ON THE FORMATION OF A CUSTOMARY LAW ON *ALLMENDE* IN JAPAN (*IRIAI*[(1)])

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§ 263 As to an *iriaiken*[(1)] which has the nature of co-ownership the provisions of this Section (co-ownership) apply in addition to the customs of the particular district (The Civil Code of Japan)

§ 294 As to *iriaiken*[(1)] not having the nature of co-ownership the custom of each locality is to govern; also the provisions of this Chapter (servitudes) apply correspondingly (The Civil Code of Japan)

I Introduction

It may not be too much to say that every Japanese jurist is more or less inclined to regard the customary law with deep respect, although the most fundamental part of our law is statute law. He often considers the customary law as a valid mitigative or a useful brake against the cold and severe statute law. He may also think it has naturally grown among the pepole rather than been made by the authorities. And so he seems to have the optimistic point of view that the customary law must have come into existence for protecting all

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(1) Prof. Ludwig Löhnholm annotated "*Iriaiken* means generally a right held by a whole village to take wood or grass from certain land, especially forests" (his "Civil Code of Japan" Tokyo, 1898, P. 68)

of the common pepole from oppression and intolerance. This being assumed, the customary law must be the natural production of the voice of the people, certainly.

But I met with a serious doubt when I was making researches into a question at issue, which was probably typical of the process of "custom" becoming law. Then it occured to me that all customary laws were not based on the right to liberty, equality and the property.

Now, as far as my researches are concerned, I can affirm as follows. Some kinds of customary laws were not the results of the natural growth in pastoral social life or vivid voicies of the whole common people, but the ones of the feudal and severe and discriminating policies under the days of the shogunate—the feudal system consisted of the central administration Tokugawa and the local lords Daimyo or Han authorities. In this paper, I will briefly introduce a case of them with a famous decision at the Supreme Court on June 26, 1920 and orders given by the Matsue Han authorities in 1816. But I will not be able to go into details in this brief paper in English. So my description will be limited to the only suggestion how to approach to a certain aspect of the problem.

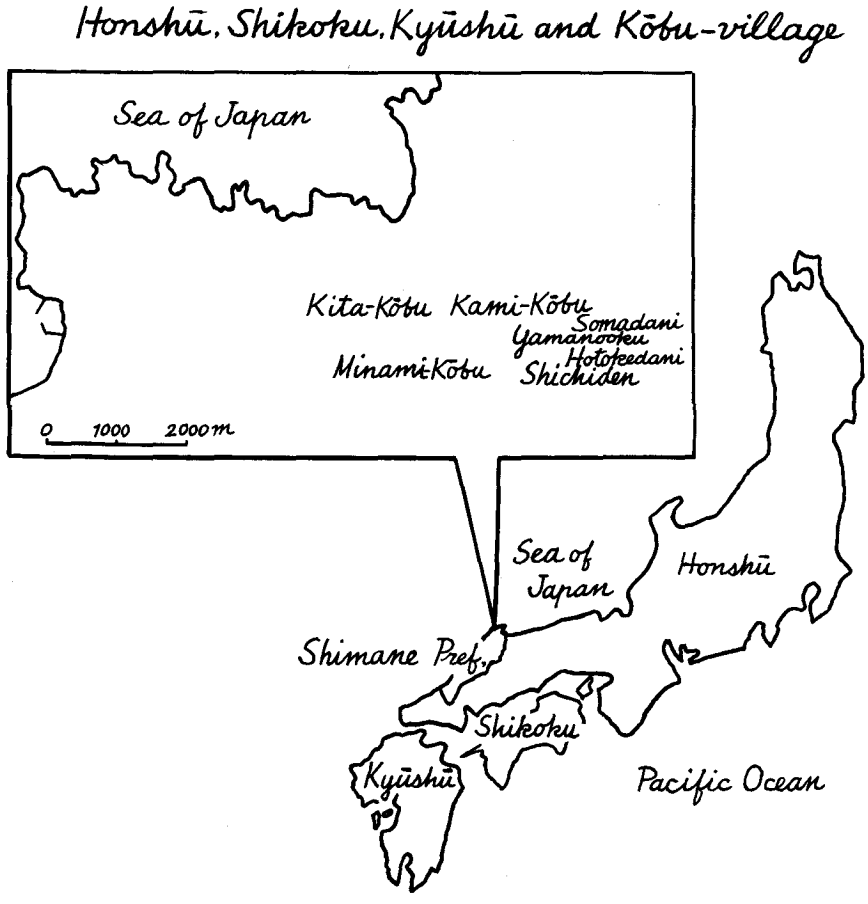
II A Famous Judicial Case on *Iriai*

A lawsuit was brought centering around village customs on village mountains as communal property in a solitary countryside, Shimane Pref. (the Province of Izumo in the Tokugawa era) by the Sea of Japan. The accusers were the representatives of two villages — Kita-kōbu and Minami-kōbu, and defendants were H. Kimura (a resident of Yamanooku) and M. Kuwatani (a resident of Kami-kōbu). The gist of the accusation was as follows;

