

The Use of Foreign Law by Courts in Japan

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Summary

In Japan, various systems for assimilation of foreign law in court have been developed in these dozens of years, but practical and systematic use of their fruits is still insufficient. Cases in which judges have to apply foreign law are still rare and many judges and court practitioners are not so interested in foreign law yet except some particular fields of law.

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§1 Introduction

In the latter half of 19th century Japan started its whole modernization, modeling after Western countries, and after that it has also studied and absorbed modern law from Western countries. The objects of this kind of study and absorption of law have entirely been German law, French law and Anglo-American law. So, "foreign law" in this paper means these laws, unless mentioned otherwise.

§2 Judicial study of foreign law

§2-1 Judges and foreign law

(i) Generally, judges in Japan have no need to have the knowledge of foreign law at all, both before and after becoming judges. They are only required to study Japanese law in Japanese language. They have chances to study foreign law, at their colleges as law students before taking the bar examination, and at the Legal Training and Research Institute as legal apprentices after passing the bar examination, but these courses are just elective subjects. They have to study foreign law neither for the bar examination nor for the judicial practice after becoming judges.

Fundamental codes in Japan have been influenced more or less by some foreign law, e.g., the present Civil Code and Civil Procedure Code were enacted after the German Codes and the present Constitutional Code and Criminal Procedure Code adopted a lot of fruits of American constitutional law and criminal procedure. But the reasons judges in

Japan do not have to study the original foreign law for themselves are as follows;

At first, these fundamental codes were made long years ago (40 years to 100 years) and each department of law in Japan has made its own development in these periods so judges do not need the knowledge of present foreign law in order to interpret these Japanese codes, and almost every legal problem in these fields has already been resolved by the precedents of the Supreme Court.

Second, as research of foreign law by scholars has been quite prudent and their interpretations of Japanese law have necessarily been based on their study of foreign law, it is enough for judges to study only Japanese scholars' books concerning themselves.

(ii) Some judges study foreign law, individually or in study groups. In this case, it is common for them to choose one between German law and Anglo-American law, and after the World War II studying American law is more popular than studying German law. It is rare for them to choose French law or general comparative law.

The reason they study foreign law is in their personal and academic interest, and they usually have no intention to use their knowledge of foreign law for their practice in the courtrooms. Their academic levels varies and some of them, including several doctorate degree holders, are excellent, and usually they, as judges, are interested in positive law rather than philosophical aspects of law, and in civil or criminal procedure rather than substantive law. But, the number of judges who are interested in foreign law and study it actively is less than a few per cent of the whole judges in Japan⁽²⁾.

In the former half of this century, some judges studied foreign law eagerly, in particular, German law. At that time, German law was much more important for judges than it is today because German codes were direct models of all of the fundamental codes of Japan. Many judges understood German language and they read German law books, in particular, German Commentaries of BGB and ZPO for their judicial practice. And study of scholars of foreign laws was still insufficient then so judges had to study them for themselves. A judge, reportedly, said he would not write the judgment until he got the book he had ordered from Germany. But this kind of episode was quite rare even at that time, and now it is certain that there are no such judges in Japan absolutely.

(iii) Nowadays, international disputes are increasing in Japan quite rapidly, as international trade develops. So attorneys at law sometimes need the knowledge of foreign law, and expert attorneys of international disputes also increase in big cities. And in courts, there are many civil cases in which parties are foreigners, and criminal cases in which the accused are foreigners. But, law that will be applied to these cases in courts is usually Japanese law. It is still rare that foreign law is applicable to these cases. And for these cases, if any, judges do not have to look for foreign applicable law for themselves because it is the burden of the parties or their counsellors to find and show the applicable law for the case. But if judges want to look for some applicable rule for the case for themselves, the General Secretariat of the Supreme Court can be helpful.

§2-2 Systematic assimilation of foreign law by court system

(a) The General Secretariat of the Supreme Court

In the system of courts of Japan, there are no standing offices to study the foreign law generally and comprehensively. But, some departments of the General Secretariat of the Supreme Court, such as Civil Affairs Bureau, Criminal Affairs Bureau or System Research Office, research foreign law when needed, for example, for making court rules, making a draft of a new code or answering to the inquiries from inferior courts about some foreign law. In this case this kind of research is made from books, using the Library.

