Rethinking the Masters of Comparative Law

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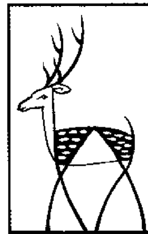

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Nobushige Hozumi: A Skillful Transplanter of Western Legal Thought into Japanese Soil

HITOSHI AOKI*

INTRODUCTION

In October 1899, a Japanese legal scholar presented, at the International Congress of Orientalists in Rome, a paper entitled "Ancestor-Worship and Japanese Law," in which he discussed ancestor worship in general and its institutionalization within the new Japanese legal system, particularly in the fields of constitutional and family law. He showed how ancestor worship, one of the most important indigenous traditions of Japanese culture, had been recognized in law and was affecting modern Japanese law.

Five years later, in September 1904, he was invited to the International Congress of Arts and Science in St. Louis. His presentation this time was titled "The New Japanese Civil Code as Material for the Study of Comparative Jurisprudence" and compared, from a wider perspective, various features of the Japanese Civil Code with those of other countries.[1]

The man in question is Nobushige Hozumi (1855–1926), who became the first Professor of Jurisprudence at the Imperial University of Tokyo in 1882.[2] He was the first Japanese legal scholar to appear in international forums and publish papers in English, which are still regarded today as being among the best international references on Japanese law and jurisprudence.

His contribution to the modernization of Japanese law through the transplantation of advanced Western law and jurisprudence was unrivaled by any of

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[1] *See* Nobushige Hozumi, *Ancestor-Worship and Japanese Law* (4th ed., Tokyo, 1938); Nobushige Hozumi, *Lectures on the New Japanese Civil Code as Material for the Study of Comparative Jurisprudence* (2d ed., Tokyo, 1912). Both papers were later revised and published as books under the original titles.

[2] The present-day University of Tokyo originated from the official schools of the Tokugawa Shogunate, merged as the University of Tokyo under the new Meiji Government, reorganized and renamed the Imperial University of Tokyo in 1886 with four Faculties of Law, Science, Literature, and Medicine.

his Japanese contemporaries. Among other things, he played a pivotal role in drafting, with two other scholars, the new Japanese Civil Code, which finally came into force in 1898. In accordance with Japanese governmental policy, the three scholars mainly referred to the German system (*Pandektensystem*) in drafting the Code. However, Hozumi also had a thorough knowledge of the social evolutionism of H. Spencer, the historical jurisprudence of H. S. Maine, and the ethnological empiricism of J. G. Frazer. Systematic legal thinking and dynamic historical and comparative jurisprudence are thus interlocking in his works.

In his St. Louis address, he characterized the Japanese Civil Code as "a connecting link between the Past and the Present, between the East and the West," standing at the crossroads of historical and comparative jurisprudence.[3] In this chapter, I explore Hozumi's own role as "a connecting link" between the West and Japan through a close reading of another article of his, namely "Tabū to Hōritsu" ["Taboos and Law"]. The article, written under the strong influence of J. G. Frazer, not only illustrates the features of his scholarship, but also contains some critical issues arising from the interaction between Japanese indigenous thought and transplanted Western thought. While treating Frazer's views with due respect and admiration, he deliberately rejected or altered some aspects of them to introduce them smoothly into the soil of Japanese culture. Hozumi's struggle both for and against Frazer brought forth a truly creative work. A close analysis of how and why Hozumi "trimmed" Frazer's work will not only provide interesting materials for the reflection on the method of comparative law but also a possible answer to the contemporary issue of what significance comparative law has to non-Westerners especially.

HOZUMI AND HIS SURROUNDINGS

Let us begin by looking at four pictures. Figure 1 was taken in 1871. On the right, we can see a young samurai wearing a long sword sitting with folded arms. This man is Hozumi who was 16 years old at that time. Figure 2 was taken in 1873, only two years after the first picture was taken. Readers might be surprised to find that the appearances of the boys are totally different here. Hozumi, who is standing in the middle, looks a little embarrassed. He cut his topknot, wore an occidental style uniform with a bow tie, and abandoned his sword that was a symbol of samurai. Figure 3 is a postage stamp issued in 1999 to commemorate the centenary of the Japanese Civil Code. The three men in traditional Japanese clothes were all professors of the Imperial University of Tokyo and they were drafters of the Code. We can see Hozumi in his forties on the right. He does not look embarrassed any more in this picture. On the contrary, his face is full of self-confidence. Lastly, figure 4 was taken in 1924, two years before Hozumi's death. He looks very natural in this picture. At last

[3] *See supra* note 1, at 2.

western clothes became him. In my view, these four pictures not only reflect Hozumi's personal history, but also symbolize the path that Japanese law followed after the Meiji Restoration.

Hozumi was born the second son of a middle-class *bushi* [samurai] in the small fief of Uwajima, Shikoku in 1855, at the dawn of modern Japan.[4] Prior to 1871, when the modern system of local government was introduced, the country was divided into fiefs called *han*, each of which was ruled by a *daimyō* [military lord]. Hozumi commenced his studies at a school run by the Lord of Uwajima. As was typical of *bushi* in those days, the main subject he studied was Chinese Literature and Thought. The other subjects were Calligraphy, Swimming, Kendo, Judo, Horseback Riding, Japanese Classical Studies, Military Affairs, and Arithmetic. He spoke no English until he came to Tokyo in 1871.[5]

In 1871, three years after the Meiji Restoration, the new central government ordered each *han* to recommend the brightest youth to be sent to the new capital, Tokyo. The government intended to let them absorb advanced western sciences in order to utilize them as a dynamic force for building a new, modern, and westernized nation. The Uwajima-han selected Hozumi. In the final examination, they tested the candidates' ability to interpret a passage from the Chinese classics. As ridiculous as it might seem when we consider the purpose of the examination, history has subsequently shown that they chose the right candidate. Hozumi left Uwajima for Tokyo by ship in the same year. Disturbed by bad weather, it took more than a month for him to reach Tokyo. Today the same distance can be covered in several hours by air or railway.

The boys in figures 1 and 2 were the elite of the day who had been selected to assemble in Tokyo by the new central government soon after the collapse of the Tokugawa Shogunate. There is a striking change in the clothes, but this change was not due to their personal tastes but rather to Japan's national policy. At that time, the new government issued edicts to cut off topknots (1871) and to abandon swords (1876) in order to hasten westernization of Japanese society; Japan experienced not only a big political change, but also a kind of cultural revolution.

