Lost in Translation: the Reception of German law in Japan[1]

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It is widely accepted that modern Japanese law found its essential models in German law: our first modern Constitution of 1889 was principally inspired by the Prussian Constitution; our Civil Code of 1898, starting from the first draft written by a French scholar, finally chose BGB, as an example to follow. Not only concerning the codes, but also, and perhaps still more significantly, with regards scholarly works and theories, the German contribution has been far more important than that of any other country. Many Japanese academics and lawyers, before and after World War II, have come to study in Germany, always trying to compare the developments taking place in German legislation, judicial practice and academic works, with those occurring in Japanese law.

In this Germano-Japanese relationship, historical studies of the German influence on Japanese law have accumulated, and this has produced quite a considerable amount of literature on this topic which is

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1 This article is based on a paper read at *37. Deutscher Rechtshistorikertag* (Passau, 8 September 2008). My special thanks are due to Prof. Dr. Ulrike Müssig and Prof. Dr. Ulrich Manthe of the University of Passau. For the overview of the conference, see ***Zeitschrift der Savigny-Stiftung für Rechtsgeschichte***. Romanistische Abteilung, Bd. 126 (2009), pp. 667-673; Germanistische Abteilung, Bd. 126 (2009) pp. 947-969; Canonistische Abteilung, Bd. 95 (2009) pp. 730-736.

I should also like to thank Dr. Nicholas Henck of Keio University for correcting my English and Prof. Naoko Matsumoto of Sophia University for helping me in German sources.

accessible to German readers, because it is written by Japanese scholars in German or in English. (In addition to this corpus there is of course even more literature written in Japanese.) It is worth noting here the methodology employed by Japanese scholars when examining the German influence on Japanese law. Typically, Japanese scholars begin by outlining the German context surrounding the law, before moving on to writing about Japan's adoption of it, and end by outlining the parallels that are thought to exist between the lender country's law and that of the recipient. However, what tend to be emphasized in this process are those aspects of German law that are carried over into Japanese law. (Similarly Japanese scholars often tend to adopt a positive attitude towards ascertaining what can or should be imported from German colleagues.) Far less frequently discussed, if ever, are those aspects of legislation, or the thinking behind it, which fell by the wayside and did not successfully survive the crossing over process.

In this paper, I wish to concentrate on this aspect, and argue that what was ***not*** received shaped our history of reception as well as the transformation which took place in the course of reception. It is from this point of view that this paper approaches the reception of law, somewhat as an audacious attempt to extend the author's habitual interest in ***juridiction consulaire*** (French Commercial Court), which indeed was not employed by modern Japan as its model. While aiming at observing some twists in the way German law was received (including what can also be seen as a failure to receive), my focus shall begin with the Commercial Code (I. The Reception of German law in the Japanese Commercial Code), before extending my views towards theoretical works (II. The Reception of German theories). Guided by insightful works by specialists of German law, both parts of this paper will be concerned with the issues of juridical persons.

I The Reception of German law in the Japanese Commercial Code

It is generally accepted that modern Japanese commercial law, both in its construction and in its development, constitutes one of the

legal areas most influenced by German law, though it received some strong American influence after World War II. The Commercial Code of Japan, promulgated on 9 March 1899, "appears to be, among Japan's five major modern codes, the one most remote from the French legal tradition", as one French Professor puts it in his paper examining the French influence on the Japanese Commercial Code[2]. Indeed, because the drafting of the Commercial Code was commissioned to a visiting German Professor, Hermann Roesler, in 1881, who was an advisor to the Japanese Government, it has experienced scarce involvement by French jurists in its elaboration. In contrast, Gustave Boissonade, French Professor and advisor to the Ministry of Justice, prepared the first Penal Code and the first Code of criminal instruction, as well as the first draft of the Civil Code[3].

