

FAMILY LAW AS A REPOSITORY OF *VOLKSGEIST*: THE GERMANY-JAPAN GENEALOGY

YUN-RU CHEN

INTRODUCTION

This article is based on the introductory chapter of my dissertation, titled *The Emergence of Family Law in Colonial Taiwan: A Genealogical Perspective*.¹ The dissertation itself is a theoretical and empirical analysis of the way in which Family Law was (re-) constructed as a distinctive and separate legal sphere in colonial Taiwan (1895-1945), a former province of a declining Chinese Qing dynasty and the first colony of an expanding Japanese empire.

The idea that the distinctiveness of family law is neither natural nor inherent but is rather a social construction has been an important theme.² Recently, Janet Halley and Kerry Rittich propose a theory named “family law exceptionalism” (FLE). The FLE tries to demonstrate the infinite ways in which family and family law are deemed special and exceptional, as opposed to market and market law, which are deemed general and common. Market law and family Law are polarized and, at the same time, mutually constitutive.³

My dissertation is a sequent development of the abovementioned theme. A main proposition which I develop in the dissertation is that the development in colonial Taiwan occurred among a sequence of similar formative process in which universalist and modern market law was devised for the economic development of the nation, while family law was reserved for collective identity. The dissertation hence offers a genealogy of the idea of unique family law,

¹ Chen Yun-Ru, *The Emergence of Family Law in Colonial Taiwan (1895-1945): A Genealogical Perspective* (2013) (unpublished S.J.D. Dissertation, Harvard Law School).

² Olsen Frances E., *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HAR. L. REV. 1497 (1983); Siegel Reva B., *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 Yale Law Journal 2117 (1996).

³ Halley Janet and Rittich Kerry, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 Am. J. Comp. L. 753 (2010). Halley further tells us a story of how a body of law called “family law” came into being: the laws of domestic relations emerged as a distinctive legal topic in the late-nineteenth-century legal treatises and was then renamed and reconstructed as family law. Halley Janet, *What is Family Law?: A Genealogy Part I*, 23 Yale J.L. & Human. 1 (2011).

starting with ideas flowing from early-19th century Germany, tracing these ideas to late 19th-century Japan and, following through to their transformation all the way to 1920s- Japan-colonized-Taiwan.

This article explores two developments prior to colonial Taiwan. Using the famous Savigny-Thibaut debate in Germany and the Civil Code Controversy in Japan as the vantage points, it looks at the codification debates in these two emerging nation-states on how and when a national code should be completed. Each of the stories of codification had its own complexity. At the same time, they were not only analogous but also could be seen as parts of a chain in the globalization of FLE. The arguments and concepts articulated in the famous Savigny-Thibaut debates were, a few decades later, borrowed and modified by European-educated Japanese jurists back home in Japan. This article describes the way in which a market-family distinction concept crystalized in Savigny's scheme of law in resistance to a French mode of codification and how the Japanese anti-codifiers adopt selectively the various (and sometime conflicting) Savignian concepts, be it the very famous, nationalist and neo-traditionalist *volksgeist* (the spirit of the people) or the universalist and modern "legal science." This occurred when they were formulating a neo-traditionalist family law during the drafting of the Japanese Civil Code (1898).

As described in my dissertation, but not in this article, the idea of unique family law traveled further to Taiwan when Japan acquired Taiwan as her first colony (1895) and was served as key argument bite for liberal Taiwanese nationalists to resist the Japanese family law.

II. THE *VOLKSGEIST* – SAVIGNY AND CODIFICATION IN GERMANY

THE SETTING

In 1814 when Napoleon's French occupation force was finally defeated, a wave of patriotism and nationalism, which called for national unity, swept through the then-fragmented German lands. In 1815, each of the forty-one

kingdoms and territories which belonged to the then-German state had its own body of laws. This posed an obvious obstacle to commerce and the formation of a united German nation.

Anton Friedrich Justus Thibaut (1772-1840), the Heidelberg professor of Roman law, wrote a small pamphlet that advocated the codification of the law for all of Germany.⁴ Thibaut lamented that German law was not only fragmented but also terribly confusing. The authorities and jurisdictions conflicted with each other



and generated piecemeal and scattered laws. The complexities of Roman law made it unmanageable for the lawyers, not to mention the laymen, and further exacerbated delay and uncertainty in the administration of justice. The remedy, he claimed, would be a united German Civil Code. There were three possible sources for the new codes in Germany, namely Germanic, canon, and Roman law.

Thibaut rejected all three. He considered them to be too fragmented, too authoritarian, or too foreign. Instead, Thibaut advocated for a natural law codification, a model best represented by the Code Napoleon (1804), a product of the French Revolution and the most prestigious and widely-adopted Civil Code of its time.⁵

He also rejected Montesquieu's idea that the law was a product of a particular people and should vary according to time, place, and local conditions. The ideal Code, Thibaut asserted, should be drafted by enlightened jurists who select the most practical and logical laws to teach the people to be reasonable and

⁴ Thibaut Anton Friedrich Justus, *Über die Notwendigkeit eines allgemeinen bürgerlichen Rechts in Deutschland* [On the Necessity of a General Civil Law for Germany] (1814).

⁵ In addition to the countries occupied by the French during the Napoleonic Wars, such as Italy, Spain, and Portugal the Code Napoleon was also adopted in 1864 in Romania. It was considered the main source of inspiration of the laws in Latin American, such as the Chilean Civil Code (1855). See Mirow M.C., *Borrowing Private Law in Latin America: Andres Bello's Use of the 'Code Napoleon' in Drafting the Chilean Civil Code*, 61 LA. L. REV, 291 (2011). The Code Napoleon was introduced to Egypt as part of the system of the mixed courts and was translated into Arabic in the late nineteenth century and had great influence in the Islamic World.

logical beings.⁶ Within two to four years, he believed that a German Civil Code could be completed⁷ and that such a general civil law for the states of Germany would pave the road toward a united and independent Germany.⁸

VOLKSGEIST AND SAVIGNY'S (ANTI-) CODIFICATION SCHEME

Thibaut's passionate pamphlet immediately triggered the response from Frederick Charles von Savigny (1779-1861), a professor of Roman law from the newly-established University of Berlin, who later became the Prussian Minister for Legislation and one of the most famous names in the civil law tradition. Savigny rebutted Thibaut's proposal in an equally passionate pamphlet entitled "Of the Vocation of Our Age for Legislation and Jurisprudence (*Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*)" (hereinafter the "*Vocation*").

The "Savigny-Thibaut" debate was seen as the archetype of the perennial debate between natural lawyers and legal positivists, as well as between codifiers and the anti-codifiers.⁹ In the *Vocation*, Savigny went beyond Thibaut's scheme and presented his general view of law. It was later labeled as the basic tenets of the "Historical School" and was soon regarded as the classic polemic against codification. Such a reputation spread beyond Europe and among the cosmopolitan-minded jurists around the world. For example, across the Atlantic in the New York codification debates in the postbellum era, Savigny's ideas were adopted by the opposition to the New York Civil Code while the codifier showed

⁶ Gale S.G., A Very German Legal Science: Savigny and the Historical School, 18 STAN. J. INT'L L. 123, 129-130 (1982).

⁷ VON SAVIGNY FREDERICK CHARLES, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE 177 (Abraham Hayward trans., The Lawbook Exchange 2002) (1831). This essay was first published in 1814 and the second edition, on which this translation is based on, was in 1928; Reimann M, *The Historical School Against Codification-Savigny, Carter and the Defeat of the New York Civil Code*, 37 AM. J. COMP. L. 95, 1989.

⁸ EBKE WERNER & FINKIN MATTHEW W., INTRODUCTION TO GERMAN LAW (1996); NOBUSHIGE HOZUMI, Savigny-Thibaut no Hōten Sōgi [The Saviny-Thiabout Debate] in HŌSŌ YAWA [Collection of Legal Anecdotes] 344-348 (1980). NOBUSHIGE HOZUMI, HŌTEN RON [On Codification] 537 (1890).

⁹ Merryman John Henry & Pérez-Perdomo Rogelio, *The Civil Law Tradition: an Introduction to the Legal Systems of Europe and Latin America* 31 (2007).

empathy with Thibaut.¹⁰ Almost simultaneously in the Far East, as I will demonstrate later, Japanese jurists in their codification debate were very much aware of the analogy between them and their German colleagues.