> "Having pretended to his own share of communal mountains —Yamanooku, Shichiden, Hotokedani and Somadami —, H. Kimura selfishly sold it to M. Kuwatani who had been

unqualified to possess it since the Tokugawa era.

But the village mountains had belonged to the whole of us, not the individuals but the community, in accordance with our established custom. Therefore our co-ownership had not been *Miteigentum nach Bruchteilen*, but *Gesamteigentum* in substance. We as a whole – in capacity of members in *Gemeninde* and to the exclusion of the other villagers—had customarily acquired the rights (*iriaiken*) to derive benefit from the mountains for agricultural affairs. As long as such a fixed custom lives, those vested



rights and interests ought not to be devided into individual shares. Because the sacred and inviolable custom, i.e. the customary law must be kept for the stability of order as the civil code bids clearly. We must and will have to do as our ancestry used to do from genaration to genaration.

Moreover — mention must be made here with emphasis — M. Kuwatani, who bought the apparent share, had not the customary rights to the village mountains of our joint names. He had been excluded from the meeting of decision - making about control over the mountains since the Tokugawa era, so to speak, since time immemorial. In a sense, he had been one of the outsiders of our traditional mechanically integrated community. Though the custom, as it stands at present, may be severe on such a kind of villagers, a binding force of customary laws about *iriaiken* is provided for in the civil code.

So that there is evidence enough for us that sales contract between H. Kimura and M. Kuwatani was illegal. Immediately, the illegal contract which was against the spirit of the customary law and the civil law must be withdrawn."

This accusation was thought to be reasonable at the first trial, but at the scconde trial to be unreasonable. And, for the last time, the judges at the Supreme Court in 1920 declared that the contract of defendants was of no effect, nor was the decision at the second trial in force. The judges at the Suprame Court concentrated their attention upon existence of the custom as the accusers asserted. So the assertion of accusers could gain the approval of the court, successfully.

" *Gesamteigentum* is different from *Miteigentum*. The former is characterized by the principle that the community is superior to the individual ——therefore the individuals,

to say nothing of the outsiders, cannot take their own shares ——, while the latter is not.

The mountains in the focus of trouble had been under the control of the community according to the continual custom since 1816. The mountains in good order depend upon the old custom. Such an old custom is always a good one that is worthy of esteem and worth preserving in future. This is the reason why the civil code justly gave effect to such a custom.

So that the act of defendants, the division of the communal property and the transaction with the outsider, was against the spirit of the customary law, i. e. the conception of *Gesamteigentum*. It was clearly invalid. And we must express our regret that the decision at second trial failed to understand the natura of *iriaiken* and the spirit of the customary law or the civil code. The decision at the second trial must be set aside. Try the case over again."

The decision in 1920 was, roughly speaking, as the above quatation.

III The Meaning of "Old Good" Custom

The judges at the Supreme Court in 1920 established a precedent, of course. The final decision has been presumed to be a respectable one by lawyers, and it has been supported and even admired by most of scholars. It is no exaggeration to say that the decision gained firmly the position as an established theory about *iriaiken*.

But, as above-mentioned, the only evidence by which the defendants were obliged to lose the suit was actually the mere fact, that is, existence itself of the custom since 1816 under the shogunate. It is undeniable that they judged by mere outward appearances. Therefore I have grave suspicious of its propriety : Indeed the ju-

dges surveyed the surface appearences of the custom, but they did not pay their attention to the essential qualities within it. They should have inquired more into the contents, e. g. the origin or the process of the formation of the custom.

