

# COMMENTS

## EMPIRE RISING: INTERNATIONAL LAW & IMPERIAL JAPAN

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*“Japan now realized that the time had come for it to absorb all the science and arts of the Occident, from which it had been secluding itself. To this task the nation’s talent devoted itself for the next thirty years.”<sup>1</sup>*

### INTRODUCTION

Japan’s emergence from feudalism and its rapid modernization in the late nineteenth century, and its resurrection following World War II have long been a source of interest for social scientists. Indeed, copious research has examined Japan’s successful development not once but twice in the past 150 years.<sup>2</sup> Though the perspectives offered by history, economics, political science, anthropology, and sociology provide a deep understanding of Japan’s development, an analysis of law will further enrich our knowledge.

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1. JOHN H. WIGMORE, PANORAMA OF THE WORLD’S LEGAL SYSTEMS 520 (Washington Law Book Company 1936).

2. See generally W.G. BEASLEY, THE RISE OF MODERN JAPAN: POLITICAL, ECONOMIC, AND SOCIAL CHANGE SINCE 1850 (Palgrave Macmillan 2000); PETER DUUS ET AL., THE CAMBRIDGE HISTORY OF JAPAN: VOLUME 6 THE TWENTIETH CENTURY (Cambridge University Press 1989); JOHN W. DWYER, EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II (W. W. Norton & Co. 2000) (examining how modern Japan’s political and economic foundation was laid during America’s occupation of Japan following World War II); MARIUS B. JANSEN, THE MAKING OF MODERN JAPAN (Belknap Press 2002); ANDREW GORDON, A MODERN HISTORY OF JAPAN: FROM TOKUGAWA TIMES TO THE PRESENT (Oxford University Press 2003).

This paper aspires to flesh out (albeit incrementally) two areas of law not fully addressed by Western legal scholarship: the relationship between law and imperialism, and the historical origins of modern Asian legal institutions. The intersection of these two areas within the context of modern Japan<sup>3</sup> is the crux of this paper.

The relationship between law and imperialism has been disregarded by legal scholars.<sup>4</sup> Indeed, it seems Professor Antony Anghie is the only legal scholar to have offered any contemporary research of a sustained nature on the topic, set forth in his recent book, *Imperialism, Sovereignty and the Making of International Law*.<sup>5</sup>

The emergence of East Asia has catalyzed legal scholarship exploring China, Japan, and, to a lesser extent, South Korea. The increasing importance placed on the study of Asian jurisprudence is reflected by the emergence of legal publications and programs focused specifically on Asia.<sup>6</sup> But this increased interest has centered almost exclusively on contemporary issues in the region. Legal scholars in the West have paid scant attention to the historical evolution of Asian legal institutions. This is unfortunate, because studying the origins of legal institutions in Asia provides fertile ground for exploring international law and development. Japan, in particular, provides a compelling example, since it was able to learn and eventually leverage international law to accomplish its foreign policy objectives, developing from a target of imperialism to Asia's imperial doyen. By looking at the historical origins of the Japanese legal system, I will explore the relationship between law and imperialism, situating the Japanese case within the broader context of law and development.

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3. It is important to note that "modern Japan" in the context of this paper is not limited to just contemporary Japan, but conveys the sense of periodization used by historians. Thus, "modern Japan" describes Japan from 1850 onward.

4. By contrast, the topic of imperialism and its cousin, colonialism, have been a source of extensive inquiry in the other social sciences. Extensive scholarship has documented imperialism and its effects, ranging from work by Edward Said to historical treatises on the British Empire to more contemporary (and some might say radical) critiques of Pax Americana by thinkers such as Noam Chomsky.

5. ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* (Cambridge University Press 2004). Professor Anghie's other works include *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations* 34 N.Y.U. J. INT'L L. & POL. 513 (2002) and *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1 (2000).

6. We need not look far for examples. UCLA's Pacific Basin Law Journal was one of the first legal publications created to address the growing interest in Asia. Besides other examples include the Pacific Rim and Policy Journal at the University of Washington School of Law and the Journal of Asian Law at Columbia Law School. Additionally, the law schools at Columbia, Cornell, Georgetown, and Harvard have programs dedicated to studying various aspects of Asian law.

