
Family Formation and the Social Law

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Although the laws known collectively as “social law” do not directly govern the nature of family formation, there is an extremely diverse and complex interactive relationship between the two. The traditional Japanese system of employment, and the laws that have supported it, are clearly constructed on the unspoken premise of the (male) single-earner household. As a result, they have served to universalize and consolidate this image of the family without being specifically intended to do so. On the other hand, this relationship between social law and the family has changed greatly since the 1990s, backed by the two legislative and policy objectives of employment equality and measures to halt the decline in the birthrate. This stems from an awareness that family and work are in a mutually complementary relationship. Meanwhile, the concept of “work life balance” (WLB), much discussed in the second half of the 2000s, is also worthy of attention. It involves reappraising the family from an angle that had tended to be forgotten in Japan—namely, that of the financial burden associated with having a family. Moreover, based on the normative value of workers’ self-determination, WLB goes beyond the aspect of family responsibility to consider the whole of a worker’s private life, revealing a comprehensive image of a new society. Today’s social law is expected to be fully cognizant of the fact that it must exert an extremely significant impact on the image of the family, albeit indirectly, while bearing in mind that the family is not the direct object of concern in its legal intervention—particularly in relation to the discussion of measures to halt the declining birthrate—and to serve as a “social creation law” based on these new values.

I. Introduction: Social Law and Family Formation

1. The Law and Society

In this paper, the relationship between social law (labor law, social security law) and “the family” in Japan will be studied by tracing the growth and development of social law in postwar Japan. The purpose in doing so will be to consider the roles that social law should play in a worker’s relationship with the family.

The family¹ is one of the important elements that make up our society. This society is in an interactive relationship with the laws that govern it, whereby (i) laws impact society and influence the mechanisms that form social order (social norms),² while (ii) conversely,

¹ The family is defined by a diversity of elements including blood relations and marriage, cohabitation and cooperation, awareness (people’s perceptions of family) and systems (subjects to which the law attributes certain effects as the family). Atsushi Omura, *Kazoku ho* [Family law], 3rd ed. (Tokyo: Yuhikaku, 2010), 9–11.

² Here, “social norm” refers to a non-legal mechanism for forming order in social life. On the concept of social norms, see Takashi Iida, “*Ho to Keizaigaku*” *no Shakai Kihanron* [Theories of social norms in “law and economics”], (Tokyo: Keiso Shobo, 2004), 60ff. On the impact the law can have on

by incorporating social norms, laws are themselves influenced by those norms.³ Moreover, when a law incorporating social norms is created, the existence of said law makes the norms more widely accepted by society, thus universalizing and consolidating them.⁴ In this way, the relationships in (i) and (ii) concerning a given legal norm occasionally arise in connection with each other, with the passage of time (what we call in this article the “social norm universalizing and consolidating” function of law). On the other hand, reflecting some value that the law itself is supposed to embody, the law may even incorporate a norm that is different to those established in society. In such cases, the law’s very purpose is to change the existing social norm (what we call the “social creation” function of the law⁵).⁶

2. Social Law and Society

Based on the premise above, let us very simply enumerate the roles to be played by labor law and social security law in their relationship with society. Firstly, Labor law intervenes to free contracts between individuals either by penalties as well as administrative controls, etc. (labor protection law), or by coercive effect on these contracts, based on legal principles such as abuse of rights (labor contract law, in broad sense).⁷ Such legal interventions are normally justified under Article 27 (2) and (3) of the Constitution, and by the higher-level principle of labor contracts, in that they protect workers in weaker negotiating positions (for reference, see Article 1, Article 3 [1] of the Labor Contract Act).

On the other hand, even if values and higher-level norms exist to justify such legal intervention, laws that bind the parties with obligations too far divorced from reality may not actually function in the field of labor law, where the cost that the law might generate has to be borne by the employer or labor-management relations.⁸ Therefore, when legal intervention is made in expectation of the social creation function, careful attention should be paid to confirm the existence of a value or higher-level norm that could justify such inter-

social norms, *ibid.*, 133ff.

³ Makoto Ishida, “Kodo Seicho to Rodoho: Nihonteki Koyo Shisutemu to Rodoho no Sogo Kochiku [High-level economic growth and labor law: Interactive formation of the Japanese-style employment system and labor law],” *The Japanese Journal of Labour Studies* 55, no. 5 (2013), 78–87.

⁴ *Ibid.*, 79.

⁵ For reference, see Junichi Aomi, *Ho to Shakai: Atarashii Hogaku Nyumon* [Law and society: A new law primer] (Tokyo: Chuo Koronsha, 1964), 104ff. In a historical context, laws related to labor legislation and the welfare state indeed served as social creation laws. In this paper, this historical context will be set aside and the discussion pursued, for the time being, on the premise of the existing social state and welfare state.

⁶ See also Shinya Ouchi, “Hoseido to Jittai no Kankei ni Kansuru Futatsu no Teze” [Two theses on the relationship between legal systems and actual situations],” in *Yuai to Ho* [Fraternity and the law], ed. Kazuo Sugeno, Shigeya Nakajima, and Akira Watanabe (Tokyo: Shinzansha, 2007), 39–40.

⁷ Takashi Araki, *Rodoho* [Labor Law], 2nd ed. (Tokyo: Yuhikaku, 2013), 39–40.

