ICCLP Review

The Graduate School of Law and Politics, the University of Tokyo
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From the Editors

We would firstly like to thank you all for the positive response to the first edition of the ICCLP Review released earlier this year. It appears that the changes we introduced have been well-received. We hope to continue in the same vein but are always keen to hear your thoughts regarding the design and contents of our publications.

In the last edition we carried an introductory piece to the 4th Comparative Law and Politics Symposium held in February of this year by Professor Carl E. Schneider entitled, "Bioethics and the Law: US and Japan". In this edition we are pleased to present more detailed reports from each individual discussion.

In August Professors Kashiwagi Noboru and Kitamura Ichiro represented the University of Tokyo at the Japan-Brazil Comparative Law Symposium held at the University of Sao Paulo. In addition, to celebrate the 5th Anniversary of the founding of the ICCLP, we plan to hold a one-day commemorative symposium in November. Reports of these symposia will be carried in our next edition.

Recently we have been honoured to welcome Professor Michal Sewerynski of Lodz University in Poland as a Visiting Professor of the Center. Despite the oppressive heat of the Japanese summer, Professor Sewerynski appeared to enjoy his time in Tokyo as demonstrated in this edition's interview. We also present a second interview with Associate Professor Dimitri Vanoverbeke of Kyushu University who will soon be taking up a post at his *alma mater*, Leuven Catholic University. We wish Dimitri, a former ICCLP Research Scholar, the best of luck in his new position.

In Part II of the ICCLP Review we include short articles by Professor Joseph L. Hoffmann of Indiana State University and James D. Malcolm, one of the Center's Research Scholars. As regular readers of our publication will know, Professor Hoffmann spent one year here as a visiting professor participating in seminars, forums, symposia and was the subject of an interview in our previous edition. We bid Professor Hoffmann farewell and best wishes as he returned to the US at the end of July.

From this edition onwards, all persons' names will be given in the style of the country of origin.
The staff of the Center would like to thank you for all your support as always. If you have any comments or suggestions regarding the activities of the Center, please feel free to contact us.

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

Visiting Professors at the ICCLP

From April to September 1998 the following professors were invited to the ICCLP:

Michal Sewerynski (Professor, Lodz University, Poland)
Profile:
After studying at Lodz University, Professor Sewerynski was appointed as Lecturer at the Trieste International School for Comparative Labour Law, and thereafter as Assistant Professor at the Faculty of Law and Administration at the University of Lodz. In 1980 he earned his professorship specialising in Labour Law. Professor Sewerynski spent two months at the ICCLP from June jointly conducting a seminar series entitled, "New Developments in European Society and Labour Policy" with Professor Sugeno Kazuo and Associate Professor Araki Takashi. He also gave an ICCLP Seminar entitled, "Labour and Social Policies under Economic Reform in Poland".
Major Publications:
POLISH LABOUR LAW AND COLLECTIVE LABOUR RELATIONS IN THE PERIOD OF TRANSFORMATION (ed. Ministry of Labour and Social Policy 1995, Warsaw).
Trade Unions in Post-Communist Countries: Regulation, Problems and Prospects, 16-2 COMP. LAB. L.J.(1995).

Moon Kwangsam (Professor, Pusan University)
Profile:
After studying at Seoul National University, Professor Moon worked as an administrative officer before becoming an assistant professor at Pusan National University. He then proceeded to be appointed Deputy Professor, and then Professor in 1994 specialising in Constitutional Law. His two-month stay at the ICCLP began in September.
Major Publications:
CONSTITUTIONAL HISTORY OF THE MODERN KOREA (Koreaone, 1988, Korea) [co-authored] [in Korean].
A Study on the Effects of the Modified Decisions by the Constitutional Court, Constitutional Court of Korea (1995).

Daniel H. Foote (Professor, University of Washington)
Profile:
After studying at Harvard University and the University of Tokyo, Professor Foote worked as a judicial clerk in the Supreme Court and as a lawyer. He then went on to earn his assistant professorship at the University of Washington and was appointed Professor in 1993 specialising in Japanese and Comparative Law.
Major Publications:
LAW AND INVESTMENT IN JAPAN: CASES AND MATERIALS (Harvard East Asian Legal Studies Program 1994) [co-authored with Yanagida, Johnson, Ramseyer and Scogin].
The Benevolent Paternalism of Japanese Criminal Justice, 80 CAL. L. REV. 317 (1992).
Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of ¾Stability?, *43* UCLA L. REV. 635 (1996).

ICCLP Research Scholar

Stacey Steele (University of Melbourne, Australia)

Stacey is currently a Research Assistant of the Asian Law Center at the University of Melbourne specialising in Japanese and Comparative Law. During her one-year stay at the Center from October 1998 she plans to conduct research into the reform of Bankruptcy Law in Japan and what lessons the Asia Pacific region can learn from these developments.

ICCLP Research Scholar **Jürgen Reichert** has extended his period of stay at the ICCLP until the end of March 1999. In addition, we include in this edition a short essay by former ICCLP Research Scholar **Sabine Zélany** whose completed her stay at the Center at the end of July.

Charming Fukui

Sabine Zélany, (ICCLP Research Scholar 1996-1998)

Before coming to Tokyo, I spent one year studying Japanese in Fukui. It is not because I am especially fond of Echizen crabs that I chose to go there. It was only that the Japanese Ministry of Education had decided to send me to this place after granting me a scholarship. It was quite a big change for me to move there as I have always lived in a big city in France (Paris). But as soon as I arrived I was charmed by the landscape. The city was surrounded by rice fields which was something I have of course never seen before in my country. Even the city itself was quite green, not especially because of the great number of gardens but as in front of most of the houses you could see so many flowerpots lined up. The best way of going through the city was to use the train or bicycle. They were no traffic jams except in a few streets, so that you could take a deep breath of the fresh air when cycling. Although the trains were very small (one or two cars), they were hardly ever crowded and sometimes you would enter streets so narrow that you could nearly, with your hand stretched out, touch the walls of the houses along the route.

During my stay in Fukui, I was able to get experience many aspects of Japanese traditional culture. For instance, I went to flower arrangement (*ikebana*) lessons. It was personally a great experience for me and a change from my studies of law to try to create something with my own hands. I also joined the tea ceremony club of Fukui University and attended several competitions of *kendo* organised among the students. Moreover, in Fukui, there is one of the most important zen temples of Japan, the Eheiji. One of the charms of Japanese temples is the relationship they have with the nature surrounding them, and in the case of the Eheiji, the location on the side of a mountain is indeed beautiful. The large temple made up of many buildings is very impressive and as I stayed there for one night I could observe the way of life of the monks with my own eyes. To put it concretely, I was able to share a frugal meal served in the temple or to enjoy the peaceful beginning of the day which starts there as early as six o'clock with the practice of zen.

If I was eager to know more about Japanese culture and the way of life, the inhabitants of Fukui too seemed curious to meet the few foreign people living in their city. Many events were organised so that foreign and Japanese people could meet and speak together. I was, among other

things, regularly invited to schools and asked to introduce my country to the pupils. This was very exciting to me, as I could get in contact with many different people and also have a view from inside the education system of Japan. I was surprised for example to see all the parents gathering once a month in the classrooms and then standing in the back of the room attending the class and observing their children. Such a scene cannot be seen in France.

[*July 1998*]

Interview with Professor Michal Sewerynski

Professor of Law, Lodz University, Poland
ICCLP Visiting Professor, Graduate School of Law and Politics

During his two month stay in Tokyo Professor Sewerynski has taught classes with Professor Sugeno Kazuo and Associate Professor Araki Takashi on Polish Labor Law and Labor Policy. Professor Sewerynski spoke to both Professor Sugeno and ICCLP Researcher Hugo Dobson about his personal experiences of education and international exchange in Japan and Poland in addition to his research on Polish Labor Law.

[*Professor Sugeno Kazuo and Hugo Dobson, July 1998*]

The Polish Education System

HD: Could you tell us a little about the Polish education system and in particular its higher education system?

MS: Generally speaking, we have three levels of education: elementary, medium and higher, or university, level. The university level itself is sub-divided into three levels. The first level is the undergraduate level leading to the equivalent of a Bachelor's degree after three years of study. In Poland we call this the *lycéencier*. The second level is a Master's degree attained after two additional years of study. The third level is doctoral level which usually takes four years.

The number of people interested in studying is increasing and as Poland is not a rich country there are problems in funding the education system. For this reason there are two types of university: state and private universities. The number of private universities is growing and at the moment stands at some 140 institutions. These are very small institutions centering on limited fields like business studies. However, this private sector is suffering from a lack of professors. Recently this problem has been addressed by professors contracted at national universities supplementing their income by teaching courses at private universities.

State universities are based upon the ideals of democracy and autonomy. This means that posts like the Dean and President are appointed democratically by the professors. The term of appointment is limited to three years and a candidate can only be re-elected once to avoid a monopoly, thus making a total of six consecutive years in office.

HD: How does one enter university?

MS: In Poland we have a series of entrance examinations to select the best candidates out of a growing body of young people keen to study. The successful have the right to study free of charge. Those who fail can be given admission but they are forced to pay. This is unconstitutional both under the old and new constitutions. However, as Polish universities are not funded properly by the state we have been forced into this situation.

HD: How does a typical academic career take shape in Poland?

MS: A typical academic career begins with appointment as an assistant to a given chair for which a Master's degree is necessary. His or her duties include teaching and research and involves eight years personal study in order to present a Ph.D. degree thesis. If he or she cannot complete the thesis he or she is removed. If successful, the thesis is presented and the assistant is appointed to the post of adjunct professor. He or she is then required to present a second, more complex Ph.D. thesis in nine years which is published. This second degree, or

"habilitation paper", is approved by a national commission which can override the universities' decision and in this way maintains high standards. The candidate is then appointed as an associate professor. In order to be appointed to full professor a further thesis or generally recognised scientific achievements are required.

HD: Can I ask you about your own academic career?

MS: When I started there were only two levels: a Master's degree taking five years and then the doctoral level. I graduated from the University of Lodz and then after graduating from my doctoral course I studied in France for one year. Before going to France I took part in summer schools on comparative law and social security in Italy.

HD: How did you become interested in this particular field?

MS: Chiefly because industrial relations is an area very close to politics and economics. This can be seen in Poland where one of the major trade unions played an important political role. Also, I am a member of two bodies in Poland charged with the duty of actually making law which in the current climate I find very interesting indeed. As this aspect is not taught at universities and a great number of politicians have no previous legal experience (in our former Parliament there were only eighteen lawyers), it requires a lot of theoretical knowledge and practical experience.

Lodz University

HD: Can you tell us something about the history and location of the University of Lodz?

MS: Lodz is a relatively young university and Lodz as a city occupies a peculiar place in Polish history. It was originally founded in 1423 as a very small city. With the re-birth of the Polish state under Russian protection after the Vienna Congress of 1815, Lodz was re-defined as a center of the textile industry with a huge Russian market nearby. It was a place where fortunes could be made and was very much an ethnic melting pot with Catholic Poles, Orthodox Russians, Protestant Germans and Jews all settling here and living in harmony. In the 1920s, when the cathedral was built in Lodz, all parties joined together and co-operated in its construction.

However, Lodz was never regarded as a city worthy of its own university. Plans were rejected at the time of the Polish uprising in 1863 and it was only with the end of the Second World War that Lodz University could be established. It is one of the leading universities with 31,000 students. The Law Faulty is one of the largest faculties with 6,000 students. Of course, there are larger universities like Warsaw, Posnan and Krakow. However, Lodz probably occupies forth place according to a recent poll.

I was President of the University from 1990 to 1996 and we made a considerable effort at that time to improve international exchange. Because of this there is an international feel to the university with 115 various exchange agreements with foreign universities on probably all continents except maybe Australia. This a recent phenomenon because under the Communist regime all contacts with Western universities had to be approved by the Ministry of Education or the Central Committee of the Communist Party. Now we are free to make our own contacts.

HD: How would you compare the University of Lodz with the University of Tokyo?

MS: Well, firstly the University of Tokyo seems much more organised. There is a special atmosphere which comes from having all the faculties in one place. In Lodz the university is dispersed. When I was President I administered eighty-six buildings all across the city.

However, recently we are attempting to concentrate everything in two or three campuses. Lodz like Todai is centred upon autonomous faculties. I don't know about the power of the President of Tokyo University, but in Lodz the President's powers are currently being strengthened to cope with the growing number of administrative duties. Although the size of the two universities is comparable, I suppose that Todai is a flagship university in Japan, whereas Lodz is more of a regional university which has its own advantages and disadvantages.

International Exchange at Lodz University

HD: Could you tell us something about the state of international exchange at the University of Lodz.

MS: It is very well-developed. Due to the high number of international agreements we receive over 1,000 visitors every year from sister universities. The length of the average visit is relatively short—three to four days. However, we have employed some visiting professors in the various faculties. On the level of exchange between professors and academics, internationalism is highly developed.

