

Living Law in Japan: Social Jurisprudence in the Interwar Period

Colin Philip Charles Jones

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ABSTRACT

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Scholarship on modern Japanese law tends to focus on the codification of Japan's legal system in the 1890s and its dramatic overhaul after 1945. This dissertation argues that the interwar years constituted a third point of inflection that transformed Japanese law and laid the foundation for the Japanese welfare state.

In the wake of World War I, amid varied and widespread social tumult, a group of influential professors at Tokyo Imperial University undertook to remake civil law as an instrument of social policy. They rejected the Japanese civil code as it was codified in the 1890s, along with the methods of strict interpretation developed by their teachers. In its place they envisioned a new paradigm of legal thinking and practice that they believed could mend tearing social fabric. Their ideas were inspired by a transnational discourse on the centrality of society to law that emerged at the end of the nineteenth century. In Japan they coalesced into a new and nationally distinct legal movement that came to be called "social jurisprudence" (*shakai hōgaku*). There were many elements, but the most notable were an emphasis on the indeterminacy of legal interpretation and a preference for informal conflict resolution, as opposed to the formal procedures of the modern judiciary.

The 1923 Kanto Earthquake afforded an opportunity to put these ideas into practice on a large scale. In these years two of the most notable features of modern Japanese law were established: reliance on judicial precedents rather than simply the

statutory law, and the prevalence of informal mediation. With these tools, the social jurist strove to reform urban housing, rural tenancy, labor relations, and family law. From the 1930s they took their ideas to the Chinese mainland, where they were deployed in the puppet state Manchukuo in an attempt to pacify the local population by harnessing “Asian” customs. Never did these efforts hit their intended mark, yet they gave rise to new legislation, legal practices, and frames for thinking about society, history and gender that have endured into the present.

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INTRODUCTION

Inside Chuo University's Surugadai Memorial Hall, situated between the Kanda River and the Imperial Palace, just east of the maze of used booksellers in Tokyo's Jinbōchō district, is a copper statue of an ant. It stands erect on two legs and wears a cape, from which a single arm extends to grasp a long spear. Installed in 1989 on the hundredth anniversary of Chuo University, this odd statue was commissioned by a former student to commemorate the university's law school. From the placard at its base, a passerby could learn its name: "Statue of the Guardian of the Law" (*Gohō no zō*). The reason an ant seemed an appropriate symbol to embody this concept, sculptor Yamashita Tsuneo explained, was because just as ants "observe the law" and conduct themselves as a "well ordered" colony, so "all people, as members of society, must live according to the law (*hō*)."¹

Yamashita's ideas might be dismissed as idiosyncratic were it not for the fact that they were so common in postwar Japan. Not as venue for enforcing individual rights, or as a system of universally applicable abstract rules, or as the commands of a sovereign state—the law in postwar Japan has been most frequently construed as the totality of social relationships. This social interpretation was not the only theory of law at play, but it was the most pervasive. It underpins the subfield of legal sociology (*hōshakaigaku*) that dominated private-law scholarship in Japan for more than three decades after World War II and continues to occupy a prominent position in the academy. It was also common in

¹ "Gohō no zō," *Kanda runessansu*, no. 23 (October 20, 1992): 16.

the courts. In justifying a Supreme Court ruling that a 1950 translation of *Lady Chatterley's Lover* was obscene, for example, one justice claimed the court was simply expressing “the prevailing ideas in society.”² A social conception of law also suffuses a prodigious body of work on Japanese “legal culture” and “legal consciousness.” The outstanding example of the genre is the legal sociologist Kawashima Takeyoshi’s 1967 study *Japanese Legal Consciousness (Nihonjin no hōishiki)*, in which he argued that the low rates of litigation, the small number of lawyers, and the prevalence of mediation and conciliation in postwar Japan stemmed from the survival of a traditional, collective ethos within Japanese modernity.³ So prevalent was this perception that foreign historians and legal scholars set themselves the task of recovering the importance of social conflict in Japan, in part to prove that it had in fact existed.⁴ Meanwhile, the liberal constitutional law scholar Higuchi Yōichi channeled John Stewart Mill in declaring that “society itself” had become a legal tyrant. While “freedom from political authority” had come to be widely accepted in postwar Japan, he wrote, “[f]reedom from social authority” was still offset by the conferral of rights to associations as juridical persons and the widespread

² Quoted in Yasuo Hasebe, “Rights of Corporations, Rights of Individuals: Judicial Precedents,” in *Five Decades of Constitutionalism in Japanese Society*, ed. Yōichi Higuchi (Tokyo: University of Tokyo Press, 2001), 84.

³ Kawashima Takeyoshi, *Nihonjin no hōishiki* (Tokyo: Iwanami shoten, 1967). For some other notable examples of this literature, see Rokumoto Kahei, *Nihon hōbunka no keisei*, Hōsō daigaku kyōzai (Tokyo: Hōsō daigaku kyōiku shinkōkai, 2003); Tanaka Shigeaki, *Gendai Nihonhō no kōzu* (Tokyo: Yūyūsha, 1992); Kamishima Jirō, *Nihonjin to hō* (Tokyo: Gyōsei, 1978).

⁴ Tetsuo Najita and J. Victor Koschmann, *Conflict in Modern Japanese History: The Neglected Tradition* (Cornell University Press, 1982); Frank K Upham, *Law and Social Change in Postwar Japan* (Cambridge, Mass: Harvard University Press, 1987).

belief that these groups should police themselves.⁵ For both boosters and critics, the cornerstone of postwar law was this concept of the social.

Here I seek to recover the historical formation and development of this intellectual link between law and society in Japan. In approaching this subject, I adopt what one might call an agnostic view of law. This means that I am not concerned with a normative critique of the Japanese legal system, with diagnosing why Japan failed to realize the “rule of law” or other measures of what law should be. I understand the law as a historically contingent mode of thought and try to uncover the meanings that it had for contemporaries and provide an account of their influence. My contention is that the preoccupation with the role of law in promoting social cohesion in Japan is not the reflection of some inherent cultural trait or traditional conservative paternalism. Instead it was created in the interwar period, emerging in the confluence of political crisis and a transnational exchange of ideas about how to buffer society from the iniquities of the market.

At the center of this history stand three generations of private jurists from the Faculty of Law at Tokyo Imperial University, the premier institution of higher learning and the training ground for the national bureaucracy. Elite lineage was commonplace in the department, but even for the professors without a name to trade on, a position on the faculty assured elevated status. To be a professor at Tokyo Imperial was to enjoy official bureaucratic rank, cultural caché, connections to the ruling class and business elite

⁵ Yōichi Higuchi, “When Society Is Itself the Tyrant,” *Japan Quarterly* 35, no. 4 (October 1988): 354.

through marriage and students, and proximity to power.⁶ Shuttling between lecture halls, the editorial boards of Japan's leading law journals, government legislative committees, and seats in the House of Peers, these professors not only exerted commanding influence over their field. They were instrumental in designing new legislation, and they were political figures in their own right.

In the wake of the First World War, facing an eruption of labor disputes and tenant unrest in Japan and the specter of revolution abroad, these scholars reimagined law as an active force for promoting equitable social relations. Inspired by contemporary legal theories from Europe and the United States, they rejected the liberal orthodoxy centered on individual rights and strict textual exegesis. In its place they envisioned a “social jurisprudence” (*shakai hōgaku*), a new paradigm of legal thinking and practice that they believed could heal the fissures they saw opening around them: between state and society, rich and poor, tenant and landlord, labor and capital, rural and urban.

Not a discipline in itself, social jurisprudence was an amalgam of shared beliefs, concepts, modes of argument, and practices—all of which stemmed from a basic orientation toward the law that viewed it as simultaneously the product of a deep social order and the most important instrument for establishing that order within collective life. The law was a social fact; the law needed to conform to society: Like a Möbius strip, social

⁶ Within the prewar bureaucracy, the heads of departments at Tokyo Imperial were accorded *chokunin* status—“appointed by imperial decree”—while others professors were ranked as *sōnin*—“appointed by memorial”—which placed them in the top eight percent of the bureaucracy. With salaries that could be as much as ¥3000 per year and no less than ¥1000, they were also quite wealthy in comparison to most of their countrymen. Byron K. Marshall, *Academic Freedom and the Japanese Imperial University, 1868-1939* (Berkeley: University of California Press, 1992), 48–50.

jurisprudence curled back on itself, shifting from description to prescription in one continuous plane.⁷ A great share of interwar law turned on this reasoning. Beginning in the early 1920s, such ideas were mobilized to strengthen the rights of Japanese tenants and laborers. From the 1930s this social vision of the law was employed in the puppet state of Manchukuo. To facilitate Japanese rule, the social jurists helped write a new civil code intended to both overcome the streak of individualism in Western law and observe local customs. Never did these efforts hit their intended mark. Social jurisprudence was far from sufficient to remedy the pervasive sense of social crisis that gripped Japan in the early 1920s and continued practically unabated until the country plunged into war again in the late 1930s. Meanwhile, to the contrary of its drafters' intentions, Manchukuo's civil code became a tool for expropriation. Yet if interwar social jurisprudence never instituted the orderly societies it envisaged, it was nonetheless a decisive force in shaping the development of Japan's legal system and social policies during a pivotal season in their formation.

It is common to divide modern legal history in Japan into two main acts of lawgiving: the codification of the state in the 1890s and the sweeping legal reforms carried

⁷ These ideas borrow from Keith Baker's observations about the dualism in the modern concept of society. Baker writes about the contrast between "thin" and "thick" conceptions of the social: "between voluntarism of the free contract, on the one hand, and the constraints of collective human existence on the other." Keith Baker, "Enlightenment and the Institution of Society: Notes for a Conceptual History," in *Main Trends in Cultural History: Ten Essays*, ed. William Melching and Velema Wyger (Atlanta, GA: Rodopi, 1994), 108.

out after World War II under the Allied occupation.⁸ It would be difficult to overemphasize the importance of either of these events. The promulgation of the Constitution in 1890 and the issuance of the Civil Code in 1898 established an authoritarian imperial state, in which the authority of the emperor over his subjects was reflected in the Japanese home by the power of the head of the household over his family members. Postwar reforms brought a swift end to both institutions, preparing the ground for the more democratic regime that followed. I argue that between these two watersheds lay a third. Through their ideas and action, the social jurists of the interwar period refashioned Japan's legal system into a key pillar of what might be called the Japanese "social state," the piecemeal and provisional system of social assistance developed in advance of the national programs of social insurance, healthcare, poverty relief associated with the twentieth-century welfare state.⁹

They did this in a number of ways. One of the most important was the elevation of the act of legal interpretation from a narrow analysis of statutes to a holistic practice that, in theory, sought to determine the best outcome for society. This is not to say that Japanese judges became neutral arbiters of the common good, but in recasting their role

⁸ The examples of this are innumerable. It can be observed in textbooks, such as Wilhelm Röhl, ed., *History of Law in Japan since 1868* (Boston: Brill, 2005); Asako Hiroshi et al., *Nihon hōseishi* (Tokyo: Seirin Shoin, 2010).

⁹ I borrow this term from Takaoka Hiroyuki, although he intends something a little different than I do. By "social state" he aims to disaggregate welfare reforms, highlighting the importance of contests between various interest groups in the 1930s to the development of the major welfare policies that accompanied total war after 1937. I would like to extend the timeframe back to the 1890s, when the first self-conscious efforts at social policy were made. Takaoka Hiroyuki, *Sōryokusen taisei to "fukushi kokka: senjiki Nihon no "shakai kaikaku" kōsō* (Tokyo: Iwanami shoten, 2011), 16.

in these terms, and in a concerted effort to increase the scope of judicial discretion, the social jurists engendered key regulatory functions into the courts. For example, judges came to mediate between tenants and landlords and mandate rent reductions and the extension of leases. In establishing a new practice of the study of case law, the social jurists enhanced the power of the courts to act as a legislative body. Until then, it was generally believed that the Civil Code was the main source of law, yet by training Japanese jurists and judges to search for the law in judicial decisions, the social jurists effectively created an alternative source of law to the static statutes of the Civil Code. The results were significant. Without changing the letter of the law, social jurisprudence succeeded in such things as relativizing the concept of private ownership, expanding legal liability, and providing greater legal protections for common-law wives (*naien no tsuma*).

My efforts to recover this history build on a growing body of scholarship that examines the enduring legacy of interwar social policies.¹⁰ From the end of the nineteenth century into the first decades of the twentieth, industrialized nation-states across the world developed new capacities to intervene in the social and economic affairs of their citizens. Not until the outbreak of total war in 1937 did Japan's national government take

¹⁰ For social policy specifically, see Takaoka, *Sōryokusen taisei to "fukushi kokka"*; Sheldon M. Garon, *Molding Japanese Minds: The State in Everyday Life* (Princeton: Princeton University Press, 1997); Shō Kashin, *Nihongata fukushi kokka no keisei to "jūgonen sensō"* (Kyoto: Mineruba shobō, 1998). Historians have long been attentive to the importance of prewar reforms to the postwar era. For some classic examples of this, see Chalmers Johnson, *MITI and the Japanese Miracle: Growth of Industrial Policy: 1925-1975* (Stanford University Press, 1982); John W. Dower, "The Useful War," *Daedalus* 119, no. 3 (Summer 1990): 49; Tetsuji Okazaki, "The Japanese Wartime Economy and the Development of Government-Business Relations: An Overview," in *Total War and "Modernization,"* ed. Yasushi Yamanouchi, J. Victor Koschmann, and Ryūichi Narita (Ithica: Cornell University Press, 1998).

significant steps to directly provide for the well-being of its citizens, and not until the overhaul of Japan's political system in the aftermath of World War II did it create a system recognizable as a modern welfare state. Yet as scholars have shown, the elaborate systems of public assistance developed in the 1920s formed the foundation on which the postwar Japanese social state was built. Sheldon Garon has argued that the Home Ministry's moralizing response to urban poverty and the ruination of Japanese farmers in the interwar decades conditioned consumption habits and attitudes toward sex and gender that persisted long into the postwar era.¹¹ Takaoka has traced the lasting influence the network of local health clinics developed to provide low-cost care in the 1920s exerted on the national healthcare system established in 1938.¹² In similar fashion, the creation and expansion of mediational tribunals radically remade the practice of the Japanese legal system. Here I show how these changes emerged from the conviction of social jurists that the formalities of the law were an impediment to more equitable social relations.

The story of social jurisprudence also underlines the fact that the development of Japanese law was part of a global process. The legal innovations of the interwar period have often been interpreted as acts of domestication. This began with the social jurists themselves, who were fond of portraying their campaigns against private property and other features of Japan's civil law as an assault on foreign legal standards ill-suited to Japanese society.¹³ This line of thinking continued with contemporary legal scholars, who

¹¹ Garon, *Molding Japanese Minds*.

¹² Takaoka, *Sōryokusen taisei to "fukushi kokka,"* chap. 2.

¹³ The paradigmatic example is the introduction Suehiro Izutarō wrote for his 1921 study of property law. In it he traces the source of current social discord to the fact that Japan

have claimed traditional values as the basis of their ideas.¹⁴ In fact, social jurisprudence evolved through consistent attention to and appropriation from contemporary legal scholars in the United States and Europe. Indeed, this trend of thought and practice would have been unthinkable outside the context of ongoing transnational exchange. Japanese social law, then, is best understood as belonging to what legal scholar Duncan Kennedy has described as the second globalization of legal thought. Atop an international infrastructure of shared legal institutions and conceptual languages laid down in the nineteenth century, new social theories of law that emerged from the 1890s traveled rapidly around the world.¹⁵ These developed in opposition to *laissez faire* liberalism and the aspect of civil law that seemed to underwrite it, most prominently the concepts of rights and freedom of contract. The social critique took many forms, from an outright denial of rights, to assaults on formalism, to efforts to retrofit rights language to protect

had adopted a “Roman” legal system. Typically, Suehiro’s antipathy toward Roman law was borrowed from a number of German legal theorists he was reading at the time. Rather than taking him at his word, it is better to see his longing for a stable tradition as part of the experience of global connectivity. Suehiro Izutarō, *Bukkenhō*, vol. 1 (Tokyo: Yūhikaku shobō, 1921), 1–3.

¹⁴ Even critics of culturalist explanations of Japanese law have fallen victim to this tendency. In discussing the spread of mediation in interwar Japan, for example, John Haley writes that the central purpose “was to ensure that dispute outcomes reflected Japanese morals rather than law.” John Owen Haley, “The Politics of Informal Justice: The Japanese Experience, 1922-1942,” in *The Politics of Informal Justice*, 1982, 137. For examples of similar interpretations from Japanese scholars, see Hoshino Eiichi, “Nihon no minpō kaishakugaku,” in *Minpō ronshū*, vol. 5, 10 vols. (Tokyo: Yūhikaku shobō, 1986), 215–51; Takeyoshi Kawashima, “Dispute Resolution in Contemporary Japan,” in *Law in Japan: The Legal Order in a Changing Society*, ed. Arthur Taylor Von Mehren (Cambridge, Mass.: Harvard University Press, 1963), 115–17.

¹⁵ Duncan Kennedy, “Three Globalizations of Law and Legal Thought: 1850-2000,” in *The New Law and Economic Development: A Critical Appraisal*, ed. David M. Trubek and Alvaro Santos (New York: Cambridge University Press, 2006), 19–73.

collective goods. By the 1920s its reach was truly global. To compare the discussions of Japanese jurists about property, contract, or legal interpretation in the 1920s with those of their French, German, or American counterparts is to observe remarkable similarities. By the end of the decade Chinese jurists too were speaking a social language of law. The point is not to then claim that interwar Japanese law was more Western than previously imagined. It is rather to point out that the categories of national and foreign, East and West, and the immense significance accorded them are ideological artifacts of the same dynamic and unequal international order that gave rise to modern law. This was especially evident when social jurists employed their ideas in the task of writing a civil code for Manchukuo in the 1930s. At the height of anti-Western sentiment, their efforts to create a uniquely Asian law resulted in a similarly eclectic mix of extant, international legal theories and institutions.

One of the challenges in understanding the social jurists arises from their failure to fit conventional political categories. In Japanese scholarship they are most often characterized as proponents of prewar democracy, critics of the state, and foundational legal theorists.¹⁶ They were these things, but this image is so partial as to be distorted. As in much of the world, the 1920s and 1930s in Japan was an era of high ideological contest, as socialists, communists, nationalists, agrarianists, fascists, and others struggled over policy and ultimately over control of the state. Against the ideological clarity of these beliefs, the social jurists cut an ambiguous figure. They advocated for the legalization of

¹⁶ For example, see Itō Takao, *Taishō demokurashii ki no hō to shakai* (Kyoto: Kyōto daigaku gakujutsu shuppankai, 2000); Hoshino, “Nihon no minpō kaishakugaku”; Tetsu Isomura, *Shakai hōgaku no tenkai to kōzō* (Tokyo: Nihon hyoronsha, 1975).

unions and kept company with socialists, yet they rejected class struggle on principle. Indeed, one of their enduring goals was to diminish, if not erase, the existence of social conflict altogether. Like contemporaneous Marxist thinkers, they believed that the formal equalities guaranteed by the law were largely a deceptive mask that concealed more consequential, substantive disparities in society. Yet their efforts to foster reform never ventured far outside the legal system that they themselves mistrusted. By their contemporaries they were considered “liberals” and their successors have hailed them as democrats, but in their rejection of individual rights and the universal applicability of the law, their ideas were explicitly anti-liberal. And while they thrilled to the surge of popular protest in the early 1920s and consistently pressed to broaden access to the legal system, they showed little interest in parliamentary politics or representative democracy more generally. When Japanese politics swung right after the invasion of Manchuria in 1931, without exception they welcomed the advent of fascism as an opportunity to achieve the socio-legal reforms they had desired for a decade.

Their closest contemporary analogue in interwar Japan was probably the “new men” (*shinjin*) who took control of the Home Ministry after World War I to pursue a set of reforms that outstripped previous efforts to use the state to mediate among socio-economic classes. They backed the development of the Japanese labor movement in the 1920s and helped support Japanese fascism in the 1930s. Although many of these officials were purged during the occupation, the many who were not purged assumed the reins of the postwar Welfare Ministry where they guided postwar labor policy.¹⁷ But this

¹⁷ The classic work on these Home Ministry officials is Sheldon M. Garon, *The State and Labor in Modern Japan* (Berkeley: University of California Press, 1987).

comparison goes only so far. The social jurists were comfortable with more radical redistribution of wealth and power than were the Home Ministry officials. What is more, a defining feature of social jurisprudence was its antipathy to the state in general. The great appeal of society as a focus was in part its potential to transcend the realm of politics. It was the desire not simply for a particular policy outcome but for a “social” means of achieving change that helps explain the capacity of the social jurists to work under such different political regimes.

The rest of the dissertation proceeds chronologically and is divided into three chapters, followed by an epilogue. Chapter One explains how a nebulous discourse on the relationship of law to society coalesced into a reform movement in the years following the First World War. Makino Eiichi set down the basic intellectual framework in the mid-1910s, when he argued that Japanese law was being “socialized,” evolving from a system based on individual rights to one that prioritized the good of society as whole. The mechanism for this change, according to Makino, was not new legislation but interpretation, through which dynamic social norms gave new meaning to written laws. A confluence of political and structural change helped popularize Makino’s ideas, but his claim that jurists and judges could interpret the law almost however they pleased remained too radical for consumption by the legal profession. A more practicable theory came from two younger professors, Hozumi Shigetō and Suehiro Izutarō, who had recently returned from sabbaticals in Europe and the United States. They gave structure to Makino’s ideas by welding them to a new practice of the study of case law. From this point forward Japanese legal scholars began carefully reading court decisions for evidence of the process of legal evolution that Makino had foretold.

Chapter Two charts the rightward drift of social jurisprudence over the course of the 1920s. The chapter centers on three case studies that take the 1923 Kanto Earthquake as their point of departure. The first was a debate about the nature of private ownership that unfolded after the 1923 quake rendered hundreds of thousands of renters in Tokyo homeless. According to the letter of the law, their leases had vanished when their homes and offices burnt down, but in their attempts to justify the tenants' right to squat on their landlords' land, the social jurists discovered the political limits of Makino's theory of socialization of law. In response, Makino began to couch his ideas in the language of nationalism and when total war came, he hailed the National Mobilization Law as the fulfillment of his social vision. The second case relates to one of the most misunderstood legal reforms of the period: the creation of a system of mediational tribunals. While often portrayed as an intentional effort to deny Japanese citizens their formal rights, mediation in Japan was in fact inspired by similar reforms in the United States and Britain. Like its Atlantic counterparts, the Japanese goal was to provide the poor with cheaper, quicker, and more equitable resolutions than they would receive in formal judicial proceedings. At first the move to mediation did just that, but as the political conditions changed, these tribunals proved to be tools for isolating grievances and collective action. The chapter concludes by exploring the link between a settlement house established by professors of Tokyo Imperial and the North China Rural Customary Law Survey, carried out in service of Japanese occupation from 1939 to 1944. In the process, research methods developed in the service of the Japanese labor movement were mobilized to help pacify occupied Chinese territory.

In Chapter Three the focus shifts to Manchuria and the creation of a new civil code for the puppet state established in 1933, following the invasion of the region by the Japanese army in 1931. By the 1930s the rise of the ultra right had foreclosed the possibility of significant reform in Japan. Yet for Wagatsuma Sakae, who was recruited from Tokyo Imperial University to preside over the drafting of a novel civil code for Manchukuo, the empire appeared as a laboratory for testing his theories about law. The key issue was how to handle customary law. The Manchukuo state had staked its claim to legitimacy on its sensitivity to China's multi-ethnic population, as opposed to the Han-dominated policies of Chiang Kai-shek's Republican regime. Yet the new code was also supposed to systematize the region's immensely complex system of land tenure—the legacy of the Qing empire and more recent extraterritorial concessions. Large amounts of capital and time were expended to understand local customs and to codify them. Ultimately, however, the Manchukuo civil code belied these efforts by establishing an especially strict registration requirement that in effect gave the state bureaucracy the power to decide who owned what. This facilitated the dispossession of the land of Chinese peasants. It also represented an about-face from the anti-bureaucratic thrust of social jurisprudence in the early 1920s. I trace this shift to Wagatsuma's conclusion that only the state was powerful enough to manage the complexities of financial capitalism.

The epilogue appraises the legacy of social jurisprudence after 1945. For the jurists themselves, the postwar era was less a moment of reckoning than inflection point. Participation in the wartime state did not preclude them from taking positions under the Allied occupation, gaining them a level of direct policy influence they had never before enjoyed. They were instrumental in legalizing a robust labor movement and ending legal

patriarchy in Japanese family law. They were also among the leading proponents of the new, democratic constitution, which they celebrated for the social rights it conferred. In the long term, the nexus of ideas and practices the social jurists created in the 1920s and 1930s proved remarkably durable, even as the postwar legal academy ramified into a far more pluralistic system with the expansion of the universities. Case law continued to define the mainstream of Japanese civil law scholarship. Mediation remained the primary recourse for conflict resolution, and under the conservation regime that crystalized in the mid-1950s, it functioned to blunt the force of individual rights accorded by the constitution. But perhaps their greatest legacy of social jurisprudence was a conceptual edifice. At its center was the belief, inscribed into the framework of legal thought in Japan, that the law was an expression of a dynamic social order. Over the next decades, the horizon toward which the law was headed shifted as political circumstances changed. Yet the conviction that the current legal order, if somehow incomplete, still represented a certain, deeper social logic remained the main conceptual ground over which the struggles of contemporary Japanese law were waged.

CHAPTER ONE

The Advent of Social Jurisprudence

Suehiro Izutarō sounded the alarm. “The lower class has awakened,” he proclaimed in January 1921. “The people’s needs have increased, and yet there is not enough to go around.”¹ A professor of civil law at Tokyo Imperial University, Suehiro had returned to Japan only a few months earlier from Europe, where he assisted the Japanese delegation to the Paris Peace Conference and watched laborers march in protest (?) through the streets of the capital. Back in Tokyo he believed he was witnessing similar historical forces at work. Japan’s economy boomed during the war, fed by European demand for materiel. But with growth came an urban housing shortage, factory strikes, a spate of disputes between tenant farmers and their landlords, and, over the summer of 1918, nation-wide rioting in protest of the high price of rice.² The fallout from the Rice Riots brought down the administration of Prime Minister Terauchi Masatake, aide-de-camp to the oligarchs who had continued to govern the country behind the scenes since the Meiji era. The ascension of Hara Takashi as the next prime minister inaugurated a period of limited but real parliamentary rule, the first since the establishment of constitutional government

¹ Suehiro Izutarō, “Minpō kaizō no konpon mondai,” in *Uso no kōyō* (Tokyo: Kaizōsha, 1923), 202.

² On the sudden increase in tenancy unrest, see Ann Waswo, “The Origins of Tenant Unrest,” in *Japan in Crisis: Essays on Taishō Democracy*, ed. Bernard S. Silberman and Harry D. Harootunian (Ann Arbor, Mich.: University of Michigan Press, 1999), 374–97. The union movement in the 1910s is covered in Andrew Gordon, *Labor and Imperial Democracy in Prewar Japan* (Berkeley: University of California Press, 1992), chap. 2; Stephen S. Large, *Organized Workers and Socialist Politics in Interwar Japan* (New York: Cambridge University Press, 1981), 40–50.

nearly thirty years earlier. For some, the early 1920s set the high-water mark for electoral democracy in imperial Japan. Suehiro, though, cared little about the vote. His main concern was the civil code.

Twenty years earlier Japan's first generation of professional jurists completed the code's five sections and 1146 articles. If the promulgation of the constitution in 1889 signaled Japan's arrival to modern statehood, the completion of the civil code in 1898 had, in the eyes of its drafters, secured the country a berth among the civilized nations of the world.³ Like the French *Code civil* and the German *Bürgerlichgesetzbuch* on which it was modeled, the Japanese code was a testament to the belief that human life could be ordered by a set of written rules. By 1921, though, Suehiro worried these rules had been left in the past. The "new demand for equality" was incompatible with the "concept of private property," he wrote. Villagers had once shared access to land and resources. Now a few wealthy men "possessed vast open spaces" in the cities, while many residents were left "without homes to live in."⁴ Japanese contract law exacerbated the problem. Freedom of contract ignored the "substantive inequalities" that subjected workers to the whims of capital. In addition, little distinction was made between labor contracts and leases, leaving

³ For example, Hozumi Nobushige, one of the code's main authors, believed that all the worlds' laws could be hierarchically categorized into different families of law, with European legal systems at the top. With the promulgation of the new civil code, he wrote, the Japanese legal system now stood "in a filial relation to the European systems [of law], and with the introduction of Western civilization, the Japanese civil law passed from the Chinese Family to the Roman Family of law." Nobushige Hozumi, *The New Japanese Civil Code as Material for the Study of Comparative Jurisprudence. A Paper Read at the International Congress of Arts and Science, at the Universal Exposition, Saint Louis, 1904*. (Tokyo: Tokyo Printing Co., 1904), 19.

⁴ Suehiro, "Minpō kaizō no konpon mondai," 201.

few legal remedies for late wages or termination without notice. “That workers are living beings is neglected entirely,” Suehiro observed in outrage. Then there was the family. Spouses who had not filed the proper paperwork were ineligible for compensation if their partners were killed in an industrial accident. Meanwhile, men who fathered children out of wedlock bore no legal responsibility for them.⁵ If each of these issues demanded a discrete solution, to Suehiro they also signaled something greater: Civil law needed to be reimagined from its foundations. Trying to sustain this status quo would end in “mutual slaughter.” “The only alternative,” he wrote, “is socialization [of the law].”⁶

Many of Suehiro’s colleagues had come to a similar conclusion. In the years after the First World War, in the face of tumultuous unrest, leading scholars in the Faculty of Law at Tokyo University came to identify the legal system as the source of the problem. It was at this time that the concept of society emerged both as an explanation of what had gone wrong and as the promise of a solution. “Day by day it is as if an unbridgeable gulf is opening between conventional law and the realities of social life,” wrote a young Rōyama Masamichi, future theorist of the Great East Asia Co-Prosperity Sphere. “The ‘socialization of law’ means nothing other than to fill this gap and make [the law] fulfill its social vocation (*shakaiteki shokunō*).”⁷ Of the code’s many flaws the worst offender was

⁵ Article 775 of the Civil Code required that spouses report their marriage to a local administrator, yet many Japanese couples did not comply. In 1915 the Great Court of Cassation, prewar Japan’s highest court, handed down a decision that gave limited recognition to common-law marriages, yet couples who did not give notification to their local administrators were ineligible for the allowance

⁶ Suehiro, “Minpō kaizō no konpon mondai,” 203.

⁷ Rōyama Masamichi, “‘Hōritsu no shakaika’ ni tsuite,” *Chūō hōritsu shinpō* 1, no. 18 (1921): 5. “The distance between theory and reality has come to seem striking,”

what Anglo-law specialist Takayanagi Kenzō called its “individual-centered social philosophy” that was called into existence by the institutions of private ownership (*shoyūken*), freedom of contract (*keiyaku no jiyū*), and a narrow understanding of liability that hinged on fault (*kashitsu sekinin*). This trinity established the parameters for an autonomous individual with few legal obligations other than to his own self-interest. The language of society deemed this form of personhood artificial and antiquated, a “crystallization of the nineteenth century” that had ossified into an encumbrance in a present where connectivity appeared self-evident.⁸

A focus on society also drew attention to the disparity between law as a system of rules and law as a social practice. Japanese jurists of an earlier era had assumed that the law resided in legal statutes. The jurists of the 1920s emphasized Japan’s courts, exploring the ways that judicial interpretation and application were productive. At the same time, they took an interest in legal procedure and the institutions of law, since these came to seem consequential for the workings of legal system. The notion of society, though, had yet other meanings. At its grandest scale, it seemed to present an order unto itself, which called for a new orientation toward the law. Japan needed a “social jurisprudence” (*shakai hōgaku*), one young scholar claimed, a new method of legal study that would “plunge into

commented the Anglo-American law specialist Takayanagi Kenzō Takayanagi Kenzō, “Gainen hōgaku no botsuraku to shinhōgaku no kichō toshite no risō oyobi genjitsuteki keikō,” *Chūō kōron* 37, no. 7 (1922): 71.

⁸ Takayanagi, “Gainen hōgaku no botsuraku to shinhōgaku no kichō toshite no risō oyobi genjitsuteki keikō,” 72.

our lives and grasp social norms that are flowing through them.”⁹ Identifying this deep, dynamic law beneath the law might make it possible to return to Japan the stability it had lost.

In voicing these ideas, Japanese jurists joined an international chorus that had been growing louder since the end of the nineteenth century. First in France and Germany, but soon across the world legal scholars had begun to reimagine law in light of new concepts of society and the fact of human interdependence. “It has been understood,” wrote legal scholar Léon Duguit, “that man cannot have individual natural rights because he is by nature a social being, that the individual man is a pure creation of the mind, that the notion of law presupposes social life, and that if man has rights he can draw them only from the social milieu and not impose them on it.”¹⁰ In Eastern Europe, from his office at the University of Czernowitz, Eugen Ehrlich was developing the theoretical foundations for what he hoped would become an empirical legal science. Because, Ehrlich wrote, the “great mass of law arises immediately in society itself in the form of a spontaneous ordering of social relations,” the real subject of legal investigation ought not be legal statutes, which represented only the most visible fraction of the law. Instead, he implored scholars to address themselves directly to the “great mass” he called

⁹ Hirano Yoshitarō, “Shakai hōgaku to hōritsu kaishaku (shita),” *Chūō hōritsu shinpō*, no. 17 (1921): 8.

¹⁰ “On a compris que l’homme ne peut avoir de droits naturels individuels parce qu’il est par nature un être social, que l’homme individuel est une pure création de l’esprit, que la notion de droit suppose la vie sociale, et que si l’homme a des droits il ne peut les tirer que du milieu social et non les lui imposer.” Léon Duguit, *Les transformations du droit public* (Paris: A. Colin, 1913), xvi.

the “Social Order.”¹¹ Contemporary legal thought in Kenya, the United States, Palestine, Argentina, Brazil, South Africa, and other places used similar language.¹² By the interwar years there were few legal thinkers in the world who did not reserve a central position for society in their theories of law. Those who did not, like Hans Kelsen, often did so as conscious objectors to the new trend.¹³

“What man is he owes to the union of man with man,” the German jurist Otto von Gierke wrote in 1868, in the opening volume of his four-part work *Das deutsche Genossenschaftrecht*. Roscoe Pound, a towering figure in early-twentieth-century American law, reproduced this passage from Gierke in a 1912 article in the *Harvard Law Review*, in which argued for a sociological approach to law.¹⁴ Four years later Hozumi

¹¹ Eugen Ehrlich “The Social Order,” *Harvard Law Review* vol. 36, no. 2, Nov. 1922, 136. Ehrlich belonged to a loose collective of Germanic legal scholars who James E. Herget and Stephen Wallace, “The German Free Law Movement as the Source of American Legal Realism,” *Virginia Law Review* 73, no. 2 (March 1, 1987): 399–455; Katharina Isabel Schmidt, “Law, Modernity, Crisis: German Free Lawyers, American Legal Realists, and the Transatlantic Turn to ‘Life,’ 1903-1933,” *German Studies Review* 39, no. 1 (February 2016): 121–40.

