

Chronology of the Modernization process in Japan (3) Enactment of Civil Code and Other Main Codes

- 1870 The Meiji government began with its *codification project of civil code* based on Japanese translation of French Civil Code by *Rinsho Mitsukuri* (箕作麟祥). *Shimpei Eto* (江藤新平) took its leadership. He represented the liberal faction in the government.
- 1871-2 Several trials for law on persons called “*Resolutions on Civil Law* (民法決議)”
- 1872 Comprehensive drafts named “*Revised Trial Proposal for Civil Code by Meiho Institute* (明法寮改刪未定本民法)” and “*Provisional Civil Regulation for the Empire of Japan* (皇国民法仮規則)”
- 1873 An alternative proposal for law on persons called “*Provisional Civil Regulation* (民法仮規則)”
- Minister of Justice *Ohki* ordered a nationwide survey of customary civil practices and commissioned *Mitsukuri* to compile a new comprehensive draft of civil code in conformity to the result of the survey.
- In this year, a legal adviser from France, *Gustave Emile Boissonade*, arrived in Japan. The Chinese Criminal Code from Ching Dynasty was adopted.
- 1878 A new comprehensive draft for civil code (“*Draft Civil Code of 1878*”)
- 1880 Enactment of the **Penal Code** and the **Code of Criminal Instruction**, which were drafted under the leading of *Boissonade*.
- 1890 Enactment of the **Code of Penal Procedure**, which was based on German and French law. Enactment of the **Commercial Code**, which was drafted by a German legal adviser *Herbert Roessler* and based largely on German and French law. Enactment of the **Code of Civil Procedure**, which was at first drafted by *Boissonade*, then completely reworked by a German adviser *Herman Techow*. Enactment of the Civil Code (so-called “**Old Civil Code**” 旧民法), which was completed by *Boissonade*. However, it encountered a hard criticism and had to be soon suspended (Japanese “**Codification Controversy**” in 1892).
- 1896 Enactment of the first three books of the **Revised Civil Code** (General Provisions, Real Rights, Obligations), which was compiled by Japanese professors. In this new version, the compilers introduced the significant achievements from the draft of German Civil Code into *Boissonade's* concepts.
- 1898 Enactment of the last two books of the **Revised Civil Code** (Family Law, Law of Succession). In accordance with the political vision of social reform, the autocratic family system of the former Samurai-warrior class was officially legitimated.
- 1899 Enactment of the **Revised Commercial Code**, which was also accomplished by Japanese professors. It was based largely on German law, the traditional commercial customs were also respected.
- 1907 Enactment of a **New Penal Code**, which was based on German law.
- 1923 Enactment of a **New Code of Penal Procedure**, which was based exclusively on German law.

Initial Stage of the Codification Project for Civil Law by the Government

Soon after the foundation of the new Imperial Regime, its government began with a project for introduction of Western legal system. Its primary concern was to introduce a modern *civil code* as soon as possible. Despite a close relationship between England and the Meiji government, its favorite model was “*Code Civil*” of France. The government recruited several former officers of the Shogunate who were in charge of translation of French documents. One of them was *Rinsho Mitsukuri* (1846 – 1897). The government commissioned him to translate the French civil code into Japanese. Its first edition was accomplished in 1871.

Based on this translation, the government office for legislation adopted several “**Resolutions on Civil Law** (民法決議)” (1871 – 72) under the leadership of *Shimpei Eto* (1834 – 1874), who was one of the most radical democrats in the government and made efforts for establishment of “Division of Powers” and “Independence of Judiciary”. However, these resolutions included only basic provisions such as “Enjoyment and Loss of Civil Rights” and “Records of Civil Status”, “Domicile”, “Disappearance”, “Marriage and Divorce”. According to these provisions, “*conclusion of a contract of marriage*” should not be allowed for a man under 18 years or a woman under 15, and agreement of parents was necessary if a man was under 25 or a woman under 21. A man over 30 or a woman over 25 should be always allowed to marry even if their parents did not agree with it, and so on. These trial provisions were almost a simple “duplicate” of French provisions under replacement of word “French” with “Japanese”. Nevertheless, they were the first attempt towards a self-reliant codification in the future. Against such a liberal project pursued by *Eto*, there was a counterbalancing vision backed up by a conservative faction in the government.

