JAPANESE LAW

FOURTH EDITION

HIROSHI ODA

OXFORD

Japanese Law

Japanese Law

Fourth edition

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OXFORD

UNIVERSITY PRESS

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UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

First Edition published in 1992
Fourth Edition published in 2021

Impression: 1

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data

Data available

Library of Congress Control Number: 2020948073

ISBN 978–0–19–886947–4

DOI: 10.1093/oso/9780198869474.001.0001

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

Preface

Ten years have passed since the third edition of this book was published. The period covered by the previous edition was a period of reform triggered by the collapse of the 'Bubble Economy' in 1990/1991. Japan embarked on a long process towards recovery. This necessitated a major reform of the regulatory framework which inevitably involved various areas of law. Just to mention a few, a new Company Law was enacted in 2005 and the Securities and Exchange Law was replaced by the Financial Instruments Exchange Law in 2006. By virtue of the 'Justice System Reform', the judicial system also underwent major reform. Now, a decade later, it is time to assess the outcome of those reforms. In some areas, the reform was successful, while in other areas, it did not work as had been envisaged. I believe the experience in Japan provides a lesson, positive or negative, to other countries contemplating legal reforms.

It should be added that amendments to the part of the Civil Code on the law of obligations took effect in 2020 after more than two decades of deliberation. These amendments are addressed in this edition.

The fourth edition is intended to analyse those reforms in a critical manner. As was the case with the third edition, the focus of this book is business and commercial law. On the other hand, in order to understand the system, knowledge of the basis of the legal system is needed, and therefore, these subjects are duly covered. Since case law plays a crucial role in Japan, decisions of the courts are extensively cited. In order to present the way the system operates in Japan, statistical surveys are cited as much as possible.

The Sir Ernest Satow Chair of Japanese Law at University College London (UCL) has recently celebrated its thirtieth anniversary. It was the first and still the only centre of Japanese law studies in the United Kingdom, and one of the few such institutions in Europe. Publication of this book represents one of the core activities of this Chair. On this occasion, as the holder of the Chair, I would like to thank all those in academia as well as in practice and business who have supported the Chair throughout those years.

I am indebted to Professor Sir Jeffrey Jowell QC, KCMG, former vice provost of UCL and the dean of the Law Faculty, for his commitment and support to the Chair. I am grateful to Professor Piet Eeckhout, the current dean of the Faculty, and colleagues for their understanding and warm support. My gratitude goes to Lord Harry Woolf, also at UCL, the former Master of Rolls and the former chairman of the UCL Council and Mr Victor Chu, the current chairman. I would like to thank Professor Paul Davies QC of Oxford University, Professor Klaus Milhaupt of

Stanford University, and Professor Gen Goto of the University of Tokyo for kindly joining UCL conferences on a regular basis.

I would also like to thank my German colleagues at the Max-Planck Institute for Comparative and International Private Law in Hamburg, namely Professors Dr Klaus Hopt and Dr.Juergen Basedow, former directors of the Institute, and Professor Dr Harald Baum, former head of Japanese Law Studies, for allowing me to work at the Institute whenever necessary and organizing conferences and seminars. My special thanks naturally go to my friends and colleagues in Japan including colleagues at Nagashima, Ohno, and Tsunematsu law Office, who have supported and assisted the Chair whose names I cannot mention individually because of there are so many of them.

I am also grateful to Mr Sadakazu Oosaki, senior fellow at the Nomura Research Institute, for reviewing key chapters in the manuscript and giving me useful comments.

In the process of publication, I am indebted to Ms Brianne Bellio at OUP, Mr Ashirvad Moses of Newgen and Janet Walker for their kind assistance and tolerance.

Last, but not least, I would like to thank my wife Midori for her support and assistance over the years in preparing four editions of this book.

Contents

III. BUSINESS-RELATED LAWS

Abbreviations

ADR	alternative dispute resolution
BGB	Bürgerliches Gesetzbuch
BIS	Bank of International Settlement
CIETAC	China International Economic and Trade Arbitration Commission
CPA	Chartered Patent Attorney
EDINET	Electronic Disclosure Network for Investors
FIB	Financial instruments business
FIBO	financial instruments business operators
FIEs	financial instruments and exchanges
FIEL	Financial Instruments and Exchange Law
FSA	Financial Services Agency
FSMA	Financial Services and Markets Act 2000 (UK)
FTC	Fair Trade Commission
HHI	Herfindale Hirschman Index
IMF	International Monetary Fund
IPO	initial public offering
JASDAQ	Japan Association of Securities Dealers Automated Quotation
JCA	Japan Credit Rating Agency
JCAA	Japan Commercial Arbitration Association
JPX	Japan Exchange Group
JSCC	Japan Securities Clearing Corporation
LLC	limited liability companies (US type)
LLP	limited liability partnerships
LPS	lender processing services
LPS	limited partnership for investment
METI	Ministry of Trade, Economy, and Industry
MSCB	moving strike convertible bonds
MTF	multiple trading facilities
NASDAQ	National Association of Securities Dealers Automated Quotations
NBS	Nippon Broadcasting System Inc.
OECD	Organisation for Economic Cooperation and Development
PCT	Patent Co-operation Treaty
PTS	private trading system
R&I	Rating and Investment Information
ROE	return on equity
SCAP	Supreme Commander of the Allied Powers
SEC	Securities and Exchange Commission (US)

