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Politics of codification in Meiji Japan (1868-1912): Comparative perspective of position of customary law in Japanese civil code

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Abstract

The purpose of this paper is to explain a crucial difference between the Japanese civil code and its European equivalents, such as the French civil code and the German BGB, with regard to the position of customary law. Whereas the European codes contained a strict exclusivity clause, the Japanese code allowed for the continued existence of many important legal customs. It will be argued that this difference can be accounted for by comparing the political background of the European codifications with the reasons that led to the introduction of a civil code in Japan. In continental Europe, the main aim of the codifications was achieving legal unity at a national level, which was deemed necessary as a requirement of the process of nation building. Since customary law was predominantly local law, it had to be abolished entirely.

In Japan, the main incentive to work on a codification was also political, but with other features. Above all, the Japanese wanted a codification as a means to convince the Western powers that the Japanese legal system had been modernised and thus the unequal treaties could be revised. With attaining legal unity being only of secondary importance, customary law did not need to be abolished altogether. On the contrary, retaining legal customs proved to be an excellent strategy to salvage at least some of the Japanese legal traditions.

1. Introduction

On 16 July 1898, the Japanese civil code came into force. It was modelled on the German civil code, the *Bürgerliches Gesetzbuch* (BGB), which had been

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promulgated by the German Emperor on 18 August 1896. Curiously, the Japanese civil code became effective earlier than the BGB because the Germans decided, for symbolic reasons, to postpone the introduction of the civil code until 1 January 1900. In their efforts to codify private law, the Japanese were not only influenced by the German example. In the decades preceding the creation of the German code, they had been working on an adaptation of the French civil code.[1] This work took place under the guidance of Gustave Emile Boissonade de Fontarabie (1829-1910), a French lawyer who had come to Japan in 1874 as an advisor to the Japanese government. Finally, the Dutch civil code of 1838 was also well known in Japan because of the efforts of Masamichi Tsuda (1829-1903).[2] By order of the government, Tsuda studied law at the University of Leiden from 1862 until 1865, together with Amane Nishi (1829-1897), who also played an important role in the transmission of Western legal concepts to Japan.[3]

Given the fact that both the German and French civil code, and to a lesser extent the Dutch civil code, had served as models, it is remarkable that the authors of the Japanese code took a more favourable stance towards customary law than their European predecessors. As a result, almost a hundred years after the promulgation of the code, Japanese lawyers still held customary law in high regard, as a remark of the Japanese legal historian Kaisaku Kumagai shows. He wrote in 1973: 'Every Japanese jurist is more or less inclined to regard the customary law with deep respect, although the most fundamental part of our law is statute law. He often considers the customary law as a valid mitigative or a useful brake against the cold and severe statute law'.[4]

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1) Cf. M. Ishimoto, "L'influence du Code civil français sur le droit civil japonais" in: *Revue internationale de droit comparé* 6/4 (1954), 744-752. Y. Noda, "La réception du droit français au Japon" in: *Revue internationale de droit comparé* 15/1 (1963), 543-556.

2) R. Epp, "The challenge from tradition: attempts to compile a Civil code in Japan, 1866-78" in: *Monumenta Nipponica* 22/1-2 (1967), 15-48 (17-18).

3) T. Okubo, "Ono Azusa and the Meiji Constitution: the codification and study of Roman law at the dawn of modern Japan" in: *Transcultural Studies* 1 (2013), 101-144 (105-110). R. H. Minear, "Nishi Amane and the reception of Western law in Japan" in: *Monumenta Nipponica* 28/2 (1973), 151-175. R. Feenstra, "Contacten op juridisch gebied tussen Nederland en Japan in de 2e helft van de 19e eeuw" in: *Gratii Commercii. Opstellen aangeboden aan Prof. Mr. A. van Oven ter gelegenheid van zijn afscheid als hoogleraar aan de Rijksuniversiteit te Leiden* (Zwolle 1981), 57-69.

4) K. Kumagai, "On the formation of a customary law on *Allmende* in Japan (*Iriai*)" in: *Osaka University Law Review* 20 (1973), 1-9 (1).

The purpose of this contribution is to provide an explanation for this difference. It will be argued that both the European codifications and Japanese civil code have been introduced for political reasons, but these reasons were of a different nature, resulting in a different attitude towards customary law.

2. Position of customary law in European civil codes

One characteristic of the French civil code is the strict exclusivity clause, in which all sources of law except statutory law are abolished. In this clause, customary law was also deprived of its status as an autonomous source of law. Article 7 of the original 'titre préliminaire' of the French civil code stated that all legal customs 'cessent d'avoir force de loi générale ou particulière dans les matières qui sont l'objet de ce Code'.[5] By using the words 'dans les matières' (English translation: 'with regard to the subjects'), the clause was even stricter than an earlier draft, which only declared void those customary legal rules that were contrary to a provision of the new codification.

The first Dutch civil code (1809), introduced by King Louis Bonaparte (1778-1846), a brother of the French Emperor Napoleon Bonaparte, was also accompanied by a strict exclusivity clause.[6] Article 3 of the decree by which this code was promulgated, under the title 'Code Napoleon adapted for the Kingdom of Holland', stated that all laws concerning private law, whatever their designation, lost their validity unless they were explicitly preserved by the code.[7] This provision was even stricter than the French example because Article 3 of the decree abolished all legal customs related to private law. In 1811, the Kingdom of Holland was annexed to France. Consequently, the French *Code civil* entered into force in the Netherlands. After regaining independence in 1813, the French *Code* remained in place until a new codification was prepared for the Netherlands. This new Dutch civil code was introduced in 1838. In this new code, it was again emphasised that customary law lacked the status of an autonomous source of law. Article 3 of the accompanying statute, the 'Law on General Provisions', unequivocally declared that 'a custom does not have force of law, unless a statute

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5) *Dalloz Code civil* (Paris 1973/1974), 11.