⁸ Takashi Araki, “Rodo Rippo ni okeru Doryoku Gimu Kitei no Kino: Nihongata Sofuto Ro Apurochi? [The function of provisions for obligatory efforts in labor legislation: A Japan-style soft law approach?]” in *Rodo Kankeiho no Gendaiteki Tenkai* [Contemporary developments in labor-related law] (Tokyo: Shinzansha, 2004), 43.

vention. Mechanisms for correcting divergence from social norms also need to be studied (in Japan, gradual systems are occasionally chosen, by for example imposing an obligation to make efforts or amending the law in stages).⁹

Next, social security law focuses on loss of income and hardship in daily life as the potential result of the civil law principle, and particularly the principle of citizens' responsibility for their own livelihoods as the consequence of that. It directly impacts the result of this, mainly through the payment of benefits. For this reason, laws are always constructed in forms focusing on needs that actually exist in society, and thus incorporate those needs. As a result, the simple function of social creation is probably not intended as the main function, at least,¹⁰ and this tends to encourage legal intervention that appears to have the function of universalizing and consolidating the status quo. Moreover, social security law is not necessarily subject to normative evaluation as to whether the existence of those needs is in itself desirable or not. Rather, if a need actually exists and is thought to justify the fair procurement and redistribution of public funds from the perspective of guaranteeing the right to maintain a living (Constitution of Japan, Article 25), a law might be created to cover that need.

3. Labor Law, Social Security Law and the Family

From section II below, based on the premise outlined above, the author will trace through the era of high-level economic growth to analyze how social law has taken account of "the family" within its system. Given the diverse relationship between the law and society, as shown above, the issue will be studied as broadly as possible, while paying attention to the roles of laws thought to have had an indirect impact on family formation. Owing to limitations of space, the main focus of the study will be on labor law, while mention of social security law will be limited in nature.

II. The Era of High-Level Economic Growth

1. Labor Law: The Japanese-Style Employment System, Wages Based on Seniority, and the Family

(1) The So-Called "Japanese-Style Employment System"

To understand the relationship between labor law and the family in the era of high-level economic growth from the 1950s onwards, we need to understand the so-called

⁹ For reference, see Araki, *supra* note 8, at 43; Ouchi, *supra* note 6, at 54–55.

¹⁰ Moreover, even if the needs existing in society are clear, systems in conflict with actual needs are sometimes created, owing to other circumstances such as the administration of social security finances. Examples include legal amendments to raise the starting age for payment of old age pensions to 65 in a situation where a consolidated retirement age of 60 has become the norm with the vast majority of workers (1994, 2000). As a result, social norms were forced to change to a society where people work until age 65 (legislation in the field of labor law related to employment of the elderly has played an important role in this process).

“Japanese-style employment system” that was created in that era, and the system of wages adopted at the time. To enumerate these very simply, the “Japanese-style employment system” was a way of employing people characterized by seniority-based treatment on the premise of long-term employment (→ [2]), and by company unions that developed in the closed internal labor market of individual companies.¹¹ Although it was not planned that workers would be dismissed flexibly in line with business cycles and the like (limits on adjustment by the external labor market), on the other hand, flexible adjustment in the internal labor market (such as working hours and personnel redeployment) was permitted. Moreover, a strict distinction was made between regular employees, who benefited from this special employment system, and non-regular employees, who were positioned outside of it. The latter were given the role of supplementing adjustments in the external labor market, as a kind of regulating valve for employment. This employment system was a custom that had become established in actual practice for the regular employees of large corporations, but was legally ratified as the legal principle of abuse of dismissal rights, etc., in the form of case law.¹²

(2) The Seniority-Based Wage System

In the “Japanese-style employment system,” many companies adopted performance-related pay systems based on seniority.¹³ Historically, this treatment based on seniority was enforced by the state during World War II, then taken over by the labor movement after the war, and was subsequently established by being supported by labor unions,¹⁴ thus linking with the practice of long-term employment described above. The family allowance paid by companies to workers with responsibility for family dependants also expanded significantly under wage controls during World War II, and became established as a perk for regular employees.¹⁵ The wage structure established in this way could be evaluated as essentially guaranteeing workers a living wage in line with the age-specific cost of living.¹⁶ Although this wage structure was not forced by law, it was a practice that matched

¹¹ Ishida, *supra* note 3, at 79.

¹² Ishida, *supra* note 3, at 86. As well as strictly regulating dismissals of regular employees, legal precedents are also judged to confirm that there is a big difference between regular and non-regular employees in terms of the stability of employment. Supreme Court judgment in the Hitachi Medico case (Sup. Ct., 1st Petty Bench, Judgment, Dec. 4, 1986, Hanrei Taimuzu 629–117).

¹³ Keiichiro Hamaguchi, *Atarashii Rodo Shakai: Koyo Shisutemu no Saikochiku he* [A new labor society: Towards a reconstruction of the employment system] (Tokyo: Iwanami Shoten, 2009), 119ff.

¹⁴ Keiichiro Hamaguchi, “Chingin Seido to Rodoho Seisaku [Wage systems and labor law policy],” *Quarterly Labor Law*, no. 212 (2008): 208–09.

¹⁵ Keiichiro Hamaguchi, “Nippon no Rodo Shisutemu (iii): Kazoku Teate no Bunmyaku [Japan’s labor system (iii): The context of family allowance],” *Chingin Jijo*, no. 2539 (2008): 3.

¹⁶ Keiichiro Hamaguchi, “Nippon no Rodo Shisutemu (ii): Seikatsukyu to Doitsu Rodo Doitsu Chingin [Japan’s labor system (ii): The living wage and same wage for same labor],” *Chingin Jijo*, no. 2537 (2008): 4; Yoshio Sasajima, “Seikatsukyu: Seikatsukyu no Genryu to Hatten [The living wage: Origin and development of the living wage],” *The Japanese Journal of Labour Studies* 53, no. 4

with long-term labor relationships, was closely linked to this and became deeply permeated and established in Japan's labor relations.