SESC	Securities and Exchange Surveillance Commission
SEL	Securities and Exchange Law (replaced by FIEL)
SII Talks	Structural Impediments Initiatives Talks
TDNET	Timely Disclosure Network
TOB	takeover bids
TOMAC	Tokyo Maritime Arbitration Commission
TOPIX	Tokyo Stock Price Index
TRIPs	Trade-Related Aspects of Intellectual Property Rights, Agreement on
TSE	Tokyo Stock Exchange
UNCITRAL	United Nations Commission on Trade Law
WTO	World Trade Organization
ZPO	German Code of Civil Procedure

Table of Cases

SUPREME COURT

SUPREME TRIBUNAL (PRE-WAR PREDECESSOR TO THE SUPREME COURT)

JUDGMENTS OF APPELLATE COURTS

JUDGMENTS OF DISTRICT COURTS

ADJUDICATIONS OF OTHER COURTS

FTC DECISIONS

Table of Legislation

JAPAN

Constitution

Codes

Introduction

1. Japanese Law Viewed from Abroad

The study of comparative law has attracted academics in Europe and the United States since the last century. In 1869, the *Société de Legislation Comparée* was founded in France. Legal systems outside the Common Law and Civil Law system were not entirely ignored. An article by T. Gorai on the influence of Code civil on Japanese law was published in a book commemorating the centenary of the French Code civil in 1904.[1]

J. E. de Becker published a 'commentary' on the Japanese Commercial Code in 1913.[2]

In 1950, two books on comparative law were published in France. In the *Traité de droit comparé* by P. Arminjon, B. Nolde, and M. Wolf, the influence of German law on Japan was emphasised and Japanese law was characterised as German law in the Far East.[3] This is primarily because the draft German Bürgerliches Gesetzbuch (hereinafter 'BGB') served as the basis for the Japanese Civil Code.

The view that Japanese law is part of the Romano-Germanic family had already been stressed in the early twentieth century by N. Hozumi, who was a Professor of Civil Law at the University of Tokyo. Referring to the Civil Code, he pointed out that Japanese law had shifted from the family of Chinese law to the family of Roman law: '. . . the new Japanese Civil Code stands in a filial relation to the European systems, and with the introduction of Western Civilization, the Japanese civil law passed from the Chinese Family to the European Family of law'.[4]

René David later elaborated on this topic in the *Major Legal Systems in the World Today*.[5] Here, the connection of Japanese law with the Romano-Germanic family of legal systems is acknowledged, but with some reservation:

[1] T. Gorai, 'Influence du Code Civil français sur le Japon', in la Société d'études législatives ed., *Le Code Civil: Livre du Centenaire* (Paris, 1904), pp. 783–784.

[2] J. E. de Becker, *Commentary on the Commercial Code of Japan* (Yokohama, 1913).

[3] P. Alminjon, B. Nolde, and M. Wolff, *Traité de droit comparé* (Paris, 1950), Tome II, pp. 427–428. R. David, *Traite centenaire de droit civil copmparée* (Paris, 1950), pp. 388–399.

[4] N. Hozumi, *Lectures on the New Japanese Civil Code as Materials for the Study of Comparative Jurisprudence* (Tokyo, 1904), p. 19.

[5] R. David and J. E. C. Brierley, *Major Legal Systems in the World Today* (London, 1968), pp. 20, 450–460.

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> The reception of Western ideas and institutions, decreed by their rulers, has not wholly eliminated those traditional ideas which were considered as morality and the social order. For a long time yet modern law may very well remain a mere 'veneer', behind which the traditional ways of acting, thinking and living will be perpetuated.[6]

This pattern of thought was followed in the work by K. Zweigert and H. Kötz. In their view, positive law imported from foreign countries had not fully taken root in Japan. Instead of recourse to the courts, people resort to informal procedures of dispute settlement, characteristic of Confucianism which discourages the settlement of conflicts in public.[7]

In the second edition of Zweigert and Kötz's book, the tone has slightly changed:

> … it is clear that until well into the twentieth century these imported statutes had very little practical effect on Japanese legal life.… But it would be wrong to overemphasise the Japanese preference for resolving disputes uncontentiously. Many people familiar with Japan believe it to be a myth that the Japanese are reluctant to litigate.[8]

