

[Comment]

The decision by the Third Petty Bench, the Supreme Court, on Oct. 30, 1979, on the case involving the posting of bills by the National Railways Workers' Union in Sapporo marked a turning point in reviving discussions on the legitimacy of union activities in facilities of the enterprises or of the public corporations concerned or using such facilities.

By way of discussion, questions were raised for what reason union activities can be conducted within an enterprise without the permission of the employer and to what extent as well as what kind of activities the unions can conduct.

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7. Legal History, Sociology of Law and Legal Philosophy

A. Legal History

The 32nd general meeting of *the Legal History Association* was held for two days on Apr. 11 and 12 in 1980 at Waseda University, Tokyo, and the 28th study meeting of the Association for three days from Oct. 10 through 12 at Tohoku University, Sendai.

The 1980 general meeting featured individual study reports based on free subjects. The lack of a unified theme since 1978, however, should be taken up seriously in view of the academic activities of other sciences of proper and semi jurisprudence. On the other hand, this trend indicates the fact that comparatively younger researchers have been steadily dealing with problems in their own respective fields. The contents of the reports in the year under review were indicative of their activities.

(1) Legal History of Japan

"On Regulations of *Taiho Ryo* (the *Ryo* Laws of *Taiho*) concerning the Distribution of Farmland," by Prof. Toshiya Torao (Hiroasaki University).

"Study on *Nihon Ritsu-Ryo* (Japanese Codes), Centering on a Revolt Case," by Makoto Saikawa (LL. M., Waseda University).

The *Nihon Ritsu-Ryo* (Japanese Codes) of the ancient Japanese state were enacted after the fashion of the Chinese *Ritsu-Ryo*. Actually, these laws of the two countries resembled each other in their legal structure. They were more or less the same in point of provisions, but differed in their pattern of operation at the view of application. Saikawa attempted to probe into this problem centering on a revolt case.

"On Envoys for Local Inspections during the Kamakura Shogunate," by Kuninobu Oka (LL. M., Kyushu University).

The only reference concerning the so-called *Junkenshi* (roving inspectors) was made in "*Bukemeimokusho*" and "*Azumakagami*," written and edited by Hanawa Hokiichi (1746 - 1821), but due to the lack of materials the true nature of the subject remains somewhat vague. Oka analyzed several cases, in which *Junkenshi* and other envoys were dispatched to local areas by special order of the Kamakura Shogunate, in order to bring to light the true character of local supervisory officers.

"On a Study of *Hinin* Outcastes in the Middle Ages - Centering on Emergence of *Saidaiji* Temple's Administration of *Hinin*," by Prof. Koji Matsuo (Tokyo University).

It was hitherto believed that *Kofukuji* Temple had ruled over the *Hinin* throughout the Kamakura Period. Prof. Matsuo, however, insisted that *Saidaiji* Temple established itself in administration of the *Hinin* during the latter part of the Kamakura Period on the basis of his analysis of such documents as "*Kinhakkisho-shihaimonjo*" and the geographical relations between inns for *Hinin* outcastes and branch temples of *Saidaiji* Temple.

"On a Study of the Phenomenon of Modern Age Lowly People Tending to Become Exiles, Centering on a Register of Exiles on *Niijima* Island, Province of *Izu*," by Prof. Kojiro Arai (Toyo Uni-

versity).

“On Studies Concerning Criminal Laws of the Hachinohe Clan,” by Prof. Suketada Kudo (Hachinohe Institute of Technology).

Prof. Kudo on the basis of such materials as the “Clan Diary of the Hachinohe Clan” made a progress report of his study of reconstructing the actual state of affairs involving the criminal law of the Hachinohe clan.

“Actual Situation of Consular Jurisdiction during the Closing Days of the Tokugawa Regime and the Meiji Era,” by Asst. Hideaki Kato (Nagoya University).

