1.4 Foreign Influences

Japan's law system has experienced significant effects from foreign institutions three times in its history. Chinese law was introduced in the seventh and eighth centuries, continental European law in the Meiji era, (Anglo-)American law in the 1920s and, to a greater extent, after 1945. Even if the literal translation of the foreign law was enacted the adoption did not usually result in a lasting application in exact accordance with the original meaning. The foreign law was 'japanized'. The old Chinese codes were brought into line with Japanese legal understanding and its needs by way of amendments (*kyaku*) and statutory instruments (*shiki*). When the main western (especially German) codes were received the Japanese legislator brought, more or less, indigenous ideas into the laws; after a period of interpreting the new law in accordance with the academic view of the scholars in the country of origin, the jurists were also careful to consider the particular Japanese attitude and brought any such features to bear in their perception. The strong influence of American law was mitigated after control by the occupying powers had ended in the early 1950s.

The course from the beginning of the Meiji period can be summarized as follows:

On 6 April 1868 the emperor proclaimed: "Knowledge should be sought throughout the world and thus the foundation of the Imperial polity shall be strengthened".[1] This meant the definite end of the seclusion of Japan which had been instituted by the *bakufu* about 230 years before. The search for knowledge throughout the world also concerned the legal systems; this issue developed into a topic of major importance inasmuch as that the ensuing share in world trade and the effort to achieve revision of the unequal treaties which, unfavourably for Japan, the *bakufu* had concluded with the United States and some European governments, were top objectives of Japan's policy.

There was a choice of three ways to create a modern legal system: (i) to build up a new home-made system independently by themselves—that would take too much time, (ii) to introduce English-style foreign law—a venture beyond hope because of the vast realm of case law, (iii) to adopt European codified law—the only practicable method for an approach to the reform. Consequently, the Japanese

[1] The fifth article of the Charter Oath of Five Articles, see chapter 'Constitutional Law' in this volume.

began to study the European codes in earnest. The object of study was French law. Many jurists had a better command of the French language than of other western tongues, and a modern code, the *Code Napoléon*, existed in France and provided a suitable model.[2] The energetic Minister of Justice, Shinpei ETŌ (in office 1872–1873), ordered an urgent translation of that code, and instructed the translator simply to replace the words 'France' and 'French' with 'Japan' and 'Japanese', and the result, regardless of translation errors, would be enacted as Japanese law.[3] Such a law never appeared, but French law continued to be the focus of the consideration for a reform.

Japanese officials travelled abroad in order to study the foreign systems, and foreign experts were invited to advise the authorities regarding the creation of a new legal structure. Then, foreigners were employed under contract with the responsible ministry.

On 9 November 1871 the Law School (*Meihōryō*) was set up within the Ministry of Justice.[4] In August 1872 Henri DE RIVEROL of France was engaged as a teacher, and in March 1874 the French jurists Emile Gustave BOISSONADE de Fontarabie[5] and Georges BOUSQUET were also employed as experts in French law. Other French teachers and an American lawyer followed.[6] French law was the favourite of the Ministry of Justice which, like other ministries,[7] also consulted separate foreign experts. There were men from England, the USA and Italy. BOISSONADE dominated, and it was he, in his additional capacity as an adviser to the government, who introduced principles of French law into the first important new codes, the Penal Code and the Code of Criminal Instruction, both of 1880. The Penal Code replaced the previous new penal laws: the Provisional Penal Code of 1868,[8] the

[2] J.V. FEINERMAN, The Meiji Reception of Western Law, in H.E. LESER and T. ISOMURA (ed.), Wege zum japanischen Recht (Roads to Japanese Law), pp. 95–105, (1992).

[3] G. RAHN, Rechtsdenken und Rechtsauffassung in Japan (Legal Thinking and Legal Opinion in Japan), p. 82, (1990).

[4] See chapter 'Legal Education' in this volume.

[5] BOISSONADE, in the government's service from 1873 to 1895, was an adviser with considerable influence in matters of legislation and held in high esteem.

[6] See chapter 'Legal Education' in this volume. The dates were taken from the *Shihō enkakushi* (A History of Justice), compiled by the Ministry of Justice and edited by the Jurists' Association in 1939.

[7] Prior to the accomplishment of administrative centralization regional governments sought advice from foreigners, though apparently not on broad legislation but on military and technical know-how.

[8] It was modelled on the Japanese *Yōrō*-code (8th century), the Chinese codes of

Outline of the New Criminal Law of 1871,[9] and the Amended Criminal Regulations of 1873 as well as several other regulations to follow.