HD: What are the conditions like for students?

MS: We also have an international center for international students established about forty years ago for the teaching of the Polish language. There are about 400 to 500 foreign students coming every year. We do not have a special curriculum for these students but are considering how to elaborate a special curriculum to attract foreign students. Our tardiness in this respect is due to the fact that Poland was traditionally not so popular for students, however, this is changing slowly as Poland is so cheap for students to live and study. Unlike Japan, an apartment can be rented very easily and cheaply in Poland. However, at the moment we send more students abroad than we welcome.

Polish Labor Law

SK: You kindly gave a series of six lectures on Polish labor law and industrial relations at the University of Tokyo. Can I ask you what was your impression of our students?

MS: I was very impressed with the attitudes of students here. I think they could be compared to Polish students at the doctoral level. They were able to follow my "home-made" English, ask questions and generally play a very active role in class. I had the impression it was useful for them to study the unique and particular case of Poland. I am convinced that it has been a successful co-operative venture. The group was also very small and this made it easier to maintain contact with students both formally and informally. In contrast at Nantes University I had to supervise sixty students. Hopefully the students will continue their studies on this important topic.

SK: In the lectures you covered a very broad period and addressed many aspects. What was the message you were trying to convey in these comprehensive lectures?

MS: My objective was to get across two or three ideas. First, that political, economic and social factors play important roles in Polish industrial relations. I was trying to demonstrate the peculiarity of the current situation in Poland (often called the period of reconstruction) and the interdependence of these factors. In particular, I tried to convey my personal experience and views on these matters.

Rather than repeat existing theories and using existing materials, I attempted to show the

originality of the individual Polish case. Thus, I tried to stress the necessity for university professors and students to examine Polish history and the transformation from the time of Soviet domination to the contemporary period and the changes in the law with the rise of democracy and the market economy.

SK: I think you were successful in conveying these messages. In these lectures I could see a continuity in your very European way of thinking despite these important social changes and, moreover, the revival of your thinking was evident with the collapse of communism and your role in drafting new legislation.

MS: Yes, I agree. The commission charged with drafting new labor law was composed mostly of university professors and it is true that certain ideas prospered in the universities despite the communist system. My professor taught us all the traditional European, Roman ideas of law which stood opposed to the ideas of the communist system. We retained these ideas until the period of reconstruction when they could be put into practice.

In Poland we were not so isolated as other communist countries. Professors were allowed to go abroad if invited by foreign universities and acquire foreign ideas. Moreover, the communist system was relatively short and never truly destroyed connections with the pre-communist system. For example, the socialist labor law code was only introduced in 1974, civil law in 1965, and the commercial law adopted before the Second World War was never abolished formally. So, come the period of reconstruction we were able to draw on the traditional European ideas of law.

The attachment to these traditional values in society can be seen in Solidarity with its ten million members and additional ten million supporters. It always stressed its social, not political, role and stressed a continuity to these values and ideas. Now, neighbouring countries often look at the Polish example and have introduced similar solutions. For example, a couple of years ago I met a Russian colleague who told me that some Polish labor laws had been translated into Russian to serve as an example.

Impressions of Tokyo

HD: What were your reasons for coming to the University of Tokyo and what preparations did you make for your stay here?

MS: The main reason was Professor Sugeno whose conviction that interaction between foreign professors and Japanese students and professors could have a positive influence for all parties is to be applauded. Although this is not my first visit to Tokyo, it is my first real contact with the University of Tokyo. My previous visit to Japan was for only one week at an international conference conducted in French so I saw little of the "real" Japan. Now I have some time I plan to visit some festivals and places in and around Tokyo and before I came, with this in mind, I prepared for my visit by reading around the subject of Japan.

HD: What has made the deepest impression upon you here in Tokyo?

MS: My family is accompanying me here and we have been struck by how clean the subway is and how safe a city of this size is. We are all very impressed with life in Tokyo. With the high level of social discipline and education in Japan, I have got the impression that Japan is prepared for the challenges of the next century. The Japan that I encountered fitted with the impression I had got from the preparatory reading I did in Poland.

HD: Have you experienced any problems here?

MS: Except for the unexpected heat and humidity, none whatsoever. My daughter is very

interested in foreign languages and has been able to help us out and make life easier. I have been very busy here and have had no time to complain.

Language Study

HD: I understand that you possess a gift for languages. How many languages have you mastered?

MS: Mainly French and Russian. Some English, a little Italian. As there is a tendency to conduct comparative studies, it is necessary to analyse the texts in their original language. Because of this I can read Czech, Croat and Slovak. After a number of visits I can understand some Spanish. I believe a reasonable amount of time has to be spent in the country in order to acquire a natural pronunciation and an understanding of the nuances.

HD: What languages are taught in Polish schools?

MS: Russian used to be compulsory up until the 1980s and at secondary schools another language could be chosen. Since then it is no longer the automatic second language. When I was younger, only two languages were allowed: the language of friends, Russian, and the language of enemies, English. Thus, as I said before my English is "home-made" as I never studied it abroad in an English-speaking country. These days English has become the second language and dominates all fields. After that, probably German for business reasons, and then French.

HD: I would like to thank you for taking the time out of a busy schedule to talk to us. Do you have any final words of encouragement or advice for young scholars at the Universities of Lodz and Tokyo?

MS: I am sure we have several common problems to face and I would stress the promotion of international exchange. I think it is very important for students to meet visiting professors from abroad. Japan is in a strong position to play a leading role in this field and can provide a fine example for other Asian nations. It is a truly amazing opportunity to give students the chance to travel abroad, meet other scholars and utilise their language ability. This state of affairs seems to be well-developed in Japan; I only hope it continues.

The Michigan-Columbia Exchange Project

From June to July 1998 we welcomed the following three teaching staff from the Law School of Michigan University to conduct a series of lectures entitled, "Introduction to Contemporary American Law".

Professor Thomas E. Kauper, University of Michigan
(Property Law, Anti-trust Law)
Major Publications:

PROPERTY (West Publishing Company, 1974, 3rd ed., 1992) [co-authored with Donahue & Martin].

Whither Article 86? Observations on Excessive Prices and Refusals to Deal, EEC/US COMPETITION AND TRADE LAW (B. Hawk ed., Fordham Corporate Law Institute,1990).

Professor Phoebe C. Ellsworth, University of Michigan
(Legal Psychology)
Major Publications:

METHODS OF RESEARCH IN SOCIAL PSYCHOLOGY (McGraw Hill, 2nd ed. 1989, New York) [co-authored with Aronson, Carlsmith, and Gonzales].

Real Juror's Understanding of the Law in Real Cases, 16 Law & HUM.BEHAV. 539 (1992) [co-authored with Reifman and Gusick].

Professor Samuel R. Gross, University of Michigan
(Sociology of Law, Criminal Law)
Major Publications:

DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING (Northeastern University Press 1989, Boston) [co-authored with Robert Mauro].

Crime, Politics, and Race, 20 HARV. J. L. & PUB. POL'Y (1997).

Notes from a Lecture Given at University of Hong Kong

by Professor Kashiwagi Noboru

This past July I attended the annual Transnational Law Summer School in Hong Kong, co-hosted by the University of Hong Kong and Duke Law School, to lecture on Japanese business law.

The sloping campus of the University of Hong Kong sits on the western side of Hong Kong Island. If you wanted to, you could go hiking on to Victoria Peak. The University of Hong Kong is the most prestigious in Hong Kong, and the location of the campus too is prestigious, being in the oldest settled part of the island. At the highest point of this campus stands Robert Black College, where the Summer School's staff and students were housed. It was somewhat similar to the Sanjo-kaikan Annex to Todai's Sanjo-kaikan. The classrooms, however, were a considerable way down the slope, which made for a hard climb after lectures.

The forty-two student participants in the Summer School this year were from Hong Kong, Japan, the USA, China, Taiwan, Mongolia, Kazakhstan, India, Denmark, Burma and Azerbaijan. Unusually, Australia, New Zealand and Korea were not represented this year, and a professor from Duke Law School posited that this might be related to the downturn in the economy in Asia. The staff too was a cosmopolitan group, including lecturers from Duke Law School and the University of Hong Kong, but also from various institutions in Australia, Japan, Korea and Hawaii.

This melting pot seemed appropriate given the subject matter of the Summer School, but also its location. Hong Kong has a fascinating racial mix of Chinese, English, Filipinos, Indians, Japanese, Americans and many others, and the Chinese include mainlanders, Hong Kong residents and people from Taiwan. Television programs in Hong Kong are in English or Chinese. At first it seemed somewhat curious that the Chinese programs had subtitles in Chinese, until I was informed that this was due to the use of both Mandarin and Cantonese dialects. The mass-circulation English-language South China Morning Post has articles on local and regional Asian issues, as well as events in America, Europe, Australia and New Zealand. I did not see significant coverage of Africa, the Middle East and Latin America. What I did see was a lot of advertisements for universities in England and Australia. The financial pages contained information on Hong Kong stocks, but also on the major markets in Asia, America and London. This broad coverage was replicated on the television news bulletins. On radio, the BBC news was pervasive. This wealth of information made me realise how much the Japanese media concentrates on Japanese affairs. Amongst all the cities in the world, Hong Kong is truly an international city which has adopted the international as a way of life. This feature of Hong Kong had escaped me in my past brief visits, but was truly impressed upon me during this more substantial stay.

It is now over a year since Hong Kong was returned to Chinese rule, but there were few outward signs of change. I heard a presentation by Martin Lee, a leader of the democracy movement, who reported that it is still possible to speak freely without pressure or restriction. His concern was that, without democracy, there is no guarantee that this freedom will continue. In the recent elections, the Democratic Party gained sixty percent of the vote, but due to the structure of the Legislative Council this translated into only one-third of the seats. Certainly to my eye there seemed little evidence of the Chinese government's influence from what I saw on the streets and

on television, and a friend who lives in Hong Kong confirmed that the Chinese government has had a minimal impact so far.

One feature of this Summer School was the shared accommodation. The staff and students basically ate all their meals together at Robert Black College. This was not a rule, but a practical outcome of the facts that it was over 30°C outside, that there were no restaurants within walking distance, and that meals at the College were included in the students' fees. Another factor may have been that the meals provided at the College were delicious! There was no fixed seating in the dining hall, so staff and students sat together and chatted during meals. This intense contact ensured that everyone got to know each other very quickly. I think most people would agree that eating from the same rice pot (or cultural equivalent) has the effect of intensifying friendships. It was also very stimulating to be able to share conversation with other guests at the College, whether they be linguistic experts from France or German physicists, and satisfying to make ourselves understood despite our various thick English accents. When there were no classes, the students formed groups to go hiking to Victoria Peak or to go sight-seeing in the city. It was good to see that the composition of these groups was constantly changing as different students participated in the various activities. I felt envious of their camaraderie. They invited me to join them, but I did not think I could keep pace with their younger legs. I preferred to do my sight-seeing on my own without huffing and puffing.

Apart from this experience at Robert Black College, it was of course of great benefit to me to be able to meet members of the faculty of so many different origins at the University of Hong Kong and Hong Kong City University and to lecture with them.

As a part of Asia, Hong Kong has been swept into the downward economic spiral and all its economic indicators are negative. However, compared to Japan the economy seemed vibrant. The Hong Kong dollar has made gains against the Japanese yen, so it would seem that Japanese goods have become more affordable and there is a boom in Japanese shopping tours. Previously it was always Hong Kong that was the shopper's paradise: in this day and age, it would seem that paradise is relative!

[Translated by Peter Neustupný, August 1998]

On Being a Young Researcher: Dimitri Vanoverbeke

by Wada Keiko

Dimitri Vanoverbeke is currently Associate Professor at the International Students Center of Kyushu University. Born in 1969 and raised in Hasselt in eastern Belgium, some fifteen minutes from the Dutch border, Dimitri had his first experience of Japan in 1987 as Rotary Club scholarship student in Saitama Prefecture. He returned in 1992 to study sociology of law at the Faculty of Law at the University of Tokyo. After graduating in Japanese Studies from the Catholic University of Leuven, he spent six months in 1994 as an ICCLP Research Scholar. He has held his current position since December 1995. In 1996 he gained his Ph.D. from the Catholic University of Leuven.

Impressions of a four-time visitor to Japan

The planes at Fukuoka Airport loom large from the campus of Kyushu University. Some of them almost seemed to graze my head as I looked to the sky, and I was shocked by their size and sound as they passed above. The first time I observed classes at the International Students Center, I couldn't help but grimace at the noise. The students, by contrast, seemed used to it. I tried counting how often the noise interrupted the voices of the instructors and students during the ninety minute class, and figured it must have averaged about once every twelve or thirteen minutes. When I was telling this to Dimitri after the class, he seemed surprised at the frequency. As if to confirm my findings, another plane skimmed over our heads.