1) An eclecticism (which also entails selective reception)

Once we enter into concrete and detailed observation, however, we can no more speak easily of the influence of one particular law. Indeed, one of the outstanding characteristics found in the Japanese codification in general is its eclecticism concerning laws imported from different mother countries[4]. The Commercial Code is no exception to

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2 Jean-Louis Halpérin, "Le Code de commerce au Japon : une brève histoire ou le Code sans esprit", 2007, à l'occasion du Colloque bicentenaire du Code de commerce à Toulouse (27 et 28 septembre 2007).

3 The Code of civil procedure, prepared by a German, Hermann Techow, shows both German and French influence.

4 Nobushige Hozumi, one of the three framers of the Civil Code of 1898, is proud that "The Japanese Civil Code may be said to be the fruit of comparative jurisprudence". The draftsmen consulted "the codes, statutes, and judicial reports of all civilized countries which existed in the English, French, German or Italian languages, besides international treaties which have reference to the rules of private law", which included more than thirty civil codes, promulgated or in draft ... the first and second drafts of the BGB, the French Civil Code, the draft of the Belgian Code, as well as "the Swiss Federal Code of Obligations of 1881, the Spanish Civil Code of 1889, the Property Code of Montenegro, Indian Succession and Contract Acts or the

this.

Japan's reception of Western law started about the same time as the restitution of governmental power to the Emperor from the Tokugawa Shogunate in 1868 (the so-called Meiji Restoration). One might have an impression that Japan, from that point on, hastened at maximum to equip herself with Occidental law[5], but the fact is that it took her about 20 years to adopt a Western-styled Constitution, and more than 30 years to avail herself of a Civil Code and a Commercial Code. In the meantime, she remained undecided for quite a long time as regards the models from which to take her new laws, trying to choose from among different Western countries, some of which utilized a system of Common Law. Thus the government invited a variety of scholars of different nationalities to become its advisors. Hermann Roesler was one such scholar.

Roesler, born in 1834 in Lauf, near Nürnberg, and educated at Erlangen, was 44 years old when he came to Japan, after having quit, on account of his conversion to Catholicism, the post he had held at

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Civil Codes of Louisiana, Lower Canada or the South American Republics or the draft of the Civil Code of New York and the like"... The principles of English common law were also followed. Nobushige Hozumi, ***The New Japanese Civil Code, as Material for the Study of Comparative Jurisprudence***, 2nd and revised ed., Maruzen, Tokyo, 1912, pp. 20-23.

5 The rapidity of westernisation is often emphasised in general explanations of Japanese modern legal history. A keen sense of the necessity for the introduction of the Western system was felt by contemporary Japanese officials, who were only too aware of the precarious situation of Japan, desiring to maintain its independence, but scarcely rid of colonisation by the Western powers and put under unequal treaties which deprived her of autonomy in jurisdiction and in taxation. An episode favoured by Japanese legal historians to illustrate the "hastiness" of westernisation is that of Shinpei Eto, Minister of Justice, who tried to introduce in the early years (1872-1873) the French Civil Code as it was, only in direct translation and without modification to the contents, and who is said to have urged the translator with the phrase: "Just translate as quickly as you can, even if you might mistranslate".

Rostock for 16 years. He taught political science and administrative law, and published during these years at Rostock such important works as: *Über die Grundlehren der von Adam Smith begründeten Volkswirtschaftstheorie* (Erlangen, 1868, 2. A. 1871) ; *Das soziale Verwaltungsrecht* (2 Bde, Erlangen, 1872-1877), and *Vorlesungen über Volkswirtschaft* (Erlangen, 1878)[6]. This scholar came to a country that was unknown to him, and helped her construct a new legal system by deploying his knowledge and insights, and experimenting with his theory by adapting it to the different conditions he found there.

His widely-known contribution to Japan is the help he provided for the establishment of the Japanese Constitution (1889), through his redaction of a draft of it as well as through his intensive advisory input. Less known is the fact that he is also the author of the draft for the Commercial Code of 1890, which underwent many difficulties in its enactment, and was to be replaced by a new Code of 1899[7].