¹² Kennedy, “Three Globalizations of Law and Legal Thought: 1850-2000.”

¹³ For a summary of Kelsen’s position, see Bart van Klink, “Facts and Norms: The Unfinished Debate between Eugen Ehrlich and Hans Kelsen,” in *Living Law: Reconsidering Eugen Ehrlich*, ed. Marc Hertogh (Oxford: Hart, 2009), 127–55.

¹⁴ “That the group or association has a real personality, that in fact and not merely in legal fiction it is more than an aggregation of individuals, that there is a group will, which is something real, apart from the wills of the associated individuals, that the law does not create but merely recognizes personality, exactly as in the case of the human being, and does not create but merely gives legal effect to the powers of action of the group or association, again exactly as in the case of the human being—these ideas of Gierke’s not only revolutionized theories of the juristic person but they compelled new theories of the greatest of all these groups, namely, the state.” Roscoe Pound, “The Scope and Purpose of Sociological Jurisprudence. [Concluded.] III. Sociological Jurisprudence,” *Harvard Law Review* 25, no. 6 (1912): 504–5.

Shigetō, the son of one of the main authors of Japan's civil code of 1898, cited the Gierke quotation from Pound for his *Outline of Legal Theory* (*Hōrigaku taikō*), the first Japanese overview of legal philosophy. In 1939, in a lecture he delivered to the Shōwa emperor, Hozumi claimed that he had made this maxim the center of his life's work.¹⁵ This process of transnational legal influence was repeated again and again. The years from the end of World War I until the close of the 1920s brought a swell of translation of foreign legal thought that surpassed anything that came before.¹⁶ It is one of the central claims of this chapter that the process of appropriation, translation, and reinterpretation was vital in conjuring new conceptions of the social into being in the opening decades of the twentieth century.

In retrospect it seems clear that the rise of the social in legal thought was part of a global shift away from the shibboleths of classical liberalism. Industrialization, urbanization, the rise of the administrative state, intensifying imperial competition, and the emergence of mass politics stressed existing legal frameworks to the point of rupture. They did not, however, dictate any single path accommodation or reform might take. Proposed solutions emerged at the nexus of a global exchange of ideas and local efforts to buffer certain goods and values from the market.¹⁷ Precisely because the social was such

¹⁵ Ōmura Atsushi, *Hozumi Shigetō: shakai kyōiku to shakai jigyō to o ryōyoku to shite* (Kyoto: Mineruva shobō, 2013), 5.

¹⁶ A substantial list is provided by Toshitani Nobuyoshi, "Nihon hoshakaigaku no rekishiteki haikai," in *Hoshakaigaku no genjō*, ed. Takeyoshi Kawashima (Tokyo: Iwanami shoten, 1972), 219.

¹⁷ As Daniel Rodgers has shown, a transatlantic exchange of ideas and policies was especially important in the formation of the American welfare state. Daniel T. Rodgers,

an ambiguous concept, its expression, the meanings it came to carry, the institutions that gave it form, and the practices that characterized it were dependent on specific contexts and struggles. This was certainly true in Japan, where the doyens of the legal profession constituted a small minority of academic elites.

Writing in 1925, Katayama Tetsu, who would become Japan's first socialist prime minister in 1947, credited the sea change in the academy to three figures: Makino Eiichi, Hozumi Shigetō, and Suehiro Izutarō.¹⁸ In this orbit were a handful of other legal scholars who built on their ideas and popularized them, including Hirano Yoshitarō, later a leading theorist of *Kōza-ha* Marxist history; Takayanagi Kenzō, a specialist in English law, who played an important role on the Japanese commission that evaluated constitutional revisions after World War II; Nakagawa Zennosuke, who was instrumental in reforming Japanese family law after 1945; Wagatsuma Sakae, probably the single most influential private law scholar from the end of the war into the 1970s. The works and thinkers these figures read and met, and how they interpreted them, proved decisive in shaping social jurisprudence in Japan across the interwar period.

Makino, Hozumi, Suehiro, and those around them did much to make interwar law, but they did not make it they as pleased. In spite of their influence in the academy, they enjoyed little support from the leading political parties or from the bureaucracy. In fact, it was largely due to the failure of the Diet to enact major—and from the perspective

Atlantic Crossings: Social Politics in a Progressive Age (Cambridge, Mass: Belknap Press, 1998), 28–29.

¹⁸ Katayama Tetsu, “Tōdai wo saran to suru Hatoyama Hideo ron,” *Kaizō* 7, no. 12 (1925): 86.

of the jurists, necessary—social policies in the early 1920s that they came to place so much weight on the role of legal interpretation. Makino was the pathfinder. Decades before his peers he insisted that “the interpretation of law must follow from an interpretation of society,” a maxim he believed would necessarily entail the limitation of rights.¹⁹ In the 1910s, amid a political transition after the death of the Meiji emperor and an eruption of social problems, a new generation of jurists rallied to his call to “socialize the law.” Still, Makino’s “free jurisprudence” (*jiyū hōgaku*), which called for a practically unlimited expansion of judicial discretion, was too free for his peers. Suehiro and Hozumi gave it structure, tethering Makino’s ideas to a new practice of case law study. Until then, legal scholarship revolved around the analysis of statutes, but by reading the decisions of the court as precedents, the social jurists effectively created a new source of law. In doing so, they hoped to capture and preserve the hand of history at work. The civil code was static and social legislation was slow to materialize, but the courts, it was believed, could compensate where other branches of the government had failed. This chapter charts their efforts. It begins with a brief overview of the development of the civil code, and then examines how a new concept of law took shape through a complex interplay of the appropriation of contemporary legal thought from abroad and the drive for social reform after the First World War.

The Civil Code

¹⁹ Makino Eiichi, “Kenri no ranyō,” in *Hōritsu ni okeru shinka to shinpo* (Tokyo: Yūhikaku shobō, 1925), 240.

The overthrow of the Tokugawa shogunate in 1867 brought down a political order that had lasted for over two centuries. The Meiji Restoration the following year only began the complex process of replacing it. Over the next two decades a profound transformation occurred during which reform was the rule rather than the exception. Politics, culture, society, as well as the lexicon in which people made sense of these matters, were remade.²⁰ During the same period the institutional and intellectual foundations of modern Japanese civil law were laid. Because the social jurists of the 1920s defined their program against this nineteenth-century edifice, understanding this shift it helps to understand what came before it.

Two primary objectives guided Meiji legal reforms: the quest for political autonomy and the consolidation of power in a modern state. Both argued for a institutional codification based on Western models. In the treaties of the late 1850s Japan had ceded its jurisdiction over parts of its territory and control of its trade policies to the United States, Great Britain, the Netherlands, Russia, and France. One of the preconditions for revising these unequal treaties was the creation of a legal system analogous to those of the North Atlantic states.²¹ So pressing was this concern that at one

²⁰ Saitō Tsuyoshi, *Meiji no kotoba: higashi kara nishi e no kakehashi* (Tokyo: Kōdansha, 1977).

²¹ For the process of treaty revision, see Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (Oxford: Oxford University Press, 2012), chap. 6; Turan Kayaoglu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (New York: Cambridge University Press, 2010), chap. 3. More recently, scholars have begun to explore the ways that Japan, as well as other non-Western states, used the terms of international law to their own advantage, promoting the spread of these conventions in the process: Douglas Howland, *International Law and Japanese Sovereignty: The Emerging Global Order in the 19th Century* (Palgrave Macmillan, 2016), chap. 3; Arnulf

point in the late 1880s the Foreign Ministry deemed it necessary to take control of drafting the new civil code.²² But as the clique of intellectuals tasked with carrying out these reforms realized, the institutions of Western law also represented impressive technologies of power that could be harnessed to the project of state building. Dispatched to France to master its legal system, a young student found the *Code civil* “truly unparalleled and without precedent.” Nothing he had seen in Japan came close to its meticulousness in elaborating sovereign authority.²³ To Etō Shinpei, a military hero appointed Minister of Justice in 1872, this utility outweighed any other concerns. Charged with developing a civil code for Japan, Etō proposed it could be accomplished as

Becker Lorca, “Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation,” *Harvard International Law Journal* 51 (2010): 475–552. Not only against Europe, Japan also mobilized international law to justify encroaching on neighboring states in East Asia: Alexis Dudden, “Mission Législatrice: Extraterritoriality and Japan’s Legal Mission to Korea in the Early Twentieth Century,” in *Settler Colonialism in the Twentieth Century: Projects, Practices, Legacies*, ed. Caroline Elkins and Susan Pedersen (New York: Routledge, 2005), 137–51; Robert Eskildsen, “Of Civilization and Savages: The Mimetic Imperialism of Japan’s 1874 Expedition to Taiwan,” *The American Historical Review* 107, no. 2 (April 1, 2002): 388–418.

²² Röhl, *History of Law in Japan since 1868*, 175.

²³ It has been suggested that the Japanese of this time misunderstood the civil code because they still conceived of law as they had under the Tokugawa regime: as an extension of administrative power. If anything the opposite is true. The rights granted under the code may have expanded the scope of individual freedoms and leveled, at least in theory, the castes and domains that had divided Japanese under Tokugawa rule. But these developments were coupled to the establishment of a new form of government, which claimed for itself the authority to grant these rights and to adjudicate them when disputes arose. Although by the nineteenth century civil codes had become associated with the private sphere and post-revolutionary liberty, Kurimoto Joun’s perception was largely in keeping with the initial codifications commissioned in the eighteenth century by Enlightened despots. John O. Haley, *Authority without Power: Law and the Japanese Paradox* (New York: Oxford University Press, 1991), 74.

simply as translating the French *Code civil* and retitling it.²⁴ This was more than a careless quip. Under Etō's guidance the first two drafts of the Japanese civil code were slightly modified translations.²⁵

Etō and others had grasped something essential. One of the most important functions of modern civil codes was to supplant other sources of law. While ancient precedents for modern codes could be found in the sixth-century Justinian *Corpus iuris civilis*, their immediate origins lay in the eighteenth century, when enlightened despots commissioned jurists to bring order to the heterogeneous legal topography of early modern Europe. Before codification the law was a matter of learned interpretation that required working through multiple, disparate sources—Roman, ecclesiastic, manorial, municipal, precedential, custom—as well as reams of doctrinal commentary. Modern civil codes sought to unify this patchwork, update it, and codify it into a system that would become the sole source of law governing private affairs. This centralized authority to determine the law. Without recourse to precedent, custom, or reason, the role of the judge was reduced, as Montesquieu wrote, to “merely the mouth which pronounces the words of the law.”²⁶ The French *Code civil*, the most important civil code of the

²⁴ Asako Hiroshi, “Kyōto Saibansho No Secchi,” in *Meiji Zenki No Hō to Saiban*, ed. Reiji Hayashi, Shirō Ishii, and Yoshimitsu Aoyama (Tokyo: Shinzansha, 2003).

²⁵ Röhl, *History of Law in Japan since 1868*, 174.

²⁶ R. C. van Caenegem, *An Historical Introduction to Private Law* (New York: Cambridge University Press, 1992), 123.

nineteenth century, epitomized this belief. It contained no statement of general principles or guidelines because it assumed that the meaning of its statutes was transparent.²⁷

In Etō's eagerness to adopt the legal trappings of a modern state, he seems to have discounted the content of those laws. This is surprising, for if a civil code performed a centralizing function, it was also an instrument of social reform. Codifications and compilations reconfigured the essential elements of economic life, they restructured gender and familial relationships, and, in instituting a "private sphere" in which the state was understood to have no direct interest, they established a liberal paradigm in which an important set of activities and relationships were construed as outside the purview of the state's interests.²⁸ Given these radical implications, it was perhaps inevitable that codification would not be as simple as initially projected. Etō was beheaded in 1874 after taking part in a failed uprising against the new state, and those who took over the reins were less sanguine about the applicability of foreign laws to Japan.

From the mid-1870s there commenced searching inquiries into where to draw the boundary between the universal and the irreducibly native.²⁹ Yet no real alternatives to the French *Code civil* emerged. The 1877 *Collection of Civil Customs* and the 1880 *National Collection of Civil Customs* offer clues as to why. The guiding belief, as the Confucian scholar Washitsu Nobumitsu wrote in his introduction to the first volume,

²⁷ Ibid., 150.

²⁸ Isabel V. Hull, *Sexuality, State, and Civil Society in Germany, 1700-1815* (Ithaca: Cornell University Press, 1996), chap. 10.

²⁹ Shusei Ono, "Comparative Law and the Civil Code of Japan (1)," *Hitotsubashi Journal of Law and Politics* 24 (1996): 37–38.

was that the main difference between Japanese law and the laws of Europe and America was codification.³⁰ On this premise surveyors were dispatched across the archipelago to collect local material from which to fashion a new civil code. The result was nearly 700 pages of customary practices of unmanageable diversity, slotted uneasily into a legal framework derived from the French code. For example, where the French version began with a section of laws that defined legal subjecthood and familial relationships, the corresponding customs recorded by the surveyors dealt exclusively with the Tokugawa status system, above all the definition and boundaries of the pariah groups, the *eta* and *hinin*.³¹ Property offered another case of fundamental incongruity. In customary practice, land did not exist in the abstract. Rice paddies were distinguished from dry fields, which were distinguished from tea plantations. Moreover, ownership was suspended in a web of relationships that differed depending on the region. In the area around Nara and Kyoto, a homeowner was reportedly expected to pay “a little money” to his neighbor if he wanted to cut a new window into his house. No such custom existed in Shiga prefecture.³² At the outset of the 1870s the Meiji government had accepted political equality and private property. Once these principles were accepted, the legal tradition available for use was shattered into fragments. It is therefore not surprising that these collections of customary practices were never used.³³

³⁰ *Minji Kanrei Ruishū* (Shihōshō, 1877), 1–2.

³¹ Ikuta Kuwashi, ed., *Zenkoku minji kanrei ruishū* (Shihōshō, 1880), 1–19.

³² *Ibid.*, 430, 555.

³³ Röhl, *History of Law in Japan since 1868*, 174.

Even as skeptics found fault with specific aspects of the new laws, the alternatives they proposed still tended to corroborate the general understanding of modern civil codes. A good example is the arch-conservative Hozumi Yatsuka's attack on the first version of a complete civil code. In the last years of the 1880s, Gustav Boissonade, a French legal scholar retained by the Ministry of Justice, had produced a complete draft of a Japanese civil code that was submitted to the Diet and promulgated in 1890. Before it went into effect, Hozumi decried it for its "excessive individual orientation."³⁴ In what turned out to be the opening salvo in an acrimonious debate about the new code, he accused the draft of propagating a fundamentally Christian worldview in which all individuals were equal before God. This equality, he felt, threatened Japan's traditional order based on familial piety and blood.³⁵ While Hozumi's attack on the proposed civil code is often portrayed as the product of hidebound traditionalism, it was in keeping with common tendency in nineteenth-century legal thought to associate national particularity with family, while property and contract law were viewed as an expression of universal truths.³⁶ Despite his condemnation of individualism, it never occurred to him to attack

³⁴ Hozumi Yatsuka, "Minpō idete chūkō horobu," in *Hozumi Yatsuka shū*, ed. Ryūichi Nagao (Tokyo: Shinzansha, 2001), 110.

³⁵ *Ibid.*, 113.

³⁶ Janet Halley, "What Is Family Law: A Genealogy Part I," *Yale Journal of Law & the Humanities* 23, no. 1 (2011): 1–109; Janet Halley, "What Is Family Law: A Genealogy Part II," *Yale Journal of Law & the Humanities* 23, no. 2 (2011): 189–294; Duncan Kennedy, "Savigny's Family/Patrimony Distinction and Its Place in the Global Genealogy of Classical Legal Thought," *The American Journal of Comparative Law* 58, no. 4 (October 1, 2010): 811–41.

private property and freedom of contract. He worried only about overturning the balance of power within the family, which he saw as the foundation of political order writ large.

The redraft of the civil code supports this reading. As a result of Hozumi's philippic and the debates that followed, the enactment of Boissonade's civil code was suspended, and a team of Japanese legal scholars from the law faculty at Tokyo University was charged with drafting a new version. They abandoned Boissonade's draft, modeled directly on the French *Code civil*, and produced one based on German law. It began with a chapter on General Provisions (*sōsoku hen*), followed by a chapter that detailed real rights (*bukken*), or property law, and a third on obligations (*saiken*), which dealt largely with issues of contract. The final two chapters concerned the family (*shinzoku*) and inheritance (*sōzoku*). Behind this scaffolding stood a complex blend of legal content. Property law retained a French hue, while the law of obligations was widely sourced, including elements of Swiss and German law.³⁷ Laws concerning the family and inheritance were substantially revised to better reflect what, as viewed from the halls of the Faculty of Law, was seen as Japanese tradition. In light of how often these revisions have been blamed for the creation of the patriarchal family, or household (*ie*) of imperial Japan, it is worth noting that the key provision that subjected married women to the will of their husbands, Article 14, was only a slightly modified version of one that Boissanade, following French precedents, had included in his draft. In this sense Japanese patriarchy

³⁷ John O. Haley and Daniel H. Foote, "Judicial Lawmaking and the Creation of Legal Norms in Japan: A Dialogue," in *Legal Innovations in Asia: Judicial Lawmaking and the Influence of Comparative Law*, ed. John O. Haley and Toshiko Tanaka (Northampton, MA: Edward Elgar, 2014), 72.

rested in part on Catholic legal foundations.³⁸ Looking back on the controversy that his brother had initiated in the early 1890s, Hozumi Nobushige recalled that in the end it was less a debate about the applicability of Western law in Japan than it was a fight between factions of Western-law specialists.³⁹

The creation of a legal system required more than writing laws. As important as the determination of statutes was the formation of an interpretive regime that stabilized its meaning. By the latter half of the nineteenth century, the models available were converging around a view of law as a self-contained practice of textual interpretation. In France the legal academy was dominated by an exegetic tradition that sought to remove from law all factors beyond the statute.⁴⁰ German jurisprudence was more fragmentary, an artifact of the patchwork political settlement that existed until the empire was unified in 1871. At the beginning of the nineteenth century, Friedrich Karl von Savigny had laid out a powerful case against codification in his epochal pamphlet *Of the Vocation of Our Age for Legislation and Jurisprudence*. Law, he claimed, was like language, an accretion of time and the collective energies of the nation. To try to contain it in a finite body of rules was thus an act of excessive hubris.⁴¹ But the Pandectists who heeded Savigny's call to revive the Roman legal tradition ended up overturning it. In their efforts to distill the

³⁸ Hoshino Eiichi, "Nihonminpō ni ataeta Furansu minpō no eikyō," in *Minpō ronshū*, vol. 1 (Tokyo: Yūhikaku shobō, n.d.), 69–149.

³⁹ Hozumi Nobushige, *Hōsō yawa* (Tokyo: Iwanami shoten, 1980), 331.

⁴⁰ Article 5 of the *Code civil*, for example, prohibited judges from pronouncing general rulings in cases submitted to them. Caenegem, *An Historical Introduction to Private Law*, 150.

⁴¹ James Q. Whitman, *The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change* (Princeton: Princeton University Press, 1990), 100.

corpus of ancient legal texts into a practicable body of law, they devised a doctrinal edifice that, if anything, exceeded French theory in its formalism.⁴² Contemporary American legal thought followed a similar process of formalization, as lawyers and judges sought to refine and reduce the law to a rational set of organizing principles, categories, and general rules.⁴³

Japanese jurists never went as far as their most doctrinaire Western counterparts. Never did they presume that law was autonomous from moral and political consideration, nor that custom had no place in legal calculations. Instead, the most common understanding of law viewed it as an expression of state authority and a form of necessary discipline. As Ume Kenjirō wrote in one of the earliest commentaries on the civil code passed in 1898: “Law must dominate society.”⁴⁴ The result was that even as this first generation of jurists subscribed to no particular dogma of the sanctity of the law, they had neither the framework nor the inclination to question the validity of the civil code as a whole.

The advent of the social jurisprudence in the 1920s changed this, but before it could, earlier conceptions of society needed to erode. As early as a decade before the civil code became law, society had emerged as a leitmotiv in Meiji legal thought. Yet in contrast to the connotations of mutual obligation and organic order it carried after World War I, the late nineteenth-century concept of society functioned primarily as an apologia

⁴² Ibid., chap. 6.

⁴³ Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), 11–14.

⁴⁴ Ume Kenjirō, *Minpō sōsoku dai 1-3 shō* (Tokyo: Hōsei daigaku, 1907), 7.

for the state. Negotiated during the years of “civilization and enlightenment” in the mid-1870s, when Japanese intellectuals zealously consumed and translated Western philosophy, the word society had only just solidified conceptually and lexically in Japanese discourse when it was welded to Victorian stage theories of development and German *Staatslehre*. The conservative Katō Hiroyuki worked out the archetype of this formula in his 1882 *A New Theory of Human Rights*. Reacting against the claims of natural right from the intellectual leaders of the People’s Rights Movement, Kato located the origin of the law in a brutal process of “social evolution,” a phrase he plucked from Herbert Spencer. In Katō’s view, the baseline human condition was a violent struggle of all against all, which over time gave rise to the domination of the many by the few. Only with the establishment of a state was law made possible, and only with its strict enforcement were humans able to impose a higher order on a natural world governed solely by physical strength.⁴⁵

Hozumi Nobushige concurred. “The reason states have laws and regulations,” wrote Hozumi, one of three main authors of the 1898 Civil Code and the most important legal thinker of his day, was because “there is no inherent Right in society.”⁴⁶ At fourteen,

⁴⁵ Winston Davis, *The Moral and Political Naturalism of Baron Katō Hiroyuki* (Berkeley, CA: Institute of East Asian Studies, 1996), chap. 3.

⁴⁶ Hozumi Nobushige, “Keibatsu no ken wo ronzu,” in *Ibun shū*, vol. 1 (Tokyo: Iwanami shoten, 1922), 198. For more on Hozumi Nobushige, see Nagao Ryūichi, *Nihon hōshisōshi kenkyū* (Tokyo: Sōbunsha, 1981), chap. 2; Ishizawa Ayayuki, “Hozumi Nobushige no hōritsu shinkaron ni kan suru ichi kōsatsu: Hozumi Nobushige no hō ninshiki,” *Aomori hōsei ronsō*, no. 15 (n.d.): 65–78; Matsuo Keiichi, “Hozumi Nobushige,” in *Nihon no hōgakusha*, ed. Toshitaka Ushiomu and Nobuyoshi Toshitani (Tokyo: Nihon Hyōronsha, 1975), 55–72.

Hozumi had been sent to the precursor of Tokyo University to study foreign language and law. In 1876 he was one of a group of some ten students who received a commission from the Ministry of Education to pursue his education abroad. After three years at the University of London, where he became the first Japanese student to take a Ph.D. in law from a foreign university, he traveled to Berlin for another several months of study. His legal education instilled in him a Darwinian view of the world. By itself society meant merely the “struggle for existence” and “natural selection.” It fell to the state to discipline the social body, and the value of this order was such that even unjust laws had to be observed.⁴⁷

Makino Eiichi and the “Socialization of Law”

More than anyone it was Makino Eiichi who cobbled together the arguments and ideas that wed legal thought to a new conception of society, one that was not a chaotic collection of antagonistic individuals but an order unto itself. A towering figure during his active years, a period that spanned the first half of the twentieth century, Makino is remembered today, if at all, mainly as a progressive criminal law reformer.⁴⁸ He was that, but considering that Makino was also responsible for introducing so many concepts that remain central in civil and constitutional law in Japan, this is a considerable demotion.⁴⁹

⁴⁷ Ishizawa, “Hozumi Nobushige no hōritsu shinkaron ni kan suru ichi kōsatsu: Hozumi Nobushige no hō ninshiki,” 67–68.

⁴⁸ For example, see Tokoro Kasuhiko, “Makino Eiichi,” in *Nihon no hōgakusha*, ed. Toshitaka Ushiomu and Nobuyoshi Toshitani (Tokyo: Nihon hyōronsha, 1975), 257–74.

⁴⁹ Among the most notable are the abuse of rights (*kenri no ranyō*), the notion of the specific validity of legal rulings (*gutaiteki datōsei*), and the right to life (*seizonken*),

In part his diminished legacy can be attributed to Makino's penchant for abstraction and to the pronounced Hegelian streak in his thought. More than the details of legal doctrine, he thought in terms of consciousness, morality, and the inevitability of progress, which to him seemed permanently on the brink of uniting fact and value. As a consequence, his work is almost unrecognizable as legal scholarship today. Even among his peers his ideas were often seen as outré. Perhaps even more damning, though, was Makino's impassioned defense of the family system after 1945, which tarnished him with a reputation as an inveterate conservative.⁵⁰ There is irony in this label. Up until the 1940s Makino could claim to be the most radical scholar on the law faculty at Tokyo Imperial University. He had always been sympathetic to the socialists, although he rejected their class politics, and he consistently advocated for the abolition of private property. It was Makino in fact who first suggested that socialism could be brought about through the practice of legal interpretation.⁵¹

Makino arrived at a version of these ideas early in his career. Born in 1878 in the mountains of Gifu Prefecture, he entered the Faculty of Law at Tokyo Imperial in 1899, one year after the promulgation of the Civil Code. Codification had consumed the faculty's attention for much of the 1890s, but with completion in view, many had turned

which is regarded as the legal foundation of the Japanese welfare state, as guaranteed by Article 25 of the postwar Japanese Constitution.

⁵⁰ For an example of criticism from Makino's former students, see Kazahaya Yasoji, "Makino hōgaku e no sōhihan (shiron)," *Hōgaku shinpō* 49, no. 8 (1977): 73–83; Tokoro, "Makino Eiichi."

⁵¹ Makino Eiichi, "Shakaishugiteki shisō no hōritsu kōsei: Morito gakushi no 'Zenrōdōshūekiken shiron,'" *Hogaku shirin* 26, no. 12 (1924): 87.

to what was already being called the “social question.” These concerns issued from multiple sources. A series of prominent strikes, most notoriously those at the Ashio copper mine, as well as the establishment and immediate suppression of Japan’s first socialist party in 1901 raised the specter of a politics qualitatively different from the struggle between the popular parties and the oligarchy that had dominated the previous years. Although its magnitude was still too small to be anything more than symbolic, class politics had become a reality.⁵² More generally, the 1890s marked a turning point for Japan. Since the Restoration the prevailing concern of Meiji politicians and intellectuals had been the establishment of national unity, defined primarily in terms of what the country lacked. The promulgation of the Meiji constitution in 1889, the establishment of the national Diet in 1890, and the abrogation of the unequal treaties in 1899 formalized the national polity and imperial rule, and secured Japan’s legal independence. In doing so, they exposed how partial these original institutional priorities had been.⁵³

Within the Faculty of Law there was little ambiguity about the source of this rhetoric. It came from a young professor of economics, Kanai Noburu and a growing clique of scholars who comprised the Japanese Social Policy Association (*Nihon shakai*

⁵² Japan’s first socialist party declared its formation on May 20, 1901, to be disbanded within 12 hours under the 1900 Public Peace Police Law. Peter Duus, “Socialism, Liberalism, and Marxism, 1901-1931,” in *The Twentieth Century*, ed. Peter Duus, vol. 6, *The Cambridge History of Japan* (New York: Cambridge University Press, 1997), 620.

⁵³ Soeda Juichi put it succinctly: “Once political issues are settled, social issues necessarily arise.” Quoted in Carol Gluck, *Japan’s Modern Myths: Ideology in the Late Meiji Period* (Princeton: Princeton University Press, 1985), 27.

seisaku gakkai) which he had founded.⁵⁴ Kanai styled the group after the *Verein für Sozialpolitik*, the central association of German economics in the late-nineteenth century and a major source for social policy for would-be reforms around the world.⁵⁵ During four years of study in Germany in the late-1880s, Kanai had worked with the founders of the *Verein*, Gustav Schmoller and Adolf Wagner, and had adopted their view that state intervention was necessary to manage the market economy and prevent revolution from the left.⁵⁶ Like them, he and association members lobbied for a number of social policies. Japan's economy at the turn of the century was overwhelmingly agricultural, but by adopting factory regulations, tenant protections, poor relief, compulsory insurance, credit cooperatives, and tax reforms to ease the burden of low-income groups, they hoped that Japan could head off major strife before it took root.⁵⁷ As always when Japanese intellectuals borrowed from foreign precedents in order to plan their country's future, Kanai and his cohort did not simply copy. He and association members were proponents of "thought guidance" (*shisō gendō*), which formed the spine of the Social Policy Association's strategy for rural Japan. These ideas would comprise the main approach the Japanese government took to the social problem, hardening in the 1910s into a

⁵⁴ Kenneth B Pyle, "Advantages of Followership: German Economics and Japanese Bureaucrats, 1890-1925," *Journal of Japanese Studies* 1, no. 1 (Autumn 1974): 127-64.

⁵⁵ Rodgers, *Atlantic Crossings*, 93-94.

⁵⁶ Pyle, "Advantages of Followership: German Economics and Japanese Bureaucrats, 1890-1925," 141-43.

⁵⁷ Toshitani, "Nihon hoshakaigaku no rekishiteki haikai," 201.

conservative framework that cultivated frugality, self-reliance, and communal support networks that did not require the allocation of national funds.⁵⁸

Makino's ideas about law were formed against this backdrop. It is not clear when he took notice of the social question, but it was no later than 1902, when his advisor, Hozumi Nobushige, dedicated his annual seminar to studying it.⁵⁹ Makino and the other students in the course were given classic tracts from authors like Pierre-Joseph Proudhon and Ferdinand Lassalle and instructed to examine them not as models but as candidates for cooption.⁶⁰ The paper Makino turned in, later published in the flagship journal of Tokyo Imperial's law department, was a piece of juvenilia that showed him struggling to reconcile the "objective" reality of law, characterized by constant conflict between individual interests, and the "social ideal" of socialism, which he envisioned as the "social ideal" of "absolute equality." In light of the direction his thought would later take, though, it was telling that he considered that one solution might be a practice of legal interpretation that sought to "harmonize" the two spheres.⁶¹

Makino made this connection via his study of French law. In graduate school he had started reading the work of Raymond Saleilles, François Géný, Léon Duguit, and

⁵⁸ Sheldon M. Garon, *Molding Japanese Minds: The State in Everyday Life* (Princeton: Princeton University Press, 1997); Kenneth B Pyle, "The Technology of Japanese Nationalism: The Local Improvement Movement, 1900-1918," *The Journal of Asian Studies* 33, no. 1 (1973): 51–65.

⁵⁹ Hozumi Nobushige, "Furansu Minpō No Shōrai," in *Hozumi Nobushige Ibunshū*, vol. 3 (Tokyo: Iwanami shoten, 1934), 18. Quoted in, Nagao, *Nihon hōshisōshi kenkyū*, 61.

⁶⁰ Shiraha Yūzō, *Keihō Gakusha: Makino Eiichi no minpōron* (Hachijōji: Chūō daigaku shuppanbu, 2003), 16–18; Ritani, "Nihon hoshakaigaku no rekishiteki haikai," 196.

⁶¹ Makino Eiichi, "Shakaishugi to hōritsu," *Hōgaku kyōkai zasshi* 21, no. 1 (1903): 70–76.

Joseph Charmont, as well as other French jurists who made their names in the 1890s as critics of *laissez faire*. Though each jurist had his own hobbyhorse, generally their ideas about law began from the broad observation of interdependence and the belief that industrialization and urbanization necessitated new forms of law. Politically, they were aligned with the Radicals, who, having gained an electoral majority in the early 1890s, were pushing through factory laws and other social legislation. Within their discipline, these French thinkers defined themselves against the exegetic tradition that had dominated the academy since the promulgation of the *Code Civil*. They sought the sources of law in fundamental social structures and forces rather than in the statutes of the Code.⁶² In a way they resembled Marxists to a degree, but they were not materialists. They tended to imagine society in organic terms that echoed the thought of Émile Durkheim, a personal acquaintance of a few of these figures.⁶³ With a distinctive mix of descriptive and prescriptive analysis, they assumed a necessary relationship between the law and social cohesion, such that the legal system and its change over time were understood to somehow respond to social “needs.” Joseph Charmont’s assertion that “the law results, as a natural consequence, from the intervention exercised by society in its own interest, an intervention destined to terminate or to prevent conflicts” was in this sense typical, not least in its attribution to society of a baseline harmony and a subjective

⁶² Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (New York: Cambridge University Press, 2004), 236–37; J. E. S. Hayward, “The Official Social Philosophy of the French Third Republic: Léon Bourgeois and Solidarism,” *International Review of Social History* 6, no. 1 (April 1961): 19–48.

⁶³ Best known is the friendship between Léon Duguit and Durkheim.

will.⁶⁴ The political implications of these ideas were spelled out most clearly by the statesman Léon Bourgeois. In an 1896 pamphlet, he outlined a program for state intervention, collective action, and limitations on rights in proportion to the social obligations that, according to Bourgeois, all people were born into.⁶⁵

If for the French, industrialization formed the historical context that clarified the necessity of a social understanding of law, for Makino, who was following their debates from afar, it was the advent of the ideas themselves. He put forward this theory in a 1904 article, “The Abuse of Rights.” The term came from recent French legal discourse, where it had been used to restrict private property and freedom of contract. The question Makino posed was whether any limiting principle could be deduced for what constituted an abuse of rights. After reviewing its treatment by French jurists and its application in a series of recent legal decisions, he concluded that no such limitations existed.⁶⁶ The abuse of rights was ambiguous and lacked a clear standard for application. Yet, in a move that would become typical of his style of argumentation, Makino maintained that the ambiguity surrounding the abuse of rights was best understood as evidence of its historical nascence. The political and social thought of the nineteenth century was built on a principle of individual liberty inherited from Enlightenment philosophy, he

⁶⁴ Alfred Charmont, “Recent Phases of French Legal Philosophy,” in *Modern French Legal Philosophy*, trans. Franklin Scott and Joseph Chamberlain (Boston: Boston Book Co., 1916), 67–68.

⁶⁵ Léon Bourgeois, *Solidarité* (Paris: Armand Colin et Cie, 1896); Hayward, “The Official Social Philosophy of the French Third Republic,” 28–29.

⁶⁶ Among the jurists Makino directly addressed were Marcel Planiol, Raymond Saleilles, Joseph Charmont, and Léon Géný.

explained. Accordingly, law had been conceived of as a system for limiting the scope of legitimate actions, and once these limits had been fixed in law, any behavior within those limits was legal, no matter the intentions of a right holder in exercising his right. Yet this traditional understanding of rights was giving way to a more holistic theory. Against the individualism of the past, “new ideas about the group” had emerged, while the “notion of community” (*kyōdō kannnen*) was “becoming clearer by the day.” “At this juncture,” Makino continued, “we may say that the problem of the abuse of rights is the clearest reflection of the massive transition our thinking about society is currently undergoing.”⁶⁷

Makino was only partially correct. The idea of an abuse of rights was quick to find acceptance among Makino’s colleagues and among judges.⁶⁸ The expansion of the bureaucracy over the next decade and large-scale urban migration after the Russo-Japanese War (1904-05) made it an appealing tool for a judiciary in search of greater room for discretion.⁶⁹ Makino’s philosophy of history, however, did not receive the same attention. In 1904 he was hired to teach criminal law at Tokyo Imperial. In his lectures he presented law as the manifestation of a process of “social evolution” that, having progressed from clan-based society, through the absolutist state, and to “a humanitarian period,” was now verging on an epoch where science and morality were converging.⁷⁰ But for the next decade, these ideas found little purchase among his peers. Instead, a formal

⁶⁷ Makino, “Kenri no ranyō,” 238.