The first time I met Dimitri was in August 1994, towards the end of his period as an ICCLP Research Scholar as he was preparing to return to Belgium. I was struck by his elegant spoken Japanese. By the time he was appointed to Kyushu University, it was his fourth time in Japan. Since then, I have enjoyed exchanging information and opinions with him about international academic exchange.

The International Students Center at Kyushu University operates a short term exchange program called "Japan in Today's World". This year there are twenty-eight students in the program, twenty-four of them from the USA. It seems this imbalance can largely be attributed to the fact that classes other than Japanese language classes are held in English.

Dimitri said he would never forget his first class at the Center. In Belgium, as in Japan, classes are a one-directional affair, with the lecturer imparting specialist knowledge on the students. Because it was his first class, he spent a lot of time preparing, and anticipated how he would progress the class. However, as soon as he opened his mouth to address the class on the Japanese employment system, an American student raised her hand and asked a question. The class continued as a sequence of questions and answers, and he suffered a form of culture shock. Some of the students' questions were off the mark, but many were perceptive. From then on, he learnt how to keep the class on track, while responding adequately to the students' questions and opinions.

When I visited the Center, I observed a Japanese language class for the "Japan in Today's World" program and some of Dimitri's lectures. He was teaching the advanced Japanese language class discussing texts on "Developments in Theories of Japanese Culture" and "Introduction to Legal Sociology." The class consisted of students from various disciplines, with a noticeable number from China and Korea. I was impressed not only by the complexity of the material they were tackling, but also by Dimitri's method of interacting with the students. Although it might have been easy to rely on the students with the best Japanese language ability to do most of the talking, it was clear that he was encouraging and coaxing each of them to state their opinion during the limited time available. It made me wonder about his own experiences as an exchange student.

"Why did you decide to come to Japan as an exchange student?", I asked.
"I had trouble deciding between America and Japan. Whether to go the land of my dreams or an unknown land; whether to go where I would feel comfortable or where I knew I would have difficulties. In the end, I figured that I would be able to go to America at any time, but this was

probably my only chance to go to Japan." And so, he ventured to Japan at the age of eighteen on a Rotary Club scholarship.

"If you had to sum up that year as an exchange student in one word, what would it be?"
"*Tiring*. It might seem simplistic, but I think this sums it up the best."

I had also heard this response previously from a German student who had lived and studied in Tokyo as a trainee at a Japanese company. I sympathised with both of them as I imagined this state of exhaustion from living in a strange country.

The 18-year-old Dimitri attended classes at a senior high school in Saitama Prefecture, and was a member of the judo and baseball clubs. He had to have an extra large uniform made specially for his height.

"In Belgium we wear uniforms at Catholic and state schools, so it didn't feel too strange to be wearing a uniform, and the teaching method was not dissimilar to Belgian schools. The school that I was attending had quite a liberal atmosphere, which made things easier for me. I enjoyed the judo and baseball. But I found English classes a bit frustrating. I expected this was the one class where I might have some advantage, but I got seventy percent in the exam and the boy next to me got ninety-six percent. At first, I thought he must have been cruelly pretending that he didn't understand when I tried to strike up a conversation with him, but I soon realised that his stunned silence was more to do with the different emphasis of English language instruction in Japan and Belgium. In Belgium, as in Japan, everyone starts learning English at junior high school, but after six years you are expected to be able to converse freely. This is because Dutch, French and English are the official languages. In Japan, the focus of school English classes is passing entrance exams, which are heavily based on reading and writing."

I sympathised with Dimitri even more when he described his home-stay experiences to me. The Rotary Club has a policy of exposing their students to as much as possible during their stay, and so Dimitri lived with four different families for three months each. Even for me, who has never experienced a home-stay, this sounded exhausting. Dimitri's four families had different structures and lifestyles, but he got on well with them all and still keeps in contact.

"I had decided not to judge Japan, but rather to absorb the true state of life in Japan. When I returned to Belgium, two of us foreign students gave a presentation. The other student had been to Canada. I was amazed to hear him say 'Canada is an incredible country. I became truly Canadian while I was there.' For me, living in Japan made me think more about the nature of my own country."

"Looking back now, that year as an foreign student was so precious," says Dimitri. "Without it, I would be leading a completely different life today."

In the past, Belgium encouraged workers from northern Africa to immigrate to provide labour for the coal mines. Belgium introduced a multicultural policy, so that after two or three generations the immigrants have been able to retain their identity in terms of religion, language and lifestyle. The government even subsidises the construction of mosques by Moslems. At school in Saitama, Dimitri took part in a joint project with another school on the topic of Koreans in Japan, which raised his awareness of cross-cultural issues in Japan.

While he had previously aspired to the law, Dimitri returned to Belgium in the summer of 1988 and decided to major in Japanese studies at the Catholic University of Leuven.

"The reason for this decision was that I wanted to understand contemporary Japan, and to do this I thought I needed to understand Japan's past". In 1991 he met Professor Araki Takashi (Associate Professor at Todai's Faculty of Law) who was spending a year at the Catholic University of Leuven teaching Japanese law. During my many discussions with him, I began to find my own field of interest."

Dimitri wrote his graduation thesis on "Alternative Dispute Resolution in Japan: Conciliation and Settlement." This was in the context of a flurry of European interest in conciliation due to the increasing use of conciliation in divorce proceedings.

"I finished my four year degree in three years, and then from October 1992 I started my second stay in Japan as a foreign research student at the University of Tokyo Faculty of Law. This time I rented an apartment on my own in Toda in Saitama Prefecture. It was very hard to find a landlord who would accept a foreign tenant. In the end, my landlord only agreed to accept me after an interview."

As a foreign research student, Dimitri majored in sociology of law. Under the supervision of Professor Rokumoto Kahei, he undertook research on the functions of the land tenancy conciliation system in modern Japan. "Professor Rokumoto suggested the topic to me, and I took it on with enthusiasm because I thought it would shed light on contemporary Japanese law and the relationship between law, society and individuals. I learnt a lot at Todai. I was fortunate to meet many respected professors and made many friends. Professor Rokumoto was very strict, but always had his students' interests at heart. I had read one of his books in Belgium, and I considered myself very fortunate to have him directly supervising my work. Professor Omura (Professor Omura Atsushi of Todai's Faculty of Law) was also a strict taskmaster, but during the breaks of his seminars we discussed literature and he recommended many novels to me. I am still in touch with Professor Araki, who has been so kind to me and treated me as a friend, as well as my co-students from that time."

In April 1994, he came to Japan for a third time as an ICCLP Research Scholar. Again he chose to take an apartment in Saitama. "This was not an easy time financially, as each month 80,000 yen of my 180,000 yen scholarship went in rent. However, I look back on that time with great fondness. Compared to now, it was a much simpler life focussed entirely on research and study."

After six months at the ICCLP, he returned to Belgium to undertake his Ph.D. at the Catholic University of Leuven. Then he obtained his position at Kyushu University. This provided the opportunity for his fourth stint in Japan, and his first time outside Tokyo.

"In Fukuoka, I had a strong sense that Japan was part of Asia. I did not have this feeling when I was in Tokyo. While Fukuoka is a metropolis, it retains the innocence of a regional city. The people are open and easy to talk to. People in Tokyo often spend some time getting to the true point, but in Fukuoka they are more direct. Fukuoka is famous for its street stalls, which is a typical feature of many Asian cities—eating, drinking and talking out in the street. And in Fukuoka, Korea feels very close, both physically and emotionally."

Currently, Dimitri is teaching four classes and has various time-consuming administrative duties. At this the busiest time of his life, even he finds it difficult to believe that he was able to complete his Ph.D. thesis.

He says what he feels most about living away from Tokyo is the sense of isolation from the central administration. While he does not need to travel to Tokyo to obtain books and materials, for example, living in Fukuoka has made him feel that Japan is highly centralised around Tokyo.

His latest research theme is the Equal Employment Opportunity Law. He is using his knowledge of conciliation—the convenience of the conciliation system between various parties, the historical use of land tenancy conciliation to favour landowners rather than tenants, and the socially placatory effect of conciliation—to gain further insights into the application of this law.

My last question to Dimitri was, "Out of your experiences of teaching, reading and writing as a lecturer and researcher, what has given you the most satisfaction?"
"Without a doubt, teaching and being with students is the most satisfying. Without this, I would question why I was conducting research or writing papers."

[*Translated by Peter Neustupný, December 1997*]

Comparative Law and Politics Symposium

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

Topic: Bioethics and the Law: U.S. and Japan
Reporter: Professor Carl E. Schneider, University of Michigan Law School; ICCLP Visiting Professor
Panels and Commentators:
(1) Autonomy
Professor Matsuura Yoshiharu, Osaka University
Ms Sato Keiko, University of Tokyo
(2) Brain Death and Organ Transplantation
Professor Maruyama Eiji, Kobe University
(3) AIDS
Professor Tejima Yutaka, University of Tsukuba
(4) Decision Making on Death
Dr. Akabayashi Akira, University of Tokyo
(5)Physician Assisted Suicide
Ms Tomita Kiyomi, Waseda University
Professor Joseph L. Hoffmann, Indiana University; ICCLP Visiting Professor
(6)Managed Care
Professor Higuchi Norio, University of Tokyo

Moderator: Professor Higuchi Norio, University of Tokyo

Language: English

Reports on the 4th Comparative Law and Politics Symposium

Session 1 - Autonomy

Autonomy has been "the principal principle" in US bioethics to date, and should continue as such for the foreseeable future. This is due to the deep-seated importance of autonomy in US lifestyle, history and culture and its protection in the 14th Amendment to the Constitution. Accordingly, autonomy has been a vital link in the reasoning in major issues in bioethics such as informed consent, refusal of treatment, advanced directives and physician-assisted suicide and has been at the forefront of debates on these issues in the spheres of law and medical education.

At the present time, when the pre-eminence or even "triumph" of autonomy has been widely proclaimed, there are generally two forms of this principle. The first is so-called "optional autonomy" which foresees that an individual may abandon his or her autonomous rights. The second form, "mandatory autonomy", stresses that autonomy is too important to waive and mandates the exercise of autonomous decisions. Arguments that autonomy should be mandatory include:

1. the need to prevent any pressure from physicians on a patient to abandon his or her autonomous rights;

2. the beneficial clinical effects found to result from the exercise of a patient's autonomous rights;
3. the fallacy involved in a conscious decision not to make a decision;
4. the philosophical position that it should be the obligation of every human being to make decisions about their own life.

However, there are some difficulties with each of these arguments, and in fact, the focus on autonomy is facing some serious challenges, for reasons such as:

1. the tendency to neglect other important bioethical principles;
2. the tendency to look to other principles because it would seem that every possible argument on autonomy has been exhausted, as the "Georgetown Mantra" has shown;
3. the plethora of complications that arise in terms of medical economics and administration when patients do exercise their autonomy;
4. the fact that a considerable number of patients do not wish to exercise their autonomy.

Autonomy is clearly a central principle of bioethics, but it is not entitled to hold centre stage on its own. In order for autonomy to share the limelight, it may be necessary to examine the issues adopting a case-by-case empirical approach rather than trying to deduce from overarching principle alone. To this end, there may need to be a greater focus on the optional form of autonomy.

In response to Professor Schneider's lecture, Professor Matsuura began by defining autonomy as "consciously making reasoned choices about one's self". Professor Matsuura pointed out that the debate on autonomy in the US has focussed on the patient's choice of treatment methods, which has tended to limit the exercise of autonomy to choosing from a restricted list. The so-called "guarantee of autonomy" has increased the societally acceptable number of choices, but has not really affected their total contents. He further pointed out that one function of autonomy has been to act as a psychological absorber for doctors and for society at large, by throwing the onus of decisions onto the patient, and also to act as a risk distribution mechanism between patients, doctors and judges ensuring the smooth operation of society. Accordingly, he agreed with Professor Schneider that autonomy is not an absolute principle, but should be perceived in the context of social values.

Ms Sato, approaching the topic from the perspective of nursing studies, asked the question "Will the triumph of autonomy ever arrive in Japan?" She referred to current Japanese medical practices as "the crisis before the triumph"—practices such as paternalism amongst doctors, patients' willingness to entrust their bodies to the doctors, three minute diagnoses, etc. which are presumed to be tantamount to the giving of informed consent. In Japan, there is a very different type of "crisis of autonomy" from the one Professor Schneider referred to, in which doctors seem to think they have obtained informed consent once they have provided a client with a list of treatments and made the client choose one of them. Ms Sato proposed a two-pronged response to this "Japanese crisis of autonomy": doctors need to study the true meaning of patient autonomy, and patients need to study and be aware of their own illnesses. The desired result is not to force a patient to choose from an unembellished list, but rather to jointly select a treatment to match the patient's chosen quality of life, analogous to the relationship between a wine drinker and his sommelier.

One question from the floor was whether the traditional Japanese view that medicine is a benevolent art is inconsistent with the modern principle of autonomy. Professor Schneider pointed out that there is a tradition of benevolent healing in Western Christianity also, and this had not prevented the principle of autonomy developing in the West. Another question asked what is the core of the legally equivocal concept of autonomy. To this, Professor Schneider responded that it is because of this equivocality that an empirical approach is required, but the core of the concept is choice based on information and freedom.