The most catchy and popular Savignian idea was that the law existed on the *volksgeist*, the spirit of the people.¹¹ Introducing Herder's idea of the *volksgeist* into law, Savigny stated that "law, as well as the language, exists in the consciousness of the people (*volk*)."¹² The law, like language and customs, has an organic connection with the "being and character" of a particular people:¹³ "Law grows with the growth, and strengthens with the strength of the people, and finally dies away as the nation loses its nationality."¹⁴

It would not be a surprise that he saw the Code Napoleon an intruder imposed by the foreign oppressor, a disease that "broke into Germany, and ate in, further and further, like a cancer."¹⁵ Savigny's deprecation to the French code was not merely about its alien-ness. For him, the French codification, characterized by rational and secular natural law thinking, was very much associated with "a blind rage for improvement" in Europe since the mid-eighteenth century¹⁶ and presented a "shallow self-sufficiency." The French approach was said to be arrogantly dismissive of the history and obsessed with "pure abstraction" as well as "mechanically precise administration of justice" that broke off the "natural development of communities and institutions."¹⁷

This mode of codification, as Savigny asserted, also presented the theory that law was founded on the expression of the supreme power of arbitrary legislators, that

¹⁰ Reimann, *supra* note 7.

¹¹ The term "volksgeist" was first used by Savigny's academic successor, Georg Friedrich Puchta in his book, *DAS GEWOHEITSRECHT* (Erlangen 1828-37), as a short form of the "common consciousness of the people" (*das gemeinsame Bewusstsein des Volkes*) expressed by Savigny. See Gale, *supra* note 6, at 131.

¹² SAVIGNY, *supra* note 7, at 25.

¹³ *Id.* at 21, 27.

¹⁴ *Id.* at 27.

¹⁵ *Id.* at 9; Preface to the Second Edition, at 18.

¹⁶ *Id.* at 20.

¹⁷ *Id.* at 21-22.

a complete code was of primary importance, and the customary law was merely supplemental. The law and jurisprudence were hence “of a wholly accidental and fluctuating nature.”¹⁸ In contrast, he maintained that law was originally founded on customary law and gradually developed, almost unconsciously from it. The ideal law should be “first developed by custom and popular faith, next by jurisprudence, everywhere, therefore, by internal, silently-operating powers, not by the arbitrary will of a law-giver.”¹⁹ A people have a natural desire to cling to the law and customs, such as language, from their ancestor.²⁰

Note that as much as Savigny appeared to be anti-codification when he talked about the “living customary law,”²¹ or about the violent disruption brought by legislative act to the natural development of law. He did not argue against codification per se, at least not expressly. Nor was Savigny indifferent to the “unity of the German.” He considered it “an object of the highest political importance.”²² Rather, he stated that the Germans were not yet qualified to form a code.²³ Rejecting a code which was “lifeless, mechanical and...worthless composition,”²⁴ he maintained that an ideal code should be based on the aggregate of existing laws which were “thoroughly understood,” “properly expressed,” and arranged in a coherent system.²⁵ The feasibility of adopting such a code depended on a well-developed “legal science (*Rechtswissenschaft*),” which he considered non-existent in his lifetime.²⁶

In other words, Savigny argued that a sound civil code for all Germans required greater work and time than what Thibaut suggested and that a hasty

¹⁸ *Id.* at 23.

¹⁹ *Id.* at 30.

²⁰ Walton E. P., *The Historical School of Jurisprudence and Transplantation of Law*, 9(4) JOURNAL OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW, THIRD SERIES, 183, 184 (1927).

²¹ SAVIGNY, *supra* note 7, at 154.

²² *Id.* preface to the second edition, at 10.

²³ *Id.* at 65.

²⁴ *Id.* at 180.

²⁵ MERRYMAN & PÉREZ-PERDOMO, *supra* note 9, at 65; SAVIGNY, *supra* note 7, at p37.

²⁶ SAVIGNY, *supra* note 7, at 182.

codification based on a ready-made French model was not only undesirable but also detrimental. Not until a “peculiar” and, at the same time, “scientific” jurisprudence was developed shall codification ever be considered.²⁷ To summarize in Savigny’s own phrases, the “vocation” at his age was not for codification. Instead, it was for the development of legal science in Germany.

THE PLACE OF VOLKSgeist IN SAVIGNIAN LEGAL THINKING:

THE FAMILY-STATE INTERLOCK

In addition to the peculiar, organic, historical and romantic idea of *volksgeist*, there was another idea in Savigny’s legal thinking which was equally important but directly contrary to the *volksgeist*. That was the universalistic, individualist, and rational dimension of law, usually associated with terms such as “will” and “system,” which was elaborated in Savigny’s another seminal work, *System of the Modern Roman Law* (hereinafter, the “*System*”).²⁸ The main theses included that the law is derived from jural relationship based on the will of individuals. Here the concept of law was rather ahistorical and autonomous, a result of the influence of Kant’s view of the moral autonomy of the individual. Law defined the free space for each individual, within which the individual could develop their own strengths.²⁹

Another important thesis was that law was a “system” consisting of coherently organized categories and deductible rules along a gapless structure. Developed further by Savigny’s successors, the systematization of law into hierarchies of abstract concepts and the way of seeing law as a close and self-sufficient system came to be known as the characteristics of the so-called “conceptual jurisprudence.” The abstract and highly technical taxonomy, categories, structure and methodology in the *System*, just like the very sentimental

²⁷ *Id.*, at 168-169.

²⁸ VON SAVIGNY FRIEDRICH CHARLES, *SYSTEM OF THE MODERN ROMAN LAW* (William Holloway trans., Hyperion Press 1979) (1867).

²⁹ Wieacker Franz, *A History of Private Law in Europe: with Particular reference to Germany* 282 (Tony Weir trans, Oxford University Press, 1995).

ones in the *Vocation*, were globalized and deployed by juristic elites in different locales in their speeches.³⁰

Savigny never published the planned volume of his famous “System of the Modern Roman Law” on family law.³¹ Nevertheless, he provided a conceptual tool holding that family law is a distinct sphere in private law. Duncan Kennedy reveals, in his textual analysis of *System*, how the above-mentioned distinction linked to another distinction: that between family law on the one hand and the laws of property and obligation (patrimonial law) on the other hand.³² Family law governed the relations between family members, such as husband and wife and parents and children, decided by the “organic nature of the men.”³³ Patrimonial law, in contrast, governed the relation between individuals exercising their free wills.³⁴

I would like to point out that such a linkage of the opposite pairs was also eminent in the *Vocation*, which was published three decades earlier than the *System*. Savigny asserted in the *Vocation* that in a highly-developed civilization existed a twofold element of law: the “political element,” viz., “the connection of law with the general existence of the people,” and the “technical elements,” viz., “the distinct scientific existence of law.”³⁵ While family law was representative of the political and people’s “general existence” on which the passionate discussion by laymen “could find no end,” property law stood for the technical and the scientific aspect of law about which the public were not concerned³⁶:

³⁰ Kennedy Duncan, *Three globalizations of law and legal thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 23 (David M. Trubek & Alvaro Santos ed., 2006).

³¹ Yet, Savigny did show his disapproval of divorce, which was legalized in Napoleonic Code. See Kennedy Duncan, *Savigny’s Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought*, 58 AM. J. COMP. L. 811, 826 (2010).

³² *Id.* at 813.

³³ *Id.* at 814-815; SAVIGNY, *supra* note 28, at 275-276, 279.

³⁴ *Id.* at 814-815; SAVIGNY, *supra* note 28, at 275-276.

³⁵ SAVIGNY, *supra* note 7, at 29.

³⁶ *Id.* at 62, footnote. “[In] the discussion of the French Conseil d’Etat on the code, ... with regard to the former, unprofessional men could find no end; the latter were often not spoken of at all.”

