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From Social Law to Labor Law: The Change in Japanese Legal Theory in Connection with Social Law (*Shakai-ho*)

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1 Introduction

In the 1920s, following World War I, concepts and problems related to Japanese society (*Shakai*) were prominent in several fields in Japan. In August 1920, the Ministry of Home Affairs moved the Social Branch of the Local Bureau to the Social Bureau and subsequently separated it as an external bureau in November 1922. Under the authority of the external Social Bureau, young bureaucrats in the Ministry of Home Affairs tried to legislate new plans for the labor system, such as attempting twice to pass a draft labor union law, which they could not enact and was abandoned owing to incomplete deliberations under the Imperial Diets. They succeeded, however, in omitting an article in the *Security Police Law* that suppressed the labor movement and in passing the *Law on the Arbitration of Labor Conflict*.¹ In addition to legislation related to the change in labor relations, several other pieces of legislation were passed in connection with social security to address severe economic problems, such as the *Health Insurance Law* and the *Poor Law*.²

In the situation described above, no legal scholar could define social law (*Shakai-ho*) in detail at the time. Kikuchi Isao (1898–1975), who held the first chair in social law at Kyushu Imperial University and continued in that position after World War II, was asked by the Ministry of Education about the content of his lectures. In his reply, he stated that it depended on the contents of the collection of laws and regulations abridged by the Social Bureau of the Ministry of Home Affairs, and the lectures could be changed in response to an increase in these regulations.³ Kikuchi tried continuously to define this type of law, but there is still

no concrete definition of the concept of social law in Japan. This essay presents an overview of legal theory's history in connection with social law in Japan by examining the thoughts of select scholars.

2 Pre-War Study of Social Law at Japanese Universities: The Peripheral Character of the New Legal Fields

Starting with Yosino Sakuzo (1878–1933), a professor of political science at Tokyo Imperial University, many intellectuals »discovered society« in the 1920s,⁴ and some legal scholars also took part in the process. Suehiro Izutaro (1888–1951), a professor of civil law at Tokyo Imperial University, discovered labor problems by chance through cases related to constitutional law while he was researching in the United States. He also assisted implementing the peace treaty ending World War I in France, and, after returning to Japan, he began lecturing on labor legislation as an optional legal course in 1920. Suehiro's fascination with the labor problem was related to his interest in and activities concerning the gap between national statutes and society. In his later years, Suehiro recollected that his study of labor law had »little relation to the studies of labor law that belonged to the German theories during the Weimar era, which were popular in Japan after that period.« Most legal scholars interested in the labor problem were strongly influenced by German legal theory.⁵ They referenced German legal theory on labor law with deep sympathy for the concepts of social democracy. Closely following Suehiro, lectures on labor law as a regular legal course were initiated at the Tokyo University of Commerce in 1924 by Sonta Hide-

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1 GORDON (1985) 81–121. In detail, see YANO (1993). As for the history of legislation on the labor problem, see HAMAGUCHI (2004).

2 SOEDA (2007) 461–471. Before World War II, legislation in this field was called social work law (*Shakai jigyo Ho*). See KIKUCHI (1970).

3 KIKUCHI (1959) 2. See, ISHII (2013) 86–87.

4 IIDA (1997) 171–176. See ARIMA (2013) 228–339.

5 NIHON HYORONSHA (1950) 101–102. For details, see ISHIDA (1989) 1–40, ISHII (2015) 32–66.

haru (1886–1976), who had been a student of Walter Kaskel (1882–1928). Along with Suehiro and Sonta, several other Japanese scholars also began investigating social law in the 1920s.⁶