⁶⁸ After 1945, its success as doctrine was enshrined as one of the fundamental principles of the revised civil code. Article 1, Section 3.

⁶⁹ Toshitani, “Nihon hoshakaigaku no rekishiteki haikai,” 195.

⁷⁰ Makino Eiichi, *Keihō sōron (kōgi an)*, 2nd ed. (Tokyo: Hosei daigaku, 1909), 7.

style of jurisprudence inspired by late-nineteenth century German legal science came to dominate the department. Led by Kawana Kaneshirō and Hatoyama Hideo at Tokyo Imperial, and Ishizaka Otoshirō at Kyoto Imperial University, this approach emphasized internal coherence and systematization.⁷¹

The breakthrough for Makino can be dated to his publication of his 1916 “The Socialization of Law” in the *Central Review* (Chūō kōron), a general interest magazine whose rise to prominence in the 1910s paralleled the emergence of a new middle class of urban professionals and intellectuals.⁷² Given the difference in reception, it is remarkable how similar this article was to his earlier essays. As before, the main point of reference was French legal thought. The title was borrowed from recent works by Léon Duguit, which Makino had read during a European sabbatical in 1910.⁷³ As before, its central premise was a teleological progression in which an age of individualism was giving way to what Makino referred to as the “awakening of society.”⁷⁴ And as before, Makino traced this transformation through the law, especially new legal concepts, which he viewed as signposts pointing toward an emergent social ethos. He had developed these ideas somewhat further. He spoke now of the emergence of a kind of “self-other” (*jita*)

⁷¹ Hoshino Eiichi, “Nihon no minpō kaishakugaku,” in *Minpō ronshū*, vol. 5 (Tokyo: Yūhikaku shobō, 1986), 227–28.

⁷² Jung-Sun N. Han, *An Imperial Path to Modernity: Yoshino Sakuzo and a New Liberal Order in East Asia, 1905-1937* (Cambridge, Mass: Harvard University Asia Center, 2013), 22–23.

⁷³ Makino Eiichi, “Pari yori (shōzen),” *Hōgaku kyōkai zasshi* 30, no. 11 (1911): 138–40.

⁷⁴ Makino Eiichi, “Hōritsu no shakaika,” *Chūō kōron* 31, no. 8 (August 1916): 58.

intersubjectivity that welded rights claims to reciprocal obligations.⁷⁵ Yet these amendments only refined the arc of history as Makino had presented it earlier. The basic point stood: Japan's legal system was undergoing a transformation. What had once constituted liberty needed to be replaced by a new form of freedom, and the concept of individual rights needed to be refigured as entitlements, recognized only to the extent that they served public interest (*kōeki*).⁷⁶

“The Socialization of Law” departed from Makino's previous writings in its historical orientation and the outsize emphasis it placed on the role of legal interpretation as the agent of change. In 1904 Makino had styled himself as the herald of a new social age, uncovering signals of its coming in the writings of French jurists. In 1916 he undertook to demonstrate, using Japanese legal sources, that this age was already dawning. The legal system, he wrote, was being “socialized,” even “while the law has remained the same (or nearly the same) as it was in the past.”⁷⁷ This was possible because as society evolved, morality changed with it, and through interpretation—“the application (*unyō*) of laws realized under past ideas in accordance with contemporary ideas”—the legal system was constantly remade in the image of the present.⁷⁸ Makino pointed to the proliferation of “special laws” (*tokubetsu hō*), which supplemented the legal system laid down in the 1890s. The Foundation Mortgage Law (*Zaidan teitō hō*) and the Secure

⁷⁵ Ibid., 82.

⁷⁶ Ibid., 63.

⁷⁷ Ibid., 64.

⁷⁸ Ibid., 79.

Bonds Trust Act (*Tanpotsuki shasai shintaku hō*) streamlined business financing by bypassing the large sections of civil law concerning property and contract. Other new laws governing mining and railroads altered the basic structure of property rights, making ownership contingent on productive use.⁷⁹ But more important than these legislated changes was the emergence of new interpretive principles that had filtered into Japanese law and were reshaping the meaning of rights and liability. Some, like the abuse of rights, could be traced to Makino's own scholarship. Others, like the concept of strict liability (*mukashitsu sekinin*), by which a party could be held liable for damages even when there was no legal fault, had been introduced recently by other scholars.⁸⁰ In all cases Makino presented them as if they had emerged organically, cultivated by history itself and the evolution of moral sentiments. Jurists needed to keep two things in mind in order to grasp "the essence of law," he wrote. Law was "a product of history," and it was a "social norm."⁸¹ For Makino these were two sides of the same coin.

Popularization

By the early-1920s the "socialization of the law" had become, in the words of Rōyama Masamichi, "a slogan for contemporary jurisprudence itself" worthy of almost religious

⁷⁹ *Ibid.*, 62–62.

⁸⁰ *Ibid.*, 64–65; Okamatsu Santarō, "Mukashitsu songai baishō sekinin ron (jō)," *Kyōto hōgakkai zasshi* 10, no. 9 (1915): 2–19.

⁸¹ Makino, "Hōritsu no shakaika," 77.

devotion.⁸² In part this was a matter of good timing. “The Socialization of Law” hit the presses just as a swell of popular agitation for reform was coming to a head. Beginning with the 1905 Hibiya riots, sparked by the perception of Japan having accepted unfavorable terms in the Portsmouth Treaty that ended the Russo-Japanese War, the lower and middle classes participated in a string of often violent protests against rising taxes and the government’s failure to deliver on their growing expectations of the state.⁸³ The death of the Meiji emperor in 1912 united this current of popular anger with an elite-led movement against the bureaucrats, oligarchs, and military leaders that ruled the country. Intellectuals and politicians who had tempered their criticisms out of deference for the aged monarch became vocal in demanding fundamental reforms.

Liberal professors at Tokyo Imperial emerged as some of the most influential advocates for change. An incendiary challenge to the status quo came from Minobe Tatsukichi, at the time a soft-spoken constitutional law specialist. In a series of lectures he gave to middle school teachers in the summer of 1911, Minobe argued that sovereignty resided in the legal person of the state, rather than in the emperor, as the constitution stipulated. Minobe’s interpretation was as abstruse as the German constitutional theory he appropriated to formulate it, yet at its core it was a case for parliamentary rule that lent

⁸² Rōyama continued, “We now understand that ‘the socialization of law’ means nothing other than the unceasing process by which unconscious law evolves into conscious law. We have learned that it is the action of specialization that, moving ever forward, develops toward an infinite, objective existence. Or to rephrase, one could say that law returns to its inner self.” Rōyama, “‘Hōritsu no shakaika’ ni tsuite,” 5.

⁸³ Gordon, *Labor and Imperial Democracy in Prewar Japan*, 26–29.

academic legitimacy to the emergence of party cabinets at the end of the 1910s.⁸⁴ What Minobe's theory did for constitutional law, Yoshino Sakuzō did for politics more generally. In a celebrated 1916 essay on the "central meaning" of constitutional government, Yoshino, a Christian and a liberal, issued a clarion call for popular rule. Though he affirmed imperial sovereignty, Yoshino argued that the form of the state was not so important as its purpose. Historical progress and the fact that Japan had established a constitution, regardless of its specific content, meant that a government that existed for the sake of the people (*minponshugi*) was destiny.⁸⁵ Yoshino and his Whiggish reading of the moment became lightning rods for a broad-based reform movement that was taking shape. At his public debate with representatives of the rightwing Genyōsha on November 23, 1918, the crowds spilled into the streets for blocks around the venue in Tokyo's Kanda district. Such was the enthusiasm for Yoshino's message.⁸⁶

Makino's ideas were buoyed on the same currents. At Tokyo Imperial, many of the students who gravitated to Minobe and Yoshino's progressive vision of the Japanese polity saw Makino as their analogue in the fields of criminal and civil law.⁸⁷ So did Uesugi

⁸⁴ Frank O. Miller, *Minobe Tatsukichi: Interpreter of Constitutionalism in Japan* (Berkeley: University of California Press, 1965), chap. 5; Miyazawa Toshiyoshi, *Tennō kikansetsu jiken: shiryō wa kataru* (Tokyo: Yūhikaku shobō, 1970).

⁸⁵ Han, *An Imperial Path to Modernity*, 80–88; Peter Duus, "Yoshino Sakuzō: The Christian as Political Critic," *Journal of Japanese Studies* 4, no. 2 (July 1, 1978): 301–26.

⁸⁶ Later Yoshino would claim that his essay was nothing special. It had merely touched on the major problems of the day and presented "some solutions indicated by the advanced countries of Europe." Quoted in Iida Taizō, "Yoshino Sakuzō: 'Nashonaru demokuratto' to 'shakai no hakken,'" in *Nihon no kokka shisō*, ed. Shigeo Komatsu and Hiroshi Tanaka, vol. 2 (Tokyo: Aoki shoten, 1980), 14.

⁸⁷ Wagatsuma Sakae, "Makino Eiichi sensei no omoide," *Shosai no mado*, no. 189 (1970): 10.

Shinkichi, Minobe's rightwing opponent in fiery debates about the meaning of the constitution that spanned much of the 1910s. Against Minobe's secular reading of the state, Uesugi vigorously defended the theocratic interpretation of the constitution that, until Minobe's intervention, had passed as dogma.⁸⁸ Uesugi felt the same ire for Makino's notion of legal interpretation and, as a student later recalled, decried it in one lecture as a radical, "revolutionary idea." When Makino got word of what Uesugi was saying, he burst into the hall to defend himself.⁸⁹

Perhaps the epitome of this confluence between Makino's ideas and the political ferment of the age was the *Central Legal Review* (Chūō hōritsu shinpō). Founded in 1921 by two former students of the Faculty of Law—Hoshishima Nirō, the son of a prominent politician, and Katayama Tetsu, later Japan's first socialist prime minister—the *Review* could trace its lineage directly to the reform movement of late 1910s. Its precursor was the Central Legal Aid Society (*Chūō hōritsu sōdan sho*) that Katayama established in 1918 in a spare room at the headquarters of Yoshino Sakuzō's Christian youth group. The idea came from the legal aid societies that were cropping up in American cities around the same time. Katayama's organization shared with them the mission of lowering the bar of access to the justice system, but because of the timing, much of its work was done on behalf of laborers, sharecroppers, and wives trying to claim some legal control over their being. The political sympathies of its members no doubt also contributed to this bent. On

⁸⁸ In English, the major work on Hozumi Yatsuka's constitutional theory is Richard H. Minner, *Japanese Tradition and Western Law* (Harvard University Press, 1970). The Japanese literature is copious, but one of the better treatments of both Hozumi and Uesugi can be found in Nagao, *Nihon hōshisōshi kenkyū*.

⁸⁹ Wagatsuma, "Makino Eiichi sensei no omoide," 10.

the side, Katayama was the chief legal adviser to Japan's largest labor organization, while Hoshishima ran *University Criticism* (Daigaku hyōron), a smalls journal that frequently gave space to radical leftist thought.⁹⁰

The *Review's* immediate origins lay in the crackdown against these activities. In January 1920, an assistant professor in the economics department at Tokyo Imperial named Morito Tatsuo came under fire from a right-wing student group for an article he wrote on Kropotkin's social thought. In what became known as the Morito Affair, the Faculty of Economics voted to suspend Morito from his duties. The next day he was indicted for sedition. Many other professors would be purged in a similar manner over the next twenty years. Morito was the first, and his case galvanized the campus and the Tokyo press. Rallies were held, editorials issued, and eminent scholars including Yoshino Sakuzō came forward to support their colleague. Hoshishima and Katayama entered the fray. They paid for Morito's counsel and also dedicated one section of their office to coordinating his defense.⁹¹ In the end Morito was convicted on a lesser charge. He was fined, expelled from the university, and jailed in an Ichigaya prison for several months. That July, under the increased scrutiny following Morito's trial, Hoshishima's *University*

⁹⁰ Ōta Masao, *Taishō demokurashī kenkyū: chishikijin no shisō to undō* (Tokyo: Shinsensha, 1990), chap. 4; Hoshino Jirō, "Hibiya no kado no 'Chūō hōritsu shinpō,'" in *Chūō hōritsu shinpō* (Kyoto: Tōyō bunka sha, 1972), 23–29; Matsushita Yoshio, "'Chūō hōritsu shinpō' no omoide," in *Chūō hōritsu shinpō* (Kyoto: Tōyō bunka sha, 1972), 42–58.

⁹¹ The "Morito Affair" was a watershed moment for the relationship between the state and its Imperial Universities. From the vantage of post-1945 Japan, it was also a clear precursor to the purges of left-leaning academics that began in the late 1920s. In English, the most complete treatment can be found in Marshall, *Academic Freedom and the Japanese Imperial University, 1868-1939*, chap. 4.

Criticism was ordered to cease publication.⁹² The closure sent him and Katayama to Makino and Hozumi Shigetō, another professor who served as an adviser to the legal aid society. The *Review* was established in consultation with them.

For Hoshishima and Katayama, the *Review* was a continuation of their legal aid outreach, an effort to reform the law by working through the minutiae of the system. Their zeal was captured in a Latin phrase scrawled across its cover of the first issue, which appeared in February 1921: “Fiat Justitia, Ruat Caelum”—*Let justice be done though the heavens fall*. Makino’s name appeared next to the headline article of the inaugural issue: “Socialization as the Foundation of Legal Renovation.”⁹³ Over the next two and a half years, before the 1923 Kanto Earthquake put an abrupt end to the *Review*, he contributed articles at such a rate that the managing editor later remembered him as the de facto “head writer” (*shupitsu*).⁹⁴ Katayama and Hoshishima were already sympathetic to Makino’s ideas before they started the magazine, but from the sixth issue on they enshrined them as the center of the journal, changing its motto to “the socialization of law.”

Compatriots

⁹² The offending article called for the end of the monarchy and international solidarity of the proletariat. Ōta Masao, “Chūō hōritsu sōdansho to ‘Chūō hōritsu shinpō’: hōritsu no shakaika, minshūka undō,” in *Chūō hōritsu shinpō* (Kyoto: Tōyō bunka sha, 1972), 8–9.

⁹³ Makino identified new legislation that provided for jury trials, a juvenile justice system, and gave greater legal protections to renters—all the products of legal reforms undertaken in the wake of the disorder of the previous few years. The law, Makino wrote, was only a “prism” through which jurists and judges must endeavor to see “social facts.”

⁹⁴ Matsushita, “‘Chūō hōritsu shinpō’ no omoide,” 49.

Acolytes were important, but they could also be fickle. Indeed, after the 1923 Kanto Earthquake destroyed the offices of the *Review*, the journal disbanded, along with the cluster of lawyers, jurists, and students whom it brought together. Social jurisprudence, however, remained. Its resilience was largely due to two younger professors recently returned from sabbatical. Both Hozumi Shigetō and Suehiro Izutarō had shown interest in social theories of law before they traveled overseas. But in Europe and the United States they came to embrace a more socially engaged vision, and although they never quite agreed with the radical political aspects of Makino's ideas, their views came close enough that they became his intellectual compatriots, giving purchase to his social vision within the Faculty of Law by combining it with new social theories from abroad.

Hozumi Shigetō, five years Makino's junior and in some ways his opposite, was perhaps an unexpected ally. Makino was of common birth and had come to Tokyo from a remote mountain town. As the son of Hozumi Nobushige, author of the civil code and the senior scholar in the Faculty of Law at that time, and as the nephew of Hozumi Yatsuka, the ideological forefather of the Japanese family state, Hozumi Shigetō was practically born into the role of legal academic. In preparatory school Hozumi had listed "being a professor" as his desired career and was so diligent in his studies that he was designated a model student.⁹⁵ Around the law department Makino took to referring to him as "the young lord" (*wakasama*).⁹⁶ Pedigree carried Hozumi through the war years

⁹⁵ A detailed portrait of Hozumi Shigetō's early education can be found in Ōmura, *Hozumi Shigetō*, 20–30. Makino's nickname for Hozumi was related by Wagatsuma in Wagatsuma, "Makino Eiichi sensei no omoide," 10.

⁹⁶ Wagatsuma, "Makino Eiichi sensei no omoide," 12.

and situated him well after 1945, when he was assigned to a joint post as a Supreme Court Justice and steward to the Crown Prince (*Tōgū taifu*). While his academic achievements were overshadowed by some of his most able peers, Hozumi remained among the most publically favored of the professors in the Faculty of Law, his very presence a reminder of the department's elite heritage.

Hozumi's early writings are scant, but in them one sees a keen interest in the comparative legal scholarship that his father Nobushige championed, as well as in law related to the family, especially as it pertained to women. Before he had finished his studies in 1910, Hozumi had published on divorce law and the rise of feminism abroad.⁹⁷ It was during his travels in Europe and the United States, from 1912 to 1916, that his ideas about law decisively took shape. First in Bonn, then in Berlin, Paris and London, he attended lectures while spending his free time touring orphanages, settlement houses, juvenile courts, and other monuments of European social politics of the time.⁹⁸ "Apart from legal research in the narrow sense," Hozumi wrote in his travel diary, being in Europe was a "once in a lifetime opportunity to practice a living sociology (*ikita shakaigaku*)."⁹⁹ In Bruchsal and Manheim Hozumi toured prisons with the legal

⁹⁷ Hozumi Shigetō, "Shissō senkoku go no saikon," *Hōgaku kyōkai zasshi* 27, no. 9 (1909): 1480; Hozumi Shigetō, "Feminizumu," *Hōgaku kyōkai zasshi* 28, no. 7 (1910): 1340.

⁹⁸ Ōmura, *Hozumi Shigetō*, 41–47.

⁹⁹ Hozumi Shigetō, *Ōbei ryūgaku nikki (1912-1916): Taishō ichi hōgakusha no shuppatsu* (Tokyo: Iwanami shoten, 1997), 109. For more about Hozumi's time abroad, see Ōmura, *Hozumi Shigetō*, 35–61.

philosopher and member of the Social Democratic Party Gustav Radbruch.¹⁰⁰ In Berlin he scheduled his days around lectures with the criminologist Franz von Liszt and Joseph Kohler, a neo-Hegelian titan of comparative law.¹⁰¹

The outbreak of war in 1914 forced Hozumi to change his itinerary. He fled first to London, where the democratic spirit of the jury trials he observed and the suffragette movement made a strong impression.¹⁰² In October 1915, he continued across the Atlantic to the East Coast of the United States. For Hozumi, as for many Japanese intellectuals, World War I soured him on both Germany and the German style of jurisprudence he had majored in at Tokyo Imperial.¹⁰³ The Kaiser's actions seemed at once vainglorious and rash, and the purported binding force of the law had failed spectacularly to stop Europeans from joining in internecine slaughter. Hozumi jotted his thoughts in his diary in August 1914: "Jurists believe in the law too much."¹⁰⁴ This sense of disillusionment perhaps helps explain why Roscoe Pound, who was quickly becoming

¹⁰⁰ Hozumi, *Ōbei ryūgaku nikki (1912-1916): Taishō ichi hōgakusha no shuppatsu*, 36–37.

¹⁰¹ Kohler was exceptionally solicitous toward Hozumi once he realized who his father was. In May 1913 he hosted Shigetō at the professor's home and tested a phrase or two of Japanese on him. *Ibid.*, 48, 50.

¹⁰² In Japan, Hozumi wrote, judges handed down decisions from on high, but in England, the seats were all on the same level. *Ibid.*, 279.

¹⁰³ For more on the anti-German trend, see Frederick R. Dickinson, "Toward a Global Perspective of the Great War: Japan and the Foundations of a Twentieth-Century World," *The American Historical Review* 119, no. 4 (2014): 1172.

¹⁰⁴ Hozumi, *Ōbei ryūgaku nikki (1912-1916): Taishō ichi hōgakusha no shuppatsu*, 99. In London, he worked through these ideas in what became his first book. Hozumi Shigetō, *Sensō to keiyaku* (Tokyo: Yūhikaku shobō, 1916).

one of America's most important legal scholars, played such an important function in Hozumi's early attempts to describe a sociological approach to the law.

Hozumi met Pound at most a couple times during his short stay in the United States, from early November 1915 to early January 1916. The one encounter he recorded does not give the impression of any particular regard.¹⁰⁵ Yet on his return to Japan, the first book Hozumi published evidenced Pound's profound influence. *An Outline of Legal Philosophy* (Hōrigaku taikō) was the first Japanese overview of legal thought, and that alone made it an epoch-making work. From its structure down to some of its sentences, it was clear that Hozumi had modeled the book on Pound's 1914 *Outlines of Lectures on Jurisprudence*.¹⁰⁶ In that work Pound, who was originally a botanist, grouped the major legal thinkers of the past into four different philosophical "schools," which he juxtaposed in labored diagrams that depicted what he determined were each school's major traits. Hozumi adopted Pound's categories and replicated his diagrams. The only significant modification he made was the addition of comparative law, to the analytical, philosophical, historical, and sociological schools that Pound had enumerated.¹⁰⁷

More than merely borrowing a framework, though, Hozumi took on Pound's belief that sociological law represented the culmination of nineteenth-century legal

¹⁰⁵ Pound commanded a vast knowledge of legal history, Hozumi observed, but because of this the lecture Hozumi sat in on seemed to "become a one-man show." Hozumi, *Ōbei ryūgaku nikki (1912-1916): Taishō ichi hōgakusha no shuppatsu*, 337.

¹⁰⁶ Roscoe Pound, *Outlines of Lectures on Jurisprudence* (Cambridge, Mass: Harvard University Press, 1914).

¹⁰⁷ *Ibid.*, 5; Pound, "The Scope and Purpose of Sociological Jurisprudence. [Concluded.] III. Sociological Jurisprudence," 504; Hozumi Shigetō, *Hōrigaku taikō* (Tokyo: Iwanami shoten, 1917), 9–13, 85.

thought. In the United States, Pound is best known as a precursor to the Legal Realism movement of the 1930s, as a vociferous critic of the expansion of the administrative state, and as an inveterate anti-Semite.¹⁰⁸ For the Japanese jurists who met him in the 1910s, however, Pound proved to be an accessible guide to a social conception of law and recent European legal trends. Like Makino, Pound was interested in thinking about law not as a system of rights but as a social institution, driven and shaped by its overarching function, and although he analyzed individual thinkers with a level of precision and detail that eluded Makino, the synthesis he arrived at was remarkably similar. By the mid-1910s, when Hozumi encountered him, Pound had come to see a sociological approach to law as the fruition of a great movement of legal thought over the past two hundred years.¹⁰⁹ Hozumi made this the central thesis of his own *Outline*, and it colored his readings of all the thinkers he addressed. Kant, for instance, had made a major contribution in his attempt to ground legal philosophy in moral sentiments, but he failed in never having been able to understand society as anything more than an atomistic collection of

¹⁰⁸ For example, see Daniel R. Ernst, *Tocqueville's Nightmare: The Administrative State Emerges in America, 1900-1940* (Oxford ; New York: Oxford University Press, 2014), chap. 5; John Fabian Witt, *Patriots and Cosmopolitans: Hidden Histories of American Law* (Cambridge, Mass: Harvard University Press, 2007), chap. 4.

¹⁰⁹ “Jurists are coming together upon a new ground from many different starting points. Some of them profess to find this new ground, potentially at least, in the schools from which they set out. But there is much to indicate that instead of a further variation of one of the old creeds, a wholly new creed is framing. The rising and still formative school to which we may look chiefly henceforth for advance in juristic thought, may be styled the Sociological School.” Roscoe Pound, “The Scope and Purpose of Sociological Jurisprudence. I. Schools of Jurists and Methods of Jurisprudence,” *Harvard Law Review* 24, no. 8 (1911): 594.

individuals.¹¹⁰ The passage with which Hozumi concluded his book drove home the point: “Legal interpretation of today should be centered on society. The application of law today should be centered on society. Current legislation should be centered on society. And our philosophy of law now must put society first.”¹¹¹

This was as theoretical as Hozumi ever became. While he stayed committed to a social vision of law to the end of his life, from the late-1910s into the 1920s, he came to focus on social engagement. He sponsored legal aid societies. Through his involvement with the Special Commission on the Legal System (*Rinji hōsei shingikai*), an advisory board created by Prime Minister Hara Takashi in 1919 and chaired by his father, Hozumi advocated for the creation of jury trials and a family court, as well as reforms to the civil code that would have granted women greater rights within marriage, had the proposals been accepted.¹¹²

Suehiro Izutarō departed Japan in 1917, one year after Hozumi returned. He returned in spring 1920, not only a convert but a proselytizer. Before he left he had been at work on a meticulous textual analysis of contract law in the formal style of his adviser Kawana Kaneshirō.¹¹³ Suehiro completed his book while crossing the Pacific and mailed

¹¹⁰ He had not “conceived of society as society.” Hozumi, *Hōrigaku taikō*, 50–51.

¹¹¹ *Ibid.*, 145.

¹¹² For more on the commission, see Haley, “The Politics of Informal Justice: The Japanese Experience, 1922-1942,” 130; Ōmura, *Hozumi Shigetō*, 70–75. A jury system was adopted on the committee’s recommendation and enacted from 1928. The general antipathy that judges had for the system, and the fact that they were not bound by the jury’s recommendations, undercut Japanese juries long before the system folded in 1943. Asako Hiroshi et al., *Nihon hōseishi* (Tokyo: Seirin Shoin, 2010), 354–56.

¹¹³ Suehiro Izutarō, *Saiken kakuron* (Tokyo: Yūhikaku shobō, 1918).

the last chapter to Japan from Hawaii, the first port in which his ship docked.¹¹⁴ By the time he alighted in Tokyo again in September 1920, he had renounced the work entirely, along with the “conceptual” and “Germanic” style of jurisprudence that informed it. As he saw it in 1921, the work of legal scholars who “buried their heads only in legal codes and foreign law books,” refining their concepts and making their theories more consistent, was no more meaningful than “tending morning glories in one’s retirement.”¹¹⁵

Because of the war, his itinerary was almost the exact reverse of Hozumi’s. After a year in the United States, where he too met with Pound, Suehiro continued to Europe in 1918, once armistice was in sight. He travelled to Lyon in October and from there he continued to Versailles where, for the next year and a half, he performed diplomatic duties and helped write the labor treaties that formed the foundation of the International Labor Organization. Later in life Suehiro credited the months he spent in the United States with his discovery of social jurisprudence and labor law. By his account, the case method he observed in American law schools and the importance American lawyers attributed to legal fact-finding drew his attention to the realities of law beyond legal statutes. He later credited John Rogers Commons and John B. Andrews’s pioneering work, *Principles of Labor Legislation*, with having opened his eyes to the structural factors

¹¹⁴ Ushiomi Toshitaka, “Suehiro Izutarō,” in *Nihon no hōgakusha*, ed. Toshitaka Ushiomi and Nobuyoshi Toshitani (Tokyo: Nihon hyōronsha, 1975), 337.

¹¹⁵ Suehiro Izutarō, *Bukkenhō*, vol. 1 (Tokyo: Yūhikaku shobō, 1921), 5.

at play in the law.¹¹⁶ There is probably some truth in these statements, but the stress Suehiro placed on his intellectual debts to the United States needs to be interpreted in the context of the postwar occupation. Three years prior to delivering his lecture, he had been purged from academia for his association with the wartime state. This talk in 1949, which has since become the authoritative word on Suehiro's intellectual formation, was his first major public engagement after the ban was lifted, a situation hardly conducive to rigorous intellectual honesty.¹¹⁷

Judging by what Suehiro wrote in the early 1920s after returning to Japan, as much as he thought about Pound he was also thinking about the French socialist Jean Jaurés, the Germanist and legal historian Otto von Gierke, Bulgarian labor law, American pragmatism, and new regulations from the International Labor Organization.¹¹⁸ His conception of society and the zeal with which he embraced it were essential to his experience of the end of the war, one characterized by fear of violent revolution from the left, frustration with the state of Japanese politics and culture, and a powerfully felt need to reconnect to an authentic, national essence. If there was a central theme, it was his antipathy for the modern Japanese state as it had developed since the Meiji Restoration.

¹¹⁶ In 1946 Suehiro was banned from teaching by the American occupation for his involvement with the war. This speech marked his return to public life after the injunction was lifted. His emphasis of the debts he owed to American legal thought, then, should not be taken at face value. Suehiro Izutarō, "Hōritsu shakaigaku," in *Suehiro Izutarō to Nihon no hōshakaigaku*, ed. Rokumoto Kahei and Yoshida Isamu (Tokyo: Tokyo daigaku shuppankai, 2007), 3–134.

¹¹⁷ Tahata Seiji, "Suehiro Izutarō sensei no shi wo itamu," *Suiei*, no. 92 (1951): 1–6.

¹¹⁸ Suehiro Izutarō, "Musansha no tachiba yori mitaru baishin seido," *Kaihō* 5, no. 5 (1923): 7; Suehiro Izutarō, "Burugariya no kyōsei rōdōhō," *Chūō hōritsu shinpō* 1, no. 8 (1921): 5; Suehiro, "Minpō kaizō no konpon mondai"; Suehiro Izutarō, "Kōjōhō no kaisei ni tsuite," in *Usō no kōyō* (Tokyo: Kaizōsha, 1923), 331–64.

Suehiro bemoaned the loss of control the Tokugawa shogunate once wielded over goods, labor, transportation, and rent. In view of what was lost, the “materialist” and “shortsightedly utilitarian” reforms of the early Meiji-era, which had liberated people and property from feudally appointed status only to have the market impose a new kind of domination on society, appeared to him a catastrophe.¹¹⁹ Yet Suehiro was no simple nationalist. In his eyes, Shintō was nothing more than an attempt by the state to monopolize the ethical lives of its subjects, and the exhortations to observe Japan’s “virtuous ways and beautiful customs” that issued from the Home Ministry in the face of unrest were simply an ineffectual attempt to sustain the status quo.¹²⁰ It was not modernization or westernization outright that vexed him but privatization. Thus, even as he expressed a longing for the past, Suehiro was a proponent of collective bargaining and unions. He also praised the superiority of European hotels, of which he said that those stately institutions offered their guests “communal and splendid lobbies, dining rooms, and libraries,” as opposed to Japanese inns where customers were confined to the room they rented. It seemed to Suehiro that the West was “incomparably” ahead of Japan in adopting social legislation and legal concepts that blunted the worst excesses of individualism.¹²¹

Looking for Law in the Judiciary

¹¹⁹ Suehiro Izutarō, “Kaizō to Meiji jidai no shōsatsu,” in *Uso no kōyō* (Tokyo: Kaizōsha, 1923), 85–89.

¹²⁰ Suehiro, “Minpō kaizō no konpon mondai,” 77, 102.

¹²¹ *Ibid.*, 199.

If Makino's ideas had provided a rallying point for the department, they were also impracticable. In the torrents of ink he spilled expanding his theories—in the 1917 *Contemporary Culture and Law*, in the 1919 *Contradiction and Harmony in Law*, in the 1920 *Justice and Equity in Law*—he offered little more than exhortations for faith. By means of a vast dialectical progression, science and morality, fact and value, and society and law were moving ever closer to convergence as mankind came to understand itself as a collective subject.¹²² But what could one do in response? Makino had little to recommend on this front, but Hozumi and Suehiro did. They directed the departments' students and faculty toward a new practice of carefully studying the decisions of the court with the intention of observing and recording the way law was transforming. With this, social jurisprudence was given disciplinary structure. The teleological assumptions about the direction of legal change endured.

To understand the significance of this shift, it helps to get a picture of how legal scholarship worked before. In contrast to common law systems, where judicial decisions were always considered a potential source for legal doctrine, in Japan and other civil law countries, judges were generally considered passive agents. When their decisions were examined before the 1920s, it was done as critique, where judges were evaluated for how accurately they applied the law. Meanwhile, jurists almost never used court decisions in their own writings.¹²³ Suehiro himself offers an example. Before going abroad he practiced

¹²² Makino Eiichi, *Hōritsu ni okeru mujun to chōwa* (Tokyo: Yūhikaku shobō, 1919), 109–11; Makino Eiichi, *Gendai no bunka to hōritsu* (Tokyo: Yūhikaku shobō, 1917); Makino Eiichi, *Hōritsu ni okeru seigi to kōhei* (Tokyo: Yūhikaku shobō, 1920).

¹²³ Takeyoshi Kawashima, “The Concept of Judicial Precedent in Japanese Law,” in *Ius Privatum Gentium: Festschrift Für Max Rheinstein Zum 70. Geburtstag Am 5. Juli 1969*,

the meticulous textual analysis that was de rigueur for civil law scholars at Tokyo Imperial. In a 1915 essay on whether property that was merely possessed (*senyūken*) but not owned could be inherited. Suehiro began with the definition of possession in Roman law, then worked through its meaning in medieval Frank law, in the French code, in the Law Code for the Grand Duchy of Baden, et cetera. From these he inferred exquisite conceptual distinctions that led him to the conclusion that possession could be inherited.¹²⁴

It was precisely this style of legal scholarship that Suehiro lambasted when he returned from Europe in 1920. Trying to determine the law by analyzing statutes was as useless as “casting a net on dry ground, hoping for fish,” he wrote in his 1921 *On Real Rights* (*Bukkenhō*), generally considered the manifesto for the new approach to case law.¹²⁵ The central claim was that law needed to be understood as a social fact. Rather than seeking it in statutes or theory, which only described a legal ideal (*arubeki hōritsu*), jurists needed to turn their gaze directly to society to understand “law as it exists” (*aru hōritsu*). They needed to study the “living law” that inhered in everyday life. This idea and the terminology Suehiro used to explain it were inspired by the ideas of the Germanic legal scholar Eugen Ehrlich. More specifically, they were probably based on a short introduction to Ehrlich’s vision for a “sociology of law” that ran in translation in the

ed. Ernst Von Caemmerer, Soia Mentschikoff, and Konrad Zweigert (Tübingen: Mohr, 1969), 86–87.

¹²⁴ Suehiro Izutarō, “Senyūken no sōzoku,” in *Hozumi sensei kanreki shukuga ronbun*, ed. Eiichi Makino (Tokyo: Yūhikaku shobō, 1915), 935, 946, 991, 1013.

¹²⁵ Suehiro, *Bukkenhō*, 1:2.

