

## COMPARATIVE LAW AND THE CIVIL CODE OF JAPAN (II)

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### *Part.II. Fundamental Premises of Codification and Comparative Law*

#### *I. Civil Code and the Comparative Law*

##### **1. Comparative Method**

(a) As foreign laws have had a significant influence on the development of our law it is useful to draw attention to some of them. Most influenced were German, French and English law. It is not surprising that they are also the main objects of the comparative study today. These laws are at the same time great families of law.

There are several families of law in the world. While there is broad agreement over the existence of these families exactly how they are defined, details varies from theory to theory. The first family is the European Continental Law, which has its origins in Roman Law. This family can be divided in two, e.g. the German law and the French law. The second family is the Anglo-American law.

One of the drafters of our Civil Code, Hozumi, also referred to the “Great families of law”<sup>1</sup>. He classifies seven great families of laws. (i) the family of Chinese law, (ii) the family of Hindu law, (iii) the family of Mohammed law, (iv) the family of Roman law, (v) the family of Germanic law, (vi) the family of Slavonic law and (vii) the family of English law. This classification is not inviolable as Hozumi did not intend for it to be exhaustive or exclusive<sup>2</sup>.

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<sup>1</sup> Hozumi, *The New Japanese Civil Code, as material for the Study of Comparative Jurisprudence*, 1904 (in English), p.16; see also in his *Hotenron*, pp.43.

<sup>2</sup> Hozumi, p.16–17. He says; “There are many smaller branches of law, not belonging to any of the above mentioned Families, which are, none the less, very important for the Genealogical Method of comparative study,

(b) Modern comparative studies also define the families or systems of laws. E.g. in *David, Les grands systèmes de droit contemporains, 1974* refers to (i) la Famille romano-germanique, (ii) les droits socialistes, (iii) la Common Law and (iv) autres conceptions de l'ordre social et du droit (le droit musulman, le droit de l'Inde, Droits de l'Extrême-Orient, Droits de l'Afrique et de Madagascar)<sup>3</sup>.

In *Rabel, Das Recht des Warenkaufs, I.* (i) Mitteleuropäischer Rechtskreis [Family of German Law], (ii) Romanischer Rechtskreis [Family of French Law], (iii) Anglo-Amerikanischer Rechtskreis, (iv) Nordische Rechte, (v) Islamische Rechte, (vi) Römisches Recht (in der Form der byzantinischen Quellen) and (vii) Neue Kodifikationsbestrebungen<sup>4</sup>. Or II (i) Das anglo-amerikanische System, (ii) Das romanische System, Das deutsche System and (iii) Die Hauptländer Lateinamerikas (ABC-Staaten)<sup>5</sup>.

In *Zweigert-Kötz, Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, (i) Der romanische Rechtskreis, (ii) Der deutsche Rechtskreis, (iii) Der anglo-amerikanische Rechtskreis, (iv) Der nordische Rechtskreis, (v) Der sozialistische Rechtskreis and (vi) Die übrigen Rechtskreise (Der fernöstliche Rechtskreis, Das islamische Recht, Das Hindu-Recht)<sup>6</sup>.

*Rheinstein, Einführung in die Rechtsvergleichung, 1974* classifies (i) Der kontinental-europäische Rechtskreis, (ii) Der anglo-amerikanische Rechtskreis, (iii) Rechtsprobleme der Entwicklungsländer: Recht und sozialer Wandel in Afrika<sup>7</sup>.

*Constantinesco, Traité de droit comparé, t.III, La science des droits comparés, 1983* described these various attempts and failures to classify law systems in terms of great families of law<sup>8</sup>. His work, *Inexécution et faute contractuelle en droit comparé, 1960*, however, compares *droits Français, Allemand and Anglais*.

(c) The author thinks that the model developed by Hozumi is not so different to modern theories of classification. The different classifications reflect the viewpoint of their creators. Western comparative theories attach importance to western families. In Japanese theories, e. g. Hozumi, the family of Chinese law was of greater importance. This was because the traditional Japanese law was influenced so greatly by Chinese law. It is important to note the Japanese civil statutory law shifted from the Chinese family to the Roman family of law<sup>9</sup>.

The first introduction into Japan of Chinese civilization began in 7th century. From 645 to 1192 was the age of the ancient bureaucratic state, modeled after the Chinese system. Through the 8th century, Japanese law was greatly influenced by Chinese law. First the *Taiho-ritsuryo* (Codes) was promulgated in 702. Several other Codes followed this. However the direct influence from Chinese statutory law was forgotten in the next feudal period.

Under the three Shogunate governments (Kamakura Shogunate 1192–1333, Ashikaga

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but for the purpose of the present lecture, they need not be mentioned here."

<sup>3</sup> David, (i) pp.37, (ii) pp.161, (iii) pp.321, (iv) pp.469–582. The 4th part has only 113 pages.

<sup>4</sup> Rabel, I, 1957 (I. Teil. Der Umfang und die Ziele der Vereinheitlichung, § 2, Übersicht über die Kodifikationen des Kaufrechts, S. 19ff.).

<sup>5</sup> Ib. (II. Teil. Abschluß und Form des Kaufvertrages, § 11. Die Gesetze und Entwürfe, S. 71ff.).

<sup>6</sup> Zweigert-Kötz, Bd. 1: Grundlagen, 1971. S. 67ff. (B. Die Rechtskreis der Welt).

<sup>7</sup> Rheinstein, S. 77ff. (3. Teil. Die großen Rechtskreise).

<sup>8</sup> Cf. pp.80–162. Also, Constantinesco, *Rechtsvergleichung, Bd. III, Die rechtsvergleichende Wissenschaft, 1983*, S. 73–169. He states also the work by Hozumi, p.101. "Ce classement surprend par sa justesse, et, si l'on tient compte de l'époque, on doit le considérer comme probablement le meilleur."

<sup>9</sup> Hozumi, op.cit., p.19.

Shogunate 1338–1573 and Tokugawa Shogunate 1603–1867)<sup>10</sup>, customary law prevailed. Because, incontest to China, where the system of an unitary centralized state was upheld, Shogunate government in Japan was a feudal system. This was abolished in China by “First most Sublime Ruler of Ch’in” as early as 221 B.C. Most of the time feudal government had no interest in comprehensive statute law.

The *Joyei Shikimoku* of 1232 by the Kamakura government under the *Hojo* regency was the exception to this. Codes or statutes were rare in the feudal period. Law and institution under Shogunate government had, however, as their base Chinese moral philosophy. This provided a moral philosophy for rulers. Thus at least indirectly, Japanese law belonged to the family of Chinese law and ideas for more than one thousand years<sup>11</sup>. This situation continued until the reformation period of 1868.

(d) Because the modern international legal system belongs to western legal tradition, the families of law which belong to other legal systems disappear or their significance decreases. This is what happens, for example to the family of Chinese law, the family of Hindu law or the family of Mohammed law.

The objects of comparative law continues to concentrate more and more on the western legal system, e.g. either the continental or Roman family of law (Germanic and French law) or the Anglo-American family of law. Other families of law are sometimes relegated as objects of law sociology.

It was natural that the modernization of the Japanese legal system after 1868 was accomplished through the introduction of western law. Japanese statutory law after 1868 was completely replaced by West-European type law.

## 2. Japanese Law and Other Laws in the World

(a) It is also important to note not only the main families of law which have significant influence on other countries but also many other variations or branches of law. The social and economic state of each country is different and also the tradition varies greatly from country to country. Thus the details of law which can be adopted are at least a superficial form very different.

Our drafters considered the variations or branches of laws and collected more than thirty civil codes, including many drafts:

(i) In the family of French Code Civil, 1804 (abridged as CC, below), Netherlands Civil Code, 1838 (Nied.CC); the former Italian Civil Code, 1865 (It.CC), Portuguese Civil Code, 1867 (Port.CC); the former Spanish Civil Code, 1888 (Sp.CC). And the draft of Belgium Civil Code, 1804 (BeE, revised 1851).

(ii) In the family of German Civil Code, 1900 (abridged as BGB, below); ALR, 1794 (*Allgemeines Landrecht für die preussischen Staaten*); ABGB, 1814 (*Allgemeines Bürgerliches-*

<sup>10</sup> From 1573–1603 was an age without a Shognate. From 1478 it was the epoch of the warring countries and Japan disintegrated. Many *Daimyos* [princes] and their vassals ruled their own areas and struggled with each other.

<sup>11</sup> Hozumi thinks that Japanese law has Chinese moral philosophy, together with the custom of ancestor-worship and the feudal system as its base. In his book, op.cit., p.17.

On the short history of Japanese law to 1868, cf. Noda, *Introduction au droit Japonais, 1966 (French); Introduction to Japanese Law, 1976 (English translation by Angelo)*, pp.19. On the process of reception, op.cit., pp. 41.

*gesetzbuch für Österreich*); the first draft of BGB, 1887 (Entwurf=E I); the second draft of BGB, 1896 (E II). There were some codes of the small states in Germany before the unification in 1871: Civil Code of Saxony, 1865 (Sach.BGB); Draft of Civil Code of Bavaria, 1860-64 (Bay.E.). And Dresdener Entwurf, 1865 (Dresd.E.) was the draft of Law of the Obligations by German Confederation (1814-1866) and it became the basis of the Book II (Law of Obligations) of the draft of the German Civil Code in 1900.

