

■研究最前線

戦前から占領期までの法と法学の研究 • Research on the law and legal studies from before world war II to the period of occupation

戦時中や占領下、 法学者は何をしていたのか？

資料の発掘と丁寧な読み込みで、知られざる実相を浮き彫りに

What did legal scholars do during the war and under the occupation?

The unearthing of documents and careful reading have revealed a previously unknown state of affairs

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1931年満州事変、1937年日中戦争勃発、1941年真珠湾攻撃を機に第二次世界大戦参戦、1945年終戦、1952年のサンフランシスコ平和条約まで続く占領期。この激動の20年間にわいては、法制度ももともとに機能していなかったのではないというイメージを持つ人もいる。しかし、戦時中も裁判は行われていた。NHK連続テレビ小説「虎に翼」の舞台となり、注目されるこの時代の法曹界。どのような法制度があり、法学者は何をしていたのだろうか。法学部の小石川裕介准教授は先行研究の少ないこのテーマに光を当て、その実像を少しずつ鮮明にしている。

After the 1931 Manchurian incident, the 1937 outbreak of the Sino-Japanese War, and the 1941 attack on Pearl Harbor, Japan participated in the Second World War until the end of the war in 1945 and then was in a period of occupation until the San Francisco Peace Treaty was signed in 1952. Some people may have the impression that the legal system was not functioning normally during those two decades of turbulence. However, there were still trials being held during the war. The judicial world of this era has attracted attention after it became the setting for the morning serial drama “Tora ni Tsubasa” televised by NHK. What kind of legal system existed and what were the legal scholars of the time doing? Associate Professor Yusuke Koishikawa of the Faculty of Law has thrown light on this theme, regarding which there had been little previous research, and he has gradually clarified the real situation.



▲小石川准教授の共著書
Books co-authored by
Associate Professor Koishikawa



■戦時期であっても、日本の法は機能していた？

——ご専門の分野について教えてください。

日本法制史です。なかでも、1930～1950年ごろの戦前から戦後の占領期までを中心に研究しています。

——なぜその時代を選んだのですか。

あまり研究がされておらず、それほど明らかになっていない時代なので面白いなど。この時期は戦争で法や法学がうまく機能しなかった時代だと思われがちですが、実はそうでもありません。同時代のドイツは事実上ワイマール憲法を停止しましたが、日本は憲法を停止せず、法制度は一応機能して、戦後の日本国憲法にもつながっていきました。

——研究から明らかになったことはありますか。

法学者は戦争末期の時代でも、可能な限り法学をやろうとしていたということ。戦時中ですので、国家の顔色をうかがう人もいましたし、反対に半分ボイコットするような人たちもいました。けれども、少なくない数の法学者は目の前の法制度にしっかりと向き合い、自分の仕事を果たそうとしていたんです。

そして、戦後になって、戦時中に活躍した法学者の多くがそのまま活躍することになります。公職や教職を追放された人もいましたが、それほど多くはありませんでした。

例えば、戦後の行政法の大家、田中二郎は戦時中に自分の理論を組み立てています。戦時中は国家の存在が大きくなって、さまざまな分野に国家が出張ってきます。田中はそれに対応する法解釈を仕立て上げ、理論付けていきました。その法理論の多くが戦後、行政法の通説として扱われるようになります。戦時中の研究が戦後の基礎になったと考えることができます。

少なくとも人材の側面から見ると、戦前と戦後の間にはそこまで大きな断絶はなく、基本的には連続しています。日本国憲法の施行が戦前から戦後への変わり目だと思う方は多いですが、いくつかの法分野ではもう少し後ろにずれて起こりました。日本国憲法施行は1947年。この時点の法学者の多くは戦前に教育を受けて、戦前に論文を発表してきた人たちだからです。制度が新しくなれば、すべてがガラリと変わるというわけではなく、関わる人が対応できない、あるいは対応しようとしないうちは変わっていくことができないのです。

■ Did Japanese law continue to function during the war?

—— Please tell us about your specialist field.

My field is the history of the Japanese legal system. In particular, my research mainly focuses on the period from 1930 to around 1950, from before the Second World War to the period of occupation after the war.

—— Why did you choose that period?

I found it interesting because it was a period that had not been researched very much and it wasn't really clear what had happened. People tend to think of this period as an era when the law and legal studies were not really functioning properly due to the war, but actually that isn't true. During that same period in Germany, the enforcement of the Weimar Constitution effectively stopped. However, the constitution of Japan was not suspended and the legal system more or less continued to function, which connected to the Constitution of Japan that was established after the war.

—— What have you found from your research?

That even towards the end of the war, the legal scholars were still trying to conduct their legal studies as much as they could. As it was during a time of war, some of them were trying to please the state as they did so, while others were half boycotting it. Nevertheless, a not insignificant number of legal scholars continued to squarely take on the legal system in front of them and attempted to fulfill the roles of their jobs.

