Law Code Versus Political Change in China and Japan

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Recommended Citation
Available at: https://scholarsarchive.byu.edu/ccr/vol16/iss16/4

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From about 600 A.D., at either end of the Eurasian continent, a written, systematized, and conceptualized—in short codified, and therefore transferable—body of law was available for leaders of younger nations in the area, who wanted the order, the strength, and the prestige accompanying the adoption and implementation of such a legal system.

At the western end, the model was the Corpus juris civilis enacted in the name of Emperor Justinian, and consisting of the codified law of the Roman tradition, Codex Justinianus (534); the systematized opinions of Roman lawyers, Digesta (533); a textbook, containing the key to the system, Institutiones (533); finally, new laws enacted from 534, when the former materials were given force of law, to 565, when Justinian died, or Novellae.

Through enacting and implementing all or part of this material, ancestral tribes of what is now Western Europe hastened their march towards civilization. For even barbarized Roman laws made the rulers stronger, feuds illegal, and trade easier. They also forced everybody to face the unsettling fact that more developed social institutions than those of the present existed or had existed. From the 11th century, the study of Roman law in the universities of Italy, notably Bologna, was the chief secular intellectual baggage of those who, serving Church or princes, developed European administration, spiritual life, commerce and civic life anew.

This story, having Byzantium as its focus, is well known. Less well known is the parallel story in the East, having Ch’ang-an as its focus. In China, it was the Western Chou rulers (1027-771 B.C.) who began to enact written law, though it was only made known to officials, and not systematized. The military overlords who usurped these rulers enacted more and more written law, and one of the Warring States for the first time, in 536 B.C., systematized the law and made it known to others than officials. The custom
spread rapidly, because it was useful for the rulers in regimenting their peoples towards more fighting, production, taxpaying, and discipline in general. The laws were penal, and their operation cruel. The winning state of Ch'in (221-207 B.C.) systematized more of the law than any predecessor, published it, burnt the books of morality, the competing law source, and enforced the code without respect for status or traditional morality. Thereby Ch'in dealt feudalism and folk law a heavy blow and alienated the upper classes who had hitherto been subjected to their moral code, but exempt from the rigors of the law. The subsequent Han dynasty (206 B.C.-220 A.D.) kept most of the cruel laws, but made the upper class go along with the system through recruiting them as officials and exempting these from the full horrors of the penal laws. The Han ideologists developed the idea that law is but the handmaiden of morality, a sad but necessary tool against bad men who disturb the social and cosmic order.

The successor states of Han, especially the dynasties north of the Yangtze, which were mostly foreign nomads holding down resentful, more civilized Chinese majorities, developed laws which expressed the Legalist/Confucian compromise of the Han. In addition to the character which the Japanese read ritsu and now means law, but originally meant "constant," then "rule" or in music "pitchpipe," and finally "statutory penal provision," one got ryō, a character originally meaning "to publish a police order," but came to mean "to remind the subjects of moral rules already in force." Law took on a pedagogical aspect, ryō, dear to the Confucian heart, in addition to its deterrent ritsu aspect of Legalist origin.

From the northern dynasties the re-unifying dynasties of Sui (581-618) and T'ang (618-906), and eventually China's neighboring states, first among them the Japanese, took over the ritsu/ryō terminology and the ideology underlying it, i.e., pedagogical ryō insisting that their contents were already hallowed by tradition, and draconic ritsu fortifying the ryō with various punishments, some of them as cruel as those our ancestors invented. It was part of Han and later ideology that one had better not bother the authorities with civil litigation, but thrash it out under the guidance of clan, village, or guild elders. Civil law therefore only turned up in the interstices of ryō and ritsu, particularly when the code dealt with land use, land tax, succession, marriage, or mar-
kets, and remained in an underdeveloped state, which hampered the growth of trading or manufacturing elites who might have competed with the gentry officials. The Chinese codes had their forte in administrative law, because they had grown in a milieu where the state was stronger than the clans, and the rivers stronger than the state, while the Roman codes had grown in a milieu, where man was stronger than the rivers, and the clans stronger than the state, so that the forte of the Roman codes became pacifying the clans by dispensing equity. In Kamakura times, similar conditions prevailed in Japan. But in China, radical 18, the knife of mutilation, became the symbol of the law, like the blindfolded goddess holding the balance aloft became ours.