Major officers of those departments are lawyers and have experience of being judges of inferior courts, and some young officers have studied abroad.

(b) Dispatch of judges to abroad

① Training

(i) From mid-1960's the Supreme Court has been dispatching young inferior court judges (assistant judges)⁽³⁾ systematically and continuously to the United States, England, Germany, France and Canada⁽⁴⁾ for training of foreign law. The number of these young judges is about 15 every year, and this means that about one-fourth of newly appointed

young assistant judges have the chance to study abroad.

The major way for selection of them is designation by the Supreme Court, and only a few get this chance by open examination. The period of this training is usually one year, except one or two who stay abroad two years.

This training system has been popular among young assistant judges, because this is only one chance for them to study abroad while they are in office, and, after completing their training, they will have bigger opportunity to be promoted earlier in the bureaucracy of the judicial department.

They are sent to some universities or inferior courts of those countries. At universities, they study the law of that country as law students or visiting scholars. At court, though it depends on each court how it treats the trainees, they are usually given the advantages to have offices or desks inside of the courthouse, to see the records, to observe trials or pretrial procedure, and to ask questions of judges and other court officers.

(ii) They have to submit reports of their study to the Supreme Court after completing their terms, but usually they are not published, except some which are worthy of publication. This kind of training abroad permits them to acquire knowledge of foreign law and widens their horizons, but there has been no systematic project to utilize their entire studies for judicial practice in Japan. The Supreme Court seems not to expect them to become experts of foreign law, and to be satisfied if they get fundamental knowledge of each foreign law and ability in a foreign language.

② Research

The Supreme Court has also dispatched judges of inferior courts to foreign countries, such as the United States, Germany, England or France, in order to make them do some specialized study of judicial situations and conditions of that country. The Supreme Court needs this information for making court rules, participating in the legislative process or resolving big and important cases pending at the Supreme Court.

For example, a few years ago, the Supreme Court dispatched a criminal judge of Tokyo District Court, who is an expert in American criminal law, to the United States more than one year to study the real

situations of jury trial in the U.S., because Japanese people now take great interest in jury system and we may resume jury trial which has been suspended since 1943.

And now an overall amendment of the Civil Procedure Code is under way, so the Supreme Court is dispatching several judges of inferior courts to foreign countries every year to study the situations of civil practice of those countries.

(c) Judicial research report

Every year after the World War II, the Supreme Court designated several inferior court judges as judicial researchers and make them study some judicial themes⁽⁵⁾. All of the reports have been published. At first, it had been quite usual for them to choose foreign law as their topics, because at that time whole the judicial department was eager to absorb foreign law and foreign legal system. For example, for the first 10 years (from 1947 to 1956) about one-third of those reports (27 out of 78) handled foreign topics⁽⁶⁾, and some of them really matched doctoral dissertations.

But recently, ordinary judges are losing their interest in foreign law and it is quite common for these researchers to choose very domestic, practical and technical themes⁽⁷⁾ rather than academic ones. In the last 10 years (from 1981 to 1990), only two reports⁽⁸⁾ (out of 13) handled foreign law topics.

(d) The Supreme Court Library

The Supreme Court Library is one of the best law libraries in Japan. It has 215,000 law books and 40% of them (84,000 books) are foreign books. It subscribes to 730 legal periodicals and 30% of them (about 220 magazines) are foreign ones. These are important materials for practice and research of the Supreme Court and its General Secretariat.

All High Courts, District Courts and Family Courts⁽⁹⁾ have their own law libraries, but they are concentrated on Japanese law books only, so collections of foreign law books at these libraries, if any, are fragmentary.