(iii) In the family of English Common Law the drafters cited not only many precedents in English law but also Indian Contract Law, 1872 and the Indian Claims Limitation Act, the Indian Specific Performance Act, 1877 or some Acts, because those Indian Codes sometimes materialized English precedential principles.

In America the "Canadian Code", namely the Civil Code of Québec of Canada (1886) and the Code of California (1872), but not the Civil Codes of Louisiana (1808). There was no substantial reference to codes comparable to continental Civil Codes. Even the Civil Code of California, the Draft of the Obligation Code of New York, 1863 were nominally referred by the drafters of the Japanese Civil Code.

(iv) In the Law of Estate many variations in small countries as cantons in Switzerland were referred to. Vaud, Graubünden, Zürich etc. The former Obligation Code of Switzerland, 1888 (SOR) is also referred to in relation to the area of civil law.

(v) Eastern European codes were also referred to; The Property Code of the principality of Montenegro, 1888. Also the Russian Civil Code, 1832, but not the Civil Code of USSR, 1922.

On Commercial Law, Italian Commercial Code or German Commercial Code, 1861 (AD HGB = Allgemeines Deutsches Handelsgesetzbuch).

Our drafters paid no attention to Scandinavian laws.

(b) Not only the above laws which were referred to by the drafters of the Japanese Civil Code but also the many variations of the laws which came out after the enforcement of the Civil Code (in 1898). From 20th century there has been many amendments to these Codes. Those amendments also need to be noted in comparative studies.

These include the new Obligation Code of Switzerland, 1911; new Italian Civil Code, 1945; new Civil Code of Portugal, 1967; New Civil Code of Netherlands, after 1969.

Between 1945 and 1990 there were many Civil Codes in socialist countries. E.g. East German Civil Code, 1978-90 (DDR-ZGB).

(c) From the later half of 20 century the importance of American law increased. The works of the establishment of the Restatements of the Law or the Uniform Commercial Code (UCC) should be noted. E.g. Restatement of the Contracts (1932, 1981), Torts (1925, 1965) etc.

(d) Moreover, we can see some efforts to unify the laws by the United Nations and European Community or European Union.

The convention relating to a Uniform Law on the International Sale of Goods (The Hague Convention), 1964 and Uncitral Convention on Contracts for the International Sale of Goods (Vienna Sales Convention), 1980 (CISG) are examples of this.

As are the recent Unidroit, An international restatement of contract law: UNIDROIT Principles of International Commercial Contracts, 1994. The Commission on European Contract Law (Lando Commission), Principles of European Contract Law (Part I: Performance, Non-Performance and Remedies), 1995.

### 3. Foreign Law and the Drafters

(a) As the author already noted, the drafters of the Civil Code referred to more than thirty civil codes and drafts.

Among the drafters, Hozumi was notable in that he intentionally tried to use the comparative method. His interest on law was not limited to the interpretation of Civil Law. His works in English, *Hozumi, The new Japanese civil code: as material for the study of compare, 1904; Lectures on the new Japanese civil code (2d & rev.) 1912; Ancestor-worship and Japanese law, 1901 (2nd. 1912, 3rd. ed. 1913)* show this. He also wrote on the Japanese customary law.

(b) Other drafters, e.g. Ume and Tomii worked from the basis of French law. Especially for Ume the law, which should be referred to develop new Japanese law, was necessarily French law. Ume was a gifted commentator and his interest was not in the history of law or comparative law. His idea of comparative law is not clear. Ume's only work in a foreign language is *De la transaction, comparé avec le code civil italien et le Projet de code civil japonais, 1889*, which was written in France.

This is also true for Tomii. There was, however, a difference between them. Ume thought that the French law was the best law in the European family whereas Tomii placed German law in this position. This is despite the fact his works in a foreign language were in French; see *Tomii, État de la codification au Japon, communication a la société de législation comparée, Séance générale du 9 février 1898, 1898; Coup d'oeil sur les transformations politiques du Japon, 1897. Droit romain; des droits du vendeur non pay; Droit français, du droit de résolution du vendeur non pay, 1882*<sup>12</sup>.

## II. Prologue for Legislation

### 1. The New idea of law and legislation

(a) During the time of the Tokugawa régime, laws or statutes were not publicized. They were kept strictly secret<sup>13</sup>. They were neither allowed to be printed nor published. Only judges and officials were allowed to peruse the codes and the records of judicial precedents<sup>14</sup>. For lawyers (*kujiyado*) and men of high repute who were sometimes obliged to escort the parties to a suit, there were only unofficial guidebooks which collected precedents and summarized the legal standards<sup>15</sup>.

<sup>12</sup> The drafter's works in Japanese are cited op.cit., pp.33-36 in vol.24 in this series. Among these works Hozumi's *The new Japanese civil code* and Tomii's *État de la codification au Japon* are noteworthy here. The latter, however, is a short report on the general legal and judicial system in Japan after 1868 (There are only 7 pages and 3 pages discussion). Tomii was not a man of thought.

<sup>13</sup> Hozumi, op.cit. (at note 1), p.20.

<sup>14</sup> Hozumi, ib., p.20.

<sup>15</sup> Cf. Takigawa, *The role of "Kujiyado" in the Japanese Feudal Period as the Predecessor of the Modern Bar - with the original text of Hikae (forms of documents for various legal proceedings) compiled by Kujiyado, Institute of Comparative Law of Waseda University Publication No.8 (1959)*, pp.77 (Comments), pp.95 (Text). (in Japanese).

Under this system there was no motivation for legislation or comprehensive codification. Law was one of the means of rule for the bureaucracy and as such its use was restricted to specialists in the court or the government. So there were only a collection of unwritten laws and acts, and even these were not systematically organized. In Tokugawa period it was usual that small acts or orders were issued occasionally on the demand of each practice.

Hence only rarely was a comprehensive Code enacted and published. One example is *Osadamegaki-Hyakkajou* [or *Kujigata-osadamegaki*, The Hundred Articles of Criminal Code] (by Tokugawa Shogunate government, 1720–42)<sup>16</sup>. The initial motivation for this legislation was the simplification of law because the huge number of precedents hindered even the specialists finding the law. However the code accomplished not only the simplification but also some innovation of law. The author thinks that the enactment of the comprehensive Code is inevitably accompanied not only simplification of law also by some innovation. This is true of this case.

There was some other simplifications of law by means of logical arrangement or consolidation of legal rules<sup>17</sup>. This constitutes the most usual motive for primitive codification not only in the Meiji Era but also in the Tokugawa period.

The idea that laws should be published show one characteristic of intentional innovation. Hozumi says that one of the most remarkable changes which the introduction of western jurisprudence produced in Japan was the change in the conception of law. "Previous to the Restoration of 1868, there was no idea that publication was essential to law."<sup>18</sup>

(b) After 1868 law was expected to fulfil a new role. The reformation at the beginning of Meiji Era was on such a large scale that law took on a role in the process of social reform.

The traditional law was totally replaced by western law. Social reforms were motivated by a desire to westernize and modernize Japanese industry and society. Thus it was felt that the law also should be westernized. Codification had to be done in order to recognize these preceding changes.

(c) During the time of Tokugawa régime, there were different local laws and customs. The law of the Shogunate government could not directly apply in the jurisdictions of feudal princes (*Daimyous*). The new government also aimed to have unified laws throughout the country.

(d) According to Hozumi, there was one more objective behind the codification. He saw the pacification of law as one of the goals as codification takes place after a great social disturbance in order to restore peace and maintain order by means of comprehensive legislation<sup>19</sup>.

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Kujiyado was one of the authorized type of lawyer in Tokugawa period. On the other hand, Kujishi was one of the unauthorized type of lawyer. The social status of lawyers in this period were far lower than that of western countries.

<sup>16</sup> But under the traditional system, the separation of civil and criminal law was not completed.

<sup>17</sup> Hozumi, *op.cit.* (at note 1), p.13.

<sup>18</sup> Hozumi, *ib.*, pp.19–20.

<sup>19</sup> Hozumi, *ib.*, p.13. "This was true of the ancient codes Draco and Solon in Greece, the Law of Twelve Tables in Rome, and the codifications in China since the Han Dynasty, where it was customary for the founder of every dynasty to publish a new code of laws after he had gained the imperial power by force of arms. In Japan, the codes of the Hojo and the Tokugawa belong to this class."

The author takes that pacification of law is not always necessary and thus the only and essential motive for this is simplification of law.

## 2. Dajoukan Proclamations

(a) For the first time after *Osadamegaki-Hyakkajou* a comprehensive Criminal Code was enacted and promulgated in 1870; *Shinritsu-kouryou* [The Criminal Code, 1870], and then *Kaitei-Ritsuryou* [Revised Criminal Code, 1873]. Those Code were enacted in the form of Dajoukan Proclamations.

In the area of civil or commercial law, however, the Codification did not keep pace with the swift social changes. Comprehensive codifications only occurred from the 1890s; the first Commercial Code in 1891, the Commercial Code in 1899 and the first Civil Code in 1890 (only promulgation). Before the enactment of the Civil Code in 1896 and 1898, there was only fragmentary and minimal legislation. Such legislation could not meet the requirements of the time.

(b) Law in this early period had a temporary character as it was only expected to function until the time of comprehensive codification. For the first time, some kinds of law on emancipation were enacted in order to abolish feudal tradition<sup>20</sup>. Next, laws on innovation were enacted<sup>21</sup>. However the whole system of the law was not touched. So most of the decision of the courts was issued according to the traditional (unwritten) law<sup>22</sup>. But those traditional laws alone were not enough to meet the demands of the changing society.

