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ESSAY

# Articles

## Political Threats to Judicial Independence in Post-war Japan: Judging from Judge Impeachment Cases

*Noboru Yanase**

**Abstract**

In Japan, judges typically work with high integrity and are held in deep trust by the public. However, some judges have deviated from this high level of integrity, and in the past 70 years seven of them have been removed for misbehavior by the Judge Impeachment Court.

In this paper, the author reviews and analyzes all Japanese impeachment cases, in addition to some impeachable but unimpeached judge cases. By placing them in the context of judicial history, the author unveils one aspect of the structural problems regarding the relationship between politics and the judiciary.

The key questions of this paper are how impeachment of judges has constitutionally worked and whether it has been properly conducted in Japan. The impeachment procedure is somewhat political. If an innocent judge were unduly impeached and removed from office it would undermine the independence of the judiciary, which is guaranteed by the Constitution of Japan, and if deviant judges unreasonably evaded impeachment and removal it would amount to the same result. So far there have been some questionable impeachment cases, but as yet a fatal misjudgment has not been made. Since the impeachment system faces the unavoidable risk of abuse, more attention should be paid to it, and further study should be conducted on it.

### 1. Introduction

In Japan, judges in judicial courts typically work with high integrity and

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are held in deep trust by the public.[1] John O. Haley, one of the leading non-Japanese scholars of Japanese legal studies, admires Japanese judges stating: 'Japanese judges are among the most honest, politically independent, and professionally competent in the world today' (Haley 2007: 99).[2] It is argued that this stems both from judges' individual self-restraint and from bureaucratic control, as this foreign scholar's states '[o]rganized as an autonomous professional bureaucracy, the judiciary comprises a small, largely self-regulating cadre of elite legal professionals who enjoy with reason an extraordinarily high level of public trust' (Haley 2007: 99).

Although Japanese judges have been strongly respected in general[3], not all of them are great people, and unfortunately there have been some who have deviated from a high level of integrity. Over the 70-year history of the postwar judicial system, eight judges in inferior courts have been tried in the Judge Impeachment Court for misbehavior, and seven judges have been removed from office. How has impeachment of judges constitutionally worked in Japan? Has it been properly conducted so far?

In this paper, the author reviews and analyzes all Japanese impeachment cases, which are almost unknown to foreign scholars, in addition to some impeachable but unimpeached judge cases. By placing them in the context of judicial history and delving into some impeachable but unimpeached judge cases, the author hopes to unveil one aspect of the structural problems regarding the relationship between politics and the judiciary.

## 2. Overview of the Judge Impeachment System in Japan

The Constitution of Japan, which was enacted on May 3, 1947, established the first impeachment system in Japan's history. Japan's impeachment system is unique, since its target is limited to judges in judicial courts, and it is implemented by the special organizations established by the Diet and consisting of Diet members. Although the impeachment system is so

1) According to a public opinion poll continuously conducted by one of the leading polling institutes in Japan, judges are well-trusted (public trust is 3.3 in a maximum score of 5). For comparison, the score for the Self Defense Force is 3.8, for medical institutions it is 3.7, for Diet members 2.5, and for the mass media and bureaucrats 2.6 (Chūō Chōsa Sha 2019).

2) Haley states 'Japan's judges depend far more on public confidence in their nonpartisan professionalism and expertise than their common law counterparts' (Haley 2006: 92).

3) Haley asserts that generally '[j]udicial corruption is virtually unknown,' and '[j]udges do not take bribes' in Japan and '[a] combination of factors helps to explain this extraordinary integrity' (Haley 2007: 112). This paper, however, introduces virtually corrupt judges and judges who took de facto bribes as a deviation from the usual extraordinarily high level of integrity.

important that it is described in the Constitution,[4] little attention has been given to it in Japan.[5]

The Constitution of Japan strongly guarantees an independent status for judges. Article 78 states:

> Judges shall not be removed except by public impeachment unless judicially declared mentally or physically incompetent to perform official duties[6]. No disciplinary action against judges shall be administered by any executive organ or agency.

The grounds for impeachment are described in Article 2 of the Judge Impeachment Act: '[j]udges shall be removed by impeachment in the following cases: (1) grave violation of official duties, or serious neglect of work; (2) other misconduct gravely degrading the dignity of judges whether in duty or not'.

The procedure for an impeachment of a judge is as follows:

1. Whoever thinks a certain judge should be impeached can ask the Judge Impeachment Committee to impeach the judge (Article 15, Paragraph (1) of the Judge Impeachment Act[7]). The Committee also accepts requests from the Supreme Court to impeach any judges whom the Court deems to be impeachable (Article 15, Paragraph (2)).[8]

2. The Judge Impeachment Committee consists of ten members of the House of Representatives and the same number of members of the House of Councillors (Article 5, Paragraph (1)). When a public proposal or claim by the Supreme Court is filed, or when the Committee itself deems any judges to be impeachable, the Committee shall investigate and decide whether to impeach the judge. The Committee can also suspend the impeachment of the judge under extenuating circumstances (Article 13). A resolution for impeachment or suspension requires a greater than two-thirds majority

4) The Constitution of Japan has two provisions regarding the judge impeachment system. One is Article 64, which established the tribunal for impeachment (the Judge Impeachment Court), and the other is Article 78, which provides for impeachment of judges in judicial court.

5) There are few articles on Japan's impeachment system in Japanese, while textbooks on the Japanese constitution usually introduce it only briefly. No articles have been published about Japan's impeachment system in English, except Tsuji (2011) which introduces the Japanese impeachment system and all cases except the cases of Judge Shimoyama and Judge Hanai who were impeached after the publication, and Yanase (2015) which portrays the impeachment system while showing the similarities and differences between Japanese and American systems.

6) Judgment of incompetence to perform official duties for a judge is decided by the court that is superior to the subject judge's court pursuant to Article 3 of the Judge Disciplinary Act.

7) Articles referenced hereinafter in this chapter are those of the Judge Impeachment Act unless otherwise stated.

8) The chief judges of the inferior courts, when they deem a certain judge under their own jurisdictions impeachable, shall report to the Supreme Court.

vote of all attending members of the Committee (Article 10). When the Committee approves the resolution for impeachment, it files the articles of impeachment with the Judge Impeachment Courts (Article 14).

3. The Judge Impeachment Court consists of seven members of the House of Representatives and the same number of members of the House of Councillors (Article 16, Section 1). The Court shall hold an oral argument, and after deliberation it shall make a judgment regarding removal of the impeached judge. The judgment for removal requires a greater than two-thirds majority vote of all the attending members of the Court (Article 31, Paragraph (2)).

4. When the Court declares a sentence of removal of the impeached judge, he or she will be removed from office immediately, and will lose his or her certification of becoming a judge, a public prosecutor, or an attorney.

Aside from impeachment, there are disciplinary and warning measures: (1) reprimand or non-penal fine of up to 10,000 yen for violation of official duties, neglect of work, or other misconduct degrading the dignity of judges (Article 49 of the Court Act)[9] pursuant to the Judge Disciplinary Act, and (2) verbal or written warning against inadequate handling of affairs or behavior of judges pursuant to Article 80 of the Court Act or Article 21 of the Rules for Affairs of Inferior Courts. These disciplinary and warning measures are decided by the court which is superior to the subject judge's court.

## 3. Judge Impeachment Cases in Japan

While the impeachment system in Japan has a 70-year history, there have been relatively few actual impeachment cases. To date, the Judge Impeachment Court has tried nine cases regarding eight judges, and it has removed seven judges. In this Chapter, the author describes all cases the Court tried below.[10]

9) The grounds for impeachment described in Article 2 of the Judge Impeachment Act mirror the grounds for disciplinary measures described in Article 49 of the Court Act, except for the addition of an emphasis. However, the author would like to note the distinction between formal impeachment by the special organizations established by the Constitution and disciplinary action handed down from a judicial court.

10) Since the final judgment of the Judge Impeachment Court will be published in the Kanpō (Japan's Official Gazette) as public information according to Article 36 of the Judge Impeachment Act, all judgment documents are officially recorded in Kanpō. Such judgments as well as the major decisions by the Judge Impeachment Committee until 1997 can also been seen in Saibankan Dangai Saiban-sho Jimukyoku & Saibankan Dangai Sotsui Iinkan Jimukyoku (1997).

a) Judge Amano (*Kanpō Shōwa Series* 6588, 283-87)

Judge Amano Shunichi of the Shizuoka District Court, Hamamatsu Branch, was absent for a week without permission to go on a business tour with an attorney who was acquainted with him. Moreover, he was involved with dealing goods for the black market, and after the police discovered the crime, he tried to pressure the local police chief into overlooking it. His absence was found to be a grave violation or serious neglect of duties of judges, and his conduct regarding the black market dealings was found to be a misconduct gravely degrading the dignity of judges. As such, he was impeached by the Judge Impeachment Committee ex officio on June 29, 1948.

The Judge Impeachment Court, however, decided not to remove him on November 27, 1948. The Impeachment Court held that, while his absence violated the rule, it was not a grave violation or serious neglect of duties, because the District Court functioned well with the alternate judge. His conduct regarding the black market dealings was held to be excessive but did not rise to the level to require removal under Article 2, Paragraph (2) of the Judge Impeachment Act.

After the Impeachment Court's decision, he was reprimand by the Tokyo High Court as a disciplinary measure on January 31, 1949.

b) Judge Terasako (1950) (*Kanpō Shōwa Series* 6924, 106-09)

Judge Terasako Michitaka of the Otsuki Summary Court was accused of giving advice to the wife of an acquaintance to hide black-market goods before the police investigation that the judge knew was imminent. In addition, he advised his acquaintance to refuse a summary order and to request a formal trial, and then sought to have the trial assigned to him, against procedural rules. He was also alleged to have suborned perjury of his acquaintance in the trial. Because of these allegations and responding to a request by the Chief Justice of the Supreme Court, the judge was impeached under Article 2, Paragraph (2) of the Act on December 7, 1948.

On February 3, 1950, the Judge Impeachment Court decided not to remove him, because it held his conduct did not rise to level of violating the duties of judges nor misconduct gravely degrading the dignity of judges. Although he provided information of the police investigation to the wife of his acquaintance, it was not proven that he advised anyone to hide evidence. While he was responsible for leaking confidential investigation information, it was found to be a causeless event and unavoidable based on their relationship. Additionally, his intentional assignment of the trial to himself seemed highly suspect, but it was not found to be gravely serious. The fact that he suborned perjury was not proven.

After the Impeachment Court's decision, Judge Terasako was punished by a non-penal fine of 9,000 yen by the Tokyo High Court as a disciplinary measure on May 31, 1950.

c) Judge Takai (*Kanpō Shōwa Series* 8790, 350-54)

Judge Takai Sumio of the Obihiro Summary Court was charged with the following five actions: (1) he failed to treat cases swiftly, causing 395 summary orders to become void and preventing indictment for two-thirds of them; (2) he gave a signed blank warrant to his officials in advance, and let them arbitrarily issue the warrant; (3) in a civil dispute regarding a personal acquaintance, he threatened the opponent with imprisonment unless the opponent settled or compromised, and requested an early resolution from the opponent, and issued an arrest warrant for the opponent himself; (4) he issued an illegal bench warrant, and then lost it out of carelessness; and (5) he let unauthorized court officials to hold conciliation, and ignored both his and his subordinates' problematic attendance records for a long time. On August 30, 1955, he was impeached by the Judge Impeachment Committee ex officio. He was further punished by two non-penal fines of 2,000 and 7,000 yen by the Tokyo High Court as a disciplinary measure on June 12 and December 28, 1954.

The Judge Impeachment Court decided to remove him on April 6, 1956, because it considered that the aforesaid actions (1), (2), and (4) constituted grave violation of duties of judges or serious neglect of duties; considered (3) a misconduct gravely degrading the dignity of judges; and held (5) did not rise to the grounds stipulated in Article 2, Paragraph (1) of the Act.

d) Judge Terasako (1957) (*Kanpō Shōwa Series* 9239, 216-18)

Judge Terasako Michitaka, in his second time before the Judge Impeachment Court (the first in 1950, detailed above) had been moved to the Atsugi Summary Court, and had been invited to and accepted dinner by a party of a case he presided over with conciliation commissioners. After he realized that this had been reported to his court by someone, he tried to cover it up, bribed the conciliation commissioners with a sake barrel to deal with another party, and paid for the dinner in question after the fact and after the investigation by the Judge Impeachment Committee. At a public request, he was impeached under Article 2, Paragraph (2) of the Act on July 11, 1957.

The Judge Impeachment Court decided to remove him on September 30, 1956, holding that his conduct gravely degraded the dignity of judges.

e) Judge Kitō (*Kanpō Shōwa Series* 15066, 17-20)

On August 4, 1976, the incumbent Prime Minister Miki Takeo received

a call from an unidentified person[11] who falsely claimed to be the Prosecutor-General, who then tried to get the Minister to admit to unjust political pressure with regards to the Lockheed Scandal under the former Prime Minister Tanaka Kakuei. This conversation was recorded by someone.

Assistant Judge Kitō Shirō of the Kyoto District Court, concurrently serving as a judge of the Kyoto Summary Court, gave the tape of this conversation to a journalist, although he recognized that the fake call would have harmful effects on the prosecutors' investigation of the scandal. The Judge Impeachment Committee impeached him on February 1, 1977, responding to requests of both the public and the Supreme Court.

The Judge Impeachment Court decided to remove him on March 23, 1977, because it held his excessive politically oriented behavior betrayed public trust and gravely degraded the dignity of judges.

f) Judge Taniai (*Kanpō Shōwa Series* 16445, 7-9)

Assistant Judge Taniai Katsuyuki of the Tokyo District Court, concurrently serving as a judge of the Tokyo Summary Court, received a complete golf set and two business suits as a gift from an attorney for a party in his assigned case.[12] Upon a request of the Supreme Court, he was impeached on May 27, 1981.

The Judge Impeachment Court decided to remove him on November 6, 1981, because it held that his conduct gravely violated duties of judges, betrayed the public trust, and gravely degraded the dignity of judges.

g) Judge Muraki (*Kanpō Heisei Series* 3253, 11-14)

Assistant Judge Muraki Yasuhiro of the Tokyo District Court concurrently serving as a judge of the Tokyo Summary Court and as acting judge of the Tokyo High Court, was convicted of child prostitution with three girls aged 14 to 16 involving the payment of money. He was sentenced to two years in prison with probation of five years on August 27, 2001.

There were questions as to whether a judge whose actions were found to be otherwise disqualifying[13] should automatically be removed (like national government employees) or remain in office until the Judge Impeachment

11) The Impeachment Committee did not specify that Judge Kitō, in fact, made the fake call. However, Kitō was later indicted for fraud and found guilty, proving that he made the fake call. He was ultimately sentenced, on June 9, 1977, to detention for 29 days for abuse of authority by public officials.

12) He (as well as the attorney) was arrested for bribery, but his indictment was suspended. This was the first case in which an incumbent judge was arrested for crime.

13) Article 46 of the Court Act stipulates that a person who has been punished with imprisonment without work or a heavier penalty shall not be appointed as a judge.

Court removes him. He was the first incumbent judge to face this situation.

He was impeached on August 9, 2001, responding to a request from the Supreme Court.

The Judge Impeachment Court consequently decided that any judges whose actions were found to be otherwise disqualifying will not be automatically removed, rather, they shall remain in their office until the Impeachment Court removes them. The Court ultimately decided to remove him on November 28, 2001, because it held his conduct gravely violated duties of judges, betrayed the public trust, and gravely degraded the dignity of judges.

h) Judge Shimoyama (*Kanpō Heisei Series* 4982, 10-12)

Judge Shimoyama Yoshiharu of the Utsunomiya District Court, concurrently serving on the Utsunomiya Summary Court, was convicted of stalking a female court official, by monitoring her behavior and constantly sending sexually suggestive e-mails to embarrass her.[14] He was sentenced to six months in prison with probation of two years on August 8, 2008. He also was impeached by the Judge Impeachment Committee on September 9, 2008, responding to a request from the Supreme Court.

The Judge Impeachment Court decided to remove him on December 24, 2008, because his conduct gravely infringed upon woman's dignity, betrayed public trust, and gravely degraded the dignity of judges.

i) Judge Hanai (*Kanpō Heisei Series* 6025, 8-11)

Assistant Judge Hanai Toshiki of the Osaka District Court took videos with his cell phone up a woman's skirt on a commuter train, was arrested on the spot, and received a summary order to pay a fine of 500,000 yen. Responding to a request from the Supreme Court, he was impeached on November 13, 2012. He graduated from a national law school in Nagoya, passed the bar examination six months later, and was appointed to an assistant judgeship. His arrest came one year and seven months after his appointment, and he confessed that he started his video voyeurism immediately after his appointment.

The Judge Impeachment Court decided to remove him on April 10, 2013, holding that he lacked an awareness of human rights, and his conduct betrayed public trust and gravely degraded the dignity of judges. The judge was just 28 years old when the Court removed him.

14) His sexual harassment took place while he was in charge as the chief of the Ashikaga Branch of the Utsunomiya District and Family Courts.

## 4. Analysis of the Judge Impeachment Cases and Relevant Problems

### 4.1. Lenient Decisions of Non-Removal under the Post-war Turmoil

Immediately after the end of World War II, which was also the beginning of Japan's impeachment system, the Judge Impeachment Court tried two cases concerning black market activities. In these two cases, the Court decided not to remove the impeached judges, excusing their behavior in the post-war turmoil. These decisions by the Court could be considered justified, because government distribution and control of supplies were highly confused, shortages of essential goods were serious, and consequently black market business was widely 'overlooked' in those days in Japan. Among judicial professionals, it was well known that Judge Yamaguchi Yoshitada died from starvation because of his refusal to use the black market.[15] Most people at that time felt pity for him and deeply respected his upright behavior as a judge. He was the epitome of virtue befitting a judge, acting morally and legally, yet people also understood that virtue may not save a life. Ordinary people experienced the food shortages, and understood judges faced the same risks, and therefore perceived the black market to be unavoidable. Most of the Judge Impeachment Court members, who were the representatives of the Japanese people, thus seemed to pity the judges and were forgiving of their guilt. The Court stated in its first judgment that: 'since a judge is also a member of society, it is impossible to infringe on his or her right to live in a community.'

However, the two impeached judges did not appear to be saving themselves, but rather used their positions as judges to access the black market to help their acquaintances. Considering the impeached judges' indirect benefit of the black market activities, as well as their obstructions of justice, these two judgments could be considered relatively lenient.

The impeachment system was new, however, and the Court judges and staff were inexperienced in implementing it. The author surmises that the Judge Impeachment Court had not begun to form the standards for impeachment and removal for judges yet, or the Court might have simply acted out of compassion.

15) At that time, the food rationing system was introduced because of its scarceness in Japan, however, the rationed food was so small that many Japanese people were starving and had no choice but to buy food on the black market. Since he was so strict in obeying the Foodstuff Control Act, he fed the rationed food to his children and refused to use the illegal black market, and eventually died of malnutrition. His life history is described in detail in Yamagata (2010).

### 4.2. Two Decisions of Removals and Potential Impeachment in the 1950s

In 1956 and 1957, the Judge Impeachment Court decided to remove two judges from their offices, one for improper treatment of a warrant and the other for quasi-bribery. The Court seemed to decide these cases without hesitation, because both acts of misconduct obviously gravely degraded the dignity of judges. The author presumes that the Court's standard for impeachment began to emerge from these two relatively straightforward cases. The Court stated in its third judgment that misconduct resulting in public doubts about the fairness of trials would gravely degrade the dignity of judges, and hence they were impeached. The Court also emphasized public trust of justice when considering impeachment cases in its fourth judgment.

One of these cases was that of Judge Terasako, who was initially impeached but not removed. Although he had an opportunity to reflect on his behavior after his first impeachment trial, he repeated the same mistake. The second time, the Judge Impeachment Court did not tolerate the behavior and removed him.

In addition to these cases, there were some in which the Judge Impeachment Committee decided to abandon or suspend the impeachment of judges. The 1950s were the most challenging era for Japan's judiciary, because courts could not always control proceedings against disturbance in controversial cases related to socialists or communists. This phenomenon was referred to as the *areru hōtei* ("the violent courtroom").

When Judge Sasaki Tetsuzo of the Osaka District Court did not control or reprimand communist defendants' arbitrary behavior in court[16], it was requested that he should be impeached. However, the Judge Impeachment Committee decided to suspend his impeachment on November 12, 1954.[17] The author believes that this fact has been of decisive importance for judicial independence. If the impeachment against him for his incomplete control of court proceedings had succeeded, it would have caused a chilling effect on Japanese judges. Therefore, not using impeachment as a tool for criticizing the court control of proceedings was beneficial to the indepen-

16) For example, defendants sometimes delivered impermissible presentations on political topics, applauded or engaged in silent prayer for foreign revolutionists, and loudly sang songs of revolution in chorus with their supporters in the courtroom. Judge Sasaki did not stop the defendants, denying the prosecutors' petition; rather he was perceived as supporting the defendants' behavior. This was known as the Suita *Mokuto* ('Silent Prayer') Incident.

17) Afterwards, the impeachment against Judge Sasaki was again requested, because he unjustly took the side of the Korean defendants and held them not guilty or sentenced them to inappropriately light penalties in other criminal cases. However, the Judge Impeachment Committee decided to suspend his impeachment on January 10, 1955.

dence of judges.

In contrast, while Chief Justice Tanaka Kōtarō of the Supreme Court also faced impeachment, he expressed his deep concern about sacrilege in the court and the undermining of judicial authority, and encouraged judges to be brave at a court director's meeting in June, 1951. Tanaka said in a May 1955 meeting that judges should not listen to 'the noise of the public', when some progressive people criticized the presiding judges' control of the court in the Matsukawa Incident, the Yakai Incident, and others. Leftist attorneys requested he be impeached for his remarks at the meetings and his strict attitude toward the defense counsels in the Mitaka Case, but the Judge Impeachment Committee decided on January 28, 1959 not to impeach him. Subsequently, attorneys continuing to complain about the Matsukawa Incident again requested the Committee to impeach him, but on April 28, 1960 he was again spared impeachment. Although Tanaka's attitude toward his subordinate judges and attorneys might be controversial and be criticized as a threat against judicial independence, his behavior could be understood as a measure to prevent conservatives' criticism against the judiciary. If he had not shown the strict attitude toward progressives, the judiciary might have lost political balance, and consequently faced critical attack by conservatives.

The late 1950s marked the onset of a period of rapid economic growth for Japan after the postwar chaos. As Japan made a new start for prosperity, the Judge Impeachment Committee and the Judge Impeachment Court further defined adequate standards for impeachment and removal of judges.

Public requests for impeachment were used as a political weapon, but they were unsuccessful. Although the organizations in charge of impeaching judges were unavoidably involved in the political controversy, they fought to remain objective.

### 4.3. The 1970s as a time of Political Turbulence

Judge Kitō's case was a serious political scandal. If the impeached judge's plot had succeeded, the highest public prosecutor and Prime Minister Miki would have been deeply marginalized, while the former Prime Minister Tanaka might have evaded arrest. Miki and Tanaka were both influential politicians belonging to the Liberal Democratic Party (LDP) and were involved in an internal factional struggle with each other. Besides the impeachable actions, Kitō had illegally obtained the personal prison record of Miyamoto Kenji, who was a chairman of the Japanese Communist Party, and leaked it to a journalist. Kitō was therefore sentenced to ten months in prison with probation of two years. He seemed to have had strong political motives, but it has remained unclear what his ultimate goal was. Regard-

less, since not only the politicians belonging to opposition parties but also those belonging to the ruling party did not endorse his politically motivated conduct, all members of the Committee and the Court agreed to his impeachment and removal. The author points out that Kitō deviated significantly from the expectation of politically neutral judges in Japan.

In the 1970s, discussions relating to courts and judges in Japan necessarily include the Hiraga *Shokan* (epistle) Incident.[18] This occurred in the context of the serious ideological confrontation between conservatives and progressives in the 1970s. The LDP, which had exclusive control of the government from 1955 to 1993, had taken the position that the Japan Self-Defense Forces (SDF) were constitutional and that the Japan-U.S. security treaty should be maintained. In contrast, the left continued to criticize the LDP's security policy and insisted that the SDF and the Japan-U.S. alliance were unconstitutional and should be revoked.[19]

Judge Fukushima Shigeo of the Sapporo District Court was presiding over the trial of the Naganuma Case,[20] which involved the constitutionality of the SDF. Chief Judge Hiraga Kenta of the Sapporo District Court[21] wrote his own opinion about the constitutional issues in the Naganuma Case in an epistle (aka Hiraga *Shokan*) although Hiraga himself was not in charge of the case, and shared it with Fukushima privately. Fukushima thought that Hiraga's action constituted a serious violation of judicial inde-

18) There are a few English papers about the Hiraga *Shokan* Incident. For instance, Hayakawa (1971) contemporarily illustrates this incident.

19) Under so-called '1955 system', the LDP had successively held majority government for about 40 years, while the Japan Socialist Party (JSP) had taken an opposing position in the national security policy with other opposition parties.

20) In 1969, the Minister of Agriculture and Forestry canceled the designation of national forests near Naganuma Town, in order to allow construction of a ground-to-air missile (Nike Hercules) base of the Japan Air Self-Defense Force in the area. Nearby residents claimed that the SDF was unconstitutional and the cancellation of the national forest designation was illegal, and they sued the Government.

21) Odanaka conjectures that the reason why Hiraga was appointed to the chief judge of the Sapporo District Court was carrying out the special mission of exercising his influence on the judgment of the Naganuma Case in response to the Government and the General Secretary of the Supreme Court, which expected a judgment that the SDF was constitutional (Odanaka 1973: 140-41).

pendence.[22] Therefore, he consulted with the Deputy Chiefs of the District Court about the epistle, telling them he wanted to disclose this action. He also sent a copy of the epistle to various other judges in Tokyo seeking advice on whether he should disclose the problematic epistle or not.[23] Although Fukushima promised the Deputy Chiefs it would not be disclosed until the Judicial Conference of the Sapporo District Court was over, the epistle became widely covered by the media.[24] Afterward, on September 7, 1973, Fukushima held that the SDF was unconstitutional under Article 9 of the Japanese Constitution.[25]

The Judge Impeachment Committee received public requests for impeaching Fukushima and Hiraga from each political side.[26]

After investigation and deliberation, on October 19, 1970 the Committee decided to suspend Fukushima's impeachment for breaching the confidentiality of the Judicial Conference in violation of a judge's duty, not trying to stop diffusing the Hiraga *Shokan* which was ultimately received by journal-

22) Kumamoto points out that '[t]he Japanese understanding of judicial independence is not quite the same as in other countries where Western types of democracy provide the fundamental sources of political institutions', and '[j]udicial independence simply means independence from any kind of order, or indication, or pressure, imposed by outsiders on individual judges who deal with concrete litigation in court' (Kumamoto 1958: 220). According to his interpretation, it is possible to conclude that Hiraga's epistle threatened judicial independence, which means not judges' collective autonomy but judges' individual independence.

As it relates to judicial independence in the non-Western countries, Lin summarized that the independence of the court from other state organs was emphasized in the pre-war phase and the independence of judges' individual authority was considered the core principle of independent judicial power in the post-war phase. His analysis states that: '[s]uch a two-step process is not only the inevitable result of historical development, but also typically reflects the concrete connotations of judicial independence faced by non-Western countries, especially Asian countries that bear the legal tradition of integrating judicial power and administrative power', and he calls this particular historical experience the 'Japanese model' achieving judicial independence from the perspective of historical development (Lin 1999: 194-95).

23) Most of the judges to whom Fukushima sent the copy strongly insisted that he should disclose the epistle. Although he recognized the possibility that one or more of them might disclose it, he did not seek to prevent that, resulting in a journalist receiving a copy of the epistle.

24) One of the Deputy Chiefs of the District Court, who was not in charge of the Naganuma Case, also received the document (aka Hiraga *Memo*) similar to the epistle by Hiraga, and told Fukushima that it was not a problem and should be ignored. Fukushima disclosed the Hiraga *Memo* in a press briefing without any permission of the receiver.

25) This decision was appealed and annulled by the Sapporo High Court on August 5, 1976. The High Court held that the constitutionality of the SDF was dependent on an extremely high degree of political consideration, so it fell outside the judiciary's purview, unless it was clearly unconstitutional. On September 9, 1982, the Supreme Court declined to rule on judging its constitutionality, because it thought that it was not necessary to the case at hand.

26) Matsui points out that '[s]ometimes […] the impeachment procedure could be used as an attempt to influence judges', and he criticized an attempt to request impeachment against Fukushima as being 'a serious threat to judicial independence', although he does not mention the attempt to request the impeachment of Hiraga (Matsui 2017: 216-7).

ists, and disclosing another confidential letter (the Hiraga *Memo*) without any permission, although the Judicial Conference had not yet reached a decision at that time.[27)]

On the same day, the Judge Impeachment Committee decided not to impeach Hiraga, who was moved to the Tokyo High Court. The Committee found that the reason why Hiraga shared the epistle with Fukushima was not to interfere with or to unduly influence the authority, but only as a senior colleague helping a junior colleague. People expect judges to exercise their authority independently without undue influence. Judges must uphold the judiciary's independence and fairness of the process, and therefore should not interfere in other judges' cases. However, he handed the epistle that detailed his personal opinion on the case to the judge who was presiding over the case. The Committee held that he had overstepped his authority as a chief judge of the district court, and that it was quite regrettable that his action was suspicious of undue influence, which could undermine public trust in the court. However, while his misconduct actually degraded the dignity of judges, the Committee held that it was not grave, and therefore declined to impeach him.

Some criticized these judgments against Hiraga and Fukushima by the Impeachment Committee as wrong and believed they should be reversed.[28)] They insisted that Hiraga be impeached and that Fukushima should not be impeached.[29)] Contrastingly, Haley does not hold a negative view on Hiraga's behavior but rather understands it as the court's voluntary defense

27) Afterward, on October 26, 1970, the Sapporo High Court gave a warning to Judge Fukushima for his deplorable behavior in disclosing the Hiraga *Shokan* and Hiraga *Memo* pursuant to Article 80 of the Court Act. Fukushima then resigned in a press briefing on October 28, criticizing the Sapporo High Court's disciplinary action on him as blindly adherent to the decision of the Judge Impeachment Committee, and saying that he could not do his duties anymore because the court itself had abandoned judicial independence and instead bowed to the incumbent government. However, two days later, he suddenly withdrew his resignation in another press briefing. Again he was warned by the High Court for his criticism of the court system in the former briefing. His impeachment was again requested, but the Judge Impeachment Committee decided not to impeach him, though it criticized his behavior in the incident on March 26, 1971.

28) Miyazawa states 'Fukushima's exposure was taken to be a more serious crime than the fact that the head of the court had intervened in the decision of another judge's case', and insists that one of the factors for the harsher treatment of Fukushima was undoubtedly his membership of Sei-Hō-Kyō which is mentioned below (Miyazawa 1994: 275).

29) Washino Tadao, who is an attorney member of Sei-Hō-Kyō (mentioned below), criticized the Committee's judgments for these two judges as being inverted (Washino 2015: 56-57). Toriu Chūsuke, an attorney, points out that Judge Fukushima lost his chance to dispel the misunderstanding of his qualification as a judge because he was suspended to be impeached by the Judge Impeachment Committee, whereas he could have done so if he were impeached by the Committee and tried and sentenced no to be removed by the Judge Impeachment Court (Takeshita, et al. 1997: 81).

against potential political attack from outsiders. As Haley argues, the overseeing of an individual judge's decision on politically sensitive cases is often exercised not by political leaders but by judges themselves (Haley 2006: 106),[30] and such judges' self-restrictive judgment makes the Japanese judiciary bureaucratic.

In addition, it can be presumed that the political movement criticizing progressive judges[31] caused the Hiraga *Shokan* Incident. Some of those who requested that Fukushima be impeached recognized that he was one of the leading activists in the Seinen Hōritsu-ka Kyōkai (Japan Young Lawyers Association), aka Sei-Hō-Kyō[32], and he had been actively engaging in a political campaign. Sei-Hō-Kyō was comprised of progressive attorneys, judges, and law professors. It was criticized as a radical progressive group not only by the far-right political movement but also by politicians belonging to the government party and by the Supreme Court. In fact, the LDP criticized Sei-Hō-Kyō judges as being grossly biased,[33] and formally adopted a proposal denouncing them on February 8, 1970. The Secretary-General Kishi Seiichi of the Supreme Court announced on April 8, 1970, as the official opinion of the Supreme Court, that judges should avoid joining political organizations, because it might invite public suspicion. Likewise, Chief Justice Ishida Kazuto of the Supreme Court gave similar instructions, in the official statement on the Constitutional Memorial Day, on May 2, 1970. At a press interview, the Chief Justice said, 'It is difficult for extreme militarists, anarchists, or apparent communists to serve as a judge, even though their thoughts were free.' For this statement and the denial of ap-

30) After briefly touching upon the Hiraga *Shokan* Incident (but not mentioning impeachment regarding this incident), Haley notes as follows: 'The response of the judiciary, particularly senior judges in charge of its administration, to the potential politicization of the courts in the 1970s can be argued as having secured the necessary political and public confidence for them to continue to claim immunity from politics' (Haley 2006: 106).

31) This movement was called the 'Blue Purge.' Since the 'sei' of Sei-Hō-Kyō means 'blue' in color, the naming stems from the 'Red Purge,' which was the Japanese version of purging communists from public and private sectors that took place from 1950 to 1952 under the occupation by the General Head Quarters.

