

# *Ono Azusa and the Meiji Constitution: The Codification and Study of Roman Law at the Dawn of Modern Japan*

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## Introduction

Full-scale contact with the western powers in nineteenth century East Asia had the impact of shaking the foundations of the established international order and the region's understanding of the world. Under the Tokugawa Shogunate, Japan had, from the middle of the seventeenth century, pursued a policy of national isolation, generally expressed at the time as "closing the ports" (*kaikin* 海禁),<sup>1</sup> with limited trade being carried out with China and the Netherlands through Nagasaki (under Tokugawa administration), and with Korea, the Ryūkyūs and the Ainu through the domains of Tsushima, Kagoshima (Satsuma) and Matsumae respectively. Since Japan had not established any accredited vassal relationship with the Chinese court, official diplomatic relations between the two countries were suspended and the only exchanges with China were commercial, through Chinese merchants conducting trade in Nagasaki. Japan did however have ties with Korea, based on the so-called *kyorin* 交隣 (neighbourly relations) diplomacy, but these ties remained between Japan and Korea alone and did not go further. The peaceful reign of the Tokugawa shogunate held sway with little change (despite minor vicissitudes) for 250 years.

The situation in Asia changed in the nineteenth century, and for Japan in particular with the arrival of the Perry Expedition. In 1853, four ships under the command of Commodore Matthew Calbraith Perry (1794-1858) of the East India Squadron of the United States Navy appeared at Uruga harbour in the bay of Edo (now in Kanagawa prefecture). The arrival of the so-called

1 The term *kaikin* was coined in Ming China, and a similar policy was also pursued in Li dynasty Korea. Such policies were followed to enable the governments to control foreign relations and particularly trade relations. The term by which the policy of national isolation is best known today is *sakoku* 鎖国, invented by Shizuki Tadao in translating a work of Engelbert Kaempfer's in 1801, *Sakokuwon* 鎖国論. For a discussion of the origins of *sakoku* and its implications, see Hiraishi (2001), Fujita (2005), Ōshima (2009), etc. For English studies on this subject, see Laver (2011), Tashiro (1982), Katō Eichi (1972), Katō Hidetoshi (1981), Gipouloux (2011), etc.

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“Black Ships” led ultimately to the Tokugawa government signing friendship and trade treaties with the western powers, which included articles covering unilateral most-favoured-nation treatment, a system of consular courts and a loss of tariff autonomy. They are known as the “unequal treaties”.<sup>2</sup> As a result, Japan made a sharp turn towards a foreign policy based on “opening the country” (*kaikoku* 開国).

From the viewpoint of Transcultural Studies, “opening the country” is an extremely interesting subject for study. As far as Japanese society was concerned, the act of “opening the country” that had its beginnings in Perry’s arrival was a political-historical event, propelling it semi-forcibly, as it was admitted, into the western international system of the nineteenth-century. However, this also gave Japan the opportunity to come into direct contact with a European world that possessed a history and tradition of a different nature from its own.

Japanese scholars, intellectuals and politicians in the last part of the nineteenth century, while understanding acutely the unequal balance of power between Japan and western countries, attempted a positive dialogue with European thought. They searched for a way to preserve Japan’s independence as a nation in a non-western sphere, by studying and adopting the knowledge of European jurisprudence, political economy and political science. Under a complicated power structure fraught with contradiction and tension, they made an intensive and renewed study of their own traditional legal culture and social ethics, and pulled together a political design that looked towards the formation of an open society.<sup>3</sup> Even though we talk about the “reception” of western culture, this does not by any means imply a simple imitation of European learning or the direct import of European political systems and values without any change. Rather, when Japanese intellectuals and politicians encountered different cultures and traditions, they made the greatest possible use of their own traditional vocabulary and concepts to study western political theory in a critical way. In other words, political theory was in no way something abstract. At the time of the opening of the country, their intellectual efforts

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2 Whether or not the unequal treaties really were unequal has today given rise to a great amount of academic discussion that also incorporates the foreign settlements, etc. See Sugiyama (1989), Ugai (2002), Watanabe (2007). In English, see for example Auslin (2006).

3 The encounter with western political ideas by Japanese intellectuals and politicians through the “opening of the country” was of a scale and depth not usually conceived. The intellectual activity that grew out of this encounter with a completely different civilisation was undertaken with a self-awareness that freed western political theory from a closed historical identity and bestowed upon it a new significance (Miyamura [1996], 285-286). For an examination of the research into the history of political thought surrounding “opening the country” and a discussion of the methodology, see Miyamura (1989), Maruyama (1996), Matsuzawa (1993), Watanabe (2010). In English, see Watanabe, Noble trans. (2012), Howland (2002).

aimed at liberating European political theory from a closed historical identity and imbuing it with a new practical meaning in a new context. Their serious intellectual struggle led to the creation of a new political system and social ethic as they sought ways for Japan to survive as an independent state. Such activities expanded in many forms in Japan in the last part of the nineteenth century, and an advanced polemic developed. As the activities of non-western intellectuals living in the nineteenth century, they have a significance that goes beyond the confines of Japanese Studies; from the perspective of transcultural studies, they have a great importance.

With the opening of the country, Japanese society was confronted with a great political task: codification of the law and enacting a modern Constitution. Tokugawa society underwent a metamorphosis and its system of government, which had continued for more than 250 years, collapsed within a scant fourteen years. As Japan became incorporated into the European international system, the framework of its society as a whole was rocked to its very core. In late 1867 a political revolution known as the “Meiji Restoration” occurred and a new government came into being. From the time of its inauguration, this “Meiji government” ran up against the difficult diplomatic issue of revising the “unequal treaties”, and to do so, it felt it had actively to study the western social sciences and legal systems in order to create the sort of civilised nation that western countries would recognise as an equal. On the domestic front too, it had to restore social order, which had been thrown into confusion following the Restoration, and establish a smooth system of rule as a new, modern state. Both external and internal demands thus required the urgent codification of law.

At the same time, a Freedom and Popular Rights (*jiyū minken* 自由民権) movement grew up from among the populace, seeking an expansion of the rights of the people and a broadening of the right to participate in politics. In 1875 the government announced that constitutional government would be set up in gradual stages (“Deed for constitutional government”; *Rikken seitai no shōsho* 立憲政体の証書, *Dajōkan fukoku* No. 58), and six years later, in October 1881, it issued an “Imperial edict for inaugurating a national assembly” (*Kokkai kaisetsu no mikotonori* 国会開設の詔). Meanwhile, a considerable number of private draft constitutions were being prepared by Popular Rights figures outside the government. For example, the *Kōjunsha* (交詢社), the “Society to Promote Social Contacts” that was closely associated with Fukuzawa Yukichi 福沢諭吉 (1835-1901), one of the founders of modern Japan, produced what was known as the “Privately-Prepared Draft Constitution” (*Shigi kenpō hōan* 私擬憲法案), and Ueki Emori 植木枝盛 (1857-1892) drew up the “Tōyō Dai-Nihon National Constitution Proposal”

(*Tōyō Dai-Nihonkoku kokken-an* 東洋大日本国国憲按), which stipulated popular rights, including the right to protest and revolt, based on natural law. The government regarded such private initiative with apprehension and ultimately enacted an “imperially-bestowed” constitution (*kintei kenpō* 欽定憲法), resisting these popular demands. This was Japan’s first modern constitution, the so-called Meiji Constitution (formally, Constitution of the Empire of Japan), which came into force on November 23, 1890.

As a considerable amount of prior research has shown, the Meiji Constitution was drafted by a group centring on Itō Hirobumi 伊藤博文 (1841-1909) and Inoue Kowashi 井上毅 (1844-1895).<sup>4</sup> Making reference to the Prussian Constitution, they established that the emperor (Tennō 天皇), of an unbroken imperial line and inviolable sacredness held the sovereign power to rule. Nevertheless, we cannot overlook the existence of the private draft constitutions that disappeared from the stage of history once the Meiji Constitution came into being. By casting light on them, we can exhume “another history”, different from the official history, and thereby reveal the many possibilities inherent in the political ideas that existed at the dawn of modern Japan.

In order to follow this interest further, I would like to take up the political thought of Ono Azusa 小野梓 (1852-1886), a leading scholar in the popular rights movement in the 1870s and 1880s who is known as the “founder of political science in Japan”.<sup>5</sup> He is also famous for his involvement, together with Ōkuma Shigenobu 大隈重信 (1838-1922), in the founding of Waseda University (Tōkyō Senmon Gakkō). I will examine Ono’s private draft constitution, *Kokken hanron* 国憲汎論 (A General Treatise on Constitutions), to shed light on what went into Ono’s political thought as he arrived at his ideas about the constitution. To the extent *Kokken hanron* has been called “a work that throws undying light on Meiji legal history”,<sup>6</sup> it is greatly superior to the other private draft constitutions in both quality and volume. In particular, I would like to draw attention to the fact that from his youth, Ono addressed the study of Roman law, and he continued to give his undivided attention to the study of civil and constitutional law right to the end of his short life of thirty-four years. Through the analysis I undertake below of his ideas about the relationship between civil and constitutional law, I would like to answer two questions: to what extent, at a fundamental level, was Ono able to get to grips with the whole body of western law, and how was this understanding transplanted to the legal traditions of East Asia? In the process, I hope to be

4 For a recent study, see Takii (1999). In English, see Takii 2007.

5 Takata, 1918, p. 19. For a study of Ono Azusa in English, see Davis (1980).

6 Fukushima (1978), p. 595.

able to elucidate a unique discourse on the constitution conducted by one intellectual speculating about western and East Asian thought during the period of legal codification that was starting point for the building of Japan as a modern nation.<sup>7</sup>

### The intellectual world of Roma ritsuyō– Roman law and Utilitarianism

#### (1) Annotated translation of Roma ritsuyō

Ono Azusa was born in 1852 (Kaei 5), one year before Pery’s arrival in Japan, in the province of Tosa (in modern Shikoku), the second son of Ono Setsukichi, a samurai of Sukumo domain. He spent his childhood and youth amid the confusion that attended the last years of the Tokugawa Shogunate, and in 1870, in the early years of the Restoration period, he went to study in the United States, privately funded. Then in 1873, he was selected as a sponsored scholar of the Ministry of Finance and sent to study in England. However, the Ministry ordered his return the following year. Awaiting him in Japan was the great political surge that was the movement calling for a national assembly under Itagaki Taisuke 板垣退助 (1837-1919) and others. Following his return, though, he “lived withdrawn”,<sup>8</sup> and immersed himself in making an annotated translation called *Roma ritsuyō* 羅馬律要 (The Essentials of Roman Law).<sup>9</sup> The source of his translation was the English translation, *The Pandects; A treatise on the Roman Law and upon its connection with modern legislation* (1873) by R. de Tracy Gould, of the *Pandecten-systeem, eerst deel* (1866), written by the Dutch legal scholar, Joel Emanuel Goudsmit (1813-1882).<sup>10</sup>

The very interesting thing about this work is that it follows the style of an “annotated translation” (*sanyaku* 纂訳). It is not simply what we usually mean by “translation”, since it consists, not just of the translation of the original text itself, but also of passages and explanations inserted by Ono. These constitute Ono’s own research, and derive largely from quotations from works by Jeremy Bentham. Thus we can regard *Roma ritsuyō* as an independent work which bears the traces of his intellectual struggle with European law, embracing Roman law according to Ono and Benthamite Utilitarianism.

