

# **Reception of the Western Legal System in Japan (1870s - 1890s)**

**Its Historical Background**

**And**

**Establishing a “Nation State” in Japan**

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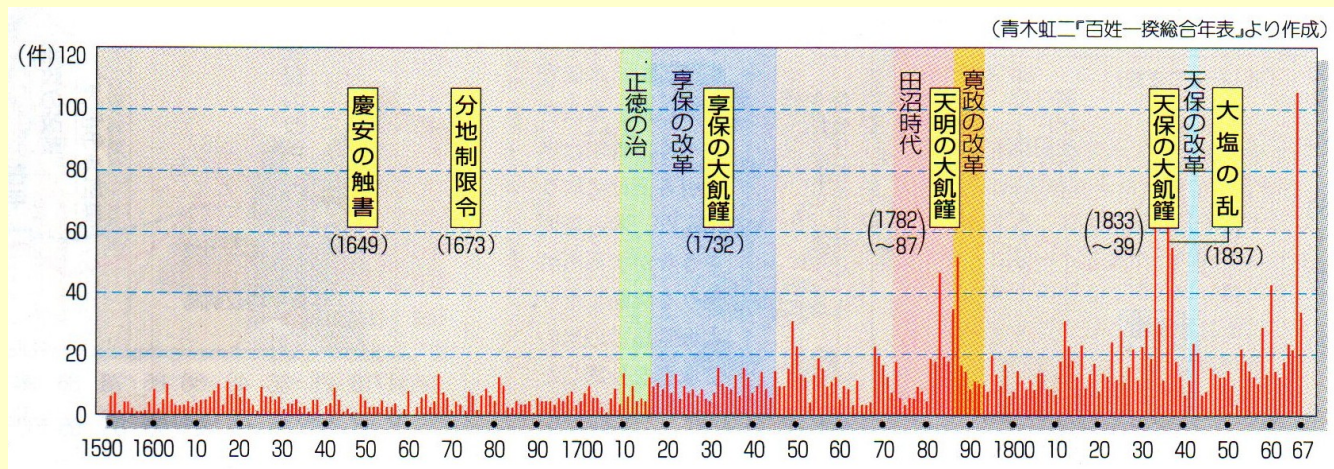
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# Decline of Tokugawa Shogunate (19.C.)

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- ◇ Due to the **financial Crises of the Samurai-Warrior class** since 18.C., the Samurai-Warriors began to collect more and more tributes from the farmers. The majority of the farmers fell deeply into debt to rich farmers. They lost their farmland and had to rent farmland (farmland tenancy).
- ◇ In the 19. C., the **poverty problem of the Farmer class** become quite serious, and they began to resist against the Samurai-Warrior class. Rebels of farmers spread over the country. The Tokugawa Shogunate gradually lost its political control over the country.



# Imperial Alliance

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- ◇ In 1850s, the Western battleships emerged in the Japanese off shores and required the Shogunate to open the ports to the Western power. The Shogunate accepted it and breached their own foreign policy.
  - ◇ Meanwhile, the young Samurai-Warriors, who were strongly inspired by **the political reform doctrines**, took over political leadership in several Southern Lordships.
  - ◇ They joined together and set up a military alliance. Their goal was to defeat the Tokugawa Shogunate and to restore the absolute sovereignty of the Emperor again.
- In 1867, the Shogunate resigned from its ruling position.



## Restoration of Ancient Imperialism (王政復古)

◇ In December 1867, the Imperial Alliance declared re-establishing of the absolute rule of the Emperor. Its main policies were following points:

いっくんばんみん

[1] 一君万民 Absolute Rule of the Emperor

Under the sovereignty of the Emperor, the division of the country among feudal lordships must be completely abolished, and the centralized administration system should be established.

しみんびょうどう

[2] 四民平等 Equalization of Four Classes

The division of classes must be abolished, and all the population should contribute to the defense of the country.

ふこくきょうへい

[3] 富国強兵 Enrich the Country, Strengthen the Armed Forces

Following the teachings of the ***Chinese Legalism***, a rich state revenue should be secured, and a solid military system should be established.

# Initial Reforms of State Institutions

◇ According to these main policies, the Meiji government introduced following reforms:

はいはんちけん

[1] **廃藩置県** (Abolition of Feudal Lordships, Establishing of Local Administration System, 1871)

All the Samurai-Warriors were excluded from the local administration and replaced with the government officials.