6) Peter A. J. van den Berg, "La codification et la formation d'un État national sous le Roi Louis" in: A. Jourdan (ed.), *Louis Bonaparte. Roi de Hollande* (Paris 2010), 81-100 (81-83).

7) The decree, dated 24 February 1809, is published in J. H. Sassen, *Proeve van een beredeneerd overzigt van het Burgerlijk Wetboek voor het Koninkrijk der Nederlanden* (Den Bosch 1827), 9.

refers to it'.[8)]

Finally, with regard to the German codification, the supreme authority of the civil code as the sole source of law was also declared. Article 55 of the statute introducing the code, the *Einführungsgesetz zum BGB* (EGBGB), dating from 18 August 1896, stated: 'Die privatrechtlichen Vorschriften der Landesgesetze treten außer Kraft, soweit nicht in dem Bürgerlichen Gesetzbuch oder in diesem Gesetz ein anderes bestimmt ist'. The English translation is: 'The rules entailed in the statutes of the Member States lose their validity, unless the civil code or this statute determines otherwise'. Although customary law was not mentioned explicitly, it was included without any doubt. Based on the second part of Article 55 EGBGB, about a hundred detailed descriptions of such local provisions were included in the EGBGB, thus salvaging some local law.[9)]

The fierce rejection of customary law as an autonomous source of law can only be explained by the fact that these three European codifications were meant to serve a political purpose. They were not primarily designed to increase legal certainty for the benefit of litigants, but to create legal unity as part of the process of nation building.[10)] After all, until the codifications, France, the Netherlands, and Germany were characterised by a bewildering legal diversity. Each region had its own legal system using a variety of sources of law, such as local statutes, local customary law, religious law, and Roman law. This situation was increasingly regarded to be detrimental to the idea of a coherent nation state, and an exclusive codification was the perfect means to address the problem. For that reason, the drafters of the new codes made use of a strict exclusivity clause to prevent the resurgence of local (customary) law to fill in the many *lacunae* that were inevitably present in the new civil codes. Its main aim was, in other words, to

8) In Dutch, Article 3 reads: 'Gewoonte geeft geen recht, dan alleen wanner de wet daarop verwijst'. The Dutch title of the statute is: 'Wet, houdende Algemene Bepalingen der Wetgeving van het Koningrijk'. Cf. C. J. H. Jansen, "Over de plaats en de functie van de Wet, houdende Algemeene Bepalingen der Wetgeving van het Koningrijk (1829)" in: *Ars Aequi* 57 (2008), 22-29 (22 and 25).

9) Cf. Articles 59-167 EGBGB. Cf. also Article 1 section 1 EGBGB.

10) Cf. Peter A. J. van den Berg, *The politics of European codification. A history of the unification of law in France, Prussia, the Austrian Monarchy and the Netherlands* (Groningen: Europa Law Publishing 2007). A recent summary of this argument can be found in: Peter A. J. van den Berg, "Constitutive rhetoric: the case of a 'European civil code'" in: J. M. Milo, J. H. A. Lokin and J. M. Smits (eds.), *Tradition, codification and unification. Comparative-historical essays on developments in civil law* (Cambridge/Antwerp 2014), 45-70 (48-51).

ensure that the civil code brought about legal unity. From this perspective, it is easy to understand the fact that on 1 January 1992, in the context of the introduction of the new Dutch civil code, the provision restricting the scope of customary law as a source of law was rescinded. The provision had served its purpose, since legal unity had been achieved, and the legislator could now again leave the development of some (national) legal customs to the participants in the field.

3. Position of customary law in Japanese civil code

Seemingly, the Japanese codifiers followed the European codifications with regard to the position of customary law. Article 2 of the 1898 statute that accompanied the introduction of the Japanese civil code stated (in the official English translation): 'Customs which are not contrary to public policy shall have the same force as law in so far as they are recognized by the provision of a law or an ordinance or relate to matters which are not provided for [by] laws or ordinances'.[11] After the French model, it was declared that customs concerning subjects that were covered by the new civil code were abolished. In accordance with the German example and Article 3 of the Dutch 'Law on General Provisions', exceptions to this rule were made possible by stating that a legal custom would remain in force if this custom was explicitly recognised in a provision of the civil code.

However, a close reading of Article 2 of the 1898 statute reveals that the attitude towards customary law was formulated positively in the civil code, unlike in its European equivalents. After all, customary law was not 'abolished'; it was 'granted the same force as law'. Unsurprisingly, therefore, the Japanese civil code included several provisions in which local customary law was declared applicable.[12] One of these provisions involved the legal rule of *iriai-ken*, which regulates the use of communal lands.[13] In Japan, this legal custom was greatly valued.

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11) Law concerning the application of laws in general (Horei). Statute no. 10 of 21 June 1898.

12) See for example the Articles 217, 219, 228, 236, 263, 268, 269, 277, 278 and 526 of the Japanese Civil code.

