

## 2014 年度判例研究所プロジェクト 総合比較研究プロジェクト

### 「ミクスト・リーガル・システム論から 見た慣習法の総合的比較研究」による セルビア・クロアチア・モンテネグロ訪問

代表 松本英実

本プロジェクトでは 2015 年 3 月 15 日より 3 月 22 日まで、旧ユーゴスラビアの三国、セルビア、クロアチア、モンテネグロを訪問した。目的は、ベオグラード大学（セルビア）、ドーニャ・ゴリツァ大学（モンテネグロ University of Dogna Gorica, Pod Gorica, Montenegro）における国際シンポジウムの開催と、ボギシッチ記念博物館（ボギシッチ図書館、ツァヴタット Cavtat、クロアチア）での資料調査であった。参加者は、代表者のほか、本プロジェクト研究分担者である大山和寿准教授（本学）、岡孝教授（学習院大学法学部）、葛西康德教授（東京大学大学院人文社会系研究科）、亀田真澄助教（同）、オブザーヴァーとして小川浩三教授（専修大学法学部）、溜箭将之教授（立教大学法学部）であり、さらに現地でモンテネグロ出身のチャスラヴ・ベイヨヴィチ Caslav Pejovic 教授（九州大学大学院法学研究院）が合流された。成果については、本誌次号（『青山ローフォーラム』4 巻 2 号（2015 年））において公表するが、これに先立って訪問の概要を、シンポジウムの資料を添えて報告したい。

最初の訪問国はセルビアであった。ベオグラード到着の翌日 3 月 16 日（月）には、青山学院大学法学部判例研究所とベオグラード大学法学部の共催による国際シンポジウム（セルビア・日本法学研究者集会）「比較法、法典化、慣習法、混合法」が開催された。シーマ・アヴラモヴィチ Sima Avramovic 法学部長の司会の下、葛西康德「日本におけるノモイと国体」（英語）、松本英実「ボワソナードとボギシッチーパラレル研究」（英語）、岡孝「梅謙次郎の慣習法概念」（ドイツ語）

の発表を行った（各報告の英語表題については後掲のプログラムを参照されたい）。岡教授の発表は、ゾーラン・ミルコヴィチ Zoran S. Mirkovic 教授（ベオグラード大学法学部、法制史）によって、ドイツ語からセルビア語に通訳された。各発表に対しては、ベオグラード大学法学部、セルビア国立比較法研究所等から参加された教員、ポスドク、大学院生から活発な質疑があった。今回の訪問についてテレビ取材（Studio B）があり、シンポジウムの様子が報道された（<http://www.ninamedia.rs/ftp/pravni/18.03.2015/>）。また日本大使館からは早川修公使がご参加下さった。

午後は、アヴラモヴィチ教授のご紹介で、イヴァン・ムルキチ Ivan Mrkic 大統領顧問（元在日本セルヴィア大使）を大統領府に訪ねた。その後、学部長とニーナ・クルシュリャーニン Nina Krsljanin 助教（ベオグラード大学法学部、法制史）の案内でベオグラード市内を見学した後、ベオグラード大学文学部 Faculty of Philology を訪問した。アレクサンドラ・ヴラネシュ Aleksandra Vranes 文学部長（情報学）とリリヤナ・マルコヴィチ Ljiljana Markovic 教授（文学部副学部長、日本学科長）と会談し、今後の交流について意見交換を行った。ベオグラード大学の日本学科は、学部生各学年 50 名規模、大学院博士課程を備えたヨーロッパでも有数の日本学科である。マルコヴィチ教授はケンブリッジ大学で経済学と日本学の修士号を（修士論文は後期水戸学）、中央大学で博士号を取得された研究者（中小企業研究）で、父君の故ラドミール・ジュロヴィチ Radomir Djurovic 教授（ベオグラード大学法学部、商法）との共著でセルビア語による概説書『日本法』Pravni sistem Japana（2011）を出版されている。日本学科では様々な分野の日本語書籍を必要としているということや予め伺っていたので、訪問者はそれぞれ数冊ずつ文献を寄贈した。また、多くの日本学科関係者、特に若手研究者と話をする機会が得られた。

文学部では、亀田真澄による「写真における国家建設カルト—ソヴィエト連邦とユーゴスラヴィアの英雄イコノグラフィ—」（英語）講演が行われ、60 名を超える聴衆を得て、活発な質疑が行われた。

3 月 17 日（火）はベオグラード・シンポジウム 2 日目が開催され、午前の部として小川浩三「日本における売買と慣習法」（ドイツ語）、溜箭将之「日本の信託法—市民法体系の例外?」（英語）の報告が行われた。司会はマリヤ・カラニキチ・

ミリチ Marija Karanikic Miric 准教授（ベオグラード大学法学部、民法）、小川報告の通訳はミリヤナ・ラドヴィチ Mirjana Radovic 助教授（ベオグラード大学法学部、民法）が務められた。このセッションには、ノヴィ・サド大学法学部ドゥシャン・ニコリッチ Dusan Nikolic 教授（比較法）、ザグレブ大学法学部マルコ・ペトラック Marko Petrak 教授（ローマ法）が参加された。ニコリッチ教授とは今後の交流を見据えた意見交換を行った。

午後の部は、リュピンカ・コヴァチュヴィチ Ljubinka Kovacevic 助教授（ベオグラード大学法学部、労働法・公法）の司会により、大山和寿「日本の慣習としての退職金と倒産」（英語）、チャスラヴ・ベイヨヴィチ「日本における労働法改正—経済効率性を求めて」（英語）の報告が行われた。その後ニコラ・テスラ博物館見学を挟んで、質疑の時間を設け、シンポジウムを閉会した。両日、各セッションとも20～30名程の聴衆を得て、活発な質疑応答があり、プロジェクトとして非常に得るところが大きかった。シンポジウムについては、ベオグラード大学法学部のサイトでも紹介されている ([http://www.ius.bg.ac.rs/vesti-cir.htm#\\_dani\\_Japana](http://www.ius.bg.ac.rs/vesti-cir.htm#_dani_Japana); <http://147.91.244.8/Dani%20japanskog%20prava.pdf>)。

シンポジウムを終えた後、国立の比較法研究所を訪ねて、オリヴェル・ニコリチ Oliver Nikolic 所長のご配慮で、研究員および大学院生との意見交換の場をもち、日本法についての質疑を1時間ほど行った。この会合では特にヴェスナ・チョリチ Vesna Coric 研究員にお世話になった。この間、葛西、大山、小川は日本大使館に黒木雅文大使を表敬訪問した。

