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Structural Reform and Social Security Law

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Abstract In Japan, worn-out phrases like "the right to life," "minimal security of life," and "benefits by the country" now fail to encompass the reality. This paper clarifies the theoretical achievement of social security by analyzing five legal theories of social security in Japan: the theories of rights, scope, legal system, legal ideology, and legal subject. From the discussion, I draw three conclusions. First, as the role of local governments and private companies has become gigantic, the role of the nation in social security has become more relative. Second, the relationship between the nation and its citizenry has been changing and the legal subject of social security is now more diversified. And third, as measures of social security are now addressing the security of health and a serene life beyond the subsistence level, the characteristics of social security have become inarticulate.

1. Introduction

There are many issues to be resolved in the field of social security in Japan—among them, health insurance reform and pension reform—although the Long-Term Care Insurance Law was enacted in 1998. As reflected in the 1995 Recommendation by the Social Security System Council, "Restructure of the Social Security System," a new approach to social security has been sought in theory, since worn-out maxims like "the right to life," "minimal security of life," and "benefits by the country" no longer encompass the reality.

This paper clarifies the theoretical achievements of social security in Japan by analyzing theoretical measures along with systematic developments from the viewpoint of the jurist. I have always thought that an important function of social security law is to produce a policy that includes judicial examination beyond legal interpretation.[1] This paper maintains that perspective.

It first summarizes theoretical situations of social security in Japan from various jurisprudential standpoints. It will clarify the issues by discussing these points, even though they have been correlated in theory. To do so, it reviews the two recommendations of the Social Security System Council that are theoretically essential in promoting the social security policy of Japan: the 1950 Recommendation

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1 Yoshimi Kikuchi, "The Rights of Social Security (1)," *Hokkaido Law Review* 47 (1), 1996, p. 194.

providing the basis for restructuring social security in Japan after World War II and the 1995 Recommendation, titled "Restructure of the Social Security System," considering the upcoming century of an ultra aging society. Finally, it focuses on how the Japanese view of social security has changed since World War II.

This paper only summarizes past discussions and raises general questions. I thus discuss the fundamental issues concerned with restructuring the social security system elsewhere.[2]

2. Legal Theory of Social Security

This section will focus on the five different approaches to building the legal theory of social security in Japan: theory of rights, theory of scope, theory of the legal system, theory of legal ideology, and theory of the legal subject.

2.1. Theory of Rights

Arguments on the rights of social security in Japan have centered on the rights of existence stipulated in Article 25 of the Constitution.[3] Above all, through lawsuits including the Asahi Incident,[4] the theory of "the right of social security"[5] was discussed in connection with the theory of movement. The theory of rights was based on the public support system relevant to Article 25(1) of the Constitution. During the 1980s "the social security theory with rights on principle" became invalid as a result of low economic growth.[6]

At the beginning of the 1950 Recommendation, Article 25 was quoted before the listing of specific plans: "we must establish a unified social security system as soon as possible so as to respond to the ideas of the Constitution and social facts." Considering the people's poverty after World War II, it is not difficult to presume that the "right to life" provision of Article 25 played an important role in the development of our social security system.

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[2] Yoshimi Kikuchi, "The Rights of Social Security (2)," *Hokkaido Law Review* 47 (2), 1996, p. 692, and "Legal Ideology of Social Security and Fundamental Structure of Public Pension," *Osaka Law Review* 49, 1999, p. 93.

[3] Article 25 of the Constitution stipulates that "all people shall have the right to maintain the minimum standards of wholesome and cultured living. In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health." See supra note 1, p. 185.

[4] "Asahi Incident," *Civil Cases Series* 21, May 24, 1967, p. 1043.

[5] See, e.g., Masaaki Ogawa, *Social Security as a Right* 1964.

[6] Tadashi Fukutake, "Social Security and the Theory of Social Security," *The Basic Issues of Social Security*, 1980, p. 1.

On the contrary, the 1995 Recommendation names "universality," "fairness," "comprehensiveness," and "validity" as principles of social security promotion as well as "rights," and it makes the rights issue relevant to other policy schemes. This shows the difficulty in discussing social security only on the basis of rights, which is different from the postwar period, when actualizing the idea of right to life was the first priority.

The approach to social security based on rights now seems outdated, as society has become mature and legislation and the income security system have developed.

2.2. Theory of Scope

How to determine the scope of social security (law) is closely related to the significance of social security (law). It also relates to how to grasp the legal system or the constituent of social security.

