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## ESTABLISHMENT OF THEORY OF JAPANESE LAW HISTORY

By KAISAKU KUMAGAI

### 1. Two Schools in Japanese Jurisprudence

Names of "Law Department Group" and "Literary Department Group", which were given to two schools of contrasting nature, have originated simply from the names of two departments in Tokyo Imperial University. I have, therefore, no intention to attach any importance to these terms as categories of established academic value, but to employ them only as a means to analyze their respective characteristics.

#### Origin of Classification and its significance

The classification, "Law Department Group" and "Literary Department Group," was first introduced by the late Dr. Chikayuki Miura (1871-1931), which was later adopted by Dr. Masajiro Takigawa (1897- ). According to Dr. Takigawa: "There are two decidedly controversial schools in the legal circles of Japan, that is, Law Department Group, who may be called Comparative Law System Research Group from their somewhat authodox and scientific attitude in the study of Japanese Law history; and Literary Department Group, who, representing the conservative school of Japanese jurisprudence, may better be called Back-to-the-Ancient-Law-and-Order School from their peculiarly nationalistic legal standpoint." He also contended that "those who belonged to the Literary Department Group were mostly historians engaged in the study of history. It is, therefore, quite natural for them to adapt a method used in their line of research in interpreting Japanese law system itself from the social, economical and cultural angles." He then enumerated the merits of this school, adding that "Association of Japanese Laws History may be organized only by virtue of controversy between these two schools." Dr. Takigawa gave the names of those belonging to Literary Department Group, such as Mayori

Kurokawa, Kiyonori Konakamura, Masakoto Kimura, Yoshiyuki Hagino, Hiroshi Kurita and Chikayuki Miura; and to the Law Department Group, Tatsui Baba, Takeo Kikuchi, Kazuo Hatoyama, Nobushige Hozumi, Michisaburo Miyazaki and Kaoru Nakata.

When we read some of the books written by the authors belonging to the Law Department Group, we cannot help noticing many basic principles of Western jurisprudence or modern law conceptions are freely adapted in setting up their own theory as with the case of Japanese statutes. However, in the works of those belonging to the other group, little trace of such characteristics is seen. Dr. Takigawa's classification may be significant only in this respect. It is, however, more important for us to find out the answer to the question why these two contrasting legal trends thus classified were allowed to exist contemporarily in the field of Japanese jurisprudence. To solve this problem, it is necessary for us to first glance over some of the legal inclinations prevalent in the Meiji era (1868-1912) along with the certain trend in the law studies and the education system of the time.

(1). How Law Department Group come into being in Meiji era?

School system in Meiji era and its influence

In the early part of Meiji era (1868-1885), two main factions were formed in the field of Japanese jurisprudence by the graduates of two law institutions, namely, Tokyo Kaisei Gakko Institute and the Shiho-sho-Hogakko (Justice Ministry Law School). The former faction is generally known as English Law School (Drs. Takeo Kikuchi and Nobushige Hozumi of this School studied either in England or in the United States after their graduation). The latter is otherwise called French Law School because of its scholastic background of French influence.

It goes without saying that the study of the history of Japanese jurisprudence cannot be complete unless taking into consideration the influence given by these two factions upon those following after them, and also the extent of their roles played in the formation of Japanese jurisprudence. It is, however, our intention to limit our discussion to the law education system and legal trends in the Kaisei Gakko Institute and Tokyo Imperial University, which was set up by the reorganization of the former in 1886. (The above-

mentioned Justice Ministry Law School was also merged into Tokyo Imperial University in 1885). It must be worth remembering that an attitude taken by the competent authorities of the time toward the study of law history, which had been already included among the curriculum of Kaisei Gakko, resulted in deciding the nature of Japanese jurisprudence during the Meiji era; and the characteristics thus endowed upon the Japanese law history have had a great influence upon this branch of science in the subsequent eras in Japan.

#### History of school system (1873-93)

In December, 1869 Bansho Shirabe-Dokoro (Government Document Inspection Board), which had been established during the Tokugawa regime, was reorganized into Daigaku-Nanko School, which was later (April, 1873) renamed Tokyo Kaisei Gakko. There were six Departments for jurisprudence, physical science, engineering liberal arts and mining in its set-up. Further, in April 1877, Tokyo Imperial University was established by the merger of Tokyo-Igakko (Tokyo Medical College). On March 1, 1886, with the enactment of Imperial University Act the Imperial University of Tokyo was set up by the further merger of Kobu-Gakko (Technical College). The school function was now complete with post-graduate course besides Law, Medical, Technological, Literary and Science Departments as stipulated under the above Act. The office of first Presidency of Tokyo Imperial University was assumed by Dr. Hiroyuki Kato in 1877, but first President under the Decree was Hiromoto Watanabe (1886), then Governor of Tokyo Prefecture, appointed by the Education Minister Yurei Mori.