[*Okuda Jun'ichiro, translated by Peter Neustupný*]

Session 2 - Brain Death and Organ Transplantation

Professor Schneider began his lecture pointing out that organ transplantation following brain death is accepted unquestionably in the United States today. Traditionally, organ transplantation followed death, which was defined as the irreversible cessation of heart and lungs; however, over the past twenty years, a new definition based on the notion of brain death has spread without dispute. Underlying this change was the cultivation of an altruistic attitude in society towards increasing the supply of organs available for transplantation.

Organ transplantation began with kidney transplants which were conducted *inter vivos*. As the number of successful trials accumulated, the procedure became routine and this promoted experimentation with transplanting other organs. However, despite the fact that ten to twenty percent of the population carried donor cards, the supply of organs was insufficient. Physicians still felt the need to secure the family's consent, and it was practically difficult to request this in many cases. Political interest groups formed around several well-publicized cases of people in urgent need of organ transplants, and began to demand that states should work to encourage a greater supply of organs. This led directly to the adoption of the new criteria of brain death.

Professor Schneider discussed the cultural change of how Americans have ceased to think of brain death as scary, and how the concept of autonomy has affected this change. The first step was abortion. Traditionally, fetuses had been recognized as human life, but this view was undermined following Roe v. Wade, 410 U.S. 113 (1973). In particular, the fact that fetuses lacked consciousness and the ability to think was used to legitimize this change. The second step was the allowance to discontinue life treatment for patients in a persistent vegetative state, as seen in Cruzan v. Dir., Miss. Dep't of Health, 497 U.S. 261 (1990). Patients' autonomy may have been important, but the notion that such patients were not essentially alive contributed to the public's acceptance of this change. The third step is the current movement towards legalizing physician assisted suicide for terminally ill patients. In part, the idea is that the terminally ill patient has basically lost the ability to choose and their life is no longer meaningful. Human life has become equated with an entity which must be capable of autonomous choice about his or her own life, rather than functioning on a purely biological level.

Professor Schneider listed a number of conceivable countermeasures to combat the under-supply of donor organs. First, physicians could be obliged to ask the family for permission to remove organs following a patient's death. In the past this has not worked because of the problem of monitoring physicians. Second, the intention for organ donation could be presumed unless opinion is expressed to the contrary. This scheme works in Europe but would be politically difficult to implement in the United States. Third, people could be obliged to express their intention of

donating or not donating their organs in case of death on their driving licenses. Fourth, terminally ill patients who have opted to have their treatment suspended and have indicated their willingness to be donors could have their organs removed two minutes after their heart has stopped following the withdrawal of life support systems. This procedure is used at the University of Pittsburgh and has provoked strong controversy in regard to the possibility that the patient may revive. Fifth, organs could be removed from donors prior to death. Sixth, a lesser definition of brain death, admitting both donors in a persistent vegetative state and brain-absent babies, could be adopted. This would be problematic because it is much more difficult to judge “higher” rather than total brain death and a line would need to be drawn at some point. Seventh, legalizing the sale of organs would increase their supply. Eighth, the invention of artificial organs and other substitute technologies would relieve the problem of undersupply. Ninth, the existing supplies of organs could be used more efficiently by distributing them only to those with the best chances of survival. Finally, priority could be given to more efficient and less expensive forms of organ transplantation.

He added that, in apparent contrast to the situation in Japan, prospective donor patients in the United States trust the advice of physicians regarding organ transplantation in spite of their obvious apprehension about professional conflicts of interest. Patients' distrust and skepticism has been alleviated by the fact that physicians have stressed patient autonomy when explaining their treatment options, with the result that communication between physician and patient has improved.

Discussant, Professor Maruyama, pointed out the different criteria Japan has used to define brain death and outlined the background of the Organ Transplant Act of 1997. He argued that a brain-dead patient should not be referred to as "dead," but that under criminal law the euthanasia and removal of organs from such a patient is justified when they have indicated their intention to donate organs. Professor Maruyama questioned the link to abortion and brain death, pointing out that if fetuses are not considered living humans because of their lack of reason and ability to choose, so too were newborn babies. Professor Schneider agreed, but added the issue was too abstract to discuss only the criteria for death. Many American lawyers believe that the main issue behind the legal criteria of death should be social benefit: while organ transplantation is desirable, you should not kill those who may revive.

Professor Dr. Bai asked about the relationship between the idea of autonomy and brain death in the new Japanese act. Professor Maruyama explained that the basic attitude of the act was that a brain-dead patient should be considered "dead," but that prior consent from the patient or later consent from his or her family would be a necessary condition for conducting a test to objectively pronounce brain death.

Professor Higuchi challenged Professor Maruyama's objection to the act, arguing that it provided for no limit while American way had one, that of "brain death." Professor Maruyama replied he distinguished by whether the patient breathed autonomously, adding that the higher-brain death standard also permitted expansion. Professor Schneider observed that they did not encourage altruism or keeping organs under the Japanese Organ Transplant Act and its legislative process, and asked whether such factors had ever been discussed. Professor Matsuura agreed that Japanese law did not try to encourage altruistic social ethics while American law attempted to promote donation. Professor Maruyama explained that there had been no such discussions in Japan; rather, they focus on trivial abstract conceptualizations.

As Professor Schneider had noted in his opening, the Japanese situation clearly contrasts with that

in the United States, and this session shed further light on differences between the Japanese way of thinking and American pragmatism.

[*Aizawa Hisashi*]

Session 3 - AIDS

The topic of AIDS displays the inter-relation of the issues of autonomy and discrimination. Professor Schneider focussed mainly on the sub-themes of the right to secrecy and mother-child infection.

The right to secrecy

There are two main lines of argument relating to information concerning a patient's AIDS status. The first stresses the patient's "right to know" and "right of autonomy", which demand strict secrecy in order to prevent discrimination against the patient, as well as the clear prior consent of the patient to an AIDS test. By contrast, the second emphasises the need to treat the patient effectively, prevent further infections and protect medical staff. Professor Schneider preferred the second line of argument, while acknowledging that this virtually imposes an "obligation to know" on the patient.

Due to the dire consequences of infection, he argued that doctors should be obliged to report AIDS infections to the public health authorities and that AIDS patients should have certain duties to their neighbours. Further, Professor Schneider argued for a duty of disclosure when a doctor is infected with AIDS. He referred to case law which supports this duty of disclosure, as well as public opinion which favours subordinating any right of autonomy of the doctor to the autonomous rights of the patient.

Professor Schneider expressed serious doubts about the capacity of the rights-based paradigm to appropriately balance individual interests in relation to disclosure of information relating to AIDS patients. In such a rights-based paradigm, it is extremely difficult for the state to intervene and regulate when this becomes necessary, which may end in outcomes that are not in the public interest.

Mother-child infections

Professor Schneider raised the scenario of a pregnant woman in a high risk category for AIDS, and whether in deference to her right to autonomy her consent is required to conduct an AIDS test. Professor Schneider stated the importance of considering protection of the unborn child.

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Professor Tejima raised several particularities of the legal environment surrounding AIDS: there was a need to deal with over-reactions while recognising the possibly limitless consequences of the disease and the undeniable continuing threat of infection. He pointed to how legal responses had been influenced by developments in the medical treatment of AIDS. He referred to Japanese experiences with AIDS, including discrimination against AIDS patients and the medical profession's response to haemophiliacs.

Professor Higuchi raised further issues about the Japanese situation such as consent requirements for HIV tests, the position of infected doctors and whether there have been mother-child infections. Professor Tejima responded to each of these. Professor Schneider questioned the validity of giving AIDS a special treatment in bioethics—he did not consider that issues such as

consent should be debated solely in the context of AIDS treatment. Professor Schneider also responded to questions from the floor on the relationship between involuntary medical procedures and due process by explaining experiences in the U.S.

[*Someya Masayuki, translated by Peter Neustupný*]

Session 4 – Decision Making on Death

The principle of autonomy applies only to patients to be competent and capable of making decisions. Given that autonomy is the only widely accepted principle in American bioethics, how can bioethicists justify decision-making in relation to patients who have lost capacity? It is thought that the solution lies in "advanced directives", by which the individual makes decisions before they lose capacity.

The two types of advanced directives are:

1. the *living will*, by which the individual sets out how they want specific situations dealt with after they lose capacity; and
2. the *durable power of attorney*, by which the individual appoints an another person to make decisions on their behalf in case of incapacity.

These directives are seen as an exercise of autonomous decision-making powers and are given legal foundation by the laws of each state and reinforced by the Patient Self-Determination Act (1990). Bioethicists tend to favour the living will as being more representative of the autonomous will of the individual: with a living will, there is the opportunity to express precise wishes and to require consultation with doctors, but with a durable power of attorney there is the very real risk that the appointee (often a relative) will not really understand the appointor's views.

The development of the living will has been in three stages so far. In the first stage, the living will was written in abstract terms which were ultimately found not to be helpful. In the second stage, the willmaker anticipated various situations and made an inclusive list of their responses to each event, but it became clear that this system as also somewhat impractical as it was difficult to make prudent decisions based on the limited information available to patients. In the third stage, the willmaker stated general values and approaches to life that would guide decisions about the willmaker, but it proved difficult to extract guidance on specific situations from these general statements.

There are also some lingering issues with the core concept of the living will. Not every individual will want to make a living will. An individual may not have their own articulated value system, and may wish to "go with the flow". Moreover, the individual's decision as recorded in the living will may be situational, in that it could have been influenced by the way the question was asked. By nature, the living will binds the future exercise of autonomy by a past exercise of autonomy, but given the fluidity of human will there remains the issue of whether the person making the decision in the past is really the same autonomous individual as the person being bound in the future. Furthermore, advances in medical science may affect how the willmaker would have responded to a particular situation. For these reasons, many people acknowledge that there must be great flexibility in the interpretation of living wills.

In the end, it is arguable whether living wills have adequately resolved the issue of decision making

during incapacity, to the extent that the concept of autonomy itself is called into question. There is also the issue of the standard of medical care provided to patients without capacity.

Dr. Akabayashi based his commentary on Japanese survey data. He stated that, while the majority of Japanese patients and the vast majority of Japanese doctors would respect a living will, very few patients have actually made one. The common view amongst patients is that they want to leave some general advanced directives in oral form, but do not want to bind themselves absolutely. Dr. Akabayashi stated that, if the aim of the advanced directive is to respect the patient's autonomy and also to protect the actions of medical personnel and ease their psychological burden, then it is necessary to determine who can make an advanced directive, for what purpose, and with what content. Furthermore, given the difference in the overall medical systems in Japan and America (the former based on public health insurance, the latter on private), he pointed out that the direction in which the autonomy debate is headed is opposite in the two countries, so that in Japan the issue is one of how much "selfishness" can be permitted at the public expense.

Questions from the floor focussed on whether advanced directives in America have had the effect of reducing the content of standard medical treatment, and if so whether advanced directives are contributing to a reduction in the cost of providing medical services. Professor Schneider replied that advanced directives could in fact expand the scope of standard medical treatment. He stated that advanced directives made little contribution to lowering medical costs at present because of the current low level of adoption of this mechanism, but that there are other considerations involved in the costs issue which he would take up in Session 6 on Managed Care.

[*Okuda Jun'ichiro, translated by Peter Neustupný*]

Session 5 - Physician Assisted Suicide (PAS)

The debate in America on the rights of patients in the final stages of life has recently focussed on the option of physician-assisted suicide. Physician-assisted suicide is founded in the exercise of autonomous decision-making but, in the Western tradition where suicide itself was until recently a criminal act, it is difficult to justify physician-assisted suicide on the basis of autonomy alone.

The push for physician-assisted suicide has occurred in the context of:

1. changing approaches to the conceptualisation of death;
2. the possibility of prolonging an "undignified life state" due to advances in medical science;
3. the difficulty in differentiating the right to PAS on the one hand from the right to die with dignity or the right to refuse treatment on the other.

The arguments on physician-assisted suicide have been stimulated by activity on three fronts. First was the action by Michigan doctors contrary to the legal prohibition of physician-assisted suicide. Second came the demands for state laws to permit physician-assisted suicide based on a state plebiscite. Third was the legal suit to challenge the constitutionality of using the crime of assisting suicide to prosecute physicians who assisted suicide. The first of these has resulted in repeated failures to indict doctors before a grand jury, the second in revisions to Oregon state law, and the third in a recent decision of the Supreme Court.