[4] In the first half of the seventeenth century, Japan adopted a policy of national seclusion (*sakoku*, meaning "closing the doors of the country"), mainly because the Tokugawa Shogunate regarded Christianity as politically dangerous. With the help of her geographic isolation, Japan was able to maintain this policy for more than two hundred years. Until the mid-nineteenth century, ordinary Japanese had hardly any opportunities to learn about foreign countries and people. Only a limited number of volunteers learned anything of the Western world and sciences. Japanese had been, so to speak, thoroughly isolated from the rest of the world and therefore blind to foreign affairs. In 1853, an American naval officer, Commodore Perry, arrived at Uraga, not far from Edo (Tokyo), with four warships, and requested that the Tokugawa Government open the country. This event shook and awoke the whole of Japan, triggering radical changes in quick succession, during which time the Tokugawa Shogunate was forced to open the nation to the world and, finally, to return political rule to the Emperor Meiji in 1867. Under the authority of the Emperor, a new and young government began to build a modern Japan by importing knowledge, ideas, values, institutions and even everyday etiquette from Western countries such as Britain, France and Germany.

[5] *See*, Shigeyuki Hozumi, *Meiji Ichi Hōgakusha no Shuppatsu*, 3 (Tokyo, 1988).

Fig. 1 Nobushige Hozumi aged 16
(Reproduced from Shigetō Hozumi (ed.) *Hozumi Nobushige Ibunshū*, vol. 1 (1932))

Fig. 2 Nobushige Hozumi aged 18
(Reproduced from Shigeyuki Hozumi (ed.), Meiji Ichi Hōgakusha no Shuppatsu (1988) with kind permission of the author)

Fig. 3 Postage stamp issued in 1999 to commemorate the centenary of the Japanese Civil Code

Fig. 4 Nobushige Hozumi in 1924
(Reproduced from Shigetō Hozumi (ed.) *Hozumi Nobushige Ibunshū*, vol. 4 (1934))

After his arrival in Tokyo, Hozumi entered a special school for the elite. This institution was later reorganized into the University of Tokyo, where almost all the important teachers were English, French, German or American and hired by the Japanese Government.[6] It was an Englishman named W. E. Grigsby who first trained Hozumi as a lawyer.[7] His classes were conducted in English.

At that time, Japan had neither a parliament nor a modern systematic corpus of laws—no constitution or civil code, let alone procedural codes or commercial codes. There was in fact a criminal code compiled soon after the Restoration, but its contents were far from modern.[8] For example, crimes were not clearly defined and the punishments tended to be cruel.[9] In addition, the code explicitly ordered judges to qualify criminal acts by analogy when they could not find a section applicable to the offence. Japanese law in the 1870s did not include any of the aspects of legal practice commonly associated with the rule of law, such as the principle of void for vagueness.

Hozumi was sent to England in 1876 to study law. On arriving in London, he enrolled at King's College, University of London and then at Middle Temple, one of the Inns of Court. He qualified as a barrister in 1879. During his stay in London, he devoted his youthful energies to the study of social evolutionism as well as English law, and came to have a strong belief in the universal evolution of law. He declared to one of his Japanese friends that "he would devote all his future life to the study of law's evolution."[10]

In 1880, on his own initiative he moved to Berlin to study German law. In a letter requesting the Japanese Government's permission, he explained his reasons for wishing to move to Germany as follows: (1) he had already obtained "sufficient knowledge of English law to further those studies by himself"; (2) comparative jurisprudence, which he thought necessary for modernizing Japan, was most advanced in Germany while "British people were too proud to learn from the laws of other countries that they unduly looked down upon"; (3) the system of legal education was much more advanced in German universities than in British ones; and (4) as Germany was in the midst of legal reform at that time, it would be most useful for him and Japan to study the German example.[11]

[6] *See* Kiyoshi Inoue, *Meiji Ishin* 272–274 (Tokyo, 1984); Tokyo Daigaku Hyakunenshi Henshū Iinkai, *Tokyo Daigaku Hyakunenshi (Bukyokushi)* 41–167 (Tokyo, 1986).

[7] In the Meiji era, many foreigners were hired in arts and sciences. The number of foreigners hired by the Japanese government amounted to more than 500 in the middle of the 1870's including some lawyers. According to a letter of recommendation written by Grisby in 1876, Hozumi had successfully completed the Special Course of Law, which included Public and Private International Law, General Outline of English Law, Law of Contracts including the Laws of Sales and Law of Agency, Constitutional Law, Roman Law – The Institutes of Justinian Book 1 to 3, Philosophy with special reference to Politics, and French. *See supra* note 5, at 144.

[8] *See* Einosuke Yamanaka, *Nihon Kindaihō Ron*, 116 (Kyoto, 1994).

[9] *See* Chihiro Saeki & Yoshinobu Kobayashi, "Keihō Gakushi (Gakushi)," 11 *Kōza Nihonkindaihō Hattatsushi* 207, 211–212 (1967).

[10] *See* Jyoji Sakurai, "Ko Hozumi Danshaku no Omoide," 458 *Gakushikai Geppō* 19, 20 (1926).

[11] *See supra* note 5, at 383–386.

In Berlin, he attended university for two semesters as an auditor. The classes he attended included French Civil Law, German Private Law, History of the Corpus Juris Civilis, Pandekten, Marriage Law, History and Character of the German Criminal Code, On the Death Penalty, Penitentiary Science, and so forth.

On returning home in 1881 after a year's stay in Berlin, Hozumi was appointed associate professor at the University of Tokyo. He became a full professor and dean the following year, despite still being in his twenties, evidence that he had been sent to Europe by the Meiji Government as a young representative of Japan, carrying the future of Japanese law and jurisprudence on his shoulders.

As a scholar, Hozumi published numerous books and articles covering various fields. His method was always empirical, anthropological and comparative, as we will see below. As a teacher, he trained the Japanese elite of the Meiji era, who would go on to build modern Japan as administrative officers, judges, lawyers, statesmen, businessmen, and citizens. As a legislator, he made full use of his knowledge and ability in drafting the Civil Code of Japan. It was a code of national pride that had been developed by the three Japanese professors in picture 3 after the rejection of the first Civil Code drafted under the strong influence of G. E. Boissonade, a French professor employed by the Japanese Government. Hozumi's skill as a legislator was so outstanding that the main part of the code still remains in force a century after its promulgation.

Hozumi was also a statesman who served as an Imperial Nominee to the House of Peers (1890–1892) and then as a Privy Councilor (1916–1926), where he was appointed Speaker in 1925, a year before his death. This aspect of Hozumi's career deserves more than a passing mention. His academic works as a comparative lawyer were supported by his strong patriotism. We should always bear this in mind when reading his articles.