There were many traces of hasty arrangement in the faculty as well as in the curriculum of the Tokyo Imperial University at that time since the Meiji Government was then busily occupied with reorganization of its set-up since the Restoration (1867). Following table shows how the lecture program was arranged in the Law Department of Tokyo Imperial University in its early period.

The Japanese jurisprudence had not had any theory of its own during the period between 1867 and 1875 as compared with the well-established theories of modern Western jurisprudence in the same period. With neither the Constitution nor other statutes as yet promulgated, it is strange to claim as the purpose of legal education in the Tokyo University that "the purpose of this

TABLE I Chart for Curriculum of Law Department, Tokyo University (1873-1893)

YEAR (AD)	1873	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89
SUBJECTS	CLASS HOURS PER WEEK																
Japanese Law					2	2	3	6	8	11	12	12	12				
English Law (a)		3	3	4	4	4	17 $\frac{1}{3}$	23	17	15	15	15					
French Law (b)		1	1	1	1	2	6	6	6	10	10	10					
German Law (c)																	
International Law		3	3	1	1	1	3	3	3	3	3	3					
Comparative Law		1															
Roman Law		2								4	1	1	1				
Chinese Law					1	1	1										
Japanese Law History		3	3	3	3	3	4	4	4	5	5	5					
Politics		1	3	3	3	3	4	4	4	5	5	5					
Japanese Statutes										4	4						
English Language					1	1	1	4	4	4	4						
French Language		1	1	2	2	2	6	6	6	6							
German Language		1	1	2													
MARKS:	(Tokyo Kaisei-Gokko Period)					(Tokyo University Period)					(Imperial University Decree issued)						
Continued from above																	
YEAR (AD)	1890	91	92	93													
SUBJECTS	CLASS HOURS PER WEEK																
Jap Law	38	48	48														
Eng Law	16	21	21														
Fr Law	15	16	16	(also French Law history included)													
Ger Law	10	18	17	(( " German " " " " " ))													
Int'l Law	2	5	6	((a), (b) or (c) should be chosen as													
Comp Law				according to majoring subject.													
Roman "	3	4	5														
Chin "																	
Jap Law His.		2	2														
Politics																	
Statutes																	
Eng.																	
Fr.																	
Germ.																	
Subjects from 1893 are: Constitution, Civil Law, Commercial Law, Civil Law Procedures, Criminal Law, and Its Procedures, Administrative Law, International Law, International Private Law, Roman Law, Comparative Law History, German, English, & French Laws.																	

REMARKS: In 1893 Lecture course system opened under Imp. Ord. No. 93.

Subjects from 1893 are: Constitution, Civil Law, Commercial Law, Civil Law Procedures, Criminal Law, and Its Procedures, Administrative Law, International Law, International Private Law, Roman Law, Comparative Law History, German, English, & French Laws.

Department is to give thorough knowledge of existing law system of Japan, giving at the sametime the general principles of Laws of England, France, and Germany." There were in fact only Criminal Law or some other unsystematically enacted laws existent to meet the current needs. Under such circumstances, the authority concerned was bliged to put an emphasis on the study of Laws of England and France despite the above claim. On the other hand, courses for the study of the ancient laws and Japanese law history were also included in the curriculum of the university as the subjects of same importance as those of the Western laws; because the Public Service Regulations of the Meiji Era had been made mostly modelled after our ancient laws and statues. Meiji Government revived Dajyokan system (Ancient Japanese Official Organization) and Shinto in 1869. It is, therefore, quite natural that there appeared many works dealing with the history of ancient Japanese laws of Japanese law system.

When in 1882, however, Hirobumi Ito came back from his investigation tour of German and Austrian law systems in those countries, the trend of study of jurisprudence suffered a drastic change at the Tokyo University. The all out efforts toward the codification of new statues modelled after modern Western laws have been made to such an extent that even the study of our ancient laws and history of Japanese law system was given a minor importance in the curriculum of the Law Department of Tokyo University. The Prussian influence upon curriculum of the Law Department became more evident at the time when Yurei Mori, Ex-Minister to Britain, assumed the office of Education Minister in 1885. In 1887 the Law Department of Tokyo University set up respective course majoring in either English, French or German laws, thus enabling to devote all efforts to the study of respective country's laws and law systems. Any subject, which had not direct bearing upon the national project of Constitution making suffered the fate of neglect among the scholars of Japanese jurisprudence. Though the Roman Law class was still retained, the history of Japanese Law system completely disappeared in the weekly schedule of the curriculum of the Law Department during the period of 1886-1890. Such trend of Japanese jurisprudence continued until the issuance of Imperial Ordinance No. 93, (1893) under which the

lecture course system at the Law Department was provided. The course for the study of Japanese law history was then given only a two-hours-a-week existence in the curriculum while, on the one other hand, such subjects as Roman Law, French Law History, German Law History, and Pandecten kept on occupying the places of some importance even while the former was entirely neglected until its revival in 1893.

