

## The Beginning of the Modernization Process in Japan (Mid. 19. Century)

In 1868, the *Imperial Alliance* defeated the Tokugawa Shogunate, and the Meiji Government was founded in Tokyo. It was the beginning of the *Meiji Restoration*. Japanese Feudalism, the rule of the Samurai-Warriors class, finally fell down.



This picture shows the scene where the Shogun, the Supreme Commander of the Samurai-Warrior class, declared the return of the Sovereignty to the Emperor.

However, *who were the leaders of the Imperial Alliance?*

The following photo gives us an image of the members of the Imperial Alliance.



They fought against the Samurai-Warrior Regime, but they themselves were also young Samurai-Warriors. The *Meiji Restoration* was not any democracy-oriented civilian revolution, but a *Restructuring of a militarily oriented regime* of the Samurai-Warrior class. This feature significantly influenced the whole process of the Modernization in Japan.

## Restoration of the Ancient Imperial Regime

Soon after the establishment of the Meiji government, the “*Ritsu-Ryo System*”, was restored. It was the ancient governmental system from the 8. century which was modeled on the “*Lǜlìng System*” of the ancient Tang Dynasty of China.



【Meiji Emperor in a traditional costume】

## Codification Project of Civil Code

On the other hand, the government planned to introduce a *modern legal system in Western style* and set up a codification project in 1870. At this point, we can clearly recognize a *contradictory character* of the Japanese Modernization Policy.

Moreover, this project itself has a quite strange point. Namely, the members of the government began to discuss seriously on enactment of Civil Code, especially *Law on Family and Succession*.

*What was a reason for the idea to enact Civil Code at first?*

# Law of Samurai-Warrior as a “Private Military Law” in the Feudal Period (12. to 19. Century)

Samurai law had mainly 3 fields:

1. Feudal contract between Master and Retainer (***Obligations***)
2. Resolution of territorial troubles among Samurais (***Properties***)
3. ***Family*** and ***Succession*** as political tools

Marriage, Adoption and Succession were important opportunities for Samurai-Warriors to establish or maintain political alliance and hierarchical order among them.

## Restructuring Plan of the Meiji Government

Following such a traditional legal understanding, the Meiji government considered to reorganize and restructure the whole Japanese society based on the traditional family system of the former Samurai-Warrior class.

The government had a vision : “All the population, including farmers, merchants and manufacturing workers, are organized in a strictly disciplined family. The head of family conducts as agent of the government and commands his family members. Everybody serves to the government like former Samurai-solder.”

## Initial Stage of Codification Project (1870s)

At first, the government decided to use the French Civil Code (symbol of “*French Revolution*” !!) as its model.

The first Japanese translation of the French Civil Code was accomplished in 1871. The members of the government compiled several trial drafts in following years.

They had to learn basic techniques to compose legal text and invent technical terms at first.

Regarding this project, however, there were two groups in the government, Liberalists and Conservatives.

- ***Liberalists*** pursued to establish the modern liberalism and individualism in Japan.
- ***Conservatives*** aimed to restore the genuine traditional family system.

At the end of 1870s, Conservatives obtained dominant position in the project, and gradually shaped up the concept of so-called “***IE-System***”, especially “Head of Family”, “Succession of Patrimony by Single Heir”.

On the other hand, the project members had no idea how to draft the law on properties and obligations.

## Boissonade's Contribution (2nd Stage, 1880s)

In 1880, Minister of Justice (leader of Liberalists) decided to abort the own codification project and commission a French legal advisor, Prof. **Gustave Emile Boissonade de Fontarabie** (1825 – 1910) from Paris, to compile a new draft for Law on Properties and Obligations while Law on Family and Succession were still reserved to Japanese lawmakers. However, the whole codification project was decided to be directed by Prof. *Boissonade*.



In 1873, he was invited to Japan and gave lecture on French law and “Natural Law” at Law School in the Ministry of Justice and at Tokyo University.

In 1876, Meiji Government at first commissioned him to compile drafts for **Criminal Code** and **Criminal Procedure Code**.

His drafts for these two codes were enacted in 1880. They were the first modern codification in Japan.

After that, he began to work on his new tasks and finished it in 1888. Meanwhile, the political circumstances changed and became unfriendly to him. Meiji Government had been deeply impressed by the **Rise of the German Empire** in 1871. Since then, it had begun to shift from French law to German law.