How was jurisdiction treated in the course of code compilation during the period of the treaty revision which was the biggest issue in the diplomacy of the Meiji government? Asst. Kato took up consular jurisdiction which had provided a sphere of contact between the ordinary Japanese and western laws, thus analyzing the actual state of affairs involved.

“Trials and Legislation involving Perpetual Leases,” by Prof. Kaisaku Kumagai (Osaka University).

In an attempt to supplement his previous theory which insists that the practice of perpetual lease has disappeared, Prof. Kumagai introduced and analyzed a judgment which admitted the continuation of perpetual lease practices prior to the enforcement of the Civil Code (Nov. 12, 1884, by *Daishinin*, former Supreme Court, and Mar. 16, 1894, by the Kobe District Court) and reported in detail the argument on issue of the perpetual lease at the time of drafting the Civil Code and the critical reaction of the tenants under perpetual lease against the regulations of the Civil Code.

“Labor Issues at the Time of Forming the Modern Employment Law, Centering on the Question of Stipulating the Workmen’s and Apprentices’ Act,” by Tatsuo Yano (LL.M., Osaka University).

The various draft acts providing for workmen and apprentices were of a legislative attempt aimed at regulating labor relations in modern Japan. The efforts for legislation were made from

about 1877 and abandoned in the Meiji Era (1887-1896). Yano introduced various opinions concerning abortive acts and referred to the legal characteristics and historical backgrounds of the provisions in question.

(2) Legal History of the Orient

“Formation and Characteristics of the Laws during the Chin and Han Dynasties, based mainly on *Suikochishinkan*,” by Lecturer Takeshi Hori (Tokai University).

“On Taxation Systems of the Tang and Zong Tax Laws, Centering on the Question Involving Their Changes,” by Lecturer Yasuji Funakoshi (Yamagata University).

“Transition of Criminal Penalties in the Special Laws of Mongol During the Ch'ing Dynasty,” by Prof. Masao Shimada (Meiji University).

(3) Roman Law and Legal History of the West

“On the ‘*Lex Aquilia*’ in the Later Roman Republic,” by Takayoshi Nishimura (LL.M., Waseda University).

The Nishimura report put emphasis on the Later Roman Republic and the early Empire in his historical study on the development of *Lex Aquilia* in the community concerned. He conducted a positive analysis of the thinking process and judgment patterns adopted by jurists and law practitioners in those days. Of the various facts drawn from his study of concrete cases of *actiones in factum*, his report revealed how the practical elements that had broken down the framework of the civil law (*jus civile*) were established in the course of interpretations and legal practices. His study also involved the formation of *dominium*, that is, the abstract concept of ownership, in the changes of the socio-economic foundation, especially out of the basic recognition that the order of ownership is a premise to *actio legis Aquiliae*.

“Roman Rule over Sicilia in the 1st Century B.C.,” by Assoc. Prof. Akira Koba (Tokyo University).

Focussing attention on the system of Roman public revenue

in various cities in Sicilia prior to the establishment of the Principate and taking up Cicero's impeachment address against *Verres* as material, Assoc. Prof. Koba analyzed the nature of Roman rule and Cicero's views on it.

"The Existing Patterns of Ownership in Ancient Roman Law," by Takahiro Taniguchi (LL.M., Waseda University).

Taking up the generally accepted view that ownership during the period from the founding of Rome to the 3rd Century B.C. was relative ownership and the theory opposing it, Taniguchi delved into the relationship between the relative ownership theory and the legal theory of the National Socialism. He also detailed functionally divided ownership concerning *servitudes* from the standpoint aimed at contributing to better understanding of this theory, although it was not intrinsic.

"A View on the Structure of the German Reich in the early Staufer Period," by Assoc. Prof. Yoichi Nishikawa (Tokyo University).

Elucidating the characteristic modes of political and legal unification of the German Reich in the latter part of the 12th Century, centering on the question of the status of Reichsfürsten Assoc. Prof. Nishikawa illustrated such prospects into modern times.

"Problem of Succession in Farming Households in England during the Middle Ages," by Assoc. Prof. Hiroshi Hiramatsu (Aoyama Gakuin University).