Even the protest made by Dr. Yatsuka Hozumi (1860-1912) against the unfair treatment given to the study of Japanese law history in the field of Japanese jurisprudence seem to have failed to arouse sympathy toward or interest in this line of science in the mind of those in this period.

According to the purpose mentioned in the Paragraph 1 of Imperial University Act issued on March 1, 1886, under Imperial Ordinance No. 3, it is claimed: "The purpose of establishing University is to teach and make thorough research of every branch of higher cultural and technical knowledge which shall be prerequisite to the State." Then what is actually meant by "higher cultural and technical knowledge prerequisite to the State"? The answer may be given in the following remarks of Lorenz von Stein in his lecture to Hirobumi Ito: "Almost every country nowadays has its own public schools....The Government officials are required to be well-versed in the duties of their particular office. As a result, those who are aspiring to assume any Government office should have satisfactory attainment in the line of learning and technical qualifications required for such office. The Government, on the other hand, should choose men well-versed especially in his line of learning." In 1890 Hermann Loesler told Chū Egi (1858-1925) in his letter of advise that "According to the German point of view, university is a public institution, whose function is to cultivate and have its students initiate into the sanctuary of learning in their respective line of science. From the legal point of view, it may be called a public corporataion if seen from two angles: In the first place, the acquirement of knowledge (by higher education) is indispensable in order to get enough knowledge to satisfy all the important public demand, for example, of some government office of legislative or administrative function; or of the medicine wherein the technical knowledge of highest degree is prerequisite; or of

the field of many other important line of work.

In the second place, refined ideas and views of the men which have been obtained through their higher education contribute much in appreciating or judging public sentiments or public installations. In short, there will be no bound in the extent of influence upon the national sentiments (nation's mental sphere) by accomplished knowledge acquired through higher education." Neither the lecture nor the advise quoted above was trying to give a comment on the "Imperial University Act". It may be regarded as indicative of the Government view concerning university education as well as their attitude toward learning in general at the time. The phrase, "Higher cultural as well as technical knowledge of prerequisite to the State", may signify that the university is the public institution, whose purpose was to cultivate and give enough knowledge to engage in government duties and to effectively understand the laws of the country. It is needless to mention, therefore, that the Law Interpretation, one of the branches of jurisprudence, was the one answering the above demand if this principle mentioned in the Decree be applied to any of the subjects of the Law Department.

In view of the general trend in the field of jurisprudence at the time, only way to claim the *raison d'être* of Japanese Law history as subject with learning seemed for itself to establish, in the wake of analytical jurisprudence systematic theory of its own like other branches in the modern jurisprudence. In other words, adherents of Japanese law history in the Law Department Group regarded the principles of applied to modern law system as a universal standard even applicable to all the laws of past ages. Though somewhat in a moderate manner, the scholars of this school adapted this method; and anybody who was averse to it was sure to be branded as novice in the line of this branch of jurisprudence. The examples of such attempts of this school are given in the following paragraphs:

a. It is questionable for authors of books of Japanese Law History have employed so freely such terms, as public law, private law, civil law or criminal law in a classifying the old Japanese law system, as with the case of modern law classifications. It is also questionable to apply various modern legal terminology such as law of property, law of obligation, family law, law of succession



or criminal law in analysing ancient laws of Japan. In view of the fact that the legal conceptions indicated in these terms are of a nature peculiar to modern laws, their indiscriminate use of these legal terms in delineating old Japanese law system may be interpreted as indicative of their lack of understanding in specific nature of pre-modern period and its law system. Is it feasible for anyone who is indifferent to the peculiarity of a certain period in the history to correctly represent the historical significance of a given cases in the past?