The United States Court of Appeals on two occasions had held the prohibition of physician-assisted suicide to be contrary to the 14th Amendment, but the Supreme Court overruled both of these. In response to arguments relating to invasions of the individual's right of choice and parallels with the right to die with dignity, the court held that America's history and tradition did not make a fundamental right of the "right to seek physician-assisted suicide" and rejected the proposition that the due process requirements under the 14th Amendment protect all autonomous decisions. The court further held that the states had a legitimate interest in prohibiting physician-assisted suicide, namely:

1. a real and symbolic interest in protecting human life;
2. the obligation to protect individuals from an ill-considered exercise of autonomy;
3. the protection of the ethics of medical professionals;
4. the need to prevent the imposition of the suicide option as a result of health funding pressures;
5. the need to prevent society falling down the slippery slope towards involuntary euthanasia.

The judgment does not go as far as declaring unconstitutional the state laws that permit physician-assisted suicide, so the debate is set to continue. Further, given the controversy surrounding the Supreme Court's recent decision in relation to the Roe v. Wade abortion case which had the support of many bioethicists, one has to doubt the effectiveness of adopting the mechanism of constitutional law for resolving the issue of physician-assisted suicide which is at least as contentious. Until the American people resolve the ethics of physician-assisted suicide, American democracy requires that the issue be debated outside the court room.

Ms Tomita commenced the commentary by comparing the Tokai University case in Japan, the Rodriguez case in Canada and various cases in the USA to display the multiplicity of responses to this issue.

Professor Hoffmann pointed to the futility of jurists trying to differentiate between physician-assisted suicide and dying with dignity according to the motivation of the actors or causal relationships. He stated that we need to draw clear lines, but admitted that this was not aided by the fluidity through time of concepts of what is right and wrong, so that in the end we have to rely on criteria of who is acting and the manner in which they are acting. He also expressed doubts about categorising this as a constitutional issue in the US, preferring to leave the matter to individual states to resolve. He stated that even if physician-assisted suicide is prohibited through the crime of assisting suicide, there should be a means to override its criminality in special cases. Professor Schneider expanded on this point, stating that the advantage of the federal system was the ability to make full use of the experiences and mistakes of the fifty states.

Questions from the floor raised the issue of hospice care and physician-assisted suicide. Professor Schneider replied that those involved in hospice care tend to see physician-assisted suicide as inimical to their very reason for existence. In response to a question on the "slippery slope" of voluntary euthanasia in Holland, Professor Schneider replied that while one hears that conditions have become less strict, because it remains a personal issue, there are no clear-cut solutions.

[*Okuda Jun'ichiro, translated by Peter Neustupný*]

Session 6 - Managed Care

The sixth and final presentation given by Professor Carl Schneider of the University of Michigan Law School, at the 4th Comparative Law and Politics Symposium, Bioethics and the Law : U.S. and Japan examined how changes in the way health care is provided are affecting bioethics in the United States.

Professor Schneider began by describing the changes in the U.S. health care system toward treatment within ever larger institutions, since size allows institutions to compete better by offering more services. However, with increased size necessarily comes increased bureacratization and more bureaucrats. Bureaucratic organizations such as managed care groups have also arisen since they are seen as offering ways to reduce health care costs.

This bureaucratization, Professor Schneider argues, has changed the bioethical paradigm which traditionally assumed one doctor making the decisions for one patient. Decision making increasingly has moved out of the hands of the physician as people and teams in the organizational structure formulate diagnoses, prognoses, proposals and treatments. Doctors spend less time with patients and their loyalty leans away from patients and more toward the organizations which employ doctors, their subculture, and their profession. Moreover, third-party payer organizations have control costs by reviewing bills carefully, insisting on pre-approval for some procedures, and second opinions before expensive surgery.

While Professor Schneider admits that bureacratization may offer some advantages in the area of cost savings, he argues there is a price to be paid as clients find themselves without power to change the bureaucracy's behavior. Bureaucracies may accord patients due process rights, but studies show clients seldom avail themselves of these rights. Moreover, "bureaucratic formalism" in which the spirit of the rules is lost often results, and red tape, delay, routinization, rigidity, and indifference plague all bureaucracies.

Professor Schneider asserted that one solution to these problems is to view bioethics in terms of consumer protection rather than consumer choice. The underlying assumptions of the consumer choice model, such as engaged and energetic purchasers, are often not fulfilled. On the other hand, regulatory incentives like those used in other areas might be used to help change the medical care system so that it delivers a better product. Guidelines might be effective in helping patients get the medical care they want: kinder and more personal care.

[*Todd Elwyn*]

Comparative Law and Politics Seminars & Forums

Held at The University of Tokyo, Graduate School of Law and Politics, April - September 1998

[Seminars]

The 59th Comparative Law and Politics Seminar - 2 June 1998
Speaker: Professor Dr. Michal Sewerynski, University of Lodz, Faculty of Law and Administration; ICCLP Visiting Professor
Topic: Labor and Social Policies under the Economic Reform in Poland
Language: English
Moderator: Professor Sugeno Kazuo

The 60th Comparative Law and Politics Seminar - 4 June 1998
Speaker: Professor Eric Zolt, UCLA Law School
Topic: Prospects for Fundamental Tax Reform in the United States: Beyond IRS Bashing and Implications for Japan
Language: English
Moderator: Professor Nakazato Minoru

The 61st Comparative Law and Politics Seminar - 26 June 1998
Speaker: Professor Mary Dee Pridgen, University of Wyoming College of Law
Topic: U.S. Consumer Law: Paternalism or Individualism?
Language: English
Moderator: Professor Kashiwagi Noboru

The 62nd Comparative Law and Politics Seminar - 25 September 1998
Speaker: Professor Jean-Louis Halpérin, Dijon University
Topic: The French Revolution and Private Law
Language: French (with Japanese translation)
Moderator: Professor Kitamura Ichiro

The 63rd Comparative Law and Politics Seminar - 30 September 1998
Speaker: Professor Sara Sun Beale, Duke University School of Law
Topic: Current Public Attitude toward Crime
Language: English
Moderator: Professor Higuchi Norio

[Forums]

The 89th Comparative Law and Politics Forum - 14 April 1998
Speaker: Professor Kotera Akira, College of Arts and Sciences, The University of Tokyo
Topic: Sport Arbitration Court
Language: Japanese
Moderator: Professor Dogauchi Masato

The 90th Comparative Law and Politics Forum - 4 June 1998
Speaker: Mr. Jin Chongji, Vice-Director of the Institute of Historical Documents
Topic: Zhou Enlai and Chinese Diplomacy in the 1950s
Language: Chinese (with Japanese translation)
Moderator: Professor Watanabe Hiroshi

The 91st Comparative Law and Politics Forum - 19 June 1998
Speaker: Associate Professor Luke Nottage, Kyushu University
Topic: Cyberspace and the Future of Comparative Law: Japanese and New Zealand Law on the Internet as Case Studies
Language: English/Japanese
Moderator: Professor Kashiwagi Noboru

The 92nd Comparative Law and Politics Forum - 7 September 1998
Speaker: Sir Colin Campbell, Vice-Chancellor, University of Nottingham
Topic: Legal and Ethical Issues in Human Genetics
Language: English
Moderator: Professor Hasebe Yasuo

Reports on Selected Seminars and Forums

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

Professor Bernard A. Rudden

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

Monetary obligations are the simplest and the most basic of all positive legal obligations. In most categories of contract such as sales, lease, employment, and transport, the essential obligation of one of the parties is just to pay money; in some categories like insurance and stock exchange, both parties are bound only to pay money. In fact, it is very difficult to find contracts which do not contain monetary obligations. Aside from family relationships, most ordinary citizens enter into at least one non-monetary obligation in their lives: they get a job. But the rest of the obligations are monetary ones. "Earning a living" means earning what is necessary to perform monetary obligations.

Professors of law have spent very little time on this topic, however. Common lawyers ignore it completely, and comparative lawyers do not deal with it very broadly. This is to a considerable extent true for analytical jurists and civil lawyers as well.

Monetary obligations have a number notable features. The constant element is to pay the capital, that is, the main amount, whereas the contingent element is to pay interest and compensation. An obligation to pay money is the most rigorous of all obligations in the sense that it makes the recipient the owner of the money, that it is not an obligation to try to pay, but an obligation to pay, and that courts have no power to vary the obligation except in response to some defects in the other performance. Other features of monetary obligations include abstractness and heritability; also, it is noteworthy that performance of monetary obligations is often postponed, and that security is very often taken by the lender for this reason. A primary monetary obligation is extinguished when the debtor pays the money, which makes his or her creditor the creditor of a public law obligation, the creditor of the Bank of Japan, for example.

With these points in mind, Professor Rudden extended the observation and looked at the treatment of monetary obligations generally. Civil lawyers sometimes state that fault is a condition of liability for breach of contract, that plaintiffs must show damages, and that comparative negligence of a plaintiff can make a difference to the amount owed by the defendant; however, such propositions are not true of monetary obligations. There are common-law distortions as well: common lawyers disagree about whether the enforcement of monetary obligations should be considered as specific performance or damages, and in England, neither the standard textbook of specific performance nor that of damages discusses this point. Finally, failure to pay attention to simple monetary obligations sometimes leads comparative lawyers in the wrong direction; for example, comparative lawyers distinguish those systems in which ownership passes by consent from those in which delivery or something else is needed, but ownership of the money does not pass until delivery, of course. Similar examples are abundant.

Legal historians often suggest that once upon a time the law was kinder, and that things were generally better until the Industrial Revolution. But we must not forget that, before the 19th

century, the sanction for failure to pay money was imprisonment.

[*Abe Keisuke*]

The 59th Comparative Law and Politics Seminar - 2 June 1998

Professor Dr. Michal Sewerynski

Labor and Social Policies under the Economic Reform in Poland

Professor Sewerynski delivered six lectures under the title, "The Evolution of Labor Law and Industrial Relations in Poland and Some Other Post-Communist Countries" during his stay at the University of Tokyo. His ICCLP seminar talk corresponded to the first part of these lectures and mainly focused on Polish history since its founding and Polish Labor Law during the Communist Era before the 1980s thus providing an important background in understanding the situation of labor law and industrial relations after the Communist Era.

Polish History

It is important to understand the background to the state of labor law after the Communist Era. Facts that should be emphasized include the important political role played by Roman Catholic Church throughout Polish history, the rich Polish tradition of democracy, and the progressive labor legislation that was introduced after the First World War.

Individual Labor Law under the Communist System

The main source of individual labor law was the Labor Code of 1974. The delay in the enactment of the Code was due to the communist government's policy of attempting to preserve most of the communist-interpreted previous legislation.

One of the major features of the individual labor law is that its "organizational functions", which integrate workers into production under the planned economy, were seen as playing an important role and sometimes regarded as more important than the workers' protection functions. Another major feature was the limited role of the employment contract. This was due to the fact that the planned economic system made the room for negotiation between managers and employees very small.

On the other hand, the right to work was guaranteed by the Constitution and workers were able to enjoy full-employment. However, this policy of full-employment policy was a political and social, rather than economic, device and the allocation of manpower was often economically unjustifiable.

Individual labor disputes were resolved mainly by arbitration commissions under the guidance of trade unions, and thus, the role of the Labor Court was marginal.

Collective Labor Law under the Communist System

Trade unions were organized on the industrial level. The main legislative reference point was the Trade Union Law of 1949 that seemingly guaranteed the freedom of union activity. However, in reality, trade unions were strongly controlled by the Communist Party and the freedom of union activity was limited. Trade unions played various administrative roles such as the settlement of individual labor disputes, labor inspection and the administration of social security. However, their role in workers' protection was rather limited.

Collective bargaining agreements were regulated by legislation enacted in 1937 before the adoption of the Labor Code of 1974. Agreements were concluded through negotiations between the National Board of Industry-based unions and the minister in charge of the particular industry. These collective labor agreements were not so important because of the fact that the freedom of trade unions was limited and that the planned economic system severely limited the scope of bargaining. However, in reality, both parties to the "formal" negotiations jointly conducted "real" negotiations with the Minister of Labor in order to seek the realization in legislation of their previously conducted agreements.

As for collective labor disputes, there was no official resolution system because these disputes theoretically could not exist under the communist system. They were actually resolved informally with the participation of the Communist Party within the enterprise in question.

A workers' participation system that allowed employees to take part in the management of enterprises was one of the typical features of the communist system. In Poland, like other communist countries, the adoption of a workers' participation system was provided in the Constitutional Law and was elaborated as one of the devices to integrate workers into the achievement of economic goals under the planned economic system.

[*Kawata Takuyuki*]

60th Comparative Law and Politics Seminar - 4 June 1998

Professor Eric Zolt

Prospects for Fundamental Tax Reform in the USA: Beyond a Critique of the IRS and some Suggestions for Japan

There is currently a spirited debate occurring on tax reform in the USA. The purpose of this presentation is to raise five questions in this area.

Q. Why is tax reform such a popular agenda?

A. An existing tax system is always easy to criticise, in terms of minimum rates, complexity, distortions of economic activity, relationship with wage earning activities, etc.