In 1871, the government founded “Ministry of Justice”. Also its institute for legal research and education, called “*Meiho-Ryo*”, undertook another project for preparation of a draft civil code. This project followed rather the conservative idea than *Eto's* liberal concept. This project in *Meiho* Institute brought out “**Revised Trial Proposal for Civil Code by Meiho Institute** (明法寮改刪未定本民法)” and “**Provisional Regulations of Civil Law for Empire of Japan** (皇国民法仮規則)” in 1872. They were initial attempts for a comprehensive draft of civil code – the latter had totally 1084 articles – and covered not only law on persons, family, and succession, but they included also all other fields of properties. However, their provisions on properties were almost word-for-word translation from French Civil Code. On the other hand, they included also traditional provisions on “*Succession of Patrimony*” and “*Establishment and Merger of a Branch Family*” based on the family law of former Samurai-warrior class. Its provisions on marriage provided that parental agreement should be always required for marriage.

Against such a conservative concept, the liberal faction led by *Eto* tried to bring the project back to the original liberal concept. In 1873, *Eto*, supported by a French legal adviser *Albert Charles du Bousquet*, brought out “**Provisional Civil Regulation** (民法仮規則)”. It was merely a partial draft on “*Records of Civil Status*” and did not include any substantive article, but it provided that the conclusion of marriage should be conducted by the registration officer and before witnesses. An individualistic idea stood behind this provision, namely the idea that conclusion of marriage is an act between individuals and needs only to be acknowledged by the state authority, but not by the family.

In parallel with this development, the conservative faction in the *Council of Senators* (左院) closely researched details of the traditional customary law of former Samurai-warrior class and tried to improve articles on family and succession in the “*Provisional Regulations of Civil Law for Empire of Japan*”. Until 1874, they accomplished new proposals for “*Law on Succession of Patrimony and on Bequeathal*”, “*Law on Adoption*”, “*Law on Guardian*”, and “*Law on Marriage*”, which provided again that parental agreement should be always required for marriage. In this way, the conservative faction in the Meiji government gradually shaped up the concept of so-called “**IE-System**”, Japanese traditional family system.

Meanwhile, a professor of civil law at the University in Paris, *Gustave Emile Boissonade* (1825 – 1910), was invited to Japan. The government commissioned him to give lectures on French law and modern legal science in Ministry of Justice. In the same year, *Takato Ohki* (大木喬任) was appointed to Minister of Justice (as successor of *Shinpei Eto*). He ordered a nationwide survey of customary civil practices among people (published as “*Civil Customaries of the Japanese Nation* (全国民事慣例類集)”, and he commissioned *Rinsho Mitsukuri* (that translator of French Civil Code) and other legal officers to compile a new comprehensive draft civil code under sufficient attention and respect to the collected customary rules. This new draft was accomplished in 1878 (called “**Draft Civil Code of 1878**”). This draft followed the liberal concept of *Eto* and rejected the conservative concepts such as “*Succession of Patrimony*” or an outstanding position of “*Head of Family*”. On the other hand, it failed to adopt customary civil practices enough. In general, it was still a “word-for-word translation” of the French Civil Code. Minister *Ohki* consulted with *Boissonade*. The French adviser submitted the opinion that this draft would not be ripe enough to enact. Finally in 1880, Minister *Ohki* decided to abort the drafting project and commissioned *Boissonade* to compile another new draft of “*Law on Properties*” and “*Law on Acquisition of Properties*”.