## Old Civil Code of Japan (1890)

Based on the French Civil Code (so-called “*Institution System*”), Prof. *Boissonade* developed his own system of civil law;

1. Law on Persons (nationality, family, legal capacities etc.)
2. Law on Properties (real rights, obligation, tort etc.)
3. Law on Acquisition of Properties (contracts, succession)
4. Law on Securities (personal and real securities for claims)
5. Law on Proof (means of proof, prescription)

In 1888, the first draft was accomplished. However, its Family Law and Law of Succession were too liberal for the conservative government members. These parts had to be revised once again. At last, the concept of “*IE-System*” developed by the Conservatives in the initial stage was adopted.

In 1890, the old “Civil Code of Japan” (totally 1,762 articles) was promulgated.



法學部

M. G<sup>ve</sup> Boissonade

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# CODE CIVIL

DE

L'EMPIRE DU JAPON

ACCOMPAGNÉ

D'UN

## EXPOSÉ DES MOTIFS.

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TOME PREMIER

**TEXTE**

Livre Des Biens,

- De l'Acquisition des biens  
(Chapitres 1<sup>er</sup> à XII<sup>e</sup>),
- Des Garanties des créances,
- Des Preuves.

Prononcé le 27<sup>e</sup> jour du 3<sup>e</sup> mois  
de la XXIII<sup>e</sup> année de *Meiji*.

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TRADUCTION OFFICIELLE.

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TOKIO

XXIV<sup>e</sup> ANNÉE DE *MEIJI*.

1891.

### 3rd Stage of Codification of Civil Code (1890s)

After the promulgation of the “*Civil Code of 1890*”, certain groups of lawyers hardly criticized it and objected to its implementation. This happening is called “***Codification Controversy in Japan***”.

Some legal scholars of ***English Law School*** pointed out the discrepancy between “*Civil Code*” drafted by Prof. *Boissonade* and “*Commercial Code*” drafted by a German advisor, *Herbert Roessler*, and warned that it would cause serious troubles in the future. They criticized that Prof. *Boissonade* referred exclusively to the *French Law* and ignored the *German Law* completely. They blamed him also for his “*Natural Law*” concept.

***Nationalists*** and ***Conservatives*** condemned that this code, especially Law on Family and Succession would destroy the traditional moral and virtue of Japanese family (even though these parts were not drafted by Prof. *Boissonade*!)

The tension between supporters and opponents gradually escalated into an quite emotional conflict, and eventually in 1892, the Imperial Diet decided to postpone the implementation of the both *Civil* and *Commercial Code* of 1890 and appointed a new commission for their revision.

## “Research Commission for Codification”

For the revision of the “Civil Code of 1890”, three Japanese professors were appointed to the leading drafting members. They have studied in England, France or Germany:



