# Real Rights in Japanese Civil Code

Generally speaking, the part of "*Real Rights*" in the codification of civil code had to carry out two tasks. Firstly, it should lay the foundation for modern economic system ("*Capitalism*"). It is, so to say, a *creative and systematic task*. At same time, however, it should also authorize and legitimate existing rights and duties of each social member which were established by customary rules during feudal age. This is a *socio-historical task* of codification. Accordingly, that "*Individualities*" of each legal culture which the German "*Historical School*" had emphasized in 19th century could be seen rather in "*law on real rights*" than in "*law on obligations*".

A real right of a person over an object has its effect and validity against all other persons, hence it must be broadly accepted and acknowledged in the society. In other words, it must have its root in customary practices of the society while "*claim and obligation*" arising from an agreement or contract have binding force only for the parties and they are mostly governed by a general principle of fairness. Even in the codification, it would be a cause of troubles if a quite unknown new real right would be introduced in a code.

## Real Rights and Real Securities in the "*Old Civil Code*" of 1890

In the drafting work of "*Old Civil Code*", Prof. *Boissonade* paid due respect to the Japanese customs and listed following real rights in Part 1 "***Real Rights***" of Book 2 "***Law on Properties***" :

Chapter 1: Ownership

Chapter 2: Usufruct ("usus fructus"), Usage ("usus") and Habitation("hibitatio")

Chapter 3: Lease, Emphyteusis and Superficies

Chapter 4: Possession

Chapter 5: Servitudes

In the 2nd Part of "***Real Securities***" of Book IV "***Law on Securities***", Prof. *Boissonade* listed following real securities:

Chapter 1: Rights of Retention

Chapter 2: Pledge on Movables

Chapter 3: Pledge on Immovables

Chapter 4: Statutory Liens (or Preferential Rights)

Chapter 5: Hypothec

Prof. *Boissonade* classified these rights into 2 groups (Art. 2, Properties), namely "***Primary Real Rights***" (ownership, usufruct, usage or commonage, habitation, lease, emphyteusis, superficies, and possession) and "***Derivative Real Rights***" (servitudes, rights of retention, pledge, statutory liens or preferential rights, and hypothec). Prof. *Boissonade* certainly tried to acknowledge and legitimate customary rights of common people in feudal relationship ("tenant farmers"!) as widely as possible and put them under legal protection. Especially, it was a key point of his code that "***lease***" should be acknowledged ***as a real right***. He aimed to protect interests of tenant farmers in rural communities against landowners ("landlords") and interests of house-renters in city areas against house owners.

## Real Rights and Real Securities in the "*Revised Civil Code*" of 1896

The revised Civil Code of 1896 deals with real rights in its 2nd Book while the German Civil Code (BGB) provides real rights in its 3rd Book. The Japanese Civil Code follows the original order of the "*Pandects System*". This book covers primary property rights ("*possession*" and "*ownership*"), partial or derivative property rights ("*superficies*", "*emphyteusis*", "*servitudes*"), and real securities ("*rights of retention*", "*statutory liens or preferential rights*", "*pledge*", "*hypothec*").

When its content is compared to the content of "*Old Civil Code*", then following points can be noticed:

(1) The commission for the revision of "*Old Civil Code*" at first combined "***Real Rights***" and "***Real Securities***" of "*Old Civil Code*" together in the new 2nd Book. Hence the general provisions on "*rights of retention*" and "*statutory liens (preferential rights)*" were preserved in the "*Law on Properties*" while the German Civil Code (BGB) does not have any general provisions on "r*ights of retention*" and "*statutory liens*", the latter is regulated in the insolvency law.