"TABOOS AND LAW"

Now let us turn our eyes to Hozumi's article, "Taboos and Law."[12]

Why did Hozumi choose taboo as his subject? On one level, it was not so strange for Hozumi to pick such a subject, since jurisprudence and ethnology could not be separated as two distinct disciplines in Japan at that time.[13] More

[12] *See* Nobushige Hozumi, *Hōritsu Shinkaron* (Tokyo, 1927). The article was first published in 1917 as part of a collection of essays, dedicated to his colleague, Yasushi Hijikata, Professor of English Law at the Imperial University of Tokyo, on the occasion of the twenty-fifth anniversary of his appointment to that office. *See* Hijikata Kyōjyu Zaishoku in Hideo Hatoyama (ed.), *25 Nen Kinen Shihō Ronshū* (Tokyo, 1917). It was a long article of about 150 pages in Japanese, and was later included in Volume 3 of his voluminous but unfinished lifework *Hōritsu Shinkaron* [Theory of the Evolution of Law]. Hozumi published this article rather late in his life. His inclination to the ethnological and historical study had been clear in his early works.

[13] *See* Shinnosuke Sakamoto, "Hozumi Nobuishige to Nihon Jinruigaku no Kigen," 64 *Minzokugaku-Kenkyū* (2000). (Rediscovering Hozumi as one of the founders of Japanese anthropology. To my knowledge, Hozumi was the first scholar to introduce Frazer's work to Japan, although many Japanese anthropologists ignore Hozumi's contribution.)

importantly, in Hozumi's view, at that time there were two different opinions regarding the origin of law. One held that laws are made artificially by high authorities. The other, for example Rudolf von Jhering and Friedrich Karl von Savigny, insisted that law was not made, but rather evolved spontaneously. Hozumi believed the latter to be true and chose taboo as one example to support this general view propounded by the school of historical jurisprudence.

As an ethnologist J. G. Frazer had a very similar view. In the article he contributed to the *Encyclopaedia Britannica*, he remarked:

> "The original character of the taboo must be looked for not in its civil but in its religious element. It was not the creation of a legislator but the gradual outgrowth of animistic beliefs, to which the ambition and avarice of chiefs and priests afterwards gave an artificial extension. But in serving the cause of avarice and ambition it subserved the progress of civilization, by fostering conception of the rights of property and the sanctity of the marriage tie, conceptions which in time grew strong enough to stand by themselves and fling away the crutch of superstition which in earlier days had been their sole support. For we shall scarcely err in believing that even in advanced societies the moral sentiments, in so far as they are merely sentiments and are not based on an induction from experience, derive much of their force from an original system of taboo. Thus on the taboo were grafted the golden fruits of law and morality, while the parent stem dwindled slowly into the sour crabs and empty husks of popular superstition on which the swine of modern society are still content to feed."[14]

It is clear from the references in his article[15] that Hozumi's argument was based on the advanced ethnological arguments of his time.[16] According to Hozumi's grandson Shigeyuki,[17] the shelves of his grandfather's library groaned under the weight of books on ethnology and anthropology, and the margins of books by E. A. Westermarck, L. H. Morgan and J. G. Frazer were filled with notes by Nobushige himself.[18] We can imagine Hozumi's deep admiration for

[14] James G. Frazer, "Taboo," in *The Encyclopaedia Britannica* (9th ed., 1888).

[15] *See supra* note 12, at 309, 310, 321, 327, 334, 338, 348, 350, 352, 354, 355, 356, 357, 358, 361, 371, 372, 397, 399, 400, 401, 403, 407, 409, 414, 416, 417, 419, 421, 425, 432 and 442 (citing the following Western books: Brinton, *Religions of Primitive Peoples*; Cherry, *Growth of Criminal Law in Ancient Communities*; Decle, *Three Years in Savage Africa*; James G. Frazer, "Taboo," in *Encyclopaedia Britannica*; James G. Frazer, *Early History of Kinship*; James G. Frazer, *The Golden Bough*; James G. Frazer, *Psyche's Task*; Gennep, *Tabou et Totémisme à Madagascar*; Lubbock, *Origin of Civilization*; W. Mariner, *Account of the Nations of the Tonga Islands* (2nd ed); Matius, *Rechtszustände unter den Ureinwohnern Braziliens*; Steinmetz, *Rechtsverhältnisse*; Sumner, *Folkways*; R. Taylor, *Te Ika A Maui, or New Zealand and Its Inhabitants* (1870); A. S. Thomson, *The Story of New Zealand*; Bail Thompson, *The Fijians*; G. Turner, *Samoa*; Westermarck, *History of Human Marriage*; Westermarck, *The Origin and Development of Moral Ideas*; Yate, *An Account of New Zealand*. Given the academic tradition of the time in Japan of not citing the works of others, Hozumi was without doubt one of the first scholars to write papers in the Western tradition. As we see above, however, he referred to the titles only in most of his citations).

[16] Jun'ichi Aomi, "Keikenshugi no Hōshisō," in Yoshiyuki Noda & Jun'ichi Aomi (eds), *Kindai Nihonhōshisōshi* 394 (Tokyo, 1979).

[17] Shigeyuki Hozumi is a former professor of Western History at Tokyo Kyoiku University and a former president of Daitō Bunka University.

[18] Shigeyuki Hozumi, "Hikaku Hōgaku to Hozumi Nobushige," 21 *Hikaku Hōgaku* 159, 172 (Tokyo, 1987).

those works and his great effort to keep up with the latest western developments.

In the Meiji era, social Darwinism or evolutionism was very fashionable among Japanese intellectuals. Hozumi had come to believe in the universal evolution of law during his stay in London. These thoughts were also propagated by some of the foreign teachers hired by the Meiji government.[19]

The reason Hozumi received evolutionary theories with such enthusiasm must have had much to do with his patriotic concern for the situation of Japan. When he was sent to London to study law, his mission was to absorb western law and legal thought in order to raise his country to the level of "civilized" countries. To do that, it was assumed, it was first necessary for Hozumi to measure the location of Japanese law exactly on the scale of evolution, and then to understand how to raise it to the level of "civilization."

Hozumi's article consists of two parts besides the introduction and conclusion. The first part, entitled Preliminary Argument, is divided into the following six sections: (1) the definition of "taboo," (2) the essence of taboos, (3) the significance of taboos, (4) the types of taboos, (5) the origins of taboos, and (6) the creation of taboos. Such discussions of the problems associated with taboos in general were necessary for Japanese readers unfamiliar with ethnology and the term "taboo" as transliterated into Japanese characters.[20]

The second part deals with more specific problems regarding the relationship between taboos and law. It is necessary to summarize each of the sections of this part, filled as it is with examples,[21] in order to compare his ideas, which I believe to be rather straightforward, with those of Frazer.

Taboos and the Notion of Law

One of the most important requirements for the formation of a nation or legal community is a general habit of subjection to a legitimate authority. When people in the same region begin to form a moral union, their actions tend to be unified to form a system of customs. The belief that a certain act should not be performed and that the infringement of this taboo would invite great disaster gives rise to the common norm of conduct among the people. The sense of law

[19] Ernest Francisco Fenollosa (1853–1908), who had been one of the founders of the Herbert Spencer Club at Harvard, was invited to be the first professor of Philosophy at the University of Tokyo in 1878. His theory was based mainly on Spencer's *Principles of Sociology*. *See* Shigekazu Yamashita, *Supensā to Nihon Kindai* 123–140 (Tokyo, 1983).