(3) Creation of the “Japanese-Style Employment System” and the Family

(i) An Employment System Suited to the Needs of Single-Earner Households

How should we evaluate the nature of the Japanese-style employment system described above and the law that has supported it, from the perspective of the family? Speaking ahead of the conclusion, there has been no process of labor law directly taking account of the family when constructing case law, etc. Conversely, the nature of this employment was a system that suited the needs of the (male) single-earner household, in which a male worker supported a spouse and children as the main breadwinner, the prevalent format in Japan at the time (in the following, this term shall be used to include households in which the spouse was working as a secondary breadwinner). In another way, this employment system was accepted and widely established, precisely in premising this kind of household.¹⁷

That is, if the single-earner family in which there is only one main earner is taken as the premise, the expectation of securing a stable and continuous income by that earner over the long term is an important element as the economic foundation of the family.¹⁸ Conversely, if long-term employment is not taken as a premise, family formation by single-earners poses a significant risk. For many workers, moreover, a wage structure based on a living wage means that wages rise in line with the increased burden of family dependants, and this also contributes to the stability of the family's economic foundation.

Furthermore, as stated above, the inflexibility of the external labor market for regular employees was supplemented by non-regular employees, but many non-regular employees were female workers who played an auxiliary role in household finances and whose spouses were regular employees. As a result, the instability of employment for non-regular employees did not cause a problem in terms of the family's economic stability as long as the regular employees remained in employment.

(ii) The Case Law Principle Facilitating a Flexible Internal Labor Market with Long Working Hours, and the Family

In the Japanese-style employment system, the case law principle enabling the employer to order transfers and secondment against the wishes of the worker has been evaluated positively, to a certain extent, as a channel for human resource development and career formation of full employees on the premise of long-term employment.¹⁹

(2011): 42.

¹⁷ Mutsuko Asakura, “Rodoho to Kazoku Seikatsu [Labor law and family life],” *Horitsu Jiho* 78, no. 11 (2006): 25–26.

¹⁸ For reference, see Hamaguchi, *supra* note 13, at 121–22.

¹⁹ Michiyo Morozumi, “‘Shigoto to Katei no Bunri’ to ‘Shigoto to Katei no Chowa’: Rodoho ni okeru futatsu no kihan to haiten hori [‘Separation of work and home’ and ‘Harmony of work and

The Supreme Court judgment in the Toa Paint case (Sup. Ct., 2nd Petty Bench, Judgment, Jul. 14, 1986, Hanji 1198–149) recognized the employer’s right to order redeployment, unless there is an individual agreement limiting the place or type of work, as justified by provisions on said right in labor agreements and rules of employment. However, it deemed a redeployment order invalid as an abuse of authority, in cases where there is no business necessity, where the redeployment order is made for improper motives or objectives, or where the worker is made to suffer a “disadvantage significantly exceeding the normally tolerable level.” Then, workers living separately from their families (i.e. on lone assignments) have been, in many judicial precedents, deemed to suffer a “disadvantage not exceeding the normally tolerable level” unless there are exceptional circumstances.²⁰ In academic studies today, this case law principle has been criticized as lacking respect for the worker’s home life,²¹ but at the same time, it reflected the social norms in Japan at the time to a certain extent.²² At the time, it was more or less accepted as a social norm that spouses would accompany their husbands on a transfer, or that the worker would go alone and live apart from the family, while the spouse would be responsible for childcare and other aspects of family responsibility in general.²³ We may understand that the courts, while taking into account the actual nature of workers’ households at that time, prioritized employment security in the context of a tradeoff between employment security and respect for family life.²⁴

Meanwhile, long working hours resulting in death from overwork have been partly caused by demands for internal flexibility within companies. In legal terms, Article 36 of the Labour Standards Act, which essentially permits unlimited extensions of working hours through agreements with labor unions organized by a majority of the workers, etc., and no-

home’: Two norms in labor law and the legal principle of redeployment],” in *Rodohogaku no Tenbo* [The outlook for labor law studies], ed. Takashi Araki, Masahiro Iwamura and Ryuichi Yamakawa (Tokyo: Yuhikaku, 2013), 453.

²⁰ Osaka District Court judgment in the Chase Manhattan Bank case (Apr. 12, 1991, Hanrei Taimuzu 768–128), Fukushima District Court Koriyama Branch judgment in the NTT East Japan (Redeployment Request, etc.) case (Nov. 7, 2002, Rodo Hanrei 844–45), and others.

²¹ Hajime Wada, “Haiten Meirei to Katei Seikatsu (Katei Sekinin) he no Hairyo: Rodohogaku no Tachiba kara [Redeployment orders and consideration for family life (family responsibility): From the perspective of labor law studies],” *Jurist*, no. 1298 (2005): 124.

²² Hideki Mizuno, “Haiten Meirei to Katei Seikatsu (Katei Sekinin) he no Hairyo: Rodo no Tachiba kara [Redeployment orders and consideration for family life (family responsibility): From the perspective of the worker],” *Jurist*, no. 1298 (2005): 136.

²³ The judgment in the Teikoku Hormone (Lone Assignment) case (Tokyo Dist. Ct., Judgment, Sep. 29, 1993, Hanrei Jiho 1485–122) asserted that “the rationale that family life should be prioritized ... cannot be deemed socially mature under current circumstances.” On the situation in the 1970s, Toshiko Kanno, “Nippon no Ikuji Kyugyoho, Ikuji Kaigo Kyugyoho Seitei Katei ni miru Henyo [Transformation of attitudes seen in the process of enactment of the Child Care Leave Act and the Child Care and Family Care Leave Act in Japan],” in *Shakaiho no Saikochiku* [Reconstructing social law], ed. Fumito Komiya et al. (Tokyo: Junposha, 2011), 139–40.