§3 Judicial practice and foreign law

§3-1 Inferior courts

(i) As said before, it is still rare for judges in Japan to have to apply foreign law to their cases, though the number of foreign parties are increasing rapidly. In cases to which foreign law will be applied, parties have the burden to find and show the applicable law, and it is not so difficult for the counsellors to find some relevant rule from books or from the foreign parties. But in this case it is also quite common for judges to have wide and free discretion of interpretation in every field of law, even in the field of international private law, too, because they usually do not have enough knowledge or materials for the original rule. And, when they cannot find the applicable foreign rule by any means, judges can apply "reason" as law, because judges cannot refuse to handle the case due to the lack of applicable law.

But divorce cases are somewhat exceptional. Judges have handled many and various international divorce cases so far, so not a few judges, in particular, judges of the family law division of Tokyo District Court are familiar with the divorce law of many countries, such as China, Korea, Philippines and many states in the U.S.

Cases to which foreign law were applied are usually reported by law magazines and they are useful precedents for the judges to handle the same kind of cases.

Study of foreign fundamental law is so popular among scholars now that Japanese commentaries of them, such as UCC of the United States, BGB or ZPO of Germany have been published here, but they are seldom necessary for the cases in court.

(ii) It has been also rare for judges to make direct use of knowledge of foreign law when interpreting Japanese law. Knowledge of foreign law will be quite helpful to interpret law of Japan because, as said before, fundamental codes of Japan were made under great influences of foreign laws. But it is rare for counsellors to argue about foreign law in courtrooms except some cases to which foreign law will be directly applied. Many judges and practice lawyers think law in Japan can be interpreted in Japanese way without any direct help of foreign law know-

ledge because of the courts' own development of those law and great number of precedents. It is true that judges and court practitioners are not so interested in foreign law.

Some attorneys at law in big cities need knowledge of foreign law because foreign clients are increasing, but their major fields are making agreements and preventing conflicts outside of court, so they seldom appear at the courthouse.

§3-2 The Supreme Court

Although at the Supreme Court, the fundamental situation of practice is similar to those of the inferior courts, there are some different points.

At first, in the Supreme Court, there are about 30 judicial research officers. All of them are recruited from inferior court judges and they make preparations for the judgments, and relevant researches when necessary to assist the Supreme Court Justices⁽¹⁰⁾. Some of them do research in foreign law, when they think it is necessary for the particular case. But it depends on their personal knowledge, and all judicial research officers do not necessarily make this kind of research in foreign law. Knowledge of foreign law or foreign language is not one requirement to be appointed as judicial research officers.

Second, in some particular cases, parties directly argue and cite foreign law, precedents and academic theories. The most typical examples of these cases are ones in which fundamental human rights under the Constitution of Japan are disputed. The American Constitution was a model of the present Constitution of Japan and we have had similar issues, so counsellors sometimes cite American constitutional cases or theories as persuasive authority⁽¹¹⁾. Usually, parties who submit this kind of argument are the accused and their defenders in criminal cases, and public prosecutors have seldom made these kinds of arguments or citations⁽¹²⁾.

But the opinions of the Supreme Court usually handle the original issues only, which are problems of Japanese law, and seldom mention those foreign laws or cases. In one case⁽¹³⁾, the Supreme Court said that although foreign law can be one of the important reference materials, it is not a right way to interpret the Constitution of Japan if we adopt the

foreign authority directly without considering the difference of social conditions of Japan and of that country, and this is almost the only exception that the court opinion of the Supreme Court made an official comment for this kind of argument.

There is another quite rare exceptional case⁽¹⁴⁾ where both majority opinion and minority opinion cited foreign laws respectively, in which the issue was whether ban of political activities of public servants was constitutional, but in this case both sides found convenient foreign rule or authority for their conclusions and reinforced their standings with those. Both sides had no intention to make their interpretation more significant by the fruits of foreign jurisprudence.

§4 Some comments

Although various system for assimilation of foreign law in court have been developed and improved in these dozens of years, practical and systematic use of their fruits is still insufficient. The reason for is, as I said before, that cases to which foreign law is applicable are few and judges usually do not need the knowledge of foreign law in interpreting Japanese law.