The study of law and its influence on developing countries has fluctuated in popularity over the years but is quickly regaining interest.<sup>7</sup> Though sometimes overlooked, law is at the center of development in both political and economic spheres. It orders the interactions of actors, be they political parties or multi-national corporations. The development of a legal regime contributes to the formalization of norms and values that affect all aspects of society.<sup>8</sup> Harvard Law School professor David Kennedy cogently states the imperative to study the relationship between law and development:

The market rests on a set of legal arrangements. Formal arrangements and informal arrangements. Arrangements of public action and inaction. Of private and public entitlements. The rule of law is a collection of enforced distributions. Economic activity conducted on this foundation sometimes leads to growth, and sometimes to development. It seems completely plausible that different distributions will yield different economic results, and that attention to law in the development process would heighten our awareness of the choices available to us.<sup>9</sup>

The intersection of law and development is not a static crucible that countries endure a single time to instantly create a mature legal system. Rather, it is a work in progress, a process that continually influences a country's pattern of governance, economic growth, and even foreign policy. Japan presents an interesting case study of how the law can be leveraged by a developing country to facilitate modernization, assisting a country in its transition from developing to developed. This is not to say that Japan's legal system (or any other legal system, for that

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7. DAVID KENNEDY, *Law & Developments, in LAW AND DEVELOPMENT: FACING COMPLEXITY IN THE 21ST CENTURY* 17 (John Hatchard & Amanda Perry-Kesaris eds., Cavendish Publishing 2003). See also Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law & Development*, 108 *YALE L.J.* 1 (1998); John K.M. Ohnesorge, *Conference: Japan and Law & Development in Asia: Introduction*, 23 *WIS. INT'L L.J.* 225 (2005) (noting the importance of law and development in the context of East Asia).

8. JURGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (MIT Press 1996) (discussing the process of creating norms and making law, and the effects of that process on democracy); Obiora Chinedu Okafor, *The Global Process of Legitimation and the Legitimacy of Global Governance*, 14 *ARIZ. J. INT'L & COMP. LAW* 117, 117 (1997) (explaining the international legal system as a body of formalized norms and principles); FRIEDRICH V. KRATOCHWIL ET AL., *RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS* (Cambridge University Press 1991); Kenneth M. Rosen, *Lessons on Lawyers, Democracy, and Professional Responsibility*, 19 *GEO. J. LEGAL ETHICS* 155 (2006) (explaining that lawyers are critical in preserving democratic norms and values).

9. KENNEDY, *supra* note 7.

matter) is finished developing, but this paper focuses on how law assisted in the formation of a modern Japanese state.

As one of the few countries in the world, and the only one in East Asia, to modernize without being colonized, Japan's path to development is a particularly salient example for developing countries.<sup>10</sup> As the only non-Western country to be considered fully developed economically and politically, Japan is unique, yet the Japanese experience has also been replicated by the East Asian Tigers.<sup>11</sup> From the perspective of international law, Japan represents a successful cross-cultural, transnational transplantation of both the processes and substance of modern law. This new Japanese legal regime was eventually transplanted from the Japanese home islands to Japan's colonial periphery, forming the backbone of the legal systems found in Taiwan and South Korea today.

Writing a complete legal history of Japan would be fascinating, but due to time and resource constraints, this paper will focus more narrowly on the early- to mid-Meiji period,<sup>12</sup> from approximately 1867 through 1900. As Japan emerged from the shadow of the Tokugawa shogunate, its desire to be viewed as a peer of the West began in earnest. Though a large part of Japan's efforts centered on industrialization and the military, considerable effort was also expended to equal the West in the realms of international law and diplomacy, particularly in light of the unequal treaties the West imposed on East Asian countries, including Japan and China.<sup>13</sup> At a very basic level, Japan's struggle to modernize was a fight for sovereignty and independence from Western encroachment. And in that fight, rifle and cannon were not the only weapons Japan employed. Capable statesmen fluent in the language of international law were also required.<sup>14</sup> By exploring the genesis of the Japanese legal system against the back-

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10. Ohnesorge, *supra* note 7, at 226-27 (commenting that any theory of law and development that does not include East Asia is inchoate).

11. "East Asian Tigers" is a phrase coined to describe high-growth countries such as Korea, Taiwan, Singapore, and Hong Kong. Both South Korea and Taiwan followed the Japanese economic growth model to varying degrees, though neither has yet reached Japan's level of economic maturity.

12. The "Meiji period" refers to the forty-five-year reign (1868-1912) of the Meiji Emperor. It was during this period that Japan experienced tremendous modernization and development, emerging as the only non-Western world power.

13. ALEXIS DUDDEN, *JAPAN'S COLONIZATION OF KOREA: DISCOURSE AND POWER* (University of Hawaii Press 2005).

14. Japan was not unique in relying on law and lawyers for its foreign policy needs. See, e.g., Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era*, 78 N.Y.U. L. REV. 239, 241 (2003) ("Lawyers dominated U.S. foreign policy during this period and beyond – for example, from 1889 to 1945, every Secretary of State was a lawyer."); Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: The Twenty Years' Crisis*, 77 S. CAL. L. REV.

drop of the Meiji period, this paper will illustrate how law was employed by Japanese leaders as a vehicle of development to secure a position of parity among the developed (i.e., Western) nations.

This paper will begin by exploring the motivation for change in Meiji Japan, specifically within the context of the Japanese legal system. It will then examine the development of the Japanese legal system, with particular attention to the European influences that laid the foundation for Meiji Japan's government and legal apparatus. Finally, this paper will consider how adopting a Western-style legal system facilitated Japan's ascension into the ranks of the developed nations at the turn of the twentieth century.