32) Sei-Hō-Kyō was established for pursuit of pacifism, democracy, and fundamental human rights in 1954. In the 1970s, members of Sei-Hō-Kyō were seriously persecuted. Miayazawa illustrates that judges of Sei-Hō-Kyō received discriminatory treatment by the General Secretariat of the Supreme Court (Miyazawa 1994: 274-76). As it relates to Sei-Hō-Kyō, in 1971, the Supreme Court did not appoint some Sei-Hō-Kyō members as judges, and it did not reappoint Assistant Judge Miyamoto Yasuaki of the Kumamoto District Court after a ten-year term, although it claimed the reason of denial of his reappointment was not his membership of Sei-Hō-Kyō. See, Haley (2006: 106-07; 2007: 121-27).

33) Ramseyer and Rosenbluth thoroughly examine Sei-Hō-Kyō judges' career path statistically and prove that the Supreme Court did not generally punish leftist judges just for joining the Sei-Hō-Kyō, although it did not allow their personal politics to interfere with their work (Ramseyer & Rosenbluth 1997: 165).

pointment of Sei-Hō-Kyō candidates as judges, the impeachment of Ishida was requested by some scholars, then-famous novelists and 40,000 others, but the Judge Impeachment Committee decided not to impeach him on July 15, 1970 and April 10, 1973.

Some have said that the Supreme Court worked behind the scenes to compel judges to withdraw from Sei-Hō-Kyō since the November of 1969, although there is no official record of this. In fact, most judges withdrew from Sei-Hō-Kyō during this period, resulting in the judges section of this group being almost eliminated.[34] The impeachment of 214 judges suspected of belonging to Sei-Hō-Kyō was requested on July 10, 1970. The Judge Impeachment Committee directly inquired of each whether they belonged to this group, rather than asking the Supreme Court for this information, but only 142 judges answered. On February 17, 1972, the Judge Impeachment Committee decided not to impeach any of the judges regardless of whether they really belonged to the group.

### 4.4. A Simple Case and Hidden Cases in the 1980s

Judge Taniai's case was quite simple and an easy decision for the Judge Impeachment Court, as well as the two 1950s' cases. After this, there were no impeachments for twenty years.

There was another area of judicial misbehavior in this era, however, which was not tried in the Judge Impeachment Court. Judge Yasukawa Teruo of the Kokura Summary Court told an accused woman that he had her destiny in his hands, and he engaged in prostitution with her in July 1980. The Supreme Court of Japan requested the Judge Impeachment Committee to impeach him, but during the impeachment procedure, he suddenly ran for Mayor of Hisayama Town, Fukuoka Prefecture. According to Article 90 of the Public Office Election Act, any officers shall be automatically deemed to have resigned from their office when such officers, who are prohibited to run for any elected office, put themselves forward as election candidates. He used this provision for the purpose of halting the impeachment procedure (Koike 1981: 18).[35] Although he lost the mayoral election, he avoided impeachment and removal, and earned the full amount of his

34) The judges Section of the Sei-Hō-Kyō was finally dissolved in 1984 (Miyazawa 1994: 275).

35) Judge Yasukawa had been a court clerk for several years and was appointed as a judge of a summary court. Since he had not passed a bar examination, he originally did not have the certification to become a lawyer. However, if a judge who has once passed a bar examination avoids the decision of removal by the Judge Impeachment Court, he can maintain the qualifications to become a lawyer. If he were a judge who had passed the bar examination and cheated as mentioned above, he would not only keep his financial benefits but also be able to become a lawyer without any shame.

expected retirement bonus and pension. This was a loophole in the impeachment system at that time.

In 1981, the Diet revised the Judge Impeachment Act and added Article 41-2, which declares that a judge who is requested to be impeached by the Supreme Court or who is impeached by the Judge Impeachment Committee shall not be subject to Article 90 of the Public Office Election Act. Since then, a judge who is under an impeachment procedure cannot avoid the consequences by using this loophole.

### 4.5. A Political Case Again: Discipline for Judge Teranishi in the 1990s

Although no cases were filed in the Judge Impeachment Court in the 1990s, it was not the case that Japan's judiciary was trouble-free in this decade. In fact, this is the decade in which the most famous judge discipline case in post-war Japan happened.

Assistant Judge Teranishi Kazushi of the Sendai District Court and the Sendai Family Court, and concurrently serving as a judge of the Sendai Summary Court, made a speech from the audience while identifying himself as a judge at a meeting on the abandonment of the Wiretapping Bill and Anti-Organized Crime Bill, in the Social Democratic Party Building on April 18, 1998. He said, 'Initially, I was supposed to participate as a panelist in this symposium, but I have decided not to participate as a panelist, because the chief judge of my court warned me that I might be subject to disciplinary measures for participating in this meeting. I personally don't think that it would amount to active engagement in a political campaign prescribed in the Court Act even if I spoke against the bills, but I will decline to speak as a panelist.' Through this speech, he conveyed his opinion to the meeting participants that the Bills had problems with respect to warrant issues from the viewpoint of a judge,[36] thereby assisting and promoting the campaign for the abandonment of the Bills.

Article 52, Item 1 of the Court Act prohibits judges 'becoming a member of the National Diet or the Assembly of a local government or actively engaging in a political campaign' while in office. The Sendai High Court reprimanded him on July 24, 1998, because he actively engaged in a political campaign, which is prohibited by this Act, in breach of his official obligation as a judge. He immediately appealed this decision, but the Grand Bench of the Supreme Court dismissed the appeal. The Supreme Court held

36) Before his behavior at the meeting, on October 2, 1997, he wrote to the Asahi Shimbun, which is one of the progressive newspapers. In his letter, while identifying himself as a judge, he pointed out that most judges issue warrants without consideration and the judges' examinations on issuance of wiretapping warrants are unreliable.

as follows:

> The Constitution adopts the principle of separation of power […]. Among the three powers, judiciary is required to, as an independent third party, apply laws from a neutral and fair standpoint and to declare specific contents of law that are applicable to settle the dispute, thereby protecting the people's freedom and rights and maintaining rule of law. All judges who are to exercise such judiciary power must have a neutral and fair viewpoint, and they shall be independent in the exercise of their conscience and shall be bound only by the Constitution and the laws (Article 76, Paragraph (3) of the Constitution). In order to guarantee their independence, judges are entitled to sufficient protection for their status (Articles 78 to 80 of the Constitution). Judges should perform their duty independently and from a neutral and fair viewpoint, and they are also required to discipline and regulate themselves so as not to undermine their neutrality and fairness in appearance, because public confidence in justice is […] based on fair judgments on specific cases and due court proceedings, and also endorsed by the neutral and fair appearance of judges. Therefore, judges must not be influenced by any force, and in particular, they must draw a line between them and any political force.

Based on this reasoning, the Supreme Court indicated that the purpose of Article 52, Item 1 of the Court Act prohibiting judges from 'actively engaging in a political campaign' is to secure independence as well as the neutrality and fairness of judges so as to maintain public confidence in the judiciary, while realizing disciplined relationships among the judiciary, legislature, and executive under the principle of separation of powers. The Supreme Court defined 'actively engaging in a political campaign' as an act of positively taking part in organized, planned or continuous political activities, which are likely to undermine independence as well as the neu-

trality and fairness of judges.[37)]

However, five out of fifteen Justices of the Supreme Court wrote dissenting opinions that contested the imposing of no disciplinary measures on Judge Teranishi. Moreover, the Supreme Court did not make a request for impeachment against him, and the Judge Impeachment Committee did not impeach him.

Although it might seem that Judge Teranishi was unlikely to have been reappointed as a judge, he was in fact twice reappointed after ten-year terms of office, and served as a judge until August 2020.[38)]

### 4.6. Obvious Impeachment Cases in the 21st Century

Around 2000, Japan's court system was confronted with the fiercest arguments for reform by the Justice System Reform Council,[39)] which existed under the Cabinet from July 1999 to June 2001. Legal training systems were dramatically changed under this reform, which introduced a new bar examination system and a Japanese type of law school system. Moreover, public participation in the criminal justice system, known as the *saiban-in*

37) Foote describes Judge Teranishi's Case in detail and compares it with a similar case off two years before on the opposite side of the Pacific Ocean. On January 26, 1996, Justice Richard B. Sanders of the Washington Supreme Court delivered a political speech as a participant at an anti-abortion rally, and on May 12, 1997 the Commission on Judicial Conduct of the State of Washington held that Justice Sanders violated the Code of Judicial Conduct by engaging in political activity other than to improve the law. However, the Washington Supreme Court held that the Commission's decision should be reversed on April 28, 1998, although Sanders' conduct seemed more problematic than Teranishi's. Foote points out that the Washington State Supreme Court placed great weight on judges' right to free expression, while the Supreme Court of Japan emphasized the interests of a fair and impartial judiciary (Foote 2009: 292-93). The author adds that it is reasonable for the Supreme Court of Japan to value maintaining public trust in a fair and impartial judiciary because the legitimacy of the judiciary in Japan is built on public trust.

38) Some studies have claimed that the refusal of reappointment of judges is politically used to control them. For instance, Matsui states '[t]he Supreme Court can use this power to refuse reappointment to ensure judges continue to meet its expectations and not disrupt the harmony of the judiciary', illustrating the refusal of the reappointment of Judge Miyamoto as proof of his arguments (Matsui 2017: 222). This might be true for Miyamoto in 1970s, but the refusal of reappointment of judges has not been used as a political weapon. Haley concludes that '[d]enial of tenure was no longer a viable sanction', because no judge has been denied reappointment since Miyamoto (Haley2007: 126).

39) The purposes of this council was 'clarifying the role to be played by justice in Japanese society in the 21st century and examining and deliberating fundamental measures necessary for the realization of a justice system that is easy for the people to utilize, participation by the people in the justice system, achievement of a legal profession as it should be and strengthening the functions thereof, and other reforms of the justice system, as well as improvements in the infrastructure of that system' (Article 2, Paragraph (1) of the Law concerning Establishment of the Justice System Reform Council).

*seido* (trial system by lay judges)[40], was introduced, consistent with the recommendations of the Council, in order to promote the understanding of the people and to enhance their trust of the judiciary. However, the judge disciplinary system and judge impeachment system were never discussed by the Council, although the judge appointment system was partly changed.[41]

After twenty years with no impeachment trial, one was filed in the Judge Impeachment Court in 2001. Since then, there were three impeachment cases in the 21st century, which all stemmed from male judges' sexual harassment or sexual crimes. Notably, Judge Hanai is the first impeached judge who graduated from a law school and passed the new bar examination.[42] The author does not believe that the quality of judges has deteriorated due to the new system designed to nurture the legal profession, based on this one case. Instead, the author notes that Hanai's own wicked crime obviously undermined public trust in the judiciary, because he perpetrated it at the very time he was working on the trial of an arson murder case with *saiban-in*s, a trial in which issues included the constitutionality of the death penalty by hanging[43]. The author believes that the same is true of the other two impeachment cases in 2000s.

In Japan, from the late 2000s to the early 2010s, politics have dramati-

40) Article 1 of the Act on Criminal Trials with Participation of *Saiban-in* stipulates the purpose of this system as follows: 'This Act sets forth special provisions to the Court Act (Act No. 59 of 1947) and the Code of Criminal Procedure (Act No. 131 of 1948) and other necessary items for criminal trials with the participation of *saiban-in*s, considering that the involvement of *saiban-ins* appointed from among the people in criminal procedures together with judges contributes *to promote the understanding of the people and to enhance their trust in the justice*' (emphasis added). The meaning of the new participation system was described and thoroughly examined in Yanase (2016: 327).

41) Consequently, the following systems were implemented: ensuring judges gather diversified experience as legal professionals in positions other than the judiciary (in order to secure judges with abundant, diversified knowledge and experience); establishing councils which select appropriate candidates for nomination as lower court judges, and recommending the results of their consideration to the Supreme Court (in order to reflect public views in the process whereby the Supreme Court nominates those to be appointed as judges); and creating appropriate mechanisms for the personnel evaluation of judges (in order to secure transparency and objectivity).

42) The number of people who passed the bar examination was under 300 in the 1950s, gradually increased, and reached around 500 from 1963 until 1990, again increasing to about 1,000 in 1999, and 1,500 in 2005. In 2006, the new examination system, under which only law school graduates can take the exam, was introduced, while the old examination coexisted during the transition period until 2011. Since 2007, the number of those passing the bar increased to over 2,000 for seven years, but since 2014 suddenly dropped and is currently around 1,500. Hanai passed the examination in 2009.

43) The so-called Konohama-ku Pachinko Arson Case was first tried in the Osaka District Court, and the panel consisting of *saiban-in*s and professional judges (including Hanai) strenuously discussed the constitutionality of the death penalty. On October 31, 2011, the District Court sentenced a defendant to capital punishment after affirming its constitutionality, and the Supreme Court upheld this judgment on February 23, 2016.

cally changed. Muraki was tried for impeachment from August to November of 2001, during the time of the LDP-Komeito (formerly New Komeito) coalition government. In the meantime, the impeachment investigation of Shimoyama was held from June to July of 2008, when the ruling coalition commanded a majority in the House of Representatives while the opposition parties had control of the House of Councillors (aka the *nejire kokkai* (divided Diet)).[44] Hanaki was impeached under the government led by the Democratic Party of Japan (DPJ) on November 13, 2012, and after the general election and governmental transition he was removed by the Judge Impeachment Court under the LDP-Komeito coalition government on April 10, 2013. During these three impeachments, although the majority of the Houses of the Diet had changed and therefore the leading members of the Judge Impeachment Court had also changed, the Court's attitude regarding the delinquent judges did not change. The author presumes the reason was that the issue of impeachment had no relationship to political affairs.

## 5. Conclusion

By reviewing all judge impeachment cases as well as some impeachable but unimpeached judge cases in Japan, it becomes evident that the judge impeachment system is subject to complex problems, which include political matters.

Some of the cases that relate to a judge's personal interests are obviously faults of those judges lacking high integrity. They are definite deviations from Japanese judicial norms. Impeachments for them have contributed to maintaining public trust in the judiciary.

In contrast, other cases which involve political issues are difficult to interpret. As for the political cases, there were some questionable actions by the Judge Impeachment Committee, but the Judge Impeachment Court has not made a fatal misjudgment.[45] However, it can be said that the im-

44) This impeachment was filed on September 9, 2008, when eight days prior Prime Minister Fukuda Yasuo announced his resignation because he could not control the Diet any longer. Since the House of Representatives was at risk of dissolution, the Judge Impeachment Court took special measures against it (Matsumoto 2011: 83-84).

45) Ramseyer and Rosenbluth conclude that 'n substance, Japanese judges are agents of LDP principals; in practice, LDP principals treat Japanese judicial agents much as principal-agent theory suggests', and 'LDP leaders use their direct control over judicial appointments and indirect control over the Secretariat to shape judicial decisions' (Ramseyer & Rosenbluth 1997: 178-79). In this connection, the author points out a fact that Ramseyer and Rosenbluth do not find. Japanese judge impeachment precedents indicate that neither the LDP nor the Supreme Court have succeeded to use impeachment in order to politically shape judicial decisions, although removal is more decisive in effecting judges than moving to provincial lower court.

peachment procedure is somewhat political, because anyone can ask the Judge Impeachment Committee to impeach a judge and members of both the Committee and the Court are politicians. Therefore, the impeachment system has an inherently unavoidable risk of abuse. If an innocent judge were unduly impeached and removed from office it would undermine the independence of the judiciary, which is guaranteed by the Constitution of Japan, and if a deviated judge unreasonably evaded impeachment and removal it would amount to the same result.

The author concludes that more attention should be paid to Japan's judge impeachment system, and further study should be conducted on it.[46)]

## References

Chūō Chōsa Sha. 2019. '"Giin, Kanryō, Dai-kigyō, Keisatsu-tou no Shinrai-kan" Chōsa' (Research on "the Trust of Diet Member Bureaucrats, Large Corporation, Police, etc."). https://www.crs.or.jp/data/pdf/trust19.pdf (accessed on December 23, 2021).

Foote, Daniel H. 2009. 'Restrictions on Political Activity by Judges in Japan and the United States: The Cases of Judge Teranishi and Justice Sanders.' *Washington University Global Studies Law Review* 8: 285-302.

Haley, John O. 2006. *The Spirit of Japanese Law.* The University of Georgia Press.

Haley, John O. 2007. 'The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust.' In *Law in Japan: A Turning Point*, ed. D. Foote. University of Washington Press, 99-135.

Hayakawa, Takeo. 1971. 'The Japanese Judiciary in the Whirlwind of Politics.' *Kobe University Law Review* 7: 15-23.

Koike, Nobuyuki. 1981. 'Saibankan Dangai-hō no Ichibu-kaisei ni tsuite' (On the Partial Revision of the Judge Impeachment Act). *Hō no Shihai* 49: 18-23.

Kumamoto, Nobuo. 1958. 'Contemporary Reflections on Judicial Independence in Japan.' In *Judicial Independence: The Contemporary Debate*, eds. Shimon. Shetreet & J. Deschênes. Martinus Nijhoff Publishers.

Lin, Laifan. 1999. 'Judicial Independence in Japan: A Reinvestigation for China.' *Columbia Journal of Asian Law* 13(2): 185-201.

Matsumoto, Keisuke. 2011. 'Heisei 20 (So) Dai 1-go Himen-sotsui Jiken wo Furikaeru' (Reviewing the Case of the 1st Impeachment Case of 2008). *Saiban-kan Dangai Saibansho Hō* 2011: 82-96.

Matsui, Shigenori. 2017. 'Independence of the Judiciary and Securing Public Trust in Japan.' In *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity*, eds. H. P. Lee & Marilyn Pittard. Cambridge University Press, 209-30.

46) Readers of this paper might expect the author to refer to Judge Okaguchi's case, but the author deliberately does not mention this case here. Judge Okaguchi Kiichi of the Sendai High Court concurrently serving as a judge of the Sendai Summary Court, posted problematic comments on Twitter and Facebook repeatedly ignoring two warning measures by the Chief Judge of the Tokyo High Court (on June 21, 2016 and March 15, 2018), and as a result he was twice reprimanded by the Grand Bench of the Supreme Court of Japan on October 17, 2018 and August 26, 2020. He was impeached by the Judge Impeachment Committee responding to public requests for impeachment against him on June 16, 2021. Judge Okaguchi's reprimanded case is partly described in Tsuji (2020: 99-103). Since this case is an important one involving the constitutional issues of judges' freedom of expression, the author plans to examine it in detail in a subsequent paper.

Miyazawa, Setsuo. 1994. 'Administrative Control of Japanese Judges.' In *Law and Technology in the Pacific Community*, ed. Philip S.C. Lewis. Westview Press, 263-81.

Odanaka, Toshiki. 1973. *Gendai Sihō no Kouzō to Shisō* (Structure and Thought of Contemporary Justice). Nippon Hyoron sha.

Ramseyer, J. Mark & Frances McCall Rosenbluth. 1997. *Japan's Political Marketplace: with a New Preface*. Harvard University Press.

Saibankan Dangai Saiban-sho Jimukyoku & Saibankan Dangai Sotsui Iinkan Jimukyoku. 1997. *Saibankan Dangai Seido no Gojū-nen* (*Fifty Years History of the Judge Impeachment System*). Saibankan Dangai Saiban-sho Jimukyoku & Saibankan Dangai Sotsui Iinkan Jimukyoku.

Takeshita, Morio et al. 1997. 'Zadankai: Saiban-kan Dangai Seido no Gojū-nen' (Roundtable Talk: Fifty Years History of the Judge Impeachment System). *Jurist* 1123: 54-89.

Tsuji, Yuichiro. 2011. 'Independence of the Judiciary and Judges in Japan.' *Surugadai Hōgaku* 24(3): 63-82.

Tsuji, Yuichiro. 2020. 'Independence of Judiciary and Judges and Techniques of Interpretation in Japan.' *Courts & Justice Law Journal* 2(1): 76-108.

Washino, Tadao. 2015. *Kenshō Shihō no Kiki 1969-72* (*Examining Judicial Crisis: 1969-72*). Nippon Hyoron sha.

Yamagata, Michifumi. 2010. *Ware Hanji no Shoku ni ari: Yamaguchi Yoshitada* (I am a Judge: Yamaguchi Yoshitada). Shutsumondau.

Yanase, Noboru. 2011. 'Saibankan Dangai-seido wo meguru Kenpō-jō no Ronten' (Constitutional Issues on the Judge Impeachment System). *Saibankan Dangai-Saibansho Hō*. 2011: 3-27.

Yanase, Noboru. 2015. 'Overview of the Judge Impeachment System in Japan: Focusing on the Constitutional Design for the Impeachment Committee and Court.' *Nihon University Comparative Law* 31: 1-17.

Yanase, Noboru. 2016. 'Deliberative Democracy and the Japanese *Saiban-in* (Lay Judge) Trial System.' *Asian Journal of Law and Society* 3: 327-49.

# The Legal Framework of the 'Unwilling or Unable' Theory and the Right of Self-Defence against Non-State Actors

*Yuki Motoyoshi**

**Abstract**

This article provides the theoretical background of so-called the 'Unwilling or Unable' theory which enables a State to conduct military operations when the territorial State is unwilling or unable to suppress the threat of non-State actors based on the right of self-defence. Then, on the basis of the conclusion that the theory is legally acceptable under the inherent right of self-defence, the role of the theory in the military operations against ISIS is considered. Finally, this article examines the legal framework to avoid the abusive use of the theory through the mechanism to decide the situation of unwilling or unable.

## I. Introduction

The legal challenges that various international threats pose against a common understanding of the United Nations (UN) Charter constitutes controversial legal issues in contemporary international law.[1)] In this context, one of the most recent and serious ones is the emergence of armed non-State actors such as the Islamic State of Iraq and Syria (ISIS), which has been designated as an international terrorist organisation by the UN Security Council.[2)] However, the text of the UN Charter does not explicitly provide an answer as to the type of legal measures that can be taken to

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1) Yuki Motoyoshi, 'The Legal Status of the 'Unwilling or Unable' Theory: Its Origin and Historical Development (in Japanese)' (2017) 26(1) Yokohama Law Journal 153-55.

2) United Nations (UN) Security Council Resolution (SC Res) 2178 (24 September 2014) UN Doc S/RES/2178. The Security Council expressed 'particular concern that foreign terrorist fighters are being recruited by and are joining entities such as' ISIS in the resolution.

suppress the threat of armed non-State actors when the territorial State is unwilling or unable to suppress the threat of non-State actors (a situation of unwilling or unable).[3)]

The main aim of this article is to provide the theoretical background of the 'Unwilling or Unable' theory, which enables a State to conduct military operations in a situation of unwilling or unable based on the right of self-defence.[4)] Therefore, the debate about the theory is closely related to the legality of military operations against non-State actors in the right of self-defence. Firstly, having examined the key terms such as a situation of unwilling or unable, the definition of a non-State actor and a State (Section II), to address the controversies about the legality of the 'Unwilling or Unable' theory, it is considered whether the theory is justified based on the right of self-defence under the UN Charter (Section III). Then, the legal analysis of the military operations against ISIS is analysed as the one of the most recent and important State practice (Section IV). Finally, this article provides brief guidelines to avoid the abusive use of the theory (Section V).

## II. Preliminary Issues

### 1. A Situation of Unwilling or Unable

As a preliminary issue, firstly, a situation of unwilling or unable needs to be defined. This article employed the definition provided by Cassese as a starting point because his definition clearly and simply expresses a situation of the unwilling or unable as a legal term.[5)] The situation of the unwilling or unable has two aspects, the *unwillingness* of a territorial State and the *inability* of a territorial State. The former is defined as the situation where a State simply acquiesces in terrorist groups seeking refuge on its territory and 'does not take coercive action to prevent or punish terrorism'.[6)] And the latter is the situation where armed non-State actors 'operate on the territory of a State which is unable to exercise control over them'.[7)]

3) See Yuki Motoyoshi, 'The Scope of the Right of Self-Defence against Non-State Actors under the UN Charter Through the Analysis of Its Travaux Préparatoires and the Nicaragua Case (in Japanese)' (2021) 87(3) Nihon Hougaku: See also Motoyoshi (n 1) 165-66.
4) Ashley Deeks, 'Unwilling or Unable: Toward a Normative Framework for Extra-Territorial Self-Defense' (2012) 52(3) Virginia Journal of International Law (VJIL) 486.
5) See also Yuki Motoyoshi, 'The Exercise of the Right of Self-Defence and the Rules of Attribution Particularly When the Territorial State is Unwilling or Unable to Suppress the Threat of Non-State Actors (in Japanese)' (2022) 63 Hougaku Kiyou 3-4.
6) Antonio Cassese, *International Law* (2nd edn, Oxford University Press (OUP) 2005) 470.
7) ibid.

## 2. The Definition of a Non-State Actor and a State

Secondary, it should be examined what the definition of a *non-State actor* and a *State* is in this article because both of them are also key legal terms. In the context of military operations against non-State actors, the examination of the boundary between a non-State actor and a State is of particular importance because some non-State actors such as ISIS have controlled a certain territory within existing States. The term of a non-State actor in this article is defined as an armed actor which conducts transnational attacks.[8] Peaceful actors, such as non-governmental organisations (NGOs), are excluded from the definition of a non-State actor here. In the international legal system, a State remains the primary subject of international law although non-State actors hold more influence than before.[9]

The Montevideo Convention on the Rights and Duties of States (Montevideo Convention) is often referred to in this context. Even though the convention only reflects the reality of States, and it is not legally binding outside the Latin American region, it is regarded as the 'best known' basic criteria for the law of Statehood and employed as the standard definition of a State under international law.[10] Therefore, with respect to the applicable law in this context, the Montevideo Convention needs to be examined.

In article 1 of the Montevideo Convention, four qualifications are listed for a State to exist as a person of international law: A permanent population; a defined territory; government; and capacity to enter into relations with other States.[11] For the criterion of 'a defined territory', it is enough to keep 'a certain coherent territory' even if it is small,[12] and the land frontiers of a State are not 'fully delimited and defined'.[13]

However, it is argued that the four criteria provided in the convention cannot always effectively work as criteria to determine whether an entity is a State.[14] Particularly, the convention has been criticised because this criterion looks too formalistic and easy to satisfy. Of course, these four criteria

8) See Massimiliano Sassoli de Bianchi, 'Transnational Armed Groups and International Humanitarian Law' (HPCR Occasional Paper Series, 2006) 1-2: Noam Lubell, *Extraterritorial Use of Force against Non-State Actors* (OUP 2010) 20.
9) James Crawford, *The Creation of States in International Law* (OUP 2007) 72.
10) ibid 45.
11) Convention on Rights and Duties of States adopted by the Seventh International Conference of American States (Montevideo Convention on Rights and Duties of States) (Montevideo, 26 December 1933, 165 United Nations Treaty Series (UNTS) 3802): See Motoyoshi (n 1) 177.
12) Crawford (n 9) 46-52.
13) *North Sea Continental Shelf, Germany v Denmark*, (Merits) (1969) the International Court of Justice (ICJ) Rep 3 (*North Sea Continental Shelf* case) para 46.
14) See Crawford (n 9) 436-37.

provided by the convention can still be considered to reflect a minimum standard but are not enough to determine Statehood in contemporary situations. In addition, other criteria which are not referred to in the Montevideo Convention have been proposed in the scholarship, such as recognition, and with it, 'a degree of permanence', 'a certain degree of civilization' and 'willingness and ability to observe international law'.[15)]

Moreover, it is suggested that some States 'have begun also to require respect for human rights and the rights of minorities as well as respect for existing international frontiers, as further conditions for granting recognition'.[16)] With regard to these new aspects, Crawford argues that '[a]n entity created in violation of rules to the use of force in such circumstances will not be regarded as a State'.[17)] Thus, these criteria 'a degree of permanence', 'a certain degree of civilization', 'willingness and ability to observe international law' and 'respect for human rights and existing international frontiers' should be added to the criteria to determine Statehood in addition to the criteria provided in the Montevideo Convention. Therefore, in this article, to determine Statehood, these criteria should be satisfied, and it means that ISIS does not satisfy these criteria because at least, they did not respect existing international frontiers and international law.[18)]

### 3. The Relationship between a State and a Non-State Actor

Finally, it needs to be examined how the relationship between a State and a non-State actor affects the status of non-State actors.[19)] Thus, this section considers the difference between State and armed non-State actors. The acts of the non-State actor can be attributed to the State if the actors are State organs or *de facto* organs even though the non-State actor is a separate entity and by definition not a State. This is because their acts are attributable to the State under the law of State responsibility.[20)] If the actors are State organs or *de facto* organs of States, such actors are excluded from the scope of the research. Then, if the relationship between a State and a non-State actor satisfies the *effective control* test,[21)] the acts of a non-State actors are attributable to a State.[22)] The *effective control* test codified in Article 8

15) ibid 90-92.
16) Cassese (n 6) 75.
17) Crawford (n 9) 148.
18) See also Motoyoshi (n 1) 177.
19) The detailed analysis of the rules of attribution in the context of the right of self-defence is in Motoyoshi (n 5).
20) International Law Commission (ILC), Draft articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) art 4.
21) ibid art 8.
22) *Nicaragua* case, para 115.

of Draft articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) was born in the debates by Special Rapporteur Reporter Ago in International Law Commission (ILC).[23] Article 8 of ARSIWA reads, '[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.

Although the detailed legal issues whether and how international law can engage with the situation where military actions by armed non-State actors can be attributed to States is out of scope in this article,[24] this research particularly focuses on the non-State actors whose military actions cannot be attributed to States by the strict application of the international rules of State responsibility.

## III. The 'Unwilling or Unable' Theory as a Part of the Inherent Right of Self-Defence

There is a dispute about whether the 'Unwilling or Unable' theory constitutes customary international law. With respect to the debates about the 'Unwilling or Unable' theory, Deeks provides a theoretical framework for its theory and argues that the theory fits in the right of self-defence.[25] Yet, within international legal scholarship, there is a disagreement about the legal status and the scope of the 'Unwilling or Unable' theory. Critiques of the theory span its disputed acceptance as a norm of international law, the scope of the theory, and the potential for the theory to be abused by States who can make unilateral decisions to exercise the right of self-defence.[26] For example, Corten argues that a situation of unwilling or unable cannot be regarded as an armed attack under Article 51, and therefore, accepting the 'Unwilling or Unable' theory would lead to 'a radical change' in the interpretation of the UN Charter.[27]

Thus, it can be said that the main criticism of the theory is the lack of legal basis, State practice and *opinio juris*. This article firstly examines whether the inherent right of self-defence clearly expressed in Article 51 of the UN Charter provides the solid legal basis of the 'Unwilling or Un-

23) Roberto Ago, UN Doc A/CN.4/264 and Add.1 (1972) Fourth Report on State responsibility, 124-25.
24) See Motoyoshi (n 5).
25) Deeks (n 4) 486.
26) See Motoyoshi (n 1) 159-61.
27) Olivier Corten, 'The "Unwilling or Unable" Test: Has it Been, and Could it be, Accepted?' (2016) 29(3) Leiden Journal of International Law (LJIL) 794-97.

able' theory. The right of self-defence in Article 51 plays a key role for the legal regulation of the military operations, as it constitutes one of the valid exceptions to the general prohibition of a use of force under Article 2(4) of the UN Charter.[28] Article 51 reads that:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[29]

One of the main difficulties in settling the debate on whether the right of self-defence can be exercised against non-State actors particularly in a situation of unwilling or unable, lies in the lack of consensus on the content of the inherent right of self-defence at the time of adoption of the UN Charter.[30] Assessing this requires a review of the extent to which international law restricted the right of self-defence generally in the pre-UN Charter period. Given that Article 51 of the UN Charter is generally believed to codify the already existing right of self-defence,[31] identifying the exact contours of the scope of this right prior to its codification in the UN Charter is essential.

In this regard, the Caroline incident has been generally accepted as the paradigmatic case on the right of self-defence against non-State actors in the pre-UN Charter period.[32] In the incident, the UK exercised the right of self-defence against non-State actors (rebels) within the US territory.[33] The US Secretary of State, Webster, stated that the right of self-defence against non-State actors in the territory of other States can be exercised when 'a necessity of self-defence, instant, overwhelming, leaving no choice of means,

28) See Cassese (n 6) 354: Olivier Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Bloomsbury Publishing 2010) 51-52.
29) UN Charter, art 51.
30) The detailed analysis of travaux préparatoires of the UN Charter is in Motoyoshi (n 3) 137-44.
31) ibid 143; See also Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America) (Merits) (1986) ICJ Rep 14-150 (*Nicaragua* case) para 176.
32) See Derek Bowett, *Self-Defence in International Law* (Praeger 1958) 58.
33) Robert Jennings, 'The Caroline and McLeod Incidents' (1938) 32(1) American Journal of International Law 82.

and no moment for deliberation'.[34] The standard proposed here is the so-called *Webster formula*, and it allowed a State to intervene in the territorial State to suppress the threat of non-State actors. The legal doctrine arising from this incident constitutes the standard for the assessment of the lawfulness of interventions against non-State actors in the situation of unwilling or unable.[35]

Thus, the right of self-defence against non-State actors in a situation of unwilling or unable, has been accepted as a part of inherent right of self-defence.[36] Although detailed analysis of State practice, *opinio juris* and case law before the emergence of ISIS is out of scope in this article, this article takes the stance that the ratification of the UN Charter did not fundamentally restrict the customary right of self-defence, and it means that the right of self-defence can be exercised against non-State actors in a situation of unwilling or unable.[37] Next section will examine the legal status of the military operations against ISIS as one of the most recent and important State practice of the theory.

## IV. Emergence of ISIS and the 'Unwilling or Unable' theory

### 1. The Military Operations against ISIS by the US and Its Allied States

This section considers the legality of the military operations against ISIS in Syria and Iraq.[38] In this context, it is crucial to identify whether there exists consent of the territorial States, Syria and Iraq. The Iraqi government requested international support to suppress the growing threat of ISIS in the letter sent to the Security Council in September 2014.[39] In this letter, Iraq indicated that it requested the US intervention with Iraq's 'express consent'.[40] Based on this request, not only the US but other States started military operations to help Iraq from the expansion of ISIS.