However the next Dajoukan Proclamation is exceptionally noteworthy. It was short but its contents were not fragmentary. It was admitted as a temporary measure to supply the demands of the changing society.

(c) Dajoukan Proclamation (in the 8th year of Meiji [1875] No.103) provided in article 3 that *judges should decide civil cases according to the express provisions of written law, and in case where there was no such written law, according to custom. In the absence of both written and customary laws, they were to decide according to the principles of reason and justice.*

In the early period of Reformation of Meiji Era, there was no systematic organized civil law. It was often necessary to find law in cases where no written law existed. Sometimes the old customary law, which governed the life of the people was applied. This old law, however, had no application to the international transactions. Thus sometimes the idea of foreign law was applied. The Dajoukan Proclamation mentioned above opened the door for the introduction of

<sup>20</sup> E.g. Dajoukan Proclamation (in the 5th year of Meiji [1872] 10, 2) No.295 and Directive by the Ministry of Justice (in the 5th year of Meiji [1872] 10, 9 No.22) emancipated apprenticeship from long term contract. This aimed especially to abolish "geisha" house. The latter Directive is famous because of the characteristic of limitation of capacity of women who were in "geisha" house.

The sale of farms were prohibited in 1643 under feudal government. In 1872 it was allowed by the Dajoukan Proclamation (in the 5th year of Meiji [1872] 2, 15, No.50).

<sup>21</sup> By Dajoukan Proclamation in 1873 (in the 6th year of Meiji [1873] 7, 28, No.50) every land owner got official certification of ownership (*chiken*), which became the basis of taxation on land (*chiso-kaisei*). Also cf. Dajoukan Proclamation (in the 7th year of Meiji [1874], 10, 3) No.104; D.P. (in the 8th year of Meiji [1875] 6, 18) No.106.

Dajoukan Proclamation (in the 13th year of Meiji [1880] 11, 30, No.52) abolished the system of the endorsement of *chiken* in order to transfer land-ownership. After this time the acquisition of *chiken* ceased to be a necessary condition of ownership but the acquisition of ownership could not be set up against a third party until it had been registered (cf. Civil Code, Art.177). The *chiken*-system was abolished by the Land Registration Code in 1886.

<sup>22</sup> In some money-lending cases, *Osadamegaki-Hyakkajou* was applied even after 1868. cf. *Fukushima, Nihon shihonshugi no hattatsu to shiho* [The development of Japanese Capitalism and Private Law], 1988, p.36.

foreign law, especially in the area of this type of transactions.

Moreover there was a time lag of 8 years, between the proclamation (without enforcement) of the first Civil Code (in 1890) and the enforcement of the second Civil Code (in 1896/98). This period was short but important. Indeed the enforcement of the first Civil Code was postponed because of the Controversy on the Civil Code Codification. But during this time judges often used the provisions of the former Civil Code in the name of the principles of reason and justice. Also there was sometimes *de facto* application of the former Civil Code<sup>23</sup>.

(d) Moreover even before the proclamation of the first Civil Code the concept of the principles of reason and justice meant substantially French law in the sense of the natural law.

Boissonade stated; "Les magistrats japonais qui, depuis la Restauration du Gouvernement impérial, appliquent déjà les principes du Code civil français, comme 'ratio scripta,' les retrouveront ici dans leur loi nationale"<sup>24</sup>.

For example in 1887 one district court declared an application of the principles of reason and justice from the viewpoint of foreign law in the absence of written law, without deciding according to customary law<sup>25</sup>.

(e) This Proclamation (in the 8th year of Meiji [1875] No.103) aimed also to exclude the interference of administrative power within the court. Before that time the courts of each prefectures were set under the jurisdiction of Ministry of Justice, so the directives or orders by the Ministry or Dajoukan Council were the main source of judgments<sup>26</sup>.

Naturally it was rare for foreign law to be directly consulted. But the invisible and indirect application influenced the early theory of judicial precedents.

According to Hozumi, the rapidly changing circumstances of Japanese society brought many cases before the court for which there were no express rules, written or customary, and the judges naturally sought to find out the principles of reason and justice in western jurisprudence. The older members of the Bench, who had not been systematically taught western jurisprudence, consulted the translations of the French and other European codes and text books. The increasing number of younger judges who had received systematic legal education in universities, either in Japan or abroad, consulted western codes, statute books, law reports, and juridical treatises, and freely applied the principles of occidental jurisprudence, which in their opinion, were conformable to reason and justice<sup>27</sup>.

<sup>23</sup> The French law which was the basis of the first Civil Code was the *ratio scripta* (written reason) for Japanese law as the Roman law was the *ratio scripta* for German law in medieval period.

<sup>24</sup> Boissonade, *Projet de Code civil pour l'Empire du Japon, t.2., 1883, Introduction, p.vii*. "Ratio scripta, 'raison écrite,' est la qualification qu'on donnait, en Europe, au droit romain, quand il était appliqué pour suppléer aux lacunes du droit coutumier". The idea of Boissonade on natural law is shown here, "Nous croyons, d'ailleurs, pouvoir affirmer qu'il n'y a aucune des solutions de ce Projet qui ne soit conforme au Droit naturel et qui, par conséquent, en l'absence de loi positive, ne puisse être supplée par un tribunal sage et éclairé, suivant les lumières de la Raison pure, le sentiment de l'Équité naturelle et la notion de l'Utilité générale."

Also, cf. Fukushima, *op.cit.* (at note 22), p.19, p.39.

<sup>25</sup> Fukushima, *ib.*, p.207. Of course it only rarely did a case directly refer to foreign law. In ordinal cases the influence of foreign law were hidden after the name of "justice" or "reason of law".

<sup>26</sup> *Ib.*, p.206.

It is to be noted that in 1875, after Etoh's retreat, there was a reform of administrative structure in order to divide the influence of Ministry of Justice. cf. *op.cit.*, p.12 (this paper, Vol.24).

<sup>27</sup> Hozumi, p.18. Also, "Many academic texts were looked upon as repositories of just and reasonable principles and supplied necessary data for their judgments. In this manner, Occidental jurisprudence entered our country, not only indirectly through the University and other law colleges, but also directly through the Bench and the Bar."

**3. Second type of Dajoukan Proclamations**

(a) Some fragmentary Dajoukan Proclamations survived even after the enactment of the Civil Code. For example the Dajoukan Proclamation on usury law survived till 1954. This law was short but concerned the fundamental principles of civil law.

The Dajoukan Proclamation (in the 10th year of Meiji [1877] No.66) provided as follows.<sup>28</sup>

Indeed in the early period of Meiji Era, there were many translations of academic books and commentaries on European law. Perhaps the Japanese tendency to regard the translations of foreign law highly stems from this.

<sup>28</sup> In 1919 the law was once amended.

“Art.2. (Maximum rates of interest)

The contractual interest can be fixed by a voluntary contract. The contractual interest shall be fixed under the rates: where the principal is less than one hundred yen, fifteen percent per annum; where the principal is one hundred yen or more but less than one thousand yen, twelve percent per annum; where the principal is one thousand yen or more, ten percent per annum. If it exceeds the sum calculated at the rates of interest mentioned above, the agreement on interest shall be null and void in the process of trial with respect to the portion which is in excess and it shall be deemed to be applied to the principal.”

The maximum rates of interest were reduced according to the financial changes.

The existing Usury Law was provided after the World War II (in 1954). Because the money value totally changed by the inflation after the World War II, the old maximum rates of interest became unworkable.

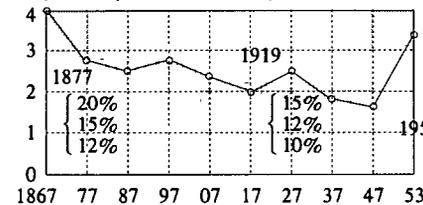
Effective Interest Rates on Loans & Deposits of all Banks.

Japanese Statistical Yearbook (Source: Ministry of Finance & National Financial Control Associations, & The Bank of Japan).

	1867	1877	1887	1897	1907	1917	1927	1937	1947	1953
○	3.84	2.73	2.48	2.79	2.35	2.02	2.55	1.79	1.59	3.33

Daily interest rates by Sen (1/100 Yen) for principle of 100 Yen.

Daily rates (Sen = 1/100 Yen)



Daily rates 4 Sen means annual 14.60%

Daily rates 3 Sen - 10.95%

Daily rates 2 Sen - 7.30%

Daily rates 1 Sen - 3.65%

Law of 1873	legal interest rates 6%				
	Maximum contractual interest rates by Usury Law			Civil Code	
Law of 1877	less than ¥100 20%	¥100-¥1000 15%	¥1000 or more 12%	Civil legal interest	5%
Amendment of 1919	15%	12%	10%		
Law of 1954	less than ¥100,000 20%	¥100,000- ¥1,000,000 18%	¥1,000,000 or more 15%	Commercial legal interest	6%

Art.1. The interest is fixed either by law or by contract. (cf. Art.1907 Code Civil Français).