[20] In the Preliminary Argument, Hozumi pointed out that general theory of taboo was also applicable to Japanese examples. One of the examples he cited was the expression *heika*. Heika is the special expression used by the Japanese people to refer to the Emperor. Its original meaning is "under the stairs," indicating insurmountable distance between the speaker and the Emperor. Hozumi believed that this was one of the illustrations of taboos' survival in civilized societies. *See* Hozumi, *supra* note 12, at 308. The expression is still used very often in contemporary Japan.

[21] Hozumi cited numerous examples from East and West, past and present. I omit most of them in this summary.

(*Rechtsgefühl*) comes into existence among the people in this way. The original punishments for the infringement of taboos, formerly sanctioned by priests or chiefs in the form of the payment of redemptions, death penalties or expulsion from the community, were transformed into sanctions of a legal nature.[22]

Taboos and Sovereignty

The solidarity of an organization is maintained by centripetal force, which is strongest when the authority of the chief is "sacred, inviolable and thus unchallenged." To achieve this, the chief needs to make people stand in awe of his superhuman powers. An organization with strong, cohesive internal power can survive, and such power is achieved by attracting people to the chief vertically and solidifying relationships between the members horizontally. In primitive societies, vertical power was most important. Here lies the origin of sovereignty. "A sovereign chief is not always an excellent warrior or a person with superior wisdom or morality. If ordinary people were allowed to approach the chief easily, they might realize how ordinary he in fact was. If his defects were known, his prestige would suffer a severe blow, eventually endangering the solidarity of the society."[23] For this reason, the taboos concerning sovereigns are most commonly found rigidly observed. The inviolability of sovereigns later gave birth to an abstract principle of the inviolability of sovereignty guaranteed by constitution.

The taboos concerning sovereigns can be divided into three types, namely (1) taboos against looking, (2) taboos against touching, and (3) taboos against calling names.[24] Thus, the notion that the sovereign is sacred and inviolable has developed and been maintained with the help of taboos.[25]

[22] *See supra* note 12, at 336–340.

[23] *Id*. at 343–344.

[24] *See supra* note 12, at 350. The first type of taboo prohibits someone from looking directly at the sovereign. Such practices are found all over the world. A sovereign was often forbidden to leave his palace and forced to wear a mask or hide behind curtains when granting an audience. In Japan, prior to the Meiji Restoration in 1868, the Emperor shut himself away deep within the palace and met only a few high-ranked officials from behind a bamboo blind. The second type of taboo prohibits touching the sovereign or coming close to him, as drawing near to him would invite divine retribution. The tabooed sphere is usually extended to the entire site of his residence. This is why the Imperial Palace in Japan often carries in its name the character *kin*, meaning "prohibited," *id* at 355. The King's Peace in English law is another example where the taboo against touching was extended to the extreme, *id*. at 358–368. The third type of taboo is derived from the second. The scope of the taboo is extended further from the person to the name. There are three types of these taboos, namely keeping the real name of the sovereign a secret, using another appellation to avoid phonetic collisions with the sovereign's name, and avoiding the use of the same character used in his name or placing it in a special position wherever the name appears in a composition, *id*. at 369–395. Many of these taboos still survive in the Japanese society today.

[25] *Supra* note 12, at 395.

Taboos and Marriage

In primitive societies, religious taboos were the most effective way of preventing adultery and protecting matrimonial fidelity. It was widely believed that breach of this taboo would bring forth a disaster not only to the perpetrator, but also to the whole community to which he/she belonged. The community had to punish the adulterer/adulteress to appease the divine anger and thus avoid the common disaster. This practice of punishment served as a powerful tool to deter adultery and assisted the development of a general respect for fidelity. Later, as public authority developed, the matrimonial relationship was no longer maintained by religious sanctions, but rather by legal ones such as outlawing adultery and making it a cause for mandatory divorce. "As the infringement of the taboo on sex could bring such disasters as famine, epidemic, attacks by furious tigers or big crocodiles, and so forth to the whole community and region, the observance of the taboo was not only a matter of private concern, but also a public preoccupation."[26] If the taboo was violated by adultery or incest, the people needed to perform some kind of ritual to avoid disaster and/or punish the violator to appease the divine anger. It was here that automatic social sanctions against the violation of the taboo appeared in addition to divine retribution. Later, when political organizations and their authority developed in society, observance of the taboos came to be enforced by legal measures, prohibiting consanguineous marriages and treating incest and adultery as criminal offences by legislation. All such institutions stemmed from taboos fostered by superstitions at early stages of their civilization.

Taboos and Property

In primitive societies, there was no concept of private property. People had to protect their possessions and occupations by constant vigilance and reliance on their own physical force. When transcendental power came into force making people respect each others' possessions, the concept of "mine and thine" emerged.[27] It also promoted the evolution of human society and accelerated its material progress. In many primitive societies, it was taboo that served as this transcendental power promoting the notion of inviolable private property. It can thus be said that the exclusive and inviolable possessions or occupations, now protected by law, stemmed from a belief in taboos. Taboos gave birth to the practice of respecting the property of others, which eventually developed into a legal right.

However, taboos were not the only catalyst for modern property rights. The demand for goods necessary for subsistence was another main cause. Any

[26] *Id*. at 409–410.
[27] *Id*. at 411.

person wishing to coexist with others is forced to hold on to the things he needs to survive and take every possible measure to secure his possessions. Violation of the possessions would provoke angry retaliation. Fearing such a response, people come to refrain from violating others' possessions and the practice crystallizes after many generations into a full recognition of proprietary rights.

Taboos were thus only one of several causes for the advent of modern concepts of property. Nevertheless, it was the most influential one as the notion of protection of property was most effectively supported by supernatural sanctions.[28]

Taboos and Criminal Law

Taboo is supported by the belief that any violator will suffer the automatic sanction of divine retribution. As the violation was believed to bring disaster to the entire group, however, artificial sanctions in the form of additional punishment were meted out by his fellow men. They might kill and offer him as a sacrifice or ostracize him. The mystical nature of the sanction of the taboo could thus be accompanied by a secular one, and the sanction might come to include both religious and secular meaning. The artificial punishments inflicted by the priest or sorcerer/sorceress can be called "religious" sanctions, while those inflicted by the chief or secular authorities "legal" ones. Once a society had developed sufficiently to have some political organizations, both kinds of sanctions were inflicted cumulatively, although the religious ones were more effective than the legal ones in the early stages.[29]

In their purification rituals for the avoidance of disasters, primitive people tended to offer clothes, food and other items to appease the divine anger, and also gave something to the priest. Where a taboo concerning the chief had been violated, they made an offering to him as well. And if they harmed others by violating the taboo, they paid something as compensation for the damage and attempted to avoid retaliation by the aggrieved. The sanctions against the violation of taboo thus evolved into both criminal penalties and civil compensation.[30]

Conclusion

In sum, taboos are the origin of norms with effective sanctions necessary in an organized human society. They reinforced the psychological cohesive force

[28] *Supra* note 12, at 425–426.