The first chair of the theory of social law (*Shakai-ho ron*) was established at Tohoku Imperial University in 1925, not at Tokyo and Kyoto Imperial Universities, which were the first- and second-oldest national universities in Japan. After the first chair of the theory of social law resigned the position,⁷ Hashimoto Fumio (1902–1934) assumed the position at Tohoku Imperial University.⁸ Following his graduation from the Faculty of Economics at Kyoto Imperial University, Hashimoto did graduate work in economics and was instructed by Tsuneto Kyo (1888–1967), a professor of the philosophy of law at Kyoto Imperial University.⁹ Hashimoto started his work on the relationship between the law and the economy, but gradually his interests shifted toward social law under the deep influence of Gustav Radbruch (1878–1949).¹⁰ Hashimoto defined the character of social law by contrasting it with civil law and characterizing it as »post-civil law.« He said, »[I]f there are some resemblances in the form, the legal theories which would not pass the concept of the civil law completely and would not be established with plenty of awareness about their contrast with civil law are not social law in the true sense of the word.« In addition, he emphasized the tendencies of social law toward »non-capitalism,« not »anti-capitalism,« and acknowledged the co-existence of social law and civil law. Thus, he denied other scholars' attempts to »contrast civil law and social law from the viewpoint of the character of the social class of laws,« and said that »these types of attempts just mean the characterization of the legal field based on so-called human types and fixed collectives.«¹¹ Hashimoto's work established the foundation for the theory of social law in Japan. However, his work was interrupted by his death at age 33 and was limited by a lack of

analysis of the relationship between social law and the nation.¹²

Subsequently to Tohoku Imperial University, Kyushu Imperial University established a chair of social law in 1927 and, as mentioned above, Kikuchi Isao held it. Further, lectures were offered on social law and labor law at several official and private universities, and most scholars leading these initiatives joined the Japan Association of Economic Law, established in 1939. However, no scholar was connected with Tokyo Imperial University, except for Makino Eiichi (1878–1970), a former professor of criminal law. At the time, research on social law was peripheral because it was a new legal field, as was also the case with economic law. Most of the scholars at Tokyo Imperial University rejected the possibility of reorganizing the Japanese legal system and maintained their focus on legal theory received from Germany.¹³

3 Studies of Social Law during Wartime and the Suppression of Marxism

Along with Hashimoto, there was another scholar of social law at Kyoto Imperial University. Kako Yujiro (1905–1937), who had also been a student of Tsuneto, was appointed to the position of full-time lecturer in the Faculty of Law at Kyoto Imperial University in March 1933, just after he completed his graduate work in law. However, he had to resign the following August because of a serious political incident at that university. Following the lead of Takigawa Yukitoki (1891–1962), a professor of criminal law who protested against pressure from the Ministry of Education regarding the contents of his books and lectures, which the ministry regarded as »leaning towards Marxism,« all staff members of the Faculty of Law resigned at once, although they later split, with some leaving and others remaining.¹⁴ Kako left Kyoto Imperial

6 NISHITANI (2004) 135, NISHITANI (2009a) 6.

7 Suzuki Yoshio (1894–1964) held the first chair, but he resigned in 1930 owing to ideological problems and became a lawyer and politician.

8 The analysis of the legal theories of Hashimoto, Kako, and Numata discussed below relies mainly on EGUCHI (2000) 286–314.

9 Tsuneto moved from the Faculty of Economics to the Faculty of Law in 1928.

10 TANSO (1959) 36–37. Hashimoto translated selected passages of G. Radbruch, *Vom individualistischen zum sozialen Recht*, in: *Hanseatische Rechts- und Gerichts-Zeitschrift* 8./9. Heft, 1930. HASHIMOTO (1957) 399–420.

11 HASHIMOTO (1957) 286–294.

12 EGUCHI (2000) 289–290.

13 For details, see DEGUCHI (2013) 137–147. The Japan Association of Economic Law stopped their activities just before the end of World War II.

14 Ito (2003) 125–203.

University with Tsuneto and moved to Ritsumeikan University, where he lectured on the philosophy of law and social law.

