GERMAN RECEPTION OF ROMAN LAW

AND

JAPANESE RECEPTION OF GERMAN LAW

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A people's deep-seated value-judgments — of which historical documents leave few traces, because the basic value-judgements go uncontested — come up to the surface of events and become visible in cases of conflicts: that is why legal history is such an important probing tool for political history, as well as for the history of ideas.

Conflicts are ultimately resolved by force: naked force while legal systems change, and regularized use of force, that is, according to law, while a stable legal system operates. That authorities of one nation subject citizens of another nation to the ignominy of having to obey the laws of the hegemon nation is common under conditions of war, occupation, and colonialism. Rare is, on the other hand, the situation where the authorities of a nation subject their own citizens to the laws of another nation, and do so voluntarily. We call that peculiar phenomenon that nation A "receives" the laws of nation B. Such action takes place when the authorities of nation A think that the laws of nation B are useful for promoting peace, or development, or both, in nation A, and are convinced that they, the A authorities, sit sufficiently firmly in the saddle to survive the operation. For a reception policy is obviously fraught with danger. The people in the "receiving" state may spurn the new laws, and the innovators may lose face, or even —should the people rise in rebellion—their heads. The imported laws may fail to harmonize with traditional laws or attitudes, or the judges fail to understand the new laws, so that confusion and insecurity occur. Or — the ultimate danger — the authorities
instituted to implement the imported laws may study them so intensively that they take over the entire range of value — judgments of the nation from which the laws were borrowed, with the consequence that national identity — and, ultimately, national independence — are lost. For no reception of laws, if at all successful, fails to change the value judgments and the political style of the receiving people: seen from their end, reception is modification of their own identity as citizens. Thus, reception of foreign laws is an extreme case of intercultural communication, and therefore interests not only lawyers, but also interculturalists.1

"Reception" does not take place when, for instance, the Germans Schulz and Huber trade a piece of German real property, sign the deed in Germany, register the deed there; and then for some reason, litigate over the deal in an American court. In such a case, the American court will have to apply German law in order to solve the conflict. But the use of German law in such a case is not "reception"; it follows simply from a rule laid down in American private international law. Likewise, it was not "reception", when seventeenth and eighteenth century British lawyers took their law with them abroad, and built, in the New World, the foundations of what is now American and Canadian law: for here, no indigenous authorities were in a position to decide that they wanted British law.

The law receptions we deal with here are such cases as the Japanese reception of Chinese codified law in the seventh and eighth centuries, or Turkish reception of Swiss law in the twentieth century. The classic example, because it had such far-reaching effects, and concerns countries of considerable economic power, is the march of Roman law from the banks of the Tiber to the Bay of Tokyo, by way of, initially, Paris, and ultimately, Berlin. From the viewpoint of history, it was a most unexpected affair. For Germanic tribes were those who were first terrorized by, and ultimately wrecked, the hegemony of Rome; and premodern Germany was, because of its divisiveness and constitutional backwardness, the European country least suited for the reception of the supra-national pretensions of Imperial Roman Law; Japan, finally, belonged to the cultural perimeter of China, definitely not to that of Rome and Byzantium, and at the end of its seclusion period possessed a highly developed system of judge-made law able to deal with trade, shipping, banking, and intraprovincial conflict of laws; a system, in fact, ready for codification. Yet, Japan discarded this heritage, and, with immense effort, ultimately adopted Roman law in its German form. How and why did this extraordinary process of transcultural communication — one of whose consequences is that Japan has more renowned experts on Roman law and on the history of German law than on its own ancient law, and that an increasing number of German lawyers grapple with Japanese in order to learn the many improvements which Japanese legal scholarship has invented in the fields of borrowed Roman-German law — come about?2
The first Roman lawyers, way back in pre-Republican times, were priests. They did not maintain that they had received their law directly from the gods, as their colleagues did in, say, ancient Sumeria or Babylonia. But the conflicts these law-men dealt with were, since trade was undeveloped, mostly conflicts between clans over land: and clans, and land boundaries, were supposed to be protected by the gods. In Republican times, Roman lawyers were aristocrats of independent means, who wrote legal opinions and/or pleaded for their friends in court: non-aristocratic underlings taught the law, and worked in the government bureaux, where knowledge of the law was necessary. In imperial times, Roman lawyers became bureaucratized: they served the Emperors with advice, decision-making, and, ultimately, codification. The Justinian codification of 534 A.D. —a time when the Western parts of the Empire had fallen to our barbaric ancestors, and only the Eastern part, Greek-speaking and centered on Byzantion, survived— consisted, as is well known, of a textbook of basic law, the Institutions; next, the codified law of the Roman tradition, the Codex, to which were by and by added not only the new statutes, or Novellae, of the Byzantine emperors, but also the feudal law of the Lombards, the most talented barbarian successors to the Roman law tradition, and connected with Bologna, whose university was to become the transmitter of Roman law to medieval Europe; finally, and most important, the Justinian codification contained a partially systematized digest of juridical opinion from many centuries, embodying many contradictions, but, as a totality, showing the way Roman lawyers thought, or "the grammar of law", called the Digesta or Pandects. A mind steeped in this way of thinking is able to reduce the emotional gush of conflicting parties to a series of propositions, under which facts can be subsumed, leading to a conclusion at best just, and at any rate predictable. This technique is the basic tool by which European political discourse has spread over the world, honored even when abused. Its only rival, when it comes to taming emotion by reason, was the Anglo-Saxon Common Law which, since judge-made, stayed closer to life, but was harder, at least in its non-codified states, to export.