In contrast, the legal issue about consent by Syria is more complex. Firstly, with respect to the question about which subject in Syria could give consent of military operations by foreign States in the situation where a civil war occurred, the Assad regime was the only possible subject in Syria

34) 29 British and Foreign State Papers 1129 (Webster to Fox) (1840-41).
35) See Derek Bowett, *Self-Defence in International Law* (Praeger 1958) 58.
36) Motoyoshi (n 1) 190: See also Motoyoshi (n 3) 155.
37) Motoyoshi (n 1) 165-66: Motoyoshi (n 3) 143-44.
38) The brief description regarding the legal debates about the military operations against ISIS is in Motoyoshi (n 1) 177-84: In addition, the analysis of the military operations from the viewpoint of rules of attribution is in Motoyoshi (n 5) 16-19.
39) UN Doc S/2014/691 (22 September 2014).
40) ibid.

which could give consent.[41] However, this matter about the legitimacy of a State in international law is out of the scope of this research. Secondly, then, it should be considered whether the Assad regime gave consent to the military operations within its territory. Although the Assad regime received military support from other countries such as Russia,[42] the Assad regime did not give any requests or consent to the US and its allied States. Moreover, the Assad regime condemned the military operations in Syria by the US because they violated the 'the respect for the unity, sovereignty and territorial integrity of Syria'.[43] Syria required States to stop 'distorting the meaning of Article 51' of the UN Charter.[44] This statement highlighted that Syria, a territorial State in this case, did not give any explicit request to the military operations by the US and other coalitions.

The US representative Samantha Power said that the US led airstrikes against ISIS in Syria and pointed out that the threat came from the safe havens in Syria.[45] In addition, the US stated that:

> ISIL (ISIS) and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.[46]

In this statement, the US stressed that the US and the international community faced the threat from ISIS.[47] With respect to the legal justification for the operations in Syria (but not Iraq because there exits clear consent by Iraq), the US's justification connects the inherent right of (individual and collective) self-defence with the situation where the Syrian government is

41) For example, Flasch also focused on whether the Assad regime consented to the military operations by the US and its allied States. Olivia Flasch, 'The Legality of the Air Strikes against ISIL in Syria: New Insights on the Extraterritorial Use of Force against Non-State Actors' (2016) 3(1) Journal on the Use of Force and International Law 43-46.
42) Angela Stent, 'Putin's Power Play in Syria: How to Respond to Russia's Intervention' (2016) 95 Foreign Affairs 106.
43) UN Doc S/2015/719 (Syria) (21 September 2015).
44) ibid.
45) UN Doc S/2014/695 (the US) (23 September 2014).
46) ibid (blanket added).
47) ibid.

unwilling or unable to prevent the threat of non-State actors.[48] Thus, this statement is an example of the 'Unwilling or Unable' theory being used in the context of the military operations against ISIS and other States follow this stance.[49]

Moreover, the US, Canada, Turkey and Australia employed the terms of unwilling or unable, *before* the adoption of Security Council Resolution (SC Res) 2249 in the context of the military operations against ISIS in Syria. This section has shown that there existed suggestions about the loss of effective control over territory, which is closely related to the inability of a territorial State to suppress the threat of non-State actors (the situation, which shared the core idea of the 'Unwilling or Unable' theory). This section shows that the 'Unwilling or Unable' theory was endorsed by some States in the context of the military operations against ISIS.[50]

Regarding international reactions, the military operations conducted by the US and other States since 2014 received widespread support.[51] Some countries joined the military operations while others offered military bases or sent weapons and aid. The following sub-sections will look at the legal justifications provided by each State that conducted military operations against ISIS to ascertain the role of the 'Unwilling or Unable' theory.

## 2. The Paris Attacks and Security Council Resolution 2249

On 31st October 2015, a Russian airliner crashed in Egypt and killed all 224 people on board,[52] and after the incident, the ISIS branch group 'Islamic State in Sinai' claimed responsibility for the attack in Egypt.[53] Then, attacks took place at the centre of Paris on the night of 13th November 2015 by gunmen and suicide bombers, which killed 129 people (the Paris Attacks).[54] ISIS claimed responsibility for the Paris attacks and French President François Hollande regarded the attacks as 'an act of war'.[55] In response to these terrorist attacks, the international community including the US, Russia, the

48) ibid.
49) Motoyoshi (n 1) 178-79.
50) ibid 183-84.
51) 'Who's doing what in the coalition battle against ISIS' *BBC* (28 February 2015) at <https://edition.cnn.com/2014/10/06/world/meast/isis-coalition-nations/index.html> accessed 1 May 2018.
52) 'Sinai plane crash: Russian airliner 'broke up in mid-air'' *BBC* (1 November 2015) at <http://www.bbc.co.uk/news/world-middle-east-34694057> accessed 1 May 2018.
53) ibid.
54) The brief description of the Paris Attacks and the adoption of SC Res 2249 is in Motoyoshi (n 1) 180-82.
55) François Hollande, 'Attacks in Paris – Statement by M. François Hollande, President of the Republic, following the Defence Council meeting' at <http://www.ambafrance-uk.org/Paris-attacks-Official-statements> accessed 1 May 2018.

EU and the Gulf States condemned these attacks by the non-State actors.[56] To suppress the threat of ISIS and its affiliates, France started its military operation against ISIS in Syria and the EU activated collective self-defence under Article 42(7) of the Treaty of the EU.[57]

Based on the article, EU member States joined the military operations against ISIS. Up until this point, there were disputes between the West (such as the US, and the UK) and Russia regarding the response to the civil war in Syria. Russia strongly supported the Assad-regime, but the West did not accept the Assad-regime as the legitimate government. This difference caused difficulties of cooperation against ISIS.[58] However, the Paris Attacks fostered momentum for creating a global coalition to suppress the threat of ISIS.[59] In fact, the Security Council adopted SC Res 2249 which notes that ISIS is 'a global and unprecedented threat to international peace and security' just after the Paris Attacks.[60]

SC Res 2249 reaffirmed the previous resolutions regarding the threat of non-State actors such as SC Res 1368 (2001), SC Res 2178 (2014) and SC Res 2214 (2015),[61] and on the basis of these resolutions, SC Res 2249 condemns terrorist acts conducted by ISIS and notes that ISIS 'has the capability and intention to carry out further attacks and regards all such acts of terrorism as a threat to peace and security'.[62] Moreover, paragraph 5 of this resolution required more efforts to suppress the threat of ISIS as follows:

> Calls upon Member States that have the capacity to do so to take all necessary measures, in compliance with international law, in particular with the United Nations Charter, as well as international human rights, refugee and humanitarian law, on the territory under the control of ISIL (ISIS) also known as Da'esh, in Syria and Iraq, to redouble and coordinate their efforts to prevent and suppress terrorist acts committed specifically by ISIL (ISIS) […] and to eradicate the safe haven they have established over significant parts of Iraq and Syria;[63]

56) 'World leaders react to 'barbaric' Paris attacks' *France 24* (15 November 2015) at <http://www.france24.com/en/20151114-paris-attacks-world-reactions-france-terrorism-hollande-putin-obama> accessed 1 May 2018.
57) European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01, art 42(7).
58) See Motoyoshi (n 1) 180.
59) 'Paris attacks: World leaders united against terrorism, says Cameron' *BBC* (16 November 2015) at <http://www.bbc.co.uk/news/uk-34829546> accessed 1 May 2018.
60) UNSC Res 2249 (20 November 2015) UN Doc S/RES/2249.
61) ibid.
62) ibid.
63) ibid (blanket added).

In the vote, the resolution was unanimously adopted by the permanent member States (China, France, Russia, the UK and the US), and other member States (Angola, Chad, Chile, Jordan, Lithuania, Malaysia, New Zealand, Nigeria, Spain and Venezuela). In the Security Council meeting in which this resolution was adopted, most States reacted favourably, for example, Nigeria stated that '[t]he situation calls for urgent action by the international community to intensify the fight against' ISIS.[64] Angola also severely criticised ISIS and stated that it is high time to 'build a global coalition to fight and eradicate terrorism in all its forms and manifestations'.[65] These statements explicitly admit that the adoption of SC Res 2249 advances the military operations against ISIS. SC Res 2249 was passed despite the differences among States including States such as Russia, which strongly questioned the legality of actions within Syria.[66]

Even though this resolution positively endorsed the military operations against ISIS not only in Iraq but also in Syria since 2014, the legal effect of SC Res 2249 has been one of the most controversial legal issues.[67] Firstly, it is discussed whether the phrase 'to take all necessary measures' employed in the resolution, authorises military operations against ISIS. As Akande and Milanovic argued there remains 'ambiguity' regarding the interpretation of this resolution,[68] without referring to Chapter VII of the UN Charter, it is difficult to regard the resolution as authorisation of the military operations by the Security Council. Other scholarly literature also indicates that this resolution cannot be 'an independent basis of military action' because of the omission to refer to Chapter VII.[69] Akande and Milanovic argued that:

> Resolution 2249 […] is constructed in such a way that it can be used to provide political support for military action, without actually endorsing any particular legal theory on which such action can be based or providing legal authority from the Council itself.[70]

64) UN Doc S/PV.7565 (20 November 2015) 5 (Nigeria).
65) ibid 7 (Angola).
66) See Motoyoshi (n 1) 182.
67) ibid 181.
68) Dapo Akande and Marko Milanovic, 'The Constructive Ambiguity of the Security Council ISIS resolution', EJIL: Talk!, 21 November 2015 at <http://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution/> accessed 1 May 2018.
69) Anne Peters, 'German Parliament decides to send troops to combat ISIS − based on collective self-defense "in conjunction with" SC Res. 2249' EJIL: Talk! (2015) at <http://www.ejiltalk.org/german-parlament-decides-to-send-troops-to-combat-isis-%E2%88%92-based-on-collective-self-defense-in-conjunction-with-sc-res-2249/> accessed 1 May 2018.
70) Akande and Milanovic (n 64).

SC Res 2249 includes a certain degree of ambiguity with respect to its binding role without reference to Chapter VII. It does not authorise the military operations under Chapter VII unlike SC Res 678.[71] There is an additional concern with the resolution, which is whether SC Res 2249 successfully removed the ambiguity surrounding the 'Unwilling or Unable' theory as a part of the right of self-defence. This question arises because the resolution calls on Member states 'to eradicate the safe haven they [ISIS] have established over significant parts of Iraq and Syria'.[72]

With respect to the relationship between the meaning of 'safe haven' and the idea of the situation of unwilling or unable, both are closely related. 'Safe haven' was employed in SC Res 1373 and it means the place where terrorists 'finance, plan, support, or commit terrorist acts'.[73] If there exists the situation of unwilling or unable, such places where terrorists plan and commit terrorist acts can be established and kept within a territorial State. Thus, the argument of a 'safe haven' and the situation of unwilling or unable are linked.[74]

Before the adoption of the resolution, the military operations under the 'Unwilling or Unable' theory were based on uniliteral judgment by a State attacked by non-State actors regarding whether there exists the situation of unwilling or unable. However, in the context of the military operations against ISIS, SC Res 2249 plays a key role in the interpretation of the 'Unwilling or Unable' theory beyond the unilateral decision by the State because SC Res 2249 regarded some of its territories within Syria as a 'safe haven'.[75]

## 3. State Practice After SC Res 2249

After the adoption of SC Res 2249, some other States such as Germany, Belgium and Norway joined the military operations against ISIS within Syria.[76] Even though Germany's operations were initially restricted against ISIS in Iraq,[77] Germany decided to expand its operations from Iraq to Syria after the adoption of SC Res 2249.[78] Germany argued that their actions are

71) UNSC Res 678 (29 November 1990) UN Doc S/RES/678.
72) UNSC Res 2214 (27 March 2015) UN Doc S/RES/2214 (blanket added).
73) UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.
74) Motoyoshi (n 1) 168.
75) See ibid 180-84.
76) ibid 182-83.
77) UN Doc S/PV.7316 (19 November 2014) 39 (Germany).
78) 'Germany joins fight against Isil after parliament approves military action in Syria' *Telegraph* (04 December 2015) at <http://www.telegraph.co.uk/news/worldnews/europe/germany/12032948/Germany-joins-fight-against-Isil-after-parliament-approves-military-action-in-Syria.html> accessed 1 May 2021.

based on the right of self-defence under Article 51 and stressed that they are 'directed against ISIL (ISIS), not against the Syrian Arab Republic'.[79] Germany also mentioned as follows:

> ISIL (ISIS) has occupied a certain part of Syrian territory over which the Government of the Syrian Arab Republic does not at this time exercise effective control. States that have been subjected to armed attack by ISIL (ISIS) originating in this part of Syrian territory, are therefore justified under Article 51 of the Charter of the United Nations to take necessary measures of self-defence, even without the consent of the Government of the Syrian Arab Republic.[80]

The phrase that Syria 'does not at this time exercise effective control' should be noted as German justification of the operation within Syria. This statement also endorses the 'Unwilling or Unable' theory because the phrase of failure to exercise effective control suggests that the Syrian authorities are not able to control the territory where ISIS is located.[81]

Moreover, Belgium justifies its military operations based on the right of collective self-defence and admitted that Syria 'does not, at this time, exercise effective control'.[82] In addition to the reference to 'effective control', Belgium stressed that the measures are directed against ISIS not Syria.[83] Norway also referred to a 'safe haven' established by ISIS and also employed the phrase 'directed against ISIL (ISIS) not Syria'.[84] The Netherlands expanded its operations to Syria after the adoption of SC Res 2249.[85] It decided to conduct military operations against ISIS 'in particular eastern part of Syria (in met name het oostelijk deel van Syrië)' based on the collective self-defence and international coalitions.[86]

In conclusion, these States which participated in the operations in Syria referred to or suggested the lack of effective control of the territory by Syrian government, which is closely related to the situation of unwilling or

79) UN Doc S/2015/946 (Germany) (10 December 2015) (blanket added).
80) ibid (blanket added).
81) Motoyoshi (n 1) 182-83.
82) UN Doc S/2016/523 (Belgium) (9 June 2016).
83) ibid.
84) UN Doc S/2016/513 (Norway) (3 June 2016) (blanket added).
85) 'Dutch jets to join bombing of Islamic State targets in Syria' *Reuter* (29 January 2016) at <http://www.reuters.com/article/us-mideast-crisis-syria-netherlands/dutch-jets-to-join-bombing-of-islamic-state-targets-in-syria-idUSKCN0V71SZ> accessed 1 May 2018.
86) Letter of the Government to Parliament, 'Bestrijding internationaal terrorisme' Kamerstuk 27925 nr. 570 at <https://zoek.officielebekendmakingen.nl/dossier/27925/kst-27925-570?resultIndex=21&sorttype=1&sortorder=4 > accessed 1 May 2018.

unable. The 'Unwilling or Unable' theory seeks to determine whether there exists the situation of unwilling or unable.[87] Therefore, the military operations against ISIS suggests that all these States share the core value of the theory, which enables a State to exercise the right of self-defence against non-State actors within a territorial State, and not the territorial State.[88]

With regard to the role of SC Res 2249, although it should not be regarded as a typical authorisation by the Security Council and it is not an independent legal justification beyond the legal basis in the UN Charter,[89] this resolution played a 'complementary' role to judge the validity of the operations based on the Unwilling or Unable' theory. Having adopted SC Res 2249, other States joined the operations in Syria such as Germany.

On the basis of the fact that the 'Unwilling or Unable' theory is legally acceptable under the inherent right of self-defence, this section showed that the military operations against ISIS strengthen and reaffirm the 'Unwilling or Unable' theory.[90] It should be noted that most States which joined the military operations against ISIS refer to the situation of unwilling or unable. Moreover, as will be closely discussed, the adoption of SC Res 2249 played a key role in the context of the application of the 'Unwilling or Unable' theory.[91]

## V. Legal Framework to Avoid the Abusive Use of the 'Unwilling or Unable' Theory

As shown in previous sections, the interpretation of the existing international legal framework can respond to the contemporary threats from non-State actors based on the inherent right of self-defence. In a situation of unwilling or unable, the 'Unwilling or Unable' theory is an appropriate legal framework to supress the threat of non-State actors.[92] Yet, the fact that the 'Unwilling or Unable' theory fits within the UN Charter, should not be the end of the examination because the theory is open to abuse by a State.[93] The abusive use of the theory may occur firstly, if the decision regarding the situation of unwilling or unable is done arbitrarily and secondly, if

87) Deeks (n 4) 498-501.
88) Motoyoshi (n 1) 184.
89) Gabor Kajtar, 'The Use of Force against ISIL in Iraq and Syria-A Legal Battlefield' (2016) 34 Wisconsin International Law Journal 568.
90) See Motoyoshi (n 1) 184.
91) ibid.
92) ibid 190.
93) ibid 184.

the military operations are conducted without any guidelines.[94] Thus, this section examines mechanisms or guidelines regarding military operations based on the 'Unwilling or Unable' theory.

In the context of the detailed contents of the 'Unwilling or Unable' theory, Deeks proposes six standards to encourage the territorial State to address the non-State actor's threat and to reduce the abuse of the military operations.[95] The standards are: (1) Prioritization of Consent; (2) Nature of the Threat Posed by the Nonstate Actor; (3) Request to Address the Threat and Time to Respond; (4) Reasonable Assessment of Territorial State Control and Capacity; (5) Proposed Means to Suppress the Threat; and, (6) Prior Interactions With the Territorial State.[96] Deeks suggested that these factors are 'clear standards' to improve the decisional process of the State that wishes to exercise the right of self-defence.[97]

These standards proposed by Deeks are related to the prior contacts with the territorial State, a reasonable assessment of the condition of the territorial State and the efforts to avoid collateral damage by the military operations. Therefore, this research focused on three factors, (1) The Consent of the Territorial State, (2) A Reasonable Assessment of the Territorial State's Condition by International Organisations and (3) The Reliance on the Customary Requirement of Proportionality.

### 1. The Consent of the Territorial State

Although the right of self-defence against non-State actors within the territorial State is permissible under the UN Charter, the military operations should be carefully conducted to respect the territorial sovereignty of a territorial State as much as possible. As mentioned above, the consent of the territorial State should be firstly focused on. The reason is that with respect to the exceptions to the prohibition of the use of force under Article 2(4) of the UN Charter, valid consent by the territorial State precludes the violation of its territory under Article 20 of ARSIWA.[98] Therefore, the State attacked by non-State actors should try to secure prior consent from the territorial State.

Moreover, the existence of some kind of 'cooperation' by a territorial State is also important (although it is not an indispensable condition for military operations) because it is proof of the *willingness* of a territorial State.

94) ibid 190-91.
95) Deeks (n 4) 509-10.
96) ibid 519-33.
97) ibid 519.
98) ILC, ARSIWA in UN Doc A/51.10 (2001) art 20.

Deeks stated that the State should assess what the territorial State 'has done in response to any previous requests to take steps against' the non-State actors.[99] Thus, the lack of cooperation of the territorial State suggests that the territorial State is unwilling to suppress the threat of non-State actors. In addition, to avoid collateral damage to the State as much as possible, enough information and support from the territorial State is essential because military targets will be determined accurately by such corporations.

## 2. A Reasonable Assessment of the Territorial State's Condition by International Organisations

Although, the collective security measures under Chapter VII should be the primary method of responding to threats to peace and security, it remains ineffective due to the lack of the UN standing army under Article 43.[100] Moreover, because the function of the Security Council is easily paralysed if one of the permanent member States exercises a veto, collective security measures are not sufficient and are an ineffective means to suppress international threats.[101]

However, international organisations can play a key role to avoid the *unilateral and arbitrary* uses of the theory. Under the 'Unwilling or Unable' theory, a State attacked by non-State actors can conduct military operations within a territorial State unilaterally. Yet, it does not mean that the theory is employed without any other mechanisms or guidelines.

In this context, Ahmed proposes a mechanism which utilises the Security Council as a 'fact-finder' to determine the situation of the unwilling or unable to avoid the abuse of the theory.[102] Ahmed suggests that the Security Council determines the facts that would then confirm the applicability of the 'Unwilling or Unable' theory. This section explores Ahmed's proposal and suggests the Security Council is not the only factfinder that can assess whether there exists the  situation of unwilling or unable.

### (1) The Role of the Security Council

Even though one of the most controversial issues regarding the 'Unwilling or Unable' theory is in what situations a territorial State would be considered as *unwilling or unable*, there does not exist a framework for

99) Deeks (n 4) 531: See also Motoyoshi (n 1) 188.
100) UN Charter, art 43.
101) See UN Charter, art 27(3): Yuki Motoyoshi, 'The Legal Status of the Responsibility to Protect (R2P) in International Law-The Relevance of Military Actions for the Purpose of Protecting People Based on R2P- (in Japanese)' (2019) 27(3) Yokohama Law Journal 530.
102) Dawood Ahmed, 'Defending Weak States Against the 'Unwilling or Unable' Doctrine of Self-Defense,' (2013) 9 Journal of International Law and International Relations 1, 36.

deciding that.[103] In this context, Ahmed proposes a mechanism which utilises the Security Council as a 'fact-finder' to determine the situation of the *unwilling or unable* to avoid the abuse of the theory.[104] Firstly, he argues that a State is permitted to conduct military operations against non-State actors if the State 'is willing to bear the burden of disclosing to the Security Council why it deems' the territorial State is in the situation of unwilling or unable.[105] In addition, he suggests that in the event that information 'is still lacking as to discerning a state's effectiveness, or the host state [the territorial State] does not challenge the claim', the Security Council should set-up a fact-finding mission to examine the issue.[106] He maintains that:

> [T]he Security Council should act as a fact-finder and transmit information to the international community as to the accuracy of the victim state's claim. For this purpose, in addition to information voluntarily disclosed by the victim and host state, the Security Council should seek information on a host state's effectiveness […] and, if necessary, set-up fact-finding missions to verify host state effectiveness.[107]

The core of his proposal is to impose constraints on a State which conducts military operations; the State is only permitted to conduct military operations against non-State actors if the State 'is willing to bear the burden of disclosing to the Security Council why it deems' the territorial State to be ineffective before the military operations.[108] This suggestion is quite useful because such a mechanism avoids the abusive use of the theory because the decision regarding the situation of unwilling or unable cannot be done unilaterally as the Security Council will also examine the situation of the territorial State. Moreover, this kind of mechanism will improve decision-making processes. As the Security Council has 'a primary responsibility for the maintenance of international peace and security' under Article 24(1) of the UN Charter, Ahmed argues that it is best-placed to act as a fact-finder.[109]

As mentioned above, the Security Council played a crucial role in the operations against ISIS through the adoption of SC Res 2249 because this resolution, which calls on Member States to take all necessary measures

103) See Flasch (n 40) 37.
104) Ahmed (n 101) 36.
105) ibid 21.
106) ibid 21-22.
107) ibid.
108) ibid.
109) ibid 24.

'on the territory under the control of' ISIS in Syria,[110] suggests that Syria lost effective control over its territory where ISIS had power at that time.[111] The Security Council refers to the situation where Syria failed to control its own territory,[112] and this reference supports the military operations against ISIS.[113] Yet, it should be noted that such a role by the Security Council is on 'a case-by-case basis'.

It should be stressed that a State can act without Security Council authorisation in the right of self-defence if an armed attack occurs.[114] Moreover, the function of the Security Council is easily paralysed if one of the permanent member States exercises the veto power.[115] In this context, the role of the Security Council cannot and should not be decisive. Rather, when a State conducts military operations based on the 'Unwilling or Unable' theory, the reference by the Security Council legitimates the decision-making by the State.[116]

Moreover, because the UN Charter does not restrict the role of keeping international peace and security to the Security Council, the role of the Secretary General, the General Assembly, and other international organisations in the context of the 'Unwilling or Unable' theory can be explored.

**(2) The Role of the Secretary General**

The Secretary General could serve to determine whether the 'Unwilling or Unable' theory is applied through the reference to the condition of a territorial State. In fact, with regard to the role of the Secretary General in armed conflicts, it is suggested that the Secretary General has played an important role.[117] Under the UN Charter, the Secretary General has a role to 'bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security'.[118] In practice, the Secretary General has served to resolve disputes regarding international peace and security through his role as a fact-finder and negotiator.[119] For example, the Secretary General expressed his deep regret of the air strikes against Yugoslavia by the North Atlantic Treaty Organisation

110) UNSC Res 2249 (20 November 2015) UN Doc S/RES/2249.
111) See Motoyoshi (n 1) 184.
112) UNSC Res 2249 (20 November 2015) UN Doc S/RES/2249.
113) Motoyoshi (n 1) 184.
114) UN Charter, art 51.
115) UN Charter, art 27(3).
116) See Motoyoshi (n 1) 190.
117) Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (OUP 2001) 184.
118) UN Charter, art 99.
119) José Alvarez, *International Organizations as Law-makers* (OUP 2005) 433.

(NATO) in 1999. He states:

> I deeply regret that, in spite of all the efforts made by the international community, the Yugoslav authorities have persisted in their rejection of a political settlement, which would have halted the bloodshed in Kosovo and secured an equitable peace for the population there. It is indeed tragic that diplomacy has failed, but there are times when the use of force may be legitimate in the pursuit of peace.[120)]

Here the Secretary General is referring to the situation where the State (Yugoslavia) failed to secure the peace in the region. This also occurred in the context of the military operations against ISIS. The Secretary General noted that 'the strikes took place in areas no longer under the effective control of the Syrian government'.[121)] This statement suggests that there exists the situation where the territorial State is unable to suppress the threat of non-State actors.[122)] It is correctly argued that the Secretary General is expected to 'fill the gaps in the system instituted by the Charter'.[123)] Therefore, there is potential for the Secretary General to act as an arbitrator of the question of whether a State is in a situation of unwilling or unable.

**(3) The Role of the General Assembly and Other International Organisations**

The General Assembly is also a candidate to play a role in assessing whether there exists the situation of unwilling or unable. Article 11 of the UN Charter reads that the General Assembly 'may consider the general principles of co-operation in the maintenance of international peace and security […] and may make recommendations with regard to such principles to the Members or to the Security Council or to both'.[124)] Historically, the General Assembly played a greater role during the inaction of the Security Council because the General Assembly may make recommendations for the maintenance of international peace and security.[125)] The typical example is Resolution 377 (V) A (Uniting for Peace Resolution),[126)] and it was passed

120) UN Press Release SG/SM/6938 (24 March 1999).
121) Secretary-General Ban Ki-moon, 'Secretary-General of the U.N., Remarks at the Climate Summit Press Conference' (Including Comments on Syria) (23 September 2014), at <http://www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=2356#.VIrmZNFy-Z9A> accessed 1 May 2018; See also Motoyoshi (n 1) 180.
122) Motoyoshi (n 1) 184.
123) Alvarez (n 119) 433.
124) UN Charter, art 11; See also Motoyoshi (n 101) 547-48.
125) See Christine Gray, *International Law and the Use of Force* (3rd edn, OUP 2008) 259-61.
126) UN General Assembly Resolution 377 (V) A (3 November 1950).

when the Security Council was paralysed with the vetoes by the USSR during Korean War. According to this resolution,

> If the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.[127)]

Based on this resolution, it was shown that not only the Security Council but also the General Assembly may recommend collective measures to the UN Member States. Thus, regarding the maintenance of international peace and security, the General Assembly also potentially serves to determine the situation where the 'Unwilling or Unable' theory can be applied. The General Assembly should do so particularly when the Security Council is paralysed.

In addition to the Security Council, the Secretary General and the General Assembly, other international organisations such as the International Court of Justice (ICJ) or regional organisations can potentially serve to determine whether the territorial State is in the situation of unwilling or unable although the detailed analysis of the role of these organisations is not examined here.[128)]

**(4) Summary**

The key issue is that the reference of the terms regarding a situation of unwilling or unable by international organisations will provide the legitimacy of the decision regarding whether there exists the situation of unwilling or unable in the context of the application of the 'Unwilling or Unable' theory.[129)] It should be noted that Ahmed's proposal that the Security Council alone determines the facts in this context, is not realistic because if the Member States of the Security Council cannot agree to set up the mechanism, it never happens.

The Security Council, the Secretary General, the General Assembly and

127) ibid.
128) See Motoyoshi (n 101) 548-49.
129) Motoyoshi (n 1) 190.

other international organisations can potentially provide the legitimacy of the decision regarding the situation of unwilling or unable by a State. Furthermore, in this research, it is concluded that the role of international organisations in the context of the application of the 'Unwilling or Unable' theory is *complementary*, but not decisive because States can conduct military operations based on their own decisions under the right of self-defence.

### 3. The Reliance on the Customary Requirement of Proportionality

Although ultimately, the decision regarding the situation of unwilling or unable can be done unilaterally,[130] a State attacked by non-State actors should not and cannot employ its military forces without any limitations because the theory is a part of the right of self-defence.[131] It means that the State must follow the customary requirements of the right of self-defence, and particularly, the customary requirement of proportionality provides the practical limits on a State attacked by non-State actors.[132]

## VI. Conclusion

This article dealt with one of the most controversial and contemporary legal questions whether international law, within the framework provided by the UN Charter, can address the threat posed by non-State actors in a situation of unwilling or unable. The 'Unwilling or Unable' theory, which has a solid legal basis on the inherent right of self-defence provides an appropriate legal framework to supress such threats. At the same time, it is an urgent matter how to construct the mechanisms to avoid the abusive use of the theory as the theory ultimately permits a State to conduct military operations within the territorial State although the target should not be the territorial State itself. How to take a balance between the national security of a State attacked by non-State actors and the territorial sovereignty of the territorial State should be focused on for future research.

130) Yoram Dinstein, *War, Aggression, and Self-Defence* (5th edn, Cambridge University Press (CUP) 2011) 272.

131) See Kimberley Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorist Actors' (2007) 56(1) International & Comparative Law Quarterly 156: The 'Unwilling or Unable' theory is considered as a part of the components of the customary requirement of necessity. See Deeks (n 4) 494: Motoyoshi (n 1) 187-88.

132) Trapp (n 131) 156: Motoyoshi (n 3) 156, 164 (footnote 140). The detailed analysis of customary requirement of proportionality in the context of military operations based on the theory is out of scope in this article and will be conducted in future research.

# Explaining third party success: Analysing the Japanese Innovation Party in the context of greater regionalism

*Sean P. Vincent**

As this author has argued in previous work, Japan has returned to one-party electoral dominance (Vincent, 2021). As such, the Liberal Democratic Party's (LDP) success in the November 2021 lower house election proved to be no great surprise. The result strengthened the position of new Prime Minister Fumio Kishida and condemned the Constitutional Democratic Party to defeat, leading to the resignation of its leader, Yukio Edano. While the LDP were the undoubted winners of election night, the performance of the Japan Innovation Party (JIP) proved to be a pleasant surprise for its supporters. The party was able to increase its seats from 11 to 41 and win seats in 10 separate regions on the proportional representation list. However, it is the party's remarkable success in Osaka, where it won 15 out of its 16 single member constituencies which is of particular interest to this article. Such a dominant victory in a defined regional area puts one in mind of the Scottish National Party (SNP) in Scotland, the Christian Social Union (CSU) in Germany, The Quebec National Party (Bloc Québécois) in Canada and Catalonian independence parties in Spain. Therefore, this article aims to put the recent gains of the JIP in the context of wider development in regional party success, first by attempting to define the JIP's regional nature, then by examining the similarities the party has with other regional parties around the world, in particular the SNP, and attempting to explain its success in the context of being a regional party. Finally, this article will discuss potential steps the JIP could take next to ensure its success in national elections extends beyond one election cycle and becomes embedded as the dominant regional party, as the SNP, CSU and other "regional" parties have done.

## What is the Japanese Innovation Party?

Perhaps the most difficult aspect of studying the JIP is defining whether it is a regional or national party. There has been a great deal of research

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which has attempted to define parties which operate, or are successful, on a regional basis. The key distinction is drawn between *regional* and *regionalist* parties. Regional parties are those which compete in only one defined region. Most often have a presence in both regional and statewide elections. Their core aim is focused on the region they represent, but this does not exclude them from having a statewide agenda or having an organisational presence in other areas of a state (Mazzoleni & Mueller, 2016). Nevertheless, it is likely that all, or the majority of, their support is going to be drawn from a particular geographic area (Ziegfeld, 2012). It also implies an acceptance of working constructively within a national level government (Brancati, 2007). The core definition of "region" exists in a geographical sense, although there can also be a clear ethnic distinction included in the area under question (Dandoy, 2010). The Samajwadi Party in India contests elections in a number of regions, but its power base is located in Utter Pradesh, India's largest state. It has at various times acted as coalition partner and member of the opposition in national government (Misra, 2016).