7 This essay is based on the fourth and fifth chapters of Ōkubo (2010).

8 Jap. *senkyo* 潜居. Ono Azusa. *Jiden shiryō*, in *Ono Azusa zenshū*, Vol. 5, p. 316.

9 Ono’s manuscript copy of *Roma ritsuyō* was for a long time preserved in the Ministry of Justice Library. It became widely known after the complete text was published in 1974 by the Waseda University Institute of Comparative Law as *Ono Azusa-kō, Kokken hanron, Roma ritsuyō*, critically edited by Fukushima Masao, Nakamura Kichisaburō and Satō Atsushi.

10 J. E. Goudsmit, *Pandecten-systeem, eerst deel*, Leiden, 1866, translated by R. de Tracy Gould, *The Pandects; A treatise on the Roman Law and upon its connection with modern legislation*, London, 1873.

This work has a further important significance, both in terms of the pioneering role it played in introducing Roman law to Japan very early in its modern period and in terms of the history of the reception of western law in Japan. As is well known, Japan maintained trade and mutual exchange with the Netherlands throughout the Tokugawa period, despite the ban on overseas intercourse from the seventeenth century, through the VOC (Dutch East India Company) settlement of Dejima in Nagasaki. From here emerged “Dutch Studies of Dutch Learning” (Rangaku 蘭学), principally the natural sciences, such as medicine, astronomy and pharmacology. And at the dawn of the modern era too, when there was a concerted effort to gain knowledge of western humanities and social sciences, it was against the backdrop of this tradition that knowledge of contemporary law, political science and economics was brought from the Netherlands.

Knowledge concerning European legal systems came first from the translation of Dutch legal texts, including the Constitution, Criminal Code and Codes of Civil and Criminal Procedures, during the 1840s under Mizuno Tadakuni 水野忠邦 (1794-1851), a senior councillor (*rōjū* 老中) in the Shogunate.<sup>11</sup> These translations had extremely limited exposure and were not widely known among the general public. It was to be the scholars of the Bansho shirabesho 蕃書調所, a school of western learning founded on the traditions and knowledge of Dutch Learning, set up by the Shogunate in 1857 in response to Perry’s arrival, who propelled the understanding and dissemination of European law, politics and economics. In a landmark decision, the Shogunate decided in 1862 to send two scholars, Nishi Amane 西周(1829-1897) and Tsuda Mamichi 津田真道 (1829-1903) to study in the Netherlands. They left the following year, as the first students to be sent officially to study in Europe. They studied in Leiden for two years under the supervision of Simon Vissering (1818-1888), a professor in the faculty of law at Leiden University, who gave them personal instruction in a five-course curriculum of natural law, international law, constitutional law, political economics and statistics. Nishi and Tsuda became the first Japanese to study abroad in Europe, receiving direct, systematic and comprehensive instruction from a noted European scholar in the mechanisms of European law, political institutions and economics. After their return to Japan, they translated their Dutch lecture notes into Japanese, which were published in a series of books: *性法説約* (Lectures on Natural Law) in 1879, *Bankoku kōhō* 万国公法 (Lectures on International Law) in 1868, *Taisei kokuhō ron* 泰西国法論 (Lectures on Constitutional Law) in 1868, and *Hyōki teikō* 表紀提綱 (Lectures

11 See Verwaijen (1996) for a study centring on an analysis of the *Waran rissho* 和蘭律書, translated by Mitsukuri Genpo (1799-1863). For a general study of Tokugawa translations of Dutch legal texts, see Verwaijen (1998). For a broad sketch of the reception of Dutch law in Japan in the latter half of the nineteenth century, see Feenstra 1981.

on Statistics) in 1874. They were to exert a great influence on shogunal policy, as well as on the subsequent building of the Meiji state and the development of academic thought in Japan.<sup>12</sup> As a result of Nishi's and Tsuda's period of study in the Netherlands, knowledge of European legal systems and law, mediated by Dutch Learning from the early modern period, accelerated rapidly, both in understanding and diffusion, compared with their former limited exposure.

Moreover, after 1868, political science and the law flowed into the country in vast quantities from the leading countries of the time – Britain, France, Germany and the United States. Most scholars and politicians in Japan were engaged in seeking a model that worked for the codification of their own law: what country should they look to to provide it? Thus three different and opposing patterns were devised, the English, the French and the German.<sup>13</sup> By comparison, the importance and influence of Dutch Studies gradually declined.

Given the particular historical circumstances surrounding the reception of European law, and the current political situation, why did Ono seem to go against the trend of the times, “living withdrawn” and throwing himself into the world of Roman law through the work of the Dutch jurist, Goudsmit? Of course, Ono was no longer a Rangaku scholar – he translated it into Japanese from an English translation. However, if we want to throw light on the intellectual landscape that made up the background for *Roma ritsuyō* and to follow the traces of the various conflicts that developed, then Ono's work is of significance in the history of political thought at the dawn of the modern age in Japan. Let us begin our investigation by looking at the distinctive features of the original work, *Pandecten-systeem*.<sup>14</sup>

## (2) J. E. Goudsmit and Nineteenth-Century Dutch Law

Joel Emanuel Goudsmit was born on June 13, 1813 in Leiden to Jewish parents. After entering the University of Leiden in 1829, he studied under Cornelis Jacobus van Assen (1788-1859), a scholar of Roman law, and was appointed professor of Roman law at that university in 1858.<sup>15</sup> He was an

12 For a detailed study, see Ōkubo (2010), chapters 1-3. These chapters will shortly appear in English translation as *The Quest for Civilization: Encounters with Dutch Jurisprudence, Economics and Statistics at the Dawn of Modern Japan* (Brill).

13 For a representative study that analyses conflicts in the reception of western political theory in Meiji Japan, see Yamamuro (1984).

14 Prior scholarship analysing Ono Azusa's Treatise on Civil Law includes Satō (1974) (1983) (2004), Fukushima (1974). However, they do not seek to trace the Dutch law in the background, nor do they ask what sort of person Goudsmit was, or what the distinctive features of the *Pandecten-systeem* were.

15 For a biography of Goudsmit, see Levy (1882) and also the entry “J. E. Goudsmit” in the *Nieuw nederlandsch biografisch woordenboek*, pp. 610-611.

active member of a number of academic societies, including the Koninklijke Akademie van Wetenschappen (The Royal Netherlands Academy of Arts and Sciences), and was made a Ridder (knight) of the Order of the Netherlands Lion. His *Pandecten-systeem*, published in 1866, is a representative work of Dutch jurisprudence in the latter half of the nineteenth century, and its English translator, R. de Tracy Gould, referred to Goudsmit as one whose “name has long been regarded, throughout the Continent of Europe, as of supreme authority, in all that concerns ... Roman Law”.<sup>16</sup>

During Goudsmit’s time as a student, he was greatly influenced by Johan Rudolph Thorbecke (1798-1872), a professor at the University of Leiden and one of the lights of Dutch legal circles at the time. Thorbecke had in turn been influenced by a German scholar of Roman Law, Friedrich Carl von Savigny (1779-1861) and was one of the first to work in historical jurisprudence, asserting that law developed over history within the manners and culture of a people, and thereby pushing aside the prevailing abstract arguments of the proponents of natural law. It was within this context that Thorbecke’s interest in law moved towards positive law (*ius positum*), man-made law as distinct from natural law. He called for the realization of a responsible Cabinet, limitations on the powers of the monarch and a broadening of the franchise, and proposed changes to the constitution. In March 1848, King Willem II, fearful of the repercussions of the February Revolution in France that overthrew the monarchy of Louis Philippe, suddenly shifted from his conservative and absolutist stance and formed a committee to revise the constitution, with Thorbecke as its head.<sup>17</sup> A revised constitution was promulgated in November 1848. It introduced a system of a responsible cabinet, a truly constitutional monarchy with specific limitations on the authority of the king, and direct election of members of the lower house, state assemblies and local councils. In this way, the Netherlands experienced a moderate political reformation, as a liberal system was established which made Thorbecke the prime minister. From the middle of the nineteenth century, historical jurisprudence and legal positivism extended their power widely in Dutch legal circles as a result of such political activities and movements.<sup>18</sup>

Simon Vissering, who mentored Nishi Amane and Tsuda Mamichi, was a student of Thorbecke and his successor at the University of Leiden. Goudsmit also had a close friendship with Thorbecke and was a colleague of Vissering in

16 R. de Tracy Gould, “Translator’s Preface”, in *The Pandecten*, p. vii.

17 For representative studies of Thorbecke’s political thought, see for example Poortinga (1987) and Drentje (2004).

18 See Otterspeer (1992), Kossmann (1978), Duynstee (1940).



the same faculty. Another student of Thorbecke was the philosopher Cornelis Willem Opzoomer (1821-1892), through whose work Nishi Amane studied the ethics of J. S. Mill (1806-1873), and Opzoomer too had been a close friend of Goudsmit since their university days. Goudsmit later wrote to Opzoomer, recalling their time as students. “How often do I remember, with a sense not completely free of nostalgia, the enjoyable evenings when, light-heartedly and cheerfully and without any concern for the future, we delighted in the fine, terse and concise fragments of the incomparable Papinianus, in the strict logical style of reasoning of the still insufficiently known Donellus, and in the just published parts of Savigny’s unequalled masterpiece.”<sup>19</sup> This was the environment within which Goudsmit studied Roman law. It was not at all surprising that he should have been deeply influenced by the historical school of jurisprudence led by Savigny that was opening new vistas on the study of Roman law in Germany at that time.

In his *Pandecten-systeem*, Goudsmit gave an overview of the research history concerning Roman law and criticised the school of natural law that had risen to dominance in the eighteenth century for “its grand defect ... exclusiveness” and its ahistoricity, based on pure reason. Its followers “were unable to perceive that the present is attached to the past by indissoluble ties” and that “the experience of several centuries” is “an indispensable pilot, whose guidance must be followed”. He ascribed the “Historic School”, whose pioneer was Savigny, as “having reconnected the broken chain which linked the past to the present, and replaced the History of Law upon its pedestal”.<sup>20</sup>

The distinguishing feature of the historical school of jurisprudence is the understanding that the law, like language, manners and customs, is born of a “common conviction of a people” and that it takes form and develops together with that people. “Law” (*recht*) is explained as a system of rights, an organic combination of rights as subjective *recht* based on the “will of individual people”. Goudsmit also incorporated this concept of law and rights, and as we shall see, it runs throughout the First Book of *Pandecten-systeem*.

We may find the background to this idea in the historical context of the codification of civil law that occurred in the Netherlands in the nineteenth century.<sup>21</sup> With the collapse of French rule in 1813, the Netherlands established its own constitution the following year. The *Code civil* (Napoleonic Code)

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19 J. E. Goudsmit, *Brief van Mr. J. E. Goudsmit, aan Mr. C. W. Opzoomer, naar Aanleiding van een Werkje van Prof. Büchel, Üeber die Nature des Besitzes*. Leiden, 1868, p. 5.