13) Article 294 Japanese civil code. Cf. K. Kumagai, "Iri-ai-ken from the Tokugawa period till the legislation of the Japanese Civil code. Reception of European laws and iri-ai-ken" in: *Recueils de la Société Jean Bodin pour l'histoire comparative des institutions* 62: *Les communautés rurales* (Paris 1982), 407-410. K. Kumagai, "Two customs and the codification of the civil code in Japan" in: *Osaka University Law Review* 30 (1983), 1-6.

Of even greater importance for the leeway granted to customary law is the fact that Article 2 of the 1898 statute had to be read in conjunction with the revolutionary Article 92 of the Japanese civil code. Article 92 elaborated on the category of customs mentioned in Article 2, which are the customs that 'are not contrary to public policy'. Article 92 stated that (in the official English translation): 'If there is a custom differing from any law or regulation not relating to the public welfare, such custom is to be followed, if it is to be considered that the parties intended to be governed by such custom'. Unlike its European equivalents, this provision opened the door for the application of an in principle unlimited number of legal customs in the field of private law. Thus, the possibility of salvaging Japanese legal traditions was deliberately kept alive in the Japanese civil code by creating a strong position for customary law.[14] Indeed, soon after the introduction of the civil code, it became clear that Article 92 of that code had been interpreted broadly.[15] If customary rules were relevant in a case, the judge was inclined to assume that the parties wanted to have these customary rules applied, even if the parties had not made any statement about that. In this way, many customary rules retained their validity, even if they diverged from the civil code.

Interestingly, the same attitude to customary law was adopted when the Japanese civil code came into force in Korea after its annexation to Japan in 1910.[16] Korean customary law was granted an important position in accordance with the Japanese provisions on that issue. As a result, the introduction of the Japanese civil code did not create complete legal unity between Korea and Japan. It was only by judicial decisions that efforts were made to further align Korean and Japanese law.

4. Political nature of Japanese endeavours to introduce codification

As stated above, the European codifications were introduced as a requirement of the process of state formation, in which the focus was on centralisation and unification of the governmental system. In Japan, the efforts to codify were

14) Cf. M. Dean, *Japanese legal system* (London 2002), 132-133. M.S.-H. Kim, *Law and custom in Korea* (Cambridge 2012), 94-95 and 193-194. H. Oda, *Japanese law* (London/Dublin/Edinburgh 1992), 60-61.

15) Kim, *Law and custom in Korea*, 195-196.

16) J.-H. Jeong, "Umformung des japanischen Zivilrechts in Korea" in: H.G. Leser and T. Isomura (eds.), *Wege zum japanischen Recht. Festschrift für Zentaro Kitagawa* (Berlin 1992), 171-198. Kim, *Law and custom in Korea*, 192-234.

politically inspired as well. The new Japanese civil code was not meant to improve the legal system, but to address certain pressing political needs. These political needs were not the same as those of the European countries, however, and the differences in this respect probably explain the benevolent attitude of the Japanese civil code towards customary law.

The Japanese started to reform their legal system under great external pressure. In 1853, threatened by the use of violence, they were forced by the United States to open up their country to foreigners. Subsequently, treaties were agreed upon with the United States and other Western countries, which restricted Japanese sovereignty.[17] The treaties not only deprived Japan of its customs autonomy, but they also included provisions enabling the subjects of Western countries in Japan to avoid, to a certain extent, Japanese jurisdiction. The Japanese legal system was regarded by the Western powers as inadequate.[18] Article 6 of the *Treaty of Amity and Commerce*, which was concluded between Japan and the United States in 1858, serves as an illustration. It reads: 'Americans committing offenses against Japanese shall be tried in American Consular courts, and, when guilty, shall be punished according to American law. Japanese committing offenses against Americans shall be tried by the Japanese authorities and punished according to Japanese law. The Consular courts shall be open to Japanese creditors, to enable them to recover their just claims against American citizens; and the Japanese courts shall in like manner be open to American citizens for the recovery of their just claims against Japanese.'

The military weakness of Japan and dishonour of the unequal treaties were blamed on the *shogunate* by at least part of the elite, and a revolution was inevitable. In 1868, the *Shogun* was overthrown, and the Emperor, who until then had had a predominantly symbolic function, was granted a position that was closer to the actual government. This transformation is often called the 'Meiji Restoration' after Emperor Meiji (1852-1912). However, this term is somewhat misleading, since this 'restoration' initiated an impressive amount of substantial reforms. These reforms were mainly aimed at restoring the power of Japan so that it could end the foreign diktats. A slogan frequently heard in this context was *fukoku kyohei*, 'enrich the country, strengthen the military'.[19] As a matter of

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17) K. Mukai and N. Toshitani, "The progress and problems of compiling the Civil code in the early Meiji era" in: *Law in Japan: an Annual* 1 (1967), 25-59 (32).

18) Cf. J. O. Haley, *Authority without power. Law and the Japanese paradox* (New York/Oxford 1991), 68.

course, the Western countries stood as a model for the reforms. After all, Japan strived towards having a rival military power and equal status amongst the 'civilised countries'. The unequal treaties could only be replaced if Japan became a powerful nation with a reputation of being 'modern'.