"Power Structures and Criminal Law in England of 12th Century, Centering on the Local Judiciary System," by Asst. Shin'ichi Naoe (Tohoku University).

"Political Function of Early Parliament in England, Centering on the so-called Constitutional Crisis (1304-1341)," by Mrs. Kaoru Kitano (LL.M., Tohoku University).

Of the three England-related reports, Assoc. Prof. Hiramatsu took up the questions of farming household patterns and the practice of succession which are basic themes in the historical study of European family and the history of family law. Based on concrete documents concerning English villages such as Codicote, he studied problems in connection with the ex-

isting patterns of farmland and the partition of holdings.

Asst. Naoe studied the local justice system, which came into being temporarily in the historical process of the Norman conquest through the end of the 12th Century, on the basis of various documents such as *Leges Henrici Primi*, and probed anew into its historical significance.

While admitting the view that the early parliament in England was an executive organ centering on the judiciary and administration, Mrs. Kitano advocated the need to recognize its transitional process to a political representative council as an influence of the socio-economic changes on the central political system.

Mentioned above is an outline of the moves of *the Legal History Association* in the year under review. Special mention must be made, however, of the special lecture entitled "*Savigny's Lebendige Anschauung*" delivered at the autumn general meeting of the association by Prof. Dieter Nörr of the University of Munich who visited Japan at the invitation of the Japan Foundation. Prof. Nörr attended various meetings in Tokyo and Kyoto for dialogue with researchers of ancient western history and Roman law, and at these meetings he raised the question and reported on "*Bevölkerungsplanung durch Gesetzgeber die Ehegesetze des Augustus*" in addition to the major theme of his lecture delivered earlier. At the meeting in Tokyo, in particular, energetic discussions were held on the ruling structure during the period of the Principate.

B. Sociology of Law

The Japan Association of Sociology of Law held its 1980 academic meeting at Kwansei Gakuin University and Konan University on May 17 and 18. The program was divided into a plenary session and subcommittee meetings, while the second-day session was devoted to a symposium.

(1) Symposium

The background leading to the choice of the major theme of

the symposium was best described in simple form by Prof. Masashi Chiba of Tokyo Metropolitan University as follows:

Modern law, in an attempt to guarantee the individual rights, established certain systems to compensate the damage or loss caused by others, that is, the damage compensation system in private law and the loss compensation system in public law.

These systems made up of clearcut theories have protected the social life of modern people, and such was believed to be self-evident. This self-evidence, however, became exposed to serious doubt in the postwar years, especially after the period of high economic growth, and various kinds of injury not compensated by these systems have occurred. In the face of the emergence of circumstances with which existing theories were incompatible, efforts have been made to search for a method to compensate injuries believed irrecoverable. Then and there it was recognized that the responsibility should no longer be found in a specific individual but in the social environment.

An opinion was then voiced that a study of the issue should be held in a new legal domain in connection with the inevitable correlation between the social environment and these injuries, transcending the usual domains of private and public laws. Accepting the call of the times as such from the macro standpoint, *the Japan Association of Sociology of Law* in its academic meeting sponsored a symposium on this theme to the above effect.

The symposium on "Loss and its Compensation" was carried out mainly through discussions on the three reports that raised various questions. Described below is an outline of the Kitagawa report which constituted the introductory part of the theme.

"Introduction," by Prof. Zentaro Kitagawa (Kyoto University).

Prof. Kitagawa pointed out the problems at stake in setting up the theme, its background and significance. In studying the questions of loss and legal relief and protection, he said it was necessary to grasp the loss as soon as possible without adhering only to existing law concepts and legal systems to clarify the area in which legal protection is possible. This was an attempt to

review the phenomenon as a subject of sociology of law, so to speak. Prof. Kitagawa then systematically deployed his view on a grand scale concerning the patterns of loss, victims, parties that caused injuries, causes of injuries, interest, grouping of the loss viewed from mutual relationships of the factors above and its relief.

