

# ICCLP Review

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## *From the Editors*

With this first edition we would like to welcome you to our new publication - the ICCLP Review. Although a fresh departure from our previous newsletter, the first part will contain reports of our activities broadly similar in content to the now discontinued newsletter. However, the second part will contain short articles and polemics. In order to promote consistency in the new Review, we will from now on be using the widely-recognized Bluebook system of citation. We hope you find the changes improve the quality of this publication.

In this edition we have included the Third ICCLP Interview conducted by Hugo Dobson and Keiko Wada with Professor Joseph L. Hoffmann of Indiana University. The interview touched on subjects as diverse as Professor Hoffmann's family life in Japan, impressions of Japanese language learning, and his current research on the death penalty.

We also have professors visiting us from closer at home in the form of Visiting Japanese Professors Shin'ichi Yoshida and Yutaka Kiyokawa. Professor Yoshida's impressions of his time here have been included in the Review. Meanwhile, Professor Shozo Ota has written in detail upon his time at University of Michigan and Professor Noboru Kashiwagi has described his stay at Duke University. These two essays will provide a valuable reference point for any professors planning to head over to the US.

The Fourth ICCLP Symposium took place from February 16th to 18th dealing with 'Bioethics and the Law: US and Japan'. In this edition Professor Carl E. Schneider of University of Michigan Law School has introduced the themes of the symposium.

In 1998 the Center will celebrate its 5th anniversary. We would like to thank all the visiting professors, researchers, ICCLP research scholars, and everybody else who has been connected with the activities of the Center. Without all your help and encouragement, the Center could in no way have developed to the extent it has.

The staff of the Center would like to take this opportunity as always to thank you for your support. We look forward to hearing your thoughts regarding the new design and contents of the ICCLP Review.

Keiko Wada ICCLP Co-ordinator, ICCLP Review Editor  
Hugo Dobson ICCLP Researcher, ICCLP Review Editor (English Edition)

## Part I

### *Visiting Professors at the ICCLP*

From October 1997 to March 1998 the following professors were invited to the ICCLP:

**Bernard A. Rudden** (Professor, The University of Oxford, UK)

Profile:

After studying at the Universities of Cambridge and Wales, Professor Rudden became a Professor of Comparative Law and Fellow of firstly Oriel College and then Brasenose College. Specializing in Comparative Law, he visited the Center from November 1997 to January 1998 conducting a course with Professor Yoshiko Terao entitled, "The Principles of Comparative Law". Professor Rudden also gave an ICCLP Seminar entitled, "Thinking about Monetary Obligations: Why Do Law Professors Neglect Simple Monetary Obligations?"

Major Publications:

THE LAW OF PROPERTY (2nd ed. Oxford University Press 1982) [co-authored with F. H. Lawson].

THE NEW RIVER: A LEGAL HISTORY (O.U.P. 1985).

A SOURCE-BOOK ON FRENCH LAW (3rd ed. O.U.P. 1991).

BASIC COMMUNITY CASES (2nd ed. O.U.P. 1997).

**Carl E. Schneider** (Professor, University of Michigan, USA)

Profile:

After studying at Harvard University and the Law School of University of Michigan, Professor Schneider qualified as a judicial clerk and in 1981 earned his professorship at University of Michigan Law School, specializing in Family Law, Property Law, and Medical Ethics and the Law. During his one month stay from February, he led the 4th ICCLP Symposium entitled, "Bioethics and the Law : U.S. and Japan".

Major Publications:

*Cruzan and the Constitutionalization of American Life*, 17 J. MED. & PHIL. 589 (1992).

*Bioethics with a Human Face*, 69 IND. L. J. 1075 (1994).

FAMILY LAW: CASES AND MATERIALS (West Publishing Co. forthcoming) [co-authored with Margaret Friedlander Brinig].

## *Visiting Japanese Professors at the ICCLP*

This field was established in July 1995 with the objective of promoting education and international research by welcoming visiting members of the public and bureaucratic walks of life as professors and assistant professors to conduct research and teaching with members of the Faculty of Law. For two years, from July 1995, Mr Masabumi Yamane of the Bank of Tokyo was adopted as a visiting professor and Mr Nobiru Adachi of the Ministry of Finance was adopted as a visiting associate professor. We would like to introduce the new visiting professor and associate professor adopted from July 1997:

**Shin'ichi Yoshida** (Visiting Professor, Senior Political Correspondent of the Asahi Shimbun)

Profile:

After graduating from the Faculty of Law at the University of Tokyo, Mr Yoshida began work at the Asahi Shimbun. After being dispatched to Fukuoka, Urawa and Akita, and working in the political and foreign news departments, he was dispatched to Washington for three years. He returned to the political department and in 1996 was appointed to the editorial board. His current research topic is entitled, "Changes in Japanese Political Perceptions: Research into the Reform of Control Systems". He is also conducting a lecture series with Professor Ikuo Kabashima entitled, "Basic Documents and Readings on Contemporary Japanese Politics". He is a recipient of the Japan Newspaper Association Prize in 1978 and 1995, and the Japanese Journalists' Conference Prize in 1978.

Major Publications:

KIMURA OHKOKU NO HOKAI [THE COLLAPSE OF THE KIMURA KINGDOM] (Asahi Shimbun Publishing Co. 1971, reprint 1984).

TANAKA SHIHAI [TANAKA'S DOMINANCE] (A.S.P. Co., 1985) [co-authored].

**Yutaka Kiyokawa** (Visiting Associate Professor, Official of the Ministry of International Trade and Industry and Minister's Secretariat)

Profile:

After graduating from the Faculty of Law at the University of Tokyo, Mr Kiyokawa entered the Ministry of International Trade and Industry working in the Agency of Natural Resources and Energy, the Fair Trade Commission, and the Consumer Goods Industries Bureau. In 1991, for one year, he studied in the School of Advanced International Studies at Johns Hopkins University. Returning to the Agency of Natural Resources and Energy, he then went on to participate in the Japanese Foreign Ministry's delegation to the EU and was appointed First Secretary to the Japanese Embassy in Belgium. From 1996 he took up his current position. Under the title "High Technology-centered Industry and the System of Intellectual Property", he is currently conducting research and teaching duties with Professor Nobuhiro Nakayama .

Major Publications:

*On the Methods of Evaluating the Value of Intellectual Property in the Case of Securities*, 513 JAPAN FOREIGN TRADE COUNCIL MONTHLY REPORT 42 (1996).

## The Difficulty of Explaining Japanese Politics

by Shin'ichi Yoshida, Senior Political Correspondent of the Asahi Shimbun, ICCLP Visiting Japanese Professor

There are probably very few people who hold two professional positions (other than honorary positions) at once. As can be seen from expressions such as *nisoku no waraji o haku* (wearing two pairs of straw sandals, i.e. engage in two businesses) or *nito o ou mono wa itto o mo ezu* (if you chase two rabbits, you will catch neither) or the moral value placed on *ichi-i senshin* (singleheartedness, i.e. devotion to a task) this situation has often been viewed in a negative light in Japan. Until last year, after reporting on political affairs for the Asahi Shimbun for twenty years, the possibility that such expressions would apply to me had never crossed my mind.

However, life is always full of surprises. Since last summer I have found myself spending a few days each week at the Law Faculty as a Japanese visiting professor of the ICCLP, and from October I taught a course entitled 'Contemporary Japanese Politics' with Professor Ikuo Kabashima. When I wasn't at Todai, I continued chasing a different rabbit, namely the flow of political events.

I would like to thank my employer, the Asahi Shimbun, for being understanding enough to give me the opportunity to chase both rabbits in this way. My reason for going against the grain of traditional wisdom by taking on these two roles was a desire to take some measured time to consider a problem that I had faced in my day-to-day experience as a journalist, namely the oft-stated difficulty of 'explaining' Japanese politics to foreigners.

I had my own experiences in this respect. I was a special correspondent in Washington for the Asahi Shimbun for three years until 1994. Since Japan's economic power has increased, Japanese foreign correspondents are often called upon to explain Japanese events to people at their postings. You often get telephone calls from local journalists or community groups asking questions like "I've heard that Japan is reforming its electoral system. Could you tell me the reasons for the change and how the new system will work?"

I came across this situation so many times and was faced with the difficulty in explaining Japanese politics in a rational way. Of course, part of this was due to my own limitations in gathering relevant information and presenting it in a logical manner. But even after taking this into account, I was unable to satisfactorily answer basic and frank questions like "why is it possible in Japan for the prime minister to be replaced at the whim of one faction of the LDP?" or "why is it that the most capable person can never become prime minister?" or "why does a prime minister with the highest approval rating in history suddenly resign for no apparent reason?" I would mention concepts such as factional and consultative politics, but I felt a little uneasy about leaving it at that. What I was saying did not seem to 'explain' the situation, but merely provide some background.

I realize that it is not always possible to eliminate the irrational from politics. However, in Japanese politics, the number of phenomena that cannot be explained rationally seems disproportionate. It is not only the so-called 'revisionists' that feel the impenetrability of Japanese politics. The fact is that the majority of Japanese citizens feel that something is wrong.

This situation has been accentuated since the end of the LDP's one party rule in 1993. Recently, we have heard politicians saying "politics is adrift" or "politics has reached a bottle-neck", indicating that they have lost a sense of direction and perspective in how they should proceed in politics. They have fallen into a state of

self-doubt. It is not surprising that increasing numbers are saying “we do not understand politics any more” and declining to support any one party.

Why is it that this phenomenon can exist in Japanese politics without us being able to explain it properly? Is this the result of the Japanese brand of political journalism, that focuses on ‘facts’ such as the movements of politicians and political calculations, and is bandied about by the flow of everyday affairs? Perhaps this is the result of the high-brow critical style of journalism in the past? Or is it the consequence of the entire course of journalism and academic thought in Japan? The problem therefore becomes one not only of the nature of politics but of the nature of society itself, a subject with which I do not feel I can grapple on my own.

However, the attempt by the Faculty to link journalism and academia, including my stay at the Center, has provided an ideal opportunity to begin to consider these issues. I believe that contemplating and discussing the nature of Japanese politics at the Center, with the stimulus of so many foreign and Japanese researchers and students, has been one pair of straw sandals for me, not two. I am only just beginning on this dual life, but I have great expectations.

*[Translated by Peter Neustupný, January 1998]*

## *ICCLP Research Scholars*

**Jürgen Reichert** (D.Phil. candidate, Trinity College, University of Oxford, UK)

Profile:

Having previously studied in Germany, Italy, the US, and Great Britain, he holds a MA Degree in Political Science from the Free University, Berlin and a MA Degree from the School of Advanced Studies at Johns Hopkins University. He is currently working for a D.Phil. in international relations at the University of Oxford in the field of comparative political economy of financial deregulation. His responsibilities, during his stay at the ICCLP from October 1997 to September 1998, include the administration of the ICCLP's web site.

**James D. Malcolm** (Ph.D. candidate, University of Sheffield, UK)

Profile:

After graduating from the School of East Asian Studies at the University of Sheffield, he went on to work in Japan under the JET Program. Thereafter, he returned to the University of Sheffield in order to begin work towards a Ph.D. dealing with financial deregulation in Japan in the context of globalization. In October 1996, he came to the Faculty as a Foreign Research Student. He will begin his time at the Center from April 1998.

## *Interview with Professor Joseph L. Hoffmann*

Professor of Law, Indiana University School of Law, USA  
ICCLP Visiting Professor, Graduate School of Law and Politics

*Professor Joseph L. Hoffmann studied at Harvard College and the University of Washington before working as a judicial clerk in the Supreme Court. Thereafter he gained an associate professorship at Indiana University and subsequently a professorship in 1992 specializing in criminal procedure and criminal law. During his one year stay in Tokyo he has been conducting a seminar with Professor Masahito Inouye on American criminal justice. Professor Hoffmann spoke to us about his experience in Japan and the US and his research on the death penalty.*

[Hugo Dobson, December 1997]

### **Personal Background**

HD: Having studied mathematics at Harvard what influenced your decision to move onto law school and how easy was this process?

JH: There are many ways to answer this question. One aspect is that it became apparent to me even before graduating that I was never going to be a very good mathematician! In fact, after graduating I initially went to work as a radio announcer for three years presenting news, sports and music. Despite being a fun career, I realized that this was a young person's job and was not going to be a long-term career for me. It was about this time that I began to consider my future career direction and decided upon law. I had always regarded myself as something of an academic dilettante, preferring to study many different topics rather than specializing in a narrow field, and due to the universal nature of the discipline of law this was the perfect field for a person like me. Also, because my background in science had been very focused and narrow, I enjoyed moving into the broader field of law.

Luckily for me, one feature of the American education system is that you can enter the system at any point in your life, and many people decide to go to law school later in their lives and careers. Some of the best law students often have previous degrees in subjects such as music, religion, philosophy, mathematics, etc. Everybody brings their particular field of expertise to the three years of general law study.

After graduating from law school, it is possible to sit for the examination to become a practicing attorney immediately, and no further study or training is required. This is partly because of the nature of the students, who come to law school later in their lives. It is believed that with their previous education, three years of additional training is all that is required before these people can go on to become qualified lawyers. So, to answer your question, the process is very straightforward.

HD: After having graduated from law school, you went to work as a judicial clerk to Judge Phyllis Kravitch of the US Court of Appeals for the 11th Circuit and also a judicial clerk to Justice William H. Rehnquist of the US Supreme Court. Can you tell us something about how this judicial clerk system works and what are the duties of a judicial clerk?

JH: Well, I had decided at an early stage that I did not want to become a practicing lawyer. Rather, I wanted to be involved in the study of law, and in order to get there, I was lucky to have a fairly different experience from the norm. There is a tradition that the top law graduates of each year can apply for the opportunity to work as a legal assistant to a judge. Among these assignments, the most prestigious involve working with a federal judge, and the role of judicial clerk at the US Supreme Court is the most prestigious of all. The initial clerkships begin right after graduation, and then the Supreme Court will select from among those who have already obtained a clerkship with another judge, usually in a federal court. The federal judges tend to have usually three clerks and the Supreme Court Justices will have four clerks.



