

How did Codification Project of Civil Code in Japan Change its Model from French to German Law?

Its Political Background and Theoretical Grounds

 See "[Contents of Related Civil Codes](#)"

Main Goal: Nation State

- ◇ In 1868, the *Imperial Alliance* defeated the *Tokugawa Shogunate* in Edo and founded a new government. It was the end of the feudalism in Japan since the 12th Century.
- ◇ Its main goal was to abolish the feudalistic division of the society and to establish a “*Nation State*” in order to protect the independence against the Western powers:
 - Unification of the 266 territories of the feudal lords
 - Integration of the 4 Classes into “*Commons*”
 1. Samurai-warriors
 2. Farmers
 3. Manufacturers
 4. Merchants

Start of Codification Project for Civil Code (Its Modern Aspect)

- ◇ The Japanese Samurai Warrior Class had developed its “*Private Law Tradition*” since the 12th Century. For them, “Private Law” was the principle of governance.
- ◇ In accordance with this tradition, the Meiji Government started its codification project for Civil Code already in 1870s.
- ◇ Its main subject of this project was “*Law on Persons*”:
- ◇ Firstly, it was quite important for the government to clearly declare the “*Japanese Nationality*” and to establish an equal “*Civil Status*” for all the population.

Start of Codification Project for Civil Code (Its Conservative Aspect)

- ◇ For this purpose, the Meiji government intended to develop a “**Unified Family System**” as a political instrument. In its vision, each family household should function as a smallest “**administrative unit**”, its head of family as an “**agent of the government**”. He should govern and discipline other family members in his household.
- ◇ Such a unified legal system should be designed after the “**Law of Family and Succession**” of the former Samurai-Warrior Class in the feudal period.
- ◇ The leading persons of the government were young Samurai-Warriors, and their mentality was quite conservative. Above all, the “**Meiji Restoration**” was not any genuine “**Civilian Revolution**”.

Who were the Leaders of Meiji Government?



Soldiers of "Imperial Alliance"
(1868)



Emperor Mutsuhito
(His Reign: 1867 – 1912)



Court Noble
Tomomi Iwakura
(1825 – 1883)

There were no civilian persons in leading positions of the government.

What could be a Model Law?

- ◇ However, the members of the Meiji government had absolutely no idea how they should codify their own civil code.
- ◇ First of all, they had to invent *basic vocabulary* and *technical terms* for legal terminology in Japanese language.

Secondly, they had no experience *to compose legal provisions* and *to arrange such provisions to a system*.

- ◇ The only method to clear these difficulties was *to translate an established Civil Code into Japanese*. The “*French Civil Code*” was almost only choice for this purpose.
- ◇ In this regard, *Common Law* (unwritten case law) was of no use. Moreover, it was the “*Law of Colonial Lords*” in the British colonies, but not for the protection of independence against Western colonialism.

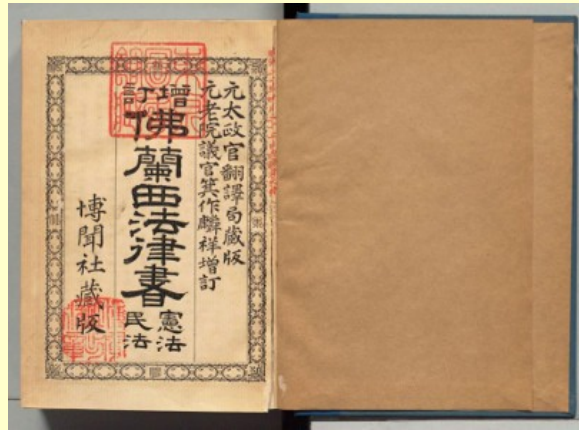
👉 See “[List of National Legal Systems](#)”.