In the third edition, there is a reference to the way 'the Japanese tenaciously cling to their old practices despite all changes in the circumstances of life'. The book proceeds to present some 'examples' of disputes being resolved by 'internal procedures', which seem to be rather exaggerated.[9]Presumably these authors based their views on the work of Professors T. Kawashima and Y. Noda. In an article published in 1963, Professor Kawashima pointed out as follows:

> Traditionally, the Japanese people prefer extrajudicial, informal means of settling a controversy. Litigation presupposes and admits the existence of disputes and leads to a decision which makes clear who is right or wrong in accordance with standards that are independent of the will of the disputants.… There is a strong expectation that a dispute should not and will not arise; even when one does occur, it is to be solved by mutual understanding.… Because of the resulting disorganisation of traditional social groups, resort to litigation has been condemned as morally wrong, subversive and rebellious.[10]

[6] Ibid.

[7] K. Zweigert and H. Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiet des Privatrechts,* erste Auflage, Bd. 1, (Tübingen, 1971), S. 431–434. Translated into English by T. Weir, *An Introduction to Comparative Law*, vol. 1, (Oxford, 1977), pp. 362–365.

[8] Zweigert and Kötz, ibid., zweite Auflage (Tübingen, 1984), S. 416–419. Weir, ibid., (Oxford, 1988), pp. 370–372.

[9] Zweigert and Kötz, ibid., dritte Auflage (Tübingen, 1996), S. 294–296. Weir, ibid., (Oxford, 1998), pp. 300–302.

[10] T. Kawashima, 'Dispute resolution in Contemporary Japan', in A. von Mehren, (ed.), *Law in Japan* (Ann Arbor, 1963), pp. 43–45.

Professor Noda went even further in his book, *Introduction to Japanese Law*:

> Japanese generally conceive of law as an instrument of constraint that the State uses when it wishes to impose its will. Law is thus synonymous with pain or penalty. To an honourable Japanese the law is something that is undesirable, even detestable, something to keep as far away as possible. To never use the law, or be involved with the law, is the normal hope of honourable people. To take someone to court to guarantee the protection of one's own interests, or to be mentioned in court, even in a civil matter, is a shameful thing; and the idea of shame . . . will be the keystone to the system of Japanese civilisation.[11]

Whether this notion of the 'non-litigiousness of the Japanese' is a myth or not was a focus of contention for some years. Serious doubts have been raised about the validity of this notion.[12]

There was a view that the small number of lawyers compared to other jurisdictions was a demonstration of the limited role of the formal system of dispute settlement in Japan. However, as the present author has contended in the past, a simple comparison of the number of practising attorneys in other countries can be misleading since the scope of work covered by practising attorneys varies from country to country. Although the number of attorneys per 1,000 inhabitants in Japan is much smaller than that in any other jurisdiction, as a recent survey by the Japan Federation of Bar Associations demonstrates, if the number of 'neighbouring professions' such as tax attorneys and patent attorneys are added, the number is not that different from other countries (see Figure 4.1, Chapter 4).[13]

According to a survey of users of the civil procedure, 0 per cent of respondents replied that the reasons for their hesitation to go to court are simply 'time and cost'. In a later survey, 53.3% of the respondents felt no reluctance to contest the case in court.[14]

David's view on Japanese law, largely shared by Zweigert and Kötz, regardless of its inappropriateness, deserves attention since it seems to represent a notion common to foreign observers. His view is essentially that due to the persistence of traditional morals and values, the 'imported' modern legal systems did not fully succeed in taking root in Japanese society. Therefore, 'the question is still very much open whether behind this facade of westernization, Japan really has undergone any kind of significant transformation and whether it has accepted the idea of justice and law as understood in the West'.[15]

[11] Y. Noda, *Introduction to Japanese Law* (Tokyo, 1976), pp. 159–160.
[12] J. O. Haley, 'The Myth of the Reluctant Litigant', *Journal of Japanese Law*, vol. 4 (1978), pp. 576–578.
[13] https://www.nichibenren.or.jp/library/pdf/document/statistics/2019/1-3-7_2019.pdf.
[14] *Minji-soshō riyōsha chōsa (Survey of the Users of Civil Procedure)*, 2006. Society for the Study of the Civil Procedural System ed., *Report on Japan's 2011 Civil Litigation Survey*, Tokyo 2014, pp.64-65.
[15] David and Brierley, *supra,* p. 456.

It is natural in a way to imagine friction arising between imported foreign laws on one hand and traditional morals and values on the other. However, in Japan, in the period of modernisation, foreign law was imported and accepted fairly smoothly without any significant resistance. The gap between modern codes based upon foreign law and social reality in Japan has not been as wide as is believed by foreign observers (see Chapter 1).

In every legal system, there is a discrepancy between the law in books and the law in action. This applies to Japanese law as well, but the assumption that this gap is wider in Japan than in other countries simply because foreign law was introduced to a 'traditional' society cannot be substantiated.

