INFLUENCE OF FOREIGN LAW AND COMPARATIVE JURISPRUDENCE

I. A Problem of Comparative Jurisprudence

There have been several conspicuous changes in the history of the studies in foreign laws or in the relation between the Japanese and foreign legal systems. To sum up, the earlier half of the Meiji Era (until about 1886) saw the prosperity of studies in French and English laws but later various codes came to be framed under the powerful influence of the German law. Since then the balance inclined in favor of the German law, while the importance of the French and English laws had remained only subsidiary. But the end of the World War II brought about restored interest in the English and especially American laws.

More detailed explanation will show there were four periods with particular characteristics.

A. The First Period (c1867-c1896; from the begining of the Meiji Era to the apparent achievement of codification)

This was a period when our country was less sufficiently equipped in the legal system and in need of the information about the Western legal systems for the development of its own legislation, administration of justice and jurisprudence. At this stage "Western" meant "French" or "English". But at the latter half of this period, it came to mean "German".

This period was characterized by the fact that the formation of our own legal system was nothing but indiscriminate introduction of the foreign legal cultures into Japan.

B. The Second Period (c1897-c1919; from the apparent achievement of codification to World War I.)

Once the need to frame a series of codes after the German law had been satisfied, there followed the secondary need of

studying jurisprudence or giving legal education on the basis of "home-made" codes. But in such cases the German law was referred to most often while the French and English law were paid less attention to.

In this period establishing our own jurisprudence was considered as referring to the foreign (German) legal cultures.

C. The Third Period (c1920–c1944; covering both World Wars.)

With the outbreak of World War I there came a great change in our relation to the foreign laws. It brought about separation from the German legal culture and closer relation to the French and English legal cultures. Moreover the radical change in social and economic conditions after World War I ushered in a new period in the studies of Japanese jurisprudence. The result of the World War was the waned influence of the unquestioned authority that the German law had exerted for a long time upon Japanese jurisprudence, while the French and English (though less often) legal cultures began to be studied and paid attention to with renewed interest.

The characteristics of this period was that our legal system was reconsidered in the light of foreign legal thought.

But towards the latter half of this period there came into being a suggestion of another World war which made it almost impossible to refer to foreign legal cultures.

D. The Fourth Period (1945–1969; from the end of World War II to the present time)

The end of World War II brought in still greater changes in the relation between the Japanese and foreign laws, that is, the beginning of partial reception of the English and American laws and increasing interest in the Soviet law. In the face of this change Japanese jurists were to come across still more and newer problems and difficulties.

In short this period saw the reconstruction of the Japanese legal system by the partial reception of the English and American

laws.

Complexity of the relation between the foreign and Japanese legal systems and the valuable contributions made by foreign legal systems attracted the attention of earlier Japanese jurists and there had been accumulated some amount of research of papers and books since then. Most of them could be classed under the title of "The Influence of Foreign Law in Japan." However, they could be divided broadly into three phases.

The first one is pointing out and asserting that there was an influence or influences. This was done at the earliest stage of research and perhaps the greater part of the papers and books belonged to this stage.

The second one is giving account of or demonstrating the fact of an influence or influences by studying the detailed historical background. This kind of approach appeared at the later stage of research and less papers and books were written about it. This second approach, in many cases, confined itself to the mere comparison of two different texts or sentences of decisions or only satisfied itself in finding formal differences in two different institutions. Naturally the result of this was far from successful.

Dissatisfaction with this limited way of comparison led the jurists to apply more scientific and extensive method to the studies of comparative jurisprudence. Hence the third one which examines the quality or characteristics of the influences that Japan received basing on various evidences piled up by the first and second stages of researches.

Studies of this kind require the exhaustive facts about the foreign legal influences and complete grasp and apprehension of the social background. At this latest stage, researches aim at a scientific and extensive understanding of the reception in terms of comparative jurisprudence. The results of the latest stage is still left in future.