## I. IMPETUS FOR CHANGE IN MEIJI JAPAN

Shōgun Yoshinobu Tokugawa's fall from power in 1867 and the installation of imperial rule ushered in a time of great change in Japan. Motivated in large measure by the need to figure out how to cope with the West and not suffer the same humiliation as China, Meiji leaders pondered the most effective way to modernize while simultaneously countering Western expansionism and exploitation. Indeed, the decision to modernize was a direct response to the specter of Western imperialism, which was already decimating China.<sup>15</sup>

Under the aegis of *ōsei fukko* (restoration of imperial authority) the traditional role of the emperor as a ruling figure was restored, leading to a revival of ceremony and tradition.<sup>16</sup> In step with the Confucian approach of the Meiji restoration, Meiji leaders initially relied on early Chinese codes as the foundation for their new legal system.<sup>17</sup> Initial efforts to codify law resulted in the *Kari keiritsu* (The Provisional Criminal Code), the *Shinritsu kōryō* (The Essence of the New Code), the *Keitei ritsurei* (The Statutes and Substatutes as Amended), and the *Kōsei ritsurei kō* (The Draft of Statutes and Substatutes as Revised) most of which were initially inspired by legal codes found in Ming and Qing China.<sup>18</sup> These nascent attempts to codify law

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583 (2004) (examining the influence of classical legal ideology on American foreign policy during the early twentieth century).

15. MARIUS B. JANSEN, *THE EMERGENCE OF MEIJI JAPAN* (Cambridge University Press 1995). An overview of the history and changes that occurred during the Meiji period can be found at <http://www.thecorner.org/hists/japan/meiji2.htm> and <http://afe.easia.columbia.edu/japan/japanworkbook/modernhist/meiji.html>.

16. PAUL HENG-CHAO CH'EN, *THE FORMATION OF THE EARLY MEIJI LEGAL ORDER* xix (Oxford University Press 1981).

17. *Id.*

18. *Id.* at 3. Only the first three were ever codified as law; the last remained a draft.

laid the foundation for future acceptance of Western law.<sup>19</sup> It is important to note, however, that although Japanese public and criminal law relied heavily on Chinese legal tradition, Japan's commercial law regime at this time was almost completely indigenous, consisting of business customs mediated by trade associations and guilds.<sup>20</sup>

At the same time it was reevaluating and codifying its legal system, Japan found itself at a crossroads in its attempt to combine Eastern tradition with Western modernity. As the Meiji government considered its response to the West, it grew increasingly aware that Japan was disadvantaged in its dealings with the West because of its lack of Western legal knowledge.<sup>21</sup> As a result, initial efforts to rely predominantly on Chinese and Japanese legal tradition gave way to a Westernization of the Japanese legal system, though according to legal scholar Paul Ch'en, the Chinese tradition remained influential until the early 1880s.<sup>22</sup>

The disparity between West and East was especially evident in the privileged position Western nations had secured for themselves through the use of unequal treaties when opening Asian countries. Following the Opium Wars, China was forced to sign unequal treaties; Japan suffered a similar fate when Commodore Perry and his "Black Ships" effectively ended its isolationist policy.<sup>23</sup> Unequal treaties often guaranteed Western nations tariff autonomy or protection and provided their citizens legal protection through extraterritoriality. As a result, Europeans committing crimes in China/Japan were not subject to the laws of the host country and instead had their cases adjudicated by their own country's presiding authority, often receiving much lighter sentences, if any at all.

Unequal treaties were a primary impetus for the Meiji government's efforts to modernize its legal system. As Japanese leaders attempted to reform the unequal treaties to reflect a more equitable relationship, Western nations informed the Japa-

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19. *Id.*

20. Elliott J. Hahn, *Perspective: An Overview of the Japanese Legal System*, 5 *NW. J. INT'L L. & BUS.* 517, 518 (1983).

21. Ch'en, *supra* note 16, at xix.

22. *Id.* at xx.

23. The Japanese described the U.S. flotilla that sailed into Yokohama Harbor as "Black Ships" because of their color and the black smoke that billowed from their coal-powered engines. For a detailed account see FRANCIS L. HAWKES, *COMMODORE PERRY AND THE OPENING OF JAPAN: NARRATIVE OF THE EXPEDITION OF AN AMERICAN SQUADRON TO THE CHINA SEAS AND JAPAN, 1852-1854* (Trafalgar Square Publishing 2005); PETER BOOTH WILEY, *YANKEES IN THE LANDS OF THE GODS: COMMODORE PERRY AND THE OPENING OF JAPAN* (Viking 1990).

nese that the adoption of a modern legal system, a Western legal system, would be necessary to initiate change.<sup>24</sup>

Many Meiji leaders also felt that adopting modern law was necessary to order economic relationships in a newly industrializing country like Japan.<sup>25</sup> Developing countries undergoing rapid modernization are often faced with increasingly complex business transactions and a greater need for delineated property rights, an effective contracting regime, a set of procedures to deal with trade disputes, and a variety of mechanisms to cope with possible labor or political unrest. Thus, even though the nationalistic desire to remove the yoke of unequal treaties was a primary motivating factor, as a practical matter, it appears that Meiji leaders understood the need for a more sophisticated legal system.