The whole Justinian Corpus was given force of law by Imperial fiat, and survived intact in the Byzantine empire, and partially, mingled with Germanic tribal law, in the Germanic successor states of the Western part of the Roman empire. Another point from which Roman law radiated into barbarized surroundings was the Church of Rome, which developed Roman law into Canon law; its function was, internally, to govern the Church, and externally, to form the basis of the judgments of ecclesiastical judges over matters of wills, marriages, usury, and orthodoxy.²²

Roman law-ways proved to be a most useful tool for the rebuilding of European civilization after the dark centuries. A chieftain who wanted to organize a kingdom could find how to organize his bureaucracy, his court, his army, and his taxation system; he could find rules which made trade and credit secure again; and above all, since it was a Byzantine codification that survived, he could find religious
and historical arguments for making himself more exalted, as partial heir to imperial power, than he could aspire to as a Germanic warlord, that is, a political figure absolute in war, but in peace dependent on the support of clan elders, and, ultimately, on the totality of armsbearing men. We find, therefore, already in the later phases of the Barbarian invasions, simplified Roman law in force among Franks, Visigoths, Lombards, and other self-styled successor peoples to the Western part of the Empire. We know that simplified Roman law survived; but how the massive and bulky Justinian corpus itself survived in Western Europe from the seventh to the eleventh centuries — probably in monasteries, and among Lombard officials — is still murky. At any rate, from the eleventh century Roman law, embodying some, though not all, parts of the Justinian corpus, was taught at the University of Bologna, in Lombard League territory; and there, secular and ecclesiastical power-holders sent bright young men to be trained in Roman law and Canon law. The returning young intellectuals, secular or ecclesiastical, brought into their semi-developed homelands the basic ideas of a state based on law rather than on fealty, on predictable jurisdiction rather than on inscrutable folkways, and on records rather than on tribal memory. The seeds of modernization and rationalization of society were thus sowed, not unlike the process taking place in Japan from about 600 AD: government students returning from the Chinese centers of learning, impressed by the idea of a centralized state based on written law, and eager for new political forms, in which they could carve out careers utilizing their knowledge of this alien law. In Western Europe, and in Japan, the lawyer, in his capacity of an agent of government-sponsored modernization, could rise to high honors: this is one of the deeper reasons why both areas became future seedbeds of economic and technical modernization, whereas the homelands of the exportable codes, Eastern Rome and China, had leaders who regarded lawyers as tools of social stasis; failed to utilize their talents; and ultimately fell prey to financial and technical obsolescence, and foreign onslaughts.

The Roman law radiating from Bologna, and, later, other universities of Italy and Southern France, worked only slowly on substantial law, since that was essentially feudal and indigenous; and societies north of the Alps largely illiterate. The main impetus between the eleventh and thirteenth centuries consisted in rethinking and systematization of indigenous law by means of the concepts of Roman law, so that legal thinking became Roman, though legal substance remained Germanic: only in the urbanized parts of Northern Italy and Southern France, where the forms of rule, trade, and life had remained somewhat comparable to the civilization standards of late antiquity, could Roman law operate directly as substantial law.