In 581 the first emperor of the Sui dynasty, building on the laws of those Northern dynasties from which the Japanese had got so many cultural and institutional impulses while they still wrote little, enacted new ritsu and the year after, new ryō. He also began enacting edicts later than the latest compilation, Novellae in Justinian parlance, and kyaku in Japanese, a character having run the gamut of meaning "to penetrate" in Chou, "to correct" in Confucius' time, and finally, "a regulation." Finally, the Sui emperor issued ordinances on how to implement the above kinds of laws. These ordinances were called shiki, a character which meant "pattern, model" already in Chou times.

In 622, Japanese students who in T'ang China had learnt about China's laws and legal reforms, told the Japanese court that "The Land of great T'ang is an admirable country, whose laws are complete and fixed; constant communication should be kept up with it." Two years after, the T'ang government enacted the whole Corpus juris of China: ritsu, ryō, kyaku, and shiki: lu⁴, ling⁴, ke², and shih.⁴ The officials only had access to the code. To permit the people to copy it would have been "Legalism." The people were only told in concreto what the law required of them such as tax, corvée, and conscription.

After minor changes in 632, the T'ang corpus was reissued with further modifications in 637, including even one chapter of internal customary rules developed by the administrative offices, and to the subsequent 651 edition an official commentary was for the first time added. Besides their good political reasons, such as threats to the prestige of the government by one magnate family, setbacks in Korea, and severe exploitation of privately-owned...
peasants, the Taika reformers of Japan from 645 onwards could accordingly look on vigorous legislative action in T'ang. When, under the Tenji emperor (661-671), the Japanese court came round to codify part of the law, the Ōmi-ryō of 662, the T'ang model had, years ago, reached the same level of general usefulness as the Justinian corpus, namely: There was a “Codex,” i.e., the ritsu-ryō, with implementing shiki; There were “Digesta,” or the opinions of lawyers, in the form of code commentaries; There was a textbook-like key to the system, like “Institutiones,” because definitions and principles were mapped out in the opening sections; in the ritsu, there was even an ideological and historical introduction, mapping out why the state punished; Finally, the system was kept up-to-date by assembling the “Novellae” as kyaku.

Japan's more perfected code, the Kiyomigahara code of 681, the Taihō code of 701, and the Yōrō code of 718, followed the same general pattern, but kept themselves independent from the Chinese model as to details. Yet, the East Asian code system based on the T'ang code, had features in common distinguishing its aims and operations from those of the Mediterranean code system:

Relatively speaking, the Chinese system was:

1° strong on penal law and penal procedure;
2° modern as for its well-ordered civil service, increasingly recruited by examinations;
3° archaic in its steep hierarchy of status classes; absent was the Greek ideal of isonomia, or equality before the law, from which slavery was increasingly seen as an aberration;
4° systematic, particularly compared to the Digesta;
5° vulnerable, because no church, no independent civic associations, and no estate of private law-knowers, only the bureaucracy upheld the law;
6° monolithic, because, though it accepted that communities of foreign merchants might live according to their own laws, it was so bureaucratically fine-meshed that it could not easily accommodate competing social institutions. On this point, Japanese law was destined to diverge from the Chinese pattern, and undergo developments parallel to those in the West.

Among Franks, Germans, and Longobardians clans were so strong, princes so limited in power by their magnates,
agrarian communalism so entrenched, and princely bureaucracies so undeveloped, that Roman law had to accommodate itself to the realities of each particular people. Therefore, lawyers trained in Roman law or in its offspring, Canon law, had to analyze the indigenous law with the tools of Roman law, and thereby created new syntheses, which are the ancestors of modern European law, such as Law and Equity in Britain, Coutumiers like the Beauvoisis in France, Sachsenspiegel in what is now Germany, and the so-called "Provincial Laws" in medieval Northern Europe. Finally, from the Atlantic to Elbe, Roman law was more or less accepted as the law which it was reasonable to use if and when the Bible or the local prince had not decided otherwise.