Then, when the war had ended, many of the legal scholars who had been active during the war continued their activities. There were some people who were purged from public office or the teaching profession, but it wasn't really a very large number of people.

For example, Jiro Tanaka, who was an authority on administrative law after the war, had spent time during the war assembling his own theories. The presence of the state increased during the war, and it encroached into various fields. Tanaka put together legal interpretations to deal with this, and developed the theories for them. After the war, a lot of those legal theories went on to be treated as the commonly accepted theories of administrative law. We can therefore view this as the research performed during the war becoming the foundations for what came after the war.

At the very least, from the aspect of the scholars involved, there was no major discontinuity between the scholars before the war and those after the war, with basically the same situation continuing. Many people see the enforcement of the Constitution of Japan as a turning point between the situation before the war and that after it, but in many legal fields, the change actually only occurred later on. The Constitution of Japan came into effect in 1947. However, many of the legal scholars at that time had been educated before the war and had presented their theses before the war. Just because a system is updated, it does not mean that everything changes all of a sudden. It is not possible for things to change while the people involved remain unable to deal with the change, or do not attempt to respond to the change.

■研究最前線



▲研究室でゼミ生の指導にあたる小石川准教授
Instructing students in his laboratory



▲資料として古本屋で購入した
戦前の法学生の授業ノート
Prewar law student notebooks
he bought at a used bookstore
for reference



◀戦前の司法試験雑誌のコピー
Stacks of prewar bar exam magazines

はただ解説をしていただけといった批判を受けましたが、戦時中においては重要な仕事の一つだったのだと思います。

——この時代についての研究は、具体的にどのように進めるのですか。

当時の研究者の論文や著作を丁寧に読み込むのはもちろん、当時の大学や各種組織に関する一次資料や二次資料を幅広く収集、整理して、どういう人がいつどのようなことを述べているのかをマッピングしていきます。

最近では法学者の個人の文書、ノートやメモなども公開されるようになってきて、次第に実態が分かるようになってきました。

当時の法学者の活動を調べると、非常に多くの仕事をこなしているんですよ。ちょっと僕にはできないなというぐらい。当時も今も生きているのは同じ人間ですので、共感を覚えるところもあります。戦時中だから今とは何もかも違うということではないと思います。

■公文書から個人のメモまで、当時の実像を探る

——研究上の難しさやご苦労されたことは何ですか。

戦時中のことを扱うので、やはり資料が焼失、散逸していることがあります。例えば1945年の東京大空襲で法制局が燃えてしまい、戦争末期の話が資料上はよく分からない。その分、ノートやメモをはじめ、個人のもとに残っている文書などをつなぎ合わせて推測していきます。戦前と戦後がどう変わったのか、もしくは変わらなかったのかを、今後も考察していきたいと思っています。

——そもそも法制史を研究しようと思ったのは、なぜですか？

民法とか刑法とか、実定法って難しいじゃないですか。もともと歴史が好きでしたので、法制史の講義を受けてみたら面白かった。それでゼミを選んで、大学院に進み、研究者になってしまったというわけです。でも、法制史をやっていく上では、実定法のことを分かっているなければできない。結局、後になって泣きながら勉強し直しました。

■From control to competition - the transition from prewar to postwar economic law

—— Have you paid particular attention to any other areas?

A new area of economic law was created under the wartime control. When we think of economic law today, it is basically something to prepare the systems for companies to compete with each other. However, the basis for the economic law during the war was the idea of having control by the state. In other words, despite it being the same economic law, it was almost completely the opposite legal field.

—— What specific control was there during the war?

One of the most widely known laws is the National Mobilization Act. This National Mobilization Act was a law that basically made it possible for the state to control the material resources and human resources.

As things such as Imperial ordinances and ministerial ordinances were established based on the National Mobilization Act, one of the jobs of the legal scholars of the time was to consider how the ordinances related to each other, and to the laws enacted previously, and to add an explanation to each ordinance as they organized them. When Japan moved into the postwar period, there was criticism that all the scholars had been doing was adding explanations. However, I believe that they had been performing one of the very important jobs during the period of the war.

—— How do you actually advance your research on this period?

Of course, I read the theses and writings of the researchers of the time very carefully and thoroughly, and I also collect and organize a wide range of primary sources and secondary sources related to the universities and the various organizations at that time. I then work through these to match up what kind of people were saying what kind of thing and when.

In recent years, we are starting to see the personal documents, notebooks and memos of the legal scholars and we are gradually finding out what the actual situation was like.

When we investigate the activities of the legal scholars of the time, they were performing a very large number of jobs. In fact, this was to the extent that I suspect I would not have been able to cope. The people living in those times and now are all the same human beings, so I feel sympathy for them. I don't think we can just think that everything was different to today because they were living during a war.