According to the conception in modern legal terminology, the difference between public law and private law should be made when the sovereign power decides whether or not an individual has any legal relationship with the interests of the State. In the pre-modern period, even petty affairs of an individual was apt to be judged as having legal relationship with the State. Thus the function of private law in the pre-modern ages was obliged to narrow its scope of operation to much greater extent than that of modern ages, or rather had none at all in those days. It should be noted, therefore, that the scholars of this school committed a gross mistake in analysing the legal system of pre-modern ages of Japan by the light of modern legal principles, at the same time obscuring of necessity the sovereign power, which actually exercised supreme power in pre-modern period. Their mistake resulted from not recognising true state of affairs in those days and also from losing sight of their own ground after being baffled by the glaring merits of law interpretation method of modern jurisprudence, which had been first introduced into the field of Japanese jurisprudence in the Meiji era.

b. In their attempt to comment on one-modern period laws of Japan, they employed legal sources such as statute law, customary law, and rational law as data for the explanation of existing laws. Their idea and use of legal sources in such an instance should be deemed too modernistic to be called appropriate from the following ground: that the written law or the statute is the most authentic legal source because it is a legal document in writing wherein contained the pledge of observance of all the provision therein by all the members of the community of modern age, who were liberated from the yoke of feudalistic rule and swear they are "equal in the sight of law"; that from the principle of modern law, neither

custom nor logic of any kind is deemed valid if they were contrary to the aims of written law or statute; that there should be fundamental difference, from their respective nature, between the statute and the simple (primitive) customs or logics of the community as legal sources and their. The statute law is respected because it has been made by the common agreement of the people of a community. The laws of pre-modern ages were apt to be onesided expression of the ruler's will. Whether written or unwritten, or in what form, the ruler's wishes were imposed upon the ruled as law in those days. Custom or logics, which were advantageous to the ruler was apt to be invested with a full force and effect of law. In this sense, it is correct to say that "All the laws of custom in the feudal ages were none other than the ruler's privileges." In short, such modern way of classification of written law, customary law and rational law is unnecessary in the premodern ages. It is, therefore, their mistake to apply modernistic principle of legal classification by the use of legal sources so indiscriminately or universally to the laws of premodern ages. This error was made by the indiscreet attitude of blindly adopting principles of modern jurisprudence.

c. Another error the scholars of this group made was their careless use of the term Justice (Shiho in Japanese) in the interpretation of old law system. According to the modern legal phraseology, the word "shiho" (justice) has its own significance from the independent function in connection with other two mutually independent functions of the State, Legislature and Administration. In other words, the laws of the State which have been made, after strict and minute processing by the Legislative organ (in this instance Diet in Japan) can be first enforced when actually applied to a case at court. The principle of check and balance in connection with the mutually independent functions of Legislature, Administration and Justice has been so contrived as to guarantee people's liberty and rights to the greatest possible extent in the communities of modern ages, the pre-modern ages, on the other hand, no justice of this kind was conceivable. In legislature the ruler's will was predominant over all and there was no way to express the wishes of the ruled in those days. It was same, for example with the trial in those days. In those days, therefore, the courts could not always be fair and honest because the judgement

was to be given onesidedly for the benefit of the ruler's wishes. Under the circumstances the Justice as well as Legislature suffered the fate of complete subordination to Administration in those days. It goes without saying that the scholars of so-called Law Department Group should have been aware of the fact. In spite of the knowledge, they dared to describe as if independent Justice existed in those days in the analysis of Japanese law system of bygone days. They might have committed this error unwittingly by simply applying this principle to their (otherwise scientific) analysis of Japanese law system when they saw other Japanese legal circles of Meiji era hailing enthusiastically the newly introduced idea of mutual independence of Legislature, Administration and Justice as a golden rule for the basic principles of modern state system.

(2). Literary Department Group and their Characteristics.

The so-called Literary Department Group in the field of Japanese jurisprudence was first organised by those belonging to the Literary Department of Tokyo Imperial University. As stated before, Drs. Miura and Takigawa belong to this school as leading figures.

The Literary Department was apt to be regarded the department of minor influence in the university in the early part of Meiji era, whereas such practical departments as Jurisprudence, Chemistry, and Technology exercised great influence in the academic circles of the time. A glance at major subjects of the curriculum of Tokyo Kaisai Gakko Institute in 1875 convinces us that jurisprudence occupied an important place while literary subjects were given minor place, which fact may bear eloquent witness to the prevailing trend of placing anything concerning Western culture above Japanese culture.

Hiroyuki Kato recommended in his official letter to the Education Ministry regarding new school term program for 1877, reading in part: "University cannot be said truly contributing to the civilization of Japan in view of the prevailing deplorable trend of the university graduates, who are only well-versed in English and little familiar with their own Japanese literature." Dr. Kato and his colleague's contention seems to have prevailed over general trend of the time, since in 1882 a lecture course for Japanese classical literature was opened in the Literary Department. From

this time on the study of Japanese classics started its smooth sailing on the sea of Japanese literary world. As for the study of Japanese law history, the subject names of "Chinese and Japanese law system", "Japanese and Chinese Laws" and "History of Japanese Law system" were still retained in the curriculum of the Literary Department of the Tokyo Imperial University during the period from 1886 to 1890 whereas the Japanese Law History completely disappeared from the curriculum of the Law Department in the same period. Taken from the weekly class hour schedule of the Literary Department for the year 1890, (at Japanese Law course) the following hours were allotted for the classes of "History of Japanese Law System", "Law History", and "Chinese Law History and Its Law System": 10 hours, 5 hours, and 6 hours respectively.