As part of the Meiji government's efforts to modernize, representatives were sent to various Western countries to gain knowledge in technology, language, military affairs, government, and law. This knowledge transfer was conducted under the mantle of *wakon yosai* (techniques from the West, spirit from Japan).<sup>26</sup> This mentality also permeated the transplantation of Western law to Japan.

Legal scholars Wilhelm Rohl, Roland Bahr, and James V. Feinerman espoused similar views with respect to Japan's legal development, particularly regarding cultural compatibility. Feinerman states that one factor that contributed to the successful development of the Japanese legal system during the Meiji period was the attention given to "cultural compatibility of legal transplants and the adjustment of foreign legal borrowings to suit local conditions."<sup>27</sup> Bahr expands upon this idea when he offers his three main points regarding Japanese legal development: 1) Japanese law is not *only* derived from Western law (i.e., it also has non-Western roots); 2) Western law in Japan does not have to be interpreted from a Western perspective; and 3) Western law and Japanese values are not incompatible.<sup>28</sup>

In establishing a new government and laws, the Meiji leadership attempted to find a model that could incorporate both Japanese values and modern, Western knowledge. This struggle is emblematic of the constant dilemma Meiji leaders faced in trying to maintain their Japanese ethos while being forced to deal with Western nations on Western terms. (In many ways, this is a prob-

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24. Hahn, *supra* note 20, at 521.

25. Harold Hohmann, *Japanese Law: Legal History and Concept of Law, Public Law and Economic Law of Japan*, 44 AM. J. COMP. L. 151, 155 (1996).

26. *Id.*

27. *Id.*

28. *Id.*

lem that developing countries face even today, exemplified in the blowback response to globalization—i.e., the negative reaction to the diffusion of Western/American values, entertainment, etc. into previously “sheltered” cultural and religious spaces, leading to a clash between modernity and tradition.)<sup>29</sup> Meiji leaders made a concerted effort to emulate the West in their efforts to modernize, though Japanese nationalism was integrated with Western knowledge and technology whenever possible.

## II. PATH TO LEGAL DEVELOPMENT

Rapid modernization and significant institutional change in a short period of time often leads to action, political or otherwise, by disaffected groups attempting to prevent or minimize change to establish an equilibrium that respects their interests. Of course the success of these groups varies widely. In the case of Japan, elites, many of whom were former samurai, initiated the process that resulted in the development of the modern Japanese legal system.<sup>30</sup>

The de-feudalization of Japan resulted in a large number of disaffected samurai.<sup>31</sup> Though the Meiji Restoration entailed (as the name denotes) a restoration of the emperor to power, the emperor did not rule absolutely, but received significant counsel from the samurai who had spearheaded the Restoration. Attempting to consolidate power following the transition of leadership, daimyo, samurai, and other feudal lords were encouraged to relinquish their lands and other holdings.<sup>32</sup> Eventually, the government absorbed these feudal lands. The Meiji government also disbanded individual domain armies and promulgated new social policy that stripped samurai of their special class privileges.<sup>33</sup>

The transformation of Japan's centuries-old samurai-based social order created significant tension between the conservative and liberal elites. This tension was brought to a head by a diplomatic row between Korea and Japan. Conservative samurai

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29. For further reading on the negative effects of globalization see, AMY CHUA, *WORLD ON FIRE* (Doubleday 2002); SAMUEL P. HUNTINGTON, *CLASH OF CIVILIZATIONS* (Simon & Schuster 1998); and JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (W. W. Norton & Co. 2002).

30. NAKAMURA KICHISABURO, *THE FORMATION OF MODERN JAPAN* (University of Hawaii Press 1962).

31. *Id.* at 42-48.

32. Asia for Educators, *The Meiji Restoration and Modernization*, at <http://afe.easia.columbia.edu/japan/japanworkbook/modernhist/meiji.html> (last visited Apr. 14, 2006).

