



Proceedings from the
2009 Sho Sato Conference
on Tax Law, Social Policy,
and the Economy

Hiroshi Kaneko and the Transformation of Japanese Jurisprudence

Minoru Nakazato and J. Mark Ramseyer
University of Tokyo and Harvard University

All rights reserved by the authors.

This paper was presented at a Sho Sato Conference held on March 9-10, 2009, under the auspices of the Institute for Legal Research and in cooperation with the Robbins Religious and Civil Law Collection, School of Law, University of California, Berkeley.

Hiroshi Kaneko and the Transformation of Japanese Jurisprudence

Minoru Nakazato and J. Mark Ramseyer¹

“The professor of tax law in Japan,” the late Harvard professor Oliver Oldman called him.

To study the emergence of modern Japanese tax jurisprudence is to study the scholarship of Hiroshi Kaneko, emeritus professor of tax law at the University of Tokyo. Indeed, to study the emergence of modern Japanese jurisprudence more generally is at least in part to study Kaneko’s work. Many have worked in the fields he has studied. Few have had his transformative impact.

Although the occupation-controlled Japanese Diet enacted a modern tax regime in 1950 in the wake of the 1949 report of the Shoup Commission, it enacted a regime with which the existing scholarship did not fit. The statute introduced a tax regime that followed the basic rules of public finance.² Yet legal scholars brought to the statute a set of interpretive tools tied not to finance but to the pre-war German legal academy. Economic scholars brought only a commitment to a Marxist tradition rooted in concepts and methods that few modern scholars can comprehend. To interpret the tax regime according to the principles by which the drafters had designed it, a scholar would have needed modern economics. Most Japanese scholars brought nothing of the kind.

To introduce public finance, Kaneko crafted a new jurisprudence entirely. In so doing, he transformed the field of tax, and created an intellectual community where virtually none had existed before. But the jurisprudence he founded did not just transform tax law. Instead, Kaneko demonstrated to others that what he did for tax they could do – and now have done – for the rest of law as well. Among the many consequences lies the introduction of law and economics – making Kaneko one of the “fathers” of the field in Japan.

In essence, Kaneko crafted a way within the canons of public law for scholars simultaneously (a) to retain the rule-of-law controls on the bureaucratic over-reaching

¹ Minoru Nakazato is Professor of Law, University of Tokyo, and J. Mark Ramseyer is Mitsubishi Professor of Japanese Legal Studies, Harvard University. The authors thank Akiyuki Asatsuma, Keigo Fuchi, Hiroyuki Kohyama, Yoshihiro Masui, and Masao Yoshimura for their thoughtful comments and suggestions. Professor Ramseyer received generous financial assistance from the John M. Olin Center for Law, Economics and Business at the Harvard Law School.

² In fact, the Diet had already introduced modern tax theory through the reforms of 1947. These reforms were in turn strongly influenced by economist Henry Shavell. See Henry Shavell, *Taxation Reform in Occupied Japan*, 1(2) *National Tax J.* 127 (1948); Henry Shavell, *Postwar Taxation in Japan*, *J. Pol. Eco.* 124 (1948).

that had wreaked havoc during the long war, but (b) to introduce policy concerns and augment their work with intellectual resources from beyond the legal discipline. In effect, by opening the door to public finance, Kaneko opened the door to explorations of public policy and inter-disciplinary scholarship more generally, but in a way that scrupulously circumscribed bureaucratic reach.

In the essay that follows, we begin by summarizing the legal and scholarly world of the 1950s (Section I). We explain the scholarly strategy Kaneko adopted (Section II), and its impact on the Japanese legal academy (Section III).

I. Jurisprudence in the 1950s

A. The Tax Bequest

Japan emerged from the war with an eclectic tradition in tax. The government had enacted its first modern income tax in 1887. The law had U.K. antecedents, and applied to but a small fraction of the population. There followed several fundamental tax reforms, but the most major of the pre-War reforms occurred in 1940. In 1940, the government adopted a tax system that resembled the French income tax of the early 20th century. Under this new law, it imposed two taxes. One was a schedular system in which high-income taxpayers (workers had their tax withheld at source) reported different “types” of income on different schedules, and separately calculated a tax on each. The second was a global system in which taxpayers summed their schedular incomes, and calculated an additional tax (at progressive rates) on the total.³

World War II did not come cheap, however, and the Japanese government financed it in ways that greatly complicated the law. It imposed high marginal rates in its 1940 income tax, and the high rates induced evasion. Facing increasingly desperate fiscal straits, it then added a panoply of excise taxes besides. By the end of the war, it managed a tax portfolio that was cumbersome, inequitable, and chaotic.