As a result, the initial drafting project for civil code by Japanese legal officers was not successful. This stage was, in other words, a training period. Through try and error, they gradually mastered the basic concepts of modern civil law and prepared legal technical terms in Japanese language. Furthermore, the conservative faction also learned how to formulate and systematize their concepts of traditional family law in modern legal provisions. This achievement was succeeded by into the following stages.

Since 1873, Professor *Boissonade*, together with *Bousquet*, gave lectures for students in the *Meiho-Institute*. He taught “Natural Law”, penal law, administrative law, and civil law (properties and obligations). *Bousquet* was in charge of lecture on commercial law. *Boissonade* gave also lectures on civil law, penal law, and civil and penal procedures for legal officers of the ministry. In 1870s, Meiji government began negotiate with Western countries for revision of unequal treaties (abolishment of extraterritorial jurisdiction and reestablishment of customs autonomy). In order to reach this goal, it was necessary for Japan to modernize its total legal system, especially to establish main codes (penal law and penal procedure, civil law and civil procedure, commercial law as well as international civil law). In 1875, the government reformed its organization (Main Governmental Office, Senat, High Court, Council of Local Authorities). Senate should play a role as legislative power. At first, Ministry of Justice let its own legal officers compile drafts for penal law and penal procedure, but this attempt was unsuccessful. In 1876, the ministry decided to commission *Boissonade* to compile both drafts. His draft penal code was accomplished in 1877, and draft penal procedure in 1878. Both drafts were reworked in the ministry and enacted in 1880 (“**Penal Code**” and “**Code of Criminal Instruction**”). They were the first modern codes in Japan, and modern legal principles in criminal law, especially “*Legality Principle of Crime and Punishment*” and “*Prohibition of Torture*” could be officially established. *Boissonade* wanted also to introduce a jury system into the new penal procedure, but the ministry rejected it.

After the enactment of these two codes, *Boissonade* began with another heavy task, namely a draft civil code. However, the political circumstance around him became suddenly unfriendly against him because the liberal democratic faction was expelled from the government in 1881. The conservative faction led by *Hirobumi Ito* took control over all political issues. In the legal field, they preferred German law (Prussian legal system) rather than French or English law and strongly encouraged German study also for lawyers and law students. In the same year, the government commissioned German adviser *Hermann Roesler* to compile a draft commercial law. Furthermore in 1884, the government invited another German adviser *Hermann Techow* and commissioned to compile a draft civil procedure on the base of the new German Code of Civil Procedure (1877). Nevertheless, *Boissonade* continued to work on his major and last task in Japan.

Second Stage: “Old Civil Code of Japan” drafted by *Boissonade*

Already in 1879, *Gustave Boissonade* had begun with his drafting work of civil code on request of the Japanese government. He planned the whole system based on French “*Code Civil*”, but it was not any simple duplicate of the French code. He adjusted and improved its system according to his own idea. The French Code has three books, namely law on *persons*, law on *properties*, and law on *acquisition of properties*. *Boissonade* found that the third book of French Civil Code covered too many fields. So, he divided it in three parts. His draft of the Civil Code had therefore five books:

- I. ***Law on Persons*** (nationality, family, legal capacity, domicile, etc.)
- II. ***Law on Properties*** (real rights, general principles of obligation, unjust enrichment, tort)
- III. ***Law on Acquisition of Properties*** (typical contracts, succession)
- IV. ***Law on Securities*** (real securities, personal securities)
- V. ***Law on Proof*** (means of proof, prescription)

Boissonade was in charge of the parts concerning general principles, properties and obligations, other parts on family and succession were drafted by Japanese legal officers. However, these Japanese members of the commission had been *Boissonade*'s students in *Meiho*-Institute and educated in French spirit. From this reason, their drafts on family and succession were rather liberal than traditional and conservative. For example, according to its provisions on marriage, a man under 17 or a woman under 14 may not marry (Art. 40), and minorities may marry only if their parents agree with marriage (Art. 47). Another example was the provisions on “*Head of Family*”. A head of family was defined as “*a person who manages an independent household*” (Art. 392) and a “*successor of patrimony*” [=head of family] may not enter another household through marriage (Art. 401). A head of family however should not possess any outstanding position or control power over other family members.