December 1920 issue of the *Journal of the Jurisprudence Association*.¹²⁶ In that article, and throughout his later work, Ehrlich described the world of law as an organic, spontaneous system of norms that regulated everyday interactions and tended to sustain harmonious communal life. As Ehrlich memorably phrased it, the law was “living.”¹²⁷

If these ideas anticipated efforts to introduce empirical methods into legal science, for Suehiro, as for Ehrlich, this was not the main focus. Each writer vaguely gestured at a rigorously methodical approach to studying the living law, but their real interest lay in what they took as its most proximate and accessible source: the courts.¹²⁸ Ehrlich had

¹²⁶ Eugen Ehrlich, “Seibunhō to ikita hōritsu (Eirurihhi),” trans. Hatoyama Hideo, *Hōgaku kyōkai zasshi* 33, no. 12 (1920): 43–70. After the war, Suehiro claimed that he had met Ehrlich personally during his sabbatical in Europe, sometime between 1919 and 1920. This was probably apocryphal. There are a number of inconsistencies with Suehiro’s account of the meeting, the most glaring of which was his assertion that Ehrlich had become a German tutor to a group of Japanese law students stranded in Europe after the war. That such an eminent scholar would do this is doubtful. It also conflicts with a contemporary account by another professor in the Faculty of Law. Takayanagi Kenzō met Ehrlich in 1920 and solicited two articles from him to publish in translation in Japan. In 1922, he wrote about the encounter. According to Suehiro’s timeline, this would have been after Suehiro met Takayanagi, but in Takayanagi, Ehrlich, who had been driven from his home in Czernowitz during the war, took months to locate. Moreover, when he finally met the aging scholar, Ehrlich told him that he was the first Japanese person Ehrlich had met aside from “Sadayakko,” or Kawakami Sadayakko, a Japanese geisha and mistress to Itō Hirobumi who toured the US and Europe around the turn of the nineteenth century. Notable, too, is the fact that Suehiro had not shown any particular knowledge of Ehrlich’s ideas prior to writing his introduction. Suehiro, “Horitsu shakaigaku,” 25–26; Takayanagi Kenzō, “Hōritsu shakaigaku,” *Hōgaku kyōkai zasshi* 40, no. 1 (1922): 10.

¹²⁷ The first article Ehrlich published in Japanese was also translated into English, where it was featured in the *Harvard Law Review*, along with a short obituary by Roscoe Pound. Eugen Ehrlich, “The Sociology of Law,” trans. Nathan Isaacs, *Harvard Law Review* 36, no. 2 (December 1, 1922): 130–45.

¹²⁸ Hatoyama Hideo, “Fudōsan bukken no tokusō henkō ni kan suru kōshinshugi oyobi kōjishugi o ronzu,” *Hōgaku kyōkai zasshi* 33, no. 7 (1915): 4; Ehrlich, “The Sociology of Law,” 144.

been a central figure in the Free Law Movement, a loosely connected group of scholars who together developed a devastating critique of judicial objectivity. In their view, judges were far less constrained by the law than jurists had previously imagined. General clauses and novel cases, for which no immediate legal remedy was obvious, forced them to fall back on their perceptions of social utility and moral sentiments to reach a decision. According to the strong version of this argument, the ability judges possessed to determine which legal facts to consider and which statutes to apply allowed them to decide the outcome of any case largely as they pleased. Only after the decision was made was it dressed up in legal syllogisms that made it seem internally coherent. The judge, in this sense, functioned as legislator, making the law with each ruling.¹²⁹

In order to track this judge-made law, Suehiro founded the Civil Case Law Study Society (*Minpō hanrei kenkyū kai*) in early 1921. The society's membership in the first year included Hozumi Shigetō, Wagatsuma Sakae, Hirano Yoshitarō, Nakazawa Zenjnosuke, Tanaka Seiji, and Azuma Suehiko. They met once a week and spent their time analyzing recent court decisions, the results of which they reported in the back of the *Journal of the Jurisprudence Association*. In contrast to earlier records of court decisions, which often only reported the decision and offered scholarly commentary on whether it was legally sound or not, the reports produced by Suehiro's society included considerably more detailed accounts of the facts of each case. This was meant to better convey the process by which the courts made law, which was not only about the decision but how judges decided which aspects of each case were legally actionable and which were not.

¹²⁹ Herget and Wallace, "The German Free Law Movement as the Source of American Legal Realism," 410–17.

This strategy had political implications. In what is credited as the first example of this kind of scholarship, Hozumi Shigetō celebrated the Great Court of Cassation's 1917 decision to grant limited marital rights to common-law wives (*naien no tsuma*). As an interpretation of the civil code, if the decision "is not wholly inappropriate, at the least it is extremely far-fetched. But as a legislative decision (*ripōteki hanketsu*), made by the judiciary in the instance of a fault in the law, it is valid," he wrote. In fact, providing some kind of indemnity to the woman, who was denied entry in the household register (*koseki*), was the "real motive and real goal" behind the decision." Where the law had failed, the judiciary had provided "socially necessary relief from the evils of the age (*jihei*)."¹³⁰ By reporting these decisions, Suehiro and other member of the society sought to preserve them as precedents. In doing so they turned their interpretation of the courts into a new source of law, a dynamic alternative to the civil code's static statutes.

Another article by the then young scholar Wagatsuma Sakae took the same approach to case law. He took a draft of the House Lease Law (*shakuya hōan*) to the Diet in early 1920 as his point of departure. During the urban housing crisis in the 1910s, the structure of Japanese property law allowed tenants to be evicted if their landlord sold the property to another party. The House Lease Law sought to fix this by allowing renters to contest third-party claims, but at the time Wagatsuma was writing, it was unclear whether the Diet would pass the law or reject it, as it had many times before when similar bills were put before it. Based on a survey of recent judicial decisions regarding urban evictions, Wagatsuma argued that the vote mattered little. By educating multiple instances

¹³⁰ Hozumi Shigetō, "Konin yoyaku yūkō hanketsu no shin igi," *Hōgaku shirin* 19, no. 9 (1917): 9–10. Quoted in Ōmura, *Hozumi Shigetō*, 64.

in which the courts had refused to evict a tenant, citing “common human sympathy” (*jinrui no dōjōshin*) or simply “reason” (*jōri*), Wagatsuma argued that the legislation itself was largely pro forma. In a telling passage, he wrote that either “through the front door” of the new House Lease Law or “through the backdoor” of judicial interpretation, he wrote, a tenant’s right to contest third-party claims on the property seemed guaranteed.¹³¹ Legislation merely ratified social change already evident in the courts.

Despite their pretensions of recording the law as it was made in the courts, the members of the Civil Case Law Study Society were in fact very selective about which cases they decided to canonize and which they dismissed as aberrations that defied larger trends. Decisions that were seen as advancing cherished reforms—such as the recognition of a woman’s legal rights within marriage, strengthening renters’ rights, or protecting laborers from arbitrary dismissals—were canonized as new developments in the law. Decisions that contradicted these, on the other hand, were often dismissed as aberrations within ultimately more compelling progressive trends.

Conclusion

Writing in 1923, Makino declared the advent of the case law method a “Copernican revolution” in the study of the law, brimming with democratic meaning. No longer was law something “conferred from above by the state.” It now “bubbled up from below, from

¹³¹ Wagatsuma Sakae, “Hanrei ni arawaretaru shakuyamondai to shakuya hōan,” *Chūō hōritsu shinpō*, no. 1 (1920): 9.

among the people.”¹³² Postwar Japanese scholars have tended to take Makino and other social jurists at their word, characterizing the development of a case law method in Japan as a democratic move.¹³³ It may well be that they understood themselves as democrats, but their notion of democracy betrayed only a passing interest in forms of representative politics. A better way to understand their reformist effort is as a scholarly attempt to yolk the legal system to a judiciary that, at least in the early-1920s, appeared to be the primary engine of legal reform to preserve a common good they identified with society at large.

¹³² Makino Eiichi, “Kosaku chōtei shugi: sono igi oyobi genkai,” *Hōgaku shirin* 26, no. 8 (1924): 99. This piece was initially published in 1923, in *Nōsei kenkyū* 2, no. 6.

¹³³ Kawashima, “The Concept of Judicial Precedent in Japanese Law”; Itō Takao, *Taishō demokurashii ki no hō to shakai* (Kyoto: Kyōto daigaku gakujutsu shuppankai, 2000); Ushiom, “Suehiro Izutarō”; Isomura Tetsu, *Shakai hōgaku no tenkai to kōzō* (Tokyo: Nihon hyoronsha, 1975).

CHAPTER TWO

The Practice and Politics of Social Jurisprudence

Shortly before noon on September 1, 1923, a loud cracking noise resounded through Tokyo. This was followed by some 15 seconds of violent, horizontal heaving that knocked pedestrians off their feet, collapsed bridges and buildings, and threw charcoal braziers—lit to prepare the day’s lunch—onto floors and into walls. Within 30 minutes 130 major fires were spreading across a city made mostly of wood. A typhoon that by terrible coincidence made landfall at the same time whipped the flames into towering columns of heat. When the fires subsided three days later, tens of thousands of residents were dead—by some accounts the number was over 140,000, though figures vary widely—and more than one-and-a-half million were left homeless.¹ The lower city, the traditional home of Tokyo’s laborers and artisans that spread out to the south and east of Tokyo Imperial University, sustained the greatest damage. The six wards of Nihonbashi, Asakusa, Honjo, Kanda, Kyōbashi, and Fukagawa were almost entirely destroyed. At the time, the Kanto Earthquake was the worst disaster Japan had experienced in the twentieth century. It took seven years before Tokyo declared itself recovered.

The earthquake was at once a test of the most fundamental premise of social jurisprudence—that the law existed for the sake of society—and a catalyst that exposed the fissures that such a broad proposition had largely concealed. By the early-1920s there

¹ Gennifer S. Weisenfeld, *Imaging Disaster: Tokyo and the Visual Culture of Japan’s Great Earthquake of 1923* (Berkeley: University of California Press, 2012); J. Charles Schencking, *The Great Kantō Earthquake and the Chimera of National Reconstruction in Japan* (New York: Columbia University Press, 2013), 39–40.

were few scholars who did not accept the basic idea that the law was a product of society and history, and needed to be adjusted accordingly. This idea had animated the advocates of social jurisprudence in the early-1920s, as they sought to create a more socially engaged form of legal practice, but as they approached the question of implementation, the differences among them became pronounced. The arguments were no longer about whether law was social but about the consequent implications of this premise.

These questions were asked and given defeasible answers in the context of a major bout of legislative reform. Until 1928, when universal male suffrage was enacted, only relatively wealthy men had a direct say in government, but pressure from organized labor, tenant unions, feminist organizations, and mass protests forced the state to respond. To new demands for change from below, Japan's two major political parties, the Seiyūkai and the Kenseikai, as well as the bureaucracy oversaw a series of special legislative commissions and sub-committees tasked with devising a reform package to remedy the problems and quell the unrest. These efforts gave rise to new administrative divisions, new institutions, and a raft of new legislation. The signal reform of the era was the adoption of universal male suffrage in 1925. Although half the country was still excluded from the franchise on the basis of gender, the new law fulfilled the most urgent demand of the coalition of politician, intellectuals, and labor activists who came together in the late-1910s. But the franchise was only one side the story. Questions loomed about how and whether laborers and farmers could find a manageable position in the national economy. Ultimately, it was the ancillary social legislation both enacted and rejected by the Diet that did the most to determine the structure of imperial Japan's brief experiment in mass democracy.

Although social jurists decried the state as at once an abstraction and a tyrant, they were more than willing to lend their voices to the debates about what social policy the state should adopt. Shaken by the October Revolution, Prime Minister Terauchi Masatake created a 38-member special commission to examine ways to bolster the family system. Two years later in 1919, Hara Takashi expanded his predecessor's project to include a 25-member Special Legislative Council (*Rinji hōsei shingikai*), chaired by Hozumi Nobushige and including Makino Eiichi, Hozumi Shigetō, and Hatoyama Hideo, the scion of a political dynasty and specialist in German law to Tokyo Imperial. The following year, when Suehiro returned from Europe, he joined a research committee established by the Ministry of Commerce and Agriculture to devise a solution to the growing number of rural tenant disputes. But the legislation that came from these was only one component of their attempts to socialize the law. Their main bailiwick was still the world of concepts and practices, through which they sought to work around inconvenient laws and amplify reforms.

This chapter examines their efforts in the wake of the earthquake and the mixed results they achieved. Early successes stoked expectations that a social age was in the offing, but the gains tapered off, and when the social jurists were attacked from the right, they chose to embrace the language of nationalism. Partly this was done out of a sense for self-preservation. The academy insulated scholars from the direct and sometimes violent means the state used to break socialist parties and unions, but a series of high-profile purges beginning in the late-1920s showed that the buffer had its limits. It was also the case that the right was not anathema to social jurisprudence. The social jurists were scornful of the tendency of Japanese conservatives to moralize social issues, but after the

dissolution of leftwing party politics in 1928, nationalism and appeals to a folkish community appeared as most immediately viable means of achieving desired reforms.

To explore this process, I look at three cases of major efforts to socialize the law. There was never a single social jurisprudence, yet no matter the particular concerns of individual jurists, one issue was viewed as paradigmatic expression of the way the legal system was changing and an indicator of the direction of that change: the relationship between tenants and landlords. A reconstruction of the legal discussion of this question from the mid-1910s into the mid-1920s will show how the 1921 Land and House Lease Laws, which enhanced legal protections for renters, and the state's response to the aftermath of the earthquake seemed to corroborated the social jurists' belief that a fundamentally changed society altered the nature of private property. Second, the development and expansion of a system of mediational tribunals reveals how fickle the line was between assistance and oppression. The success of mediation in managing mass homelessness after the earthquake established a model that was extended first to the countryside, where it was used to mitigate tensions between tenant farmers and landowners, and then to Japan's factories, as a supplement to the minimal body of labor legislation already in place. In each case mediation provided a channel for weaker parties to attain some relief, yet contrary to the expectations of the social jurists, its function proved to be equally as dependent on the sociopolitical context as formal legal proceedings. Finally, an exploration of the connections between an urban settlement founded by Suehiro Izutarō in the wake of the earthquake demonstrates the direct link between labor organizing in the 1920s and the mobilization of social jurisprudence for Japan's conquest of China in the late-1930s.

From the Housing Crisis to 1921 Land and House Lease Laws

The first and the most visible social issue, from the vantage point of the jurists at Tokyo Imperial University, was the urban housing crisis in the middle of the 1910s. Housing regulations were minimal or nonexistent in Japanese cities at the beginning of the twentieth century, leaving sale prices and rent to be coordinated by an unstable combination of supply and demand and informal customary norms. The mass migration to the cities that began after the Russo-Japanese War put stress on this arrangement, as real estate prices and rents began to climb in step with growing urban populations. The explosion of wartime manufacturing pushed the housing issue to the breaking point. At the same time that a new industrial labor force was pouring into these urban centers, the housing supply had remained static. In Tokyo, Osaka, and other major cities, shortages emerged from around middle of the decade and became acute by 1915.² In 1909 there were 3.5 *tsubo* (about 11.5 m²) of space for every resident in Tokyo. In 2015 that figure had fallen to 2.8 *tsubo* (9.2 m²), a decrease of about 20 percent. It remained at this level through the 1920s.³

The housing shortage had a number of adverse effects. Rent increased faster than wages, and as a new professional class moved to the suburbs, the housing stock within the cities deteriorated dramatically. Even while landlords raised rents, they found it difficult to do so fast enough to keep pace with rising costs because of political pressure from

² Ono Hiroshi, “Daiichi sekai taisen zengo no Tokyo ni okeru jūtaku mondai,” *Rekishi to keizai*, no. 192 (2006): 3.

³ *Ibid.*, 4.

tenants and municipal authorities. Rather than housing, then, developers began putting their money into building new warehouses and factories, which offered a better return on investment. The increase in housing stock that began from around 1918 was thus of generally poor quality.⁴ But for the jurists at Tokyo Imperial, the most unsettling issue was a spate of attempted evictions that stemmed from the structure of Japanese property laws.

While the 1890 draft of the civil code produced by Boissonade classified leases as a form of real right (*bukken*), the final law enacted in 1898 defined them instead as a form of obligation (*saiken*). As a result, leases (*chintaishaku*) were considered matters of contract, enforceable exclusively against consenting parties. This meant that if a rental property was sold or foreclosed on, the tenant could only seek damages against his landlord. He had no claim to the rented property itself and no legal case against the new purchaser—or, in legal terminology, a third party (*daisansha*). In contrast, the three forms of land tenure defined as real rights—ownership (*shoyūken*), a right to build a structure on a piece of land (*chijōken* or a superficies), and a permanent sharecropping right (*eikosakuken*)—were exclusionary rights, enforceable against anyone.

This basic structure was augmented by a system of registration (*tōki*) established by the civil code and amended by two laws passed in 1899 and 1900.⁵ These followed nineteenth-century European legal trends that developed along with the commercialization of the real estate market. The main purpose of registration was to

⁴ Ibid., 7–8.

⁵ They were the Immovable Registration Law (*Fudōsan tōki hō*) and the Law Concerning Superficies (*Chijōken ni kan suru hōritsu*).

ensure a clear title—that is, to ensure that the purchaser could, by checking public records, be sure that no other party held a legal claim on the property in question. Germany enacted the most extreme version of this system. The 1896 Land Registry Regulation made registration the sole criterion for deciding rightful ownership, abstracting private property to a matter of public record.⁶ French law, on which Japanese registration law was modeled, did not go so far. As provided for in the *Code civil*, all that needed to occur for a transfer of property was an expression of intent by two parties, which most often took the form of a contract. Legally, alienation of the property was accomplished at the moment of signature, even if delivery did not occur at that time. This opened the door for major complications. Because contracts drawn up between two parties could be kept secret, unscrupulous sellers could sell the same property multiple times, leaving buyers unsure of whether they were getting a clear title or not. The 1855 Law of Transcription attempted to remedy this. Title still passed by the consent of two parties, but it was unenforceable against third-party claims unless documentation of the transfer had been recorded in the public register.⁷ The result was a conceptual grey area in transactions, where two different parties could present a compelling case for ownership, by contract or by registration.

⁶ Alejandro M. Garro, *The Louisiana Public Records Doctrine and the Civil Law Tradition* (Baton Rouge: Paul M. Hebert Law Center Publication Institute, 1989), 33–35.

⁷ *Ibid.*, 45–47.

Articles 176 and 177 of the Japanese Civil Code reproduced this problem.⁸ In Japan, however, registration was even more troublesome. In part this was because it was abruptly imposed on a population that was not in the habit of registering titles and leases. It was also due to the fact that Japanese law required a landlord's consent to the registration of a right in his property. This was rarely forthcoming, inasmuch as registration strengthened the rights of tenants at the expense of landlords.

Major disputes between landlords and their tenants occurred almost immediately after the promulgation of the civil code. The main issue was whether their agreements constituted superficies—and thus real rights—or much weaker leases. The fact that registration was necessary to demonstrate a superficies effectively gave landowners the ability to decide. The 1909 Law Concerning the Protection of Buildings (*Tatemono hogo ni kan suru hōritsu*) attempted to remedy this problem by extending de facto recognition of a right to contest third-party claims to anyone leasing a plot of land, regardless of registration.

Yet shifting demographic trends had advanced the problem beyond this solution. The majority of new urban residents were not leasing land to build on. They were renting houses and rooms, which Japanese law unambiguously defined as a form of lease. As real estate prices and taxes rose in the 1910s, landlords began raising rents, effectively tripling them between 1914 and 1922. Yet even while there were few formal restrictions on a

⁸ Here, Boissonade's influence on Japanese civil law is apparent. These articles derived from Articles 177 and 178 in his 1890 draft of the code. Sano Tomoya, "Minpō dai 99 jō - dai 398 jō," *Meiji minpō jōhō kiban: Meiji-ki no minpō no rippō enkaku ni kan suru kenkyū shiryō no saikōchiku*, accessed July 1, 2017, <http://www.law.nagoya-u.ac.jp/jalii/arthis/1896/table2.html#id213>.

landlord's ability to increase rent, it seems that because of pushback from tenants and public censure, major adjustments had to wait until they could renegotiate leases or new tenants moved in.⁹ One way around this was to sell the property. Because leases were categorized as obligations, they were only effective between the landlord and the lessee. When a new owner took control, they were extinguished (*shōmetsu*), leaving the original tenant facing eviction.¹⁰ The rapidity of turnover in urban real estate markets also exacerbated problems stemming from the ambiguity of exactly when a property was legally transferred between two parties. In the gap between signing a contract and registering the transaction, there existed huge potential for legal conflict.

In 1921, after a decade of false starts, the Diet finally passed legislation to address these problems.¹¹ The Land and House Lease Laws represented a watershed in Japanese housing policy. Not only did they decide the decades-old dilemma of how to handle registration in favor of renters, who were accorded a *de facto* right to contest third-party claims regardless of whether they had registered their leases or not. The new laws also lengthened the minimum duration of real-estate leases; they allowed the courts to determine a reasonable rent in instances when the landlord and tenant could not; and, in

⁹ Ono, “Daiichi sekai taisen zengo no Tokyo ni okeru jūtaku mondai,” 7–8.

¹⁰ Ōba Hiroyuki, *Fudōsan kōji seidoron* (Tokyo: Seibundō, 2010), sec. 3; John O. Haley, “Japan’s New Land and House Lease Law,” in *Land Issues in Japan: A Policy Failure?*, ed. John O. Haley and Kozo Yamamura (Seattle: Society for Japanese Studies, University of Washington, 1992), 153–56.

¹¹ The first proposal for this kind of legislation was made by Upper House member Isobe Shirō in 1910. Similar attempts were made throughout the 1910s, but not until 1921 was a bill able to get through both houses of the Diet. For a brief history of this process, see Hirata Atsushi, *Shakuchi shakuyahō no rippō kenkyū*, Shohan (Tokyo: Seibundō, 2014), chap. 2.

stipulating that landlords could not refuse to renew a lease without showing “just causes,” they decisively strengthened the legal position of urban renters. In light of this, John Haley described the system created under these laws as an indirect “rent control regime.”¹² That is precisely what these laws were intended to be, and they served this function until they were replaced in 1991.¹³

In advance of the Land and House Lease Laws, jurists at Tokyo Imperial devised two major legal solutions to the troubles facing renters and buyers in the 1910s. These conditioned their interpretation of the 1921 reforms. Both ideas were predicated on the basic belief that social change necessitated legal reform, and both saw interpretation as the main mechanism of that reform. Where they diverged was in their framing of the problem and their conception of social benefit. The first proposal, championed by the German-law specialist Hatoyama Hideo, favored securing real estate transactions by enhancing the power of registration. As in France, Japanese law worked on the premise that a seller could not transfer a better right than he actually possessed.¹⁴ In the instance that one piece of real estate was sold to two buyers, this forced the courts to try to determine the sequence of the sales in order to decide which contract was valid. By contrast, Hatoyama essentially argued that Japan should adopt the German model, making registration the sole criterion for a transfer of rights (*kōshinshugi*). This meant that regardless of whether the seller possessed a legitimate claim to the real estate he was

¹² Haley, “Japan’s New Land and House Lease Law,” 165.

¹³ Hirata, *Shakuchi shakuyahō no rippō kenkyū*, 33–35.

¹⁴ Garro, *The Louisiana Public Records Doctrine and the Civil Law Tradition*, 47.

selling—regardless, for instance, of whether he had already contracted to sell to another party—so long as he was still named as the owner in the public registry, the courts should recognize the good faith of the buyer and consider the sale valid. For Hatoyama, social evolution justified making this change. Japanese property law, he claimed, developed in an age when the most important aspect of property law was the “static security” (*seiteki anzen*) of ownership. This was a reasonable choice when the civil code was promulgated, since there was no custom of registration, yet “with the development of society,” it had become increasingly important to guarantee the “dynamic security” (*dōteki anzen*) of real estate transactions.¹⁵ What was good for the market was good for society.

Makino Eiichi offered the major alternative to Hatoyama’s thesis. Beginning with “The Socialization of Law” and continuing into the early 1920s, Makino argued again and again that Japan was entering an era in which use should be given precedent over ownership. Registration was beside the point. The solution to the spate of disputes between tenants and landlords boiled down to a question of social utility. Landlords may claim they need to raise rents because the value of their real estate was increasing, but for Makino it was self-evident that tenants who lived in a building or operated a business out of it added greater value to society than those who only collected rents from these

¹⁵ Hatoyama first proffered this argument at a March 1915 meeting of the Legal Philosophy Research Association (*Hōri kenkyūkai*). Several months later he published a more completely developed argument in the *Journal of the Jurisprudence Association*. The basic premise remained the same. Hatoyama Hideo, “Hōritsu seikatsu no seiteki anzen oyobi dōteki anzen no chōsetsu to waga minpō,” *Hōgaku kyōkai zasshi* 33, no. 5 (n.d.): 180–81; Hatoyama Hideo, “Fudōsan bukken no tokusō henkō ni kan suru kōshinshugi oyobi kōjishugi o ronzu,” *Hōgaku kyōkai zasshi* 33, no. 7 (1915): 54.

activities. In fact, the notion that value derived from supply and demand was reprehensible to him. The reason land prices were rising in the first place, he wrote in 1916, was because tenants were “using the land,” while landlords made “no contribution whatsoever.”¹⁶ It was utterly perverse, he believed, that a plot of land could gain value simply by having a new train line built in its vicinity.

Makino was usually careful to insist that he was not calling for the abolition of private property but only that, as he once put it, “ownership is treated equitably with other elements that bring prosperity to the land.”¹⁷ But beneath these qualifications lay a radical vision for reorganizing Japanese society along essentially corporatist lines. On occasion this showed through. In Makino’s 1917 *Contemporary Culture and Law* (*Gendai no bunka to hōritsu*), he portrayed society as a factory in which each member contributed “energy” through the performance of specific and socially ascribed tasks. In another piece from the same year, he admired what he called the “socialist jurisprudence” of Britain and Germany’s war economies, which made “it impossible to arbitrarily dispose of capital, labor, and ownership” for personal gain.¹⁸

Despite the differences between Hatoyama and Makino’s interpretation of Japanese property law and the politics that informed them, the two scholars avoided direct confrontation through the second half of the 1910s, with the result that no real

¹⁶ Makino Eiichi, “Hōritsu no shakaika,” *Chūō kōron* 31, no. 8 (August 1916): 67.

¹⁷ *Ibid.*, 59–63; Makino Eiichi, “Hōritsu kaizō no kiten toshite no shakaika (shita),” *Chūō hōritsu shinpō* 1, no. 2 (1921): 2.

¹⁸ Makino Eiichi, “Shakaihōgakuha no hōritsu shisō,” *Chōsen oyobi Manshū*, no. 125 (1917): 35.

resolution was reached between them. Instead, the issue was settled by the adoption of Land and House Lease Laws in 1921. For Makino and for other professors in the department, not only the fact that these laws strengthened renters' rights but the mechanisms by which they achieved this effect appeared full of historical import. By allowing renters to contest third-party claims just as any landowner might, the laws seemed to elevate the right to use of a piece of property to nearly the same status as ownership, and Makino's theory about the trajectory of property rights seemed to be corroborated.

Makino was typically quick to herald these laws as the advent of a new age. In light of the reforms, it was evident, he wrote, that "land ownership" was "no longer a thing like a right" but needed to be understood "in regard to the social service the landowner provided." They confirmed the fact that it was justified to limit an owner's rights for the sake of "someone who, by acting on the land, fulfills a social service."¹⁹ Suehiro Izutarō, too, remarked on the epochal nature of the new laws. To look back over the history of the last hundred years of civil law was to discover a gradual process of "real right-ization" (*bukkenka*) of the legal status of renters, he wrote. While the ability of one party to use and profit from another person's real estate had once been dependent on the owner's will, "step by step legal protections have been accorded. Moreover, protections that once stopped at the level of an obligation have, with time, become like real rights."²⁰

¹⁹ Makino, "Hōritsu kaizō no kiten toshite no shakaika (shita)," 2.

²⁰ Suehiro Izutarō, "Jūtaku mondai to shin shakuya hōan," *Hōgaku kyōkai zasshi* 39, no. 2 (1921): 69.

By mid-decade, this theory had gained wide acceptance in the legal academy.²¹ Makino believed the situation could be pushed further. In the aftermath of the Kanto Earthquake, he proposed that “right to life” could be inferred from recent legislation and the government’s reaction to the disaster. This time Hatoyama directly contested Makino. Their debate showed how much ground the social interpretation of law had gained, and also presaged the limits of how far this interpretation could be taken.

The Earthquake and the “Barracks” Problem

Two years after the Land and House Lease Laws were enacted, the aftermath of the Kantō Earthquake drew the legal academics back to questions about the status of private property and the balance of power between renters and landlords. Once again the issue turned on the technicalities of Japanese property law. Long before the civil code was drafted, it was customary in Japan to treat land and the structures built on it separately. This practice was translated into modern property law, allowing up to four different parties to have a legal claim to real estate on one plot: the landowner (*jinushi*), the land lessee (*shakuchijin*), the owner of a building built on the land (*yanushi*), and the tenant of that building (*shakuyajin*). Here lay the problem: Tokyo was full of people who owned or

²¹ The examples are innumerable, but perhaps the best evidence of its consecration can be found in the diction or jurisprudential words and concepts that Suehiro and fellow Tokyo Imperial Professor Tanaka Kōtarō edited in the mid-1930s. Nishimoto Tatsunosuke, “Shoyūken,” in *Hōritsugaku jiten*, ed. Izutarō Suehiro and Kōtarō Tanaka, vol. 2, 5 vols. (Tokyo: Iwanami shoten, 1935), 1403–8; Wagatsuma Sakae, “Shakuchi shakuya hō,” in *Hōritsugaku jiten*, ed. Suehiro Izutarō and Tanaka Kōtarō, vol. 2 (Tokyo: Iwanami shoten, 1935), 1203. It continued to carry currency well into the postwar era. For example, see Watanabe Yōzō, *Tochi, tatemono no hōritsu seido* (Tokyo: Tōkyō daigaku shuppankai, 1960).

held leases to the buildings they lived or worked in but had no legal claim to the land on which these buildings stood. When the fires took their homes and their businesses, hundreds of thousands of people were made vagrants overnight. The city had only started building its administrative capacity and was woefully unprepared to deal with so many homeless families.²² For the most part, the displaced were left to fend for themselves. Many retreated to the homes of relatives outside the city, while others gathered in public parks in Hibiya, Ueno, and Shinjuku, and in the open areas around Meiji Shrine. It was weeks before the government offered them temporary shelters.²³ In the meantime, a large number of residents returned to the plots where they had been renting and built or tried to build temporary structures, or “barracks” (*barrakku*) as they were called in the Japanese press, on the footprint of their former homes and businesses.

The ensuing legal discussion turned on whether there was a legal case for allowing the temporary structures to remain. While a handful of scholars argued the shanties should be torn down immediately, their voices were drowned out by the majority who saw that as politically impossible. Far more common were arguments like that of Imamura Shin, a young graduate of the Faculty of Law, who claimed that former residents had a right to build shelters in order to safeguard their property that remained

²² The city’s Bureau of Social Affairs had only been established in 1919, the City Planning Bureau a year later.

²³ Schencking, *The Great Kantō Earthquake and the Chimera of National Reconstruction in Japan*, 69–70.

on site.²⁴ Others favored an emergency ordinance (*kinkyū chokurei*) granting a temporary stay to residents of the shelters.

Two weeks after the earthquake, in an October 3 article for a popular Tokyo newspaper, Makino put forward an unorthodox case for allowing the shanties to stay, one whose implications far exceeded the scope of the problem at hand. If the law was interpreted narrowly, there was no question, Makino conceded: The temporary structures were illegal, and the former tenants should be evicted if landowners so desired. But for Makino this argument simply exposed the illegitimacy of abstract legal reasoning. Instead, he claimed, the former renters should be allowed to rebuild based on the fact that every Japanese citizen was entitled to a right to life (*seizonken*).²⁵ To be clear, no such right existed in the letter of the law, but Makino argued it could be derived from the penumbra of the Land and House Lease Laws. In the extra protections they provided to real estate leases specifically—leases created for the express purpose of building or using a structure—Makino detected the “recognition of a certain sort of thing” (*isshu no aru mono*). What the law had merely implied, Makino felt he could name: a right of residency (*kyojūken*) and a right of enterprise (*eigyōken*). The combination of these he called a right to life.²⁶ The right to work was a standard of legal socialism since Fourier, although it was

²⁴ Hatoyama Hideo, “Taisaigo no shihō mondai,” in *Saigo no hōritsu mondai* (Tokyo: Ushiku shoten, 1923), 64–65.

²⁵ Makino’s piece was reprinted in a collection of articles about the legal issues surrounding the earthquake that was rushed to the printer in December 1923. Makino Eiichi, “Yakeato no karigoya mondai,” in *Saigo no hōritsu mondai* (Tokyo: Ushiku shoten, 1923), 1–26.

²⁶ *Ibid.*, 9.

new in Makino's repertoire.²⁷ It has been suggested that he took the concept from the Weimar Constitution, but he had already started using the term in 1916.²⁸

As was his style, Makino offered multiple arguments to support his claim, but the main thrust of his case came down to a utilitarian justification. In the twentieth century, private property mattered less than social utility. "A plot of land does not derive its value by virtue of it being owned by any one person," he wrote. "It fulfills its social purpose (*shakaiteki igi*) when someone makes appropriate use of it and when it is rationally administered."²⁹ Catastrophe only underscored this fundamental truth. Recovery would not be "advanced on the basis of ownership." It would take labor, applied to the land and buildings on which ownership made its claims.³⁰ The right to life, he assured his readers, was "not a right to be idle. It was a right to social activity."³¹ These ideas were not exactly new, but Makino had never assembled them in such a forceful array, and he had never been quite so explicit about their political import. The right to life was a frontal assault on private property, in the name of social utility.

Hatoyama Hideo took exception to Makino's argument for a number of reasons. In a response published in the *Osaka mainichi shinbun*, he questioned why landlords had

²⁷ Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Mass: Harvard University Press, 2010), 35.

²⁸ Shiraha Yūzō, *Keihō gakusha: Makino Eiichi no minpōron* (Hachijōji: Chūō daigaku shuppanbu, 2003), 61; Makino, "Hōritsu no shakaika," 63.

²⁹ Makino, "Yakeato no karigoya mondai," 14.

³⁰ *Ibid.*

³¹ *Ibid.*, 21.

seemingly been left out of Makino's calculations.³² After all, they made their living from their property rights. If tenants had a right to life, surely landowners did as well. But for Hatoyama, the main problem with Makino's proposal was that it extrapolated new, hazily defined rights when a perfectly viable remedy already existed in Japanese law: the abuse of rights. In the abstract, perhaps Makino's right of residency and right of enterprise seemed commonsensical, but there was no way of determining their relationship to a rental contract and thus no way to tell how long they endured after the contract was terminated. Far better than trying to balance these rights against the rights of the landlord was to use the more "elastic" standard of the abuse of rights. As the legal quandaries surrounding a case grew more complex, the abuse of rights became more "flexible and elastic," Hatoyama claimed.³³

The significance of this dispute can be difficult to identify. Makino and Hatoyama agreed that property rights were not absolute. They agreed that the shanties should be allowed to stay. Neither was especially concerned with the letter of the law or the formal coherence of the civil code. And even though Makino's right to life seemed to make a positive case for the tenants while Hatoyama's abuse of rights merely restricted the exercise of landlords' ability to evict them, in practice both required the courts to make a decision based on balancing of interests rather than any explicit legal rule. The key difference lay in the question of duration. Makino's right to life extended a state of

³² Hatoyama, "Taisaigo no shihō mondai," 67.