As for the meaning of social security law, traditional theories maintain that "social security law is the law to control the relations of life security benefits to secure the people's right to life,"[7] or "social security law is the legal system that actualizes life security measures on the national level for the national government."[8] The general idea was that the nation would take the responsibility and would consider the nation and the people to be the parties concerned under the theory of right to life. In this connection, we can say that individual businesses of local governments, the employees' pension plan fund,[9] or health insurance associations[10] are within the scope of social security.

As for the former, there are a variety of individual businesses including cases where the nation watches over the business and cases where local governments do it on their own. In light of the traditional theory that the nation takes responsibility for social security, it might be difficult to consider individual businesses of local governments to be a social security; however, more discussion of this issue is required.[11] In the first report of the Social Security System Council in 1993 and its 1995 Recommendation, local governments are apparently deemed to be responsible in the areas of health, medicine, and welfare.

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[7] Seishi Araki, *The Legal Structure of Social Security*, 1983, p. 31.

[8] Tsuneki Momii, *Social Security Law*, 1972, p. 41.

[9] The pension system for which the state has responsibility in principle consists of the basic pension (for all citizens) and the employees' pension (proportional to compensation). The employees' pension fund, which is a part of old-age benefits, is a public corporation whose purpose is to provide benefits plus the old-age benefits. It requires 500 or more employees to establish an individual corporation.

[10] The health insurance intended for employees is usually administered by the state. Companies with 300 or more employees are eligible to establish a public corporation that is a health insurance association for the state.

[11] Takashi Ebashi, "Reconsideration of Nationality," *Jurist*, 1101, 1996, p. 10.

Although I do not oppose the tax-qualified pension[12] having the character of private pensions,[13] it is questionable whether employees' pension plan funds are social security or not, since they are composed of the "agency" part and the "added" part.[14] As for health insurance associations, we can consider the "agency" part and the "added" part separately.

Now let us consider the attitudes toward social security portrayed in the recommendations of the Social Security System Council. In the 1950 Recommendation, the Council stated: the "social security system is to take economic measures on behalf to those who have suffered from sickness, injury, delivery, disability, death, aging, unemployment, many offspring, and other difficulties by way of insurance or public funds, to secure the minimum life of those who have difficulties in making a living by national assistance, and to try to improve public health and social welfare for all citizens so they can make a cultural living." Social insurance, national assistance, public health, and social welfare are included within the scope of social security, and the national government has responsibility for the life security of Japanese citizens.

On the other hand, the first report of 1993 mentioned that social security has three missions: (1) to restore citizens' lives when they have lost stability, (2) to make citizens' lives secure by providing funds, and (3) to secure citizens' lives as a responsibility of the national or local governments. On top of that, it said that social security was to provide public funds (as a responsibility of the national or local governments) to citizens to secure healthy and serene lives when they lost stability. This includes income security, medical security, and social welfare benefits that are provided through social insurance or social assistance. The qualification system for offering medical treatments or social welfare, ensuring staff, facility maintenance, regulations, public health, environmental health, and/or antipollution measures can also be considered social security in the broad sense if benefits are not the requisite.

As we can see, fifty years after World War II the meaning of social security has changed from "minimum life security to those who suffer from difficulties" to "security of a healthy and serene life." This means that the role of social security has changed along with the economic development of society, and that the legal aspects of social security have also changed. The 1950 Recommendation emphasized that the role of the national government was to provide minimum life security as it related to Article

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[12] It is one of the company pension plans and is grounded in the Corporation Tax Act. The tax-qualified pension is spread among small- to medium-size firms because the requirement is not strict.

[13] Seiyou Kojima, "The Legal Theory of Company Pensions," *Quarterly of Social Security Research* 32 (2), 1996, p. 204.

[14] Seishi Araki, "The Character and Function of Public Pensions," *Jurist*, 1063, 1995, pp. 26–28 and supra note 13, p. 205.

25 of the Constitution, whereas the 1995 Recommendation argued that the role of the national government was to provide stable life security above the minimum level.

This is striking, for example, when we consider the position of local governments or relationships with the private sector. The 1950 Recommendation observed that the nation was responsible for life security and had an obligation to lay the general groundwork and implement it efficiently through the national and local governments. The 1950 Recommendation regarded the relationship between the national and local governments as a vertical one or national institutions. On the contrary, the first report of 1993 considered social security to be a means through which the national or local governments would support citizens' lives. In this case, it seems to see the relationship as parallel.