[T]he twofold element of all law, which I have termed the political and the technical, is manifest. In some of the subjects they [the “*unprofessional men*”] taken an immediate lively interests; other they give up, as indifferent matters of juridical technicality. The former is more the case in family law; the later in property law, mostly in its general fundamental principles. We will take, as representatives of these different kinds of objects, marriage and property.³⁷

Also, Savigny stated that the consciousness of people was less obvious in a more matured and complicated nation. Nevertheless, it could be observable in an individual’s special feeling toward his “family relations and patrimonial property.”³⁸

The close relationship between family law and *volksgeist* made the category of family law, a newly-intensified and crystalized legal field in the *System*, the antithesis of the individualist, scientific, and universal patrimonial law. In the level of domestic law, the will and “science” met an end when they came to the sphere of family law.³⁹ Savigny assigned marriage “half to law, half to manners” and considered marriage relation “non-juridical.” In contrast, objects such as property “belong exclusively to juridical technicality.”⁴⁰

Such a delegating move was also well illustrated when he denied, repeatedly, that the duties between husband and wife and parent and child are legal.⁴¹ “It is therefore in no way denied here that to marriage, loyalty and self-sacrifice, as to the paternal power obedience and reverence, belong [sic]; but these in themselves, most important elements of that relation stand under the protection of moral not law.”⁴² The case of divorce was just as illuminating of Savigny’s conservative stance on family. He firmly rejected the contractual view of marriage and divorce by mutual

³⁷ *Id.* at 62.

³⁸ *Id.* at 25.

³⁹ KENNEDY, *supra* note 30, at 33.

⁴⁰ SAVIGNY, *supra* note 7, at 63-64.

⁴¹ KENNEDY, *supra* note 31, at 826.

⁴² SAVIGNY, *supra* note 28, at 285.

consent. He criticized the draftsmen of the Code of Napoleon for their misunderstanding of the history on divorce in Rome as contracts and, “to the disgust of everyone [in Christian Europe],” adopting divorce by mutual consent.⁴³

Another family/market distinction emerged as one of the solutions to settle the dissension between the Germanist and the Romanist, a manifestation of a long rivalry between German law and Roman law since the sixteenth century as well as of the radicalization of tension between the organicist and rationalist sides in Savigny’s programme discussed above. The quarrel was centered on the “Reception of Roman law,” a law of foreign origin but which had been adopted and developing in Germany for centuries. Between these two camps in the Historical School, the Germanists saw the Roman law as a system of foreign law incompatible to the German law and demanded its elimination from the German soil. The medieval German law and German customs were the exclusive expression of German *volksgeist*. The Romanists later advocated a division of labor for the task of systematization: the study of Roman law offered the scientific method, and the historical studies supplied raw materials.⁴⁴

It was generally known that Savigny intervened in the dispute and rationalized the Reception by constructing a fiction of representation *inter alia*. He asserted that the jurists who brought the Roman law from Italy back with them in the eleventh century were acting as the representative of the *volksgeist*.⁴⁵ I would like to highlight another solution provided by Savigny, which also involved the division of labor. During the quarrel on the source of law in national legislation, Savigny suggested to the Germanists that they could devote themselves to the investigation of certain aspects of marital property and inheritance law and contribute their findings in provincial legislation.⁴⁶ That was to say, family law was the right place to house local customs in legislating national law.

⁴³ SAVIGNY, *supra* note 7, at 80-81.

⁴⁴ WIEACKER, *supra* note 29, at 325-326; Gale, *supra* note 6, at 140.

⁴⁵ *Id.* at 141.

⁴⁶ *Id.* at 142.

In the transnational level, the distinctive nature of all people and their respective morality and “spirit” produced variable family laws, while the laws of property and obligation, closely associated with universalistic legal science, were relatively invariable. As aforementioned, Savigny’s conservative version of Christian view about marriage was explicit. Nevertheless, true to his conviction that each family law of a particular people was an organic whole reflecting each distinctive *volksgeist*, Savigny took a rather relativist approach toward the norms that arrange other peoples’ family life, to such an extent that he did not disregard polygamy as a valid marriage form in non-Christian countries. Despite regarding polygamy as “a lower stage of in the moral development of nations” and monogamy in Christian countries the presentation of the highest stage, Savigny recognized both of them as positive law, because “the special shape, in which [family relations] are recognized is very manifold according to the positive law of different people.”⁴⁷ On the topic of consanguineous marriage, Savigny asserted that “... the inhibition of marriage between those very nearly related has its root in the moral feeling of all times but the extent of this prohibition is of an entirely positive nature.”⁴⁸

Savigny’s concern for the organic characteristic of the nation manifested not only in the family law but also in the law of state. The anti-individualist political stand, which saw the state as an organic whole became the dominant ideology of the Holy Alliance and the Restoration after the Congress of Vienna. It had increased influence on Savigny when he was close to the Prussian crown.⁴⁹ It was only natural that the distinctive *volksgeist* worked on the level of state: there is a “particular shape presented by the state in each people.”⁵⁰

Similar to the relation between family law and law of obligation and property, state law was “the organic manifestation of the people” which stood starkly in

⁴⁷ KENNEDY, *supra* note 31, at 817; SAVIGNY, *supra* note 28, at 281, n.(a).

⁴⁸ SAVIGNY, *supra* note 28, at 281, n.(a).

⁴⁹ WIEACKER, *supra* note 29, at 287-288.

⁵⁰ SAVIGNY, *supra* note 28, at 18.

contrast with private law, “the totality of jural relation.”⁵¹ Savigny recognized the affinity between family law and state law, and analogized legal family to state law: “For the family has in its enduring membership as also in the relation of government and obedience an unmistakable analogy to the state.”⁵² The relation between family and state even went beyond analogy and kinship and became a constitutive one: “In families are embraced the germs of the state and the completely formed state has families, not individuals immediately for its constituent parts.”⁵³

FROM FAMILY LAW EXCEPTIONALISM TO MARKET LAW EXCEPTIONALISM?

The contrasting relation between family law and market law is captured, justly, in a developing theory of “family law exceptionalism (hereinafter “FLE”),” a phenomenon in which family law is often treated as exceptional for various reasons in various contexts.⁵⁴ I claimed that the same phenomenon can also be perceived as “market law exceptionalism (hereinafter ‘MLE’),” not merely because the dual construction between family and market is internally reversible. Furthermore, this flipping term makes the inter-link among family, nation and state visible and highlights the exceptional and transnational characteristics of market law in the modern legal world founded on nation-states where we all live.

EPILOGUE- THE GERMAN CIVIL CODE (BGB) OF 1896

In 1896, the third draft of the German Civil Code (*Bürgerliches Gesetzbuch* or the BGB) was adopted and went into effect in 1900. Indeed, it was the progress of German nationalism, namely the unification of Germany in 1871, not the scholarly debate, that played the decisive role in determining the feasibility of codification. When the BGB was enacted, a leading German

⁵¹ *Id.* at 18.

⁵² *Id.* at 18.

⁵³ *Id.* at 279.

⁵⁴ Halley Janet & Rittich Kerry, Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism, 58 AM. J. COMP. L. 753 (2010).

publication ran the headline: “One People, One Empire, One Law.”⁵⁵ However, Savigny’s opposition to a civil code founded on the general principles of secular natural law redirected the BGB to become radically different from the Code Napoleon. The method of legal science also paved a way to the highly technical and structured BGB. In contrast to the “revolutionary, rationalistic and non-technical” character of the Code Napoleon, the BGB was “historically-oriented, scientific and professional.”⁵⁶

A significant share of the structural difference between the BGB and the Code Napoleon was also owed to Savigny’s systematization of Roman law, particularly to his exceptionalization of the family law in the *System*. In the Code Napoleon, laws of family and succession respectively constituted a part of Book I “Person” and of Book III, “Means of Acquiring Property.” In contrast, the BGB adopted the Pandekten system derived from Roman law and was divided in five books: The General Provision, Law of Obligation, Property Law, Family Law, and Inheritance Law. Both family law and inheritance law were perceived as distinct spheres. During the process of drafting, more old German law and customs were retained, especially in the books of family law and inheritance law.⁵⁷

Despite the critiques of being too abstract and technical, the BGB was still recognized as a masterpiece. Soon after its enactment, the BGB surpassed the Code Napoleon as the most up-to-date civil code and was widely adopted around the world.⁵⁸ The influence of the BGB in fact preceded its enactment. As we are now going to see in the story of Japan’s codification, the first draft of the BGB (1888) replaced the Code Napoleon and became the model of Japanese Civil Code (1898).

⁵⁵ Zimmermann R., Civil Code and Civil Law - the “Europeanisation” of Private Law within the European Community and the Re-emergence of a European Legal Science, 1 COLUMBIA JOURNAL OF EUROPEAN LAW 63, 65 (1995).

⁵⁶ MERRYMAN & PÉREZ-PERDOMO, *supra* note 9, at 31.

⁵⁷ WALTON, *supra* note 20, at 187.

