

Instructional Text for “Introduction to Japanese Law” (LA275)

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Part 1

Introduction to Japanese Legal History in Pre-modern Period

Prehistoric Age

Nobody knows exactly where the first human beings on the Japanese islands came from. They maybe, so we assume, came from Siberia during the Ice Age (ca. 30 ~ 20,000 years ago). Indeed, Japanese language belongs to the Altai-Mongolian language family, and it is related to Mongolian, Korean, Tibetan languages, and so on. But the people on the Japanese islands must have been completely separated from the continent in a very early period because the Japanese language does not have any common vocabulary even with the Korean language. In this period, the people on the Japanese islands lived in a peaceful and primitive life style of Stone Age. In the following period since 400 BC., other groups of people immigrated to the Japanese islands from Southern China, Southeast Asia, and Polynesian islands. They brought rice cultivation and agricultural economy to the Japanese islands.

These economic changes deeply influenced social and political structures. The society became unstable and began to change dynamically and constantly. Many state-like organizations were probably founded and contested each other, but we do not possess any documentation about this period because the people did not use any characters yet.

The first report about Japan can be found in Chinese royal documents. According to these materials in the 1st c. BC., there were more than hundred small states in Japan. Rulers of some states regularly presented tributes to the Chinese dynasty. In 107 AD., the ruler of a Japanese state named “*Na*” offered 160 slaves to the Chinese dynasty and asked for audience with the Chinese Emperor. Japanese small countries were in a state of war against each other. So, the king of “*Na*” wanted to be supported by the Chinese dynasty. “Slaves” existed already in Japanese society. The Japanese people were probably divided into ruling families and subordinated unfree people, and one kind of class structure was built. Political system was maybe set up with kinship or clan (family) relation.

A Chinese document of the 3rd c. reported about a powerful state in Japan named “*Yamatai*” which was ruled by a queen “*Himiko*”. She was a shaman (religious leader). In the following century, smaller countries were occupied by bigger countries, and Japan was gradually unified. Some historian assume that powerful military groups from Korea invaded Japan in this period; the rulers let people (or slaves) construct huge tombs for them. Archaeologists found many weapons from iron, harness and other goods for horse riding in such ancient tombs. Moreover, ruling people began to use Chinese characters.

Yamato- and Asuka-Era (5th – 7th c. AD.): Establishment of Japanese Ancient State

In the 5th c., the first Japanese dynasty named “*Yamato*” was established. It ruled Southern and Central Japan. In the 6th c., rulers of this dynasty introduced Chinese culture and Buddhism into Japan. Official documents were written in Chinese. Presumably, many foreign experts were recruited from China and Korea. They worked for the *Yamato* Dynasty and educated Japanese staffs. Accordingly, subordinated people were reorganized to functionally specialized groups (servants for textile, ceramic ware and other artworks). The importance of slaves was maybe reduced through this social change.

However, *Yamato* Dynasty had to suffer from a crucial limitation because there were some powerful clans in the ruling class. They possessed own territories and own people (servants and slaves). *Yamato* Dynasty tried to wipe out such ruling clans from the regime in order to establish the sovereignty of the Dynasty and to put all population under its direct control. This attempt was realized in the “*Taika*”-Reform in 645.

Nara-Era (710 – 794): Introduction of Chinese State System

Through the introduction of the Chinese *Ritsu-Ryo* system (“*Ritsu*” means criminal law and “*Ryo*” means administrative law), the traditional clan system was completely dissolved, and the sovereignty of the Emperor, “*Tenno*”, was firmly established. Under this system, all people and land belonged to the state, or rather to the Emperor. Consequently, other dominant clans lost their domain, serves and slaves. The new imperial regime centralized the political power and, relying on the Chinese model,

organized an administrative system. Agricultural land was divided and shared equally to all adult persons. In return, they were obliged to pay tributes, to serve in the military, and to contribute to large construction projects. Their duties were very heavy. For this purpose, a new family register system was founded, and each household was controlled with it. However, the state authority did not possess any efficient administrative system yet, so it was very difficult to maintain such a large-scale state system correctly.

Background of “Ritsu-Ryo System”

This ancient system of the state power was based on a philosophical and political theory of China, which was a synthesis or combination of “**Confucianism**” and “**Legalism**”;

“Confucianism (儒家; Rújiā) is an ancient Chinese ethical and philosophical system originally developed from the teachings of the early Chinese philosopher Confucius (Kong Fuzi/K'ung-fu-tzu, lit. "Master Kung"). It focuses on human morality and good deeds. Confucianism is a complex system of moral, social, political, philosophical, and quasi-religious thought that has had tremendous influence on the culture and history of East Asia. Some consider it to be the state religion of East Asian countries because of governmental promotion of Confucian values. ...

Confucius (551 – 479 BC) was a sage and social philosopher of China whose teachings have deeply influenced East Asia, including China, Korea, and Japan for two thousand five hundred years. The relationship between Confucianism and Confucius himself, however, is tenuous. Confucius' ideas were not accepted during his lifetime and he frequently bemoaned the fact that he remained unemployed by any of the feudal lords.

As with many other prominent figures such as Jesus, Socrates, and Buddha, Confucius did not leave any writings to put forward his ideas. Instead, only texts with recollections by his disciples and their students are available. This factor is further complicated by the "Burning of the Books and Burying of the Scholars", a massive suppression of dissenting thought during the Qin Dynasty, more than two centuries after Confucius' death.”

(from <http://en.wikipedia.org/wiki/Confucianism>)

The Qin Dynasty of China (秦; 211 – 206 BC) was the first dynasty which has successfully unified the whole Chinese territory. Its founder called himself as “First Emperor (始皇帝; Qín Shǐ Huáng)”. But why did this regime suppress the Confucianism? Simply because the Emperor of Qin adopted a rival theory to Confucianism, namely “Chinese Legalism”. The Chinese Legalists helped the Emperor of Qin to reform his Empire from a backward state to a centralized powerful one. They insisted to sweep away all the nobles and feudal lords from the politics. Instead, they required to introduce well-trained bureaucrats and to formate a powerfully operating state mechanism. For this purpose, they used clearly written legal rules and taught that all the people under the ruler were equal before the law. Equal and stringent application of legal rules, especially heavy and pitiless punishments would keep all the subjects in order and obedience to the ruler. They hated their rivals, especially Confucian scholars who preferred “the rule of morality and virtue” to “the rule of law and power”.

The rule of the Qin Dynasty, however, could not be held for a long time. Due to its brutality and heartlessness, this dynasty was soon replaced by the second Empire of China, namely Han Dynasty (漢; 206 BC –220 AD). The Han Dynasty adopted the administrative and political system of the Qin Dynasty almost unchanged. Indeed, it was not possible to administrate the whole country without such a system of bureaucrats. On the other hand, this new regime rehabilitated the Confucian teachings (“the rule of morality and virtue”). The Confucianism was adopted as the orthodox theory of the

imperial rule and offered a philosophical basis for its legitimation. In this way, a new combination of Legalism and Confucianism was established. The positions of officials were, however, still occupied by the nobles and feudal lords and succeeded by their descendants. Under the rule of the Han Dynasty, Chinese society flourished and laid the foundation for today's Chinese culture.

The rule of the Han Dynasty was once interrupted by another regime (8 – 23 AD), but rebuilt soon. However, the authority of the later Han Dynasty gradually declined due to the deep corruption of its officials and the rise of feudal lords in provincial areas. At the beginning of the 3rd c., the later Han Dynasty fell down, the Empire was divided into several territorial states (三国; “Three Kingdoms”).

This warring states period of China lasted over 300 years until the Sui Dynasty (隋; 581 – 619), and then the Tang Dynasty (唐; 619 – 907) unified the Chinese Empire again and established a stable regime. These two regimes refreshed the Legalist tradition from the Qin Dynasty period and issued new legal codes as the principles of the imperial rule. These codes were called “Lù-Lìng (律令)”. Basically, the old Chinese word “Lù (律)” means penal law, and “Lìng (令)” administrative law. With these two legal tools, the Sui and Tang Dynasty implemented following four measures:

1. Sharing system of agricultural land among farmers
2. Charging system of taxes directly upon individual subjects
3. Military obligation system upon all adult male subjects
4. Direct control of individual subjects with a systematic and centralized local administration

Originally, the Sui and Tang Dynasty pursued to make the Confucian idealism true with these measures – the idea that every subject should be ruled directly by the Emperor with his superior morality, virtue and humanity. Their real aim was to centralize the political power and to deprive nobles and feudal lords of political and military influences.

Furthermore, the Sui and Tang Dynasty introduced a new recruiting system of administration officials, namely “Imperial Examination (科举; Kējǔ)”, in order to sweep away genealogical or personal influences from the official recruitment and to establish an efficient administration system. Everybody should be appointed to a suitable position in the government so long as he shows an excellent competence, just regardless of his social standing. Contents of the examination were Confucian teachings. With this examination system, the integration of Confucianism and Legalism was accomplished. Since that time, the Confucian teachings became deeply rooted in the Chinese mind. This system was maintained almost 1,400 years long (until the 19th c.). Later, this system was adopted also in Korea and Vietnam when these countries were subordinated and strongly controlled by Chinese dynasties. Confucian teachings have been deeply engraved also in the mentality of these two nations.

How about Japan? Confucian teachings were introduced also into Japan together with Buddhism in the 6th c.. However, such highly intellectual documents in a foreign language could not be translated into Japanese language probably because Japanese culture at that time was still too primitive and underdeveloped to assimilate Buddhism and Confucianism in their true meaning. Nevertheless, the Japanese regime in Nara-Era decided to introduce the Chinese “modern” state organization and administration system (“Ritsu-Ryo System”). It was “revolutionary” and successful. The Japanese regime tried to introduce also the “Imperial Examination”, but it was not successful. The nobles in the “Imperial Court” of the Japanese Emperor neither understood Chinese Confucianism, nor accepted “Imperial Examination”. This is one reason why the Japanese “Ritsu-Ryo System” could not be held for a long time. After all, the genuine Confucianism was not adopted in Japan. Later, Confucian teachings were officially adopted by the Samurai regime in the 17th c.. It was not the original Confucianism, but a “japanized” one.

RITSU (律)

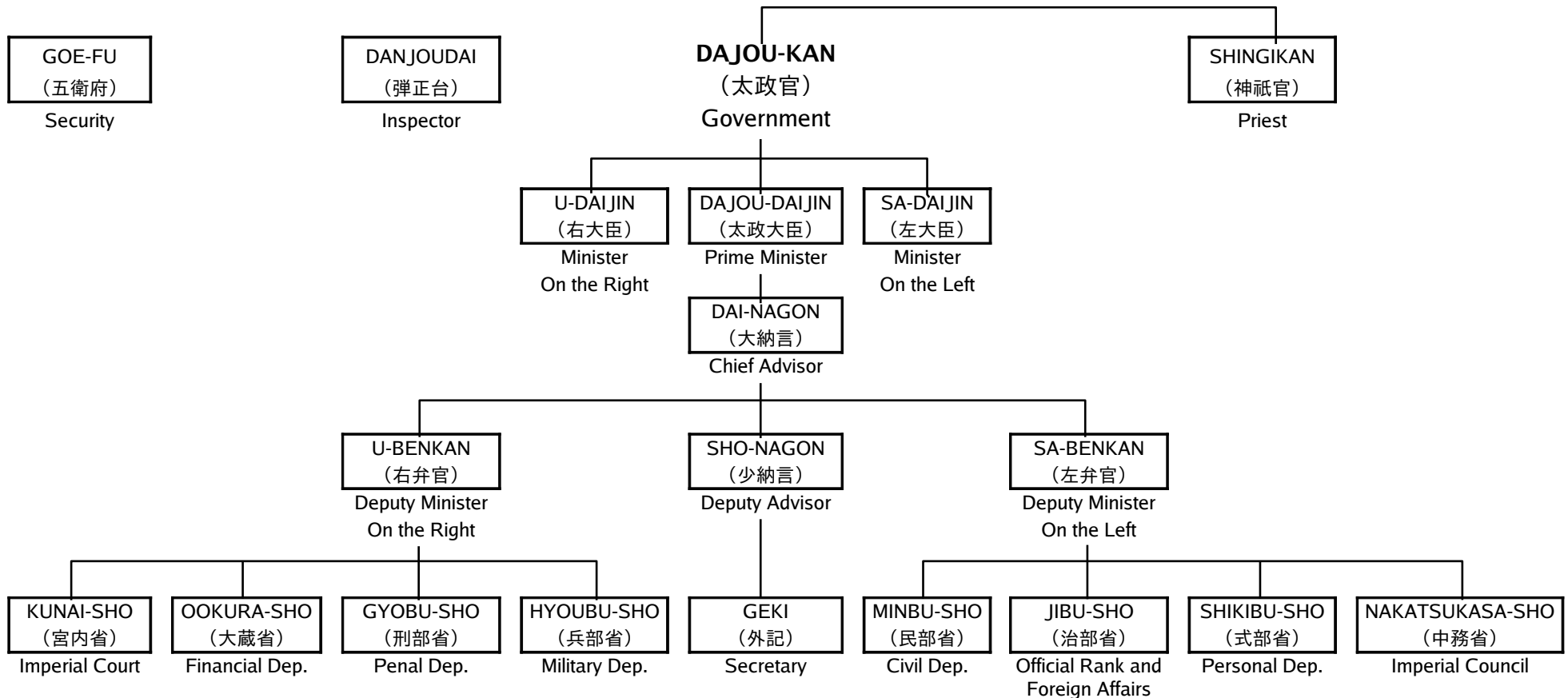
5 Punishments (五刑)

笞: Whip	5 levels (10 - 50)
杖: Beat	5 levels (60 - 100)
徒: Servitude	5 levels (1 - 3 years)
流: Banish	3 levels (near, middle, far)
死: Death	2 levels (hanging, beheadal)

8 Sins (八虐)

謀 反: Crimes against Emperor	大不敬: Religious crimes
謀 大逆: Destruction of Imperial Properties	不 孝: Immoral behaviours
謀 叛: Rebellion and collusion	不 義: Disloyalty
惡 逆: Crimes against lineal ancestor	
不 道: Crimes against others	

RYOU (令)



●計帳 (山背國愛宕郡出雲郷計帳 神龜三年)

戸主大初位上出雲臣千依戸

去年帳定良賤口貳拾貳人男十六 奴一

帳後无損益

今年計帳定見良賤大小口貳拾貳人男十六 奴一

不課口拾柒人

男拾貳人 使部一 綠子一 廢疾一
 小子七 耆老一 奴一

女伍人 妻一 少女一 耆女一
 丁女一 小女一

見不輸啖人少丁

見輸肆人正丁

輸調錢參拾陸文

① Head of Family

戸主大初位上出雲臣千依、年陸拾玖歲、耆老

② 男勲十二等出雲臣嶋麻呂、年參拾歲、正丁 右頰黒子

眉間黒子

男出雲臣広主、年貳拾伍歲、正丁 眉間黒子

男出雲臣小広、年拾玖歲、少丁 眉間黒子

19

5 男出雲臣広長、年拾參歲、小子 左眉黒子

6 男出雲臣広方、年拾壹歲、小子 无印

7 女出雲臣麻志麻売、年參拾參歲、丁女 右頰黒子

8 孫出雲臣符日佐、年參歲、緑子 嶋麻呂男

9 弟少初位上出雲臣牛養、年參拾柒歲、正丁

10 母出雲臣姉売、年柒拾陸歲、耆女 左頰黒子

11 男出雲臣佐比物、年拾歲、小子 左頰黒子

12 男出雲臣袁佐比、年柒歲、小子

13 男出雲臣諸主、年肆歲、小子

14 女出雲臣黒虫売、年柒歲、小女

15 弟出雲臣人足、年參拾肆歲、正丁

16 和銅五年逃、尾治國結市郡

17 戸出雲臣族果安、年伍拾參歲、一支廢疾、右頰黒子

18 妻素高椅悅売、年肆拾捌歲、丁妻

19 男出雲臣族東人、年貳拾參歲、正丁

20 男出雲臣族小東人、年拾參歲、小子 額疵

21 男出雲臣族真東人、年拾歲、小子 右眉黒子

22 女出雲臣族刀自売、年拾捌歲、少女

in military service

A household (726 AD)

• 22 persons { 16 persons in the main house
 6 person in a small house (正倉院文書)

- with tax duties : 5 persons
- without tax duties : { 12 men
 5 women
- slave : 1 person

左目後黒子

右頰黒子

Heian-Era (794 - 1182)

In the Imperial Court in *Kyoto*, a new noble class developed, and some powerful noble families dominated in the politics and the culture. They were entrusted with the administration of rural areas and allowed to rule such areas like their own territories. They enjoyed a wide range of privileges and immunity (*manorial system*). Large Buddhist temples and Shinto shrines were allowed to possess manors, too. Peasants who could not fulfil their heavy duties under the *Ritsu-Ryo* system ran away from their villages and fled into such manors. They were accepted as serfs, i.e. privately owned peasants (formation of *serfdom* or *bondage*). The nobles stayed in the Royal Court in *Kyoto* and sent their private servants to their manors for the administration. The nobles organized also private military troops for the security of the manors. This was the beginning of Japanese warrior class (*Samurai*).

The warrior class was founded outside of the *Ritsu-Ryo* system. However, they developed an original relationship among them independently from the official social system. They were bound with a contract-like relationship among each other. The master had to protect their retainers and pupils, the latter had duties to loyalty and military services for the master. They were gradually accepted in the Royal Court and finally took over the political leadership. Also in the rural areas, manors were laid under the rule of warriors, and they founded their territories. Such territories were militarily organized with the warrior-relationship. The rule of the Royal Court in *Kyoto* lost its political meaning. It was the end of *Heian-Era* (classic age of Japan).

Kamakura-Era (1182 - 1333)

At the end of *Heian-Era*, there were two large groups of warriors, *Heike*-clan and *Genji*-clan. At first, *Heike* achieved the ruling position in the Royal Court. But they were attacked by the *Genji* troops and completely removed from the Royal Court. The head of the *Genji* was appointed to "*Shogun* (Marshal)" by the Emperor, but they left *Kyoto* and founded their own "*Bakufu* (headquarter)" far from *Kyoto*, in *Kamakura*. They began to rule the country according to their own political principles (law of Samurai-warriors). The *Genji* was condemned for the breach of the *Ritsu-Ryo* system. The tension between the Imperial authority in *Kyoto* and the *Kamakura Shogunate* gradually escalated to the military conflict. In 1221, the Samurai-warriors who supported the Imperial Authority attacked the *Kamakura Shogunate* ("[Jōkyū War](#)"). However, the Samurai-warriors on the side of the Shogunate defeated the Imperial army. After this first battle between the Imperial authority and the Shogunate, the latter set up a new security agency in *Kyoto* and strictly controlled the activities of the Imperial authority ("[Rokuhara Tandai](#)"). The superiority of the Shogunate was established in the military way. Nevertheless, the *Kamakura Shogunate* did not have any intention to abolish the Imperial Court or to take over its authority. The Shogunate rather tried to justify its own rule with the argument that they did not act against the *Ritsu-Ryo* system; the sovereignty of the Emperor stayed untouched, they wanted only to control internal relations of warriors and to settle troubles among them, these were purely private matters of warriors, their law was a *private law* which had effect only to warriors. In 1232, the Shogunate promulgated the first legal code for the whole Samurai-warriors ("[Goseibai Shikimoku](#)"). It was the declaration of the private law tradition (class laws) in Japan.

Japanese Buddhism in Kamakura-Era

New religious consciousness was shaped out through criticism against Esoteric Buddhism of *Heian-Era*. In *Kamakura-Era*, several important sects of Japanese Buddhism were founded and became widespread under warriors and normal people (merchants, manufacturers, peasants).

- *Jōdo-Shinshu* was founded by a monk named "*Shinran*" based on *Jōdo-shū* in *Heian-Era*. He denied the meaning of personal efforts to reach "*Nirvana*" completely, and taught to trust the great charity of *Amitabha* Buddha because everybody is so sinful that nobody can enter Heaven (*Jōdo*) by himself. He said "Wrongdoers will be *of course* rescued by the great *Amitabha* Buddha because *even* honest people may be allowed to enter Heaven". He denied also the holy status of monk and priest and married a woman. A wide range of solidarity and cooperation arose among members of

his sect beyond discrepancy of social classes.

- A monk named "*Dōgen*" went to China and studied Zen-Buddhism. After his return home, he founded his own temple "*Eiheiji*" and taught to restore the original form of Buddhism. He said "Meditation is only way for genuine Buddhists". It did not matter for him which social status people had. He indeed recommended ascetic training of meditation for everybody, but it was not any absolute condition to become monk or nun. He denied also luxurious decoration and grandiose ceremonies in Buddhist temples. Even Buddha statue was not necessary for him. He divided religion and secular life clearly and avoided any close contact with political authorities.
- There was one more important figure for Japanese Buddhism. It was "*Nichiren*". He insisted that Buddhist should not believe in any visual image or fantasy of Buddha and Heaven, but in a holy sutra, namely "*Lotus Sutra*". He drew also a vision of Buddhist state. *Shinran* was an outsider, and *Dōgen* avoided politics, but *Nichiren* never hesitated to contact politics. He was politically very active. He tried to convince political authorities and mobilized people in order to realize his vision of Buddhist state.

Kamakura Buddhism was, so to say, "*Evangel*" for normal people. In Nara- and *Heian*-Era, Buddhism was monopolized by the state authorities and the noble class. In Kamakura-Era, Buddhism was for the first time opened for "sinful wrongdoers" like warriors, and uneducated poor people could realize a genuine religious world. It was an unavoidable destiny for warriors to kill enemies and to be killed in battle, but now such warriors knew that they could enter Heaven. They also tried to overcome terrible fear of death through ascetic meditation. Analphabetic peasants could not offer any donation to temples, but now they knew that they had only to call the name of *Amitabha Buddha* or *Lotus Sutra* for forgiveness and charity. Through such religious experiences, a transcendental horizon beyond the unequal, cruel and miserable world was opened for everybody.

In these religious movements, normal people became actively committed to politics. In the sect of *Shinran*, warriors and peasants cooperated, and in the following warring states period, they founded their own republics. *Nichiren* brought people directly into political activities. Therefore, these two sects were hardly hated by the ruling power.

Contributions of Zen-Buddhism were rather cultural. Warriors discovered their own cultural values in this religion, and it protected them from regression to the culture of the nobles in *Heian*-Era even when they reached a ruling position. Such cultural independence and value consciousness probably enabled warriors to interpret Confucianism suitably to the political situation in Japan.

Ashikaga-Era (1333 - 1477) and Warring States Period (1477 – 1600)

The rule of the *Genji* could not be held for a long time. The leadership of the warrior class was taken over by another family "*Ashikaga*". The head of *Asikaga* showed his loyalty to the Emperor and set up his headquarter in Kyoto again. But He could not keep the whole warriors together, and lost his control over the country. Japan was split in many territories ruled by warring lords. They began to battle against each other in order to achieve a ruling position over the whole warriors and to found a new political order. This period lasted one and a half century.

Development in the Warring States Period (16th c.)

In the middle of the 15th c., the *Ashikaga* Shogunate lost almost completely the control over the land, and the warring state period began. The land split into many territories which were ruled by territorial lords (leading warriors; *Daimyo*). They fought against each other 100 years long.

In the meantime, foreign ships arrived from Portugal and Spain. They brought Christianity and guns to Japan. Japanese merchants began with international trade, and the productivity of Japanese manufacturing increased. Territorial lords who pursued their military ambitions needed financial and industrial supports from merchants and manufacturers. They encouraged commerce and industry in

own territories and granted economic freedom to merchants and craftworkers (manufacturers). Such “*pre-modern citizens*” organized *guild*-like associations and governed own branches by themselves. Some cities enjoyed even political autonomy. On the other hand, warriors and peasants who belonged to the Buddhist sect of *Shinran* joined together and founded republics in some territories. Such religious territories were difficult hindrance for powerful lords who aimed to unify the whole country.

In 1582, Lord *Nobunaga Oda* took the most part of the land under his control. He did not hesitate to attack against the private army of Buddhist temples and Buddhist republics. After he destroyed them, he entered *Kyoto* in order to ask the Emperor for the official acknowledgement of his power. But he was killed by one of his own retainers.

Lord *Hideyoshi Toyotomi*, another retainer of *Nobunaga*, succeeded to a leading lord and unified the land completely. Soon after his victory, he organized a nationwide survey of agricultural fields and their productivities in order to establish a rigid taxation system. In 1587, he issued "Anti-Christian Edict" to expel all Christian missionaries from Japan. In 1588, he prohibited peasants from possession of weapons, and fixed four classes absolutely (warriors, peasants, craftworkers and merchants).

Establishment of Tokugawa Shogunate (17th c.)

But the rule of *Hideyoshi Toyotomi* did not last for a long time. After the unsuccessful mission in Korea (1592 and 1597), Lord *Ieyasu Tokugawa* defeated the troops of *Toyotomi* (1600), and founded his Shogunate in a small fisher village in East Japan, *Edo* (today's *Tokyo*). In general, *Tokugawa* Shogunate took over the political strategy of *Hideyoshi*. All territorial lords swore obedience and loyalty to the Shogunate. In return, it granted protection and autonomy to subordinated territorial lords. However, the control of the Shogunate was so powerful that subordinated lords sometimes had to move from one region to another. The Shogunate could even confiscate territories of other lords. In this way, the Shogunate nationwide rearranged the positions of lords for the security reason.

The strength of each lord was measured in amount of rice which was collected as annual tribute from peasants in his territory. Lords distributed such rice to each of their retainers according to his rank as compensation for their services. It was only earning for warriors. It was officially prohibited and even thought as a dishonour for warriors to involve themselves into agriculture or mercantile business. Warriors had to sell their earning to rice merchants in order to get money. In this sense, peasants who were tightly bound to the agricultural fields were primary resource and basis of political power of Samurai-warriors. Land was not an object of private property, and commercial transaction of agricultural fields was strictly forbidden (1643, except in city-regions). On the other hand, merchants and craftworkers classes enjoyed economic freedom and limited self-government of their own branches. Indeed, Samurai-warriors paid their attention only to the productivity of peasants and underestimated the economical importance of commerce. They disrespected merchants as those who produced nothing. But merchants played a significant role for the economic development as “*organizers of market and industry*”. In the 18th c., a nationwide rice market was organized through commercial activities of rice merchants, and a complex commercial mechanism was gradually established in Japan. This development led to a crucial result for the ruling class in the 19th c..

Legislations and regulations by the Shogunate

After the establishment of a new regime, the *Tokugawa* Shogunate promulgated several “laws” – but not in the modern sense, they were “military laws” – and declared main principles of a new political order:

- "*The Law on Military Households of Warriors*" (1615 -) provided basic moral principles and regulations for the warrior class.
- "*The Law governing the Imperial Court and Nobilities*" (1615) prohibited the Emperor and all the nobles in the Imperial Court from political activities and provided that they should dedicate

themselves exclusively to arts and academic research. In other words, the Shogunate subordinated the Imperial Court and the noble class, and took them completely under its control. They were isolated in a small area in *Kyoto* and separated from the real world. In the 14th c., as General *Yoritomo Minamoto* founded his Shogunate in *Kamakura*, he had justified his regime with the argument that the Shogunate controlled only internal matters of the warrior class and its regulations could be seen as private law. But now, the positions of the Imperial Court and the Samurai-warrior regime turned over. The household of the warrior class was declared as "Public Order", and the Imperial Court lost its actual meaning even though the sovereignty of the Emperor was officially maintained until Modern age.

- "*The Law governing Buddhist Temples*" (1665) excluded also Buddhist monks and temples from political activities and prohibited them from founding any new sect or school. At the same time, the Shogunate intensified its persecution of Christians, and forced everybody to belong to a temple as Buddhist. However, the Shogunate was not interested in contents of religious teachings. It used temples merely for administrative purposes, and instructed temples to keep family registers of the people.

Moreover, the Shogunate even tried to control everyday life of normal people, especially peasants, and gave them many detailed instructions, for example, what they should wear or eat, when they should wake up or go to bed, and so on. But the regime did not intend to govern each matter of normal people. Such regulations aimed merely to fasten the class structure. Everyday life and social relations among normal people were governed mostly by customary rules of each class or each branch. In Japan, normal people were not forced to any military service (it was a main business of warriors). In this sense, they were excluded from "*Public Order*" of the warriors and lived in "*Private Sphere*" – it means "outside of the military order". Peasants lived in village communities and had a different family system as warriors. Merchants and craftworkers organized guilds and developed customary laws of merchants for own business (for example, sale for account, book keeping, limited companies, futures contract, bill of exchange and so on, even if they were still in a primitive stage). Business conflicts were arbitrated by seniors or councils of guilds. Only serious conflicts and crimes were adjudicated in the court of territorial lords or the Shogunate.

In general, Japanese warriors were not only disinterested in religion as legitimation of their rule over the nation, but they almost ignored also jurisdiction as political instrument. Accordingly, Samurai-warrior regime possessed neither legal professions, nor developed legal procedures. Japanese feudalism was depending simply upon ethical binding force of loyalty and good faith.

Introduction of Confucianism

For the moral discipline of the warrior class, the Shogunate authorized the Confucian theory of Ming-Era in China as official moral discipline, and obliged all warriors to study it. However, they had to interpret its contents according to Japanese political situation. The original Confucianism was a moral teaching for civilian officials, and military servants could not attain any respected position in China. Therefore, they had to compare the family order (this was a basic social principle for the Confucian in China) to the feudal relation of loyalty between a lord and retainers (household of warrior class). Accordingly, normal people in villages and cities did not have anything to do with Confucianism.

Financial difficulties of Warrior class and Tokugawa Shogunate (18th c.)

In the 18th c., the economy and culture of the merchant class flourished, and Japanese economy reached a the stage of money economy. Some dominant merchant houses accumulated capitals more and more while the warrior class, including powerful territorial lords and the Shogunate, became heavily dependent on financial support from rich merchant houses. Their expenditure in money increased so rapidly that they could not cover it with their only earning in rice from peasants. All warriors fell into debt deeply. The Shogunate had to announce "*Edict of debt relief*" several times in order to rescue official authorities and warriors, otherwise they would not be able to maintain the

feudal class order. On the other hand, the merchant class developed own civilian culture and life style with their wealth. Under the isolation policy, the market was limited to the narrow domain of Japan, and they did not have any opportunities to invest their capitals to oversea markets or even to a new industry. The culture of merchant class in *Edo*-Era was therefore very wasteful. “*Ethics of Capitalism*” could not be established in Japan.

Splitting of peasant class into landlords and tenant farmers (18th c.)

Also peasants had to be involved into money economy, and merchant houses stretched their economic influence to rural areas. They organized reclamation projects for new agricultural fields and gained profits. As result of this development, the peasant class began to split into rich families and poor farmers. Agricultural fields were not transferable, but powerful farmers obtained factual possession of fields from poor farmers by way of “*pledge*”. In this way, a new social structure of landlords and tenant farmers was gradually built in rural areas.

Revolt of peasants and political confusion (19th c.)

The majority of peasants was tenant farmers as the lowest stratum of the society. They suffered from the dual exploitation, namely exploitation by the territorial lords and exploitation by landlords. The warriors class who fell deeply into debt to merchants collected tributes more and more hardly from peasants, and these fell into more and more deeply into debt to landlords. They often had to offer their children as servants for merchant houses or “sold” their daughters to so-called “*Geisha* houses”. Sometimes, they escaped villages and became beggars or outlaws, or even rose in revolt against territorial lords. In the 19th c., the warrior class gradually lost its control over the country. They possessed neither necessary knowledges to understand the economic and social development, nor they were competent to manage it. Japan stood suddenly without any powerful leaders or rulers as Western powers neared the Far East.

Rise of a new consciousness among young warrior leaders (mid 19th c.)

In this period, some people learned about Western civilization and modern science, and were deeply convinced of its superiority. They claimed to modernize Japanese society, but other people asserted to strengthen the traditional isolation policy and to rebuild the ancient Imperial Rule instead of the rule of the warrior class. The latter opinion found intensive support especially under younger warriors. In several territories in Western Japan which were former enemies of *Tokugawa* family, such young leaders attained decision making positions in their territories. They tried to build a new alliance under the supreme command of the Emperor and prepared it for a war against Western countries. However, they threw away this naive political vision at once as they have really fought against fleets of Western countries. They recognized the military superiority of Western powers and decided to follow them. The new aim of the Imperial Alliance was set up on “Defeat of *Tokugawa* Shogunate” for the modernization of Japan – especially in a military way. After all, the new leaders were still warriors.

Dominant merchant houses like *Mitsui* and *Sumitomo* financially supported this Imperial Alliance. They were looking for freedom from feudal restrictions and new opportunities to expand their business. However, they did not possess any own political vision or concept. This combination of the military ambition and the desire for economic expansion decided the political and social development of the following century in Japan.

Part 2

Modernization and the Road to War

Chronology of the Modernization process in Japan (1)

- 1853 Admiral Perry's fleet of "Black ships" from U.S.A. appeared in the gulf of Edo. The admiral asked for the opening of Japanese ports and conclusion of a friendship and commercial treaty.
- 1855 "Convention of *Kanagawa*" (treaty of friendship) was concluded between United States and Shogunate, followed by "Anglo-Japanese Friendship Treaty" with England and "Treaty of *Shimoda*" with Russia. Shogunate abandoned its isolation policy since 1633. Several ports (*Yokohama*, *Hakodate*, Kobe and so on) were finally opened for foreign ships.
- 1858 Tokugawa Shogunate (徳川幕府) was forced to enter into the "Treaty of Amity and Commerce between United State of America and Japan". It was a so-called "unequal treaty". In following years, the Shogunate concluded similar treaties with other European countries (England, France, Netherlands, and Russia). The most important partner of trade was England. Japan exported raw silk and imported wool and cotton. The powerful feudal lords (大名) such as *Satsuma* (薩摩) and *Choshu* (長州), and more importantly, the Imperial Court (朝廷) did not agree with Shogunate's decision to open ports. They all asserted aggressively the total war against the Western countries.
- 1863-4 *Satsuma* and *Choshu* opened battles against the fleet of England and other Western countries. As its result, their capital cities were temporarily occupied by the Western troops. Some young warriors of *Satsuma* and *Choshu* realized immediately that Japanese army would have no chance against the Western powers. They took over the political leadership and quickly changed their policy. Now, their targets were not foreigners, but Shogunate in Edo. They together founded an alliance against Tokugawa Shogunate. They knew that Japan would not be able to release its society from the traditional feudal structure of politics and economy if it would stay under the leadership of the Shogunate.
- 1867 In order to keep internal peace, Tokugawa Shogunate handed back its sovereignty to the Imperial Court. The allied lords were however not satisfied with it. They demanded also the hand back of its whole territories from the Shogunate. The Shogunate refused it.
- 1868 The war broke out between the Shogunate and the allied lords (明治維新). After the surrender of the Shogunate, the imperial alliance declared the "*Restoration of the Ancient Imperial Rule*" (王政復古). The new government was built on the model of Ritsu-Ryo system (律令体制) from the 8. century. The government was referred to as "Dajokan" (太政官) and its departments or ministries as "Sho" (省).
- 1871 Meiji government abolished the feudal lordship (藩) and despoiled the political power from the whole feudal lords. The administration was nationwide centralized, and feudal territories were reorganized to prefectures (県). Transportation and distribution became absolutely free.
A new family registration system was introduced. At this time, the whole population was still classified into three groups, namely peers (華族), former warriors (士族) and commons (平民). However, marriage between different classes was allowed. Furthermore, debt servitude and human trafficking were absolutely prohibited. In this year, the Ministry of Education (文部省) was founded, and the compulsory education began.

“Nation State” – Final Goal of the Modernization

When the Imperial Alliance defeated the Tokugawa Shogunate, the leaders of the Alliance declared the “[Restoration of the Ancient Imperial Rule](#)” and intended to return to the “[Ritsu-Ryo System](#)” because this ancient Chinese concept (ideas of public law and state organization) was the only alternative to the feudalism. However, there were many requirements to meet which were never considered under such an old-fashioned concept from the 8. century. Indeed, the real goal which they pursued was to establish a “[Nation State](#)” in a modern sense.

A nation state in a modern sense means a “sovereign state governed by a single nation” and would have several characteristics:

1. Territorial unification (**State**): First of all, it must establish a territory which is countrywide unified and clearly defined by borders. Under the feudalism, a country was divided into many local territories which were governed by independent territorial lords, and a central government was merely a strongest one among many feudal lordships. Such a division of territory must be abolished, and any restrictions on movement and transportation must be removed nationwide.
2. Centralization of political authority (**Government**): At the same time, a sovereign political power must be established, and this central government should set up an effective administration system to govern the whole population of the country.
3. Social and ethnic integration (**Nation**): The central government must be accepted and supported as a genuine representative of the whole nation. In order to establish the unity of people as a nation, all social and ethnic divisions must be abolished, and the legal status of all the members must be equalized. Otherwise, they would not be ready to carry out official duties and obligations (taxation, military duties, compulsory education etc.).
4. Economic integration (**Market**): The core functions of the state are not military, but economic activities (production and commerce). The wealth of a nation could be measured in its economic productivity ([Adam Smith](#)), and one of its essential political goals is to encourage and promote growth of productivity of the state. Small local markets must be integrated and unified to a national market, and a unified commercial and financial system must be established.
5. Modern Legalism (establishing **Public Law** and integration of **Civil Law**): The whole process of establishing a nation state must be performed as “*State’s (legal) acts*”. These acts must be clearly distinguished from acts of private individuals, and they find their expression in a new concept of “*Public Law*” (constitutional, administrative, panel, procedural laws etc.). At the same time, the diversity of civil law (local customary law) in a feudal society must be removed, and a unified civil law system must be set up together with effective sanction and enforcement mechanism.