Few Japanese scholars specialized in tax law in the 1940s and early 1950s, but those who did turned to Germany. As their leading treatise, they took Shosaburo Sugimura’s 1940 text.⁴ Sugimura – predecessor to Kaneko – taught at the University of Tokyo, and introduced to the Japanese academy the work of German scholars like Albert Hensel.⁵

Before Hensel, German tax law scholars had stressed procedure rather than substance (e.g., the concept of income). In fact, the most influential public-law scholar at

³ The French Finance Minister of the early 20th century, Joseph Caillaux, proposed a two-part tax system in 1907: (a) it divided tax by category, and imposed fixed rates on each income schedule (the rates differed by income category), and (b) it imposed a progressive rate structure on the income total. This combination of a general income tax and a seven-category schedular tax is known as the “Systeme Caillaux.”

⁴ Sozeiho [Tax Law] (Tokyo: Nihon hyoron sha, 1940).

⁵ Albert Hensel, *Steuerrecht*, 1 Aufl. (1924).

the time, Otto Myer, tried to systematize tax law through the concept of the assessment procedure itself. “The tax is a money payment,” Myer explained, “which is imposed on the subjects by the public power typically in order to raise state revenue, but based on a general standard.”⁶

Compared to Myer, Hensel studied something of the substance of the law. By Hensel’s account, tax law was a system of tax liability (Steuerschuld), a concept he developed by analogy to the civil-law concept of liability. Hensel took pains to treat the taxing state and the taxpayer as equals. But the system he created remained fundamentally orthogonal to public finance or to economic theory more generally. “Material tax law necessarily took a back seat in [his] endeavor,” one historian explained, “the general doctrines of tax administration law (inclusive of tax procedures and legal protection) stood in the foreground.”⁷

Those few scholars who studied tax law worked within the broader ambit of administrative law. Sugimura himself wrote in both tax and the larger administrative law field,⁸ and so did most others. Jiro Tanaka, Sugimura’s junior by six years on the University of Tokyo faculty and later Supreme Court justice, similarly wrote in both fields. Even Kaneko began within administrative law. Until he shifted to a University of Tokyo chair specifically in tax law (established on the advice of the second Shoup Report), he held an administrative law position like his mentor Sugimura. Unlike the others in tax, however, he refused to let that tradition shape his research.

B. The Shoup Reports

The post-war tax regime was not a regime Douglas MacArthur’s staff at the occupation wanted. A few years into their work, they brought to Japan a “tax mission.” Headed by Columbia economics professor Carl Shoup, the mission visited Japan twice, in 1949 and 1950. A talented group, it included the young Stanley Surrey (later Under-Secretary of Treasury under Kennedy) and William Vickrey (later a Nobel laureate).⁹ In both years, it published its recommendations as a report.¹⁰

⁶ Otto Myer, *Duetsches Verwaltungsrecht*, Bd. 1, 2 Aufl [German Administrative Law, vol. 1, 2d ed.] 331 (1914).

⁷ Michael Stolleis and Thomas Dunlap, *A History of Public Law in Germany, 1914-1945* 221 (Oxford: Oxford University Press, 2004). A descendant of Fanny Hensel-Mendelssohn, Hensel became a victim of the Nazis. He was dismissed from his senior professorship at Koenigsberg in 1933 and died the same year. His wife was driven to suicide in a Gestapo prison. See *id.* at 222 and 119.

⁸ E.g., *Shin hanrei to gyoseiho no shomondai* [New Opinions and Problems in Administrative Law] (Tokyo: Ryosho fukyu kai, 1943).

⁹ The members of the mission were Carl Shoup (Professor of Economics, Columbia University), Howard Bowen (Dean, College of Commerce and Business Administration, University of Illinois), Stanley Surrey (Professor of Law, University of California, Berkeley), William Vickrey (Associate Professor of Economics, Columbia University), Jerome Cohen (Associate Professor of Economics, City College of New

Following the mission's recommendations, the Japanese government enacted a new income tax in 1950. At least notionally, the new law purported to tax all income. To be sure, where the Internal Revenue Code adopts a "global" approach, it took a seemingly "schedular" one. Section 61 of the I.R.C. defined gross income as "all income from whatever source derived." The Japanese code tallied different kinds of income separately, and levied a tax on the sum of each.

