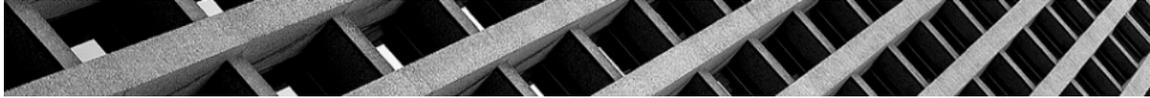




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"Mille-feuilles influences" - Reception of foreign law in the Edo-Meiji period Japan

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1. Introduction

Modern Japanese law was influenced not by a single western legal system, but of multiple systems from countries such as China, Netherlands, France, England and Germany; and the United States of America after World War II. At the same time, needless to say, the traditional legal culture since the Edo period still remains in modern Japanese law. On account of this, in the field of Japanese legal history, there has long been a strong interest in the relation between the pre-modern Japanese law and the new knowledge of modern law.

The focus of this article is not narrowed down to the reception of Western modern law. This paper shall refer to Chinese law that was the basis of the reception of Western modern law. Furthermore, the general view over the reception of Western law, Dutch, French, English and German law, will be presented chronologically. Finally, the characteristics of the reception of the foreign law shall be analyzed.

2. Reception of Chinese law in the Edo Period

2-1. Investigation of Chinese penal code in Tokugawa government

Books on the laws and legislation of China had already been brought before 17th century. Concerning the study on the reception of Chinese law in the Edo period, it is worth of mentioning that Yoshimune Tokugawa, the eighth shogun of the Tokugawa government (shogunate), took on the leadership in the collection and research of books about Chinese law in the early 18th century.

Yoshimune ordered Sorai Ogyu (philosopher, philologist and Confucian) and other retainers to translate and research Chinese documents including the Ming and Qing penal codes, *Dai Min*

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Kaiten (the Ming administrative code), *Rikuyu-engi* (the commentary of *Rikuyu*, or Ming moral law), and *Toritsu Sogi* (the commentary of the Tang penal code) into Japanese. For this reason, it improved the research and learning environment of Chinese law in Japan.

However, Yoshimune was cautious in the direct application of Chinese law studied through the literature mentioned above to the government's legal system of the day. Two particular reasons for this can be assumed. First, the political system of the Tokugawa government was different from the Chinese system which was based on the direct and centralized control over the land and people by one emperor via a bureaucracy mechanism. Thus, it was clear that a simple import of the Chinese legal system would not sufficiently function in Japan. Another reason was that the researches on Chinese law promoted by Yoshimune were still under development. Hence, no direct reference to the Chinese legal system is found in *Kujigata Osadamegaki*, the famous systematic penal code that he enacted. However, a more detailed review of the individual provisions of the code would show some similarities; an example could be found in the *Zokuto-Ritsu Setto-Jo* (provisions on larceny in the regulations concerning theft) of the Ming penal code and the article 56 of the second volume of *Kujigata Osadamegaki* (concerning the provisions on habitual theft with previous convictions). Specifically, both stipulate the punishment of *tataki* (lashing) for the first offense, *irezumi* (tattoo) for the second offense, and death for the third offense. Here, we can partly get a glimpse of the influence of the Ming penal code.

2-2. Investigation of Chinese code in feudal domains

Apart from the Tokugawa government, there exist a specific example that studied the Ming penal code and reflecting it in its system of law.

In the territories other than Edo (the old appellation of Tokyo) and other areas under the direct control of the Tokugawa government, *hans* (domains mandated to control the territory by the Tokugawa government) were authorized to compile and create penal codes for themselves with certain autonomy. One of the major examples is the "Ming and Qing penal-code-based" system *Go Keiho Sosho* compiled by the *Higo Kumamoto Han* (Kumamoto Domain of Higo Province) in the late 18th century. In the preparation this code, the provisions were systematized and categorized with reference to some commentaries of Chinese codes including the *Dai Shin Ritsurei Isan* and the *Min Ritsu Kokuji Kai* (the Japanese explanation of the Ming penal code). These commentaries were also utilized as supplement for the legal interpretation of the *Kumamoto Han's* actual codes.