In Japan, from late Heian, political and legal polycentrism reasserted themselves as feudalism. But law was technically well developed, because ritsu-ryō-trained lawyers could handle concepts and draft lucidly whatever any legislator wanted. Local law improved by the conceptualization developed by the legists of Ch'ang-an or Byzantium became the seedbed of economic growth in medieval Japan as well as in the medieval West. The local law, whether princely or folk law, provided the substance, and the classical law the form. From about 1200, the new syntheses, east and west, had surpassed the classic law as seedbeds for economic growth. Chinese law, subjected to no such challenges, remained an admirable framework for an agrarian-bureaucratic state, but hampered the growth of a society built on trade capital, manufacture, and competing elites. A conservative reformer like Tokugawa Yoshimune therefore favoured Chinese law.

Finally, the Corpus Justinianum did not aim at regulating all aspects of human existence, but ritsu-ryō did. In the West, the Church took care of man's spiritual side. The Hellenistic tradition left certain areas of life to the free unfolding of the citizens' will, in so far as they were adult, males, and not enslaved. The Justinian laws remained incomplete, as regards property distribution, family organization, education, choice of abode and occupation (3rd century experiments with making occupations hereditary had been unsuccessful), research and cultural activities, clothing, and ceremonies, unless they were considered pagan. The ritsu, on the con-
trary, due to the combined efforts of Legalism to regulate everything, and of Confucianism to create symmetry between the human and the natural world, and to attribute disasters to human misbehaviour, tried to penalize all aberrant behaviour. Likewise, the ryō tried to plan against everything unexpected, and, consequently, regulated in considerable detail:

a) All public offices, and how to recruit, pay, evaluate, medically treat, control, and dismiss their staffs from above. No public power belonged to elected officials, except, to some extent, peace-keeping within villages and guilds. On the other hand, except for armies and trading companies, no Western organizations attained such rationality before the 19th century.

b) All services in any way related to the needs of the center of the system, the emperor, and his consorts and heirs.

c) The rituals of the state in service of its deities; but apart from its strict control of religious establishments, of millenarian or otherwise disruptive faiths, and of magic, the state did not (in this respect like the pagan Roman, but different from the Christian Roman tradition), forbid or impose any faith.

d) Population registers and everybody's duty to supply them with information.

e) Land surveying, and distribution of land to peasants.

f) Taxes, levied on land, other products, or as corvée. Townships had no autonomy and could not levy taxes. Towns were therefore administrative centers, rather than centers of civic self-rule.

g) Schools and education that is, central and local academies to train future officials.

h) Army: its organization, recruitment, equipment, and frontier and coast guard. No armed nobility in command of their own, nor any arms among commoners, were permitted. The civilian bureaucracy was superior to the military.

i) Rituals, also those not having to do with the state's service of its gods;

j) Clothing: who could wear what when.

k) Public works and their repairs.

l) How to write and keep track of all public documents.

m) Public granaries, magazines, stables, and horse breeding (important for the army).
n) Medicine, in so far as it concerned keeping the ruling class healthy and able to reproduce itself.

o) Burials, and the ceremonies of the expression of grief. The rules were taken from the Ritual Classics, but mattered also in civil law, because the degrees of mourning determined who could marry whom, who inherited whom, who could avoid testifying against whom, and who would be punished particularly severely, because the victim of his or her crime was a senior relative or in-law.

p) Barriers and markets; some of the few and scantly rules on trade law were tucked in here.

q) The capture, imprisonment, questioning, and torture of offenders.

r) Miscellaneous provisions, such as weights and measures.