The role of the clerk is essentially the same in either setting. Duties include helping to prepare the judge for the cases, reading briefs, writing memos summarizing the cases, etc. One of my judges, who was not particular keen on reading memos, preferred to talk over the cases, and if the weather was fine we would walk around the block chatting about the aspects of the case in question. In this way, a clerk can help a judge to reach his or her own conclusions on the case.

One of the most interesting aspects of the job was that, as a clerk, you got the first crack at drafting the opinions that would be issued as the official opinions of the Supreme Court. Obviously, this is just a draft that will be revised time and time again, but it is the closest you could get without becoming a judge to participating in the process of making the law. This adds to the highly regarded reputation that these positions have earned.

HD: How did this experience influence your future career direction and research interests?

JH: In the US there is no system of apprenticeship with law professors after graduating from law school, so this system of clerking for a judge was really the best through train into the profession of legal teaching. Afterwards I immediately applied for positions at universities. Today the system has changed a little, so that often students with a Ph.D. and an inter-disciplinary interest may well find it easier to enter the legal teaching profession.

When in law school, Property Law and Criminal Law and Procedure were my favorite subjects. On the one hand, Property Law, because it was almost mathematical in its use of logic and order, was very attractive to me. On the other hand, Criminal Law and Procedure appealed to me because of the issues of state power and the fact that such a great deal is at stake, thus making the theoretical side of the law very interesting.

Property Law was what I originally wanted to teach, but during my clerkships I became more and more interested in Criminal Law and Criminal Procedure. Particularly because I clerked in the 11th Circuit, which includes the three big death penalty states of Georgia, Florida and Alabama, many of the death penalty decisions had to come through our court, and this is where I was exposed to an intense death penalty appeal case within the first week of my clerkship. My judge and I worked on the case until midnight, and the judge ultimately voted with the other judges to allow the execution to proceed. The accused was scheduled for a sunrise execution, which caused me to stay up that entire night thinking about the role I had played, just one week out of law school, in the final decision of this case. In the morning, as I walked to work, the news of the execution was all over the newspapers, and this made me realize the immediate consequences of the legal work in which I was involved. These kind of experiences made me focus on this particular field of research.

## **Life in Japan**

HD: How have you enjoyed teaching at the University of Tokyo?

JH: This is my second time teaching at the University of Tokyo. In 1994 I was teaching on a Fulbright fellowship in both the Faculty of Law and the American Studies Center at the Komaba campus. This time I am based solely in the law school. I learned a lot about the teaching here three years ago, especially from Professor Norio Higuchi (who was my host professor then), and I am really enjoying the experience again this time around. In 1994 I assigned seminar presentations to the students, but this time, thanks to the way Professor Masahito Inouye has organized our joint seminar, I have not needed to do this to encourage dialogue and debate. However, I have altered my teaching methods to include a weekly written outline of what we are discussing in seminar, which has meant I have had to become more disciplined and organized.

HD: How are Japanese students in comparison and contrast with US students?

JH: The students in class tend to be younger in Japan and they tend to take a larger number of subjects. The assigned reading seems to be less here, and the students are maybe not so inclined to speak openly in class. In the US, the problem is often getting the students to shut up! It is not rare for US law students to

have had prior careers and a bit more experience than their Japanese counterparts, so they come to class prepared to argue, especially after they realize that openly expressing your opinions is encouraged. The problem then becomes time-management and ensuring that you can cover all the material in the allocated time. In Japan, although the students are very attentive, ask pertinent questions, and seem to have no trouble getting to grips with a different legal system, I have had to try to encourage them to state what they think the law should be. This process has been assisted by Professor Inouye who has constructed the seminar so that the undergraduate students are accompanied by postgraduate students, professors from other universities, a judge from the Tokyo District Court, and a few of the top criminal lawyers from the Tokyo area. This selection of notable professionals has encouraged lively debate in the seminars.

HD: What are the benefits of researching and teaching abroad for your own work and has your experience in Japan influenced your future possible research interests?

JH: I am now in a position where I hope that I can get started on my research with the help of Professor Inouye. Coming into contact with him and the variety of people at the seminars has given me the opportunity to discuss various criminal-justice issues in Japan, and is the starting point for me to consider possible future research interests.

I may be unusual in occupying this position at the ICCLP as I am not a Japanologist or a comparative specialist. My work centers primarily on American case law; however, this is a marvelous opportunity for me to come to Tokyo and take back some of what I learn here when I return home. I will be interested to see how my visit influences my thinking on the American system, which will always be the core of my research but will certainly be altered by my experience in Japan. I am afraid that some people in the US have problems seeing the fact that it is important to view issues from a variety of new perspectives.

Hopefully in the spring of next year I will be able to go out into the field and observe some aspects of the criminal-justice system in Japan — possibly sit in a *koban* or do some other field work — it will be important for me to avoid being stuck in the library and thus getting a one-sided view of criminal procedure in Japan.

HD: How have you found fitting into Japanese life, especially with a family to consider?

JH: I have tried to learn the language, and although it is beyond my ability to give a lecture in Japan or read a law book in Japanese, because Japan will be a part of what I research from now on I hope to learn enough of the language to get more exposure to the people and the society.

Last time on the Fulbright fellowship, my family also came with me, but because the stay was only four and a half months it was like an extended holiday outside of the classroom. This time is considerably different as we are living here for a longer period and I have more opportunity to conduct research. My wife is also working part-time, which limits our free time, so there is a lot more work involved for all of us. Having said that, we have managed to take in trips to Kanazawa and Kyoto.

My youngest child, Michael, is also making good progress in his Japanese. Unlike my two daughters, who are several years older, Michael is attending a Japanese school, which gives him exposure to the Japanese language in context. So, all in all, this is a wonderful opportunity — not only for me but for my family as a whole — to experience not only Japanese culture, but also to learn more about Asian culture in general, especially as the world's attention continues to center on Asia.

### **Death Penalty**

HD: In the various articles you have written and seminars you have made are there any common themes behind what you are saying?

JH: I don't have an agenda but am able to identify certain common aspects. For example, I am not an abolitionist. I have come to the conclusion in moral terms, after many years, that some crimes are so evil and so inexcusable that society has the right and duty to exact the ultimate punishment for these crimes.

This is not because I believe the death penalty has any deterrent effect. It is because I believe in a Kantian view that treating somebody as less than fully responsible is to treat that person as an animal and less than fully human. So, I have no moral qualms about the theoretical existence of the death penalty.

In addition to this, I wish to shift the emphasis that has been placed in the US upon the procedural rules of a death penalty case, and begin to discuss more openly whether each particular crime truly merits the death penalty or not.

I guess another theme would be the massive responsibility felt by the jurors in making death penalty decisions, which has been my main concern in the Capital Jury Project.

HD: What would you like to see change with the death penalty in the US?

JH: I believe that in the US we give far too many death sentences too indiscriminately. I also worry about an emphasis placed upon the procedures rather than the substance of the death penalty. In the 1970s, the death penalty was suspended and then restarted, and I regard this as having been a lost opportunity to reconceptualize the legal focus in death penalty cases. In a number of appeals in the late 1970s, the federal courts failed to look at the heart of jury decisions to impose the death penalty, choosing alternatively to focus on procedural problems. This has created a cycle in which cases can go on for twenty years and the discussion is only focused on procedural rules, rather than on the underlying merits of a particular person being on death row. I sometimes fear for the system but have yet to give up hope. This is one area where the US could learn a great deal from Japan, where the focus of litigation is not so much on procedure.

HD: Is it responsible to have a jury, which is essentially an unprofessional body, deciding the death penalty? Or should the judge play a greater role than the jury?

JH: It has actually been suggested that the death penalty should be abolished because it is cruel to the jury members who have to sit and make these decisions. However, I believe that juries are the right body to make such decisions. Nobody should be fooled into thinking that judges are any less human than juries. Moreover, when you reach the sentencing stage of a capital trial it is no longer a legal problem. There is no set of legal parameters or rules for juries to decide about the death penalty — it is purely a moral judgment. There was an attempt to create a set of rules in the 1970s for juries to follow, but this unfortunately became a kind of excuse for some juries to hide behind — “the law made me reach this decision.” It is important for juries to realize that the decision is theirs alone, and that no binding legal rules exist to permit the jurors to distance themselves from their decision.

Personally, I would certainly rather have twelve average people from various backgrounds making this decision than a single judge. There is also a great distrust of government in the US, so handing this momentous decision over to a government official would be unacceptable. A small number of states do give the judge this power, but they are very much in the minority.

HD: What role does the death penalty play as a deterrent? The Ehrlich Research Project suggested that each execution deterred up to 8 homicides. Alternatively, some have suggested that the homicide rate actually increases in the wake of an execution. How do you feel?

JH: Despite the Ehrlich Project, I doubt there are any serious scholars in the US who would suggest that the death penalty has been proven to have a deterrent effect. It may possibly have an effect in certain kinds of clear-cut cases like shooting a policeman, where criminals can internalize the state statutes, but in other cases the evidence has failed to prove any concrete deterrent effect.

HD: Being an important factor in the US generally, does race play a role in the decision to give the death penalty?

JH: In the US the problem of race looms over all aspects of criminal justice and the death penalty is no exception. The data suggests that the overt forms of racism that undoubtedly existed in the 1960s are much less likely to happen today with juries becoming more multi-racial — which is another reason behind having a jury making decisions rather than a judge. Today, the data suggests that this overt racism

has disappeared, however, there does appear to be a more subtle and difficult-to-eradicate form of racism in which defendants are treated the same but crimes which occur in white areas against white victims (by either white or black criminals) are more likely to lead to death sentences than similar crimes committed against black victims. My feeling is that all jurors regardless of color believe that certain crimes are worse than others and are shocking. It is shocking — to both black and white jurors — that certain crimes occur in “good,” safe, peaceful neighborhoods. Alternatively, it is not particularly shocking if somebody gets shot in a “bad” neighborhood. In the US, blacks tend to live disproportionately in so-called “bad” neighborhoods, which can easily produce the phenomenon described above. Thus, it is not so much the issue of race as such, but the closely correlated issue of socio-economic class, which leads to disparity in death-penalty imposition based on the identity of the victim. This form of subtle, indirect racism is deeply ingrained in American society.

HD: Can you tell us about your research on the Capital Jury Project?

JH: The project was started by an inter-disciplinary group of researchers from the fields of law, sociology, psychology, and political science, to mention but a few, and is being funded by the National Science Foundation. We have interviewed 120 jurors involved in death penalty decisions in each of eight states, including Indiana, mainly because we believe that it is impossible to replicate the experience of capital jurors with mock jury studies. The project has recently expanded to 14 states with outside funding. Interviews have averaged at about three to four hours, and we have attempted to ask these jurors about every aspect of their singular experience.

Each researcher is using the same data for their own research projects. My personal goal in the project is to get at the heart of the issue of whether the jurors feel the weight and responsibility of their decision, which can be compromised once the law gets involved and starts setting rules as I have described previously.

HD: Were there any problems associated with collecting the evidence?

JH: Personally I had no problems in Indiana, after getting permission from the Chief Justice of the Indiana State Court, and we hit our quota of interviews just before I came to Tokyo. In other states some courts were suspicious of how the data was going to be used, and the project had to be conducted on the sly.

HD: Is the death penalty a symbol of an uncivilized society, considering that the majority of developed nations have chosen to abolish the death penalty?

JH: Recently, with South Africa choosing abolition and the EU demanding abolition as part of a united, single legal system, there seems to be a discernable trend towards abolition; however, at the same time, certain nations — for example, in the former Soviet bloc — have re-introduced the death penalty due to the collapse of law and order.

Generally, international opinion is against the death penalty. However, in the US these opinions don't carry a great deal of weight. The US has never greatly listened to international criticism. This may be a factor more likely to influence Japan.

Our history of violence and our beliefs in individualism and personal responsibility would suggest that unlike in Europe, where society may be partially blamed for criminal behavior, in the US when a heinous crime is committed it is the individual's own responsibility. The US view is an extreme view of free will, and when looking through this lens, the death penalty does not seem uncivilized. One's view of the death penalty must inevitably be colored by this framework, which will be difficult for the international community to break down.

HD: I would like to thank you for taking time out of your busy schedule to talk to the ICCLP Review. I would love to continue this discussion of the death penalty but unfortunately we have run out of time. Do you have any final words of wisdom for young, up-and-coming researchers?

JH: My message to any young, up-and-coming researchers is to be as open as possible to as many new experiences as possible — multi-disciplinary, multi-national and multi-theoretical. You may not always see the importance or relevance of a particular avenue of research now, but if it is interesting to you, you should pursue it -- because you never know where it may lead you in the future. This is something I hope to stress when I return to Indiana University and take over responsibility for our international programs.

## *The Michigan-Columbia Exchange Project*

From October to December 1997 we welcomed the following three teaching staff from the Law School of Columbia University to conduct a series of lectures entitled, "Introduction to Contemporary American Law" as well as giving ICCLP Seminars and Forums.

### **Associate Professor William M. Sage, Columbia University**

(Health Law)

Major Publications:

*Enterprise Liability for Medical Malpractice and Health Care Quality Improvement*, 20 AM. J.

L. & MED. 1-28 (1994) [co-authored].

*"Health Law 2000": The Legal System and the Changing Health Care Market*, 15 HEALTH AFF. 9 (1996).

### **Professor Albert J. Rosenthal, Columbia University**

(Constitutional Law)

Major Publications:

*Conditional Spending and the Law*, 39 STAN. L. REV. 1103 (1987).

CONSTITUTIONALISM & RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD (Columbia University Press 1990) [co-authored with Louis Henkin].

### **Dr . Alice Haemmerli, Columbia University**

(Intellectual Property)

Major Publications:

*Insecurity Interests: Where Intellectual Property and Commercial Law Collide*, 96 COLUM. L. REV. 1645 (1996).

