

Paul-Christian SCHENCK: *Der deutsche Anteil an der Gestaltung des modernen japanischen Rechts- und Verfassungswesens*. Stuttgart: Franz Steiner Verlag 1997, 325 S. (Beiträge zur Kolonial- und Überseegegeschichte herausgegeben von Rudolf von Albertini und Eberhard Schmitt, Band 68)

The Editor suggested that this book be reviewed in English. It is a pleasure to comply with this idea, because it is a pity that the book is only available in German, which few scholars in the Anglophone or Francophone parts of the world care to learn to read, in spite of the many excellent works on all aspects of Asia published in German only. The Germans can to some extent blame their own federal authorities for this situation, since these authorities are very parsimonious with funds for the dissemination of German language and culture abroad.

Dr. Schenck has investigated all sources in German dealing with the background of the employment of German lawyers – typically judges, public prosecutors, and university law teachers, but also a few barristers and a handful of civil service economists – to draft new statutes and to train legal officials. They were proud, capable, had a sense of mission, and felt that they helped the Japanese overcome old customs of antiquated social structures, in particular excessive dispersal of power, which invited foreign violence; they saw the recent history of their own country the same way, and could therefore transfer the focus of their patriotism partially to their Japanese masters, as long as they served them. Thus, they were, on the whole, successful and influential. After the Japanese had learnt what was to learn from these German advisors, the Japanese terminated their employment: it was the consistent policy of the Meiji government to make use of, but not to remain dependent on, foreign advisors, no matter which country they came from. German law was more attractive to the Meiji leadership than the law of other nations: Chinese law was out of the question as a model, since it was now backward, in penal matters cruel, and the Western powers refused any re-negotiation of the unequal treaties imposed on Japan, until Japan had westernized its legal system. Among Western systems, Anglo-Saxon law was unimportable, being ensconced in miles of volumes of case reports, French law was unsuitable because Napoleon's codifications contained many republican ideas and were written for a not yet industrialized society, and the laws of other advanced nations were bound up with particular historical conditions in these countries. The idea of some common-law advisors, in particular the American judge and law professor Wigmore, to build, in matters of civil litigation, on the advanced case law evolved by Tokugawa courts, did not satisfy the thoroughgoing Westernization demanded by the treaty powers. The German language was virtually unknown, until Katô Hiroyuki, political thinker (on him and his Social-Darwinistic ideas there is much interesting material in Noriko KOKUBUN: *Die Bedeutung der Deutschen für die japanische Staatslehre unter der Meiji-Verfassung*, Frankfurt am Main 1993) and sometime Tôdai Vicechancellor began to teach German language and political philosophy in the 1880's. But, as is well known, the „Prussian achievement“ impressed the Iwakura Mission leaders, the Meiji leaders travelled to Europe and opted for German models, and above all, Germany was no military menace for the Japanese. In Constitutional Law, the German model made it possible to have a front of parliaments, independent courts, and limited monarchical powers, while erecting a government system which kept most of the people in a state of political non-participation and reserved decision-making to a narrow circle of soldiers, businessmen, and bureaucrats. Without this heritage, there would have been no Rape of Nanking, no Hiroshima, no Nagasaki. On

the lower levels of law, the German model made it possible to establish uncorrupt courts, honest and hardworking bureaucracies, a non-litigious and energetically saving middle class, and to get rid of the unequal treaties. Without this heritage, Japan would not have overcome its backwardness and become a model for Anti-colonialists in Asia (including the Koreans, whom the Japanese cruelly oppressed). Thus, the German influence was a major historical factor in the world, and it is good that there is a monograph on the topic.

The sub-title is „Deutsche Rechtsberater im Japan der Meiji-Zeit“ (= German legal advisors in the Meiji era), and, accordingly, Chapters 4.2. deals with what the Japanese learnt from Rudolph von Gneist, who taught them Constitutional Law from his European location; 4.3. deals with what Lorenz von Stein taught them in the same field, likewise without leaving Europe (on the former there are interesting works by Klaus Luig, and on the latter by Reinhard Zöllner, see Bibliography). As for those who actually worked in Japan, 11.1. deals with Albert Mosse, Gneist's former student, who stayed for 4 years in Japan and first of all drafted the laws of self-government on the local level (Ishii Shirô and others just published (München: iudicium 1995) his informative letters to family and friends in Germany (*Fast wie mein eigen Vaterland: Briefe aus Japan 1886–1889*)); 11.2. with Mosse's enemy Otto Rudorff, who spent 6 years in Japan, studied and published important works on Tokugawa and early Meiji law, and drafted the statutes on the organization of the courts (Wilhelm Röhl has written about his life); 11.5. with Herrmann Techow, who spent 4 years in Japan, and drafted statutes on schools and on civil litigation; 11.3., 5., and 6. with lesser known advisors (finding their data must have been a Herculean task, because so many German archives were burnt during World War II); 2.4. with Hermann Roesler's drafting of legislation on Commerce, bills of exchange etc., and 6. with his extensive drafting of constitutional principles and paragraphs (Johannes Siemes wrote a monograph on Roesler, but there is much new material in the present book).

