ON HISTORICAL CONDITIONS OF THE JAPANESE CIVIL CODIFICATION

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I Comparative Introduction

Leon Duguit had pointed out four constituting essential elements of Code Napoléon: —

a) La liberté individuelle.
b) Le principe de l'inviolabilité du droit de propriété.
c) Le contrat.
d) Le principe de la responsabilité individuelle pour faute.[1)]

No one doubts these elements in the Code Napoléon, and many Japanese writers quote these in their primer text of civil law, very often. But each of these four elements did not appear for the first time in the Code Napoléon. For example, we can find the institutions of property in far distant time before it. A German had them in Schrein registers of Köln as early as in the

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1) Léon DUGUIT, "Les Transformations Générales du Droit Privé depuis le Code Napoléon", Paris, 1912, pp. 30–3.

12 th century.[2] In the French middle age, there were some freehold *alleux* and two kinds of ownership. From two kinds of ownership — superior and inferior ownership (*dominium directum and dominium utile*) — inferior one had approached to ownership in the 18 th century.[3] There was already the base of the physiocrats' insistence on *propriété exclusive*. In England, as Shelley's Case shows, there was an estate of freehold since the 16 th century. Even in Scandinavia, we can find the property institutions. For example, in Swe den, there were some regulations on property in the code of Västmanland (*Västma nnalagen*) since the 16 th century.[4] In short, there were already the property ins titutions before the beginning of the capitalist method of production. But the relation between the ower and the property in such a period, according to Karl Renner, was — "Der Eigner «rei suae legem dicit», er ist Gesetzgeber über diese welt von Dingen, denn erstens stehen *neben ihm* fast nur E i g n e r g l e i c h e r A r t — das Rechtsinstitut kann und muss auch nach der subjktiven Seite hin universal sein-und zweitens beeinflusst sein Mikrokosmos von Dingen den des Nachbars fast gar nicht. *Seine* Herrshaft über den Mikrokosmos ist schon deshalb total unbeschränkt, weil kein Nachbar Interesse hat, sich einzumischen, oder gewillt wäre, Einmischung zu ertragen."[5] Such a period is called the period of simple commodity production.

There, however, occured the transformation to the so-called bourgeois society. In this transformation, the condition in which an owner was surrounded by other owners of the same status had reached the end. The property of simple commodity production became to separate piece by piece from the previous owners. "Sie ist nicht vom Gesetze erzwungen, sondern *faktische* Expropriation und Appropriation,"[6] and the old microcosm of previous owners had to be appropriated by somebody.[7] In this process, the society demanded another institution, which was concerning with transactions of goods. Further, the society demanded a new institution regulating labour and goods. Thus,

2) Takeshi HAYASHI, "A History of Establishment of Köln Community in the Middle Age", Hogaku XXVI 4–XXVII 4, Sendai, 1962–3.

3) Fr. Olivier-MARTIN, "Histoire du Droit Français des Origines à la Révolution, 2° tirage", Paris, 1951, p. 644.

4) Åke HOLMBÄCK and Elis WESSÉN, "Svenska Landskapslagar, 2^{a} serien", Stockholm, 1936.

5) Karl RENNER, "Die Rechtsinstitute des Privatrechts und ihre Soziale Funktion, mit einer Einleitung und Anmerkungen von Otto Kahn-Freund", Stuttgart, 1965, SS 76–7.

6) 7) Karl RENNER, a. a. O. S. 80.

