

Civil Law of Japan



Boissonade



Tomii, Ume, Hozumi

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Preface

- Self-Introduction
- History of Civil Code of Japan
- Current Situation of Civil Code of Japan



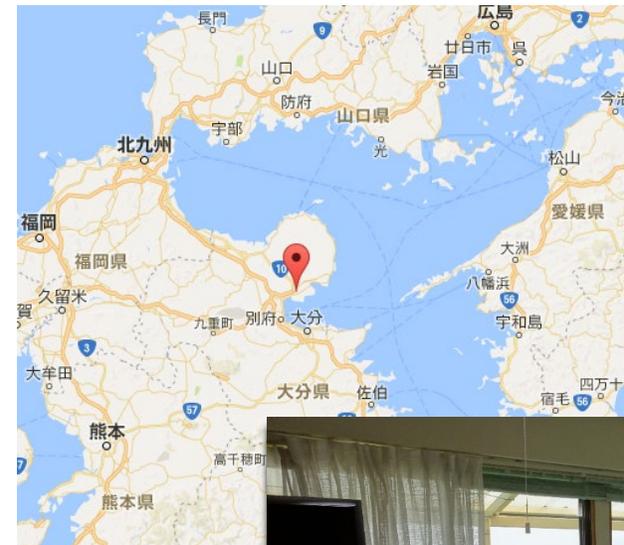
Self-Introduction (1/2)

- I am an emeritus professor of Nagoya University and Meijigakuin University.
- 17 years ago, I was a professor of Nagoya University.
 - During 1997-2004 I was going to Asian countries, State of Mongolia, Vietnam, Cambodia, Laos, Uzbekistan and China to cooperate development of civil law.
 - Fortunately, these activities were evaluated from this university, I became an emeritus professor of Nagoya University in 2008.
- My specialty is civil law, but I also study consumer law, legal informatics (AI & Law), law & management, and copyright law.
 - I am currently writing a book titled "Introduction to Law for Children" on legal education for young children.



Self-Introduction (2/2)

- Since retiring in 2017, I have moved to Oita Prefecture where my parents live.
- I have been conducting research on copyright law at the Graduate School of Intellectual Property Studies (correspondence course) in Kibi International University of Junsei Gakuen.
- In addition, I am an intensive lecturer of civil law for international students at Nagoya University Graduate School, and "Contract Law" at the Faculty of Law, Meiji Gakuin University.



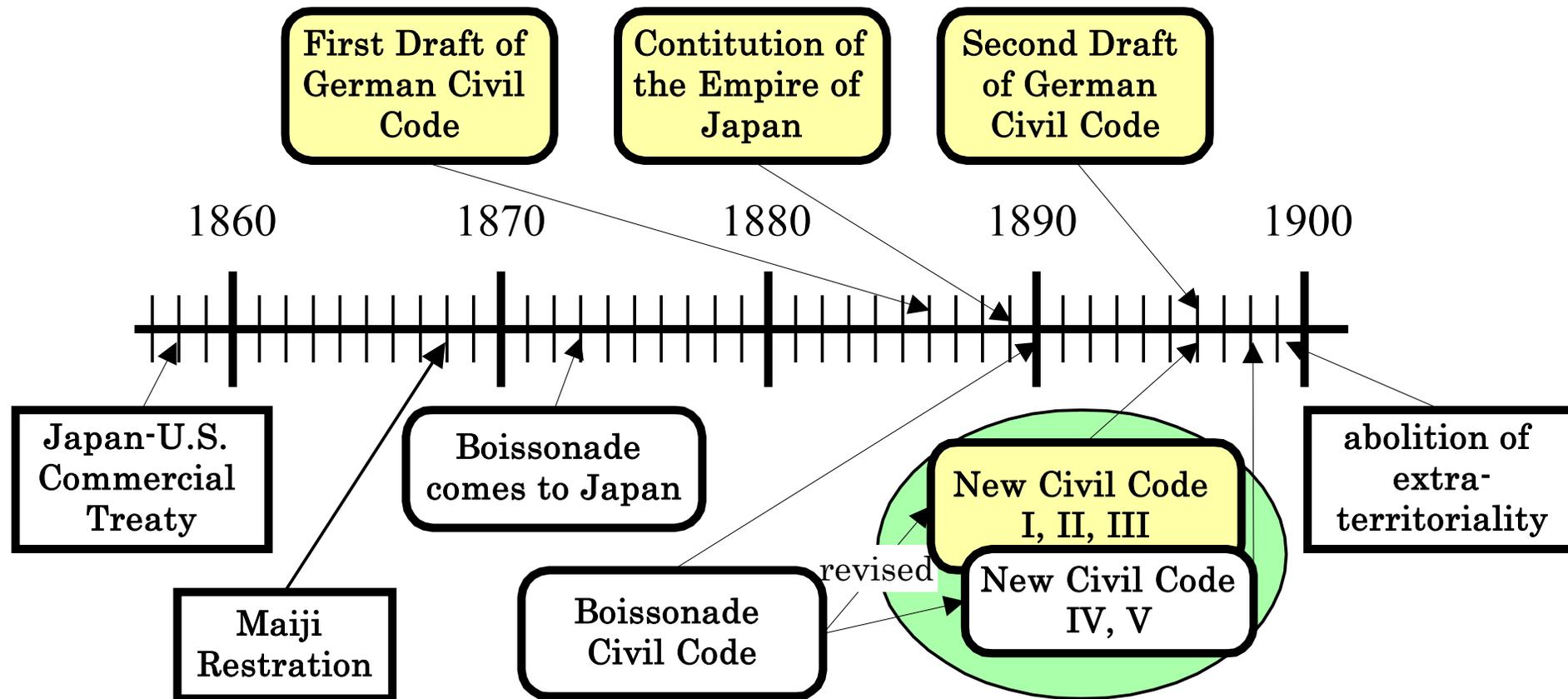


History of Civil Code of Japan

- As a part of the modernization of the Japanese legal system
- As a part of the movement to abolish extritoriality which was imposed by the Western Powers in 1850's (and had finally abolished in 1899).



Outline of the historical background of Civil Code



Comparison of the Three Civil Codes

→ Tort, Business management

Boissonade Civil Code	Institutional System	German Civil Code	Pandekten System	Civil Code of Japan	Pandekten System
Book 1	Person	Book 1	General Provisions	Book 1	General Provisions
Book 2	Property	Book 2	Obligation	Book 2	Real Property
Book 3	Acquisition of Property	Book 3	Real Property	Book 3	Obligation
Book 4	Security of Obligation	Book 4	Family	Book 4	Family
Book 5	Evidence	Book 5	Succession	Book 5	Succession



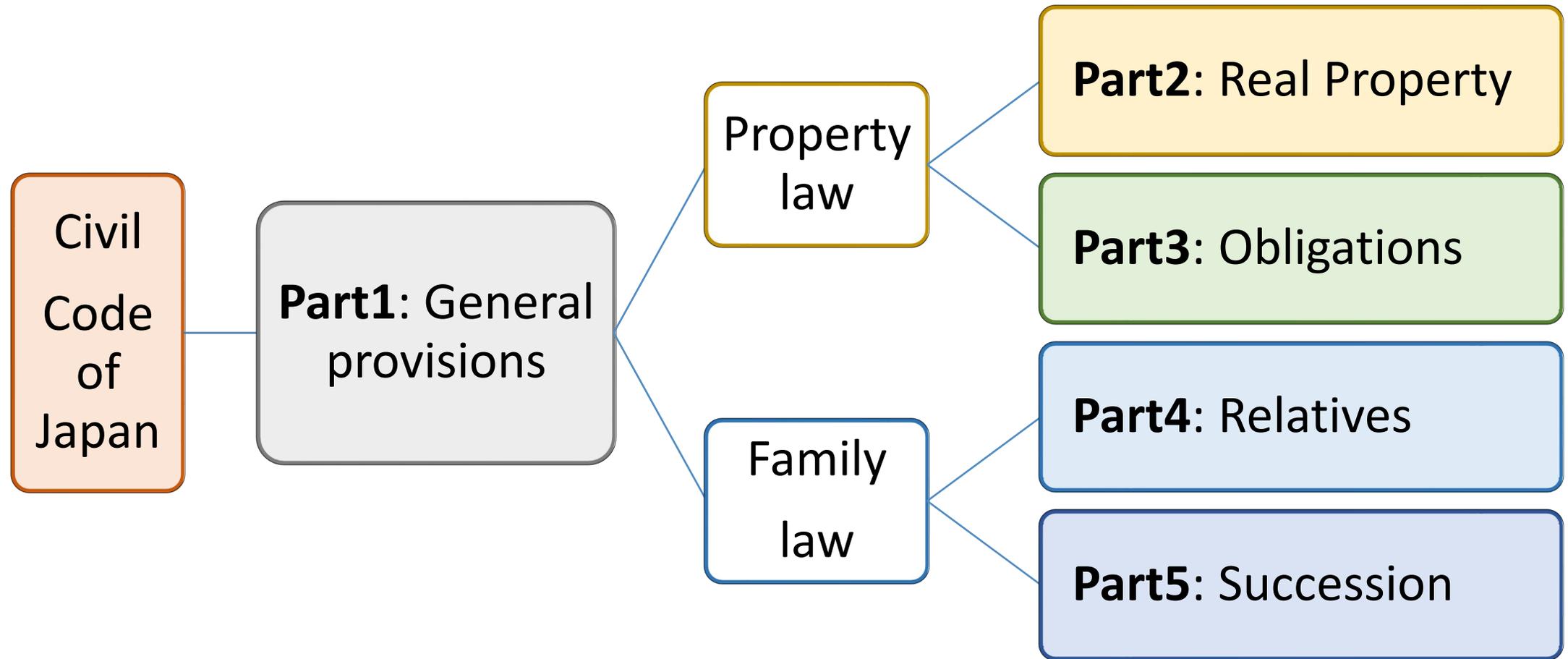


Current situation of Civil Code of Japan

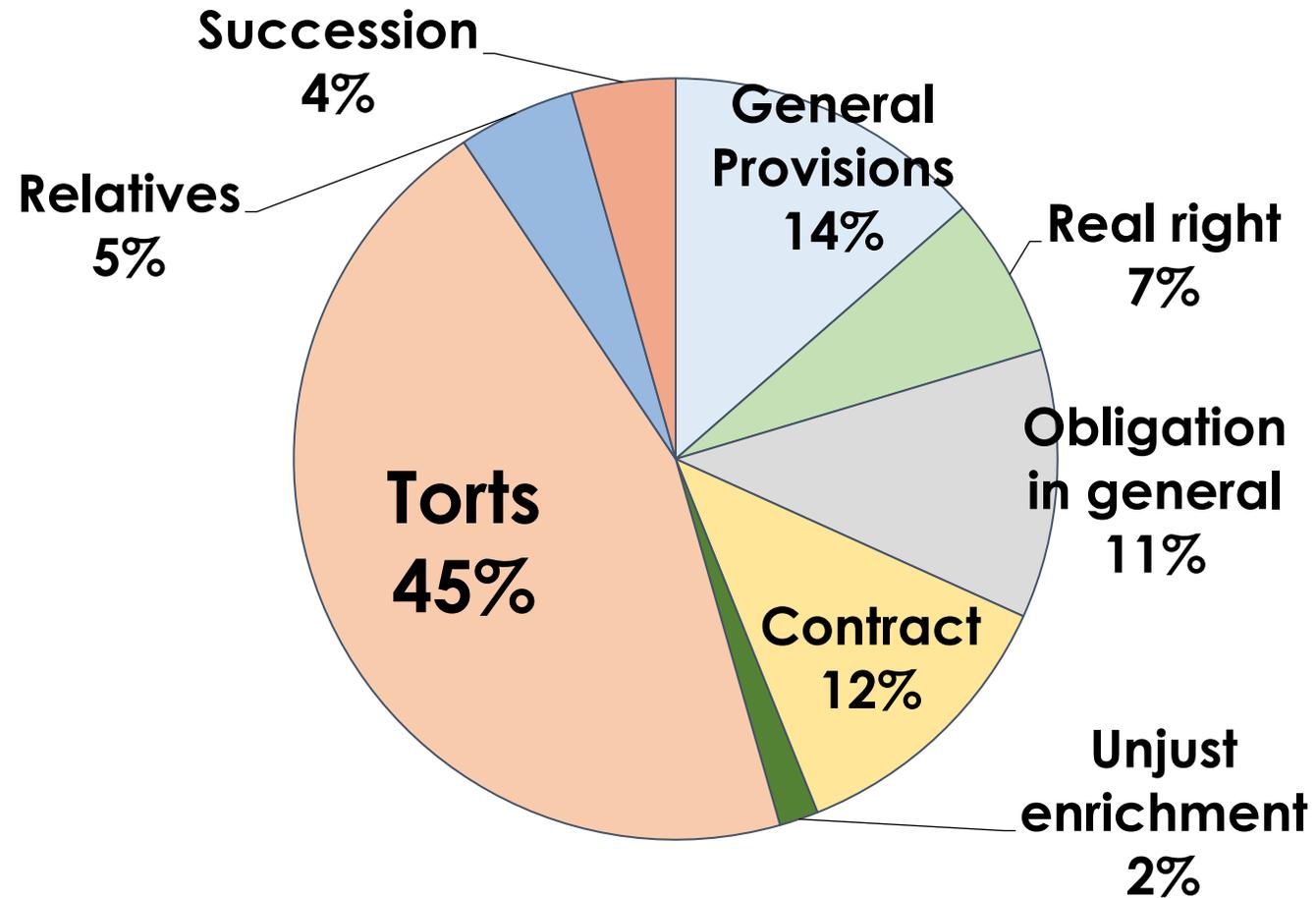
- Structure of Civil Code of Japan
- Frequency of application of articles of civil Code of Japan



Structure of Civil Code of Japan

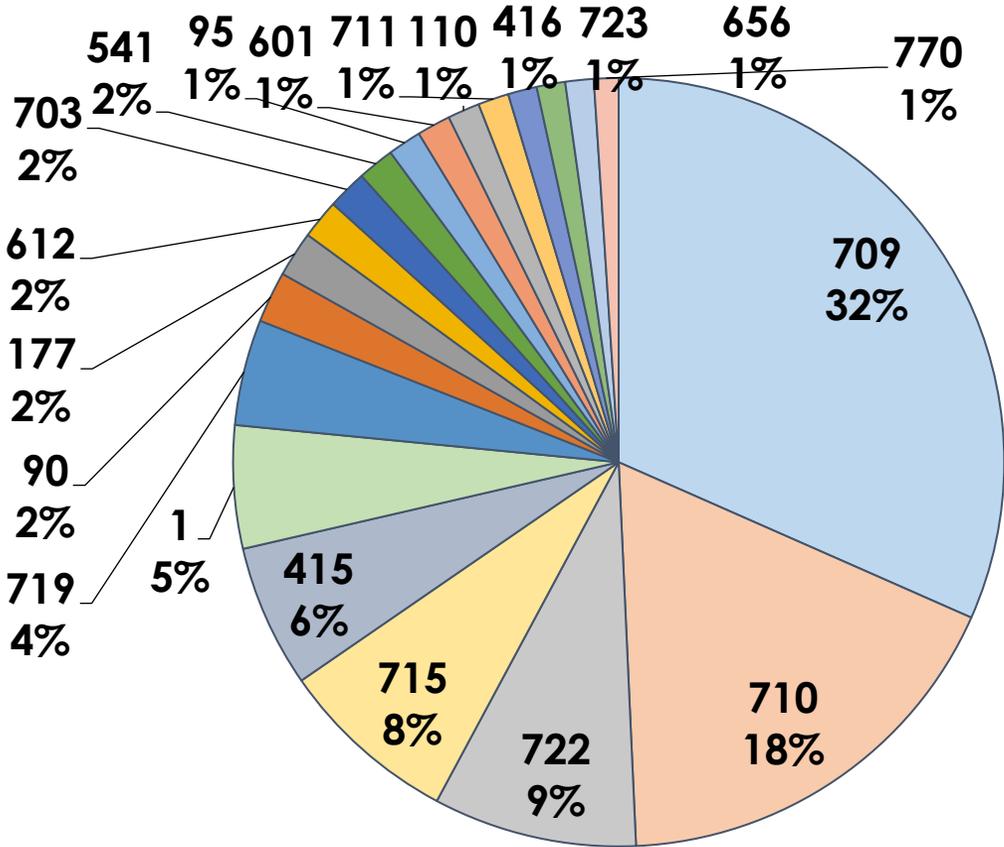


Frequency of application of civil law by Japanese courts



Best 20 articles of Civil Code of Japan

from the view point of frequency of application(1945-2013)



No.	Article	Title of Article
1	Art.709	General tort law
2	Art.710	Compensation
3	Art.722	Comparative Negligence
4	Art.715	Employers' liability
5	Art.415	Non Performance
6	Art.1	General Principles
7	Art.719	Joint tortfeasor
8	Art.90	Pubic policy
9	Art.177	Transfer real estate
10	Art.612	Restriction of sublease