(2) The original articles on "*lease*" were moved to the 3rd Book "*Law on Obligations*", and those on "*usufruct (usus fructus)*", "*usage (usus)*", and "*habitation*" were deleted. In other words, the commission decided to abolish all the real rights of "*feudalistic*" characters. Probably, the commission had aimed a drastic modernization of legal relationships regarding farm land. It is uncertain what would have happened if such rights as "*usufruct*" or "*usage* (*commonage*)" could have been preserved in the Revised Civil Code. At least, it is quite obvious that the return to the conventional concept of *lease* as an obligation had a tremendous consequence in the life of large number of farmers. This change was an crucial error of the commission. The members of the commission probably did not possess understanding enough for the socio-historical task of codification. Many interests of farmers which were acknowledged under their customary rules lost their legitimacy, and could not enjoy judicial protection enough.

| Chapter | Contents of Book II |
|---|---|
| I | **General Provisions (Art. 175 – 179)**<br>"No real rights can be created other than those provided for in this Code or in other laws" (Art. 175). |
| II | **Possession (Art. 180 – 205)** |
| III | **Ownership (Art. 206 – 264)** |
| IV | **Superficies (Art. 265 – 269)**<br>The owner of a ground may entitle someone else to the use of its surface for the purpose of owning a structure (house, building) or trees. The amendment to the Civil Code in 1966 introduced a new type of superficies which allows the entitled person to the use of the *underground* or *space* over the ground (Art. 269-2).<br>The entitled person (superficiary) is protected better than a lessee in the case of lease: at first, the duration of superficies may be, if not determined in the creation act, between 20 to 50 years; secondly, a superficiary may register his right or transfer it to another person without consent of the owner (this is the reason why superficies is counted to a "real right"). Because of this strength, owners usually prefer "lease" to "superficies". |
| V | **Emphyteusis (tenancy of land) (Art. 270 – 279)**<br>Also in the case of "emphyteusis", the owner of the ground entitles someone else to the use of its surface. Unlike the superficies, this right may be created only for agricultural purposes. This type of real rights was necessary to transform the feudal relationship between landlords and tenant farmers to the modern legal relationship. Through the "Reform of Agricultural Land" under the occupation by the allied forces, the former tenant farmers obtained the ownership of their fields. The historical role of "emphyteusis" is therefore already completed. |
| VI | **Servitudes (Art. 280 – 294)** |
| VII | **Rights of Retention (Art. 295 – 302)**<br>The right of "retention" is the first type of real security. Someone who has something of his debtor in possession may retain his possession until the debtor has performed his obligation. This right does not depend upon any agreement between the parties. The creditor however must already have the possession, he may not claim the debtor to take over something to him as security. Moreover, the object must be closely concerned to the obligation in question. The last point is not required in case of commercial acts between merchants (Art. 521, Commercial Code). This right is not transferable from its nature. |

| Chapter | Contents of Book II |
|---|---|
| **VIII** | **Statutory Liens (Preferential Rights) (Art. 303 – 341)**<br>Under certain circumstances, certain creditors may seek performance from debtor's properties prescribed in the law in prior to other creditors. These rights of priority for performance from certain properties do not rely on agreement between parties. Therefore, it is one type of real security. These rights are not transferable. |
| **IX** | **Pledge (Art. 342 ~ 367)**<br>Pledge is a most popular real security created by agreement between the debtor and the creditor. The object of pledge is not limited to movables, but immovables, securities, and intellectual properties may be pledged,too. In principle, the creditor may not acquire the ownership on the object even in case of non-performance. He can only claim for auction sale of the object and gain payment from it's proceeds. But in the commercial cases, parties may agree to transfer the ownership of the object to the creditor if the debtor defaults to perform his duty (Art. 515, Commercial Code). |
| **X** | **Hypothec (Art. 369 ~ 398)**<br>Hypothec is the second type of real security created by agreement. However, the Japanese Civil Code limits the object of hypothec strictly to immovables, superficies and emphyteusis. Hypothec may have effect also over accessories or attachments which are tightly combined with the object. Similarly to pledge, the creditor principally may not obtain the ownership on the object in case of non-performance. He can claim for payment from proceeds by auction sale. Hypothec may be transferred together with the claim which is secured by it. |
| | **Maximal Amount Hypothec (Art. 398-1 ~ 398-22)**<br>Normally, a hypothec may be created as security for a specific claim based on a single contract, and extinguishes when the obligation was performed. Through the amendment to the Civil Code in 1971, a new type of hypothec was added, namely "Maximal Amount Hypothec" or "Maximal Collateral". This hypothec can cover continuous trading relationships between parties, and does not extinguish at each time of the performance. The kind of cause of obligations and the maximal amount to be secured must be specified in the creation act. This type of hypothec had developed in the practice among merchants and was already acknowledged by the court in the Prewar period. |