Thus Japanese Law History still retained its claim on the Japanese academic circles only in the Literary Department of Tokyo Imperial University even though it disappeared from among the curriculum of the Law Department. Though the Japanese Law History was later included in the curriculum of the Law Department for its practical merits, with the case of Literary Department, it was included for what was contended in the recommendation made by President Watanabe of Tokyo Imperial University to the Education Ministry in October, 1888, which reads: "Those who are interested in the study of political economy are required to be familiar with all the data collected from the studies of laws and public systems and political as well as economical activities of foreign countries, clarify the specific features of those countries with reference to their respective soil and people, and study histories of respective national peculiarities, which have been developed on a specific soil and by a specific people.....Even most of the Western countries have been metaphysically inclined in their policy toward education, neglecting the study of geography and history until recently..... (The study of Japanese law history, therefore, shall be made) for the benefit of improving various present institutions and civilization so as to help establishing the basis for the maintenance of national liberty and independence." His contention might be regarded quite pertinent to the current needs in view of the circumstances that it was made by the President of the state-owned institution at the time when Japan was then making a big stride toward the formation

of national state herself.

It is, however, regrettable to state that Japan's sincere efforts toward the realization of modern racial nation was deplorably influenced by the resrospective or backward attitude taken by the scholars of this group as they committed an error in their method in studying "history of national peculiarities". They studied those peculiarities simply as they were and seldom in a scientific method.

Such attitude toward the Japanese law history by the scholars of this group has been clearly indicated from the following excerpts, as reading: "Changeable is the principles for law system but not so with our national structure. From the first accession to the Throne by Emperor Jimmu (660 BC), only his desceneants are to rule over this country and to conduct all the state affairs. Such is our national structure foreordained. No subjects of the Emperor have ever been vested with this sovereign power in the history even though at times trusted with it under certain abnormal circumstances.....".

Such peculiar attitude of this school has been kept on until recently even though it had to undergo some logical readjustment from time to time. According to Mr. Takigawa, one of the leading characters of this school, the peculiarities of Japanese law history should be found in the traditional conceptions of Japaneses law history as he contended: "Our country adopted the statute of China under Tong (To) regime at its height of prosperity at the time of the Restoration of Taika Era (645 AD). All the national institutions were reorganized based on the principles in the Chinese statute. Then at the time of Meiji Restoration (1867 AD), all the laws of Japan were made modelled after law systems of Western countries. However, national belief that our path of justice should always lead back to the gods of our forefathers never wavered despite the drastic changes made in that period." Dr. Kenji Maki, another distinguished scholar of this school, who was claiming himself to have made the through study of basic principles of Japanese law history, contended that "Forms of government of Japan may have changed at times in the history but there has been no change in the sovereign power in this country, which should be regarded as our national peculiarity in the history of the world." Such attitude was universally taken by the scholars of this group in a strong

contrast to the attitude of the other group of Law Department School, who were too eager in adopting the theories of the Western jurisprudence to be careful about their method of application. In other words, the former committed a fatal error, which was entirely contrary to that of the latter, about peculiarities of Japanese law history. Their theoretical shortcomings will be enumerated below in detail.

a. In the first place they committed an error in the concepts pertaining to public law and private law in a manner strikingly different from those of the other group. They denied the significance of differentiation principle about public law and private law in modern laws. "The basic conception of the State which has been developed in Europe is to regard each individual as a basic constituent of the community and not to regard it in a relationship among the families which are the basic units of the community of Japan. According to Japanese interpretation of the State or nation, it means a home or a house. In other words, there are two kinds of house according to this school: the one, which is the respective home in usual sense of the word; the other, the house in a form of the state as a whole. The Japanese word, 'Kokka', means "State-House" if literally translated in English, which may clearly indicate the Japanese idea of the state or nation.