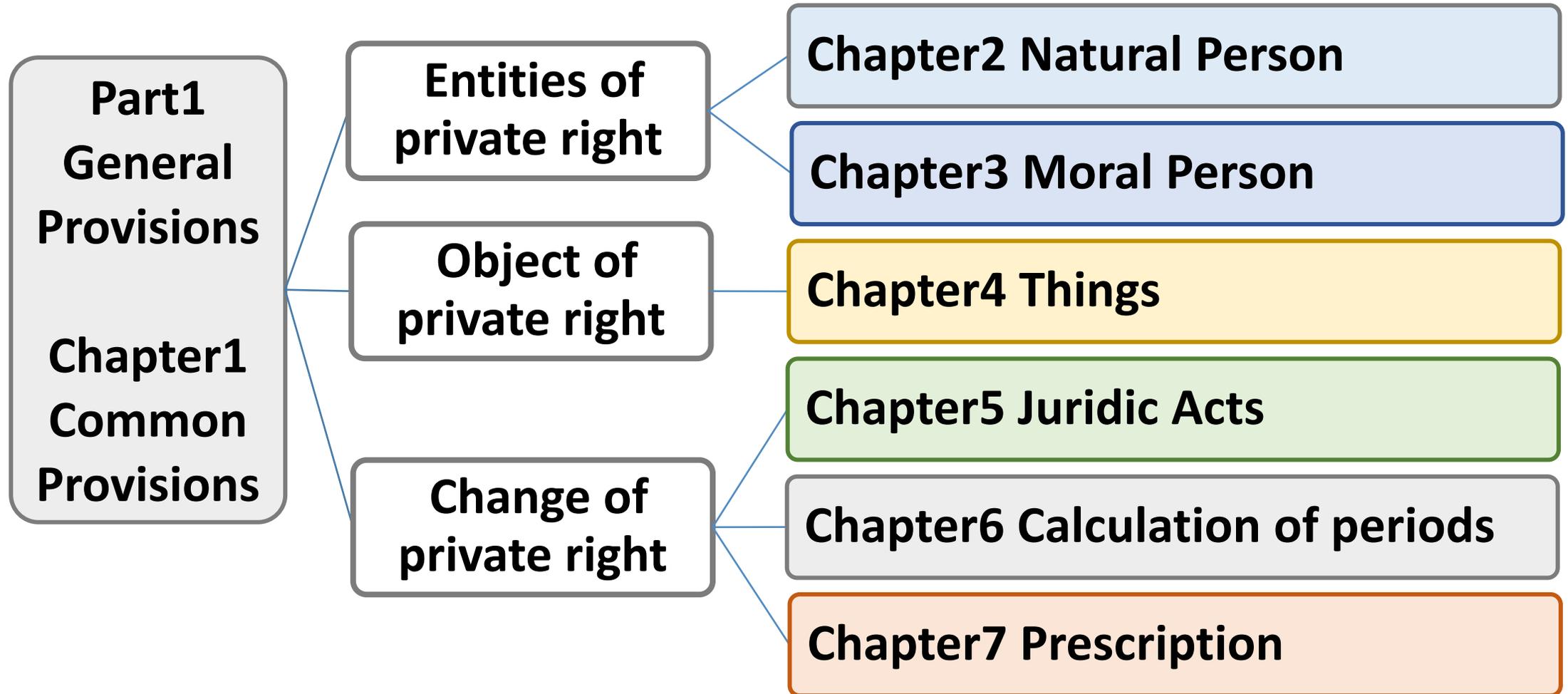


1. General Provisions of Civil Code of Japan

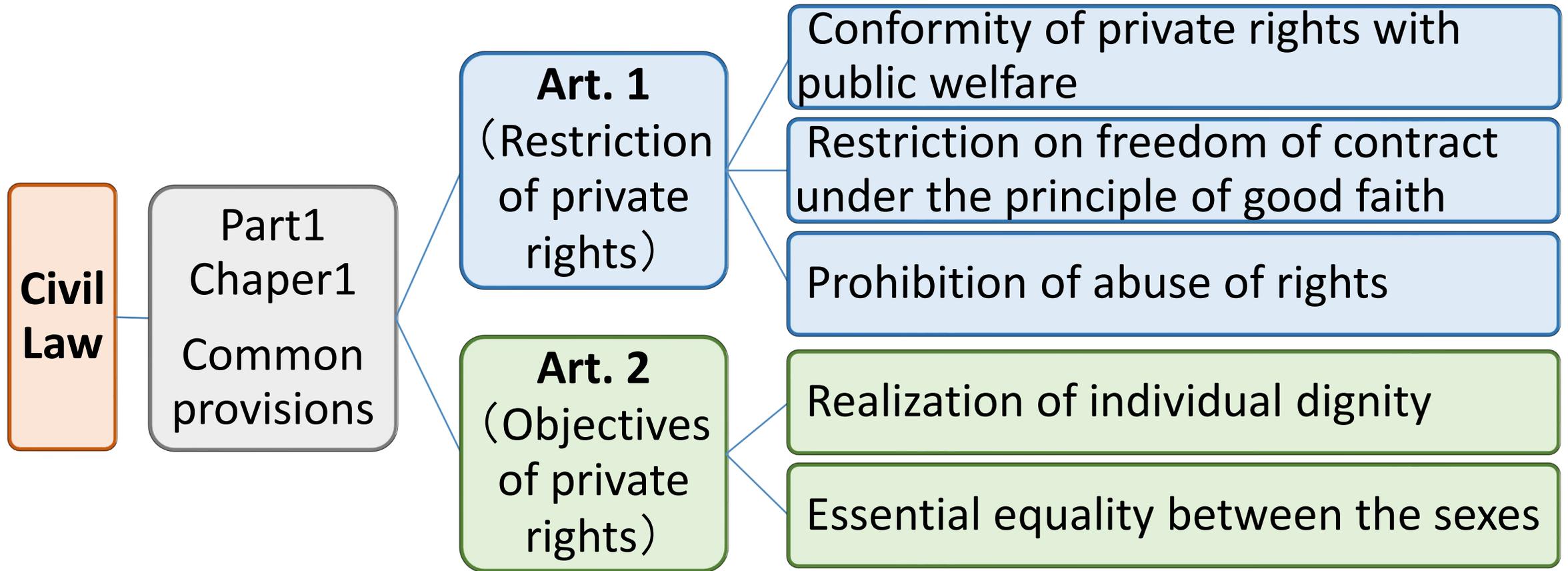
- Structure of General Provisions of Civil Code of Japan
- Objective of Civil Code of Japan (Art. 1, Art. 2)
- Validity of Juridic Acts



Structure of General provisions of Civil Code



Common Provisions(Art.1-2) of Civil Law of Japan at the top of general provisions



Objectives of Civil Code of Japan

My proposal of amendment of Civil Code of Japan

■ Article1_a (Purpose of Civil Code of Japan)

- The purpose of this Act is to realize the dignity of individuals and the essential equality of the sexes by providing for,
 - (a) the subject enjoying private rights
 - (b) the object of private rights
 - (c) the creation, modification and extinction of private rights.

■ Article1_b (Limitations of Exercise of Private Rights)

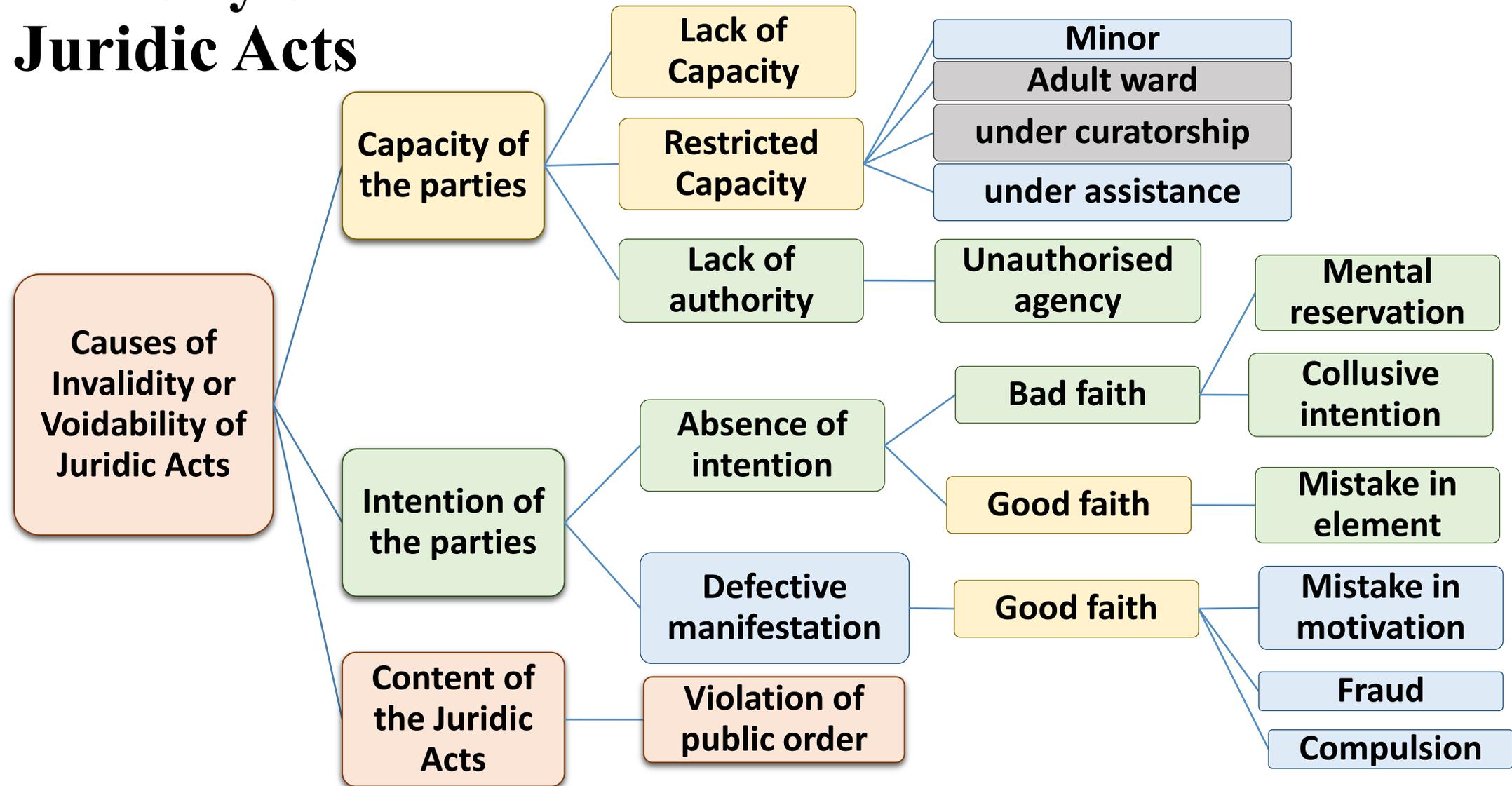
- (1) Private rights shall conform to the public welfare.
- (2) The exercise of rights and the performance of obligations shall be carried out in good faith.
- (3) No abuse of rights shall be permitted.

■ Article2 (Standards for Interpretation)

- This Act shall be construed in accordance with the dignity of individuals and the essential equality of the sexes.



Validity of Juridic Acts



Relationship between gross negligence and mala fide

Bona fide (in good faith)			Mala fide (in bad faith)
Without negligence	negligence	Gross negligence	
Protected in almost all cases	Protected some cases	Evaluate as mala fide and not protected almost all but opponent is also mala fide cases	

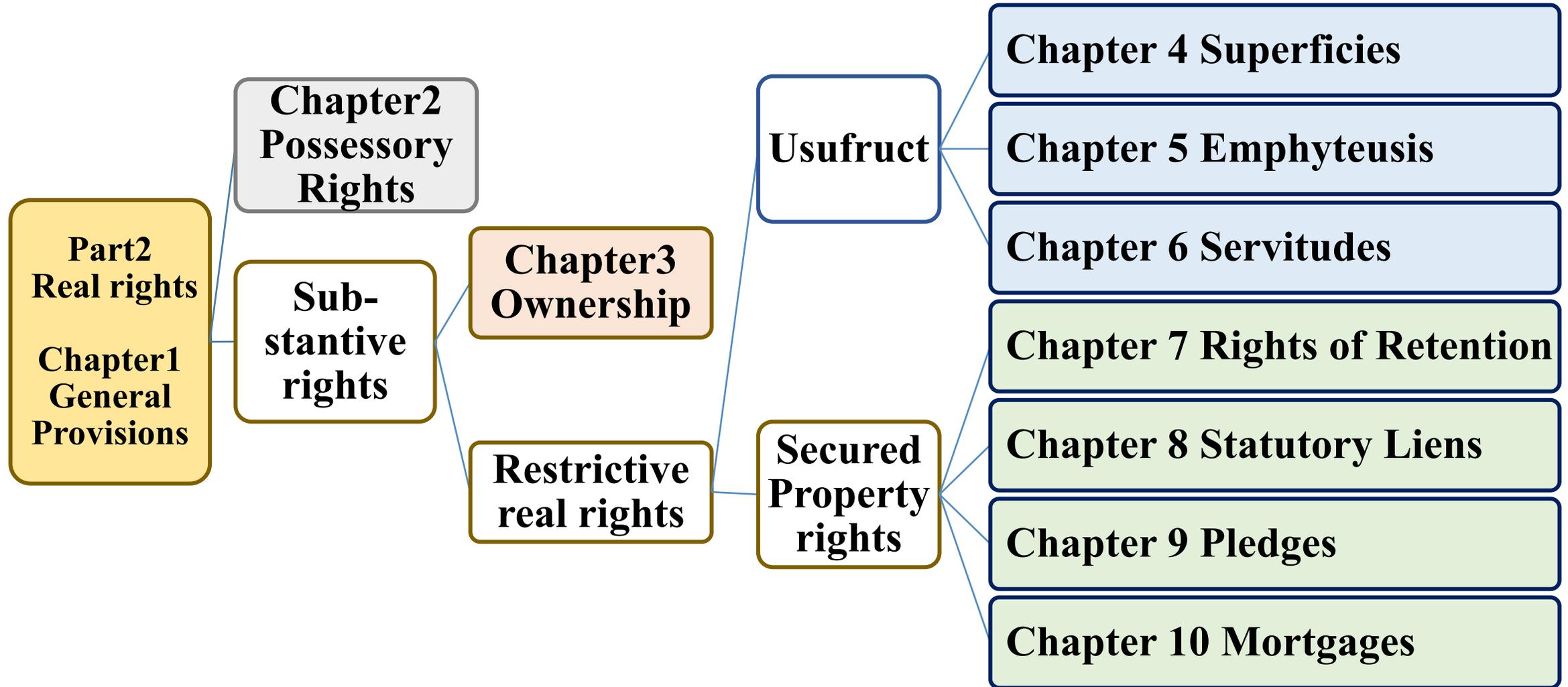


2. Real rights

- Structure of Real rights
- Distinction between Real rights (Part2) and Claims (Part3)
- Relation ship between Sales Contract and Real Right