Two Aspects of “Public Law”, “Modernization” and “Democratization”

The concept of “*Public Law*” was established for the first time when the [Chinese Legalism](#) clearly distinguished between political acts of the emperor and moral consideration. In the European civilization, a similar concept was achieved after the Renaissance by [Niccolò Machiavelli](#) (1469 – 1527, “*Prince*”). This idea of “*State’s acts*” was further developed by [Thomas Hobbes](#) (1588 – 1679, “*Leviathan*”). His theory of “*State as Monster*” contributed to justify the “divine” right of absolute monarchy in the 17. – 18. century. Later in the 19. century, [Georg Wilhelm Friedrich Hegel](#) (1770 – 1831) shaped this concept into his “*Philosophy of Law*”. According to this theory, the State should enjoy an extraordinary position as highest level of morality and embodiment of “*Objective Spirit*”.

On the other hand, however, the European legal tradition had possessed another origin of “*Public Law*” concept in the “[Great Charter \(Magna Carta\)](#)” of 1215 which put legal restrictions upon the power of the monarchy. In the 17. century, this legal concept of “*State’s authority*” over the monarchy developed into the “[Bill of Rights](#)” and “[Claim of Right Act](#)” which were enacted by the English and Scottish Parliament in 1689. This concept was philosophically justified by [John Locke](#) (1632 – 1704) in his idea of “*Social Contract*” as “*state’s founding act by people*”. This theory provided the legal foundation for the “[United States Declaration of Independence](#)” in 1776 and the “[French Revolution](#)” in 1789. In this second aspect, the modern legal concept of “*Public Law*” would contain “*Democracy*” and “*Protection of Human Rights*” as its indispensable elements.

Political and Social Restructuring by the Meiji Government

For the new Meiji government, it was the most urgent task to abolish the territorial rule of more than 250 feudal lords and to unify the country. In 1869, all the feudal lords were deprived of their power to govern the population in their territories. They were once integrated into the administrative system of the central government as public servants. Further in 1871, the Meiji government declared to reorganize the feudal lordships as simple administrative districts. At once, all the internal borders disappeared, and the Samurai-warriors suddenly lost the basis of their existence as a ruling social class. The population were put under the direct rule of the central government, and their local communities also ceased to work as self-governed administration units. Such a drastic restructuring of the political system in a quite short time was possible because there were no personal bindings between Samurai-warriors and population. The functionality of the Samurai-warriors under the Tokugawa Shogunate were already quite similar to that of modern public officials.

Indeed, the Meiji government intended to abolish the Samurai-warrior class. Only their 10 % of the population would not be enough for protection of the country against the Western powers. All the members of the “*Japanese Nation*” should be involved in this task through a military conscription system, which was introduced in 1873. Accordingly, the former Samurai-warriors lost their status, privileges and jobs. They were integrated into “*Commons*” together with farmers, manufactures and merchants. The division of social classes was eventually abolished, and the “*Equality of All*” was the principle of a new society.

On the other hand, however, the Meiji government had no intention to allow common people to participate in politics. The government expected rather loyalty and obedience from them. For this reason, the government introduced following three measures in order to discipline and train common people just like former Samurai-warriors:

- (1) **Family** as *administrative unit* (based on Samurai family model) and also as modern *investor*
- (2) **Confucian education** in school and army (moral teaching of Samurai class)
- (3) Establishment of **a national religion** (National Shintoism)

(1) Family reform

A Samurai family was ruled by a powerful head of family as a commander, and other members, especially female members were subordinated to him. Only the eldest son could enjoy the right to succeed to the position of the head of family and the entire estate of the family (so-called “*patrimony*”). Other children had to remain under his control. The most important moral principle was *loyalty and obedience* to the head of family. The Meiji government intended to use this old family system as basis for the whole Japanese society. In other words, the government forced people to live in a life style quite similar to the former Samurai families. The head of family in each household should play a role as agent of the government and rule the whole family in accordance with governmental policies. In such a way, each family should work as a terminal unit of the administration. At the same time, the government expected from the head of family to play a role as investor for the modern industry. This was another reason for the succession by the eldest son alone.

(2) Confucian education

Traditionally, Confucianism was a moral teaching exclusively for the Samurai-warrior class, and common people had nothing to do with it. Now, the Meiji government decided to teach the Confucian moral of *loyalty and obedience* to the whole common people in school education and military training.

(3) National Shintoism

Shinto was a traditional mythology and a native religion in the community life. Each community possessed its own Shinto shrine, but there was no large-scale organization of shrines. The Meiji government missed a national religion like Christianity in Western countries. They planned to organize shrines and put them under the control of a state authority. In this way, a nationwide hierarchical system of shrines - “*State Shinto*” or “National Shintoism” - was artificially set up, and the Emperor was put on the top of the hierarchy. The government combined the new Shinto belief - “Emperor is a living God” - with the Confucian teaching together and used as a symbol of “*Japanese Nation*” and its *Nationalism*.

Chronology of the Modernization process in Japan (2)

- 1872 The prohibition against dealings in the land was abolished. But the land outside of city areas still had no price.
- 1873 Meiji government issued the certificate of land title (地券), and determined the land price. The people obtained the property right in its modern meaning on the land on which they had enjoyed the possession under the rule of the customary law during the feudalism. However, new owners of the land were not actual farmers (tenant farmers), but former “**landlords**”. In return, they had to accept the obligation to pay the property tax (3% of the land price - *not of annual income!*). Through this reform of the land property and the taxation system (地租改正), the feudal system of land tenancy (小作) was rather legitimated. The annual government revenue was secured by this reform.
- The National Bank (国立銀行) was established.
- The compulsory military service was introduced. Hereby, the former warriors lost their status and privileges completely. They were officially integrated into the normal class (“*commons*”).
- The Ministry of Interior (内務省) was founded for the public security (police service) and the encouragement of the modern industry (殖産興業).
- 1874 The great part of the population was deeply disappointed with the new policy of the government - joblessness under the former warriors, a heavy tax duty and other duties such as compulsory education and military service on the small farmers. They jointed together and began to protest against the government – “*Popular Movement for Freedom and Democracy*” (自由民権運動).
- 1881 After the escalation and nationwide spread of the movement, the government announced the Imperial Edict to set up a parliament in the year of 1890.
- 1884 The government began with the preparation for promulgation of the first constitution, and enacted the government ordinance of the new nobility (華族令). Such officially authorized new status was necessary for the assignment of the members of the House of Lords (貴族院) in a coming parliament.
- 1885 The ancient Ritsu-Ryo system was finally abolished, and “*Dajokan*” was replaced with “Cabinet”.
- 1889 Promulgation of “**the Constitution of the Empire of Japan**” (大日本帝国憲法).
- 1890 The first election for the House of Representatives (衆議院). The voting right was entitled only to male tax payers (“landlords”, qualified voters were only 1.1% of the entire population!).
- 1894 A new treaty of commerce was concluded between England and Japan. One of the unequal provisions (extraterritorial jurisdiction) was abolished.
- 1911 Japan reestablished the customs autonomy against the Western countries.

Modernization (industrialization) – A Heavy Burden charged to Farmers

Through the land reform in 1872-73, landlords (dominant farmers and merchants) obtained ownership of land, but the most part of the farmers had to stay in the lower status as tenant farmers ("peasants") and suffered from almost same exploitations by the new regime as by feudal lords in *Edo*-Period. Under the rule of feudal lords, tenant farmers had to offer 40 - 50% of their harvests to the feudal rulers and 20 - 30% to the landlords. Also under the Meiji regime, they had to pay 35% to the government and 35% to the landowners. The government covered whole costs for its modernization and industrialization policy with this tax revenue from the farmers.

The government founded many governmental enterprises in fields of textile, mining (coal, copper, silver, cement etc.), shipbuilding and arms industry, and constructed railways across the whole country. Such factories and other facilities were privatized for very low prices (1/5 - 1/2 of invested value) as soon as the management could be stabilized and the profitability was secured.

Popular Movement for Freedom and Democracy

Through the abolishment of the feudal territories and the centralization of administrative power, the most part of the population was equalized as "commons". Former warriors lost their privileges, business and earning. In 70s, such jobless former warriors and heavily exploited farmers joined together and began to protest against Meiji government. They were inspired by the Western democracy and claimed the government for election (universal suffrage) and parliament. Their resistance was spread nationwide and intensified. Some leaders of the movement published also private drafts for constitution based on French or English model. Some of them proposed "constitutional monarchy", other groups demanded even abolishment of imperialism and establishment of genuine democracy. The government threw in their new police troops and oppressed the freedom of speech and press, restricted the freedom of assembly. Even with such a hard oppression policy, however, the revolt of oppositional groups could not be suppressed. Finally in 1881, the Emperor proclaimed that Imperial Diet would be opened in the year 1890.

Establishment of Constitutional Monarchy

Despite of the Imperial Edict which promised election and parliament, the leaders of Meiji government did not have any intention to introduce democracy. They began to investigate constitutions in European countries and chose *Prussian* Constitutional Monarchy as model for Japan. The government invited a legal adviser from *Germany*, Mr. *Hermann Roesler*. Under his support, the government began with drafting work of constitution. In order to secure their ruling position and to block out political parties from the governmental decision making even after the coming opening of parliament, the government set up a "New Nobility" in Western style (*Prince, Marquis, Count, Viscount, Baron* etc.). These New Nobles were members of Imperial Family, former feudal lords and other supporters of Meiji government; they should be appointed to members of the coming "*House of Lords*" which should work as barrier and firewall against political parties in "*House of Representatives*". On the other hand, the leaders of Meiji government had also a fundamental distrust to the traditional nobles in Imperial Court.

Furthermore, the government decided to introduce a cabinet system, but just on this issue, a hard dispute arose among members of the government. In the government, there were two groups, namely Realists and Extremists. For the Realists (*Hirobumi Ito*), Prussian Prime Minister Bismarck was an ideal figure for the powerful leader in a constitutional monarchy. Prime Minister should always stay in a leading position, and other Ministers should support him. Also Emperor and Old Nobles in the Imperial Court should not intervene in the political decision making process. Emperor's attendance in the Cabinet meeting should be refrained. But for the Extremists (*Kowashi Ino-ue*), Emperor should be a genuine leader of the nation, and the Parliament could be a place where representatives of the nation would have opportunities to meet Emperor and feel a spiritual unity with him. Prime Minister and his

Cabinet should be mere moderators between Emperor and the nation. In the most important points, the vision of the Realists was adopted in the Constitution of Empire of Japan in 1889. However, this dispute could not be settled down completely. So, this Constitution did not have any provision on the Cabinet. Its duties and competence, especially the relation between Prime Minister and other Ministers could not be clearly defined. The Constitution had only one article about ministers;

Article 55. The respective Ministers of State shall give their advice to the Emperor, and be responsible for it.

According to this provision, Ministers should offer their service directly to the Emperor, the control by Prime Minister was not mentioned. Finally, the controlling competence of Prime Minister in the Cabinet could not be so powerful as the Realists had hoped. The most crucial point was the control power over the Imperial Army and Navy. Deployment of conventional forces and budget for it were matters of “*Imperial prerogative*” (Art. 11 and 12). In other words, these matters stand outside of the control by the Prime Minister and his Cabinet, they could be decided by the Imperial Army and Navy themselves in the name of the Emperor.

Fatal Error in Constitution

In the Constitution of 1889, the Emperor was the sovereign and the origin of the state's power. The supreme command over the Imperial Army and Navy was reserved to him. Moreover, the Emperor possessed the competence to issue prerogatives on a wide range of matters. For the Realists in the government, it should mean a solid position of the Prime Minister and his Cabinet in the politics.

In the first decade of the Constitutional Monarchy in Japan, the majority of the Diet (House of Representatives) was always “*oppositional (!)*”, it means, members of popular political parties. The Cabinet assigned by the Emperor tried to ignore the intensive criticism by the Diet. But such an autocratic attitude could not be carried out for a long time. The Cabinet was forced to seek a way to cooperate with political parties and the Diet. A conventional rule was gradually established in the Diet; a leader of the major party in the Diet should be assigned to Prime Minister, and he should appoint other Ministers. In this way, the principle of “Cabinet in Parliament”, or “*Spell of Party Cabinet*” could be put into practice in Japan even though the Constitution did not provide it.

But this “Party Cabinet” suffered from a fateful failure; Ministers of Imperial Army and Navy had to be nominated by the military headquarters, and they were always active officers in a high rank. Imperial Army and Navy enjoyed their outstanding position in the Constitution. They stood directly under the supreme command of the Emperor, and they were not obliged to obey the command of the Cabinet. As a result, these two Ministers had a veto in the Cabinet meeting. The Prime Minister and his Cabinet could not do anything when the military Ministers denied their agreement.

The Imperial Army and Navy really began to use this veto as the Cabinet wanted to reduce arms in accordance with the request by League of Nations. The Party Cabinet in Japan had to fall under the control by the Imperial Army and Navy. The supreme command and the outstanding competence of the Emperor in the Constitution, which should have been reserved for the Cabinet in the vision of the Realists, were in reality carried by the Imperial Army and Navy. In 1930s, the Cabinet itself was assigned according to the will of the military powers, and the military regime opened the front against China and began with the invasion in Asia.

« Additional Commentary to “the Constitution of the Empire of Japan” in 1889 »

Theoretical Background of the Constitution – “True Nature of the Japanese Nation”

It was true that the promulgation of the Constitution was a compromise to the “*Popular Movement for Freedom and Democracy*”. At the same time, however, the Meiji government attempted to abolish the ancient “Ritsu-Ryo System” and to replace it with a modern state system. This system had mainly two functions.

Firstly, this system should ensure the absolute supremacy of the government. For the leaders in the government, such an extraordinary position of the government seemed to be an absolute requisite for the execution of the drastic modernization policy which would put heavy burdens on the population. Secondly, this system should resist the philosophy of Western democracy and prevent democratization of the state organs. The decision making procedure should firmly be protected against influences of political parties.

For this purpose, a philosophical, legal theory of the “*True Nature of the Nation* (国体, *Kokutai*)” was developed as the theoretical foundation of the Constitution. The original idea of this theory was formed by a nationalist and Confucian *Seishisai AIZAWA* (会沢正志齋, 1782–1863) in Edo period. It was a combination of the Confucian theory and the Shinto mythology. This theory clearly distinguished the “*True Nature of the Nation*” or “*Spirit of the Nation*” on the one hand and “*polity* (political system)” or “state organs” on the other hand. According to this theory, “*Kokutai*” of the Japanese nation, namely “*everlasting divine rule of imperial family*” or “*imperial sovereignty*”, was never changed since its formation. It was merely “*polities*” which had been changed in the Japanese history, e.g. introduction of “Ritsu-Ryo System”, establishment of Shogunate, and Meiji Restoration and so on.

Based on this half-mythological theory, the Meiji government justified the establishment of its new regime (“Restoration of Imperial Rule”) and the promulgation of the Constitution of 1889 at the same time. The Meiji Government argued that the constitutional system of the state concerned merely a new “*polity*” and that the Constitution could be given only by the impersonation of “*Kokutai*”, namely by the Emperor, in accordance with it. In this way, the government completely rejected any participation of political parties or people's representatives in the drafting work of the Constitution. “*Kokutai*” should be absolutely superior to any polity, any constitution. Any constitution might not and could not affect “*Kokutai*” itself.

Declaration of “*Kokutai*” and the Supreme Command of the Emperor

The Constitution declared the “*Kokutai*” (Art. 1). Regarding the “*Imperial Sovereignty*”, the Constitution rejected the “Division of State Powers” (Art. 4). This article was modeled after German constitutions :

Article 1. The Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal.

Article 4. The Emperor is the head of the Empire, combining in Himself the rights of sovereignty, and exercises them, according to the provisions of the present Constitution.

The formulation: “... according to the provisions of the present Constitution” in Art. 4 did not mean any duty of the Emperor to follow the constitutional provisions, but it meant simply that the constitutional provisions concerned the “polity” only. The Emperor stood over the Constitution (Art. 3), and the “*Law on Imperial Household*” should be sacred from any control by state organs (Art. 2, 17, and 74).

Above all, this concept of “*Kokutai*” had its significant effect in the military competence of Emperor:

Article 11. The Emperor has the supreme command of the Army and Navy.

Article 12. The Emperor determines the organization and peace standing of the Army and Navy.

Article 13. The Emperor declares war, makes peace, and concludes treaties.

Any military decision of the Emperor could be sacred and completely free from any intervention of other state organs including the Cabinet and the Diet. Consequently, the Imperial Army and Navy could enjoy a kind of immunity from responsibility to the state organs.

“Polity (state organs)”

At the second level of state system, namely “polity”, the Constitution followed the modern principle of “Division of Powers”:

Article 5. The Emperor exercises the legislative power *with the consent of the Imperial Diet*.

Article 37. Every law requires *the consent of the Imperial Diet*.

Article 57. (1) The Judicature shall be exercised *by the Courts of Law according to law*, in the name of the Emperor.

(2) The organization of the Courts of Law shall be determined by law.

Article 58. (1) The judges shall be appointed from among those, who possess proper qualifications according to law.

(2) *No judge shall be deprived of his position*, unless by way of criminal sentence or disciplinary punishment.

(3) Rules for disciplinary punishment shall be determined by law.

According to Art. 5, the executive power of the state should be exercised directly by the Emperor. In the vision of the Realists in the government, however, it should mean that the Cabinet has the exclusive authority to exercise this power in the name of the Emperor. In any case, neither the Emperor nor the Cabinet has to take any political responsibility for his or its executive actions. Contrary to the democratic concept of the “Division of Powers”, each minister should carry his responsibility in relation to the Emperor, but not to the Diet or the people :

Article 3. The Emperor is sacred and inviolable.

Article 55. The respective Ministers of State shall give their advice to the Emperor, and be responsible for it.

Outstanding Competence of the Emperor (and the Cabinet)

Moreover, this Constitution provided several issues which should be put under the exclusive power of the Emperor (Art. 6 ~ 16). In the name of the Emperor, the government (or Cabinet) could break its limitation especially with “*Imperial ordinances*” :

Article 8. (1) The Emperor, in consequence of an urgent necessity to maintain public safety or to avert public calamities, issues, when the Imperial Diet is not sitting, Imperial ordinances in the place of law.

(2) Such Imperial Ordinances are to be laid before the Imperial Diet at its next session, and when the Diet does not approve the said Ordinances, the Government shall declare them to be invalid for the future.

Article 9. The Emperor issues or causes to be issued, the Ordinances necessary for the carrying out of the laws, or for the maintenance of the public peace and order, and for the promotion of the welfare of the subjects. But no Ordinance shall in any way alter any of the existing laws.

Consequently, this extraordinary power of the Emperor imposed profound restrictions on the legislative power of the Diet, regardless of the question who or which organ would really exercise this power.

Above all, the Diet had no competence to control over the “*Imperial issues*”. The most important one of them was appointment of Prime Minister and other State Ministers (Cabinet). Another one was “Supreme Command over the Army and Navy” (Art. 11) and “peace standing of the Army and Navy”, namely its scale and formation, equipments and budget for them. These issues were almost “sacred matters” laying beyond the competence of the Diet :

Article 6. The Emperor gives sanction to laws, and orders them to be promulgated and executed.

Article 12. The Emperor determines the organization and peace standing of the Army and Navy.

Limitation on the Other Competence of the Diet

In the modern concept of “Constitutional Democracy”, the control power over financial issues of the state is the essential competence of the Diet. Regarding taxation, expenditures and revenue of the state, the Constitution of 1889 acknowledged this principle, too (Art. 62, 64, 65). However, the Diet had to suffer significant restrictions upon its competence also in the field of finance (Art. 63, 67, 71) :

Article 62. (1) The imposition of a new tax or the modification of the rates (of an existing one) shall be determined by law.
 (2) However, all such administrative fees or other revenue having the nature of compensation shall not fall within the category of the above clause.
 (3) The raising of national loans and the contracting of other liabilities to the charge of the National Treasury, except those that are provided in the Budget, shall require the consent of the Imperial Diet.

Article 63. The taxes levied at present shall, in so far as they are not remodelled by a new law, be collected according to the old system.

Article 64. (1) The expenditure and revenue of the State require the consent of the Imperial Diet by means of an annual Budget.
 (2) Any and all expenditures overpassing the appropriations set forth in the Titles and Paragraphs of the Budget, or that are not provided for in the Budget, shall subsequently require the approbation of the Imperial Diet.

Article 65. The Budget shall be first laid before the House of Representatives.

Article 67. Those already fixed expenditures based by the Constitution upon the powers appertaining to the Emperor, and such expenditures as may have arisen by the effect of law, or that appertain to the legal obligations of the Government, shall be neither rejected nor reduced by the Imperial Diet, without the concurrence of the Government.

Article 71. When the Imperial Diet has not voted on the Budget, or when the Budget has not been brought into actual existence, the Government shall carry out the Budget of the preceding year.

Restrictions upon Judiciary and Jurisdiction

The independence of the Judiciary (Regular Court, Court of Justice) could be protected relatively well.

However, the European concept of judicial competence justified several restrictions on the competence of the regular court.

Firstly, the scope of the jurisdiction of regular court was closely limited to criminal and civil cases. Administrative litigation was deemed to lay beyond the jurisdiction of regular court :

Article 61. No suit at law, which relates to rights alleged to have been infringed by the illegal measures of the administrative authorities, and which shall come within the competency of the Court of Administrative Litigation specially established by law, shall be taken cognizance of by Court of Law.

The law on the administrative litigation, however, rejected the possibility of lawsuit except in cases listed in the law. Consequently, the judicial protection against “infringements by the illegal measures of the administrative authorities” had to be quite insufficient.

The second restriction of the jurisdiction regards “*Judicial Review*”, namely control over the question “Constitutionality or Unconstitutionality” of legislation and activities of administrative authorities. The traditional European concept of “Division of Powers” denied this special competence of the Judiciary. Under the Constitution of 1889, the competence to decide this question was acknowledged only to the “*Privy Council*”, and only the government was allowed to submit this question to the “*Privy Council*”.

Tremendous Restrictions upon Human Rights

The Constitution of 1889 provided the protection of basic Human Rights in the Chapter II “Rights and Duties of Subjects”. However, the judicial protection of these rights was put under the significant restriction by “*Legislative Reservation*” or “*Reservation by Law*”. It was always possible for the government to suspend the constitutional protection of these rights and also to infringe them by way of legislation or “*Imperial ordinance*”. The Judiciary could do nothing against such a “legal infringement” of Human Rights due to lack of the competence of “*Judicial Review*” :

Article 23. No Japanese subject shall be arrested, detained, tried or punished, unless according to law.

Article 25. Except in the cases provided for in the law, the house of no Japanese subject shall be entered or searched without his consent.

Article 26. Except in the cases mentioned in the law, the secrecy of the letters of every Japanese subject shall remain inviolate.

Article 28. Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief.

Article 29. Japanese subjects shall, within the limits of law, enjoy the liberty of speech, writing, publication, public meetings and associations.

After the fall of “Party Cabinet” in 1930s, the legal effect of these articles was completely spoiled by the government. The freedom of speech, press, religious belief, public meetings and associations including labor unions and political parties were treated as indication of crime against Emperor and “Spirit of the Nation” :

Article 31. The provisions contained in the present Chapter shall not affect the exercises of the powers appertaining to the Emperor, in times of war or in cases of a national emergency.

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. “Causality Principle” in Japanese Law

In the Japanese civil law, the creation, transfer (assignment), or alteration of a real right can be effected immediately 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 formed. 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. ***Digesta* 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 *Digesta (Pandectae)* was completely forgotten soon.

B. Establishment of a New Roman Law Science:

1. In 11. c., a handwriting of *Digesta (Pandectae)* was found in Italy, and a new Roman Law Study based on *Digesta* was established (University in Bologna; the first university in Europe). 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 statutory laws 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 (*ius commune*, *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 legislation 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 enact 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 a 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 *Digesta (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 five 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.

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 (“*habitatio*”)
- 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 Movable
- 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 “*rights 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) “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) 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 <i>underground</i> or <i>space</i> over the ground (Art. 269-2). 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 superficies 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) 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) 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	<p>Statutory Liens (Preferential Rights) (Art. 303 – 341)</p> <p>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.</p>
IX	<p>Pledge (Art. 342 ~ 367)</p> <p>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 its 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).</p>
X	<p>Hypothec (Art. 369 ~ 398)</p> <p>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.</p>
	<p>Maximal Amount Hypothec (Art. 398-1 ~ 398-22)</p> <p>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.</p>

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 planned 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"). "Emphyteusis" 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, planned 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 fictitious 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 *Superficies* 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 Movable

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 officially acknowledged in the “***Law on Contracts of Security by Provisional Registration***” in 1978.

Law of Obligations – Its Various Concepts

Prologue - Primary Effect of Obligations and Remedies for Non-performance

In the 18. century, the establishment of the modern civil law in European countries was one of the political achievements of the democracy movement and civilian revolutions.

In the course towards a “Nation State”, all the feudalistic restrictions were abolished, and the whole spheres of private life of citizens were freed from political interventions. These fields are just the target of the law of obligations in the modern sense. This law determines the basic rules of economic activities in our civil society. In this sense, “*Civil Autonomy*” and “*Freedom of Contract*” are the fundamental principles for the law of obligations.

However, the declaration of such fundamental principles is only the beginning for the law of obligations in modern sense. Its main task would be to set up effective methods to solve conflicts or disorders among citizens. In this sense, “*Remedies for Non-performance*” would be the central subject in the law of obligations; in other words, it should be clearly determined what the creditor may demand from the debtor if the latter does not perform his obligations properly. There have been different answers to this question in the history.

A. Common law solution – Damages

Firstly, the Common law maintains the most traditional solution for civil conflicts; namely payment of compensation for damages (normally simply called “*Damages*”). Principally, the Common law court will not acknowledge any law suit for “*Specific performance*”. A demand of specific performance could be accepted only in exceptional cases as one of the several “*Equitable remedies*”. Besides specific performance, “*Rescission*” and “*Injunction*” are counted as equitable remedies.

Since the medieval age, the conflicts among “Commons” were not just important matters for the public authority. The Court adjudicated cases, but did not offer any system of enforcement (there was only “*Debtors’ Prison*”). For this reason, payment of damages was only remedy for non-performance in normal civil cases.

On the other hand, the creditor may sue the debtor for damages soon after the time of performance has already arrived. It means, the debtor “defaults” immediately with the arrival of the time for performance, and he is liable for damages. The creditor therefore has no duty to request the performance from the debtor in advance, nor has he to prove any “*fault* (responsibility)” on the side of the debtor for non-performance. It means, the debtor has no excuse for his non-performance and no opportunity for defense.

This Common law solution, however, results in a paradoxical situation that the creditor has no choice but the debtor may choose between performance of his obligations or payment of damages. Above all, this question – whether an obligation should be properly performed or rather damages may be paid instead – is not considered as a moral question, but a pure business matter.

B. French solution – Specific performance or Damages

For the European countries under the strong influence of the Roman law tradition, any obligation, especially an agreement between the parties must be properly performed – “*Pacta sunt servanda*”. In order to protect the effectiveness and reliability of contracts, obligations must be performed as properly as possible. Therefore, the creditor should not demand compensation for damages at first, and the debtor may not offer damages in stead of performance. When the time for performance has arrived and the obligation is due, the creditor must demand “Specific performance” at first.

On the other side, however, enforcement of obligations could infringe the basic freedom and dignity of individuals. For this reason, the French Civil Code clearly distinguishes two kinds of obligations; namely “*Obligations to give something*” and “*Obligations to do or not to do something*”. In the first cases, the enforcement of specific performance would seldom cause infringement of the human rights of the debtor. Therefore, it is a primary step for the creditor to demand for specific performance.

Upon the demand from the creditor, however, the debtor maybe fails to perform his obligations – it means, he will not or can not fulfill his duties. In such a case, the creditor may sue the debtor for specific performance and even its enforcement.

Alternatively, the creditor may also ***demand for damages in lieu of performance*** if the obligation can not be performed or may not be enforced, or if he prefers payment of damages to specific performance, provided that *the debtor is responsible for his non-performance*. Principally, the debtor is ***assumed to be responsible*** for his non-performance if he has not performed his obligations on the demand from the creditor. However, the French law still give the debtor an ***opportunity of defense***; he can prove that he is not responsible for the non-performance. In other words, the debtor bears ***the burden of proof***.

In this manner, *the creditor has a choice*; namely, he may primarily sue the debtor for specific performance if the debtor fails to perform his obligations, he may alternatively demand also for compensation of damages in lieu of performance if the debtor is responsible for his non-performance.

In the second cases (obligations to do or not to do something), however, enforcement of the obligation means to force the debtor to perform or forbear a particular action against his own intention, and it would infringe his freedom and dignity. For this reason, the creditor principally may demand only for compensation of damages if *the debtor is responsible for his non-performance*. However, it is still allowed for the creditor to demand for *specific performance by an agent* at the debtor's expense so long as the obligation does not need to be performed in the debtor's own person. As a result, *the creditor could still have a choice* in certain cases; the creditor may demand primarily for compensation of damages, he may alternatively demand for specific performance by an agent so long as it would not spoil the purpose of the obligation.

In any case, the debtor may not have any choice, he does not have a right to offer payment of damages instead of specific performance. In this sense, the right to demand for specific performance must be always reserved for the creditor as primary effect of obligations.

Moreover, the French Civil Code understands payment of damages for non-performance as "***accusation***" or "***punishment***" against breach of duties, and the intensity of punishment may vary with the severity of the breach. For this reason, the scope of damages could be different according to the modes of fault, namely intentional breach or simple negligence.

C. German solution – Natural Fulfillment only, then Damages in case of Impossibility

The German civil law shares the basic stance of the French civil law – "Pacta sunt servanda". However, the German law *denies the creditor's choice between specific performance or damages*; he may demand ***only specific performance*** from the debtor so long as it is possible for the debtor and meaningful for the creditor to perform the obligation properly. It is called the principle of "***Natural Fulfillment***". Under this principle, the effectiveness and reliability of contracts could be maximized.

Moreover, the German civil law *rejects the distinction between "obligations to give" and "obligations to do or not to do"* in the French Civil Code, and requires application of the principle of "***Natural Fulfillment***" to any kind of obligations. As a result, the creditor may demand compensation for damages in lieu of performance mainly only in two cases; namely if specific performance may not be enforced, or if it might be enforced but has subsequently become impossible ("***subsequent impossibility***"), provided that the debtor is responsible for his non-performance or for the impossibility of performance.

In the German solution, the concept of "***impossibility***" is almost synonymous with the concept of "***non-performance***" in general. Other modes of non-performance, for example "imperfect performance" are treated as "***partial impossibility***".

As mentioned above, the German civil law also requires the debtor's fault (responsibility) as a condition for his liability. However, payment of damages is not "accusation" or "punishment", but it aims to restore the initially intended state. In this sense, the scope of damages does not vary with different modes of fault; it should be quite objectively determined regardless of how severe the subjective aspect of the debtor's fault might be.

These three solutions are summarized as follows. Which concept is to select would be a pure political matter:

Three Concepts of Remedies for Non-performance

	Condition for Default	Remedies for Non-performance	Fault (Responsibility)	Choice	Damages
C/L	Arrival of time	Damages only	–	Debtor	Business option
Fr.	Arrival of time & Demand	Specific perform or Damages	Required	Creditor	Punishment against non-performance
Gr.	Arrival of time & Demand	Specific perform only then Damages	Required	Nobody	Recovery from damages

D. “Liability for Damages”: Its Subjective and Objective Aspects

Generally speaking, the issue of “**Liability for non-performance**” has different two aspects, namely **subjective and objective aspects**. On the objective aspect, the debtor is “**liable**” for damages **because he caused them**. In other words, he has a duty to recover damages insofar as a “**Causation**” may be proved between his conduct (non-performance) and them. The question of the causation is not any matter of moral, but simply a matter of facts. Accordingly, the liability in this sense has no implication for moral accusation. The Common law considers the liability exclusively in this meaning. Consequently, for the Common law, the question of “**Scope of damages**”; namely the question “**How much should the debtor pay to the creditor for the compensation of damages?**”, is purely the matter of objective causation. Accordingly, the compensation of damages has no implication as a moral penalty or sanction against non-performance, but simply an alternative performance of the obligation.

Above all, the “**Causation**” would be the primary and substantial ground for the liability. For this reason, the French law takes it into consideration, too. For the assessment of the liability, however, the French law goes one more step further and looks into the reason for the causation; namely a question “**Why did the debtor cause these damages?**” Asking this question, the French law pays a special attention to the subjective aspect of liability. On the subjective aspect, the debtor is “**liable**” for damages **because he has willingly or negligently caused damages** or **because he has failed to prevent them**. His misconduct or failure would be the reason for the causation of damages. Accordingly, the French law requires the debtor’s responsibility (“**Fault**”; intention or negligence) to establish his liability for damages. On the other side, the debtor is completely free from any liability so long as his conduct is neither faithless nor careless; for example, in case of impossibility due to “**force majeure**”. In such a case, the debtor may enjoy the opportunity to defend himself against the claim for compensation from the creditor.

Contrary to the Common law, the French law assesses the “**Scope of damages**” primarily in accordance with this subjective criterion. The amount of the compensation varies depending upon the intensity and severeness of the debtor’s fault (intentional non-performance or negligence). Accordingly, the compensation of damages means a moral accusation and sanction against the debtor’s faithless or careless conduct (non-performance or breach of duties).

Regarding the primary meaning of the liability, the German law stays on the side of the French law. Considering the “**Causation**” quite objectively, the German law pays a special attention also to the subjective aspect of the liability and requires “**Fault**” to establish the debtor’s liability for damages. With regard to the question of “**Scope of damages**”, however, the German law rejects the French approach and shares the pure objective approach with the Common law. The purpose of the compensation of damages is not any sanction against the debtor’s non-performance, but just “**Recovery from damages**”, and its range and scope would not vary according to modes of the debtor’s fault.

Historical Development of the System of Law of Obligations

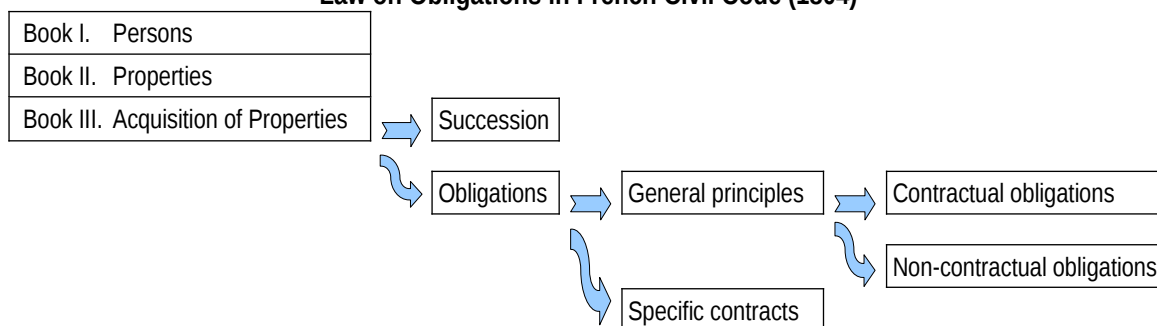
The first comprehensive civil code, the *French Civil Code* of 1804, was a symbol of the French Revolution in 1789. In accordance with the modern ideal of “*Natural Law*” (“Social Contract” as a state founding act of the sovereign people), this code declared “*Agreement*” as a most important principle of a civil society.

A. Structure of Law of Obligations in French Civil Code

This code was compiled based on the “*Institutiones*” of the “*Corpus Iuris Civilis*” and has three books; namely “*Law on Persons*”, “*Law on Properties*” and “*Various Modes of Acquisition of Properties*”. The top part of the first book “Law on Persons” contains several provisions on the French nationality as source of civil rights. This shows that the legal concept of “*civil law*” had been still not clearly separated from the concept of “*public law*”.

The law of obligations is located in the last book together with the law of succession. It has roughly two parts; namely [I] *General principles of obligations* and [II] *Specific types of contracts*, and the first part is further separated into two sections; [1] *obligations arising from contracts* and [2] *obligations arising without contract* (management without mandate, unjust enrichment and unlawful acts).

Law on Obligations in French Civil Code (1804)



A-1. Contents of “Obligations arising from contracts”

The distinction between contractual and non-contractual obligations is based on the different types of *causes of obligations*, and all the general principles of obligations are contained in the part of contractual obligations. Indeed, this part is the core of the whole law of obligations and treats following subjects:

1. **Essential conditions for a valid agreement;**
the French Civil Code still had not known the concept of “Judicial Acts”, which was developed in the German civil law theory in the 19. century. In this sense, the principles of “*Agreement*” declare the essential conditions for legal acts in civil law. Also, the provisions on “*Capacity*” are included in this part.
2. **Effects of obligations;**
the French Civil Code distinguishes two kinds of obligations; namely “*Obligations to give*” and “*Obligations to do or not to do*”. This part defines rights and duties of the parties (creditor and debtor). First of all, provisions on the “*Remedies for non-performance*” are of the highest importance. They determine what the creditor may demand from the debtor in the court if the latter does not perform his obligations; namely “*Specific performance*” or “*Damages*”.
3. **Particular kinds of obligations;**
certain special provisions are provided for obligations with conditions, obligations with more than one creditor or debtor, divisible or indivisible obligations and so on.
4. **Extinction of obligations;**
as to causes for extinction of obligations, the French Civil Code counts not only “*Payment*” or “*Performance*”, “*Novation*”, “*Release*”, “*Set-off*” and “*Confusion*”, but it lists also “*Loss of*

the object”, “Nullity or rescission of agreement”.