*Comment: Of Contracts, Commerce, and Intellectual Property*, 2 Colum. J. EUR. L. 491 (1996).

In addition, from February 1998 Professors Yozo Yokota and Masahito Inouye visited Columbia University Law School. From April, Professor Kahei Rokumoto plans to visit there also. And from June to July 1998, Professors Thomas E. Kauper, Phoebe C. Ellsworth, and Samuel R. Gross from University of Michigan Law School will be visiting the Center to undertake a lecture series entitled, "Introduction to Anglo-American Law".

## Introductory Classes to Anglo-American Law

by Foreign Research Student Todd Elwyn

In late October the Faculty of Law welcomed Associate Professor William Sage of the Columbia University Law School for a series of four lectures on "Health Care Law and Policy in the United States." Professor Sage, whose impressive achievements include serving as a member of Hillary Clinton's health care reform taskforce, boasts the unusual background of having both practiced as a physician and as an attorney. He shared his unique insight into the application of law to medicine with a classroom full of enthusiastic but sleepy-eyed students, whose interest in healthcare issues packed them in for the 8:30 am lectures.

Professor Sage devoted his first lecture, not surprisingly, to healthcare reform in the United States, including both the recent changes from the traditional fee for service system to managed care, and the recently failed national efforts at reform. Efforts at reforming health care have sought to correct the main problem areas: to improve access and provide coverage to the numerous uninsured and underinsured, to reduce the national cost of health care which currently exceeds 15% of the GDP, and to maintain or improve health quality (the U.S. ranks 13th in life expectancy and 22nd in infant mortality). Professor Sage described how legislation (ERISA) allowed managed care to flourish and the reaction of the public to such changes as limitations in choice of one's physician, financial incentives provided to the physician to not treat or refer patients, and the increasing threat to confidentiality from the use of patient data by managed care companies. Finally, he addressed how the public currently finances health care (such as through Medicare) and examined some difficulties involved with moving to a national health insurance system.

In his second lecture, Professor Sage addressed the cost of health care and discussed why the large expenditure matters. "Real" reasons for considering cost (such as whether the value we receive is worth what we pay) were contrasted with reasons which merely serve as political rhetoric (such as that healthcare is bankrupting the country.) Various explanations for the high cost of health care were then reviewed and evaluated for their contribution to the rise in costs, such as unnecessary services, high patient expectations, fraud, and profiteering. Professor Sage opined that much of the high cost can be attributed to accounting difficulties in affixing a dollar amount to costs and benefits. While we may be able to compare costs of a hospital stay, we are unable to calculate monetarily such things as the value of a less painful treatment.

Professor Sage's third lecture examined issues surrounding the physician-patient relationship. He described the perceived role of the physician as both "social trustee" and as "expert" and how these roles may conflict at times. In examining the nature of the relationship he stressed that not only is it built on asymmetric information between the parties, it also operates on the basis of imperfect information since the physician may not know precisely what condition the patient has. Professor Sage also discussed the fiduciary duties in medicine the physician must fulfill, and raised the question of whether or not the physician is appropriately situated to act in the role of advocate for the patient.

Professor Sage's final lecture took up some of the issues surrounding death and dying. He examined the patient's right to refuse treatment, whether one has a right to determine the manner of one's death, and whether or not there might exist a "duty" to die. He also addressed the very controversial topic of whether physicians ought be able to assist patients in committing suicide, and whether death should be as much a part of the health care system as is the preservation of life.

Showing no signs of jet-lag himself, Professor Sage's presentations were equally lively and often interactive as he posed questions for the students to answer. To insure his lecture material was well understood, Professor Higuchi periodically summarized the key points into Japanese and translated questions and answers during discussions. The students were able to both learn a great deal about this area of the law as well as gain

a feel for what it might be like to take classes at Columbia or some other law school in the United States. For those who missed this opportunity, since Professor Sage's visit was part of a faculty exchange agreement between the two law departments, there may be other chances. One can expect they will be equally well done.



## *Accounts of Foreign Research Trips*

### **Michigan University and its Environs**

by Professor Shozo Ota

Already four months have passed since I arrived at the University of Michigan (UM) Law School. UM is in the state of Michigan, which consists of the Lower Peninsula, flanked by Lake Michigan to the east and Lake Huron to the west, and the Upper Peninsula, which lies between Lake Michigan to the south and Lake Superior to the north.

The locals liken the Lower Peninsula to the palm of the right hand. Near the point where the outside of the thumb joins the palm is the city of Detroit. On the opposite bank of the Detroit River is the Canadian city of Windsor. Between the thumb and the index finger lies Saginaw Bay. Detroit and Windsor are connected by both the Ambassador Bridge and the Detroit-Windsor Tunnel. When you cross to Canada, it is imperative to carry your passport and visa for the return trip, although I found that in practice you can often re-enter the USA without any border checks. For the 500 km five-hour drive to Niagara Falls, the highway from Windsor proved the most convenient. Near the wrist, the Detroit River connects Lake St. Clair and Lake Erie.

The Upper Peninsula has vast natural expanses and is perfect for hunting and fishing in spring and autumn. The winters, however, are severe and the snow lies deep.

Both peninsulas are covered with dense woodland, and the autumnal countryside is spectacular with its blazes of red foliage. I spent parts of October and November appreciating these forests as I drove a distance equal to the width of Japan.

Michigan is known for its conservative politics, but also for its extreme personalities. An example of this is Terry Nichols, co-accused with Timothy McVeigh of the Oklahoma bombing. Another example is Dr. Jack Kevorkian, whose name is well known even in Japan for his stance on mercy killing and euthanasia. Incidentally, Dr. Kevorkian has again incited public reaction recently with his proposal to use the bodies of his euthanasia patients for organ transplants. Other famous names hailing from Michigan are: Thomas Edison, Gerald Ford, Henry Ford, Lee Iacocca, Magic Johnson, Madonna, Diana Ross, and Malcolm X.

The city of Ann Arbor, where UM is located, has a population of some 110,000 and is essentially a university town. The 'Ann' of Ann Arbor comes from the names of Ann Allen and Mary Ann Rumsey, the wives of the founders of the city, John Allen and Elisha Rumsey. The 'Arbor' refers to the heavily wooded countryside. The city is about one hour's drive from Detroit, and on the way is Detroit Metro International Airport. The Huron River flows near the city, and the area is surrounded by parkland which the citizens enjoy to full measure. The staff from the UM Law School too enjoy this parkland on their annual spring and autumn picnics by the river.

Ann Arbor proved to be a culturally sophisticated city. There are many excellent public halls, where operas and concerts are held with first class artists. The UM art gallery and museum are also well worth a look. Downtown Ann Arbor has many good restaurants, including the regular French, Italian, and Chinese, but also more unusual cuisines like Japanese, Korean, Greek, Mongolian, and even Ethiopian. There are also jazz bars where you can hear first rate performers every night. I was pleasantly surprised by the many entertainments to be had in what I had feared might be a sleepy university town.

In terms of Japanese knowledge of American universities, UM would probably not rank as highly as Harvard or Yale, or even UCLA. Of course, this is through no fault of UM, but through the distorting influence of the Japanese viewpoint. Another example of this distortion is the inflated esteem in which UCLA is held in Japan compared to UC Berkley. Berkley is amongst the top five US universities in many fields and has one of the highest numbers of Nobel laureates. Incidentally, there are probably few Japanese who would know the difference between UM and Michigan State University or would know that state universities in general tend to be less research based and of a slightly lower academic standing.

UM was established as a general university in Detroit in 1817, and moved to Ann Arbor in 1837. By 1866, it had become the largest general university in the country. Today, it is a mammoth institution with 51,000 students and 5,600 academic staff. UM is ranked top in the US in archaeology and business management, and within the top five in many other fields. It is hard to find any field where UM is not in the top ten. The Law School is no exception, and is considered to be amongst the top five. It counts many judges, legal academics, and attorneys amongst its alumni. The Michiganites' claim that the UM Law School out-ranks Harvard may be more than just home town pride.

Even though the degree of familiarity with UM may be low in Japan, it has strong links with Japan. The Center for Japanese Studies was established in 1947, in other words straight after the end of the Pacific War, and celebrated its 50th anniversary in November last year. The head of the Center is Professor Hitomi Tonomura. There are also Japan specialists in the other Faculties who speak fluent Japanese. I heard members of the Faculty of Music performing the *shamisen* and *nagauta*.

Of course, the Law School has strong links with Japan. The earliest Japanese students graduated from the Law School in 1880, and today there are regularly five or more Japanese students enrolled in the Master of Laws program and you see Japanese faces around the Law School all the time. The Law School library's holdings on Japanese law are substantial. In addition, everyone who reads this Review would know that there is a very fruitful ongoing exchange project between the Law School and the Faculty of Law at the University of Tokyo, which sees about three members of each faculty visiting the other institution each year to give lectures and seminars.

The most heated topic of conversation at UM recently has been the wonderful winning record of the Wolverines, the UM football team. They won all eleven games in the 1997 season and ended the season at the top of the league. On New Year's Day they appeared at the Rose Bowl at Pasadena. To cap off the season, UM's defense player Charles Woodson won the Heisman Trophy, the ultimate accolade of college football. This award made an especially great impact because this was the first time in the 63 year history of the Heisman Trophy that it had gone to a defense player.

I watched several games, both on television and from the stands, and I could understand the reason for all the excitement. The Wolverines did not appear to be an overpowering force. On the contrary, they often seemed on the verge of defeat, or at least this was the impression in the first half. However, they had an uncanny knack of coming back in the second half to steal the game. Whatever the reason for this pattern, the Wolverines won the Rose Bowl for UM for the first time since 1948 and confirmed their place at the top of the ladder with an unbeaten record for the season.

There has also been much animated conversation around UM recently on a more serious topic. In particular, the Law School is the defendant in a class action. Let me state briefly the background to this action. Affirmative action policies were implemented in the US as a result of the 1960s civil rights movement. The policies promote social equality of Black Americans, who have suffered discrimination in the past. Under affirmative action, Black Americans can gain college entry with lower Scholastic Assessment Test (SAT) results than under the regular entry criteria. However, white students who would otherwise have entered

these institutions have been riled and are claiming that this is reverse discrimination. Conservative elements within the Republican Party have been advocating an end to affirmative action. Fanning this trend is a line of judicial pronouncements from the Supreme Court and other courts. As a result of Republican appointments to the Supreme Court during the Reagan and Bush administrations, the Supreme Court has begun to make decisions contrary to affirmative action interests. For instance, in 1992 Texas University lost a case brought by a white female student who claimed she could not gain entry because of reverse discrimination, and the numbers of black students have been declining. In terms of public sentiment, whites still constitute the majority of the US population and the trend of public opinion is veering away from affirmative action. For instance, Proposition 209 in California now prevents any consideration of race for the purposes of employment or university entry, with the result that there was only one black entrant to Berkley Law School in 1997.

In Michigan too conservative elements of the Republican Party have supported an anti-affirmative action push, and from 1997 various parties have brought actions against UM, UM President Lee Bollinger, the Law School, and Law School Dean Jeffrey Lehman. This action was very disappointing for Dean Lehman after he had just successfully completed a six-year fund raising push and arranged the finance for a new building for the Law School.

The plaintiffs are being represented by the Center for Individual Rights, an anti-affirmative action body of conservative law firms. According to their claims, race is a decisive criterion in entry to UM and the Law School—this is reverse discrimination against whites and is therefore unconstitutional. In particular, they say that for a given standard of applicant, blacks are guaranteed entry to the Law School, but whites only have an 8.6% chance.

UM claims that race is merely one of the many factors that are taken into account in determining who gains entry to UM—it is not the decisive factor. In addition, UM claims that diversity is a necessary ingredient to improve the quality of the institution and the education it provides, and that racial considerations constitute one factor in attaining this diversity, and it is, therefore, legitimate to take them into account. UM also points to contributing acts by some plaintiffs, who removed themselves from the waiting list for entry—if they were on the list they would still have a 50% chance of entry. The Law School has denied the accuracy of the statistics on which the plaintiffs' case is built. However, as the case against the Law School only commenced in December, the Law School has not yet lodged a formal defense.

According to rumors that circulated after the case began, the conservatives had considerable trouble finding plaintiffs to bring the action against the Law School and had to settle on a disgruntled 44 year-old white woman who could not have gained entry to the Law School whatever the criteria. Put another way, good students receive offers from several law schools such as UM, Yale, Harvard, Columbia, etc. and would not even think of suing UM. However, perhaps we will only get to the truth of the matter through litigation.

This litigation will undoubtedly whittle away at the physical, human and intellectual resources of UM and the Law School for several years to come, and will cast shadows across research and teaching activities and all interpersonal relationships. And eventually, this litigation will have an influence on the very nature of tertiary education in the US.

I would like to end by pointing out one thing that particularly struck me by UM's response to this whole litigation episode. Namely, after the suit was brought against the Law School, the Law School has organized regular presentations on the progress of the case and there have been regular opportunities for staff and students to exchange views. If, or when, this kind of response occurs naturally in Japan, we may also see the bureaucratic structure become more user-friendly for the Japanese population and we may be able to declare the full maturity of Japanese democracy.

*[Translated by Peter Neustupný, January 1998]*

## **Travels to Duke Law School**

by Professor Noboru Kashiwagi

I visited Duke Law School for about six weeks between August and October 1997. My purpose was to conduct my own research and to present lectures on Japanese business law.

### **The Campus**

The first thing that struck me about my host institution was the large and beautiful campus. It was as if the university buildings were scattered through a resort like the Tateshina Highlands in Nagano Prefecture in Japan.

As soon as I arrived, I rang up my friend Professor Thomas from the Law School and arranged to meet him at his office. I asked him the way from my hotel to the Law School. Not knowing the size of the campus, I said I would walk there, at which he was rather surprised! I set out on foot, but was soon ruing my decision. My bag, containing my computer and several books, began to feel like a lead weight. As I was shuffling along under this burden, I was very thankful to see Professor Thomas driving towards me to pick me up.