The reception of foreign law in Japan took place without any substantial resistance. Although modernisation began in response to both pressure from foreign countries to open up and the desire of Japan to renegotiate unequal treaties, the need for modernisation itself was never doubted. The government's slogan of emulating and surpassing Western powers was shared by most political leaders and largely supported by ordinary people. Therefore, psychological barriers to the reception of foreign law were minimised, making the implementation of laws modelled on foreign laws easier than in countries where foreign law was imposed from above by colonial rulers. In the absence of commitment to a specific country, the Japanese legislature seldom carbon-copied foreign legislation in its entirety without considering its adaptability to Japanese society. At the very beginning of the modernisation there were attempts to translate French Codes and implement them directly, but these attempts were quickly abandoned, and a more prudent approach prevailed.

The reception of foreign law in Japan was selective, i.e. it was introduced only insofar as it met specific social demands at the time. It is often pointed out, for instance, that the present Civil Code is primarily influenced by German law, yet it is neither a replica of the draft German BGB nor even primarily influenced by the German Code. In fact, in the process of preparation, French law, German law, and English law were all studied, and the Code incorporated the parts considered to be most suitable, regardless of the source. One of the authors of the Code later stated that legislative materials were collected from all over the civilised world and that the Code was 'a fruit of comparative jurisprudence'.[16]

The legislature in the period of modernisation did not fail to take into account the existing customs and conventions in Japan, especially commercial practice. Naturally, some traditional customs and conventions needed to be abandoned for the sake of modernisation, but justifiable practices were preserved under the new regime. In order to meet specific conditions in Japan, foreign law was often

[16] Hozumi, *supra,* pp. 21–22.

modified, sometimes to the extent that its origin became difficult to identify. This careful consideration of social reality existing in Japan minimised the friction between the new laws and established social practice.

Although modern Japanese law has been substantially influenced by foreign law, particularly German and French law, Japan has not taken over foreign legal institutions without considering their adaptability and suitability to Japan. Foreign law was carefully examined in light of the existing social reality of Japan, and only that which met the specific requirements of the day was accepted, often with substantial modification. This cautious approach still did not eliminate the possibility of discrepancy between law and reality. In such cases, it was not uncommon that a different practice which was not always compatible with the law emerged. This can be seen, for instance, in the area of atypical real securities, where a body of case law which was different from the statutory law developed. However, once established, these practices were endorsed by the court, if not by the legislature, and became fully compatible with the law.

In this way, Japan has been fairly successful in assimilating foreign laws and transplanting them on different soil. The gap that initially existed between the 'imported' laws and social reality has been filled in one way or another, and statutory laws are duly implemented and generally enforced. Therefore, an overemphasis on the disparity between law and practice is often misleading and results in 'mystification' of Japanese Law.

It should be added that in the process of the 'regulatory reform' in the past several decades, the above prudent approach seems to have given way to the need for urgent reform. An example is the successive amendments to Japanese company law, which culminated in the enactment of the 2005 Company Law. In this process, some components of the US system were transplanted into Japan, arguably without sufficient infrastructure. This is demonstrated in the takeover law, where various defensive measures were made available without necessary rules to regulate their use.

2. The Role of Courts in Japan—Judicial Activism?

If any uniqueness is to be found in Japanese law, it is not in the approach to dispute settlement but rather the role of courts in shaping the law and interpreting contracts.

There is a marked anti-positivist approach in the interpretation of law by the court in Japan.

When interpreting statutes, the Japanese court naturally places significance on the literal meaning of the statutes, but other factors such as the legislative history and the policy goals are taken into account. In cases where there is no alternative way to achieve an equitable solution, the court may deviate from the wording of

statutory law rather than adhering to the literal interpretation of the statutes. In some cases, the court may rule against an explicit provision of the law.

For instance, in cases involving loans, there is an explicit provision in the statute to the effect that the interest exceeding the limit set by the law which the debtor has paid voluntarily is not subject to reimbursement. When faced with cases involving consumer loans, where debtors had to pay interest above this limit and later claimed reimbursement, the Supreme Court ruled that the excess amount should be regarded as repayment of the principal sum, and if the principal and the statutory interest have been fully repaid, the excess amount should be returned to the debtor.[17] One foreign observer characterised the role of the court in this respect as 'judicial activism'.[18]

In the area of labour law, according to the Civil Code, the employer is entitled to terminate an employment contract without a fixed period at any time. The termination takes effect in two weeks. The Labour Standards Law extended this period to one month. However, the doctrine of unfair dismissal has developed by case law. Termination of the contract by the employer is not allowed as an abuse of rights, if a compelling ground does not objectively exist, or if the dismissal is not compatible with socially acceptable standards (see Chapter 16).[19] This doctrine was later reflected , in the newly enacted Labour Contract Law. In family law, although there is no specific restriction in the Code on the person who is entitled to initiate divorce proceedings, the court has long maintained that the spouse who is responsible for the collapse of the marriage is not entitled to initiate the proceedings despite the absence of any statutory basis.

