, although the modern definition of empire usually includes the idea of a rule extending to overseas territories or a group of countries, which is not the case anymore for Japan (although the term might be justified from a historical perspective). Nowadays, it would probably be more appropriate to simply use the term king, since Japan is a constitutional monarchy.

[27] Available at https://tinyurl.com/4pfk7 (last visited 15 November 2018).

[28] Available at https://tinyurl.com/y6wq9jwv (last visited 15 November 2018).

For this reason, the principle of equality contained in the Constitution is still applied mostly to vertical relations between the State and citizens, and can be applied to horizontal or citizen-to-citizen relations only by means of interpretation. With respect to Art 25 (the right to a certain standard of living), the influence of Art 151 of the Weimar Constitution of 1919, the same found in other welfare states such as Italy and France, is undeniable. It seems that the Japanese politicians Morito Tatsuo and Suzuki Yoshio[29] particularly supported the Weimar model on the occasion of the constitutional amendment.[30] Therefore, it seems that, in this case, the Japanese view prevailed over the SCAP's.

In assessing the importance of Art 14 of the Shōwa Constitution in terms of equal opportunity law, a good starting point could well be the research done in the eighties by Frank K. Upham. Although much has changed since then, Upham tried to understand the connection between the law and social change. In particular, he identified a group of cases decided by Japanese courts that might have affected the Act 1 July 1972 no 113, also known as the Equal Employment Opportunity Act (EEOA). In this regard, it must be noted that, as highlighted by Upham himself,[31] many observers considered the EEOA the result of international pressure on Japan connected to the signature (1980) and ratification (1985) of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). In reality, however, it could be described more as a process, albeit one involving an external stimulus, that took root in the fertile ground of an on-going jurisprudential reflection that will be summarized in the next section.

## V. Historical Overview

Upham starts by reminding us that the contribution of women to the development of Japan up until the end of the Second World War had been fundamental, especially in agriculture and manufacturing. The situation changed after the war. Until the 1960s, women had to leave the labor market when getting married, usually around twenty-five years of age, and were not expected to return to work later in their lives. From the 1980s, however, women started re-entering the labor market, around thirty-five years of age, after their children gained some independence. The reasons for this were many: a higher level of education, a smaller number of children, longer life expectancy, and a decline in rural population. To these factors, one may add the economic crisis, which

[29] The given name follows the family name, in accordance with the Japanese use.

[30] H. Takahashi, 'Kenpō gikai ni okeru Weimar Model: seizonken kitei no sōnyū' (The Weimar model in the constitutional debate: the addition of a *menschenwürdiges Dasein* article) 37 *Shakai rōdō kenkyū* (Research on society and labor), 1-48 (1990).

[31] F.K. Upham, *Law and Social Change in Postwar Japan* (Cambridge and London: Harvard University Press, 1987), 151.

definitely compelled the need for more money since one salary was not enough anymore. However, women were relegated to low-level jobs, with lower salaries and less employment protection. In this context, women were almost exclusively part-timers and temporary workers, whereas full-time and undetermined-time jobs were reserved for men. Nowadays, inequality in employment persists in Japan as well as in many other countries,[32] and the sub-group of atypical workers is much larger because it includes around one third of the total number of workers – mostly women, young and older people, and non-Japanese.[33] As summarized by Upham, in the past, Japanese women were excluded from the labor market, and especially from managerial positions for three main reasons: the traditional idea of family;[34] the fear that their inclusion would increase the unemployment rate of men; and the belief that men would become less devoted to their jobs, without the support of their wives at home.

Currently, the above-mentioned justifications are considered old-fashioned, to say the least, and history has proved them wrong, since no correlation has been found between the rate of working women and the unemployment rate of men, or the devotion of men to their jobs. However, considerations like these used to be quite common also in Europe, and such inflexible thinking still lingers on in certain social groups, although they tend to be more hidden than in the past, since they are perceived to be somewhat backward. Everything changed in a very short span of time, and in Japan, a series of cases opened the door to the EEOA and the recognition of the discriminatory nature of various practices that had been widely accepted in companies up until the 1960s. A first group of judgements scrutinized blatant and direct discriminations in term of salaries, pensions and staff reduction, whereas a second group of decisions, starting from the 1970s, focused on more indirect discrimination. As explained above, the Constitution already contained a specific prohibition of discrimination, but involved an action of the State – apart from being subject to an evaluation of reasonableness – and therefore could not be applied *sic et simpliciter* to horizontal relations, ie cases of citizens discriminating against other citizens in the workplace.[35] Until the EEOA, the only protection in the latter situation was the already mentioned Art 4 of the LSA, which still prohibits differential treatment

[32] C. Olivetti and B. Petrongolo, 'Unequal Pay or Unequal Employment? A Cross-Country Analysis of Gender Gaps' 26 *Journal of Labour Economics*, 621-654 (2008).

[33] Unless otherwise specified, all statistical data is from the Statistics Bureau of the Ministry of Internal Affairs and Communications of Japan, available at http://www.stat.go.jp.

[34] As pointed out at the beginning of this section however, being forced to stay at home was actually not the norm or tradition in Japan before the war, since women used to work as much as men especially in agriculture and manufacturing.

[35] It must be noted that this approach is not peculiar to Japan. On the contrary, it seems to be perfectly in line with European tradition. As briefly outlined in section III, the equality principle was established to protect citizens from abuses by public authorities that were common practice under the *ancien régime*.

in very limited cases – on grounds of sex and with regard to wages –,[36] and Art 3, which covers discrimination on grounds of nationality, creed or social status. Therefore, judges had to refer to other principles, such as Art 24 of the Constitution on individual dignity and freedom of marriage, Arts 1 and 2 of the Japanese Civil Code against the abuse of rights and in favor of the equality of sexes respectively, and Art 90 of the Japanese Civil Code on the nullity of acts against public order and good morals.[37]

Single cases will not be analyzed here.[38] It is more useful, for the aims of this paper, to proceed directly towards evaluating the overall impact and outstanding issues that still remained in the 1980s. Regarding the impact, one of the points that Upham made is that litigation supported the creation of a political consensus[39] that functioned as a prelude to the EEOA and its amendments. It is undeniable that Japanese companies have gradually abandoned some common practices that Japanese judges have deemed in violation of the law, and the Ministry of Labor, nowadays Ministry of Health, Labor and Welfare (MHLW), has endorsed the case law produced by courts in this regard by amending the EEOA. At the same time, however, the Government did not challenge in an active and effective way the more ambiguous discriminatory practices that came about after the initial series of cases. Moreover, the lack of compelling legal remedies[40] and the fact that the prohibition of discrimination was not extended to all aspects of employment, including promotions and hiring, remained as outstanding issues. Obviously, differentiating workers according to categories is not wrong per se, since it might help preserve a company in time of crisis, during which temporary and part-time workers could be dismissed in a relatively easy way. However, if such a buffer becomes so common that approximately one third of the current workers are atypical, it might be a sign that there is something wrong with the system. Regarding this last point, from the employer's point of view, it might well be that the protection they have to ensure to full-time and undetermined-time positions is too much of an onerous burden. If we recall John Maynard Keynes, who wrote in the 1930s that he imagined a future of three hours of work per day for a total of fifteen hours per

[36] Other working conditions were excluded because in other situations discriminatory treatment was in fact allowed in order to favor women, at least according to the legislator.

[37] Notions of public order and good morals are often used, also in European legal systems, as flexibility clauses that can be updated over time according to the interpretations given by judges.

[38] For a more detailed overview of what is summarized in this section, see F.K. Upham, n 31 above, 129-144.

[39] ibid 156.

[40] In case of unlawful discrimination, the plaintiff could only hope for a limited monetary compensation for damages, but not for the nullification of the discriminatory act. In companies, it is quite common to calculate the costs of a possible lawsuit and compare them to how much money can be saved thanks to an unlawful practice. If the lawsuit costs less that the benefits derived from the unlawful practice, the management might prefer the latter. This kind of behaviour is known in Law & Economics as efficient breach.

week,[41] the solution perhaps will lie in a redefinition of what work is supposed to be, and on the importance of free time.

## VI. Current Situation

In the previous section, the origins of the EEOA and the problems that emerged up to the 1980s were quickly summarized. The situation, however, has obviously changed in the years that followed. According to some scholars, what is happening nowadays can be described as a progressive switch from an employment policy approach to a human rights approach that is much more similar to the one adopted in Europe.[42] The EEOA, in its first significant amendment entered into force in 1986, collected the outcomes of the above-mentioned political consensus that had slowly crystallized over the years. Despite its many initial flaws, the law has been refined to protect men as well as women, and to cover other stages in the lives of workers, such as recruiting, promotions and training, at least in theory. Moreover, in case of unlawful discrimination, the worker can now be granted monetary damages as well as the annulment of the act in violation of the law.[43] From the 1990s, however, the CEDAW Committee expressed perplexities towards the so-called traditional employment system. In particular, according to the Committee, it seemed that Japanese women were subject to indirect discrimination resulting from the separate personnel management track system[44] widely adopted by private companies. Therefore, the Japanese Government was urged to include a prohibition of indirect discrimination in legislation.[45] It is undeniable that effectively prohibiting indirect discrimination could be a way to solve some of the above-mentioned issues affecting Japanese female workers, but it took a long time and a great deal of discussion before Japan finally introduced some sort of protection by amending the EEOA in 2006. Moreover, as highlighted by other scholars,[46] the provision

[41] J.M. Keynes, 'Economic Possibilities for our Grandchildren', in J.M. Keynes ed, *Essays in Persuasion* (London: Macmillan, 1931), 358-373.

[42] R. Sakuraba, 'Employment Discrimination Law in Japan: Human Rights or Employment Policy?', in R. Blanpain et al eds, *New Developments in Employment Discrimination Law* (Alphen aan den Rijn: Kluwer Law International, 2008), 181-200.

[43] Although a certain margin of discretion by employers remains, in accordance with their fundamental right to do business enshrined in Art 22 of the Constitution.

[44] According to this management practice, employees could be hired under two different career tracks: one for workers that were destined to menial jobs and another one for workers who could actually climb the career ladder until management positions. However, in order to access the latter, the worker had to accept a series of conditions, including transfers within Japan and abroad, which were sometimes difficult to meet for women who have additional family responsibilities.

[45] UN Committee on the Elimination of Discrimination against Women, *Consideration of the Reports Submitted by States Parties under Article 18 of the Convention* (New York: UN Committee on the Elimination of Discrimination against Women, 1994), para 598.

[46] M. Asakura, *Koyō sabetsu kinshi hōsei no tenbō* (A new prospect of anti-discrimination

failed to become a true instrument for social change because of the reasons that will be summarized in the next section.

## VII. Indirect Discrimination

The concept of indirect discrimination, also known as disparate impact, firstly appeared in the United States Supreme Court decision *Griggs* v *Duke Power Co* of 1971,[47] where it was applied to discrimination on grounds of race. The Unites States Supreme Court described the issue with an unusual reference to the fable '*The fox and the stork*' by Aesop. According to the fable, a fox generously offered some milk to a stork, but it was on a plate that was actually too wide and shallow for the stork to be able to drink. In the actual case, the employer listed high school completion among the requirements, thus excluding the majority of non-white applicants, although it was not necessary for the job. However, as highlighted by the Court, 'tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork' and the 'vessel in which the milk is proffered' must be accessible to all. The relevant law[48] had therefore to be interpreted as prohibiting 'not only overt discrimination, but also practices that are fair in form, but discriminatory in operation'. Consequently, the idea of indirect discrimination focuses on the negative impact on a certain group of workers. In order to understand how the mechanism works, it might be useful to refer to the relevant legislation applied in the EU.

With relation to discrimination on grounds of sex, the relevant EU Directive[49] defines indirect discrimination as a situation

> 'where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary'.

This kind of discrimination is prohibited in relation to access to employment and vocational training, working conditions including pay, and other matters mentioned in the Directive itself. Therefore, three elements must be present at the same time: (a) an apparently neutral rule; (b) a protected group that is affected by such apparently neutral rule in a more negative way; (c) a comparator, ie a

law in employment) (Tōkyō: Yūhikaku, 2016), 61.

[47] 401 US 424 (1971).

[48] Title VII of the Civil Rights Act of 1964.

[49] European Parliament and Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.

person of the other sex that can be used as term of comparison in order to assess the negative impact on the protected group by the apparently neutral rule.[50] Moreover, there is a possibility for lawful differential treatment in case of objective justification. As it will be clarified in the next paragraph, Japan adopted a similar approach, but decided to limit the prohibition of indirect discrimination to a very small number of cases.

Following the concluding observations of the CEDAW Committee of 1994 and, especially, of 2003,[51] a first non-binding definition of indirect discrimination was released in a policy research report by the MHLW in 2004.[52] According to this, indirect discrimination happens when an apparently neutral provision, criterion or practice is unfavourably affecting, to a considerable degree, the members of one sex in comparison to the other, and such provision is not reasonable or justifiable, for instance, because it has no connection with the job. Moreover, seven examples of indirect discrimination were selected by the MHLW research group. Two years later, the EEOA was amended to include indirect discrimination in Art 7, but the limitations were many. First of all, the prohibition was applicable only to situations mentioned in Art 5[53] and Art 6[54] of the EEOA. In addition, only three of the seven cases mentioned in the policy research report were listed:[55] (a) height, weight or physical strength requirements at the time of recruitment or employment; (b) worker's availability for relocation at the time of recruitment, employment, promotion or job change; (c) worker's experience of relocation at the time of promotion. It seems that the selection of the three measures was based on consensus among the representatives of labor and management, but not on political or legal considerations.[56] Finally, it is always possible for employers to prove that there is a 'reasonable justification'[57] that makes the differential treatment lawful.

To sum up, the prohibition of indirect discrimination was added to the EEOA in 2006, although the Japanese term for indirect discrimination[58] does

[50] European Union Agency for Fundamental Rights, *Handbook on European Non-discrimination Law* (Luxembourg: Publications Office of the European Union, 2011), 29-31.

[51] UN Committee on the Elimination of Discrimination against Women, *Consideration of the Reports Submitted by States Parties under Article 18 of the Convention* (New York: UN Committee on the Elimination of Discrimination against Women, 2003), para 358.

[52] Ministry of Health, Labor and Welfare, 'Danjo koyō kikai kintō seisaku kenkyūkai hōkokusho' (Report of the research group on policies for equal opportunity between men and women in employment), available at https://tinyurl.com/yap649y4 (last visited 15 November 2018).

[53] Recruitment and employment.

[54] Assignment, promotion, demotion, training, certain fringe benefits, change in job or employment type, retirement, dismissal, and renewal of the labor contract.

[55] Art 2 of Ordinance no 2 of 27 January 1986, as amended. See also the MHLW Public Notice no 614 of 2006 for the guidelines.

[56] M. Asakura, n 46 above, 72 (fn 12).

[57] In Japanese, *gōriteki na riyū*.

[58] In Japanese, *kansetsu sabetsu*.

not appear in the law itself, since the title of Art 7 is simply 'Measures on the basis of conditions other than sex'. However, its many limitations have reduced the potential of the provision in terms of raising awareness towards certain situations that are nowadays considered legitimate, but are de facto hindering the possibility of certain groups of workers, including women, but also young and older people, or non-Japanese, to have access to the best opportunities in the labor market. Of course, the MHLW can always update its list of unlawful practices in the future, and Japanese courts can work on developing a more general prohibition of indirect discrimination, which over time might be codified in national legislation. However, this process that has struggled over many years has been further slowed and, as mentioned above, the reform has missed the opportunity to really promote social change. On the bright side, it must be noted that a legislative step was taken and it raised some awareness by generating public discussion. Moreover, a certain degree of flexibility was ensured, since updating a ministerial ordinance requires less effort than a law, and reference to the concept of 'reasonableness' allows judges to balance decisions between business freedom and workers' rights. Once again, the role played by the judiciary will probably be fundamental.

## VIII. Conclusions

In order to conclude this short overview on indirect discrimination in Japanese labor law, some final, but certainly not definitive, considerations will be drawn. A long time has passed since the entry into force of the Shōwa Constitution, of the LSA and of the EEOA. By recalling the initial aims of this paper, it is clear that many efforts were made in order to gradually clarify the content of such laws. In the end, Japan has somehow embraced the Euro-American views on indirect discrimination, but, for now, has adopted a very cautious approach, which might be justified by the future development of a broader political consensus on which further reforms could be based upon. As noted above, perhaps a bolder approach in the 2006 reform could have promoted a quicker response in society, but the mentality that the prohibition of indirect discrimination is challenging is quite entrenched in Japan. The timing for structural reforms is never easy to calculate, and it is not uncommon that they require many years in order to reach their full potential. Waiting for the response of the labor market, or resorting to more flexible legal sources before imposing top-down drastic reforms is therefore understandable.

From the point of view of the effectiveness of such reforms, despite the elements missing from a fully-fledged equality of opportunity that includes more ambiguous indirect discrimination cases, a fruitful osmosis has been established between the MHLW, the Japanese courts, and the National Diet, ie the executive, judiciary and legislative branches. With dialogue between the different institutions

of the State and representatives of the employers and the employees, a minimum level of compromise is possible. Such an arrangement, although it might not solve all the existing issues, is more likely to be implemented in an effective way in the future, since its content, at least in theory, was agreed upon by all the relevant actors. There are certainly differences between the EU and Japan, but with relation to the equality principle and its application to labor legislation, it seems that they share similar values that are gradually being reflected in the law. In Japan, legal reform has often been prompted by external pressure, but the same situation can be found in the Member States of the EU, and it can be said that it is in fact the capacity of a legal system to respond to crises through change that determines its ability to survive in the international arena.[59] States with institutions capable of cooperating in a productive manner offer a brighter future, if they can incorporate best practices from around the world.

[59] M. Riminucci, 'Resilient Japan: Legal Adaptability and Migration', in L. Ferrara et al eds, *Biopolitica dell'immigrazione* (Frankfurt am Main: Peter Lang, 2017).

# The Protection of Our Image: Between the Right to One's Own Image and the Right of Publicity

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**Abstract**

Through an analysis of the privacy right of publicity (or 'personality rights') in the American legal system and the right to one's own image in the Italian legal system, the author demonstrates the strict analogies that exist between these legal institutions, despite the differences in their origins.

## I. Introduction

The desire for protection of the intangible aspects of our life (honour, reputation, dignity) is very ancient. In Classical Roman law,[1] for example, there were specific actions against injuries uttered in public (*convicium*)[2] or against rumours spread widely by someone against someone else (*infamatio*).

Despite this ancient tradition, we can say that the right to one's own image is a result of technology's evolution of image reproduction. Without the invention of photography and its diffusion, we would not have this right. If we examine the history of such right (both in common law and civil law) we observe that, before photography, there was no need to protect our own image.[3] Once we

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[1] '*Fin da epoca alquanto antica, l'ordinamento giuridico romano ha conosciuto alcune norme dirette a tutelare onore, decoro e reputazione offesi. Si può cogliere, anzi, nella storia della disciplina prevista in questa materia, uno dei più sicuri dati relativi al riconoscimento della personalità individuale in Roma e vi si può contemporaneamente vedere un esempio molto rilevante dell'ampiezza e della profondità delle modificazioni recate in strutture giuridiche arcaiche da una più matura coscienza sociale*' ('Since ancient times, the Roman legal system has known some rules aimed at protecting honor, decoration and offended reputation. On the contrary, in the history of the regime provided for in this subject, one can grasp one of the most certain data concerning the recognition of individual personality in Rome, and at the same time we can see a very relevant example of the amplitude and depth of the modifications carried out in archaic juridical structures from a more mature social consciousness'), G. Crifò, 'Diffamazione e ingiuria (diritto romano)' *Enciclopedia del diritto* (Milano: Giuffrè,1964), XII, 470.

[2] *Convicium* was 'a verbal offense against a person's honor. It was considered an *Iniuria* when committed by loud shouting in public (*vociferatio*)'. A. Berger, *Encyclopedic Dictionary of Roman Law* (Philadelphia: The American Philosophical Society, 1953), 416.

[3] In this regard we disagree with the opinion, according to which '*la tutela dell'immagine, intesa come ritratto, ha un'origine antica. Essa affonda le sue radici in pratiche sciamaniche*

realized that it is only with photography that is possible to reproduce and spread our image, we acquired the need to protect our privacy.

That stated, we should remember that the common law and civil law have very differing approaches. In the common law tradition, there is no specific right to the protection of one's own image. In contrast, civil law recognizes and protects, in almost every jurisdiction, a specific right to one's own image.

Both these rights (privacy and right to one's own image)[4] have a form of 'birth date' in the era of photography development.

## II. The Birth of the Right to Privacy

The right of privacy was born with the famous work of Samuel D. Warren and Louis D. Brandeis.[5] These two Boston lawyers, towards the end of the nineteenth century,[6] theorized privacy as the *right to be alone,* as a civil and

*che si fondavano sulla credenza per cui la manipolazione dell'immagine di una persona potesse consentire di infliggere danni o benefici al corpo o alla psiche della persona ritratta*' (the protection of the image, understood as a portrait, has an ancient origin. It has its roots in shamanic practices that were based on the belief that the manipulation of the image of a person could allow to inflict damage or benefits to the body or psyche of the person portrayed), F. Benatti, 'Danno all'immagine' *Digesto civile* (Torino: UTET, 2011), VI, 275.

[4] Considering the first developments of this right, there is often quoted a case regarding the American painter, James Whistler. Early in 1894 Whistler painted a small portrait of Lady Eden (Hunterian Museum and Art Gallery, Glasgow), and her husband, Sir William Eden, who sent one hundred pounds for it, which Whistler banked. Whistler exhibited the picture in Paris but refused to deliver it and Eden instituted legal proceedings. Thereupon, Whistler returned the money but scraped out the figure, substituting that of an American sitter in its place, so that if he lost the case, the portrait could not be recovered. At the civil tribune in March 1895, Whistler was ordered to hand over the portrait and pay damages but after two appeals, in 1897 and 1900, Whistler was finally granted the picture and Eden was ordered to pay expenses. In *Eden versus Whistler: the Baronet and the Butterfly* (1899), Whistler published his account of the case, which entered French law by establishing that artists do not enter into ordinary commercial contracts of sale with their patrons.

According to F. Cionti, *All'origine del diritto all'immagine. Dall'immagine dipinta all'immagine fotografata della cosa* (Milano: Giuffrè, 1998), 12-30, who expressly based a large part of his analysis on the work of M. Ricca-Barberis, 'Il diritto all'immagine (casi e pareri della vecchia bibliografia francese e tedesca)' *Rivista di Diritto Civile*, I, 226 (1958), the issue of the right to one's own image was born already with painting but even allowing for this, the situation completely changed with the advent of photography (ibid 31-75).

[5] S.D. Warren and L.D. Brandeis, 'The right to privacy' 5 *Harvard Law Review*, 193-220 (1890).

The authors state the purpose of the article as: 'it is our purpose to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is', ibid 197.

[6] The recognition of the same right in Italy arrived much more later. The first time the word privacy as '*riservatezza*' was used by M. Giorgianni, 'La tutela della riservatezza' *Rivista trimestrale diritto e procedura civile*, I, 13-30 (1970), then it appeared in the legge 20 maggio 1970 no 300, Art 6 '*Le visite personali di controllo sul lavoratore sono vietate fuorché nei casi in cui siano indispensabili ai fini della tutela del patrimonio aziendale, in relazione alla qualità degli strumenti di lavoro o delle materie prime o dei prodotti. In tali casi le visite personali*

non-contractual right of protection against invasion of privacy. They concluded[7] that the development of 'instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life'.[8] Privacy, at least at its beginning, is an environment in which no one is permitted to enter without our permission, so the issue of one's own image protection is linked to that environment. Personality rights originate, indeed, in the 'right to privacy'.

Given the importance of the establishment of the right to privacy,[9] for purposes of this paper, it may serve to offer a brief analysis of the background.

First, Warren and Brandeis examined the law of slander and libel (forms of defamation) to determine if it adequately protected the privacy of the individual. The authors concluded that this body of law was insufficient to protect the privacy of the individual because it 'deals only with damage to reputation'.[10] In other words, defamation law, regardless of how widely circulated or unsuited to personality rights, requires that the individual must suffer a direct effect in his or her interaction with other people.

Second, in the next several paragraphs, the authors examined intellectual property law to determine if its principles and doctrines sufficiently protected the privacy of the individual and they concluded that

> 'the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone'.

Warren and Brandeis then discussed the origin of what they called a 'right to be let alone'. They explained that the right of property provided the foundation

*potranno essere effettuate soltanto a condizione che siano eseguite all'uscita dei luoghi di lavoro, che siano salvaguardate la dignità e la riservatezza del lavoratore e che avvengano con l'applicazione di sistemi di selezione automatica riferiti alla collettività o a gruppi di lavoratori (...)*' (Personal check-ups on the worker are prohibited except in cases where they are indispensable for the protection of the company's assets, in relation to the quality of the work tools or raw materials or products. In such cases, personal visits may be carried out only on condition that they are performed at the exit of the workplace, that the worker's dignity and privacy are safeguarded and that they occur with the application of automatic selection systems referring to the community or groups of workers (...)).

[7] Warren had a wife who practiced worldly habits, frequenting night-time dances and often coming home late, even accompanied by gentlemen other than her husband. The chronicle of Boston was always interested in the activities of the lady, making known the private details through a local daily newspaper selling around eighty thousand copies. For this reason, Warren and Brandeis decided to write their work about privacy. See A. Gajda, 'What if Samuel D. Warren Hadn't Married a Senator's Daughter? Uncovering the Press Coverage that Led to The Right to Privacy' 35 *Michigan State Law Review*, 35-59 (2008).

[8] n 5 above, 195.

[9] 'The right to privacy is, as legal concept, a fairly recent invention', see D.J. Glancy, 'The invention of right to privacy' 21 *Arizona Law Review*, 1-39 (1979).

[10] n 5 above, 197.

for the right to prevent publication. However, at that time, the right of property only protected the right of the creator to any profits derived from the publication. The law did not yet recognize the idea that there was value in preventing publication. As a result, the ability to prevent publication did not clearly exist as a right of property.

Finally, Warren and Brandeis considered the remedies and limitations of the newly conceived right to privacy. The authors acknowledged that the exact contours of the new theory were impossible to determine but several guiding principles from tort law and intellectual property law were applicable.

Such principles are: I. the right to privacy does not prohibit any publication the matter of which is of public or general interest;[11] II. the right to privacy does not prohibit the communication of any matter which, though in its nature private, when the publication is made under circumstances, would render it a privileged communication, according to the law of slander and libel; III. the law would probably not grant any redress for the invasion of privacy by oral publication, in the absence of special damage; IV. the right to privacy ceases upon the publication of the facts by the individual or with his consent; V. the truth of the matter published does not afford a defence; VI. the absence of 'malice' in the publisher does not afford a defence; VII. with regard to remedies, a plaintiff may institute an action for tort damages as compensation for injury or alternatively request an injunction.

As a closing note, Warren and Brandeis suggested that criminal penalties should be imposed for violation of the right to privacy but they declined to elaborate further on the matter, deferring instead to the authority of the legislature.

The work of Warren and Brandeis was extremely successful in American jurisprudence; their theories were quite soon embraced by several decisions which have been analysed by William L. Prosser. He identified a complex of four torts: 1. intrusion upon the plaintiff's seclusion or solitude or into his private affairs; 2. public disclosure of embarrassing private facts about the plaintiff; 3. publicity which places the plaintiff in a false light in the public eye; 4. appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[12]

[11] Warren and Brandeis elaborated on this exception to the right to privacy by stating: 'In general, then, the matters of which the publication should be repressed may be described as those which concern the private life, habits, acts, and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested, or for any public or quasi public position which he seeks or for which he is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity. The foregoing is not designed as a wholly accurate or exhaustive definition, since that which must ultimately in a vast number of cases become a question of individual judgment and opinion is incapable of such definition; but it is an attempt to indicate broadly the class of matters referred to', n 5 above, 216.

[12] W.L. Prosser, 'Privacy' 48 *California Law Review*, 383-423, 389 (1960).

## III. The Right of Publicity: Its Origin and Development

It was through the tort of the appropriation, for the defendant's advantage, of the plaintiff's name or likeness that United States jurisprudence elaborated the modern right of publicity.[13]

More than a century ago, New York's highest court, the Court of Appeals, was asked to find a right to privacy in a case brought by a young woman whose portrait had been used without her prior consent, in an advertisement for a flour company. The court rejected the request but its ruling was followed by public outrage that led the State's legislature promptly to enact a statute creating a right to privacy that exists to this day.

In 1902, in *Roberson* v *Rochester Folding Box Co*, *25*,[14] the plaintiff brought an action against a flour manufacturer, claiming an infringement of her right to privacy due to unauthorized printing, sale and circulation of twenty-five thousand lithograph prints of her image.

The court summarized the plaintiff's complaint:

> 'Such publicity, which some find agreeable, is to plaintiff very distasteful, and thus, because of defendants' impertinence in using her picture, without her consent, for their own business purposes, she has been caused to suffer mental distress where others would have appreciated the compliment to their beauty implied in the selection of the picture for such purposes'.

The court refused to recognize a common law right of privacy in this case, fearful of opening the litigation floodgates but in 1903 the New York legislature enacted sections 50, 51 and 52 of the *New York Civil Rights Law*,[15] overruling Roberson and made it an offense and a tort to use a person's 'name, picture or photograph' in advertising or trade without his or her consent.[16]

[13] In this regard, see S. Barbas, 'From Privacy to Publicity: The Tort of Appropriation in the Age of Mass Consumption' 61 *Buffalo Law Review*, 1119-1189 (2013).

[14] *Roberson* v *Rochester Folding Box Co* 171 NY 538, 64 NE 442 (1902).

[15] The Civil Rights Law was an act relating to civil rights, constituting chapter six of the consolidated laws (which are the codification of the permanent laws of a general nature of New York enacted by the New York State Legislature) and it became a law on 17 February 17 1909 with the approval of the Governor.

[16] Section 51 recognizes in this case an action for injunction and for damages 'Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages. But nothing contained in this article shall be so construed as to prevent any person, firm or corporation from selling or otherwise transferring any material containing such name, portrait, picture or voice in whatever medium to any user of such name, portrait, picture or voice, or to any third party for sale or transfer directly or

The right of publicity developed, as celebrities sought recognition for the far more lucrative claims for the value of their endorsement. Having relinquished much of their 'privacy' as far as being in media or participating in advertising and marketing, their focus was on the value of their endorsement and subsequently this authorization – more of a license than a release – became extremely valuable.

For these reasons, formal recognition of the modern right of publicity is usually traced to the case of *Haelan Laboratories, Inc* v *Topps Chewing Gum, Inc* a 1953 decision of the United States Circuit Court of Appeals for the Second Circuit.[17]

In *Haelan,* one producer of baseball cards packaged with bubble gum (the Bowman Gum Company) sued another (Topps Chewing Gum), alleging that the latter had infringed exclusive contracts that the first producer had secured with many Major League baseball players.

Prior to the *Haelan* decision, the boundaries of an individual's publicity rights were not clear. On the one hand, it was widely accepted that there was a right of privacy which protected individuals from the unauthorized use of their names or images for commercial purposes, even if they were public figures. However, this right was not typically thought of as a 'property right' but rather as a right to bring an action in tort. As such, it was not clear that individual publicity rights could be alienated or enforced by a third party. Further complicating the matter was that the right of privacy was derived from the

indirectly to such a user, for use in a manner lawful under this article; nothing contained in this article shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this article shall be so construed as to prevent any person, firm or corporation from using the name, portrait, picture or voice of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait, picture or voice used in connection therewith; or from using the name, portrait, picture or voice of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait, picture or voice used in connection therewith. Nothing contained in this section shall be construed to prohibit the copyright owner of a sound recording from disposing of, dealing in, licensing or selling that sound recording to any party, if the right to dispose of, deal in, license or sell such sound recording has been conferred by contract or other written document by such living person or the holder of such right. Nothing contained in the foregoing sentence shall be deemed to abrogate or otherwise limit any rights or remedies otherwise conferred by federal law or state law'.

[17] *Haelan Laboratories, Inc* v *Topps Chewing Gum, Inc*, 202 F.2d 866 (2d Cir 1953). Scholars agree that this case was the formal recognition of right of publicity. See D. Maffei, 'Il *right of publicity*', in G. Resta ed, *Diritti diritti esclusivi e nuovi beni immateriali* (Torino: UTET, 2010), 511-548, 515; J. Gordon Hylton, 'Baseball Cards and the Birth of the Right of Publicity: The Curious Case of Haelan Laboratories v. Topps Chewing Gum' 12 *Marquette Sports Law Review*, 273-294, 273 (2001); S. Martuccelli, 'The Right of Publicity under Italian Civil Law' 18 *Loyola of Los Angeles Entertainment Law Journal*, 543-563, 551 (1998).

common law in some jurisdictions and from statutes in others.

In his majority opinion in *Haelan,* Judge Jerome Frank moved beyond the tort analysis and found that individuals (here, Major League baseball players) also possessed a property right in their own images. More importantly, in Judge Frank's view, this right could be transferred to a third party who then had the same right as the individual himself to enforce it against competing but unauthorized users. Other jurisdictions were initially reluctant to follow Judge Frank's lead; as late as 1970, courts in only five states (Pennsylvania, Georgia, New Jersey, Hawaii and Missouri) had recognized the existence of a right of publicity of the sort described in *Haelan* and in only two states (Oklahoma and Florida) had the principle been adopted by statute. However, by 2000, the number of American jurisdictions recognizing the right of publicity by either judicial ruling or statute had reached twenty-eight and the *Restatement of Unfair Competition* identifies it as an essential part of the American law of intellectual property.[18]

The right of publicity expanded through the second half of the twentieth century, with further statute and case law development increasing its scope. When Elvis Presley died in 1977, his personal manager objected when a poster immediately appeared with his image and the words 'In Memoriam'.[19] It was clear that Elvis's right of publicity would continue to be valuable for as long as it was kept 'alive'. Thus the post-mortem rights for the heirs or the estate became a battleground for litigation and legislation. Consequently, the right of publicity was untethered from privacy. The most public celebrity could protect the value of his or her name or association when commercialized and it would not end with the celebrity's death.

All through its development, as new technologies for communication were created, the right expanded to encompass additional bases for celebrities to state claims for compensation. Voice and voice imitation, signature or gesture were added to those aspects of identity which could be recognized as the basis for a claim. In this regard, in the US case brought by Lindsay Lohan, she argued that her privacy rights under New York Civil Rights Law, Section 51 was violated by a character of the video game *Grand Theft Auto*.[20]

For the Italian experience was the case of the popular singer, Lucio Dalla, against an Italian company, Autovox SPA, a producer of audio equipment such as radios, compact disc players and stereos. Dalla alleged that Autovox misappropriated his persona in an advertising poster by using two of the most distinctive elements of his appearance, *viz* a woolen cap and a pair of small, round glasses. Dalla argued that the use of the cap and glasses constituted a

[18] On December 28, 1994, the American Law Institute officially published the *Restatement (Third) of Unfair Competition* (1995). In §§ 46-49 of this Restatement (Topic 3 of Chapter 4), that institute for the first time recognized a full-blown commercial 'right of publicity'.

[19] *Factors Etc, Inc* v *Pro Arts, Inc*, 579 USA F.2d 215 (2nd Cir 1978).

[20] *Lohan* v *Take-Two Interactive Software, Inc*, 24 Court of Appeal of New York, 2018.

misappropriation of his persona because they created an immediate association between himself and Autovox. He further alleged that the advertisement damaged his reputation because consumers were likely to believe that he endorsed Autovox's products, despite the fact that Dalla consistently refused to appear in commercials.[21]

Nowadays, the right of publicity continues to expand to encompass more elements of personality and more media and forms of communication. Traditionally, trained advertising professionals were previously in the creation of advertising campaigns and were careful to obtain necessary licenses. Advertising agencies also provided the advertiser with insurance that covered such rights of publicity claims. Nowadays, content commissioned and paid for by advertisers is sometimes created without input from advertising professionals and content may include discussions of popular cultural events and celebrities. When it also includes product placements and advertiser-dictated content or even just an advertiser's credit for sponsoring or underwriting the cost of the content, it may expose the advertiser to claims by people who are identified in the content.

