ISSN 0289-8101

Nihon University

COMPARATIVE LAW

Vol.41 2025

Comparative Law Institute
Nihon University Tokyo

Nihon University

COMPARATIVE LAW

Vol. 41

2025

Comparative Law Institute
Nihon University Tokyo

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Outline of the Guideline for Debt Consolidation of Victims of Natural Disasters and Its Characteristics

*Takahiro Matsushima**

I. Purpose of this article

This article provides an overview of the Guidelines for Debt Consolidation of Victims of Natural Disasters (hereinafter referred to as GL)[1] and explains its characteristics. GL is a rule used by individual debtors when conducting private liquidation. When an individual debtor is unable to repay past debts such as mortgages and renovation loans due to the impact of a natural disaster, they may use GL as a rule for debt consolidation based on an agreement with creditors (mainly financial institutions). Private arrangements using GL are understood as a type of so-called standard-based out-of-court workouts.

The author, as a member of Nihon University Disaster Research Society (NUDS), is engaged in disaster research, mainly from the perspective of law. Whereas Japanese disaster regulations are beneficial to the disaster legislation of other countries and is attracting attention, it is difficult for foreign researchers to access them due to the language barrier. Moreover, whereas English translations of statutes and major judicial cases have been prepared, translations of disaster related soft law are difficult to obtain.

Therefore, this article will first introduce GL, which is a type of soft law.

II. Overview of GL

1. The Nature of GL

GL is a standard for fair and prompt debt consolidation, and was formulated by financial institutions, the Japan Federation of Bar Associations, commercial and industrial organizations, and other related parties through repeated consultations with neutral and impartial academics. GL, though not legally binding, is expected to be voluntarily respected and complied with by eligible creditors, debtors, and other interested parties, such as financial institutions.

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1) The full text of the Natural Disaster Guidelines can be found below (In Japanese language only).
https://www.dgl.or.jp/guideline/

2. GL stakeholders

The stakeholders involved in GL are as follows.

(1) Eligible creditors (ECs)

The eligible creditors (hereinafter referred to as ECs) are persons whose rights are scheduled to be changed accordingly if debt consolidation based on GL is established through a special conciliation procedure. They are for example, banks, credit unions and other financial institutions, and credit guarantee associations etc. (GL2 (2), 3 (2)). Other creditors, if necessary for debt consolidation based on GL, may be included. ECs shall be required to cooperate in good faith in debt consolidation according to GL (GL 2(2)).

(2) Debtors

The debtor is an individual and meets all of the following requirements. The debtor may be offered debt consolidation under GL (GL 3 (1)).

①	They are unable to repay mortgages, home renovation loans, business loans, and other past debts due to the impact of a disaster on their living infrastructure such as their residence and workplace, business premises, business facilities, business partners, etc., or it is expected that they will not be able to repay its prior debts in the near future.
②	They are honest about repayment and their property status (including the situation of debts).) to ECs.
③	Before the disaster occurred, they committed no act that constituted an acceleration clause for the debt owed to ECs, except when the ECs have given their consent.
④	If debt consolidation is carried out based on GL, it is expected to be economically rational for ECs, as there is for example a possibility of obtaining the same amount or more as the bankruptcy proceedings and civil rehabilitation proceedings.
⑤	If the debtor is a businessperson who intends to rebuild or continue their business, the business must be financially viable and it must be feasible to rebuild it with the support of ECs.
⑥	The debtor has no relationships with an anti-social force nor is there any risk of such a relationship arising.
⑦	There are no grounds for disallowance as stipulated in Article 252, Paragraph 1 of the Bankruptcy Law (excluding Item 10).

(3) Registered Support Specialists (RSS)

A registered support specialist (hereinafter referred to as RSS) is a person who is an expert (lawyer, certified public accountant, tax accountant,

real estate appraiser) and has been registered as a support professional by the organization to which he or she belongs (namely the Japan Federation of Bar Associations, Japan Institute of Certified Public Accountants, Japan Federation of Tax Accountants Associations, or Japan Federation of Real Estate Appraisers Associations: (hereinafter referred to as the management organization)) (GL 4(1)). The RSS performs the following tasks (GL 4(2)). RSSs are defined as those who assist in proceedings under GL from a neutral and impartial standpoint, with no interest in either the debtor or the creditor (GL 4(1)). They perform the following tasks.

①	Assistance in filing debt consolidation requests.
②	Assistance in preparing and submitting documents required for debt consolidation applications.
③	Assistance in drafting conciliation clauses.
④	Support for comprehensive coordination among stakeholders in the preparation of draft conciliation clauses.
⑤	Submission of the proposed Conciliation clause to ECs Support for explanations to ECs subject to the proposed conciliation clause.
⑥	Preparation of necessary documents for special conciliation petitions Support for the implementation of procedures from the filing of a petition for special conciliation to the conclusion of the special conciliation procedure.

3. The Procedures of GL

(1) Preparatory procedures for debt consolidation based on GL

If the debtor intends to file a request for debt consolidation, he or she shall request the largest creditor (the principal creditor) to initiate proceedings under the GL (GL5 (1)). However, the claims of the principal creditor are limited to those that are intended to be subject to debt consolidation based on GL.

The principal creditor who receives the request shall provide a written expression of consent or disagreement to commence proceedings under the GL within 10 business days (GL 5(1)). In such cases, the principal creditor shall not express disagreement unless it is clear that the debtor does not meet any of the prescribed requirements (GL 3 (1)) (GL 5(1)). In addition, if the main creditor expresses their disagreement, they must specify the reason in the relevant document (GL 5(1)).

The debtor, when receiving a written consent from an EC, requests the management organization to commission an RSS who belongs the organization (GL 5(2)).

The organization selects a suitable person who has no interest in either the debtor or ECs from among the RSSs which it belong to it, and recommends them to the management body (the Debt Consolidation Guidelines for Victims of the Great East Japan Earthquake and Natural Disasters) (GL5(2)). The management body that receives the recommendation will promptly commission an RSS based on the recommendation (GL 5(2)).

The commissioned RSS shall notify the debtor of the commission within three working days from the date of receipt of the commission by attaching a document certifying the fact of the commission (GL5 (3)).

(2) Start of debt consolidation

The debtor shall submit a written request to all ECs for debt consolidation under the GL on the same day (GL6 (1)).

ECs may object to debt consolidation under the GL only if any of the following apply, after consulting with the RSS in advance (GL6 (4)):

①.	If it is found that the debtor clearly does not meet the requirements of GL 3 (1).
②.	If the debtor is found to have violated GL 7 (1) ① or ②.
③.	If there are obvious deficiencies in the required documents but they are not corrected within a reasonable period of time.

The objection shall be made by simultaneously sending a written statement stating the reason for the objection to the debtor, the RSS, and all ECs other than the EC. Even if the EC does not raise an objection, the EC is not obliged to agree to the proposed conciliation clause.

In addition, the debtor shall submit the necessary documents (property inventory, creditor list, etc.) to all ECs (G L6 (2)). The debtor may carry out the procedures under GL6 (1) and GL 6 (2) through RSS (GL 6 (3)).

From the time the request (GL 6 (1)) is made, the period of suspension (GL7) begins (GL 6 (3)).

(3) Termination of debt consolidation

Debt consolidation under the GL shall be terminated on the earliest of the following dates (GL6(5)):

①	The date on which six months have elapsed since the date of the application for GL6 (1). In addition, after the petition for special conciliation is filed, the date on which the special conciliation procedure is completed.

②	The date on which the debtor sends a written statement to all ECs stating that it will withdraw the debt consolidation based on the GL.
③	The date on which the objection written by the EC reaches the debtor, the RSS and all other ECs.
④	The date on which the debtor sends a written statement about the failure of debt consolidation to all ECs.

(4) Suspension

As mentioned above, the period of suspension (GL7) begins from the time of the request (GL 6 (1)) (GL 6 (3)). The period of suspension is until the date on which the debt consolidation under the GL is completed (GL 7 (2)).

During the period of suspension, all ECs and the debtor shall refrain from the following acts (GL 7 (1)):

①	The debtor shall not dispose of their assets and shall not bear new debts, except in the ordinary course of life or business, except in the case of the consent of all ECs. However, ECs cannot disagree without reasonable grounds.
②	The debtor shall not repay any ECs (including repayment in kind), or conduct any offsetting, acts related to debt extinction, or provision of physical security.
③	ECs must maintain a "credit balance" on the date the suspension begins. No EC shall improve its relative position to the debtor in relation to other ECs. ECs are forbidden from doing any of the following: ・Acts related to debt extinction (receiving repayment, offsetting, etc.) ・Seeking additional physical and personal security ・Executing a security interest ・Petitioning for compulsory execution, provisional seizure, provisional injunction, and commencement of legal bankruptcy proceedings

In addition, the suspension is not treated as a default event specified in the bank transaction agreement, etc. (GL 7 (1)).

Additional loans during the period of suspension shall be made as necessary within the amount determined by the consent of all ECs and in the manner prescribed thereof. Receivables from additional loans are repaid from time to time in priority over claims held by the ECs (GL 7 (3)).

(5) Draft Conciliation Clause

The debtor shall prepare a draft conciliation clause within three months of the application and submit it to all ECs via an RSS (GL 8 (1)). However, if necessary, the debtor may extend the deadline for submitting the proposed conciliation clause to a range not exceeding three months by notifying all ECs of the reasons for the extension of the deadline for submitting the proposed conciliation clause (GL8(1)).

The GL stipulates in detail the contents to be included in the conciliation clause, including ① Cases where the debtor is a non-business entity (mortgage debtor) or sole proprietor, and ② When the debtor is a sole proprietor and intends to rebuild or continue the business by repaying future revenues generated from it. Here we will introduce only the overview (GL 8 (2)).

In ①, the draft conciliation clause must include, in principle, the following:

a.	The reason why the debt could not be repaid (including the content of the impact of the disaster).
b.	Property status (the appraisal of property is carried out as a disposal of property in principle for property by self-declaration of the debtor.)
c.	Debt repayment plan (within five years in principle).
d.	Asset conversion and disposal policy.
e.	The content of the request if a request is made to the EC for debt reduction, deferral of deadlines, or other changes in rights.

If a debtor who is expected to earn income continuously or repeatedly in the future requests the EC to reduce or exempt the debt along with a grace period by means of installment payment, the total amount of repayment to the EC based on the conciliation clause shall be determined according to repayment ability based on the actual living conditions of the debtor, and taking into account the income and assets of the debtor (GL8 (2)).

In addition, the content must be expected to be financially rational from the point of view of the EC by, for example, including the prospect of the debtor achieving a recovery equal to or greater than the expected recovery through bankruptcy proceedings (GL 8 (2)).

In ②, in addition to the above, the following must be included (GL 8 (2)).

a.	Business Outlook (Sales, Costs, Expenses)
b.	Income and Expenditure Planning

c.	Even before the disaster occurred, if business profits were already in the red the cause of the deficit and the measures to eliminate it should be described, and the content should aim to achieve a surplus within approximately five years from the year following the year of the establishment of the special conciliation. However, it does not prevent the content from making a reasonable period beyond this.

In this case, too, the content must be expected to be financially rational from the point of view of the EC by, for example, including the prospect of achieving a recovery equal to or greater than the expected recovery through bankruptcy proceedings (GL8(2)).

In the case of requesting a reduction or exemption of debts from the EC, the content of the proposed conciliation clause shall include an agreement by the debtor to the EC regarding the matters specified in (i) and (ii) as follows (GL8(3)).

(i)	As of the date of drafting the conciliation clause, the debtor pledges that they have no assets with a market value of 200,000 yen or more or liabilities not listed in the creditor list other than the property listed in the property inventory.
(ii)	If the debtor is found to have failed to meet the requirements or is found to be in breach of the pledge, the debtor agrees in advance to pay the full amount of the debt immediately, regardless of the agreement to forgive the debt or postpone the deadline, unless there are reasons that cannot be attributed to the debtor.

The adjustment of rights relations in the proposed conciliation clause must be equal among ECs. However, this does not apply if there is a difference between ECs that does not harm equity (GL8 (4)).

(6) Submission and explanation of the proposed conciliation clause

The debtor, with the assistance of an RSS, shall conduct prior consultations with the ECs before submitting the proposed conciliation clause and strive to obtain the understanding of the proposed conciliation clause among the ECs (GL 8 (6)).

After submitting the proposed conciliation clause, the debtor shall explain the proposed conciliation clause to all ECs, answer questions and exchange opinions (GL 8 (7)). The explanation of the proposed conciliation clause can also be made by issuing a written statement with the consent of the EC (GL 8 (7)). The debtor may also seek assistance from an RSS if necessary, such as an explanation of the proposed conciliation clause (GL 8 (7)).

The EC shall respond in writing to the debtor and the RSS within one month after the above explanation of their agreement or prospect of agreement or disagreement with respect to the proposed conciliation clause (GL 8(8)). The RSS shall compile the results and promptly notify all ECs (GL 8 (8)).

Unless complete consent or prospect of consent from the EC is not obtained for the proposed conciliation clause, and unless consent or prospect of consent cannot be obtained within a reasonable period of time even after discussing appropriate measures such as changes to the proposed conciliation clause, debt consolidation based on the GL will not be established (GL 8(9)).

(7) Petition for Special Conciliation

The debtor, who has obtained consent or prospective consent from all ECs, shall file a petition for special conciliation in the summary court (GL 9 (1)).

In the event that the special conciliation procedure is terminated, the debtor shall obtain from the court a statement of the conclusion of the conciliation and other documents certifying the termination of the special conciliation procedure, and promptly notify the RSS of the result with a copy of the document certifying the completion of the special conciliation procedure (GL 9 (2)).

III. Features of GL

The features of GL are as follows.

1. Standard-based Out-of-Court Workout

Standard-based out-of-court workout refers to cases in which private arrangements are based on a certain framework. In the case of standard-based out-of-court workout, a fair and neutral third party (expert) is generally involved. The characteristics of GL as standard-based out-of-court workout are summarized as follows.

(1) Involvement of a fair and neutral third party (expert)

An RSS, as an expert (GL 4 (1)), shall participate in GL and perform GL-related work (GL 4 (2)). The fairness and neutrality of RSSs is guaranteed by registration (GL 4 (1)).

(2) Debt consolidation based on standard

In GL, it is assumed that the EC shall cooperate in good faith with the debt consolidation by the GL (GL 2 (2)). Reflecting this, the main creditor who received the request is required to express their consent or disagreement in writing (GL 5 (1)). The main creditor must not express disagreement unless it is clear that the request does not meet any of the prescribed requirements (GL3 (1)) (GL5 (1)), and if even then, they express their dis-

agreement, it must be clearly stated in the document (GL 5 (1)).

After the debt consolidation has begun, there are only a limited number of cases where the EC can raise an objection, in which case it is required that they consult with an RSS in advance (GL6 (4)).

The period of suspension begins from the request, and during the period of suspension, ECs refrain from taking prescribed actions related to collection, and once the suspension begins, it is not treated as a reason for an acceleration clause in the bank agreement, etc. (GL7(1)).

2. ECs and Debtors

(1) Limitation of ECs to financial creditors

In GL, the ECs are limited to financial creditors such as financial institutions. They are required to cooperate in good faith with the GL's debt consolidation (GL 2(2)). Formally, it is possible to bind financial institutions to the GL rule, and in effect, it is intended to free individual debtors from bank loans.

(2) Limitation of debtor to individuals

In GL, the debtor is limited to individuals (GL 3(1)). This is because GL aims to free personal debtors from bank loans. Debt consolidation of corporations is entrusted to the normal standard debt consolidation procedure. There are no rules specifically for debt consolidation of corporations affected by natural disasters.

3. Use of Special Conciliation procedures

After debt consolidation based on GL, a petition for special conciliation is finally filed (GL9 (1)). Special conciliation is a procedure that aims to adjust the interests related to the financial debts owed by the specified debtor in order to promote the economic revitalization of the debtor who is at risk of being unable to repay the debt, and is based on the "Act on Special Conciliation for Expediting Arrangement of Specified Debts" (Special Conciliation Act, (hereinafter referred to as "the Act")).

When an agreement is reached between the parties in a special conciliation and it is stated in the record, the special conciliation is deemed to have been established, and the description has the same effect as a judicial settlement (Article 22 of the Act, Article 16 of the Civil Mediation Act).In other words, the statement in the settlement agreement has the same effect as the

final judgment (Article 267 of the Civil Procedure Code)[2] and becomes a Title of Obligation (Article 22, Item 1 of the Civil Execution Act)[3]. This ensures the effectiveness of out-of-court workouts based on GL.

In addition, in special conciliation, Article 17 of the Civil Mediation Act applies mutatis mutandis to Article 20 of the Act. Article 17 of the Civil Mediation Act allows the court to make flexible decisions based on guardianship and discretionary judgment (Article 17 Decision)[4]. It can be said that GL uses special conciliation because it has the potential to take advantage of the Article 17 decision.

IV. Conclusion

This paper explains the outline and characteristics of GL from the perspective of introducing Japan's disaster legislation. I hope that this paper will be of some help to foreign researchers and practitioners who are interested in Japan's disaster legislation.

* This work was supported by the research grant of Nihon University, "Development of a Cyber-Physical System Aimed at Establishing a Resilient and Resident-Friendly Regional Collaboration Hub for Disaster Preparedness."

2) Article 267 of the Civil Procedure Code stipulates as follows:
Article 267
When a settlement or a waiver or an acknowledgement of a claim is entered in the record, that entry has the same effect as a final and binding judgment.

3) Article 22, Item 1 of the Civil Execution Act stipulates as follows:
Article 22
Compulsory execution shall be carried out based on any of the following (hereinafter referred to as the "title of obligation")
Item 1: A final and binding judgment

4) Article 17 of the Civil Mediation Act stipulates as follows:
Article 17
If mediation carried out by a mediation committee is unlikely to be successful, and the court finds it appropriate, it may, by its own authority and to an extent that does not contradict the objectives of the parties' petitions, issue a necessary order to resolve the case after hearing the opinions of the civil mediation commissioners composing the mediation committee, giving consideration to equitable treatment of the interests of both parties, and taking into account all relevant circumstances. Through this order, the court may order the payment of money, delivery of an object, or any other provision of economic benefit.

Initiatives for BCP by Government Agencies and Companies in Japan

*Takuya Ohkubo**

I. Introduction

Japan is a country highly prone to natural disasters, including typhoons, floods, and earthquakes, which can occur at any time. It is essential to prepare for disasters in advance, and business continuity planning (BCP) exist for this very purpose. BCP refers to a plan that stipulates how to respond to ordinary times and emergencies so that an organization like a company can continue its business in the event of an emergency such as a disaster.

Organizations that should establish BCP include not only national and local administrative agencies, but also companies. From the perspective of the author specializing in commercial law and company law, this paper presents the efforts of government agencies (including the Financial Services Agency (FSA)) and companies (including corporations) regarding BCP in Japan[1].

II. BCP as determined by the FSA

1. Basis for establishing BCP by government offices

It is necessary to plan how to respond so that national and local government agencies and companies can function appropriately even in the event of a disaster. The Basic Act on Disaster Management requires designated administrative agencies such as the Cabinet Office and the FSA to formulate disaster management operation plans (Article 36, Paragraph 1 of the Basic Act on Disaster Management). The purpose of this Act is to protect

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1) For the consideration of Japanese Law, see Chise Onodera(ed.), 'A Study of Basic Guidelines for Reconstruction' Nihon Hogaku Vol. 90 No. 4 (2025) pp. 51-86.

the national land and the lives, bodies, and property of citizens from disasters by formulating basic principles, establishing the necessary system through input by the national government, local governments, and other public institutions and, in addition to clarifying where responsibilities lie concerning disaster management, drawing up a basic policy on the necessary disaster control measures. This includes the formulation of disaster management plans, disaster management, emergency disaster control measures, disaster recovery efforts, and financial measures concerning disaster management. These develop and promote a comprehensive and systematic disaster management administration and contribute to the preservation of social order and securing public welfare (Article 1 of the Basic Act on Disaster Management).

Based on this disaster management operation plan, the FSA has established guidelines for disaster management (the FSA Disaster Management Operation Plan[2]). Finance is a device that plays a circulatory role in the economy and people's lives by properly supplying funds, and it is necessary to ensure that the circulation of funds can be carried out smoothly even in emergencies such as disasters. In addition, the FSA has established guidelines for BCP[3].

This paper analyzes the outline of the BCP guidelines established by the FSA and the responses of the FSA and financial institutions to them. Specifically, it deals with the FSA Disaster Management Operation Plan and the outline of the FSA's version of the BCP.

2. FSA's goals and BCP

Even in the midst of rapid changes in the financial environment, the FSA aims to increase the welfare of the people through sustainable growth of companies and the economy and stable asset formation by balancing (1) the stability of the financial system and the demonstration of financial intermediary functions, (2) user protection and user convenience, and (3) market fairness and transparency and market vitality. The remit of the FSA is to work on financial administration[4].

2) Financial Services Agency Disaster Management Operation Plan (https://www.fsa.go.jp/news/r2/sonota/20210531-2/disaster_management_operation_plan_202105.pdf [Last viewed December 25, 2025]).

3) For the BCP (Business Continuity Plan) refer to, https://www.fsa.go.jp/policy/bcp/ [Last accessed November 1, 2025]. These guidelines include the Financial Services Agency's BCP (Responses to an Earthquake Directly Under the Tokyo Metropolitan Area) and the Financial Services Agency's BCP (Novel Influenza Response).

4) For an overview of the Financial Services Agency, refer to https://www.fsa.go.jp/common/about/fsainfo.html [Last accessed November 1, 2025].

The FSA's BCP has set a general outline in the disaster management operation plan mentioned in 1, and has individually established plans for responses to an earthquake directly under the Tokyo metropolitan area and responses to new strains of influenza. Here we will look at the FSA Disaster Management Operation Plan and responses to an earthquake directly under the Tokyo metropolitan area.

3. FSA Disaster Management Operation Plan

(1) Outline of the FSA Disaster Management Operation Plan

The outline of the FSA Disaster Management Operation Plan (FSA Instruction No. 25, January 6, 13) is as follows.

Chapter 1 General Provisions
Chapter 2 Establishment of a Disaster Management System
Chapter 3 Disaster Emergency Measures and Disaster Recovery
Chapter 4 Disaster Management Enhancement Plan for the Nankai Trough Earthquake
Chapter 5 Earthquake Disaster Management Measures Promotion Plan for Trench-type Earthquakes Around the Japan Trench and Kuril Trench
Chapter 6 Criteria for Preparation of Regional Disaster Management Plans
Chapter 7 Supplementary Provisions

The purpose of the FSA Disaster Management Operation Plan is to establish the basics of "measures to be taken regarding disaster management" for the affairs under the jurisdiction of the FSA, and to set out the standards for the preparation of regional disaster prevention plans (Article 1 of the FSA Disaster Management Operation Plan)[5]. Measures to be taken regarding disaster management include measures necessary for the FSA and financial institutions to recover from damage as soon as possible and to continue the minimum level of business necessary to maintain the functioning of the financial system in the event of a disaster, etc., and the addressee of the measures shall be the FSA and other administrative agencies and financial

5) The Financial Services Agency's Disaster Prevention Business Plan based on the provisions of Article 36, Paragraph 1 of the Framework Act on Disaster Countermeasures and Article 6, Paragraph 1 of the Act on Special Measures for Large-scale Earthquake Countermeasures.

institutions. The reason for these measures is to maintain a mechanism for the FSA, which serves as a command tower for recovering from damage and continuing operations after a disaster, and for financial institutions and others to provide funds through finance for recovery from disasters, so as to run the economy smoothly.

Financial institutions, etc. are financial institutions that handle deposits, etc., banking associations, etc. (associations whose members are financial institutions that handle deposits, etc.), insurance companies, small short-term insurance companies, electronic receivables record institutions, financial instruments business operators, financial instruments exchanges, financial instruments exchange associations, custodian and transfer institutions, transfer institutions, and clearing institutions (FSA Disaster Management Operation Plan Article 2, Paragraph 2, Item 2). Banks, financial instruments institutions, and settlement institutions will be heavily involved in the movement of funds, and insurance companies will be involved in reconstruction by paying insurance claims for damages.

(2) System development in the FSA Disaster Management Operation Plan

The FSA Disaster Management Operation Plan stipulates the development of systems in peacetime (Chapter 2) and the development of systems in an emergency (Chapters 3-5).

Regarding system development in peacetime, this mainly stipulates the response within the FSA, but its feature is that it stipulates that it will cooperate with financial institutions, etc. For example, it stipulates that the Bank of Japan and other related institutions should cooperate (Article 4, Paragraph 3 of the FSA Disaster Management Operation Plan), confirm contact methods with financial institutions in the event of a disaster (Article 6, Paragraph 3 of the FSA Disaster Management Operation Plan), and establish a system to enable the continuation of operations to the minimum level necessary for early recovery of damage and maintenance of the financial system in the event of a disaster (Article 8-2 of the FSA Disaster Management Operation Plan).

Regarding system development in an emergency, the FSA is required to provide information collection measures by implementing emergency measures and requesting reports from financial institutions. Measures related to the financial instruments trading business (Article 13 of the FSA Disaster Management Operation Plan) and earthquake countermeasures will also be established. The main issues for financial instrument transactions are the handling of financial products and the operation of the exchange's network system. Here, we will take up measures related to finance (Article 12 of the FSA Disaster Management Operation Plan) (earthquake counter-

measures will be described later in 4).

The priority items of the financial measures (Article 12 of the FSA Disaster Management Operation Plan) are as follows.

(i) Measures related to disaster-related loans (taking timely and accurate measures in consideration of the expediency of disaster victims, such as the establishment of a loan counseling center, simplification of examination procedures, speeding up loans, and deferring loan repayments, taking into account the situation of the disaster and the demand for emergency funds, etc.)