Regionalist parties on the other hand, are devoted to increasing regional sovereignty or some form of self-government, or even complete sovereignty within a territorial area (DeWinter 2006; Hepburn & Hough, 2012). This is often, but not always driven by cultural, religious, ethnic and linguistic identities (Strmiska, 2002). The case of the United Kingdom is particularly relevant here, where both Scotland and Wales exist as separate countries in what has become and almost quasi-federal state. In Wales, Plaid Cymru utilize the Welsh language to promote regionalism. All press releases and social media output from the party, and the majority of its lawmakers are bilingual, and the party's manifesto in the 2021 Senedd elections vowed to give all children access to Welsh language education and increase Welsh speakers to 1 million by 2050. Scotland has been a country with a strong national identity ever since the Act of Union in 1707. Like Wales, it retains a national anthem, recognized language, a flag – all symbols of an independent nation, and advocates in no uncertain terms its desire for Scottish independence. Both Wales and Scotland have been described as "Stateless-Nationalist-Regionalist" parties, primarily focused on the cultural protection of their regional, or in this case national identity (McAngus, n.d.). A brief visit to the website of Bloc Québécois would confuse any non-French speaker – there is no English language option. The party's 2021 manifesto pledged to support the French language, proposing a law which would make "sufficient" knowledge of French a prerequisite of Canadian citizenship in Quebec, and supporting reform which would give the region the power to make international treaties (CBC News, 2021). Both the Democratic Con-

vergence of Catalonia and the Northern League in Italy have campaigned for greater autonomy along ethno-regionalist lines (Chrusciel, 2016). Regional parties can also be utilized as personal vehicles for established political actors, especially in countries where the electoral system allows new parties to enter and succeed in national elections. In India, regional parties had little success during the era of Congress one party rule. But dealignment, which took support from the previously dominant Congress and other national parties such as Janata Dai, led to coalition governments, which opened the door to regional parties having national level success. These new regional parties were most often led by former members of national level parties, who voters recognized and had existing local support networks (Ziegfeld, 2012). In Japan, the JIP itself is a relevant example of this. The JIP is an offshoot of the Japanese Restoration Party (JRP), which itself was an offshoot of the Osaka Restoration Association, a party founded with the (ongoing) aim to merge Osaka prefecture, Osaka city and other nearby administrative areas. One thing all of these parties have in common is their first President, former governor and mayor of Osaka, Toru Hashimoto. A popular and ever-present fixture on national television in the early to mid-2010's, Hashimoto used these parties to push his stated aim of greater autonomy for the Osaka region. While the JIP and its forerunners have campaigned in statewide elections, and not just in the Osaka region, the core goal of Hashimoto's politics has always been focused on the Osaka region. Indeed, in previous elections, while candidates for the JIP in the Osaka area had a clear goal for their national campaigns, candidates in other regions often felt cut off from the party and even though the party had a national manifesto, were not clear on what core policies they were campaigning on (Vincent, 2020). The short-lived presence of the Party of Hope at the national level existed as an offshoot of Governor Yuriko Koike's Tokyo based Tomin First and had little success outside of the Kanto region.

Taking definitions into account, how then can we describe the JIP? In a comparative context, it cannot be described as a *regionalist* party, although it does share similar characteristics with regional parties. As the article will discuss in the next section, other regionalist parties remain a useful comparison when explaining and predicting the JIPs success. *Osaka-ben*, along with other regional dialects, provides the region with a regional linguistic identity, although certainly not to the degree one would find in Wales or Catalonia for example. Osaka, during the reign of Hideyoshi Toyotomi, was seen as the center of the country and the region's rich history can still be seen in places such as Osaka castle today. Japan owes a great cultural debt to the region of Osaka; Cup Noodles were invented there after all. Outside

of the Kanto area, some of Japan's biggest companies, such as Panasonic and Itochu have their headquarters located in Osaka. However, there is no imminent threat of the region demanding independence, or greater protection for its linguistic or cultural heritage, as there is no distinct ethnic group. The JIP is a political party which runs candidates in multiple areas of Japan and has a national manifesto. Indeed, the JIP supports a more aggressive *Japanese* foreign policy, including constitutional revision and increased defence spending. As such, the JIP is very much a party of Japan. Nevertheless, we cannot ignore the fact that the party's support, at least support significant enough to allow to win seats at the national level, is concentrated in a specific geographical area. As such, the JIP can be described as a *regional* party. Perhaps the term used by Mazzoleni & Mueller (2016, pg. 10) "region specific catch all party", is the one which best sums up the JIP. In the next section, the article will examine general models of success for regional (and regionalist) parties and examine the JIP in the context of other regional parties.

## Regional parties – measures of success

There is a general consensus on the growing rise of the importance of regional parties and their effect on national politics. One only has to look at the turmoil in Catalonia, the consistent strength of the SNP in the UK or the difficulty in forming governments in regionally distinct places such as Belgium, to see how important regional politics are. But just as there a wide variety of "regional" parties, ranging from those seeking greater recognition to those seeking full blown independence, there is more than one way to measure their success.

The most common measure of success is of course *electoral*. Can a party with a limited geographical appeal become a force large enough to win seats in the national parliament? Table 1 shows party seat share from the previous 4 elections for regionally focused parties in both regional and national elections in Japan, Scotland and Germany. What is evident from the data is that all three regionally focused parties have been remarkably consistent in the level of support they have attracted. All three parties have been the largest party in regional elections for the past four (in the JRA's case three) The JIP (and its predecessors) are the newest party to have been founded, but very quickly established themselves as the 3rd force in Japanese politics. The party has won a majority of seats on 2 out of the last 3 elections and with the exception of the 2017 election, they have arguably maximized their support in the Osaka region to win a consistent share of seats. A similar pattern has

emerged with the SNP, a party which was founded 1934, but only found real electoral success with devolution and the creation of the Scottish Assembly in 1999. The SNP has been able to run a majority or minority government, often with the support of the Greens in the last four administrations and this has translated into continued success in national elections, with the SNP winning a majority of Scottish seats in the last three elections. The CDU, historically the most successful of these parties, has had a command of the Bavarian *Lantag* since 1958 and been a vital partner to the CDU in federal elections. Although it is interesting to note that in the most recent state and national elections, the CDU faced challenges from the Alternative for Germany (AfD) on its ideological right and the Green party on its left. Only a coalition with the Free Voters party allowed it to retain state control.

| *Regional / State level assembly elections* | | | |
|---|---|---|---|
| | Osaka JRA / JIP | SNP | CDU |
| Most recent election | 57.95 | 49.61 | 41.46 |
| Previous election 2 | 47.72 | 48.83 | 56.11 |
| Previous election 3 | 52.29 | 53.4 | 49.19 |
| Previous election 4 | N/A | 36.43 | 68.88 |
| *National / Federal elections* | | | |
| Most recent election | 8.81 | 7.38 | 6.11 |
| Previous election 2 | 2.36 | 5.38 | 6.48 |
| Previous election 3 | 8.63 | 8.61 | 8.87 |
| Previous election 4 | 11.25 | 0.92 | 7.23 |

Table 1: Percentage of seats won in both regional/state and national parliaments/assemblies in the 4 most recent elections.

As well as *electoral* success, regional parties, in fact all political parties, are also judged on their *office* and *policy* success. Mazzolini and Mueller (2016) identify two aspects of *office* success: external support and coalition inclusion. If we were to take the CSU as an example, they have had considerable success in terms of *office*. In the 2018 Federal cabinet, CSU members held three cabinet positions, chief amongst them Horst Seehofer, who became Minister for the Interior. Much of the CSU's continued success comes from its ability to take part in national government, an opportunity which has not occurred for either the JIP or SNP. *Policy* success refers to the realization of a party's political goals. This can mean either the partial or total achievement of these goals. In the case of regional parties this could mean anything from greater decentralization of political power to complete independence. Recent trends in Germany have seen a greater degree of decentralization, which has benefitted the CSU in the prosperous Bavaria

region. For example, the CSU led Bavarian *Lander* (region) has been able to increase public sector pay and adopt new regulations in healthcare and justice reforms more quickly and efficiently than other areas in Germany (Turner & Rowe, 2015). This paper is chiefly concerned with explaining electoral success, and will do so in the next section. This will be followed by a brief discussion on office and policy success, the two areas parties need to focus on in order to continue electoral success

## Explaining electoral success: Examining parallels with other regional parties

Despite a respectable 2nd place finish, with 28% of constituency votes and 27% of list votes for the SNP in the first ever Scottish Assembly elections in 1999, Scotland was a nation of Labour party dominance in the post war period. In 2001, Labour won 56 out of 72 Westminster seats in Scotland, with the SNP in 3rd place with just 5. Fast forward to 2021, the SNP has been in either majority or minority government in the Scottish Assembly for the past 14 years and hold 48 out of 59 Westminster seats. This remarkable transformation, where a regional (indeed regionalist) party has taken control of one region in the UK provides a fascinating insight into how regional parties can maximize national influence. The subject of this section is to document the reasons behind the success of regional parties, with a particular focus on the SNP in Scotland, although other regional parties will be discussed, and what parallels can be draw with the JIP both historically and going forward.

There are growing calls for decentralization in many democratic countries. Massetti and Schakel (2017) identify two distinct results of greater devolution: accommodation and empowerment. According to the accommodation thesis, when governments accede, at least partially, to the demands of regional actors and give a greater level of devolved power, be it a regional assembly, greater power over law making or taxation etc., this hypothetically eliminates the main reasons for regional parties' existence and curtails their electoral appeal (Meguid, 2015). Under the empowerment thesis, strengthening local institutions, such as regional assemblies or parliaments, will give regional parties more opportunity to take part in the political process and open up access to public funding, which in turn allows them to build more effect organizations. When looking at the SNP, the case for the empowerment thesis becomes overwhelming. Results from both Scottish Assembly and national elections (Table 1) show that in the period following devolution, with the creation of the Scottish Assembly, the SNP has become

the dominant force in Scottish politics. With a clear goal, the administration of Scotland, at the local level, the SNP have increased grassroots support, becoming the overwhelming choice of younger and metropolitan voters. Success breeds success, the SNP are now seen as winners and have a front-bench in the Assembly with experience of running an administration. In the case of the UK, the Labour government's attempt at accommodation, if that is what the plan was, backfired and raised a continuing threat to the Union under the auspices of Scottish nationalism. Prior to the emergence of the original Osaka party, and its national party the JRP, the Kinki region had been a battleground fought between the national parties. In 2009, the DPJ and LDP shared the majority of the seats the region. But the success of the original JRA in the Osaka prefectural election in 2011, where they won a majority of seats for the first time led to a breakthrough at the national level in 2012. Research suggests that greater decentralization of power leads to better representation for regional parties (Brancati, 2007). Continued steps towards decentralization may have additional benefits for both the SNP and JIP. There is a question about how much further decentralization can go. In Scotland, the question of referendum has not gone away since the 2014 vote, where Scots voted by 55% to 45% to stay as part of the UK. In Osaka, plans to merge Osaka's 24 wards, the *raison d'etre* of the party since its inception, have twice been rejected by the electorate. However, this disappointment may offer electoral opportunity. Under the accommodation thesis, if referendums in Osaka and Scotland were successful, both the JIP and SNP would need to answer existential questions about their very purpose. Conversely, there is evidence to suggest that defeat has hardened the support of their voters. Polling throughout 2021 has put support for Scottish independence at between 50% and 45%.[1)] In Osaka, the result of the 2020 referendum (a 1.2% margin) mirrored that of the 2015 defeat (a 0.76) margin. The implication is voters in both regions have hardened their stance along Yes/No lines and the success of both parties in recent national elections could be connected to this newly emerged regional cleavage. As long as further decentralization is denied by the national government, there is the possibility that both parties' regional dominance could continue.

Support for regional parties can also be connected to the center-periphery cleavage first described by Lipset and Rokkan (1967) as the "centralizing, standardizing and rationalizing … of the nation state" onto culturally distinct regions. While many of the social cleavages identified by Lipsett

1) Based on author's interpretation of polls from multiple sources.

and Rokkan have been replaced or become irrelevant, the center-periphery cleavage is increasing in importance with the growing rise of political regionalism. Along with populist and green parties, regionalist parties have been the ones to benefit from growing voter discontent with traditional parties (Hepburn & Hough, 2012). Dalton (2020) documents the increasing strains of the center-periphery relationship in Catalonia and Scotland. In Catalonia, regional identity, including linguistic identity, was brutally suppressed by the Franco regime. The idea of Spanish identity, and what it entailed, was forced upon the people of Catalonia. As we have seen in recent years, with the unofficial referendum which took place in Catalonia in 2017, and the resulting persecution of members of the Catalonian government, regional identity is reasserting itself. This is evident in continued success for parties supporting independence, the Republican Left and Together for Catalonia, in the 2021 Catalan parliamentary election. While Scottish identity has never been expressly persecuted by the national government, there is a long-held image of the Westminster parliament, and Britain as a whole, as being run by the English. This has certainly been reinforced by successive Conservative Prime Ministers, born and raised in English heartlands. The center-periphery cleavage can also be exacerbated by what regional parties see as the economic negatives of remaining too closely controlled by a central government. Economic disparity is one of the key drivers of regional movements (Kyriacou & Morral-Palacín, 2015). This is certainly true in Catalonia, where the region made up approximately 20% of Spain's total GDP in 2020, growing with importance while the Spanish economy has been hit hard by the effects of COVID-19 on its tourist industry (Romero, 2021). The SNP have long made the case that too much of its revenue from North Sea oil goes to Westminster and that total control over its natural resources would provide Scotland with the basis for economic independence. However, this argument looks on increasingly shaky ground. Data from the Scottish government shows receipts from North Sea oil fell almost 50% in the fiscal year 2019-2020, and the Scottish government running a fiscal deficit of 8.6%. There would also be the question of access to EU markets both regions would have to face in the event of complete independence from the central government. The SNP and independence movements represent an extreme version of greater regional autonomy and there is no suggestion this would be the model for the JIP. However, reasons given by supporters of the referendum in Osaka have primarily made a case based on economics. They argue the merger would give local wards more fiscal independence and be in a better position to offer tax breaks to both domestic and foreign companies setting up in the region. The transfer of power from the center to the periphery is a goal all regional parties, left and

right, have in common, even those who cannot appeal to ethic or cultural feelings of voters.

Another factor explaining the growing success of regional parties is dealignment of voters and the evolution of multi-party systems in many democracies. In single or two-party systems, voters are given at most a binary choice between two national, catch-all parties. Regional concerns can only be expressed at the regional level, in local elections. In multi-party systems however, there is space for regional voice to be heard at the national level and even to influence national policy. Once they have entered national politics, regional parties have the opportunity to access public funding, be involved in national debates and build a more professional political operation which in turn attracts higher caliber of candidates (Ziegfeld, 2012). In the immediate post-colonial era, India was dominated by the Congress Party, led by the Nehru-Gandhi dynasty. It was at the regional level, in the 1970's and 1980's that opposition parties were first able to wrest some power away from Congress, followed by a period of coalition government which lasted from 1984 to 2014 (Vaishnav & Hintson, 2019). Even though the BJP currently holds a majority in the *Lok Sabha*, it has a number of regional party coalition partners, Janata Dal and Apna Dal Sonelal which are based in north-eastern India and Uttar Pradesh respectively. In Germany, the Christian Social Union (CSU) has been a *defacto* part of the national Christian Democratic Union, which has led government since 2005. Much like the SNP in recent years, the CSU returns a remarkably consistent number of members to the Bundestag, ranging from between 43 and 58 in elections since 1953, acting as a quasi-state level party, the CSU has been a part of formulating government policy. While starting out as a party devoted to protecting the ethnic and territorial interests of Bavaria, based on conservative Christian values, the CSU adapted into a catch-all regional party with a national reach. The CSU also fits into the ethno-cultural model of regional party as they seek to have Bavaria recognized as a special region, with its own recognized identity Its ability to access national state level decision making allowed it to create a "stronghold" over regional politics in Bavaria (Hepburn, 2012). This is not unlike the dual benefit enjoyed by the SNP in Scotland. Success at the local level bred success at the national level, with the breakdown of the traditional two-party system in the 2015 election, which saw Britain's first post-war coalition government and a breakthrough for the SNP, winning 56 out of 59 seats in Scotland. There was a genuine belief at the time that the SNP could enter either a formal or informal alliance with the Labour Party which, along with the First Past the Post voting system which has undoubtedly aided the success of the SNP, encouraged

voters that voting SNP could make a real difference to government. Even with the UK's return to one party predominance, the SNP has continued to enjoy electoral dominance at both the regional and national level. While it has not been able to enter government, its success has ensured the question of Scottish independence has not disappeared and that further devolution is still being considered by the Conservative government. The JIP occupies a similar right of center ideological position, even further to the right than the LDP, and, as stated earlier, supports similar reforms in foreign, defence and constitutional policies (Arai & Nakajo, 2018). Perhaps a question remains as to how well the JIP would perform as a third party in a genuinely competitive two-party system. Indeed, it could be argued that with LDP victory assured, the success of the JIP may be attributed to a regional protest vote. However, it is just as likely that voters in Osaka voted according to a rational choice model, realizing that the political space has opened up and that the JIP offer them a chance to have the largest regional voice in the Japanese Diet (outside of the Kanto region). Note should also be made of the organizational efforts made by the Osaka branch of the JIP to train and develop young political talent. Opened in 2012, the Seijijuku academy has acted as a finishing school for prospective young politicians and has been able to attract candidates such as Hitoshi Aoyagi, who previously worked for the United Nations and was able to win the Osaka 14 constituency as a political newcomer in 2021 (Mainichi Shimbun, 2021).

Finally, this section examines the influence of party leadership in the rise of regional parties. As noted above, India is one country where regional parties have flourished due to leaders leaving statewide parties and building their own personalistic, regional operations. There is a growing trend of personalisation amongst political candidates at the national regional level, aided by the diffusion of social media (McAllister, 2015; Zittel, 2015). As the breakdown of single and two-party politics has occurred across many democracies, opening up a multi-party space, so to have technological developments given a greater number of political actors a platform to reach voters. Whereas regional parties, especially those founded relatively close to an election, may have struggled to find supporters, doners and activists before, new media has given them the ability to build a party orginisation capable of being competitive in a national election (Vincent, 2020). For example, SNP membership grew from around 20,000 in 2012 to over 100,000 by 2015 (Gordon, 2015). As noted above, much of this can be attributed to the 2014 referendum and the hardened support the SNP gained from being the sole party of independence – support which continues until this day. At the same time, the importance of party leadership, or in particular

the leadership of Scottish Frist Minister Nicola Sturgeon cannot be overlooked. Unlike her predecessor as SNP leader, Alex Salmond, who was a highly divisive and combative figure, Sturgeon has been seen as a strong and dependable leader. She currently ranks as the most popular politician in the UK and has an appeal which stretches beyond the borders of Scotland (YouGov, 2021). Under Sturgeon's leadership, the SNP has moved to the left on social issues and committed to a generous, "big state" welfare system which includes free tuition fees for university students. At the height of the COVID-19 pandemic, she was seen as the most trusted leader in the UK. Sturgeon's skill as SNP leader and consistent commitment to seeking independence has allowed the SNP to make the most of the chances offered by the weakening of the multi-party system in the UK and the legacies of the failed referendum bid on 2014. As noted, the original incarnation of the JIP relied heavily on the personal popularity of its founder and leader, Toru Hashimoto. However, Hashimoto did not lead the JRP or JIP into national elections in 2014 and 2017. By the time of the 2017 elections, Hashimoto had already stepped back from frontline politics. So, while the JIP retained its stronghold over the Osaka region, it lacked a popular national figure to lead it into parliamentary elections. Around the same time though, a new actor emerged, not as the party's leader, but as a figurehead that could extend their popularity far beyond the Osaka region. In 2015 Hirofumi Yoshimura burst onto the scene as the underdog victor of the Osaka mayoral election. Until that point Yoshimura limited experience in local politics and a short stint in the Lower House until he decided to run for mayor at age 40. In 2019, Yoshimura effectively swapped position with Governor Ichiro Matsui to win a landslide victory in the gubernatorial race and he also currently serves as deputy leader of the JIP. Yoshimura has yet to lead the JIP in a national capacity and of course cannot take all of the credit for the party's 2021 electoral success. However, it would be remiss to dismiss the personal popularity he has accrued. As mayor and governor, Yoshimura was a leading figure in bringing about the second referendum. He has spoken out in support of allowing casinos to be legalized and built in Osaka and against plans in San Francisco to build a statue of "comfort women" in 2017, which led to Osaka ending its "sister-city" relationship. But it was during the COVID-19 pandemic when Yoshimura made himself a national level figure. While the LDP government was hesitating and encouraging people to travel between prefectures, Yoshimura was asking them not to travel and developing an "Osaka" model for dealing with the pandemic (Nippon.com, 2020). In stark contrast to the 71-year-old Prime Minister, Yoshihide Suga, Yoshimura was utilizing social media to portray his youthful energy and hard work. His popularity has been compared to that of a

pop star. Although unsuccessful with the 2020 referendum, Yoshimura has become a regional politician well known and liked at the national level. Unlike Nicola Sturgeon, he has the potential to develop into a national level politician, although doing so would mean either a defection to the LDP or a seismic change in Japan's electoral landscape. For regional parties, it is important that they feel as though their representatives, even if they are focused on regional issues, have a reach into national politics. Without this there is little hope of the significant reform regional parties often promise.

## Discussion: Does *electol* success lead to *office* and *policy* success?

This paper has documented and attempted to explain the reasons behind the recent electoral success of regional parties, in particular the JIP and SNP. This final section will examine both parties' achievements and potential goals in office and policy areas, and posit how electoral success may be translated into office and policy success in the future.

As noted earlier, the SNP have been a formidable vote winning machine, and at the local level, very successful in maintaining power in Scotland. However, in Westminster, the SNP is very much a party of opposition and opposes the vast majority of governmental bills. However, the SNP is an active member in Westminster politics. SNP MPs currently hold 2 chairs of House of Commons Select Committees, for International Trade and Scottish Affairs, and as such are in a position to scrutinize the formulation and implementation of government policy. Looking towards the future, it is not inconceivable that the SNP could even enter government, or at least play *enabler* to a prospective Labour government. With the UK still recovering from the COVID-19 pandemic and recent controversy over Conservative MPs taking well-paid second jobs, (as of autumn 2021) the Conservative and Labour parties are almost tied in opinion polls. Were an election held under these circumstances, a single party majority would be unlikely and there would be a significant opportunity for the SNP to extract office-based concessions, not to mention a possible second referendum, from Labour.

Upon entering the 49th elected House of Representatives, the JIP entered into an agreement with the Democratic Party for the People which gives them the numbers to propose budget legislation. This new alliance may put them in conflict with the LDP however as they have already agreed to propose legislation which would cut lawmaker's salaries by 20%. In the Diet, the JIP holds only one chair of lower house committees, for Science, Technology and Innovation and any legislation introduced by the JIP would

need support from the LDP in order to pass. However, while the JIP has little *de jure* office power, its role as potential ally to the LDP in the area of military spending and constitutional revision open up the possibility of more access to *de facto* power, as will be discussed in the next section.

| | SNP | JIP |
|---|---|---|
| Economic | *Control over employment rights in Scotland for the Scottish Assembly* | *Reduction of consumption tax to 5% (for a 2-year period)* |
| Constitutional | *Seek a referendum on Scottish independence* | *Reduction of Diet members by 30% and stricter donation rules* |
| Immigration | *Devolved powers to allow higher levels of immigration to Scotland* | *N/A* |
| Climate | *Set a target for net-zero carbon emissions by 2045* | *To phase out nuclear energy and aim for carbon neutral by 2050* |
| Security | *Eliminating or removing "Trident" nuclear missiles from Scotland* | *Eliminating 1% of GDP spending cap on defence* |
| Decentralization | *(1) Devolution of employment law. (2) Power to raise minimum wage.* | *(1) Commitment for administrative reform in Osaka. (2) Regional control over consumption tax.* |

Table 2: A selection of manifesto pledges by the SNP (2019) and JIP (2021). Pledges chosen highlight regional/decentralization themed policies parties are pursuing.

To examine *policy*, manifesto pledges are a good indicator of what parties aim to achieve. Pre-election, they can give us an idea of what believe, even if they are not in government, as is the case with many regional parties. Post-election, they allow for an appraisal of party success in influencing national government policy. While both parties promote policies, which are applicable to state units as a whole, both are also localized in focus.

*"We believe people in Scotland have the right to choose their own future - a choice between Westminster control and becoming an independent country" – SNP 2019 Manifesto*

Naturally, a large part of the SNP 2019 manifesto was the push for a second referendum in Scottish independence, breaking Scotland away from the "cruel" Conservative led UK government and the "mess" of Brexit. The selection of manifesto policies highlighted in Table 2 show how the SNP has taken a dual track philosophy to greater devolution. On the one hand, the SNP advocates a second referendum and details what it could do as an independent nation, such as scrapping the Trident nuclear defence system and rejoining the EU. However, there is also a recognition that Scotland, at least in the short term, will remain a part of the UK. As such, there are also calls for greater devolution of powers from Westminster, such as im-

migration policy and the power to change employment law. As an opposition party, with a hostile relationship with the Conservative government in London, the SNP has been unable to achieve any of these goals thus far. However, there are 2 ways in which policy "progress" has been made. Firstly, the Scottish government has done what it can to put its own mark on policies. While immigration rules have been drastically altered in the wake of Britain's withdrawal from the EU, the Scottish government has taken great trouble to highlight the continued need for immigrant labor and that Scotland is "just as welcoming as it has always been" (Scottish Government, 2021). The Scottish government has also worked with independent bodies to highlight the need for greater flexibility in immigration rules. For example, the Law Society of Scotland (2017) has written of the need for a "bespoke" immigration policy, which would address Scotland's need for greater population growth and shortfall of labour in some sectors. Secondly, the idea of devolution across the whole of the UK is currently under discussion. Under the policy of "Levelling Up" Britain, the government's plan to rejuvenate economically deprived areas and bring about a recovery from the COVID-19 pandemic, the UK parliamentary Housing, Communities and Local Government Committee has recommended more devolution to England. While this does not pertain to Scotland, or Wales or Northern Ireland, the decentralization of power in the UK surely owes much to the political pressure the SNP has placed on the UK government since 1999.

*Decision making to be done "at the smallest unit possible…the role of government should be clarified and all other responsibilities lay with local government" – JIP manifesto 2021*

In comparison to the SNP 2019 manifesto, the JIP set out a more nationally focused set of policy priorities. And also, unlike the SNP, the JIP is much more closely aligned with the governing LDP ideologically. At the regional level, the Osaka JIP had considerable policy success, passing laws to privatize the city subway system and free education measures (Adelstein, 2021). While not in any kind of position to make laws itself on national level, the JIP could prove an invaluable ally to the government should it wish to make any constitutional change. With recent developments in the rest of East Asia, specifically heightened tensions between China and Taiwan and the signing of the AUKUS pact seeming to put the Pacific at the top of America and Australia's security priorities, there has been renewed discussion about Japan's own security capabilities. With the current make-up of the Lower House, the LDP would need help from friendly parties, which would place the JIP in an advantageous position were it to use its support

as a negotiation tactic in relation to other policy making. The long-held aim of reducing the number of Diet members and devolving more power to the regions act as a dual strategy to strengthen local administrations, at the expense of national government power. While the JIP presents this an ideological pledge which should apply to the entire country, it is not difficult to connect this to the desire for greater autonomy for Osaka. The manifesto also restates the party's desire for further devolving power to the Osaka region, having local control over income tax as a way to make regional economies more efficient and competitive and to continue to seek reform of Osaka's city and prefectural administration. This last pledge, while designed to keep the support of the considerable number of people who voted in favor of reform in 2015 and 2020, has the danger of causing voter apathy, or even resentment towards continued local referendums. The JIP will need to carefully consider whether its 2021 election success gives it the mandate to hold another referendum, or whether holding off on another vote would allow it to achieve its goals in the long-term while maintaining its electoral support at the national level.

Democratic countries have been seeing a greater push towards further decentralization of power in recent years. The UK and Japan are no exceptions to this. The push has been exacerbated by the COVID-19 pandemic, where central governments have had to rely on regional authorities to administer lifesaving vaccines and take responsibility for public safety through region specific rules and guidance. As the world looks towards a life after COVID-19, it is unlikely that regional authorities will wish to give back this power. Therefore, regional parties, acting as vehicles for regional interests, have the opportunity to consolidate and extend their influence on politics at the national level. We can certainly expect to see continued pushes for the devolution of power to regional areas in the UK and Japan.

## References

Adelstein, J. (2021, November). *Japan's new right marching in a muscular direction*. Retrieved from Asia Times: https://asiatimes.com/2021/11/japans-new-right-marching-in-a-muscular-direction/

Arai, K., & Nakajo, M. (2018). Survey of candidate's policy preferences. In R. Pekkanen, S. Reed, E. Scheiner, & D. Smith, *Japan Decides 2017: The Japanese general election* (pp. 149-164). Palgrave MacMillan.

Brancati, D. (2007). The Origins and Strengths of Regional Parties. *British Journal of Political Science, 38*, 135-159.

CBC News. (2021, August). *The Bloc Québécois unveils its electoral platform, stressing Quebec identity, environment*. Retrieved from CBC News: https://www.cbc.ca/news/canada/montreal/bloc-qu%C3%A9b%C3%A9cois-election-platform-1.6149655

Chrusciel, M. (2016). Today's stance of ethno-regionalist parties on European integration in the prsim of the migrant crisis. *Dans L' Europe En Formation*, 77-94.

Dalton, Y. (2020). *Catalonia & Scotland: Centre-Periphery Cleavage.* Retrieved from Researchgate: https://www.researchgate.net/publication/342242048_Catalonia_Scotland_Centre-Periphery_Cleavage

Dandoy, R. (2010). Ethno-regionalist parties in Europe: a typology. *Perspectives on Federalism, Vol. 2, issue 2*, 194-220.

DeWinter. (2006). Introduction: Autonomist Parties in European Politics. In L. De Winter, M. Gomez, & P. Lynch, *Autonomist Parties in European Politics* (pp. 11-30). ICPS.

Gordon, T. (2015). *SNP boost as membership soars past 100k mark*. Retrieved from The Herald: https://www.heraldscotland.com/news/13206844.snp-boost-membership-soars-past-100k-mark/

Hepburn, E. & Houge, D. (2012). Regionalist Parties and the Mobilization of Territorial Difference in Germany. *Government and Opposition, Vol. 47, No. 1,*, 74-96.

Japanese Innovation Party. (2021). *身を切る改革, 実行中 - 2021 JIP Manifesto*. Retrieved from https://o-ishin.jp/shuin2021/ishin_manifesto.pdf

Kyriacou, P., & Morral-Palacín, N. (2015). Regional Inequalities and the Electoral Success of Regional Parties: Evidence from the OECD. *Publius, Vol. 45, No. 1*, 3-23.

Law Society of Scotland (2017). *Immigration and Scotland Inquiry: Consultation response.* https://www.lawscot.org.uk/media/359420/imm-immigration-and-scotland-inquiry.pdf.

Lipset, S. & Rokkan, S. (1967). Cleavage Structures, Party Systems and Voter Alignments: An Introduction. In S. M. (Eds.), *Party Systems and Voter Alignments: Cross-National Perspectives.* New York: Free Press.

Mainichi Shimbun. (2021, November). *What's behind Japan Innovation Party's major breakthrough in general election?* Retrieved from Mainichi Shimbun: https://mainichi.jp/english/articles/20211101/p2a/00m/0na/043000c

Massetti, E. (2017). Decentralization Reforms and Regionalist Parties' Strength: Accommodation, Empowerment or Both?", Political Studies, 65(2). *Political Studies, 65(2): 432-451.*, 432-451.

Mazzoleni, O. &. (2016). Explaining the policy success of regionalist. In O. &. Mazzoleni, *Regionalist parties in Western Europe* (pp. 1-21). Routledge.

McAllister, I. (2015). The personalization of politics in Australia. *Party Politics, 21(3)*, 337-345.

McAngus, C. (n.d.). *How do nationalist parties reform their organisational profiles? The cases of Plaid Cymru and the SNP compared*. Retrieved from Democratic Audit: http://eprints.lse.ac.uk/63113/1

Meguid, B. (2015). Multi-Level Elections and Party Fortunes: The Electoral Impact of Decentralization in Western Europe. *Comparative Politics, Vol. 47, No. 4*, 397-398.

Misra, S. (2016, October). *Regional parties and Indian politics*. Retrieved from Observer Research Foundation: https://www.orfonline.org/expert-speak/regional-parties-indian-politics/

Nippon.com. (2020). *Two Young Japanese Governors Rise to Prominence in COVID-19 Crisis*. Retrieved from Nippon.com: https://www.nippon.com/en/japan-data/h00718/

Scottish Government. (2021). *Visa and Immigration*. Retrieved from Scotland.org: https://www.scotland.org/about-scotland/visa-and-immigration

Scottish National Party. (2019). *Stronger for Scotland - 2019 SNP Manifesto*. Retrieved from https://s3-eu-west-2.amazonaws.com/www.snp.org/uploads/2019/11/11_27-SNP-Manifesto-2019-for-download.pdf

Romero, T. (2021). *Gross domestic product (GDP) in Catalonia and the whole of Spain between 2003 and 2020*. Retrieved from Statista: https://www.statista.com/statistics/327063/gross-domestic-product-in-catalonia-and-spain/

Strmiska, M. (2002). A study on conceptualisation of (ethno)regionalist parties. *Central European Political Studies Review, Volume 4*.

Turner, E., & Rowe, C. (2015). *A race to the top, middle or bottom? The consequences of decentrlisation in Germany.* Institute for Public Policy Research.

Vaishnav, M., & Hintson, J. (2019). *The Dawn of India's Fourth Party System*. Retrieved from Carnegie: https://carnegieendowment.org/2019/09/05/dawn-of-india-s-fourth-party-

system-pub-79759
Vincent, S. (2020). #Personal vs #Party: A comparative study of candidates' new media campaigning in Japan and the United Kingdom. *Open Political Science; 4*, 1-14.
Vincent, S. (2021). The return to one-party dominance: The challenges of opposition party institutionalization in Japan and the United Kingdom. In M. Iwasaki, *議会制民主主義の揺らぎ* (pp. 61-84). Keiso Shobo.
YouGov. (2021). *The Most Popular Other Uk Public Figures (Q3 2021)*. Retrieved from YouGov: https://yougov.co.uk/ratings/politics/popularity/other-uk-public-figures/all
Ziegfeld, A. (2012). Coalition Government and Party System Change: Explaining the Rise of Regional Political. *Comparative Politics, Vol. 45, No. 1* , 69-87.
Zittel, T. (2015). Do candidates seek personal votes on the Internet? Constituency Candidates in the 2009 German Federal Elections. *German Politics 24:4*, 435-450.