## IV. The Right to One's Own Image

The origins of a right to one's own image in Europe are partially different and linked to the first known 'paparazzi' case.[22]

The shocking image of the dead German Chancellor, Otto von Bismarck (1815–1898), lying dishevelled, propped-up on his deathbed is the world's first 'paparazzi' photograph. The clandestine photograph was taken by two young photographers, Max Priester and Willy Wicke, on 30 July 1898. They broke into Bismarck's chambers by bribing a servant and photographed his corpse only a few hours after his death; in fact, the deceased Chancellor's family had only just paid its last respects and left the bedroom when the photograph was taken. No one except Chancellor's family was permitted to see Bismarck's last moments.

This grainy black and white photograph of Bismarck's corpse turned out to be the final image of the great leader; no 'official' death mask or post-mortem

[21] Pretura di Roma, 18 April 1984, *Foro Italiano* I, 2030 (1984) with comment from R. Pardolesi and *Giurisprudenza Italiana*, I, 2, 453 (1985), with comment from M. Dogliotti, 'Alcune questioni in tema di notorietà, diritto all'immagine e tutela della personalità' and ibid 551 with comment of M. Garutti, 'Utilizzazione in una campagna pubblicitaria di accessori abitualmente usati da una persona'.

According to S. Martuccelli, n 17 above, 548 'the judge in the Dalla case reasoned that such protection should also apply to unauthorized uses of attributes of one's persona, hence creating a right similar to the American right of publicity'.

[22] With the term *paparazzo,* we define (sometimes in a derogatory way) those photographers specialized in photographing famous people in public places or in their private sphere, almost always looking for the most particular, rare, more compromising situations (in order to obtain more money). The term is derived from and spread thanks to the film by Federico Fellini, *La dolce vita*, in which a character (played by Walter Santesso), who practices this profession, has the surname *Paparazzo*.

portraits were made. Bismarck's emaciated face peers out from above a sea of bedcovers and pillows, exposed in the cruel, bright ray of magnesium light used by the photographers to illuminate the scene. Save for a protruding right hand, Bismarck's collapsed body lies invisible beneath the bed sheets. In this iconoclastic image, Bismarck, the national hero who unified Germany, is revealed in a frail and un-heroic state; a chamber pot at his bedside, he slips from the world, much as his body slides underneath the sheets.

Like the photographers who sell their images to the world's media today, Priester and Wicke tried to hawk their newsworthy 'scoop' featuring the dead 'celebrity' to the German newspapers, who declined to publish it. They advertised the image in the newspaper, *Tagliche Rundschau* on 2 August 1898,

> 'for the sole existing picture of Bismarck on his deathbed, photographs taken a few hours after his death, original images, a buyer or suitable publisher is sought'.

Priester's and Wicke's behaviour caused public outrage in Germany. It led to the confiscation of their plates by the police and to civil and criminal legal proceedings being brought against them in 1899.

In the end, Priester was sentenced to five months' imprisonment and Wicke received an eight months' sentence.[23] Their censored plate was handed over to Bismarck's family, where it remained out of sight for a long time though, remarkably, it was not destroyed. Instead, it was to resurface after World War II, to circulate in a context in which such images did not seem so shocking in the wake of the War's atrocities. Today, the image is readily accessible on the Internet.

The image of the dead Bismarck marks one of the first encounters between the law and photography. At the heart of this encounter, we find what might be described as three categories of image 'offence', all of which are conflated in the taking, content and (attempted) distribution of this disturbing photograph.

The first offence is the means by which the photograph is taken, seen here in the duplicitous intrusion by the photographers into the 'sacred' realm of Bismarck's home. The second offence is the 'content' of the photograph, namely the intimate and undignified image of the dead Bismarck, a sight which was only supposed to be visible to Bismarck's family members (even Kaiser Wilhelm II was denied permission by Bismarck's family to view his dead body). The third offence is the 'distribution' of the photograph, namely the way in which the photographers sought to exploit it by selling or licensing it for profit, thereby transforming the dead Bismarck into a commodity.

It is, perhaps, no accident that the scandal caused through the explosive combination of all three image offences in Priester's and Wicke's photograph

[23] The case of the Bismarck death photography was detailed described by J. Kohler, 'Der Fall der Bismarckphotographie' 5 *Gewerblicher Rechtsschutz und Urheberrecht*, 196–210 (1900).

would directly lead to the passage of one of the first laws of image rights, *viz* section 22 of the German Copyright Act (*Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie* 1907). In this law, German legislators, troubled by the wound caused by the scandal, devised a way to grant the subject 'rights' over their image to protect their personality. From then on, permission by the subject portrayed would be required when photographs of them were taken and disseminated, though an exemption was granted for public persons or 'figures of contemporary history', who would have lesser protection and these rights could persist even after their death and be exercised posthumously by their family relatives.

Since then, 'consent' became the key point of right to one's own image and this is why in Italy we have, in legge 22 April 1941 no 633 for the protection of copyright, a specific section for rights on portraits.

In this section, Art 96 provides that the portrait of a person may not be displayed, reproduced or commercially distributed without the consent[24] of such person or, after his death, without the consent of his heirs.

In contrast, according to Art 97,[25] the consent of the person portrayed is not necessary if the reproduction of the portrait is justified by his notoriety[26] or his holding of public office, or by the needs of justice or the police, or for scientific, didactic or cultural reasons, or when reproduction is associated with facts, events and ceremonies which are of public interest or which have taken place in public.[27]

[24] Regarding consent we have to remember the decision of Corte di Cassazione, 29 January 2016 no 1768, *Il Diritto Industriale*, 55 (2017) with comment of A. Geraci, 'Il negozio unilaterale per il consenso alla pubblicazione della propria immagine'; *Danno e responsabilità*, 47 (2017) with comment of E. Barni, 'Cassazione e diritto all'immagine: divulgazione del ritratto per scopi pubblicitari, revocabilità del consenso, tutela risarcitoria'.

With this judgment the Corte di Cassazione stated that consent for the publication of one's own image constitutes a unilateral deed, having as its object not the personal and inalienable right to the image but only the exercise of that right, so that although it may be occasionally included in an agreement, the consent remains distinct and independent from the agreement that contains it and is always revocable, whatever the deadline indicated for the permitted publication and regardless of the agreed stipulation, which does not integrate an element of the authorization deed.

[25] The first Italian law on copyright (legge 25 June 1865 no 2337) did not contain any provision regarding the right to one's own image while Art 11 of Legge 18 March 1926 no 562 was substantially similar to the Arts 96 and 97, quoted above.

[26] In this regard we remember the recent case of theatric show about the famous Italian singer and actor Domenico Modugno. See Tribunale di Roma, 17 July 2015, *Il Diritto Industriale*, 273 (2017) with comments of F. Florio, 'Il diritto all'immagine, la necessità del consenso e le sue eccezioni', and M. Maggiore and L. Zoboli, 'Interesse pubblico ed eccezione culturale: le limitazioni al diritto all'immagine dei personaggi famosi'.

[27] Public events have been always deemed to be situations in which consent of the portrayed person is not necessary. See M. Ricca-Barberis, 'Il diritto alla propria figura' *Rivista del diritto commerciale, industriale e marittimo*, I, 3-12, 3 (1903) '*non viola il diritto individuale colui che armato di una Kodak fotografi per la via un'altra persona anche se questa non lo voglia,*

However, the portrait may not be displayed or commercially distributed if its display or commercial distribution would prejudice the honour, reputation or dignity of the person portrayed.

The Italian normative system about such a right[28] is made also by Art 10 of the Civil Code, which provides that if the image of a person or the parents or the spouse or child has been exposed or published except in cases where exposure or publication and permitted by law, or with prejudice to the dignity or reputation of the person or of those relatives, the authorized court, on application, may provide for an end to the abuse, though not for damages. The article does not contain any reference to consent because it was expressly written to give a wider protection to the right to one's own image, considering the provision of Art 11 of legge 18 March 1926 no 562.[29]

Contrasting the right of publicity and right to one's own image, there exist, apparently, two different legal institutions (the latter, in particular, should be one of the personal rights, such as freedom and it was analysed in detail by German jurists after the Bismark case).[30] In reality, in reviewing the work of Eduardo Piola Caselli, the father of the Italian Copyright Law, we see that the institutions are substantially similar.[31]

*chi passeggia per la strada sa di esporsi ai suoi simili: che poi la sua immagine si imprima fuggevolmente sulla retina di un occhio umano o durevolmente sulla pellicola di una macchina fotografica, poco importa*' (who armed with a Kodak takes a picture of someone on the street does not violate any individual right even if he does not want; who walks the street knows how to expose himself to his fellow men: if his image is impressed on the retina of a human eye or durably on the film of a camera, it does not matter).

[28] There is a huge literature about the right to one's own image, but for deep and exhaustive analysis see M. Proto, *Il diritto e l'immagine. Tutela giuridica del riserbo e dell'icona personale* (Milano: Giuffrè, 2012).

[29] See E. Piola Caselli, *Codice del diritto d'autore. Commentario della nuova legge 22 aprile 1941-XIX, n. 633* (Torino: Unione Tipografica Editrice Torinese, 1943), 506, 507.

[30] Referring to the *Recht am eigenen Bilde*. See ibid 504-505.

[31] '*La riproduzione della nostra immagine in un ritratto che avvenga in quelle stesse condizioni nelle quali avviene la quotidiana esposizione della nostra figura agli occhi del pubblico, non può di per sé offendere alcun diritto né ledere alcun ragionevole interesse della persona. L'offesa non sorge se non quando la riproduzione o la diffusione dell'immagine avvengano al di fuori di queste condizioni normali e siano per così dire qualificate per talune circostanze particolari che urtano veramente il sentimento giuridico (...). Ma allora noi dobbiamo dire che la lesione giuridica va riferita ad un'altra causa che esiste al di fuori o al di sopra di questo diritto; e che consiste in fondo in quella esplicazione del diritto generale della libertà e dignità personale che gli inglesi hanno chiamato diritto dell'intimità o right of privacy*' (The reproduction of our image in a portrait occurring in the same conditions in which the daily exposure of our figure to the eyes of the public takes place, can not in itself offend any right or harm any reasonable interest of the person. The offense does not arise unless the reproduction or the diffusion of the image take place outside of these normal conditions and are, so to speak, qualified for certain particular circumstances that really impact the legal feeling (...). Then we must say that the legal injury must be referred to another cause that exists outside or above this right; and which consists basically in that explication of the general right of freedom and personal dignity that the English have called the right of intimacy or right of privacy). See ibid 505-506.

## V. Nowadays

Facebook, Linkedin or Whatsapp sought to make almost everyone a 'celebrity'. Twenty years ago, one could only find pictures of genuinely well-known people but nowadays a Google search will produce the name and photographs of almost anyone.

The fact that videos and photographs are today made exclusively in digital formats led, indeed, to a wider circulation of images that now transfer from smartphones to social networks and from social networks to various web sites and are downloaded again on devices and often modified and reused.

It is precisely because of the unstoppable expansion of these phenomena that search engines have, for a long time, offered the 'image search service' that allows every user of the network to find, for each noun or adjective, dozens of images that the search engine research considers 'correspondent' to that word, according to the cold logic of its algorithm. If I search for 'ugly' on Google images, whose face would Google give me as result? Could one trust that such result is accurate?

In light of these considerations, if on the one hand, it is true that the recognition and affirmation of a right of publicity is undoubtedly caused by the advent and the development of photography, we have to acknowledge that the concomitant evolution of these phenomena (digitalization and access to the network) has radically changed our habits and our sensitivity to our right of publicity and of our privacy.

For these reasons we face two demands which are diametrically opposed to each other. We spread our image on the network[32] continuously. In many cases, personal photographs are not retained purely privately but are shared with others immediately after being taken.[33] At the same time, however, our sensitivity to our own image has become sharpened. Not long ago, despite it being explicitly recognized in almost every legal system, the right to the protection of our own image was considered a right only of those people who enjoyed a certain amount of notoriety (actors, politicians, sports personalities, etc). Today it is a right that everyone perceives as his own.

Despite the efficiency of the legal system (both common law and civil law) in protecting our image, the only possible protection of it in an Internet era[34] is

[32] But always giving our consent. Only when we see that our picture is used in a way that violates our honor or our reputation we would delete it forever from Internet. See, in this regard, the case of Caitlin Seida, https://tinyurl.com/y8u9wgvt (last visited 15 November 2018).

[33] Considering the *phenomenon* of *fotosociality*, delivered through the Samsung camera which is able immediately to post pictures on social networks without first downloading them.

[34] '*Il concetto di oblio non esiste su Internet. I dati, una volta pubblicati, possono rimanerci letteralmente per sempre – anche se la persona interessata li ha cancellati dal sito "originario", possono esisterne copie presso soggetti terzi; appartengono a quest'ultima categoria i servizi di archivistica e la funzione di "cache" disponibile presso un notissimo motore di ricerca. Inoltre, alcuni fornitori di servizi rifiutano di ottemperare (o non ottemperano affatto) alle*

to follow the advice of Epicurus, to 'live secretly'. Maybe it is time to relinquish any protection of our image.

*richieste degli utenti di ottenere la cancellazione di dati e, soprattutto, di interi profili*' (The concept of oblivion does not exist on the Internet. The data, once published, can remain literally forever – even if the person concerned has deleted them from the "original" site, there may be copies to third parties; the archiving services and the "cache" function available in a well-known search engine belong to the latter category. In addition, some service providers refuse to comply (or fail to comply) with user requests for data deletion and, in particular, for entire profiles) (*Garante per la protezione dei dati personali*, Rapporto e Linee-Guida in materia di *privacy* nei servizi di social network 'Memorandum di Roma', 3-4 March 2008).

# The Public Administration and the Citizens Privacy Protection.
# A Comparison Between European Union and Japan

Giacomo Mannocci*

**Abstract**

Cybersecurity and privacy protection are strategic objectives to ensure free trade and economic freedom in a global society. Precisely for this reason, recently, the European Union and Japan have changed their legislation on the protection of personal data, strengthening the powers of control and regulation by public bodies. Ensuring citizens of the proliferation of data on the internet has become a necessity. This is demonstrated by the recent scandals involving Facebook and Cambridge Analytica.

## I. Introduction

In the past years privacy protection and information security have become topical: the Privacy Right, meant as the right to protect the inner life from various interferences, is strictly linked to the tutelage of a person dignity.

The emergence of social networks and internet development created a new problem: the 'unauthorized profiling' of personal data. The services offered on internet, inevitably require the acquisition of information regarding the personal sphere: every day, a huge quantity of personal data, imagines and inclinations are put online. So, the data became exchange goods always more exposed to continuous collection and monitoring, often in occult ways. The 'Over The Top' (that is a label to indicate the big internet monopolists which declared a commercial interest) collect and register personal data in huge servers; these data are provided by the users for many different reasons. In this way such societies realize the most sophisticated forms of behavioral advertisement, becoming brokers, even more exclusive, between producers and consumers, they orientate choices and often knowledge, accumulate major wealth and negotiate as pair with governments. Governments and police authorities themselves collect and treat data put on the net by the users for legitimate security reasons. The will to prevent terroristic threats immeasurably multiplied the collection and classification of information and data regarding citizens lives and behaviors.

In this social contest it becomes even more necessary to find a balance

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between the need to protect people privacy (and so dignity), by ensuring national and international security from terroristic threats and, at the same time, the priority of supporting free circulation of data and free competition between economical operators.

The privacy regulation is in continuous evolution because it has 'to run after' and 'to answer' to new information and technological discoveries. For this reason, it is interesting to analyze, in a comparative way, how European Union and Japan have recently modified their legislation about personal data protection. On 25 May 2018 came into force the new Privacy European Regulation[1] which replaces the one of 1996.[2] The previous year, on 30 May 2017 in Japan, came into force the new privacy laws which replaced quite totally those of 2003 and took into consideration the technologic evolution of the last decade.

In the current contribution, the European and the Japan Regulation will be seen by a particular perspective: it will be examined how Public Administration protect privacy of its citizens and most of all how it guarantee their rights against the intrusiveness of economic operators. The recent scandal that involved Facebook is an example: the well-known social network yielded millions data of its users to the society called Cambridge Analytica,[3] which in turn has used them to influence voter choices in many electoral competitions. So the active role of Public Institutions becomes fundamental to avoid not only the privacy violation but also the market alteration due to an unfair competition.

## II. The Privacy Protection in Japan

In Japan, the privacy protection of personal data has an implicit foundation in the Art 13 of the Constitution, according to which

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

[2] The GDPR supersedes EC Directive 46/95 currently in force, implemented in Italy through the Legislative Decree 196/03 (Data Protection Law). The Legislative Decree on the harmonization of the national legislation with the provisions of the GDPR (the 'Decree 101/2018'), which amends Legislative Decree 196/2003 (the 'Privacy Code') was published on 4 September 2018 and it is came into force on 19 September 2018. The new regulatory framework for the protection of personal data is therefore made up of the GDPR, the amended Privacy Code, Decree 101, but also Law 11 January 2018 no 5 (telemarketing reform), as well as Legislative Decree 18 May 2018 no 51 (regarding the protection of personal data in processing for the purposes of prevention, investigation, verification and prosecution of crimes or execution of criminal sanctions).

[3] For a more detailed historical reconstruction, see Information Commisioner's Office, *Investigation into the use of data analytics in political campaigns*, 2018, available at https://ico.org.uk/media/action-weve-taken/2259371/investigation-into-data-analytics-for-political-purposes-update.pdf (last visited 15 November 2018).

> 'All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs'.[4]

Japan's Act on Protection of Personal Information (Act no 57 of 2003, known by the acronym APPI), one of Asia's oldest data protection laws, was originally created in 2003, and came into effect in 2005.[5] Over the following decade, developments in information technology and the globalization of data have had the effect of aging the APPI and shifting it out of line with internationally accepted standards. On 24 June 2014, the Japanese Government published the Policy Outline of the Institutional Revision for Use of Personal Data.[6] Changes to the APPI were passed by the Diet in September 2015. Some provisions, mainly those establishing and governing the Personal Information Protection Commission (PPC) (1 January 2016), are in force, and the remaining provisions are taking effect on 30 May 2017.[7]

As groundwork for the enforcement of the new APPI the Government has prepared the amended basic policy of the protection of personal information as decided by the Japanese Cabinet on 28 October 2016, the new cabinet order[8] the enforcement rules of the Amended APPI as published on 5 October 2016 and the guidelines[9] of the Amended APPI. The guidelines of the Amended APPI, which were published on 30 November 2016, contain guidance regarding: general rules, offshore transfer of personal data, book-keeping and verification obligations when transferring personal data to a third party and big data processing. These foundational policies, rules and guidelines will become effective upon the enforcement date of the Amended APPI.

The 2015 law is deeply innovative compared with the past one and it guarantee more protection to citizens, in fact the limit which scheduled the rule applicability only to the economic operators which had personal information database containing details of more than five thousand persons on any day in

[4] For a more detailed analysis and discussion on Japanese Constitution, see S. Matsui, *The Constitution of Japan: A Contextual Analysis* (London: Bloomsbury Publishing Plc, 2010). For a more detailed explanation and interpretation of the Human rights in Japan, see T. Kuramochi, 'The Protection of Human Rights and the Role of Constitutional Judicial Review in Japan' 26 *King's Law Journal*, 252-265.

[5] Act no 57 of 30 May 2003, enacted on 30 May 2003 except for Chapters 4 to 6 and Arts 2 to 6 of the Supplementary Provisions; completely enacted on 1 April 2005 and amended by Act no 49 of 2009 and Act no 65 of 2015.

[6] Strategic Headquarters for the Promotion of an Advanced Information and Telecommunications Network Society, *Policy Outline of the Institutional Revision for Utilization of Personal Data,* 2014, available at https://tinyurl.com/y9to4who (last visited 15 November 2018)

[7] The English translation of the amended Act on the Protection of Personal Information is available at https://tinyurl.com/ydaphnxj (last visited 15 November 2018).

[8] https://tinyurl.com/y9ozgjot (last visited 15 November 2018).

[9] https://tinyurl.com/yaelm62x (last visited 15 November 2018).

the past six months[10] has been canceled; then it is granted to a single independent administrative authority the role to write the privacy guidelines, while until 2015 many Ministry or independent agencies were granted to issue guidelines about their proper competences. Approximately forty guidelines regarding personal information protection have been issued by government agencies including the Ministry of Health, Labour and Welfare,[11] the Japan Financial Services Agency[12] and the Ministry of Economy, Trade and Industry.[13]

The law hasn't limited itself only to establish the new field of competence of publics organisms, but it also influenced deeply the personal data notions to guarantee them a more effective protection. Among the most significant innovations of this law, it is important to remember the widening of the concept of personal data to comprehend the 'individual identification code' (Art 2 para 2), the introduction of the 'Special care-required personal information' concept (Art 2 para 3) to indicate the valid data to gather information about health conditions, racial origins, crime committed and so on and the creation of the 'Anonymously processed information' category (Art 2 para 10) to indicate the revision and the annexation of data without going up again to single personal data.

It is interesting to observe that the new law, according to what established in 2003, lays down the duties of the National Government and of local administrations as regards the citizens' privacy protection. First, it established that

> 'The central government shall have the responsibilities for comprehensively developing and implementing necessary measures to ensure the proper handling of personal information' (Art 2)

and then it clearly state that

> 'The government shall, considering the nature and utilization method of personal information, take necessary legislative and other action so as to be able to take discreet action for protecting personal information that especially requires ensuring the strict implementation of its proper handling in order to seek enhanced protection of an individual's rights and interests, and shall take necessary action in collaboration with the governments in other countries to construct an internationally conformable system concerning

[10] Art 2 of the Order for Enforcement of the Act on the Protection of Personal Information (Cabinet Order 506, 2003, enacted on 10 December 2003).

[11] The Guidelines on Protection of Personal Information in the Employment Management (Announcement no 357 of 14 May 2012 by the Ministry of Health, Labour and Welfare).

[12] The Guidelines Targeting Financial Sector Pertaining to the Act on the Protection of Personal Information (Announcement no 63 of 20 November 2009 by the Financial Services Agency).

[13] The Guidelines Targeting Medical and Nursing-Care Sectors Pertaining to the Act on the Protection of Personal Information (Announcement in April 2017 by the PPC and the Ministry of Health, Labour and Welfare).

> personal information through fostering cooperation with an international organization and other international framework' (Art 4).

The law also specifies the role and the functions of local authorities in the personal data management. Thus, Arts 11-13 establish that each local government shall:

- based on the nature of personal information it retains, the purpose of retaining the personal information, and so on, strive to take necessary action so as to ensure the proper handling of the retained personal information (Art 11 para 1);
- in response to the characteristics and business contents of a local incorporated administrative agency that it has established, strive to take necessary action so as to ensure the proper handling of personal information that the agency retains (Art 11 para 2);
- in order to ensure the proper handling of personal information, strive to take necessary action to support a business operator and a resident in a local area (Art 12);
- in order for a complaint caused between a business operator and a principal about the handling of personal information to be dealt with appropriately and promptly, strive to mediate dealing with the complaint and take other necessary action (Art 13).

Finally, it is establishes as a general standard that central and local governments cooperate with each other in the implementation of measures concerning the protection of personal information (Art 14).

One has to observe that the new law has strengthened the Prime Minister's role because as until 2017 single Ministries issued their proper guidelines. It now belongs to Government as a whole to establish

> 'a basic policy on the protection of personal information in order to seek to comprehensively and integrally promote measures concerning the protection of personal information' (Art 7).

Moreover, it is the Cabinet to establish agreements with other Nations about data and information circulation, as well as to give directions and support to local administrations. By the same token, it is a Prime Minister's duty to propose the adoption of new technical rules, to nominate the President and the members of the Personal Information Protection Commission.

This Commission is the other news of the 2015 law because it will have a real propulsive role for the privacy theme and it will represent the reference point both for Government, local authorities and most of all for economic operators. Its functions are very wide, in fact the Commission:

- provides guidance and advices, requests reports, conducts on-site inspections, offers a recommendation and makes orders to governmental institutions and

business operators who handle Specific Personal Information, depending on the issue;

- mediates the complaints with regard to the handling of Specific Personal Information;

- announces and promotes the importance of personal information protection, as well as proper and effective use of personal information;

- promotes cooperation with data protection authorities in foreign states;

- acridities private organizations, which process complaints on business operators handling personal information and provide information to them.

The Commission is composed by a chairperson and eight Commission members, appointed by the Prime Minister with the consent of both Houses of the Diet. The term of offices of the chairperson and the Commission members is five years. The chairperson and Commission members exercise their authorities independently.

While the President and the Vice-President can be chosen freely, the other six members are chosen based on specific competences acquired in their academic or working field. The Japanese Legislator's aim was to permit that the Commission would have those specific competences necessary to examine privacy problems with a multidisciplinary view. In fact it comprehend:

- A person who has knowledge and experience in the protection and in appropriate and effective use of personal information

- A person who has knowledge and experience in the protection of consumers

- A person who has knowledge and experience in information processing technology

- A person who has knowledge and experience in administrative fields used in specific personal information

- A person who has extensive knowledge and wide experience in matters relating to the practices of private enterprises

- A person recommended by six federations composed of governors, mayors and presidents of the local councils.

## III. The New European Privacy Regulation

In the same period in which Japanese Government started to reform its privacy regulations, European Union completely updated its own, which dated back to 1996.

Since the mid-1990s, EU policymakers have adopted a series of data protection rules that quickly became the de facto global standards for most countries except for a few holdouts like China, Russia, Japan and the United States.

Before briefly examining the new EU regulation, one has to highlight a fundamental difference between the European and the Japanese one. In fact, in Japan the 2015 law not only regulates the basic aspects of the personal data

management, but it also clearly indicates the competences of the independent administrational Agency which have to supervise the respect of the rules. By contrast, in Europe the European Data Protection Supervisor will still have to be regulated by the 2001 Regulation and not by the General Data Protection Regulation of 2016. This will require to harmonize the Supervisor figure in the context of the new Regulation. The problem is well known, in fact the European Commission adopted a proposal on 10 January 2017 which repeals Regulation (EC) 45/2001[14] and brings it into line with the GDPR. The proposal is currently under discussion in the European Parliament and the Council of the European Union. Both the ePrivacy[15] and Regulation 45/2001 replacement texts should be adopted in time to become applicable at the same time as the GDPR. With this comprehensive reform, the EU will have a modern framework for privacy and data protection.

In light of the above, it is now necessary to analyze the most innovative aspects of the new Personal Information Protection Regulation.

After four years of preparation and debate the General Data Protection Regulation (acronym GDPR)[16] was finally approved by the EU Parliament on 14 April 2016.

The EU General Data Protection Regulation replaces the Data Protection Directive 95/46/EC and was designed to harmonize data privacy laws across Europe, to protect and to empower all EU citizens data privacy and to reshape the way organizations across the region approach data privacy. Over the last 25 years, technology transformed lives of European citizen in ways nobody could have imagined, thereby requiring a review of the old rules. The aim of the GDPR is to protect all EU citizens from privacy and data breaches in an increasingly

[14] Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. For a legal analysis of this regulation, see K. Runeberg, Balancing the Right to Data Protection and the Right of Access to Documents. A Study of the Conflicts Between Regulation 45/2001 and Regulation 1049/2001, Faculty of Law, Lund University, 2018, avalaible at https://tinyurl.com/y9q2pq4v (last visited 15 November 2018).

[15] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications). For more details, see L.F. Asscher and S. A. Hoogcarspel, *Regulating Spam. A European perspective after the adoption of the e-Privacy Directive* (Berlin: Springer, 2006).

[16] There is a considerable body of scientific literature on the GDPR. In particolar, see P. Voigt and A. von dem Bussche, *The EU General Data Protection Regulation (GDPR): A Practical Guide* (Berlin: Springer, 2017); C. Kuner, L.A.Bygrave and C. Docksey, *Commentary on the EU General Data Protection Regulation* (Oxford: Oxford University Press, 2018); G. Voss and K. H. Woodcock, *Navigating EU Privacy and Data Protection Laws* (Chicago: American Bar Association, 2016); Paul Lambert, *Understanding the New European Data Protection Rules* (Boca Raton: Auerbach Publications, 2017).

data-driven world that is vastly different from the time in which the 1995 directive was established.

The GDPR is now recognized as law across the EU and Member States have two years to ensure that it is fully operational in their countries by May 2018: they must implement the Data Protection Directive for the police and justice sectors into national legislation. It will be applicable as of 25 May 2018.

It will be applied to the processing of personal data by controllers and processors in the EU, regardless of whether the processing takes place in the EU or not. The GDPR will also apply to the processing of personal data of data subjects in the EU by a controller or processor not established in the EU, where the activities relate to: offering goods or services to EU citizens (irrespective of whether payment is required) and the monitoring of behaviour that takes place within the EU. Non-EU businesses processing the data of EU citizens will also have to appoint a representative in the EU.

Another legislative change concerns the conditions for the consent from the citizens. Consent must be clear and distinguishable from other matters and provided in an intelligible and easily accessible form, using clear and plain language. It must be as easy to withdraw consent as it is to give it.

The GDPR provides the following rights for individuals:

1. The right to be informed (It encompasses an obligation to provide '*fair processing information*', typically through a privacy notice. It emphasizes the need for transparency over how you use personal data. Furthermore that is the right to be informed of a data protection breach)

2. The right of access (everyone have the right to obtain confirmation that their data is being processed; and access to their personal data; and other supplementary information)

3. The right to rectification

4. The right to erasure (this right is to enable an individual to request the deletion or removal of personal data whether there is no compelling reason for its continued processing)

5. The right to restrict processing (when processing is restricted, you are permitted to store the personal data, but not further process it. You can retain just enough information about the individual to ensure that the restriction is respected in future)

6. The right to data portability (The right to data portability allows individuals to obtain and to reuse their personal data for their own purposes across different services. It allows them to move, copy or transfer personal data easily in a safe and secure way, without hindrance to usability)

7. The right to object, namely right to object to:

a) processing based on legitimate interests or the performance of a task in the public interest/exercise of official authority (including profiling);
b) direct marketing (including profiling);

c) processing for purposes of scientific/historical research and statistics

8. Rights in relation to automated decision-making and profiling because the new law provides safeguards for individuals against the risk that a potentially damaging decision is taken without human intervention.

These rights are guaranteed with the provision of precise obligations for the controller. Financial penalties are also provided. The controller must not refuse to give effect to the rights of a data subject unless the controller cannot identify the data subject. The controller must use all reasonable efforts to verify the identity of data subjects. Where the controller has reasonable doubts as to the identity of the data subject, the controller may request the provision of additional information necessary to confirm the identity of the data subject, but is not required to do so.

These are very briefly the novelties concerning the rights protected by the Regulation: it is important to underline that such instrument is extremely complex and detailed and for this reason it is not possible to summarize it in a few pages. But here, it will be added the Public Administrations duties of the single members Nations to make effective the right above quoted. The European Legislator, in fact, established that the same duties which are imposed on the economic operators also apply to Public Administrations. Those are:

1. Data Protection Officer. The GDPR introduces a duty to appoint a Data Protection Officer (DPO) for a public authority, or for carrying out certain types of processing activities (Art 37). DPOs give assistance to monitor internal compliance, to inform and to advise on your data protection obligations, it provides advice regarding Data Protection Impact Assessments (DPIAs) and acts as a contact point for data subjects and the supervisory authority. The DPO must be independent, an expert in data protection, adequately resourced, and reported to the highest management level. A DPO can be an existing employee or externally appointed. In some cases several organizations can appoint a single DPO among them. DPOs can help to demonstrate compliance and are part of the enhanced focus on accountability.

2. Records of processing activities. Art 30 of the GDPR obliges companies and Public Administration to maintain 'records of processing activities'. The processing records serve to ensure transparency with regard to processing personal data and to provide legal protection for the company. It can support the company's data protection officer, as well as the supervisory authority in carrying out their tasks. In accordance with Art 30, para 4, of the GDPR, the controller or the processor shall make the record available to the supervisory authority on request. The processing records also serve as verification, so the company can prove to the supervisory authority that the requirements of the GDPR were fulfilled by the controller.

Part of the general duty of the controller is the cooperation with the supervisory authority, on request, in the performance of its tasks (Art 31 of the GDPR).

3. Data protection impact assessment. (Art 35) In order to enhance compliance with this Regulation where processing operations are likely to result in a high risk to the rights and freedoms of natural persons, the controller is responsible for carrying-out a data protection impact assessment to evaluate, in particular, the origin, nature, particularity and severity of that risk. The outcome of the assessment is taken into account when determining the appropriate measures to be taken in order to demonstrate that the processing of personal data complies with this Regulation. When a data-protection impact assessment indicates that processing operations involve a high risk, which the controller cannot mitigate by appropriate measures in terms of available technology and costs of implementation, a consultation of the supervisory authority takes place prior to the processing.

## IV. The Data Transfer Between Japan and EU

Finally, we are going to examine the relationship between EU and Japan. On July 2017, the European Commission and the Japanese Government published a joint statement on international transfers of personal data.[17] The statement mentions that the EU and Japan will continue their cooperation and aim by early 2018 to recognize each other as having adequate levels of personal data protection. If this does indeed occur, it would mean there would be compliant transfers of personal data between the EU and Japan without the need for instruments such as standard contractual clauses, binding corporate rules or privacy certifications.

How explained before, from the technical point of view, is the Japanese PPC that has to engage in relationships with foreign Authorities which attend to regulation and transfer of personal information. It is for this reason that since its assignment in 2016, the Commission has started a worthwhile dialogue with the European Commission and with the single EU Nations to manage the personal information transfer and utilization between Japan and Europe. There is, in fact, the need to harmonize the Community Regulation and the Japanese one to make commercial exchange easier that is of fundamental importance for both.

To establish a fundamental framework for mutual and smooth transfers of personal data between Japan and the EU, in June 2017, the PPC proposed the following criteria to be set forth as amendments to the PPC Rules for designating a foreign country (which is an alternative measure to obtaining the data subject's consent for a cross-border transfer of personal data from Japan to a foreign country under Art 24 of the APPI):

- there are statutory provisions or codes equivalent to those relating to the

[17] The cross-border flows of personal data are governed by Chapter V of GDPR (arts 43-50).

obligations of personal information handling business operators defined under the APPI, and the policies, procedures and systems to enforce compliance with these rules can be recognized;

- there is an independent personal data protection authority, and the authority has ensured the necessary enforcement policies, procedures and systems;

- the necessity for a foreign country designation can be recognized as in Japan's national interests.

In February 2018, the Japanese PPC reported on a plan to establish additional Guidelines being applicable to personal data transferred from the EU to process it in Japan under the mutual adequacy findings. The PPC recognizes the following major differences between the APPI and the GDPR, and plans to reflect them in the additional Guidelines:

- Scope of the data subject's rights on the retained personal data – the data subject's rights requesting disclosure, correction, suspension of usage, etc. shall be given to any personal data transferred from the EU regardless of the duration of the data retention period;

- Sensitive data – personal data regarding sex life, sexual orientation, and labor union membership transferred from the EU shall be treated as equivalent to 'special care-required personal information' under the APPI;

- Anonymized data – 'anonymization' of personal data transferred from the EU shall mean no one can re-identify a specific individual data subject by discarding decryption keys (different from 'pseudonymization'). Such data is treated as anonymously processed information under the APPI.[18]

At the moment, a comprehensive agreement is lacking even, though it is likely to be reached in a few months because it is a cardinal matter fundamental for both.