[29] *Id*. at 432.

[30] *See id*. at 434. The old Japanese custom of *harai*, where offerings were made to cleanse the violator of contamination, can be understood as one of the purification rituals commonly found in the South Pacific and other regions. It is a prototype of both pecuniary punishment and civil indemnity. *Id*. at 434–440.

among the people negatively but powerfully. From taboos stemmed both the moral conceptions of good and evil and the legal conceptions of rights and crime.[31]

HOZUMI'S ACCEPTANCE OF FRAZER'S THEORY

Although Hozumi borrowed many examples and theories from works of the western anthropologists mentioned above, when writing "Taboos and Law" he mainly relied on three works by Sir James Frazer. In the preliminary argument of his article on taboos, his explanations of the etymology of the word "taboo," classifications of taboos, and ways of creating taboos were mainly borrowed from Frazer's article "Taboo" in the *Encyclopaedia Britannica*. Moreover, Hozumi referred to numerous examples which were mostly cited from Frazer's three works, namely the above article, *Psyche's Task* and *The Golden Bough*. The same can be said of the main argument of the article, which contains rich examples.[32] According to my calculations of all the corresponding parts in Hozumi's article,[33] there are about a hundred examples and arguments borrowed directly from Frazer's works.[34]

Apart from the great correspondence of concrete examples, I must emphasize here that the structure of Hozumi's article bears a strong resemblance to much of that of *Psyche's Task*.[35] The four sections in Hozumi's argument correspond to

[31] *Id*. at 445–448.

[32] The examples cited are from Polynesia, New Zealand, Borneo, the Malay Archipelago, Africa, Samoa, Melanesia, Greece, Ireland, Jewish Law, the Code of Hammrabi, Laws of Manu, Mosaic Law, Saxon Law, and so on.

[33] *See* Hitoshi Aoki, "Hozumi Nobushige to Sā Jēmusu Furēzā," 115 *Hitotsubashi Ronsō* 62, 75–78 (1996).

[34] In addition to the many examples and arguments borrowed from Frazer, he enriched his article by including numerous ones of his own. For instance, he cited examples from important Japanese classics such as *Manyōshū* [Collection of Ten Thousand Leaves] (an anthology of poetry completed around 759), *Kojiki* [Record of Ancient Matters] (completed in 712), and *Nihonshoki* [Chronicle of Japan] (completed in 720); gave a detailed account of Japanese and Chinese taboos concerning the names of emperors; carefully examined the eighteenth-century Japanese scholar of Japanese Classical Studies, Norinaga Moto-ori's theory on *harai*; and even cast new light on the King's Peace in English law by placing it in the stream of evolution of taboos. Although it is certainly true that all of these, which cover a considerable number of pages in the article, are his original findings, they are used only to verify or reinforce Frazer's hypotheses and not to support his own new ones.

[35] *See supra* note 15. (*Psyche's Task* was first published in 1909 and based on a discourse read at an evening meeting at the Royal Institution in London and lectures later delivered to his class in Liverpool.) The introduction to the book outlines Frazer's aim to show that, whereas we are apt to take a superstition for unmitigated evil, false in itself, or pernicious in its consequences, it has a positive side and deserves to be placed in a rather better light. He proposed to prove through examples that among certain races and at certain stages of evolution some social institutions which we believe to be beneficial have been partially based on superstition. We can see his intention clearly in the fact that he changed the title of the book from *Psyche's Task* to *The Devil's Advocate* when the third edition was published. In addition to the introduction and the conclusion, *Psyche's Task* consists of four chapters: Government, Private Property, Marriage, and Respect for Human Life. The propositions to be proved in each chapter were: (1) Among certain races and at certain times, superstition has strengthened the respect for government, especially monarchial government, and has thereby

the four propositions in *Psyche's Task*. The second section of Hozumi's main argument on "Taboos and Sovereignty" corresponds to Frazer's chapter "Government," the third section on "Taboos and Marriage" to the chapter "Marriage," the fourth section on "Taboos and Property" to the chapter "Private Property," and the last section on "Taboos and Criminal Law" to the chapter "Respect for Human Life."

Readers might think that Hozumi lacked academic originality and he was a mere copier of the western ideas. This criticism would hold true to a certain extent if we are to appreciate Hozumi's works only by referring to present academic standards. But we must bear in mind that in Hozumi's time there were not sufficient Japanese terms corresponding exactly to the notions used in the literature of western social science. Even the most fundamental Japanese terms such as *kenri* (rights) and *shakai* (society) were "invented" in the latter half of 19th century. At that time, it was considered much more creative to translate western theories into Japanese than it is now. We could compare Hozumi to an architect who had to begin by making bricks. Moreover, a closer examination reveals that Hozumi deviated from Frazer's outline in the case of the last section. I explore this interesting issue in the next section.

HOZUMI'S REJECTION OF FRAZER'S THEORY

Although Hozumi gained much from Frazer's theories, there is a remarkable exception in the last section on "Taboos and Criminal Law." While the three preceding sections on sovereignty, private property and marriage correspond almost precisely to Frazer's three chapters, the content of this section does not correspond in any way to the chapter on "Respect for Human Life" in *Psyche's Task*. It is true that Hozumi also used Frazer's examples and arguments in the last section, but many of them were borrowed from the chapter on "Marriage." Why is this so? For what reasons did Hozumi ignore Frazer's last chapter?

If we compare the title "Taboos and Criminal Law" with the tone of other sections, we notice that there is something "unstable" in that title. While sovereignty, marriage and private property can be characterized as values or institutions to be legally protected, criminal law is not an object to be protected, but rather a means of protection. In addition, the main point that the sanction imposed for the violation of the taboo evolved from religious to secular punishment had already been stated repeatedly in the preceding sections. Moreover, in spite of the section's title, Hozumi discusses the origin of civil law damages as

contributed to the establishment and maintenance of civil order. (2) Among certain races and at certain times, superstition has strengthened the respect for private property and has thereby contributed to the security of its enjoyment. (3) Among certain races and at certain times, superstition has strengthened the respect for marriage and has thereby contributed to a stricter observance of the rules of sexual morality both among the married and the unmarried. (4) Among certain races and at certain times, superstition has strengthened the respect for human life and has thereby contributed to the security of its enjoyment, *id*. at 4.

well. In contrast, the subject Frazer chose – human life – belongs reasonably to the same dimension as the other subjects. Frazer's argument seems much more lucid.

