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CODIFICATION OF EMPHYTEUSIS (EIKOSAKU:永小作) IN THE MIDDLE MEIJI PERIOD

Kaisaku KUMAGAI*

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Introduction

Elsewhere[1] I described three decisisons of the Great Court of Judicature (*Daishin-in*:大審院) on the *emphyteusis* in the early Meiji. It was pointed out there that two decisions on the *emphyteusis* in Tosa in 1879–1880 denied the customary rights of croppers and a decision in 1884 recognized them. There were no written laws on the *emphyteusis* in those days. The Japanese Civil Code was enacted later and several provisions for the *emphyteusis* were included in the code. I have suggested that this fact forces us to examine the codification process of the Civil Code in the middle Meiji and that my forthcoming paper would discuss this problem. This paper intends to pursue the above mentioned problem.

I. G. E. Boissonade and the Japanese Old Civil Code of 1890

In 1873 Gustave Emile Boissonade de Fontarabie, a French scholar, was

* Professor of Japanese Legal History, Osaka University.
1) Osaka University Law Review No. 25, p.1 (1978).

invited by the Japanese government and he stayed in Japan for twenty-three years. His work constituted great contribution to the codification and to the education of Japanese lawyers. Here I shall only refer to his task as a draftsman of the Civil Code. His task was to draw up the draft of the Civil Code only insofar as it related to *Zaisan-hō* (real and personal property, contracts, torts, etc.). Family and succession laws were excluded and left to Japanese draftsmen because these laws were thought to be closely related to the traditional mores of Japan. It was in 1889 that part of the draft of the Civil Code prepared by Boissonade was adopted by the Genrō-in[2]. His draft contained the book on "Property", the greater part of the book on "Methods of Acquiring Property", the book on "Securities Guaranteeing Obligations", and the book on "Modes of Proof."[3] The draft was promulgated together with the books on family and succession in 1890 as "the Japanese Civil Code". This code is called as "the *Old* Civil Code" contradistinguished from the Civil Code which was drafted after the model of the German Civil Code Draft of 1888, promulgated in 1896–1898, and enorced from 1898. It is clearly useful to examine some important characteristics of the Old Civil Code, even though it never became effective. There were many differences between both codes. The *emphyteusis* was a strong entitlement in the Old. It is to be noted that Professor Boissonade included several provisions for the *emphyteusis* in the Japanese Civil Code, while no provision of the kind is found in the French Civil Code. Before examining the *emphyteusis* in the Civil Code for some detail, I shall present a general view of the leasehold in the Old Civil Code.

The Old Covil Code provided the leasehold (*Chin-gari-ken*:賃借権) as the right of property, not as a *obligatio*, in the book on "Property" and strongly guaranteed the entitlements of leaseholders.[4] For example, we can see such an article as follows:

> Art. 134 A leaseholder may assign his right without or with payment, and he may sublease the thing hired within the during of his right.

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2) The *Genrō-in* was the legislature until 1890 when the National Diet began his activity.

3) Cf. NODA Yoshiyuki, *Introduction to Japanese Law*, translated and edited by Anthony H. Angelo, Tokyo, 1976, pp.46–7.

4) The provisions for the leasehold are in the book on "Obligation" in the New Civil Code of 1898.

Boissonade wrote why the status of a leaseholder should be so well protected by law and his opinion was accepted when the Old Civil Code was enacted. He indicated that as to the right of leasehold France and other countries were under the influence of Roman Law. The right of a leaseholder was considered to be a simple right of *obligatio* in those countries but, he continued, opinions and authoritative texts were divergent even in France. Thus, he insisted on the necessity of strengthening the status of a leaseholder in Japan.
He said:

> En France, et dans les autres pays qui ont suivi surtout la législation romaine, le droit du preneur est considéré comme un simple droit *personnel*, comme un droit de créance contre le bailleur et qui n'affecte pas la chose louée; c'est, au moins, l'opinion générale. Mais il y a des divergences d'opinion et les textes ne sont pas sans laisser des doutes à cet égard.
>
> .....
>
> .....
>
> Le Projet japonais, en fortifiant le droit du preneur, en lui donnant une plus grande stabilité encore que celle qu'il a en France et ailleurs, favorisera l'agriculture, dans le louage des terres, et le commerce autant l'industrie, dans le louage des maisons.
>
> ..... [5)]