⁵⁸ The BGB served as a template for the regulations of several other civil law jurisdictions, including Portugal, Estonia, Latvia, the Republic of China, Japan, Thailand, South Korea, People's Republic of China, Greece and Ukraine.

II. THE FAMILY-STATE IDEOLOGY: CIVIL CODE CONTROVERSY IN 1890S- JAPAN

THE SETTING

Against the Western imperialism that ended the two-hundred-year seclusionist policy and forced the “opening” of Japan, the Meiji Restoration marked the emergence of modern Japanese nationalism in 1868, three years before the unification of Germany. The resignation of the last shogun and the revival of the imperial rule under the reign of Emperor Mutsuhito demanded administrative and political centralization around the throne. An emerging nation-state was calling for a unified legal order to replace old laws and customs over the Japanese land.

On the other hand, it was also a national priority to revise the unequal treaties concluded with sixteen western powers in the last years of the Tokugawa period, which was perceived by Japanese as national shame. The extra-territoriality included in such treaties rested on the assumption that the laws and procedure of non-Christian countries were insufficient to protect the safety and well-being of those sojourning in such countries. A Western-oriented legal reform through which Japan could prove herself a qualified member among the “civilized nation” was taken as a prime requirement for the revision of the treaty system. The double exigency directed this newly-born nation-state to codification.⁵⁹

Prior to the Meiji Restoration, statutes were enacted by the shogun as well as the 270 feudal lords (*daimyo*) in their feudal domains. The confederate political structure in the feudal age resulted in overlapping and confusing jurisdictions. In addition to indigenous Japanese law, the introduction of Confucianism and imperial Chinese law, epitomized by the reception of the Tang Code in the seventh and eighth centuries, also significantly contributed to

⁵⁹ Seizelet Eric, *European Law and Tradition in Japan during the Meiji Era*, in *EUROPEAN EXPANSION AND LAW: THE ENCOUNTER OF EUROPEAN AND INDIGENOUS LAW IN NINETEENTH AND TWENTIETH CENTURY AFRICA* 59, 59-82 (W.J. Mommsen and J.A. Moore ed., 1922).

the form and substance of Japanese laws. Like the imperial Chinese legal system, there was no distinction between public *vis-à-vis* private law and between criminal and civil law in the pre-modern Japanese legal system. The written and official laws were devoted mostly to the administrative and criminal matters and showed the least interest in matters related to what we now regard as civil law, including contract and marriage. Instead, those matters were by and large left to customs.⁶⁰

In the Tokugawa period (1603-1868), the very basic unit of society was the “house”(*ie*), comprising primarily of the “househead” (*koshu*), usually the father, his spouse, and his lineal descendants, as well as certain relatives who lived together. The “house” is similar to Roman *paterfamilias*, except that in Japan a woman might, in some rare occasions, be the “househead.”⁶¹

The house existed in both the samurai and commoner classes but their practices varied. Usually the samurai “house” was more hierarchical and the samurai “househead” had more centralized power over his family members. The rules in the samurai “house” were usually described in the following way: The “househead” was endowed with vast power and authority in all family affairs, including owning the family property and giving consents to marriage of family members. Correspondingly, the “househead” was charged with duties such as continuing the name of the “house,” keeping up with the administration of the “house” altar and supporting the members of his “house.” The word *kato^{ku}* could be referred to either “house” authority or “house” property, both of which were parts of the headship that passed to the next “househead,” usually the eldest son. “House” members, including the wife, were not allowed to possess personal property.

⁶⁰ Frank Ronald, *Chapter Three, Civil Law, General Provision*, in *HISTORY OF LAW IN JAPAN SINCE 1868* 166, 167-169 (Wilhelm Röhl ed., 2005).

⁶¹ WALTON, *supra* note 20, at 190.

In contrast, in commoners' families, the "househead" and members were bonded mostly by moral relationship.⁶² The use of surname, which later became the symbol of the "house" as a whole, had been a privilege exclusively to the samurai class. It was not until the 1870s that the peasants were allowed to obtain surnames.⁶³ The practices of inheritance varied. Ultimogeniture and equal division of family property, for example, were practiced in the villages. In fact, even in the samurai family, the rule of primogeniture was not absolute.⁶⁴ However, despite the fact that samurai classes only consisted of a small and decreasing number of the society in the late-nineteenth Japan, as I will illustrate later, the samurai "house" institution was adopted during the standardization of family law and inheritance for all Japanese nationals and became the model for orthodox Japanese family.

BOISSONADE AND THE OLD CIVIL CODE

In 1890, the Japanese Civil Code modeled on the Code Napoleon (1804) was promulgated and was supposed to go into effect on January 1, 1893.⁶⁵



However, due to the debate that erupted between its supporters and opponents, the Code never saw the light of the day. Consequently, the Code was usually referred as the "Old Civil Code (*Kyū Mimpō*)" in Japanese literature, for it was later replaced by the "New Civil Code" (*Shin Mimpō*) of 1898, which was modeled after the first draft of the German Civil Code (or the BGB) of 1888.

⁶² Schmidt Petra, *Chapter Three, Civil Law, Family Law*, in *HISTORY OF LAW IN JAPAN SINCE 1868* 262, 268 (Wilhelm Röhl ed., 2005).

⁶³ Frank, *supra* note 60, at 189.

⁶⁴ TAKENOBU KAWASHIMA, *IDEOROGI TO SHITE NO KAZOKU SEIDO* [The Family System as an Ideology] Preface, 46 (1957).

⁶⁵ The Commercial Code, which was drafted by Hermann Roesler, a Hanoverian Liberal. The Commercial Code was said to be more French than German. Takayanagi Kenzo, *Contact of Common Law with Civil Law in Japan*, 4 AM. J. COMP. L. 60, 61 (1955).

The leading draftsman of the Old Civil Code was Gustave Émile Boissonade de Fontarabie (1825-1910), a French law professor from Paris University. He was invited by the Meiji government to Japan in 1873 as one of the very first foreign law scholars in Japan. He taught French law and the theory of natural law at the Justice Ministry law school, the first modern law school in Japan, as well as several other law schools founded by his students.

Soon after his arrival, Boissonade advised the Meiji government with his international law expertise when Japan was about to begin drafting her own version of the gunboat policy toward neighboring countries. As early as 1874, while the Meiji leaders were planning a military expedition to Taiwan, then a territory of imperial China, in the name of punishing and pacifying the Taiwanese aborigines who killed fifty-four fishermen from Okinawa (*Ryūkyū*) in a shipwreck, Boissonade's legal knowledge and maneuver proved to be extremely useful as he assisted Japan in dealing with the opposition from Beijing and similar protests from Britain, USA, Spain, and Italy. He justified the mission by international law and natural law. He also helped Japan strengthen her sovereign assertion over Okinawa, which had been a tributary kingdom of both China and Japan until 1872 when it was annexed by the newly-founded Meiji government.⁶⁶

Boissonade's contribution to the Taiwan Expedition, perceived by historians as the beginning of modern Japanese expansionism and assertive foreign policy toward Asia, brought him the attention from the most important Meiji politicians and enabled him to influence the entire legal system in Japan. He furthered assisted in renegotiating the unequal treaties with the Western Powers in 1887, and became one of the draftsmen of several codes, including the Japanese Penal Code. However, it was his leading role in the drafting of the Old Civil Code that made Boissonade known as one of the founders of modern Japanese legal system.

⁶⁶ This episode is also known as "Formosan Expedition." For Boissonade's role in the Formosan Expedition of 1874. See Ikeda Masako Kobayashi, *French Legal Advisor in Meiji Japan (1873-1895): Gustave Emile Boissonade de Fontarabie*, Chapter 4 (1996) (unpublished Ph.D. dissertation, University of Hawaii).

The influence of the French and natural law on the Old Civil Code was undeniable. As a secular natural law lawyer, Boissonade highly admired the revolutionist ideas including natural rights of individuals to property and equality for all citizens.⁶⁷ The Code Napoleon, he claimed, was not merely a French Code but also the embodiments of a natural law beyond time and space. The natural rights of individual to life, liberty and property, according to Boissonade, were absolutely protected by the natural law.⁶⁸

He proclaimed that the most fundamental principle in natural law and the “only source for all laws” was “do not harm others.”⁶⁹ In conformity with the individualist property law, which was not only the core principle of the natural law but also deemed as a prerequisite for modern capitalism and a “rich and strong country (*fukoku kyōhai*), ” Boissonade set up two guiding principles in drafting family and inheritance law. The first principle recognized the legal capacity of family members including the wife, and the other principle was to confirm the inheritable share of property for all sons.⁷⁰

Meanwhile, great effort was made to accommodate the existing customs related to family affairs and to reconcile them with the principles of French law. Such a direction seemed in harmony with Boissonade’s natural law theory regarding family. He considered the “modern notion of morality” as the common ground for family law. However, he believed that the detailed rules may vary depending on circumstances: “The theory of property law is based on the common principle of reason, public and common interest...is not different according to time or space. In contrast, personal law varies, to some extent, when time or space is varied.”⁷¹

⁶⁷ For secular natural law, see MERRYMAN & PÉREZ-PERDOMO, *supra* note 9, at 20, 46.