Therefore, the introduction of the Japanese civil code in 1898 was of equal importance for the international position of Japan as the build-up of its army. With that codification, Japan could argue that it had joined the club of 'civilised countries' and that the unequal treaties, including the limitations to the Japanese jurisdiction, should end. The following quote, taken from an article written in 1897 by Masao Tokichi (1869-1921), a Japanese lawyer who became ambassador to Thailand in 1920, illustrates just how closely the Japanese codification was connected to the desire of Japan to follow in the footsteps of Western imperialism. The article was printed in *The Arena*, a liberal literary and political magazine published in Boston, Massachusetts, and was obviously directed at an American audience. Tokichi wrote: 'Truly, the year 1896 has been an eventful year for Japan. The war with China had brought glory to her arms. Formosa and numerous other islands had been added to her possessions. (⋯). The treaties with the leading nations of the world had been revised, providing for the abolishment of the disgraceful extra-territoriality regime in Japan, to take effect, however, upon the taking effect of the new civil code. The last and greatest event of all, the new code was adopted'.[20] The aspiration to participate in the legal development of the West was also reflected in his concluding remark that Mutsuhito, better known as Emperor Meiji, could now proclaim, like the Byzantine Emperor Justinian, that he was able to govern 'with arms and laws'.

5. Two models of unification and modernisation of law

The resounding success of the reforms, which also resonates in the quotation from Tokichi, makes it almost easy to forget that the task of the early Meiji reformers was daunting, including with regard to the law. The reformers were confronted with a Japanese legal system that differed substantially from the law in the Western countries regarding both form and substance.

Until the end of the *Tokugawa* era, the period between 1600 and 1868,

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19) Z. Kitagawa, *Rezeption und Fortbildung des europäischen Zivilrechts in Japan* (Frankfurt am Main/Berlin 1970), 45.

20) M. Tokichi, "The new Civil code of Japan" in: *The Arena* 18/92 (Boston, Mass. 1897), 64-69 (69).

Japanese society was largely characterised by feudal features.[21] Admittedly, the local nobility was subordinated to the will of the *shogun*, who ruled the country on behalf of the Emperor. In fact, however, this nobility enjoyed substantial autonomy in its territories, including in matters of law. Basically, both law making and the administration of justice, the two were hardly separated, took place at a local level. In addition, the emphasis was on customary law, which differed from area to area.[22] Legislation was merely used on a small scale and then only to complement customary law, not to replace it.[23] The content of the law was also tailored to the feudal structure and therefore differed from what had become typical of the Western legal systems. In the Western countries, the emphasis had shifted to the individuals as subjects of law, whereas in Japan, the family and community still played a pivotal role.[24]

Since the Western countries served as a model, the Meiji reforms aimed to centralise the administration of justice and modernise the laws. Firstly, this implied that efforts were made to create legal unity to construct a more coherent Japanese nation.[25] This was in line with the main purpose of the early nineteenth century codifications in Europe. Secondly, the feudal features of the Japanese legal system had to be removed to accommodate the Western powers. With regard to the unification and modernisation of their legal system, the Japanese had two models to choose from: the European-continental model of codification and the English model of development of a 'common law' based on centralised judiciary.[26]

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21) See J. R. Strayer, "The Tokugawa period and Japanese feudalism" in: J. W. Hall and M. B. Jansen (eds.), *Studies in the international history of early modern Japan* (Princeton 1968), 3-14. J. W. Hall, "Feudalism in Japan - a Reassessment" in: Hall and Jansen (eds.), *Studies in the international history of early modern Japan*, 15-51.

22) Cf. for the legal system in the *Tokugawa* period: C. Steenstrup, *A history of law in Japan until 1868* (Leiden/New York/Copenhagen/Cologne 1991), 108-159. D. F. Henderson, "The evolution of Tokugawa law" in: Hall and Jansen (eds.), *Studies in the international history of early modern Japan*, 203-229.

23) W. Röhl, *History of Japanese law since 1868* (Leiden/Boston 2005), 168.

24) Röhl, *History of Japanese law since 1868*, 262-263, 268 and 311.

25) Cf. for this emphasis on legal unity as a means of strengthening the Japanese nation: Epp, "The challenge from tradition", 15-16, 19, 24-25 and 47-48. Kitagawa, *Rezeption und Fortbildung*, 44-45. N. Hozumi, *Lectures on the new Japanese civil code as material for the study of comparative jurisprudence* (Tokyo/Osaka/Kyoto 1912 (2nd edition)), 26-28. M. Tomii, "Étude sur l'état de la codification au Japon" in: *Bulletin Mensuel de la Société de législation comparée* 3 (March 1898), 178-184 (179).

With hindsight, the choice of the European-continental model seems obvious. By using a codification, the intended reforms could be implemented quickly, while it was also an excellent means to convince the Western countries of the modernity of Japanese law.[27] In addition, when the Japanese started their reforms, several ready-to-use codifications were available such as the French *Code civil* (1804), the Austrian *Allgemeines Bürgerliches Gesetzbuch* (ABGB 1811), and the Dutch civil code (1838). The French *Code* had a staunch supporter in Boissonade de Fontarabie, mentioned above, who lectured on natural law, criminal law, and civil code topics at the Justice Department School of Law. Moreover, the relationship between Japan and France had been very close since the conclusion of a friendship treaty in 1858.[28] The Dutch code was particularly relevant as an example for the Japanese because the Netherlands had been the only European country that was allowed to trade with Japan through its trading post on the island of Deshima until the forced opening of Japan in 1853.[29]

