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Law and Culture in China and Japan: A Framework for Analysis

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COMMENT

LAW AND CULTURE IN CHINA AND JAPAN: A FRAMEWORK FOR ANALYSIS

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Each of the articles in this collection offers a separate perspective on the relationship of law and culture as related to legal development and reform in China or Japan or both. Each provides significant insights. Yet none attempts to define either of the two concepts—law and culture—central to each. In this respect they are not unusual. Seldom do studies of law and development or legal reform attempt either to explore applicable concepts of law or to state explicitly the definitional premises on which their analyses are based. Such neglect is understandable where the focus of the inquiry is a single legal order or tradition and definitional assumptions are commonly shared—as detailed below, a cultural phenomenon—and can be left unstated. Comparative law analyses, particularly those that treat well-established legal traditions, do not enjoy this privilege. To leave unstated basic assumptions regarding the objects of observation can only obfuscate the issue and create more questions than answers to the problems posed. The perennial disputes over the meaning of "law" in China come to mind.[1] To ask whether a culturally-bound, Eurocentric definition of law existed in China is almost as silly as asking whether a Chinese emperor reigned in Rome. Thus, before attempting to make any comments, I would like first to suggest a set of definitions that will hopefully enable a fuller and clearer analysis of the problems the articles in this symposium raise. Using this definitional frame of reference, I will then propose an historical or evolutionary perspective that I believe aids in understanding East Asian legal orders, especially the fundamental differences between China and Japan. This Comment is thus divided into two parts. The first sets forth a series of definitional propositions intended for a more general analysis of the interrelationships of law and culture. The second comprises an introduction to the evolution of legal institutions that enables us to understand better the reception and development of Western legal institutions in East Asia and provides context for the four articles and their individual and collective insights.

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1. *See, e.g.*, Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179, 181–88 (2002).

I. DEFINING LAW AND CULTURE

With respect to definitions of "culture," I know of no better than the one Cornell University Professor Robert Smith recommended to me many years ago.[2] Speaking as an anthropologist, he said that culture comprises the values, beliefs, habits, and expectations shared within a community. Thus defined, culture can hardly be separated from law, and attempts to do so must fail. Any presumed conundrums regarding their interrelationships dissipate once their inseparability becomes apparent. Most legal rules and principles in any society reflect generally-held values and beliefs, if only by virtue of their longevity and endurance. Similarly, either by affirming preexisting habits and expectations or by creating the conditions for change, existing processes for both lawmaking and legal enforcement inexorably influence the continuity or change of culture. Conceptions of law itself are also cultural phenomena. Legal orders are belief systems in the sense that concepts of law are themselves shared beliefs that generate shared habits and expectations. As elaborated below, Western notions of natural law and private law exist as components within a widely shared notional system. The institutions and procedural processes that make them seem real as positive or "living" law—and appear to set them apart from what "ought" to be—may be treated analytically as "institutional," but the norms themselves and the system of law in which they are conceived are grounded in widely shared understandings and generally unstated presumptions. Political legitimacy in particular is determined by shared values and beliefs. Thus, as a prerequisite for governance without the imposition of a totalitarian regime based on fear and the effective threat of brute force, legitimacy as culture determines the efficacy of all legal orders.[3]

We too often fail to define culture with precision or to identify more specifically its various aspects. For example, Japan's preeminent postwar legal sociologist, Takeyoshi Kawashima, coining the phrase "legal consciousness," argued[4] that a culturally-based aversion to litigation as a shared value exceptionally inhibited litigation in Japan. He erred. As I

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2. Smith suggested the definition during a research workshop of contributors to THE POLITICAL ECONOMY OF JAPAN: CULTURAL AND SOCIAL DYNAMICS (Shunpei Kumon & Henry Rosovsky eds., 1992). The meeting included a lively interchange among leading specialists on Japan from various social science disciplines on the meaning and role of culture in Japan's political economy, much of which is memorialized in the published volume.

3. *See generally* DAVID BEETHAM, THE LEGITIMATION OF POWER (1991).

4. *See* KAWASHIMA TAKEYOSHI, NIHONJIN NO HŌ ISHIKI [JAPANESE LEGAL CONSCIOUSNESS] (1967); Kawashima Takeyoshi, *Dispute Resolution in Contemporary Japan*, *in* LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 5 (Arthur Von Mehren ed., 1963).

countered[5] nearly three decades ago, Kawashima presented no evidence of a peculiarly Japanese aversion to litigation. Litigation for selfish gain is condemned morally in nearly all societies. Nonetheless, litigation had long been a central feature of Japanese governance, and, as Kawashima's own data showed, litigation rates in prewar Japan were considerably higher than in postwar Japan. Indeed, litigation rates did not reach prewar levels until over a decade after Kawashima's study.[6] Had Kawashima been more precise and narrowed his claim—had he identified, for example, the shared opprobrium of physical handicaps and their public display as one example of a disincentive to litigate—his argument would have been persuasive. He also would have been quite correct to attribute this disincentive to culture. We now have substantial evidence that potential Japanese litigants avoid lawsuits, even when litigated outcomes will likely yield greater gains than final private settlements, in situations where a public trial might require the exposure of physical disfigurement and inflict a sense of "shame" on those in defiance of a widely accepted societal norm.[7] Thanks to Kawashima's gifted protégé, Kahei Rokumoto, we have empirical evidence that lawsuits for compensation for personal injury constitute the only category of tort litigation where survey data show Japanese claimants settling for less gain than they anticipate from litigating and prosecuting their case to judgment.[8]

By the same token, economic and institutional disincentives are equally compelling explanations for both fluctuations in Japanese litigation rates over time and lower rates relative to the United States. The sudden increase in shareholder derivative suits almost immediately after a reduction in filing fees in the early 1990s, noted by Mark West among others,[9] illustrates the importance of what I view as institutional barriers to litigation.[10] In turn, Mark Ramseyer and Minoru Nakazato's study of insurance settlements and court awards in automobile accident litigation[11] amply supports the assertion that the lack of a civil jury system and greater certainty in the outcome of litigation in Japan fosters settlements

5. John O. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPAN. STUD. 359 (1978).

6. *See* John O. Haley, *Litigation in Japan: A New Look at Old Problems*, 10 WILLAMETTE J. INT'L L. & DISP. RESOL. 121, 123–26 (2002).