Public-administrative law was not nearly as systematic in the Roman-Byzantine world. What distinguished, politically and ideologically, the T'ang code and its Japanese successor codes, as they were enforced in Nara and Early Heian times, from the Corpus Justinianum, were mainly the following points:

a) The recruitment and needs of the public sector were not only in fact, but quite visibly in the code, of overwhelming importance.

b) The public sector could, on principle, do as it pleased; nobody had any "rights" against it, and there were no permissible civic associations for running such things as roads, markets, or harbors: the state took care of that.

c) The loopholes in the laws, which constitute freedoms, were fewer than in the premodern Western world, particularly because of the thorough registration of the population. Conversely, as long as the system worked, only the state exploited the commoner, it tried to supply him with paddy land, and it tried to uphold standards of probity in the public administration way beyond that of counts, dukes, and knights in the West.

d) As for ideology, the ritsu-ryō state was universalistic rather than particularistic, tolerant in matters of religion, and it preferred civilian to military, and agrarian to mercantile values.

In China, but not in Japan, some officials were commoners' sons, whereas aristocratic recruitment, and aristocratic values, were prevalent in Japan. In both varieties, family socialization was
the most important tool to make the people docile and peaceful. Since socialization pressure is more intense in an extended family than in a nuclear family, the Japanese government made heroic efforts to change the family patterns in the latter direction, and, with some modifications, it took over the Chinese principle of draconically severe punishments for disobeying or harming family seniors. In Heian times, most of this legal Chinoiserie fell into desuetude. Like in China, true chattel slavery was rare, because so few were really “free” in the Western sense of the word, so that many types of semi-freedom were readily accepted. There was no transcendent religion whose tenets, on principle, opposed slavery and bondsmanship. Buddhism accepted these states as products of karma, and Confucianism because they were traditional. But the Confucian/Legalist state, aiming at omnicompetence, disliked the very existence of “privately owned subjects,” as it disliked monastic religion, because it deprived the state of taxpayers and corvée labourers. In short, the T’ang-type state in China and in Nara Japan had much more power and much heavier duties than any state built on the principles of Corpus Justinianum. Therefore, adoption of the T’ang system required a much greater commitment, and implied a greater risk of failure, than adopting the Corpus. Particularly this applies to the land distribution system. If it worked, the state was committed to herculean efforts of paperwork. If it did not work, the state had to face the unhampered growth of latifundia, because the small owner-occupiers had been wiped out as a class and could not easily be resurrected. Latifundia and re-feudalization became, as we know, the end of the experiment both in T’ang and in Heian. Roman law did not touch the structure of the production basis: it was therefore less of a time-bomb to introduce into a primitive society.

Further, while Byzantium was too politically weak to demand vassalage of cultural pupil states, China was not. The Vietnamese and the Koreans fought regularly, and the island-dwelling Japanese intermittently, for their freedom to use China’s institutions without becoming vassal states of China. The reception of the ritsu-ryo was the most direct way in which China’s influence spread to neighbouring countries. By adopting Chinese institutions one entered into common destiny with China, in which success was dependent on imbuing the native elite with Chinese values. No wonder that both before and after the Taika Reform

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(645 onwards) conservative Japanese clans fought against China-infatuated alliances of ambitious princes and returned students, and no wonder that, during Heian times, pre-ritsu-ryō values and institutions reasserted themselves. The bureaucrat beneficiaries of ritsu-ryō wrote the chronicles, and painted the opponents of mainland centralism, like the Soga, black, and its protagonists, like Shōtoku taishi and his descendants, white. But when one realizes how T'ang order bred Sung orthodoxy, Ming tyranny, and Ch'ing stultification, one must still praise the Heian statesmen, who out of laziness and greed dismantled the ritsu-ryō system, in which the political superstructure had, from Taika up to the end of the 8th century, tried to perform the Great Artifice which so rarely succeeds, and always at enormous costs: to mold the production base into the superstructure's image for ever.