Everywhere, however, Roman law in early medieval Europe was a highly useful way out of the quandaries of jurisdictional atomization and political divisiveness which the Migrations had brought about, and here we have the deepest
reason for the "reception" of alien law: it could be used to recreate, or create from scratch, political unification. A common ethical philosophy played that part in China; but in Japan and Western Europe, T'ang law and Roman law did it. As Japan had been in the sixth century, the region which is now Germany was, from the end of the 13th century, after the failure of the Salian and Stauffian emperors to establish a strong centralized monarchy, a highly complicated system of competing independent princedoms, dukedoms, and eventually, free cities, each jealously guarding also their jurisdictional independence. British and French kings, who had fought their own magnates, whereas German emperors had struggled with border peoples and the secular claims of the Pope, ended as lords of centralized monarchies, and did not need the "Ghost of Rome" to further legal unification. On the contrary, they kept Roman law at a distance, as the British kings did, or used it as an element in national codification, as the French kings did. In Germany, the independent local magnates were the main instruments in the reception of Roman law, from the fourteenth through the sixteenth centuries, each of them trying to strengthen his territory by means of Roman law; and at least from the end of the fifteenth century, the weak imperial central power did the same thing, based on the hoary myth that they were the historical caretakers of the Western part of the Roman empire. Again, the ideological parallelism with Japan is striking: The competing warlords of the fifteenth and sixteenth centuries often used Chinese legal ideas to bolster their independent codifications, whose substance was feudal law; while the Emperor and his courtiers, as legal scholars, transmitted T'ang law in its modified Japanese forms, until, in the 18th century, scholars of the national-historical school tagged on to this tradition, and honestly believed that what their antiquarian studies resurrected, ad made politically relevant, was not a modified Chinese law tradition, but an autochthonous Japanese tradition. For the student of Japanese history, the German historical school of law of the nineteenth century, with Savigny as its founding father, advocating the non-codificatory, organical growth of law, but actually researching deeply into antique Roman law, is not the paradox it seems to be to the student whose horizon is limited to Europe.5

A strong feudal hegemonial power like that of the Tokugawa could order the semi-independent princes under its sway to submit cases of conflict of laws (say, merchant X of princedom A suing merchant Y of princedom B for performance of a contract signed in princedom C, each of A, B, and C having their own laws) to the courts of the hegemonial power. But in medieval Germany, the central power had no such clout, and so the courts of each prince had to struggle with such cases: only in 1495 did the Emperor's central court, the "Reichskammergericht", and in many periods, on paper only, and with enormous exceptions, since many princes had secured the finality of their judgments, achieve a comparable status to the Tokugawa high court; and the "Reichskammergericht" only did so by using Roman law to solve the competing claims of territorial laws. And when a princely court
faced such a problem (dismissing it unsolved would, under the political conditions of the times, have led to the parties' taking to feuding again), Roman law came in handy: for it was the law of the weak and far-off hegemon, and not of any territorial prince; it was technically superior to local law; it had a law literature in the prestigious common language of Latin (Latin was to medieval Europeans what Chinese was to medieval Japanese); it used a written procedure making it possible to transmit files to a law faculty to ask its opinion, or to appeal a decision without transporting witnesses over atrocious roads; it was easy to use for the professional judge, for it was the law he had studied; and it was sweet to the prince, for when his Estates clamored for a more predictable administration of justice, he could answer them that the highly localized folk law and its lay judges — embodiments of lingering democratic forces — were the very cause of the legal confusion; and if the Estates would only allow the Prince's Roman-law-trained statesmen to draw up a codification, and his Roman-law-trained judges to enforce it, the Estates would have predictable administration of the laws: and the Estates often consented.6 And thus, from the fourteenth through the sixteenth century, the reception of Roman law in Germany ran its course. Had the received law been true Justinian law, this would not have been possible, for Roman law of the sixth century was weak on many essential points where medieval society was more progressive, notably in the fields of abolition of slavery, the development of company law, of commercial paper, of maritime insurance, and the legal powers of women to engage in trade: but, as is well known, in the Italian universities, notably Bologna, law professors, from the twelfth century onwards, had extracted from the sea of legal opinion contained in the "Digests" logically coherent rulings; and another generation of law professors, from the fourteenth century onwards, had, by shrewd interpolations and interpretations, based on their own forensic activities, modernized the traditional Roman law: and it was this "improved" Roman law, not the rigid Justinian law, which was received. Nor is it true that the development of commerce made the reception of Roman law necessary. For in the new forms of commerce just those parts of Europe which did not receive Roman law, notably Britain, acted as spearheads; and in the trading towns along the Baltic, Roman law was used to systematize the trade practices which the merchants had already developed by their own light. The lure of Roman law as an idea was its general applicability, the fact that the enormous intellectual labor leading from a case to a rule had already been performed, and, last but not least, that the world of Antiquity, and everything connected with it, had enormous prestige; the Renaissance is the intellectual and aesthetic branch of that view; and therefore Roman law was even taught in British medieval universities; it was part of the mental outfit of a gentleman, though he learned the actual law as an apprentice in the Inns of Court. Fifteenth and sixteenth century French lawyers objected to the scholastic methods of the Italian law professors, and wanted to study the legal sources independently, thereby laying the
foundations of a true, objective study of the Roman state and its Greek foundations; whereas German lawyers stuck to the scholastic methods of the Italians. They thereby contributed to the development of modern logic. On the whole, not Roman law in itself, but the fact that you could not grasp it without mastering Latin, history, philosophy, and logic, gave Europe its edge over the rest of the world: the princes might remain primitive in their thinking, but their officials, who ran their states, became shrewd and civilized. The core curriculum of ethical philosophy imposed on trainees for office in China fulfilled a similar task. The Japanese, suffering from the problem that in Tokugawa times, offices were heritable, and early modern European monarchies, suffering from the problem that offices, even judicial ones, were bought, used ethical philosophy and Roman law, respectively, to keep corruption at manageable levels, with partial success. The goal of generally clean and efficient administration was only reached when not only the ideology of office, but the very basis of office, became the law: and that was, in continental Europe, as well as in Meiji Japan, the idea that the legally trained official, in particular the judge, is appointed on a merit basis; is made difficult to remove; and is trained in a basically "Roman" philosophical tradition. In the common Law countries, has also come to be merit-appointed, and hard to remove; but he was imbued not with a "Roman", but with a nationally grown ideology developed during the seventeenth century struggles between Crown and Parliament; yet, that struggle again was fuelled by a central controversy in the Roman law tradition: Is the Prince the source of law, or is he the tool of law? When the Japanese, in the 1930's, debated whether their emperor was an "organ" of the state or not, they were, in theological vocabulary, since they had resurrected the hoary figure of a theocratic emperor, acting out a struggle prefigured in the sad development of public law — characteristically underdeveloped in Roman law—from "Principate" to "Dominate"; and when they, in the years after 1945, abolished the "Dominate" and established the people as sovereign, they were, under American gunpoint, attaching themselves to a tradition of political forms originating in Greece and not used in China. The mechanism seems to be this: First, "reception" of laws creates a ruling class susceptible to the values and concepts of the order received; then, this ruling class views itself as acting out the roles of the great figures of the history of the order received; British colonial officials in India and elsewhere seeing themselves in the roles of Roman proconsuls, and Japanese colonial officials seeing themselves as carriers of the "mission civilisatrice" of even those Proconsuls are well-known examples; by identifying with historical roles of past models one can give one's job an historical dimension and justify certain authoritarian actions; that is an important, and little studied, mechanism of law reception having a direct impact on actual history.7