Now here the Institute of Comparative Law of Waseda Uni-

versity has been making a common study of various foreign legal influences under the title of "The Influences of Foreign Laws upon the Modernization of Japan". Especially our chief interest is centered upon the question of what "the influence of foreign law" is. To solve this question, it is necessary for us to become well-informed not only upon the facts maintained and established through the first and second stages of research but upon the comparative mode of apprehension that the third stage of research has exploited.

There are a series of problems for us to tackle. First of all it is necessary to inquire into the relation between "the influence of foreign law" and "the reception of them", and then to give them scientific definitions and gain more sufficient and accurate picture about their causes and effects upon our legal system. Our research may be said to cover one of the most important problems of comparative jurisprudence by virtue of its attempt at full and scientific explanation about the contact of Japan with foreign legal cultures and the relation between the two different legal systems. This research will serve us, we hope, to understand how our legal system was formed and developed through the contribution of the foreign legal cultures, and aid us to find our true orientation in a development of the Japanese legal system. This is why we have chosen the above-mentioned theme.

II. The Meaning and Aspect of Foreign Legal Influences

A. We analyse the influences that foreign laws has been exerting on Japan in the hope of giving fuller explanations about how the whole Japanese legal system was formed, grew and developed into present maturer condition under the influences of foreign legal cultures. The influence ranges from its slight reflection in the Japanese legal thought to codifitial reception whose effect is more direct and obvious. Ours is the question of how much or how little the foreign legal cultures have made contributions to

the formation of our legal systems in its whole stage. Now some more detailed account of our theme will be given.

(1) By "influence of foreign law", we mean not only one-sided influences—that is transplantation or penetration of the foreign norm—but interrelation between the foreign and Japanese legal cultures. In other words legal influences are simply relative and to reach their proper understanding, we must know how the two legal cultures have been interacted among themselves. The relativity of influences made it difficult to solve their process because the influence caused in the one by the other reflects back in the latter and brings about a secondary effect. This interacting process continues in increasing complexity.

(2) To sum up, our legal culture made such constant progress as to establish its own present legal system taking in foreign legal cultural elements. And two points are to be considered in terms of the relation of influences.

a. Studies of the relation of the legal influences should not be limited to partial treating of civil, commercial or penal code, but it must be treated more extensively taking the whole legal order of a state into consideration. And even when a particular part of legal system or institution is to be treated, it must be considered as a part in the organic whole.

b. The initial introduction of foreign legal cultures takes a form of individual acquisition of knowledge. This stage is called "introduction." Then the knowledge acquired by individual begins to spread throughout the country by its translations, adaptations or public lectures. This stage is called "penetration". Further the prevailed knowledge comes to be "adopted" into a law or judicial decision by some public institutions. (The most conspicuous case of this is called "reception".) Still further the adopted legal elements are to be assimilated into the legal soil of the country according to various other situations and conditions which have existed. This stage is called "nationalization".

Now I shall follow the three stages in the history of the formation and development of Japanese legal cultures. The initial introduction of Western knowledge of laws into Japan began more early than the First Period (around 1867) I have already mentioned. Already it began about the end of the Edo Period. Various codes were established somehow by about 1896, and since then there followed a long period of adapting and changing the received qualities to the native conditions. So the formation and development of Japanese legal system under various foreign influences must be regarded as a very long and complicated phenomenon.

(3) In short when we study the contributions of the foreign legal systems to Japan, we understand them in their whole process of adoption, reception and assimilation. We do not regard influence as one particular or isolated event but we try to grasp it in its whole system with its historical background.

B. I have considered "reception" as one of the most conspicuous aspects of the foreign influences. I shall now make some remarks about each concept of influence and reception and their interrelations.