Art.2. (Maximum rates of interest)

The contractual interest can be fixed by a voluntary contract. The contractual interest shall be fixed under the rates: where the principal is less than one hundred yen, twenty percent per annum; where the principal is one hundred yen or more but less than one thousand yen, fifteen percent per annum; where the principal is one thousand yen or more, twelve percent per annum. If it exceeds the sum calculated at the rates of interest mentioned above, the agreement on interest shall be null and *void in the process of trial* with respect to the portion which is in excess and it shall be deemed to be applied to the principal.

[In cases where the debtor has voluntarily paid the portion in excess mentioned in the paragraph, he may not demand refund thereof, notwithstanding the provisions of said paragraph.]

Art.3. The interest fixed by law is applied to those case where there exists no agreement on the rate of interest. The rate is six percent per annum.

Art.4. For the purpose of application of the provisions of the Article 2, where the creditor receives money under the name of a fee, discount charge or commission, or otherwise under whatever name they may be charged, the contract shall be null and *void in the process of trial*.

Art.5. The determination in advance of the amount of damages on account of failure to perform obligations shall be deemed as the amount of damages to the principal. If the judge considers the amount which the creditor receives is excessive for the compensation as damages, he can cut the amount down to a proper portion at his discretion.

(b) Under feudal Tokugawa régime the maximum rate of interest was, in principle, 12%. In 1871 the Dajoukan Proclamation (in the 4th year of Meiji, No.31) abolished this rule<sup>29</sup>. Similar to the situation after the French Revolution, the interest rates was deregulated for a short period.

In France from 1804 to 1807. Code civil 1804 freed the rates (Art.1907). In 1807 the law 1807. 9. 3 (Lois des 3 sept.1807) provided that the civil legal and contractual rate was 5% and commercial legal and contractual rate was 6% (Art.1)<sup>30</sup>.

In Japan from 1871 to 1877, because of the detrimental effect of the higher rates of interest, the Dajoukan Government provided a law. This was the Proclamation noted above (in the 10th year of Meiji [1877] No.66).

<sup>29</sup> See the author's paper on Usury Law, in Hougaku-kenkyu [Hitotsubashi University Research Series, Law & Politics], Vol.27 (1995), pp.43-107, especially p.45 (in Japanese).

*Minji kanrei ruishu* [The Collected Customs on Civil Affairs], 1877-1880 (Book.3 Contract, Chap.2 leases and loans) shows the customary law in the early period of Meiji. (in Japanese). Also, *Wigmore, Law and Justice in Tokugawa Japan, Part III, Contract, Legal Precedents*, p.256-261, *Part II, Contract, Civil Customary Law*, pp.69.

In Tokugawa period, there were many exception to this principle, which allowed higher rates of interests. cf. The author's paper, op.cit. (at note 29), p.45.

<sup>30</sup> The author's paper: The Development of Usury Law, in *Gyousei-shakai-ronshu* Vol.1 (1988), pp.1-43, especially p.38-39.

French Civil Code, Art.1907 provided; L'intérêt est légal ou conventionnel. L'intérêt légal est fixé par la loi. L'intérêt conventionnel peut excéder celui de la loi, toutes les fois que la loi ne le prohibe pas.

Le taux de l'intérêt conventionnel doit être fixé par écrit.

On Lois des 3 sept.1807, 19 déc.1850, 14 janv.1886, the author's paper, op.cit. (at note 30), 39-40. Loi 18 avr. 1918 abolished the maximum rate of civil interest. On development in the 20th century, cf. the author's paper, op.cit., p.40-41.

(c) In the course of drafting of the Civil Code several different motives were at play. Boissonade's draft intended to maintain the restriction on the contractual rate<sup>31</sup>. He wished to maintain large restrictions on usury from the view point of natural law. Restriction on illegal interest also reflects this opinion.

The drafters of the first Civil Code, however, amended Boissonade's draft. In the first Civil Code it was allowed to contract at a higher rate than legal interest as long as there was no restriction by law (Art.187 I). However the existence of usury law by the Dajoukan Proclamation was presupposed. In the Drafting Committee, however, there were strong supports for the deregulation of contractual rate of interest and for the abolition of usury law<sup>32</sup>.

The drafters of the second Civil Code had even stronger desires which was in accord their economic liberalism. So they proposed new draft which abolished the Proclamation on usury law. The draft of the provisions of loan for consumption of the Civil Code stood on the premise of abolishment of the Usury Law<sup>33</sup>. The main reason was the freedom of contract.

In the Drafting Committee, however, there were also strong opinions for the maintenance of Usury Law. Many of the members feared the usury and intended to protect debtors who were economically weak and were forced to contract on extremely unfair terms. Indeed, there many detrimental effects did spring from the abolition of the usury law in 1871 (high interest rates like 62%, 70% or 108%<sup>34</sup>).

The draft to abolish the usury law was rejected twice in the Committee and the usury law survived the enactment of the Civil Code<sup>35</sup>.

(d) It was usual that fragmentary laws were either inserted into the comprehensive system of the Civil Code or abolished later. In some cases, such as the Usury Law, this attempt failed. So there existed some fragmentary laws which survived even after the enactment of the Civil Code. In Japan it was not possible to systematize and unify the whole civil law from the earliest time. Even the *Pandektensystem*, which was later introduced by the Codification of the Civil Code, is based on this.

Moreover, especially after the World War I, a new idea of the role of law became in a social welfare state came into view. New laws for the protection of debtors were enacted one after another. The Civil Code itself was rarely amended. Instead fragmentary and independent laws were often enacted. The Rented House Law (1921), Rented Land Law (1921), Restriction Law on the Responsibility of Surety for Employee (1933) and recently Restriction Law

<sup>31</sup> Cf. Boissonade, *Projet de Code Civil pour l'Empire du Japon accompagné d'un commentaire*, t.3 (*des moyens d'acquérir les biens*), 1888 (rep. 1983), pp.779.

Art.882. "Les intérêts conventionnels ne peuvent excéder les intérêts légaux que dans les cas où la loi ne le prohibe pas.

S'ils ont été ostensiblement fixés à un taux supérieur à celui que la loi permet, ils sont réductibles à ce taux et ce qui en a été payé au-delà est sujet à imputation sur le capital ou à répétition;

Mais lesdits intérêts illégitimes ne sont dus pour aucune portion, et, s'ils ont été payés, ils sont sujets à répétition pour le tout, lorsque le créancier les a fait dissimuler, en tout ou en partie, soit par la reconnaissance d'un capital supérieur à celui qu'il a effectivement prêté, soit de toute autre manière." Boissonade's draft reflects the restrictions of interest by French law, e.g. Lois des 3 sept.1807, 19 déc.1850, 14 janv.1886.

<sup>32</sup> The author's paper, op.cit. (at note 29), p.57. Hoten-chosakai-kyuminpou-giji-sokkiroku [The stenographic records of the Drafting Committee on the first Civil Code], vol.12, pp.94 (61th session, 1888. 6. 4).

<sup>33</sup> The author's paper, op.cit. (at note 29), p.58. Hoten-chosakai-minpou-giji-sokkiroku, vol.28, pp.103.

<sup>34</sup> Fukushima, op.cit., p.205 (at note 22).

<sup>35</sup> The author's paper, op.cit. (at note 29), p.59. The author has the intention, in this series (V.Law of Obligations), to examine the characteristic and the development of the Usury Law.

on the Acquisition of Mortgage (1978), Law on Product Liability (1994) etc. are examples of this. More and more fragmentary laws were attached in the area of substantial civil law, but formally they remained independent laws. Herein lies one of the characteristics of Japanese legislation.

#### 4. The first Drafting Committee.

(a) The attempt to codify the new Civil Code was initiated by the *Houritsu-torishirabe-iinkai* [Drafting Committee of Civil Code Codification], which was founded in the Senior Council's Office of Civil Code Codification in April 1880. It was abolished on March 31, 1886.

This work was continued by the Drafting Committee in the Ministry of Justice (April 1, 1886–April 18, 1887) and by the *Houritsu-torishirabe-iinkai* in the Ministry of Foreign Affairs (August 6, 1886–October 20, 1887)<sup>36</sup>. This was conducted by the Ministry of Foreign Affairs as Codification was one of means of amending the unequal treaties.

The *Houritsu-torishirabe-iinkai* [the first Drafting Committee of the Civil Code] for the first Civil Code was founded on October 21, 1887 in the Ministry of Justice. Attempts of modern codification substantially began with this Committee.

Its head was *Yamada Akiyoshi* (1844–92), the Minister of Justice. This Committee discussed on the Civil Code Project prepared by Boissonade. Boissonade made the original drafts of the Civil Code, Book I-IV (on the part of law of property, obligations, surety and evidence; the draft of law on persons was prepared by Japanese members), but he himself was not the member of the Committee and had no right to attend the Committee. His project was translated into Japanese and amended by the *reporting (or drafting) members* of the Committee and presented to the Committee (official draft). The members of the Committee were divided in two. Even the reporting members had no right to vote. The drafts were determined by the other members of the Committee, the *discussing members*.

(b) One characteristic of the first Drafting Committee is that most of the members were judges and members of the Senior Council. E.g., most of the reporting-members, IMAMURA Kazuro (1846–91), KURIZUKA Shougo, MIYAGI Kouzou (1852–93), INOUE Shouichi (?–1905), ISOBE Shirou (1851–1923), KUMANO Toshizou (1854–99), KOUMYOUJI Saburo etc. and the discussing members, MITSUKURI Rinsho (1846–97), KIYOOKA Kimiharu (1841–1901), WATARI Masamoto (1839–1924), TSURUTA Hiroshi (1835–88), MURATA Tamotsu (1842–1925), OZAKI Miyoshi, MAKIMURA Tadanao, HOSOKAWA Junjiro (?–1923) were members of Senior Council<sup>37</sup>.