However, it was not entirely inconceivable that the Japanese would have preferred the English option.[30] Firstly, it has to be reiterated that circa 1870, England was by far the most powerful nation in the world. In addition, the Americans who forced the Japanese to open up their country were also trying to implement the English model.[31] Therefore, the exemplary role of these countries should not be underestimated. Moreover, Anglo-American 'common law' had become an established part of the curricula of Japanese law schools in the first

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26) J. V. Feinerman, "The Meiji Reception of Western law" in: Leser and Isomura (eds.), *Wege zum japanischen Recht*, 95-105 (97). For a detailed comparison of these two models, see: Peter A. J. van den Berg, "Lawyers as political entrepreneurs? A historical perspective on the contribution of lawyers to legal integration in Europe" in: A. Jettinghoff and H. Schepel (eds.), *In Lawyers' circles. Lawyers and European legal integration (=Recht der Werkelijkheid*) (The Hague 2004), 163-190 (169-180).

27) Feinerman, "The Meiji Reception of Western law", 96-97.

28) Mukai and Toshitani, "The progress and problems", 35 and 49.

29) Cf. F. B. Verwaijen, *Early reception of Western legal thought in Japan, 1841-1868* (s. l. 1996), who highlights the substantial Dutch influence on Japanese legal thought in the decades preceding the Meiji Restoration. Cf. also Epp, "The challenge from tradition", 17-18.

30) A. T. von Mehren, "Some reflections on Japanese law" in: *Harvard Law Review* 71 (1957), 1486-1496 (1487), also makes this point.

31) Cf. *Swift* v. *Tyson*, 41 U.S. 1 (1842). In 1938, the Supreme Court of the United States admitted that the attempt to unify the law through the judiciary had failed. See *Erie Railroad co*. v. *Tompkins*, 304 U.S. 64 (1938), overruling *Swift* v. *Tyson*.

decades after the beginning of the Meiji reforms, in addition to French law and Roman law.[32] Between 1873 and 1892, the English common law became particularly dominant in the curriculum of the University of Tokyo.[33] Last, but not least, using the English model would perfectly fit the Japanese doctrine of sources of law, since customary law was central to that model as well.[34] After all, the *common law* had been developed through the judiciary based on customary law without the help of a codification. It is possible that this process could have been replicated in Japan.

In the first years of the Meiji Restoration, some measures were adopted that seemed to point in the direction of a *common law* solution to the dilemma regarding legal reform. For example, in 1875, a Supreme Court, the *Dai-shin'in*, was established. In the same year, the government issued a decree with an instruction directed at the judiciary that clearly showed that with regard to the administration of justice, considerable importance was attached to customary law. According to the instruction (in the official English translation), 'Those matters for which there is no written law are governed by custom and those matters for which there is no custom shall be adjudicated by inference from reason'.[35] The explicit reference to 'reasonableness' as a supplementary source of law opened the possibility of resorting to foreign law where it was deemed necessary. In this way, the French *Code civil* exerted considerable influence at an early stage: the *Code* was translated into Japanese and used in judicial decisions as some kind of 'ratio scripta'.[36]

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32) K. Takayanagi, "A century of innovation: the development of Japanese law, 1868-1961" in: A. T. von Mehren (ed.), *Law in Japan. The legal order in a changing society* (Cambridge, Mass./Tokyo 1963), 5-40 (27-29). Interestingly, between 1874 and 1878, the subject of Roman law was taught at the University of Tokyo by an English lawyer, W. E. Grigsby (1847-1899). Cf. T. Hayashi, "Roman Law studies and the Civil Code in modern Japan – system, ownership, and co-ownership" in: *Osaka University Law Review* 55 (2008), 15-26 (16).

33) K. Kumagai, "Establishment of theory of Japanese law history" in: *Osaka University Law Review* 2 (1953), 25-45 and K. Gorai, "Influence du Code civil français sur le Japon" in: *Le Code civil, 1804-1904: livre du centenaire* II (Paris 1904), 781-790 (784).

34) K. Takayanagi, "Contact of the Common Law with the Civil Law in Japan" in: *The American Journal of Comparative Law* 4 (1955), 60-69 (61).

35) Decree no. 103 (1875), Article 3. See for this decree: Dean, *Japanese legal system*, 132.

36) Gorai, "Influence du Code civil français", 781-782.

6. Growing resistance: fate of 'old civil code' (*kyuh minpoh*)

In the early days of the Meiji era, the reforms that were implemented with regard to the legal system met with relatively little resistance. The majority of the Japanese elite regarded these reforms as inevitable. To some extent, this can be explained by the fact that despite the feudal structure, the consciousness of national Japanese identity had developed during the *Tokugawa* era.[37] Consequently, the efforts to centralise the competences of the government could count on sufficient support. Moreover, in the first decades after the revolution, the Western examples were followed without being closely scrutinised.[38] It was firmly believed that the development of humankind was universal, a notion that was also promoted by the Western countries, and that Japan only needed to make up lost ground.[39]

However, many Japanese intellectuals and politicians were quick to understand that in the Western countries, the so-called 'universal values' were implemented according to their specific national needs and habits. This resulted in a reappraisal of their own traditions, which was sometimes expressed in the slogan *wakon yosai*, meaning something like 'Japanese spirit, Western techniques'.[40] The consequence of this reassessment was that Western ideas were no longer taken for granted.[41] Instead, the ideal became to implement the necessary reforms, while retaining the Japanese traditions as much as possible.[42] Since many of these traditions were contained within customary law, the future position of these legal customs was one of the crucial issues to be resolved by those responsible for the revision of the judicial system.

