論　　説

Non-Economic Losses under Japanese Law from a Comparative Law Perspective (1)

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CHAPTER 1: INTRODUCTION

Ⅰ. INTRODUCTION

This article explores non-economic interests and losses under Japanese law through analysis of traditional Japanese scholarship regarding the concepts of harm and loss and their emphasis on the monetary value, and comparison to the approach of countries with similar civil liability systems, such as France and Latin America. By first examining the drafting process of delictual liability provisions within the Japanese Civil Code, this paper questions the view that Japanese law, at least in the area of delictual liability, was influenced by German law. It also addresses how, in cases of non-economic losses, Japanese scholarship has focused on the issue of calculating damages rather than developing a general concept for these types of losses, such as the French *dommage moral*. This has led to a system that, while working as a whole, sometimes reveals unclear rules or where the path taken to reach a conclusion does not necessarily follow the traditional rules set by the delictual liability system.

This paper contains six chapters. Chapters 2 focuses on Article 709 of the Japanese Civil Code, which regulates delictual or tort

liability. Chapter 3 introduce the concepts of harm and loss, both economic and non-economic losses, under Japanese law by examining Articles 710 and 711 of the Japanese Civil Code. Both chapters especially consider the ideas of the drafters and the case law development. Following this model, Chapters 4 and 5 address the same issues, but from a Comparative Law perspective by emphasizing how various jurisdictions approach the differences between harm and loss and how they developed the concept of non-economic losses. Chapter 6 analyzes the ideas and theories presented in Chapters 2 and 3 under the doctrines introduced in Chapters 4 and 5.

Civil liability, especially that which deals with torts and delicts, is based on the fact that victims have suffered a legal loss that grants them the right to seek redress. In most civil law countries, the other elements of civil liability, such as negligence and causal link, are dependent on the existence of a loss. Though the term "non-economic losses" is comparatively new, rules regarding defamation can be found even within ancient legal systems. Madden has noted that "*several ancient cultures evidently considered defamation or false witness to have such a corrosive effect on the public peace and order as to require the most severe punishments.*" [1]

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[1] M. Stuart Madden, *The Cultural Evolution of Tort Law*, 37 Ariz. St. L. J. 831, 851 (2005).

Similar laws have existed throughout history in various civilizations and legal systems. Examples in Jewish law are the prohibition against false witness under Exodus1:16 and the rule that if a man entices a maid and sleeps with her, he must make her his wife, and in the case that the father does not allow the marriage, the father must pay the same dowry as for a virgin, which is under Exodus 22:16-17. The Talmud also recognizes offenses against honor as valid claims.

The Greeks also recognized that some misdeeds originated in non-economic offenses. Gagarin has illustrated this with a passage from Iliad in which Menelaus considered himself wronged by Antilochus, who maneuvered his

In modern times, non-economic losses are an area of law subject to debate regardless of the system. Issues range from whether certain losses should be granted legal protection to the amount victims receive as compensation, and there is no one way to adequately measure all the elements encompassed under the category of loss in a non-economic sense. However, in today's capitalist society, the idea of harms that cannot be quantified is certainly less preposterous than it was centuries ago. Furthermore, in contrast to economic losses, such as lost wages, non-economic losses usually illustrate the significance of individual rights under a particular legal system. Property rights are necessary for the economic and legal development of a society and serve as an incentive for individuals to produce more goods and services under the assurance that they will not be taken from them indiscriminately. These are "legal rights" in the sense that most individuals understand them today. They are also addressed differently in court. If a victim has suffered an economic loss, the question can be approached by using either the concepts of causal link or foreseeability. There are no elements of the loss that cannot be neatly applied to a mathematical formula. Non-economic losses, however, tend to focus on those elements of the human psyche that everyone possesses yet are challenging to pinpoint.

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horses during a race in such a way as to cut Menelaus' path and win the race. Menelaus suffered no injury – he was bested in the competition – yet he believed he was the victim of an offense. If he indeed suffered from an offense, it could be called a non-economic or moral offense. Michael Gagarin, *Writing Greek Law* 22 (2008) (Though Gagarin has cited this example in order to illustrate ancient legal procedure).

According to Vinogradoff, Athenian plaintiffs had a free choice of remedies. They were not obliged to bring a criminal accusation in order to claim damages. It seems they preferred a simple action that could bring them a substantial compensation. PAUL VINOGRADOFF, *Outlines of Historical Jurisprudence, Volume Two the Jurisprudence of the Greek City* 192-195(1922).

In addition, the advancement of communication technologies influences how some non-economic interests such as privacy and data protection are regulated and the remedies available in the event of an infringement. While information or data obtained via infringement of privacy or data protection regulations might have an economic value, to the victim, harm and loss usually comes in the form of a non-economic loss, and a data breach might grant victims both a claim for quantifiable economic damages and non-economic losses depending on the situation. Recent advances in ICT technologies, the implementation of Big Data and Cloud Computing, and public policies aimed at the design, development, and administration of smart societies such as the Japanese government's Society 5.0 have brought privacy issues to the forefront of national and international discussions.

The basis for the legal protection of economic rights is the effort that the right holder has expended to obtain such a right. However, individuals possess liberty, feelings, or the right to pursue happiness from birth. Thus, there is no sense of effort with these rights because these entitlements arise from the fact that the individual is a human being. Since these "moral rights" [2] are not based on an individual's effort to obtain them but rather are a product of human nature itself, they can be breached more easily than other economic legal rights. Although traditionally linked to the idea of natural law, the societal changes that began in the 19th century allowed for these interests to be granted a broader scope of protection.

While Japan has protected these types of interests since the enactment of the Civil Code, it did not follow the same path as other Western countries in their development. For one, the enactment of the

[2] The term "moral right" has different meanings depending on jurisdiction and the area of the law in which it is used. In this paper, it is used as a placeholder for the protected rights or interests that, if infringed upon, are considered non-economic harm.

Civil Code was the result of the historical necessity to advance Japan to the same level of social development as Western countries. This essentially meant that the goal of the Code was not to unify Japanese law, but rather to signal the development of the country. Therefore, the background of European scholars in both *ius commune* and canon law was not part of the education of most Japanese scholars during the period wherein the drafting took place. The ideas and concepts within the Code were adopted after researching the result, not the origins.

As this paper addresses later, there are discussions of whether the Japanese law of delictual liability is more akin to the French model of a general clause or the German model. General delictual liability is established in Article 709 of the Civil Code, which requires an infringement of a legal right or interest as the consequence of an intentional or negligent act, and that the victim suffers a loss as a result. Article 710 regulates non-economic losses, a departure from the custom of civil codes that followed the French model at the time the draft was written, which included non-economic losses under the general concept of *dommage*.

Article 711 grants the next of kin a claim for non-economic losses, and Articles 712 and 713 concern the legal capacity for delictual liability. Next, the Code introduces some specific types of liability, such as the liability of guardians (Article 714), employers (Article 715), persons commissioned for a work (Article 716), the owner of a building structure (Article 717), and the owner of animals (Article 718), as well as cases of joint liability (Article 719). The Code also establishes a defense in cases of self-defense and to avoid imminent danger (Article720) and grants an unborn child a claim for damages (Article 721). Moreover, the Code regulates the matter of comparative negligence (Article 722) and grants a special remedy in cases of defamation to the victim, under which an apology can be requested in addition to or in lieu of damages (Article 723). The last provision

(Article 724) sets a three-year statute of limitations in cases of delictual liability, counted from the date of the loss and when the victim became aware of the perpetrator's identity. It also sets an absolute limit of 20 years from the moment the delictual act occurred.

The main question of this paper is how Japanese courts and scholarship view the concepts of harm and loss, especially in the realm of non-economic losses. Notably, it discusses how these concepts evolved and how foreign legal ideas potentially influenced their development. In addition, it seeks to address how the concept of non-economic losses has been affected by the development of a theory of loss centered on economic losses, as is the case in Japan. Finally, it inquires the characteristics of the Japanese approach compared to those of other countries when viewed from a Comparative Law perspective, and specifically how the concepts of harm and loss, both economic and non-economic, relate to more traditional views on the subject.

In the case of non-economic losses, an individual is granted a certain level of protection, either via a general clause, a list of protected interests, or the prohibition of specific acts. However, the level of protection does vary depending on the path taken. In Japan, for example, the general clause of Article 709 of the Civil Code is complemented by Article 710 of the same Code, which governs non-economic losses. Nevertheless, a review of the literature reveals that discussions surrounding Article 710 are of a more general matter, *i.e.*, they are discussions that address questions that could be considered part of the general discourse on the law of delict, its function, and its nature.

Another valid question is whether the concept of *songai* under Article 710 is the same as that of Article 709. To answer these questions, it is necessary first to understand the factors that have influenced Article 709 and the civil liability system. Japan is, after all, a Civil Law country. The influence of French law is undeniable, and the

general clause structure of Article 709 is one result. Yet, a robust German influence has been present in the text of the Japanese Civil Code and among Japanese scholars, many of whom have studied in Germany. It is common to find academic articles regarding German law in any Japanese law journal, with French and American law being the other two popular systems to study. However, suppose one is to study the French legal family. In that case, the law of Latin America could provide a much richer environment, as it illustrates how countries that share a common legal root have developed their legal institutions to address the challenges of their respective societies. On the other hand, Japan cannot be thought of as having the same legal traditions as France or Germany, nor can its legal culture be clearly defined within the framework of other Asian countries.

evertheless, it is undeniable that Japan was influenced by countries other than France and Germany when its Code was first written. Therefore, limiting a comparative analysis to these two countries is counterintuitive, both under the general prism of Comparative Law and to the extent that this paper intends to identify a general theory of non-economic harm, if one exists, and the position of Japan within it.

A. NON-ECONOMIC INTERESTS AND LOSSES IN JAPANESE LAW

Studying Japanese law from a comparative law perspective is not an easy endeavor. Colombo has indicated that it is highly uncommon for a researcher to have even an average knowledge of Japanese law.[3] Since issues can arise from language barriers and the lack of scholarship in English, a comparative scholar may be hard-pressed to learn about Japanese law, except from the most well-known sources. As a result, deep and comprehensive knowledge of the

[3] Giorgio Fabio Colombo, *Japan as a Victim of Comparative Law*, 22 Michigan State International Law Review 731, 733 (2014).

Japanese system is usually reserved for a select few.[4] In the matter of non-economic losses, this situation is exacerbated. It is not rare for the specific chapter referring to delictual liability to address the topic just by referring to some cases after introducing the relevant article of the Civil Code.[5]

Japan is also a particular case regarding non-economic losses. It is one of the few civil law countries in which the Civil Code has a provision (Article 710) that deals with non-economic losses in a detailed manner. Additionally, Article 711 addresses the issue of non-economic losses of a close relative of a victim in the case of the victim's death. A cursory reading of Japanese literature regarding the topic reveals that Japanese scholars are usually more interested in discussing the function of the monetary award or *isharyo*. However, that is not to say that there are no discussions about legal doctrine, as the concept of personality rights has been part of the legal discussion since soon after the enactment of the Code.

This leads to a second issue: even within Japan, the concepts of harm and loss are not often subjects of study. Indeed, scholarship regarding loss in Japan has been notably poor.[6] This resulted from an influx of German ideas that began during the early 20th century, which led to harm and loss being treated under the amount-difference theory or *sagakusetsu* theory, based on the German *Differenztheorie*. However, Zimmerman has argued that the *Differenztheorie* works only because "*as a rule, only material damages are recoverable, this involves a comparison of the hypothetical value, established on the assumption that*

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[4] *Id.* at 734.

[5] See: CURTIS MILHAUPT, J. RAMSEYER & MARK WEST, The Japanese Legal System (University Casebook Series) (2nd. Ed., 2012).
J. MARK RAMSEYER & MINORU NAKAZATO, *Japanese Law: An Economic Approach* (2001).

[6] YOSHIO HIRAI, *Saiken Kakuron II Fuhokoi* 75 (2010) (Japan).

the event had not occurred." [7] Thus, this theory is not suitable to address non-economic losses. In addition, other approaches that attempt to explain the concept of harm within the Japanese system strongly emphasize the "quantification" of the loss, meaning they do not entirely address the problems of the *Differenztheorie* in the case of non-economic losses. This was not the drafters' intention, at least regarding non-economic losses.

Western and Japanese scholars consider that the Japanese Civil Code was influenced by the first draft of the German *Bürgerliches Gesetzbuch* or BGB. While it is true that the drafters had access to this document, it is also true that their education was mainly in French or English common law. Kitagawa explains that the historical development of Japanese Civil Law can be divided into three stages: the "commentaries era" which focused with comments of the Civil Code under the influence of German and French law; during the "theory reception era" which extends from the end of the Meiji era to the end of World War I, Japanese Civil Law was construed based on the German Civil Law jurisprudence; lastly, during the "Comparative Law era" scholars slowly distanced from German theories and began using other foreign laws for reference.[8]

While it is true that the German legal system and theories influenced Japanese Civil Law, an examination of the discussion regarding Article 709, which governs delictual liability, and Articles 710 and 711, which establish claims for non-economic losses, reveals that the drafter used only French and English ideas when discussing harm and loss. The fact that the German drafter and scholarship of the

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[7] Reinhard Zimmermann, The Law of Obligations Roman Foundations of the Civilian Tradition 824 (1996).

[8] Zentaro Kitagawa, *Introduction: The Identity of Japanese and German Civil Law* in The Identity of German and Japanese Civil Law in Comparative Perspectives 3, 5-6 Zentaro Kitagawa & Karl Riesenhuber eds., 2007).

time were opposed to the idea of granting remedy for non-economic losses casts further doubt on a German influence, at least regarding delictual liability and non-economic losses. However, the fact remains that support for German ideas among Japanese scholars increased after the death of one of the drafters, Kenchiro Ume, who was a strong supporter of the French school of legal thought.

This also influenced how scholars and the courts addressed the concept of loss. The amount-difference theory was founded on the premise that loss is a monetary issue, and therefore its quantification was central to the discussion. This stance is incompatible with the concept of non-economic losses. Other theories, such as the loss-as-fact theory or *songai jujitsu setsu*, have somewhat departed from the issue of monetary quantification. However, regardless of the approach, scholarship seems unable to separate losses and damages. Thus, for non-economic losses, any discussion of the topic is typically from an economic perspective.

In contrast, Japan approaches the issue via a causal link. Loss lies at the end of the causal chain.[9] Therefore, theories concerning the nature of the causal link, such as whether it should be sufficient or should include all the actual consequences of the act, are one of the pillars for establishing the concept of loss under Japanese law. In countries following the French model, the issue of causality is an element of loss. Conversely, under Japanese law, loss is subservient to causality to the extent that an abstract concept of loss has consistently been of secondary importance.

An example of this is Hirai's theory that legal losses are those that fall within the area of protection or *hogo han'i*. However, this concept of "area of protection" is established mainly by following an idea of actual causality. In addition, since these non-economic losses

[9] Masayuki Kato, *Kihanteki Songai Gainen heno Tenbo*, 61 Journal of Law and Political Studies 195, 196 (2004) (Japan).

were usually based on a sense of natural right, a positivistic approach tends to be restrictive. However, Chapter 5 discusses an Italian example, which demonstrates that courts and scholars can find a way to expand the list of legal interests.