"As simple commodity production gave way to manufacture, and manufacture to factory production, ownnership became a *dominium* over persons,"[8] and the institution of property accomplished to combine with the institution of a free person. Such condition as "the institution of property was allied to its *twin brother*, the law of personal freedom"[9] was carried out. This stage was that a capitalist appropriated goods and employed labourers, so it is called a stage of capitalist production. Four essential elements pointed by L. Duguit were *combined* in this stage and they formed a comprehensive system as a civil code. So, by the side of the institutions of property and contract, the institutions of capacity and juristic act had be to put in the same code. It does not matter whether a woman has a juristic capacity or not. It is important that the first book of BGB is Allgememeiner Teil, and that the fourth and fifth books after the provisions of Recht der Schuldverhältnisse and Sachenrecht are Familienrecht and Erbrecht. Those had rendered service to reliable and swift appropriations, as a whole. "The French Revolution was only the last step in the break-up of antiquated feudal institutions. In the sphere of private law the legal concept of the abstract '*persona*' was the true image of a society in which economic functions were not as yet specialized."[10]

But, many different figures of codification were found in many different countries according to different formations of capitalist production. In England, in spite of J. Bentham's insistence on codification, "his influence was 'purely intellectual'."[11] And, in Sweden, in spite of many individual codes since 1734 there is not a systematic civil code. These are interesting facts concerning with the economic developments of these two countries. But, I do not ask the conditions in England[12] and in Sweden,[13] and I shall examine the process of codification in Japan.

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8) O. Kahn-FREUND's Introduction to K. Renner's "The Institutions of Private Law and their Social Functions", London, 1949, p. 28.

9) 10) O. Kahn-FREUND, ibid. p. 25.

11) On Bentham's influence, the following explanation is very interesting. "His name is little known in England, better in Europe, best of all in the plain of Chili and the mines of Mexico. He has offered constitutions for the New World and legislated for future times. The people of Westminster where he lives hardly dream of such a person but the Siberian savage has received cold comfort from his lunar aspect." (K. LIPSTEIN, "Bentham, Foreign Law and Foreign Lawyers, in Jeremy Bentham and the Law", by George W. Keeton and George Schwarzenberger, London, 1948, p. 201, cf. Alan HARDING, "A Social History of English Law", London, 1966, p. 335. Yoshio MIZUTA's introduction in Hōseishi-Kenkyu)

12) I cite Prof. Kahn-Freund's quoteworthy sentence:— "Continental practical lawyers, having been brought up in the system of one of the Codes, are accustomed to think and speak of

In Japan, the economic development from simple commodity production to capitalist production had begun during the Edo era (1603–1867). But in the latter half of that era, Japan had come in contact with the western advanced nations, and Japanese codification was influenced or compelled by them. Japanese codification depended not only on his inner conditions but on outside motives. As international nagotiations had usually occured in the period of capitalist production, such relations were found in most backward nations. About it, Karl Marx said "die Bourgeoisie schafft sich eine Welt nach ihrem eigenen Bilde."

II The Conditions of the Japanese Civil Codification

It is very questionable that there were institutions of property in the Edo era. At least, buying and selling of farmer's land had been prohibited by the Tokugawa Shôgunate since 1643 and some kinds of cultivation (tobacco, medicinal herbs, mulberry, etc.) had been limited since 1643, and also division of land ownership had been prohibited since 1673. But, in fact, there were many small owners who were surrounded by other owners of the same status on one side, and there were many farmers who sold their lands and cultivated tobacco, herbs and mulberry on the other side. And, the economic conditions had been approaching to capitalist production at the end of the Edo era, and under such circumstances the Meiji Restoration had been achieved. The Meiji Government began to compile the Civil Code, the Criminal Code, the Procedure Code, etc., but about thirty years were necessary to compile them. Then, I ask the conditions of Japanese civil codification. First of all, I show the chronicle of civil

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ownership as a relation between a *persona* and a *res*. The Codes were written by university-trained draftsman skilled in the handling of highly abstract definitions. Claims which were to be raised in the courts were understood as the outcome of substantive rights fixed within the framework of a systematised structure. The owner's right to obtain possession from a wrongful detentor, to ward off a trespass or a nuisance were mere incidents of his right of ownership. *Ubi jus ibi remedium.*" ... In England, however, the practical lawyer's attention "is fixed on cases of conflicting interests, he thinks in terms of 'remedies' much more than in terms of 'right.'" (Kahn-FREUND, ibid. p. 18).