General clauses accommodated in the Civil Code, such as the public order and good morals clause and the provision on good faith and fair dealing often serve as the basis of such an approach.[20] Naturally, one may question whether such an approach is compatible with the stability of law. In many areas where general clauses are utilised, a body of case law has been accumulated and a set of criteria is largely available. After all, these general clauses are designed to serve as a channel to reflect the values commonly shared by the public. The fact that judges in Japan are 'career' judges, and that as a result court practice is fairly standardised, may further reduce any concern about legal stability.

It should be added that, in general, legal training in Japan is against positivist thinking like that of the *Pandektenists.* Legal positivism was widely supported in

[17] Judgment of the Supreme Court, 13 November 1968, *Minshū* 22-12-2526. See Hironaka, 'Wagatsuma Minpō-gaku to Minpō no Hanseitei-hō-teki Kaishaku (Prof. Wagatsuma's Theory and Anti-Literary Interpretation of the Civil Code)', *Jurist*, 1996, vol. 1096, pp. 74–83.

[18] A. M. Pardieck, 'Japan and Moneylenders—Activist Courts and Substantive Justice', *Pacific Rim Law and Policy Journal*, 2015, vol. 17, No. 3, p. 532.

[19] K. Sugeno, *Shin Koyō-Shakai no Hō (New: Law of the Working Society)*, supplementary edition (Tokyo, 2004), pp. 64–66.

[20] T. Uchida, *Keiyaku no Jidai: Nihon Shakai to Keiyaku-hō (The Era of Contracts: Japanese Society and the Contract Law)* (Tokyo, 2000), p. 84. See also H. Tanaka, *The Japanese Legal System* (Tokyo, 1974).

the pre-war period in Japan, but even then, there was some opposition to it. The German *Freirechtslehre* in pursuit of *lebendes Recht,* as opposed to positivistic interpretation of law, had a significant influence in Japan before the war. This was reinforced after the war by the introduction of sociology of law from the United States. At present, it is generally accepted that the interpretation of law should not be limited to literal or logical interpretations; teleological and sociological interpretation is equally important.

Presumably influenced by the American jurisprudence of realism, there is an influential view which generally acknowledges that judges make value judgments in resolving specific cases. Judges identify the interests involved in the dispute and make a decision as to which interest should be protected more than others by weighing conflicting interests. In this process various factors are considered, including the intention of the legislature, and the intended goal of the statute. It is understood that the final decision of choosing the most appropriate alternative is a value judgment on the part of the judge, who substantiates or rationalises the conclusion by applying a suitable norm for the purpose.[21]

Whether this view reflects the true state of affairs may be arguable, but Japanese judges certainly seem to adopt a more liberal and flexible attitude in statutory interpretation than their counterparts in the Anglo-American jurisdictions.

Another unique characteristic of Japanese law is the way courts interpret contracts. In English law, contracts are to be interpreted in accordance with the 'ordinary grammatical meaning of the words' used in the contract.[22] In interpreting a term of a contract, 'the word or a syntax should not be amended in order to protect one of the parties from having entered a bad bargain'.[23] As a general rule, pre-contractual negotiations are not permissible as evidence when interpreting contracts (Parol Evidence Rule).

This approach is in stark contrast to Japanese law. Courts in Japan take into consideration various factors and circumstances including the negotiation preceding the conclusion of the contract. In normal cases, naturally, literal interpretation would suffice in order to establish the intention of the parties, but in cases where there is a gap in the contract, the courts may fill the gap by surmising the intention of the parties (supplementary interpretation). If and when the contract leads to an unfair or inequitable outcome, courts may rectify the contract (revisional interpretation) on the basis of the doctrine of good faith and fair dealing, or public policy (see Chapter 6). While in English law, courts are not allowed to rewrite the contract for the parties, in Japan, depending on the circumstances, this is possible.

[21] E. Hoshino, 'Minpō niokeru Rieki Kōryō-ron *Minpō Ronshū, (Treatise on Civil Law)*', vol. 8 (Tokyo, 1996), pp. 203–213.

[22] *Lowell & Christmas lts v. Wall-Cozens Hardy* (1911) 104 LT 85, 162, 168.

[23] A. Burrows et al., *A Restatement of the English Law of Contract* (Oxford, 2016), pp. 84–85.

PART I

THE BASIS OF THE SYSTEM

1
The History of Modern Japanese Law

1. The Period of Modernisation

Foreign law was received into Japan in three different stages. The first stage was in the seventh and eighth centuries, when Japan imported the Chinese political and legal system.

The second stage occurred between the overthrow of the Tokugawa shogunate in the mid-nineteenth century and the early twentieth century, when the industrialisation of the country was accomplished. In this period of modernisation, European law—namely the French and German codes—was imported into Japan and served as a model for the major Japanese codes.