Similar to the Penal Code there were earlier legislative endeavours to regulate criminal action.[10] The influence of western ideas first became noticeable concerning the application of torture which was, under certain conditions, allowed in order to obtain the confession of the suspect. Criticisms by Japanese jurists were strongly supported by BOISSONADE, and finally the rule of evidence, art. 318 of the Amended Criminal Regulations of 13 June 1873, was revised: the original wording "the judgement of all crimes shall be based upon a deposition" [= written confession] was altered to "the judgement of all crimes shall be based on proof". That meant a change to the principle of free conviction of the judge, and there was no longer a reason for torture.

BOISSONADE's engagement was not limited to penal law and criminal procedure. He was asked to give advice to the government or to draw up drafts concerning laws on the organization of the courts, the civil code and the code of civil procedure (this draft was incomplete). He also gave his view about the revision of the unequal treaties. Lecturing at the Law School of the Ministry of Justice and the Meiji (Special) Law School,[11] BOISSONADE acquainted the students with the French doctrine of natural law and civil liberties, his preferred subjects of research.

While French law was the main source for legislative work of the Ministry of Justice to modernize the legal system,[12] Anglo-American law became the favourite of Tokyo University. At both the university and in the ministry,[13] the aforementioned foreign areas of law

651 and 1397, the Japanese Code of One Hundred Articles (*Kujikata osadamegaki hyakkajō*) of 1742, and the draft of a penal code prepared by officials of the Higo domain in Kyūshū.

[9] It was also formed on old Chinese and *bakufu* law without western influence worth mentioning.

[10] See P. SCHMIDT, chapter 'Criminal Procedure', in this volume. R. ISHII, *Meiji bunkashi, 2. hōseihen* (Cultural History of the Meiji Era, vol. 2, Legal System), 1954, pp. 257–270. Adapted translation by W.J. CHAMBLISS, Japanese Legislation in the Meiji Era, pp. 320–335, (1958).

[11] *Meiji (senmon) hōritsu gakkō*, privately founded in 1881, predecessor of the Meiji University (*Meiji daigaku*), orientated towards French law.

[12] Even the Supreme Court (*Daishin'in*), established in April 1875, was modelled on the French *Cour de Cassation*.

[13] Among the topics of the judges examination, held by the Ministry of Justice from 1885, were English and French property law, civil procedure, law of contract, law of evidence, excluding German law. See chapter 'Legal Education' in this volume.

and their tradition were not the only matters in the curriculum; the university also offered lectures on French law. The attachment to a foreign legal system was the consensus.

In the early years of the 1880s the government began to concentrate on German law, and the trend within the academic sphere to study German law also became more widespread. The government employed several German jurists as advisers whose duties included drafting of laws.[14] Penal law and the law of criminal procedure were BOISSONADE's domain. The two codes governing these areas were enforced from 1882. However, soon afterwards amendments were contemplated, and the new Penal Code (*keihō*) of 1907 showed a remarkable influence of German law,[15] and in 1922 the new Code of Criminal Procedure also followed the German system.[16]

German advisers in the 1880s attended to other fields. The foremost men were: H. ROESLER, a former professor of Rostock university, was the author of the first Japanese Commercial Code and became involved in preparatory work for the constitution, and also lectured at the Tokyo University; P. MAYET, an economist,[17] dealt with postal organization, insurance, and the savings bank system; A. MOSSE, a judge, was occupied in various branches of law, mainly in creating the regulations for the administrative system of regional self-government; O. RUDORFF, a judge, drafted the Law for the Constitution of the Courts; H. TECHOW, a judge, public prosecutor, and government official, was engaged in the reform of the school system and also drafted the Code of Civil Procedure; H. MOSTHAF, a government official, was adviser to the Ministry of Foreign Affairs. A few other jurists were hired.

[14] Since the engagement of foreign advisers has frequently been described in general and in detail, only a brief summary is given here. A selection of literature regarding this topic is as follows: H. JONES, Live Machines. Hired Foreigners and Meiji-Japan (1980). P.-C. SCHENCK, Der deutsche Anteil an der Gestaltung des modernen japanischen Rechts- und Verfassungswesens (The German Contribution to the Modern Japanese Legal and Constitutional System, (1997). J. MURAKAMI, Einführung in die Grundlagen des japanischen Rechts (Introduction to the Bases of Japanese Law), (1974). K. TAKAYANAGI; A Century of Innovation: The Development of Japanese Law, 1868–1961, in A.T. VON MEHREN (ed.), Law in Japan, (1963). Z. KITAGAWA, Rezeption und Fortbildung des europäischen Zivilrechts in Japan (Reception and Further Development of European Civil Law in Japan), (1970). W. RÖHL, Fremde Einflüsse im modernen japanischen Recht (Foreign Influences in Modern Japanese Law), (1959).