3. The end of the Edo period

During the late Edo period, the Tokugawa government was under the necessity of collecting information on Western countries on the occasion of the call for the opening of Japan to the world. This created channels of accepting Western law and institutions.

3-1. Momentum of accepting Western Knowledge via China

Western books translated into Chinese and the books focusing on Western knowledge edited in China were utilized.

From early to mid-Edo period, the acquisition of western knowledge in natural sciences was made possible through books imported from the Netherlands. In contrast, people could not obtain systematic information the fields of law and politics because publications of these books were essentially banned and only a few were available during the Edo period. Under this background, books on topography and history containing descriptions of legal systems and politics in the Western countries were imported and studied carefully in Japan as a means of obtain general knowledge of the West:

For instance, *Kaikoku Zushi* compiled by Wei Yuan, a scholar at the end of Qing Dynasty, was based on the translation of *Shishu Shi (An Encyclopedia of Geography)* and other books such as *Daibi Renpo Shiryaku* (History of the United States) written in Chinese by E.C.Bridgeman, an American missionary based in Shanghai; *Bankoku Koho* and *Elements of International Law* of H. Wheaton translated by W.A.P.Martin from the United States in 1836.

These books contained specific information about the system of the separation of three powers and were referred to afterwards by the officials of the Meiji new for the establishment of the governmental structure. In fact, it was fragmented information and in the context of the reception of western law or politics its impact cannot be overestimated. Nonetheless, it occupies an important place in Japan as part of the earliest stage of accepting the knowledge of Western modern legal system.

3-2. Dispatch of students abroad

During the later part of the Edo period, both Tokugawa government and its rival domains pushed forward to obtain Western knowledge, through sending dispatches of students abroad. Hirobumi Ito, who later became the first Prime Minister of Japan, went in England in his low-class clansman days to study English conditions and affairs.

Among those students who studied in foreign countries, Mamichi Tsuda and Amane Nishi are highly important, in learning the basis of systematic Western modern legal system and bringing back this knowledge to Japan. The Tokugawa government also sent engineers, scholars, doctors and those in charge of naval technology to the Netherlands in 1862. Tsuda and Nishi studied under Professor S. Vissering at Leiden University, receiving lectures on five subjects, namely; natural law, international law, public law (*Staatsrecht*)¹, economics and statistics. Upon returning to Japan, Tsuda and Nishi went about to translate their lectures notes. Of special note is Tsuda who had translated the lecture on *Staatsrecht* and the explanatory note on jurisprudence of Western countries. His work was published as “*Taisei Kokuho-ron*” included not only a mention of the jurisprudence of one State, Netherlands, but also other Western legal concepts based on the natural law of Western countries, such as the description of “the three powers” in *De l’esprit de lois* of Montesquieu. The fruit of these studies, that is, the knowledge on foreign legal system in

¹ It is called *Kokuho* in Japanese. In Netherland, it was spelled *Staatsregt* at that time. This concept is mainly used in the languages such as German and Netherlandic and there is no corresponding expression in English in the strict sense. See G. Jellinek, *Allgemeine Staatslehre* (written in Germany), 3. Auflage, Berlin: Julius Springer, 1914, pp.11-12; Gyobu Toru, *Kokuho Gaku no Naiyo ni Tsuite*, in Katsutoshi Takami (Eds.), *Gyobu Toru Chosakushu*, Tokyo: Jigakusha, 2008, p.17. Here the original word in German "*Staatsrecht*" is used in this article.

the book, was useful not only for Tokugawa Government but also for Meiji new government, that was established in 1868, to accept the legal system of the West.

4. Influence of foreign law in the Meiji period

4-1. Consultation of Chinese law

As was during the Edo period, it was the field of criminal law that the officials of Meiji government tried to study and incorporate to Japanese law in the early Meiji period. The government recruited a former clansman and the brother of the lord of the Kumamoto Domain of Higo Province, and ordered them to codify the penal law for its provisional application. It is called *Kari Keiritsu*. The description of the code followed the text of *Go Keiho Soshō*, the penal code of Kumamoto Domain of Higo Province, which was influenced by Ming code as previously mentioned above.