# Investigation on the Relationship between the Implementation of Chinese Civil Code and the Application of Intellectual Property Law

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## Introduction

As the product of the systematic development of statutory law, the code is of symbolic significance to the development of the legal system of the continental law system countries, which reflects the systematic development of the legal system. On January 1, 2020, China's Civil Code came into effect. China's civil code is based on the successful experience and practice of other civil codes and combined with the development of China's actual conditions. The history of the compilation of Chinese civil code has been accumulated for several decades, which is accompanied by various academic arguments in the process of formulation[1)]. In the early days of the civil code, there were many disputes about whether intellectual property law should be included in civil law[2)]. With the development of intellectual property system in China, intellectual property law has long been regarded

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1) In 1954, 1962 and 1979, China started the work of formulating a civil code, but all of them were stalled due to various reasons. In December 2012, the Standing Committee of the National People's Congress (NPC) reviewed the draft of the Civil Code for the first time. However, after discussion and study, it decided to continue to adopt the method of formulating separate laws to promote the construction of China's civil law system. In 2014, the compilation of the Civil Code was put forward again. This time, the compilation was divided into "two steps". The second step is to compile the parts of the civil code. The compilation of the civil Code was officially launched in 2016, which will be published on May 28, 2020 and implemented on January 1, 2021. See the preface of *Key Amendments and Interpretation of New Provisions of the Civil Code* (Vol. 1 and Vol. 2) by Jiang Bixin.

2) Professor Wang Liming mentioned in his article "On the Formulation of China's Civil Code" published in 1998 that whether the intellectual property system should be included in the civil law is very controversial. Some scholars believe that intellectual property has its particularity and does not fully apply the basic principles of civil law, so it should become an independent legal department. See Wang Liming, "On the Formulation of China's Civil Code", Tribune of Political Science and Law, No.5, 1998, pp. 44-52+83.

as an important part of civil law[3]. Later, the academic disputes about intellectual property related issues in the compilation of the civil code turned into whether intellectual property law should be included in the civil code,[4] and whether intellectual property rights should be independently organized[5], some scholars also analyzed and demonstrated the different

3) China's relevant intellectual property legislation mainly provides for civil rights and other contents. Although administrative management is included, the main provisions are still civil rights and other contents. The prevailing view is that intellectual property law is part of civil law. For example, Professor Xie Huaishi classises intellectual property as one civil right along with the right of personality, the right of kinship and the right of property and membership. Professor Wang Liming also believes that we do not deny the particularity of the intellectual property system, but in the final analysis, intellectual property is still a civil right, its essential attribute is the combination of property rights and personal rights. In the field of intellectual property law, it is also a general theory that intellectual property belongs to civil rights. In the textbooks edited by Professor Wu Handong, the private nature of the right ontology is the basic basis for classifying intellectual property into the category of civil rights.

See:Xie Huaishi, "On the Civil Rights System", Chinese Journal of Law,No. 2, 1996, p. 9.

See Wang Liming, "On the formulation of China's Civil Code", Tribune of Political science and Law, No.5, 1998, p. 52.

See Wu Handong (ed.), *Intellectual Property Law*, Law Press China, 2014, p. 7.

4) In the opinion of whether to include intellectual property law in China's civil code, the mainstream view is agreed to include intellectual property law in China's civil code.

See Wang Liming, "On the Formulation of China's Civil Code", Tribune of Political Science and Law, No.5, 1998, pp. 44-52+83.

See Wang Qian, "Thoughts on incorporating Intellectual Property law into the Civil Code," Intellectual Property, No. 10, 2015, pp. 16-19.

5) Professor Wu Handong points out that the independent compilation of intellectual property rights is to respond to the economic development of intellectual property rights, improve the civil rights system and inherit the legislative tradition of the General Principles of Civil Law in his article "Intellectual Property Rights Should be Independent in the Future Civil Code". See Wu Handong, "Intellectual Property Rights Should be Independently Compiled in the Future Civil Code", Intellectual Property, No.12, 2016, pp. 3-7.

Professor' intellectual property rights in the theory of the civil code compiling is independent to make a paper from opening new of intellectual property rights, the relative stability of the civil code of volatility and profound contradictions exist, intellectual property law, procedural and the civil code of the private law attribute does not match such problems as intellectual property law in China's civil code should not be kept independent set. See Li Yang, On "Intellectual Property Rights should not be Independently compiled in the Compilation of Civil Code", Journal of Shaanxi Normal University (Philosophy and Social Sciences Edition), No. 2, 2017, pp. 32-41.

models[6]. In August 2018, after the Civil Law Office of the Commission for Legislative Affairs of the Standing Committee of the National People's Congress (NPC) of China responded to concerns about failing to independently 'codify' intellectual property laws,[7] the academic debate about whether the intellectual property law should be independently compiled in the formulation of China's civil code is also quiet. With the implementation of China's Civil Code on January 1st, 2021, the relationship between the implementation of China's Civil Code and the application of intellectual property law has also become a topic of academic discussion. Therefore, by combing the historical process of the enactment of China's civil code and the development history of intellectual property law in China, this paper aims to expatiate the connotation and logic of intellectual property provisions in China's civil code, and further analyze the application relationship between China's civil code and intellectual property law.

6) See Yang Xudong, "Review and Reflection on the Non-Independent Edition of Intellectual Property In The Civil Code: On the Connection between the Systemization of Intellectual Property Law and the Civil Code", Journal of Chongqing Technology and Business University (Social Science Edition), No.6, 2020, pp. 139-148.

See Cao Xinming, "The choice of the connection mode between intellectual Property and civil Code: from the perspective of the compilation of intellectual Property Code", studies in Law and Business, no. 1, 2005, pp. 26-34. In this paper, the coordination mode between intellectual property and civil code is discussed and analyzed from the aspects of separation mode, inclusion mode, mashup mode and link mode. Professor Wu Handong, in his article "Intellectual Property Law in the Movement of Codification of civil Law", analyzes two modes of linking Intellectual property law and civil code in China. One is to form a special intellectual property code. See Wu Handong, "Intellectual Property Law in the Movement of Codification of Civil Law", China Legal Study, No.4, 2016, 24-39.

7) China's intellectual property legislation has always adopted special civil laws, such as the Patent Law, the Trademark Law and the Copyright (Copyright) Law. It also involves laws such as the Anti-unfair Competition Law and administrative regulations such as the Regulations on the Protection of Integrated Circuit layout-designs and the Regulations on the Protection of New plant varieties. China's intellectual property legislation provides for both civil rights and administrative management, and is generally consistent with relevant international treaties. The civil code is a law to adjust the civil legal relations between equal civil subjects. It is difficult to include the contents of administrative management, and it is difficult to abstract the general rules of different types of intellectual property rights. The intellectual property system is still in rapid development and change, and domestic legislation, law enforcement and judicature need to constantly adjust to it. If intellectual property laws and regulations are incorporated into the civil code now, it will be difficult to maintain its continuity and stability. Due to the above reasons, the legislation method of civil special law is still adopted for intellectual property related. According to different needs, single legislation is implemented and the system of intellectual property related is improved by means of separate laws on intellectual property. Meanwhile, the existing separate laws on intellectual property will continue to be retained, which is more conducive to strengthening and improving the protection of intellectual property. It is not appropriate to set up an intellectual property section in the civil code for the time being.

# Chapter 1 The Debate on Whether Intellectual Property Law Should Be Incorporated Into the Civil Code

## Section 1 Enactment of the Civil Code

### 1. First Draft of the Civil Code

The compilation of the Civil Code of New China began in 1954,[8] The Standing Committee of the National People's Congress established the Leading Group for the Drafting of the Civil Law, and completed the first draft of the General Provisions in October 1955. In 1956, the entire framework of the Civil Code was initially formed, and relevant revision work continued until 1957.[9] The effort of New China's first drafting of the Civil Code showed a strong enthusiasm. The characteristics of the drafting of the first Civil Code of New China reflect the characteristics of the times at that time. The first draft of the Civil Code has four parts: *General Provisions, Ownership, Creditor's Rights and Succession*. However, due to political reasons, the drafting of the first civil code did not succeed.[10]

8) The subject of this paper is the history of civil code enactment after the founding of new China. In order to distinguish it from the civil code enacted in Chinese history, this paper uses new China as the expression. In modern Chinese history, there were three drafts of the Civil code: the Draft of the Qing People's Law in the late Qing Dynasty, which was drafted in 1908 and completed by the end of 1910. It entered the deliberation process in 1911, but was never formally promulgated. The second draft of the Law of the People and the People compiled by the Beijing government of the Republic of China was completed in 1925-1926, and the draft was not deliberated by the National Assembly and passed into a formal code. For the third time, he drafted the civil code organized by the Nanjing government of the Republic of China. In December 1928, the Legislative Yuan was established, responsible for the compilation of the code, which was promulgated and implemented after the compilation was completed in December 1930. See xie Zhenmin, *Legislative History of the Republic of China*, Vol. 2, China University of Political Science and Law Press, 2000.

9) In 1956, the drafting of the first civil code in New China had 45 drafts, accounting for about 73% of the total manuscripts, and the interval between revisions was relatively short. In 1956, more than 500 articles were drawn up, and the framework of the entire civil code was initially established. See he Qinhua et al., An Overview of the Draft civil Code of New China (Vol. 1), Law Press, 2003. In June 1956, Peng Zhen reported in his report on the work of the Standing Committee of the National People's Congress: "Part of the draft civil Law has been drafted. These are still some hate the immature draft, very preliminary preparatory work, are seeking opinions from the relevant parties, continue to revise ". He said the same thing in his work report in 1957. See the Research Office of the General Office of the Standing Committee of the NPC,*Compilation of the Documents of the People's Congress of the People's Republic of China (1949-1990)*, China Democracy and legal System Publishing House, 1990.

10) Professor Jin Ping's speech at the theoretical seminar "Review and Prospect of the 50th Anniversary of the drafting of the New China Civil Code" : "At a time of high interest (in the drafting of the civil Code), great changes have taken place in the political situation. It was the change in the political situation at that time that led to the cessation of the drafting of the civil law, and in the following years, the report on the work of the Standing Committee of the National People's Congress no longer contained the contents of the enactment of the civil law.

**2. Second Draft of the Civil Code**

After the first drafting of the Civil Code was forced to stop in New China, the drafting of the Civil Code was put on the agenda again in 1962,[11] Although in 1962 and 1963, the National People's Congress seek opinions, but the substantive effect is not significant.[12] The final draft of the Second Civil Code was completed and published on November 1, 1964. The Draft of the Civil Law of the People's Republic of China (Trial Implementation) consisted of 262 articles in 24 chapters in three parts, and the system adopted was the General Provisions, the ownership of property and the circulation of property in three parts,[13] Later, the second drafting of the Civil Code was clearly recorded in its last draft that the drafting work was stopped because of the participation in the social and educational movement.[14] The drafting of the second civil code also failed because of the special historical period.

**3. Third Draft of the Civil Code**

Since 1978, China has entered a new historical period. Under the specific historical background of the transformation of national focus, reflection on history and the need of social development, the drafting of the Third Civil Code has once again been included in the agenda. In November 1979, the Legislative Affairs Committee of the NPC set up a drafting group for the

11) In September 1962, the Law Office of the General Office of the NPC Standing Committee organized a civil Law Research Group to start the drafting of the second civil Law. Involved in the second draft civil code of the main, the law committee of the NPC Standing Committee, Beijing university, Beijing institute of political science and law (now the China university of political science and law), renmin university of China, east China institute of political science and law (now east China university of political science and law), jilin university, hubei university, southwest college of political science and law (now southwest university of political science and law) and other institutions.

12) According to professor Li Jingtang in retrospect and prospect "new China civil code draft fifty years" symposium on theory of speech: "when the economy is a planned economy, the public sector of the economy first, economy is self-sufficient (especially in rural areas), Commodity Exchange is few, such as transportation, can only carry portable pedal, or illegal. Without Commodity Exchange, how to formulate the civil code that mainly regulates commodity economy? No matter how serious you are, there is no way. In the end, there is no debate on the draft. Lee said, The last draft of the Civil Law was finalized on November 1, 1964, but I am not satisfied now. It is not a law, but it reflects the history of the time.

13) See He Qinhua et al., *An Overview of the Draft civil Code of New China (vol. 2)*, Law Press China, 2003, p. 160.

14) Social education movement refers to the socialist education movement in the form of "siqing" in 1962, especially after the Tenth Plenary Session of the CPC Central Committee. See Zhang Yumin, *Review and Prospect of the 50 Years of Drafting New China's Civil Code*, Law Press China, 2010, p. 59.

Civil Law, with over 40 members participating in the drafting.[15] In May 1980, the third draft of the Civil Code was drafted, and in August of the same year, the draft of the Civil Law of the People's Republic of China (Draft for Public Comments) was issued to solicit public opinions from the whole country. In April 1981, the Second Draft of the Civil Law of the People's Republic of China (for Comments) was issued to solicit opinions from the whole country. In July 1981, the Third Draft of the Civil Law of the People's Republic of China was issued. In May 1982, the Fourth Draft of the Civil Law of the People's Republic of China was issued.[16] Some achievements were made in the drafting of the third civil code, but due to the rapid development and change of the society at that time, the stability of the civil code and the unstable factors of the social development at that time, the state changed the guiding ideology of the drafting of the civil code: The enactment of the civil code is still the main task and goal, but the civil code is not issued at the beginning, but to issue separate laws, mature to enact one by one.[17] Under such a background, the draft of the Civil Law of the People's Republic of China (the fourth draft) was not submitted for discussion, and the drafting of the third civil code was stopped again.

15) Leading members of the civil law drafting group set up by the Legislative affairs Committee of the National People's Congress are Tao Xijin, Yang Xiufeng, Sun Yamin, Lin Hengyuan, Zhao Guoping, Wu Kejian, Zhen Rou and Shi Yue. The drafting group also includes Wang Jiafu, Su Qing, Chen Hanzhang and Yu Nengbin from the Institute of Law of the Chinese Academy of Social Sciences. Zhenying Wei and Zuotang Wang of Peking University; Zhao Zhongfu of Renmin University of China; Jin Ping, Southwest Institute of Political Science and Law; Yang Zhenshan of the Beijing Institute of Political Science and Law; Ma Yuan, Long Shirong, Ai Wei and Fei Zongyi of the Supreme People's Court; Lu Jialin of Beijing Higher People's Court; Shi Xiuzhen and Li Shirong from Tianjin High People's Court, and Professor Xu Kaishu participated in the drafting in the later stage.See Zhang Yumin, *Review and Prospect of the 50 Years of Drafting New China's Civil Code*, Law Press China, 2010, p. 74.

16) The Draft Of the Civil Law of the People's Republic of China (Draft for Public Comment), released during the drafting of the third Civil Code, consists of six parts, namely, general Provisions, property ownership, contracts, remuneration and rewards for labor, liability for damage, and property inheritance, with 501 articles in total. The Draft Of the Civil Law of the People's Republic of China (Second Draft for Public Comment) consists of six parts, including general provisions, property ownership, contract, liability for tort damages, right of intellectual achievements, and property inheritance, with a total of 426 articles. The Draft of the Civil Law of the People's Republic of China (Third Draft) consists of eight parts and 510 articles, including tasks and basic principles, civil subjects, property ownership, contracts, intellectual achievements, kinship succession, civil liability and other provisions. The fourth Draft of the Civil Law of the People's Republic of China consists of 465 articles in eight parts: the tasks and basic principles of the civil law, civil subjects, property ownership, contracts, intellectual property rights, property inheritance, civil liability and other provisions. See the general Review of the Draft Of the New China Civil Code by He Qinhua et al. See Zhang Yumin, *Review and Prospect of the 50 Years of Drafting New China's Civil Code*, Law Press China, 2010, p. 75,81.

17) See Gu Angran, *Introduction to New China's Civil Law*, Law Press China, 2000, pp. 7-11.

Thereafter, China's civil legislation entered the stage of making separate laws and regulations. On April 12, 1986, the Fourth Session of the Sixth National People's Congress adopted the General Principles of the Civil Law of the People's Republic of China, which came into effect formally on January 1, 1987, signifying the end of the drafting of the Third Civil Code.[18)]

**4. Fourth Draft of the Civil Code**

In December 2002, the 31st session of the Standing Committee of the Ninth National People's Congress deliberated on the draft of the Civil Law. After the property law has not yet set,[19)] together with the wide divergence of the understanding of the draft civil law,[20)] Leadership of the legal work of the civil code compiling committee work in abandoned some experts to compile the draft, will then intact the introduction of the current law, the civil code of arbitrary behavior actually is "assembly" rather than "compiled", caused strong dissatisfaction with the civil law educational world, under the civil code, and then work has finally been shelved, It is still de-

18) Zhang Yumin, *Review and Prospect of the 50 Years of Drafting New China's Civil Code*, Law Press China, 2010, p. 94.

19) The Real Right Law of the People's Republic of China was adopted at the fifth session of the tenth National People's Congress on March 16, 2007. Promulgated by Order No. 62 of the President of the People's Republic of China on March 16, 2007 and effective as of October 1, 2007.

20) The Commission for Legislative Affairs of the NPC Standing Committee held a meeting on January 11, 2020, and officially launched the compilation of the Civil Code. Hu Kangsheng, deputy Director of the Commission for Legislative Affairs of the NPC Standing Committee, commissioned six experts and scholars to draft the articles of each part of the Civil Code. Professor Wang Liming was responsible for the drafting of personality rights and tort; Zheng Chengsi, a researcher of the Institute of Law, Chinese Academy of Social Sciences, was responsible for drafting the intellectual Property compilation. Tang Dehua, vice president of the Supreme People's Court, was responsible for drafting the civil liability edition. Professor Wu Changzhen from China University of Political Science and Law was in charge of drafting the kinship and succession compilation; Fei Zongwei, a retired judge of the Supreme People's Court, was in charge of drafting the application of laws on foreign-related civil relations. The Commission for Legislative Affairs of the NPC Standing Committee formed and discussed the Draft Civil Code (September Draft) in five months based on the work of six experts. However, after this discussion, the contract part, the kinship part, the inheritance part and the intellectual property part were scrapped, and the relevant laws in force at that time were incorporated directly, which caused the anger and dissatisfaction of civil law scholars. Liang Huixing, a civil jurist, fully expressed his dissatisfaction with the "compilation of civil codes" by submitting the "Suggestions on correcting the Arbitrariness of the Civil Code Legislation" during the National Committee of the Chinese People's Political Consultative Conference (CPPCC) in 2003. Then, in 2003, the legislative plan did not mention the issue of the enactment of a civil code, and work on the enactment of a civil code was again suspended.

termined to continue the approach of separate legislation.[21)]

**5. Drafting of the Fifth Civil Code**

In 2014, the compilation of China's civil Code was put forward again, and in June 2016, the compilation of China's civil Code formally entered the legislative process,[22)] On March 15, 2017, the General Provisions of the Civil Law of the People's Republic of China (Draft) was approved for review. On this basis, the Commission for Legislative Affairs of the NPC Standing Committee and the participating units of the compilation of the Civil Code fully promoted the compilation of the sub-chapters, which will be reviewed in August 2018.[23)] The draft civil Code of the People's Republic of China (Draft) was revised and merged with the General Provisions of the Civil Law in 2018-2019 after multiple deliberations. In 2019-2020, the draft was further revised and improved by extensively listening to the opinions of all parties, reading and discussing, and finally passed to a vote on May 22, 2020. Effective as of 1 January 2021. At this point, the Chinese civil code was born, which is the first law named after the code in New China, and has great historical significance. The Civil Code of the People's Republic of China consists of seven parts with a total of 1,260 articles. Each part is divided into general provisions, Real Right, Contract, right of personality, marriage and family, inheritance, tort liability and supplementary provisions.

21) The Real Right Law of the People's Republic of China was adopted at the fifth Session of the tenth National People's Congress on March 16, 2007. Promulgated by Order No. 62 of the President of the People's Republic of China on March 16, 2007 and effective as of October 1, 2007; The Tort Liability Law of the People's Republic of China was adopted at the 12th session of the Standing Committee of the 11th National People's Congress on December 26, 2009 and implemented on July 1, 2010.

22) In November 2014, the Fourth Plenary Session of the 18th CPC Central Committee explicitly proposed the compilation of a civil code. In June 2016, the 21st session of the Standing Committee of the 12th National People's Congress (NPC) reviewed the draft general Provisions of civil Law for the first time, indicating that the compilation of the civil code has entered the legislative process. See People's Daily, History of the Compilation of new China's Civil Code, October 26, 2016.

23) The Commission for Legislative Affairs of the NPC Standing Committee and the participating units in the compilation of the Civil Code have made every effort to promote the compilation of the civil Code in different parts. Taking the existing property law, contract law, guarantee law, marriage law, adoption Law, inheritance Law and tort Liability law as the basis, and taking into account the new demands of China's economic and social development for civil law, The draft of the civil Code was submitted to the Fifth session of the Standing Committee of the 13th National People's Congress (NPC) in August 2018 for deliberation, including six sub-chapters, including real right, contract, right of personality, marriage and family, inheritance, and tort liability.

## Section 2: The Causes of the Enactment of the Civil Code

### 1. Historical Analysis of the Reasons for Formulating the Civil Code

In the decades between the drafting of the first civil code in New China and the birth of the Chinese civil code, a total of five civil codes have been drafted. In different historical backgrounds, the reasons for the compilation of civil code also have different historical backgrounds. The drafting of new China's first civil code was a requirement for the Central People's Government to establish a complete democratic legal system,[24] in 1956, the Eighth National Congress of the Communist Party of China held, proposed to further strengthen the construction of democracy and legal system.[25] It paved the way for the drafting of the first civil code under such a background. The background of drafting the second civil Code is also put forward again under the background of economic adjustment.[26] The drafting of the third civil code was put forward because of the change of national focus, which can be summarized in four aspects: the development of civil code is the need of economic development, the need of rights protection, the need of justice, and the need of maintaining social morality.[27] The drafting of the fourth civil Code was put forward against the background of the development of the socialist market economy. The successful enactment of a large number of separate civil laws, the development of civil trials, the in-depth research on civil law and the enactment of civil codes in various countries around the world all contributed to the drafting of the fourth Civil Code in China.[28] There are five main reasons why the drafting of the fifth civil Code is put forward: first, the need of the development of China's so-

24) In 1953, China began a large-scale economic construction, and the judicial work became increasingly heavy. In order to ensure the economic construction, the country needs to improve the judicial level. See People's Daily, May 14, 1953, edition 1, "The second National Judicial Conference adopted a resolution to Strengthen people's judicial construction, ensure the smooth progress of economic construction and elections". On September 16, 1953, In his Report on Political and Legal Work, Peng Zhen stressed that political and legal work would be a major task in the future. See selected Works of Peng Zhen (1941-1990), People's Publishing House, 1991, p. 242. On the legislative side, the necessary laws and regulations should be further developed. See editorial "Further Strengthening Political and legal Work in the Period of Economic Construction", People's Daily, March 30, 1954, page 1.

25) See *Selected Works of Liu Shaoqi*, Shaanxi People's Publishing House, 1985.

26) Due to the people's commune movement after 1957 and three years of natural disasters, the national economy encountered serious difficulties. In 1961, the ninth Plenary session of the eighth CPC Central Committee put forward the eight-character policy of "adjustment, consolidation, enrichment and improvement", and the national economy entered a period of adjustment.

27) Zhang Yumin, *Review and Prospect of the 50 Years of Drafting New China's Civil Code*, Law Press China, 2010, p. 69,72.

28) Zhang Yumin, *Review and Prospect of the 50 Years of Drafting New China's Civil Code*, Law Press China, 2010, p. 137,139.

cial system; second, the need of building a country under the rule of law; third, the need of economic development; fourth, to safeguard the rights of the people; fifth, the socialist legal system with Chinese characteristics has been formed, laying the foundation for the formulation of the civil code.[29] Through sorting out the reasons and background for the drafting of the new Chinese civil code, social development and economic development are the main reasons. As a country of civil law system (civil law system), China's tradition of formulating written law is also the inevitable result of the birth of Chinese civil code.

**2. The Only Way to Systematize Civil Legislation**

In addition to historical and political reasons, the drafting of the New China civil Code has been suspended for several times because of the lack of enactment and implementation of relevant laws and the lack of a complete legal system. Since the formation of the socialist legal system with Chinese characteristics, the complete development of the civil legal system has promoted the smooth progress of the compilation of China's civil code. As a country of civil law system, China's code is an important embodiment of the rationality of written law, which is mainly manifested as formal rationality.[30] The formal rationality can realize scientific legislation,[31] scientific legislation is one of the value judgment standards to evaluate whether the legal system is perfect, and the pursuit of The formal rationality in the code is more about stability, reducing the conflict between values, avoiding the conflict of civil legal system, and realizing scientific legislation.[32] Therefore, the enactment of civil code is the best way to realize the systematization of civil law, which can not only guarantee the scientific, reasonable and logical norms of civil law, but also realize the fairness and unity of the application of civil trial law.

29) See Liu Junchen, Deputy Director of the Commission for Legislative Affairs of the NPC Standing Committee, "The Great Significance and General Consideration of the Compilation of the Civil Code", Social Governance, No. 9, 2020, pp. 5-9.

30) In professor Xu Zhongyuan's philosophy of Civil Code Systematization -- Comment on Professor Wang Liming's Thought of "Civil Law Systematization", we borrow Max Weber's concept of formal rationality: Weber believes that the formalism of the code "provides the largest relative space for the interests of the law to move freely. It sees the legal process as a special form of peaceful resolution of conflicts of interest, bound by fixed and abiding "rules of the game."Xu Zhongyuan, Xiong Bingwan, "The Philosophy of Systematization of Civil Code: A Review of Professor Wang Liming's thought of systematization of Civil Law", Law and Social Development, No.3, 2009, pp. 63-72.

31) Wang Liming, Study on the Major and Difficult Problems of China's Civil Code, Law Press China, 2006, 28-32.

32) Wang Liming, "The enactment of civil Code after the Formation of legal System", Guangdong Social Sciences, No.1,2012, 5-17.;

## Section 3 Disputes over Whether Intellectual Property Law Should Be Included in the Civil Code

### 1. Opinions on Codification in the Civil Code

The specific reasons are as follows:

#### 1.1 It is the requirement of internal logic and integrity of the civil code.

According to the current definition of intellectual property rights in China's legal circle, intellectual property rights are the exclusive rights that people enjoy in accordance with the law for their creative intellectual achievements and marks and reputations produced in industrial and commercial management activities. The preamble of the TRIPs Agreement confirms the property of the private right of intellectual property, which shows that the property of the private right of intellectual property is basically recognized all over the world and is also an important content in the field of civil rights. The property right system without intellectual property is not a complete property right system. Therefore, some people believe that the civil code, as the core of the civil legislation system, is not a complete civil code without the content of intellectual property[33].

Scholar Wu Handong pointed out in his thesis "Intellectual Property Law in the Movement of Codification of Civil Law" that the acceptance of intellectual property rights in the civil code satisfies the requirements of comprehensiveness and consistency of the private rights system. Although intellectual property is an intangible property right form of knowledge, its basic attribute is no different from property ownership. Civil code should construct a complete property rights system including tangible property rights and intangible property rights. In essence, intellectual property law should not be absent in civil code.[34]

Su Yeong-chin professor pointed out that in the search for a new civil law, even be classified as special law of intellectual property rights, the rights with configuration (that is, the same category) were significantly higher than those of commercial law, given the traditional civil code in the personal right, creditor's rights, property rights and other rights type, there is no such have the absolute effect of intellectual property rights, the common rules in civil code should be systematic more appropriate choice.[35]

33) Wang Yingxian, "A Study on the Legislative Model of Intellectual Property System in civil Code Enactment", Journal of Shaoyang University (Social Science Edition), No.2, 2017, pp. 30-35.

34) Wu Handong, "Intellectual Property Law in the Movement of Codification of civil Law", Chinese Legal Science, No.4, 2016, 24-39.

35) Su Yongqin, "The Significance of the Civil Code in the Times", in *Search of A New Civil law*, Peking University Press, 2012, p. 82.

### 1.2 The theory and system of intellectual property have a feedback effect on the theory and system of civil law

Some scholars believe that the landmark of the civil Code incorporated into the Intellectual Property Code does not mean simply adding a new property law member to an inherent Civil Code, but that the integration of this new sub-system, rather than "joining", It is a historic transcendence of a series of representative Civil codes since the beginning of the 19th century. The essence, institutional function, business model, unique property right ability, theory and logic of property origin revealed by intellectual property right, its method and explanatory power are not only an extension of the inherent civil law, but also a re-creation of system and theory, which can feedback the civil law. Bring the traditional civil law into the new era of knowledge economy. The intellectual property law ADAPTS to the new technology, new economy and new way of life, and can inject new vitality into the traditional Civil Code.[36)]

### 1.3 It is the need of the systematic construction of the intellectual property system

The code is at the highest level among the various forms of legislation, and has higher requirements for the logic and systematization of the provisions of the law. As the core of the legal system of this sector, the code needs to lead the basic values and reflect the legal principles. Codification is an important opportunity to improve the system structure between intellectual property legislation and civil code, eliminate contradictions, identify loopholes and fill gaps. In addition, it is beneficial to strengthen the understanding of the state and the public on the private property of intellectual property.[37)]

Some scholars also point out that the codification can promote the system coordination among the intellectual property law departments. If the contents of the three major copyright laws are included in the Civil Code, some principles and commonalities of intellectual property law can be stipulated in the Civil Code, and the basic principles and systems of civil law can be used to influence intellectual property law, instead of the current practice of repeating provisions in separate legislation. At present, the problem of incoordination among the intellectual property laws is expected to be

36) See Liu Chuntian, "Rationality of the Establishment of Intellectual Property In China's Civil Code", Intellectual Property, no.9, 2018, pp. 81-92.

37) See Wang Yingxian, "A Study on the Legislative Model of Intellectual Property System in the Enactment of Civil Code", Journal of Shaoyang University (Social Science Edition), No.2, 2017, pp. 30-35.

solved.[38)]

**1.4 Promoting the protection of intellectual property rights**

The incorporation of intellectual property law into the civil code provides a broader legal application for intellectual property cases and makes the rights of intellectual property more specific. When intellectual property becomes a universal civil right, the more specific the right is, the more it can be sued, and the more it can be protected.[39)] At the same time, entry into the code can provide judges with an accurate basis for judicial decisions and stable expectations for judicial subjects to evaluate their legal acts,[40)] provides a broader legal application for intellectual property cases. For example, when there is a loophole in the separate laws of intellectual property, if intellectual property is "codified", the provisions of the upper law can be applied when there is no provision in the lower law, which also provides legal support for the judges to apply the legal principles in the civil law as the judgment basis in the judicial work. It is helpful to reconstruct the source system of Chinese civil law, to define the boundary between legislation and justice, to establish a legal development model with reasonable division of labor and orderly regulation, to abandon the existing phenomenon of the mismatch between legislators and judges, and to let the Supreme Court return to its role as a judge[41)].

**1.5 Inherit the legislative tradition of the General Principles of Civil Law**

The general Principles of Civil Law combines intellectual property with real right, creditor's right and personal right. The institutional innovation and legislative tradition of the chapter of civil rights lay the institutional foundation for the independent compilation of intellectual property rights in the civil code. China is the first country to write intellectual property rights into its civil code as a legal system. No other country has formally stipulated intellectual property rights in its civil code. The General Principles of the Civil Law of China for the first time stipulated intellectual

38) Liu Mingliu, "Research on the Incorporation of Intellectual Property Law into the Law", In Economic Outlook around Bohai Sea, No. 3, 2019, pp. 171-172.

39) See Zhu Ningning, "Whether Intellectual Property Rights Should Be Included separately in the National Law Code Raises Heated Debate among Standing Committee Members", Legal Daily reported on The position of Xu Xianming, a member of the Standing Committee of the National People's Congress, accessed on September 4, 2018,http://www.npc.gov.cn/npc/c22342/201809/ba49d927e3d64a5cbbc587343f71e351.shtml.

40) See Yi Jiming, "The Choice of Intellectual Property Legislation under the Background of China's Civil Code", Journal of Shaanxi Normal University (Philosophy and Social Science Edition), no.2, 2017, pp. 5-19.

41) See Xue Jun, "The Compilation of China's Civil Code: Ideas, Visions and Ideas", Chinese Legal Science, No.4, 2015, pp. 41-65.

property rights in the basic law of the Civil Law, which is the embodiment of the Chinese characteristics of the General Principles of the Civil Law. Compiled today's civil code to do, of course, the general principles of the civil law tradition of legislation, the independent intellectual property rights into woven into, in the civil law breaks through the civil law real right and creditor's rights and dual structure, make the intellectual property rights and real right and creditor's rights, as property rights, inheritance characteristic of civil legislation in our country, comply with the property dematerialize when knowledge economy era, For the civil law system to create a new legislative model.[42)]

**1.6 The civil code in line with the characteristics of the socialist system with Chinese characteristics**

Some scholars also suggest that the socialist legal system with Chinese characteristics should be combined with the civil code and intellectual property. The characteristics of The Chinese civil code weaken the unique legal character of intellectual property, rationalize the unique normative composition of intellectual property, and legitimize the unique system connotation of intellectual property. The autonomy of the private law of the Chinese civil code is developing in both ways of moderation and expansion, which accords with the development law of the modern private law order and the basic requirements of the socialist rule of law with Chinese characteristics. The dual development trend of civil code's restraint and expansion weakens the emphasis on the uniqueness of intellectual property and interprets the unique intellectual property from the perspective of traditional civil code.[43)]

**1.7 The independent compilation of intellectual property rights is the trend of the world civil code compilation**

Some scholars believe that the independent compilation of intellectual property rights has become the trend of the world civil code compilation.[44)] Since the 21st century, the world civil codification movement in intellectual property law in civil codes as a independent part of a compiled and some countries in formulating and modify its civil code, not only in the general provisions of the intellectual property rights, intellectual property rights in the catalog as a separate part of civil code or independent, some countries have abolished the special law of intellectual property, Fully integrate

42) Deng Shemin, "Legislative Conception of Intellectual Property Rights in the Compilation of Special Provisions of China's Civil Code", Law Review, No. 5, 2017, pp. 107-115.

