JURISPRUDENCE AND THE SOCIOLOGICAL METHOD —IN PARTICULAR REFERENCE TO THE THEORY OF LABOR LEGISLATION

By MITSUTOSHI AZUMA

Professor of Civil and Labor Law

It is a well-known fact that the theory of private law was elaborated almost to its completion by the end of the nineteenth century with Germany as center of its study along with the development of the systems of private laws, in particular, of the code of civil laws, which had been in completion by that time.

Although we do not have any intention to trace its development back to the Roman law or to jurisprudence in Rome, it is believed that the theory of law and various systems of laws based upon them in Europe at the end of the nineteenth century is certainly worthy of being called the final outcome of a long tradition, when we think of the tradition of jurisprudence through many centuries after the reception of Roman law. No one can therefore deny the fact that they are well-established not only in theory but also in their structure.

It is however interesting to note that various social problems were in full maturity outside the theory and the systems, which were at that time well-established. In fact, these problems were assuming serious proportions confronting the theory and systems with their solution. In particular, the labor problems were getting most urgent at the end of the nineteenth century and at the beginning of the twentieth century, striking the social and economic foundations of the society.

Such a crisis consciousness would in other cases been of help to ruin people's confidence in the theory and systems of law. In reality, a strong repulsion took place on the part of the theory of private law, which had a long tradition and its own well-established logic or system. A feeling of fretfulness also took place on the part of those against the theory, which necessarily made stubborn resistance to such a move. Although the theory of private law in the nineteenth century was criticized as jurisprudence of conceptions (Begriffsjurisprudenz) for its too abstract and logical attitudes, it is an undeniable fact that such a criticism arose as a repulsion to its well-established logic.

In the first place, the repulsion gave birth to various methodologies

against jurisprudence of conceptions in the theory of laws. The free law movement (Freirechtsbewegung) proposed more elastic interpretation of law emphasizing infinitely many possibilities of interpretation of law against the operation of formal logic, while the antagonism of substantial social interests and the need for their co-ordination were emphasized by jurisprudence of interests (Interessenjurisprudenz). It is therefore well within the mark to suppose that these movements were a representation of the repulsion to the theoretical standing of jurisprudence of conceptions, although its philosophical foundations might be differently evaluated.

Indeed, those standings, which presupposed the validity of an existing system of laws and was primarily concerned with its interpretation and application, especially under above-mentioned circumstances, was of deep significance. But, beyond such standings, there were still some problems remaining unsolved. In other words, it was now required to critically examine the very social foundations of the existent theories and systems of law taking into consideration those social problems, the solution of which was now urgently looked for. Further, it became necessary to explicate the historical and social implications of the theories and systems and bare the hidden judicial structure of the social problems, which were confronting the people with their solution. The focus of the whole problem was thus shifted to the construction of a new theory of law, more suitable for the solution of these newly arising problems. Here, we can expect the methodology of jurisprudence and its application, both of which are beyond the proper sphere of the interpretation of positive laws.

It is not difficult to find an endeavor towards such a goal in the jurisprudence of the twentieth century, in particular, in the theory of private laws. The endeavor is, it is believed, characterized by the following two points.

(1) In the first place, such an endeavor was started with the analysis of the capitalist economy, because more critical attitudes were required of the representatives of this new tendency towards the system of laws in the nineteenth century and the whole social structure based on it and the domain of private law was closely connected with the economic structure of the society. Accordingly, much attention was called to the domain of economics, in which many note-worthy results had already been obtained. In particular, Marxism was often referred to as a theory which predicted the necessary transition of the capitalist economy to the socialist or to the communist one.

(2) Secondly, the tendency is characterized by its rise above the phenomenological or traditional aspects of law and its theory, when analysis was made of the characters of the system of laws in connection with the socio-economic structure of the society as a whole.

In other words, the exponents of this new tendency proposed the inter-

pretation of laws as a component of many social phenomena such as political, economic and cultural ones in order to construct a new theoretical system, of law based upon the observations made in the domains of politics, economics, history and other social sciences.

Such a tendency was certainly a revolution to jurisprudence, because jurisprudence is self-contained as a science of norm and such a nature of jurisprudence was most strongly emphasized in the nineteenth century as its final characterization. The interest in social sciences was further promoted by the so-called sociological tendency of politics, economics, history and other related sciences, which were primarily concerned with various social phenomena. It is therefore well within the mark to suppose that such a strong interest in Marxism was mainly taken by the sociological attitudes strongly immanent in Marxism.

