Introduction

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In August of 1978 a group of scholars gathered at the Center for East Asian Legal Studies of the Harvard Law School for a conference on "Law and the State in Traditional East Asia." The scholars themselves came from East Asia and Europe as well as from the United States, and presented papers which dealt not only with the Chinese tradition but also the legal traditions of other major East Asian states including Japan, Vietnam, and Korea.

Given the diversity of scholarly interest involved, the papers presented dealt with a variety of topics, under the general rubric of law and the state. Philosophy, codification, law enforcement, judicial process, and foreign relations were all discussed in one or more papers. And yet all of the papers focused in differing ways on two main areas—the effects of real world constraints on law and its practice, and the sources from which the law was derived. Those papers which concerned themselves with the law in practice dealt with the Ch'ing dynasty. They will appear as a separate volume. In the papers which are concerned with the sources of law, the roles of custom, procedure, codification, borrowing, and imperial will in determining the shape of the law are all analyzed. The examples are drawn from Lê dynasty Vietnam, Yi dynasty Korea, Kamakura Japan, and Tokugawa Japan, as well as from Sung and Ming China. Taken together they provide a suggestive overview of different ways in which law might be created in the traditional East Asian world.

The first paper in this volume, Edward Farmer's study of the codification of norms under the Hung-wu Emperor, raises some broad questions about the nature of law, but does so through the study of specific legisla-

tion. By focusing on the role of the Ming founder in shaping the general legal framework of his times, Professor Farmer is able to reveal the critical importance of key individuals in promoting certain social ideals. As he recognizes, such ideals never correspond exactly with social practice, but they do tell us much about the attitudes of those who seek their enforcement and also about the society they are designed to shape. In the process of analyzing these documents, their origins, and their impact, Professor Farmer also provides succinct descriptions of the codes themselves, the Ming system of local control, and the relations between center and local regions.

The three pieces of normative legislation described by Professor Farmer are the *Imperial Ming Ancestral Instruction* (*Huang Ming tsu-hsün*), the *Great Ming Commandment* (*Ta Ming ling*), and the *Placard of People's Instructions* (*Chiao min pang-wen*). These documents provided the people and officials with instructions governing the appropriate behavior to be expected from the descendants of Chu Yüan-chang, rules governing the practices of the six official boards and those under their jurisdictions, instructions for the management of village affairs by the elders, and warnings about a whole range of abuses.

Professor Farmer seeks to analyze how these normative rules fit with the actual structure of local society and the ways in which these bodies of rules reflected elite understanding of the desirable social structure, as indicated by the categories of persons into which the population was divided. This problem, in turn, is linked with the nature of elite control over local society and with potential conflicts between the aims of the central authorities and the interests of local people. In describing these interrelationships between imperial ideals, local interests, and official aims, Professor Farmer illuminates not only the power of key individuals to influence the content of the law, but also the kinds of limitations on such individual power inherent in the social and political situation.

In the second paper Ta Van Tai illustrates the role and power of custom as a source of law. In some respects Vietnam may rightly be called the smaller dragon, a state that modeled itself closely on its large neighbor to the north. But as Dr. Tai demonstrates, this borrowing of Chinese cultural elements could not, in practice, alter fundamental Vietnamese custom, which in important ways determined the substance of legal relations. Even when, as under the Nguyễn dynasty, the formal legal code itself slavishly imitated its Chinese model, actual legal practice conformed to the native Vietnamese traditions embodied in the *Lê Code*. Dr. Tai concentrates on this *Lê Code*, since it portrays most clearly the underlying Vietnamese legal mores. In particular he focuses on one very striking way in which Vietnamese law differed from Chinese law—its treat-

ment of the civil rights of women. Beginning with a brief discussion of the special position of women in Lê criminal law, Dr. Tai goes on to talk about the private rights of women and their protection from abuses by male relatives including the husband. Vietnamese women were in a better position than their Chinese counterparts when it came to divorce and were not denied the right to bring suit to enforce their rights. These discussions form a valuable backdrop to the major example used in the paper to illustrate the special position of Vietnamese women, their rights over property. Dr. Tai discusses rights to inheritance, including the inheritance of ancestral worship property, rights of settlement in the matrimonial estate, rights of management over the matrimonial estate during the husband's lifetime, and other facets of property law in which the Vietnamese woman's legal position was far superior to the legal position of women under Chinese law.

The third paper, by Carl Steenstrup, does not focus explicitly on the sources of law, and yet, in describing the legal system of Japan at the end of the Kamakura period from the litigant's point of view, Dr. Steenstrup cannot help but elucidate the process by which substantive law was deposited in the interstices of procedure. Dr. Steenstrup begins by raising some very fundamental issues about the relationships that exist between legal systems and the social and political systems in which they are embedded. In brief, he argues that strong, centralized governments (of which the major dynasties of traditional China would be examples) tend to de-emphasize the difference between law and administration, and, insofar as they develop the law system, concentrate on criminal law. In weakly centralized systems, of which Kamakura Japan is an example, the central authorities emphasize civil laws and procedure, and stress the importance of their role as honest brokers between litigating individuals.