Later, the penal code will have been compiled mainly by scholars of Chinese and Japanese classics. In 1870, when the *Shinritsu Koryō*, (the new Penal Code) was enacted, historical record would show that the compilers of the code at that time referred to the text and the commentaries of Chinese law and institutions; the penal code of Ming and Qing, *Bunken Tsuko* (historical records of Chinese political institutions before the Sung dynasty) and so on. The Meiji government was aiming to build institutions based on the central administrative organ of government grounded on the *Ritsuryō* system of ancient times. At the starting point of the process, the information on Chinese law played an important role in creating Japanese system of law organizationally.

4-2. The Influence of Western Law

(a) The Premise of the Acceptance of Western Law

In the Meiji era, westernization and modernization of natural science and culture (also called the “civilization and enlightenment”) was often quite focused. However, at that period, the creation of a Western-style legal basis for states and individuals was more urgent issue than the above-mentioned topic, since it concerned the existence itself of the government.

The background of this urgency was the necessity of forming a state system to join the other nations of the world in the international community without giving in to European powers. The new government recognized the unequal treaty of commerce which the Tokugawa government had concluded with the United States, Great Britain, France, Russia, and the Netherlands. This unfair treaty included provisions of; 1) renunciation of the autonomy of customs of Japan; 2) unilateral most-favored-nation treatment wherein an advantageous provision for a contracting-country is automatically applied to other member countries; and 3) consular jurisdiction. These provisions were prepared on the ground that Japan has yet to develop a modern legal system which allowed to have an equal relationship with Western countries.

In this context, resolving these problems was a major driving force behind the acceptance of Western law. The acceptance of Western law can therefore be considered merely as a means to

externally protect the people of Japan and the state itself. It must be noted that Western law is not evaluated as the “*acquis*” for object that people establish the state and the mutual rights and obligations. Subsequently, an overview will be presented concerning the acceptance of legal knowledge from various Western countries.

(b) Acceptance of Dutch Legal Knowledge

At the end of Edo period, Japanese students in Netherlands learned and earned the deep understandings of international law, *Staatsrecht*, and natural jurisprudence. Its background was the academic foundation of *rangaku* (the study of Western sciences by means of the Dutch language), or the study of Western knowledge brought from Netherlands during the Edo period. Of course, while literature on law and politics could not be imported into Japan, as has been previously mentioned, it was the accumulation of the Dutch linguistics and the translations of dictionaries that provided the basis for an awareness of governmental mechanisms such as the judiciary.

For example, the *Dai Bi Renpo Shirayku*, "History of the United States" written in Chinese which was brought to Japan in the middle of the 19th century contained explanations about the Supreme Court of the United States, as mentioned in the third article of the US Constitution. To put guiding marks for rendering Chinese into Japanese for this work, the word "oppregeertshoff" (the Dutch word equivalent of the supreme court) was appended to help readers understand the concept of American “Supreme Court”.

Japanese students with the background of *rangaku* displayed the results of their study when textbooks such as *Taisei Kokuho-ron* ("*Staatsrechtslehre* of the Far West Countries") were published. This textbook was used by officials of the new government in their groping efforts to learn about law, particularly Western modern law. During the Meiji period, translations of Dutch law such as the Constitution and the Act of the Constitution of Courts, for example *Oranda Seiten* and *Oranda Shiho Shokusei Ho*, were later referred to by the first Minister of the Judiciary, Shinpei Eto and others in the *Seido Torishirabekyoku* (Bureau of Institutional Investigation). Actually, this information was reflected in the institutional reforms of the judiciary gradually organized in and after 1871.

These books, including translations of Dutch law and some explanations, are not limited to the study of legal system of the Netherlands. These same books were later used as supplemental materials to understand French legal system during lectures given by the foreign technical advisors of the Meiji government². Thus the knowledge of the Dutch legal system was an important as a prerequisite for the reference and the installation of Western law, from French law onwards; it is very essential because it provided a basis in understanding the fundamental concepts of Western modern law.