If the above observation is right, the proposed methodology is to be called most properly the sociological method in jurisprudence.

It is beyond my ability to delve into every application of this sociological method throughout all the branches of jurisprudence in order to present its bird-eye view. Indeed, the purpose of this paper is the description of the results obtained by this method in various labor problems as well as within labor jurisprudence, which is concerned with these problems. Among various theories proposed in the twentieth century, there are supposed to be two tendencies which were particulary interested in the sociological method and its application.

One of them is a tendency to propose it as a methodology of laws. For instance, Eugen Ehrlich[1] and Roscoe Pound[2] are the representatives of this school respectively in European Continent and America.

The former is metaphysically inclined under the influence of the continental law, in particular, of German laws, being primarily concerned with systematization and sympathetic to Marxism. On the other hand, the latter is more empirical and positivistic representing a general tendency of American jurisprudence advocating more liberal stand-point. It is however safe to say that they both represent the same tendency in the study of jurisprudence.

Besides such a group of jurists, there is another one which is concerned not so much with such methodological problems as with the analysis of legal structure of capitalism. This group was under the particularly strong influence of Marxism. For instance, the works of Karl Renner[3] and Alex-

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[1] One of the main works of Ehrlich is "*Die Grundlegung der Soziologie des Rechts*". As is clear from the title, no systematization of legal sociology is presented in this work.

[2] Among many works by Pound, "*Interpretation of Legal History*" should be referred to as a systematic presentation of his method.

[3] K. Renner, *Die Rechtsinstitute des Privatrechts.*

ander Leiszt[4] who both trying to analyse the interaction of legal institutions and social economy, was already fully introduced to us by Prof. Wagatsuma.[5] On the other hand, Prof. Kawashima's theory of ownership law is one of the most outstanding works made for the analysis of legal structure of capitalism, depending upon Ehrlich's theory.

However, it seems that the tendency has lost its old brilliance, at least in Europe and America. A description concerning this situation will be made later by pointing out the stagnation of sociological method in the theory of private law in connection with various tendencies of labor law. Nevertheless, in this country the interest and concern in sociological method have much increased in post-War times particularly with respect to labor and agrarian problems. The results which have been obtained in this field will be evaluated later.

The above description is only the outline on the rise of sociological method in jurisprudence in the twentieth century. We might as well confine ourselves to such a brief account of this tendency and make a more detailed description on this tendency in connection with various theories of labor laws.

I. *Theory of Labor Laws and the Sociological Method*

Long before the establishment of modern systems of private law and its theory, labor problems had already been one of the most serious issues and confronted these systems with their complete solution. It was therefore quite natural that the new method in the theory of private laws would find in labor problems the best material for the application of the so-called sociological method.

In reality, the sociological method, which was already an issue at the beginning of the twentieth century, was mainly focused to capital which was the very foundations of capitalistic structure or to the business as its bearer. However, it was rather difficult in the sociological methodology to find penetrating analysis of labor problems or labor relations in connection with the legal structure of capitalism, focusing attention on capital or capitalistic enterprises, especially on their functions and transactions. In fact, labor problems and social problems were not taken care of by legal science, but by various social sciences, in particular, by economics as a necessary consequence of capitalistic legal structure, and the legal order of society for their solution was only proposed or suggested as legislation by those exponents of socialism or communism. As a result, no comprehensive study was made for the analysis of the very legal structure of the relations

[4] A. Leiszt, *Privatrecht und Kapitalismus.*
[5] Sakae Wagatsuma, *Supremacy of Credits in Modern Laws* (in Japanese).

between employers and employees. In other words, labor problems or labor relations as sources of social problems were looked for only beyond jurisprudence or pre-juridical. Here is already suggested the fate of jurisprudence.

The overemphasis of positive laws, in particular, of written law, in the nineteenth century was already severely criticized at that time by the historical jurisprudence. However, the social phenomena are required to be developed enough for their giving birth to a legal system as that of norms. Thus, the legal structure of capitalism, which has thereafter been crystalized under the so-called capitalistic system, is not expected in that century to be thoroughly analyzed by the formal and logical analysis of existent various legal concepts. Indeed, there remains a possibility to represent it by means of such an analysis. It was therefore quite natural that sociology of law concentrated its effort on its analysis. It is, however, extremely difficult to comprehend from a legal point of view various social problems produced by the very structural inconsistency of capitalistic system, in connection with the legal structure of capital per se, though not impossible. At best, they are explained as pre- or non-legal relations of causality. The sociological studies, which are confronted with social problems at the time, are therefore destined to come to maturity, when and only when the living social relations immanent in the social problems such as that between employers and employees and that between landowners and tenants are sufficiently crystalized for their being the objects of legal norm, or, in particular, when they come into legislation. This is one of the fundamental differences existing between the sociological methods from the view point of other social sciences and that from jurisprudence.