About 1600 German law had become rather thoroughly "Romanized". The price the Germans paid for the reception of modified Roman law was high. Only
the professional lawyers now understood the law. Legal institutions of the late Roman Empire like the half-free status of tenants, or "coloni", were unreasonably perpetuated; and princely pretensions to be allowed to rule by the grace of God, uninhibited by interference by the Estates, had been successfully abetted by Roman law and its professionals. The written forms of civil procedure had become extremely time-consuming and costly, and the ghastly cruel forms of late Roman criminals procedure and punishment had been received, too. Yet, Roman law was in the seventeenth century commonly considered to possess the qualities of "common sense in written form". The ravages of the 30-Years-War, and the willing acceptance thereafter of the people to submit to any rule, however authoritarian, if only it provided peace, worked the same way; just as the memory of protracted civil wars impelled the Japanese to submit to the institutionalized cruelty of the Tokugawa in order to escape the anarchic cruelty of the wars. Europe, however, remained open, and the absolute control of princes and their henchmen over people's minds incomplete; whereas Japan closed it doors to the world after the stamping out of civil wars, and bought peace with social stasis. In Europe, a reaction against the artificiality of law began in the 17th century, embodying ideas from the New Testament, from Greece and pre-Imperial Rome, and from the re-thinking of man's estate engendered by Protestantism; by the abortive peasant revolutions of the early 16th century; and last but not least, by the impact of the knowledge of overseas cultures with quite different scales of values. Philosophers and lawyers clothed their legal and political reform proposals into the mantle of "Natural law", even trying to formulate general rules for man's behavior to man in the mode of deductive mathematics; a new and prestigious way of thinking of great promise.