43) See Wang Linlin, "Legislative Proposals on the Incorporation of Intellectual Property Rights from the Perspective of The Era characteristics of Chinese Civil Code", Contemporary Law, no.2, 2018, pp. 97,111.

44) Deng Shemin, "Legislative Conception of Intellectual Property Rights in the Compilation of Special Provisions of China's Civil Code", Law Review, No. 5, 2017, pp. 107-115.

intellectual property rights into the civil code.[45] It can be seen that, with the increasing importance of intellectual property in property, in the world civil code compilation movement, the return of intellectual property to the civil code, and become an independent part of the civil code has become the trend of contemporary civil code compilation, which provides useful experience for the compilation of intellectual property in China.

## 2. That It Should Not Be Codified in the Civil Code

### 2.1 Intellectual property rights have different origins from civil law

Scholar Xiong Qi pointed out in his paper "The Systematic Orientation of Intellectual Property Law and Civil Law" that the historical development path of intellectual property was in fact basically close to the commercial law rather than the civil law, which was the result of the joint action of mer-

45) As adopted by the Bureau on October 1, 1998 and amended on January 5, 2016, the Civil Code of Belarus consists of 1,153 articles and consists of eight parts: Part I General Provisions; Part II Ownership and other Property rights; Part III General Provisions for Creditor's Rights; The fourth part of the types of debt; Part V Intellectual Property rights; Sixth part right of inheritance; Part VII private international law; Part VIII Final provisions. The Civil Code of Kazakhstan was promulgated on December 27, 1994 and amended several times from 2011 to April 21, 2016, with a total of 1,124 articles. Part II Ownership and other Property rights; Creditor's rights of Part III) and the specific rules (types of debt of Part IV; Part V Intellectual Property rights; Sixth part right of inheritance; Part VII Private International Law). The Civil Code of Tajikistan is divided into three parts and seven parts, with a total of 1,234 articles. Part I promulgated on June 30, 1999 and amended on July 23, 2016, Part I General Provisions, Part II Ownership and Other Property Rights, Part III Creditor's rights; The second part was promulgated on December 11, 1999 and amended on July 3, 2012. Part III was promulgated on March 1, 2005 and amended on July 3, 2012. Part V Intellectual Property rights, Part VI Inheritance Rights, Part VII Private International Law. The Civil Code of Turkmenistan was promulgated on July 17, 1998 and amended on December 22, 2012. It consists of five parts: Part I general provisions, Part II property (property) rights, Part III creditor's rights, Part IV intellectual property rights, and Part V right of inheritance. The Civil Code of Ukraine was promulgated on January 16, 2003 and amended on June 14, 2016, with a total of 1308 articles, consisting of six parts: Part I General Provisions, Part II personal rights of natural persons, Part III ownership and other real Rights, Part IV intellectual property rights, Part V Creditor's rights, and Part VI right of inheritance. The Civil Code of Uzbekistan was promulgated on December 21, 1995 and amended on August 2, 2015, with a total of 1,199 articles, consisting of two parts and seven parts. Part I: Part I General Provisions, Part II Ownership and other Real Rights, Part III Creditor's rights; Part II: The types of part IV debt, Part V intellectual property rights, Part VI inheritance rights; Part VII private International Law. The Civil Code of Gilsutan was promulgated on March 8, 1996 and amended on July 23, 2016, with a total of 1,208 articles, consisting of two parts and seven parts. Part I: General Provisions of Part I, General Provisions of Title and Other Property Rights of Part II, General Provisions of Law of Debts of Part III; Part II: Part IV types of debt, Part V Intellectual property, Part VI Right of inheritance, Part VII Private international law. The Civil Code of Armenia was promulgated on July 28, 1998 and amended on December 3, 2015, with a total of 1,183 articles and consisting of 12 parts. Part I General Provisions; Part II (subject of civil rights); Part III Object of civil rights; Part IV Ownership and other Real Rights; Part V Legal act, agency, time limit and limitation of action; Part VI General Provisions for Creditor's Rights; Part VII Contractual debts; Part VIII Debts for unilateral acts; Part IX debts for damage; Part X Intellectual Property rights; Part XI Right of inheritance; Part XII Private International Law.

chants' autonomy and the state's "mercantilist" thinking. Its legislative impetus has always been to seek competitive advantage for the private or the state. The rise and development of intellectual property rights is due to the importance of innovation as a means of economic competition between nation states. In order to protect and stimulate innovation and make the country gain advantages in national competition, after a long period of system trial and error, intellectual property rights have been used up to now after being proved to be the best tool to protect innovation in comparison with other systems. It is because of the means of market competition emerge in endlessly, lead to fluctuations in the category of intellectual property rights, and finally caused the intellectual property rights become a the most unstable part of the system of private rights, in the history of all the efforts to be included in the civil code of all failed, because the object of intellectual property and rights category, needs to constantly changing along with the development of The Times and technology, It is opposite to the stability and abstractness that codification pursues, and it is different from the system reform path that civil law provides the basic rules of civil society as general private law. Therefore, intellectual property law, as a special private law, is more similar to commercial law. It is discovered and created by businessmen in the practice of commercial transactions, rather than the result of logical deduction of the system. Therefore, it should refer to the legislative style of commercial law and exist in the system of private law.

### 2.2 There is a profound contradiction between the openness and variation of intellectual property rights and the relative stability of the civil code

The intellectual property code should not undermine the stability of the code. Wang liming scholars in the paper 'on the several problems of China's civil code system', points out that in the civil code is a significant strategy of governing the country according to law is important one annulus, is that "systematic help by ensuring the stability of the civil law, so as to achieve the stability of the social life and people in social life predictability"[46]. Scholars Li Yang in the paper 'the theory of intellectual property rights in the civil code compiling is unfavorable in separate compiled' pointed out that the intellectual property right is different from the traditional real right, the type, content, exercise, limit and protection core content have openness, influenced by science and technology, economy and international trade, which determine the intellectual property law in legislative technology also

46) Wang Liming, "Some Problems on the Construction of China's Civil Code System", Law Science, No.1, 2003, pp. 30-39.

needs to maintain moderate openness and volatility, There is a profound contradiction between this openness and variation and the relative stability of the civil code[47].

### 2.3 The public law norm and procedural norm of intellectual property law do not match the private law attribute of Civil Code

Scholar Li Yang in the paper 'the theory of intellectual property rights in the civil code compiling is unfavorable in separate compiled' pointed out that in the non-material characteristics of as the object of intellectual property, knowledge itself does not have the physical characteristics of exclusive possession, at the same time, in order to achieve the efficiency as the center of science and technology innovation, cultural progress, industry development, fairness and justice, give attention to two or more things The state has to examine through certain procedures and methods the characteristics of the advanced nature, creation and recognition of the knowledge that enforces the exclusive right, and enforces the publicity effect of such exclusivity. Therefore, patent, trademark, new plant varieties, integrated circuit layout-design and other intellectual property laws will inevitably contain a large number of procedural norms and public law provisions related to application, review, objection, authorization, revocation, invalidation, administrative management and other procedural norms, and all intellectual property laws and regulations will be relocated to the civil code as a whole. Obviously, it will not match with the civil code, which is the basic protection of private rights, and greatly impact the private law attribute of the civil code, and violate the fundamental idea of private law autonomy, which can only be said to be an extremely romantic idea.[48]

### 2.4 The three kinds of rights inside intellectual property are complicated, and the system is difficult to refine

Scholar Xiong Qi pointed out in his paper "The System Orientation of Intellectual Property Law and Civil Law" that there are great differences in the object and scope of rights between intellectual property and civil rights, or the three rights within intellectual property. From the point of view of object identification, intellectual property is regarded as different from the property rights on the object of land, air or animals, and the identification of its object needs to be based on the recognition of additional creative

47) Li Yang, "Intellectual Property Rights Should Not Be Independently Compiled in the Compilation of Civil Code", Journal of Shaanxi Normal University (Philosophy and Social Sciences Edition), No. 2, 2017, pp. 32-41.

48) Li Yang, "Intellectual Property Rights Should Not Be Independently Compiled in the Compilation of Civil Code", Journal of Shaanxi Normal University (Philosophy and Social Sciences Edition), No. 2, 2017, pp. 32-41.

labor, which results in a great difference in the definition of copyright, patent and trademark right creation in the protection requirements.[49] From the perspective of rights category, copyright law, trademark law and patent law have different types of rights. The protection of intellectual property is faced with high cost of bounding rights. At the same time, it is difficult to have complete and comprehensive exclusive attributes like property right. In the scholars' Proposal for The Intellectual Property Edition of the Civil Code of the People's Republic of China, drafted under the guidance of the China Intellectual Property Law Institute, a large number of articles are divided into three paragraphs to correspond to the special arrangements of copyright, patent and trademark rights. This clearly shows that the legislative differences among the three types of laws make it difficult to extract the common ground prevailing in all types of intellectual property laws through legislative techniques.[50]

### 2.5 The independent compilation of intellectual property rights is difficult to increase the normative function of intellectual property law

Scholar Li Yang pointed out in his paper "On the Inadvisable Independent Compilation of Intellectual Property Rights in the Compilation of Civil Code" that the structure design and content arrangement of civil code should consider not only the dual attributes of civil law which professor Liang Hui-xing said had both rules of conduct and rules of judgment, but also the creation of new normative energy. Will all existing intellectual property laws regulate the overall relocation to the unique one in the civil law, or to all existing substantive intellectual property law, civil law standard one-on-one hit out alone in the civil code set one, can't increase the intellectual property law not to speak of the specification of the energy, even by some scholars point of view, all or part of the abstract out the general rule applies to all intellectual property rights, Nor does it increase the regulatory energy already stored up by existing intellectual property laws.[51]

### 2.6 There is no example in the world of a successful relationship between intellectual property law and civil code

From the perspective of the history of intellectual property legislation, since the establishment of modern intellectual property law system, both

49) Xiong Qi,"Intellectual Property Law and Civil Law", Journal of Wuhan University (Philosophy and Social Sciences), No. 2, 2019, pp. 128-138.

50) Xiong Qi,"Intellectual Property Law and Civil Law", Journal of Wuhan University (Philosophy and Social Sciences), No. 2, 2019, pp. 128-138.

51) Li Yang, "Intellectual Property Rights Should Not Be Independently Compiled in the Compilation of Civil Code", Journal of Shaanxi Normal University (Philosophy and Social Sciences Edition), No. 2, 2017, pp. 32-41.

the Common law system and the civil law system countries have always adopted the legislative model of civil special law or separate law, which has nothing to do with the compilation of civil code. Due to their own legal tradition, legal concept, legislative technology and other reasons, the common law countries have no civil code in form. Since the birth of intellectual property law, it has taken the form of independent enactment law, which has become a unique legal system independent of tangible property rights. Examples include the Monopoly Act of 1623 in England and the Anna Act of 1709. The civil law countries are different from the Common law countries, inheriting the tradition of ancient Rome codification. France at the beginning of the 19th century, Germany and Japan at the end of the 19th century respectively formulated and promulgated the civil code of paradigm significance. Before this, the most important intellectual property legislation in France, Germany and Japan has been completed, but the civil codes of France, Germany and Japan have not incorporated the intellectual property system into their civil codes.

In the 20th century, in response to the object of intellectual property development and intellectual property status in the whole property right constantly strengthened, Italy, Russia, the Netherlands, Mongolia, Vietnam and other civil law countries began to try to include intellectual property rights in the civil code system, and in the 1990 s reached climax, the codification movement, but there are no successful examples. The Russian civil code has moved the intellectual property law into the civil code, but there are some problems in this practice. There are at least the following defects: first, the object of intellectual property rights to adopt a closed exhaustive enumeration. Second, Article 1232 of the Russian Civil Code stipulates the national registration procedure of intellectual activity achievements or individual means, which is inconsistent with the private law attribute of the civil code. Third, the definition and uniform use of core concepts do not meet the requirements of codification. Fourth, the civil codification of intellectual property has seriously impacted the stability of the civil code. Fifth, both the Russian Civil Code and the Intellectual Property Code adopt the structure of "general provisions -- specific provisions", but the relationship between general provisions and specific provisions is not well handled. There are many problems in the "general provisions" of the Intellectual property law in Chapter 69. For example, the norms related to the authors of intellectual activities (article 1228), the norms related to the collective management of copyright (Article 1242-1244), and the norms related to patent agents and patent fees are all stipulated in the "general provisions", which obviously does not conform to the logical requirements of the "general pro-

visions - specific provisions" of the civil Code.[52)]

In 1995, Part 6 of Vietnam's Civil Code was set up to systematically regulate intellectual property rights, and the Industrial Ownership Protection Act of 1989, Copyright Protection Act of 1994 and Foreign Technology Introduction Act of 1988 were abolished when it came into force in 1996. Title 6 of Vietnam's Civil Code is entitled "Intellectual Property rights and technology transfer rights", including "copyright", "industrial ownership" and "technology transfer" three chapters. However, there are also some drawbacks in the civil code concerning intellectual property in Vietnam. First, the contents of the civil code are too repetitive with the intellectual property code. Second, it only defines the traditional main types of intellectual property rights, and does not respond to the new intellectual property rights that arise with the development of science and technology. Like the Italian civil code, it lacks inclusiveness and expansion. Three is the common fault of the other civil code, the artificial segmentation substantive law, civil law and procedural law, public law, the procedural norms of intellectual property rights, administrative law and criminal law norms can only be kept in separate regulations or other legal departments to complete, causing the applicable law is not very convenient, and the difficulty of learning, research.[53)]

### 3. The Third Way: Incomplete Codification, Setting General Provisions of Intellectual Property Rights

Professor Wu Han-dong is put forward in the paper, set in the "general" property rights of civil code "general provisions of intellectual property", the right nature, right object, right of ontology, rights to produce, effectiveness, rights to use, and the relationship between the prior right, prohibit abuse of rights, and the relationship between civil special law, and the relationship between civil code of the ten items. This is neither a parallel implantation of the intellectual property system into the civil code, nor a simple declaration of the property of intellectual property in the civil code. Its legislative method is the combination of the general provisions of the civil Basic law and the special provisions of the civil law.[54)]

Some scholars also put forward the path of incomplete codification, suggesting that the general norms of intellectual property should be abstracted

52) See Wang Zhihua, "On the Civil Codification of Intellectual Property Law in Russia", global Law Review, No.6, 2009.

53) Li Yang, "Intellectual Property Rights Should Not Be Independently Compiled in the Compilation of Civil Code", Journal of Shaanxi Normal University (Philosophy and Social Sciences Edition), No. 2, 2017, pp. 32-41.

54) Wu Handong, "The Introduction of Intellectual Property Rights and the General Provisions of Property Rights in the Civil Code", Legal and Social Development, No.4, 2015, pp. 58-66.

as the intellectual property book, and the separate laws of intellectual property should be retained outside the civil code. Scholars who hold this view believe that the generalized dual legislative model has more advantages: In highlights the importance of intellectual property rights and to better coordinate the relationship between the civil code of intellectual property rights and superior to the link type, while maintaining the purity and stability of the civil code is better than into the type, the openness and low cost rather than intellectual property legislation of administrative procedure, in both the integrity of the special law of intellectual property itself and facilitate the applicable law in the total fraction of the intellectual property rights. Therefore, this model is the best choice for China to construct the relationship between civil code and intellectual property rights. In view of this path, some scholars have pointed out its drawbacks. Professor Yi jiming pointed out that the practice of setting up a separate intellectual property section in the civil code and retaining a separate law on intellectual property rights may lead to a certain degree of legislative duplication. Professor Li Yang pointed out that this approach makes it more difficult to refine the intellectual property rights provisions. The existing legal system of intellectual property is mainly composed of individual laws of intellectual property, and the differences between the individual laws may be more prominent than the similarities, so it is difficult to refine the general rules of intellectual property.[55)]

55) Scholar Li Yang pointed out that "it is difficult to refine the provisions of the intellectual property section because the civil code sets up an independent intellectual property section and retains a separate intellectual property law". Li Yang, "Intellectual Property Rights Should Not Be Independently Compiled in the Compilation of Civil Code", Journal of Shaanxi Normal University (Philosophy and Social Sciences Edition), No. 2, 2017, pp. 32-41.

# Chapter 2 Provisions on Intellectual Property Rights in the Civil Code

## Section 1 Provisions Relating to Intellectual Property Rights in the Current Civil Code

| | Article | Book | Chapter | Main Content |
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| 1 | 123 | Book I: General Provisions | Chapter V Civil Rights | Civil subjects shall enjoy intellectual property rights according to law. Intellectual property rights are exclusive rights enjoyed by the right holder in accordance with the law with respect to the following objects :(1) works; (2) inventions, utility models and designs; (3) Trademarks; (4) Geographical indications; (5) Business secrets; Layout-design of integrated circuits; New varieties of plants; (8) other objects provided for by law. |
| 2 | 440, Paragraph 5 | Book II Real Rights | Chapter XVIII Pledge | The following rights which the debtor or a third party is entitled to dispose of may be pledged:..... (5) the property rights among intellectual property rights such as the exclusive right to use a registered trademark, patent right and copyright that can be transferred; ... |
| 3 | 444 | Book II Real Rights | Chapter XVIII Pledge | If the property right in the intellectual property right such as the exclusive right of registered trademark, patent right and copyright is pledged, the right of pledge shall be established upon the registration of pledge.<br>After the property rights in the intellectual property rights are pledged, the pledgor shall not transfer or permit others to use them, except as agreed by the pledgor and the Pledgee through consultation. The proceeds obtained by the pledgor from transferring or licensing another person to use the property rights in the pledged intellectual property rights shall pay off debts or be deposited with the pledgee in advance. |
| 4 | 501 | Book III Contracts | Chapter IX Sales Contracts | The parties may not divulge or improperly use trade secrets or other confidential information that they have come to know in the course of concluding a contract, no matter whether the contract is formed or not. If the party divulges or improperly uses such trade secrets or information and causes losses to the other party, it shall be liable for compensation. |
| 5 | 600 | Book III Contracts | Chapter IX Sales Contracts | Where a subject matter with intellectual property rights is sold, the intellectual property rights in the subject matter do not belong to the buyer, unless otherwise provided by law or agreed by the parties. |

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| 6 | 843 | Book III Contracts | Chapter XX Technology Contracts | A technology contract is a contract through which the parties establish the rights and obligations of each other in respect of technology development, transfer, licensing, consultation or services. |
| 7 | 844 | Book III Contracts | Chapter XX Technology Contracts | The conclusion of a technology contract shall be conducive to the protection of intellectual property rights and the progress of science and technology, and promote the research, development, transformation, application and dissemination of scientific and technological achievements. |
| 8 | 845 | Book III Contracts | Chapter XX Technology Contracts | The contents of a technology contract generally include the name, content, scope and requirements of the project, the plan, place and method of performance, the confidentiality of technical information and data, the ownership of the technical achievements and the method of distributing the benefits, the acceptance criteria and methods, and the interpretation of terms and terms, etc.<br>The technical background information, feasibility demonstration and technical evaluation report, project assignment and plan, technical standard, technical specification, original design and process documents and other technical documents related to the performance of the contract may be an integral part of the contract as agreed by the parties.<br>Where a technology contract involves a patent, it shall indicate the name of the invention-creation, the patent applicant and the patentee, the date of application, the application number, the patent number and the validity period of the patent right. |
| 9 | 846 | Book III Contracts | Chapter XX Technology Contracts | The method of payment for the price, remuneration or royalties under a technology contract shall be agreed upon by the parties, and may be in the form of one-time payment on a one-off basis or installment payment on a one-off basis, or in the form of royalty payment or royalty payment plus an advance payment for the initial fee.<br>Where a royalty payment is agreed upon, the royalty may be calculated as a percentage of the product price, the additional output value resulting from exploitation of the patent and use of the technical secret, the profits or the sales of the product, or by any other method agreed upon. The proportion of royalty payment may be fixed, increasing or decreasing year by year.<br>Where royalty payment is agreed upon, the parties may agree on a method for inspection of the relevant accounting accounts. |

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| 10 | 847 | Book III Contracts | Chapter XX Technology Contracts | Where the right to use and the right to transfer the employee-owned technology belongs to a legal person or an organization without legal personality, the legal person or organization may conclude a technology contract with respect to the employee-owned technology. Where a legal person or an organization without legal personality enters into a technology contract for the transfer of job-related technology, the person who made the job-related technology shall have the right of first refusal under the same conditions.<br>A job-related technology is a technology developed in the performance of a task assigned to a legal person or an organization without legal personality, or by utilizing primarily the material and technical resources of a legal person or an organization without legal personality. |
| 11 | 848 | Book III Contracts | Chapter XX Technology Contracts | The right to use and transfer the non-job-related technology belongs to the individual who made the technology, and the individual who made the technology may enter into a technology contract in respect of the non-job-related technology. |
| 12 | 849 | Book III Contracts | Chapter XX Technology Contracts | The individual who has made the technological achievement shall have the right to identify himself or herself as such in the relevant technological achievement documents and the right to obtain certificates of honor and awards. |
| 13 | 850 | Book III Contracts | Chapter XX Technology Contracts | A technology contract that illegally monopolizes technology, impedes technological progress, or infringes upon the technological achievement of another person shall be null and void. |
| 14 | 851 | Book III Contracts | Chapter XX Technology Contracts | A technology development contract is a contract concluded between the parties concerning research and development of new technology, new product, new technology, new varieties or new materials and their systems. Technology development contracts include commission development contracts and cooperative development contracts. A technology development contract shall be in writing.<br>Where a contract is concluded between the parties concerning the transformation of a scientific or technological achievement of practical value, reference shall be made to the relevant provisions governing technology development contracts. |
| 15 | 852 | Book III Contracts | Chapter XX Technology Contracts | The commissioning party under a commissioned development contract shall pay research and development funds and remuneration in accordance with the contract; Provide technical data and original data; Put forward research and development requirements; To complete collaborative tasks; Acceptance of research and development results. |

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| 16 | 853 | Book III Contracts | Chapter XX Technology Contracts | The developer under a commissioned development contract shall formulate and implement the development plan in accordance with the contract; Rational use of research and development funds; Complete the research and development work on schedule, deliver the research and development results, provide relevant technical data and necessary technical guidance, and help the client master the research and development results. |
| 17 | 854 | Book III Contracts | Chapter XX Technology Contracts | Where a party to a commissioned development contract violates the contract and causes stagnation, delay or failure of the development work, it shall be liable for breach of contract. |
| 18 | 855 | Book III Contracts | Chapter XX Technology Contracts | The parties to a cooperative development contract shall, in accordance with the contract, make investment, including investment in technology; To participate in research and development work according to the division of labor; Cooperate in research and development. |
| 19 | 856 | Book III Contracts | Chapter XX Technology Contracts | Where a party to a cooperative development contract breaches the contract, thereby causing stagnation, delay or failure of the development work, it shall be liable for breach of contract. |
| 20 | 857 | Book III Contracts | Chapter XX Technology Contracts | Where the technology which is the subject matter of a technology development contract has been disclosed by another person, rendering the performance of the technology development contract meaningless, the party may terminate the contract. |
| 21 | 858 | Book III Contracts | Chapter XX Technology Contracts | In the course of performance of a technology development contract, if the research and development fails or partially fails due to insurmountable technical difficulties, such risk shall be agreed upon by the parties; Where it is not prescribed or clearly prescribed, and cannot be determined in accordance with the provisions of Article 510 of this Law, the risk shall be reasonably shared by the parties. If a party discovers any of the circumstances prescribed in the preceding paragraph which may cause the failure of the research and development in part or in part, it shall promptly notify the other party and take appropriate measures to reduce the losses. If the party fails to timely notify and take appropriate measures, thus causing further losses, it shall be liable for such further losses. |

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| 22 | 859 | Book III Contracts | Chapter XX Technology Contracts | For an invention-creation resulting from a commissioned development, the right to apply for a patent shall belong to the developer, unless otherwise provided by law or agreed upon by the parties concerned. Where the developer has obtained a patent right, the entrusting party may exploit the patent according to law. Where the developer assigns the patent application right, the client shall have the right of first refusal under the same conditions. |
| 23 | 860 | Book III Contracts | Chapter XX Technology Contracts | Unless otherwise agreed by the parties, the right to apply for a patent for an invention-creation resulting from a cooperative development shall be jointly owned by the parties. Where a party assigns its jointly owned patent application right, the other parties shall have the right of first refusal under the same conditions.<br>Where one party to the cooperative development declares to waive its joint right to apply for a patent, the other party may file an application separately or the other parties may file an application jointly. Where the applicant has obtained the patent right, the party waiving the right to apply for the patent may exploit the patent free of charge. Where one party of the cooperative development does not agree to apply for a patent, the other party or any other party may not apply for a patent. |
| 24 | 861 | Book III Contracts | Chapter XX Technology Contracts | The right to use and transfer the technical secret resulting from the commissioned or cooperative development, as well as the method for distributing the benefits thereof, shall be agreed upon by the parties; Where there is no agreement or the agreement is not clear, and it cannot be determined in accordance with the provisions of Article 510 of this Law, the parties shall have the right to use and transfer the technology before the same technical solution is granted a patent. However, the developer of the commissioned development may not transfer the research and development results to a third party before delivering them to the commissioning party. |

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| 25 | 862 | Book III Contracts | Chapter XX Technology Contracts | A technology transfer contract is a contract concluded by the right holder who legally owns the technology to assign the rights related to the existing specific patent, patent application and technical secret to another person. A technology licensing contract is a contract concluded by the right holder of the technology who legally owns the technology to license the relevant rights of the existing specific patent or technical secret to another person for exploitation or use. The provisions in a technology transfer contract or a technology licensing contract concerning the provision of special equipment or raw materials for the implementation of the technology or the provision of relevant technical advice and services shall be an integral part of the contract. |
| 26 | 863 | Book III Contracts | Chapter XX Technology Contracts | Technology transfer contracts include contracts for the assignment of patent rights, patent application rights and technical secrets. Technology licensing contracts include contracts for licensing patents, licensing technical secrets, etc. Technology transfer contracts and technology licensing contracts shall be in writing. |
| 27 | 864 | Book III Contracts | Chapter XX Technology Contracts | A technology transfer contract or a technology licensing contract may specify the scope of exploitation of the patent or use of the technical secret, but shall not restrict technological competition and technological development. |
| 28 | 865 | Book III Contracts | Chapter XX Technology Contracts | The patent licensing contract shall be valid only during the duration of the patent right. Where the validity period of the patent right expires or the patent right is declared invalid, the patentee may not enter into a patent licensing contract with any other person for the patent. |
| 29 | 866 | Book III Contracts | Chapter XX Technology Contracts | The licensor under a patent licensing contract shall, in accordance with the contract, license the licensee to exploit the patent, deliver technical materials related to exploitation of the patent, and provide necessary technical guidance. |
| 30 | 867 | Book III Contracts | Chapter XX Technology Contracts | The licensee under a patent licensing contract shall exploit the patent in accordance with the contract, may not license the patent to any third party other than the one agreed upon, and shall pay a royalty in accordance with the contract. |

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| 31 | 868 | Book III Contracts | Chapter XX Technology Contracts | The transferor under the contract for the transfer of the technical secret and the licensor under the contract for the license for the use of the technical secret shall, in accordance with the contract, provide technical materials, provide technical guidance, ensure the practicality and reliability of the technology, and bear the obligation of confidentiality. The obligation of confidentiality provided for in the preceding paragraph shall not restrict the assignor or licensor from applying for a patent, except as otherwise agreed by the parties. |
| 32 | 869 | Book III Contracts | Chapter XX Technology Contracts | The transferee under a contract for the transfer of technical secret and the licensee under a contract for the licensing of the use of technical secret shall, in accordance with the contract, use the technology, pay a royalty and bear the obligation of confidentiality. |
| 33 | 870 | Book III Contracts | Chapter XX Technology Contracts | The transferor under a technology transfer contract shall warrant that it is the legal owner of the technology provided and that the technology provided is complete, correct, effective and capable of achieving the agreed objectives. |
| 34 | 871 | Book III Contracts | Chapter XX Technology Contracts | The transferee under a technology transfer contract shall, within the agreed scope and time limit, bear the obligation to keep confidential the undisclosed part of the technology supplied by the transferor. |
| 35 | 872 | Book III Contracts | Chapter XX Technology Contracts | Where the transferor fails to transfer the technology in accordance with the contract, it shall refund part or all of the royalties and shall be liable for breach of contract; Where any party exploits the patent or uses the technical secret beyond the agreed scope, or, in violation of the agreement, permits a third party to exploit the patent or use the technical secret, it shall cease its breach of contract and be liable for breach of contract; Where a party breaches the agreed confidentiality obligation, it shall be liable for breach of contract. Where licensor is liable for breach of contract, the provisions of the preceding paragraph shall apply with reference to. |

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| 36 | 873 | Book III Contracts | Chapter XX Technology Contracts | Where the transferee fails to pay the royalties as agreed, it shall make up the royalties and pay liquidated damages as agreed; Where it fails to make up the royalties or pay liquidated damages, it shall stop exploitation of the patent or use of the technical secret, return the technical materials and be liable for breach of contract; Where the transferor exploits the patent or uses the technical secret beyond the agreed scope, or licenses the patent or the technical secret to a third party without the consent of the transferor, it shall cease the breach and be liable for breach of contract; Where a party breaches the agreed confidentiality obligation, it shall be liable for breach of contract. Where the licensee is liable for breach of contract, the provisions of the preceding paragraph shall apply with reference to. |
| 37 | 874 | Book III Contracts | Chapter XX Technology Contracts | Where the assignee or licensee exploits the patent or uses the technical secret in accordance with the contract to infringe upon the lawful rights and interests of another person, the assignor or licensor shall be liable, except as otherwise agreed by the parties. |
| 38 | 875 | Book III Contracts | Chapter XX Technology Contracts | The parties may, in accordance with the principle of mutual benefit, stipulate in the contract a method for sharing any subsequent improvement resulting from the exploitation of the patent or the use of the technical secret. Where it was not prescribed or clearly prescribed, and cannot be determined in accordance with the provisions of Article 510 of this Law, the other parties shall not be entitled to share any subsequent technological improvement made by one party. |
| 39 | 876 | Book III Contracts | Chapter XX Technology Contracts | The transfer and licensing of other intellectual property rights, such as the exclusive right of layout-design of integrated circuits, the right of new plant varieties, and the copyright of computer software, shall be governed by reference to the relevant provisions of this Section. |
| 40 | 877 | Book III Contracts | Chapter XX Technology Contracts | Where laws or administrative regulations provide otherwise in respect of technology import and export contracts or patents or patent application contracts, such provisions shall prevail. |
| 41 | 878 | Book III Contracts | Chapter XX Technology Contracts | A technical consulting contract is a contract concluded by one party to provide the other party with the technical knowledge to provide feasibility demonstration, technical forecast, special technical investigation, analysis and evaluation report for a specific technical project.<br>A technical service contract is a contract concluded by one party to solve a specific technical problem for the other party with its technical knowledge, excluding contracts for work and contracts for construction projects. |

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| 42 | 879 | Book III Contracts | Chapter XX Technology Contracts | The client under a technical consulting contract shall, in accordance with the contract, clarify the problem concerned and provide technical background materials and relevant technical materials and data; Accept the work results of the trustee and pay remuneration. |
| 43 | 880 | Book III Contracts | Chapter XX Technology Contracts | The agent under a technical consulting contract shall complete the consulting report or answer the questions within the prescribed time limit; The consulting report submitted shall meet the agreed requirements. |
| 44 | 881 | Book III Contracts | Chapter XX Technology Contracts | Where the client under a technical consulting contract fails to provide the necessary materials and data in accordance with the contract, affecting the progress and quality of the work, or fails to accept or delays in accepting the work result, the remuneration paid shall not be recovered, and the unpaid remuneration shall be paid.<br>Where the agent under a technical consulting contract fails to submit the consulting report within the prescribed time limit or the consulting report submitted is not in conformity with the contract, it shall be liable for breach of contract such as reduction or exemption of remuneration.<br>The client under a technical consulting contract shall bear the losses caused by making decisions based on the consulting reports and opinions of the agent that meet the requirements of the contract, except otherwise agreed by the parties. |
| 45 | 882 | Book III Contracts | Chapter XX Technology Contracts | The client under a technical service contract shall provide working conditions and complete cooperation items in accordance with the contract; Accept work results and pay for them. |
| 46 | 883 | Book III Contracts | Chapter XX Technology Contracts | The agent under a technical service contract shall, in accordance with the contract, complete the service projects, solve technical problems, ensure the quality of work, and impart knowledge for solving technical problems. |
| 47 | 884 | Book III Contracts | Chapter XX Technology Contracts | Where the client under a technical service contract fails to perform its contractual obligations or fails to perform its contractual obligations in conformity with the terms of the contract, affecting the progress and quality of the work, or fails to accept or delays in accepting the work results, the remuneration paid shall not be recovered, and the unpaid remuneration shall be paid.<br>Where the agent under a technical service contract fails to complete the service work in accordance with the contract, it shall be liable for breach of contract such as the exemption of remuneration. |

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| 48 | 885 | Book III Contracts | Chapter XX Technology Contracts | In the course of performance of a technical consulting contract or a technical service contract, any new technology produced by the agent using the technical data and working conditions provided by the client belongs to the agent. Any new technology developed by the client using the work products of the agent belongs to the client. If the parties agree otherwise, such agreement shall prevail. |
| 49 | 886 | Book III Contracts | Chapter XX Technology Contracts | Where the technical consulting contract or the technical service contract does not specify or clearly specify the burden of the expenses required by the agent to carry out the normal work, the agent shall bear the burden. |
| 50 | 887 | Book III Contracts | Chapter XX Technology Contracts | Where laws or administrative regulations provide otherwise for technology intermediary contracts or technology training contracts, such provisions shall prevail. |
| 51 | 1062 | Book V Marriage and family | Chapter III Family relations | The following property acquired by husband and wife during the period of their marriage shall be their joint property and shall be in their joint possession:<br>...<br>(3) earnings from intellectual property rights;<br>...<br>Husband and wife shall have equal right to dispose of their joint property. |
| 52 | 1185 | Book VII Tort liability | Chapter II Damages | Where the intellectual property rights of others are intentionally infringed and the circumstances are serious, the infringed shall have the right to request corresponding punitive damages. |

## Section 2 Specific Contents Related to Intellectual Property Rights in the Civil Code

The Civil Code does not include the intellectual property law as a separate part. A total of 52 articles related to intellectual property law are scattered in the general Provisions, the Real Rights book, the contract book and other relevant provisions, accounting for 4% of the total 1,260 articles. However, the civil code fully affirms the value of intellectual property in its legal attribute. In the aspect of civil legal behavior, the civil Code also fully considers and takes care of the special property attribute of intellectual property, and gives proper guidance on the exercise and protection of relevant rights.

