Roman Law Studies and the Civil Code in Modern Japan — System, Ownership, and Co-ownership

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I. Introduction—The Reception of Western Legal Systems and the Origin of Roman Law Studies in Japan

As a Japanese historian of Roman law, during this presentation, I will construct a brief overview of the Japanese experience in establishing Roman law studies in modernity and their dialogue with the Japanese Civil Code. Efforts to explain the situation of Roman law, Western law, and traditional law in Japan in the Italian language have already been made by my senior Romanists, and I owe much to them.[1] Firstly, considering the key concept of the congress "Rights over things," I will discuss the position of the rights over things in the Japanese Civil Code. I will then proceed to treat some topics on ownership, including co-ownership, as the most important right over things.

Japan introduced a Westernized legal system in the late 19th century when Civil Law and Civil Procedural Law had already been separated and their codification was nearly complete in major European countries. This timing would incise a peculiar character on Roman law studies in Japan. Western legal systems in Japan took the form of law codes similar to the models they were based on in Europe as

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1) e.g., Muto, 1935, 299ff.; Kamiya, 1992, 365ff.; Schiapini, 1992, 363f.; Crifò = Fusco, 1992, 391ff.

well as nurturing the experts, both academic and professional, who were in charge of interpreting said codes. Under these circumstances, there was no room for the "usus modernus pandectarum" to enable the Romanists to directly participate in the interpretation of the positive law. However, Roman law studies were introduced as the historical foundation underlying Western legal systems and as an indispensable prerequisite to understand it. When lectures on Western law began in 1874 at Tokyo Kaisei-Gakko, which was the origin of Tokyo University, the subject "Roman Law" was also taught by an English teacher, William E. Grigsby.[2] Since then, Roman Law has been continuously taught at the university level in Japan, and the accumulation of this research can be observed. It has been treated as a separate subject from modern civil law but the dialogue between them has continued up to the present day. The material for education in the earliest period was the re-translation from the English translation of Justinian's *Institutiones* and the Institutiones system, which comprised the law of persons (ius personarum), the law of things (ius rerum), and the law of actions (ius actionum), and was rather familiar to the Japanese during that period. The interest in Roman law was particularly strong prior to the adoption of the Civil Code.

II. System—The Arrangement of the Japanese Civil Code and the Rights over Things

As is well known, a French scholar, Gustave Emile Boissonade de Fontarabie[3] prepared the draft for the Civil Code, which consisted of five parts and was deeply influenced by the French Civil Code; it took the form of the Institutiones system.[4] However, after the promulgation in 1890, his draft was involved in a serious academic and political conflict, which was called "Hohten-Ronsoh," and he was frustrated as a result. It was to be called the "Kyuh Minpoh (Old Civil Law)."[5] After the conflict, three Japanese scholars, Kenjiroh Ume, Yatsuka Hozumi, and Masaakira Tomii[6] were appointed to draft the new Civil Code, which went into effect in 1898. What should be particularly noted is that Ume and Tomii had profound knowledge of Roman law. Neither of the men were Romanists in a rigorous sense, but as civil law scholars, both wrote a doctoral thesis at the University of Lyon and gave considerable weight to the study of Roman law.[7]

2) Yata, 1934, 88
3) Stolleis, 1995, S. 95
4) Maeda, 2004, pp. 611f., 942–945
5) Maki = Fujiwara, 1993, pp. 351–356
6) Stolleis, 1995, S. 295f., 618, 627f.
7) Harada, 1942, p. 296

This Civil Code (hereafter the Japanese Civil Code) has since been amended very often but retains a fundamental continuity to the present day. It consists of five parts beginning with the general provision and ending in the law of inheritance.[8)]