(1) The Japanese research about the foreign influences has been chiefly concentrated on "reception". The history of studies in "reception" is as follows: firstly the reception of the Roman law was studied. Interest was in reception of the Roman law into the medieval Europe and especially in its catastrophic reception into Germany. Secondly the reception of the advanced Western laws (French, German and Swiss etc.) into many less advanced countries was studied. This kind of study confirmed that the reception of foreign laws from more advanced countries brought about a systematization and, Westernization of the laws and a rearrangement and clarification of existing laws and increasing needs for a newer legal order on the part of less advanced countries: that the reception here is, nine cases out of ten, "codifitial and elective reception": that there were two types

of reception, that is, reception between the same kind of legal systems and between the different kind of legal systems, to the latter type of which the reception in Japan, China and Middle East countries belonged: and further that the receptions in the European colonies and the Middle East countries nearer Europe are markedly different from those in Japan and China which were apparently free from European colonization.

But it is left for us to seek for a common concept that covers both of two different types of reception and to investigate into the relation between reception and its resultant influence. It is necessary to solve these questions in an extensive and scientific way.

(2) The word "influence" can be used so far as any change is caused, by the contact with foreign legal cultures, in the mode of grasping or understanding of a particular legal subject matter, but it does not always follow that the mode of grasping or understanding itself should be the same as or similar to the foreign mode of grasping or understanding. For example, at the stage of "introduction", the introduced knowledge of foreign laws gave an impetus to Japanese jurists and lawyers to reexamine and improve their knowledge of laws to some extent. Their reexamination and improvement did not always lead to the making of the same legal culture as those which were introduced. But such can be safely called a result of "influence" from a foreign legal culture.

I shall give more detailed account of this in the respect of how influence comes to be established. To assert that there is some influence between two legal systems, the following four conditions must be observed.

a. The evidence of a contact, intercourse or relation between the two legal phenomena.

b. The evidence of resultant changes after those contact, intercourse or relation. Above two are minimum conditions for the establishement of "influences".

c. But besides the two is the evidence of a difference in cultural levels between the two legal phenomena.

d. And last, the evidence of the sameness or similarity of the two legal systems resulted from a mutual contact between the two legal phenomena. The last condition plays a greater role in determining the quality or style of influences. (By quality or style, I mean, for example, the intensity or necessity of influences.) But the establishment of influence does not always require the last condition.

"Reception" means adoption by public institution, that is, an institutional expression (eg. codes or judicial decisions) based on intentional and conscious acts, so that reception is the most conspicuous phenomenon of influences as phenomena. "Reception" often fulfills all those four conditions. Especially the degree of resultant similarity mentioned in the fourth condition decides the intensity or completeness of reception.

This is why I already said that the reception is the most conspicuous form of influences and is the easiest phenomenon to describe.

(3) Recently, "reception" of western law has begun to be studied in Japan, because reception is not only the easiest concept to grasp but it has such a weight that there was a reception in bloc of the Western codes at the stage of the initial compilation of Japanese codes. So the study of reception is one of the most important branches in our comparative jurisprudence and its development is generally expected. Of course the study of reception alone is not enough to elucidate the details of influences. The phenomenon of reception can be observed even at the whole stages of influences. So we must not limit our research in "reception" (a sort of influences). The true aspect of reception can be made clear in the whole succession of development of foreign legal influences.

But more interesting point in this research is how the received

foreign legal elements come to be changed or assimilated according to the existing Japanese conditions and circumstances. The mode of interpretation and application of the received elements must be studied in relation to the particular situations or reactions on the part of Japan. But it will be long before the received foreign legal elements have come to their final nationalization. And the quesion of assimilation and nationalization in their final form is also one of the important problems for comparative jurisprudence.

Our final aim is to grasp firmly this comprehensive concept of influence in due consideration of its every possible stage and aspect including the study of reception (which has the heaviest weight), and secondly to concentrate on every concept contained in the phenomena of influences.

III. Some Problems and Attempt to Solve Them.

A. I have already considered the great importance of foreign legal cultures in the making of Japanese legal system and the intensity of general interest in the foreign laws. Now I shall consider the reason for this intensity of interest. Was it a mere transient inclination of jurists and lawyers? Or was there necessity or need for it? And if there was, what was the reason for it?