Two other reports that dealt with such particulars were as follows:

“On the Act of State Liability — Recent Tendencies Regarding Injuries and Legal Remedies,” by Prof. Eiji Shimoyama (Tokyo Metropolitan University).

“On the Anti-Monopoly Act of Japan,” by Prof. Yuji Nunomura (Kanazawa University).

(2) Plenary Session

“On the Mediation and Handling of Grievances in Comprehensive Systems of Justice,” by Prof. Takeshi Kojima (Chuo University).

In response to a call for the universalization of justice, Prof. Kojima advocated a thesis called the general system theory of justice and clarified the modes of interplay of the structures of this system including mediation, arbitration, handling of grievances, reconciliation and forced self-resignation which surround court trials.

“Toward a General Theory of Sociology of Law, Centering on Disputes which involve Rights,” by Dr. Takeyoshi Kawashima (attorney).

Dr. Kawashima has been of the opinion that a “general theory” is absolutely necessary in an empirical science, the subject of which is law. He made his report in the form of a counter-criticism against the criticism of his publicized opinions. He criticized the “misunderstanding” of Prof. Mitsukuni Yasaki of Osaka University on the social-control and social-sanction theories which constitute the basis of his general theory of sociology of law.

At the same time, he detailed the general theory on the dispute advocating legitimacy of certain conflicts between people.

(The meaning of “dispute” has been subdivided as a point of traditional contention and therein suggested the basic but specific factor of law in western society originating in Roman Law.) He made it in response to the criticism of Prof. Masashi Chiba.

(3) Subcommittees

In the three subcommittee meetings the following reports were made:

“Development and Problems of the Postwar Theory on the Right of Common,” by Lect. Kazukuni Shimizu (Tohogakuen Junior College).

“Study of ‘Property Ward’ from the Standpoint of Sociology of Law,” by Assoc. Prof. Hiroshi Hiramatsu (Aoyama Gakuin University).

“Study on the Legislative Process of Supplementary Regulations Concerning Creation and Maintenance of Owner Farmers,” by Masaaki Hirose (LL.M., Kwansei Gakuin University).

“Historical Background of Cases Involving Disputes Concerning the National Health Insurance Act,” by Lecturer Shun’ichi Fueki (Nihon Welfare (*Fukushi*) University).

“Victims and Compensation, Centering on a *Ueno* Lawsuit,” by Assoc. Prof. Hideo Inoue (Ibaraki University).

“Law and Society of Afghanistan, viewed from the Utilization of Water,” by Prof. Mitsue Kobayashi (Ibaraki University).

“Public Law Nature of Environmental Rights and Suit Involving Environmental Rights,” by Prof. Shoetsu Matsumoto (Chukyo University).

“Process of Establishing System of Emperor as Symbol and Relevant Requirements,” by Shoichi Koseki, LL.M.

“Study on Legal Norms as Social Facts,” by Lecturer Kenji Tokunaga (Okinawa International University).

[Reference: “Studies on Laws Concerning Injured Sufferers,” edited by the *Japan Association of Sociology of Law* — Sociology of Law, No. 33.]

C. Legal Philosophy

The Japan Association of Legal Philosophy adopted "The Legal Philosophy of Japan" as a major unified theme for the second time as last year at its 1979 general academic meeting held in Tokyo, on Nov. 5 and 6. Reports submitted at the two-day meeting were as follows:

"The Legal Philosophy and Criminal Law Theory of Kameji Kimura," by Prof. Heikichi Ono (Hiroshima University).

"The Legal Philosophy of Kojiro Wada," by Prof. Tokuji Sato (Waseda University).

"The Legal Philosophy of Amane Nishi," by Assoc. Prof. Keisuke Hasunuma (Kobe University).

"Jurisprudence of Nobushige Hozumi," by Prof. Jun'ichi Aomi (Tokyo University).

"The Legal Philosophy of Tomoo Otaka," by Prof. Mitsu-kuni Yasaki (Osaka University).