33. *Id.* As an aside, many of these changes are documented in the Hollywood blockbuster, *The Last Samurai*, including the banning of samurai swords, the removal of top-knots, and the general resistance of conservative samurai to ever-increasing social change.

clamored for an armed expedition against Korea but were ultimately denied. To protest the Meiji government's policies, particularly those regarding foreign affairs, leading samurai such as Takamori Saigō, Taisuke Itagaki, and Shimpei Etō resigned from high positions.<sup>34</sup>

Following their thwarted efforts to mount an expedition against Korea, the conservative samurai, led by Itagaki, spearheaded a movement to create a national assembly.<sup>35</sup> Itagaki was heavily influenced by Risshisha, a group in his hometown of Tosa that advocated for a European-style constitutional government.<sup>36</sup> Itagaki desired a peaceful change and attempted to enlist Saigō in his efforts. Saigō rebuffed Itagaki's overtures, however, advancing a more aggressive approach that culminated in the Satsuma Rebellion (also known as the Civil War of Seinan).<sup>37</sup> The insurrection was quickly suppressed by government troops in 1877.

The Satsuma Rebellion represents not only a symbolic but also a physical clash between tradition and modernity that developing countries face in their struggle to modernize. Though the right political institutions and economic growth model are crucial, the sociological side effects of development should not be overlooked. The Japanese are often extolled for their ability to adapt and absorb, particularly in light of Japan being the first Asian country to effectively adopt Western practices. Unfortunately, there are always costs associated with societal transformation. As modernity replaces tradition, the resulting displacement activates previously inert forces that create (or exacerbate) rifts in society. These rifts lead to increased tension and occasionally violent conflict, as in the case of Saigō and his ill-fated rebellion.

Although Saigō's efforts were frustrated, Itagaki's reform movement gained momentum. Eventually it became clear that a fundamental change would have to be made to the framework and institutions of government. At that point, the Meiji government faced an important decision. Until then, it had governed by "rule of force," but to gain lasting legitimacy, it must make a transition to "rule by law."<sup>38</sup> The government, recognizing that change was probably inevitable, attempted to control the nature of the change.<sup>39</sup>

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34. Kichisaburo, *supra* note 30. As mentioned earlier, the dispute was due to differing opinions regarding Japan's policy toward Korea.

35. *Id.* at 50.

36. *Id.*

37. *Id.*

38. *Id.* at 57.

39. *Id.* at 59.

Itagaki and others who favored a more democratic form of government supported a constitutional system based on the British model.<sup>40</sup> For example, Progressive Party member and distinguished jurist Azusa Ono (also from Tosa) compiled a three-volume treatise entitled *A Summary of the National Constitution*,<sup>41</sup> detailing a government based on the British model and outlining various iterations of a possible constitution.

The Meiji government proceeded with change carefully. Attempting to maintain as much control as possible, Viscount Kowashi Inoue advised Premier Hirobumi Itô on possible alternatives to the British model.<sup>42</sup> Inoue, who would go on to play a leading role in drafting the new Japanese constitution, suggested a “constitution of Prussian-type absolutism.”<sup>43</sup> Inoue also shrewdly advised proceeding with the initial drafting of a new constitution in order to prevent other alternatives, such as the British model, from garnering increased support.<sup>44</sup> A Prussian-style system was an enticing alternative; it leveraged the rhetoric of nationalism to legitimize the need for a central locus of power and did not tolerate dissent as readily as other Western forms of democracy. Thus, this form of constitutional government would preserve the power of the state while simultaneously appeasing Itagaki and other reformers.

In March 1882, Itô departed to Europe on a fact-finding mission, while Inoue remained in Japan.<sup>45</sup> Before leaving, Itô received confidential instructions from the emperor detailing his mission. His directive read in part, “Inspect Germany, whose national polity is most similar to that of Japan.”<sup>46</sup> When the emperor’s directions were subsequently published, however, they were altered so that Itô’s trip would appear more benign. The published record merely read, “Visit the constitutional states in Europe,” with reference to Germany or to a Prussian-style constitution removed.<sup>47</sup> The government was keen on keeping its efforts confidential in order to maintain control over the promulgation of a new constitution.

The drafting of a new constitution began in earnest after Itô’s return from Europe in 1883. A final draft of the document appeared in 1888, with formal acceptance in early 1889 by the

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40. *Id.* at 58.

41. *Id.*

42. *Id.* at 59. For more information on Kowashi Inoue, see [http://yushodo.co.jp/english/mic\\_list/inoue.html](http://yushodo.co.jp/english/mic_list/inoue.html).

43. Kichisaburo, *supra* note 30, at 59.

44. *Id.*

45. *Id.* at 60.

46. *Id.*

47. *Id.*

emperor and his privy council.<sup>48</sup> The new constitution, formally called the Constitution of Imperial Japan, and also referred to as the Meiji Constitution, resulted in an interesting hybrid of Prussian-style absolutism and the traditional *Tennō* (imperial) system.<sup>49</sup>

This hybrid governmental structure was further influenced by French legal scholarship, particularly by French lawyer Gustave Boissonade. Boissonade served the Meiji government in various capacities for approximately twenty years, advising on foreign affairs as well as international and domestic legal matters.<sup>50</sup> His efforts in assisting the Japanese draft modern legal codes were particularly substantial. Ultimately, Meiji Japan was a unique amalgamation of Prussian-inspired government and legal structures, infused with the substance of French law, within the framework of a quasi-imperial system based on Confucian tradition.