The well-known great codifications — the Prussian of 1794, the French of 1804, the Austrian of 1811 — were the product of joining the bricks of Roman law (for where else could continental lawyers fetch ideas of alleged general validity?) with the mortar of idealistic philosophy, while leaving out such odd bricks as appeared dated in the light of humanitarian thought. Thus were, by and by, judicial torture, debt slavery, particularly revolting methods of execution, arbitrary confinement, and eventually, slavery itself, outlawed from continental legal practice: they only came back in the twentieth century with the rise of totalitarian rule, which denied the legacy of Natural law. These retrograde trends remained absent from Common law systems, because these were basically unphilosophical, and stuck to the historical givens, namely, that a series of compromises had been worked out between the Crown and the politically relevant classes; that the benefits of these compromises had filtered down to the rest of the people; and that the Crown's ever-present efforts to regain absolute power were bound to fail, because the power of the purse had been lost at the end of the seventeenth century. That is the reason why Common Law-countries with antiquated, largely non-codified legal systems, remained more impermeable to the 20th century resurgence of barbarism than the
countries which had received the Roman law, and thus had irretrievably swallowed the idea that what the legislator does is law, for good or bad ends, irrespective of the trend of previous historical traditions. Warning voices were not heeded in time. The reaction on the continent, notably in Germany, to the cult of legislative omnipotence rife about 1800, was, as is well known, the “Historical School” of the early nineteenth century. Its proponents saw, justly, that law cannot be divorced from inherited social realities. But the school grew in an atmosphere of reaction to the ideas of the French revolution; and it was adverse to the egalitarian trends inherent in codification, since a people is hard to govern autocratically, if you can buy the law in intelligible form at the bookseller’s. With the historical school, the legal profession became the only reliable carrier of legal culture, and the resurrection of true, even archaic, Roman and Germanic law, the aim of legal scholarship. Beyond that aim was the hope of finding "eternally valid" forms of legal relationships, the so-called conceptual jurisprudence; and once having seen these, to rise to a yet higher plane, and see the teleological, the purposeful, ideas working behind and in the concepts. In these legal and philosophical struggles of 19th century Germany, embodied in the founder of the historical school, Savigny, the founder of conceptual jurisprudence, Puchta, and the conceptual jurisist, Jhering, who ended by transcending it, and developing the purposes behind the concepts instead, there intervened, with increasing force, the social forces of industrialism, pauperism, and socialism, against which the German lawyers responded with professing the most extreme liberty of contract. Into the final great codification, [xxxx] the Burgerliches Gesetzbuch of 1900, thus flowed a great amount of profound studies of Roman and European legal history, of philosophical controversy, of refined case law, and — at least theoretical — understanding of social change away from the soldier-peasant-artisan-based society envisaged by the Napoleonic code of 1804.8 The Japanese, expert in law borrowings since the seventh century, where they adapted and improved Chinese codes, and having the benefit of latecomers, became the successful heirs to an extant, extremely rich and "well-digested" law world, in which they could take their pick. How, then, did the Japanese receive Western law, notably in its Roman form? The important transmitting countries were, as is well known, France and Germany: the American impact came only after 1945; and the British impact was limited by the non-codified state of much important British law. Obviously, politically it is much tougher to adopt the law of a living nation than that of a defunct nation: and particularly so from any nation which tries - like France and Germany did to at the Japan end of the nineteenth century - to block the expansion of the adopting nation.9

Japan’s first brush with Western ideology took part in the 16th century, through Portuguese Jesuit missionaries. They brought their faith, their strong personalities, some medicine, some mathematics and linguistic science, but little of
law. For late sixteenth century European law, even in the lands of the Inquisition, had thwarted much of the Pope's pretentions to be a hegemon of worldly princes; the European states were, or were on their way to become, secular states, in which the princes protected the Church and even executed its judgments, but did so out of their own volition. Obviously, Churchmen could not transmit law which denied the Pope's legal supremacy. On the other hand, the teaching of Canon law to the Christian Japanese clergy would have presented dangers: for Canon law contained ideas about the hegemony of the Church over secular princes which no Japanese warlord would have tolerated. Fearing subversion, re-unified Japan stamped out Christianity. Only in the 18th century, through the Hollanders, did Japanese intellectuals hear of Western law. They were only moderately interested. For Japan already had an impressive and functioning legal system. Its roots and terminologies were Chinese laws of the sixth and seventh centuries, adapted to Japan's needs, and thus codified in the seventh and eighth centuries. During the warlike medieval ages, these codifications lost most of their validity, but they were studied for their intellectual qualities, much as Roman law was studied in Europe, and used to systematize feudal and tribal law. From the 16th century onwards, every Japanese warlord felt that he could, and often he did, codify the customs and statutes of that part of Japan over which he held military sway. The Tokugawa, in power after 1600, let this state of things remain, but unified the laws on foreign policy, defence, social statuses, and market operations, and maintained, and to a large extent enforced, that shogunal law ought to be the model of new laws in the daimiates. In 1742, shogunal law was partially codified, but the codification was made known to bureaucratic leaders only. The populace was only informed through minatory paraphrases, often on permanent noticeboards, of the law, and the judiciary was not separated from the administration.

Yet, 18th and 19th century Tokugawa jurists were of a fairly high quality. They studied Chinese law, and carefully recorded, and followed, their own precedents. They dealt not only with cases arising within the shogunal territories, but also, and successfully so, with cases of conflicting jurisdictions: a necessity because each daimiate had its own law, and so had the shogunate territories. Their jurisdiction included cases where, while litigation was pending in a lower court, their opinion was asked; like law faculties were asked by judges in premodern Germany. The weaknesses of Japanese indigenous law was lack of theory, lack of clear distinction between law and morality, and of penal and non-penal law: finally that Tokugawa status society became more and more irrational as time passed, and jurisprudence could not paste the cracks in the political edifice. The teaching of law was purely practical, "learning by doing", and counsel was not permitted. Penal procedure was revoltingly cruel, like in Europe before the early 19th century reforms. In non-penal law, custom was the most important source of law, even in penal cases; which could lead to anti-common-sense decisions. Finally, justice was
always a grace, never a right. The protection of commercial property, in particular money loans, was weak. In short, overall judicial standards were, though higher than anywhere else in Asia, lagging behind Western European standards around the middle of the 19th century.¹⁰