20 J. E. Goudsmit, *Pandecten-systeem*, pp. 12-13. *The Pandecten*, p. 13.

21 The following summary is based on “J. E. Goudsmit” in Levy 1882.

however remained in force and the implementation of a new code took some time. A committee under Johan Melchior Kemper (1776-1824) submitted a draft code based on the idea of natural law in 1816, but Parliament turned it down in 1820 as being dogmatic, ignoring historically-based legal custom. The civil code that finally came into force in 1838 was based largely on the French *Code civil* it was supposed to replace. This incited people's interest in Roman law, which underlay the French code, and which had, long before the French unification of the European codes, formed the legal tradition of the continent.

On top of this came the famous controversy of 1814 in Germany between Savigny and the jurist Anton Friedrich Justus Thibaut (1772-1840), who taught Roman Law at the University of Heidelberg. Thibaut suggested a general civil code for all of Germany (then composed of 41 kingdoms and territories), but Savigny opposed the idea as premature, saying that law was based on custom and needed an historical context. There were, in the Netherlands and Germany at the time, great differences of opinion concerning both the evaluation of the French civil code and the significance of Roman law as a legal tradition. Nevertheless, we can see that the historical school was born when jurists took up the banner against the movement that looked to a law based on "universal reason", unconcerned with the organic development of existing law. In this sense, the study of Roman law by the historical school both in the Netherlands and Germany during the period of codification in Europe was not simply an academic exercise but had practical meaning. This was the environment within which Goudsmit emerged.

All the same, Goudsmit was aware that at times the historical school was overconcerned with historical research and so was in danger of losing sight of its purpose as a study of law. He rarely referred to the "folk", the concept that Jacob Ludwig Grimm (1785-1863) and others had inherited. In his inaugural lecture given at Leiden University in 1859, he insisted that Roman law was the well-spring of existing legal systems in Europe, and declared, "One should study Roman law, not because it is Roman but because it is law".<sup>22</sup> In lectures to students too, he pointed out that the superiority of Roman law was in the way it could be applied practically. Specifically, "Roman law had the ability to adapt to gradually changing customs and concepts and political systems, not to agitate people through sudden revolution or weaken the respect for traditions, but rather to disentangle obstinate systems as necessary and adjust

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22 J. E. Goudsmit, *Redevoering over de Vraag: "Waartoe Dient in den Tegenwoordigen Tijd de Beoefening van het Romeinsche Regt in Nederland?"*, Haarlem, 1864, p. 29.

their direction”.<sup>23</sup> If people understand the “fresh and inspiring spirit” within Roman law and study it as a “model for the development of law”, they will be able to refine their legal system in a way more freely and over a broader scope. Though we speak of studying ancient Rome, he said, this is not with the intention of being overconcerned with the vestiges of times past, such as the slave system. Rather, through the study of history we reject irrational elements like the slave system that connote ancient Rome and separate out the useful and universal functions possessed by Roman law. Thus we understand the meaning of the law as it is today and its origins, and acquire the technique to interpret and apply it appropriately. This in itself is the modern significance of studying Roman law, said Goudsmit.<sup>24</sup>

Stemming from such concerns, Goudsmit sometimes accepted positively and sometimes reviewed critically the work on the pandects by contemporary German jurists like Georg Friedrich Puchta (1798-1846) and Bernhard Windscheid (1817-1892), successors of Savigny. His *Pendecten-systeem* was the work that systematised his own study of Roman law.

### (3) *Roman Law and Utilitarianism in Roma ritsuyō*

How did Ono Azusa tackle Goudsmit’s work? He described his motivation to undertake the annotated translation in the following way. “Since the Restoration”, Japan has paid great attention to “the west”, “wanting to adopt the strengths [of western countries] to overcome its own weaknesses”. The same applies to the legal system, with “some looking to France and others to Britain”. However, “Western law largely has its origin in Roman law”. “The Napoleonic Code and the (civil) code of Frederick [III], valued and respected by Europeans, also have their origins in Roman law. The laws of Britain and the United States also find their basis in Roman law”. Consequently, all those who “study deeply” the present western legal system “must first study Roman law”. “If we do not learn its origins, we cannot investigate whether its descendants are genuine or not”.<sup>25</sup> Thus even as Japan was adopting western legal systems it was necessary to study the Roman law that was their “origin”. Ono later reminisced about the particulars of his annotated translation in his *Jiden shiryō* 自伝志料 (Autobiographical Materials). According to him, after about twenty years had passed since the opening of the country, there was a concerted effort to assimilate the law of France and other European countries. However, this consisted of nothing but superficial explanations of “the letter

23 J. E. Goudsmit, *Toespraak aan zijne Leerlingen ter Gelegenheid van de Opening zijner Lessen over de Instituten van het Romeinsche Regt*, Leiden, 1864, pp. 7-8.

24 *Ibid.*, pp. 6-9.

25 Ono Azusa, “Roma ritsuyō”, *Ono Azusa zenshū* Vol. 2 (1979), pp. 3-4.

of the provisions” and did not reach any “deep analysis” of the “principles of law” (*hōri*, 法理) that supported its foundation. Thus he had decided to seek what “our civil law” should be by investigating the essential qualities of western law by tracing it back to Roman law, its well-spring, with Goudsmit’s work as a guide.<sup>26</sup>

As Ono noted, the Meiji government, looking towards codifying its laws, was at that time seeking to introduce European law formally by translating it verbatim. There is a famous episode which symbolizes this state of affairs, when Etō Shinpei 江藤新平 (1834-1874), who was involved in establishing new political institutions as a high-ranking government official, ordered Mitsukuri Rinshō 箕作麟祥 (1846-1897), to render the French civil code into Japanese. Etō said to Mitsukuri, “Just hurry up and translate it, it doesn’t matter if there are some translation mistakes”.<sup>27</sup> Ono’s study of Roman law was also a criticism of such a government attitude.

At the beginning of the *Pandecten-systeem*, Goudsmit presented a classification of rights into four divisions, based on the system adopted by the German jurists Gustav Hugo (1764-1844) and Georg Arnold Heise (1778-1851): rights concerning things (*Zaken-recht*), rights of obligations (*Obligatie-recht*), family rights (*Familie-recht*) and rights of inheritance (*Erfrecht*). But, Goudsmit said, over and above discussing each particular subject, there are “certain points which are common to all the relations of Right”; this he discussed in “Book First” of the *Pandecten-systeem*, “Of rights in general” (*Algemeen deel*).<sup>28</sup> Ono’s *Roma ritsuyō* was a translation with added commentary of the first five chapters of “Book First”: (1) Rights (*Het Recht*), (2) The idea of rights, and their divisions, (3) Of persons, or subjects of rights, (4) Of things, or objects of rights, and (5) Of the exercise of rights and the means of enforcing them.

A distinctive characteristic of Goudsmit’s *Pandecten-systeem* as a whole is the practice of Roman law and its applicability to the present. To this end, his main text analyses rights and the system of laws within them, and explanatory notes illustrate their continuity within the legal systems of the countries of Europe at the present time. Ono was in sympathy both with Goudsmit’s methodology based on the historical school and with his practical concerns, and guided by this he acquired a focus through which to relativise and criticise modern western legal systems. Ono then moved on to a study of “rational law” (*gōri*

26 Ono Azusa, “Jiden shiryō”, *Ono Azusa zenshū*, Vol. 5, pp. 316-317.

27 Matono (1914), Vol. 2, p. 107.

28 J. E. Goudsmit, *Pandecten-systeem*, pp. 16-19, 35-36; *The Pandects*, pp. 17-21, 40-41.

*no hō* 合理の法) and the “principles of law” (*hōri* 法理) that were spread throughout “Roman law”, preserving the “common happiness of the people”.

First, Ono had to define “law” and “right”. He used the word *kenri* 権理 to translate *recht* (right), explaining his choice in accordance with the original text. “Broadly speaking, that which is called Rights (Recht) (*kenri* 権理) is the universal conviction (*de gemeenschappelijke overtuiging*).” This “leads all members of the same community to recognise and adapt one uniform rule as the guide of their actions”. It appears in the form of “laws” (*ritsurei* 律例) and “customs” (*kanshū* 慣習).<sup>29</sup> As “broadly speaking” demonstrates, here Rights (Recht) is not “right” in a narrow sense but indicates “Law” as a whole. It may be inferred that Ono’s understanding was correct on this point from a footnote, which reads, “The notion of ‘Rights, Recht’ which the ancient Romans use is frequently of the same meaning as the matrix of the laws. Defining “right” in the narrow sense, he again followed Goudsmit’s original text. “A Right in its subjective sense is the power given, by right in the objective sense, to the will of a person, relatively to a certain object”.<sup>30</sup> Thus in *Roma ritsuyō*, law is understood as a system of rights through which subjective right/Recht is organised. Rights and obligations are determined by means of the “law” as “defined by the people in general”, that is, by all the members of the same community. Ono’s commentary tells us that he had, with great effort, correctly understood Goudsmit’s jurisprudence, developed out of the work of Savigny and others of the historical school. Based on this definition of “law”, Ono went on to insert a comment about the historical development of Roman law that cannot be found in Goudsmit’s original, explaining that the basis of Roman law is to be found in the “disposition of the people towards self-government (*jichi* 自治)” existing within the political culture of Republican Rome, and in the legal traditions of the jurists who supported it.<sup>31</sup>

How did Ono understand the concept of “rights” that was at the core of this? What he developed here was a theory of rights based on “status”. Relying on Goudsmit’s historical school argument, Ono explained that human rights are determined by “various laws and ordinances” (*hatto* 法度) enacted for the purpose of “maintaining the social intercourse of people”. But they are by no means “natural”.<sup>32</sup> Goudsmit wrote that for the Romans, “status” meant

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29 Ono Azusa, *Roma ritsuyō*, p. 10; J. E. Goudsmit, *Pandecten-systeem*, p. 29, *The Pandects*, p. 32.

30 Ono Azusa, *Roma ritsuyō*, p. 30; J. E. Goudsmit, *Pandecten-systeem*, pp. 34-35, *The Pandects*, pp. 38-39.

31 Ono Azusa, *Roma ritsuyō*, pp. 10-27.

32 *Ibid.*, p. 40.

“the position which a man occupies relative to other men”, and though all are capable of having rights, they are not the same for all. He classified rights into three: the right to liberty, the right to citizenship and the right to ties of agnation. Ono added his own comment, saying that in Republican Rome, there existed “free people”, “the right to liberty” and “the right to citizenship” among people who had the legal status and state of freeborn individuals.<sup>33</sup> With the development of the law and society, the citizens of Republican Rome established broad “civil rights” (*minken* 民権) based on the rights to liberty and citizenship. There, “civil rights” were made up of various rights, including “the right to vote”, “freedom of marriage and betrothal”, “freedom to trade”, and “rights pertaining to the possession of property”.<sup>34</sup> Thus Ono, through the concept of “status”, depicted rights in Roman law as historical products that came into being in Roman political culture, that is, self-government by the people. It was here that he detected the origins of “civil rights” within contemporary western legal systems.