The point that was impressed upon me was that it was impossible to get around without a car in this environment. Without one, the several miles between the Law School and the International House of Duke University, at which I was asked to fill out administrative papers would be a major obstacle, as would trips to the bank, post office, dry cleaners, etc. Even getting lunch would be very difficult.

Luckily, I had my international drivers license with me. I went straight to rent a car. However, many professors kindly invited me for dinner. This was a problem. In the daytime, I could see the street signs and could confirm them on the map. However, I was slightly worried at the prospect of driving along the heavily wooded roads at night time in the dark.

### **The Food**

The city of Durham, where Duke University is located, was founded on the tobacco industry. These days, there is a high technology industrial development near the University called the "Research Triangle" where some Japanese companies have offices and factories. During my stay, I did not have too much time to venture beyond the simple life consisting of my residential hotel and Duke Law School. Therefore, I did not have the opportunity to try too many restaurants. There were a few nice restaurants but most of them served typical Southern fare. It all seemed much the same - steaks, hamburgers, fried chicken, and sandwiches were the main dishes. I tried the famous Southern specialty of catfish, but I found the taste muddy and not very enticing. Generally, I preferred my own cooking. I went to two Japanese restaurants. One restaurant specialized in "teppanyaki", with the kind of oily fried rice which is rather unfamiliar cuisine in Japan itself. However, the restaurants seemed to be thriving. I wonder if they agree with American tastes?

From the beginning of October, I stayed at University of Michigan Law School in the truly beautiful and prim town of Ann Arbor. There were a large number of delicious ethnic restaurants which I frequented happily every night. South of Durham was the cozy town of Chapel Hill which is home to the University of North Carolina and greatly resembles Ann Arbor. Chapel Hill is a small town with some wonderful restaurants. I once visited a typical Southern restaurant in Chapel Hill on my last night. The atmosphere was singular and it made me feel as if I was in the real America. However, the food left something to be desired. I had heard from one Japanese student who had studied at Duke Law School that he had lost weight while at Duke in spite of heavy American meals because he could not find anything for which he felt an appetite. I understood his dilemma. As it so happened, Professor Koichiro Fujikura and his wife were staying in the hotel room next to mine, and I was lucky enough to have a break from the restaurant food when they invited me to their room for a home cooked meal on a couple of occasions. So, I managed to return to Japan without losing weight.

### **The People**

All the academic and general staff at Duke University, from Professor Thomas onward, were extremely kind. The secretary was a temporary staff member, but she loved computers and helped me no end. Perhaps because

Durham is quite a small city, there were several couples who were both attached to the Law School, which gave it a friendly atmosphere. Many people invited me to their homes. One professor even gave me a lift on the back of his Honda 1100cc motorbike. The twenty or so students who attended my lectures gave me a book on Harley Davidson motorbikes. Apparently the students saw the professor giving me a lift on the back of his bike and discovered my interest. This was very moving for me, just as I was feeling a little self-disgust at the difficulties I was having communicating in English.

Of course, it was not only at Duke that I experienced great kindness. I would also like to thank the many people who helped me at Michigan. The only way I can return the favor is by extending my hospitality to the professors who visit Today. I hope I can match the high standards set at Duke and Michigan.

*[Translated by Peter Neustupný, November 1997]*

## ***Comparative Law and Politics Symposium***

The 4th Comparative Law and Politics Symposium took place on 16, 17, 18 February 1998.

Topic: Bioethics and the Law: U.S. and Japan

Reporters: Professor Carl E. Schneider, University of Michigan Law School; ICCLP Visiting Professor

Panels and Commentators:

(1) Autonomy

Professor Yoshiharu Matsuura, Osaka University

Ms Keiko Sato, University of Tokyo

(2) Brain Death and Organ Transplantation

Professor Eiji Maruyama, Kobe University

(3) AIDS

Professor Yutaka Tejima, University of Tsukuba

(4) Decision Making on Death

Dr. Akira Akabayashi, University of Tokyo

(5) Physician Assisted Suicide

Ms Kiyomi Tomita, Waseda University

Professor Joseph L. Hoffmann, Indiana University; ICCLP Visiting Professor

(6) Managed Care

Professor Norio Higuchi, University of Tokyo

Moderator: Professor Norio Higuchi, University of Tokyo

Language: English

## **Introduction to the 4th Comparative Law and Politics Symposium**

by Professor Carl E. Schneider

In recent years, the rapid pace of change in medicine and the development of ideas about human rights in law have led to the growth of the field of bioethics and law. A symposium is now planned at the International Center for Comparative Law and Politics to investigate the way that the field has developed in one country, the United States.

The experience of the United States is interesting because the law of bioethics there has in large part been the development of one principal idea, the idea that the patient's autonomy should be unfettered and that patients should be as free as possible to determine the circumstances of their medical care. Indeed, in the United States that idea has become so strong that there are even indications that some bioethicists are coming to think that patients not only have a right to make their own medical decisions, but may also have a duty to do so.

Nevertheless, even at the moment of autonomy's triumph as the chief principle of American bioethics, there are doubts about its future, doubts the conferees will be discussing. These doubts will be investigated in terms of a number of specific areas. One of these areas is of particular interest in the light of recent legal developments in Japan. This is the area of brain death and organ transplantation. In the United States, organ transplantation has been relatively uncontroversial. This has helped lead to a change in the definition of death away from the traditional definition (have the heart and lungs permanently stopped working?) toward a definition that asks if the brain has stopped working. This new definition is part of a broader change that defines life not biologically, but in terms of the extent to which people are able to think and to choose, that is, to be autonomous.

The conferees will also discuss the bioethics of AIDS. Once again, American bioethicists have tended to think of AIDS as a problem in autonomy. For example, bioethicists have been critical of laws which restrict the ability of AIDS sufferers to maintain confidentiality about their disease or which require testing of pregnant women or newborn children.

Much attention in American bioethics has been devoted to decisions at the end of life. Here the principle of patient autonomy runs into the difficulty presented by the patient who becomes mentally unable to make decisions for himself. The standard bioethical solution to this difficulty has been to try to persuade people, while they are competent, to write an 'advance directive', a document that specifies how someone would want to be treated if he became incompetent and mortally ill. These documents have now been in use for some time, but the conference will ask whether they have worked in the ways bioethicists originally hoped.

Perhaps no bioethical issue has received more attention in the United States recently than the question of whether doctors should be permitted to help terminally ill patients commit suicide. Last year, the Supreme Court held that laws prohibiting P.A.S. (Physician Assisted Suicide) were constitutional. But this has not ended the controversy, for legislatures remain free to repeal those laws. One state, Oregon, has done so. The conference will ask whether this state has taken a brave step towards greater autonomy for the ill, or a grave step toward a world in which vulnerable people are cajoled and bullied into saving their families and doctors the trouble of caring for them.

Finally, the conference will examine what happens to the idea of autonomy when medical care is increasingly delivered by large organizations. Will both doctor and patient lose their ability to control medical decisions? What happens to patients' autonomy when doctors are given financial incentives to keep medical costs down? Thus, the conference will close by confronting yet again the question that will have concerned it throughout its deliberations, what new principles of bioethics might be needed when social needs are set against individual claims of freedom?



## ***Comparative Law and Politics Seminars & Forums***

Held at The University of Tokyo, Graduate School of Law and Politics, October 1997 - March 1998

### **[Seminars]**

#### **The 53rd Comparative Law and Politics Seminar - 7 October 1997**

Speaker: Professor Michael Joachim Bonell, University of Rome I “La Sapienza”, Director of the Institute of Comparative Law (Univ. of Rome I), Director of the Center for Foreign and Comparative Law Studies (Rome), Legal Consultant, UNIDROIT

Commentator: Professor Mary D. Pridgen, University of Wyoming College of Law; Visiting Research Scholar

Topic: The Role of Comparative Law in the Unification Process

Language: English

Moderator: Professor Hisakazu Hirose

#### **The 54th Comparative Law and Politics Seminar - 13 November 1997**

Speaker: Professor Albert Rosenthal, Columbia University School of Law

Topic: Separation of Church and State

Language: English

Moderator: Professor Kazuyuki Takahashi

#### **The 55th Comparative Law and Politics Seminar - 10 December 1997**

Speaker: Dr. Alice Haemmerli, Dean of International Program, Columbia University School of Law

Topic: Internationalization of Columbia Law School

Language: English

Moderator: Professor Noboru Kashiwagi

#### **The 56th Comparative Law and Politics Seminar - 10 December 1997**

Speaker: Professor Gerald J. Thain, University of Wisconsin Law School

Commentator: Professor Mary D. Pridgen, University of Wyoming College of Law; Visiting Research Scholar; Graduate School of Law and Politics

Topic: Product Liability Settlement with U.S. Cigarette Manufactures

Language: English

Moderator: Professor Hisakazu Hirose

#### **The 57th Comparative Law and Politics Seminar - 21 January 1998**

Speaker: Professor Bernard A. Rudden, The University of Oxford; ICCLP Visiting Professor

Topic: Thinking about Monetary Obligations: Why Do Law Professors Neglect Simple Monetary Obligations?

Language: English

Moderator: Professor Yoshiko Terao

#### **The 58th Comparative Law and Politics Seminar - 31 March 1998**

Speaker: Lord Woolf, Master of the Rolls

Topic: Access to Justice

Language: English (with translation in Japanese)

Moderators: Professor Norio and Professor Yukiko Hasebe (Seikei University)

## [Forums]

### **The 83rd Comparative Law and Politics Forum - 22 October 1997**

Speaker: Professor Jack Beatson, University of Cambridge  
Topic: English Administrative Law and the Influence of EU Law  
Language: English  
Moderator: Professor Norio Higuchi

### **The 84th Comparative Law and Politics Forum - 28 October 1997**

Speaker: Associate Professor William M. Sage, Columbia University School of Law  
Topic: Medical Information and Law  
Language: English  
Moderator: Professor Norio Higuchi

### **The 85th Comparative Law and Politics Forum - 18 November 1997**

Speaker: Professor Joseph L. Hoffmann,  
Indiana University School of Law; ICCLP Visiting Professor  
Topic: Recent Developments of U.S. Death Penalty Law and Procedure  
Language: English  
Moderator: Professor Norio Higuchi

### **The 86th Comparative Law and Politics Forum - 2 December 1997**

Speaker: Associate Professor Richard Cullen, Deakin University School of Law  
Topic: Freedom of the Press in Hong Kong at Present  
Language: English  
Moderator: Professor Norio Higuchi

### **The 87th Comparative Law and Politics Forum - 11 December 1997**

Speaker: Judge Young Sig Cho, Taegu High Court, Korea;  
Visiting Research Scholar of the Graduate School of Law  
and Politics, University of Tokyo  
Topic: Judicial System of Korea  
Language: Japanese  
Moderator: Professor Makoto Ito

### **The 88th Comparative Law and Politics Forum - 17 December 1997**

Speakers: Professor Liang Shou De, Beijing University  
Professor Pan Guo Hua, Beijing University  
Professor Gong Won Xiang, Beijing University  
Topic: The Study of International Relations in China  
Language: Chinese (with translation in Japanese)  
Moderator: Professor Takeshi Igarashi

## *Reports on Selected Seminars and Forums*

### **The 53th Comparative Law and Politics Seminar - 7 October 1997**

Professor Michael Joachim Bonell

The Role of Comparative Law in the Unification Process

Professor Bonell identified three roles for comparative law in the unification process: identifying the subject(s) for unification; choosing the appropriate technique of unification; and lastly, ensuring the proper application of uniform law in practice. With regards to identification, the example of agency was given a term that represents different areas of the law to different scholars depending on their country of origin. The issue of techniques was framed in terms of non-legislative methods

Professor Bonell concluded that the unification of law is not an end in itself and that it is important to realise that the unification process is a difficult one. He stated that some fields require legislation while in other areas perhaps a soft law approach would take one further. Finally he concluded that one must not forget the fate of the law once it has been put into action, there needs to be a continued exchange of experience in the application of the law so as to avoid the danger of the renationalization of something that is supposed to be international law.

Several comments were then offered by Professor Bonell and Professor Hirose. A lively discussion then ensued tackling the question of Japan's intention to ratify several of the principles discussed.

*[Richard Small]*

### **The 56th Comparative Law and Politics Seminar - 10 December 1997**

Professor Gerald J. Thain, University of Wisconsin Law School

Product Liability Settlement with U.S. Cigarette Manufactures

Until 1996 there was no effort by the FDA (Food and Drug Administration) to regulate tobacco products, the only regulations being those regarding cigarette advertising by the FTC (Federal Trade Commission). Beginning in the 1950s, the tobacco industry responded to public health concerns by advertising 'mildness' and marketing the 'filter' cigarette. While internal documents indicated the potential health hazards, industry-wide organizations were formed to jointly address and rebuke these concerns.

The 1964 Report to the U.S Surgeon General on Smoking and Health implicated smoking as a major factor in the causation of lung cancer and represented a watershed in the regulation of cigarettes. A more assertive approach was initiated by the FTC maintaining that to sell cigarettes without disclosing the health hazards would constitute an unfair trade practice. Congress intervened and required warnings labels. In the 1970s all advertising on radio and TV was eliminated by an act of Congress.

Beginning in the 1980s, the regulation of cigarette smoking was influenced by two trends. First, while smoking declined generally, there was a rise among youngsters. New marketing strategies targeted teenagers and the FTC issued complaints against 'Joe Camel' advertisements in 1997. Second, 'addiction' became a more central concept for regulating tobacco. The 1988 Report of the General Surgeon defined nicotine as addictive.

In private lawsuits and tort actions, former smokers asserted that they were injured and held the industry responsible. The industry argued that even if smoking is a health hazard, plaintiffs chose to smoke. This argument found much backing among jurors, however, is highly questionable. Criminal investigations were initiated against industry representatives who testified before Congress that cigarette smoking is non-addictive. There have been class actions by 64 law firms against cigarette companies stressing the addiction

argument and more than 100 individual suits were expected. Also 40 states have brought actions against all tobacco companies to recover costs incurred as a result of the health risks.

