Japan and the Liberal Global-Order Project: A Time to Stop and Stare

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“If Japan poses problems for Western theory, then so much the worse for Western theory.”

“Japan has always been changing, but any future alterations will be on Japanese terms.”

“My dear members of the Congress, please do come and see the new Japan, where we have regained our spirit of reform and our sense of speed.”

I. INTRODUCTION

Japan is a fertile field of inquiry for the legal comparatist. Officially this is due to the double-featured essence of Japan’s modern

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trajectory as expressed by the influence of the Civil law tradition over the Japanese legal system and by the Americanization of the country’s commercial, socio-economic, and legal educational spheres.\(^5\) Unsurprisingly, a large number of cultural, socio-legal, and socio-political studies have appeared over the past years investigating the impact of the legislation and regulations brought about by the 1994 electoral reforms and 2001 Recommendations of the Justice System Reform Council—For a Justice System to Support Japan in the 21st Century (JSRC)\(^6\). Many studies have also been conducted about the more recent developments of Japan’s administrative apparatus and the growing “legal consciousness” of the Japanese.\(^7\)

However, the legal comparatist’s interest in Japan may also be explained by reference to a different and primary reason that itself constitutes the spirit of the comparative method since Solon’s laws. Comparative law has a particular capacity to delve into the unofficial working levels of a norm or legal system. As the multi-disciplinary and unconventional research trends of the past twenty years demonstrate, comparative law is capable of uncovering what lies beneath the narratives and phenomena that inform, shape, and at times, destroys cultures and ideologies by defining identities.\(^8\) With respect to Japan, comparative law might help the interpreter better understand the peculiarities and

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6 The Justice Reform Council, RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL: FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY, (June 12, 2001), http://japan.kantei.go.jp/policy/sihou/singikai/990612_e.html. The JSCR was established by Law No 68 of 1999 and its 13 members were all approved by the Diet.


contradictions that characterize its people’s attitudes from different perspectives of socio-political and legal inquiry.\(^9\)

Delving into both these official and unofficial dimensions, this paper presents some preliminary reflections on the outcomes of the analytical research on Japan’s attitude toward globalized liberalism. In particular, the aim is to contribute to the academic debate on the Westernization of Japan’s living standards, and its impact on legal values (liberty), form of government (democracy), and doctrines (the rule of law) in light of the strategy pursued by the liberal global-order project.\(^10\) My intention is to show that, despite initial appearances, Japan has never been part of the liberal global-order project, and continues to reject it.

Since the end of the Tokugawa era and the 1868 Meiji “Renovation,”\(^11\) a great deal of scholarship has dealt with Japan’s paradigmatic relationship with the Western notion of civilization. In particular, this has been done with the aim of deciphering the inner features of the country’s “non-Asianness”\(^12\). Hence there is the need to further clarify: the scope of this contribution, what sets it apart from other

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\(^10\) This term refers to the intention to create a world society underpinned by the liberal notions of ‘civilized economy’ and ‘good economic governance.’ Both terms relate to the belief that governments should educate consumers, as well as build or reform institutions and regulate economic activities, according to rational global standards determined by outsiders. See generally Luca Siliquini-Cinelli, Hayek the Schmittian: Contextualising Cristi’s Account of Hayek’s Decisionism in the Age of Global Wealth Inequality 24 GRIFFITH L. REV. 687 (2015); Luca Siliquini-Cinelli, “Against Interpretation”? On Global (Non-)Law, the Breaking-Up of Homo Juridicus, and the Disappearance of the Jurist 8 J. OF CIV. L. STUD. 443 (2015).


\(^12\) MCCORMACK, CLIENT STATE, supra note 9, at 200.
comparative accounts, and the unconventional negative terms that I will use.

The visiting scholar experience at Kyushu University is part of a broad comparative research program on the bio-political and juridical essence of so-called “Abenomics.” The three facets of Prime Minister Shinzō Abe’s economic strategy are: (1) aggressive monetary easing to weaken the yen, boost the stock market, and generate inflation; (2) fiscal spending through budget deficits; and (3) structural change to sustain long-term economic growth.

Abenomics has not had the desired results and some doubt it ever will. Despite this, Abenomics has received a considerable amount of national and international support because it has helped Japan emerge from recession. At first glance, the plan seems imbued with Keynesian (i.e., devaluation and fiscal stimulus) principles and aims to push the Westernization of Japan’s socio-economics regulatory schemes farther. Abe’s success in liberalizing the electricity and gas sectors, as well as in dispatching the labor market along the trajectory initiated by the 1986 Labour Dispatch Law, and further promoted by Prime Minister Obuchi in 1999 and Prime Minister Koizumi in 2004, are testament to this.

In this sense, Japan’s willingness to enter the liberal global-order project could be made in light of the country’s long-sought internationalization (kokusaika). In particular, with respect to foreign public and private policies and relations, several elements could be interpreted as other signals that Japan shares the post-political, socio-economic managerial paradigm put forward by liberals as the West’s post-war guardians. These include: (1) the activities of the Asian Development Bank, which was established in 1966 and the biggest shareholders being Japan and the US; (2) the negotiations with the European Union and the signing of the first Free Trade Agreement and Economic Partnership Agreement; (3) the signing, in February 2016, of the Trans-Pacific Partnership with the US and ten other countries that together account for over two-fifths of global gross domestic product and whose main purpose


14 See generally Levitation Speed, supra note 13; Overhyped, Underappreciated, supra note 13.


16 MCCORMACK, CLIENT STATE, supra note 9, at 41–47.
is to contain China’s geopolitical and economic power;\(^\text{17}\) (4) the fact that Abe was the first Japanese Prime Minister to have been invited to speak in front of the US Congress; (5) the 2015 update of the guidelines for American-Japanese defense cooperation in Asia; and (6) top financial operations such as the acquisition of the Financial Times by Nikkei and of two Finmeccanica rail businesses by Hitachi.

Yet upon closer look, several data suggests that, far from being a mere economic plan, Abenomics is part of a more comprehensive reformative roadmap (kouzou kaikaku) the main purpose of which is to restore the national polity (kokutai) that informed the pre-war imperial system.\(^\text{18}\) These include: (1) the enactment, in September 2015, of security

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\(^{18}\) Kokutai is an old and broad term that mainly denotes the purity of the Japanese spirit (nihon seishin) and of the ethnic form of polity/state that expresses it (minzoku kokka). Scholars agree that the kokutai sentiment has both an ideological and practical political meaning, the latter of which is expressed by its military component. However, its actual content was much debated during the Tokugawa shogunate (1603–1867), especially by the representatives of the Nativist School (Kokugaku), such as Fujiwara Seika (1561–1619), Hayashi Razan (1583–1657), Motoori Norinaga (1730–1801), and Hirata Atsutane (1776–1843). Aizawa Seishai (1782–1863) also played a fundamental role in the Meiji Renovation and will be discussed in due course. In addition to the 1873 censorship instruction to the press, the reader may refer to the 1890 Imperial Rescript of Education and the 1937 Ministry of Education’s “Cardinal Principles of the National Polity,” *Kokutai no Hongi*. IMPERIAL RESCRIPT ON EDUCATION (Oct. 30, 1890), https://isites.harvard.edu/fs/docs/icb.topic1392009.files/THE%20IMPERIAL%20RESCR IPT%20ON%20EDUCATION.pdf; ANDREW GORDON, *A MODERN HISTORY OF JAPAN: FROM TOKUGAWA TIME TO THE PRESENT* 196 (Oxford U. Press 2014). Significantly, Abe’s renovation intent has been recently endorsed by one of Japan’s most powerful nationalist organizations, Nippon Kaiji (Japan Council). Mari Yamaguchi, *Ultraconservative Lobby Backs Japan PM Charter Change Drive*, ASSOCIATED PRESS (Jul. 13, 2016), http://bigstory.ap.org/article/4a1d99a94cee42368c203aa76d8a538d/ultraconservative.
bills (Legislation for Peace and Security and International Peace Support Law) aimed at allowing the use of collective self-defense when (i) Japan is attacked, or when a close ally is attacked and the result threatens Japan's survival and poses a clear danger to people, and (ii) there is no other appropriate means available to repel the attack and ensure Japan's survival and protect its people—the legislation came into effect on 29 March 2016; (2) the approval, in December 2016, of the biggest defense budget (5.13 trillion yen ($43.6 billion) and the appointment, in August 2016, of Tomomi Inada as Minister of Defense; (3) the enactment of the Official Secrets Act 2013;¹⁹ (4) the establishment of the National Security Council and of the National Security Strategy in December 2013; (5) the subsequent April 2014 enforcement of the Three Principles of Transfer of Defense Equipment and Technology; (6) the government’s intention to have an electoral reform legislation enacted during the current Diet session; (7) the revision of the Official Development Assistance within the Organization for Economic Co-operation and Development; (8) the enactment of the Basic Act on Education (Kyōiku Kihonhō) in 2006;²⁰ (9) the Yasukuni visits and unfriendly relations with neighboring countries such as South Korea and China;²¹ and (10) the government’s overall


²⁰ McCormack, Client State, supra note 9, at 140–57.