Article 710 lists three legal interests that are granted protection: body, liberty, and reputation. The courts have never interpreted this list as being *numerus clausus*. Instead, new interests have been given legal protection thorough the years. However, there is a clear divide between the study of these interests under the umbrella of personality rights and their importance as monetary compensation, or *isharyo*, with the latter being far more prevalent. This affects not only scholarship but also practical matters during the trial process. Saito[10] has asserted:

> *[B]ecause judges can freely determine the amount, lawyers do not know if their request is going to be granted even if they advocate for it, and even if their request is granted, the amount is usually low and the burden on the lawyer is very heavy, therefore, they do not press for the emotional pains of the victim too strongly, and because of that their understanding of this type of pain diminishes, as a result the amount in non-economic damages cases has stayed low. Furthermore, because the amount is low it has become a vicious circle.*

B. NON-ECONOMIC INTERESTS AND LOSSES IN COMPARATIVE LAW

Since these non-economic interests and losses are highly dependent on the level of development of individual liberties, and since they are further affected by an array of socio-cultural factors, studying them requires a more profound knowledge than just the letter of the law. Nevertheless, most modern legal systems grant legal protection to

[10] Osamu Saito, *Isharyo no Santei no Riron*, 164 Ho no Shihai 5, 11 (2012) (Japan).

these moral rights, although the manner in which they do so is not necessarily the same. At a doctrinal level, non-economic losses have traditionally been defined in relation to economic losses in what Dominguez[11] calls a "negative approach." Under this view, the first step is to define economic losses, after which any losses that do not fit that category are defined as non-economic.[12]

However, non-economic losses have also been defined positively, *i.e.*, regardless of their relation to economic losses. Under this approach, non-economic losses are ascribed a specific meaning, such as *pretium doloris*, or as an infringement on an individual's personality rights. The latter approach has resulted in the creation of the terms *patrimonio moral* or *patrimoine moral* within Civil Law countries, which refer to all the cultural, social, and spiritual interests of an individual[13] and have produced a new interpretation of the term *patrimoine* that forgoes its Latin origins. Thus, non-economic interests can also be considered as part of the *patrimoine*. To further complicate matters, the concept is not clear under Common Law either. In Common Law countries, the issue instead concerns the nature of the claim and the name applied to the remedy, *i.e.*, punitive damages, nominal damages, etc. Kritzer *et al.* has offered a list of the legal interests covered under non-economic damages. These include disability, disfigurement, emotional distress, loss of consortium, loss of normal life, loss of society, pain, and suffering.[14]

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[11] 1 Carmen Domínguez Hidalgo, *El Daño Moral* 33 (2000) (Chile).

[12] De Cupis also proposed this approach when he said that non-economic losses can only be defined in contrast to economic losses, as any loss that cannot be considered pecuniary. Adriano De Cupis, *El Daño* 124 (Angel Martínez Sarrión trans. Bosch 1975) (Spain trans. It. original).

[13] In Mexico, Article 7 of the Ley de Responsabilidad Civil para la Protección del Derecho a la Vida Privada, el Honor y la Propia Imagen en el Distrito Federal uses this term.

[14] Herbert M. Kritzer, Guangya Liu, Neil Vidmar, *An Exploration of*

Ⅱ. METHODOLOGY

This paper first addresses some areas that the literature has failed to engage with deeply and comprehensively to answer the questions presented above. For example, by closely examining the drafting process on Articles 709, 710, and 711 of the Civil Code. It must also analyze the influence of German legal thought throughout the years and how this has affected the development of the concepts of harm and loss. This paper argues that, in fact, an overreliance on German scholarship has cultivated a special relationship between economic and non-economic losses, which focuses on monetary awards over any abstract considerations. This has consequently led to some cases, such as non-economic awards for foreigners, which focus on the monetary award rather than the implications of the ruling *per se*.

At first glance, Comparative Law might not seem helpful when discussing non-economic losses. After all, among the various types of legal losses, those arising from the infringement of non-economic interests can be considered strongly affiliated with a society's culture and ethos. However, as Wagner has noted, *"the law of delict or torts is particularly amenable to comparatist endeavor as the patterns of cases are almost identical across different societies, provided that they are at the same level of economic and technological development."* [15] In addition, systems from the same legal family, but which have clearly distinct economic and technological development levels, are excellent for comparing differences. Cultural differences are even more marked than those of an economic nature. Thus, the result should be different, even if they are based on the same principles.

The functional approach and its search for similitude that

"Noneconomic" Damages in Civil Jury Awards, 55 Wm. & Mary L. Rev. 971, 993 (2014).

[15] Gerhard Wagner, *Comparative Tort Law*, *in* The Oxford Handbook of Comparative Law 1004 (Mathias Reimann & Reinhard Zimmerman eds., 2006).

significantly impacted the study of comparative law was slowly replaced after the mid-20th century by a critical approach, which focuses on differences between the systems.[16] As far as this paper is concerned, it uses the functional approach to help explain how the current state of affairs came to being, especially within the context of the Japanese system; then, it analyzes several cases through a critical approach to determine the results of these differences or similarities.

Comparative law is useful when the objective is not an integral reform of a system, but rather a search for answers to challenges that are not being addressed through the traditional means. Curran has asserted:

> *Just as an understanding of foreign legal cultures can enrich our grasp both of the significance and of the contingent nature of our own legal culture, so too increased comparative work within our own legal culture elucidate previously unobserved connections which allow for new understandings.*[17]

Furthermore, Curran has argued:

> *[T]he comparatist will fail to grasp a foreign legal culture from within… the benefits lie in illuminating the observed legal culture in ways that are new for those within it, and in providing valuable insights for the comparatist as well, both about the target legal culture and the culture of origin.*[18]

Nevertheless, this might be an arduous endeavor depending on

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[16] For a summary see: Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences?, in* The Oxford Handbook of Comparative Law 384*ff.* (Mathias Reimann & Reinhard Zimmerman eds., 2006).

[17] Vivian Grosswald Currian, *Cultural Immersion, Difference and Categories in U. S. Comparative Law,* 46 The American Journal of Comparative Law 43 (1998).

[18] *Id.* at 58.

the intended public and the societal and cultural contexts. The role of comparative law is not to convince a lawyer of a particular country that their system is the best or the worst, nor is it to apply the same tools used within national discourse to address the challenges that manifest from the interpretation of the law. If a comparative lawyer requested these goals, it would defeat the purpose of the comparative aspect.

By definition, a comparative lawyer must be aware of aspects of the law that are unaddressed in usual literature. Legal customs, obscure backgrounds, mistranslations that lead to the development of certain legal rules, and even interpretations of certain theories transplanted to a specific system are all elements that a comparative lawyer considers when generating a hypothesis. Yet, to a scholar accustomed to engaging with more particular problems within a system, such knowledge could seem interesting at best, and unworthy of research at worst. If the response to a new idea is "this is not the way it is done in our country," then it is safe to assume that the reader is not the intended audience for that publication. Such reactions halt discourse in its tracks, as there is no way to thoroughly address them. Nevertheless, comparative law is a discipline that repeatedly encounters such challenges, and when writing a paper or giving a presentation, comparative lawyers do not only address the specific legal question at hand but also make a case for the necessity of comparative law as a discipline.

A. SCHOLARSHIP AND CASE LAW

As mentioned above, the approach to non-economic interests and losses in Japan can be divided into a general study under the term of personality rights, and the more specific study of each claim under the concept of *isharyo*. However, the latter issue, *i.e.*, how to calculate damages, is beyond the scope of the present work, and thus it will be discussed briefly. Instead, special attention has been given to any

literature that pertains to the concepts of harm, loss, unlawfulness, and non-economic losses. In the case of Japan, literature that exclusively concerns the theory of harm and loss has been prioritized over that which delves into questions of how to calculate damages or the importance of the casual link.

Concerning case law, there are a significant number of different claims on the matter, but the analysis is limited to three in particular: claims from the relatives of a victim, especially theories on determining who can become a plaintiff; claims from foreigners; and claims for loss of chance, or the closest Japanese equivalent for the infringement of the substantial probability, or *soto teido no kanosei*. These cases were selected because these claims appear in almost every country that served as a basis for this research, and yet the results vary somewhat when comparing Japan to other jurisdictions. Although rulings from the Japanese Supreme Court have been prioritized, most of the legal developments have been initiated or decided by the lower courts. Regarding foreign case law, case selection was based on two criteria: either they reach the same conclusion as to their Japanese counterparts, but in a divergent manner, or the court adopted a different stance altogether, with emphasis on how the courts viewed the victim's loss.

B. TERMINOLOGY

Terminology presents a challenge for any comparative law scholar, mainly when writing about the laws of countries with different languages. In the specific case of civil liability, a writer's home jurisdiction exerts much influence on language. The language used in legal research is, by nature, significantly complicated in the context of national law. However, when it is extrapolated to address how various systems approach a problem, it can become truly staggering, especially when the languages involved do not share a common origin. In the past, this has not been an obstacle for comparative lawyers. Curran

has noted:

> *The generation of comparatists immediately following the Second World War was steeped in many languages, products of classical educations strong in the tradition of multilinguism, including Greek and Latin… Post-war comparative law thus was conducted by those who were well equipped to understand the nature of translation, the challenges to conveying meaning from one community to another, the disguises of the seemingly similar, and the depth and nature of differences.*[19]

The law of obligations is a prime example. Civil law countries that follow the French model classify interactions between two parties that produce a legal obligation under the title of the "law of obligations." Japan, however, categorizes them under the term "saiken ho," or the law of credit.

It is tempting to think that such a minuscule difference is irrelevant. After all, the existence of credit requires that someone maintains responsibility for it. However, these two words have different nuances. Obligation expresses a legal position: what must be done and by whom; when, where, and how the obligation is fulfilled; what types of obligations exist, and so on. It is a word with a passive quality, implying that debtors are at the mercy of their creditors and yet must be able to know their exact obligations. Many codes begin their chapters on obligation by clearly stating that an obligation consists of handing an object to the creditor, doing, or refraining from doing a certain act. On the other hand, the law of credit refers to the active aspect of a legal obligation. The content of the obligation, its

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[19] Vivian Grosswald Currian, *Comparative Law and Language, in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 675, 686 (Mathias Reimann & Reinhard Zimmerman eds., 2006).

type, and how it is performed is not as crucial to a creditor, who might decide that a debtor's performance is satisfactory even if the obligation has not been fulfilled to the letter of a contract. The term conveys a right, and as such, its study is centered on how to enforce such rights rather than on the specific conduct of a debtor. Upon opening a Japanese civil law book, a reader finds that the study of the law of credit begins by comparing it to property rights, and that the basic rule is that credit is the right to require the performance of a specific conduct from an individual.

However, the entry of other languages into the discussion, such as English, complicates the matter. Martin Weitenberg[20] has asserted when referring to the terminology of EC Tort Law, and to damages in particular:

> *The notion of damages seems to be susceptible of two different meanings. Usually, it describes the fact of compensation or reparation of a loss or injury which a person may claim for. In this case the English term "damages" corresponds to the French "Dommages-intérêts" and the German "Schadensersatz"… However, "damages" is also used as a "normal" plural of the notion "damage", i.e., without the special meaning of remedying damage. It then corresponds to the French "Dommages" and the German "Schaden."*

This, in turn, means that a simple "s" can completely change the meaning of a legal provision. In addition to expressing the concept of a remedy or a loss, these terms also carry a cultural and historical meaning that is usually impossible to express correctly. Japanese is not an exception, as the word for "damages," the legal remedy, and the terms for harm and loss – the detriment suffered by the victim – *are*

[20] Martin Weitenberg, *Terminology*, in Tort Law of The European Community 312-313 (Helmut Koziol & Reiner Schulze eds., 2008).

different, as is the case in French.

Some authors have utilized the term "torts" in a general sense to refer to civil liability under both common and civil law. However, while they might address similar issues, torts and delicts are essentially two distinct approaches. Ward has illustrated their differences by specifying that tort liability under common law is determined based on *a posteriori* arguments, while civil law relies on *a priori* logic.[21] Similarly, Zimmerman has explained that the continental civil law of delict is based on general principles and abstract concepts.[22]

Following the above, this paper uses the term delictual liability refers to civil liability systems under continental civil law, including Japan's, and tort to reference those under common law. However, a matter more urgent than the term used to refer to the legal systems is harm and loss. The *a priori* civil law approach is why harm and loss are such an important focus of civil liability. The abstract concept of harm is the most crucial element in establishing liability under the law of delicts. Therefore, scholars and judges must first grapple with abstract ideas before applying them to specific cases. In doing so, the elements of redressable harm or redressable losses naturally become the main point of inquiry. On the other hand, since the law of torts emphasizes *a posteriori* arguments over abstract concepts, this may preclude concepts, such as loss and harm, from developing as they do under the logical rules of civil law.

Aside from the comparative law aspect of legal interpretation and translation, the terms harm (*dommage, danno, daño*) and loss (*perjuicio, prejudice*) have been traditionally used as synonyms in civil law literature. However, as Mazeud has revealed, this was not the case in Roman law. The Roman *dannum* referred to the integrity of an object, which yielded a sanction, regardless of any loss suffered by the

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[21] Peter Ward, *Tort Cause of Action*, 42 Cornell L. Rev. 28, 30 (1956) .

[22] ZIMMERMANN *supra* note 7 at 907.

owner.[23] This was a result of the form and function of Roman law, which in most cases emphasized the sanction of an aggressor rather than the loss suffered by the victim. Therefore, *dannum* suggested that the aggressor had indeed affected a certain object. However, the mere fact that an object has been negatively affected is no longer sufficient to offer its owner a claim against an aggressor. Now, it must result in an actual loss. Once the victim's situation is evaluated, separating the loss from the acts of the aggressor, it is evident that harm and loss are two concepts that are deeply related but distinct.

However, harm and loss share a commonality. To be taken into account by a judge, neither the harm nor the loss needs to be expressed in monetary terms. In other words, the harm has its basis in reality, while the loss is an abstract concept of being disadvantaged in a specific manner. A judge approaches the issue of quantifying damages only after the plaintiff has successfully demonstrated these two elements. Therefore, monetary quantification of the loss cannot be a requirement for defining loss and harm to establish liability.

It follows that harm and loss are terms that express two unique concepts. The former signifies a legal event based on physical phenomena that may or may not result in a loss. The distinction is not new,[24] and French scholars who have been debating it for many years are divided into two clear camps. Those who recognize the distinction have argued that it allows for a more accurate understanding of these two concepts. In contrast, other scholars have asserted that this distinction has no basis in statute or case law and only seeks to

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[23] Henri Mazeud, Leon Mazeud & Andre Tunc, 1 *Traité Théorique et Pratique de la Responsabilité Civile Délictuelle et Contractuelle* 261 note 208 (6 ed., 1965) (France).

[24] ([dommage] la lésion d´intérets patrimoniaux ou extrapatimoniaux… [préjudice] conséquences qui résultent de cette lésion) Manuella Bourassin, *Droit des Obligations - La Responsabilité Civile Extracontractuelle-* 67 -68 (2nd ed., 2014) (France).

address an unanswerable question.[25] In addition, if the difference between harm and loss is accepted, then it is not adequate to qualify harm as either economic or non-economic. Since harm comprises a change of circumstances, regardless of legal rules, any harm yields possibility for an individual to suffer both economic and non-economic losses.

The Italian Civil Code offers an example of the confusion caused by the use of these terms. Article 2043 reads "*Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno*"; the word *danno* is used twice within the same provision. According to Franzoni,[26] this is a result of the poverty of the Italian language. These two instances of *danno* have been construed as having different meanings. The first *danno* is the actual, factual situation caused by the aggressor, *i.e.*, *an unlawful infringement of the victim's rights*. In contrast, the second *danno* refers to the result of the first one, the actual loss for which the aggressor must compensate.[27] These two instances of the word *danno* help illustrate the importance of terminology and why using different terms for harm and loss results enables much clearer understanding of legal rules. Moreover, the second *danno* had a precise meaning within the Italian law of delicts. It referred only to patrimonial loss, as the

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[25] Geneviève Viney & Patrice Jourdain, *Les Conditions de la Responsabilité* 4 (3rd ed., 2006) (France).