To strengthen the status of a leaseholder coincides with to protect the status of a emphyteuta. Now, provisions for the *emphyteusis* in the Old Civil Code are to be analyzed. There were sixteen articles on the *emphyteusis* in the book on "Property". An *emphyteuta* has a right to carry on argiculture or cattle raising on the land of another on payment of a rent. He may assign his right and may sublease the thing hired. He possessed a strong entitlement as a leaseholder. But it is important to recognize that the *emphyteusis* was not a perpetual right and submitted to the limitation of time under this code. The first provision on the *emphyteusis* reads;

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5) G^{ve}. E. BOISSONADE, *Projet de Code Civil pour l'Empire du Japon accompagné d'un Commentaire*, T. 1er, 2^{e} édition, Tokio, 1882, pp.219–20.

Art. 155 An *emphyteusis* is a leasehold of immovables over thirty years. The period of duration of an *emphyteusis* cannot exceed fifty years. If it is for a longer period than fifty years, it is reduced to fifty years.

Boissonade's commentary on the *emphyteusis* is of special significance. First, he asserted the necessity of provisions the *emphyteusis*. It was his opinion that the Japanese *emphyteusis* was under the influence of the feudal regime as in European countries and resembled *propriété utile* under *propriétaires directs*. But he insisted to strengthen the right of the cropper for long term cultivation and said that a landlord must become a "victim" of a longer cropper. He said:

> Au Japon, l'influence du régime féodal se fit sentir sur la condition des terres rurales, non moins qu'en Europe et même avec plus de similitude que de différences.[6]
>
> .....
>
> .....
>
> La raison principale pour laquelle le propriétaire devra être sacrifié à l'emphytéote est que son droit n'est, en réalité, qu'une créance d'argent: elle n'est guère *foncière* que de nom; quand il vend son fonds, il vend seulement une créance. Une autre raison dont il ne faut pas méconnaître l'importance, c'est que l'emphytéote est attaché à sa terre autant de coeur que d'intérêt; c'est lui qui, en quelque sorte, a crée son sol, qui l'a *fertilisé*, arrosé de ses sueurs: l'en dépouiller, par voie d'indemnité forcée, serait blesser chez lui un sentiment aussi vif que respectable et légitime.[7]

Second, we have to observe Boissonade's thought on the limitation of duration of the *emphyteusis*. He recognized a long leasehold as an *emphyteusis* provided in Art. 132 but did not refer to its limitation of duration in his draft. His original draft of Art. 132 reads[8]:

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6) Ibid. p..295.
7) Ibid. pp.298–9.
8) Ibid. p.226.

> Lorsque les baux d'immeubles faits par le propriétaire excèdent trente années, ils deviennent des baux emphytéotiques et sont soumis aux règles particulières établie à l'Appendice pour ces sortes de baux.

Though no provision on limitation of duration was seen in the Boissonade's draft, limitation of duration appeared in a provision of the Old Civil Code as Art. 155. The reason for this change is that Japanese commissioners amended Boissonade's draft and inserted another provision in the draft.[9)]

The Japanese Old Civil Code was promulgated in 1890. The leasehold of land was provided for as a property right while a long leasehold as the *emphyteusis* with limitation of duration. But the right of leasehold was defined as a mere *obligatio* in the New Civil Code of 1898. I shall examine the process of this transition from the Old Civil Code to the new one. I shall begin describing the dispute occurred during that period.