³³ *Ibid.*, 69.

emergency into doctrine.³⁴ For him, the earthquake simply highlighted historical trends that predated it and that ought to be made permanent. By contrast, the abuse of rights, as described by Hatoyama, was largely restricted to states of emergency. The specific standard he cited was established by a 1919 Supreme Court decision, where the court had ruled that when the harm caused by exercising a right “exceeds a generally accepted degree,” the exercise of that right did not fall within the “suitable range” and was therefore invalid.³⁵ Thus, whether an action constituted an abuse or right was not dependent on that action itself. Rather, that determination required taking into account the scope of social harm in general. The abuse of rights allowed that conflicts of interest exist in all societies, and to certain extent social life required that individuals be prepared to suffer damages for the good of the whole. But when these harms became excessive, as in the case of the earthquake, the exercise of individual rights could be curtailed for the sake of the society. In this way, Hatoyama wrote, the abuse of rights performed the role of a “safety valve in contemporary law.”³⁶

Makino fired back with an article that was partly a defense of the right to life and partly a personal attack on Hatoyama, whose criticisms he called “unbecoming of an

³⁴ This was a sign of things to come. In the late 1930s he interpreted the National Mobilization Law (*Kokka sōdōin hō*) as a sign that national socialism had finally arrived. Makino Eiichi, “Hijōjihō no hijōhō to kōjōsei,” *Nihon hyōron* 14, no. 6 (April 1939).

³⁵ Hatoyama, “Taisaigo no shihō mondai,” 75.

³⁶ *Ibid.*, 76.

established scholar.”³⁷ What Hatoyama had failed to see was that the difference between their positions was primarily perspectival, he explained. “When the concept of ownership is regulated by the idea of an abuse of rights, the rights of others in opposition to the right of ownership are extended by that much more.” The right to life was simply Hatoyama’s abuse of rights as viewed from the other side.³⁸

Hatoyama never responded. After publishing a major treatise on property law in which he took his most progressive stance to date, arguing that all contracts should be regulated by the principle of good faith (*shingi seijitsu no gensoku*), Hatoyama never produce another piece of academic work.³⁹ A year later he shocked the academic community by opting for early retirement. In a system where esteemed scholars typically occupied their positions into their sixties and continued thereafter on emeritus status, Hatoyama’s decision to leave Tokyo Imperial at the age of 42 was virtually unprecedented. His scuffle with Makino was surely not the only cause of his retirement, yet their disagreement was emblematic of Hatoyama’s growing isolation in a department that had been taken over by more zealous reformers. On the housing issue, the question of debt relief, and the legal status of married women, he tended to hold more conservative

³⁷ Makino Eiichi, “Seizonken no gainen no hōritsuteki kōsei ni tsuite: karigoya mondai ni kan shite Hatoyama hakase e,” in *Saigo no hōritsu mondai* (Tokyo: Ushiku shoten, 1923), 33.

³⁸ *Ibid.*, 36.

³⁹ Suzuki Rokuya, “Hatoyama Hideo,” in *Nihon no hōgakusha*, ed. Toshitaka Ushiomi and Nobuyoshi Toshitani (Tokyo: Nihon hyōronsha, 1975), 298.

opinions than his peers. While he moved closer to them in the early-1920s, he never found a comfortable position in the department.⁴⁰

Reflecting on the event decades later, Hatoyama's protégé and successor, Wagatsuma Sakae, recalled his mentor being greatly pained by the tirades against German law that Suehiro Izutarō frequently delivered in the faculty lounge. To a scholar who had spent his career mastering the kind of careful statutory analysis that Suehiro condemned as "idiocy," these words landed like brickbats.⁴¹ The stress was such that on at least one occasion Hatoyama broke into tears as he and Wagatsuma walked home from a night at the bars around campus.⁴² Contemporary accounts also drew a connection between Hatoyama's retirement and recent shifts in the department. While his peers dedicated themselves to the social issues of the day, Hatoyama had "buried his head" in the study of the civil code itself, wrote Katayama Tetsu. Owing to his "inflexible, insufficiently accommodating" conception of law, Hatoyama was "never able to establish himself as a leading figure" among civil law scholars of the day.⁴³

As it turned out, the most important outcome of the debate was the exposure of the radicalism that had been latent in Makino's writings for years. Although he had the

⁴⁰ Yoshida Katsumi, "Shakai hendōki no nihon minpōgaku: Hatoyama Hideo to Suehrio Izutarō," *Hokudai hōgaku ronshū* 52, no. 5 (January 2002): 261–300.

⁴¹ Wagatsuma Sakae, "Minpō ni okeru omoide to kaiko," *Hōritsu jihō* 23, no. 11 (1951): 759.

⁴² In 1950 Suehrio, Makino, and Wagatsuma discussed Hatoyama's departure. A transcript of their conversation can be found in Nihon Hyōronsha, ed., *Nihon no hōgaku*, (Tokyo: Nihon hyōronsha, 1950), 51–57, esp. 54.

⁴³ Katayama Tetsu, "Tōdai wo saran to suru Hatoyama Hideo ron," *Kaizō* 7, no. 12 (1925): 86.

last word against Hatoyama, right-wing students now accused him of violating Article 27 of the Constitution, which guaranteed the inviolability of private property except as stipulated in law, and denounced the right to life as “a hackneyed socialist expression.”⁴⁴ Being labeled a socialist had always been dangerous in Japan, but by the mid-1920s the risk was growing considerably. The imprisonment of professor Morito Tatsuo for his 1920 article on Kropotkin scandalized the academy at the beginning of the decade. Although the government had long acted to suppress leftwing activity, until then it had generally exempted academics so long as they confined themselves to scholarly work.⁴⁵ Yet the Morito Affair, combined with a flurry of leftwing organizing in the early 1920s and the attempted assassination of the Crown Prince in December 1923, impelled conservative Justice Ministry officials Hiranuma Kiichirō and Suzuki Kisaburō to devise a more muscular legal mechanism for suppressing leftwing activities.⁴⁶ After a failed attempt in 1923, their efforts bore fruit in 1925 with the enactment of the Peace Preservation Law, which provided that anyone who organized or joined an association “with the objective of radically altering the national polity (*kokutai o henkaku shi*) or denying the system of private property” was subject to imprisonment for up to ten years.⁴⁷ The first major use of the law came in March 1928, when police conducted mass arrests of

⁴⁴ Makino Eiichi, “Seizonken,” *Hōgaku shirin* 26, no. 17 (1924): 82–83.

⁴⁵ Marshall, *Academic Freedom and the Japanese Imperial University, 1868-1939*, chap. 3.

⁴⁶ Richard H. Mitchell, “Japan’s Peace Preservation Law of 1925: Its Origins and Significance,” *Monumenta Nipponica* 28, no. 3 (1973): 329–33; Garon, *The State and Labor in Modern Japan*, 132–33.

⁴⁷ I am using the translation of the law’s wording provided by Garon, *The State and Labor in Modern Japan*, 130.

some fifteen hundred communists across the country. Amendments that year broadened its scope and added the death penalty to the possible range of sentencing, allowing the law to be used against not only the Communist Party but organized labor more generally.⁴⁸

All this was still in the offing in 1924, when Makino addressed his accusers, but he was already well aware of the threat. The year before he had written a critique of an early draft of the legislation that became the Peace Preservation Law.⁴⁹ Now, accused of socialism, he undertook to reconstruct the legal foundations for the right to life, abandoning his utilitarian argument and emphasizing instead its connection to Japanese case law and the “virtuous ways and beautiful customs” of Japanese tradition. In 1920, in a landmark ruling, the Great Court of Cassation ruled that a wife whose husband had repeatedly failed to send remittances back from his job overseas was entitled to engage in all legal activities she needed to in order to support her family. Under Japanese law wives were considered “legally incompetent,” but the justices reasoned that the husband’s consent to his wife’s activities could be inferred from his duty to his family.⁵⁰ In a second, earlier case from 1912, the chief priest of a monastery had been found guilty of abandonment (*ikizai*) for expelling an infirm traveler who collapsed in one of the temple’s hall.⁵¹ In both these examples, Makino claimed, an obligation to others was

⁴⁸ Ibid., 150–51.

⁴⁹ Makino Eiichi, “Kageki shakaiundō torishimari hōan ni tsuite,” *Hōgaku shirin* 24, no. 8–12 (1922).

⁵⁰ Makino, “Seizonken,” 84.

⁵¹ Ibid., 90.

affirmed above the minimal parameters of those that were spelled out in the law. From this could be discerned a right to life, however dimly.⁵²

This pattern of repackaging “legalistic socialism,” as Makino had described his project, grew more pronounced over the 1920s.⁵³ Facing the criminalization of socialist thought, Makino found it convenient to rephrase his ideas about social obligations in the idiom of the Japanese right.⁵⁴ In 1926, for example, he cited Article 51 of the constitution, which stipulated that the judicial powers and all of the Japan’s courts operated “in the name of the emperor,” as yet further grounds for the need to restrict private property and freedom of contract.⁵⁵ Later, in the closing months of the Pacific War, he could be found insisting that the right to life was promised by the Meiji emperor’s Five Charter Oath.⁵⁶

Interwar Mediation

In the end, the barracks question was decided not by legal doctrine but by a new system of mediational committees that had been created in 1922 as an addendum to the Land and House Lease Laws. This system, the first of its kind in Japan, became the model for similar mediational tribunals established throughout the 1920s and 30s to manage a growing number of social issues. Following the 1922 Land and House Lease Mediation

⁵² Ibid., 93.

⁵³ Makino Eiichi, “Shakaishugiteki shisō no hōritsu kōsei: Morito gakushi no ‘Zenrōdōshūekiken shiron,’” *Hogaku shirin* 26, no. 12 (1924): 89.

⁵⁴ Ibid.

⁵⁵ Shiraha, *Keihō gakusha*, 160.

⁵⁶ Makino Eiichi, *Nihon hōteki seishin no hikaku hōteki jikaku* (Tokyo: Yūhikaku shobō, 1944), 67.

Law, a string of legislation was passed that extended mediation to the farm tenancy system, labor disputes, and debt repayment. As mediation was expanded, greater degrees of compulsion were introduced into the system. As provided for initially in the 1922 Land and House Lease Mediation Law, mediation was an entirely optional alternative to regular court, initiated by a petition from either party of the dispute. A 1924 amendment allowed judges to recommend mediation for chosen cases, which became standard in all subsequent mediation laws. Settlements still required the consent of both parties. If they failed to reach an agreement, the committee could draw up a recommendation and send it to the claimant and defendant. If neither party contested the recommendations within a month, the settlement would be considered binding, but this kind of passive acquiescence was rare.⁵⁷ Instead, failure to reach an agreement through mediation meant that the case would be sent back to the courts. The 1932 Monetary Claims Temporary Mediation Law broke with this precedent. In instances where the parties could not reach an agreement, the law allowed the court to render “judgments in lieu of mediation,” based on the recommendations of the mediation committee. This was continued with the 1938 Agricultural Land Adjustment Law, and with the 1942 Special Wartime Civil Affairs Law, mediation was made compulsory for all civil cases, and in the event that the parties could not reach an agreement, the judge was permitted to impose one.⁵⁸ With this mediation supplanted the formal legal process entirely.

⁵⁷ Hozumi Shigetō, “Daishinkazai to shakuchi shakuya chōteihō,” *Hōgaku kyōkai zasshi* 42, no. 5 (1924): 178.

⁵⁸ This shift is discussed in detail in Haley, “The Politics of Informal Justice: The Japanese Experience, 1922-1942,” 135–37; Frank K Upham, “Weak Legal

Mediation was one of the most significant Japanese legal innovations of the interwar period and perhaps even of the twentieth century. Not only did it anticipate the collapse of formal court processes in the late 1930s. It also bequeathed the template for informal resolution to the postwar era, when litigation in Japan tracked remarkably low levels in comparison to other industrial democracies. For these reasons mediation has been the subject of rich scholarly discussion. Kawashima Takeyoshi, a student of Suehiro's and one of the main torchbearers of a social approach to the law in the early postwar decades, saw it as emblematic of a traditional preference for harmonious social interactions which he variously identified as "Japanese legal consciousness" or Japan's "legal culture."⁵⁹ American academics pushed against this. In a seminal 1978 essay, John Haley demonstrated that Japan's low rate of litigation was a strikingly recent phenomenon.⁶⁰ In fact, the number of new cases filed annually in the 1920s and early-30s was markedly higher than in the postwar years, despite population growth.⁶¹ Rather than culture, Haley argued that the expansion of mediation in the interwar period was part of a conservative reaction to the explosion of lawsuits in the 1920s, driven by fear that

Consciousness as Invented Tradition," in *Mirror of Modernity: Invented Traditions of Modern Japan*, ed. Stephen Vlastos (Berkeley: University of California Press, 1998), 59.

⁵⁹ His classic Kawashima Takeyoshi, *Nihonjin no hōishiki* (Tokyo: Iwanami shoten, 1967).

⁶⁰ John Owen Haley, "The Myth of the Reluctant Litigant," *Journal of Japanese Studies* 4, no. 2 (1978): 359–90.

⁶¹ There were 129,152 new civil cases filed in 1920, according to Ministry of Justice statistics. In 1931, this figure peaked at 261,760 new cases, and then began to fall, reaching a nadir during the war around 40,000 cases. Despite a growing population in the postwar years, through the 1960s, the number of lawsuits never exceeded 190,000. *Ibid.*, 369.

litigation would upset the established social hierarchy.⁶² Frank Upham echoed Haley in describing mediation as the work of longstanding conservative antipathy to individual rights.⁶³ For these scholars, who were particularly conscious of the difficulty Japanese pollution victims in the 1970s encountered in bringing their grievances to trial, interwar mediation appeared as the origin of a half-century of denial of justice.

Certainly, mediation had a strong conservative pedigree. It emerged from the Special Legislative Council (*Rinji hōsei shingikai*) created by Hara Takashi in 1919 to devise ways to reconcile Japan's civil code with the "virtuous ways and beautiful customs." More than anything this phrase, long a watchword of the Japanese right, meant obedience and the preservation of the existing social hierarchy. The appointment of the conservative bureaucrat Hiranuma Kiichirō as the council's vice chair bolstered these commitments. But closer inspection suggests that despite these circumstances, the idea for the establishment of mediational committees was not particularly conservative in origin or intent. Along with Hiranuma, four jurists from Tokyo Imperial were appointed to the council: Hozumi Nobushige as its chair, and Makino Eiichi, Hatoyama Hideo, and

⁶² Importantly, Haley notes that the availability of conciliation by itself did not entail lower rates of formal litigation. "Instead the creation of an additional process for formal dispute resolution led to an even greater increase of cases channeled into the formal process." *Ibid.*, 373, 379. Haley stayed with this thesis, but in his subsequent writings he has cast it in an increasingly positive light. What were once the conservative underpinnings of mediation became a preference for "cohesion over conflict, a collectivist ethic over liberal values" or "confirming community...in which the interests of the community as a whole subsume those of each member." Haley, "The Politics of Informal Justice: The Japanese Experience, 1922-1942," 140; Haley and Foote, "Judicial Lawmaking and the Creation of Legal Norms in Japan: A Dialogue," 96.

⁶³ Upham, "Weak Legal Consciousness as Invented Tradition."

Hozumi Shigetō as regular members. Ultimately, their ideas proved to be a more significant influence on the establishment of mediational tribunals.

In the early 1920s, as the council deliberated on how to reform Japan's legal system, the professors and students at Tokyo Imperial came together behind the notion that the legal system needed to be simplified. Hozumi Shigetō put forward the first proposal along these lines.⁶⁴ Borrowing from the American lawyer Reginald Heber Smith, he made a series of recommendations: lowering the cost of legal proceedings, state appointed lawyers, a family court, legal aid, and the creation of a mediation system.⁶⁵ For Hozumi, these were all ways to lower the bar of access to the legal system and increasing legal knowledge among Japan's poor. Hatoyama had the same notion: "To the extent that the actual law (*jittaihō*) remains unchanged, the simplification of court procedure is necessary in order to protect the economically inferior."⁶⁶ Makino's enthusiasm for mediation was similarly driven by an interest in egalitarianism, though he conceived of it more in terms of outcome than process. Because tribunals uncoupled the administration of justice from the confines of formal legal procedure, they facilitated what he called the "concrete validity" (*gutaiteki datōsei*) of decisions. By this he envisioned "equitable" (*kōhei*) outcomes tailored to the individual nature of each dispute. Like Makino's jurisprudence in general, this idea was predicated on an essentially moral vision of what

⁶⁴ Hozumi Shigetō, "Saibansho no kan'ika," *Hōgaku kyōkai zasshi* 38, no. 4–8 (1920).

⁶⁵ Irie Hideaki, *Gendai chōteiron: Nichi-Bei ADR no rinen to genjitsu* (Tokyo: Tōkyō daigaku shuppankai, 2013), 153–55.

⁶⁶ Hatoyama Hideo, "Genkō saiban seido no kaizen ni tsuite," *Chūō hōritsu shinpō* 1, no. 1 (1921): 8.

the law should be, yet it was not a hidebound morality but an evolutionary one in which he placed his faith. As he wrote in an extended essay on the value of mediation, “The law’s content can only be understood in the context of contemporary thought. And because contemporary thought is not determined by the law, the judge, independent of the law, must foresee (*dōsatsu*) the direction it is heading, and based on this make reasonable judgment on each case.”⁶⁷

The earthquake and the aftermath offered a chance to test these ideas. In the eleven months between the enactment of the bill and the quake, mediation committees settled 311 cases. In the next four months, until the last day of January 1923, they would field 10,000 inquiries and accept 6,416 new cases. To handle the load, a series of field offices were set up in the wards of Tokyo hardest hit by the quake and the ensuing fires. Beginning already on September 26, 11 field offices were established in Hibiya, Kōjimachi, Nihonbashi, Kyōbashi, Akasaka, Shiba (now part of Minato), Kanda, Hongō, Shitaya, Asakusa, Honsho Fukagawa. Koshikawa and Ushigome were added shortly after.⁶⁸ According to the new mediation law, a single legal expert could conduct a committee by himself, but after the earthquake the preferred structure was to combine an academic with a local representative, often someone nominated as an honorary position by the ward office.⁶⁹ Makino Eiichi was dispensed to Kyōbashi. Mizuma Shinzō, a senior

⁶⁷ Makino Eiichi, “Gutaiteki datōsei,” in *Hōritsu ni okeru gutaiteki datōsei* (Tokyo: Yūhikaku shobō, 1925), 103.

⁶⁸ Hozumi, “Daishinkazai to shakuchi shakuya chōteihō,” 154.

⁶⁹ The precise wording was “someone with special knowledge or experience” (*tokubetsu no chishiki keiken aru mono*). More than a decade later, it appears that academics were still the preferred option for filling this role. Kumatani Kenichi, “Shakuchi shakuya

professor of civil law, was sent to Shiba. Hatoyama went to Koishikawa and Ushigome, while Suehiro handled Shitaya and Hozumi took Nihonbashi.⁷⁰ At each location they worked first in tents and then in temporary structures built on burned out lots.

There were all kinds of disputes in the more than six thousand cases that came before the committees, but the overwhelming majority of them revolved around the construction of temporary structures on private land. Although this created a legal quandary about whether those renting homes and offices had any legal claim to the land on which those structures stood, the mediation committees did not have to concern themselves with doctrine. Their decisions show that this generally worked out favorably for the tenants. Within 1,710 cases resolved by the committees in 1923 where the landlord filed a petition, former tenants had been forced to vacate only 101 times. Moreover, in 79 of these cases the tenants were awarded compensation by the committee, either the purchase price of the barracks or a fee for relocation expenses. The most common outcome was to allow the barracks to stand and to award rent to the landlord, although in 328 cases this was only a short-term arrangement.⁷¹

By the numbers, it was clear that mediation offered better outcomes for tenants for a lower cost than the courts could have. But for Hozumi the benefits of mediation went beyond quantifiable results. In his description of the experience, he returns again and again to the thought that mediation seemed to model a more immediate and

chōteihō,” in *Hōritsugaku jiten*, ed. Izutarō Suehiro and Kōtarō Tanaka, vol. 2 (Tokyo: Iwanami shoten, 1935), 1999.

⁷⁰ Hozumi, “Daishinkazai to shakuchi shakuya chōteihō,” 159.

⁷¹ *Ibid.*, 165–66.

therefore more salutary means of resolving legal conflicts. Rather than a courtroom, he and other mediators had conducted their hearings amid the ruins of the city. In their tents and shelters, “rich with the sense of catastrophe,” the social function of the law was made immediate.⁷² The committees were also able to glide over procedural issues that would have delayed a formal hearing. Some of the children orphaned by the earthquake were party to disputes that went to mediation. Rather than convening a family meeting to select an official guardian, mediators felt comfortable partnering the minors with more proximate “able attendants.”⁷³ Even more promising, for Hozumi, was the way that mediation worked in an emotional register that legal formalities precluded. Most disputes, he thought, stemmed from an “emotional collision” between the parties involved, and “easing those emotions is the key to resolution.” In general, the mediation process was supposed to be closed to the public, but exigencies after the quake had forced them to hold relatively open proceedings. This redounded to the benefit of the commissions in Hozumi’s estimation. The public nature of mediation, in which the opposing parties pleaded their cases before their community, tempered their emotions and was conducive to more reasonable comportment.⁷⁴

In all these ways mediation seemed to confirm the Tokyo Imperial jurists’ belief that streamlining legal procedure would better fulfill the law’s obligations to justice and social order. In a moment of elation, Makino celebrated mediation for having “smashed

⁷² Ibid., 154.

⁷³ Ibid., 160.

⁷⁴ Ibid., 165.

the foundations” of private ownership and “rights-based” legal procedure and wished out loud that it would overtake the entire justice system.⁷⁵ In some respects, Makino got his wish. The next several years saw the enactment of the 1924 Tenant Farmer Mediation Law and the 1926 Labor Dispute Mediation Law. These were followed by similar legislation in the 1930s, beginning with the 1932 Monetary Claims Temporary Mediation Law, which effectively supplanted the regular legal system in favor of mediation. Expansion, however, would reveal the deficiencies in Makino’s understanding of how mediation worked. The kind of legal system he desired was not achievable simply by tearing down the formal system of rights. It would turn out that the “specific validity” was just as subject to context as rights.

The creation of the Tenancy Mediation Law (*Kosaku seido chōteihō*) foreshadowed the increasingly conservative bent that mediation would take as the decade wore on. Poverty in the countryside was a longstanding issue. It had precipitated uprisings in the 1880s, when fiscal restraint bankrupted small holders. As attested to by Nagatsuka Takashi’s portrait of village life, *The Soil* (Tsuchi), conditions in the at the start of the twentieth century were harrowing in many places.⁷⁶ By the end of the 1910s, due not only to hardship but the increasingly the rise of rentier landlords, who no longer shared a community with their tenants, sharecroppers began to organize to boycott rents

⁷⁵ Makino Eiichi, “Ōkina hōritsu to chisana hōritsu,” *Chūō hōritsu shinpō* 3, no. 2 (1923): 3.

⁷⁶ Takashi Nagatsuka, *The Soil: A Portrait of Rural Life in Meiji Japan*, trans. Ann Waswo (Berkeley: University of California Press, 1989).

and demand reductions.⁷⁷ In response to this politicization, the Ministry of Agriculture and Commerce convened an investigative commission on the tenancy system in November 1920. Suehiro Izutarō joined the commission just after he returned from his travels in Europe. In June 1921 he sat in on the fourth session, and by the fifth one that July he had become a full member.⁷⁸ Two officials from the Ministry, Ishigurō Tadaatsu and Kodaira Gon'ichi, had already put forward draft legislation detailing a more complete list of rights for tenant farmers, similar to the Land and House Lease Laws that had just been ratified in the Diet. Suehiro added to these a proposal for the creation of sharecropper unions and a new law that would have facilitated collective bargaining with landlords.⁷⁹ Somehow these proposals leaked to the Tokyo and Osaka Asahi newspapers, which published them in October 1921. The outcry from landlords forced the committee to change its tack. A legislative fix was scrapped. In its stead the commission recommended the tenancy issue be managed through a system of mediation.⁸⁰

⁷⁷ Waswo, “The Origins of Tenant Unrest.”

⁷⁸ Itō Takao, *Taishō demokurashii ki no hō to shakai* (Kyoto: Kyōto daigaku gakujutsu shuppankai, 2000), 88–89.

⁷⁹ Makino Eiichi, “Kosaku chōtei shugi: sono igi oyobi genkai,” *Hōgaku shirin* 26, no. 8 (1924): 10–11.

⁸⁰ Itō, *Taishō demokurashii ki no hō to shakai*, 91. Similar to the system of mediation established for urban housing disputes, the Tenancy Mediation Law enacted in 1924 was voluntary. Disputants could bring their issues to a committee rather than a court, but the composition of the committee was less favorable. A new position of chief mediation officer was created in each local district. He was able to choose two other members of the community to help mediate disputes. “Kosaku sōgi chōtei hōan zenbun,” *Chūō hōritsu shinpō* 2, no. 29 (1922): 16–17; Ronald Dore, *Land Reform in Japan* (New York: Oxford University Press, 1959), 83.

The change of course was immediately condemned by Sugiyama Motojirō, one of the founders of the newly formed Japanese Farmers Association (*Nihon nōmin kumiai*). In his view, the mediation law was “muddled rubbish” that existed simply as a means to avoid more actionable reforms to tenancy law.⁸¹ Landlords, for their part, attacked the legislation for interfering in what they saw as their private contractual relationships with tenants.⁸² Suehiro defended the decision as the best outcome of what was politically possible. The fundamental problem facing farmers, he wrote in a pamphlet about the mediation law, was a problem of capitalism. The penetration of the market economy into the countryside had transformed Japanese farmers, small holders and sharecroppers alike, into a proletarian labor force that could no longer pursue subsistence agriculture. Until a comprehensive policy was devised, mediation could at least provide a measure of relief.⁸³ Where the law, or what Suehiro called “state norms” (*kokkateki kihan*), failed to protect tenants from eviction and exploitation, the ethical judgments of the community could be mobilized to constrain the behavior of landowners.⁸⁴ In another essay, he couched his justification of mediation in more pessimistic terms. The real-life disparity between landowners and tenants was too great and the state too beholden to the interests of capitalists and landowners, Suehiro wrote. At best the state could mediate between the two sides, but it was just as likely that it would become a tool of the landholding class. It

⁸¹ Itō, *Taishō demokurashii ki no hō to shakai*, 91.

⁸² Makino, “Kosaku chōtei shugi: sono igi oyobi genkai,” 86.

⁸³ Suehiro Izutarō, *Kosaku chōteihō taii* (Tokyo: Kagaku shisō fukkyū kai, 1924), 3–8.

⁸⁴ *Ibid.*, 14.

was thus “self-contradictory” to expect a solution to come from the government. Instead, Suehiro laid his trust in the tenant farmer union movement to achieve results that would “far exceed those achieved through the government’s so-called social policy.”⁸⁵

Makino was more ambivalent. He maintained hope that the expansion of mediation would further the collapse of “the fortress of conceptual law” and move the country “one step” closer to “a social revolution.”⁸⁶ Yet he saw severe limitations to its capacity to ameliorate the poverty of Japan’s tenant farmers, due largely to the deflationary economy. In contrast to cities, where conflicts between landlords and tenants stemmed from rising prices, the countryside was plagued by falling profits. Mediation may have facilitated a more just distribution between landlords and tenants, but it offered little relief where the problem was fundamental scarcity. Mobility was another issue. Whereas urbanites could move if their rents got too high, tenant farmers were tethered to the land, into which the labor they poured was yielding slimmer and slimmer returns.⁸⁷

These doubts proved prescient. Mediation did provide some tangible relief to sharecroppers in the form of rent reductions and deferments in the worst years. Ultimately, however, the relief provided was not enough, and the reliance on the munificence of local officials proved an unstable mechanism for social assistance. In Miyazaki Prefecture, for example, petitions to the mediation committees frequently yielded rent reductions, and only in rare cases did the committees support landlord’s

⁸⁵ Suehiro Izutarō, *Nōson hōritsu mondai* (Tokyo: Kaizōsha, 1924), 137.

⁸⁶ Makino, “Kosaku chōtei shugi: sono igi oyobi genkai,” 101.

⁸⁷ *Ibid.*, 103–5.

attempts to evict their tenants for late payment. Still, mediation did little to halt the growth of farm tenancy, as more and more small holders lost their land to soaring debts. Moreover, in providing a sanctioned channel to address disputes, this system contributed to the delegitimization of tenancy unions and direct action.⁸⁸ Similar outcomes were observed in Akita Prefecture. Mediation of agricultural tenancy helped supplant efforts to realize collective bargaining.⁸⁹

Viewed at a remove in time, the failures of mediation in the countryside are even clearer. The 1920s were hard years for Japan's farmers. The 1930s were worse. Falling agricultural prices from 1920—due in part to general economic deflation and in part to a state policy of importing large quantities of grain from the colonies—left farmers in Japan with expenses greater than earnings in five out of the ten years in the 1920s. Not since the Matsukata deflation of the mid-1880s had such a situation lasted for such a period of time.⁹⁰ The 1927 banking crisis and the collapse of agricultural prices in 1931 exacerbated these issues. The years after 1930 were marked by hunger, debt, foreclosure, and the experience of precariousness. Estimates of farm debt in 1932 put the amount farmers owed at 4 to 6 billion yen, and a 1934 survey found an average debt of about four times the expected annual income of a family in one northeastern village.⁹¹ Without

⁸⁸ Kainō Tamie, “Kosaku chōtei hō to nōmin kumiai undō,” *Waseda hōgakkai shi*, no. 23 (1973): 31–32.

⁸⁹ Hara Naoyuki, “Tōhoku chihō ni okeru kosakuryō kankei gata kosaku chōtei jiken no bunseki,” *Tochi seido shigaku* 39, no. 4 (1997): 1–15.

⁹⁰ Kerry Douglas Smith, *A Time of Crisis: Japan, the Great Depression, and Rural Revitalization* (Cambridge, Mass: Harvard University Press, 2001), 47.

⁹¹ *Ibid.*, 65.

corresponding legislation, mediation alone may have afforded case-by-case relief to the destitute, but in comparison to the scope of the problems facing Japanese farmers and laborers, it was woefully insufficient.

The 1926 Labor Disputes Mediation Law followed a similar pattern. Initially conceived as one element in the most progressive package of labor legislation proposed in Japan before 1945, mediation came to function as a hindrance to the labor movement when accompanying labor laws failed to make it through the Diet. The initial draft was prepared by the Kenseikai party and belonged to a larger effort to cultivate support among the working class in anticipation of the establishment of universal male suffrage. The proposed bill would have recognized labor unions and expanding social services. It also contained provisions to punish employers for arbitrary dismissals and for refusing to hire union members, and it guaranteed collective bargaining agreements by making them enforceable against companies and individuals who were not directly involved. Prime Minister Wakatsuki Reijirō's Home Ministry lined up behind the new law, but in the Investigative Commission on Administration (*gyōsei chōsakai*) held in the fall of 1925, conservatives from the Ministry of Agriculture and Commerce and the Justice Ministry were able strip the law of many of the elements most favorable to labor.⁹² Despite these amendments, the new labor law failed to win a majority. With its collapse, all that was left was the mediation bill, which narrowly made it through to ratification. The law was officially invoked only six times before 1945, all between 1930 and 1934, when was used to resolve large transportation strikes. The scope of mediation was greater than these

⁹² Garon, *The State and Labor in Modern Japan*, 126–27.

figures convey. From the late 1920s it became customary to resolve strikes and other labor disputes through unofficial negotiations, with the police serving as the most common mediator.⁹³ For labor, the results were at first mixed. The police frequently extracted concessions from management, enough that Japan's largest union supported a proposed expansion of mediation in 1934.⁹⁴ But they also worked to eliminate communists and other labor leaders considered too far left from the bargaining table. Those who stayed were dependent on the discretion of the state to support them against their employers. This turned into a terrible position once the military moved to break unions entirely, beginning with their elimination from the military's arsenals in 1936.

From the Yanagishima Settlement to North China Rural Customs Survey

The third innovation to come out of the earthquake was the creation of a Yanagishima Settlement in the slums east of campus. Its creation was a direct result of the quake. Suehiro was in the mountain retreat of Karuizawa with his family when the earthquake struck on September 1. He caught the first train back to Tokyo that he could. Arriving on campus he found his library and the room used for the Civil Law Study Association destroyed by fire. Thousands of homeless from the surrounding neighborhoods, some of the worst affected areas in the city, crowded onto the university's campus, where groups

⁹³ Andrew Gordon, *The Evolution of Labor Relations in Japan: Heavy Industry, 1853-1955* (Cambridge, Mass: Harvard University Press, 1985), 209.

⁹⁴ Garon, *The State and Labor in Modern Japan*, 206–7.

of students had begun organizing relief efforts.⁹⁵ Suehiro joined them, and later put on gators and walked around the disaster areas with a mess kit.⁹⁶ The disaster drove a cleft into his vision of a socially attuned practice of law. He had only just established the Case Law Study Association the year before, but after the earthquake he increasingly focused on more direct engagement with the community. He might have gone in this direction regardless, but the shock and proximity of the disaster spurred him to an abrupt change of course.

Suehiro began lobbying for the creation of a university-affiliated mission in the slums east of campus from the end of 1923. On June 10, 1924 the Yanagishima Settlement opened its doors. The name and the basic concept were borrowed from London's Toynbee Hall and Chicago's Hull House. Founded in the 1880s, these two institutions served as the archetypes for an Anglo-American settlement movement that mixed philanthropy and social scientific investigation, middle-class condescension toward the poor and a Christian gospel of service. The differences were in some ways as large as their similarities. Toynbee Hall was staffed by British lords and male students from Oxford, while Jane Addams's Hull House was operated by middle-class women. Toynbee's major concern was the working class, while at Hull House, the beneficiaries were mostly recent European immigrants. Yet both represented an attempt by elite, university-affiliated Protestants to soften the class divide through philanthropy. A great emphasis was placed

⁹⁵ Hirano Yoshitarō, "Shakaikagakusha Suehiro Itzutarō," *Hōritsu shinpō* 23, no. 11 (1951): 4.

⁹⁶ Fukushima Masao and Kawashima Takeyoshi, eds., "'Hozumi Suehiro ryōsensei wo shinobu kai' kara," in *Hozumi suehiro ryō sensei to setsurumento* (Tokyo: Tokyo daigaku setsurumento hōritsu sōdanbu, 1963), 12.

on educational enrichment. By giving the poor the tools and knowledge of the middle class, it was thought that their lives, and perhaps even their social standing, could be bettered. Toynbee and Hull also functioned as research facilities, collecting information on urban poverty that undergirded early social and labor legislation.⁹⁷

The settlement movement reached Japan as early as the 1890s, gaining steam in during the 1910s, as urban poverty grew increasingly visible. By 1924, when the Yanagishima Settlement was established, there were already 49 settlement-like institutions in Japan, concentrated in Tokyo and Osaka.⁹⁸ Christians accounted for many of these. Katayama Sen and Kagawa Toyohiko opened settlements in Tokyo, Osaka, and Kobe, while the Kōbōkan settlement in Tokyo's Honjo Ward was the work of the work of foreign missionaries connected to the Japanese Women's Christian Temperance Union.⁹⁹ But if there was a touchstone for Yanagishima, it was Toynbee Hall. Suehiro and Hozumi Shigetō, who joined the settlement in its first year of operation, had both visited the Hall

⁹⁷ There is an extensive body of literature on Toynbee Hall and Hull House, as well as on the settlement movement more generally. I have relied on Rodgers, *Atlantic Crossings*, 64–66; Robert C. Reinders, “Toynbee Hall and the American Settlement Movement,” *Social Service Review* 56, no. 1 (1982): 39–54; Emily K. Abel, “Toynbee Hall, 1884–1914,” *Social Service Review* 53, no. 4 (1979): 606–32; Gertrude Himmelfarb, “Victorian Philanthropy: The Case of Toynbee Hall,” *The American Scholar* 59, no. 3 (1990): 373–84.