Prof. *Hozumi*

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



Prof. *Ume*

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



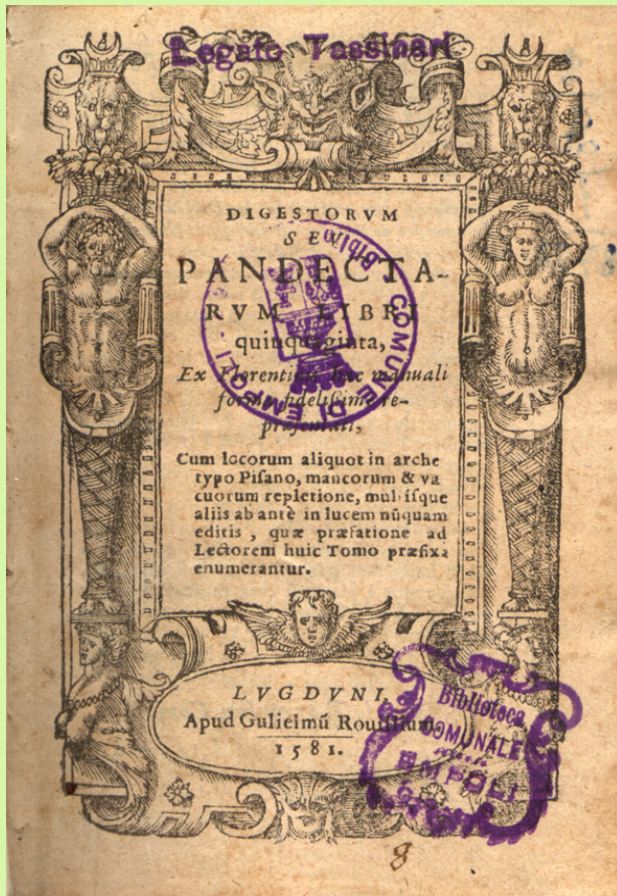
Prof. *Tomi-i*

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

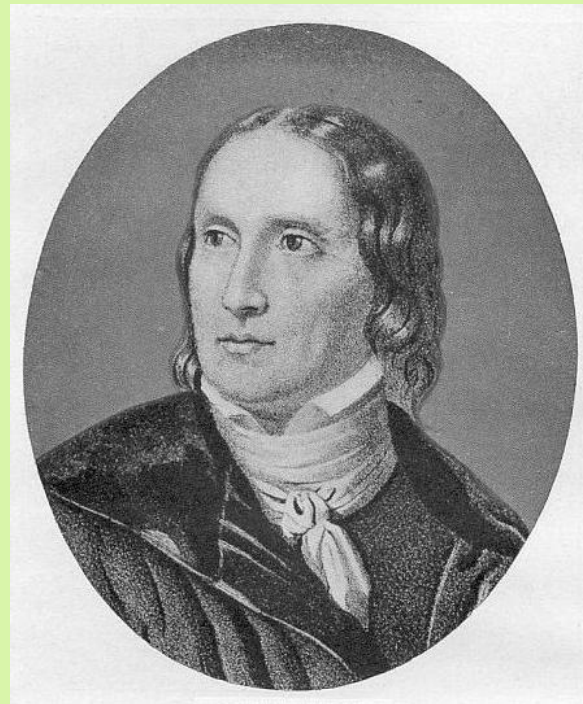
Under the strong leadership of Prof. *Hozumi* who represented the *German Law School* in Japan, the Commission decided to revise the Civil Code of 1890 according to the “latest achievement of legal science” in Europe, that is, the ***German Civil Law*** which has its origin in the “Roman Civil Law Study” of the “Historical School of Law” in the 19. Century. They referred mainly “***Saxony Civil Code***” (1863) and the ***First Draft of German Civil Code*** (1888).

In this way, the “***Revised Civil Code of Japan***” (1896 and 98) was compiled in accordance with the so-called “***Pandects System***”.

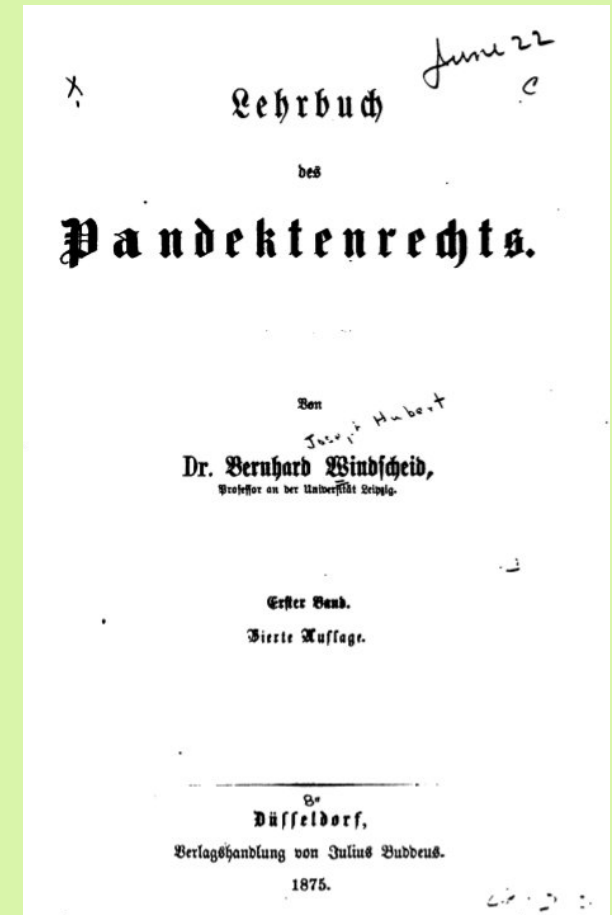
However, it was the ***Revised*** Civil Code of 1890. The Commission did not drafted another one. They reworked the *Civil Code of 1890*. All the articles were rearranged in accordance with the *Pandects System* and reviewed from the view point of the comparative study of major leading codes including “Draft German Civil Code”.



***Digesta or Pandectae***  
the Second Book of  
***“Corpus Iuris Civilis”***



***Friedrich Carl von Savigny***  
(1779 – 1861)  
the originator of  
***“Historical School of Law”***



***Texbook of Pandects Law***  
by  
***Dr. Bernhard Windscheid***  
(1875)

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# Bürgerliches Gesetzbuch

für das

Königreich Sachsen,

nebst

Publications-Verordnung

vom 2. Januar 1863.