## Historical Role of *Emphyteusis*

In the feudal period, legal relations in regard to the land were unclear and complicated because the concept of “ownership” in modern legal sense did not exist. There were only overlapped relations of “possession”. Nobody could enjoy exclusive rights over the land. But for “real-estate transaction” in the modern system of market economy, it was inevitable to establish clear legal relations of “ownership” over the land.

In agricultural areas, the government planed to transform feudal relationship between landlords and peasants into legal relationship between landowners and tenant farmers. The government granted the right of “*ownership*” to former landlords. They were often merchants or money brokers living in cities, and the government expected that they would play a role of agricultural “*entrepreneur*”. On the other hand, the government failed to pay due attention to protect the rights and interests of tenant farmers.

When Prof. *Boissonade* worked on his “*Old Civil Code*”, he recognized a legal practice in the Japanese rural communities which was comparable to the Roman “*emphyteusis*”. For this reason, he decided to adopt this real right from the Roman civil law. Furthermore, he considered that the “*lease*” should be defined as a real right in order to secure the legal status of the majority of the population. According to his consideration, propertyless tenant farmers could still enjoy the right of “*emphyteusis*” (in this case, they would be called “*emphyteuta”*) or at least the right of “*lease*” (in this case, they would be called “*lessee*”). “*Emphyteutis*” as a real right had already disappeared in France and Germany. The articles

on "*emphyteusis*" in the Old Civil Code were based on the Italian civil code. However, the Revised Civil Code rejected this consideration of Prof. *Boissonade* regarding "*lease*".

An *emphyteuta* is entitled to cultivate the land of another person upon payment of a rent (Art. 270). The duration of this right may be between 20 to 50 years (Art. 278). During this duration, the *emphyteuta* may assign his right or lease it to another person (Art. 271). The transaction or lease may be performed without consent of the owner. Moreover, a hypothec may be created on this right (Art. 369).

In reality, however, landowners often rejected to accept such a generously protected "*emphyteusis*" for their tenant farmers and preferred simple "*lease*" because of a strong position of *lessor* against *lessee* in the provisions on "*lease*":

> **Art. 617 [Notice to terminate]**
> If no period has been fixed by the parties for a lease, each of the parties may at any time give notice to the other party *to terminate the contract*. [...]
>
> **Art. 618 [Reserved right to terminate]**
> If, even in cases where a period has been fixed by the parties for the lease, one or both of the parties has reserved *a right to terminate the contract,* the provisions of the preceding Article shall apply mutatis mutandis.

As a result, the most part of tenant farmers had to live with terrible fear that their lessors (landlords) would at any time terminate the leasing contract or that the renewal of their contracts would be rejected, and they would be deprived of their farming land.

In the feudal period, the status of tenant farmers did not expire, and farmers were protected by customary rules of their village communities. Through the "modernization" of the legal relationship in rural areas, they were deprived of such a solid status and stable rights in their everyday life. In this way, the status and position of farmers against landowners was essentially and drastically weakened.

Accordingly, the economic and political rule of landowners in rural areas were not merely preserved but also strengthened after the modernization. The government tried to legitimate and fasten this hierarchical relation between landowners and farmers by the Confucian moral of protection and loyalty.