ちつろくしょぶん

[2] **秩禄処分** (Abolition of Employment of Samurais, 1876)

The salary-payment to the Samurai-Warriors was a huge financial burden for the government. They were all discharged.

がくせい

[3] **学制** (Introduction of Compulsory Education for All, 1872)

ちょうへいせい

[4] **徴兵制** (Introduction of Conscription System, 1873)

With these reforms, the government planned to involve all the population into a modern military system.

ちけんはっこう

[5] **地券発行** (Issue of Land Title, Introduction of Ownership on land, 1873)

The government lifted the ban of transaction of farmland (1642 ~), issued the certificate of ownership on farmland to the landlords (rich farmers), and determined the land price.

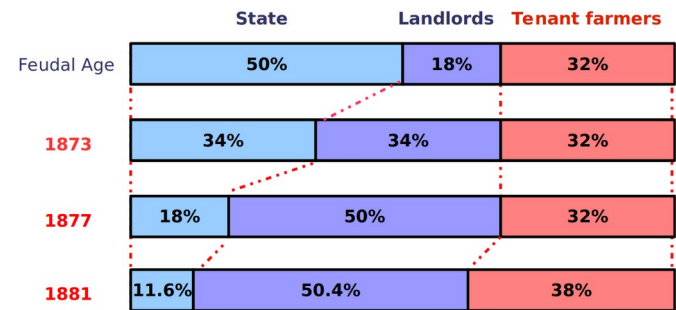
ちそかいせい

[6] **地租改正** (Abolition of Feudal Tributes, Introduction of Land tax, 1873)

The government introduced a new taxation system based on the land price for the purpose to secure the same tax revenue as in Edo period.

Accordingly, the financial situation of farmers stayed unchanged. It was the reason for the **“Popular Movement for Freedom and Democracy”**.

Distribution of Rice Harvest among State, Landlords, and Farmers



しょくさんこうぎょう

[7] **殖産興業** (Introduction and Promotion of New Industry, 1874 ~)

After the return of the ***“Iwakura Delegation”*** from Europe, many national projects were started for the industrialization. For this purpose, more than 1,300 foreign advisers were invited to Japan until 1890s.

## Iwakura Delegation (岩倉使節団)

◇ In 1871 in Europe, the Prussian army defeated the French army and declared the foundation of “**German Empire**”. Soon after the end of battle, the Meiji government sent a large delegation to the USA and European countries (Nov. 1871 ~ Sep. 1873):

- 107 persons (46 government members, 18 secretaries, 43 students).
- USA, England, France, Belgium, Netherlands, Germany, Russia, Denmark, Sweden, Italy, Austria, Swiss, etc.
- **[Purpose 1]** Submission of the official greeting letters from the Emperor to the Western governments.
- **[Purpose 2]** Preparation for re-negotiation of the unequal treaties.
- **[Purpose 3]** Investigation of the actual Western civilization.





# “Nation State” Supreme Goal of Modernization

- ◇ In the Asian history, there was already a clear concept of “**State**” especially in China since the **Qin Dynasty** (秦朝) in 221 - 206 BC.
- ◇ Compared with this ancient imperialism, the main actor is now a “**Nation**”. Main characteristics of a modern “**Nation State**” would be following points:
- **State** (Unified territory and unified defense forces)
  - **Government** (Centralized administration system)  
An efficient education and a fair recruitment system are necessary.
  - **Nation** (Establishing of “Civil status” for all)  
An equal status for all individuals must be established for their unity.
  - **National market** (Economic activities as “Wealth” and “Power”)  
“Civilian persons” are main actors.
  - **Modern legalism** (Rule of “Public law”)  
Modern “Public law” concepts are established and integrates also “Private law” into it (“**Codification**”).

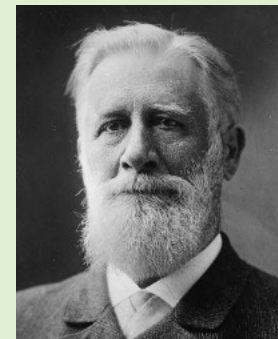
# Modern Concept of “Public Law” (I) “Superhuman Authority”

◇ In the Western feudalism, each social class or status developed own “private law”. The modern concept of “**Law of State**” developed together with the absolute monarchy:

- **Niccolò Machiavelli** (1469 – 1527, “**Prince**”)  
He released the monarch (state’s acts) from moral bindings.
- **Thomas Hobbes** (1588 – 1679, “**Leviathan**”)  
He described the state as a monster, a “superhuman authority”.
- **Georg Wilhelm Friedrich Hegel** (1770 – 1831, “**Philosophy of Law**”)  
The state occupies an extraordinary position as highest level of morality and embodiment of “Objective Spirit”.