The solving of these questions depends on how the foreign laws exerted influences upon us and how they were estimated. In other words, the degree of intensity of interest in foreign laws gives a scale with which we can measure how much or how little they were admired or criticized in the past. The followings must be taken into consideration.

(1) That is J. H. Wigmore's (1863—1943) studies about the Japanese native laws. Wigmore examined traditional laws in the Edo Period during his sojourn in Japan between 1889—1892. And he found that only English and Japanese judges had made decisions

on cases according to their precedents, and that the levels of legal knowledge that the judges of the supreme court had were not less low than those which English judges possessed. Because of this he highly esteemed law and justice (not always of jurisprudence) of the Edo Period.

Furthermore he published an English translation of the law, the records of legal conventions and the many cases of civil law by the Tokugawa Supreme Court. In his studies and translation, Wigmore was trying to compare the received Western institutions, rules and principles with those which had been existing in Japan and to demonstrate the maturer state of Japan capable of understanding and receiving the Western laws.

His point is that there was a maturity of various conditions in Japan, (including the development of the native law,) that made it possible to receive the foreign laws. And it is this point of his that we must pay due attention to and analyse in details. I shall give some subsidiary explanation about this to clarify where the problem lies.

(2) Already in the end of the Edo Period there existed some pioneers who took interest in the Western laws. How did they come to be interested in them? They must have been struck with the excellency of the Western laws especially when they thought of the insufficiency of their own native laws, (in the Edo Period). At that time Japan was divided into a number of domains governed by feudal clans over which the Tokugawa Shogunate had been ruling, so that every feudal clan had its own jurisdiction and there was a certain danger of conflict of law. Moreover the centralized authority of the Tokugawa Shogunate was limited and its legislative power over the whole country was weaker. There was no popularization of legal knowledge nor specialization in academic system.

But on the other hand there had been an economic and social development and the growth of the money economy and increas-

ing need for free trade. And to meet the needs of the times, some laws were enacted and some customs of law were established. In some respect the Japanese legal theories were as mature as the Western theories. In short, Japanese legal theory itself could meet the needs of the times and make an independent progress to some extent. But there are two opposite opinions as to how much or how little we are to estimate this particular and partial development of Japanese Philosophy of laws.

The first is a negative estimation. It is true that newer legal thoughts were exploited to meet the need for changing economic and social situations with some success but its creative aspect was limited. Reformation and change were still but a bottom-current and not a universal one, so it was impossible to solve every case on the basis of Japanese legal system. Meanwhile urgent need for a newer legal order, especially more refined law of obligation, commercial law and code of civil procedure made Japan to receive the influences of the Western laws which had reached great elaboration through the test of time. This inclination to the foreign laws spared the continuous development of the Japanese native law into a modern legal system. And there came a sudden flight to the Western laws.

The second is a positive estimation. It estimated highly the development of native laws. It asserts the economic and social reformation to meet the needs of the times prepared the way for the reception of the Western laws. Or it regards the reception of the Western laws as finalstage of the continuous development of the native laws. It attaches some value to the Japanese capacity of accepting a newer order more than to see the relative stagnation of legal development in the Edo Period. This is very near to Wigmore's view. (There was a tendency to give higher estimation to the native laws among the German controversialists from the middle 19th century to the begining of the 20th century as to the origin of the reception of the Roman laws. The relation between this

controvercy and Wigmore's opinion is very interesting subject in the light of the history of legal theory.)

(3) I don't mean to argue here which estimation to take. I only point out here that Wigmore raised an important problem, and presented a new approach to Japanese comparative jurisprudence. And he gave a consideration to the relation and connection between the new and old legal institutions. What he considered is just what we must pay attention to and consider deliberately. By so doing we will find a possible solution for why our country had necessity for receiving the powerful influences from foreign legal cultures.

