

The New Japanese Civil Code as Material for the Study of Comparative Jurisprudence. By NOBUSHIGE HOZUMI, professor of law in the University of Tokio, barrister-at-law of the Middle Temple. Tokio, 1904.—73 pp.

Ancestor Worship and Japanese Law. By NOBUSHIGE HOZUMI. Tokio, Maruya & Co., 1901.—iv, 74, (3) pp.

Die Hauserbfolge in Japan, unter Berücksichtigung der allgemeinen japanischen Kultur- und Rechtsentwicklung. Von RIUCHI IKEDA. Berlin, Mayer & Müller, 1903.—xxi, 269 pp.

Die Lehre von der japanischen Adoption. Von FUSAMARO TSUGARU. Berlin, Mayer & Müller, 1903.—xxiv, 228 pp.

The Early Institutional Life of Japan: A Study in the Reform of 645 A. D. By K. ASAKAWA, lecturer on the Far East at Dartmouth College. Tokio, 1903.—(7), 355 pp.

No better introduction to the study of Japanese law can be found than that which Hozumi offers in his brief essay on the *New Japanese Civil Code*—an essay prepared for the Congress of Arts and Sciences at St. Louis in 1904. It is wider than its title; for it outlines the earlier stages through which Japanese law passed, and in summarizing the innovations which have been made by the civil code in the law of personal capacity, of family and of succession, the author indicates the previous development of these branches of the law. In this part of his essay, Hozumi has restated the principal points brought out in his earlier pamphlet on *Ancestor Worship*. This is an illuminating introduction to the study of Japanese family law, but it has a wider significance. It throws much light on early Mediterranean institutions. While Hozumi courteously assures us that Fustel, Maine, Lubbock, Jhering and Hearn “have grasped the true inwardness of a custom which is totally foreign to them” in a manner which is “little short of marvellous,” it is obvious, as he adds, that “they have observed the phenomena from without,” and not, as he does, “from the point of view of an ancestor worshiper.” Such studies as his serve the double purpose of confirming conclusions which were previously in a measure conjectural and correcting misapprehensions which outsiders could not well escape.

Hozumi's *Civil Code* and several of the other works under review give us a clear picture of the rapid assimilation of West European law since 1868, and of the movements which led to the adoption of the

existing civil code. To the reader familiar with the reception of Roman law in Germany and in the Netherlands at the close of the middle ages, the similarity of the Japanese reception is most striking, although Japan passed in a generation through stages which in Europe covered centuries. Japanese students went to European universities as the north Europeans, seven centuries earlier, had gone to Bologna and other Italian universities. They returned to Japan, as the "legists" trained in Italy had returned to northern Europe, filled with a conviction of the superiority of their new learning. In both instances the study of the foreign laws was taken up at home in schools organized on the foreign model, while translations and treatises in the vernacular made the alien laws familiar to widening circles. In both instances, the conviction developed that the imported law was written reason or natural law of universal validity; it began to be cited in the courts and incorporated in judicial decisions. In Japan, as in mediæval Europe, the practical reception was hastened by the organization of a centralized administration of justice conducted by judges learned in the foreign laws. Almost simultaneously, in Japan, came a legislative reception of the foreign rules, at first piecemeal, and then in bulk, by codification.

In some respects, however, and notably in the completion of the reception by legislation, the Japanese movement differed from the European. No historical links connected the Japanese state with Europe as the theory of continuous empire connected the mediæval European states with the ancient Roman world; nor was there any single embodiment of West European law that could claim such authority as the law-books of Justinian commanded in the European middle ages. There was, however, one law book which at first seemed to enjoy an equivalent supremacy in Japanese opinion—the code Napoléon—and Japan came near receiving this code, almost in bulk, by process of enactment. In 1890 a civil code, compiled by a Frenchman and based very largely on the great French model, was actually adopted by the Council of State, to go into force in 1893. Then came a Japanese national reaction, closely paralleling the modern European reaction against pure Roman law. In this reaction the leading part was played by Japanese like Hozumi, who had studied in England and in Germany. Their appeals to Japanese national feeling found an energetic response; the introduction of the code of 1890 was postponed; a Japanese committee of revision was appointed, and from this committee came a new and independent code, which was adopted 1896–1898 and is now in force. In its general arrangement it is more German than French; in its details it is eclectic. Its fundamental conceptions and its rules regard-

ing movable property and obligations are substantially West European. Its rules regarding family and succession are based on the ideas and customs of Japanese society, although in these matters also occidental points of view have been accepted and occidental rules have been introduced.

The house (*ie*), which constitutes the fundamental unit of Japanese society, is not the modern European family, nor, although it resembles in some respects the old Roman family, is it by any means identical with the latter. Like the Roman family it has a single head but it may contain not only the wife and the children of the head and his unmarried sisters, but also his brothers and his uncles, with their wives and children. It may even contain his parents and his grandparents. In other words, it represents a development intermediate between the Roman *gens* and the Roman family; and the further back its history is traced, the more like a little clan does it appear.