Q. Why, despite its popularity, is fundamental tax reform never brought to fruition?

A. First, there is no consensus on fundamental principles. Does the principle of "equity" logically lead to a flat tax on all income, a graduated tax on income or a consumption tax? Alternatively, is equity a question of distribution? Does the principle of "efficiency" depend on the size of government; does it necessitate a neutral effect on economic activity; does it mean avoiding capital levies; or does it mean keeping taxation to a minimum? The answer depends on whom you ask. The same goes for the principle of "simplicity".

Second, many of the simpler tasks in tax reform have already been undertaken and there is significant inertia caused by continued dependence upon the pre-1986 distribution tables. Reform is also made that much more difficult by the influence of vested interests. There is also the question of the heavy reliance of the system upon payroll tax (including social security tax) which constitutes thirty-six percent of revenue. It is not possible to sensibly discuss tax reform without considering the effects on this important source of revenue. Finally there is the logistical issue of how to transfer to a new system.

Q. What options are there for comprehensive tax reform?

A. One option is a "retail sales tax" on the consumer at the final point of sale. At a rate of eight percent, such a tax would obviate the need for other taxation. However, the distribution of revenue between state and federal levels under this system has never been satisfactorily resolved. Another option is a "value added tax". This has been rejected by both sides of political opinion, liberal and conservative. A third option is the "Hall-Rabska tax", which is essentially a value added tax with exemptions for non-individual taxpayers. Next is the "USA tax," which taxes consumption. Finally, there is the "Gepphart ten percent tax", similar to the English system under which there is one tax rate for ninety percent of income earners and a higher rate for the most affluent ten percent of taxpayers.

Q. What option is the most likely to be realised?

A. In practice, none of these models is likely to be implemented in its pure form. The effects of the resulting hybrid model on economic activity would be complex. For instance, there is data suggesting that reducing the top tax rate in America would be accompanied by a decline in economic growth, although there is no simple causal relationship between the two.

Q. What suggestions for Japan can be gleaned from the US experience of comprehensive reform?

A. There are many differences in national sentiment between Japan and the USA in relation to savings and the desire for comprehensive tax reform. However, the proportions of income tax and consumption tax to GDP are similar in the two countries, so any fundamental change in the USA would undoubtedly bear close examination in Japan.

Professor Zolt plans to expand on the contents of this report in an article for JURIST.

[Fuchi Keigo, translated by Peter Neustupný]

89th Comparative Law and Politics Forum - 14 April 1998

The Court of Arbitration for Sport

Professor Kotera Akira

Professor Kotera acted as an arbitrator in the Court of Arbitration for Sport (CAS) at the Nagano Winter Olympics, which resolved disputes relating to such matters as the disqualification of athletes for drugs offences or nationality issues, and commercial contractual disputes relating to the Games.

In this presentation, Professor Kotera began by explaining why arbitration is an appropriate dispute resolution mechanism in the context of sports law. He referred to the inability of the regular court system to guarantee prompt outcomes and problems with enforcement of court judgments.

The Court was initially established in 1984 under the International Olympic Committee (IOC) but from 1994 was administered by the newly-created International Commission for Arbitration in Sport (ICAS). This change in administration was intended to ensure the independence of the Court. Its jurisdiction covers both arbitration and advisory opinions, and the addition of a mediation jurisdiction is currently being mooted. The three divisions of CAS are :

1. the General Arbitration Division—for disputes arising from an arbitration agreement;
2. the Appellate Arbitration Division—for appeals relating to penalties imposed by international sporting bodies; and
3. the Temporary Arbitration Division—for disputes arising during the Olympiad (as of the 1996 Atlanta Olympic Games).

CAS has 150 registered arbitrators, and one or three of these are selected to constitute a bench of arbitration. The site of arbitration is Lausanne, the headquarter of CAS. CAS adopts Swiss procedural law and substantive law is determined, as in any other type of arbitration, as the law agreed between the parties or the relevant law.

Professor Kotera then reported on four cases heard by the Temporary Arbitration Division during the Nagano Games.

1. *X and "Puerto Rican Ski Federation" v. IOC*—X was the Secretary General of the "Puerto Rican Ski Federation". He had been barred from appearing in the skiing events through application of the participation criteria created by the International Ski Federation and published by the IOC. This action claimed that the participation criteria breached Article 54 of the Olympic Charter and that X had been wrongly excluded from the event. The Court found that X was not a member of the Puerto Rican Olympic team and that the "Puerto Rican Ski Federation" that he represented was not a national sporting body. The Court therefore concluded that neither had standing before the Court and refused to determine the case.
2. *X v. IOC*—The IOC stripped X of his gold medal for snow-boarding when test results showed he had used marijuana. The Court reversed this decision on the basis that there was not adequate consensus amongst international sporting federations and IOC medical representatives to make the use of this drug the subject of testing and penalties.
3. *X v. Speed Skating Federation of Y*—Skaters from Country Y used clap skates in competition. The boot section was manufactured by Company X, but the blades were manufactured by Company A. The skaters used skate covers for their clap skates to improve the aerodynamic properties of the blades. The covers were imprinted with the logo of Company A. When the covers were in place the logo of Company X was obscured. Company X complained that this situation gave the false impression that Company A had made both the boot and the blade. Company X claimed that its advertising activities were unfairly hindered under the Japanese antitrust law and Article 61 of the Olympic Charter and demanded that the skate covers be withdrawn from use. The Court did not support the claim, on the grounds that the use of the skate covers was not with an advertising objective and Article 61 is not intended to regulate commercial competition. The Court rejected X's claim and stated that any further claim of unfair competition should be pursued in another forum.
4. *X and Swedish Olympic Committee v. International Ice Hockey Federation* and *Czech Olympic Committee v. International Ice Hockey Federation*—This dispute concerned the rules of the International Ice Hockey Federation, which deemed a match forfeited where a team fields a player who is not entitled to play. The Court found that the player X had acquired US citizenship and accordingly lost Swedish citizenship, and was not entitled to represent Sweden. However, the Court found that the Czech Olympic Committee did not have standing to bring a claim as the Czech team had not played Sweden and belonged to a

different league within the Olympic competition, with the result that Swedish team did not forfeit the game.

Professor Kotera commented that while the third case involved regular commercial arbitration, the other disputes were specific to the Olympic context and differed in nature. In relation to the powers of the IOC and the Court, he pointed to the inconsistency between the supremacy of the IOC within the Olympic movement (Article 1 of the Olympic Charter) and the exclusive jurisdiction of the Court (Article 74). The effect of Article 19.4 in resolving this inconsistency is not yet established, so the determination of the distribution of powers may have to await further developments in specific cases. Furthermore, there is an unresolved issue of the difference in procedure between the General Arbitration Division and the Temporary Arbitration Division, which could become especially problematic if identical claims were brought in both divisions simultaneously. Finally, Professor Kotera commented on measures to deal with the special urgent nature of sports arbitration, such as the deferral of providing detailed reasons or making determinations in stages or on a provisional basis. He pointed out that the possibility of error was the undeniable result of these measures.

In conclusion, Professor Kotera stated some of his impressions from taking part in the Court's proceedings. Whereas there is an image of arbitration as relying on fairness and equity, he found that in fact there was a cogent exchange of legal arguments, such that it was not at all surprising that the Court's bench was made up of jurists. However, at the same time, he also had the impression that the "reasonable expectations" of the parties were given considerable weight. In relation to the rule of law in the sports world, Professor Kotera stated that the extent to which dispute resolution in sport is governed by law is ultimately a policy decision for the members of the sporting community, but there is a distinct trend for decisions that were formerly made behind closed doors to now be made in public.

[*Someya Masayuki, translated by Peter Neustupný*]

90th Comparative Law and Politics Forum - 4 June 1998

Zhou Enlai and Chinese Diplomacy in the 1950s

Mr. Jin Chongji

Mr Chen began his research career studying the Chinese Revolution of 1911, but after obtaining the position of Deputy Head at the Chinese Communist Party Central Reference Studies Center in 1984 and gaining free access to the confidential materials of the Center he began the project of writing and editing the biographies of major characters in the Chinese Communist Party. The subject of this presentation was an introduction to his biography of Zhou Enlai (published in February 1998 by the Zhougyang Wenxian Center Publishing House).

Zhou played a vital role in Chinese diplomacy as decision maker, leader and administrator. For the twenty-six years from his appointment as Premier to his death, he held ultimate responsibility for foreign relations. For the nine years from the establishment of the state in 1949 until 1958, he was also the Foreign Minister. Thus a study of Zhou constitutes a meaningful study of Chinese diplomacy as a whole.

Zhou's role in the diplomacy of the new China

The new Chinese state emerged in a difficult international environment. The superpower USA took a hostile attitude to the new China and the USSR, which one might have expected to be an ally, had underlying fears that China would follow the path of Tito. The surrounding Asian states also did not fully understand the new China and bore a strong sense of uneasiness. In this environment, the priorities for Chinese diplomacy were to ensure its independence and prevent isolation.

In order to ensure independence, the new China did not recognise the privileges of imperialism nor the international treaties adopted by the Nationalist Government. Foreign diplomats who remained in China were given protection as foreign residents but were not accorded diplomatic privileges in the absence of diplomatic relations. However, this is not an indication that China did not desire normal and equal relations. When Nanjing was liberated, former US Ambassador John Leighton Stuart approached the Communist Party with his wish to visit Yanjing University, of which he had previously been the President. Zhou recognised that this could lay the foundations for a change in Sino-American relations and agreed to the request on the basis that Stuart make his visit in his capacity as the former President of the University rather than as Ambassador. The visit was later cancelled due to reservations of the US Secretary of State, but Zhou's attempts to forge international links while maintaining independence are clear.

As the USA decided to continue supporting the Nationalist Government, the new China had no choice but to support the USSR. However, the new China pursued its independence policy even in its relations with the USSR. From the new China's point of view, there were unequal treaties even with the USSR, such as the Sino-Soviet Treaty on Friendship and Alliance of August 1945. Towards the start of 1950, Zhou visited the USSR and negotiated for a new Sino-Soviet Treaty on Friendship, Alliance and Mutual Aid. Stalin was not very receptive to these overtures. He saw the old treaty as having the imprimatur of the Yalta Conference, and a new treaty might have a negative influence in relation to the Northern Territories dispute with Japan. However, the Chinese delegation persisted and eventually won its much sought after new treaty. Territories such as Lüshun Military Port, the City of Dalian and the Zhongchang Railway, which had been leased to the USSR or were under joint Sino-Soviet administration, were restored to full Chinese sovereignty after the treaty to end hostilities with Japan. Zhou later recollected that there was no intention to rely completely on socialist nations such as the USSR: rather, there was a conscious decision to adhere to the stance of independence.

Zhou's diplomacy of forging alliances to resolve international disputes and maintain international harmony

Early in the summer of 1954, Zhou led the Chinese delegation to the international conference in Geneva on the Korean and Indochinese problems. Widely disparate views were expressed at the conference. Zhou proposed a resolution that at least reflected the cooperative spirit of the conference participants, but this was opposed by the USA and was not passed.

The Indochinese problem was debated in the later part of the conference. The USA did not adopt a cooperative stance towards any resolutions, so Zhou focussed his attention on France, the interested party in the negotiations. The major point of conflict between France and Vietnam was the terms of the ceasefire. In particular, the issue was whether to conduct the ceasefire based on the territory currently controlled by the two sides or to draw an east-west dividing line. If the latter, the further issue was whether the line should be drawn at 16^{o}N latitude as favoured by the Vietnamese or 18^{o}N as favoured by the French. Zhou conducted vigorous discussions with both

sides and determined what compromises they were prepared to make. As a result of these efforts, the line was drawn at 17°N with the agreement of both sides, and peace was brought to Indochina.

The Five Principles for Peaceful Coexistence and the promotion of joint Asian-African interests

On the occasion of meeting Indian delegates in 1953 to discuss relations between the India and the Tibet Region of China, Zhou expressed his five Principles for Peaceful Coexistence for the first time. The five Principles were later repeated in the preambles to agreements between these two states, as well as in joint statements by their prime ministers.

In 1955, Zhou headed the Chinese delegation to the Asian-African Conference at Bandung. Most participants at the conference did not have diplomatic relations with the new China and had conflicting social systems and ideologies. Some participants, under US influence, took a hostile approach to the new China. Faced with this situation, Zhou addressed the delegates and sought their understanding, saying "We have come to the conference for the purpose of joint action, not to have disputes". Zhou's efforts to "recognise differences but seek points of concord" was successful in changing the mood of the conference. When the conference declaration was being debated, some states opposed the socialist terminology of "peaceful coexistence". Zhou proposed the alternative of "live together in peace" as in the preamble to the United Nations Charter, and obtained the agreement of all the delegates. Zhou's efforts of this kind were undoubtedly vital to the success of the Bandung Conference.

Following the presentation, there was further discussion of the features of Zhou Enlai's diplomacy and its effects on current Chinese diplomacy.

