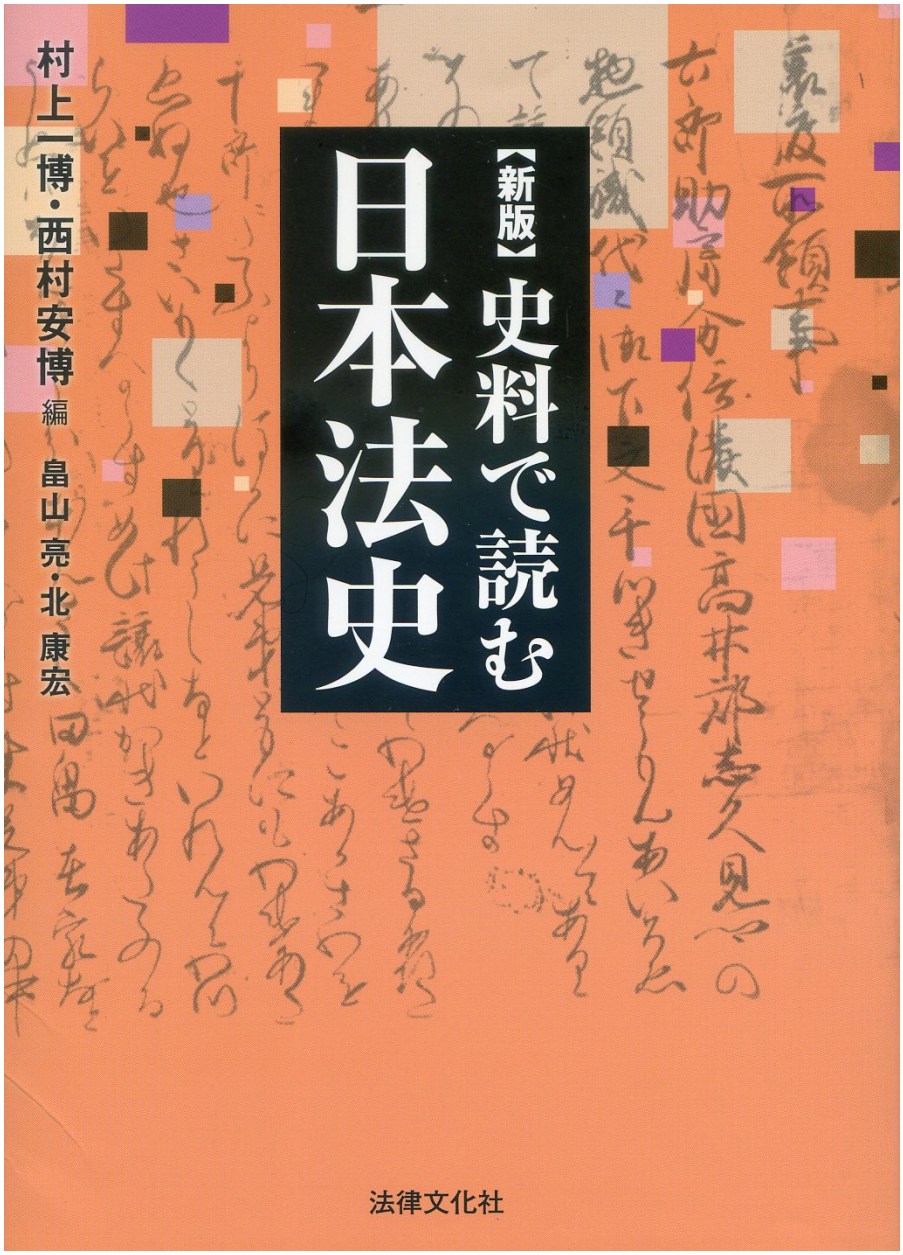

The History of Law in Japan, Through Historical Records

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Prologue: The Door into Japanese Legal History

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Did you know that legal history is an actual field of study? A law student typically studies the constitution, penal codes and criminal law, and the civil code. But when it comes to the history of law, many students never take a course. Generally legal history is understood as taking up such themes as the legal systems of the past with their customs, notions of law, and legal ideology. So students aiming to take bar examinations dedicate their energies to studying existing laws and especially the interpretation of contemporary legal texts. A question to ask, though, is whether legal history is less important than existing law. This book was written to give you an opportunity to think about that question.

Why the history of law?