## V. Conclusions

Pointing out to the European Legislation and the Japanese one, it can be noticed that the fundamental aim is the same: protect individuals from intrusiveness, sometimes really excessive, of economical operators, most of all operating in the Net. If it is right that all laws are perfectible, this statement is more pregnant when speaking about privacy and informatics security because technology necessary brings to face aspects until that moment have been unthinkable. The challenge is not only to have Legislation in the forefront, but also to have a Public Administration able to utilize tools that new rules grant. For example, the European Regulation gave two years (2016-18) to State members to bring in line their administrational structures according to Community requirements.

[18] Y. Watanabe, 'Japan EU Data Transfers - Mutual adequacy findings under APPI and GDPR' (2018), available at https://tinyurl.com/y8wzmxbg (last visited 15 November 2018).

Now then, in some cases, like in Italy, time passed uselessly. Actually, the Italian Government approved the measures to actuate the new Community duties only in March 2018, two months before the direct enforceability of new dispositions. This is creating many problems because many administrations, particularly Cities, are not able to front new requirements. There is also a lack of specific formation for public employees, who will be called to really actuate the Community Regulation. We are still in 'work in progress'.

# Software and Patent Law: Reverse Contaminations, Hybridizations and Trends, Observed Through the Legal Systems of Italy (and the EPC System), Japan, and the United States

Matteo Dragoni*

**Abstract**

This article compares how software inventions are protected by patent law in Italy (and the European Patent Convention (EPC) system), United States and Japan. Notwithstanding said legal systems appear to be so distant one from the other, surprising similarities may be found. The article describes such findings and attempts to provide an explanation of the same by looking at the peculiarities of the legal systems involved and how the patent system itself operates internationally.

## I. Introduction

The legal systems of Japan and Italy have apparently very little in common. The current Italian legal system, built on 'Roman law' (or, to be more accurate, on a modified and reinterpreted version of the same) and influenced by other Roman-based legal systems, most notably the French and the German legal systems, has developed its own legal theories and doctrines since late XIX Century.

Japan, on the contrary, possessed a completely different legal infrastructure until the second half of the XIX Century, when, in an effort to update its legal framework, also came in contact with, and was partially shaped by, the French and the German legal systems of the times. Japan, however, as comparative law scholars know too well, never really 'copied' any of the mentioned legal systems, but adapted them to its own culture and legal traditions.

Superficially speaking, both Japan and Italy can be classified as 'civil law' systems, and their legal infrastructure has been somehow shaped by the French and the German models, although, unsurprisingly, with two radically different results. The two systems cannot certainly be called 'similar', even if similarities, once again unsurprisingly, may be found.

When it comes to intellectual property rights (IP rights), however, the common thought is that it is very difficult not to find any similarities between

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legal systems, even the most distant ones. Given their immaterial character, IP rights can be more easily violated (technically, infringed) than many other kinds of 'property' rights, especially in the era of Internet, computers, smartphones, 3D printing devices and so on. This is why harmonization efforts began very soon in the IP rights' history, especially from the more developed economies of the late XIX Century, and never stopped until today. The aim was, and continues to be, the creation of IP rights which are the same, or at least very similar, worldwide and that can be easily, cost-efficiently and quickly obtained internationally.

As a result of more than one century of harmonization initiatives (and especially after the adherence to the TRIPs Agreement was set as a condition to be part of the World Trade Organization (WTO)), IP rights' basic principles and norms are indeed very similar in most of the world's economies. However, despite the great efforts which have been made to reduce differences between legal systems, when analyzing how IP rights are applied in practice in specific fields, (superficial) differences are immediately apparent, and warn the comparative scholar that the harmonization process might not be at such an advanced stage. At the same time, an in-depth analysis of the said differences from multiple viewpoints (and especially how the law is applied in court/administrative offices, interpreted by lawyers/law practitioners, officers and judges but also taught and studied by scholars) is necessary in order to ascertain whether we are dealing with real differences, or merely cosmetic ones.

In this paper, I take as an example the patent protection of software inventions, which is a very narrow and specific field to which the (allegedly) harmonized IP norms and principles are applied in practice. When dealing with software patents, the first impression is that, notwithstanding a harmonized starting point, we have very different results as to how general standards and requirements are applied. Especially when comparing Japan with Europe (Italy included) and with the United States.

## II. A Legal Protection for Computer Programs

In general, patent protection for computer programs has always been a very debated topic.[1] For many years, starting from the sixties, international organizations and some of the most progressive countries of the times debated over which kind of protection software deserved.

While according to some proposals, computer programs deserved (only) copyright or patent protection, some others envisaged a *sui generis* right to

[1] See P. Kirby, 'Industrial Property Protection for Software' 5(2) *IIC – International Review of Industrial Property & Copyright Law*, 169 (1974) and J. Drexl, 'What Is Protected in a Computer Program?' *IIC – International Review of Industrial Property & Copyright Law Studies*, 15 (1994).

address the specificity of software creations: computer programs are abstract and somehow 'literary' in nature, but at the same time characterized by a strong technical side and a myriad of technical and industrial applications. Copyright protection means a protection which is very long-lasting (now in many countries it lasts for seventy years after the death of the author) but focused on the means of expression of the underlying idea and not necessarily requiring any kind of disclosure of how the software program works. In other words, longer and easier to obtain (it is granted automatically from the moment of the protected work's creation) but for some aspects easier to circumvent, although there might be the possibility to keep the important parts of software program (eg the source code) secret or partially secret. Patent protection, on the other hand, means a shorter protection (now maximum twenty years) but a stronger one: a specific product or process is protected, and also their 'equivalents', and in case of product patent the protection works independently of how the product is manufactured. This stronger exclusivity is counterbalanced by the need to file a patent application that at some point becomes public and in which the applicant has to disclose all (or most of) the details about the invention and no protection is granted unless a patent application is made in every State where the protection is sought.

With regard to the *sui generis* proposals, they were mostly a combination between copyright and patent protection, usually with a shorter duration than both (given the quick obsolescence of software programs).

In the US, a proposal to protect software through patents was submitted to the attention of the Congress in the early Sixties but the Presidential commission in charge of its evaluation concluded against such a legislation. Due to the intense lobbying against the patentability of computer programs, other similar proposals failed. On 12 December 1980 the US Parliament decided to pass the Computer Software Copyright Act, which included software amongst the copyrightable works: copyright protection was established even if the courts continued to debate over computer programs' patentability.[2] In Japan, in order to clear the uncertainties, the Ministry of International Trade and Industry (*breviter*, MITI) appointed a special Study Committee on Legal Protection of Software, which issued an interim report in 1972. According to the report, copyright protection was inadequate for software. A year later, the Second Subcommittee of the Copyright Council set up by the Japanese Agency for Cultural Affairs submitted a report stating the opposite, ie that copyright law was the most suitable way to protect software, also because it required minimal changes to the legislation. After several years of debate, in 1983 the MITI was presented with another report in which a *sui generis* legislation to protect computer software was recommended. However, even if this solution had obtained a large consensus, under pressure of the US and Europe, and upon suggestion

[2] See also J.M. Haynes, 'Computer Software: Intellectual Property Protection in the United States and Japan' 13 *John Marshall Journal Computer and Information Law*, 245 (1995).

of the Sixth Subcommittee of the Copyright Council set up by the Agency for Cultural Affairs, Japan decided to grant copyright law protection to software.[3]

With regard to Europe, Italy included, some of the first European decisions conferred protection only to the visual/graphic effects produced by the software, which was initially compared to a cinematographic work. Moreover, the approaches taken *vis-à-vis* computer programs were very different within the States of the European Communities, which tried to harmonize the entire system with the first Software Directive of 1991.[4] Pursuant to the Directive

> 'Member States shall protect computer programs, by copyright, as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works. For the purposes of th(e) Directive, the term "computer programs" shall include their preparatory design material'.[5]

With the clarification that protection shall apply to the expression in any form of a computer program and that 'ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected'.[6] The only condition which is required for the computer program to be protected is that 'it is original in the sense that it is the author's own intellectual creation'.[7]

In the end, copyright protection was largely adopted for software programs but their patent-eligibility was not categorically excluded. Some States, however, were indeed more prone than others in recognizing software patent-eligibility.

In Europe, Art 52 of the European Patent Convention, which excludes software *per se* from patent-eligibility, was read by several national courts – and by the European Patent Office itself – as an indication about 'what-not-to-do'. The United States, on the contrary, from the beginning of the Eighties became one of the strongest promoters and supporters of software patent-eligibility, especially if compared to the European Patent Office and Japanese Patent Office (JPO) very cautious approaches. A few years ago the situation in the United States radically changed, as an increasing number of scholars started to criticize such permissive approach,[8] and even the courts indirectly acknowledged a

[3] See, *ex multis*, R. Arancibia, *Intellectual Property Protection for Computer Software – A Comparative Analysis of the United States and Japanese Intellectual Property Regimes,* available at https://tinyurl.com/y6u5h6gr, 2003 (last visited 15 November 2018).

[4] See Council Directive 91/250/EC of 14 May 1991 on the legal protection of computer programs.

[5] See Directive 91/250/EC Art 1, para 1.

[6] See Directive 91/250/EC Art 1, para 2.

[7] See Directive 91/250/EC Art 1, para 3.

[8] See, *ex multis*, C.V. Chien, 'Reforming Software Patents' 50 *Houston Law Review*, 325 (2012); E. Goldman, 'Fixing Software Patents' *Santa Clara University Legal Studies Research*, 1-13 (2013). Some authors have even questioned the patent system as an incentive for innovation: see *ex multis* L. Larrimore Ouellette, 'Patentable Subject Matter and Nonpatent Innovation Incentives' 1115 *UC Irvine Law Review*, 5 (2015); C. Shapiro, 'Navigating the Patent Thicket:

few distortions in the then current system.

On the contrary, the attitude in Europe (meaning the European Patent Convention Countries, Italy included) and in Japan also changed in the last few years, with said legal systems heading towards a still prudent but less conservative approach towards software patents.

## III. Software Patents in Japan

Differently from other legal systems, the Japanese Patent Act (JPA), instead of stating what cannot be considered as an invention (eg computer programs *per se* according to EPC Art 52), tries to positively define what an 'invention' is: an invention is 'a creation of a technical idea utilizing a law of nature'[9] As a consequence, the JPA does not contain a list of 'excluded subject matters', ie matters which cannot be the subject of a patent, but such a list is contained – to the benefit of the practitioner – in the JPO Guidelines and Handbook.

As opposed to other national or regional experiences in Japan there were no 'software specific' cases until less than a couple of decades ago. A few interesting cases merely dealt with patent-eligibility in general,[10] clarifying the basic legal requirements for an invention to be considered eligible for a patent and referred to before.[11]

Although (and probably because) there was no specific case law regarding software patents, the JPO took up the task to delineate which kind of protection software inventions deserved, if any.[12]

The JPO Examination Guidelines of 1976 were the first document to contain some guidance about computer program inventions.[13] Such guidelines were quite restrictive: even though they did not preclude patent-eligibility for computer software in general, they stated that programs themselves and recording media containing software were denied patent-eligibility.

Those Guidelines were followed by some improved versions in 1993 and

Cross Licenses, Patent Pools, and Standard Setting' 1 *Innovation Policy and the Economy*, 119-120 (2000).

[9] See Art 2 legge 13 April 1959 no 121.

[10] See Tokyo High Court Judgment 25 December 1956, Gyōshū, 7, no 12, 3157, so called *Utility Pole Advertising Method* case; Tokyo High Court, 22 December 1970, Hanta, no 260, 334, so called *Ionic Toothbrush* case; Tokyo High Court, 12 February 1986, Hanrei Kogyoshoyukenho 2001, at 16, so called *Electric Mirror Stand and Full Length Mirror* case; and Tokyo High Court, May 26, 1999, no 1997 (Gyo-Ke) 206, *Hanji*, no 1682, 118, so called *Video Recording Media* case.

[11] See A. Sako, 'Patentability of Inventions Incorporating Human Mental Acts (Intellectual Property High Court, August 26, 2008)' *Intellectual Property Law and Policy Journal*, 34 (2011).

[12] See H. Sakai, *Historical Transition of Computer Program Protection – A Review of Examination Guidelines over a Quarter Century* (Tokyo: Kobundo Publishing Co, 2015), 154-172.

[13] See Y. Aita, 'Legal Protection of Computer Software', in Id et al eds, *Advanced Science Technology and Intellectual Property Rights* (Tokyo: Hatsumei Kyokai, 2001), 117-119.

1997,[14] but the first significant modification to the JPO Guidelines can be traced back to the year 2000. According to the new Guidelines, an invention expressed as a sequence of computer processes can be considered as a 'statutory invention' regardless of the technology field and even if a computer program per se is claimed.[15]

In 2002, the Japanese Patent Act was amended and its Art 2 was changed to add 'computer programs' and 'any other set of information similar to a program that is designed to be used for computer processing' to the possible subjects of 'product patents'. The reason for this change was to provide a stronger protection for information technology products.[16]

Due to this amendment to the JPA, Japan became one of the few States in the world to explicitly recognize patent protection for computer programs, which can be even the subject of a so called 'product patent' (and not only of a 'process patent').

Starting from the early 2000, a few cases regarding software patents[17] were eventually decided. The JPO guidelines were integrated by the principles set out in the decisions of the Japanese Supreme Court and of the Tokyo High Court and, from its creation in 2005, of the Intellectual Property High Court, specialized in IP disputes.

The first important decision dealing with a software patent is the so called *LSI Simulator* case,[18] where the Tokyo High Court explicitly stated that even an algorithm could be patented[19] as long as the relationship between the algorithm and the physical parts of the invention is specified and there is a concrete interaction between the components.[20]

Another very interesting decision was rendered in the so called *Dental*

[14] See Intellectual Property Committee of the Industrial Structure Council, *Report*, 11 December 2001.

[15] See Intellectual Property Committee of the Industrial Structure Council, *Report*, 12 December 2001.

[16] See Task Force on Industrial Competitiveness and Intellectual Property, *Policy Report*, 5 June 2002, 5; Y. Aita, 'Current State and Remaining Issues of Patent Protection for Computer Programs' *Jurist*, 1303, 138-143 (2005).

[17] Or utility models, as in the decision of the Tokyo District Court Judgment, 20 January 2003, *Hanji*, no 1809, 3/*Hanta*, no 1114, 145 (the so called *Balance Sheet* case). See also N. Nakayama, 'Industrial Property Law' 1 *Patent Law*, 105-106.

[18] See Tokyo High Court 21 December 2004, (Gyo-Ke) 188, (2004) *Hanji* 1891,139.

[19] See R. Hirashima, 'A Note on Patenting Computer Software-related Invention & Assessing the Requirement "Utilizing a Law of Nature" Under the Japanese Patent Law – Something Like "the Suggestion" from LSI Simulator Case' 20 *Intellectual Property Law and Policy Journal*, 65-94 (2008).

[20] See N. Mizutani, *Technical Scope of a Software-Related Invention Described in Functional Claims*, *Commemoration of the Retirement of Prof. Toshiaki Iimura* (Toyko: Japan Institute for Promoting Invention and Innovation, 2015), 517-533. See also Id, 'Determination as to Whether the Laws of Nature Were Used to Make a Software-Related Invention' 20 *Intellectual Property Law and Policy Journal*, 77 (2008).

*Treatment* case,[21] decided in 2008 by the Tokyo IP High Court and concerning 'an interactive network for dental treatment'.[22] While the High Court conceded that mental activity itself cannot be considered as a statutory invention, it also stated that all technical means have some connections to mental activities of human beings 'as all technical means are created by human beings, assisting, facilitating or replacing human beings' activities including their mental activities'.[23] Therefore, unless

> 'the essential nature of the invention (…) is directed to a human being's mental activities (…) patentability of such invention should not be denied on the grounds of not being considered as an "invention" within the meaning defined in the Patent Act'.[24]

In *Knowledge Base System*,[25] a case decided a few years after *Dental Treatment*, the IP High Court clarifies what 'essential nature of the invention' means. According to the Court, when the 'hardware' components mentioned in a patent application are generic computers or recording media and their specific interaction with the underlying software or database is not clear, the 'technical significance' of the structure described in the patent application is meaningless. In such a case, the invention was considered as merely reciting abstract concepts linked with general computers, and therefore, even when analyzed as a whole, it does not contain any creation of technical ideas using the laws of nature, but mere abstract concepts, as such unpatentable. This also means that there must be a meaningful interaction between hardware and software components which cannot be reduced to the mention of some physical components in the patent in order to quickly pass the patent-eligibility threshold.[26]

After *Dental Treatment*, and before and after *Knowledge Base System*, a few other relevant decisions[27] followed, without however introducing any new or fundamental concepts that required any amendments in the JPO Guidelines.

Finally, it is worth mentioning that the Examination Guidelines also point

[21] See also Intellectual Property High Court 29 February 2008, *Hanji*, no 2012, 97, 2007 (Gyo-Ke) 10239.

[22] See Intellectual Property High Court 24 June 2008, 2007 (Gyo-Ke) 10369.

[23] ibid 25-26.

[24] ibid 26.

[25] See Tokyo IP High Court, 24 September 2014, (Gyo-Ke) 10014 (2014).

[26] See JPO Examination Handbook, Annex B, 14.

[27] See Intellectual Property High Court 26 August 2008, *Hanji*, no 2041, 124/Hanta no 1296, 263, (Gyo-Ke) 10001 (2008); Intellectual Property High Court of 16 June 2009, *Hanji*, no 2064 (so called *Amusement Machine* case) as explained in A. Sako, 'Patentability of Inventions Incorporating Human Mental Acts (Intellectual Property High Court, August 26, 2008)' n 11 above, fns 55 and 56; Tokyo IP High Court 5 December 2012, (Gyo-Ke) 10134 (so called *Energy Saving Action Sheet*) (2012); Tokyo IP High Court 24 February 2016, (Gyo-Ke) 10130 (*Energy Saving Action Sheet II*) (2015).

out, in line with the case law,[28] that in assessing patent-eligibility

> 'the invention should be viewed as a whole, [and that] it is inappropriate to identify the claimed invention separating the aspect of artificial arrangement and that of automation technique'.[29]

As a consequence, the most important part of software patents examination becomes the analysis of the inventive step of the invention,[30] ie whether the invention is obvious or not to the expert in the field of the invention.

In Japan, also at this stage, the invention is considered and assessed 'as a whole', ie without artificially severing the inventive parts from the non-inventive parts and, most importantly, without separating technical from non-technical elements.

The above implies that, for instance, just changing the data that are processed by software is likely to be considered as lacking inventive step, because the underlying program and the interaction between computer program and the machine are exactly the same.

However, if a new mathematical formula implemented by a computer process were to create, as a result, a new and non-obvious process, under the Japanese law this could be a patent-eligible invention and, if as a whole the process were to be found new and inventive, such invention could be considered patentable. Such invention would probably have a harder time in being awarded a patent in the EPO system, Italy included, or in the current US system.

## IV. Software Patents in the European Patent Convention System

When dealing with software patenting in Europe,[31] we must start from Art 52 para 1 EPC, according to which patents

> 'shall be granted for any inventions which are susceptible of industrial application, which are new and which involve an inventive step'.

So, first of all, patent-eligibility requires an invention. However, the term 'invention', differently from the Japanese legal system, is not positively described within the EPC, which contains only a 'negative' definition. According to Art 52 para 2 EPC, discoveries, scientific theories, mathematical methods, aesthetic

[28] See *ex multis* Intellectual Property High Court 24 June 2008, (Gyo-Ke) 10369 (2007). See Intellectual Property High Court 26 September 2006, (Gyo-Ke), 10698 (2005).

[29] See also JPO Guidelines for Examination, chapter 2.2.

[30] See for instance one of the last decisions involving software patents, Intellectual Property High Court 6 August 2015, (Gyo-Ke) 10231 (2014), where the claimed invention was found to be lacking an inventive step.

[31] With specific reference to the States which are part to the European Patent Convention (EPC) and the case law of the European Patent Office (EPO) established under the said treaty.

creations, schemes, rules and methods for performing mental acts, playing games or doing business, presentations of information and programs for computers are not regarded as inventions.

The above-mentioned exclusion, however, is not as absolute as it might seem, since Art 52 para 3 EPC clarifies that it is limited only to patent applications directed to computer programs '*as such*'.[32]

Therefore, since a computer program *per se* seemed to be excluded from patentability, the analysis of the EPO Technical Boards and Boards of Appeal (BoAs)[33] was focused on distinguishing a patent-eligible software-related invention from a patent-ineligible one and then on trying to understand when a patent-eligible software invention is then patentable (ie new, inventive and industrially applicable).

The BoAs' case law initially followed two different general approaches with regard to patent-eligibility: the contribution approach and the whole-content approach. Eventually, only one of them was chosen as the most appropriate and an evolution of the same became the standard.[34]

According to the so called 'contribution approach', patent-eligibility is established after a *prima facie* examination of the (alleged) invention's inventiveness: the invention is inherently patentable when the invention's contribution to the art is technical and it is not limited to a subject-matter excluded from patentability (which in the case of the EPC includes software *per se*, algorithms, etc).[35]

According to said approach the invention is not examined 'as a whole' to determine the patent-eligibility, but the 'inventive part' of the (alleged) invention is somehow severed from the initial 'whole' and analyzed separately. If what

[32] See R.M. Hilty and C. Geiger, 'Patenting Software? A Judicial and Socio-Economic Analysis' *IIC – International Review of Intellectual Property and Competition Law*, 623 (2005); E. Arezzo, *Tutela brevettuale e autoriale dei programmi per elaboratore: profili e critica di una dicotomia normativa* (Milano: Giuffrè, 2012), 236.

[33] The EPO not only administers the examination of patent applications (which can be granted or rejected), but it is also equipped with a very functional system of appeal of the examiners' decisions. Both the decisions granting a patent or rejecting a patent application can be opposed in front of a Technical Board and the decision of the Technical Board can be appealed in front of a Board of Appeal.

[34] See P. Van den Berg, 'Patentability of Computer-software-related Inventions', in Members of the Enlarged Board of Appeal of the EPO ed, *The Law and Practice of the Enlarged Board of Appeal of the European Patent Office During Its First Ten Years* (Cologne: Carl Heymanns Verlag, 1996), 33.

[35] See generally J. Pila, 'Dispute over the Meaning of "Invention" in Article 52(2) EPC – The patentability of computer-implemented inventions in Europe' 36 *IIC – International Review of Industrial Property and Copyright Law*, 173-191 (2005). See G.D. Kolle, 'Patentability of Software-Related Inventions in Europe' *IIC – International Review of Industrial Property and Copyright Law*, 660 (1991) and J. Drexl, 'What Is Protected in a Computer Program? Copyright Protection in the United States and Europe' *IIC– International Review of Intellectual Property and Competition Law Studies*, 15 (1994); G. Guglielmetti, 'Brevettabilità delle invenzioni concernenti *software* nella giurisprudenza della Commissione di ricorso dell'Ufficio europeo dei brevetti' *Rivista di Diritto Industriale*, II, 358 (1994); Id, *L'invenzione di software. Brevetto e diritto d'autore* (Milano: Giuffrè, 1996).

seems to be the inventive part is made up only by excluded subject matter (or constituted an advancement in an excluded category), like computer programs, the invention is not patent-eligible.

Such analysis is carried out at the patent-eligibility stage, therefore before analyzing whether the invention is new, inventive and industrially applicable (and sufficiently described).

On the contrary, according to the 'whole content approach', in order to verify whether the invention is patent-eligible or not, the 'whole content' of the invention must be taken into consideration, without splitting it into inventive and non-inventive parts.

If the 'whole' invention is patent-eligible because it does not fall into one of the excluded categories, then the patentability analysis must be carried out. As a consequence of this approach, if the invention is a mix of technical and non-technical elements, the patent-eligibility test is rapidly passed, because the invention could hardly be considered 'a computer program *per se*', 'a mathematical formula as such', etc.

However, the issue of excluded subject matter is not solved with this first assessment, but it revives when considering the criteria of patentability (novelty, inventive step and industrial applicability), and in particular the inventive step. The invention is inventive, and thus patentable, if it is the solution of technical problems or technical means are used to achieve such a solution and the contribution to the art pertains to a field non-excluded from patentability, ie a technical one.

The EPO Technical Boards followed this second approach in several decisions,[36] alternating it to the above-described 'contribution approach'. At some point, the 'contribution approach' was slowly abandoned by the Boards,[37] even though sometimes a revival of the same could be discerned in some decisions.[38]

Starting from 2006, the BoAs began adopting a slightly different approach,[39] by recognizing that some technical means were enough to confer 'technical character' to software-related inventions, therefore making the patent-eligibility phase almost useless. This new line of decisions[40] has been referred to as 'any

[36] See for example T 0208/84 *Vicom/Computer-related Invention*; T 26/86 *Koch & Sterzel/X-Ray Apparatus*; T 115/85 *IBM/Computer-Related Invention*; *KEARNEY/Computer-Related Invention*, T 0042/87; T 236/91 *TEXAS INSTRUMENTS/Language Understanding System*; T 164/92 *Computer Components/Bosch*, etc. See also D. Schiuma, 'TRIPS and Exclusion of Software "as such" from Patentability' *IIC – International Review of Industrial Property and Copyright Law*, 1 (2000).

[37] See for example T 1173/97, *Computer Program Product/IBM*; T 1194/97, *PHILIPS/Record Carrier*; T 931/95, *PBS Partnership/Controlling Pension Benefits System*, etc.

[38] See P. Leith, *Software and Patents in Europe* (Cambridge: Cambridge University Press, 2007).

[39] See T 258/03, *Auction Method/HITACHI*; T 424/03, *Clipboards formats I/Microsoft*; T 154/04, *DUNS LICENSING ASSOCIATES/Estimating Sales Activities*.

[40] But especially T 424/03, *Clipboards formats I/Microsoft*.

hardware approach', since the mentioning of any hardware next to a computer software was enough to make the 'whole' invention patent-eligible and quickly go to the patentability analysis.

The EPO Enlarged Board of Appeal, which is a special composition of the BoA that addresses very specific and delicate matter concerning the application of the EPC,[41] clarified in 2010 that a computer program, in order to be patentable, has to generate 'further technical effects', but those effects do not have to be new or inventive (such analysis will be left to the subsequent inventive step and novelty assessments). In doing such statement, the Enlarged Board of Appeals confirmed that tying the software to 'any hardware' is not enough if in the end the software is claimed as the only invention in the patent. However, if something else containing the software is claimed, for instance a 'storage medium', there is no patent-eligibility issue there. Since 'storage media' *per se* are not excluded from patentability, the analysis will immediately be focused on the patentability requirements.[42]

The Enlarged Board of Appeal clarifies that during the patentability analysis all the elements of the invention have to be taken into account, not only the technical/non-excluded ones. In fact, also matters excluded from patentability may nonetheless contribute to the technical character of the invention.[43]

The EBA's teachings were followed in the subsequent decisions of the Technical Boards and are still followed today.[44] They have also been incorporated in the EPO Guidelines for Examination, whose last version became binding starting from 1 November 2017.[45]

## V. Software Patents in the United States

United States' statutory law, unlike the EPC and Italy but similarly to Japan, never contained an explicit list of 'excluded subject matters', ie categories of inventions (or 'non-inventions') that are excluded from patentability. As a consequence, in the US there was no explicit exclusion of 'software patents' from the scope of the Patent Act. However, a less specific (if compared to the EPC) list of 'excluded categories' has been created through a series of judicial precedents.

[41] See G 03/08.

[42] See G 03/08, 38-39 at 10.8.7.

[43] See J. Pila, 'Software Patents, Separation of Powers, and Failed Syllogism: A Cornucopia from the Enlarged Board of Appeal of the European Patent Office' *Cambridge Law Journal*, 70 (2011). See also Id, *The Requirement for an Invention in Patent Law* (Oxford: Oxford University Press, 2010).

[44] See *ex multis* T 0313/10 *Item matching/AMAZON*; T 0573/12, *Automated process flow/SAP*; T 1755/10, *Software structure/Trilogy*; T 1385/12; T 1370/ 11, *On-demand property system/Microsoft*; T 1789/11, *Clipboard formats I/Microsoft*; T 1463/11 *Universal Merchant Platform/Cardinal Commerce*.

[45] See EPO, Guidelines for Examination, 2017.

US courts, through a series of decisions interpreting the US Patent Act and in particular USC 35 para 101, began to exclude 'abstract ideas, natural phenomena or natural laws' from the scope of patentable subject matter.[46]

In order to have some judicial precedents dealing specifically with software patents[47] we have to wait until the Seventies. The first one is *Gottschalk* v *Benson*,[48] which involved a method for converting binary-coded decimals into pure binary numerals. The US Supreme Court found that the invention was not related to any particular machine or apparatus, art or technology, but it was nothing more than a mathematical calculation that could be performed mentally by humans without the help of any machine, and therefore not patent-eligible.

A second relevant case is *Parker* v *Flook*,[49] where the Supreme Court stroke down another software invention because in the opinion of the Supreme Court the algorithm was the only new and useful characteristic of the invention, which per se was not patent-eligible and had to be considered as part of the prior art as a mere mathematical, abstract, discovery.

For a slight change of course from this more restrictive approach, we have to wait another couple of years with *Diamond* v *Chakrabarty*[50] and, with specific regard to software, the Supreme Court showed a more permissive approach towards its patent-eligibility in *Diamond* v *Diehr*.[51] In dealing with the patent at issue, the justices in *Diehr* found that, since the patent at hand involved physical and chemical processes for molding precision synthetic rubber products, it fell within the categories of patentable subject matter[52] and such conclusion could not be altered by the fact that in several steps of the process a mathematical equation and a programmed digital computer were used.[53]

The *Diehr* decision is interesting also from another point of view: While in Europe the contribution approach and the whole content approach were being conceived, the US Supreme Court immediately intervened to clarify a similar matter. The majority of the justices in *Diamond* v *Diehr* stated that

> 'in determining the eligibility of respondents' claimed process for patent protection under para 101, their claims must be considered as a whole. It is

[46] See *O'Reilly* v *Morse* 56 US (15 How) 62, 131 (1853).

[47] See M. Campbell-Kelly, 'Not All Bad: An Historical Perspective on Software Patents' 11 *Michigan Telecommunications and Technology Law Review*, 191 (2005), and E.R. Hyde, 'Legal Protection of Computer Software' 59 *Connecticut Bar Journal*, 298, 302-303 (1985).

[48] See *Gottschalk* v *Benson* 409 US 63 (1972), no 71-485. See also M.A. Duggan, 'Patents on Programs? The Supreme Court Says No' 13 *Jurimetrics Journal*, 135 (1973).

[49] See *Parker* v *Flook* 437 US 584 (1978).

[50] See *Diamond* v *Chakrabarty* 447 US 303 (1980).

[51] See *Diamond* v *Diehr* 450 US 175 (1981). See also, for different points of view, J.E. Cohen, M.A. Lemley, 'Patent Scope and Innovation in the Software Industry' 89 *California Law Review*, 1, 9 (2001) and K.E. Collins, 'Propertizing Thought' 60 *Southern Methodist University Law Review*, 317 (2007).

[52] *Diamond* v *Diehr*, n 51 above, 185.

[53] ibid 188-189.

inappropriate to dissect the claims into old and new elements and then to ignore the presence of the old elements in the analysis (…)'.

After *Diehr*, the Supreme Court did not hear any other patent-eligibility case until 2010. It was the Court of Appeal for the Federal Circuit (CAFC, or 'Federal Circuit') that adopted *Diehr*'s more permissive approach towards patent-eligibility and developed it even further. The landmark case that has been regarded as the first real opening to software patent-eligibility is *State Street Bank & Trust Co* v *Signature Financial Group, Inc.*[54] In this decision, the CAFC clarified that some types of subject matter, standing alone, represent no more than abstract ideas unless they are reduced to a practical application. Even an algorithm, in itself patent-ineligible, can become eligible if applied in a 'useful' way. In *State Street* the Federal Circuit held that the transformation of data, through a machine governed by an algorithm, into other data (amounts of dollar into final share prices) can be seen as the practical application of a mathematical formula, which produces a 'useful, concrete and tangible result'.[55] Such an invention is therefore patent-eligible.

Between 2010 and 2014, a trilogy of Supreme Court decisions changed completely the landscape of patent-eligibility in the United States.[56]

The first decision is *Bilski* v *Kappos* (2010), where the Supreme Court began demolishing the existing system by questioning the validity of both *State Street*'s 'useful, concrete and tangible result' test and the older 'machine-or-transformation' test,[57] however slightly mixing patent-eligibility criteria (natural laws, natural phenomena and abstract ideas) with some of the patentability concepts: the invention is not considered 'as a whole' when determining its patent-eligibility but what seems to be the novel/non-obvious part is severed

[54] See *State Street Bank & Trust Co* v *Signature Financial Group, Inc*, 149 F.3d 1368, 47 U.S.P.Q.2d 1596 (Fed Cir 1998).

[55] See J.R. Allison and S.D. Hunter, 'On the Feasibility of Improving Patent Quality One Technology at a Time: The Case of Business Methods' 21 *Berkeley Technology Law Journal*, 729, 730-31 (2006); J.E. Cohen and M.A. Lemley, 'Patent Scope and Innovation in the Software Industry' 89 *California Law Review*, 46 (2001).

[56] See J.F. Duffy, 'Rules and Standards on the Forefront of Patentability' 51 *William & Mary Law Review*, 609, 612 (2009). See also M.A. Lemley, 'Software Patents and the Return of Functional Claiming' *Wisconsin Law Review*, 905 (2013); A.-Bhattacharayya, 'Implementation, or the Possible Lack Thereof, of the Bilski Supreme Court Decision' 6 *Journal of Business and Technology Law*, 103 (2011); M.A. Lemley, 'Ignoring Patents' *Michigan State Law Review*, 19-21 (2008).

[57] See *Bilski* v *Kappos*, 561 U.S. 593. See also P.S. Menell, 'Forty Years of Wondering in the Wilderness and No Closer to the Promised Land: Bilski's Superficial Textualism and the Missed Opportunity to Return Patent Law to Its Technological Mooring' 63 *Stanford Law Review*, 1289 (2011); M.A. Lemley et al, 'Life After Bilski' 63 *Stanford Law Review*, 1315 (2011); P. Samuelson and J. Schultz, 'Clues for Determining Whether Business Methods and Service Innovations Are Unpatentable Abstract Ideas' 15 *Lewis & Clark Law Review*, 109 (2011); D. Crouch and R.P. Merges, 'Operating Efficiently Post-Bilski by Ordering Patent Doctrine Decision-Making' 25 *Berkeley Technology Law Journal*, 1673 (2010).

from the rest, and evaluated separately.

The second case about patent-eligibility is *Mayo Collaborative Services* v *Prometheus Laboratories*,[58] which was about a method to identify the correct dosage of a medicine to administer to patients that the Supreme Court found to be a mere attempt to secure a patent on a natural law. Interestingly, the Supreme Court also admitted that the para 102 novelty enquiry might sometimes overlap with the para 101 patent-eligibility analysis, but that this is not a good reason to eliminate the para 101 investigation entirely in favor of a 'patentability-oriented' approach.