⁶⁸ IKEDA, *supra* note 66, at 227.

⁶⁹ *Id.* at 98-99.

⁷⁰ SCHMIDT, *supra* note 62, at 265.

⁷¹ Boissonade Gustave Émile, *Shin Hōten Hinan no Hihyō* [The Response to the Criticism of the Code], in HŌSEI KANKEI SHIRYŌ I [Archives Relating to Legislation] 299, 304 (Itō Hirobumi et al. ed., 1969).

While Boissonade drafted most of the Code, the task of the compilation of family relation and succession, included respectively as Book I (“Persons”) and as part of Book III (“Means of Acquiring Property”), were reserved, at least nominally, to the hands of two French-trained Japanese jurists.⁷² Boissonade was a passionate advocate for the (gradual) abolishment of primogeniture. He claimed that “the custom of the absolute right of the eldest son to inherit his parent’s property does not follow natural law. It is natural for parents to love all of their children equally.”⁷³

But through various compromises, the model of samurai “house” still remained preserved and coexisted with an individualist property regime. The rights of a “househead” included the right of the solo ownership of family property. The consent of a “househead” was necessary in case of the marriage or adoption of house members.⁷⁴ The eldest son’s right to inheritance, the primogeniture, was recognized as an important Japanese custom and was incorporated into the law of succession. Coexisting with primogeniture and the matrimonial property regime, an individual property system was built. Each house member, including the wife, was entitled to own private property.⁷⁵ A system of property inheritance based on the death of the family members was thus developed.⁷⁶

⁷² The two Japanese jurists in the “Law Investigation Committee,” Shirō Isobe (1851–1923) and Toshizō Kumano (1854–1899), singled exclusively responsible for these parts but it was generally acknowledged that their work stood under Boissonade’s influence. Schmidt, *supra* note 62, 265.

⁷³ Ikeda, *supra* note 66, at 235; Boissonade proposed gradual replacement primogeniture with an equal share system among all children—not only because it was the rule in French Civil Code, but, more importantly, because it was incompatible with “the principle of natural law.” He regarded primogeniture as merely an institution of historical contingency derived from a particular religious and economic background, viz., the feudalism, and was contradicting with the spirit of the Meiji Reform and parents’ egalitarian love toward every child regardless of sex and order of the birth. Mukai Ken, *Boissonade no Mibunhō Shisō: Sono Shizen Hōron to Sōzoku Hōron* [Boissonade’s Thoughts on Status Law: Natural Law Theory and Succession Law], in *KAZOKU : SEISAKU TO HŌ, KINDAI NIPPON NO KAZOKAN 7* [Family: Policy and Law, Views of Family in the Modern Japan, Volume 7] 165, 185-190 (Fukushima Masao ed., 1976).

⁷⁴ Art. 246, Old Civil Code.

⁷⁵ Art. 245, Old Civil Code.

⁷⁶ Ken Mukai & Nobuyoshi Toshitani, *The Progress and Problems of Compiling the Civil Code in the Early Meiji Era* (Dan Fenno Henderson trans.), in *1 LAW IN JAPAN AN ANNUL*, VOLUME 25, 55 (1967).

The highly compromising feature of family law made one of the opponents of the code concede that the “Law of the Person” was one exception in the Code when the rest were merely “being almost a literal translation of the Code Napoleon⁷⁷.” Thus, a dualism between the individualism and familism existed in Boissobade’s draft and continues to hold sway in Japan today.⁷⁸

THE BATTLE (1889-1892)

The compromises Boissobade made in his draft of the code did not prevent it from raising controversy. In fact, parts of the Code that were criticized the most were the very ones where compromises were made to reconcile the orthodox Japanese family traditions with the individualist French model.

The battle was initiated in 1889 by jurists who had studied Anglo-Saxon Law at Tokyo University and other common law-oriented law schools in Japan, the United States or Great Britain, usually referred to as the “English School.” They criticized the code for being a blind imitation of Western law and for imposing a theory of natural law that had no basis in Japan.⁷⁹ The Code was too foreign. These jurists demanded to postpone the implementation of Old Code until a complete revision with “national characteristics (*kokuminsei*)” was made.⁸⁰

On the other side, supporters were those who studied French law under Boissonade’s instruction or at other French law oriented schools in Japan, or in France, known as the “French School.” They rebutted the opponents’ accusation

⁷⁷ Masao Tokichi, *The New Civil Code of Japan*, 92 THE ARENA 64, 66 (1897).

⁷⁸ The “House” system was abolished after World War II during the US occupation according to the new Constitution of 1947 that adopted the tenets of individualism, equality, and liberal democracy. However, certain “invented” familial traditions remain lively. The article 750 of the current Japanese Civil Code, for example, stipulates that married couples must share one surname, almost always that of the husband in practice. The reform proposal of “dual-surname by choice” is still stalled due the stiff opposition from conservatives who consider the amendment a threat to age-old Japanese culture. However, as indicated earlier, it was not until the 1870s that most of Japanese were not allowed to obtain surnames. For recent development about the reform, see McCurry, Justin Japanese Marital Surname Faces Legal Challenge, THE GUARDIAN, January 11, 2011.

⁷⁹ Yatsuka Hozumi et al., *Hōten Jisshi Enki iken* [Opinion for Postponement of the Code’s Enforcement] in MINPOTEN RONSO SHI [A History of Controversies on the Civil Code] 14, 175-176 (Hoshino Tōru ed., 1944) [Hereinafter cited as *Postponement*].

⁸⁰ Frank, *supra* note 60, at 177.

that the code was anti-Japan by pointing out that the Japanese family customs were adopted in the Code and emphasized the urgent need of a modern code to achieve national goals: the unification of the nation, development of the modern economy and the revision of the treaties. The French School demanded the immediate enforcement of the Code. The confrontation escalated to a rivalry beyond bench and bar to the politics, the anti-codifiers as named “postponement fraction (*enkiha*),” the pro-codifiers “quick enforcement fraction (*dankōha*).”

It was noteworthy that although eventually it was the German Civil Code that became the model of the New Civil Code of 1898, there was yet no Germany School when the debate first started. At that time, a chair of German law was just established in Tokyo University in 1887, and the study of German law was still marginal, in terms of the numbers of students and scholars.⁸¹ The reception of the German Code preceded the development of German legal science in Japan.⁸² Furthermore, while the highly technical and abstract New Civil Code (1898) was as foreign as the Old Civil Code (1890), no major controversy followed after its promulgation.⁸³

THE PROTAGONISTS

The Hozumi brothers, Hozumi Nobushige (1855-1926) and Hozumi Yatsuka (1860-1912), were considered representatives of the postponement fraction. They were taught Western jurisprudence in Japan and abroad. Between 1876 and 1881, the older Hozumi was trained as a barrister of the Middle Temple (London) and studied in Humboldt University of Berlin (1880-1881). He was a civil law professor at the Tokyo University and founded the English Law School (later Chuo University) in 1885. Yatsuka studied in Germany from 1884 to 1889, successively at three universities, Heidelberg, Berlin and Strasbourg, and then

⁸¹ *Id.* at 185.

⁸² *Id.* at 185-186.