[26] Massimo Franzoni, *Danno Ingiusto e Danno Risarcible nella Responsabilitá Civile* (2002) (It.).
http://www.aci.it/fileadmin/documenti/studi_e_ricerche/monografie_ricerche/franzoni.pdf.
Massimo Franzoni, *Trattato della Responsabilitá Civile - Il Danno Risarcibile 3* (2010) (It.).

[27] Paolo Cendon, Commentario al codice civile. Artt. 2043-2053 187 (2008) (It.).
Francesco Caringella, Responsabilità Civile e Assicurazioni. Normativa e Giurisprudenza Ragionata 88 (2008) (It.).

Italian Civil Code does not grant general protection to all types of non-economic losses. From a methodological standpoint, harm and loss are two distinct elements, and both are required to establish delictual liability under a civil law system of general clause. Therefore, harm refers to the physical phenomena, and loss refers to the consequences of that phenomenon, provided they produce a legally relevant effect.

Nevertheless, some sections of this paper use the term presented in the original language – in particular, the Japanese term *songai*. Since Japanese scholarship does not differentiate between harm and loss in the same manner as with *dommage* and *prejudice*, it is thus difficult to ascertain whether a particular writer is referring to an event or its result. Therefore, for the sake of clarity and precaution, the term *songai* is used unless the context is sufficiently clear to convey the meaning of the term.

Ⅲ. REVIEW OF THE LITERATURE

Two challenges emerge in navigating the topic of non-economic losses in Japan under comparative law. The first is the number of comparative law papers on Japanese law in general. Several books engage with the matter in an introductory manner. Oda´s *Japanese Law*[28] introduces the reader to the Japanese legal system, though this introductory approach sacrifices the potential for an in-depth examination. The second challenge arises from the Japanese sources themselves.

On the one hand, literature regarding harm and loss usually relates to either damages or theories regarding the causal link. Indeed, papers and books regarding damages, or *songaibaisho,* far outnumber those related to the theory of loss, or *songairon*. This extends to sources dealing with non-economic losses. On the other hand, except for sources that address personality rights, literature has focused on

[28] Hiroshi Oda, *Japanese Law* (3rd ed., 2011).

both the nature and function of *isharyo* or a case law analysis of the standards for calculating damages, rather than a doctrine of non-economic losses.

A. COMPARATIVE LAW AND JAPAN

The first hurdle for a comparative scholar when studying Japanese law is the limited availability of sources. Undoubtedly, a mastery of the language is a crucial step for the comprehensive study of any given legal system. However, since the English language is a key source of comparative scholarship, the first step is to browse the literature. However, as Colombo has noted, the number of texts on the subject available to the general public has long been limited.[29] Amongst Japanese scholars who have written in Western languages, Kawashima,[30] Noda,[31] and Oda[32] deserve a special mention. As the few Japanese scholars who have written in English, they were thought to be objective. As a result, they have exerted a significant deal influence and impact on general scholarship.[33] Colombo has illustrated this challenge by stating that the number of law articles analyzing Japanese law in a comparative law perspective is relatively low. For example, in continuing the work of Frank Upham,[34] Colombo has perused 16 years (1997-2013) worth of publications in the American Journal of Comparative Law and discovered that there had been only

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[29] Colombo *supra* note 3 at 746.

[30] Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan in* Law in Japan: The Legal Order in a Changing Society 41 (Arthur Taylor von Mehren ed., 1963).

[31] Yoshiuki Noda, *Introduction to Japanese Law* (Anthony h. Engelo ed., trans. 1976) (1966).

[32] *Supra* note 27.

[33] Colombo *supra* note 3 at 746.

[34] Frank Upham, The Place of Japanese Legal Studies in American Comparative Law, 1997 Utah L. Rev. 639 (1997).

15 articles on Japanese law, 8 of which were included in a special issue, "Law in Japan."[35] Repeating this exercise for the UK-based International Law Quarterly in the period from 1952 to 2013 yielded only 10 articles on Japan,[36] even fewer than on the People's Republic of China, to which 18 papers were dedicated. To further complicate matters, most articles tend to study socio-cultural aspects of Japanese law, such as the low litigation rate, or conduct an overview of the system in general.[37] However, that is not to say these articles deal exclusively with general issues. A glance at the Journal of Japanese Law of the University of Sydney or the Social Science Research Network database shows that corporate governance, business law, and copyright law are also prime research subjects. Of particular importance is the Journal of Japanese Law, published by the Max Planck Institute of Comparative and International Law, which deals almost exclusively with legal issues from a practical and theoretical standpoint.

However, papers on non-economic losses are even rarer, especially those on the three main axes that serve as the basis of the arguments presented here. The first axis is an analysis of the drafting

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[35] COLOMBO *supra* note 3 at 737.

[36] COLOMBO *supra* note 3 at 738.

[37] See: Donald L. Uchtmann, Richard P. Blessen, Vince Maloney, *The Developing Japanese Legal System: Growth and Change In The Modern Era*, 23 Gonzaga Law Review 349 (1987), Tom Ginsburg & Glenn Hoetker, *The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation*, 35 J. Legal Stud. 31 (2006).

Luke Nottage, Stephen Green, *Who Defends Japan?: Government Lawyers and Judicial System Reform in Japan*, 13 Asian-Pacific Law & Policy Journal 129 (2011),

Feldman, Eric A., *Law, Culture, and Conflict: Dispute Resolution in Postwar Japan*. U of Penn Law School, Public Law Research Paper No. 07-16. Available at SSRN: http://ssrn.com/abstract=980326.

process that preceded the enactment of the Civil Code, particularly regarding Articles 709, 710, and 711. Soon after the promulgation of the Japanese Civil Code, Kazuo Hatoyama wrote a series of papers for the Yale Law Journal in which he compared the new code with the French Code.[38] Although Hatoyama briefly addressed the drafting process, the nature of the papers precluded any analysis beyond an overview. Another important source is a book written by one of the drafters, Nobushige Hozumi, titled Lectures On The New Japanese Civil Code As Material For The Study Of Comparative Jurisprudence.[39] Unfortunately, Hozumi did not engage with the subject of delictual liability in this work. Shusei Ono authored another series of papers for the Hitotsubashi Journal of Law and Politics that analyzes various aspects of the Civil Code. The first two issues introduce a meticulous recounting of the background and composition of the drafting committee,[40] while the third and fourth issues concern delictual liability.[41] However, sections regarding the drafting process

[38] Kazuo Hatoyama, The Civil Code of Japan Compared with the French Civil Code, 11-6 The Yale Law Journal 296 (1902)
Kazuo Hatoyama, The Civil Code of Japan Compared with the French Civil Code, 11-7 The Yale Law Journal 354 (1902)
Kazuo Hatoyama, The Civil Code of Japan Compared with the French Civil Code, 11-8 The Yale Law Journal 403 (1902).

[39] NOBUSHIGE HOZUMI, Lectures On The New Japanese Civil Code As Material For The Study Of Comparative Jurisprudence (2nd ed.,1912) (Japan).

[40] Shusei Ono, *Comparative Law and the Civil Code of Japan (I)*, 24 Hitotsubashi Journal of Law and Politics 24 (1996) (Japan).
Shusei Ono, *Comparative law and the Civil Code of Japan (II)*, 25 Hitotsubashi Journal of Law and Politics 25(1997) (Japan).

[41] Shusei Ono, The Law of Torts and the Japanese Civil Law (I): Comparative Law and the Civil Code of Japan (III), 26 Hitotsubashi Journal of Law and Politics 24 (1998) (Japan)
Shusei Ono, The Law of Torts and the Japanese Civil Law (II): Comparative law and the Civil Code of Japan (IV), 27 Hitotsubashi Journal of Law and

are short.

There are some limited sources on case law. One is the translation available at the Supreme Court website,[42] and another is the casebook edited by Milhaupt, Ramseyer, and West.[43] However, the former is usually limited to notable Supreme Court rulings, while the latter incorporates other cases besides delictual liability. Given this situation, there is no current English source that focuses solely on the drafting process of the section regarding delictual liability and non-economic losses[44] in the Japanese Civil Code or the specific legal doctrines that developed from it, or that more closely examines the law of non-economic losses.

B. HARM AND LOSS IN JAPANESE SCHOLARSHIP

Although sources in Western languages are helpful in disseminating information and research, only sources in the original language can provide sufficient information to explore and address any perceived issue, which is true for any endeavor in comparative law. Concerning the specific subject of this work, Japanese sources can be divided into three groups. The first is sources that engage with the drafting process. Among these, committee records[45] are the main primary source. Written in old Japanese, these records involve the introduction of each specific provision, discussions between drafters and other committee members, and a background explanation of the

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Politics 25(1999) (Japan).

[42] http://www.courts.go.jp/english/.

[43] CURTIS MILHAUPT, J. RAMSEYER & MARK WEST, *The Japanese Legal System (University Casebook Series)* (2nd. Ed., 2012).

[44] However, there are some articles that address specific developments. See: Hsiao, Philip, *Power Harassment: The Tort of Workplace Bullying in Japan* (September 28, 2014). 32 UCLA Pacific Basin L.J. 181 (2015).

[45] Available in digital form at the National Diet Library Collections: http://dl.ndl.go.jp/.

Civil Code. Secondary sources are mostly limited to articles written for the specific purpose of discussing the drafting process. Though not rare, referencing the ideas of drafters or the legislative story is not typical in the writing of Japanese scholars. The *Minpoten no Hyakunen,*[46] a four-volume treatise written for the 100th anniversary of the Civil Code, is of particular interest. While data regarding case law and doctrines has not been updated, it provides a solid background to analyze the historical process.[47] Some papers have approached the topic of the influence of foreign codes, the legal education of the drafters, or the meanings that drafters ascribed to various terms, such as fault, right infringement, or delictual liability.[48] However, except for two papers written by Ippei Osawa,[49] no papers present an in-depth

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[46] Volumes I and III are of particular interest to the subject at hand.
I Minpoten no Hyakunen Senpanteki Kansatsu (Toshio Hironaka, Eichi Hoshino eds., 1998) (Japan).
III Minpoten no Hyakunen Kobetsuteki Kanstatsu (2) Saiken Hen (Toshio Hironaka, Eichi Hoshino eds., 1998) (Japan).

[47] However, in some cases the information must be read while considering the influence of the authors.

[48] See: Teru Okubo, *Minpo Kisosha no Kangaekata no Chigai ni tsuite*, 26 Chuo-Gakuin University review of Faculty of Law 113 (2013) (Japan), Takashi Oka, *Meiji Minpo Kiso Katei ni okeru Gaikoku Ho no Eikyo*, 4 Journal of International Philosophy 16 (2014) (Japan), Yoichi Sakaguchi, *Minpoten Kiso no Hoko: Hozumi to Ume ni okeru Doitsu Minpo Keiju no Ronri*, 22 Area and Culture Studies 107 (1972) (Japan), Tomoya Sano, *Minpo Kisoji ni okeru Sansho Gaikokuho Bunseki Kiban no Kochiku*, 263 Journal of Law and Politics 37 (2015) (Japan)、Zhang Zhihui, *Meiji Minpo no Seiritsu to Kinmochi Saionji – Minpo Chosakai no Giron wo Chushin ni-*, 93 Ritsumeikan Daigaku Jinbungaku Kenkyusho Kiyo 207 (2009) (Japan), Akihito Kushihi, *Meiji Minpo [Fuhokoi] ni okeru Kisosha Ishi no Tankyu: Meiji Minpo 709 Jo no Shisoteki Haikei* , 66 Journal of Law and Political Studies 289 (2005) (Japan).

[49] Ippei Osawa, *Minpo 711 ni okeru Hoeki Hogo no Kozo II Fuhokoi Sekinin no Seisakuteki Kaju ni kansuru Ikkosatsu*, 128 (2) Journal of the Jurisprudence Association the University of Tokyo 453 (2011) (Japan).

examination of the legislative process of Articles 710 or 711. Another important historical document is the commentaries of the drafter Kenchiro Ume, as he was the only drafter to record a complete commentary on the Civil Code.[50]

The second type of source is those that approach the issue of delictual liability, particularly the concepts of harm and loss. In traditional scholarship, textbooks are not usually granted the same weight as peer-reviewed journals. However, any comparative scholar studying Japanese civil law immediately discovers that this is not necessarily the case in Japan. Japanese scholars who write textbooks tend to include discussions of law-related issues. Sakae Wagatsuma[51] and Ichiro Kato[52] are two classic legal scholars who have influenced generations of legal professionals in Japan. Yoshio Hirai has also published a prominent book regarding the theory of compensation.[53] The variation of the German *Differenztheorie*, was introduced to Japan by Otoshiro Ishizaka[54] and Tamakichi Nakajima[55]. This theory requires losses to be expressed as money has influenced scholarship to the point that harm and loss as independent legal concepts have ceded center stage to the law of damages.

An example of this is a symposium titled "Theory and Reality of The Law of Damages (*Songai Baishoho no Riron to Genjitsu).*" [56] The

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[50] Kenshiro Ume, *Minpo Yogi Maki sono San Saiken Hen* (reprint 1984) (Japan).

[51] Sakae Wagatsuma, *Jimu Kanri Futo Ritoku Fuhokoi* (1988) (Japan).

[52] Ichiro Kato, *Jimu Kanri・Futo Ritoku・Fuhokoi* 148 (1957) (Japan).

[53] Yoshio Hirai, *Songai Baishoho no Riron* (photo. reprint 2011) (Japan), Yoshio Hirai, *Saiken Kakuron II Fuhokoi* (2010) (Japan), Yoshio Hirai, *[Songai] Gainen no Saikosei*, 90 Journal of the Jurisprudence Association The University of Tokyo 1515 (1973) (Japan).

[54] Otoshiro Ishizaka, *Nihon Minpo Saiken Soron Jokan* (1911).

[55] Tamakichi Nakajima, *Minpo Shakugi Maki Sono III Saiken Soron Jo* (1911) (Japan).

[56] S*ongai Baishoho no Riron to Genjitsu*, 55 Shiho 3 (Masamichi Okuda,

second presentation of the symposium, titled "Theory of Loss (*Songairon),"* was only six pages long and began by discussing the procedural aspects of claims in the case of wrongful death, the monetary awards for non-economic losses, and transferability via *mortis causa*, before moving to the realities of damages calculations. In a symposium concerning the law of damages, in a topic titled "Theory of Loss," there was no conversation about the criteria for a loss to be considered legally protected and no normative discussion on the importance of the formal or material aspects of the concept. Another example is the article "*Songai to sono Shuhen"* by Mina Wakabayashi,[57] which briefly engages with some theories regarding harm and loss before focusing on the concept of causal link.

That is not to say that discussions regarding loss in an abstract manner are unknown. Rather, most researchers in Japan connect the concept of loss to either the casual link or the monetary award. Nevertheless, some papers have addressed the matter of loss and harm abstractly without approaching it from a financial perspective.[58] Of particular importance is Makoto Takahashi's *Songai Gainenron Josetsu,*[59] which tackles the multiple theories used to address the idea of loss and harm in Japanese law. It is also notable that harm and loss are studied under the concept of unlawfulness or *ihosei*.

Finally, the third type of source is those that regard non-

Takehisa Awaji eds., 1993) (Japan).

[57] Mina Wakabayashi, *[Songai] to sono Shuhen*, 29 Kyoto Gakuen Law Review 243 (1999) (Japan).