The third stage began after the Second World War and continued during the period of the allied occupation. During this stage, some laws were amended or replaced on the basis of US law. Nevertheless, the strong influence of the Civil Law system remains today. The second and third stages are of particular significance, since these two stages have direct bearing on contemporary Japanese law.

The modernisation process in Japan started with the fall of the Tokugawa shogunate, which ruled the country for two and a half centuries.[1] In 1867 the Emperor declared that imperial rule should be restored. A new government was first formed on the model of the archaic *dajōkan* system, which dates back to the eighth century.

When major reforms took place after the fall of the Tokugawa shogunate, the existing social and economic system in Japan was fairly well developed and certainly ready for another stage of development. A money-based economy had developed to such an extent that large mercantile and money-lending capital enjoyed dominant power in the economy. This enabled the introduction of the modern banking system under the new government. Despite lacking the modern concept of land ownership, some rights of land-holding had developed before the modernisation, and land was traded extensively under the Tokugawa shōguns' rule. This made it possible to introduce a modern system of land ownership smoothly.[2]

Despite their initial chauvinism, the ruling elites quickly realised that the knowledge of foreign civilisations and use of the advanced technology that had developed

[1] For the history of Japanese law in English, see R. Ishii, *A History of Political Institutions in Japan* (Tokyo, 1980). For the history after 1868, see W. Röhl (ed.), *History of Law in Japan since 1868* (Leiden, 2005).

[2] In general, see C. Nakane et al. (eds), *Tokugawa Japan: The Social and Economic Antecedents of Modern Japan* (Tokyo, 1990).

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in the West were indispensable to the modernisation of Japan. Modernisation was considered to be an urgent task if Japan was not to be colonised like many other Asian countries. Therefore, after a brief return to the ancient *dajōkan* system, the new government turned to European countries for a model.

While in the Charter of Oath of the new regime in 1868, the emperor had proclaimed that public opinion should be consulted, this had merely meant that territorial lords should be consulted in decision-making. However, inspired by the parliamentary systems in Europe and strengthened by disillusionment and discontent with the autocratic system of the new government, a movement to establish a publicly elected parliament gained wide support in the 1870s. Different trends were discernible in this movement—the Popular Rights Movement (*jiyū-minken-undō*). Inspired by John Locke, John Stuart Mill, Jean Jacques Rousseau, and Jeremy Bentham, a charter of one of the earlier organisations declared that all Japanese were equally endowed with rights to life, liberty, property, livelihood, and the pursuit of happiness—rights that 'no man can take away'.[3] The movement had wide support; at one stage, 303 societies emerged in the provinces around Tokyo, at least 120 in the north-eastern region, and approximately 200 in western and south-western Japan.[4] This eventually led to the emperor's proclamation in 1881 that a national diet (parliament) would be established and a constitutional monarchy created by 1890.

In the meantime, the government became more autocratic in the early 1880s. Already in the mid-1870s, the government had enacted the Libel Act and the Regulations on Newspapers in order to limit the freedom of speech, attempting to keep dissatisfied people under control. A major rebellion by former *samurais* in Satsuma in 1877 certainly influenced the course of events. It was, in a way, impossible to implement unpopular economic measures and at the same time to grant political freedom to the people.[5] The Ordinance on Public Meetings, which significantly restricted such meetings, was enacted in 1880. Further restrictions on public meetings were introduced in 1890, coinciding with the opening of the Imperial Diet.

After the Emperor's proclamation of the intention to introduce constitutional democracy in 1881, the popular rights movement more or less lost its momentum. Moderate factions developed into political parties, while some factions ended up in outright rebellion caused by the serious economic difficulties experienced by people in rural areas. Such rebellions were quickly suppressed by the government.[6]

[3] M. B. Jansen (ed.), *The Emergence of Meiji Japan* (Cambridge, 1995), p. 241.

[4] Ibid. p. 243. See also D. Irokawa, *Kindai Kokka no Shuppatsu (The Emergence of the Modern State)*, revised edition (Tokyo, 2006), pp. 126–159.

[5] J. Banno, *Taikei Nihon no Rekishi (Compendium of the Japanese History)*, vol. 13 (Tokyo, 1996), pp. 78–79.

[6] K. Nakamura, *The Formation of Modern Japan: As Viewed from Legal History* (Tokyo, 1962), pp. 48–56.

In 1889, preceding the opening of the Imperial Diet, the first Constitution of Japan was 'granted' to the subjects by the Emperor. The enactment of a constitution was a development related to the establishment of the Imperial Diet. Already in the 1840s the Dutch Constitution had been translated into Japanese, followed by a translation of the French Constitution in 1873. Some Japanese therefore had a vague idea about the role of a constitution. The senate had drafted a constitution commissioned by the emperor in 1876, but this was considered to be unsuitable for Japan and was abandoned. It was the intention of the government to proclaim the divine origin of the imperial family and the sovereignty of the emperor, but the draft had been unsatisfactory from this point of view.