The third relevant case about patent-eligibility, *Alice Corporation* v *CLS Bank International*,[59] involved four patents regarding an automated platform for mitigating settlement risk. The Supreme Court, attempting to clarify its past approaches, created a new two-step test:

> 'First, we determine whether the claims at issue are directed to one of those patent-ineligible concepts. If so, we then ask, "(w)hat else is there in the claims before us?" To answer that question, we consider the elements of each claim both individually and "as an ordered combination" to determine whether the additional elements "transform the nature of the claim" into a patent-eligible application. We have described step two of this analysis as a search for an "inventive concept" – ie, an element or combination of elements that is "sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the (ineligible concept) itself" '.[60]

Following this test, the Supreme Courts intended to reject any sort of 'any hardware approach', clarifying that the interaction of software with physical components is not enough, by itself, to make an invention patent-eligible.[61]

After *Alice* was decided by the Supreme Court, the United States witnessed a tremendous increase in software patents' invalidations, both at the district court level and at the appeal (Federal Circuit) level.[62] Such a trend started to be seen in a less 'pessimistic' way after the opinion of the CAFC in *DDR Holdings, LLC* v *Hotels.com*[63] and seemed to decrease starting from 2016, when three cases about software-related inventions were decided in favor of the patentee:

[58] See *Mayo Collaborative Services* v *Prometheus Laboratories, Inc*, 566 US 66 (2012). See also R.S. Eisenberg, 'Prometheus Rebound: Diagnostics, Nature, and Mathematical Algorithms' 341 *Yale Law Journal Online*, 122 (2013).

[59] See *Alice Corp. Pty Ltd.* v *CLS Bank Int'l*, 134 S.Ct 2347 (2014).

[60] 134 S.Ct. 2347, 7 (2014), page 7 of the decision.

[61] 134 S.Ct. 2347, 15-16 (2014), pages 15 and 16 in particular.

[62] See generally R.R. Sachs, 'Two Years After Alice: A Survey of the Impact of a "Minor Case" ' I (2016) and, for some statistics, available at https://tinyurl.com/nfbs9ya (last visited 15 November 2018).

[63] *DDR Holdings, LLC* v *Hotels.com, L.P.*, 773 F.3d 1245, 1255 (Fed Cir 2014).

*Enfish, LLC* v *Microsoft Corporation*,[64] *Bascom Global Internet Services*,[65] *Inc* v *AT&T Mobility LLC* and *McRO Inc* v *Bandai Namco Games America Inc.*[66] Such 'opening', however, was not the beginning of a new golden era for software patens, the majority of which, during the course of 2017, has been declared ineligible,[67] with only two cases[68] where patents concerning computer software managed to pass successfully *Alice*'s two-step test at the appellate level (CAFC), and namely: i) *Trading Technologies International Inc* v *CQG, Inc*[69] and *Visual Memory LLC* v *Nvidia Corp*.[70]

In other words, there seem to be no bright-line rule regarding patent-eligibility of software patents, but it is clear that the patent-eligibility analysis is extensively used by US Courts as a mean to judge (and often invalidate) patents.

Finally, once the patent-eligibility test is passed, the next steps are novelty and non-obviousness, which are not analyzed very differently from what the patent law and the United States Patent and Trademark Office (USPTO) guidelines instruct. The real hurdle for software patents is now the patent-eligibility phase.

## VI. Software Patents in Italy

Having now briefly summarized how the EPC system, Japan and United States address software patent-eligibility and patentability (with only some references here and there to the Italian legal system), it is interesting to see whether and how Italy has dealt with such legal issues.

Since Italy is an EPC member State, it is not surprising that the Country has been strongly influenced by the EPO's case law and examination practices, notwithstanding the Italian judiciary remains independent and has to follow the EPC as far as it has been incorporated into Italian law.

[64] *Enfish, LLC* v *Microsoft Corp*, 2016 US App LEXIS 8699, 2016 WL 2756255 (Fed Cir 12 May 2016).

[65] *BASCOM Global Internet Services, Inc.* v *AT&T Mobility LLC*, no 15-1763 (Fed Cir 27 June 2016).

[66] *McRO, Inc.* v *Bandai Namco Games America, Inc.*, no 15-1080 (Fed Cir 13 September 2016).

[67] See for example *Intellectual Ventures I* LLC v *Erie Indemnity Co* CAFC Appeals nos 2016-1128 and 2016-1132 (7 March 2017); *Intellectual Ventures I LLC* v *Capital One Financial Corp*, CAFC Appeal no 2016-1077; *Return Mail, Inc.* v *United States Postal Service*, CAFC Appeal no 16-1502 (28 August 2017); *Secured Mail Solutions LLC* v *Universal Wilde, Inc*, CAFC Appeal no 2016-1728 (16 October 2017); *Smart Systems Innovations, LLC* v *Chicago Transit Authority*, CAFC Appeal no 2016-1233 (18 October 2017). See also, although non-precedential and amongst many non-precedential cases, *Clarilogic, Inc* v *FormFree Holdings Corp*, no 2016-1781 (5 March 2017).

[68] Or three, if we also consider the case *Thales Visionix Inc.* v *US*, 850 F.3d 1343, 121 U.S.P.Q.2d 1898 (Fed Cir 2017).

[69] *Trading Technologies International Inc* v *CQG, Inc*, CAFC Appeal no 2016-1616 (18 January 2017).

[70] *Visual Memory LLC* v *Nvidia Corp,* CAFC Appeal no 16-2254 (15 August 2017).

One would expect that, similarly to the UK, where software patent-eligibility has been the subject of debate multiple times in national courts (especially before the referral to the EBA of the EPO aimed at clarifying the matter and mentioned above), also in the Italian case law software's patent-eligibility and patentability have been highly debated. By analyzing said Italian case law, however, one soon discovers that after the EPO became operational, no relevant case regarding software patents can be found in Italy.[71] When software patents cases have been decided, no issues specifically relating to the peculiarities of software inventions' patentability and patent-eligibility have arisen or anyway no position is taken regarding them by the judges deciding the case.

It is not so easy to give an explanation to this phenomenon. One might be that since the Italian Patent Office did not carry out any kind of substantive patent examination until 2010, Italian patents had very little value, and patent litigation was mostly done in other jurisdictions (Germany, UK, etc) or directly at the EPO level through its opposition and appeal mechanisms. Another explanation might be that the Italian market is less strategical than others (independently of the strength of the national patents), so that big software litigations were started in other more crucial countries (once again Germany, UK, France, etc) but not in Italy.

Another possible explanation might be that in Italy, during court proceedings, much of the work, when it comes down to patents, is demanded to the court-appointed expert which interacts with the party-appointed experts. As a result, with specific concern to technical matters, it is not infrequent for the Italian judge (which has no technical background) to rely on the court-appointed expert's determination. Therefore, the judge (and the resulting decision) might not dive deep into the details of patent-eligibility and patentability of a software invention even when those issues arise because: 1) sometimes technical issues arise and are solved during the technical investigation phase; 2) connected to number 1), and given that anyway the lawyers know that there will be a technical 'phase' of the judgment where technical matters will be discussed, it is also common practice not to use and explain in detail all the arguments in the initial briefs and leave the matter (and some arguments) to the technical experts. As a consequence, it might not be so surprising to find out that decisions do not make reference to software's peculiar aspects.

One other possible explanation of the above paucity of Italian case law regarding software patents may also derive from the fact that Italian judges are very reluctant to decide differently from what the EPO has decided (especially after opposition proceedings and subsequent appeal have taken place). This

[71] In 1981, when the EPO was just becoming operational, the Italian Supreme Court decided a case regarding broadly-speaking, software patents, but without dealing with the specificities of software inventions highlighted before: Corte di Cassazione 14 May 1981 no 3169, available at www.dejure.it.

also means that once the matter has been settled at the EPO level, in case of European patent validated in Italy, the case can be considered almost decided also for Italy, except when the EPO decision was dependent on procedural aspects which might differ between the two systems (eg which kind of evidence is considered is not always the same at the EPO and in Italian courts).

Finally, another possible explanation might derive from EPO's 'any hardware approach', which has made crucial also for software inventions the inventive step examination phase, where the prior art as a whole comes into play to assess whether the invention was obvious or not. As a result, it might not be surprising that also Italian courts have dealt with the issue as a matter of inventiveness, and it is therefore more likely that software's specific problems and peculiarities remain hidden amongst all the other considerations regarding the prior art which is relevant to assess the presence of an inventive step.

On the practical level, and similarly to Japan, the absence of national guidance to national software patents cannot be considered, and was never, an obstacle to software patenting. It is true that in Italy there is some sort of reluctance, among many practitioners, to talk about software patents, but this has not prevented software patents from being issued in Italy. In some cases it might be true the opposite: patents that would not have survived an EPO examination could survive in Italy thanks to the absence of a substantive examination at the Italian Patent Office.

Even now that the EPO is entrusted with the substantive examination of Italian patents for the Italian Patent Office, the EPO carries out only one examination, and then sends back a report to the Italian Patent Office, stating whether according to the EPO the patent should be granted or rejected or how the patent should be modified in order to be granted. The EPO sticks to the report in its answer to the patent applicant. The applicant, however, can reply to the Italian Patent Office (through a patent attorney) and explain why the EPO was wrong in its report on the patent application and also make some amendments, preferably following at least some of the suggestions given by the EPO. If that happens, since the answer of the patent applicant to the EPO report does not go back to the EPO but stays with the Italian Patent Office and the Italian Patent Office is unequipped to respond and evaluate the matter, the patent is usually granted as proposed by the patent applicant anyway. Hence, the absence of case law specifically dealing with software patents does not have a negative impact of patent grants or on the patent examination in Italy. The EPO carries out the examination according to its own guidelines and case law, and absent in Italy a substantive examination phase, even if there were some national case law about software patenting, it would be anyway disregarded during the Italian quasi-examination phase.

## VII. Conclusion

Despite the highlighted differences between the legal systems that are here considered, the result of the investigation is that there are also more similarities than one could imagine. Whether such, sometimes surprising, similarities are the product of a fruitful dialogue between patent offices and judges of different jurisdictions or merely the result of casuistry, is hard to tell. It is certainly true that patent offices around the world, and especially JPO, EPO and USPTO (along with the Korean and Chinese patent offices), are always following very carefully what happens in other crucial jurisdictions, so that some contaminations and influences can be expected. Patent grants, and how strict a patent office's examination is, are also matters of policy, and Countries can be more or less interested in having weaker, stronger, broader or narrower patents than other jurisdictions, and they constantly monitor what other patent offices and other national courts do in order to compete for the most attractive legal system (for investments, etc).

Japan, similarly to Italy, had almost no case law regarding software patents and their patent-eligibility and patentability criteria. Nonetheless both countries seem to be venues where software inventions can obtain more easily a patent, even if for different reasons. A very liberal, pro-software, patenting approach of the Japanese legal system, opposed to the absence of a real substantive examination in Italy.

The 'essence of the invention' analysis that is performed by the JPO and by Japanese courts, on the other hand, is very similar to what happens in the EPC system (Italy included, for the reasons stated above) during the inventive step examination phase. The technological problem is found and the means to solve such a problem are isolated: if such means do not make use of any laws of nature, then the invention is not patentable. This is not very different from what happens in the EPC inventive step analysis: the problem-solution approach (which is the main, although not unique, method for assessing the inventive step) is similarly applied, with the difference that in Japan novelty and non-obviousness considerations are usually not made in conjunction with this step, although patent practitioners confirm that there is no clear guidance and they might sometimes be performed.

With regard to a Europe-US comparison, when the US courts mention the 'inventive concept', they are reviving some sort of 'contribution approach' (long abandoned in the US since the eighties), that tries not only to find what the 'core' invention is (the solution to the problem, Japanese style) but also what is really 'inventive' in the invention. In doing so, inventiveness is necessarily taken into account, mixing patent-eligibility with patentability. The *Mayo-Alice* approach looks at the 'essence' of the invention, but in a slightly deeper way than the Japanese system does.

Once again, however, the US practice seems very distant from the European

one but it is not. Applying *Mayo-Alice* test is not so different from what the EPO and its boards do when assessing the patentability of the invention, but without artificially severing the inventive part of the invention before assessing the patent-eligibility of the same. If some 'further technical effects' are produced or, alternatively, some kind of hardware is mentioned, the invention is patent-eligible, but if its 'inventive'/'non-obvious' part resides in a non-patentable element, then the invention cannot be considered to be 'non-obvious', because excluded subject matter as per Art 52 para 2 EPC would dictate so. And the inventive part is evaluated by taking into account only those elements that contribute to the technical character of the invention.

In other words, in Europe this separation between 'inventive' and 'non-inventive' occurs at a later stage, but the general criterion used to deal with 'excluded subject matter' does not seem so different.

In the end, the examination of software inventions is a composite evaluation of what is 'inventive' and what patent policy wants to be 'excluded subject matter'. Such evaluations take place at different stages: patent-eligibility for US and Japan; inventive step for the EPC system, including Italy.

Despite the apparently radically different approaches, by knowing differences and similarities of the systems that have been analyzed, a good patent practitioner is certainly able to draft a patent application in such a way as to maximize the chances of survival of the same patent application in multiple jurisdictions, and at least in Japan, Europe and the United States.

# Scientific Evidence and Criminal Proceedings: The Italian and Japanese Experience

Giuseppe Gennari* and Takeshi Matsuda**

**Abstract**

The use of scientific evidence in court raises several problems in both Italian and Japanese jurisdictions. The authors, starting from the problem of admissibility, discuss two main cases of misuse of scientific evidence: the Amanda Knox case in Italy and the Ashikaga case in Japan. In both cases the trial court condemned the defendant on the basis of corrupted science (DNA fingerprint). The authors conclude that a better handling of this kind of evidence is needed taking into account that errors are inevitable and judges are not able to evaluate science and its reliability.

## I. The Use of Scientific Evidence in Criminal Courts in Italy

The use of scientific evidence in criminal courts in Italy[1] is increasingly widespread. Beside the 'old fashioned' forensic techniques – such as traditional fingerprint, toolmarks and firearms identification etc – newer technologies are gaining a fundamental role. Among them we can mention DeoxyriboNucleic Acid (DNA) fingerprint in its last and more advanced developments.[2] The increasing reliance on scientific evidence in criminal proceedings poses the problem of how to assess scientific evidence in court. Judges (and lawyers as well) should be aware of basic scientific principles and their epistemological foundations in order to make a truly informed use of these new technologies and to avoid uncritical phenomena of 'science fascination'.

Unfortunately, the reality is quite different.

On the one hand, judges scarcely have any scientific knowledge or education. Law schools only teach… law. Biology, statistics, physics, physiology are all subjects foreign to the body of knowledge of jurists. In Italy, judicial training[3] is

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[1] On this matter G. Gennari, *Nuove e vecchie scienze forensi alla prova delle corti* (Santarcangelo di Romagna: Maggioli, 2016).

[2] The last frontiers are low copy number, highly mixed DNA profiles, phenotypic DNA etc.

[3] Judicial training is under the competence of *Scuola Superiore della Magistratura* (Superior school for magistrates). The School organizes several courses each year. Every Judge can apply for participation in these courses. Participation is not mandatory, nonetheless it is taken into account during judicial carrier.

also mainly focused on strictly legal issues (law interpretation, jurisprudence...).

On the other hand, the Italian code of criminal procedure does not provide any specific rules regarding scientific evidence. When the Italian legislator adopted the adversarial system in 1988 with a totally new procedural code, the 'expert witness'[4] – well known in the American legal system[5] – was not introduced. As a matter of fact, scientific evidence is admissible in court, in conformity with the general rule of Art 190 of the Italian Code of Criminal Procedure. This means that scientific evidence, similarly to any other evidence, is always admissible upon request of the parties. It can be rejected only when it is manifestly non-relevant or redundant and this happens only rarely.

Usually, both parties – the defendant and the public prosecutor – appoint separate experts who prepare, in support of the respective appointing parties' case, a written expert report. The parties then file the reports in court. If the judge is not satisfied (more often, if he or she cannot decide which is the 'best' report), he or she can appoint a court expert in order to obtain a new and impartial report. As a consequence, there is no preliminary filter on the reliability of scientific assumptions, methods or techniques on which the evidence/report is based; and it marks another great difference with the American legal system based on jury trial.

Having both a judge and a jury creates a clear division of tasks: the former to decide what evidence should be considered by the factfinder and the latter to be the factfinder. The judge plays the role of gatekeeper for the jury. During pre-trial hearing he can filter scientific evidence and decide what can be heard by the jury and what cannot.[6]

[4] Federal Procedural Rule: Rule 702. Testimony by Expert Witnesses.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case'.

[5] Expert testimony must meet a higher standard of reliability than lay testimony. Cf M.J. Saks and B.A. Spellman, *The Psychological Foundations of Evidence Law* (New York: New York University Press, 2016), 121.

[6] Because it is unreliable and misleading for the jury. The standard for the decision is the Daubert standard (*Daubert* v *Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993)). Scientific evidence is admissible:

Whether the theory or technique employed by the expert is generally accepted in the scientific community;

Whether it has been subjected to peer review and publication;

Whether it can be and has been tested;

Whether the known or potential rate of error is acceptable; and

Whether the research was conducted independent of the particular litigation or dependent on an intention to provide the proposed testimony.

In Italy there is no jury in criminal as well as in civil proceedings.[7] The professional judge (sitting alone or in a three-judge panel) admits the evidence and assesses it as well.[8]

Now, the question is the following: is the Italian system reliable? Can judges really assess and discriminate good and bad science only on the basis of the expert reports? Probably not.

Here is one of the most intriguing and (internationally) famous case in which the use of scientific evidence became infamous.

## II. DNA Low Copy Number in the Legal Context

Meredith Kercher was a young English student at the University of Perugia.[9] On 1 November 2007, during the night, she was raped and murdered. After a few weeks of turbulent investigations, suspects fell on two other students, Amanda Knox and Raffaele Sollecito. The most important piece of evidence is a (supposed to be) blood[10] stain found on the blade of a knife belonging to Amanda. DNA from the bio sample is extracted and analysed in order to obtain a profile. During the debate in court the officer in charge for the forensic laboratory of the *Polizia di Stato* (Italian Police) declares a full match with the poor victim's DNA. The knife, according to the results of the investigation, was the murder weapon. That would be hard evidence against the defendants.

Unfortunately, the matter was much more complicated.

The bio sample was so scarce (probably only a few cells)[11] that it fell into the realm of 'DNA low copy number'.

This term is used when the estimated quantity of DNA present in a sample is less than one hundred-two hundred pg (picograms).[12] Consequently, these

[7] In Court of Assise (it is the court in charge for murder cases, international terrorism and other few serious crime) there are lay judges (five). Nonetheless, they sit on the bench together with professional judges (two).

[8] Similarly, even in the United States the Daubert standard does not apply in bench trial (trial without a jury). See G. Gennari, 'I criteri di ammissione della prova scientifica nel contesto internazionale', in G. Canzio and L. Luparia eds, *Prova scientifica e processo penale* (Milano: CEDAM, 2018), 165-199.

[9] This case is widely debated in J. Vuille et al, 'The Importance of Having a Logical Framework for Expert Conclusions in Forensic DNA Profiling. Illustrations from the Amanda Knox Case', in R.C. Huff and M. Killias eds, *Wrongful Convictions & Miscarriages of Justices* (New York-London: Routledge, 2013), 8.

[10] Because of the very low quantity it is impossible to identify without any doubt the biological array of the stain.

[11] The Forensic Lab did not have the instrument power enough to determine exactly the quantity of DNA. It was surely under nine point ninety-nine picograms (a pictogram is a billionth of a gram) given that the Qubit fluorimeter used by the Police gave a result 'too low' and the sensitivity threshold of this instrument is ten picograms.

[12] B. Budowle et al, 'Validity of Low Copy Number Typing and Applications to Forensic Science' 50 *Croatian Medical Journal*, 207-217 (2009); J. Buckleton and D. Taylor, 'Do Low

samples may undergo special procedures developed to increase assay sensitivity. Commonly, this means a greater amount of copying via *polymerase chain reaction* with increased PCR cycles (twenty-eight cycles increased to thirty-one or thirty-four). Thanks to modern PCR kits even a few cells can be analysed for DNA typing.

The other side of the coin is that the increased number of cycles increases as well the probability of stochastic effects such as allele drop-in, allele drop-out and artefacts appearing (*stutter*). Moreover this technique also increases the risk posed by contamination of samples. The augmented amplification cycles may as well amplify even the minimum amount of contaminating traces substantially enough to make the final profile disputable or unusable.

Admissibility in court of low copy number is under scrutiny in many jurisdictions.

English courts usually admit Low Copy Number (LCN) DNA, nonetheless posing some rules[13] as stated in the famous 'trilogy'[14] by Lord Justice Thomas. These rules sound as:

- DNA shall always be quantified;
- stochastic threshold should be drawn between one hundred and two hundred pg;
- above the threshold DNA profiles should be deemed always reliable and a challenge (in court) to the validity of the method should no longer be permitted;
- below the threshold 'the evidence may properly be adduced and it must then be addressed and its weight established by the adversarial forensic techniques'.[15]

The Court's view – in a few words – is that LCN DNA is

> 'well established to pass the ordinary tests of reliability and relevance (…), in cases where there is clear evidence (adduced in the manner discussed) that the profiles are sufficiently reliable'.[16]

In the United States admissibility of LCN DNA is still far from being largely affirmed. In February 2010 an important *Frye hearing* in the New York State Supreme Court ruled in favour of admissibility.[17] The hearing involved extensive

Template DNA Profiles Have Useful Quantitative Data ?' 16 *Forensic Science International*, 13-16 (2015).

[13] The same rules and principles are followed in New Zealand (*Micahel Scott Wallace* v *The Queen*, [2010], NZCA 46).

[14] They are three decisions from the England and Wales Court of Appeal: *Regina* v *Reed and Garmson*, [2009] EWCA Crim, 2698; *Regina* v *Broughton* [2010] EWCA Crim 549; *Regina* v *C*, [2010] EWCA Crim 2. In all these cases the presiding judge was Justice Thomas, a well-known and revered jurist.

[15] *Regina* v *Broughton* [2010], n 14 above.

[16] ibid.

[17] *The People of the State of New York* v *Megnath*, Ind no 917/2007.

testimony by scientists from NY OCME (Office of the Chief Medical Examiner) – the governmental agency[18] that conducted the genetic analysis – and other experts appointed by the defendant. The court, in its final statement, found that 'LCN DNA testing as conducted by the OCME is generally accepted as reliable in the forensic scientific community'. Few years later even a federal court[19] confirmed the OCME good fame. Again, LCN was deemed admissible because OCME adopted long lasting internal validation procedures regarding LCN through the analysis of more than eight hundred samples.

These decisions are more on the good job done by NY OCME rather than the general reliability of the LCN method. Changing the laboratory, the outcome changes too.

In the same period, the federal district court of New Mexico[20] rejected expert witness on LCN after a very conflicted Daubert hearing. This time the DNA profiling was carried out by the local forensic laboratory (NMDPS). According to its internal protocols, the stochastic threshold[21] for that laboratory was two hundred fifty pg, whereas the sample analysed in this specific case was two hundred fifteen pg. The court pointed out that the question

> 'is not whether it is possible to perform LCN testing reliably – but instead whether the LCN testing performed in this case, by the NMDPS, is reliable',

and the decision is against the laboratory. They did not have any experience in the field of LCN – the court says – and they did not demonstrate the competence to produce results. During the direct examination, the public prosecutor asked the scientist responsible for the laboratory:

> 'and for example if you see stochastic effect at one locus, why are others still reliable'.

The answer is puzzling: 'just based on my experience'. Personal experience is not objective and verifiable… it is not science.

In conclusion, LCN still has many twists and turns in the USA.

After all, it is not really important to establish if LCN is admissible or not in Great Britain, USA or any other country. It is much more important to point out that there is a strong debate in these countries; in court and among the community of forensic scientists.

[18] It is one of the most prominent agencies with a long standing routine use of LCN DNA technique in the United States.

[19] Federal Court for the Southern District of New York, *United States* v *Morgan*, 12-cr-00223. See also Bronx Supreme Court, *People* v *Garcia*, 2013 NY Slip Op. 23053.

[20] *United States* v *McCluskey*, Cr no 10-2734 JCH, 20 June 2013.

[21] The threshold below which the DNA fingerprinting enter in the potential danger zone of unreliable results.

## III. The *Amanda Knox* Case and Future Perspectives

In the case of Meredith Kercher, the genetic evidence submitted in court was undoubtedly problematic. The Italian police had no experience in LCN analysis, no reliable protocols, and no the possibility to quantify the DNA sample. The defendants harshly criticized the report filed by the police, explaining that the amplification of the sample – the most sensitive phase in LCN – was not repeated and verified and international standards regarding LCN were not fulfilled. Consequently, they asked the court to appoint a new and independent expert in order to have a new and impartial report.

The courtrejected the request, and held that a report by a court-appointed expert would have only added another interpretation (to those of the defendants and the public prosecutor) and it would not have solved the problem of assessing which was the correct interpretation in the case.[22]

The real point is that Italian court was totally unaware of the sharp international debate rising around LCN. In court's mind the attack against LCN performed by the police was nothing but usual defensive arguments. So that it was just easier to trust more the interpretation offered by the 'governmental laboratory' than the opinion of the 'private experts' appointed by the defendants.[23] Unfortunately, it was a fatal error.[24] And this error was totally clear when the Court of Appeal[25] before and Supreme Court[26] after reversed the judgment of the trial court.

The trial court's judgement had a large mass media coverage all over the world. Amanda Knox was an American citizen and this fact transformed a legal matter into a political dispute. A few months later an international congress on LCN, with the most prominent American and Italian forensic experts, was held in Rome. Put simply, the decision aroused a large discussion among scholars and jurists on how to assess scientific evidence in court and avoid the use of corrupted or non-reliable science. It has been proposed that the court should always appoint an independent expert simply at the request of the parties.[27] Others have suggested that the introduction of a 'daubert standard' style filter

[22] Corte di Assise Perugia 5 December 2009 no 7, available at https://tinyurl.com/yc9tbmjt (last visited 15 November 2018). The defendants where condemned for murder. The sentence was reversed, after six years, by the Supreme Court (Corte di Cassazione 7 September 2015 no 1105, available at https://tinyurl.com/yccjr4wp (last visited 15 November 2018).

[23] Very often courts decide on the base of a sort of 'principle of authority' and this 'authority' always falls on the side of the public prosecutor.

[24] L. Luparia et al, 'La prova del DNA nella pronuncia della Cassazione sul caso Amanda Knox e Raffaele Sollecito' *Diritto penale contemporaneo*, 155-161 (2016).

[25] Corte di Assise di Appello Perugia 3 October 2011, available at https://tinyurl.com/y7fsldc3 (last visited 15 November 2018).

[26] Corte di Cassazione 7 September 2015 no 1105, n 22 above.

[27] P. Tonini, 'Dalla perizia prova neutra al contraddittorio sulla scienza' *Diritto penale e processo*, 360 (2011).

according to which court should admit or assess scientific evidence.[28] That discussion is still going on and probably it will never stop just because there is no magic formula. In order to improve the quality of the decisions involving scientific issues, it is fundamental to adopt a wholistic approach. The 'recipe' should include: promoting a strong educational training for lawyers and judges on the basic principles of science and scientific knowledge; disseminating among judges standards and protocols approved by scientific organizations;[29] adopting strategies in order to prevent cognitive biases during acquisition and assessment of the evidence; promoting a strong selection among experts, binding them to quality and ethical guidelines; ensure the real independence (from the law enforcement agencies) of the scientific laboratories. It is a long way to go. Nevertheless it is unavoidable to start working immediately if Italian judicial system wants to maintain a good degree of credibility on the international stage.

## IV. The Use of Scientific Evidence in Criminal Courts in Japan

In Japan, it has long been emphasized that it is important to apply scientific knowledge and new technology not only for investigation but also for fact-finding (either against or for the accused) by courts. Especially for the Japanese criminal justice, under the slogan, 'from subjective evidence to objective evidence', scientific evidence has been expected to change the situation in which investigation and fact-finding have depended so much on confession of the accused.

At the same time, it is often warned that it is dangerous to rely on scientific evidence. In fact, there have been several cases of false charge and judgment caused by scientific evidence. It has been pointed out that the judges are not able to assess substantially or exactly the meaning of the evidence because of its highly technical character, but on the other hand, are likely to believe the reliability easily because it is 'scientific'. The competence and impartiality of the experts have been also disputed.

## V. How was Scientific Evidence Handled in the Japanese Criminal Justice?

Although both the importance and the risks associated with scientific evidence have been emphasized for a long time, 'scientific evidence' has not been clearly defined. For instance, both DNA fingerprints, blood type tests or polygraph tests, and expert analysis on handwriting, voiceprints, hair identifications or dog sniff tests are often classified as 'scientific evidence'. However, the admissibility

[28] Corte di Cassazione 17 September 2010 no 43786, available at https://tinyurl.com/y9d76z2c (last visited 15 November 2018).

[29] ENFSI (European Network of Forensic Science Institutes) is particularly active in Europe.

of this type of evidence is determined on the basis of 'natural or legal relevancy' standard, like all the other types of evidence. This might mean that the problems specific to scientific evidence have not been fully interrogated in Japan.

Art 317 of the Japanese Code of Criminal Procedure provides that 'facts shall be found on the basis of evidence'. This provision has been interpreted to require not only that the court's fact-finding is based on 'evidence', but also that the facts are established on the basis of evidence admissible according to the evidential rules provided in the Code of Criminal Procedure, for example, exclusionary rule of forced confession (Art 319) and hear-say rule (Arts 320-328). There are also rules, though not explicitly provided by law, accepted and developed by doctrine and/or case law especially under influence of the US law and theory, for example, natural and legal relevancy and exclusionary rule of illegally collected evidence.

The admissibility of scientific evidence, like other types of evidence, is determined on the basis of such evidentiary rules. Among the rules governing the admissibility of evidence, the most relevant and important rule for scientific evidence has been considered to be 'natural and legal relevancy'. This concept was introduced in the Japanese theory on criminal procedure under influences of a theory in the US at that time.[30] According to this concept, when evidence has in its nature no or too little probative value, it has no natural relevancy and is not admissible. For example, simple opinion, reputation, or imagination is not admissible because it is not empirically or logically relevant to the fact to be proved. On the other hand, evidence lacks legal relevancy, when it is typically likely to entail risks of wrong judgments or unjust prejudice of judges. Evidence that may produce confusions in issues is also considered to be legally irrelevant.[31]

The doctrines have long analyzed the admissibility of scientific evidence using the 'natural and legal relevancy' framework. However, they have not sufficiently examined the problems proper to 'scientific evidence' and its definition. Empirical or logical relevancy or reasonability of inference has been mainly discussed and proper rules to determine 'scientific evidence' have not been established. Similarly, the courts have not been conscious of the problems peculiar to scientific evidence. Moreover, they seem to have been reluctant to categorically exclude certain type of scientific (or expert) evidence and tend to reduce the problem to the question of probative evaluation. In fact, the Supreme Court has affirmed in concrete cases

[30] Especially the concept of 'legal relevancy' by J.H. Wigmore (J.H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Boston: Little, Brown and Company, 3rd ed, 1940), 1, 298). See also G. Naruse, 'Admissibility of Scientific Evidence (1)' 130(1) *Journal of the Jurisprudence Association (Tokyo University)*, 14 (2013).

[31] For example, the Supreme Court denied the admissibility of the evidence on the past similar offense(s) or conduct(s) committed by the accused in order to establish his/her identity with the author of the offense charged, because it might entail judge's prejudices on the criminal inclination or confusion in the hearing SC 7 September 2012, *Keishu* 66-9, 907; SC 25 February 2013, *Keishu* 67- 2, 1.

the admissibility of the result of handwriting analysis,[32] polygraph test,[33] dog sniff tests[34] etc, though admonishing that the courts shall carefully evaluate the probative value.[35]

According to the Japanese code of criminal procedure, courts are considered to have discretion to decide which evidence is to be examined in trial. In particular, the court may decide at its discretion if it is necessary or appropriate to examine a certain document or article of evidence in trial. But it is not imaginable for courts to deny the necessity to examine scientific evidence that the court deems to be relevant to the fact to be proved.

In summary, the standards in order to determine the admissibility or to assess the relevancy and reliability of scientific evidence have not been established in Japan.

## VI. The *Ashikaga* Case and DNA Type Analysis

However, as in Italy, the use of a result of DNA type analysis in a concrete case in Japan as evidence to establish the identity of person who commits a crime and to link the person to the crime has is currently being interrogated. In particular, the *Ashikaga* case, in which the accused was convicted on the basis of DNA type analysis and was incarcerated for seventeen years but found innocent in retrial as a result of a new, more advanced DNA type analysis,[36] confronted the criminal justice system with the serious problem of 'scientific evidence'.

In 1990, a missing four-year-old girl was found dead at a riverside in Ashikaga City, Tochigi Prefecture.[37] It was confirmed that she was strangled to death and a lot of sperm was found on her short-sleeves shirt left at the riverside. The next year Mr Sugaya, a kindergarten bus driver, was arrested and prosecuted of the murder of the girl.[38] His arrest was founded mainly on the confession, which was later found to be false, acquired in the police interview by showing him the

[32] SC 21 February 1966, *Hanrei-jiho* 450, 60.

[33] SC 8 February 1968, *Keishu* 22-2, 55.

[34] SC 3 March 1987, *Keishu* 41 -2, 60.

[35] Art 318 of the Japanese Code of Criminal Procedure provides that the probative value of evidence shall be left to the free discretion of the judge, namely does not provide any formal restriction to the evaluation of evidence. Of course it does not mean that arbitrary evaluation of evidence is permitted; it shall be empirically and logically 'reasonable'.

[36] For the details of the case, see H. Sato, 'Report on the Ashikaga Case' 71 *Quarterly Keiji-Bengo*, 25 (2012); K. Honda, 'The Ashikaga Case of Japan – Y-STR testing used as the exculpatory evidence to free a convicted felon after 17.5 years in prison' 7 *Forensic Science International: Genetics*, 1-2 (2013).

[37] Two similar cases occurred in a residential area in 1979, 1984 and 1996 when he was detained. This fact would have suggested that the Ashikaga case was a part of serial murders of young girls and Mr Sugaya was not the author. See K. Honda, n 36 above, 2.

[38] It is harshly criticized that the police improperly drove Mr Sugaya to confess by showing the result of incorrect DNA analysis. See H. Sato, n 36 above, 25.

result of analysis on D1S80 type DNA of the sperm on the victim's shirt conducted by the National Research Institute of Police Science (NRIPS).

According to the NRIPS report, both the sperm on the victim's shirt and Mr Sugaya had sixteen-twenty-six (D1S80 type DNA) and B (ABO blood typing). However, as to the D1S80 typing method, a serious scientific problem was pointed out after the result of the original DNA test was submitted to the court. Responding to it, the NRIPS changed the original typing and revised the results from sixteen-twenty-six to eighteen-thirty during trial. However the NRIPS insisted the DNA type of the sperm was the same as that of Mr Sugaya.

In trial of the first and second instance, the admissibility and reliability of the result of analysis on the DNA type became an issue. However, the court of the first instance, Utsunomiya District Court, admitted the evidence and convicted Mr Sugaya. The accused appealed, but the court of the second instance, Tokyo High Court rejected it. The court defined scientific evidence as a result of the inspection and analysis by means or methods that are beyond the one by normal senses on a certain phenomena or action. The court held that in order to admit such scientific evidence in criminal trial, not only the fundamental principles of the analysis shall be founded scientifically but also the means or methods shall be appropriate and typically reliable. As a result, the court affirmed the admissibility of the NRIPS report on the Mr Sugaya's DNA fingerprints.[39]

The Supreme Court supported the decision of the Tokyo High Court, rejected the defense's recourse, and found that the NRIPS report was admissible because the inspection and analysis on the DNA fingerprints were conducted in accordance with scientific principles that were theoretically correct, by the persons who mastered the proper skills and by means and methods scientifically reliable.[40]

As a result, the imprisonment for indefinite term sentence (life sentence) against Mr Sugaya had become final and binding and he was incarcerated in the Chiba prison on 17 July 2000. However, Mr Sugaya continued to protest his innocence from inside of the Chiba prison and repeatedly demanded DNA re-testing and a retrial (revision). In 2008 the Tokyo High Court, accepting his request, and nominated two forensic scientists for the re-test: one recommended by the prosecution and the other by the defense. The shirt was divided between the two experts, who accomplished newly the DNA analysis. It was a very difficult mission because 19 years had passed since the crime had occurred and the crime scene sample had become very old and was in bad condition.[41] Nevertheless, the new DNA analysis with more advanced method (Y-chromosomal STR testing) conclusively showed that he could not be linked with the murder.