The FDA ruled that nicotine is a drug and classified cigarettes as delivery devices. It issued limitations on advertising and restrictions on the public availability of cigarette vending machines. It will be possible to bar nicotine entirely and prohibit cigarettes. Having a serious public relations problem, cigarette companies have been willing to accept a 'global' settlement that was negotiated between the Attorney General, cigarette companies, and private attorneys. It provides payments totalling \$368.5 billion dollars over the next 25 years and includes a ban on future class actions against the industry and on punitive damages, caps on recovery of damages by smokers, as well as limits on FDA authority. Although the final word is with Congress, the settlement signals that the regulation of smoking has taken a big step ahead.

[*Jürgen Reichert*]

### **The 85th Comparative Law and Politics Forum - 18 November, 1997**

Professor Joseph L. Hoffmann

Recent Developments of U.S. Death Penalty Law and Procedure

On November 18, 1997, Professor Joseph Hoffmann of Indiana University, currently spending one year as a Visiting Professor at the ICCLP, lectured on Recent Developments in U.S. Death-Penalty Law and Procedure.

Professor Hoffmann noted that the total number of executions in the U.S. in 1997 — 65, as of November 18 — was the highest in more than forty years. More than half of the 1997 executions occurred in the State of Texas, where legal challenges had held down the number of executions the year before. Other states with smaller numbers of executions included Virginia, Missouri, Arkansas, and South Carolina.

At the same time, the number of criminals receiving death sentences in the U.S. continues to outpace the number of executions, producing a steady increase in the population of Death Row. As of mid-1997, more than 3200 criminals were imprisoned under a sentence of death, with the highest totals in California (474), Texas (372), and Florida (350). Altogether, twelve states (out of 38 with death-penalty laws) presently have more than 100 criminals on Death Row.

Professor Hoffmann talked about recent trends in U.S. death-penalty opinion, policy, and law. In the area of public opinion, the death penalty still retains clear majority support — more than 80% — although this support weakens considerably when people are asked to consider an alternative sentence of life in prison without possibility of parole, combined with a requirement to work in prison and pay restitution to the victim's family.

In terms of legislative policy, the most important development was the decision by the State of Massachusetts not to restore the death penalty. A bill to do so initially passed both the Massachusetts Senate and House of Representatives. But upon a later re-vote, one legislator — who was influenced by the publicity surrounding the case of the British nanny, Louise Woodward (convicted by a Massachusetts jury of manslaughter but released by the trial judge) — changed his position, thus causing the bill to fail by one vote.

Case law concerning the death penalty focused on three areas in 1997: (1) How much should the jury be told about the sentencing option of life without parole, before deciding whether to impose the death penalty? (2) Does a Death Row inmate have a right to qualified defense counsel, in connection with filing state habeas corpus petitions? (3) How do the major 1996 legislative changes in the federal habeas corpus statute affect litigation in capital cases?

Professor Hoffmann closed his lecture by offering a few predictions about the near-term future of the death penalty in the U.S. He suggested that the recent rise in the number of executions would continue, but would not turn into a blood-bath. This is because most Americans support the death penalty primarily as a symbol (of getting tough on crime), but do not really want large numbers of executions. Therefore, most state governors and attorneys general have little incentive to push the pace of executions much beyond current levels.

*[Joseph L. Hoffmann]*

## **The 87th Comparative Law and Politics Forum – 11 December 1997**

Judge Young Sig Cho  
Judicial System of Korea

In this forum, Judge Cho presented an outline of the Korean judicial system, describing the organization of the Courts and of the Constitutional Court, their authorities and some conflicts between them.

### **1. Courts**

The Constitution of the Republic of Korea provides that judicial power shall be vested in courts composed of judges. The judicial power of the courts extends to any legal dispute and the review of constitutionality or legality of administrative decrees, regulations and dispositions. The courts have also the power to request a constitutional review of laws by the Constitutional Court. This request for a constitutional review is made on a motion of any party or ex officio, when the constitutionality of a law is a prerequisite issue to a trial.

Korean courts are composed of the Supreme Court, other inferior courts (High Courts, District Courts, Family Courts, the Administrative Court and the Patent Court) as general courts and Courts-Martial as special courts. The Patent Court, Administrative Court, and Municipal Courts were newly established in the latest judicial reform (amendment of the Court Organization Law in July 1994, including also reformation of the legal training system and establishment of the preparatory judge system).

As for jurisdiction of the courts, cases of the first instance are, according to the value of the subject matter, heard by a single judge (the single judge of the District Court (branch) or of the Family Court (branch)) or handled by a collegiate court (the collegiate panel of the District Court (branch) or of the Family Court (branch)). Cases of appeal from the judgment of a single judge are heard by a collegiate panel of the District Court (main office) or of the Family Court (main office), and those from the judgment of a collegiate court, by a High Court. Minor cases of the first instance are heard by a Municipal Court.

The Supreme Court has jurisdiction over appeals and election contests of National Assembly members. High Courts have jurisdiction over the election contests of members of assemblies. The Administrative Court has jurisdiction over disputes related to administrative acts, and the Patent Court has jurisdiction over actions against decisions of the Patent Office.

The courts are composed of about 1,400 judges appointed by the Chief Justice of the Supreme Court with the consent of the Assembly of Justices. The term of office of judges is ten years and they can be re-appointed. The retirement age is 63. As a qualification, it is necessary to have practiced as a preparatory judge for two years in addition to the qualification of advocate granted after two years of legal training following the Bar Examination. For the Chief Justice and Justices of the Supreme Court, some other qualifications are required.

Some procedural features can be noted as being unknown within the Japanese system. To lighten the excessive burden of the Supreme Court, an appeal can be dismissed by the decision of a “discontinuation of the trial” made by a body composed of four Justices of the Supreme Court. As for criminal cases, the period

of retention of an accused is determined for each instance, so that the entire period can not exceed fourteen months. Family Courts have jurisdiction not only over hearing cases but over trial cases, which facilitates the transition from one to the other.

## **2. The Constitutional Court**

In Korea, the power of constitutional review had been vested in the courts (for about ten years from 1962) or in the Constitution Committee. The present Constitutional Court was established by the 9th amendment of the Constitution in 1987. Though it was modeled on the German system, it has no power to review in the abstract; a concrete legal dispute is necessary for this power to be invoked. But a judgment declaring the unconstitutionality of a law shall have the effect to invalidate the said law.

The Constitutional Court is composed of nine judges appointed by the President from persons nominated: three by the National Assembly, three by the Judiciary and three by the Executive. The Constitutional Court has also jurisdiction over impeachment of public officials, dissolution of a political party, jurisdictional disputes between public authorities and direct petitions for constitutional review which consists of “remedy type” petitions and “constitutional review type” petitions. Decisions are made by a majority, but for some important matters, the concurrence of six members is required.

## **3. Conflict between the Constitutional Court and the Supreme Court**

The Constitution suggests the independence and equality of the Supreme Court and the Constitutional Court by giving provisions for them in parallel in chapters V and VI. But there are some situations where the superiority of one to the other is in question. For example, it was discussed whether the Constitutional Court has also the power to review the constitutionality of administrative decrees, regulations and dispositions, and if so, the decisions of which court shall have the ultimate authority. A similar question is raised when the Supreme Court dismisses a motion for the request of a constitutional review of a law and the Constitutional Court declares the unconstitutionality of the said law on a direct petition for constitutional review.

[*Shusuke Kakiuchi*]

## **88th Comparative Law and Politics Forum - 17 December 1997**

Professor Liang Shou De, Professor Pan Guo Hua, Professor Gong Won Xiang  
The Study of International Relations in China

This highly informative forum was composed of three sections: 1) the views and recollections of academics involved in the study of international relations in China from the standpoint of actual instructors; 2) the originality of the case of China was asserted directly; and 3) a question and answer session with the Chinese professors tackling questions from the Japanese side on the real state of affairs regarding this stated originality. The presentations on the Chinese side examined one theme from various angles introducing significant nuances and leaving a deep impression upon all those who attended.

Professor Liang Shou De spoke first about the study of international relations in China. International political science and international relations as a subject has a history going back to the 1960s. In 1963 international politics departments were created in Beijing University, Fudan University and Beijing People’s University accepting students from the following year. Studies centred upon the history and activities of the Comintern and the writings of Lenin and Marx. After the aftermath of the chaos of the Cultural Revolution of 1966, students admitted in 1977 were the first to study international politics systematically. From that time area studies, study of a particular country and theoretic research became the three pillars of the field. Particularly in theoretical studies, 1984 was an epoch-making year when classes were established and international relations theory was recognised as a subject of general education for students. Professor Liang was one of the first lecturers to start teaching this subject at this time. Not only Marxist-Leninism and Maoism, but also

American theory, occupied an important place in the syllabus. Also as a practical exercise, international issues of the day were taken up and analysed. From this time onwards theoretic texts on international relations and politics began to be published and teaching materials were decided on the basis of each region and university. Area studies, within which the study of specific countries is included, was composed of the three topics of foundational theory, foundational knowledge and study of crisis zones (or “hotspots”) in the world.

The next important period came with the changes caused by the end of the Cold War. Standards of research advanced and along with stronger teaching coming out of systematic and theoretical methods, a specifically Chinese framework began to develop. Among American scholars there are many who are outwardly opposed to this due to ideological overtones and the fact that the universal application of American theories of international politics is called into question. Professor Liang is one of the first to have advocated the originality of the Chinese case. While naturally supporting the idea of an universal application of academic subjects, at the same time Professor Liang believes in the originality of each nation, university and individual in addition to the necessity of combining universality and individualism as universality is born of individualism. American international relations is constructed from paying attention to America’s position and national interest and China is no different. Professor Liang believes that the theoretical research that takes place in late-developing nations can be put to an advantage and have something to contribute to international relations theory. Incidentally, China is similar to America in that academic cliques exist. Regionally speaking, these cliques can be divided between universities to the north and south while each university retains its own special characteristics.

In order to comprehend today’s China four points need to be addressed: 1) that it is a large developing nation; 2) it is also politically a great power; 3) it is the only nation in the world to stress a policy of “one nation, two systems”. Socialism is naturally central. However, as the level of socialism is still at an early stage, accordingly national production must be developed. Furthermore, unlike the socialism of the former Soviet Union, Chinese socialism is coloured by improving national production and promoting peace abroad. Moreover, there is a leniency learnt from recognising the existence of the capitalist system of Hong Kong; and 4) China is a nation where the traditions and civilisation of Asia originated. China’s national interest, international relations theory and conceptions of teaching this subject are based upon these four points and not simply upon the promotion of ideology.

Professor Takashi Inoguchi mentioned the American scholar John Stone and his idea that international relations theory in China is based on an independent culture stressing a realism characterised by power politics and Machiavellism. Whether it is realism or not, Professor Liang, in answer, referred back to the four points above emphasising that culture is not the sole factor and that we ought to inherit a harmonious culture. Recent Chinese diplomacy has recognised that this style is highly suitable to the post-Cold War international order. In class, issues such as economic interdependence and universal human rights are taken up and there is even a class entitled “Human Rights” and “Cultural Comparison between China and the West”.

Professor Gong added that problems exist with American scholars’ understanding of China. Because of the hundred flowers movement Chinese culture and thinking can be called Cultural Realism but from the various legacies left to us today we have inherited the most significant in the form of Cultural Realism and this makes it desirable. Of special importance is the distinction between the rule of right and the rule of might. The rule of might like that of the first emperors was not successful and rare in recent history when China has been weak. Professor Takeshi Igarashi stated that China as a large nation has an impact outside of China with its domestic policy. Therefore, not just confined to foreign policy, he wondered whether there is a necessity to “edit” into domestic politics the conception of international relations and adjust to each foreign nation in question? In reply it was stated that domestic politics having an external impact is a common problem for all large nations. Recently at the 15th Chinese Communist Party Conference there were three new foreign policy aspects decided: 1) China’s national interest must be broadly in keeping with world peace and development; 2) other nations’ national interest must be taken into consideration as a premise of national

interest; and 3) national interest must be thought about with respect for international law and the UN Charter. Unlike Chinese policy, it was suggested there has been no statement in American official documents stating a preference for international society rather than national interest. Incidentally, recent Chinese diplomacy was seen to have demonstrated two trends: 1) the construction of an equal and strategic partnership with each neighbouring nation and each great power, including America; and secondly, a call for these neighbouring nations and great powers to co-operate as we approach the 21st century. It was hoped that international misunderstanding could be avoided in addition to stressing the distinctive nature of taking world peace and development into consideration. As a final comment the thinking of Confucius and the basic concept of peace between heaven, earth and man was stressed as having had the greatest influence of all thinkers.

*[Kaoru Iyokibe, translated by Hugo Dobson]*



***Visiting Research Scholars of the Graduate School of Law and Politics October  
1997 - March 1998***

**Kyu-Lin Cho**, Professor, Chungbuk National University, Korea

Term: October - November 1997

Research Area: Legal Problems connected with Tertiary Educational Administration

Host: Professor Mitsuo Kobayakawa

**Chul-Song Lee**, Professor, Hanyang University, Korea

Term: October 1997 - September 1998

Research Area: The Equity of Financial Allocation in Japan and the Harmonization of Financial  
Businesses' Autonomy and Profit-Making

Host: Professor Shinsaku Iwahara

**Sun-Hee Yun**, Professor, Sangji University, Korea

Term: December 1997 - February 1998

Research Area: Intellectual Property Law: A Comparative Study of Japan and Korea

Host: Professor Nobuhiro Nakayama

## **Part II**

### **PROFESSOR LANDO ON UNIDROIT**

BY NOBORU KASHIWAGI  
PROFESSOR OF THE UNIVERSITY OF TOKYO

Professor Lando is the chairman of the Commission on European Contract Law and an important member of the UNIDROIT working group on Principles of International Commercial Contract. He is also Professor of law at the Institute of European Market Law, Copenhagen School of Economics and Business Administration in Denmark. The following is a report compiled by Professor Kashiwagi of the speech made by Professor Lando on Nov. 16, 1996.