I believe it is unnatural for a scholar as competent as Hozumi not to be aware of this—there must have been a substantial reason for his rejection of Frazer's chapter on "Respect for Human Life." By analyzing the reasons why he must have rejected it, we may gain a clearer picture of the relationship between the two scholars.

Simply put, Frazer's argument in the chapter "Respect for Human Life" is that taboos stemming from a fear of ghosts evolved gradually into the legal protection of human life. According to him, the feared spirits were not necessarily those of people who died from unnatural or violent causes, such as a mother who died in childbirth or a man who was slain. Let us select a few examples from among the numerous illustrations in *Psyche's Task*. Australian Aborigines put hot coals in the ears of their departed brother so as to contain his spirit in the corpse for long enough to allow his relatives and other members of the tribe to escape from it. The Tinneh Indians of Alaska greased the hands of a corpse so they could slip through the ghost's greasy fingers and escape when the ghost attempted to grab their souls to carry them off with him. The Lengua Indians of the Gran Chaco in South America lived in great fear of the spirits of their dead. No sooner had a person died than the whole village was evacuated, every hut burnt down, and the property of the dead man destroyed. For these Indians believed that, however good and kind a man may have been in his lifetime, his ghost would always be a danger to the peace and prosperity of the living.[36]

The conception that even the ghost of a beloved family member or a good man could be evil and dangerous was probably beyond Hozumi's comprehension. When he discussed the origin of ancestor worship at the outset of his book *Ancestor-Worship and Japanese Law*, he attributed western scholars' opinions to the dread of ghosts and then confessed:

> "With the greatest deference due to these writers, I cannot persuade myself to accept their view. It appears to me more correct to attribute the origin of ancestor-worship to a contrary cause. It was the love of ancestors, not the dread of them, which gave rise to the custom of worshipping and making offering of food and drink to their spirits. I cannot understand why a primitive people, who must have loved their parents in their lifetime, should have experienced fear of them after their death. I cannot understand why a primitive people should have been so near-sighted and thoughtless as to ill-treat their parents without scruple during their lifetime, and suddenly begin to fear their spirits after their death."[37]

In Hozumi's view, the writers who attribute the origin of ancestor worship to "the dread of ghosts" and to "ghost-propitiation" fail to distinguish between the ghosts to be dreaded and those to be respected. He strongly believed that the

[36] *Id.*
[37] *See supra* note 1, at 9.

ghosts of ancestors were to be respected. This belief must have been formed primarily by the traditional education he received in his childhood as a son of Samurai, and then reinforced by the official political thought of the Meiji government, which also valued ancestor worship very highly, as I discuss later.

Hozumi describes his own personal experience relating to the theory. He recollects a visit to the Lyceum Theatre in London, where he saw Henry Irving play Hamlet, as follows:

> "I admired indeed the performance of that famous actor; but when it came to the ghost scene, I was struck with an impression that our actors would perform it in a different way. Hamlet, as represented by Irving, appeared to me as constantly showing signs of fear and dread, not only on account of the horrible story told by his father's ghost – which is but natural – but for the ghost itself. A Japanese actor, if he were to act the part of Hamlet, would certainly show strong marks of love and respect towards the father's spirit, mingled with the feeling of sorrow and sympathy for his father's fate, and of horror and anger at the "foul and most unnatural murder."[38]

From this episode, we learn that his rejection of Western theories, which ascribed the origin of ancestor worship to the dread of ghosts, resulted not only from an intellectual or scientific reflection, but also from a psychological or even physiological resistance.

This strong attachment to ancestor worship was not a feeling peculiar to Hozumi. It was a widely and deeply rooted feeling among his contemporaries in Japan, with important political significance at that time. After bringing the *Tennō* [Emperor] out of isolation from his palace in Kyoto to the new political center in Tokyo, the Meiji Government aimed ideologically to build a new nation and change the status of the Imperial Family in the process. They wished the Emperor to be father of the nation and consequently installed him as head of state[39] and intended to establish a system to fuse filial piety and loyalty to the Emperor.

Hozumi's younger brother Yatsuka, who also was a professor of The Imperial University of Tokyo, was one of the most ardent advocates of this political thought. In his book *Aikokushin* [Patriotism], Yatsuka remarked:

> "What unites a racial group is the authority of the ancestors. The authority of the ancestors does not lie in a promise among equals, so the feeling of veneration is strong and the concept of obedience is profound. In the house, the head of the house, representing the authority of the ancestors, exercises the patrimonial power over the family; in the nation, the emperor, representing the authority of the Sun Goddess, exercises the sovereign power over the nation. Patrimonial power and sovereign power: both are powers whereby the emperor-father protects the children beloved of the ancestors . . . The ancestors of my ancestors is the Sun Goddess. The Sun Goddess is the founder of our race, and the throne is the sacred house of our race. If father and mother are to be revered, how much more so the ancestors of the house; and if the

[38] *See id.* at 17.
[39] Inoue, *supra* note 6, at 71.

ancestors of the house are to be revered, how much more so the founder of the country! The position of the head of the house is that of the authority of the ancestors; the throne is the place of the Sun Goddess. Father and mother are ancestors living in the present; the emperor is the Sun Goddess living in the present. For the same reason one is filial to his parents and loyal to the throne; and the national teaching which connects these two is the worship of ancestors."[40]

Thus, as Richard H. Minear summarizes: "Ancestor worship transforms the nature of the power of the emperor-father. This power is not simply force. It is rather the solicitude of a father for his child. Obedience becomes a sacred obligation, the piety of a filial son."[41]

The elder Hozumi did not explicitly advocate such a mythological and eventually chauvinistic theory as his brother. Contrary to Yatsuka's theory that ancestor worship was incompatible with Christianity, Nobushige emphasized their compatibility as follows:

"I look with sincere regret upon frequent conflicts that arise between the missionaries or newly-converted Christians and our people who are ancestor-worshippers; for I am one of those who firmly believe that the practice of Ancestor-worship is not incompatible with Christianity. It is not contrary to the First Commandment, because the ancestral spirit is nothing more than the outcome of the belief in the immortality of soul, and can not be considered as 'gods,' which the 'jealous God' forbids to worship. If Ancestor-worship is, as maintained in this book, the extension of love and respect to distant forefathers, the manifestation of the love and respect in a certain harmless way may be regarded as a realization of the Fifth Commandment to honour the parents; and nothing against Christianity, which is essentially a religion of love."[42]

Although the elder Hozumi was not a narrow-minded chauvinist, as illustrated by the citation above, he certainly was a nationalist. Regarding the emperor-centered political system, the elder Hozumi also praised this national system in his lecture later read in front of the Emperor Taishō by admiring "the strong solidarity of the Japanese nation integrated through the unification of the imperial and the popular ancestor-worship."[43]

Another question arises here: Was Hozumi's adoration of the Japanese political system (*Tennō* system) compatible with his orientation toward western law and his scientific studies of the imperial taboos? From the standpoint of cultural evolutionism, Hozumi regarded the taboo as "a practice of uncivilized and primitive people."[44] To analyze the taboos relating to the Emperor scientifically would have been demeaning to the Emperor. In fact, Ryūichi Nagao has stated that Hozumi "had walked into a dangerous sphere of anthropological study of

[40] *See* Yatsuka Hozumi, *Aikokushin* (1897), *cited in* Richard H. Minear, *Japanese Tradition and Western Law*, 73 (1970).