5. **Proof of obligations:**

At the end of the part for contractual obligations, certain procedural provisions are located. They covers following subjects; namely, *proof with documents or testaments, presumptions, acknowledgment, oath* so on.

A-2. Several Types of Obligations arising without Contract

The French Civil Code distinguishes these obligations roughly into two groups; namely “*Quasi-contracts*” and “*Crimes and Quasi-crimes*”:

1. **Quasi-contracts** :

- a) Firstly, there are cases where the debtor voluntarily perform legal businesses of others without any formal mandate of the beneficiary (“*management without mandate*”).
- b) Secondly, there are cases where the debtor has received the performance of others without any legal titles. He is obliged to return the interest to the other party and to restore the original state (“*unjust enrichment*”).

2. **Crimes and Quasi-crimes** :

- a) The second large group of the obligations arise from infringement of rights and interests of others (“*delict*” or “*tort*”). The ground of this liability is the duty of care for others, and this liability requires violator’s fault. Contrary to cases of the contractual liability, the victim bears the burden of proof for all the requisites; namely breach of duty, fault (responsibility or culpability), damages and causality between breach of duty and damages.
- b) In certain exceptional cases, the liability for damages could be acknowledged even if the offender (debtor) does not commit any fault. Such a strict liability is often called “quasi-crime”.

A-3. Specific Types of Contracts

1. **Marriage as contract** :

After the general provisions about contractual and non-contractual obligations, the French Civil Code provides special rules for different kinds of contracts. First of all, a “Marriage” is treated here as one of bilateral contracts, which shows the political role of this code.

2. **Other standard contracts** :

Sales, Exchange (barter), Hiring, Partnership in civil law, Loans, Deposit, Play and Gaming, Mandate

3. **Security contracts** :

Personal security, Pledge, Mortgages (hypothecs),

4. **Procedural provisions** :

Compounding (settlement), personal arrest, privileges (statutory lien) , Prescriptions

B. General Civil Code for Austrian Monarchy (1811)

During the Napoleonic Wars (1803 – 1813), nationalistic movements arose also in the German states, and there was a strong desire for codification of unified civil code for all the German states as a countermeasure against the French imperialism. In 1811, the Austrian Kingdom has enacted its own civil code as the first one among the German states. It was the “*General Civil Code for the whole hereditary lands of the Austrian Monarchy*” of 1811.

This civil code has three parts; namely “Law on Persons”, “Law on Real Rights” and “Determination of Rights on Persons and Real Rights”. Principally, this code followed the model of “Institutions” just like the French Civil Code.

Regarding the remedies for non-performance, its §919 provided as follows:

§ 919 If one party does not fulfill the contract at all, or fulfills it but not in a proper time, or not at a proper place, or not in a stipulated manner, then the other party may demand a proper fulfillment of the contract and compensation [for damages] but may not demand cancellation [of the contract] except cases determined by law".

This provisions seems to allow the creditor to choose between a proper fulfillment or damages. If so, it is a solution still based on the French concept.

C. General State Laws for the Prussian States (1794)

Soon after the outbreak of the French Revolution, the German approach put its initial phase in the “**General State Laws for the Prussian States**” (1794), which was not a civil code in the modern sense but a systematic legitimization of the absolutism based on the feudalistic class structure. Its first part covered almost the same subjects as the French Civil Code while the second part regulated statuses and class structure of the feudalistic society.

The fifth Title of the first part provided the basic principles of the obligations and contained following provisions:

<p>Title V. Contracts II. Subject Matters in Contracts</p> <p>about Impossible Acts</p> <p>§ 51 Contracts which obligate someone to absolutely <u>impossible acts or performances</u> are <u>null and void</u>.</p> <p>Title VII. Fulfillment of Contracts</p> <p>§ 270 Principally, contracts <u>must be fulfilled</u> in accordance with their whole contents.</p> <p>§ 271 The party who demands the fulfillment of the contract must prove that he has already exercised his own duties defined in the contract, or that he is obligated to exercise his duty after the other party has performed the obligation.</p> <p>Fault</p> <p>§ 277 Someone who commits <u>severe fault in fulfillment</u> of a contract is in all cases obligated to <u>compensation for damages</u>.</p> <p>Interests</p> <p>§ 285 Someone who <u>intentionally or faultily violates his duty</u> in conclusion or fulfillment of a contract must compensate the other party for whole of the interest of the other party.</p>

§51 declares the principle of the Roman law; namely “Impossibilium nulla obligatio est”, which will play a very important role in the German concept of obligations.

The law entitles the creditor to demand the fulfillment of the obligation from the debtor so long as it is possible (§ 270). It means, the primary effect of obligations consists in the entitlement to demand fulfillment of obligation (performance).

The creditor is entitled to claim for damages when the debtor intentionally or faultily fail to fulfill his obligations (§§ 277, 285). In other words, damages as a remedy for non-performance is the second effect of obligations.

In this way, the main subjects of the German concept of obligations were already determined in this feudalistic code:

- 1) Possibility and impossibility of fulfillment
- 2) Claim for fulfillment (specific performance)
- 3) Failure in fulfillment (non-performance)
- 4) Fault of the debtor (responsibility)

5) Claim for damages (liability)

D. Historical School of Law and the Theory of Impossibility

Traditionally, the German civil law put a special weight on the issue “Possibility of performance” because it could work as a decisive criterion for validity or nullity of obligations. In the 19. Century, the “**Historical School of Law**” developed the general theory of “**Impossibility of Performance**” based on the Roman law principle of “*Impossibilium nulla obligatio est*”; especially *Friedrich Carl von Savigny* (1779 – 1864) and *Friedrich Mommsen* (1818 – 1892). They made a distinction between different types of impossibility and determined their influence on the effects of obligations – “*What may the creditor demand from the debtor?*”; namely *natural or juristic, absolute or relative, objective or subjective, permanent or provisional, whole or partial* impossibility. Above all, the essential distinction was made between *initial or subsequent* impossibility.

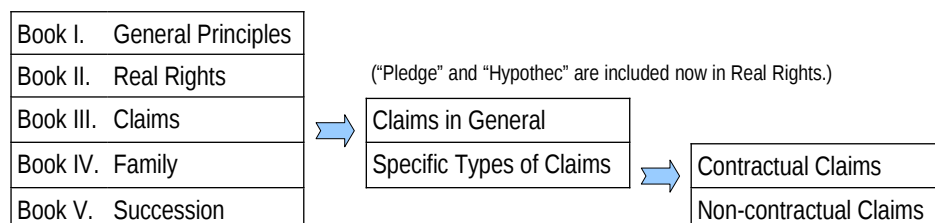
They applied the same criterion “*Impossibility = Nullity*” also to *subsequent impossibility* which occurs to a valid and effective contract. It means; *if its fulfillment becomes subsequently impossible, then the debtor should be relieved from his duty of fulfillment. However, the debtor may not be discharged from his obligations if the impossibility is his fault. In this case, the creditor’s claim for specific performance is transformed into the claim for damages in lieu of performance.*

However, the theory of “**Impossibility of performance**” can not cover all the possible damages arising from non-performance; especially, “**Delay in performance**” or “**Default**” may cause damages to the creditor even though fulfillment of the obligation is still not completely impossible (so-called “delayed damages”). Therefore, “**Default**” is, clearly separated from “**Impossibility of performance**”, treated as the secondary cause of liability.

E. Civil Code for the Kingdom of Saxony (1863)

Shortly before the foundation of the German Empire in 1871, the Kingdom of Saxony enacted its original civil code called the “**Civil Code for the Kingdom of Saxony**” (1863). It was the achievement of the German civil law theory in the 19th century led by the “**Historical School of Law**”.

This code was compiled according to the new concept called “**Pandects system**” as follows:

**E-1. Contents of “Claims in General”**

Besides the definition and other basic provisions of claims, this part treats following subjects; “**Fulfillment** (Effect)”, “**Formation**”, “**Assignment** (Transfer)” and “**Extinction**” of claims. Such procedural provisions as “*Proof of obligations*” in the French Civil Code are not included any more.

The section of “**Formation**” distinguishes two main grounds of claims; namely “**Judicial acts**” and “**Unlawful acts**”, and it contains also general provisions on “**Contracts**”.

E-2. Contents of “Specific Types of Claims”

- a) Firstly, this part lists 30 different types of standard contracts. On the other hand, “**Marriage**” is not included in this list, and real security contracts (“**Pledge**” and “**Hypothec**”) are moved to Book II. Real Rights.
- b) Secondly, “**Unlawful acts**” and “**Undue enrichment**” are treated as grounds for non-contractual claims.

E-3. Primary Effects of Claims and Remedies for Non-performance

The Saxony Civil Code (1863) declares the traditional principle of “**Natural Fulfillment**” more clearly

than the “General State Laws for the Prussian States” (1794) as follows:

Title 1. about Claims in General	
Chapter 1. Essence of Claims, Persons at Claims and Subject Matter of Claims	
§ 662	Claims are legal relations which <i>entitles a person, namely creditor, to a performance</i> with property value, acts or forbearance of acts by another person, namely debtor. [...]
Title 2. Fulfillment of Claims	
Chapter V. Influence of Fault	
§ 721	If the fulfillment of a claim becomes <i>wholly or partially impossible</i> owing to the debtor's fault, nevertheless, his obligations persists, and the creditor may claim for compensation instead. [...]
Chapter VI. Default of the Debtor	
§ 733	After the claim has become due, the debtor is <i>in default</i> if he does not fulfill his obligations in spite of <i>warning made by the creditor</i> . [...]
§ 745	From the time of default, the debtor is liable for all the kinds of fault even in cases where the responsibility of the debtor is reduced. He is liable also for accidentally caused impossibility of the fulfillment, and liable for destruction or deterioration of the subject matter unless the accident would have affected the subject matter also in case of fulfillment at the right time. [...]
Chapter VIII. Lawsuit for Fulfillment	
§ 761	<i>A lawsuit for fulfillment of a claim</i> pursues <i>the original contents of the claim</i> as its subject matter even in cases of personal acts. A lawsuit for damages may be brought into the Court only under the conditions which the law particularly prescribes.

In these provisions, we can easily recognize the quite clear scheme of the German theory of “**Impossibility of performance**”:

- a) The primary effect of claims (obligations) consists in the entitlement of the creditor to the demand of fulfillment even in the lawsuit (§§ 662, 761).
- b) However, the creditor is entitled to demand compensation for damages if the fulfillment becomes impossible due to the debtor's fault (§ 721).
- c) When the debtor is in default (§ 733), then he is liable for all kinds of damages (§ 745).

F. Civil Code of Germany (1898)

Principally, the “**Civil Code of Germany**” (1898) followed the basic idea of the “**Civil Code for the Kingdom of Saxony**” (1863). However, the order of Book II and III was turned over in accordance with the “**Abstraction Principle**”; the second book is now “**Obligations**”, and the third book is “**Real Rights**”.

The German concept and scheme of “**Impossibility of performance**” was further developed and sophisticated in the Civil Code of Germany (1898) as follows:

F-1. Principle of Natural Fulfillment

- | | |
|-------|--|
| § 241 | By virtue of an obligation the creditor is <i>entitled to claim performance</i> from the debtor. The performance may consist in a forbearance. |
| § 242 | The debtor is <i>bound to effect the performance</i> according to the requirements of good faith, ordinary usage being taken into consideration. |

F-2. Scope of damages

- | | |
|-------|---|
| § 249 | A person who is bound to make compensation shall bring about the condition which would exist if the circumstance making him liable to compensate had not occurred. If compensation required to be made for injury to a person or damage to a thing, the creditor may demand, instead of restitution in kind, the sum of money necessary to effect such restitution. |
|-------|---|

F-3. Time for Performance

§ 271 (1) If a time for performance is neither fixed nor to be inferred from the circumstances the creditor may demand the performance forthwith, and the debtor may perform his part forthwith [...]

F-4. Impossibility of Performance and Responsibility (fault)

§ 275 (1) The debtor is relieved from his obligations to perform if the performance becomes *impossible in consequence of a circumstance for which he is not responsible* occurring after the creation of the obligation [...]

§ 276 (1) A debtor is responsible, unless it is otherwise provided, for *intention and negligence*. A person acts negligently when he does not exercise ordinary care [...]

§ 280 (1) Where the performance becomes *impossible in consequence of a circumstance for which the debtor is responsible*, the debtor shall compensate the creditor for any damage arising from the non-performance [...]

§ 282 If it is disputed whether the impossibility of performance is the result of a circumstance for which the debtor is responsible, the burden of proof is upon the debtor.

F-5. Default of the Debtor

§ 284 (1) If the debtor does not perform after warning given by the creditor after maturity, he is *in default through the warning* [...]

§ 285 The debtor is not in default so long as the performance is not effected in consequence of a circumstance for which he is not responsible.

§ 286 (1) The debtor shall compensate the creditor for *any damage arising from his default*.

(2) If the creditor has no interest in the performance in consequence of the default, he may, by refusing the performance, *demand compensation for non-performance* [...]

§ 287 A debtor is responsible for all negligence during his default. He is also responsible for impossibility of performance arising accidentally during the default, unless the injury would have arisen even if he had performed in due time.

F-6. Prerequisite for Valid Contracts

§ 306 A contract for *an impossible performance* is null and void.

F-7. Impossibility of Performance in case of Reciprocal Contracts

§ 323 (1) If the performance imposed on one party under a reciprocal contract becomes *impossible in consequence of a circumstance for which neither he nor the other party is responsible*, he loses the claim for counter-performance [...]

§ 324 (1) If the performance imposed on one party under a reciprocal contract becomes *impossible in consequence of a circumstance for which the other party is responsible*, he retains his claim for counter-performance [...]

§ 325 (1) If the performance imposed on one party under a reciprocal contract becomes *impossible in consequence of a circumstance for which he is responsible*, the other party may *demand compensation for non-performance, or rescind the contract* [...]

F-8. Effect of Contracts – Default in case of Reciprocal Contracts

§ 326 (1) If one party is in default in respect of the performance imposed on him under a reciprocal contract, the other party may allot him *a fixed reasonable period* for performing his duty with a declaration that *he will reject the performance after the expiration of the period*. After the expiration of the period, he is entitled to *demand compensation for non-performance, or rescind the contract*, if the performance has not been effected in due time; the claim for performance is barred [...]

G. Inflexibility of the German Scheme

This specially German theory of Non-performance was well-considered and quite consistent. It offered a sharp counterpart to the Common law principle.

On the other hand, however, this tightly constructed logical scheme was too rigid and inflexible, and its view was quite narrowed. As a result, several aspects of the problems had dropped out from the perspective of the theory.

G-1. Three Dichotomies

The reason for this hindrance could be seen in the tight logical connection of the three dichotomies; namely “**possible or impossible**” – “**valid or void**” – “**fulfillment or damages**”.

- a) If the performance is **possible**, then the obligation is **valid**, and the creditor may claim only for its **fulfillment** so long as it is possible.
- b) If the performance becomes **impossible**, then the obligation is **void**, and the creditor may claim for **damages** if it is the debtor’s fault.

G-2. “Gap in the law” and the Development in the 20th Century

Soon after the Code was put into effect, a hard controversy arose among German legal scholars. Some of them complained about “**Gaps in the law**” and insisted on the necessity to fill these gaps with new theories and doctrines. This circumstance seriously damaged the international applicability of the German law of Non-performance.

In the 20. Century, the German civil law science developed a variety of general theories on the subject “Non-performance of obligations” and applied them to resolve the inflexibility of the German Civil Code:

- a) Theory of “**Positive Breach of Contracts**” or “**Imperfect performance**”
 - b) Theory of “**Additional Duties**” or “**Duty of care**” in contractual relationship
 - c) Theory of “**Culpa in Contrahendo**” (liability before contract conclusion)
 - d) Theory of “**Loss of Basic Conditions for Contract**” (unreasonableness of contract)
 - e) Theory of “**Sphere of Risks**” (risks to bear instead fault)
- etc.

H. “Civil Code of Japan” (1890)

We return to the story of the Japanese law. In 1890, the first Japanese Civil Code was enacted. The person in charge to supervise this project, Prof. *Boissonade*, compiled this code based on the French Civil Code. In the “Law on Properties” however, we recognize considerable differences from the original French concept:

H-1. “Putting in default”

Art. 336 The debtor or any other obligor shall be put in default in the following cases:

1. when there is a **claim [brought by the creditor] before the Court**, or delivery of a letter of demand or a writ of enforcement in a good and due form after the arrival of the fixed time for performance;
2. when the fixed time for performance has arrived in cases where it is prescribed by law or by mutual consent that [the debtor bears] such a responsibility simply on the arrival of the time;
3. when the debtor failed to perform in due time even though he knew that any delayed performance would be useless for the creditor.

H-2. Primary Effect of Obligations

Art. 381 (1) The effect of obligation **primarily** consists in entitling the creditor to take a legal action for **direct performance [=specific performance]**, and **alternatively** in cases of non-performance a legal action for

compensation for damages according to the distinctions provided in Title I, II, and III of this Chapter [...]

- Art. 382 (1) *The Court is bound to order direct performance [=specific performance]* in accordance with its proper form and content upon the claim of the creditor *whenever it is possible to enforce it without any physical restraint of the debtor.*
- (2) If the tangible object to be delivered to the creditor is located in the properties of the debtor, then the Court has to seize it and deliver it to the creditor.
- (3) In case of *obligation for an act*, the Court may allow the creditor to cause a third person to perform such act at the expense of the debtor.
- (4) In case of *obligation for a forbearance*, the Court may allow the creditor to cause a third person to remove the outcome of such act performed by the debtor at the expense of the latter, and to take appropriate arrangements to prevent any such act in future.
- (5) In the cases mentioned above, furthermore, the creditor may also demand compensation for damages if he suffers any.
- (6) The enforcement of direct performance [=specific performance] takes place according to the provisions in the Code of Civil Procedure.

H-3. Secondary Effect of Obligations

- Art. 383 (1) In cases where the debtor refuses to perform his obligations, the creditor may demand *compensation for damages* if he missed an opportunity to claim for enforcement of direct performance [=specific performance], or where the nature of the obligation does not allow such an enforcement; the same shall apply if *the performance becomes impossible* for any cause for which the debtor is responsible.
- (2) The creditor may demand compensation for damages also in a case of delay in performance.
- (3) The amount of compensation should be, so long as the parties have reached no agreement on it, determined by the Court according to the distinctions and conditions provided in following articles unless a certain amount of compensation is prescribed by law.
- Art. 384 (1) The duty to pay compensation is not due until the debtor has been put in default according to Art. 336.
- (2) In cases where the obligation consists in duty of inaction, however, the debtor always and inevitably bears the responsibility for delay in performance [whenever he breached his duty].
- (3) The same shall apply to the cases where someone has duty to return money or other valuable things which he deprived others of through criminal offenses.

Art. 381 clearly prescribes the priority of “**claim for specific performance**” as “Primary Effect of Obligations” while a “claim for compensation of damages” is merely “**alternative remedy for non-performance**”. The Court has also duty to enforce specific performance so long as it is possible, and a “performance by a third person” is prior to “damages” also in case of “obligations to do or not to do” (Art. 382). The creditor may demand compensation for damages if the enforcement of specific performance is impossible (Art. 383).

According to Prof. *Boissonade*’s vision, the creditor should officially sue the debtor for specific performance if the latter does not willingly perform his obligations (Art. 336 “**putting in default**”). The Court is bound to order specific performance so long as the performance is possible (Art. 382). The creditor may demand for damages only when no more probability or possibility exists for specific performance (Art. 383). This vision is closely similar to the German “**Principle of Natural Fulfillment of Obligations**”. Apparently, Prof. *Boissonade* tried to introduce several German concepts into the French system of obligations. In this context, Prof. *Boissonade* introduced the term “**Impossibility of performance**” from the German law. In the French law, this concept did not play any important role because the creditor has no need to wait for the impossibility in order to switch from “specific performance” to “damages” for the target of his claim. Instead, the French law discusses cases of

“*force majeure*” or “*fortuitous events*” (for example, Art. 1148 in the French Civil Code).

However, Prof. *Boissonade*’s vision suffers almost same problem as the German scheme mentioned above; namely the narrowed perspective of the theory. Art. 383 lists five cases where the claim for compensation of damages should be allowed to the creditor:

- 1) Refusal of performance by the debtor,
- 2) Failure by the creditor to claim for performance,
- 3) Inadequate nature of performance,
- 4) Impossibility of performance and
- 5) Delay of performance.

As a result, it would be quite unclear whether other types of troubles regarding obligations – “*Imperfect performance*”, “*Breach of duty of care*” in performance, “*Cupla in contrahendo*” etc. – could be properly covered by this concept or not.

Moreover, there was another problem; namely the responsibility of the debtor. Art. 1147 of the French Civil Code requires the debtor’s responsibility as a prerequisite for his liability (“*No liability without responsibility*”). However, Art. 383 drafted by Prof. *Boissonade* mentions this issue only in case of impossibility of performance. It would be quite unclear whether this issue should be required also in other cases of non-performance or not.

H-4. Scope of Damages

Art. 385 (1) The compensation for damages covers the loss which the creditor has suffered as well as the profit which he has been deprived of.

(2) However, if the non-performance or delay of the performance is *due merely to the debtor's negligence without any malicious intention*, then the debtor is liable only for damages which the parties have foreseen or could have foreseen at the time of the agreement.

(3) In the case of *the debtor's malicious intention*, he is liable even for unforeseeable damages which were caused as inevitable consequence from the non-performance.

However, regarding the subject “*Scope of Damages*”, Art. 385 clearly distinguishes between cases due to the debtor’s *intention* and cases due to simple *negligence* and acknowledges certain difference in amount of monetary compensation according to state of responsibility:

- a) In Paragraph (2) of this article, Prof. *Boissonade* followed Art. 1150 of the French Civil Code and applied the standard of “*Foreseeability*” to the cases of non-performance due to the debtor’s negligence in order to delimit the otherwise unlimited chain of causation;
- b) In Paragraph (3), however, Prof. *Boissonade* applied his original standard of “*Inevitability*” to the cases of intentional non-performance instead of “*Immediate and direct*” in Art. 1151 of the French Civil Code.

In other words, this provision considers the compensation for damages as “*Sanction against non-performance*”. In this aspect, Prof. *Boissonade* remained in the French tradition.

I. Revised Civil Code of Japan (1896)

Principally, the members of the “*Code Investigatory Commission*” which was in charge of the revision of the “Civil Code of Japan” (1890) intended to follow Prof. *Boissonade*’s concept in regard to “*Effects of performance*” and “*Remedies for non-performance*”. However, they tried to revise the whole scheme of effects of obligations in following points:

- a) Firstly, they decided to delete Arts. 336 and 384 regarding “*Putting in default*”. They found quite bothersome and inadequate if the creditor would have to bring the case before the court each time when he intended to exercise his right. *The parties should have opportunity to directly and rapidly solve their troubles by themselves* even without any involvement of the judicial authority. In principle, the creditor should be able to enjoy a opportunity to claim for

compensation of damages immediately and directly from the debtor. It means the adoption of *the Common law concept regarding "Default"*.

- b) Secondly, they tried to *remove the German-style scheme* of effects which would rigidly require the priority of "**Natural fulfillment**". Apparently, they intended to bring the whole concept of effects of obligations *back to a French-style scheme* which would allow the creditor's choice between specific performance or damages. For this reason, Arts. 381 and 382 must be completely rewritten.
- c) On the other hand, however, it would be inadequate if the debtor could enjoy any privilege to choose between specific performance or payment of damages like in the Common law. In order to definitely deny such a privilege for the debtor, the creditor's *right to claim for enforcement of specific performance* must be clearly provided for.
- d) The liability of the debtor to compensation for damages should not be rigidly formulated for certain types of non-performance, but it should be *a general clause in order to cover all the possible forms of troubles* in regard to obligations.
- e) In the end, the responsibility of the debtor should be required in any types of troubles. So, the principle of "*No liability without responsibility*" should be generally required.

I-1. First Proposal (Jan. 1895)

In January 18th, 1895, the Commission proposed the following provisions to fulfill these requirements:

<p>Art. 406 [Time for performance]</p> <p><i>The creditor may at any time demand performance of the obligation</i> from the debtor in cases where no fixed time for the performance is determined.</p>	<p>(comparable to the current Art. 412)</p>
<p>Art. 408 [Claim for enforcement]</p> <p>(1) If the debtor does not voluntarily perform his obligations, then the creditor may bring <i>a claim for enforcement of direct performance</i> before the court, unless the nature of the obligation does not allow it.</p> <p>(2) In cases where the nature of the obligation does not allow the enforcement of direct performance, if the obligation has performance of an action for its subject matter, then the creditor may demand the court to cause a third person to do this act at the expense of the debtor.</p> <p>(3) With regard to the obligation for a forbearance, the creditor may demand removal of the outcome of the action at the expense of the debtor as well as adequate measures adopted for the future.</p> <p>(4) The provisions of the preceding three Paragraphs do not affect a claim for compensation for damages.</p>	<p>(comparable to the current Art. 414)</p>
<p>Art. 409 [Compensation for damages]</p> <p>If the debtor fails to perform his obligations <i>in accordance with its proper form and content</i>, then the creditor may demand compensation for damages arising therefrom, unless the debtor is not <i>responsible for a cause of his non-performance</i>.</p>	<p>(comparable to the current Art. 415)</p>

For the formulation of Art. 409, the Commission used Art. 110 of the "**Federal Code of Obligations**" of Swiss (1881) as a model:

Art. 110 Where the creditor can not obtain performance of the obligation or may obtain it only imperfectly, the debtor is liable for damages unless he proves that no fault is attributable to him.

The Commission improved the formulation "the creditor can not obtain performance [...] or may obtain it only imperfectly" with the phrase "**in accordance with its proper form and content**" from Art. 382 of the "**Civil Code of Japan**" (1890).

I-2. Second Proposal (Dec. 1895) and "Delay in Performance"

However, this first proposal had serious problems. Firstly, the "*Putting in default*" was removed, but *the creditor's right to claim for damages immediately and directly from the debtor* is still not clearly declared. Secondly, the provisions were so drastically simplified that certain basic technical terms like

“**Delay in performance**” or “**Impossibility of performance**” suddenly disappeared.

For this reason, Art. 406 on “**Time for performance**” cited above had to be replaced with a provision on “**Delay in performance**”. In such a manner, Art. 336 of the “**Civil Code of Japan**” (1890) could be rehabilitated. However, neither direct claim for performance nor any lawsuit should not be required. The new provision was formulated as followed:

<p>Art. 409 [Delay in performance]</p> <p>(1) In cases where a definite due time is determined for the performance of the obligation, then the debtor shall be <i>liable for the delay in performance [=in default] on and after such a due time arrived.</i></p> <p>(2) In cases where only an indefinite due time is decided for the performance of the obligation, then the debtor shall be <i>liable for the delay in performance [=in default] on and after he is noticed of the arrival of the due time.</i></p> <p>(3) In cases where there is no fixed due time determined for the performance of the obligation, then he shall be <i>liable for the delay in performance [=in default] on and after the debtor received the demand for performance from the creditor.</i></p>	<p>(same as the current Art. 412)</p>
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This provision shows exactly the same concept as the idea of “**Default**” in the Common law; namely, it is allowed for the creditor to claim for compensation of damages already on the arrival of due time *even without any claim for specific performance or lawsuit in advance*. Just like in the Common law, the debtor shall be liable for all possible damages which would occur after the arrival of the time for performance. In this sense, his liability is “**strict**”.

On the other side, the debtor’s responsibility for non-performance would be required if the French or German principle of “**No liability without responsibility**” should apply. For this reason, Art. 409 cited above uses the wordings that the debtor shall be “**responsible**” on and after the arrival of a due time. However, such a responsibility could not be the same responsibility as required in the French or German concept; namely “**Intention**” or “**Negligence**”.

In this way, this provision causes a serious conceptual conflict and confusion. As a result, it is quite unclear whether the liability of the debtor for “**Delay in performance**” is strict like in the Common law, or his fault (intention or negligence) is required like in the French or German law.

I-3. “**Impossibility of performance**”

Besides the problem of “**Delay in performance**”, there was another conceptual problem, namely the uncertainty in regard to “**Impossibility of performance**”. Initially, the drafters had planned to follow the model of the “**Civil Code of Japan**” (1890) and to dedicate several articles to provide basic principles regarding this issue. In the discussion of the Commission on Apr. 5, 1895, however, the drafters proposed to delete all the planned articles regarding “**Impossibility of performance**”. They justified this proposal with the argument that it would be self-evident for everybody that the debtor would be released from his obligations and from any responsibility for non-performance if the natural fulfillment of his obligations became impossible due to “**force majeure**” for example. The proposal was approved in the Commission. On the other hand, however, the drafters found a certain necessity to change the wordings in the article on the “**Compensation for damages**” (at this time point, Art. 414). The original version had provided that the creditor may demand compensation for damages if the debtor *fails to perform his obligations in accordance with its proper form and contents*. Suddenly, it became quite uncertain if the wording “*fail to perform the obligation*” would cover also cases where the debtor “*can not perform the obligation*”. For this reason, they proposed to replace the second sentence of the article “unless the debtor is not responsible for a cause of his non- performance” with the second sentence of Paragraph 1 in Art. 383 of the “**Civil Code of Japan**” in order to clearly signify that “**Failure to perform**” includes also “**Impossibility to perform**”. The modified article was formulated as follows:

Art. 410 [Compensation for damages] (same as the current Art. 415)
 If the debtor fails to perform his obligations in accordance with its proper form and content, then the creditor may demand compensation for damages arising therefrom; the same shall apply if the performance becomes impossible for any cause for which the debtor is responsible.

This change in the composition of the provision, however, could suggest such an understanding that the creditor is entitled to claim for damages also in cases of impossibility but only if the impossibility of performance was caused by any reason for which the debtor was responsible. Consequently, it would be even legitimate to limit the application of the principle of “**No liability without responsibility**” exclusively to cases of impossibility, but not to apply to any other types of non-performance (!)

In an extremely narrow understanding of the provisions on “**Delay in performance**” and “**Impossibility of performance**”, the debtor’s liability for delay in performance would be “**strict**” while the debtor’s fault (intention or negligence) would be required in case of impossibility of performance. However, such a combination of the Common law principle and the French concepts would not work properly because the debtor would be in any case strictly liable on the arrival of the due time. The creditor would have no need to prove the debtor’s fault for impossibility at all. Moreover, how about other types of non-performance, for example in case of “**Imperfect performance**”? Is there any reason for distinction of the debtor’s liability according to types of non-performance?

I-4. “Delay in Acceptance”

Later in May, 1895, the Commission decided to adopt an additional provision on the issue “**Delay in acceptance**”. It should be located just next to the article on “**Delay in performance**” and provide as follows:

Art. 412 [Delay in acceptance] (same as the current Art. 413)
 If the creditor refuses to accept the tender of the performance, or is prevented from such an acceptance, then he shall be responsible for the delay on and after the time of the tender of the performance.

According to the explanation by the drafter, “*Acceptance of performance*” is not any genuine legal duty of the creditor. For this reason, his “Responsibility for delay in acceptance” does not require any fault (intention or negligence). He must simply bear any risk during his delay in acceptance even if he may be prevented from acceptance in due time by other persons or “*force majeure*”. This concept is based on the same idea as the provision on the issue “**Passage of risk**”:

Art. 534 (1) When a reciprocal contract has for its object the creation of transfer of a real right in a specific thing, if such thing has been lost or damaged by a cause not attributable to the debtor, such loss or damage falls on the creditor [...]

On the other side, the debtor's responsibility may be reduced during the creditor’s delay in acceptance. Unfortunately, there is no clear provision on reducing the debtor’s responsibility because there is even no clear definition of the debtor’s standard responsibility like the German provision § 276.

I-5. Final Formulation: Selective Scheme of Remedies for Non-performance

In the end, the simple scheme of the Japanese concept for “Remedies for non-performance” was born, which could be summarized as follows;

- 1) Art. 412 “Delay in performance [=default]”
- 2) Art. 413 “Delay in acceptance”
- 3) Art. 414 “Enforcement of specific performance”
- 4) Art. 415 “Compensation for damages”

As mentioned above, the initial plan of the Commission had been to follow the basic scheme proposed by Prof. *Boissonade*. So, they provided “Enforcement of specific performance” as a primary remedy for non-performance in Art. 414. Indeed, the debtor may not enjoy any free choice between specific performance of his obligations or compensation of damages. Contrary to Prof. *Boissonade*’s concept,

however, it should be openly allowed for the creditor to spring from Art. 412 directly upon to Art. 415 skipping Art. 414 because it is not clearly required that the creditor would have to claim for specific performance in advance. In this way, the consideration of the Commission resulted in a ***selective scheme of remedies for non-performance***, which could be clearer than the original French scheme.

I-6. “Rescission of Contract”

Besides “*Claim for specific performance*” and “*Claim for damages*”, the Commission decided to adopt the German concept of “*Recession of contract*” as a third remedy, the primary effect of which consists in “*Restoration to the original state*”. On the other hand, however, the Commission clearly rejected the selective scheme between “*Recession of contract*” or “*Claim for damages*” in the German concept (see §§ 325, 326). The discussion resulted in the following final formulation:

Art. 541 [Rescission after notification]
If one party fails to perform his obligations, then the other party may fix a reasonable period of time and demand performance within such period; and if the contract is not performed within that period of time, then the other party may rescind it.

[...]

Art. 545 [Effects of rescission]
(1) When one of the parties has exercised his right of rescission, each party is bound to restore the other party to his original state; but the rights of third persons may not be injured.
(2) In the case described in the preceding paragraph, the amount of money received must be restored with interest from the day of receipt.
(3) The exercise of the right of rescission does not affect a claim for compensation for damages.

I-7. “Scope of Damages”

Prof. *Boissonade* had followed the French concept in his Art. 385 of the Law on Properties and differentiated intensity and severness of the liability according to the modes of the debtor’s responsibility (intentional non-performance or negligence). For the Commission, however, it would be not necessary to take such a subjective aspect into consideration because the purpose of the compensation of damages is not any “*Moral accusation*” or “*Punishment*” against the debtor’s non-performance, but it consists in just “*Recovery from damages*”. The intensity and scope of damages itself would not vary according to the debtor’s mental state. It should be objectively determined.

For this reason, the scope of damages should be determined exclusively in accordance with the objective criterion of “*Causation*”. The debtor should compensate the creditor for damages so long as a causal relationship could be proved between his non-performance and particular damages. In this sense, the Commission preferred the German approach to the French one. § 249 of the German Civil Code determines the scope of damages as follows:

§ 249 A person who is bound to make compensation shall bring about the condition which would exist if the circumstance making him liable to compensate had not occurred. If compensation required to be made for injury to a person or damage to a thing, the creditor may demand, instead of restitution in kind, the sum of money necessary to effect such restitution [...]

This provision follows the “*Equivalence Theory*” in the criminal law – “*conditio sine qua non*” in Latin – to establish the causation between two events, for example, between a criminal offense and the death of a victim. The causation could be established if it is true that the death of the victim would not happen if the offender would not have committed the crime.

According to the German concept, the same principle should apply to both of contractual cases and tortuous cases. In contractual cases, “*the circumstance making him liable to compensate*” means “*Non-performance*”, and in tortuous cases “*Tort*” (unlawful act). In the former cases, the debtor should restore the condition to ***an expected state*** which would exist if he would not have failed to properly perform his obligations. In other words, he should recover all the damages which would not occur if he would not have failed to properly perform his obligations.

However, such a liability would be quite heavy for the debtor because he would have to recover almost every kind of damages except such ones as would occur even if the debtor would have properly performed his obligations. Only with the “*conditio sine qua non*”-Test, it would be very difficult to exclude accidental and unexpected damages from the scope of the debtor’s liability.

For this reason, the Commission decided to follow *the English approach* in order to delimit the scope of the debtor’s liability to a reasonable one. Relying on a famous judgment in England (*Hadley vs. Baxendale*, 1854), the drafter proposed the following formulation:

Art. 410 (1) The claim of compensation shall be approved for such damages as would arise from the non-performance in usual circumstances.

(2) The creditor may demand compensation even for damages which have arisen due to special circumstances insofar as the parties have foreseen or could have foreseen such damages at the time of the formation of the obligation.

The Paragraph (1) gives the creditor an award of compensation for *usual damages* which (everybody know) *would always and inevitably occur* in consequence of the non-performance *in usual circumstances*. However, it does *not require* the creditor to prove that the debtor in his person had really foreseen these damages. In this sense, the causation of these damages is quite “*objective*”. This paragraph aims to reduce the basic scope of liability just to the minimal range. In return, the creditor has *no special burden of proof* in regard to the causation of these damages.

For the compensation of other *non-usual damages* which arise from special circumstances, the creditor bears *the burden to prove that the debtor has really foreseen or could have foreseen these particular damages*. The concept of “Foreseeability” in this context means “*foreseeable causation*”.

Compared with the German concept, the liability of the debtor would be essentially light. Just in this point, this proposal was criticized by some members of the Commission. They strongly asserted the improvement in two points:

- a) Firstly, it would be enough for the creditor to prove that the debtor has foreseen or could have foreseen the special *circumstances*.
- b) Secondly, the condition “*at the time of the formation of the obligation*” should be deleted. The “Foreseeability” for the debtor should be acknowledged regardless if he has been informed about the special circumstances at the time of the formation of the obligation or after it.