(ii) Measures for refund of deposits and premature cancellation (for depositors who have lost their deposit passbooks, notification seals, etc., to facilitate the refund of the savings of the victims by presenting a disaster certificate or other simple confirmation methods in accordance with the actual situation, and time deposits for disaster victims for whom it is deemed there is no alternative. The item describes taking appropriate measures such as mid-term termination of fixed savings funds, etc., or responding to loans using the deposits as collateral)

(iii) Measures related to bill exchange, businesses closed for holidays, etc. (referring to taking measures that take into account the expediency of disaster victims, such as exchanging bills or disposing of non-delivery in the event of a disaster, giving appropriate consideration to the business of financial institutions closed for holidays or outside of normal hours, and measures that take into account the expediency of disaster victims, such as refunding deposits at automatic teller machines, etc., with due consideration for the safety of customers and employees, even if business cannot be conducted over the counter).

Of these, (i) and (ii) are necessary measures to rebuild people's lives, and specific measures will be taken by the FSA to encourage financial institutions to respond to loans and deposits. (iii) is a measure required for business payments and online payments. Bill exchanges are settled at an electronic clearing house, and whether the online system is in operation or not, the technical problem of making an exchange based on paper bills arises. Automated teller machines will also depend on the operation status of online payments.

Since the FSA Disaster Management Operation Plan is stipulated only in general terms, it is not clear what will happen to the online system. However, since financial transactions and financial instruments transactions are online and data is connected through networks, it is necessary to establish a system to ensure that the network can be quickly restored for business continuity.

4. FSA's BCP Responses to an Earthquake Directly under the Tokyo Metropolitan Area

The FSA's BCP (Tokyo Metropolitan Earthquake Response, June 23, 2023) was formulated to maintain the function of the financial system, which is the basic infrastructure of the Japan economy, in the event of frequent earthquakes in Japan[6].

The basic policy of the FSA's BCP is to promote business continuity based on the following policies (i) and (ii) in order to maintain the functions of the financial system in the event of a possible disaster, etc.

(i) The FSA will strive to preserve the financial assets of the people, avoid as much as possible the interruption of people's lives and private financial and economic activities, and strive for their early recovery.

(ii) In order to ensure the business continuity system of the FSA, it will ensure the safety of employees, establish the necessary enforcement system, and appropriately allocate administrative resources.

The outline of the FSA's BCP Responses to an Earthquake Directly under the Tokyo Metropolitan Area is as follows.

Chapter 1 Scope of Application, Expected Disasters and Damages, etc.
Chapter 2 Response in the Event of a Disaster
Chapter 3 Preparation for Business Continuity
Chapter 4 Review of Education, Training, and Plans

Looking at the countermeasures, immediately after the earthquake, the government specifies the time schedule for confirming and reporting safety, establishing a disaster response headquarters, gathering personnel, establishing an information management system, establishing an information dissemination system, disseminating information to overseas officials, and disseminating information related to the disaster situation of financial institutions to the persons and the agency in charge.

First, as a plan for employees within the FSA, it clarifies what should be done as an initial response for employees. Since it is impossible to tell when an earthquake will occur, the FSA stipulates measures not only during working hours but also outside working hours, including information for those who have difficulty attending the disaster response headquarters.

6) Financial Services Agency BCP 'Earthquake Response Directly Under the Tokyo Metropolitan Area' (https://www.fsa.go.jp/policy/bcp/07.23.pdf [Last viewed November 1, 2025]).

The FSA will establish a disaster response headquarters to build a system to respond to disasters, and establish a system for collecting and disseminating information sequentially.

In terms of the FSA's external relations, the following items stipulated in the implementation of emergency priority operations, etc. (Chapter 2, 3(2)) are important.

・How to check information at financial institutions
・Dissemination of information to the public, financial institutions, overseas authorities, etc.
・Operations related to requests for disaster victim support from financial institutions
・Plans related to the management and operation of EDINET

With regard to external countermeasures, the FSA will collect accurate information and provide it in conjunction with the Government Disaster Response Headquarters, the Ministry of Finance, the Bank of Japan, overseas authorities, etc. It will also collect information on the damage situation from financial institutions, exchanges, payment institutions, transfer institutions, etc., and provide support for maintaining and restoring their functions.

This guideline is based on the premise that the FSA building itself is earthquake-resistant. Information will be collected, opinions exchanged, and information disseminated within the FSA. However, the level of damage assumed by this guideline is an earthquake directly under the southern part of the city center with a magnitude of 7.3. It is also important to take measures in case the FSA itself is physically damaged or if employees are unable to attend the office due to damage to the transport infrastructure. In addition, now that financial transactions and financial instruments transactions have become online, it is necessary to further consider the extent to which measures to avoid damage to financial transactions and online trading centers for financial transactions and financial instruments transactions (construction of backup centers) can be further examined in response to earthquakes directly under the city center. If it is difficult to respond within the FSA, it will be necessary to establish a backup system and improve external relations in the event of recovery.

III. BCP specified by the enterprise

1. The necessity of formulating a BCP and the company's legal response

To what extent should companies formulate BCP?[7] If the formulation of a BCP is mainly in response to natural disasters, the occurrence of damage is considered to be caused by force majeure, and therefore may not be exempt from liability (proviso to Article 415, paragraph 1 of the Civil Code, etc.). In the first place, if a BCP is not formulated to prepare for damages incurred based on natural disasters, would directors and other managers be held legally liable based on this deficiency in planning?

In this regard, directors have a duty of care (Article 330 of the Companies Act, Article 644 of the Civil Code), and if there is negligence in performing their duties, such as violating that obligation, they may thus be liable (Articles 423 and 429 of the Companies Act, etc.)[8]. One example of negligence would be when a director does not take any measures as the manager of a company while recognizing the need to formulate countermeasures in anticipation of the occurrence of a natural disaster, or fails to take measures to protect the safety of employees (the duty of safety consideration[9]). As mentioned in I, a BCP is a plan to arrange how to respond both in normal times and emergencies so that the organization can continue its business in the event of an emergency such as a disaster. Therefore, if such a plan is made, it will be possible to avoid or reduce the occurrence of damage.

The development of a BCP is related to the creation of an internal control system. Internal control system[10] is a risk management system established according to the size and characteristics of the company's business in order to ensure that the company's business execution is carried out appropriately and efficiently. Companies that are required to establish an internal control system within a corporation are large companies and companies that establish committees (Companies Act Article 348, Paragraph 3, Items 4 and 4 (Companies without a board of directors as a large company), Article 362, Paragraph 4, Items 6 and 5 (a company with a board of directors that is a large company), Article 399-13, Paragraph 1, Item 1 (c) (Company with an Audit and Supervisory Committee), and Article 416, Paragraph 1, Item

7) See Yoshihiro Moriwaki, 'Business Continuity Plan and Corporate Law : Introductory Study Primarily about Relation with Duty or Liability of the Management' The Bulletin of Takaoka University of Law Bulletin No. 36 (2025) p. 97

8) See Takahiro Matsushima & Takuya Ohkubo (eds.), Lectures on Commercial Law 1: Company Law (2nd ed.), (Chuokeizaisha, 2023) pp. 193-214.

9) The duty of safety consideration is the obligation of the employer to take care to protect the life, health, etc. of workers from danger (the Supreme Court Judgment Dated February 25, 1975, Supreme Court Civil Case Reports, Vol. 29, No. 2, p. 143).

10) See Wataru Tanaka, Corporate Law (5th ed.), (University of Tokyo Press, 2025), p. 292.

1 (Companies with a Nominating Committee, etc.)). In a company that is required to do so, failure to establish a system will amount to a violation of laws and regulations (violation of the duty of care (Article 330 of the Companies Act, Article 644 of the Civil Code)).

The matters to be developed as an internal control system are stipulated in the Ordinance of the Ministry of Justice, which requires the establishment of the following (i) and (ii). (i)Systems regarding retention and management of information in relation to the execution of the duties of a director of the stock company and (ii) rules and other systems related to management of the risk of loss of the stock company (Article 100, Paragraph 1, Items 1 and 2 of the Regulations for Enforcement of the Companies Act, etc.). The development of systems such as information preservation and management and loss crisis management is a serious problem when companies and other organizations encounter disasters and other emergencies. For this reason, it can be said that the establishment of a BCP so that the business of the organization can continue is a matter that should be developed as an internal control system.

For example, if a company has not established an internal control system to respond to misconduct in the past, it is highly likely that it will violate the internal control system and violate the duty of care in good management. The same can be said about the formulation of BCP.

Is it thus unnecessary for small and medium-sized companies to establish an internal control system to create a BCP under the Companies Act? The formulation of a BCP is to create a plan that allows the organization to continue its business in the event of an emergency. While a large company can respond to emergencies in terms of funds and human resources, emergencies can have a significant impact on small and medium-sized companies and it can therefore be said that there is a considerable need for them to formulate BCP.

Companies that should establish an internal control system are required to formulate BCP, but there are disparities in size even among large companies, such as the location of the head office (whether or not it is in a disaster-prone location) and the number of branches and sales offices. Therefore, the level of BCP determined by the directors is part of the management

decision of the directors[11]. In formulating a BCP, each company should consider it individually as a matter of management decision and formulate a plan that it deems appropriate.

2. Corporate awareness of BCP

The government offices mentioned in the second section are highly public and are regulated by law, so BCP are being developed. In contrast, companies range from large companies to small and medium-sized enterprises.

Therefore, companies have different responses to the formulation of BCP. According to recent statistics (Teikoku Databank's "Business Continuity Plan (BCP) Survey"), the rate of corporate BCP formulation now exceeds 20.4%, exceeding 20% for the first time, and the number of companies that are placing importance on protecting human resources and corporate assets as a preparatory measure is increasing.[12] According to this data, the formulation rate of "large companies" is 38.7%, while for "small and medium-sized enterprises" it is only 17.1%, indicating that the gap is widening depending on the size of the company.

Large companies are active in developing BCP because they have enough funds and human resources, but small and medium-sized enterprises are not doing enough. Therefore, support measures are required for small and medium-sized enterprises.

The Small and Medium Enterprise Agency has established the "Small and Medium Enterprise BCP Formulation and Operational Guidelines" to support the formulation of BCP in small and medium-sized enterprises[13].

The BCP cycle described in this guideline consists of the following five "processes".

11) The principle of management judgment is the idea that if the business executive is not careless in the recognition of facts and the decision-making process in light of the situation at the time of the act, the business executioner will not be held liable for violating the duty of care (Article 330 of the Companies Act, Article 644 of the Civil Code) and the duty of fidelity (Article 355 of the Companies Act) (the Tokyo District Court Judgment Dated September 28, 2004, Hanrei Jiho No. 1886, p. 111; Kenjiro Egashira, Laws of Stock Corporations (9th ed.), (Yuhikaku, 2024), pp. 499-501).

12) Teikoku Databank 'Survey on Corporate Attitudes Towards Business Continuity Planning (BCP)' (June 20, 2025) (https://www.tdb.co.jp/report/economic/20250620-bcp2025/ [Last viewed November 1, 2025]). From this survey, the many reasons for not formulating BCP identified included "lack of skills" and "difficulty in securing human resources and time", and small and medium-sized enterprises also pointed out issues such as "not feeling the need" and "not being able to secure costs".

13) 'Small and Medium Enterprise BCP Formulation and Operational Guidelines' (https://www.chusho.meti.go.jp/bcp/index.html [Last viewed November 1, 2025]).

(1) Understand the Business
(2) Prepare for BCP and Consider Preliminary Measures
(3) Formulate a BCP
(4) Establish a BCP Culture
(5) Diagnose, Maintain, and Update BCP

Referring to these guidelines, each company should decide what kind of BCP it is best to formulate.

IV. Conclusion

This paper introduces the initiatives of government agencies and companies in Japan to address BCP. It can be said that government agencies are developing BCP and plans are being made to respond to large-scale disasters such as earthquakes. On the other hand, it is necessary to support the response of small and medium-sized enterprises in particular, and it can be said that there is room for improvement.

Although this paper explains the current situation in Japan, I believe that publishing it in English is highly significant. This is because there are many countries and regions that have all sorts of disasters like Japan, and material written in English rather than Japanese is required[14]. We hope that the contents of this paper will be useful for understanding Japan law and improving BCP.

*After submitting this paper, I came across Takayoshi Sugawara, 'A Study on Natural Disasters and Law: From the Perspective of Corporate Legal Affairs' Keio Law Journal No. 55 (2025) p. 13.

*This work was supported by the research grant of Nihon University, "Development of a Cyber-Physical System Aimed at Establishing a Resilient and Resident-Friendly Regional Collaboration Hub for Disaster Preparedness."

14) As part of the research of the Japan University Disaster Research Society (NUDS) (https://www.runit.cst.nihon-u.ac.jp/nuds/ [last viewed November 1, 2025]), the author, along with NUDS member, had the experience of being interviewed by Professor A. Ers in Bayra about 'Japan's Disaster Recovery Legislation'. According to the professor, Turkey is also a disaster-stricken country, and Japan's legal situation is being used as a reference for disaster recovery legislation. According to Professor Bayra, since it is impossible to grasp the content of the Japanese material available on internet sites and Japanese papers, he was asked to provide English materials.

Historical and Theoretical Insights for Coarse-Grained Evaluation in Theory of Justice

*Takashi Izumo**

Abstract

The maxim "suum cuique" (to each their due) involves assessing person-related features, but institutions rarely achieve precise measurement without errors or costs. They therefore depend on coarse-grained evaluation, which intentionally reduces evaluative resolution, and treat differences within a tolerated band as practically equivalent. A common form is categorical evaluation, in which continuous values are divided into a few status-relevant categories, potentially resulting in cliff-edge effects at the boundaries. While natural sciences have developed systematic methods to model and control error, normative inquiry has discussed analogous forms of simplification less systematically and without a unified framework. This paper offers a justice-based perspective on categorical evaluation and explores the normative issues it raises. It draws on historical insights from Aristotle's equity, Jesuit probabilism, Thomasius's cognitive pessimism, and Kant's regulative goals. By comparing cases from grading and threshold-based fiscal and eligibility rules, the paper argues that how banding should be assessed is not determined by banding itself. Instead, it depends on which evaluative factors are prioritized, such as efficiency and ease of administration, transparency, incentive effects, and the availability of boundary relief.

1. Introduction

On justice, Ulpianus, one of the most influential Roman jurists of the classical period, famously provided the following formulation preserved at the beginning of Justinianus's *Institutiones*: "Justice is the constant perpetual will to render to each their due" (Iustitia est constans et perpetua voluntas ius suum cuique tribuens).[1] "To each their due" can be interpreted as a directive to assign claims and burdens based on person-related features.

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1) Behrends, O. et al. (Hrsg.). (1997). *Corpus Iuris Civilis: Text und Übersetzung: Institutionen*, 2. Aufl., Heidelberg, C. F. Müller. S. 1.

However, before debating which features justify desert or entitlement, a fundamental formal challenge arises: no institution can distinguish arbitrarily fine differences at scale. In practice, institutions must coarse-grain what is owed: they define ranges and treat differences within those ranges as practically irrelevant for assessment and distribution.[2] University letter grades illustrate this: a 75 and a 73 both receive a C, while a 70 and a 69 can fall on opposite sides of a boundary (C vs. D).

In this paper, the author adopts coarse-grained evaluation as a central theme in normative inquiry. By coarse-grained evaluation, the author refers to institutional designs or assessment procedures that intentionally reduce evaluative resolution, treating some differences among cases as practically negligible for purposes such as assessment, allocation, or responsibility. Coarse-graining can take various forms. It may involve numerical approximation (e.g., rounding or quantization) or the use of intervals, bands, or other simplified representations. The paper emphasizes a prominent form of coarse-graining: categorization. By categorical evaluation, the author means the practice of mapping a continuous range of values onto a limited number of status-relevant classes or bands and treating differences within a class as equivalent for institutional purposes. In this context, categorization is not just about using a representative number for convenience. Assigning a representative value to a band is a separate process that can facilitate coarse-graining. However, the core feature of categorization is the assignment of status itself, especially when it determines eligibility, duties, or other qualitative outcomes. For example, when raising taxes on high-income earners, the externally conferred status of "high-income earner" itself plays a critical role.

This paper aims to provide a foundational inquiry into the role that categorical evaluation plays in theories of justice, outlined as follows. Section 2 formulates the problem of categorical evaluation and connects it to related themes in moral and legal thought. Section 3 compares the way errors are handled in the natural sciences with their treatment in normative inquiry, emphasizing the differences. Section 4 analyzes threshold-based eligibility rules in Japan's social insurance schemes and uses them to explore the cliff-edge phenomenon, characterized by sudden changes in status at a bound-

2) Izumo, T., and Weng, Y.-H. (2022). Coarse ethics: how to ethically assess explainable artificial intelligence. *AI and Ethics* 2(3):449–461. https://doi.org/10.1007/s43681-021-00091-y; Izumo, T. (2025). Introduction to coarse ethics: Tradeoff between the accuracy and interpretability of explainable artificial intelligence. In: Montag, C., and Ali, R. *The Impact of Artificial Intelligence on Societies.* Studies in Neuroscience, Psychology and Behavioral Economics. 155–167. https://doi.org/10.1007/978-3-031-70355-3_12

ary. Section 5 offers a conclusion.

2. Problem Definition

The maxim "render to each their due" (in Latin: suum cuique tribuere) can be understood, in legal terms, as a directive to assign each person a correlative right or duty based on some person-relative feature. Specifically, if A and B collect 90 nuts together and their contributions are judged to be in a 2:1 ratio, then giving 60 to A and 30 to B might seem to be just. I say might advisedly. What counts as the relevant feature—such as effort, time spent, marginal productivity, need, prior claim, risk borne, or a combination—does not belong to formal justice but to substantive justice, and there is no universally accepted criterion for it.

This paper does not try to define the reasons for substantive justice. In the nut-division example, the question of what should be considered is not our focus. Our starting point is the idea that even at the level of formal justice, that is, before deciding what each person's due is, errors can occur because of how legal and administrative systems must carry out directives. Just for the sake of argument, assume that time spent is used as a substantive basis. This assumption is controversial and may be hard to defend in practice; some might argue that working hours should not serve as a basis for distribution, but that debate is not our concern here. Suppose A and B agree to split the nuts based on the time spent. A suggests: "I worked for 1 hour while you worked for 30 minutes; let's split 2:1." B responds: "You worked 59 minutes and 37 seconds, and I worked 30 minutes and 1 second; under that agreement, a strict 2:1 split isn't justified." How should we interpret such precise descriptions? In everyday life, many consider it nonsense. If two people agree to split a bill because each ate one pizza of the same kind and size, it would be silly for one to object: "Your pizza weighed 156 grams while mine was 155 grams; splitting evenly is unfair." Even if the gram difference were proven, the complaint would still seem out of place.

Let's compare this issue with various schools of legal thought to identify its position within the field of ethics.

(1) Aristotle's Equity (επιείκεια)

Aristotle recognized that rules written in natural language are ill-suited to capture subtle differences. Law must "speak in universals," and because of this universality, it can fail at the edges.[3] Equity (επιείκεια) is the tool for

3) Aristotle, *Nicomachean Ethics*. Translated by W. D. Ross. NetLibrary, Inc. Vol. 5. §. 10., p. 58.

correcting a rule after the fact when, without such correction, applying its general wording as written would otherwise yield an unfair result—one that the legislator would have avoided by adding an explicit exception or proviso had they been present and known the facts (NE 5.10, 1137b11–1138a3).

Put simply, Thomas Aquinas (ca. 1225–1274) uses the well-known "city gates" example to explain why a generally sound rule might need an exception: a rule like "Whoever opens the city gates shall suffer death" can be reasonable in normal times (since it prevents treachery), but during a siege, the same act—opening the gates to fight off an attack or to bring in help—should not result in the penalty.[4)]

Aristotle's account of epieikeia aligns with our issue as it diagnoses failures in rule application. However, it addresses a different question. Epieikeia asks how to correct an otherwise reasonable general rule after the fact when it fails in a specific case; it is a theory of post-hoc correction. In contrast, this paper examines why, and under what conditions, a legal or moral framework can justify ignoring small differences beforehand, meaning to embed indifference to minor variations directly into the rule.

(2) Catholic Probabilism

A second related concept is probabilism in early modern moral theology, often connected with Jesuit casuistry. Probabilism asserts that if there is a probable opinion supporting the permissibility of an action (in Latin: opinio probabilis), an individual can legitimately follow it even if the opposite opinion (impermissibility) is more probable.[5)] Its classic formulation is attributed to Bartolomé de Medina (1527–1580): "If an opinion is probable, it may be followed, even if the opposite opinion is more probable" (in Latin: Si est opinio probabilis, licitum est eam sequi, licet opposita probabilior sit).[6)]

Probabilism involves overlooking differences when it allows equally acceptable choices among competing views despite their different likelihoods. However, it does not fully address our issue. Our concern is not that current evidence is insufficient to determine which theory of justice is better, thus allowing us to choose any theory that is sufficiently probable. Instead, while holding a substantive basis constant, we ask when a rule

4) Aquinas, T. (1892). *Opera Omnia: Prima Secundae Summae Theologiae*. Tom. 9. Romae: Typographia Polyglotta. q. 96. a. 6. p. 187.
5) Franklin, J. (2015). *The Science of Conjecture: Evidence and Probability Before Pascal*. Baltimore, Johns Hopkins University Press. pp. 74–76.
6) Schüssler, R. (2005). On the Anatomy of Probabilism. In: Kraye, J., and Saarinen, R. (eds.). *Moral Philosophy on the Threshold of Modernity*. 91-113. Cham, Springer. p. 92.

can preemptively treat micro-differences as irrelevant from a normative perspective, meaning it intentionally incorporates indifference into the rule itself even when all facts are known.

(3) Thomasius on Folly

Christian Thomasius (1655–1728), skeptical of human insight, advocated practical maxims like the psychological golden rule—"do not do to others what you would not have done to you"—rather than complex casuistry.[7] Thomasius believed that ordinary citizens could not engage in legal reasoning from the start and thus could not make judgments based on it.[8]

In spirit, this relates to error handling: if subtle differences exceed ordinary understanding, we should not design systems that rely on their detection. However, our thesis is not about pessimism of human nature ("humans are foolish, therefore we should accept rough rules"). We argue something more precise and different: even when fine distinctions can be identified, institutions may be normatively justified in ignoring them for allocation purposes because striving for precision can distort incentives, hinder publicity and coordination, and create unfairness at boundaries.

(4) Kant's Regulative Ideal

Immanuel Kant (1724–1804) argues that reason sets ideals in *Critique of Pure Reason*, meaning strict and complete notions of virtue or legality, which serve as regulative guides rather than constitutive rules for human action (A569/B597).[9] These ideals help shape judgment and promote self-improvement, but they are not standards we are required or even able to meet precisely in practice. His common example is the Stoic sage: an ideal of moral perfection that acts as a guiding star, though no one is expected (or able) to become such a sage (A569/B597).[10] In the *Metaphysics of Morals*, he also criticizes types of moral fanaticism or pedantry: an overly zealous obsession with moral details that confuses the idea with a decision procedure, thereby distorting normal deliberation (MS TL §17, AA 06: 409.13–19).[11]

Among the four comparanda, Kant is the closest to our target. His ex-

7) Thomasius, C. (1718). *Fundamenta juris naturae et gentium*. Halle, Christoph Salfeld. Lib. 1. Cap. 6. §. 42., p. 177.
8) *Ibid*., Lib. 1. Cap. 6. §§. 19–22., pp. 171–172.
9) Kant, I. (1996). *Critique of Pure Reason*. Translated by Werner S. Pluhar. Cambridge, Hackett Publishing Company. p. 561.
10) *Ibid*., p. 562.
11) Kant, I. (2017). *The Metaphysics of Morals. Revised edition*. Edited by Lara Denis. Translated by Mary Gregor. Cambridge, Cambridge University Press. p. 178.

planation of regulative ideals and flexibility in practical judgment suggests that when multiple agents follow a common public rule, conformity to that rule need not—and often should not—depend on tracking small differences. The key question is: how did Kant suggest we judge the acceptable error when finite agents operate under the same rule? It appears he did not provide a detailed explanation. He states that the ideal is regulative, not a strict blueprint, but gives little detail on how regulation works, such as what level of latitude is justified, how much variance is acceptable, and who bears the residual error. It's like saying, "a product should conform to the blueprint, but tolerances are allowed," without explaining how to determine those tolerances.

3. Comparison Between Natural Science and Normative Science

Why, even though the problem of error was already recognized by the late 18th century, has it still not received systematic treatment up to today? The reason becomes clear when compared to the natural sciences.

By the mid-17th century, natural philosophers began to treat experimental error as a distinct epistemic issue. Influenced by Baconian critiques of "idols," figures like Robert Boyle (1627–1691) and Robert Hooke (1635–1703) specifically studied and listed "popular errors," arguing that careful methods could uncover and fix them.[12] By the early 18th century, this empirical approach was formalized mathematically: Thomas Simpson (1710–1761)'s 1755 memoir used probability axioms in telescopic observations, treating positive and negative errors as equally likely.[13] In the late 18th century, Pierre-Simon Laplace (1749–1827) produced foundational work in probability, including influential memoirs beginning in 1774, and he contributed to the emerging mathematical treatment of observational uncertainty.[14] In short, early modern science promoted a systematic approach to error analysis; measurement uncertainty was recognized, averaged, and modeled (in astronomy, physics, and other fields) as a key part of knowledge, culminating in the development of least-squares and probabilistic theories by the end of the century.