The power of the Left House (legislature, 1871–1875) was usurped by the Senior Council in 1875 in order to handle legislative affairs (and was abolished in 1890 before the time of establishment of the Diet).

OZAKI Tadaharu, NANBU Kameo, NISHI Naruto, MATSUOKA Yasuki, KITABA-

<sup>36</sup> Ohkubo, Boissonade, pp.134–142. *Ikeda, Saikenjouto no kenkyu* [Research on Assignment of Claims], 1993, p. 455.

<sup>37</sup> Many of the members of Senior Council were appointed from the group of judges, e.g. KUMANO Toshizo, who took a doctorate in France and wrote a commentary on Civil Code with Judge Kishimoto in 1890.

The reporting-members, Kumano, Koumyouji, Kuroda and Takano not only prepared the drafts (Book I-IV) based on the projects by Boissonade but also drafted originally the provisions of Book 5 (Des personnes) of the first Civil Code. Cf. Tezuka, *Koshuken* [The right of House-Headship] in the first Civil Code, *Hogaku kenkyu* (Keiou University), Vol.26, No.10, pp.7. (in Japanese).

TAKE Harufusa (1833–1921). They were judges. MIYOSHI Taizou (1845–1908) was the Vice-Minister of Justice.

Many judges were educated in the School of the Ministry of Justice or at least accustomed to French law. As a result, their attitude to law was inclined to the solutions provided by French law<sup>38</sup>. Rarely did the Committee fundamentally question the drafts by Boissonade and French law.

In the early period of Meiji the separation of court and administration did not complete<sup>39</sup>. The judges sometimes held various high-ranking posts at the Ministry of Justice after or before their tenure.

(c) The characteristic of the first Drafting Committee is that there was no leading influential member in the Committee. Contrary to the first Drafting Committee, in the second Drafting Committee three drafters, Ume, Hozumi and Tomii played the main role in discussion. In the first Drafting Committee the judicial members were familiar with the practices and customary law and they played a greater role in the discussion, but even the judges often exposed their ignorance of western law.

Formally Boissonade has no right to attend in the Committee. However in substance he was the drafter of the code except the Law of Family and Succession. There was a marked difference in the knowledge of western law between Boissonade and members in the Committee<sup>40</sup>.

Some years were necessary before the grounding and the knowledge of western law of the Japanese Committee members progressed. The second Drafting Committee was established in this situation.

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<sup>38</sup> KURIZUKA Shougo, MIYAGI Kouzou, INOUE Shouichi, ISOBE Shirou, KISHIMOTO Tatsuo and KUMANO Toshizou were the first graduates of the School of Ministry of Justice in 1876. They were also ordered to study in France by the Ministry. Later some of them helped Mitsukuri to translate Boissonade's projects into Japanese. Cf. *Kabuto, Jirekifu* [*Memoirs by Kabuto of his own History*], 1929 (rep.1982), pp.115. Short profiles can also be seen in *Ohue, Meiji kakocho* [*Necrology in the Meiji era*], *Taishou kakocho* [*Necrology in the Taishou era*], rep.1946.

UME Kenjiro was one of the second group of graduates from the School of the Ministry of Justice in 1884. cf. *Kabuto, ib.*, p.131.

<sup>39</sup> Cf. Vol.24, p.12. The court-system was under the control of the Ministry of Justice. Taishin'in [The former supreme court until 1947] was established in 1875 but it was under the substantial influence of Ministry of Justice until 1947. cf. Appendix III.

<sup>40</sup> One of the reason why Boissonade was invited to Japan was that Mitsukuri, the translator of many western laws and codes, had asked Minister of Justice, Etoh to let him go abroad in order to study law because he was not sure his translations were correct because of his lack of grounding in law. Etoh answered that Dr. Mitsukuri was an indispensable person to the government which hastened westernization of the country. Instead of allowing Mitsukuri study abroad, Boissonade was invited to Japan in order to answer questions which occurred in the process of translations by Mitsukuri. The process of invitation of Boissonade, cf. *Ohkubo, op.cit.* (at note 36), pp. 33.

Originally Dr. Mitsukuri was a translator of western books in the Tokugawa government. In Tokugawa period the research and translation of western books was restricted to the areas of natural science (especially medical science, agriculture and technology) and sometimes geography. The research and translation in the area of social science officially began with the Meiji Era under the new government.

### III. *The Process of Codification: The Second Drafting Committee*

#### 1. The Second Drafting Committee.

(a) The government appointed the members of the new (second) Drafting Committee in 1893. The original Committee consisted of 33 members from various regions. They can be divided in groups as follows.

① ITOH Hirobumi (1841–1909) was the president of the Drafting Committee. He later became Prime-minister (1885–89, 1892–96, 1898, 1900–01). SAIONJI Kinmochi (1849–1940) was the vice-president of the Drafting Committee. He and Dr. Mitsukuri were the chairmen in the session of the Committee. He also became Prime-minister (1906–08, 1911–12). Saionji studied in France. In spite of his social position of peerage he belonged to the progressive political force at the time of Meiji Era.

② Three drafters, HOZUMI Nobushige (1856–1926) \* , UME Kenjiro (1860–1910), TOMII Masa'aki[ra] (1858–1935) were professors.

③ HIJIKATA Yasushi (1859–1939) \* and Hozumi's brother HOZUMI Yatsuka (1860–1912) \* were also professors. The former belonged to the English section or school of lawyers.

④ There were several members of the Diet, e.g. HATOYAMA Kazuo (1856–1911), MOTODA Hajime (1858–1938) \* and HOSHI Toru (1850–1901). OZAKI Miyoshi and MURATA Tamotsu were formerly members of the Senior Council.

⑤ There were several judges, Nambu Kameo, HASEGAWA Takashi, INOUE Shouichi, TAKAGI Toyozou, ISOBE Shirou (?–1923), KISHIMOTO Tatsuo (1852–1912). Most of them had studied in the School of the Ministry of Justice and belonged to the French section or school of lawyers<sup>41</sup>. Judge Inoue and Judge Kishimoto had taken a doctorate in France<sup>42</sup>. Judge Nambu, Inoue and Isobe were also members of the first Drafting Committee.

⑥ There were many high-ranking officials of the government. Most of them became later conservative politicians. KIYOURA Keigo (1850–1942) was a Vice-minister of Justice and later became Prime-minister for a short period (1924, Jan.7–June 7). ITOH Miyoji (1857–1934) was the chief secretary of the Cabinet Secretariat. KANEKO Kentaro (1853–1942) was the Vice-Minister of the Agriculture, Forestry and International Trade and Industry. These

<sup>41</sup> Some judges who were in the first Drafting Committee wrote a series of commentaries on the first Civil Code in 1890 (The year of the promulgation of the first Civil Code); e.g. IMAMURA Kazuro, KAMEYAMA Sadayoshi, MIYAGI Kouzo, INOUE Shoichi, KUMANO Toshizo and KISHIMOTO Tatsuo. Minpou Seigi, 12 vols. (These books were reprinted in 1996).

<sup>42</sup> In 1892 many high-ranking judges resigned because of a scandal "Rouka-jiken". They found to have played Japanese playing cards ("Hanafuda" [flower cards]), which was linked to gambling. Public opinion forced these judges to resign. Judges Kurizuka (a member of the first Drafting Committee), Takagi and Kishimoto (later they were to participate to the second Drafting Committee) became lawyers in this year. The most famous judge who resigned by the case is KOJIMA Iken. Kojima is well-known because he was the chief Justice of Taishin'in at the time of the trial of the criminal who stabbed crown prince Nikolai of Russian Empire, near Kyoto in 1891 (*Ohtsu-jiken*). He rejected the governmental interference with the trial and protected the independency of judiciary.

1892 is the year of postponement of the first Civil Code.

two men were the assistants of the unofficial drafting meeting of the former Constitution led by Itoh.

MIURA Yasu (1829–1910) was the governor of Tokyo. YOKOTA Kuniomi (1850–1923), KINOSHITA Hiroji (1851–1910), TSUZUKI Keiroku (1861–1923), MOTONO Ichirou and TABE Hiroshi (1860–1936) were the officials in the Ministry of Justice, Education, Home Affairs or Foreign Affairs. MOTONO Ichiro was the co-author with Tomii of the French translation of Japanese Code Civil. OKUDA Yoshito (1860–1917) \* was in the Cabinet Secretariat. KIKUCHI Take'o (1854–1912) studied in the USA and was an official in the Ministry of Justice but went into become a lawyer.

MITSUMURI Rinshou (1846–97) was a judge of the administrative court. SUEMATSU Norizumi (1855–1920) was the chief of the Legislative Bureau. The two men shared an academic framework for their work. Mitsukuri was the main translator of the first Civil Code draft. Suematsu is known as a translator of Roman Law.

⑥ Details of some members were unknown, e.g. YAMADA Kinosuke \* and MIZAKI Yanosuke.

\* are members of the Alumni Association of Law (of Tokyo University) which opposed the enforcement of the first Civil Code in 1893 and insisted its postponement and repeal. They belonged to the English section or school of lawyers.

