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Interpretation of Law in the Age of Enlightenment

From the Rule of the King to the Rule of Law

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INTERPRETATION OF LAW IN THE AGE OF ENLIGHTENMENT

From the Rule of the King to the Rule of Law

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Foreword

Our project: the "Hermeneutic Study and Education of Textual Configuration" (HERSETEC), commenced in June 2007, after official notice was delivered by the Society for the Promotion of Science. The Society organized peer reviews with advice from distinguished scholars both within and beyond the borders of Japan, and authorized us to launch. As this project was to focus upon the pedagogical dimensions of the doctorate course, we called upon doctorate students for their willing participation in our project, in order to enrich both their knowledge and their experience in their respective research fields.

Our scientific assumptions about textual configuration can be explained as follows: in general, texts constitute a kind of imaginary constellation of homologues: both those of pre-textuality – a prerequisite for textual existence – and other related texts, which realize inter-textuality through cross-references among them; meta-texts, which assign annotations or interpretations to texts; and para-texts, which are titles that indicate genres of texts or categories to which the texts belong, as well as their forms and constitutions. A particular text exists as a closely-knit gathering of textual constituents, and their overall configuration is characterized as "text" in the broad sense. Based on the theoretical ideas explained above, which have already been cultivated and elaborated on in the sphere of literature, we have examined what is called the "hermeneutical point of view," which is, as I see it, one of the most important devices of modern science for the understanding of the written text.

As the fruits of labor in the educational sphere are, regrettably, less visible when compared to the research results, I would explain the activities of our project over the past four years by presenting the trajectory of various international meetings that we have organized and hosted.

First, we inaugurated the series with a conference entitled "Philological and Grammatical Studies of English Historical Texts," which was held in Nagoya, in September 2007. The late Professor AMANO Masachiyo was

its organizer and the proceedings were published in 2008 from Peter Lang. The second international colloquium that we organized was named *Balzac, Flaubert. La genèse de l'oeuvre et la question de l'interprétation* and was held in December 2007. The third was held in February 2008, titled "Identity in Text Interpretation and Everyday Life". In July 2008, we hosted the fourth international conference on the subject of "The Global Stature of Japanese Religious Texts: Aspects of textuality and syntactic methodology". The fifth international conference was organized by MATSUZAWA Kazuhiro in collaboration with Gisèle SÉGINGER: *La mise en texte des savoirs*, in March 2009, at the *Université de Paris-Est*, of which proceedings were published in November 2010 from *Presses Universitaires de Strasbourg*. Almost simultaneously, we held the sixth international meeting with the theme *Herméneutique du texte d'histoire: orientation, interpretation et questions nouvelles* on the 7th and 8th of March in 2009, in Tokyo. The seventh, titled "The Sixth Workshop on Altaic Formal Linguistics" was held in September 2009 in Nagoya. The proceedings of this colloquium were published by the MIT Press in 2011. Once again, almost contemporaneously, the eighth international meeting was hosted in association with the Charles University of the Czech Republic, in Prague: "Historical Trajectory of the Written Text in Japanese: Interpretation, Re-contextualization and Configuration". The ninth meeting was based on the theme "Japanese Academic Knowledge Aiming for Language" in September 2010. Finally, it was the tenth international meeting that our colleague MORIGIWA Yasutomo organized in association with Professors Drs. Michael STOLLEIS and Jean-Louis HALPÉRIN, titled "Interpretation by Another Name: The Uses of Legal Texts in the Age of Enlightenment", from which this book has ensued.

I would stress the fact that the conference was our first to discuss the problem of law and juridical texts. I do not doubt that our scientific attempt ended successfully, thanks to the collaboration of all the contributors gathered at this meeting. To conclude, I would like to express my sincere gratitude to my colleague MORIGIWA Yasutomo, and Professors Drs. Michael STOLLEIS and Jean-Louis HALPÉRIN for their scientific patronage and advice.