In other words, the sociological method is confronted with two alternatives, both of which are pregnant with a danger. One is the possibility that the sociological method would cease to be jurisprudence by too much relying upon the results of other sciences in the name of the sociological method. The other is the degeneration into positivism, to which the sociological method has made an extremely critical attitude.

We are therefore required to find out the possibility of our going middle way in analysing the legal structure of contemporary labor problems or the relations between employers and employees.

(1) At the beginning of the twentieth century, when the study of labor law became active, there were already in existence some legislations having labor problems in wider sense as their objects. In particular, in England, such legislations go back to a period of two or three hundred years ago. However, these legislations were rather fragmentary without any systematization, whether they were concerned with the protection of workers or the disposition of labor movements. As a result, it was impossible for the student of labor laws to systematize the theory of labor law

relying upon these fragmentary labor legislations. The first step taken by the study of labor law for its systematization was therefore to grasp the reality of social phenomena as represented in labor problems and the social relations as represented in that of employers and employees. Therefore, the study of labor law was in fact obliged to employ the sociological method at the very beginning of the study. Here, we find a background for its antagonism with the theory of private law in the nineteenth century. In other words, the study of labor law acted as a pioneer of introducing the sociological methods into jurisprudence.

(2) In practising the sociological method in the above mentioned sense, the study of labor law was necessarily demanded to take care of such novel social phenomena as labor disputes or actions in labor dispute and collective agreement. They were the very fields, in which the students of labor law were most interested. In fact, they were the social phenomena, which had never been expected by any system of private law. In other words, the system of private law in the nineteenth century tried to clarify the legal relations in social lives through contracts. Indeed, the labor disputes arising from the failure of the labor contract by individual workers to bring about the improvement of workers' living condition are of no direct significance to the problems of contracts proper. Furthermore, the system of private law can not cover the sought-for rationalization of the standard of individual labor contract by means of collective labor agreement which is pushed forward by trade-unions.

(3) The sociological method was more, frequently employed in the study of the social phenomena as represented in labor agreements rather than in the analysis of those as represented in labor disputes. It is therefore safe to say that the study of labor laws was systematically developed with the theory of labor agreements as center. This is due to the following two reasons:

1) The disputes between employers and employees called labor disputes and strikes and other actions of disputes which are employed for the benefit of one or other party of the dispute are all a bare representation of the relation between these two antagonistic parties. They are at the same time highly liquid or flexible and it is extremely difficult to observe these disputes from the legal point of view. On the other hand, the labor agreement is an agreement between groups to the effect of controlling labor conditions. There is therefore a clue to a legal understanding of labor agreements, because they bring about some stable and constant relations to employers and employees, although it is difficult to find out a legal category to cover labor agreements in the system of private laws.

2) The legislations with respect to labor disputes were at first primarily concerned with the restriction or ban of strikes, but they have since lost the importance among the motives of the legislations in later times. It

should further be pointed out that such a restriction or ban was, as it were, an instinct repulsion of the system of private laws completed in the nineteenth century and the capitalist economy which constituted the background of the system. Such being the situation, the study of labor laws had to take up the problems more or less directly connected with the existent system of private laws. As a result, it was difficult for the students of private laws to freely introduce the sociological methods which were more lively freed from various restrictions by the system of private laws. However, there was not seen such a repulsion from the side of the system of private laws in the case of labor agreements, although they were a new kind of social phenomena developed through labor movements. Further, these agreements were, on the other hand, not in a position to be incorporated at once to the system of private laws by means of legislations, and their development were therefore gradually under way without being legislated. This is also one of the reasons why the sociological method as proper method of the study of labor laws was provided with suitable subjects by labor agreements.

(4) However, there remains a problem, whether or not the study of labor laws primarily concerned with labor disputes and agreements was successful in opening a new field in the methodology of private laws by means of a thoroughgoing application of the sociological method. In this paper, we are not concerned with a detailed and concrete analysis of the theory of labor laws, but are more interested in the evaluation of the theory from the above point of view. In this connection, it should be remarked that the theory of labor laws to be analysed here is that originating in Germany being most influencial among our students of labor laws.