The succession to the headship, which Ikeda, in his *Hauserbfolge*, treats in a systematic and scholarly manner, is in many respects peculiar. A change in the headship occurs not only when the head dies, but when he abandons the active direction of the affairs of the house (*inkyo*). It is this not uncommon abdication which makes it possible that the head of the house may have under his authority his own father and possibly his grandfather also. Succession is regularly determined by primogeniture, with a preference of males; but females take precedence over heirs of a subsequent class, and female househeadship is by no means unusual. When the headship or the expectation of headship vests in a female, her husband enters her house; and, according to the terms on which he enters, he may come under her authority as a sort of prince consort, or he may become head of her house. If there are no heirs of the first class, *i. e.*, no real or fictitious descendants, the head may designate the successor, and if there be no legal or designated successor, the house may elect a new head.

Like the old Roman family, the Japanese house may be perpetuated by adoption, and the motive for adoption is the same, *viz.*, the maintenance of the *sacra*. Tsugaru's *Lehre von der Adoption* is as creditable a work as Ikeda's. Each of these writers treats his special topic in connection with the general organization of the house. Half of Tsugaru's monograph and more than half of Ikeda's are historical. Each writer, moreover, is familiar with the principal European works on the family and each utilizes analogies of occidental legal development.

The chief criticism which suggests itself to the reviewer concerns

the uncritical spirit in which the Japanese legal writers—not merely those under review, but others as well—deal with the earliest sources of Japanese history. A foreigner, unable himself to read these sources in the original, may not presume to say that this or that specific statement can not be true; but when he encounters statements which are contradictory, he has the right to say that some of them must be incorrect. The description of the early Japanese house which these writers give us cannot be true, because it does not hang together; its details are more than inconsistent, they are incompatible. We are told that, before the reception of Chinese ideas and customs in the seventh century of our era, women enjoyed a more independent position than in later times; that they could hold land in their own right, and that they fought in war; that the early Japanese marriage left the wife among her own kinsfolk, with the husband on the footing of a surreptitious although licensed visitor; that paternal authority, if it existed at all, was imperfectly developed; that the word for household authority (*katoku*) was borrowed from the Chinese; that half-brothers and sisters who had different mothers could intermarry, because the community of blood derived from the common father was ignored. Not all of these statements, indeed, are found in all the books under review, but some of them are found in each.¹ At the same time these writers constantly assume and repeatedly say that the primitive Japanese house was based on the worship of the deceased male ancestors; that the head of the house was charged with the duty of maintaining this worship; that the succession to the headship vested normally in the eldest legitimate son; and that, in default of a male heir born in the house, adoption was resorted to in the earliest times, because the worship of the deceased male ancestors properly devolved upon a son of the house. In other words the European reader is asked to believe that the patriarchal house existed in a society living under the mother-right system of kinship and exhibiting matriarchal features.

Asakawa, in his *Early Institutional Life of Japan*, throws some light (pp. 7-12) on the character of the sources from which information is drawn regarding primitive Japanese customs. He tells us that the art of historical recording found its way into Japan ca. 600 A. D.; that the oldest chronicle which has come down to modern times, the *Kojiki*, was composed 711-712 A. D.; that it is especially full and precise as

¹ See Hozumi, Civil Code, p. 28; Ikeda, p. 5, note 1, p. 7, note 3; Tsugaru, p. 33, note; Asakawa, pp. 53, 57-59, 73, 98, 105. Cf. Iwasaki, *Eherecht*, pp. 11, 12, and Sakamoto, *Ehescheidungsrecht*, pp. 10-12.

regards events from the seventh century B. C. to the fifth century of our era; that it begins to lose "its narrative detail" after 488 A. D. and stops with the year 628. He tells us, further, that there were older (seventh century) records of which the *Kojiki* apparently makes no use, and that it "was mainly based on the recital of one Hiyo-no-Are, a person of strong memory." To this it must be added that "the language of the *Kojiki* appears to be the vernacular of the date of its composition"; that in it the Chinese characters are used partly in a phonetic way; and that modern Japanese scholars do not agree in their interpretation of all of its characters.

The other source from which information is drawn regarding the first thirteen centuries of Japanese history is the *Nihongi*, composed 720 A. D. This, Asakawa tells us, "is written in a Chinese style as pure and dignified as its authors could make it"; and it is "so thoroughly unnational in many places, not only in language and style but also in thought, that the student has to be on his guard on every page." The record purports to be based, in part, on seventh century sources, and the narrative grows fuller as it approaches the year 697, at which date it closes.