²⁴ For reference, see Morito Hata, “Haiten Meirei to Katei Seikatsu (Katei Sekinin) he no Hairyo: Shiyoshagawa no Tachiba kara [Redeployment orders and consideration for family life (family responsibility): From the perspective of the employer],” *Jurist*, no. 1298 (2005): 132.

tification to the relevant government agency, still today forms the basis of this.²⁵ Though these long working hours naturally restrict the worker's home life, it is only quite recently that such problems have come to be discussed as problems of the family; from the 1990s, they were mainly discussed as problems of the worker's own health. Here too, a structure can be seen in which it was difficult for the relationship between working hours and family responsibility to be taken up as a problem, in the context of all family responsibility being assumed by spouses in single-earner households.²⁶

2. The Development of Social Security

(1) Consideration for Dependant Relationships and the Tardy Development of Family Allowance

In Japan, the era of high-level economic growth after World War II was a time when social security advanced markedly and the basic building blocks of today's social security system were laid. Directions for the development of social security after the war were set out in the "Report on the Social Security System" (Advisory Council on Social Security, 1950). The report defined social security as "implementing economic security measures... against the causes for needy circumstances including illness, injury, childbirth, disablement, death, old age, unemployment and having a lot of children... ensuring minimum levels of subsistence... for the needy." Of these causes of poverty, "death" and "having a lot of children" were understood as needs in which the risk of losing family support and the financial burden caused by having a lot of children should be covered by social security. In the field of social security law, the family was primarily considered from the viewpoint of dependant support and financial burdens.

However, it was not until 1971 that child allowance was introduced in Japan, thereby bringing the cost associated with supporting children under the umbrella of social security.²⁷ Including later developments, child allowance was slower to progress than other systems, as well as in international terms.²⁸ As has already been pointed out by different authors, this situation resulted from the fact that the need for remedial action via social security was not readily manifest, as the burden of child support had been covered by the seniority-based living wage described above.²⁹

²⁵ Yuichiro Mizumachi, "Rodo Jikan Hosei no Kadai to Kaikaku no Hokosei [Issues with legislation on working hours and directions for reform]" (discussion paper 10-J-012, The Research Institute of Economy, Trade and Industry, Tokyo, 2010), 4.

²⁶ Morozumi, *supra* note 19, at 442.

²⁷ For reference, see Eri Kasagi, "Gendai no Rodosha to Shakai Hoshō Seido [Workers and the social security system today]," *The Japanese Journal of Labour Studies* 53, no. 7 (2011): 44.

²⁸ For a comparison of expenditure related to family policies in general, see Takahiro Eguchi, "Kodomo Teate" to Shoshika Taisaku ["Child allowance" and measures to halt birthrate decline] (Tokyo: Horitsu Bunkasha, 2011), 125.

²⁹ Hamaguchi, *supra* note 15, at 3; Kasagi, *supra* note 27, at 43.

(2) Consideration of Needs Premised upon the Single-Earner Household

Various forms of social security were created and developed in Japan from the end of the war until around the 1980s, via the era of high-level economic growth. These included many schemes premised upon the single-earner married couple that was prevalent at the time. A classic example of this is the so-called “Class 3 insured persons system” (National Pension Act, Article 7 [1] iii), created specifically for full-time housewives, whereby the whole amount of the basic pension is paid to the dependant spouse of an employee without needing to pay any pension contributions.³⁰

3. Discussion

Two points will be made in connection with the discussion above. Firstly, it should again be stressed that aspects in which the law influences society are diverse and complex. The case law that constitutes and supports the Japanese-style employment system did not take direct account of the worker’s family, but at the same time, was clearly created on the premise of the single-earner household that was prevalent at the time. As a result, it served to universalize and consolidate this image of the family. In this way, even without legal intervention whereby the law consciously “takes into account” a given social norm (here, aspects of the family), when implicitly premised on this norm, a universalizing and consolidating effect could arise in connection with the premised social norm. From this perspective, labor law in this period could be said to have engaged in legal intervention in a form that significantly influenced the image of the family. In social security law, meanwhile, the system was designed with direct consideration of the needs of single-earner couples, and is consequently thought to have consolidated and universalized this image of the family. Here again, however, the law did not positively evaluate or consciously consolidate and universalize this image of the family. Thus it should be noted that, in pursuing its own objectives, the law produced the side effect, as it were, of consolidating and universalizing social norms.³¹ Also, all of the above-mentioned judicial precedents on redeployment have occurred since the 1980s, and these judgments are thought to have been premised upon the social norms of the time. As this shows, the process whereby, with the passage of time, social norms that have been consolidated and universalized by the law are incorporated back into law and reinforced also cannot be ignored.³²

³⁰ On the positioning of the “household” in the pension system, Masahiko Iwamura, “Shakai hoshō ni okeru setai to kojīn [Households and individuals in social security]” in *Kojīn wo Sasaeri Mono* [What supports the individual] (Tokyo: University of Tokyo Press, 2006), 278–79.

³¹ Research on the law and gender discusses this function of the law. Mutsuko Asakura, *Rodoho to Jenda* [Labor law and gender] (Tokyo: Keiso Shobo, 2004), 5ff. For reference, see Nathalie Morel and Alexandra Jönsson, “Soutenir les femmes ou changer les hommes? Les trois mondes des politiques de conciliation vie familiale-vie professionnelle,” in *Où va la protection sociale?*, Anne-Marie Guillemard (Paris: PUF, 2008), 256–57.

³² See also Mutsuko Asakura, *Rodoho to Genda* [Labor law and gender] (Tokyo: Keiso Shobo, 2004), 63.

The second point is that, when seen from the concerns of social law, the family has two different types of importance for the worker.³³ From an economic perspective, the family is something that should be supported by the worker. But from geographical, temporal and psychological perspectives, work and family (home life) are in a complementary relationship,³⁴ i.e. one in which each defines the outline of the other. In the Japanese-style employment system, the financial burden imposed on the family is hidden in the shadow of the living wage based on seniority, and does not become manifest. Moreover, no attention was paid to the complementary relationship of work and family, as it was not envisaged that regular employees would bear responsibility for the home.

