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**T. OTAKA'S PHENOMENOLOGICAL SOCIOLOGY
APPLIED TO LEGAL AND POLITICAL PHILOSOPHY¹⁾**

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- I Otaka's Trace and Its Interpretation
- II Otaka and Schütz in Vienna, 1932
- III Phenomenology and Understanding of Social Phenomena
- IV „Fundierungszusammenhang“ and Its Application to Law and Politics
- V The Western and the Eastern in Otaka's Thought?

I Otaka's Trace and Its Interpretation

T. Otaka (1899–1956) is still now an influential scholar in the tradition of legal and political philosophy in Japan. His influence, however, may be interpreted in various ways. Some scholars evaluate his achievements in the post-(Second World) war period, represented by a paper, “Metaphysics and empiricism in legal philosophy” (Hōtetsugaku ni okeru keijijōgaku to keikenshugi),²⁾ or a book, “On liberty” (Jiyūron),³⁾ some emphasize the significance of his works in the pre-war period, for instance, “An inquiry into the order of positive law” (Jitteihō-chitsujo-ron),⁴⁾ or “On dynamic structure of political state” (Kokka-kōzō-ron).⁵⁾

It is certain that Otaka showed an strong interest, practically in democracy, liberty, theoretically in empiricism, relativism, and so on, during the

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1) This paper is a summary, though considerably modified in its content, of my original article, “The legal philosophy of Tomoo OTAKA”, which appeared in *Legal Philosophy in JAPAN II*, The Annual of Legal Philosophy, 1979, ed. by The Japan association of Legal Philosophy, publ. by Yuhikaku, Tokyo. I would like to express my gratitude to Prof. J. Tokunaga for his advice to me about the materials, 7) and 8).

2) T. Otaka, Metaphysics and empiricism in legal philosophy, The Japan Quarterly of Legal Philosophy (hōtetsugaku-shikihō) vol. 1, 1948, Asakurashoten.

3) Otaka, On liberty, 1952, Keisōshobō.

4) Otaka, An inquiry into the order of positive law, 1942, Iwanamishoten.

5) Otaka, On dynamic structure of political state, 1936, Iwanamishoten.

post-war period. Then, what was characteristic to his pre-war period idea? Shall we expect to find there an opposite side of his idea? No, I don't think so. Then, no difference at all there? Again, I would say, no. This may well be said an overstatement. It is sure that we may find a change in Otaka's idea on law, society, and political state, but we should be careful in characterizing that change — decisively a great change, or a gradual, or a slight change.

At this time, I should like to make a brief comment on Otaka's problem said above by paying an attention to his pre-war period achievements.

II Otaka and Schütz in Vienna, 1932

During this period, Otaka energetically wrote many books, including two mentioned above, which have been highly appreciated, and even at present. As to title of this short paper, however, attention must be paid to the formative period (1929–1932) when Otaka went to Europe, especially Vienna, Austria, and Freiburg, Germany, to clarify and to develop his focus of study on law, philosophy, and sociology. Even before this experience, though young, he concentrated to study those fields and published papers one by one, with keen insight and integrative ability by utilizing many achievements, for instance, of Neo-Kantian School, M. Weber, Ed. Husserl's phenomenology in philosophy, A. Vierkant, F. Tönnies, G. Simmel in sociology, H. Kelsen, R. Stammler, G. Radbruch in law.⁶⁾ It was also a remarkable fact that Otaka read M. Weber's „Wissenschaftslehre“ under K. Nishida's tutorial in his seminar,⁷⁾ when Otaka was in Graduate School of Faculty of Letters in Kyōto University. Here, especially Nishida's name should be remembered to whom I will mention below in this paper. Originally, Otaka was a graduate of Tōkyō University School of Law. Then he moved to Kyōto. After his study in Kyōto and graduation from that University, he became an associate professor Keijō University at that time. It was in this period when he was sent to Europe under the financial aid of Ministry of Letters. He looked like a scholar able, stimulating, and of full

6) The achievements of this period mainly are compiled, after his death, in a book entitled: “The social structure of law” (Hōritsu no shakaiteki kōzō), 1957, Keisōshobō.