7. *See* Haley, *supra* note 5, at 367.

8. Rokumoto Kahei, *Higaisha-gawa tōjisha no hōkōdō* [*Legal Process From the Perspective of Victims as Parties*], *in* JID SHA JIKO MEGURU FUNS SHORI TO H [LAW AND RESOLUTION OF AUTOMOBILE ACCIDENT DISPUTES] 33 (Kawashima Takeyoshi & Hirano Ryuichi eds., 1978).

9. Mark D. West, *Why Shareholders Sue: The Evidence from Japan*, 30 J. LEGAL STUD. 351, 353 (2001); Zenichi Shishido, *Reform in Japanese Corporate Law and Corporate Governance: Current Changes in Historical Perspective*, 49 AM. J. COMP. L. 653, 674 (2001).

10. *See* Haley, *supra* note 5, at 378–89.

11. J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263 (1989).

and thus helps to explain an apparent dearth of lawsuits relative to the United States.[12] Culture, defined and delineated with some precision, is thus neither all-explaining nor a residual "black box" to be ignored unless all other explanations for social behavior fail. Culture may also reflect, I should add, rational choices over time.

We also tend to neglect the mutability of culture. Economic, social, and political change inexorably produces cultural change. New patterns of daily life produce changed habits and expectations. Novel ways of dealing with old and new problems create new ideas that often challenge and eventually upend long-held shared values and beliefs. Institutional and cultural changes thus go hand in glove. From an historical perspective, the dynamic interplay of both produces an evolutionary—but not linear—progression in governance and law. For example, as economic and social incentives to sue increase and socially accepted—i.e., culturally determined—disincentives decrease, or justifications increase, or both, cultural impediments to litigation should dissipate. Unfortunately, no one to my knowledge has followed Kahei Rokumoto's lead and examined the propensity over time of Japanese plaintiffs with personal injury claims to settle for less than they anticipate receiving through a litigated outcome.

Studies of the reception of Western legal institutions in East Asia, as I have suggested previously,[13] usefully begin with a definition of law as well as culture. With respect to law, I posit a view that identifies elements and processes that appear common to all developed legal orders and established traditions. The basic elements are twofold. The first element comprises the rules and principles or the norms of law. The second element includes the sanctions of law. Connected to both are institutional legal processes for the recognition of legal norms (lawmaking) and their enforcement (law enforcing). Each process involves an exercise of political authority or power (or both) and thus requires some sort of political rule or governance comprising actors and institutions. Without such institutions, widely shared norms—infractions of which incur some form of social disapproval—may function and be defined as "law,"[14] but for comparative purposes, at least, such norms are more properly treated as "custom," as described below.

All political orders have identifiable legal norms generally intended to channel or control individual and collective behavior. It is axiomatic

12. *See* Haley, *supra* note 5, at 364, 366.

13. *See* JOHN OWEN HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX 5–18 (1991).

14. *See, e.g.*, E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN 18–28 (1954). Hoebel's definition illustrates the difficulty in defining law in societies at the earliest stages of institutional development.

that most of these orders establish norms designed to protect vested interests, especially the interests of those who rule and make the norms.[15] Most have rules to deter unwanted disruptions of social and political order, such as the proscription of unauthorized violence, and all have rules that regulate wealth, its creation, and its allocation to those who rule. In democratic societies in which political authority responds to majoritarian values and needs, legal rules tend to reflect and reinforce those interests. In those societies where political authority is concentrated, the rules tend to favor the interests and values of the few who govern. In societies in which political authority rests on broader bases of community consensus, the legal norms generally reflect broader, more widely shared community interests and values. Therefore, determining who controls norm creating or lawmaking processes illuminates the configurations of political authority and influence within a society. Conversely, prevailing legal norms are themselves equally revealing with respect to who governs.

Sanctions and law enforcement constitute my second cluster of element and process. Sanctions may be authorized by lawmakers, but they are applied or imposed through one or more formal and official processes for enforcing legal norms. Learning which sanctions are imposed, how severe and how effective they are in channeling conforming behavior, by which processes they are imposed, and who controls their application is telling with respect to the nature of the political and legal orders in which they are applied. Lawmakers, and those who control the law-enforcing processes, generally reserve the most severe sanctions for threats to legal norms they consider most important, particularly those that allocate wealth and suppress threats to the authority and power of those who govern. Indeed, few if any political orders tolerate and leave unpunished effective threats to existing political arrangements—whether democratic or autocratic.

As suggested above, we need to differentiate legal norms (rules and principles) and their related processes for sanctions, lawmaking, and enforcement from customary and nonlegal institutional norms and their processes. Lawmaking and legal enforcement differ from similar or even otherwise identical nonlegal institutional norms and processes in two critical respects. The first precondition of law, as noted, is that it

15. The example provided by Feldman of the Japanese Ministry of Finance's interest in tobacco-related legislation comes readily to mind. The Japan Tobacco and Salt Public Corporation, established in 1904 as a public monopoly to control the cultivation, manufacture, and sale of tobacco products, was, until 1984, a public corporation managed as an agency of the Ministry. In 1984 the corporation was privatized and renamed Japan Tobacco, but with two-thirds of its stock owned by the Ministry. *See* Eric A. Feldman, *The Landscape of Japanese Tobacco Policy: Law, Smoking and Social Change*, 49 AM. J. COMP. L. 679 (2001).

emanates from political authority. The second is that its validity as law depends on what H.L.A. Hart refers to as the secondary rules of law—or the rules of recognition—in any given system.[16] Hence, a dress code may be purely conventional or customary, with infractions punished through some form of social disapproval. If so, its validity and endurance depends solely on its power to conform social behavior. Change occurs through nonconformity followed by increased imitation. Institutionalized rules may still not be considered legal by virtue of particular rules of recognition, as in the case of the formal rules of private versus public schools.