■Searching for a real image of that time in everything from public documents to personal memos

—— What has been difficult about the research and where have you struggled?

As can be expected, because I am handling things from the during the war, a lot of the materials were destroyed in fire or got scattered and lost. For example, the Legislation Bureau was destroyed in fire during the Tokyo air raids in 1945, so it is not possible to get a clear picture of the situation at the end of the war from the documents. To make up for that, I work to infer the situation by piecing together the documents that remained with individuals, such as notebooks and memos. I want to continue to consider how things changed between before the war and after it, or indeed, whether it actually did change at all.

—— What made you want to start researching legal history in the first place?

Well, you know, positive law such as civil law and criminal law is quite difficult. I always liked history, so I tried attending a lecture on legal history and I found it interesting. That made me choose a seminar on it, and I then proceeded to graduate school and ended up as a researcher. However, to pursue a study of legal history, it is necessary to understand positive law. In the end, I had to go back to it later and struggle to restudy it.

■統制から競争へ、戦前から戦後の経済法の転換

——他に注目したことはありますか。

戦時統制下で新たに経済法分野が生まれています。経済法といえば、現在は基本的には企業が競争するための制度を整えるものですが、戦時中の経済法では国家が統制するという考え方が根底にありました。つまり、同じ経済法といっても、ほとんど真逆の法学分野になっているということです。

——戦時中は具体的にどのような統制があったのでしょうか。

よく知られた法律ですと、国家総動員法があります。国家総動員法は物的資源、人的資源について、国家が基本的に統制することができるという法律です。

国家総動員法に基づいて勅令や省令などが制定されたので、それらがどのように相互に関係しているのか、今までの法律とどのように関係するのかを、一つずつ解説を付けながら整理するのが、当時の法学者の仕事になっていました。戦後になってから、それ

●足掛け4年。政府機関資料を後世に残す

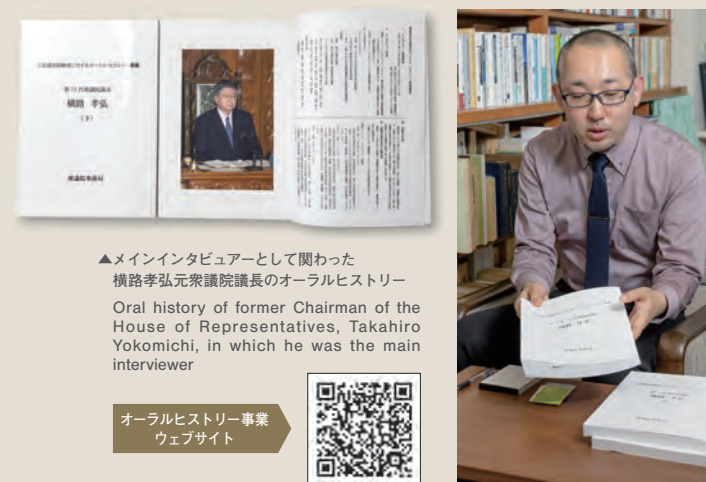
先ごろ公表された、横路孝弘元衆議院議長のオーラルヒストリーの作成に携わった小石川准教授。これは衆議院事務局の事業で、正副議長を務めた横路元議長に対して、出生からの生涯をインタビューし、その政治活動全般についての感想や思いを記録していくもの。活動の中核を担う研究者に声を掛けられ、メインインタビュアーの一人を務めた。

作成には4年もの期間を要した。後の世代が政治判断を行う際、また歴史的検証を行う際に参考となるよう、本文と詳細な注釈を含め、約100万字という膨大かつ精緻な記録になっている。90年代の資料など、今まで手に入らなかったような資料まで公開している。小石川准教授とこの事業への関わりは今後も続く予定で、次のインタビューも始まっている。

●Four years of work. Preserving government institution materials for future generations

Associate Professor Koishikawa was involved in the production of the recently published oral history of Takahiro Yokomichi, who was previously Speaker of the House of Representatives. This was a project of the Secretariat of the House of Representatives. Former Speaker Yokomichi served as both the Speaker and Vice Speaker. He was interviewed about his whole life from birth and a record was created of his impressions and thoughts on the political activities in general. Associate Professor Koishikawa was invited to participate by the researcher playing the central role in the activities and served as one of the main interviewers.

The creation of the oral history took four years. The aim was to create something to be a useful reference when future generations make political judgments or perform historical verification and it became a very large and detailed record with the main text and detailed explanatory notes totaling about a million characters. Materials that were previously impossible to obtain have also been disclosed, such as documents from the 1990s. It is planned that the involvement of Associate Professor Koishikawa in this project will continue from now on, and the next interviews have already begun.



▲メインインタビュアーとして関わった
横路孝弘元衆議院議長のオーラルヒストリー
Oral history of former Chairman of the
House of Representatives, Takahiro
Yokomichi, in which he was the main
interviewer

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