B. There is something more to be considered in relation to cultural influences, that is about the qualities and traditions of influencing and influenced countries. The Western law and philosophy of legal thought have their tap root in their particular social conditions and philosophical tradition. So it must be considered what had happened when Western law and philosophy of legal thought were introduced into Japan quite defferent in social conditions and philosophical background. The point is that the foreign legal cultures were not introduced into Japan as a clean slate. The matter was not so simple. The new culture was superimposed upon a long-existing culture which had reached a certain height of level. (And it had its own tradition and history quite defferent in quality from those of Western countries.)

As the result there followed a series of resistance, expulsion, compromise or fusion between the influencing and influenced cultures. And at a certain period even the mere reception of a new culture became extremely difficult. But it is not sufficient to consider the relation between the influencing and influenced (legal) cultures only in case that their introduction, penetration or reception encountered some obstacles. Somethimes the mere presence of a (legal) culture on the part of influenced country (however different in quality or insufficient) makes it possible or

easier for the influencing cultures to be introduced, penetrate and be received. We must study these problems at their each stage taking every condition I mentioned into consideration.

I give here complementary explanation by a comparison.— Completely assimilated influence is hard to be discerned. For example a lion's flesh is composed of the mutton it devoured. However analysis of the lion's flesh will not reveal the existence of the devoured mutton. And yet the lion's flesh is not without relation with the mutton. In such a case external or formal approach brings no result.—

Here I have compared the Japanese legal system to the lion's flesh and the various foreign legal cultures to the mutton. We will trace the devoured and swallowed (or vomited or left indigested) foreign legal cultural elements to its digested and assimilated state, throughout the whole making and development of the Japanese legal system. And the relation between the lion's flesh and mutton must be considered from various points of view.

At any rate the older culture or the Japanese traditional culture must be studied in detailed relation to the foreign cultures. And this study will bring us a better understanding for necessity or non-necessity for the influence or reception. The study in the effect of influences or its true meaning will be far easier after the completion of above-mentioned fundamental research.

IV. The Final Aim of Comparative Jurisprudence.

Study in the charcteristics, origin and effect of the foreign influences (including "reception") in a comparative way needs much information and many materials, from which a correct conclusion about foreign influences can be deduced.

As the Roman influences differed greatly in Germany and France, so the reception of the Western laws (codifitial reception) differed in advanced Western countries (reception between the same advanced kind of legal systems) and Middle East countries (reception between

the different kind of legal systems). These two cases contain markedly different problems.

China, India and Japan are often compared with one another in the studies of the Western cultural influences on Asia. Scholars would be interested in the different results of influences corresponding to the differences in cultural and social context of each country. But at first we will choose Japan as our subject. We will make a collection of the materials concerning the foreign influences on Japan and classify them and make some report on them. Then we will move to China and India. Of course we will pay constant attention to the latest results of the studies about influences and reception and refer to them continually.

In this way we will play our own role in the study of foreign influence in the true sense of the word. And this way of study will also give an answer to the theme, "The study of the conditions and circumstances under which a foreign system of law has in modern times been received in a country having a cultural background and tradition different from that of the country in which the system was originally developed." which was adopted in 1954 by The International Association of Legal Science.

〔附記〕

本稿は，ミラノ・L・ボッコニ大学（イタリア）のアンジェロ・スラファ比較商法・産業法・労働法研究所（Istituto di Diritto Comparato Commerciale, Industriale e del Lavoro "Angelo Sraffa": Via R. Sarfatti, 23 Milano）からの依頼により，わが国における比較法学上の一つの問題点——外国法継受・影響論——についての理論状況並びにその展望について，わたくしが「外国法の影響と比較法なる題名の下に執筆（早稲田大学語学教育研究所　塩田勉訳）したものである。また本稿は，紙数の制限もあって，説き足りなかった面もあったので，これを補充し，また註解を加え，「外国法の影響とはなにか」という題名の下に別に（比較法学第6巻第2号所収）発表しておいた。参照せられたい。

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