"English legal mind has made it unnecessary and impossible for itself to search for a definition of property in the continental sense. ... The separation between legal title and beneficial use permeates many branches of English law." (Kahn-FREUND, ibid. p. 23).

13) I could not find the book which explained the Swedish movement of modern codification, during my stay in Uppsala in 1965.

codification.

1886–7 (Meiji 19–20)	The Draft Jurisdictional Convention The Investigation Committee of Codification in the Foreign Ministry The Investigation Committee moved to the Judicial Ministry.
1890 (Meiji 23)	The Civil Code was promulgated (reception of the French Code).
1890–2	The Controversy on the Civil Code
1892	The Civil Code of 1890 became void.
1893	The New Committee of Codification
1896–8	The New Civil Code was promulgated (systematized by the pandect system).
1898 (Meiji 31)	The New Civil Code came into force.

1 In General

1) About Some Acts after the Meiji Restoration

It may be said that the right of ownership had already existed in the Edo era, *in facto*. But, *in jure*, the first institution was the Act of 1868 which guaranteed farmers ownership on land, and after it the Act of Free Cultivation (1871) and the Act of Remove Embargo on Buying and Selling of Land (1872) had followed. And, in 1872, the Act of Register of Land was proclaimed. A series of these acts were useful for new appropriations upon a large scale. The rate of increase of Kosaku-chi (小作地, tenancy land) since 1872 is following: —

	Change of the rate of Kosaku-chi per whole cultivated acreage. (%)
1872	30.63
73	31.10
83	36.75
87	39.34

Thus, the old microcosm of previous owners began to be appropriated by

somebody, and new appropriators had demanded new institutions served to more reliable and swift contract. But those acts had not been systematized, yet. In order to systematize those acts to a code, the western powers were deeply influential. The western powers had already thought Japan as a profitable market.

2) Die Bourgeoisie schafft sich eine Welt nach ihrem eigenen Bilde.

There were unequal treaties between Japan and the western strong powers since 1858 (Ansei-安政-5), which contained the consular jurisdiction of powers and denied Japanese tariff autonomy. The Japanese codification began with the revision of such old treaties. When the Japanese Government demanded the revision of the treaties, the western powers required Japan to have modern codes in accordance with western principles.[1] They had newly demanded profitable and secure markets in the Far East. The Japanese Government met their demands, and after several congresses.....

The Draft Jurisdictional Convention was agreed upon by the Conference of 22 April, 1887 in Tokyo. Among signers, there were Shûzo Aoki (the Vive-Minister of Foreign Affairs of Japan) and 15 representatives of following countries: — France, Austria, the Great Britain, Italy, Belgium, U.S.A., Germany, Holland, Sweden, Norway, Denmark, Spain, Portugal, Russia and Switzerland. This draft began with such articles as: — "The Imperial Government of Japan undertakes to open completely and forever the Empire to foreigners within two years after the exchange of the ratifications of the present Convention", and as: — "The Imperial Government of Japan undertakes to grant to foreigners, in comformity with the general principles of international law, all the rights and privileges enjoyed by subjects of His Majesty of Emperor of Japan," (§ 2). And the 4th Article regulated on Japanese judical organization and his codification.