⁸³ *Id.* at 187.

joined the faculty of the law at Tokyo University as a Constitutional Law professor.⁸⁴

As they were close to the Emperor, they were appointed to the House of Peers. Both Hozumis were legal positivists and were influenced by the Historical School of Jurisprudence. John Austin, Henry Maine and Savigny were often cited by Nobushige, who was also known as the founder of the Japanese Historical Jurisprudence. Yatsuka was no less an admirer of Savigny. His organic theories of family and state and his belief of the legal personality of the state made him the mouthpiece for the conservatives in the Meiji politics, resembled Savigny's ideas.⁸⁵

The differences of the Hozumi brothers were no less striking than their similarities. For instance, being cautious of not explicitly taking sides, Nobushige did not express substantial opinions when the debate was still ongoing. Yet, he was later appointed, as the representative of the postponement fraction, to serve as one of the three committees to draft the New Civil Code (1898). His ideas about the Japanese spirit along with a unique but evolutionary Japanese law were relatively moderate and flexible. Nobushige's academic pursuit of a unique Japanese law was tempered with his brief of a universal "legal science" and "legal revolution." Yatsuka, in contrast, was undoubtedly the most outspoken figure in the rivalry. Furthermore, his "family-state" ideology was the most radical one within the jurists and, at the same time, the most appealing among the laymen.

As mentioned earlier, the postponement fraction started a nationalist outcry that the Code blindly imitated the Western laws and disregarded the "national characteristics (*kokuminsei*)."

The main theme of their attack, which revolved around family and inheritance law, was illustrated by the frequently quoted neo-Confucian statement of Yatsuka, "*Civil Code Comes In, Loyalty and Filial Piety Die Out*" (*Mimpō idete chūkō horobu*). Yatsuka elaborated this inflammatory

⁸⁴ Minear H., *Japanese Tradition and Western Law; Emperor, State, and Law in the Thought of Hozumi Yatsuka* (1970); Hozumi Shigeyuki, *Meiji ichi hōgakusha no shuppatsu: Hozumi Nobushige* [Hozumi Nobushige: The Journey of a Meiji Scholar](1988).

⁸⁵ MINEAR, *supra* note 84, at 40-49.

slogan both in his own essay of the same title and in a lengthier essay titled “Opinion for Postponement of the Code’s Enforcement” (*Hōten jisshi enki iken*) (Hereafter, the *Postponement*).⁸⁶

SAVIGNY-THIBAUT ANALOGY

Nobushige, in retrospect, repudiated that the civil code controversy could be ascribed as a turf war between the French School and the English School. Instead, he compared this rivalry to the famous Thibaut-Savigny dispute, which was an enlightened contest of great intellectual and historical significance:

[The controversy] may have seemed to arise from the competition between the English and French school of Japanese lawyers. However...in reality, it was nothing but a contest of the Historical School with the School of Natural Law. The French school believed in nature law and a codification based on universal legal principles beyond time and space. Since the Historical School, in contrast, emphasized on the national characteristic and the times, it was only nature for their rejection to Boissonade’s draft based on natural law. Accordingly, such a dispute in nature was not different from the dispute between Savigny and Thibaut happened earlier in the same century in Germany.⁸⁷

Similar to the Thibaut-Savigny debate, the Civil Code controversy in Japan was highly ideological and theoretical, while few concrete legal issues were identified or fully elaborated. This is particular true in Yatsuka’s criticism directed at the Old Civil Code, which was centered on the incompatible family-state ideologies in Japan and Christian Europe.⁸⁸ This feature might be attributed to the fact that these articles were meant to be circulated among the Diet members who could decide the fate of the Old Civil Code and that Yatsuka was an expert of

⁸⁶ See *Postponement*. Being the key text from the postponement fraction, the *Postponement* was jointly signed by Yatsuka and ten other legal scholars (Nobushige not included). Yet Yatsuka was the one who contributed the main content. The main component of the *Postponement* was published in several articles of Yatsuka in similar or sometime identical wording.

⁸⁷ NOBUSHIGE HOZUMI, *Savigny-Thibaut no Hōten Sōgi* [The Savigny-Thiabaut Debate] in HŌSŌ YAWA [Collection of Legal Anecdotes] 344 (1932).

⁸⁸ FRANK, *supra* note 60, at 179.

Constitutional law but not of civil law or family law. Also, Yatsuka's argument followed closely the ideals of Savigny and the German Historical School. In fact, Yatsuka asserted that Savigny's analogy between law and language was the most insightful.⁸⁹ The thesis of the incompatibility was grounded on the conflict between the spirit of Japanese and those of the "Christian countries."

In Yatsuka's neo-traditionalist theory, the national character of Japan was not only unique but was also irreconcilable with either the Christian customs or the liberal thoughts of French Revolutionists. He considered the Code as representative of the Western law and claimed that its enforcement would erode the traditional Japanese value system. The Code's fundamental assumption of an autonomous acting individual was also perceived as a threat to Japan's polity.⁹⁰

Yatsuka's theory was one of familism. His organist and collectivist approach was founded on family and state but, as I will show later, ran all the way to market. The very foundation of Japan's national characteristics was ancestor worship, which presupposed an institution of "house" which had been "existing uninterrupted from the past into the future, irrespective of the birth or the death of its members."⁹¹ Yatsuka defined ancestor worship as a religion.⁹²

The flesh of ancestors vanished but their "deity" existed and was guarding the "house."⁹³ More than that, it was a "national religion." The Emperor of Japan was, in Yatsuka's constitutional law theory, the "head" of the nation-state, if not the state itself.⁹⁴ The divinity and sovereignty of the Japanese Emperor were derived from a single basis of his being the descendant of the unbroken Imperial

⁸⁹ *Postponement*, at 150.

⁹⁰ FRANK, *supra* note 60, at 179.

⁹¹ SCHMIDT, *supra* note 62, at 262.

⁹² Nobushige characterized it as "reverence" for ancestors. See NOBUSGUGE HOZUMI, ANCESTOR-WORSHIP AND JAPANESE LAW (1912).

⁹³ *Postponement*, at 151.

⁹⁴ One of the most famous single sentence in pre-WWII. constitutional law scholarship was "The Emperor is the State" (*Tennō wa sunawachi kokka nari*), an assertion of Hozumi Yatsuka. See MINEAR, *supra* note 84, at 57.

family, the lineage of the Sun Goddess, Amaterasu.⁹⁵ The family and the state were intertwined in Yatsuka's mysterious theory of the "national polity" (*kokutai*):



In the house, the "househead," representing the authority of the ancestors, exercised the patrimonial power over the family; in the nation, the Emperor, representing the authority of the Sun Goddess, exercised the sovereign power over the nation. Patrimonial power and sovereign power: both are power whereby the emperor-father protects the children beloved of the ancestors [sic]...The position of the head of the "house" is that of the authority of the ancestors; the throne is the place of the Sun Goddess. Parents are ancestors living in the present; the emperor is the Sun Goddess living in the present. For the same reason one is filial to his parents and loyal to the throne.⁹⁶

The organist view about family and nation-state existing beyond time also reminded us of Savigny, when he asserted that the people, like family, has a temporal dimension: it "runs through generations constantly replacing one another, and thus it unites the present with the past and the future."⁹⁷

HOZUMI YATSKA'S FAMILY-STATE IDEOLOGY

Yatsuka found the affinity between the "house" in Japan and in pre-Christian Europe. In the glory age of Greece and Rome, he claimed, since the power of the ruler was derived from the holy power of the patriarchal father, the foundation of the country was also ancestor worshiping. However, the "house" in Christian countries, which, according to Yatsuka, was adopted in Boissonad's

⁹⁵ On this, see MIKIHARU ITÔ, *KAZOKU KOKKAKAN NO JINRUIGAKU* [Anthropology of Pseudo-Family State Ideology] (1982).

⁹⁶ MINEAR, *supra* note 84, at 73.

⁹⁷ KENNEDY, *supra* note 31, at 822; SAVIGNY, *supra* note 28, at 33.

draft, was founded on the “contract” between the husband and the wife and was devoid of the ideas of an unbroken family line. Yatsuka considered the Christian family custom as being extremely individualistic and “cold,” as a Christian marriage was based on the affection and love between man and woman and was not for the purpose of continuing the family line.⁹⁸

The family law in the Old Civil Code was certainly the main target of criticism. The “house” was said to exist in the Code in name only. Such was deemed a capital defect. The Code was therefore said to cause “disorder [of] the national religion and destroy the ‘house’ once it was enforced.”⁹⁹ On the issue of illegitimate children, Yatsuka was against the rule provided by Article 103 that an illegitimate child acquired the status of legitimate children if his or her parents later legally united in marriage. He believed that this rule was derived from a custom practiced in Rome Empire when its morality was declining, and that such a custom was unsuitable to the “national condition” and “national custom” in Japan.¹⁰⁰

The issue of the duty of support among family members reminded one of the delegating move of Savigny in his treatment of family law. Yatsuka criticized Article 26 for guaranteeing the rights of the individual to receive support from their consanguineous relatives. He considered the duty of support one of moral, not legal and argued that such Article 26 would create an atmosphere in which people would not fulfill the customary obligations unless the law specifically requires them to do so and would lead to the decline of traditional familial ethics.¹⁰¹

Interestingly, although the issues regarding divorce and married women’s legal capacity were usually the focal points of the family legal reform in Euro-America, this was not the case in Japan. A wife’s legal capacity in the Old Civil Code was not contested in the dispute. She owned the title of her separate

⁹⁸ YATSUKA HOZUMI, *Mimpō Idete Chūkō Horobu* [Civil Code Comes In, Loyalty and Filial Piety Die Out] in HOZUMI YATSUKA HAKUSHI RONBUNSHU [The Collective Essays of Dr. Hozumi Yatsuka] 223, 223-225 (Hozumi Shigetaka ed., 1943).