Japanese Translation of “French Codes”

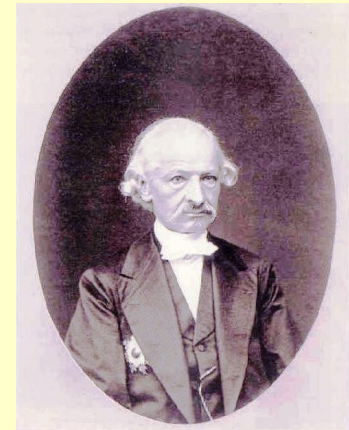
- ◇ Firstly, the government commissioned Mr. *Rinsho Mitsukuri* to create a comprehensive translation of main French Codes:
Criminal (1870), Civil (1871), Civil Procedure (1873), Constitution (1873), Commercial (1874), Criminal Procedure (1874) and so on.
- ◇ Moreover, the government invited Prof. *Gustave Émil Boissonade* from Paris and commissioned him to give lecture on legal science and to draft *Criminal Code* and *Code of Criminal Procedure*.



Rinsho Mitsukuri
(1846 – 1897)



Constitution and Civil Code (1887)



Gustave Émile Boissonade
(1825 – 1910)

Competition between Liberals and Conservatives (1870s)

- ◇ The main subjects of the codification projects were “*Nationality*”, “*Civil Status*”, “*Family*”, and “*Succession*”. The members of the government tried to compose several trial drafts on these subjects in accordance with the Japanese translation of the French Civil Code.
- ◇ However, the members of the government split over the basic principle for the codification project. There were a *liberal* group and a *conservative* one. The liberal members intended to introduce French provisions almost unchanged. The conservative members resisted against liberalism and individualism of the French provisions. Their opinions were divided, for example, on the question whether the marriage would be a contract between two individuals or a matter of concern between two families.

Political Crisis in 1870s and 80s

- ◇ Meanwhile, the political situation was dramatically changed, and the tension in the Japanese society increased rapidly.
- ◇ The reason for this tension was a new taxation system. The Meiji government imposed a very high taxation on the majority of the population, namely *poor farmers*, in order to cover all the costs for the industrialization policy. As a result, the everyday life of the farmers could not be improved at all. They were deeply disappointed.
- ◇ There was another group of people who opposed to the government, namely *former Samurai-warriors*. They lost their status, privileges, jobs and earnings due to the new policy of the Meiji government.

These two groups jointed together and organized *rebellions* against the government. This protest movement rapidly spread nationwide.

Majority of Population living under same conditions as in Feudalism



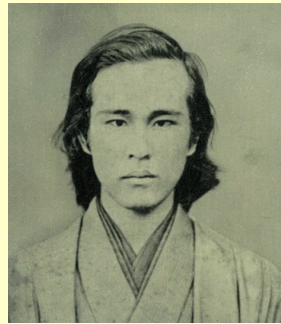
125 唐棹での脱穀 ca.1880 Threshing with flails

Popular Movement for Freedom and Democracy

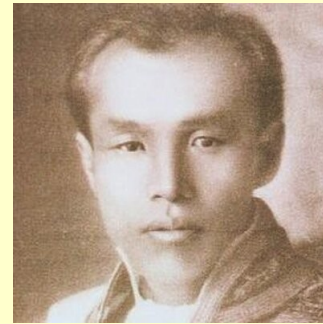
- ◇ Of course, violence and destruction could not solve the problem. The leaders of the movement took a step toward a genuine *political movement* and began to study Western political theories. They were deeply impressed with *the Spirit of the French Revolution* and founded political parties and demanded the government to introduce “*Universal Suffrage*” and to open “*Parliament*”.
- ◇ Even some *liberal members of the government* associated with this movement. For this reason, they were expelled from the government.