There are at least two reasons why so much T'ang-inspired law fell into desuetude in Japan from the beginning of the ninth century. One is the obvious one that elites outside the state, first civilian, and then military nobles, were alive and in power. In China, they had been persecuted by Ch'in, adopted into office by Han, been uprooted by the Northern dynasties, and made to study the same classical books in order to become officials since T'ang. Japan's aristocrats had suffered few civil wars, no foreign invasions, had had their ranks filled by refugee Korean and Chinese elites, had succumbed to no examination system opening alleys of power to commoners, and had, by putting on official caps as the Court wanted, enriched themselves. They could therefore do without the ritsu-ryō state. When clans quarrelled, they wanted honourable treatment, and isonomia. That is why we find, under warrior rule, refined systems to uphold material justice in civil litigation, in Kamakura times. The commoner might be beaten or bullied in court, but the aristocrat, whether ecclesiastic, noble, or warrior, demanded isonomia and justice from the courts, as the state became weaker and weaker, and finally, dyarchic. The power of the sword brought about procedural reform, like the power of the purse in the hand of the rich townsman did it in medieval Europe. In Japan, too, guilds, landowners, and in the end, even associations of burghers and farmers, were strong enough to demand material justice of the courts, whether imperial or bakufu, and, up to Tokugawa times, where justice as a grace, not a right, temporarily won, they, more often than not, got
The codes fell into desuetude. Even the draconic local statutes of warlords left many lacunae, particularly in the field of economic activities for non-farmers. Many life-spheres, as in the West, were now outside the law.

The other reason why *ritsu-ryo* lost out in the end was that Japan's own legal institutions had, like most ancient legal systems, strong and visible religious roots, while the Legalist onslaught on Ch'in times had broken these bonds in China. From Han times, law in China was ideologically propped up by making its role an executive but basically unworthy appendix of morality. Morality was again anchored in an alleged cosmic order. The idea was old, the details, however, were only worked out by the Neo-Confucian scholars of Sung times. The Japanese view of the relationship between the law and the deities was simpler and much more concrete. Clan heads were supposed to serve (*matsuru*) the local or ancestral deities. Thereby they came to know (*shiru*) the will of those deities, and laid the message of the divine will down as law for their people by enouncing it (*noru*). *Nori*, the substantiated form of *noru*, became the first Japanese word for "law." The deities intervened as guarantors of truth-speaking in legal proceedings, and the first lists of crimes were offenses of one deity, the storm and later underworld deity, against the Sky goddess. Only after 400 A.D. were penalty for crime and purification for religious pollution conceptually distinguished, and that happened under Chinese influence. The legitimation of the ruler was shamanic and sacrificial centuries before it came to be based on Chinese ideas of ethical monarchy. While the national religion was well known, the secular philosophy of China could only be acquired through laborious studies, and its legitimation of the legal system was precarious, because the Confucian ideology taught that law was intrinsically penal, a nuisance, invented by crude barbarians, and had come into prominence thanks to the book-burning Ch'in. Much safer was therefore the Buddhist legitimization of the legal system, the "Golden Light" Sutra which taught the unity of politics and religion, and was much beloved and expounded by the Nara regime. This sutra could be used to prop up any legal and administrative system. But the more the emperor was seen as a human being immersed in running a secular and administrative system, the nearer came the day when his pretention to rule was based on "virtue," with the corollary
that the people could change the dynasty when its exponents ruled badly. The _ritsu-ryō_ code fitted a system where the ruler was Heaven's representative admirably, but it fitted a system where the ruler was supposed to be a deity in his own right rather badly. The imperial institution owed the copied T'ang system its glory, but the preservation of the system was to some extent due to the fact that the emperor ceased to be the first official of his realm, so that the exploitation of the peasant majority was not carried out in his name, but by civil and military nobles acting for themselves. And that was the death of the unitary, absolutistic _ritsu-ryō_ state, and the re-emergence of a state whose strongest binding factor was the master-man relationship rather than allegiance to an abstract body of codified law.

The brush with the T'ang system left indelible marks on Japan's legal thought and legal methods, which made parallels with Western rather than with Chinese developments appear.