この日は上記のほか、ジーカ・ブイユクリチ Zika Bujuklic 教授（ベオグラード大学法学部、法制史）のご好意で、ローマ法の博士論文口頭審査の冒頭を参観させて頂いた。この席にはニコラ・セラコヴィチ Nikola Selakovic セルビア共和国司法大臣、ドラゴミル・ミロイエヴィチ Dragomir Milojevic 破棄最高裁判所長官 President of Supreme Court of Cassation もおられ、ご挨拶申し上げた。夕食会では、セルビアの伝統料理と伝統音楽を堪能した。この夕食会には法学部、文学部各学部長、マルコヴィチ教授のほか、法哲学のヤスミンカ・ハサンベゴヴィチ Jasminka Hasanbegovic 教授（ベオグラード大学法学部、我が国の法哲学にも影響を与えたドイツ人法学者テオドル・フィーヴェクの下で博士号を取得）も同席した。

翌18日(水)は、モンテネグロを經由してクロアチアに入った。ツァヴタットは世界遺産ドブロヴニクから車で20分ほどのアドリア海に面した町で、法学者ボギシッチ(Baltazar BogisicあるいはValtazar Bogisic、1834-1908)の故郷である。1888年のモンテネグロ一般財産法典を単独起草したボギシッチの蔵書、研究資料、収集品を所蔵する図書館・博物館があり、クロアチア・アカデミーの管理下にある。ここでの資料調査がクロアチア訪問の目的であった。主としてボギシッチと日本の関係を明らかにする資料の探索を行い、松方正義との会見(1878年)についての資料、ヨーロッパ在住の日本人を相手としてボギシッチが日本について行った聴き取り調査(Yamanouchiに対する封建制、家族制度等に関するもの等)の資料、ボワソナードとボギシッチの間の通信、ボギシッチが入手し書込みを加えたボワソナードのProjetなどを閲覧した。限られた時間ではあったが、ボギシッチによる慣習法調査・法典化と日本における慣習法・法典化の問題とを比較する手がかりをいくつも得ることができた。調査にあたっては、ザグレブ大学マルコ・ペトラック教授のご紹介を介し、ボギシッチ・コレクション主任学芸員スターネ・チヴァノヴィチStane Divanovicさんに大変お世話になった。殊に、ボギシッチの支援者であり研究の補助者でもあったクノール男爵(女爵)Baronne Knorrの存在と貢献について、大変貴重なご教示を得た。記して感謝申し上げる。3月18日と19日の二日間にわたって行ったボギシッチ図書館・博物館での資料調査で得られた成果については、本誌次号(「青山ローフォーラム」4巻2号)で公表する予定である。

19日午後まで調査を行い、その後モンテネグロへと移動した。ポド・ゴリツァまで予定していたルートが土砂崩れで通行不能となったため、急遽ボスニア・ヘルツェゴヴィナ経由で移動することとなった。ポド・ゴリツァでは、ベイヨヴィチ教授が迎えてくださった。

翌3月20日(金)は、モンテネグロの私立ドーニャ・ゴリツァ大学においてシンポジウムを開催した。同大学は新設大学で、教員も若手が多い。シンポジウムに先立ってヴェゼリン・ヴコティチVeselin Vukotic学長(経済学)と会談し、学内を見学した。ここでのシンポジウム「グローバル時代の法の役割」では、ベオグラード大学でのシンポジウムとは対照的に、大学院生2名のみを聴衆とする閉じられた会合で、ドーニャ・ゴリツァ大学の若手研究者の発表に対して日本人研究者が

コメントを加える、という形を主とした。ヴク・ウスココヴィチ Vuk Uskokovic 専任講師（ドーナ・ゴリツァ大学法学部、外交史・ケンブリッジで修士号取得）の司会により、まず松本が今回の訪問の目的を説明した上で、ボギシッチと日本の接点、特にボワソナードとの接点についての発表を行った。続いて、モンテネグロ側から、ミラナ・チャバルカバ Milana Cabarkapa 専任講師（ドーナ・ゴリツァ大学法学部、会社法）「モンテネグロ会社法における法人格の問題」、ヤドランカ・カルデロヴィチ Jadranka kaluderovic 助教授（ドーナ・ゴリツァ大学経済学部、国際経済）「グローバル化とインフォーマル・ルールと開発」、ブランコ・ボシュコヴィチ Branko Boskovic 専任講師（ドーナ・ゴリツァ大学法学部、政治社会学）「モンテネグロにおける政党の法的枠組み：ポピュリズムと EU の観点」、ミルコ・ジュコヴィチ Mirko Djukovic 専任講師（ドーナ・ゴリツァ大学法学部知的財産法、EU法）「EU 加盟の費用対効果：その法的枠組」の報告が行われた。すでに面識のあったアンドレイ・ブラカノヴィチ Andrej Bracanovic 専任講師（ドーナ・ゴリツァ大学法学部、法制史）も交えて討議を行った。モンテネグロの現行法について、また EU、グローバル化の中でのモンテネグロの現状や、国立大学と私立大学の関係等について理解を深めることができた。会食後、ポド・ゴリツァ空港に向かい、モンテネグロを後にした。

ベオグラードではアヴラモヴィチ学部長が再び迎えてくださり、一週間を振り返りつつ、今後の共同研究についても相談を進めた。翌 21 日（土）早朝、ベオグラードから帰国の途についた。

今回の二つの国際シンポジウムでは、ミクスト・リーガル・システムの観点からの日本法の提示、慣習法を素材とする日本法の提示、またセルビア、クロアチア、モンテネグロと日本の比較という新しい試みを行った。この比較の際の重要な素材となるのがボギシッチによるモンテネグロ一般財産法典であり、この法典を作成する前にボギシッチによって行われた慣習法調査、その法典への反映、家族法、相続法の扱いと法典との関係等を明らかにしたうえで、日本法と比較することが必要である。

今回のプロジェクトを開始し、三国への訪問を実施するに至ったそもそもの発端は、2014 年 1 月のシーマ・アヴラモヴィチ教授の来日であった。東洋大学の招

聘により国際シンポジウムに参加された同教授は、青山学院大学法学部での研究会「比較法セミナー」でも発表され（1月10日）、そのときに取り上げられたのがボギシッチであった。この講演「ボギシッチと日本民法典」については、『青山法学論集』57巻1号（2015年）で公表する。すでに述べたように、今回の訪問の成果は『青山ローフォーラム』4巻2号（2015年）で発表する。また、代表者は「グローバル化と比較法」と題する論考を『法律時報』87巻7号（2015年6月号、86-91頁）に執筆し、この中で今回の訪問について紹介した。あわせて参照されたい。

ベオグラード大学でのシンポジウムはシーマ・アヴラモヴィチ学部長の、ドニーヤ・ゴリツァ大学でのシンポジウムはチャスラヴ・ベイヨヴィチ教授のお力によって実現することができた。また、本訪問では在日本セルビア大使館のネナド・グリシッチ大使にもお世話になった。記して感謝の意を表したい。