Roesler, who was asked to prepare the Commercial Code in 1881, finished his draft in 1884. He published this draft of 1133 articles, accompanied by his commentaries, that year (i.e. 1884), in German[8] and in Japanese[9]. This work explains well both his methodology and the nature of the Code: comparative and eclectic. It can be said, indeed, that Japanese codification in general is marked by its eclecticism. It was not only at the governmental level that Japan wished to try a wide range of examples before choosing a model from among the Western laws, but also at the level of individual jurists, some of whom went to study in different countries. (The best example is found in the case of Nobushige

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6 It is fitting to mention also Roesler's *Gedanken über den konstitutionellen Wert der deutschen Reichsverfassung*, 1877, which criticised Bismarck's Constitution of the German Empire.

7 It is known as "Controversy on Codes" or "Postponement campaign" of the Commercial Code and of the Civil Code.

8 Hermann Roesler, *Entwurf eines Handelsgesetzbuches für Japan mit Commentar*, 3 Bde, Tokio, 1884 (reimp. Shinsei-Shuppan, 1996)

9 Roesler shi kikô, *Shôhô sôan*, Tokyo, Ministry of Justice, 2 vols, 1884 (reimp., 1995)

Hozumi, one of three writers of the Civil Code of 1898, who was called to the Bar (Middle Temple) and practiced in London, before he went to study at the University of Berlin. Another legislator, Kenjiro Ume, became docteur en droit at Lyon, and also went to Berlin to pursue his study.) Moreover, it was not only the Japanese side which proceeded using a comparative approach to this variety of laws, but also the invited Western scholars who demonstrated their interest in the comparative study of laws when proposing models. In fact, for both sets of scholars, this interaction did not mean a mere comparative approach of choosing one law as a model and of justifying the choice, but rather an eclectic approach to building a new law[10].

2) The ignorance and/or abandonment of context

Roesler's draft of the Commercial Code, which was the product of his own eclecticism, was now handed over to a governmental committee in which Japanese members discussed his propositions. It is interesting to observe that some points on which Roesler scrupulously elaborated his articles of the Code to make his view clear on controversial matters, were changed by the Japanese committee and came to express a very innovative interpretation of the same matter. The articles went far beyond what Roesler had intended or imagined, and resulted in a very radical interpretation. Here I would like to pick up one example, among many others, which will illustrate a characteristic feature of the Japanese Commercial Code.

In a pioneering article published first in German in 1992 (and

10 Yoshiyuki Noda, "Gustave Boissonade, comparatiste ignoré", in ***Problèmes contemporains de droit comparé***, Recueil d'études de droit comparé en commémoration du 10e anniversaire de la fondation de l'Institut japonais de droit comparé, t. II, Tokyo 1962.

reprinted in 2006[11]), and subsequently in Japanese in 1996[12], Professor Junichi Murakami suggested examining the characteristics of the reception of law as seen in the Japanese Commercial Code.

Surprisingly, by consulting Roesler's draft, we can see that what he had meant concerning the juridical personality of commercial companies was, in the Japanese interpretation of the article, converted into a totally opposite sense. In fact, Roesler, while coming close to it, did not go quite so far as to acknowledge the juridical personality of commercial companies, whereas Japanese lawyers and scholars conversely interpreted the same article in such a way as to grant all the companies juridical personality.

When Roesler introduced his articles on commercial companies in his commentary for the projected code (Part 6 of the First book), he clearly stated that[13]:

> Recent theoretical views recognise in companies a specific and independent legal personality (eine besondere und selbständige Rechtspersönlichkeit), without regarding them as juridical persons (juristische Personen) in the proper sense.

