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TWO CUSTOMS AND THE CODIFICATION OF THE CIVIL CODE IN JAPAN

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Introduction

In the Second Book (the Book of Real Right) of the Japanese Civil Code we find two institutions which would be remarkable from the European eyes. Although the institutions of the similar nature had disappeared from European civil codes, they continue to live to our day. These institutions were put in the Japanese code by the Japanese Legislature in the Meiji era. One institution is the *Emphyteusis (Ei-kosaku-ken*, 永小作権) and the other is the *right of common (Iriai-ken*, 入会権). The institution of *Emphyteusis* was concretised into ten articles of the 5th Chapter of the Second Book and the *right of common* were crysterized into two articles of the 3rd Section of the 3rd Chapter and the 6th Chapter of the same Book. The 3rd Section of the 3rd Chapter is titled 'co-ownership'. The articles of co-ownership recognized the same partition right of each co-owner as European civil codes. It is, however, the only one article in that Section that has very often acted do deny each owner's partition. That article reads:

> § 263 As to an *iriai-ken* which has the nature of co-ownership the provisions of this section apply in addition to the *customs of the particular district.*[1)]

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As the custom of *Iriai-ken* greatly varies depending on the district of Japan, "proper" principles of co-ownership have been, in effect, denied by this provision.

Simultaneously ten articles of the *emphy teusis* had acted, in their total effect, to restrict the landownership. Because there were so many customs of the *emphyteusis* in the period of codification of the civil code. With all these difficulties of the similar kind, *Iriai-ken* and *emphyteusis* had contrasting legilative history. In this connection the view of Boissonade who apparently represented the European view is of much interest. He supported the custom of *emphyteusis* but denied the custom of *Iriai-ken.*

I G. E. Boissonade's view toward the Japanese Customs and the Old Civil Code

1. On *Emphyteusis (Ei-kosaku-ken:* 永小作権 *)*

It is important that Boissonade said, "Doubtless what Japan adopts should not be French law purely and simply. I want your government to adopt our laws only to the extent that they have been proved good by the experience of three-quarters of a century. I will use every effort to incorporate in the draft the improvements that other Western jurisdictions have adopted in their wisdom and justifies by their experience."[2)]

This Boissonade's intention was realized in the legislative process. The institution of *emphyteusis* was a remarkable instance of this selective attitude.

Customs of *emphyteusis* are found in the "Collection of Civil Customs"[3)] (Minji-kanrei-ruishu: 民事慣例類集) which was published by the Ministry of Justice in 1880. Once I mentioned that 42 reported cases on the custom of *emphyteusis* could be classified into three forms. They are 1) *emphyteusis* by the reclamation of wasteland of other; 2) *emphyteusis* obtained through the cultivation of other's land over 10 years; 3) other

1) *The Civil Code of Japan* (L. Lönholm's translation, 1896, Tokyo)

2) G. Boissonade, *Ecole de droit de Jedo*, Revue de législation (1874). Quoted from Yoshiyuki NODA, *Introduction to Japanese Law* (A. H. Angelo's translation, 1976, Tokyo) P. 46.

3) This book was translated by Professor John Henry Wigmore under the title of *Law and Justice in Tokugawa Japan.*

forms. But, majority of cases is included in 1) or 2).[4)]

Furthermore, many court decisions recognized these customs as valid. Though there were some decisions which denied *emphyteusis*, we can find other decisions contrary to them in the reported cases of the Great Court of Judicature (Daishin-in: 大審院) which was the highest court until 1947. I had elsewhere referred to these instances and discussed them.[5)] It is important to note that those customs and decisions were in the real accord with Boissonade's thought.

Gustave Emile Boissonade de Fontarabie came to Japan in 1873 and performed a great service for the legislative work of the Meiji Government. In 1889 he completed his monumental work "Projet de Code Civil de l'Empire du Japon," 5 vols. where we can identify his intention and efforts to render the proper place to the provisions of *emphyteusis* in his work. He advocated strengthening the right of the cropper for long term cultivation and that a landlord must become a "victim" of a longer cropper.[6)]

His endeavor eventually ripened to be the Japanese Civil Code which was promulgated in 1890 and should have come into force on 1 January, 1893. For this reason we call it "Boissonade's Code". Sixteen articles (§§. 155-170) on *emphyteusis* were thus put in the Book on "Property" of the Japanese Civil Code.

Curiously enough, the attitude of Boissonade toward the *right of common* (Iriai-ken: 入会権) was totally different one which we shall see in the next section.

2. On *Right of Common* (Iriai-ken: 入会権)

There existed many customs concerning the *right of common* in the Early Meiji as well as the Tokugawa Period (from 17 th. cert. to middle of 19 cent.). These customs are documented in the "Collection of Civil Customs". But Boissonade's attitude toward these customs was quite an inverse of his

4) cf. Kaisaku Kumagai. *On Emphyteusis (Eikosaku: 永小作) in Early Meiji,* 25 Osaka Univ. Law Rev. PP. 2–6 (1978).