Mit

ausführlichem, alphabetisch und chronologisch geordnetem

Sach- und Wortregister,

unter vergleichender Berücksichtigung der speciellen Motiven des Gesetzbuchs, sowie unter Aufnahme der dem heutigen Römischen Rechte angehörigen lateinischen Kunstausdrücke.

Dresden,

Druck und Verlag von C. E. Reinhold & Söhne.

Königliche Hofbuchdruckerei.

1863.

*Germany. Laws, statutes, etc.,*

Entwurf

eines

bürgerlichen Gesetzbuches

für das

Deutsche Reich.

Erste Lesung.

Ausgearbeitet durch die von dem Bundesrathe  
berufene Kommission.



Amtliche Ausgabe.

Berlin und Leipzig.

Verlag von J. Guttentag

(D. Collin).

1888.

# 民法

## 第一編 總則

(理由) 本編ハ既成法典人事編、財產編、財產取得編及七證據編ノ一部ヨリ成ル蓋シ一種ノ權利ニ特別ナルモノヲ除キ凡ソ各種ノ權利ニ共通ナル規則ハ皆之ヲ網羅シテ本編ニ掲ケント欲シタルナリ而シテ其順序モ亦力メテ論理ニ從ハシコトヲ期セリ乃チ第一章ニ於テ權利ノ主格タル人ノ總則ヲ掲ケ第二章ニ於テ人ニ非スシテ權利ノ主格タルキ法人ノ規則ヲ掲ケ第二章ニ於テ或權利ノ目的タル物ノ原則ヲ掲ケ第四章ニ於テ權利ノ得喪ニ關スル法律行為ノ總則ヲ定メ第五章ニ於テ諸種ノ權利ニ通スル期間ノ計算法ヲ定メ第六章ニ於テ直接又ハ間接ニ權利ノ消滅ニ關スル時效ノ規則ヲ定メタリ

## 第一章 人

(理由) 本章ノ規定ハ主トシテ既成法典ノ人事編中ニ取レリ乃チ第一節ヲ權利ノ享有ト爲シ何人カ權利ノ主格タルコトヲ得ルカヲ規定シ第二節ヲ能力ト爲シ其權利ノ主格タル人カ如何ナル條件ヲ以テ其權利ヲ行使スルコトヲ得ルカヲ示シ第三節ヲ住所ト爲シ人ノ生活ノ根據ヲ定メ第四節ヲ失踪ト爲シ人ノ踪跡分明ナラサル時ノ處置ヲ明カニセリ

既成法典中國民分限及ヒ身分證書ニ關スル規定ハ之ヲ削除セリ蓋シ此等ノ事ハ主トシテ公法ニ屬スルノモノヲ各種々手續ニ關スルモノ多キヲ以テ之ヲ特別法ニ讀ムフ至當トシタレハナリ

# 民法原案

(印刷)

## ***“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 :

### **Incapacity and Quasi-incapacity**

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.

### **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. In this sense, the articles on these real rights stem directly from the Old Civil Code.

### **Rights of Retention and Statutory Liens (or Preferential Rights)**

In the Old Civil Code, Prof. *Boissonade* put all the types of securities for claim, namely “*Personal Security*” and “*Real Securities*” together into Book IV. As a result, “*Right of Retention*”, “*Statutory Liens*”, “*Pledge*”, and “*Hypethec*” were clearly separated from Obligations. This idea could be the possible consequence from careful study of the German Civil Law.



In any case, 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 certain articles on this issue, too, but they have not any general form like in the Old Civil Code, and they are scattered in the 1st, 2nd, 3rd, and 6th Books.

### **Purging of Hypothec (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).

### **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 have its effect 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.

## **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. This is French Approach. In Common Law, the primary remedy for non-performance is monetary compensation while the German Civil Law allows the creditor only to demand performance so long as the performance is possible and still reasonable. The creditor may demand monetary compensation only if the performance is impossible or meaningless at all. This is German Approach. In the Old Civil Code, Prof. *Boissonade* preferred rather German Approach to French one (Art. 382–394, Properties). However, Prof. *Hozumi* returned to the original French Approach again. So, the creditor has choice between these remedies (Art. 412–422). In this sense, this institution would not be a genuine “*Boissonade's Heritage*”, but still stays in French tradition.

Moreover, Prof. *Hozumi* adopted the formulation of the French article which provides the debtor's responsibility (intention or negligence) as one requirement for his liability.

## **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).