²¹ Article 20(3) of the 1947 Constitution states that “The State and its organs shall refrain from religious education or any other religious activity.” Nihonkoku Kenpō [Kenpō] [hereinafter CONSTITUTION], May 3, 1947, art. 20(3) (Japan). From 1983 to 2001, Japan’s prime ministers have duly refused any association with the Yasukuni Shrine in Tokyo, where Japan’s war dead are enshrined. Former Prime Minister Junichirō Koizumi visited the shrine annually, notwithstanding the constitutional provision and the “anti-Yasukuni” sentiment of the US and neighboring countries (with the exception of China’s former President Lee Ten-hui who visited the shrine in 2007). This is not causal, as the idea at the center of Koizumi’s premiership was that Japan’s socio-economic crisis was rooted in a more profound spiritual vacuum. Abe has been promoting the same belief. See generally McCormack, Client State, supra note 9. Other examples of renewed nationalist sentiment are the well-known territorial disputes with China, South Korea, and Russia over the Senkaku, Dokdo ( Takeshima for the Japanese), and Kuril Islands, and the dispute with South Korea over the “right” social studies textbook to be used in Japan’s junior high schools.

In regard to the former issue, Japan, China and South Korea have held a trilateral meeting in late August. See generally Kiyoshi Takenaka & Xiao Yu, Japan, China, South Korea to urge North Korea to stop provocation, Reuters (Aug. 24, 2016), http://www.reuters.com/article/us-northkorea-missiles-trilat-idUSKCN10Z0AW; Sven Saaler, Nationalism and History in Contemporary Japan, 14 Asia-Pac. J. (Oct. 2016), http://apjjf.org/2016/20/Saaler.html. While in June 2015, at the 50th anniversary of the countries’ diplomatic relationship, Abe and the South Korean President Park Geun-hye
public diplomacy, and in particular, its pressure on the country’s liberal broadcasters.22

Therefore, the economic and political agendas are part of one main objective: restoring Japanese authority and prestige. It is commonly held that this political intent poses a clear threat to the modernization and democratization of Japan (minshuka).23 In particular, when focusing on the shift towards the new “authoritarian ‘family state,’’ Murphy has pointed out that the reaffirmation of the kokutai entails the dismantling of the political decision-making machine that has operated in Japan since the premiership of Tanaka Kakuei (1972–74).25 This seems to be confirmed by called for a “new era,” it cannot go unnoticed that both South Korea and China expressed severe criticism of the nationalistic speech with which Abe marked the 70th anniversary of the end of the II World War. See generally Central Park: Diplomatic Logjams in North-East Asia Are Breaking at Last, THE ECONOMIST (Oct. 22, 2015), http://www.economist.com/news/asia/21676818-diplomatic-logjams-north-east-asia-are-breaking-last-central-park. On Japan’s attitude towards China and South Korea, see Nakano Koichi, Contemporary Political Dynamics of Japanese Nationalism 14 ASIA-PAC. J. 1 (Oct. 2016), http://apijjf.org/2016/20/Nakano.html.


For a contextualization of Japan’s contemporary nationalist roadmap, see the accounts featuring in the Special Issue of the ASIA-PAC. J. (Oct. 2016), http://apijjf.org/2016/20/Kingston.html.

24 Murphy, supra note 9, at 356. See generally Christopher W. Hughes, Japan’s Foreign and Security Policy Under the ‘Abe Doctrine’ (Palgrave Pivot 2015).

It should be noted that a similar roadmap was pursued by Abe’s rightist grandfather, Nobusuke Kishi. Not coincidentally, Abe began his speech to the US Congress by quoting Kishi own address in the same chamber in 1957. Importantly, Kishi was one of the closest associates of Tōjō Hideki, the General and Prime Minister who was sentenced to death by the International Tribunal for the Far East for the crimes committed during the World War II.

25 Murphy, supra note 9, at 366. It is well-known that notwithstanding its liberal and deregulating-privatizing façade, this was the aim of Koizumi’s nationalist premiership as
the efforts that, since its historical defeat in the 1993 elections, the Liberal Democratic Party (LDP) has dissociated itself from the system of power personified by the party’s former secretary-general and Tanaka’s greatest pupil, Ozawa Ichirō.

The LDP’s strategy proved to be necessary for Abe’s nostalgic agenda. Indeed, when the need to amend the 1947 Constitution became even more evident at the end of the Cold War, Ozawa took the lead of the “Creative Reinterpretation” group whose party platform was against revision. Conversely, Abe has always favored the rewriting of the pacifist and US-imposed Charter in light of the newly rediscovered nationalist ideology and rearmament plan. Both reforms are part of the fukoku kyōhei, or “rich nation and strong army”, vision. Not only the above-mentioned recent militarist reforms, but also the 2006 passing of the Basic Act on Education are fundamental steps along this nationalist reformative path.

well for several different reasons—one of them being the fact that Koizumi was the pupil of former Finance Ministry bureaucrat Fukuda Takeo, Tanaka’s great rival. Recently, see generally McCORMACK, CLIENT STATE, supra note 9, at 33; MURPHY, supra note 9, at 304, at 360–61. See also Koichi, Contemporary Political Dynamics of Japanese Nationalism, supra note 23.

26 See McCORMACK, THE EMPTINESS OF JAPANESE AFFLUENCE, supra note 9, at 203–7.

27 Abe has recently described the revision of the 1947 Constitution as his ‘duty as LDP President.’ See generally Linda Sieg et al., Revising Japan’s Pacifist Charter Not Easy Despite Poll Win – PM, REUTERS (Jul. 11, 2016), http://uk.reuters.com/article/uk-japan-election-idUKKCN0ZQ016. See also Abe Explicit in Call for Amendment to Constitution’s Article 9, The Japan Times (Feb. 3, 2016), http://www.japantimes.co.jp/news/2016/02/03/national/politics-diplomacy/abe-explicit-call-amendment-constitutions-article-9/. But see the opposite statement made by the LDP’s Vice-President, Masahiko Kōmura, http://www.japantimes.co.jp/news/2016/07/26/national/politics-diplomacy/ldp-vice-chief-negative-revising-article-9/#.WC1c7Hq3TEA. I am grateful to Machiko Hachiya for stressing that Abe can push his ideology much farther than Prime Minister Nakasone did because of the end of the Cold War, China’s leadership in the region, and Japan’s counter-terror strategy.

The LDP submitted a revised draft in 2012. In May 2015, after more than two years of recess, the LDP resumed the meetings of its Constitution revision panel. Cartoon pamphlets were then distributed to raise public awareness of and support for the initiative. The spark of this sentiment is to be found in the policies initiated in the mid-1950s by Prime Minister Ichirō Hatoyama, and which received further support from former Prime Minister Yasuhiro Nakasone, who, at the age of 96, delivered a speech at the 2015 meeting. See generally Mari Yamaguchi, LDP Gears up to Revise Constitution, JAPAN TIMES (May 2, 2015), http://www.japantimes.co.jp/news/2015/05/02/national/politics-diplomacy/ldp-gears-up-to-revise-pacifist-constitution/.
If this is correct, it would not only mean that, as Lawrence Repeta has contended, “Japan is facing a constitutional crisis.” Instead, it would mean that Japan represents a counter-force to the move of Western civilization towards the self-annihilating global-order project brought about by liberalism’s notion of “civilized economy”. This is why it is necessary to embark upon an interdisciplinary comparative analysis of Abenomics by contextualizing (1) Japan’s recent socio-political and legal development; (2) the re-emergence of the kokutai strategy; and (3) the country’s peculiar relationship with the roadmap pursued by the promoters of universalized liberalism.

Before going any farther, it would be appropriate to expound the relevance that liberals’ imperialist agenda has for the Japanese form of polity in greater detail. Elsewhere, I argued that the substitution of action with behavior prompted by the politico-theological and liberal traditions, and further normalized by legal positivism, have determined the absorption of authority and sovereignty by power, and thus, of government with governance. The effects of this artifice have become particularly noticeable since the fall of the “bipolar” system. The post-political strategy pursued by universalized liberalism has indeed voided local government through an emphasis on global governance, in so endorsing the substitution of politics with administration. Hence, I further maintained, Westerners currently “(non-)live” in a sort of post-political “global Eden”, that is, in the global aspirational “(non-)dimension” in which what constitutes human uniqueness makes no appearance because we do not act

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28 See generally Lawrence Repeta, Japan’s Proposed National Security Legislation—Will This Be the End of Article 9? 13 ASIA-PAC. J. 1 (June 2015), http://apjjf.org/-Lawrence-Repeta/4335/article.pdf. Over the past two years, several commentators have denounced the unconstitutional essence of the informal constitutional amendment sought the Japanese government. Among them, stands Hasebe Yasuo, a towering constitutionalist. See generally Hasebe Yasuo Interview with the Kochi Shimbun, ICONnect (June 30, 2015), http://www.iconnectblog.com/2015/06/hasebe-yasuo-interview-with-the-kochi-shimbun/. See also Muto Ichiyo, Retaking Japan: The Abe Administration’s Campaign to Overturn the Postwar Constitution 14 ASIA-PAC. J. 1 (Jul. 2016), http://apjjf.org/-Muto-Ichiyo/4917/article.pdf. It should be noted, however, that Abe’s “renovationist” plan appears to have been backed up by 49% of the voters in the recent Upper House election. For a contextualization of the legislative process that led to the passing of the Legislation for Peace and Security and of the public perceptions, see Anne Mette Fisker-Nielsen, Has Komeito Abandoned Its Principles? Public Perception of the Party’s Role in Japan’s Security Legislation Debate, 14 ASIA-PAC. J. (Oct. 2016), http://apjjf.org/2016/21/Fisker-Nielsen.html.

but merely behave according to the reason-oriented mechanisms of societal interaction brought about by liberalism.