I want to begin this introduction with a word about Heinrich Mitteis (1889-1952), a well known German historian of law. Mitteis was one of Europe's most important legal historians, and he was responsible for the formation of legal historical studies in Germany after World War II. Although a jurist, Mitteis studied and wrote on laws of the past and present, connecting legal science to history and culture. He famously argued that legal history is history unto itself, and that from the view of law, all historical facts are legal facts as well.[1] He argued that the purpose of the history of law was to identify ideas of law in history that would withstand social crises—specifically, those of Nazi Germany and the Third Reich. His studies and views were a critique of prewar and wartime German legal scholarship. He charged that legal history studies had gone from positivism to protecting the law and a mistaken belief in legal dogma that had led Germany into danger under the Third Reich. He wrote, "We invite legal history to appear before the forum of life, and … we ask it to prove that the fruits of its work can be directly translated into present values."[2] For Mitteis, the history of law could shed light on existing laws and their creation, and he thought that study of legal history could release humanity from danger by providing them with perspectives on contemporary law. Historicizing law releases us from the constraints of contemporary legal language and dogmatism. For those studying law, then, legal history is an indispensable tool.

In another instance, the historian of Japan Nakada Kaoru (1877-1967) argued that the Meiji-era (1868-1912) Civil Code House System was actually a new system without historical precedent, against claims by its creators and supporters. He put it this way:

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[1] H. S. Offler. "Reviewed Work: Die Rechtsidee in der Geschichte. Gesammelte Abhandlungen und Vorträge by Heinrich Mitteis" in *The English Historical Review*, Vol. 74. No. 291. April 1959. pp. 289-292.
[2] Translation from Michael Stolleis, *Studien Zur Rechtsgeschichte Des Nationalsozialismus*. Chicago: University of Chicago Press, 1998. p. 25.

> The Meiji Civil Code puts into writing the rights of the househead in the family residence, including the right to conduct marriage agreements and (authorize) separatation from the family register, in addition to his property rights and authority over household succession. In fact this was a new system—it was without precedent (despite the claims of its creators). The fact is, this civil code was compiled after the destruction of the feudal system, which had lasted 1500 years. And during the foregoing medieval period, as a general rule partible inheritance had been practiced. That fact has been ignored and unrecognized since the (new) creation of the Meiji code house system, which ended the feudal stipend system. The Meiji Civil Code ignores history.

In 1918 the High Court (precursor to the current Supreme Court) had decided that in the Edo Period there had been only national ownership, that there had been no private land ownership, and that people could hold no more than the right to use land. In response to this decision, Nakada published an article, "Individual Landholding Rights in the Tokugawa Period." He argued there, "Current historians do not accept that in the Tokugawa Period there was no ownership of land by the people, even though the buying and selling of land was forbidden." He proceded to demonstrate how important the people's landholding rights were as the basis of their livelihood. Nakada's research and publications established the field of the history of law in Japan.

Nakada was not alone as a scholar who used historical research to correct assumptions about past law and what those of the present needed to know about legal history. In a famous work on the sociology of law, *Iriai no kenkyu* (A Study of the Right of Commonage), Kainō Michitaka (1908-1975) made similar arguments, this time about the character of village commons that Tokugawa warrior government had abolished. His book analyzed earlier uses of undivided open land and various claims and issues that arose about such "commons." And finally a Supreme Court decision of March 16, 1915 brought state-owned land under the 1868 land-tax amendment, with a decree that ordered that land previously held under bakufu control should be apportioned to individual farmers. This paved the way for private land ownership in Japan. Kainō also showed that even prior to these reforms, land ownership by multiple parties had been common. The 1870s had seen laws allowing the buying and selling of land, as well as the encouragement of cultivation, which allowed more revenue for the Meiji state. In fact Kainō showed that the taxes resulting from new provisions for commoner ownership of land in the 1870s had been incredibly important to the new government.[3] He noted that the customary practice had been for village heads to determine what land was to be used in common by the entire community, but that such practice had been abolished at the time of the Meiji land incorporation. Kainō criticized the ignorance of the earlier practice of commonage by empirical historical study of legal history. And yet it was only in 1973 that Kainō's views were finally accepted by the Supreme Court, thirty years after the publication of his book.

Nakada and Kainō, together with Mittis, emphasized the value of legal history. It is self-righteous to assume that there is no place to critique existing law. Legal history frees people from the constraints of established language. It rescues law from positivist paralysis. Despite the

[3] Dimitri Vanoverbeke. *Community and State in the Japanese Farm Village: Farm Tenancy Conciliation (1924-1938)*. Leuven: Leuven University Press, 2004. pp. 33-35

fact that some people think that to be skilled at legal history means to be concerned only with antiquarian ideas unrelated to the present, we need to free ourselves from rigid stereotypes of the past. The relationship between rights and interests is tangled in complex ways in today's legal society, and the tapestry of history is woven with numerous colors. If we unravel it, we can imagine the law as it was actually experienced, and from this thread we can spool historical significance, which can have a decisive effect on today's laws in practice. We need to remember too that what "history" is and what "tradition" was can be easily misunderstood. Furthermore how these terms are explained often have political motivations.[4] When faced with attempts to create baseless legal standards, legal history can provide important arguments. It is a unique weapon.

Sources of legal history

For legal history studies, historical documents provide the basis of arguments. Without the analysis of documents, it would not be a scholarly (or historical) field. So what is a legal document?