Article 71 (1st paragraph) of this part concerning commercial companies provides that:

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11 Junichi Murakami, Die Rechtspersönlichkeit der Handelsgesellschaften. Ein Beispiel für eine kontextfreie Begriffstransplantation, in Hans-Peter Marutschke (Hrsg.), ***Beiträge zur modernen japanischen Rechtsgeschichte***, Berliner Wissenschafts-Verlag (Juristische Zeitgeschichte. Abt. 1, Allgemeine Reihe ; Bd. 21), 2006, pp. 212-222; first appeared in H. Coing (Hrsg.), ***Staat und Unternehmen aus der Sicht des Rechts***, 1992.

12 Junichi Murakami, "Kaisha hôjinkaku – hikakuhôshi no danshô" (Rechtspersönlichkeit der Handelsgesellscaften. Ein Ausschnit aus der geschichtlichen Rechtsvergleichung), ***Toin Law Review***, Vol. 2 No. 2, 1996, pp. 1-23.

13 Roesler, ***Entwurf...***, Bd. 1, p. 192, id. ***Shôhô...*** vol. 1, p. 198.

> Jede Handelsgesellschaft hat ein besonderes Vermögen und selbständige Recht und Pflichten; insbesondere kann sie auf ihren Namen Forderungen und Schulden eingehen, bewegliches und unbewegliches Eigenthum erwerben, und vor Gericht klagen und verklagt werden.

Roesler explains this article of his draft as follows[14]:

> Although the commercial company is not a juridical person in its full sense, it is often considered by law as if it were a juridical person. This is quite often the case, especially in a company's external relations and in the necessity of business. This is how the reasoning behind commercial law tends to be quite variable and flexible, which is different from the reasoning concerned with civil law. A commercial company is legally something particular which enjoys property, rights and obligations...

In spite of the author's explicit intention, it took no time for this article to be interpreted by Japanese jurists as setting a rule whereby a company should be considered as a juridical person.

A commentary published right after the promulgation of the Commercial Code in March 1889, the entering into force of which was set for 1st January 1890 but which was postponed by the decision of Parliament on 31st December 1889, interprets Article 73 corresponding to Roesler's article 71 in a manner which would no doubt have surprised this German Professor[15].

> Article 73
> It is understood that this article provides that a commercial company should enjoy the status of a juridical person. It is true that we can not find in this Code of Commerce any such article that stipulates explicitly that the commercial company should be

14 Roesler, ***Entwurf***..., Bd. 1, p. 199; id. ***Shôhô***... vol. 1, p. 209.

15 Tatsuo Kishimoto and Takashi Hasegawa, ***Shôhô Seigi***, Tokyo, 7 vols, 1889 (vol. 2 was written by Kishimoto).

> considered a juridical person. The Civil Code does not contain such a provision either. Thus, this is the only article which expresses recognition of a company's status to be considered a juridical person. If one paraphrases this article in simple words, it means nothing but "a company shall be a juridical person".

Even if the article concerned seems to have followed Roesler's proposition, the Japanese lawyers were already, as early as 1890, ready to introduce such a provision as would take form in the Code of Commerce of 1899 and be maintained up until the present day.

> Article 54, paragraph 1 of Commercial Code 1899:
> A company shall be a juridical person.[16]

Behind this straightforward provision on the personality of a commercial company[17], Professor Murakami finds critical the ignorance of contemporary Japanese jurists as to what Roesler meant by the notion of juridical personality. To reveal the meaning and significance of this concept for Roesler, Professor Murakami draws our attention, first, to the historical development of the notion of a ***persona moralis*** and a "Juristische Person", starting from the viewpoint of scholars such as Pufendorf, Svarez, Klein, Savigny, Puchta, before referring to Gierke, whose major work appeared in 1887, i.e. subsequent to Roesler's draft of the Commercial Code. Professor Murakami then analyses Roesler's work, ***Das soziale Verwaltungsrecht***[18], with specific reference to the historical

16 This article was recently moved to the Company Law, promulgated in 2005 and entered into strength in 2006, with only a slight change in style of formulation, of which the English translation would be the same:
Article 3 of Company Law:
A Company shall be a juridical person.