Thus, on the basis of the new DNA analysis, Mr Sugaya was released from

[39] Tokyo High Court 9 May 1996, *Kokeishu* 49-2, 181.

[40] SC 17 July 2000, *Keishu* 54-6, 550.

[41] According to H. Sato, n 36 above, 26, the shirtsleeves' shirt was not conserved under the controlled temperature.

the jail in 2009 after more than seventeen years of imprisonment and acquitted definitively by the court of retrial in 2010.[42]

## VII. The Situations After the *Ashikaga* Case

The Ashikaga case was taken seriously, because on the one hand it was a DNA type analysis that caused the erroneous judgment, yet on other hand, the evidence that allowed the error to be discovered, and which allowed Mr Sugaya to be released from the jail was also a DNA type analysis. It is worth noting that the DNA type analysis that caused false conviction against Mr Sugaya was conducted using a primitive method, whereas the one that saved him from prison was more advanced. Successively, other cases, in which result of the old method of DNA type analysis was used as decisive evidence to establish the identity of the accused with the author of the crime, were reexamined, and some of them were found erroneous.[43]

The situation became even complicated because the institution of *saiban-in*, the participation of the lay judges with professional judges in criminal trial on heavy offenses, was introduced in 2005 and started in 2009. Thus the practice and the doctrine were faced with the serious problem: How do we handle the scientific evidence in criminal proceedings with the participation of lay judges.

Since the year 2010, research into, and discussions relating to scientific evidence have intensified. For instance, the Judicial Research and Training Institute of the Supreme Court conducted a research on scientific evidence focusing especially on the DNA type analysis in 2010 and the report was published in 2013.[44] However, report was harshly criticized by some authors for being too optimistic about the reliability of the recent method of DNA type analysis.[45]

After the Ashikaga case, interest in comparative research, not only into the development of the case law and disputes in the United States including the Frye and the Daubert standard, and the reform of the Federal Rules of Evidence in 2000 but also into the situations in other common law countries, for example the UK and Australia intensified among scholars.[46]

However, many problems still remain unsolved and for the Japanese judicial

[42] Utsunomiya District Court 26 March 2010, *Hanrei-jiho* 2084, 157.

[43] The most famous is the so-called murder of a woman working for Tokyo Electric Power Company, in which the Nepalese accused, Mr Govinda Prasad Mainali was released after fifteen years of wrongful imprisonment. See M. Ibusuki et al, 'Scientific Evidence and Criminal Trial' *Quarterly Keiji-Bengo*, 76, 82 (2013).

[44] The Judicial Research and Training Institute, *Scientific Evidence and Criminal Trial* (Tokyo: Hosokai, 2013).

[45] M. Ibusuki et al, n 43 above, 76.

[46] Y. Tsujiwaki, 'Relevancy and Reliability of Scientific Evidence' 7 *Meiji Law School Review*, 413 (2010); G. Naruse, 'Admissibility of Scientific Evidence (2)-(4)' *Journal of the Jurisprudence Association (Tokyo University)*, 130(2), 386; 130(3), 573; 130(4), 801 (2013).

system it is important to start working on these issues with urgency.

First, there is a need to establish standards or criterion to determine the admissibility of scientific evidence and assess its reliability.

As for the admissibility, three standards can be from the holdings of the Supreme Court on the Ashikaga case; 1) if the scientific principles used for the inspection and analysis are theoretically correct or not; 2) if the inspection and analysis are conducted by the persons who mastered proper skills or not; 3) if the means and methods used for the inspection and analysis are scientifically reliable or not.

Of course these standards are still too vague and abstract, because they do not even define 'scientific evidence' and each standard needs precision to function substantially as a formula to determine admissibility of scientific evidence. In fact, it did not work well in the Ashikaga case so as to screen out the primitive method of DNA type analysis and failed to prevent the serious error of judgment. However, simple importation of the Frye or Daubert standard or any other foreign standards might not be solution neither in Japan: we need to refine the definition of scientific evidence and standards to determine the admissibility, and in reconstructing the law on evaluating scientific evidence.

Secondly, we need to prepare institutions to ensure that judges (and prosecutors and lawyers) can substantially and correctly evaluate the relevancy and reliability of scientific evidence. The scientific education and training of judges, though a plausible solution is a limited one, in light of the fact that it is impossible for them to learn all the fundamental principles of each domain of science. Moreover, the evaluation of the relevancy and reliability is not only a matter of correctness of scientific principles and methods but also a matter of human error. Because even if the principles and methods used for inspection and analysis of scientific evidence were theoretically correct, the result is reported by humans, who are not completely exempted from error, prejudice or impartiality. Thus we need to have reasonable procedural institutions so as to avoid such risks.

Thirdly, it is important to reserve the possibility to retest the evidence and to revise the judgment. The possibility to revise the judgment might be guaranteed institutionally by admitting relatively broadly re-examination of the evidence and appeal or retrial. Whereas possibility to retest the evidence is reserved factually by conserving good conditions of the samples so as to avoid the degeneration and contamination. In order to reserve the possibility, the scientifically appropriate conservation of the samples is indispensable.

It is even more important if we consider the development of science and technology. The Supreme Court, in the Ashikaga case, held that the probative value of the evidence shall be estimated carefully taking into consideration the facts newly discovered as a result of the subsequent development of science and technology. Nevertheless, the Court rejected the request for re-test of the DNA

type by a more advanced method demanded from the defense.[47] If the Court had ordered the re-test at that time, the error could have been discovered much earlier.

Mistakes and errors are inevitable in the human world, no matter how much advanced and developed the science. So the most important thing in handling scientific evidence for all the people who concern the Criminal Justice is to be always conscious of the possibility of error in assessment or judgment as well as to be honest and courageous to acknowledge mistakes when discovered.

[47] H. Sato, n 36 above, 26.

# Current Situation of Consumer Bankruptcy in Japan

Masaki Sakuramoto*

**Abstract**

In Japan, starting with the bursting of the bubble economy in the early 1990s, and followed by a series of crises, such as the global financial crisis caused by the Lehman Brothers Shock of 2008, and the Great East Japan Earthquake of 11 March 2011, the economic life of consumers has been heavily affected by a serious, long term economic depression. For instance, consumer insolvencies sharply increased due to multiple debts. As a consequence, expressions such as 'debt adjustment', 'individual rehabilitation', 'credit card bankruptcy' and 'credit loan bankruptcy' have been routinely used when dealing with this topic.

In this article, I would like to analyze the following three points that illustrate the current situation of consumer bankruptcy based on the latest data.

1. Numbers of petitions for bankruptcy accepted by district courts;
2. Characteristics of bankrupts in consumer bankruptcy;
3. Numbers and rate of orders granted discharge by the district courts.

## I. Purpose of This Article

The purpose of this article is to illustrate the current situation of consumer bankruptcy (*消費者破産*) in Japan, which is central to consumer insolvency (*消費者倒産*), based on (1) the numbers of petitions for bankruptcy accepted by the district courts, (2) the classification of types of consumer bankrupts, and (3) the numbers and rate of orders granted discharge by the district courts.

## II. Introduction

In Japan, the prolonged and worsening economic slump caused by the so-called burst of the bubble economy from the early 1990s, the so-called Lehman crash in 2008, and the Great East Japan Earthquake of 11 March 2011 is still having a major impact on the economic life of consumers. For instance, when taking a look at individual bankruptcy cases, consumer insolvency expressed using terms such as debt adjustment (*債務整理*), individual rehabilitation (*個人*

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*再生*), credit card bankruptcies (*カード破産*) and credit bankruptcies (*クレジット破産*) particularly caused by multiple debts (*多重債務*) has increased dramatically. As a result, consumer insolvency became an issue in the field of insolvency laws, and, in particular, consumer bankruptcy, which accounts for most of such consumer insolvency, came under close scrutiny as an urgent issue.

Nevertheless, the term 'consumer bankruptcy (*消費者破産*)' is not used in the Japanese Bankruptcy Act 2 June 2004 no 75. In addition, terms such as 'credit card bankruptcies' and 'credit bankruptcies'– which are used as terms that are synonymous with consumer bankruptcy – are also missing in the Japanese Bankruptcy Act.

The Japanese Bankruptcy Act is not principled on the bankruptcy of traders like the Italian and French Bankruptcy Act. It is based on the fundamental bankruptcy principle which doesn't distinguish between trader and non-traders as in England and Germany. The Japanese Bankruptcy Act prescribes both the bankruptcy of artificial persons and that of natural persons, and it could be said that the framework of bankruptcy procedures is basically the same for both artificial persons and natural persons.

With respect to this point, unlike Japan, the bankruptcy of companies and entrepreneurs (juridical person) and the bankruptcy of consumers (natural (civil) person) are prescribed in separate laws in Italy. In other words, the bankruptcy of entrepreneurs is prescribed under the law referred to as the Bankruptcy Act, and the bankruptcy of consumers is prescribed under the law referred to as the 'Provisions regarding usury and extortion, as well as composition of over-indebtedness crises'. The latter is hereinafter referred to as the 'Italian Consumer Bankruptcy Act' 27 January 2012 no 3 for the sake of convenience.

In this article, I would like to define the term 'consumer bankruptcy' as one distinctive and most-often encountered type of bankruptcy in which most bankruptcies are by consumers, and are filed for the purpose of obtaining a discharge.

Common characteristics found in many consumer bankruptcy cases include the following; specifically, a) the petitioner is a consumer as a civil debtor who is natural person, b) the petitioner has fallen into a state of multiple debts, c) in many cases, the petition for bankruptcy is filed not by the creditor, but by the debtor himself/herself, d) in many cases, the court issues an order of discontinuance of bankruptcy proceedings upon issuing an order of commencement of bankruptcy proceedings, and e) most importantly, the petition for bankruptcy is filed for the purpose of obtaining a discharge.

The discharge clause was not previously prescribed under Italian laws, but a discharge was foremost acknowledged for entrepreneurs pursuant to the revision of the Italian Bankruptcy Act in 2006, and then was additionally acknowledged for civil debtors and consumers under the Italian Consumer Bankruptcy Act of 2012. Since this 'discharge' will most likely play a major role in the consumer

bankruptcy cases in Italy in the future.

## III. Current Situation of Consumer Bankruptcy

According to the Statistics by the National Police Agency, the total number of suicide victims in 2017 was twenty-one thousand three hundred twenty-one people, and three thousand four hundred sixty-four people among these victims committed suicide because of economic or personal problems.[1] Looking at the 2017 average of victims who committed suicide because of economic or personal problems, reveals approximately ten people committed suicide per day or one suicide approximately every two point five hours. While the number of victims who committed suicide because of economic or personal problems is decreasing as a whole, the number is more than two times that of the ten thousand three hundred nineteen persons in 1989 when the so-called bubble economy reached its peak. Of course, not all of the victims who committed suicide because of economic or personal problems matters were a result of consumer bankruptcy due to their inability to pay multiple debts, but it appears that many of these suicide victims corresponded to consumer bankruptcy when giving consideration to today's economic circumstances.

### 1. Number of Bankruptcy Cases Filed

*Graph 1* shows the transition of bankruptcy cases that were newly filed from 1989 to 2016 in Japan.

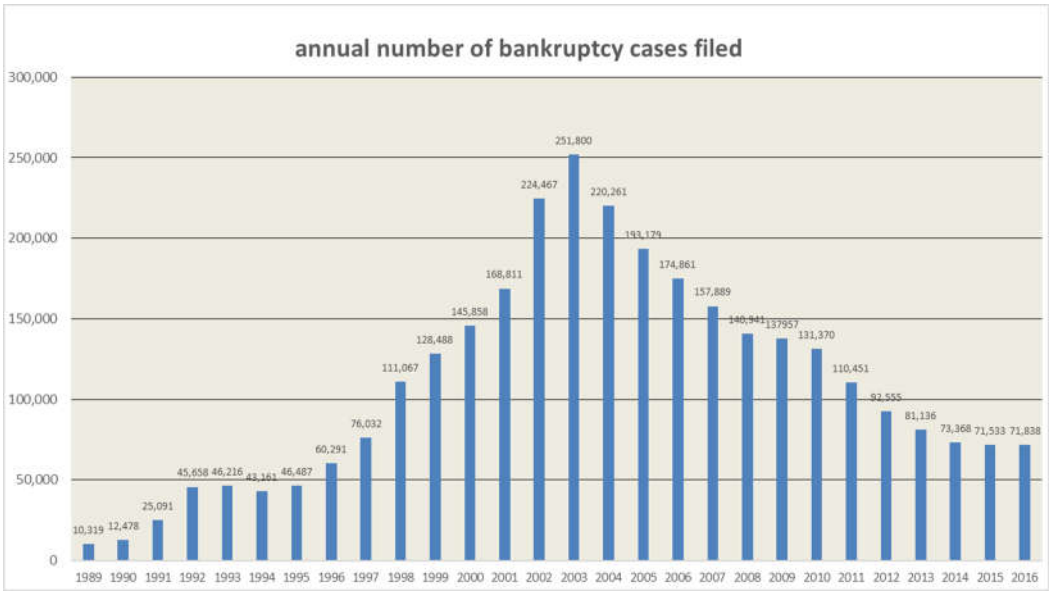
'Cases that were newly filed', it refers to cases that were newly accepted by district courts. While there may be cases where certain cases are counted redundantly as a result of being transferred from a different court, these figures can be considered as the general number of bankruptcy cases that were filed with the courts. As explained in detail below, in Japan, unlike in Italy, a commencement order is issued by the court for basically all bankruptcy cases that are filed, and procedures are thereby commenced.

There were ten thousand three hundred nineteen cases in 1989 when the bubble economy started to collapse. In 2003, so-called '*Yami-Kinyu* (loan sharks based on the *yakuza (Japanese organized crime syndicates)*)' became a big social problem in Japan, so the number of bankruptcy cases filed had peaked in this year at two hundred fifty one thousand eight hundred cases. But the number of cases has gradually decreased year-by-year to seventy-one thousand eight hundred

[1] Available at https://tinyurl.com/y9blmnpc, 2, 6, 25 (last visited 15 November 2018). By way of reference, the death rate of suicide victims was twenty point seven per one hundred thousand persons according to Japanese statistics of 2013, and six point four persons according to Italian statistics of 2012, which means that the death rate caused by suicide in Japan is more than triple in comparison to that of Italy, available at https://tinyurl.com/ybzl722u, 35 (last visited 15 November 2018).

thirty-eight[2] in 2016.

*Graph 1*




One reason for this is because, in 2003, the so-called '*Yami-Kinyu* Countermeasures Act' (formally known as the Act for Partial Revision of Moneylending Control Act and Investment Act) was revised, and penalties were strengthened against unregistered moneylenders and high-interest loans, as well as against illegal collection of loans (for instance, collecting debts by repeatedly calling the debtor's workplace or calling the debtor's home at night, going over to the debtor's home and yelling out loud, or in a manner that verges on extortion).

Subsequently, the Moneylending Control Act was partially revised in 2006, and (1) excessive loaning was inhibited, the total amount that may be loaned was restricted to be up to one third of the borrower's income, and the borrower's income must be accurately calculated by causing the borrower to submit a withholding certificate to maintain effectiveness, (2) gray zone interest rates were abolished and the interest rate that was valid as so-called constructive repayment up to twenty-nine point two per cent was lowered to fifteen/twenty per cent according to the amount of the Interest Rate Restriction Act, constructive payment was abolished, and penalties were strengthened against the violation of these revisions in order to place strict restrictions on lenders, and (3) call centers such as the Japan Legal Support Center and consumer hotlines were established with the government and local public agencies playing a central part

[2] General Secretariat of the Supreme Court, *Annual Report of Judicial Statistics for 2016* (Tokyo: Lawyers Association, 2017), 72. Other case counts are also based on the annual report of judicial statistics of each year.

in the creation process of these call centers, and safety-net loans for individuals such as the system of loaning for social welfare were enhanced so as to protect the borrowers. Thus, the public and private sectors have joined hands and taken measures for eradicating the problem of multiple debts.

By way of reference, the number of cases in which bankruptcy procedures of companies were taken in Italy was fourteen thousand four hundred seventy-five[3] in 2015 based on the latest materials. Nevertheless, the number of consumer bankruptcy cases (bankrupt persons) in Italy is unclear, and it would be impossible to compare the number of bankruptcy cases in Japan and Italy unless the number of consumer bankruptcy cases in Italy is added to the foregoing number of corporate bankruptcy cases. However, when using the number of cases in which bankruptcy procedures were commenced in Italy as a reference and applying it to the population of Japan, the result shows twenty-eight thousand nine hundred fifty cases, and the number of bankruptcy seventy-one thousand five hundred thirty-three cases in Japan in 2015 is approximately two point five times that of Italy even after performing the calculation upon applying the figures to the population of Japan. The characteristics of the number of bankruptcy cases in Japan and Italy are that, while the number of bankruptcy cases filed and the number of cases in which bankruptcy procedures were commenced in Japan are basically the same, there is a considerable difference in the numerical values of the two in Italy. For instance, when taking 2015 as an example, the number of fourteen thousand four hundred seventy-five cases in which bankruptcy procedures were commenced has decreased to one third of the number of bankruptcy forty-one thousand thirty-six cases that were filed.

### 2. Characteristics of Bankrupts in Consumer Bankruptcy

As characteristics of bankrupts in consumer bankruptcy I will mention gender, ratio by age, income, amount of debt, occupation, and cause of bankruptcy.

This information is based on the record surveys issued by the Japan Federation of Bar Associations.[4] This survey has been conducted nine times so

[3] Available at https://tinyurl.com/y8n933jq, 196 (last visited 15 November 2018).

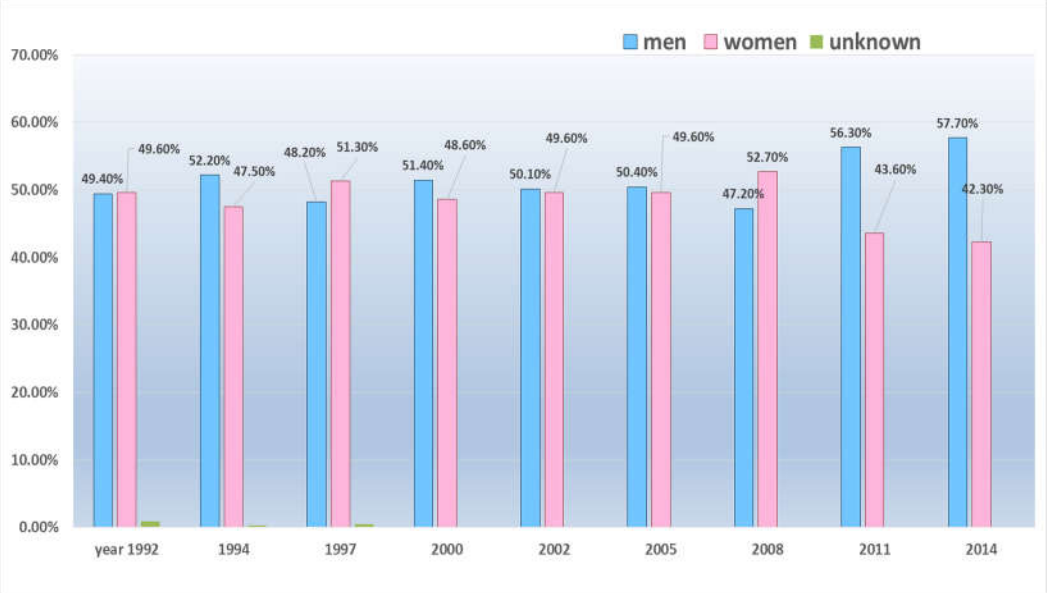
[4] The Japan Federation of Bar Associations the Consumer Affairs Committee has issued the following nine Record Surveys, available at https://tinyurl.com/y82e6g67 (last visited 15 November 2018). *Record Survey of Bankruptcy Cases and Individual Rehabilitation Cases in 2014* (2014); *Record Survey of Bankruptcy Cases and Individual Rehabilitation Cases in 2011* (2011); *Record Survey of Bankruptcy Cases and Individual Rehabilitation Cases in 2008* (2008); *Record Survey of Bankruptcy Cases and Individual Rehabilitation Cases in 2005* (2007); *Record Survey of Bankruptcy Cases and Individual Rehabilitation Cases in 2002* (2003); *National Survey of Bankruptcy Records in 2000* (2000); *National Survey of Bankruptcy Records in 1997* (1999); the survey of 1994 is based on *the Collection of Documents Concerning Revision of Bankruptcy Act in Relation to Consumer Bankruptcy*, 215, (1997), and the survey of 1992 is based on *the Results of Questionnaire Concerning Consumer Bankruptcy Survey and Debt Adjustment of Multiple Debts and Questionnaire of Bar Association Concerning Consultation on Multiple Debts* (1992).

far in the years of 1992, 1994, 1997, 2000, 2002, 2005, 2008, 2011, and 2014.

Please note that these surveys include bankrupt persons among sole proprietors as a result of randomly extracting bankrupt persons who are natural persons, which is why the amount of debt is considerably high. Thus, it should be kept in mind that these surveys may not necessarily be an accurate reflection of the figures of consumer bankruptcy of income and amount of debt.

a) Concerning the gender of bankrupt persons (*graph 2*), all surveys basically show the same rate, and there was no bias based on gender. However, in 2011 and 2014, bankruptcies by men surpassed those by women by roughly ten per cent. Nevertheless, since the ratio of suicide victims of men and women in Japan is three to one, as explained above, the bias is minimal in comparison to this ratio.

*Graph 2*



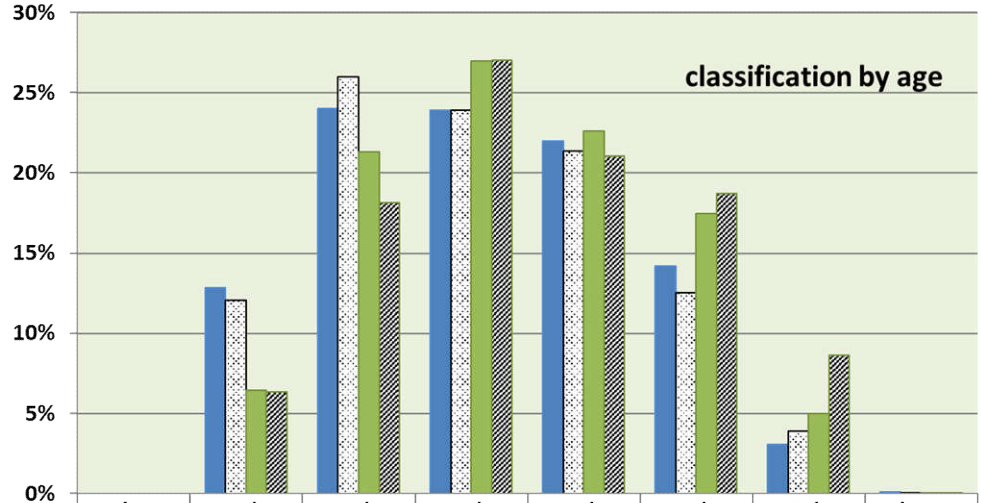

b) Concerning bankrupt persons by age (*graph 3*), data only from 2005 is included for the sake of simplification. In comparison to the year 2005, which is before the Lehman crash, a sweeping generalization would be that, on the one hand, bankruptcies by people in their forties, sixties and seventies are of an increasing tread on the one hand, but, on the other, bankruptcies by people in

In these nine record surveys, the number of cases and items to be surveyed are not necessarily unified, but the survey items have been unified from the record survey of 1997 onward. Nevertheless, from the survey of 2014, the contents have been slightly modified such as the option of 'purchase by credit card' being added to the cause of debt of bankruptcy and individual rehabilitation.

The respective figures used in this chapter are based on the record survey of the corresponding year.

their twenties and thirties are of a decreasing trend on the other, and the aging of consumer bankrupt persons is notable. When calculating the average age based on the 2014 Survey (calculating the intermediate value of men and women by age (for instance, calculating people in their twenties as being twenty-five years of age, and calculating people in their seventies or older as being seventy-five years of age)), in 2005 the average age of men is forty-five point four years and the average age of women in 2005 is forty-five point nine years, and the average age of both men and women in 2005 is approximately forty-six years. But in 2014 the average age of men is fifty point two years and the average age of women is fifty point four years, and the average age of both men and women in 2014 is fifty-two point four years, and the aging of consumer bankrupt persons is notable.

*Graph 3*

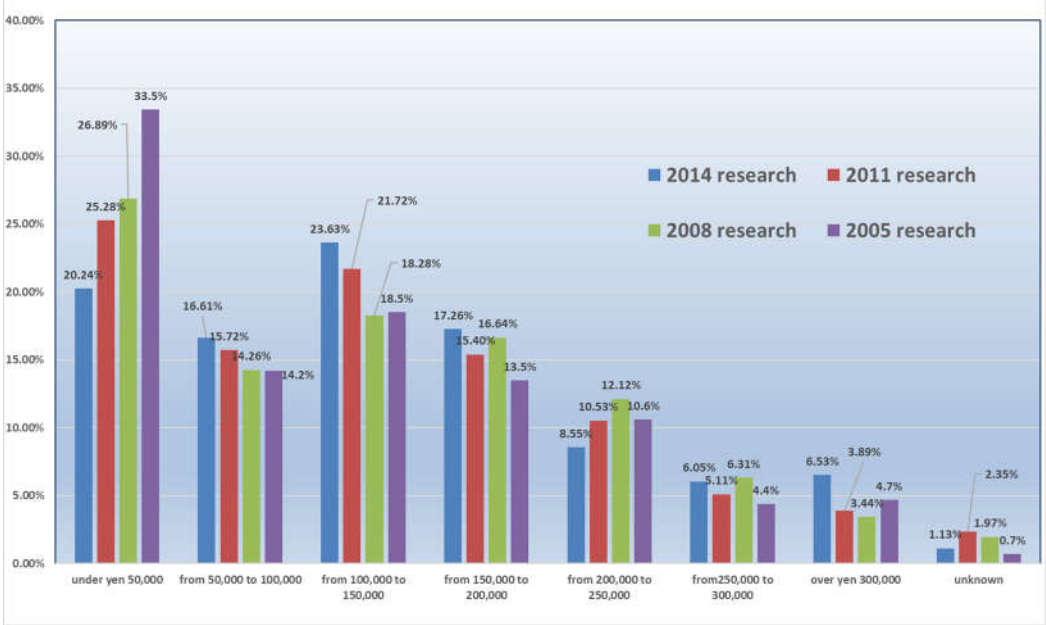



| | under 20 | 20's | 30's | 40's | 50's | 60's | 70's | unknown |
|---|---|---|---|---|---|---|---|---|
| 2005 research | 0.0% | 12.9% | 24.0% | 23.9% | 22.0% | 14.2% | 3.1% | 0.1% |
| 2008 research | 0.0% | 12.1% | 26.0% | 23.9% | 21.4% | 12.5% | 3.9% | 0.1% |
| 2011 research | 0.0% | 6.5% | 21.3% | 27.0% | 22.6% | 17.5% | 5.0% | 0.1% |
| 2014 research | 0.0% | 6.4% | 18.2% | 27.0% | 21.1% | 18.7% | 8.6% | 0.1% |

c) Concerning the income of bankrupt persons (*graph 4*), irrespective of the year, the most common monthly income was less than fifty thousand yen, but in 2014 the most common monthly income was 'one hundred thousand yen or more and less than one hundred fifty thousand yen' (approximately twenty-four per cent of reported cases), and the next common monthly income was the zone

'less than fifty thousand yen' (approximately twenty per cent). Nevertheless, unlike before, there is no drastic difference between the respective income ranges, and it could be said that people are filing for bankruptcy irrespective of the income range.

*Graph 4*

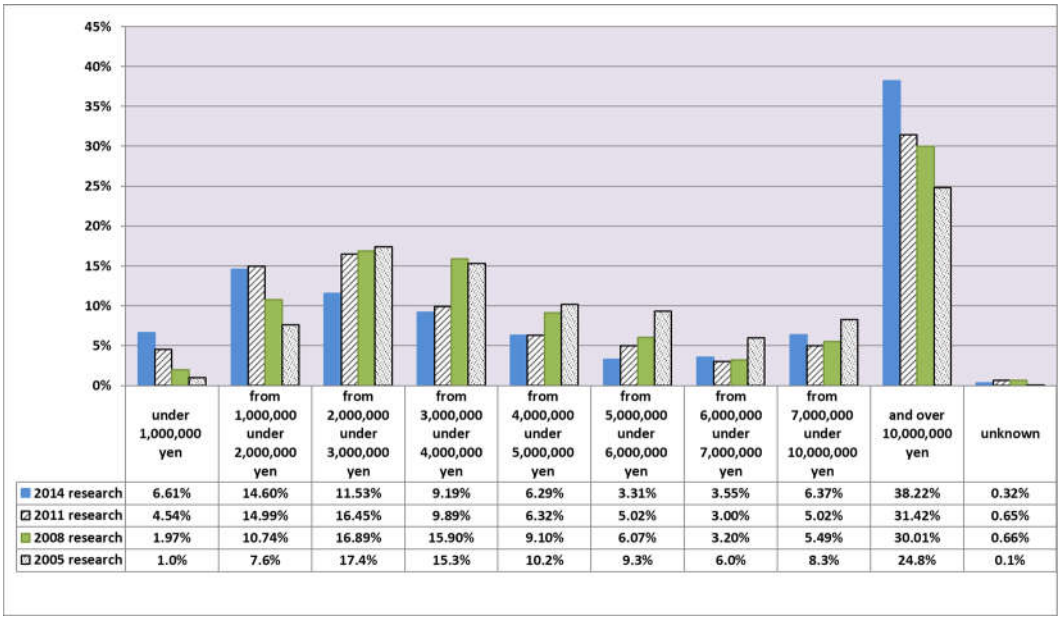



Moreover, while this is not indicated in the table and graph, in the 2014 Survey, while men with a monthly income of less than fifty thousand yen (including no income) accounted for approximately sixteen per cent of bankruptcies, the ratio of women was ten per cent greater, accounting for approximately twenty-seven per cent. Contrarily the ratio of men having a monthly income of two hundred thousand yen or more was approximately thirty per cent, and the ratio of women was approximately ten per cent. The fluctuation of monthly income based on gender is notable, and we can see that women who declare bankruptcy have a lower income. Furthermore, while the average monthly income was one hundred ten thousand sixty one yen in the 2005 Survey before the Lehman crash, the average monthly income increased by roughly twenty thousand yen in 2014 to one hundred thirty-one thousand six hundred twelve yen. Still, the fact remains that the people who file for bankruptcy have a low income.

d) Concerning the amount of debt of the bankrupt persons (*graph 5*), since cases where the total amount of debt is greater than one hundred million yen account for four point thirty-five per cent among all cases, as explained above, it appears that the bankruptcy of entrepreneurs as natural persons is included in addition to those of consumers. In the annual survey from 2005 onward, the

amount of debt of ten million yen or more is the most common and accounts for approximately thirty per cent of declared bankruptcies, but in the 2014 Survey, this amount of debt increased considerably to approximately forty per cent of cases. Contrarily, while the amount of debt of under seven million yen represented approximately sixty-seven per cent of bankruptcies in 2005, the percentage of this amount of debt decreased to fifty-five per cent in the 2014 Survey. However, the amount of debt of under one million yen equalled approximately nine per cent of cases in 2005, but increased to more than double to twenty-one per cent in 2014. Thus, cases of filing for bankruptcy even when the amount of debt is small are an increasing trend.

*Graph 5*

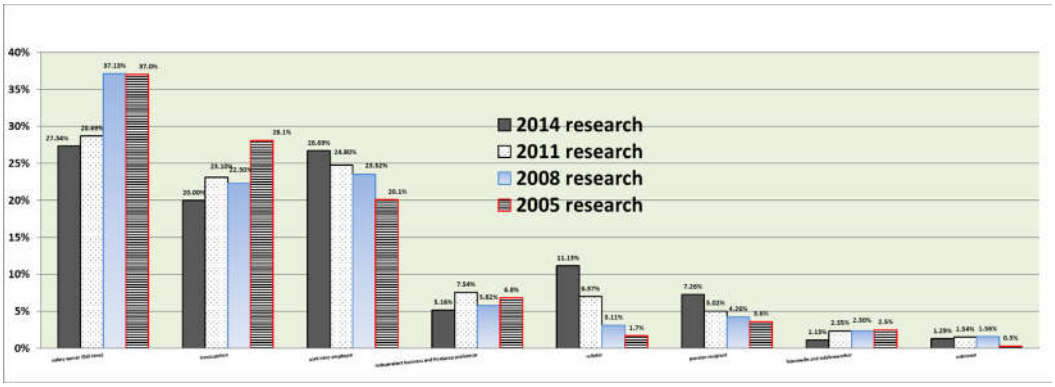



| | under 1,000,000 yen | from 1,000,000 under 2,000,000 yen | from 2,000,000 under 3,000,000 yen | from 3,000,000 under 4,000,000 yen | from 4,000,000 under 5,000,000 yen | from 5,000,000 under 6,000,000 yen | from 6,000,000 under 7,000,000 yen | from 7,000,000 under 10,000,000 yen | and over 10,000,000 yen | unknown |
|---|---|---|---|---|---|---|---|---|---|---|
| 2014 research | 6.61% | 14.60% | 11.53% | 9.19% | 6.29% | 3.31% | 3.55% | 6.37% | 38.22% | 0.32% |
| 2011 research | 4.54% | 14.99% | 16.45% | 9.89% | 6.32% | 5.02% | 3.00% | 5.02% | 31.42% | 0.65% |
| 2008 research | 1.97% | 10.74% | 16.89% | 15.90% | 9.10% | 6.07% | 3.20% | 5.49% | 30.01% | 0.66% |
| 2005 research | 1.0% | 7.6% | 17.4% | 15.3% | 10.2% | 9.3% | 6.0% | 8.3% | 24.8% | 0.1% |

Moreover, while this is not indicated in the table and graph, the ratio of women with up to under three million yen of debt, forty-five point twenty-three per cent, is nearly double the ratio of men with the same burden, twenty-three point sixty-one per cent. The fluctuation of the amount of debt based on gender is notable: women file for bankruptcy at a smaller amount of debt. Furthermore, while the average amount of debt was seventeen million nine hundred thirty thousand seven hundred seventeen yen in the 2005 Survey, the average amount of debt increased approximately one point three times to twenty-four million one hundred forty-three thousand three hundred twenty-nine yen in the 2014 Survey, and the amount of debt of one hundred million yen or more also increased from three point eighty-nine per cent in 2005 to four point thirty-five per cent in 2014. The total amount of debt is heading toward both extremes.

e) Concerning the occupation of the bankrupt persons at the time that they filed for the commencement of bankruptcy procedures (*graph 6*), while the ratio of unemployed and full-time salaried workers is decreasing, the ratio of these two groups still accounts for nearly half of all cases at approximately forty-seven per cent, and remains at a high level. Moreover, the ratio of pensioners and welfare recipients has increased considerably in comparison to the 2005 Survey, and the ratio of part-time workers has also increased.