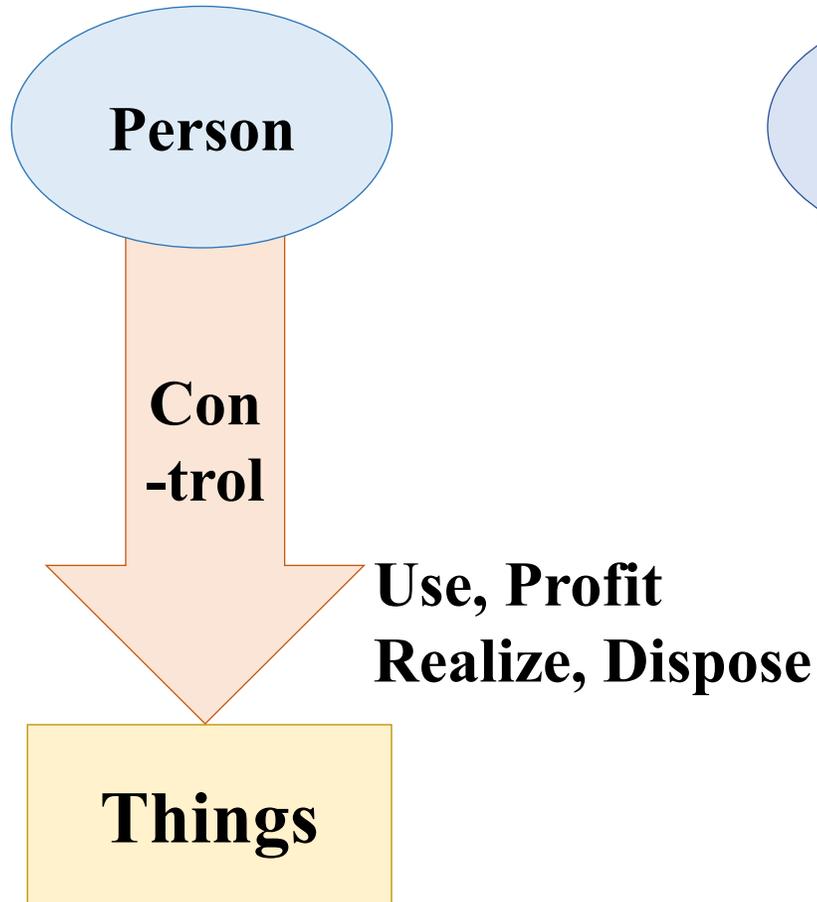


Structure of Real Rights

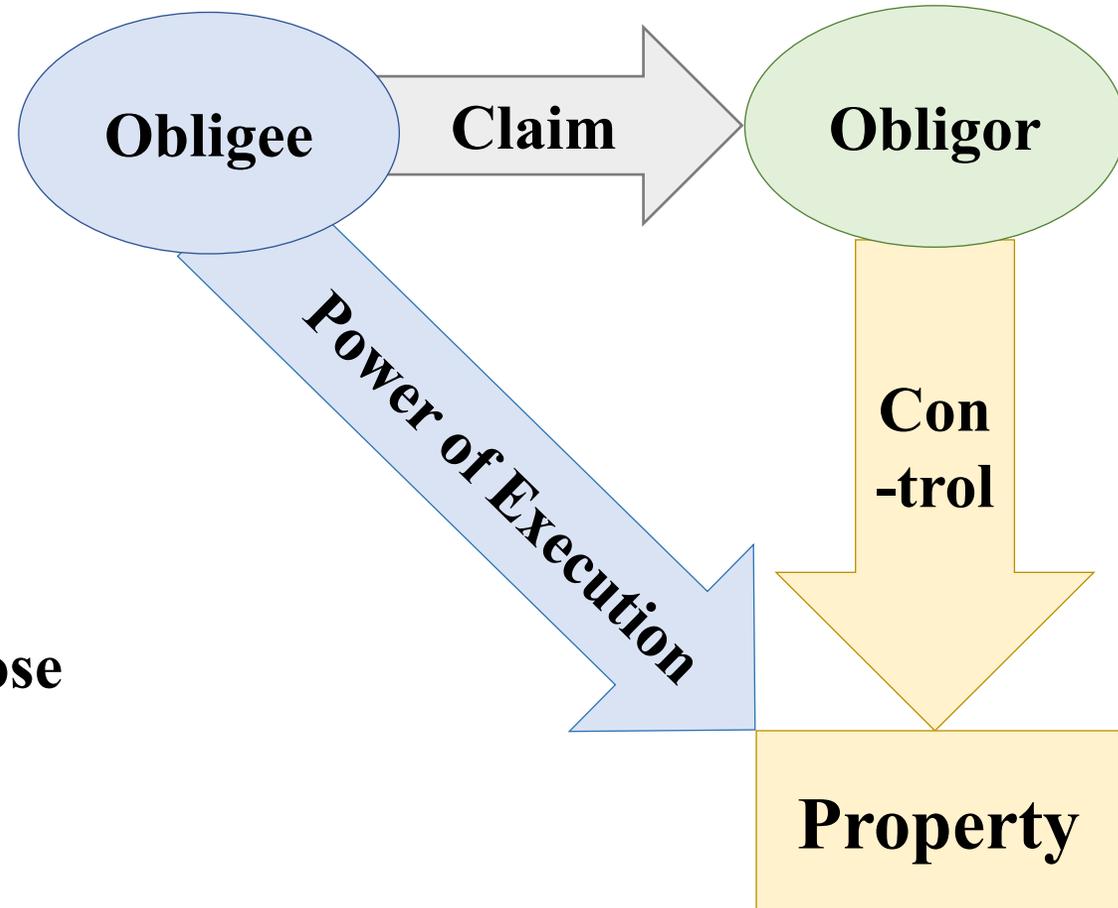


Distinction between Real rights and Claims

Real rights



Claims



Relationship between sale contract and real right of land (1/2)

■ Article 555(Sale)

- A sale shall become effective when one of the parties promises to transfer a certain real rights to the other party and
- the other party promises to pay the purchase money for it.

■ Article 176(Creation and Transfer of Real Rights)

- The creation and transfer of real rights shall take effect solely by the manifestations of intention of the relevant parties.



The effect of sale contract (Art. 176 Code Civil of Japan)



- Article 176 (Creation and Transfer of Real Rights)
 - The creation and transfer of real rights shall take effect
 - solely by the manifestations of intention of the relevant parties.

Relationship between sale contract and real right of land (2/2)

- Article 177(Requirements of Perfection of Changes in Real Rights concerning Immovable properties)
 - Acquisitions of, losses of and changes in real rights concerning immovable properties may not be asserted against third parties,
 - unless the same are registered pursuant to the applicable provisions of the Real Estate Registration Act (Law No. 123 of 2004) and other laws regarding registration.



The effect of the double selling of a real estate (Art. 177 Code Civil of Japan)



3. Relationship between Law of Real property and Obligation

- Dominant position of claims under modern law
 - Extensive effect of claims on third parties
 - Action directe
 - Action paulienne
 - Strong Power of Suretyship
 - Real suretyship as preference
 - Personal suretyship as strong liability



Action paulienne

■ Article 424(Obligee's Right to Demand the Rescission of Fraudulent Act)

- (1) An obligee may demand the court to rescind any juristic act which an obligor commits knowing that it will prejudice the obligee;
- provided, however, that, this shall not apply to the cases where any person who benefits from such act, or any person who succeeds to such benefit, did not know, at the time of such act or succession, the fact that the obligee is to be prejudiced.

■ Article 425(Effect of Rescission of Fraudulent Act)

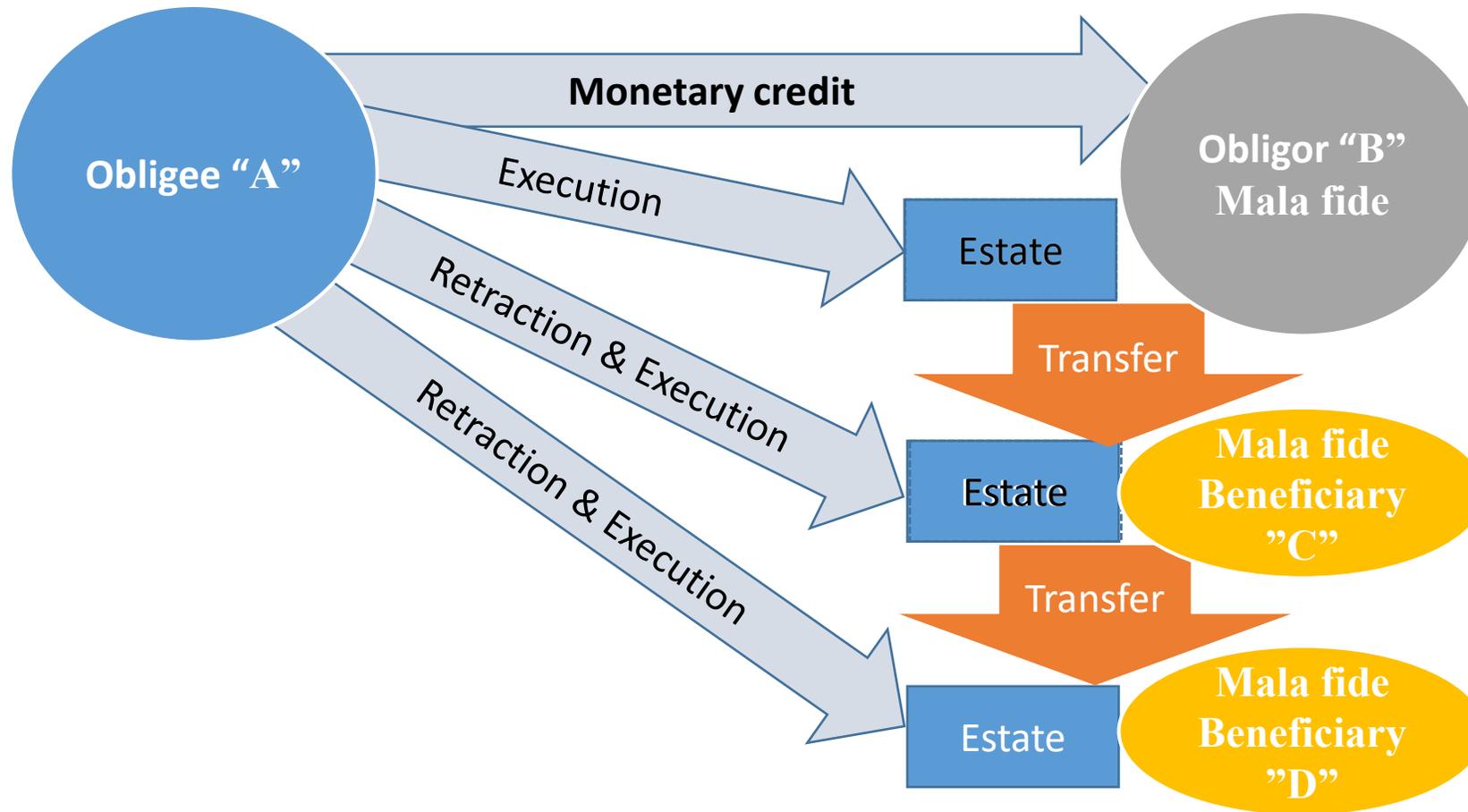
- The rescission pursuant to the provision of the preceding Article shall have an effect for the benefit of all obligees.

■ Article 426(Limitation Period of Obligee's Right to Rescind Fraudulent Act)

- The right to rescind pursuant to the provision of Article 424 shall be extinguished by operation of prescription if not exercised within two years from the time that the obligee acquired knowledge of the cause of the rescission. The same shall apply if twenty years pass from the time of the act.

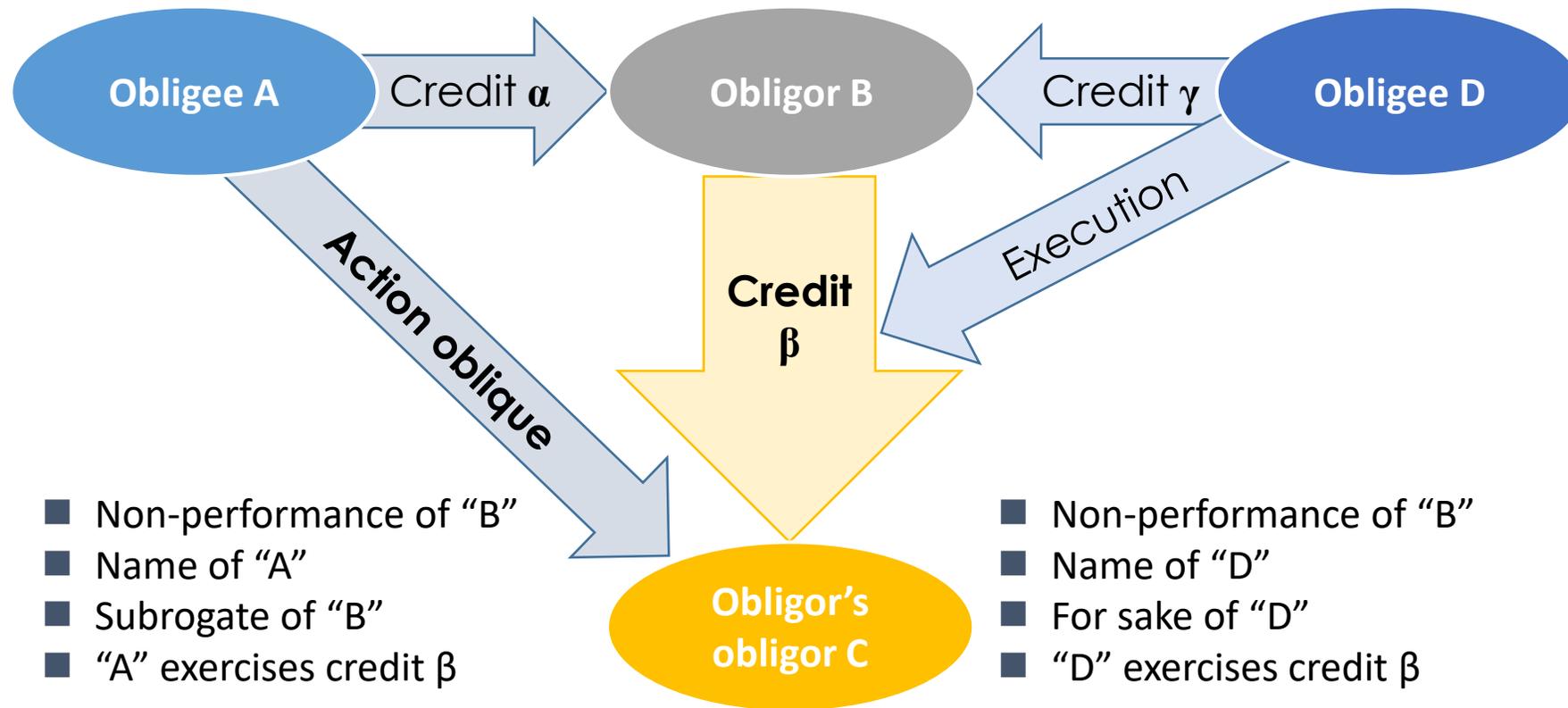


Action paulienne (droit de suit: tracing right)



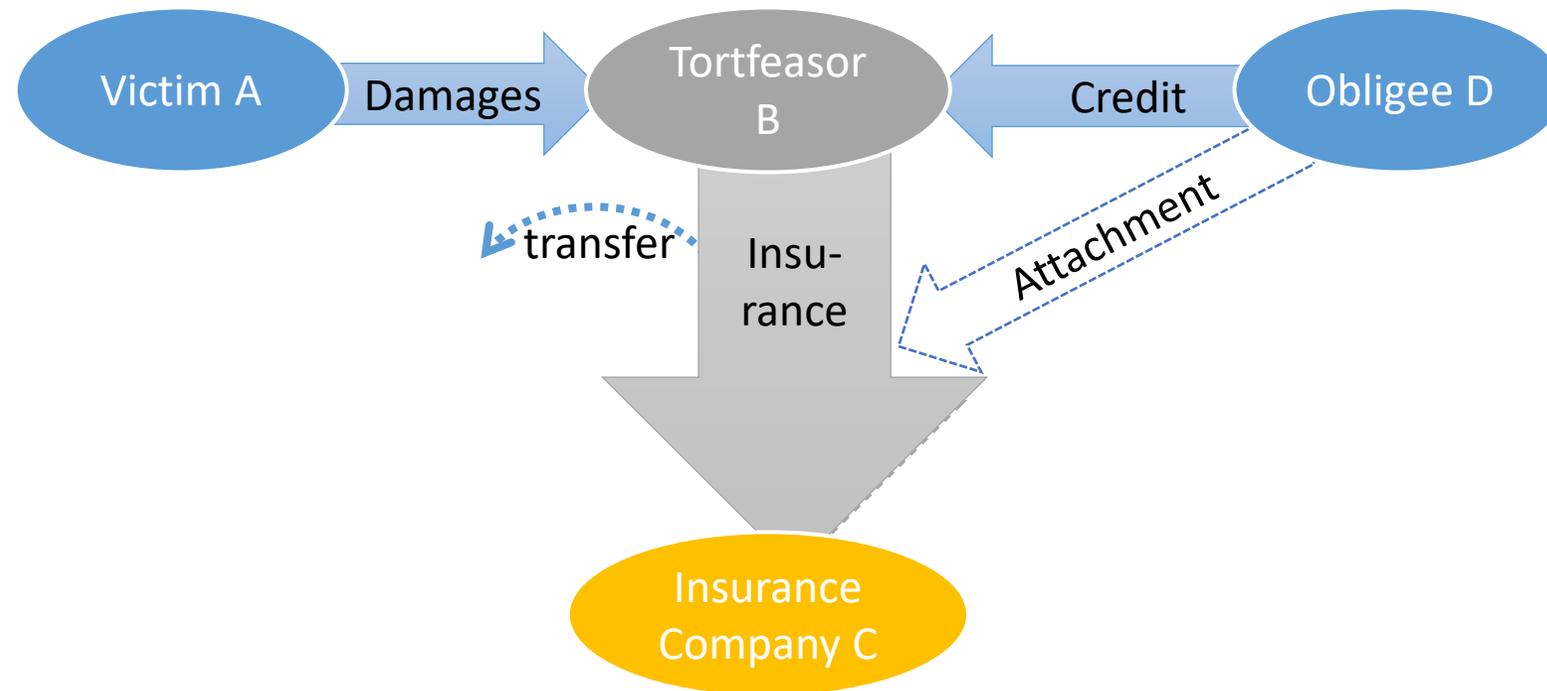
Action Oblique and Attachment

Dividend is equal among obligees



“Action directe” of a victim against insurance company

- Security Act of the Automobile Accident Liability Art. 16 (1)
 - A victim of automobile accident may claim for damages against insurance company of tortfeasor to the extent of the insurance amount.