◇ German “Theory of State (Staatslehre)” in the 19. – 20. C. inherited this authoritarianism and criticized liberalism and individualism:

- **Otto von Gierke** (1841 – 1921)
- **Georg Jellinek** (1851 – 1911)
- **Carl Schmitt** (1888 – 1985)



## Modern Concept of “Public Law” (II) “Supervising Authority over State’s Acts”

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◇ On the other hand, however, the European legal tradition had possessed another origin of “Public Law” concept which put legal restrictions upon the power of the monarchy. Its origin is to find in English history:

- “Great Charter (Magna Carta)” (1215)
- “Petition of Right” (1628) and “Bill of Rights” (1689)

◇ This concept was philosophically justified by the modern theory of “*Natural Law*” and “*Social Contract*”:

- John Locke (1632 - 1704, “Two Treatises of Government”)
- Jean-Jacques Rousseau (1712 - 1778, “Social Contract”)

◇ These theories were really actualized in following historical events:

- “United States Declaration of Independence” (1776)
- “Constitution of the United States” (1787)
- “French Revolution” (1789)

# Legal Reforms after French Model

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◇ In the early period, however, the government had nothing other than to apply the provisions of the ancient law (律令):

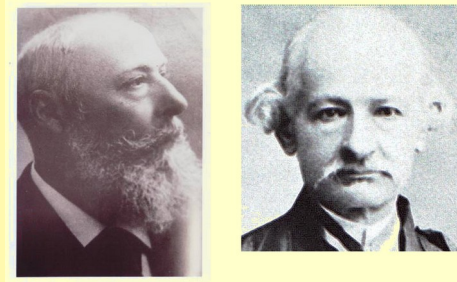
- 『しんりつこうりょう新律綱領』 (1870), 『かいていりつれい改定律例』 (1873) etc.

◇ The government was clearly aware of the inevitability to introduce the modern Western legal system. It began to take necessary measures soon:

- The Ministry of Justice (しほうしょう司法省) and its law school (めいほうりょう明法寮) for research and education were set up in 1871.
- The government ordered an officer, みつくりりんしょう箕作麟祥, to create Japanese translation of French Codes (1870 - 1874).

◇ Moreover, the government decided to invite French legal advisers for the lecture at the law school:

- **Georges Hilaire Bousque**; 1872 - 1876
- **Gustave Émile Boissonade**; 1873 - 1895



# First Modern Criminal Codes

◇ Besides the study of the French law at the law school, the legal officers tried to draft a penal code by their own effort. However, their first “**Draft for Penal Code**” (1876) was not successful.

◇ The government decided to commission Prof. **Boissonade** to draft the “Penal Code” and the “Code of Criminal Procedure”.

In 1880, the first modern codes in Japan, けいほう 刑法 (**Penal Code**) and ちざいほう 治罪法 (**Code of Criminal Instruction**), were enacted.

◇ In 1870s and 80s, the “**Popular Movement for Freedom and Democracy**” widely spread in the country and intensified its criticism against the government.

The conservative members criticized the liberalism of the Penal Code of Prof. **Boissonade** and demand much harder punishment against the protesters.

◇ Later in 1890s, the second drafting project based on the German law started.

The second “**Penal Code**” (1907) and the “**Code of Criminal Procedure**” (1923) replaced the old Codes.

# Question of “Constitution”

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◇ From the beginning of its rule, the government considered whether a constitution should be introduced or not.

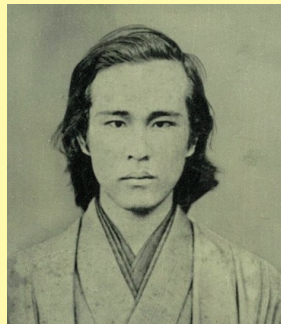
Its conservative members, however, rejected the modern concept of “**Constitutional Monarchy**” and intended to save their quite archaic vision of the “**Absolute Rule of Emperor**”.

◇ In 1874, the liberal members in the government submitted the “*Petition for*  
みんせんぎいんせつりつけんぱくしょ  
*Opening the Parliament elected by People*” (民撰議院設立建白書).