Yet the distinction mattered less than one might think. The I.R.C. may define income globally, but it taxes different kinds of income differently. Whether capital gains, interest income, or leasing income, it supplies a panoply of adjustments specific to the income type. It may tax income globally, but it incorporates within the global framework a list of separate schedules.

The Japanese code calculates income through several disparate schedules, but includes in one of the schedules a residual category for income that might otherwise escape. It computes income schedularly, in other words, but incorporates within the schedular form a global scope. Both countries tax all income, and both tax different kinds of income differently.¹¹

The post-war Japanese tax code imposed a tax at progressive rates, but it was a tax that most taxpayers satisfied through wage withholding. Most taxpayers in most countries, including Japan, primarily earn wage income, of course. The post-war rates climbed as high as 75 percent in the 1970s, and currently peak at 40 percent, excluding local taxes. But few taxpayers ever reached the 75 percent mark. Even now, most of the individual income tax revenues come from withholding: 12.9 trillion yen from withholding in 2007, compared to 3.2 trillion yen outside of the withholding system.¹²

C. The Scholarly Tradition

1. Procedure and interpretation. In 1950s Japan, to study tax law meant to study procedure, for such was the impact of Otto Myer and the German tradition. When the government audited a taxpayer, it undertook a procedural act. When the taxpayer contested the assessment, he undertook a procedural act. Rather than evaluate alternative

York), William Warren (Professor of Law, Columbia University), Rolland Hatfield (Department of Taxation, St. Paul, Minnesota).

¹⁰ Report on Japanese Taxation by the Shoup Mission, vols. 1-4 (1949) (hereinafter 1949 Report). The mission followed that report with another the next year, Second Report on Japanese Taxation by the Shoup Mission (1950) (hereinafter 1950 Report). See generally J. Mark Ramseyer and Minoru Nakazato, Japanese Law: An Economic Approach ch. 9 (1999); Minoru Nakazato, The Impact of the Shoup Report on Japanese Economic Development, in Lorraine Eden, ed., Retrospectives on Public Finance 51-66 (1991).

¹¹ See generally Minoru Nakazato and J. Mark Ramseyer, General Description: Japan, in Hugh J. Ault, ed., Comparative Income Taxation: A Structural Analysis 71, 74 (The Hague: Kluwer, 1997).

¹² Kokuzeicho, Dai 57-kai jimu jiho Heisei 19 nen [57th Report, 2007] 111 (2007).

definitions of income or competing tax policies, scholars in the field focused on the legal rules that governed such acts.¹³

Because tax fell within public law, scholars largely ignored questions of policy.¹⁴ Necessarily, they ignored the economic ideas behind the policies implemented through the tax system. To study public law at the time was to focus on interpretation (*kaishaku ron*) rather than statutory design (*rippo ron*). The distinction was – and in many fields still is – basic to Japanese legal scholarship. But in Japan in the 1950s (and sometimes even now), public-law scholars asked how to interpret a law. They did not ask how to draft a new one.

The distinction between interpretation and design matters, because by tradition legal scholars discussed policy only when debating design. They did not – at least ostensibly did not – discuss it during the interpretive enterprise. This was not quite the case in corporate law. There, scholars did at least advance policy arguments when advocating legislation, even if they did not formally raise them when interpreting statutes in place. In public law, however, scholars saw policy as the domain of the bureaucratic and political process. They seldom advocated legislation, and seldom raised questions of policy.

As cramped as the dual distinctions between interpretation and design and between public and private law may seem today, they reflected a crucial historical fact. Under the pre-war constitution, the ordinary civil law courts did not handle most public law litigation. Instead, the latter fell within the exclusive jurisdiction of a separate set of administrative law courts.¹⁵

The legacy of this bifurcated jurisdiction continued to shape post-war public-law jurisprudence. The pre-war jurisdictional design obviously reflected the government's reluctance to expose itself to litigation it could not readily control. And the scholarly reluctance to employ policy arguments reflected an equally strong reluctance to give post-war bureaucrats any wider latitude than necessary. The scholars had lived through the military-dominated government. They did not want another, and to cabin the interpretive enterprise by the formal statutory language did hold the government to the rule of law.¹⁶

¹³ A culmination of this tradition is Jiro Tanaka's classic treatise, *Sozeiho* [Tax Law] (Tokyo: Yuhikaku, 1968).

¹⁴ The public-law-private-law distinction in Japan loosely tracks the distinction in the U.S. academy, even if it does not entirely coincide.