First, when the all-embracing codes ceased to operate, that is, in late Heian Japan and in Europe after 700 A.D. when the onslaught of Islam broke up the Mediterranean trade zone, scholars at both ends of the world began to study the codes in a dispassionate manner, in order to extract from the individual articles those general principles which could impose order upon the now prevalent confusion of folk law, remnants of the old codes, officials' customary law, and princely _Novellae_. That is what the _Postglossators_ did at Bologna University from the 11th century onwards, and what the Heian legists compiling such exegetical works as the _Ryō no gi_ (833) and the _Ryō no shūge_ (ab. 880) had already been doing for a long time. Code commentary writing in China, however intellectually impressive, remained bound to individual articles, because exegesis served the utilitarian purpose of explaining the actually valid law, while those who worked on the codes when they no longer operated, were cultivating what they called a _michi_ if they did it in a _kuge_ family in Kyoto, and one of the _artes liberales_ if they did it, say, in Bologna.

Second, Western and Japanese societies, but not China, became legally multipolar. The princes who founded national states in Europe, and the warrior leaders who established the Kyoto/Kamakura dyarchy shortly before 1200, hired legists from the centers of legal thinking, i.e. Bologna and Kyoto, and used them to bring order to their haphazardly grown bodies of law. In this way
it was discovered that any legal order can be described succinctly by those who have learnt an advanced conceptual grid, and here *ritsu-ryō* filled the function of Roman Law in the West. The usefulness of law for social engineering was thereby much increased. A similar development took place in Sung China during the debates on Wang An-shih's reforms, but was quashed when his "Neo-Legalism" succumbed to that retrospective and anti-scientific movement which we honor with the name of "Neo-Confucianism." China's legal specialists remained private hired secretaries working in yamen backrooms and always subservient to the non-specialist, non-lawyer *literatus* official whose forte was the knowledge of the classics on morality and ritual, which not only regulated most of civil law, but also the determination of what constituted *mens rea* in criminal justice. In Japan, where conceptualized law was no outgrowth on a homegrown moral tradition, but a subject laboriously learned, the legal expert in Nara and pre-Nara times might be a prince told by the emperor to take part in statute drafting, or a court noble dispatched as *myōbōhakase* in order to explain new laws to local magnates now called officials; they knew how to rule, but had to learn to do it *ritsu-ryō* fashion. Such tasks of law drafting and law teaching were arduous and prestigious. In Heian times, the best lawyers toiled in those extralegal offices which took over administration from the cumbersome T'ang-style ministries; and in the ensuing centuries of warrior rule they were stewards of civilian, ecclesiastical or warrior landowners, or ex-Court legists hired to serve in the Kamakura or Muromachi administrations. Their task was to get the best for their masters out of the law body as it looked 1200-1600: a medley of remnants of imperial law, new Kyoto statutes, warrior customs, new bakufu statutes, customary rules determining what body of law to apply to which persons and cases, enactments by local warrior dynasts, customary laws of manors (*honjo-hō*), the whole corpus encased in documents and precedents more often than in statutes, and eked out by equity or *dōri*. The person who could, because he had learnt from a courtier the conceptual grids developed in such law commentary books as the *Ryō no gige* and the *Ryō no shūge*, and was thereby able to penetrate and exploit the contemporary legal mess, could demand high rewards, just as the medieval European legist *studied* in Bologna, whose *forte* was Justinian law, or in Paris, whose *forte* was the ecclesiastical offspr-
ing of Roman law, Canon Law. But he would serve prince or bishop who hired him to put his acumen to bear on the local sources of law. Chinese law never got into this state of challenging mess: it remained monolithic, secular but dependent on the ritual and morality classics, and overwhelmingly penal, because no corporation was strong enough to demand decent court procedures and material justice from the state; whereas warrior groups, guilds, convents, and merchants’, ultimately even farmers’ organizations were often strong enough to do so in Japan until the Tokugawa won hegemony. Civil law and civil litigation without penal elements therefore developed into independent branches of law in Japan from 1200 to 1600, but could not do so in imperial China, where the social order permitted neither isonomia, nor competing elites, nor the upholding of “rights” against the state, nor any demand for justice from the state: one could only petition for it, and one had better not. In Tokugawa times, a China-like situation came to apply in bakufu courts administering penal law, but never quite did so in civil law courts, because the bakufu commanded not the whole, but only a part of the country’s wealth, and depended on daimyō and merchants for resources, where the Chinese government could conscript corvée labour from the whole realm. When the early 18th century shogun Tokugawa Yoshimune wanted to strengthen shogunal autocracy, he looked wistfully to Ming law, but in the end just codified the praxis of bakufu courts, somewhat conceptualized.