An unstated assumption is that those who make law also control law enforcement. This is not necessarily true. Lawmaking and law enforcing are closely related, but they are also distinct and, at least with respect to lawmaking, independent processes. It may be useful at this juncture to define and distinguish what I refer to as "public" versus "private" law-enforcing processes. Both, in turn, must be differentiated from customary enforcement. The notions are simple. A public law enforcement process is one controlled by those who govern and their agents. The capture, condemnation, and punishment of a village thief by the ruling elders exemplify a rudimentary process of public law enforcement in the legal order of an equally rudimentary political system. We can more readily identify the actors, institutions, and procedures of our administrative regulation and criminal justice systems that constitute the public law enforcement processes of the modern state. By private law enforcement, I mean simply the process for enforcing private law—a formal, official process that, as explained in detail below, we generally take for granted—enabling, or to be more accurate, empowering private parties (those who are governed subjects or citizens) to enforce legal rules. In contrast to both public and private law enforcement processes, customary enforcement processes do not involve political authority. A process like the sanction is unofficial, informal, and communitarian. Ordinarily, it presupposes collective or community action—various forms of social disapproval or, to use John Braithwaite's often misunderstood label, "shaming."[17] Thus, custom rarely remains viable when challenged by interest-enhancing, nonconforming behavior unless community consensus deems the violation offensive and regularly meets it with some form of social disapproval. Without such sanction, customary norms readily change through nonconformity and increasing imitation. Community

16. H.L.A. HART, THE CONCEPT OF LAW 77 (1961).

17. *See* JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 100 (1989); *see also* HOEBEL, *supra* note 14.

disapproval inhibits both. The consequence is that the community, not those who rule, determines the continued viability of customary norms.

Charles Whitehead's account of network norms and sanctions with respect to the 1988 Basel Accord on capital measurement and capital standards for banks is a near perfect example of customary norm creation and enforcement within a rudimentary political order. The processes he describes have more in common with the "law of primitive man," to borrow Adamson Hoebel's title,[18] and early feudal processes in Western Europe and—as described below—Japan than lawmaking or enforcement within any of the states involved. Both the norms and their efficacy, as Whitehead argues, depend upon consent and consensus among the states with the greatest economic and political leverage. As in customary orders, the creation of any new norm requires negotiated assent among all but dependent or subordinated actors. Compliance, too, requires broad acceptance or the effective threat of "shaming" in one or more of its various forms. The international legal order is largely one of authority without power, and the consequence is informality and consensual governance. Feldman's account of the realization of an international norm within Japan details the other side of the story. His scenario also has Japanese officials at an international conference, in this instance agreeing under extreme international and domestic NGO and media pressure to sign the World Health Organization's Framework on Tobacco Control. As discussed below, it is a story that well illustrates the processes of consensual governance in Japan.

Why do the distinctions among public, private, and customary processes for law enforcement matter? The answer lies first, as noted, in management and control. As defined, the mechanisms for law enforcement differ essentially in who manages and controls them. In all public law enforcement processes, government officials determine whether and which legal rules to enforce. In the simplest political orders, the rulers themselves may exercise this discretion; in the most complex, agents of the state, administrative officials, the police, and prosecutors have this choice. The appropriateness of the choices they make may become issues of control between the governing principals and their prosecutorial agents, but their subjects, those who are governed, do not get to choose. Private parties—the victims of a crime or of some administrative infraction—may file complaints and thereby have some voice in initiating the enforcement process, but their voice diminishes thereafter. They may petition or plead, but they do not determine whether to proceed with or

18. HOEBEL, *supra* note 14. For a similar but far more extensively elaborated perception that international law resembles law in primitive societies, see MICHAEL BARKUN, LAW WITHOUT SANCTIONS: ORDER IN PRIMITIVE SOCIETIES AND THE WORLD COMMUNITY (1968).

stop enforcement. They cannot end the process by withdrawing their complaint or reaching a settlement with the offender. The bargains reached with those accused of violating applicable rules are negotiated between public officials and the miscreants, not the victims, who are affected most by the infraction of the legal norm. Universally justified in terms of "public interest"—the rhetorical rubric for the policy preferences of those who rule or seek influence—public law enforcement by definition lodges prosecutorial discretion and control in the hands of those who exercise political authority and power.

Private law enforcement, in contrast, describes any means of formal, state-sponsored law enforcement subject to the control of private parties—in other words, the subjects of political authority.[19] Private law enforcement thus usually represents either a willingness by rulers to give up control or a recognition of their inability to control, at least fully, the process of law enforcement. Needless to say, this is a pivotal notion in any analysis of the evolution of political institutions.

The processes of both public and private law enforcement are formal and official. They involve a resort to established state institutions and state actors. The difference is in who exercises prosecutorial discretion and control. Private law enforcement limits the role of those who rule—the state and state actors—with one pivotal exception: judges. Those who rule and their agents thus do not control the private enforcement process. Even judges in purely private law enforcement do not initiate or control private enforcement. They may determine and permit the sanction, but they do not, for the most part, supervise its actual application.

Law enforcement processes inexorably serve dual purposes. To the extent that law enforcement or its threat affects behavior, those who control enforcement control the efficacy of the legal rule. Not all legal rules are ever formally enforced, and one can imagine a political order in which all legal rules are left to informal means of enforcement, with the consequences detailed above. The legal enforcement of norms, whatever their source, also involves their formal and official recognition and thus an independent phase in their "making" as law. Thus, whether intended or not, through the articulation and enforcement of particular norms as either rules or standards, adjudicatory or "judicial" processes conducted by those who rule are, or necessarily become, lawmaking processes in which judges have a decisive voice.

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19. Eric Feldman describes an example of an embryonic private enforcement system that has all but one of the critical characteristics in Eric A. Feldman, *The Tuna Court: Law and Norms in the World's Premier Fish Market*, 94 CAL. L. REV. (forthcoming 2006). The only feature it lacks is state enforcement. Compliance with the decisions of the adjudicator is voluntary, based on a sense of mutual self-interest of repeat players. It thus has much in common with adjudication in early feudal orders, noted below.

A system of private law enforcement necessitates some means of determining who exercises control over the enforcement of legal rules. Whatever the language, whatever the terminology, some conception of "rights" as claims to enforcement and "duties" to be enforced must be devised. Expressed in the maxim *ubi ius ibi remedium*, the conception of a system of "rights" that entitle their holders to a state-enforced remedy was, in my view, Roman law's grandest achievement and one of its most important legacies. Hohfeld's seminal conclusion that in private law all rights have correlative duties[20] lies at the heart of Roman law and, by reception, Western law.