⁹⁸ Jason Michael Morgan, “Equity under Empire: Suehiro Izutarō and the Birth of the Law-and-Society Movement in Japan” (Dissertation, The University of Wisconsin, Madison, 2016), 151–52.

⁹⁹ Manako Ogawa, “‘Hull-House’ in Downtown Tokyo: The Transplantation of a Settlement House from the United States into Japan and the North American Missionary Women, 1919–1945,” *Journal of World History* 15, no. 3 (September 1, 2004): 365.

during their sabbaticals, as had a number of their students, and to the extent that they cited their sources, it was to Toynbee that they gave credit.¹⁰⁰

As at Toynbee and Hull, the first mandate of the Yanagishima Settlement was to share academic knowledge with the community at large. In a memorable phrase, Suehiro described himself and his colleagues as “monopolists of higher learning” who had a duty as citizens and recipients of public funds to bring their expertise directly to the community at large.¹⁰¹ The creation of a law clinic, along with education programs for laborers, children, and regular residents from the neighborhood fulfilled this mission.¹⁰² Research was, if anything, even more central the Yanagishima Settlement’s purpose than it was to their British and American counterparts. Over the years, two generations of social scientists began their careers by living and working there.

Yet the similarities only extended so far. For one, Yanagishima was a notably makeshift affair. Its initial operating costs were strung together with a combination of leftover earthquake relief funds, personal contributions, and donations collected by Tokyo Imperial students, but by the later years Suehiro and Hozumi were covering most

¹⁰⁰ Suehiro Izutarō, “Tōkyō teikoku daigaku setsurumento setsuritsu shuisho,” in *Hozumi Suehiro ryō sensei to setsurumento*, ed. Fukushima Masao and Kawashima Takeyoshi (Tokyo: Tokyo daigaku setsurumento hōritsu sōdanbu, 1963), 109–11.

¹⁰¹ Suehiro Izutarō, “Teidai setsurumento kara mitaru hōritsu,” *Hōgaku kyōkai zasshi* 44, no. 4 (1926): 747.

¹⁰² An overview of these activities can be found in *Tōkyō teikoku daigaku setsurumento nenpō*, vol. 2 (Tōkyō teikoku daigaku setsurumento, 1926), 6–30.

of the expenses from their personal accounts.¹⁰³ Its facilities consisted only of a single two-story house that a student with connections to a large landowner had secured.¹⁰⁴ Nominally, eight student settlers lived and worked in the building, but during exams and other busy moments in the semester it was not uncommon for operations to be suspended for days on end.¹⁰⁵ More importantly, its political hue was not that of turn-of-the-century philanthropists but of the interwar left. Among its most active residents were the three so-called Marx Tarōs—Hirano Yoshitarō, Yamada Moritarō, and Ōmori Yoshitarō—former students of Tokyo Imperial who had become key theorists of Japanese Kōza-ha Marxism by the end of the 1920s. The other students who manned the settlement were notorious for their left-wing sympathies, and the singer, feminist, and communist Seki Akiko was a mainstay in the children’s education department. She even wrote an anthem to help domesticate the concept of “settlement” (*setsurumento*), a foreign word unfamiliar outside the cosmopolitan elites who ran it.¹⁰⁶

The settlement’s leftwing ethos showed clearly in workers’ schools that Hirano established. Together with Suehiro he developed curricula for classes on the rural problem, labor law, economics, and the history of labor movements in Japan.¹⁰⁷ It was also evident in the law clinic. The legal work the students performed was often aimed at

¹⁰³ Fukushima Masao, “Hozumi Shigetō ryō hakase to setsurumento jigyō,” in *Hozumi Suehiro ryō sensei to setsurumento*, ed. Masao Fukushima and Takeyoshi Kawashima (Tokyo: Tokyo daigaku setsurumento hōritsu sōdanbu, 1963), 82, 87.

¹⁰⁴ Fukushima and Kawashima, “‘Hozumi Suehiro ryōsensei wo shinobu kai’ kara,” 13.

¹⁰⁵ *Tōkyō teikoku daigaku setsurumento nenpō*, 2:31.

¹⁰⁶ Fukushima, “Hozumi Shigetō ryō hakase to setsurumento jigyō,” 84.

¹⁰⁷ *Tōkyō teikoku daigaku setsurumento nenpō*, 2:7–11.

assisting their clients in conflicts with the authorities, employers, and husbands. They inspected labor contracts for compliance with the law and helped workers make claims against their employers for stolen wages. They assisted divorced women trying to keep custody of their children, and they counseled people who had been maimed by the police and prison authorities.¹⁰⁸ By keeping records of these exchanges, they sketched out a picture of the major difficulties that the residents encountered. For example, one of the most pernicious issues that local factory workers faced was the prevalence of foremen (*shokuchō*), who not only managed the workforce but also supplied it. This arrangement buffered factory owners from their laborers. Sometimes they would not even know the name of the company they were working for. It also allowed owners to evade certain provisions in the Factory Law that only applied to full-time employees.¹⁰⁹

Surveillance and police pressure were never far from the activities of the settlement. In the first year of operation the association between the settlement and leftwing politics was apparently so strong that Hozumi Shigetō was recruited to rehabilitate its image. According to one former resident, Hozumi's proximity to the Imperial family via his father was seen as means to shield the settlement.¹¹⁰ If this worked, it did so only to a certain extent. Of the approximately 260 students who lived at the settlement in the 14 years it was in operation, about 70 were arrested by the police at

¹⁰⁸ Suehiro, "Teidai setsurumento kara mitaru hōritsu," 747–49.

¹⁰⁹ *Ibid.*, 48. For an example of how cases were categorized, see *Tōkyō teikoku daigaku setsurumento nenpō*, 2:33.

¹¹⁰ Fukushima and Kawashima, "'Hozumi Suehiro ryōsensei wo shinobu kai' kara," 14.

some point. Twenty students had just been taken in for questioning when Hozumi himself made the decision to shut the settlement down in 1938.¹¹¹

Yet closure of the Yanagishima Settlement did not mean an end to the ideas that had inspired it. Shut down in Tokyo, Suehiro and a group of the settlement's most dedicated researchers shifted their activities to China, where they applied research methods and ideas developed over the past decade to produce a survey of enduring significance. The North China Rural Customs Survey (*Kahoku nōson kankō chōsa*) was carried out during the height of the war, from 1939 to 1942. Suehiro was the chief architect of the study. Under him operated a crew of assistants, all of whom had cut their teeth conducting social surveys out of the Yanagishima Settlement: Hirano Yoshitarō, Niida Noboru, Kainō Michitaka, Isoda Susumu, and Fukushima Masao.

On the one hand, the North China survey fit neatly into a long tradition of similar studies conducted by Japanese administrators in Taiwan, Korea, and Manchuria shortly after Japan gained a concrete interest in these lands through annexation or extraterritorial concession. The most ambitious of these was a study of Taiwanese customary law (*Taiwan kyūkan chōsa*), which spanned more than two decades, from 1900 to 1922, and resulted in a three-volume compendium not only of Taiwanese legal customs but an exacting statistical analysis of economic conditions around the islands.¹¹² The North China survey was one of many surveys in China underway in the 1930s. Japanese

¹¹¹ Fukushima, “Hozumi Shigetō ryō hakase to setsurumento jigyō,” 88–89.

¹¹² For an abbreviated summary in English, see Santarō Okamatsu, *Provisional Report on Investigations of Laws and Customs in the Island of Formosa* (Taipei: Ch'eng Wen Publishing Co, 1971).

researchers working for the South Manchuria Railway (*Mantetsu chōsabu*) were responsible for four major surveys in the North China Plain from 1935 to 1942, while Chinese researchers from Nankai University, aided by foreign experts, produced droves of data on the Chinese economy and rural life during the 1920s and 30s.¹¹³

Like all these surveys, the primary aim of Suehiro's study was knowledge production to facilitate more effective administration of China. Yet its conceptualization of its subject and its methods set it apart from other social surveys conducted in China before or during its execution. The survey Suehiro conceived of was less empirical than ethnographic, and the kind of information it sought to uncover were not the legal practices that had existed up to the point of Japanese invasion, which is how previous customs surveys had conceptualized local practices. Nor did it seek quantitative data on land ownership, population, and crop production as was the norm in contemporary economic surveys. Rather, Suehiro was after "nothing other than the 'living law' that Ehrlich made the subject of his legal sociology."¹¹⁴ In this way, the North China survey represented the most overt example of the confluence between the ideas and methods

¹¹³ Yung-chen Chiang, *Social Engineering and the Social Sciences in China, 1919-1949* (New York: Cambridge University Press, 2001), chap. 5. One of the more notable examples of these surveys was organized by the American agricultural economist John Lossing Buck, who was hired to help establish a social science program at Nanjing University. John Lossing Buck, *Chinese Farm Economy: A Study of 2866 Farms in Seventeen Localities and Seven Provinces in China* (Chicago: University of Chicago, 1930).

¹¹⁴ Ishida Makoto, "Senzen no kankōchōsa ga 'hō seibi shien' ni toikakerumono: Taiwan kyūkan chōsa, Manshū kyūkan chōsa, Kahoku nōson chōsa," in *Hikaku hōgaku kenkyū no shindankai: hō no keiju to ishku no riron* (Tokyo: Seibundō, 2003), 103.

developed by Tokyo Imperial jurists in the 1920s and the agenda of the imperial wartime state.

Years before the survey, beginning around 1933, Suehiro already showed a willingness to compromise with the rightward trend in Japanese politics. These developments in some ways reflected Suehiro's own intellectual trajectory. Like his colleagues at Tokyo Imperial, Suehiro spent much of the 1930s trying to accommodate his vision of reform to a political environment increasingly hostile to social science and to university professors. He had begun distancing himself from the day-to-day operation of the settlement in 1934, when he was appointed as Dean of the Faculty of Law and came under attack from Minoda Munekichi's rightwing student groups. Where he had once criticized Japanese labor law for its dependence on the benevolence of employers (*onjōshugi*), from 1930 he began to explore ways to "permanently" sustain it "if," he wrote, benevolence was in fact a "special feature of our national economy."¹¹⁵ By his 1934 *Beginner's Guide to Jurisprudence* (*Hōgaku nyūmon*), he had made his peace with fascism. "All people must fulfill their duty as a member of society," he wrote. In light of this, Japan needed a "new jurisprudence" that would "recognize [an individual's legal] authority only to the extent that it is necessary" to perform one's social function.¹¹⁶ When tensions between Japanese and Republican troops flared into full-scale war in July 1937, he was ready to put his theories of law into service for the empire.

¹¹⁵ Suehiro Izutarō, "'Onjōshugi' no botsuraku," *Kaizō* 9, no. 2 (1927): 256–62; Suehiro Izutarō, "Onjōshugi to rōdō rippō," *Hōritsu jihō* 2, no. 5 (1930): 3.

¹¹⁶ Quoted in Ishida Makoto, "Suehiro hōgaku no kiseki," in *Suehiro Izutarō to Nihon no hōshakaigaku*, ed. Kahei Rokumoto and Isamu Yoshida (Tokyo: Tokyo daigaku shuppankai, 2007), 168.

The initial concept of the North China survey seems to have occurred to Suehiro in the aftermath of the July 1937 Marco Polo Bridge Incident, when provocations between Japanese and Republican troops erupted into full-scale war on the continent. In his editorial column in the October 1938 issue of the *Law Bulletin*, Suehiro identified a need for customary law surveys in China to help “adjust” the tactics used by Japanese troops to pacify the local population.¹¹⁷ A year earlier, Suehiro, along with international law scholar Yamada Saburō and Matsumoto Jōji, a former Tokyo Imperial law professor who left the academy for a high-powered political career, petitioned the state to authorize such a survey. Their point of contact was the East Asia Development Board (*Kōain*), a new agency under the direct control of the cabinet, created in 1938 to coordinate China policy. The request was relayed to the East Asia Research Center (*Tōa kenkyōjo*), an advisory organ to Prime Minister Konoe Fumimārō’s war cabinet, and in October 1938, the Sixth Survey Committee (*Dairoku chōsa iinkai*) was established to undertake the project.¹¹⁸ Suehiro was put in charge of the committee, and from the spring of 1939 he began outlining plans for the subject and methods of his pet project.¹¹⁹

The vision for the survey took shape over the course of about a year, as Suehiro and his team of researchers from Tokyo Imperial refined their ideas about how to

¹¹⁷ Suehiro Izutarō, “Shina ni okeru hōteki kankō chōsa no hitsuyō,” *Hōritsu shinpō* 10, no. 10 (1938): 3.

¹¹⁸ Ishida, “Senzen no kankōchōsa ga ‘hō seibi shien’ ni toikakerumono: Taiwan kyūkan chōsa, Manshū kyūkan chōsa, Kahoku nōson chōsa,” 101.

¹¹⁹ Fukushima Masao, “Chūgoku nōson kankō chōsa to hōshakaigaku: tokuni Suehiro Izutarō no hōshakaigaku riron o chūshin toshite” (Chūgoku nōson kankō kenkyūkai, February 1957), 7, Niida Papers, Institute for Advanced Studies on Asia Library, Tokyo University.

systematically describe the living law and the methodology needed to “grasp as a whole the actual conditions of customs” in Chinese villages, as it was put in the earliest research proposal.¹²⁰ The existence of this kind of thick, determinative customary law was assumed by the Tokyo Imperial staff, but in communicating it to the field researchers in China, they found that the concept was not as clear as they imagined. Prompted by an April 1940 brief from the research division of the South Manchuria Railway, which defined customary legal norms vaguely as “historical, social, economic products,” Suehiro drafted an eight-page, handwritten memorandum that attempted a more precise definition.¹²¹ Yet conceptual precisions would prove elusive, because of the nature of his concept of a legal norm (*hōteki kihan*). “In theory,” he wrote, “moral, ceremonial, and religious norms” needed to be excluded from the survey, but “in reality” it was often difficult to draw clear distinctions between them and the living law. It was the same for economic activity. These elements were all part of the normative universe “forming the social order.”¹²² Instead, Suehiro stressed the contemporary efficacy of the “legal norms” he was interested in. He wanted a cross-section of the normative universe that, he believed, constituted Chinese society in the present. Without recourse to common conceptual distinctions that divided law from other spheres, he had to reach for a meteorological metaphor. He describes customs he sought as like a “discontinuous front” (*furenzokusenteki karyū*)

¹²⁰ From a bulleted list of possible research agenda, circulated internally among the members of the Sixth Survey Committee (*Chōsa jikō junbi shian*), which is reproduced in *Ibid.*, 7–13.

¹²¹ The researchers’ proposal is reproduced in *Ibid.*, 16–17.

¹²² Suehiro Izutarō, “Chōsa no konpon hōsin ni kan suru oboegaki,” 1940, 3, Niida Papers, Institute for Advanced Studies on Asia Library, Tokyo University.

between two separate weather patterns: one a “traditional” normative universe that “originated in ancient China;” the other comprised of “progressive elements” that had emerged in Chinese society since the overthrow of the Qing Dynasty in 1912.¹²³ When his clarifications were again met with confusion, Suehiro refined them further in a longer brief delivered to the research team, but the conceptual framework, organized around the metaphor of a “discontinuous front,” remained.¹²⁴

Suehiro’s idiosyncratic vision resulted in an idiosyncratic survey, one whose conceptual peculiarity was tempered by scrupulous collection of an immense amount of information. From November 1940 to December 1942, a team of 16 researchers made seven multi-week trips to six villages that dotted the edge of a large arc that began outside of Jinan in Shandong Province, passed through Shijiazhuang in Hebei, continued north to Beijing, and then looped back toward Tangshan and the Bohai Sea.¹²⁵ In each village the research team gathered data on the local government, land titles, the tax system, water management, family structure, and other quantifiable subjects, but a large part of their time was spent interviewing local informants. Most often these were village leaders and those identified as local literati, from whom, as Suehiro had envisioned, they sought to

¹²³ Ibid., 8.

¹²⁴ Suehiro Izutarō, “Chōsa hōshin tō ni kan suru uchiawase jikō,” November 1940, 5, Wagatsuma Papers, Institute for Advanced Studies on Asia Library, Tokyo University; Koguchi Hisata, “Chūgoku kenkyū ni okeru Suehiro hakase no kyōteki igi,” *Waseda hōgaku* 55, no. 2 (1979): 16–17.

¹²⁵ The villages were Lengshuigou, Houxiashai, Sibeichai, Wudian, Shajing, Houjiaying.

understand the normative structure of Chinese village life that operated beneath direct state control.¹²⁶

The six-volume collection that resulted from these efforts was a key source for a number of studies of Chinese village life before the 1949 revolution.¹²⁷ How extensively Suehiro's theory of living law was translated into the survey results and how greatly these influenced the academic work that later drew on them remains a question.¹²⁸ But considering its origins in the labor movement of the early 1920s, the survey marked a remarkable breakdown. The mission that had inspired Suehiro after the 1923 earthquake was one of service and empowerment. In China it was about pacification. The social order that he and his researchers sought to uncover and explain precluded the possibility that the peasants they were surveying were capable of political views that mattered. Where once the concept of society had signified a need for equity and accommodation for the working class, in China it was refigured as a purely descriptive category with which Suehiro and others sought to conceptualize an inexorable process of modernization.

¹²⁶ Suehiro, "Chōsa hōshin tō ni kan suru uchiawase jikō," 8–9.

¹²⁷ In English, the most notable examples are Prasenjit Duara, *Culture, Power, and the State: Rural North China, 1900-1942* (Stanford, Calif: Stanford University Press, 1988); Philip C. Huang, *The Peasant Economy and Social Change in North China* (Stanford, Calif: Stanford University Press, 1985); Ramon Hawley Myers, *The Chinese Peasant Economy: Agricultural Development in Hopei and Shantung, 1890-1949* (Cambridge: Harvard University Press, 1970).

¹²⁸ Scholars who have used these surveys have generally approached them critically, careful not to reproduce the perspective of Japanese "conquerors," as Philip Huang put it, in their own work. Despite this caution, few if any have appreciated the intellectual context and objectives responsible for survey's design and thus have tended to take at face value the premise of the survey—that there was a living law to be captured in the first place—without appreciating its political entailments. Huang, *The Peasant Economy and Social Change in North China*, pt. 39; Duara, *Culture, Power, and the State*, 6–7.

Conclusion

One of the most trenchant critiques the social jurists leveled at rights in the civil code was that they were mere abstractions that distracted from the social relationships that subtended them. It was ironic, then, that in answer to rights they offered only greater abstractions and informal alternatives. There seemed to be no way to formulate the social aspect of law. It could only be adumbrated with concepts like the “real right-ization” of leases, appeals to morality, or Suehiro’s “living law.” After the Kanto Earthquake these provided a compelling account of the ways that society and the law were changing, and to the extent that they were believed, they served to thicken the meager social policies of the 1920s. They directed discretionary decisions, which were at the core of the Land and House Lease Laws and mediation committees, toward considerations of equity and social outcomes, and they conditioned expectations of outcome. This system provided significant protections, especially against evictions, but it was dependent on a political reality external to it. Makino’s habit of inferring social principles into the law hit its limit with the “right to life.” By the 1930s, with substantive policy to address rural poverty and legal support for collective bargaining derailed, mediation no longer operated in the interest of the weaker party.

CHAPTER THREE

One Giant Test Site

It was all perplexing to Wagatsuma Sakae. He had arrived in Manchukuo for the first time on December 5, 1935, to assist in creating a workable property regime for the new state. At the end of two busy weeks he was standing at the podium of the employees club for the Economic Research Association of the South Manchurian Railway. “What is my general impression now that I’ve come to Manchuria?” Wagatsuma asked, prompted by the association’s chairman. “I don’t understand a thing about Manchuria. That is my impression.”¹ It was too hot on the train from Dalian, but when he finally disembarked in Changchun, renamed Xinjing (New Capital) under the new Japanese puppet regime, he found it was freezing. The city’s streets were jammed with cars and horse-drawn carts—“a mess of old and new mixed together”—and the Hotel Yamato where he was staying presented a discomfiting blend of the familiar and foreign. Befitting its name evoking ancient Japan, it was done up in Japanese style, with a Japanese bath and a staff in Japanese dress, but when Wagatsuma tried speaking to the employees, he found that they were locals who could barely understand him. Strangest by far was the state of the government.² Describing a visit to the General Affairs Agency (*sōmuchō*), the seat of power since an administrative reshuffle in 1934, Wagatsuma did not explicitly call Manchukuo a puppet state, yet his distaste for the charade of local governance was clear.

¹ Wagatsuma Sakae, “Wagatsuma kyōju danwa sokkiroku,” December 21, 1935, 3, Wagatsuma Papers, Institute for Advanced Studies on Asia Library, Tokyo University.

² Wagatsuma, “Wagatsuma kyōju danwa sokkiroku.”

“Generally the most senior director [of each section] was a Manchurian, and generally he was in his office. The Japanese staff, who would be the assistant manager or something like that, was generally away somewhere, and when you asked where he went, you’d usually be told there was a meeting at the military headquarters,” Wagatsuma said. “The impression I got was that all of Manchukuo’s staff was at military headquarters.”³

The army’s outside role in Manchukuo’s government was all the more unsettling because it was familiar. The Kantō Army’s invasion of Manchuria on September 18, 1931 coincided with rapid and punishing deflation in Japan, compounding economic crisis with a diplomatic one, precipitating Japan’s withdrawal from the League of Nations Assembly in 1933, and shattering the fragile practice of allowing party cabinets that emerged after 1918. The ramifications of these events were still unfolding in December 1935 when Wagatsuma visited the country. Already it was clear that the creation of Manchukuo in 1932 had endowed the Japanese military with a level of political power it had not enjoyed since the Meiji era. With the two main parties Seiyūkai and Minseitō already in turmoil, they were unprepared to offer meaningful resistance when, after the assassination of Prime Minister Inukai Tsuyoshi on May 15, 1932, Crown Prince Saionji Kinmochi appointed Admiral Saitō Makoto to fill the vacancy. Entrusting the prime ministership to a member of the military was supposed to be a stopgap until the “time of crisis” had passed, but once the reins of the state were in military hands, the political parties never really regained control of the system.⁴ The academy, too, had come under

³ Ibid., 3–4.

⁴ Gordon Mark Berger, *Parties out of Power in Japan: 1931-1941* (Princeton: Princeton University Press, 1977), 51–53.

attack. The accusation of communism the Education Ministry leveled at Takikawa Yukitoki, a criminal law professor at Kyoto Imperial University, was followed by similar charges against the professors in the Faculty of Law at Tokyo Imperial. In Diet debates Makino Eiichi and Suehiro Izutarō were labeled “red professors” (*sekka kyōju*), and in 1935 the liberal Minobe Tatsukichi, whose organ theory of the emperor laid the foundation for a secular parliamentarianism, was charged with *lèse-majesté* and purged from his position in the university, the Diet, and public life.⁵ The conditions Wagatsuma found in Manchukuo might have seemed an unpleasant reminder of the baleful turn politics had taken back home.⁶

Yet Wagatsuma was still able to see Manchukuo as something greater than the circumstances of its creation. Whatever his grievances with the current state of the country, they were counterbalanced by the hopes he invested in its future. He had come

⁵ In contrast to the fierce protest of Takikawa’s dismissal at Kyoto Imperial, Minobe’s colleagues and Tokyo Imperial students largely met the news of his purge with indifference or at least inaction. As his successor Miyazawa Toshiyoshi later wrote, “It did not become a problem directly affecting the tenure of university professors. . . . Those of us at Tōdai at the time, myself included, just kept quiet, passively, and did nothing. The other professors had more or less the same idea, and so in the end nothing was done formally.” Marshall, *Academic Freedom and the Japanese Imperial University, 1868-1939*, 158.

⁶ At that time Wagatsuma was given strict instructions from the Ministry of Culture to consider Manchukuo a foreign country, not a colony, and because, as a professor at Tokyo Imperial, he was considered a public employee, he was required to secure permission from the emperor (*chokkyo*) before he could officially work for a foreign government. The next problem was his title. The Foreign Ministry would not allow him to be called an “adviser” (*komon*), as they worried it might undermine their insistence that Manchukuo was an independent country. Tokyo Imperial vetoed a suggestion to call him a “non-regular employee,” as it saw this as a position beneath the dignity of one of its professors. The issue was resolved by borrowing a word from Chinese that translated roughly as “auditor” (*shinkaku*), though to Wagatsuma it was no longer clear what that title meant. Wagatsuma, “Wagatsuma kyōju danwa sokkiroku,” 6.

of age in the early 1920s, at the height of enthusiasm for making the law serve the cause of social evolution, but after a three-year stint in Germany, he had grown dissatisfied with these ideas. He still understood law as a social phenomenon, and like his Tokyo Imperial University mentors Makino Eiichi and Suehiro Izutarō he believed social evolution had outstripped Japan's civil code of 1898. But no longer did he think that the failure of the legal system could be remedied through judicial discretion as had been attempted in the 1920s. Instead, inspired by interwar German sociology and Austro-Marxism, Wagatsuma had cultivated his own theories about the direction Japanese civil law ought to take. Neither custom nor the courts but the state needed to be the main instrument of social regulation, he believed. If social change had made the classical foundations of private property and freedom of contract untenable, the way to rein in the excesses of the system was to identify and explicate new “guiding principles” around which a logically consistent civil law system could be reconstructed.⁷

Now in Manchuria, for the first time since he became a full professor of civil law in 1926, Wagatsuma had the opportunity to apply his ideas on a scale commensurate with his vision. He could not pass up the chance. Despite his misgivings about the preeminence of the military in Manchukuo, he concluded his talk with a note of tempered optimism. For the time being the “experts”—by which he meant himself and the collection of China hands, pan-Asianists, and left-leaning academics comprising the Economic Research Association—would have to accomplish their work under the aegis of the military. But as results emerged, it seemed possible that the professional class could

⁷ Wagatsuma Sakae, “Shihō no hōhōron ni kan suru ichi kōsatsu (I),” *Hōgaku kyōkai zasshi* 44, no. 6 (1926): 1–36.

eventually wrest the state back from the military.⁸ How much faith Wagatsuma had in this forecast is hard to gauge, but whether he believed it or not, it was enough to give him a *modus vivendi*. In a February 1936, having returned to Japan, he published an article detailing preliminary steps for writing a new code. If he still had doubts, he did not mention them. Manchukuo, as he now viewed it, appeared as “one giant test site for scholars of private law.”⁹

The Code

When Wagatsuma wrote that he was thinking of a ten-year timeline that had been set at the December 1935 meetings in Xinjing: five years for a land survey that would catalogue not only ownership and property boundaries but also the complex array of local landholding customs; another five years to compile a code based on this information and calibrate it.¹⁰ As it turned out, the actual process would be compressed into a little over a year. In May 1936 the General Affairs Agency requested that complete drafts of the first

⁸ Wagatsuma, “Wagatsuma kyōju danwa sokkiroku,” 21–22. Here Wagatsuma echoed many Japanese experts that went to Manchukuo. As Shiina Etsusaburō wrote, “As for preserving peace in Manchuria, there is a 7:3 ratio of military might to government. Without a 7:3 [reversed] ratio of government to military might it cannot be achieved. To the extent possible, win the hearts of the people through the power of government; if this fails, then bring out military force.” Janis Mimura, *Planning for Empire: Reform Bureaucrats and the Japanese Wartime State* (Ithaca: Cornell University Press, 2011), 73.

⁹ Wagatsuma Sakae, “Manshūkoku ni okeru tochi seido kakuritsu no kito,” *Hōgaku kyōkai zasshi* 54, no. 2 (1936): 299.

¹⁰ *Ibid.*, 305.

three chapters of Manchukuo's civil code be ready by June 1937. Wagatsuma's grand vision for Manchukuo's civil code transformed into a race to the finish line.

In spite of the haste, Manchukuo's civil code presents a revealing instance of the ways in which jurists responded to the conjuncture of economic and geopolitical crisis that characterized Japan in the 1930s. The Ministry of Justice had stipulated two guidelines for its compilation: The new code was to "rectify conventional individualist legal thought," defined by the now familiar trinity of "absolute ownership, freedom of contract, and fault-based liability," and it was to "accept traditional customs and practices as much as possible."¹¹ The first directive, to dispel liberalism from the law, had become commonplace since the onset of the Great Depression, when capitalism lost legitimacy and the fabric of society seemed threatened, but it was the combination that marked the code as a particularly Japanese endeavor. Before the years of the extended wartime empire of the early 1940s with its Great East Asia Co-Prosperty Sphere, and before Kyoto School philosophers and Japanese Heideggerians attempted to "overcome modernity" by recovering a Japanese essence, the drafting committee of Manchukuo's civil code undertook to square the circle between a "total" state and customary tradition.¹² Their efforts represented perhaps the most concerted attempt to translate this preoccupation of the 1930s into policy. An examination of this process illuminates the turn taken by social jurisprudence in the empire at the same time that it represents what Prasenjit Duara has

¹¹ "Shihō hōki seitei ni tsukite," *Hōsō zasshi* 4, no. 7–8 (1937): 3.

¹² Harry D Harootunian, *Overcome by Modernity: History, Culture, and Community in Interwar Japan* (Princeton: Princeton University Press, 2000), chap. 2.

called the “East Asian Modern”—the attempt to meld tradition and state planning to provide an institutional alternative to the present.¹³

The Manchukuo civil code is important too because of its main author. By the early 1930s Wagatsuma was quickly establishing himself as the preeminent civil law scholar in Japan. It was in part because of his stature that he was charged with overseeing the creation of Manchukuo’s civil code, but not until after 1945 did he truly solidify his claim to preeminence. In 1945 during the waning days of the war, he was tapped by Nanbara Shigeru, the new dean of the Faculty of Law at Tokyo Imperial, to join a small group of academics to prepare the university for the impending defeat.¹⁴ During the American occupation that followed, he took the lead in eliminating the legal foundations of patriarchy in Japanese family law and in promoting the postwar democratic constitution.¹⁵ The academic work Wagatsuma produced in the 1950s and 60s defined the mainstream of postwar civil law scholarship for decades. Even today, Wagatsuma’s textbooks and commentaries on civil law remain staples for Japanese law students.¹⁶ Yet as recently as 1944 in a primer he wrote on the civil code, Wagatsuma’s ideas about the law were unmistakably fascist. “In the end,” he wrote in a section on the guiding

¹³ Prasenjit Duara, *Sovereignty and Authenticity: Manchukuo and the East Asian Modern* (Lanham: Rowman & Littlefield Publishers, 2003), 76.

¹⁴ Andrew E. Barshay, *State and Intellectual in Imperial Japan: The Public Man in Crisis* (Berkeley: University of California Press, 1988), 115.

¹⁵ For his interpretation of these reforms, see Wagatsuma Sakae, *Atarashii ie no rinri* (Tokyo: Gakufū shoin, 1949); Sakae Wagatsuma, *Shin kenpō to kihonteki jinken*, ed. Kenpō fukyūkai (Tokyo: Kokuritsu shoin, 1948). A transcript of the discussion

¹⁶ The most recent edition of his commentaries was issued in 2016. Sakae Wagatsuma et al., *Wagatsuma, Ariizumi konmentāru minpō: sōsoku, bukken, saiken*, 4th ed. (Tokyo: Nihon hyōronsha, 2016).

principles of civil law, society described the relationships between “various groups in which the individual is subsumed (*hōsetsu*),” private law “was subsumed within the concrete, total order of the state,” and individual rights were “nothing more than tasks (*shokumu*) with which each person was charged.”¹⁷

The Manchukuo civil code can help us reconcile these two images. It marked Wagatsuma’s step toward fascism, but it also helps explain his reasons for doing so. For Wagatsuma, the most pressing issue of the age was the management of capitalism. This belief underpinned his willingness to collaborate with the military in Manchukuo and his embrace of legal fascism. It was also the source of his enthusiasm for the early postwar reforms under the occupation. As he wrote in 1948, it may have been too simple to reduce the war to the “inevitable outcome of monopoly capitalism and imperialism,” as postwar Marxists did, yet it seemed “self evident” that “the particular phase of capitalism at that time” was one of the primary causes of the war.¹⁸ If this soft economic determinism was conveniently exculpatory, it also stood Wagatsuma in good stead with the Allied occupiers. They too were eager to explain the war in part as a consequence of Japanese monopoly capitalism, and like him they saw postwar democracy as double-sided: “in the first place as a guaranty of the people’s freedom and their rights against any

¹⁷ Wagatsuma Sakae, *Minpō taii jōkan* (Tokyo: Iwanami shoten, 1944), 15–16.

¹⁸ Wagatsuma Sakae, “Sengo keizai rippō no hōkō,” in *Minpō kenkyū*, vol. 9 (1) (Tokyo: Yūhikaku shobō, 1970), 307.

encroachment by the State; and secondly as a guaranty of the welfare of the people and of the “wholesome and cultured living...of every individual.”¹⁹

A Shining Example for the World

Wagatsuma was not the first and would not be the last to project his dreams onto Manchuria. In Japan, where the imperialist expansion into new territories was of a piece with the drive for civilization and material progress, the colonies often became staging grounds for reforms.²⁰ Manchukuo occupied a special place in the imperial constellation that included Taiwan and Korea. Japan traced its presence in the region to 1905, when it obtained the Guandong Leased Territory and the Southern Manchuria Railway (Mantetsu) as part of the settlement that ended the Russo-Japanese War. By the 1920s Manchuria was absorbing the lion’s share of Japanese foreign investment. When the Kantō Army invaded in 1931, it catalyzed the transformation of an informal imperial space into a state planned site for realizing utopian visions. In rough proportion to the sense of political and economic precariousness that pervaded the early 1930s, the establishment of Manchukuo sparked an outpouring of radical schemes that sought to wrest a new order out of the crisis.

¹⁹ Sakae Wagatsuma, “The Japanese Legal System 1945-1955. Changes in Retrospect,” *Monumenta Nipponica* 12, no. 1/2 (1956): 112.

²⁰ At the same time that activists were mobilizing rural youth throughout the Japanese archipelago, for example, similar projects were underway in Taiwan and Korea. Sayaka Chatani, “Nation-Empire: Rural Youth Mobilization in Japan, Taiwan, and Korea 1895-1945” (Dissertation, Columbia University, 2014).

One of the most influential of these visions was a romantic notion of Asian unity. Ideas of this sort were in currency since around the turn of the twentieth century, when Asia-minded intellectuals like Okakura Tenshin in Japan and Rabindranath Tagore in India had cast off a unitary conception of civilization for a pluralistic view of the modern world in which Asia and Asians had as much to contribute as the West.²¹ The pan-Asianism that came into vogue in Manchuria in the late 1920s shared a number of tropes with this earlier rhetoric. Yet at its core, it was a distinctive settler ideology that took shape amid the political tensions in northeast China and contemporary intellectual currents on the Japanese radical right. Chiang Kai-shek's military campaign to reunite China under the Guomintang formed the backdrop. In response to the Guomintang efforts in 1928 to extend Republican jurisdiction into Manchuria and nationalize the South Manchurian Railway company (Mantetsu), pan-Asianist activists lobbied Japanese military commanders and local leaders to create an autonomous regime in Manchuria and Mongolia. They also drummed up popular support through interest groups like the Majestic Peak Society (*Daiyūhōkai*), a right-leaning organization that drew on Buddhist thought, and the Manchurian Youth League (*Manshū seinen renmei*), which recruited members from among Mantetsu's research staff. By the time of Manchukuo's founding in 1932, the idea of establishing an autonomous, multi-ethnic state in Manchuria and

²¹ Perhaps the most eloquent spokesman of this group was Okakura Tenshin, whose 1904 proclamation that "Asia is One" would later be appropriated by Japanese propagandists as a fig leaf for Japan conquest. See especially Cemil Aydin, *The Politics of Anti-Westernism in Asia: Visions of World Order in Pan-Islamic and Pan-Asian Thought* (New York: Columbia University Press, 2007).