Professor Lando spoke about the principles of European contract law and how they were established.

In the 70s and 80s, it was more and more strongly felt among some lawyers in Europe that it was not very practical to have different legal systems on contract law. Europe had many rules in common. The common market established common rules on competition, restricted trade practices, export and import. The public sector was being unified in Europe. However the law of contracts was still very different in the private sector or the commercial sector. It was thought of as a kind of restraint of trade. Business people who traded abroad often felt very insecure when they traded with people from other countries as they did not know the laws of the country of the other party.

That is an impediment to trade. In order to obviate that, the Commission on European Contract Law was established. At the same time the UNIDROIT Principles were being drafted. They are for the world, whereas principles on the European Contract Law are for the European Communities.

The group who participated in the drafting contained law academics. At the beginning there were only 9 members of the drafting group. Then later, it became 12 members of the European Communities and now there are 15 members. Today the Commission on European Contract Law is still working and has members from all the 15 EC or European countries. It now consists of 22 members. The bigger countries such as Italy, France, Germany, England to Belgium and Holland have two members and the smaller countries have one member. The United Kingdom even had three members at one point. The membership now consists of 22 lawyers from the 15 member states.

The Commission on European Contract Law received subsidies from the European Communities. The European Commission has paid most of expenses so far, however now it is also financed by private funds.

None of the members of the commission are appointed by a government. It is important to avoid the government politics. It was important to have draft rules which academics thought were the most appropriate, in a manner similar to the UNIDROIT Principles. The working groups on the UNIDROIT Principles were selected by the UNIDROIT and not by the governments, in order to safeguard independence of the group.

The Commission started working on rules on performance of contracts, on non-performance and on the remedies for non-performance. The first part of the principles were published. It contained many articles. These articles are provided with comments which explain the purpose of the law and its interpretation. Sometimes practical illustrations and examples of how the rule operates are provided. In addition there are notes, called reporters' notes. In these notes, relevant laws of the 12 member states (now 15 member states) are explained. This is important for those who are reading to see how the articles correspond to the

respective system of member states.

Some references to American law and Swiss law are also included. Rules on formation of contracts and on authority of agents, what the Germans call "Vollmacht", have just been finished, but not yet published. The validity is dealt with in chapter 3 and chapter 4. The interpretation is dealt with in chapter 5. Chapter 6 is for competence. Chapter 7 is for performance and chapters 8 and 9 are for breach and non-performance.

The Commission on European Contract Law consists of the full commission. There is a drafting group of five in number. The discussion process is as follows: first, a report is submitted, the draft is shown in front of the drafting people who meet in different cities, in Paris, in London or in Copenhagen to discuss the draft. A heated discussion will then ensue. Often a vote will be taken as to the draft. Generally the Commission will follow the majority. When the drafting group's proposal comes before the Commission, it will be discussed by the full commission.

Professor Lando then spoke about the differences between the legal systems. There is the major difference among the civil laws in the European countries. The German law and French law are of course outstanding representatives of the civil law. The German law is of course quite influential in the drafting group, as is the French law. The main difference in technique and in attitude between the common law and the civil law, which is felt stronger now. On the continent, people tend to be more open to ethical considerations. People think that they have a common moral and moral attitudes. Thus if unethical behavior is believed best to be avoided in connection with commercial contracts on the Continent, then people believe that the legislator should intervene.

In England, the attitude is different. In England, it is believed that there should not be intervention in commercial contracts on the grounds of ethical or moral reasoning. People should be free to enter contracts at their own will. So in England and in the UK law, there is less interventionistic attitude towards contracts. They will leave many questions open to the will of the parties. Whereas on the continent there is a tendency to intervene. This interventionistic tendency is stronger in the Nordic countries, maybe also in Germany and in Holland, than it is in countries like Italy, Spain and Portugal. There is such a slight difference even on the continent.

There is another difference of attitude noticed in the drafting group. In some countries, the idea is to establish general principles which are not to be too detailed. This idea follows the famous words of Portalis, who was a draftsman of the Civil Code of France who lived at the turn of 18th to 19th century. He said that as the rules should be full of implications, they should leave the courts to give the details. They should not be too detailed. This philosophy is followed in the Nordic countries, also to some extent in France and also in some of the German schools, although in Germany the schools are divided.

England, however, there has been a tendency to be more detailed for historical reasons, because the English legislator has been confronted with a sort of hostile attitude of the courts. Because of this hostile attitude, the English have been eager to draft the rules as detailed as possible, to prevent the courts from going around the statute. So the English have been in favor of great details. Whereas, the other countries, France the Nordic countries, and Holland to some extent, are in favor of more general rules.

Another topic is the formation of contract. This is a tricky subject, but it is important because there are different rules on the effect of contracts. Having different rules on the formation of contracts is dangerous, because someone may go to France and enter into negotiation there without knowing when in France he will be liable on what he has said and done. Whereas he knows in Denmark he is not liable for promises made during the negotiation, he may be liable in another country and vice versa. So it would be useful for negotiations in Europe if the rules on the formation of contracts were uniform.

Among various models for making contracts, the model which is in your code, and also in the Danish code, is what is called the offer and acceptance model. A person A, writes to another person B offering him a contract. The person B writes back and says I accept the offer. If acceptance is made in time and is clean, there is no difference between the offer and acceptance, there is a contract. This way of making contracts is the traditional offer and acceptance model. That model has also been used in the Japanese code and the American code. However there are other models for making a contract. These are more simple. For example, one drives one's car into a parking lot, parks, gets a ticket, puts the parking ticket in the slot machine which tells one how much to pay, one puts in the coins, one gets a new ticket and drives out. That is the way to make a contract without using any words and just by acts. Or, for instance getting on a bus and just putting the ticket or coins in the slot machine without exchanging words.

There is another model too which is important. It is called the consecutive negotiations model. This is often the way in which major contracts are prepared. Lawyers, accountants, economists, engineers of large corporations have meetings and exchange letters, these contracts may take many months to make. For instance a construction contract for an oil platform in the open sea to extract oil. To build a big oil rig costs as much as to build a motor road from Copenhagen to Paris. These contracts are not made by exchanging offers, followed by acceptance. They are made through careful negotiation. When the contract is finally agreed upon, it is a contract of many pages. It is then exchanged between the members to be signed and sealed. It is very important that the rules be made uniform. So both the UNIDROIT Principles and the Principles of European Contract law have tried to make uniform rules on the formation, including at the pre-contractual stage. Namely the question whether parties are liable for the negotiations. In all the laws of the European communities, a party is free to start negotiations, even if he does not know if he will conclude the contract or not. He may also break off negotiations and in general he will not have to be responsible for this reason.

But some laws impose a so-called pre-contract liability upon a party who negotiates or who breaks off negotiations contrary to good faith. This liability mostly arises in the consecutive negotiations model. Some countries, including several countries in Europe, have rules which impose liability for breaking off contracts contrary to good faith. The origin of that rule is the German scholar Rudolf von Jhering. He established a doctrine in culpa in contrahendo, which, when translated from Latin, means a fault in the negotiation process. It influenced German, Austrian and Greek law. Each party has a duty of care or of good faith behavior in the negotiations. This rule is found in most of the European countries except for England. English law does not impose any specific duties on the party to enter into or continue negotiations in good faith. That also reflects the point that in England they are less interventionistic. In England they say that people can do whatever they like during the negotiations phase. In continental Europe, parties have to behave in accordance with good faith.

The Principles on European Contract Law did not completely adopt British attitudes. In England there is a trend towards Europeanization of the British common law. More and more lawyers tend to be impressed by continental law. Continental lawyers are also in some respects impressed by the common law, which is in many respects superior to the continental law. In respect of the good faith principle in the negotiations, the UNIDROIT group persuaded the common lawyers to accept the principle. A party is free to negotiate. He is not liable for failure to reach an agreement, that is the main principle. However, a party who has negotiated or broken off negotiations contrary to good faith is liable for the losses caused to the other party.

It says its contrary to good faith for a party to enter into or continue negotiations with no intention of reaching an agreement with the other party. Party A intends to enter the trade as a competitor of B. He enters into negotiations with B. He claims to be interested in becoming B's sales manager. B in good faith pays A's travel expenses and a short training program for A which A has wished to join before signing the contract.

Then, when A has got the information about B's sales and production methods, which he can use as a future competitor of B, he breaks off the negotiations and starts his own enterprise. This behavior is considered to be contrary to good faith and therefore A would be liable for his unethical behavior.

Another question is whether an offer can be revoked. The Japanese position is if one makes an offer in a commercial setting to another person, the offer may be irrevocable for a certain period of time. If the offer says that this offer stands valid for ten days and if the offerer does not have an answer in 10 days the offer lapses, then the offer is irrevocable during these ten days under Japanese law. Of course you can say that this offer is not binding. There is the same rule in the Nordic countries and also in Germany and in Switzerland.

But the rule is quite opposite in the common law world. The general rule in England and in the United States is that an offerer can revoke an offer until it is accepted, subject to the special rules in the Uniform Commercial Code. In England it is even stronger so that even if an offer says that this offer is irrevocable, the offerer is not bound by it. Since there was great disagreement about this rule, when the commission drafted the UN Conventions on Sales Contracts, which is now in force in 45 countries, they made a compromise between the irrevocability and revocability. The general rule is that until an offer is accepted it is revocable. But an offer may be made irrevocable. The UN Convention on Contracts for the International Sales of Goods states that the offer cannot be revoked (a) if it indicates whether by stating a fixed time for acceptance or otherwise that it is irrevocable, or (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance of the offer. This is a compromise.

In the UNIDROIT Principles that rule was not changed. The UNIDROIT Principles have the same rule. However, in the Principles of European Contract Law, common law lawyers were successfully persuaded. Article 202 provides "an offer may be revoked if a revocation reaches the offeree before he has dispatched his acceptance. "That is the main rule but then in paragraph 3 it is provided that "A revocation of an offer is ineffective if the offer indicates that it is irrevocable or it states a fixed time for its acceptance. "So this rule purports to be clear: any fixing of time makes the offer irrevocable. Professor Lando believes that the rule is preferable to that of the UNIDROIT Principles and that of the CISG (The Vienna Convention).

The last point is the question on the battle of forms. The battle of forms comes up in the following situation: any big company has standard form contracts which they use. General conditions of contract are printed. This very often happens to contracts selling things and also providing services. However the other party also often uses a standard form contract. So when a selling enterprise like Toyota sells their cars to a foreign country, they use their standard form contract, but if the purchaser also uses his standard form contract and the standard form contracts contradict each other, problems will arise. It very often occurs, at least, in Europe. In the seller's conditions there often is a disclaimer of liability clause saying that sellers are not liable for defects in the car, or sellers offer only repairs or replacement. A buyer cannot terminate or avoid the contract if the car is defective. He may get a new car or get it repaired. He may not claim damages. But there may be a provision in the buyer's standard form contract that if the car is defective the buyer can claim repair and replacement, terminate the contract and claim damages if the buyer suffers damages through it. Let's assume that one party, the seller, sends out his standard form contract and the buyer accepts the contract. But then the buyer supplies his own form and says we accept under the condition that our rules on our form applies. This happens very frequently in both Europe and the United States.

One may say that if there is a discrepancy there is no contract, because in most countries there should be an identity in offer and acceptance. A mirror image rule applies. However, it is not very practical to say that there is no contract, because both parties often believe that they have a contract. The main reason for this problem is that the parties often do not read each others contract forms carefully. They agreed on the price and on the specifications of the goods, but they did not agree on the rest because they did not read it. Under the normal contract rules there is no contract because there is no identity between offer and acceptance.

However this is impractical for several reasons. Parties want a solution, but they do not wish to avoid the contract. It would be contrary to good faith to have the contract avoided because parties have already started performance of the contract. There are very different attitudes about this problem in the world. I have the impression that in America the conditions of the offerer very often prevail. That means that the person who comes first, who fires the first shot, makes his offer, his conditions will prevail. Of course there are certain exceptions to this rule. In Germany they had the opposite rule before. The rules were that the person who fires the last shot prevailed, but now they have changed the rules in line with the American rule. In England the issue is very controversial, the case law does not show very much.

Neither of these solutions are very satisfactory. The Germans changed their law, and they changed in the same direction as seen in the Principles of European Contract Law and in the end in the UNIDROIT Principles, drafted the rules.

These rules say that if the parties have reached an agreement except that the offer and acceptance refer to conflicting general conditions of contract, a contract is none the less formed. The reason of this provision was that it was uncertain under English law. The general conditions form part of the contract to the extent that they are common in substance. So when they are common they form part of the contract. However, no contract is formed if (1) one party has informed in advance that he does not intend to be bound on the basis of this rule, or (2) one party without undue delay informs the other party that he does not intend to be bound by the contract. There is a definition on what general conditions of contract are, but the gist of the rule is not expressed in the rule. Like the UNIDROIT Principles, the general conditions form part of the contract to the extent that they are common in substance.

However, there is no provision about those conditions that are not identical. The idea is that the general rules of law apply, but it is not necessary to say that. The UNIDROIT Principles have expressed the same idea, but this rule cannot cover every situation because there may be terms in a contract where the laws do not apply. For example, a big firm was importing marble cyanide, a raw material. They had in their standard form contract a rule saying that if this cyanide contains less than 60% aluminum then they would not be buying it and may terminate the contract. The seller was a big Asian firm. They had their own contract form which said that they do not guarantee more than 50% aluminum. Now there is no rule in any law that says whether there should be 50% or 60% aluminum in cyanide. So the above principles may not be used here and the general usage in the trade should be found. The problem was not easily solved. In this case, maybe the last shot should prevail, which means that maybe the buyer should be victorious.