[*Chen Zhaobin, translated by Peter Neustupný*]

The 91st Comparative Law and Politics Forum - 19 June 1998

Professor Luke Nottage

Cyberspace and the Future of Comparative Law: Japanese and New Zealand Law on the Internet as Case Studies

Much ink has been spilt—and much time spent at computer keyboards—writing about specific legal problems associated with the rapid growth of the internet, multimedia, and digital information technology. Luke Nottage's talk prompted participants to consider broader issues stemming from the ongoing expansion of cyberspace, defined as "a mature electronic culture— one where electronic networks are much more fully developed than they are today, one where many different kinds of data and stimuli can be simultaneously communicated around the globe, and one where the electronic means at our disposal to acquire and process information are richer and much more developed than they are today" (M. Edwin Katsch, LAW IN A DIGITAL WORLD 14-15 (1995)). The main focus of the talk was the implications for the future of comparative law, but in the broader context of the future of legal practice and legal education.

Luke's speculations as to comparative law in a cyberspace era were prompted by his extensive "surfing" (searching) through the internet for materials related to Japanese law in Western languages (most recently for a chapter in Luke Nottage & Harald Baum, JAPANESE BUSINESS

LAW IN WESTERN LANGUAGES: AN ANNOTATED SELECTIVE BIBLIOGRAPHY (Littleton Co.: Fred B. Rothman & Co., 1998) and to New Zealand law (for a chapter in Makoto Ibusuki, ed., INTANETTO DE GAIKOKUHO (Nihon Hyoronsha 1998, Tokyo). Five features emerging from this mass of material raise prompt us to consider what sort of law.

The first feature of this growing mass of material is that it mainly comes from government or quasi-governmental websites, and consists of statutory material. This is reminiscent of *fin de (19ème) siècle* legal positivism and "comparative legislation". It may lead to a renewed focus on black-letter statute law comparisons, or at least to comparative lawyers focusing more on the institutional framework of legal systems and on public law.

Secondly, however, there is an increasing amount of case law becoming readily available over the internet. This is particularly so in common law jurisdictions. Comparative lawyers have increasingly—and justifiably—challenged the notion of a rigid dichotomy between the common law and civil law traditions, pointing for instance to the increasing importance of precedent in so-called civil law systems. That the latter do not yet make their case law so readily available, however, suggests that aspects of the distinction may still be valid. More case law is emerging even in civil law or hybrid systems, nonetheless. More case law on the internet helps bring in more private law. A possible historical parallel here is with legal realism, beginning prior to World War II and fueled by a rapid expansion of, and interest in, published case law. Legal realism, in the U.S. at least, developed in two directions: a radical, even nihilist variant (sometimes associated with some of Jerome Frank's work), and a more constructive variant (such as Karl Llewellyn's later work to reform U.S. commercial law to better deal with the problems encountered in actual business relations). The latter variant may have underpinned the emergence of the mainstream post-war comparative law methodology: a functionalist approach focusing on how different systems resolve "common problems", by statutory rules but also case law development. Increasing accesssibility of case law on the internet nowadays may reinforce this methodology in the short term.

A third feature, however, is that much of the material on the internet is "related" to law (whether statutory or case law), often only in a broad sense. This may reinforce both the increasing interest in social theory by legal scholars since the 1980s, and more resolutely inter-disciplinary comparative law methodology. So far, mainstream comparative law scholarship has tended to baulk at the latter, even though it can be seen as a logical extention of a functionalist approach. Partly this may be because it is just so difficult and time-consuming, relative to just comparing statutory and case law. Another reason is probably institutional academic conservatism. The growth of cyberspace, however, makes inter-disciplinary research easier, and will probably lead to a reconfiguration academic fields, at least over the medium term.

A fourth feature of Law-related material on the internet so far is that it is still predominantly in English, although the rapid expansion of internet use in Japan in the last few years has brought with it much more in Japanese. This raises the interesting possibility of divergence within convergence, even though cyberspace is often touted as heralding a new era of globalisation—sometimes in the sense of simple homogenisation. Just as evolutionary theory shows how a barrier (like a mountain range) can lead to the development of distinct species, continued language barriers may create distinct sets of norms and discourses within cyberspace (cf. David Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, at

1395-7, 1996). This may lead to renewed "legal orientalism" in comparative law study, valorising difference, or a new "colonizing influence" on the part of the dominant set of norms (see Luke Nottage, *Contract Law and Practice in Japan: An Antipodean Perspective* 31 HIKAKUHO ZASSHI 55, respectively at 62, 99, 1998). Or, more likely—as we see also within legal systems, as well as across legal systems—fluctuating combination of these two influences.

Even more speculative is the possibility of the emergence of a new lex mercatoria, a "lex informatica" radically divorced from state boundaries but driven now by the imperatives of digital technology (Aron Mefford, "Lex Informatica: The Foundations of Law on the Internet" (1997) http://www.law.indiana.edu/glsj/vol5/no1/mefford.html). This could imply, if not the "death of comparative law", at least its radical reconceptualisation, over the long term. Such a trend, however, assumes unrealistically that states will not be able to develop techniques to regulate cyberspace and the emergence of endogenous norms. The factors driving the latter must also be more carefully analysed, as Ota Shozo pointed out during the discussion after the talk.

His observation also leads to the need to locate the developments in much broader context. Aspects relevant to both the future of law and the future of comparative law include the implications of cyberspace for legal practice, and legal academia more generally, over the next few decades (see, generally, Luke Nottage, *Cyberspace and the Future of Law, Legal Practice, and Legal Education*, 65/1 HOSEI KENKYU (1998). The political interests of those involved in running contemporary nation-states or new supra-national bodies, or citizens marginalised in the new cyberspace era, could readily create new paths of development. Comparative law, and law itself, therefore still have many futures. This talk showed, however, that we cannot consider these without ignoring the implications of cyberspace.

[*Luke Nottage*]

Visiting Research Scholars of the Graduate School of Law and Politics
April - September 1998

Kim Hyung-Du, Judge, Hongsung Branch Office of Daejeon District Court, Korea
Term: April 1998 - February 1999
Research Area: The State and Management of Corporate Reorganization in Japan with reference to its incorporation in Korea
Host: Professor Aoyama Yoshimitsu

Wu Yuhtzong Robert, Associate Professor, Shih Hsin University
Term: April 1998 - March 1999
Research Area: Modernization of Japanese Law
Host: Professor Takahashi Kazuyuki

Suh Geo-Suk, Professor, Chonbuk National University
Term: June - July 1998
Research Area: Japanese Economic Criminal Law
Host: Professor Nishida Noriyuki

COMPUTER CRIME AND THE LIMITS OF THE LAW

BY
JOSEPH L. HOFFMANN
PROFESSOR OF LAW, INDIANA UNIVERSITY

Introduction

As I sit in Bloomington, Indiana, preparing to submit this essay to the ICCLP office in Tokyo by means of a computer file sent in seconds over the Internet, I can only marvel at the way that my professional and personal lives—like those of many other people—have been transformed by computers.

When I began as a law teacher at Indiana University in 1986, I was provided with a personal computer for my office, but—like many academics—initially I used it almost exclusively as a kind of high-powered electric typewriter or word-processor. Over the next few years, as I grew more and more familiar with the capabilities of my personal computer, I began to use it to perform more complex office tasks. Before long, for example, I became virtually independent of the need for secretarial support—with my personal computer, I could compose, edit, format, and print almost any document with ease. I also gradually began to retain most documents in my personal computer as a substitute for a physical file cabinet, and I started to use my law school's local network as a means of daily communication with my colleagues.

At that time, I could not have imagined what lay ahead. When I first came to the University of Tokyo, as a Fulbright professor in 1994, I had only recently learned about the existence of the Internet. Quickly, however, it became my professional lifeline, allowing me to exchange e-mail messages and documents with professors and students back in the United States. I was even able to complete several chapters of a new casebook, working in conjunction with an American publishing company, during my stay in Tokyo.

As magical as the Internet seemed then, it was nothing compared to the wonders of the World Wide Web. By 1997, when I returned to the University of Tokyo, I had become an avid user of the Web, for a wide variety of professional and personal purposes—legal research (especially Lexis and Westlaw), news, entertainment, personal communications, and even the purchase of goods and services.

Nowadays, I connect to the Web almost every single day. My wife and children have become Web addicts, too. Since our return to the United States in August 1998, we have even added a second telephone line to our home (an increasingly common phenomenon in America), in order to facilitate our Web usage. I often feel that we have truly entered a "Brave New World."

The Internet and Computer Crime

The same kind of story, of course, could be told by many other people, in the United States and around the world. The statistics are staggering. Just ten years ago, for example, there were only 80,000 Internet host computers. By 1991, the total had grown to 750,000; by 1996, it had reached almost thirteen million. Currently, about fifty million people are regular Internet users. Soon a second, more powerful Internet II will be implemented, to relieve the pressures that exploding usage is imposing on the original Internet. Growth of the World Wide Web has been even more startling. In January 1993, there were only fifty Web sites in existence, whereas by July 1996,

there were more than 230,000 Web sites. By some calculations, the size and scope of the Web is doubling about every six months.

But while computer technology races ahead, human nature remains basically the same. The rapid increase in the use of computers, and especially the Internet, in recent years has given rise to a growing concern over computer crime.

Again, the statistics are staggering. In the past five years alone, computer security breaches reported to CERT (the Computer Emergency Response Team, an Internet-security study group funded by the United States government) have increased by almost 500 percent, with a jump of more than 700 percent in the number of computers affected. Although reliable loss estimates are difficult to obtain (because many companies do not want to admit such losses), it is believed that computer crime causes more than $10 billion in losses every year in the United States and Western Europe alone. By almost any measure, computer crime is a serious problem. And countries around the globe are struggling to keep up, as law enforcement and the criminal law itself often lag significantly behind the fast-paced developments in computer technology.

What should be done about computer crime? How should cyberspace be regulated? These are the questions I intend to address in the remainder of this essay, with a particular focus on recent developments in the United States with respect to computer crime.

Computer Crime Legislation in the United States

Because everyday computer usage developed most rapidly in the United States, the perceived need for legal reforms to deal with computer crime (and related information-based crimes) also emerged first in the United States. These legal reforms have mostly been implemented by the federal government, which possesses the constitutional authority to regulate the channels and instrumentalities of "interstate and foreign commerce," see U.S. Constitution, Article I.

The first federal statute to address criminal conduct in the realm of information and data processing was the Fair Credit Reporting Act of 1970. The Fair Credit Reporting Act marked the beginning of the so-called "first wave" of computer crime statutes. These statutes were designed primarily to protect against the improper use or disclosure of personal, often private information that was frequently collected and stored in computers. During the 1970s and 1980s, many other federal statutes were enacted with the same basic privacy goal: Privacy Act of 1974 (protecting government-held databases), Fair Credit Billing Act of 1974, Family Educational Rights and Privacy Act of 1974, Right to Financial Privacy Act of 1978, Privacy Protection Act of 1980, Electronic Communications Privacy Act of 1986, Video Privacy Protection Act of 1988 (enacted after the controversy surrounding the disclosure of the list of movie videos that had been rented by United States Supreme Court nominee Robert Bork), and Computer Matching and Data Protection Privacy Act of 1988.

The "second wave" of computer crime statutes involved legislation to protect computers and computer systems themselves from infiltration and damage. In general, such statutes prohibited intentional and unauthorized access. By doing so, they effectively created a new kind of "property right" in the contents of computers and computer systems. Examples of such statutes are the Counterfeit Access Device and Computer Fraud and Abuse Acts of 1984, and the Computer Fraud and Abuse Act of 1986.

The Computer Fraud and Abuse Act of 1986, which has since been amended (most recently and most extensively in 1996), and which now is codified (in eleven separate sub-sections) at 18 U.S.C. Section 1030, remains the primary legal source of protection for the confidentiality, integrity, and availability of most computer-based information in the United States. The original Act primarily addressed two particular kinds of computer crime: (1) using unauthorized access to any computer to obtain certain financial records, and (2) using unauthorized access to gain entry to a government computer, and thereby to obtain classified data, alter or destroy records, or use the government computer for personal purposes. Later amendments expanded the scope of the information protected by the Act, and also extended the list of protected computers (for example, to those computers used in "interstate or foreign commerce").

In the past year or so, the federal government has become deeply immersed in a major effort to improve the level of protection for America's most important information systems. The President's Commission on Critical Infrastructure Protection (PCCIP) issued a lengthy report in late 1997 (available on the Internet at http://www.pccip.gov/), assessing the scope of the risk and proposing a variety of strategies to reduce that risk in the future. Most of the proposed strategies involve greater research efforts, combined with more extensive record-keeping and analysis of relevant data; the Commission recommended only a very few changes in the laws relating to computer crime.

The "third wave" of computer crime legislation included those statutes that sought to define and protect intellectual property rights in certain kinds of digital information, such as computer software. This kind of statute, best represented by the Copyright Act amendments in 1980, has enjoyed only limited success in preventing the wholesale copying of computer software—recent estimates place the annual software-piracy losses of American computer companies in the billions of dollars worldwide.