Thus, the Japanese-style employment system, while clearly premised upon a specific family image, was (for this very reason) a framework in which labor law and social security law were not directly concerned with the relationship between work and the family.

III. The Normative Value of Employment Equality

1. Early Legislation on Employment Equality

As stated above, in the Japanese-style employment system, there was a great difference between the working styles of the main breadwinner (usually male) and the secondary breadwinner who was responsible for the home (usually female). This situation was implicitly ratified by the law, and was thus universalized and consolidated. One stimulus to change this relationship between labor law and the family was provided by the emergence of a new value—that of employment equality.

A provision prohibiting discrimination against women in relation to wages was already included in the Labour Standards Act (Article 4), but there was no law prohibiting such discrimination in matters other than wages. From the 1970s, judicial precedents recognized the value of gender equality as a public policy which makes void any juristic act with purpose against itself (Civil Code Article 90). These created a case law principle invalidating work rules that stipulate systems of retirement due to marriage and different retirement ages for men and women. Then, in 1985, the Equal Employment Act was enacted. This case law principle and law enactment were based on the constitutional value of equality (Constitution of Japan, Article 14); their creation was strongly influenced by international movements (International Women's Year in 1975 and the adoption of the Convention on the Elimination of All Forms of Discrimination against Women in 1979).³⁵ As such, they had the character of “social creation” laws prompting an important change of direction in the

³³ Asakura, *supra* note 17, at 26.

³⁴ Junko Takahata, “Waku raifu baransu [The significance of work-life balance measures and ensuring their effectiveness],” *Quarterly Labor Law*, no. 220 (2008): 22; Morozumi, *supra* note 19, at 448.

³⁵ Takahata, *supra* note 34, at 15.

conventional nature of employment.³⁶ As a result, it could be said that employment equality (or the prohibition of job discrimination against women, as the starting point for that) was added as one of the basic values justifying intervention by labor law into agreements between private individuals.^{37 38}

2. The Family Image Assumed by Labor Law

So did the value of employment equality produce any change in the relationship between labor law and the family? Here, our attention should be on the fact that the debate at the time mainly revolved around gender equality in “employment”—and equality in the form of “prohibition of discrimination against women.”³⁹ In fact, it was not immediately anticipated that the existence of private life and home would be actively taken into account by the law, on the premise of workers bearing responsibility for the home. If the aforementioned working style demanded of regular employees (→II. 1. [3]) were taken as the premise, it would have been harder for women to fulfil the family responsibility they had conventionally borne if they were to work in the same way as men.⁴⁰ Therefore, either the sharing of family responsibility should have been corrected using some method, or the nature of jobs should have been corrected so that people could work while fulfilling their family responsibility. Action on this point was not sufficiently taken into account.

That is, the very early legislation on employment equality from the 1970s to the 1980s did not set out to correct ways of working premised on the worker’s family or the existence of family responsibility. Naturally, it did not intervene at all in labor relations with the purpose of correcting single-earner households or separation of roles in the home. In the first place, the Equal Employment Act merely provided for an obligation to make efforts, up to the 1997 amendment (which came into force in 1999). As can be seen from this, tackling the mindset of employment equality in the field of labor law in itself caused a major correction in the structure of labor law and labor-management practices at the time. Despite the obligation to make efforts, there was probably no lack of awareness on the importance of

³⁶ For reference, see Masao Murayama and Ryo Hamano, *Hoshakaigaku* [Socio-legal studies], 2nd ed. (Tokyo: Yuhikaku, 2012), 195ff; Ouchi, *supra* note 6, at 55 (note 44); Araki, *supra* note 7, at 89.

³⁷ Araki, *supra* note 7, at 30 and 31.

³⁸ Although lack of space prevents a more detailed discussion, in the field of social security law, various transformations and debates have arisen over the conventional system premised upon gender divisions. Nevertheless, considering the purpose of social security law in designing systems on the premise of actually existing needs, gender equality and the negation of traditional gender-based divisions are not always incorporated; adjustment of conflicting normative values is expected to be needed sometimes. For more detail, see Eri Kasagi, “Shakai hoshō ni okeru ‘kojin’ ‘kojin no sentaku’ no ichizuke [‘Individual’ and ‘choice of individual’ in social security],” in *Shakai Henka to Ho* [Social change and the law], vol. 3, ed. Takashi Araki (Tokyo: Iwanami Shoten, 2014 forthcoming).

³⁹ It was after the amendment in 2006 that Japan’s equality laws came to prohibit discrimination against men. See note 45.

⁴⁰ For reference, see Noriko Mizuno, “Kazoku no Honraiteki Kino no Jitsugen [Realizing the true functions of the family],” *Jurist*, no. 1424 (2011): 49.

changing ways of working to a form that took the home into account, as seen in the existence of provisions related to childcare leave.⁴¹ For the time being, however, this was merely an attempt at cautious legal intervention not too far divorced from the realities of labor relations.

3. Discussion

The mid-1980's, when the Equal Employment Act was created, was also a time when the Japanese-style employment system became established, and the traditional case law principle concerning redeployment was formed (→III. [3]). Given the consolidation and universalization of the traditional family image through interaction between the law and social norms, which until now had been accumulated unconsciously (→II. 3), this can be enumerated as a period in which social creation laws based on the new value of employment equality were not easy to effectuate.⁴²

IV. Harmony and Balance between Work and Family Life

1. Diverse Legislation

In the 1990s and 2000s, a series of laws designed to transform the importance of the family within the system of social law (the childcare leave system being a notable example) were created, mainly through new legislation. To mention just the main examples, in the field of labor law, there was the enactment of the Childcare Leave Act (1991) aimed at male and female workers,⁴³ the obligation of employers to grant nursing care leave (obligation to make efforts in 1995, mandatory from 1999), and the restriction on overtime work by workers who bear family responsibility (the 2001 amendment to the Child Care and Family Care Leave Act). In the field of social security law, important amendments are in progress, including the introduction of childcare leave benefits guaranteeing a fixed proportion of wages during childcare leave (1996).⁴⁴ In both cases, these are used for legal intervention aimed at ensuring harmony and balance between workers' jobs and home lives, thus making it easier for workers who bear family responsibility to participate in the employment market.