To enable private law enforcement, some form of adjudication is also necessary. A politically and legally authorized third-party adjudicator must make the required findings of fact and law in order to determine who is entitled to enforcement as a holder of the rights at issue, whether the claim has been properly lodged against the defending party as the bearer of the duty, and whether the duty has been breached. Adjudication is thus, I posit, a shared feature of all private law enforcement processes.

Lawmaking and law-enforcing processes also tend to differ with respect to the underlying conditions for their effectiveness. Both require actors and institutions, but lawmaking also needs the legitimacy or the authority of the relevant legal norms or those who make them—or, better yet, both. Effective law enforcing requires both authority and power, legitimacy as well as the capacity to coerce. Effective authority (legitimacy) with or without power and effective power with or without authority are both possible. Authority and power become mutually necessary only with respect to the effectiveness of adjudicatory (judicial) lawmaking, where compliance is not based on voluntary assent.[21] We can imagine, for example, a relatively simple political order based on kinship, ruled by a small group of household heads by custom and convention—by definition, authoritative, legitimate norms—and led by the eldest member. To the extent they wish to change customary or conventional rules regarding succession to the household headship or the designation of the eldest as leader, members of this order face problems of authority and power. First, the ruling household heads must have sufficient political authority to make a new norm—that is, for the community to accept the new norm as legitimate, it must also accept the lawmaking authority of those who made it. Such community consensus eliminates the need for any mechanism for enforcing the new rule. By definition, community acceptance of the rule's legitimacy—which might

20. *See* Wesley Newcomb Hohfeld, *Some Fundamental Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

21. See the example of the Tuna Court. Feldman, *supra* note 19.

best be called "derivative legitimacy"—produces compliance.[22] It thus will function like any other customary rule dependent upon community acceptance and conformity. If a member of the community effectively challenges the legitimacy of the new rule, however, its formal enforcement becomes necessary. To the extent the rulers can coerce compliance, they may be able to effect the change. But unless and until the community accepts the legitimacy of the new rule, those who rule will continue to need the capacity to coerce compliance. In such an event, our simple hypothetical polity risks transformation from one of authority without power to one of power without authority.

Finally, rulers do not readily give up control. This was as true for the Romans as it is for state actors today. Private law in Roman times was not the central feature of Roman rule. Although it became Rome's most significant conceptual legacy, it was, and presumably remained, peripheral to Roman rule. The Twelve Tables from which the classical conceptions of private law developed were themselves a set of rules the patrician rulers of the city of Rome formulated as a result of the demands of plebeians seeking political recognition and influence in the fifth century BCE. In Alan Watson's words, "The plebeians had demanded that the law should apply to all. What they got was a code that was egalitarian in appearance because the patricians, legislating *de haut en bas*, inserted into it only rules and institutions they were willing to share with the plebeians."[23] Notably absent in the Twelve Tables are the most meaningful rules related to governance, including rules concerning control over resources and revenues (a paramount issue for any rulers), and those related to economic, social, or political behavior. Such rules—if one may call them rules at all—apparently remained unwritten and under patrician control. Thus, the separation of public and private law, or, as Watson put it, "the public dimension" of private law, became one of Roman law's notable characteristics.[24]

II. JAPAN AND CHINA FROM AN HISTORICAL (EVOLUTIONARY) PERSPECTIVE

Just as political and social systems can be described and understood in historical—that is, evolutionary—terms, so too can law and its corresponding legal processes evolve. They do so, however, in tandem with the political regimes on which they depend. However law may be defined, the institutions that make and enforce law are instrumentalities of

22. HALEY, *supra* note 13, at 6.
23. ALAN WATSON, THE SPIRIT OF ROMAN LAW 55 (1995).
24. *Id.* at 49.

those who rule. At some point and at some level, therefore, legal systems reflect the systems of governance within which they function.

The spectrum of political development commences with the simplest forms of political community. Communities defined by social ties of kinship and held together by mutual dependency and the need for cooperative endeavor come to mind. In such societies, political and social authority tends to be undifferentiated, rudimentary, and relatively weak. Family hierarchy and accepted claims to religious authority are the common sources of authority. Custom and customary processes prevail, and law as related to institutional processes seldom exists. Similarly, the capacity for coercion depends on collective, community action.[25] At the other end of the evolutionary spectrum are the most politically, economically, and socially advanced societies. They are characterized by complex organizational features and ordering arrangements. They have well-established hierarchical systems of governance with centralized institutions featuring specialized actors as agents of the state and elaborate bureaucracies for making and enforcing legal rules.[26] Those who rule may differ in the legitimacy of their authority and their capacity to coerce, but all are able to make and enforce new rules of law. The legal rules of this system tend to be proscriptive—generally expressed as administrative orders or crimes—and enforced through one or more public law processes. At the very least, those who govern entrust control over the enforcement of the legal rules they consider significant to one or more official, public agencies. In contemporary criminal law in the United States and Japan, prosecutors exercise this control.[27] Although some might think of the advanced industrial states of Western Europe as the prototype of this system, the great bureaucratic empires of Czarist Russia, the Ottomans, and the imperial Chinese outdistanced the West in terms of governance and control by several centuries.[28] In fact, the first

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25. *See, e.g.*, HOEBEL, *supra* note 14. *See also* Richard Schwartz, *Social Factors in the Development of Legal Control*, 63 YALE L.J. 471 (1954).

26. *See, e.g.*, S.N. EISENSTADT, THE POLITICAL SYSTEMS OF EMPIRES 15–17 (1963).

27. The restriction of prosecutorial discretion expressed by the *Legalitätsprinzip* in German law is a notable exception. Not coincidentally, the German system of mandatory prosecution was not influenced by Friedrich Carl von Savigny (1779–1861), Germany's preeminent nineteenth century Roman private law scholar. By restricting prosecutorial discretion, German criminal law became a system that paralleled private law, in that it ensured what were in effect legally enforceable claims, or "rights," to enforcement by crime victims. *See Promemoria der Justizminister Savigny und Uhden über die Einführung der Staats-Anwaltschaft [Memorial of Justice Minister Savigny and Uden on the Establishment of State Prosecution in Criminal Procedure]*, *in* 11 PREUSSISCHE GESETZREVISION, 1825–1848 [PRUSSIAN LEGISLATIVE REFORMS, 1825–1848] 1284 (Werner Schubert & Jürgen Regge eds., 1981).