Academician of the Japan Academy
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SATO Shoichi

Preface

Legal interpretation was a matter of great controversy in 19th century Germany. The conflicts that took place between the historical school and what was deemed the school of *Begriffsjurisprudenz* is well known. This debate increasingly broadened divisions between the Germanisten and the Romanisten, and Savigny, Puchta, Jhering are just some of the names that come to mind as the major actors at play. The issue of legal interpretation has continued to be discussed in the 20th century; a great part of the works of Zitelmann, Ehrlich, Gény, Kelsen, Holmes, Cardozo, Llewellyn, Hart and, more recently, of Ronald Dworkin, Joseph Raz, and Neil MacCormick have been devoted to pressing interpretive questions. These questions include those concerning the issues of "judge-made law," silences in the law, the idea of "one right answer", the Janus-faced character of legal interpretation, and the nature of legal reasoning itself. In addition, the "linguistic turn," influenced by the views of L. Wittgenstein, J. L. Austin, and H.-G. Gadamer, among others, accentuated this focus on the role of interpretation in the creation of legal norms.

Compared to what we know of the 19th and 20th centuries, our understanding of what occurred in 18th century Europe on this issue is much less evident. However, just as the knowledge of 19th century controversies aids our understanding of those of the 20th century, a sound understanding of how legal interpretation was regarded in the eighteenth ought to help us better understand these later developments.

Further, legal interpretation in the Age of Enlightenment is a topic of great interest from the point of view of legal theory. How did the ideology of the era, with its emphasis on the power of reason, affect the practice of legal interpretation in the courts? As in the case of Kant, the 18th century was the period during which the concept of public reason was developed. Is it possible that the judiciary had been operating upon such a concept, perhaps without being aware of it? If there were enlightened judges, would they not

have espoused the idea that through reason, a code could be derived with two main functions: first, unification of the then various and conflicting sources of law which necessitated interpretation; and second, to be so clear and systematic that no interpretation would be needed? Further, because none existed, that the judges can and should interpret the law according to natural law principles so that a functional surrogate of such a code could be derived in practice?

While Friedrich the Great aspired to bring about such a Code, and although there were attempts to systematize positive law under natural law principles in the universities, such tendencies seem not to have been the case with the judges of the courts in his official realm. As the work by Heinz MOHNHAUPT and Jan SCHRÖDER in this volume demonstrates, history tends to contradict our expectations. Finding reasonable solutions through legal interpretation, and reading reason into the law was mainly a pre-18th century practice. In contrast, what developed in the 18th century was the replacement of reason by authority. More and more, as Hobbes said, authority, not reason, made the law. The power of absolutist kings controlled the judiciary, and directed them to follow the wishes of the sovereign; the concept of authority was thus firmly rooted in this century, and the scope for judicial interpretation became increasingly narrower.

Furthermore, in contrast to the spread of Enlightenment philosophy from France to Germany, and the high level of communication among the literary and scientific circles of England, Scotland and Continental Europe, there was relatively little exchange of ideas and practice between the courts divided by the Rhine. Entirely different ways of addressing the needs of a new, modern state were developed in each area respectively.

These preliminary findings prompted a more thorough investigation of the subject, with the aim of finding out in more detail how the German and French judges interpreted law in their respective courts. This in turn provided a foundation for a better understanding of the development of legal interpretation during the Age of Enlightenment.

The first idea of this collective work, initiated by MORIGIWA Yasutomo, was to question the German and the French systems during the Age of Enlightenment. The working hypothesis was that the well known contrasts between French legalism ("legicentrism", prevalent Napoleonic codification, and disallowance of judicial review of statutes), and the German theory of interpretation (Savigny's system, later adapted to the Kelsenian context of constitutional review) could find their roots in 18th century differences between each country's philosophical, political and legal contexts. The working hypothesis was exactly that: nothing more than temporary scaffolding, thus in need of further refinement and elaboration as the enquiry

progressed. The most well-known writings discussing legal interpretation during the 18th century – such as Montesqieu's famous expression of the judge as the "mouth of the law" – seemed, *prima facie*, foreign to any interpretivist understanding of the law. It was as if they spoke of interpretation "by another name" if at all. This was consonant with the changing practice of the judges in France and Germany, but admitting no room for interpretation is by far an exaggeration. Thus, it was necessary to further investigate the works of less notorious writers and those engaged in judicial practice.

Thanks to the financial support of the Hermeneutic Study and Education of Textual Configuration (HERSETEC, a Global Centre of Excellence Program organized by the Nagoya University Graduate School of Letters), a symposium was organized and held in Paris, September–October 2010. In preparation, Michael STOLLEIS (former Director of the *Max-Planck-Institut für europäische Rechtsgeschichte*) in concert with MORIGIWA, provided scientific perspective on the issue at hand, and the *Centre de Théorie et Analyse du Droit* (UMR 7074 represented by Jean-Louis HALPÉRIN, *École normale supérieure*, Paris) kindly provided the venue for the conference, utilizing both campuses of the *École normale supérieure*. In addition, as co-organizer, HALPÉRIN provided a wealth of ideas for the conference.