Behind these amendments lies, firstly, rigorous application of the principle of em-

⁴¹ Aiming for "harmony between working life and home life" of female workers was stated as one of the objectives of the 1985 Equal Employment Act.

⁴² For reference, see Tsuneo Ishikawa, *Bunpai no Keizaigaku [Economics of distribution]* (Tokyo: University of Tokyo Press, 1999), 416.

⁴³ On the process of enacting and developing this Act, see Sugeno, *supra* note 23, at 139.

⁴⁴ Measures exempting workers from social insurance contributions while on leave were also introduced (see Article 159 of the Health Insurance Act and Article 81.2 of the Employees' Pension Insurance Act). Meanwhile, although the expansion of nursery services is also important in the field of social security law, it will be omitted here.

ployment equality discussed in III above, or the principle of substantiating it.⁴⁵ Secondly, these systems (particularly those related to childcare leave) are also significant as measures to halt birthrate decline, triggered by the so-called “1.57 shock” when the total fertility rate fell to just 1.57 (1989).⁴⁶

2. Direct Consideration of the Family by the Law

- (1) How has the relationship between the law and the family changed as a result of the amendments outlined above? Firstly, amendments aimed at achieving employment equality were designed to create a system of labor law premised upon enabling regular employees to become bearers of family responsibility, in the awareness that work and home are in a mutually complementary relationship. Compared to the days when labor law was implicitly premised upon the single-earner household and/or separation of work and family responsibility, an important correction has been made to the image of the worker upon which the law is premised. Moreover, legislation on childcare leave and restrictions on overtime work covering all workers regardless of gender also had the purpose of clearly showing that the system of labor law is not premised upon fixed gender role divisions.⁴⁷
- (2) On the other hand, legal intervention in response to the problem of birthrate decline is directly focused on the family’s reproductive function in producing and raising children.

For labor law, a worker’s private life choice of whether or not to have children should normally be outside the scope of the law’s concern.⁴⁸ However, just as employment equality legislation has had to be concerned with the worker’s family, so also, because employment is in a mutually complementary relationship with the home, measures to halt birthrate decline are closely linked to employment policy in reality. That is, with respect to employment and the home, which should be seen as mutually complementary, the approach of employment equality policy was based on concern for employment, while that of measures to halt birthrate decline was based on concern for the home. These two together have borne fruit in labor law legislation taking the home into account, as a shared policy expression. For example, Article 5 of the Basic Act for Measures to Cope with Society with Declining Birthrate, enacted in 2003, set out the

⁴⁵ Behind this lies a trend towards expansion or intensification of laws and regulations related to employment equality, including the change of the Equal Employment Act to a mandatory law (1997) and its transformation from a law prohibiting discrimination against women to one prohibiting gender discrimination (2006).

⁴⁶ In Japan during the era of high-level economic growth, the birthrate was generally stable at a level in excess of 2. Eguchi, *supra* note 32, at 81.

⁴⁷ Sugeno, *supra* note 23, at 151.

⁴⁸ For reference, see Mutsuko Asakura, “Shoshika Taisaku no Hihanteki Bunseki [Critical analysis of measures to halt birthrate decline],” *Rodo Horitsu Junpo*, no. 1609 (2005): 6.

basic policy measure of enhancing employment environments, enabling workers to enjoy home life while engaging in professional life.

- (3) Next, while childcare leave allowance was created as an employment insurance benefit, it is assumed not to have the character of a livelihood or income security, and its theoretical background as a social security benefit has been left ambiguous. The following is a tentative assumption, but it may be necessary to rebuild this system. In doing so, the manifest need to recognize the risk of losing part or all of income due to childcare should be borne in mind, as a need that should be covered by social security. If premised upon the worker who works while bearing family responsibility, loss of wages during leave for childcare represents a risk that could become a reality for many workers (however, even if this point is taken as a premise, there must still be room for further discussion on the specific nature of system design, such as whether or not this income security is achieved under employment insurance). As a general theory, at least, in labor law incorporating the value of employment equality, it could be seen as obvious that the content of risks covered by social security for workers will change in line with changes in the image of the worker upon which the law is premised.
- (4) On the other hand, wage security during leave for childcare, etc., has also been promoted in terms of the policy objective of measures to halt birthrate decline, as potential support for a worker's decision to have children. Nevertheless, in terms of the original objective of social security law as guaranteeing citizens' rights to maintain a livelihood, the policy objective of measures to halt birthrate decline has a heterogeneous character.

3. Discussion

The two different objectives of achieving employment equality and taking measures to halt birthrate decline have borne fruit in legal intervention that takes a worker's family responsibility directly into account, against the background of the complementary relationship between work and family.

Within this trend, a decision that corrected the existing case law principle on redeployment (→II. 1. [3]) was issued and received much attention (the Meiji Tosho case [Tokyo Dist. Ct., Judgment, Dec. 27, 2002, Rohan 861–69]). This judgment, premised on a demand for gender equality and the progress of measures to halt birthrate decline, etc., stated that “the disadvantage of a (worker's) wife having a job” and “the (worker's) disadvantage that can only be avoided by either (the worker) or his wife... quitting his or her job can no longer be described as a ‘normal disadvantage’.” It is thus evaluated as an opinion premised upon changes in social awareness of the private lives of workers.⁴⁹

⁴⁹ Mizuno, *supra* note 22, at 136. For an assertion of the impact of various legislation since the 1990s, Asakura, *supra* note 17, at 27.