7) J. Usui, Essays on sociology (Shakaigaku-ronshū), Post-script, PP. 560-1, 1964, Sōbunsha.

energy.

What appears impressive to me in understanding of Otaka's effort of study in abroad may well be symbolized by incidental coincidence of prefatory remarks made by both Otaka and A. Schütz in their each own books.

„Der sinnhafte Aufbau der sozialen Welt“ written by Schütz includes the following remarks in its preface: „Innigen Dank schulde ich Herrn Professor Tomoo Otaka. für das tiefe Verständnis, das er meinen Gedankengängen entgegenbrachte, und für seine teilnehmende Hilfsbereitschaft, ohne die das Erscheinen dieses Buches unter den jetzigen schwierigen Verhältnissen leicht in Frage gestellt gewesen wäre; sowie Herrn Dozenten Felix Kaufmann, Wien, der das Entstehen meiner Arbeit in allen Phasen mit nie erlahmendem Interesse begleitet und gefördert, sich auch der mühevollen Durchsicht der Korrekturbogen unterzogen und mir manche überaus wertvolle Anregung gegeben hat.“⁸⁾ It was published in Vienna, in March, 1932. In the same month, March, a little bit later? („Ende März“,) 1932, appeared Otaka's book: „Grundlegung der Lehre vom sozialen Verband“, with the following remarks in the same Vienna: „Zu innigstem Dank bin ich ferner Herrn Dozenten Dr. Felix Kaufmann und Herrn Dr. Alfred Schütz in Wien verpflichtet, die mit großer Bereitwilligkeit und Sorgfalt das Manuskript und die Korrekturbogen meiner Arbeit durchsahen und mir durch verschiedene Vorschläge sachlicher und stilistischer Natur wertvolle Unterstützung angedeihen ließen, sowie Herrn Dr. Eugen Fink in Freiburg, der mir durch tiefgehende Aufklärung des Sinnes der transzendentalen Phänomenologie bei Ausarbeitung des zweiten Kapitels dieses Buches behilflich war.“⁹⁾

Both referred to F. Kaufman who tried to combine phenomenology with pure theory of law. This, too, must be an interesting coincidence if we take into account their focus of academic interest. Within the period of study in abroad, Otaka at first learned from H. Kelsen in Vienna, then from Ed. Husserl in Freiburg, and again he returned to Vienna in 1932. While he was getting a bit critical to Kelsen's pure theory of law, he was

8) A. Schütz, *Der sinnhafte Aufbau der sozialen Welt*, Vorwort, S. IV, 1. Aufl., 1932, Wien, 2 unveränderte Aufl., 1960, Springer, und S. 10, 1974, Suhrkamp.

9) T. Otaka, *Grundlegung der Lehre vom sozialen Verband*, Vorwort, S. VI, 1932, Wien, Springer.

rather affirmatively accepted Husserl's transcendental phenomenology. A. Schütz who paid a special attention to "subjective meaning" (subjektiver Sinn), that is, one of main themes of M. Weber's understanding sociology, dealt with relevant problems raised from that theme by referring to the studies of H. Bergson, and Ed. Husserl on the internal time-consciousness. That book written by Schütz from this perspective investigates carefully several trends of Western thought in connection with problems of understanding of self, ego, alter ego which had been raised and developed under the unrest mood of Europe.

Viewed from this perspective, it may be more than incidental for both, Otaka and Schütz that they were interested in and treated similar themes at the same place and in the same period under influence of similar trends of Western thought, especially Husserl's, Weber's and so on, despite of their great difference of where they came from, that is, East and West. As I have no more precise data to explain the friendly relation between them, I have to be now contented merely to point out the above, but I would like to continue to trace, if possible, what kind of intimate relation they had at that time in Vienna.

III Phenomenology and Understanding of Social Phenomena

Next question is what effect gave such an experience in abroad and ideas belonging to his formative period to the sequent works of Otaka. Let me cite a few notes from his "Dynamic structure of political state": "Alfred Schütz's precise study is to be referred in regard to distinction and relation of subjective and objective meaning".¹⁰⁾ "What we can grasp is, as Schütz says, merely an "approximation" to the marginal concept as called "meaning intended by somebody else". Although there may be an endless variation for approximation of understood objective meaning-relation to subjective experience, it is solely impossible in reality to reach to the meaning itself intended by somebody else.¹¹⁾ The former note concerned with W. Dilthey's term of subjective and objective spirit (Geist),

10) Otaka, Dynamic structure of political state (Kokka-kōzō-ron), note 3 at p. 117.