As an aside, one of the most vivid accounts of early Meiji punishment comes to us from another Frenchman, Georges Bousquet. Bousquet describes in great detail the capital punishment of a group of criminals:

The first of these wretched people appears, still tied up and held up rather than led by two assistants of the executioner. They make him kneel at the edge of the pit. A sword flashes, but it is only the aides cutting the bonds and lifting the prisoner's head so that the vertebrae joints will be on a horizontal line. While he says over and over again: "Mada! Mada!" one of the men in the cover approaches, sword in his hand and raises his weapon—a flash of lightning, a clean slash, a flood of blood gushing out, a trunk that crumbles down. . . This bloody heap is tossed next to the pit, while another condemned person is brought or feebly makes his own way to this hole that he does not see under his blindfold but indeed where he smells—a horrible thing to describe—the smell of blood that has just flowed. I saw the terrible lightning flash five times; five times I saw a head fall with one stroke, the same hand without trembling, and the same weapon without becoming dull accomplished this monstrous piece of work. Five corpses are aligned in the pit without a cry, moan, or sigh breaking the mournful silence, and without another sound being heard besides that of a broken vertebra or of a rolling head.<sup>51</sup>

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48. *Id.*

49. *Id.*

50. *Id.* at 73.

51. Ch'en, *supra* note 16, at 60.

## III. EMULATING THE WEST

With European-modeled (albeit indigenously influenced) institutions of government and law in place, Japan quickly improved its ability to fluently leverage previously foreign concepts of international law and diplomacy, quickly achieving parity with the West and superiority to its East Asian neighbors (i.e., China and Korea). In her recently published book, *Japan's Colonization of Korea: Discourse and Power*, Alexis Dudden explores Japan's ability to use the language of international law as a foreign policy tool.<sup>52</sup> Of particular salience is her examination of how foreign legal terms were quickly adapted not only to gain legitimacy in the eyes of Western powers, but also to emulate them.

Dudden's work fills a gap in previous scholarship regarding Japanese imperialism and East Asian international relations. Prior work, particularly that of Hilary Conroy<sup>53</sup> and Key-Hiuk Kim,<sup>54</sup> examines Japanese imperialism within the context of political theory and the systemic change that occurred when East Asian countries began dealing with Western countries. These interactions between East and West required an acceptance of the Western ordering principles that had emerged from the Treaty of Westphalia to govern relationships between nation-states.

Dudden, however, moves beyond a system-level analysis to capture at a very detailed level how Japan not only oriented itself to the new international system, but also, more importantly, leveraged its new fluency in international law to legitimize its colonial practices. Specifically, her analysis examines the intersection of law and language in the context of Meiji Japan and the rapidity with which Japan was able to integrate itself into the ranks of the "civilized" world. Dudden's work also serves as an insightful guide to Japan's transformation during this period and its quest to emulate the Western powers, which ushered it toward imperialism.

Dudden focuses on the vernacular of international law and explains how, through language, Japan was able to normalize previously foreign values and standards. The meanings of such terms as *right*, *obligation*, and *sovereignty* were subjects of significant discourse for neophyte Japanese legal scholars and diplomats, especially regarding how to convey such meanings in Japanese. As Japan became increasingly sophisticated in the use of international law, it progressed from simply recasting foreign

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52. Dudden, *supra* note 13.

53. HILARY CONROY, *THE JAPANESE SEIZURE OF KOREA* (University of Pennsylvania Press 1974).

54. KEY-HIUK KIM, *THE LAST PHASE OF THE EAST ASIAN WORLD ORDER* (University of California Press 1980).

legal terms into kanji to conducting negotiations with the Chinese in English, signaling that Japan no longer operated in a Sino-centric system but had joined the “civilized” countries of the world.

Dudden’s work also details the incorporation of Japan’s nascent legal system into a colonized Korea,<sup>55</sup> with particular attention to the development of the rule of law and the administration of punishment in Korea. Dudden’s examination of the Japanese-created colonial legal system in Korea provides insight into how colonial Korea was governed and offers background information on the development of South Korea’s modern legal system. Understanding how the modern Japanese legal system developed is crucial because it represents the conceptual foundation for legal systems throughout East Asia.

As mentioned earlier, Meiji leaders, eager to reach the status of Western powers, began to adopt the lexicon of international law. This was due in part to the fact that “[t]he vocabulary of international law could not be separated from the material conditions of industrializing capitalism. Nor, for that matter were its terms meant to be distinct from such conditions.”<sup>56</sup> Furthermore, by inculcating terms of international law such as “sovereignty” and “independence,” Japan was able to interact with the West on Western terms, developing the vocabulary, stature, and gravitas required to be considered a power on the global stage.<sup>57</sup> Indeed, by cloaking itself in modern international legal vernacular, Meiji Japan was able to integrate itself into the international economy, not as a colonized nation but as a core member.