This “intangible open” is characterized by the liberal model of civilization, which is ultimately rooted in the Western (and in particular, Anglo-American) standardization of local and particular forms of cultural sensibility. Importantly, in this system of perfect contemplation of objective regularities rather than subjective irregularities, of procedural rather than absolute truths, of language rather than languages, we do not have a sense of our living experience because we neither come to birth nor die as “someone”—a consequence of the liberal aim to achieve a perfect order from the chaos that affects the condition of the state of nature (homo homini lupus). From a genealogical point of view, this totalizing strategy finds its origin precisely in the extent to which the modern sterile technē oikonomikē has penetrated the domain of the political. The secularization of naked or bare life (that is, real “people”, or zoē) and political or public existence (that is, ideal “People”, or bios) is a key component of this process.

Bearing in mind Arendt’s studies on the dissolution of the “public-private” divide, Kolakowski’s inquiry into the self-destructive essence of the liberal paradigm of the “open society” and “bureaucratization of the world”, and Agamben’s accounts of the “occult” double-sided source of Western politics, I have defined this contemplative “(non-)reality” as an “intangible (non-)dimension”. Indeed, it may not be considered a territory in spatio-ontological terms and, consequently, there is no need in it for a nomos in terms of “division”, “allocation”, and “appropriation” (Nahme) of rights, interests, obligations and duties; that is to say, by being made up of “(non-)boundaries”, “global (non-)law” rejects law’s anthropological and ontological need for a tangible signature. Importantly, the movement towards this sort of Kojèvean post-historical (that is, animal) condition is taking place through the formal “de-politicization” and “de-juridification” of the world; that is, through the imposition of the administrative and economics-oriented paradigm of liberal global governance as opposed to that of local government.


31 See generally Bradner & Walsh, Democrats Reject Obama on Trade, supra note 17.

Liberalism’s notion of “civilized economy”, and its related belief that governments should educate consumers and build or reform institutions to regulate economic activities according to rational global standards determined by outsiders is what we should delve into when trying to offer a neorealist, rather than modern or post-modern, contextualization of Japan’s vacillation between its “non-Asianness” and the Westernization of its living, socio-economic, political, and legal standards.

A specific reference to Agamben would in this sense be profitable. Indeed, as Agamben noted in a short but highly valuable book in which he analyzed the “animality of man in post-history,” Kojève thought that Japanese society had undertaken a diametrically opposed path to that of the American form of civilization, thus giving rise to the first and only post-historical human condition. Kojève’s revolutionary account explained why Japan had not been affected by the totalizing dehumanization of the world as brought about by the imposition of the sterile “American way of life,” and thus of liberalism’s reason-oriented working logic on societal relations. Conversely, nearly fifty years later after Kojève’s account, Supiot placed the “civilizing mission” of contract as experienced by Japan at the center of his inquiry into the dissolution of the law’s anthropological and socio-political regulative function and special domain. In other

33 See generally FRANCA D’AGOSTINI, REALISMO? UNA QUESTIONE NON CONTROVERSA (Bollati Boringhieri 2013).

34 See generally David Pollack, Modernism Minceur, or Is Japan Postmodern?, 44 MONUMENTA NIPPONICA 75 (1989); Postmodernism and Japan, 87 SOUTH ATLANTIC QUARTERLY (Masao Miyoshi & H.D. Harootunian eds., 1988).

35 Tom Ginsburg has recently argued that Japan’s politico-economic high-growth era was structurally connected to the transfer that Japan has made of its “configuration of legal institutions” to the Northeast Asian region. See Japanese Law and Asian Development, LAW AND DEVELOPMENT IN ASIA 68–88 (Gerald Paul McAlinn & Caslav Pejovic eds., Routledge 2011).

36 What McCormack has persuasively labelled Japan’s “dependent nationalism” when describing the country’s reliance on US foreign policy to protect its uniqueness is a key component of this equivocal attitude. See MCCORMACK, CLIENT STATE, supra note 9, at 81. See also S. N. EISENSTADT, JAPANESE CIVILIZATION: A COMPARATIVE VIEW 15 (U. of Chi. Press 1996). This assertiveness should be analyzed through the lens of Maruyama’s politico-realist belief that while international behavioral guidance is required for national leaders to avoid directing their nation toward ruin, an alliance with the US would nevertheless undermine democracy and thus (democratic) nationalism. See FUMIKO SASAKI, NATIONALISM, POLITICAL REALISM AND DEMOCRACY IN JAPAN 131–57 (Routledge 2012).


words, Supiot used the liberal contractarian notion of “civilized economy” to argue the exact opposite of what had been contended by Kojève. The question is, whether Japan constitutes the exception to our current animalization as behavioral “form-of-(non-)living,” or is its most appropriate and powerful example.

It is all the more evident that the answer cannot be found by only looking at Japan’s normative development. Considering that Japan’s political and juridical settings are more the delicate and sophisticated result of unwritten customary practices and living methodologies than of official and visible rules, legal positivism’s political sin would affect any attempt to overcome the boundaries of official presentations and storytelling narratives.

Yet this poses the difficulty of what roadmap the comparatist should pursue when trying to understand the Japanese paradigm. In a recent account of Japan’s modernization through legal changes, Lawrence M. Friedman correctly contended that “[there is . . . no obvious way to test the convergence theory.” The same may be safely argued with respect to the divergence model, as the list of possible criteria which may be used to analyze why Japan has not been affected by the universalization of liberal thought could be drafted endlessly.


43 A possible criterion could be the peculiar essence and role of Japan’s behavioral schemes of societal interactions and their impact on the self-defining power-to-will, which should be analyzed in light of the influence that Shintoism still has upon Japanese society. This would necessitate addressing the belief in a spiritual entity (kami) that generates the world not by deciding “for” and “against” someone and something, as the God of St. Augustine and Paul did, but by establishing natural, contextual, and symbiotic relations. This analysis would shed new light on the astounding similarities between liberalism’s self-destructive shift from action to behavior, and what van Wolferen has described as the “active suppression of the personal inclinations of the Japanese, in nearly all social contexts and on all levels, through a program of character-molding that helps ensure predictable and disciplined behavior’. VAN WOLFEREN, supra note 9, at 245. Yet this is not the right place in which to embark upon a comparison of this kind, which
However, two elements appear to be of pivotal importance to the scope of our inquiry: (1) the Western façade placed over Japan’s political and juridical institutions as expressed by both the Meiji and post-war liberal constitutions and recent structural reforms; and (2) the essence of “output” mechanisms of political legitimation and accountability through which Japan is governed and which appear to share important features with Western soft-networked schemes of post-national governance (“PNG”).

II. AUTHORITY AND POWER, REVISITED

The confusion generated by the Western façade draped over the inner, esoteric political essence of Japan’s regulatory apparatus is strictly connected to the authority and power dichotomy which informs the Western metaphysical tradition. This antithesis was inherited by politico-theological thought and transplanted into the legal, in particular positivist, domain.44

The antithesis between auctoritas and potestas constitutes the pillar of Arendt’s thought on the dissolution of the Western politico-philosophical tradition.45 Taking this one step farther, Agamben spoke instead of “transcendence/immanence, general providence/special providence (or fate), first causes/second causes, eternity/temporality, intellectual knowledge/praxis”.46 This allowed Agamben to demonstrate that since the fall of the Greek polis, the paradoxes, if not the perils, of Western politics have been nothing but the expression of the aforementioned “politico-juridical” and “economic-governmental” rationalities. Importantly, Agamben has also proved that by transposing the Pauline concept of the “economy of the mystery” into the “mystery of the economy,” the Church’s founding Fathers have made the (theological)


44 Thus, auctoritas, creatio, ordinatio, dignitas, ousia, gloria, being, substance, and legitimacy figure on the one hand, while potestas, conservatio, executio, administratio, dynamis, gubernatio, acting, praxis, and legality figure on the other.

45 ARENDT, BETWEEN PAST AND FUTURE, supra note 32, at 120–41. See also HANNAH ARENDT, ON REVOLUTION, supra note 32, at 171–206.

non-epistemic “economic-managerial” paradigm the key component of the Western form of civilization. 47

Building on Peterson contra Schmitt while delving into the emptying essence of this strategy, 48 Agamben has further maintained that the modern liberal nation-state inherits the same logic of the Trinitarian paradigm of the oikonomia as “activity of administration and management.” 49 Liberalism falls exactly within this phenomenon, embraces it, and pushes it farther by displacing value-oriented authority in favor of value-neutral power. 50 Agamben thus argues that in a dehumanized post-political age such as ours, in which “popular sovereignty [is] an expression drained of all meaning,” 51 instead of claiming that “there is nothing outside the law” we should rather appreciate that “there is nothing inside the law.” 52

Since the feudal age, Japan’s regulatory structure has been characterized by the same division between authority and power, which is why Kantorowiczs’s study on the king’s two bodies has a much older Japanese counterpart in Suematsu Kenchō’s 1881 investigation of the ruler’s physical body (shintai) and spirit (seishin). 53 As described by Maruyama, this dualistic conception influenced the Yamato dynasty’s import from the Chinese centralized bureaucracy of the Tang dynasty of the distinction between legitimacy and actual political power. 54

47 See generally Agamben, The Kingdom and the Glory, supra note 32.


50 Agamben, The Kingdom and the Glory, supra note 32, at 284–5.

51 Agamben, The Kingdom and the Glory, supra note 32, at 4.


Japanese institutionalization of this antithesis was characterized by the creation of an ad hoc council, the *dajōkan*, “council of great government,” placed between the Emperor and his ministers. Such a dichotomy was then officialized by both the Meiji and post-war liberal Constitutions which placed the official locus of sovereignty in the Emperor and the Diet. The actual exercise of political power was the official and unofficial prerogative of other actors.