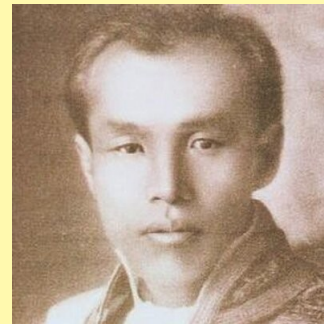
The majority of the Japanese population jointed to this action and started the  
じゅうみんけんうんどう  
“*Popular Movement for Freedom and Democracy*” (自由民権運動).



Chomin Nakae  
(1847 – 1901)



Emori Ueki  
(1857 – 1892)



Shigenobu Okuma  
(1838 – 1922)



Taisuke Itagaki  
(1837 – 1919)

## “True Nature of Japanese Nation” 國體 (国体)

◇ Facing the popularity of the democracy movement, the leading members introduced this half-mythological concept into the constitutional theory.

◇ Its origin was <sup>こくがく</sup> 國學 (National Studies) in the Edo period, especially its <sup>み とがく</sup> 水戸學 (Mito School). It was born from the criticism against the Neo-Confucianism and Buddhism. It insisted to find out the original tradition or spirit of the Japanese nation before the introduction of the Chinese civilization into Japan.



Tokugawa Mitsukuni  
(1628 – 1701)

◇ Its political theory clearly distinguished <sup>こくたい</sup> 國體 from <sup>せいたい</sup> 政體 (particular political systems) and asserted: “The true Japanese tradition is *the everlasting divine rule of Emperor*, it had never been infringed by any constitutional changes”.

The sovereignty of the Emperor stood over any constitutional regulations.

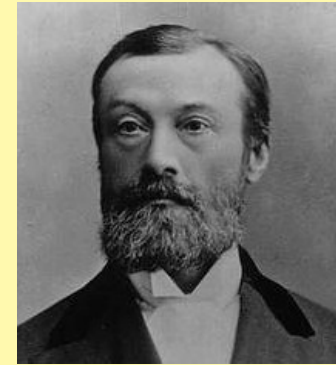


(1937)

# Constitution of the Empire of Japan (大日本帝國憲法)

◇ The nationalistic concept of 國體 could be easily combined with the authoritarian concept of the German theory of state.

In 1878, a German legal scholar, [Hermann Roesler](#), was invited to Japan as a legal adviser. The government commissioned him at first to draft the **Commercial Code**.



◇ In 1881, the Emperor announced the Imperial Edict to set up a parliament in 1890. At the same time, the government decided to dismiss all its liberal members from their official positions in the government.

◇ With assistance from **Roesler**, the government started the drafting project of a constitution based on the [Prussian Constitution of 1850](#).

In 1889, the "[Constitution of the Empire of Japan](#)" was promulgated without any participation of civilian persons or political parties.





# Codification Project for Civil Code (Its Modern Aspect: “Nation”)

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◇ The government started its codification project for Civil Code already in 1870.

Firstly, it was quite important for the government to clearly define the “**Japanese Nationality**” and to establish an equal “**Civil Status**” for all the population.

◇ The liberal members in the government began to write partial drafts for Civil Code based on the French Civil Code, especially Book I on Persons (“**Civil Rights**”, “**Nationality**”, “**Marriage**” etc.)

みんぼうけつぎ

- **民法決議** (Resolutions on Civil Law, 1871 - 72)

みんぼうかりきそく

- **民法仮規則** (Provisional Civil Regulation, 1873)

めいじ

みんぼうそうあん

- **明治11年民法草案** (Draft Civil Code, 1878)

◇ However, these drafts were mostly word-for-word translation of the French Civil Code, especially in the parts for law on properties and obligations.

## Traditional Concept for Family and Succession (Its Feudalistic Aspect)

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- ◇ On the other hand, the conservative members in the government were strongly interested in Law on Family and Succession.
- ◇ They intended to introduce a unified family system for all citizens. In their vision, each family household should function as an administrative unit, its “**head of family**” should play a role as an agent of the government and govern and discipline other family members in his household.

Such a family system was designed after the Law on Family and Succession of the former Samurai-Warrior class in the feudal period.

- ◇ Until 1874, they shaped out their main concepts for “**Law on Succession of Patrimony**”, “**Law on Adoption**”, “**Law on Guardianship**”, “**Law on Marriage**” etc.

Later, these quite feudalistic ideas formed the core concepts of the Law on Family and Succession in the Revised Civil Code of 1896/98.