Of course, one begins with interest in a certain time period for a nation and system, whether it be a penal code, civil code, or commercial law, as well as the legislative process that created these laws, standards of interpretation, and how they were applied. In addition one looks at those who were involved with the law, from legal experts to the people themselves, as well as at the law's ideology and legal awareness as demonstrated through events and objects. All suxh issues comprise the study of legal history. Legal historians study not only the effects of an era on statute law but also the customs and habits of the community that form a living law. This means that the history of law is broader than just documents related to the legal system.

Since there is such a wide variety of sources included in the history of law, the ways that people use these sources and depict legal history will vary. For instance, to use Japan's Edo Period as an example, there are people studying the following issues:

1. Legal differences between the Tokugawa Bakufu and the domains (*han*)
2. Differences between representative Bakufu laws and the large compilation of Tokugawa law known as the *Koji kata goteisho*, including its textual contents and legislative process
3. The legal thought of Shogun Tokugawa Yoshimune (1684-1751)
4. Analysis of decisions by the highest court of the Edo Bakufu deliberative council (with its legislative, judicial, and consultation functions)
5. Police legal knowledge and instructions
6. Legal specialists and their circumstances
7. How Bakufu law operated, popular resistance to it, and its value to town and village communities

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[4] This is an important point made by Benjamin Anderson in his well known book, *Imagined Communities*. London: Verso, 1991. He uses the phrase, "the invention of tradition." Other works that demonstrate this point well include Patrick Geary's *Myth of Nations (*Princeton U Press, 2003*)*; and Alexander Woodside's *Viet Nam and the Chinese Model* (Harvard U Press, 1979), and his more recent *Lost Modernities: China, Viet Nam, Korea, and the Hazards of World History* (Harvard U Press, 2006).

Such studies make Edo legal history a diverse field, and there is much interest in analyzing various problems from different perspectives. From this research a different image of the foundations of Japan's modern law is rising to the surface.

What You'll Find in This Book

In the first and seventh chapters, we use legislative documents and explore the characteristics and details of ancient and modern legal compilations. In chapter 3, we analyze sources like letters concerning the legislative purpose behind Hojo Yasutoki's (1183-1242) judicial formulary, the *Goseibai shikimoku*. In chapter 17, we look at government officials' writings that created and developed case law. In chapter 6, we turn to Edo Period town orders and the reality of legal expert and their "lawsuit dorms." In chapter 9 we analyze documents left by estate proprietors and offer a document-based understanding of the reality of how the judicial system worked in the Kamakura Period (1185-1333). In chapter 8, we examine the practice of trial by ordeal as seen in the stories of the gods and temple documents. In chapter 22, we use early modern provincial documents to discuss the sale of land and use of collateral. In chapter 25, we use signboard law in Kyoto to examine succession in merchant houses. Finally, in chapter 26, we discuss the view of the family held by the legal scholar Hozumi Yatsuka. There is therefore a great variety of content and approaches in legal history.

Taking well known documents and changing the perspective, or taking documents that are not well known and using them in new ways, makes it possible to bring forth new points of view and advance previous scholarship. Chapter ten concerns the practice of "unofficial negotiation" (*watakushi wayo)*, an important judicial process in medieval times that has not been well understood. By examining these materials we learn that there were often out-of-court settlements encouraged by but not recognized by the government.

Then in chapter sixteen we describe the law mandating punishment of both sides in a quarrel. Older scholarship on this law argues that it had two objectives: 1) Eliminating the need to make judgments about right and wrong, and 2) Forbidding the use of violence in all cases. After examining and comparing the well-known laws of Warring States warlords (*daimyô*), however, we find that the Date warlords punished one party to a dispute for not announcing who had been judged right and wrong. There were legal variations between the judicial views and customs of different warlords.

Finally, in chapter twenty-six the content of a famous essay on his views of the family by the scholar of law Hozumi Yatsuka (1860-1912) that is entitled, "Reject the Civil Code: Loyalty and Filial Piety Wither" displays an audacious perspective of the Meiji Civil Code's household system, which system Hozumi strongly disapproved.[5]

[5] In English see Richard Minear, *Japanese Tradition and Western Law: Emperor, State and Law in the Thought of Hozumi Yatsuka*, Harvard University Press, 1970. Also see Walter Skya, *Japan's Holy War: The Ideology of Radical Shinto Untranationalism*. Duke University Press, 2009.

As you read the book, we invite you to compare this book with a standardized textbook that does not offer you sources to study. We want you to experience the delight of discovering a historical source as a way of learning; the real pleasure of finding a new point of view, and the fun of developing a new interpretation and argument about an existing law.[6]

[6] Jeffrey Mass called it, "studying history through documents." See *The Kamakura Bakufu, A Study in Documents*, Stanford University Press, 1976, esp. 3-23.