In 1888, the first draft was completed, but its part on family was criticized in the commission because it did not respect the “*traditional customs and order in family*” enough. The commission decided to revise it. “*Exclusive succession by the eldest son*” should be adopted, and the position and competence of “*head of family*” should be more strengthened. In March 1890, the government promulgated ***Law on Properties*** (572 articles), ***Law on Contractual Acquisition of Properties*** (285 articles), ***Law on Securities*** (298 articles), and ***Law on Proof*** (164 articles), and 6 months later in October, ***Law on Succession*** (150 articles) and ***Law on Persons*** (293 articles) were promulgated (totally 1,762 articles).

In its law on persons, a head of family was defined as “*a person who supervises the whole family members*” (Art. 243). In the law on acquisition of properties through succession, there were also articles on “*Succession of Patrimony*” (Art. 286 to 301). According to these provisions, the eldest son of the head of family alone should be entitled to succeed to the position of his father and inherit the whole patrimony of the house (Art. 295). Regarding marriage, a man under 17 or a woman under 15 may not marry (Art. 30). However, even if this condition was fulfilled, the consent of their parents was necessary for marriage (Art. 38). Furthermore, Article 245 provided that any member of the family should obtain permission from their head of family for marriage or adoption. For female members and a male person who was a designated successor of the patrimony, it was absolutely impossible to marry without permission of the head of family, but other male members would be expelled from the family and found another family if they marry without permission of the head of family (Art. 250). Even for the person who has succeeded to the position of the head of family, it was prohibited to dissolve their family (Art. 251). The articles on family and succession in the promulgated civil code (so-called “***Old Civil Code of Japan***”) were so conservative and “*feudalistic*” in such a manner. Despite this fact, the Civil Code of 1890 was hardly criticized for its “*Liberalism*” and “*Individualism*” soon after its promulgation.

“Codification Controversy” in Japan

Already in 1889, the Association of Legal Academicians (法学士会) showed its fear that the enactment of civil code at this time could cause many troubles to the Japanese society because it was just on transition from feudalism to modern civilization. The association did not want to accept any simple duplicate of a Western civil code. Furthermore, the association pointed out the discrepancy between civil code which was drafted by a French adviser on the one side, and commercial code and civil procedure which were drafted by German advisers on the other side. This criticism acted as a trigger of an emotional conflict in 1890s.

In this period, major national and private universities already began with legal education, and there were French schools and English schools. Some members of English schools began to criticize the Civil Code of 1890 as soon as it was promulgated. They doubted of the appropriateness of the natural law theory which *Boissonade* inspired in his Civil Code of Japan. Moreover, enthusiastic nationalists began to attack against this Civil Code, too. The parts of family and succession had been drafted by Japanese specialists and their contents were already quite conservative and autocratic. Despite it, the nationalists condemned that this Code would deny the virtue of loyalty and service-minded consciousness in Japanese family and destroy the traditional moral of Japanese society. In reality, they rejected to accept such a legislation of family law which had been supervised by a foreign adviser. Nationalists criticized also the Commercial Code of 1890 which was drafted under the supervision by a German adviser, *Herman Roessler*, and argued that this Code did not pay due attention to the traditional commercial customs among Japanese merchants and would destroy the traditional order and moral of merchant houses.

The controversy was gradually escalated into an emotional controversy, and the government was trapped into a political crisis. In 1892, the Imperial Diet decided to postpone the implementation of the both Codes, and set up a new commission for the revision of Civil Code and Commercial Code.