### 1. Clarifying the Object of Intellectual Property Rights

Article 123 of the Civil Code clearly stipulates that "civil subjects enjoy intellectual property rights in accordance with the law", which is considered to be a centralized provision on intellectual property rights with a broad outline, indicating that the Civil Code is the main source of intellectual property laws and regulations. This method of defining intellectual property as civil power from the point of view of the subject of rights indirectly expresses the legislators' recognition of the property of private right of intellectual property and the original intention of legislating the legal power. As a matter of fact, chapter 5 of the General Principles of The Civil Law promulgated in 1986 (implemented in 1987) stipulates that civil rights consist of "property ownership and rights related to property ownership", "creditor's rights", "intellectual property rights" and "personal rights". The third section explains that "intellectual property rights" consist of copyright, patent right, trademark right, discovery right, invention right, etc. However, due to the insufficient research and understanding of intellectual property legal sources, rights content, the relationship between intellectual property system and national policy and legal system, the right attribute and right structure of intellectual property were not mentioned, and the generalization of the scope of intellectual property rights was limited by The Times.[56] In addition, Article 118 of the General Principles of the Civil Law provides for civil liability for infringement of the above rights.[57] On

56) Yang Bin, Cui Fengming. "The Highlights of the Intellectual Property Provisions in the Civil Code and the Institutional Outlook", published in Peking University, January 8, 2021.

57) Article 118 of the General Principles of the Civil Law of the People's Republic of China "where a citizen or a legal person's copyright (copyright), patent right, right to exclusive use of a trademark, right of discovery, right of invention or right of any other scientific or technological achievement is infringed upon by plagiarism, alteration or counterfeiting, he or she shall have the right to demand that the infringement be stopped, the effects be eliminated and damages be compensated".

this basis, Article 123 of the General Provisions of the Civil Law was further formed in 2017, and this time it was changed to Article 123 of the General Provisions of the Civil Code.

This regulation directly confirms the legal status of "intellectual property" from the level of basic civil legal system, and fundamentally brings all civil legal acts related to intellectual property into the jurisdiction of the civil code. At the same time, the regulation lists the objects of intellectual property rights protection, including seven specific types of works, trademarks, trade secrets, as well as "other objects prescribed by law." In this way, it not only fully sums up the connotation of the intellectual property in reality, but also leaves some space for the extension of the types of intellectual property rights in the future.

Article 444 of the Civil Code makes specific provisions on the issue of the pledge right of intellectual property. On the one hand, it emphasizes the economic attribute of intellectual property, the intangible intellectual property, and on the other hand, it clarizes the way of exercising the pledge right of intellectual property. This regulation helps the society to carry out intellectual property pledge activities in a more healthy and orderly way.

**2. Strengthen the Protection of Business Secrets**

Trade secrets, as an essential factor in promoting social and economic development, are of great value. The civil code lists the protection principles and compensation schemes for trade secrets, and relevant provisions further strengthen the protection of trade secrets. "Trade secrets" in China, for the first time in the civil procedure law in 1991, but due to the time of the "general principles of the civil law" the lack of specific provisions of the commercial secret, until 1993, "the anti-unfair competition law" expressly determine business secret is a specific legal rights, many business secrets about the dispute case is the basis of the substantive law.

"Civil code" article one hundred and twenty-three the provisions of the commercial secrets belong to one of the object of intellectual property rights, for the business secret rights in civil law protection system provides the most basic and higher authority and status of the basic legal basis, which not only helps to set up the honest credit market order, will be more conducive to the fundamental principles of civil law and the organic combination of the internal requirement of market economy, We will consolidate good market order and competitive environment. Although the commercial secrets can be included in the category of the object of intellectual property rights, the nature of the business secret and intellectual property such as whether the object of expanding the range of appropriate controversial, but from the civil law general business secret should be brought into the protection of intellectual property rights, market operators to business secret

rights attribute, the form and right protection path, etc have a more clear understanding, But it is also an indisputable fact.

The inclusion of trade secrets in the protection of intellectual property rights in the Civil Code reflects China's attitude and determination to strengthen ipr protection. It is consistent with the policy of creating a law-based business environment and accords with the connotation of long-term and stable rights of trade secrets. At the same time, the civil code of business secret should be brought into the protection of intellectual property rights, also accord with outside countries and international organizations on commercial secret protection mode of the general consensus, but also in the process of a new round of economic transformation in China for foreign investment legal support, help international exchanges and economic cooperation between enterprises, boost business environment optimization and the intellectual property protection level of ascension.

Article 501 of the Civil Code provides for the situation of "trade secrets" learned in the course of contract signing. According to the provisions, "No matter whether the contract is formed or not, the parties shall not disclose or improperly use trade secrets or other confidential information that they have come to know during the conclusion of the contract; If any party divulges or improperly uses such trade secrets or information, thereby causing losses to the other party, it shall be liable for compensation."

**3.The Regulation of Punitive Damages**

Punitive compensation for malicious intellectual property infringement is the focus of judicial and legislative practice of intellectual property in China in recent years. In 2013, the third amendment of the Trademark Law was first introduced into punitive damages. In 2019, the Anti-Unfair Competition Law was revised to include punitive damages. The revised patent law and copyright Law also contain punitive compensation provisions. Since the first introduction of China's Trademark Law in 2013, the punitive damages system has played a positive role in punishing and curbing intellectual property infringement and safeguarding the legitimate rights and interests of intellectual property rights holders. However, due to the trademark infringement cost is relatively low, the infringer profits is relatively high, the holder of the loss is difficult to determine, and the legal standard of compensation not high, the punitive compensation liability for the infringer of shock and awe, the compensation for the holder, for the infringement prevention enough strength, tension deficiencies and problems such as the effect not beautiful. Among cases involving trademark infringement heard by courts at all levels, the proportion of punitive damages awarded

to defendants was low, less than 0.2% between 2014 and 2018.[58] by 2020 it will account for only 6.5 percent,[59] to some extent, this reflects that the actual implementation effect of the punitive compensation system of intellectual property is not very ideal. Article 1,185 of the Civil Code states that "if a person intentionally infringes upon the intellectual property of another person and the circumstances are serious, the infringed person shall have the right to claim corresponding punitive damages". The Civil Code clearly stipulates that in intellectual property infringement cases, based on the subjective intention of the actor, the serious consequences of the infringement and the judicial demands of the right holder, the people's court can order the tortfeasor to bear the punitive compensation liability according to law. The judicial interpretation continues to clarify the application requirements of punitive damages, quantify the amount of basic damages, regulate the application of calculation methods, and clarify the restriction rules.[60] These regulations echo China's recent regulations on punitive damages in the intellectual property law, such as patent law and trademark law. All this highlights the importance China attaches to intellectual property rights as a civil legal right and its determination to protect them.

**4. Institutionalize Technology Contracts Related to Intellectual Property Rights**

Articles 843 to 887 of the Civil Code govern the use and transfer of technology-related intellectual property contracts. Compared with the Technol-

58) In 2019, The "Statistical Analysis Report on the Implementation of Trademark Punitive Damages System" released by "Chaochao Research Institute" and the "Research and Analysis Report on Intellectual Property Punitive Damages (May 1, 2014 -- December 31, 2018)" provided by "Zhichanbao", among the trademark infringement cases heard by courts at all levels, The proportion of cases in which defendants were ordered to assume punitive damages was no more than 0.2%, see Zhang Guangliang, "Construction of The Punishment System for Intellectual Property Damages", Law Sience, No. 5, 2020.

59) According to the research of scholars Such as Wang Lianfeng and Xu Jun, the punitive damages system was introduced into the Trademark Law of China in 2013, and the effective date of the punitive damages clause for trademarks (May 1, 2014). One was applicable in 2015, one in 2016, two in 2017, three in 2018, three in 2019 and six in 2020. A research team of futian District People's Court in Shenzhen, Guangdong Province, found that punitive damages were used as the criterion in only 6.5 percent of trademark cases. See Wang Lianfeng, Jian Jialin, "The legal application of punitive Damages for Trademark Infringement: an empirical analysis based on 123 Judgments in China", electronic Intellectual Property, no.5, 2020, pp. 73-90. See Wang Xinmei, "Construction of Punitive Compensation system for Trademark Infringement", Intellectual Property, No. 5, 2020, pp. 40-54. See Xu Jun, Ye Mingxin, "A Study on the Classification of the Legal Application Requirements of Trademark Punitive Damages", Intellectual Property, No.4, 2021, pp. 79-96.

60) Interpretation (2021) No. 4 of the Interpretation of the Supreme People's Court on the Application of Punitive Damages in The Trial of Civil Cases of Intellectual Property Infringement (adopted at the 1831st meeting of the Judicial Committee of the Supreme People's Court on February 7, 2021, effective from March 3, 2021)

ogy Contract Law of 1987, the Civil Code has revised the structure, concept, purpose, terminology and obligation setting of technology contract to varying degrees. This revision not only responds to the need of building an innovative country in China, but also reflects the call and requirement of comprehensively strengthening intellectual property protection. It also provides clear judgment guidance for the judicial practice of intellectual property, which has very distinct characteristics of The Times and practical significance.

Specific content, Civil Code will technology license contract as an independent type of technology contracts, and to expand its coverage to the patent and the technical secret, has been clear about the technology and general civil contracts in such aspects as content, lifting, implementation and invalid, highlights its in contract law system and the important position in the field of intellectual property rights and the rule of unique. At the same time, clarifying the purpose of the technology contract has important judicial significance for judging whether the legal termination conditions have been achieved, determining the liability for breach of contract and the performance of the subsequent technology contract. In addition, the non-essential clause of individual remuneration right should be deleted, and the correspondence between the technical contract clause in the Civil Code and the patent Law and other special laws should be maintained, and the simplicity of the Civil Code clause should be moderate. It can be said that the relevant provisions of the Civil Code on technology contract not only reflect the commonality between technology contract and general civil and commercial contract in terms of internal mechanism, applicable scenario and legal effect, but also maintain the exclusivity of technology contract in terms of coverage, quasi-application of clauses and legal effect.

Look from change amplitude, the civil code of technology contract shall be discussed with forty-five law, no change of only eight, although most changes does not belong to the substantial changes, but the whole, the technology contract section arrangement more reasonable some fine, content more, pay more attention to the parties to a contract the parties balance of interests and more respect the autonomy of the parties. In this way, the practical operation of technology contracts will be more reasonable, and it will help to promote the innovation potential and enthusiasm of intellectual property practitioners, so that the transformation of science and technology and intellectual property achievements will be more conducive to the implementation of innovation-driven development strategy. It can be said that the setting of the chapter of technology contract timely responds to the requirements of China's current development, and provides a new paradigm and a new pivot for the transformation of China's technological achieve-

ments and intellectual property rights.

## Chapter 3 Application Relationship between Civil Code and Intellectual Property Law

### Section 1: Intellectual Property law under the Civil Code

#### 1. Basic Logic of Application of Civil Code and Intellectual Property Law

As the basic law, superior law and general law in the civil field of China, the Chinese civil Code has the function of governing the legal norms in the civil field.[61] According to Article 88 of the Legislation Law of the People's Republic of China on the application of laws, the upper law is superior to the lower law. The civil Code, as the upper law, is naturally more effective than the intellectual property law and has the priority of application.[62] Article 92 provides that the special law is superior to the general law, provided that the prerequisite is a law enacted by the same agency. Based on the above analysis, the intellectual property law as the special legislation in the field of intellectual property rights, however, from the level to analyze its enactment organ, belongs to Xia Wei Fa, as a special law of its relevant content and included in the civil code, only if there are no relevant provisions in the civil code content priority applicable intellectual property laws, fully embodies the "civil code" as the "basic law" in the civil field.

From the perspective of the basic logic of the application of the Civil Code and intellectual property law, it can be specifically expressed as follows: 1. The Civil Code is the basic law in the civil field, and has the function of governing other laws in the civil field, so it includes the governing of intellectual property law. 2. The Civil Code is the basic law in the civil field, so the general norms made by the Civil Code are also applicable to intellectual property rights. 3. From the perspective of the enacting organs, the Civil Code belongs to the upper law and has the conditions of priority application. 4. From the perspective of specific legal norms, intellectual property law is a special norm in the field of intellectual property. In the absence of specific provisions in the Civil Code, it has the effect of priority application.

61) See Liu Tiegang, "Revision of the Separate Law on Intellectual Property Under the Jurisdiction of the Civil Code", Contemporary Law Review, No. 2, 2021, pp. 24-33.

62) Depending on the issuing department of the law, the law issued by the upper authority is more effective than that issued by the lower authority. In China, the Civil Code is issued by the National People's Congress, while the intellectual property law is issued by the Standing Committee of the National People's Congress, so the civil code is naturally more effective than the intellectual property law.

From such a basic logic, the future development of intellectual property law needs to return to the basic norms of the Civil Code. But in general, the Civil Code can provide theoretical support for the intellectual property law, and secondly supplement the applicable value, but also to prevent arbitrary application of civil law to destroy the balance of the intellectual property system.[63)]

**2. Special Provisions of the Civil Code Governing Relations**

In order to prevent the application of the Civil Code and other laws from upsetting the balance between laws, special provisions are made in the Civil Code. For example, article 11 of the Civil Code stipulates that "if other laws have special provisions on civil relations, such provisions shall be followed". According to this article, although the Civil Code is the superior law of the intellectual property law, this special norm makes the intellectual property law can be applied as a special law first. When there are special provisions in the intellectual property law for civil relations in the field of intellectual property, the intellectual property law shall be applied preferentially, and the Civil Code shall not have the effect of preferential application. Article 11 of the Civil Code can effectively prevent arbitrary application of the Civil Code from destroying the balance of the intellectual property system. For another example, article 188 of the Civil Code stipulates that "the limitation of action for the protection of civil rights shall be three years, if the law provides otherwise".[64)] In the current intellectual property related legislation, only the Patent Law provides the prescription of action for the temporary protection of patent infringement and invention patent.[65)] And the civil Code protection of the same statute of limitations, three years. But in the patent law before its rules of litigation protection lasting for two years, after three years of patent law is amended as also for maintaining the basic principle of the equal protection of civil rights, such as for the provisions of the statute of limitations is different, also need to first apply when applicable law, the conflict with the basic principles of the civil code of special provisions can only through revising the law to adjust.

63) See Kong Xiangjun, "The relationship between the Civil Code and the application of intellectual Property Law", Intellectual Property, No. 1, 2021, pp. 3-19.

64) Article 188 of Civil Code "the limitation of action for petitioning a people's court for the protection of civil rights shall be three years. Where the law provides otherwise, such provisions shall prevail".

65) Article 74 of Patent Law "the limitation of action for infringement of a patent right is three years, counting from the date on which the patentee or any interested party became or should have become aware of the infringing act and the infringer".

In addition, there are articles 877 and 887 in the Civil Code[66],special provisions are also stipulated for technology contracts, and the special provisions of intellectual property law on technology contracts can be applied first.

### 3. Application of Basic Principles of Civil Code and Intellectual Property Law

"From the perspective of comparative law, it is not the norm to enumerate the basic principles in the general provisions of the civil code",[67] there is some controversy in translating general legal thought into culture. In The Civil Code of China, the general legal thought of civil law is still clarified and the six basic principles are stipulated.[68] As a general principle of law in the civil field, it has wide applicability and great discretion. Therefore, there are two situations in which the basic principles of civil law can be applied in practice: one is when the basic principles of civil law are not expressly stipulated in the civil law; Secondly, the basic principles should be applied when the results caused by the application of relevant specific norms will directly violate the basic principles of civil law.

From this analysis, the basic principles of the Civil Code are to coordinate civil legislation and reduce the conflicts between relevant civil legislation, which is of guiding significance. Therefore, the basic principles of the Civil Code have the same effect on the intellectual property law in practice, and the basic principles of the civil law can only be applied when the intellectual property law does not provide for problems arising in the field of in-

66) Article 877 of civil Code of the People's Republic of China "where laws or administrative regulations provide otherwise in respect of technology import and export contracts or patents or patent application contracts, such provisions shall prevail. Article 887 Where any law or administrative regulation provides otherwise in respect of technology intermediary contracts or technology training contracts, such provisions shall prevail".

67) Scholar Fang Xinjun argues in his paper: "If observed from the level of comparative law, the legislative example of setting general principles in the civil code originated from Germany, but there is no provision on basic principles in the German Civil Code, which directly starts with the provision on" human ". The Civil Code of Japan (hereinafter referred to as "The Japanese People"), which followed Germany in terms of style, was completely consistent with the German Civil Code in the original version. The civil Code of Taiwan added a chapter of "Laws", mainly about the sources and interpretations of laws, without listing the basic principles. See Fang Xinjun. "The Realization of The Integration of The Internal System and the Civil Code System -- Comments on the Basic Principles of The General Provisions of Civil Law", Peking University Law Journal, No. 3, 2017, pp. 567-589.

68) Article 5 of Civil Code of the People's Republic of China "in engaging in civil activities, a civil subject shall abide by the principle of voluntariness and establish, alter or terminate civil legal relations according to its own will. Article 6 in engaging in civil activities, a civil subject shall abide by the principle of fairness and reasonably determine the rights and obligations of each party. Article 7 In engaging in civil activities, a civil subject shall abide by the principle of good faith, uphold honesty and abide by its commitments. Article 8 In engaging in civil activities, a civil subject shall not violate the law or public order or good customs. Article 9 Civil subjects shall engage in civil activities conducive to the conservation of resources and the protection of the ecological environment".

tellectual property. When the application of specific provisions in an intellectual property law will directly contradict the general legal principles, the basic principles shall be applied, which is also the basic need to maintain the stability and stability of the Civil Code. Although there are different views on the establishment of basic principles in the Civil Code, this paper only analyzes the application relationship between the basic principles and intellectual property law after they are clarified.

## Section 2 Intellectual Property Provisions of Civil Code and Intellectual Property Law

### 1. Object of Intellectual Property Rights

Article 123 of the Civil Code stipulates that "civil subjects enjoy intellectual property rights in accordance with the law", which defines the object of intellectual property rights by enumerating.[69] it expresses the legislators' recognition of the property of intellectual property as private right, and ensures the stability of legal norms through the legislative model of "enumeration + cover". The civil Code has a general stipulation on the object of intellectual property, while the intellectual property law has a more specific stipulation on the object of intellectual property. From the perspective of the relationship between the two, the provisions of the civil Code on the object of intellectual property reflect the guiding role of the Civil Code in intellectual property law, and absorb the achievements of the development of China's intellectual property system in terms of ensuring the stability of legal norms. In the legal norms of the object of intellectual property, the provisions in the Civil Code and the intellectual property law maintain a complementary structure. Therefore, the Civil Code provides the basic law support for the intellectual property law in terms of application, making the development of intellectual property law more in line with the needs of the development of socialist rule of law with Chinese characteristics.

### 2. Punitive Damages

According to the stipulations of article one thousand one hundred and eighty-five of the civil code of the infringement of intellectual property rights system of punitive damages, the clause formally established in the field of intellectual property rights general specification of punitive dam-

69) Article 123 of the Civil Code of the People's Republic of China "civil subjects shall enjoy intellectual property rights according to law. Intellectual property rights are exclusive rights enjoyed by the right holder in accordance with the law with respect to the following objects :(1) works; (2) inventions, utility models and designs; (3) Trademarks; (4) Geographical indications; (5) Business secrets; Layout-design of integrated circuits; New varieties of plants; (8) other objects provided for by law".

ages, for the law of the People's Republic of China copyright law "patent law of the People's Republic of China to introduce the punitive damages system provides guidance. The Trademark Law of the People's Republic of China introduced punitive damages in 2013 and revised and increased the amount of punitive damages in 2019.[70] Punitive damages for infringement of intellectual property rights were introduced in the Civil Code, and then China's Copyright Law and Patent Law were revised to introduce punitive damages system, and the amount of compensation followed the provisions of the Civil Code. So far, the provisions of the Civil Code on punitive damages for intellectual property rights will lead to a series of implementation details of punitive damages for intellectual property infringement, which will further promote the protection of intellectual property rights. From this perspective, the provisions of the civil code of China are also leading the development of China's intellectual property law, in the legislative level, the field of intellectual property rights law revision is also in line with the "civil code" of the basic regulation, so in practice for the civil code of terms of intellectual property rights and intellectual property law will also presents the application of the complementary relationship.

**3. Systematic Specification of Technical Contract**

According to articles 843 to 887 of Chapter 20 of the Civil Code, the legal norms governing contracts for intellectual property rights related to technology are provided. The provisions on technology contract in The Civil Code of China respond to the construction needs of an innovative country, and the technology contract clauses in the Civil Code correspond to the quasi-application of provisions in the Patent Law of the People's Republic of China and other separate laws. In the relationship between the two, it also presents a complementary pattern. In the Patent Law of the People's Republic of China, there are no specific details about technology contract, and in Article 10, Article 12 and Article 47, it is generally stipulated that patent license and transfer need to conclude a written contract, without specific details. Therefore, there is a complementary application relationship between the intellectual property provisions of civil Code and the patent law. In accordance with the basic norms of the Civil Code, the application will be combined with specific cases.

**4. Business Secrets**

According to Article 123 of the Civil Code, trade secrets are clearly defined as the object of intellectual property, which provides the highest basic

70) In 2019, the revised Trademark Law of the People's Republic of China changed the amount of compensation from 1 to 3 times in 2013 to 1 to 5 times.

law basis for the right of trade secrets in the civil field. In the original legal norms, trade secrets are generally protected by the Anti-Unfair Competition Law. There has been disagreement over whether trade secrets belong to intellectual property rights.[71] Now from the legislative level to end this dispute, trade secret right as the object of intellectual property rights, and then face the problem is how to use the field of intellectual property law to protect the trade secret right as the object of intellectual property rights. At present, there are no specific provisions in the specific laws related to intellectual property, so the next step of the revision of the specific laws in the field of intellectual property is to respond to the trade secret right as the object of intellectual property, and coordinate with the Civil Code and the Anti-Unfair Competition Law. The civil Code includes trade secrets in the scope of intellectual property protection, reflecting China's attitude towards strengthening intellectual property protection. At present, the protection of trade secrets still needs to be adjusted according to the Anti-Unfair Competition Law, and the provisions of the Civil Code also need to comply with the general legal principles in the intellectual property law.

## Chapter 4 Some Controversies and Problems

### Section 1 The Connection and Coordination between the Civil Code and Various Intellectual Property Laws

#### 1. Whether Codification of Intellectual Property Rights is a Necessary Choice

There are two approaches to codification of intellectual property rights in China. One is that the intellectual property system is codified. The second is to formulate a code of intellectual property rights. The main reasons for the development of intellectual property codification include: first, the country's need for competitive advantage; secondly, the codification of intellectual property rights has successful precedents in comparative law and business.[72] third, perfect the right system of civil code; fourth, the needs of modern social economy and social development;[73] fifth, to solve the existing problems of intellectual property law,[74] and so on.

71) See Lin Xiuqin, "Theoretical Basis of Intellectual Property Rights of Trade Secrets", Social Sciences of Gansu, No. 2, 2020, pp. 11-20.

72) See Wu Handong, "Intellectual Property Rights Should Be independently Compiled in the Future Civil Code", Intellectual Property,No. 12, 2016, pp. 3-7.

73) See Liu Chuntian, "Rationality of the Establishment of Intellectual Property In China's Civil Code", Intellectual Property, No.9, 2018, pp. 81-92.

74) See Wang Qian, "Thoughts on incorporating Intellectual Property law into the Civil Code," Intellectual Property, No. 10, 2015, pp. 16-19.

Undeniably, there is a connection between the reasons for the codification of intellectual property and the codification of intellectual property law, but it does not constitute a necessary connection. First, the increasing importance of intellectual property in the development of modern society leads to the conclusion that it is necessary to strengthen the protection of intellectual property. The way of protection can be to improve the legislation related to intellectual property, but not necessarily to codification. Second, although Professor Wu Handong pointed out: "The incorporation of intellectual property into codification is the historical coordinate of the movement of codification of civil law since the 1990s." After reviewing the beneficial experience of codification of intellectual property in other countries, he argued that intellectual property should be independently compiled in China's Civil Code. However, the successful experience of codification of intellectual property in comparative law, As the reason for the codification of intellectual property law in China is obviously not sufficient, there are also counterexamples of not codification of intellectual property law in the comparative law, the persuassibility of this reason is limited. Intellectual property plays an important role in the economy of the United States and Japan, but there is no development of intellectual property codification because of its importance. Third, it is reasonable to codify intellectual property rights to improve the rights system of the civil code. However, as Professor Liang Huixing pointed out: "Intellectual property law although have in common, but the lack of available for extracting common factor between (that is, as the intellectual property rights make up the first chapter of the common regulations under the" general rules "), if you want to into the civil code of intellectual property law, it is to extract the common factor, like civil code abstracts some general rules, but it is basically impossible". Therefore, in order to improve the rights system of the civil code of the reason for the existence of a substantial conflict, is obviously not sufficient. Fourth, the deepest reason for advocating the codification of intellectual property is that the development of codification reflects the modernization and rationality, and can promote the development of modern social economy and society. But from the other side, can we not achieve its goal without the codification of intellectual property? Clearly there is no necessary connection. Fifth, the development of intellectual property codification can solve many problems in the current intellectual property law, not to mention whether it can solve the existing problems. Is it impossible to solve the problem by perfecting the existing specific method of intellectual property right? Obviously, the answer is not inevitable. Whether the development of intellectual property codification is an inevitable choice for the development of intellectual property law is still worth thinking about.

## 2.The Defects of Intellectual Property Law Research Methods

The reason for the controversy caused by the development of intellectual property codification in China is that the logic of intellectual property law and civil law is not clear. In view of the important difference in rule design between property rights of unembodied objects and property rights of embodied objects and the fact that common factors cannot be extracted from various types of rights in intellectual property law, copyright law, patent law and trademark law should be kept separate legislation. In terms of the current research method of intellectual property rights in China,[75] from the perspective of intellectual property discipline construction and development, it is an immature and non-standard research method. There are several defects:

The first is the lack of a reasonable division and clear orientation of intellectual property law discipline. While focusing on the comprehensive description of the nature of the intellectual property rights but in intellectual property law as a independent discipline, while in other subject content, should not be dismembered by other disciplines, led to intellectual property law subject positioning chaos, so the intellectual property law research needs in a clear definition and classification on the basis of study, to avoid subject positioning chaos phenomenon.

The second is the lack of a unified, rigorous and scientific logical system. The study of intellectual property law relies too much on the legislative content and judicial hotspot of intellectual property law, which seems to be a lack of logical legal introduction, thus reducing the status of intellectual property theory system. The pluralistic and comprehensive characteristics of intellectual property law make intellectual property law have the nature of both private law and public law. However, the nature of private right determines that the core content of intellectual property law is still private law. Therefore, it is necessary to return to the core content of intellectual property law, and let the content of public law return to the theoretical system of public law research. The study of private law is the core of building the basic theoretical system of intellectual property law.

75) Scholar Li Jianhua pointed out in his thesis: “The research content of intellectual property law includes both private law and public law. There are both substantive law and procedural law. There are domestic laws, international conventions and international treaties. Both law content, also have administrative science and other content. To sum up, the current research methods of intellectual property law not only integrate the normative contents of different legal properties of intellectual property law, but also integrate the contents of many disciplines such as law and administration. In this paper, this kind of intellectual property law research method is called “the combination of various laws” comprehensive research method. See Li Jianhua, “Private Law Research Paradigm of Intellectual Property Law in the Post-civil Code Era”, Contemporary Law Review, No. 5, 2020, pp. 47-59.

Thirdly, the research of the general theory of intellectual property law is insufficient, and there is no logical connection between the general theory and the sub-theory. In China, the intellectual property law circle has a relatively weak research on the basic theory of the general theory of intellectual property law, which is in sharp contrast to the enthusiasm of the research on the division of intellectual property, and has not formed a systematic research on intellectual property, so it has not reached the necessary state that the division is the specific development and support of the general theory.

From the above analysis, it can be concluded that the development of intellectual property codification needs to form its independent research paradigm, basic category and basic theoretical system to effectively avoid disputes and form a "common factor" in the field of intellectual property. Then it will be possible for intellectual property law to be "codified" or "codified". How to change the research method of intellectual property law requires further exploration, analysis and demonstration by scholars.

### 3. Maintain the Status Quo to Maintain the Defects of the Legislative Pattern of the Separate Law on Intellectual Property Rights

Intellectual property law "the fit" research methods from the side reflects the special law of intellectual property legislation pattern directly affect the research method of the intellectual property law, the relationship between the independence intellectual property special law is relatively high, lead to more difficult to form the understanding of the system is, the development of the intellectual property administrative procedure form the block.

In order to realize the connection between the Civil Code and the intellectual property law, Professor Zhang Yimin once proposed a plan: "To formulate the general principles of intellectual property law, summarize and coordinate the entire intellectual property legal system, and make up for the gaps in the separate intellectual property law". Its purpose is not to deny the application of intellectual property rights to civil law, but only to the general sense of intellectual property laws, but also to help form the system of intellectual property law itself. "Civil code" in China are not independent intellectual property rights into compiled background, the scholars Yang Xudong said: "as a civil rights of intellectual property rights in the context of its systematic construction of the unfinished, return have a logic system of civil law conflicts, systematic need to complete intellectual property rights, intellectual property system systemized, after the completion of its" into "will also be potential open." Scholar Wu Handong believes that "in China's" civil Code era ", legislative preparation schedule should be mentioned in the formulation of the basic law of intellectual property, which is the legislative choice of the basic law after the "decodification" of intellectual property, and also an institutional arrangement to seek common

values and norms of various separate laws of intellectual property ".[76] It is not difficult to find from the viewpoints of the above scholars that they all affirm the systematic development of intellectual property rights. Although there are different purposes for the scholars to explore the development of intellectual property system law, they all aim to seek the common value of the specific method of intellectual property rights.

Through intellectual property "civil code" will not "into" the legislative choice, reflect the intellectual property law in the legislation pattern of defective, as the civil right of intellectual property rights are still lack of systematic, this also is in the "civil code" after the release of scholars put forward first need to realize the systematic development of intellectual property right system, to talk about the reasons for the development of the intellectual property administrative procedure idea. Therefore, the systematic development of Intellectual property system in China in the future still needs the joint efforts of legislators and scholars.

## Section 2 Other Specific Existing Problems

### 1. Intellectual Property Right Attribute Type Connection Problem

Although Article 123 of the Civil Code stipulates that intellectual property is a kind of civil rights, the scholar Li Jianhua, on the basis of summarizing the academic research on the attribution of intellectual property, believes that "the view that intellectual property belongs to civil rights is not proper and lacks sufficient basis and argument. In addition, only thought that "civil code" overview of intellectual property regulation will be the viewpoints of intellectual property rights as civil rights legislation according to the defect of inadequate, "civil code" as the construction of law system of the basic law, the interview right type requires not only comprehensive regulation, but also provides other rights type, If article 125 provides for equity and other investment rights, they shall be commercial rights; Article 128 provides for the types of private rights such as consumer

76) See Wu Handong, "On The Basic Law of Intellectual Property in China in the Era of Civil Code", Intellectual Property, No. 4, 2021, pp. 3-16.

rights ",[77] it can be seen that only from the provisions of the Civil Code, there is a dispute on the view that it is a civil right, which needs further study and discussion.

Some scholars believe that "intellectual property law should be divided into the commercial law system rather than the civil law system." However, although there is a certain connection between the intellectual property with the nature of private rights and the commercial rights, which are also private rights, there is a lack of sufficient and convincing arguments for dividing the intellectual property law into the commercial law system rather than the civil law system.

In addition, the dispute of intellectual property rights attribute will also involve the independent discipline status approved by the Chinese intellectual property law and intellectual property rights of independent private right type confirmation problems, and returned to the systematic development and intellectual property in the study of relationship between "civil code", you also need to stay after the systematic development of China's intellectual property system to determine the conclusions.

**2.Other Specific Issues**

Firstly, the rights and interests of trade secrets, especially the technical secrets and their protection, are obviously different from other intellectual property rights and their protection, such as patent right, registered trademark right and copyright. Most countries protect trade secrets under the framework of competition law, and China is also mainly regulated under the Anti-Unfair Competition Law. Article 123 of the Civil Code directly puts trade secrets in the group of intellectual property objects. In the future, one of the tasks of the Civil Code is to strengthen and integrate the legal protection of trade secrets in the civil law and the Anti-Unfair Competition Law.

Secondly, China's civil Code, Trademark Law, Anti-Unfair Competition Law, Patent Law and Copyright Law have stipulated the punitive compensation system for intellectual property rights, but the subjective constitutive

77) Although the Civil Code provides for intellectual property rights, the independence of intellectual property rights should not be denied by attributing intellectual property rights to civil rights. Commercial law is a special law of civil law, but commercial rights do not belong to civil rights. Although the status of commercial law as an independent legal department is controversial at present, the status of commercial law as an independent discipline has been widely recognized. Intellectual property law is a special law of civil law, but intellectual property should not be classified into the category of civil rights. The independent private right type of intellectual property should be confirmed, and the independent discipline status of intellectual property law should also be recognized. See Li Jianhua, "Private Law Research Paradigm of Intellectual Property Law in the Post-civil Code Era", Contemporary Law Review, No. 5, 2020, pp. 47-59.

elements have two legislative expressions: intentional infringement and malicious infringement. And, generally speaking, malice is limited to subjective intent, which is not the same. Therefore, the trademark law, anti-unfair competition law and the provisions of China's civil code are inconsistent.