When the Popular Rights Movement was at its height, various private drafts of the constitution, primarily of a British parliamentary type, appeared. However, Tomomi Iwakura, who was a councillor at that time, considered it more appropriate to enact the constitution on the initiative of the emperor, rather than the people. In 1882, Hirobumi Itoh, later to become the first prime minister, was sent to Europe to study the constitutions of European countries. Germany was chosen as the primary place of research. Itoh consulted Friedrich Julius Stahl in Berlin and Rudolf von Gneist in Vienna, both of whom represented the conservatives among German and Austrian scholars. Germany was intentionally selected as a model, because it had just been unified and its situation was considered to resemble Japan's. In Germany, the Kaiser apparently had strong power and authority, while the British and French constitutions were regarded as being too liberal and democratic.

In contrast to the private drafts prepared by the supporters of the Popular Rights Movement, the government promoted an emperor-centred, semi-religious political system. Thus, Eifu Motoda's draft constitution provided for the divine character of the imperial family, as well as its perpetuity as the sovereign of Japan. It was a clear proclamation of emperor-centred absolutism.

Itoh prepared a draft constitution with the assistance of a German adviser, Hermann Roesler, after his return from Europe. Roesler defended a constitutional system based upon the Prussian Constitution of 1850, but without even the limited democratic institutions which had been imported into Prussia from England via France and Belgium. The Japanese members who participated in the drafting process went even further. One point of disagreement was the status of the emperor. Roesler refused to give the emperor a religious status, at least in the Constitution, while the Japanese side intended to provide for the eternity of the emperor's rule. Roesler defended universal suffrage for the lower house, which was naturally turned down.[7]

[7] The history of this constitution is given in T. Fukase, 'Meiji kenpō Seitei o meguru Hō-shisō (Legal Thoughts Concerning the Enactment of the Meiji Constitution)', in Y. Noda and J. Aomi (eds), *Gendai Nihon Hō-Shisōshi (History of Modern Japanese Legal Thoughts)* (Tokyo, 1979), pp. 164–214.

There was a firm belief on the part of the Japanese participants that the power of the emperor should be left as free as possible from any control exercisable by the Diet. The imperial family was to be left outside the realm of the Constitution. To this end, rules concerning the succession of the emperor and other matters regarding the imperial household were left outside the Constitution, and a separate law on the Imperial household (*kōshitu tenpan*) was adopted. This law was not even promulgated, ostensibly because it was a private act of the imperial household.

The draft constitution was discussed at the privy council, rather than in the senate. People were not informed of its contents until the day of promulgation. The Constitution began by proclaiming the sanctity and inviolability of the emperor and the perpetuity of his rule. Accordingly, the legend that an ancestor of the emperor had founded the nation around two-and-a-half millennia ago, which has no historical basis, gained official endorsement. The emperor was the sovereign who ruled the country in accordance with the provisions of the Constitution. However, a wide range of matters was left to the prerogative of the emperor. The Diet was there merely to assist and support the emperor. Laws were enacted by the Diet but needed imperial approval. The Emperor also had broad power to issue imperial edicts. It should be added that only 1.1 per cent of the populace even had a vote in this Diet with only limited power.

Cabinet ministers were appointed by the emperor, while the Diet had no say in the selection. Ministers were responsible to the Emperor, not to the Diet. Later it became constitutional practice that the power of the emperor as the supreme commander of the armed forces remained outside the control of the Diet and the cabinet.

The Constitution had a limited list of the 'rights and duties of subjects'. These included freedom of residence, rights not to be arrested and detained without a legal basis, freedom of correspondence, freedom of religion, and freedom of association and expression. These rights and freedoms were guaranteed only within the framework of statutory laws, i.e. the legislature was free to enact laws that restricted those rights and freedoms. Indeed, the Publication Ordinance, which was enacted in 1893, accommodated a system of strict censorship. Freedom of association was also severely restricted by later legislation. Freedom of religion presupposed the supremacy of Shintoism.

Supporters of emperor-centred nationalism were not fully satisfied with still relatively secular nature of the Constitution. They favoured an even more religious and ethical constitution. In order to appease them, the imperial rescript of education was promulgated by the emperor before the enactment of the Constitution. The Rescript was a mixture of archaic Confucianism and Shintoism targeted against western civilisation. It proclaimed that loyalty to the emperor, the Confucian obligation of filial piety and obedience were the essence and virtue of the nation. Subjects were to offer themselves courageously to the state—which was

identified with the emperor—should any emergency arise.[8] This was intended to be the fundamental ethical code of the nation, and indeed served as such until the end of the Second World War.