5) Ibid. P. 8

6) G. Boissonade, *Projet de Code Civil pour l'Empire du Japon accompagné d'un Commentaire,* vol. 1, 2 ed Tokyo, 1882, PP. 298–9. cf. Kumagai, *Codification or Emphyteusis (Eikosaku: 永小作) in the Middle Meiji Period.* 26 Osaka Univ. Law Rev. P. 4 (1979).

attitude toward *emphyteusis*. He argued against any institution that might possibly interfere the functions of ownership or co-ownership. Boissonade's draft of civil code contained four articles on co-ownership in part II of "Property" where we find his basic position to each co-owner's share. Those provisions obviously denied Japanese customs contrary to each co-owner's partition and his right of disposal. For example, the sections 1 and 2 of Article 38 read:

> §. 38 Si une chose appartient en commun à plusieurs personnes, pour des parts indivises, égales ou inégales, chacun des copropriétaires peut user de la chose intégralement, mais en se conformant à sa destination et pourvu qu'il ne mette pas obstacle à l'usage des autres; Les fruits et produits se partagent périodiquement, dans la mesure du droit de chacun;[7]

The object of co-ownership belong to the co-owners with their partitions and fruits of the objects also belong to co-owners by their partitions. He thought that in the history of law the amalgam of the old co-ownership system has been in the process of dissolution toward the individuated property right. He, therefore, said in his commentary as follows:

> Dans les pays où il n'y a pas de droit d'aînesse (et ce sont aujourd'hui le plus nombreux), il arrive souvent que plusieurs héritiers de même degré sont appelés ensemble à une succession.
>
> Il peut arriver aussi que plusieurs personnes se réunissent pour acheter un bien, sans se mettre d'ailleures en société proprement dite.
>
> Enfin, quand une société se trouve dissoute, les droits de propriété qui appartenaient précédemment à la personne morale *société*, appartiennent désormais aux exassociés, individuellement.
>
> Tel sont les principaux cas de copropriété.[8]

Boissonade endeavored to protect the farmers' rights. But he could not fully understand the Japanese context where the customary *right of com-*

7) G. Boissonade, Ibid. P. 75.
8) G. Boissonade, Ibid. P. 95

mon functiond, so that he was led to deny the *Iriai-ken*. His view derived from the European civilian thought and it found its way into the Civil Code of 1890. On being completed, the Civil Code had to face the severe controversy and was obliged to be revised.

II Legal Controversy on the Old Civil Code and the Emergence of the New Civil Code

The very severe controversy was brought about concerning the Civil Code of 1890. This controversy was fought between the partisans of the immediate enforcement of the code and those who stressed its postponement. The advocates of the postponement consisted of the conservatives and the landlords. Among their many claims we find the abolition of *emphyteusis* on one hand and the maintenance of the traditional family community and the village community on the other.

In 1892, the Japanese Imperial Diet voted on this issue and the proposal of the postponement of the Civil Code prevailed. This Code, therefore, came to be called "the Old Civil Code". After the vote the Investigation Committee for Codification was established in the Cabinet in 1893. The drafting work was done in this committee and several reading sessions followed it. And three Books of Property of the New Civil Code was promulgated in 1896 and became effective in 1898. The New Civil Code included, like the Old Civil Code, the institution of *emphyteusis* which was actually provided in ten articles in the Second Book.[9)]

On the other hand, the provisions of Iriai-ken were put in the New Civil Code for the first time. ITO Hirofumi, the chief of the Committee and the prime minister, directed the Minister of Agriculture and Commerce to make investigations concerning the *Iriai*. The reports collected from nearly whole country, showed that customs of *Iriai* were prevalently working in Japan, and the Committee decided to provide the *Iriai-ken* in the Civil Code. As to the inclusion of the customary right of Iriai which has the nature of co-

9) Though the conservatives urgently opposed to the provisions of *emphyteusis*, the institution of it was put in the New Civil Code. The reason of it was perhaps looked for the very vigorous force of the custom of *emphyteusis* in whole country. cf. Kumagai, *Codification of Emphyteusis*, note 6).

ownership, the legislative policy gave the following reasons:

> "If a member of a village who simply has a share of woods and fields by co-ownership, he could freely dispose of his share, the village order would be distroyed. Customs of *Iriai* which almost prohibit to dispose the share must be provided in the Section of Co-ownership".[10]

The policy was approved in the IXth Imperial Diet in 1896 and the provision of §. 263 was put into effect and it is still in force.

Conclusion

Boissonade insisted on the necessity of *emphyteusis* and denied the *right of common*. But both institutions were provided in the New Civil Code. The institution of *emphyteusis* intended to protect farmers' life and production, but the institution of *Iriai* was projected to protect the village order by conservatives and landlords. The problem of the former was considerably solved by the Agricultural Reformation after the Second World War,[11] but the area of woods and fields under the custom of Iriai still occupies 1 million hectares, now. Such woods and fields turn out to be the precious resources to protect green environment of Japan. It may be said the paradox of history.

10) cf. Kumagai, *Iriai-ken from the Tokugawa Period till the Legislation of the Japanese Civil Code*, Recueils de la Société Jean Bodin – *Les Communautés Rurales* – 1982, Paris, PP. 409–410.

11) By the Agricultural Reformation the farm land of landloads was purchased by the Government and farmers acquired it favorably from the Government.