17 It is to be noted that the "company" or "commercial company" prescribed in all these articles, since Roesler's project, includes even ordinary partnerships and limited partnerships.

18 This work of 1872 was translated into Japanese by Makoto (Chu) Egi, and published by Tokyo Metropolitan Police: ***Shakai gyôsei hô ron***, Tokyo, 1885.

context of the notion of personality, in order to clarify his idea of juristic personality. Roesler thought that certain groups（bodies）of people or of property are indispensable parts of society and maintain its order. He argued that if there exist only atomised individuals and the State without such social groups, the general order of society could not be well controlled（in this sense, he criticised the theory of Adam Smith and provided a concept of social administration as well as of administrative law）. Such groups should be distinguished as ***moral persons*** from groups which are not of this "moral" nature. As for the commercial company, as long as it is constituted to pursue private profits only, it cannot be considered a moral person nor thus a juridical person.

In Murakami's understanding, Roesler, in the context of the above-mentioned development of ideas, inherited the traditional concept of society composed of moral persons. However, Roesler was not merely a conservative, reacting against the new and changing industrialised society of the mid to late 19th century and in favour of the preservation or the resurrection of the ***organisation corporative*** of the Old Regime; rather, he searched for a new way of running society with the aid of the power of social groups defined as "***Juristische Personen***". The notion of juridical personality thus leads to the combining of Roesler's commercial law and his public law（administrative and constitutional）. His position of not extending juridical personality to the commercial company is indeed the very expression of his whole conception of social organisation and the Constitution.

According to Professor Murakami, it was this significance or context surrounding the notion of the juridical person that was not perceived by the Japanese. Instead, Japanese jurists cut themselves off from this European historical context, regardless of whether or not they were fully aware of it or of the meaning of their choice regarding this "context-free" reception of Western law[19].

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19 Cf. Akio Ebihara, "Roesler", ***Jurist***, No. 1155（1999）, pp. 38-41.

Ⅱ The Reception of German theories: two examples on juridical persons

So far, in terms of the Reception of law, we discussed only the Code and the process of codification. To widen our scope a little bit, we should try to look at the reception of doctrines and theories. The first thing to recognise is that since the late 19th century, Japan has received and enjoyed an enormous amount of influence from the German academic world. It is widely accepted that around 1910 to 1920, the German school experienced its most flourishing period. As for the Wissenschaft of civil law in Japan, "the systematisation and basic patterns of interpretation of the Civil Code were established in this period. One can not deny that the German school's influence has been considerable from then until now"[20].

If we take some illustrative examples on the subject of the juridical person, the theory concerning the "Körperschaft" of a company was deeply affected by German discussions on it. However, ironically, despite this strong influence, and the fact that in Germany there is a great difference in the allocation of the status of juridical personality depending on the different types of companies, in Japan all commercial companies are considered juristic persons, whereas in Germany Personengesellschaften are not.

Considering this undeniable contribution of German Wissenschaft to the development of Japanese legal science, we must take further steps in our analysis of the Reception of law. In this respect, Professor Akio Ebihara, a successor of Professor Murakami, has undertaken very careful and informative analysis on this matter. In a series of works, he reveals to us some important manners in which the sometimes complex reception of theories took place[21].

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20 Eiichi Hoshino, "Nihon Minpôgaku-shi (1)", ***Hôgaku Kyôshitsu***, 8, 1981 p.39. See also, id., "L'influence du Code civil au Japon", in ***1804-2004. Le Code civil. Un passé, un présent, un avenir***, Dalloz, 2004, pp. 871-895.