In the end, the Commission approved this proposal and changed Paragraph (2) according to it. Its final formulation was as follows:

Art. 416 (1) The claim of compensation shall be approved for such damages as would arise from the non-performance in usual circumstances.

(2) The creditor may demand compensation even for damages which have arisen due to special circumstances insofar as the parties have foreseen or could have foreseen such *circumstances*.

Moreover, the Commission decided to separate the question of *contractual liability* due to non-performance and the question of *tortious liability* due to unlawful acts. The drafter, however, refrained to define a clear scope of compensation in case of tortious liability. He argued: “In case of unlawful act, any “foreseeability” may not be required – neither in aspect of “damages” nor in aspect of “circumstances – because an unlawful act and damages normally arise unexpected.” He decided to let judges find a just adequate scope of compensation in each particular case in accordance with the spirit of the fairness.

Contrary to the vision of the drafter, however, the Japanese courts usually apply Art. 416 also to tortious cases analogically. In this point, therefore, there is no difference between the French and German laws on the one hand and Japanese law on the other hand.

Above all, the severity of liability based on the pure objective causation in § 249 of the German Civil

Code was intensively discussed also in Germany. In order to reduce the scope of damages to a reasonable extent, the German legal scholars and the court developed the “*Adequacy Theory*”, which requires “*Objective foreseeability*” besides objective “*Causation*”. This additional criterion aims to limit the liability exclusively to such damages as would be *foreseeable for a reasonable and careful person in normal circumstances*. However, the debtor would have to bear the burden of proof to show that such damages would not be foreseeable for such a person in normal circumstances. In this sense, the debtor’s liability in German civil law would be essentially harder than in the Common law and the Japanese civil law.

I-8. Final Formulation of the Provisions on Remedies for Non-performance

Art. 412 [Delay in performance]

(1) In cases where a definite due time is determined for the performance of the obligation, then the debtor shall be liable for the delay in performance [=in default] on and after such a due time arrived.

(2) In cases where only an indefinite due time is decided for the performance of the obligation, then the debtor shall be liable for the delay in performance [=in default] on and after he is noticed of the arrival of the due time.

(3) In cases where there is no fixed due time determined for the performance of the obligation, then he shall be liable for the delay in performance [=in default] on and after the debtor received the demand of the performance from the creditor.

Art. 413 [Delay in acceptance]

If the creditor refuses to accept the tender of the performance, or is prevented from such an acceptance, then he shall be liable for the delay on and after the time of the tender of the performance.

Art. 414 [Claim for enforcement of direct performance]

(1) If the debtor does not voluntarily perform his obligations, then the creditor may bring a claim for enforcement of direct performance before the court, unless the nature of the obligation does not allow it.

(2) In cases where the nature of the obligation does not allow an enforcement of specific performance, if the obligation has performance of an action for its subject matter, then the creditor may demand the court to cause a third person to do this act at the expense of the debtor; but with regard to an obligation which has a juristic act for its subject, a judgment may be substituted for an expression of intention by the debtor.

(3) With regard to the obligation which has a forbearance for its subject matter, the creditor may demand removal of what has been done at the expense of the debtor as well as adequate measures adopted for the future.

(4) The provisions of the preceding three paragraphs shall do not affect a demand for compensation for damages.

Art. 415 [Compensation for damages]

If the debtor fails to perform his obligations in accordance with its proper form and content, then the creditor may demand compensation for damages arising therefrom; the same shall apply if the performance becomes impossible for any cause for which the debtor is responsible.

Art. 416 (1) The claim of compensation shall be approved for such damages as would arise from non-performance in usual circumstances.

(2) The creditor may demand compensation even for damages which have arisen due to special circumstances insofar as the parties have foreseen or could have foreseen such circumstances.

Art. 541 [Rescission after notification]

If one party fails to perform his obligations, then the other party may fix a reasonable period of time and demand performance within such period; and if the contract is not performed within that period of time, then the other party may rescind it.

Art. 542 [Rescission without notification]

If one party does not perform his obligations at a fixed time or within a fixed period of time, then the other party may just upon the arrival of such time or on the passage of such period of time rescind the contract without making the notification prescribed in the preceding article in cases where the purpose for which the contract has been concluded, according to the nature of the contract or to the intention expressed by the parties, cannot be attained unless it has been performed just in such due time or within such period of time.

Art. 543 [Rescission in case of impossibility]

If the performance has become totally or partially impossible due to a cause for which the debtor is responsible, then the creditor may rescind the contract.

Art. 545 [Effects of rescission]

(1) When one of the parties has exercised his right of rescission, each party is bound to restore the other party to his original state; but the rights of third persons may not be injured.

(2) In the case described in the preceding paragraph, the amount of money received must be restored with interest from the day of receipt.

(3) The exercise of the right of rescission does not affect a claim for compensation for damages.

Short Story of the Civil and Commercial Code of Thailand

A. Codification of the Civil and Commercial Code

Soon after the enactment of the Penal Code of the Kingdom of Siam in 1908, the Siamese government started a project for codification of a civil code and created a Commission of Codification.

In this project, the French legal advisers were commissioned to the drafting members, and the Legislation Adviser, *Monsieur Georges Padoux* (1867 – ?), took a leadership role until 1914.

The French advisers proposed to unify the civil and commercial law to a single code and compose it according an original concept which followed neither the French Civil Code (“Justinian system”) nor the German Civil Code (“Pandectist system”):

1. Book on Obligations
2. Book on Things
3. Book on Capacity of Persons
4. Book on Family
5. Book on Inheritance

B. Draft Civil and Commercial Code in 1919

The Commission started the drafting work with the *Law on obligations*, and its first version was accomplished in 1912.

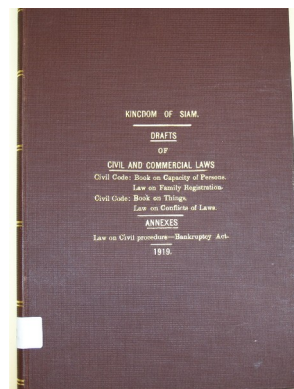
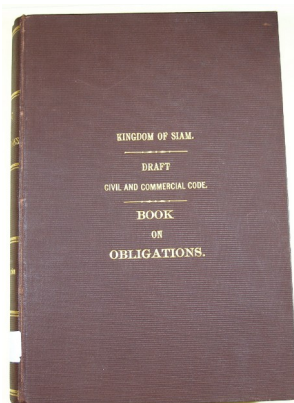
As the second task, they began to draft the *Law on family*. However, a hard controversy arose on this issue between the French advisers and the Japanese legal adviser, *Mr. Dr. Masao Tokichi* (1871 – 1921), who was a member of the Revising Committee. Due to this conflict, the drafting work of law on family and inheritance was suspended.

Since 1916, *Monsieur René Guyon* (1876 – 1963) took control of the drafting work, and the final draft was submitted to the Siamese government in 1919:

- | | |
|--------------------------------|-----------------|
| 1. Book on Obligations | (1463 sections) |
| 2. Book on Things | (168 sections) |
| 3. Book on Capacity of Persons | (120 sections) |

This draft did not include law on family and inheritance. Instead, drafts for two supplementary enactments was added:

- | | |
|----------------------------|---------------|
| Law on Family Registration | (52 sections) |
| Law on Conflict of Laws | (27 sections) |



B-1. The Contents of Book on Obligations

(General Part)

Preliminary	Secs. 1 – 39
Title I. Title, Commencement, Repeal	
Title II. Definitions	
Title III. General Provisions	
Title IV. Rules for Construction of Documents	
Title V. Periods of Time	
Division I. How Obligations Arise	Secs. 40 – 137
Title I. Contracts	
Title II. Management of Affairs without a Mandate	
Title III. Undue Enrichment	
Title IV. Wrongful Acts	
Division II. Of Some Particular Kinds of Obligations	Secs. 138 – 199
Title I. Conditional Obligations	
Title II. Obligations Subject to a Time Clause	
Title III. Alternative Obligations	
Title IV. Plurality of Creditors and Debtors	
Title V. Indivisible Obligations	
Division III. Transfer of Obligations	Secs. 200 – 217
Title I. General Provisions	
Title II. Transfer of Rights	
Title III. Transfer of Liabilities	
Division IV. Effects of Obligations	Secs. 218 – 305
Title I. General Provisions	
Title II. Rights of the Creditor	
Title III. Rights of the Debtor	
Division V. Rights of Creditors over the Property of the Debtor	Secs. 306 – 349
Title I. Respective Rights of the Ordinary and Preferred Creditors	
Title II. Rights of the Creditor to Exercise the Debtor's Rights of Action	
Title III. Rights of the Creditor to Cancellation of the Acts Made in Fraud of His Own Rights	
Division VI. Extinction of Obligations	Secs. 350 – 387
Title I. Performance	
Title II. Release	
Title III. Set Off	
Title IV. Merger	
Title V. Prescription	

(Specific Part)

Division VII. Specific Contracts	Secs. 398 – 1463
Title I. Sale	Title XIII. Warehousing
Title II. Exchange	Title XIV. Agency
Title III. Gift	Title XV. Brokerage
Title IV. Hire of Property	Title XVI. Compromise
Title V. Hire of Service	Title XVII. Gaming and Betting
Title VI. Hire of Work	Title XVIII. Current Account
Title VII. Carriage	Title XIX. Insurance against Loss
Title VIII. Loan	Title XX. Insurance on Life
Title IX. Deposit	Title XXI. Bills
Title X. Suretyship	Title XXII. Partnerships and Companies
Title XI. Mortgage	Title XXIII. Associations
Title XII. Pledge	

B-2. The Contents of Book on Capacity of Persons

Preliminary	Sec. 1
Division I. Natural Persons	Secs. 2 – 95
Title I. General Provisions	
Chapter I. Age	
Chapter II. Name	
Chapter III. Signature	
Chapter IV. Witnesses	
Chapter V. Residence	
Chapter VI. Disappearance	
Title II. Incapacitated Persons	
Chapter I. Married Women	
Chapter II. Minors	
Chapter III. Persons of Unsound Mind	
Division II. Juristic Persons	Secs. 96 – 120
Title I. General Provisions	
Title II. Foundations	

B-3. Contents of Book on Things

Preliminary	Secs. 1 – 18
Title I. Different Kind of Things	
Title II. Domain of the State	
Division I. Ownership	Secs. 19 – 94
Title I. Acquisition of Ownership	
Chapter I. General Provisions	
Chapter II. Acquisition by the Effect of the Law	
Chapter III. Acquisition by Way of Occupation	
Chapter IV. Acquisition by Way of Usucaption	
Chapter V. Acquisition by Way of Inheritance or by the Effect of Obligations	
Title II. Extent and Exercise of Ownership	
Title III. Joint Ownership	
Title IV. Surrender and Abandonment	
Title V. Expropriation	
Division II. Possession	Secs. 95 – 125
Title I. General Provisions	
Title II. Usucaption	
Title II. Recovery of Possession	
Division III. Servitudes	Secs. 126 – 168
Title I. General Provisions	
Title II. Real Servitudes Created by Law	
Title III. Servitudes Created by Contract or Will	
Title IV. Other Servitudes	
Chapter I. Habitation	
Chapter II. Superficies	
Chapter III. Charges on Land	

C. Civil and Commercial Code (1923 and 1925)

C-1. Prince Raphi's Instructions

The Draft of 1919 eventually could not be enacted in its original arrangement mainly due to the intervention by a young Thai legal officer, **Phraya Manava Rajasevi** (พระยามานวราชเสวี, 1890 – 1984).

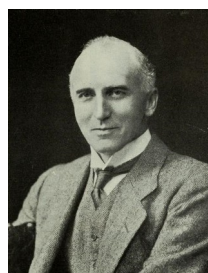
His first commitment to the codification project goes back to 1909 when he was, in his age of 18, assigned to the regular interpreter of the Commission of Codification.

The Minister of Justice, **Prince Raphi Phatthanasak** (พระเจ้าบรมวงศ์เธอ กรมหลวงราชบุรีดิเรกฤทธิ์), discovered his remarkable talents and promoted him. He was enrolled in the Law School of the Ministry of Justice and certified as a Siamese Barrister at Law in 1911. Subsequently, he received the scholarship of the government and studied the English law at the Inner Temple in London.

Before his departure to London, **Prince Raphi** gave him two secret instructions; firstly, he should go to Heidelberg and study the German civil law after the completion of the English law study. Following this instruction, he gathered and studied the English literature for the German civil law besides the English law study at the Inner Temple in London.

Secondly, **Prince Raphi** requested him to visit a British government member at the time, Attorney General **Sir John Simon** (1873 – 1954), and ask for opinion and advice about the draft Civil and Commercial Code prepared by the French advisers.

Sir Simon checked the draft and saw high risk of discredit by the Western countries in its unusual arrangement (“เขาต้องการที่จะทำให้มันวิเศษเกินไป แต่มือไม่ถึง”). Moreover, he pointed out certain inconsistencies in its logical construction (“ไม่กินเกลียวกัน”). He strongly recommended to follow the model of the Japanese Civil Code which was widely acknowledged as a successful adoption of the German Civil Code. Following **Sir Simon's** advice, **Phraya Manava Rajasevi** gathered and studied also literature for the Japanese law in London.



C-2. Promulgation of the Code in 1923 – 25

In 1916, **Phraya Manava Rajasevi** was certified as a British Barrister at Law and returned to the Kingdom of Siam due to the outbreak of the 1st World War.

In 1919, the Siamese government sent him back to the Commission of Codification and commissioned him to translate the Draft of 1919 into Thai language. In the revising procedure of his translation, he insistently complained about the inconsistency of the draft and loudly appealed the need for reconsideration of the whole draft. Following **Sir Simon's** advice, he strongly recommended the adoption of the **Japanese method** (วิธีญี่ปุ่น).

His claim and proposal eventually motivated the Siamese government to the revision of the Draft of 1919. However, the government decided to initiate the changing procedure with the promulgation of the Draft of 1919 in order to maintain a harmonious relationship with the French government.

In 1923, the Civil and Commercial Code, Book I (General Principles) and Book II (Obligations) were promulgated. In January 1925, Book III (Specific Contracts) followed. Apparently, the basic concept was changed. Book I was urgently composed mainly with the provisions from the “Book on Obligations” (Preliminary) and those from the “Book on Capacity of Persons” of the Draft of 1919.

C-3. Contents of the Code of 1923 and 1925

บรรพ ๑ บทเปิดเสร็จทั่วไป (มาตรา ๑ - ๑๐๕)	
ลักษณะ ๑	บทวิเคราะห์
ลักษณะ ๒	ปรับบทกฎหมาย
ลักษณะ ๓	วิธีตีความในเอกสาร
ลักษณะ ๔	ระยะเวลา
ลักษณะ ๕	บุคคลธรรมดา
ลักษณะ ๖	บุคคลนิติสมมต
ลักษณะ ๗	ทรัพย์

(Main sources)

Book on Obligations, Preliminary
Book on Capacity of Persons

บรรพ ๒ ว่าด้วยหนี้ (มาตรา ๑๐๖ - ๔๕๒)	
ภาค ๑	มูลแห่งหนี้
ภาค ๒	หนี้ต่างประเภท
ภาค ๓	โอนหนี้
ภาค ๔	ผลแห่งหนี้
ภาค ๕	สิทธิของเจ้าหนี้เหนือทรัพย์สิน ของลูกหนี้
ภาค ๖	ความระงับหนี้

(Main sources)

Book on Obligations, Division I – VI

บรรพ ๓ เอกเทศสัญญา (มาตรา ๔๕๓ - ๑๒๙๗)			
ลักษณะ ๑	ซื้อขาย	ลักษณะ ๑๓	จำนำ
ลักษณะ ๒	แลกเปลี่ยน	ลักษณะ ๑๔	เก็บของในคลังสินค้า
ลักษณะ ๓	ให้	ลักษณะ ๑๕	ตัวแทน
ลักษณะ ๔	เช่าทรัพย์	ลักษณะ ๑๖	นายหน้า
ลักษณะ ๕	เช่าซื้อ	ลักษณะ ๑๗	ประนีประนอมยอมความ
ลักษณะ ๖	จ้างแรงงาน	ลักษณะ ๑๘	การพินและขั้นตอน
ลักษณะ ๗	จ้างทำของ	ลักษณะ ๑๙	บัญชีเดินสะพัด
ลักษณะ ๘	รับขน	ลักษณะ ๒๐	ประกันภัย
ลักษณะ ๙	ยืม	ลักษณะ ๒๑	ตัวเงิน
ลักษณะ ๑๐	ฝากทรัพย์	ลักษณะ ๒๒	หุ้นส่วนและบริษัท
ลักษณะ ๑๑	ค้ำประกัน	ลักษณะ ๒๓	สมาคม
ลักษณะ ๑๒	จำนอง		

(Main sources)

Book on Obligations, Division VII

D. Civil and Commercial Code (1925 and 1928)

The Code of 1923 – 25 was a preparation stage for its revision. Its implementation was postponed until January 1926. During this period, Book I and II were radically revised according to the proposal of *Phraya Manava Rajasevi*. In November 1925, Book I and II of 1923 were repealed, and Book I and II of the revised Code were promulgated. The Japanese Civil Code of 1896 played a fundamental role in the revision work of these two books. Later in 1928, the revised Book III was also promulgated. In this case, the basic concepts and features of the old version remained almost unchanged.

D-1. Contents of Book I (1925), General Principles

Regarding the *overall framework of Book I*, the Siamese drafters maintained the initial part of the old version (*Preliminary, General Provisions*) while they followed the six-titles construction of the Japanese Code in the other parts (*1. Persons, 2. Juristic Persons, 3. Things, 4. Juristic Acts, 5. Period of Time, 6. Prescription*). They slightly modified it in following points:

- a) Title “Persons” and Title “Juristic Persons” were combined to a single title with two chapters, and Chapter “Associations” in Title “Juristic Persons” was omitted.
- b) Chapter “Representation” in Title “Juristic Acts” was also omitted.

The Siamese drafters filled this framework with the provisions mainly from the Japanese, German, Swiss and French codes as well as those from the Code of 1923.

Unexpectedly many provisions *from the Code of 1923 (77 articles)* survived the revising work especially in the titles on “Preliminary”, “General Provisions”, “Persons”, “Things” and “Periods of Time” as well as in “Prescription”.

The second large group of the provisions (*55 articles*) were adopted *from the Civil Code of Japan*. It is a multiple of the number of the provisions adopted directly *from the German Civil Code (26 articles)*. Among these Japanese provisions, however, there are 24 articles which have their origin probably in the German civil law. The other provisions belong to the “*Boissonade’s Heritage*”.

The revising work of Book I did not aim to replace the old provisions with new ones from foreign laws, but the drafters tried to save the core provisions of the old Book I, added new subjects (especially in Title “Juristic Acts”) and complemented them mainly with the provisions from the Japanese and German civil codes.

Code of 1925, Book I : Its Contents and Origin of the Provisions

ประมวลกฎหมายแพ่งและพาณิชย์ พ.ศ. ๒๔๖๘	1923	Jp. (Gr.orig)	Gr.	Sw.	Fr.	Oth.	Total
ข้อความเบื้องต้น	3	-	-	-	-	-	3
บรรพ ๑ หลักทั่วไป							
ลักษณะ ๑ บทเบ็ดเสร็จทั่วไป	7	-	-	2	2	-	11
ลักษณะ ๒ บุคคล							
หมวด ๑ บุคคลธรรมดา	23	17 (4)	3	1	2	7	53
หมวด ๒ นิติบุคคล	16	11 (5)	-	1	-	2	30
ลักษณะ ๓ ทรัพย์สิน	4	-	3	2	-	5	14
ลักษณะ ๔ นิติกรรม							
หมวด ๑ บทเบ็ดเสร็จทั่วไป	1	1 (-)	1	1	-	1	5
หมวด ๒ การแสดงเจตนา	2	3 (2)	5	-	-	6	16
หมวด ๓ โมฆะกรรมและโมฆียะกรรม	3	5 (2)	3	-	-	-	11
หมวด ๔ เงื่อนไขและเงื่อนไขเริ่มต้นหรือเวลาสิ้นสุด	1	9 (3)	1	-	-	1	12
ลักษณะ ๕ ระยะเวลา	3	3 (3)	-	-	-	1	7
ลักษณะ ๖ อายุความ	14	6 (5)	10	-	-	1	31
Total	77	55 (24)	26	7	4	24	193

D-2. Contents of Book II (1925), Obligations

In the case of Book II, it would be just correct to speak of “replacement”. Indeed, the six-divisions construction of Book II (1923) was replaced with the overall framework of the Japanese Civil Code (1896). The Japanese drafters in 1890s had adopted the concept to clearly divide three parts (1. General provisions, 2. Contractual obligations, 3. Non-contractual obligations) from the Civil Code for the Kingdom of Saxony (1863). The Saxony legacy was then introduced also in to the Kingdom of Siam. The contents of Book II were ordered as follows:

Code of 1925, Book II : Its Contents and Origin of the Provisions

บรรพ ๒ หนี้	1923	Jp. (Gr.orig)	Gr.	Sw.	Fr.	Oth.	Total
ลักษณะ ๑ บทเบ็ดเสร็จทั่วไป							
หมวด ๑ วัตถุประสงค์แห่งหนี้	1	2 (2)	6	-	-	-	9
หมวด ๒ ผลแห่งหนี้							
ส่วนที่ ๑ การไม่ชำระหนี้	3	3 (-)	17	-	-	-	23
ส่วนที่ ๒ รับช่วงสิทธิ	1	1 (1)	2	-	1	2	7
ส่วนที่ ๓ การใช้สิทธิเรียกร้องของลูกหนี้	4	-	-	-	-	-	4
ส่วนที่ ๔ เพิกถอนการฉ้อฉล	2	1 (-)	-	-	-	1	4
ส่วนที่ ๕ สิทธิยึดหน่วง	-	8 (1)	-	2	-	-	10
ส่วนที่ ๖ บุริมสิทธิ	1	34 (-)	-	-	-	4	39
หมวด ๓ ลูกหนี้และเจ้าหนี้หลายคน	-	1 (-)	12	-	-	-	13
หมวด ๔ โอนสิทธิเรียกร้อง	2	7 (1)	2	-	-	-	11
หมวด ๕ ความระงับหนี้							
ส่วนที่ ๑ การชำระหนี้	2	12 (3)	9	2	1	-	26
ส่วนที่ ๒ ปลดหนี้	-	1 (1)	-	-	-	-	1
ส่วนที่ ๓ หักกลบลดหนี้	1	5 (4)	2	-	-	-	8
ส่วนที่ ๔ แปลงหนี้ใหม่	-	4 (-)	-	-	-	-	4
ส่วนที่ ๕ หนี้เคลื่อนที่กัน	-	1 (-)	-	-	-	-	1
ลักษณะ ๒ สัญญา							
หมวด ๑ ก่อให้เกิดสัญญา	2	4 (3)	9	-	-	-	15
หมวด ๒ ผลแห่งสัญญา	-	5 (3)	2	1	-	-	8
หมวด ๓ มัดจำและกำหนดเบี้ยปรับ	-	-	9	-	-	-	9
หมวด ๔ เลิกสัญญา	-	7 (7)	2	-	-	-	9
ลักษณะ ๓ จัดการงานนอกสั่ง	1	1 (1)	9	-	-	-	11
ลักษณะ ๔ ลากมิดควรไต้	5	4 (2)	3	1	-	1	14
ลักษณะ ๕ ละเมิด							
หมวด ๑ ความรับผิดชอบเพื่อละเมิด	5	2 (-)	4	2	-	5	18
หมวด ๒ ค่าสินไหมทดแทนเพื่อละเมิด	-	1 (-)	6	4	-	-	11
หมวด ๓ นิรโทษกรรม	3	-	-	1	-	-	4
Total	33	104 (29)	94	13	2	13	259

However, the Siamese drafters slightly modified this construction in following points:

- a) Chapter 2 “*Effects of Obligations*” in Title I “*General Provisions*” was clearly divided into four parts (1. *Non-performance*, 2. *Subrogation*, 3. *Exercising of Debtor's Claims*, 4. *Cancellation of Fraudulent Acts*) and extended with further two parts (5. *Right of Retention*, 6. *Preferential Rights*), which were adopted from Book II on “Real Rights” of the Japanese

Civil Code. These extended parts belong to the “*Boissonade’s Heritage*” in Book II.

- b) The provisions on “*Suretyship*” in Chapter 3 “*Plurality of Debtors and Creditors*” of Title I “*General Provisions*” and the *whole chapters on specific contracts* in Title II “*Contracts*” were removed. These issues should be separately provided for in Book III.
- c) Consequently, Title 2 “*Contracts*” contains only general provisions (1. *Formation*, 2. *Effects*, 4. *Rescission*). Additionally, the provisions on “3. *Earnest and Stipulated Penalty*” were introduced from the German Civil Code (1898).
- d) The provision on the subject “*Release*” in Chapter “*Extinction of Obligations*” in Title I “*General Provisions*” was placed at the second position in the same chapter next to the subject “*Performance*”.

Unlike in Book I, the Siamese drafters preserved here in Book II only few provisions of the *Code of 1923* (33 of totally 259 articles). It is the case for example in the part on “*Exercising of Debtor’s Claims*” in Chapter “*Effects of Obligations*” of Title I “*General Provisions*” and in Title VI “*Undue Enrichment*” as well as in Title V “*Wrongful Acts*”.

In the other parts of Book II, the Japanese and German provisions are quite dominant (respectively 104 and 94 of 259 articles). Roughly speaking, the *Japanese* provisions are dominant in Title I “*General Provisions*” (except in the part on “*Non-performance*” in Chapter 2 “*Effects of Obligations*” and Chapter 3 “*Plurality of Debtors and Creditors*”). On the other side, the *German* provisions are relatively dominant especially in Title II “*Contracts*” and Title V “*Wrongful Acts*”.

E. Inconsistency Question in Draft 1919 and Remedies for Non-performance

E-1. Non-performance in Draft 1919

Besides the unusual construction of the Draft prepared by the French advisers, *Sir John Simon* had pointed out also its certain logical inconsistencies. What was inconsistent in it? Could be this problem overcome in the Code of 1925?

A possible problem could be found in the provisions of Chapter II “*Non-performance*” in Title II “*Rights of the Creditors*” of Division IV “*Effects of Obligations*”:

Part I. – Default of the Debtor	
Sec. 257	If the obligation is not performed the debtor is said to be in default.
Sec. 258	(1) If the obligation is to be performed at a definite time, that is to say on a date which was known beforehand, the debtor is <i>in default from such date</i> . (2) If the obligation is to be performed at a time which is not definite, the debtor is <i>in default from the moment</i> when he knows that such time has arrived, or when he would have known of it if he had exercised such care as may be expected from a person of ordinary prudence. (3) If the performance of the obligation by the debtor depends on an act to be done by the creditor or by another person, the debtor is not in default until such act is done.
Sec. 259	If no time, definite or otherwise, has been fixed for the performance of the obligation, the debtor is in default after a demand for performance is made to him.

According to Sec. 258, the debtor is in default when the time for performance has arrived. Principally, *neither fault* or responsibility of the debtor is required, *nor* has the creditor to *demand for specific performance*. This concept follows rather the principle in *Common law* and breaks away from the *French law tradition* where the debtor may be put in default through a formal demand for performance.

According to Sec. 262, after the arrival of the time for performance, the creditor may bring a claim into the Court. Contrary to the Common law principle, however, the creditor may claim either *specific performance* or *cancellation (=rescission) of contract* or even *compensation for damages*:

Part II. – Remedies of the Creditor

Sec. 262 (1) From the time when the debtor is in default, the creditor may *claim specific performance* of the obligation.

(2) If the obligation arose out of a contract, the creditor may *claim cancellation of the contract*, except when the law provides that his remedy is to determine the contract.

(3) The creditor is also *entitled to compensation for any injury* caused to him by the non-performance, except in the cases provided by Part IV of this Chapter.

[...]

Part III. – Specific Performance

Sec. 265 The Court may *in its discretion* order specific performance of an obligation whenever such performance is possible and desirable.

In the end, not the creditor, but the Court has the final word over the art of the remedies (Sec. 265). In other words, specific performance may not be always mandatory even if it is still possible. In this point, this concept breaks away also from *German law tradition*.

Part IV. – Compensation

Sec. 270 If performance has been delayed or made impossible by *force majeure*, the creditor is not entitled to compensation for the consequences of such delay or impossibility.

Sec. 271 If after the debtor is in default performance of the obligation becomes impossible owing to *force majeure*, the debtor is bound to make compensation to the creditor, unless he prove that his default was not *caused by his fault*.

Sec.272 As between the creditor and the debtor, non-performance caused by persons for whom the debtor the creditor are not responsible is deemed to be caused by force majeure.

As mentioned above, Sec. 258 provides that the debtor is already in default on and after the arrival of the time for performance. The fault (responsibility) of the debtor is not required just like in the Common law. The creditor may immediately claim for either specific performance or rescission of contract or compensation of damages (Sec. 262). Principally, the debtor has no opportunity to defend himself. Exceptionally, in cases where the performance becomes impossible by “*force majeure*” after the debtor has been already in default, it is allowed for him to defend himself (Sec. 271). However, it is quite unclear what is a ground to require “*fault*” of the debtor only in such exceptional cases.

Part V. – Assessment Compensation for Non-performance

Sec. 273 Compensation shall be for the injury actually suffered by the plaintiff and for the loss of the benefits which the parties, at the time when the obligation arose, foresaw or could have foreseen would result from performance of the obligation.

For the issue “*Scope of damages*”, Draft 1919 adopts the *objective approach*. Regarding “*Injury actually suffered*”, however, Sec. 273 does not distinguish between “*usual*” and “*non-usual*” damages. The debtor would have to compensate the creditor for all the actual damages. It would mean a similar understanding as in the German concept. On the other side, the creditor would bear the burden to prove the foreseeability of “*loss of the benefits*” like in the Common law.

As a whole, the concept of the Draft 1919 in regard to the issue “Remedies for Non-performance” has quite similar features as the *Revised Civil Code of Japan* (1896); namely Arts. 412 – 415. Probably, Sec. 258 was formulated after Art. 412 of the Japanese code. Just like in the Japanese Civil Code, this draft tried to combine the Common law principle in regard to the “*Default*” and the French principle of the “*Selectivity of the remedies for non-performance*”. Also in a quite similar way as the Japanese concept, this Draft suffers the conceptual conflict between the *strict liability* in case of “*Default*” and the requirement of “*Fault*” in certain other cases. Furthermore, this Draft would allow a wide range of discretion to the Court; neither the creditor nor the debtor, but *the Court would enjoy the choice* of remedies for non-performance. This would cause a serious uncertainty regarding outcomes of the lawsuit.

E-2. Provisions in the Code of 1923

ลักษณะ ๓ การไม่ชำระหนี้

หมวด ๑ ลูกหนี้ผิดนัด

มาตรา ๓๒๓

อันว่าหนี้ถ้าไม่ชำระไปไซ้ ลูกหนี้ได้ชื่อว่าอยู่ในฐานะผิดนัด

มาตรา ๓๒๔

ถ้าหนี้จะต้องชำระตามเวลาที่มีกำหนดแน่ คือว่าในวันอันรู้กันอยู่ก่อนแล้ว นับว่าลูกหนี้ผิดนัดแต่วันนั้นไป ถ้าหนี้มีกำหนดชำระแต่มีได้วันกันแน่ ท่านว่าลูกหนี้ผิดนัดตั้งแต่วันที่เมื่อตนรู้ว่าถึงกำหนดชำระ ฤๅในขณะที่อันควรจะรู้เช่นนั้น ถ้าหากใช้ความระมัดระวังอันจะพึงคาดหมายได้แต่วิญญูชน

ถ้าการที่ลูกหนี้จะชำระหนี้อาศัยต่อการอันหนึ่งอันใดซึ่งเจ้าหนี้หรือบุคคลอื่นจะได้กระทำลงก่อนไซ้ ท่านว่าลูกหนี้ยังไม่ผิดนัดจนกว่าการวันนั้นจะได้กระทำแล้ว

มาตรา ๓๒๕

ถ้ามิได้มีเวลากำหนดไว้เป็นแน่ ฤๅมิได้กำหนดไว้ด้วยประการอื่น เพื่อให้ชำระหนี้ ท่านว่าลูกหนี้ยอมผิดนัด จำเดิมแต่เมื่อได้ถูกทวงถามให้ชำระหนี้

หมวด ๒ ทางแก้ของเจ้าหนี้

มาตรา ๓๒๘

ตั้งแต่เวลาลูกหนี้ผิดนัด เจ้าหนี้จะเรียกให้ชำระหนี้โดยเฉพาะเจาะจงก็ได้ ถ้าหนี้นั้นเกิดแต่มูลสัญญาไซ้ เจ้าหนี้จะเรียกให้เพิกถอนสัญญาได้ เว้นแต่ในคดีที่กฎหมายบัญญัติว่าทางแก้ของเจ้าหนี้จะพึงเลิกสัญญาเสียเอง

เจ้าหนี้ยังชอบที่ได้ค่าสินไหมทดแทนที่ต้องเสียหายอย่างใด ๆ อันเกิดขึ้นแก่ตนด้วยการไม่ชำระหนี้ เว้นแต่ในบทที่บัญญัติไว้ในหมวด ๔ แห่งลักษณะนี้

หมวด ๓ การชำระหนี้เฉพาะเจาะจง

มาตรา ๓๓๑

เมื่อใดการชำระหนี้โดยเฉพาะเจาะจงเป็นวิสัยจะทำได้และเป็นที่ยังปรารถนาไซ้ ศาลจะสั่งบังคับให้ชำระหนี้นั้นโดยเฉพาะเจาะจงก็ได้ สุดแต่จะพึงเห็นสมควร

หมวด ๔ ค่าสินไหมทดแทน

มาตรา ๓๓๖

ถ้าการชำระหนี้เงินเข้าไปฤๅทำไม่ได้ด้วยเหตุสุดวิสัยไซ้ เจ้าหนี้ไม่มีสิทธิจะได้ค่าสินไหมทดแทนผลแห่งการยื่นชำระหนี้วิสัยจะทำได้นั้น

มาตรา ๓๓๗

ถ้าภายหลังที่ลูกหนี้ผิดนัดแล้วนั้น การชำระหนี้ตกเป็นอันทำไม่ได้เพราะเหตุสุดวิสัยไซ้ ลูกหนี้จะต้องใช้ค่าสินไหมทดแทนให้แก่เจ้าหนี้ เว้นแต่ลูกหนี้จะพิสูจน์ได้ว่าการผิดนัดนั้นมิได้เกิดเพราะความผิดของตน

F. Siamese Solution: Rearrangement of the German Provisions in Accordance with the Japanese Scheme

In the revision work for the Code of 1925, the Siamese drafters were confronted with a difficult situation. On the one side, they could not directly adopt the Japanese provisions as they are because it suffers the quite similar conceptual problems as the Draft 1919. Moreover, they are extremely short and simple. The Siamese drafters were looking for more detailed provisions like the German ones. On the other side, however, they could not adopt the German concept and scheme because of its quite special logical structure and the serious weakness (“*Gaps in the law*”).

The leader of the Siamese drafters, *Phraya Manava Rajasevi* (พระยามานวราชเสวี), devised a quite venturesome strategy to overcome this dilemma; namely he preferred the German provisions, however, he completely rearranged them in accordance with the Japanese scheme.

F-1. Strategy for the Rearrangement

At first, the targeted provisions of the German Civil Code could be segmented into following six sequences in accordance with the Japanese provisions Arts. 412 – 419:

Segmentation of the Provisions of the German Civil Code

Segments		Targeted Provisions (1898 – 2001)
1. Scope of damages	§§ 249 – 254	249, ^a 254
2. Time for performance	§ 271	271
3. Impossibility	§§ 275 – 280	275, 278, 280
4. Debtor's default	§§ 284 – 287	284, 285, 286, 287
5. Delinquency charge	§§ 288 – 290	288, 289, 290
6. Creditor's default	§§ 293 – 301	293, ^a 294, 295, 296, 297, 298, 299, 301

^a These provisions were only taken into consideration as comparable ones.