28. The ancient bureaucratic empires of Egypt, Rome, and the Byzantines could be added to the list. *See* EISENSTADT, *supra* note 26; see also the various studies in THE DECLINE OF EMPIRES (S.N. Eisenstadt ed., 1967).

enduring political system to reach this endpoint of the evolutionary trajectory was China.

By the third century BCE, imperial Chinese rulers had established a system of centralized hierarchical governance that represented in evolutionary terms the most advanced administrative order on the globe. It was an exemplary public law system,[29] reflecting, as Douglass North observed with respect to ancient bureaucratic empires of the Mediterranean, "the persistent tension between rulers attempting to maximize their revenues and control over their constituents and agents whose interests seldom completely coincided with those of the ruler."[30]

Yet China lacked the two features of law that distinguish the conceptions of law as developed in Western Europe. One feature was private law. The second was the inclusion within the Western European legal system of the notion of natural law—a cultural conception of an order of law which deems certain controlling norms universal, timeless, hierarchically superior, and thus binding with respect to all other legal rules.[31] In no other legal tradition, to my knowledge, did either a system of private or natural law develop. To be sure, the great legal traditions of East and South Asia both recognized and enforced private agreements and proprietorship claims, but they did so within a conceptual and institutional framework that gave claimants only limited voice. The dynastic codes of imperial China, as well as laws in the Hindu-Buddhist tradition of South Asia—the other enduring legal tradition of an "Axial civilization" outside of Mesopotamia and the Mediterranean[32]—included recognition and enforcement of what we now consider private law rules, such as those concerning the failure to pay debts or the appropriation of goods left on deposit.[33] But both imperial Chinese law and the *dharma* or "laws" of Manu deemed these actions minor penal offenses not requir-

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29. *See* THOMAS A. METZGER, THE INTERNAL ORGANIZATION OF CH'ING BUREAUCRACY: LEGAL, NORMATIVE, AND COMMUNICATION ASPECTS (1973); R. Kent Guy, *Rule of Man and Rule of Law in China: Punishing Provincial Governors during the Qing*, *in* THE LIMITS OF THE RULE OF LAW IN CHINA 88, 88–90 (Karen G. Turner, James V. Feinerman & R. Kent Guy eds., 2000). Benjamin Schwartz describes the system as "unambiguously authoritarian," with state authority "totalitarian" in scope. Benjamin I. Schwartz, *The Primacy of the Political Order in East Asian Societies: Some Preliminary Generalizations*, *in* FOUNDATIONS AND LIMITS OF STATE POWER IN CHINA 1, 1–4 (Stuart Schram ed., 1987), *cited and discussed in* HALEY, *supra* note 13, at 26–27.

30. DOUGLASS C. NORTH, STRUCTURE AND CHANGE IN ECONOMIC HISTORY 119 (1981).

31. *See* 2 JOSEPH NEEDHAM, SCIENCE AND CIVILIZATION IN CHINA 564 (1956).

32. *See* THE ORIGINS AND DIVERSITY OF AXIAL AGE CIVILIZATIONS (S.N. Eisenstadt ed., 1986).

33. *See* INDIAN HISTORY SOURCEBOOK: THE LAWS OF MANU, C. 1500 BCE ch. VIII, secs. 3–7 (George Buhler trans., 1886), *available at* http://www.fordham.edu/halsall/india/manu-full.html (last visited Feb. 8, 2006).

ing, at least in the Chinese system, official enforcement. Officials instead served as adjudicator-mediators to assist the disputants in reaching a settlement. As in the case of the Twelve Tables, the only disputes over which claimants had any voice—essentially the right to withdraw their complaint—in imperial China concerned matters deemed too petty for magistrates to pursue with full vigor as a law enforcement matter. From the perspective of those who governed at the center, these were indeed "minor matters" they hoped the parties could resolve themselves peacefully without official intervention; if necessary, however, the services of a magistrate as adjudicator-mediator were available.[34] In short, these were matters for dispute resolution, not law enforcement. As Philip Huang concedes in his influential study of Qing civil law,[35] the magistrate functioned more as mediator than adjudicator. Unless penal sanctions were applied—thus making the dispute more than a "minor matter"—relief ultimately required the mutual assent of all parties to the proceedings.

Both imperial Chinese and Hindu-Buddhist law also drew on and were immeasurably influenced by a shared belief in universally valid moral orders. Neither the *dharma* themselves nor Confucian precepts were conceived, however, as a set of rules or principles with intrinsic force as law.[36] Indian princes may have enforced the *dharma* just as the dynastic codes of imperial China reflected and enforced Confucian norms, but even the most basic Hindu-Buddhist or Confucian norms did not function as legal principles—as norms with the force of law—until articulated and enforced separately as legal rules. The Hindu-Buddhists and Confucians conceived of a "natural" order within which prescribed norms were universally and eternally valid—but as a separate moral, not legal, order. They did not postulate an extant nexus of moral and legal norms; their worlds of morality were separate from the world of law. In contrast, the norms of "natural law," as conceived by Greek philosophers, articulated in classical Roman law, redefined by Thomas Aquinas, and understood in Western jurisprudence, today function conceptually (culturally) as moral truths expressed as legal principles or rules in a hierarchy in which they are effectively superior. In other words, because of their notional nature, they either have the force of law or function as criteria for "legality" and thereby trump all inferior or inconsistent—that is, manmade—rules. One word, "justice," captures the nexus between moral

34. *See, e.g.*, PHILIP C.C. HUANG, CIVIL JUSTICE IN CHINA: REPRESENTATION AND PRACTICE IN THE QING 5–19, 76–137, 235 (1996).

35. *Id.* at 76–109, 122.

36. For a summary of assessments of the nature of the *dharma* as distinct from law, *see* Rajeev Dhavan, *Introduction*, *in* MARC GALANTER, LAW AND SOCIETY IN MODERN INDIA xiv–xvii (1989).

rules and legal rules in Western legal thought, which deems an otherwise valid legal rule invalid or lacking "legality" if it is "unjust" in terms of a natural law norm. Thus, in the West a notion of natural law "rights" enforceable against the state could develop.[37] In this sense, there was no "justice" in a Hindu-Buddhist kingdom or imperial China. Why these characteristic features of Western law developed and endured uniquely in the West remains a crucial question.