21 Akio Ebihara, "Doitsu hôgaku keiju-shi yoteki", ***Jurist***, Nos. 927, 929, 932, 936, 938, 941, 943, 945, 947 (1989), 948, 950, 952, 954, 958, 960, 961, 963, 965, 967, 970 (1990), 973, 975, 977, 978, 981, 983, 984, 986, 988, 990, 992 (1991),

Let us continue by examining several examples of theories relating to the juridical person. I would like to mention two:

・The theory on the nature of the juridical person

・The theory of *ultra vires*

1）Theory concerning the nature of the juridical person

Professor Ebihara examines the reception of theory concerning the nature of the juridical person from a specific viewpoint: there is a standard approach in Japan to surveying the panorama of theories that exist on the nature of the juridical person[22]. Most textbooks divide up various theories into three main groups and explain each of these groups in the following order: first, the theory according to which the juridical person is regarded as a legal fiction; second, the theory according to which the real existence of the juridical person is rejected; third and finally, the theory according to which the juridical person is considered a reality. Focusing on this style of classifying and explaining theories, Professor Ebihara asks whence Japanese scholars adopted this style of explanation. Through his research, Ebihara makes clear that in commentaries published in 1896 and 1897, authors, including Kenjiro Ume, one of the framers of the Civil Code, explained that Article 33 of the Civil Code[23] was written based on the first theory outlined above, which regards the juridical person as a fiction. The other theories are not mentioned, nor even the classification of theories, except for one commentary which adopted a classification into three groups, but which does not correspond to the classification which later became standard.

In 1903, however, Masaakira Tomii, another framer of the Civil Code, incorporated this tripartite classification, which would later become standard, into his ***Principles of civil law***[24]. This scholar, deeply influenced by the German school although he studied in France（***Docteur en droit***,

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993, 995, 997, 999（1992）.

22 Akio Ebihara, "Doitsu hôgaku keiju-shi yoteki: Hôjin no honshitsu ron", *Jurist*, No. 950, pp. 12-13, No. 952, pp. 10-11, No. 954, pp. 12-13（1990）.

23 Art. 33. Juridical persons can be formed only in accordance with the provisions of this Code and/or other laws.

24 Masaakira Tomii, *Minpo Genron*, vol. 1, 1903.

Lyon), made use of French literature on the subject to keep up with developments in German academia. In fact, his presentation of the theory on the nature of the juridical person, which cites many German scholars, was based on Henri Capitant's *Introduction à l'étude du droit civil* published in 1898[25].

The first important monograph by a Japanese scholar on the juridical person was published by Hideo Hatoyama, Professor of civil law at Tokyo University, in 1908[26]. This leading scholar in civil law is regarded as the principal figure of the German School in Japan. His keen interest in German legal science is clearly shown in his work, which analyses an article by Hölder which appeared the same year[27]. It is notable, however, that his demonstration of the reality of the juridical person depended heavily on the work of a French scholar, Léon Michoud, published in 1906[28].

In 1911, an important work by Joji Matsumoto was published. This Professor of commercial law at Tokyo University, thoroughly explored both the German and French literature on the subject[29]. He analysed the works of Savigny, Böhlau, Windscheid, Enneccerus; Brinz, Jhering, Meurer, Planiol, Berthélemy, Hölder and Binder, as well as those of Zitelmann, Gierke, Michoud, and Raymond Saleilles, and classified these scholarly works into three main groups employing his own subdivisions and expressing his view supporting the theory of the reality of the juridical person, which was much influenced by Raymond Saleilles's work, *De la personnalité juridique*, published the previous year[30].

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25 Henri Capitant, *Introduction à l'étude du droit civil, notions générales*., A. Pédone, 1898.

26 Hideo Hatoyama, "Hôjin ron", *Hôgaku Kyôkai Zasshi*, vol. 26, No. 11, pp. 477-494; No. 12, pp. 587-607 (1908).

27 Hölder, "Das Problem der juristischen Persönlichkeit", JherJb, 53 (1908)

28 Léon Michoud, *La théorie de la personnalité morale et son application au droit français*, L.G.D.J., tome I, 1908.

29 Joji Matsumoto, "Hôjin gakusetsu", *Hôgaku Shinpô*, vol. 21, No. 1, pp. 53-66; No. 2 pp. 14-32; No. 3, pp. 68-77 (1911)