"It is, therefore, quite natural for any Japanese home to have its own constitution, family laws, and family discipline of a sort as Japan as a nation has her own Constitution, Laws and national precept as represented in the Imperial Rescript on Education (given to the Japanese in 1890). The relationship between respective home and the State in Japan has been so closely intertwined as shown in the above explanation. The State is a house in the wider sense of the word in Japan." Consequently, any attempt to draw a line between public law and private law in Japanese legislature has been discouraged as an ignominious attempt against the basic national precept since Meiji era. In fact, total self-negation for the cause of the state was expected to every member of the Japanese community; and the Japanese statute, whether they were concerned with public or private lives of the community, should ultimately in line with the objectives of the country.

b. The scholars of this school rejected the modernistic legal

conception that the written law or statute is the basic legal form according to the modernistic legal classification of laws as written law, customary law and rational law. Hence their contention: "Laws of Japan should guard and maintain the prosperity of our Imperial throne as well as the prosperity of the State, and subsequently should help promoting the well-being of the subjects of the Emperor. They should be, therefore, enforced 'Norm' which has immortal significance in itself. From the basic significance of the word 'Law' (Ho in Japanese), there should be no discrimination of written law from unwritten law such as custom law, or our unalterable Constitution from those laws and decrees subject to frequent amendment..... In order to achieve this grand objective, the law of the country exercises its authority for its execution. Whosoever disobeys what has been stipulated in any statute shall be forced to perform by the authority of the law. In this sense, every subject has obligation to observe laws of the State..... Our legal conception has something common with that of the Western countries but the fundamental principle of our law is peculiarly characteristic of this country. It has never suffered change by the vicissitude of time: because it is of a nature true and infallible in all ages and is a principle of eternal truth."

It is, therefore, needless to mention that not much importance has been attached to the provisions of the statute made in the Diet, where the common people of Japan had a say of some extent in legislature, and that any laws or decrees of unconvincing nature, could be enacted and should be observed in a spirit to obey the supreme order of the Emperor regardless whether they were written, customary, or rational. Thus the basic principles of modern jurisprudence were entirely forgotten by the scholars of this school, whose predominant idea in legislature was none other than that of the monopolistic pre-modern ages.

c. The absolute independence of judicature (Justice) from other two State functions was also rejected by the scholars of this group in this period. This attitude may be clearly indicated when they said: "The presiding Judge for the important trials such as 5.15 case (Case of assassination of Premier K. Inukai a band of Army radicals on May 15, 1932) used to go secretly to pray before the spirit of Emperor Meiji at the Meiji Shrine for his spiritual guid-

ance. This fact clearly indicates nation's legal conviction that only true and fair trial can be conducted on the basis of spiritual guidance." In this period such foolish mental attitude as "Nation's legal conviction" prevailed and any contention on co-ordinating existence of three basic national functions was immediately rejected. In view of such legal trend of the time, the scholars of this School seem to have failed to recognize the modern significance of absolute independence of Judicature (Justice). They were indeed all nostalgic about law and order of our olden times and were proudly making desperate effort to revolt against the idea of progressiveness of world history. It goes without saying that this anachronistic trend of Japan was at its height during the period of the Pacific War.

## 2. Victory of Literary Department Group and its circumstances

As described before, Tokyo Imperial University played a decidedly influential role in the formation of modern science in Meiji era. As also stated elsewhere, the policy taken toward the Japanese law history was quite different in the Law Department and Literary Department of Tokyo Imperial University. At the Law Department, the Japanese Law History course was excluded from its curriculum during the period of 1886-1890 while at the Literary Department this subject was included among its curriculum as subject of considerable importance during the same period. Why was so? However, Japanese Law History was revived in the Law Department later in 1891. What might be the reason for the change? The different attitude taken toward the study of Japanese Law History in both Departments influenced much each of those belonging to respective Department in a strikingly contrasting way, and these contrasting influences are still recognizable even on the present day Japanese academic circles. Why existed such differences?

With a view in mind to find out what ultimate course the future Japanese jurisprudence should take in their study of Japanese law history, let us probe into above questions in order to find a key to solution.

Two kinds of prevailing circumstances in Meiji era may furnish us with some clues to this question. One is such circumstance that Japan of Meiji era found herself as a part of world capitalism, which was then still in the making; the other, that Japanese



capitalism thus hastily formed could survive only by maintaining her own feudalistic social system against the onslaught of western capitalism.

From the former circumstance the answer may be given to the question why Japan had to eagerly westernize her own law system. From the latter, the answer may be given to the question why Japan had to legalize the existing social relationship in her community.

The reciprocal relationship of above two circumstances naturally required each other as indispensable factors for their co-existence. It is strange to note that the Japanese capitalism embraces such paradoxical elements in its initial stage of progress in early Meiji era. We are going to study them from two angles.

(1) Japan first opened her ports to western countries on July 1, 1857 upon conclusion of Commercial Treaty with the United States of America while she was still under Tokugawa regime. With the withdrawal of the United States from the Far East when the Civil war (1861-1865) broke out, Britain replaced the United States, subsequently playing a leading role in the Japanese market. Britain's intention to cultivate Japanese market may be clearly seen from the provisions of the Amended Tax Agreement signed on June 5, 1866 between Japan and Britain.