Act on Securing Compensation for Automobile Accidents — Direct Action

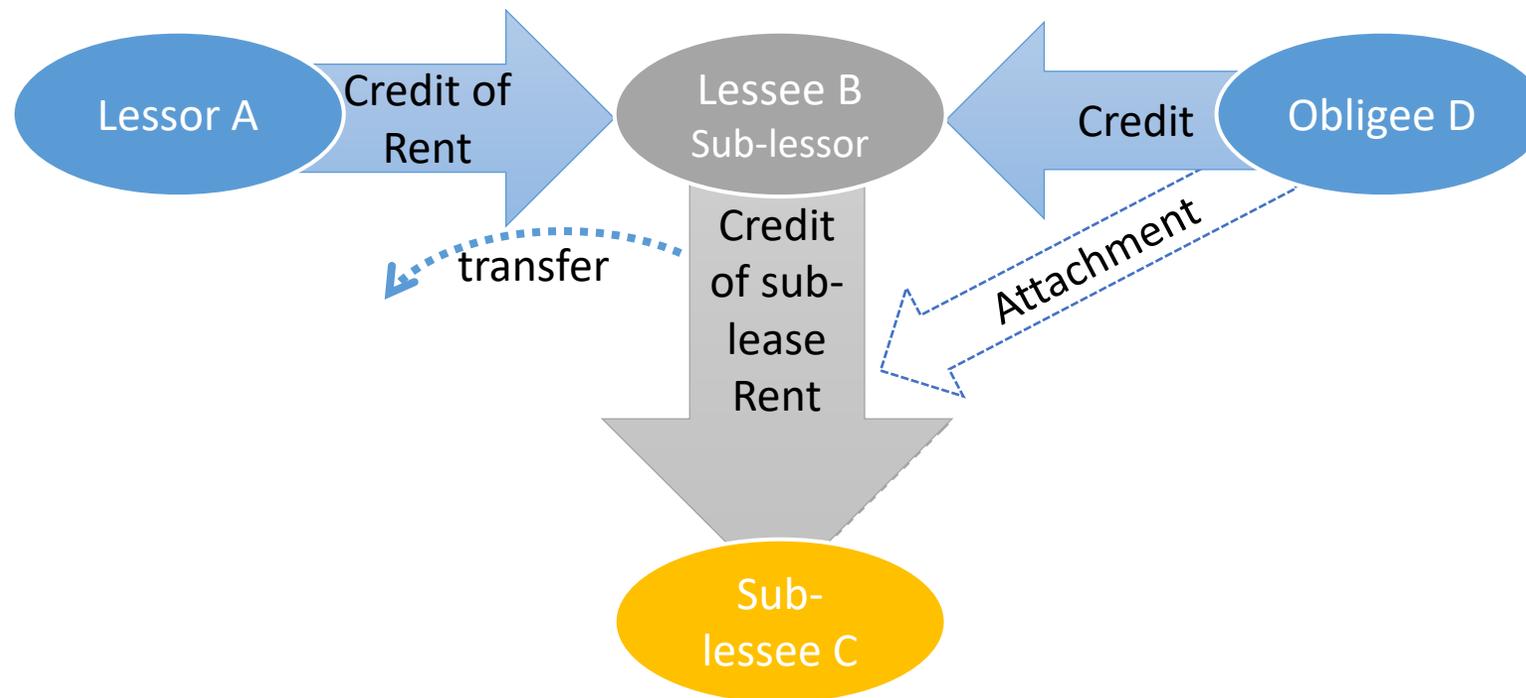
- Article 16(Filing a Claim with the Insurer for Damages)
 - (1) If a person[Y] in possession becomes liable to compensate for damage as under Article 3, the injured party[X] may file a claim with insurer for the insurer to pay the injured party damages of up to the amount of insurance coverage, pursuant to Cabinet Order.



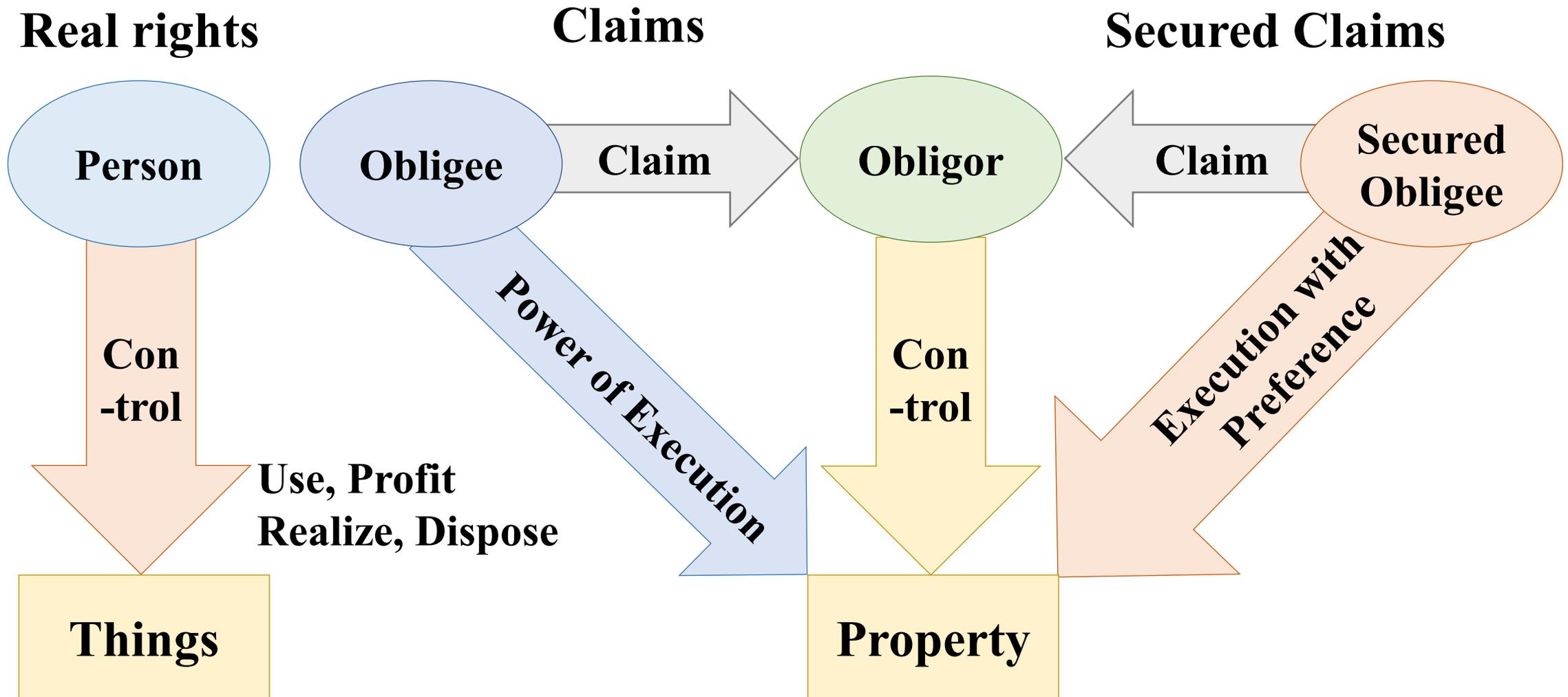
“Action directe” of sub-lease contract

■ Article 613 (1)

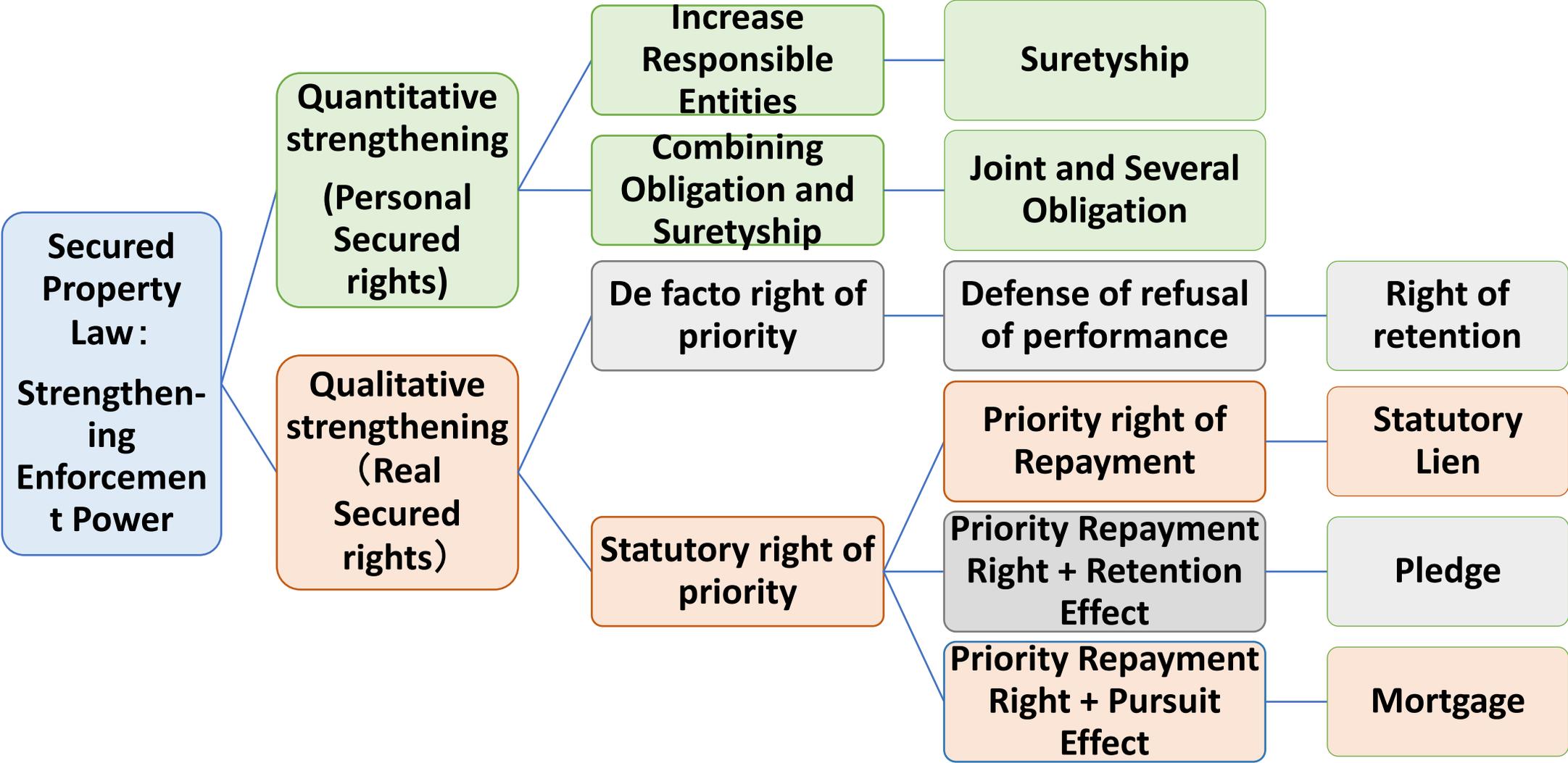
- (1) If a lessee lawfully sub-leases a leased Thing, the sub-lessee shall assume a direct obligation to the lessor. In such cases, advance payment of rent may not be asserted against the lessor.
- (2) The provisions of the preceding paragraph shall not preclude the lessor from exercising his/her rights against the lessee.



Dominant position of claims under modern law

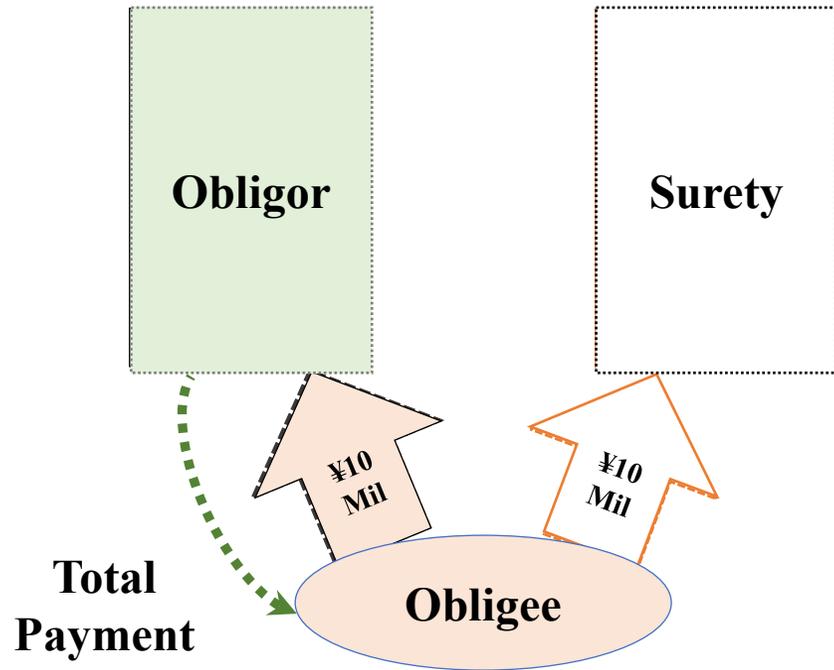


Structure of Secured Property rights



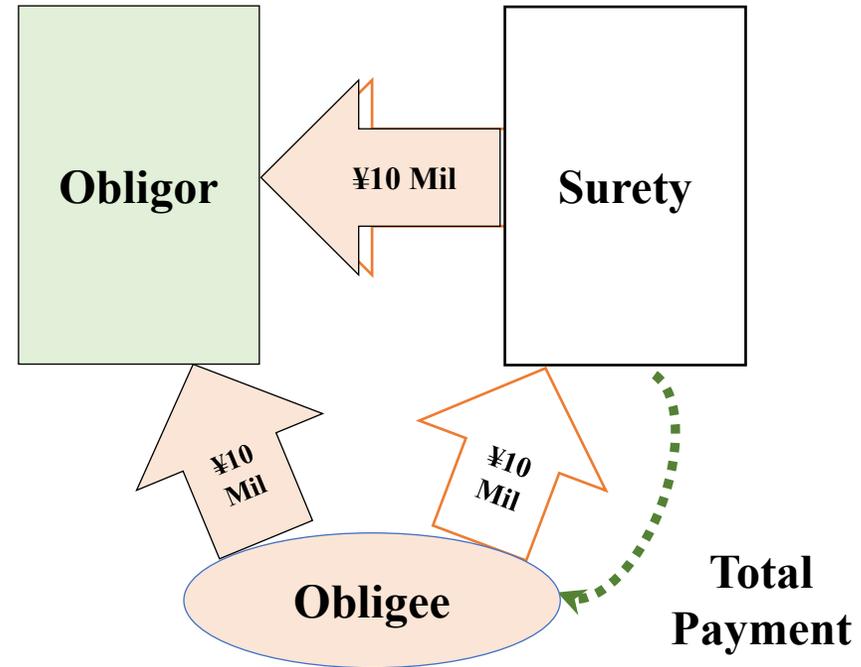
Two types of payments cause completely different results