This does not mean, however, that Ono evaluated all of Roman law as rational principles of law. Goudsmit had pointed out that “rights to ties of agnation” that relied on the slave system or the *paterfamilias* had “no connection with us today”.<sup>35</sup> Ono went further and criticised such rights head-on, citing examples from East Asian legal culture. He discovered within the “subjugation” of wives and children to the “*paterfamilias*” in the Roman family system a close resemblance with family relationships in East Asia, which he judged to be “damaging to the interests of human society”.<sup>36</sup> He also stated clearly that the slave system was “irrational” (*hiri* 非理) and ran counter to “the great principle of utility (*shinri* 真利).<sup>37</sup> During the Tokugawa period in Japan, the bushi (warriors), as retainers of the various daimyo (domain lords), placed their lives and bodies into the care of their lord, and this Ono saw as being in the nature of servitude. However, Japanese society had freed itself, he said, from the shackles of servitude and drudgery that closely resembled “ancient Rome”, as a result of the Meiji Restoration and the subsequent abolition of the domains. This in itself was a golden opportunity to create a political society by “free people” possessing “civil rights”.<sup>38</sup> Thus for Ono, living in East Asia,

33 Ono Azusa, *Roma ritsuyō*, p. 40; J. E. Goudsmit, *Pandecten-systeem*, pp. 44-45, *The Pandects*, pp. 49-51.

34 Ono Azusa, *Roma ritsuyō*, pp. 40-42.

35 J. E. Goudsmit, *Pandecten-systeem*, pp. 44, *The Pandects*, p. 49.

36 Ono Azusa, *Roma ritsuyō*, p. 172.

37 *Ibid.*, p. 50.

38 *Ibid.*, pp. 51-52.

there was practical significance in his criticism of the irrationality of the slave and patriarchal systems and in casting light on the civil rights of a free people.

In his discussion about the slave and patriarchal systems, it is notable that Ono rejected the irrationality of Roman law by quoting from Jeremy Bentham's *Principles of the Civil Code*, pronouncing that "Where there is *shinri* 真利 (true utility), there is *shinri* 真理 (true principles)."<sup>39</sup> Here, distinguishing between rational principles and irrationality in Roman law, Ono introduced "utility" as his own individual axis. Guided by Goudsmit's study of Roman law, he utilized Bentham's jurisprudence to prune away the "irrationality" lying within it. Thus he attempted to break away from the bounds of western society and extract, from the well-spring of western legal tradition, universal "principles of law" capable of being applied to another cultural sphere.

From the third chapter, Ono quoted widely from Bentham's study of the civil code, comparing it to the Pandects text. Of particular interest is that a discussion of rights is introduced, based on Bentham's "state" / "condition".<sup>40</sup> As Ono noted, like Goudsmit's historical jurisprudence, Bentham's theory of civil legislation also takes the position of legal positivism, understanding that rights and obligations are created by the law. Bentham also criticised the idea of natural rights. He pointed out that rights and obligations are determined by law according to various states and conditions, such as "husband and wife, parent and child, master and servant, between equal citizens, [and] government and people", based on "sociability", "that existed before the establishment of laws".<sup>41</sup> Here, Ono detected a common concept of rights between Goudsmit's Roman law, based on historical jurisprudence, and Bentham's theory of civil legislation. From this point of view, he deduced a theory of legal rights, rejecting natural rights and defining rights as a legal product enacted in order to protect various kinds of "social intercourse" (*jinkan kōsai* 人間交際).

In the final part of the *Roma ritsuyō*, Ono introduces Bentham's criticism

39 Section 3, "The Rights of Father and Child" of the *Roma ritsuyō* (pp. 196-199), is Ono's own commentary patterned after Bentham's "Principles of the Civil Code", Third Part, Chapter IV "Father and Child". In the fifth chapter of *Roma ritsuyō* too, Ono introduced "Bentham's laws on inheritance and succession", found in Second Part, Chapter III, pp. 334-336. Bentham's "Principles of the Civil Code" was first published in French in 1802, included in *Traité de Législation Civile et Pénale* by Étienne Dumont. It is probable that Ono used the English translation.

40 In particular, Ono Azusa, *Roma ritsuyō*, pp. 187-189, p. 224.

41 Here Ono relies on J. Bentham, "Principles of the Civil Code", and J. Bentham, "A General View of a Complete Code of Laws", in *The Works of Jeremy Bentham*, vol. I, pp. 338-339 and vol. III, pp. 179-180 respectively.

of natural rights and the social contract. Quoting from Chapter Five of the Part Two of “Principles of the Civil Code”, Ono criticised natural rights and the social contract as spoken of by philosophers from Hugo Grotius to Jean-Jacques Rousseau. He closed his work by praising Bentham’s arguments “that expounded the correspondence between utility and truth” and made clear that “obligations are necessarily based on utility” as “one of the greatest of all discoveries, penetrating the shallow views of past and present”.<sup>42</sup>

In this way, Ono was led by Goudsmit’s study of Roman law, itself deeply influenced by historical jurisprudence, to look back on the origins of the western legal tradition and from there to attempt to elucidate the “principles of the law”. However, Ono did not share the same historical traditions as Goudsmit, born a European, and so needed to build a foundation for Roman law’s usefulness as a “rational law”, based on open and general principles. Therefore he had introduced Bentham’s legislative and civil law theories that had reconstructed the law on the basis of humanistic ideas grounded on the “fact” of empirical science, pleasure over pain. Bentham’s jurisprudence and historical jurisprudence shared something in common in that both determined rights to be positive law, and criticised natural rights and the theory of social contract.

(4) *The significance of the annotated translation in the history of political thought*

Ono’s *Roma ritsuyō* was the first attempt at a thorough study of Rome undertaken at the dawn of modern Japan, and it is extremely important for two reasons. First, the idea of legal rights based on social intercourse, deduced in a form that bridged Goudsmit’s historical jurisprudence and Bentham’s civil law theories, had a special resonance with the popular rights movement of his time. In February 1875, Ono published an article called “The Thieves of Rights” (*Kenri no zoku* 権理之賊), against the backdrop of Bentham’s discourses on rights. In it, he criticised shallow-minded students with only a superficial knowledge of western books who, at a time when discussion centred on the establishment of a representative assembly, called for rights and freedom because they harboured a personal grudge or because they sought fame and honour. The problem for Ono was that, influenced by the idea of natural rights, such people were advocating natural liberty (rights and freedom bestowed by Heaven). As far as he was concerned, this natural liberty would ultimately lead to a society where only the fittest would survive. People would not think of others but simply assert their own rights, regardless of everyone else, so that finally they would despoil one another of their very

42 Ono Azusa, *Roma ritsuyō*, pp. 228-229; J. Bentham, “Principles of the Civil Code”, p. 351.



lives. This was too radical and over-excessive, and “greatly harmful to the way of coexistence”.<sup>43</sup> Besides criticising the idea of natural rights and natural liberty, he also advanced another type of discussion about rights. He called the idea “civil liberty, or the rights based on social intercourse”. According to Ono, legal rights and obligations should come into existence where mutual human intercourse is protected by law, such as the relations between husbands and wives, parents and children, guardians and wards, masters and servants, self and others, and state and people.<sup>44</sup> Rights and obligations thus first make their appearance in the enactment of laws based on social life. Consequently, we must consider, without going to extremes of behaviour and advocating our own personal rights alone, how we set up a system of laws that is aware of social intercourse and go on to determine rights and obligations accordingly. This is a true theory of rights and liberty.

We can trace Ono’s interest in social life, that is, “the way of mutually sustaining and supporting the lives of one another” and “living together in harmony” to an essay he wrote in 1870, prior to going abroad to study, entitled “On the Salvation of the People” (*Kyūminron* 救民論).<sup>45</sup> It is possible that at the root of his constant awareness of these concerns was the influence of the philosopher Han Yu (768-824), through writings such as “Essentials of the Moral Way” (*Yuandao* 原道) that he had known from childhood.<sup>46</sup> His theory of civil rights in *Roma ritsuyō* was also achieved as he developed further the issues he had been interested in before he went abroad, employing traditional vocabulary from East Asian thought and expanding its concept.

Although Ono had thrown himself into the Freedom and People’s Rights Movement, his ideas about rights within social intercourse showed him to be seeking a path different to that of people like Ueki Emori who advocated natural rights and the right of resistance. As a result, of all his intellectual activity, Ono’s inquiry into the legal system – civil law and the constitution – was highly significant also in terms of achieving civil rights. As we shall see in the next section, his conception of a constitution that was both moderate and gradual came into being as an extension of his theory about rights.

The second reason for the importance of *Roma ritsuyō* is that Ono’s intellectual efforts displayed within it are of great significance from the viewpoint of the

43 Ono Azusa, “Kenri no zoku”. *Ono Azusa zenshū* Vol. 3, 1980, pp. 13-14.

44 *Ibid.*, pp. 14-16.

45 Ono Azusa, “Kyūminron”. *Ono Azusa zenshū* Vol. 3, 1980, p. 3. See Davis (1980), pp. 27-28.

46 See Kinoshita (2002), p. 246.

reception of Bentham's utilitarianism early in the Meiji period. In Edo-period Japan, the concept of "utility" (*ri* 利) was at times often discussed negatively, as for example in terms of the difference between *yi* 義 (righteousness or justice; Jp. gi) and *li* 利 (benefit or utility; Jp. ri) in Confucianism.<sup>47</sup> When utilitarianism entered Japan from the west as the latest thing in philosophical ideas in the Meiji period, it made a great impact on people in that it spoke positively of maximising utility and happiness. In the early Meiji years in particular, bureaucrats dealing with law codification in the government, such as Mutsu Munemitsu<sup>48</sup> (1844-1897), Shimada Saburō (1852-1923) and Ga Noriyuki (1840-1923) were greatly receptive to Bentham's utilitarianism. They took a great interest in Bentham's jurisprudence as a science of legislation that brings about true happiness for society as a whole, and subsequently produced a great number of translations of Bentham's works. There is an overlap here too with Ono, whose annotated translation, *Roma ritsuyō*, paved the way for his appointment as a bureaucrat within the Civil Law section of the Justice Ministry.

Closer study however reveals the existence of unmistakable differences between Ono and a core figure among the bureaucrats, Mutsu Munemitsu. In his essay *Shiji seiridan* 資治性理談, Mutsu asserted that if people were left to themselves "freely", they would be moved only by "greed" and conflicts and disorder would be sure to occur. The result would be a diminishing of the "pleasures of humankind". Therefore, "superior people" with a great amount of knowledge and understanding must demonstrate the advantages and disadvantages of any situation to "inferior people" and determine what constitutes wrongdoing. In other words, "superior people" lay down the law thinking of the greatest happiness of society, and "inferior people" "submit" to it. In this way, true happiness for all of society will be realised.<sup>49</sup> What Mutsu took from Bentham's jurisprudence was the figure of the legislator as a superior person who governs subjects through sanctions based on a calculation of pleasure. This was the diametric opposite of Ono, whose concern was always how to determine legal rights and obligations within the social intercourse of people.

In his civil code, Bentham determined what were legal rights and obligations and put restrictions on unlimited natural freedoms. Further, he insisted that

47 For example, Zhu Xi, "Mengzi jizhu" (Commentary on Mencius), *Sishu zhangguo jizhu* (Commentaries on the Four Books), p. 202.