According to the provisions of this Agreement, Japan's repeal of all the existing restrictions upon trade and trafficking and her voluntary offer of every kind of facilities to aliens were chief items agreed upon. Paragraph 9 of the Agreement reads: "We hereby reconfirm the provisions for the removal of every obstacle against the trade between the Japanese people and the British people. Japanese merchants of all the classes shall be free to conduct their trade with alien merchants directly and without any official interference at all the ports in Japan as well as at any place outside Japan.

"Nobody shall be levied tax on his transactions by the Japanese Government more than levied on such transactions made by the traders. All the feudal lords and their vassals shall be free to go to all the open ports in Japan and conduct trade with the alien traders."

The principle behind this Agreement reminds us the famous saying about the English bourgeoisie's designs that: "Bourgeoisie

patterns the world after its own image." English bourgeoisie requested Japan to replace her old laws with new one so as to enable them to smoothly conduct trade with her, to ensure their profits from the trade, and also to guarantee trade and commerce.

The current circumstances that some of the anti-Tokugawa regime feudal lords, who were supported from inside by the rapidly raised productivity of raw silk and green tea for export, responded to this request helped gradually paying the way toward the enactment promulgation of new laws in favor of trade promotion.

For this purpose literal adoption of Code Civil was attempted in such a hasty manner that Shimpei Eto, Chairman of the Civil Law Legislative Committee of Public Service Bureau, which was just set up in Daijokan (present Cabinet) in 1890, submitted immediately to the Committee any part of the Code Civil just translated by his official translator, Rinsho Mitsukuri. He seemed to be in such a hurry in this Government project that he was said having told Mitsukuri to translate it as fast as he could, not even minding chance mistranslation.

In 1882 Foreign Minister Kaoru Inoue made to the foreign Powers the request for Japanese jurisdiction over alien offenders and other 8 items; because the treaties or agreements concluded between Japan and foreign countries since Tokugawa regime were markedly unilateral and disadvantageous to Japan.

Finally on 20 April, 1887 the Amended Legal Agreement was concluded after twenty-eight sessions with the countries concerned. It is worth noting that in Paragraph 4 of this Agreement "Japanese Government shall provide legal system and statute according to the provisions of this Agreement and based on the principles of her Westernizationism."

It was quite evident that interference of western powers with state affairs of Japan was kept on as before, and Japan's westernization policy was decidedly prevailing in the early part of Meiji era. This phenomena may be worth remembering together with the fact that the commercial law was enforced in July, 1893, prior to the enactment of Civil Code.

The attitude taken toward (law making) will be shown in the following excerpts: "Prior to the compilation of commercial law, we have listened to the businessmen's opinions about commerce:

while as much possible regard has been taken on our part to any established commercial practices as well as the profits of businessmen." This attitude of the leading circles of the time incidentally gave a chance to bourgeois principles to thrive in the field of Japanese jurisprudence such that one scholar contended: "Our country is proud of being a land of gentlemen, where moral code prevailed over all else, and the laws were disdained. It is, therefore, quite natural that very few studied jurisprudence, and all the law enforcement officers, too, used to adjudge various cases in the light of past instances in their annals. Even in the event of selfish or arbitrary disposal of cases on the part of law enforcement officers, it was very hard for any laymen to try to prove their irregularities at the court because of general lack of legal knowledge in those days.

"Since the Meiji Restoration (1863) period, however, western civilization has been introduced in Japan, resulting in drastic change in every walk of life in our community. Japan discarded all the primitive oriental ways of thinking, and adopted the thorough-going western rationalism. The remarkable change in the nation's mental attitude naturally paved the way for the revision of various existing laws regulating all the social activities of Japan.

Law system of present day Japan has been set up entirely modelled after that of western countries. It should be called, as the saying goes, a sticker for rules if anybody attempted to interpret laws of present day by the standard of past customs."

In view of the prevailing circumstances, the Law Department of Tokyo University, one of whose greatest objective was the training of prospective government officials, was obliged to concede to this general trend of the time. Law Department, therefore, was obliged to put an emphasis on such classes as those of Roman Law, French Law History, German Law History and Pandecten while deleting the class of Japanese Law History from its lecture schedule though it was later reinstated in the Department curriculum in 1891. At the Literary Department of the Tokyo University, on the other hand, the subject of Japanese Law History was among the curriculum as a subject of much more importance in the same period. As for the policy taken toward the study of Japanese Law History at the Literary Department, it has been detailed elsewhere in this thesis. What then is the significance of this facts?

(2) In a strong contrast to the smooth progress of the western capitalism, Japanese counterpart of this modern ideology was obliged to go through many difficulties in course of its progress. In those days it was necessary to get enough capital and labor to produce raw silk and green tea for export as referred to elsewhere. The landowners or commercial capital of the time, and the productivity of the time, which was capitalized by the former, could only meet the above needs. It was, therefore, quite natural that those capitalists could not but assume the feudalistic attitude toward the relationship of management-labor (in their production).