It should be noted that the combination of Shintoism and the emperor's rule with elements of Confucianism had not always been the norm before the restoration of the emperor's rule in 1867. There is a tradition of syncretism of Shintoism and Buddhism in Japan. In fact, Shintoism and Buddhism were not necessarily strictly demarcated. There were instances where former emperors retired to a Buddhist temple, and some emperors were enthroned in a Buddhist manner. There was a school of thought maintaining that the supreme goddess of Shintoism was a reborn Buddha, and another school of thought reversing this order—Buddha was the reborn goddess. The government formed after the fall of the Tokugawa shogunate adopted a policy of favouring Shintoism in order to strengthen the authority of the emperor. Shintoism, which had largely been a spontaneous religion of the people, emanating from ancestor worship, was thus transformed into a state religion.[9] The enactment of the Constitution, together with the introduction of the cabinet system and the opening of the imperial diet, marked the consolidation of the new regime. Now the government was in urgent need of a systematised legal system to replace the obsolete feudal law. Laws of the previous period were unsystematic and mostly differed from one domain to another. In order to consolidate the rule of the emperor, a powerful and highly centralised political system was required. Codified law was to play a significant role to support such a system.

There was another reason to develop a modern system of law. The Tokugawa shogunate had no choice but to sign unequal treaties with foreign countries at the end of its reign. These treaties had imposed unfavourable terms on Japan, in particular judicial immunity for foreigners, primarily because the Japanese legal system was thought to be insufficiently developed to be applied to them. Japanese rulers considered it necessary to modernise the legal system in order to convince foreign countries that there was no problem in acknowledging Japanese jurisdiction over foreigners in Japan.

The emperor's government initially looked towards Chinese law for a model. The first criminal code—*shinritsu-kōryō*—of 1870 was primarily based upon the *ritsuryō* codes of the seventh century, as well as the laws of Ming and Ching China. However, the *ritsuryō* and Chinese codes proved to be obsolete and unsuitable for a nation aspiring to achieve equal status with European countries in its economic and military strength. It was only natural that political leaders turned to Europe for a better model.

In fact, despite its long isolationist policy, some European political and legal ideas were already known to the Japanese under the Tokugawa shogunate through

[8] R. Storry, *A History of Modern Japan*, revised edition (Harmondsworth, 1982), p. 119.
[9] A. Yoshie, *Shinbutsu-Shūgō (Syncletism of Shintoism and Buddhism)* (Tokyo, 1996), p. 192.

the Dutch. The idea of natural law was imported into Japan from the Netherlands in the early nineteenth century. However, it was French rather than Dutch law which first influenced Japanese law. France was considered to have the most developed codified legal system at the time when the emperor's government started looking for a model in the 1870s. The first Minister of Justice, Shinpei Etoh, was particularly in favour of French law, and had French codes translated into Japanese. Two advisers from France, George Boussquet and Gustave Boissonnade, helped the Japanese to understand the French system. The first Criminal Code, enacted in 1880, was primarily based upon the French Code, though with some influence from the Belgian and Italian codes. The earlier judicial system, including the system of practising attorneys, closely reflected the French system. The first Code of Criminal Instruction, enacted in 1880, was also a replica of the French Code.

This period of French influence did not last long. There was a gradual shift towards German law in the 1880s. The fall of Etoh after a failed rebellion was not the only cause of this shift: it was the difference between the political systems of these countries that really mattered. In light of the Popular Rights Movement, which demanded the introduction of a democratic parliamentary system, the government presumably developed some reservations about the French system. The German monarchy suited Japanese requirements, since the Kaiser was almost free from parliamentary control. Moreover, Germany was in the process of enacting its own codes and therefore had the most recent codified laws. The adoption of the Constitution based on the German system was the final move away from French and towards German law.

First came the Code of Civil Procedure of 1890, which followed the German and Austrian model. The Commercial Code was drafted with the assistance of a German adviser and was promulgated in the same year. However, together with the Civil Code, which was based upon the French *Code Civil*, the Commercial Code was caught in a fierce controversy and it took another decade for the Code to take effect. The German influence was not limited to newly enacted laws. Some earlier laws of French origin were replaced by new laws of German origin. Thus, the Law on Court Organisation of 1890 partly replaced the Code of Criminal Instruction. The Criminal Code was replaced by a new Code in 1907.

The history of the Civil Code is more complicated and is dealt with in a separate chapter below. It is sufficient to mention here that the original Code was prepared by a French adviser, Gustave Boissonade and was promulgated in 1890, but was abandoned in the face of strong opposition. A new Code, based primarily on the Pandekten system, was finally enacted in 1896–1898.

The enactment of the major codes was completed in the 1890s. In the meantime, legal education had developed rapidly. The Ministry of Justice founded a school of law in 1871. French law was primarily taught there, while in Kaisei School, which dated back to the Tokugawa period, lectures on English law were given. These schools merged and became the Law Faculty of the University of Tokyo. Private