⁹⁹ *Postponement*, at 152; HOZUMI, *supra* note 98, at 226.

¹⁰⁰ *Postponement*, at 156.

¹⁰¹ *Postponement*, at 155; Ikeda, *supra* note 66, at 249.

property while her husband acquired the right to possess and manage such property.¹⁰² Neither was divorce, either by mutual consent or by judicial decision, controversial.¹⁰³

Boissonade, as a supporter for consensual divorce, openly praised the divorce practiced in Japan in his lecture on natural law and regarded it as a “manifestation” of the “good custom” in Japan. He asserted that, in contrast to some western countries, who saw divorce detrimental to family, the fact that divorce was allowed and considered not harmful to the family could be ascribed to the “tenderness, intelligence and integrity” of the Japanese people.¹⁰⁴ Such a point was even more emphatically made by the draftsmen of the New Civil Code when they claimed that divorce by mutual consent in fact facilitates harmony, a value of paramount importance in the family.¹⁰⁵

YATSUKA'S MARKET LAW EXCEPTIONALISM



Yatsuka also criticized that the Old Civil Code prioritized property law over family law. He asserted that the “civil law” had centered around personal matters, the rules of which had constituted general principles of law ever since thousands of years ago in ancient Japan; whereas, the property rules had been secondary and complied with such legal principles. He pointed out, correctly, that the Code

¹⁰² A wife still needed her husband's authorization for a number of legal acts, such as accepting donations, selling real property and a like (Article, 68, Old Code). Schmidt, *supra* note 62, at 280.

¹⁰³ Both the Old Civil Code and the New Civil Code provided for divorce by mutual consent or by judicial decision. A divorce by mutual consent was effective by merely notification but, like marriage, the consent of the “househead” was necessary. After divorce, the children usually stayed with the father, or, more precisely, at the “House” which the father belonged to. No provision on alimony was provided. *Id.* at 279-280, 287-288.

¹⁰⁴ Boissonade Gustave Émile, *Seihō Kōgi* [Outline of Natural Law] (Inoue Misao trans.), in MEIJI BUNKA ZENSHŪ: DAI 13 KAN HŌRITSU HEN [The Collected Collection of Meiji Culture, Volume 13, Law] 464, 467 (Meiji Bunka Kenkyūkai ed., 1957).

¹⁰⁵ Epp Robert Charles, Threat to Tradition, The Reaction to Japan's 1890 Civil Code 198 (1964)(unpublished Ph.D. Dissertation, Harvard University).

premised on individualist property law and accordingly reformed the existing family customs conflicting with the property law. Such a measurement would destroy the morality in Japan.¹⁰⁶

In other words, Yatsuka maintained that the Market should comply with the Family in preserving national characters. Indeed, Yatsuka's organism started from the cluster of family and the state and went all the way to market. He criticized the draftsmen for mistakenly seeing the society as simply an aggregation of individuals and neglecting the fact that the society was and ought to be a community. The Civil Code was said to emphasize exclusively the individuals' freedom of contract and to encourage a society for the weak to fall prey to the strong. The enforcement of the Code, Yatsuka warned, would throw the society into turmoil and eventually lead to the rise of socialism.¹⁰⁷

Yatsuka's opinion certainly represented a nationalist sentiment in the late nineteenth century Japan not to be simply interpreted as xenophobia. The outburst of "national-mindedness," including (re-) assertions of the indigenous characteristics and national thoughts were everywhere since the late 1880s.¹⁰⁸ However, as we have noticed before, the neo-traditionalist stance Yatsuka represented might also be considered as an outlier in the late Meiji legal circle. His general ideas of law were in sharp contrast even with other members of the postponement fraction in many ways, including Yatsuka's older brother Nobushige.

THE MILD ANTI-CODIFIERS: GERMAN LEGAL SCIENCE AND FLE

As indicated earlier, Nobushige kept a low profile when the debate was on but was eventually selected as one of the three draftsmen of the New Civil Code. He was highly influenced by Savigny's historical approach. Like Yatsuka, he was deeply interested in ancient Japanese customs, particularly the ancestor worship.

¹⁰⁶ *Postponement*, at 151. YATSUKA HOZUMI, *Kunika Teki Minpō* [The Civil Law of the Country] in HOZUMI YATSUKA HAKUSHI RONBUNSHŪ [The Collective Essays of Dr. Hozumi Yatsuka] 215, 215-216 (Hozumi Shigetaka ed., 1943).

¹⁰⁷ *Postponement*, at 163-164.

¹⁰⁸ Gluck Carol, *Japan's Modern Myths: Ideology in the Late Meiji Period* 23 (1985).

In his academic journey, he had been seeking and constructing a unique Japanese law. Such a commitment was well illustrated by his representative work, *Ancestor-Worship and Japanese law*.¹⁰⁹

At the same time, however, Nobushige was also fascinated with the other side of Savigny, the “legal science:”

[T]he fountain-head of legal improvement is legal science. Law is national and territorial, but the science of law is universal, and is not confined within the bounds of any state... We have profited in the past by the work of scientific jurists of the West, and we must look, in the future, to the mutual assistance and co-operation of the scientific brotherhood of the world.”¹¹⁰

Nobushige embraced the universalistic idea of “legal science” that created the space for foreign legal thinking in Japanese law. He welcomed the reception of Western laws to such an extent that he asserted in a speech to an international audience in the USA that “the higher the community stands in the scale of civilization, the greater is the proportion of the foreign to the indigenous element.”

¹¹¹ Influenced by reform-minded Bentham, Nobushige believed that law should reflect the social reality but, at the same time, should lead the social change. If such changes required some elements of individualism, the law should incorporate the values in need.¹¹²

Despite his assertion that family law and succession law depended upon “national character, religion, history, traditions and customs” and “showed the least capacity for assimilation [into Western laws]”, Nobushige saw the family institution as a unique yet evolving system.¹¹³ In discussing marital property, he

¹⁰⁹ HOZUMI, *supra* note 92.

¹¹⁰ Hozumi Nobushige, *Lectures on the New Japanese Civil Code: as Material for the Study of Comparative Jurisprudence* 157 (1912).

¹¹¹ *Id.* at 32. The content of this book was expressed in a lecture delivered in 1904 in the US and later became a book with English, Italian and German versions.

¹¹² Nobushige Hozumi, *Hōritsu Gaku no Ichi Dai Kakumi* [A Great Revolution in Legal Studies], 60 *Hōgagku Kyōkai Zaashi*, VII, 8 (1889); Epp, *supra* note 105, at 199.

¹¹³ HOZUMI, *supra* note 110, at 155-156. “The usual order of assimilation, or the reception of foreign law is (1) Law of Obligation (2) Law of Movables (3) Law of Immovables (4) Law of Succession and Family”

positioned the community property on the lowest and the system of separate property on “the highest, sale of civilization [sic].” He proudly reported to his colleagues around the world the achievement of the draftsmen of the New Civil Code, who had “taken a decided step, and leaped, at one bound, from the system of complete merge of wife’s property in that of the husband to the system of separate property.”¹¹⁴

Nobushige’s main opposition to the Old Civil Code, which he did not make public during the debate but explained ex-post, much like his brother, centered on family law. However, Nobushige was against Yatsuka’s idea of constructing a civil law around family law. Instead, he preferred situating family law in a distinct and separate place in the Civil Code, a proposal that resembled Savigny’s treatment of family law.