11) 10) note 7 at p. 117.

the latter with Weber's term of subjectively intended meaning. As seen in such citations, both concentrate upon the problem of how to grasp an objective range of meaning, and how to understand meaning intended by the other, which in turn show phenomenological or fundamental idea underlying Otaka's approach to society, political state, and law.

Soon after the end of the Second World War, in 1948, he again wrote a few words in memory of Husserl in a new preface for revised edition of that book, "Dynamic structure of political state": "In writing new preface, I heartily would like to express my gratitude and condolence to late professor Edmund Husserl. It is Husserl's phenomenology which makes a philosophical basis of this book. As well, it is that professor's personality (*Persönlichkeit*) which truly awaked me of my passion to *Wissenschaft*. Indeed, he was really a distinguished scholar who concentrated upon philosophy with fresh mind of youngsters despite of his age, that is, over seventy years old. When he spoke of phenomenology in his quiet study of suburban community of Freiburg, this older philosopher filled with silver hair looked like an embodiment of *Wissenschaft* itself. The author could never forget that beautifulness of blue eyes of this Meister at that time, as if the younger, committed himself to passion to truth. The author firmly believes now that Meister's phenomenology which gave a deeper basis of German philosophy to English empiricism must be actually significant, and it must be much more significant at present, than in the past."¹²⁾ It is clear that Otaka still maintained and developed his idea even after his return to Japan which he shared partly with Schütz.

Let me now switch my focus of attention to social phenomena including law. The following phrase may well serve as an interesting illustration: "When we scientifically try to observe and study social phenomena, what serves as principal means for knowledge (*Erkenntnis*) is already objectified meaning content and objective spirit (*Geist*) fixed on things, such as spoken words, written document, performed act, drawn picture, produced instrument, believed religion, and observed laws, and so on. In terms of grasp of this objective spirit, we proceed furthermore to catch subjective spirits underlying behind it and scientifically to reach to streams of experience

12) Otaka, 10), rev. ed., new Preface, p. 3, 1938.

of alter ego. But unendlessly variable subjective spirit, so far as its unendlessness is really untraceable, can never be an object in an exact sense of science. Subjective spirit can be grasped and brought to knowledge only if it is objectified in any form, in other words, only if it is transformed from "noesis" to "noema" in order to be an objective spirit".¹³⁾

It is only possible for us scientifically to understand subjective spirit in terms of objective spirit. Here Otaka gave a special emphasis on objective spirit, or objective meaning, since he saw principally both words interchangeable. In doing so, he seems to keep a slight distance from Weber's idea, and his approach apparently represents, so to speak, "spirituallistic" tradition, or "internal stream of consciousness" tradition, especially of Husserl, as showed in the citation of *noesis* and *noema*. We may, however, raise a question of how to reach to *objective* spirit, or meaning which I shall put aside for the purpose of this paper.¹⁴⁾

IV „Fundierungszusammenhang“ and Its Application to Law and Politics

What is essential for this tradition must be answered for the next step. For instance, "phenomenology" as emphasized by Otaka is surely an important idea and approach, but there are too many books and articles including Otaka's to point out its essentials. Therefore, I would like again to summarize his idea on musical performance as typically expressing this trends of mind: Musical idea of composer is expressed on music paper. But only when music is repeatedly performed actually, and understood and appreciated by audience actually, it has a social reality. Here it is factual acts of a number of members which give a basis („fundieren“) for existence of music as ideal object — factual acts, however, are spiritual, or meaningful acts in a musical sense, which give a basis for it as such *lower* spiritual, or meaningful object connected with physical behaviors.¹⁵⁾ Otaka's idea may well be understood as an illuminating example, since

13) 10) pp. 113f., 140.

14) Cf. my original article mentioned above 1) in respect to the problems of subjective-objective spirit, or Husserl's phenomenology, and so on.