The more critical approach to Western ideas came to the surface after 1870. In

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37) J. W. Hall, "From Tokugawa to Meiji in Japanese local administration" in: Hall and Jansen (eds.), *Studies in the international history of early modern Japan*, 375-386 (375-376).

38) Röhl, *History of Japanese law since 1868*, 176.

39) Mukai and Toshitani, "The progress and problems", 36.

40) Y. Okubo, "La querelle sur le premier Code civil japonais et l'ajournement de sa mise en vigueur: le refus du législateur étranger?" in: *Revue internationale de droit comparé* 43/2 (1991), 389-405 (390). Röhl, *History of Japanese law since 1868*, 176-177.

41) Cf. for the reaction of Japanese intellectuals to the universal pretentions of the West also T. Takenaka, "The domestication of universal history in Meiji Japan: Fukuzawa Yukichi and Nakae Chōmin" in: *Saeculum* 63 (2013), 119-142.

42) Cf. for the transfer and transformation of political models: J. de Jong, "'The principles of steam': political transfer and transformation in Japan, 1868-89" in: *European Review of History* 12/2 (2005), 269-290.

that year, civil servants had started working on a draft codification based on the French *Code civil*, albeit without official authorization.[43] These activities met with serious opposition among lawyers and within the ranks of the bureaucracy. There were fears that a civil code modelled on the French example would not fit well with the Japanese traditions.[44] In the course of 1874, it was decided that it was necessary to prepare a compilation of customary legal rules from all over Japan in an effort to preserve domestic Japanese law.[45] Subsequent attempts to codify private law were fiercely criticised as well. This criticism was induced by the concern that a codification would be detrimental to the traditional legal customs.[46] Characteristic of the resistance is the fate of the draft civil code dating from 1890, also known as 'the old civil code'.

A significant part of the 'old civil code' was drafted by Boissonade de Fontarabie, at least with respect to property rights.[47] In 1879, he was commissioned by the government to work on a draft of a civil code and was assisted by Japanese lawyers who provided the translations. Because of widespread hostility, however, the government agency charged with the coordination of the work was shut down.[48] In 1887, the activities were resumed by a newly appointed committee. The parts with regard to property law, drafted by Boissonade, were revised, while the Japanese members of the committee prepared the missing chapters on family law and the law of inheritance.[49]

The supporters of the 'old code' have emphasised that this draft remained relatively close to the Japanese legal customs, in contrast to the allegations of its antagonists. As early as 1894, Boissonade published a comprehensive essay, in

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43) Epp, "The challenge from tradition", 23-24. Röhl, *History of Japanese law since 1868*, 171-172.

44) Epp, "The challenge from tradition", 26-29.

45) Epp, "The challenge from tradition", 44. Röhl, *History of Japanese law since 1868*, 174. Two compilations of customary law were published in 1877 and 1880 respectively. The American lawyer John Henry Wigmore (1863-1943), who taught law in Tokyo from 1889 to 1892, made an English edition available under the title: *Materials for the study of the private law of old Japan* (=*Transactions of the Asiatic Society of Japan 20: Supplement*) (Tokyo 1892).

46) Epp, "The challenge from tradition", 45-47.

47) Cf. for details on the process of compiling the 'old civil code': Mukai and Toshitani, "The progress and problems", 53-56.

48) Röhl, *History of Japanese law since 1868*, 175.

49) Röhl, *History of Japanese law since 1868*, 175-176.

which he went to great lengths to argue that the draft code was in accordance with domestic customary law.[50] The remarks of Boissonade were not without merit. The chapters with regard to family law and the law of inheritance, which were drafted by Japanese lawyers, clearly show that Japanese traditions concerning these subjects were not abolished.[51] Moreover, in the parts dedicated to property law, ample attention was paid to legal rules that originated from Japanese circumstances.[52] It has even been argued that the important legal rule of *Emphyteusis (Eikosaku-ken)*, which traditionally regulated the rights to cultivate the soil that belonged to somebody else, was better protected in the draft of Boissonade than in the Japanese civil code as it was finally adopted.[53]

At the same time, the degree of modernization that would have been brought about by the draft of Boissonade, if introduced, should also not be underestimated. Although much of the draft was aligned with Japanese traditions, it is indisputable that the 'old civil code' was founded on the concept of the autonomy of the individual and, thus, was at odds with fundamental Japanese values.[54] In addition, the draft codification, which was modelled after a Western example, was completely out of line with the existing doctrine of sources of law of Japan. In the Japanese legal system, the emphasis was placed on customary law, whereas legislation only had a complementary function.[55] The proposed draft would radically change this tradition, since it deprived customary law of its status as an autonomous source of law. Interestingly, the proponents of this draft code even argued that abolishing the Japanese legal customs was inevitable because, according to them, customary law in the strictest sense of the term did not exist in Japan. In accordance with the French legal theory of the nineteenth century, it was held that customs could only be regarded as 'law' if they were recognised as such in judicial decisions.[56] This had not occurred in Japan yet, since the development of the judiciary was still in its infancy there.

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50) G. E. Boissonade de Fontarabie, *Les anciennes coutumes du Japon et le nouveau Code civil, à l'occasion d'une double publication de John Henry Wigmore* (Tokyo 1894).

51) Röhl, *History of Japanese law since 1868*, 279-282. Hozumi, *Lectures*, 14.