By contrast, mainstream moral philosophy during this period remained firmly rooted in rationalism and rule-based approaches, with little explicit

12) Leonard, A., and Parker, S.E. (2022). Put a mark on the errors: Seventeenth-century medicine and science. *History of Science* 61(3):287–307, pp. 303–305. https://doi.org/10.1177/00732753221135046

13) Shoesmith, E. (1985). Thomas Simpson and the arithmetic mean. *Historia Mathematica* 12(4):352–355, p. 352. https://doi.org/10.1016/0315-0860(85)90044-8

14) Wilson, E.B. (1923). First and second laws of error. *Journal of the American Statistical Association* 18(143):841–851, p. 841. https://doi.org/10.2307/2965467

acknowledgment of uncertainty. Hugo Grotius (1583–1645), Samuel von Pufendorf (1632–1694), Christian Wolff (1679–1754), and their followers saw natural law as a deduction from right reason, meaning they believed moral law was dictated by right reason.[15] Kant later summarizes this tradition by stating as follows.

> The practical rule is therefore unconditional and so is represented a priori as a categorical practical proposition by which the will is objectively determined absolutely and immediately (by the practical rule itself, which accordingly is here a law). For, pure reason, *practical of itself*, is here immediately lawgiving.[16] (KpV, AA 05: 31.7–10)

It must be noted that Grotius and other natural law theorists were not indifferent to the gap between law and reality, nor to the issue of factual determination in judicial proceedings. Grotius acknowledged that overly detailed natural law rules could lead to excessive litigation. For example, he argued that there should be a precise equivalence in value between a good and its price. If the amount paid is more or less than the intrinsic worth of the item, moral duty requires correcting the discrepancy.[17] However, he also recognized that allowing legal remedies for every minor imbalance would result in an unmanageable surge of lawsuits. Therefore, he concluded that such cases should be considered morally significant but not legally actionable.[18] Pufendorf offered a partial revision by allowing legal recourse in cases where the imbalance between a good and its price is "graver" (in Latin: gravior).[19] However, he did not specify clear criteria for determining what qualifies as a "graver" disparity. Furthermore, as mentioned earlier, Kant introduced the concept of the regulative function of ideals, thereby allowing a distinction between the ideal and the empirical realms. Although

15) Grotius, H. (1680). *De jure belli ac pacis.* Amsteldam, Janssonio-Waesbergios. Lib. 1. Cap. 1. §. 10., p. 6.: "Jus naturale est dictatum rectae rationis"; Pufendorf, S. (1672). *De jure naturae et gentium*. Lund, Adam Junhans. Lib. 2. Cap. 3. §. 13., p. 179.: "Igitur hoc sensu lex naturalis nobis dictamen rectae rationis asseritur, quod intellectui humano ea sit facultas, ut ex contemplatione conditionis humanae liquido perspicere possit, ad norman ejus legis sibi necessario vivendum: simulque investigare principium, ex quo ejusdem praecepta solide et plane demonstrari queant."; Wolff, C. (1754). *Institutiones juris naturae et gentium*. Halle, Officina Rengeriana. Part. 1. Cap. 2. §. 39., pp. 20–21.: "Vocatur autem naturalis, quae rationem sufficientem in ipsa hominis rerumque essentia habet: [...] Lex naturae communiter quoque Jus naturae appellatur."

16) Kant, I. (2015). *Critique of Practical Reason*. Translated by Mary Gregor. Cambridge, Cambridge University Press. p. 28.

17) Grotius, *supra note* 15, Lib. 2. Cap. 12. §. 11. n. 1., p. 255.

18) *Ibid*., Lib. 2. Cap. 12. §. 26. n. 1., p. 264.

19) Pufendorf, *supra note* 15, Lib. 5. Cap. 3. §. 9., pp. 629–630.

these positions resemble the situation of a discrepancy between theory and observation in the natural sciences, the natural law theorists, unlike natural scientists who relied on probability theory and statistics, did not believe that such a discrepancy could be resolved through mathematical means.

This paper does not argue that ethics or jurisprudence should incorporate probability theory or statistics into rule-setting in the same way as the natural sciences. Such an application, in any direct sense, is impossible. This inapplicability stems from a fundamental difference between the natural sciences and the normative sciences. In the natural sciences, it is the theory that is subject to verification through the relation between theory and observation or experiment, and thus it is accepted or rejected; the observation or experiment itself is not directly verified. For example, Newton claimed that chromatic aberration—a distortion caused by the dispersion of light—could not be eliminated even by combining lenses made of different materials; however, this claim was later disproven by the invention of the achromatic lens.[20] In this case, what was ultimately rejected was Newton's theoretical assertion, not the empirical findings demonstrated by the achromatic lens. In contrast, in the normative sciences, the relationship between theory and reality is such that reality itself is evaluated and either endorsed or condemned. When a natural-law rule states that "one must not kill," but an act of killing still happens, it is not the rule that is refuted; rather, the act of killing is judged wrongful. This does not mean that normative theories are never revised or rejected. They can be refined, qualified, or abandoned based on feasibility constraints, empirical consequences, and reflective equilibrium. For example, if doctrines in criminal law were based on an incorrect physiognomy claiming to identify criminal tendencies from facial features, those doctrines would be expected to be revised once this so-called "science" is shown to be methodologically flawed.

Accordingly, the way errors are treated in the natural and normative sciences initially differs in the types of questions they ask.

- Natural sciences: When testing a theory (an ideal model), how much can a theoretical prediction differ from the observed result and still be considered acceptable?
- Normative sciences: When assessing an action, how far can it deviate from the norm (the ideal model) and still be considered acceptable?

20) Glashow, S.L. (2008). The errors and animadversions of Honest Isaac Newton. *Contributions to Science* 4(1):105–110. p. 108.

4. Case Studies

(1) Letter Grading

This paper does not aim to present a definitive solution to the previous asymmetry but instead to enhance our understanding through a series of illustrative cases. The first case involves a situation where a very detailed norm proves too challenging to implement in practice and is thus replaced by a less precise one. Consider the following example: Suppose that, when grading a jurisprudence report, we use a 101-point scale ranging from 0 to 100. We also assume the normative principle that "students who perform better should receive higher evaluations." Although this assumption is open to debate, it is reasonable within normal limits. For example, claiming that a student who earns 40 points has written a better report than one who earns 30, or that a student with 70 points has produced a better report than one with 65, seems convincing—especially when compared to more controversial moral judgments, such as whether volunteering or donating money results in the greater good.

In actual university grading systems, however, such a 101-point scale is often converted into a single-letter grade scale. For example, scores below 60 are marked as F; scores from 60 to 69 are marked as D; scores from 70 to 79 are marked as C; scores from 80 to 89 are marked as B; and scores from 90 to 100 are marked as A, creating a five-tier system. Additionally, this may be simplified further into a binary distinction, with F representing failure and A, B, C, and D representing passing. This exemplifies what this paper refers to as setting an admissible margin of error. In such a five-tier system, it is implicitly assumed that the difference between, for instance, a student who scores 65 and one who scores 67 can be legitimately disregarded. Therefore, even if Student s_1 claims, "I scored 75 while s_2 scored 73, so it is only just that I be rated higher," the instructor can respond, "According to the rules of this examination, everyone scoring between 70 and 79 receives the same grade of C; hence, the evaluation is not unjust."

Therefore, instead of using exact values in assessment, we will refer to the method utilizing fixed ranges as "categorical evaluation." All the following are examples of categorical evaluation.

- Treating a person who worked 7 hours and 56 minutes the same as someone who worked exactly 8 hours by calling it "8 hours of work" and paying them the same wage.
- Not differentiating between stabbing someone 5.0 cm and 5.1 cm with a knife, but treating both as injuries of the same severity and applying the same penalty.
- Recognizing both a person who donated 100 million yen and another

who donated 110 million yen as major donors, and awarding both with the same recognition.

In educational research, the validity of such categorical (banded) evaluation has often been a direct object of study. When there are multiple graders, disagreements about rank ordering are common.[21] For example, Grader g_1 might score $s_1 = 70$ and $s_2 = 71$, while Grader g_2 scores $s_1 = 72$ and $s_2 = 70$; they do not agree on who is better. Banded letter grades help make the results more stable: in this example, both s_1 and s_2 fall into the C band, so the assigned grade is the same. Additionally, in microeconomics research, administrative simplicity and clear communication are important: coarse public cut-scores (e.g., A/B/C or pass/fail) make information easier for audiences to process and can even reduce overall estimation error by pooling cases in the middle.[22]

(2) Eligibility Thresholds in Social Insurance

A widely discussed recent example in Japan is the so-called "1.30-million-yen wall." This term was used in debates over social insurance dependency rules. In simple terms, when a spouse's expected annual income is estimated to exceed a set threshold (often around 1.30 million yen), the spouse may lose dependent status under the insured person's coverage. This can result in the spouse having to pay premiums on their own. In policy debates, the threshold is often linked to an exemption system where spouses considered "dependents" below that limit can avoid contributing to pension and health insurance schemes. The arrangement is frequently seen as a disincentive to working longer hours.[23]

What is striking is that this "wall," unlike letter grading in education, which often receives positive appraisal, has tended to be evaluated negatively. Where does this difference come from? In my view, it does not stem from a disciplinary split between education and law per se, but from a difference in focus: educational research often foregrounds the efficiency of grading from the assessor's perspective, whereas theories of justice emphasize the fairness of the institution. If we swap these focal points, negative

21) Schinske, J., and Tanner, K. (2014). Teaching more by grading less (or differently). *CBE—Life Sciences Education* 13:159–166, p. 160. https://doi.org/10.1187/cbe.CBE-14-03-0054

22) Harbaugh, R., and Rasmusen, E. (2018). Coarse grades: Informing the public by withholding information. *American Economic Journal: Microeconomics* 10(1):210–235, p. 211. https://doi.org/10.1257/mic.20130078

23) Makiko Yamazaki, "Japan's labour crunch forces rethink on traditional homemakers," *Reuters*, June 12, 2025, accessed October 23, 2025, https://www.reuters.com/business/world-at-work/japans-labour-crunch-forces-rethink-traditional-homemakers-2025-06-12/

assessments could arise in education, and positive assessments could arise in justice theory. That is, if educational studies were to attend not to reduce the teacher's workload but to fairness among students, and if justice theory were to attend not to fairness among taxpayers but to administrative ease on the taxing side, we could articulate the following:

- Letter grading can trigger perceptions of unfairness among students. Although the numerical gap between a student with 69 points and one with 70 points is only one point, the former receives a D while the latter receives a C, creating a sharp discontinuity. Conversely, unfairness may also be felt between a student with 60 points and one with 69 points: despite a nine-point gap, both fall into the same D category and thus receive the same grade.
- In social security systems, there is a rational cost-based case for adjusting contributions or benefit eligibility using income bands. Creating broad categories—e.g., "dependent" versus "required to enroll/pay contributions as an insured person"—can substantially reduce administrative and compliance costs compared to continuously tracking and recalculating status based on income down to the one-yen level.

From the above, we can conclude that categorical evaluation generally leads to boundary discontinuities, and these discontinuities can be analyzed in various ways. The discontinuity itself has no inherent legitimacy or illegitimacy. Therefore, when rule-makers implement a cliff-edge design, it cannot be justified or criticized without considering the broader context. An additional evaluative perspective is necessary. Although we have considered perspectives such as efficiency, administrative costs, and the psychology of affected parties, it is uncommon, if not nonexistent, in the current literature to systematically treat these perspectives as separate objects of analysis within theories of justice.

5. Conclusion

This paper argues that even in the formal stages of developing theories of justice, creating tolerance bands presents a normative challenge, and that categorical evaluation often results in boundary discontinuities. The justice principle "to each their due" requires us to evaluate each individual's deservingness; however, accurately measuring this deservingness is unrealistic, and errors are frequent. In everyday practice, we accept these errors by categorizing cases into broad groups, treating unlike cases as if they were the same. University letter-grade evaluations exemplify this approach.

We refer to this as coarse-grained evaluation, which intentionally reduces the evaluative resolution. We then define categorical evaluation as a form of such practices in which assigning cases to discrete categories or status bands, rather than merely numerical approximation, is normatively significant.

This issue has been debated since ancient times in various forms that don't necessarily align with the focus of this paper. Aristotle, recognizing the excesses of natural language, permitted corrections after the fact through the principle of equity. Jesuit probabilism stated that when multiple plausible arguments exist, any of them could be chosen. Early modern German jurist Thomasius, modest about human intellectual abilities, recommended intuitive judgment guided by the Golden Rule—"do not do to others what you would not have done to you"—rather than strict reasoning. Kant proposed governing reality by the ideal, allowing a gap between the ideal and actual conditions. Of these, Kant's view most closely relates to this paper's concerns; however, he did not specify how to set the tolerance between the ideal and reality. This suggests that, even when the gap is acknowledged, the question of how to define tolerances remains insufficiently explored in normative theory. Whereas the natural sciences have developed systematic tools for managing error, normative inquiry has addressed analogous issues less systematically and without a widely shared framework.

Categorical evaluation gives rise to several potential problems; among them is the discontinuity at category boundaries. Crucially, this discontinuity is neither inherently good nor bad; its evaluation depends on the context. For example, in education studies, some researchers view letter grades positively as a cliff-type (notch) design. In contrast, in the social security system, such cliff-type designs have faced significant criticism. This does not mean that either judgment is wrong; rather, opinions differ depending on which factors—such as efficiency or fairness—are emphasized. In other words, no inherent justice or injustice exists in the cliff-type design itself. However, there is still no systematic discussion, for instance, on how to compare or balance these factors; therefore, there is a need to develop coarse-grained evaluation as a distinct area within theories of justice.

We have not, in this paper, examined which principles of justice might apply to the issue at hand, nor whether a mathematical model, similar to those used in the natural sciences, could be developed. We also have not explored the historical and philosophical question of whether Kant's idea of the regulative role of ideas could provide insights into resolving, for example, the statement "ought implies can." If "ought implies can" is true, then it may follow that evaluators cannot be reasonably expected to manage detailed distinctions that are operationally unfeasible. These remain tasks

for future research.

Constitutional Supremacy and Judicial Review in Post-Colonial Contexts: The Commonwealth Caribbean and Macau–Hong Kong Experience

*Denis De Castro Halis**

Abstract

This article compares how two post-colonial regions – the Commonwealth Caribbean and the Special Administrative Regions of Macau and Hong Kong – have addressed the constitutionality of laws and the role of judicial review. Despite shared histories of European colonization and inherited legal frameworks, the two regions have developed distinct constitutional trajectories. In the Commonwealth Caribbean, constitutions modeled on the Westminster-Whitehall system coexist uneasily with doctrines of parliamentary sovereignty and "saving law clauses" that preserve pre-independence legislation. By contrast, Macau and Hong Kong, under China's "One Country, Two Systems" arrangement, operate under Basic Laws that assert clear constitutional supremacy while maintaining limited continuity with pre-existing colonial norms. The article explores how courts of final appeal for these regions – particularly the Caribbean Court of Justice (CCJ) in Trinidad and Tobago, and the Privy Council in the United Kingdom – interpret the boundaries between constitutional supremacy and legislative authority. It argues that these divergent approaches reveal broader questions about post-colonial constitutional identity and the evolving relationship between law, sovereignty, and legitimacy in transitional legal orders.

1. Introduction

The constitutional experiences of the Commonwealth Caribbean and the Special Administrative Regions of Macau and Hong Kong illustrate two

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An earlier version of this paper was presented at the Institute of Comparative Law, Nihon University, College of Law, on July 17, 2025. Scholar affiliated with the Faculty of Law, the University of the West Indies/Cave Hill, Barbados with previous research funds from UNESA/RJ.

contrasting paths taken by post-colonial societies confronting inherited legal systems. Both regions share a colonial past, marked by constitutional transplantation and limited local participation in the formation of their foundational laws. Yet, their respective strategies for reconciling these legacies differ fundamentally: while the Commonwealth Caribbean has struggled to define the balance between *constitutional supremacy* and *parliamentary sovereignty*, Macau and Hong Kong have institutionalized a model of conditional continuity under the principle of *One Country, Two Systems*.

The Commonwealth Caribbean comprises twelve independent states – among them Barbados, Jamaica, Trinidad and Tobago, Belize, and Guyana – and six British Overseas Territories. Their constitutions were drafted largely in London during the independence movements of the 1960s and 1970s. Scholars have described these as *"constitutions by transfer"*, written not through participatory national processes but by British officials (and, sometimes, members of local elites) under the Westminster–Whitehall model.[1] This model, characterized by a fusion of executive and legislative powers, parliamentary responsibility of ministers, and a non-executive head of state, was transplanted to those newly independent Caribbean nations with minimal adaptation.[2] As McIntosh observed, this gave rise to an enduring "identity problem": legally valid constitutions yet not "our own".[3]

A central tension in these constitutions arises from the coexistence of *parliamentary sovereignty* – as classically articulated by Dicey[4] – with an explicit declaration of opposing nature that "this Constitution is the supreme law of the land".[5] The result is a hybrid constitutional framework where courts must mediate between inherited doctrines of legislative supremacy and modern commitments to constitutional review. The problem is deepened by the inclusion of *saving law clauses*, which preserve pre-independence statutes even when inconsistent with post-independence constitutional rights.[6] While intended to ensure legal continuity and stability during the transition to independence, these clauses have often perpetuated colonial-era laws authorizing corporal punishment or mandatory death

1) Richard Albert, Derek O'Brien & Se-shauna Wheatle (eds.), *The Oxford Handbook of Caribbean Constitutions* (Oxford University Press, 2020), ch. 2, 47–49.
2) Stanley de Smith, *Constitutional and Administrative Law* (London: Penguin, 1971), 52.
3) Simeon McIntosh, *Caribbean Constitutional Reform: Rethinking the West Indian Polity* (Kingston: Caribbean Law Publishing, 2002), 37–40.
4) A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1885), 39–40.
5) Robinson, Bulkan & Saunders, *Fundamentals of Caribbean Constitutional Law* (Kingston: Caribbean Law Publishing, 2018), ch. 4.
6) Albert et al., *Oxford Handbook of Caribbean Constitutions*, 61–63.

penalties, thereby constraining judicial enforcement of human rights.

In recent decades, this tension has played out in divergent judicial philosophies. The Judicial Committee of the Privy Council (JCPC), still the final court of appeal for many Caribbean states, has often adopted a textual or formalist approach to constitutional interpretation. By contrast, the Caribbean Court of Justice (CCJ), established in 2005, has advanced a more purposive and principle-based jurisprudence that emphasizes the constitution's living nature and its alignment with contemporary human rights norms.[7)]

A different trajectory has unfolded in Asia. Macau and Hong Kong, former Portuguese and British colonies respectively, became Special Administrative Regions (SARs) of the People's Republic of China in 1997 and 1999. Each operates under a Basic Law that functions as a quasi-constitution, guaranteed by the Chinese Constitution under the principle of "One Country, Two Systems."[8)] These Basic Laws ensure a "high degree of autonomy" and continuity with pre-existing legal institutions, while simultaneously affirming the supremacy of the Basic Law over inconsistent colonial statutes.[9)] This structure stands in marked contrast to the Caribbean's general saving law clauses: while both mechanisms preserve elements of the past, the Basic Laws explicitly subordinate continuity to constitutional supremacy.

By examining these two regions in parallel, this paper aims to illuminate the relationship between constitutional design and post-colonial identity. In the Commonwealth Caribbean, the endurance of British legal structures and interpretive habits reflects an incomplete break from the colonial constitutional order. In Macau and Hong Kong, continuity is carefully confined by a framework that subordinates inherited norms to a new constitutional authority. The comparison underscores how post-colonial societies confront the dual imperatives of stability and autonomy, continuity and rupture, in defining their constitutional futures.

7) *McEwan v. Attorney General of Guyana*, [2018] CCJ 30 (AJ); see also Peter Jamadar, "The Basic Structure Doctrine and Its Implications Concerning the Belize Constitution," Caribbean Court of Justice, 2022.

8) Denis D.C. Halis, *Rule of Law in the Mainland and in Macau...With "Chinese Characteristics"?* In: M. Chan, J. Rangel, C. Mendes, et al. E. Yu & R. Ramos (eds). Macau in Coimbra. (International Institute of Macau, 2015), 85-101; Yash Ghai, *Hong Kong's New Constitutional Order* (Hong Kong University Press, 1999), 24–26.

9) Denis D.C. Halis,*"Post-Colonial" Legal Interpretation in Macau, China: Between European and Chinese Influences.* In: S. Miyazawa, W. Ji, et al (eds.). East Asia's Renewed Respect for the Rule of Law in the 21st Century. (Brill, 2015), 68-86; Albert H.Y. Chen, *The Basic Law and Constitutional Development in Hong Kong* (Hong Kong University Press, 2011), 18–21.

This introduction is followed by five sections. Section 2 examines the constitutional framework of the Commonwealth Caribbean, tracing its Westminster-Whitehall inheritance and the resulting tensions between parliamentary sovereignty and constitutional supremacy. It analyses the identity problem that followed independence, the role of entrenchment clauses, and the persistence of colonial statutes through saving law clauses. Section 3 explores the jurisprudential dialogue between the Judicial Committee of the Privy Council and the Caribbean Court of Justice, contrasting their approaches to constitutional interpretation and the balance of judicial review. Section 4 turns to the constitutional experience of Macau and Hong Kong under the Basic Laws, outlining the "One Country, Two Systems" framework, the principles of autonomy and continuity, and the operation of judicial review within the Special Administrative Regions. Section 5 offers a comparative analysis of these two post-colonial models, highlighting how each manages constitutional continuity, legitimacy, and identity. Section 6 concludes by reflecting on the broader implications of these contrasting trajectories for post-colonial constitutionalism and the ongoing negotiation between inherited authority and constitutional transformation.

2. The Commonwealth Caribbean Constitutional Framework

The constitutional systems of the Commonwealth Caribbean are among the most distinctive products of the British decolonization process. Between the 1960s and early 1980s, twelve Anglophone Caribbean territories transitioned to independence, adopting written constitutions largely drafted in the United Kingdom.[10] These texts, sometimes appended as schedules to the British *Orders in Council* that conferred independence, reflected the *Westminster-Whitehall model* – a design centered on parliamentary government, executive accountability, and adherence to the rule of law as understood in the British tradition.[11]

2.1. The Westminster–Whitehall Model

The "Westminster model" denotes a system in which the head of state is not the effective head of government; the executive authority lies in a prime minister and cabinet drawn from, and accountable to, the legislature.[12] The

10) Albert et al, *Oxford Handbook*, ch. 2.
11) Ibid., 47–49.
12) De Smith, *Constitutional and Administrative Law,* 52.

arrangement presupposes a parliamentary culture of responsible government and constitutional conventions developed over centuries in Britain. Its transplantation into newly independent Caribbean societies occurred without the accompanying political and social foundations that had sustained it in its original context.

While the model was intended to preserve familiarity and stability, it also imported structural tensions. Westminster constitutionalism rests on the principle of *parliamentary sovereignty*, which in its pure form posits Parliament's right "to make or unmake any law whatever."[13] Yet Caribbean constitutions, unlike the unwritten British constitution, are formal written instruments that explicitly declare their own supremacy. Each begins with a clause asserting that "this Constitution is the supreme law of the land," and that any inconsistent law "shall, to the extent of the inconsistency, be void."[14] The coexistence of these doctrines, sovereignty and supremacy, created a hybrid system that would later test judicial interpretation and constitutional coherence.

2.2. The Identity Problem

This hybrid inheritance has produced what Caribbean scholars describe as a persistent *identity problem*.[15] Constitutional texts, though the legal foundation of sovereignty, were not the product of local political imagination or popular will. As one commentator quipped regarding the Constitution of St. Vincent and the Grenadines, independence appeared to have been bestowed by "some Duke of Something-or-the-other who came down and supposedly gave us this new independence constitution."[16] Such accounts underscore the sense of detachment between formal independence and constitutional authorship. Simeon McIntosh argues that because these constitutions originated externally, they lacked the transformative legitimacy necessary to ground a new constitutional order; they represented continuity rather than rupture.[17]

The legal consequences of this externally imposed design were significant. Many constitutional provisions, including those governing fundamental rights, were framed in language drawn almost verbatim from British co-

13) Dicey, *Law of the Constitution*, 39–40.
14) Robinson et al, *Fundamentals,* ch. 4.
15) Albert et al., *Oxford Handbook*, ch. 1, 59–61.
16) Ibid.
17) McIntosh, *Caribbean Constitutional Reform*, 37–40.

lonial instruments.[18] Consequently, even after independence, local legislatures and courts often continued to rely on British precedents and interpretive methods, perpetuating the colonial legal culture that the constitutions ostensibly displaced.

2.3. Entrenchment and the Structure of Constitutional Amendment

To reconcile parliamentary sovereignty with constitutional supremacy, the framers introduced a system of *entrenchment*. Entrenchment clauses impose heightened procedural requirements for constitutional amendments, varying according to the importance of the provision.[19] For ordinary amendments, a two-thirds parliamentary majority may suffice; for entrenched provisions – such as those protecting fundamental rights, the separation of powers, and the office of the judiciary – a referendum or supermajority in both legislative chambers is required.[20]

This mechanism, while preserving stability, also restricts flexibility. Alexis describes the paradox succinctly: although Parliament may alter "any of the provisions of this Constitution," it may do so only "subject to the provisions of the Constitution."[21] Thus, Parliament's authority to amend the Constitution is itself constitutionally limited. The doctrine of *constitutional entrenchment* embodies the principle that certain constitutional elements are not merely procedural but substantive, thereby defining the basic structure of the constitutional order.

Justice Peter Jamadar of the Caribbean Court of Justice (CCJ) has elaborated this concept through the analogy of a tree and its roots.[22] The visible text of the constitution (i.e., the trunk and branches) rests upon deeper, often unarticulated principles such as the rule of law, the separation of powers, and respect for fundamental rights. These principles form the *basic structure* of the constitution, without which the legal order would collapse. Amendments that seek to uproot this structure, even if procedurally valid, would therefore be unconstitutional in substance. The CCJ's developing jurisprudence increasingly reflects this understanding, aligning with comparative doctrines in India and other jurisdictions that recognize substantive limits

18) Ibid., 38.
19) Francis Alexis, *Changing Caribbean Constitutions* (Bridgetown: Carib Research & Publications, 1983).
20) Ibid.
21) Ibid.
22) Jamadar, "Basic Structure Doctrine".

to constitutional amendment.