(5) As above suggested, the legal theory of labor disputes are concerned with the legislation for the restriction or ban of strikes and other similar actions as well as with the liability involved in these actions. The study of the former is throughout concerned with the labor policy of the state concerning the relations between employers and employees under the capitalist economy, while the main task of the students of the latter has been the development or the theory for liberating the actions in labor disputes from the legal responsibility. Therefore, no comprehensive result has been obtained by the legal theory of labor disputes in its legal-sociological analysis of labor disputes and other similar social phenomena. Indeed, it has been the same not only with the theory of labor laws in Weimar Republic, which was the very birth place of the theory, but also with various related theories developed in this country under the influence of the former. Like this, the theory of labor laws is now wandering about outside the established methodology of private laws looking for a new methodology of its own. If it is allowed to state my conjecture about this matter, this is because the theories thus far proposed of labor laws have failed to grasp labor dis-

putes as a living, liquid relations between social parties such as employers and employees and confined themselves within the established system of private laws without attempting any realistic regulation of such living relations. This is however a problem in the theory of labor laws proper and cannot be taken care of in the present paper.

(6) As above-mentioned, a good start was given by the theory of labor laws in applying the sociological method to the study of labor agreements. For instance, in the theory proposed by Lotmar of Switzerland[6], who was the founder of the theory of labor agreements, it is pointed out that the theory is under the influence of the legal dogmatics of civil laws in the nineteenth century. However, his theory is at the same time a result of the sociological method, which was first applied to more concrete studies of labor agreements and later led to the discovery of their peculiar character as norm of the society. Such a tendency was further developed by the theories of labor laws in Germany as developed by Jacobi, Sinzheimer and other German jurists. In particular, these theories were further developed and elaborated by Sinzheimer and very brilliant achievements of the theory of labor agreements was presented in Germany with Sinzheimer as its leader.

However, under the regime of Weimar Republic, Verordnung ueber Tarifvertraege[7] was legislated conveying its character as norm of labor agreements and the legal principles concerning labor agreements were incorporated to the legislation as a part of the system of private laws. As a result, the sociological method, which was just started, was rapidly amalgamated with the dogmatics of the theory of private laws in the nineteenth century. Of course, it is not to be denied that the legislation of the essence of labor agreements as norm of the society and their elevation to that of the state was a contribution of the sociological method at its early stage of development. However, its incorporation to the system of positive laws was to come a pitfall of the sociological method.

Under the regime of Weimar Republic, the theory of labor agreements had already been highly developed accompanied by lively discussions and a large variety of the theory. Nevertheless, the theory deviated from the original theory as proposed by Rotmar and Sinzheimer and began to devote itself to the detailed analysis of conceptions in accordance with the tradition of German private laws. In fact, no concrete information is obtained any more about labor agreements from the theory of labor laws in Germany after Verordnung ueber Tarifvertraege. In other words, here, we have to face an extremely conceptual legal theory concerning the nature and effect of labor agreements and the attitude of trying unconsciously to incorporate

[6] Lotmar, *Arbeitsvertrang*, 1903.
[7] Sinzheimer, *Der Korporative Arbeitsnormenvertrag*, 1914.

them as social phenomena into the system or theory of private laws peculiar to the nineteenth century.

On the other hand, most of the studies made in England or America concerning labor agreements have not been made from a legal point of view. In fact, the students of labor agreements are mostly concerned with economic or purely sociological aspects of labor problems and relations between employers and employees. They are however not interested in the legal analysis of labor agreements and the structure of the relations between employers and employees involved. Of course, no regulation is legally provided for in England of labor agreements, which are to some extent under a legal control in America. But, in both countries, labor agreements are mostly not taken care of by legal procedures. In these countries, not only labor agreements but also labor disputes are disposed of pre- or non-legally.

II. *Jurisprudence and the Sociological Method*

In the observation of the development of the theory of labor law, it has now been made clear that the study has at last been led to the world peculiar to jurisprudence, in particular, to the logical operation in the theory of positive laws although the theory of labor laws was heavily leaning upon the sociological method at its early stage of development.

We are thus confronted with the following three alternatives: One is to criticize, from the standpoint of the so-called sociological method, such a result as a necessary one of a method only prevailing in particular stage of the development of the theory. The second is to admit the result as a destiny fatal to jurisprudence as a science of norm. On the other hand, the remaining and third alternative is to try to find a room for the application of the sociological method, in particular, to look for a possibility of meeting both the legal theoretic and sociological requirements without destroying the proper character of jurisprudence.