[58] Masayuki Kato, *Kihanteki Songai Gainen heno Tenbo*, 61 Journal of Law and Political Studies 195 (2004) (Japan).

Masayuki Kato, *Songai* Yoken Saitei (1): Fransuho ni okeru Baisho Genri to *Songai* Gainen no Kankei, 38 The Law and Politics Review 949 (2009) (Japan), Joji Namba, *Songai no Chushousei to Gutaisei: Songai no Kaidan Koso ni kansuru Oboegaki*, 1 Rikkyo Homukenkyu St. Paul's Law Review 105 (2008) (Japan).

[59] Makoto Takahashi, *Songai Gainenron Josetsu* (2005) (Japan).

economic losses. The challenge in gathering these sources is that most of the literature focuses on either the method for calculating damages or the monetary award's nature, function, or other aspects.[60] Two prime examples are Osamu Saito's *Isharyo no Santei no Riron*[61] and the *Isharyo Santei no Jitsumu*, which was published by the Lawyers' Association of Chiba (*Chiba ken Bengoshi Kai)*.[62] Empirical research on this topic is almost nonexistent, except articles published by Professor Momioka regarding non-economic damages in the case of medical malpractice[63] and defamation cases.[64] Daisuke Shimoda has published a paper[65] in three[66] parts[67] that studies the development of the claim for infliction of emotional distress in the US. While these papers are

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[60] Hiroshi Uebayashi, *Isharyo no Santei no Riron* (1962), Munehiko Mishima, *Isharyo no Honshitsu,* 5 (1) Kanazawa Law Review 1 (1959) (Japan).
Hirofumi Itou, *Isharyo no Seishitsu wo Meguru Giron ni Tsuite,*7 Bulleting of Toyohashi Sozo College 141 (2003) (Japan), Isamu Goto, *Saikin ni Okeru Isharyo no Shomondai*, 145 Ho no Shihai 31 (2007) (Japan), Michikata Kaino, *Fuhokoi ni okeru Mukei Songai no Baisho Seikyuken 1,* 50(2) Hogaku Kyoukai Zasshi, 18 (1932) (Japan), Michikata Kaino, *Fuhokoi ni okeru Mukei Songai no Baisho Seikyuken 2 Kan*, 50 (3) Hogaku Kyoukai Zasshi 116 (1932) (Japan), SAITO *supra* note 9.

[61] *Isharyo Santei no Riron* (Osamu Saito ed., 4ed., 2013) (Japan).

[62] *Isharyo* Santei no Jitsumu, Chiba ken Bengoshi Kai (ed.) 1 (2013) (Japan).

[63] Horinari Momioka, *Iryo Kago Sosho ni Okeru Isharyo no Kino ni Kansuru Jisshoteki Kenkyu*, 63 Journal of Hokkaido University of Education 83 (2013) (Japan).

[64] Horinari Momioka, Meiyo Kison Sosho ni Okeru Isharyo no Seisaiteki Yokushiteki Kino –Hodo Kikan ga Hikoku to Natta Jirei no Tokeiteki Bunseki, 119 The Chuo Law Review 583(2013) (Japan).

[65] Daisuke Shimoda, *Amerika ni Okeru Seishinteki Kutsu Baisho no Hatten (1)*, 19 The Okayama-Shoka Law Review 136 (2011) (Japan).

[66] Daisuke Shimoda, *Amerika ni Okeru Seishinteki Kutsu Baisho no Hatten (2)*, 20 The Okayama-Shoka Law Review 116 (2012) (Japan).

[67] Daisuke Shimoda, *Amerika ni Okeru Seishinteki Kutsu Baisho no Hatten (3)*, 21 The Okayama-Shoka Law Review 21 (2013) (Japan).

intriguing, they exhibit the same problems as other research – that is, a focus on the nature and function of the claim. Because of this, they can be perceived as basically the same research with an empirical basis, but they neglect to address the relationship between economic and non-economic damages and favor finding answers to more theoretical questions. A key source is Kato Ichiro's *Chushaku Minpo*, which has highly detailed, extensive sections about non-economic damages written in 1965 by Hiroshi Uebayashi.[68] An updated version was published in 2017, edited by Atsumi Kubota contains comprehensive explanations on Articles 709, 710 and 711.[69] However, the section concerning non-economic losses explains *isharyo*, or the monetary quantification of the loss suffered by the victim and continues referring to *isharyo* during its analysis; hence, it follows the same monetary approach as other sources.

Next, there is the issue of the influence of foreign scholarship, mainly German scholarship, on legal thinking in Japan. One of the first lessons for comparative scholars learn when studying Japanese law is that German law has exerted a great deal of influence over civil law scholarship. Indeed, it is common knowledge that the German code influenced the drafters. This paper tries to dispel this idea – at least regarding the law of delicts, particularly non-economic losses. The importance of German influence must be discussed in two fronts. The first is whether German law influenced the drafters regarding loss and harm under delictual liability. While it is true that the drafters had access to the first draft of the BGB, it is also true that they consulted the civil codes from France, Spain, Belgium, the Netherlands, Italy,

[68] Hiroshi Uebayashi, *Seishinteki Songa*i ni taisuru Isharyo in Chushaku Minpo (19) Saiken (20) Fuhokoi 193, 203-211 (Ichiro Kato ed., 1965) (Japan).

[69] Atsumi Kubota, *Zaisan igai no Shingai no Baisho in* Shin Chushaku Minpo (15) Saiken (8) 861, 862 (Atsumi Kubota ed. 2017) (Japan).

Portugal, Montenegro, and Austria.[70]

However, above all, during the discussion of the requirement of delictual liability, rights infringement, and loss, the drafters were clear that these two concepts represented English common law and the French Code, respectively. Nevertheless, most scholars have attempted to identify links between Article 709 and the BGB. An excellent example is the *Minpoten no Hyakunen* mentioned above, which discusses the legislative history of Article 709 with the corresponding articles of the BGB, apparently ignoring the fact that the BGB was promulgated years after the Japanese Civil Code and the very words used by the drafters.[71] Later in the same section, the author quotes Hozumi and Tomii to posit that the requirement of right infringement is not based on German law. However, the author again seems to ignore Hozumi comments on the matter:

> *At first sight, it may appear that the new Code was very closely modeled upon the new German Civil Code; and I have very often read statements to that effect. It is true that the first and second draft of the German Code furnished, very valuable material to the drafting committee and had a great influence upon the deliberations of the Committee. But, on close examination of the principles and rules adopted in the Code, it will appear that they gathered materials from all parts of the civilized world, and freely adopted rules or principles from the laws of any country, whenever they saw the advantage of doing so. In some parts, rules were adopted from the French Civil Code; in others, the*

[70] http://www.law.nagoya-u.ac.jp/jalii/arthis/1896/table3.html#id900.

[71] Nobuhige Segawa, *Minpo 709 Jo (Fuhokoi no Ippanteki Seiritsu Yoken) in* III Minpoten no Hyakunen Kobetsuteki Kanstatsu (2) Saiken Hen 559, 560ff. (Toshio Hironaka, Eichi Hoshino eds.,1993) (Japan).

> *principles of English common law were followed; in others again, such laws as the Swiss Federal Code of Obligations of 1881, the new Spanish Civil Code of 1889, the Property Code of Montenegro, Indian Succession and Contract Acts or the Civil Codes of Louisiana, Lower Canada or the South American Republics or the draft Civil Code of New York and the like have given materials for the framers of the Code. In January 1896, the report of the Committee on Book I, "General Provisions," Book II, "Rights in rem" and Book III, "Rights in personam" was submitted to the Imperial Diet and was adopted with only a few unimportant modifications.*[72]

To be fair, the author was following a tradition that began in the early 20th century. The German influence is not a result of the drafters' intent but rather changes in the balance of power within the law school of the Tokyo Imperial University, now Tokyo University. In addition, the death of Ume in 1910 further shifted this balance towards favoring the introduction of German ideas. In other words, the influence of German law in later generations is accurate, although the drafters did not intend such consequence.

Therefore, this paper approaches the issue of non-economic losses without relying on the traditional tools used by Japanese law, such as German ideas or an approach based on economic valuation. Instead, it analyzes the development of the law, starting with the drafting process and continuing through many of the doctrinal and practical discussions that arose from it. By arguing that the German influence is merely the result of historical circumstances, rather than a deliberate attempt to modernize the law, this paper presents a new perspective of the realm of civil liability under Japanese code,

[72] HOZUMI *supra* note 38 at 22-23.

particularly regarding the issue of non-economic losses under a more general scope than past research has done, either in Japanese or English literature.

CHAPTER 2: ARTICLE 709 JAPANESE OF THE JAPANESE CIVIL CODE

Ⅰ. HARM AS AN ELEMENT OF DELICTUAL LIABILITY UNDER ARTICLE 709 OF THE JAPANESE CIVIL CODE.

This chapter explores the concepts of harm and loss as they appear in Article 709 of the Japanese Civil Code and their role as requirements for delictual liability under Japanese civil law. For context, Article 709 of the Japanese Civil Code reads:

> *"A person who has intentionally or negligently infringed any right of others,or legally protected interest of others, shall be liable to compensate any damages resulting in consequence."* [73] [74]

While the language appears straightforward enough, it belittles that the concept of loss, as understood by Japanese scholars, does not carry the same weight as it does in other civil law countries. On the

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[73] Translation from: http://www.japaneselawtranslation.go.jp/.
The original text of the Civil Code, as it was promulgated in 1896, did. not include the phrase "*or legally protected interest of others,"* which in turn led to a prolonged discussion, both in scholarship and case law, regarding the concept of unlawfulness under Article 709. This phrase was added to the Japanese Civil Code in the 2004 reforms, which were aimed at modernizing the language in the text and complementing the provisions with precedents set by the Supreme Court. In the case of delictual liability, the phrase was added to align the code with the general view that rights should not be construed in a limited manner.

[74] For the purposes of this chapter, the term "loss" refers to damages, as it appears in the above translation.

one hand, a review of the literature reveals that scholarship has been focused on the concepts of damages, referring to the monetary amount a victim receives.[75]

Moreover, there are discussions about whether Article 709 of the Japanese Civil Code reflects the French model or the German model of civil liability.[76] Supporters of the German model[77] have noted that an early draft of the Civil Code that only required negligence or carelessness (*kashitsu matawa taiman*) as a single element of delictual liability was replaced by a two-step system, *i.e.*, intent or negligence and the infringement of a legal right. Those who follow the German school of thought have argued that this change bears a clear resemblance to Article 823 of the BGB.[78] On the other hand, advocates for the French model[79] have asserted that both Article 709 of the Japanese Civil Code and Article 1382 of the French *Code Civil* present a uniform system of delictual liability. In addition, they have highlighted that the infringement of a legal right requirement is broader than the list of rights established under Article 823 of the BGB. Finally, during discussions regarding delictual liability prior to the enactment of the code (the *Hoten Chousakai*), there were no

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[75] Indeed, a fixation on *monetary quantification* is found in almost any discussion regarding losses, even those related to non-economic losses.

[76] Ippei Osawa, *Minpo 711 ni okeru Hoeki Hogo no Kozo I Fuhokoi Sekinin no Seisakuteki Kaju ni kansuru Ikkosatsu*, 128(1) Journal of the Jurisprudence Association the University of Tokyo 157,169 (2011) (Japan).

[77] See: Seishi Nishigori, *Ihosei to Kashitsu*, in Minpo Kosa 6 134, 139 (Eichi Hoshino ed., 1985) (Japan)

Masunobu Kato, *Shin Minpo Taikei V Jimu Kanri･Futo Ritoku ・ Fuhokoi* (2ed., 2005) (Japan)

Tatsuaki Maeda, *Minpo VI (Fuhokoiho) 3* (1982) (Japan).

[78] Osawa *supra* note 4 at 169.

[79] See: Yoshio Hirai, *Songai Baishoho no Riron* 361 (photo. reprint 2011) (Japan). Eichi Hoshino, *Minpo Ronshu 6* 317 (1986) (Japan).

references to German law.[80] The influence of German scholarship in Japanese law is evident; however, to the degree that the original draft and the Civil Code as it was enacted is concerned, historical evidence lends more support to the French model.

Kato has assessed that under Japanese law, the concept of loss is understood as that which lies at the end of the causal link. Many theories divide the issue of the causal link and the field of compensation. Approaching the issue of loss under the causal link is a *but-for-cause* type of approach, which does not include normative considerations.[81] In contrast, in the French *Code*, the issues of the causal link and the extent of compensation are not independent but rather interrelated. Furthermore, under the principle of *reparation intégrale,* the loss, as a requirement for delictual liability, is not limited by external factors but rather wholly compensated. Hence, under the French system, the issue centers on identifying these losses[82].While there are no doubts that the existence of a loss is required under Article 709, Kato has noted that discussions of the concepts of harm and loss tend to be limited to the amount of the compensation rather than the legal requirement of loss.[83] In this regard, the main issues are the relation between the first half of Article 709, *i.e.*, the infringement of a legal right, and the second half, *i.e.*, that the victim suffers a loss due to said infringement.

The discussion of the infringement of rights that resulted from the construction of first half of Article 709 allowed for an expansion of both the concept of rights and the idea of unlawfulness. This also meant that the concepts of harm and loss were relegated to a

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[80] OSAWA *supra* note 4 at 169.

[81] Masayuki Kato, *Kihanteki Songai Gainen heno Tenbo*, 61 Journal of Law and Political Studies195, 196 (2004) (Japan).

[82] *Id.* at 197.

[83] KATO ***supra*** note 9 at 950.

secondary role, regardless of their actual importance. Thus, the loss as a requirement and the concept of loss as the final step in the causal link were not considered connected. Instead, scholarship has advanced them as two separate issues. Furthermore, the relation between these two requirements has been a controversial issue since the draft's inception. Perhaps one of the most salient issues is the introduction of German scholarship, regardless of its degree of influence on the delictual liability system under Articles 709, 710, and 711. This has led to the adoption of a concept of loss that is linked to the idea of monetary valuation, following the German *Differenztheorie*.

However, as is discussed later, the *Differenztheorie* was never intended as anything more than a means to quantify the loss suffered by a victim and is not a tool for granting the concept of loss any legal meaning. In this context, Namba has attempted to explain the concept of *songai* as a spectrum that ranges from "abstract harm" to "specific harm." This spectrum is divided into three stages: the first involves the concept of harm itself, the second concerns the types of losses (*e.g.*, economic or non-economic), and the third regards the specific loss, which is the economic valuation of such losses.[84] Namba has further argued that while specific losses should be held as the principle, understanding loss as an abstract concept is necessary to a certain degree. Although, regardless of which end of the spectrum is chosen, only those items that can be specified can be considered as loss.

Nevertheless, a close analysis of Namba's argument reveals that the proposition includes more than a simple distinction between abstract and concrete concepts. Namba has advocated for a division of the term *songai*, which refers to both harm and loss within the Japanese Civil Code, case law, and scholarship. In a rather roundabout

[84] Joji Namba, *Songai no Chushousei to Gutaisei: Songai no Kaidan Koso ni kansuru Oboegaki,* 1 Rikkyo Homukenkyu St. Paul's Law Review 105, 107 (2008) (Japan).

manner, Namba recognized loss as an abstract idea that refers to an event that occurs in the world and is detrimental to a victim's favorable situation, is not the same concept as harm as damages. In a sense, Namba has referred to the distinction between harm and loss that is common among the scholarship of civil law countries under the French model. However, the fact that he is bound by the word *songai* means that, in a way, he cannot correctly define the phenomena he has correctly observed.