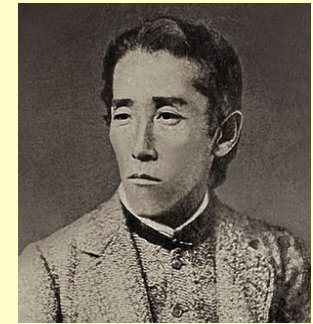
Chomin Nakae
(1847 – 1901)



Emori Ueki
(1857 – 1892)



Shigenobu Okuma
(1838 – 1922)



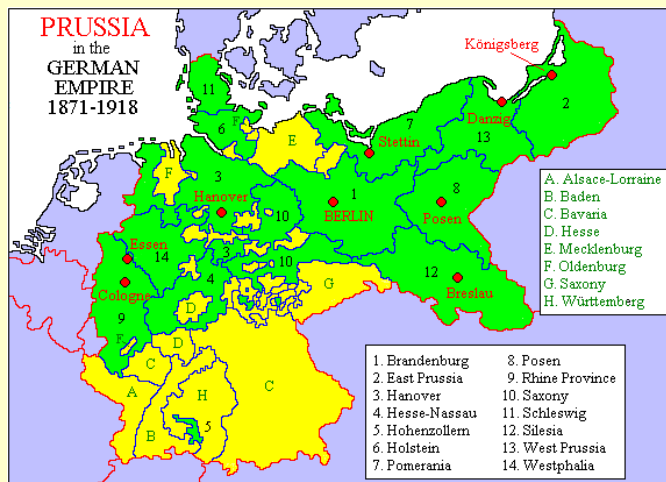
Taisuke Itagaki
(1837 – 1919)

Gradual Shift away from French Law, Approach toward German Law

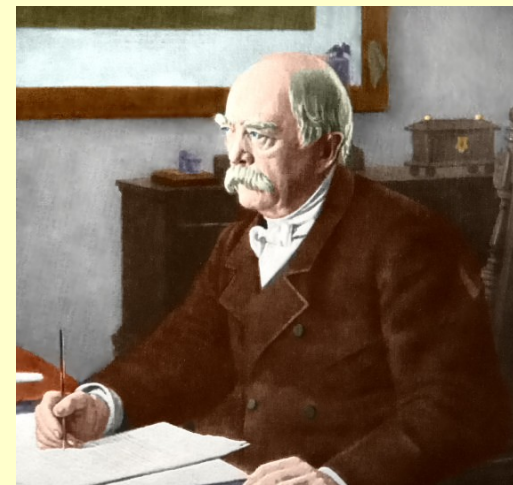
- ◇ Facing heavy pressure from the democracy movement, the conservative group in the government realized that the French Civil Code was a symbol of the French Revolution. They gradually distanced themselves from the French law and searched for an alternative model law.
- ◇ At this moment, they became aware of the “*Rise of the German Empire*” which was established in 1871.
- ◇ In 1881, the conservative majority purged the liberal group from the government and declared to establish a *constitutional monarchy after the Prussian model*.
- ◇ In the same year, the government commissioned Prof. *Hermann Roesler* from Germany to draft a “Commercial Code”. In 1884, the government commissioned Mr. *Hermann Techow* from Germany to draft a “Code of Civil Procedure” after the German Code.

Where was Prussia?

- ◇ During the Napoleonic Wars (1803 – 1815), the “Holy Roman Empire” was finally dissolved. After the wars, people in these areas became aware of themselves as a “**Nation**”. In 1868, 22 states in the Northern Germany were unified as “North German Confederation” under the military leadership of the Kingdom of Prussia.
- ◇ This was an achievement of the powerful leadership of Prime Minister Otto von Bismarck. The well-organized military forces of Prussia defeated Denmark (1864), Austria (1866), and France (1870). In 1871, the Prussian King declared the foundation of “German Empire” including the Southern Germany.