(b) The number of the members varied over time<sup>43</sup>. A characteristic of the second Drafting Committee was that there were many members who were high-ranking officials of the government and that the leading-members of the Committee were university professors. This demonstrates the progress in the formation of bureaucracy and university within this short time.

Some of the members were judges who remained from the time of the first Drafting Committee. But because the whole number of the members increased, especially the number of officials, the influence of the judges of the French section or school were decreased.

The high-ranking official members were inevitable faithful to the decisions by the head of the government. President Itoh and other politicians who rendered distinguished works on the establishment of the new government became more and more inclined to the German Style. Some members of the committee, e.g. Kiyoura Keigo, Ihoh Miyoji and Kaneko Kentarou were Itoh's close attendants. Later many of the high-ranking officials became members of the Privy Council, which was the advisory organ to the Emperor until 1947.

(c) (i) In 1894 there were 54 members. It is significant that some members representing financial magnates and private citizens were added, e.g. SHIBUSAWA Eiichi (1840–1931), ABE Taizou (1849–1924), SUENOBU Michinari (1855–1932). In March 1894 the number of members of the Committee was reduced, especially the number of members representing financial magnates. Later after 1897, not only Shibusawa and ABE Taizou but also TSURUHARA Sadakichi (1855–1914), KATOU Masayoshi (1854–1923) were added<sup>44</sup>. The govern-

<sup>43</sup> On the Proceedings Rule of the Drafting Committee, cf. *Fukushima and Shimizu (ed.), Meiji minpou no seitei to Hozumi bunsho [Codification of the Meiji Civil Code and Papers by Hozumi], 1956, pp.111.*

<sup>44</sup> Fukushima, op.cit. (at note 22), p.158; Fukushima and Shimizu, op.cit. (at note 43), p.125.

Shibusawa was a man of business and founder of many companies in the early period of Japanese industrialization. He served for the last Shogun, TOKUGAWA Yoshinobu and accompanied TOKUGAWA Akitake in the mission to the international exhibition in Paris in 1867. He obtained knowledge on industry and finance from this experience abroad.

ment, however, did not so expect the role of the members representing financial magnates. On the other hand the enthusiasm of the members representing financial magnates for the Civil Code Codification was also not remarkable. They were always absent from the sessions of the Committee.

Overall the attendance rate of the members was not high. For example in the session of April 6, 1894 (the first general session of the Drafting Committee, on the paragraph of representative, now Art.99) 28 members were present (*Saionji, Mitsukuri, Suematsu, Hozumi N., Yokota, Hasegawa, Kinoshita, Takagi, Tomii, Ume, Tabe, Kikuchi, Hatoyama, Mizaki, Motoda, Murata, Hijikata, Nanbu, Kiyoura, Okuda, Tsuzuki, Inoue, Hozumi Y., Kishimoto, Ozaki, Kaneko, Isobe, Miura*)<sup>45</sup>. In the session of May 22, 1894 (14th session, on the paragraph of transfer of property) 19 members were present (*Saionji, Mitsukuri, Nanbu, Nakamura, Hozumi N., Yokota, Kinoshita, Okuda, Hasegawa, Inoue, Takagi, Tomii, Motoo, Hozumi Y., Ume, Hijikata, Tabe, Ozaki, Murata*)<sup>46</sup>.

This rate of attendance decreased more and more. In the session of April 19, 1895 (79th session, on the paragraph of risk of loss, now Art.534) only 17 members attended (*Mitsukuri, Hijikata, Tabe, Takagi, Hozumi Y., Kiyoura, Okuda, Inoue, Hozumi N., Tomii, Ume, Yokota, Hasegawa, Nanbu, Isobe, Nakamura, Nishi*)<sup>47</sup>. There were no representatives from commerce and industry. Most of the arguments were developed from the view put by the judges. Also in the session of June 4, 1895 (91th session, on the paragraph of loan for consumption & usury law) 17 members were present (*Mitsukuri, Hijikata, Kishimoto, Tabe, Takagi, Kiyoura, Okuda, Inoue, Tsuzuki, Hozumi N., Tomii, Ume, Yokota, Hasegawa, Ozaki, Miura, Nakamura*)<sup>48</sup>. Again in the session of October 2, 1895 (119th session, on the paragraph of torts, now Art.709) only 17 members attended (*Mitsukuri, Hijikata, Murata, Tabe, Hozumi Y., Mizaki, Okuda, Tsuzuki, Hozumi N., Tomii, Ume, Yokota, Shigeoka, Hasegawa, Ozaki, Miura, Nakamura*)<sup>49</sup>.

(ii) The number of active members of the Committee was restricted. E.g. three drafters

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In 1869 he served for the new government in the Ministry of Treasury. In 1873 May he was a director of the Ministry of Treasury but resigned with Minister of Treasury, INOUE Kaoru, because of the dispute against Saigou and Etoh over the issue of a balanced budget (and against expansionism. Saigou and Etoh resigned in Oct. 1873) and never returned to post of government official (In contrast Inoue became a member of Senior Council in 1875, then Sangi and Minister of Construction in 1878, Minister of Foreign Affairs in 1885 etc.).

Shibusawa not only played a leading part in business world but was also devoted to educational, social and cultural achievements. He was one of the founders of the school which became later Hitotsubashi University.

<sup>45</sup> There was a stenographic record of Drafting Committee of the Civil Code. It was, however, consumed by fire during the war in 1945. Before its loss the Japan Society for the Promotion of Science (JSPS) made eight copies and distributed them to universities (so-called Gakushin ed.). In 1975 the Ministry of Justice began to reprint some parts of the record (Houmu-toshokan ed.). This was widely distributed. After 1983 the work was succeeded by a publishing company, Shouji-houmu-kenkyukai (Shouji-houmu ed.).

The author cites here mainly from the Shouji-houmu ed. For example, draft Art.100 (now Art.99, on the paragraph of representative) located in Vol.1, pp.1 (Shouji-houmu ed.), Vol.1,pp.5 (Houmu-toshokan ed.) and Vol.1,pp.20 (Gakushin ed.).

<sup>46</sup> Draft Art. 177 (now Art.176, on the paragraph of Transfer of property) in Vol.1, pp.579 (Shouji-houmu ed.); Vol.2, pp.259 (Houmu-toshokan ed.).

<sup>47</sup> Draft Art.532 (now Art.534, on the paragraph of risk of loss) in Vol.3, p.765 (Shouji-houmu ed.); Vol.9, pp.219 (Houmu-toshokan ed.).

<sup>48</sup> Draft amendment otsu No.21 (now Usury law, on the paragraph of loans for consumption & usury law) in Vol.4, pp.213 (Shouji-houmu ed.); Vol.10, pp.281 (Houmu-toshokan ed.). Draft amendment otsu No.21 & Art.591 is the last part of Houmu-toshokan ed.

<sup>49</sup> Draft Art.719 (now Art.709, on the paragraph of Transfer of property) in Vol.5, pp.294 (Shouji-houmu ed.).

and Dr. Mitsukuri, Prof. Hijikata, Judge Nanbu, Judge Hasegawa, Judge Inoue, former Judge Takagi, former Judge Kishimoto. These judges were in the section or group of French lawyers, and so many argument favored of the provisions of the first Civil Code. Prof. Hijikata was in the section of English law but sometimes he invoked the provisions of the first Civil Code. He was not necessarily a narrow-minded sectionalist<sup>50</sup>.

Meetings of the Drafting Committee could not be held unless over one third of the members was in attendance (The Proceedings Rule of the Committee, Art.10)<sup>51</sup>. Thus sometimes 17 was the minimum number necessary.

High-ranking officials were not in generally active. However there were few exception including Yokota, Tsuzuki and Tabe who were relatively active<sup>52</sup>.

In other groups, Isobe, Ozaki and Yamada sometimes proposed constructive opinions.

## 2. The System of the Code

(a) Itoh and other high-ranking politicians who had worked towards the Meiji Reformation in 1868 felt a sense of intimacy with German style in many areas. So it was presupposed that the Civil Code after the Controversy on the Civil Code Codification was to be compiled in German style (*Pandektensystem*)<sup>53</sup>. There was no room for other members of the Committee to change this fundamental concept of the system.

The leaders of the government, however, had no interest above or beyond the system and certain fundamental ideas of the Code. There were thus many chances to include paragraphs or institutions from many other areas of law. All technical changes were left in the drafting members' hands.

In addition as the new codification was formally a process of the innovation of the first Civil Code, many paragraphs from first Civil Code were adopted in the new draft and the Code.

(b) The influence of the three drafters was very strong in the Committee because they took partial charge of the drafting work. Every arguments were from the work of their original drafts.

Other members could express opposition each paragraph and even propose to amend it but it was necessary to make a proposal with the support of at least two members (proposer plus one other member) in order to amend one rule to another<sup>54</sup>. When nobody supported a

<sup>50</sup> The English school or section of lawyers contributed to the repeal of the former Civil Code (Controversy on Civil Code Codification) but after the postponement (in 1892, abolishment in 1898) of the first Civil Code not only the French school or section but also the English school or section lost its influence. This was because the influence of German school became increased, especially within the university. cf. op.cit., I p.8 (Vol.24, at note 30). Hozumi was devoted to introduce the superiority of German section to other section in his university.

<sup>51</sup> Fukushima and Shimizu, op.cit. (at note 43), p.121.