52) Röhl, *History of Japanese law since 1868*, 168. Haley, *Authority without power*, 71.

53) K. Kumagai, "Codification of *Emphyteusis* (*Eikosaku*) in the Middle Meiji period" in: *Osaka University Law Review* 26 (1979), 1-7.

54) Haley, *Authority without power*, 75-76. Family law, too, could not avoid some modernisation. Kitagawa, *Rezeption und Fortbildung*, 30.

55) Haley, *Authority without power*, 75-76. Röhl, *History of Japanese law since 1868*, 168.

56) Kim, *Law and custom in Korea*, 84.

In 1890, the political opposition again proved crucial with nationalist sentiments playing a substantial role. The conservatives argued that the draft codification was destroying Japanese traditions, especially the *Ie*, the Japanese family structure.[57] Characteristic for the resistance was an essay published in 1891 under the title *The civil code destroys loyalty and filial piety* (in Japanese: *Minpoh idete, choku horobu*) by Yatsuka Hozumi (1860-1912), an influential professor of constitutional law at the University of Tokyo since 1889.[58] In this essay, Hozumi, who was the son of a samurai, argued that the civil code of Boissonade adhered to extreme individualism and therefore would eliminate the beliefs prevailing in Japan for three thousand years.[59] The proponents of the Anglo-American law school, who were particularly well represented at the bar, participated in this resistance.

The opposition was reinforced when it became widely known that the attempts to enact a civil code were inextricably bound up with the Japanese efforts to end the existence of foreign jurisdiction on Japanese territory. In the course of the negotiations on the revision of the unequal treaties, the Japanese promised of its own volition to introduce codifications. In the *Draft Jurisdictional Convention*, signed on 22 April 1887 in Tokyo, a provision was included stating that 'The Imperial Japanese Government undertakes to establish (…) the codifications hereinafter specified, namely: (…) 3. Civil code'.[60] In addition, it was even promised that an English translation of the authentic text of the provisions of the new code would be handed over to the foreign powers. In this way, the Japanese hoped to convince these foreign powers that the Japanese legal system would soon measure up to Western standards. As a result, the conviction that codification was a western phenomenon and unsuitable for Japan gained momentum, and in 1892, the Japanese Parliament adopted a bill to postpone the introduction of the 'old

57) Kim, *Law and custom in Korea*, 86.

58) Takayanagi, "Contact of the Common Law", 62. M. Stolleis (ed.), *Juristen. Ein biographisches Lexikon. Von der Antike bis zum 20. Jahrhundert* (Munich 2001), 306. Cf. for the constitutional thought of Yatsuka Hozumi: R. H. Minear, *Japanese tradition and Western law. Emperor, state, and law in the thought of Hozumi Yatsuka* (Cambridge, Mass. 1970).

59) T.-F. Chen, "Transplant of Civil code in Japan, Taiwan, and China: with the focus of legal evolution" in: *National Taiwan University Law Review* 6/1 (2011), 389-432 (395).

60) K. Kumagai, "On historical conditions of the Japanese civil codification" in: *Osaka University Law Review* 15 (1967), 1-10 (6-7). Cf. also Mukai and Toshitani, "The progress and problems", 33.

civil code' until 1896. The 'violation of custom' was mentioned as one of the reasons for submitting this bill.[61)]

7. Towards compromise: introduction of Japanese civil code

The efforts to introduce a codification were not abandoned altogether, however, and it is not difficult to understand the reason for that. In 1894, the *Anglo-Japanese Treaty* was concluded between the United Kingdom and Japan, and this treaty was meant to enter into force in 1899. Other countries followed this example and signed Treaties with the Japanese government. This opened the possibility of ending the privileged position of foreigners in Japan. Although the promise previously made by the Japanese with regard to codifications was not explicitly included in these new treaties, it was still part of the official communication between the Japanese diplomats and the government of the Western countries.[62)] Therefore, these new treaties would only become effective if Japan kept this promise to introduce a codification.

Moreover, it had become perfectly clear by now that the English solution to this problem would take too much time. Admittedly, the Japanese Supreme Court had been working on it for some time, but it proved too difficult to transform Japanese customs into something resembling a 'common law'.[63)] This is exemplified by the fact that the case law that was developed after the promulgation of the decree directed at the judiciary of 1875, mentioned above, was not very coherent yet.[64)]

Because of these problems, Kenjiro Ume (1860-1910), who as a civil servant in the Ministry of Justice was sent to France and Germany to study law, chose a more direct approach. Upon returning from Europe, he first supported those favouring the introduction of the draft code of Boissonade.[65)] When that strategy failed, he successfully proposed installing a new committee charged with revising that draft. Ume became one of the three members of this committee, which was

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61) Mukai and Toshitani, "The progress and problems", 58.

62) K. Hatoyama, "The Civil code of Japan compared with the French Civil code" in: *Yale Law Journal* 11 (1901-1902), 296-303, 354-370 and 403-419 (298).

63) Feinerman, "The Meiji Reception of Western law", 96.

64) Kumagai points to the fact that the Supreme Court sometimes arrived at opposing judicial decisions. K. Kumagai, "On emphyteusis (Eikosaku) in early Meiji" in: *Osaka University Law Review* 25 (1978), 1-9 (8).