Third Stage: A New “Revised Civil Code” modeled on “Pandects System”

Generally speaking, it was almost certain that the Meiji government preferred the German civil law to the French one. The latter was the achievement of the spirit of the French Revolution (Freedom, Equality and Fraternity). The French theory of “Natural law” was just the main ideology which inspired the “*Popular Movement for Freedom and Democracy*”. In contrast, the basic tone of the German civil law was “*Conservatism*” and “*Historicism*”. For the German legal scholars, a civil law should be the expression of the “*Spirit of the Nation*” (“*Historical School*”). This theory had certain similarities to the Japanese concept of the “*True Nature of the Nation*” in public law which offered the ideological basis for the Constitution of 1889. In this sense, it was quite natural that the commission for the Revised Civil Code preferred the German Civil Code to the French Civil Code.

This commission was mainly led by three Japanese professors who had studied the newest legal science in England, France, or in Germany. The head of the commission was Prof. *Nobushige Hozumi* (穂積陳重), who had at first studied Common Law in England (1876 – 79) and then Civil Law in Germany (1879 – 81). The second person was Prof. *Kenjiro Ume* (梅謙次郎), who had at first studied French Law in France (1884 – 89) and then studied in Germany (1894). The third person was Prof. *Masa-akira Tomi-i* (富井政章), who had studied in France. Just at this time, the second version of “Draft German Civil Code” (“*Bürgerliches Gesetzbuch*” in German ; **BGB**) was published. They decided that the Revised Civil Code of Japan should be based on this latest achievement of German legal science.

However, it should be noticed that the commission did not simply throw away the Old Civil Code. They studied its whole articles again and carefully compared with other codes, especially with articles in the “Draft German Civil Code” (1st and 2nd version). The main purpose of the revision consisted in systematization and simplification. Many articles for educational purposes (definition and explanation

of legal concepts or technical terms) were deleted. The commission deleted also such articles as existed merely for declaration of basic principles because their contents were almost “obvious and self-evident”. Then, the whole provisions were rearranged and reworked in accordance with “*Pandects System*”, namely, General Part, Real Rights, Obligations, Family, and Succession.

“Boissonade's Heritage” in the Revised Civil Code

Nevertheless, some institutions and articles of the Old Civil Code could “survive” through the ruthless revision work of the commission :

1. Incapacity and Quasi-incapacity

It was a special idea of German legal scholars in the 19. c. that all the general rules were collected together in the first part of civil code. This concept was neither of the Roman law tradition, nor the French Civil Code (and the Old Civil Code of Japan) knew this technique. Accordingly, the most part of Book I of the Revised Civil Code of Japan was based mainly on the German concept, especially its titles on “*Things*”, “*Juristic Acts*”, “*Periods*”, and “*Prescription*”.

The title “*Natural Persons*” of the German Civil Code in its original version included articles on *capacity* and *incapacity*, *domicile*, and *disappearance* while the Old Civil Code treated these issues in separated titles and provided them in details. The commission therefore decided for the concept of the Old Civil Code in these issues.

Meanwhile, the Old Civil Code did not have any particular articles on *juristic persons*. Prof. *Boissonade* had thought that these issues should be separately treated in the Commercial Code or in special laws. Basically, the title “*Juristic Persons*” in the Revised Civil Code was therefore based on the German concept, its articles were however newly written by Prof. *Hozumi*. So, the construction of this title in the Revised Civil Code is not the same as in the German Civil Code.

2. Superficies and Emphyteusis

The German Civil Code in the original version had included some articles on “*Superficies*” (it is now regulated by a special enactment). However, the articles on this issue in the Revised Civil Code are based on those in the Old Civil Code. On the other hand, “*Emphyteusis*” was never provided as a real right in the German Civil Code. “*Usufructuary Lease*” (Title 3, Chapter 7, Book II BGB) seems to be similar to “*Emphyteusis*”, this is however not any real right, but one type of obligation. In this sense, the articles on these real rights stem directly from the Old Civil Code.