The 1995 Recommendation, however, stated that the nation was responsible for planning, legislation, setting the minimum standards, and bearing the costs when they were to be enforced at the national level, and the nation would be responsible for policy-making and establishing financial responsibility, particularly for income security. On the other hand, local governments would provide services relating to health, medical treatment, and welfare. The national and local governments would assume responsibility based upon each function.

As for the position of the private sector in social security, the 1950 Recommendation was silent. Instead, in relation to social welfare, it mentioned that government should consider the private sector to be independent; the private sector should utilize its unique characteristics as well as coordinate its activities with the national and local governments by establishing a special foundation system. In contrast, the 1995 Recommendation emphasized cooperation between the public sector and the private sector in relation to social welfare and medical services. It suggested the possibility of the national or local governments being involved not to provide direct benefits, but rather to subsidize private services or provide regulations to ensure quality. In connection with the private sector, the position of volunteer organizations could be in question.

2.3. Theory of the Legal System

As for the legal system's view of social security,[15] in the 1950s the Theory of Systematism by System,[16] which considers each system to be the whole, was the mainstream approach. In the 1960s this was replaced by the Theory of

[15] Publication Committee, *Judgments of Social Security and Social Welfare (1)*, 1996.

[16] Isao Kikuchi, *The Formation of Social Security Law*, 1970, pp. 82–84, and Yutaka Sumida, *The Issues and Prospects of Social Security Law*, 1968, pp. 3–35.

Systematism by Benefits, which focused on security needs and benefits.[17] Later, some legal scholars tried to integrate these two theories.[18]

The 1950 Recommendation introduced the Theory of Four Sectors (social insurance, national assistance, public health, and social welfare) and had a strong influence on doctrines. The first report of 1993 mentioned that the main benefits of social security were income security, medical security, and social welfare. These could be provided through either social insurance or social assistance.

The theory of the legal system is not being discussed as before. But it must be determined whether the following areas should be included in social security: (1) the medical security law in terms of a series of comprehensive medical benefits including the prevention, cure, and rehabilitation to prevent illness and death,[19] (2) the health security law in terms of maintenance and improvement of the national health, which is broader than the former law,[20] and (3) the house security law, which comes from the right of residence.[21]

This attempt means that the concept of social security has changed, and the concept of "life accidents" or accidents that need security has not necessarily required. These concepts are related to the facts that social security developed with social insurance and that the occurrence of accidents was the requisite. Old doctrines basically looked at the occurrence of accidents and then the content of the benefits.[22] On the contrary, new doctrines do not always deal with whether accidents have actually occurred. The concept of "accidents needed" has been closely influenced by how to consider social security or how to define the nation's role in relation to social security.

2.4. Theory of Legal Ideology

In Japan, the right to life is a concept of social security or social security law.[23] The theory[24] or the idea[25] of social solidarity, however, could be a principle of

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[17] At the beginning, this theory consisted of two different area—(1) the income social security law to provide monetary benefits for income loss and (2) the life disability law to provide non-monetary benefits for rehabilitation of the sick and disabled. See Seishi Araki, *Social Security Law*, 1970, p. 49.

[18] See, e.g., supra note 8, pp. 77–79.

[19] Idem p. 22.

[20] Hideo Inoue, "The Right to Health and Medical Security," *The Course of Japanese Health and Medicine (2): Current Medical Security*, 1991, p. 76.

[21] Akira Takafuji, *The Basic Principles and Structure of Social Security Law*, 1994, p. 209.

[22] E.g., supra note 17, pp. 5–16.

[23] Supra note 1, p. 186.

[24] Supra note 21, p. 22, and Takahiro Eguchi, *Think About the Basic Principles of Social Security*, 1996, p. 206.

[25] Katsuhiro Hori, *The General Theory of Social Security Law*, 1994, pp. 99–101.

social security law as well as the right to life in recent doctrines.

The term "social solidarity" appeared in the 1950 Recommendation, although it was used to impose a social obligation on the citizenry to maintain and implement the system according to ability based on the spirit of social solidarity on condition that the nation would be responsible for life security. On the contrary, social solidarity was the basic principle of social security in the 1995 Recommendation. Here, "social solidarity" meant to collaborate with others while fulfilling one's own responsibilities, not to depend on one another. Accordingly, it would be necessary for every citizen to bear an equal burden based on the spirit of independence and solidarity when the burden increased, and to bear the social insurance premium and the social security cost in keeping with social solidarity.[26]

2.5. Theory of the Legal Subject

As I stated in section 2.2., social security in Japan has been considered to be a legal relationship between the nation and its citizenry. Thus, the legal subject of social security would be the nation and the citizenry, and there seems to have been no discussion beyond this point.