48 Studies in the reception of utilitarianism in the early Meiji period include Matsuzawa (1984), Miyamura (2005), Anzai (1995) and Sugawara (2009). See also Chapter 2 of Ōkubo (2010).

49 Mutsu (1929), pp. 246-248. For a detailed study of Mutsu's reception of Bentham's utilitarianism, see Miyamura (2005), Ch. 12.

people were able to enjoy life, security, survival, equality and true liberty because the penal code kept control over the illegal behaviour that violated such rights.<sup>50</sup> Consequently, the penal code, which carries out legal sanctions, is “the language of a father and a master” and it precedes all other codes.<sup>51</sup> If we consider the relationship between penal and civil law, the figure of the legislator that Mutsu drew lessons from was, within Bentham’s jurisprudence, a commanding presence in the penal code.

Ono, by contrast, deeply admired rather the civil code throughout his life. Recent research on Bentham has drawn attention to the distinctive perspective of his civil code. According to Paul Joseph Kelly, for example, for Bentham, “law provides the basic framework of social interaction by delimiting spheres of personal inviolability within which individuals can form and pursue their own conceptions of well-being”.<sup>52</sup> Ono’s viewpoint also meshes with such an understanding. Through his study of Roman law and through his efforts to identify civil rights as the principles of law existing at the origin of western legal systems, and even as he came to grips with Bentham’s jurisprudence, Ono exhibited a keen appreciation of a civil code that determined the rights and obligations within the social life of people, rather than of a penal code that governed people through commands and criminal law.

In the early years of the Meiji period, when the codification of law emerged as a political issue, the government favoured adopting western systems of law superficially, by means of direct translation. As a result, however, this led to chaotic political situation, and the government met ridicule over its lack of principle. While many politicians and scholars actively looked to Britain, Germany or France as a model for the course Japan should follow, amid the exigencies of the time, Ono went to the opposite extreme, submerging himself in western legal traditions and daring to choose the more roundabout route of Roman law as a subject of study. He turned his interest to ideas concerning the traditional culture of self-government in Europe, and endeavoured to extract universal principles of law capable of being applied to Japan, with its different historical experience. His efforts are positioned within intellectual history as an activity that gave further depth to how western legal systems and jurisprudence were received in Japan, advancing knowledge of them from their limited initial exposure in the Tokugawa period to a more systematic understanding.

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50 J. Bentham, “Principles of the Civil Code”, pp. 301-302, “A General View of a Complete Code of Laws”, p. 160.

51 J. Bentham, “A General View of a Complete Code of Laws”, pp. 161-163.

52 P. J. Kelly (1990), p. 81.

Further, the *Roma ritsuyō* itself is also of great interest in terms of cultural contact, as the result of Ono's close study of Goudsmit's *Pandecten-systeem*, one of the preeminent Dutch legal works of the time. Dutch Studies (Rangaku) had played an important role during the Tokugawa period as the one and only conduit to a knowledge of the western world, and subsequently formed the foundation for the reception of the humanities and social sciences in Japan. However, by the beginning of the Meiji period, people's interest had turned completely toward the scholarship of Britain, Germany and France as a result of the decline in the position of the Netherlands in international society. This meant that there was less to learn from the Dutch political and legal systems as models. It can be said that there was also a certain fortuity in Ono's encounter with Goudsmit's work. Nevertheless, the most advanced scholarship from Britain, France and Germany was being absorbed by the Netherlands at the time, to be combined with its own political and scholarly currents, and this was assimilated in a simpler form out of practical interest. Goudsmit's study of Roman law, though influenced by German scholars of historical jurisprudence of the time, did not lapse into abstract commentary, nor did it dwell on "folk". It must have seemed an eminently suitable text for Ono, coming across Roman law for the first time. Conversely, it must have provided Ono with fruitful and abundant material for speculation when he was investigating the original state of the law, politics and human beings while undertaking *Roma ritsuyō*. In this sense, Dutch jurisprudence, though not belonging to a country considered able to provide a model for Japan, became all the better a guide for Ono's political and intellectual activities, as he studied the origin of western legal systems. This then is not an episode we can overlook when we consider the reception of western jurisprudence in modern Japan.

All the same, Ono's intellectual efforts still had a way to go. We will now examine how he went on to deepen his study of the idea of a civil code and how that led him towards the idea of a constitution.

### **Political Concepts in Kokken hanron**

#### *(1) Historical Jurisprudence and Utilitarianism*

Just over 200 years ago when Britain's American colonies finally broke away and declared their independence, two major political philosophies confronted each other across the Atlantic. The American Declaration of Independence of 1776 invoked, in some famous brief sentences, the doctrine that all men are created equal and possessed of the natural unalienable rights of man: rights to life, liberty, and the pursuit of happiness, and that it was to secure these rights that governments, deriving their just powers from

the consent of governed, were instituted among men. But only three months before the Declaration of Independence was signed, Jeremy Bentham had announced to the world in his first book *A Fragment on Government* his famous formulation of the principles of utilitarianism.<sup>53</sup>

Thus H. L. A. Hart described the emergence of Benthamite utilitarianism in his essay, "Utilitarianism and Natural Rights". Leo Strauss refers to the formation of the historical school, which included historical jurisprudence, as follows:

The historical school emerged in reaction to the French Revolution and to the natural right doctrines that had prepared that cataclysm. In opposing the violent break with the past, the historical school insisted on the wisdom and on the need of preserving or continuing the traditional order.<sup>54</sup>

The idea of natural rights was the theoretical wellspring of the American Declaration of Independence (1776) and the French Declaration of the Rights of Man (1789). The historical school and Utilitarianism arose in criticism of, and opposition to, this idea. In the *Roma ritsuyō*, these two great and widely influential streams in nineteenth century European jurisprudence intersected and flowed together. Through his study of Roman law, Ono investigated the situation of "civil rights" within the tradition of "popular self-government" that had been formed in Europe over the course of history. He then attempted to revise the understanding of civil rights as a universal "principle of law" from the viewpoint of empirical science, thereby transcending European history and legal culture. In doing so, he was criticising the reception of western legal systems based on direct translation. By going back to the very origins of the European legal tradition, he detached the "principle of law" from its roots and on that basis introduced it into Japanese society.

Viewed from a different angle, however, points of difference inevitably existed between historical jurisprudence and utilitarianism in nineteenth-century European legal thought. In fact, if we consider how they laid the foundation for law, the frames of reference of the two might be said to be diametrically opposite. Bentham defined "law" as "the commands of a sovereign" whose object should be the "happiness of the whole community" and "general utility".<sup>55</sup> In *A General View of a Complete Code of Laws*, he set forth four principles for the promotion of happiness, based on an analysis of pleasure and pain: subsistence, abundance, security and equality. Of the four, he gave

53 Hart (1983), p. 181.

54 Strauss (1953), p. 13.

55 For example, J. Bentham, "A General View of a Complete Code of Laws", p. 186.

primacy to security.<sup>56</sup> On the other hand, the historical jurisprudence embodied in Goudsmit's *Pandecten-systeem* attached great importance to customary law as well as written law; like language and custom, law was based on the "common conviction of a people" living in the same country, and was understood as being formed and developing over history, together with the community.

Thus historical jurisprudence and Bentham's jurisprudence had certainly an affinity in that they both criticised the theory of natural law and determined legal rights on the basis of positive law. At the same time, however, there was a sharp division between them over whether to reduce law to the commands of the sovereign based on the principle of utility or whether to make the history and legal traditions of the whole community its foundation.

This difference took actual form during the period of law codification in Europe in the eighteenth and nineteenth centuries, when many countries, such as Prussia and Austria, undertook, on a large scale, to arrange their laws into a systematic national code. Bentham, invented the term "codification", played a role in codifying laws in nineteenth-century Britain and made proposals to several countries, including Turkey, Egypt and France, for codifying their laws. Criticising English common law, he wanted a legislator to edit a complete collection of the laws, "embracing the whole of litigation", based on the principle of utility.<sup>57</sup> The historical school, however, as can be seen also in Goudsmit's work, rather criticised hasty attempts to introduce perfect and faultless law codes and sought to select and record laws that had come into being over history just as they were.

How then did Ono deepen his inquiry into these two legal theories following his completion of *Roma ritsuyō*? And how did his work fare when he worked as a bureaucrat during a time of codification when the Meiji state was trailing in the wake of the west? To anticipate my conclusion a little, Ono's use of historical jurisprudence as a frame of reference and his interest in the question of utilitarianism continued in a tense relationship, with both theories serving to support his academic thinking. He went on to refine further the "principle of law" that he had extracted from the European legal tradition and root it in Japanese political society in order to grapple with the serious political issues surrounding codification.

## (2) *From Roma ritsuyō to Minpō no hone*

*Roma ritsuyō* brought Ono to the attention of government officials, and in

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56 J. Bentham, "Principles of the Civil Code", pp. 302-303.

57 J. Bentham, "A General View of a Complete Code of Laws", pp. 205-210, "Principles of the Civil Code", p. 324.

August 1876 he was appointed to the Ministry of Justice to codify civil law. Though he resigned after ten days over differences with other members of the committee, he received a new appointment in October and thereafter worked as a bureaucrat, actively involved in preparing laws. He retired from public office in 1881 as a result of the political crisis of that year,<sup>58</sup> and took the opportunity to join with Ōkuma Shigenobu 大隈重信 (1838-1922) to organise a political party, the Rikken kaishintō (立憲改進黨; Constitutional Progressive Party) and to write up his own proposal for a constitution, his *magnum opus*, *Kokken hanron* 国憲汎論 (A General Treatise on Constitutions) between 1882 and 1885. It was thus on the basis of his experience as a bureaucrat involved in legal matters that he produced his own private draft constitution. At the same time he was also deepening his understanding of civil law and in 1884 wrote and published the first volume of *Minpō no hone* (民法之骨; The Bones of Civil Law), based on *Roma ritsuyō*. It is considerable interest that *Kokken hanron* and *Minpō no hone* have an almost twin-like relationship, their prefaces even beginning with the same words.<sup>59</sup> Let us now examine how Ono's understanding of civil law deepened between *Roma ritsuyō* and *Minpō no hone*, in the process throwing light on the connection between Ono's ideas about civil law and about the constitution.

What first strikes us when we compare the two works is the strong influence of the idea that the law is the command issued by a sovereign, found in the works of Bentham and his follower John Austin (1790-1859).<sup>60</sup> Ono defined a system of laws to be “commands, the commands of the ruler”, whose ultimate object was to “secure” “subsistence, abundance and equality” and to “preserve the tranquillity of the nation and society”.<sup>61</sup> Of interest here is that Ono did not translate the world “sovereign” (*shukensha*, 主權者) directly, though he had introduced the definition of the law held by Bentham and Austin, but rather used the expression *shuchisha* (主治者), meaning “someone in political charge”, “ruler”.<sup>62</sup>

58 In October the date for the opening of the Diet was announced and this gave impetus to the formation of political parties. At the same time, Ōkuma Shigenobu was dismissed from office and the Satsuma-Chōshū coalition took firm control of the government. See Davis (1970), Davis (1980), pp. 148-150.