Roesler spent 15 years in Japan. Pages 333 through 343 chart the lives of all known legal and economic advisors, including Ludwig Lönholm, who translated the Japanese BGB and other laws into Western languages, Georg Michaelis who rose to become the Premier of Germany during a period of WW I, and Karl Rathgen, noted economist and sometime Rector of the University of Hamburg. Other appendices contain the Meiji Constitution – in Wilhelm Röhl's translation – and detailed references to all unprinted and printed sources used. There is, unfortunately, no index.

More important than the lives and works of these advisors are, in my opinion, the presentation of the interaction between politics, law, diplomacy, ideology, and influences from abroad which formed the Meiji institutions, and in which the advisors were important cogwheels, their governments the pistons, and the Meiji leaders held the steering wheel, and the brakes. Chapter One summarizes the debate on Japan and the modernization theories, and Chapter Two the interaction between autochthonous law and borrowed codes (the Japanese are still struggling with the consequences, see Guntram RAHN: *Rechtsdenken und Rechtsauffassung in Japan*, München: C.H. Beck 1990). Chapter Three asks why and how the Movement for Liberty and Peoples' Rights failed; Chapters 4 through 7 trace the genesis of the Meiji Constitution; 7.4. shows why the people's possibilities to control the Administration through litigation became so weak, and 7.5. how the Imperial Rescript on Education of 1890 efficiently undermined all sprouts of liberalism and individualism in the Constitution; while Chapter 8 describes how and why this bogus „Free Constitution“ was hailed as a „Truly free Constitution“ by so many well-meaning but-misguided contemporaries. This chapter ought to be required

reading for students of Japan who need to grasp the difference between *honne* (true intention) and *tatemae* (facade). The real trouble for the government was to suppress the hotheads, which made its efforts to free Japan from the unequal treaties even more difficult: the draconic police measures to that effect were to stay in spite of the new constitutional framework. Chapter 5.2. deals lucidly with this complex of problems and how German diplomats, who knew the Japanese actors well, reported on them: absolutely fascinating stuff. Thus, it was clear from the outset that the Constitution, like the rest of the imported and adapted legal system, was not to be a brake, by means of which the governed could influence their rulers, but to be a driving belt transmitting the will of the rulers to the pyramid below them. The German tradition of top-down political management and of using legal constructions to wrap actually held power in the cloak of reason („Positivismus“) was exactly what the Meiji leaders needed. The sudden and enormous growth of influence of German legal and political scholarship and how it was channelled into the heads of future judges and other officials 1884–1895 not primarily through university courses (which would have engendered resistance from the protagonists of other legal traditions, and not have allowed thorough indoctrination), but through courses in the government-supported „School of the Association for German Scholarship“ and its law branch are traced in Chapter 9, and the victory of the German school of law over its rivals in Chapter 10. The most important figure on the Tôdai level was Lönholm who taught German law for over 25 years, liked the Japanese, was a brilliant teacher, and was more interested in Japanese-German friendship than in helping his own embassy scheming against the Anglo-Saxon powers, England in particular. These findings, and their foreign policy background (the Japanese-British alliance of 1902 reduced German political clout in Japan, it was men like Lönholm who upheld Germany's reputation in law, statecraft, and scholarship) are new and important.

Chapter 12.1. summarizes the struggle between adherents of traditional family customs (they won, and their suppression of women lasted until 1948) and the French-inspired draft of a civil code; 12.2. investigates the reasons why not only code texts, but also code interpretation, ultimately became German-inspired, 12.3. is an excursus about the German influence on penal law, and 12.4. deals with the consequences of German interpretation principles; that, however, one can read about more fully in the cited work by Guntram Rahn.

The book provides important aperçus concerning the connections between financial, military, and legal policies, relevant to all developing nations; this compensates for the fact that the author uses no sources in Japanese (the unprinted Japanese archival materials quoted S. 358 are in German). There are some misprints in particular when quoting French texts. But the overall verdict cannot but be: a perceptive and highly useful book for the study of Germany and Japan, of Meiji policies, and of the way in which institutions, once launched upon the world, develop along parameters which the founders did not foresee. In the Japanese case, from defence to aggressiveness; in the German case, from the incense celebrating Wilhelminian progress to the smoke of their burning cities. Thus, as for instruments, the Meiji Japanese leaders chose wisely; as for guiding principles, less so. What they wanted were loopholes in the legal system through which they could govern as they wanted. What they got was a Constitution which, in the end, allowed fanatics to rule by proxy, as Maruyama Masao demonstrated in *Thought and Behaviour in Modern Japanese Politics* (Ivan Morris trans. & ed., Oxford 1963), and a sub-constitutional system which gave the state such a preponderance over the interests of the common people that, in the end, the citizens lost the entrepreneurial spirit of the

Meiji era and became the tools of the generals of the Shōwa era. There is probably no better Western-language book available to demonstrate how law and ideology interlocked in Meiji Japan. As for the sequel, read Kokubun.

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