The ordering aspect of international law was especially important to Japan. A colonizer/colonized dichotomy had developed, influenced by social Darwinism and “racially driven theories of civilization [that] shaped a Euro-American political climate that increasingly sustained a taxonomical ordering of peoples of the world.”<sup>58</sup> The dichotomy was further buttressed by the notion of the “white man’s burden,” espoused by Rudyard Kipling, representing a widely held view in the West that a “civi-

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55. DUDDEN, *supra* note 13, at 100.

56. *Id.* at 30.

57. *Id.* at 43-44. (By the end of the nineteenth century, Japanese government documents included references to “Japan and *other* Powers.” “The promoters of Japan’s newly expanding place in the world clearly defined Japan among the Powers by referring to them as the ‘other’ ones. Meiji leaders had made international terms Japanese in practical application and law; such terms enabled Japan to conclude new trade treaties with England and Germany, for example, and they confidently displayed the transformation abroad.”)

58. *Id.* at 9.

lized" nation was only truly civilized if it could transform a "non-civilized" one.<sup>59</sup>

For Japan, this idea meant that not only was it necessary to adapt Western political and legal institutions, it was also crucial that Japan emulate the West in its efforts to transform its less-civilized neighbors—an ironic point, given that Japan was often considered an ersatz Confucian country in a Sino-centric world order and therefore was often marginalized historically.

International law at the time employed various terms to describe different types of political entities. Besides "sovereign" nations, there were also "semi-sovereign," "dependent," "principality under the *suzerainete*," "protectorate," "vassal," and "tributary."<sup>60</sup> These were terms that the Japanese needed to incorporate. As a practical matter, since such terms did not exist in Japanese, a new legal lexicon was necessary.<sup>61</sup>

Japan also began using English and French, even when communicating with its East Asian neighbors. For example, in 1885, when Itô traveled to China to negotiate the Tianjin Convention,<sup>62</sup> he broke with tradition by conducting negotiations in English, while the Chinese responded in their native language.<sup>63</sup> Dudden opines that "[b]y speaking English, Itô confirmed Japan's desire to change forever the order of the regional discourse of power. . . . Brush-talking was useful, but the Chinese were its champions. Articulating the same concepts in a wholly alien language allowed international terms to retain their distant authority. Thus, English made the terms nonnegotiable."<sup>64</sup> Even notes and reports were written in English, translated into Japanese, and then provided to the leadership back in Japan.<sup>65</sup>

To further illustrate the intersection between international law and language, Dudden offers insight into the use of the Japanese word for annexation, *heigô*, a topic previously explored by both Peter Duus<sup>66</sup> and Conroy.<sup>67</sup> While Conroy believes that the

59. *Id.*

60. Alexis Dudden Eastwood, *International Terms: Japan's Engagement in Colonial Control 34* (1998) (Ph.D. dissertation, University of Chicago) (on file with author). The cited section appears in the author's dissertation but seems to have been edited from the book form of the dissertation. I therefore cite to the original dissertation.

61. DUDDEN, *supra* note 13, at 34-35.

62. The Tianjin Convention was convened to negotiate the reduction in the number of Chinese and Japanese soldiers garrisoned in Korea.

63. DUDDEN, *supra* note 13, at 56-60.

64. *Id.* at 55-56.

65. *Id.* at 56-57. In her dissertation, Dudden recounts how a member of the Japanese delegation sent a telegram in English to the Japanese Foreign Bureau, updating it on the progress of the negotiations. See, Eastwood, *supra* note 60, at 55.

66. PETER DUUS, *THE ABACUS AND THE SWORD: THE JAPANESE PENETRATION OF KOREA 1895-1910* 423 (University of California Press 1995).

term *heigō* was adopted because it was purposefully vague, and Duus opines that the term had some hidden meaning, Dudden believes that “. . .the particular term reveals that the Meiji regime defined Japan’s actions to the world in terms that intersected with terms other nations used.”<sup>68</sup> To a greater extent than Conroy and Duus, Dudden presents an image of a burgeoning imperialist Japan striving to expand like its Western mentors.

Dudden also includes a narrative regarding Japanese jurist Nagao Ariga, whose research on colonies and protectorates<sup>69</sup> created the theoretical underpinnings for Japanese colonial expansion. Ariga desired to render Japanese terms of colonial control equivalent to international terms, legitimizing Japan’s imperial project by situating it as on par with the other imperialist powers.<sup>70</sup> Ariga’s work and the development of a university curriculum designed to train colonial administrators are emblematic of a Japan preparing for the large-scale colonization of its neighbors<sup>71</sup>—a Japan following in the footsteps of Europe’s “civilized” nations.