The significance of the exceptional development of both private and natural law is not lost on those who argue that patterns of institutional and cultural history continue to shape the course of present institutional development and thus profoundly, if not determinatively, influence the future directions of a society.[38] How or why conceptions of private and natural law developed and persisted over time should be especially significant for those, like Professor Tanase, who accept the influence of evolving institutional and cultural patterns within a society—"path dependency," in the words of Douglass North.[39] Do these conceptions endure as beliefs? If so, why? What economic, social, and political conditions influence their retention or atrophy?

The primary source of private law in the West was classical Roman private law, as received in Western Europe through the *Corpus Juris Civilis* beginning in the eleventh and twelfth centuries. The *Corpus Juris Civilis* was itself a sixth century compilation of the precepts of classical Roman civil law, whose significance relative to the evolution of public law in its jurisdiction appears totally ignored. We know little and presumably care less about Roman administrative or criminal law, either at its formation or in its classical period when it applied in the Eastern Empire (now commonly known as the Byzantine Empire).[40] The primacy of private law in Western Europe was thus based on an historical stream of political choices made in the late Middle Ages during the formative period of the contemporary European state. It was the product of early European statecraft, which reflected a mix of widely shared beliefs and values, as well as economic, social, and political needs. By the nineteenth century, the conceptual system of private law derived from late Roman sources had become firmly embedded in Western European institutional reality and legal culture as private and public law. Legal rules

37. *See, e.g.*, RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT (1979).

38. *See, e.g.*, NORTH, *supra* note 30.

39. DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 92-104 (1990).

40. Manlio Bellomo asserts that the Corpus Juris Civilis was superceded and "never" functioned as a source of "living" law in the Eastern Empire. MANLIO BELLOMO, THE COMMON LEGAL PAST OF EUROPE, 1000-1800 39 (Lydia G. Cochrane trans., 1995).

expressed in terms of rights and duties enforced through an adjudicatory process had become the constituent core of what was meant by "law." We hardly know or care how the East defined law, particularly in the developing bureaucratic systems of the Russian and Ottoman Empires (the latter of which occupied lands of the Eastern Roman Empire, where scholars once taught the *Corpus Juris Civilis* as if living law).

The states that emerged in Western Europe during the nineteenth century were not prototypical advanced political orders. Western Europe remained fragmented, with multiple states, diffuse sources of wealth, and various constraints on state control. All states, however, had well-developed private law systems. Indeed, from a nineteenth century perspective, the heart and soul of European legal systems were private law rules set out in civil codes and enforced through lawsuits. The conceptual separation of public from private law began during the nineteenth century, with France taking the lead and Germany following, although state control through administrative regulation and criminal proscription did not truly supplant the primacy of private law in the West until later in the twentieth century. Prior to these events, most institutionally advanced European industrial states, as well as the United States, had not established as pervasive a merit-based state bureaucracy or regulatory system as that of imperial China. By the last half of the twentieth century, particularly in the United States, the functional distinction between private and public law became increasingly untenable as the expanding public law dimension of private law made it an integral component of state control.

Adjudication necessitates judges and other specialized actors. It also empowers judges as lawmakers and enforcers, as well as actors who participate and influence the process. The centrality of adjudication in the English system since the twelfth century explains why Montesquieu could discover in England the judiciary as a separate branch of government. As evolved within common law jurisdictions, the role of the judiciary became an essential fixture of the liberal state, taking the "rule of law" rather than "rule by law" as its hallmark. The paradox of this vision is that it presupposes a state institution with the capacity to control the state. Two seemingly contradictory conditions for the judiciary become essential: political autonomy from direction or interference by any of the political branches of government and the capability as a state institution to compel compliance from all who are subject to its commands. These conditions also apply to other state institutions that direct and exercise the coercive capacity of the state. To date, no state has fully resolved this paradox.

The conceptual and institutional features of Western European law, with its distinctive blend of private and natural law and independent judiciaries, became notionally indispensable components of any "civilized" or "modern" legal system by the mid-nineteenth century. Although private law rights had yielded their place in natural law theory to rights against the state, the argument persists that Eurocentric visions represent the "civilized" and "modern." As insightful a comparative legal scholar as Marc Galanter described the elements of "modern" law[41] for a 1966 Voice of America Forum Lecture Series, listing eleven features. The first three related to legal rules: in "modern" legal systems, he asserted, legal rules are applied uniformly within a given territory. They are expressed as rights and duties resulting from and applied to transactions. They are deemed to have universal rather than particularistic application and are thereby applied predictably. The remaining eight factors related to the institutional system in which legal rules are made and enforced. As defined by Galanter, modern legal systems are hierarchal, organized bureaucratically, rational, administered by professionals, and require legal specialists—lawyers. In such a system, legislation replaces custom as legal rules become "amendable." Above all, the system is political—lawmaking and enforcing become a monopoly of the state. Remove the two elements relating exclusively to a private law system—transactional rules and the need for lawyers—and what remains are features of any highly-developed public law system. All these features, it should be emphasized, were fundamental elements of imperial Chinese law for over a millennium. Galanter's list simply identifies features of late nineteenth century Western law and legal systems. They are modern only in the sense that Western states did not become full-fledged administrative bodies until the past century. Like Galanter, Kawashima also absorbed a culturally prevailing notion of modernity heavily influenced by Western sociologists, such as Max Weber and Talcott Parsons, who took the European state for granted as the model of modernity within a linear conception of evolutionary institutional progress.[42] The articles by Tanase and Peerenboom similarly assume an unstated definition of law in which private law and the features of private law enforcement as developed in Western Europe remain paramount. Hence the debate continues over the lack of law in China and the concern over litigation as an essential aspect of a developed legal order.