<sup>52</sup> Yokota studied law in Germany in 1886 and researched judicial practices. Cf. Kabuto, op.cit. (at note 38), p.302.

<sup>53</sup> Op.cit., p.9 (in this series, Vol.24). Fukushima and Shimizu, op.cit., p.111 (The Plan of the Drafting Committee in the letter by Hozumi to Prime-minister Itoh).

Itoh's main interest was the Constitution, which he drafted himself. Nominally he was the president of the Drafting Committee of the Civil Code, but he rarely attended. Most of the time it was chaired by Saionji. The level of enthusiasm for a Civil Code that Napoléon exhibited during the creation of the French Civil Code was sadly lacking.

<sup>54</sup> The Proceedings Rule of the Committee, Art. 18; Fukushima and Shimizu, op.cit., p.122.

proposal, it was rejected without voting. Under this system, in fact, it was impossible to introduce comprehensive new institution or replace one rule with another of a different style. Then we can say that three drafters played not only formally but also substantially the main roles in the Drafting Committee.

(c) The first Civil Code followed the French Civil Code, so-called “*Institutionssystem*”. It had no distinct part assigned to general rules applicable to all other parts. This system rendered frequent repetition of the same rules necessary in different parts of the Code, making the whole work a voluminous code, containing 1762 articles<sup>55</sup>; *Livre 1: Des biens* has 572 articles, *Livre 2: Des moyens d’acquérir les biens* has 435 articles, *Livre 3: Des sûretés ou garanties des créances* has 298 articles, *Livre 4: Des preuves et de la prescription* has 164 and *Livre 5: Des personnes* has 293 articles<sup>56</sup>.

The second Civil Code following the draft of the German Civil Code, “*Pandektensystem*”, placed the general rules, relating to persons as subjects of rights, to things as objects of rights, and to facts and events by which rights are acquired, lost or transferred (“Juristic acts”) at the beginning. Contrary to German Civil Code, the Japanese Civil Code put the “Real Rights” (*Sachenrecht*) in Book II and the Law of Obligations (*Schuldrecht*) in Book III<sup>57</sup>.

It is said that this method of arrangement avoided unnecessary repetitions and made the body of the law succinct; the new Code containing only 1146 articles<sup>58</sup>.

The *Pandektensystem* was, however, deficient in that there were so many instances of cross-referencing between Books. Avoidance of Repetitions was made possible only through the complex references between articles. The system did not result in a reduced body of law, so there are more articles in German Civil Code than in French Code<sup>59</sup>.

The drafters of the second Civil Code in Japan took the position that it was not necessary to write in the Code what is clear and as a matter of course from the viewpoint of modern civil law principles and they also excluded unnecessary provisions for definition of concepts, which was included in the many paragraphs of the first Civil Code. Contrary to Boissonade, who had intended the most completed Code, the drafters of the second Civil Code left large possibility of interpretation to the future development of legal theory. Then the interpretation of law after the codification got large freedom on this basis.

<sup>55</sup> Hozumi, op.cit. (at note 1), p.23.

<sup>56</sup> The French Code Civil contains 2283 articles. The German civil Code also contains 2385 articles. There is no fundamental difference in the number of the articles.

<sup>57</sup> Although, the Civil Code of Saxony in 1865 has the same system as Japanese Civil Code, the German Civil Code in 1900 has the system that Book II is for the law of obligations.

<sup>58</sup> Hozumi, op.cit. (at note 1), p.24.

<sup>59</sup> Op.cit. (at note 1), p.24.

Hozumi also says, “The new Code, besides having a Book devoted to general provisions common to all legal relations, has distinct places set apart for the laws of Family and Succession. In the Code drafted by Prof. Boissonade the law of family was included in Book I relating to ‘Persons,’ and the law of succession formed a part of Book III relating to the ‘Means of Acquiring Property’. Now, this arrangement formed one of the strong reasons for postponing the operation of the first Code and are constructing it on an entirely new basis.”

Thus this does not provide a good reason for the superiority of *Pandektensystem*. Because succession (Book V) is one of the means of acquiring property (mainly Book II and III) and the articles of ‘Persons’ in the General Provisions (Book I) have the strong relation with the law of Family (Book IV).

For those people who insisted the postponement of the operation of the first Civil Code (substantially the abolishment of the Code) the *Pandektensystem* was at the beginning the ideal model of the Codification.

### 3. Influence of Foreign Law

(a) As for the influence of foreign law, the enforcement of the Civil Code hinders any direct influence on Japanese law. For a short period after the enforcement of the Civil Code, however, because of the commentary by Ume, the influence of the idea and style of the French law survived. But after his death in 1910, the interpretation by French law style was completely forgotten.

Some aspects of French law could be found buried in legal precedents. It was the judicial class that were the main followers of the French school. Thus after the abolition of the School of the Ministry of Justice which had taught French law there were no students to follow in the judges footsteps and the influence of French law decreased. Academic idea and theory in universities inclined more and more to German style of law.

(b) 1898 is not only the year of the enforcement of the Civil Code, but also the year of large scale judicial reform. Before this time there were group of judges who had no knowledge on western law but were appointed in order to full all the judicial positions of the courts. The leaders of the government used the judicial posts as a kind of reward for the work in course of 1868 Reformation. Such men even occupied the post of judges in Taishin'in [the former Supreme Court until 1947] or chiefs of High Courts.

It is to be noted that there were other governmental organs whose posts were also used as the grant of rewards for work in Reformation period. *Jingikan* is an example of this type of institution. It had nominally equal power to the *Dajoukan* and was concerned with non-worldly affairs<sup>60</sup>. In 1870s it appointed many persons who had worked to establish the new government but were old-fashioned exclusionists or ultra-nationalists who had no intention to reform themselves. In spite of its high ranking *Jingikan* had no substantial function. It was reformed to become a lower ranking institution, *Jingishou* in 1872, became *Kyoubushou* in 1873 and was completely abolished in 1877.

The reformation of the judicature took place last in 1890s. In 1898 strong reformation in the courts was accomplished. Those who had no knowledge on western law lost their position as judges. Both the codification and the modern judicial system were completed in this year<sup>61</sup>.

### 4. The Educational System

(a) Study of Law at the universities aimed, from the beginning of the 1868 Reformation, to import students western knowledge and a western way of thinking. There were many foreign teachers in schools of all fields. After 1868 Japanese government sent students abroad, mainly to England, France and Germany in order to assimilate and import western system and knowledge, especially technology.

Soon the government came to the conclusion that the German university system was the

<sup>60</sup> Op.cit. (in this paper), vol.24, p.37 (I 3 (a)). cf. Appendix III.

<sup>61</sup> Cf. Kabuto, op.cit. (at note 38), pp.170. For Example, KITABATAKE Harufusa was a man of action against Tokugawa government before 1868. He became judge in 1872, judge of Taishin'in in 1890 and Chief of Osaka High Court in 1891 (op.,cit. at note 38, p.361).

Tomii in the book in 1989 (at note 12) states that among 1625 magistrats only 200 were the graduates of university or law school of Ministry of Justice. 571 did not study [western] law (p.5).

best in the world. During the later half of 19th century German science was in a golden era. As a result many students were sent to Germany. On their return home, they became professors in Japan. This is now the so-called "Germanization" of Japanese universities.

English law had been taught in the Tokyo University since 1874. On the other hand, there was a law school attached to the Ministry of Justice, in which French Law was taught by Boissonade and other French and native teachers. In 1887, the law school of the Ministry of Justice was transferred to the University (there was only one national university in Japan at that time) and at the same time a German Law Section was newly established, so that there came to be three sections in the College of Law. In 1890s the German Section asserted its superiority over the other sections<sup>62</sup>.

(b) There were, however, significant differences between Japanese universities and German universities. German universities emphasized the active investigation. In contrast active investigation was never seen in the leading national universities in Japan. The mission of the national (imperial) universities of those days was to teach existing knowledge to students in order to supply either high-ranking officials to the government or many engineers to the large enterprises<sup>63</sup>.

Under this system active research meant a kind of time-loss. Professors gave only one-side lectures. This made it possible to teach many students at one time. It served for the efficiency. New knowledge was imported from the western, especially German universities. The comparative method of Japanese law before 1910 meant only a consideration of the choices of where to import (from German law, French law or English law) and did not contain an element of creativity<sup>64</sup>.

#### IV. *The Purpose of This Paper, The Influence of the Foreign Laws*

##### 1. Law of Obligations or Property

This paper aims to examine some institutions of Civil Law and compare foreign institutions each other in order to establish some standard of comparative civil law. The material explored is the Japanese Civil Code, because we can see in this Code the substantial influences

<sup>62</sup> Op.cit. (in this paper), vol.24, p.34.

<sup>63</sup> Prof.Ushioji points out that there was only one opponent to these tendency. E.g. "Professor Gijin Takane, law professor at Kyoto, asserted that the mission of the university is not to teach existing knowledge to students, but to introduce them into independent research activity. He reformed the training system of Law School of Kyoto University, which became a sharp contrast to the training system of Tokyo University".

"However, the experiment of Kyoto Imperial University [independent research by students themselves, study by students at German-Style Seminar] could last only 7 years. The training style of Kyoto was not useful to prepare students to the governmental examination for higher civil servants. 1907, Professor Takane, promoter of the university innovation, resigned from his position. Kyoto University changed its training system and adopted the same system with Tokyo University [mere repetition and memorization of textbooks]." (Ushioji, German University as a model for Japanese University at the Meiji period, Zusammenfassungen, AvH-Stiftung, Japanisch-Deutsches Kolloquium zur Bedeutung der Geisteswissenschaften, 1996, S.126).