（追記）

本稿は、青山学院大学判例研究所2014年度総合比較研究プロジェクト（ミクスト・リーガル・システム論から見た慣習法の総合的比較研究）による研究成果の一部である。

# **Comparative Law, Codifications, Customary Law, and Mixed Legal Systems**

International Conference of Japanese and Serbian Scholars

**Belgrade, March 16/17, 2015**

The visit is sponsored by Aoyama Gakuin University, Faculty of Law, Tokyo  
The leader of the delegation: Professor Emi MATSUMOTO

**Monday, March 16, 2015**

10.00 – Faculty of Law University of Belgrade, Old Conference Room

## **Codifications and Customary Law**

Yasunori KASAI (Greek and Roman Law, Tokyo University)

Topic: *Nomoi* and Kokutai (Constitution) in Japan

Emi MATSUMOTO (Comparative Law, Aoyama Gakuin University, Tokyo)

Topic: Boissonarde and Bogisic – A parallel study

Takashi OKA (Civil Law, Gakushuin University, Tokyo)

Topic: The idea of Customary Law by Prof. Kenjiro Ume (1860 -1910, professor of civil law and one of the three compilers of Japanese Civil Code)

13.00 – Lunch buffet

17.00 – Faculty of Philology University of Belgrade

Masumi KAMEDA (Slavic Language and Literature, Tokyo University)

Topic: " Nation-Building Cult in Photography: Iconography of Heroes in the Soviet Union and Yugoslavia"

**Tuesday, March 17, 2015**

10.00 – Faculty of Law University of Belgrade, Old Conference Room

## **Civil Law and Labour Law**

Kozo OGAWA (Roman and Canon Law, Senshu University, Tokyo)

Topic: Sale and Customary Law in Japan

Masayuki TAMARUYA (Anglo-American Law, Rikkyo University, Tokyo)

Topic: Japanese trust law as an exception of Japanese civil law system ?

11.30 – Faculty of Law University of Belgrade, Courtroom

Kazutoshi OHYAMA (Civil Law, Aoyama Gakuin University, Tokyo)

Topic: Retirement payment as a custom in Japanese law and insolvency

Caslav PEJOVIC (International Private Law and Comparative Law, Kyushu University)

Topic: Revisions of the Japanese Employment Law: Towards Greater Economic Efficiency

13.00 – Visit to the Nicola Tesla Museum

14.00 – Question & Answer, Closing of the Conference

15.00 – Visit to the Institute for Comparative Law in Belgrade

16.00 – Visit to the Embassy of Japan

19.00 – Dinner in Scadarlia Restaurant „Ima dana“



16 March 2015, Belgrade

Nomoi and Kokutai (Constitution) in Japan

Yasunori Kasai, Tokyo

Keywords: Kokutai, Nomoi, Codification, Customary Law, Mixed Legal System, Legal Transplant

Key Persons/Data in Modern Japanese Legal History

1868 Meiji Restoration

Civil Code (MIMPO)

1890 OLD, Boissonade MI (1825-1910)

1898 NEW, Nobushige HOZUMI (1855-1926), Masaakira TOMII (1958-1935),  
Kenjiro UME (1860-1910)

Constitution (KEMPO)

1890 OLD (Meiji) KEMPO Kowashi INOUE (1844-95)

Yatsuka HOZUMI (1860-1912)

1890 Kyoiku Chokugo (Emperor's Rescript to School)

1882 Gunjin Chokuyu (Emperor's Rescript to Army and Navy)

1947 NEW KEMPO

Toshiyoshi MIYAZAWA (1899-1976), Tomoo ODAKA (1899-1956)

Kengyo (Clear Chant, Charm, Mythos)

Shinkichi UESUGI (1878-1929) Katsuhiko KAKEI (1872-1961)

Mikkyo (Hidden Wisdom Logos)

Tatsukichi MINOBE (1873-1948) Toshiyoshi MIYAZAWA (1899-1976)

Meiji KEMPO (my translation)

Art. 1 The Emperor of the ever-lasting single-lineage governs Japan.

Art. 3 The Emperor is sacred (divine) and cannot be polluted.

Art. 4 The Emperor as the head of state looks after the governance in accordance with this Constitution.

NEW Constitution (from the Internet)

**Article 1.** The Emperor shall be the symbol of the State and of the unity of the People, deriving his position from the will of the people with whom resides sovereign power.

**Article 9.** Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

#### I Introduction

- 1 The Constitution (Kempo and/or Kokutai) and Legal Transplant
- 2 Miyazawa 'August Revolution' vs Odaka 'The Sovereignty of Nomos'

#### II Kokutai as a Japanese Customary Constitution

- 1 Sir John's 'Our Unwritten Constitution'
- 2 Hozumi (elder)'s Ancestor Worship

#### III Plato's Nomoi

- 1 Meanings of Nomoi
- 2 Education, Persuasion and Enforcement
- 3 Nomoi and Epitedeumata (consciously exercised custom)

#### IV Conclusion -A Constitutional Deal-

#### Select Bibliography (only those in English)

- Baker, Sir John (2010), Maccabean Lecture on Jurisprudence, 'Our Unwritten Constitution', read at the British Academy 24 November 2009, published in *The Proceedings of the British Academy* 167 (2010), 91-117
- Dean, Meryll (2009), 'Japan', vol 3, 365-387, Katz, Stanley, N. (ed.), *The Oxford International Encyclopedia of Legal History*, 6 vols, OUP, New York 2009
- Hozumi, Nobushige (1912), *Ancestor Worship and Japanese Law*, Tokyo
- Ishii, Ryosuke (1980), *A History of Political Institutions of Japan*, Tokyo
- Ishii, Shiro (2007), *Beyond Paradoxology*, Tokyo
- Kasai, Yasunori (2013), 'In Search of the Notion of Aequitas (epieikeia) in Greek and Roman Law', in *Hiroshima Law Journal*, 37, 543-564
- Plato, *Laws (Nomoi)*, Opera V (Oxford Classical Texts)

Comparative Law, Codifications,  
Customary Law,  
and Mixed Legal System

International Conference of Japanese and Serbian Scholars  
Belgrade, March 16/17, 2015

Boissonade and Bogisic  
– A parallel study-

Emi MATSUMOTO  
Aoyama Gakuin University, Tokyo, Japan

Monday, March 16, 2015

1.  
Aim of our visit

Comparative Law Project  
Faculty of Law, Aoyama Gakuin University  
Research Institute of Legal Cases/ Institut de Jurisprudence

“Comparative study of Customary law  
from the perspective of Mixed Legal System”

Professor Sima Avramovic in Japan  
January, 2014

- SYMPOSIUM AT TOYO UNIVERSITY  
“THE TRANSFER AND TRANSFORMATION OF LAW”  
S. AVRAMOVIC, Serbian law between Roman-Byzantine and Austrian traditions
- AOYAMA SEMINAR OF COMPARATIVE LAW  
S. AVRAMOVIC, Bogisic and Japanese Civil Code

“Comparative study of Customary law  
from the perspective of Mixed Legal System”