Prussia in the German Empire 1871–1918



Prime Minister Otto von Bismarck (1815 – 1898)

A New Commission to Prof. *Boissonade* Last Attempt of the Liberals

- ◇ Shortly before the conservatives attained its dominance in the government, Minister of Justice, Mr. *Takato Ohki*, decided to suspend the Codification Project of Civil Code. He was a leading person of the liberal group.
- ◇ The main reason for this decision was the incompetence of the project members to develop original ideas and visions for *law on properties and obligations*. Indeed, they were former Samurai-warriors, and had no experience in business matters.
- ◇ Instead, Minister of Justice Mr. *Ohki* commissioned Prof. *Boissonade* to draft these parts of Civil Code. However, law on family and succession was reserved for the Japanese members of the project.
- ◇ The 1st version of his draft was completed in 1888. The conservative members of the government criticized it because “it was too individualistic”. In response to this criticism, the revised version was accomplished and enacted in 1890.

Civil Code of Japan (1890)

- ◇ The vision of Prof. *Boissonade* was principally based on the French Civil Code (so-called *Institutions System* or *Justinian System*). He improved its system for better understandability. His draft had following 5 Books:
1. **Law on Persons**Civil Rights, Nationality, Relatives, Capacity, Domicile, etc.
 2. **Law on Properties**
 1. Part 1: Real RightsOwnership, *Lease*, Emphyteusis, Superficies, *Possession*, Servitudes, etc.
 2. Part 2: ObligationsCauses, Effects, and Extinction of Obligations, etc.
 3. **Law on Acquisition of Properties**.....*Occupancy*, Contracts, Succession, etc.
 4. **Law on Securities**
 1. Part 1: Personal SecuritiesSuretyship, Joint and Several Debtors, etc.
 2. Part 2: *Real Securities**Retention, Statutory Lien, Pledge, Hypothec etc.*
 5. **Law on Proof**
 1. Part 1: ProofDiscretion of Judge, Direct Proof, Indirect Proof, etc.
 2. Part 2: Prescription Interruption, Suspension, Acquisitive Prescription, etc.

Special Features of Civil Code (1890)

- ◇ Compared to the original French Civil Code, the Civil Code of Japan (1890) shows following special features:
 - “**Lease**” was classified into “**Real Rights**”.
 - “**Possession**” itself was protected independently from proper Real Rights.
 - “**Real Securities**” were divided from “**Contracts**” together with “Personal Securities”.
- ◇ Prof. **Boissonade**'s intent and purpose in regard with “**Lease**” probably consists in legal protection and stabilization of life conditions of common people.
- ◇ In regard to “**Possession**” and “**Real Securities**”, Prof. **Boissonade** apparently referred to the **German Civil Law Theory** in the 19th century (so-called “**Pandects Science**” or “**Pandectist Studies of law**”).

Codification Controversy in Japan (1890 – 92)

- ◇ Already in 1889, the *Association of Legal Academicians* in Japan announced its fear that this Civil Code would cause many troubles with other codes which were drafted by German advisers.
- ◇ “*English Law Schools*” had a fundamental doubt about the validity of a “universal law of rationality” and criticized such a civil code based on the French theory of “*Natural Law*”.
- ◇ Moreover, *the conservatives and nationalists* among people even warned that such codes would destroy the moral and tradition of Japan.
- ◇ The tension between supporters and opponents gradually escalated into an emotional controversy, and eventually in 1892, the Parliament decided to postpone the implementation of the Civil Code of 1890, and the government appointed the “*Investigation Commission for Codification*” for the Revision of the Civil Code and the Commercial Code.

Investigation Commission for Codification

For the revision of the “Civil Code of 1890”, three Japanese professors were appointed to the leading drafting members:



Prof. Nobushige Hozumi
(1855 – 1926)

He studied in *England* and *Germany*. He **opposed** the Civil Code of 1890. He was in charge of head of commission.



Prof. Kenjiro Ume
(1860 – 1910)

He studied in *France* and *Germany*. He passionately **supported** the Civil Code of 1890.



Prof. Masa-akia Tomi-i
(1858 – 1935)

He studied in *France*. However, he was deeply convinced in the superiority of German Civil Code. He **opposed** the Civil Code of 1890.