3. Rights of Retention and Statutory Liens (or Preferential Rights)

The chapters on “*Rights of Retention*” and “*Statutory Liens*” in the 2nd Book of the Revised Civil Code stem directly from the Old Civil Code. In the German civil law, “*Statutory Liens*” are not regulated in civil code, but in the law of Enforcement. Regarding “*Rights of Retention*”, the German Civil Code has surely certain articles on this issue, but they have not any general form like in the French concept, and they are scattered in the 1st, 2nd, 3rd, and 6th Books.

4. Purging of Hypothecs (or Mortgage)

This is a right of a third person who acquired the ownership, superficies, or emphyteusis on a hypothecated immovable. He may purge the hypothec (or let it terminate) by paying a certain amount of money to the hypothec creditor. This is a typical French concept and does not exist in the German civil law. The articles on these issues in the Revised Civil Code (Art. 378†–387†) stem from the Old Civil Code (Art. 255–269, Real Securities).

5. Transfer of Ownership

For the transfer of the ownership over particular properties, the Old Civil Code required simply the agreement between the parties (Art. 331, Properties). The transfer should be effective just at the moment of the agreement. In case of immovables, its registration should be required in order to

hold out the effect of the transfer against third persons (Art. 350, Properties). On the contrary, the German civil law has another approach (“*Abstraction Principle*”). According to this principle, the transfer of the ownership over immovables may be effective only when it has been registered. The Revised Civil Code decided for the French approach. In this concept, however, the registration can not be “*prima facie* evidence”. In other words, there is no guarantee that all the records in the registry book would be true.

6. Effect of Non-performance

In case the debtor does not perform his obligation, the creditor may principally demand either the judicial order of enforcement or monetary compensation for damages. The creditor has right to choose one of these solutions. This is the French approach. Of course, the Old Civil Code followed it (Art. 382–394, Properties). On the contrary, the German civil law has developed its unique concept (so-called “*Impossibility Approach*”). Basically, the Revised Civil Code remained in the French approach (Art. 412–422).

7. Liability for Unlawful Acts

The French Civil Code regulates this issue in the single article (“*Single-rule Approach*”) while the German civil law separates three types (“*Pluralism*”). The Old Civil Code followed the French approach. “A person who intentionally or negligently infringed on others shall be liable to compensate any damages resulting thereof” (Art. 370, Properties). Also in this issue, the Revised Civil Code remained in the French approach (Art. 709).

For Information and Reference 1**“Abstraction Principle” in German Law and Effect of Registration in Japanese Law****A. Separation of “Obligation Act” and “Real Fulfillment Act”**

In the German civil law, juristic acts regarding obligation (“obligation act”) and those regarding real rights (“real fulfillment act”) are clearly separated in procedure as well as in effect. So, for example, a sale contract alone (this is an obligation act) has merely an effect to oblige the parties to performance, and is not enough to transfer the ownership over its object.

B. Independence of Effects of Both Acts (“Abstraction Principle”)

The validity and effect of a real fulfillment act depends neither on its “*causa*” - the validity of an obligation act which just founded the basis of the real fulfillment act, nor the existence of the latter is necessary.

§ 873 [Acquisition through agreement and registration]

(1) For transfer of the ownership over an immovable and creation of a [real] right on it as well as transfer of this right and creation another right on it, a [real] agreement between the parties on the alteration of the juristic state and the registration of this alteration in the land register are required unless the law provides otherwise.

(2) ...

§ 929 [Acquisition and delivery]

For transfer of the ownership over a movable, its delivery from one party to the other and their [real] agreement on transfer of the ownership are required. The agreement is enough if the acquirer already possesses the movable.

C. “Integration Principle” in Japanese Law

In the Japanese civil law, the creation, transfer (assignment), or alteration of a real right can be performed through a single juristic act (agreement of the parties).

Art. 176 [Creation and transfer of real rights]

The creation and transfer of real rights take effect by a mere declaration of intention by the parties.