59 Ono Azusa, “Kokken hanron”, *Ono Azusa zenshū*, Vol. 1, pp. 7-14; “Minpō no hone”, *Ono Azusa zenshū*, Vol. 2, pp. 235-237.

60 J. Austin, *Lectures on Jurisprudence or, The Philosophy of Positive Law*, 4th edition, London: John Murray, 1879, Vol. 1, pp. 225-226. “Every positive law ... is set by a sovereign person, or a sovereign body of persons”.

61 Ono Azusa, “Minpō no hone”, *Ono Azusa zenshū*, Vol. 2, pp. 240-245.

62 *Ibid.*, pp. 240, 243.

I will discuss the significance of this further below. For the time being, we can confirm that Ono introduced the legal theories of Bentham and Austin as the basis for his discussion in *Minpō no hone*, unlike in *Roma ritsuyō*, which was based on historical jurisprudence,

In an article of 1877, “Minkei nihō jitsuri” (Principles of Civil and Criminal Law), Ono wrote that following the Meiji Restoration, there had been frequent calls to bring in “European and American laws and legal institutions”. However, because these were closely connected with, and inseparable from, “local customs and practices” that had been followed in the west “from ancient times”. Therefore, sometimes “strange precedents” were included that impaired the “essentials of the legal system”. What we who live in East Asia, he said, with “different habits and customs”, can truly learn from European jurisprudence is the “essentials of the legal system”. In pointing this out, Ono was advocating giving concrete form to a “universal theory of law”, that is, Bentham’s and Austin’s jurisprudence, “based on the principle of utility”.<sup>63</sup>

Nevertheless, the actual content of *Minpō no hone* is by no means simply a verbatim copy of the legal theories of Bentham and Austin. For example, concerning the connection between civil and criminal law, Ono emphasised, unlike Bentham, that “civil law is prior to criminal law, and criminal law has been established to preserve the civil law”. According to him, it was civil law, with its purpose of “explaining and elucidating the rights and obligations in social intercourse”, that was the “primary basis of the legal system”.<sup>64</sup> Besides, the content of *Minpō no hone* relies greatly on *Roma ritsuyō* and much of its argument is based on Goudsmit’s *Pandecten-systeem*. For instance, the list of references at the beginning of *Minpō no hone* includes the names not only of Bentham and Austin, but also contemporary Dutch and German scholars of Roman law, such as Goudsmit, Savigny, Hendrik Cock, Johann Friedrich Kierulff and Windsheid.<sup>65</sup> Their arguments do appear in the text, and most are quotations from Goudsmit’s *Pandecten-systeem*, transferred from the *Roma ritsuyō*. Throughout *Minpō no hone*, Ono reviewed *Roma ritsuyō* on the basis of a “universal theory of law” as he attempted to construct his own theory of civil law, whose core was the idea of rights.

In *Minpō no hone*, Ono again defended the idea of rights based on “status”, which “those who lectured on the Roman legal system in later times, as well

63 Ono Azusa, “Minkei nihō jitsuri”, *Ono Azusa zenshū*, Vol. 3, pp. 448-449.

64 Ono Azusa, “Minpō no hone”, *Ono Azusa zenshū*, Vol. 2, pp. 251-253.

65 *Ibid.*, pp. 238-239.



as Bentham” advocated.<sup>66</sup> According to Ono, “a person’s status” is his “state and condition in terms of other people”. People live together with others, and “rights” and “obligations” come into being from within the relationships among free citizens, from those between obligees and obligors, and to those between parents and children and between siblings. Citizens’ rights, such as the “rights of subsistence, and of freedom and equality”, are first formed when people acknowledge among themselves “the status of an independent person”. Types of “social intercourse” are formed relative to other people from within their mutual lives, and here various types of “status” emerge. Civil rights, as legal rights, are determined premised on this status and state in order to protect “social intercourse” in the form of relationships towards others. In this assertion can be seen traces of “rights within social intercourse” that he had pursued constantly from his study of *Roma ritsuyō*. He had thus come to understand the theory of status within Roman law and Bentham’s theory of the state as being superimposed one upon the other. By perceiving “status” in a more pluralistic way, he sought to break free of the “slave system” and the “old patriarchal system” in the laws of Republican Rome. He had thus rethought what he had written in *Roma ritsuyō*, based on more open “universal theory of law”.

Moreover he maintained in *Minpō no hone* his views derived from historical jurisprudence concerning “history and legal culture”. This was because, in his development of his theory of rights based on status within social intercourse, those interactions and the political culture that premised them were extremely important elements. By returning to the source of the intellectual traditions of European legal systems, *Roma ritsuyō* had extracted principles of civil law based on a political culture of “popular self-government”. By contrast, in *Minpō no hone*, Ono took up the question of how these principles could be applied to, and rooted in, Japanese political society. And so he again confronted the philosophical and practical questions of the “principles of law” and “history and political culture”.

What kind of legal concepts then existed in Japanese society? In *Minpō no hone*, Ono pointed out first that from ancient times, “law” had been considered the “commands of the ruler”. In this respect, the Japanese concept of the law has something in common with Bentham’s jurisprudence.<sup>67</sup> However, according to Ono, East Asia lacked the concept of “civil law”. “Laws and ordinances” had been formulated “from the times of Xia and Shang” in China, but law was regarded as comprising only “categories of penalties” and “criminal law”.

66 *Ibid.*, pp. 257-268, 276-282.

67 *Ibid.*, p. 241.

As a result, the “truth” of the law was not studied and no heed was paid to anything “like civil law”. The same was true of Japan after it accepted the Tang (Chinese) system in the administrative reorganization of “the Taihō era” (seventh century) and later looked to the model of the Ming Code (Da Ming lü 大明律). “No doubt the notion of civil law was lacking, and did not exist in the mind of the people of Asia until modern times”.<sup>68</sup> Within the legal traditions of East Asia, laws as commands of the ruler did not go beyond the bounds of penal law; the idea of a “civil law” that determined and defended the rights and obligations of people based on the law remained underdeveloped.

What prevented the concept of civil law from developing in East Asia and Japan? According to Ono, “the head of the family, the master of the house” ruled the family in Japan as well as in “ancient Rome and present-day China”. The family was made the basic unit forming the state. Modern western nations, by contrast, consisted of a political society organised of “independent and autonomous individuals”.<sup>69</sup> The political cultures of Japan and ancient Rome share a point in common, not in the latter’s “popular self-government” but rather in the patriarchal family system.

Ono said that a society based on the family is one whose underlying principle is *jō* 情 (sympathy, affection, sentiment). Here, like in the slave system, people other than the family head or the master were not regarded as “elements of society” and as a result, they did not try to take any interest themselves in their own society. By contrast, political societies in modern western nations were organized by “independent, autonomous law-abiding citizens” governed by *ri* 理 (reason). A strong society, an assemblage of the strengths of its members, is formed when each person as an individual unit has a strong interest in that society. A political society based on a “civil law” that determines the rights and obligations between people with spirit of independence and autonomy is “civilised government”.<sup>70</sup> Ono then went on to quote directly his criticism of the relationship of father and son in Japanese society that he developed in *Roma ritsuyō*.<sup>71</sup>

Ono’s argument was also formed in the context of his experience as a legal bureaucrat. In 1873, Japan’s first comprehensive Civil Code draft, the Imperial Civil Code Provisional Rules (Kōkoku minpō kari kisoku, 皇国民法仮規則)

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68 *Ibid.*, pp. 249-250.

69 *Ibid.*, pp. 299-302.

70 *Ibid.*, p. 301.

71 *Ibid.*, pp. 302-306.

was issued by the Meihōryō (Institute for Legal Studies) in the Ministry of Justice. Following this, there was a trend within the Meiji government to construct a framework for the codification of civil law around the rights of the household head and sole inheritance by the eldest son. Ono's arguments were a criticism of such tendencies.

While Ono regarded Bentham's theories of legislation highly, he thought that civil law could not function sufficiently only as the commands of a sovereign. Civil law which set up and defended legal civil rights could only be established in a political society rooted in the ethos of independence and self-government. The intellectual task confronting Ono, as he tried to introduce the principles of the law that determined civil rights in East Asia was how to get to grips with his own political culture, which had no tradition of "civil law". How did he surmount this issue? We will investigate this question in the final section when we discuss the connection between Ono's theories of civil law and of the constitution.

### (3) *Stratagems concerning Japanese legal traditions in Kokken hanron*

*Kokken hanron* was written in 1881, when Ono had resigned as a bureaucrat. Its first two volumes were published the following year, and its final volume in 1885, just four months before he died. He directly incorporated the western jurisprudence and political theories of Bentham and Austin, as well as Francis Lieber (1798-1872) and Theodore Dwight Woolsey (1801-1889), producing a work that attempted to construct a new design for a constitution.<sup>72</sup> It has an excellent scheme and content, even compared with the drafts prepared by other Japanese scholars of the time. How did Ono expand his ideas about the constitution on the basis of his understanding of civil law down to that time?

There is a close relationship between *Kokken hanron* and *Minpō no hone*. Not only do they have the same preface, but the definition of the law and the theory of rights in the former were taken directly from the latter. Ono did not differentiate civil law and the constitution as was done between private and public law, but rather combined them into a single theory of legal rights based on status that he had been studying up to that point. According to Ono, whereas civil law determines rights within "people's mutual intercourse", a constitution "explains the relationship between rulers and subjects, differentiates the positions of officials and the people, and sets out the authority of officials

<sup>72</sup> For Ono's political theory and studies of the *Kokken hanron*, see, for example, Yamashita (1969), (1978); Yoshii (1974), Izuhara (1995), Ogiwara (1996), Sawa (2005). However, there has been insufficient study of Ono's research into western jurisprudence as a whole, including connections with the incorporation of the theory of civil law and Roman law.

and the rights of the people”.<sup>73</sup> In other words, the difference between civil law and the constitution arises from the differences in status within human interactions, according to whether the object is the mutual relationships among the people or the relationship between ruler and ruled.

All the same, a constitution has its own importance. According to Ono, even though “people’s mutual intercourse” is governed by civil law, without a constitution, subjects may be “regarded as slaves by their rulers” and individuals cannot control rights such as the possession of property, and even life itself. Therefore the establishment of a constitution “does not only set right the relationships between rulers and subjects but also dealings between the subjects themselves”.<sup>74</sup> Here Ono sets forth questions related to the inherent nature of a constitution: who is the “ruler” and, if a political system is established, is legislation rooted in “popular self-government” possible?

This insight derives from Ono’s own experience as a legal bureaucrat. In Chapter 16 of *Kokken hanron*, he reminisced about his activities then, pointing out the “hybrid” conditions that existed at a time when Japan was without an independent legislature, administration and judiciary.<sup>75</sup> In the present political circumstances, even if legal bureaucrats attempted to introduce civil law, their efforts would easily be quashed by the administrative authority, the Dajōkan (Council of State, 1868-1885). Moreover, if the civil code was enacted, it would be difficult to protect the civil rights of the people, because judicial powers were not independent. Having experienced setbacks as a legal bureaucrat, he reached the decision that the only way to establish civil law as the “primary basis of the legal system” was to first establish a constitution.