[41] *See id.* at 74–75

[42] *See supra* note 36, at xiii–xiv.

[43] Nobushige Hozumi, *Hozumi Nobushige Ibunshū*, 57 (Tokyo, 1932).

[44] *See supra* note 12, at 303.

the Emperor."[45] Nobuyoshi Toshitani has asserted that Hozumi's evolutionary theory of law was "a heretical doctrine" that conflicted with the orthodox theory that took the inviolability of the Emperor for granted.[46] Did Hozumi not violate the very taboo he sought to describe by examining it too closely? Even if we take into consideration the peculiar situation of the lecture in the Emperor's presence,[47] the question still remains.

By choosing words prudently, Hozumi managed to enable two *prima facie* incompatible standpoints to coexist. For example, in his explanation of the taboo on looking, he stated that the Emperor had shut himself away deep within the palace, but added an important phrase, "until the Meiji Restoration,"[48] to limit the time in which his statement would hold true. In fact, in this respect the Emperor must have lost the character of a tabooed chief especially for Hozumi, who had, as a Privy Councilor from 1916, opportunities to see him daily. Moreover, in this article, Hozumi explicitly classified his country after its adoption of constitutionalism as one of the "highly civilized countries."[49] Remaining taboos were characterized as outdated customs surviving in a civilized society. In short, as far as the article "Taboos and Law" is concerned, Hozumi paid due respect to the contemporary Emperor and the Imperial Family, so we need not be too anxious about Hozumi's apparent critical views on the imperial taboo.

This point becomes clearer when we compare Hozumi's attitude toward the Emperor with the manner in which Frazer described the *Mikado* [Emperor] in *The Golden Bough*. According to Frazer, the Mikado is a typical example of a king who practices magic or conducts religious services:

> "He (Mikado) thinks that it would be very prejudicial to his dignity and holiness to touch the ground with his feet; for this reason, when he intends to go anywhere, he must be carried thither on men's shoulders. Much less will they suffer that he should expose his sacred person to the open air, and the sun is not thought worthy to shine on his head. There is such a holiness ascribed to all the parts of his body that he dares to cut off neither his hair, nor his beard, nor his nails."[50]

And

> "[T]he Mikado's food was cooked every day in new pots and served up in new dishes; both pots and dishes were of common clay, in order that they might be broken or laid aside after they had been once used. They were generally broken, for it was believed

[45] Ryūichi Nagao, "Hozumi Nobushige no Hōshinka Shisō," *Nihon Hōshisōshi Kenkyū* 65 (Tokyo, 1980).

[46] Nobuyoshi Toshitani, "Senzen no Hōshakaigaku," 2 *Hōshakaigaku Kōza* 185, at 194 (Tokyo, 1972).

[47] *See supra* note 42. This lecture was read as *Goshinkō-hajime* in January 1919. *Goshinkō-hajime* is a ceremonious lecture in the Imperial Palace at the beginning of the year, where a designated scholar reads his lecture directly to the Emperor who is sitting face-to-face with him.

[48] *See supra* note 12, at 350.

[49] *Id*. at 346.

[50] *See The Golden Bough supra* note 15, at 2–3.

that if anyone else ate his food out of these sacred dishes, his mouth and throat would become swollen and inflamed."[51]

Hozumi totally ignored these descriptions. One of the reasons may be that, as a learned Japanese man, he did not have to use the out-of-date information on which Frazer had relied. In addition, Hozumi must have been convinced of his view that the contemporary Emperor was much more civilized than the magical or religious chiefs in primitive tribes. My guess is that he could not tolerate Frazer's theory on the fate of a priestly king who was to be slain (!) when his magical powers waned.

How then did he understand, for example, the official rituals dispensed by the Emperor and the Imperial Family under the modern constitution? By Hozumi's time, it was well understood that they were not mere survivors or relics of another age. On the contrary, they were given fresh and strong legal support by The Imperial Household Ordinance Relating to Festivals in 1902, which contained detailed regulations regarding the holding of ceremonies in the Imperial Household.[52] Under this Ordinance, thirteen Great Festivals were to be hosted by the Emperor himself and eight Small Festivals by the chief Ritualist on behalf of the Emperor. Remarkably, this general scheme survived within the democratized legal system after the Second World War: some Great Festivals as national holidays and many others as domestic ceremonies of the Imperial Family.[53]

For example, in the Festival of the Feast of the New Crop of Rice, one of the oldest festivals still celebrated today, the offering of the new rice is made to the First and other Imperial Ancestors and other deities in the Sanctuary of the Imperial Palace. The Emperor, after taking a bath to purify his body, enters the Sanctuary, offers his prayer to the deities, and partakes of the new rice along with them. It is undeniable that the role of the Emperor in the festival closely resembles that of a priestly king among primitive peoples described in *The Golden Bough*. How could Hozumi accept modern legislation giving official support to such religious rituals? Is it not a "regression" from the standpoint of his evolutionism?

The clue to answering this question lies in the key term, "ancestor worship." Hozumi commented on each of these festivals in one chapter of *Ancestor-Worship and Japanese Law*. As the title of that chapter, "The Worship of

[51] *See id* at 131.

[52] *See* Shigeyoshi Murakami, *Tennō no Saishi*, 157–161 (Tokyo, 1977).

[53] *See supra* note 1, at 38–40. Great Festivals include the Festival of the Sacrifice to the Origin; Anniversary of the Accession of the First Emperor and the Foundation of the Empire; Spring Sacrifice to the Imperial Ancestors; Spring Sacrifice to the Shrines of Gods; Anniversary of the Death of First Emperor Jimmu; Autumnal Sacrifice to the Spirits of the Imperial Ancestors; Autumnal Sacrifice to the Shrines of Gods; Festival of Offering the First-Fruits of the Year to the First Imperial Ancestor; Festival of the Feast of the New Crop of Rice; Anniversary of the Death of the Late Emperor; Celebration Year's Festival of the Emperors within Three Generations Previous to the Last Emperor; Celebration Year's Festival of the Late Empress who was the Consort of the Last Emperor; and lastly, Celebration Year's Festival of the Late Empress who was the Mother of the Reigning Emperor.