¹⁵ *Dainihon teikoku kempo* [Constitution of the Great Japanese Empire], eff. 1890, art. 61.

¹⁶ At least anecdotally, pre-war tax administration was said to be been extremely haphazard. Often, the actual tax levied was said to have been largely the result of a bargaining session between the taxpayer and the auditing official.

2. Haig-Simons. Yet policy dominates public finance, and would have dominated discussions within the Shoup mission. When analyzing a tax regime, public-finance economists work within a tradition rooted in the notion of a “comprehensive income base.” Typically, they attribute the concept to work by Robert M. Haig and Henry C. Simons in the 1920s and 1930s. Sometimes they trace the idea back to 19th-century studies by German legal scholar Georg von Schanz. Under this “Haig-Simons” (or Schanz-Haig-Simons) approach, a person’s income during a given period equals the amount he consumes plus any change in his wealth:

$$I = C + \Delta W,$$

where I = income, C = consumption, and ΔW = change in wealth. In effect, the definition captures all real accretions to purchasing power.

Obviously, the Haig-Simons approach treats all “types” of income equally. Money is money, whether earned as salary or received from the sale of a painting, whether earned on a recurring basis or received as a windfall. Whatever the source, an increase in purchasing power constitutes income, and should – within this tradition – be subject equally to tax.

When scholars in the Haig-Simons tradition advocate different tax regimes for different types of income, they primarily do so out of concern for measurement and enforcement. The imputed value of owner-occupied housing, for example, is income (as a form of consumption) under Haig-Simons. Most scholars advocate excluding it because it is too much of a bother to measure.

Similarly, the value of capital gains is also income, but many scholars advocate a lighter rate because it is so hard to enforce. A taxpayer who sells an appreciated painting to a friend can “forget” to report the revenue. And even an honest taxpayer can choose whether to pay the tax by choosing whether to sell the asset or hold it.

3. The Legal Response. Although the Shoup mission worked within the Haig-Simons tradition,¹⁷ Japanese public-law scholars took a different tact. German legal scholars typically defined income without recourse to public finance,¹⁸ and so too did Japanese scholars in the 1950s. To define the concept of income, they instead looked, in one way or another, to the Civil Code. According to the Code, however, only regularly recurring proceeds constituted income. The concept turned on the distinction between assets (principal; capital) and proceeds (fruit; income). Sections 88 and 89 of the Code

¹⁷ Perhaps because the government had already incorporated a global approach to income in its 1947 tax reform, the mission did not explicitly allude to Haig-Simons. It instead focused on increasing the simplicity and apparent equity of the code.

¹⁸ The *Markteinkommen*theorie, they call it.

defined the “natural fruit” of an asset as its proceeds (a tree and an apple, a cow and a calf), for example, and the “legal fruit” as a rental charge from the use of an asset.

Define income by the Civil Code, and a scholar excluded a variety of revenue that fell within the Haig-Simons comprehensive income base. German scholars in this tradition had no trouble with rent, wages, or interest. They had a harder time with capital gains and illegal winnings. For just that reason, several traditional European schedular systems excluded capital gains and occasional income. They included illegal gains only through distinctive (and somewhat tortured) substance-over-form approaches.¹⁹ Necessarily, the European approach then influenced the direction Japanese scholars took.

At stake was a fundamental mis-match between the statute and the scholarly community interpreting it. The statute was a creature of the Shoup mission. That mission, in turn, had started with the Haig-Simons global approach, and explored the administrative apparatus necessary to implement it in a second-best world. By contrast, the scholars interpreting the statute had started – and ended – with the references to income influenced by the Civil Code. The Americans told the Japanese government to include capital gains and illegal gains. The scholars could not explain why.²⁰

Of course, as the discussion of German scholarship suggests, those few legal scholars who worked in tax law shunned discussions of “income” anyway. Instead, they wrote in the tradition of administrative law and focused on procedure. Calculating income was not a subject worth their time. It was an exercise for bookkeepers and tax collectors.

II. The Kaneko Transformation

A. Background

Born in 1930 in the city of Ueda, Nagano, Kaneko arrived at the University of Tokyo law faculty shortly after the war. Upon graduating in 1953, he took a research associateship (*joshu*) under the tax- and administrative-law scholar Shosaburo Sugimura. He became assistant professor of administrative law in 1956, and soon moved to the tax law chair established in 1951 at the behest of the Shoup Commission.²¹ He travelled to

¹⁹ The doctrine of *l'autonomie du droit fiscal* in France, and *wirtschaftliche Betrachtungsweise* in Germany.