If anything, this confirms that any attempt to understand why sovereign power in Japan is still grounded in authoritarian instances, requires one to delve into the juridical foundation and manifestation of authority and power relations within the Japanese context. To be successful, this task ought to commence from the analysis of the bureaucracy’s predominance over the government and parliament. Among others, peculiar attention should be paid to Kaplan’s and Pempel’s innovative studies, Johnson’s famous notion of Japan as a “development and plan-rational state”, and van Wolferen’s well-known controversial claims.\(^56\)

In particular, refusing to describe it as a “state,” van Wolferen interpreted Japan as a wholly “ politicized System” enigmatically run by administrators.\(^57\) Van Wolferen also hooked the technocrats’ vision of their socio-political function to the Tokugawa rulers’ altruistic belief in the need “to sustain the natural order.”\(^58\) The Meiji oligarchs thought similarly, although they were moved by clearly political aims.\(^59\) To the contrary, Johnson explicitly addressed the Japanese conception of the “authority-power” antithesis in light of a primary discrepancy, namely that between the visible and outer (*omote*) and the invisible and inner (*ura*), or principle and formality (*tatemae*) as distinguished from reality and actual practice (*honne*). Over the past decades, this structural feature has been examined from different standpoints such as the tension between the bureaucracy and the *zaibatsu* (business conglomerates), the dynamics through which political and administrative elites have interacted with each other, and the

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\(^{55}\) Maruyama, *The Structure of Matsurigoto*, supra note 54, at 38.


\(^{57}\) *Van Wolferen, supra* note 9, at 109. Van Wolferen seems, however, to contradict himself. *Id.* at 374.

\(^{58}\) *Van Wolferen, supra* note 9, at 304.

\(^{59}\) *Van Wolferen, supra* note 9, at 304–5.
similarities between pre-war imperial officials (tennō no kanri) and post-war national bureaucrats (kokka kōmuin).\textsuperscript{60}

For our purposes, it should be noted that to a certain extent, the correct understanding of the “omote-ura” dichotomy may also prove to be essential to contextualize Takeyoshi Kawashima’s scholarship on law’s development in Japan. The reason being that Kawashima offered invaluable accounts on the importance of informal, unofficial, and alternative mechanisms of dispute resolution, and on the inevitability of the normalization of Japan’s societal relations brought about by its Westernization.\textsuperscript{61}

Here is where the comparatist’s confusion may arise. When delving into the role that the Western “authority-power” working logic has had in our animalization, Agamben condemned the “angels”—that is, the regulatory apparatus as such—and then argued that only the Pauline Messianic redemption may save mankind.\textsuperscript{62} The point, however, is that despite what may be thought, Japan represents the anti-canon of the Western conception for two specific reasons.

First, the enactment of the 1947 liberal Constitution has not caused the voiding of authority.\textsuperscript{63} This explains why, while discussing

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\textsuperscript{61} Kawashima’s first English-language work appeared in Von Mehren’s 1963 edited collection of essays. See Foote, LAW IN JAPAN, supra note 7, at xi-xvi. Notwithstanding the use of little empirical data in his comparative research, Kawashima’s suggestions are at the center of an important branch of literature that tries to overcome the limits of culture-oriented approaches to Japan’s legal development by reference to its “institutionalization.” See Masayuki Murayama, Culture, Situation, and Behavior, THE CHANGING ROLE OF LAW IN JAPAN, supra note 7, at 189–205; Ichiro Ozaki, Law, Culture and Society in Modernizing Japan, The CHANGING ROLE OF LAW IN JAPAN, supra note 7, at 50-65.

\textsuperscript{62} See generally AGAMBEN, THE KINGDOM AND THE GLORY, supra note 32; Agamben, Introductory Note on the Concept of Democracy, supra note 32.

\textsuperscript{63} When analyzing why the 1947 Imperial House Law led “some scholars to argue that . . . Japan had an unwritten constitution . . . prior to the Constitution of Japan,” Bix noted that “[a]t the deepest levels of national identity emperorism retained its hold over the minds of many Japanese.” See Bix, supra note 9, at 578. Compare JOHN DOWER, EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II 313–18 (Norton 2000) (On Emperor Hirohito’s “renovationist” strategy), with KENNETH J. RUOFF, THE PEOPLE’S EMPEROR: DEMOCRACY AND THE JAPANESE MONARCHY 86 (Harv. U. Asia Ctr. 2001) (“the interpretation that the postwar symbolic monarchy represents a return to premodern tradition... is... problematic for several reasons”). See also David S. Law, The Myth of the Imposed Constitution in Japan, SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 239–67 (Denis J. Galligan & Mila Versteeg eds., Cambridge U. Press
MacArthur’s willingness to preserve the Emperor as the canon of Japanese socio-political consciousness, McCormack wrote that “the most vociferous proponents of the ‘Japanese’ tradition are those most faithful to the US order.” Thus, as the “benevolence” that informs the settings of the Japanese order is truly authoritarian. As a result, while in the West, the formal de-politicization and de-juridification of law’s authoritarian instances seem to have reached its apex, socio-legal scholars witness the opposite trend with respect to Japan, where there is an increase of law’s institutionalization.

Secondly, if to Western eyes Japan’s enigma or paradox is represented by the socio-political essence of its “power,” rather than “authority,” this is not because “[p]ower in Japan is so diffuse that it eludes confrontation.” Rather, I contend, it is because the country’s “angels”, or guardians, have always exercised political, rather than administrative functions, and in so doing, have challenged the very essence of the Western paradigm. To support this claim from a semantic point of view, it would suffice to point to the Japanese title for the imperial institution, Tennō Heika, which literally means “heavenly sovereign” a conception which exempts the emperor from any political activity as such. From a historical perspective, and looking at modern developments only, one could point instead to the strategy pursued by the Meiji oligarchs to limit party politics, in particular, the Emperor and Diet’s space of intervention. The fact that this was done for political purposes is beyond dispute among Japan’s socio-political theorists and legal historians.

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64 McCormack, Client State, supra note 9, at 153.
65 See generally supra notes 5–7.
66 See generally Haley, supra note 40, at 14; Van Wolferen, supra note 19 where it is argued that the stability of the Japanese system is due to the combination of centralized authority and power diffusion.
67 Van Wolferen, supra note 9, at 52.
68 The term “angels” should be understood in its literal meaning, being amakudari (descent from heaven), one of the most significant practices in Japan. According to this custom, which still operates today, retiring senior technocrats are given prestigious sinecures at the companies they supervised and are favored when in office. From a socio-political and anthropological perspective, it would be worthwhile to compare Van Wolferen’s description of the politicization of the household during the Togukawa period to Agamben’s study on how the stasis represented in Ancient Greece “a zone of indifference between the unpolitical space of the family and the political space of the city.” See Giorgio Agamben, Stasis: Civil War as a Political Paradigm 16 (Nicholas Heron trans. Stan. U. Press 2015); Van Wolferen, supra note 9, at 165–66.
69 See Ruoff, supra note 63, at 19, where (I believe not coincidentally) the term “authority” is used to describe both the legitimizing source of the Meiji oligarchs’ decision-making activity and the essence of the modern imperial institution. See also
Yet a similar claim may be made about contemporary Japan as well. The term “authority” is not-coincidentally used to describe the government’s ruling activity, rather than the Emperor’s legitimizing source, in the JSRC’s Recommendations as if, paraphrasing Arendt, authority had not vanished in Japan. This is despite the conventional presentations offered by the transplant of Western values and doctrines into the Japanese order and the fact that the term “nation-state” has been used by Western and Japanese scholars alike. The risk inherent in this conceptualization is thus to assign to Japanese liberalism the same function liberalism has had in the Western tradition, as emerges when even those commentators who correctly label that of Japan as “nonliberalism” speak of a nation-state.

This is of pivotal importance, as the sentiment that inspires the kazoku kokka ideology “of blood relatives headed by the sovereign emperor” is the canon of the kokutai. To avoid confusion regarding the similarities and differences between the Japanese and Western paradigms of “nation-state,” particular attention should therefore be paid to Arendt and MacPherson’s accounts on the Hobbesian device. In particular,

DOWER, supra note 63, at 379, 602. This may also shed new light on why the premise of the Authentic Account of the Shōwa Emperor’s Life and Reign (Shōwa Tenno Jitsuroku) released by the Imperial House in 2014 is that the emperor is a “non-political” figure. See Herbert P. Bix, Showa History, Rising Nationalism, and the Abe Government, 13 Asia-Pac. J. (Jan. 2015), http://apjjf.org/-Herbert-P-Bix/4251/article.pdf. The distinction between the kokutai, which stands above politics, is represented by the Emperor, and embraces the “national structure”, and the seitai, or “political structure”, is rooted in this conception. See Eisenstadt, supra note 36, at 31 (quoting Peter Duus).