When Japan opened ports to the outside world, domestic market was first opened by the western capitalism with the supply of their own machine-made goods. Only course for Japanese capitalism to take against the invasion of western Capitalism was none other than to manufacture cheaper goods at the price of cheap labor. Hence Japanese capitalists naturally turned to feudalistic management-labor relationship as prerequisite in the field of manufacture.

To add to this trend, there was feudalistic family system still existent as a basic unit of Japanese community, which was still eager to stick to the feudalistic conception of social relationships and looked askance at western conception of public life and public consciousness as prejudicial to their national objectives...

Japanese capitalism, armed with its own favorable social conditions, rejected any trend of unconditional adoption of anything western or bourgeois conceptions to its own world of old law and order.

Its attempts along this line went so as to the revival of old Japanese customs and morals. The maintenance (and reproduction) of old social relationship was deemed as an only key to solve the pending problem. It is no wonder that the authority in those days attempted to suppress the political movement of liberalists in during the period while the Constitution was still in the making. Another instance of this kind may be seen when the Civil Code was issued on April 19, 1890 and was later replaced by the Meiji Civil Code on the ground that its principles were too much influenced by the English bourgeois ideologies after the famous Civil Code Controversy. The Meiji Civil Code thus made had its basic principle in the traditional family system of Japan (1898).

Such prevailing anachronistic trend may be indicated from the words of Yatsuka Hozumi when he demanded the suspension of enactment of Bourgeois Civil Code on the occasion of the above Controversy. He contended that "Our country has a religion of our forefathers. Our community is under family system of our own. In this country authority and Law of the country originate from each family of our community where their patterns are to be found.....The head of the family represents in this temporal world the spirits of his forefather.....All the family members, regardless of their age of sex, shall obey the authority of the head of the family, while the latter protects the former.

"A man and a woman come to live together in family because of the love toward each other, (thus forming a family. This idea about the family belongs to a period under influence of Christianity (and not ours). Our new Civil Code was made based on this principle. The family in this sense is contrary to our traditional conception of it," and he continues:

"It goes without saying that it is in the sphere of public law to provide regulations controlling some manners of customs in the event such necessity arises. However, this law's provisions are trying to control over such personal matters as our own family system.....Family law, as such, shall be limited to stipulate only such matters as property rights or property distributions and not to interfere with other established system of private manners and customs of the Japanese community."

As a result, objectives of the history of Japanese law system have come to be none other than the study of our traditional manners and customs or the social systems of old time Japan. It might not have been, therefore, without a reason that with its characteristic trend thus given, the history of Japanese law system, which had been then firmly established and endowed with an important message of its own in the field of Japanese jurisprudence by the hand of scholars of Literary Department Group, could maintain its own *raison d'être* while at the same time keeping pace with the forward progress of Japanese capitalism in the subsequent period.

### 3. CONCLUSION

The controversy between Law Department Group and the

Literary Department Group in Japanese legal circles as stated in the foregoing has been kept on until around the time of Japan's surrender in the World War II.

Completely (theorized) Japanese law history of the Literary Department Group gradually strengthened its influence since Meiji era, and, in league with ultra-nationalistic politics, climbed at its height of prosperity with the outbreak of the Pacific War. When, however, American civilization started to flow into Japan after the war, it seems to have been entirely blotted out from the Japanese academic world, survived only by the theory of the Law Department Group. If ever allowed to survive in the post-bellum Japan, the theory of History of Japanese law system of the Law Department should not keep to its heretofore course without due reflection upon its own theoretical stand. The scholars of this group should not again indulge in an illusion that all the principles of the modern analytical jurisprudence are indiscriminately applicable to any law system of the by-gone days, nor fall into a false belief that modern class legislation has its universal value.

Modern legal order are now all subject to judgment in the light of present day world history. Theoretical history of law system can first establish the true theory of its own when it forgoes itself as it is.

It is regrettable to note that the theoretical history of law system of the Literary Department Group, which was once in league with ultra-nationalistic politics of Japan, has not been entirely expunged. On the contrary, it seems inclined still undauntedly to take initiative in the Japanese politics in this turbulent period of post-bellum Japan. Indications are that its gloomy forward march in some dark corner of present day Japan seems to be secretly kept on.

Where is the remedy for such diseases of Japan as caused either by the scholars of Law Department Group or those of the Literary Department? Only clue leading to the solution of this puzzle should be to know correctly the principles regulating the true history of the world progress. The principles should be sought in such a world trend that all the peoples of the world will be liberated from the pressure of all the classes in the respective community and human nature will be reinstated upon its legitimate throne.