Thirdly, according to the understanding of Chinese legal circles, on the one hand, the special law is superior to the general law. Article 11 of the Civil Code provides that where other laws have special provisions on civil relations, such provisions shall prevail. Since trademark law, patent law, copyright law and other intellectual property laws are special laws of civil law, there is a logic of law application that "special laws are superior to general laws". On the other hand, the new law is superior to the old one. Compared with trademark law and anti-unfair competition law, the civil code is a new law, and there is a logic of law application that "the new law is superior to the old law". Then, how to solve the conflict between the two logic of law application? In accordance with paragraph 1 of Article 94 of the Legislation Law, if a new general provision on the same matter is inconsistent with an old special provision between laws, and the application cannot be determined, the Standing Committee of the National People's Congress shall make a ruling. Accordingly, the standing Committee of the National People's Congress will be required to further clarify the inconsistencies between the above-mentioned provisions of the Trademark Law and the Anti-Unfair Competition Law and the Civil Code.

## Conclusion

The history of compilation of China's Civil Code is of special historical significance, which reflects the development history of the society. The birth of the civil code also reflects the improvement of China's civil legal system and the level of social development. The relationship between the civil Code and the intellectual property law has always been controversial. In the era after the implementation of the Civil Code in China, the research on the application relationship between the intellectual property law and the civil code still needs constant reflection and discussion. First, the systematic development of Intellectual property law in China needs to be improved. After the systematic development of intellectual property law, there are still many ways to choose. Second, there is still a dispute about the property of intellectual property right, and its origin is still the lack of basic theoretical research on intellectual property law, and the lack of systematic research on intellectual property law.

The implementation of the civil code of China and the application of the intellectual property law relations as China's civil code of practice and the

development of China's intellectual property law changes, such changes may make the intellectual property rights in the civil code, may also make the form system of branch of independent intellectual property rights, obtain the independent discipline status recognition, independent private right type of confirmation. No matter how it develops, it will promote the further development of intellectual property in China and form a barrier for intellectual property protection.

# Essay

## Politics in Europe: From National to Supranational Governance*

*Dr. Thomas Poguntke*

### Introduction

I am very glad to be here and I will talk about Politics in Europe – the title is: From national to supranational governance. I will start with some methodological remarks about how to do comparative politics and then I will briefly talk about the differences between the traditional way of looking at political systems: the distinction between presidentialism and parliamentarism. I will also talk about the principal-agent perspective that is another way of looking at the same thing and I will then talk more about a more innovative approach to understanding how political systems work. It was given to political science by Arend Lijphart and is about majoritarian and consensus democracy. I will conclude with two sections that are based on my own work. I will ask two questions: First, what does the European integration process, what does the European Union actually mean for the way government works in this part of the world? Second, from a more general perspective, are there trends towards the presidentialization of modern democracies? Let me start with the boring part, with methodological remarks.

### Some Notes on Typologies

Why do we do classifications and typologies? It is a very simple tool, but it is worth reflecting why we do it. We want to reduce and simplify the bewildering empirical reality to a manageable level of complexity; hence it is a reduction of information. What we do is to compare objects of analysis and try to identify similarities and differences. Basically it is an ordering exercise not different from what natural sciences do. We think about the relevant aspects we want to look at when we compare political systems, what matters and what does not matter. It does not matter for us as political scientists whether the flag of a country is red or yellow. This does not tell

* This "Essay" is based on a special lecture at Nihon University, College of Law, 21th October 2019.

anything about the power relations – instead we identify relevant empirical dimensions.

That is the general idea behind it and the simplest way of doing this is a classification. It is the first brick of a more complicated intellectual building. Basically, a classification is an exercise in assigning all objects that I want to study to separate distinct categories. I used to say – that is no longer politically correct - that identifying men and women is exhaustive. As we know in the age of Facebook, we have many more different genders, so we have moved on there, but initially you could assign people to either men and women and this is an important simple classification, and it is still widely used. Basically you have two classes which are separate, they are clearly distinguishable - and that is, of course, the debate nowadays - but originally you could assign everybody to one of the two classes. That is the simplest version and we know more complicated classifications. Of course, you can use income, you can use all the kinds of things.

Often this is not enough, so we go one step further and combine classifications in order to build typologies that are based on several dimensions. Socioeconomic status is one of these typologies. You have social background, you have income, maybe you have education and then you combine these different dimensions to say certain people are in a higher socioeconomic category and others are in a lower socioeconomic category. You can do the same with political systems, and I will show you the example in a minute.

Theoretically and conceptually there are different variations of types. The most important one that goes back to Max Weber is the ideal type, that is a theoretical construct. This is important, because we often see in the literature that this gets confused with empirical types. An ideal type is a theoretical construct and we know that it does probably never and nowhere exist, but it is a heuristic - something that we use to understand reality. Furthermore, there are different empirical types like modal types - those which are most frequent - or polar, another word is extreme, types. Now what is a problem with a typological approach?

In the first instance, typologies are mainly descriptive - not necessarily, some are, some are not - but typologies are not necessarily very theoretically guided. In addition, there is a tendency in the literature to confuse ideal types with the empirical reality, i.e. to confuse theoretical constructs with the real world. Also, they are fairly static by their very nature because

they are based on a system of classes. They are not well suited for capturing dynamism like change over time, and of course there are the general measurement problems.

The change of classes and types over time is a problem. When do you go from one type to the next, where exactly are the boundaries? In addition, this problem is quite frequent, especially in my field in party research, we find many typologies which are not really typologies but which are mainly talking about certain main or modal types. Even some of the most important contributions to the literature like the cartel party thesis or the literature on the mass party and the catch-all party thesis – if you really look at them conceptually they are only talking about the modal types. They don't provide a full typology which allows us to assign all parties in the party system to one type within this typology. As I used to tell Richard Katz and Peter Mair, they were very silent about my favorite subject when I was younger, which were the Green parties. If you read the cartel party thesis, you do not really know where the Green parties fit. This is not a fundamental criticism; it is just a remark that if you really want to do a typology, you should theoretically be able to put all cases in there.

## Regime Types

So far for my methodological remarks – I will now briefly talk about an application of a typology and I start with something that is most likely familiar to you, the distinction between parliamentary and presidential systems. Here you see that three dimensions are combined - this goes back to basic work by Arend Lijphart who said, when we want to distinguish a parliamentary from presidential system we need to know, first, how the executive is dismissed. You cannot get rid of the President for political reasons. In the United States, they tried to get rid of Donald Trump through an impeachment, but this was not for political reasons. Even though this process needs a qualified majority in the Senate, they need to show that the President has done something legally wrong. It is not about political confidence, whereas the Prime Minister and cabinet in a parliamentary system depend on the confidence of parliament; they can be sent home for political reasons. If the majorities change, if the majority party falls out with the Prime Minister, they can send him home for political reasons. The second dimension is the emergence of the executive and that is very important. The President is elected by the voters. It can be indirect as in the United States, where it goes through an Electoral College, but it is a vote and the legitimation by the people.

The Prime Minister, on the other hand, is selected by the legislature. Not all parliamentary systems require an active vote for the Prime Minister to assume office - some parliamentary systems function on the basis of toleration. This means that the Prime Minister stays in office as long as he or she is not voted out. Frequently, the Prime Minister is simply appointed by the monarch. The third dimension concerns the form of the executive. Conceptually, the President is the government and all his cabinet members are - literally - secretaries. They derive their power, their competence, their legitimacy from the President while, in a parliamentary system, the ideal is that there is a collective executive, the cabinet governs, not the Prime Minister alone. I have already mentioned the word ideal, I am talking about ideal types and now we take this typology and see how well the reality fits this typology, and that is how we use these typologies: To analyze the reality, and I will now talk about the strengths but also the limitations of this method.

In the world of ideal types there is simply the parliamentary system on one side and presidential system on the other side. In the former, the voters vote for the legislature, and executive and cabinet are part of the legislature. There is no separation between the executive and the legislature. In an ideal-typical presidential system there are two chains of legitimacy. One goes to the legislature and one to the President, and the President simply appoints his secretaries, that means his cabinet. However, beyond this strict institutional separation of powers there must be – in the real world – functional interlocking, which means that the powers have to do things together, otherwise the system of government will not function. However, this interlocking does not always function well.

Now, when we look at the at the real world, there is an almost ideal-typical example of a parliamentary system and this is the political system of the United Kingdom. Her Majesty's Government is part of Parliament and the electoral legitimation goes from the voters to the House of Commons and the House of Commons selects the Prime Minister. The monarch, we have seen this in the crisis of over Brexit, the monarch is purely ceremonial. At the end of the day, there is no real power with the monarch who is directed by the Prime Minister to do what he or she wants or what the majority of the House wants. The Prime Minister acts for the House as long as he is tolerated by the House, that means, as long as there is no vote of no-confidence. If you look to Britain during the Brexit crisis, you see that right from the beginning of his government, Boris Johnson was strictly speaking without a majority, so was Theresa May in many crucial decisions: Hence, what we

saw during the Brexit crisis was a deviation from the ideal type, because if you read the textbook accounts on the British system you will always find references to the fact that, as soon as the Prime Minister loses a major vote in the Commons, he or she will resign. However, this did not happen, so Britain lived through a very interesting period of time politically, but we saw that the government in the British system cannot survive in the medium term without a majority, so that situation was bound to resolve itself sooner or later.

When we look at the U.S. system of government, which is fairly close to an ideal-typical presidential system, things get more complicated. We see the election of the House of Representatives, the Senate and of the President by the people, and there are many interconnections; there is an interlocking of powers. In the ideal world of the presidential system, the secretaries of state are simply the servants of the President. However, in the real world of the U.S. system a candidate for cabinet, e.g. candidate for being a Secretary of State, needs to survive a hearing in the Senate in order to assume office – this is what is meant with interlocking powers.

Now, I said before that there are some criticisms about the typological approach. Often these typologies are not sufficient to capture all cases and the old typology by Arend Lijphart is an example of this because initially it could not account for cases like France and any other countries, which have a mixed system, a so-called semi-presidential system. Here we see a directly elected President with significant powers who is completely independent of parliament - parliament cannot send him home - who coexists with a Prime Minister who needs the confidence of parliament. What we see here is a combination of the presidential logic with the parliamentary logic. A President who is popularly elected and cannot be removed under parliamentary logic coexists with a Prime Minister who needs the confidence of the house and who needs to govern with the national parliament.

This is one example where the binary typology of parliamentary vs. presidential system does not fit, but there are others. Switzerland is a country where the government emerges from the national assembly but the National Assembly, which has that has two chambers, follows a so-called magic formula which determines the composition of an oversized coalition government. The same parties have formed the government for many years and it does not matter very much which way the election goes. At the same time much of the legislation needs to go through a vote by the population, through a plebiscite. I will not go into details here, the point simply is that

this is another example where the simple typology does not function. Having said this, Switzerland is a very peculiar case when it comes to its tier of direct democratic decision-making.

## A Principal-Agent Perspective

Let me move on to the next part of the presentation that is delegation and accountability and here we see more analytical approach to the same problem. Kaare Strøm suggested that one can reduce the way political systems function to chains of delegation as he and others call it. Interestingly, he says that the French system is simply also a parliamentary government. I think this is disputable, but the big analytical contribution of all people following Kaare Strøm is that they directed our attention to the real workings of these two institutional arrangements, and what they say is that politics in the ideal world should be understood as chains of delegation. Voters vote for the members of parliament in a parliamentary system. Parliament brings a Prime Minister into office who then selects his cabinet members, who then try to control their governmental departments. The idea is that the people rule in democracy; hence the orders go from voters to parliament to the Prime Minister, and eventually the orders go to the government departments. The voters delegate, because they cannot act themselves, they delegate to parliament. Parliament cannot do everything by itself, it cannot govern. You cannot govern by assembly, so the parliament selects a committee – from this perspective, the government, the Prime Minister and the ministers, are a committee of parliament and they take orders from parliament; and finally the ministers then give orders to their departments.

This is only part of the story. The other part is accountability. The idea is that each of these principal-agent relationships has two sides: delegation and accountability. Voters are the principals, parliament is the agent of the voters, voters delegate power to parliament, but they also give orders and hence parliament is accountable to the voters. The idea is that parliament, that individual MPs can be held accountable by voters and that is the most simple and fundamental form of delegation and the principal-agent relationship; accountability here is simply about elections. If people are not happy with what parliament does, they will vote in a way that the next parliament looks differently and some members of parliament will lose their jobs.

What you see here is a huge research agenda. It is more than a theory. This is a research program because what you need to ask is how well do all these chains of delegation and accountability function? The principal-agent

literature is mainly about how well these principal-agent relationships function at each stage of the chain of delegation. Ideally this chain should be constructed in a way that whatever department B does is more or less what the majority of voters want – and the 'more or less' is the research agenda.

There can be several kinds of problems along the chain of delegation and accountability. Voters may not know exactly what, for example, the candidates for parliament want. They may not tell the truth. At the same time, voters may not be powerful enough to deselect them. There are many different problems of agency loss. I could now talk very long about this but I will not, one simple example here may suffice. In the language of the principal-agent approach it is called contract design, which is about the specific rules that guide the selection of the agent. The accountability between voters and parliament depends a lot on how the electoral system works. A very simple and effective system - at least when it comes to the delegation between all voters in one constituency and the specific MP - is the British First Past the Post electoral system, because parties have relatively little power. There is a direct accountability of the MP to his constituency.

Another example is Germany - it is changing now, because the party system is changing, but let us forget this for a moment. In a system with fixed lists that are determined by the political parties and proportional representation, many members of parliament can be very sure that they will be reelected. The composition of parliament in a proportional system is relatively far removed from the will of the ordinary voter, because it is small groups within the party who de facto decide over a large portion of the seats in parliament.

We have seen that one important element of the principal-agent analysis is concerned with way the contract is designed. Another important aspect - and that applies to the entire chain of delegation - is of course the media system: How well do the media function in order to prevent the agents from doing things that the principals do not want? The legal system is another important factor to prevent agency loss - but as I said, I do not want to spend too much time on this.

Let us come back to our main theme, namely the configuration of power. Regarding the configuration of institutional elements Kaare Strøm reduced political systems to two versions or two types. In a way this also speaking of ideal types, and the presidential system is characterized by a much more complicated configuration of chains of delegation. There are three chains

of delegation: from the voter to the President, to the upper chamber, and to the lower chamber. This means that there are also three different sources of legitimacy. Furthermore, there are all these interlocking connections that I mentioned before. The main problem, however, is that the President has no more popular legitimacy than House and that explains to certain degree the problems that you sometimes have in presidential systems when the majorities in the house are not friendly to the political ideas of the President. Having said this, we are now living through a phase where we see problems of majority government in many other parts of the world; I just mentioned Britain that is only one example, of course.

**Majoritarian and Consensus Government**

Let me turn to another way of looking at how political systems function, namely them dichotomy of consensus vs. majoritarian systems that also goes back to Arend Lijphart. When we want to understand how political systems function, it is essentially about the following questions: How does power emerge, how is it legitimized and how is it shared? These are the fundamental questions about understanding political systems. Arguably even more important are the following: How many actors in the political system are legitimized directly by the people? And how do they need to work with each other? These remarks already hint at the underlying idea of this theory and also at the empirical study of consensus democracy versus majoritarian democracy.

Lijphart started with a basic typology of political regimes, but he did not stop there. Very early on he worked on more sophisticated, more differentiating ways of understanding the configuration of political systems in the tradition of new institutionalism. This means that he uses an extended conceptualization of institution that includes configurations of actors and rules. Furthermore, the way the political actors are forced to interact with each other – in other words - the political process itself becomes part of the typology. Finally, there are another two important aspects, and now you will understand why I started with these conceptual remarks about typologies: First, he thinks in terms of a continuum and no longer of two distinct types; hence a system can be more or less of this or the other. And second, the ideal type becomes - and that is what an ideal type should be - the end point of the continuum. In addition to this, the intention is to do causal analysis in order to see whether a specific type of democracy produces better or worse outcomes. The idea is that there should be a correlation between the type of democracy and a given output.

The central perspective of Lijphart's theory is that we need to think of political systems as a configuration of veto points. To put it differently, Lijphart asks himself how much does the political system force political actors to negotiate with each other.

If we want to understand what was going on in the United Kingdom during the Brexit crisis, why the political system found it so difficult to handle Brexit – this has a lot to do with the fact that the United Kingdom is very much a majoritarian system, and under majoritarian systems the political actors are used to not having to negotiate. What we saw in Britain was that the system is very badly equipped to a situation where the majority is not really there and if the majority is not there, in parliament, you should be used to, and you should be trained to negotiate, and I think that is what the British system faced.

This is just a little teaser. Now, let us go through the different variables which explain the entire concept. The leading question is always: Are there configurations of institutions in the system that enforce negotiation rather than allowing decision by majority, by a simple 50 plus one logic. Lijphart looks at two dimensions. The first one he calls the executive-parties dimension. This is mainly about parliament, government and the party system, and the second one looks at the structure of the state; it is called federal-unitary dimension.

The first dimension starts with the idea that - and here you see the extended idea of institutionalism - if you have a party system that tends to function like a two-party system, this is part of the institutional setup. Britain used to be characterized by single party majorities and a two-party system for many decades. Of course, we all know that Britain never had a two-party system. There were more parties in parliament, but they did not count when it came to governing. Small parties were beginning to be part of a government only in recent years. This leads to a concentration of executive power, which is the majoritarian pole of the continuum. The opposite is the consensus pole, where traditionally there is the institution of multi-party government, often based on broad coalitions, maybe even oversized coalitions.

The second variable is concerned with the relationship between the executive and the legislature. The legislature can be very strong vis-à-vis parliament, which means that once a government is in office it can dominate parliament. Of course, parliament can always dismiss a government under

a parliamentary system, but there are political systems where the executive dominates the legislature while in others there is a balance of power. How would you measure this? Stronger parliaments have more committees, they have more rights to set the agenda, they have more resources, all these aspects are relevant indicators.

The third variable talks about the party system and this is something where Lijphart has been criticized for. The format of the party system is very closely related to the type of government in that two-party systems lead to a single-party governments while multi-party systems tend to result in multi-party coalition governments.

Also the fourth variable, the electoral system, is related to the variables measuring party system and government format. A majoritarian system like the British tends to favor a two-party system. Clearly, there are exceptions, but majoritarian systems tend to produce majorities; proportional systems tend to do the opposite.

The last variable has become a little less fashionable in recent years. It relates to the system of interest groups. Here you can have a pluralistic interest group system where many groups compete with each other for influence. Interest groups are not powerful enough to block what government wants, which is conducive to majoritarian government. On the consensus side of the continuum, we have a neo-corporatist system of interest intermediation. Classic examples are the Scandinavian countries, where powerful organizations of labor and industry have almost co-equal powers to the government in the socio-economic sphere. Hence, governments need to negotiate.

Let us turn to the second dimension, the federal-unitary dimension. If you have a centralized structure of government, the central government has nobody with whom it needs to negotiate. Federal and decentralized government means that there are many power centers in the country. Germany, for example, has a federal government and 16 federal states. The latter have autonomous legislative and administrative powers. Very often, the federal government needs to cooperate with the federal states. It cannot simply do what it wants, it needs to talk to state governments.

The second variable on this dimension is about unicameralism vs. bicameralism. In unicameral systems, legislative power is more concentrated. Here, the UK comes close to the ideal type. Of course, there is the colorful

House of Lords, where they have purple dresses and wigs, but its function is largely ceremonial. The House of Lords is not very powerful. The opposite is true for the German second chamber, the Bundesrat, or the American Senate, where the states have a very strong representation. The two chambers make it more difficult for the government to do what it wants, especially if there are hostile majorities which can emerge because of a different electoral system or a different logic of representation. This means there is another need for negotiation.

Obviously, if the constitution is flexible and can be amended easily, a government finds it easier to govern compared to a situation where constitution is very rigid, which means that constitutional change requires qualified majorities. Again, we have two variables that are relatively close to each other, because juridical review, the other variable, means that the power of a governmental majority is limited by a strong constitutional court. The UK is fairly close to the typical majoritarian pole as it has no written constitution and weak judicial review whereas Germany and the United State, for example, are clearly near the opposite end of the continuum on these two variables.

Last, but not least there is a central bank. If the government can control the central bank it has more possibilities to steer the economy compared to a situation where the central bank is independent. An independent central bank is a limitation of majoritarian power.

This is Lijphart's original model, which allows him to place individual political systems along these two dimensions. The United Kingdom is very much on the majoritarian side on both dimensions because it has a fairly centralized and majoritarian government. Germany is situated somewhat towards the consensus side on the executive-parties dimension, because it tends to have coalition governments and many other aspects which enforce negotiation; it is very clearly on the consensus side of the federal-unitary dimension, because Germany is a strongly decentralized, federalized state. Japan is in a relatively neutral position on both dimensions while the United States are very decentralized, but the strong presidency places it on the majoritarian side on the executive-parties dimension.

This is what you can do with that particular analytical tool. Lijphart and many others following him have used this empirical instrument, which has also been refined by many others later on, to understand and to analyze whether this actually makes a difference for the output of political systems.

Lijphart found that there were some significant differences, e.g. the representation of women and participation was better in consensus democracies. By and large, Lijphart concluded that consensus systems worked somewhat better than majoritarian systems. However, we need to remember that we are looking at a limited number of cases statistically, so some of these correlations have to be read with a little bit of care.

**Party Government in the EU?**

I will now move one level higher up and talk about the European Union, which is a unique creature. When you go to other parts of the world, you will also find arrangements of collaboration between states but none of them comes close to the level of supranational integration that we find in the European Union.

Sorry to keep talking about Brexit, but the fact that Brexit is so difficult shows you how far integration had already proceeded. Arguably, some of the British may have thought that one could simply leave the European Union like a club – you go in, you go out, you resign your membership - this is it. However, they are learning the hard way that the European Union has created an interconnection that is so hard to dissolve that it is very costly and very difficult to leave the EU.

The main theme in this section will be political parties. More precisely: What do parties do in the European Union. How much do they do? Do they do anything meaningful? Let us begin with a brief a look at the unique configuration of what parties are in Europe. We have had direct elections to the European Parliament since 1979. It is a very interesting creature, because it keeps changing all the time. In the wake of Brexit, we had a very peculiar situation in that suddenly 73 MEPs had to leave. Once the UK left the EU, the UK Members of the European Parliament had to resign their seats. As a result, the majorities in the European Parliament changed. It is an interesting historical footnote that we had European elections, which resulted in a certain majority that decided upon the composition of the Commission and the election of the President of the Commission. However, within a few weeks, a significant number of the MEPs who participated in this decision had to leave the European Parliament.

We have groups in the European Parliament. These groups are ideological families. There are Socialists, Christian Democrats/Conservatives, Liberals, Greens, Left Socialists and various shades of right-wing formations.

These parliamentary groups have a somewhat difficult or not fully developed relationship with European parties. To call them European parties is not entirely correct, because they are federations of parties rather than real parties. Europarties, as we call them now in the literature, have no individual members. To be sure, there are some minor exceptions, but individual members play no role within Europarties. The members of the Europarties are national parties. The German Social Democratic Party, for example, is a member of the Party of European Socialists. Clearly, the fact that Europarties are not real parties undermines the idea of party politics in Europe. The second important point is that the national member parties are in charge of selecting candidates to the European Parliament. As a result, their connection to their MEPs is relatively strong. How well these connections function will be discussed now.

The conceptual question is formulated in the header of this section: Party government in the European Union? Now, what is party government? Again, I start with the basics. Party government means that the parties control policy and the selection of political personnel. They select personnel, they are the gatekeepers for whoever wants to get in political office and parties determine policy. Within the EU, however, the question is which party determines what? Is it the national member parties, is it the Europarties or who is it? This is a really complicated question when we look at the European Union.

The European Union as a system of governance means that - compared to national systems - there are many more veto points that undermine direct party control. If you think back to Lijphart, the idea was that consensus systems create more need to negotiate. How can you create the need to negotiate? If somebody can veto something. An actor who can block a decision can force the others into a negotiation. Essentially, the European Union is a configuration of political institutions that leads to many veto points.

Now, what are the principal arenas of legislation? At the end of the day, legislation is the most important aspect of the European Union, because it does not really have a strong executive. If you look at the European Union as a system of governance it is mainly governing through regulation. It does not have an army. It does not have a police. Everything the European Union does in member states is done through the member states, it needs the administration, the executive of the member states. Essentially, the European Union is a system of legislation and regulation. Hence, we need to look at who controls legislation. I am simplifying a bit, but this is really it, I would

argue.

What are the arenas of legislation? On the one side, you have the Council of Ministers and the European Council; the Council of Ministers is an assembly of ministers; one day they can be the Ministers of Agriculture, the next day they can be the Ministers of Interior. It is one legislative chamber in the European system of legislation. In addition, some of the fundamental guidelines are subject to a decision by the European Council, which is the assembly of chief executives, the Presidents and Prime Ministers, who meet at the European summits. Hence, one legislative chamber is an assembly of executive members, and the other chamber in the European legislative process is the European Parliament.

Let us look at the different logics of decision-making. The European Council is mainly intergovernmental in that it does not decide with majority, but mainly decide by consensus. This is not always the case, but in most cases there is a national veto. The reason why the European Council mainly decides in an intergovernmental mode is because that is where the fundamental decisions are taken and the member states would not easily accept that their national government loses a vote on an important issue.

The Council of Ministers is generally involved in more detailed and technical aspects of legislation. This is where we have seen a movement to a supranational decision logic, which means an increased usage of qualified majority voting. This involves not a simple 50 plus one rule but additional criteria: 55 percent of the members states need to agree and they need to represent 65 percent of the population of the EU.

In a nutshell, legislation in the European Union has a strong executive component. Government members co-decide about legislation, which then becomes either directly or indirectly binding legislation in all European member states. The negotiations in the Council follow the logic of international politics, which is characterized by an executive bias. This means that it is structurally very difficult to connect these decisions back to national party government, to link them to what national parliaments want. After Council negotiations, ministers go back to their countries and tend to argue that the results represent as much as they could achieve. They will tell their parties not to mess things up by blocking it in the national parliament, because the price would normally be a government crisis. Once negotiations are finalized at the EU level, it would create a government crisis if a minister or even the chief executive could not get the support of his or her own

majority back home. Hence, that rarely happens. In other words, the blackmail power of these executive members is relatively high or - to think back to Kaare Strøm's idea - the accountability is relatively low at this moment.

The European Parliament, the other legislative chamber, functions purely according to a supranational logic in that there is no national veto. More precisely, it has a double supranational logic. First, European party groups decide with majority. There is no national veto, because each delegation to these groups is too small to block anything within the group. Second, no national delegation to the European Parliament is sufficiently large to bloc anything.

What does this mean for party government? What is the opportunity structure for party government? In other words: What is the structural possibility for party government to work? There is a strong national component incorporated in the Council (despite its supranational tendencies). Therefore, all depends on the future development of European political parties. I would argue that we could only expect a strengthening of party government if the parties in the European Parliament were truly supranational and clearly linked to extra-parliamentary Europarties. In theory, this would mean that there should be coherent majorities in the European Parliament based on parties linking directly to the European people. Of course, this does not happen. Instead, we have this strangely fragmented system where parties in European member states are members of European Parties, which are not really organizations in their own right.

While European party government is an idealistic projection, it is a heuristic, a theoretical yardstick. We could find that parties are moving a little in this direction. The real question is: Do political parties link EU decisions to the preferences of citizens? This was one of the questions that we tried to answer in a large empirical study on the EU-15 a few years ago. What did we find? The elites, who are almost exclusively party politicians, enjoy a very high degree of discretion. Discretion is the opposite of accountability in the sense that elite action is really linked to the will of the people. This applied to the members of the European Parliament, but even more so this applied to the members of governments who are in the Council acting as legislators. Even though national parties and national parliaments tried to improve the accountability of politicians acting at the EU level, they had very high discretion.

Why was this so? We explained it by the fact that if a political system is

based on negotiations, elites need to have a room for maneuver. There is an inherent and theoretically understandable contradiction between having a high degree of accountability and having a consensus system working where the elites negotiate. The price of a working consensus system is that accountability is limited, hence parties are fighting a losing battle here to a certain degree. Clearly, this logic has not changed since our study was in the field, which means that the weakness of linkage is still very much the same.

**European Integration and Presidentialization**

What is the connection between the process of European integration and presidentialization? When you look who gets into office in this complex structure that is called the European Union system of governance, you will find that political parties have selected these people. However, as I have pointed out above, parties do not really control the substance of the European policy process because linkage is weak. It is such a complicated system with many veto points which require negotiation that there is an inherent logic that undermines the accountability of elites vis-à-vis their parties – simply because these negotiations necessitate room for maneuver of elites. EU system of governance strengthens the power of those higher up in the political system, and this means mainly those who are in government.

On a very impressionistic or anecdotal level, you see this when we talk about European politics. We often talk about Angela Merkel talking to Macron, or the French President is talking to the Italian Prime Minister, or Boris Johnson goes over to Brussels and he talks to members of the Commission. Hence, already in our way of thinking about politics on a simple everyday level or in the way the media report, we have become used to personalize things. We think and talk about the leading actors rather than institutions. Instead of talking about the relationship between the French and German governments, for example, we have begun to say that Angela Merkel gets along with Emmanuel Macron - or that she does not get along with Donald Trump.

This purely anecdotal perspective shows that something has changed in the way politics works. From an analytical perspective, we can do this a with more substance than simply looking at the media and the public debate. This is what I have done with a colleague who was here a while ago, Professor Paul Webb from Sussex. Together with many other colleagues around the globe we argue that we see a trend towards the presidentializa-

tion of politics in modern democracies. What we mean with presidentialization is that there is a shift of power. There is a shift of power away from collective actors like cabinet, parliament is a large collective actor, parties are large collective actors. We see a shift of power from collective actors to individual leaders - and this may include small groups of leaders. We often find that strong leaders have a small group of close advisers or a core cabinet around them.

In a nutshell, the concept of presidentialization means, first, that we have an increasing leadership power and autonomy within the executive. Within the executive itself the chief executive - whether it is a President or a Prime Minister or a Chancellor does not matter - the chief executive becomes the central actor. It is no longer so important who is in cabinet; instead it is the chief executive who matters. It is Boris Johnson, it is Angela Merkel, who decide the policies, who make the decisions, who can also more freely select their cabinet members than in the past. That is the first element of the concept.

The second aspect of presidentialization is that we also see an increasing power and autonomy of leaders within the political party, so they can set the agenda more independently than in the past. As a necessary result of this we see, thirdly, an increasingly leadership-centered electoral process. This aspect is largely synonymous with personalization. We find that parties fight election campaigns by putting their leaders to the front, by not talking much about programs but about personalities. We find that the media do the same. They talk about the leading candidates and they do not discuss much about policy; instead they talk increasingly about the qualities of leaders, personal properties of leaders. Finally, voters decide accordingly, and we have fairly strong evidence for all three aspects of this trend towards a personalized or leadership-centered electoral process. We have fairly strong evidence on the presidentialization of political parties and also of the executives.

What does this mean? I want to emphasize - this is very important - the concept basically means that political systems can move from partified government to a more presidentialized government and also back again. We argue that there is generally a trend, a push towards presidentialization, and we can also give reasons why there is such a push. However, depending on political context, situations, or the quality of leaders, political systems can also move back towards a more partified logic.

The second important point is that we are not talking about institutional change; instead we talk about a change in the way political systems function. We are focused on their working mode. We do not argue that parliamentary systems might change their rules and become semi-presidential or even presidential. We claim that the way they function, the way they behave, changes - and in this respect this is comparable to the logic of Arend Lijphart. And we argue that the powers that move political systems towards the presidentialized pole of the continuum are stronger than the countervailing powers and there are many reasons for that. It follows from this that also semi-presidential and presidential systems can become more presidentialized. The power of the President and his or her autonomy, the ability to do things, can also grow in a presidential system.

It is all about increase of power and the increase of power can happen in two ways. It can be the result of more resources becoming available to the chief executive or the party leader , e.g. more personnel or more money. We know that the resources of the chief executive have grown in many European democracies; the Prime Ministers used to have relatively small offices, even Number 10 Downing Street is small, but behind Number 10 the apparatus has grown. There are more government advisers working directly for the Prime Minister. Formal powers are also resources; there is also a growth and this brings us back to the European Union. In addition, there is also a growth of autonomy, which is a very important element of power. Especially the European integration process has led to growth of leadership autonomy through the executive bias in the Council and the decreasing accountability of those who make decisions in the Council. They are increasingly removed, insulated from controls, so they can decide more things relatively autonomously. To be sure, leaders may not like the decision of which they are part at the EU level, but they are more powerful than in the past to enforce these decisions in their own countries.

You may have guessed that I would end with some remarks about Brexit. Brexit as an example of presidentialization. First of all, Brexit is very much the result of elite action or lonely decisions. David Cameron decided to have the referendum, Boris Johnson decided to be against EU membership, Theresa May did not decide for a long time, and now we have Boris Johnson and we must not forget Jeremy Corbyn and Nigel Farage, who pushed the established parties ahead.

So when we talk about Brexit and I think this is to a certain degree not just a media construction, we talk about individual politicians, what we also

see is that political parties are becoming ever less coherent. They are almost in danger of disintegrating and we see – this was really interesting - a very strong attempt to govern past parliament. The chief executive tries to govern beyond his own parliamentary control. Boris Johnson even went as far as suspending parliament. That may be an extreme example, but I think when we think about presidentialization we detect many parallels to the way the British system works right now.

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