V. Work Life Balance

1. A Basic Principle Embracing Employment Equality and Measures to Halt Birthrate Decline

Amid the debate on directions for advancing and substantiating employment equality policies and measures to halt birthrate decline, from around the mid to late 2000s,⁵⁰ a single concept that embraces these concerns and has a wider target came to be discussed.⁵¹ This was the concept of “work life balance” (abbreviated to WLB below). Article 3 (3) of the Labor Contract Act enacted in 2007 provides that “A labor contract shall be concluded or changed between a worker and an employer while giving consideration to the harmony between work and private life,” establishing WLB as an important basic principle in labor contracts. The following is a discussion from the viewpoint of how the role to be performed by social law could change in future in relation to the family, depending on the concept of WLB and the rationale behind it.

2. WLB and the Family

- (1) The “Work Life Balance Charter” (referred to below as “the Charter”), published by the Cabinet Office at the end of 2007, describes the ideal society in which WLB has been achieved as one in which (a) “people can provide themselves with jobs,” (b) “people have time to lead healthy, affluent lives,” and (c) “people can choose from a diversity of working and living styles,” adding an explanation to each. Focusing on the parts related to the family, in (a), the Charter requires that “an economic foundation can be secured... with a view to fulfilling wishes concerning marriage and child-rearing”; in (b), “a rich life allowing... quality time with the family... and others can be achieved”; and in (c), “diverse and flexible ways of working can be chosen according to the situation in which the individual is placed, such as times needed for child-rearing or nursing care of parents... and a fair treatment is guaranteed.”
- (2) What should be stressed first of all is that point (a) above reveals a perspective of securing an economic foundation for a worker’s marriage and child-rearing. This perspective is cognizant of the existence of the family from a financial perspective, unlike the consideration concerning family life in recent years seen in IV above (→II). This clear awareness that forming a family is accompanied by a financial burden represents a new direction in the context of the involvement of the law in the family. This change in direction is premised upon a number of facts. One is the increasing number of workers who cannot earn sufficient income to support their families, even if they are the main breadwinner, due to an important change of the structure of Japanese em-

⁵⁰ Takahata, *supra* note 34, at 18–19.

⁵¹ See Takahata, *supra* note 34, at 15–18; Kurata, *supra* note 46, at 23.

ployment market from the mid-1990s—a rise in non-regular employment.⁵² Another is the fact that it is no more realistic to think that all workers should secure a foundation for family formation by working as conventional Japanese-style regular employees. That is also to say, although the above-mentioned rise in non-regular employment derived largely from the deregulation policy,⁵³ the simple re-regulation and reversion policy would be far from an ideal solution for the financial support for family formation. Moreover, this cannot be approved in terms of concepts involving issues such as the family and gender equality, either.

- (3) On the other hand, (b) and (c) are expressed in the complementary relationship between a worker's work and life. Firstly, point (b) mainly sets out to correct the fact that the conventional working style of regular employees did not respect their private lives, including home life. Conversely, (c) demands improved treatment for non-regular employees who receive poorer treatment than regular employees at present, to make it substantially possible for workers to choose their preferred employment format from the diverse range available.⁵⁴ If the requirement for financial independence in (a) above is understood at the same time, the ideal society being sought could be seen as one in which even non-regular workers can reach financial independence, including family formation.

3. The Law and the Family in a Society Where WLB Has Been Achieved

(1) The Financial Burden of Family Dependents

Based on the concept of WLB, what kind of changes can be expected in the relationship between Japan's labor law, social security law and family formation in future?

Firstly, as stated above (→2. [2]), on the premise that the traditional image of the full employee is no longer dominant, realistic or desirable, it is evident that the law needs to address the financial burden of forming a family in a new light. From this kind of perspective, as has already been pointed out by different authors, the burden of supporting children needs to be understood positively, by means of social security as separate from employment.⁵⁵ In the first place, bearing in mind that support of children is not the sole domain of workers' households, and that the financial burden of child-rearing can be a cause of poverty (→II. 2), social security law needs to reappraise the financial burden involved in child-rearing as a need faced by the people.⁵⁶ To put it another way, because the treatment

⁵² For reference, see Kasagi, *supra* note 27, at 43; Yuki Sekine, "The Rise of Poverty in Japan: The Emergence of the Working Poor," *Japan Labor Review* 5, no. 4 (2008), 50.

⁵³ Sekine, *Ibid.*

⁵⁴ Mutsuko Asakura, "Rodoho ni okeru Waku Raifu Baransu no Ichizuke [Position of work life balance in the labor and employment law]," *The Japanese Journal of Labour Studies* 52, no. 6 (2010), 50–51.

⁵⁵ For reference, see Hamaguchi, *supra* note 13, at 127ff.

⁵⁶ Kasagi, *supra* note 27, at 44.

previously enjoyed by many workers is in the process of changing, needs presented by family dependants, which have tended to be overlooked in the field of Japanese social security law, are becoming clear.

(2) Role of Labor Law concerning Private Life and Family: The New Value of Workers' Self-Determination

(i) As discussed in the case of the family, irrespective of whether work and private life are clearly perceived in legislation or legal interpretation, the scope of work defined in diverse labor legislation is in a relationship with the worker's private life whereby it defines the outline of the latter as its reverse image. Therefore, to realize a society as described in (b) and (c) above, some kind of consideration in the field of labor law will be indispensable. In particular, in fields such as legislation on working hours, legal principles on redeployment, and legislation on leave and holidays, where law determines the outline of work, and at the same time, as a result, directly determines the outline of private life, legal intervention is required to give the worker room to freely develop his or her own private territory.

(ii) The concept of WLB takes account of private life encompassing diverse activities other than those related to family responsibility (e.g. learning activities, social activities), and the family is merged into one element of private life. What is new about the concept of WLB is that, in this way, it includes the policy suggestion that due attention should (also) be paid to legal intervention concerning workers in general, irrespective of whether they bear family responsibility.