No objection should be made to the idea that the nation is the legal subject of social security through Article 25(2) of the Constitution or to the principle of a welfare state. But there have been some changes as a result of economic development and variable needs in how the subject should be defined. The legal subject was considered to be directly related to provisions in the 1950 Recommendation but now can be considered to be somewhat indirectly related to regulations and assistance.

The citizenry or individuals are also an important subject of social security. In Japan, under the principle of the right to life based on Article 25(1) of the Constitution, social security was considered one way for the nation to provide benefits to the citizenry.

Concerning the citizenry or individuals, what can be questionable is the family. The family used to be a basic social unit of life security for each individual. Social security was a supplement to the family when the family could not cope with accidents. Even now the family is considered as a unit for contributions or benefits in various situations. In this sense, the family itself cannot be a subject of rights or obligations; there should be situations where the family becomes a legal subject of social security in the theory of the legal system.

Structural changes in society and the economy have altered the idea of family. This will have a substantial effect on the direction of social security in the future.

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[26] Satoshi Kurata, *The Basic Structure of Medical Insurance*, 1997, p. 317.

The 1995 Recommendation observes that it would be desirable, if possible, to shift the social security system from the family unit to the individual.

It has become impossible to grasp the legal subject of the nation or the citizenry, along with the recent changes in the doctrines pertaining to the position of the nation on social security. As the role of the nation becomes more relative, it is more apparent that social units of the nation closely relate to social security.

In the application of social security law, we can imagine regions and occupations as a society for the present. As for regions, prefectures or municipalities will be most important. We can consider local governments from two standpoints. First, local governments are public subjects of social security. Under the current law, local governments sometimes function as an institution of the nation and in this case they cannot be considered independent. As for collective work, depending on how you grasp the relationship between the national and local governments, the position as a public subject will change. We should consider what kind of responsibility the local government has as a subject pertaining to the right to life under Article 25 of the Constitution. Second, local governments are in a position to work for social security based on the intent and responsibilities of the residents. In this case, local governments are clearly different subjects from the nation. As for whether local governments can be subjects of social security, Articles 92 and 94 of the Constitution might be regarded as the norm.

In relation to occupations, the position of employers is important. Employers pay premium for social insurance and organize health insurance associations or employees' pension plans as well as the insured. In that sense, the independence of employers can be questioned in social security law. In the case of social insurance, insurers such as health insurance associations or employees' pension plans can be deemed organizations that act for the nation in insurance management.[27] Thus, we try to consider these entities as independent subjects, not institutions of the nation. We cannot deny that insurers have characteristics of national institutions. But in the theory of the system or policy, insurers are expected to run businesses independently since the insured and businesses are included as organization members.

3. Legal Issues of Social Security

Obviously, we cannot equate the entire current social security system with the traditional approach such as the right to life, minimum life security, or national

[27] Supra note 8, p. 112.

benefits. With this in mind, I can reach three conclusions for the present.

First, the role of the nation in social security is not absolute—that is, it is no longer the sole implement of social security. On the other hand, as the role of local governments in providing health, medicine, and welfare services and the role of private companies in providing welfare or care services have become gigantic, the nation has changed its position to the more general one of planning and enforcing regulations. Even so, it does not contradict Article 25 of the Constitution.

Second, the legal subject of social security is now more diversified. The fact that the relationship between the nation and its citizenry has been changing points to the existence of a society that lies between the nation and its citizenry. The important legal issue in the future will be to clarify the correlation between the legal subjects of social security such as local governments and private companies.

Finally, the characteristics of social security have become inarticulate. The concept of the necessity of accidents used to be closely connected to poverty in theory as well as in reality. But various aspects of social security are now looking at the security of a healthy and serene life beyond mere subsistence. This type of security can be achieved through measures relating to national lives that are not limited to social security. This is how social security becomes inarticulate. It also illustrates the importance of addressing the scope or the system of social security.

To understand the issues identified in this paper might not be immediately useful in the interpretation of law; nevertheless, the system and policies should be meaningful in describing the basic concepts relating to each issue.