Arguably, Namba – and Japanese scholarship in general – has encountered two significant challenges when studying harm and loss in a legal context. The first is language. The Japanese language has several terms to describe harm and loss. The original draft by Boissonade utilized the terms *dommage, prejudice,* and *perte* in various articles, and did so in a remarkably distinct manner. However, the translation applied the terms *songai* and *sonshitsu* and referred to their French counterparts without any explicit rules. Thus, Japanese scholars are chained to the term *songai* in a way that is not commonly observed in comparative law. In a sense, the main issue can be presented in mathematical terms: scholarship attempts to assign multiple meanings to a single variable, resulting in confusion and misunderstanding the topic.

There is no doubt that under the Japanese Civil Code, a loss is an integral element of delictual liability. However, as Kato[85] has stated, "discussions regarding the concept of harm tend to be about the content and extent of the damages." Thus, the topic has not been researched as much as an element of delictual liability. The relation between the infringement of a legal right or interest and the existence of harm under Article 709 is ambiguous. Since a breach of a right naturally leads to the emergence of harm, discussions inevitably shift

[85] KATO *supra* note 9 at 950.

to the content of harm instead. Wagatsuma[86] had asserted that an act that infringes on a third party's right is not necessarily an unlawful one – nor can it be said that every unlawful act causes a loss to a third party. In the same sense, Ichiro Kato[87] has admitted that even if an unlawful culpable act took place, a victim cannot claim damages in the absence of harm.

However, Japanese literature has tied the concept of harm to the concept of unlawfulness and the content of harm, expressed in a monetary sum, is more important than its definition or characteristics. Moreover, the Japanese Civil Code does not provide a statutory definition of harm or loss. In this regard, Japan is reflective of most civil law countries. However, Japan is arguably an exception within the countries that follow the French legal tradition. It does not follow the traditional "characteristics of loss" approach. In turn, several theories seek to situate harm and loss within the context of the Japanese system.

Japanese literature has tended to denounce a concept of loss like that presented under the French system, *i.e.*, the decrease in a favorable situation of the victim as empty and of no use.[88] However, this stance disregards the fact that such a definition is accompanied by discussions regarding the nature of harm and loss and requirements for a loss to be legally protected. This attitude towards such a definition seems to stem from an overreliance on the German model even though the Japanese law of delict is clearly modeled after the French *Code*. The concept of infringement and unlawfulness are thoroughly rooted in the mentality of Japanese lawyers.

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[86] Sakae Wagatsuma, *Jimu Kanri Futo Ritoku Fuhokoi* 152-153 (1988) (Japan).

[87] Ichiro Kato, *Jimu Kanri・Futo Ritoku・Fuhokoi* 148 (1957) (Japan).

[88] Makoto Takahashi, *Songai Gainenron Josetsu* 199 (2005) (Japan).
Hirai *supra* note 18 at 75.

Hirai[89] has highlighted that legal techniques for defining harm in Japan are poor, and that failing to define the concept of harm is not solely a Japanese idiosyncrasy, but rather one that can also be observed in American common law and the French *Code*. Indeed, few codes provide a statutory definition of loss.[90] However, in the example he provides, Hirai does not consider two key elements regarding harm and loss. First, American common law, especially the law of torts, ascribes more importance to the conduct and duties of the tortfeasor than to the loss of the victim, at least at an abstract level. Loss and harm are elements involved in determining the amount granted as damages, and as such, they cannot be abstract concepts but must be assigned a precise value. Therefore, abstractly defining harm or loss could prove incompatible with *a posteriori* rules of tort law. Second, while it is true that there is not statutory definition of harm or loss in the French *Code*, Hirai seems to have neglected the fact that the concepts of harm and loss occupy center stage in discussions of the law of delicts – not only in French scholarship, but also in countries that have received its influence.

The second common theme in Japanese literature and theories regarding harm is a fixation on monetary quantification. This derives from the fact that Japanese civil liability adheres to a theory called *kinsen baisho gensoku*,[91] or the principle of monetary compensation, under which compensation for civil liability must be provided in the

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[89] HIRAI *supra* note 18 at 75.

[90] Exceptions are found within the Argentinean and Paraguayan Civil Codes. Article 1835 of the Paraguayan Civil Code defines harm as any loss regarding the person, rights, faculties, or property of an individual. Existirá daño, siempre que se causare a otro algún perjuicio en su persona, en sus derechos o facultades, o en las cosas de su dominio o posesión.

[91] Specifically, Article 417 of the Japanese Civil Code states "Unless other intention is manifested, the amount of the damages shall be determined with reference to monetary value".

form of monetary damages. The influence of this principle in Japanese legal thinking is apparent in the presentation of the various theories regarding harm later in this paper. Under such circumstances, the study of the concept of loss and harm under Japanese law must be approached via the drafting process in the late 19th century to better understand its relation to the idea of non-economic losses, which is addressed in the next chapter.

Ⅱ. THE DRAFT OF THE CIVIL CODE

A. THE BOISSONADE DRAFT

As a result of the rapid changes that the Meiji era (1868-1912) incited in Japan, the Japanese government under Emperor Meiji urged for a complete reform of the legal system to align it more closely with those of Western countries.[92] In 1873, the French jurist Gustave Émile Boissonade de Fontarabie, under the invitation of the Japanese government, arrived in Japan to participate in the drafting of the first

[92] For a more complete study: Teru Okubo, *Minpo Kisosha no Kangaekata no Chigai ni tsuite*, 26 Chuo-Gakuin University review of Faculty of Law 113 (2013) (Japan), Takashi Oka, *Meiji Minpo Kiso Katei ni okeru Gaikoku Ho no Eikyo,* 4 Journal of International Philosophy 16 (2014) (Japan), Yoichi Sakaguchi, *Minpoten Kiso no Hoko: Hozumi to Ume ni okeru Doitsu Minpo Keiju no Ronri*, 22 Area and Culture Studies 107 (1972) (Japan), Tomoya Sano, *Minpo Kisoji ni okeru Sansho Gaikokuho Bunseki Kiban no Kochiku*, 263 Journal of Law and Politics 37 (2015) (Japan)、
In English: Nobushige Hozumi, Lectures on the New Japanese Civil Code as Materials for the Study of Comparative Jurisprudence (1912) (Japan),
Shusei Ono, *Comparative Law and the Civil Code of Japan (I)*, 24 Hitotsubashi Journal of Law and Politics 24 (1996) (henceforth Ono I) (Japan),
Shusei Ono, *Comparative law and the Civil Code of Japan (II),* 25 Hitotsubashi Journal of Law and Politics 25(1997) (henceforth Ono II) (Japan),
Kazuo Hatoyama, *The Civil Code of Japan Compared with the French Civil Code*, 11 The Yale Law Journal 296,303 (1902) (Japan),

Japanese Civil Code.[93] [94] Many members of the First Drafting Committee were judges educated under the Ministry of Justice. Hence, they were influenced by French law, and as a result, the committee rarely questioned the principles set forth by the Boissonade code or French law.[95]

Under the Boissonade draft, delictual liability was designated as *dommages injuste*. However, Boissonade did not address the issue of unlawfulness or infringement of legal rights.[96] Delictual liability, Boissonade argued, was based on the ideas of natural law.[97] Moreover, Boissonade limited the concept of *dommage* to material losses and explicitly rejected the idea of non-economic losses as a subject of the law of delicts.[98] For example, in cases of personal injury, it applied only to medical expenses and losses resulting from an inability to work and a pension to the family of the victim in cases where the victim died.[99] Boissonade based his rejection of non-economic losses on two points. The first was the idea that any type of monetary award is insufficient

[93] A Drafting Committee of the Civil Code Codification was founded in April 1880 and Abolished in March 1886.

[94] Boissonade was not an official member of the commission, but the draft produced by the commission was, for all intents and purposes, the same as the one proposed by Boissonade. He was invited to Japan because Rinsho Mitsukuri, the translator of many Western codes, was not sure his translations were true to the original material. Thus, he asked the Minister of Justice for permission to go abroad in order to study law and become familiar with the Western systems. The Minister rejected his request, deeming Mitsukuri too important to the codification process, and Boisonnade was invited to help answer any questions Mitsukuri might have had. See: Ono I *supra* note 21 at 28, Ono II *supra* note 21 at 41.

[95] Ono II *supra* note 21 at 40-41.

[96] Osawa *supra* note 4 at 170.

[97] Osawa supra note 4 at 171.

[98] Osawa supra note 4 at 173.

[99] Osawa supra note 4 at 171.

to compensate the victim for these types of losses, rather than the difficulty of a monetary valuation.[100] Second, Boissonade described the delictual liability as a two-step process, making a distinction between harms, such as personal injuries or defamation, and any economic losses that result from them.[101]

Throughout the draft, Boissonade used the terms *dommage* and *prejudice* as synonyms. There is no evidence that he would have ascribed these terms two different meanings, at least not within the statute. Boissonade did use the term *dommage* far more frequently than the term *prejudice*; however, both seem to refer to the infringement of a legal interest of the victim and the actual loss suffered. However, in the Japanese version of the draft, these terms are translated as songai and sonshitsu, and their use is inconsistent. In some instances, *prejudice* is translated as *songai*, only to be later translated as *sonshitsu*.[102] In addition, the term *perte*, used by Boissonade to refer to a loss, was also translated as *sonshitsu*, further compounding the confusion. It is possible that while Boissonade did not intend for *dommage* and *prejudice* to be construed as two different concepts, he did not consider *perte* to be their synonym. It is unlikely that it could be a simple error, as Boissonade was a professor of law and would be fully aware of the consequences of such a mistake.

The Japanese Civil Code was enacted in 1890 and was expected to take effect in 1893. However, there was some controversy regarding certain parts of the code, particularly those related to family law. This *hoten ronso,* or controversy on the Civil Code Codification, resulted in

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[100] Osawa supra note 4 at 173.

[101] Osawa supra note 4 at 173.

[102] In the current Civil Code, the preferred term for ham is "*songai.*" A quick search of the Civil Code reveals that the term is used more than 100 times. In contrast, the word "*sonshitsu,*" or loss, is only used 9 times within the actual Japanese Code.

postponing enforcement of the Civil Code in 1892, and finally to its abolishment in 1898, before it was even enforced.[103]

B. THE JAPANESE DRAFT

The Second Drafting Committee was established in 1893 to address criticism directed at the first committee. It consisted of 33 members and was presided over by Ito Horobumi, who was so supportive of the German style that, under his insistence, the new draft was written in the *pandekten system*.[104] [105] Many members were either judges or high-ranking government officials, and the time that had passed since the composition of the first draft had allowed Japanese scholars, judges, and officials to improve their knowledge of comparative law.[106]

However, the task of writing the actual draft was delegated to three scholars: Kenshiro Ume, Nobushige Hozumi, and Masaakira Tomii.[107] Each had strong comparative law roots, having studied in

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[103] ONO I *supra* note 21 at 29.

[104] While Ito supported a German model of codification, the leaders of the government were only interested in a code without any particular leanings towards the origins of the rules within. This allowed for the inclusion of institutions from various sources. See: Ono II *supra* note 21 at 45.

[105] The German ideas of government and state in general were very influential during the restoration. For one, Germany was considered in its Golden Age of development, an underdeveloped society that caught up with other Western powers, which was the same thing that Japan was trying to achieve at the time. On the other hand, German ideas were of a conservative nature, which was very attractive to the political leaders of Japan. ONO I *supra* note 21 at 31,

[106] ONO II *supra* note 21 at 41.

[107] Kenshiro Ume obtained his Ph.D. at the University of Lyon after studying for three years in 1889, after which he moved to Germany. There, he was able to attend lectures at the University of Berlin until 1890, returning to Japan in 1891. Ume was also the only drafter who had supported the original draft as presented by the First Committee, as well as the only drafter to write a

France, Germany, or England. Surprisingly, the drafter who referenced German law and ideas the most was neither Ume nor Hozumi, who briefly studied German law in Germany, but Tomii, who only had experience in French law. Nevertheless, Ume did consider that since the German BGB was the product of new legal principles, it was necessary for the legal future of Japan.[108]

In contrast with the Boissonade draft, which was based on the concept of natural law, the drafters and the commission, in general, rejected the idea of rights having a basis in the natural world. Instead, laws were a manmade construct, and rights and duties were established by law. Therefore, natural rights could not be legally enforced or classified as rights under the Japanese code at the time of the draft.[109] The drafters also opposed the belief that the code should

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complete commentary on the Civil Code, *Minpo Yogi*, which consisted of more than 300 pages and spanned five volumes.

Nobushige Hozumi studied at the University of London and graduated in 1879. After obtaining his barrister license, he moved to Germany to attend the Berlin University before returning to Japan in 1881. Together with his brother, Yatsuka Hozumi, he was very critical of the first code, raising the issue of national pride, but not rejecting foreign influences completely.

Finally, Masaakira Tomii also attended the University of Lyons, where he obtained his Ph.D. degree in 1883, and returned to Japan in 1885. In contrast with Nobushige and Kenshiro, he did not move to Germany or study German law. In 1892, he gave speeches advocating for the repeal of the first Civil Code. For more see: OKA *supra* note 21 at 16, Okubo *supra* note 21 at 116 *ff*, ONO I *supra* note 21 at 32-36.

[108] OKUBO *supra* note 21 at 119,

Ume, on the other hand, placed a great deal of importance on French law. In contrast to Ume, Tomii never had the opportunity to study German law directly, and his comparative law works did not deal with German law, most of them being written in French. However, he was very critical of French law and supported the idea that German law was the best representative of European Law. See: Ono I *supra* note 21 at 35-36, Ono II *supra* note 21 at 33.

[109] HATOYAMA *supra* note 21 at 303.

be redacted in a straightforward manner, except for the inclusion of definitions that were part of Boissonade's draft, permitting opportunities for future development of legal theory via interpretation.[110]

This discussion regarding the codification process in Japan, especially the influence of foreign codes and legal theories, is imperative to understand the situation after the promulgation of the code. Although two of the drafters studied in Germany, the short duration of their stays and the period in which they took place made it unlikely that they were influenced to such an extent as to negate their formal education. This is evidenced by the discussion of delictual liability and the fact that the drafters included a remedy for non-economic losses, which was rejected by the legal thinking that led to the creation of the BGB.[111] The drafters opted to adopt the French model of delictual liability and chose not to follow a *numerus clausus*

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[110] ONO II *supra* note 21 at 46.

[111] The theories presented by Frederich Von Mommsen in his work *zur lehre von dem Interesse* were the starting point for what later came to be the *differenztheorie*. For Mommsen, the scope of the infringed interests is an issue that should be solved under the rules of causality. However, Mommsen's theory was not applied to non-economic losses, as the general public in Germany at the time was opposed to granting remedy in those cases.
See: Yumiko Kashimi, *Doitsu ni okeru Songai Gainen no Rekishiteki Hatten: Doitsu Minpoten Seiritsu Maeshi*, 38 (1-2) Kanazawa Law Review 211,222-223 (1996) (Japan),
Mina Wakabayashi, Hotekina Gainen toshite「*Songai*」no Imi - Doitsu Ho ni okeru Hanrei no Kento wo Chushin ni (1), 248 Ritsumeikan Law Review 108 (1996) (Japan),
Mina Wakabayashi, Hotekina Gainen toshite「*Songai*」no Imi - Doitsu Ho ni okeru Hanrei no Kento wo Chushin ni (2), 251 Ritsumeikan Law Review 105 (1997) (Japan),
Mina Wakabayashi, Hotekina Gainen toshite「*Songai*」no Imi - Doitsu Ho ni okeru Hanrei no Kento wo Chushin ni (3), 252 Ritsumeikan Law Review 63 (1997) (Japan).

like that adopted by the BGB years later. Article 709 does not limit or categorize harm or loss in any way, unlike the BGB. One of the changes the drafters made compared to the Boissonade draft was the term for delictual liability. Originally, Boissonade had used the term *dommage injustes*. Instead, the drafters decided to use the term "unjust conducts" (*fusho shoi),* and finally, "unlawful acts" (*fuhokoi*).