The concept of WLB is achieving this kind of shift in direction while basically continuing the previous policy objectives of employment equality and measures to halt birthrate decline. Behind this lies the circumstance that the concept is supported by the value of workers' self-determination and free choice, whereby workers decide their own way of working (Article 13 of the Constitution is occasionally referred to as normative justification).⁵⁷ ⁵⁸ What is required is a legal framework whereby, through this kind of shift in thinking, decisions related to the family are also respected as part of diverse self-determination concerning a worker's private life.

(iii) On this point, the prevalent academic view is that care activities in the home have high

⁵⁷ Asakura, *supra* note 56, at 48. On the relationship between Article 13 of the Constitution and labor law, see Araki, *supra* note 7, at 30; Satoshi Nishitani, *Rodoho* [Labor law] (Tokyo: Nihon Hyoronsha, 2008), 23–24, 27; *id.*, *Kisei ga Sasaeru, Jiko Kettei* [Self-determination supported by regulation] (Kyoto: Horitsu Bunkasha, 2004).

⁵⁸ In the field of social security law, too, system design based on Article 13 of the Constitution has been discussed in recent years. For reference, see Yoshimi Kikuchi, *Shakai Hoshō Hōsei no Shorai Koso* [Future conception of social security legislation] (Tokyo: Yuhikaku, 2010), and others.

importance for workers, even compared to learning, self-betterment, and other activities,⁵⁹ and should be given priority consideration, since these are reproductive activities that support society⁶⁰ and include social elements that cannot be reduced to personal affairs.⁶¹ Again, from the perspective of gender equality, doubts over the evaluation of the family as a mere element of private life have been pointed out.⁶² While these are all important assertions, if we place emphasis on the fact that the value of workers' self-determination lies behind the concept of WLB as stated above, the normative reason justifying the priority given to family-related activities over other activities in the system of social law—and particularly if we also consider that learning activities, for example, can increase a worker's employability—cannot necessarily be described as clear. Moreover, even from the viewpoint of gender equality, legal intervention focusing only on family responsibility and care responsibility may have difficulty in changing the situation whereby only females balance work with home when separation of family responsibility remains entrenched.⁶³ Thus, experts have already stressed the importance of improving legislation on normal working hours for workers in general, in order to achieve employment equality.⁶⁴ Furthermore, as stated above, there is a potential danger that the discussion on employment equality will be linked to the completely separate policy concern of measures to halt birthrate decline. Considering this (→IV. 3), it would not be appropriate to disregard the importance and significance of the fact that WLB is a concept concerning various workers' ways of working and self-determination.

The author certainly does not deny that positive consideration of family responsibility under the system of labor law is important in order to achieve employment equality. On reflection, however, the concept of WLB being put to use in the future creation of laws, whereby legal intervention in the form of improvement and substantiation of general legislation on working hours and paid leave for workers in general is given at least equal or greater value than legal intervention that takes direct account of childcare, etc., is felt to be useful.

(3) Legal Intervention to Make Diverse Ways of Working Substantially Possible

In the relationship with society to be realized in (c) above, in the field of social security law, the need to (re)create allowances paid in consideration of family dependants and

⁵⁹ Takahata, *supra* note 34, at 23–24.

⁶⁰ Asakura, *supra* note 56, at 47–48.

⁶¹ For reference, see the Japan Institute for Labour Policy and Training (JILPT), *Waku Raifu Baransu Hikakuho Kenkyu: Chukan Hokokusho* [Comparative law study on work-life balance: Interim report] (Tokyo: JILPT, 2010), 197–98.

⁶² Mutsuko Asakura, *supra* note 48, at 11.

⁶³ Morel and Jönsson, *supra* note 31, at 259.

⁶⁴ Hiroki Sato, “Dai 3 ji Danjo Kyodo Sankaku Kihon Keikaku no Tokucho to Kadai [Characteristics and issues of the third basic plan for gender equality],” *Jurist*, no.1424 (2012), 12.

family responsibility, as something neutral to ways of working, will be pointed out very briefly (see also IV. [3]).⁶⁵ Strong demands should be made for guarantees of social security benefits enabling, even for non-regular workers, an economic foundation for creating a family to be built (→ [1]), and of benefits which enable to keep a certain level of income security in cases of leave for childcare and nursing care, among others.⁶⁶

VI. Conclusion: Social Law and the Family Today

It should again be stressed that legal intervention focusing specifically on the reproductive function of the “family,” with a view to maintaining or strengthening it, is not the original role of social law. On this point, careful consideration is required in situations where measures to halt birthrate decline are discussed in happy unity with the original purpose of social law. Social law, both traditionally and also in future, has no more than an indirect influence on the image of the worker’s family. On the other hand, today’s social law differs from traditional social law in that, while the latter has had a distorted influence on the image of the family in an unconscious manner, so to speak, today’s social law is expected to effect legal intervention with a view to realizing important values in the system of social law—namely, respect for employment equality and workers’ self-determination—in full awareness and understanding of the impact indirectly exerted by the law on the image of the family. In particular, the debate on the concept of WLB discussed at the end of this paper, though appearing to be slightly cooling down in recent times, takes a comprehensive view, based on the axis of the individual worker, of diverse arguments concerning various workers’ labor and lives, and indicates a specific image of the new employment society. The author would stress once again that, in this point, the debate on WLB can be of significance as the basis for future “social creation” law.

⁶⁵ See Cabinet Office, “Shigoto to Seikatsu no Chowa Suishin no tamenō Kodo Shishin [Action policy for promoting the work-life balance charter,” http://www.cao.go.jp/wlb/government/20barrier_html/20html/indicator.html (accessed September 8, 2014).

⁶⁶ Sugeno, *supra* note 23, at 153ff.