Now, I turn to the rights over things. One of the main characteristics of the Japanese Civil Code was the adoption of the German Pandekten System. For those who are familiar with the composition of *Gaii Institutiones* or *Iustiniani Institutiones*, the manner in which the Japanese civil code treats the right over things is rather odd. Persons are subject to the right and the things, as objects of the right, which are both clearly defined in Part I—"general provisions." Then, in Part II, "the law of right in rem" deals with the rights over things in detail. However, the modes by which persons acquire and lose rights over things are scattered in Part III "the law of obligation right" and Part V "the law of inheritance." (Part IV is entitled "family law.") Although identifying the Western civil law system that was dominantly influential on the substance of the Japanese Civil Code is still an unsettled argument among civil law scholars and legal historians, its composition was clearly influenced by the Pandekten legal science of 19th century Germany. Curiously, more textbooks on Roman law came to be composed according to the Pandekten system, while they had been following the Institutiones System until then. Yoshijiro Okamoto, who wrote a doctoral thesis at the University of Leipzig, taught Roman law from 1899 to 1907 at the Meiji Hohritsu Gakkoh, which was the origin of the Meiji University.[9)] At the preface of his textbook on Roman law, he deplores that more attention came to be applied to the interpretation of the Japanese Civil Code than to Roman law among scholars and insists on the importance of Roman law as its historical background.[10)] He actually constructed his textbook according to the Pandekten system.

III. Ownership—The Essence and the Limit of Ownership in the Japanese Civil Code

The change from the pre-modern rule over things to the modern notion of ownership, which parallels contemporary Western countries, proceeded in the development of Japan in the Meiji Era beginning in 1868. However, the precise time of its completion is still seriously debated.[11)] Apart from the substantial practice of rule over things in society, the Japanese Civil Code prescribed the

8) Maki = Fujiwara, 1993, pp. 356–365

9) Yata, 1934, 596

10) Okamoto, n. d. p. 2f.

11) Kai et al., 1979, pp. 167–185

protection of private ownership from its enactment. This rule forms the major principle of the Japanese civil law along with the principles "Freedom of contract" and "Responsibility with fault."[12] However, as I will later point out, this principle was naturally not restrictable in any situation as the limit of private ownership has been discussed.

"The owner has the right to use, gain profit from, and dispose of the things he owns within the limitation of the laws and regulations" (Art. 206, my translation).

According to the commentary of De Becker in this article, "'Ownership' (Shoyu-ken) is a right by virtue of which a thing can be freely governed; in other words, it is a right of freely using, receiving the profits of, and disposing of a thing."[13] This notion of trilogy (to use, gain profit from, and dispose of) is sometimes attributed to Roman law without limitation by the civil law scholars in modern Japan.[14] However, the famous Romanist of the 20th century, Harada, noted in 1937 that the legal maxim "Dominium est ius utendi et abutendi re sua, quatenus iuris ratio patitur (Ownership is the right to use and dispose of his own things as far as the reason of law permits—my translation)" only dates back to the 16th century at the earliest.[15]

Real estate, and above all, land, was given particular importance among things in Japanese civil law. In Japan, the government has admitted to private ownership of land since "Chiken-kofu (issuance of the land bill) in 1872, and the Japanese Civil Code confirmed this fact. Article 207 prescribes as follows, "The ownership of the land has an effect above and beneath the land within the limitation of the laws and regulations" (my translation). Naturally, Japanese landowners can claim nothing in relation to Brazilians on the opposite side of the globe, and in addition to the natural and reasonable limits of the right, there are special laws restricting its effects, such as the "Dai-shindo Chika no Kohkyoh-teki Riyoh ni kansuru Tokubetsu Sochihoh (Act on Special Measures Concerning the Public Use of the Deep Underground), enacted in 2000. Criticism of such a mode of prescribing law can be seen as early as 1924 in Japan, and it quotes the argument of Otto von Gierke in Germany in the 19th century, around the time of the first draft of the German Civil Code (BGB). Its counterpart is Article 207.[16] I will treat the

12) Endo et al., 2002, pp. 10–14
13) De Becker, 1921, p. 151
14) e.g., Endo et al., 2003, p. 168
15) Harada, 1954, p. 104
16) Hirano, 1924, pp. 79–84

argument of Yoshitaro Hirano, who wrote the Article, in the next chapter in detail.