²⁰ As late as 1969, some scholars lamented the absence of a scholarly theory of income for use in practice, but suggested that Kaneko's new approach (the first installment of his study appeared in 1966) potentially promised such a theory. See, e.g., Jun Shiozaki, *Shotokuzeiho no ronri* [The Logic of the Income Tax Law] (Tokyo: Zeimu keiri kyokai, 1969) (panel discussion).

²¹ The mission did not just recommend the reform of the Japanese tax system. It also had an impact on scholarly personnel. The establishment of chairs in tax law at the Universities of Tokyo and Kyoto was the result of the second (1950) Shoup Recommendation. The 1949 Report, *supra* note 9, at App. (D), (E)(5)(b)(3), recommended:

Courses in Tax Law – The Law Department of the Universities should institute courses in Tax Law as a distinct subject in itself. Attention should be directed toward the

the Harvard Law School in the summer of 1961 as a Rockefeller Foundation Fellow. There, with Stanley Surrey serving as John Kennedy's Under-Secretary of Treasury, he studied with a man who would become a close personal friend, Oliver Oldman.

B. The Revolution:

1. Introduction. Largely eschewing procedural questions, Kaneko forthrightly grounded tax in the definition of income, and grounded that definition in the comprehensive income base of public finance.²² As aware as any of how bitter the university world could be, he did not flout the radical nature of his shift. Writing as he did within a self-consciously Germanic and legal community, he reflected extensively on the work of German legal scholar Georg von Schanz – not just the American economists Haig and Simons. Writing as he did within a tradition that prized thorough comparative work, he studied carefully the tax practice in a wide variety of countries – not just a select few.

2. The interpretive innovation. At the same time that he introduced the public finance behind the comprehensive income base, Kaneko had first to craft a new theory of interpretation. The Japanese statute taxed income. As just discussed, however, by the public law tradition a scholar looked to the term's meaning in the Civil Code. There he would find a discussion of assets and fruits. And there he would find himself left with a tax on recurring legal revenue – and not much else.

To circumvent this quandary, Kaneko bluntly proposed a distinction between two sets of statutory terms: “borrowed” terms, and “specific” terms.²³ Courts, he explained, should interpret “borrowed” terms according to their meaning in the common law – or in statutes like the Civil and Commercial Codes that codified the Roman common law. Given these common-law antecedents, legislatures had not enacted these codes with any specific “purpose” in mind. The meaning the codes gave a term reflected only its meaning within the common law tradition.

substantive and technical provisions of the tax laws and to the specialized aspects of tax administration.

The 1950 Report, *supra* note 9, at app. F(3) made more pointed recommendations:

The University Law Schools should institute courses in the legal aspects of income taxation, as distinguished from the fiscal policy and public finance aspects. Such courses would do much to interest attorneys in tax matters and to increase informed criticism of the system. It would of course also bring about needed academic research into the legal phases of taxation. Sufficient funds should be provided in the budget to permit such course to be given by the Law School.

²² Kazei yoken ho no sho mondai [Problems in the Law of the Prerequisites of Taxation], Nihon bengoshi kai rengo kai, Tokubetsu kenshu sosho (1967).

²³ *Id.*

By contrast, courts should interpret “specific” concepts in a manner that reflected the purposes behind the statute (e.g., the tax statute) that introduced them. Other than the basic codes, the legislature enacted statutes to advance specific and often complex goals. It did not pass the tax act only to collect revenue, for example. It passed it to dampen the swings in the business cycle. It passed it to redistribute income. After all, the Japanese Constitution (Art. 25) grants citizens “the right to maintain the minimum standards of wholesome and cultured living.” It requires the government to promote “the social welfare and security.” The legislature passed the tax act, Kaneko explained, to promote goals basic to the Constitution itself.

Because the legislature enacted the tax statute to accomplish these goals, courts needed to define key terms accordingly. To be sure, some words will lie in the ambiguous zone between borrowed and specific terms. “Income” will not. The concept is central to the tax act and, as such, constitutes the quintessential specific term. To interpret it, courts need to look to the goals of the men and women who drafted the statute – and there Schanz-Haig-Simons was key. By contrast, insisted Kaneko, courts must interpret “borrowed” terms according to their meaning in the common law (and the Civil and Commercial Codes that codified it). Only then would the law cabin the discretion of the bureaucratic community. And only then would the law promote the private market ordering so crucial to economic growth.