In *Kokken hanron*, Ono called for checks and balances between the three powers of the legislature, administration and judiciary. He pointed out that the legislature had an eminent role in response to the need for social vitalisation in a civilised society.<sup>76</sup> However, power should not be concentrated only here. Ono therefore envisaged a Supreme Constitutive (*seihon no shoku* 政本の職) which had the power to both convene and dissolve the legislature, so protecting against absolutism on the part of both the legislators. In this way Ono conceived a fourfold division of power within the political body: the Supreme Constitutive, the Legislature, the

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73 Ono Azusa, *Kokken hanron*, pp. 9-10.

74 *Ibid.*, p. 10.

75 *Ibid.*, pp. 159-166.

76 *Ibid.*, pp. 150-155, 179-180.

Administration and the Judiciary. Who then bore the responsibility of the Supreme Constitutive, the very basis of the system? According to Ono, it was the people who elected representatives to the national assembly and the sovereign who had the power to convene and dissolve the assembly, that is, the emperor.<sup>77</sup> He thus proposed the idea of the “united rule of monarch and people” (*kunmin dōchi* 君民同治), in order to ensure the “greatest happiness of the greatest number of people”.

On the other hand, though, Ono had misgivings about the emperor becoming a despot. Thus, he spoke of introducing, as an institutional guarantee, a cabinet made up of the party with the largest number of seats, as in English-style parliaments, and a representative system comprising ministers responsible to the assembly.<sup>78</sup> According to him, a constitutional system of government must be led by a national assembly based on “the ethos of popular self-government”. In order to avoid the tragic harm that comes, as during the French Revolution, of people rising in revolt in the name of unrestricted natural rights, it is necessary to draw up a legislative system that legally determines people’s rights. In this sense, “representative government” is the system that regulates, and protects against, both “the despotism of the monarchy” and “the oppression of the masses”. Thus in his constitutional ideas too, Ono spoke of legal rights in the same way as civil rights, calling for rights to be determined by positive law and rejecting innate natural rights, and he developed his theory of parliamentary government on this basis. Ono’s conception of the state called for the realisation of a party cabinet and a representative system based on the idea of the “united rule of monarch and people”.

In contrast to Ueki Emori and others in the Jiyūtō (Liberal Party) who, under the influence of French radicalism, advocated the idea of natural rights and sought a broadening of political rights in an extreme form, Ono wanted to create policies and ideology for the Rikken kaishintō that looked toward the establishment of a moderate national assembly based on English-style ideas of a parliamentary cabinet system and a constitutional monarchy.

At the same time, what we should note in connection with Ono’s idea of civil law is that his constitutional ideas centring on the discourse of sovereignty include much that is critical of the jurisprudence of Austin and Bentham. First, let us look at Ono’s criticism of Austin and his contention that the law is the command of the sovereign. Austin defined “sovereignty” as being in the hands of “a person or a body of persons”. Ono criticised this, quoting from Lecture

77 *Ibid.*, pp. 173-175.

78 *Ibid.*, pp. 186-188, 334, 367-369.

VI of Austins's *Lectures on Jurisprudence or the Philosophy of Positive Law*, as having the danger of leading to autocracy.<sup>79</sup> According to Ono, the locus of "sovereignty" lay within "all the people together" and "the state as a whole", including both people and emperor.<sup>80</sup> The "political ruler" (*shuchisha*, 主治者), at the centre of establishing laws, was the government of the time. However, this government, the "ruler", was no more than a representative of the people of the country, who bore sovereignty. This is why the "ruler" had to legislate considering the country as a whole, both people and emperor, that is, the "sovereign". Here we see the close and mutually comprehensive relationship between Ono's theories of civil law and the constitution. In *Minpō no hone*, Ono had been influenced by the theory that the law was the command of the sovereign, but he consistently changed the wording from "sovereign" (*shukensha* 主権者) to "[political] ruler" (*shuchisha* 主治者). Behind this lay criticism of Austin's ideas about sovereignty. By separating "*shukensha*" and "*shuchisha*" he determined that the locus of sovereignty was the people of the country as a whole. Through this, he asserted that legislation by the "ruler", the government of the day, had to support the self-government of the people, who were "sovereign". In other words, in order to bring about a realm of civil law rooted in "the autonomy of the people", it was necessary to establish a constitutional system of the "united rule of monarch and people", based on a representative system and government by the majority party. In this sense, Ono's discourse on civil law was formed in the context of the theory of sovereignty and the conception of the state he developed in *Kokken hanron*.

Ono's discourse on sovereignty also connoted criticism of Bentham. Ono's *seihon no shoku* 政本の職 was modelled after Bentham's "Constitutive authority" and "Supreme Constitutive".<sup>81</sup> However, Ono criticised Bentham's development of the idea of popular sovereignty, in terms of the happiness of the greatest number, that demanded that sole sovereignty rest in people, who were the Constitutive Authority.<sup>82</sup> According to Ono, first of all this was not the same as the discourse of popular sovereignty taught by Rousseau, but risked falling into "popular despotism". Moreover, it was not suitable for Japan, since there the emperor "reigned over the four seas in order to provide for the greatest happiness of the people". As a result, the Supreme Constitutive

79 *Ibid.*, pp. 46-54.

80 *Ibid.*, pp. 55-56.

81 *Ibid.*, pp. 173-176. J. Bentham, "Constitutional Code", in *The Works of Jeremy Bentham*, vol. IX, 1843, pp. 96-98, 153-160. It is thought that Ono used Bowring's edition. For problems related to Bowring's edition of the "Constitutional Code", see "Editorial Introduction" to *Constitutional Code*, Vol. 1 in *The Collected Works of Jeremy Bentham*, edited by F. Rosen and J. H. Burns, Oxford, 1983.

82 Ono Azusa, *Kokken hanron*, pp. 175-176

(*seihon no shoku*) was the responsibility both of the people and the emperor. We see here how Ono's ideas about a constitutional monarchy combined a theoretical struggle with western political thought and an attempt to base his findings within Japan's legal traditions. The "united rule of monarch and people" too was an idea distilled by retracing his own history. Thus again he confronted questions concerning the law and history.

The imprint of this struggle is most clearly seen in the second chapter of *Kokken hanron*, "Historical Precedents of Constitutions in Our Country". In this chapter, Ono elucidated the existence of the idea of rule at the origin of Japan's legal tradition, which was that "the people do not exist to serve the emperor; rather the emperor exists to serve all the people". Through a study of the *Kojiki* (Records of Ancient Matters, 712) and the *Nihon shoki* (Chronicles of Japan, 720), he confirmed that the "The Great Law of the Central Land of the Luxuriant Reed Plains (Toyoashihara no nakatsukuni)" had flowed through history from ancient times down to the present.<sup>83</sup> At first glance, this positive evaluation of Japan's legal tradition encompassing imperial rule and the "united rule of monarch and people" seems to be at complete discrepancy with *Minpō no hone*, which is consistently negative. However, as we have already seen, Ono considered that, since the political society of Japan lacked a tradition of "popular self-government" and its "notions of civil law" were immature, a constitution had to be established before civil law could be determined "as the most important foundation of the legal system". It was as if Ono had stepped back from the front line, illustrating, in order to realise codification of civil and other law, that the establishment of a constitutional system of government upon the idea of the "united rule of monarch and people" was the historical product of the Japanese legal tradition, and making that the starting point for the legal system. We see here Ono's strategy concerning the legal tradition. However, he was not advocating absolute emperor worship or Japan-centrism. His stance can be understood in the way he grappled with Bentham's criticism of the Declaration of Rights issued during the French Revolution.

For Ono, attempting to discover "the germ of constitutionalism" within the political society of contemporary Japan, describing the political ideal in the figure of the emperor as the sovereign who provided the people with "the greatest good" was only part of his task, since there remained the question of how to situate civil rights on the basis of the constitution. Was it even necessary to specify and guarantee the rights of citizens vis-à-vis the government in the constitution? In pursuing this theoretical question, Ono took up Bentham's "Anarchical Fallacies", adding his own critical study. The "Anarchical

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83 *Ibid.*, pp. 15-24.

Fallacies” was a denunciation of the Declaration of Rights issued by the French National Assembly in 1791, which Bentham criticised for determining the rights of citizens based on natural rights. As far as he was concerned, to consider absolute and inviolable natural rights that existed before the formation of governments and to mention them expressly in a constitution was nothing other than to instigate resistance and insurrection towards all laws and ordinances.<sup>84</sup> Further, from Bentham’s point of view, as an expounder of the doctrine of popular sovereignty, only the consensus of the people of the nation could limit the authority of a people’s assembly. The existence of a declaration of rights set up *a priori* can only be harmful, restricting the future enactment of laws by the national legislature.<sup>85</sup>

However, Ono squarely refuted Bentham’s arguments. Of course, he shared Bentham’s denunciation of natural rights. Yet he did not completely agree with Bentham, saying it was not altogether futile to make clear details of civil rights through a constitution. He found positive meaning in the constitution, saying, “It informs officials of their limits and the people of their rights”.<sup>86</sup> The reason Ono gives for this is noteworthy. According to him, because the Japanese have become accustomed to “the oppression of officials”, a constitution is necessary to clarify the rights they should possess. In this vein, he criticised Bentham:

For people such as the great scholar [Bentham], born in a country of freedom like Great Britain, who have heard about their rights from a young age and are accustomed to them, such rights are second nature to them. Though they may feel themselves that there is no need to clarify their rights [in a constitution], this is a case that applies only to Britain, not to our country. How can we then approve of and accept his statements?<sup>87</sup>

Ono had discerned a universality of “legal principle” in Bentham’s jurisprudence down to this point. However, here he claimed that even Bentham had at times been unconsciously constrained by the *a priori* premise of his own legal tradition. In the context of discussion about a national assembly according to the idea of popular sovereignty, Bentham’s assertion that it was unnecessary to clarify the people’s rights in a constitution applied only to Britain, where

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84 J. Bentham, “Anarchical Fallacies; Being an Examination of the Declaration of Rights issued during the French Revolution”, in *The Works of Jeremy Bentham*, vol. II, pp. 496-503.

85 *Ibid.*, pp. 492-493.

86 Ono Azusa, *Kokken hanron*, p. 113.

87 *Ibid.*, for an excellent study of this section, see Miyamura (1996), pp. 19-22.



the concept of freedom and a consciousness of rights were rooted like “second nature”. Particularly in political societies like “our country”, Japan, where the knowledge of the finer points of their rights was still immature, and where people were used to “the oppression of officials”, even if a national assembly should be formed, there would remain the danger that people’s rights would be violated by the government’s abuse of its authority. It was a vital necessity that the people’s rights vis-à-vis the government be clearly stated in a constitution and that the people be made to understand the details of these rights. In this criticism of Bentham, Ono displayed a keen and subtle understanding of the tension between history and law.

Looking at this from a different point of view, Bentham’s jurisprudence advocating the science of constitutionalism is also implicitly premised by European legal traditions of “popular self-government”. In this sense, even if Benthamite constitutionalism was adopted in Japan, it alone was not sufficient for the needs of Japanese civilisation. Questions such as the form of Japanese political culture and the nature of the legal culture formed over history had also to be considered. Here Ono grappled long and hard with the issue of law and history. Having a strong sense of the danger posed by a political culture where the government is always able to deprive the people of their rights, he attempted, without falling into a form of own-culture centrism, to formulate a methodological position whereby he could discover the possibility of the “germ of constitutionalism” from within his own legal tradition.