Here again, the term Roman law appears on some recent commentaries of civil law as originally claiming the right to be, in effect, from the heavens to the very depths of the globe. Harada refutes such a tradition of criticism and insists that such a notion "usque ad caelum (all the way to the heavens)" and "usque ad inferos (all the way to the deep underground)" dates back to the Glossatoren (notes to Paulus *ad edictum* 21 lib. D. 8, 2, 1 pr.)[17] at best and is not attributable to classical Roman law.[18] His argument was based on that of Pampaloni.[19]

My paper has a focus on the analysis of the academia and law in modern Japan, and therefore, it is beyond my present scope to trace the historical formation of this doctrine itself from medieval European legal science in detail. Thus, it would be appropriate for me to simply show in this paper that the original classical Roman law source on which the doctrine was formed had a very limited implication and little connection with the effects "usque ad caelum" and "usque ad inferos" of the land property. The original source "quia caelum, quod supra id solum intercedit, liberum esse debet" (D. 8, 2, 1 pr. Paulus *ad edictum 21*) corresponds to the following part of the English translation, which I have underlined. "If public ground or a public roadway lies between two estates, this does not prevent the existence of a servitude of *iter* or *actus* or one giving a right to build higher. But this situation does prevent the existence of a servitude giving a right to insert a beam or to have a roof or other structure projecting from a building or to discharge a flow of rainwater or rainwater dripping from the eaves of a house [hereafter, eavesdrip]. The reason is that the air space above such ground must be kept clear."[20] As I stated above, Harada's argument is based upon historical knowledge of the Western legal tradition and on comprehension of contemporary legal research in Europe.

In fact, the problem regarding to what extent a restriction should be applied to private rights was a focal point in civil law theory and practice in the early half of the 20th century. Moreover, with the influence of German theory, "*Sozialisierung,* the socialization of ownership" came to be a motto,[21] and this was made concrete

17) For the glossa added to the above, "Cuius est solum eius est usque ad coelum (The land belongs to the owner as well as the air space all the way to the heavens–my translation)," see also Mario Viora, *Accursii Glossa in Digestum Vetus* (1969, Torino), p. 296.

18) Harada, 1949, p. 101f.; Harada, 1954, pp. 104–106

19) Pampaloni, 1892, 34

20) Watson, 1998, I

21) e.g., Kai et al., pp. 196–198

in the civil law "abuse of right" doctrine. With the general acceptance of a given doctrine in the academic world, the courts gradually came to follow it. The leading case was the Shingenkoh Hatakakematsu case, where a railroad company was sued because it ruined a historically famous pine by operating a steam locomotive train and neglected the prevention of sooty smoke emissions, which could have been done rather easily if the company had considered it. The Supreme Court (Taishinin) admitted the claim for compensation and argued that even the exercise of a right, in this case the operation of trains within the property of the company, can constitute a tort by the defendant's intent or negligence.[22] The second case of great importance is the Unazuki hotspring case, where the judgment of the Supreme Tribunal denied the owner's (hereafter, A) right to remove a water pipeline belonging to another person (hereafter, B). A came to own some land through a purchase, and a pipeline carrying hot water from a spring to a spa facility happened to be located just inside A's property line. The pipeline was owned by B, a railway company that ran the spa facility. A proposed that B should buy the land at a price far above its actual market value and demanded the removal of the pipeline if B refused. However, due to its location on a cliff, its removal and resettlement would be very costly. B denied A's proposal, so A proceeded to sue B for the removal of the pipeline according to the right of ownership. The Supreme Court denied the claim as the abuse of right.[23]

The abuse of right doctrine was later incorporated into the Japanese Civil Code by the amendment in 1947 to Article 1.[24] The text is as follows. "1. Private rights must conform to the public welfare. 2. The exercise of rights and performance of duties must be done in good faith. 3. No abuse of rights is permitted." In my observation, the tendency to restrict private ownership will continue in the future with the increase of various special public laws restricting its exercise.