<sup>64</sup> New style of case method and active seminar system was imported from the USA during World War I (1914-1918), as during this time Japan could not send students to Europe.

In some cases the old-fashioned method survived even after the World War II (1939-1945).

of many foreign laws and the role of comparative law can be seen through an examination of the process of constructing of the Code.

It is not necessary to examine every institution in the Civil Law. Some fundamental institutions will be shown to be characteristic of each law. E.g. the form of juristic person, transfer of property, the structure of non-performance, transfer of risk or fruit and the structure of torts law etc. Some of them are to be examined<sup>65</sup>.

## 2. Family Law

The family law and the law of succession are, however, not necessarily suitable for comparative method. It is sometimes said that this area is most influenced by customary law and in it survives many unique characteristics<sup>66</sup>. This area is outside the scope of this comparative examination<sup>67</sup>.

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<sup>65</sup> Some other papers (written other than Japanese) on the Civil Law by the author also aim to further comparative research between Japanese and western law. For the General Section of the Civil Code and the Law of Family, *Recent Problems in the Japanese Incompetency and Absentee Law, the Hitotsubashi Journal of Law and Politics, Vol.23 (1995), pp.33-51*; for the Law of Real Rights, *Land Reform in Japan 1945-1951 and in the former East Germany 1945-1949, ib., Vol.22 (1994), pp.43-65*; for the Law of Obligations, *Restitution and the Extinction of Rescission, ib., Vol.22 (1994), pp.21-41* (in English); *Die Gefährtragung und der Gläubigerverzug, ib., Vol.19 (1991), S.21-32* (in German).

On the transfer of property and risk, cf. Appendix II.

<sup>66</sup> Then from the beginning the Project by Boissonade had no provisions relating to Family Law and Succession. I. Des droits réels; II. Des droits personnels ou obligations; III. Des moyens d'acquérir des biens; IV. Des sûretés ou garanties, Des créances ou droits personnels; V. Des preuves et de la prescription.

<sup>67</sup> Even some part of property law are sometimes said to be not suitable for comparative method because they contain many differences stemming from customary law.

Hozumi showed in detail some characteristics of the customary Japanese family law in his book on the Civil Code. These characteristics of Japanese family law were totally abolished after the Civil Code Amendment in 1947 (Book 4 & 5). cf. the following table.

The provisions of the Civil Code (Book 4 & 5) was replaced in 1947.

<b>Book 4 Family Law, 1898</b>	<b>Book 4 Family Law, 1947</b>
Chap.1 General Provisions	Chap.1 General Provisions
Chap.2 <i>House-Headship and Family</i>	
Chap.3 Marriage	Chap.2 Marriage
Chap.4 Parents and Children	Chap.3 Parents and Children
Chap.5 Parental Power	Chap.4 Parental Power
Chap.6 Guardianship	Chap.5 Guardianship
Chap.7 <i>House Council</i>	
Chap.8 Support	Chap.6 Support
<b>Book 5 Succession</b>	<b>Book 5 Succession</b>
Chap.1 <i>House Authority Succession</i>	Chap.1 General Provisions
Chap.2 Property Succession	Chap.2 Successors
	Chap.3 Effect of Succession
Chap.3 Acceptance and renunciation of succession	Chap.4 Acceptance and renunciation of succession
Chap.4 Separation of Property	Chap.5 Separation of Property
Chap.5 Non Existence of Successors	Chap.6 Non Existence of Successors
Chap.6 Will	Chap.7 Will
Chap.7 Legally secured Portions	Chap.8 Legally secured Portions

## APPENDIX I. DETAILS OF THE DRAFTING COMMITTEE

	The second Drafting Committee (1893-1898)	The first Drafting Committee (1888-1890)
① President	ITOH Hirobumi, SAIONJI Kinmochi (Vice President)	YAMADA Akiyoshi
② Drafters	HOZUMI Nobushige*, UME Kenjiro, TOMII Masa'aki (ra)	IMAMURA Kazuro, KURIZUKA Shougo, MIYAGI Kouzo, <i>INOUE Shouichi, ISOBE Shiro, KUMANO</i> Toshizo, KOUMYOUJI Saburo, KURODA Tsunahiko, TAKANO Mason
③ professors	HOZUMI Yatsuka*, HIJIKATA Yasushi*	<i>MITSUKURI Rinshou, OZAKI Miyoshi,</i> <i>MURATA Tamotsu, KIYOOKA</i> Kimiharu, TSURUTA Hiroshi, MAKIMURA Masanao, WATARI Masamoto, HOSOKAWA Junjiro
④ members of Senior Council (1875-90) members of Diet (1890- )	<i>MITSUKURI Rinshou, OZAKI Miyoshi,</i> <i>MURATA Tamotsu</i>  HATOYAMA Kazuo, HOSHI Toru, MOTODA Hajime*	<i>MITSUKURI Rinshou, OZAKI Miyoshi,</i> <i>MURATA Tamotsu, KIYOOKA</i> Kimiharu, TSURUTA Hiroshi, MAKIMURA Masanao, WATARI Masamoto, HOSOKAWA Junjiro
⑤ Judges	<i>NANBU Kameo, ISOBE Shiro,</i> HASEGAWA Takashi, <i>INOUE Shouichi,</i> TAKAGI Toyozo, KISHIMOTO Tatsuo	<i>NANBU Kameo, OZAKI Tadaharu,</i> MATSUOKA Yasuki, NISHI Naruto, KITABATAKE Harufusa
⑥ Officials	KIYOURA Keigo, ITOH Miyoji, KANEKO Kentaro, MIURA Yasu, YOKOTA Kuniomi, KINOSHITA Hiroji, OKUDA Yoshito*, TSUZUKI Keiroku, MOTONO Ichiro, TAHE Hiroshi, KIKUCHI Takeo, SUEMATSU Norizumi	MIYOSHI Taizou
⑦ added members	OKAMURA, SENKE, NAKAMURA, SEKI, OH'OKA, MOTO'O, KAMIMUCHI, SHIMADA, HOSOYAMA, KAWASHIMA, KONAKAMURA, YAMADA, OGASAWARA, EGI, FOHJI, KINOSHITA Shuichi, KUMANO, OZAKI, TAKADA, SHIBUSAWA Eiichi, ABE Taizou, SUENOBU Michinari, TSURUHARA Joukichi, KATOU Masayoshi	

Also, YAMADA Kinosuke\*, MIZAKI Yanosuke.

The names in italic are members of the Drafting Committee who were reappointed. (The first and second Drafting Committee). \*cf. p.15.

Cf. Tezuka, op.cit. (at note 37), Hougaku Kenkyu, Vol.26, No.10, p.7; Ikeda, op.cit. (at note 36), p.456; cf. Fukushima and Shimizu (ed.), Meiji minpou no seitei to Hozumi bunsho, op.cit. (at note 43), pp.109, p.125.

APPENDIX II. TRANSFER OF PROPERTY AND RISK

		Transfer of risk	
		at the time of conclusion	delivery
Transfer of fruits	at the time of conclusion	France, Italy (Res perit domino.)	
		↑ Netherlands Switzerland Spain *Gemeines Recht (Res perit creditoris.)	↓
	at the time of delivery	Japan ↑	↓ Germany, Austria (Traditionsprinzip)
	at the time of conclusion		at the time of delivery
Transfer of property			

※ This is the system of continental common law (Gemeines Recht). The transfer of the risk is at the time of conclusion of contract (Res perit creditoris) but the transfer of property is at the time of delivery.

In Scandinavian law the transfer of fruits has relation neither to the transfer of risk nor to that of property.

### APPENDIX III. THE STRUCTURE OF THE THREE POWERS

#### ① Administration

##### (1) Dajoukan System in 1869

Dajoukan (Grand Council of State)

6 ministries - the ministry of Foreign Affairs, Treasury, Military, Criminal Affairs, Civil Affairs, Imperial Household Agency).

Jingikan (Grand Council of Priest)

##### (2) Dajoukan System in 1871

3 Houses under Dajoukan

The Central-House-- Dajoudaijin, Sadaijin, Udaijin, Sangis [ministers]

[Prime-minister, 2nd. or Left minister, 3rd. or right minister]

The Left-House-- An advisory organ to handle legislative affairs.

The Right-House--8 ministries - the ministry of Religion (Jingishou. the position of the Jingikan was abolished. Jingishou was also abolished in 1872), Foreign Affairs, Treasury, Military (the Naval Department was separated in 1872), Education, Construction, Justice, and the Imperial Household Agency.

(Later, 2 ministries - the ministry of Home Affairs in 1873, the ministry of Agriculture, Forestry and Fisheries, International Trade and Industry in 1882).

#### ② Legislature

The Left-House 1871

The Senior Council 1875

The Privy Council 1890 ( -1947)

(The former Imperial Constitution (before 1947) in 1889)

The first Diet elected by a restricted group of voters in 1890

#### ③ Judicature

Districts courts in each prefecture under the jurisdiction of the Ministry of Justice in 1872.

County courts under the jurisdiction of each district court in 1873.

The court system under the jurisdiction of Taishinin [The former supreme court until 1947] in 1875.

Judgement by administrative officials was abolished in 1877.