30 Raymond Saleilles, *De la personnalité juridique : histoire et théories : vingt-cinq leçons d'introduction à un cours de droit civil comparé sur les personnes juridiques*,

Matsumoto's work can be distinguished from preceding scholarship on two points. Firstly, he attached himself clearly to one of the three theories in the controversy, whereas his predecessors had tended to regard their own views as lying outside the three categorised theories. Secondly, Professor Matsumoto was the first Japanese scholar to explain the three categories of theory utilising the order which subsequently became standard: the theory of fiction, the theory denying the reality of the juridical person, and the theory of reality. This work of Matsumoto was persuasive in both its form and contents. His style of presenting the theories came to be adopted by most of the textbooks on civil law, and the theory of the reality of the juridical person came to be adopted by the majority of Japanese scholars.

Professor Ebihara continues his analysis by stating that, as regards the theory on the juridical person, Japanese scholars learned more from French scholars who had studied the German school than from the German school itself (i.e. German theory was adopted via the intermediary of the French school). This completely challenged the pre-existing perception in Japan which had believed that Japanese theories on the juridical person derived directly and almost exclusively from the German school. This perception was understandable because the important and basic construction of these theories had indeed been done in Germany before it passed through French hands. Moreover, Professor Ebihara points out another element which contributed to the impression of the German School having provided the predominant influence. He notices that scholars after Professor Matsumoto, especially Hatoyama, who revised his work according to the former's achievements, eliminated all French scholars' names from their references except for Michoud and Saleilles. This attitude continued in fact for quite a long time, at least until after World War II. This may be explained by the fact that legal scholars and students in Japan were mostly German-readers, who added more and more German works to their bibliography. Certainly, this was one facet of Japan's reception of German law.

Professor Ebihara concludes his observation by pointing out a further important feature of the reception of German law in Japan. The

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Librairie Arthur Rousseau, 1910.

reception in Japan of the theories on the nature of the juridical person was only discussed in the field of private law. The western academic tradition, conversely, shows how discussion on the juridical person embraced both public and private laws. Gierke's concept of Körperschaft was applied to both fields. Michoud devoted half of his work to the treatment of the public juridical person, and cited Duguit, Carré de Malberg, Hauriou, Laband, Jelineck, Otto Mayer, and so on. Again, when introduced into Japan, such prominent names in the field of public law were eliminated from scholars' lists of references. Professor Ebihara thus concludes that: "the theories on the juridical person were stunted, not because of the influence of German Wissenschaft, nor of French science, but, in fact, because of Japanese scholarship itself".

2) The theory of *ultra vires*

A further example of the reception of German theories reveals yet another detour. This concerns the ***ultra vires*** theory[31].

Article 43 of the Civil Code of Japan provides that:

> A juridical person is, subject to the provisions of laws and ordinances and within the scope of the objects fixed by the articles of association or by the act of endowment, entitled to rights and subject to duties.

It is certain that this article has as its origin the ***ultra vires*** theory developed in Common Law. However, this origin was quickly forgotten by Japanese scholars, partly because the majority opinion at the time on the nature of the juridical person supported the theory which urged that it was a fiction. This understanding of the juridical person perhaps deprived Japanese scholars of any strong necessity to seek for the origin of the article. Concerning this article, the continental style of argument flourished, introducing the distinction between Rechtsfähigkeit and

31 Akio Ebihara, "Doitsu hôgaku keiju-shi yoteki : Hozumi Nobushige to Ultra Vires no Hôri", ***Jurist***, No. 970, pp. 10-11 (1990), No. 973, pp. 10-11, No. 975, pp. 12-13 (1991).