In the four chapters after Chapter 8 of *Kokken hanron*, Ono made a theoretical examination, modelled on Frances Lieber’s *On Civil Society and Self-Government*, of the rights of the people versus the government, including mental and physical liberty and the freedoms of association, speech, belief, possession of property and petition.<sup>88</sup> He then went on to discuss how they could be reinterpreted from within Japan’s legal tradition. This he does on Chapter 12, “The Origins of Civil Rights in Japan’s Ancient Past”. There, Ono first challenged the opinion, expressed by Fukuzawa Yukichi, that “from ancient times, Japan had a government, but was not a nation, and that subjects were slaves of the [political] rulers”. However, Ono said that it might look that way “to the naked eye”, but seen “through a microscope” it was possible to discern the “thread of civil rights”.<sup>89</sup> For example, there was the so-called “decree of the bell and box”, mentioned in the *Nihon shoki* in an item dated 646 (Taika 2). According to Ono, this system, where the government of the day hung up a bell and provided a box in order to receive petitions and hear people’s grievances,

88 See particularly *Kokken hanron*, pp. 70-72.

89 *Ibid.*, pp. 114-115.

demonstrates that people had the “freedom” institutionally “to discuss political matters publicly”.<sup>90</sup> Then there was Article 4 of the *Jōei shikimoku* (1232), the administrative code of the Kamakura Shogunate, also known as the *Goseibai shikimoku* (Formulary of Adjudications). This determined that “provincial military governors” (*shugonin*) may not arbitrarily confiscate the private property of a person, calling it an offense, even if that person has committed a crime. This is evidence, Ono said, of the survival of “the principle that officials are there for the people, not the people for officials”.<sup>91</sup> Of course, the “thread of civil rights” that had continued down history had been for a time on the brink of danger under the military government of the Tokugawa period. However, even during that perilous time, it continued to be passed down within the “minds” of the people as legal tradition. This tradition had been revitalised and brought to fruition by the Meiji Restoration, with the opening of the country and exposure to western political theory.<sup>92</sup> The post-Restoration flourishing of the Freedom and Popular Rights Movement and activities seeking the establishment of a national assembly and a constitution have come about as an extension of this legal tradition. Here then is today’s “germ of constitutionalism”.

Thus Ono discovered another intellectual tradition, with its “origins” in ancient Japan, different from the legal concept that understood the law to be the “orders of the ruler”. Furthermore, he had retrieved the “thread of civil rights” from the mists of Japanese history, where people possessed “rights” and “the freedom to discuss matters publicly and to take legal proceedings against officials”<sup>93</sup> were guaranteed as legal rights. Of course, it is also necessary to study the validity of Ono’s historical description from different angles.<sup>94</sup> What we should note here, though, is that Ono’s argument was also strongly conscious,

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90 *Ibid.*, p. 116.

91 *Ibid.*, pp. 122-123.

92 *Ibid.*, pp. 123-126.

93 *Ibid.*, p. 119.

94 Maruyama Masao (1999, pp. 118-134) discusses the *Jōei shikimoku*. He understands there to be two diametrically-opposite ways of thinking about the law. “[If we think in terms of ancient Japanese law], the law meant regulations proclaimed from above; they had a vertical structure”. This was connected to the post-Meiji concept of the law, that “a system of law was formed, along a systematic hierarchy of laws – orders – execution, and rights were allotted according to positive law”. The era of the *Jōei shikimoku* involved another concept of the law. “This was a period when the right to take legal action was at the core of the law, and when all legal thought was permeated by a way of thinking of the civil law type: public order was a dynamic process to resolve conflict to resolve violations of rights by rationalizing legal procedures”. He added the comment about Article 4 of the *Jōei shikimoku*, that “protecting the just rights of the weak and those in a disadvantageous situation is called ‘justice/righteousness’”.

as well as critical, of the *Bunmeiron no gairyaku* (An Outline of a Theory of Civilisation, 1875). This was an influential work by Fukuzawa Yukichi (1835-1901), an intellectual of an older generation than Ono who created the basis for modern Japan through his pioneering studies of western thought. In the ninth chapter of that work, “The Origins of Japanese Civilisation”, Fukuzawa traced Japanese civilisation from ancient times comparing it with western civilisation. He took issue with the “arbitrary use of authority” that prevailed then, pointing out that “in Japan there is a government but no nation”.<sup>95</sup> In the tenth chapter, “A Discussion of our National Independence”, he insisted on the necessity to mobilise “the power of manners and customs” such as “the relationship between lord and vassal” and cultivate “a spirit of service to the country” in order to maintain Japan’s independence. However, for Fukuzawa this was in the final count “an expedient of civilisation”.<sup>96</sup> Ono directly criticised Fukuzawa’s conception of civilisation that stated “in Japan there is a government but no nation”. Ono ventured to use a “microscope” to view his own legal traditions from within, to unearth the “thread of popular rights” and the “germ of constitutionalism” where people could discuss politics publicly and had the right to bring an action in court against officials. He truly believed that without the investigation and reinforcement of their own sources of civil rights, it would be impossible to create a new constitutional system following the principle of self-government, or to achieve codification.

This does not mean, though, that Ono ever abandoned his critical gaze regarding the Japanese legal tradition that lacked “the notion of civil law”. In the final chapter of *Kokken hanron*, he pointed out that “a constitutional nation is a self-governing nation”. Even if a constitution was realised, it would not work properly without “a spirit of self-government and independence” among the people. Here Ono once again criticised Japanese society based on the patriarchal family system, quoting from *Minpō no kotsu*.<sup>97</sup> It was the very extermination of such evil customs in Japan’s legal culture that was the country’s greatest and most urgent task. Ono said that the Japanese people must achieve this by themselves, as a constitutional nation.<sup>98</sup>

Even if a constitutional system revolving around representative government and a party cabinet according to the principle of “united rule of monarch

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95 Fukuzawa Yukichi, *Bunmeiron no gairyaku* (1995), pp. 220-221. In English, see Dilworth and Hurst tr. (2009), p. 187.

96 *Ibid.*, pp. 298-299.

97 Ono Azusa, *Kokken hanron*, pp. 572-573.

98 *Ibid.*, p. 573.

and people” was established under law, a truly constitutional nation could not come about until the legal tradition that looked to patriarchal control had been overcome and a political society replete with a spirit of self-government and independence been constructed by means of instituting civil law as the primary basis of the legal system. This had to be done by the hands of the people themselves.

Thus Ono exhumed the “thread of popular rights” from Japan’s legal tradition and contemplated creating a new political culture of self government by a truly constitutional nation. Ono’s ideas about civil laws and the constitution had a multilayered relationship within his intellectual activity. His intellectual struggle over the subjects of law and history was charged with a sharp tension and difficulty until the end. Returning to the roots of the European legal tradition, Ono Azusa, the political philosopher, strove to break the impasse surrounding history and law in Japan.

### Conclusion

Ono Azusa, having put his soul into the achieving the enactment of a civil law and the establishment of a constitutional system, passed away in January 1886, four months after publishing the last volume of *Kokken hanron*. Kaneko Kentarō 金子堅太郎 (1853-1942), who was involved in drafting the Constitution of the Empire of Japan (the Meiji Constitution) with Itō Hirobumi and Inoue Kowashi, said in a eulogy to Ono that the work “was of the strong opinion that it was not right to advance European and American theories unless on the basis of Japanese history and so made national history its foundation”, and remarked, “Prince Itō has read it very closely”. Kaneko continued, “Presented to Prince Itō, Mr Ono’s work must never disappear” and he revealed “the Japanese Constitution owes greatly to Mr Ono’s power”.<sup>99</sup>

Whatever Ono’s real effect, Itō Hirobumi was considerably influenced by the historical school, through Friedrich von Gneist (1816-1895), a pupil of Savigny, whom Itō consulted in Berlin about European constitutions in 1882. Certainly, the Meiji Constitution incorporated the results of the western constitutional theory “on the basis of Japanese history”. In his *Commentaries on the Constitution of the Empire of Japan*, Itō, commented on the right to petition in Article 30 in the same way as Ono had done: “In the reign of the Emperor Kōtoku, a bell and a box were hung out, through which the people might make their representations and complaints”. He pointed out that “it is the ultimate object of the Constitution to secure respect for the rights of the

99 Waseda daigaku Bukkyō seinenkai, ed. *Ono Azusa*, 1926, pp. 57-58.

people, while tender love is borne them, and care is taken to see that no one is excluded from the enjoyment of any of these benefits. This may be regarded as the height of political morality”.<sup>100</sup>

However, the Meiji Constitution differed greatly in character from Ono’s constitutional ideas, in both actual institutional mechanisms and in spirit, being centred on the supreme authority of the emperor: “The sovereign power of reigning over and of governing the State is inherited by the Emperor from his ancestors and by him bequeathed to his posterity. All the different legislative as well as executive powers of State ... are united in [him].”<sup>101</sup> In the course of the dispute over the compilation of the Civil Code that occurred between 1889 and 1892, the jurist Hozumi Yatsuka 穂積八束 (1860-1912) held that “we are a country that respects the rules of the ancestors and where the family system prevails; therefore authority and the law are derived from the family”. This view led him to find an overlapping of Japan’s “rules of the ancestors” and Roman family law, which he evaluated positively.<sup>102</sup> Thus the authority of the household head was stipulated in the Meiji Civil Code, and so was formed the idea of a family state supporting the Meiji Constitution. The process of the formation of such a Meiji state system can perhaps be considered a watering-down of Ono’s struggle between the legal traditions of Europe and Japan. Here ended the early stage of the reception of western jurisprudence in modern Japan.

Nevertheless, Ono Azusa’s efforts have intellectual significance, down to the present day. The two great currents of nineteenth century European jurisprudence, the historical school and Utilitarianism, flowed into his endeavours concerning the law, where a concern for “the principles of law” intermingled, in constant tension, with a serious regard for “history” and “legal culture”. Through this encounter with a foreign tradition, how close can we come to the essence of rational principles of law that have the potential for universality, though formed on the basis of the history of a different political society? Can we make them the foundation of our legal system in the historical context of our own political society? Is there also the possibility that we may change our own political culture and ethos ourselves?<sup>103</sup> Ono’s intellectual activities throw a brilliant light on the reception of European law and legal traditions in Japan from the late Tokugawa period, when limited absorption changed to systematic understanding, from the

100 Itō, 1940, pp. 61-62. English translation by Miyoji Itō, pp. 62-63.

101 Itō, 1940, p. 2. English translation by Miyoji Itō, pp. 7.

102 Hozumi, 2001, pp. 110-111. For the controversy over the Civil Code, see for example Haley 1991.

103 For a study concerning “dialogue” and “transformation” in the pursuit of “rationality” among various traditions and encounters with different traditions, see MacIntyre, 1988, from which I have received many valuable suggestions.

viewpoint of one man's unflagging determination to penetrate the sources even more deeply. His activities also suggest to us that there were many layers to his self-conscious and continuous engagement with the issue of establishing a constitution in the non-European environment of Japan and indeed living under such a constitution.

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