Each of these segments could be linked to a comparable Japanese article on the corresponding subject. According to this “Correspondency Structure”, the whole procedure of the rearrangement could be reconstructed in following seven steps:

Overall Correspondency Structure and Rearrangement Steps

German Provisions (1898 – 2001)			Japanese Provisions	Rearrangement
Segment 1	Scope of damages			
Segment 2	Time for performance		Art. 412	→ Step 2
Segment 3	Impossibility		Art. 413	→ Step 7
			Art. 414	→ Step 3
Segment 4	Debtor's default		Art. 415 Sentence 1	→ Step 1
			Art. 415 Sentence 2	→ Step 4
			Art. 416, 417, 418	→ Step 5
Segment 5	Delinquency charge	Art. 419	→ Step 6	
Segment 6	Creditor's default			

F-2. Procedure of the Rearrangement

Due to the essential difference between the German and French-Japanese schemes, there was no similarly composed provision in this field which could serve as a starting point for the rearrangement. Even the central provision on the subject “*Debtor's liability for non-performance*” was quite differently composed; the German Civil Code (1898 – 2001) possessed the primary provision for this subject in its §280 on “*Impossibility of performance*” and the secondary one in §286 on “*Damages*”

from debtor's default" while the Revised Civil Code of Japanese has its single and general provision for the same subject in its Art. 415. Nevertheless, a slight similarity could be recognized between the German §286 Paragraph 1 and the Japanese Art. 415 Sentence 1; if we would replace the word "*default*" in the German provision with "*non-performance*", then we would have a virtually identical provision to the Japanese counterpart, namely "***The debtor shall compensate the creditor for any damage arising from his non-performance***". According to this recognition, the correspondency link between The German §286 and the Japanese Art. 415 could serve as a starting point for the rearrangement. The reconstructed procedure of the rearrangement could be described as follows:

1. *In the first step*, therefore, the German provisions in Segment 4 (§§ 284, 285, 286, 287) on the subject "Debtor's default" would be adopted. At the same time, however, ***the German provision §286 Paragraph 1*** was soon replaced with the Japanese Art. 415 Sentence 1. Though, §286 Paragraph 2 remained untouched. In the final arrangement of the Code of 1925, these German and Japanese provisions form Arts. 204, 205, 215, 216, 217 (see Table "**Final Arrangement**").
2. In order to put the debtor in default, of course, the ***beginning time of the effect of the obligation*** must be determined beforehand. *In the second step*, the German provision in Segment 2 (§271) was placed just before the provisions on "*Debtor's default*" (the top of them is §284). This positioning (Art. 203 in the Code of 1925) exactly corresponded with that of the Japanese Art. 412.
3. In the Revised Civil Code of Japan, the provision to entitle the creditor to the claim for ***compulsory performance*** (Art. 414) preceded the provision for damages due to non-performance (Art. 415 Sentence 1). *In the third step* of the rearrangement, the Japanese Art. 414 was adopted and located provisionally between §285 and Art. 415 Sentence 1 in accordance with the Japanese scheme (between Art. 205 and Art. 215 in the Code of 1925).
4. *Phraya Manava Rajasevi* and other Siamese drafters probably recognized the Japanese Art. 415 Sentence 2 as a provision on the subject "***Impossibility of performance***". *In the fourth step*, therefore, the German provisions in Segment 3 (§§275, 278, 280) were adopted and placed next to the German provisions adopted from Segment 4 (its last one is §287). In doing so, however, §280 was moved to the top position of the segment (Arts. 218, 219, 220 in the Code of 1925).
5. In the Revised Civil Code of Japan, the provisions on "***Scope of damages***" and "***Contributory negligence***" (Arts. 416, 418) follow the Art. 415 Sentence 2. *In the fifth step*, the German provisions in Segment 1 (§§249, 254) were adopted and placed provisionally next to the sequence of the German provisions adopted from Segment 3 (its last one is §278) in faithful accordance with the Japanese scheme. At the same time, however, the German provision §249 was soon replaced with the Japanese Art. 416 (Arts. 222, 223 in the Code of 1925).
6. The last provision in the Japanese scheme was the provision on "***Delinquency charge***" (Art. 419). *In the sixth step*, accordingly, the German provisions in Segment 5 (§§288, 289, 290) were adopted and placed next to the German provision adopted from Segment 1 (§254). These are Arts. 224 and 225 in the final arrangement of the Code of 1925.
7. *In the last step* of the rearrangement, the whole bundle of the provisions in Segment 6 on "***Creditor's default***" (§§293 – 299, 301) was adopted and placed just before the provision on "Compulsory performance". This positioning (Arts. 207 – 212 in the Code of 1925) exactly corresponded with that of the Japanese Art. 413. In doing so, however, there was fine-adjustment of several provisions. *Firstly*, the order of §§288 and 289 was turned over in order to put the provisions regarding exceptions of creditor's default together. *Secondly*, §301 was separated from the other provisions of Segment 6 and placed next to the provision on vicarious liability, which is the last position of the provisions on debtor's liability for non-performance (Art. 221 in the Code of 1925). This separation was done probably because the Siamese drafters saw it rather as a provision to reduce the debtor's liability.

F-3. Final Arrangement and Its Achievement

After the rearrangement of the German provisions, several provisions were additionally adopted from the Code of 1923; namely Art. 327 on “**Debtor’s default in tort cases**” and Art. 373 on “**Objects of compulsory performance**” (Arts. 206 and 214 in the Code of 1925). At last, furthermore, Art. 355 on “**Creditor’s default**” replaced the German provision §293 (Art. 207 in the Code of 1925).

Regarding the final arrangement of the whole provisions on the issue “**Remedies for non-performance**”, it could be suffering from certain critical vulnerability to misunderstanding; *Phraya Manava Rajasevi*’s idea to rearrange the German provisions in accordance with the Japanese scheme had lacked all the necessary theoretical prospects for its adequacy and functionality. It is quite uncertain how seriously he had considered the heterogeneity between the both concepts. Indeed, there are certain points which could cause doubts as to system consistency in the final arrangement.¹ First of all, Art. 216 has remained in the original wording of the German §286 Paragraph 2 (on “default”) even though its Paragraph 1 has been replaced with the Japanese Art. 415 Sentence 1 (on “non-performance”). Moreover, several essential provisions in the German scheme have not been adopted into the Code of 1925, especially §276 on “*Definition of debtor’s responsibility*”, §282 on “*Burden of proof*” and §300 on “*Effect of creditor’s default*” probably because such provisions are missing also in the Revised Civil Code of Japan. It would be a side effect from the “Japanese method”.

Final Arrangement and Origin of the Provisions on “Non-performance”

Gr.	1923	*	Civil and Commercial Code of 1925	*	Jp.
§ 271		→	Art.203 Time for performance	≈	Art.412
§ 284		→	Art.204 Debtor's default through warning		
§ 285		→	Art.205 No default without responsibility		
	Art. 327	→	Art.206 Debtor's default in tort cases		
§ 293	Art. 355	→	Art.207 Creditor's default	≈	Art.413
§§ 294,295		→	Art.208 Actual and verbal tender		
§ 296		→	Art.209 Cases where no tender is required		
§ 298		→	Art.210 Cases where creditor is not in default (1)		
§ 297		→	Art.211 Cases where creditor is not in default (2)		
§ 299		→	Art.212 No tender of counter-performance		
			Art.213 Compulsory performance	←	Art.414
	Art.373	→	Art.214 Objects of compulsory performance		
§ 286 (I)		≈	Art.215 Damages due to non-performance	←	Art.415 S.1
§ 286 (II)		→	Art.216 Damages in lieu of performance		
§ 287		→	Art.217 Strict liability during default		
§ 280		→	Art.218 Impossibility with responsibility	≈	Art.415 S.2
§ 275		→	Art.219 Impossibility without responsibility		
§ 278		→	Art.220 Vicarious liability		
§ 301		→	Art.221 No interest during creditor's default		
§ 249		≈	Art.222 Scope of damages	←	Art.416
§ 254		→	Art.223 Contributory negligence	≈	Art.418
§§ 288,289		→	Art.224 Statutory interest for money debts	≈	Art.419
§ 290		→	Art.225 Interest upon lost values		

* Relationship between provisions: Adoption (→ or ←) or Comparability (≈).

F-3. System Inconsistency and Actuality of the Rearrangement

In order to clean up such *vulnerability and doubts*, it would have been essential to closely investigate the theoretical backgrounds of the both concepts. However, the Siamese drafters had no opportunity to such a theoretical confrontation probably because the codification of the Code of 1925 was carried out without commitment of any German or Japanese legal advisers. Eventually, such an intensive and systematic assimilation of a foreign legal theory as the so-called “*Theory Reception*” of the German civil law in Japan has never happened among legal scholars and practitioners in the Kingdom of Siam. Apparently, as Phraya Manava Rajasevi himself uttered, the language barrier was one of the reasons for such circumstances.

On the other hand, however, certain *actuality of this venturesome arrangement* in the Code of 1925 has been suddenly revealed since promulgation of the “*Modernized Law on Obligations of Germany* (2001)”. Above all, the new German law has its core provisions on the issue “Debtor’s liability for non-performance” in the modernized provisions §§280 – 283, and they stay in a sequential order which is just parallel to that of the provisions on the same issue in the Code of 1925; namely the basic principle of debtor’s liability for non-performance (the modernized §280 to Art. 215), damages in lieu of performance (the modernized §§281 and 282 to Art. 216) and impossibility of performance (the modernized §283 to Arts. 218 and 219). This fact means that the conceptual difference between the German Civil Code and the Code of 1925 has been essentially reduced through the reform of the German law on obligations.

G. Outlook for the Future

In 1992, King Bhumibol Adulyadej (Rama IX.) issued the royal edict to promulgate the Revised Civil and Commercial Code of Thailand, Book I. In the new version, the expression and wording of every provision was purified from the language legacy from the time of the absolutism, and the whole book was rearranged. Moreover, the provisions on “Association” were removed from Book III and integrated into Book I, Title 2 “Persons”, Chapter 2 “Juristic Persons”. Nevertheless, the basic features and concepts of the original version were carefully maintained. The traces of the Japanese and German influence are still clearly to recognize even in this revised version. On the other side, Book II on “Obligations” has not experienced any such profound revision until today. A complete overhaul of Book II on obligations is still not in sight.

However, faced with the new development of the major two model laws – namely the implementation of the modernized German law of obligations and the advance of discussion about the reform of the law on obligations in Japan –, it would be highly desirable to critically review the conceptual commonalities and differences among the German, Thai and Japanese law of obligations from the viewpoint of comparative law. Such interactive exchange of legal theory and experience among these three systems would eventually contribute not only to clarification of identity of each law but also to achievement of common strategy for harmonization of law on obligations in the Asian region in the future.

Family in Prewar Period

“IE-System” and Discrepancy between its Idea and Reality

The “*IE-System*” was a legal expression of the fundamental ideology of the Meiji government for a well-disciplined social order. This concept was gradually shaped out in the first stage of codification process of civil code, and had achieved once its accomplished form in the final version of “*Old Civil Code*”. After the suspension of this code, it was finally settled in the 4th and 5th Book of the revised Civil Code of Japan in 1898 (so-called “*Meiji Civil Code*”). This code contained following provisions:

I. Incompetence of Wife to Perform Juristic Acts

Art. 14†

The wife must obtain the consent of her husband for doing following acts:

1. all the acts which are listed in No. 1 to 6, Paragraph 1, Article 12 [= quasi-incompetent persons (คนเสมือนไร้ความสามารถ)];
2. Making or renouncing a gift or a bequest;
3. Concluding a contract which would place her under a physical bind exercised by somebody else.

Art. 15†

The husband may permit his wife to carry on one or several kinds of business. The wife, in relation to her permitted business, have a same capacity as an independent person.

Art. 16†

The husband may withdraw his permission for his wife to carry on business or put a restriction on it. This may not, however, set up against a *bona fide* third person.

Art. 17†

The permission of the husband for his wife to carry on business is not required in following cases:

1. if it is unknown whether he is alive or dead;
2. if he had left her;
3. if he was adjudged to be incompetent or quasi-incompetent;
4. if he is suffering from leprosy and put in confinement in a hospital or in his own house;
5. if he was sentenced to imprisonment of longer than one year.

Art. 18†

If the husband is minor, then he may grant permission for his wife only in accordance with Article 4 [with consent of his legal representative].

II. Dominant Status of “Head of Family”

Art. 732†

- (1) A family consists of all the relatives of the head of family and their spouses who live together in his household.
- (2) If a person succeeds to the position as head of family, then the ex-head of family and his family members constitute the family of the new head of family.

Art. 747†

The head of family has duty to support all the members of his family.

Art. 748†

- (1) Possessions of a member of the family which he acquired in his name belong to his own property.
- (2) If the belonging is not to clarify, then it is assumed that the property belongs to the head of family.

Art. 749†

- (1) A member of the family may not change his domicile against the will of the head of family.
- (2) If a member of the family changed his domicile in violation of the foregoing paragraph, then the head of family may be released from the duty to support this member.
- (3) In case of the foregoing paragraph, the head of family may, specifying a reasonable period, demand the member to return to the domicile which he determined. If the member will not obey the demand, then the head of family may expel him from the family, unless this member is still a minor.

Art. 750†

- (1) A member of the family may marry, adopt a child or be adopted only if the head of family consents to it.
- (2) In case of marriage or adoption in violation of the foregoing provision, the head of family may expel the member from the family or reject his or her reentry into the family register within one year from the day of the marriage or adoption.
- (3) If a family member was expelled by the foregoing paragraph because he or she had adopted a child contrary to the provision of the 1st paragraph, then this adopted child enter the new house of the member in question.

Art. 762†

- (1) A person who has established a new family may abolish it and enter into another family.
- (2) A person who has succeeded to the position as head of family through the succession of patrimony may not abolish his/her family, unless he/she has obtained the allowance by the Court for the reason of succession or re-establishing of the main branch of the family or for other due reason.

III. Succession of the Patrimony**Art. 970†**

- (1) A lineal descendant of the person succeeded to will be a successor in the following order:
 1. the **nearest** descendant has priority to other descendants
 2. **male** descendants have priority to female descendants
 3. **legitimate** children have priority to other children [=illegitimate children]
 4. legitimate female children have priority to other children
 5. in case 4, the eldest [legitimate female] child has priority to all the other children
- (2) ...

◇ Some additional Comments to the Articles above

a) Incompetence of married major women

The first book of Meiji Civil Code provided four types of incompetence or limited capacity – minors, incapacitated persons, quasi-incapacitated persons and wives. In general, major single women could enjoy a full competence just like men, but they had to lose their legal capacity when they married. Married women were put under the control by their husbands just like minor children. Legal capacity of married women had to be narrowly limited in order to secure, so to say, the “supreme command” of their husbands in economic activities. However, it should be noted that such discriminating limitations of legal competence for married women were not “*unique*” provisions of “*Meiji Civil Code*”. They were rather “*common sense*” also in European countries.

b) Head of family, a “supreme commander” in the house

“*Meiji Civil Code*” of 1898 did not contain any article which defined the meaning of “*head of family*”. However, it is quite clear that this code silently took over the definition in the final version of “*Old Civil Code*” of 1890, namely “*supervisor of all family members*”. The head of family had duty and right to rule and maintain his family and house as *patrimony*. For this reason, freedom and rights of other members had to be put under restriction. Normally, the oldest male person was in charge of this position, and his eldest son alone should succeed to him. Other sons and female persons in the house had to stay in subordinated positions for their life time unless they separated themselves from father's house and found a branch house.

c) Problem of marriage

Such a dominant position of head of family caused sometimes serious difficulties and conflicts in the family if a member of family explained a will to marry someone and the head of family denied his consent to this marriage. Officially, they were not allowed to marry insofar as the head of family rejected to agree with it.

d) “*Illegitimate, but acknowledged children*” and “*fatherless children*”

“*Meiji Civil Code*” provided “*Monogamous marriage*” of course. However, it contained many articles which mentioned “*illegitimate children*”. Such children were categorized in two groups, namely children whom their father acknowledged as their children, and those who were fatherless. Compared to legitimate children, they had to live under harder conditions. In other words, “*Meiji Civil Code*” silently acknowledged the illegal practice of “*de-facto polygamy*” in the Japanese families.

Development of Legal Protection of “*de-facto marriage*”

Through the marriage, the female person had to leave her house and enter the house of her male partner. However, she could not leave her house if she was only child or the eldest daughter without any brother because she had to be the designated successor to the patrimony of her house. In such a case, the male person had to enter the house of the female partner. For this purpose, they proceeded in two steps. At first, the father of the female person adopted the male person as his child (this male person had to be free from charge to succeed to the head of family in his own house, in other words, he might not be the eldest son of his house). Now he became a family member of his female partner. Secondly, the father of the female person let them marry. The husband was officially put into the position to succeed to the head of family while the female partner was freed from this task and put under the control power of her husband. However, there was no possibility to marry if both of the partners were in charge to succeed to the head of family.

In such a way, many couples had to stay and live in so-called “*de-facto marriage*” (unregistered marriage), which led to several legal difficulties. The courts in Japan tried to solve these problems by way of judge-made law.

According to the result of a social research in 1925, 17% of men and 16% of women stayed “*unmarried*” in the family register under men and women who lived together in a single household (“*cohabitation*”). They did not

notified the official authority of their marriage even though they had begun to live together with their partners in a house, or they had already celebrated their wedding. This percentage increased to 20~30% in the lower social groups (industry workers, construction workers etc.). They lived in so-called "*de-facto marriage*". There were several reasons for this living style in Japan:

1) Cause 1 (Testing or trial period)

It was an established old custom among the Japanese that they did not notify the official authority of the marriage even if they had already celebrated their wedding. They waited and observed the new couple for 2~3 years. During this testing period, they tried to ensure that the new couple could really live together happily, or that the new wife could be well-adapted to the family relations of her husband, or they wanted to know even that she had really competence to bear children. After this testing period, they notified the authority of the marriage, or dissolved the "*de-facto marriage*" if the new couple could not pass this test. In the latter case, the family of the man let the woman return to her parents and gave her another opportunity to get married with another partner.

2) Cause 2 (Legal hindrance)

Some couples could not marry because both of them were head of family or in charge to succeed to it in each house. Some other couples could not marry because their families did not allow the marriage. According to the Meiji Civil Code, it was required to obtain consent of parents until the age of 30 years for man, 25 years for women. Furthermore, the consent of the head of family was always required.

3) Cause 3 (Social hindrance)

Under the lower social groups, as mentioned above, the percentage of *de-facto marriage* was extremely high. They did not have any time, any occasion to go to the registrar office to notify of their marriage. They did not know how to write the notification form and did not have any money for a judicial scrivener. On the other hand, they did not have any necessity to register their marriage because they did not possess any "patrimony"

According to the result of another social research in 1923, the half of the *de-facto marriage* was caused because of the legal hindrance. In such *de-facto marriage*, however, women were often disadvantaged. The courts had to develop some methods to protect interests of disadvantaged women in *de-facto marriage*:

a) Acknowledgement of Engagement as Contract

Japanese Civil Code does not have any provision about engagement. In this sense, a testing period after wedding ceremony could not have any legal meaning. In some cases, however, women were ejected from the family of their partners soon after this period even if they did not do anything wrong. They asked the Judiciary for protection of their rights. They insisted that the dissolution of the (de-facto) marriage was unjust, and accused their partners for damages arising from non-performance or breach of contract. In the first decade after the enactment of the Civil Code, the Supreme Court of Japan rejected their accusation because engagement was not provided as contract in the Civil Code.

- In 1911, in a case in which a man used a fraud act to persuade a woman to live together with him, the Supreme Court judged that the man was liable for damages because of *tort (unlawful act)*. In this judgement, the Supreme Court showed the concept that interests of women who were unreasonably ejected after the testing period could be legally protected insofar as the other side had used some unlawful methods. However, only a small part of cases could be covered by this concept.
- In 1915, in a case in which a woman was unreasonably ejected 2 days after the wedding celebration, the Supreme Court declared a new doctrine that an engagement was a true *contract* with intention to marry in future. If one party has breached this contract without any reasonable ground, then he or she is liable for damages. Indeed, the Supreme Court had long time hesitated to accept such a form of "cohabitation" because judges doubted whether it was contrary to the "*Public Order and Good Moral*" or not. Finally in this

judgement, the Court acknowledged this form of “*cohabitation*” in testing period as a legal relation which should be officially protected.

- In 1919, the Supreme Court slightly expanded the scope of protection with the new doctrine. In a case in which a man and a woman began to live together without any wedding celebration, the Court judged that it was not essential for the protection of engagement if any formal ceremony was celebrated or not. In another case in which the man was minor at the beginning of their “*cohabitation*”, the Court judged that it should be confirmed that both parties possessed intellectual capacity enough to act reasonably; but legal requirements for marriage (majority, consent of parents and head of family etc.) were not relevant to the engagement (!).

However, even this new doctrine could not cover cases in which parties did not have any intention to marry in future. Engagement could be legally protected just because it was a preparatory step towards legal marriage. “*de-facto marriage*” or “*cohabitation*” itself could not be legitimated by this doctrine of engagement. The other half of *de-facto marriage* cases, namely unmarried couples due to legal hindrance, were still put outside of judicial protection. But the Judiciary found some approaching points towards official acknowledgement of *de-facto marriage* itself as legal relation in certain cases:

- Already in 1919, in a case in which a woman in testing period had a sexual relation with another man, the Supreme Court judged that this person was liable for damages because of tort. This judgement confirmed the *duty to keep chastity* each other also in case of *de-facto marriage*, and implicitly acknowledged this form of marriage as a legal relation which could have certain legal effects against third person.
- In 1921, in a case in which a woman demanded return of “unjust enrichment” from her partner after dissolution of “*cohabitation*” under an agreement, the Supreme Court officially acknowledged that the both partners even in “*cohabitation*” stay under the *duty of mutual aid and corporation*. Furthermore in 1922, in another case, the Court confirmed also the *duty to support other partner* just like in legal marriage.
- In 1930, in a case in which a woman escaped the house of her partner because she was unbearably forced to work by the family, and in a case in which a woman was ejected because she terribly behaved and caused unreasonable difficulties to other family members, the Supreme Court judged that the cancellation of engagement (dissolution of *de-facto marriage*) had a reasonable ground and was lawful. The Court founded these judgements on No. 5, Article 813† (*Reasons for judicial divorce*) – “Husband or wife can bring an action for divorce if he or she was unbearably ill-treated or seriously libelled by the other spouse”.

Despite of such efforts of the Judiciary to legitimate *de-facto marriage*, there was no possibility of legitimation if one party of “*cohabitation*” – normally male person – was already married with third person (*de-facto marriage as bigamous marriage*). In such a case, the other party – normally female person – could not seek any protection by the Judiciary even if she was defrauded, unbearably ill-treated and misused, or unreasonably ejected. In other words, “*immoral conducts*” of men were protected by the Judiciary through its inaction. This was a serious paradox of the legal moralism which the Judiciary in Japan could not clear up under the Meiji Civil Code.

◇ Epilogue

de-facto marriage could be partially acknowledged rather in the social welfare than in civil law. The percentage of *de-facto marriage* was, as mentioned above, extremely high in the lower social classes. After the foundation of Soviet Russia, the Japanese government was very afraid of socialist influence and expansion of labour movement in these social sectors. The government realized that life styles of those people had to be officially confirmed.

b) Reform in the Field of Social Welfare Law

In 1923, the Parliament passed the Act for the Reform of Factory Law. The new law gave *de-facto wives* the

right to receive financial support and compensation for damages if their *de-facto husbands* died from accidents or diseases in working place. However, they were positioned to the third rank after ascendant and descendants of husbands. Similar provisions were introduced also in other laws on social welfare, e.g. “Act on Financial Support for Mine Workers” (1926), “Enforcement Ordinance for the Act on Financial Support for Industrial-Accident Victims” (1931), “Enforcement Ordinance for the Act on Payment of Reserve and Retiring Benefits” (1936), and so on.

- In 1930s, Japanese society was rapidly militarized, and the Imperial Army expanded the front widely in China. Many soldiers left *de-facto families (wives and children)* in home country and were killed in war field. Such families often fell into poverty because they did not have the right to receive financial support for war victims. Also some members of the government, therefore, insisted that *de-facto marriage* should be equally treated to formal marriage in regard to financial support for war victims. But the military side denied such a measure in order to protect the “Honour of Imperial Army and Navy”. The government could enact merely the “Act on Postal Notification and Mandate of Notification of Marriage” (1940). According to this law, marriage could be notified also after the death of one spouse. After all, *de-facto marriage* itself could not be legitimated under the “Meiji Civil Code”.

Soon after the unconditional surrender of Japanese Empire in 1945, the GHQ (General Head Quoter of the Allied Forces) issued the order to totally revise the 4th and 5th Book of Civil Code (Law of Family and Law of Succession). All provisions about head of family had to be deleted in the new family law of 1947. The “I-E”-System was finally abolished, and the legal hindrance of marriage in regard to the consent of head of family disappeared. But the problem of *de-facto marriage* itself was not solved yet.

c) Acknowledgement of *de-facto marriage as quasi-marriage*

In 1958, in a case in which a woman (*de-facto wife*) demanded payment for pain and suffering because her partner (*de-facto husband*) had unjustly dissolved the *de-facto marriage* after she became severely ill from hard work during the cohabitation, the Supreme Court confirmed his liability because of *tort*. According to the judgement, so-called “*de-facto marriage*” should be legally protected as one type of cooperative relations because it has almost same meanings for the parties as formal marriage except for official notification. For the first time, the Supreme Court declared the “*doctrine of quasi-marriage*”.

- In 1987, even in a case in which a *de-facto marriage between a woman and a married man* had to be dissolved because the man began with a sexual relationship with another woman (second *de-facto wife*), Tokyo District Court confirmed the accusation from the first *de-facto wife* and judged that the man and the second *de-facto wife* should pay compensation for pain and suffering because of tort liability. After the declaration of the “*doctrine of quasi-marriage*”, the Judiciary often protects also such bigamous cases *insofar as the formal marriage is already broken down*.

In general, the Judiciary uses the “*doctrine of engagement*” in order to settle disputes just between both parties of *de-facto marriage*, and it uses the “*doctrine of quasi-marriage*” in order to protect interests of parties against violation by third person. However, the protection of quasi-marriage is not possible if it is prescribed in laws or other regulations that the person must be a “*spouse*” or “*successor*”. This is a **fundamental limitation of “judge-made law”**.

Root of the Japanese Imperialism and Agrarian Reform

A Report on the Workshop
 “War, Violence, Restoration: Lessons learned through the past
 projecting to the present and future”
 November 26th, 2005
 by
 Shiori Tamura (Faculty of Law, Thammasat University)

Statement of Prime Minister Murayama (1995)

10 years ago, in the year of the 50th Anniversary of the End of World War II, the House of Representatives of Japan passed a special resolution and declared in it;
“... Remembering colonialism and aggression in the recent history of the world, we regard pains which the people in other countries, especially those of Asian nations had to suffer from such acts of our country. We sincerely express herein our deep regret for them ...”. On the day of the surrender in the same year, Prime Minister Murayama announced an official statement and amplified the intention of this resolution more clearly; *“... During a certain period in the not too distant past, Japan, following a mistaken national policy, advanced along the road to war, only to ensnare the Japanese people in a fateful crisis, and through its colonial rule and aggression, caused tremendous damage and suffering to the people of many countries, particularly to those of Asian nations. In the hope that no such mistake be made in the future, I regard, in a spirit of humility, these irrefutable facts of history, and express here once again my feelings of deep remorse and state my heartfelt apology. Allow me also to express my feelings of profound mourning for all victims, both at home and abroad, of that history ...”*.

10 years have already passed since that time. But, I must wonder to myself; have we seen any easing of the strained international relations between the former victim nations and Japan in these years? Unfortunately, our answer is “No”. The current Japanese government is probably of the opinion that this issue has been completely cleared with the special resolution and statement in 1995. I guess so because the Japanese government has ceased to show its sincerity to accept any criticism from Chinese and Korean governments especially regarding the “Yasukuni-Shinto-Shrine” and “Schoolbook-Screening” issues. Is this an arrogance of the Japanese people, or even a symptom of a “Rise of New Imperialism” in Japan?

Discrepancy regarding Understanding of the History

Behind this conflict between the former victim nations and the aggressor, we can recognize an almost unrecoverable discrepancy regarding understanding of the history. The people of the victim nations see simply a “rise of another imperialism” in the development of the Japanese society since the middle of 19. c. while the majority of the Japanese understand their own modern history as a result of inevitable fatality, in other words, a “struggle for survival” in the age of colonialism. In their sight, they themselves were “victims of the history”. Of course, they would not deny the cruelty of the Japanese aggression during the war, but strangely enough, they do not suffer from any painful guilty conscience as wrongdoers or offenders. The inscription on the monument in the Peace Memorial Park of Hiroshima would symbolize this typically Japanese historical consciousness of the Postwar period; *“Let all the souls here rest in peace. We shall not repeat the evil”*. “We shall not repeat *the fault*” in the original Japanese word. Anyway, what was the evil or fault, the aggressive invasion or the atomic bombardment? And whose fault was it, of the Emperor, the commandants of the Imperial Army and Navy, or American President Truman? Nothing is clear. It is rather a sobbing confession of a “lost

sheep". The majority of the Japanese believes that all the killed or injured people in Asian countries and fallen soldiers were victims of the fearful storm of international politics. In such a perception, also the executed war criminals were not exceptions of the "victims of the history". Some Japanese politicians are firmly convinced that the existence of the "Yasukuni-Shinto-Shrine" is completely justifiable from this perception.

Fundamental Questions

However, which is a correct understanding of the Japanese modern history, a "rise of another imperialism" or a "struggle for survival"? We have now reached the fundamental questions over the political and social development of Japan since the middle of the 19. c.;

1. Mr. Murayama spoke of "a mistaken national policy" in his official statement. To exactly say, what was the fatal mistake of Japan?
2. Was the "Japanese Imperialism" really an "inevitable fatality", or probably avoidable?
3. And what was a real reason or the root of the "Japanese Imperialism"?

Postwar Reforms under the Occupation

Before we go into these difficult questions, I would like to mention here another related question regarding the comprehensive postwar reforms which were implemented under the rule of the occupation powers, namely;

Which reform policy was the most effective one for the ultimate dissolution of the Japanese Imperialism?

On August 15th, 1945, Japan accepted the "Potsdam Proclamation" and surrendered without any condition. On August 30th, General Douglas MacArthur, Supreme Commander for the Allied Powers (SCAP), arrived in Tokyo. Since then, almost the whole political, economic and social structures underwent drastic change and democratization in accordance with the "Directives" from the General Headquarters of the Allied Forces (GHQ).

The first tasks of GHQ were, of course, complete disarmament of Japan and prosecution of war criminals. In October 1945, GHQ issued a directive for the "*Five Basic Reforms*" toward total democratization of the Japanese society;

1. Emancipation of women
2. Legalization of labour unions
3. Democratization of education
4. Abolishment of political autocracy and repression system
5. Liberalization of economic system

Agrarian Reform

This was the beginning of the postwar reform under the occupation, but this directive did not include any specific order about emancipation of farming land. The Japanese government meanwhile began with the preparation for the own agrarian reform program. General MacArthur thereupon announced his "*Memorandum on Agrarian Reform*" on December 9th, 1945. In this statement, General MacArthur clarified his basic perception that the feudalistic social structure in rural areas was just the root of the Japanese militarism, and called for a final dissolution of the traditional tenant system of farming land. On December 18th, the Japanese Diet passed the so-called "*First Agrarian Reform*"

Measures". GHQ, however, rejected it and demanded more radical measures. On October 8th, 1946, the Japanese Diet passed the so-called "*Second Agrarian Reform Measures*" with consent of GHQ;

1. Prohibition of landownership for absentee landlords and rigid limitation of tenanted land for farming landlords (maximal 2.45 acres in the mainland, 9.8 acres in Hokkaido)
2. Compulsory acquisition of tenanted land by the state and its distribution to former tenant farmers (up to 7.5 acres for each farming household)
3. Restriction of tenancy rent and prohibition of rent paid in kind
4. Contract in writing as a requirement for remaining tenancy relations

This reform was rapidly implemented and accomplished in 1950. Social relations in Japanese rural areas were dramatically changed. The "landlords" who had dominated farming communities since the Shogunate Regime, disappeared suddenly. In my sight, this reform could perform a more immediate and effective impact for the improvement of life style and mentality under the majority of the Japanese than other political or economic reform measures. Moreover, it was a fundamental adjustment to the modern Japanese history since the second half of the 19. c. In order to prove my opinion, I would like to go back to the starting point of the modernization under the rule of Meiji Regime and follow the establishment of the Japanese Imperialism.

Land Tax Reform in 1871

After the defeat of the Shogunate Regime in 1868, one of the most important measures for the modernization was the introduction of the modern legal concept of landownership. In 1871, the new government under the rule of Meiji Emperor issued the certificate of land title and officially determined the land price for each region as basis for the new land tax system. In this reform, so-called "Land Tax Reform", the Meiji Regime granted the landownership to the former landlords and legitimated the tenancy farming system from the feudal period. Accordingly, economic conditions of the Japanese farmers became rather worse than improved under the new regime. *THIS IS THE INITIAL MISTAKE OF JAPAN* in my sight. Tenant farmers, that is the majority of the population, had to suffer from a double exploitation, namely land tax ($\geq 30\%$) and tenant rent ($\geq 30\%$). For the Meiji Regime, land tax collected from tenant farmers was the main financial resources for its modernization and industrialization policy.

Popular Movement for Freedom and Democracy (1870s -)

Groaning under a heavy burden of land tax, poor farmers began to join together and initiated a nationwide protest movement against the government. Sometimes, it escalated into a bloody collision with the police forces. Moreover, another social group took sides with rebellious farmers, namely former Samurai-warriors who could not enjoy any opportunity under the new regime. They together set up a so-called "*Popular Movement for Freedom and Democracy*" and founded *political parties*. They demanded a constitution, a parliament, and voting rights. Meiji government tried every suppression measure against this democracy movement, but unsuccessfully. The regime fell into a serious crisis.

Countermeasures against Political Parties

In 1881, Meiji Emperor officially promised the promulgation of a constitution and the convening of a national assembly within a decade. The government started then to develop a system of countermeasures against possible influence from political parties in

a coming parliament:

1. Establishment of supreme decision-making organs (Cabinet, New Peer, Privy Council) outside of constitution
2. Separation of supreme command and military affairs from conventional political affairs
3. Establishment of supervision and direct control over the population exercised by Imperial Army and Navy (National Shintoism, ideological education and military training in school)

With these measures, the government strived to purge political parties from the decision-making process. THIS IS THE SECOND MISTAKE OF JAPAN in my sight.

Limited Competence of Prime Minister

But, who should exercise the real decision-making power? Just on this question, the governmental leaders were split into two groups, namely Realists and Extremists. The Realists pursued a strong leadership of Prime Minister and tried to detach the Emperor from real politics while the Extremists dreamed of the Emperor as a heroic figure in real politics. This dispute inside the government could not be settled down. Finally, the Realists had to give away a leading position of Prime Minister. Accordingly, the possibility of Emperor's intervention in politics became more likely. So, the Constitution of the Empire of Japan (1889) possessed only Article 55 on Ministers of State and nothing about Prime Minister and Cabinet. As a result, the predictive power of Prime Minister over his Cabinet had to be very limited. Later in 1890s, the Emperor deprived Prime Minister of the competence to appoint Ministers of the Imperial Army and Navy in return to his permission for the first party cabinet in Japan. Together with the Articles on the Imperial Prerogatives and Supreme Command, *an extraordinary tight connection between the Emperor and Imperial Army and Navy* was hereby established just outside of the constitutional democracy. Even Prime Minister could not argue against both military ministers. THIS IS THE THIRD MISTAKE OF JAPAN in my sight. Until the beginning of the 20th century, *a totalitarian power structure* from the Emperor down to the common people through the Imperial Army and Navy was accomplished.

Initial Stage of the Imperialism

In the international scene, the Meiji government had pushed an active diplomacy to China and Korea from the initial stage of its rule. In 1874, Japan sent troops to Taiwan. In 1876, Japan forced Korea to conclude an unequal treaty of commerce and began with political intervention in Korean internal affairs. In 1879, Japan annexed the Kingdom of Ryukyu. However, confronted by the nationwide escalation of violence under the population (Popular Movement for Freedom and Democracy), this active diplomacy probably gained another motive force, namely to pursue economic opportunities for the poorest segment of the population in order to cool down their violent actions. As a matter of facts, new political leaders of the democracy movement never protested against such aggressive diplomacy of the government, they rather claimed to exercise more powerful pressure to China and Korea. THIS IS ANOTHER MISTAKE ON THE SIDE OF THE DEMOCRATIC WING. In 1888, backed up by the support from political parties, the government decided to reorganize the whole Imperial Army and Navy for foreign expedition. When the first session of the Imperial Diet was convened in 1890, Japan was ready to start an aggressive war against China.

Second Stage of the Imperialism

After the Sino Japanese War (1894 - 95) and the colonization of Taiwan, Japanese

Imperialism entered its second stage. In 1898, the Emperor permitted the formation of the first party cabinet which represented the interests of the landlords, in return, this cabinet boosted the military spending with consent of the Diet. *The Cabinet, the Diet, the Imperial Court, and the Imperial Army and Navy, they all banded together and prepared for the next war against Russia.* After the Russo Japanese War (1904 - 05), Japan completely annexed Korea. THESE ALL WERE, of course, THE FOURTH MISTAKE OF JAPAN. At this point, the initial expansion policy planned by the Meiji Regime was accomplished. In parallel to this development, the parliamentary cabinet system was established as unwritten law, and common people began to claim universal suffrage. After the World War I, Japan entered the ranks of industrial nations, and industry workers began to organize themselves. The Japanese people enjoyed, so to say, a short period of “*Indian Summer of Democracy*” until “*Black Monday*” in 1929.

Coincidence of Democracy and Imperialism

When we take a look back on the Japanese history from 1870s to 1920s, we find a bizarre and complex development of Democracy and Imperialism. They were tightly coincided each other from the beginning of the modernization. The Japanese experienced these 50 years as a period of “*Progress to Constitutional Democracy*” while the neighbouring nations could recognize only a “*Rise of Japanese Imperialism*”.