70 See EISENSTADT, JAPANESE CIVILIZATION, supra note 36, at 37; GORDON, A MODERN HISTORY OF JAPAN, supra note 18, at 62.

71 See generally ARENDT, supra note 32.

72 ROUFF, supra note 63, at 1; JOHNSON, supra note 1, at 25.

73 Such as Hozumi Yatsuka, who spoke of “nation-state as family”—kazoku kokka. See McVeigh, supra note 2, at 43-44.

74 See SHARON NOLTE, LIBERALISM IN MODERN JAPAN: ISHIBASHI AND HIS TEACHERS, 1905–1960 (U.C. Press 1987); see also ABE, SHINDÔ, AND KAWATO, supra note 43, at 207.


according to Arendt, the artificial birth of the Leviathan was based “not on some kind of constituting law . . . which determines the rights and wrongs of the individual’s interest with respect to public affairs, but on the individual interests themselves.” If this is correct, the reason for Japan not being affected by liberalism’s administrative logic is purely historical. Although the Meiji leaders had engineered nationalism, they “did not create a liberal state and society.”

Thus, it is historical institutionalism that proves that the Japanese nation (nihon minzoku) is not, and has never been, a nation-state, at least in the Western sense of the term. To argue otherwise by unduly highlighting the Japanese belief in the inherent goodness of ever-increasing prosperity, science, and “techno-logical” advances, or MacArthur’s faith in the Christian “spiritual core” of democracy, would be misleading. The functional formation of the Japanese state’s myth is neither the expression of Hobbes’s passion for geometry and reason-oriented behavioral standards, nor the Platonic and Stoic metaphysical conceptions, both of which constitute the seed of the modern branch of the Western politico-theological tradition.

Yet this leads to a corollary consideration. Political and legal theorists, as well as sociologists and philosophers, are aware of the imperativeness of the challenge brought about by the global governance model of the liberal-corporate lex mercatoria. Thus, Wendy Brown asks, “What can democratic rule mean if the economy is unharnessed by the

79 Kokumin, meaning “people,” “nation,” “a national,” “a citizen,” became an extremely popular term by the early twentieth century. Any attempt to understand Japanese nationalism should at least consider the works of Maruyama Masao. See SASAKI, supra note 36; Andrew E. Barshay, Imagining Democracy in Postwar Japan: Reflections on Maruyama Masao and Modernism, 18(2) J. JAP. STUDIES 365 (1992). See infra the concluding remarks to this paper.
80 NOLTE, supra note 74, at 4.
81 The fact that Yamamura uses the term “nation-state” in conjunction with “national empire” (kokumin teikoku) gives further support to this thesis. See Shinichi Yamamura, Form and Function of the Meiji State in Modern East Asia, 34(1) ZINBUN 179 (1999).
82 MCCORMACK, THE EMPTINESS OF JAPANESE AFFLUENCE, supra note 9, at 176. See also RUF, supra note 63, at 17.
84 Which is why Katō Hiroyuki feared that Christianity would empty the kokutai. See McVEIGH, supra note 2, at 44.
political yet dominates it?” 85 This question could be rightly asked about Japan as well, considering that the spark for the political paradigm through which Japan has been ruled for almost 40 years in the post-war period was the merger of the Liberal Party and Democratic Party, organized by financial, trade, and industrial organizations. Thus, Eisenstadt writes that “the combination of a nonideological, accommodative stance with an emphasis on consensual politics . . . has characterized the LDP from the very beginning.” 86

The structural symbiosis between Japanese rulers and businesses, as well as the confusion that Davis’s description of the Meiji Restoration as an act of “civic theology” are well-known. 87 However, what matters for our comparative purposes is that Japan’s “angels” are not Hobbes’s “civil magistrate” whose main concern, in Pocock’s words, was “the whole content of revealed religion.” 88 By “religion” we mean the juridico-political deditio in fudem which in Greek and Roman times linked the city and the people together. The term “concern” indicates instead the theoretical premise for the practical voiding that the liberal “(non-)sovereign”, as mere civil magistrate, performs on the public-religious bond, with the intent to let civil society’s capitalist (and, thus, scientific) interests dissolve the act of political government. 89

This understanding may shed new light on Curtis’s attempt to uncover the limits of Johnson’s plan-rational “developmental state” theory, as well as of all those accounts according to which the Japanese “miracle” was obtained by the triple-featured system of LDP’s one-party democratic system, the bureaucracy, and big businesses known as “Japan, Inc.” Curtis’s contention is based upon what he had claimed eleven years earlier. 90 In particular, after having noted that “[p]olitics in Japan makes sense in Japanese terms” 91 in a manner that recalls Legrand’s argument on the practical impossibility of legal transplants, 92 Curtis argued that both

85 WENDY BROWN, We Are All Democrats Now . . ., DEMOCRACY IN WHAT STATE?, supra note 32, at 44, 54.

86 EISENSTADT, supra note 36, at 155.


90 CURTIS, THE JAPANESE WAY OF POLITICS, supra note 9, at xi.

91 CURTIS, THE LOGIC OF JAPANESE POLITICS, supra note 9, at 10.

92 Pierre Legrand, The Impossibility of Legal Transplants, 4 MAASTRICHT J. EUR. &
“[t]he theory of politician dominance [and] the theory of bureaucratic dominance [are] curiously apolitical”93 because neither is capable of encompassing the fact Japan “is not a corporatist system.”94 Rather, in the Japanese model, politics and bureaucracy form what could described as an inextricable, substantial, and functional partnership whose essence is purely political.95 It is indeed the LDP’s “[s]trong political leadership [that] defines the parameters of feasible government policy and gives bureaucrats the political opportunity to try to pursue their own preferences within those boundaries”.96 The same may be said with respect to the scenario inaugurated with the 1994 electoral reforms. These were expected to break up the LDP’s dominance and generate a two-party system. However, what has resulted from them is, in Curtis’s words, “quite the opposite of what its proponents said the new system would accomplish.”97

Other scholars, such as Inoguchi, Park, Richardson, Miwa, Ramseyer, Nakazato, and more recently Kazuyuki, have made similar suggestions that may be used to support the claim that Japanese society is politically governed rather than managerially administered.98 Further elements in support of this argument may be seen in Schlesinger’s argument against the “Japan, Inc.” label through the deconstruction of

93 CURTIS, THE LOGIC OF JAPANESE POLITICS, supra note 9, at 59.

94 CURTIS, THE LOGIC OF JAPANESE POLITICS, supra note 9, at 60; see also VAN WOLFEREN, supra note 9, at 81.

95 CURTIS, THE LOGIC OF JAPANESE POLITICS, supra note 9, at 59 and 61; see VAN WOLFEREN, supra note 9, at 143. Finally, see KOH, supra note 60, at 264, according to whom:

“The character of the nexus between bureaucrats and politicians can also be listed as a strength of the Japanese model. The modes of interaction between the two groups, the bureaucratisation of politics, and the politicization of bureaucracy in Japan result in in an unusually high degree of cooperation between them, which can construed as functional not only for the government bureaucracy but for the larger society as well”.

96 CURTIS, THE LOGIC OF JAPANESE POLITICS, supra note 9, at 62. Emphasis added.

97 CURTIS, THE LOGIC OF JAPANESE POLITICS, supra note 9, at 138.

Tanaka’s, Kanemaru Shin’s, Takeshita Noboru’s, and Ozawa’s “political machine”, as well as in Baruma’s suggestions that the post-war order, in which the “LDP System [was] a formidable political machine . . . is still intact”, and Murphy’s belief that “the political is everywhere in Japan”.99

III. “OUTPUT” FORMS OF GOVERNANCE AND GOVERNMENT

Another element that may complicate the legal comparatist’s interpretation of Japan’s relationship with the liberal global-order project is the way in which political theorists such as Richardson or jurists such as Itoh, Haley, Wolff, Nottage, and Anderson use the terms “government” and “governance” interchangeably in their work. As they do so, the distinction between governance’s administrative essence and government’s political one is blurred. As a result, it becomes almost impossible to compare Japan’s much-debated peculiar theoretical-cultural conceptions of political, juridical, and social accountability with the movement from “input” to “output” forms of “(non-)legitimation” and “(non-)accountability” that has taken place in the West since the end of the “bipolar” age.100 What I shall argue in this section offers a systematization and neorealist contextualization of the “government-governance” dichotomy with the aim of contributing to the academic debate on the subject.