“Revised Civil Code of Japan” (1896/98) and “Boissonade's Heritage”

- ◇ Under the strong leadership of Prof. *Hozumi* who represented the *German Law School* in Japan, the Commission decided to adopt certain parts from the *German Civil Law Theory (Pandects science)*.
- ◇ In this way, the “*Revised Civil Code of Japan*” (1896/98) was compiled in accordance with the so-called “*Pandects System*”.
- ◇ However, it was the *Revised Civil Code of 1890*. The Commission did not draft another one. *They reworked the Civil Code of 1890*. All the articles were rearranged in accordance with the *Pandects System* and reviewed from the view point of the comparative study of major leading codes of the world including the “*Civil Code of Austria*” (1811), the “*Civil Code for the Kingdom of Saxony*” (1863) and “*First and Second Draft German Civil Code*” (1888, 1892).
- ◇ Nevertheless, many institutes and provisions of the “*Old Civil Code of 1890*” *survived* the revision work by the Commission. These parts of the Revised Civil Code of Japan are called “*Boissonade's Heritage*”.

Reference: “Institutions” vs. “Pandects”?

◇ These European arrangements of civil law are derived from “**Roman Law Tradition**” based on the “**Corpus Iuris Civilis**”, which was the comprehensive collection of important legal documents. It was compiled at the request of Emperor **Justinianus** of the Eastern Roman Empire in 529 – 537. They were compiled in the following four Parts:

◇ **Institutiones**

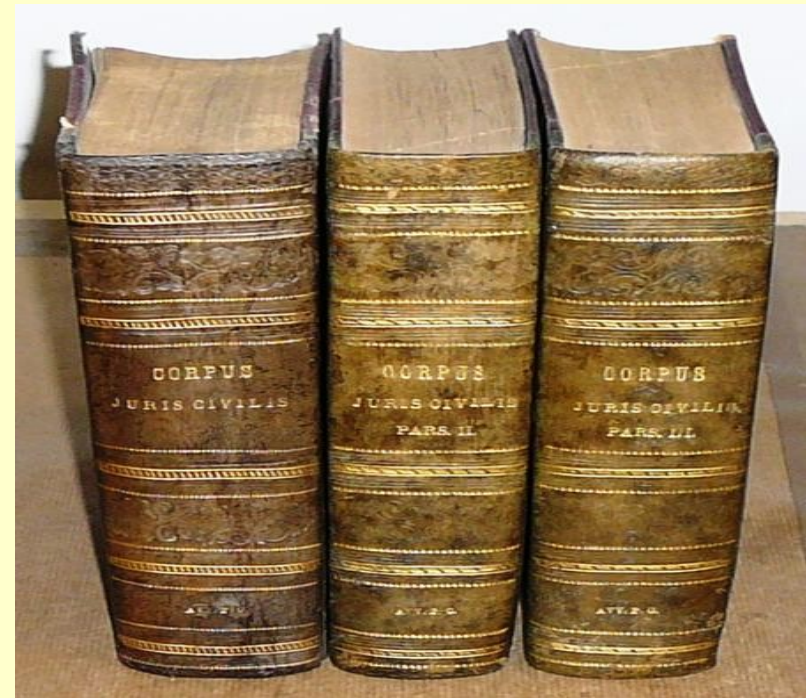
A general introduction to Roman law

Digesta (Pandectae)

Collection of legal theories and opinions of famous scholars

Codex and Novelle

A collection of statute laws enacted by Emperors.