From the 1850's, the Western sea powers, as is well known, imposed unequal treaties on Japan, as they had done on China from the 1840's. Immunity for foreigners from Japan's penal laws (which was reasonable, since Japan only abolished judicial torture in the 1870's under pressure of French legal experts), and the imposition of foreign consuls as judges even in civil cases between Japanese and foreigners (the consuls were often unjust and sometimes corrupt) were part of these treaties. The Western powers would not abrogate these treaties until Japan had introduced penal and non-penal laws similar to those in the West, and had trained a corps of judges to administer, independently of the administrative bureaucracy, these reformed laws. How did the Japanese meet this immense challenge? That is, in functional terms, how did they "receive" Western law?

Already in the last years of the shogunate, that is, in the 1860's, students were sent to Europe to learn Western legal terminology. They returned greatly impressed with the French codes of the Napoleonic age, notably the "Code Civil" of 1804. No wonder. Apart from contemporary codes of Italy and of Saxony, the "Code Civil" was still the most modern European codification. It was admirably short and clear, it contained all the anti-feudal institutions which Japan needed in order to modernize; and it was based on pretentions of universal reason, pretentions which Japanese bureaucrats steeped in Neo-Confucianism shared. From about 1870, English, French, and later also German law was taught to future judges, but French law had a special status, since it was taught and expounded in the Ministry of Justice, one of whose top bureaucrats — later, he rose in revolt against the Meiji government's shabby treatment of ex-samurai and its exploitation of farmers, and was duly beheaded — was a great admirer of France. Thus, officials of the Ministry of Justice were put in charge of translating French law, and of drafting Japanese laws with French law as the model. These officials likewise got impressed with French law; and used French advisors, who performed Herculean labors. It is therefore no wonder that the civil code project which the Meiji government wanted to impose on the Japanese people — there was no Parliament as yet — in order to speed, internally, its march from feudalism to capitalism, and externally, in order to get liberated from the unequal treaties - was structured much like the French Code. The project was ready for promulgation in 1890, but that was also the year in which the newly instituted Parliament—rooted in the German-inspired Imperially granted Constitution of 1889—first convened. The Parliament wanted its say concerning the new code, and a considerable number of its members objected to the proposal. So did most of those lawyers who had been trained in English, or in German law. Nobody wanted a codification of Tokugawa civil law: it was, as we saw, more
humane and technically developed than Tokugawa penal law; but it lacked conceptual refinement, and was so tied up with keeping the Tokugawa system together that a codification on this basis would have thwarted both the unification aims of the government and the policy of showing the Western powers a Western-inspired code in order to get rid of the unequal treaties. Actually, the No. One expert on Tokugawa law at the time was the American legal scholar, John Henry Wigmore (the "Wigmore on Evidence-Wigmore"), who had, with his Japanese helpers, studied and digested, and later published in English in an immortal work, the reports on the Shogunate's and on each daimiate's customary law, which the Meiji government had elicited and assembled, and on the basis of which it decided to give up improving the old system, and opt for an up-to-date Western law system. Likewise, a codification based on British law — for whose qualities the Japanese had great respect — was out of the question, since a large part of British law was still uncodified, unexportable case law. Thus, the practical choice of the Japanese parliament stood between the French-inspired government proposal and the newer (but not yet enacted in its homeland) code-proposal of Imperial Germany. The criticism against the government proposal was loud and varied. Conservatives — and the Parliament was elected by the rich only, the poor had no vote as yet — disliked the relative individualism of the family, marriage, and inheritance provisions (though these were fairly conservative, not only because their drafters were Ministry of Justice officials rather than French advisers, but also because the government proposal had made some extra modifications to placate the traditionalists), and preferred that the subjection of even grown-up individuals to the "lord of the house" — the kinship structure prevalent among the upper-class samurai — be made compulsory on the whole people. Lawyers disliked that the code contained many repetitions, since there was no "General Chapter" containing definitions. They also objected that a Commercial code mainly on German lines was ready for enforcement, and that the Civil Code in certain respects did not tally with the Commercial Code. In these technical respects the German drafts were more streamlined. After all, they embodied 90 years more of Code-drafting experience than the French Code. Finally, Imperial Germany had a political history which appealed to the Japanese government: Imperial Germany looked like a successful and recent negation of feudalism, without discarding militarism; and Imperial Germany had, on the battlefield, and as an industrial power, surpassed France: one reason why the Meiji Constitution of 1889 had been deliberately framed on German models.