■ Payment of obligor



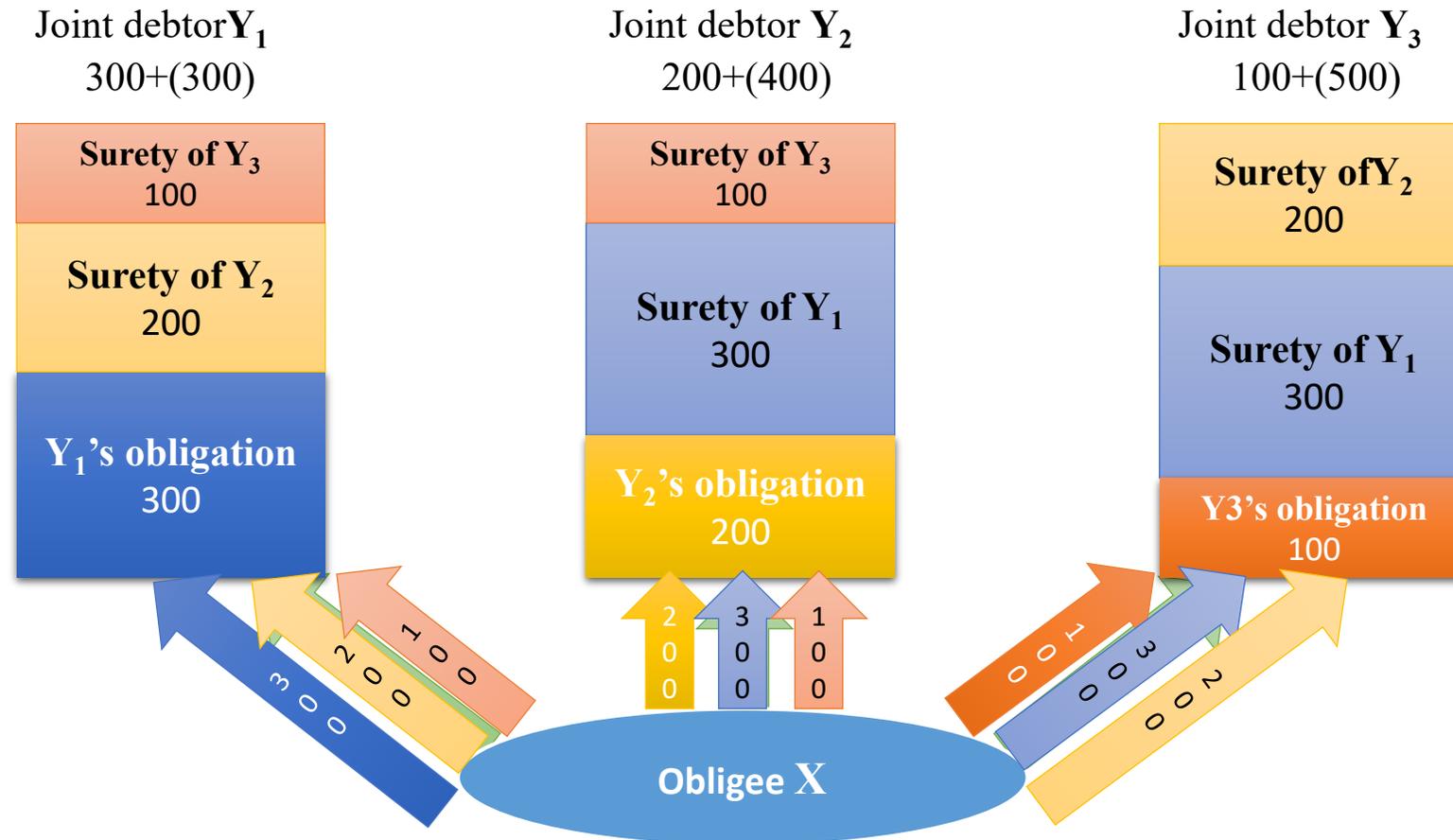
Both obligations are extinguished

■ Payment of Surety

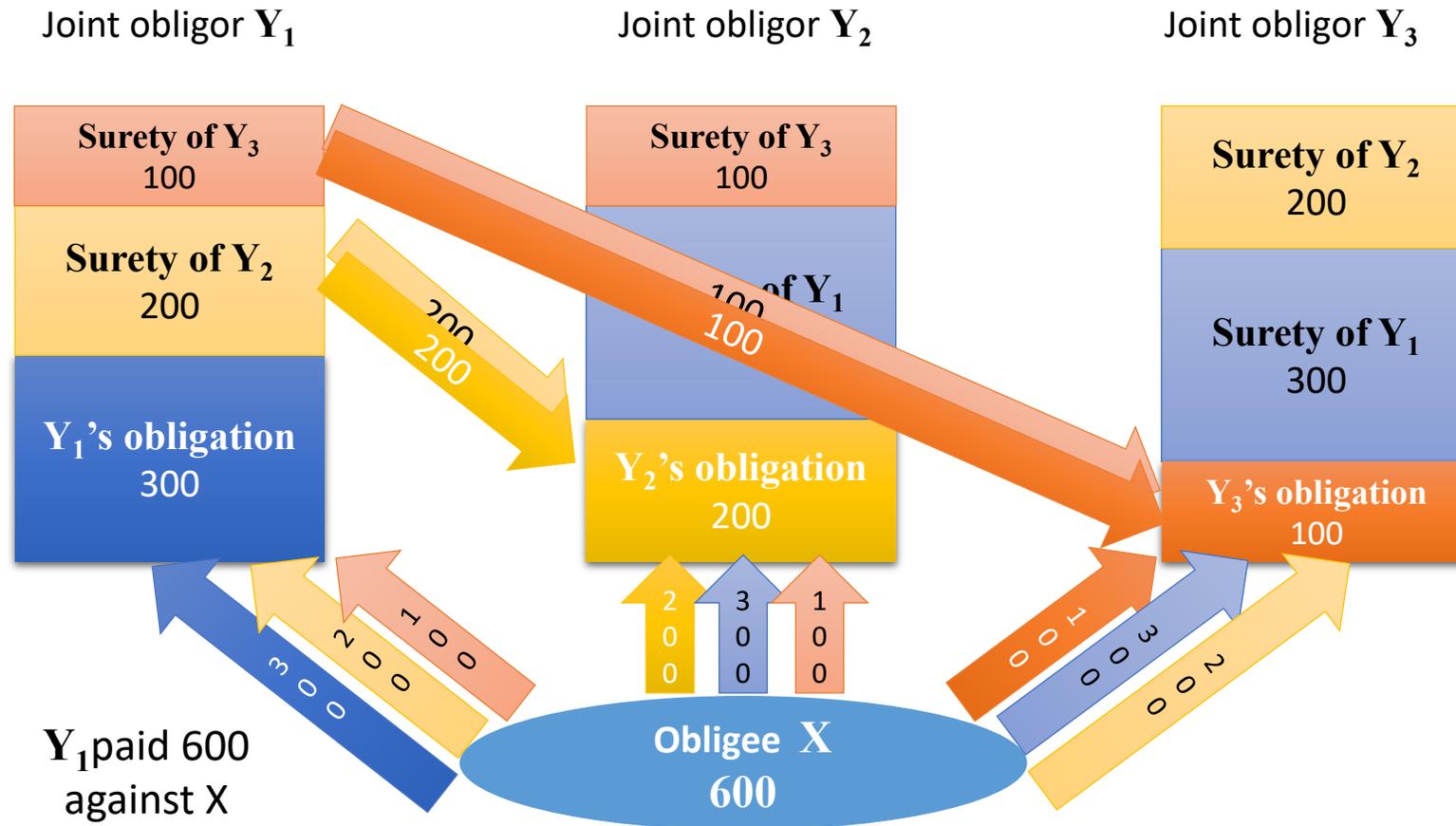


The credit move from Obligee to Surety. Obligation of Obligor not extinguished and exist for the purpose of reimbursement.

Structure of several and joint liability



Subrogation of joint obligor by total payment



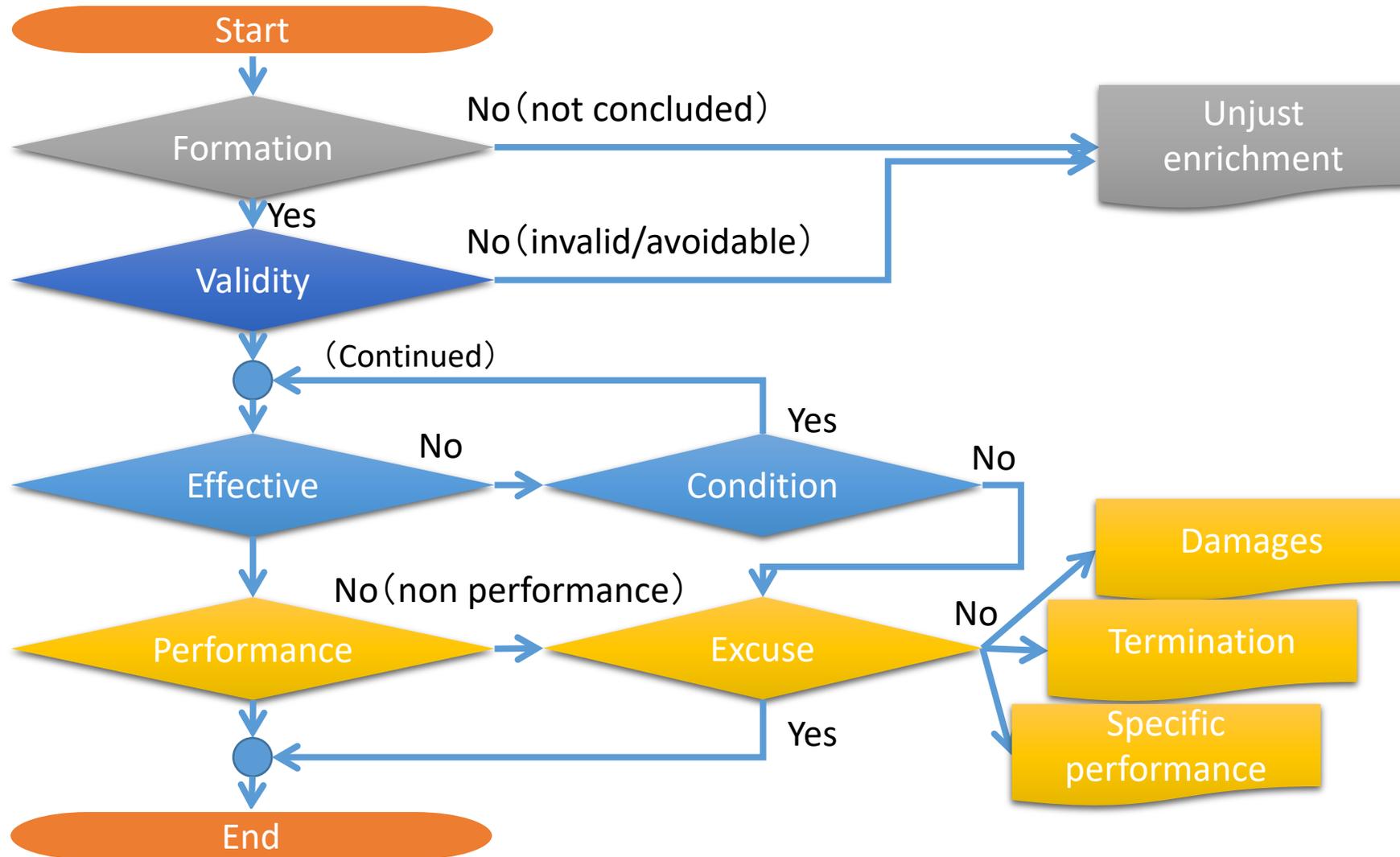


4. Contract Law

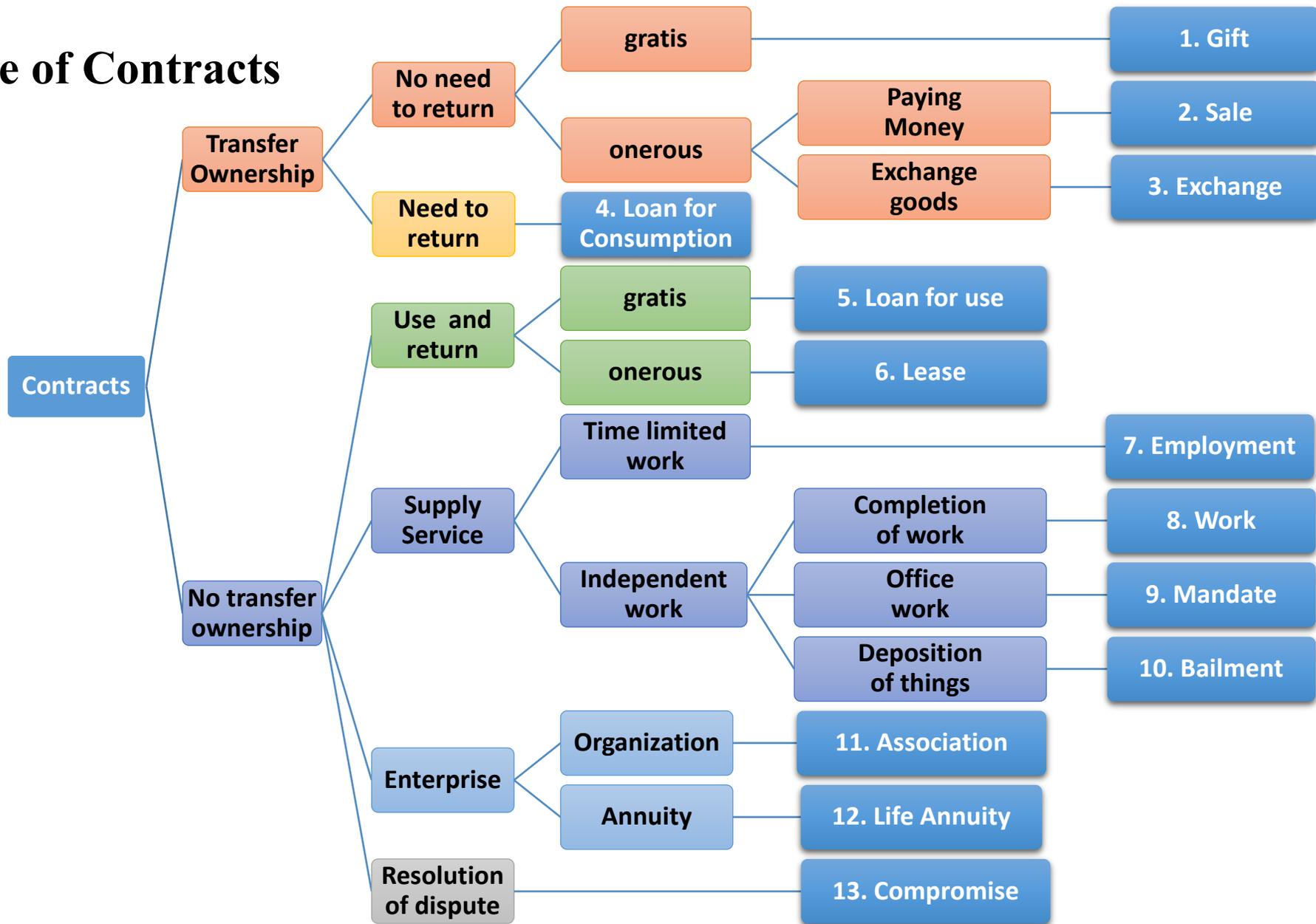
- Flow of Contract
 - Formation, Validity, Effectiveness, Performance of Contract
- 13 Types of Contracts



Flow of Contract



Type of Contracts





Obligations outside Contracts

→Comparative study

- Business Management (Benevolent Intervention in Another's Business)
- Unjust enrichment
- Tort



5. Business Management

→ Comparative study

■ Comparative study

- French law (as a part of Unjust enrichment)
- German law (as a part of Contract)
- Japanese law (one of the independent system in the extra contract)

■ Case study



Law of Management of Business

■ Chapter 3 Negotiorum Gestio (Management of Business))

■ Article 697 (Management of Business)

(1) A person who commences the management of a business for another person without being obligated to do so ("Manager") must manage that business ("Management of Business") in accordance with the nature of the business, using the method that best conforms to the interests of that another person ("the principal").

■ (2) The Manager must engage in Management of Business in accordance with the intentions of the principal if the Manager knows, or is able to conjecture that intention.



Applicable articles in Maizuru City Grand Sumo Case (2018)

■ Urgent Management of Business

■ Article 698

If a Manager[woman] engages in the Management of Business[artificial respiration] in order to allow a principal[Mayer] to escape imminent danger to the principal's person, reputation or property, the Manager[woman] shall not be liable to compensate for damages resulting from the same unless he/she has acted in bad faith or with gross negligence.

■ Continuation of Management of Business by Managers

■ Article 700

A Manager[woman] must continue the Management of Business[artificial respiration] until the principal[the mayer] or his/her heirs or legal representatives[male rescue team] can undertake it;

- provided, however, that this shall not apply in cases where it is evident that the continuation of the Management of Business is contrary to the intentions of the principal, or is disadvantageous to the principal.



After the Maizuru City Grand Sumo Case

- After the Maizuru Sumo Case, the male rescue team arrived and took over the rescue work with the two women, and the mayor was rushed to the hospital and admitted to the hospital, where he survived.
- The rescue operation of two women, ignoring the announcement "Women should get off the stage.", saved lives (The mayor of Maizuru is now recovering his health and returning to work.).
- Subsequently, President Hakkaku of the Japan Sumo Association explained that the announcement of the event was "inappropriate as an emergency response".
- On the other hand, there are opinions that the tradition of "Nyonin kinsei(女人禁制 : No women allowed in the Sumo stage)" should be respected and that announcements should be followed.