> "The Imperial Japanese Government undertakes to establish, in accordance with *Western Principles*, and with the stipulations of the present Convention, the judicial organization of the Empire and the codifications

1) Gustow Emile BOISSONADE de Fontarabie, who had been in Japan since 1873, wrote on this condition — "N'est-ce pas précisément au moment où le Japon s'agite pour obtenir son indépendance, en matière de législation et de jurisdiction sur les étrangers, qu'il lui est *absolument nécessaire* de se présenter à la Révision des Traités avec une législation précise, rationnelle et surtout équitable?" (Préface pour "Projet de Code Civil pour l'Empire du Japon, t. I" Tokio, 1890, p. XXIV).

hereinafter specified, namely: —

1. Criminal Code;
2. Code of Criminal Procedure;
3. Civil Code;
4. Commercial Code (including bankruptcy laws and laws relating to shipping and bills of exchange);
5. Code of Civil Procedure (including the procedure to be followed in commercial matters);

Moreover, the Police Laws and Regulations actually in force shall be, as far as possible collected and classified." Still more, the content of the 5th Article was such as following; — "The Imperial Japanese Government will promulgate the laws and regulations enumerated in the preceding Article within the time fixed by Article I; and undertakes to communicate to the (foreign) Government their authentic text, *in English*, not later than eight months before the time fixed in Article I, namely, within sixteen months after the exchange of the ratifications of the present Convention. In the same manner the Imperial Japanes Government undertakes to bring to the knowledge of the (foreign) Government all alterations intended in these laws eight month before the said alterations come into force."

This draft did not become a treaty. But its contents had given deep influences to the process of Japanese codification. In the same year (1887), the Investigation Committee of Codification had been established in the Foreign Ministry. After that the Committee moved to the Judicial Ministry, but in fluences of the draft remained. The western countries had persistently demanded Japanese codification in accordance with western principles for the revision of old treaties, and the Civil Code was promulgated in 1890–91, and the Commercial Code in 1890. To the compilation of that, especially of property and contract laws, G. Boissonade had contributed, and to the compilation of this H. Roesler had. Boissonade wrote on the necessity of civil codification in Japan as following: —

> "Les Nations sont, à bien des égards, comme les individus: elles s'immobilisent et s'atrophient dans l'isolement; elles se développent sans cesse, au contraire, par le contact avec les autres, par l'échange des idées

2) G. E. BOISSONADE, ibid. p. XXII.

et la communication des découvertes."[2]

"Le Japon n'est pas humilié d'emprunter à l'Occident son industrie, ses engins de défense, ses applications de la vapeur et de l'électricité, sa médecine et toutes ses découvertes scientifiques. Pourquoi rougirait-il d'emprunter beaucoup aussi aux lois civiles des pays qui l'ont précédé dans le nouvel ordre de choses, d'idées et d'intérêts où il est entré?"[3]

The Civil Code of 1890–91 was formed by the system of the French Civil Code. But for this code, the controversy happened in 1890 and continued to 1892. The opposites to the code stood on the traditional thoughts and they emphasized the maintenance of the "Iye" (specially Japanes family) institution. They, however, could not turn off a stream of the codification. In 1893, the New Committee of Codification was established, which adopted the system of the German Civil Code (B.G.B.) and added to it the Japanese family institutions. After all, the new Civil Code was promulgated in 1896 and in 1898, and was put in force in 1898. This Civil Code was constituted by the pandect system, namely, — Book I General Privisions, Book II Real Rights, Book III Obligations, Book IV Family, Book V Succession.[4]

This Civil Code regulated a wife as a quasi-incompetent person and as inferior one to a husband. But, this was not curious. Even in the western civil codes, it is easy to find such regulations on the situations of a wife. I take an instance.

The provision of 14th Article is;[5]—

A wife must obtain the permission of her husband for doing the following act:—

3) G. E. BOISSONADE, ibid. p. XXIII In the comparative explanation of Japan and China, he wrote as following:— "La Chine serait-elle restée stationnaire pendant tant de siècles, si elle ne s'était pas enfermée dans son aveugle et orgueilleux isolement? Au contraire, quels pas immenses a faits le Japon dans la voie de la civilisation matérielle et intellectuelle, depuis qu'il est entré dans le concert international!" (pp. XXII–III) We find such description in the western works, often, but I think that Chinese obstinacy originated much more in western diplomacy on him than in his own mind.