Art. 177 [Requirement for setting up against in case of real rights over an immovable]

The acquisition or loss of, or any alteration in a real right over an immovable cannot be set up against a third person until it has been registered in accordance with the provisions of law concerning registration of property.

Art. 178 [*Ibid* in case of a real right over a movable]

The assignment of a real right over a movable cannot be set up against a third person until the movable has been delivered.

Even in case of immovables, such an act is effective even without its registration. But the effect of the agreement is still limited to the parties only. The acquirer of a real right cannot hold it out against a third person if the acquisition is not registered. In other words, the registration is not required for the effect of the agreement, but is necessary for its effect against third persons.

For Information and Reference 2

Historical Background of “*Pandects System*”

A. Development of Ancient Roman Law:

1. Ancient Roman Law was established through the struggle of free farmers and citizen (*plebitas*) against the Nobles (*patricitas*). It was officially acknowledged customary rules for the rights of free citizens. Roman Civil Law (*ius civile*) was a "private law" for the free status.
2. Through the economic development and the increase of commercial trade with foreign folks, another system of regulation for legal issues was formatted. This system of general rules (*ius gentium*) was a kind of Commercial Law based on the general principles of fairness (*aequitas*) and applied on trade affairs with foreign merchants.
3. In Ancient Roman Empire, legal scholars were highly respected by political rulers, and their opinions and theories gained same binding force as legislations. This legal culture, however, could be saved only in the eastern Roman Empire. In the western Roman Empire, the legal system was "germanized" through the invasion of German folks into Italy.
4. In 529, Emperor *Justinianus* of the eastern Roman Empire let collect all important legal sources and codified "*Corpus Iuris Civilis*". It was not a code in modern meaning, but a collection of all kinds of legal sources. This code had 4 books:
 - I. ***Institutiones*** : a kind of textbook for civil law study and contained also an introduction into jurisprudence. This book was granted binding force.
 - II. ***Digestae* or *Pandectae*** : this name means "classification" or "encyclopedia". It was a collection of works of famous legal scholars. In their academic opinions, *ancient Roman Case Law* was described. These opinions of scholars were granted binding force, too.
 - III. ***Codex*** : a collection of important legislations by former rulers.
 - IV. ***Novellae*** : a collection of legislations by Justinianus himself.
5. *Justinianus* tried to introduce his Code to the western Roman Empire. Three books (*institutiones*, *codex*, *novellae*) were accepted by lawyers, but *digestae* (*pandectae*) was forgotten soon.

B. Establishment of a New Roman Law Science:

1. In 11. c., a handwriting of *digestae* (*pandectae*) was found in Italy, and a new Roman Law Study based on *digestae* was established (e.g. university in Bologna). At that time, legal scholars were called "*Glossators*".
2. In 14. c., a new generation of legal scholars, *Postglossators*, systematized the *ancient Roman case law*. Many students from European countries studied this systematized Roman law and brought it back to home countries.

C. Reception of Roman law in European countries:

1. In the ancient period, German folks lived a primitive community life under the tight kinship relations (*Sippe*). Accordingly, original German law was based on a simple and religious order of

the kinship.

2. In the Middle Ages, Roman Church enjoyed almost equal status with feudal lords and kings in German territories. Church controlled over whole legal issues of the people. So, the secular political power in Germany could not be centralized intensively enough to set up an absolute monarchy. Each feudal territories had its own legislations and local customary rules. Because of this lack of common regulations, German lawyers began to apply *Roman case law* as supplementary legal source. It should be applied only when neither legislation nor appropriate customary rule could be found. In reality however, Roman law often enjoyed priority against customary rules because the latter were difficult to be proved, moreover, lawyers were deeply convinced of a *general validity* of Roman law. In this way, Roman Law was gradually adopted in German territories. Since 15. c., Roman law was officially acknowledged as a binding “common law (*Gemeinrecht*)”.
3. In France and England, Roman law could play only a partial role. In these countries, the political power was intensively centralized under the rule of powerful absolute monarchies. In France, Roman law could not be granted any direct binding force because French monarchy was afraid that the authority of French monarchy could be weakened if the legislations of foreign rulers could enjoy a binding force in French territory.