However, we should not ignore the negative sphere of the abuse of right doctrine and socialization of ownership. According to the argument of civil law scholars, the former doctrine can sometimes function to depress the private rights of persons with relatively small wealth and power and can promote the interests of one party who had already established the existing state that is very costly to remove. Another point of importance is that the socialization of ownership theory approached the Nazism civil law theory of the 1930s and 1940s, which insisted

22) March 3, 1919. *Taishinin Minji-Hanketsuroku* 25, 356

23) Oda, 1999, p. 135; October 5, 1935. *Taishinin Minji-Hanreishu* 14, 1965

24) Maeda, 2004, pp. 1310–1313

upon the mobilization of the nation and of their property.[25)]

Sometimes, very individualistic standpoints or attitudes that put too much emphasis on rights were given incorrect Roman labels in civil law debates concerning the protection of rights and social welfare. Moreover, in some cases, the distinction between German Pandekten legal science, classical Roman law, and medieval law was not made, and they were generally labeled as Roman law by civil law scholars and so on. Hirano himself originally mentions the distinctions between Pandekten legal science and Roman law in its own historical context done by von Gierke.[26)] However, they seem to have been lost in the course of diffusion according to my inference.

Harada's major contribution was to provide a sober correction to the prejudiced labeling of the nonspecialists from the perspective of a legal historian. Moreover, he explains that Roman private law functioned in classical Roman society along with public law (ius publicum), divine law (fas), customs (mores), religions, and so on. Further, the reproaches of the Germanisten in Japan are done without considering the original situation and point out only the minute characters of the individual institution with some exaggeration.[27)] I infer that this plurality of norms thesis in his apologia is influenced by Fritz Schulz, whose theory he actively introduced.[28)]

IV. Co-ownership—The Roman Character in the Japanese Civil Code and its Circumstances

As I have already mentioned, there was a serious debate among Romanisten and Germanisten in Japan in the first half of the 20th century, replaying the original debate in the latter half of the 19th century in Germany, this time with particularly Japanese connotations. One of the best representatives of Germanisten in Japan was Yoshitaro Hirano, who began his academic career as a civil law scholar and then developed into a Marxist-leaning general legal theorist and political activist. His first book was entitled *Minpoh ni okeru Roma-Shisoh to German-Shisoh (Roman and German Thought in Civil Law)* and developed a harsh criticism of the Pandekten character of the Japanese Civil Code, basing his argument primarily upon the work of Otto von Gierke and then on that of Anton Menger in Germany. Along with the points on ownership, his criticism is very harsh on the co-ownership

25) Kai et al., p. 198f.

26) Hirano, 1924, p. 18f.

27) Harada, 1949, p. 105; Harada, 1950, p. 59f.

28) e.g., Harada, 1950, I–II

articles in the Japanese Civil Code.[29]

The co-ownership articles of the Japanese Civil Code are recognized to be of Roman law character.[30] One can dispose of his/her share freely (Art. 206). Partition of co-ownership in property is admitted at any time (Art. 256, para. 2). This type of co-ownership is called "Kyohyuh" in Japanese. This notion cannot be applied to the property of a partnership (Art. 667) where the members of the partnership cannot dispose of it freely (Art. 676, para. 2). Civil law scholars invented the notion "Gohyuh" to explain this type of ownership and to distinguish it from Kyohyuh. Hirano criticized the Kyohyuh notion and introduced the idea of "gesamthand" from German legal science, which was to be called "Sohyuh," where each co-holder cannot dispose of his/her share nor claim the partition of the property. Under Sohyuh, co-holders can only use and gain profit from the property. Such a notion was accepted by civil law studies and was regarded as applicable to the common right (Art. 263, Art. 294) and rights over things admitted by custom such as the right to use water exclusively (suiri-ken) or the right to use a spa (onsen-ken). Kyohyuh, Gohyuh, and Sohyuh form the three categories of co-ownership in the Japanese civil law doctrine.