The academic meeting of 1980 was held at Fukuoka University on Nov. 15 and 16 under the unified theme of "Law and Language." Details of their reports will be described in the next issue of the Bulletin.

Hasunuma Report on Amane Nishi (1829 - 1897):

A report was made on Amane Nishi at the previous academic meeting by Prof. Ryuichi Nagao. Hasunuma sought the reason why few discussions were held on how this scholar, who systematically learned western law and philosophy, had related law to philosophy and what his legal philosophy was.

Defects arising from the lack of biographical documents on "The Life of Amane Nishi" by Ogai Mori* were mainly responsible for the failure to clarify the subject. In other words, the thought and activities of Nishi during the period from his studies in the Netherlands to 1872 remained unknown.

Thereupon, Hasunuma turned his attention to Nishi's encounter with the "natural law theory" and assumed that Nishi had taken a major interest in this theory. He attempted to clarify the thoughts

* Ogai Mori was the pen name of Rintaro Mori (1802-1922) who played a prominent role in the literary circles in Japan during the Meiji Era.

of Simon Vissering (Leiden University) from whom Nishi directly learned the “natural law” theory as the basis of law. Hasunuma believes that although Nishi, in the course of his academic development, had made some accomplishments in his criticism of the “natural law” theory, he could not establish his own legal philosophy by restructuring it. This is because, Hasunuma concluded, Nishi failed to clarify human psychology by the positive method in his criticism of Auguste Comte.

Yasaki Report on Tomoo Otaka (1899 – 1956):

With the various studies made so far in mind, Yasaki threw light on the basic pillar of Otaka’s legal philosophy. Yasaki’s report, in particular, delved into how western culture centering on phenomenology and sociology had penetrated Otaka to become the basis of developing his legal philosophy, and how the occidental elements in him were related to his Japanese culture.

Attention was focussed on his prewar trail of thinking, especially when he was abroad for study (1928 - 1932) rather than on his legal philosophy after World War II which was based on English empiricism and German philosophy, especially the phenomenology of Ed. Husserl.

The central point of spirit is found in meaning. Meaning is composed of the operation of granting meaning. In this regard, the spiritual subject can be studied from the noesis of the operation to give meaning and from the noema of thus composed meaning itself—“Verstehende Soziologie” and phenomenology. Then, the background of the legal philosophy of Otaka was made up of the phenomenological method of Ed. Husserl and M. Weber’s “sozialwissenschaftlicher Erkenntnis”

Ono Report on Kameji Kimura (1897 - 1972):

Ono probed into the legal philosophy of Kimura by the traditional method. The report dealt with the central problems of legal philosophy, law and moral, criminal law and morals, law and the state, positive law (its effectiveness, positive nature and norms),

natural law theories and theories on justice. Ono's report said that although Kimura in his study of the distinction of law and moral deployed a general theory theoretically, he had actually the problems of criminal law and morals in mind.

Sato Report on Kojiro Wada (1902 - 1954).

It had a practical significance for him in that Wada in his search for the ideas of law and legal philosophy had oriented himself to the study of natural law. The idea of law at the starting point of a study of legal philosophy should aim at true peace and true freedom overcoming class distinction, and that the interpretation and the application of laws should be guided by the idea of law. Such was the keynote of Wada's studies in his later years.

One of the major characteristics of Wada's legal philosophy, the report stressed, is that Wada attempted to deal with law subjectively and approach the true essence of law from the standpoint of the majority of the nation. Wada was a democrat to the quick. On the basis of Wada's academic accomplishments, the report elucidated the process in which Wada, amid the oppressive circumstances of the times and changing notions on value always facing up to reality, deepened his academic standards and structured his theories.

[Reference: The Annual Legal Philosophy 1979 — "Legal Philosophy of Japan II," edited by *the Japan Association of Legal Philosophy*]

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8. International Law

The Spring Congress of *the Japanese Association of Interna-*