Final Stage of the Imperialism

The “*Great Depression*” in 1929, however, brought an end to the time of Constitutional Democracy in Japan. Already soon after the World War I, the Imperial Army in Korea and North China (Manchuria) had begun to arbitrarily perform military activities without consultation to the government. In 1931, the Imperial Army suddenly occupied Manchuria and established a puppet-state “*Manchukuo*”. Showa Emperor (*Hirohito*), however, authorized this military ambition. The Japanese government lost completely its control over the Imperial Army. On May 15th, 1932, Prime Minister *Inukai* was assassinated during the attempted coup by the extremist officers of the Imperial Navy. The party cabinet fell down. The Emperor assigned a military cabinet. The Japanese Imperialism entered hereby its third and last stage. In the following years, all the constitutional institutions ceased to work. Instead, a monstrous war machine of that totalitarian power structure ruled everything in Japan. THESE ALL WERE FATAL ERRORS OF JAPAN. And further numerous errors followed until the atomic bombardment in Hiroshima and Nagasaki.

Dissolution of the Imperialism

After the disarmament and the destruction of the totalitarian power structure under the rule of the occupation powers, the constitutional democracy of Japan came back to life, and a peace-loving regime could be rapidly established. But, the initial mistake of Japan was that “*Land Tax Reform*” in 1871. Accordingly, the end of the Japanese Imperialism had to be set with the “*Agrarian Reform*” in 1948 - 50. During the time of the Imperialism, the poverty problem of the Japanese tenant farmers had continuously worsened, and their protest movement against the government could never be suppressed until the military regime took over the political power. Through the “*Agrarian Reform*” after the defeat of the Japanese Imperialism, the peaceful life in rural areas was finally restored. They had never to send their sons to any aggressive war more, and we will never repeat these fatal errors in the modern history of Japan again.

Now, to the closing words of this speech; *Internal peace is the best contribution to international peace.*

Estimated Numbers of Victims during the War in Asian Region

China	at least	10,000,000
Korea	at least	200,000
Vietnam, Laos, Cambodia	at least	2,000,000
Indonesia	at least	2,000,000
Philippine	at least	1,000,000
India	at least	3,500,000
Malaysia, Singapore	at least	5,000
Myanmar	at least	50,000
New Zealand		11,625
Thailand		unknown
Maldives		unknown
Polynesian islands		unknown
Sakhalin, Kuril islands		unknown
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Total	at least	18,820,000

Japan	at least	2,565,878
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Part 3

The current Constitution and the Judicial Review

Postwar Policy by the Allied Forces in Japan

On 15th August in 1945, the Emperor declared the acceptance of the “Potsdam Declaration” under only condition to uphold the “*Kokutai*”. The Allied Forces agreed to this condition. Eventually, the Imperial Army and Navy surrendered. The Allied Forces, mainly the American Forces, occupied the whole Japan soon and began with its occupation policy.

Above all, “Abolishment of *Tenno* system” was never required by the Allied Forces. Indeed, the most part of the Japanese people had been greatly concerned about the *safety of the Emperor*. They were ready to accept any directive of the occupation army in order to retain the *Tenno* system and to avoid any accusation of the war responsibility against the Emperor. This seems to be a real reason why the Japanese did not try any resistance against the occupation policy. In other words, they did not understand what the occupation army intended to achieve through its policy (total reorganization of the Japanese society). They were very surprised when the GHQ declared its major reform plans.

Compared with the German case, *the question of the war responsibility of the Japanese Emperor* has more complicated characters. Hitler was a real despot. Not only Jews, but also many German people suffered from the barbarism of the Nazis. After all, Nazis was merely a political party. But in Japan, the entire Imperial Army and Navy promoted the expansion policy and performed the war against USA and England. In a certain sense, they were never selfish. Moreover, the Emperor was always “clean and sacred” for the Japanese people. They did not recognize how seriously their Human Rights had been violated and what crimes had been committed in Asian countries in Emperor's name. They felt rather responsible for the difficulties to the Emperor. In this consciousness of the responsibility to the Emperor, the Japanese people identified themselves with those who were really responsible for the war (war criminals). Therefore, the Japanese people were (or “*are still*”) incompetent to proceed with the prosecution of the war criminals.

Supreme Goals of the Occupation Policy

1. To remove military threats to the safety of the USA and the international peace
2. To remove political, legal, social and economic factors which had blocked democratization in Japan, and to establish a democratic and peaceful regime before the socialism and communism would gain popularity among the Japanese people

Main Reform Measures for the Total Reorganization of the Japanese Society

1. *Prosecution of the war criminals* and banishment from public positions of those persons who were responsible for the war
2. *Demilitarization*
 - a) Dissolution of armed forces (Imperial Army and Navy)
 - b) Closing all military sectors in industry (ex. ship and airplane building)
3. *Democratization* of political and social structures (“*Five Major Reforms*”)
 - a) Abolishment of all systems to oppress Human Rights, especially freedom of speech, publishing, meeting and religion
 - b) Emancipation of women and equalization of both genders (especially *Family and Succession*)
 - c) Encouragement of labor unions
 - d) Dissolution of authoritarian structures in public organizations and rural communities
 - e) Establishment of a democracy-oriented education system
4. *Liberalization of economic structures*
 - a) Dissolution of 15 conglomerates and division of monopoly firms
 - b) Land reform to create independent farmers (dissolution of tenant farming and rigid limitation of tenant rent)

Rapid Proceeding of Democratization towards a New Constitution

Aug. 1945	Begin of the dissolution of the Imperial Army and Navy
Sept.	Directive to arrest all suspected war criminals
Oct.	Declaration of “ Five Major Reforms ” Abolishment of the “ <i>Law on the Maintenance of Public Security</i> ” Directive of “ Dissolution of 15 conglomerates ”
Dec.	Directive for the “ Agrarian Reform ” Enactment of the “ Labor Union Law ” Directive to suspend all lessons on moral, history and geography in schools
Jan. 1946	Declaration of “Human Emperor” Begin of the banishment of all responsible persons from public positions
Feb.	The first Agrarian Reform (planned); <i>Land owners should be forced to sell their land to its tenant farmers. Trading conditions should be agreed through the negotiation between owners and tenant farmers.</i> This reform plan could not be enforced because GHQ found it <u>not radical enough</u> . On Feb. 3, MacArthur decided the “ Three Basic Points ” for a new Constitution (Emperor as the head of the state, Renunciation of war, Abolishment of Feudalism). Prime Minister <i>Kijuro Shidehara</i> (幣原喜重郎) brought his draft amendment to the Constitution to General <i>MacArthur</i> in GHQ. <i>Shidehara</i> had thought that some partial changes in the constitutional articles would be enough, for example, limitation of the supreme power of the Emperor. However, GHQ rejected this draft and announced its own draft. Negotiation between both sides for a new Constitution began.
Apr.	The first general election under the genuine universal suffrage
May	Opening of the 90. session of the Parliament under the Meiji Constitution; Discussion about “ <i>Amendment to the Constitution</i> ”, in reality drafting work of <u>a new Constitution</u> , began.
Sept.	Enactment of “ Labor Relations Adjustment Law ”
Oct.	The second enforcement of the Agrarian Reform (Compulsory Purchase); <i>the state bought tenanted land from its owners for fixed price and sold it to tenant farmers for a low price.</i>
Nov.	Promulgation of the “ Constitution of Japan ”
Mar. 1947	Enactment of “ Fundamental Law of Education ”
Apr.	Enactment of “ Labor Standards Law ”, “ Anti-Monopoly Law ” and “ Economic Decentralization Act ” (Antitrust Act) Enforcement of a new school system in American style (6-3 school system)
May	Enforcement of the “Constitution of Japan”
Sept. 1951	Treaty of Peace with Japan in San Francisco (the end of the occupation) Treaty of Mutual Cooperation and Security between the United States and Japan

Current Constitution of Japan (1947)

Main Principles of the new Constitution of 1947

- | | |
|-------------------------------|------------------------|
| A) Sovereignty of people | Preamble, Art. 1 |
| B) Protection of Human Rights | Preamble, Art. 10 - 40 |
| C) Pacifism | Preamble, Art. 9 |
| D) Rule of law | |

« Reference 1 »

What does the Principle “Rule of Law” really mean in its modern sense?

1. Protection of Human Rights
2. Division of State's Power (Legislative, Executive, Judiciary)

In the Western European countries, the modern democracy (“sovereignty of people”) was achieved through hard struggles against the executive power of absolute kings. Hence, the legislative power (“Parliament”) has a prior position to the other two powers.

According to this tradition, the exercise of Executive power should be strictly controlled through regulations by the legislative power, and Judiciary should apply laws mechanically.

In the USA, however, its independence was achieved through the struggle under the strong leadership of the Executive (“President”) against the Legislative of colonial masters (England).

3. Independence of Judiciary and Judicial Constitutional Review

This is rather an American tradition. Independence of the Judiciary in the European countries was quite weak. “Judicial *Constitutional* Review”, namely the control power of the Judiciary over the Legislative and the Executive was established as “judge-made law” in the USA (1803).

« Reference 2 »

Two Models of Judicial and Constitutional Review

1. Abstract Normative Control (European style)

An extraordinary court will be founded for this task. This court has a right to examine all legislatures and exercise of the executive power in regard of their constitutionality. This control may be exercised independently from actual and concrete case.

2. Actual and Specific Control (American style)

Any ordinary court has a right to examine constitutionality of legislations by the Legislative and activities of the Executive, but only when this control is necessary in a specific case.

Pacifism in the New Constitution of 1947 (Art. 9) and Judicial Constitutional Review

- A) Renunciation of “*war as a sovereign right of the nation and as means of settling international conflicts*”;
- B) Prohibition to maintain any “*land, sea, and air forces as well as other war potential*”;
- C) Abandonment of “*state's right of aggression*” (right to declare war to other countries).

Crucial Issue 1 What is “land, sea, and air forces as well as other war potential”? Should be foreign troops in the Japanese territory included in it?

Crucial Issue 2 Should Japan abandon also the right to defend itself against aggressions opened by other countries?

The Japanese government has insisted that Art. 9 provides to abandon the right to aggress other countries as means of settling international disputes, but not the right of self-defense. According to this opinion (this is also the ruling opinion in Japan), the word “war” in Art. 9 means only “aggressive war”, “preemptive attack”, and “invasion”; military activities for self-defense due to foreign aggressions are not implied in “war” in this sense. Therefore, any military potential which would be required and necessary for the effective self-defense in case of expected aggressions should be excluded from “armed force” in Art. 9.

The government is of the opinion that “the Self-Defense Forces” (founded in 1954) should be perfectly constitutional in so far as its scale, formation, and its equipments are kept within the scope which is really necessary and reasonable in the actual international security situation.

This interpretation of Art. 9 could be very realistic, but can not weep away all unclarity and suspicion of violation of Art. 9.

Indeed, under the current Constitutional Review (Art. 81), there is not any effective control and supervision system as “judicial review” in regard of necessity and reasonableness of the scale, formation, and equipments of the Self-Defense Forces. Such issues are discussed and regulated in the Parliament, but it is not any true “*Judicial and Constitutional Review*”. It is merely a “self-control” of the Legislative. The judicial authority for this purpose must be independent from the Parliament according to the principle of Rule of Law.

Crucial Issue 3 Another problem: International military alliance and “Collective Defense”

International military alliance such as "*Treaty of Mutual Cooperation and Security between the United States and Japan*" in 1951, 60 and 70 are subjects which must be taken under the control of Art. 9. Also in this point, the Japanese government insists on the constitutionality of these treaties and argues that these treaties were concluded only for the security of Japan and not for any aggression war.

Normally, international military alliance obligates its partners to the bilateral duty of defense. But such bilateral duty of defense would be for Japan a violation of Art. 9. For example, suppose that a certain country attacked the USA, and the Japanese Self-Defense Forces participated in the battle against this country to defend the USA. This military activity would mean, however, one case of “preemptive attack” or “aggression”, because this country has not attacked Japan yet.

For this reason, the Japanese government is of the opinion that Art. 9 does allow the right of Self-Defense, but prohibit any “Self-Defense for collective security”. Therefore, the security treaty between the USA and Japan obligates the Japanese government to offer grounds and ports for the US. Army and to cooperate with it for the internal security and international peace in the East-Asian region, but the Japanese government does not have any duty to defend the territory of the USA.

Such a method of “Unilateral Duty”-Solution could work in the actual relationship between the USA and Japan, but not in general. In the future, there will be probably certain cases in which Japan will have to conclude further military security treaties with other Asian countries. In such cases, other alliance partners would not accept this “Unilateral Duty”-Solution.

Judgment of the Supreme Court, October 8, 1950

Case: In 1950, according to the request of the USA, the Japanese government founded “*Police Auxiliary Force*”. An opposition party brought an action to the court against the government for the violation of Art. 9. They argued that the Police Auxiliary Force was a “*war potential*” in the sense of Art.9, Paragraph 2.

Judgment: The Supreme Court rejected this action with the argument that there is not any case. According to the understanding of the Supreme Court, the competence of the Judiciary should be limited to judge specific legal cases. If the court would decide on the Constitutionality of a certain legislation even if there is not any actual legal conflict, then it would mean that the Court would make a decision in advance on merely expected cases in the future. In such a judgment, the Court would exceed its authority and competence under the current Constitution (Art. 81).

Judgment of the District Court in Tokyo, March 30, 1959

Case: Soon after the Allied Forces (49 countries) and Japan concluded the “*Peace Treaty with Japan in San Francisco*” in 1951, the USA and Japan signed “*Treaty of mutual cooperation and security between Japan and the United States of America*”. Based on this agreement, the US Forces continue to maintain their military bases and ports even after the end of the occupation. In 1957, the US Air Force planed to extend the air force base in “*Sunagawa*” Town in Tokyo. 7 protesting demonstrators were arrested when they cut the wire netting and entered the base. They were accused by the *Special Criminal Act* which was enacted according to the USA-Japan Security Treaty mentioned above. In the first instance, the accused persons insisted that they were innocent because the Security Treaty and the *Special Criminal Act* were unconstitutional. The main question is if such foreign military powers in the Japanese territories would be also included under “*war potential*” in the sense of the Art. 9 or not. In this case, following two questions were discussed:

- 1) the question of the competence of the Judiciary to control constitutionality of international treaties;
- 2) the question of the constitutionality of the stationary troops of the USA

Judgment: The District Court in Tokyo declared the innocence of these persons because the USA-Japan Security Treaty was against the Art. 9, and the *Special Criminal Act* violated the Art. 31 of the Constitution (“Due Process”).

Judgment of the Supreme Court, December 16, 1959

Against this judgment of the District Court in Tokyo, the public prosecutor brought the direct appeal to the Supreme Court.

Judgment: The Art. 9 of the Constitution does not declare the renunciation of the right of self-defense, which is an essential right of a sovereign country by nature. *The USA-Japan Security Treaty* is even an effort to secure the sovereignty without maintenance of “*war potential*”. In this sense, this treaty does not violate the Art. 9.

In general, the Judiciary has also the competence to control constitutionality of international treaties. However, the *USA-Japan Security Treaty* is a highly political matter. So, the control about such issues should be done by the people themselves through their political decisions. The Judiciary may examine and decide such a question only when its unconstitutionality or illegality is quite obvious to everybody.

The stationary troops of the USA in Japan might be “*aggressive*” in the sense of Art. 9, but they do not stand under the command channel of the Japanese government. So, the question of their constitutionality of such foreign troops is not any subject of the Constitutional Review by the Japanese Judiciary.

Judgment of the District Court in Sapporo, March 29, 1967

Case: The Self-Defense Agency opened a maneuvering ground for the Ground Self-Defense Force in a small town named “*Eniwa*” in *Hokkaido*. The relationship between the Ground Self-Defense Force and the local residents was highly strained. One day, two persons entered the ground without any permission, and cut the telephone cables to disturb the maneuver. They were arrested and accused by the Art. 121 of the *Self-Defense Forces Act*. This article provides that a person who damaged, destroyed military equipments for the defending activities of the Self-Defense Forces shall be punished with penal servitude for not longer than five years or a fine of not more than fifty thousand yen.

Judgment: The District Court rejected the accusation and declared the innocence of the two persons with the argument that the telephone cables did not belong to the “*military equipments*” which should be protected with Art. 121 of the *Self-Defense Forces Act*.

Judgment of the District Court in Sapporo, September 7, 1973

Case: The Self-Defense Agency planned to build an air force base for the Air Self-Defense Force in a small village named “*Naganuma*” in *Hokkaido*. But the forest in this area was protected under the “*Act for the Prevention of Floods*”. The Self-Defense Agency requested the Ministry of Agriculture, Forestry and Fisheries to exclude this area from the protection. On this request, the Ministry of Agriculture, Forestry and Fisheries decided to revoke the protection for this area.

The local residents protested against this decision and brought an action to the Court. They insisted that the Self-Defense Forces were “*war potential*” in the sense of Art. 9 of the Constitution, and the founding of the air base would also violate the “*Right for peaceful life*” which was mentioned in the Preamble of the Constitution.

Judgment: The District Court in *Sapporo* decided that the Self-Defense Forces were really “*war potential*” in the sense of Art. 9 of the Constitution, and the decision of the Ministry of Agriculture, Forestry and Fisheries was illegal.

Judgment of the Appellate Court in Hokkaido, August 5, 1976

On the appeal from the Ministry of Agriculture, Forestry and Fisheries, the Appellate Court in *Hokkaido* declared that the accusation of the local residents should be rejected because the safety from floods in this area was already secured through alternative measures, and the local residents did not have any reason to accuse the Ministry.

Furthermore, the Court showed its opinion in regard to the constitutionality of the Self-Defense Forces:

- 1) The founding of the Self-Defense Forces was a highly political act of the government. Such issues belong to the matter of the Legislative or the Executive power of the State. After all, the question about the constitutionality of the Self-Defense Forces should be decided by the people themselves. The Judiciary could examine and decide this question only when its unconstitutionality or illegality is quite obvious to everybody.
- 2) The wording of Art. 9 allows a wide range of interpretation. So, the question about the right of self-defense — if the Constitution prohibits also this right or not — can not be decided clearly.
- 3) Regarding to their scale, formation, and equipments, the current Self-Defense Forces can not be considered as clearly aggressive “*war potential*”.
- 4) Therefore, the unconstitutionality of the Self-Defense Forces is not obvious enough to legitimate any judicial judgment.

Judgment of the Supreme Court, September 9, 1982

The Supreme Court rejected the final appeal from the local residents in *Naganuma* with the same argument as in the judgment of the Appellate Court in *Hokkaido*.

(I) Origin of Judicial Constitutional Review, European model and American model

- In European countries, democracy was established through the struggle between despotic kings and Parliament. Therefore, European people thought that the Legislative (Parliament) represented the sovereign will of the people itself. Legislations by the Legislative were expression of this sovereign will, and nobody had any right to criticize them. The Legislative was so-to-say, *a brain*, the Executive and the Judiciary were *a body* which works on commands from the brain. There was no space for any judicial control of constitutionality of legislations.
- In 20. century, European people had serious experience that the Legislative could fail to obey the principles of democracy and violate Human Rights of the people. After WW II, the Judiciary was vested with a new competence for Judicial Constitutional Review. In Germany, Austria and Italy, a special court was founded for this task. This court is authorized to test any legislation in its constitutionality without any concrete legal conflict. This function is called "Abstract Normative Control" of Constitutionality.
- In the U.S.A., democracy was established through the struggle against Parliament because Parliament did not represent the will of American people, but the will of English government. The independence was achieved under the powerful leadership of the Executive (President). Therefore, the American concept of democracy conceived certain doubt against the Legislative. Its behaviour should be controlled from both sides, by the President and by the Court. In 1803, the competence of the Court for Judicial Constitutional Review was officially acknowledged in a judgement (judge-made law). In the American model, no special court had to be founded. Theoretically, each court in any case has opportunity to test Constitutionality of legislations (Specific Incidental Control or Actual Specific Control). However, this competence should be put into practice only as "last resort" because the authority of the Legislative could be enormously damaged, and political process would be critically disturbed through such interventions by the Judiciary.

(II) What is a main concern in Judicial Constitutional Review?

- The purpose of Judicial Constitutional Review is to save fundamental principles and value of democracy, especially Equality and Human Rights of the people. Obvious abuse of the legislative and executive power must be rejected.
- On the other hand, the Legislative or the Executive may have certain justifiable reason behind the appearance of unequal or unfair treatment; they would argue that it is a temporary measure (political discretion) in order to secure final achievement of such principles or value, or they would insist that it is sometimes unavoidable to disadvantage certain individuals for the sake of a whole people (public welfare) . Therefore, it is the most important matter to set adequate criteria to determine whether the legislative or executive power is abused or not.
- Such criteria may be distinguished each other according to the nature of concerned principle or value. In 1938, the American Supreme Court established a fundamental distinguishing between restrictions of intellectual or political freedom and limitations of economic activities (Dual Standard Doctrine); Any restriction of intellectual or political freedom must be tested under strict criteria while less strict criteria may be applied to the test of limitations of economic activities.
- Freedom of opinion, speech, or press forms the basis of democracy. So, a quite narrow free space may remain for political discretion. But in concern with economic activities, many complicated factors must be taken into consideration, and the legislative and executive power may enjoy wider freedom of choice for their decisions.

(III) Value-conflict between Human Rights and Public Welfare

It is said that Human Rights are inviolable. But Human Rights are often restricted in favour of public welfare, and such restrictions are sometimes unavoidable. The essential question is; in which situation and how far may Human Rights be restricted?

Basic consideration in the “Dual Standard Doctrine”

- The basic concept of Judicial Constitutional Review contains a general respect for the authority of the Legislative. In regard to the lawmaking task, the Legislative has the priority, and for this task, the Legislative also has to take many other factors than specific legal ones into consideration while the Judiciary has no adequate apparatus for such a task. For this reason, the Judiciary should refrain from intervention into the political process (*Division of Powers*).
- According to such a concept, a wide range of free hand (*discretion*) is granted to the Legislative or the Executive, and the Judiciary normally work on the assumption of the Constitutionality of legislations or governmental decisions. Sometimes, such legislations and decisions contain certain restrictions of Human Rights or fundamental freedom of citizens, and the Legislative and the Executive usually justify such restrictions in name of “*Public Welfare*”.
- Especially, freedom of economic activities (“*absoluteness of property rights*”, “*civil autonomy*” or “*freedom of contract*” in civil law) must be often restricted in favour of “*Public Welfare*”. After “*Great Depression*” in 1929, people experienced malfunctions or negative results of unlimited economic freedom (*free market mechanism*). Sometimes, political interventions into free market mechanism are inevitable in order to secure “*Public Welfare*”. In 1930th. in USA, President *Theodore Roosevelt* introduced a new economic policy (“*New Deal*”) and tried to improve economic situation through political interventions into free market mechanism. But the Judiciary rejected “*New Deal Policy*” because it would violate *freedom of contract*. In 1937, the President finally decided to dismiss all judges from the Supreme Court and appointed new judges who were willing to support “*New Deal Policy*”. This so-called “*New Court*” showed its firm trust in the Legislative and the Executive – “*They must have reasonable grounds for their economic policy*” – and established the assumption of Constitutionality of governmental economic policy; it means that any political decision of the government and its enactment in the economic fields is principally constitutional.
- However, even abuse of the legislative or executive power could be justified with such a general argument, and the basis of constitutional democracy would be threatened through abuse of powers. So, the general assumption of the Constitutionality must be broken if a legislation or governmental decision would lead to an unreasonable violation of fundamental values which the Constitution guarantees to the people. But, in which situation should Judicial Constitutional Review by the Judiciary be activated to break the assumption of Constitutionality? In other words; how should the discretion of the Legislative and the Executive be limited in favour of Human Rights and fundamental freedom of citizens?
- According to the ruling opinion, the guarantee of intellectual freedom may not be “absolute”, and contains similar limitation in favour of Public welfare, too. But it must be more carefully respected because it forms just the basis of constitutional democracy itself.
- Under this consideration, “Dual Standard Doctrine” was born: Strict standard for restriction of intellectual freedom and less strict standard for restriction of economic freedom.
- Principally, Constitutionality of a restriction of intellectual freedom must be tested in each specific case, and may be constitutional only when “clear and present danger” for the public

welfare and security must be feared, or when there is absolutely *no other alternative measure* than such a restriction in order to secure public welfare and security. For justification of such a restriction, it is not enough to mention to a merely general reasonableness between aim (for example, to secure public security or political neutrality of the administration) and measure (for example, to prohibit a public meeting in certain area, or to restrict political activities of public officials).

Criteria of Constitutionality/Unconstitutionality of restrictions of Human Rights (Dual Standard Doctrine)

Restriction of intellectual Human Rights (tested with Doubt of <i>Unconstitutionality</i>)	Restriction of Economic Rights (tested under Presumption of <i>Constitutionality</i>)
A: Restriction of elements of Rights The strictest test: “ <i>Void on its Face</i> ” – Test	
B: Restriction regarding contents in exercises of Rights A quite strict test: “ <i>Clear and Present Dangers</i> ” – Test	
C: Restriction regarding the way of exercises of Rights A less strict test: “ <i>Less Restrictive Alternatives</i> ” – Test	D: Restriction to prevent harmful results for public welfare A less strict test: “ <i>Less Restrictive Alternatives</i> ” – Test
	E: Restriction to achieve political goals *) A quite mild test: “ <i>Clear Unreasonableness and Abuse of Power</i> ” – Test

*) *Why should two levels be distinguished in the restriction of economic freedom?*

Fundamental Human Rights and freedom in modern democracy have even their backside and can cause some negative results. But such results arise rather from the essence or nature of Human Rights and fundamental freedom. They are foreseeable and in certain extent unavoidable. Therefore, these negative results cannot serve as reason for restriction of Human Rights and fundamental freedom. They should be removed or defused through other measures than restrictive ones. In other words, restrictive measures in this field should be more strictly tested than economic measures for specific goals.

Dual Standard Doctrine and the Constitution of Japan

- The Constitution of Japan in 1947 introduced a “*New Deal*”-like doctrine. It guarantees the freedom of profession only under the limitation: “*to the extent that it does not interfere with the public welfare*” (Article 22), and set also the property rights under the limitation: “*in conformity with the public welfare*” (Article 29). In regard to other fundamental Human Rights, especially intellectual freedom, the current Constitution of Japan does not clearly mention to any similar limitation. In this sense, the Constitution permits a relatively wide discretion to the Legislative *in economic fields* and allows it to *restrict economic freedom of the people in favour of Public welfare*.

Topic-(A) Equal treatment under the law (Article 14 of Constitution)

Article 199 of Japanese Criminal Code provides the punishment against homicide; "A person who kills another shall be punished with death or penal servitude for life or not less than three years."

However, Article 200 provided that a person who kills a lineal ascendant (parents, grandparents and so on; *parricide, patricide, matricide* in English law) shall be punished with death or penal servitude for life.

Furthermore, Article 205 Paragraph (1) provides the punishment against bodily injury resulting in death; "A person who inflicts injury upon another and thereby causes the latter's death shall be punished with penal servitude for a limited period of not less than two years." But its Paragraph (2) provided the punishment of penal servitude for life or not less than three years against a person who injured a lineal ascendant.

Are such different treatments according to the family relations between offenders and victims not unconstitutional?

- **Case:** Miss D was raped by her own father as she was 14 years old, and then he repeated this offence regularly over 10 years. Miss D bore 5 children. Despite of this misery, she got to know a boy friend and wished to marry him. Her father tried to break this friendship and mistreated her. Finally, she killed her father and gave herself up to the police.
- **Judgement:** Miss D should be punished with death or imprisonment for life, but it would be unreasonably too hard for her. In the trial, it was intensively discussed whether Article 200 of Criminal Code was constitutional or unconstitutional. The District Court decided that this article was unconstitutional, but the Appellate Court reversed this judgement. In 1973, the Supreme Court eventually judged that Article 200 was unconstitutional. The Court argued in following way;
 1. Tender sentiment and respect for own ascendants is quite natural and one of the fundamental moral principles of our society. It is a important task of the criminal law to maintain this moral. Therefore, such a provision like Article 200 of Japanese Criminal Code has its reason. In this sense, a different treatment of offenders according to their family relations to victims is not unconstitutional.
 2. However, the hardness of the punishment of Article 200 can not be justified with this consideration, and the discrepancy between Article 199 and 200 is unreasonably too wide. The application of Article 200 to this case is unconstitutional at this point.

As regarding Article 205 Paragraph (2), the Supreme Court judged in another case that the hardness of its punishment did not exceed the limit of reasonableness and it was constitutional.

In any case, the Public Prosecutor stopped to bring charge with Article 200 and 205 Paragraph (2). In 1995, both provisions were deleted in the revised Criminal Code of Japan.

By the way, the Supreme Court considered whether it was a proper task of the criminal law to maintain our natural sentiment and respect for the ascendant or not. But there is another point which should be also discussed, namely the question whether it was reasonable to provide generally a harder punishment of offences against the ascendant without to consider concrete relationship between offenders and victims in each case.

• Related Cases on Equal Treatment under the Law

a. Nissan Automobile Case

Nissan Automobile Company had a company rule which provided the compulsory retirement age of employees. According to this rule, a female employee should retire when she reached the age of 50 while a male employee may work until the age of 55. One female employee sued the company for the violation of equality under the law (Article 14 of Constitution).

In the trial, the company insisted that this different treatment of female and male employees has a reasonable ground because female employees can fulfil only simple tasks and their contribution to the company are generally lower than in case of male employees. Tokyo District Court judged in favour of the plaintiff; the difference of gender is not enough to justify a general distinguished treatment of employees. Men and women can perform normal tasks in almost same way until 60. Therefore, such a general rule of the compulsory retirement age constitutes abuse of rights, and violates “public order and good morals” (Article 90 of Civil Code). Tokyo Appellate Court upheld this judgement, and the Supreme Court upheld it, too (judgement of the Supreme Court on March 24, 1981).

Normally, Constitution regulates legal relations among state organs and relations between a state organ and private persons. Constitutional provisions may apply only to laws and their implementation through official authorities. It is still questionable whether constitutional provisions have same effects on relations among private persons (“*Third Effect of Constitution*” or “*Constitutional Effect among Private Persons*”). What may be done when a private person with powerful influence violated Human Rights of another person? In the case cited above, the Courts regarded the company Nissan as a quasi-official organization because it controlled a wide range of company groups and employees, and its behaviours intensively influenced the local society. In other words, the Courts recognized higher social responsibility of large-scale enterprises. Nevertheless, it was denied to apply a constitutional provision directly on this case. Instead, the Courts interpreted Article 90 of Civil Code in accordance with the principle of equal treatment under the law:

Article 90 of Civil Code [Public order and good morals]

A juristic act which has for its object such matters as are contrary to public order and good morals is null and void.

However, the Supreme Court seldom affirms this indirect application of the constitutional principles. In the following case, the Supreme Court compared *Economic Freedom* and *Intellectual Freedom* (political opinion) in private relations, and judged that it was not illegal to ask an applicants some questions about his political opinion in the employment interview:

b. Mitsubishi Resin Case

Mitsubishi Resin Industry Inc. employed a man, but after his trial period of three months, the company cancelled the employment with the argument that he did not mention to his political activities during his student days (he was a member of the student organization of Communist Party). He sued the company for the abuse of rights.

District Court judged in favour of the employee (judgement of Tokyo District Court on July 17, 1967), and Appellate Court upheld it with the argument that freedom of political opinion and belief should be guaranteed in any case, and it was allowed to keep such facts secret in the interview (judgement of Tokyo Appellate Court on June 12, 1968). But the Supreme Court gave priority to freedom of contract over freedom of thoughts and belief, and reversed the judgement (judgement of the Supreme Court on December 12, 1973).

Topic-(B) Separation of Politics and Religion (Article 20 of Constitution)

Under the militarism before and during the World War II, the military regime used Japanese traditional religion "Shinto" as a spiritual basis of its expansionist policy and oppressed freedom of political opinion and religious belief. After the War, it was one of the most important principles for democratization of Japanese society to separate politics and religion clearly, namely Article 20 and 89 of Constitution.

a. Christian in Shinto-Shrine Case

Mrs. F is a Christian. Her husband was an officer of Self-Defence Forces, he died in a work-related accident. Mrs. F held his funeral in a Christian church. However, an association of veteran officers and Self-Defence Agency planned to register his name in a Shinto shrine as a sacred spirit without to ask Mrs. F for her agreement. After his name was really registered, Mrs. F sued the veteran association and Self-Defence Agency for mental damages.

- Judgement

The District Court recognized the fact that the application for the registration was a collusive act of the association and Self-Defence Agency, and the Court judged that Self-Defence Agency violated Article 20 Paragraph (3) and should pay the compensation to Mrs. F (judgement on March 22, 1979). The Appellate Court affirmed the liability of Self-Defence Agency, too (judgement on June 1, 1982). But the Supreme Court revised the judgement of the Appellate Court, and also rejected the finding of facts of the District Court. The Supreme Court argued as follows (judgement on June 1, 1988);

1. The applicant was the veteran association alone, Self-Defence Agency merely gave indirect support to the association. Therefore, the Agency itself did not violate Article 20 Paragraph (3). It is still to check whether some officials behaved against Constitution.
2. The officials of Self-Defence Forces supported the registration of the dead officer in Shinto shrine in order to improve the morale of the Self-Defence officers. They did not aim to favour Shintoism over other religions. The acts of the officials were therefore not of religious character, and they did not violate Article 20.
3. The association and the Shinto shrine are private organizations and enjoy freedom of religion and belief, too. Their rights should be protected against disturbance from outside. On the other hand, Mrs. F did not suffer from any damages. So, this case does not have any relevance to Article 20.

• Related Cases on Separation of Politics and Religion

In regard to this topic, separation of politics and religion, there are other several points of controversy. One of them is worship at a Shinto shrine by ministers, especially at "Yasukuni Shrine". This shrine has a special meaning; during the war, Japanese military government declared that spirits of all fallen soldiers and officers of Emperor's Army and Navy would gather together here in "Yasukuni Shrine". So, this shrine was a symbol of Japanese militarism. The list of honoured spirits in this shrine contains also names of war criminals who were responsible for cruel acts of Japanese Army in Asian countries. Despite of this fact, This shrine still enjoys respect of certain parts of Japanese people, especially families of fallen soldiers. Many associations of families of fallen soldiers request regular worship at this shrine by the government. Indeed, many members of the ruling party and ministers visit regularly this shrine. Pacifist groups in Japan suited the government for the breach of Article 20. In 1986, the Supreme Court made a judgement that the worship at Yasukuni Shrine by ministers or other government officials does not violate Article 20. The Court argued as follows;

1. It is not possible to separate official and private status in person of government officials.
2. Government officials as private persons have right to enjoy freedom of religion, too. It is unconstitutional to restrict their freedom even though they have official positions.
3. Their visit and worship at Yasukuni Shrine is therefore constitutional unless this act is obviously performed as “Affairs of State”.

Another point of controversy is Shinto service at a ground-breaking ceremony held officially by local authorities and donation for shrines. The Supreme Court judged that such acts by local authorities are constitutional in so far as the ceremonies did not directly aim to promote Shintoism itself and the amount of donation did not exceed the normal standard.

In 1997, the Supreme Court changed his precedent in regard to the Constitutionality of donation for shrines by local authorities. The Court judged that donations for shrines are not merely a formal fulfilment of moral duties, but a religious performance and is not allowed for public authorities.

Topic-(C) Restriction of intellectual freedom by Legislative or Executive Powers

As is mentioned in the history of “Dual Standard Doctrine, for justification of restriction of Human Rights and freedom in intellectual fields, it is not enough to mention to a merely general reasonableness between aim (for example, to secure public security or political neutrality of the administration) and measure (for example, to prohibit a public meeting in certain area, or to restrict political activities of public officials). However, Japanese Supreme Court shows its tendency to accept such a general reasonableness between aim and measure as a ground for the Constitutionality of the restriction of intellectual freedom.

a) Restriction of Workers' Rights (Judgement of the Supreme Court on October 26, 1966)

- Article 28 of the Constitution guarantees rights of workers to organize themselves and to bargain and act collectively. But the most parts of such basic rights are hardly restricted for public officials with criminal punishment. In 1958, some post office workers had a strike and asked other workers to join in a meeting. They were accused for the breach of the law. The District Court decided in favour of the workers, but the Appellate Court judged that they were guilty.
- In 1966, the Supreme Court reversed the judgement of the Appellate Court with the following argument: Principally, the rights of workers in Article 28 must be guaranteed to all workers including public officials, but because of the nature of their tasks (public services for the people), their rights have to be restricted according to the respective contents of their tasks. Therefore;
 - i) The restriction may be allowed only in the necessary, minimal extent;
 - ii) The restriction may be justifiable only when quite harmful results for the public must be feared if the concerned workers would perform their rights;
 - iii) Punishment in case of illegal performance must be limited to the reasonable extent;
 - iv) Adequate compensation must be guaranteed when the restriction is unavoidable.
- According to these standards, the application of the restriction on this case could not be justified, and is *unconstitutional*. The Supreme Court did not mention the “Dual Standard Doctrine”, but it seemed like that it accepted this doctrine and applied its strict tests of Level (B) and (C) to this case.

b) Restriction of Political Activities (Judgement of the Supreme Court on November 6, 1974)

- Political activities are widely restricted for public officials just like their rights as workers. In 1967, a post office worker took part in Socialist party's election campaign on Sunday. He was accused for the breach of the restriction of political activities of public officials. The District Court applied the standards set up by the Supreme Court mentioned above and judged that the application of the restriction on this case was unconstitutional (Article 21 and 31).
- However, the Supreme Court changed its own precedent and judged that the post office worker was guilty. The Court argued as follows: Political activities of public officials must be restricted in order to secure political neutrality of public services. Such restriction may be justified when the [abstract] reasonableness between the aim and such measures is proved, and insofar as the restrictions are limited to a necessary extent. The Supreme Court denied the necessity of detailed test in each case. In other words, the Supreme Court granted a wide range of discretion to the Legislative also in the field of intellectual freedom. This attitude of the Court would correspond

to Level (D) in the “Dual Standard Doctrine” for restriction of economic freedom.