However, drafters were divided on the requirement of delictual liability. Ume explained that the term *shoi* in the expression *fusho shoi* represented the French *faite*. On the other hand, the term *koi* from the expression *fuhokoi* referenced the French word *acte*.[112] Moreover, this spurred a discussion among the drafters on the meaning of the term *koi*, since it signified actions to which the law granted a specific effect. Therefore, there was a question as to whether negligence was included within the meaning of *koi*.[113] Tomii argued that if the inclusion of the term *koi* would generate such an issue with its interpretation, they must either clearly add negligence to the language of Article 709, or if the draft rejected the infringement of rights requirement, change the title to "unjust losses," or "*fusei no songai.*"[114]

Furthermore, Hozumi described the term *fuho* as failing to perform an act that should have been done, such as paying a reward. He reasoned that such actions contradicted morality and affected the balance of public interests.[115] Tomii supported the idea that when public order was established by law, it prevented any interference by moral considerations.[116] Ume maintained a more nuanced approach, promoting the separation of ethical considerations and public order

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[112] Osawa *supra* note 4 at 179.

[113] *Ibid*.

[114] *Ibid*.

[115] Hoten Chosakai Minpo Giji Sokkiroku Dai 3 at 91 ura available at: http://dl.ndl.go.jp/info:ndljp/pid/1367529 (at 95-96).

[116] Hoten Chosakai Minpo Chusa Kaigi Sokkiroku Dai 6 at 138 hyo available at: http://dl.ndl.go.jp/info:ndljp/pid/1367598 (at 141 *ff*).

considerations. Morality, he argued, was within the internal sphere of the individual, while the law was positioned in the external sphere. Hence, they could not prevent society from punishing certain immoral conducts, but they should prevent the law from doing so. He agreed with Tomii that once the law had regulated a conduct, it ceased to fall within the realm of morality and was absorbed into public order.[117]

However, this discussion was not about the correct title for the section. Rather, it reflected one of the main issues the drafters faced: the role of harm and loss within delictual liability in the new Japanese Civil Code. As Tomii[118] [119] noted, there were two opposing views regarding the role of loss in delictual liability during the drafting process. One view, which adhered to the British common law model, approached the issue of delictual liability through the concept of legal rights, specifically their infringement. Under this view, the breach of a legal right would suffice to grant a victim a claim for damages, regardless of any actual loss suffered by the victim. Therefore, this approach was labeled the right-violation principle (*kenri shinpan shugi)* and was supported by Hozumi. The other view, the actual loss principle (*jisson shugi*), which followed the French model and supported by Ume, , only required that the victim had suffered a loss, regardless of any legal rights infringements.

The discussion regarding the requirements under Article 709 is the result of the influence of comparative law had on the drafters, especially concerning the concepts of loss and rights. Hozumi[120]

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[117] Hoten Chosakai Minpo Chusa Kaigi Sokkiroku Dai 6 at 144 ura available at: http://dl.ndl.go.jp/info:ndljp/pid/1367598 (at 148 *ff*).

[118] Hoten Chosakai Minpo Soukai Giji Sokkiroku Dai 1 at 120 hyo available at: http://dl.ndl.go.jp/info:ndljp/pid/1367523 (at 124 *ff*).

[119] Akihito Kushihi, *Meiji Minpo [Fuhokoi] ni okeru Kisosha Ishi no Tankyu: Meiji Minpo 709 Jo no Shisoteki Haikei*, 66 Journal of Law and Political Studies 289,293 (2005) (Japan), Osawa *supra* note 4 at 180.

[120] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 72 ura available at:

addressed the issue by identifying two approaches to the concept of *songai*. The first assumes that *songai* refers to *jishitsujo no songai,* or real losses, while the second concludes that a *songai* exists if a legally protected right has been infringed upon, regardless of any actual loss suffered by the victim. Hozumi supported the first approach, *i.e.*, *songai* refers to any actual loss suffered by the victim. However, from Hozumi's viewpoint, actual loss was limited only to economic losses.[121] In contrast, Ume argued for a broader view of *songai* as not limited to economic losses but including material and non-economic losses as well.[122] Nevertheless, in explaining the last sentence of Article 709, Hozumi demonstrated that the draft had adopted the position that *songai* included both economic and non-economic losses.[123]

Ume and Hozumi's opinions on defamation illustrate the difference in their approaches. Hozumi argued that defamation by itself did not immediately amount to an actual loss and that victims' emotional discomfort did not amount to *songai*.[124] While he did not assert that these types of losses should not be recognized, he did believe that they were outside the purview of the concept of *songai*. Therefore, under the actual loss principle, there would be cases in which defamation would not grant the victim a claim for damages since no actual loss had occurred. To prevent this, defamation under the violation principle would be considered an infringement of a legal right, therefore granting the victim a claim for compensation of any

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http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at *75 ff*).

[121] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 57 ura available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at *61 ff*).

[122] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 66 ura available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at 70 *ff*).

[123] Hoten Chosakai Minpo Giji Sokkiroku Dai 40 maki at 88 hyo available at: http://dl.ndl.go.jp/info:ndljp/pid/1367567 (at *91 ff*).

[124] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 64 hyo available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at 67 *ff*).

actual losses.[125] Conversely, Ume argued that in defamation cases, the victim does not always suffer a monetary loss. In those cases, he highlighted, the victim could still request an apology as a means of reparation, even if no economic remedy was available.[126] Therefore, from Ume's perspective, defamation was a type of *songai,* which in turn meant that the victim had a claim against the wrongdoer. The reason, he argued, was that defamation would inevitably produce an actual loss, though not necessarily an economic one.[127]

Kushihi argues that both views do not necessarily oppose each other, as Hozumi's view on *songai* was limited to monetary losses, while Ume's view included material and non-economic losses. Therefore, at least in defamation cases, the result is the same, though the approach might differ.[128] On the other hand, in the case of property rights infringement, the approach would indeed change the outcome. Hozumi argued that when property rights were infringed upon, the existence or absence of *songai*, *i.e.*, a monetary loss, would be irrelevant, as the infringement itself would be sufficient to grant the victim a claim for damages.[129] In contrast, Ume supported the view that not every case of infringement warranted compensation. He argued that victims should only be granted a legal remedy in cases where they suffered discomfort (*fukeikan)* as a type of non-economic loss.[130]

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[125] KUSHIHI *supra* note 48 at 295.

[126] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 60 hyo available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at *63 ff*).

[127] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 63 ura available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at *67 ff*).

[128] KUSHIHI *supra* note 48 at 296.

[129] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 60 ura available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at 64 *ff*).

[130] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 62 ura available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at 66 *ff*).

Hozumi opposed the actual loss principle, arguing that it contradicted principles contained within the draft.[131] He specifically argued that monetary losses might not result in cases of contractual liability. In those cases, under the right-violation principle, the affected party could request performance because their rights were infringed upon. In contrast, under the actual loss principle, the affected party would have no remedy if no loss had occurred, which Hozumi believed contradicted principles of the draft that permitted remedy for non-performance.[132] Ume defended his position by citing that parties enter a contract because it is mutually beneficial. Therefore, non-performance of the contract is a violation of a legally protected interest, which Ume reasoned amounted to loss.[133] [134]

The issue of which principle should rule the law of delictual liability also illustrates that the drafters did not share the same views regarding the nature and function of delictual liability. Hozumi opined that the value of a right derives from the fact that it has been granted protection under the law. Therefore, the adoption of loss as the basis for liability would obscure the standard of conduct for individuals.[135] Hence, for Hozumi, the rights violation principle was not only a matter of delictual liability, but also a means to protect the legal order.[136] In contrast, Ume upheld the view that the goal of delictual liability was

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[131] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 64 hyo available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at *67 ff*).

[132] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 56 ura available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at 60 *ff*).

[133] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 66 ura http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at 70 *ff*).

[134] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 68 hyo available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at 71 *ff*).

[135] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 64 hyo available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at 67 *ff*).

[136] KUSHIHI *supra* note 48 at 301.

not punishment but rather compensation for the suffered loss. Therefore, liability should be the result of an actual loss rather than the infringement of a legal right. Furthermore, under his approach, the infringement of a legal right was not included within the meaning of *songai*.[137] [138]

Ultimately, the final version of Article 709 was a compromise between these two views. The infringement of a legal right is the basis of liability, but only so far as a it causes a loss. The courts and scholars then had the task of determining what constitutes a legal right and in which cases the acts of an individual would amount to an infringement.

Ⅲ. THE EVOLUTION OF THE CONCEPT OF SONGAI

As a result of Western influence brought by the Meiji Restoration, two schools of legal thought appeared in Japan regarding legal education.[139] The University of Tokyo taught English law, beginning in 1874. Meanwhile, Boissonade and other native professors taught the principle of French law at the school of law under the Ministry of Justice. However, in 1887, the law school attached to the Ministry of Justice was transferred to the only national university at the time. In the same period, the German law section was founded, and by the 1890s, it had surpassed the other two in terms of influence. The reason for this was that the government had sent students abroad to study various teaching methods and had determined that the German model was superior. Nevertheless, Japanese universities diverged from the German model, which identified research as the primary goal, and instead focused on teaching existing knowledge and importing new

[137] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 75 ura available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at 79).

[138] Hoten Chosakai Minpo Chusakai Giji Sokkiroku Dai 2 at 59 ura available at: http://dl.ndl.go.jp/info:ndljp/pid/1367594 (at 63 *ff*).

[139] Ono II *supra* note 21 at 47-48.

ideas from the West. Thus, the issue was not how to develop new theories but from where to import them.

Ume's commentary on the Civil Code after its enactment in 1898 triggered a short period when French law was highly influential for legal thought regarding civil law. For example, in 1902, Kazuo Hatoyama authored three papers for *Yale Law Journal* in which he compared the Japanese and French civil codes, only briefly mentioning German influences.[140] However, after the death of Ume in 1910, and coupled with the fact that the school under the Ministry of Justice had lost much of its influence, reliance on French law drastically diminished[141] and was replaced by the German school of legal thought.

This shift resulted in both courts and scholars applying German theories to the code in general, regardless of whether the specific rule was of French or English origin.[142] The law of delicts was also subject to this treatment. In the case of harm and loss, Japanese scholarship followed the German *Differenztheorie* and renamed it amount-difference theory. Consequently, discussions regarding loss were focused through a prism of monetary valuation, which is the basis for the *Differenztheorie*, and a general approach to the concepts of harm and loss were excluded from the discussion, as is the case in countries that adhere to the French model.

A. THE SAGAKUSETSU OR AMOUNT-DIFFERENCE THEORY

Scholars who wrote on harm and loss in the years following the

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[140] Kazuo Hatoyama, *The Civil Code of Japan Compared with the French Civil Code*, 11-6 The Yale Law Journal 296 (1902) (Japan),
Kazuo Hatoyama, *The Civil Code of Japan Compared with the French Civil Code*, 11-7 The Yale Law Journal 354 (1902) (Japan),
Kazuo Hatoyama, *The Civil Code of Japan Compared with the French Civil Code*, 11-8 The Yale Law Journal 403 (1902) (Japan).

[141] Ono II *supra* note 21 at 47.

[142] Ono I *supra* note 21 at 31.

promulgation of the Japanese Civil Code had perhaps more room to argue, in the sense that they were not limited by any previous ideas or case law regarding the code. As mentioned, Ume supported the adoption of French principles in interpreting the new Civil Code. Nevertheless, Ume limited his commentary on Article 709 to little more than one page. There, he explained that the two approaches – the infringement of a legal right and the existence of a loss – had their geneses in English and French law. He further specified that the Japanese Civil Code required both, without any references to German law.[143]

Early case law seems to reflect the ideas of Ume regarding the importance of loss. For example, the courts ruled that the mere infraction of a patent and production of counterfeit goods based on that patent was not solely enough to grant the right holder a remedy without proof of an actual loss.[144] Conversely, in defamation cases, the courts were more lenient on this requirement. For example, acts that affected credit and reputation were innately infringements on a victim's rights, without necessarily mentioning the existence of a loss.[145] Cases regarding comments were also examined under a similar standard.[146] However, there were cases in which victims' rights were determined to be infringed upon when their position in society was impacted. Thus, the concept of loss was abstract.[147] Furthermore, the Great

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[143] KENSHIRO UME, *Minpo Yogi Maki sono San Saiken Hen* 884 (reprint 1984) (Japan).

[144] Daishin' in [Great Ct. of Jud.] Aug. 16, 1904 Mei 37 (re) no.1525 Keiroku 10-1616 (Japan) The Japanese Supreme Court was known as the Supreme Court of Judicature (Daishin' in) before World War II.

[145] Daishin' in [Great Ct. of Jud.] Feb. 19, 1906 Mei 38 (o) no.296 Minroku 12-226 (Japan).

[146] Daishin' in [Great Ct. of Jud.] Nov. 2, 1910 Mei 42 (o) no. 172 Minroku 16-745 (Japan).

[147] Daishin' in [Great Ct. of Jud.] Dec. 8, 1905 Mei 38 (o) no.298 Minroku 11-

Court of Judicature had ruled that monetary loss was not a requirement in defamation cases.[148]

Regardless of the lack of references to German law during the drafting process and the courts' position, after Ume's death in 1910 – and due to the decreased influence of the French school because of its assimilation – German theories began to expand to the realm of delictual liability. Two early examples of scholars who engaged with these theories are Otoshiro Ishizaka[149] and Tamakichi Nakajima.[150] Both Nakajima and Ishizaka discussed various German legal theories regarding harm and loss, emphasizing the *Differenztheorie* and the *Theorie der Konkretenschaden*, which defined loss as the specific loss suffered by the victims to their person or property resulting from a delictual act. Nevertheless, as Takahashi noted, there were some differences between their approaches. First, Ishizaka considered the amount-difference theory adequate for determining economic losses but did not approve of its use for dealing when non-economic losses.[151] Second, Nakajima approached the issue by presenting two different theories: the amount-difference theory and the specific loss theory or *gutaiteki sonshitsu setsu*. Under the latter theory, Nakajima distinguished between harm and loss,[152] with loss referring to the actual effect on either the property or the body which the victim

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1665 (Japan).

[148] Daishin' in [Great Ct. of Jud.] Apr. 13, 1911 Mei 44 (re) no. 463 Keiroku 17-557 (Japan) The Court did recognize that an individual' s reputation and economic interest were deeply related to each other.

[149] Otoshiro Ishizaka, *Nihon Minpo Saiken Soron Jokan* 282*ff*. (1911) (Japan) available at http://kindai.ndl.go.jp/info:ndljp/p*Id*./791647.

[150] Tamakichi Nakajima, *Minpo Shakugi Maki Sono III Saiken Soron Jo* (1911) (Japan).

[151] Takahashi *supra* note 17 at 136.

[152] Nakajima uses the word *songai* twice, as the term to be defined and, later within that definition, as the actual detriment suffered by the victim.

suffers because of the harmful event itself, *i.e.*, harm is the event itself, and not an abstract number.[153] However, while following the *Theorie der Konkretenschaden*, Nakajima favored the *Differenztheorie* because of the monetary compensation system of Japanese law.