Many tenant farmers, of course, soon began to protest against such a "Tenancy Policy" of the government. Deprived farmers claimed for reduction and exemption of tenant fee, and demanded guarantee for lease contract and its renewal. Such a conflict between tenant farmers and landowners was widely spread in rural areas, and often escalated to violence ("***Tenancy Troubles***"). The government, which acted as protector of interests of landowners, planed thereon a countermeasure which aimed at settlement of conflicts through acquisition of tenanted land by tenant farmers. The protesting farmers, however, rejected such a solution and insisted in "***Regain of lost status and rights of tenant farmers***" which they had enjoyed during feudal period. The official authority did not possess competence to understand such a "*legal consciousness*" of farmers ("*They want to stay at tenancy and return to feudalism?!*"). This incompetence of the government disappointed the farmers very and let them look for understanding and support from the side of "*Imperial Army and Navy*". Indeed, the Japanese militarism found its home ground in such rural areas. After all, these conflicts could not find any final settlement until the "***Agrarian Reform***" which was enforced by the occupation army in 1946.

In the occupation period after the World War II, it was a most important goal for the GHQ to remove all political, legal, social and economic factors which inhibited democratization in Japan and to establish a democratic and peaceful regime before the socialism and communism would gain popularity among the Japanese people. GHQ ordered the Japanese government to perform a *drastic agrarian reform* in order to improve the social and legal status of farmers. This reform was rapidly enforced in period of 1946 to 50. The state bought tenanted land from its owners for fixed price

(compulsory purchase) and sold it to tenant farmers for a low price. After that, the transaction of farming land was strictly controlled by the official committee in order to prevent repurchase by former landowners. Finally, all farmers could obtain the right of ownership upon the land which they have cultivated. The modernization and democratization process in rural area since 1870s was therewith completed, and the socio-historical role of the provisions on "*Emphyteusis*" was finished.

## *Superficies* and Special Legislations for Protection of Rights of Lessees

Also in city areas, the legal relations between land- or house-owners and beneficiaries had to be modernized and regulated, but in another way than in rural areas. According to the vision of the government, the relationship between the owner of a house and its inhabitants (*lessees*) should be transformed into "***lease***", and it should be regulated in the *Law of Obligations*. On the other hand, a more solid right, namely "***superficies***", should be granted to landholders (*superficiaries*) because they are owners of houses or other constructions upon the land.

In Japan, the government decided to clearly separate the ownership of the land and that of structures on it. This had been the established practice in Tokyo region in the feudal period. The land and a house on it may be owned by different persons, and these rights should be registered separately. In other words, the accessory character of houses or other constructions to the land was denied in Japan. Therefore, for the purpose to protect the right of house-owners who do not have the ownership of the land, a right of claim based on a contract like *"Lease"* would not be enough because a right of claim may be asserted and exercised only against the counterpart of the contract (here, landowner). In case of such a lease contract, the right of a house-owner could be threatened, for example, if the ownership of the land has been transferred to a third person, and this person would contradict the validity of the lease.

Prof. *Boissonade* had intended to include the right of lease of immovables to real rights, but the Japanese professors who revised the old Civil Code did not agree for this concept. In most cases where the land should be used by other persons for the purpose of constructing a house or other structures, so they supposed, the parties would rather create a right of *Superficies* than conclude a lease contract. According to this consideration, Art. 388 provides an automatically created superficies:

> **Art. 388 [Statutory superficies]**
> If, where the land and the building thereon belong to one person, either the land or the building only has been hypothecated, the hypothecator is deemed to have created a superficies in case of official auction; in such case, however, the rent shall be determined by the Court on the application of the party concerned.

Furthermore, Art. 605 also provides an supplementary way to protect the right of lessees:

> **Art. 605 [Registered lease of immovables]**
> The lease of an immovable, if registered, shall be effective even as against persons who subsequently acquires real rights on such an immovable.

However, this consideration of the Japanese professors completely missed the point. Landowners always avoided to create the right of *Superficies* and preferred ***lease*** contracts. Moreover, Art. 605 could not work at all because lessees do not have any right of claim to register their right (Judgment of the Supreme Court, July 11, 1921). A lessee of an immovable needs always consent of its owner for the registration of lease, and owners normally reject such a disadvantageous act for them.