All of this said, how do these notions help us to understand the problems of law and culture in East Asia and the problems of law reform in

41. Marc Galanter, *The Modernization of Law*, *in* MODERNIZATION: THE DYNAMICS OF GROWTH 167 (Myron Weiner ed., 1966).

42. Kawashima, *supra* note 4.

China and Japan? As I have long argued, the propositions detailed above provide a framework that enables us to understand more fully the fundamental differences in the reception and development of Western law in China and Japan. What matters in this story is that within the context of comparable political arrangements and institutions, Japan too developed an embryonic private law system. Japan was, in comparison to imperial China, a primitive backwater on the periphery. Japan's institutional evolution mirrored that of Western Europe in a remarkably simultaneous paradigm of institutional arrangements between the twelfth and sixteenth centuries, as fragmented warrior governance superseded, but did not fully displace, centralized governance by sinofied elites. Unlike Europe, however, Japan reached institutional equilibrium at the beginning of the seventeenth century with the establishment of Tokugawa rule. This equilibrium persisted until the Meiji Restoration in 1867. Moreover, unlike Europe and China, the notion of universally applicable, transcendental norms—whether conceived as natural law or a separate moral order—did not take hold in Japan.[43] Historically, Japanese culture did not include a shared belief in universal values nor a dichotomy between "good" and "evil."[44]

Nonetheless, Tokugawa Japan provides a telling example of the development through adjudication of rules and practices that constitute private law in all but name. Tokugawa edicts recognized two types of adjudication—one labeled "inquisitorial," the other "adversarial" (in translation)—differentiated by the subject matter of the complaint and the extent to which the matter in dispute related to the interests of the Tokugawa overlords.[45] Japanese adjudicatory procedure further differentiated "adversarial" suits into four categories: those related to land and water (*ronsho*), "main suits" (*honkuji*), "money suits" (*kanekuji*), and mutual affairs (*nakama-goto*).[46] Unquestionably influenced by imperial Chinese law, these classifications and their differential treatment reflected a similar decision to allow official discretion and claimant voice in cases involving matters deemed insignificant to the interests of the rulers. As in China, ruling authorities considered the outcome of disputes left to the initiative of claimants of so little concern that they could and indeed should be settled quickly, preferably by some mutually acceptable

43. *See, e.g.*, K. VAN WOLFEREN, THE ENIGMA OF JAPANESE POWER 9 (1989).

44. *See, e.g.*, John C. Pelzel, *Human Nature in the Japanese Myths*, *in* JAPANESE CULTURE AND BEHAVIOR 3, 15–25 (Takie S. Lebra & William P. Lebra eds., 1974); TAKIE SUGIYAMA LEBRA, JAPANESE PATTERNS OF BEHAVIOR 11–14 (1976).

45. *See* 1 DAN FENNO HENDERSON, CONCILIATION AND JAPANESE LAW 99–125 (1965); Yoshiro Hiramatsu, *Tokugawa Law*, 14 LAW IN JAPAN, 1981, at 1, 27 (Dan Fenno Henderson trans.).

46. HENDERSON, *supra* note 45, at 102; Hiramatsu, *supra* note 45, at 34.

compromise. Unlike China, it appears, these suits, particularly commercial "money" suits, became increasingly common fare. And with the frequency of like claims, a system of precedents developed. In the words of John H. Wigmore: "From the 1600's onward, the highly organized judiciary system began to develop by judicial precedent a body of native law and practice, which can only be compared with the English independent development after the 1400's."[47] This presumably enabled Japanese, like English claimants, to rely on prior judicial decisions in similar cases and begin operating in the "shadow of the law." The consequent reduction in transaction costs, as well as risks associated with credit transactions, undoubtedly benefited commerce. With respect to the legal system, Japan would later prove able to import verbatim translations of German and other Western private law rules with alacrity, as many resembled preexisting practices with startling coincidence.[48]

By the end of the nineteenth century in Japan, the Meiji state had successfully adapted Western law and legal institutions to achieve unification and the establishment of stable state authority in what was, and remains, a relatively weak state. The age-old tensions of state power remained as government institutions expanded, reinforced their authority, and attempted to increase their capacity to coerce. Japan's recent reforms, noted by Tanase as well as the case study of tobacco policy, must therefore be viewed in the context of these tensions and the continuous efforts for reform and institutional change that are themselves significant features of Japanese continuity. This context includes another notable feature of continuity: Japan's highly competitive, closely knit communities—public and private—that constantly seek ways to maintain their autonomy from external control. Learning from abroad is an equally persistent and related aspect of the Japanese experience, less a process of conformity, as Feldman suggests, than the combination of two closely related factors—both cultural reflections of shared habits and values. The first is an internally motivated, highly competitive, and quite rational utilitarian quest for new and better models by the state and the communities that compete within it.[49] The second is the prevailing communitarian orientation of a society that lacks a sense of transcendental values.[50] Membership in an elite international community, like the village or the

47. 2 JOHN HENRY WIGMORE, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS 504 (1928). Wigmore taught Anglo-American law in Japan from 1889 to 1992. His multivolume compilation of materials on Tokugawa law and practice remains unsurpassed as an historical resource.

48. *See* Mark D. West, *Losers: Recovering Lost Property in Japan and the United States*, 37 L. & SOC'Y REV. 369 (2003).

49. *See* JOHN OWEN HALEY, THE SPIRIT OF JAPANESE LAW 9–12 (1998).

50. *Id.* at 4–9, 13–19.

firm, requires subordination of individual self-interest and conformity to community norms.

Feldman's study illustrates the process of social change through consensus. The critical element is not conformity, however, but the agents of change—individuals acting within or as communities. He identifies most of the players: state actors, principally the Ministry of Finance (MoF) and Japan Tobacco, the Ministry of Health, Labor, and Welfare (MHLW), and concerned politicians; tobacco growers, retailers, and others with economic and commercial interests at stake; the media, organized groups of non-smokers, and their lawyers; and the courts. He describes a quarter-century long process of persuasion that ultimately changed attitudes and habits and produced an abrupt legal change. The enactment between 2000 and 2003 of a series of local ordinances and national legislation regulating tobacco use and, not coincidentally given MoF influence and interests, increasing the tobacco tax represented the final stage of a process of consent and consensus that featured a variety of persuasive means. Feldman stresses the increasing general awareness by Japanese, especially those who traveled abroad for business or as tourists, students, or otherwise, of changing U.S. attitudes and law, as well as international pressures (*gaiatsu*). A closer look, however, reveals a process that may have begun with changing worldwide attitudes but that unfolded in Japan in ways that exemplified the complex process of consensual governance.