And I think I should add one more reason for it. One of the characteristics of Japanese jurisprudence is that the distance between practice and academic theory is pretty big. There have been few interchanges between scholars and court practitioners including judges. Most of the professors of law have no experience as practitioners and it is also rare for professors of law to become practitioners. So, most of the judges are not so interested in studying foreign law, and only scholars have studied foreign laws systematically and tried to utilize them. In order to make good use of foreign jurisprudence, active interchange between practice and academy is one of the subjects of legal world in Japan in the future, I believe.

Notes

- (1) Professor of Law, Niigata University. ex-judge of Niigata District Court.
- (2) The whole number of judges in Japan is about 2,800 (1,400 full-fledged judges, 600 assistant judges and 800 summary court judges).

- (3) Most of them are late 20's.
- (4) Canada was added to this list in late 1980's.
- (5) Until 1970's they were exempted from their case load and they devoted full time to their research for one year. After that they do their research besides doing the work as judges.
- (6) e.g., *Criminal Evidence in the U.S.* (1947) by J. Kawahara, *History of Rule Making Power of Court of England* (1947) by J. Hosono, *Cross Examination in Anglo-American Civil Procedure* (1948) by J. Kawano, *Divorce in the U.S.* (1948) by J. Ooe, *Professional Ethics in the U.S.* (1949) by J. Fujii, *Constitutionality of the Juvenile Court in the U.S.* (1949) by J. Nakagawa, etc.
- (7) e.g., *Credibility of Confessions* (1984) by JJ. Tazaki et al., *Admissibility of Illegally Obtained Evidence* (1985) by JJ. Takagi and Oobuchi, *Civil Trial Practice* (1986) by JJ. Iwasa et al., *Summary Handling of Small Claims* (1988) by JJ. Hirate et al., etc.
- (8) *Court System for Constitutional Issues of Western Countries* (1989) by JJ. Chiba et al. and *Civil Court Practice in France* (1990) by JJ. Yamashita et al.
- (9) There are 8 High Courts, 50 District Courts, 50 Family Courts. Besides, there are about 400 Summary Courts.
- (10) Their role resembles to that of law clerks in the United States, but all research officers have judgehip of inferior courts and they have experience of inferior court judge of more than 10 years. Their term is usually three to five years, and after that they are appointed as inferior court judges again.
And only Supreme Court has this kind of research officer.
- (11) e.g., *Sogo Taxi Co. v. Director of Tax Administration Office*, Judgment of the Supreme Court on June 24, 1966, 20 Supreme Court Civil Reporter 1146, *Japan v. Koh*, Judgment of the Supreme Court on Apr. 30, 1970, 24 Supreme Court Criminal Reporter 196, *Japan v. Boku* (so called Takada case), Judgment of the Supreme Court on Dec. 20, 1972, 26 Supreme Court Criminal Reporter 631, *Hanober Ins. Co. v. Oosaka Shosen*, Judgment of the Supreme Court on Mar. 15, 1974, 28 Supreme Court Civil Reporter Supreme Court Criminal Reporter 544, *Japan v. Hashimoto*, Judgment of the Supreme Court on Sep. 7, 1978, 32 Supreme Court Criminal Reporter 1762, *Matsumoto v. Soka-Gakkai* (so called Itamandara case), Judgment of Supreme Court on Apr. 7, 1981, 35 Supreme Court Civil Reporter 443, *Natsume v. Land Register*, Judgment of Supreme Court on Dec. 16, 1986, 40 Supreme Court Civil Reporter 1236, *Japan v. Makieda*, Judgment of the Supreme Court on Dec. 18, 1989, 43 Supreme Court Criminal Reporter 882, etc.
- (12) *Japan v. Ogawa* (Judgment of the Supreme Court on May 21, 1976, 30 Supreme Court Criminal Reporter 1178) is such a rare case.
- (13) *Japan v. Oosawa* (so called Sarufutsu case), Judgment of the Supreme Court

- on Nov. 6, 1974, 28 Supreme Court Criminal Reporter 393.
- (14) Japan v. Tsuruzono, Judgment of the Supreme Court on Apr. 25, 1973, 27 Supreme Court Criminal Reporter 547.