In England, its legal system developed under the balance of power between the king and the nobles. English courts were ruled by noble judges (*Common Law* lawyers) and they prevented the reception of Roman law into English courts. On the other hand, English monarchy tried to introduce Roman law in order to strengthen its control power over legal issues against Common Law lawyers. So, Roman Law could be introduced into the *Court of Chancery* as *Equity* (law of fairness) which played a role as counterpart of Common Law.

D. Modern Codification of Civil Law in France and Germany:

1. After French Revolution, Emperor *Napoleon* enacted *Code Civil* in 1804. The code was based on the modern natural law theory, but it was composed in a Roman law system based on *Institutiones*. *Napoleon* tried to introduce this code into other European countries. Some German countries accepted it, but in other regions, a new German nationalism was awakened.
2. Some German lawyers and legal scholars proposed to legislate own civil code and unify the civil legal system in German territories. They intended to enact a civil code based on the natural law theory like French *Code Civil*. A representative scholar of this trend was Prof. *Anton Friedrich Justus Thibaut* (1772 – 1840) . But other German legal scholars rejected this proposal and asserted that a legal system was one part of culture, and a genuine legal system could not (or should not) be arbitrarily set up. This group of legal scholars was called “*Historical School*”, which was represented by Prof. *Friedrich Carl von Savigny* (1770 – 1861) . In his epoch-making publication “*About the Mission of Our Time for Legislation and Legal Science*” in 1814, He argued:

“Above all, insofar as we can know from detailed documents, we find in the history [of the nation] that the civil law has always a certain character which is unique and individual to the nation, just like its language, public morals, and constitution. These [social] appearances are not of any separate existence, but they are several [discrete] forces and activities of the nation [as a same and single substance], all of them are tightly bound together in their nature. They appear separately rather due to our determinate observation. Something binds them tightly together, it is just the common conviction of the nation, the feeling of inner inevitability, which decisively secures our spirit from any incidental or arbitrary ideas”.

The main target of *Savigny's* critics was “Natural Law Theory”, especially its speculative manner of thinking and doctrine that we could achieve an universal legal system simply through abstract and pure speculation. For *Savigny*, civil law is one aspect of an organic existence, one form of living activities of the nation. Civil law must be “*organically grown up*” in the particular and individual conditions of each nation, just like a tree. For the comprehensive understanding of this organic life of the nation, *Savigny* insisted on the necessity to study the historical development of its customary law before any reasonable legislation of a civil code would be possible.

In the political context, this doctrine of the Historical School was the declaration of “*German Conservatism*”, a countermovement against “*French Progressionism*”. However, it should be noticed that *Savigny* had intended primarily to establish a new scientific method of legal research based on critical reading of historical documents instead of a pure speculative method. At the beginning of the 19. c., the historical science was a symbol of a new empirical social science.

3. The most members of Historical School in Germany, however, did not study German history or German custom law, but they researched historical development of *the Roman case law* which was reported in *Digestae (Pandectae)*. They repeatedly purified the historical materials and gradually developed an abstract and logical theory of civil law. Finally, German legal science of civil law lost its character as historical research at all and accomplished a logical system of legal term and concepts (*Pandects science* or “*Pandectism*”) just like its counterpart, “Natural Law Theory”. On this theoretical basis, German Civil Code of 1900 was codified.

The division of six books of the Roman civil law in the “*Pandects System*” was at first designed by a German legal scholar, *Gustav von Hugo* (1764 – 1844), in 1789, and then improved to the current form by a friend of *Savigny*, *Georg Arnold Heise* (1778 – 1851), in 1807.