2.4. The Preservation of Colonial Laws: Saving Law Clauses

If entrenchment represents the effort to secure the future of constitutionalism, *saving law clauses* reflect an attempt to preserve its past. Nearly all Commonwealth Caribbean constitutions contain clauses safeguarding laws enacted prior to independence from constitutional challenge.[23] Two principal forms exist. *General saving clauses* protect all laws in force at independence, while *partial saving clauses* immunize specific categories, such as criminal punishments, from review under the new bill of rights.[24] The rationale was to ensure legal continuity and prevent the immediate invalidation of colonial legislation upon independence.

However, the long-term effects have been deeply problematic. Many saved laws – including those prescribing mandatory death sentences and corporal punishment – conflict with modern human rights standards.[25] The courts have thus faced the dilemma of reconciling the constitutional protection of fundamental rights with clauses that insulate pre-independence laws from scrutiny. In *Reyes v. The Queen* and *Boyce v. R*, the Privy Council acknowledged the tension but adopted a cautious, textual approach, deferring to the letter of the savings clause.[26] By contrast, the CCJ in *McEwan v. Attorney General of Guyana* interpreted the clause narrowly, holding that not all pre-independence laws could be preserved if inconsistent with the spirit of the post-independence constitution.[27]

This judicial divergence reflects a deeper philosophical divide between *formalism* and *purposivism* in constitutional interpretation. For the Privy Council, constitutional authority is bounded by text; for the CCJ, it is animated by principles. In the Caribbean context, this tension encapsulates the broader struggle between continuity and transformation: the colonial inheritance and the aspiration for a truly indigenous constitutional identity.

23) Albert et al., *Oxford Handbook*, 61–63.
24) Ibid.
25) Robinson et al, *Fundamentals,* ch. 5.
26) *Reyes v. The Queen* [2002] UKPC 11; *Boyce v. R* [2004] UKPC 32.
27) *McEwan v. Attorney General of Guyana* [2018] CCJ 30 (AJ).

3. Judicial Review and the Tension Between Supremacy and Sovereignty

The coexistence of *constitutional supremacy* and *parliamentary sovereignty* has produced one of the most distinctive jurisprudential debates in the Commonwealth Caribbean. While the constitutions expressly affirm their supremacy, the region's inherited Westminster tradition continues to influence judicial attitudes toward legislative authority. The result is an evolving dialogue between two courts – the Judicial Committee of the Privy Council (JCPC) in London and the Caribbean Court of Justice (CCJ) in Port of Spain – over how to interpret and enforce constitutional limits.

3.1. From Westminster to Written Constitutions

Under the British constitution, parliamentary sovereignty is a foundational principle. Dicey famously declared that "no person or body is recognized by the law as having a right to override or set aside the legislation of Parliament."[28] In the United Kingdom, the absence of a written constitution means that Parliament's authority remains legally unbounded, constrained only by political convention. By contrast, every Commonwealth Caribbean constitution is a written instrument that declares its own supremacy and grants the courts explicit authority to strike down laws inconsistent with it.[29] This transformation from an unwritten to a written constitutional order introduced a conceptual rupture in the inherited model.

Yet, despite this formal shift, early post-independence jurisprudence remained hesitant to embrace robust judicial review. Many judges, trained in or influenced by the English tradition, viewed Parliament as the primary guardian of constitutional values.[30] Consequently, courts often exhibited deference to legislative intent, interpreting constitutional rights narrowly and upholding the validity of colonial-era statutes preserved under savings clauses.[31] The persistence of this interpretive restraint revealed the enduring pull of the Westminster ethos within the Caribbean's new constitutional order.

28) Dicey, *Law of the Constitution*, 39–40.
29) Robinson et al, *Fundamentals*, ch. 4.
30) McIntosh, *Caribbean Constitutional Reform*, 42–44.
31) Albert et al., *Oxford Handbook*, 61–63.

3.2. The Privy Council: Textualism and Deference

For much of the post-independence period, the JCPC remained the final appellate court for most Caribbean states. Its jurisprudence has been marked by formalism and textual fidelity. In *Reyes v. The Queen*, the Privy Council invalidated the mandatory death penalty in Belize, but its reasoning was cautious, rooted in the text of the Constitution and the specific wording of the savings clause.[32] Similarly, in *Boyce v. R* (Barbados), the JCPC emphasized the limited scope of judicial intervention, holding that courts could not invalidate pre-independence laws expressly protected by constitutional savings provisions, even when these conflicted with human rights norms.[33]

This textual approach reflects the Privy Council's broader philosophy: constitutional interpretation must remain within the bounds of the written text, not guided by judicial perceptions of morality or social progress.[34] As a judge, Lord Hoffmann, stated in *Matthew v. State of Trinidad and Tobago*, the function of the court is "to apply the law as it is written, not as it might ideally be."[35] Critics have argued that such formalism constrains the transformative potential of post-colonial constitutions and perpetuates the colonial logic of deference to legislative power.[36]

3.3. The Caribbean Court of Justice: Holism and Transformation

The establishment of the CCJ in 2005 marked a turning point. Conceived as both an appellate and a regional integration court, the CCJ symbolizes constitutional self-determination. Its jurisprudence has articulated a distinct interpretive philosophy grounded in *constitutional holism* and *living constitutionalism*.[37] In *McEwan v. Attorney General of Guyana* (2018), the Court invalidated a colonial-era statute criminalizing cross-dressing, holding that it could not be shielded by the savings clause because it offended the post-independence constitutional order.[38] The Court reasoned that the Constitution must be interpreted "in a manner that gives life to its spirit," emphasizing dignity, equality, and evolving standards of human rights.[39]

32) *Reyes v. The Queen* [2002] UKPC 11.
33) *Boyce v. R* [2004] UKPC 32.
34) *Matthew v. State of Trinidad and Tobago* [2004] UKPC 33.
35) Ibid.
36) Alexis, *Changing Caribbean Constitutions*.
37) Jamadar, "Basic Structure Doctrine".
38) *McEwan v. Attorney General of Guyana* [2018] CCJ 30 (AJ).
39) Ibid.

Similarly, in *Nervais v. The Queen* (2018), the CCJ struck down mandatory death sentences in Barbados, reaffirming that constitutional supremacy prevails over pre-independence laws.[40] The Court's reasoning invoked the *basic structure* of the Constitution, including respect for human dignity and proportionality in punishment. Justice Peter Jamadar described this interpretive orientation as one that "resists the fossilization of colonial norms under the guise of continuity."[41]

Through these decisions, the CCJ has redefined judicial review as an instrument of constitutional transformation rather than mere textual interpretation. Its method integrates rules and principles, echoing Ronald Dworkin's jurisprudence, which conceives law not simply as a set of commands but as a coherent expression of moral and constitutional integrity.[42] The Court thus conceives the Constitution as a *living document* that evolves alongside social values, rather than a static artifact frozen at the moment of independence.

3.4. Competing Paradigms of Legitimacy

The divergence between the JCPC and the CCJ is not merely interpretive; it also reflects competing understandings of judicial legitimacy. One may argue that the Privy Council's authority rests on its distance: thus, it can claim to be a neutral space of deliberation as a court external to regional politics. Many Caribbean states have retained the JCPC precisely because it is perceived as insulated from domestic pressures.[43] The CCJ, by contrast, draws its legitimacy from proximity: from its commitment to regional values, post-colonial identity, and an indigenous constitutional culture.[44]

The debate over which court better safeguards constitutionalism mirrors the broader tension between *textual certainty* and *principled flexibility*. The JCPC's formalism ensures predictability but risks ossifying outdated norms. The CCJ's purposive approach promotes adaptation and justice but exposes the judiciary to accusations of activism. In this ongoing dialogue, Caribbean constitutionalism oscillates between two poles: deference to inherited authority and assertion of interpretive autonomy.

40) *Nervais v. The Queen* [2018] CCJ 19 (AJ).
41) Jamadar, "The Basic Structure Doctrine," 2–3.
42) Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 22–28.
43) Albert et al., *Oxford Handbook*, ch. 6, 112–114.
44) Richard Albert, "Caribbean Constitutionalism at the Crossroads," (2020) 5 *Caribbean Law Review* 201–205.

Ultimately, the *supremacy–sovereignty tension* encapsulates the unfinished project of Caribbean constitutionalism. Written constitutions proclaim a new order of supremacy, yet the gravitational pull of Westminster continues to shape judicial consciousness. The gradual evolution of CCJ jurisprudence suggests that the region is moving toward a more self-confident constitutional identity: one in which judicial review serves not as an exception to parliamentary power but as its necessary complement in a truly post-colonial rule of law.

4. The Macau and Hong Kong Model: Basic Laws and Continuity

The constitutional structures of Macau and Hong Kong offer a contrasting paradigm to that of the Commonwealth Caribbean. Like the Caribbean states, both regions experienced European colonial rule – Macau under Portugal and Hong Kong under Britain – but their post-colonial transition unfolded within a different constitutional framework. Rather than attaining independence, Macau and Hong Kong were reintegrated into the People's Republic of China (PRC) as Special Administrative Regions (SARs). Their governance is regulated by the *Basic Laws*, quasi-constitutional instruments enacted under the authority of the Chinese Constitution, pursuant to the principle of "One Country, Two Systems."[45]

4.1. The "One Country, Two Systems" Framework

The doctrine of *One Country, Two Systems* was devised by Deng Xiaoping in the 1980s to facilitate the peaceful reunification of territories that had previously been under different political and economic systems.[46] Under this formula, the PRC maintains sovereignty (*one country*), while Macau and Hong Kong retain a *high degree of autonomy* and continue operating capitalist economies and common law legal systems (*two systems*). The arrangement is constitutionally entrenched in Article 31 of the Chinese Constitution, which authorizes the creation of special administrative regions governed by "systems prescribed by law by the National People's Congress."[47]

45) Ghai, *Hong Kong's New Constitutional Order*, 12–14; Halis, *Rule of Law in the Mainland*, 85-101.
46) Albert H.Y. Chen, *The Basic Law and Constitutional Development in Hong Kong* (Hong Kong University Press, 2011), 20–22.
47) Constitution of the People's Republic of China (1982), art. 31.

Each SAR has its own *Basic Law* – the *Basic Law of the Hong Kong Special Administrative Region* (effective 1997) and the *Basic Law of the Macau Special Administrative Region* (effective 1999). These instruments operate and occupy the position of constitutions in their legal systems, establishing the governmental structure, the rights framework, and the relationship between the region and the central authorities in Beijing.[48] The Basic Laws guarantee local self-governance in most domestic affairs, including legislation, taxation, the judiciary, and immigration, while reserving defense and foreign affairs to the central government.[49]

4.2. Constitutional Supremacy and Continuity

Unlike the Westminster-derived constitutions of the Caribbean, which balance between parliamentary sovereignty and constitutional supremacy, the Basic Laws unequivocally assert their superior normative status. Article 11 of each Basic Law stipulates that "No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law," and that "No law, decree, administrative regulation or normative act of the Macau Special Administrative Region shall contravene this Law"[50]. These provisions establish a clear hierarchy: the Basic Law functions as the supreme constitutional instrument within the SAR, subordinate only to the PRC Constitution in a formal sense but autonomous in substantive operation.

Continuity, however, remains a defining feature. Both Basic Laws provide that "laws previously in force shall be maintained," provided they do not conflict with the Basic Law.[51] This *conditional continuity* stands in marked contrast to the Caribbean *saving law clauses*, which shield pre-independence laws from constitutional challenge regardless of inconsistency. In Macau and Hong Kong, by contrast, continuity is *permissive rather than absolute*: pre-existing colonial legislation survives only insofar as it aligns with the new constitutional order. This difference reflects distinct political and jurisprudential objectives. The Caribbean constitutions sought to preserve stability through deference to the colonial legal framework; the Basic Laws sought to reassure local and international communities that the transition to Chinese sovereignty would not destabilize the rule of law or

48) Halis, *Rule of Law in the Mainland*, 85-101.
49) Chen, *The Basic Law and Constitutional Development*, 27–30.
50) *Basic Law of the Hong Kong Special Administrative Region*, art. 11; *Basic Law of the Macau Special Administrative Region*, art. 11.
51) Ibid., art. 8.

economic systems, while maintaining an explicit constitutional hierarchy that ensures the primacy of the new order.

4.3. The Principles of Autonomy and Local Leadership

The *high degree of autonomy* granted to the SARs includes legislative, executive, and judicial independence within defined limits. The Basic Laws guarantee the continuation of the capitalist system and existing social and legal institutions for fifty years after the handovers – until 2047 for Hong Kong and 2049 for Macau. In practice, autonomy includes several key elements, such as:

1. High Separation of their Legal Systems – Both SARs maintain the legal traditions inherited from their colonial periods: Hong Kong continues to operate under common law, while Macau retains a civil law system derived from Portuguese law.
2. Independent Judiciary – Each SAR has its own court hierarchy, culminating in a Court of Final Appeal (CFA), which possesses the power of constitutional review within the region.
3. Local Leadership – The principle of "Hong Kong people ruling Hong Kong" and "Macau people ruling Macau" ensures that key offices, including the Chief Executive and judges, must be filled by permanent residents with substantial local ties.

This arrangement constitutes an unprecedented experiment in comparative constitutional design: two autonomous regions, under the sovereignty of a socialist state, preserving capitalist economies and legal systems distinct from the mainland. The Basic Laws, in this sense, function both as a constitutional charter and a treaty-like assurance of continuity.

4.4. Judicial Review and the Role of the Basic Law

Judicial review in the SARs is entrusted to the Courts of Final Appeal, which interpret and apply the Basic Law within the boundaries of autonomy. In the early years of Hong Kong as a SAR, the CFA has exercised this authority actively, developing a sophisticated body of constitutional jurisprudence on rights and the separation of powers.[52] In *Ng Ka Ling v. Director of Immigration* (1999), the Court affirmed its power to review

52) Johannes Chan, "Hong Kong's Constitutional Interpretation: The Court of Final Appeal and the NPCSC," (2015) 15 *Hong Kong Law Journal* 195–197.

legislative acts and government decisions for consistency with the Basic Law, characterizing the Basic Law as "the constitutional instrument for the Hong Kong Special Administrative Region."[53] However, the decision also exposed the limits of autonomy: the National People's Congress Standing Committee (NPCSC) in Beijing retains the ultimate authority to interpret the Basic Law under Article 158.[54] The resulting dynamic, a local judiciary exercising constitutional review subject to central interpretive control, illustrates the tension between autonomy and sovereignty embedded in the *One Country, Two Systems* formula.

In Macau, judicial review has been more restrained, reflecting both its civil law tradition and a less contentious political environment. Nevertheless, Macau's courts have similarly treated the Basic Law as the supreme legal norm and invalidated inconsistent local legislation when necessary.[55]

4.5. Comparative Reflections: Continuity, Supremacy, and Post-Colonial Order

The contrast between the SARs' Basic Laws and Caribbean constitutions reveals two divergent conceptions of constitutional transition. In the Caribbean, independence entailed *political separation but legal continuity, i.e.,* the transfer of sovereignty accompanied by the preservation of colonial law. In Macau and Hong Kong, reintegration entailed *political continuity but legal differentiation, i.e., t*he restoration of sovereignty accompanied by the maintenance of distinct legal systems under a new constitutional framework. Both approaches seek to balance legitimacy and stability, but they prioritize different values.

The *saving law clauses* of the Caribbean emphasize caution and preservation; the *continuity clause* of the Basic Laws emphasizes adaptation within constitutional supremacy. The Caribbean experience reflects ambivalence toward colonial legal inheritance; the SARs' model represents a negotiated reaffirmation of that inheritance within a sovereign framework. In both contexts, judicial review serves as the critical mechanism for mediating the boundaries between past and present – between inherited authority and emergent constitutional identity.

53) *Ng Ka Ling v. Director of Immigration* [1999] 1 HKLRD 315 (CFA).
54) Ibid.; see also Albert Chen, "The NPCSC's Power of Interpretation and the Autonomy of Hong Kong's Legal System," (2000) 30 *Hong Kong Law Journal* 151.
55) Halis,*"Post-Colonial" Legal Interpretation in Macau*, 68-86.

5. Comparative Reflections: The Legacy of Empires and Constitutional Identity

Both the Commonwealth Caribbean and the Special Administrative Regions of Macau and Hong Kong illustrate the profound and enduring influence of empires on constitutional design. Each region inherited institutional and normative frameworks from its colonial predecessor, but the paths they took to reconcile those inheritances diverged markedly. The Caribbean model embodies *independence without rupture*, while the Macau-Hong Kong model represents *reunification through differentiation*. These distinct trajectories highlight how constitutional identity is negotiated in post-colonial contexts, between the desire for stability and the aspiration for autonomy.

5.1. Colonial Continuities and Constitutional Transfers

The constitutions of the Commonwealth Caribbean were born from what Albert and his collaborators have called *"constitutional transfers"* – arrangements designed in the United Kingdom and adapted minimally to local circumstances.[56] These transfers imported not only the institutional architecture of Westminster government but also the ideological assumptions underpinning it: a reverence for parliamentary sovereignty, faith in the political process as the ultimate safeguard of rights, and the subordination of judicial power to legislative supremacy.[57]

In contrast, Macau and Hong Kong's Basic Laws were negotiated instruments, drafted to reconcile two different political systems within a single sovereign state.[58] They too preserved colonial structures – the judiciary, economic order, and language of law – but reconstituted them under a new constitutional hierarchy that explicitly affirmed the supremacy of the Basic Law. Thus, whereas the Caribbean constitutions inherited the Westminster model largely as a finished product, the Basic Laws represent a *constitutional synthesis*: they preserve the colonial legal order within a framework of Chinese sovereignty and constitutional supremacy.

Both models demonstrate the paradox of decolonization: independence or reintegration rarely begins with a constitutional blank slate. Instead, colo-

56) Albert et al, *Oxford Handbook,* ch. 2.
57) Dicey, *Law of the Constitution*, 39–40.
58) Halis, *Rule of Law in the Mainland*, 85-101; Ghai, *Hong Kong's New Constitutional Order*, 24–26.

nial legacies persist as legal, institutional, and even epistemic continuities that shape how sovereignty and legitimacy are understood.

5.2. The Role of Judicial Review in Reimagining Sovereignty

Judicial review has become the principal site where these post-colonial continuities are contested and reinterpreted. In the Caribbean, the CCJ has assumed this role by reasserting the supremacy of the Constitution over colonial-era statutes and by rejecting the formalist legacy of the Privy Council. Its jurisprudence in cases such as *McEwan v. Attorney General of Guyana* and *Nervais v. The Queen* reflects a deliberate effort to transform the Constitution from a transplanted instrument of governance into an indigenous source of normative authority.[59] The CCJ's interpretive philosophy – the view of the Constitution as a *living document* grounded in principles of dignity, equality, and the rule of law – represents an act of constitutional self-definition that is aligned with important trends within constitutional interpretation.

In Hong Kong and Macau, judicial review functions within a more complex hierarchy. The Courts of Final Appeal interpret the Basic Laws as supreme within the regions but subject to the ultimate interpretive power of the National People's Congress Standing Committee (NPCSC). This asymmetry embodies a tension between *autonomy and central control*, a defining feature of the "One Country, Two Systems" model. Yet, within those limits, the SAR courts have cultivated an impressive constitutional jurisprudence that affirms local autonomy and the rule of law as essential components of the Basic Laws' constitutional identities.[60]

In both regions, then, judicial review operates as the principal mechanism for negotiating constitutional meaning in light of inherited norms. Courts are not merely arbiters of legality; they are architects of post-colonial legitimacy.

5.3. Constitutional Identity and the Management of Continuity

The management of continuity is at the heart of post-colonial constitutionalism. In the Caribbean, continuity was guaranteed through *saving law*

59) *McEwan v. Attorney General of Guyana* [2018] CCJ 30 (AJ); *Nervais v. The Queen* [2018] CCJ 19 (AJ).

60) Albert H.Y. Chen, *The Basic Law and Constitutional Development in Hong Kong* (Hong Kong University Press, 2011), 34–36.

clauses, which preserved pre-independence legislation regardless of its consistency with new constitutional rights.[61] These clauses, once justified as a stabilizing measure, have come to symbolize the persistence of colonial legality within independent states. In Macau and Hong Kong, continuity was structured differently: all pre-existing laws remain valid only insofar as they are consistent with the Basic Law.[62] The distinction is more than technical: it reflects two contrasting conceptions of constitutional identity.

The Caribbean approach embodies a *defensive continuity*: a reluctance to depart from inherited structures for fear of instability. The SAR approach embodies a *conditional continuity*: preservation coupled with subordination to a higher constitutional norm. Both systems, however, reflect a cautious pragmatism, recognizing that legitimacy in transitional orders often depends as much on continuity as on change. As Ackerman has noted in the context of constitutional transformations, legitimacy arises when continuity and innovation are reconciled through institutionalized processes rather than revolutionary breaks.[63]

5.4. The Post-Colonial Quest for Legitimacy

At its core, the comparative experience of the Commonwealth Caribbean and the Chinese SARs reveals the post-colonial quest for *constitutional legitimacy*. For the Caribbean, the challenge lies in transforming constitutions that were granted rather than created: turning "paper constitutions" into expressions of local sovereignty. For the Macau and Hong Kong SARs, legitimacy rests on maintaining trust in the Basic Law as a genuine guarantee of a high degree of autonomy within the unitary state of China. In both contexts, legitimacy depends on the perceived capacity of constitutional institutions – especially courts – to interpret the constitution as more than a technical instrument, but as an evolving statement of political community.

In this sense, post-colonial constitutionalism is less about the origin of the text than about the practices of interpretation that sustain it. Whether through the CCJ's assertion of regional judicial authority or the CFA's invocation of constitutional rights under the Basic Law, courts perform the work of *re-constitutionalization*: they transform inherited legality into an indigenous and legitimate constitutional order.

61) Albert et al., *Oxford Handbook of Caribbean Constitutions*, 61–63.
62) *Basic Law of the Hong Kong SAR*, arts. 8–11; *Basic Law of the Macau SAR*, arts. 8–11.
63) Bruce Ackerman, *We the People: Foundations* (Cambridge, MA: Harvard University Press, 1991), 6–8.

6. Conclusion

The comparative trajectories of the Commonwealth Caribbean and the Special Administrative Regions (SARs) of Macau and Hong Kong reveal two distinct paradigms of post-colonial constitutionalism. Both emerged from the shadow of European empire and sought to balance continuity with transformation, stability with autonomy. Yet they diverged fundamentally in how they conceived of constitutional supremacy, judicial authority, and the management of inherited legal orders.

In the Commonwealth Caribbean, independence produced a paradox. While political sovereignty was achieved, the constitutional framework remained tethered to the Westminster–Whitehall model, preserving doctrines of parliamentary sovereignty and colonial-era legislation through *saving law clauses*. The judicial response to this hybrid order has been evolutionary: the Caribbean Court of Justice (CCJ) has gradually asserted a jurisprudence of constitutional supremacy and living constitutionalism, transforming constitutions drafted abroad into instruments of regional self-definition. Judicial review, in this context, has become the vehicle through which sovereignty is reimagined and the colonial inheritance reinterpreted.

Macau and Hong Kong followed a different path. Their Basic Laws, products of negotiation between European countries (Portugal and the United Kingdom) and the People's Republic of China rather than decolonization, established a model of *conditional continuity* under the doctrine of *One Country, Two Systems*. The Basic Laws affirm the supremacy of a new constitutional order while maintaining much of the colonial legal system within that hierarchy. Judicial review within the SARs, though limited by the interpretive power of the National People's Congress Standing Committee, nonetheless operates as a meaningful expression of autonomy and rule of law. The Basic-Law model thus represents a constitutional synthesis: continuity constrained by supremacy, autonomy within unity.

Placed side by side, these two paradigms illuminate the diversity of post-colonial constitutional experience. The Commonwealth Caribbean model demonstrates how inherited institutions can evolve toward autonomy through reinterpretation; the SAR model shows how continuity can be preserved within a framework of sovereignty through constitutional design. Both, however, reveal that post-colonial legitimacy is not achieved by discarding the past but by reconstituting it: through institutions, interpretation, and judicial imagination.

Ultimately, the challenge common to both regions lies in sustaining the

transformative promise of constitutionalism amid the enduring legacies of empire. Whether through the CCJ's assertion of regional judicial authority or the SAR courts' defense of autonomy, each experience underscores the same truth: that the authority of the constitution, in any post-colonial society, depends not only on its text but on the ongoing dialogue between legislation, legal interpretation and philosophy, historical approaches, and the collective will to govern oneself.

Deconstructing Social Reality: A Primer on Critical Discourse Studies

*Bernhard Seidl**

1. Introduction[1)]

In the 1970s German TV adaptation of Astrid Lindgren's famous Pippi Longstocking, the eponymous character sings 'Two times three is four, deedledumdee; plus three makes nine: I make my world the way I want it'. Even though we can be reasonably sure this was not the song writer's intention, this actually encapsulates poststructuralist thought on reality and jumps right to the key issue at the heart of studying discourse: How can we make sense of such a multitude of individual, overlapping 'worlds'?