In a book review, Kako criticized Hashimoto's social law theories, which were »centered on private law and lacking the analysis of public law«. Kako also admonished him »for establishing minute doctrines so optimistically from an academic viewpoint, which has the tendency toward isolation from real society« and for not demonstrating an interest in »how to establish social law as some phase of quite tough and, so to speak, bloody history of strife of human beings.«¹⁵ In his work, Kako tried to show the binary structure of the modern legal system constructed by »civil society« on the one hand, which was influenced by »the principle of legal equality and the formal and abstract equality of the legal subject« and based on the process of the equivalent exchange of goods, and »political society« on the other, which was influenced by »the principle of heterogeneity« defined by »the social limitations embodied in social class« and based on economic progress.¹⁶ Kako appropriately pointed out the real character of human beings who are divided by »social class,« as based on the theory of Hugo Sinzheimer (1875–1945).¹⁷ This viewpoint was rooted in his deep analysis of the ideological and logical structure of the legal subject of modern law, and it was influenced by the Marxist theory of Evgeny Pashukanis's (1891–1937) early work.¹⁸ However, like Hashimoto, Kako also failed to develop his theory of social law because he died at the age of 33.

As reflected in the pressure on Takigawa, freedom of expression and anything deemed suspicious activity that might be connected with communism were strictly suppressed by the *Maintenance of Public Order Law* under the wartime regime in Japan. Kazehaya Yasoji (1899–1989), a former professor of criminal law at Kyushu Imperial University, was detained on suspicion of breaking the Maintenance of Public Order Law. Upon release, he joined plans to reorganize social policy using young bureaucrats to mobilize human re-

sources with Okouchi Kazuo (1905–1984), a professor of economics at Tokyo Imperial University. In 1940, these reorganization plans were included in the New Order movement during the second cabinet of Konoe Fumimaro (1891–1945), but they could not be realized owing to opposition from conservative forces. The conservatives criticized these radical plans for »leaning toward Marxism.«¹⁹

4 Change and Development in the Legal Theory of Social Law following World War II: Marxist Influences and the Sociology of Law

After World War II, according to early occupation planning under the Allied Forces, which mainly consisted of the US Army, the Japanese government passed several pieces of legislation to reform the labor situation, and this occurred under the close supervision of the General Headquarters (GHQ), Supreme Commander for the Allied Powers. The Labor Legislation Committee of the Welfare Ministry, mainly led by Suehiro, coordinated the Labor Division of the Economic and Science Section of the GHQ and drafted the *Labor Union Law* in December 1945, before the draft of the new Japanese constitution was submitted to the Government Section of the GHQ. The Labor Legislation Committee continued its work, drafting and enacting the *Labor Relations Adjustment Law* and the *Labor Standard Law* in 1946. However, the policy of the GHQ in connection with labor problems »reversed course« and resumed suppressing Marxist thought due to the tense international situation during the Cold War. In February 1947, General Douglas MacArthur ordered the suspension of a general strike and denied the right of public officials to strike in a letter to the Japanese Prime Minister in July 1948. Therefore, some of the legislation mentioned above was revised to conform to the opinions expressed by the GHQ.²⁰

15 KAKO (1934) 146.

16 KAKO (1964) 229–260.

17 TANSO (1959) 38–40. However, Kako did not apply his theory on economic law, especially regarding the character of the human being. EGUCHI (2000) 293–294.

18 MORI (1976) 132–154.

19 TAKAOKA (2011) 126–168. See

GORDON (1991) 302–330.