*Graph 6*




f) With regard to the cause that led to bankruptcy (*table 1*), the total percentage exceeds one hundred per cent since multiple answers were allowed, but the most common cause in 2014 was 'hardships of life/low income' at sixty per cent. This is basically the same as the percentage of sixty-one point nine per cent in 2005 before the Lehman crash. The causes of 'illness/medical expenses' and 'unemployment/job change' also show similar figures as those of 2005. Contrarily, the cause of 'overspending/entertainment expenses' decreased to six per cent, which is a one per cent decrease from 2005, and the cause of 'gambling' was approximately four per cent, and increased by zero point five per cent from 2005. The ratio of 'gambling' and 'overspending/entertainment expenses' did not change considerably and merely accounts for approximately ten per cent, but the most common cause of 'hardships of life/low income' accounts for approximately sixty per cent of all cases and, when combined with the cause of 'pay cut' which accounts for thirteen point five per cent, the total is seventy-three point five per cent, a large percentage of the total. Based on these facts and the previous results by age, as the primary cause of bankruptcy, it could be said that the recession-induced bankruptcy is still ongoing where persons of an age who need to support their family file for bankruptcy due to 'hardships of life/low income' or 'unemployment/job change', rather than young people filing for bankruptcy as a result of overspending or entertainment.

*Table 1*

| causes of debt of bankruptcy (multiple answers) | 2014 research | 2011 research | 2008 reserach | 2005 research |
|---|---|---|---|---|
| 1 hardships of life/low income | 60.2% | 60.3% | 63.7% | 61.9% |
| 2 illness/medical expenses | 20.7% | 20.3% | 21.0% | 22.9% |
| 3 unemployment/job change | 19.8% | 19.8% | 14.7% | 18.1% |
| 4 pay cuts | 13.5% | 16.1% | 11.4% | 11.8% |
| 5 business operating finance | 21.4% | 16.1% | 18.9% | 18.7% |
| 6 payment or debt (withoutguarantee) | 17.2% | 23.7% | 28.2% | 32.3% |
| 7 debt guarntee and assumption of the third-party debt | 27.18% | 44.00% | 25.08% | 25.1% |
| 8 name lening | 2.1% | 3.3% | 3.4% | 4.1% |
| 9 purchase of living essentials | 11.2% | 11.4% | 8.8% | 8.1% |
| 10 education fund | 7.8% | 7.1% | 7.1% | 8.2% |
| 11 ceremonial occasions | 1.6% | 2.4% | 1.5% | 2.4% |
| 12 housing purchase | 16.1% | 0.2% | 9.6% | 10.8% |
| 13 gambling | 3.9% | 4.9% | 4.3% | 3.4% |
| 14 overspending/entertainment expenses | 6.0% | 9.6% | 7.2% | 7.1% |
| 15 investiment (stocks, membership, real estate etc.) | 1.2% | 1.5% | 0.7% | 0.8% |
| 16 others | 13.5% | 14.6% | 15.8% | 17.3% |

To briefly summarize the standard characteristics of bankrupt persons in consumer bankruptcy based on the Record Survey of 2014: the ratio of men/women is basically six to four, the average age is approximately fifty-two point four years (about fifty point two for men and fifty point four for women), the occupation is salaried workers including part-time workers, the monthly income is approximately one hundred thirty-one thousand six hundred twelve yen (approximately one hundred thirty-nine thousand four hundred forty yen for men and about one hundred thousand seven hundred forty-nine yen for women),[5] the main cause that led to bankruptcy is 'hardships of life/low income', and the amount of debt is approximately twenty-four million one hundred forty thousand yen. Note that the average amount of debts[6] when the amount of debt is capped at fifty million yen, as with individual rehabilitation procedures, is approximately nine million five hundred twenty thousand yen.

In comparison to the Record Survey of 2005 before the Lehman crash, the ratio of men to women increased from fifty percent to fifty percent, to sixty

[5] The monthly income is the intermediate value of the respective monthly income ranges that were surveyed, and is the average value calculated, for instance, by deeming a monthly income of fifty thousand yen or more and less than one hundred thousand yen as being seventy-five thousand yen. However, the eight persons whose monthly income was unknown and the fifty-four persons who had a monthly income of three hundred thousand yen or more in which the intermediate value could not be set (total of sixty-two persons who account for approximately five point four per cent of all persons) have been excluded.

[6] The debt is the intermediate value of the respective debt ranges that were surveyed, and is the average value calculated, for instance, by deeming a debt of two million yen or more and less than three million yen as being two point five million yen.

percent to forty percent (ie, a ten per cent increase of men), age increased by six years from approximately forty-six years to approximately fifty-two years, which indicates aging, and average income increased by about thirty thousand yen from approximately one hundred ten thousand yen to approximately one hundred forty thousand yen. The occupation of the bankrupt continues to be salaried workers, including part-time workers who account for half of all bankrupted people. The main cause that led to bankruptcy is 'hardships of life/low income', and there is no significant change on this variable. (The average debt when the amount is capped at fifty million yen as with individual rehabilitation procedures is approximately nine million five hundred twenty thousand yen, an increase from the amount of approximately eight million ninety thousand yen in 2005).

### 3. Number of Bankruptcy Discharges Granted

The term 'discharge' means,

> 'The bankrupt shall be discharged from his/her liabilities for bankruptcy claims, except for a liquidating distribution through bankruptcy proceedings'.[7]

In other words, this is a system where, if a discharge is granted, a person is allowed to restart one's economic life without having to bear debts, that is to say, 'make a fresh start', and this system plays an important role in today's Bankruptcy Act. The discharge system was adopted in Japan in 1952, and was introduced into the Bankruptcy Act in Italy in 2006.

In the days of Roman law, a debtor would be killed if he/she was unable to pay the debt, and the creditor would take home a part of the debtor's body in accordance with the amount of claim. Today, a bankrupt person is allowed to press the reset button and restart one's life when a discharge is granted. It could be said that the Bankruptcy Act is one of the legal systems in which the pendulum swung the greatest from one end to the other.

The requirements of a discharge are as follows; namely, (1) the person filing for bankruptcy is a natural person, (2) a petition for discharge is filed separately from a petition for bankruptcy, and (3) the person filing for bankruptcy does not correspond to grounds for non-grant of discharge. Among the above, (3) the 'grounds for non-grant of discharge (*免責不許可事由*)' are very important. These grounds are prescribed in Art 252, para 1, Item 1 to Item 11 of the Bankruptcy Act, and some examples include: significant reduction of property by conducting extravagant spending, gambling or any other speculative act, assumption of excessive debts, filing of a petition for grant of discharge within seven years from the day that the initial discharge has been granted, a breach of duties prescribed in the Bankruptcy Act. If I may disregard the details and offer a sweeping generalization, these three requirements are basically the same as

[7] Art 253, para 1, of the Japanese Bankruptcy Act.

those for a discharge to be granted in Italy. The third requirement is prescribed in Art 142, para 1, Item 1 to Item 6 of the Italian Bankruptcy Act as the eligibility (*meritevolezza*) requirement under the Italian academic definition.

If I were to point out one requirement that differs between Japan and Italy in connection with granting a discharge, it would be that, while Italy has a requirement where a discharge is not granted if the 'creditor is not repaid even in part' under Art 142, para 2 of the Italian Bankruptcy Act, Japan has no such requirement and most consumer bankruptcy claims are granted a discharge without having to pay even one yen, that is to say even one '*centesimo*', to the creditor. The reason why Japan does not adopt this requirement is, to begin with, consumer bankruptcy is a case where a person files for bankruptcy because he/she has no notable property or money, so it would be meaningless to impose a requirement to repay the creditor, even in part, in order to grant a discharge to the bankrupt person; rather, such a requirement is considered to lead to the impediment of the rehabilitation or revitalization of the bankrupt. In addition, since most of the creditors are moneylenders anyway, it could be said that they are individually responsible for the 'miscalculation' of loaning money to such debtors to begin with, even if they are unable to collect their claims from bankrupts, because there is no such payment requirement.

Concerning the numbers and rate of orders granted discharge by the district courts in Japan (*table 2*), in 2014 sixty-five thousand eight hundred eighteen discharges were granted, while one hundred forty-eight were not. The grant rate is ninety-nine point eight per cent and the non-grant rate is zero point two per cent, so discharges are granted at a considerably high rate. This rate has hardly changed in the last several years.

It is undeniable that the reason for this is also delicately related to moral hazard, but the reason why a discharge is given preference over moral hazard is because, if a bankrupt person is left with debt, he/she will continue to bear that debt for the remainder of his/her life, and may eventually despair and lose the will to continue living. If such becomes the case, the problem cannot be resolved in any way even if the bankruptcy system is used.

What kind of bankrupt persons are not granted a discharge? The material only describes the numbers of discharges non-granted, so I'm speculating the reasons, but it may be in cases where the bankruptcy corresponds to grounds for non-grant of discharge as a result of engaging in criminal activity such as fraudulent bankruptcy prescribed in the Bankruptcy Act. Alternatively, even if the bankruptcy does not correspond to the foregoing criminal activity, it may correspond to grounds for non-grant of discharge due to'malicious demeanor (*悪質な態様*)', for example, cases where the amount of debt is extremely high due to overspending or gambling.

*Table 2*

| year | Granted cases (percentage on the total amount of granted and not granted cases) | Not granted cases (percentage on the total amount of granted and not granted cases) |
|---|---|---|
| 2009 | 122,984(99.8%) | 198(0.2%) |
| 2010 | 122,555(99.9%) | 197(0.1%) |
| 2011 | 105,169(99.8%) | 174(0.2%) |
| 2012 | 84,850(99.8%) | 175(0.2%) |
| 2013 | 73,140(99.8%) | 150(0.2%) |
| 2014 | 65,818(99.8%) | 148(0.2%) |

While it would be interesting to compare the number of discharge cases with the current status of the Italian discharge system, but the number of Italian discharge cases is still unknown to me even after conducting research for several years. I hope to find an answer someday by continuing my research.

## IV. Conclusion

In summary, the number of bankruptcy cases filed in Japan peaked at two hundred fifty-one thousand eight hundred cases in 2003, and then gradually decreased year by year seventy-three thousand three hundred sixty-eight cases in 2014, approximately a quarter of the number of cases at the peak. Nevertheless, the number of bankruptcy cases filed is still seven times more compared to the time that the bubble economy collapsed, and there is no choice but to say that it is still at a high level.

As characteristics of bankrupt persons, it is not the young people who are filing for bankruptcy as a result of purchasing luxury goods or spending money on entertainment or leisure, and the number of bankrupt persons in their forties who need to support their families, but are unable to do so due to 'hardships of life/low income' including pay cuts and unemployment caused by the chronic depression, is increasing. Based on these results, it is my opinion that bankrupt persons, excluding 'malicious ones (*悪質な破産*)', should be granted a discharge and be given an opportunity to press the reset button for

their debts and restart their economic lives. I believe the same thinking of my opinion is reflected in the results of many discharges being granted in Japan.

# Contribution-Benefit Relationship in Social Security in Italy and Japan

Seiyo Kojima*

**Abstract**

Regarding social security in Italy, any bilateral or corresponding relationship between contribution and benefit is considered denied, following the 'social security benefit automaticity principle' under Art 2116 of the Italian Civil Code of 1942. Meanwhile, in Japan, some connection between contribution and benefit in the social insurance system is generally considered almost self-evident. Despite these opposing basic perceptions, in reality, the legal systems and operations in both countries governing the contribution-benefit relationship are extremely similar. The employee's right to receive benefits under the social security system is generally protected from any failure on part of the employer in making his/her contribution. At the root of this asymmetry in both countries, there may be differences in the understanding concerning the actor(s) responsible for contributing toward financial resources for social security.

## I. The Background

### 1. The Contribution-Benefit Relationship

Financial resources are required in order to provide social security benefits. In social insurance systems, that is, those that use insurance infrastructure, by definition, contributions are the main source of finance. Accordingly, systems for workers or employees usually involve contributions made by both employee and employer.

This is where financial resources come from. Let us consider whether or not there is any relationship between individual contributions or contribution obligations and individual benefits or benefit entitlements. The issues are whether one must make a contribution in order to receive benefits or not, whether one must make a contribution even if one does not receive benefits or not, and whether one can receive benefits even without any contributions or not. This paper will refer to these issues as the *contribution-benefit relationship*.

### 2. Contrasting Ideas: Italy and Japan

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In Italy, the principle of automatic social security benefit ('*principio dell'automaticità delle prestazioni previdenziali*') exists. Put simply, this is a principle whereby an employee can receive benefits even if his/her employer did not make appropriate contributions. The principle is mentioned under Art 2116 of the Italian Civil Code of 1942. Accordingly, any corresponding or bilateral connection ('*corrispettività*' or '*sinallagma*' in Italian, respectively) between contribution and benefit is fundamentally understood to have been denied ('*negare*') or overcome ('*superare*').

Meanwhile, in Japan, while there is less active debate, and it is doubtful as to whether such a common understanding as in Italy exists or not, there is, nonetheless, a shared recognition that the relationship between contribution and benefit should definitely, to a degree, be bilateral and corresponding. For instance, there is deep-rooted antipathy toward people insured under Category-three National Pension, namely 'housewives' of salaried men, who are unfairly deemed to be eligible to receive pensions without paying contributions.

## 3. Ideals and Responding to Reality

From the explanation given above, the perceptions and ideas in Italy and Japan seem quite different. We could even consider them complete opposites.

However, the two countries actually have extremely similar systems when it comes to social security legislation, particularly, in how they regulate the relationship between individual contributions and benefits. It can even be said that the two countries are almost the same in that the receipt of benefits is generally protected, even when a contribution has not been made.

How do we explain this similarity, despite the perceptions and ideas being completely opposed to one another? This holds the key to understanding the characteristics of social security in each country. Addressing such correspondences between ideals and reality can be an interesting task not only in terms of comparing Italy and Japan, but also from a wider, globally comparative perspective.

This paper is intended to offer a starting point for such work.[1] [2]

[1] The table below details the key terms used in this paper.

| ITALIAN LAW | JAPANESE LAW | COMMON TERM (ENGLISH) |
|---|---|---|
| *Previdenza, previdenza sociale* | *shakai-hosho* | social security |
| | *shakai-hoken* | social insurance |
| *Lavoratore, prestatore di lavoro* (c.c.) | *hi-hokensha* (insured person) | employee |
| *Datore di lavoro, imprenditore* (c.c.) | *jigyo-nushi* | employer |
| *Contributo* | *hoken-ryo* | contribution |

[2] Note that '*previdenza*' and '*previdenza sociale*' in Italian law may sometimes refer to 'social security' and sometimes 'social insurance'. In Italy, social security in a broad sense consists

## II. Ideals Concerning the Contribution-Benefit Relationship

### 1. Italy: Principle of Automatic Benefit

#### a) Legislative Process

The principle of automatic benefit is mentioned in para 1, under Art 2116 of the Italian Civil Code, which was enacted in 1942. The provision defines it as follows:

> 'Social security benefits as indicated under Art 2114 will be paid to the employee, even when the employer has not appropriately paid the contributions due to the social security system. However, this does not apply under different provisions of any special laws'. ('*Le prestazioni indicate nell'Art 2114 sono dovute al prestatore di lavoro, anche quando l'imprenditore non ha versato regolarmente i contributi dovuti alle istituzioni di previdenza e di assistenza, salvo diverse disposizioni delle leggi speciali (...)*').

It was already provided for by a 1935 law concerning labor incidents,[3] and a unifying law concerning social insurance in 1939,[4] to the effect that despite the employer's duty to pay contributions (Art 2115, Civil Code), benefits may be received even if an employer does not make contributions. Art 2116 of the Civil Code made this provision a principle for all forms of social security. It must be noted that before Art 2116 of the Civil Code, there was no stipulation of the principle of automatic benefit for pension systems.[5]

#### b) Application to the Pension System

The proviso to Art 2116 of the Civil Code allows for exceptions under special legislation. It was assumed from the time the Civil Code was enacted that the pension system would fall under one of these exceptions. Fundamentally, this was for financial reasons. In the end, however, no provision stipulating exceptions was established. As a result, even though it was strange to interpret the text literally, simply because automatic benefit had not been stipulated in a separate law, for a long time, the automatic principle was not applied to the pension system. This came to be established by a precedential ruling by the Italian

of three sectors: '*previdenza, assistenza, e sanità*'. '*Previdenza*' is a general term that refers to a system of monetary benefit following prior contribution. In this sense, we may consider '*previdenza*' to be a collection of and a general term for individual social insurance systems. Meanwhile, '*previdenza*' may sometimes also be used to represent social security overall, including the other two sectors. Accordingly, this paper uses differing translations depending on the context.

[3] Regio decreto legge 17 August 1935 no 1765.

[4] Regio decreto legge 14 April 1939 no 636.

[5] In the unifying law above (R.D.L. no 636/1939), no pension system was included in the list found in the provision (Art 27) stipulating the applicability of the automaticity principle to individual systems.

Supreme Court (ISC) (*Corte di Cassazione*).[6]

Later, the Brodolini Reforms were implemented in 1969. These reforms expanded pension benefits significantly, based on labor union initiatives. They also reached a sort of accommodating legislative solution to the issue of the principle of automaticity.[7] A 'principle of partial automaticity' ('*automaticità parziale*') was introduced, albeit only for the obligatory general pension (AGO) ('*Assicurazione Generale Obbligatoria per l'invalidità, la vecchiaia ed i superstiti*'), from the National Institute for Social Security (INPS) ('*Istituto Nazionale della Previdenza Sociale*'). This introduced automaticity for as long as the period of prescription, that is, the period of the right held by the INPS to collect contributions from an employer, had not expired. These reforms also extended this period of prescription from five to ten years.

The Dini Reforms in 1995 changed the calculation of pension benefit amounts from a remuneration-based approach to a contribution-based approach. The reforms also expanded the principle of partial automaticity to other pension systems, going beyond the INPS AGO.[8] Under these reforms, the period of prescription, beyond which contribution collection rights would expire was also cut down from ten to five years. This point is of particular significance in this paper, so it will be detailed further below.

In 1997, the Constitutional Court overturned the previous precedent set by the Supreme Court and ruled that the principle of automaticity should also be applied, as written, with pension systems, provided there were no exception stipulations.[9] At this stage, however, the principle of partial automaticity had already been provided for in each system, since these were interpreted as exception stipulations. In reality, though, the change had little effect.

### c) The Contribution-Benefit Relationship and the Principle of Automaticity

In general, the following two points are indicated as common knowledge regarding the principle of automaticity. First, drawing on the social purpose and public nature of social security, the principle seeks to achieve social protection without burdening an employee with, for instance, the risk of his/her employer failing to pay contributions. Second, the principle separates social security matters from private insurance contracts and denies or overcomes any bilateral or corresponding relationships between contribution and benefit.

The second point relates to the topic of this paper. There are different nuances depending on the author's arguments. However, we may consider the following to be an established and common understanding. Traditionally, with private

[6] Corte di Cassazione 7 April 1992 no 4236, *Informazione previdenziale*, 787 (1992).
[7] Legge 30 April 1969 no 153.
[8] Legge 8 August 1995 no 335.
[9] Corte Costituzionale ordinanza 5 December 1997 no 374, *Giustizia civile*, 617 (1998).

insurance, it is understood that insurance contracts are set up between three parties: the insurance carrier, the insured person, and the policyholder. However, the principle of automaticity in social security divides this single three-party relationship into two two-party relationships. These are the relationship between the employer and the social security body for the purpose of the contribution, and the relationship between the employee and the social security body for the purpose of benefits. Both relationships are mutually independent. As a result, any bilateral or corresponding relationship between contribution and benefit is said to disappear.[10]

The most thorough discussion in this regard was developed by one author thus:

> 'the non-existence of a correspondence between contributions and social security benefits is (...) confirmed by the principle of automaticity' ('*l'inesistenza di una corrispettivita tra contributi e prestazioni previdenziali è (...) confermata dal principio dell'automaticità*').[11]

Based on detailed arguments on the contribution-benefit relationship in earlier writings, the fundamental impossibility of any bilateral relationship between contribution and benefit was asserted.[12]

This idea was also used in a precedential ruling by the ISC, and now appears to be the dominant opinion. In a case before the ISC in 2003,[13] it was decided that there is an obligation to make a contribution even when it is not possible to receive a benefit. In this ruling, the ISC highlighted points such as the principle of automaticity, and clearly stated that the foundation of social security is a principle of solidarity ('*principio di solidarietà*'). The judgment also indicated that the concepts of corresponding obligations and bilateral relationships did not adequately represent the system, and that there is no means of justification through any reciprocal or causal link between contributions and benefits

> ('il fondamento della previdenza sociale stia nel principio di solidarietà (...) non esiste tra prestazioni e contributi un nesso di reciproca giustificazione causale').

Here, 'a link which is justified through some reciprocal, causal relationship' ('*un nesso di reciproca giustificazione causale*') is the exact phrase found in expert studies to deny the existence of a bilateral relationship.

[10] L. Riva-Sanseverino, 'Disciplina delle attività professionali, impresa in generale: Art 2060-2134', in A. Scialoja and G. Branca eds, *Commentario al Codice Civile* (Bologna-Roma: Zanichelli, 1986), 565.

[11] M. Persiani, *Diritto della previdenza sociale* (Padova: CEDAM, 19th ed, 2012), 49.

[12] M. Persiani, *Il sistema giuridico della previdenza sociale* (Padova: CEDAM, 1960), 88-110.

[13] Corte di Cassazione-Sezioni unite 27 June 2003 no 10232, *Archivio civile*, 34 (2004).

## 2. Japan: Overwriting Insurance Principles

### a) Insurance and Social Security Principles

In Japan, social insurance using insurance infrastructure is often used to achieve social security. It is said that with social insurance, insurance principles will be overwritten by social security principles. Of the three main insurance principles, those that do stand are the law of large numbers (the need to be able to predict probabilities with groups over a certain size), and the principle of balance equality (the insurer has equal income-expenditure balance). The one that does not stand is the principle of equivalence of benefit ('performance') and premium ('counter-performance') which means that insurance premiums will be probabilistically equal to benefit amounts.[14]

In other words, when a benefit is needed, the social security principle that requires that definite provision is prioritized, and any insurance principles here will be overwritten by the principles of social security. The degree of this modification is subject to a variety of opinions and ongoing debates. Nonetheless, there is a shared perception of there being some relationship between insurance premiums (contribution) and benefit, even if not one of equivalence; accepting the existence of some correspondence, in a broad sense, does seem to be a vague shared perception. One of the representative scholars of social security wrote in a text about pensions that 'even if not of equivalence, there is, nonetheless, some corresponding relationship'.[15]

### b) The Expression 'Implication' (*Kenrensei*)

The Supreme Court of Japan (SCJ) uses the expressions 'implication' or 'implicated' (*kenrensei* in Japanese). This term was originally used to talk about being related to some method or results (eg, see Art 54, para 1, of the Penal Code of Japan, 1907, 'Implicated crime'). In a 2000 ruling,[16] it was held that because there is an indirect implication between contribution and benefit with a survivor's pensions, the pensions do not qualify for loss of income calculations. This means that a survivor's pension benefit amounts were not included in compensation when the recipient died as a result of a tort.

Moreover, in a 2006 ruling,[17] it was decided that National Health Insurance contributions are collected as counter-performance on an insured person's ability to obtain benefit payments, and that even if two-thirds of the financial resources used to cover benefits are public funds, it is still not possible to break

[14] Y. Kikuchi, *Shakai hoshō hō (Social security law)* (Tokyo: Yuhikaku Publishing, 1st ed, 2014), 22-24.

[15] K. Hori, *Nenkin hoken hō (Pension insurance law)* (Kyoto: Horitsu Bunka Sha, 4th ed, 2017), 66-72.

[16] Supreme Court of Japan, 3rd Petty Bench, Judgment of 14 November 2000, Minshū 54-9, 2683.

[17] Supreme Court of Japan, Grand Bench, Judgment of 1 March 2006, Minshū 60-2, 587.

the implication between contribution, and being in the position to receive benefits. This ruling resulted in denying the strict application of tax legalism (ie, the principle of no taxation without legal provisions thereof) under Art 84 of the Constitution of Japan to the collection of National Health Insurance contributions.

It must be noted that the perception generally held by most people is that one will receive a pension because one has paid contributions. There are regular discussions concerning profit and/or loss here. Some economists have long argued for the thorough application of insurance principles in social insurance and the opposition of any income redistribution undertaken through social insurance, such as pensions.

In the world of legal scholarship, there was traditionally a tendency to view the thinning of insurance principles positively. In recent years, in contrast with methods of social assistance financed via taxation, there has been a growing tendency to positively assess some correspondence in social insurance, focusing on increasing 'entitlement' or 'eligibility,' for instance, through the ease of skipping means testing.[18]

## III. Prevailing Legal Systems

### 1. Introduction

Before comparing the prevailing legal systems, we first need to establish an arena for comparison and check for similarities.

#### a) Systems Subject to Comparison

We use pension systems for this comparison. Representative forms of social insurance in Japan are healthcare, pensions, and nursing care. However, since Italy has a national health service (SSN) ('*Servizio Sanitario Nazionale*'), there is no healthcare insurance there. There is also no social insurance for nursing care.[19]

Looking beyond Italy and Japan, from a global perspective, pension systems have common frameworks and are amenable to comparison. Accordingly, in both countries, the contribution-benefit relationship in practice mostly becomes an issue for discussion and debate in the context of pension systems.

This paper looks at pension systems that deal with employees, specifically, the INPS AGO ('general obligatory pension') system for Italy, and the Employee's Pension Insurance (*kōsei nenkin hoken*) system for Japan.

#### b) Shared Features of the Core Structures of Each System

[18] Y. Kikuchi, n 14 above, 25-28.

[19] While worker accident insurance does exist in both Italy and Japan, its benefit payout is protected from any non-payment of contribution by employers in both countries. Thus, there is little related debate.

The core structures of both, the Japanese and Italian systems compared are almost identical, and may be considered to present an unproblematic arena for comparison.

First, in both countries, the social insurance connection between the actors concerned is established compulsorily and automatically, based on the fact that employees are subject to direction-dependence relations. In Italy, this is called the 'automatic establishment of social insurance connection' ('*automatica costituzione del rapporto previdenziale*'). In Japan, the qualification for receiving insurance is confirmed by the Minister of Health, Labour and Welfare, according to Art 18 of the Employee's Pension Insurance Act, 1954, but this is considered an administrative act, officially confirming the qualification which is already automatically established by Arts 9 and 13 of the same Act.

Second, in both countries, the party responsible for paying contributions is the employer. The burden is divided between employee and employer, but the duty of payment of contribution in its entirety, including the employee's portion, is the employer's.[20] In both countries, the employer is also obliged to give notifications. Sanctions against violating duties are also almost identical.

Finally, in both countries, the basic design of benefit payouts, for old-age pensions, features age and qualifying period criteria. Moreover, in both countries, the benefit amounts are, in principle, proportionate to earnings, and proportionate to the period as an insured person.

### 2. Benefit when Contribution Has not Been Paid: Basic Rules

In Italy, the 'principle of partial automaticity' described above is applied as a basic rule while considering what happens to benefits when an employer has not paid contributions. This principle introduces automaticity, though limited within the scope of the period in which the right to collect contribution is still valid, and has not expired (ie, the period of prescription). In other words, insofar as the INPS is able to collect contributions, the principle of automaticity applies, and there is no loss of benefit. In periods after which the INPS has become unable to collect contributions, employees incur benefit losses.

Meanwhile, in Japan, provisions that make stipulations about this issue can be found in Art 75 of the Employee's Pension Insurance Act. The article reads: 'When the right to collect insurance contributions has expired, benefit payments based on the contributions concerned will not be undertaken'. Again, in periods after which contributions can no longer be collected, employees incur benefit losses.

It is noteworthy that the systems for the prescription periods of contribution collection rights are also fundamentally the same in both countries. This means

[20] However, the distribution of responsibility between labor and management differs. Whereas the distribution is fifty- fifty in Japan, the ratio in Italy is approximately seventy-thirty for the employer and the employee, respectively.

that the prescription is invoked without a claim, and forcefully, at that. It also means that it is not possible to make a contribution after the prescription period is over.[21] The prescription periods differ and are longer in Italy (five years in Italy, and two in Japan). The period of prescription here is a key factor in the Italian case.

## 3. Methods of Preventing the Occurrence of Benefit Losses by Employees

This section examines the methods by which an employee may prevent his/her losses after learning that his/her employer has not made contributions.

In Italy, after various debates, there is now a strong tendency, for it to be more effective, to take action against social insurance bodies, such as the INPS, rather than to consider working with the employer to pay correct contributions. In other words, it is better to send notifications or alerts ('*denuncia*') to the INPS, in the event of a failure on part of the employer to make a contribution. This notification has the effect of interrupting the expired prescription of contribution collection rights, while also extending the period of prescription.

First, when it comes to the extension of prescription periods, it was noted earlier that the period of prescription is, in principle, five years. This is the result of the shortening of the Brodini Reform-era ten-year period to five years by the Dini Reforms. The Dini Reforms also established an exemption stipulation whereby a notification or alert from an employee could keep the period at the existing ten years. At present, the period is, in principle, five years, but can be extended to ten years if a notification to this effect is sent. Next, concerning the interruption of prescription, which was recognized through the precedential ruling by the ISC,[22] ultimately, if an employee sends a notification or alert to the INPS before the period of prescription ends, a further prescription period of ten years is incurred from the relevant point in time. Accordingly, it is possible to expand the scope of applicability of the principle of automaticity significantly, however partial it may be. Indeed, in some cases, it is even possible to create circumstances in which it may be viewed as identical to a complete principle of automaticity.

In Japan, a proviso to Art 75 of the Employee's Pension Insurance Act explains this issue. It states thus:

> 'This shall not apply when the prescription of the right to collect contributions has expired following the submission of an employer notification based on Art 27 concerning the qualification to be insured, a request for confirmation of qualification from the insured person themselves based on Art 31, or a request for correction of the Employee's Pension

[21] Italy: legge 8 August 1995 no 335, Art 3, para 9; Japan: Accounting Act, 1947, Art 31.
[22] Corte di Cassazione 12 February 2003 no 2100, *Giustizia civile Massimario*, 318 (2003).

Insurance Register based on Art 28.2'.

Setting aside the employer notification, this means that as an insured person, it is possible to prevent benefit losses by taking action, such as confirmation requests against the Minister of Health, Labour and Welfare (in practice, the Japan Pension Service (JPS) Branch Office), against the insurer, before the period of prescription ends.

## 4. Recovering Original Pension Benefits

This section considers whether or not it is possible to recover original pension benefits later, when there have been some actual benefit losses.

In Italy, a life annuity ('*rendita vitalizia*') system was legally established in 1962.[23] Here, an employer can request the INPS to set up a life annuity, and employees can also make requests in place of an employer. The life annuity supplements pension benefits, unchanged. This means that the lost pension amount is supplemented and, combined with the portion that is not lost, from the INPS, the original pension amount is provided intact. In addition to supplementing monetary amounts, by fulfilling the qualification period criteria, it is also possible to restore the qualification to receive benefits itself. The employer is responsible for financing the actuarial accumulated amount.

In Japan, the 'Act concerning special cases of Employee's Pension Insurance benefit and contribution payments' (a special treatment law under the Employee's Pension Insurance Act), was established in 2007, in response to the 'lost pension' problem. At first, this did in fact provisionally function as special legislation using a third-party pension record checking council under the Ministry of Internal Affairs and Communications (MIC). A revision of the Employee's Pension Insurance Act in 2014 made the system permanent, combined with, for instance, structures for requesting correction of register records. Insured persons who had questions about their own pension records, such as when their employer has not paid contributions, are allowed to make a request for the corrections of their records by the Minister of Health, Labour and Welfare (in practice, the JPS Branch Office), even after the right to collect contributions has expired due to its period of prescription. When a request is granted after inspection, qualifications may be renewed, standard remuneration may be revised, register records may be corrected, and so on and so forth. Ultimately, this means that the original pension benefits are provided based on corrected records. The employer provides the financial resources again, here, through a special contribution fee.

## 5. Employer's Obligation to Damage Compensation

Finally, this section examines whether it is possible for an employee to

[23] Legge 12 August 1962 no 1338, Art 13.

request damages from an employer when benefits have not been recoverable.

In Italy, an employer's obligation to pay damages is already stipulated under para 2 of Art 2116 of the Civil Code, which provides for the principle of automaticity.[24] By this mechanism, employees are protected through the supportive measure of damages by the employer even in cases that are omitted from protection by the principle of automaticity.

In Japan, there is no such stipulation. Recently, however, there have been more cases of employees requesting damages from employers. Judicial precedents also tend to recognize these requests in general.[25] In academia, there may be debates such as whether one should follow structures for defaulting on their debt or not, or for illegal behavior, but overall, there is a consensus on the core approach of recognizing and providing for damages.

### 6. Summary

This section summarizes the prevailing legal systems in both countries. First, there is almost complete similarity in the basic rules that benefit losses will be incurred by expiry of the period of prescription for the right to collect contribution. Second, in both countries, it is possible to prevent losses through certain action taken by an employee against the insurer before the end of the period of prescription.

Third, in both countries, special legislation has systematized the recovery of original benefits within a certain scope. Fourth, the employer's obligation to pay damages is largely recognized in the same manner in both countries.

In conclusion, we may consider the prevailing legal systems of both countries to be largely similar.

## IV. Comparing Japan and Italy, and Some Hypotheses

### 1. Italy, Japan, and Other Major Countries

This section offers an overall comparison of the two countries. In Italy, the ideal supposes that there is no bilateral or corresponding relationship between contribution and benefit. Indeed, in the prevailing legal system, there is a weak relationship between contribution and benefit, with employee benefit generally

[24] Art 2116, para 2, Civil Code: '*Nei casi in cui, secondo tali disposizioni, le istituzioni di previdenza e di assistenza, per mancata o irregolare contribuzione, non sono tenute a corrispondere in tutto o in parte le prestazioni dovute, l'imprenditore è responsabile del danno che ne deriva al prestatore di lavoro*' ('In cases in which, in accordance with such provisions, the social security or assistance institutions are not required to pay all or part of the benefits owed due to the non-payment or irregular payment of the contribution, the enterpriser is liable to the employee for the resulting damages': translation by J.H. Merryman et al, *The Italian Civil Code and Complementary Legislation* (New York: Oceana, 2010)).

[25] For example, Nara Prefectural Court 5 September 2006 no 925, *Labor case*, 53 (2006).

protected from employers not paying contribution. We may say that the ideal and the actual legal system are consistent with each other. Meanwhile, in Japan, while the ideal is that there is some correspondence between contribution and benefit, the actual legal system is the same as in Italy, with the relationship between contribution and benefit being weak. Here, we may say that there is some difference between the ideal and the actual legal system.

In a comparative legal study, we should be checking circumstances not only in these two countries, but also in other major countries, from the same perspective. Unfortunately, however, this paper has not been able to do this. Nonetheless, the following may be given as perceptual impressions.

First, the author has not seen the principle of 'automatic benefit' outside of Italy. Italian scholars also appear to offer no indication of its existence in other countries. This suggests that even if other countries were indeed to exhibit the same circumstances as in Italy, it is still only in Italy that these circumstances are clearly acknowledged and formalized as 'principles'.

Second, as far as the prevailing legal systems are concerned, at least in EU states, there is considerable convergence between legislation on labor and on social security, and there is a general tendency for worker rights to be protected from an employer's arbitrary behavior. This means that we may consider the Italian legal system as classifying the issue as normal or standard based on the issue in question.

### 2. Two Hypotheses[26]

Considering the above premises, the first hypothesis that comes to mind is that Japan is lagging behind. In Japan, the special treatment law in the form of the Employee's Pension Insurance Act was a measure cooked up owing to pressure from the need to cope with pension record issues. The obligation to pay damages placed on employers has also only come to be recognized relatively recently through legal precedent. The prevailing legal system has finally caught up to respond to reality. However, the ideal has not broken free from the old form of private insurance, or from a principle of exchange. We could perhaps think of things this way.