II. A dispute concerning the Old Civil Code

A dispute concerning the Civil Code of 1890 occurred in 1890 and continued until 1892. Lawyers were divided into two camps and a violent debate arose between the partisans of the immediate enforcement of the Code and those who favored a postponement of it. Professor Noda crystallizes essential arguments of the last and characterizes them —— "Postponement was demanded because the Boissonade code did not sufficiently take account of the traditional customs and morality of the Japanese people. One of the most conservative of the jurists, Hozumi Yatsuka, professor of constitutional law at the Imperial University in Tokyo, went so far as to state that once the civil code came into force, loyalty to the emperor and filial piety would be at an end."[10)] One of advocates of a postponement, Murata Tamotsu, a member both of the *Genrō-in* and the

9) For example, IMAMURA Kazuo earnestly inserted the limitation of duration of the *emphyteusis*. On his draft, MIZUBAYASHI Hyo, Modern Formation of Japanese Land Law (Nihon Kindai Tochihōsei no Seiritsu), *Hogaku Kyōkai Zasshi* Vol. 89 No.11.

10) NODA, op. cit. p.47.

House of Lords said in the third Diet in 1892: "The Japanese Civil Code provides a leasehold as a right of property. This is contrary to the Japanese traditional customs. In addition, a leasehold is provided for as a *obligatio* in the French Civil Code."[11] Murata cited the provisions of the French Civil Code to strengthen his opinion, only. But, he was wrong, because a leasehold had been a right of property not a mere *obligatio* in the Japanese traditional customs, which I have argued elsewhere.[12] But the majority of the Diet supproted his claim and in 1892 the Died voted for postponement. This postponement meant, in its effect, the abolition of the Old Civil Code and Boissonade's endeavor was destined to end in vain.

III. A majority view on emphyteusis in the Council for Codification Studies (Hōten Chōsa-kai:法典調査会)and the New Civil Code of 1898

After the failure of the Boissonade Code the Council for Codification Studies was established and a commission for drafting a new civil code was appointed in the Council. Members of the commission were Hozumi Nobushige, Tomii Masaakira, and Ume Kenjiro. Among them, Ume was a brilliant scholar of French civil law. But the commission decided not to adopt the system of the French Civil Code and, instead, to replace it with the German Civil Code system. The first three parts of the Code, the General Part, the Book on Real Rights, and the Book on Obligation passed the Died and were promulgated in 1896. The remaining two parts, the Books on family and succession were voted by the Died and promulgated in 1898. The New Civil Code as a whole came into force in the same year.[13] In this code, the right of leasehold or ordinary tenacny was defined as an mere *obligatio,* not as a property right.[14] Even Ume, known as a liberal jurist, opposed to provide a leasehold as a property right during the law-drafting process. I shall cite two provisions from the Book on *Obligatio* in the new code so that we can see their differences from those of the old code.

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11) *Minutes of the Diet* (Dainippon Teikoku Gikai Shi), Vol. 1 p.1597.
12) See 1.
13) Cf. NODA, op. cit. p.51.
14) Cf. Ann WASWO, *Japanese Landlords*, Berkeley, 1977, p.21.

Art. 604 The period of duration of a leasehold cannot exceed twenty years. If a leasehold is made for a long period, such period is to be reduced to twenty years.

Art. 612 A leaseholder can assign his right or sublet the thing hired *only with the assent of the letter.*

Landlords, in effect, could cancel tenancy agreements at any time and they were not required by law to compensate tenants for any improvements of the land made by tenants.[15] The principle that the ownership be superior to the using rights was firmly established here.

However, we can find provisions on *emphyteusis* in the book on real rights or property in the New Civil Code, which I have already mentioned.[16] Art. 272 reads: ..... An *emphyteuta* may assign his right, or may let the land for the purpose of agriculture or cattle raising with the during of his right; unless it has been forbidden by the act of creation of the right. The Japanese traditional custom and the spirit of Boissonade are found in this provision. But Art. 278 reads: ..... The duration of an *emphyteusis* is from twenty to fifty years. If it is created for a longer period than fifty years, it is reduced to fifty years. Landlords and their ideologues were enthusiastic in restricting the rights of *emphyteuta* and they finally succeeded in maintaining the provision on limitation of duration both in the Old Civil Code and the New Civil Code. The New Civil Code which provided a leasehold as an mere *obligatio* and the *emphyteusis* as a not perpetual right was earnestly supported by landlords, has been enforced for a long time and has protected them.

15) Ibid.
16) See 1.