20 GORDON (1985) 327–366. For details, see TAKEMAE (1982).

In this complicated situation, especially in light of the rise of the labor union movement, the main focus of social law theory was on labor law. Tokyo Imperial University established a new chair of labor law in September 1947; however, Suehiro had been purged from the educational field in September 1946 because he had »abandoned his principles as an educator« during the war.²¹ One of his students, Ishikawa Kichiemon (1919–2005), therefore assumed that chair in April 1951. After the publication of the new draft constitution, some staff members of the Faculty of Law at Tokyo Imperial University planned to organize a society to study it. Ishikawa was asked to examine some articles in connection with the labor problem instead of Suehiro, and he was anxious that his »conservative and reactionary« theories would be criticized because he was not an original student of Suehiro's.²² Along with Ishikawa, Ishii Teruhisa (1906–1973), a student of Tanaka Kotaro (1890–1974) and a professor of commercial law at Tokyo Imperial University, also joined that society and investigated labor problems. Ishikawa, Ishii, and other scholars at Tokyo Imperial University, which was renamed Tokyo University in September 1947, organized a society for the study of labor law in November 1947 and published annotated books on the *Labor Relations Adjustment Law* and the revised *Labor Union Law* in 1949. They influenced not only legislation but also judicial proceedings, and they tended to comprehend labor law as a special branch of civil law generally. In contrast, the theory of labor law proposed outside Tokyo University, which tried to support the activities of labor unions, had little connection with the legislative process and aimed at bypassing the existing system of civil law and creating a new labor law system. However, both of these groups continued to be influenced by German labor law theory.²³

Then, in the latter part of the occupation era, so-called postwar theories of labor law became divided into three theoretical currents.²⁴ The first current was mainly based on Marxism, and it

anticipated the activity of labor unions as the bearers of the class struggle. The second current was based on the methods of the sociology of law, which tried to find living law through the analysis of the division between national legislation and the labor situation. The third current tended to criticize theory that was strictly influenced by Marxism and to emphasize the importance of an ordered society. Numata Inejiro (1914–1997), whose studies at the graduate school of law at Kyoto Imperial University were interrupted by his conscription before the end of World War II, and who after his demobilization was purged in July 1950 from a newspaper office owing to suspicions about his connections with a communist party, was the representative scholar of the first current. Numata had already been influenced by Kako's legal theories during his days as a university student and had established his own theory, which was guided by Marxist thought.²⁵ He also built on the structure of Kako's theory in connection with social law. Like Kako, Numata started his theoretical studies on social law by analyzing »the factitiousness of the principle of the civil law« from the viewpoint of historical materialism and said that »the general principle of civil law can only reflect the one-sided realities of society under the system of capitalism.« He described social law »in connection with a particular and partial society, so-called social groups« and stated that its normative principle »existed by the admission of the realities of the social groups that are threatened in their right to life by the mechanical conflicts of society under the system of capitalism through the accomplishment of the principles of civil society itself, and by the regulation of the principles of civil society based on social justice, which pay attention to the right to life.«²⁶ Numata did not limit his theory of social law to labor law, but owing to the necessity of catching up with the labor union movement, some parts of the theory of social law after World War II had quite a practical character, such as the so-called legal theory for laborers (pro-

21 YAMAMOTO (1994) 188–202.

22 ISHIKAWA (1991) 14–15. Ishikawa was one of the students of Wagatsuma Sakae (1897–1973), and Ishikawa's original major was intellectual property. See NAKAJIMA (1993) 229–234.

23 NISHITANI (2004) 139–140, NISHITANI (2009a) 16–18.

24 The history and analysis of the legal theory regarding labor law after the end of World War II in this essay, as discussed below, mainly relies on MOMII (1996) 11–94.

25 MORI (1976) 152.

26 NUMATA (1975) 76–117.

labor) relative to the legal theory for capitalists (pro-capitalism).²⁷

In addition to Marxism as a methodology, the sociology of law as a field of legal thinking based on the value of democracy under the new constitution was important to creating a »postwar legal theory.« Its proponents intended to cut themselves off from the dominant prewar legal theory and were conscious of the need to construct new theories that fit the establishment of a postwar Japanese society.²⁸ Kawashima Takeyoshi (1909–1992), a professor of civil law at Tokyo University and a student of Suehiro, led the early research on the sociology of law by analyzing the labor problem, especially the tactics called »production control« (*Seisan-Kanri*).²⁹ Kawashima tried to distinguish »the rule of conduct« as living law, which maintained order over the conduct of people, from »the rule of judgment,« which ordered judges' decisions and emphasized the importance of the former through the labor union movement. Kawashima emphasized the importance of legal relationships made by activities of unions that »conflicted with and changed civil law order,« and said that »for the periods of generation and formation of the study of labor law, the sociology of law should hold more importance than the interpretation of law.«³⁰ Through methodology of the sociology of law, Kawashima tried to describe the premodern features of Japanese society and to modernize it in the latter part of the occupation era. However, he started to shift his focus in the sociology of law toward the study of the practical interpretation of law, and he changed his activities from »postwar enlightenment« to those of a legal scholar.³¹ Along with Kawashima, many scholars investigated labor law using the methods of the sociology of law. Azuma Mitsutoshi (1903–1973), a professor at the Tokyo University of Commerce, which was renamed Hitotsubashi University in May 1949, continued the research on labor law that he had begun during the war and insisted on maintaining the theory of »the control of the power of laborers.« Azuma participated in the society for the study of