4) Of those, provisions of Book I·II·III are in force, now; but those of Book IV·V were abolished in 1947 and new provisions are in force.

5) This provision was struck out on 22, dec. 1947.

6) Art. 12, No. 1–6.

A quasi-incompetent person must have the consent of his curator for doing the following acts:—

1. Receiving or employing capital;
2. Contracting a loan or giving security;

1. Those specified in Art. 12, No 1–6;[6]
2. Accepting or refusing a gift or a legacy;
3. Making any contract affecting the disposition of her person.

Any act contrary to those provisions may be rescinded.

We can easily find similar provisions to this in western civil codes. Namely, Art. 215. 217 of French Civil Code, Art. 134 I of Italian Civil Code and Art. 1358 I of German Civil Code.

These provisions, however, are not contradictory to the economic development. Because, the incapacity of a wife did not distrub the economic development from simple commodity production to capitalist production. It is rather important to regulate — who is capable? who is incapable? — for reliable and swift activity. Thus, a comprehensive and systematic code was accomplished involing the provisions of a wife's incapacity and so on.

The speciality of Japanese Civil Code had not been in this, but in the "Iye" institution, first of all.

2 In Particular

1) "Iye" (家, Family) Institution

A wife is subject to a husband. Such a situation of a wife is never curious in the modern world. But in Japan, a wife was not only subject to a husband but to a chief of husband's family. The rights and duties of the cheif were inherited by a different method from a property succession—typically *aganatio* institution.

This institution of family had been in force since 1898. In the process of the compilation of the new civil code, through the controversy of 1890–92, the provisions of "Iye" promoted from chapter 13 to chapter 2 in Book IV. I take the most typical provisions: —

Art. 746 The chief and the members of a family bear the name of the family.

Art. 747 The chief of a family is bound to support its members.

Art. 749 I A member of a family may not choose his residence against the will of the chief of the family.

Art. 750 I If a member of a family desires to marry or enter into a relation of adop-

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3. Doing any act whose object is the acquiring or parting with a right in an immovable or a valuable movable;
4. Doing any act in the course of a lawsuit;
5. Making a gift, a compromise, or an agreement to submit to arbitration;
6. Accepting or refusing a succession;

tion, he must obtain the consent of the chief of his family.[7]

Then, I must ask the reason why the "Iye" institution was necessary for Japan. In short, Japanese capitalism had commenced behind western countries and been destined to overtake them. The Japanese Government had to help many enterprises financially and establish Japanese military industries, so he had not a room to relieve poor nation produced during the process of accumlation of the capital. "Iye" was nothing but the relief structure in behalf of the government.

2) Some Complementary Institutions of the Porperty Ownership

The codification of the Japanese Civil Code had not been received warmly in many districts where people had not become familiar with it. For example, the institutions of the property ownership were opposed by many people who were familiar with the cooperative use of land. So some provisions about it was set up in the civil code. I quote some examples from Book II Real Rights: —

On the natural flow of water:

Art. 214 The owner of a land must not obstruct the natural flow of water from an adjoining land.

On emphyteusis

Art. 270 An emphyteuta has a right to carry on agriculture or cattle raising on the land of another on payment of a rent.

On *iriari-kens*[8]

Art. 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.

Art. 294 As to an *iriai-ken* not having the nature of co-ownership the custom of each locality is to govern; also the provisions of this Chapter apply correspondingly.

This, however, does not mean that such institutions deny the ownership. On the contrary, those work as the complementary institutions of the property ownership. Leaving those institutions of cooperative use and suppressing complaints of farmers, the institutions of property ownership have developed as a method of capitalist production in Japan.

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7) Art. 788 By marriage the wife enters the family of the husband.

A man who marries a woman who is the chief of a family, or *mukoyôshi* enters the family of his wife. (from Chap. III).

8) *Iriai-ken* is a right held by a whole village to take wood or grass from a certain land.