3. The theory applied. For example, consider the term “loan interest,” found in Section 161 of the Income Tax Act.²⁴ The Section defines domestic source income, and includes some types of loan interest as domestic-source. When a foreign corporation without a permanent establishment receives such loan interest, the revenue is subject to withholding.²⁵

Recently, a Japanese firm sold to a foreign firm some bonds which it then repurchased. The tax office argued that the difference between the sale and repurchase prices constituted loan interest to the foreign firm under Section 161. It then imposed the withholding tax. By the Kaneko typology, however, “loan” and “interest” are standard common-law concepts. As a result, they carry the meaning in tax that they have in the Civil and Commercial Codes. There, purchase and sale constitute one set of terms. Loan and interest constitute another.

Obviously, one could take a different approach. One could invoke standard substance-over-form arguments to recharacterize repurchases as loans. But one could also invoke the arguments to recharacterize loans as repurchases. When one recharacterizes concepts like loans and interest – concepts with standard common-law definitions – one

²⁴ Shotokuzei ho, at Sec. 161(f) (kashitsukekin no rishi).

²⁵ Under Sec. 212(b) of the Act.

does not promote transactional predictability. Neither does one promote market contracting or limit bureaucratic power.

Rather than try to maximize the ability of the tax office to increase its revenues, Kaneko opted for stability, predictability, and a narrow bureaucratic reach. To judges unaccustomed to tax litigation, he offered a solid – and distinctly legal – framework within which to write opinions. And to taxpayers who planned transactions with standard terms, he offered the predictability that comes from a respect for contractual form.

In the dispute at stake, the courts took exactly the tack the Kaneko approach required. The district court respected the terms of the transaction, the appellate court affirmed, and the Supreme Court declined review. The firms had contracted for a sale-and-repurchase. And the courts respected their agreement.²⁶

4. The context. The approach Kaneko advanced obviously parallels some elements of Anglo-American law, even if not broad substance-over-form approaches.²⁷ “Statuta sunt stricte interpretanda,” the classicists declared,²⁸ and so Kaneko argued. Statutes in derogation of the common law should be strictly construed. In the words of the U.S. Supreme Court²⁹:

Statutes which invade the common law...are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evidence....

Where a statute uses a familiar term, courts should interpret it by its usual sense – unless that would clearly violate what the statutes intended.

The rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure.

²⁶ Sumitomo shintaku ginko v. Kuni, 1274 Kin’yu shoji hanrei 43 (Tokyo D. Ct. Apr. 17, 2007), aff’d, 1290 Kin’yu shoji hanrei 32 (Tokyo High Ct. Mar. 12, 2008).

²⁷ Sozeiho to shiho: shakuyo gainen oyobi sozei kaihi ni tsuite [Tax Law and Private Law: Regarding Borrowed Concepts and Tax Avoidance], 6 Sozeiho kenkyu 1 (1978).

²⁸ Reinhard Zimmermann, Statuta sunt stricte interpretanda?: Statutes and the Common Law: A Continental Perspective, 56 Cambridge L.J. 315, 316-17 (1997).

²⁹ Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783-84 (1952), quoting Jamison v. Encarnation, 281 U.S. 635, 640 (1930).

Defining income to exclude illegal earnings or capital gains would contradict the public-finance assumptions behind the post-war Japanese tax statute. Construing a sale-and-repurchase as a sale-and-repurchase would not.³⁰

The care with which courts treat contractual form makes Japan something of a modern outlier. French and German courts now interpret tax statutes more independently even than American courts. They interpret tax concepts independently even when the drafters import the terms from the private law codes. Aside from the pointless complexity this practice engenders, it obviously makes it easier for government officials to operate beyond the scope of what elected politicians authorized. Similarly, it makes it harder for taxpayers to contract on the private market, and harder for anyone to fit the tax system to those private market transactions.

III. Implications for Japanese Jurisprudence

A. Tax

1. The tax law community. For aspiring young scholars, Kaneko offered an approach that intrigued. Where his predecessors had treated tax as a subchapter to administrative law, he offered an autonomous discipline. Where they had eschewed policy, he placed it front and center. Where they had focused on procedure, he introduced public finance.

And the approach attracted. As this conference itself illustrates, Kaneko created an active, vibrant, and coherent intellectual field. The field of tax law in Japan once barely existed. Today, it thrives.