As social creatures, we are constantly confronted with opinions and knowledge about the world we live in, whether in our interactions with others or our engagement with society at large. Even in solitude, we cannot escape the dialectic process of making sense of the many interpretations of knowledge we have accumulated, and which decides how we view the world. As Stanlaw notes regarding the foundations of structuralist thought: 'Thinking (i.e. conceiving the world in signs) constitutes, produces and reifies social reality, and social reality produces thinking' (Stanlaw 2020). The way an individual shapes their subjective reality through mental activity is therefore arguably not fundamentally different from the way a social group constructs its shared reality through what one might call intersubjective social cognition. And just as engaging with the inner processes of an individual helps making sense of the way that individual sees their place in the world and their interaction with other individuals, discourse analysis seeks to understand how intersubjective reality is formed; it presents a structured way of trying to uncover layers of knowledge, biases, aims and opinions in order to examine them thoroughly and critically, since '[...] in human matters, interconnections and chains of cause and effect may be distorted out of vision. Hence 'critique' is essentially making visible the interconnected-

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1) Notice regarding the use of AI tools: LLM-based tools were used for proofreading tasks and to assist with the translation of some verbatim quotes to English. No generative AI tools were used for primary text production or the suggestion of sources.

ness of things.' (Fairclough 1985:747).

In recent decades, numerous approaches to discourse analysis have emerged, each reflecting the priorities and perspectives of specific academic disciplines. While these approaches undoubtedly have their merits and have contributed valuable insights, the proliferation of terminologies, overlapping theoretical frameworks and acronyms (CDA, FDA, PDS, CDS, CL…)[2] tend to make the field appear rather fragmented and not easily accessible. In this paper, I will therefore try to sketch out a 'field-agnostic' basic framework of analysis drawing on various 'flavours' of discourse analysis, in order to provide a starting point for researchers and graduate students who feel a little overwhelmed by the large (and quite interdisciplinary) body of work that has been published on the topic of studying discourse over the years.

2. What is discourse?

As historian and social scientist Franz X. Eder observes, although many researchers write about discourse, only few make an effort to explain what they actually mean by it, which does not help to make discourse analysis more accessible. As Eder further remarks, it even seems to have become fashionable '[...] to have something to do with 'discourse' or 'discourse analysis' [...]' in the title of a publication (Eder 2006:11). This merely echoes the fact that outside of academic contexts, the term discourse is used interchangeably with a number of other words all pertaining to the exchange of opinions or communication in general, such as debate, discussion, talk, dialogue or exchange of opinions (cf. Eder 2006:9, Haslinger 2006:28).

Etymologically, this makes sense: The literal meaning of the Latin verb *discurrēre* is 'to go seperate ways', used also in the sense of 'dispersing information'; the nominal derivative *discursus* describes the act of 'moving to and fro', of people as well as of words (Kytzler and Redemund 2014:136). In the strictest sense, discourse can therefore be understood as the exchange of speech acts – in essence, a conversation. This allows us to draw conclusions regarding the basic constituents of discourse: Information to be exchanged, a medium of exchange (such as speech or written text), and an interlocutor.

It is not that easy, however: Based on an extensive literature survey, Andreas Gardt (2012) concludes that discourse analysis (and therefore the ob-

2) Critical discourse analysis, Foucauldian discourse analysis, Political discourse studies, Critical discourse studies, Critical linguistics

ject of such analysis) encompasses several areas of meaning. It can be understood as a method(ology), a theory, an intellectual attitude or mentality, and a philosophy. Even though discourse analysis is seldom explicitly labelled as a 'theory', the fact that it employs a variety of methodology indicates that there is an overarching theoretical framework these methods are ancillary to, making discourse analysis in Gardt's view similar to psychotherapy, which can refer to a theory as much as its practical application (Gardt 2012: 23,32). Siegfried Jäger (2015:21-23) reaches a similar conclusion comparing various discourse concepts: He argues that the two main concepts concern a) discourse as an intermediary between the individual and the social group (critical linguistics; Ruth Wodak, Teun A. van Dijk, Norman Fairclough, Theo Van Leeuwen to name a few) on the one hand, and b) discourse as the primarily linguistic part of a wider net of 'discoursive practice' that produces knowledge on the other. The latter is typically based on or influenced by Michel Foucault's work (e.g. the German school(s) of discourse studies; Siegfried Jäger, Reiner Keller, Jürgen Link, Andrea Bührmann and others).

Language in the Saussurean sense describes a social phenomenon of organised signs mediating arbitrary meaning that can only be understood in terms of their interrelatedness. While this understanding of language remains at the heart of any form of discourse theory, critical discourse studies are not primarily concerned with language itself. This makes them different from pureley linguistic discourse analysis, which refers to the analysis of the result of linguistic turn-taking (conversation) in a transparent and structured manner, typically employing various annotation systems to indicate speakers, modes of speaking, linguistics and paralinguistic idiosyncrasies. However, arguably even those flavours of critical discourse study that view themselves as applied linguistics ultimately treat language or rather 'texts' in the sense of organised bodies of semiotically coded knowledge as a means to and end; the end here being not to gain knowledge about language, but about the role of language in shaping social realities and identities. As a working definition of 'least common denominators', I would like to refer to Andreas Gardt's synthesis of multiple discourse approaches. According to Gardt, 'discourse' refers to the way a particular topic is negotiated within a social context. This process is driven by social groups and reflected in language. It shapes the knowledge and attitudes of these groups and, in doing so, can potentially influence how social reality regarding the topic in question is shaped (Gardt 2012: 26).

While I will write about methodology in sections 4 and 5 of this paper, I will briefly outline the philosophical key concepts of discourse analysis that, as Gardt notes, tend to coalesce into a certain way of viewing the world, or 'attitude', in the following section.

3. Theoretical foundations of discourse theory

Discourse theory as a multidisciplinary field of study owes much to the contributions of French philosopher and historian Michel Foucault (1926–1984). In works such as *The Archaeology of Knowledge* (1969) and *Discipline and Punish* (1975), he expounded many of the theoretical foundations of discourse analysis, emphasising the role of social power in the formation of shared knowledge.

While discourse analysis based on Foucauldian discourse theory certainly represents an epistemological approach that places great value on the role of language as an arbiter of social reality, in this context, linguistic analysis serves as a means of understanding how knowledge is created, formed, shared, and perpetuated in specific social contexts. Foucault's concept of discourses as 'practices that systematically form the objects of which they speak' (Foucault 2004 [1989]:54) was not conceived in an epistemological vacuum. Examining the fundamental principles of the theorists and schools of thought that influenced Foucault (and that he in turn has influenced) is helpful for understanding the underlying assumptions of discourse theory. Among these schools of thought, poststructuralism stands out as particularly significant, providing a broader intellectual framework within which discourse theory can be situated. Foucault's notion of discourse creating knowledge therefore needs to be understood in the context of (post)structuralism: Objects of discourse, i.e. meaning and knowledge, are not so much created as they are constituted through differentiation from one another (Martin 2022:78). This echoes the structuralist maxims of interdependence, totality and transformation (Seidl 2020: 180) and suggests that knowledge of the broader social context and cultural practices, as well as a historical perspective, is necessary in order to make sense of social discourse.

The idea of 'radical contingency', ascribed to social institutions encapsulates one of the most fundamental principles of poststructuralist thought (Howard, 2013: 188) and has also informed discourse theories emphasising the dynamic nature of social reality: Social formations, practices and subjective and intersubjective identities are in a constant state of flux; meanings are never fixed, but follow rules and constraints that facilitate social reality as much as they produce it. Consequently, discourse cannot be approached as a discrete object of study. Instead, it must be understood as an ongoing, evolving process that reflects the continuous production and negotiation of meaning within society.

3.1. Discourse and power

Discourse as a process is based on knowledge and is mediated by another central concept in Foucault's work: Power. Although Foucault's understanding of power and its role in the formation of knowledge evolved over the course of his work, he ultimately concluded that power does not just mean the capacity for repression. Rather, it permeates and facilitates the formation and maintenance of knowledge in society (Howard 2013: 189), existing as 'a relationship of force' that is negotiated and realised through constant struggle' (Jäger 2015: 158), much like a game of tug-of-war between the subjects: 'Discourse can be understood as the result of many people trying to assert themselves in society. The result is never what any single one of them has intended, but which everyone has contributed to in various ways and in different areas of life (and with varying degrees of influence)' (Jäger 2015:37).

In this context, power is at a first glance as elusive a concept as discourse, but it may be best understood as the act of claiming or attributing authority. To give an everyday conversational example: When I ask someone for directions, I am attributing to the other person the knowledge that I lack, thereby casting them as an 'expert' (Belsey 2002: 97). Their utterances (at least regarding directions) will likely be treated as an authoritative 'text'. Similarly, in discourse analysis, the questions of who lays claim to authority, who is ceded authority, and how authority is governed are important. Discourse analysis aims to answer these questions through social critique, '[...] illustrating how utterances and interpretations thereof are authorised, hierarchised, or marginalised in the course of the communicative process, thereby generating, stabilising, or destabilising power relations' (Haslinger 2006:27).

Thus, poststructuralist discourse analysis is focused on the question of how knowledge and power manifest and interact in the process of creating knowledge in a social group. This iterative process is easier to grasp if we call its intermittent result '(social) reality'. Discourse is not merely a passive mirror of what people in a social group think about a specific topic. Rather, the discoursive process shapes shared social reality by describing and dictating cultural norms, social rules and frames of understanding; it 'actively forms the knowledge and attitudes of social groups [...], and in doing so also guides future action pertaining to the construction of social reality relating to that topic' (Gardt 2012:26).

3.2 Discourse and social reality

As poststructuralism asserts, there is no objective reality; positivism regarding social phenomena is wishful thinking; fact and reality is merely what is being agreed upon by all concerned individuals in a process of the construction of multiple, overlapping realities. This implies that the critique in discourse analysis is not aimed at determining the 'truth' or the facts concerning a discourse topic. Poststructuralism also contends that facts have no inherent meaning. For instance, the controversial statements or actions of a high-ranking politician are not inherently controversial. It is only through a society's arbitrary decisions concerning ethics and morals that such utterances or acts become ethically questionable or amoral. Thus, social acts are *made* acceptable or controversial through the mechanism of the discourse, just as they may be *re-made* eventually. This harkens back to the above mentioned Ferdinand de Saussure (1857-1913), whose theory of semiotics is arguably the basis of structuralist and ultimately poststructuralist thought (Stanlaw 2020, Belsey 2002:10). While de Saussure's linguistics essentialism has largely been abandoned in discourse studies, his central claim that meaning (the relationship between the sign and the signified) is an arbitrary construct created by social norms and rules, and that meaning is derived from (again, arbitrary) contrast and thus context, has had a lasting influence on the concept of social reality in discourse studies.

In summary, the purpose of critically examining discourse is not to establish the factuality or reality of a matter. That is not to say that striving to determine the factual circumstances objectively is not helpful; it on the contrary often needed to form a comprehensive picture. However, in the context of public opinion and shared social reality, 'truth' and even 'fact' does not necessarily point to the facts themselves, but rather to what these facts mean, and to the question of how that meaning is determined, challenged and changed.

With this working understanding of discourse, I will conclude this section by briefly addressing the question of terminology in Japanese. As I noted earlier, the term 'discourse' suffers from overuse in English and German. However, it seems there is a slightly different problem in Japanese, since there are several terms with more or less overlapping denotations but diverging connotations (see Nakanishi 2008, for a detailed discussion of discourse terminology in Japanese). While the Foucauldian notion of discourse as a theoretical and philosophical construct is typically transliterated from French to Japanese (*discours* → *diskūru* [ディスクール]), this term does not quite fit modern empirical discourse study, as it is usually mainly used in Japanese texts dealing with Foucault, Derrida and other

poststructuralist theorists. Furthermore, the transliteration of English 'discourse' (*disukōsu* [ディスコース]) that is used primarily in the context of discourse analysis in the sense of 'critical linguistics', is used interchangeably with the much older and less specific term *gensetsu* (言説), denoting the exchange of opinions and explanation of concepts. Finally, discourse analysis as discussed in this paper can be mistranslated into Japanese as *danwa bunseki* (談話分析), which denotes linguistic discourse (i.e. conversation) analysis. For the kind of analytical framework I will outline in the following sections, I propose to use *disukōsu* (ディスコース) as a term specifically adopted for this kind of context, which is not used in everyday language and carries no other meanings in Japanese.

4. Approaching critical discourse analysis

Foucault's work has been, and continues to be, influential in the fields of postmodern theory and discourse studies. However, few would argue that his oeuvre is a suitable blueprint for practical research. Although he asserts that '[...] discourse is a complex, differentiated practice, governed by analysable rules and transformations [...]' (Foucault 2004 [1989]: 232), specific methodological instructions are virtually absent from his body of work. Fortunately, several decades of Foucault exegesis have produced some eminently practical approaches based on poststructuralist thought, and applied linguistics/critical linguistics have contributed their own extensive approaches to examining social reality. As I have noted, this paper follows a pragmatical approach to methodology, and although the approach outlined here is based on Siegfried Jäger's system of critical discourse analysis (*Kritische Diskursanalyse*), I have incorporated many elements from other approaches that don't necessarily regard themselves as drawing on Foucault's work, or even poststructuralist thought. However, I am convinced it is for the most part neither easy nor necessary to draw a line between the various approaches; ultimately, they all agree that social reality is constructed phenomenon and aim to make sense of it as best as they can.

Coming from this point of view, no topic is inherently unsuitable for conducting a discourse analysis. However, for an analysis to be academically and/or socially *relevant*, the topic should incorporate elements of discord, clashing attitudes or challenges to norms. In other words, the discourse needs to be 'alive'. Most discourse analyses therefore draw on topics relating to ontological spheres such as identity and subject (e.g. gender roles, sexuality, body, mind), systems of belief (politics, religion, ideology etc.) or cultural practices (e.g. family structures, traditions).

Although discourse can be approached inductively, i.e. by generating

specific problems and hypotheses from a corpus formed on the basis of more general criteria, research more often focuses on questions of actors, power relations, positions and ideologies formulated beforehand. Nevertheless, it is advisable to remain open to unexpected avenues of investigation. Discourse can be examined either diachronically, that is, along a timeline, or synchronically, focusing on a specific point in time (Martin, 2022: 78). The latter should not be interpreted too narrowly. For example, focusing on a month of a larger discourse that spans decades is synchronic in that it reflects only a slice of the whole, but still examines a corpus of data accumulated following a specified timeline. This is incidentally echoed in Jäger's characterisation of discourse as 'the flow of knowledge, or rather reservoirs of social knowledge, through time' (Jäger 2015: 26), building on Foucault's metaphor of archaeology, which implies the uncovering of layers produced over time. According to Jäger (2015), a thorough critical discourse analysis requires the following criteria to be met:

- it should be based on a representative data corpus
- it must aim to provide a detailed picture by analysing the corpus at macro and micro levels
- it should strive for a holistic approach by situating findings in the appropriate sociocultural context, including history, institutions, and media

However, this leads to a fundamental problem of discourse analysis: If discourse is essentially a process and a social phenomenon, how can it be collected, condensed or reified into a corpus?

The answer is that we don't actually analyse discourse; rather, we look at how it manifests itself, at the picture of discourse we see in the mirror. As I have established in the first section of this paper, discourse needs a medium. For conversations, that medium is language; for broader, intersubjective discourse, the question of the medium is twofold. Meaning is still transferred in and through text (in the sense of semiotic systems, including, but not limited to, spoken and written language), but now these texts need a meta-medium to be shared with other participant sin the discourse. In modern societies, this function of mediating text is realized by mass media.

4.1. Media: Places of discourse

As 'a site of power, of struggle' (Wodak 2001:6), mass media are of particular interest to all kinds of discourse study that are concerned with social critique, since the process of negotiating meaning is not limited to any particular medium. In fact, all media ultimately serve as an expression of knowledge and opinion, and thus, the various discourses they mediate.

Since discourse is not usually limited to a particular type of media, there is a potentially large variety of sources that can be drawn upon for analysis. Media shape the discourse they facilitate, and the choice of media determines the 'slice' or dimension of discourse that is examined. For example, social media may carry and amplify fringe voices in political discourse, whereas novels and movies process societal knowledge and participate in discourse on a more abstract, symbolic, or metaphorical level.

In modern media, especially digital media, it has become a 'deliberate media strategy to develop and promote properties [...] across different media channels' (MacQuail and Deuze 2020:412). This can make the decision to limit data acquisition to one medium challenging. Therefore, it is all the more important to carefully select the 'discourse mirror(s)' based on the research question, the researcher's interests, methodological inclinations and proficiencies, and of course the availability of data.

Media theory has developed several approaches to categorising media and their output according to technology, modes of interaction, intended audience, genre or format. I have found it especially helpful to consider places of discourse in terms of reactivity and interactivity (cf. Marshall McLuhan's concept of 'hot' and 'cold' media [Marchessault, 2005: 176]), and to consider reach, accessibility, and the degree of abstraction.

Reactivity here means media with a high degree of information throughput that react quickly to new information and developments. Examples include social media, news portals, or traditional newspapers. High reactivity also makes it likely that there is a large amount of data that needs to be selectively sampled.

'**Interactive**' describes media of a conversational nature that offer a high degree of participation, as opposed to passive media consumption. Examples include video games, social media and websites that invite user participation, such as forums, comments sections and polls.

'**Reach**' indicates whether a medium is potentially or practically used by large social groups or is limited to specific groups, providing an indication of the extent to which a wider social perspective can be expected. Newspapers or national television are prime examples for media with a wide reach, as well as various social media, web sites, movies or advertisements. At the same time, group-specific, limited discourse may provide valuable opportunities for in-depth qualitative analysis.

Accessibility in this context refers to whether a medium offers easy access to discourse participation (again, social media comes to mind), or if for example access to specific technology or tech literacy is required (also true of social media). The latter may prevent certain demographic groups from participating in discourse. For example, if the intention is to achieve a broad

social perspective (i.e. wide reach and high reactivity) for a super-aged society like Japan, then traditional newspapers might be a better choice of media than app-based digital media.

The above criteria are focused on media that belong to the sphere of discourse studies with a leaning towards social studies. However, it is worth noting that critical discourse analysis be applied to primarily narrative media as well.

'**Abstract media**' is used here to describe media that deal with social reality through the lens of fiction, i.e. novels, movies, or video games. After all, discourses are stories we tell each other based on a particular view of the world (Machin and Van Leeuwen 2007:58).

4.2. Corpus and data acquisition

The decision of which discourse media to analyse also determines what data the corpus will contain.

Generally, the corpus will consist of discourse fragments, i.e. the smallest self-contained units of discourse that can be justifiably counted as one contribution to the discourse in the examined media. The nature and size of such units depends on the media; while for movies or books, the whole work may constitute one unit (in the case of an anthology, one publication might ostensibly include multiple discourse fragments), for newspapers or magazines one article corresponds to a unit; for social media, one posting will typically count as one unit, and so forth. However, research focusing on cultural artefacts as products of 'abstract' media typically addresses the question of how discursive practices relating to a given topic are reflected and negotiated in fiction through the vicarious voices of characters and institutions featured in such works, and in the case of game studies, also through game mechanics and the ways in which players interact with the game world. Therefore, such analysis often focuses on a small number of works, or even a single work, and explores them in depth. For such media, as well as long documents such as white papers, it may be useful to divide the text into self-contained sub-fragments according to its structure (e.g. sections, chapters, levels, etc.).

Thinking in discourse fragments and sub-fragments as units of analysis help to maintain a structured approach and makes analysis on the macro level easier. Depending on the examined media and the 'hotness' of the discourse, it will sometimes be impossible to collect all discourse fragments. Even with discourses that are rather limited in scope, it might be difficult to be completely sure one has collected 'all there is'. Achim Landwehr calls this putative entirety of all fragments 'imaginary corpus' from

which a 'virtual corpus' that can be analysed needs to be sampled (Landwehr 2001:107). Sampling is the process of defining criteria to justify the selection of data. While I will not discuss sampling procedures in detail in this paper, the social sciences offer many approaches to data sampling that can be used to produce a corpus arguably representative of the imaginary entirety of fragments. However, for discourse analysis, I would like to point out that a corpus can be built around discursive key events for a more synchronic approach (e.g. sampling from before and after the event). Examples include geopolitical events, the passing of a law, or any other event that can be expected to have had a significant effect on the discourse. Possible ways of determining the validity of such a key event include the results of a preliminary macro analysis of discourse fragments, drawing parallels to historical events of a similar nature, and assessments in expert literature. For an initial appraisal, the researcher's own social intuition as a subject of the discourse may also be useful, as they may have experienced public discourse on a matter surging because of a certain event. In any case, identifying key events and determining time frames of data sampling must be based on clear criteria.

Building a corpus can be very straightforward if the media, subtype, topic or time frame is limited, but it is often an iterative process. This is especially true with media such a magazines, newspapers, or social media: Fragments are gathered based on key words and time constraints, and working with these fragments often yield new key words in a process akin to snowball sampling. This leads to a repetition of the sampling process, ideally until no more fragments and no more keywords are found.

The ultimate size of a corpus will vary considerably depending on the choice of topic, media, and methodological approach, but regardless of the nature of collected fragments and the size of the corpus, all collected discourse fragments should be archived in a structured way that facilitates subsequent analysis. Relevant metadata (collected when, where, based on what keywords, date of fragment creation etc.) needs to be attributed and the data needs to be stored in a durable and retrievable way (i.e. not just links to web content that might go offline at any time). Finally, the format of the collected data needs to be considered with respect to the intended method(s) of analysis (e.g. analogue or digitalised, and if digitalised, what kind of digital format?).

4.3. Analysis

As noted above, Jäger (and others) recommend conducting analyses at varying levels of granularity, working from large-scale structures (macro)

to more detailed ones (meso and micro), while iterating between these levels as required. This usually involves combining quantitative and qualitative approaches; as Früh (2007: 67–69) points out, both approaches are best used together to achieve a comprehensive perspective. At the macro level, the focus lies on broader structures, such as identifying dominant themes, actors, and trends. The meso level shifts the focus to fragments, end examines the organisation of text in narrative structures in its institutional context. Finally, the micro level explores the semiotic features of fragments on a (more or less) granular scale. The following sections will outline the characteristics of working at the macro, meso, and micro levels, and suggest specific steps and tools.

4.3.1. Macro analysis

The goal of macro analysis is to identify the general patterns of the discourse reflected in the corpus. This involves identifying connections and links between discourse fragments and strands, recognising key themes, and analysing the frequency of keywords and how they evolve over time (e.g. when specific keywords first appeared and how frequently they were used). As the often quantitative part of a multi-layered analysis, macro analysis lends itself to visualising discourse through tables, diagrams, word clouds, or various means of visualising collocations. However, macro analysis does not necessarily imply a corpus consisting of many fragments. Especially with a corpus consisting of few but voluminous texts (e.g. novels, movies, games), macro analysis can be synonymous with the surface reading and wide reading steps of literature studies influenced by cultural studies (Greguš and Kamerer 2021: 217-221).

Macro analysis reveals patterns to be further investigated. Although it may be based on theoretical considerations (deductive approach), it often leads to the inductive building of working assumptions and hypothesis regarding rules and structures governing the examined facet of discourse. Such hypotheses can then be tested deductively on macro, meso and/or micro levels. Noah Bubendorfer argues that ‘social action leads to statistically salient patterns of language use. It should therefore be possible, to a certain degree, to draw conclusions regarding the social organisation of the world examining typical patterns of language use’ (Bubendorfer 2009:3). Examining macro- and micro perspectives can also reveal how individual language use reflects larger patterns, and how in turn impacts larger observed patterns (cf. Krendel 2024:164). For large corpora of digital text and especially if the corpus is sorted along a timeline, text mining software is an invaluable tool that allows insights into such patterns through the computa-

tion of term frequency and collocations, that is, determining which words tend to be used together to from syntagmas. Commercial software, such as *KhCoder* (recommended for working with Japanese text corpora) as well as free and/or open-source tools such as *Voyant Tools* can be used to explore keywords and key phrases, as well as their contexts and collocations, according to transparent mathematical models. Visualising the results of such analyses through keyword-in-context (KWIC), keyword clustering and co-occurrence networks often offer a valuable first insight into large text-based corpora. While some applications also offer large language model-based tools as one-click solutions, as of now, these models are essentially 'black boxes', making it hard or outright impossible to understand how input is interpreted and conclusions are reached. In the context of scientific accountability, it is crucial to be able to understand and explain how results are produced and conclusions are arrived at in published research. Therefore, LLM-based or aided analysis need to be employed with great care.

Viewing the results of macro level analysis often hints at sub-discourses, i.e. thematic formations that can be traced as separate 'strands' interwoven with other such strands along a timeline. Identifying such sub-discourses is helpful in determining changes of focus, energy and tone of the larger discourse, and often hints at discursive effects. For instance, in my study of the wider discourse on language change and language decline in Japan between 1945 and 2020, gendered language emerged as a distinct sub-discourse. Following this thread, I was able to show the centrality of this sub-discourse in the 1960s to 1980s, and how the adoption of new gender ideals and imagery from the late 1980s onwards was mirrored in the reframing, and subsequent decline of this discourse strand (Seidl 2016, Seidl 2020).

Ultimately, all discourse is a sub-discourse of some larger, more abstract and more general discursive process. This can be likened to nesting Russian dolls or single hairs forming strands that together form a rope, which, together with other ropes, forms a net. While this awareness that no discourse happens in a sociocultural vacuum is important for interpreting and contextualising findings, a research project will, for pragmatic reasons, typically need to focus on one specific, dominant discourse strand that may or may not have several sub-strands. It is therefore the researcher's decision whether to investigate such sub-strands by actively creating a dedicated corpus with new or additional key words, or to limit the examination to already assembled corpus.