# **REGIONALISM AND UNITED NATIONS PEACEKEEPING ACTIVITIES: DEVELOPMENTS AND PROSPECTS**

BY

HUGO DOBSON  
ICCLP RESEARCHER

In this paper I will highlight two conspicuous trends of the post-cold war world: the growth in regionalism as the focus of international politics and security, and the expansion both qualitatively and quantitatively of United Nations sponsored peacekeeping activities. After discussing the development of these two trends, I will bring these two strands of thought together by examining the interface between regional organizations and UN peacekeeping while making some tentative observations on the efficacy and future of pooling the resources of the UN with regional organizations in the field of peacekeeping. I will suggest that regionalist and globalist approaches to world order can be combined and regarded as a positive development in providing public goods in the form of the restoration of public order, the minimisation of conflict and can result ultimately in the promotion of regionalism in a positive sense.

## **Regionalism and World Order**

With the end of the cold war old regional organizations, like the OAU and the OAS, have taken on a new lease of life and have been accompanied by new regional organizations, like the Gulf Co-operation Council (GCC), the Economic Community of West African States (ECOWAS) and the ASEAN Regional Forum (ARF). The collapse of the cold war structures of bipolarity have led to regional matters dealt with by these organisations being pushed to the forefront of international politics. With the US and the Soviet Union no longer able to play the dominant superpower roles in the world, regional conflicts have become much more visible, ferocious and problematic. The Persian Gulf War and the US role therein may have given the impression of continuing US hegemony, but this undertaking experienced a great deal of opposition both at home and abroad and the US was forced to rely upon Germany, Japan and the Arab nations to finance the war. Another multilateral intervention lead by the United States like that seen in the Persian Gulf War is highly unlikely and is probably the exception rather than the rule. The result is that in the future world order will no longer be maintained by a hegemonic state like the US and in the absence of a hegemonic state actor regional conflicts can be expected to increase in number and severity. With the removal of the structure of bipolarity and the decline of the US in its hegemonic role, regional crises, without the supervision of a superpower, now have the potential to become the predominant form of conflict.

At the same time the number of regional organizations in existence has increased rapidly. Certainly regional organizations existed before this, but their role and room to manoeuvre was greatly constrained by the confrontation between capitalism and communism. During the height of the cold war, Moscow and Washington viewed regional organizations with suspicion. On the one hand, the Soviets opposed these regional groupings as they could contain a conflict which may otherwise have provided grounds for Soviet intervention in a part of the globe normally cut off from its influence. On the other hand, Washington only regarded regional groupings of use if they were tied into the US security system pointed at the Soviet Union. With the collapse of bipolarity and the relative decline of the US, there is no longer any global security process that involves the intervention of the superpowers, and thus, the ability of regional (and equally, international) organizations to play a role has been encouraged.

## **The Evolution of UN Peacekeeping and the End of the Cold War**

Those who created the UN were imbued with a profoundly Wilsonian belief that consensus between the great powers could be reached on most issues. However, with the onset of the Cold War it soon became evident that this consensus would not be achieved and, as a result, contingency plans (including peacekeeping) were introduced in an attempt to navigate the UN through the turbulent seas of the East-West confrontation. However, if one observes the post-cold war work of the UN, there appears to be enough evidence to suggest

that the UN is experiencing a new lease of life and a return to the pre-cold war ideals of the founding fathers - success in Namibia, Cambodia and El Salvador, and an unprecedented presence in the internal affairs of Somalia and Bosnia, to mention but a few. Furthermore, with a widening in the definition of security to include economic, environmental and cultural dimensions, and the increasing number of transnational flows, particularly in the developing world, leading states to question the inalienable right of sovereignty. With the result that the UN appears to be positioned perfectly to address the issues of the post-cold war international system.

Issues such as governing exchange rates, controlling the level of whaling, nuclear proliferation and ethnic conflict resolution have forced states to find collective answers, and to this end, the role of the UN has been greatly enhanced. A comprehensive framework for international action has been developed by the UN since 1992 with a series of connected and accumulative conferences being inaugurated in a variety of fields: environment and development (Rio de Janeiro, 1992), human rights (Vienna, 1993), natural disasters (Yokohama, 1994), population (Cairo, 1994), the position and advancement of women (Beijing, 1995), and housing (Istanbul, 1996). For all states, the UN represents an arena where global problems like population movements and the depletion of the biosphere can be addressed. With the demand for the UN to play a role increasing all the time, Paul Kennedy is right when he paraphrases Voltaire in saying that “if the UN system did not exist, much of it would have to be invented.”

Turning to UN peacekeeping, the idea of peacekeeping has a history going back to before the creation of international organizations, however, nowhere in the UN Charter does the term “peacekeeping” appear. The term peacekeeping came about afterwards in the late 1950s. The International Peace Academy has defined the term as “the prevention, containment, moderation and termination of hostilities between or within states, through the medium of a peaceful third party intervention organised and directed internationally, using multinational forces of soldiers, police and civilians to restore and maintain peace.” This definition is worthy of attention because it de-emphasises the action of enforcement and places the emphasis upon mediation and negotiation. The theoretical underpinning appears to be that violence and conflict can be controlled and limited through non-violent means and through the processes of negotiation.

Since the end of the cold war UN peacekeeping operations have been regarded as having developed both in character and in number. Not only has the number of peacekeeping operations undertaken since the end of the cold war dramatically increased, the actual undertaking of peacekeeping has altered intrinsically. The most obvious examples of which are: 1) the emphasis on humanitarian assistance; 2) involvement in internal conflicts, despite previously respecting the principle of state sovereignty; and 3) a delineation of peacekeeping duties into preventive peacekeeping, peacemaking, peacebuilding, and peace enforcement has taken place. Whereas first-generation peacekeeping involved predominantly the deployment of a military force between two, or more, warring factions, with their consent and agreement to search for a political settlement, second-generation peacekeeping has been defined by Stephen Ratner as “UN operations, authorised by the political organs or the Secretary-General, responsible for overseeing or executing the political solution of an interstate or internal conflict.” Certainly some UN operations during the cold war can be categorised as second-generation operations, like the ONUC operation in the Congo. However, generally speaking, the new peacekeeping has been undertaken since and was facilitated by the relaxation in tensions between the US and the Soviet Union.

### **Co-operation between the UN and Regional Organizations Past and Present**

Regional organizations have experience of conducting peacekeeping operations independently of the UN, for example, the OAS in the Dominican Republic in 1965, the League of Arab States in Lebanon in 1976 and the OAU in Chad in 1981. There are even isolated examples of regional organizations, e.g. the OAS in Guatemala and the OAU in Ethiopia, working with the UN during the cold war period. However, due to a variety of reasons including a lack of unity, a limited membership, a lack of legitimacy and the overbearing East-West confrontation transforming regional disputes into global conflicts to be dealt with solely by the superpowers and occasionally by the UN, regional organizations never managed to fulfil the prospect of Chapter VIII of the UN Charter.



In response to the vast number of requests in the post-cold war world, the UN has suffered a decline in its ability and credibility to keep up with demand. From 1992 to 1995 the UN peacekeeping budget rose dramatically from \$1.7 billion to \$3.6 billion, force numbers rose from 11,000 to 62,000, but administrative staff only rose in number from 10 to 15 during the same time. To further compound these problems, the US demanded during the same period a reduction in its share of the peacekeeping budget from 31% to 25%. Recent large-scale UN peacekeeping activities in Somalia, the former Yugoslavia, and Rwanda have failed or experienced serious setbacks. Fears were expressed in June 1995 that the UN would be unable to reimburse states for their peacekeeping contributions and unless reimbursements were suspended the UN would be left with only three weeks' worth of funds by the end of that year. Thus, recently, with economic and political reforms a necessity, the UN has sought to seek assistance in dealing with regional conflicts by soliciting the help of regional organizations. *Try Africa first!*, or *Asian solutions to Asian problems* have become oft-quoted demands for approaches to world order based on a regional perspective. During the Gulf crisis, former Secretary-General Perez de Cuellar proposed that in "dealing with new kinds of security challenges, regional arrangements or agencies can render assistance of great value." This trend has been promoted most fervently by Secretary-General Boutros Boutros-Ghali:

In this era of opportunity, regional arrangements or agencies can render great service...the Security Council has and will continue to have primary responsibility for maintaining international peace and security, but regional action as a matter of decentralisation, delegation and co-operation with the UN could not only lighten the burden of the Council, but also contribute to a deeper sense of participation, consensus and democratisation in international affairs.

Boutros-Ghali is regarded as having resurrected the terms of the Charter referring to the role of regional organizations in his *Agenda for Peace*, and as a result, in January 1993 the Security Council formally invited regional organizations to explore ways in which peacekeeping could be improved within their own sphere of influence. It has been argued that the UN has re-found Chapter VIII of the Charter which deals with the role of regional organizations in achieving world order.

For example, in Latin America the OAS had experience of peacekeeping duties going back to 1965 originating with its participation in a US-led force in the Dominican Republic. However, during this period the work of the OAS was often involved little more than imbuing the foreign policy of the dominant hegemon, the United States, with legitimacy. All the above actions were essentially unilateral actions initiated by the United States. This trend began to change with the OAS working hand in hand with the UN in carrying out election monitoring and demobilization of guerrillas in a number of UN Central American operations, for example ONUCA, ONUVEN, ONUVEH and ONUSAL. In addition to this, the OAS also addressed the problem of Panama in the wake of General Noriega's rejection of May 1989 election results, President Fujimori's suspension of the Peruvian constitution in April 1992, and Guatemalan human rights' abuses. Although not in tandem with the UN, the OAS was successful in each of these cases in bringing the factions involved to the negotiating table and playing the role of peacekeeper in the absence of the UN. Recently suggestions have been made that the OAS can take the lead in conflict mediation, expand its peacekeeping activities undertaken so far, and possibly develop this role to sanction an inter-American peace force to restore democracy.

The case of Haiti demonstrates the possibility of the OAS and the UN working together. It was the OAS who first called for the imposition of sanctions against Haiti and pursued this policy within the UN with the aim of bringing Jean-Bertrand Aristide back to power. The fact that these sanctions were successful in initially forcing General Raoul Cedras to stand down in July 1993, despite later events, only adds to the credibility of co-operation between the OAS and the UN.

Alternatively in Africa due to a lack of resources, ideological divisions and in reaction to the experience of the ONUC operation in the Congo, the main African regional organization, the OAU, failed during the cold war period to contribute significantly to any major multinational peacekeeping operation. Some have even ventured that during the cold war peacekeeping was anathema to many African states. The OAU refused to sanction the dispatch of African troops under its aegis to the crisis in the Congo and similarly a role in the resolution of the Southwest African conflict was curtailed by limited resources. In these crises, as in the Biafran secession,

the role of the OAU was further limited by the dominant role of the UN which tended to be the more capable, less divided, and therefore the preferred peacemaker. One other reason for the failure of the OAU to realise a role for itself could be the onus that many relatively new states place upon their sovereignty. A role could, however, be seen in the OAU offering good offices for the discussion and settlement of disputes, as seen in the Somali-Kenyan dispute (1963-1964), Rwanda-Burundi disputes (1963-1972), and the Nigerian civil war (1967-1970). Through to the 1980s and 1990s conflicts in Angola, Mozambique and Namibia, conflicts of an essentially colonial nature, have been dealt with by the UN and the OAU with the OAU playing a role of pressurising and making the international community aware of these conflicts and encouraging political support for UN actions. Furthermore, in the case of Africa the OAU is not the only regional organization co-operating with the UN. The unsuccessful UNOMIL operation in Liberia was initiated following military action by ECOWAS and responsibilities for this operation were shared equally between the UN and ECOWAS. There are now over 500 UN observers working with the military forces of ECOWAS.

Yet the weaknesses of regional organizations in Africa have tended to hinder any independent action and encourage dependence upon the UN. The example of Chad demonstrates the inability of the OAU to organise its own peacekeeping operations due to a lack of financial and political support, a vague mandate, and a wariness of using force. In this dispute the OAU's role was once again limited to that of providing good offices. A similar role was envisaged for the OAU in the Somali conflict with the adoption of an arms embargo under Resolution 733. The OAU's role, along with that of the Arab League and Organization of Islamic States, was to secure political support amongst its members and attempt to approach a cease-fire agreement.

The OAU has constantly been crippled by financial problems and in the case of Chad was unable to bear the payment and upkeep of troops, depending on the contributions of its more generous members. Added to this is procedural system which lacks clarity in defining the role of the OAU's Secretary-General in OAU peacekeeping operations. However, the UN has worked with the OAU in Rwanda and Burundi. Furthermore, the OAU in collaboration with the UN played a central role over the issue of an independent Western Sahara managing to bring the various factions to the negotiating table and proposing a joint UN-OAS monitored cease-fire and referendum adopted by the Security Council on April 29th 1990. Encouragement has also come from the United States for the OAU to develop its peacekeeping capabilities with the aim of mounting large-scale operations by the year 2000 and applauding its creation of a conflict resolution centre. Proposals have been put forward by both President Robert Mugabe of Zimbabwe and former British Foreign Minister, Douglas Hurd, for greater co-operation in the field of preventive diplomacy between the UN and the OAU.