Another feasible hypothesis is that Italy is either an extreme or a progressive case. In other words, even if employee benefit is protected in a similar manner in major countries including Italy and Japan, rather than having any basis in ideals, the main factor behind this could be responding to reality, as in Japan. If these circumstances are indeed the results of responding to reality, it would in fact be rare for ideals or principles to be acknowledged in the system, and the situation in Japan may even be considered normal. For such a progressive

[26] These hypotheses are premised on the idea that employees are generally protected in other major countries, and that the 'principle of automaticity' exists only in Italy. Of course, altering these premises would enable a great number of other hypotheses.

principle as 'automaticity' to be provided for in law as early as in 1942, when the very concept of social security had not even been established, surely indicates that Italy is a special case. This is our second hypothesis.

### 3. Who Makes Contributions?

Since these two hypotheses do not necessarily contradict each other, it is also possible that they may both stand together, that is, Italy is an extreme or progressive case, and Japan is behind. There is also the possibility that both countries may exhibit some special characteristics here.

What would seem to be the key to resolving this issue is in fact the question of *who should be contributing the financial resources* for social security. In both Italy and Japan, it is the employer who is responsible for paying contributions, and the employer pays portions for both the management and labor. Despite this, it seems that in Japan, it is thought that insurance contributions should ultimately be paid by the insured person themselves. This means that there is a difference with Italy's principle of automaticity, which discusses in terms of an *employer contribution obligation* and an *employee benefit right*.[27]

Italy's Civil Code is a product of the Fascist era. The socioeconomic structure of this era, known as *corporatism* ('*corporativismo*'), placed special responsibilities on employees and, in particular, on employers. It surely cannot be denied that this has influenced circumstances in Italy. However, is this itself the reason it is thought in Italy that it is not the employee but the employer that should be responsible for contributing financial resources? Meanwhile, in Japan, are administrative convenience and more certain payment the only reasons why the duty to pay contribution is assigned to the employer in legal terms, as the situation is usually explained?

As we can see, it is not immediately obvious who is actually thought to be the actor that should be contributing financial resources for social security. Furthermore, there are different possibilities for different countries, not only Italy and Japan. There is also the issue of what sort of factors lead to the spread of these perceptions. This paper shows that there is still a lot of ground to be covered here, but also that, nonetheless, it must be seen to the end.

[27] In pension systems for the self-employed, the insured persons themselves are responsible for making contributions in both Italy and Japan. The 'principle of automatic benefit' does not apply in systems for the self-employed in Italy.

# Legal Families and the Birth, Growth and Death of a Corporate Law Rule

Sean McGinty*

**Abstract**

This paper explores the limits of the concept of legal family in the context of corporate law, where scholarship has given it a prominent role in explaining differences in legal evolution. It does so by comparing the lifespan of a single rule which, owing to historical coincidence, Japan and Ontario both enacted in the 19th century. By examining the rule's 'birth' (reception), 'growth' (judicial development) and 'death' (repeal) in these jurisdictions from different legal families, the paper highlights four factors. First is that reception of a legal system does not imply reception of a given way of regulating an issue. Second is that convergent evolution will often lead to the development of similar interpretations of rules regardless of legal family. Third is that legal development does not always follow the narrative arcs assigned to given families. Finally, comparative legal elements not captured by the legal family may sometimes better explain divergences.

## I. Introduction

This paper approaches the topic of the conference – the limits of legal families – from the perspective of corporate law, where economists in particular have played a major role over the past twenty years in reviving the concept to the sometime consternation of comparative law scholars. The literature is dominated by what is often referred to as the 'legal origins theory'[1] though for consistency in usage this paper will use the term 'legal families'. The theory posits that historically received legal families, through their influence on the substantive rules present in law, have led common law countries to better protect shareholders than civil law countries. This in turn is determinative of certain differences in economic outcomes which correlate with differences in legal family.

This theory set off a wave of literature which attempted to explain why legal families would have such an effect. Early papers focused on the historical divergences between English and French systems, with differences in political imperatives and degree of adaptability to change being suggested as mechanisms through which legal families would matter.[2] Given the strong degree of path

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[1] First popularized in R. La Porta et al, 'Law and Finance' 106 *Journal of Political Economy*, 1113 (1998).

[2] T. Beck et al, 'Law and Finance: Why Does Legal Origin Matter?' 31 *Journal of Comparative*

dependence from a single historical event (a country's reception of a given legal system) which the theory suggested, broader studies also focused on the question of how legal rules and economic conditions evolve over time.[3] In short, the debate sparked interest in how membership in a given legal family influences the subsequent development of black letter corporate law, and how this in turn relates to economic differences across countries.

This paper concentrates on the first aspect of this interest – the influence of legal families on subsequent development of black letter corporate law – in a hitherto unexplored substantive area: the regulation of the pay of corporate directors. While the legal origins literature has largely used a leximetric approach involving large scale quantitative comparisons of legal rules across dozens of countries, this paper uses a 'lifespan' comparison of the main rule governing director remuneration in two jurisdictions: Japan and the Canadian province of Ontario. In terms of legal family, Ontario is consistently classified as belonging to the English common law system. Japan's classification on the other hand is subject to more controversy as numerous taxonomies classify it differently but most of its laws in the 19th century were based on German models and the legal origins literature classifies it as German, a convention which this paper follows.

Despite their reception of different legal families, these two jurisdictions both implemented rules on director pay in their early corporate law statutes which were very similar to the rule found in the 1862 Companies Act in the United Kingdom. This rule subjected the remuneration of directors to approval by the general meeting of shareholders. The fact that both received a specific English rule gives us the opportunity to test some of the underlying hypothesis of the legal origins literature based on how they subsequently developed in systems with differing legal families. This paper traces the legislative and jurisprudential history of the rule in these two jurisdictions from their inception in the 19th century in order to highlight four limits in the use of legal families which are relevant at three distinct phases of a legal rule's lifespan: its inception, its subsequent development, and its ultimate demise or survival.

The first is that, as is perhaps obvious, membership in a legal family does not imply the historical reception of a particular way of regulating some aspect of the corporate form. This obviously applies to Japan, which did not use the then current German rule when it enacted its Commercial Code in 1899, but also to Ontario, which only adopted one similar to that contained in the English Companies Act several years after it had established its first corporate law using a different model. The second is that the judiciary in both played the main role in developing the rule, filling in gaps and providing necessary interpretations.

*Economics*, 653 (2003).

[3] C.J. Milhaupt and K. Pistor, *Law and Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development Around the World* (Chicago: University of Chicago Press, 2008).

The route by which they accomplished this was quite different – Ontario courts weaving back and forth and spawning competing authorities before higher courts settled a matter, while in Japan the courts provided interpretations in a more direct and coherent way. Nonetheless, the development provides examples of convergent evolution – the judiciary in each independently providing many of the same answers to problems that arose because they were simply the best way of doing so. Third we have the fact that sometimes legal systems act against type. Ontario, the common law jurisdiction which the legal origins theory would hold should have evolved rules that offered shareholders greater protection instead abolished the rule in 1982 and removed the requirement for shareholder approval. In Japan, on the other hand, the rule has survived to the present, giving Japanese shareholders greater control over the remuneration of directors than those in Ontario companies have. This brings us to the final point, which is that while legal family does not provide us with a useful comparative lense for understanding this ultimate divergence of the rules, constitutional differences do. Canada's federal system inspired the provinces including Ontario to mimic the highly successful Federal Canadian Business Corporations Act in the late 1970s and early 1980s, which led to the abandonment of Ontario's rule, while Japan, being a unitary state, did not have its corporate law molded by such a process.

The paper proceeds to address each of these points in the lives of the rules – their 'birth' (taking the language of legal 'parent' systems literally), growth and death or survival – in turn. In Section 2 it provides a brief overview of the legal families literature. Section 3 looks at the reception of the rule on director remuneration in each jurisdiction and its initial content. Section 4 provides an overview of how the rule was developed in the case law of each and Section 5 discusses the rule's demise in Ontario and continued survival in Japan. Conclusions follow.

## II. Legal Families and Corporate Law

The root of the interest in legal families among economists began in the late 1990s[4] with a theory that attempted to explain differences in capital market development around the world. The earliest study created an index of legal rights that shareholders had against directors (not including any related to remuneration) and, after quantitatively measuring them, found that countries in the English legal family provided higher levels of protection to shareholders than were found in the civil law families and this explained the differing levels of capital market development across countries. Comparative law based scholarship found numerous grounds to criticize this work – the use of the concept of legal

[4] R. La Porta et al, n 1 above.

families in a context to which it was ill-suited,[5] bias in rule selection that favored English law[6] and simple mistaken understandings of the content of the rules in question[7] among these. Nonetheless a follow up paper in 2008[8] reiterated the theory and identified differing approaches to social control as the key which explains the relevance of legal families.

In the meantime the need emerged to provide some theory as to why a single event in the legal evolution of a country – its reception of a parent legal system – would have such long lasting consequences. Historical divergences in the early development of English and French law which resulted in the former giving greater protection to private property rights was one explanation.[9] A second, borrowing from Richard Posner's work,[10] argued that common law developed in an adaptable way, weeding out economically inefficient rules while providing more efficient ones (which presumably protected shareholders better) over time.[11]

These explanations have also been met with skepticism from legal scholars. The emphasis on long ago divergences between French and English history ignores subsequent developments,[12] and doesn't offer a convincing explanation with regard to countries from other legal families.[13] Likewise the argument that the judicial rule making of the common law favors evolution towards efficient rules, even if accepted as true, is not well placed in the context of the debate since judicial rule making also occurs in most civil law countries despite the formal lack of a rule of stare decisis.[14] One study, looking at indices of changes in law over time, further found that substantive legal development is not well explained solely by reference to legal family as divergent trajectories are found within them.[15]

[5] M. Siems, 'Legal Origins: Reconciling Law & Finance and Comparative Law' 52 *McGill Law Journal*, 55, 62 (2007).

[6] ibid.

[7] H. Spamann, 'The Ani-Director Rights Index Revisited' 23 *The Review of Financial Studies*, 367 (2010).

[8] R. La Porta et al, 'The Economic Consequences of Legal Origins' 46 *Journal of Economic Literature*, 285 (2008).

[9] T. Beck et al, n 2 above. See also P.G. Mahoney, 'Legal Origin?' 35 *Journal of Comparative Economics*, 278 (2007).

[10] Especially R.A. Posner, 'Utilitarianism, Economics and Legal Theory' 8 *Journal of Legal Studies*, 103 (1979).

[11] See for example T. Beck et al, n 2 above.

[12] Many papers explore this point and other historical points of divergence, see for example M.J. Roe, 'Legal Origins, Politics and Modern Stock Markets' 120 *Harvard Law Review*, 460 (2006).

[13] The focus on differences between the French and English systems ignores tends to obscure the stories of Scandinavian and German families where the original data obtained by the early literature is sometimes an awkward fit with the overall narrative, see R. La Porta et al, n 1 above.

[14] As Haley notes, 'all legal systems adhere to judicial precedents to some degree'. J. Haley, 'The Role of Courts in "Making" Law in Japan: The Communitarian Conservatism of Japanese Judges' 22 *Pacific Rim Law & Policy Journal*, 491, 492 (2013).

[15] J. Armour et al, 'How do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor and Worker Protection' 57 *The American Journal of Comparative*

Another took issue with an underlying assumption implicit in the theory that laws evolve gradually over time, demonstrating through the use of case studies that law tended to evolve more rapidly in response to exogenous shocks before returning to states of equilibrium for extended periods.[16]

This is by no means an exhaustive review of the literature, but it can be said that while comparative law has been quite skeptical of this use of legal families it does at least serve as a useful point of departure for considering their limits. We can distill three questions which the legal origins theory suggests which this paper explores: does legal family coincide with the reception of a given way of regulating a given area? Does legal family provide a different way for rules to evolve over time even if they begin the same? Does legal family lead to a particular way of regulating something in favor of shareholders? These are addressed in the following sections.

## III. Birth: Divergences in Reception

The legal origins theory presupposes that legal families are associated with distinctive ways of regulating economic activity.[17] For the purposes of this paper this raises the question of whether legal families have different ways of regulating director pay in their corporate law. A comparison of Japan and Ontario suggests that insofar as such a style is historically determined by their reception from a parent legal family, there are limits to the usefulness of such a generalization.

If we look at the corporate laws of the 'parent' of each immediately prior to the reception of their first corporate law – The United Kingdom and Germany – there are significant differences between them. In England Section 54 of the Companies Act 1862[18] stated that remuneration of directors was to 'be determined by the company in general meeting' – an approach which persists in English law to this day albeit in significantly modified form in the 2006 Companies Act. The German Commercial Code of 1897, in contrast, did not require shareholder approval of the pay of members of the two boards which German corporations possessed, but required that where they were to be remunerated by a share of the profit it had to be calculated in accord with a net profit and provision of a reserve fund. So far so good for the theory.

These rules, varying with each other, did not however directly find their ways into the statute books of Ontario or Japan even though both would ultimately enact rules closer to that found in English law. Ontario's first corporate law, Ontario Joint Stock Companies Letters Patent Act[19] passed in 1874, was broadly

*Law*, 579 (2009).

[16] C. Milhaupt and K. Pistor, *Law and Capitalism* (Chicago: Chicago University Press, 2008).

[17] R. La Porta et al, n 8 above.

[18] 25 & 26 Victoria c. 89.

[19] RSO 1877, c. 150.

similar to the first law passed at the national level, the Province of Canada's 1864 Act to Authorize the Granting of Charters of Incorporation to Manufacturing, Mining and Other Companies[20] ('Province of Canada Act'). Neither of these used the Companies Act 1862 as a model however as they both adopted an earlier letters patent based approach to incorporation. In terms of the remuneration of directors, Section 7 of the Province of Canada Act defined the powers of a corporation's directors and gave them the power to, among other things, pass by-laws setting their own remuneration, but limited this power by stating that such by-laws

> 'unless in the meantime confirmed at a General Meeting of the company duly called for that purpose, shall only have force until the next Annual Meeting of the company, and in default of confirmation thereat, shall, from that time only, cease to have force'.

Following Confederation this provision would be copied into Section 13 (c) of the Companies Clauses Act [21] at the Federal level.

Section 29 of the 1874 Ontario act, in a curious omission, copied the wording of Section 7 of the Province of Canada Act almost *verbatim* but made no mention of director remuneration. This oversight was remedied in the 1897 Ontario Act,[22] Section 48 of which stated:

> No by-law for the payment of the president or any director shall be valid or acted on until the same has been confirmed at a general meeting.

This led to a substantive distinction between Ontario and Canadian Federal law since the latter acknowledged the validity of by-laws regarding director pay until they were approved by the general meeting while the Ontario rule established that shareholder approval was a condition precedent to any such by-law coming into force.

In Japan the first permanent Commercial Code[23] came into force in 1899 and included in Art 179 its original provision governing director pay:

> The amount of compensation to be received by the directors is fixed by the general meeting of shareholders if it has not been fixed in the articles of association.[24]

German law heavily influenced the drafting of the Commercial Code,[25] though

[20] 27-28 Victoria, c. 23.
[21] 32-33 Victoria, c. 12.
[22] RSO 1897, c. 191.
[23] Act no 48 of 9 Mach 1899.
[24] English translation contained in Y.Y. Hang, *The Commercial Code of Japan* (Boston: The Boston Book Company, 1911).
[25] H. Baum and E. Takahashi, 'Commercial and Corporate Law in Japan: Legal and Economic

while the 1897 German Commercial Code was consulted it was not used as a direct model since it was felt to be too advanced for the state of the Japanese economy of the time.[26] While the rule on director remuneration bears no resemblance to the rule in the German Code it is quite similar to the rule in the English Companies Act, the only difference being mention of the articles of association (which, as they also require assent of the general meeting of shareholders, is not a major difference).

The point to be noted about the reception though is that both Ontario and Japan found their way to enacting largely the same rule (with some differences in wording that will be discussed further below) in rather awkward relation to their parent. Ontario initially enacted a rule in variance with the English model and only moved towards it decades later in a move that, ironically, marked its divergence from the Canadian Federal law upon which it had originally been based. Japan likewise bucked the trend of its German parent in adopting a rule that largely followed the English model.

While this shows us a quirk in the legal family story early in each jurisdiction, which it must be emphasized may be idiosyncratic to this particular comparison, we can move on to the second question of how the legal systems themselves developed the rule. Even if they both adopted the English rule, did their civil and common law institutional mixes cause it to develop differently?

## IV. Growth: The Courts and Convergent Evolution

Posner's argument that the common law generally tends towards efficiency has been used as one of the arguments for why rules, regardless of the historical origin of their substance, evolve towards greater emphasis on shareholder protection in common law countries than civil law ones.[27] This argument misses an important point, which is that Posner and subsequent authors in that field were not referring to the 'common law' in comparison to civil law systems per se, but rather to judge made rules. It's a well established fact that the judiciaries in civil law countries like Japan do create rules even if there is no formal recognition of stare decisis,[28] so this distinction does not tell us much. A comparison of how the courts in Japan and Ontario interpreted their rules on director remuneration reveals a marked contrast in the pattern of development that may be attributable to their differing legal families, but that this was not in itself determinative of the substantive result.

Developments After 1868', in W. Rohl ed, *History of Law in Japan Since 1868* (Leiden: Brill, 2005), 360.

[26] ibid.

[27] T. Beck et al, n 2 above.

[28] N. Garoupa and C. Gomez Liguerre, 'Efficiency of the Common Law', in M. Faure and J. Smits eds, *Does law Matter?* (Cambridge: Intersentia, 2011), 226.

The rules on director remuneration in both jurisdictions, taking the Ontario iteration that existed from 1897 to 1970 and the Japanese one which existed from 1899 to 2002 as a basis of comparison,[29] were not exactly the same and raised some unique questions in each. The Japanese rule for example did not specify whether the phrase 'the directors' meant directors individually or the board as a whole and the courts eventually favored the latter interpretation,[30] so the practice in Japan came to be for resolutions regarding director pay to ask the shareholders to approve a global amount for the entire board rather than for each individual director. In Ontario on the other hand the wording of the provision made it quite clear that it applied to individual directors and the president, so the courts never had to address the issue.

In other respects though the provisions left the judiciary in each with many of the same unresolved gaps that needed filling in. Was it necessary to have the shareholders approve director pay every year? Both Ontario[31] and Japan[32] declined to make this a requirement. This type of development can be considered a form of convergent evolution – the rules independently evolved in significantly different contexts since they were the best suited solution to the issue at hand – forcing annual voting would have added an unnecessary formality since in both it was possible to set limits on remuneration that would persist for multiple years.

This is illustrated in a further issue that the rule in both called up which is worth examining in greater detail. Directors in corporations also often serve as regular employees of the corporation. The rules on director remuneration in both however were unclear on whether shareholder approval was necessary for all remuneration they received from the company or only that related to their duties as directors. Interpreting it either way would pose problems. Requiring all remuneration be subject to the rule could deprive workers of legitimate claims to pay based on failure to meet the formalities. On the other hand, removing such pay from being covered by the rule would create a potential loophole for directors to avoid shareholder oversight of their pay. The judiciary in both would eventually favor the latter option, the 'directors as directors' rule, though the development towards that would follow different paths in each. The following subsections trace the case law development of this interpretation of the rule in each.

### 1. Evolution of the Rule in Ontario

[29] In 1970 the Ontario rule was updated to reflect case law developments, while in Japan a 2002 amendment did the same. In both cases the essential requirement of the rule was unchanged by these amendments, though Ontario's would later be repealed, see discussion below.

[30] *Saiko Saibansho* (Supreme Court) 26 March 1985, 557 *Hanrei Times* 124.

[31] *Hood* v *Caldwell* 1923 Canlii 3 (SCC).

[32] No case challenging the lack of an annual approval reached the courts in Japan, but the practice sanctioned by the courts from the earliest cases was to have resolutions approve a pay limit for the entire board, which naturally lent itself to only requiring subsequent resolutions when changes to that limit were sought. *Ōsaka Chihō Saibansho* (Osaka District Court) Judgment 29 June 1953, 34 *Hanrei TAIMUZU* 63.

While case law related to director remuneration in Ontario first appears in 1887[33] it was not until 1894 that the first case in which the distinction between remuneration for directors as directors and remuneration for the same directors for other positions was addressed. In *Re The Ontario Express and Transportation Company*[34] Rose J. first articulated the directors as directors interpretation of the rule:

> '(…) I am not of the opinion that where a director is appointed an officer of the company, he holds such appointment as director. It seems to me that the words referred to apply to the payment of money for the services of a director qua director'.

This seemed to have settled the issue in the very first case in which it was raised, but this iteration of the rule did not last long. Eight years later in *Birney* v *The Toronto Milk Co., Ltd*[35] Street J. expressly declined to follow it and moved to the opposite extreme – holding that all pay to directors in any form required shareholder approval:

> '(…) we should hold the section as requiring the sanction of the shareholders as a condition precedent to the validity of every payment voted by directors to any one or more of themselves whether under the guise of fees for their attendance at board meetings or for the performance of any other services for the company'.

His basis for this change was the fact that the 'directors as directors' interpretation provided an obvious loophole through which directors could avoid the necessity of shareholder approval of their pay, by merely making their salary come under the guise of some other office. In Street J's words, it 'would in fact render the section nugatory, for nothing would be easier than to evade it'.

Street J's interpretation in *Birney* largely supplants Rose J's interpretation in *Ontario Express and Transport* as the point of departure for cases from this point.[36] In *Mackenzie* v *Maple Mountain Mining Co.*,[37] Meredith JA would however open a wedge that would allow subsequent case law to drift back towards the 'directors as directors' interpretation when he stated:

> 'The purpose of the enactment is that those who govern the company shall not have it in their power to pay themselves for their services in such

[33] *Re Bolt and Iron Company Livingstone's Case* [1887] O.J. no 153.

[34] [1894] O.J. no 179, 25 O.R. 587.

[35] [1902] O.J. no 2.

[36] This is illustrated in the decisions of Riddell J in the 1907 *Benor* v *Canadian Mail Order Co*. case in which he first issued a decision reluctantly following Rose J's interpretation ([1907] O.J. no 694), then three weeks later issued a more enthusiastic decision ([1907] O.J. no 740) reversing himself on the grounds that he had not known of Street J's decision.

[37] [1910] O. J. no 192, 20 O.L.R. 615.

government without the shareholders' sanction'.

The case did not turn on the point, but this clearly suggested that the rule intended to draw a distinction between a director's 'services in such government' and other functions they might perform.

The strict approach in *Birney* was also applied by Riddell J in *Re Morlock and Cline Limited Sarvis and Canning's Claims*.[38] There the plaintiff had only served as a 'dummy' director who took no part in management and was employed as a commercial traveller. Riddell J chose to strictly follow the rule in Birney and deny the claim for pay on the basis that

> '(…) the law does not draw any distinction between 'dummy' and non-dummy directors – and one who has accepted the position of director must continue to be so dumb that he cannot say he was not a director – it would never do to allow a director to better his position by asserting that he did not do his duty as director'.

The pushback against this strict interpretation and a move back towards the directors as directors interpretation began in 1912 with *Matthew Guy Carriage and Automobile Co. (Re)*.[39] In this case the plaintiff was a mechanic who worked as such for the company and was later appointed to the board. Since his pay as mechanic under his employment contract had not been put into a by-law and passed by the shareholders the court had to consider whether he had any claim to such pay. Relying on his own statement in *Mackenzie* v *Maple Mountain Mining Co*. Meredith JA explicitly established that the rule did not apply to regular employment positions whose appointment did not require a by-law. He expressed some wariness in light of the Bliney decision but held that

> 'I do not think that there is any warrant for extending the principle to cases in which the director has acted as a mere workman or clerk and has been remunerated at a rate not exceeding the real value of the services rendered, at the ordinary market-price'.

This new distinction was elaborated in the Ontario Supreme Court in 1918. In *Canada Bonded Attorney and Legal Directory* v *Leonard-Parmiter Ltd*.,[40] Ridell J held:

> 'If the services are such that only a director can perform them, eg, attending board meetings or acting in other regards as a director, he can recover compensation, payment, for such services, only by complying with the statute; but, if he is employed in a subordinate capacity and at a

[38] [1911] O.J. no 115.
[39] [1912] O.J. no 136.
[40] [1918] 42 D.L.R. 342.

reasonable figure, there is no necessity for a by-law confirmed at a general meeting'.

In 1919 the Supreme Court of Canada finally had its say on the rule. Anglin J settled the matter in favor of the 'directors as directors' rule, citing with approval Middleton J in the Matthew Guy Carriage and Automobile Case and Riddel J in Canada Bonded Attorney.[41] He held:

> 'The commission was not paid to Doran as a director of the company, but as an agent employed by it to sell its property. I think such a payment does not fall within Section 92 of the Ontario Companies Act (…).'

Duff J (dissenting on other grounds) also stated:

> '(…) I am inclined to concur in the view that this section does not contemplate special payments of the character here in question which are not made by way of remuneration for services of a director as director, but a special allowance on some other ground'.

It remained unclear whether these statements actually settled the matter since neither represented the majority opinion (concurring judgments having avoided addressing the issue and deciding the case on other grounds) and this uncertainty was commented on, but not resolved, by Anglin J five years later in *Hood* v *Caldwell*.[42] Despite this, the Supreme Court's decision did have the effect of ending judicial decisions on the issue in Ontario Courts, as no further cases on this point appear afterwards. The Ontario legislature put the final word on the matter by codifying the 'directors as directors' rule in its 1970 overhaul of the Companies Act.[43]

### 2. Evolution of the Rule in Japan

Owing to the limited availability of pre-war Japanese decisions [44] our discussion of the jurisprudential story there begins in the post-war period. The case law related to its director remuneration rule, then found in Art 269 of the Commercial Code,[45] begins in 1953 in the Osaka District Court,[46] where most litigation related to it played out until the 1980s, by which time it had largely

[41] [1918] 42 D.L.R. 342.
[42] [1923] S.C.R. 488.
[43] R.S.O. 1970 Ch. 53.
[44] The main commercial Japanese case law databases which were consulted for this paper, Westlaw Japan and LexDB, have coverage only extending to the postwar period.
[45] Until 2005 since when it has been in Art 361 of the Companies Act, Act no 86 of 26 July 2005.
[46] *Ōsaka Chihō Saibansho* (Osaka District Court) Judgment 29 June 1953, 34 *Hanrei Taimuzu* 63.

migrated to Tokyo. Unlike Ontario, where the earliest decision formulated the directors *qua* directors rule and subsequent decisions waved back and forth between opposing viewpoints before decades later returning the rule to one quite similar to that at which it started, the directors as directors rule would not see its first iteration in Japanese case law until 1985.

This difference is partly explained by differences in the corporate framework that the Commercial Code set. In keeping with its German origins the Commercial Code gave corporations not one but two boards: a board of directors (*torishimariyaku*) and a board of auditors (*kansayaku*). The board of directors was tasked with administering the affairs of the corporation, while the board of auditors played a monitoring role over the board of directors and was tasked with examining and investigating the documents of the directors and making reports regarding such to the shareholders.

Art 269 applied not only to the remuneration of directors, but also to that of auditors, which created a governance problem. Since resolutions regarding pay were submitted to the general shareholders meeting by the board of directors, this allowed the directors to set and request shareholder approval not only for their own pay levels but also those of the auditors, the very people tasked with supervising them.

The Osaka District Court in 1953[47] first had to deal with a case in which a shareholder, among other things, sought to invalidate a resolution which approved a change in the articles of incorporation to increase the pay of the board of directors and the board of auditors. The source of the Plaintiff's claim may have laid in the fact that the corporation's main asset, a hotel in Osaka, was being used by the American occupation authorities at the time of the resolution which meant that there was little work for the directors to be doing that would have justified a raise.

More specifically though the Plaintiff had two legal bases for seeking invalidation which were not relevant in Ontario. The first was that allowing the pay of auditors to be set alongside that of directors at the latter's motion seriously undermined the ability of the auditors to perform their function. The second was that the resolution did not actually set the pay of the directors or auditors individually, but rather set a cumulative pay limit for each board as a whole. While the wording of the Ontario statute made it clear that the pay of individual directors had to be approved by the shareholders, the Japanese rule was more vaguely worded in this respect and open to interpretation. The delegation of decisions on how to divide pay to the board of directors was particularly problematic in light of Arts 260 and 262 of the Code, which prohibited directors from voting on resolutions of the board in which they had a personal interest. Since all directors would obviously have an interest in their own pay, this rule seemed to disqualify them from making such decisions.

[47] ibid.

The Court made a number of pronouncements that, despite coming from a lower court, would be followed thenceforth. The first was the observation that the purpose of Art 269 was the need to prevent the directors from having unfettered discretion to decide their own pay since they might abuse that to pay themselves in excess of their worth to the detriment of the company. The second was to establish that resolutions did not have to approve the pay of each individual director but rather could set a global limit for the entire board to meet the requirements of Art 269. The third was that the pay of auditors could be set by the same resolution as the directors.

In 1968 the first case[48] to deal with the distinction between pay for directors in their roles as directors and that in their roles as employees appears. This case, which first arose in the Nagoya District Court and was appealed up to the Supreme Court of Japan, dealt with employee-directors who had not been paid as directors but rather had all of their earnings come from their employment. The main issue was not related to Art 269 but rather to Art 265 of the Code, which required that any contract which a director enters into with the corporation on his or her own behalf must be approved by the board of directors. The Court held that

> 'when a director of a corporation also holds a position as an employee of the corporation, the remuneration that person receives as an employee, rather than as a director, should be interpreted as being remuneration paid under a contract between that director and the corporation, which must be approved by the board of directors pursuant to Art 265 of the Commercial Code'.

The Court's narrow answer to the question in the case avoided addressing whether this pay also needed to be approved by the shareholders pursuant to Art 269. It did, however, establish a precedent for differential treatment of a director's pay in each role.

The case law then returns to the District courts for several years. In one 1973 case the Osaka High Court[49] issued a decision which went the opposite direction from Riddel J's famous line about dummy directors in Ontario sixty years earlier. There the Court upheld the Plaintiff's claim to a retirement bonus despite the fact that she had been a director of the corporation and the bonus had neither been approved by the shareholders nor the board of directors. It held that since she held the position of director in name only (in other words, she was a dummy director) at a closely held corporation where the formalities were largely ignored, the concerns related to protecting the corporation from

[48] *Saikō Saibansho* (Supreme Court 3rd Petty Bench) Judgment 3 September 1968, 92 *Hamji Shumin* 163.

[49] *Ōsaka Kōtō Saibansho* (Osaka High Court) Judgment 29 March 1971, 298 *Hanrei Taimuzu* 227.

damages which were behind both Arts 265 and 269 were not in play.

A 1972 Osaka District Court case[50] provides a further exploration of the distinction between pay for directors and pay for employees. The Plaintiff in that case had been receiving pay as a director that had been duly approved by the shareholders as required by Art 269. He suffered an injury which prevented him from attending at the corporations (he was the director of two related corporations which were both defendants), after which they stopped paying him as a director even though he continued to hold that position. The Court, in upholding the Plaintiff's claim for pay, noted that corporation had erred in treating the position of director as one of an employee. Since the Plaintiff still had the duties of a director despite his injury, he continued to be entitled to pay as such.

In 1985 the Supreme Court of Japan in the Citizen's Watch case[51] was the first, and last, to directly deal with the question of whether the rule on director remuneration contained in Art 269 covered payments for non-director duties. In a short one page judgment which upheld the decision of the Tokyo Court, the Court held:

> 'Where the system for establishing employee pay is clearly established, it cannot be said that a resolution of the general shareholders meeting which sets only their pay as directors is insufficient to allow the general shareholders meeting to perform its oversight function and determine whether or not the actual pay of directors is excessive. Therefore such a resolution does not fail to comply with the requirements of Article 269 of the Commercial Code'. (Author's translation)

Of note is that the Court used a very similar device as the Ontario courts to assuage the danger that the directors as directors rule would provide an avenue for directors to avoid shareholder scrutiny. The requirement that such pay be subject to a clearly established pay system was the functional equivalent of Meredith JA's requirement that the remuneration not exceed 'the real value of the services rendered'[52] for the directors as directors rule to apply. By inserting that objective standard, the courts found a balance that prevented directors from abusing their position to overpay themselves free from shareholder oversight while at the same time reducing the formalities that might have frustrated valid claims for work performed. With this single judgment the issue was resolved in Japan and does not appear in further cases involving Art 269.

The comparison of how the courts in Ontario and Japan developed the rule

[50] *Ōsaka Chihō Saibansho* (Osaka District Court) Judgment 21 December 1972, 298 *Hanrei Taimuzu* 414.

[51] *Saikō Saibansho* (Supreme Court 3rd Petty Bench) Judgment 26 March 1985, 557 *Hanrei Taimuzu* 124. The author's English translation of the Supreme Court of Japan and Tokyo High Court decisions in the case can be accessed here https://tinyurl.com/y8rhuuj8 (last visited 15 November 2018).

[52] *Matthew Guy Carriage and Automobile Co. (Re)* n 39 above.

shows us both that they followed different paths of development and that this difference doesn't seem to have had much effect on actual substance. The back and forth between competing lines of authority in Ontario courts as they narrowed the question of how to treat pay directors receive from regular employment through multiple factual cases over decades has no parallel in Japan, where specific questions like that were settled directly the first time they appeared. In both however the courts hit upon largely the same interpretation of the rule and the same way of resolving the underlying problem it posed.

## V. Death and Survival: The Rule Ends with a Whimper in Ontario, Japan Carries On

In 1970 Ontario's Corporations Act underwent a large scale reform following the release of the Lawrence Report that had been commissioned by the Legislative Assembly in 1967.[53] The rule on director remuneration was revised to codify the directors as directors interpretation and further clarify the content of by-laws on director remuneration but otherwise made no changes to it.[54] The rule would however find the seeds of its demise with movements at Canada's Federal level shortly thereafter. Federal corporate law, which as noted above had diverged from Ontario's in the 19th century, gave directors the discretion to set their own pay.[55] In 1975, following the recommendations of the Dickerson Report of 1971,[56] Parliament enacted the Canada Business Corporations Act (CBCA).[57] The introduction of the CBCA had a major impact on corporate law across all provinces, which until that point in history had been quite diverse. Within a decade nine out of ten provinces had completely reformed their corporate laws based on the CBCA model.[58] Ontario did so in 1982 Ontario by enacting a completely new Corporations Act[59] almost entirely based on the CBCA, including its provision on director remuneration. This marked the end of director pay being subject to approval by the general shareholders meeting in Ontario, a situation that continues to this day.

[53] Ontario Legislative Assembly, *1967 Interim Report of the Select Committee on Company Law*, 5th Session, 27th Legislature 15-16 Elizabeth II.

[54] The amended rule stated:

22 (1) A by-law relating to the remuneration of a director as director shall fix the remuneration and the period for which it is to be paid.

(2) A by-law passed under subsection (1) is not effective until it is confirmed at a general meeting of the shareholders duly called for that purpose.

[55] Section 94 *Canada Corporations Act*, 1964-65 c. 52, s. 1.

[56] R.W. Dickerson et al, *Proposals for a New Business Corporations Law for Canada* (Ottawa: Information Canada, 1971).

[57] R.S.C. 1985 c. 44.

[58] R.J. Daniels, 'Should Provinces Compete? The Case for a Competitive Corporate Law Market' 36 *McGill Law Journal*, 130, 152 (1991).

[59] *Business Corporations Act, 1982,* SO 1982, c. 4.

This divergence of Ontario's law from Japan's and a path it had followed for close to a century is notable for two reasons. The first is that it occurred as a small part of a much larger reform in which it was not viewed as significant. Neither the Lawrence Report or the Dickerson Report devoted any discussion to the rules on director remuneration. The second and more important is that the divergence with Japan is clearly not explained by legal family. The creation of the CBCA in 1975 was a watershed moment in the development of corporate law across all jurisdictions in Canada, which responded to perceived competitive pressures it created and modelled what until then had been quite diverse corporate rules on it.[60] Japan's solitary Commercial Code (and from 2005 Companies Act) was not subject to any such interjurisdictional competition or diversity in rules and the general shareholders meeting still has the final say on the remuneration of directors at most Japanese companies.[61] Constitutional differences rather than legal family offers a better comparative explanation for this, ultimate, divergence.