(c) The Influence of French Law

In addition to the Dutch providing a partial knowledge of legal systems, as well as an outline of Western modern legal concepts in Japan, French law was also rigorously studied and utilized by

² See for example, Ryosuke Yamaguchi, *Oyatoi Gaikokujin Busuke no Kojutsu to Oranda Hosei* (written in Japanese), *Horitsu Jiho*, vol.84 No.11, 2012, prefatory page.

the Meiji government as part of a systematic collection of Western modern legal code. The reason behind this focus on French law was the fact that the *Codes Napoléoniens* was introduced to Japan as being the newest and most advanced legal code of the time. Enlightened officials in the government with an awareness of the advanced nature of French law in 1869 ordered the scholar Rinsho Mitsukuri to translate the five volumes of the *Codes Napoléoniens* as well as the French constitution. The result was a translation covering capital, civil, commerce, constitutional, and civil and criminal procedural codes entitled *Furansu Horitsusho*. This was assiduously referenced to by the Japanese.

The translation work was undertaken with great urgency under orders of "translate it as soon possible, without fear of mistranslation!" Knowledge of law at the time was lacking, and a translation of legal terms was extraordinarily difficult, with many of the concepts not existing in Japan at the time, the translation resulted in many new legal terms that are still used to this day. For example, the word *kenri* came to us through Mamichi Tsuda, who studied in Netherlands. It was a word given a new meaning in Japan similar to the English *right*, the German *Recht*, and French *droit*. In any case, there were limits to the amount of systematic knowledge of French law obtained by the Japanese scholars. The government therefore invited experts on jurisprudence from France to lecture on legal matters and give advice on the compilation of legal codes. The government also put them in charge of nurturing legal scholars and attorneys.

The first of such experts to be invited was a young attorney by the name of G.H. Bousquet, who lectured from 1872 for a period of five years, on the legal code and the creation of legal and judicial systems. Further, he created the foundation for the study of French law in legal educational institutions. When giving lectures, Bousquet prepared carefully, and was able to teach difficult concepts in a way that made them easily understood. The first Japanese legal scholars who were his students at the time remember him as playing an important role in enabling specialized legal subjects to be easily learned.

A year after Bousquet's arrival in Japan, a legal scholar from the law department of the University of Paris, a man named G.E. Boissonade, came to Japan. Boissonade firstly provided general advice to the Ministry of the Judiciary on the creation of a legal system, and secondly taught law. For the government, he was an instructor at the *Shihosho Hogakko*, the law school affiliated with the Ministry of the Judiciary, and he provided strict instructions in French. Boissonade taught not only at the government school, but also accepted a teaching position at Tokyo Hogakko (in 1889, it was reorganized as *Wafutsu Horitsu Gakko* [Japanese - French Law School]). They were the predecessor of today's private university named Hosei University), after its establishment in 1881, lecturing via interpreters on civil and other codes. Boissonade's students later became government bureaucrats, judges, and legal scholars, as well as attorneys once removed from government service. Among these legal scholars, Kenjiro Ume is famous as a drafter of civil law. Moreover, Boissonade also drafted legal codes. The Criminal procedure code and penal code used his opinions extensively; these codes were enacted in 1890. In the 22 years that Boissonade spent in Japan, he served as a professor of law, and is renowned for his major contributions to the modern Japanese legal system.

(d) The Influence of English Law

English law began to be studied in parallel with the acceptance of French law from 1874, within the law department of the government-ran *Kaisei Gakko*, and was researched in a major way at

the then underdeveloped University of Tokyo. This school later produced the compiler of Japanese civil law, Nobushige Hozumi, and other outstanding individuals. Many students, including Hozumi and others from both in and out of government, learned from the English.

The acceptance of French law was primarily based on the theories of the school of natural law, which taught that "the law is universally valid". This philosophy was used in various legislative work as a legislative reference, such as the *Codes Napoléoniens*, making its influence on Japan relatively easy to trace. In comparison, it is not such an easy matter to find specific examples of English influences on Japanese law. As one of the common law systems, English law was readily accepted for its jurisprudential value in the execution of private law rather than in the compilation of legal codes. J. Bentham and J. Austin, both of the school of legal analysis, as well as H.J.S. Maine and others from the historical school of law all taught theories of legal positivism, wherein "law is defined in each country through historical relativism". This theory was a major point of contention between the French and English schools of thought.