# Civil Code of 1890

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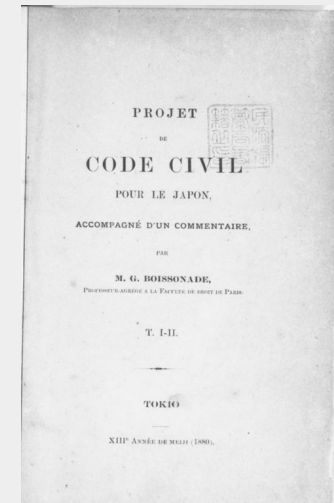
◇ There was no civilian persons among the leading members in the government. They were all former Samurai-Warriors.

They had no idea and knowledge about business activities. For this reason, it was impossible for them to create any original draft for law on properties and obligations.

◇ In 1880, the government decided to commission Prof. **Boissonade** to draft these laws, while the law on family and succession was reserved for the Japanese members of the project.

The 1<sup>st</sup> version of his draft was completed in 1888. The conservative members of the government criticized its parts for the law on family and succession because these parts were “too individualistic” for them.

◇ In response to this criticism, these parts were revised once, and the 2<sup>nd</sup> version was approved by the government and enacted in 1890.



## Legal Education at Universities

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◇ Meanwhile, the education system in high level was introduced and rapidly expanded.

In 1886, 7 **national universities** (帝国大学) were founded, and legal education on English law and French law begun.

◇ In this period, also main **private universities** in Tokyo were founded and began legal education based on English or French law.

- **“French law schools”**: today’s 法政大学 (Hosei, 1880), 明治大学 (Meiji, 1881)
- **“English law schools”**: today’s 専修大学 (Senshu, 1880), 早稲田大学 (Waseda, 1882), 中央大学 (Chuo, 1885) etc.

◇ Already in 1889, 法学士会 (Association of Legal Academicians), organized by the “English law schools”, announced its fear that the Civil Code of Prof. **Boissonade** would cause many troubles with other codes which have been just drafted by German advisers.

## Codification Controversy in Japan (1890 - 92)

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- ◇ As the government promulgated the Civil Code, lawyers and legal scholars in the “*English Law Schools*” strongly protested against it. They had a fundamental doubt about the validity of a “universal law of rationality” and rejected such a civil code based on the French theory of “*Natural Law*”.
- ◇ Moreover, many *nationalists* among people also condemned laws drafted by foreigners and asserted that such codes would destroy the moral and tradition of Japan.
- ◇ The tension between supporters and opponents gradually escalated into an emotional controversy.

Eventually in 1892, the Parliament postponed the implementation of the Civil Code and Commercial Code of 1890, and appointed the ほうてん 法典 ちょうさかい 調査会 (Code Investigation Commission) for the revision of the Civil Code and the Commercial Code.

# Code Investigation Commission

- ◇ 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)

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- ◇ Under the strong leadership of Prof. *Hozumi* who represented the *German Law School* in Japan, the Commission decided to adopt the so-called “*Pandects System*” from the *German Civil Law Theory (Pandects Science)*.
- ◇ 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 for the Kingdom of Saxony*” (1863), the “*Federal Code of Obligations of Swiss*” (1881) and “*First and Second Draft German Civil Code*” (1888, 1895).
- ◇ Nevertheless, many institutes and provisions of the “*Civil Code of 1890*” survived the revision. These parts of the Revised Civil Code of Japan are often called “*Boissonade's Heritage*”.

## “Historical School of Law”

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- ◇ Under the rule of Emperor Napoleon, the French army invaded neighbor countries and introduced the French Civil Code (**Napoleonic Wars**, 1803 - 1815). The “**Holy Roman Empire**” was defeated and fell down. A new legal consciousness arose among lawyers in German countries. Some of them insisted the necessity to establish an unified Civil Code in French style.
- ◇ However, the majority of the German legal scholars (“*Historical School of Law*”) had a fundamental doubt on an universal civil law in French style 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 the “*Spirit of Nation*” in civil law through “*Historical Research of Law*”.



## “Pandects Science” in the 19<sup>th</sup> Century

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- ◇ However, the German Historical School of Law was divided into two groups, namely *Romanists* and *Germanists*.
- ◇ The *Romanists* insisted that the Roman law was firmly integrated into the German tradition, and researched 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 the Roman law. 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.

# German Civil Code

- ◇ The first milestone of “*Pandects Science*” 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, this code was one of the most important resources for the Revision of Civil Code of Japan, especially for Book III on Obligations.
- ◇ **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.

In contrast to the tendency in the Public Law theory, *the German Civil Law has saved the liberalism and individualism of the Roman law tradition very well.* This might be one reason for its long life.