Japan’s efforts to modernize its legal system proved tangibly successful as early as 1899. The preface to English version of the Ministry of Foreign Affairs’s fourth-edition compilation of treaties signed with foreign countries, reads:

In order to afford an easy opportunity to consult the Conventional Arrangements regulating foreign intercourse of this Empire, a volume containing the Treaties and Conventions concluded *between Japan and other Powers* was first published by this Department in 1874; a revised edition was issued in 1884, with the addition of such Compacts as had been newly concluded or had undergone modifications during the interval, and the latter publication was followed by a supplementary volume in 1889.<sup>72</sup> [emphasis added]

This preface, particularly the phrase “Japan and other Powers,” is important because it pinpoints the year that the last vestiges of extraterritoriality were removed and Japan was considered another of the “Powers” and essentially an equal with the West.<sup>73</sup>

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67. CONROY, *supra* note 53, at 415–17.

68. DUDDEN, *supra* note 13, at 66.

69. *Id.* at 65–73.

70. *Id.* at 71.

71. *Id.* at 132–40.

72. *Id.* at 44.

73. *Id.* Dudden’s dissertation makes the point that the privilege of extraterritoriality was, for the most part, done away with by 1899, and that by 1899 the Meiji government considered itself a Power. See Eastwood, *supra* note 60, at 12.

## IV. CONCLUSION

In the introduction to *The Japanese Colonial Empire, 1895-1945*, Mark Peattie writes:

As the only non-Western imperium of recent times, the Japanese colonial empire stands as an anomaly of modern history. Because it was assembled at the apogee of the "new imperialism" by a nation which was assiduously striving to emulate Western organizational models, it is not surprising that it was formally patterned after the tropical empires of modern Europe. Yet the historical and geographic circumstances of the overseas Japanese empire set it apart from its European counterparts. . . . To maximize its strength, the effort to assert its presence in Asia—the creation of empire—would have to begin with domination over neighboring areas close to home.<sup>74</sup>

This passage touches on a number of salient issues, some of which have been addressed in this paper. In its efforts "to emulate Western organization models," Japan not only successfully transplanted these legal and governmental institutions, but also employed these Western models to successfully govern and expand, following in the footsteps of the *other* "Powers." In retrospect, it is easy to believe that Japan followed some teleological progression and that other countries, such as Korea and China, will naturally proceed down a similar path. The reality, however, is not so simple. Development is a path-dependent initiative contingent upon a combination of factors, including timing and probably a little bit of luck.

Why was Japan able to modernize so effectively? The answer, of course, is not just Japan's timely adoption of a Western legal system; however, this is an important aspect of Japanese development that often goes overlooked.

By adopting Western legal practices, Meiji leaders were able to signal to the West Japan's attempts to modernize. Japan's efforts were not merely symbolic, since the effective promulgation of law serves as a vesting of power. By incorporating a Prussian-style constitution and associated government bodies, Meiji leaders were able to consolidate their power, not only securing their grasp on leadership but also increasing in legitimacy.

As emphasized throughout this paper, gaining equal status with the West was of paramount importance to the Meiji leadership. Nationalistic motivations such as the elimination of extra-territoriality notwithstanding, Japan understood that in the international atmosphere of the time, the colonizer/colonized dichotomy was very real and that to avoid the fate that had be-

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74. RAMON MYERS & MARK PEATTIE, *THE JAPANESE COLONIAL EMPIRE, 1895-1945* 6-7 (Princeton University Press 1987).

fallen China, it must be capable of dealing with the West not only by force of arms but also through the use of law. By cogently and fluently employing international law, Japan interacted with Western nations as an equal; since the language of international law was (and is) a language of power, Japan was identified as a "Power" and not as one of the powerless.

Unfortunately, adopting Western legal systems also seemed to require emulation of Western imperialism. Expansion seemed the logical next step in Japan's efforts to modernize. At the time of Meiji rule, the British, French, Germans, Dutch, and even the Belgians had colonies in Africa, South America, Central Asia, and Southeast Asia, as well as spheres of influence in China. Having consciously studied and copied the Western nations, it made perfect sense to follow in their footsteps in this arena as well. Japan's efforts to expand demonstrated how sophisticated it had become in such a short period of time. Treaties signed following the Sino-Japanese and Russo-Japanese Wars, the annexation of Korea and smaller island chains, and the clandestine Taft-Katsura Agreement demonstrated the breadth and depth of Japanese legal expertise. Truly, Japan had advanced from neophyte to expert.

Japan adopted Western practices, modifying them as needed, not simply for the sake of development itself, but because emulating the West guaranteed sovereignty. Though law was not the only institution Westernized in Meiji Japan, the historical development of the modern Japanese legal system offers insight into the pattern of and impetus for change during the Meiji era. Of all the transformation efforts of Meiji Japan, the adoption of a Western-style legal system is arguably the most successful and permanent, since its general form persists even today.