- Mixed Legal System
- Customary law
- Comparative study





### MIXED SYSTEMS OF CIVIL LAW AND CUSTOMARY LAW

•BURKINA FASO	•BURUNDI	•BURUNDI SOUTH
•CHAD	•CAMBODIA	•BURUNDI NORTH
•CHINA (HONG KONG AND MACAU)	•COTE D'IVOIRE	•BURUNDI SOUTH
•CONGO	•COTE D'IVOIRE	•BURUNDI SOUTH
•CONGO, DEMOCRATIC REPUBLIC OF	•ETHIOPIA	•BURUNDI SOUTH
•COTE D'IVOIRE	•EQUATORIAL GUINEA	•BURUNDI SOUTH
•ETHIOPIA	•GABON	•BURUNDI SOUTH
•EQUATORIAL GUINEA	•GUINEA	•BURUNDI SOUTH
•GABON	•GUINEA-BISSAU	•BURUNDI SOUTH
•GUINEA	•HONG KONG	•BURUNDI SOUTH
•GUINEA-BISSAU		
•HONG KONG		

### CUSTOMARY LAW SYSTEMS AND MIXED SYSTEMS WITH A CUSTOMARY LAW TRADITION (Juriglobe)

• Today, hardly any political entity in the world operates under a legal system which could be said to be typically and wholly customary. Custom can take on many guises, depending on whether it is rooted in wisdom born of concrete daily experience or more intellectually based on great spiritual or philosophical traditions. Be that as it may, customary law (as a system, not merely as an accessory to positive law) still plays a sometimes significant role, namely in matters of personal status, in a relatively high number of political entities with mixed legal systems. This obviously applies to a number of African countries but is also the case, albeit under very different circumstances, as regards the law of China or India, for example.

### Customary Law

• Is Japanese Law a mixed law of the Civil law and the customary law?

### Comparative Law


- With which law?
- How?

2.  
Boissonade and Bogisic  
– A parallel study–

[ 4 ]

**Valtazar Bogišić**

- 20 December 1834  
Civrats, Kingdom of Dalmatia, Austrian Empire
- 24 April 1908 (aged 73)  
Fiume, Austria-Hungary



**Contacts with Japan**

- Japanese delegation to the Expo at Paris met Bogišić at Consular's office of Japan at Paris; Bogišić, asked for advice for the future codification in Japan, he told to exclude family law from the codification of Civil law.

*General Property Code for the Principality of Montenegro 1888*

- 1031 articles
- last chapter (VIII), containing about 50 national legal proverbs

*Code général des biens pour la Principauté de Monténégro de 1888 : (rédigé par V. Bogišić) / traduit par Rodolphe Darestre Paris, 1892*

<http://gallica.bnf.fr/ark:/12148/pt6k56615946>


**Reference by the Japanese legislator**

- In preparation of 287 articles out of 1044 of Japanese Civil Code, the General Code of Property of Montenegro was referred too.  
cf. Preparatory documents of Japanese Civil Code article by article

**Contacts with Japan**

- Bogišić and Masayoshi MATSUKATA (Expo Paris 1878)
- Shigeto HOZUMI and representative of Montenegro (Berlin)
- Bogišić and Boissonade
- Bogišić and Kenjiro UME
- Serbian Code / Code Boissonad (Postponment champagne)
- Bogišić's work on customary law and Study of customary law in early Meiji Japan (Shiro ISHII)

Gustave E. BOISSONADE  
1825-1910  
Legal advisor to Japanese  
government:  
  
1873-1895



Gustave E. BOISSONADE 1825-1910  
Legal advisor to Japanese government: 1873-1895

- 1873 came to Japan, at the age of 48, attached to the Ministry of Justice
- 1874 started teaching at the Law School attached to the Ministry of Justice → publication in Japanese of his lecture 1877
- 1876 worked also for the Ministry of Foreign Affairs, and for the Senate
- 1877 started drafting the Penal Code and the Code of criminal instruction
  - → completed 1882
- 1879 started drafting the Civil Code
- 1880 lectures of his draft of the Civil Code at the School of Ministry of Justice
- 1890 lectures at the Imperial University (Tokyo University)

民法典 Code Civil de l'Empire du Japon

- 1879 drafting started
- 1880 lecture on the drafts
  - 1888 text of the Code completed
  - 1889 Commentary completed
  - Submitted to the Commission of Japanese members only for translation, investigation and modification
- 1889— "Debates on Codification"
- 1890 adopted by the Senate and approved by the Privy Council  
Publication on April 21 (to enter in force in January 1893)
- 1890 lecture on the Civil Code at the Imperial University
- 1892 postponement of enforcement (enacted by Parliament)
- 1893 Commission for the modification of the Code
- Accomplishment of the "Meiji" Code 1896, 1898

旧民法"Old Code" / "Code Boissonade"

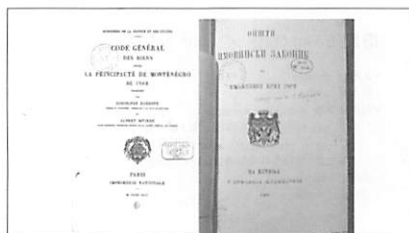
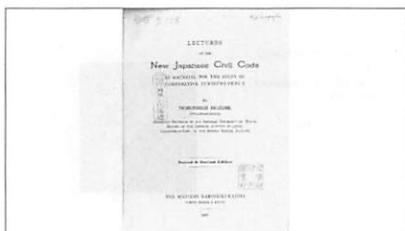
- 人事編 Persons
- 財産編 Biens
- 財産取得編 Acquisition des biens
  - 第一部 特定名義の取得法 (第1章～第12章)  
Acquisition au titre particulier
  - 第二部 包括名義の取得法 au titre intégral
- 債権担保編 Garantie
- 証拠編 Preuve

A comparative aspect

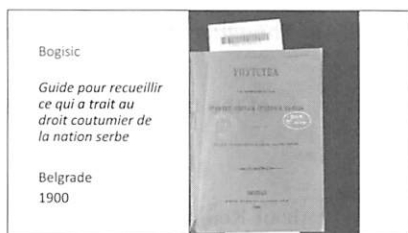
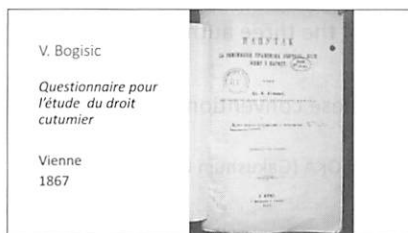
- Who is the parallel to Boissonade?
- Which was the parallel country in Boissonade's mind?
- With which country did Boissonade compare with Japan?