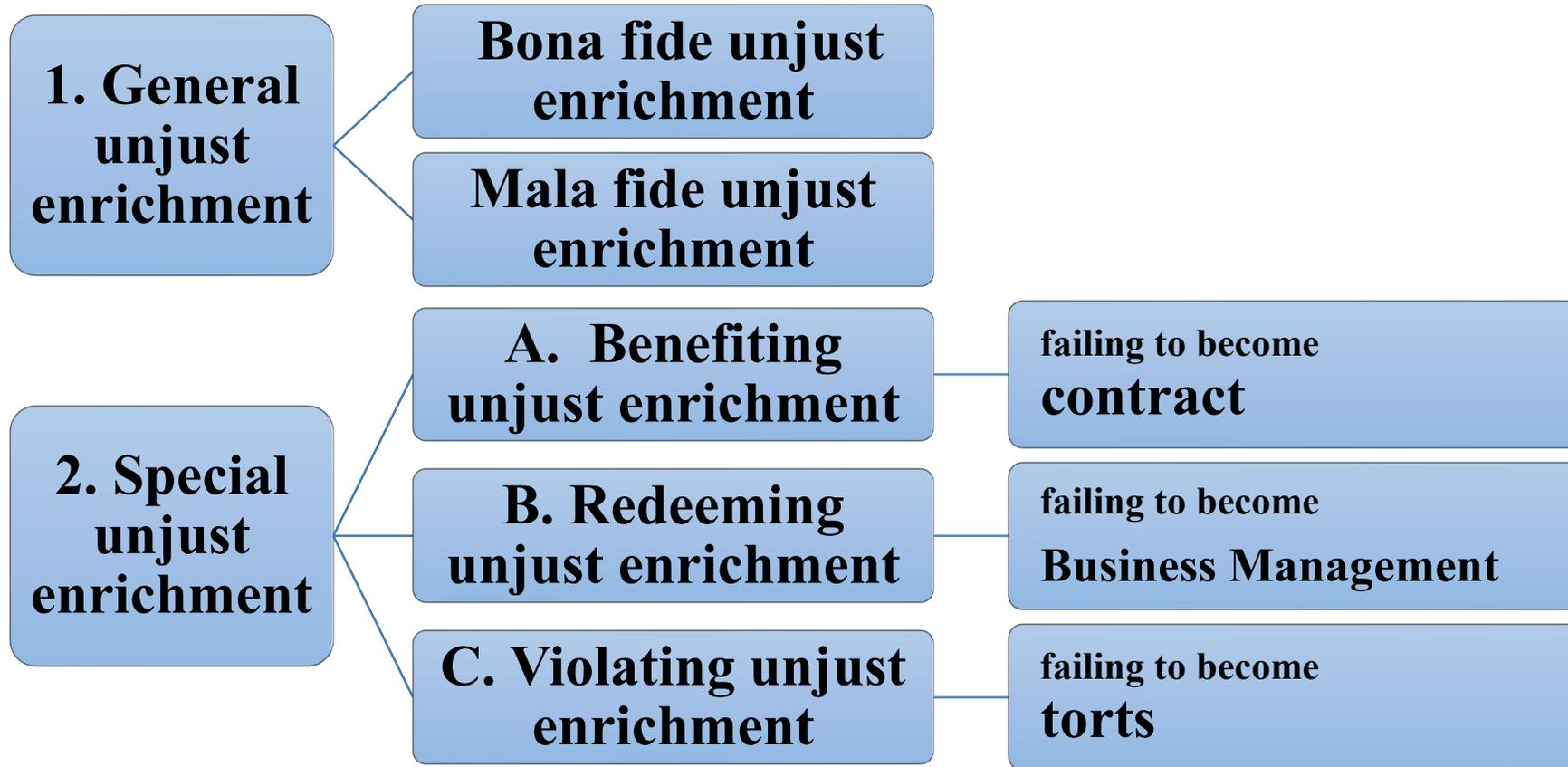


6. Unjust Enrichment

A system for adjusting losses and gains from the perspective of fairness when one party suffers a loss and the other a gain due to an event lacking a legal cause.

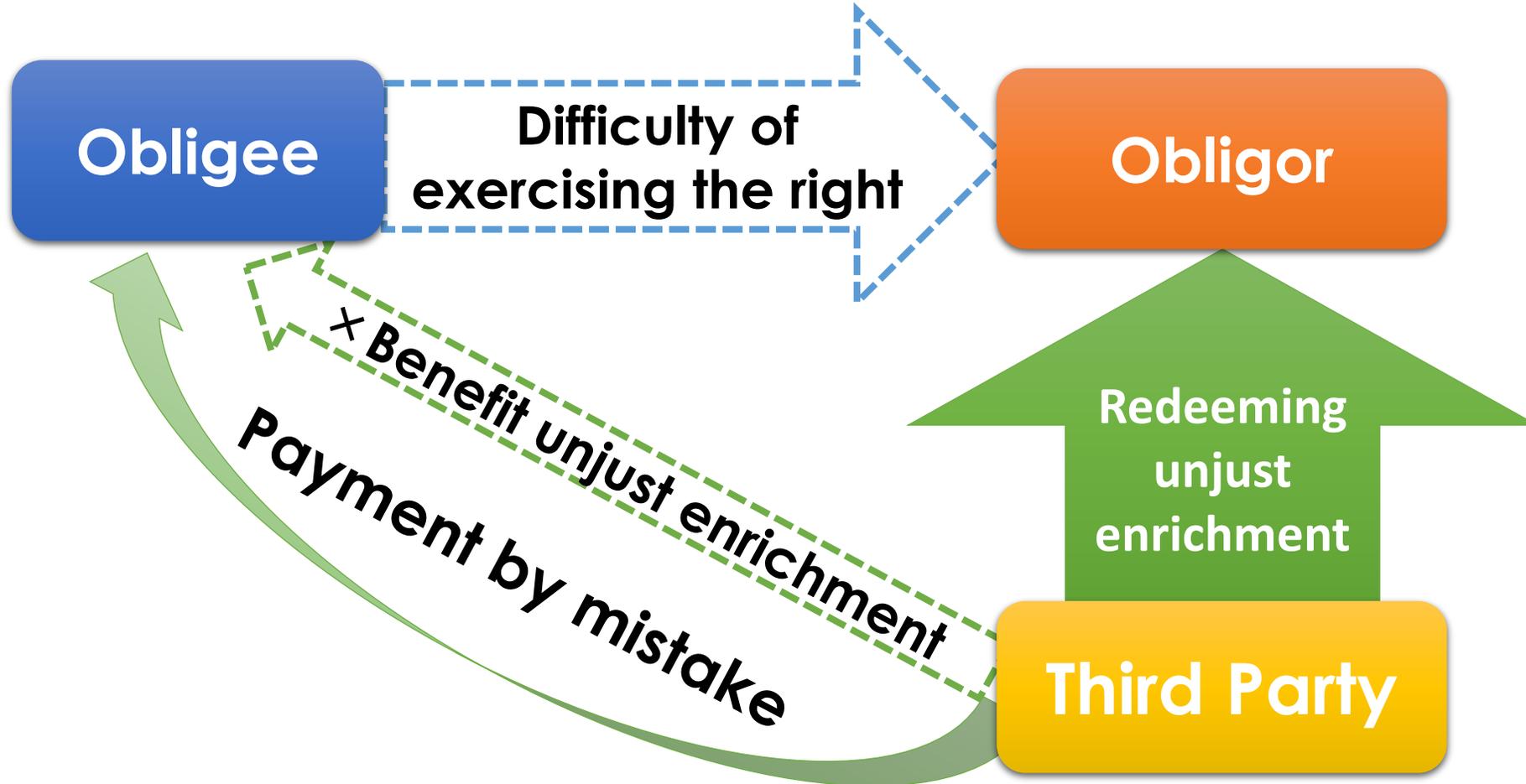


Type of unjust enrichment



Redeeming unjust enrichment (Art. 707)

Obligee has bona fide destroyed documentary evidence or has relinquished any security or has lost his claim by prescription



7. Tort Law

■ General Tort

- Art.709: Single General Tort
- Art.719: Several and Joint Tort

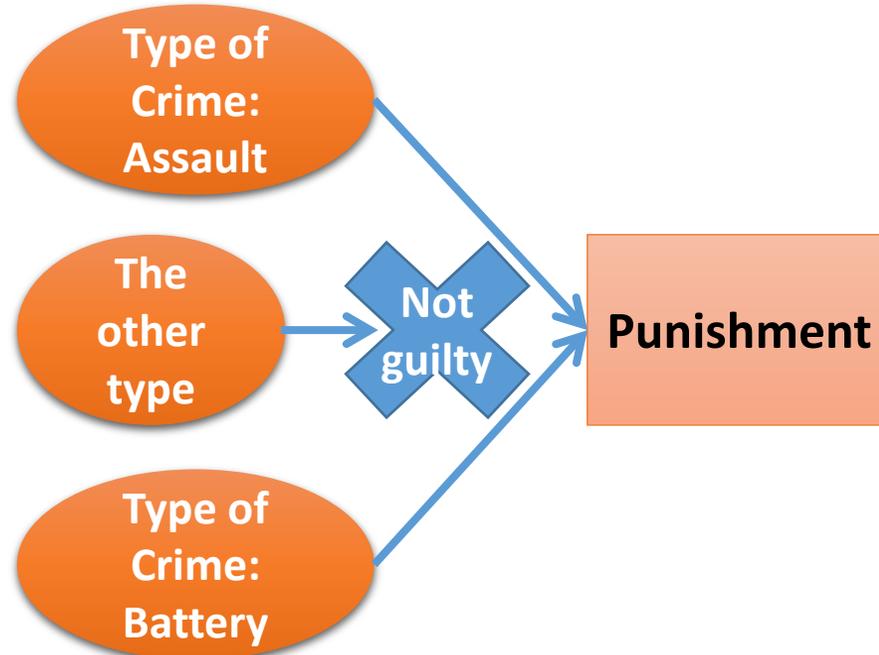
■ Specific Tort

- Art.714: Liability of person with duty to supervise person
- Art.715: Liability of employer
- Art.716: Liability of person who ordered work
- Art.717: Liability of possessor and owner for defect in structure on land
- Art.718: Liability of possessor of animal
- Art.723: Liability of defamation



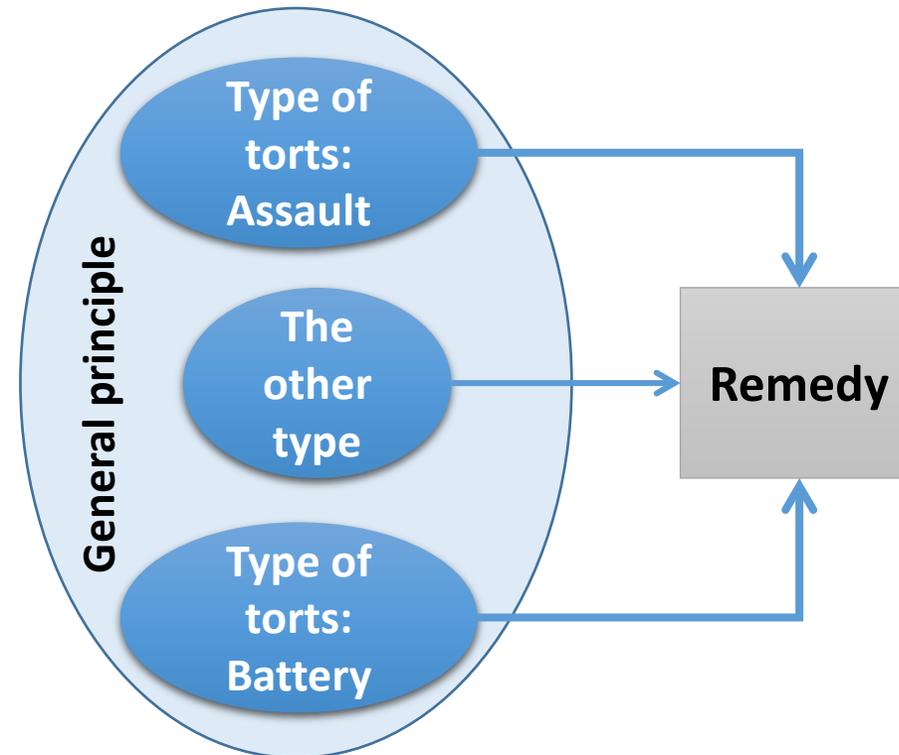
Difference between Criminal law and Tort law

Criminal law
(Legality principle: *nul poena sine lege*)



Typology

Civil law (Remedy)

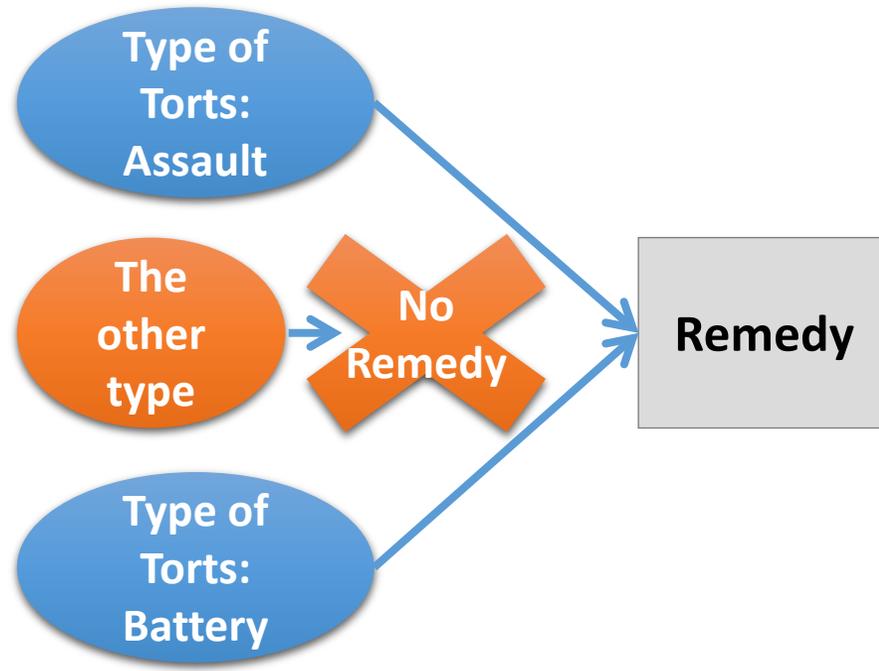


General principle

Types of tort law in the world

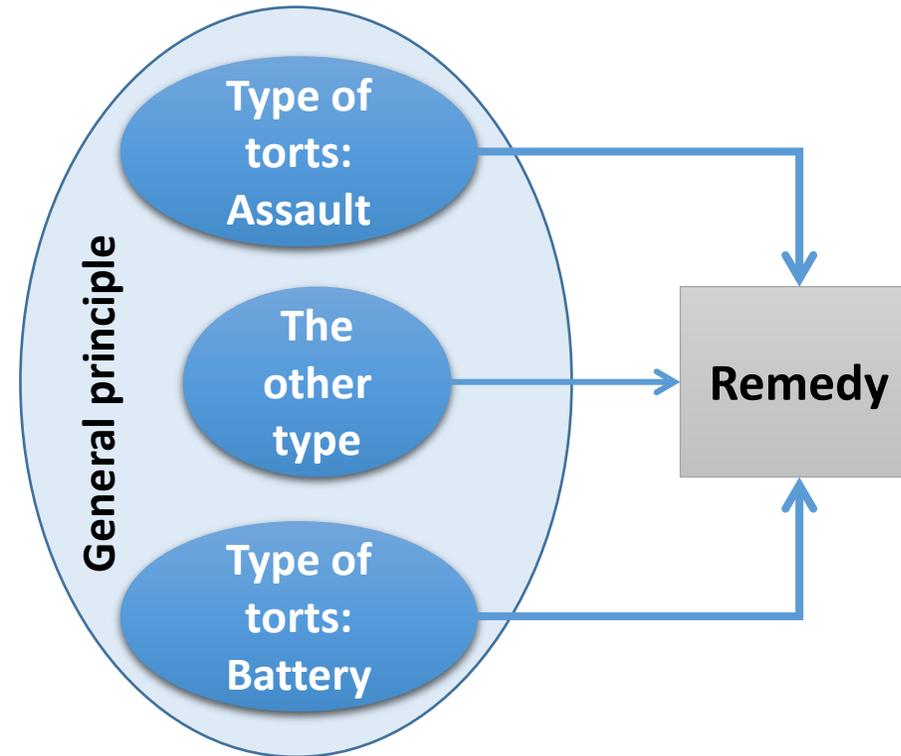
→ Comparative study

Roman or German type



Typology

French type



General principle

French Civil Code(1804)

→Comparative study

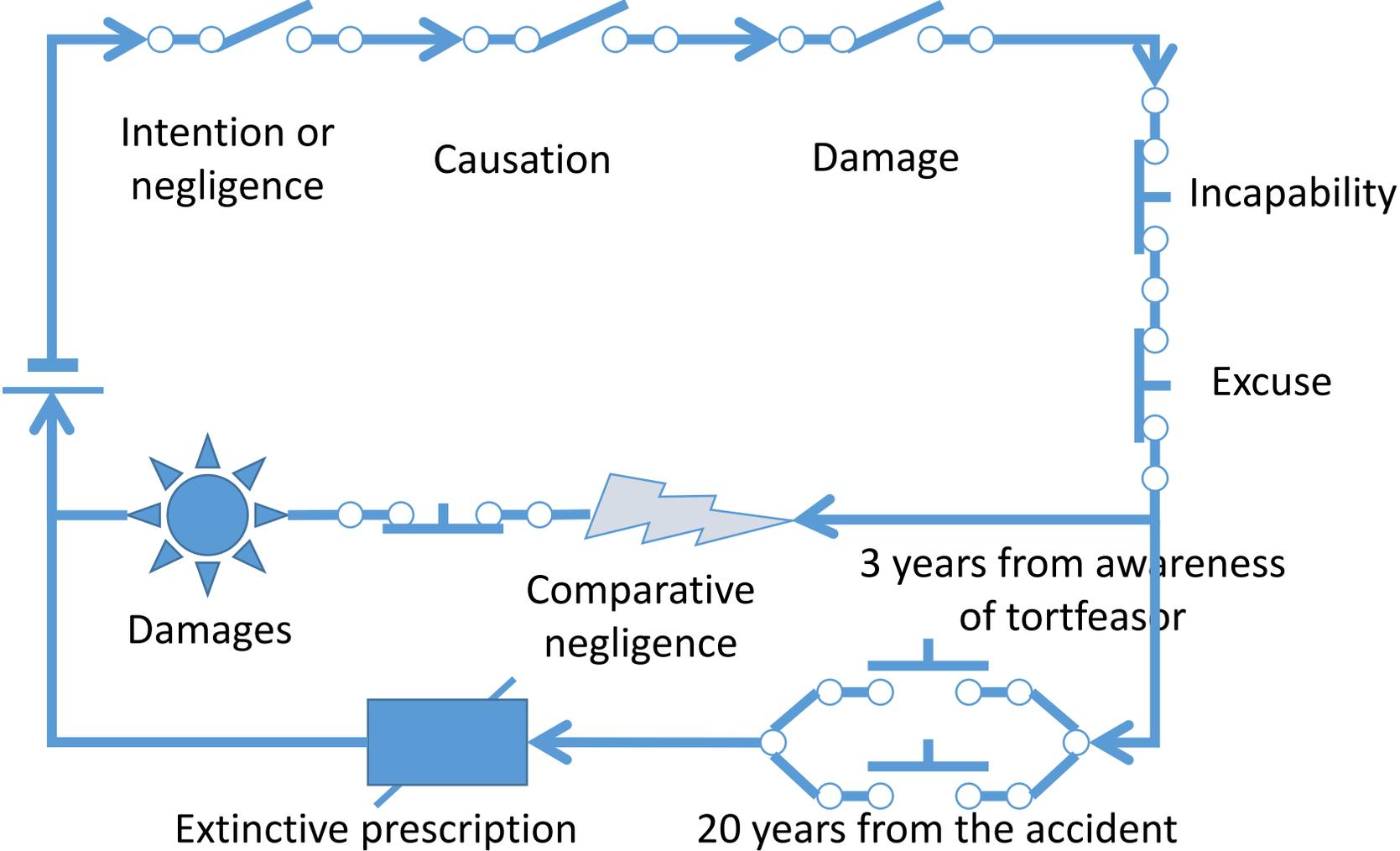
- Art. 1382 (Civil responsibility in general) → Art. 1240 New article
 - Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it.
 - Tout fait quelconque de l'homme, qui cause a autrui un dommage, oblige celui par la faute duquel il est arrivé, a le réparer.
- Characteristics
 - There is no term of right in this provision.
 - It means that all of rights and legal interests can be compensated.
 - Prerequisite is only 3: fault, damage, and causation between fault and damage.