Third, each Chinese dynasty, even the T’ang, regarded its code as a tool to re-establish the rule of deference, harmony, and agrarian communality, which Warring State and Han ideologues maintained had been the Chou reality. Codes in China were therefore, from a political point of view, retrospective in nature. So was, because of its aim of restoring Roman hegemony in the Western Mediterranean, the Justinian corpus. But in the successor states, the T’ang-inspired code in Japan and the modified Justinian laws in Western Europe, became tools of modernization, because the societies they described and the intellectual level of their first makers were of a higher order than reality in the adopting states. Three corollaries followed:

a) Whenever a new political situation occurred in the successor state, the new power holders tended to spell out their aims in a politico-legal enactment, like the Magna Charta, the Coro-
nation Charters of medieval continental monarchies, and eventually, the various Bills of Rights, as commoners usurped the rights vis-a-vis the state which magnates had secured for themselves. For one had learnt that one could actually change society by legislating. In Japan, the Taika Reform Edicts of 645, the Jōei shikimoku of 1232, the Kemmu shikimoku of 1336, and the first Buke shohatto of 1615 filled the same function. There were few such public policy declarations in the Chinese tradition, because the gentry was the only elite which could prop up the new rulers. Each new dynasty issued a code; but the code usually came years after the dynastic change, and was no carrier of political innovation: on the contrary.

b) While China stuck to the anti-Legalist principle of not publishing the laws, except to officials, the persistent use of new laws as a tool of social change made Japanese rulers publish them to the people, as kabegaki, notifications painted or pasted on walls, eventually on particular notice-boards, e.g. in Edo times at the Nihonbashi bridgehead. Even the Sinophile Tokugawa regime used elaborate publications systems for its decrees, and only kept the concrete punishments for contraventions veiled, in order to make them the more terrifying. Publication of new laws, and in Britain, also of leading cases, filled, from the 16th century, the same function in Europe, based on the fact that there, as in Japan, literacy grew rapidly. Tokugawa law publication was, however, following the pedagogical tradition of ryō enactments, highly repetitive in nature, and, since society was held together by master/man-relationships rather than by shared religion, more care was taken in Japan than in Europe that commoners learnt about the new laws: it was the duty of each group representative or furegashira, to get hold of the new laws and explain them to his group. This tradition speeded modernization for new national aims considerably.

c) Third, the experience that other countries might have useful laws which one could copy took root in Western Europe and in Japan. Most continental states in Europe came round to import, or, as it is called, receive what was seen as Roman law, except Britain and Scandinavia, which only used the concepts of Canon law to conceptualize their traditional laws.
Japan, after great debates, shortly before 1900 received Roman law, as improved by the most advanced French and German legislations. Such excessive learning behaviour proved to be enormously useful in modernizing and in social engineering. For the borrowing process spread to everybody who heard about it the message that man is not subject to immutable patterns of values imposed by a cosmic order, but is the master of his own choice of social structures. This is the point where comparative legal history and modernization theory converge. Japan’s take-off from the Chinese model is a leading case in both disciplines.

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NOTES

9. Inoue Mitsusade et alii, trans. & ed.: *Ritsu-ryō (=Nihon Shisō Taikei,


13. Ishii, Hōseishi, pp. 11-16.


15. Ishii, Hōseishi, p. 51.


18. Ishii, Nihon hōseishi gaisetsu, pp. 69 and 218.