[15] The German Penal Code had been enacted in 1871.

[16] For these two branches of law see Z.U. TJONG/P. EUBEL (ed.), Das japanische Rechtssystem (The Japanese Legal System), p. 210, and J. HERRMANN, ibid., p. 257 (1971).

[17] He had studied various subjects without taking his degree.

With the exception of Prof. ROESLER, the above named persons had been practising jurists in Germany. Their duties in the Japanese service were also of a practical nature. Besides that, scientists of jurisprudence from Europe and America gave lessons on western law at educational establishments. The study of German law gained increasing attention, especially after the Councillor of State H. ITŌ returned from Europe where, commissioned by the *tennō*, he had studied existing constitutions, particularly the Prussian constitution, and had been advised by the famous professors R. VON GNEIST (Berlin) and L. VON STEIN (Vienna) on constitutional law and detailed subjects. Japanese professors of law studied in Germany, and German jurists were invited to teach German law in Japan. Some of the above mentioned practitioners may also be called teachers or instructors of German law because their advice could sometimes necessitate regular lectures. However, when the official reformers finally decided to accept German law[18] as a guideline it was necessary for the relevant tenets to be intensively studied. In addition to the research of Japanese scientists in Germany, German experts were employed by Tokyo University and the 'School of the Society for German Science' (Schule des Vereins für deutsche Wissenschaften, *doitsugaku kyōkai gakkō*) to lecture on Roman and German law. K. RATHGEN (public law), L. LÖHNHOLM (civil law), U. EGGERT (finance law), and H. WEIPERT (civil law) at Tokyo University; and L. LÖHNHOLM, G. MICHAELIS, O. NIPPOLD, and E. and F. DELBRÜCK at the school of the said society,[19] were all well known figures in Japan.

The further development of Japanese civil law was strongly influenced by German legal science, theories, dogmatics, and systematization. This situation originated from the argument between the adherents of the French and the English direction over the civil code. Finally, the first three books of the new Civil Code (*minpō*) of 1898 were modelled on the drafts of a German civil code with several items added or modified based on other foreign regulations.[20] Traditional Japanese views were also taken into consideration. The family law (book IV) and the law of succession (book V) together maintained former native notions.

[18] Prussian law was at the fore.

[19] The best description of that school has been presented by SCHENCK (note 14). Presidents of the school were famous Japanese dignitaries, and the Japanese government made financial contributions.

[20] Preparatory research by the Japanese extended over more than thirty foreign legal systems. Z. KITAGAWA (note 14), p. 43.

In its entirety the Civil Code showed itself to be an eclectic law with German law as the prevailing pattern. In order to thoroughly understand that law academic teachers and professional users studied German jurisprudence and applied the regulations in accordance with the established interpretation thereof. This course did not go well with indigenous Japanese legal thinking which, being concrete and intuitive, competed with the abstract and discursive direction of the German 'Begriffsjurisprudenz' (conceptional jurisprudence). Inevitably, the juxtaposition of the two lines of thinking caused inconsistencies in the judgement on civil cases. There were judges who applied the law in strict accordance with the conceptional method—in this case the real situation might be neglected, and the judgement left the parties in the dark. Other judges based the judgement on the native way of thinking and gave a pseudo-reason in compliance with the German style—in this case the judgement would hardly be comprehensible.[21]

The German influence diminished due to the increasing consideration of traditional features by Japanese jurists. Criticism of the predominance of the conceptional jurisprudence began to grow towards the end of the Meiji era, and after the defeat of Germany in World War I contributed to a change of orientation: turning to 'living law' by taking heed of the social actuality and finding the solution of legal actions with a view to equity. The theory of free law (*jiyū hōron*, the German Freirechtslehre), the maturing sociology of law (*hōshakaigaku*), and the Anglo-American case-method served as sources for the new trend. The German way of applying the written law, seen as favouring individualism, was pushed into the background but survived as the framework of Japanese civil law. It continued to exist as a framework during the nationalist period (1926–1945), which was characterized by the recollection of original Japanese values and by giving these values priority over all national affairs.

In the first years after the end of the Pacific War the democratic reforms of the American occupying power also, as a matter of course, affected the legal system. When the occupation ended in about 1950 the Japanese legislators gently set about examining the laws and harmonizing the new law with traditional aspects of the Japanese way of thinking. The diverse foreign influences, especially by French, German, and Anglo-American law, have left very recognizable traces up to the present time.

[21] G. RAHN (note 3), pp. 114–129.