Imperial Ancestors" indicates, all of the imperial rituals were clearly understood to be ceremonies for the worship of Imperial Ancestors. In Frazer's view, a ritual for the propitiation of the dead is nothing but "a means" of controlling natural phenomena and maintaining the peace of that society. It has few or no ethical implications. They are neutral in this sense. For Hozumi, however, ancestor worship was more than just a means to an end—it was an end in itself.

As can be seen from the following example, Hozumi, being very prudent, chose words describing only the facts without confusing "is" with "ought": "[T]hree foreign elements—Confucianism, Buddhism, and Western civilization—all of which have had immense influence upon our laws, manners and customs, and two of which are diametrically opposed to ancestor-worship, could not make way against, nor put an end to, the wide-spread and persistent faith of the people."[54]

In "Taboos and Law," he never directly asserted that ancestor-worship was a moral good that should not be abandoned. However, behind the statement cited above, we can catch a glimpse of his belief that ancestor-worship is a national virtue in which we should take great pride. In fact, he was a well-known worshipper of the dead, and late in life even performed a grand ceremony for the souls of his childhood teachers in Uwajima as a token of his gratitude. With this strong belief in the worship of the dead, common among ordinary Japanese at that time, Hozumi regarded ancestor-worship as something worthy. This, in turn, resulted in excluding from his sight the primitive aspect of ancestor-worship as a magical means for controlling natural phenomena and thereby maintaining social peace. This must have been the very reason why he could be proud of the legislation on the Imperial Festivals in spite of his belief in evolutionism.

In conclusion, Hozumi verified Frazer's fundamental hypotheses by using many concrete examples found in Japan and other countries. But at the same time, he modified Frazer's theory as to the meaning and function of ancestor-worship for the smooth adaptation of it into the cultural soil of Japan according to his own strong belief in the love of ancestors. In this sense, he was indeed a skillful transplanter of western thought into Japanese culture, with his Occidental mind and Oriental heart. The appearance of Hozumi in picture 3 tells us that even after his head had been westernized, his heart remained traditional.

CONCLUSION: HOZUMI'S MERITS

What, then, were Hozumi's merits as a comparative lawyer? It would not be difficult to enumerate his demerits from the eyes of the present generation. Above all, his belief in a simple and linear evolutionism looks naive. His method of

[54] *See supra* note 1, at 2–3.

comparison was not refined. Most of the examples used for illustrating his hypotheses were secondary materials collected arbitrarily from the works of western scholars. Hozumi was certainly an "armchair anthropologist." However, these critical evaluations seem unjust. Whatever else might be said, he was undeniably one of the first Japanese scholars to assimilate Western jurisprudence into the Japanese cultural environment. With the help of comparative and anthropological methods, he made a great effort, as an intellectual representative of Japan, to link his isolated country to the rest of the world. This is, I believe, his greatest merit. Masaji Chiba and Jun'ichi Aomi have also praised his pioneering works full of scientific empiricism.[55]

In Japan, Western law and legal thought were not imposed forcibly. They were received or transplanted voluntarily and selectively by a few ardent Japanese scholars like Hozumi. He made full use of his wide and deep knowledge as a comparative lawyer and played a leading role in seeking out the right path for Japanese law to take. The fact that he never lost his national pride when he stood in front of the overwhelming, majestic Western law and jurisprudence is worth a special mention. Although comparative law was a discipline born in Western countries, it provided him with a strong weapon to assimilate Western law and legal thought into Japan. He used that weapon to the full from his firm standpoint as a Japanese citizen.

Hozumi's empirical and anthropological method had few successors in the next generation. In 1889, the Japanese Government adopted a constitution that, for political reasons, was deeply influenced by the Prussian constitution. After its promulgation, most of the new laws including the Civil Code, the Commercial Code and the Procedural Codes were drafted according to the German style. It was natural that the younger scholars tended to devote themselves to the study of abstract legal doctrines (*Rechtsdogmatik*) under these new Codes. Legal scholars were not sent to Frazer's country anymore. They were too busy studying specialized legal subjects to reflect calmly on the function of taboos in the universal evolution of law.

So it is only recently that Hozumi's anthropological works have been reevaluated positively in Japan. His resurgence is connected with his "culturalist" perspective. Nowadays, more and more Japanese comparative lawyers find it important to study law in a cultural context or to study "legal cultures." Some Japanese universities have started a new course on "*Hikaku Hōbunkaron*" (*Comparative Legal Cultures*), and very recently, Tsuyoshi Kinoshita, one of the leading comparative lawyers in Japan, published a 300-page book under the same title.[56]

At the beginning of this essay, I mentioned that I regard Hozumi as being "a connecting link" between the West and Japan. There we find a problem that is still very serious to non-Western lawyers. Hozumi encountered contradictions

[55] *See* Masaji Chiba, *Gendai Hōjinruigaku*, 18–19 (Tokyo, 1969); *supra* note 16, at 399.

[56] *See* Tsuyoshi Kinoshita, *Hikaku Hōbunkaron* (Tokyo, 1999) (regarding Hozumi as "a forerunner" who studied legal cultures with a comparative method), at 22.

within himself in the process of introducing Western law and legal thought. As long as contemporary comparative lawyers have culturalist concerns, such contradictions still cannot be avoided.

There are three ways to resolve these contradictions. The first way is to integrate only acceptable parts from Western law and to shut the door firmly to all other parts that collide with Japanese culture. The second way is to abandon one's own culture and adapt completely to Western culture. The third way is to modify both Western law and our own law to accommodate each to the other.

The way Hozumi chose was, of course, this last one. He did not serve as a passive or inflexible channel for importing Western law but he served as an active and flexible mediator between the West and Japan. Through the examination of Hozumi's work as a comparative lawyer, we come to realize two important functions of comparative law, namely, comparative law as a "link" and comparative law as a "weapon." The former function connects non-Western countries to the well-organized Western law and advanced legal science and enables their assimilation. The latter serves as a tool for empowerment to stand against their violent influx. These two functions have to be understood as integral to one another; they are, so to speak, two sides of a same coin. In the process of comparison, every comparative lawyer is thrown into a more or less painful situation, compelled to reflect deeply on his or her own culture. For this reason, comparative law is a discipline that is essentially subjective.[57]

Hozumi was one of the luckiest comparativists who succeeded in resolving these contradictions despite the difficult political situation of his time. Readers would notice that he is smiling peacefully in figure 4. I believe, as his compatriot, that he must have been satisfied with his own achievement.

[57] But this, I believe, does not mean that it is not "inter-subjective."