As Feldman explains here and in a previously published work,[51] this process began in the late 1970s with the first political response to non-smoker concerns over unwanted exposure to tobacco smoke. These early political efforts coincided with the first lawsuits against, among others, the government and the Japan Tobacco and Salt Public Corporation (Japan Tobacco after 1984). The litigation continued unabated through the 1980s and 1990s. Insofar as the defendants routinely won, Feldman dismisses any meaningful role for courts in effecting the change. I disagree. Although the plaintiffs may have lost all or nearly all of these suits, the litigation itself produced change. For example, the Japan National Railway and its privatized successors may have won every suit brought to compel them to institute no smoking cars, yet while these cases were still pending on appeal, or soon thereafter, the defendants decided without court compulsion to reserve some cars on most "bullet" trains for non-smokers. The litigants in effect focused national attention on a grievance. Their persistence, along with other factors—neither the least or most important of which was national media focus on international community "shaming" of Japan and other purposeful uses of *gaiatsu* by

51. Feldman, *supra* note 15.

domestic actors—helped to foster a consensus that effected political and legal change.

Feldman's story should remind us that courts, unlike legislative corridors and administrative meeting rooms, provide an accessible and open public forum, a place where those who seek legal change can voice grievances not as petitions or pleas but as claims to "rights." The story of lawsuits over tobacco policy, like that of suits concerning industrial pollution and other social issues over the past half century, thus illustrates the critical, albeit regrettably neglected, didactic role that litigation and the courts play in nearly all legal systems with developed institutions for private law enforcement. Feldman's narrative accurately excludes judges as primary actors. By dismissing the plaintiffs' claims, they removed themselves as the makers of new rules. Their refusal to recognize new "rights" left to the political branches of government the determinative voice in making new rules regarding tobacco use. The availability of adjudication as a private law enforcement process, however, empowered litigants to influence public attitudes and catalyze public discussion and concern, forming the new consensus that produced legislated change. Other actors played key roles. Officials in MHLW acquired new influence in policy formation that enabled them as a matter of intra-agency rivalry to challenge the predominant leverage of MoF. So too did the reforms satisfy the needs of the Koizumi Cabinet as a government committed to change. The increase in the tobacco tax looks very much like part of the bureaucratic consensus that preserved MoF's interests and concerns. Not until a broad social and political consensus emerges should one expect judges to affirm a "sense of society" that justifies a recognition of "rights" left unarticulated within general principles or legislated rules.[52]

Measured by almost any standard of well-being, the Japanese story is one of success. Japan today has one of the highest standards of living on the globe. The Japanese people enjoy a per capita income, a life expectancy, a literacy rate, a crime rate, and an even distribution of wealth that surpass all but a few small European states.[53] More to the point, only

52. *See* Haley, *supra* note 49, at 122, 176.

53. Despite a population that is one-third larger than Germany's and twice as large as France's and the United Kingdom's, Japan's per capita GDP, at $28,000 in 2003, is higher than any European state other than Luxembourg ($55,100), Norway ($37,700), Switzerland ($32,800), Denmark ($31,200), Austria ($30,000), and Belgium ($29,000). It is higher than the United Kingdom ($27,700), Germany ($27,600), France ($27,500), Italy ($26,800), and Sweden ($26,800). *See* http://www.worldfactsandfigures.com/gdp_country_desc.php (last visited Apr. 5, 2006). Life expectancy for both men and women in Japan is one of the highest in the world, as is its literacy rate. *See* http://www.worldfactsandfigures.com (last visited Apr. 5, 2006). Japan's crime rates are by far the lowest in the industrialized world. The most recent United Nations statistics show that as of 1997 Japan has six times fewer reported crimes than

two other Asian states are replicating its success—Taiwan and South Korea, both former colonies in which Japan introduced Western law at the same historical moment as its own legal reform.[54]

China remains a strong state. Anyone who doubts this assertion, at least relative to Japan, should compare the Chinese state's ability to build the world's largest dam on the Yangtze River to Japan's extraordinary incapacity to construct a new runway for its premier international airport at Narita.[55] Yet, as Tanase and Peerenboom examine from different perspectives, China faces a formidable challenge. To adopt the essential features of Western law, those who govern China must first be willing to relinquish control. They must allow a system of private law and effective private law enforcement to develop. They must subject themselves to legal rules restricting their freedom of political choice and transfer control over the enforcement of these rules to an autonomous state institution staffed by officials operating independently of their direction. This requires government officials to purposefully abandon beliefs, values, expectations, and habits that have endured in China for over a millennium. In other words, they must abandon culture as well as self-interest.

The alternative is, as Peerenboom suggests, reforms imposed from below. This requires the development of a civil society with a political voice, and the most seasoned institutional historians offer few encouraging words on this prospect.[56] Perhaps, as in Taiwan and South Korea, economic growth will produce such voices from below, but no historical examples—including China itself—yet exist of such an internally generated transformation occurring within a highly developed state without a well-established private law system.

Sweden and more than ten times fewer incidents than Denmark, the two lowest rates reported in Europe. Internationally, only Hong Kong equals Japan's per capita rate of reported crime. *See* http://www.unicri.it/wwd/analysis/icvs/data.php (last visited Apr. 6, 2006). Measured by the Gini Index, Japan ranks just behind Denmark but just ahead of Norway, Finland, and Sweden in terms of the equality of distribution of household income. These five states have the most evenly distributed household incomes of any industrial states. Inequality in Income or Consumption, *at* http://hdr.undp.org/reports/global/2003/indicator/indic_126_1_1.html (last visited Apr. 5, 2006).

54. *See, e.g.*, TAY-SHENG WANG, LEGAL REFORM IN TAIWAN UNDER JAPANESE COLONIAL RULE, 1895–1945: THE RECEPTION OF WESTERN LAW (2000).

55. *Compare, e.g.*, comments by international NGOs opposed to the Chinese project, such as the International Rivers Network, *at* http://www.irn.org/programs/threeg (last visited Feb. 11, 2006) *with* DAVID E. APTER & NAGAYO SAWA, AGAINST THE STATE: POLITICS AND PROTEST IN JAPAN (1984) (discussing studies of the Japanese experience at Narita).

56. *See, e.g.*, THOMAS A. METZGER, THE WESTERN CONCEPT OF THE CIVIL SOCIETY IN THE CONTEXT OF CHINESE HISTORY (1998); Guy, *supra* note 29.