Further study of comparative aspect

[6]





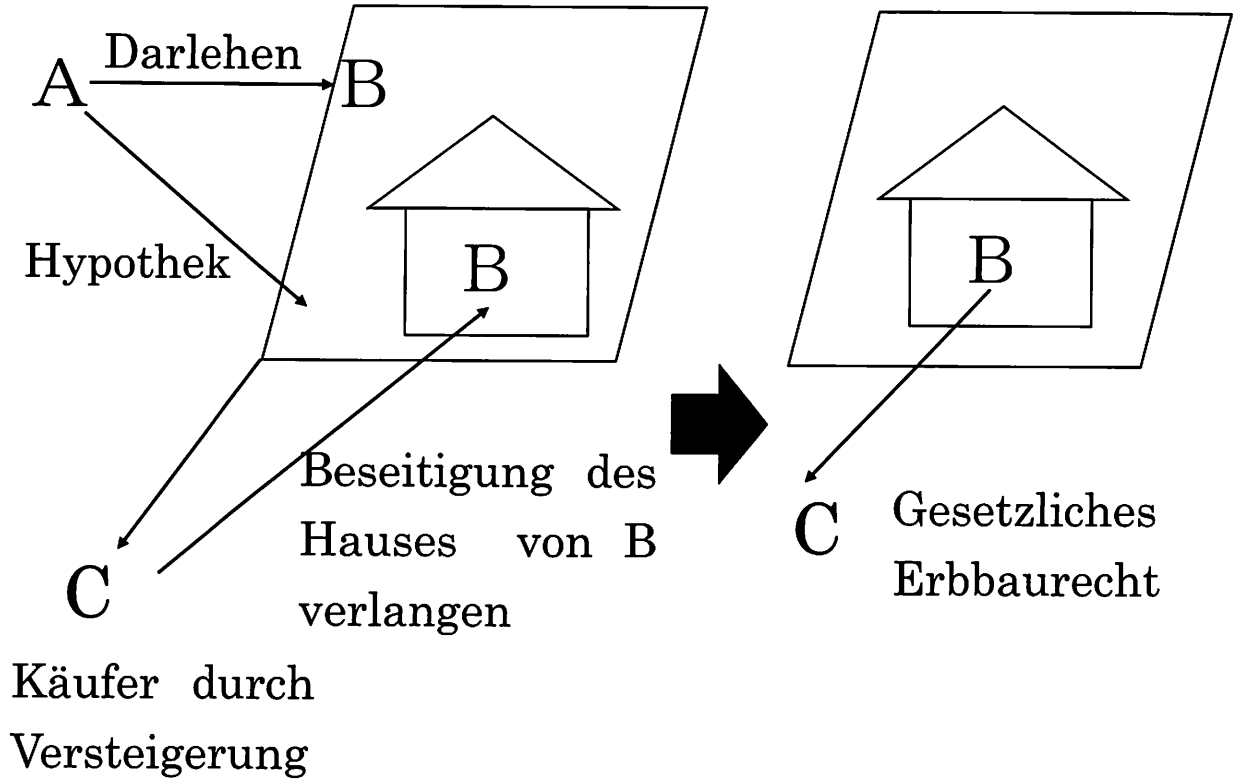


Thoughts of Prof. Kenjiro Ume, one of the three authors

of the Japanese civil code, on Japanese conventions

Takashi OKA (Gakushuin University, Tokyo)

- I. About Kenjiro Ume
  
- II. Short history of the origins of the Japanese civil code
  1. The first Japanese civil code, drawn up by Boissonade
  2. Valtazar Bogišić as the author of the General Property Code for the Principality of Montenegro
  3. Legislative procedure during the creation of the new Japanese civil code (Meiji-Minpo) after the controversy (Hoten-Ronso)
  4. The study of Japanese conventions for the revision of the first Japanese civil code
  5. The passage of the second Japanese civil code (Meiji-Minpo) and its great revision after the Second World War (present Japanese civil code: Genko-Minpo)
  
- III. Prof. Ume's thoughts on Japanese traditions and conventions
  1. On the criticism of the old civil code by adversaries (Enki-Ha)
  2. On Japanese conventions and traditions in the areas of Family and Succession Law
  3. Respect for Japanese customary law in areas not regulated by the Japanese civil code
  
- IV. An example of collision between codified rights and Japanese conventions: The Question, whether a property and a house situated on that property are one object or two separate objects
  
- V. The final point: Prof. Kenji Ume's work on the legislative process in Korea and the study of Korean conventions



Sale and Customary Law in Japan (Kauf und Gewohnheitsrecht in Japan)

March 17, 2015. Kozo OGAWA, Senshu University, Tokyo

Faculty of Law, University of Belgrade, Old Conference Room

I. Fragestellung (Subject)

Japanisches Zivilgesetzbuch (Japanese Civil Code) 1898

Kaufvertrag (Contract of Sale)

*Contractus consensualis*, Consensus

II. Rechtliche Behandlung des Kaufes in vormodernischem Japan (Legal Treatment of Sale before Modernization)

1. Abneigung gegen Rechtsstreit: eine Legende? (Dislike against Litigation: a Legend)

Edo-Regierung (Edo-Bakufu: Edo Government)

Richter in Edo (Edo-Machi-Bugyo: Judge in Edo)

Verordnung für Beförderung der Beseitigung von

Rechtsstreit durch gegenseitigen Verhandlungen (Aitai-sumashi-rei: Regulation for Encouragement of Settlement of Litigations by Bilateral Negotiations)

Klage als Belästigung der Obrigkeit (Action as Trouble of Authority)

Richter in Osaka (Osaka-Machi-Bugyo: Judge in Osaka)

Forderung von bestimmter Geldsumme (Debt of a Certain Sum)

*Certapecunia*

*Litisaestimatio* (Abschätzung des Streitgegenstandes: Estimation of the Object of Litigation)

2. Kauf als Realkontrakt

Vertragsstrafe (Stipulatio poenae: Penalty Clause)

3. Termingeschäft (Futures Trading)

Darlehen und Verkauf (Loan and Sale)

4. Immobilienkauf und Handgeld (Sale of Real Estate and Deposit)

Handgeld als Verstärkung der verbindenden Kraft (Deposit as Reinforcement)

Handgeld als Vertragsstrafe (Deposit as Penalty)

Handgeld als Mittel zur Auflösung (Deposit as Means to Cancel)

III. Gedanke von *contractus realis* und Kodifikation (Idea of *c. r.* and Codification)

Transplanting Western legal ideas onto the Japanese Custom of Inheritance  
European Civil Code and Anglo-American Trust Law  
Masayuki Tamaruya (Rikkyo University)

1. Customary law of inheritance in the late nineteenth century

(1) Family (*ie*) system in the Edo period (1603-1867)

- class system 身分制: warriors – farmers – artisans –tradesmen
- family (*ie*) as a formal unit of social and economic activity: name, ownership, and business
- family head 戸主 as the representative of the formal entity
- The blood relationship is not crucial but there were local variations

(2) Meiji Restoration and the Meiji Government (1868-)

- abolition of class system
- family registry 戸籍
- introduction of the Civil Code to negotiate with the West to revise the unequal treaties

2. The Civil Code and the Books of Family and Succession

(1) Japanese *Kodifikationsstreit* 法典論争

- 1890 Draft Civil Code 旧民法典 – French legal scholar, Gustave Boissonade
- opposition from the English school: the historical school's criticism of the natural law idea
- 'Civil Code comes and loyalty loses (fidelity falls)' 民法出でて忠孝減ぶ (穂積八束)

(2) 1898 Civil Code 新民法典 and the systematization of the family system

- German Pandekten-style codification by Codification Research Commission 法典調査会
- The family head 戸主 owns the family property and succeeds to the next 家督相続
- Male presumption of family property successor; upon marriage wife lost legal capacity.