At the conference, the discussion was particularly rigorous, not only on the papers presented, but also concerning the subject matter as a whole, especially on the links between older and more recent debates. It became apparent, first, that the Age of Enlightenment should be understood as a period beginning in the middle of the 17th century (with Hobbes' *Leviathan*) and concluding after the French Revolution with the German debates on the works of Savigny. Differences between French and German doctrine were also more precisely contextualized, and were shown to be linked with the developments of the modern State on both sides of the Rhine.

The changes that intervened during the Age of Enlightenment came to be considered as beacons for our contemporaneous understanding of the nature of legal interpretation. These changes can be aptly described by the sub-title: "from the Rule of the King to the Rule of Law", which depicts the transition from judges devoted to the service of the Prince to judges subjected to a significantly more abstract sovereignty. Through the historical investigation of legal interpretation in Germany and France during this era, the legacy of legal cultures created by the Age of Enlightenment began to appear as clues that could fuel renewed debates about legal interpretation today.

The chapters in this volume were organized with the idea above in mind. The volume begins with a work by STOLLEIS, which goes well beyond the introductory function it serves. The second and third parts are comprised of works in legal history written by representative legal historians of France

and Germany, and concentrate on the issue of legal interpretation. Heinz MOHNHAUPT and Brad WENDEL kindly joined us post-conference, which allowed us to change this volume from a record of proceedings to a well-balanced and informative collection of essays.

Part IV is a collection of chapters by philosophers of law. MORIGIWA provides an introduction discussing the way in which a theory of general interpretation can illuminate legal interpretation, given the heritage of philosophy stemming from the "linguistic turn." Michel TROPER then illustrates the modern French judge's broad interpretive scope, despite the official ideology that the French judge merely applies and never interprets law. This may give the appearance that the French judge has liberal scope in interpretation that may be little more than arbitrary. Contrary to this perspective, WENDEL discusses the interpretation of law by American lawyers, and demonstrates that they ought to be responsible for the quality of the reasons given to explain and justify their legal interpretations. This may be understood as an anti-thesis to TROPER, as it claims that there is (in the case of lawyers) a normative reason to rule out discretion in interpretation, *a fortiori* for the case of the judge. In this sense, modern day theories of legal interpretation may be seen to return to the system of reading reason into law. This is the position MORIGIWA takes, in arguing that the interpretation of law is a never-ending spiraling process of reason-giving.

The volume closes with a synthesis of the findings, presented by HALPÉRIN. We hope that this will give the reader a panoramic view of the state of legal interpretation in the Age of Enlightenment. The book should offer as well a taste of the contemporary theoretical situation on the issue of legal interpretation. With this prospect in mind, we hope that the collection of these texts, made possible with the kind support given us by *Springer Verlag*, will provoke further research and debate surrounding the question of interpretation on the use and creation of law.

Last but not least, the editors would like to thank everyone who made this volume possible. We were fortunate enough to receive papers from the leading writers in the field. The audience at the Paris symposium, their questions and critique from the floor were most helpful. Professor SATO Shoichi of the Japan Academy and leader of the HERSETEC project gave invaluable moral as well as financial support. The *Max-Planck-Institut für europäische Rechtsgeschichte* and the *École normale supérieure* were generous in allowing us the use of their premises for our meetings and the symposium. Our special thanks go to Thomas ROBERTS for his speedy and excellent translation of the work by Heinz MOHNHAUPT, NODA Yukari for her always timely secretarial work, Leah HAMILTON for her tireless polishing, formatting

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Michael STOLLEIS was born in 1941. He was a Professor for Public Law and History of Law at the University of Frankfurt from 1975 to 2006. From 1992 to 2009 he also directed the Max Planck Institute for European Legal History. He has been awarded both the Leibniz Prize of the Deutsche Forschungsmeinschaft (1991) and the Prize of the International Balzan Foundation (2000). He is a member of several Scientific Academies and

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Michel TROPER is professor emeritus at the Université de Paris X-Nanterre, a member of the Institut Universitaire de France. He created and was the first President of the SFPJ (Société Française de philosophie politique et juridique). He is also honorary president of the French association of constitutional law. TROPER has taught and lectured in several universities around the world.

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Contents

Part I
Introduction