As a result, lessees of immovables could not be protected enough in the "*Revised Civil Code*", especially in regard to registration and duration of lease. The duration of lease is limited to 20 years while the shortest period is not provided (Art. 604). In most cases, a lease contract of immovables was concluded for the short period of 2~3 years. Moreover, a lessor may at any time terminate the lease contract if any fixed period is not agreed (Art. 617). Even in a case where a fixed period is agreed, the owner may reserve a right to terminate the contract (Art. 618). The consent of the owner was absolutely necessary to transfer or sub-lease the right of lease to a third person. The lessor may rescind

the contract if the lessee has transferred or sub-leased his right without the consent of the owner (Art. 612).

This ***defection*** of codification caused serious troubles also in city areas. The government had to correct these shortcomings with special legislations. After the *Russo-Japanese War* in 1904~5, land prices in Japan increased rapidly, and landowners tried to raise rent for lease. They even tried to terminate a lease contract by way of a fictious transaction of the land when lessees did not want to accept a higher rent. The government therefore enacted "*Law on the Protection of Houses*" (1909). According to Article 1 of this law, an unregistered lease of land or S*uperficies* may be protected against third persons insofar as a house or other constructions on it has been already registered.

However, landowners had still opportunities to gain unfair profits, namely, they could force lessees to agree with a lease contract for a quite short duration, and they raised a rent at time of renewal under the threat that they would refuse renewal if lessees would not accept a higher rent. In 1921 therefore, the government enacted the "*Law on the Lease of Land*" as countermeasure against such unfair practices of landowners. This law provided the shortest period of 20~30 years for lease of land and set also the lessor's right to refuse renewal of lease contract under a limitation. The lease contract may be deemed to be renewed under the unchanged conditions if a lessee still owns a house on it and requires the renewal of the contract. The lessor may of course object to the renewal. In such a case, the lessee may still require the lessor to purchase the house for its current market price. In the same year, the "*Law on the Lease of Houses*" was enacted, too. But the right of the lessor to terminate a lease contract or to refuse its renewal was not restricted. The protection of lessees of houses against lessors by this law was still insufficient. Hence, the government had to revise this law in 1941 after a long time of hesitation. Through this revision, the right of lessors was put under a strict limitation. The lease contract may be deemed to be renewed under the unchanged conditions unless the lessor objects to the renewal with a reasonable ground. This strict limitation of termination or refusal with the phrase "*with a reasonable ground*" was introduced also into the "*Law on the Lease of Land*".

The revision of these special legislations was continued in Postwar period, and the protection of lessees was further improved. In 1991, these three legislations were finally integrated together ("*Law on the Lease of Land and Houses*"). This law provides following factors for the consideration of lessor's reasonable ground for refusal of renewal or termination of the contract:

(1) the reason why the lessor and lessee need the property;

(2) circumstances and facts relevant to the argument of the parties;

(3) the purpose and use of the property;

(4) any financial offer made by the lessor.

In general, the lessor's personal use or own need alone can not be accepted as such a reasonable ground for refusal of renewal or termination of lease contract. In this sense, the lease of immovables has now almost same strong effects as real rights. That consideration of Prof. *Boissonade* could be brought back to life.

## Special Legislations on Hypothec over Assets of Company and Movables

According to Prof. *Boissonade's* concept of Hypothec, the legal effect of a hypothec on an immovable (so-called "*Principal*") can cover all its attachments (so-called "*Appurtenance*") which are firmly integrated into a whole thing together with the immovable (Art. 197, *Law on Real Securities*). It should cover also things which are attached to the principal after the creation of the hypothec (Art. 200).

In the "Revised Civil Code of 1896", however, the commission composed the article in a quite different way:

> **Article 370 [Extension of the effect of hypothec]**
> A hypothec shall extend to all things, except buildings, which appertain to or form the part of the land hypothecated. However, this shall not apply to cases where it is otherwise provided for by the act of creation or where the act of the debtor can be rescinded by the creditor under Article 424 [Right of creditor to avoid prejudices].

According to this article, it is not possible to include things which are attached to the principal after the creation of Hypothec into its object. Furthermore, the academic theory and court practice showed a tendency to clearly separate principal and other attached movables in accordance with the ruling German theory. As a result, Hypothec in the Civil Code was quite unsuitable for special needs in the commerce and industry. The most critical shortcoming was that installed movables on the land or in the building cannot be included to the object of Hypothec. Owners of a factory, for example, could not offer his immovables together with facilities as security.