65) Kim, *Law and custom in Korea*, 85-86.

established in 1893.[66] In the meantime, the intensity of the resistance of the lawyers of the Anglo-American law school abated, and in the end, only a very few of these lawyers continued opposing any form of codification.[67]

In 1893, the new committee had already resumed working on the codification. The approach had shifted significantly, however. The committee was still headed for a revision of the Boissonade draft but decided to use another foreign civil code as an additional source of inspiration, namely the German BGB, of which a draft was published in 1888.[68] The committee also chose to pay more attention to Anglo-American law.[69] However, the most fundamental change lies in the decision to attenuate the exclusivity of the new code. As mentioned above, domestic customary law was restored as an important source of law. This strategy proved successful in overcoming the opposition. In 1896, the first three books of the new draft were ready, containing, like the German model: a general part, part on contract law, and part on property, respectively. As to the content, the influence of the Boissonade draft, and to a lesser extent the Anglo-American law, was clearly recognisable. In the same year, these three books were approved by the Japanese Parliament, and two years later, on 16 July 1898, the complete civil code came into force.

With the introduction of the civil code, the Meiji reformers were able to achieve one of their major objectives: the revision of the unequal treaties. After all, it could now be argued that the Japanese legal system was adapted to Western standards. Nobushige Hozumi (1855-1926), one of the three members of the committee that had produced the final code, used this line of reasoning in a series of lectures held in St Louis, Louisiana, in 1902. Before an American audience, he emphasised that Japan had left the Asian legal family and now belonged to the Western legal family.[70] Curiously, Nobushige Hozumi was the older brother of Yatsuka Hozumi, the fierce critic of Western influence mentioned earlier. The

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66) The other two members of this committee for a codification were Nobushige Hozumi (1855-1926) and Masaaki Tomii (1858-1935). Cf. for a short biography of these three influential lawyers: Stolleis, *Juristen*, 304-305, 632 and 642-643.

67) Gorai, "Influence du Code civil français", 787. Kitagawa, *Rezeption und Fortbildung*, 31 (footnote 8).

68) Kitagawa, *Rezeption und Fortbildung*, 32. See on the German draft civil code of 1888: M. John, *Politics and the law in late nineteenth-century Germany. The origins of the Civil code* (Oxford 1989), 102-104.

69) Hozumi, *Lectures*, 23.

70) Hozumi, *Lectures*, 40-41 and 154.

Japanese efforts proved successful, since it did not take long for Japan to be recognised as a full and equal member of the international community.

To achieve this result, there is no doubt that the Japanese had to accept major changes to their traditional legal system. After all, the new codification was strongly influenced by Western values, particularly the individualistic approach to society. As Haley argues, it was inevitable that such a codification 'redefined Japan's historical orientation based on a broader conception of familial relationships to include reverential ancestral ties'.[71)]

The transition to the Western legal family was not total, however.[72)] Particularly the part of the new civil code on family law remained profoundly Japanese, at least until after the Second World War.[73)] Regarding the three books on property, Western influence was more substantial, but even there, Japan succeeded in combining modernisation of its legal system with its own judicial tradition.[74)] This achievement was at least partly effected by granting a strong position to customary law, thus disregarding a crucial element of the European codifications.

8. Concluding remarks

The Japanese civil code of 1898 was modelled after the European codifications of the nineteenth century but nonetheless differed substantially from these codes with regard to the position of customary law. The European codes were granted exclusive force, and as a result, customary law lost its status as an autonomous source of law. The Japanese code, on the contrary, allowed for the continued existence of many important legal customs.

This difference can be accounted for by comparing the political background of

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71) Haley, *Authority without power*, 77. Cf. also Chen, "Transplant of Civil code in Japan, Taiwan, and China", 425-426.

72) Obviously, there is still some debate on the question to which legal family the Japanese legal system belongs, given, for example, its preference for out-of-court settlements. Fortunately, this debate is now only academic, and devoid of any political relevance. T. Kinoshita, "Japanese law and Western law" in: Leser and Isomura (eds.), *Wege zum Japanischen Recht*, 199-219. J. van der Vliet, "Japans recht: Oda of Noda, rechtsorde of maatschappelijke moraal" in: *Ars Aequi* 51 (2002), 133-142.

73) Cf. W. Müller-Freienfels, "Japanisierung westlichen Rechts oder Verwestlichung japanischen Rechts?" in: H. Coing et al. (eds.), *Die Japanisierung des westlichen Rechts* (Tübingen 1990), 177-205 (177-179). Tomii, "Étude sur l'état de la codification", 183.

74) Feinerman, "The Meiji Reception of Western law", 104-105.

the European codifications with the reasons that led to the introduction of a civil code in Japan. In continental Europe, the main aim of the codifications was achieving legal unity at the national level, which was deemed necessary as a requirement of the process of nation building. Since customary law was predominantly local law that created substantial legal diversity, it had to be abolished entirely.

In Japan, the main incentive to work on a codification was also political, but with other features. Above all, the Japanese wanted a codification as a means to convince the Western powers that the Japanese legal system had been modernised, and thus the unequal treaties could be revised. With the aim of attaining legal unity being only of secondary importance, customary law did not need to be abolished altogether. On the contrary, retaining legal customs proved to be an excellent strategy to salvage at least part of the Japanese legal traditions. This was crucial for the Japanese civil code to be politically accepted, since the efforts to introduce a codification met with serious opposition based on the fear that a Western-style legal system would destroy fundamental Japanese legal values and customs, especially the *Ie*, the Japanese family structure.