The dispute between these two schools was called *Minpoten Ronso* ("dispute over the civil code"), and grew out of the implementation of the civil code in 1890. Boissonade played a major role in drafting this civil code, and its contents referenced French civil code to a large extent. Adherents of the French school advocated for a speedy implementation of this code due to the need for revisions to the inequitable treaties, and to use the civil code in the negotiations process. In contrast, adherents to the English school pointed out that provisions particularly those regarding family law, diverged from Japanese reality. They emphasized the necessity for a delay in its implementation, using the criticism that it would lead to the destruction of family relations and societal order, and that it would not be recognized internationally. A similar argument was leveled at the commerce code, with commerce organizations in major cities throughout the country having vested interests in trade customs and property rights becoming involved alongside politicians, legal scholars, and legal professionals.

Differences in policy stance with regard to the revisions of the inequitable treaties were in part behind these arguments. The power struggle in the rural areas between the two schools of thoughts on the implementation of the French-style legal code, was also behind resistance from the English school of thought in response to the controlling position of the French school in Japanese law. Apart from policy arguments, when one focuses on the acceptance of Western law in Japan, one notes certain characteristics in these disputes. Namely, these disputes were over the jurisprudential stance of the methodological validity of a theoretical framework based on law rather than the validity of the law being accepted. Eventually, it was decided that implementation of the civil code drafted by Boissonade would be postponed. However, this decision did not construed to mean that the English school had taken control. English law was a system of case law, which was problematic in a sense that this system requires an accumulation of cases, and that the system did not fit the need for a comprehensive inheritance of laws in a short period of time. After the postponement in the implementation of the civil code, It was German law that ultimately gained the primary position of influence in Japanese law.

(e) The Influence of German Law

The influence of French law, which was referenced extensively in the early 1870s, gradually waned in the latter half of the 1880s. It was replaced by German law, which came to flourish. One reason for the diminishing influence of the French law was the fact that the *Codes Napoléoniens*

was created in the beginning of the 19th century, and was showing its age at the dawn of the 20th century. In addition, the *Shihosho Hogakko* (the law school affiliated with the Ministry of the Judiciary), which was the base of the French school of thought, was merged in 1885 with the University of Tokyo, which was of the English school. Thus the two schools of thought existed in parallel and in confrontation with each other within the University of Tokyo, and certain limitations of the independence of French law appeared. The postponement of the civil code implementation is symbolic of the decline of the French school of thought.

On the other hand, German law came to be studied as Japan began the work of creating its constitution. The government's objective was the creation of a constitution that assumed a state based on strong monarchical power ruled by an emperor, and the government surveyed applicable Western law to that end. As a result, the Prussian constitution was referenced due to its clear establishment of a monarchy-based sovereign power. Hirobumi Ito played a central role in this survey of constitutions, as he had gone directly to Europe and have been taught constitutional law by Professor L. Stein of the University of Vienna and Professor R. Gneist of the University of Berlin. Moreover, H. Roseler, a German technical advisor to the Meiji government also played a major role in drafting the constitution. Through the work of referencing a German constitution, Japanese statesmen and legal scholars generally turned to German law. The aforementioned legal scholars Nobushige Hozumi and Kenjiro Ume praised the systemization and logic of German law in general, not just its constitution. The influence of German law can be clearly seen in procedure law and in other areas.

In terms of the civil code, Hozumi and others referenced the German civil code, which was in its draft stage at that time in Germany, for the work of revising Japan's civil code after the implementation of the French-based code was postponed. In doing so, the system of law was gradually replaced by the German system, in the adoption of the Pandekten method for hierarchically systematizing the structure of the provisions into general provisions and particular theory. German legal theory, which allowed the completed German-style civil code to function, was aggressively introduced into Japan, influencing the interpretation of law. In inheriting these legal theories, strict German law and its logical structure was helpful in setting procedural code such as litigation law and organizational law such as the Act of the Constitution of Court. We can see from the above background that German law exerted a strong influence on Japan's legal world in the latter part of the 19th century, and created a foundation for a legal system connected to the one in use today.