Writing in 1989, van Wolferen argued that “[i]n Western constitutional democracies the problem of legitimacy does not arise, because citizens have recourse to corrective mechanisms whenever the procedures preceding political decisions diverge consistently from a legally sanctioned course”. To the contrary, van Wolferen further maintained, “[i]n Japan . . . laws do not control the administrators but are tools for administrative control”.101 This is why van Wolferen opened his magnum opus on the “enigmatic” essence of Japanese power by discussing the “fiction of responsible central government”, that is, the belief according to which Japan is a “state with central organs of government that can both recognize what is good for the country and bear ultimate responsibility for national decision-making”.102 This is not surprising, as the “occult” aim of Hirohito’s 1946 Declaration of Humanity was to


100 Siliquini-Cinelli, Hayek the Schmittian, supra note 10.

101 VAN WOLFEREN, supra note 9, at 310.

102 VAN WOLFEREN, supra note 9, at 3; See generally MURPHY, supra note 9.
restore the kokutai by limiting, rather than promoting, the democratization of the country.103

The landscape has changed both in the West and Japan since then. In the former there have emerged liquid, soft-networked schemes of PNG, that is, value-free mechanisms of regulation that transcend state-based patterns of government by working according to what elsewhere I have defined as output schemes of “(non-)legitimation” and “(non-)accountability.”104 If, building on Foucault, Agamben contended that today’s “politics assume[s] . . . the form of an oikonomia, that is, of a governance of empty speech over bare life,”105 it is because modernity has shown that the subjects of biopolitics are continuously exposed to legal and political violence by the ruler and no one can be held responsible for it.

In this respect, by substituting the ante-factum paradigm with its post-factum counterpart, inter-connected systems of PNG have proved to be essential for the liberal technē oikonomikē (literally, “economic technique”) to empty sovereignty and displace authority from view in Arendtian and Agambenian terms. This is so because the liberal logic which informs PNG’s workings displaces the irreducibility of any foundational political initiative by annihilating the boundlessness and unpredictability of (political) action. As discussed earlier, this is done through the promotion of dehumanizing, reason-oriented schemes of societal interaction.106 Importantly, while this phenomenon lies at the core of the artificial formation of the liberal nation-state, it was then pushed farther by the strategy pursued by the post-war universalization of liberal thought. The indifference towards man qua man’s original, irreducible,

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103 On this, and on Hirohito’s admission that democracy had been adopted not because the people were sovereign but “because [democracy] was the will of the Meiji emperor,” see Bix, supra note 9, at 562.


unpredictable, and self-determining action is indeed incompatible with the essence of the public realm properly understood.107

On the contrary, with respect to Japan, it seems that Maruyama’s contention that “there is a close relationship between the expressions of power and the scale of values accepted by those over whom it is exercised,”108 as well as Kawashima’s prediction on the increasing relevance of legalization and judicialization, and Upham’s sentiment on the incorrectness of law’s insignificance, have all proved to be appropriate.109 Indeed, over the last two decades Japan has embarked upon an “institutionalizing” and democracy-informed developmental path. As a result, civic engagement in the production of law and assimilation of normative instances has been promoted through public participation in formal legal processes.

The sentiment underlying these reforms appears diametrically opposed to that which informed Aizawa Seishisai’s 1825 Shinron (New Theses), which popularized the concept of kokutai by affirming that society should just accept the ruler’s benevolence and never know what the actual rules are. Aizawa’s Theses played a major role in the restorative roadmap pursued by the Meiji rulers through the enactment of the Meiji Constitution in 1889.110

In fact, several normative interventions could be listed to support the argument that Japan has moved from what in pre-war times was known as hōka banno, including, the omnipotence of law as embodied by the dominance of the University of Tokyo’s law graduates within the bureaucracy111 to the Western-oriented politico-legal model. In addition to the 1994 electoral reform and the JSRC’s 2001 Recommendations, innumerable other initiatives may be listed when addressing this period of great reform (dai henkaku-ki).112

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108 Masao Maruyama, Some Problems of Political Power, THOUGHT AND BEHAVIOUR IN MODERN JAPANESE POLITICS 272, supra note 99.
110 VAN WOLFEREN, supra note 9, at 209.
111 Koh called it the “legalist approach to administration.” KOH, supra note 60, at 24.
112 These include the Administrative Information Disclosure Act 1999, the Incorporated Administrative Agencies Information Disclosure Act 2001, the Government Policy Evaluations Act 2001, the Lay Judge Law 2004, the 2004 Labour Tribunal Law, the establishment of the Intellectual Property High Court in 2005, the Public Record Management Act 2009, and the dispute resolution mechanisms that involve the government and have been enacted in the 2010s. For a comprehensive list, see Daniel H. Foote, Introduction and Overview, LAW IN JAPAN: A TURNING POINT, supra note 7, at xxix–xxxi; WHO RULES JAPAN?, supra note 7. See generally Matthew J. Wilson, Seeking to Change Japanese Society Through Legal Reform, CRITICAL ISSUES IN CONTEMPORARY
As mentioned, there has been the tendency in the recent literature to offer a socio-legal contextualization of this law-oriented trend with the aim of overcoming the limits of a merely cultural approach to Japan’s legal progress. The argument usually put forward is that all modernizing interventions were (and still are) specifically conceived to provide a tangible sign of Japan’s movement from a “rule by man” to a “rule of law” liberal order by enhancing the political and juridical responsiveness of its public institutions. This contention is, in fact, sound and the relatively low (yet rapidly increasing) litigation rate or small number of lawyers that still characterize the Japanese scenario in comparison to that of the US and the European Union should not be used to argue otherwise. What Japan’s legal reforms seem to signify is indeed the political intent to move from the Meiji oligarchy’s “occasional accommodation of the public wishes” to a fully, and thus not “pseudo,” democratic scheme of legitimation and accountability.

Yet, I submit, the impact of these “transparency” and “accountability” transformations, as well as the normativization trend generally, ought to be appreciated in light of the Japanese system’s peculiar capacity to combine politico-juridical change with stability. Caution is thus required, as historically, the development of Japan’s politico-juridical consciousness has always been characterized by the continuous creation, destruction, and “restorative” reconstruction of networks and areas of intervention for instrumentalist purposes. Furthermore, renovationist nationalism has been a key component of Japan’s development since the Meiji period.

The above-listed reforms, I contend, are not extraneous to this “constant condition” as they have impacted more on the existence, rather than essence, and thus on the modality rather than substance, of politico-institutional formations, reconfigurations, and performances. More precisely, taking what has been argued by Takayuki Ii one step farther, I would suggest that what they have led to is a zone of

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113 See supra note 61, regarding the influence of Kawashima’s scholarship on the academic debate on the subject.
114 VAN WOLFEREN, supra note 9, at 182.
116 MCVEIGH, NATIONALISMS OF JAPAN, supra note 2, at 12. See id. at 56–81, 103; MCVEIGH, THE STATE BEARING GIFTS, supra note 98, at 10.
117 Id. at 66.
intersection between Japan’s “mediatory universe”. This “universe” is characterized by historic inter-connected levels of dynamic interaction and access to information schemes as well as the centralized, top-down mechanisms that have always underpinned the loyal, culture-oriented cohesiveness of the Japanese in regards to their construction of systems of supervision and regulation.

If we are to analytically uncover the inner functioning of this double-featured scheme in light of Japan’s recent legal innovations, we need to overcome the limits of the debate on the importance of choosing between a merely cultural or socio-legal approach to Japan’s normativization. Rather, we need to for an inter-disciplinary tertium comparationis that combines the strengths of both, as well as that of other subjects such as anthropology and political science. In doing so, it will become clear that, contrary to what has occurred in the West, methods of output recognition are used to express, rather than drain, the concept of the political and provide it with a “tangible” platform of visibility in Japan. If anything, the intent of the JSRC’s 2001 Recommendations to enhance popular sovereignty by (also) “shift[ing] from ex ante regulation by public authorities to ex post relief through the judicial system” and promoting the “rhetoric of improved legal capacity and greater popular participation in the law” is testament to this.

Clearly, for politico-juridical legitimation to occur, its output must be visible and discernible. Hence the responsiveness and adaptability of networks at the macro, meso, and micro levels increase social involvement and produce, as Ikeda and Richy have recently expounded, “political knowledge.” This analytical view is in line with Okimoto’s well-known description of Japan as a “networked” or “societal” state in which “[p]olitical power . . . is . . . exercised through a complex process of public-private sector interaction, involving subtle give-and-take, not frontal confrontations.”

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120 I partially agree with Eisenstadt, supra note 36, at 11–17.