## VI. Conclusion

To return to the overall topic which the paper began with – the limits of legal families – the comparison of the lifespan of the same corporate law rule in jurisdictions from differing legal families provides us with some insights that the larger scale, quantitative studies which dominate the legal origins literature miss out on. The first is that historical receptions of legal families did not always imply the reception of a given substantive rule. The second is that subsequent development of rules by the courts might vary in style across legal families, but also show signs of convergent evolution – rules by their nature offer limited potential interpretations and courts may often independently hit upon the same ones regardless of other differences. Third is that jurisdictions may act against type, with common law jurisdictions abandoning shareholder protections that civil law ones maintain. Finally we have the fact that other comparative legal differences not captured by the concept of legal family, such as constitutional ones, may offer better explanations for such divergences in the evolution of corporate laws in some instances.

This is not to suggest that these results are likely to be repeated across comparisons of different rules in different jurisdictions, clearly much of this is idiosyncratic to the comparison here presented. The point, however, is that the

[60] R.J. Daniels, n 58 above.

[61] Since 2002 an exception has been made for companies which adopt the Companies with Committees system, but this only represents about two percent of listed corporations. See D. Green and S. McGinty, 'What Shareholders in Japan Say about Pay: Does Art 361 of Japan's Companies Act Matter?' *Asian Journal of Comparative Law*, 1-31 (2018).

lifespan of a black letter law provides so many points for divergence in their birth, growth and death that the concept of legal families is of limited use in understanding the substantive differences that exist across countries today.

# Is the CISG a Useful Tool for the Interpretation of the Newly Reformed *Minpō*?

Franco Serena*

**Abstract**

In this article I am considering the role of the CISG in interpreting the recently reformed *Minpō*, the Civil Code of Japan. The *Minpō* was promulgated by the end of nineteenth century and had never experienced a real structural reform. However, on 26 May 2017, the National Diet of Japan approved a radical reform of the *Minpō*. This reform seems to have been fostered by the success of international rules like the CISG, which Japan ratified in 2008. In this paper, taking as an example the issue of non-conformity of goods, I will try to verify how much the reformed *Minpō* got close to the CISG. Following, I will try to find whether the CISG can be a useful interpretation tool for the reformed *Minpō*.

## I. Introduction: How to Regulate an International Sale

An international sale of goods is not different from a domestic one in its essence. In fact, a sale of goods, wherever the parties usually have their place of business, consists primarily in the transfer of property from the seller to the buyer on one hand and in the payment of the price by the seller on the other hand.

However, a sale of goods that is *international*, meaning a transaction that crosses one or more States, is different in some ancillary aspects from a domestic one. In fact, it is usually a transaction that requires a carriage contract to cover long distance transports and involves a considerable number of parties situated in different countries. This raises the possibility of a suit in a foreign court about an export license or an involvement in a foreign State political turmoil[1] or even a foreign governmental intervention of which the parties to a sale contract may not be aware. However, more fundamentally, an international sale of goods is made between parties with different legal cultures or different sensibilities about a particular legal concept. For instance, according to the Italian Civil Code (*Codice Civile*), a valid contract is concluded in the presence of a common will of two or more parties (Art 1321), a social function (the concept of *Causa*), a lawful object (*Oggetto*) and in some cases a written form as established on Art 1325.[2]

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[1] H.J. Berman and C. Kaufman, 'The Law of International Commercial Transactions (Lex Mercatoria)' 19 *Harvard International Law Journal*, 221, 222 (1978).

[2] V. Roppo, *Il Contratto* (Milano: Giuffrè, 2011), 311.

On the other hand, Japanese Law establishes that a contract is 'concluded' with the common will of two parties and in some cases a written form or the delivery of the object of the contract.[3] How do we regulate these differences between the parties?

These differences can be managed by the parties themselves under the rule of freedom of contract by providing in the contract with the solution to all aspects of the transaction. This brings certainty to the parties and permits adjusting the contract to their special needs. However, the parties may not be able to provide for all possible situations arising from an international contract's problems. There can be a case where they must defer conflicts to the domestic legal system of the parties or to a third neutral system. This can bring about uncertainty to the consequences of parties' actions because the parties may not know each other's law system or the third country's legal system they may have chosen. In addition, domestic law is more focused on an internal perspective and thus cannot always be ready to the commercial needs of international transactions.

Therefore, the idea of a set of common rules to regulate these transactions. This may eliminate the differences between different domestic legal systems and apply to the needs of a trade that is *international*. This was UNCITRAL's purpose in drafting the Convention on International Sale of Goods in 1980 (CISG).[4] The Convention is the result of almost fifty years of work and is now considered a successful international law[5] considering the large number of ratifying States including Italy (11 December 1986) and Japan (1 July 2008). CISG is especially useful given the huge quantity of the scholarly material about its interpretation and jurisprudence from all over the world applying its provisions.[6]

This success also made this set of rules a source for domestic law reform attempting to adapt domestic law to present globalized trade.[7] For example, the *Minpō*, the Japanese civil code, was recently reformed after over a hundred years. The property law was promulgated in 1896, and the succession law in 1898. The *Minpō* had not had a large-scale reform even after the promulgation of the new Constitution in 1947. As a result, in October 2009 the Minister of Justice of Japan created a subcommittee within the Legislative Council (*Hōsei Shingi kai*) tasked with preparing a draft for the future reform of the *Minpō*. After more than five years, this subcommittee approved a document containing

[3] S. Wagatsuma, *Saiken Kakuron Jōkan (Minpō Kōgi V1)* (Tōkyō: Iwanami Shoten, 1954), 54-55; E. Hoshino, *Minpō Gairon IV (Keiyaku)* (Tōkyō: Ryōshofukyūkai, 1975-76), 25; Y. Shiomi, *Kihon Kōgi – Saiken Kakuron* (Tōkyō: Shinseisha, 3rd ed, 2017), 17-18.

[4] M.J. Bonell, 'Introduction to the Convention', in C.M. Bianca and M.J. Bonell eds, *Commentary on the International Sales Law* (Milano: Giuffrè, 1987), 9.

[5] I. Schwenzer, 'Introduction', in I. Schwenzer ed, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (New York: Oxford University Press, 4th ed, 2015), 1.

[6] S. Kröll, L. Mistelis and P. Perales Viscasillas, 'Introduction to the CISG', in S. Kröll, L. Mistelis and P. Perales Viscasillas eds, *UN Convention on Contracts for the International Sale of Goods* (Portland: Hart Publishing, 2nd ed, 2018), 12-15.

[7] I. Schwenzer, n 5 above, 10.

the guidelines for the reform of the obligations part of the *Minpō* (*Minpō no Kaisei ni Kansuru Yōkō An*). After the approval of these guidelines by the Legislative Council on February 2015, the draft was received by the Cabinet and submitted to the National Diet which approved the draft on 26 May 2017.[8]

One of the main reasons for this reform seems the favorable opinions expressed to CISG by a large number of States.[9] Thus, in interpreting the reformed the *Minpō* we can consider the CISG as a reference.

How close did the *Minpō* get to the CISG?

In this paper, first I will consider the original idea that prompted the CISG rules and drafting history as well as its features as a common rule for the international sale of goods. As an example, I will refer to the issue of *non-conformity of goods*. Second, I will consider how the conformity of goods provisions in the *Minpō* changed with the reform and the similarities to the CISG. I will also discuss whether the CISG can be considered an interpretation tool for these new provisions.

## II. CISG as an Expression of the Modern *Lex Mercatoria*

### 1. The Ancient Lex Mercatoria

The idea of using a set of common rules for a transnational commercial transaction is not a recent one. In the 11th and 12th centuries, Europe experienced a commercial renaissance associated with the opening of trade with the markets of the East and general political and economic developments, including the development of agriculture, the rise of towns and cities as autonomous political units and the consequent birth of the merchant class.[10] This growth of commerce, together with the revival of law study in the universities and the growth of legal systems, contributed to the development of the *Lex Mercatoria*. This law governed only transactions between merchants in fairs, markets and seaports and it was distinct from local, feudal, royal or ecclesiastical law. Its special features consisted in the transnational character of its provisions. Its principal source was mercantile customs. It was administered not by professional judges but by merchants themselves. Its procedure was speedy and informal, and it stressed equity as an overriding principle.[11]

Later, in the 17th and 18th centuries, the rise and development of Nation State led to the nationalization of *Lex Mercatoria*. This brought clarity of rules at the domestic level regarding sales; at the same time, it made *Lex Mercatoria* lose its original flexibility. Then, the spreading of legal positivism in 19th century

[8] T. Tsutsui, 'Saikenhō Kaisei no Ikisatsu to Gaiyō' 1511 *Jurist*, 16-17 (2017).

[9] H. Nakata, *Keiyakuhō* (Tōkyō: Yūhikaku, 2017), 5-6.

[10] J.H. Berman, *Law and Revolution* (Cambridge, Massachusetts and London, England: Harvard University Press, 1983), 333-336.

[11] ibid 339-356.

made international transaction be subjected only to domestic laws.[12]

Nonetheless, the merchant class kept on producing its own rules in form of standard contracts and private regulations.[13] In the 20th century, with the flourish of international transaction, we find, just like the *Lex Mercatoria* in the Middle Ages, a new research for a *common ground* in international sales by means of a body of law reflecting the customs, usages and needs of international trade. UNCITRAL's 1980 Convention on the International Sales of Goods can be viewed as an expression of this tendency.[14]

## 2. CISG Drafting

The idea of an international convention regulating international sales dates back to 1929. In that year the International Institute for the Unification of Private Law (UNIDROIT) undertook the task of preparing such an international convention. After many years of drafting, in 1964 the Uniform Law for the International Sale of Goods (ULIS) and the Uniform Law for the Formation of Contracts for the International Sale of Goods (ULF) were finalized. However, their content was considered too close to continental law codification and too abstract and dogmatic.[15] In the end only nine countries adhered to those Uniform Laws.[16]

As a result, soon after the finalization of ULIS and ULF, the United Nations Commission on International Trade Law (UNCITRAL) established a working group of fourteen States to ascertain which modifications of ULIS and ULF might render them capable of wider acceptance by countries of different legal, social and economic systems.[17] The working group completed its work in 1978 and the General Assembly of the United Nation authorized the convening of a diplomatic conference to finalize the conventions which in the meantime had been combined into a single draft. In March 1980, representatives of sixty-two States[18] and eight international organizations met at a Conference in Vienna to finalize the Convention.[19]

At the end of the conference, the draft was voted on a plenary session article by article, each article requiring approval by a two-third majority. Out of eighty-eight substantive articles of the CISG, seventy-eight of them were approved unanimously and eight additional articles received no more than two negative

[12] M. Yamate, 'Lex Mercatoria Nitsuite no Ichikōsatsu (1)' 33-3 *Hōzatsu*, 342, 360-363 (1987).

[13] ibid 363-364.

[14] K.P. Berger, *The Creeping Codification of Lex Mercatoria* (The Hague: Kluwer Law International, 2nd ed, 2010), 60.

[15] M.J. Bonell, n 4 above, 17.

[16] I. Schwenzer, n 5 above, 1.

[17] J.O. Honnold, 'The 1980 Convention: A Brief Introduction', in H.M. Flechtner ed, *Uniform Law for International Sales Under the 1980 United Nations Convention* (Alphen aan den Rijn: Kluwer Law International, 2009), 9.

[18] Participating States consisted in twenty-two delegations from western developed worlds, eleven from socialist regimes, twenty-nine from Third World countries.

[19] M.J. Bonell, n 4 above, 3-7.

votes. All the other articles were approved by large majorities or approved without dissent after a revision *ad hoc*.[20]

This process, at first sight so *peaceful* by the numbers, was not without any kind of *sacrifice*. The CISG's scope of application is limited to sales of movable goods made for business purpose (Art 2). Moreover, CISG doesn't regulate all the aspects of a sale of goods contracts but only the formation and the obligations of the seller and the buyer, explicitly excluding instances about the validity of contract or the effect the contract may have on the property in the goods sold (Art 4). In addition, we can see that some provisions seem more like a *compromise* as they do not give a clear solution.[21] For instance, some of CISG provisions delegate the matter at hand to national courts like the case of the remedy of specific performance (see Art 28). Otherwise, the provision establishing the rules for exemption in damages (Art 79), does not make clear if its scope of application extends to hardship cases.[22]

Nevertheless, the CISG does give a common ground for an important portion of international sales by providing rules that are supposed to be understood and applied in the same way in CISG-member States and are, at the same time, tailor-made for international sales needs. But how the CISG does concretely regulate international sales?

One example can be found in how the CISG tried to create a common rule regarding the non-conformity of goods in international trade.

### 3. CISG Content: The Example of Non-Conformity of Goods

The CISG's drafters had to take account of and find a common core among all the domestic laws of the delegates in order to create transnational provisions to regulate international sale of goods.[23] In the case of the non-conformity of goods provisions, for instance, one can see two traditional approaches when considering continental law and common law.[24] On continental law side, we usually find a two-tier approach inspired by the Roman law-model consisting of a set of specific rules, parallel to the general law of breach of contract, with their own remedies creating a statutory liability for the seller about quality issues. For instance, the Italian Civil Code, together with the general liability for breach of

[20] J.O. Honnold, n 17 above, 5-12.

[21] G. Eorsi, 'A Propos the 1980 Vienna Convention on Contracts for International Sale of Goods' 31 *The American Journal of Comparative Law*, 333, 345, 353-356 (1983).

[22] On this aspect see I. Schwenzer, 'Article 79', in I. Schwenzer ed, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (New York: Oxford University Press, 4th ed, 2015), 1142-1143; D. Tallon, 'Exemptions', in C.M. Bianca and M.J. Bonell eds, *Commentary on the International Sales Law* (Milano: Giuffrè, 1987), 591-595; J.O. Honnold, 'Exemptions', in H.M. Flechtner ed, *Uniform Law for International Sales Under the 1980 United Nations Convention* (Alphen aan den Rijn: Kluwer Law International, 2009), 627-630.

[23] M.J. Bonell, n 4 above, 9.

[24] P. Hubner, 'Comparative Sales Law', in M. Reiman and R. Zimmerman eds, *The Oxford Handbook of Comparative Law* (New York: Oxford University Press, 2006), 956-960.

contract (Arts 1218, 1453 and following), establishes a special liability for the seller regarding the quality of the goods in a sale for *latent defects* (Art 1490), *lack of expressed or essential qualities* (Art 1497) and *bad functioning of goods* (Art 1512). Also, there is a category created at a jurisprudential level: the delivery of different goods (*aliud pro alio datum*).[25] The remedies for these issues are a strict liability in terms of contract termination and reduction of price remedies and a fault liability in terms of damages.[26] However, the problem with this approach is the difficulty in drawing a line between the two systems since a lack of quality can even be considered just a breach of contract.[27]

On the other side, we have a unitary approach typical of Common law systems in which the quality issues are resolved within the system of the general rules of breach of contract. For instance, Section 14 of the UK Sale of Goods Act (1893) focuses on the terms of contract and specifically whether they are *warranties* – which gives the buyer title to claim only damages – or *conditions,* giving to the party claiming non-conformity the right to terminate the contract.

In this situation, the CISG drafters decided to adopt a uniform notion of *lack of conformity* establishing that

> 'the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract' (Art 35.1).

In doing so, the CISG tries to avoid any local concept potentially menacing the *international* interpretation of its dispositions and creates a common concept of *non-conformity within the system of breach of contract*.[28]

In addition, the CISG had another task: creating rules for the good of a sale that is international in its nature. In this context, considering – for instance – the expenses and the risk concerning a sale that is international compared to a domestic one, the CISG tries to favor the valid existence of the contracts against its premature termination on the initiative of one of the parties, the so-called *favor contractus* principle.[29] Regarding non-conformity of goods, CISG may allow voiding the contract for a lack of quality or quantity only if it amounts to fundamental breach of contract, that is if the non-conformity destroys the core

[25] A. Luminoso, 'Vendita', in R. Sacco ed, *Digesto delle discipline umanistiche – Sezione Civile* (Torino: Utet, 1999), XIX, 645.

[26] ibid 647-648.

[27] P. Hubner, n 24 above, 957.

[28] I. Schwenzer, 'Article 35', in I. Schwenzer ed*, Commentary on the UN Convention on the International Sale of Goods (CISG)*, 593.

[29] B. Keller, 'Favor Contractus: Reading the CISG in Favor of the Contract', in C.B. Andersen and U.G. Schroeter eds, *Sharing International Commercial Law across National Boundaries: Festschrift for Albet H. Kritzer on the Occasion of his Eightieth Birthday* (London: Wildy, Simmons & Hill Publishing, 2008), 249, 254-257; H. Sono, 'Favor Contractus no Variēshon', in H. Matsuhisa et al eds, *Minpogaku ni okeru Koten to Kakushin* (Tōkyō: Seibundō, 2001), 258-264.

of the reciprocal exchange.[30] Unless that point is reached, the CISG tries to restore balance in the contractual relationship between the parties giving a set of remedies to the buyer. Specifically, if the lack of conformity concerns quantity, the buyer may demand delivery of the missing quantity (Art 51.1, Art 46.1) and if the lack of conformity takes another form like wrong quality or wrong delivery, the buyer has the right to require a delivery of substitute goods but only if the lack of conformity amounts to a fundamental breach of contract (Art 46.2). In addition, the buyer can even require the reparation of goods unless it unreasonable to do so (Art 46.3) and he has anyway right to price reduction under Art 50 and to damages under Art 74.[31]

So, as can be observed from the content of Art 35, the CISG drafters tried to look for transnational provisions and fit them to international transactions needs. These drafting efforts made good results: the CISG nowadays represents one of the most successful conventions made by UNCITRAL with at present eighty-nine countries as contracting states.[32] In addition, many States used CISG as a model to reform their domestic sales law,[33] including Japan in the recent reform of the *Minpō* in areas like the non-conformity of goods provision.

## III. Non-Conformity of Goods in the *Minpō*

### 1. The Pre-Reform *Minpō*

The pre-reform *Minpō* regulation about non-conformity of goods is very similar to the Italian system mentioned above in adopting the two-tier approach inspired by Roman law model.[34]

In fact, according to general rules of sales contract in the present *Minpō*, a valid sale contract consists in the obligation of the seller to transfer to the buyer the property of the subject matter of the contract and, on the other hand, the obligations of the buyer to pay the price for it (Art 555).[35] Then, according then general rule, reciprocal obligations arising from a contract must be consistent with their purpose (Art 415).[36] Thus, a case of non-conformity of goods in terms

[30] For some leading cases on conformity of goods on fundamental breach see, in Germany, Bundesgerichtshof, 3 April 1996, available at https://tinyurl.com/y78n73ya (last visited 15 November 2018) (Cobalt Sulphate Case) and, in the United States of America, Federal Appellate Court (2nd Circuit) *Rotorex Corp* v *Delchi Carrier*, 6 December 1995.

[31] I. Schwenzer, n 28 above, 616-617.

[32] https://tinyurl.com/585fw5 (last visited 15 November 2018).

[33] I. Schwenzer, n 28 above, 593.

[34] K.Yuzuki and T. Takagi, *Shinpan Chūshaku Minpō (14)* (Tōkyō: Yūhikaku, 1993), 260-261.

[35] Art 555: 'A sale shall become effective when one of the parties promises to transfer a certain real right to the other party and the other party promises to pay the purchase money for it'. Taken from Japanese Law Translation Database System Copyright © 2018 Ministry of Justice, Japan, available at https://tinyurl.com/y9ry6cu6 (last visited 15 November 2018).

[36] Art 415: 'If an obligor fails to perform consistent with the purpose of its obligation, the obligee shall be entitled to demand damages arising from such failure. The same shall apply in

of quality or quantity can be seen at first as a performance 'not consistent with the purpose of the obligation'. That entitles the buyer to the usual remedies for breach of contract as damages (Art 415), termination of contract after a reasonable period to perform (Art 541)[37] and specific performance (Art 414.1).[38] [39]

However, Arts 560-570 of the present *Minpō* provides a set of special liabilities for defects in sale contracts parallel to the remedies for general breach of contract. First, Art 565[40] provides a seller's special liability on lack of quantity established in the contract applying *mutatis mutandis* the remedies in Art 563[41] and Art 564.[42] Secondly, Art 570[43] establishes a seller's special liability for *latent defects* (*kakureta kashi*) on the subject matter of the sales contract. According to Art 570, in presence of functional or qualitative lack in the subject matter of the sales contract the existence of which cannot be realized by a reasonable person,[44] the buyer is entitled to damages or contract termination with no additional time period but the latter is possible only if the purpose of

cases it has become impossible to perform due to reasons attributable to the obligor'. Japanese Law Translation Database System Copyright © 2018 Ministry of Justice, Japan. All Rights Reserved, available at https://tinyurl.com/y9ry6cu6 (last visited 15 November 2018).

[37] Art 541: 'In cases where one of the parties does not perform his/her obligations, if the other party demands performance of the obligations, specifying a reasonable period and no performance is tendered during that period, the other party may cancel the contract'. Japanese Law Translation Database System Copyright © 2018 Ministry of Justice, Japan. All Rights Reserved, available at https://tinyurl.com/y9ry6cu6 (last visited 15 November 2018).

[38] Art 414.1: 'If an obligor voluntarily fails to perform any obligation, the obligee may request the enforcement of specific performance from the court; provided, however, that, this shall not apply where the nature of the obligation does not permit such enforcement'. Taken from Japanese Law Translation Database System, Copyright © 2018 Ministry of Justice, Japan. All Rights Reserved, available at https://tinyurl.com/y9ry6cu6 (last visited 15 November 2018).

[39] T. Uchida, *Minpō II* (Tōkyō: Tōkyō Daigaku Shuppankai, 3rd ed, 2011), 125.

[40] Art 565: 'The provisions of the preceding two Articles shall apply mutatis mutandis in cases where there is any shortage in the object of a sale made for a designated quantity, or in cases where part of the object was already lost at the time of the contract, if the buyer did not know of the shortage or loss'. Taken from Japanese Law Translation Database System, Copyright © 2018 Ministry of Justice, Japan. All Rights Reserved, available at https://tinyurl.com/y9ry6cu6 (last visited 15 November 2018).

[41] Art 563: '(1) If the seller cannot transfer any part of the rights which are the subject matter of the sale because the part of the rights belongs to others, the seller may demand a reduction of the purchase money in proportion to the value of the part in shortage. (2) In the cases set forth in the preceding paragraph, a buyer in good faith may cancel the contract if the buyer would not have bought the rights if the rights consisted only of the remaining portion.(3) A demand for the reduction in the purchase money or cancellation of the contract shall not preclude a buyer in good faith from making a claim for damages'.

[42] Art 564: 'The rights under the preceding Art must be exercised within one year from the time when the buyer knew the facts if the buyer was in good faith, or within one year from the time of the contract if the buyer had knowledge, as the case may be'.

[43] Art 570: 'If there is any latent defect in the subject matter of a sale, the provisions of Article 566 shall apply mutatis mutandis (…)'.

[44] S. Wagatsuma, *Saiken Kakuron Chukan I (Minpō Kōgi V2)* (Tōkyō: Iwanami Shoten, 1957), 288.

the contract cannot be achieved due to the present defect (Art 566).[45]

This entire system has been much discussed. First, whether the Art 565 special liability is to be considered a liability concerning parties very rights or a liability on the goods has been debated. In fact, since Art 565 applies *mutatis mutandis* the remedies of defects in rights, it can be considered accordingly as a liability in rights but at the same time a lack in quantity can be considered a defect of the goods.[46]

Furthermore, the present *Minpō* was drafted to provide a body of law that could make Japan earn the trust of Western Powers and revise unequal treaties signed with Western Powers in the middle of 19th century. For this purpose, legal concepts were transplanted directly from European legal culture by a small group of law experts. This resulted in a wording that sometimes seems alien to everyday life[47] and can lead to different interpretations of the scope of the warranty. There was a discussion regarding the meaning of the word *defect* in Art 570 since it can be intended objectively as a feature which that kind of subject matter of contract usually possesses.[48] However, recent tribunal decisions and recent doctrinal opinions[49] give a more subjective position according to which the feature of the object must be considered in the context of the contract.[50]

There has been a long discussion, about the relationship of the Art 570 special liability on hidden defects and the general rule on breach of contract.[51] A first position formulated in the 1920s claimed that this warranty was only applicable in the case of unique goods. According to this position, in the case of a sale of unique goods, a seller's duty consists only in the delivery of goods and nothing more since unique goods cannot be considered defective. However, this makes the balance of a sale contract tremble since the buyer has the obligation to pay even in presence of a defect. Art 570 has the function of counterbalancing the buyer's obligation, thereby guaranteeing a protection to him for the sale of unique goods. In this light, Art 570 special liability was considered a non-contractual obligation imposed by law on unique goods sales. Its remedies were only termination of contract and damages limited to reliance interest. However, this position was heavily criticized in terms of scope of application. It was

[45] Art 566: '((1)In cases where the subject matter of the sale is encumbered with for the purpose of a superficies, an emphyteusis, an easement, a right of retention or a pledge, if the buyer does not know the same and cannot achieve the purpose of the contract on account thereof, the buyer may cancel the contract. In such cases, if the contract cannot be cancelled, the buyer may only demand compensation for damages (…) (3) In the cases set forth in the preceding two paragraphs, the cancellation of the contract or claim for damages must be made within one year from the time when the buyer comes to know the facts (…)'.

[46] K. Yamamoto, *Minpō Kogi IV-1* (Tōkyō: Yūhikaku, 2005), 300.

[47] H. Nakata, n 9 above, 4.

[48] S. Wagatsuma, n 44 above, 288.

[49] Supreme Court of Japan Decision, 1 June 2010 (H21(JU)n.17; H21(O)n.17); T. Uchida, n 39 above, 135.

[50] K. Yamamoto, n 46 above, 280-281.

[51] T.Uchida, n 39 above, 127-128.

considered too strict and not reflecting the reality of transactions. It put all the expectations on quality and functionality of the goods outside the framework of the contract and excluded the possibility of reparations and, if possible, substitution. This created a provision applicable only in a few cases. In addition, this would have given the buyer the possibility of making claims about quality issues for non-unique goods for ten years in accordance with the general rule in Art 167.1.[52] This was held to be unrealistic when applied to actual business transactions.[53]

Therefore, in the 1960s this special liability started to be considered as a *contractual-related matter*. According to this, a seller has the duty to transfer the property of the goods with quality and functionality matching the price paid by the buyer, regardless of whether they're unique goods or not. In case the seller delivers goods with latent defects, he commits a breach of contract according to Art 570 which acts as a special rule for that kind of breach. Seen as such, Art 570 special liability grants the buyer remedies provided by general breach of contract liability like complete fulfillment, substitution and reparation in addition to remedies provided by Art 570 itself. The scope of damages will follow the general rule in Art 416 so that fulfillment profits also are included.[54]

### 2. Reformed Non-Conformity Rule

The above discussion about the content of Arts 565 and 570 shows it was felt a reform was needed. In fact, the new reform was desired for two main reasons.

One reason was more theoretical. It consisted basically of trying to solve the problem of critical wording and the gap between the black letter law and the real application of the provisions that happened to be created due to the influence of doctrinal opinions and tribunal decisions.[55]

The second reason was that the reform was needed due to the evolution of the international market.[56] Modern commerce evolved in a way that basic transactions came to be based on non-unique goods which must be delivered without quality problems.[57]

With this background, the reform committee felt the need to reformulate the *Minpō* to reflect the new realities regarding the quality and quantity of goods system. Specifically, the new Art 562 provides:

> 'When a delivered object of the contract does not conform to the content

[52] Art 167: 'A claim shall be extinguished if not exercised for ten years'. Taken from 'Japanese Law Translation Database System', Copyright © 2018 Ministry of Justice, Japan. All Rights Reserved, available at https://tinyurl.com/y9ry6cu6 (last visited 15 November 2018).

[53] T. Uchida, n 39 above, 127-128.

[54] ibid.

[55] H. Nakata, n 9 above, 312; T. Tsutsui, n 8 above, 20.

[56] H. Nakata, n 9 above, 5-6; T. Tsutsui, n 8 above, 20.

[57] H. Nakata, n 9 above, 312.

of the contract in terms of type, quality or quantity, the buyer may make a claim to the seller for completion of the obligation by repairing the subject matter, delivery of a substitute or completion of the obligation by delivery of the remaining part (…)'.

In addition, Art 563 provides the possibility of a price reduction in case there is no completion of the obligation. Art 564 provides the remedies for breach of contract (damages and termination of contract). However, in case of termination, the new rule in Arts 541 and 542 provides that a contract can be terminated only in case of a *fundamental breach*.[58]

In short, we can see four main changes regarding non-conformity of goods provisions. First, Art 562 seems to put an end to the discussion regarding the nature of warranties on non-conformity in the present *Minpō*. In fact, the new provision confirms the doctrinal position by which the non-conformity of goods is not a liability not connected to the contract, putting it as a kind of breach of contract.[59] Secondly, lack of quantity issues has been put into the umbrella of non-conformity of goods[60] and thirdly cryptical terms like *defect* have been eliminated.[61] In addition, the *Minpō*, seems to have been reformed to guarantee the survival of the contract. This is proven by a system of remedies that follow the principle of *Favor Contractus*.[62]

How do these new provisions relate to the CISG system of non-conformity of goods?

## IV. Conclusion

The *Minpō* reform on conformity of goods and Art 35 of the CISG were drafted with different theoretical purposes. The former has firstly the objective of reflecting the doctrinal opinions and decisions accumulated in over a hundred years of legal history. The latter was supposed to find the *golden path* between legal cultures. However, both seem to have reached the same conclusion considering that the new Art 562 of the *Minpō* seems to adopt an approach very close to Art 35.1 of the CISG. In fact, they both put all cases of non-conformity of goods in the context of breach of contract using the same wording.[63]

[58] Y. Shiomi, n 3 above, 94-102.

[59] Y. Shiomi, 'Baibai, Ukeoi no Tanpo Sekinin' 1045 *New Business Law*, 7, 8 (2015); T. Furutani, 'Minpōkaisei to Baibai ni okeru Keiyakufutekigōkyūfu' 51(3-4) *Sandaihōgaku*, 819, 819-820 (2018).

[60] Y. Shiomi, n 3 above, 91; S. Wagatsuma et al, *Wagatsuma, Arizumi Konmentāru Minpō (Sōsoku, Bukken, Saiken)* (Tōkyō: Nihonhyōronsha, 2018), 1160.

[61] Y. Shiomi, n 3 above, 90; T. Furutani, n 59 above.

[62] H. Matsuo, *Saikenhōkaisei o Yomu – Kaiseiron kara Manabu Shinminpō* (Keiōgijukushuppankai: Tōkyō, 2017), 3-4.

[63] M. Nozawa, 'Minpō(Saikenhō)no Aratana Chihei - Baibai' 739 *Hōgaku Seminar*, 36, 37 (2016).

In addition, the *Minpō* reform and the CISG have in common the objective of adapting the rules on non-conformity of goods to the issues of international commerce. Regarding non-conformity of goods provision, the reformed *Minpō*, just as the CISG does, seems to follow the *favor contractus* principle on remedies, trying to guarantee as possible the survival of the contract.

Can we say that they have the same provision so that we can use the CISG to interpret Art 562 of the reformed *Minpō*?

In trying to answer this question, one must not forget the very objective under which the CISG was made. In particular, it was structured to regulate *only* international sales of goods. This can be seen by taking a look at the provisions related to conformity of goods. For example, the relationship between the passing of risk and conformity of goods, a pivotal concept in the international sale of goods since international sales usually include a transportation contract.

In this regard, the Convention relating to the Uniform Law on the International Sale of Goods (ULIS), one of the predecessors of the CISG together with the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF), provided a treatment of the concept of passage of risk that was heavily criticized. Art 97.1 of ULIS disposed that 'The risk shall pass to the buyer when delivery of the goods is effected in accordance with the provisions of the contract and the present law'. Art 19.1 of the ULIS defined *delivery* as 'the handing over of goods which conform with the contract', modelled from the French law concept of *délivrance*.[64] Therefore, under ULIS, if a buyer refused a shipment saying that the quality of goods was not in conformity and claiming for instance the termination of the contract or the substitution of the goods, the risk liability on the goods still stays on the seller even if the goods are physically delivered to the buyer. This situation can be bearable in an international sale involving parties living in confining states or states in a relatively close distance. However, in a sale involving, for example, transportation by sea or long distances to deliver goods, the burden of liability for the seller can be an excessive one.[65] As a matter of fact, the ULIS seemed to be conscious of this problem. It tried to resolve it with Art 97.2[66] which established a duty for the seller to take possession of the goods even if he had rejected them. However, the black letter law itself was considered too complicated as it left a broad room

[64] J.O. Honnold, 'Uniform Law for International Sales' 107 *University of Pennsylvania Law Review*, 299, 318 (1959).

[65] M.L. Ziontz, 'A New Uniform Law for the International Sale of Goods: Is it Compatible with American Interests?' 2 *Northwestern Journal of International Law & Business*, 129, 138-141 (1980).

[66] Art 97.2: 'Where goods dispatched to the buyer have been put at his disposal at their place of destination and he exercises the right to reject them, he shall be bound to take possession of them on behalf of the seller, provided that this may be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision shall not apply where the seller or a person authorized to take charge of the goods on his behalf is present at such destination'.

for interpretation.[67] In response to these problems, while establishing the duty of the seller to deliver the goods at Art 30, Art 67.1 of CISG defines delivery as the handing over of the goods and with that, the passage of risk of loss, but passage of risk is intended not to depend on the goods being free from non-conformities.[68]

In contrast with the CISG, the reformed the *Minpō* seems to follow the ULIS path and not the path of the CISG.[69] Art 567.1 of the reformed *Minpō* provides that the passage of risk happens when the seller delivers to the buyer the subject matter of the contract 'limited to specified goods'. Since Art 401 establishes that

> 'In case the subject of the claim is specified only with reference to a type and if the quality of such property cannot be identified due to the nature of the juristic act or intention of the relevant party(ies), the obligor must deliver the property of intermediate quality',[70]

the *Minpō* seems to intend that in case of delivery of non-conforming goods, usually defined only by type and quality nowadays, the risk liability on the goods stays on the seller.[71]

In conclusion, maybe the new *Minpō*, strictly regarding conformity of goods, has been inspired by the CISG and seems to have adopted a very similar approach. However, if one considers the conformity system as a whole, one can still see some points of difference between the two systems in some pivotal concepts like the relationship between conformity of goods and the passage of risk. So maybe we can affirm that even if the objective of this reform was to *internationalize* the *Minpō*, elements can still be found that makes one think that this process is incomplete. After the coming into force of the reformed *Minpō* perhaps one will see a new interpretation of these articles and a solution to this problem. However, at present we can affirm that the *Minpō* is still a rule made for the internal market. Therefore, the CISG jurisprudence and doctrinal opinion should be used with caution.

[67] K. Sono and M. Yamate, *Kokusaibaibaihō* (Tokyo: Seirinshoin, 1993), 129.

[68] P. Hachem, 'Article 67', in I. Schwenzer ed*, Commentary on the UN Convention on the International Sale of Goods (CISG)*, 973.

[69] M. Nozawa, n 63 above, 38.

[70] Taken from 'Japanese Law Translation Database System', Copyright © 2018 Ministry of Justice, Japan. All Rights Reserved, available at https://tinyurl.com/y9ry6cu6 (last visited 15 November 2018).

[71] Y. Shiomi, *Shin Saikensōron I* (Kyōto: Shinsanshuppansha, 2017), 211, 215; S. Wagatsuma et al, n 60 above, 1168.