Reception of Roman Law in Medieval Ages

- ◇ After the fall of the Western Roman Empire, this legal tradition lost its influence in the Western Europe, **Corpus Iuris Civilis** was once almost forgotten.
- ◇ In 1070, a handwriting copy of **Digesta** (“**Littera Florentina**”) was discovered. The **new Roman law study** was established at the **University of Bologna**. Many students from European countries studied the Roman law and brought it back to their home countries.
- ◇ However, not all the countries accepted the Roman law. The Common law lawyers in England and the French Monarchy for instance rejected to apply it in court practices. The Roman law study remained rather inside universities as an academic research and legal education (**Scholasticism**).
- ◇ On the other side, the lawyers in German countries really began to introduce it into court practices. In 1495, the “**Holy Roman Empire**” officially acknowledged the binding force of the Roman law and began with its application as a general law for all the German countries (**Usus modernus pandectarum**). In such a way, the Roman law was deeply integrated into the civil law tradition especially in German countries.

“Historical School of Law”

- ◇ Meanwhile, the European Intellectuals experienced dramatic changes of consciousness through Renaissance, Reformation and Enlightenment movement.
- ◇ Especially in France, the rise of the modern theory of “Natural Law” and “Social Contract” (Jean-Jacques Rousseau) resulted in the “French Revolution” (1789) and establishment of a new legal system for abolition of feudalism. Above all, the “Napoleonic Code” (1804) was arranged after the system of “*Institutiones*” and believed to be an expression of “*Universal Reason*”.
- ◇ Confronted with the invasion of the French army and the fall of the “*Holy Roman Empire*” (Napoleonic Wars), a new legal consciousness arose also among lawyers in German countries. However, they were inspired rather by “Romanticism” and “Historicism”.
- ◇ The German legal scholars had a fundamental doubt on the “Universal Law” and thought that a civil law was the essential part of *culture* and could not be “universal”, but “*individual*” for each nation, it was an expression of “*Spirit of Nation*”. A civil law was grown up through historical development of culture.
- ◇ For this reason, they insisted to recognize “*Spirit of Nation*” in civil law through “*Historical Research of Law*”.

“Romanists” vs. “Germanists”

- ◇ However, the German Historical School of Law was divided into two groups, namely *Romanists* and *Germanists*.
- ◇ The *Romanists* insisted that the Roman law was already integrated into the German tradition since the Medieval Age, and they tried to recognize the historical development of the Roman law through the analysis of *Digesta (Pandectae)*. The representative scholars were Gustav von Hugo (1764 – 1844), Georg Arnold Heise (1778 – 1851), and Friedrich Carl von Savigny (1779 – 1861).
- ◇ The *Germanists* rejected to acknowledge the Roman law as a part of German tradition. Instead, they tried to discover the genuine German tradition before the adoption of the Roman law. The representative scholars were Karl Friedrich Eichhorn (1781 – 1854), Jacob Ludwig Carl Grimm (1785 – 1863), and Carl Georg Christoph Beseler (1809 – 1888).
- ◇ The majority was the *Romanists*. They divided the legal documents of Digesta (Pandectae) into 5 fields (*General principles*, *Real Rights*, *Obligations*, *Family*, and *Succession*), and reconstructed their historical developments.

“Pandects Science” in the 19th Century

With this research method, the German legal scholars established a quite *systematical and accurate description of the modern civil law*.

Indeed, the academic achievements of the *Romanists* were officially acknowledged and adopted in the codification in the German countries.

The first one was [Civil Code of Austria \(1811\)](#), which was divided into three books, namely “Persons”, “Properties”, and “General Principles”.

The next one was the [Civil Code for the Kingdom of Saxony \(1863\)](#). The actual “*Pandects System*” was established with this code. When Prof. *Hozumi* and Prof. *Ume* studied the German civil law in Berlin in 1880s, they mainly learned this code. Therefore, they used it as a basic model for the Revision of Civil Code of Japan.

The first Draft of German Civil Code (1888) was composed based on the Saxony Civil Code. The main scholar in charge of this draft was [Bernhard Joseph Hubert Windscheid \(1817 – 1892\)](#).

The second Draft of German Civil Code (1892) was established as a modernized version of the first draft. It was enacted in 1898 and put into effect in 1900.