The author is not in a position to give any definite answer to this difficult question. It is here suggested that the study of the following problems would be of some use not only to the methodology of jurisprudence, but also to that of sociology in general.

(1) As emphatically pointed out by Ehrlich, the purpose of the introduction of the sociological method into jurisprudence is to look for norms throughout the reality of social lives freed from the positive laws of the state, in particular, from the written laws. The supremacy of traditional laws expounded by the school of historical jurisprudence was, for instance, a representation in wider sense of the sociological method in jurisprudence. Indeed, the discovery of social norms in wider sense is certainly one of the

most important tasks of the sociological method. In other words, the task of the sociological method does not lie in a mere extension of jurisprudence beyond written laws, but in the search for the legal moments in those social phenomena such as economic and political ones which are supposed to be pre- or non-legal. The existence of such pre- or non-legal moments in social lives are to be admitted to some extent with respect to the contracts such as some moral obligations, which are not under the control of the laws of the state. However, their incorporation to the legal norms are under the selection by the state or by individuals. At this point, these moments are of some legal significance and their exclusion from jurisprudence simply because of their seemingly non-legal character is therefore quite dangerous to the development of jurisprudence. In fact, in the social lives of human beings, there cannot be in existence any thing, which would not been taken care of as legal. For instance, in English laws, the system of labor agreements is not under any legal regulation. However, such situation does not necessarily mean that labor agreements are non-legal in their character and the very task of jurisprudence is to cover all these seemingly non-legal phenomena incorporating them into a system. However, the difficulty lies in the discovery of legal moments in the so-called non-legal social phenomena presenting one of the most difficult questions, with which the sociological method is confronted. Nevertheless, such a difficulty should not be employed as an excuse to deny the sociological method. Of course, by the application of the sociological method, jurisprudence is already in the field of the science of legislations beyond that of positive laws. Indeed, the objects of the sociological method remain to constitute the most important in jurisprudence. Their importance is most clearly seen, when, the sociological method is concerned with the relations between employers and employees and other flexible social relations. Such fields have of course been studied to some extent by older methods of jurisprudence, which were not aware of their meaning. It is believed that the very task of jurisprudence is the intentional study of these social relations as one of the most important branches of jurisprudence. However, the methodological mixture with other social sciences should be carefully avoided. As was already pointed out, some methods obtained from economics have been introduced in a naive way to the methodology of the theory of labor laws and private laws with respect to the legal theory under the influence of Marxism.

(2) Such an attitude is by no means to be confined to jurisprudence. The requirements for the search for legal moments in all social lives are also the requirements for the study of all other social sciences. Although the analysis of these legal moments as such is a proper task of jurisprudence, they are not irrelevant to other social sciences and the sociological significance of these legal moments, so to speak, to these sciences, should

be one of their deepest concerns. In fact, it is easily seen that the difficulty of applying sociological method to jurisprudence is not the problem characteristic of jurisprudence, but one common to all other social sciences. In this connection, it should be pointed out that the first step of the sociological method in jurisprudence was taken by Renner, Leiszt and others by the analysis of the interaction between law and economy. However, their analysis remained a trivial logical application of the method as a result of their Marxist standing. Further elaboration of their results by jurisprudence and economics therefore constitute the tasks of the sociological method.

(3) Thus far we have mainly been concerned with a deadlock, to which the sociological method is now coming. Such a deadlock is one of the evidences that jurisprudence is still under the strong influence of the well-established tradition in jurisprudence of excluding politics, economics, history and other similar sciences from the subjects as a self-contained system of science. Such a tendency in jurisprudence is at the same time conditioned in turn by similar tendencies in other social sciences. In other words, the exclusion of legal phenomena from the subjects of these sciences has been responsible for the less successful application of the sociological method. There is no opportunity for the full employment of the sociological method, if these sciences are so naive and unprincipled as to simply reject or borrow the methodology of other adjascent sciences. A rather trivial unified methodology of these sciences, in a certain sense, has been proposed by the Marxist school.

For the better unification, there are seemingly still remaining a large number of problems to be solved even within the Marxist school. Indeed, this is the very tasks common to all the social sciences.

In accordance with my theory of labor laws, or in connection with it, the task and significance of the sociological method have been briefly outlined in this paper. However, the description remains to be a proposal and the author is now trying to solve these problems by means of the theory of labor laws being confronted with a number of problems there. The object of this paper is therefore a proposal, which the author has dared to make as a student in the process of study. It is hoped, the elaboration of this proposal will be made through the development of my theory of labor laws.