The diversity of legal interests in weak polities is reflected in the text which Dr. Steenstrup analyzes. The *Sata mirenscho* ("A book for those unskilled in legal matters") was written by an unknown author around 1320 as a guide to those warriors who found themselves involved in litigation or local law enforcement. The *Sata mirenscho* deals mainly with the Bakufu courts, describing their procedures, explaining how to write up pertinent documents, and defining the legal terms used in them. Dr. Steenstrup provides a fascinating and detailed description of the process of civil and criminal litigation in the courts involved, and in so doing gives us a general picture of Kamakura legal relationships and the society in which they existed.

Brian McKnight stresses yet another source out of which law might grow. In describing the transformation of the Sung legal system from one largely dependent on statutory law to one where precedent played an

important role, he illustrates how the very processes of codification and collection of legal materials themselves could serve as sources of legal change. Where the laws were being periodically collected, edited, and reissued, the mere preservation of a law was a type of creation. In one case the Sung editors began with almost 20,000 edicts, and ended up with less than three hundred generally applicable laws. Obviously this process exercised a profound, if negative, influence on the shape of the law. Professor McKnight describes the kinds of laws employed in Sung times, the origins and character of the compilation process, and its relationship to the increasing dependence on precedents which marks the late Northern and the Southern Sung.

In his contribution to this collection Osamu Ōba reminds us of the importance of borrowing as a source of law. Most legal systems have grown at least in part through the critical and selective use of elements taken from other traditions. The influence of T'ang law on the early Japanese legal system is a familiar story. In his paper Professor Ōba explores some of the potential influences of Chinese law during the Edo period. He does so indirectly by studying the book trade with China and Japanese scholars' studies of T'ang, Ming, and Ch'ing law.

Such studies were carried out not only by scholars working directly for the Bakufu, but also by scholars working for various daimyo and by independent scholars. The figure who looms most important as a patron was the shogun Yoshimune, who ascended to the shogunate from the position of daimyo of Kii. Work on the Ming codes had been going on at Kii under Yoshimune's father, and the young Yoshimune continued to support these studies after his appointment as daimyo. When he became shogun in 1716 he maintained his interest, and from the 1720s sponsored a series of studies of Chinese legal materials. Professor Ōba suggests that the key scholarly figure at this time was Ogyū Hokkei, who was a Confucian adviser to the shogun and was not, as is generally believed, Hokkei's older and better known brother, Ogyū Sorai.

The researches of these two brothers, and of the other legal scholars of this era, at times provided the direct and obvious models for Japanese legal reforms. Far more important, though much more difficult to assess exactly, was the influence of these studies, and of the critical editions and translations of Chinese legal works that came from them, on the general legal attitudes of the Tokugawa leadership. Finally, these Japanese scholars provided the basic background materials which facilitated the study of Chinese law when Japanese leaders were discussing legal reforms in the nineteenth century.

In the last paper, William Shaw, writing about the reception of Neo-Confucian ideas and Ming law in early Yi dynasty Korea, deals with a

topic that has much in common both with the topic of Professor Ōba and with that of Dr. Tai. We have here a case study of the effects of local customs and values on the borrowing of foreign laws and values. In fifteenth-century Korea the Neo-Confucian ideas of Chu Hsi spread among some Korean scholar-officials and eventually came to dominate their intellectual life. At the same time, the state was seeking to enforce laws borrowed from the *Ming Code*. Both of these developments were resisted by large sections of the Korean elite. Dr. Shaw argues that the slow pace of legalization in Korean life and society was not due to a too great commitment to Confucianism. On the contrary, the Neo-Confucianism of Chu Hsi and the principles in the *Ming Code* were mutually supportive. Resistance came, rather, from the failure of the Yi kings and other members of the elite to adopt these Neo-Confucian values. A commitment to old hierarchical patterns of social life and a continuing acceptance of Buddhist values bolstered the capacity of the elite to resist the encroachment of these newly imported Chinese ideas. Dr. Shaw supports his thesis by describing the controversies that surrounded the attempts to introduce Neo-Confucian ritual practices connected with ancestral worship and household shrines, and he goes on to depict the struggle of the Neo-Confucians against Buddhist values as reflected in arguments over the system of royal amnesties. Dr. Shaw presents a strong argument for the fundamental interdependence of Chinese law and Chinese philosophical ideas, and portrays for us once again the selectively creative process by which the non-Chinese states within the Sinitic world borrowed, modified, and made their own those cultural elements that originally stemmed from their larger neighbor.

The six papers included in this volume touch on a wide variety of possible sources of law, and use a number of possible approaches to the study of legal history. They are, of course, first steps in a field which is still largely unexplored. Further studies of customary law, codification, legislation, procedure, and the role of key individuals in legal change will be necessary before we can understand adequately the ways in which traditional East Asian legal systems worked and changed. Let us hope that studies such as the six gathered here will stimulate others to help in the exploration of one of the least well understood aspects of East Asian civilization.