The entry into force of the Civil Code was accordingly postponed, though, actually, much case law was already based on its contents; a new drafting committee was convened; its proposal drew a majority in Parliament, and the Code was enacted in 1898. Major revision has since then only hit the parts on family and inheritance, which were thoroughly revamped by the Occupation authorities in
1947: The powers of the "lord of the house" were abolished, the status of woman was improved, and — at least on paper — the rural custom that one heir takes all was done away with. Other important changes in the Code system followed from the Occupation-imposed Constitutional Reform of 1946 which made trade unions legal, gave women the vote, and introduced unassailable, Western-style freedoms; and from the land reform of 1946 which smashed the rule of absentee landowners, and made tenants into owners at their expense. Thus, the dated code of 1898 now operates in a society quite different from the society prevalent at the birth of the code. Germany struggles with the same problem of the aging of its Code, and even more so does France. Here lies one reason why the judiciary in France constantly re-interpret their laconic Code, but keep their rationes decidendi brief; while German judges, in a similar quandary, are very interested in methodologies of interpretation, through which the highly abstract language of their code can be brought to tally with contemporary social reality. And when Japanese lawyers intently follow these developments, they have good reasons to do so: for they are in the same boat, owing to the age of their Code. In many ways, the "reception of interpretative method" from the European continent, notably Germany, has had a deeper impact on Japanese law-ways than the reception of rules per se.

With the above exceptions, Japan's Civil Code - on person, things, and obligations - has remained, at least on paper, more or less like it was in 1898, and has contributed substantially to capital accumulation, to security of trade and credit, and to Japan's ability to cooperate with the rest of the world, notably with those parts where Roman - inspired law prevails, that is, the European Continent except the Communist states, plus South America, Taiwan, Thailand, and francophone Africa. One reason is that the Japanese legislators were lucky enough, or shrewd enough, to import Roman law in its latest fashion. The French-inspired code-proposal only embodied the basic school wisdom of late Roman law, the "Institutions". But the 1898 code of Japan embodied the whole range of Roman legal thinking, as found in the "Digesta" and systematized in the German "Pandektenwissenschaft" of the 19th century: as mentioned before, the "Digesta" or "Pandects" contain the "grammar" for analyzing any legal problem; also those which the Romans had never heard of. And whereas French legal theory about 1890 was still to some extent tied down to the exegesis of the Napoleonic Codes, the legal theory of Germany had already outgrown exegesis, and become more philosophical; possibly because political institutions in 19th century Germany were backward (the Bismarckian Empire of 1871 pasted over, but did not abolish feudalism), so that the best minds went into law or science, whereas the best minds of France went into politics or public administration; and because the gestation period of the BGB was so much longer than that of the Code Napoleon.

At any rate, whereas the Japanese code still contains many French rules, the way of thinking of Japanese lawyers became Germanized. They read German law
books, participate in impeccable German at law conferences, or even complete their doctoral studies in Germany with writing books on German law which make German lawyers kick themselves for not having learnt to read Japanese. In fact, some now actually learn Japanese.

The other branches of law supplementary to the Civil Code of Japan have, in general, followed a similar pattern: an Early Meiji period of French inspiration; then a long period, from the late 1890's to 1945, inspired by German law; and after 1945 a growing influence from Anglo-American law. Yet, the substance and structure of Japanese law, remains continental, "Roman" if you will, and within that framework, more German-inspired than French-inspired. True eclectic traits are found in the Civil Code, where rules from many Roman-inspired legislations, apart from those of France and Germany, were brought together and harmonized: from Saxony, Italy, Switzerland, and even from the now defunct state of Montenegro, according to members of the second and final drafting committee.

Surveying the Japanese legal system as it looks today, legal philosophy is still largely German, but legal sociology, constitutional law, and public administrative law, which were German until 1945, are now in many ways American. Commercial law remains tied to Germany, except for the law of seaborne trade, which is British, and company law, which is American. Bankruptcy law was first French, then became German, and remains so, except for the law of insolvent companies, which is American. Penal law was first Chinese, then French, and is still largely German; reform proposals go the American way. Criminal procedure was first Chinese, then French, then German, and since the Occupation, the rules of the protection of the accused are American, and even guaranteed in the Constitution, but often disregarded in practice. Labor law is American, but the right to strike is more restricted than in the Western world, and custom differs materially from the letter of the law. Social insurance was historically modelled on Germany, but now contains many traits of US law. Consumer protection law is American, except for basic questions as to which dangers are considered to be illegally caused by the maker: these rules are fetched from the Civil Code, and in need of reform. The law of intellectual property was historically French and German; modern law is based on international treaties, which are increasingly honored. Anti-monopoly law showed strong American influence in the immediate postwar years, but the trend of the law is to tolerate monopolies, since in Japan, but less so in the US, they have contributed to economic growth. Tax law is little inspired by foreign law. Taxes on companies and inheritances are high, taxes on capital gains - at least until recently - and on personal income - fairly low. A general sales tax has only recently been introduced, and the government is heavily indebted. Public international law was originally taught by the Dutch; present-day doctrine follows the common international standards; but the impact of public international law on government behavior, notably in refugee cases, is limited. In private international
law, the theory is German, and previous trends to avoid the use of foreign law, and to implement foreign decisions, are slowly on the wane. Court organization was traditionally German, but the US-imposed constitution brought many important reforms: a truly independent judiciary, rule-making power vested in the Supreme Court, and the power to quash not only illegal administrative acts, but also to quash unconstitutional statutes. Both powers are, however, used reticently. The training of legal personnel is tough, particularly when it comes to judges and barristers. Formalized legal training is still more German than American in aims and contents, emphasizing exegesis and interpretative methods rather than casework and studies of the ways judges actually come to their decisions. Particular training areas like plea bargaining and how to handle juries are not needed in Japan, since there is no plea-bargaining, and no juries. To handle the law is reserved to specialists, also a traditional trait of continental European law.