That the *Nihongi* was written with a pro-Chinese bias Asakawa recognizes; but he takes seriously the claim advanced by the author of the *Kojiki* that the primary purpose of this compilation was "to record the genuine traditions of national life before they should become too disfigured by the wear and tear of time." The opinion of an outsider, who has no qualifications except a general knowledge of the historiography of occidental peoples, may be of little value; but to the reviewer, considering that every successful revolution in the occidental world has immediately striven to legitimate itself by falsifying antecedent history, and that the *Kojiki* and the *Nihongi* were written a couple of generations after the reform of 645 A. D., it seems probable that both of these early chronicles were revisions of the Japanese tradition in accordance with the new and dominant views, and that the *Kojiki*, with its interesting figure of the old man of strong memory and its use of the vernacular, was the more adroit of the two reconstructions.

Of the conflicting statements above noted—some pointing to indigenous mother-right, others to a primitive patriarchal household—one set or the other must be fictitious. If Japan, like China, had agnatic succession and the worship of male ancestors before the reception of Chinese ideas and customs, it seems difficult to account for the invention of mother-right traditions. If, on the other hand, Japan had neither male ancestor worship nor agnatic succession until these came

from China by the way of Korea, it is perfectly intelligible that the ancient tradition should be falsified in accordance with the new ideas, without wholly expunging all traces of the older customs.

To the outsider it looks as if the critical acumen of Japanese scholars was somewhat blunted by religious and political prepossessions. To admit that the worship of male ancestors, which plays so important a part in their existing social life, is perhaps not indigenous, and that the chronicles which record an unbroken succession of emperors from the seventh century B. C. are possibly untrustworthy, may well be as difficult for them as the development of "the higher criticism" of the Bible has been for Europeans.

Asakawa's book touches but incidentally on the legal problems which occupy the other writers under review. He is chiefly interested in the economic and political organization of Japan before and after the reform of 645 A. D. The first third of his book is devoted to the earlier Japanese civilization; the second third to Chinese political ideas; and the remainder to the events and results of the reform. Room is found for a brief supplementary chapter showing how the imperial supremacy, which was established in the seventh century by breaking down the older clan organization and by substituting for the nobility of birth a nobility of service, was gradually undermined by the new military organizations, until, in the twelfth century, the feudal régime was definitely established.

Limitation of space and the fact that this *QUARTERLY* is not primarily a law journal prevent the reviewer from discussing the best parts of the books of Ikeda and of Tsugaru, *viz.*, those parts which deal with the mediæval and modern law of the Japanese house and which explain the interesting compromise which the new code has made between the historical solidarity of the house and the demands of modern individualism.

All of these books are so well written that the reader is seldom reminded that their authors are in each case using an acquired language. The four legal works are thoroughly lawyer-like and measure fully up to the standard of German and English legal literature. Asakawa's book is not only a valuable contribution to history but to political theory as well. None of the books except Asakawa's is indexed—an omission which is especially to be regretted in works of so technical a character as those of Ikeda and Tsugaru.

MUNROE SMITH.

The Growth of the Manor. By P. VINOGRADOFF. New York, The Macmillan Company, 1905.—viii, 384 pp.

Professor Vinogradoff's new work on *The Growth of the Manor* is not a sequel to his *Villainage in England*, nor is it by any means such an epoch-marking book in the field of mediæval history. In the twelve years that have elapsed since the publication of those remarkable essays, many workers, among them Maitland, Round and Seebohm, have been busy with manifold problems of mediæval economy and social structure, and now Professor Vinogradoff seeks to sum up, especially for students of general history, the results of the researches of the past decade. He is not, however, playing the part of a compiler but is rather undertaking new syntheses on his own account, using recent achievements in his field as the basis of his argument and conclusions. He attempts bold constructive work and seeks to weld his materials into such form that the whole will be useful, not only to students of mediæval institutions, but to those who are working on the larger problem of social evolution.

The volume falls into three parts. More than one hundred pages are devoted to the period before the Anglo-Saxon invasion, and deal with Celtic tribal arrangements and Roman influence. At the outset there is a much needed warning that "we must guard carefully against the tempting idea that a state of society, even of an ancient one, may be treated as a system." After an examination of the elements of kinship and land holding, with their concomitants in Celtic society, our author arrives at certain conclusions, some of which will not seem new to those familiar with the theories of Mr. Jenks. Thus he concludes that aristocracy develops through economic struggle within the mass of freemen; that some of the elements of the manor are discoverable in this early period, but they are "in an incomplete and disconnected state, and overshadowed by the influence of other principles"; that serfs, free proprietors and free tenants are to be found dwelling side by side, but in separate communities and without the organization fitted for the maintenance of a dominant free class. Professor Vinogradoff's conclusions from the study of Roman land law, taxation and estates leads him to regard as "an exaggerated simplification of the historical process" Mr. Seebohm's somewhat rigid conception of the Roman villa in history. He emphasizes the military character of Roman occupation, the necessity of adaptation to local conditions in the distant parts of the empire, and the general survival of Celtic arrangements and communalistic practices which readily fused with those of the invading barbarians.