In Europe NATO began to address the role it would play in the post-cold war world and began to reinvent itself with discussion of its peacekeeping role towards the end of 1991 and by the end of 1992 had enlarged its peacekeeping mandate. At the same time as formulating the framework under which contributions would be made to UN peacekeeping, NATO was beginning to involve itself with UN peacekeeping activities. In July 1992 NATO naval forces were dispatched to monitor the UN embargo against Serbia. The UN and NATO managed to work together in surveillance of the conflict with NATO contributing a number of AWAC planes to monitor the no-fly zone over Bosnia-Herzegovina, and also in self-defence missions including swift air strikes carried out by NATO but sanctioned by the UN Secretary-General. Plans were even touted for a coalition of regionally concerned Muslim countries to dispatch a force to fight alongside the Bosnian government in tandem with the withdrawal of UN troops. The interface between the UN and NATO represents one of the major developments of the UNPROFOR mission when previously these two organizations had shared no formal links through the cold war period. Also within Europe, the Conference on Security and Co-operation in Europe (CSCE, now the Organization on Security and Co-operation in Europe (OSCE)) has played an important role in preventive diplomacy particularly in the protection of the rights of minorities. Since the first mention of peacekeeping in the Prague Document on Further Development of CSCE Institutions, CSCE missions have been sent to Georgia, Nagorno-Karabakh, Estonia, Moldova and Tajikistan with the objective of preventing ethnic conflicts from escalating. In contrast to the military enforcement roles that NATO has been playing, the OSCE has been developing the conflict prevention,

provision of good offices, and crisis management aspects of peacekeeping. The Commonwealth of Independent States (CIS) also made moves in this direction and there is now a predominantly Russian-led operation in Georgia, given the veneer of respectability by the presence of UN observers as the CIS has yet to be recognised as a regional security arrangement by the UN. The West European Union (WEU) promised in the Petersberg Declaration of June 1992 to deploy WEU military units on peacekeeping operations, dispatching naval forces to the Adriatic in July 1992 and in June 1993 establishing a single command with NATO.

### **Advantages and Disadvantages of Co-operation**

Examining the previous section, it can be said that regional organizations can provide a greater consensus and legitimacy for a peacekeeping operation. If a UN peacekeeping operation contains a regional angle it can often be more acceptable to the various warring factions. It seems reasonable that regional conflicts are more likely to be resolved *en famille*. By a process of co-operation the UN can in conjunction with regional organizations acquire a greater working knowledge of the conflict in question and a more well-defined sense of legitimacy in the conduct of its peacekeeping operations. In particular, Nordic nations have attempted to achieve this kind of cultural awareness through a variety of training courses organised multilaterally by Denmark, Finland, Norway and Sweden. These regionally organised and obligatory courses for potential UN peacekeepers is based on the philosophy that:

If an understanding of these [cultural] differences is not put across, you will run into problems.

This is because you can approach people in the wrong way particularly as a peacekeeper. A peacekeeper does not use a weapon, rather he uses his capacity to negotiate as a weapon, and, therefore, it is very important for him to know what kind of person is on the other side of the table....That understanding and knowledge will give them [peacekeepers] the right attitude.

This regional system of mutual training has been in place since 1964 and makes a point of differentiating peacekeeping duties from regular military duties. Although rejected by many other nations which refuse to recognise a difference between national defence and peacekeeping activities, this regional approach appears to be the most appropriate way to address changes in the substance of peacekeeping.

Not only can the UN's role be legitimised because of the contribution of a regional organization, the UN itself can help to legitimise the role and existence of regional organizations. For example, co-operation in UN peacekeeping activities is one area where NATO is able to assert itself now that the Soviet threat, its *raison d'être*, has collapsed. To summarise, the point that needs to be stressed is that UN peacekeeping operations and the regional approach to conflict resolution are beginning to converge with the end of the cold war. However, that is not to exclude other approaches to conflict resolution. A division of labour between the unilateral, bilateral, regional and global approaches must be decided upon in the light of the particular conflict. In a number of cases regional organizations have shown themselves to possess the wherewithal, specialised knowledge and regional edge to aid the UN navigate its way through a regional conflict.

Although evidently weak in military power, regional organizations have shown themselves to be persuasively strong in diplomatic power and have achieved some success in offering the diplomatic window of opportunity for warring parties to conduct negotiations. With an advantage in the earlier stages of a conflict, it would seem logical for regional organizations to play a greater role in preventive diplomacy, arms control supervision and monitoring of border disputes in co-operation with the UN. Financial and personnel support could also be provided by regional organizations, however, judging by the evidence in this paper the contribution of personnel within only traditional peacekeeping operations would be recommended; the deployment of personnel on peace enforcement operations would have to be questioned.

One weakness of a regional approach to peaceful conflict resolution may be the ambiguity of the terms *region* and *regionalism*. Not only are many regional organizations not yet mature enough, the definitions of many regions are often fuzzy. Karl Deutsch remarked that:

For the political scientist the definition of a region is considerably more difficult than the definition of a rose was to Gertrude Stein. We cannot simply say, "A region is a region is a region."

The problem derives from the fact that regions are anything but geographically defined, but are more political and societal entities. Proximity is certainly an issue but hardly a sole defining factor. This is, however, one weakness that Boutros-Ghali has attempted to turn into a strength. Chapter VIII is unsurprisingly vague on what does and does not constitute a regional organization, it “could include treaty-based organizations, organizations for mutual security and defence, those established for regional development or for co-operation on a particular topic or function, or groups created to deal with a specific issue of current concern.” Thus, the definition is left unclear enough to include any organization of states that can serve the purposes of the UN.

Still, regional organizations differ in their development and utility in combining with the UN in providing useful peacekeeping solutions and the further expansion and development of regional organizations is required in areas which suffer from *contested regionalism* and weak regional identity. One factor which can lead to this is if a regional hegemon is attempting to assert dominance over a regional organization leading to old regional antagonisms rising to the surface. This was definitely the case with Nigerian dominance over operations in Liberia and may possibly prove to be the case with Russia’s contribution to peacekeeping operations in Georgia. The failure of the Arab League and GCC (Gulf Co-operation Council) to act during the Gulf crisis came down to historical, political and ideological disputes between Egypt, Iraq and Saudi Arabia over leadership of the Arab World. In contrast, the EC possesses the material resources to address the former Yugoslavia but has failed to demonstrate any unity in co-ordinating its policy.

The idea that a regional approach can provide a degree of familiarity with a particular conflict can often be offset by historical and local rivalries. An example of problems the UN can face when it does not possess legitimacy on a regional level can be seen in Papua New Guinea’s objection to UN involvement in the secessionist war in Bougainville. The UN has been described by the government as “international do-gooders [whose] uninformed remote deliberations could in fact be responsible for more suffering and death.” SAARC (South Asian Association for Regional Co-operation) has deliberately tried to avoid security issues due to the political in-fighting that occurs with Pakistan resisting Indian dominance and India attempting to prevent an alliance of a smaller states ganging up against it. The SAARC has yet to find a role for India which can satisfy and facilitate the participation of Pakistan and other smaller members. The conflict between India and Pakistan for influence has hampered the development of SAARC and hindered a UN sponsored solution to the conflict in Afghanistan. Within the GCC, Saudi Arabia’s leadership role has been accepted by smaller states. The way in which the GCC is lacking is its vulnerability to more powerful, adjacent states, like Iraq. NATO has proved to have the security mechanisms lacking in the CSCE necessary to fulfil a peace enforcement role in Europe and has demonstrated them in Bosnia. However, NATO has suffered from Turkish-Greek disagreements over its military budget, especially as NATO was preparing to launch a large-scale operation to evacuate UN forces from Bosnia. The OAS has been unable to play a role that conflicted with US interests. Regional co-operation in Northeast Asia has also been hampered by the Russo-Japanese dispute over the Kurile Islands. Regional organizations will only have a role to play in areas where a status quo is generally accepted and not disputed.

It has been stated that one weakness of regional organizations is that they often do not have provisions for undertaking peacekeeping operations within their charters. However, it must be remembered that neither does the UN. It is more accurate to suggest that regional organizations do not possess the experience of conducting peacekeeping operations. Furthermore, their bureaucracies are often small and limited in the duties they can shoulder. Even larger regional organizations, like the EC, may be highly developed both politically and economically, but are lacking in the framework to initiate peacekeeping operations. Only the Nordic nations have actual peacekeeping-specific training for their troops. Thus, in the field of peacekeeping, the relationship between the UN and regional organizations appears to be becoming symbiotic in character. Alternatively, regional organizations need the UN to compensate for their lack of experience and the fact that many organizations are dominated by regional hegemons. The large Nigerian presence in the Liberian operation compromised the legitimacy and impartiality of the role played by ECOWAS. Similarly in the UNPROFOR and UNOSOM operations, both the European Community and the OAU displayed little coherence and unity in the policymaking process.

Furthermore, the dispatch of NATO troops on the UNIFIL operation in the Lebanon has been suggested but repeatedly rejected as the debate on what exactly NATO's role in the post-cold war world should be is still unresolved. Dispatch of troops may be agreed within Europe, but action outside of Europe would be seen as a turning point in NATO's mandate. The UN still possesses the universal reach required to address conflict on a global level.

Often regional organizations can be lacking in the financial, political and bureaucratic wherewithal to assist constructively in UN peacekeeping activities. Also, regional organizations with fewer member states to cover costs would be unable to undertake peacekeeping operations alone. This could be seen when the OAU undertook peacekeeping operations in Chad. Thus, regional organizations need the UN to share the burden of peacekeeping expenses. East Asia provides an example of an area where discussion of creating a regional security organization is a recent development due to the prevailing US-centred security arrangements of the immediate post-Second World War period. The OAU is deeply divided between a number of Western orientated states which are predominantly French speaking and a number of radical states. This dichotomy has often led to paralysis in the work of the OAU.

The problems of neutrality were evident in the negotiations for a solution to the violence in Cyprus. The suggested dispatch of NATO troops was vehemently opposed by the neutral government of Cyprus, preferring to see what were regarded as less biased UN troops dispatched. This was later demonstrated in Liberia where the predominantly Nigerian-led ECOWAS force has been regarded as promoting Nigeria's interests and not playing the role of an independent third party. Similarly in the former Soviet Union Russian troops have been regarded with suspicion when participating in operations in Tajikistan, East Ossetia, and particularly in Moldova with Russian troops supporting the Russian ethnic minority. The smaller a region and the fewer the members, then the more difficult it will become to assemble an impartial peacekeeping force. One solution may be limiting troop contributions to nations with no land border to the area of conflict as has been attempted by the OAU.

Abuse of legitimacy can occur when regional organizations given the blessing of the UN are then manipulated to achieve a dominant state's interests. However, the UN seems limited in what it can do in this area, Boutros-Ghali has recognised "that this represents a danger for the organization's [UN's] credibility and image. But it is a fall-back position. We can do nothing else." The OAU's admission of the Sahrawi Republic as a member was viewed by Morocco as compromising the OAU's neutrality and served to limit the OAU's diplomatic role in conflict resolution in the Western Sahara.

This has been a major factor in the experience of the UN and NATO in the former Yugoslavia with the UN feeling that NATO did not fully appreciate that strategic command rested ultimately with the UN. This prompted Boutros-Ghali to seek the help of the contributing governments in ensuring that all concerned recognise that the NATO units are an integral part of UNPROFOR, under overall command of the Force Commander, and that newly arrived troops wearing UN insignia pass under UN command as soon as they reach the mission area. A specific example can be seen in the UN and NATO bickering over who had the authority to halt NATO-led air-strikes.

## **Conclusion**

This brief paper has aimed to demonstrate that although regional approaches to regional problems may not always be the most appropriate, a suitable division of labour has been reached at times between the globalist approach of the UN and the regionalist approach of a panoply of regional organizations. Furthermore, the regional approach appears to be a rising factor and is certainly a development that will have to receive more attention in the future. Ultimately, Richard Falk is correct in his view of regional organizations as "complementary and subordinate tools of global governance, being shaped within the UN and contributing in various settings to either effectiveness or legitimacy, or some combination of these." In actual fact regional organizations and the UN tend to depend on each other for efficacy and legitimacy in conducting peacekeeping operations. Regional organizations' contribution appears to be best directed in the early stages of a conflict, fulfilling traditional peacekeeping duties. When it comes to UN activities involving a military enforcement aspect then neutrality can be compromised and material capabilities not up to the task, as seen in

the Arab League's refusal to participate in Operation Desert Storm. The OAU was able to limit the conflict in the Western Sahara and bring the warring parties to the negotiating table. However, when it comes to the dispatch of peacekeeping troops on larger scale operations, it is still the UN that in the majority of cases possess the capabilities. In the future, jurisdictional primacy of the UN over regional organizations may well recede. Boutros-Ghali has already proposed this with specific reference to the OAU, and this sentiment has been returned by the Secretary-General of the OAU. I suggest also that a further division of labour will occur. Not only has the role of regional organizations increased visibly but other UN, governmental and non-governmental organizations, with the advent of the new peacekeeping, have begun to play a more prominent role. States wishing to contribute to a particular UN peacekeeping activity of interest to them have begun to be dubbed "Friends of the Peace Process" and they can offer the expertise and local knowledge that the UN may lack. Since the end of the cold war peacekeeping has developed both in the direction of humanitarian peacekeeping and peace enforcement. Furthermore, recent UN peacekeeping activities suggest that nation-building activities are becoming an integral element of today's and tomorrow's UN peacekeeping activities. Thus, new approaches will have to be adopted to ensure the successful application of, funding of, and transition to a more diverse form of peacekeeping. Certainly the UN should evaluate each conflict on its particular merits, however, I have sought to demonstrate that in a world where the UN is already overstretched in its capabilities, one of many factors the UN would be wise to accommodate is the contribution that regional organizations can make. Similarly the changes in UN peacekeeping activities and the new duty of rebuilding many failed states means that other organizations, like international financial institutions apportioning financial assistance. Similarly, non-governmental organizations like the Red Cross, Oxfam and Médecins Sans Frontières with their specialist knowledge in dealing with war-ravaged populations have an important role to play. Evidently, with the end of the cold war there has been a decided effort to combine the work of regional organizations with the UN.

Thus, I foresee that not only will regional organizations build upon their already considerable role in the field of peacekeeping with the UN, but a greater division of labour will also take place with various duties being undertaken by specialist organizations. Despite the portrayal of a globalist and regionalist approach as a zero-sum game, the aim of this paper has been to show that in the field of peacekeeping the relationship between the two is characterised by a desire for co-operation and a division of labour. Adlai E. Stevenson, the then US Ambassador to the UN, commented in 1965 that:

For the foreseeable future we will have to pursue world peace and world order in a combination of ways: bilaterally, multilaterally, regionally, and through the UN. There must be continuous flexibility about this. Each of these methods has its limitations, as well as advantages.

I would suggest that this comment has as much relevance today as Ambassador Stevenson believed it did thirty years ago.

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