How can such a historically heterogeneous system work? On the whole, it works admirably, and for the following reasons: In all branches of the law the legal personnel strives for harmonic syntheses of imported and indigenous law: this is part of the Japanese tradition. Today, there is a strong trend to lift one's nose above the imported theories and work out legal solutions particularly adapted to Japanese needs. Also, much conflict is avoided because the Japanese — either because it goes against their grain, or because lawyers are few, courts clogged, and judges prefer conciliation to clear-cut decisions — are less litigation-prone than most Westerners. Finally, much imported law — including law protecting women and minorities against discriminatory practices — exists on paper only. The powerful rule the less powerful without the customary Western mask of law, and those who have equal power compromise out of court.12 Law in Japan is not the regulator of behavior, it is only one such regulator, and its social impact is limited. Yet, the march of Roman law to the banks of the Pacific is a unique historical phenomenon and raises the methodological question: When, in the future, developing countries receive the law of already developed countries, which conditions must already prevail? - The Japanese experience suggests the following answers:

The receiving state must be well organized already, have a well-trained, innovation-prone bureaucracy, and a populace which is docile and literate. The foreign model must command high political prestige. The intellectual level at the receiving end must be so high that the imported law can not only be grasped, but also used with understanding. There must be an educational machinery able to train law personnel reasonably fast in the imported rules. There must be a flexible transition from old law to new law, so that rebellions by those who are adversely affected by the new order are avoided. Japan marched rapidly, made the peasants pay the costs of modernization, and dismantled samurai privileges without much delay. Japan accordingly experienced rebellions, some of exploited peasants, others of disgruntled ex-samurai; but the great clash of conservatives versus modernizers
was avoided. One reason was the government decree of 1875 that when there was no statute and no "custom" (this actually meant Tokugawa case law), the judge would have to decide a civil case according to reason. The rule was adapted from Swiss law, and in Japanese practice meant that the judge improved the law he was used to with what he knew of foreign law; and since he knew that his government was in some trouble, he undertook the tremendous labor, often by himself, to learn foreign law. Only officials steeped in patriotism and Confucian respect for learning could have performed such a Herculean task. There must, indeed, be impelling forces in the minds of the individual law-men to carry such a law reform program to a successful end. In Japan, it was the drive to put Japan on an equal footing with the Western powers, and help the government get rid of the galling unequal treaties. In premodern Germany, it had been the drive to emulate Antiquity, and to abolish, with the tools of Roman law, irrational folkways. The process was one at gunpoint in Japan; for Japan's survival as an independent state was at stake until about 1890; and a more leisurely one in the German states, since the system of small states was anarchic, but largely stable. But in both areas, the moral qualities, and the professional drive, of the legal profession was crucial. If that point fails, one gets modernization of the kind not unusual in certain phases of Third World development: beautiful modern codes - and the application of "Third degree" no longer by means of the rack, but by means of electrical torture instruments bought by the government under a development program.

References


3. For the internal development of Roman law, see Max Kaser, Römische Rechtsgeschichte, Göttingen (Vandenhoeck & Ruprecht) 2. Aufl. 1967, particularly pp. 237-55. For its origins, see Fritz Schulz, Geschichte der Römischen Rechtswissenschaft, Weimar (Hermann Böhlau Nachfolger) 1961, pp. 17-25. For the role of Canon Law in the European reception of Roman Law, see Franz Wieacker, Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichtigung der deutschen Entwicklung, Göttingen (Vandenhoeck & Ruprecht) 2. Auflage 1967, pp. 71 & seq. and pp. 116 & seq. (This
book is probably the best and clearest introduction into Roman-inspired law for the lawyer who, like the author of the present paper, was trained outside its sway).