For this reason, the government had to enact special types of hypothec in order to meet actual demands in commerce and industry: There were legislations which allowed comprehensive hypothec over assets of companies, for example, “Railway Hypothec”, “Factory Hypothec”, “Mine Hypothec” (1905), “Canal Assets Hypothec” (1913), “Automobile Carrier Assets Hypothec” (1931), and “Road Traffic Enterprise Assets Hypothec” (1952) and so on.

There were also legislations which prescribe hypothec over movables, “Forest Trees Hypothec” (1909), “Agricultural Movables Hypothec” (1933), “Automobile Hypothec” (1951), “Airplane Hypothec” (1954) and so on.

## Atypical Real Security Rights and Provisional Registration

According to the Art. 175, any other type of real rights may not be created than those prescribed in laws. However, some atypical *real rights combined with financing agreement* have developed in the practice. The reason is that the real security system of the Japanese Civil Code suffers from some shortcomings; first of all, this Code does not know any type of real security over movables which allows the owner of the object (so-called “*collateral*”) to use it until he repays the debt. Secondly, the official enforcement procedures of Pledge or Hypothec are complicated and cost time and money. People tried, therefore, to contrive alternative ways to avoid official enforcement procedures and to secure immediate repayment from the debtor. Such real rights may be illegal, the courts could not ignore them, but has not prohibited them completely. There are following four types:

(1) **Sale contract with an option to repurchase**
By this arrangement, the debtor transfers the ownership of a object to the creditor, and receive the purchase price from the latter, but in this sale contract, the creditor promises to let the debtor repurchase the object when he returns the purchase price.

(2) **Sale contract with an option to redemption (revocation of purchase)**
Like in Sale contract with an option to repurchase, the debtor transfers the ownership of an object to the creditor, the creditor promises to let the debtor rescind (cancel) the sale contract when he returns the purchase price to the creditor.

(3) **Conditional assignment of ownership**
In this case, the parties sign a loan contract with an agreement of purchase of an object . But its ownership may remain on the side of the debtor. The transfer of the ownership will become effective when the debtor falls into default.

(4) **Agreement to substitute performance**
In the agreement of loan contract, the debtor promises to transfer the ownership of an object to the creditor as a substitution of repayment when he falls into default.

However, such atypical real securities are fraught with some critical points; maybe the creditor will abuse his strong position and try to make unfair profits (this is a reason why real securities like

“pledge” and “hypothec” are not prescribed as contractual obligations, but are taken under a strict control by the law of real rights). For example, maybe the creditor demands the ownership of a collateral in value of ¥100,000 for the money loan of ¥50,000. Moreover, they would cause conflicts if either party disposed the collateral without consent of the other party. For example, the creditor normally let the debtor keep the possession of the collateral, and the debtor maybe sells the collateral to a third person after he transferred its ownership to the creditor with a sale contract of type (1). In case of a movable collateral, the creditor would lose its ownership if the third person was in good faith (so-called “*immediate acquisition*”). In case of an immovable collateral, maybe the creditor sells its ownership to a third person after he registered the transfer of the ownership. The debtor could not repurchase it any more if the third person already registered the transfer of the ownership.

The courts tried to regulate such atypical real rights with existing provisions in order to avoid unfair consequences. If the value of the collateral is unproportionally higher than the amount of the loan, the courts will require the clearance if the real purpose of the parties consists in a loan contract regardless its name and form (“Sale Contract”). The creditor will have to return the remains to the debtor after he took the principal and reasonable interests.

In case of immovable collaterals, the option for repurchase or substitutive repayment could be registered as “*provisionary”* in order to prevent conflicts mentioned above. This so-called "*Provisional Registration*" was a customary rule and did not have any official effects. This rule was offcially acknowledged in the “***Law on Contracts of Security by Provisional Registration****”* in 1978.