(3) Overhaul after the World War II

- New Constitution art. 24: individual dignity and equality of sexes in marital matters.
- Civil Code: abolition of *ie* system: no family property succession, equal status of the wife
- family registry: husband and wife as the unit of registration and not *ie* (family)
- French ideal of equality (*egalite*)—e.g. forced heirship 遺留分制度

[ 2 ]

### 3. Trust law

#### (1) Traditional trust: Common Law and Japan

- trust law in England: creation of trust for the family succession purposes
- the trust property belongs to the trustee as a matter of law but to the beneficiary in equity
- Japanese trust-like device, *ko* 講: community-based mutual fund

#### (2) Trust Act and Trust Business Act of 1922

- bond issues in London and the use of trust to hold collateral
- Law of Trusts for Secured Debentures (1905)
- codification of the general law of trusts: the Indian and the American examples

#### (3) Post-war development

- reconceptualization of trusts: law of obligation or law of property?
- no demand for the use of trusts for family succession purposes
- the rise of 'trust banks'

#### (4) Trust Business Act of 2004 and Trust Act of 2006

- diverse use of trusts beginning in the 1980s: real estate investment trusts; securitization
- 'commercial trusts' 商事信託 and 'civil trusts' 民事信託
- the law of trusts as a form of commercial arrangements: enterprise trusts; security trusts; non-charitable purpose trusts; limited liability trusts; securitization of beneficial rights.
- These innovations 'follow closely the type of change that common law trust jurisdictions have recently considered, or soon will be considering' -- Donovan Waters

#### (5) Interface between the law of trusts and the Civil Code

- "bequest for the family successor": persistently used but the academics were skeptical
- Renewed interest in family trusts: trust for the benefit of the family successor
- Is the law of trusts contrary to *ordre public*?

### 4. Conclusion

- Although family law does not travel easily, it does travel.
- Over long period of time, dynamic mixing can occur among different strands of customs and legal traditions, creating unique set of law and practice.
- Many factors define the process: ideas, economics, politics, imperialism, patriotism, etc.

Retirement payment as a custom in Japanese law and insolvency

March 18, 2016

Kazutoshi OHYAMA (Aoyama Gakuin University, Tokyo)

1. Overview of Retirement payment in Japan

An employee had worked the same company more than 35 years, he averagely receives about 20,145,000 RSD.

The longer an employee had worked the same employer, the higher he receives retirement payments.

If an employee voluntary retires, he receives smaller retirement payments than in the case he is discharged because of personnel reduction.

2. Origin of retirement payments in Japan

i) Compulsory Savings

Employers deducted his employees' wages and made savings without employees' consent.

Compulsory savings prevent the employees voluntary resigning.

ii) *Noren-wake*, i.e. setting up a servant's store with the name of his master

In traditional Japan, a servant had worked the store's master a long time, the master allowed the servant to set up the servant's own store with the same name of the master's store.

This custom changed, i.e. when the workers retired a factory, the employer gave him a gift of money.

In this time,

a) Retirement payments were grace of employers.

b) Employers have the discretion.

3. Before World War II enactments on retires payments

1) Reform of Commercial Code in 1938

There were voluntary reserves for employees.

But if the companies' business once became worse, voluntary reserves for employees could be used to compensate for the capital deficit.

So to protect employees, Japanese Legislator made the provision in the Commercial Code to give employees' claims preferential rights (priority).

2) Retirement Payments and Retirement Savings Act of 1936

[2]

The employer should deduct his employees' wages and make savings for each employees, the savings should be paid to the employee when he resign.

But further the Act provided that employer should also make savings from his own money to pay retirement payment, and the employer should pay retirement payment to him from that savings when an employee resigns.

#### 4. After World War II

1) Retirement payments used to be thought as the employees' right.

Because labor unions were stronger than former.

Postponed payment of wages or salaries

2) The old Corporate Reorganization Act of 1952

i) Original Provision

Wages or Salaries were one of administrative expenses, which are not restricted by the reorganization plan, and are paid prior to paying ordinary claims.

But retirement payments were not.

According to the author of the Act, it was after confirmation of the reorganization plan that the companies in the reorganization procedure could pay retirement payments.

ii) Courts' opinion

The courts used to treat as administrative expenses all amount of retirement payments of employees especially whom the trustee discharged after commencement of the reorganization procedure.

But there was a problem for the employees who voluntary resign or who had been discharged before commencement of the reorganization procedure.

ii) Reform in 1967

a) General rule:

Retirement payments were one of the administrative expenses for an amount equivalent to the total amount of the employee's salaries for the six months preceding retirement or one-third of the amount of the retirement payments.

b) Exception:

To promote personnel reduction there was room to treat as administrative all amount of retirement payments which the employees discharged by trustee had.



## Reforms of Japanese Employment Law: Towards Greater Economic Efficiency

Caslav Pejovic  
Kyushu University

## Japanese Soup\*

- Japanese ancient indigenous flavors
- 7<sup>th</sup> century - Chinese vegetables and spices
- Meiji – French celery and carrots; German potatoes and onion
- Late 1940's – American corn and bacon
- \*Mark Levin



## Wakon Yosai

- Impact of “Black Ship” (*Kurofune*)
- “Japanese Spirit-Western Skills”
- Meiji reforms
- Reforms after WWII
- After-bubble reforms



## Japanese Employment System

- **Main features:**
- *Long-term Employment*
- *Seniority System*
- *Company-based Labor Unions*

## Long-term Employment

- **Main features:**
- *Recruitment of fresh graduates*
- *On-job-training*
- *Seniority based promotions*
- *Transfers within company*
- *High level of job security*

## “White Cloth”

- “White color can be dyed any color, but a piece of cloth that has already been dyed is difficult to re-dye to another color.”
- For companies the most important thing is not what potential recruits can already do, but what they will become able to do

[2]

### Legal Basis of Protection of Employees

- Japanese Civil Code:
- Article 627 (1) "If the parties have not specified the term of employment, either party may request to terminate at any time. In such cases, employment shall terminate on the expiration of two weeks from the day of the request to terminate."
- Article 1(3) "No abuse of rights is permitted."