- As a result, the Supreme Court allowed a wide range of discretion to the prosecution authority and “*chilling effect*” against political freedom among public service workers.

c) Censorship (Textbooks Screening Case)

If the Legislative enacted a law which allowed public authorities to check contents of expression in advance of its publication and to prohibit certain expressions, it would be a censorship and unconstitutional (Article 21). Such a case would belong to the level (A) of the “Dual Standard Doctrine”. But, it is not so simple to decide whether such a law really provides a “censorship” or not. The definition of censorship is one of the most discussed issues.

- In Japan, school textbooks must be checked by the Ministry of Education, and only books which were approved by the Ministry may be authorized as school textbooks (screening system of school textbooks). In 1963, Professor *IENAGA* wrote a textbook of Japanese history and described the process of the World War II very critically. His book was rejected by the Ministry. He had to rewrite this book, but was requested to correct 300 places. For example, the phrase “Invasion in China” were not appropriate and should be replaced with “Advancement into China”. In 1965, Professor *IENAGA* sued the government for the violation of freedom of expression and claimed the revocation of the decision. He brought similar suit three times until 1984.
- In all instances of all cases, Japanese Courts judged that the textbooks screening system is not a “censorship” in the sense of Article 21. In the judgement on March 16, 1993, the Supreme Court defined the concept of censorship as a system in which administrative authorities check the content of expression in advance of its publication in order to prohibit publication with certain contents. According to this definition, so decided the Supreme Court, the screening system were not any censorship because rejected works may be still published as normal books, and works which were already published are allowed to be tested in this system.
- In other words, Japanese Courts denied to test the textbooks screening system according to the level (A) of the “Dual Standard Doctrine”. But particular decisions of the Ministry should be still checked in the point whether the requests of the Ministry constituted “abuse of power” or not, such a test would correspond to the level (B) of the “Dual Standard Doctrine”. In 1970, Tokyo District Court judged that in certain places the Ministry had gone with the screening too far and tried to force the author to change his thinking itself, and such requests were unconstitutional. The Appellate Court upheld this judgement, but the Supreme Court reversed it and remanded it to the Appellate Court (judgement of the Supreme Court on April 8, 1982).
- Finally in the 3rd case, the Supreme Court judged that the Ministry abused its power in 4 places and violated the freedom of expression (judgement of the Supreme Court on August 29, 1998). In one place, the Ministry had requested to delete the description about the cruel act of the “Troop No. 731” in Manchuria.

APPENDIX

APPENDIX A

- I. The [Constitution of the Empire of Japan](#) (1889) A1
- II. The [Constitution of Japan](#) (1946) A10
- III. The [Treaty of Mutual Cooperation and Security between Japan and the United States of America](#) (1960) A23

The Constitution of the Empire of Japan

Translated by Ito Miyoji.¹

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Imperial Oath at the Sanctuary of the Imperial Palace

We, the Successor to the prosperous Throne of Our Predecessors, do humbly and solemnly swear to the Imperial Founder of Our House and to Our other Imperial Ancestors that, in pursuance of a great policy co-extensive with the Heavens and with the Earth, We shall maintain and secure from decline the ancient form of government.

In consideration of the progressive tendency of the course of human affairs and in parallel with the advance of civilization, We deem it expedient, in order to give clearness and distinctness to the instructions bequeathed by the Imperial Founder of Our House and by Our other Imperial Ancestors, to establish fundamental laws formulated into express provisions of law, so that, on the one hand, Our Imperial posterity may possess an express guide for the course they are to follow, and that, on the other, Our subjects shall thereby be enabled to enjoy a wider range of action in giving Us their support, and that the observance of Our laws shall continue to the remotest ages of time. We will thereby to give greater firmness to the stability of Our country and to promote the welfare of all the people within the boundaries of Our dominions; and We now establish the Imperial House Law and the Constitution. These Laws come to only an exposition of grand precepts for the conduct of the government, bequeathed by the Imperial Founder of Our House and by Our other Imperial Ancestors. That we have been so fortunate in Our reign, in keeping with the tendency of the times, as to accomplish this work, We owe to the glorious Spirits of the Imperial Founder of Our House and of Our other Imperial Ancestors.

We now reverently make Our prayer to Them and to Our Illustrious Father, and implore the help of Their Sacred Spirits, and make to Them solemn oath never at this time nor in the future to fail to be an example to our subjects in the observance of the Laws hereby established.

May the Heavenly Spirits witness this Our solemn Oath.

¹ <https://www.ndl.go.jp/constitution/e/etc/c02.html>
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Imperial Speech on the Promulgation of the Constitution

Whereas We make it the joy and glory of Our heart to behold the prosperity of Our country, and the welfare of Our subjects, We do hereby, in virtue of the supreme power We inherit from Our Imperial Ancestors, promulgate the present immutable fundamental law, for the sake of Our present subjects and their descendants.

The Imperial Founder of Our House and Our other Imperial Ancestors, by the help and support of the forefathers of Our subjects, laid the foundation of Our Empire upon a basis, which is to last forever. That this brilliant achievement embellishes the annals of Our country, is due to the glorious virtues of Our Sacred Imperial Ancestors, and to the loyalty and bravery of Our subjects, their love of their country and their public spirit. Considering that Our subjects are the descendants of the loyal and good subjects of Our Imperial Ancestors, We doubt not but that Our subjects will be guided by Our views, and will sympathize with all Our endeavours, and that, harmoniously cooperating together, they will share with Us Our hope of making manifest the glory of Our country, both at home and abroad, and of securing forever the stability of the work bequeathed to Us by Our Imperial Ancestors.

The Constitution of the Empire of Japan

Having, by virtue of the glories of Our Ancestors, ascended the throne of a lineal succession unbroken for ages eternal; desiring to promote the welfare of, and to give development to the moral and intellectual faculties of Our beloved subjects, the very same that have been favoured with the benevolent care and affectionate vigilance of Our Ancestors; and hoping to maintain the prosperity of the State, in concert with Our people and with their support, We hereby promulgate, in pursuance of Our Imperial Rescript of the 12th day of the 10th month of the 14th year of Meiji, a fundamental law of the State, to exhibit the principles, by which We are guided in Our conduct, and to point out to what Our descendants and Our subjects and their descendants are forever to conform.

The right of sovereignty of the State, We have inherited from Our Ancestors, and We shall bequeath them to Our descendants. Neither We nor they shall in future fail to wield them, in accordance with the provisions of the Constitution hereby granted.

We now declare to respect and protect the security of the rights and of the property of Our people, and to secure to them the complete enjoyment of the same, within the extent of the provisions of the present Constitution and of the law.

The Imperial Diet shall first be convoked for the 23rd year of Meiji, and the time of its opening shall be the date, when the present Constitution comes into force.

When in the future it may become necessary to amend any of the provisions of the present Constitution, We or Our successors shall assume the initiative right, and submit a project for the same to the Imperial Diet. The Imperial Diet shall pass its vote upon it, according to the conditions imposed by the present Constitution, and in no otherwise shall Our descendants or Our subjects be permitted to attempt any alteration thereof.

Our Ministers of State, on Our behalf, shall be held responsible for the carrying out of the present Constitution, and Our present and future subjects shall forever assume the duty of allegiance to the present Constitution.

[His Imperial Majesty's Sign-Manual.]

[Privy Seal.]

The 11th day of the 2nd month of the 22nd year of Meiji.

(Countersigned)
Count Kuroda Kiyotaka,
Minister President of State.
Count Ito Hirobumi,
President of the Privy Council.
Count Okuma Shigenobu,
Minister of State for Foreign Affairs.
Count Saigo Tsukumichi,
Minister of State for the Navy.
Count Inouye Kaoru,
Minister of State for Agriculture and Commerce.
Count Yamada Akiyoshi,
Minister of State for Justice.
Count Matsugata Masayoshi,
Minister of State for Finance, and Minister of State for Home Affairs.
Count Oyama Iwao,
Minister of State for War.
Viscount Mori Arinori,
Minister of State for Education.
Viscount Enomoto Takeaki,
Minister of State for Communications.

The Constitution of the Empire of Japan

Chapter I. The Emperor.

- **Article 1.** The Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal.
- **Article 2.** The Imperial Throne shall be succeeded to by Imperial male descendants, according to the provisions of the Imperial House Law.
- **Article 3.** The Emperor is sacred and inviolable.
- **Article 4.** The Emperor is the head of the Empire, combining in Himself the rights of sovereignty, and exercises them, according to the provisions of the present Constitution.
- **Article 5.** The Emperor exercises the legislative power with the consent of the Imperial Diet.
- **Article 6.** The Emperor gives sanction to laws, and orders them to be promulgated and executed.
- **Article 7.** The Emperor convokes the Imperial Diet, opens, closes and prorogues it, and dissolves the House of Representatives.

- **Article 8.** The Emperor, in consequence of an urgent necessity to maintain public safety or to avert public calamities, issues, when the Imperial Diet is not sitting, Imperial Ordinances in the place of law. (2) Such Imperial Ordinances are to be laid before the Imperial Diet at its next session, and when the Diet does not approve the said Ordinances, the Government shall declare them to be invalid for the future.
- **Article 9.** The Emperor issues or causes to be issued, the Ordinances necessary for the carrying out of the laws, or for the maintenance of the public peace and order, and for the promotion of the welfare of the subjects. But no Ordinance shall in any way alter any of the existing laws.
- **Article 10.** The Emperor determines the organization of the different branches of the administration, and salaries of all civil and military officers, and appoints and dismisses the same. Exceptions especially provided for in the present Constitution or in other laws, shall be in accordance with the respective provisions (bearing thereon).
- **Article 11.** The Emperor has the supreme command of the Army and Navy.
- **Article 12.** The Emperor determines the organization and peace standing of the Army and Navy.
- **Article 13.** The Emperor declares war, makes peace, and concludes treaties.
- **Article 14.** The Emperor proclaims the law of siege. (2) The conditions and effects of the law of siege shall be determined by law.
- **Article 15.** The Emperor confers titles of nobility, rank, orders and other marks of honor.
- **Article 16.** The Emperor orders amnesty, pardon, commutation of punishments and rehabilitation.
- **Article 17.** A Regency shall be instituted in conformity with the provisions of the Imperial House Law. (2) The Regent shall exercise the powers appertaining to the Emperor in His name.

Chapter II. Rights and Duties of Subjects

- **Article 18.** The conditions necessary for being a Japanese subject shall be determined by law.
- **Article 19.** Japanese subjects may, according to qualifications determined in laws or ordinances, be appointed to civil or military offices equally, and may fill any other public offices.
- **Article 20.** Japanese subjects are amenable to service in the Army or Navy, according to the provisions of law.
- **Article 21.** Japanese subjects are amenable to the duty of paying taxes, according to the provisions of law.
- **Article 22.** Japanese subjects shall have the liberty of abode and of changing the same within the limits of the law.
- **Article 23.** No Japanese subject shall be arrested, detained, tried or punished, unless according to law.

- **Article 24.** No Japanese subject shall be deprived of his right of being tried by the judges determined by law.
- **Article 25.** Except in the cases provided for in the law, the house of no Japanese subject shall be entered or searched without his consent.
- **Article 26.** Except in the cases mentioned in the law, the secrecy of the letters of every Japanese subject shall remain inviolate.
- **Article 27.** The right of property of every Japanese subject shall remain inviolate.
(2) Measures necessary to be taken for the public benefit shall be any provided for by law.
- **Article 28.** Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief.
- **Article 29.** Japanese subjects shall, within the limits of law, enjoy the liberty of speech, writing, publication, public meetings and associations.
- **Article 30.** Japanese subjects may present petitions, by observing the proper forms of respect, and by complying with the rules specially provided for the same.
- **Article 31.** The provisions contained in the present Chapter shall not affect the exercise of the powers appertaining to the Emperor, in times of war or in cases of a national emergency.
- **Article 32.** Each and every one of the provisions contained in the preceding Articles of the present Chapter, that are not in conflict with the laws or the rules and discipline of the Army and Navy, shall apply to the officers and men of the Army and of the Navy.

Chapter III. The Imperial Diet

- **Article 33.** The Imperial Diet shall consist of two Houses, a House of Peers and a House of Representatives.
- **Article 34.** The House of Peers shall, in accordance with the Ordinance concerning the House of Peers, be composed of the members of the Imperial Family, of the orders of nobility, and of those persons, who have been nominated thereto by the Emperor.
- **Article 35.** The House of Representatives shall be composed of Members elected by the people, according to the provisions of the Law of Election.
- **Article 36.** No one can at one and the same time be a Member of both Houses.
- **Article 37.** Every law requires the consent of the Imperial Diet.
- **Article 38.** Both Houses shall vote upon projects of law submitted to it by the Government, and may respectively initiate projects of law.
- **Article 39.** A Bill, which has been rejected by either the one or the other of the two Houses, shall not be again brought in during the same session.

- **Article 40.** Both Houses can make representations to the Government, as to laws or upon any other subject. When, however, such representations are not accepted, they cannot be made a second time during the same session.
- **Article 41.** The Imperial Diet shall be convoked every year.
- **Article 42.** A session of the Imperial Diet shall last during three months. In case of necessity, the duration of a session may be prolonged by the Imperial Order.
- **Article 43.** When urgent necessity arises, an extraordinary session may be convoked, in addition to the ordinary one.
(2) The duration of an extraordinary session shall be determined by Imperial Order.
- **Article 44.** The opening, closing, prolongation of session and prorogation of the Imperial Diet, shall be effected simultaneously for both Houses.
(2) In case the House of Representatives has been ordered to dissolve, the House of Peers shall at the same time be prorogued.
- **Article 45.** When the House of Representatives has been ordered to dissolve, Members shall be caused by Imperial Order to be newly elected, and the new House shall be convoked within five months from the day of dissolution.
- **Article 46.** No debate can be opened and no vote can be taken in either House of the Imperial Diet, unless not less than one third of the whole number of the Members thereof is present.
- **Article 47.** Votes shall be taken in both Houses by absolute majority. In the case of a tie vote, the President shall have the casting vote.
- **Article 48.** The deliberations of both Houses shall be held in public. The deliberations may, however, upon demand of the Government or by resolution of the House, be held in secret sitting.
- **Article 49.** Both Houses of the Imperial Diet may respectively present addresses to the Emperor.
- **Article 50.** Both Houses may receive petitions presented by subjects.
- **Article 51.** Both Houses may enact, besides what is provided for in the present Constitution and in the Law of the Houses, rules necessary for the management of their internal affairs.
- **Article 52.** No Member of either House shall be held responsible outside the respective Houses, for any opinion uttered or for any vote given in the House. When, however, a Member himself has given publicity to his opinions by public speech, by documents in print or in writing, or by any other similar means, he shall, in the matter, be amenable to the general law.
- **Article 53.** The Members of both Houses shall, during the session, be free from arrest, unless with the consent of the House, except in cases of flagrant delicts, or of offences connected with a state of internal commotion or with a foreign trouble.
- **Article 54.** The Ministers of State and the Delegates of the Government may, at any time, take seats and speak in either House.

Chapter IV. The Ministers of State and the Privy Council

- **Article 55.** The respective Ministers of State shall give their advice to the Emperor, and be responsible for it.
(2) All Laws, Imperial Ordinances, and Imperial Rescripts of whatever kind, that relate to the affairs of the State, require the countersignature of a Minister of State.
- **Article 56.** The Privy Councillors shall, in accordance with the provisions for the organization of the Privy Council, deliberate upon important matters of State, when they have been consulted by the Emperor.

Chapter V. The Judicature

- **Article 57.** The Judicature shall be exercised by the Courts of Law according to law, in the name of the Emperor.
(2) The organization of the Courts of Law shall be determined by law.
- **Article 58.** The judges shall be appointed from among those, who possess proper qualifications according to law.
(2) No judge shall be deprived of his position, unless by way of criminal sentence or disciplinary punishment.
(3) Rules for disciplinary punishment shall be determined by law.
- **Article 59.** Trials and judgments of a Court shall be conducted publicly. When, however, there exists any fear that, such publicity may be prejudicial to peace and order, or to the maintenance of public morality, the public trial may be suspended by provisions of law or by the decision of the Court of Law.
- **Article 60.** All matters, that fall within the competency of a special Court, shall be specially provided for by law.
- **Article 61.** No suit at law, which relates to rights alleged to have been infringed by the illegal measures of the executive authorities, and which shall come within the competency of the Court of Administrative Litigation specially established by law, shall be taken cognizance of by a Court of Law.

Chapter VI. Finance

- **Article 62.** The imposition of a new tax or the modification of the rates (of an existing one) shall be determined by law.
(2) However, all such administrative fees or other revenue having the nature of compensation shall not fall within the category of the above clause.
(3) The raising of national loans and the contracting of other liabilities to the charge of the National Treasury, except those that are provided in the Budget, shall require the consent of the Imperial Diet.
- **Article 63.** The taxes levied at present shall, in so far as are not remodelled by new law, be collected according to the old system.
- **Article 64.** The expenditure and revenue of the State require the consent of the Imperial Diet by means of an annual Budget.

(2) Any and all expenditures overpassing the appropriations set forth in the Titles and Paragraphs of the Budget, or that are not provided for in the Budget, shall subsequently require the approbation of the Imperial Diet.

- **Article 65.** The Budget shall be first laid before the House of Representatives.
- **Article 66.** The expenditures of the Imperial House shall be defrayed every year out of the National Treasury, according to the present fixed amount for the same, and shall not require the consent thereto of the Imperial Diet, except in case an increase thereof is found necessary.
- **Article 67.** Those already fixed expenditures based by the Constitution upon the powers appertaining to the Emperor, and such expenditures as may have arisen by the effect of law, or that appertain to the legal obligations of the Government, shall be neither rejected nor reduced by the Imperial Diet, without the concurrence of the Government.
- **Article 68.** In order to meet special requirements, the Government may ask the consent of the Imperial Diet to a certain amount as a Continuing Expenditure Fund, for a previously fixed number of years.
- **Article 69.** In order to supply deficiencies, which are unavoidable, in the Budget, and to meet requirements unprovided for in the same, a Reserve Fund shall be provided in the Budget.
- **Article 70.** When the Imperial Diet cannot be convoked, owing to the external or internal condition of the country, in case of urgent need for the maintenance of public safety, the Government may take all necessary financial measures, by means of an Imperial Ordinance.

(2) In the case mentioned in the preceding clause, the matter shall be submitted to the Imperial Diet at its next session, and its approbation shall be obtained thereto.
- **Article 71.** When the Imperial Diet has not voted on the Budget, or when the Budget has not been brought into actual existence, the Government shall carry out the Budget of the preceding year.
- **Article 72.** The final account of the expenditures and revenues of the State shall be verified and confirmed by the Board of Audit, and it shall be submitted by the Government to the Imperial Diet, together with the report of verification of the said Board.

(2) The organization and competency of the Board of Audit shall be determined by law separately.

Chapter VII. Supplementary Rules

- **Article 73.** When it has become necessary in future to amend the provisions of the present Constitution, a project to that effect shall be submitted to the Imperial Diet by Imperial Order.

(2) In the above case, neither House can open the debate, unless not less than two thirds of the whole number of Members are present, and no amendment can be passed, unless a majority of not less than two thirds of the Members present is obtained.
- **Article 74.** No modification of the Imperial House Law shall be required to be submitted to the deliberation of the Imperial Diet.

(2) No provision of the present Constitution can be modified by the Imperial House Law.

- **Article 75.** No modification can be introduced into the Constitution, or into the Imperial House Law, during the time of a Regency.
- **Article 76.** Existing legal enactments, such as laws, regulations, Ordinances, or by whatever names they may be called, shall, so far as they do not conflict with the present Constitution, continue in force.
(2) All existing contracts or orders, that entail obligations upon the Government, and that are connected with expenditure, shall come within the scope of Article 67.

The Constitution of Japan

based on the English Edition by Government Printing Bureau ²

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I rejoice that the foundation for the construction of a new Japan has been laid according to the will of the Japanese people, and hereby sanction and promulgate the amendments of the Imperial Japanese Constitution effected following the consultation with the Privy Council and the decision of the Imperial Diet made in accordance with Article 73 of the said Constitution.

Signed : HIROHITO, Seal of the Emperor

This third day of the eleventh month of the twenty-first year of Showa (November 3, 1946)

Countersigned:

Prime Minister and concurrently Minister for Foreign Affairs

YOSHIDA Shigeru

Minister of State

Baron SHIDEHARA Kijuro

Minister of Justice

KIMURA Tokutaro

Minister for Home Affairs

OMURA Seiichi

Minister of Education.

TANAKA Kotaro

Minister of Agriculture and Forestry

WADA Hiroo

Minister of State

SAITO Takao

² <https://www.ndl.go.jp/constitution/e/etc/c01.html>

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Minister of Communications
HITOTSUMATSU Sadayoshi
Minister of Commerce and Industry
HOSHIJIMA Niro
Minister of Welfare
KAWAI Yoshinari
Minister of State
UEHARA Etsujiro
Minister of Transportation
HIRATSUKA Tsunejiro
Minister of Finance
ISHIBASHI Tanzan
Minister of State
KANAMORI Tokujiro
Minister of State
ZEN Keinosuke

The Constitution of Japan

[Preamble]

We, the Japanese people, acting through our duly elected representatives in the National Diet, determined that we shall secure for ourselves and our posterity the fruits of peaceful cooperation with all nations and the blessings of liberty throughout this land, and resolved that never again shall we be visited with the horrors of war through the action of government, do proclaim that sovereign power resides with the people and do firmly establish this Constitution. Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people. This is a universal principle of mankind upon which this Constitution is founded. We reject and revoke all constitutions, laws, ordinances, and rescripts in conflict herewith.

We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth. We recognize that all peoples of the world have the right to live in peace, free from fear and want.

We believe that no nation is responsible to itself alone, but that laws of political morality are universal; and that obedience to such laws is incumbent upon all nations who would sustain their own sovereignty and justify their sovereign relationship with other nations.

We, the Japanese people, pledge our national honor to accomplish these high ideals and purposes with all our resources.

Chapter I. The Emperor

- **Article 1.** The Emperor shall be the symbol of the State and of the unity of the people, deriving his position from the will of the people with whom resides sovereign power.
- **Article 2.** The Imperial Throne shall be dynastic and succeeded to in accordance with the Imperial House Law passed by the Diet.
- **Article 3.** The advice and approval of the Cabinet shall be required for all acts of the Emperor in matters of state, and the Cabinet shall be responsible therefor.
- **Article 4.** The Emperor shall perform only such acts in matters of state as are provided for in this Constitution and he shall not have powers related to government.
(2) The Emperor may delegate the performance of his acts in matters of state as may be provided by law.
- **Article 5.** When, in accordance with the Imperial House Law, a Regency is established, the Regent shall perform his acts in matters of state in the Emperor's name. In this case, paragraph one of the preceding article will be applicable.
- **Article 6.** The Emperor shall appoint the Prime Minister as designated by the Diet.
(2) The Emperor shall appoint the Chief Judge of the Supreme Court as designated by the Cabinet.
- **Article 7.** The Emperor, with the advice and approval of the Cabinet, shall perform the following acts in matters of state on behalf of the people:
 1. Promulgation of amendments of the constitution, laws, cabinet orders and treaties.
 2. Convocation of the Diet.
 3. Dissolution of the House of Representatives.
 4. Proclamation of general election of members of the Diet.
 5. Attestation of the appointment and dismissal of Ministers of State and other officials as provided for by law, and of full powers and credentials of Ambassadors and Ministers.
 6. Attestation of general and special amnesty, commutation of punishment, reprieve, and restoration of rights.
 7. Awarding of honors.
 8. Attestation of instruments of ratification and other diplomatic documents as provided for by law.
 9. Receiving foreign ambassadors and ministers.
 10. Performance of ceremonial functions.
- **Article 8.** No property can be given to, or received by, the Imperial House, nor can any gifts be made therefrom, without the authorization of the Diet.

Chapter II. Renunciation of War

- **Article 9.**Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.
(2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

Chapter III. Rights and Duties of the People

- **Article 10.**The conditions necessary for being a Japanese national shall be determined by law.
- **Article 11.**The people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights.
- **Article 12.**The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.
- **Article 13.**All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.
- **Article 14.**All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.
(2) Peers and peerage shall not be recognized.
(3) No privilege shall accompany any award of honor, decoration or any distinction, nor shall any such award be valid beyond the lifetime of the individual who now holds or hereafter may receive it.
- **Article 15.**The people have the inalienable right to choose their public officials and to dismiss them.
(2) All public officials are servants of the whole community and not of any group thereof.
(3) Universal adult suffrage is guaranteed with regard to the election of public officials.
(4) In all elections, secrecy of the ballot shall not be violated. A voter shall not be answerable, publicly or privately, for the choice he has made.
- **Article 16.**Every person shall have the right of peaceful petition for the redress of damage, for the removal of public officials, for the enactment, repeal or amendment of laws, ordinances or regulations and for other matters; nor shall any person be in any way discriminated against for sponsoring such a petition.
- **Article 17.**Every person may sue for redress as provided by law from the State or a public entity, in case he has suffered damage through illegal act of any public official.
- **Article 18.**No person shall be held in bondage of any kind. Involuntary servitude, except as punishment for crime, is prohibited.
- **Article 19.**Freedom of thought and conscience shall not be violated.

- **Article 20.**Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State, nor exercise any political authority.
(2) No person shall be compelled to take part in any religious act, celebration, rite or practice.
(3) The State and its organs shall refrain from religious education or any other religious activity.
- **Article 21.**Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.
(2) No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.
- **Article 22.**Every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare.
(2) Freedom of all persons to move to a foreign country and to divest themselves of their nationality shall be inviolate.
- **Article 23.**Academic freedom is guaranteed.
- **Article 24.**Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis.
(2) With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.
- **Article 25.**All people shall have the right to maintain the minimum standards of wholesome and cultured living.
(2) In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health.
- **Article 26.**All people shall have the right to receive an equal education correspondent to their ability, as provided by law.
(2) All people shall be obligated to have all boys and girls under their protection receive ordinary education as provided for by law. Such compulsory education shall be free.
- **Article 27.**All people shall have the right and the obligation to work.
(2) Standards for wages, hours, rest and other working conditions shall be fixed by law.
(3) Children shall not be exploited.
- **Article 28.**The right of workers to organize and to bargain and act collectively is guaranteed.
- **Article 29.**The right to own or to hold property is inviolable.
(2) Property rights shall be defined by law, in conformity with the public welfare.
(3) Private property may be taken for public use upon just compensation therefor.
- **Article 30.**The people shall be liable to taxation as provided by law.
- **Article 31.**No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.
- **Article 32.**No person shall be denied the right of access to the courts.

- **Article 33.**No person shall be apprehended except upon warrant issued by a competent judicial officer which specifies the offense with which the person is charged, unless he is apprehended, the offense being committed.
- **Article 34.**No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel.
- **Article 35.**The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause and particularly describing the place to be searched and things to be seized, or except as provided by Article 33.
(2) Each search or seizure shall be made upon separate warrant issued by a competent judicial officer.
- **Article 36.**The infliction of torture by any public officer and cruel punishments are absolutely forbidden.
- **Article 37.**In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal.
(2) He shall be permitted full opportunity to examine all witnesses, and he shall have the right of compulsory process for obtaining witnesses on his behalf at public expense.
(3) At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State.
- **Article 38.**No person shall be compelled to testify against himself.
(2) Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence.
(3) No person shall be convicted or punished in cases where the only proof against him is his own confession.
- **Article 39.**No person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall he be placed in double jeopardy.
- **Article 40.**Any person, in case he is acquitted after he has been arrested or detained, may sue the State for redress as provided by law.

Chapter IV. The Diet

- **Article 41.**The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State.
- **Article 42.**The Diet shall consist of two Houses, namely the House of Representatives and the House of Councillors.
- **Article 43.**Both Houses shall consist of elected members, representative of all the people.
(2) The number of the members of each House shall be fixed by law.

- **Article 44.**The qualifications of members of both Houses and their electors shall be fixed by law. However, there shall be no discrimination because of race, creed, sex, social status, family origin, education, property or income.
- **Article 45.**The term of office of members of the House of Representatives shall be four years. However, the term shall be terminated before the full term is up in case the House of Representatives is dissolved.
- **Article 46.**The term of office of members of the House of Councillors shall be six years, and election for half the members shall take place every three years.
- **Article 47.**Electoral districts, method of voting and other matters pertaining to the method of election of members of both Houses shall be fixed by law.
- **Article 48.**No person shall be permitted to be a member of both Houses simultaneously.
- **Article 49.**Members of both Houses shall receive appropriate annual payment from the national treasury in accordance with law.
- **Article 50.**Except in cases provided by law, members of both Houses shall be exempt from apprehension while the Diet is in session, and any members apprehended before the opening of the session shall be freed during the term of the session upon demand of the House.
- **Article 51.**Members of both Houses shall not be held liable outside the House for speeches, debates or votes cast inside the House.
- **Article 52.**An ordinary session of the Diet shall be convoked once per year.
- **Article 53.**The Cabinet may determine to convoke extraordinary sessions of the Diet. When a quarter or more of the total members of either House makes the demand, the Cabinet must determine on such convocation.
- **Article 54.**When the House of Representatives is dissolved, there must be a general election of members of the House of Representatives within forty (40) days from the date of dissolution, and the Diet must be convoked within thirty (30) days from the date of the election.
(2) When the House of Representatives is dissolved, the House of Councillors is closed at the same time. However, the Cabinet may in time of national emergency convoke the House of Councillors in emergency session.
(3) Measures taken at such session as mentioned in the proviso of the preceding paragraph shall be provisional and shall become null and void unless agreed to by the House of Representatives within a period of ten (10) days after the opening of the next session of the Diet.
- **Article 55.**Each House shall judge disputes related to qualifications of its members. However, in order to deny a seat to any member, it is necessary to pass a resolution by a majority of two-thirds or more of the members present.
- **Article 56.**Business cannot be transacted in either House unless one-third or more of total membership is present.

- (2) All matters shall be decided, in each House, by a majority of those present, except as elsewhere provided in the Constitution, and in case of a tie, the presiding officer shall decide the issue.
- **Article 57.** Deliberation in each House shall be public. However, a secret meeting may be held where a majority of two-thirds or more of those members present passes a resolution therefor.

(2) Each House shall keep a record of proceedings. This record shall be published and given general circulation, excepting such parts of proceedings of secret session as may be deemed to require secrecy.

(3) Upon demand of one-fifth or more of the members present, votes of members on any matter shall be recorded in the minutes.
 - **Article 58.** Each House shall select its own president and other officials.

(2) Each House shall establish its rules pertaining to meetings, proceedings and internal discipline, and may punish members for disorderly conduct. However, in order to expel a member, a majority of two-thirds or more of those members present must pass a resolution thereon.
 - **Article 59.** A bill becomes a law on passage by both Houses, except as otherwise provided by the Constitution.

(2) A bill which is passed by the House of Representatives, and upon which the House of Councillors makes a decision different from that of the House of Representatives, becomes a law when passed a second time by the House of Representatives by a majority of two-thirds or more of the members present.

(3) The provision of the preceding paragraph does not preclude the House of Representatives from calling for the meeting of a joint committee of both Houses, provided for by law.

(4) Failure by the House of Councillors to take final action within sixty (60) days after receipt of a bill passed by the House of Representatives, time in recess excepted, may be determined by the House of Representatives to constitute a rejection of the said bill by the House of Councillors.
 - **Article 60.** The budget must first be submitted to the House of Representatives.

(2) Upon consideration of the budget, when the House of Councillors makes a decision different from that of the House of Representatives, and when no agreement can be reached even through a joint committee of both Houses, provided for by law, or in the case of failure by the House of Councillors to take final action within thirty (30) days, the period of recess excluded, after the receipt of the budget passed by the House of Representatives, the decision of the House of Representatives shall be the decision of the Diet.
 - **Article 61.** The second paragraph of the preceding article applies also to the Diet approval required for the conclusion of treaties.
 - **Article 62.** Each House may conduct investigations in relation to government, and may demand the presence and testimony of witnesses, and the production of records.
 - **Article 63.** The Prime Minister and other Ministers of State may, at any time, appear in either House for the purpose of speaking on bills, regardless of whether they are members of the House or not. They must appear when their presence is required in order to give answers or explanations.

- **Article 64.**The Diet shall set up an impeachment court from among the members of both Houses for the purpose of trying those judges against whom removal proceedings have been instituted.
(2) Matters relating to impeachment shall be provided by law.

Chapter V. The Cabinet

- **Article 65.**Executive power shall be vested in the Cabinet.
- **Article 66.**The Cabinet shall consist of the Prime Minister, who shall be its head, and other Ministers of State, as provided for by law.
(2) The Prime Minister and other Ministers of State must be civilians.
(3) The Cabinet, in the exercise of executive power, shall be collectively responsible to the Diet.
- **Article 67.**The Prime Minister shall be designated from among the members of the Diet by a resolution of the Diet. This designation shall precede all other business.
(2) If the House of Representatives and the House of Councillors disagree and if no agreement can be reached even through a joint committee of both Houses, provided for by law, or the House of Councillors fails to make designation within ten (10) days, exclusive of the period of recess, after the House of Representatives has made designation, the decision of the House of Representatives shall be the decision of the Diet.
- **Article 68.**The Prime Minister shall appoint the Ministers of State. However, a majority of their number must be chosen from among the members of the Diet.
(2) The Prime Minister may remove the Ministers of State as he chooses.
- **Article 69.**If the House of Representatives passes a non-confidence resolution, or rejects a confidence resolution, the Cabinet shall resign en masse, unless the House of Representatives is dissolved within ten (10) days.
- **Article 70.**When there is a vacancy in the post of Prime Minister, or upon the first convocation of the Diet after a general election of members of the House of Representatives, the Cabinet shall resign en masse.
- **Article 71.**In the cases mentioned in the two preceding articles, the Cabinet shall continue its functions until the time when a new Prime Minister is appointed.
- **Article 72.**The Prime Minister, representing the Cabinet, submits bills, reports on general national affairs and foreign relations to the Diet and exercises control and supervision over various administrative branches.
- **Article 73.**The Cabinet, in addition to other general administrative functions, shall perform the following functions:
 1. Administer the law faithfully; conduct affairs of state.
 2. Manage foreign affairs.
 3. Conclude treaties. However, it shall obtain prior or, depending on circumstances, subsequent approval of the Diet.

4. Administer the civil service, in accordance with standards established by law.
 5. Prepare the budget, and present it to the Diet.
 6. Enact cabinet orders in order to execute the provisions of this Constitution and of the law. However, it cannot include penal provisions in such cabinet orders unless authorized by such law.
 7. Decide on general amnesty, special amnesty, commutation of punishment, reprieve, and restoration of rights.
- **Article 74.**All laws and cabinet orders shall be signed by the competent Minister of State and countersigned by the Prime Minister.
 - **Article 75.**The Ministers of State, during their tenure of office, shall not be subject to legal action without the consent of the Prime Minister. However, the right to take that action is not impaired hereby.

Chapter VI. Judiciary

- **Article 76.**The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law.
 - (2) No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power.
 - (3) All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws.
- **Article 77.**The Supreme Court is vested with the rule-making power under which it determines the rules of procedure and of practice, and of matters relating to attorneys, the internal discipline of the courts and the administration of judicial affairs.
 - (2) Public procurators shall be subject to the rule-making power of the Supreme Court.
 - (3) The Supreme Court may delegate the power to make rules for inferior courts to such courts.
- **Article 78.**Judges shall not be removed except by public impeachment unless judicially declared mentally or physically incompetent to perform official duties. No disciplinary action against judges shall be administered by any executive organ or agency.
- **Article 79.**The Supreme Court shall consist of a Chief Judge and such number of judges as may be determined by law; all such judges excepting the Chief Judge shall be appointed by the Cabinet.
 - (2) The appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and shall be reviewed again at the first general election of members of the House of Representatives after a lapse of ten (10) years, and in the same manner thereafter.
 - (3) In cases mentioned in the foregoing paragraph, when the majority of the voters favors the dismissal of a judge, he shall be dismissed.
 - (4) Matters pertaining to review shall be prescribed by law.
 - (5) The judges of the Supreme Court shall be retired upon the attainment of the age as fixed by law.

- (6) All such judges shall receive, at regular stated intervals, adequate compensation which shall not be decreased during their terms of office.
- **Article 80.** The judges of the inferior courts shall be appointed by the Cabinet from a list of persons nominated by the Supreme Court. All such judges shall hold office for a term of ten (10) years with privilege of reappointment, provided that they shall be retired upon the attainment of the age as fixed by law.
(2) The judges of the inferior courts shall receive, at regular stated intervals, adequate compensation which shall not be decreased during their terms of office.
 - **Article 81.** The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.
 - **Article 82.** Trials shall be conducted and judgment declared publicly.
(2) Where a court unanimously determines publicity to be dangerous to public order or morals, a trial may be conducted privately, but trials of political offenses, offenses involving the press or cases wherein the rights of people as guaranteed in Chapter III of this Constitution are in question shall always be conducted publicly.