2. The National Tax Administration (NTA) and courts. The NTA and courts applauded.³¹ For the most part (the repurchase transaction being an obvious exception), the National Tax Administration and the Ministry of Finance adopt Kaneko's approach. Whether to implement a statute or to recommend amendments, they turn to Kaneko's method.³² The courts adopted it to adjudicate disputes over the statute.³³ And – given that

³⁰ See Minoru Nakazato, *Kokka katsudo to shijo chitsujo* [National Activity and Market Order], in Mitsuaki Usui, et al., eds., *Kohogaku no ho to seisaku* [Public Law Studies and the Policy of Law] 95 (Tokyo: Yuhikaku, 2001).

³¹ The respect for Kaneko's work extends to economics as well. E.g., Naohiko Konno, *Shotoku gainen ronso* [Debates on the Concept of Income], in Hiroshi Kaneko, ed., *Shotokuzei no riron to kadai* [The Theory and Issues in Income Taxation] (Tokyo: Zeimu keiri kyokai, 2d 3d., 2001).

³² Indeed, for many years Kaneko served on the legislatively key Tax Policy Committee (*Zeisei chosa kai*) as well.

³³ Among recent opinions citing his work, see *Fujita v. Kawasaki kita zeimusho cho*, 241 *Zeimu sosho shiryō* 283 (Yokohama D. Ct. Mar. 24, 1999); [No parties given], 1787 *Hanrei jiho* 42 (Tokyo D. Ct. Mar. 26, 2002); [No parties given], 1801 *Hanrei jiho* 60 (Tokyo High Ct. Oct. 29, 2002); [No parties given] 1185

the government and the courts both interpret the statute by Kaneko's approach – practitioners adopt it when they advise their clients as well.³⁴ Kaneko bridged theory to practice, and the practicing community applauded.³⁵

Kaneko similarly illustrated the applicability of his approach to practice with his work on international taxation. As with the income tax more generally, Kaneko approached the subject with the details of practice in mind – in this case, details like the foreign tax credit and the transfer-pricing rules. And as with his more general tax work, he brought to the task a clear sense of the policy implications involved. When he turned to the tax-sparing credit used so commonly in treaties with developing countries, he decried the way it distorted investment decisions inefficiently.³⁶ And after his work on transfer-pricing, the government adopted new rules on point.³⁷

Hanrei taimuzu 183 (Kyoto D. Ct. July 10, 2003); [No parties given] Hanrei taikai No. 28111863 (Tokyo D. Ct. Jan. 27, 2006).

³⁴ Kaneko's work is frequently cited in the briefs of both the NTA and the taxpayer.

³⁵ Hiroshi Kaneko, *Sozeiho ni okeru gakusetsu to jitsumu* [Scholarship and Practice in Tax Law], 756 *Jurisuto* 83 (1982).

³⁶ When a Japanese corporation does business in a foreign country, it obtains a foreign tax credit for any tax paid to that foreign country. If, however, that foreign country (usually a developing country) introduces tax incentives to the Japanese company, the company will pay lower taxes. Absent a tax sparing credit, however, the company's Japanese tax liability will increase by an amount that exactly offsets the lower taxes paid to the foreign country. In order to prevent this, by tax treaty Japan traditionally agreed to allow a foreign tax credit for the amount of the tax incentive (i.e., the amount of the foreign tax credit is computed as if there were no tax incentive).

³⁷ Hiroshi Kaneko, *Amerika gasshukoku no shotoku kazei ni okeru dokuritsu tojisha kan torihiki* (arm's length transaction) no hori [The Legal Principles Concerning Transactions between Independent Parties in American Tax], 724 *Jurisuto* 104, 734 *Jurisuto* 56, 736 *Jurisuto* 95 (1980-81); Hiroshi Kaneko, *Musho torihiki to hojinzei* [Gratis transactions and the Corporate Income Tax], in 2 *Hogaku kyokai*, ed., *Hogaku kyokai hyaku shunen kinen ronbun shu* [Essays on the Occasion of the 100th Anniversary of the Hogaku kyokai] 135 (Tokyo: 1983); Hiroshi Kaneko, *Iten kakaku zeisei no horiron teki kento* [The Legal Theory of Transfer Pricing Tax System], in 2 *Nobuyoshi Ashibe, et al. eds., Gendai rikken shugi no tenkai* [The Development of Modern Constitutionalism] 439 (Tokyo: Yuhikaku, 1993); Hiroshi Kaneko, *Iten kakaku zeisei no kihon teki mondai to beikoku iten kakaku zeisei no haikai* [Basic Issues in the Tax System of Transfer Pricing and the Background of the Tax System of Transfer Pricing in the U.S.], in *Keidanren*, ed., *Iten kakaku zeisei wo meguru ugoki to keidanren no taio* [Developments in the Tax System of Transfer Pricing and the Response of the Keidanren] (Tokyo: 1994); Hiroshi Kaneko, *Iten kaku zeisei ni tsuite* [Regarding the Tax System of Transfer Pricing], in *Kansai daigaku hogaku kenkyujo*, ed., *Kokusai sozei chitsujo no kochiku* [Building an International Tax Order] (Tokyo: 1995); Hiroshi Kaneko, *Iten kakaku zeisei no tekiyo ni okeru joho shushu to shitsumon kensa* [The Application of the Transfer Pricing Tax System and Responses to Questions] in *Kenkyu joho kikin*, ed., *Iten kakaku ni kansuru chosa kekka hokokusho* [Report of the Investigation in Transfer Pricing] (Tokyo: 1995).