Now, I will take the common right (iriai-ken) as an example.[31] Recently, the common right came to attract the attention of civil law scholars and sociologists as a key notion to overcome the presupposed bilateral counterpoising of the public and the private sectors in the modern day, even though the common right had gradually been losing the attention of scholars in the process of the gradual decrease in the population of the villages and the process of decay of the forestry. This new increase in attention may be named the "Renaissance of the commons."[32] Japanese civil law prescribed the right in common positively but very scantily, lending the concrete contents of it to local customs without specification. There are only two articles, "This section (co-ownership), in addition to the local custom, is applied to the right in common with the nature of co-ownership" (Art. 263). "This chapter (easement), in addition to the local custom, is applied to the right in common without the nature of co-ownership" (Art. 294).

It developed out of old customs to empower inhabitants of some rural districts to enter certain forests, cut timber or grass, gather fallen branches or leaves, and so on, even if they did not own them. Before the Meiji Restoration in 1867, forests were

29) Hirano, 1924, pp. 165–189

30) e.g., Nishimura = Knütel, 2000, pp. 116–129

31) De Becker, 1921, p.178f.; Endo et al., 2003, pp. 269–287

32) e.g., Suzuki et al., pp. 16–18 et passim

often regarded as being owned by the "Mura" (local community, village) and its members could enter the forests to profit from it but could not dispose of nor demand its partition. In the reform directly following the "Chiso-kaisei (Reform of the Land Tax)" in 1873, the ownership of land was divided into public land and private land (Tochi-kanmin-yuh-kubun), and the ownership of the forest was retained by the government unless someone could prove their ownership. The right of members of local communities to enter the forest could be extended but became less stable. Then, even private forests were incorporated into the property of the village as the lowest stratum of the Meiji government with the establishment of the "Chohson-sei (The Foundation of Municipality and Village)" in 1888.[33] The right of the villagers to enter the forest could be abolished at the discretion of the village council. When the Japanese Civil Code went into effect in 1898, old rights involving the use of forests changed dramatically.

In this context, the criticism of Hirano regarding the Roman notion of co-ownership makes some sense because it resulted in justifying the deprivation of the older pre-modern rights, and the protection of common rights by the Japanese Civil Code was insufficient at its establishment. However, I repeat that not all such labeling and reproach was scientifically accurate from the perspective of a legal historian.

Recently, a civil law scholar Yoshioka critically analyzed the history of legal theory in the Meiji Period on common rights, particularly the work of Kaoru Nakata, a famous historian of comparative legal history as well as Japanese legal history. This work belongs to his research on law regarding forests.[34]

V. Conclusion and Prospects

In my observation, Roman law studies tended to become more theoretical and historical since the mid 20th century. They concentrate on Roman law in its own classical context rather than on the practical application within contemporary law, even though the dialogue with civil law studies continued, and Roman law offered a comparative and historical perspective. There were also no further debates between Germanisten and Romanisten in Japan. Here, I would like to mention Satoru Yoshino, Tokuji Sato, and Takahiro Taniguchi as major Japanese Romanists who contributed to the study on the rights over things during this period.[35] Recently,

33) Yoshioka, 2006, p. 194f.

34) Yoshioka, 2006, pp. 191–219

35) e.g., Yoshino, 1972; Diósdi, 1983; Taniguchi, 1999

the dialogue and communication involving civil law studies has become frequent and historical research of the origins of the Japanese Civil Code has brought forth rich results. The international symposium held in Fukuoka to commemorate the centennial of the Japanese Civil Code was one of the biggest achievements in this field.[36)]

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