Such a direction also clashed with Boissonade’s design in the Old Civil Code in which succession law constituted a part of Book III, “Means of Acquiring Property,” an arrangement which, accordingly to Nobushige, “formed one of the strong reasons for postponing the operation” of the Code.¹¹⁵ Nobushige claimed that Japanese society was “passing from the stage of family-unit to the stage of individual-unit.”¹¹⁶ However, the family was, for the moment, crucial to the Japanese way of the life:

[S]till, the family occupied an important place in the social life of the people, and there are many rules which are peculiar to their family relations, and which ought, on that account, to be grouped together and separated from the rules relating to persons regarded simply as individuals.¹¹⁷

In a sense, the disagreement between Boissonade and Nobushige on family law focused more on the structure and technique than on the substance.

¹¹⁴ *Id.* at 69

¹¹⁵ *Id.* at 51.

¹¹⁶ *Id.* at 52.

¹¹⁷ *Ibid.*

Nobushige considered the Pandekten System, which provided a distinctive place for family and succession law in Germany, the best fit for Japan. His position, which was adopted in the New Civil Code, is worth quoting at some length:

The “Pandekten-System” is peculiarly suitable to this transient state of society, for it provides for the rules relating to persons in their capacity as individuals or members of a society in the General Part, and sets apart a distinct place for those rules which relate to persons in their capacity as members of a family. In civilized societies, the rules that regard men as individuals belong to general law, while those which regard men in their family relations belong to particular law. But in less advanced communities, the case is just the reverse; the family law may be said to form the general law, the law relating to persons in their individual capacity falling under the category of *particular law*. Japan is now in a transition stage; so that the placing of the rules relating individuals in the general part, and the rules relating to family relations in the particular part of the Code is, not only logically correct, but is especially suited to the present stage of the Japanese law. (The emphasis is Hozumi’s).¹¹⁸

Nobushige’s fascination with the German legal science played an undeniable role in his opposition to the Old Civil Code. He asserted that Boissonade’s natural law theory was outdated and that “law instruction in Germany is far more advanced than in any other countries.”¹¹⁹ Nobushige was convinced that the reception of German jurisprudence was requisite to the development of Japanese law: “unless we import German jurisprudence into this country, we shall never be able to keep ourselves abreast of the world’s progress.”

¹²⁰ The German Civil Code was also a must:

[A]lthough German empire was established only recently, the new civil code which its government promulgated to unify the law of the federated empire

¹¹⁸ *Id.* at 52-53.

¹¹⁹ Nobushige Hozumi, *Doitsu hōgaku no Nippon ni Oyobu seru Eikyō* [The Influence of German Jurisprudence in Japan], in HOZUMI NOBUSHIGE IBUN SHU III [Posthumous Collection of the Writings of Hozumi Nobushige III] 617, 619 (1934). Translation is from Frank, *supra* note 60, at 183.

¹²⁰ *Ibid.*

has begun to take hold, and this German civil code embodies legal principle more up-to-date than those of the French codes which this country has used as a model for its laws. *In the interest of future progress in legislation, we must import German jurisprudence.*¹²¹ (The emphasis is Hozumi's)

A similar critique of the Old Civil Code was made by Tomii Masaaki (1858-1935), a Roman law professor at Tokyo University who was also one of the three draftsmen of the New Civil Code. The fact that Tomii obtained a doctorate in French law from Lyon University made his public opposition to the Old Civil Code sound impartial and credible. Tomii asserted that the 1804 French Civil Code was already antiquated and in need of a thorough revision to bring it to the modern standards and that adopting such a model would only hinder the progress of Japanese law. He also disliked the “textbook style” of Boissonade’s draft abounding in definition, illustration, and examples. In contrast, the BGB presented the most updated, coherent and compact code. Tommi objected relying solely on the French model and suggested relying on German legal science in re-drafting the Civil Code and, at the same time, broadly adopting the laws of other Western countries.¹²²

EPILOGUE – JAPANESE CIVIL CODE OF 1898

The heated debated ended in 1892 when the newly-founded Imperial Diet passed a bill postponing the Old Civil Code. Before that, the rapid-enforcement fraction once attempted to save the Old Civil Code from being entirely blocked by introducing another bill postponing merely the parts about family relations and succession. Such a strategy of trading family law that was accused of being too liberal and innovative, for an individualist market law, was in vain.¹²³

Boissonade went back to Paris in disappointment after his twenty years’ of

¹²¹ *Ibid.*

¹²² Epp, *supra* note 105, at 185. For Tommi’s view against the code, see RYŌSUKE ISHII, JAPANESE LEGISLATION IN THE MEIJI ERA 588 (William J. Chambliss trans., 1958).

¹²³ HOSHINO TŌRU, MINPOTEN RONSO SHI [A History of Controversies on the Civil Code] 79 (1944).

service in Japan. A Japanese only revision committee was appointed,¹²⁴ consisting of three eminent jurists from both the postponement and rapid enforcement fractions: Hozumu Nobushige, Tomii Masaaki and Kenjiro Ume (1860-1910). The New Civil Code, completed in 1898, was rather eclectic. The German legal science was adopted to formulate the structure and concepts, and the Code as a whole undoubtedly bears many marks of German influence.

Following the Pandekten System, laws of family and succession then occupied distinct places in the Code. The rivalry between the French and English schools ended in the victory of the German school, a latecomer in Japanese jurisprudence. At the same time, much content in Boissonade's draft was preserved. Furthermore, the New Civil Code borrowed widely and selectively from the laws of Belgium, Holland, Switzerland, England, and the United States.”

¹²⁵ Nobushige proudly declared that Japan now “possess[es] a Civil Code based upon the most advanced principles of Western jurisprudence.”¹²⁶

We might be tempted to suspect that, after the heated debate centered on the Family-State ideology, the New Civil Code would lean further to neo-traditionalist family ideas. But as it turned out, the difference between these two codes were not very significant. The question about how much the New Civil Code differed from the Old Civil Code was in fact an object of endless debate among Japanese scholars. One scholar claimed that the New Civil Code seemed to give more regard to customs but also admitted that the New Civil Code adopted a nineteenth-century individualism.¹²⁷ Another scholar, however, asserted that the New Code seemed more likely to break up the national customs than would the Old Code.¹²⁸ What was generally agreed upon was that the new code inherited the

¹²⁴ Nobushige once stated that entrusting foreigners for codification, one of the most important project of a nation, was “not only slights the country's own legalists, but also is harmful to the national pride.” HOZUMI, *supra* note 8, at 121.

¹²⁵ WALTON, *supra* note 20, at 190.

¹²⁶ HOZUMI, *supra* note 110, at 157.

¹²⁷ ISHII, *supra* note 122, at 591.

¹²⁸ NAKAMURA KIKUO, KINDAI NIHON NO HÖTEKI KEISEI: JÖYAKU KAISEI TO HÖTEN HENSAN [The Formation of Law in Modern Japan: The Revision of Treaty and Codification] 136 (1956)

dualism between individualism and familism from the old.¹²⁹

What was perplexing was the absence of any fierce attack on the New Civil Code as it was as equally reactionary and liberal as the Old Civil Code. One explanation, as I have proposed, has to do with the discrepancy within the postponement fraction, represented by the difference between the Hozumi brothers. The radical Yatsuka and his instigative slogan were the center of the attention during the debate. Yet, the minimum-traditionalist Nobushige and other like-minded jurists eventually played the decisive role in the re-drafting of the Code.

The relative satisfaction with the New Code could also be attributed to the change of the atmosphere and people's attitudes. The unexpected victory in the Sino-Japanese War (1894) and subsequently, the acquisition of Japan's first colony, Taiwan, in 1895 signified the achievement of Japan that evolved from a semi-colony into one of the colonizers and "civilized countries" in less than thirty years. The rapid advances in industrialization also enhanced a common feeling of national greatness. The glory of self-confidence largely mitigated the nationalist sentiment against Western laws.¹³⁰ To a certain extent, the colony/the periphery altered the legal and political direction of the homeland/the center.

For the first time, family law was applied to all the Japanese nationals regardless of classes. The Japanese family law, along with the Household Registration, played crucial roles in determining Japanese citizenship. As Japan's empire-state expanded, the Japanese family law was brought to the colonies and served as the crucial mechanism in demarcating homeland from the colony, and distinguished Japanese from the "not-so-quintessential" Japanese, viz., the colonized. The dualism between new-traditionalist and liberalist in Japanese civil law and family law was also imported to the colony and affected the daily life of the colonized.

¹²⁹ Epp, *supra* note 105, at 200, n.67.

¹³⁰ *Id.* at 201.