The most meaningful difference in the two scholars' approaches lies in their understandings of the *Differenztheorie*. To Ishizaka, the victim's situation was to be taken as a whole compared to the position resulting from the harmful action. Nakajima, however, argued that each individual item in the victim's estate must be considered. This focus on valuation eventually permeated the courts. For example, in a case where the plaintiff was unable to purchase goods due to the defendant's act, the court ruled that the standard in cases where the future price of the goods can be determined should be the standard under which damages are calculated.[154] In another case, the court recognized that the claim that the legal defense of a minor had against the minor's parents for the legal expenses incurred under their contractual obligation could be construed as a loss under the rules of delictual liability.[155] Under the traditional amount-difference theory, losses arising from personal injury are classified into *danum emergens, lucrum cessans,* and emotional losses. Yoshimura[156] has posited that compensation was traditionally aimed at losses, such as medical and funerary expenses. However, this resulted in a system in which losses, such as pain, suffering, and emotional distress, were treated as equivalent to material and economic losses.[157]

In 1964, the Supreme Court addressed the meaning of *songai*. In

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[153] NAKAJIMA *supra* note 79 at 501.

[154] Daishin' in [Great Ct. of Jud.] Jan. 22, 1916 Tai 4 (o) no. 950 Minroku 22-113 (Japan).

[155] Daishin' in [Great Ct. of Jud.] Sep. 30, 1941 Sho 16 (o) no. 625 Taiminshu 20-1261 (Japan).

[156] RYOICHI YOSHIMURA, *Jinshin Songai Baisho no Kenkyu* 71 (1990) (Japan).

[157] *Id.* at 73-74.

that case, the court ruled that for the effects of civil delictual liability, loss can be defined as harm under the formula a – b = x, where "a" is the situation, the victim would have been in without the aggression, "b" is the actual situation of the victim that resulted from the aggression, and "x" is the monetary quantification that is ascribed to such a loss. Under this premise, loss is the monetary value of damages.[158] In addition, the Supreme Court ruled on the issue of earning potential in 1967. In that case, the court concluded that even if an individual's earning potential is affected by a traffic accident, the goal of civil liability is to compensate the victim for the *actual losses* suffered. Therefore, it was evident that victims who suffer a decrease in their earning potential have no claim for damages if no actual losses were incurred.[159]

Although the concepts established under the amount-difference theory and the definition adopted by the Supreme Court might imply that discussions surrounding the concept of loss under the amount-difference theory are clear cut, the matter is more nuanced and complicated. Namba[160] asserts that, in practice, the theory is applied as a compilation of various losses. Therefore, the modern amount-difference theory is consistent with the views of Nakajima, especially in cases of personal injury.

The theory has also been the target of many critics, firstly because differences in legal backgrounds between Japan and Germany pose a challenge to applying the *Differenztheorie* under the Japanese Civil Code. Hirai has explained that the *Differenztheorie* is based on the German concept of complete compensation, a principle to which Japan

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[158] Saiko Saibansho [Sup. Ct.] Jan. 28, 1964, Sho 34 (o) no. 901 Minshu 18-1-136 (Japan).

[159] Saiko Saibansho [Sup. Ct.] Nov. 10, 1967 Sho 41 (o) no. 600 Minshu 21-9-2352 (Japan).

[160] NAMBA *supra* note 12 at 106.

does not adhere. He has argued that since Article 416 of the Japanese Civil Code states that the goal of a claim for damages is the compensation of ordinary losses, Japanese law is distinctly different from German law, which demands a complete compensation of the victim.[161] Secondly, the amount difference theory does not address non-economic losses, as the monetary approach to defining harm precludes any possibility of including non-economic losses. This is another issue that suggests a somewhat forceful introduction of German concepts, as the Japanese code never had to address the availability of claims for non-economic losses. The application of amount-difference theory fostered a situation in which scholars who supported it were fixated on legal theories from a system that was not as developed as their own, at least in the area of non-economic losses.

Scholars have developed theories that aim to address the main critiques of the amount-difference theory. One example is Nishihara's death and injury as a loss theory, or *shisho songaisetsu*.[162] In the 1960s, Nishihara argued that there are two approaches available for cases where the victim has died. The first maintains that life itself cannot be ascribed monetary value, while the other conceptualizes life's value as infinite.[163] Nishihara opposed the traditional role of the causal link theory[164] in cases of wrongful death. Specifically, he countered the

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[161] HIRAI *supra* note 7 at 195.

[162] Michio Nishihara, *Seimei Shingai Shogai ni okeru Songai Baishogaku*, 27 Journal of Private Law 107 (1965) (Japan).

[163] *Id.* at 109.

[164] Under the Japanese law of obligations, both for contractual and delictual liability, the concept of casual link is of the utmost importance. Discussions regarding it tend to overshadow other aspects of the law. Especially in the case of discussions regarding the concepts of harm and loss, it is not rare for the discussion to gravitate towards the standard under which the causal link is determined, sometimes in more depth that the concepts of harm or loss themselves.

complete compensation dogma, as it is known in Japan, which declares that a victim must be compensated for all losses, as the defendant can't foresee the specific situation of the plaintiff. The main point of Nishihara's theory is establishing a set standard for damages.[165] Known as the fixed-amount theory, or *teigakusetsu*, it states that non-economic losses resulting from death should not be divided into categories, such as emotional distress or pain and suffering, but rather considered as a whole. Moreover, it proposes that in cases of wrongful death, both economic and non-economic losses should also be considered holistically, including setting lower and upper limits and a mechanism for calculating the amount the victim should receive as damages. This would prevent any issues that would arise from an aggressor's lack of foreseeability of the victim's personal situation.

The fixed amount theory did not receive much support. Kusumoto[166] explained that Nishihara's criticism of the complete compensation dogma is unacceptable as long as civil liability aims to restore a victim's situation to its original state as much as possible – a goal he has called all-compensation rule. Perhaps Kusumoto's most significant critique of Nishihara's theory is that it contradicts the very concept of individuality. By having a system in which all losses that arise from death are addressed through a standard approach, such as the one Nishimura proposed, harm and loss are reduced and contained to a simple mathematical problem, ignoring other aspects of the law of compensation.

In the late 1970s, the loss of work capacity theory, or *rodo noryoku soshitsu setsu*, was developed in response to Nishihara's theory.[167] It posited that individual intent and ability to work and earn

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[165] NISHIHARA *supra* note 91 at 114-115.

[166] YASUO KUSUMOTO, *Jinshin Songai Baishoron* 28 (1984) (Japan).

[167] Miki Chiho, *Inochi no Nedan: Seimei Shingai ni yoru Songai to Byodo Genri*, 6 Junior Research Journal 67, 71 (1999) (Japan).

an income (*i.e.*, the earning capacity) should be ascribed a monetary value, just as with any machine. Therefore, when this potential decreases as the result of a delictual act, that in and of itself should be considered a loss for which the victim can claim damages, regardless of any actual loss of income.[168] This approach is especially useful in cases where a victim is unemployed or has no income that could serve as a basis for calculating damages. Furthermore, in the case of minors who do not yet possess the necessary skills to earn a living, this theory allows for a standard under which the victim and next of kin can pursue damages, though the nature of these damages was subject to discussion. Scholarship regarding this point has been divided.[169] On the one hand, there were those who believed that in cases of infant and minors, damages should not be granted for the amount that they could have earned in the future, but rather for being unable to participate in labor activities and support themselves and that such loss should be considered non-economic for the effects of liquidation.[170] On the other hand, others argued that in cases of minors, the probability of earning an income should be recognized and liquidation should be done under the rules of lost income by referencing adequate proof of such potential.[171]

In 1964, the Supreme Court[172] ruled on the issue and adopted the latter view. On that occasion, the Court said that while it was true that calculating damages in cases in which a case a minor died as the result of a delict is a difficult endeavor, this in itself was not enough to deny the claim. If the claim were to be denied, the only remedy

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[168] Kasuo Kato, *Koisho ni yoru Ishitsurieki no Santei, in* GENDAI SONGAI BAISHOHO KOZA 7 194 (1974) (Japan).

[169] CHIHO *supra* note 96 at 71.

[170] SHINJI SOMIYA, *Fuhokoi* 395 (1935) (Japan).

[171] BUNJIRO ISHIDA, *Saiken Kakuron Kougi 290ff* (1937) (Japan).

[172] Saiko Saibansho [Sup. Ct.] Jun. 24, 1964 Sho 36 (o) no. 413 Minshu 18-5-874 (Japan).

remaining for the victim and next of kin would be a claim for emotional distress, in which case the judge would determine the calculation after considering all the circumstances of the case. However, if the amount were too low, then it would fail to be considered a remedy, while if it were too high, it would be too harsh to the aggressor.

Therefore, the court concluded that in cases where a minor had died – regardless of the inaccuracy that it might entail – the judge should base the assessment of damages on the evidence presented, and in the event such evidence is not completely convincing, additional remedies can be granted under the figure of non-economic damages.

B. THE LOSS-AS-FACT THEORY OR SONGAI JIJITSUSETSU

Regardless of the continuing influence of German scholarship on Japanese scholarship, the amount-difference theory could not correctly address all the aspects of delictual liability under Article 709. Particularly, Hirai assumed an intensely critical stance against the amount-difference theory. He was especially critical of how the concepts of harm and loss were studied under traditional scholarship in Japanese law and questioned whether the method that defined these concepts under the amount-difference theory and further concentrated their categories had any value as a legal tool under Japanese legal analysis.

He argued that the German *Differenztheorie* results from the complete compensation principle, which Japan does not follow. Hence, there is no reason to apply that theory under Japanese law.[173] However, his most important argument and contribution was his distinction between harm and damages, which further divided harm into protectable harms that he called harms within the sphere of protection and non-protectable harms called harms outside the sphere

[173] HIRAI *supra* note 7 at 139.

of protection.[174] The causal link is the standard for judging whether specific harms should be considered protectable or not.[175] Under Hirai's interpretation, harm is based on reality – the event that is the cause and the loss itself – and he made no distinction between these two terms. However, Hirai seemed to return to a more traditional approach. He noted that since a claim is nothing more than a plaintiff's request for a certain amount of money, harm can be construed as a request for such an amount that is the result of the monetary compensation principle of the Japanese Civil Code,[176] effectively linking the concept of harm to the concept of damages, at least to a certain degree.

Nevertheless, because the loss-as-fact theory differentiates between harm and damages, it addresses the issue of non-economic losses, which was not possible under the amount-difference theory. It also allows for an interpretation of the first half of Article 709 that is more in tune with the abstract requirements of civil liability. However, the most significant contribution of this theory is that it permits remedies even in cases where the victim does not suffer a quantifiable economic loss, such as in the event of post-traumatic stress disorder (PTSD), bodily injuries, or the aftermath of such injuries.

Case law also appears to have adopted this stance, and in 1981, the Supreme Court[177] acknowledged the subject. The court had to decide whether the aftermath of an injury could be grounds for civil liability. It ultimately sided with the defendant under the argument

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[174] HIRAI *supra* note 7 at 140.

[175] *Ibid*.

However, Hirai is a proponent of abandoning the adequate causality, or *soto inga kankei*, in favor of the real causality, or *jijitsuteki ingakankei*, as a causal link standard.

[176] HIRAI *supra* note 7 at 141.

[177] Saiko Saibansho [Sup. Ct.] Dec. 22,1981 Sho 54 (o) no. 354 Minshu 35-9-1350 (Japan).

that, barring special circumstances, and even if the aftermath itself could be grounds for damages, it could not justify granting damages for *lucrum cessans* if it did not affect the earning capacity of the plaintiff. Even though the court did not grant the plaintiff request for *lucrum cessans*, commentators have highlighted that this represents a transition in the court's stance from the amount-difference theory to the loss-as-fact theory.[178]

Uchida has critiqued this theory under the argument that strictly speaking, the harmful event (*i.e.*, death, injury, destruction of property, etc.), is already included under the infringement requirement of Article 709. Therefore, there is no reason to distinguish between the infringement requirement and the existence of loss requirement.[179] However, he has also admitted that there are situations in which an infringement of rights does not result in a loss. Differentiating between the harmful event and the monetary compensation eliminates the necessity of rhetoric like the amount-difference theory.[180]

Furthermore, the loss-as-fact theory led to the development of legal theories that part with the traditional understanding of the concept of harm, which treat the harmful event and its quantification as completely different and unrelated matters. At the practical level, the 1981 Supreme Court case served as the basis for lower courts to develop a theory under which a victim could recover a loss of earning potential.

Ⅳ. UNLAWFULNESS IN JAPANESE LAW

The role of unlawfulness under Japanese law is by no means clear when viewed under the general rule of delictual liability. As mentioned before, the concept of infringement of rights as a

[178] Takashi Uchida, *Minpo II Saiken Kakuron* 384 (3rd ed., 2011) (Japan).
[179] *Id.* at 385.
[180] *Ibid.*

requirement for delictual liability resulted from the influence of common law during the drafting process. The main issue with unlawfulness under Japanese delictual liability stems from the language of Article 709. Initially, Article 709 required an infringement of a right for a victim to claim damages. However, in contrast to the BGB, which requires an unlawful injury, or the Italian Civil Code, which explicitly refers to the unlawful loss suffered by the victim, the language of the statute in the Japanese Civil Code does not require unlawfulness.

The original draft by Bossonaide did not utilize the term unlawful either. The inclusion of the legal right infringement requirement was due to the discussion between Ume and Hozumi.[181] Ume proposed a more realistic approach to the concept of delictual liability in which the deciding factor was the existence of a loss, regardless of whether an actual infringement on the rights of an individual had occurred. Hozumi, on the other hand, argued that the infringement of a legal right would be adequate to earn the victim a claim for damages, independent of the existence of any losses. In the end, Ume's approach prevailed. However, the concept of infringement referred to the event that caused the loss.[182] Furthermore, the drafters' concept of a right was not restricted to property rights but also included the victim's credit, life, body, honor, etc.[183] To the drafters, this requirement served as an objective assessment of the defendant's conduct in contrast to negligence and intent, which were subjective assessments of said conduct.[184]

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[181] YOSHIMURA *supra* note 85 at 570.
See the discussion on the draft process above.

[182] HIRAI *supra* note 18 at 20.

[183] HIROYUKI HIRANO, *Minpo Sogo 6 Fuhokoi* 29 (3rd., ed 2013) (Japan).

[184] Akihito Kushihi, *Meiji Minpo 709 Jo no [Kashitsu] to [Kenri Shingai] — Meiji Minpo Kisokatei kara no Shiten*, 71 Journal of Law and Political Studies 87, 107 (2006) (Japan).

Regardless of the drafters' intent, the courts initially construed legal rights as those which must be established via a law to be understood as such. The most famous example is the 1914 case of Kumoemon Tokuchen.[185] Kumoemon, a popular artist of a traditional genre of music called *Rokyoku,*[186] produced a piece for which he obtained copyright and which he proceeded to transfer to a third party. The melody was included on an LP, which was sold without the right holder's permission.

The case addressed two main issues. The first was whether *Rokyoku* could be copyrighted under the provision of Japanese copyright law.[187] The second was whether, in the event that the court declared *Rokyoku* not subject to copyright, its reproduction would constitute copyright infringement. Both the trial and appeals courts determined that *Rokyoku* qualified for a copyright and that, as such, any reproduction without the permission of the right holder would constitute copyright infringement.

The Supreme Court, however, adopted a different view. While admitting that music was included within the term "fine arts," it expressly denied that the *Rokyoku* performed by Kumoemon was copyrightable, arguing that since it was improvised, it did not have a musical score, nor was it famous enough that a large number of people could remember it. Therefore, it could not be protected as music. As a result, any reproduction of the melody would not constitute copyright infringement. After this, the courts adopted an approach to the requirement for an infringement of a legal right that limited it to one

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[185] Daishin' in [Great Ct. of Jud.] Jul.4, 1914 Tai 3 (re) no. 233 Keirokiu 20-1360 (Japan).