### Legal Basis (continued)

"An employer may only validly discharge an employee in circumstances where there is just cause for the dismissal, based on the common sense of society."

(Iwata v. Tokyo Seimei Hoken Sogo, 1950)

Labor Contract Act, 2007

Article 16. "A dismissal shall, if it lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, be treated as an abuse of right and be invalid."

### Criteria For Economic Dismissals

- Economic necessity to reduce the workforce;
- Good faith efforts by the employer to avoid dismissals;
- Reasonable criteria in selecting employees to be discharged;
- Reasonable efforts to explain and obtain the consent of the trade union and workers



### Priorities



### Recent Tendencies

- "Ristora"
- Transfer of employees to other jobs within the company, temporary external transfers to other companies
- Reducing number of permanent employees
- Increasing number of non-regular employees

### Trends since 1990's

	Permanent	Non-standard
• 1990	79,8%	20,2%
• 1995	79,1%	20,9%
• 2002	70,6%	29,4%
• 2007	66,5%	33,5%
• 2011	64,3%	35,7%
• 2012	64,9%	35,1%
• 2013	63,3%	36,7%

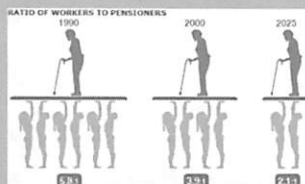
Source: The Labor Force Survey

## Job Security



- *Revision of Labor Contract Law, 2012*
- "Five-years rule"
- *More or less job security?*
- *70% of Japanese men in their 30s with regular jobs are married*
- *25% Japanese men in their 30s with irregular jobs are married*

## Aging Society



## Demographic Changes

- *In 2013 there were 1.2 million new employees, while 2.2 million retired*
- *According to the UN data, the working age population of Japan is projected to decline continuously from 87.2 million in 1995 to 57.1 million in 2050*
- *To keep the size of population at the level of 2005, the country would need 17 million immigrants up to 2050*
- *By 2050, the immigrants and their descendants would total 22.5 million and comprise 17.7% of the population.*

## Immigration

- *France: 11.8 million (19%)*
- *Germany: 16.3 million (20%)*
- *Japan: 2,066,445 (1.63%)*
  - *Asia 1,676,140*
    - *Chinese 648,980*
    - *Koreans 519,737*
    - *Philippines 209,137*
  - *Europe 59,241*
  - *US 49,979*

## Abenomics

- *"Taking Back Japan"*
- *Towards more liquid labor market*
- *SEZ in Fukuoka as a testing ground*
- *Abe: "...changes in labor law not to be part of any forthcoming policy package." (FT, Oct. 2013)*



## The Ministry of Health, Labor and Welfare

- *"...no civilized country has two sets of employment rules"*
- *"...easing employment regulations in limited areas runs counter to the Constitution's guarantee of equality before the law"*



[4]

## Abenomics II

- A new strategy from maintaining employment security towards job changes
- Rewriting rules and employment contracts to permit "varied types of regular employment."
- Promotion of "limited regular employment"



## Directions of Change

Relaxing dismissal law- "four requirements" are becoming "four factors"?

Meaning of "common sense of society" may change?

What you see may not be what you get - vagueness of standards

Percentage of companies planning to increase the ratio of regular employees exceeds the percentage of companies planning to increase the ratio of non-regular employees (Analysis of the Labour Economy 2013, MHLW)

## Future

- Increasing number of non-regular employees?
- Shortage of young employees
- Greater participation of women
- Raising retirement age further?
- What kind of employment system Japan really needs?



## Thank you!



*In the Hollow of a Wave off the Coast at Kanagawa*

Hokusai (1760 - 1849)  
Series: 36 Views of Fuji



University of Donja Gorica  
[www.udg.edu.me](http://www.udg.edu.me)

**International Conference**

The Role of Law in the Era of Globalization

University of Donja Gorica

Podgorica, Montenegro

20 March 2015

Globalization is a process significantly altering the everyday of peoples' lives and affecting the way institutions function. All-encompassing changes can be observed in all of the fields, from politics, economy, law but also in culture, sport, leisure and similar domains. Due to the fact that globalization is making strong impact on economic, social and technological activity, law represents important segment in influencing international structures, governance and legal systems at national but also international level. The effect is a tremendous increase in international, regional and national regulation and cross-national legal dialogue.

The aim of the Conference is to bring together the researchers from different fields to contribute to the debate on issues concerning globalization and law. The topics cover areas that are put under scrutiny by national and international communities and represent significant matters open for discussion. The scope of studies is wide and multidisciplinary, covering aspects of national and international law, mainly from Asian and European perspectives and case studies. Some of the topics relate to historical studies, looking into embeddedness of modern law in historical roots but also covering different spheres of current problems and issues related to specific fields.



University of Donja Gorica  
[www.udg.edu.me](http://www.udg.edu.me)

#### Agenda

- 10.00: Presentation of the University of Donja Gorica, introduction to the Campus**  
**10.20: Opening of the Conference,**  
Vice Rector, prof. dr Đorđije Borozan
- 10.35: Prof. dr Emi Matsumoto (Comparative Law, Aoyama Gakuin University, Tokyo)**  
Boissonnarde and Bogisic - A parallel study
- 10.50: mr Milana Čabarkapa (Company Law, University of Donja Gorica, Podgorica)**  
Veil Piercing in Montenegrin Company Law
- 11.05: Prof. dr Takashi Oka (Civil Law, Gakushuin University, Tokyo)**  
Korean Customs and Codification of Korean Civil Code by Professor Kenjiro Ume (1960-1910)
- 11.20: Doc. dr Jadranka Kaluđerović (International Economy, University of Donja Gorica, Podgorica)**  
Globalization, Informal Rules and Development
- 11.35-11.55: Coffee Break**
- 11.55: Meeting with the Rector of the University of Donja Gorica, prof. dr Veselin Vukotić**
- 12.20 mr Bojan Božović (International Private Law, University of Donja Gorica, Podgorica)**  
Private International Law of Montenegro and European Private International Law
- 12.35: mr Branko Bošković (Political Sociology, University of Donja Gorica, Podgorica)**  
Legal Framework on Political Parties in Montenegro: Populism and European Perspective
- 12.50: Prof. dr Časlav Pejović (International Private Law and Comparative Law, Kyushu University, Fukuoka)**  
Revisions of Japanese Employment Law: Towards Greater Economic Efficiency
- 13.05: mr Mirko Đuković (European Law, University of Donja Gorica, Podgorica)**  
Costs and Benefits of the EU Accession: Legal Framework
- 13.05-13.50: Discussion**
- 14.00: Lunch**
- 16.00: Departure to the airport**

**International Conference  
The Role of Law in the Era of  
Globalization**

University of Donja Gorica  
Podgorica, March 20, 2015

**Boissonade and Bogisic  
– A parallel study-**

Emi MATSUMOTO  
Aoyama Gakuin University, Tokyo, Japan  
Monday, March 20, 2015

**1.  
Aim of our visit**

**Comparative Law Project  
Faculty of Law, Aoyama Gakuin University**

Research Institute of Legal Cases/  
Institut de Jurisprudence

**“Comparative study of Customary law  
from the perspective of Mixed Legal System”**

**“Comparative study of Customary law  
from the perspective of Mixed Legal System”**

- Mixed Legal System
- Customary law
- Comparative study

**Mixed Legal System**

**Narrow definition:**  
Combination of Civil law and Common law

**Wider definition:**  
Combination of any different laws

- Is Japanese law a mixed legal system?