4.3.2 Meso- and micro analysis

Analysis on the meso- and microlevel seeks to reveal the language use

of discourse actors; returning to macro level analysis allows to situate such findings in the larger context of the discourse. This process is iterative rather than linear, and requires frequent shifts between perspectives due to the layered nature of discourse analysis. The exact nature of meso- and microlevel analysis depends on the characteristics of the media being examined and the resulting corpus. As established, discourse fragments can take various forms, which means there is no one-size-fits-all approach to analysis; the format of the media (text, still images, moving images or other modalities) and the desired depth of analysis decides the analytical approach. For example, is the research interest limited to text, even though the text is accompanied by images (newspaper articles, social media, web sites)? If images are to be part of the analysis, what level of detail is desired or necessary? If film clips are alluded to in textual fragments (i..e. comments to clips posted on social media), do these need to be analysed in detail, using content analysis, sequence protocols etc., or will a broader perspective suffice?

Researchers will therefore often find themselves working multidisciplinary and multimodally. This may involve borrowing methodologies from film studies (e.g. sequence protocol-based multimodal approaches, cf. Mikos 2008), literature studies (such as close-, surface- and wide reading approaches [cf. Greguš and Kamerer 2020] or hermeneutic text analysis), game studies (cf. Gee 2014), sociology (e.g. code-based content analysis, cf. Ueno 2008, Früh 2007), digital media studies (for example, multimodal web analysis, cf. Pauwels 2012), and of course linguistics (including sociolinguistics and computer/ corpus linguistics, cf. Seidl 2020). In general however, qualitative content analysis provides a solid basis for smaller text corpora, as well as for corpora consisting of different media (e.g. text, images and video). Software such as the free and open source *QualCode* or *Taguette* (and various more prominent commercial alternatives) can be used for tasks such as managing code trees and multimodal coding/annotation, which can speed up the analysis considerably.

For a text-based corpus, the meso level typically corresponds to the scale of a single fragment (or a set of closely related fragments) and is examined to reveal the overall structure, tone and positions of such texts, while working on the micro level means working on the scale of paragraphs, sentences, and words. To this end, qualitative methodologies such as hermeneutic text analysis, structured reading and content analysis help identify powerful linguistic and rhetorical devices, such as collective symbolism (which I will discuss in the following section), logical fallacies, humour, satire, and irony. Furthermore, they can be used to uncover narrative structures, such as discourse schemata (‘activity sequences’ of discourse) that can represent

the flow of imagined, idealised or critiqued social action (Machin and Van Leeuwen 2007:62-63). Returning to the macro view, such findings may coalesce into a worldview representative of certain actors or groups.

Larger text-based corpora often require computer-aided corpus linguistics methodology. Specialised software such as KhCoder is helpful not only for macro-level analysis, but also for encapsulating observed collocations and hypotheses in codes. This allows various units of analysis to be used, such as fragments, paragraphs and sentences, as well as types of tokens (nouns, verbs, adjectives, proper nouns, etc.), and Boolean operators (cf. Seidl 2010, 2020, 2025). In this way, patterns can be found, formalised and tested quite easily and iteratively.

To make sense of the findings on the various levels of analysis, corpora, and sub-corpora, discourse fragments need to be situated within their 'institutional frame' (Jäger 2015:98,99). On a general level, this means considering the characteristics of the media the corpus is drawn from (such as intended audience, modes of participation, political leaning, ideological background), but it also extends to factors such as specific causes of fragment creation (e.g. in reaction to a specific social or political event) and the personal, professional or ideological background of its creator(s), if deemed relevant.

4.3.3. Discourse actors and strategies

Discourse actors are individuals and institutions whose voices form the discourse at large. Representative actors also form an important category as individuals purporting to speak for a group, and therefore carrying the discursive weight of many voices. As this constitutes a form of discoursive power (authority based on the claim to speak for many), asking to what degree such representation is actually sanctioned by that group (or whether it is, in fact, disputed) might be prudent.

For narrative media such as novels or movies, the concept of discourse actors may be less useful at a first glance, since 'actor' would correspond to the individual(s) or institution(s) responsible for the creation of the cultural artefact as their discourse contribution. However, the various voices often present in a work of fiction may be viewed as a virtualised version of societal discourse. Therefore, analysing positions, ideologies and power relationships of represented characters and institutions nevertheless represents an important point of the analysis.

In the context of power relations, Jäger's concept of 'authorised actors' (or speakers) provides a good framework for categorising actors. Authorised actors are those who commonly claim or are awarded discursive au-

thority (i.e. power) due to their association with certain qualifications. Such qualifications might include expert knowledge (e.g. scientists, scholars, physicians, first-hand witnesses, victims and perpetrators of crimes), their social or symbolic function (emperors, presidents, judges, politicians, etc.), or institutionalised power (e.g. teachers, politicians, nobles in feudal societies, or oligarchs in societies where wealth is considered a form of crystallised power). Similarly to Link's notion of collective symbolisms discussed below, one interesting factor of authorised actors is that their authority need not be explained, since it is a function of structure; the knowledge of their social status makes their role as 'experts' largely self-explanatory and commonly acceptable. Having said that, the question of whether such authority is challenged or outright denied in the discourse represents another layer of analysing power relations in the discourse.

Actors may be examined as virtual groups that share common attributes pertinent to the research interest, even though the individuals in that group can be heterogeneous and disparate. To give an example, in an analysis of newspaper articles it may be worthwhile to compare if the virtual group of 'readers', 'experts' and 'journalists' show specific modes of talking or framing, or a focus on specific issues (cf. Seidl 2020). Analysing actors means trying to explain their aims and motives for participating in the discourse, and how they realise them. Therefore, it is crucial to examine how language or other means of conveying meaning, such as images, colours and sound is used to convey information, realise ideologies and manipulate the discourse.

On the meso level, this means determining the dominant tone of the fragment or sub-fragment; e.g. is it descriptive, explicative, questioning, predicative, or a mixture? To this end, the 'institutional frame' (Jäger, 2015: 98–99) needs to be considered, i.e. the characteristics of the media from which the corpus is drawn, such as the intended audience, modes of participation, political leaning and ideological background, as well as those of individual discourse fragments and their creators.

On the micro level, things to look out for include communicative acts that convey meaning as well as performing a social function; 'utterances that create the very state of affairs they represent' (Searle 1997:34). Such acts may include for example declarations (or war, innocence etc.), promise, forbidding (by creating a social reality in which the forbidden thing may not be done, thereby influencing social action), or naming. Similarly, different types of modality (expressions of possibility or necessity) can be important aspects of micro analysis. For example, framing something through bouletic modality (necessary because of one's desires) is different from expressing it as deontic (necessary, permissible, or possible given a normative

principle, such as laws or ethics) or teleological (necessary or acceptable in order to achieve a goal). As the slightly clichéd saying goes, it's more about how you say it than what you say.

Another important framing strategy is the use of metaphors, a 'key site of ideology in texts' (Hart 2024: 116). Hart argues that linguistic symbolism has long been recognised as an important focus of critical discourse linguistics, providing insights into the templates for thinking (frames) that discourse actors argue from or aim to invoke (Hart 2024: 117,118). John Searle defines linguistic symbolisms as semantic devices that symbolise concepts beyond or different from their lexical denotation according to convention achieved through wide social consensus (Searle 1997:66). However, symbolism in discourse is often not limited to language, which is why discourse studies scholar Jürgen Link introduced the useful concept of 'collective symbolism'. Link defines collective symbolisms as '[...] the whole "imagery" of a culture, the whole of its widely used allegories and emblems, metaphors, examples, illustrative devices, guiding themes, comparisons, and analogies' (Link 1996: 25), that can be expressed through any kind of medium, be it language, image, or sound. The power of such collective symbolisms lies in the fact that they do not need to be explained as they draw on established cultural knowledge. For example, it need not be explained why a 'flooding of our language with loanwords' or a 'flood of migrants pouring into our country' is an inherently bad thing that requires countermeasures: Floods are dangerous and bring destruction; they threaten established (and therefore implicitly 'good'; an example of *argumentum ad antiquitatem*) structures. Similarly, the slogan '[let's make] Austria into a fortress', used by the Austrian nationalist right-wing party FPÖ in the context of immigration policy, implies external enemies that need to be stopped from entering and signals the willingness to fight them. Likewise, 'lethal autonomous weapon systems' is not the same as 'killer robots' or 'the Terminator' (cf. Seidl 2025), likewise, framing a social conflict as 'war' conveys a multitude of familiar and accessible associations encapsulated in a single word (Hart 2024:118).

4.3.4. Synthesis and interpretation of findings

While working with the corpus at various analytical levels, intermediate interpretations and working hypotheses typically emerge. To achieve a comprehensive picture, these need to be synthesised and contextualised. In order to achieve this, it is helpful to reflect once more on the overall objective of a critical discourse analysis. Peter Haslinger summarises this goal as follows:

> 'Determining the influence of a discourse contribution, its degree of creativity, and the amount of attention it generates within its linguistic scope; methods of discourse control and monopolisation, hierarchisation, and restriction of expression. Integrating intermediate results into the larger picture of the examined discourse in order to describe the relationship between discourse, subject and social order — i.e. what can we infer about the examined social group from it, and how can we use the results to explain proscriptions, hierarchies and social action?' (Haslinger 2006:47)

To put the findings in perspective, it may be helpful to interpret them through the lense of a theory. While discourse theory itself offers intriguing albeit diverse and at times rather abstract (see sections 1 and 2) ways of making sense of discourse, depending on the nature of the research interest, anthropology, sociolinguistics, pragmatics, political studies, media studies etc. all provide valuable epistemological frames

Before concluding, I would like to emphasise the importance of negative analysis particularly during the synthesis and interpretation of findings. Negative analysis means focusing on what is absent from the examined corpus, even though it could reasonably be expected to be present: Which actors are missing? What themes could, might or should be present, but are not? What is left unsaid, which words are not used? Thinking about a phenomenon in terms of what it the social context says it is *not* either directly or implicitly arguably echoes the poststructuralist notion of meaning arising only from contrast to, and demarcation and absence of, other meanings. While it first needs to be established whether such discursive ellipses are the result of the chosen media or the method of data sampling, negative analysis can provide valuable insights into power relations, social and cultural norms - in short, the rules of discourse. For example, who is not permitted or invited to participate in the discourse? Is the subject of a discourse also an active participant? In a discourse about trans people's rights, for instance, to what extent are trans people's voices present? In a discourse centred on immigration policy, do immigrants participate? If not, what might explain their absence, and what does that say about the social reality regarding this issue?

5. Closing remarks

Public discourse is not merely a collection of words or images; as I have tried to outline in this paper, the ways in which something or someone is spoken about, represented, or framed in public discourse provide the foundation for how individuals and groups act and interact within society. In

this sense, discourse essentially represents the framework that influences and structures the possibilities for social action and interaction. This implies that discourses possess a transformative power that extends far beyond 'text'. Discourses do not merely reflect social practices; they actively transform them. As Machin and Van Leeuven argue, they represent, reshape, legitimise and delegitimise the social practices they recontextualise; therefore, discourses are deeply intertwined with the purposes, reasons and justifications of social practices and influence how these practices are understood, enacted, and evaluated within specific social and cultural contexts (Machin and Van Leeuwen 2007:60-61).

It follows that the energy and tension generated by discourse, its 'frictional heat', as it were, also does not remain confined to the realm of text. The reciprocal interaction between discourse and social reality manifests in tangible social action. These actions can range from the individual level (such as acts of speech, consumer choices, personal expressions through clothing or body modifications, and other behaviours in everyday social interactions) to the collective level, including voting patterns, participation in rallies, or engagement in demonstrations. Such actions are not only reflective of the discourses that shape them; they potentially also serve as catalysts for societal changes on the micro or macro level. Machin and Van Leeuwen further emphasise that since discourse constitutes socially constructed knowledge, there exists an interplay between knowing and doing. Just as actions are informed by knowledge, the act of doing also contributes to the production and reinforcement of knowledge (Machin and Van Leewen 2007:61). However, this needs to be tempered with a dose of pragmatism; it will be difficult, if not impossible, to prove a tangible causal relationship between, for example, a flame war on a social media platform and the way a government tackles a global pandemic. Furthermore, due to the reciprocal nature of discourse and social reality, the question of causality quickly becomes one of chicken or egg, where discoursive effects can only be inferred from the research findings. For instance, my research (Seidl 2016) indicated that decades of public discourse on language deterioration in Japan had resulted in a substantial, multifaceted market comprising guidebooks, training courses, certifications and even video games. This finding had to be inferred from the intricate interplay between discourse actors, emerging topics and evolving cultural values. No single event, fragment, actor or institution could be identified as the sole cause. To give another example, in my study of public discourse on lethal autonomous weapons (LAWS) in Japan (Seidl 2025), I found that LAWS, which have long been perceived as abstract or fictional, are becoming increasingly accepted as a reality that needs to be addressed, thus setting the stage for political and social action.

At the same time against a background of NPO campaigning for increasing awareness and newspapers starting to actively pursue the topic, one of the two ruling parties decided to introduce a dedicating LAWS working group, and related experts were invited to explain the issue to lawmakers - all examples for tangible social action, but again impossible to ascribe to any single event or discourse contribution. Thus, the extent to which social action can be extrapolated from the examined discourse often depends on the scope of the 'holistic approach' described in section 4 and on factors such as the recency of the topic.

Returning to the argument I made in the introductory section of this paper, the process of making sense of discourses is, in essence, an attempt to understand the mechanisms of intersubjective social cognition and the ways in which the production and circulation of knowledge drive the continuous evolution of the social world. Given this intricate relationship between discourse, knowledge, and action, it is perhaps unsurprising that discourse studies have been likened to a form of psychotherapy for societies or social groups. As Krendel (2024: 159) notes, discourse analysis serves not only a 'socio-diagnostic' function by 'demystifying the underlying attitudes and ideologies conveyed in language', but also offers a potential element of prognosis through critical engagement, using '[...] findings in an applied way to make a material difference in wider society', and in this way inviting reflection, critique, and, potentially, transformation.

In closing, I would like to emphasise that critically examining discourse holds a significant, albeit sometimes underappreciated, value: It enhances our ability to discern how public opinion is shaped, influenced, and, at times, manipulated. In an era increasingly defined by the dynamics of an economy of attention (cf. Goldhaber 1997; Franck 1998), we find ourselves inundated with information from social media, countless news outlets, and the rise of mass-generated AI content. In this buzz of voices all vying to assert their version of public 'truth,' terms like 'fake news' and 'alternative facts' have become part of our shared lexicon for describing the complexities of contemporary social reality. In such a context, critical discourse analysis provides a means to untangle and interrogate the ways in which these factors converge to construct the overlapping and often conflicting social realities we inhabit.

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Material

Communicating Japanese Constitutional Scholarship to the World: A Bibliography of English-Language Articles Published in Japanese Law Journals

*Noboru Yanase**

1. The Significance of the Bibliography of English-Language Articles on the Japanese Constitution

This paper presents a bibliography of scholarly articles written in English on the Japanese Constitution, published in major Japanese university law journals.

In addition to the articles on the Japanese Constitution included in this bibliography, the author has also compiled lists of related articles published in foreign law journals, as well as books published both in Japan and abroad. The author intends to make these lists publicly available in the future. However, due to space constraints, this bibliography is limited to articles published in Japanese university law journals.

This bibliography will be useful not only for foreign scholars who are not fluent in Japanese and wish to access research on the Japanese Constitution, but also for Japanese constitutional scholars who aim to disseminate their work internationally.

Comparative constitutional studies is an area in which scholars have been particularly active in Japan. Japanese constitutional scholars conduct highly sophisticated analyses of foreign constitutions—covering institutions, jurisprudence, and case law—comparable in depth to those by schol-

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This research is supported by the Japan Society for the Promotion of Science (JSPS), Grant-in-Aid for Scientific Research (KAKENHI No. 21K01153), titled "Elucidating the Meaning, Trends, and Agendas of Japanese Constitutional Studies: When Communicating It to the World as Well as Viewing It from the World."

ars in the countries concerned.[1] However, many of these detailed studies of foreign constitutions are written in Japanese—a language inaccessible to readers in the countries being studied—and published in domestic journals.[2] Hajime Yamamoto criticized this situation, arguing that "comparative law research in Japan has long been regarded as a one-way process of importation and assimilation, and consequently, Japanese constitutional scholarship and constitutional case law have almost entirely failed to consider readers outside the Japanese-speaking community."[3] Similarly, Makoto Arai observes that, although Japan has long been active in comparative constitutional studies since the Meiji era, and one of the most prolific and sophisticated countries in this field, the accomplishments of comparative constitutional research in Japan "have been disseminated primarily within Japan, leading to a certain disconnect from global trends in comparative constitutional studies."[4]

Traditionally, comparative constitutional studies in Japan have emphasized learning from foreign constitutions for the purpose of developing interpretive theories of the Japanese Constitution, rather than introducing

1) Tomonobu Hayashi observes that, in Japan's legal academia, asking what it means to refer to foreign legal systems reflects a growing awareness that traditional research methods are losing their once-taken-for-granted legitimacy. He describes the typical career pattern of a Japanese legal scholar as follows: "In practice, those aspiring to become legal scholars are first required, during their academic training, to acquire the ability to read foreign legal literature and to make their academic debut by writing a lengthy thesis on a topic drawn from foreign law. If they are fortunate enough to study abroad in the country whose legal system they have been studying, they are often surprised to find that local young scholars focus on their own national law, and that their own style of study is far from the norm. They may even realize that, outside their narrow research theme, they know surprisingly little about Japanese law itself—leading to an identity crisis. It may be assumed that many Japanese legal scholars have passed through such an experience early in their careers." Tomonobu Hayashi, "Rekishi-Tetsugaku no Ato de: Kempou-gaku ni okeru Gaikoku-hou no Sanshou [After the Philosophy of History: On the Reference to Foreign Law in Constitutional Studies]," *Horitsu Jiho*, 92(4), p. 6 (2020).

2) Consequently—and regrettably—the people of those foreign countries are generally unaware that Japanese scholars have conducted studies on their national constitutions, and such research therefore contributes little to the constitutional politics or protection of human rights in those countries.

3) Hajime Yamamoto, "Kempou Kaishaku to Hikaku-hou [Interpretation of Constitution and Comparative Law]," in *Kokkyou wo Koeru Kempou Riron: "Hou no Gurobaru-ka" to Rikken-shugi no Henyou* [*Constitutional Theories Beyond Borders: "Globalization of Law" and the Transformation of Constitutionalism*], Nippon Hyoron-sha, p. 197 (2023).

4) Arai notes that "one of the major challenges for Japanese comparative constitutional studies is how to engage internationally—while preserving the unique significance and merits of constitutional scholarship developed in Japan—and how to develop contemporary comparative constitutional research within the global circle of scholars." Makoto Arai, "'Hikaku-Kempou' wo Hikaku-suru [Comparing 'Comparative Constitutional Law']," in Makoto Arai et al. eds., *Sekai no Kempou / Nihon no Kempou: Hikaku Kempou Nyumon* [*World Constitutions and the Japanese Constitution: An Introduction to Comparative Constitutional Law*], Yuhikaku, p. 32 (2022).

Japanese constitutional theory abroad. However, Japan, which adopted and developed legal systems from France, Germany, the United Kingdom, and the United States during its modernization, has accumulated a remarkable body of comparative legal research. Akira Mikazuki, one of Japan's most prominent scholars of civil procedure, remarked that "all the major legal systems of the world have converged upon this island nation in the Far East, undergoing intense fermentation," describing this as a distinctive characteristic of Japanese law. He further noted that other Asian countries have been paying close attention to this unique synthesis.[5] From this perspective, the international dissemination of Japanese constitutional scholarship contributes not only to the further development of Japanese constitutional scholarship itself but also to Japan's international contribution through legal assistance to developing countries.

Although Japan is a non-Western country, it was the first in Asia to establish constitutionalism by learning from Western legal traditions. Thus, Japanese constitutional theory and doctrines are of great academic interest to scholars around the world. Nevertheless, research on these topics remains difficult for non-Japanese speakers, primarily because Japanese constitutional scholarship is almost always published in Japanese for a domestic readership. The linguistic barrier remains the greatest obstacle for foreign scholars.[6]

Thanks to resources such as the Japanese Law Translation Database System (https://www.japaneselawtranslation.go.jp/en/), which provides English translations of selected Japanese statutes,[7] and the judgment database of the Supreme Court of Japan (https://www.courts.go.jp/english/Judgments/index.html), which offers English translations of selected Supreme Court

5) Akira Mikazuki, "Nihon-koku no Kindai-ka (1868-nen) Igo no Hou-Seibi Kouchiku no Rekishi [The History of Legal Development in Japan since Modernization (1868)]," *Shiho Hyoron III* [*Review of Civil Procedure III*], Yuhikaku, p. 75 (2005).

6) Noboru Yanase, "Constitutional Cases of the Supreme Court of Japan: What the Court Stated and How We Can Obtain Each Text," *Nihon University Comparative Law*, 38, p. 55 (2022).

7) The Japanese Law Translation Database, operated by the Ministry of Justice, provides English translations of Japanese laws and regulations, although they are not official texts. The site includes the disclaimer: "Only the original Japanese texts of the laws and regulations have legal effect, and the translations are to be used solely as reference materials to aid in the understanding of Japanese laws and regulations."

cases,[8] non-Japanese speakers can now easily access reliable legal information without learning Japanese. However, even with English translations of statutes and case law, one essential component of legal research remains difficult to access—theories provided by scholars.

It is natural that Japanese scholars publish their research in Japanese, which is their native language. In today's globalized academic environment, however, Japanese constitutional scholars are increasingly expected to disseminate their research not only in Japanese—a language spoken almost exclusively by about one hundred million people in Japan—but also in international languages. Satoshi Yokodaido argues that, if the purpose of comparative constitutional studies is not limited to serving Japan's domestic interests, but also includes contributing to the globally expanding field of comparative constitutional law, then "Japanese constitutional scholars who are intimately familiar with the contextual and nuanced meanings of Japan's constitutional practices should actively publish their work in foreign languages, particularly English."[9] Similarly, Yuichiro Tsuji, who is one of the most active authors publishing English-language articles on constitutional law in foreign law journals, notes that "Japanese research achievements, written in Japanese, are largely unknown abroad due to linguistic barriers," and emphasizes that "disseminating at least part of Japan's constitutional discourse internationally will be an important mission for the next generation of scholars."[10]

It is not true, however, that Japanese constitutional scholars have never published their research in foreign languages. A small but growing number of Japanese scholars have published their work in English or other languages. Yet one serious problem remains: it is extremely difficult to locate such work.

8) The Supreme Court of Japan's official website provides translations of judgments, although they are not official texts. The site includes the disclaimer: "The Supreme Court of Japan assumes no responsibility for the accuracy of the translations." As noted in Yanase *supra* note (6), p. 57, the database previously did not allow searches by "Date of Judgment" for cases before 1969, although few of such cases were in fact included. As of September 2025, however, the database has been improved and can now be searched by judgment date back to 1926. Nevertheless, cases before 1969 remain exceedingly rare in the search results and of course, cases before 1946 do not exist and yield no results, since the Supreme Court of Japan was established only in 1946.

9) Yokodaido argues that "research on Japanese constitutional phenomena and interpretation, insofar as it contributes to the development and evolution of comparative constitutional law at the international level, is worthy of being called comparative constitutional law." Satoshi Yokodaido, "Hikaku Kempou-gaku ni tsuite no Ichi-Kousatsu [A Reflection on Comparative Constitutional Law]," in Akiko Ejima ed., *Gurobaru-na Rikken-shugi to Kempou-gaku* [*Global Constitutionalism and Constitutional Studies*], Shinzansha, p. 310 (2024).

10) Yuichiro Tsuji, "Bunken-ka no Shourai [The Future of Decentralization: Coexistence & Coprosperity]," *Kempou Kenkyu* [*Review of Constitutional Law*], 3, p. 125 (2018).

In Japan, English-language studies on the Japanese constitution are scattered across various academic journals and books, and there exists no comprehensive database for integrated searches. Articles on Japanese constitutional law published in Western law journals or academic publications are easily searchable through electronic databases. By contrast, identifying English-language articles buried among vast numbers of Japanese-language articles in Japanese university journals is exceedingly difficult. Even if a Japanese scholar writes in English and publishes in a Japanese university journal, it is nearly impossible for foreign researchers to locate such work on their own. That valuable Japanese constitutional research remains largely unknown to the world merely because of accessibility barriers represents a significant loss to the global community of constitutional scholars.

For this reason, this paper provides a bibliography of English-language articles on the Japanese Constitution published in Japanese university law journals.

This bibliography, limited to English-language works, will make such research accessible to scholars worldwide through English as an international language. It will contribute to a more accurate understanding of the Japanese Constitution among foreign scholars, assist Japanese scholars seeking to internationalize their work, and promote collaboration between Japanese and foreign researchers. In this way, the bibliography aims to make Japanese constitutional scholarship more open to the world.

2. Previous Works and the Unique Advantage of This Bibliography

Several bibliographies of books and articles on Japanese law written in Western languages have been published with a concept similar to that of the present bibliography. The four previous works particularly considered when compiling this bibliography are as follows:

First, one such bibliography is that compiled by Rex Coleman and John Haley. The Japanese American Society for Legal Studies published the English-language journal *Law in Japan: An Annual*[11] yearly from 1967 onward. It initially featured English translations of published Japanese-language articles on Japanese law written by Japanese authorities such as

11) For example, *Law in Japan* has published English translations of Japanese-language articles such as Kenzo Takayanagi, "The Conceptual Background of the Constitutional Revision Debate in the Constitution Investigation Commission," *Law in Japan: An Annual*, 1, pp. 1–24 (1967). However, in accordance with the editorial policy of the present bibliography—which includes only articles published in university law journals in Japan—these works are not listed here.