Geschäftsfähigkeit relating to what should be ruled as lying beyond "the scope of the objects" of the juridical person in question. It was only when a German scholar's work on *ultra vires* in English Common Law (Clemens Schlink, *Ultra vires in English private law*, 1935) was introduced to Japan, that Japanese scholars became aware of the significance of this theory. It was, indeed, an example of the reception of German theory and, at the same time, of the reception of Common-law theory (Common law theory via the German School). Interestingly enough, if I refer again to Professor Ebihara's additional remarks, even as late as the 1960s Japanese civil law scholars were, in general, not thoroughly aware of the origin of Article 43, whereas commercial law scholars had already known of it towards the end of the 1940s. This also shows the barrier that sometimes exists between disciplines and which is reflected in the reception of law and theory.

Conclusion

By means of the above observations, we can point out two types of twist in Japan's reception of law, especially in connection with the notion of juridical personality.

The first twist seems to be a failure of reception, at least from Roesler's and the German point of view, while contemporary Japanese jurists took pride in its innovative simplicity and technicality. Emphasis should be also put on the fact that this twisted reception concealed the connection between commercial law and the general law of corporations as seen from constitutional viewpoint. In this regard, Roesler's double mission in drafting the Constitution and the Commercial Code for Japan was meaningful. The reason why Roesler came to be placed in charge of drafting these two laws is not quite certain. No contemporary documents express any possible logic as to justify the government's decision to commission Roesler to draft these laws. Neither have later scholars been sufficiently aware of this public aspect of the commercial law. Whereas our fixed concept of the respective boundaries delineating legal fields tends to obscure our observations, Professor Murakami argues for noting this significant liaison in his above-mentioned articles, along with another article of his on Roesler, examining the relationship between his social

theory and that of Robert von Mohl[32].

The second kind of twist consists of the complex way German law in particular, as well as "Western" law in general, has been received in Japan. We definitely need to widen our scope to grasp not only what happened in one mother country but also what happened in the mother countries (plural), and especially the interaction between them. The more Japanese scholars become aware of the necessity of observing what might be called the horizontal relationships among European mother laws, the more they will become aware of their fixed gaze, which blocks the required horizontal movement of their eyes, which tend to be fixed on only one of these laws (according to each scholar's area of specialisation: German law, French law, Anglo-American law, chosen for comparison). It can thus be said that in Japan scholars tend to compartmentalise the law according to the country in which certain laws originated, and that this prevents fruitful discussion taking place between scholars of say French law and German law.

Furthermore, these reflections make us aware of our fixed method of comparison. When discussing the reception of law, Japanese scholars have always compared their case with the case of the mother country only, and have seldom thought of comparing Japan either with other non-European countries which received European law through colonisation, or with countries which have adopted a mixed legal system.

Lastly, we should rethink our perspective on the exchange of ideas that have occurred between the mother country and the child country. What Professor Murakami sees in codification concerning the juridical person and calls a "Kontextfreie Begriffstransplantation", has different interpretations in Germany and Japan. It is not sufficient to attest, viewing the matter only from one direction, that there is a lack of context and, ultimately, an ignorance of the context, for we can not easily resort to a "mutual exchange of views" when treating the phenomenon of reception, as such a mutuality may prove more imaginary than real.

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32 Junichi Murakami, "Robert von Mohl to Hermann Roesler no shakai riron", in Toshio Yamaguchi (ed.), *Tôzai hô bunka no hikaku to kôryû*, Tokyo, 1983, pp. 157-183.

Translation, after all, can work in two ways, to transmit our thoughts from one side to another, but also to block our seeing what is happening on the other side. In the late 19th century, Japan chose to translate all western legal terms into Japanese. This translation was helpful to convey and share western ideas. However, this translation also entails the shutting of a door, as long as Japanese scholars communicate among themselves only in Japanese. Once the translation begins, the reception of law enters into a kind of black hole for the mother country since all further discussion and elaboration is conducted in Japanese, which few in the West can understand. The generous and sincere words we find in every book translated into Japanese which state that "the author of the original ***believes*** that this translated work is loyal and of excellent quality" highlights, indeed, the problems inherent in the translation and reception of western thought.

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