Chapter VII. Finance

- **Article 83.** The power to administer national finances shall be exercised as the Diet shall determine.
- **Article 84.** No new taxes shall be imposed or existing ones modified except by law or under such conditions as law may prescribe.
- **Article 85.** No money shall be expended, nor shall the State obligate itself, except as authorized by the Diet.
- **Article 86.** The Cabinet shall prepare and submit to the Diet for its consideration and decision a budget for each fiscal year.
- **Article 87.** In order to provide for unforeseen deficiencies in the budget, a reserve fund may be authorized by the Diet to be expended upon the responsibility of the Cabinet.
(2) The Cabinet must get subsequent approval of the Diet for all payments from the reserve fund.
- **Article 88.** All property of the Imperial Household shall belong to the State. All expenses of the Imperial Household shall be appropriated by the Diet in the budget.
- **Article 89.** No public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or for any charitable, educational or benevolent enterprises not under the control of public authority.
- **Article 90.** Final accounts of the expenditures and revenues of the State shall be audited annually by a Board of Audit and submitted by the Cabinet to the Diet, together with the statement of audit, during the fiscal year immediately following the period covered.
(2) The organization and competency of the Board of Audit shall be determined by law.

- **Article 91.**At regular intervals and at least annually the Cabinet shall report to the Diet and the people on the state of national finances.

Chapter VIII. Local Self-Government

- **Article 92.**Regulations concerning organization and operations of local public entities shall be fixed by law in accordance with the principle of local autonomy.
- **Article 93.**The local public entities shall establish assemblies as their deliberative organs, in accordance with law.
(2) The chief executive officers of all local public entities, the members of their assemblies, and such other local officials as may be determined by law shall be elected by direct popular vote within their several communities.
- **Article 94.**Local public entities shall have the right to manage their property, affairs and administration and to enact their own regulations within law.
- **Article 95.**A special law, applicable only to one local public entity, cannot be enacted by the Diet without the consent of the majority of the voters of the local public entity concerned, obtained in accordance with law.

Chapter IX. Amendments

- **Article 96.**Amendments to this Constitution shall be initiated by the Diet, through a concurring vote of two-thirds or more of all the members of each House and shall thereupon be submitted to the people for ratification, which shall require the affirmative vote of a majority of all votes cast thereon, at a special referendum or at such election as the Diet shall specify.
(2) Amendments when so ratified shall immediately be promulgated by the Emperor in the name of the people, as an integral part of this Constitution.

Chapter X. Supreme Law

- **Article 97.**The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate.
- **Article 98.**This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.
(2) The treaties concluded by Japan and established laws of nations shall be faithfully observed.
- **Article 99.**The Emperor or the Regent as well as Ministers of State, members of the Diet, judges, and all other public officials have the obligation to respect and uphold this Constitution.

Chapter XI. Supplementary Provisions

- **Article 100.**This Constitution shall be enforced as from the day when the period of six months will have elapsed counting from the day of its promulgation.

(2) The enactment of laws necessary for the enforcement of this Constitution, the election of members of the House of Councillors and the procedure for the convocation of the Diet and other preparatory procedures necessary for the enforcement of this Constitution may be executed before the day prescribed in the preceding paragraph.

- **Article 101.** If the House of Councillors is not constituted before the effective date of this Constitution, the House of Representatives shall function as the Diet until such time as the House of Councillors shall be constituted.
- **Article 102.** The term of office for half the members of the House of Councillors serving in the first term under this Constitution shall be three years. Members falling under this category shall be determined in accordance with law.
- **Article 103.** The Ministers of State, members of the House of Representatives, and judges in office on the effective date of this Constitution, and all other public officials who occupy positions corresponding to such positions as are recognized by this Constitution shall not forfeit their positions automatically on account of the enforcement of this Constitution unless otherwise specified by law. When, however, successors are elected or appointed under the provisions of this Constitution, they shall forfeit their positions as a matter of course.

**TREATY OF MUTUAL COOPERATION AND SECURITY
BETWEEN JAPAN AND THE UNITED STATES OF AMERICA
(1960)**

ARTICLE I

The Parties undertake, as set forth in the Charter of the United Nations, to settle any international disputes in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered and to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. The Parties will endeavor in concert with other peace-loving countries to strengthen the United Nations so that its mission of maintaining international peace and security may be discharged more effectively.

ARTICLE II

The Parties will contribute toward the further development of peaceful and friendly international relations by strengthening their free institutions, by bringing about a better understanding of the principles upon which these institutions are founded, and by promoting conditions of stability and well-being. They will seek to eliminate conflict in their international economic policies and will encourage economic collaboration between them.

ARTICLE III

The Parties, individually and in cooperation with each other, by means of continuous and effective self-help and mutual aid will maintain and develop, subject to their constitutional provisions, their capacities to resist armed attack.

ARTICLE IV

The Parties will consult together from time to time regarding the implementation of this Treaty, and, at the request of either Party, whenever the security of Japan or international peace and security in the Far East is threatened.

ARTICLE V

Each Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes. Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations in accordance with the provisions of Article 51 of the Charter. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

ARTICLE VI

For the purpose of contributing to the security of Japan and the maintenance of international peace and security in the Far East, the United States of America is granted the use by its land, air and naval forces of facilities and areas in Japan. The use of these facilities and areas as well as the status of United States armed forces in Japan shall be governed by a separate agreement, replacing the Administrative Agreement under Article III of the Security Treaty between Japan and the United States of America, signed at Tokyo on February 28, 1952, as amended, and by such other arrangements as may be agreed upon.

ARTICLE VII

This Treaty does not affect and shall not be interpreted as affecting in any way the rights and obligations of the Parties under the Charter of the United Nations or the responsibility of the United Nations for the maintenance of international peace and security.

ARTICLE VIII

This Treaty shall be ratified by Japan and the United States of America in accordance with their respective constitutional processes and will enter into force on the date on which the instruments of ratification thereof have been exchanged by them in Tokyo.

ARTICLE IX

The Security Treaty between Japan and the United States of America signed at the city of San Francisco on September 8, 1951 shall expire upon the entering into force of this Treaty.

ARTICLE X

This Treaty shall remain in force until in the opinion of the Governments of Japan and the United States of America there shall have come into force such United Nations arrangements as will satisfactorily provide for the maintenance of international peace and security in the Japan area. However, after the Treaty has been in force for ten years, either Party may give notice to the other Party of its intention to terminate the Treaty, in which case the Treaty shall terminate one year after such notice has been given.

IN WITNESS WHEREOF the undersigned Plenipotentiaries have signed this Treaty.

DONE in duplicate at Washington in the Japanese and English languages, both equally authentic, this 19th day of January, 1960.

FOR JAPAN:

Nobusuke Kishi
Aiichiro Fujiyama
Mitsujiro Ishii
Tadashi Adachi
Koichiro Asakai

FOR THE UNITED STATES OF AMERICA:

Christian A. Herter
Douglas MacArthur 2nd
J. Graham Parsons

APPENDIX B

I.	Contents of the “French Civil Code” (1804)	B1
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Contents of the “French Civil Code” (1804)
(Original version at the time of the enactment in 1804)

Preliminary Title

Publication, Operation, and Application of Law in general

Book on Persons

Title 1. Enjoyment and Privation of Civil Rights

- Chapter 1. Enjoyment of Civil Rights
- Chapter 2. Privation of Civil Rights

Title 2. Records of Civil Status

- Chapter 1. General Provisions
- Chapter 2. Records of Birth
- Chapter 3. Records of Marriage
- Chapter 4. Records of Death
- Chapter 5. Records of Civil Status of Soldiers in Abroad
- Chapter 6. Correction of Records of Civil Status

Title 3. Domicile

Title 4. Disappearance

- Chapter 1. Presumption of Disappearance
- Chapter 2. Declaration of Disappearance
- Chapter 3. Effects of Disappearance
- Chapter 4. Supervision of Minors whose Father Disappeared

Title 5. Marriage

- Chapter 1. Requirements for Contract of Marriage
- Chapter 2. Formalities of Marriage
- Chapter 3. Formal Objections to Marriage
- Chapter 4. Action for Annulment of Marriage
- Chapter 5. Obligations arising from Marriage
- Chapter 6. Rights and Duties of Spouses
- Chapter 7. Dissolution of Marriage
- Chapter 8. Remarriage

Title 6. Divorce

- Chapter 1. Causes of Divorce
- Chapter 2. Divorce for Causes determined by Law
- Chapter 3. Divorce by Mutual Consent
- Chapter 4. Effects of Divorce
- Chapter 5. Judicial Separation of Persons

Title 7. Paternity and Filiation

- Chapter 1. Filiation of Children born of Marriage
- Chapter 2. Legitimate Children
- Chapter 3. Illegitimate Children

Title 8. Adoption and Friendly Guardianship

- Chapter 1. Adoption
- Chapter 2. Friendly Guardianship

Title 9. Parental Authority

Title 10. Minority, Guardianship and Emancipation

- Chapter 1. Minority
- Chapter 2. Guardianship
- Chapter 3. Emancipation
- Title 11. Majority, Incapacity and Curatorship
 - Chapter 1. Majority
 - Chapter 2. Incapacity
 - Chapter 3. Curatorship

Book on Property and Various Modifications of Property

Title 1. Various Kinds of Property

- Chapter 1. Immovable
- Chapter 2. Movable
- Chapter 3. Property in Relations with its Possessor

Title 2. Ownership

- Chapter 1. Rights of Accession to Fluits of Property
- Chapter 2. Rights of Accession to Connected and Incorporated Things

Title 3. Usufruct, Use (commonage) and Habitation

- Chapter 1. Usufruct
- Chapter 2. Use (commonage) and Habitation

Title 4. Servitudes or Land Services

- Chapter 1. Servitudes arising from Situation of Places
- Chapter 2. Startutory Servitudes
- Chapter 3. Servitudes established by Act of Person

Book on Various Modes of Acquisition of Property

General Provisions

Title 1. Successions

- Chapter 1. Opening of Succession, Taking into Possession by Heirs
- Chapter 2. Requirements for Successions
- Chapter 3. Orders of Successions (Heirs)
- Chapter 4. Irregular Successions
- Chapter 5. Acceptance and Repudiation of Successions
- Chapter 6. Division (Partition) and Restitution

Title 2. Gift Inter Vivos and Wills

- Chapter 1. General Provisions
- Chapter 2. Requirements for Gift Inter Vivos
- Chapter 3. Disposable Portion and Reduction
- Chapter 4. Gift Inter Vivos
- Chapter 5. Testamentary Dispositions
- Chapter 6. Dispositions allowed in favor of Grand-children or Children of Brothers and Sisters
- Chapter 7. Distributions made by Father, Mother or other Ancestors among Descendants
- Chapter 8. Gift made by Marriage Contract to Spouses and to Children born of Marriage

Title 3. Contracts and Conventional Obligations in general

- Chapter 1. Preliminary Provisions
- Chapter 2. Requirements essential for Validity of Agreements
- Chapter 3. Effects of Obligations
- Chapter 4. Various Kinds of Obligations
- Chapter 5. Extinction of Obligations
- Chapter 6. Proof of Obligations and of Payment

Title 4. Obligations arising without Contract

- Chapter 1. Quasi-Contracts
- Chapter 2. Crimes (Intentional Torts) and Quasi-Crimes (Unintentional Torts)

Title 5. Contract of Marriage and Rights of Spouses

- Chapter 1. General Provisions
- Chapter 2. Regime of Community of Property
- Chapter 3. Regime of Separate Property (Dowry)

Contents of the “French Civil Code” (1804)
(Original version at the time of the enactment in 1804)

Title 6. Sales

- Chapter 1. Nature and Form of Sales
- Chapter 2. Those who may buy and sell (Buyers and Sellers)
- Chapter 3. Goods which may be sold (Objects of Sales)
- Chapter 4. Obligations of Seller
- Chapter 5. Obligations of Buyer
- Chapter 6. Avoidance and Rescission of Sales
- Chapter 7. Auction
- Chapter 8. Assignment of Claims and other Incorporeal Rights

Title 7. Exchange

Title 8. Contract of Lease (Hiring)

- Chapter 1. General Provisions
- Chapter 2. Lease of Things
- Chapter 3. Lease of Labor and Services
- Chapter 4. Lease of Livestock (Domestic Animals)

Title 9. Contract of Partnership (Companies)

- Chapter 1. General Provisions
- Chapter 2. Various Kinds of Partnerships
- Chapter 3. Mutual Duties among Partners and Obligations to Third Persons
- Chapter 4. Various Modes of Extinction of Partnerships

Title 10. Loans

- Chapter 1. Loan for Use
- Chapter 2. Loan for Consumption
- Chapter 3. Loan on Interest

Title 11. Deposit (Bailment and Lodgment)

- Chapter 1. Deposit in general and Various Kinds of Deposit
- Chapter 2. Ordinary Deposit (Bailment)
- Chapter 3. Deposit of Disputed Property (Lodgment)

Title 12. Aleatory Contracts

- Chapter 1. Play and Betting
- Chapter 2. Contract for Life Annuity

Title 13. Mandate (Agency)

- Chapter 1. Nature and Form of Mandate
- Chapter 2. Obligations of the Mandatory
- Chapter 3. Obligations of the Principal
- Chapter 4. Various Modes of Extinction of Mandate

Title 14. Suretyship

- Chapter 1. Nature and Extent of Suretyship
- Chapter 2. Effects of Suretyship
- Chapter 3. Extinction of Suretyship
- Chapter 4. Legal and Judicial Suretyship

Title 15. Compromise

Title 16. Personal Arrest in Civil Matter

Title 17. Pledge

- Chapter 1. Pledge of Movable
- Chapter 2. Pledge of Immovable Property

Title 18. Preferential Rights and Hypotec (Mortgage)

- Chapter 1. General Provisions
- Chapter 2. Preferential Rights
- Chapter 3. Hypotec (Mortgage)
- Chapter 4. Registration of Preferential Rights and Hypotec
- Chapter 5. Cancellation and Reduction of Registrations

- Chapter 6. Effects of Preferential Rights and Hypotec against Third Person

- Chapter 7. Extinction of Preferential Rights and Hypotec

- Chapter 8. Purging Property from Preferential Rights and Hypotec

- Chapter 9. Purging Property of Husband and Guardian from unregistered Hypotec

- Chapter 10. Publicity of Registers and Liability of Registrars

Title 19. Forced Sales and Ranking among Creditors

- Chapter 1. Forced Sales of Immovable Property of Debtor

- Chapter 2. Ranking and Distribution among Creditors

Title 20. Prescription

- Chapter 1. General Provisions

- Chapter 2. Possession

- Chapter 3. Causes which prevent Prescription

- Chapter 4. Causes which interrupt, suspend Prescription

- Chapter 5. Time required for Prescription

Book on Persons

- Chapter 1** Enjoyment and Exercise of Civil Rights
- Chapter 2** Nationality
 - Section 1 Acquisition of nationality
 - Section 2 Loss and recovery of nationality
 - Section 3 Procedure and effect of alteration of nationality
- Chapter 3** Relatives and Relatives in law
- Chapter 4** Marriage
 - Section 1 Requisites for marriage
 - Section 2 Wedding ceremony
 - Section 3 Marriage overseas related to a Japanese, marriage inland related to a foreigner
 - Section 4 Proof of marriage
 - Section 5 Ineffectiveness and annulment of marriage
 - Section 6 Effects of marriage
 - Section 7 Penal provisions
- Chapter 5** Divorce
 - Section 1 Divorce by agreement
 - Section 2 Divorce due to particular reasons
 - Section 3 Effects of divorce
- Chapter 6** Parental Relationship
 - Section 1 Proof of family status of parents and children
 - Section 2 Action for denial of family status
 - Section 3 Claim of illegitimate and fatherless children for legitimization
- Chapter 7** Adoption
 - Section 1 Requisites for adoption
 - Section 2 Ceremony of adoption
 - Section 3 Proof of adoption
 - Section 4 Ineffectiveness and nullity of adoption
 - Section 5 Effects of adoption
 - Section 6 Penal provisions
- Chapter 8** Dissolution of Adoption
 - Section 1 Dissolution of adoption by agreement
 - Section 2 Dissolution of adoption due to particular reasons
 - Section 3 Effects of dissolution of adoption
- Chapter 9** Parental Power
 - Section 1 Parental power over children in person
 - Section 2 Parental power over properties of children
 - Section 3 Exceptional provisions for legitimate mother and stepparents
- Chapter 10** Guardianship
 - General provisions
 - Section 1 Guardian
 - Section 2 Supervisor of guardian
 - Section 3 Family council
 - Section 4 Exemption from guardianship
 - Section 5 Disqualification, discharge, and dismissal of guardianship and membership of family council
 - Section 6 Management by guardian
 - Section 7 Duties of supervisor of guardian
 - Section 8 Termination of guardianship
 - Section 9 Settlement of guardianship
- Chapter 11** Capacity
- Chapter 12** Incapacity
 - Section 1 Incapacity in civil law
 - Section 2 Quasi-incapacity
 - Section 3 Incapacity in penal law
 - Section 4 Provisional management of properties of vagabond
- Chapter 13** Head and Other Members of Family
- Chapter 14** Domicile

- Chapter 15** Disappearance
 - Section 1 Presumption of disappearance
 - Section 2 Adjudication of disappearance
 - Section 3 Effects of adjudication of disappearance
 - Section 4 General provisions on presumption and adjudication of disappearance
 - Section 5 Provisions on absentee
- Chapter 16** Records of Civil Status

Book on Properties

General Provisions

Part One : Real Rights

- Chapter 1** Ownership
- Chapter 2** Usufruct, Use (commonage), and Habitation
 - Section 1 Usufruct
 - Section 2 Use (commonage) and habitation
- Chapter 3** Lease, Emphyteusis, and Superficies
 - Section 1 Lease
 - Section 2 Emphyteusis and superficies
- Chapter 4** Possession
 - Section 1 Various kinds of possession and objects of possession
 - Section 2 Acquisition of possession
 - Section 3 Effects of possession
 - Section 4 Loss of possession
- Chapter 5** Servitudes
 - General provisions
 - Section 1 Statutory servitudes
 - Section 2 Servitudes by agreement

Part Two : Obligations

General Provisions

- Chapter 1** Causes of Obligations
 - General Provisions
 - Section 1 Agreements
 - Section 2 Unjust Enrichment
 - Section 3 Unlawful damages i.e. Torts and quasi-torts
 - Section 4 Statutory provisions
- Chapter 2** Effects of Obligations
 - General Provisions
 - Section 1 Action for enforcement
 - Section 2 Action for compensation
 - Section 3 Securities
 - Section 4 Various kinds of obligations
- Chapter 3** Extinction of Obligations
 - Section 1 Performance (Discharge)
 - Section 2 Novation
 - Section 3 Release
 - Section 4 Set-off
 - Section 5 Confusion
 - Section 6 Impossibility of performance
 - Section 7 Avoidance of obligations
 - Section 8 Avoidance of claims
 - Section 9 Rescission
- Chapter 4** Natural Obligations

Book on Acquisition of Properties

- Chapter 1** Occupancy
- Chapter 2** Accession
 - Section 1 Accession to immovable properties
 - Section 2 Accession to movables
- Chapter 3** Sales
 - Section 1 General provisions

Section 2 Effects of sales contracts
 Section 3 Rescission and avoidance of sales
 Section 4 Auction of indivisible things
Chapter 4 Exchange
Chapter 5 Compromise
Chapter 6 Companies (or partnerships)
 Section 1 Nature and incorporation of company
 Section 2 Rights and duties of members
 Section 3 Dissolution of companies
 Section 4 Liquidation and Division of companies
Chapter 7 Aleatory Contracts
 Section 1 Gaming and betting
 Section 2 Contract for annuity of unlimited duration
Chapter 8 Loan for Consumption and Life Annuity
 Section 1 Loan for consumption
 Section 2 Life annuity
Chapter 9 Loan for Use
 Section 1 Nature of loan for use
 Section 2 Duties of parties
Chapter 10 Deposit and Sequestration
 Section 1 Deposit
 Section 2 Sequestration
Chapter 11 Mandate (Agency)
 Section 1 Nature of mandate
 Section 2 Duties of the mandatory
 Section 3 Duties of principal
 Section 4 Termination of mandate
Chapter 12 Contract for Services and Works
 Section 1 Contract for services
 Section 2 Contract for apprenticeship
 Section 3 Contract for works
Chapter 13 Succession
 General provisions
 Section 1 Succession to headship and patrimony of family
 Section 2 Succession to properties of family members
 Section 3 Fall to the State
 Section 4 Acceptance and repudiation of succession
Chapter 14 Gift and Testamentary Disposition
 General provisions
 Section 1 Capacity for gift or testamentary disposition
 Section 2 Gift
 Section 3 Exceptional provisions for gift between husband and wife
 Section 4 Testamentary disposition
 Section 5 Partition of property
Chapter 15 Matrimonial Property Contract
 Section 1 General provisions
 Section 2 Statutory property system

Book on Securities for Claims

General provisions

Part One : Personal securities

Chapter 1 Suretyship
 Section 1 Nature and objects of suretyship
 Section 2 Effects of suretyship
 Section 3 Termination of suretyship
 Section 4 Statutory and judicial sureties
Chapter 2 Joint and Several Creditors or Debtors
 General provisions
 Section 1 Joint and several debtors
 Section 2 Joint and several creditors
Chapter 3 Discretionary Indivisibility

Part Two : Real securities

Chapter 1 Rights of Retention
Chapter 2 Pledge on Movables
 Section 1 Nature and formation of pledge on movables
 Section 2 Effects of pledge on movables
Chapter 3 Pledge on Immovable
 Section 1 Nature, objects, and formation of pledge on immovable
 Section 2 Effects of pledge on immovable
Chapter 4 Statutory Liens
 General provisions
 Section 1 General statutory liens over movables or immovable
 Section 2 Particular statutory liens over movables
 Section 3 Particular statutory liens over immovable
Chapter 5 Hypothec (or mortgage)
 Section 1 Nature and objects of hypothec
 Section 2 Various kinds of hypothec
 Section 3 Public announcement of hypothec
 Section 4 Effects and rank of hypothec
 Section 5 Effects of hypothec against third holder
 Section 6 Duties of registration officers
 Section 7 Termination of hypothec

Book on Proof

Part One : Proof

General Provisions

Chapter 1 Discretion of Judge
 Section 1 Hearing of statements, investigation of disputed points and documents, and interpretation of provisions
 Section 2 Inspection
 Section 3 Expert opinion
Chapter 2 Direct Proof
 Section 1 Private documents
 Section 2 Oral confession
 Section 3 Notarized documents
 Section 4 Documents as counter evidence
 Section 5 Confirmation documents
 Section 6 Certificated copy of documents
 Section 7 Statements of witnesses
 Section 8 Public opinion
Chapter 3 Indirect Proof
 Section 1 Statutory presumption
 Section 2 Factual presumption

Part Two : Prescription

Chapter 1 Nature of Prescription and its Application
Chapter 2 Renunciation of Prescription
Chapter 3 Interruption of Prescription
Chapter 4 Suspension of Prescription
Chapter 5 Acquisitive Prescription of Ownership on Immovable Property
Chapter 6 Acquisitive Prescription of Ownership on Movables
Chapter 7 Prescription of Claims
Chapter 8 Exceptional Prescription

Contents of the “Civil Code for the Kingdom of Saxony” (1863)
in a simplified form

Book I General Provisions	Book III Claims
Chapter 1 on Civil Laws	Chapter 1 on Claims in General
Chapter 2 on Persons	Title 1 Contents of Claims, Persons and Objects Regarding Claims
Title 1 Natural Persons	Title 2 Fulfilment of Claims
Title 2 Juristic Persons	Title 3 Formation of Claims
Chapter 3 on Things	Title 4 Transfer of Claims
Chapter 4 on Acts	Title 5 Extinction of Claims
Title 1 General Provisions	Title 6 Joint Obligation
Title 2 Periods	Title 7 Bearer Bonds
Title 3 Juristic Acts	Chapter 2 on Particular Types of Claim
Title 4 Unlawful Acts	Title 1 Claims Arising from Contract or Similar Relationship
Chapter 5 on Rights	I. Gift
Chapter 6 on Security, Deposition, Exercise of Rights	II. Loan
Title 1 Security	III. Sale
Title 2 Deposition	IV. Exchange
Title 3 Claim and Defence	V. Contract for Publication
Title 4 Tradition of Claims to Heirs	VI. Contract for Life Annuity
Title 5 Extinction of Right of Claim	VII. Annuity Charge
Title 6 Proof of Rights	VIII. Gratuitous Loan for Use
Title 7 Effect of Legal Judgement	IX. Ordinary Lease and Usufructuary Lease
Title 8 Self-help	X. Contract for Services
Book II Real Rights	XI. Contract for Work
Chapter 1 on Possession of Things	XII. Brokerage
Chapter 2 on Ownership	XIII. Contract for Deposition
Title 1 General Provisions	XIV. Innkeepers Obligation due to Acceptance of Travellers
Title 2 Acquisition of Ownership of Movables	XV. Consignment for Sale
Title 3 Acquisition of Ownership of Immovables	XVI. Mandate
Title 4 Loss of Ownership	XVII. Order
Title 5 Exercise of Ownership Right by Court	XVIII. Management of Affairs without Mandate
Title 6 Co-ownership	XIX. Contract for Corporation
Title 7 Relationship between Neighbouring Land	XX. Community (Partnership without Contract)
Chapter 3 on Pledge	XXI. Obligation for Payment on Invoice
Title 1 Pledge in General	XXII. Contract for Acknowledgement of Obligation
Title 2 Pledge of Immovables	XXIII. Acceptance of Obligation
Title 3 Pledge of Movables	XXIV. Compromise
Title 4 Pledge of Rights	XXV. Agreement for Arbitrary Award
Chapter 4 on Real Charge	XXVI. Stipulated Penalty
Chapter 5 on Servitudes	XXVII. Stipulated Forfeiture of Rights and Other Stipulation
Title 1 General Provisions	XXVIII. Contract for Pledge
Title 2 Servitudes of Land	XXIX. Suretyship
Title 3 Personal Servitudes	XXX. Gaming and Betting
	Title 2 Claim Arising from Unlawful Act
	Title 3 Claim Arising from other Grounds

Contents of the “Civil Code for the Kingdom of Saxony” (1863)
in a simplified form

Book IV Family and Guardianship

Chapter 1 on Marriage

- Title 1 Engagement
- Title 2 Entry into Marriage
- Title 3 Effect of Marriage on the Person of Spouse
- Title 4 Effect of Marriage on Juristic Acts of Spouse
- Title 5 Effect of Marriage on Properties of Spouse
- Title 6 Marriage Covenant
- Title 7 Termination of Marriage

Chapter 2 on Relationship between Parents and Children

- Title 1 Legal Relationship of Legitimate Children
- Title 2 Adoption of a Child
- Title 3 Rights and Duty of Parents
- Title 4 Fatherhood
- Title 5 Mutual Duty of Sustenance
- Title 6 Claim regarding Family Status
- Title 7 Relationship between unmarried Parents and Children

Chapter 3 on Guardianship

- Title 1 Guardianship over minors
- Title 2 Special Types of Guardianship

Book V Succession

Chapter 1 General Provisions

Chapter 2 on Statutory Succession

- Title 1 General Provisions
- Title 2 Succession by Relatives
- Title 3 Succession by Spouse
- Title 4 Succession by Public Organizations

Chapter 3 on Testamentary Succession

- Title 1 General provisions
- Title 2 Capacity for Testament
- Title 3 Capacity for Testamentary Succession
- Title 4 Making a Will
- Title 5 Additional Provisions for Making a Will
- Title 6 Interpretation of a Will
- Title 7 Nomination as Successor
- Title 8 Nomination as Secondary Successors
- Title 9 Joint Will
- Title 10 Making a Will by Parents in Place of Children
- Title 11 Revocation of Will
- Title 12 Opening, Announcement, and Execution of Will

Chapter 4 on Acquisition of Succession

- Title 1 Acceptance and Refusal of Succession
- Title 2 Participation Right of Nominated Co-Successors

- Title 3 Unworthiness to Succession
- Title 4 Effect of Participation in General
- Title 5 Claim regarding Succession
- Title 6 Relationship of Successors to Creditors
- Title 7 Right of Separation
- Title 8 Partition of Heritage
- Title 9 Obligingness of Statutory Successors
- Title 10 Sale of Heritage

Chapter 5 on Bequest

- Title 1 Making a Bequest
- Title 2 Beneficiary and Obliger of Bequest
- Title 3 Subjects of Bequest
- Title 4 Revocation of Bequest
- Title 5 Acquisition of Bequest
- Title 6 Particular Types of Bequest
- Title 7 Gift on the Death
- Title 8 Direction of Ancestor

Chapter 6 on Contract for Succession and Renunciation of Succession

Chapter 7 on Compulsory Portion

Chapter 8 on the Rights on Heritage without Successors

Contents of the “Civil Code of Germany” (1896/1900)

(Original version at the time of the enactment in 1896)

Book I General Provisions

Chapter 1 Persons

- Title 1 Natural persons
- Title 2 Juristic persons

Chapter 2 Things

Chapter 3 Juristic Acts

- Title 1 Disposing capacity
- Title 2 Declaration of intention
- Title 3 Contract
- Title 4 Conditions, limit of time
- Title 5 Representation, agency
- Title 6 Consent, ratification

Chapter 4 Periods

Chapter 5 Prescription

Chapter 6 Exercise of Rights, Self-defence, Self-help

Chapter 7 Security

- Title 7 Contract for work
- Title 8 Brokerage
- Title 9 Promise of reward
- Title 10 Mandates (or Agency)
- Title 11 Management of affairs without mandate
- Title 12 Deposit (or Bailment)
- Title 13 Delivery of things to innkeepers
- Title 14 Partnership
- Title 15 Joint ownership
- Title 16 Life annuity
- Title 17 Gaming and betting
- Title 18 Suretyship
- Title 19 Compromise
- Title 20 Promise and acknowledgement of debts
- Title 21 Order
- Title 22 Bearer bonds
- Title 23 Presentation of things
- Title 24 Unjust enrichment
- Title 25 Unlawful acts

Book II Obligations

Chapter 1 Contents of Obligations

- Title 1 Obligation of performance
- Title 2 Default of the creditor

Chapter 2 Contractual Obligations

- Title 1 Formation of obligations, content of contract
- Title 2 Mutual contract
- Title 3 Promise of performance in favour of a third person
- Title 4 Earnest, stipulated penalty
- Title 5 Rescission

Chapter 3 Extinction of Obligations

- Title 1 Fulfilment of obligation (or performance)
- Title 2 Lodgement
- Title 3 Set-off
- Title 4 Release

Chapter 4 Assignment of Claims

Chapter 5 Assumption of Debts

Chapter 6 Plurality of Debtors and Creditors

Chapter 7 Contracts

- Title 1 Sale and exchange
- Title 2 Gift
- Title 3 Ordinary lease and usufructuary lease
- Title 4 Gratuitous loan for use
- Title 5 Loan for consumption
- Title 6 Contract for services

Book III Real Rights

Chapter 1 Possession

Chapter 2 General Provisions Regarding Rights over Land

Chapter 3 Ownership

- Title 1 Scope of ownership
- Title 2 Acquisition and loss of ownership of land
- Title 3 Acquisition and loss of ownership of movables
- Title 4 Claims arising from ownership
- Title 5 Co-ownership

Chapter 4 Superficies

Chapter 5 Servitudes

- Title 1 Servitudes on land
- Title 2 Usufruct
- Title 3 Limited personal servitudes

Chapter 6 Real Right of Preemption

Chapter 7 Real Charge on Land

Chapter 8 Hypothec, Monetary Charge on Land, and Annuity Charge on Land

- Title 1 Hypothec
- Title 2 Monetary charge on land, annuity charge on land

Chapter 9 Right of Pledge on Movables and on Rights

- Title 1 Pledge on movables
- Title 2 Pledge on rights

Contents of the “Civil Code of Germany” (1896/1900)

(Original version at the time of the enactment in 1896)

Book IV Family

Chapter 1 Civil Marriage

- Title 1 Engagement
- Title 2 Entry into marriage
- Title 3 Revocation of marriage
- Title 4 Remarriage in case of declaration of death
- Title 5 Effects of marriage in general
- Title 6 Marital property rights
- Title 7 Divorce
- Title 8 Religious obligations

Chapter 2 Family Relationship

- Title 1 General provisions
- Title 2 Descent
- Title 3 Duty of sustenance
- Title 4 Legal relationship between parents and child in general
- Title 5 Parental authority over legitimate children
- Title 6 Parental authority over illegitimate children
- Title 7 Legitimation of illegitimate children
- Title 8 Adoption of a child

Chapter 3 Care

- Title 1 Guardianship over minors
- Title 2 Guardianship over majors
- Title 3 Curatorship

Book V Succession

Chapter 1 Order of Succession

Chapter 2 Legal Status of the Heirs

- Title 1 Acceptance and disclaimer of the inheritance. Supervision of the probate court
- Title 2 Liability of an heir for the obligations of the estate
- Title 3 Claim to the inheritance
- Title 4 Plurality of heirs

Chapter 3 Wills

- Title 1 General provisions
- Title 2 Appointment of heirs
- Title 3 Appointment of a reversionary heir
- Title 4 Legacies (or bequests)
- Title 5 Testamentary burdens
- Title 6 Executors
- Title 7 The making and revocation of a will
- Title 8 Joint will

Chapter 4 Contract of Inheritance

Chapter 5 Compulsory Portion

Chapter 6 Unworthiness to Inherit

Chapter 7 Renunciation of Inheritance

Chapter 8 Certificate of Inheritance

Chapter 9 Purchase of an Inheritance

Contents of the “Revised Civil Code of Japan” (1896/98)

Book I General Provisions

Chapter 1 Persons

- Title 1 Enjoyment of civil rights
- Title 2 Capacity
- Title 3 Domicile
- Title 4 Disappearance
- Title 5 Presumption of simultaneous death (1962 ~)

Chapter 2 Juristic Persons

- Title 1 Incorporation of juristic persons
- Title 2 Administration of juristic persons
- Title 3 Dissolution of juristic persons
- Title 4 Penal provisions

Chapter 3 Things

Chapter 4 Juristic Acts

- Title 1 General provisions
- Title 2 Declaration of intention
- Title 3 Representation (agency)
- Title 4 Nullity and voidability
- Title 5 Conditions and limit of time

Chapter 5 Periods

Chapter 6 Prescription

- Title 1 General provisions
- Title 2 Acquisitive prescription
- Title 3 Extinctive prescription

Book II Real Rights

Chapter 1 General Provisions

Chapter 2 Possession

- Title 1 Acquisition of possession
- Title 2 Effect of possession
- Title 3 Loss of possession
- Title 4 Quasi-possession

Chapter 3 Ownership

- Title 1 Limitation of ownership
- Title 2 Acquisition of ownership
- Title 3 Co-ownership

Chapter 4 Superficies (Hereditary Building Rights)

Chapter 5 Emphyteusis (Usufructuary Lease)

Chapter 6 Servitudes

Chapter 7 Rights of Retention

Chapter 8 Statutory Liens

- Title 1 General provisions
- Title 2 Various kinds of statutory liens
 - Subtitle 1 General statutory liens
 - Subtitle 2 Statutory liens over movables
 - Subtitle 3 Statutory liens over immovables
- Title 3 Order of priority of statutory liens
- Title 4 Effect of statutory liens

Chapter 9 Pledge

- Title 1 General provisions

- Title 2 Pledge on movables
- Title 3 Pledge on immovables
- Title 4 Pledge on rights

Chapter 10 Hypothec (Mortgage)

- Title 1 General provisions
- Title 2 Effect of hypothec
- Title 3 Termination of hypothec
- Title 4 Maximal-hypothec (1971 ~)

Book III Claim

Chapter 1 General Provisions

- Title 1 Subject of claim
- Title 2 Effect of claim
- Title 3 Claim with plural parties
- Title 4 Assignment of claim
- Title 5 Extinction of claim

Chapter 2 Contracts

- Title 1 General provisions
- Title 2 Gift
- Title 3 Sale
- Title 4 Exchange
- Title 5 Loan for consumption
- Title 6 Loan for use
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ลักษณะ ๒ สิทธิโดยธรรมในการรับมรดก

- หมวด ๑ บทเบ็ดเสร็จทั่วไป
- หมวด ๒ การแบ่งทรัพย์สินมรดกกระหว่างทายาทโดยธรรมในลำดับและชั้นต่างๆ
- หมวด ๓ การแบ่งส่วนมรดกของทายาทโดยธรรมในลำดับและชั้นต่างๆ
 - ส่วน ๑ ญาติ
 - ส่วน ๒ คู่สมรส
- หมวด ๔ การรับมรดกแทนที่กัน

ลักษณะ ๓ พินัยกรรม

- หมวด ๑ บทเบ็ดเสร็จทั่วไป
- หมวด ๒ แบบพินัยกรรม
- หมวด ๓ ผลและการตีความแห่งพินัยกรรม
- หมวด ๔ พินัยกรรมที่ตั้งผู้ปกครองทรัพย์สิน
- หมวด ๕ การเพิกถอนและการตกไปแห่งพินัยกรรมหรือข้อกำหนดพินัยกรรม
- หมวด ๖ ความเสียเปล่าแห่งพินัยกรรมหรือกำหนดพินัยกรรม

ลักษณะ ๔ วิธีจัดการและปันทรัพย์สินมรดก

- หมวด ๑ ผู้จัดการมรดก
- หมวด ๒ การรวบรวมจำหน่ายทรัพย์สินมรดกเป็นตัวแทน และการชำระหนี้กับแบ่งปันทรัพย์สินมรดก
- หมวด ๓ การแบ่งมรดก

ลักษณะ ๕ มรดกที่ไม่มีผู้รับ

ลักษณะ ๖ อายุความ