Nobuyoshi Ashibe, one of the most prominent constitutional scholars in postwar Japan, and later began including original English-language articles on Japanese law. Coleman was the first chairman of this journal's editorial committee. In 1961, he compiled a mimeographed pamphlet titled *An Index to Japanese Law, 1867-1961: Preliminary Draft of a Complete Bibliography of All Books, Pamphlets, Articles, Essays, Statutes, Cases and Other Legal Materials Concerning Japanese Law in the English Language*.[12] This work was a bibliography of books and articles on Japanese law written in English from 1867 to 1961 (actually including encyclopedias, history, and culture books with little relevance to law). The *Index* was substantially revised and co-edited with Haley to cover materials up to 1973, including some in German and French, and was commercially published in 1975.[13] This *Index* was also published as a Special Issue of *Law in Japan* and is accessible through the HeinOnline Law Journal Library (as all volumes of *Law in Japan* are included in HeinOnline). Updates to Coleman's *Index* were made through irregular supplements published in *Law in Japan* (from Volume 7 in 1974 onward), but the Supplements ceased with Supplement No. 6, which was published in Volume 23 of *Law in Japan* in 1990 and covered literature up to 1983. Subsequently, a bibliography of Western-language publications on Japanese law from 1974 to 1989 was published in 1992 under the name of one of the compilers of the Supplement, Matthias K. Scheer, with the support of Deutsch-Japanische Juristenvereinigung (DJJV).[14] However, since *Law in Japan* itself ceased publication with Volume 27 in 2001, a comprehensive update of Coleman's *Index* of Western-language literature on Japanese law cannot be expected unless Scheer resumes supplementing and publishing it.

Second, another such bibliography is *Japanese Business Law in Western Languages: An Annotated Selective Bibliography*, edited by Harald Baum and Luke Nottage. Both editors, based in Germany and Australia respectively, have extensive research experience in Japan and expertise in Japanese business law. The *Annotated Selective Bibliography* is an expanded

12) This pamphlet was prepared for the conference held at Harvard Law School to conclude the Japanese-American Program for Cooperation in Legal Studies. It is held in several university libraries in Japan and the United States.

13) Rex Coleman & John Owen Haley, *An Index to Japanese Law: A Bibliography of Western Language Materials, 1867–1973*, University of Tokyo Press, 1975.

14) Matthias K. Scheer, *Japanisches Recht in westlichen Sprachen 1974–1989: Eine Bibliographie* [*Japanese Law in Western Languages 1974–1989: A Bibliography*], 1992. This massive, 881-page typewritten volume was not commercially published but distributed by DJJV. It includes some Western-language articles published in Japanese university journals, but also lists works written in Japanese, and therefore differs in scope from the bibliography attached to this paper.

monograph based on a chapter in Baum's compendium on Japanese business law published in German in 1994,[15] with Nottage's collaboration. The first edition was published in 1998, and the second edition,[16] with the help of two assistants, was published in 2013. The *Annotated Selective Bibliography*, as the title suggests, is rich in bibliographic information for books and articles published in Japan and abroad from 1970 to 2012 on topics such as conflict of laws, civil law, civil procedure, trade and investment law, company law, labor law, intellectual property law, and tax law. It also includes a list of works on the Japanese Constitution. It includes, although limited in number, literature in Western languages other than German and English (e.g., French and Italian). The restriction of included literature to those from the 1970s onward is because the *Annotated Selective Bibliography* itself introduces bibliographies and general or introductory works on Japanese law published before its own release. The *Annotated Selective Bibliography* includes a list of literature in Western languages other than English (not covered by the bibliography attached to this paper) and articles published in foreign journals (not covered by the bibliography) but hardly any articles published in Japanese university journals (which are the subject of the bibliography).

Third, Tomohiko Tatsumi's "A Selective Bibliography of Japanese Public Law in German and English"[17] is a list of English and German literature on Japanese public law.[18] Tatsumi notes "The primary purpose of this paper is to facilitate Japanese researchers who will have opportunities to hold lectures, presentations, or seminars on Japanese public law in German-speaking countries in the future" (p. 257). However, English or German speakers with some ability to read Japanese could also use Tatsumi's Bibliography to gain information on Japanese law if they can find the list itself. It includes German-language literature and literature on Japanese administrative law, which are not covered by the bibliography attached to this paper. Tatsumi's

15) Harald Baum, „Annotierte bibliographische Angaben," in Harald Baum und Ulrich Drobnig (Hrsg.), *Japanisches Handels- und Wirtschaftsrecht*, Walter de Gruyter, S. 691–757 (1994).

16) Harald Baum, Luke Nottage, Joel Rheuben, & Markus Thier eds., *Japanese Business Law in Western Languages: An Annotated Selective Bibliography*, 2nd ed., William S. Hein & Co., 2013.

17) Tomohiko Tatsumi, "Nihon Kouhou ni kansuru Doitsugo/Eigo Shiryo Risuto [Auswahlbibliographie des japanischen Öffentlichen Rechts auf Deutsch und Englisch]," *Seikei Hogaku: The Journal of Law, Political Science and Humanities (Seikei University)*, 91, pp. 255–287 (2019), available at https://doi.org/10.15018/00000377.

18) Tatsumi's Bibliography itself is written in Japanese and published in a Japanese university law journal. Fortunately, the full text is available in the institutional repository, making it accessible to researchers worldwide via the internet.

Bibliography, however, mainly includes books and articles published in countries such as Germany and the United States (partly including articles published in some Western-language journals of Japanese universities) and does not include English-language articles scattered among the Japanese-language university journals, which are the focus of the bibliography attached to this paper.

Fourth, another relevant resource is the *Eigo Shoseki* List [List of Books in English] and *Eigo Gakujutsu Zasshi* List [List of Journals in English] within the Japan Law Database (https://www.waseda.jp/folaw/icl/en/database/) of the Waseda University Institute of Comparative Law. These Lists cover books, articles, etc., on all areas of Japanese law, not just constitutional law, written in English. A PDF version of the bibliography (apparently generated from a spreadsheet file) is available online in a view-only format, and future updates are anticipated. However, English-language articles on the Japanese Constitution published in Japanese university journals (the focus of this bibliography) are excluded from these Lists (except for those in a few Western-language journals of Japanese universities).

Since these four previous works do not enable the retrieval of English-language articles on the Japanese Constitution published in Japanese university journals, the present bibliography is both necessary and useful.

3. Scope and Features of English-Language Articles on the Japanese Constitution

This bibliography compiles information on English-language articles about the Japanese Constitution published in major Japanese university law journals up to September 2025, categorized by subject matter. The entries are generally ordered according to the articles of the Japanese Constitution.

Citations include the author's name (with the capitalized surname preceding the given name, and separated by a comma), article title (in bold and enclosed in quotation marks), journal name (italicized),[19] volume and issue number,[20] first and last page numbers of the article, the year of publication (in parentheses), and the URL from which the article can be downloaded (if

19) The titles of Japanese university journals are typically in Japanese, but they also possess an English title (with the exception of purely Western-language journals). In this bibliography, the English titles of the journals are provided for the sake of researchers who do not read Japanese

20) Japanese law journals publish one volume per year, often consisting of multiple issues. Thus, "Vol. 10, No. 5" is cited as "10(5)." When two issues are combined (e.g., Vol. 10, Nos. 5–6), it is cited as "10(5–6)." Some journals have only volumes or only issues; for example, issue 10 alone is simply cited as "10."

it is open access). Citations of literature in this bibliography are standardized for consistency, and may not be identical to those used in the original work. For example, titles and subtitles are uniformly separated by use of a colon, rather than dashes or other forms of punctuation, and macrons or other diacritical marks indicating long vowel sounds in Japanese words are omitted.

The main features of this bibliography are as follows. First, the literature included in this bibliography consists of articles published in the law journals of major Japanese universities. The period covered is from November 1946[21] to September 2025.

Articles on constitutional law are also published in professional law journals (such as *Jurist* and *Horitsu Jiho*), academic association journals (such as *Public Law Review* by the Japan Public Law Association, *Constitutional Law Review* by the Japan Association for Studies of Constitutional Law, and *Constitutional Theory Review* by the Association for Studies of Constitutional Theory), and books. This bibliography focuses on articles published in 253 academic journals of the law faculties (including law schools and law research institutes) of major Japanese universities. The reason for choosing articles published in the university journals is that most universities publish their journals regularly, and they often have less stringent word limits compared to other serials, making them the most flexible medium for university-affiliated scholars to publish their work. Although articles published in Japanese professional law journals or academic association journals face similar search difficulties as those in university journals, they were not included in this bibliography due to their smaller number. They may be included in future updates or expanded editions of this bibliography.

Articles in law journals published by European/American universities or by European and American publishers can be searched in electronic databases like Lexis+ and Westlaw Classic, and many are available for full-text download. The HeinOnline Law Journal Library allows for downloading the full text of articles from the inaugural to the latest issues of many European/American university law journals in the same layout as the printed version. Although few English-language articles on the Japanese Constitution have been published in European or American law journals, they are easily searchable and downloadable through these databases. Therefore, this bibliography excludes articles published in European/American law journals. On the other hand, there is no single, comprehensive database

21) The Constitution of Japan was promulgated on November 3, 1946, and came into effect on May 3, 1947. This bibliography focuses on the current Constitution, therefore it covers articles published in or after November 1946.

available to search for English-language articles published in Japanese university journals. Thus, this bibliography, which lists English-language articles on the Japanese Constitution published in Japanese university journals, will be beneficial to readers. While CiNii Research (https://cir.nii.ac.jp/), operated by the National Institute of Informatics, allows free searching of articles in Japanese serial publications, including university journals, and allows downloading full text of articles in the same layout as the printed version when they are open access, in practice, it is extremely difficult to search for English-language articles in Japanese law journals using English keywords in this database.[22)]

Constitutional law scholars may belong to departments other than the law faculty of universities and publish their articles in the journals of those other faculties. Also, scholars affiliated with a law faculty may publish articles in a journal of other departments. This bibliography primarily includes articles published in law faculty journals (although it includes some articles published in non-law faculty journals identified by the author), but the scope will be broadened to include journals from other faculties in the future.

Some Japanese universities publish separate journals for Western-language research outcomes in addition to their Japanese-language journals. Examples of current Western-language law journals[23)] include *Hitotsubashi Journal of Law and Politics*, *Kansai University Review of Law and Politics*, *Kobe University Law Review*, *Meiji Law Journal*, *Nagoya University Asian Law Bulletin*, *Nihon University Comparative Law*, *Osaka University Law Review*, *Ritsumeikan Law Review (International Edition)*, and *Waseda Bulletin of Comparative Law*. English-language articles in Western-language journals are also difficult for non-Japanese speakers to search because no

22) One reason is that in Japanese databases such as CiNii Research, English titles are sometimes not properly recorded—for example, they may use full-width letters instead of standard English ones, so searches in English do not return those results. Even if one successfully retrieves an article with an English title through a database search, disappointment often follows: in many cases, the article is written in Japanese. Japanese authors usually attach English titles (and occasionally English abstracts) to Japanese-language articles. Thus, an article appearing to be in English on CiNii Research may in fact be written entirely in Japanese.

23) Some Western-language university journals have unfortunately ceased publication. For example, *Doshisha Law Review (International Edition)*, *Keio Law Review*, *Kwansei Gakuin Law Review*, and *University of Tokyo Journal of Law and Politics* published excellent articles but were discontinued in the 2000s. *Kyoto Journal of Law and Politics* was published as part of Kyoto University's 21st Century Center of Excellence Program "Program for the Reconstruction of Legal Ordering in the Twenty-First Century" (2003–2007), and was discontinued after the program's completion.

comprehensive database exists,[24] so they are included in this bibliography, just like articles in Japanese-language journals.

Second, this bibliography only includes articles written in English among the foreign-language articles. The reason for limiting the scope to English-language articles is that English is the most widely used international language in academic research, and the author deemed English literature the highest priority in compiling a bibliography. This, however, does not negate the significance of Japanese constitutional research in other languages. In the process of collecting foreign-language literature on the Japanese Constitution, the author did find several articles on the Japanese Constitution written in German or French by Japanese constitutional scholars,[25] although fewer than those in English. It will be a future task to compile a comprehensive bibliography that includes these non-English Western-language materials.

From the perspective of focusing on the international dissemination of research accomplishments by Japanese scholars, articles written in languages other than English are just as noteworthy as those in English. Furthermore, considering the number of speakers in the world, articles should ideally also be written in Chinese. China is a neighboring country geographically close to Japan, and there is a high level of personal exchange, with many Chinese students (far more than from the United States or European countries) studying at Japanese universities, making it rational for articles on Japanese constitutional scholarship to be written in Chinese. Almost no Japanese constitutional scholars study the Chinese Constitution, making it extremely difficult to find articles written in Chinese on the Japanese Constitution in Japanese university journals. As Tomonobu Hayashi states, "In reality, even regarding foreign law, the countries primarily referenced by Japanese legal scholarship are concentrated in the United States, the United King-

24) Although the *Hitotsubashi Journal of Law and Politics* is a Japanese university journal, it is indexed in the HeinOnline Law Journal Library.

25) Among Western languages used in articles on the Japanese Constitution, German is the most common after English. For example, Hisao Kuriki, "Das Allgemeine Staatsrecht (die Allgemeine Staatslehre) in Deutschland und Japan: Geschichtliche Betrachtung," *Meijo Law School Review*, 1, pp. 4–17 (2005), available at https://mylib.meijo-u.ac.jp/webopac/TC05233723, later included in his book *Beiträge zur Geschichte der deutschen Staatsrechtswissenschaft: Gedanke des Volkes in der deutschen Staatsrechtswissenschaft*, Seibundo, 2009. Similarly, Ken Hasegawa published several French-language articles not only on French but also on Japanese constitutional issues in the journal of his institution, such as "L'État actuel et le Problème juridique du Référendum local au Japon," *Kogakuin University Bulletin*, 36(1), pp. 1–17 (1998), available at https://doi.org/10.57377/0002000734. Although his work is known among French constitutional scholars through his sustained professional engagement with them, it remains difficult for other foreign researchers to locate such works using databases like CiNii Research.

dom, Germany, and France—countries that were given the role of models to rely upon during the Meiji period's transplantation of Western law and in subsequent development".[26] Since scholars' reference countries are mostly limited to the United States, the United Kingdom, Germany, and France, they are proficient in the languages of those countries, and if they intend to write an article in a foreign language, it would be rational to write it in their most proficient language. Conversely, if a scholar has not mastered a language other than those to the level required for academic writing, they usually would not consider publishing an article in that language merely for the sake of disseminating Japanese law.[27]

Third, this bibliography comprises academic articles and their equivalents. While Japanese scholars often include a concise abstract in a Western language when writing articles in Japanese, these abstracts are not independent works and are therefore excluded. Even if written in English, mere reflections or essays are also excluded, as this bibliography is intended to support scholarly research on the Japanese Constitution both in Japan and abroad.

Conversely, the bibliography does include presentation scripts or lecture records. The opportunity to present at an international conference or during research abroad often motivates Japanese scholars to write in a foreign language. Some items in this bibliography are presentation scripts themselves, without footnotes and including greetings at the beginning and end.

In general, brief introductions to Japanese legislation or judicial precedents are excluded. However, exceptions are made for those that go beyond simple description and include detailed analysis or commentary by the author, thereby qualifying as academic articles. For example, *Waseda Bulletin of Comparative Law* regularly publishes brief introductions to newly enacted legislation and recent judicial decisions, and *Ritsumeikan Law Review (International Edition)* occasionally does the same. Such introductory pieces, which do not constitute articles in the strict sense, are excluded from

26) Hayashi, *supra* note (1), p. 6.

27) Mikazuki strongly emphasized the need for Japanese legal scholars and lawyers to communicate Japanese law to the peoples of other Asian countries. It is unrealistic to expect peoples of other Asian countries to learn Japanese, and he argued that Japanese legal scholars and lawyers must disseminate Japanese law in foreign languages—ideally not only English, German, and French but also Asian languages such as Chinese, Vietnamese, and Malay. Akira Mikazuki, "Nihon no Hou to Hougaku no Atarashii Kadai [New Challenges for Japanese Law and Legal Scholarship]," *Shiho Hyoron II* [*Review of Civil Procedure II*], Yuhikaku, p. 368 (2005). Yet, given the time and effort required to master new languages, few Japanese legal scholars or lawyers are likely to learn Asian languages for this purpose. The author therefore believes that disseminating Japanese law in English, as an international common language, is the most practical approach.

this bibliography.

Fourth, the literature included in this bibliography concerns the Japanese Constitution. Most are articles written by scholars majoring in constitutional law or related legal fields. However, articles written by scholars in fields other than law (e.g., political scientists) or those using methodologies other than traditional comparative constitutional legal studies (e.g., socio-legal approaches) are included if they are beneficial for research on the Japanese Constitution. Articles concerning the Constitution of the Empire of Japan (a.k.a. Meiji Constitution) are generally excluded unless they are discussed in the context of the transition to the Japanese Constitution or in contrast to it.[28] It is often difficult to distinguish articles on the Japanese Constitution from those that are not. For instance, articles containing the word "Constitution" may not necessarily be about the Japanese Constitution (in which case they are excluded). Conversely, some articles do not contain the word "Constitution" but substantively address issues of constitutional matters (in which case they are included). The selection process for this bibliography was not easy but was conducted by the author, a specialist in the Japanese Constitution. Furthermore, articles written by constitutional scholars that mainly address meta-theories or fundamental principles of constitutional law,[29] or that discuss foreign constitutions with little or no reference to the Japanese Constitution,[30] are academically valuable but are excluded from this bibliography in line with its purpose of collecting literature on the Japanese Constitution.

Fifth, for literature where the original text is available online, the download URL is also provided in the bibliography. Recently, most Japanese uni-

28) For example, George M. Beckmann's research on the Meiji Constitution (e.g., "The Meiji Restoration and the Constitutional Development of Japan, 1868–1871," *Hogaku Kenkyu: Journal of Law, Politics, and Sociology (Keio University)*, 26(6), pp. 458–468 (1953)) was later expanded into his book, *The Making of the Meiji Constitution: The Oligarchs and the Constitutional Development of Japan, 1868–1891*, University of Kansas Press, 1957. However, as his work concerns the Meiji Constitution rather than the current Constitution, it is not included in this bibliography.

29) For example, Toru Mori, "The Necessity and Possibility of Deliberative Democracy," *Tsukuba University Journal of Law and Political Science*, 20, pp. 325–354 (1996), available at http://hdl.handle.net/2241/00155859, and Yasuo Hasebe, "Montesquieu's Significance for Contemporary Japan: What Japanese Constitutional Scholars Have Failed to Learn from Montesquieu," *The University of Tokyo Law Review*, 7, pp. 199–202 (2012) available at https://www.sllr.j.u-tokyo.ac.jp/07/papers/v07part11(hasebe).pdf, are of potentially great influence for constitutional scholars worldwide. However, as they do not directly address Japanese Constitution, they are not included in this bibliography.

30) For example, Hideyuki Osawa, "Uncertainties in the Developing Age of Public Law Litigation," *Keio Law Review*, 3, pp. 59–89 (1983), is an excellent study of public litigation in the United States and offers insights relevant to Japan. Nevertheless, as it discusses only the American context without explicit application to Japan, it is not included in this bibliography.

versities have established institutional repositories and started making articles published in their journals available online for free. Articles published in university journals, which were previously only obtainable by visiting a library to access the printed copy, are now easily accessible via the internet from anywhere by researchers both in Japan and worldwide. However, not all universities have established institutional repositories or made their published journals available online. Some universities have no repository, and others only release recently published journal articles, without retroactively integrating older issues into the repository. Furthermore, even though the university provides its repository, some articles may not be downloadable from it due to copyright reasons, such as the author not granting permission for open access. This bibliography prioritizes the use of Digital Object Identifier (DOI) URLs (https://doi.org/) or Handle System URLs (https://hdl.handle.net/) for persistent accessibility. These are international identifiers assigned to digitized academic articles and research data, ensuring permanent access even if the server storing the content is moved, or the content's URL changes or breaks. However, since not all Japanese university repositories support DOI or Handle System URLs, where these are unavailable, this bibliography lists the direct repository URL, which may become inaccessible in the future.

Finally, any bibliography inevitably faces the risk of unintentional omissions where relevant literature is missed. Furthermore, as noted, this bibliography deliberately limited its scope to Japanese university journals, thereby excluding key literature found in professional law journals, academic association journals, and books; these sources will require supplementation in the future. Since serial publications like university journals continue to be published after the creation of this bibliography, important new literature will constantly emerge. Therefore, as with all bibliographies, a supplemental volume to this bibliography will inevitably be required in the future.

Bibliography of English-Language Articles on the Japanese Constitution

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Special Contribution

Approche de la pensée juridique de Saint-Simon

*François-Xavier Roux-Demare**

Partie 1. La conception juridique de Saint-Simon[1)]

La biographie de Saint-Simon, philosophe mais non juriste. Claude-Henri de Rouvroy, comte de Saint-Simon, est un philosophe du début du 19e siècle (1760-1825). Il est présenté comme un grand penseur, auteur d'une importante œuvre donnant naissance à un mouvement socio-politique, philosophique et moral par l'école saint-simonienne. Aristocrate penseur social, on le considère à l'origine de quatre grands courants de pensée : le positivisme d'Auguste Comte ; comme précurseur du socialisme ; un courant de la sociologie inaugurée par Emile Durkheim ; et l'école saint-simonienne ou le saint-simonisme[2)]. Son œuvre est importante, guidé par un pressentiment « *qu'il s'opèrera incessamment une grande révolution scientifique* »[3)]. Bien qu'il soit un « *esprit puissant et fumeux, fécond et incohérent* »[4)], il n'est pas pour autant un juriste. Saint-Simon ne s'est jamais revendiqué de cette qualité. Par ailleurs, cette compétence disciplinaire ne lui a pas été attribuée par les saint-simoniens. En outre, ses écrits ne sont ni utilisés ni cités par les juristes.

Les travaux de Saint-Simon, une conception nécessairement juridique. Si les travaux de Saint-Simon ne propose pas une orientation expressément juridique de sa pensée, elle transparaît au travers de sa réflexion sur la réorganisation de la société. En effet, il présente une pensée politique par son projet de reconstruction de l'ordre social. Certes, le Doyen Carbonnier

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1) Ce texte a été présenté lors d'une conférence à la Faculté de Droit de l'Université de Nihon, à Tokyo (Japon), le 21 octobre 2025.

2) Pierre MUSSO, *Saint-Simon et le saint-simonisme*, Paris, PUF, Collection « Que sais-je ? », 1999, p. 4.

3) C. H. de SAINT-SIMON, *Introduction aux travaux scientifiques du dix-neuvième siècle*, Tome premier, Paris, Imprimerie de J.L. Scherff, 1808, p. 13.

4) S. ROCHEBLAVE, « Référence bibliographique : Un précurseur du socialisme ; Saint-Simon et son œuvre, par Georges Weill, docteur ès lettres, ancien élève de l'École normale supérieure. Paris, Perrin [compte-rendu] », *Revue internationale de l'enseignement*, tome 28, juill.-déc. 1894, p. 584.

a mis en garde contre « *la tentation du panjurisme* »[5] en critiquant ce « *qui nous porte à supposer du droit partout, sous chaque relation sociale ou interindividuelle* »[6], dénonçant alors le fait « *de lire l'univers comme si c'était un livre de droit* »[7]. Et si le droit est partout, il ne faut pas croire pour autant que tout est du droit. Ces mises en garde rappelées, il apparaît pour autant difficile de penser une évolution de la société sans recourir au droit. La simple définition du terme « droit », pris dans son sens objectif, le confirme : ensemble des règles obligatoires qui régissent la vie en société et qui font l'objet d'une sanction par la puissance publique. Le droit est donc essentiel pour proposer une bonne organisation sociale, c'est-à-dire comme l'envisage Saint-Simon « *un système politique convenable à l'état des lumières, et la création d'un pouvoir général investi d'une force capable de réprimer l'ambition des peuples et des rois* »[8].

Le droit, instrument d'une nouvelle organisation sociale ?. Pour Saint-Simon, le droit doit être une source de progrès, en opposition avec les conceptions traditionnelles de l'Ancien Régime. Evoquant la crise dans laquelle le corps politique est engagé, il souligne que « *cette crise consiste essentiellement dans le passage du système féodal et théologique au système industriel et scientifique* »[9]. Le droit se présente alors comme un moyen pour une telle évolution. Il l'affirme expressément : « *on ne saurait trop le répéter, il faut un but d'activité à une société, sans quoi il n'y a point de système politique. Or, légiférer n'est point un but, ce ne peut être qu'un moyen* »[10]. Le droit doit donc assurer les adaptations nécessaires aux transformations de la société. Imposant ce processus évolutif, Saint-Simon pense un droit adaptatif, renvoyant à des formules plus récentes, du Doyen Carbonnier : « *Puisque la société est un organisme vivant, le droit, qui en est un élément constituant, participe de la vie de tout l'organisme.* »[11] ou

5) Jean CARBONNIER, *Flexible droit. Textes pour une sociologie du droit sans rigueur*, Paris, LGDJ, 10e éd., 2001, p. 23.
6) *Ibid*., pp. 23-24
7) *Ibid*., p. 24.
8) *De la réorganisation de la société européenne ou de la nécessité et des moyens de rassembler les peuples d'Europe en un seul corps politique en conservant à chacun son indépendance nationale*, *in Œuvres de Saint-Simon*, publiées par les membres du Conseil institué par Enfantin pour l'exécution de ses dernières volontés, Premier volume, Paris, E. Dentu Editeur, 1868, p. 244.
9) *Du système industriel*, *in Œuvres de Saint-Simon*, publiées par les membres du Conseil institué par Enfantin pour l'exécution de ses dernières volontés, Cinquième volume, Paris, E. Dentu Editeur, 1869, p. 3.
10) *Ibid*., p. 14.
11) Jean CARBONNIER, *Flexible droit. Textes pour une sociologie du droit sans rigueur*, *op. cit.*, p. 13.

de Rémy Libchaber : « *Faisant corps avec la société, le droit doit changer avec elle et s'adapter à ses transformations* »[12].