15) Otaka, Phenomenology and law (Genshōgaku to hōritsugaku) in: 6), p. 304. cf. 10) pp. 120ff.

the same idea will be seen in his discussion on the world of human action, human relations, institution, etc. "It is also the case with reality of law. It is factual acts of a large number of members acting in accordance with normative meaning of law which give a basis for its reality".¹⁶⁾ Positive law is law as given a basis by factual meaningful acts of a large number of members. Certainly, law is an object belonging to mental, spiritual, ideal, meaningful world, center of which is normative meaning. It is produced by human spiritual enterprise, and to use Husserl's term, it is a product of meaning-constructing work of transcendental intersubjectivity.¹⁷⁾ As showed in the case of musical work, however, it is necessary for law to be positive law that it is given a basis by *factual* acts of a large number of members, and yet their acts acting in accordance with its normative meaning. Political state, or national State, so far as viewed from this perspective, is an ideal, spiritual unity as mainly consisting of nation, which in turn has a reality through such given basis by their *factual* relationship.¹⁸⁾

Otaka's fundamental idea on law and state in his earlier or pre-war period may be summarized in this way. At the first glance, social enterprise of human being seems to be conceived by him in a highly idealistic, or aprioristic level. Actually, he was not satisfied with that level, but he tried to confirm it in connection with the level of social reality, because he always paid a special attention to that connection to give a basis („Fundierungszusammenhang“). We may perhaps call Otaka's attempt «spiritualistic» approach to social enterprise of human being on the one hand, and «realistic» approach to the spiritual on the other. — We may perhaps find from the latter the intellectual basis of his empiricism, particularly dominant in his post-war period thought. — Autonomous, independent character of normative meaning-content on the one hand, its being given a basis by factual acts on the other.

As a scholar of jurisprudence, he discussed each different role and character of legal norms from this perspective, to develop his own panoramic theory of structural order of law under the strong influence of German legal theory, particularly H. Kelsen's, but considerably modified by Otaka.

16) 15) p. 304.

17) 15) p. 302.

18) 15) p. 309. 10) pp. 124ff., 387.

As to the last point, too, it is interesting for us to compare Otaka and Schütz. While Kelsen, as it well known, saw basic norm as a corner stone of positivity of law, he treated it meta-positive legal, sometimes hypothetical, and so on. If Kelsen might aware sufficiently that notion of „Fundierungszusammenhang“, Otaka regretfully thought, Kelsen might overcome the limits of his theory of basic norm.¹⁹⁾ By contrast, Schütz (former student of law) wrote as follows: „In aller Deutlichkeit kennzeichnet Kelsen die Grundnorm als das Prinzip der idealtypischen Konstruktion jener Deutungsschemata, von denen aus die subjektiven Sinnzusammenhänge der Rechtsakte erst als objektiver Sinnzusammenhang des Rechtes verstanden werden können.“²⁰⁾

What kind of change will be found in Otaka's idea from pre- to post-war period is a question raised at the first page of this paper. Main topics such as like democracy, relativism, empiricism, on liberty, theory of statutory interpretation or construction dominant in the post-war works are not rarely treated in his pre-war works. It is also the case with phenomenology, or phenomenological approach. He often mentioned it in regard to noema-ness, Fundierungszusammenhang, and intersubjectivity. But it may be undeniable that there is a change in a delicate sense. First of all, his academic interest, if I may be allowed to say, was considerably switched from German legal philosophy to British empiricism, which particularly was traced in his defensive discussion for democracy, freedom, etc. against ideological arguments of political, and yet metaphysical nature such as represented by Marxism coming from Hegel — according to Otaka —.²¹⁾ Though there was also a delicate change in his academic interest from relativism to emphasis on limits of relativism, which he perhaps learned from G. Radbruch's thought gained through his hard years, I shall proceed to simple concluding remarks for this paper. Spiritualistic tradition mentioned above, so far as his idea is concerned, may involve two implications, that is, the Western and the Eastern.

19) 15) p. 335. 9) S. 109f.

20) 8) S. 347.