I myself cannot help but take interest in its origin, with a view to setting some due significance upon it. We should not overlook the fact ——customs, as if it were in opposition to artificial institution of nowadays, often originated in the severe and inexorable policies of the authorities, the feudal Han government under the shogunate. So, legal historians must go back to the original buds even if they seem to be in the nature of things. The apparent ovservation is sometimes deceptive. From this point of view, I dare to bring out a very question : Why had M. Kuwatani and residents of Kami-kōbu been excluded from the mountains? What was the historical substance of the custom since 1816? And, was there any relations between the will of the Han authorities and the formation of the "Old good" custom ?

Now, here are old documents which are signifcant for elucidating the origin or the essential qualities of the custom. They are Mō-shiwatashi order given by the Matsue Han authorities in 1816.(However I cannot introduce them in detail here.) The gist of orders was as follows.

> (1) The villagers at Kita (North) and Minami (South) sections shall be admitted to the communal mountains. They shall be able to enjoy an exclusive right of *iriai*. But the great part of the villagers at Kami (upper) section should be forbidden to enter into the mountains. They should be compelled to be deprived of *iriai-ken* from this time on.
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> (2) In the mountains, you peasants (or farmers) should not plant and grow a lacquer tree Haze (a tree which produces raw materials into laquered ware, what is called japan). The mountains must be put to good use for

the purpose of mowing the grass for manure to increase the production of rice.

It is since these orders in 1816 that most of the villagers at Kami were placed at disadvantage. And, in the second article of the orders, you will easily find the reason why the discriminating orders were given at that time. Of course, the second article was the cause of the first. The Han authorities intended to keep oppressive control specially over the people who grew lacquer trees Haze and carried on a manual trade of japanned articles. Judging from what the old documents (and other materials for history or statistics omitted here) tell to us, most of villagers at Kami must have been excluded from the communal mountains, because they had engaged in growing Haze for their commercial purposes, or rather because they had been obliged to do so for their means of living. Their paddy lands in the mountains were clearly too narrow for them to throw themselves into agricultural affairs and get the cost of living.

As everybody knows, the feudal political system, of which financial resources chiefly depended upon the rice paid as feudal land tax, was unusually sensitive to change in village economy. Never did the samurai class want peasants to come to neglect their duties and take interest in craft production and commerce. But village economy was not limited to cereal production alone after the middle of the Tokugawa era. Even rice was already produced for commercial purposes then in many parts of Japan. And the lacquer tree Haze was becoming a kind of commercial crops with cotton, tea, hemp, sugar, tabacco and so on. As a general rule, feudal system divided into many Daimyo domains cannot perfectly coexist with growth of commercial crops, which demand a single economic unit and entirely new political order. Despite the best efforts of the Tokugawa and Han authorities to prevent any economic change that might undermine the base of their political system, it seemed to be impossible to stop all natural processes of growth or evolution

within the village society.

However, the Matsue Han authorities, which I am dealing with here, persisted in keeping the limitation imposed upon the commercial crops, while the Choshu Han near the Matsue Han with a comparative progressive spirit had already succeeded in laying a new tax on the laquer Haze in 1769. In this sense, we might say that the Matsue Han were less broad-minded in the approach to the social change than the latter.

Properly speaking, economic growth in the Province of Matsue, a less advanced province, was not high enough for its leaders to feel that Japanese economy and society was developing beyond the bounds of a strictly feudal system. The leaders dared to stick to their traditionally financial policies over the peasantry, and even repeated their grandfather's words — "No one could live without agriculture. A peastant should devote himself to only agricultural affairs". Moreover, in addition to this, they did make a new rule ——that is, "A mountain exists for one who is absorbed in working on the land," —— in such inexorable orders in 1816.

Surely, that "old good" custom since 1816 was a result of the feudalism, or rather the most rigid conservative one. It was not a natural production among the common people at all. There is no doubt that it is far from a sacred and inviolable one which had be regarded with deep respect.

Ⅳ After the Decision of the Supreme Court

As I have mentioned above the judges at the Supreme Court said "Try the case over again". However, the poor peasants of three villages (Kami-kōbu, Kita-kōbu and Minami-kōbu) could not continue the suit. They had already owed a large sum of debt for the costs of the lawsuit. Then, the agricultural and forest department of the Shimane Prefecture had arbitrated on May, 1922. The peasants of three villages had been obliged to accept the arbitra-

tion proposal. The contents of arbitration proposal were(1)a transfer of a half of the mountains to the third person and he payed a sum of the costs to villagers, and (2) the affirmation of the co-ownership of two villages of Kita-kōbu and Minami-kōbu on a half of the mountains.