German Civil Code(1900)

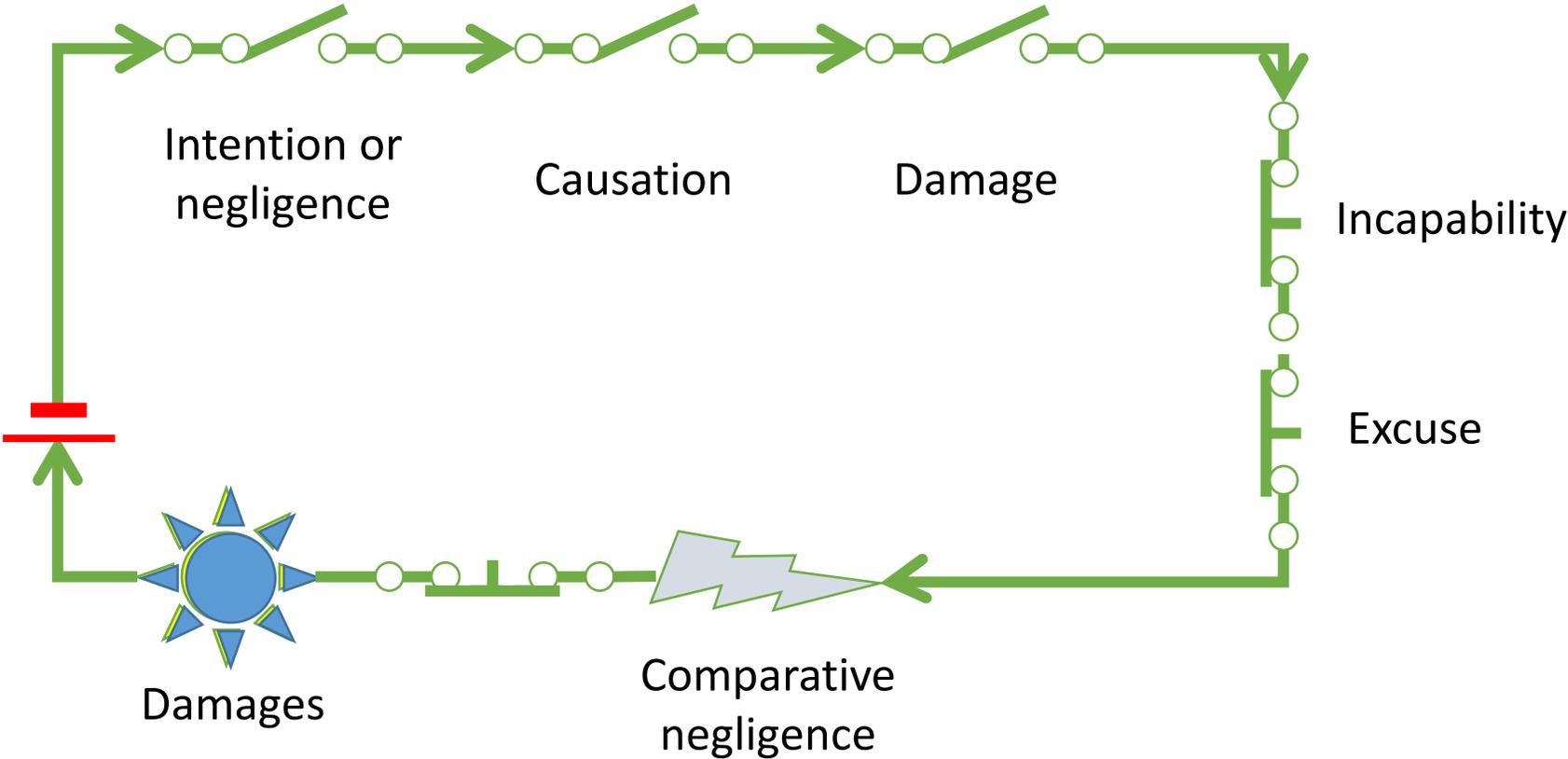
→Comparative study

- § 823 (Duty to compensate for damage)
 - (1) A person who, wilfully or negligently, unlawfully injures the life, body, health, freedom, property or other right of another is bound to compensate him for any damage arising therefrom.
 - (1) Wer vorsätzlich oder fahrlässig das Leben, den Körper, die Gesundheit, die Freiheit, das Eigentum oder ein sonstiges Recht eines anderen widerrechtlich verletzt, ist dem anderen zum Ersatz des daraus entstehenden Schadens verpflichtet.
- Characteristics
 - Limited list of rights: Pure economic loss is excluded

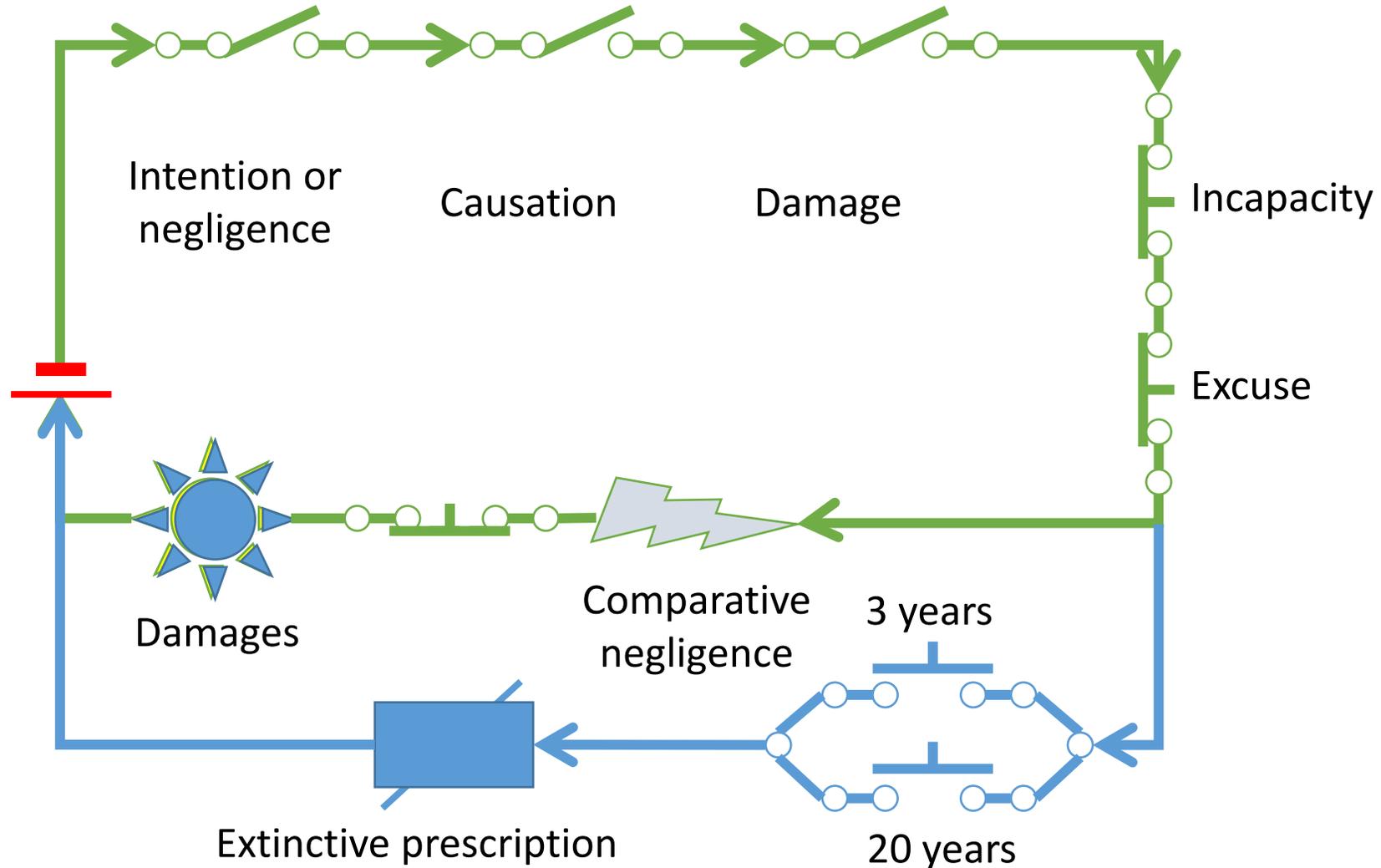
Dynamic understanding of general tort law (1/3)



Dynamic understanding of general tort law (2/3)

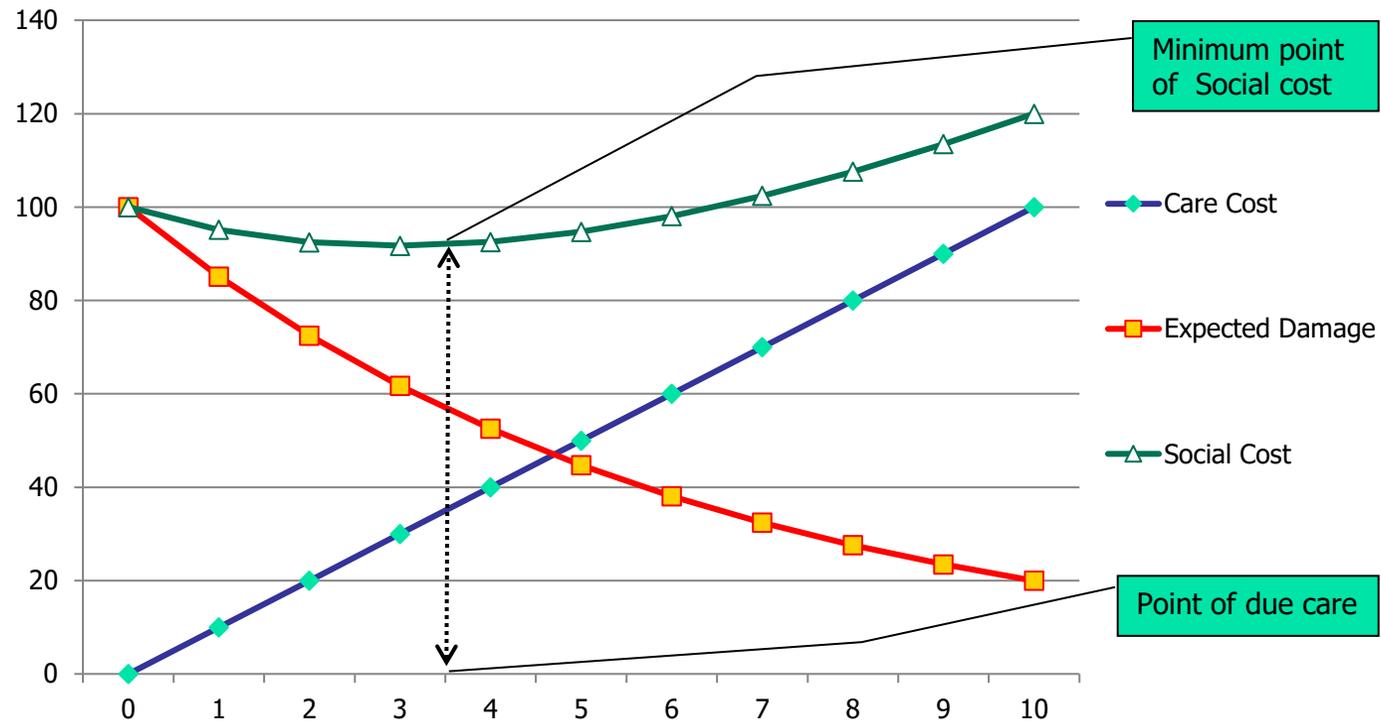


Dynamic understanding of general tort law (3/3)



What is fault?

Illustration of Point of Due Care



Joint unlawful act

■ Article 719

- If two or more persons have by their joint unlawful act caused damage to another, they are **jointly and severally liable** to make compensation for such damage; the same shall apply if it is impossible to ascertain which of the joint participants has caused the damage.
- 2. Instigators and accomplices are deemed to be joint participants.

Fact of the “wine glass case”

- Suppose there is poison of which fatal dose is 10mg.
- "A" poured poison of 5mg, "B" poured poison of 4mg, and "C" poured poison of 3mg into a victim's glass of wine and then killed the victim.
- It caused damage of 12 million yen to the bereaved family (i.e. "10 mg fatal dose case" or "wine glass case").



“Wine glass case”

No use of “sine qua non” theory

Logical Type of cases	A	B	C	Total Fatal dose: 10mg
$A \wedge B \wedge C$	5mg	4mg	3mg	12mg
$(A \wedge B) \vee (B \wedge C) \vee (C \wedge A)$	7mg	6mg	5mg	18mg
$A \vee B \vee C$	10mg	10mg	10mg	30mg

Combination between joint tort and pseudo joint and several liability

- In the past, it has been considered one of three tortfeasors is responsible for the entire damages of 12 million yen.
- If one of tortfeasor's act was removed, then the results of victim's death did not occur.
- It was reason why each of tortfeasors was responsible for all damages.
- And this responsibility has been referred to as a "pseudo (non-genuine) joint and several liability".



Unfair result of pseudo joint and several liability

- In the pseudo joint and several liability case, even if one of the tortfeasors paid the total damages of ¥ 12 million for the bereaved family of the victim, it has been impossible to obtain reimbursement for the other two tortfeasors because his/her payment has been considered as a responsibility of his/her own.
- This result is, however, unfair. Because two of tortfeasors are completely acquitted, and then, there is no the joint and several liability, after all.

Joint and several liability of joint tort

- Therefore, at present, even in the pseudo joint and several liability case, when one of tortfeasors “A” paid ¥ 12 million against the bereaved family of the victim, “A” obtain reimbursement ¥ 4 million from B and ¥ 3 million from C.
- The result is the same as the case which A, B and C was borrowed ¥ 12 million in solidarity from creditors.



Combination of joint tort and pseudo joint and several liability still exists

- Indeed, looking at the current state of the world, the liability of the joint tortfeasors is believed not a genuine collective responsibility, but a pseudo several and joint liability.
- The reason is that, the deep-rooted concept "sine qua non" theory is even now, believed to be applicable to the case of joint tortfeasors.
- Once again, let us go back to "10 mg fatal dose case". In this case, it is believed that the theory of "sine qua non" is applied and there is a causal relationship between act of each tortfeasors and the death of the victim, therefore, "A" is liable for all damages of ¥ 12 million.



Logical calculation proved that “sine qua non” theory felt into contradiction

- Alone “A”, however, it is impossible to kill the victim.
- If “B” and “C” act jointly with “A”, then the result of victim's death occurs ("A, B and C \Rightarrow Result" case).
- In other words, in a joint tort, the theory of "sine qua non" causes the serious error.
- Because, if "sine qua non" theory is applied to the joint tortfeasors case, the phenomenon "A, B and C \Rightarrow R" case changes into the phenomenon "A , B or C \Rightarrow R" case.



History of theory of causation

from factual and adequate to partial causation

- First, in "Thalidomide case" and "SMON case", these problems solved with theory of factual causation "sine qua non".
- Second, "the birth of the incident killer case", or "wagoner case", adequate causation theory, have played a role in limiting the theory of factual causation. At this stage, however, the theory of factual causation have still survived.
- Third, in "the wine glass case", it became clear that the theory of factual causation committed a serious mistake, and theory of "partial causation" led the correct result.