[186] A type of narrative singing.

[187] Article 1 of the Copyright law at the time, while including the term fine arts, did not expressly mention music as a type of copyrightable creation. It did, however, protect musical scores.

that had to be explicitly established in the law, with the right holder needing to fully meet all the law's criteria to receive legal protection.

This precedent was overturned 11 years later in the Daigaku Yu case.[188] The defendant owned a famous public bath who had leased the facilities and sold the name "Daigaku Yu" to the plaintiff. The parties then decided to rescind the lease contract voluntarily. The defendant then proceeded to allow a new lessee to use the name Daigaku Yu in the operation of the public bath. The trial court ruled in favor of the defendant, arguing that the prestige and reputation[189] of the name Daigaku Yu was not a legal right protected under Article 709 of the Civil Code. The Supreme Court reversed this decision, and in doing so, it declared that the concept of a right was not limited to a formal, literal right established by law, but rather should be construed broadly.

The Daigaku Yu case set a precedent that enabled the introduction of a concept of unlawfulness independent from the idea of infringement, at least under a narrow reading of Article 709. However, the Daigaku Yu case did not eliminate the requirement of infringement when it introduced that of unlawfulness. Instead, it expanded the concept of infringement to include rights and "other interests" as well.[190] This in turn led to the issue of interpreting the language of Article 709 with the new ideas, or as it is known, the change from infringement to unlawfulness. Hiroshi Suekawa argued that the infringement requirement should be read as an expression of unlawfulness, especially regarding conduct, since the law could not approve an unlawful conduct and it was therefore against the legal

[188] Daishin' in [Great Ct. of Jud.] Nov. 28, 1925 Tai 14 (o) no. 625 Minshu 4-670 (Japan).

[189] The term is "*shinise*," which roughly translates as a long-established store.

[190] HIRANO *supra* note 112 at 32.

order.[191] The language present in the BGB influenced Suekawa's approach.[192] By defining infringement as a sub-class of unlawfulness, he proposed a change in the interpretation of the first half of Article 709. Wagatsuma further advocated for this approach and suggested a standard method for measuring unlawfulness. Wagatsuma's theory, *sokan-kankei setsu,* posited that unlawfulness should be judged as a function of the relation between the type of legal interest protected and the nature of the infringing act.[193]

After World War II, Ichiro Kato expanded upon Wagatsuma's theory, arguing that replacing infringement with unlawfulness resulted from two factors. The first was the legal sentiment of Japanese scholars. The second was that unlawfulness formally represented a general expression of infringement, which was one of the situations in which the BGB admitted civil liability. It signified an expression of the German BGB.[194] Additionally, to Kato, a right was a rather rigid concept that could be definitively explained, whereas unlawfulness was more flexible and determined by the relation between the protected interest and the defendant's conduct.[195] An otherwise innocuous act could infringe on some interests, such as property.

This theory was highly influential to the point that Article 1 of the State Redress Act of 1947 clearly establishes unlawfulness as a requirement for claims against the state. The courts also adopted this theory under the general provision of Article 709. In cases of nuisance in particular, the courts have ruled that the defendant's act must breach the "limit of tolerance," or *junin gendo*, which in turn is

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[191] HIROSHI SUEKAWA, *Kenri Shingairon: Fuhokoi ni kansuru Kenkyu no Ichibu toshite* 30 (1930) (Japan).

[192] UCHIDA *supra* note 107 at 359.

[193] SAKAE WAGATSUMA, *Jimu Kanri・Futo Ritoku・Fuhokoi* 125-126 (1937) (Japan).

[194] KATO *supra* note 16 at 36.

[195] *Id.* at 40.

determined by taking into account the situation under which the defendant's act took place, such as while exercising a right, and the legal interest or right of the plaintiff from the standard of an ordinary individual.[196] The main critique of Wagatsuma's theory is that it does not address the relationship between intent, negligence, and unlawfulness. Under Wagatsuma's approach, the defendant's conduct was an important factor, but intent or negligence were irrelevant to determining unlawfulness. It was not addressed whether the defendant acted with intent, such as in cases of some criminal acts, or was simply negligent.

As mentioned, the infringement requirement was established to define objective criteria for determining liability. By introducing a concept of unlawfulness that incorporates both conduct and legal interest, the *sokan-kankei setsu* effectively eliminates the distinction between them. Instead, these concepts overlap, which in turn questions the necessity of the unlawfulness requirement. Furthermore, suppose the infringement requirement is broadly construed, as the drafters and Supreme Court intended. In that case, the necessity of unlawfulness as a requirement ceases to exist, as such a concept is not present in the Japanese Civil Code.[197] In the 1970s, the discussion returned to the idea of infringement. If infringement could be construed in a manner that included legal rights and any interests worthy of legal recognition, then unlawfulness would no longer be required.[198]

Hirai also opposed requiring unlawfulness for civil liability, instead arguing that the discussion should be reduced to include only infringement and negligence/intent. Hirai has noted that in many cases, the courts invoked the term unlawfulness to refer to a

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[196] HIRANO *supra* note 112 at 148.

[197] UCHIDA *supra* note 107 at 360.

[198] Takehiko Sone, *Fuhokoi Ho ni okeru Ihosei Gainen*, 85 Waseda Law Review 21, 39 (2009) (Japan).

defendant's negligence or intent, and in cases where they were used as individual terms, the standards for judging them were identical.[199] He has further argued that the concept of unlawfulness under Japanese law varies from that of German law, primarily because the BGB establishes unlawfulness as an independent requirement for civil liability.[200] He then concluded that the main function of unlawfulness under Japanese law was to expand the infringement requirement, a function that is entirely different from the unlawfulness requirement present in the BGB. Once the courts and scholarship accepted and therefore construed the infringement requirement in a broader manner, the goal of unlawfulness under Japanese law was achieved.[201]

Ⅴ. SUMMARY

The Japanese Civil Code was the product of a careful study of many legal systems. Particularly, in delictual liability, both common law and continental law struck a balance. However, the notion that German law influenced the drafters – at least regarding delictual liability – does not seem to have any documentary support in reality. On the one hand, the formal education of the three principal drafters belies a profound influence of German legal theory. On the other hand, no policy elements demanded the implementation of one school of thought over another. From a governmental perspective, the committee's goal was to present a civil code, regardless of its source of inspiration. Generally, committee members supported German ideas, but only so far as they embodied an ideal that Japan should have striven to achieve, and not because of any inherent superiority over their common law or French counterparts.

Furthermore, while the drafters and committee did have access

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[199] HIRAI *supra* note 7 at 378.

[200] *Id.* at 379.

[201] *Id.* at 383-384.

to a draft of the BGB, there is no evidence that it served as a model for Article 709. If anything, experience with implementing the German legal education system in Japan bolsters the idea that German ideals were applied in form rather than in substance. Therefore, the issue becomes whether Article 709 of the Japanese Civil Code aligns with common law or the French model. While the discussion between Hozumi and Ume may suggest that it is a mix between the two, in reality, the loss element has more weight than the infringement of a legal right. Furthermore, since the violation of a legal right is not a concept that is limited to specific claims, as common law was, Article 709 should be considered a variation of the general clause model introduced by the French *Code*.

However, scholarship seeking to address the importance of loss as an element of delictual liability from a German legal perspective has overshadowed the issue itself. The flaw of this approach, which exists to this day, is that the abstract concept of loss as it is present in the *Code* and other civil codes that have received its influence is a decisive factor of delictual liability. Consequently, loss is not a concept subject to delimitation, at least at the stage of assessing the defendant's liability.

Japan differs in this aspect from other countries that follow the French tradition. Countries that incorporate French tradition address the issue of loss by establishing criteria that the loss must meet to qualify for redress. Meanwhile, Japan approaches this issue through the unlawfulness of the act, the amount-difference theory, the causal link, and other elements. A later will discuss the element of unlawfulness under comparative law, as the development of this concept warrants its own section. Nevertheless, it is notable that the unlawfulness of an act does not define the concept of loss. Japanese scholarship derides such abstract approaches to the issues of harm and loss, considering them to be empty and lacking legal merit, perhaps as a remnant of opposition to the school of natural law. This prompted

the confusion over the concept of loss as a requirement of delictual liability, and loss as the specific amount for compensation.

To a certain extent, Article 709 of the Japanese Civil Code suffers from the same issues as Article 2043 of the Italian Civil Code.[202] Like other civil law countries, Japan insists upon the presence of harm and loss for civil liability to arise. However, Article 709 requires the infringement of a right or legally protected interest. This might initially seem like a mere difference in wording, but it does allow the argument that the amount-difference theory addresses two distinct issues. First, suppose an interpretation of the amount-difference theory only engages with the latter half of Article 709 concerning compensation of any resulting losses. In that case, it is a matter regarding procedural law rather than substantive law. Second, the amount-difference theory does not seek to define loss as a requirement of delictual liability, but rather it is a method for quantifying the

[202] Article 2043 of the Italian Civil Code reads "*Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno*," the word *danno* being used twice within the same article. According to Franzoni, this is a result of the poverty of the Italian language. These two instances of *danno* have been construed as having different meanings. The first *danno* is the actual factual situation caused by the aggressor, i.e., an unlawful infringement of the victim's rights, while the second *danno* refers to the result of the first one, the actual loss that must be compensated for by the aggressor. See: Massimo Franzoni, Danno Ingiusto e Danno Risarcible nella Responsabilitá Civile (2002) (It.), http://www.aci.it/fileadmin/documenti/studi_e_ricerche/monografie_ricerche/franzoni.pdf,
Massimo Franzoni, *Trattato della Responsabilitá Civile - Il Danno Risarcibile 3* (2010) (It.),
Paolo Cendon, *Commentario al codice civile. Artt. 2043-2053* 187 (2008) (It.),
Francesco Caringella, *Responsabilità Civile e Assicurazioni. Normativa e Giurisprudenza Ragionata* 88 (2008) (It.).

remedy. Oho[203] has noted that under the monetary compensation system of the Japanese Civil Code, the amount-difference theory is the only method approved for economic losses.

Hirai[204] has argued that since Article 416 of the Japanese Civil Code states that the goal of a claim for damages is the compensation of ordinary losses, Japanese law is distinctly different from German law, which commands complete compensation of the victim. This, therefore, prevents complete assimilation of the German *Differenztheorie*. Moreover, as commentators have mentioned, this liquidation method is inadequate for non-economic losses. Nevertheless, there is no obstacle for Japan to adopt two unique standards: one for economic losses and one for non-economic losses. Countries like Italy and Argentina have done so with minimal issues. Furthermore, under this interpretation, the argument that the legal development of Germany and Japan would present an insurmountable barrier to the application of the amount-difference theory is unconvincing.

The issue of legal transplants cannot be minimized to a simple difference in legal traditions, as it has been by laws such as the company law of Delaware, which has been used as model for civil law jurisdictions, or in Panama, where it was directly copied. The same is true for legal principles, such as estoppel and duties of care. However, an issue arises if the amount-difference theory is not applied as a method of quantification, but rather as a method of qualification, *i.e.*, to define the concept of redressable losses. If the amount difference theory serves as a basis for interpreting the first part of Article 709, which concerns the infringement of rights or legally protected interests, it cannot provide the quantifiable answer that many Japanese scholars seek. At most, it could only offer an abstract concept of being somehow disadvantaged, which has been considered empty and thus

[203] FUJIO OHO, *Saiken Soron Shinban* 135-136 (1972) (Japan).

[204] HIRAI SUPRA note 7 at 195.

rejected.[205] As a qualifying method, the amount-difference theory simply does not possess the tools necessary for scholars, judges, lawyers, or laymen to define harm or loss under statutory language.

The early influence the German *Differenztheorie* permeates scholarship even today, as theories that attempt to separate both elements tend to lead irremediably to the issue of quantification of losses as an element of harm theory. However, this seems to derive from a sense of admiration for German scholarship in the early 20th century, rather than from a meticulous study of the statutory text or spirit of the law. As Shiomi has indicated, the traditional amount-difference theory does not urge a discussion of the relationship between the concept of loss (*songai)* and the method of quantification of damages.[206] In addition, the fact that the Japanese Civil Code has explicitly allowed for the recovery of non-economic losses since its inception suggests a rejection of German legal influence in the matter, as this the BGB draft rejected these damages. Meanwhile, non-economic losses had been part of French legal tradition for decades, and the drafters would have known and been influenced by this.

However, perhaps the most convincing argument to discredit the amount-difference theory as a qualifying method is that the drafters themselves did not consider it as such. Tomii defined harm as any loss suffered by the victim regargind a legally protected interest,[207] and within those legally protected interests, he included both economic and non-economic losses. Tomii did not utilize the amount-difference theory in his composing his definition of harm. Rather, his definition is

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[205] Takahashi *supra* note 17 at 199.
Hirai *supra* note 18 at 74.

[206] Yoshio Shiomi, *Zaisanteki Songai Gainen ni tsuite no Ikousatsu – Sagakusetsuteki Songaikan no Saikento*, 687 Hanrei Times 4, 6 (1989) (Japan).

[207] Masaakira Tomii, *Minpo Genron Dai 3 Maki Saiken Soron Jo* 202 (1929) (Japan)

arguably more aligned with the French model than with a German one. The rejection of the amount-difference theory as a qualifying method is grounded in the fact that this was never its intended purpose, at least not in a *numerus apertus* system. Simply noting that the historical legal development of Japanese law was different from that of Germany is like saying that the soils of these two countries are different. While that might be true, it is no obstacle for apple trees to grow from both.

Indeed, a close observation reveals that the amount-difference theory, as traditionally interpreted, fulfills two roles in Japan: defining harm and quantifying loss. However, the amount-difference theory cannot fulfill the first role since Japan does not uphold a delictual liability system like the German one. The material and formal elements of harm under Japanese law do not converge into the actions of an aggressor, regardless of how much scholars argue about unlawfulness or infringement of rights. As previously stated, a judge or jury cannot enter the issue of quantification of damage into consideration if the existence of a harm or loss has not first been established. In systems like that of Germany or the common law of torts, where the act of the defendant is, in most cases, sufficient for establishing liability, this is not a problem. However, the abstract rules of the French system prevent this approach. To link the concept of loss to a monetary value is to deny the goal of the general clause system.

Nishihara's theory exemplifies how the economic valuation idea is deeply rooted within the mind of Japanese scholars and how the monetary compensation principle affects the concepts of harm and loss within the Japanese system. First, Nishihara had proposed this theory to prevent what he considered the extreme form of complete compensation in cases where a victim has died. However, his argument is solely based on a monetary approach, which triggers a similar problem as that which arises from the amount-difference theory.

The traditional approach of countries that require an element of

unlawfulness within their delictual liability system is to use unlawfulness as a means by which the law limits the number of legal interests that, if infringed upon, grant the victim a remedy. Nevertheless, the Japanese experience used the concept of unlawfulness in the opposite manner as a way to add to the number of legal interests that grant a victim a claim. The process of modernizing the Civil Code that concluded in 2005 added the phrase "legally protected interests," which effectively ended the debate and brought the Japanese Civil Code's general clause to the same level as the one present in the French *Code*. This established a system in which the formal elements act as a limit to the material elements and, consequently, boosting the importance of the relationship between these two elements. If this view is accepted, then the concept of loss can no longer be relegated to a secondary plane. Since this eliminates any formal limit beyond the legally protected interests of the victims, there must be a method to determine the scope of these interests.