5. Conclusion

Describing the influence of foreign law, in conclusion, two matters can be pointed out.

First, in relation with China, there were invaluable effects on Japanese law before the Meiji period, such as penal code of Ming or Qing. It is important to note that the reception of Western law stands on Western information about law and politics as translated into Chinese, which were introduced to Japan via China. Such distribution channel of knowledge provides meaningful perspectives on the reception of foreign law.

Second, for detailed studies of the reception of Western law at the time, a careful consideration is indispensable; what was brought to Japan, how it was brought to Japan, what was applied or

disregarded in the process. Standing from this viewpoint, this paper analyzed the communication with Western Modern law in Japan.

Through the step-by-step contacts with various foreign law, Japan had switched the reception of Western law unilaterally and enlighteningly, to one of "digestion", that is, interpretation and application as Modern Japanese law corresponding with Japanese traditions and circumstances of that time.

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List of Japanese kanji (including some Chinese)

<i>Amane Nishi</i> : 西周	<i>Min Ritsu Kokuji Kai</i> : 明律國字解
<i>Bankoku Koho</i> : 萬國公法	<i>Ming penal code, Min Ritsu</i> : 明律
<i>Bunken Tsuko</i> : 文獻通考	<i>Minpoten Ronso</i> : 民法典論争
<i>Dai Bi Renpo Shiriyaku</i> : 大美聯邦志畧	<i>Nobushige Hozumi</i> : 穂積陳重
<i>Dai Min kaiten</i> : 大明會典	<i>Oranda Seiten</i> : 和蘭政典
<i>Dai Shin Ritsurei Isan</i> : 大清律例彙纂	<i>Oranda Shiho Shokusei Ho</i> : 和蘭司法職制法
<i>Furansu Horitsusho</i> : 佛蘭西法律書	<i>Qing penal code, Shin Ritsu</i> : 清律
<i>Go Keiho Sosho</i> : 御刑法草書	<i>rangaku</i> : 蘭学
<i>han</i> : 藩	<i>Rikuyu Engi</i> : 六諭衍義
<i>Higo Kumamoto Han</i> : 肥後熊本藩	<i>Rinsho Mitsukuri</i> : 箕作麟祥
<i>Hirobumi Ito</i> : 伊藤博文	<i>Ritsuryo</i> : 律令
<i>Hosei University</i> : 法政大学	<i>Seido Torishirabekyoku</i> : 制度取調局
<i>irezumi</i> : 入墨	<i>Shiho-sho Hogakko</i> : 司法省法学校
<i>Kaikoku Zushi</i> : 海國圖志	<i>Shiho-sho</i> : 司法省
<i>Kaisei Gakko</i> : 開成学校	<i>Shinpei Eto</i> : 江藤新平
<i>Kari Keiritsu</i> : 仮刑律	<i>Shinritsu Koryo</i> : 新律綱領
<i>Kenjiro Ume</i> : 梅謙次郎	<i>Shishu Shi</i> : 四洲志
<i>kenri</i> : 權利	<i>Sorai Ogyu</i> : 荻生徂徠
<i>Kokuho Gaku</i> : 国法学	<i>Taisei Kokuho-ron</i> : 泰西國法論
<i>Kujigata Osadamegaki</i> : 公事方御定書	<i>tataki</i> : 敲
<i>Mamichi Tsuda</i> : 津田真道	<i>Tokyo Hogakko</i> : 東京法学校
<i>Toritsu Sogi</i> : 唐律疏議	<i>Wei Yuan</i> : 魏源
<i>Wafutsu Horitsu Gakko</i> : 和仏法律学校	<i>Yoshimune Tokugawa</i> : 徳川吉宗
<i>Zokuto-Ritsu, Setto-Jo</i> : 賊盜律窃盜条	

(The titles of the books are given in the old style of handwriting kanji characters; alphabetical order.)