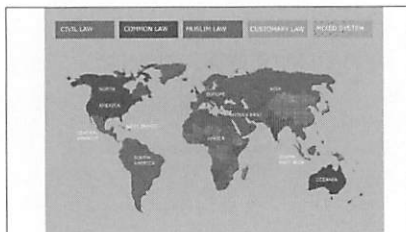
[2]

Juriglobe University of Ottawa

<http://www.juriglobe.ca/>

Five categories were selected for the creation of this Website on World Legal Systems: Civil law, Common law, Customary law, Muslim law and Mixed law systems, the latter referring not to a single system but to a combination of systems.

- Montenegro Civil law
- Japan Mixed Civil law/Customary



**MIXED SYSTEMS OF CIVIL LAW AND CUSTOMARY LAW**

•BURKINA FASO	•KOREA SOUTH
•BURUNDI	•KOREA NORTH
•CHAD	•MADAGASCAR
•CHINA (HONG KONG and MACAU)	•MALI
•COTE D'IVOIRE	•MEXICO
•COTE D'IVOIRE	•NICARAGUA
•ETHIOPIA	•NIGER
•EQUATORIAL GUINEA	•RWANDA
•GABON	•SAO TOME AND PRINCIPE
•GUINEA	•SENEGAL
•GUINEA-BISSAU	•SOUTH AFRICA
•JAPAN	•TUNISIA
	•ZAMBIA

**CUSTOMARY LAW SYSTEMS AND MIXED SYSTEMS WITH A CUSTOMARY LAW TRADITION (Juriglobe)**

- Today, hardly any political entity in the world operates under a legal system which could be said to be typically and wholly customary. Custom can take on many guises, depending on whether it is rooted in wisdom born of concrete daily experience or more intellectually based on great spiritual or philosophical traditions. Be that as it may, customary law (as a system, not merely as an accessory to positive law) still plays a sometimes significant role, namely in matters of personal status, in a relatively high number of political entities with mixed legal systems. This obviously applies to a number of African countries but is also the case, albeit under very different circumstances, as regards the law of China or India, for example.

Customary Law

- Is Japanese Law a mixed law of the Civil law and the customary law?

2.  
Boissonade and Bogisic  
– A parallel study-



## Valtazar Bogišić

• 20 December 1834  
Cakvat, Kingdom of  
Dalmatia, Austrian Empire

• 24 April 1908 (aged 73)  
Fiume, Austria-Hungary



## Valtazar Bogišić

- "a prominent follower of the Historical School"
- a pioneer in the area of sociology of law
- president of the *International Institute of Sociology*, 1902
- questionnaires for collecting legal customs with about 300 questions
- a new ambitious questionnaire, which had 2000 questions

## Contacts with Japan

- Japanese delegation to the Expo at Paris met Bogišić at Consular's office of Japan at Paris; Bogišić, asked for advice for the future codification in Japan, he told to exclude family law from the codification of Civil law.

*General Property Code for the Principality of Montenegro 1888*

- 1031 articles
- last chapter (VIII), containing about 50 national legal proverbs

*Code général des biens  
pour la Principauté de  
Monténégro de 1888 :*  
(rédigé par V. Bogišić) /  
traduit par Rodolphe Dareste  
Paris, 1892

<http://gallica.bnf.fr/ark:/12148/bptk56625946>

## Reference by the Japanese legislator

- In preparation of 287 articles out of 1044 of Japanese Civil Code, the General Code of Property of Montenegro was referred too.  
cf. Preparatory documents of Japanese Civil Code article by article

[ 4 ]

### Contacts with Japan

- Bogisic and Masayoshi MATSUKATA (Expo Paris 1878)
- Shigeto HOZUMI and representative of Montenegro (Berlin)
- Bogisic and Boissonade
- Bogisic and Kenjiro UME
- Serbian Code / Code Boissonad (Postponment champagne)
- Bogisic's work on customary law and Study of customary law in early Meiji Japan (Shiro ISHII)

Gustave E. BOISSONADE  
1825-1910  
Legal advisor to Japanese  
government:

1873-1895



Gustave E. BOISSONADE 1825-1910  
Legal advisor to Japanese government: 1873-1895

- 1845 (Sorbonne)
- 1849 licence en droit
- 1852 docteur en droit
- 1864 agrégé  
professeur à Grenoble : droit romain
- 1867 professeur agrégé à Paris : droit criminel, droit constitutionnel,  
économie politique

### Works of Boissonade before coming to Japan

- De l'effet des arrêts dans la vente sous Justinien, 1866
- De la réserve héréditaire chez les Athéniens, 1867
- Le nouveau code civil italien comparé au Code Napoléon, 1868
- La réserve héréditaire dans l'Inde ancienne et moderne, 1870
- De la liberté de tester, 1872
- Histoire de la réserve héréditaire et de son influence morale et économique, 1873 (prix de l'Académie)
- Histoire des droits de l'époux survivant, 1874 (Prix de l'Académie)

Gustave E. BOISSONADE 1825-1910  
Legal advisor to Japanese government: 1873-1895

- 1873 came to Japan, at the age of 48, attached to the Ministry of Justice
- 1874 started teaching at the Law School attached to the Ministry of Justice → publication in Japanese of his lecture 1877
- 1876 worked also for the Ministry of Foreign Affairs, and for the Senate
- 1877 started drafting the Penal Code and the Code of criminal instruction  
→ completed in 1882
- 1879 started drafting the Civil Code
- 1880 lectures of his draft of the Civil Code at the School of Ministry of Justice
- 1890 lectures at the Imperial University (Tokyo University)

### 民法典 Code Civil de l'Empire du Japon

- 1879 drafting started
- 1880 lecture on the drafts
  - 1888 text of the Code completed
  - 1889 Commentary completed
  - Submitted to the Commission of Japanese members only, for translation, investigation and modification
- 1889 = "Debates on Codification"
- 1890 adopted by the Senate and approved by the Privy Council  
Publication on April 21 to enter in force in January 1893
- 1890 lecture on the Civil Code at the Imperial University
- 1892 postponement of enforcement (enacted by Parliament)
- 1893 Commission for the modification of the Code
- Accomplishment of the "Meiji" Code 1896, 1898



[6]

Further study of comparative aspect