Saint-Simon se distingue alors de l'approche de Jean-Jacques Rousseau et du contrat social. Il explique ce détachement à l'appui des libertés. Il contredit le fait que le but du contrat social serait d'assurer le maintien de la liberté, soulignant que « *la liberté, considérée sous son vrai point de vue, est une conséquence de la civilisation, progressive comme elle, mais elle ne saurait en être le but. On ne s'associe point pour être libres* »[13]. Au contraire, pour Saint-Simon, elle relève « *d'une capacité temporelle ou spirituelle utile à l'association* »[14]. Cela renvoie à une démarche raisonnée des citoyens. Si Jean-Jacques Rousseau s'appuie sur la notion de droit naturel, Saint-Simon la rejette comme fondement de la société. Il appuie la légitimité politique de la société sur son organisation rationnelle et scientifique. Cette approche explique la place prépondérante attachée aux sachants, et plus particulièrement aux industriels. Dès lors, l'économie politique se présente comme « *le véritable et unique fondement de la politique* »[15]. Il poursuit en affirmant l'importance de la production des choses utiles et, par voie de conséquence l'essentialité des producteurs de choses utiles, « *seuls hommes utiles dans la société* »[16] concourant à régler son fonctionnement. Il conclut : « *la politique est donc, pour me résumer en deux mots, la science de la production, c'est-à-dire la science qui a pour objet l'ordre de choses le plus favorable à tous les genres de productions* »[17]. Cette approche explique l'épigraphe proposée sur la couverture de son œuvre intitulée *L'Industrie* : « *tout par l'industrie ; tout pour elle* ». La société industrielle se présente alors comme le fondement du droit.

Saint-Simon précise par ailleurs qu'« *il serait absolument imphilosophique de ne pas reconnaître l'utile et remarquable influence exercée par les légistes et les métaphysiciens, pour modifier le système féodal et théologique, et pour empêcher qu'il n'étouffât le système industriel et scientifique, dès ses premiers développements. L'abolition des justices*

12) Rémy LIBCHABER, « Où va le droit ? - Là où la société le conduira… », *JCP* Ed. G, n° 28, 9 juill. 2018, doctr. 813, p. 1382.
13) *Du système industriel*, *in Œuvres de Saint-Simon*, *op. cit.*, p. 15, note 1.
14) *Ibid.*, p. 16.
15) *L'industrie ou discussions politiques morales et philosophiques dans l'intérêt de tous les hommes livrés à des travaux utiles et indépendants - Tome 1 - Seconde partie Politique*, *in Œuvres de Saint-Simon*, publiées par les membres du Conseil institué par Enfantin pour l'exécution de ses dernières volontés, Deuxième volume, Paris, E. Dentu Editeur, 1868, p. 185.
16) *Ibid.*, p. 186.
17) *Ibid.*, p. 188.

féodales, l'établissement d'une jurisprudence moins oppressive et plus régulière, sont dus aux légistes »[18]. Il déclare alors : « *je ne conçois point du tout comment l'ancien système aurait pu se modifier, et le nouveau se développer sans l'intervention des légistes et des métaphysiciens* »[19]. Pour autant, il poursuit son exposé en soulignant les importants risques de ces mêmes acteurs « *impropres à diriger convenablement l'action politique* »[20]. A travers une métaphore sur l'enfant et le vieillard, Saint-Simon invite alors à ne plus faire appel à eux[21].

Les hommes actifs et utiles, fondement du droit. Dans sa fable *Sur la Querelle des abeilles et des frelons ou sur la situation respective des producteurs et des consommateurs non producteurs* [22], Saint-Simon fait un constat critique : « *l'art de gouverner est devenu dans ses mains la chose du monde la plus simple et la plus facile ; il se réduit à donner la plus forte portion du miel prélevé sur les abeilles à celle des deux grandes classes de frelons qui sert les vues du gouvernement avec le plus de zèle et de dévouement* »[23]. Les qualificatifs utilisés sont sans détour, parlant de « *sangsues de la nation* »[24] et critiquant les conséquences sur l'industrie paralysée par les impôts grevant les capitaux. Dès lors, il oppose la politique et l'économie, les frelons et les abeilles, avec une démarcation centrée sur le rapport au travail[25]. Il souhaite ainsi une protection des travailleurs, ce qui induit la projection d'une forme de droit du travail. Pour ce faire, il invite les abeilles à agir puisqu'il conseille aux industriels d'interpeler le roi en signant « *une pétition ne contenant que ce peu de mots : Sire, nous sommes les abeilles, débarrassez-vous des frelons* »[26]. Ainsi, la société doit être dirigée par ceux qui travaillent, créant et produisant. Le droit se présente alors comme un vecteur de cette évolution et un protecteur de ces hommes. Il cite alors un discours de Barthélemy : « *Les producteurs, c'est-à-dire les propriétaires industriels, sont la force réelle des nations, ce sont eux qui*

18) *Du système industriel, in Œuvres de Saint-Simon, op. cit.*, p. 8.
19) *Ibid.*, p. 9.
20) *Ibid.*, p. 11.
21) *Ibid.*, pp. 18-19.
22) *Sur la querelle des abeilles et des frelons ou sur la situation respective des producteurs et des consommateurs non producteurs*, *in Œuvres de Saint-Simon*, publiées par les membres du Conseil institué par Enfantin pour l'exécution de ses dernières volontés, Troisième volume, Paris, E. Dentu Editeur, 1869, pp. 211 et s.
23) *Ibid.*, pp. 224-225.
24) *Ibid.*, p. 224.
25) Pierre MUSSO, *Saint-Simon et le saint-simonisme*, *op. cit.*, p. 61.
26) *Sur la querelle des abeilles et des frelons ou sur la situation respective des producteurs et des consommateurs non producteurs*, *in Œuvres de Saint-Simon*, *op. cit.*, p. 227.

sont les gardiens des mœurs et des institutions : aussi, en leur confiant les droits politiques, les législateurs sont certains de ne pas blesser la justice naturelle ; puisque dans la société tout se fait par l'industrie, tout doit y être fait pour elle »[27]. Saint-Simon prône donc un droit répondant aux besoins de la société, regrettant que les producteurs n'aient pas eu « *la volonté de constituer l'ordre de choses qui convenait le mieux* »[28]. Ainsi, Saint-Simon « *ne vise pas la domination des élites les plus capables, mais la réalisation possible de la justice sociale* (…) *et distributive parmi les hommes dont les capacités sont inégales* »[29].

Cette même philosophie guide Saint-Simon dans son approche religieuse, pouvant également servir d'inspiration à sa conception du droit. Il expose que « *la religion doit diriger la société vers le grand but de l'amélioration la plus rapide possible du sort de la classe la plus pauvre* »[30]. Par transposition, le droit doit mener à cet identique dessein. D'ailleurs, Saint-Simon reprend en entête de cette œuvre une citation de Saint-Paul, *Epitre aux Romains* : « *Celui qui aime les autres a accompli la loi. Tout est compris en abrégé dans cette parole : tu aimeras ton prochain comme toi-même* »[31]. Le principe d'égalité et la construction d'un bien-être collectif apparaissent comme les objectifs à atteindre.

Saint-Simon propose donc une conception personnelle du droit, évidemment centré sur le cœur de sa pensée, c'est-à-dire un droit devant participer au progrès social en appuyant la mise en œuvre d'une réforme sociale et économique fondée sur les industries. Il s'agit en définitive d'un droit fonctionnel au bénéfice de l'industrialisation, en protégeant la liberté de produire mais également la sécurité des travailleurs. Malheureusement, Saint-Simon reste centrée sur l'industrie, ce qui limite le développement précis de certaines de ses pensées. Ainsi, il affirme que « *la société tout entière repose sur l'industrie. L'industrie est la seule garantie de son existence, la source unique de toutes les richesses et de toutes les prospérités. L'état de choses le plus favorable à l'industrie est donc par cela seul le plus*

27) *Ibid*., p. 230.
28) *Ibid*., p. 233.
29) Sayuri SHIRASE, *Le concept d'administration dans le système industriel. Étude sur la pensée de Henri Saint-Simon*, Thèse pour obtenir le grade de docteur en philosophie, sous la direction de Juliette GRANGE, Université de Tours, 20 déc. 2019, p. 270.
30) *Nouveau Christianisme*, *in Œuvres de Saint-Simon*, publiées par les membres du Conseil institué par Enfantin pour l'exécution de ses dernières volontés, Tome 3, Paris, E. Dentu Editeur, 1869, p. 117.
31) *Ibid*., p. 99.

favorable à la société. Voilà tout à la fois et le point de départ et le but de tous nos efforts »[32]. Durkheim critique cette approche réductrice : « *Nous savons, en effet, que l'erreur de Saint-Simon avait consisté à vouloir édifier une société stable sur une base purement économique* »[33]. Cette approche réductrice explique certainement son absence d'influence juridique.

Partie 2. La figure animale chez Saint-Simon. Etude à partir de *Mémoire sur la science de l'homme*[34]

Des métaphores à une pensée animalière. Si l'une des paraboles les plus connues de Saint-Simon s'appuie sur le monde animal – avec la métaphore animalière « *Sur la querelle des abeilles et des frelons* »[35] – il n'est pas connu ni reconnu pour ses développements relatifs aux animaux. Ses travaux ne sont donc pas cités pour identifier les rapports des hommes/humains[36] aux animaux, moins encore dans une perspective de réflexions quant à la protection animale. Toutefois, si Saint-Simon ne s'illustre pas pour ses développements sur les animaux, le penseur consacre des propos à leur sujet.

Dans son œuvre *Mémoire sur la science de l'Homme*[37], Saint-Simon se concentre sur l'homme, d'une part à la connaissance de l'individu ou de l'« *individu-homme* » (p. 9 ; physiologique et psychologique) puis de l'« *espèce humaine* » (p. 9 ; progrès de l'esprit humain). D'ailleurs, sa première indication sur les animaux résulte d'une comparaison avec l'homme : « *l'homme est le seul dont l'intelligence se soit perfectionnée ;*

32) *L'industrie ou discussions politiques morales et philosophiques dans l'intérêt de tous les hommes livrés à des travaux utiles et indépendants - Tome 1 - Seconde partie Politique*, *in Œuvres de Saint-Simon*, *op. cit*., p. 13.

33) Emile DURKHEIM, *Le socialisme sa définition, ses débuts, la doctrine saint-simonienne*, Paris, Librairie Félix Alcan, 1928, p. 336.

34) Ce texte a été présenté lors d'une conférence à la Faculté de Droit de l'Université de Nihon, à Tokyo (Japon), le 20 octobre 2025.

35) *Sur la querelle des abeilles et des frelons ou sur la situation respective des producteurs et des consommateurs non producteurs*, *in Œuvres de Saint-Simon*, publiées par les membres du Conseil institué par Enfantin pour l'exécution de ses dernières volontés, Troisième volume, Paris, E. Dentu Editeur, 1869, pp. 211 et s.

36) Il sera fait une utilisation régulière du terme « homme » pour respecter la terminologie utilisée par Saint-Simon. Rappelons qu'à ce terme, y compris orné d'une majuscule, lui est désormais préféré celui d'« humain ».

37) L'ensemble des références dans l'article est effectué à partir de : *Œuvres de Saint-Simon*, publiées par les membres du Conseil institué par Enfantin pour l'exécution de ses dernières volontés, Onzième volume, Paris, E. Dentu Editeur, 1876.

que celle des autres animaux a rétrogradé » (p. 41). Néanmoins, les réflexions de Saint-Simon ne sont pas exemptes de la prise en compte des animaux non humains. Certes, et pour user d'une technique rédactionnelle de Saint-Simon qu'est la répétition, Saint-Simon se concentrant sur l'humain, l'animal ne reste qu'un « objet » de comparaison pour présenter l'homme. L'animal est alors une figure de comparaison mais qui bénéfice d'observations spécifiques qui méritent d'être présentées.

Classification par le critère de l'anatomie : corps bruts et corps vivants. A l'appui d'un examen des ouvrages de Vicq-d'Azyr, Saint-Simon propose une présentation des idées physiologiques. Cela renvoie donc à l'anatomie, « *ensemble de la science des corps organisés* » (p. 86). Il convient de distinguer les corps bruts des corps vivants (pp. 75-76). L'homme, les animaux et les végétaux appartiennent à la catégorie des corps vivants, dont la forme organique « *est toujours disposée de la manière la plus avantageuse à la vie, à l'accroissement de l'individu et à la conservation de l'espèce* » (p. 77). Il y a donc une certaine correspondance entre l'anatomie humaine et l'anatomie animale. Toutefois, Saint-Simon ne se limite pas à cette seule comparaison. Ainsi, le vivant appartient à la même classification. Il établit alors des comparaisons entre les végétaux et les animaux, comme sur le sommeil (p. 94) ou leurs actions combinées sur l'atmosphère par des effets opposés sur l'oxygène et l'azote (p. 95). Puis, cette comparaison s'établit entre les animaux et l'homme, par des observations sur les cheveux, les os, le cerveau, etc. (p. 96 et s.). En revanche, la perte de la vie semble provoquer le passage dans l'autre catégorie. La circulation des fluides *« crée et entretient le phénomène de la vie ; de manière que le corps organisé devient corps brut quand cette circulation cesse* » (p. 91). Cela correspond finalement à la différence de classification entre la personne ou l'animal vivant et leur cadavre.

Selon l'auteur, les travaux anatomiques ont également permis de rectifier des « *idées fausses* » (p. 74) sur l'économie animale. Toutefois, l'auteur n'apporte aucune précision supplémentaire.

L'homme, un animal supérieur mais de même nature. L'homme est un animal, avec la précision qu'il est anatomiquement « *le mieux organisé de tous les animaux* » (p. 108). Ainsi, Saint-Simon affirme que « *l'homme n'était point d'une nature différente de celle des autres animaux* » (p. 176), observant que Cook a été dans l'impossibilité de prouver le contraire (p. 117). Cette même nature fait écho à la citation de Henri de Régnier : « *Il y a plus d'animaux dans Saint-Simon que dans La Fontaine, seulement*

ce sont des hommes »[38]. Cette nature identique permet le constat d'une possible évolution commune, plus encore : « *la faculté de se perfectionner était commune à tous les animaux* » (p. 176). Saint-Simon reconnaît alors l'important potentiel des animaux non humains. Pour autant, il précise rapidement que l'homme est « *le seul qui se fut perfectionné* » (p. 176), devenant alors supérieur aux autres animaux. Toutefois, cette supériorité d'intelligence n'est pas acquise à la naissance, ce dont on déduit de la comparaison d'un enfant nouveau-né avec les petits nouveau-nés d'autres mammifères (p. 112). La même analyse est également semblable avec l'homme abandonné, ou le sauvage, « *très-peu supérieur* » (p. 118). De même, à l'origine, la supériorité de l'homme n'était pas importante, bénéficiant « *des moyens fort peu supérieurs à l'animal le plus élevé après l'homme sur l'échelle d'organisation* » (p. 113). Puis, cette supériorité s'est accentuée « *graduellement et continuellement* » (p. 177).

Ces constats quant aux liens entretenus avec les animaux – et de leur capacité à se perfectionner – n'ont pas pour objectif d'assurer une protection des animaux, moins encore leur émancipation. D'ailleurs, à la suite de ce constat, Saint-Simon souligne que « *cette observation mérite toute l'attention des physiologistes ; la développer est un des meilleurs usages qu'ils puissent faire des forces de leur intelligence* » (p. 177). Il est donc possible de mettre à profit, pour les humains, les compétences des animaux. D'ailleurs, il est possible de s'interroger sur cette approche de Saint-Simon avec l'éventuel objectif d'obtenir une meilleure coopération des animaux à leur propre exploitation en recourant à leur intelligence. Une certitude, Saint-Simon n'appréhende l'animal que par son utilité pour l'homme.

La supériorité de l'homme, conséquence d'une soumission et d'une classification animales. Saint-Simon apporte une explication à la supériorité de l'homme sur les autres animaux, reprenant les propos du docteur Bougon : « *si l'homme est le seul qui se soit perfectionné, c'est par la raison qu'il a mis obstacle au perfectionnement des autres* » (p. 50, note 1). Pire que d'arrêter le perfectionnement des autres animaux (p. 180, p. 188), l'homme a même fait « *rétrograder l'intelligence des animaux moins bien organisés que lui* » (p. 176). Saint-Simon explique sans détour que l'action humaine « *a été un obstacle au développement naturel et successif, de génération en génération, de leur organisation primitive* » (p. 177). Ce même constat explique que l'absence de l'homme dans certaines zones

38) Henri DE REGNIER de l'académie française, *Lui ou Les Femmes et l'Amour suivi de Donc… et Paray-le-Monial*, Paris, Mercure de France, MCMXXIX, p. 131.

géographiques (notamment les pays froids avant que l'homme apprenne à se vêtir) – du moins à une certaine époque – a permis à certains animaux de développer et de perfectionner leurs facultés (p. 179). L'arrivée de l'homme provoque une nuisance à l'évolution des animaux, ce qui illustre l'action préjudiciable ancienne des humains sur les autres êtres vivants.

Révélant une approche des animaux par leur utilité, Saint-Simon explique que de tout temps l'homme a divisé les corps organisés – avec plus de soins pour les animaux – en deux classes : les animaux nuisibles des animaux utiles.

Pour les premiers animaux, « *à toutes les époques, il a travaillé à détruire ou du moins à éloigner le plus possible de son habitation* » (p. 177). Cette époque n'est pas révolue puisque les animaux nuisibles – expression qui avait cours en France avant qu'on lui préfère une nouvelle appellation euphémisée dans la loi française de « *susceptibles d'occasionner des dégâts* »[39] – autorise leur extermination.

Pour les seconds animaux, l'homme a œuvré à les réduire en esclavage (p. 177). Saint-Simon ne précise pas plus sa pensée sur cette utilisation des animaux. Néanmoins, cela s'inscrit dans une période transitoire avec une augmentation de la consommation de viande, qui mènera progressivement aux élevages intensifs ou industriels.

Après ces constats, Saint-Simon ne propose aucun développement moral des rapports entretenus entre les humains et les autres animaux. On ne trouve aucune critique dans un sens ou dans un autre, contestation ou justification. Cela s'apparente à un état de fait.

L'organisation, critère d'intelligence. Alors qu'il cite dans ses écrits Descartes (y compris dans cet ouvrage), Saint-Simon ne propose pas de comparaison avec la théorie de l'« *animal-machine* », selon laquelle le comportement des animaux serait semblable aux mécanismes des machines, excluant toute intelligence ou capacité à ressentir de la douleur[40]. Au contraire, sa position s'en détache foncièrement puisque qu'il observe que « *c'est un préjugé philosophique de croire que l'homme est le seul animal qui ait la propriété de se perfectionner ; que la vérité est qu'il n'est pas le seul chez lequel cette faculté de se perfectionner existe ; en un mot, que si l'homme disparaissait du globe, l'animal le mieux organisé après*

39) Code de l'environnement français, art. R. 427-6.

40) DESCARTES, *Discours de la méthode*, Nouvelle édition publiée avec une introduction et des notes par T.V. Charpentier, Paris, Librairie Hachette et Cie, 1888, spéc. pp. 108-110.

lui se perfectionnerait » (p. 42). Dès lors, l'animal dispose d'une capacité d'évolution. Il peut se perfectionner puisque cette capacité « *n'est pas possédée par l'homme exclusivement* » (p. 50, note 1).

De même, il souligne l'importance de l'organisation pour le perfectionnement de l'intelligence : « *plus un animal est organisé et plus il est intelligent* » (p. 188), provoquant une proportionnalité entre les deux éléments. Il renforce cette idée en soulignant que l'homme bénéficie d'une supériorité d'intelligence sur les animaux en raison de cette supériorité d'organisation (p. 127), observant que « *cette supériorité était très-petite* » (p. 42) à l'origine de son existence avant de progresser. Il poursuit en opposant l'intelligence de l'homme à l'instinct des autres animaux (p. 43).

En revanche, Saint-Simon opère une distinction entre l'intelligence positive et l'intelligence relative, réflexion qui à ses yeux est de la plus grande importance (p. 181). Pour ce faire, il effectue une distinction à l'appui d'un exemple, opposant l'intelligence positive du castor – qui construit des digues complexes prenant en compte les niveaux d'eau ou protégeant ses vivres – de l'intelligence relative du chien de berger – qui empêche le troupeau d'entrer dans un champ de blé. On comprend aisément la distinction entre un acte autonome et réfléchi d'un acte d'obéissance. Il explique alors : « *La véritable intelligence, l'intelligence positive, consiste à prévoir la marche des phénomènes avec lesquels on est en relation, à savoir se garantir de ceux qui peuvent être nuisibles, et à profiter de ceux qui peuvent être utiles. Elle consiste à influencer la marche de ces phénomènes pour les faire tourner à son avantage* » (p. 182).

L'exemple privilégié du castor. Dans l'approche de Saint-Simon, une classification des animaux peut donc être établie. Il constate que les physiologistes « *ont placé sur l'échelle organique le singe immédiatement après l'homme, tandis que le castor mérite évidemment d'être placé sur l'échelle d'intelligence avant le singe* » (p. 49). Le choix du singe s'appuie sur la ressemblance avec l'humain (p. 52) alors que plusieurs animaux « *sont mieux organisés que lui et plus intelligents par conséquent* » (p. 109). Il cite le castor, le rat musqué et l'éléphant, notamment en raison d'un sens du toucher. Pour Saint-Simon, cette classification par l'aspect physiologique ne semble pas retenir un intérêt majeur. Il expose par exemple que « *la vie de l'animal à sang chaud n'est que celle de l'animal à sang froid, plus certaines propriétés* » (p. 80). S'il souligne une capacité ou « *une ébauche* » (p. 52) d'une capacité du sens du toucher au castor, ce qui revêt une importance majeure, c'est sa compétence organisationnelle. Pour Saint-Simon, les castors sont en capacité d'assurer « *les travaux en société* » (p. 51) ou de se

combiner « *pour des travaux communs* » (p. 181), marque organisationnelle à laquelle s'oppose les actes d'intelligence individuelle des singes. Donc, s'il existe des différences « *bien importantes et bien tranchées* » (p.178) entre les hommes et les castors (dont physiquement à l'image du poil), les deux espèces sont les mieux organisés. Ainsi, avant que les hommes troublent le développement des castors (p. 51), Saint-Simon souligne l'intelligence positive de ces animaux. Dans cette perspective, d'autres animaux auraient ainsi pu servir d'exemples, à l'image des fourmis.

Reconnaissance d'une sensibilité animale. Dans son exposé, Saint-Simon se concentre sur l'intelligence, qui guide son propos comparatif. Pour autant, quelques indications assurent une reconnaissance de la sensibilité aux animaux : « *nous reconnaissons neuf caractères ou propriétés générales de la vie, savoir : la digestion, la nutrition, la circulation, la respiration, les sécrétions, l'ossification, la génération, l'irritabilité, la sensibilité. Tout corps dans lequel on observe une ou plusieurs de ces fonctions, doit être considéré comme corps organisé et vivant* » (p. 79). Sans surprise, l'homme se présente comme la composante principale de cette catégorie des corps vivants, les suivants apparaissant dans un ordre lié à l'analogie avec l'homme. Saint-Simon affirme alors que les végétaux doivent être rangés dans cette division puisqu'ils disposent de plusieurs de ces caractères, tout en affirmant que « *la sensibilité est le grand caractère de la vie animale* » (p. 79). Dans ses développements anatomiques, il évoque la sensibilité des os (p. 97), la circulation nécessaire à l'entretien de la sensibilité (p. 103) ou celle du système nerveux (p. 104) pour établir que « *toutes les parties de notre individu jouissent de la sensibilité à un degré plus ou moins éminent* » (p. 104).

Si Saint-Simon affirme la réalité de la sensibilité animale, qu'il démontre à l'appui de constatations liées à des expérimentations animales (pp. 105-106), cette reconnaissance n'a pas pour objectif de promouvoir une protection animale. A nouveau, il faut regretter que Saint-Simon ne tire pas des conséquences à ses constatations. Plus particulièrement, ni l'intelligence animale ni la sensibilité animale ne semblent justifier pour l'auteur un encadrement des comportements humains. Cette absence détone avec l'approche de Jean-Jacques Rousseau, penseur contemporain, pour qui « *il semble en effet que si je suis obligé de ne faire aucun mal à mon semblable, c'est moins parce qu'il est un être raisonnable que parce qu'il est un être*

sensible »[41] et par voie de conséquence l'homme ne doit pas « *maltraitée inutilement* »[42] l'animal.

Les travaux de Saint-Simon assure la reconnaissance de la proximité entre les humains et les autres animaux, affirmant deux qualités essentielles des animaux : l'intelligence et la sensibilité. Pour autant, si les hommes comme les autres animaux appartiennent à la même catégorie, de leur vivant comme de leur mort, Saint-Simon n'approfondit pas les aspects juridiques de cette catégorisation. Il est donc difficile d'ancrer la pensée de Saint-Simon dans le débat sur la catégorisation juridique des animaux tiraillés entre les personnes et les biens. Ainsi, si le terreau à une réflexion pour « *penser les droits des animaux* »[43] était présent, il faut regretter que Saint-Simon ne saisit pas l'opportunité pour étendre sa réflexion à ce sujet.

41) Jean-Jacques ROUSSEAU, *Discours sur l'origine et les fondements de l'inégalité parmi les hommes, in* Louis BARRÉ (dir.), *Œuvres complètes de J.-J. ROUSSEAU réimprimées d'après les meilleurs textes. Tome sixième*, Paris, J. Bry Ainé, 1856, p. 238 (préface du discours).

42) *Ibid*.

43) Florence BURGAT, *Les animaux ont-ils des droits ?*, La documentation française, Collection « Doc en poche. Place au débat », 2022, p. 27 et s.

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