Mongolia claimed a major following among the ranks of the officers and research staff who were running the Manchukuo state.²²

Part of the power of pan-Asianism derived from the fact that it was both full of import and politically indeterminate. Because the goal of Asian solidarity and autonomy was capacious, it could include both right-wing nationalists like Ōkawa Shūmei and Chinese socialists like Li Dazhao under the same banner. This makes it difficult to distill pan-Asianism down to a set of representative tenets. Yet, when the scope is confined to Manchuria, there are a number of traits that stand out. Anti-Westernism stood at the top of the list. Ishiwara Kanji, the army officer who prepared the plans for invading Manchukuo, saw Manchuria as a “lifeline” for Japan that was necessary for the impending final battle with the Western powers.²³ Those who did not share Ishiwara’s apocalyptic outlook often still hoped that Manchukuo might be made into an alternative to the conceptual laminate of individualism, capitalism, industry, class struggle, and Euro-American hegemony that was glossed as the model of “the West”. The Sinologist and journalist Tachibana Shiraki responded to the Confucian language invoked in Manchukuo’s declaration of independence, which promised to “revere the rites and put into practice the Kingly Way (*ōdōshugi* or *wangdao zhuyi*).” In this Tachibana heard assurances that Manchukuo would become an agrarian socialist state, where the

²² For an excellent examination of the influence these societies had on plans for the new state, see Shinichi Yamamuro, *Manchuria Under Japanese Domination*, trans. Joshua A Fogel (Philadelphia: University of Pennsylvania Press, 2006), 61–74.

²³ *Ibid.*

livelihood of all citizens would be guaranteed and the countryside would largely govern itself.²⁴

Here was another common focal point for pan-Asianists in Manchukuo: the evocation of the agrarian. The collapse of agricultural prices after World War I and the corresponding hardship that overtook village life in Japan spurred a group of outsider intellectuals to rework a longstanding belief that agriculture was the root of the nation into a radically anti-modern, anti-Western ideology that inspired some of the most notorious acts of domestic terrorism in Japan in the 1930s. The main thrust of these ideas was that the rural village was the foundation of the nation, the source both of a unique Asian identity and a harmonious social order. For Gondō Seikyo, one of the main agrarianists (*nōhonshugisha*) of the 1920s, all elements of ethical and political life could be traced back to the cultivation of the five grains and the thick veil of ceremony and tradition around it. The Japanese village had become a tableau of misery as the result of malignant influence of the cities and foreign ideas. The solution, according to Gondō, was

²⁴ Tachibana Shiraki, “Ōdō seiji,” *Manshū hyōron* 2, no. 21 (May 1932): 3. Tachibana’s speculation was probably tactical, a way to publicly urge the commanding officers to adopt these policies. More sober minds at the time, like Rōyama Masamichi, saw the kingly way for what it was, “simply a nostalgic byword or an empty abstraction.” “Manshūkoku kenkoku sengen” (Gaimushō jōhōbu, March 1, 1932), Japan Center for Asian Historical Records, Diplomatic Archives of the Ministry of Foreign Affairs of Japan. The origins of this language are hard to pinpoint. There are several possible candidates. In a 1926 speech Sun Yat-sen delivered in Kobe, he had referenced the kingly way as part of an appeal to the Japanese to join with the Chinese people in resisting Western imperialism. Earlier, Terauchi’s cabinet in the 1910s also used kingly way to describe its more conciliatory diplomatic approach toward China. Yat-sen Sun, *China and Japan: Natural Friends—Unnatural Enemies: A Guide for China’s Foreign Policy* (Shanghai: China united press, 1941), 141–51; C. Walter Young, *Japan’s Special Position in Manchuria: Its Assertion, Legal Interpretation and Present Meaning* (Baltimore: The Johns Hopkins Press, 1931), 285.

local autonomy (*jichi*), a term long used by the national government but only to place localities in service to the state. Devolving government to the village and insulating it from the outside world would allow rural recovery toward *shashoku*, Gondō's term for an ideal society built around regimented cultivation and communitarian values, and with this, the spiritual rejuvenation of Japan itself.²⁵ In Manchukuo, iterations of these ideas filled the pages of the *Manchuria Review* (*Manshū hyōron*), a journal for the expatriate Japanese intelligentsia edited by Tachibana Shiraki. They were popular, too, among the advisers who acted as architects of the Manchukuo state. The first provision of the initial draft constitution written by Matsuki Tamotsu, who was the main author of Manchukuo's provisional constitution (*Manshūkoku no soshikihō*), stipulated that the new state would adopt self-rule, reducing "the scope of official administration (*kanchi gyōsei*) and the number of bureaucrats as much as possible."²⁶

Another major current running through pan-Asian discourse in Manchukuo was the assertion of "harmony of the five ethnicities" (*gozku kyōwa* or *wuzu xiehe*). The slogan was appropriated from the Guomindang, which in its drive to unite the country had discarded the Han-centric ethnocentrism so prevalent during the overthrow of the Qing for a more encompassing, multiethnic conception of the "Chinese people" (*zhonghua minzu*).²⁷ In Nanjing, the five ethnicities were Han, Manchurian, Mongolian,

²⁵ Seikyō Gondō, *Jichi minhan* (Tokyo: Heibonsha, 1932), 199–201.

²⁶ Matsuki Tamotsu, "Manmō kyōwakoku tōchi taikōan," October 14, 1931, 2, Katakura Papers, Department of Advanced Social and International Studies, University of Tokyo.

²⁷ John Fitzgerald, *Awakening China: Politics, Culture, and Class in the Nationalist Revolution* (Stanford, CA: Stanford University Press, 1996), 121–23.

Muslim, and Tibetan. In the version espoused by Manchukuo's Concordia (or harmony) Association (*Kyōwakai*), a patriotic society that evolved into a fascistic mass party, Japanese and Koreans replaced Muslims and Tibetans. As with pan-Asianism more generally, any assertion of racial harmony in Manchukuo entailed a tacit endorsement of Japanese dominion. The Kantō Army's control of the state made the point clear. Yet these ideas were not simply an ideological fig leaf. Veneration of tradition and a concern for ethnic difference—these ideas affected national policies at every level, even if they never produced anything resembling an equitable system.

From the start, pan-Asianism existed side-by-side with plans for rapid development. In Manchukuo's first years, these plans were manifested in prodigious efforts to recruit foreign capital and the establishment of state-controlled companies in vital sectors like banking and telecommunications. These early experiments in managerial capitalism took a radical turn around 1934 as a growing number of "reform bureaucrats" from Japan insinuated themselves into the Manchukuo state. These men—among them Wagatsuma's former classmate and future Prime Minister, Kishi Nobusuke—arrived on the continent with plans to "rationalize" capitalism. Essentially corporatist in nature, their plans entailed nationalizing management of major firms while preserving private ownership. In this way they sought to coordinate production across the economy, accelerate development, and mitigate conflicts between capital and labor. Manchukuo's Five-Year Plan, the first of its kind in East Asia when it was announced in 1935, represented the essence of these bureaucrats' thinking—a blend of Soviet-style planning with private finance from *zaibatsu* conglomerates. Perhaps the most notable example of these efforts was Manchurian Heavy Industries (*Mangyō*) founded in December 1937 and

capitalized primarily by Nissan, one of the so-called new *zaibatsu* which seized the opportunities offered by Manchukuo.²⁸ But by that time, the recurrent border skirmishes with Republican troops had broken out into full-scale war, and Manchukuo's economic planners were working to integrate its economy into a new scheme to develop Japanese autarky.

These two strands—right-wing romanticism and state-led plans for rapid economic development—came together where the law touched matters of land. At the time of the founding of Manchukuo, the land within its borders was subject to multiple and overlapping claims made in several different legal idioms. The foundation had been established during the Qing dynasty. The territory north of the Great Wall was the ancestral home of the group of nomadic tribes that consolidated into the Manchus in the sixteenth century and swept down on a crumbling Ming empire. Installing themselves as the rulers of a new dynasty, the Qing, the Manchus reserved special status for Manchuria as their ancestral home. Large sections in what became Jilin province were retained for the emperor, while the western territories fronting Inner Mongolia were awarded to Mongolian royalty and banner leaders, who portioned out smaller plots to the people under their authority. Han Chinese were permitted to work in the region as seasonal laborers, but they were barred from owning property, and after the harvest season they were required to return south.

These proscriptions were never very effective, and the settlement that occurred throughout the Qing dynasty refigured the structure of landholding. By the nineteenth

²⁸ Francis Clifford Jones, *Manchuria since 1931* (New York: Oxford University Press, 1949), chap. 8.

century, much of the area from Rehe to north of the Liaodong Peninsula was under cultivation by ethnic Han, who lived on land secured by a complex system of secondary titles and customary prerogatives. Many attained long-term leases on pasture lands directly from banner officials. Others subleased their plots from Mongolian tenants, while still others reclaimed forestland, establishing settlements without permission. From this emerged a commercial trade in secondary titles which sat uneasily atop the status-based dispensation of land established under the Qing, exhibiting all the complexities of Chinese landholding conventions.²⁹

Imperialism during the last decades of the Qing dynasty and the entropy that took hold after its collapse added yet another layer of property claims. Extraterritorial concessions were one major addition. After 1905 Japan claimed the Guandong Leased Territory on the Liaodong Peninsula and the jurisdiction of the Southern Manchuria Railway over a “railway zone” that extended ten meters from the track and included the towns through which the railway passed.³⁰ In 1915, as a result of negotiations surrounding the politically invasive Twenty-One Demands issued by Japan to the fledgling Republic of China, Japan expanded its claims, securing long-term leases on

²⁹ The existence of these two systems unsurprisingly turned out to be an incubator for ethnic tension. In 1891 these ignited into mass killing. Enraged by the authority that Mongol exercised, Chinese migrants in Rehe rose up in a rebellion that lasted for weeks and left some 200,000 dead. Cecily McCaffrey, “From Chaos to a New Order Rebellion and Ethnic Regulation in Late Qing Inner Mongolia,” *Modern China* 37, no. 5 (September 1, 2011): esp. 35-6; James Reardon-Anderson, “Land Use and Society in Manchuria and Inner Mongolia during the Qing Dynasty,” *Environmental History* 5, no. 4 (2000): 503–30.

³⁰ Young, *Japan's Special Position in Manchuria*, 367–68.

commercial properties and piers in much of the region for all of its subjects.³¹ These new rights seem to have drawn a wave of migrants from the Korean peninsula. Korean farmers who were losing their lands to Japanese colonial settlers forged north, across the Yalu, where they used the legal privileges accorded to them as colonial subjects of the Japanese empire to deprive local residents of their lands.³² Meanwhile, the fragility of the early Republican state allowed a loose federation of warlords to pull away from Beijing. Administrative reforms between the 1910s and 1930s were spottily implemented around the country but especially in Manchuria, where each local leader imposed his own administrative regime on the land and economy.

The result was a system of staggering complexity. Title records were fragmented and incomplete, the class structure was crosscut by ethnic divisions, and property lines often existed only in the realm of local knowledge. A sense of the intricacies can be gleaned from a preliminary survey of six rural villages conducted by Manchukuo's Land Bureau in the first half of 1935. In a village on the border of Inner Mongolia deeded to the Horqin Left Middle Banner by the Qing emperor, life continued much as if the dynasty were still intact. The commander of the banner controlled the land, which he let to other Mongols, who were forbidden from alienating their rights, and to a small group of Han

³¹ Sugahara Tatsurō, "Manshūkoku ni okeru tochi chōsa to tochi hōki no seitei ni tsuite," *Hōritsu jihō* 11, no. 6 (1939): 1–10.

³² "Chōsen kosaku mondai ni tsuite" (Jilin: Kitsurinshō kōsho minseichō tochika, November 1935), 1–3, Wagatsuma Papers, Institute for Advanced Studies on Asia Library, Tokyo University.

families who lived on the village outskirts.³³ To the east, in a settlement near Shenyang, the social hierarchy was essentially reversed. Han migrants had driven off the Muslim bannermen who had founded the village, and a new wave of Korean settlers was now letting land to Manchurians.³⁴ Farther South, in a village at the top of Liaodong Bay, researchers found a population of some thirty Han families and a social structure that was akin to those of farming villages on the North China Plain.³⁵ In each place there was a different property regime, with different conventions and different nomenclature.

The technical challenges of sorting through these claims were substantial. Producing a central land register required both a cadastral survey and the compilation of all known property claims, but this would only provide a shaper picture of chaos. In order to systematize the country's property regime, the Land Bureau also needed to disentangle the overlapping legal claims on the land and judge which would be honored and in what capacity. Disparities were prevalent between the official record of who owned a piece of land and who was actually living on it. Across the country leases that had been in effect for over 50 years were common—some could be traced back as long as a century—raising questions of whether the occupants should be considered as owners or tenants, and if tenants, what kind of legal rights should be accorded to extend to them. Newly settled land presented a similar problem. Did it belong to its customary owner or to the individual or family who reclaimed it as farmland? The drafting committee also needed to

³³ *Manshū ni okeru tochi kankō, Manshū ni okeru kakushu dantai no fudōsan shoyū jōkyō, Manshū ni okeru eita kankō* (Tochikyoku, 1935), 170–71.

³⁴ *Ibid.*, 88–90.

³⁵ *Ibid.*, 12–17.

deal with land encumbered by customary ethnic exclusions and, most important for Japanese citizens, how to handle commercial leases.³⁶ Underlying these issues was yet another. For those in charge of drafting the civil code, the looming quandary was whether private property was the desired outcome at all.

The Land Bureau's Approach

This question was lent urgency by the issue of extraterritoriality. As Prasenjit Duara observed, “The story of Manchukuo—at least during the early phase—is the story of a state in search of a nation.” This needs an addendum, for the truth is that during the early years of Manchukuo’s existence, there was barely any state at all. The Kantō Army continued its campaign to pacify the region into the spring of 1933, when it signed the Tangu Truce with the Republic of China, effectively conceding Manchuria to Japan. Unsure of how to respond to the Kantō Army’s adventurism, the national government in Tokyo had withheld formal recognition of the new state until September 1932. Until the Lytton Commission pronounced Manchuria “unalterably Chinese,” lancing any hopes that Japanese dominion could be accommodated under the League of Nations, Manchukuo policy hung in limbo. No definite measures were taken for fear of disturbing the constructive ambiguity that was at least preserving an uneasy truce both with foreign governments and with local elites in Manchuria.

In the rush to piece together a state after the 1931 invasion, there had not been time to consider civil law, and so, just as the new state relied on administrative structures

³⁶ Sugimoto Kichigorō, “Manshū ni okeru tochi gyōshuken to sono toriatsukai kata ni tsuite,” in *Tochi mondai kenkyūkai kiji* (Shinkyō: Tochikyoku, 1935), 102–5.

of the previous regime, the provisional code of the Republic of China, issued in 1930 and extended to Manchuria a year later, was retained, along with the Republic's business and criminal codes. Japanese legal bureaucrats in the region had few qualms with this. Many, in fact, envied the Republic's new laws, which were similar enough to Japan's to be comprehensible but also incorporated progressive innovations such as rent restrictions, which were taken from Switzerland and Weimar Germany.³⁷ Yet relying on Republican law had political costs. Not only was Manchukuo's existence predicated on non-incorporation with the Chinese Republic, one of the key justifications for its independence was the supposed incompetence and criminality of Chiang's regime.³⁸

Even more critically, a new legal code was needed in order to abolish extraterritoriality. At the establishment of the new state of Manchukuo, Japanese leaders promised foreign governments that extraterritoriality would be preserved for the time being, along with all legal claims and treaties existing under the previous regime.³⁹ This promise mollified British and American fears that their citizens would be expropriated. It also appeased Japanese settlers who believed they had a "sacred right," secured by the blood of their ancestors, to the extraterritorial concessions Japan gained in its victory in the Russo-Japanese War.⁴⁰ In preserving extraterritoriality, Japanese subjects in

³⁷ Sugahara, "Manshūkoku ni okeru tochi chōsa to tochi hōki no seitei ni tsuite," 8.

³⁸ Yamamuro Shinichi, "'Manshūkoku' no hō to seiji," *Jinbun gaku* 68 (1991): esp. 134-135.

³⁹ "Manshūkoku kenkoku sengen," 3-4.

⁴⁰ The British Foreign Consul in Fengtian requested clarification about status of foreigners under new government in 1932. He was told that extraterritoriality would be

Manchukuo were able to retain their claims to outstanding debts owed to them and to real estate secured through extended leases that had been negotiated with the Republic of China in the 1910s.⁴¹ But these immediate advantages came with significant drawbacks. By preserving the compromised sovereignty, the Manchukuo state hamstrung its efforts to consolidate power and shore up its fiscal health. With extraterritoriality still in place, Manchukuo could not tax subjects of the Japanese empire or any resident within Japan's extraterritorial concessions. It also lost jurisdiction over nearly half a million people, who retained their rights to be tried in consular courts.⁴² Thus from the start the push to end extraterritoriality required a new legal system. "Whether it was an issue of staffing, the system, or a question of law, the crucial issue at all times was the imminent termination of extraterritoriality," recalled Furuta Masatake, a Japanese prosecutor recruited to Manchukuo in October 1933 to take charge of judicial reform.⁴³

Officially, Furuta was the Assistant Director of the Judicial Department (*shihōbu jichō*), but his junior title belied the fact that he was in charge of his department. As one of his first moves, he recruited Maeno Shigeru, a magistrate (*yoshin hanji*) from the Tokyo District Court, to oversee staffing the recruitment of Japanese legal officials to staff the

preserved but not indefinitely. Asano Toyomi, *Teikoku nihon no shokuminchi hōsei: hōiki tōgō to teikoku chitsujo* (Nagoya: Nagoya daigaku shuppankai, 2008), 417, 433.

⁴¹ Sugahara Tatsurō, "Nihonjin no tochi kenri kōyū to shōsoken no seiri ni tsuite," *Hōsō zasshi* 3, no. 12 (1936): 1–8.

⁴² Asano, *Teikoku nihon no shokuminchi hōsei*, chap. 4; Young, *Japan's Special Position in Manchuria*, 367–68.

⁴³ Furuta Masatake, "Manshūkoku no hōchikensetsu to chigaihōken teppai go no jōsei: Shōwa 14 nen 7 gatsu," in *Nihon gaikō kyōkai kōenshū: ji Shōwa 14 nen 5 gatsu shi Shōwa 14 nen 7 gatsu* (Tokyo: Nihon gaikō kyōkai, 1939), 10.

Judicial Department. Through Maeno, the Osaka District Court judges Banzai Kikurō and Kawakita Masaji were brought on board, as well as Makino Takeo (no relation to Makino Eiichi), Chigusa Tatsuo, and Kakumura Kokki. Together with Sugahara Tatsuō, another Tokyo District Court judge who arrived in Manchukuo in 1933, they formed the key legal experts on a new Drafting Committee (*Kisō iinkai*) that Furuta created in 1934.⁴⁴

Given the administrative confusion in the state, the Drafting Committee was only one of several agencies that had started working on reforming Manchukuo civil law. Shortly after independence a deliberative committee was established to discuss legal reform (*Hōrei shingi iinkai*), but little came of it. Sugahara later claimed that “the personnel structure was incomplete” at the time, but this was probably a coded reference to the fact that this first committee was controlled by Chinese judicial officials.⁴⁵ Far more consequential were the steps the Land Bureau had taken toward drafting a new system of property law. Established in the same month Manchukuo declared independence, March 1932, the Land Bureau was initially charged with carrying out a cadastral survey, but it soon expanded its work beyond simple data collection. At the end of March 1935, on the occasion of a visit by Kyoto Imperial law professor Ishida Bunjirō, the Land Bureau convened an academic conference to discuss the more weighty theoretical questions involved in determining a new landholding regime for Manchukuo.⁴⁶

⁴⁴ Maeda Tatsuaki, “Manshūkoku minpō,” in *Shiryō minpōten*, 2004, 1702; Koguchi Hikota, “Manshūkoku minpōhen no hensan to Wagatsuma Sakae,” in *Hōritsu seido*, vol. 2, Nitchū bunka kōryūshi sōsho (Tokyo: Taishūkan shoten, 1997), 333–34.

⁴⁵ Ikuta, *Zenkoku minji kanrei ruishū*, 57–59.

⁴⁶ “Tochi mondai kenkyūkai kiji” (Tochikyoku, August 1935), Wagatsuma Papers, Institute for Advanced Studies on Asia Library, Tokyo University.

The minutes of their proceedings convey a sense of the stakes felt by those involved in designing Manchukuo's property regime. To many members of the Land Bureau, the prevalence of customary forms of landholding in Manchukuo seemed like an opportunity to attempt modernization from the ground up. Ishida Bunjirō set the tone in his opening remarks, describing a Japanese countryside ravaged by debt that rendered small holders and tenants farmers barely to afford basic necessities.⁴⁷ In Manchukuo, such a perilous situation could be averted by avoiding the pitfall of private ownership itself, Ishida suggested. A specialist in German law, he had focused on Otto von Gierke's legal theory in the 1920s.⁴⁸ Among other things, Gierke's celebrated forms of medieval corporatism that he, a Germanist and a romantic, construed as more organic and "real" than the contractual collective bodies defined in Roman law.⁴⁹ Either through Gierke or through his epigones Ishida had adopted a similar outlook. The problem with private ownership, as he presented it, stemmed from the dissolution of the mutual obligations that bound together lord (*ryōshu*) and tenant (*kosakujin*).⁵⁰ The solution he proposed was to replace private property with a new form of collective ownership (*sōyūken*).⁵¹ Though Ishida did not elaborate on his idea at the conference, from his contemporaneous

⁴⁷ Ishida Bunjirō, "Otō Girukei no hōrigkuteki tachiba ni tsuite," *Hōgaku kyōkai zasshi* 36, no. 9–11 (1926): 15.

⁴⁸ Ishida, "Otō Girukei no hōrigkuteki tachiba ni tsuite."

⁴⁹ David Runciman, *Pluralism and the Personality of the State* (New York: Cambridge University Press, 1997), 36–37.

⁵⁰ Ishida Bunjirō, "Tochi no shoyū keitai ni tsuite," in *Tochi mondai kenkyūkai kiji* (Tochikyoku, 1935), 13.

⁵¹ *Ibid.*, 15.

writings, it is clear that he envisioned this arrangement as a kind of resurrected feudalism. By replacing the role of an actual lord with an abstract legal person (*hōjin*), rural villages could be knit together under a corporate entity.⁵²

The corporate imagination emerged as a theme of the conference. Mani Badala (also known as Ma Mingzhou), a former Mongolian bannerman who joined the Japanese after the invasion, dutifully set out to “prove” that the form of land tenure in the Mongolian banner territories in the West resembled collective ownership as Ishida had described.⁵³ Other members discovered a similar form in Chinese custom. For Sugimoto Kichigorō, a Mantetsu researcher and adviser to the Land Bureau, the affective difference between the Chinese institution of *yezhuquan* (*gyōshuken*) and ownership (*shoyūken*) seemed to offer radical possibilities for refiguring the relationship between individuals and the state. According to Sugimoto, *yezhuquan* was the right of use and revenue (*shiyōshūekiken*) granted to an individual in exchange for a portion of his gains in the form of taxes. If this sounded similar to ownership itself, Sugimoto insisted on a distinction. Ownership implied a kind of absolute dominion over a physical entity, as one might think of a desk or a teacup as “my thing by nature.” *Yezhuquan*, on the other hand, situated the owner in the middle of a three-tiered relationship, in which his access to a piece of property was ineluctably bound to his consciousness that the property was granted to him by the state, thus preserving a permanent sense of obligation. “In saying

⁵² Ishida Bunjirō, “Gendai shōyūken no bunkai sayō to tochi mondai,” *Chiyūkai zasshi* 2, no. 1 (1937): 4.

⁵³ Ma Mingzhou, “Mōchi no ippan kōsei ni tsuite,” in *Tochi mondai kenkyūkai kiji* (Tochikyoku, 1935), 29–34.

that this is my land,” Sugimoto explained, “it is implied that this land is one piece of the territory of the country to which I belong, and that I am permitted to use and profit from this piece of territory within a permitted scope.”⁵⁴

The Ascendance of Financial Capital

Wagatsuma, who was nothing if not diligent, read Sugimoto’s report in preparation for his participation on the Land System Special Investigative Committee (*Rinji tochi seido chōsa iinkai*). His reaction was skeptical. In the margins of the report, above an especially breathless passage describing *yezhuquan*, Wagatsuma jotted, in German, “Sein? oder sollen?”⁵⁵ There could hardly have been a clearer expression of the cultured skepticism he adopted toward his colleagues. It was not that he was unsympathetic to custom. As he explained at the meeting of the Special Land System Investigative Committee in December 1935, he saw Japan as a case of a miscarried modernization—not because it remained half-feudal, an article of dogma for Kōza-ha Marxists and Soviet theorists of Japan’s revolutionary potential, but because a foreign and historically inapt system of private property had, “with considerable unreasonableness,” been superimposed on Japan’s traditional system of landholding. As a result, the legal position of tenant farmers had been made “unjustly vulnerable,” planting a pathology (*byōkon*) within Japanese

⁵⁴ Sugimoto, “Manshū ni okeru tochi gyōshuken to sono toriatsukai kata ni tsuite,” 94–96.

⁵⁵ *Ibid.*, 95–96.

capitalism that “festered” into crisis as capitalism developed.⁵⁶ Farming families were losing their means of survival, a fact that “menaced the economic existence of the country.”⁵⁷ To avoid “treading in Japan’s rut,” it was imperative that the mistakes of the past not be repeated in Manchukuo. A cautious approach was needed. Legislation should follow from careful examination of already existing conditions. The committee’s job was first to know its subject, and then, through a process of selection (*shusha sentaku*) “in light of the ideals of our new era.”⁵⁸

The emphasis Wagatsuma put on research, and his belief that law could be derived from social facts, betrayed his academic lineage. Born in 1897, Wagatsuma showed himself an exceptional student from an early age, and in 1914 he was sent to Tokyo to attend the First Higher School, a feeder for Tokyo Imperial. Three years later he was admitted to the Faculty of Law. It was the same year Kishi Nobusuke entered the department. They had competed for top rank in their class since preparatory school, and this continued at Tokyo Imperial, with Wagatsuma taking the prize. They could not have known then, but a decade and a half later Manchukuo would bring them back into the same sphere, with Kishi taking over as vice minister of industry. At Tokyo Imperial in late 1910s, however, the constitutional debate between Minobe Tatsukichi and Uesugi Shinkichi was at its apex, and the students divided into two rough camps: those who favored Uesugi’s rightwing nationalism and those, like Wagatsuma, who lined up behind

⁵⁶ Wagatsuma Sakae, “Manshūkoku tochi seido kakuritsu jigyo ni kan suru shokan to kibō,” *Chiyūkai zasshi* 1, no. 1 (August 1936): 33.

⁵⁷ *Ibid.*, 35.

⁵⁸ *Ibid.*, 32.

Minobe's liberal interpretation. As a major in German law, Wagatsuma's studied under Hatoyama Hideo, but he quickly gravitated to Makino Eiichi's politically charged, social interpretation of civil law. He also joined Suehiro's Case Law Research Society as one of its founding members.⁵⁹

The influence of Wagatsuma's chosen mentors was evident in his first major article, a Hegelian assessment of the Land and House Lease Laws. In it he portrayed law as the natural product of a dialectical process, in which new legislation emerged naturally "whenever the rift between the existing law and real social conditions becomes extreme."⁶⁰ Helped along by judges and jurists who gradually reformed the law through interpretation, eventually all legislation was "unable to keep up with social progress," at which point it collapsed to be replaced by something new.⁶¹ Yet Wagatsuma ideas began to change almost immediately after he wrote this piece. Interwar German social theory was the catalyst for this change. During a three-year sabbatical in Germany, from 1922 to 1925, Wagatsuma labored through Weber's posthumous tome *Economy and Society* and struck on one of its central arguments. For Weber, the distinguishing feature of capitalism was the methodical and unyielding pursuit of profit. In earlier works he famously located the historical origins of this "rationality" in Calvinist anxiety about

⁵⁹ For a substantial biographical portrait, see Nakagawa Zennosuke et al., "Ningen, Wagatsuma Sakae o kataru," *Jurisuto*, no. 563 (June 21, 1972): 48–75.

⁶⁰ Katayama Tetsu, "Gendai seikatsu to Taishin'in hanrei," *Chūō hōritsu shinpō* 1, no. 5 (1921): 6.

⁶¹ Wagatsuma, "Hanrei ni arawaretaru shakuyamondai to shakuya hōan," 6.

personal salvation.⁶² But in *Economy and Society* Weber offered a structural explanation. For rational profit seeking to be possible, there needed to exist a highly calculable normative framework. Modern law provided just this framework. According to Weber, European law had purged itself of religious and political content over the past centuries, emerging as a “formally rational” system. It rested on universal rules rather than specific remedies, and these rules were based on principles explicit within the system itself, rather than deriving from revealed truths or “ends-directed” political programs.⁶³ Scholars have made careers tearing apart Weber’s theories of capitalism.⁶⁴ Yet however poorly Weber’s ideas explained the past, they offered a powerful defense of the Wilhelmine ideal of the autonomy of law, which was under assault by Weimar jurists while Weber was writing. The supposed necessity of the law’s internal coherence to capitalism breathed new life into old arguments about the need to separate legal reasoning from moral or political concerns. At a moment when social legislation and the prevalence of general clauses were encroaching on this principle, Weber put forward a sociological case for the value of formalism.⁶⁵

⁶² Max Weber, “The Protestant Ethic and the ‘Spirit’ of Capitalism,” in *The Protestant Ethic and the “Spirit” of Capitalism and Other Writings* (New York: Penguin Books, 2002).

⁶³ David Trubek, “Max Weber on Law and the Rise of Capitalism,” *Wisconsin Law Review* 720 (1972).

⁶⁴ For one, the legal systems of early-modern European states, England above all, were a far cry from the formal coherence that Weber believed was essential.

⁶⁵ Franz Wieacker, *A History of Private Law in Europe: With Particular Reference to Germany* (New York: Clarendon Press, 1995), 434.

Weber's ideas gave Wagatsuma theoretical purchase to begin developing his own understanding of law. He began working this out in a three-part series published over 1926, the year Wagatsuma was chosen to take over Hatoyama Hideo's chair at Tokyo Imperial. Nominally a meditation on methodology, his essay was shot through with Weberian language about "investigating multiple social factors" and "concrete value judgments." But at their core it advanced a critique of the brand of social jurisprudence Wagatsuma had subscribed to years earlier. Whereas he once could claim that a "formal examination" of legal problems "was ultimately not something that could provide solutions," Wagatsuma now set about theorizing the relative autonomy of the law.⁶⁶ Modern law, he wrote, was undoubtedly a social phenomenon, yet over the past centuries there had emerged an ideal of "formal rationality," which required the universal applicability of each legal rule. This functioned as a regulatory norm. Every time a judge faced the prospect of deciding a specific case, he had to reconcile his personal decision with a general concept of the entire legal structure (*hōritsuteki kōsei*), which presupposed, as Wagatsuma wrote, "a single, unified system without contradictions."⁶⁷ This rationality "was not absolute, as it had been misunderstood in the past." Instead, it had a "relative meaning" that preserved "a certain degree of conservatism" within the legal system. In his conclusion, Wagatsuma sharpened the disciplinary implications of his ideas: It would be "utterly impossible to make the law keep pace with the most progressive social thought,"

⁶⁶ Wagatsuma, "Hanrei ni arawaretaru shakuyamondai to shakuya hōan," 8.

⁶⁷ Wagatsuma Sakae, "Shihō no hōhōron ni kan suru ichi kōsatsu (III)," *Hōgaku kyōkai zasshi* 44, no. 10 (1926): 66.

and “those who only care about new ideals will never be content in the legal field.”⁶⁸ Quite simply, law was not a tool for radicals.

Yet for Wagatsuma, just as for Weber, the formal rationality of the legal system appeared to be crumbling. While earlier legal theory had constructed an entire system around the autonomy of individual will, the coherence of this principle had been buffeted by social change. So had the distinction between public and private law, which no longer seemed to have any conceptual integrity.⁶⁹ Weber’s thought was bathed in nostalgia for an earlier, purportedly more rational legal paradigm. Wagatsuma viewed the importance of formal rationality as a call to action. Law was a social phenomenon, but it was a particular one, and the task of jurists was to discover its boundaries and its particular functions. By uncovering and explicating the “guiding principles” that were motivating social change jurists could resituate law’s formal structure on new conceptual footing.⁷⁰

Wagatsuma found a source of these formal principles in an unlikely source. Karl Renner was one of the leading Austrian politicians of the twentieth century. Appointed as the first Chancellor of the Austrian Republic established after World War I, he would, in 1945, become the first President of the Second Republic. Renner was also a committed socialist, and along with Max Alder and Otto Brenner, he was one of the leading figures of

⁶⁸ Ibid., 95–96.

⁶⁹ Wagatsuma, “Shihō no hōhōron ni kan suru ichi kōsatsu (I),” 12–13.

⁷⁰ Wagatsuma finished the first installment of his essay with a quote from Roscoe Pound that is evocative of his newfound sense of mission: “The actual legal order is not a simple rational thing. It is a complex, more or less irrational thing into which we struggle to put reason and in which, as fast as we have put some part of it in the order of reason, new irrationalities arise in the process of meeting new needs by trial and error.” Ibid., 34.

a clique of revisionist Marxist thinkers whose ideas lent support to interwar Vienna's program of social reforms. In 1904 Renner wrote one of his first works on what would become a perennial question in his scholarship: the relationship between capitalism and institutions. *Institutions of Private Law and their Social Functions* was a highly specialized text that spoke primarily to those who, like Renner, possessed a formal legal education. Yet at a time when most Marxists tended to see law as little more than an expression of class structure, Renner's arguments were remarkable for their attentiveness to the internal structure of the law. Private law, as Renner presented it, was a rigid system, resistant to social change because it was enshrined in the statutes of the civil code. This did not mean that law was static, however. Renner's innovation was to show how the evolution of capitalism—"a third law which is neither a law made by the state nor a law of nature"—could transform the "social function" of the civil code, even as its form remained relatively unchanged.⁷¹

Renner's argument hinged on the sharp distinction between physical property and obligations, derived from the difference between *jus in rem* and *jus in personam* in Roman law and sustained in both the German and Japanese civil codes, which gave preference to real rights over obligations. He sought to show how socio-economic change had inverted this relationship. He did this with a historical argument that closely paralleled the theory of alienation Marx laid out in *Capital*. According to Renner, modern civil codes reflected the social world of craftsmen and small holders, when an individual's property comprised a *universitas rerum*, a material cosmos that was both his wealth and

⁷¹ Karl Renner, *The Institutions of Private Law and Their Social Functions*, trans. Agnes Schwarzschild (Boston: Routledge & K. Paul, 1976), 83.

his livelihood. The legal foundations of this system were an individual's dominion over physical property and his person. But with the concentration of capital and the transfer of the means of production from the home to the factory, control over things becomes a form of social power as potent as law. "Without any change in the norm, below the threshold of collective consciousness, a *de facto* right is added to the personal absolute domination over a corporeal thing," Renner wrote. "This right is not based upon a special legal provision. It is the power of control, the power to issue commands and enforce them. The inherent urge of capital to beget constantly further capital provided the motive for this *imperium*."⁷² The real force of Renner's argument comes when he describes a second functional transformation in the law, in which financial capital subjugates physical property through the legal mechanism of a mortgage. "The title to interests, originally an ordinary debt, by virtue of the deed of mortgage becomes a right *in rem*; by way of foreclosure (forced sale) it may at any moment become property itself."⁷³ With this the landowner is put in the position of the wage laborer. Although he still holds the deed to his land, his debts have hollowed out the meaning of his ownership, and he becomes merely a user of the capital that finance supplies. In this way, claimed Renner, the law of obligations had overtaken real rights as the cornerstone of private law.