B. Public-Law

1. Interpretation. Kaneko's interpretive theory is gradually winning acceptance beyond the world of tax. Scholars in public law now routinely accept that the ordinary words and concepts in a statute follow their meaning in the common law. And they take it equally routinely that some terms – terms with crucial significance to the statute – bring a meaning specific to the statute.

The distinction creates an obvious ambiguity. Some statutes forthrightly define key terms, while others leave the definition muddled. Some terms play a central part in accomplishing a statute's putative purpose, while others do so only peripherally. Some words are straightforwardly specific or borrowed, in Kaneko's lexicography. Others are not.

Nonetheless, the distinction cuts a fine line between the classic Japanese tradition and the modern continental approach. The classic tradition looked only to the private codes. In a world still recoiling from wartime autocracy, it did limit bureaucratic power, but at the cost of compounding the difficulties in drafting special-purpose statutes. The continental approach interprets all terms afresh – destroying contractual predictability, and heightening the mismatch between market transactions and their tax consequences. After Kaneko, the Japanese approach draws the meanings for most words from the codes, and recognizes distinctive meanings exceptionally.

2. Policy. Not only did Kaneko create a tax law community, he effectively transformed Japanese jurisprudence. Tax is hardly the only field where the statute both purports to pursue specific policies and includes idiosyncratic terms. After Kaneko, scholars in all such fields could introduce policy concerns.

In opening the door to policy, Kaneko opened it to social science. Policy to Kaneko did not mean ad hoc policy preferences; it involved the systematic study of rigorous public finance. Among Japanese legal scholars, he was one of the very first to introduce social science rigorously. But he has been far from the last. In effect, he introduced social science to Japanese public law studies more generally. He did not just explain the benefits of a comprehensive income base. He showed the role that a perspective rooted in social science can play in improving legal policy.

Today, more scholars use law and economics in tax than anywhere else in the Japanese legal community. Where others in Kaneko's generation fought efforts to introduce social science, Kaneko made it possible. Where others considered economics the fallback for students unable to pass the admissions test to the law faculty, Kaneko saw what it could teach and welcomed it. Kaneko may or may not have founded law and economics in Japan. But he clearly embraced it, and enthusiastically facilitated its introduction.

IV. Conclusion

Scholars in the tax-law community in the early 1950s faced a contradiction. They specialized in a statute drafted ostensibly to pursue a variety of discrete policies, but worked within a tradition that eschewed any discussion of policy. They specialized in a statute designed by public-finance economists, but worked from a tradition that held economics in contempt. They specialized in a statute implementing the Schanz-Haig-Simons comprehensive income base, but lacked the background necessary to appreciate so broad a concept of income.

Facing these incongruities, Kaneko crafted an interpretive theory that allowed him – that required him – to turn to public finance. Statutes like the tax code, he explained, contain two types of concepts. Some come directly from the common law, and should be used in ways consistent with their broader usage. Others are specific to the statute, and should be used consistently with the ostensible statutory purpose. If the Shoup mission designed the statute from the Schanz-Haig-Simons tradition in public finance, then scholars should turn to that tradition to understand the terms.

The theory did not just revolutionize tax law, though that it did in spades. Instead, it revolutionized Japanese jurisprudence more generally. Now, policy became part of the interpretive enterprise, and social science a crucial part of policy. Law was no longer an autonomous field within the university. After Kaneko, it became a field for applied social science.