121 See Bruce Stronach, Beyond the Rising Sun: Nationalism in Contemporary Japan 117–19 (Praeger 1995).

122 Wolff, Nottage, Anderson, supra note 7, at 2,11.


Furthermore, such an understanding seems to be in line with the pluralist “horizontal-fragmented metaphor”\textsuperscript{126} that Richardson used when describing how Japanese politics is a “matrix of high-level, middle-level, and low-level decisions”.\textsuperscript{127} In his words, “[t]here are many decision points and many channels through which popular concerns can be expressed and the government made accountable.”\textsuperscript{128} The workings of such mechanisms, and in particular the “existence of a coordination-integration dynamic in [Japanese] politics,”\textsuperscript{129} fall perfectly within the relational and compromise-oriented “gift-giving” \textit{modus operandi} upon which, as McVeigh has persuasively demonstrated,\textsuperscript{130} Japanese state-society relations depend, and which also informed the enactment of the 1947 Constitution.\textsuperscript{131} Thus, paraphrasing McVeigh, we may say that output systems of politico-juridical validation also act as “historical constructions” that make it possible for the Japanese to be “statists.”\textsuperscript{132}

Importantly, the workings of Japan’s power relations demonstrate that it cannot be inferred from the “fiduciary” essence of this bargaining relationship that counter mechanisms of practical politico-juridical supervision are not required. On the contrary, the whole system would have collapsed long ago without them. Richardson summarizes this well when writing that while the Japanese “government is responsible to the electorate and its interest groups, . . . responsibility comes most often in fragmented, decentralized bargains and less often by way of programs.”\textsuperscript{133} The failing experience of the first Democratic Party of Japan’s premiership, that of Hatoyama Yukio in 2009, brought to an end because of the government’s inability to keep the promises of change and deliver to the voters the reforms they asked for, supports Richardson’s assertion. The same may be said about the working logic of Japan’s bureaucratic branches.\textsuperscript{134}

The anthropological and socio-political essence of this “bargaining” attitude has been much debated, especially in regard to the

\begin{footnotesize}
\textsuperscript{127} Richardson, \textit{supra} note 43, at 248; see also \textit{id.} at 240.
\textsuperscript{128} See generally Richardson, \textit{supra} note 43.
\textsuperscript{129} Richardson, \textit{supra} note 43, at 258.
\textsuperscript{130} McVeigh, \textit{supra} note 98.
\textsuperscript{131} See Dower, \textit{supra} note 63, at 346–404 (in particular the magisterial reconstruction).
\textsuperscript{132} McVeigh, \textit{supra} note 2, at 84.
\textsuperscript{134} Miwa and Ramseyer, \textit{supra} note 98.
\end{footnotesize}
well-known mutual back-scratching deals (jinmyaku) that underpin network formations at the upper levels of Japanese society. What is relevant to our purpose here is that the view that emphasizes this ‘do ut des’ mindset finds a valuable ally in the recent work of Asako, Iida, Matsubayashi, and Ueda. By applying their theoretical model to both dynastic- and non-dynastic politicians, they found that the former category enjoys specific “electoral and bargaining advantages” that “bring more distribution to the district” and that, in turn, result in a higher probability of getting elected. A similar suggestion was also made by Ono, whose empirical analysis led him to claim that the main aim of “legislators with local-level political experience is to engage in particularistic pork-barrel activities that will benefit their local interests.”

The trajectory of these accounts seem to confirm the necessity of analyzing the social formations and power configurations that underpin Japan’s politico-juridical dimension(s) from a contextual and dynamic perspective. In fact, contrary to the Western conception broadly understood, in Japan political economic “guidance” (shidō) is “bestowed upon society by officialdom” and yet structurally informed by the output logic of political recognition. Van Wolferen has aptly defined this relationship as the “emotional trust” of the Japanese toward the performative “benevolence” of their government. The fact that administrative guidance has been a major target of liberal theorists is thus not surprising.

What matters, then, is that in the West, output mechanisms of “(non-)recognition,” “(non-)legitimacy”, and “(non-)accountability” perform a post-political function. Conversely, when it comes to describing the Japanese paradigm, the “(non-)” and “post-political” labels ought to be dropped, as output schemes have always been a vibrant instrument not just for the maintenance of social and economic order by public-policy makers, but for the signification of the concept of the political.


136 Yoshikuni Ono, Personal Attributes of Legislators and Parliamentary Behavior: An Analysis of Parliamentary Activities among Japanese Legislators, 16(1) JAP. J. P. SC. 68 (2015); see CURTIS, THE JAPANESE WAY OF POLITICS, supra note 9, at 222.

137 EISENSTADT, supra note 36, at 380.

138 MCVEIGH, supra note 98, at 9. See also id. at 98–99; EISENSTADT, supra note 36, at 54–57 (the role that “authority” plays in Eisenstadt’s explanation of governmental guidance).

139 VAN WOLFEREN, supra note 9, at 202; see also MURPHY, supra note 9, at 83.


141 See MCVEIGH, supra note 98, at 5 and 7 (where the legitimacy of the state is
While in the West, systems of PNG have officially emerged to overcome political blockages through more horizontal concertation and less vertical imposition, the need to transcend classic state-based patterns of legislation, regulation, and administration has not emerged in Japan, where responses to new problems and new risks have been provided through ongoing elaboration and reflection on classic practices of governing. That the Japanese dimension is characterized by a considerable degree of (a paradoxically stable) internal dynamism is proved by Japanese rulers’ ability to “use” social networks and power settings to provide a solid basis of local support that can be discretionarily used over national and international policy issues.

IV. CONCLUSION

Official presentations and conventional story-telling narratives tell us that Japan’s recent legal development has to be inscribed within the liberal movement that seeks to reduce the state’s intervention in societal affairs. Thus, as lawyers, when it comes to addressing Japan’s ambiguous relationship with the liberal global-order project, we are confronted with both a question of substance and one of method. In particular, the former question refers to the essence of the nationalistic vision that Japan’s guardians share of their own polity. The latter refers instead to the modality through which the neorealist kokutai legitimizes and promotes itself in politico-juridical terms. Both questions share a common core, as it was the US indirect super-national government that reinforced pre-war conceptions of power relations and old ties among the conservative elites.

The legal comparatist’s insights may be of fundamental assistance when embarking upon the delicate enterprise of answering these questions. When writing on the “convergence-divergence debate,” Sebastian McEvoy has argued that one day “it will be paradoxical to argue against

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143 The conservatives’ collaboration with the occupation authorities to ‘secularize popular veneration of the throne’ should be analyzed from this standpoint. See DOWER, supra note 63, at 204–13 and 331; see also KOH, supra note 60, at 256; but see generally RAY A. MOORE & DONALD L. ROBINSON, PARTNERS FOR DEMOCRACY: CRAFTING THE NEW JAPANESE STATE UNDER MACARTHUR (Oxford U. Press 2008) (according to which the collaborative partnership between the US and Japan has instead led to a fully-fledged modern constitutional democracy).
the harmonization and even the unification of the laws around the globe: legally, here will be everywhere.”144 If we agree with him and consider the involvement of comparative law scholars in the de-politicization and de-juridification of the world,145 both the official and “occult” aims of the comparative method described in the introductory part of this paper may shed new light on the use that Japanese legal scholars and institutional actors make of the law’s authoritarian claims to oppose liberals’ totalizing strategy.146

Paraphrasing Ozaki, it could then be argued that Japan is not part of the liberal global-order project simply because it is experiencing the very opposite of the phenomenon that is currently occurring in the West. That is, it is “turning from a law-aversive into a law-using society.”147 This straightforward use of Japan’s so-called “legal turn” (hōka) is surely sound and helps us understand why (the) law is no longer “synonymous with pain or penalty,” as put forward by Noda.148 Importantly, such a view would reinforce those claims against the risk that, without methodological rigor, “comparative law becomes an idle exercise in pseudo-comparative sociology.”149 However, positive analysis alone does not provide the


145 See generally Siliquini-Cinelli, “Against Interpretation”?, supra note 10; Siliquini-Cinelli, Schütte, Conceptualizing the Schmittian, supra note 29.


147 Ozaki, Law, Culture and Society in Modernizing Japan, The Changing Role of Law in Japan, supra note 8, at 62.

148 NODA, supra note 4, at 159.

Western interpreter with the instruments that s/he needs to appreciate why the Japanese order is still characterized by the spatial (\textit{Ortung}) and juridical (\textit{Ordnung}) components of any legal order targeted by the promoters of universalized liberalism.

This is not to say that attention should not be paid to the normative processes that have made (and still make) it possible for law in Japan to play a diametrically opposed role to that which “global (non-)law” does in emptying the anthropological and socio-political existential function of the jurist, and the role that law has in “normalizing” our actions.\textsuperscript{150} Such an analysis is unavoidable. Nonetheless, the increase of local politico-juridical consciousness and the instrumentalist use made of it by Japanese rulers cannot be fully grasped without an unconventional \textit{modus investigandi} that transcends the limits of mere positivist and behavioral institution-oriented lines of inquiry.\textsuperscript{151} In addition to recent findings in political science that this paper has discussed, the legal comparatist may also count on Benedict’s anthropological account of Japan’s “situational” morality,\textsuperscript{152} Muramaki’s definition of Japanese culture as hermeneutico-contextual,\textsuperscript{153} Nottage’s evidence of how sociocultural standards still affect Japanese law’s development,\textsuperscript{154} or Wolff’s discussion of the “socio-legal and empirical implications of law’s rising influence in Japanese popular culture.”\textsuperscript{155}

In fact, legal comparatists have long been aware of the need to adopt “interdisciplinary approaches” to uncover “the multiple dimensions of globalization and its effects on local legal traditions.”\textsuperscript{156} If we apply this awareness to the Japanese case, it would emerge that even though, as Yoshino points out, “[g]lobalization continues to be on the agenda,”\textsuperscript{157} the

\textsuperscript{150} Siliquini-Cinelli, “\textit{Against Interpretation}”, \textit{supra} note 10; Siliquini-Cinelli, \textit{Imago Veritas Falsa}, \textit{supra} note 41.

\textsuperscript{151} I refer to how the scholarship of Kawashima has influenced past and recent debates on the subject. \textit{See supra} note 61.

\textsuperscript{152} B\textsc{enedict}, \textit{supra} note 43.