Wagatsuma probably read Renner's book sometime between 1926 and early 1927. In October that year, he published the first installment of a seven-year-long cycle of essays that became Wagatsuma's signal theoretical contribution to Japanese law, the dryly

⁷² Ibid., 107.

⁷³ Ibid., 157.

titled “The Superior Status of Obligations in Modern Law” (*Kindaihō ni okeru saiken no yūetsu chii*).⁷⁴ It is difficult to characterize these essays neatly. In some respects they can be read as a sustained meditation on Renner’s thesis, and in part because of this, Wagatsuma would later dismiss the entire project as juvenilia.⁷⁵ It is true the similarities were substantial. While Wagatsuma incorporated his readings of a variety of other legal theorists other than Renner—including Weber, Sombart, Radbruch, Tönnies, Schmoller, and Wagner—his main argument never really broke away from Renner’s thesis. Decades later, trying to draw a distinction, one comparative law scholar could point only to the fact that Wagatsuma insisted, against Renner, that legal change had the capacity to shape the development of capitalism.⁷⁶ But to see the work as a simple paraphrase is to miss its significance. Renner’s ideas helped Wagatsuma gather together a number of strands in his own thinking in the late 1920s and weave them into an understanding of the world as it appeared to him at that time. The result was that through Renner, Wagatsuma discarded the nebulous conception of social progress he entertained in his youth and came to see modern law as ineluctably linked to the emergence of modern capitalism. Equally important was the fact that the understanding of capitalism Wagatsuma adopted was fundamentally Marxian.

⁷⁴ Wagatsuma Sakae, *Kindaihō ni okeru saiken no yūetsuteki chii* (Tokyo: Yūhikaku shobō, 1953).

⁷⁵ *Ibid.*, 1–3.

⁷⁶ Fukushima Masao, “Wagatsuma Sakae sensei no shūsei kenkyū: ‘Kindaihō ni okeru saiken no yūetsu teki chii’ sono hoka to kōshin gakuto no kadai,” *Jurisuto*, no. 563 (1974): 19–27.

Wagatsuma had certainly read Marxists before Renner. He cited Kawakami Hajime, a pioneering interpreter of Marxian economics, in his 1926 essays on methodology, but not until Renner did his passing familiarity with Marxism coalesce into a theoretical framework. In 1926, in an attempt to formulate a mission statement for a new kind of social-scientific approach to law, Wagatsuma had simply substituted the word “law” for “economy” in Kawakami’s description of the materialist interpretation of history.⁷⁷ By the close of 1927 Wagatsuma could write that under “a capitalist economic organization, ownership carries the power to control others, which it realizes through contract.”⁷⁸ The notion of control was key. Via Renner, Wagatsuma came to understand the economy not as a system of supply and demand but as a structured form of social domination. Under earlier forms of economic organization, this domination had been exercised directly between people, but with the advent of capitalism, social forms of power had been transmuted to the market where “firstly, the social function of ownership today is not control over things; it is control over people, and secondly, ownership is currently being deprived of its dominant position by financial obligations (*kinyū saiken*).”⁷⁹

The supremacy of financial capital had dystopian possibilities. Renner conjured up an image of a society in which every physical object was subsumed by credit, such that

⁷⁷ Sakae Wagatsuma, “Shihō no hōhōron ni kan suru ichi kōsatsu (II),” *Hōgaku kyōkai zasshi* 44, no. 7 (1926): 62.

⁷⁸ Wagatsuma, *Kindaihō ni okeru saiken no yūetsuteki chii*, 12.

⁷⁹ Bunjirō Ishida, “Tochi kinyū no keitai ni tsuite,” in *Tochi mondai kenkyūkai kiji* (Tochikyoku, 1935), 75.

a family's access to housing or bread was made dependent on debt held by a small class of predatory financiers. But ultimately he portrayed the annulment of real rights under financialization as a decisive step toward socialism, carried through not by the proletariat but by industrialists and merchants who used law to recoup control. By binding financial capital in legislation and policy, private property could selectively be converted into public establishments, just as a private train station could be made a public utility.⁸⁰ By the end of "The Superior Status of Obligations in Modern Law," Wagatsuma had reached the same conclusion: "In the end, the anarchic socio-economic structure that exists under capitalism centered on ownership is gradually subjected to conscious control through control of financial capital," he wrote. While it seemed likely that these developments would "promote the automatic socialization of capital," it was important too to take active steps to bring the power of credit under the control of the state. "Entrusting centralized capital to the intentions of a few individuals will subject the survival of society as a whole to the arbitrary."⁸¹

Yet if Wagatsuma was in sympathy with socialism in the abstract, at least in the sense that he believed the state should take control of private property, he never saw this as a political stance. Instead, his understanding of the world continued to be dominated by the structure of the civil code. Whether this was because the law seemed to offer respite from the upheavals of the 1930s, or because Wagatsuma was not a pliant enough thinker to be able to extend himself past his area of expertise is hard to judge. In any case,

⁸⁰ Renner, *The Institutions of Private Law and Their Social Functions*, 120.

⁸¹ Fukushima, "Wagatsuma Sakae sensei no shūsei kenkyū: 'Kindaihō ni okeru saiken no yūetsu teki chii' sono hoka to kōshin gakuto no kadai," 327.

from the beginning of the 1930s he came to focus on mortgages (*teitōken*), which for him represented the clearest sign of the historical progression that Renner described and appeared to offer a means to restrict capitalism within the confines of state law.

Unlike ownership (*shoyūken*), which afforded exclusive dominion over physical property, a mortgage seemed almost perfectly to sever the use of an object or real estate from its market value. With a right of pledge (*shichiken*), akin to the act of pawning an item, a borrower had to entrust possession of his or her property in order to secure a loan.⁸² With a mortgage, however, the borrower kept his or her property, and the loan was secured only with the transference of a legal right. A 1936 passage from Wagatsuma's lecture notes on mortgages captures the strangeness of this idea: "A mortgage is a right that takes as its object a value that is completely separate from the material existence of the collateral (*mokutekibutsu*). That is to say, it could be called the pure form of a *Wertrecht* (value right) against a *Substanzrecht* (material right)."⁸³ Of course, if the borrower defaulted, the creditor had the right to repossess the collateral and recoup the debt by selling it at auction. Wagatsuma recognized this, but he did not seem to consider it very significant. His attention instead turned toward the expanding applicability of mortgages in Japanese law. As provided for in the civil code, only individual plots of land and buildings could be mortgaged, but a series of special laws had extended their scope. To facilitate corporate financing, it was made possible to mortgage a factory as a collective unit. Extrapolating from this, Wagatsuma suggested that facilitating the financialization

⁸² Article 342

⁸³ Wagatsuma Sakae, *Tanpo bukken hō*, Minpō kōgi 3 (Tokyo: Iwanami shoten, 1937), 188.

of agricultural tenancy rights could increase the availability of financing to farmers, just as factories benefitted from new forms of mortgage. It might also allow for the development of socialism, if the state took control of the huge pools of capital that Wagatsuma believed would emerge.⁸⁴

There were similarities to the Nazi's "blood and soil" policies, most notably a 1933 law (*Reichserbhofgesetz*) that withheld farmland from the market and turned it into a virtually unalienable familial trust, provided that the family was considered sufficiently German.⁸⁵ In some scattered studies of Nazi law Wagatsuma made in the 1930s, he had singled out the *Reichserbhofgesetz* as the epitome of Nazi property law and wrote approvingly about how, as Wagatsuma interpreted it, it turned property into a "social trust and duty."⁸⁶ But the Nazi law forbid mortgaging protected property, just as it forbid seizure from outstanding debts.⁸⁷ Moreover, Wagatsuma mocked the racialism of Nazi law as fatuous. At best it could "temporarily earn the applause of the people," he wrote, but time would show that race could not solve the structural problems facing contemporary societies.⁸⁸ To the extent that he had a foreign model in mind, it was Vienna and the Weimar Republic, but his focus stayed locked on the minutiae of the legal system. He seemed to operate under the belief that the rest would take care of itself.

⁸⁴ *Ibid.*, 193.

⁸⁵ J. K. Galbraith, "Hereditary Land in the Third Reich," *The Quarterly Journal of Economics* 53, no. 3 (1939): 465–76.

⁸⁶ Wagatsuma Sakae, "Nachisu no shoyūken riron," in *Makino Kyōju kanreki shukuga hōironshū*, ed. Seiichirō Ono (Tokyo: Yūhikaku shobō, 1938), 416.

⁸⁷ Galbraith, "Hereditary Land in the Third Reich," 3.

⁸⁸ Wagatsuma Sakae, *Nachisu no hōritsu* (Tokyo: Nihon hyōronsha, 1934), 89.

The Final Code

Drafting of the code got underway in March 1936, when the Wagatsuma and several other academic advisers met in Tokyo with justice officials from Manchukuo and Japan. The first decision made was to delay the family and inheritance sections until more research could be done on the various ethnic customs of Manchukuo's population.⁸⁹ This followed the pattern established during the codification of Japan's own code, when laws governing family and inheritance were allotted more time because they were seen as more culturally distinct than the other sections. In Manchukuo, for the first time, similar consideration was given to property law. At the March meeting it was decided that the committee would only outline the basic elements of the country's property law until "a survey requiring a considerably long period of time" could be completed. In the meantime, the finer points of property law were to be left to custom.⁹⁰ This approach was favored by the members of the Land Bureau, who still planned to build Manchukuo's property law around their findings.⁹¹

In May, the plan was changed. Without notice Manchukuo's General Affairs Agency ordered the committee to draft a complete section on property law and moved the deadline up by half a year to July 1937. The ostensible reason was that Manchukuo's

⁸⁹ "Furoku: Minji hōki seitei kanyōsha meibo, minpō seitei shingi nittei, shinkakuin kansō, minji hōki seitei ni kan suru zadankai," *Hōsō zasshi* 4, no. 7–8 (1937): 3.

⁹⁰ Wagatsuma Sakae, "Manshūkoku minpō kisō taikō," March 28, 1936, Wagatsuma Papers, Institute for Advanced Studies on Asia Library, Tokyo University.

⁹¹ Sugahara, "Manshūkoku ni okeru tochi chōsa to tochi hōki no seitei ni tsuite," 10–11.

rulers had decided to end extraterritoriality the following year, but it is not clear why this had suddenly become so urgent other than that there were “political reasons.”⁹² In any case, the new schedule demanded a sprint to the end. “Had one person gotten sick, it would have been over,” one member of the committee later claimed.⁹³ By mid-November the Japanese officials in Manchukuo prepared a rough outline of the property law, which they submitted to Wagatsuma for advice. From then until May 1937, Manchukuo’s property law went through ten different iterations, with Wagatsuma playing the role of head editor. In vermilion ink he eliminated laws he thought useless and reworded statutes as he pleased.⁹⁴ Only in one minor instance was his advice overridden.⁹⁵

The final code was a curious document. It bore more than a passing likeness to Japan’s civil code, an unsurprising fact given that one of the reasons for bringing in legal experts like Wagatsuma was to avoid creating any friction in the economic relationship between Manchukuo and Japan.⁹⁶ The similarities began at the structural level, where its

⁹² Discussing the matter a year later, the main members of the drafting committee do not mention any reason. “Minji hōki seitei ni kan suru zadankai,” *Hōsō zasshi* 4, no. 11 (1937): 57.

⁹³ *Ibid.*, 66.

⁹⁴ For example, see Wagatsuma Sakae, “Minpō bukkenhen yōkōan (sono ichi),” December 11, 1936, Wagatsuma Papers, Institute for Advanced Studies on Asia Library, Tokyo University.

⁹⁵ The question concerned when a “legal action” (*hōritsukōi*) was invalid. The drafting committee’s version emphasized the intention to subvert public order and good custom, while Wagatsuma preferred wording that did not speculate about state of mind. Koguchi, “Manshūkoku minpōhen no hensan to Wagatsuma Sakae,” 347.

⁹⁶ Sugahara Taturō, “Chiseki seiri jigyō to shin hōrei,” *Hōsō zasshi* 3, no. 4 (1936): 116. Manchukuo’s business law was even closer to the Japanese original. Wagatsuma Sakae, “Manshū minpō no kōfu,” *Chiyūkai zasshi* 2, no. 4 (August 1937): 65.

first three chapters mirrored those of the Japanese code, and in many cases they continued down to individual statutes. It is in the exceptions to this general pattern that the character of Manchukuo's code comes into view. One of its most notable features, as legal scholars then and now have commented, was that it translated into statutes many of the legal reforms that had emerged in case law and interpretation in Japan in the 1920s. Some of these amendments were technical. Possession (*senyū*) was redefined as de facto control of an object or piece of property, as opposed to the definition in Japanese civil law that stressed intentionality. Others had more overtly political content. The principle of good faith (*shingi seijitsu*) was made a necessary condition for any legally valid exercise of a right or fulfillment of an obligation.⁹⁷ More radically for the time, women were accorded legal competence, allowing them to enter into contracts without the permission of their husbands. If these changes seemed to foreshadow postwar reforms in Japan, other innovations in Manchukuo's code evinced a fascistic commonality with the 1930s. Torts (*fuhō kōi*), for example, were abstracted from interpersonal relationships. No longer depended on the infringement of another's rights, a tort constituted any action causing "illegally inflicting damages on others" (*ihō ni tanin ni songai o kuwae*).⁹⁸

⁹⁷ Wagatsuma Sakae, "Minpō kōfu ni tsuite no Wagatsuma kyōju dan," in *Shinminpō no tokushoku*, vol. 7, Kokusei panfuretto (Manshūkoku kokumuin sōmuchō jōhōsho, 1937), 24.

⁹⁸ Koguchi, "Manshūkoku minpōhen no hensan to Wagatsuma Sakae"; Suehiro Izutarō, "Manshūkoku minpō (bukken) o yomu," *Hōritsu jihō* 9, no. 10 (1937): 50–51; Suehiro Izutarō, "Manshūkoku minpō (saiken) o yomu," *Hōritsu jihō* 9, no. 11 (1937): 1035–36. The redefinition of torts followed suit with changes that removed intentionality from the definition of juristic acts (*hōritsu kōi*). Koguchi, "Manshūkoku minpōhen no hensan to Wagatsuma Sakae," 347.

The most striking feature of the Manchukuo civil code was two new forms of real rights. The first was collective ownership (*sōyūken*), defined as an indivisible, collectively held right to property. The other new right was a provisional sale (*dianquan* in Mandarin, *tenken* in Japanese). Both were presented as formalized versions of local custom. According to Sugahara Tatsurō, one of the main authors of the code, collective ownership was modeled on the landholding customs of Mongolian nomads in the West.⁹⁹ Provisional sales had more substantial precedent in Chinese law. A longstanding feature of contract law, they allowed the seller to buy back property at the same price in the future, at no interest. Provisional sales of this kind outnumbered permanent transactions during the Qing dynasty and into the Republican period. With the commercialization of the land market in the late-nineteenth century, *dian* emerged as a source of dispute. Late Qing and Republican case files are filled with examples of sellers, or sometimes the descendants of the original seller, attempting to redeem their *dian* decades after the sale had taken place. This was possible because many *dian* contracts did not specify a term of validity. Qing and then Republican jurists tried to solve this issue by placing term limits on the validity of provisional sales, settling in the 1929 draft of the Republican civil code on a 30-year limit.¹⁰⁰ The authors of Manchukuo's civil code followed suit, making *dian* valid for a maximum of 30 years. The minimum amount of time between sale and

⁹⁹ Sugahara, "Manshūkoku ni okeru tochi chōsa to tochi hōki no seitei ni tsuite," 15.

¹⁰⁰ Taisu Zhang, "Social Hierarchies and the Formation of Customary Property Law in Pre-Industrial China and England," *American Journal of Comparative Law*, January 1, 2014, 14; Madeleine Zelin, "The Rights of Tenants in Mid-Qing Sichuan: A Study of Land-Related Lawsuits in the Baxian Archives," *The Journal of Asian Studies* 45, no. 3 (1986): 499–526.

possible redemption was set at three years, although sellers were allowed to buy back their property for at least fifteen years after the sale.¹⁰¹ There were potentially radical amendments to the civil law. They raised the possibility of near permanent retention of land by its tiller, assuming that fifteen years of inflation would reduce the relative value of the sale price enough that almost anyone could afford it.

In the end, however, the consideration given to local customs was undermined by two statutes that effectively made registration a requirement for any legal claim to real estate.¹⁰² Combined with a 1936 law that allowed land surveyors to register property as they saw fit, these articles ensured that the state would have nearly total say over who owned what and in what capacity.¹⁰³ This facilitated a brutal process of expropriation that became prevalent at the end of the 1930s, as the government in Tokyo launched its Millions to Manchuria campaign in 1936. To make room for the some 300,000 impoverished Japanese farmers persuaded to migrate to Manchukuo, Chinese peasants were removed from their land, often through forced evictions that the civil code's registration laws made easy. In a short statement he gave on the occasion of the civil code's promulgation, Wagatsuma had warned of this possibility, calling registration the

¹⁰¹ Banzai Kikurō, “Tenken ni tsuite,” *Hōritsu jihō* 11, no. 6 (1937): 17–20.

¹⁰² They were Article 177, which made registration a requirement for the legal validity of any change in status of a real right concerning real estate; and Article 180, which necessitated that all real estate transactions needed to be in writing. Maeda, “Manshūkoku minpō.”

¹⁰³ Sugahara, “Chiseki seiri jigyo to shin hōrei,” 13.

“razor of modern civil law.” Misuse, he wrote, would be calamitous.¹⁰⁴ In an article from around the same time he drew a grimmer picture. A centralized registration system meant the end of customary forms of landholding. Agricultural land would become “prey to capital” once investment from Japan came, and ownership would be concentrated into the hands of a few financiers.¹⁰⁵ Wagatsuma implored his readers to find ways to insulate cultivators from dispossession. He did not seem to think that this obligation was in his own purview.

Conclusion

One month after Manchukuo’s civil code was promulgated, war with the Republic of China broke out in July 1937. In the ensuing years the rhetoric of legal culture and Asian custom grew louder. Prime Minister Konoe Fumimarō’s 1938 declaration of a New Order in East Asia uniting Japan, China, and Manchukuo into a single economic block was soon exceeded by the Greater East Asia Co-Prosperity Sphere in 1940, a hastily conceived blueprint for the projection of Japanese power across Asia at large. With these developments the rhetoric of and scholarship on legal culture reached its pinnacle. The structures of Western law or law in general could be cast off, it was believed. Instead, legal scholars turned to the taboos of Pacific Islanders and the legal customs of the “various peoples of Asia” in search of an authentic legal principle (*hōri*) to offset the legal system as

¹⁰⁴ “Furoku: Minji hōki seitei kanyosha meibo, minpō seitei shingi nittei, shinkakuin kansō, minji hōki seitei ni kan suru zadankai,” 49.

¹⁰⁵ Wagatsuma, “Manshū minpō no kōfu,” 69–70.

they knew it.¹⁰⁶ In Japan, too, legal scholarship turned inward. The Japanese Legal Philosophy Research Association (*Nihon hōri kenkyūkai*), established by Justice Minister and head of the “thought police” Shiono Suehiko, staked its existence on this mission. For too long, wrote Suehiro Izutarō, who took a leading role in the association, the Japanese had accepted the precepts of foreign legal systems as universal. It was time to find a law that would fit with “a Japanese sense of morality.”¹⁰⁷ There was little in this. Manchukuo’s civil code had already shown that custom could have only token recognition under a state bent on development.

¹⁰⁶ Masuda Fukuratrō, *Daitōa hō chitsujo to minzoku* (Tokyo: Nihon hōri kenkyūkai, 1941), 2; Nobumoto Ōhama, “Manshūkoku hōsei kenkyū,” *Waseda hōgaku* 21 (1942): 1.

¹⁰⁷ Quoted in. Shiraha Yūzō, “*Nihon hōri kenkyūkai*” *no bunseki: hō to dōtoku no ittaika* (Hachijōji: Nihon hikakuhō kenkyūjo, 1998), 152.

EPILOGUE

Promulgated on November 3, 1946, and put into effect on May 3 the following year, Japan's postwar constitution was a revolutionary document. It accorded sovereignty to the people and recast the once "inviolable" emperor as a symbol of their unity. It provided freedom of assembly and speech; prohibited discrimination based on sex or race; committed the government to provide for the social welfare of the people; and in its stipulation that wives and husbands were to be equal partners within marriage, it outstripped all but the constitutions of communist countries in its commitment to gender equality.¹ That particular article was written by 22-year-old Beate Sirota, a Viennese émigré who lived in Tokyo for a decade as a child before attending college in California. She was one of the 21-person team of Americans who, over the course of a week in February 1946, drafted most of the postwar constitution. Through translation and through revision in an extraordinary session of the Diet, Japanese lawmakers were able to make some significant changes, but these did not erase the fact that the text of the constitution was the work of American occupiers.²

For Japanese politicians and legal academy, the new constitution served as a kind of litmus test. Their responses to it revealed their understanding of and desires for the

¹ Susan Pharr, "A Radical U.S. Experiment: Women's Rights Laws and the Occupation of Japan," in *The Occupation of Japan: Impact of Legal Reform*, ed. L.H. Redford (Norfolk, Va: MacArthur Memorial, 1977).

² For the Japanese reception and amendment of the Allied "model" draft, see John W. Dower, *Embracing Defeat: Japan in the Wake of World War II* (New York: W.W. Norton & Co., 1999), chap. 13.

new postwar regime. Conservatives and even some old liberal stalwarts denounced the constitution as an affront to Japanese autonomy, while the newly legal Socialist Party, which had succeeded in adding a constitutional provision for the right to work during the Diet deliberations, threw its support behind the document.³ Meanwhile, constitutional law scholars focused on the status of the emperor. What did it mean that a constitution predicated on his absolute authority had been replaced by one that vested sovereignty in the people? Had Japan's acceptance of the Potsdam Declaration of July 1945 stipulating that Japan must "remove all obstacles" to the development of democracy constituted a revolutionary act that allowed this transfer? Was the new symbolic status of the emperor in fact a continuation of pre-modern tradition, when his sanctity had been understood as the reason he did not concern himself in mundane political affairs? For years Japan's leading constitutional law scholars debated these issues.⁴ In the scheme of things, amid the deprivations of the early postwar years and the tangible implications of other occupation reforms, their concerns can seem picayune. Yet for them and for scores of other intellectuals, the parameters of Japan's postwar democracy seemed to hang on the issue of rupture or continuity, on whether the people had become sovereign or whether the state was still somehow enveloped in the authority of the emperor.

These debates help situate the social jurists after the war. For they too focused their attention on the new constitution, but rather than sovereignty or the emperor, their

³ *Ibid.*, 392.

⁴ For a more detailed summary of the actual debate, see Norikazu Kawagishi, "The Constitution of Japan: An Unfinished Revolution" (Dissertation, Yale Law School, 2003), 387–400, <http://digitalcommons.law.yale.edu/ylsd/4>.

concerns centered on a third axis: the legal foundations of the welfare state. Almost without exception they had welcomed the advent of fascism as a decisive step in the evolution of law. For Makino, the direct control that the state claimed over objects, people, and society under the 1938 National Mobilization Law represented the fulfillment of “the ‘socialization of the law’ that I have advocated for forty years.”⁵ Suehiro, for his part, boasted about shaking hands with Adolf Hitler on a trip to Nuremberg, and, at the height of the war, exhorted his countrymen to “awaken to their primary duty as citizens, which is none other than to cultivate, always and on a daily basis, that bodily strength that will allow them to serve with distinction in whatever way is deemed necessary, including in the military service during wartime.”⁶ Wagatsuma was more dispassionate, but he still condoned the war, describing it as the sublation of a society “centered on the individual will” and the emergence of another based on “corporate, cooperative relationships.”⁷

The social jurists took precisely the same tack in their response to the postwar constitution, celebrating it in language that echoed their earlier praise for fascism. The postwar constitution was a triumph over the old, wrote Makino in his 1948 *The New Constitution and the Socialization of Law*, because it had finally fused rights and duties into a single principle.⁸ Wagatsuma took a similar approach in the treatise he wrote at the

⁵ Makino, “Hijōjihō no hijōhō to kōjōsei,” 48.

⁶ Suehiro Izutarō, *Sensō to taiiku* (Tokyo: Dainihon taiikukai, 1944), 19–20. Quoted in, Morgan, “Equity under Empire,” 301.

⁷ Wagatsuma, *Minpō taii jōkan*, 14.

⁸ Hayashi Naoyuki, “Dainihon teikoku kenpō no kihonrinen to ‘seisonken’: 1920 nendai - 1940 nendai no hōgakusha no giron o chūshin ni shite,” *Rekishigaku kenkyū* 869, no. 10 (August 2010): 94.

behest of the American-controlled Constitution Popularization Society (*Kenpō fukyūkai*). The distinguishing feature of the new constitution was the collapse of the distinction between the people and the state, Rather than a bifurcated order, where the state claimed an absolute sovereign right while conferring similarly absolute individual rights to its citizens in the private sphere, the new constitution “conceptualized the state as a community (*Gemeinschaft*)” and took as its ideal “the interior, organic union of state and individual (the whole and the one).”⁹

The corporatist undertones seem incongruous with occupation’s message of democratization and respect for individuality, but in one sense Wagatsuma and Makino were right. Japan’s Imperial Constitution of 1890 had reflected a late-nineteenth century understanding of the private sphere, one that had since been besieged by reformers across the world: the New Liberals in England, the solidarists in France, the Social Democrats in Germany, legal realists and New Dealers in the United States, as well as communists and fascists in their own register. The devil of social politics was in the details, as the 1930s had so clearly demonstrated, but if one narrowed one’s field of vision to focus only on the relativization of rights, as the social jurists were happy to do, the postwar thinking did in fact appear as an alignment with the ideas that had informed social jurisprudence at its inception in the 1920s. Their longstanding efforts to build what I call a social state, which had drawn inspiration from European and American legal reformers earlier in the twentieth century, were realized in the Occupation under the auspices of a generation of young Americans influenced by the New Deal. It was true that the constitution drafted by

⁹ Wagatsuma, *Shin kenpō to kihonteki jinken*, 110.

the Americans conferred fundamental human rights, but it delimited them too. Article 12 prescribed that the people “shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.” Article 13—which held that all citizens had the right to life, liberty and the pursuit of happiness—strengthened this point with the qualification: “to the extent that it does not interfere with the public welfare.” And Article 25 channeled language from the Weimar Constitution to provide for “the right to maintain the minimum standards of wholesome and cultured living.”¹⁰ It was easy to see these provisions as a mirror, reflecting the truth of the paramountcy of society in the postwar world.

A sense of continuity was corroborated by other postwar reforms. Land reform, one of the signal accomplishments of the occupation, was already underway when General Douglas MacArthur set up his office as the Supreme Commander for the Allied Powers (SCAP) outside the gates of the Imperial Palace in 1945. Out of its need for healthy bodies to conscript, the wartime state had frozen rents at current levels and empowered local administrators to reduce rents further if they saw fit. Strengthened price controls made landownership less profitable, and with the 1943 Agricultural Land Adjustment Law, a path was created for tenants to buy their land at reasonable prices, and at least some did.¹¹ SCAP’s reforms enhanced these efforts. They further reduced rents and promoted the conversion of payments into cash. They forced absentee landlords to

¹⁰ “The Constitution of Japan,” Prime Minister of Japan and His Cabinet, (n.d.), http://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html.

¹¹ In the village of Sekishiba, for example, tenants had arranged large-scale land purchases with the assistance of the wartime state. Smith, *A Time of Crisis*, 354–55.

sell and capped the maximum amount of acreage a single cultivator was allowed to own. The effect was to raise dramatically the ownership of cultivated land to around 90 percent, from a little over 40 percent at the start of the Pacific War.¹² The burden for tenants who continued to rent was also significantly lightened.

The tendency to retreat from politically charged issues, which had served the social jurists well under several different regimes before the war, did so again in the postwar period. With the exception of Suehiro, who was purged from the academy for his participation in a fascistic legal research group organized by the head of Japan's thought police, none of the other major social jurists faced any consequences for their involvement with the wartime state. By itself this was not exceptional for Japanese academics. A handful had openly protested the war.¹³ The rest, like the social jurists, had found various reasons to support the war in some capacity, yet only a few hundred lost their posts.¹⁴ What was remarkable was the degree of power they wielded. Makino, who was in his seventies by the late 1940s, shifted into politics as a member of the House of Peers. Wagatsuma and Hozumi Shigetō led the committee that redrafted Japanese family

¹² Dore, *Land Reform in Japan*, 175.

¹³ The most notable was Nanbara Shigeru, who has been held up as the conscience of prewar intellectuals. Dean of the Faculty of Law at the war's close, he spent the last months of the war writing alternately forlorn and furious poetry and lobbying for surrender. Barshay, *State and Intellectual in Imperial Japan*, 114–22.

¹⁴ SCAP laid the blame for the war largely at the foot of the military, the bureaucracy, and the financial conglomerates (*zaibatsu*), and its purges were concentrated there and among the police. Leading officials in the Home Ministry, which was responsible for breaking Japanese unions in the name of wartime mobilization, were removed from their posts before the ministry itself was disbanded, but most of the rest of the staff found their way back into the government soon enough. Academics, by contrast, were generally spared. Garon, *The State and Labor in Modern Japan*, 233.

law in 1947, which among other things, finally conferred legal rights on married women.¹⁵ They were assisted by Suehiro's protégé Kawashima Takeyoshi.¹⁶ Suehiro himself, despite being purged from the university, took up a position as the head of SCAP's labor commission, where he was instrumental in the drafting of the 1945 Trade Union Law—which recognized Japanese workers' right to organize, bargain collectively, and strike—as well as a second law passed the next year that set down mediation and arbitration procedures in the event that a collective bargain could not be reached. The Trade Union Law was transformative. Within a year union membership climbed from hundreds of thousands to almost five million.¹⁷

These reforms marked the apex of the influence of the social jurists after the war. Hozumi Shigetō died in July 1951. Suehiro followed that September. Makino lived to 1970, and it was reported that to his last days he kept a stack of foreign legal journals on his nightstand.¹⁸ From the 1950s, though, his ideas began to be treated as antique.¹⁹ Wagatsuma reigned over Japanese civil law for two decades, and Kawashima Takeyoshi emerged as the standard bearer for legal sociology (*hōshakaigaku*), a continuation of Suehiro's idea of discovering a “living law” of norms in judicial decisions. The echoes of

¹⁵ Wagatsuma's account of the reforms can be found in Wagatsuma Sakae, *Ie no seido* (Tokyo: Kantōsha, 1949).

¹⁶ Eiji Takemae, *Inside GHQ: The Allied Occupation of Japan and Its Legacy* (New York: Continuum, 2002), 340.

¹⁷ *Ibid.*, 311, 325; Dower, *Embracing Defeat*, 245.

¹⁸ Dandō Shigemitsu, “Makino Eiichi sensei no goseikyo wo itamu,” *Jurisuto*, no. 450 (1970): 72–73.

¹⁹ Wagatsuma, “Makino Eiichi sensei no omoide.”

interwar legal thought were unmistakable in passages like the following: “Generally speaking, ‘precedent’ is a social act in an individual situation and this act serves as a model or canon for subsequent social acts.”²⁰ But the legalization of the socialist party and the liberalization of the university system after the war meant that the Faculty of Law could no longer determine legal discourse as they once had. A new school of Marxist legal theorists rose to challenge their theories from the left, while Kyoto University and Waseda University emerged as important centers of legal theory in their own right.²¹

The ideas and practices the social jurists developed during the interwar period had a longer tail. Into the 1960s they defined the parameters of mainstream legal discourse, which continued to revolve around theoretical models of legal interpretation, the social function of the judiciary, modernization, and the relationship between law and society.²² Conspicuous in its absence was a major discourse of rights.²³ The rate of litigation, which had spiked from the early 1920s to collapse in the 1930s as mediation became increasingly common, never recovered after it collapsed under the wartime state. It is too much to credit this phenomenon to social jurisprudence, although its influence

²⁰ Kawashima, “The Concept of Judicial Precedent in Japanese Law,” 90.

²¹ Masayasu Hasegawa, *Hōgaku ronsōshi* (Tokyo: Gakuyō shobō, 1976), 12–13.

²² See Hoshino, “Nihon no minpō kaishakugaku”; Isomura, *Shakai hōgaku no tenkai to kōzō*; Kawashima, “The Concept of Judicial Precedent in Japanese Law”; Watanabe, *Tochi, tatemono no hōritsu seido*.

²³ The major exception to this trend is the work of jurist Kainō Michitaka, who argued that the human rights recognized by the postwar constitution ought to be interpreted as natural rights that trumped collective interests. Kainō Michitaka, *Shimin no jiyū, kihonteki jinken to kōkyō no fukushi* (Kyoto, Horitsu Bunkasha, 1968). Compare with a major dictionary on constitutional legal terminology from the same period, which defines human rights as a product of history comprising liberal rights, civil rights, and social rights. Tagami Jōji, *Taikei kenpō jiten* (Tokyo: Seirin shoin shinsha, 1968).

was surely a factor. For it provided the dominant explanatory paradigm. As two law scholars put it in 1973: “The reason the Japanese are fond of compromise is related to the fact that in their social relations the boundary of one’s rights and duties are only vaguely defined.”²⁴ Here they credited culture. That might be right, but if so, it was a culture that had formed as recently as the 1920s through a sustained effort to bind the law and the market within the social order. To realize this is to understand two things: First, Japan’s contemporary legal system was made by legal theorists and practitioners and it can be changed by them. Second, it was made that way in an attempt to spare certain goods and relationships from the market and produce a more just and sustainable social state.

²⁴ Tomoyuki Ohta and Tadao Hozumi, “Comprise in the Course of Litigation,” *Law in Japan* 6 (1973): 100. Quoted in, Eric A. Feldman, “No Alternative: Resolving Disputes Japanese Style,” SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 2014), 138, <https://papers.ssrn.com/abstract=2616031>.

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