21) A way of his discussion on Hegel's idea may be a good example to guess Otaka's so-called change in his thought, because he interpreted and defended for Hegel's idea on the political state rather liberal against Nazi ideologues' interpretation.

Cf. Otaka, Hegel's philosophy of law and Führerstaat (Hegel no Hötetsugaku to Shidōsha-kokka), in: Theory of Law and State (Hō oyobi kokka no riron), dedicated to Dr. S. Sasaki for his sixty years celebration, 1938, Yuhikaku.

V The Western and the Eastern in Otaka's thought?

Whenever we pursue after the last basis of normativeness of law according to the Western (legal) tradition, we perhaps meet certain standards as having similar role or meaning as Kelsen's basic norm having in the pure theory of law, that is, so-called natural law, higher law, or "nomos" in a sense of Greek poet or philosopher. Otaka did not accept them at first, but during the post-war period, and even in the pre-war period, he seemed gradually to take an attitude somewhat affirmative for standards of this sort. One of good examples of such standards is certain *measure*, that is "Nori" to control and to make politics of arbitrary tendency return to the ordinary proper course, according to which it originally was expected to work and actually worked.²²⁾ He often mentioned to and emphasized it in order to justify the post-war democracy in Japan. But, there may be another implication. He also paid a special attention to "Kokutai", so to speak, a living form of nation based on intimate concert peculiar to Japanese of Tennō and people, in this period.²³⁾ I have no intention here precisely to trace and analyze such an interesting relation of Nori and Kokutai in his theory of law and politics. Rather, what I am thinking and wondering at last is Japanese way of thinking and its hidden impact on Japanese acceptance of the Western. For instance, Nori is invisible. It is acceptable only by means of that *meaningful* intuition. In this respect it may also be related to Otaka's phenomenological understanding, and furthermore the Western spiritualistic tradition. On the other hand, it is undeniable that the usage of word "Nori" has been conditioned by the Eastern tradition, whether Buddhistic, or Confucianistic. It is also the case with "Kokutai". If it could be understood a nation's living form of paternalistic feature, we may perhaps recall our memory on pre-modern absolutistic body politic, or militaristic Japan during the Second World War. Otaka's usage seems not always covered by this memory, but also to be accompanied by his attempt

22) Otaka, What is the last basis underlying law? (Hō no kyūkyoku ni aru mono), p. 162, 1947, rev. ed., 1965, Yuhikaku.

23) This idea appeared in a series of Otaka's papers written for the purpose of criticism and reply to Prof. T. Miyazawa's who was also a most intimate colleague of Otaka. Cf. Otaka, Popular sovereignty and emperorship (Kokuminshuken to Tennōsei), in: A system of new constitution (Shin Kenpō-taiki), Kokuritsushoin, 1947. Miyazawa, Popular sovereignty and emperorship, 1957, Keisōshobō.

of how to overcome dilemmas underlying the so-called "civil society".²⁴⁾ In addition, there may have been not a few Japanese intellectuals including K. Nishida, who more or less, are not far from such a mood of thinking despite of their acceptance of the Western.

24) This could be traced back to his original idea of *Körperschaft* (Kyōsei-shakaidantai) as given a role to overcome such a dichotomy of *Gemeinschaft* and *Gesellschaft*. Cf. Otaka, 9) SS. 190ff. 10) p.398. The following passage may well point out Otaka's orientation under the hard atmosphere of that pre-war period: "In his *Theory of State Structure* [Kokka-kōzō-ron] (1936), a landmark in the development of the Japanese school of social science, Professor Odaka Tomoo laments 'the lack of co-ordination between thought and action'. When he published the book he fervently proclaimed that in order 'to grasp the soul of the State' he would 'serve as a common soldier in the front line operation of the scholars'. Yet in this very place (Preface, p. 2) he adds: 'My inquiries in this book have no direct relation to any effort to display the special State structure of the Japanese Empire in its practical significance.' When we consider the period in which this book was published, such a statement poignantly recalls how bitterly scholars struggled under the old régime to preserve the academic integrity of State science and political science" ([.....] is added by the citator). M. Maruyama, *Thought and behaviour in modern Japanese politics*, ed. by I. Morris, p. 231, 1963, Oxford Univ. Press.