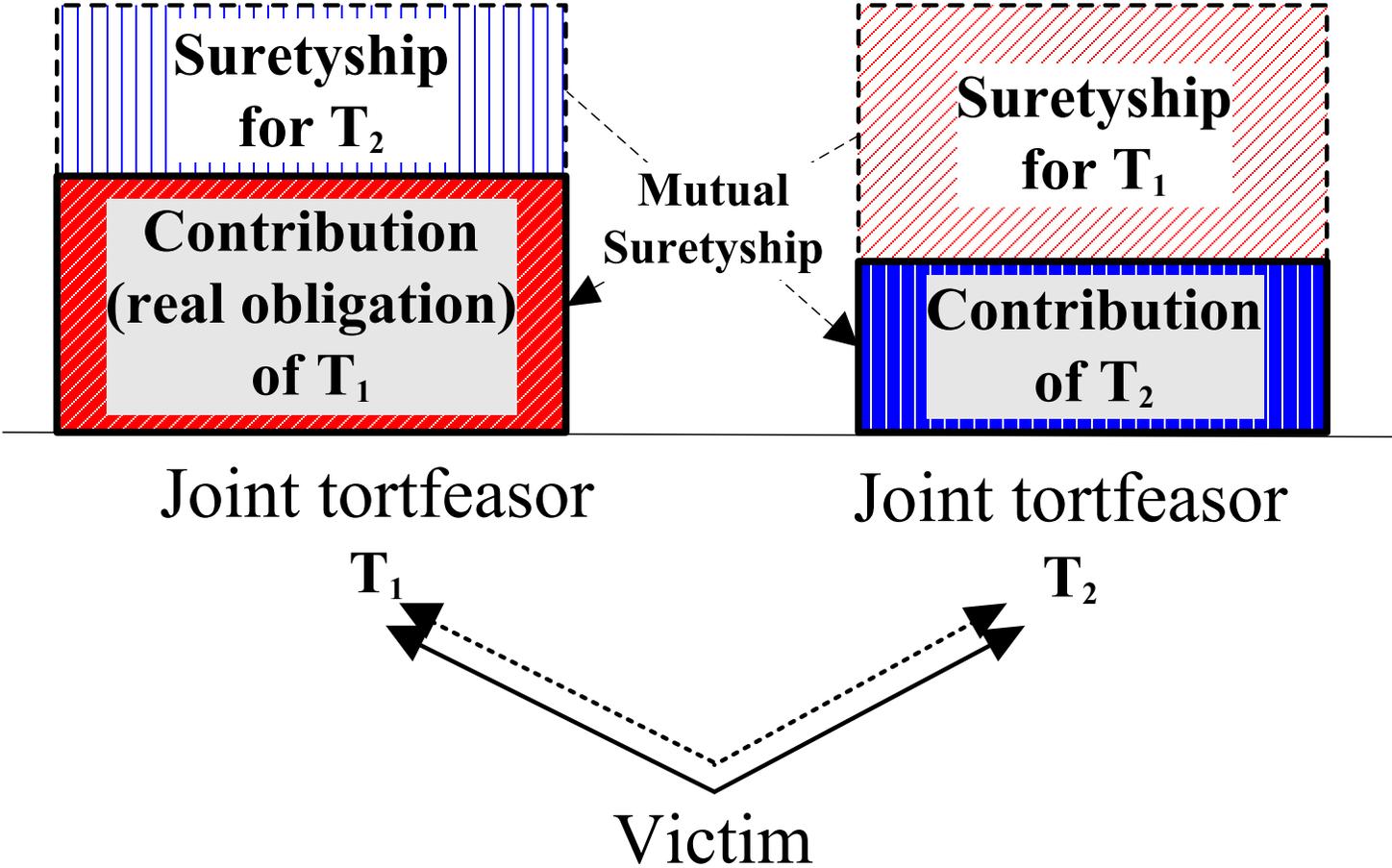


Theory of partial causation by supported by Bayesian statistics

- Indeed, the trend of the world has been dominated by not only the theory of factual causation, but also by the theory of pseudo joint and several liability.
- However, from now on, all the problems of joint tortfeasors will be resolve by theory of partial causation combined with theory of joint and several liability.
- Bayesian theory or Bayesian statistics theory will help the theory of partial causation with calculating the partial rate of causation or partial contribution of tortfeasors.



General structure of liability of joint tortfeasors



8. Lawyers' way of thinking

- Legal Syllogism (Rules, Facts, Judgment)
- IRAC (Issue, Rules, Argument, Conclusion)
 - Toulmin's art of argument



IRAC: The way of legal thinking

■ I: Issue

- Find legal issues among facts.

■ R: Rules

- Find applicable rules to facts.

■ A₁: Application

- Apply rules to facts and deduct tentative conclusions.

■ A₂: Argument (Most Important)

- Argue with tentative conclusion pro and con

■ C: Conclusion

- Draw final conclusion after rigorous argument.



IRAC as the legal way of thinking

Analyze, argue and draw your Conclusion		
Analysis	Issue	Finding data & facts
	Rules	Finding Rules
	A	Application
Argument		Argument against / for tentative conclusions
Argument	Conclusion	Finding final conclusion



Substantive and procedural law syllogism

Major premise: The human is mortal.
Minor premise: Socrates is a human.

Conclusion: Socrates is mortal.

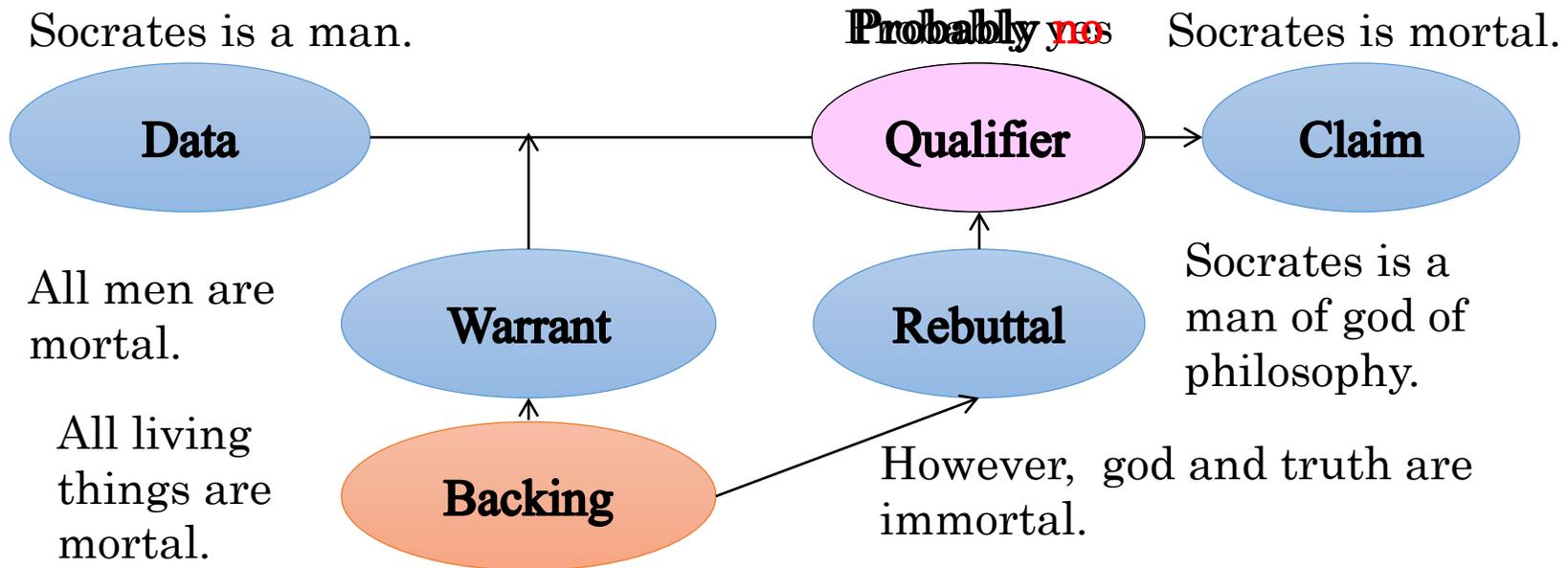
- Legal syllogism
 - (1) Rule,
 - (2) Subsumption of facts under a rule
 - (3) Conclusion (judgment)
- Rule is substantive law, subsumption and conclusion takes place according to procedural law.



From Syllogistic to Toulmin Diagram

- **Syllogism (Admit of no exceptions)**
 - Major premise: All men are mortal.
 - Miner premise: Socrates is a man.
 - Conclusion: Socrates is mortal.

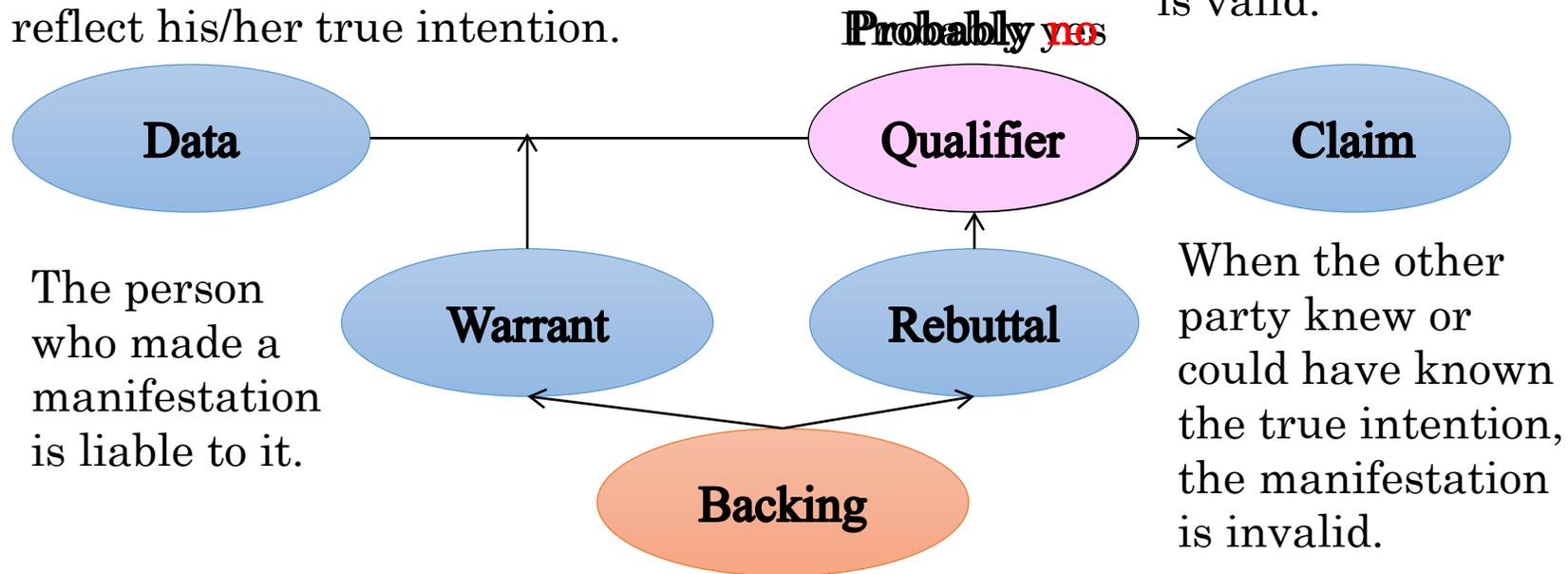
- **Toulmin Diagram (Admit of exceptions)**



Application of Toulmin Diagram to Joke

The person who made a manifestation knows that it does not reflect his/her true intention.

The manifestation is valid.



The manifestation of intention which is concealed the true intention:

It is **invalid** in case the other party knew or could have known.

It is **valid** in case the other party is didn't know and without negligence.

Legal structure of mental reservation and its amendment

Current Art. 93

- Article 93 (Concealment of True Intention)
 - **[Principle: valid]** The validity of the manifestation of intention shall not be impaired even if the person who makes the manifestation knows that it does not reflect his/her true intention;
 - **[Exception: void]** provided, however, that, in cases the other party knew, or could have known, the true intention of the person who makes the manifestation, such manifestation of intention shall be void.

Amendment of Art. 93

- Article 93 (Concealment of True Intention)
 - **(1) Principle:** If a party's manifestation is different with true intention (i.e. lack of intention), then the manifestation is **null and void**.
 - **(2) Exception:** If the other party, however, did not know and could have not known, the true intention of the one party, then the manifestation is not null and void but **valid**.
 - **(3) Presumption:** In order to protect the safety of transaction, if a party who makes the manifestation knows that it does not reflect his/her true intention, then **it is presumed** that **the other party did not know and could have not known**, the true intention of the person who makes the manifestation.
 - **(4) Burden of proof:** If **the party** who makes different manifestation with true intention **proves** that the other party knew, or could have known, the true intention of the party who makes the manifestation, such manifestation of intention shall be void, as a principle, provided in first paragraph.





Ideal Structure of Articles

- Art. 49 CISG / Art. 541-542 Civil Code of Japan
- My proposal of amendment of Art. 770 Civil Code of Japan



Art. 49 CISG

- (1) The buyer may declare the contract avoided:
 - (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a **fundamental breach of contract**; or
 - ← Common Law
 - (b) in case of non-delivery, if the seller does not deliver the goods within the **additional period of time** fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.
 - ← Continental Law(German Civil Code)

Condition of Termination of contract in Code Civil of Japan

Article 541

(Cancellation After Demand)

- If one of the parties does not perform that party's obligation, and the other party demands performance of that obligation, specifying a reasonable period of time, but no performance is completed during that period, the other party may cancel the contract;
- provided, however, that this does not apply **if the non-performance of the obligations upon the passage of the period is minor** in light of the contract and the common sense in the transaction.

Article 542

(Cancellation Without Demand)

- (1) In the following cases, the obligee may immediately cancel the contract without making the demand referred to in the preceding Article:
 - (i) if the performance of the whole of the obligation is impossible;
 - (ii) if the obligor unequivocally manifests the intention to refuse to perform the obligation in whole;
 - (iii) if the performance of part of the obligation is impossible, or if the obligor clearly manifests the intention to refuse to perform part of the obligation and **the purpose of the contract cannot be achieved** by the performance of the remaining part of the obligation; ...
- **If a breach of contract by one of the contracting parties prevents the purpose of the contract from being achieved, the other party may terminate the contract.**



Prerequisite of Judicial Divorce

Art. 770(Judicial Divorce)

- (1) Only in the cases stated in the following items may either husband or wife file a suit for divorce:
 - (i) if a spouse has committed an act of unchastity;
 - (ii) if abandoned by a spouse in bad faith;
 - (iii) if it is not clear whether a spouse is dead or alive for not less than three years;
 - (iv) if a spouse is suffering from severe mental illness and there is no prospect of recovery; or
 - (v) if there is any other **grave cause making it difficult to continue the marriage**.
- (2) **A court may dismiss a suit for divorce** if it finds continuing the marriage reasonable taking into account all circumstances, **even in the case** where there is a cause listed in items (i) to (iv) inclusive of the preceding paragraph.

My proposal of Amendment of Art. 770

- (1) Either husband or wife may file an action for divorce only when there is a **fundamental cause making it difficult to continue the marriage**.
- (2) In cases falling under any of the following items, it shall be **presumed** that there is a **fundamental cause** making it difficult to continue the marriage:
 - (i) if a spouse has committed an act of adultery;
 - **(i b) if a spouse has committed DV(Domestic Violence)**.
 - (ii) if abandoned by a spouse in bad faith;
 - **(ii b) if wife and husband have been separated for more than five years**.
 - (iii) if it is not clear whether a spouse is dead or alive for not less than three years;
 - (iv) if a spouse is suffering from severe mental illness and there is no prospect of recovery





Conclusion

- Can you explain in simple terms why the law is needed?
- What skills must a student of law acquire and practice?
- What is the ideal structure of a legal article that is easily understood by the general public?



What is the guiding principle of your life?

- 1. Do for others.
 - Do not do to others what you would not want done to you. ← Tort law
 - Actively do what others want you to do. ← Business Management law
- 2. Nurture yourself.
 - Reversing the saying, "The more you like something, the more you like it," realize that "you will only like it if you become good at it", and strive to master the skill.
 - "Continuity is power," so set a goal and make the necessary work a habit.
- 3. Challenge yourself.
 - Challenge yourself without fear of failure.
 - If you fail, try again. If you cannot try again, make amends.



How to learn the law?

Best way of learning is teaching

- Don't teach too much, and give students time to teach.
 - Reducing your teaching plan by half.
 - With a half part, let students teach others(including teaching teachers).
 - Then they will learn by themselves.
- Teach basic idea through solving one of the most difficult problems.
 - When student can solve such a difficult matter, she/he mastered basic ideas naturally.
- Try to become the most excellent teacher.
 - Imitate her/his (e.g. Prof. Kagayama's) methods first.
 - Create new methods after your experiences.



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