labor law at Tokyo University, mentioned above, and his theory was somewhat conservative, as it opposed the labor movement, which was influenced by Marxism.³²

5 Conclusion: The Fragmentation of Social Law?

In October 1950, the Japan Labor Law Association was separated from a branch of the Japan Association of Private Law, which had been established in June 1948, and Kikuchi was elected as its first representative. For a while after its establishment, most of the association's members also joined the Japanese Association of the Sociology of Law, which had been founded in December 1947.³³ After the occupation, however, owing to the economic development of Japanese society, labor law theory gradually changed, especially the theory influenced by Marxism. In the 1960s, Watanabe Yozo (1921–2006), a professor at the Institute of Social Science at Tokyo University and one of the main scholars who had focused on constructing »postwar legal theory,« criticized labor law theory as leaning toward interpretation and lacking the perspective of the sociology of law. At the time, Watanabe and his colleagues, who had been influenced by the methods of Marxism, disputed the features of »contemporary law« (*Gendai-ho*) based on the theory of state monopoly capitalism, and Watanabe's criticism was closely connected to them. Many scholars in the area of labor law objected to his attacks, especially the practical importance of interpretation for the labor movement, and they pointed out the lack of consensus on the definition of the sociology of law. Through these disagreements, however, many scholars of labor law came to reconsider their research efforts as part of an independent legal field.³⁴

Simultaneously, depending on the legislation and institutions connected with social security (*Shakai Hosho*) at that time, such as the realization of the universal health insurance system in

27 MOMII (1977) 51–72.

28 HIROWATARI (2008) 70.

29 MOMII (1996) 25–27. See CARLILE (2005) 88–105.

30 KAWASHIMA (1982) 43–50. See ISHIDA (2015) 101–115.

31 TAKAHASHI (2014) 32–33.

32 MOMII (1996) 27.

33 TADENUMA (2010) 11–14.

34 MOMII (1996) 62–64, NISHITANI (2009b) 703–721.

1960,³⁵ some scholars tried to establish new legal theories related to social security. As mentioned above, there were several laws in this field before World War II. However, they tried to establish their own theories under the articles of New Constitution, which prescribed that the State promote and extend social welfare and security, and public health. Most of these thinkers specializing in labor law, such as Ishii and Azuma, rejected that the legal field of social security was separate, but the new universities established after the end of World War II had started offering lectures on social security law, similar to those on labor law before World War II. Araki Seishi (1924–2015), a student of Kikuchi at Kyushu University, started giving lectures on social security law in addition to labor law

at Kumamoto University in the 1950s. He recollected that they »began by throwing away the thinking of Labor Law to establish the independence of the legal theories of social security law,« and they were criticized harshly by scholars in the area of labor law for denying that there was social conflict.³⁶

Today, the term »social law« is not used frequently in the Japanese legal field, and this area of law is divided into labor law and social security law. Because of its short history, the latter is more peripheral than the former, but certain scholars have tried to reintegrate them under the concept of social law and reevaluate important legal thinkers such as Kikuchi.³⁷ ■

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35 As for the history of legislation for social security after World War II, see TADA (2009).

36 ARAKI et al. (2003) 514–516, ARAKI (2011) 2–12.

37 TABATA (2011) 26–40. See, ISHII (2013) 123–137.

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