\textsuperscript{153} \textit{See generally} Yasusuke Murakami, \textit{Two Types of Civilization: Transcendental and Hermeneutic}, \textit{1 Japan Review} 1 (1990).


\textsuperscript{157} Kosaku Yoshino, \textit{Further Reflections on Sociology in Japan}, \textit{13(2) Jap. J. P. Sc.} 191, 198 (2912). \textit{See generally Carin Holroyd & Ken Coates, Japan in the Age of Globalization} (Routledge 2012); \textit{contra} Robert Dujarric & Ayumi Takenaka,
reason for Japan not being part of the post-political liberal order is that it has never been, does not constitute, an oikonomia as defined by Agamben. The extent to which the well-known linkage between politicians (state) and business (civil society) recalls the “marketing” of political candidates described by Schumpeter, Hayek, and Schmitt,\(^\text{158}\) should not confuse anyone. What counts is that Cutler’s notion of “mercatocracy,”\(^\text{159}\) which she used to describe the pluralistic influence of the global corporate elite over law and regulatory arrangements, would not be apt to describe the essence of Japan’s “nonliberal”\(^\text{160}\) national economy.

Thus, while in the West, the administrative “de-democratic” system brought about by the merging of “corporate and state power”\(^\text{161}\) has nullified both authority and sovereignty, in Japan, power is still exercised politically and grounded in authoritarian, sovereign, and identitarian regulative instances. In other words, while the Western depoliticization of societal affairs has substituted government with governance through what Catá Backer has defined as the suspension of “the presumption of an identity between state and government,”\(^\text{162}\) Japan’s regulatory structure is underpinned by the (Japanese) concept of the political in every mode in which law’s organizing claims present themselves. As a result, the Japanese cannot be defined as “(non-)humans” who, in the post-historical age, merely behave according to the mechanical and recursive schemes promoted by liberalism. Notwithstanding the use of liberal labels and the ambiguity of several socio-economic policies designed officially to empower the “company culture,” the above-analyzed preconditions for a country to be affected by liberalism’s neutralizing dictum have not been fulfilled with respect to Japan. Therefore, Kojève’s analysis ought to be preferred over Supiot.

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\(^{158}\) Siliquini-Cinelli, *Hayek the Schmittian*, supra note 10; see also Eisenstadt’s quote, supra note 86.


\(^{160}\) See generally Streeck, supra note 75.

\(^{161}\) Brown, *WE ARE ALL DEMOCRATS NOW . . .*, in *DEMOCRACY IN WHAT STATE?*, supra note 33, at 50.

This can be further understood if we pause for a moment and reflect on why, seventy years ago, Maruyama, who made the fight against authoritarian government the canon of his intellectual engagement, quoted Schmitt when analyzing the consequences of the “post-Reformation wars” and contending that the European (nation-)state “adopt[ed] a neutral position on internal values.”

To the contrary, “Japanese nationalism strove consistently to base its control on internal values rather than from external laws.” As a result, Maruyama further maintained, “the Japanese State never came to the point of drawing a distinction between the external and internal spheres and of recognizing that its authority was valid only for the former.”

The apparent similarity between Schmitt’s belief that the state’s political existence requires the sovereign right of self-defense and Abe’s reintroduction of collective self-defense should not confuse us. What matters is that Japanese nationalism is not affected by the liberal and positivist schism between juristic heteronomy and moral autonomy criticized by Schmitt and which has determined the modern displacement of the concept of the political in the Western tradition. In this sense, the fact that in his 1946 essay Maruyama described the Japanese experience as anti-Schmittian reinforces the view that Ogyū Sorai’s Chinese-oriented politico-totalistic view has been concretized in the Japanese dimension.

However, few would doubt that a political shift has occurred since McCormack suggested that “[t]he idea of restoring the essential features of the 1889 Constitution that was present throughout the Cold War decades” had been put aside with the end of the conflict. It is equally true that Japanese nationalism is “ordinary” in the sense that it has a pluralistic, malleable configuration, as is the case with all nationalisms. These aspects notwithstanding, it seems to me that Japan has rediscovered the

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163 MARUYAMA, supra note 99, at 3.
164 Id. at 4.
165 Id. at 5. See also McVEIGH, supra note 2, at 43, according to whom “[i]n early modern Japan, . . . discourses about patriotism and politics implied . . . the traditional ideals of saisei-itchi (‘oneness of worship and governing’) and seikyō itchi (‘unity of politics and religion’).”
167 Siliquini-Cinelli, Imago Veritas Falsa, supra note 41.
168 See RICHARDSON, supra note 43, at 200–39 (Richardson describes Japan’s political machine as a “Confucian welfare state” and a “party clientelistic state”); cf. EISENSTADT, supra note 36, at 141–60; VAN WOLFEREN, supra note 9, at 164–65.
169 MCCORMACK, THE EMPTINESS OF JAPANESE AFFLUENCE, supra note 9, at 176.
170 McVEIGH, supra note 2.
state-oriented utilitarian view that, as Tetsuo Najita successfully contended in his scholarship, informed the idealism and pragmatism of the Meiji period.\textsuperscript{171} This is why, in his patriotic speech to the US Congress, Abe spoke of a “new” Japan which, as Emperor Hirohito declared in the New Year’s Day rescript, is such only because it has “rediscovered” what rendered it special in the past. In particular, bearing in mind Gellner’s argument that it is nationalism that “makes” nations, not the reverse,\textsuperscript{172} the words used by Abe confirm that Japan’s neorealist roadmap is informed by frustration with the post-war domination achieved by left-wingers who have undermined the sense of national pride (kokumin dōtoku). It is this renovationist spirit that proves that the above-listed “Western” reforms express more a structural-organizational, rather than substantial-existential, development toward liberal policies.

There are both theoretical and practical explanations for this renovationist choice. Theoretically, despite the fact that the 1947 Constitution provides for equality, freedom of expression, and extensive rights,\textsuperscript{173} the belief of Japan’s ruling elite is that, having been “contaminated” by US foreign imperialist policies, post-war nationalism has always lacked what, Maruyama has defined as Japan’s “mission idea.”\textsuperscript{174} Yet, considering its ideological and practical essence, the kokutai needs to present itself within the seitaï, or sphere of pragmatic government, to perform its regulative instances.\textsuperscript{175}

With Koizumi and Abe, this combination has assumed the form of ideological-conservative political leadership.\textsuperscript{176} Considering Maruyama’s


\textsuperscript{172} Ernst Gellner, \textit{Scale and Nation}, 3 Ph. Soc. Sc. 1 (1973).


\textsuperscript{174} Masao Maruyama, \textit{Nationalism in Japan: Its Theoretical Background and Prospects, Thought and Behavior in Modern Japanese Politics}, supra note 99, at 135–57, 150; see also Ivan Morris, \textit{Nationalism and the Right-Wing in Japan}, (Greenwood Press 1960). Dower acutely noted that “the [victors’] reformist agenda rested on the assumption that, virtually without exception, Western culture and its values were superior to those of ‘the Orient.” Dower, supra note 63, at 211. For an overview of the different trajectories pursued by Japan’s post-war nationalistic movements, see Ruooff, supra note 63, at 158–201. On Japan’s “degraded present”, see McVeigh’s discussion of Matthew Levinger and Paule Franklin Lytle’s scholarship in McVeigh, supra note 2, at 65–68.

\textsuperscript{175} See supra note 18 and 69.

definition of the *kokutai* as an “absolute value,” it is all the more evident that Koizumi’s green lighting of the 2004 intervention in Iraq (in contravention of Article 9 of the 1947 Constitution) as well as the nationalistic reforms listed in the introductory part of this contribution, share important structural components with Japan’s pre-war nationalism. More particularly, Maruyama’s description of that type of nationalism may be overlapped with Abe’s willingness to restore the pre-war fundamentals of “beautiful Japan”. Therefore, Maruyama’s politico-realist call for national identity via independent thinking (*shutaisei*), democracy, and unarmed neutrality, has been listened to only partially.

A final comment is in order. The reflections in this article share the premise of the innumerable accounts of the process of “Japanization” that Japan has always imposed upon imported ways of thought and practices. However, the foregoing discussion is only partly compatible with the line of reasoning that emphasizes what in comparative scholarship is commonly known as “Japanese exceptionalism.” The so-called *Nihonjinron* literature is aimed at affirming the uniqueness of Japanese society through a comparison with other forms of civilization. As Sugimoto has noted, this quest for authenticity and purity has been pursued *ad nauseam*. To propose this approach here would be inappropriate and misleading. As discussed, the ultimate goal of the liberal global-order project is to create an intangible “(non-)reality” of dehumanized objective regularities through the imposition of reason-oriented uniform mechanisms of societal interaction. This process dissolves the presentification of local living sensibilities via definition of identities. Thus, any manifestation of sovereign politico-juridical and self-affirming consciousness, not just that of the Japanese, may be considered as an “exception” to the liberal “form-of-(non-)living.”

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177 MARUYAMA, supra note 99, at 6.

178 The dispute between the lower courts, according to which the Japanese Self-Defense Forces are unconstitutional, and the higher courts that overruled their judgments is well-known.


181 Maruyama, supra note 99, at 152; see also Sasaki, supra note 36.


183 Siliquini-Cinelli & Schütte, supra note 29.