The "fourth wave" of computer crime legislation, which began in the late 1980s, was the enactment of new statutes to define (and sometimes limit) the government's power to gain access to, and use evidence from, computers and other kinds of information systems in the investigation and prosecution of criminal cases. The Electronic Communications Privacy Act of 1986 (previously mentioned), for example, allows the government to access such information so long as a warrant is obtained.

In a related context, the United States Congress and the President have recently become embroiled in a serious controversy over how best to regulate the encryption of computer-based information—which can preclude the government from successfully accessing such information. At the present time, an executive policy limits the availability of strong forms of encryption technology to domestic (United States) users; overseas users must make do with less powerful encryption technology. Most American computer-industry leaders want to see strong encryption technology freed from all government restriction; and, in late 1997, Congress (at the behest of the computer companies) considered enacting legislation that would have over-ridden the aforementioned executive policy (the so-called Security and Freedom Through Encryption Act, or "SAFE"). However, many in the law-enforcement field argued that strong encryption technology should remain limited to domestic use, and also that the government should have the capability (by means of a kind of digital "key") to gain easy access to encrypted information under certain circumstances. So far, no acceptable compromise has been found, and the SAFE legislation

remains bottled up in Congress.

The final, "fifth wave" of computer crime legislation consisted of those efforts, especially prevalent in recent years, to regulate the content of information on computers or computer systems. The most prominent example of such a statute is the Communications Decency Act of 1996. The CDA attempted, among other things, to criminalize the "knowing" transmission of "obscene or indecent" messages on the Internet to any recipient under eighteen years old, 47 U.S.C. Section 223(a)(1)(B)(ii). The CDA also attempted to ban the "knowing" sending or displaying, to a person under eighteen years old, of any message that, "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," 47 U.S.C. Section 223(d).

The enactment of the CDA led almost immediately to a series of constitutional court challenges. In Reno v. American Civil Liberties Union, 117 S. Ct. 2329 (1997), the United States Supreme Court held that the two aforementioned provisions of the CDA violate the First Amendment guarantee of free speech. The Court's reasoning was largely based on the extreme breadth and lack of specificity of the CDA's challenged provisions. The Court also believed that other, technologically based solutions were available for parents who wanted to shield their children from potentially harmful information on the Internet, thus proving that the legislation was not "narrowly tailored" to address Congress's legitimate purposes.

A Clash of Cultures

These ongoing disputes over the various "waves" of computer crime legislation in the United States often reflect more than a simple disagreement about the wisdom of particular statutory proposals. Instead, they reveal a fundamental clash of cultures within contemporary American society. This clash of cultures is even more pronounced when the analysis is widened to include other nations.

In America, the debate over the regulation of cyberspace has largely become polarized into two opposing points of view. One side contends that law-abiding members of society must be protected from the myriad of potential dangers lurking in cyberspace—fraud, privacy violations, and various moral offenses, to name just a few. According to this view, which is commonly expressed by those involved in law enforcement, the problem of computer crime is no different in kind from the new problems presented by any other example of rapid societal evolution. The law, and law enforcement as well, must continually adapt to a changing world. What is needed today is for legislators, prosecutors, and judges to become much more familiar with computers, so that the criminal justice system can be reformed to deal with these new crimes.

The other side of the debate argues that cyberspace is different from all previous environments, and must be treated differently. According to this view, which is typically articulated by most ardent computer users, the Internet is a special haven for free speech and free expression, a futuristic kind of virtual "public forum." Although computer crimes may occur, they are often committed by "hackers" who do not really intend to cause harm, but merely wish to experiment with the limits of computer technology. Besides, it is possible for careful Internet users to protect themselves from the risks of computer crime. There is also a clearly moralistic streak to the arguments made by the defenders of Internet freedom—government regulation is seen as an evil, interfering with the development of a new and glorious "cyber-culture."

Outside of the United States, similar debates have occurred—but, of course, each such debate has taken on a uniquely local character, reflecting fundamental differences in local culture and values. For example, in Germany, it is illegal to disseminate certain information about Nazism. See German Penal Code, Section 86 Nr. 1.4 StGB and Section 131 Nr. 1 StGB. On the Internet, however, German citizens can easily access such information from Web sites in the United States, where there is no restriction on the dissemination of information about Nazism. In Germany, the strong desire to ban such information has led the government to pursue legal remedies against major Internet service providers (ISPs), like Compuserve and T-Online. Although there are disagreements over the wisdom and effectiveness of such policies, most Germans seem to accept the underlying goal—even though, in America, most people would oppose it as an illegitimate governmental restriction of free speech and free expression.

Another good example might be the ongoing effort of governments in several Asian countries to limit the availability of certain kinds of information otherwise accessible to their citizens on the Internet. In Taiwan, Singapore, and Korea, to mention just a few, censorship of some information (such as pornography) is seen as both socially desirable and legally acceptable. Because societal well-being generally enjoys a higher priority than individual freedom in these countries, the public-policy debate about the Internet has been characterized by disagreements not over the correctness of the underlying goal, but instead over whether or not particular aspects of the policy are likely to succeed. Again, the public-policy debate in these countries reflects a different set of values than that which underlies similar debates in the United States.

The Future of Computer Crime Legislation

Returning to the American situation, the three most important and controversial recent developments in the area of computer crime have been: (1) the enactment of the Communications Decency Act of 1996 (CDA), and the ensuing Supreme Court decision in Reno v. A.C.L.U.; (2) the ongoing debate in Congress over the so-called SAFE proposal to over-ride the executive policy restricting the export of strong encryption technology; and (3) the 1997 report and recommendations of the President's Commission on Critical Infrastructure Protection (PCCIP). Through a closer examination of these three controversies, I hope to make some useful observations about the future course of computer crime legislation.

Although each of the three controversies—the CDA, SAFE, and PCCIP controversies—involves a different aspect of computer crime, they all share substantial common ground. What is most significant about these three controversies is that in each situation—as a consequence of (1) rapid technological changes in the world of computers, (2) the accelerating modern trend toward globalization, and (3) the absence of a world-wide set of shared values—the law (at least as that term is understood in the traditional, formal sense) is proving to be wholly inadequate in solving the underlying social problem.

Consider first the CDA example. Most Americans (except for a few extreme libertarians) would readily agree that there is a lot of information on the Internet that is completely inappropriate for children, and even potentially harmful to many adults. For this reason, most Americans would agree with Congress that it would be best if such information could be regulated and restricted—especially because parents cannot always monitor the Internet activities of their children.

As the United States Supreme Court recognized in Reno v. A.C.L.U., however, there are many serious practical limitations on the ability of Congress (or any legislature) to carry out this worthwhile goal. First, any such effort to regulate by statute the content of information on the Internet is almost certainly destined to fail because the Internet evolves much faster than either the law or law enforcement authorities can possibly respond. Even during the short period when the CDA was in effect in the United States, it had little or no impact on the operation of the Internet. For every attempt that law enforcement authorities might make to prevent, investigate, or punish breaches of such a statute, determined computer experts would certainly find it quite easy to restructure their activities, either to avoid the statute's literal prohibitions or to eliminate any reasonable risk of detection or apprehension.

The practical problems with such a statute are complicated by the fact that the Internet has contributed mightily to the modern trend toward globalization, i.e., the relative decline in the importance of traditional concepts of national sovereignty. For example, the rise of multi-national and trans-national corporations has rendered traditional national boundaries increasingly irrelevant to the daily operation of the business world. Similarly, new trans-national forms of government, such as the European Union, have begun to replace traditional nation-states as the primary locus of governmental power.

In the world of the Internet, there can be no effective national borders—except, perhaps, in such extreme cases as the People's Republic of China, which has attempted to block the growth of the "true" Internet in favor of a home-grown, heavily regulated Chinese-language version of the same. Such efforts, however, necessarily sacrifice the enormous potential benefits along with the possible harms of the Internet; China's economy will surely suffer as a result of the government's unwillingness to open up the country to Internet access and development. This, too, is a consequence of globalization. In today's world—as North Korea has recently and painfully learned—no country can be an "island," closing itself off from the outside, without paying an enormous price.

Even in an era of globalization, of course, there are some situations in which the nations of the world can pull together and achieve collectively what no nation could achieve independently. One good example might be the recently adopted proposal to create an international criminal court, for the purpose of prosecuting war crimes and other similar crimes against humanity.

But such collective effort is impossible when, as in the case of the Internet, there is no "world community" with fundamental shared values. On such crucial matters as the relative importance of free speech and free expression, as well as the relative risks and dangers of exposing children to images of a sexual nature, Americans tend to see things quite differently from the French, who are themselves quite different from the Saudis, who are (in turn) quite different from the Japanese. Thus, there can be no international consensus about regulating the content of information on the Internet—and, without such an international consensus, no single nation is likely to succeed in enforcing its own values, except (as in the case of China) by keeping the Internet out of the country completely.

What can be done, then, about information content on the Internet? The best solution, it seems, is the one that was mentioned by the Supreme Court in the Reno v. A.C.L.U. case—to encourage the development of new technology that can enable parents (without the help of the law)

effectively to monitor, or even to block, the access of their children to harmful Web sites and other similarly damaging information.

The same three-part analysis applies to the other two controversies mentioned above. In the case of strong encryption technology, the legal system quickly proved incapable of protecting computerized information against theft, so new technology evolved to protect such information (without the help of the law). The United States attempted to keep such technology "bottled up," for the benefit of American law enforcement, but globalization and the absence of an international consensus of shared values combined to render that attempt futile. The main effect of the executive policy restricting strong encryption technology has been to handicap American computer companies in their competitive battles against foreign companies, because the American companies cannot sell their "best" encryption-equipped software overseas. That is the reason why American computer companies have been trying so hard to get Congress to over-ride the executive policy, through the enactment of SAFE.

And in the case of the PCCIP report, the Commission's recommendations explicitly recognize the inability of the law to address the serious problem of vulnerability in the nation's critical information infrastructure. According to the PCCIP report, changes in the law—even if they were to be combined with improvements in traditional law-enforcement activities—could not effectively protect against terrorism or similar attacks on the information infrastructure. Instead, therefore, the report advocates a concerted joint effort (largely funded by the government) to assist the private sector in developing the kinds of new technology that could identify and defeat such attacks (without the help of the law).

Conclusion

I want to emphasize that my criticisms of the law, as an effective method for dealing with computer crime, are not motivated by any solidarity with the "cyber-culture," Internet-as-virtual-public-forum point-of-view that was discussed earlier in this essay. I do not share the view that government regulation of the Internet is fundamentally evil, or violates the basic principles of free speech and free expression.

Instead, my message is entirely pragmatic. In my opinion, the most important lesson that can be learned from each of the three controversies I have mentioned is this: The law is not well equipped to address, let alone to resolve, many of the social problems caused by the explosive growth of the Internet. In particular, the increase in certain forms of computer crime may be difficult to combat by means of traditional legal responses, such as the enactment of new criminal laws. In fact, any attempt to implement a legal response to such a problem might actually do more harm than good, by delaying the development of new technology that might offer a much better long-term hope for resolving the problem.

This does not mean that the law, or the legal system, must remain wholly idle in the face of recent increases in computer crime. There are many things that can be done—we can improve the training of law-enforcement officials to help them enforce existing criminal laws, examine those existing criminal laws for "gaps" that might allow some computer crimes to go unpunished (even when the crime is detected and the criminal is apprehended), and work towards agreement on shared values across national boundaries (at least with respect to such ancillary matters as the extradition of computer criminals).

At the same time, however, we should constantly remind ourselves that the law cannot provide the answer to all social problems (even if, in America, people often seem to assume that this is so). Sometimes, as in the case of computer crime, the law simply must get out of the way, and make room for people to develop a better kind of solution.

Making Sense of the Japanese "Big Bang"

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Introduction

On November 11, 1996, Prime Minister Hashimoto Ryutaro stunned the financial world by announcing that Japan would carry out its own version of the UK's highly successful 1986 programme of sweeping financial sector reforms. Tokyo's "Big Bang" was to be more radical than London's in that it would encompass not just securities industry reform, but banking and insurance reform, too. Its explicit aim was to make Japan's markets "free, fair and global" by 2001; its five core aspects were (i) the removal of unnecessary barriers separating the banking, securities and insurance industries, (ii) the liberalisation of various charges, commissions and premiums, (iii) the galvanising of disclosure rules, (iv) the establishment of new laws for introducing complex financial products such as derivatives, and (v) the reorganisation of corporate accounting and taxation rules. Cumulatively, such measures promised to bring Japan into line with global standards by making its financial regulatory regime free market-oriented.

For students of Japanese politics and financial market participants alike, the announcement posed a dilemma of whether or not to believe the rhetoric of change this time around. Observers could hardly be blamed for reacting with skepticism. Recent financial reform initiatives had caused disappointment, as direct or indirect bureaucratic intervention to restrict competition in one way or another invariably emerged to protect the system's traditional shape and balance. But the Big Bang promised to be different. Precisely the idiosyncratic practices of Japanese regulation which were commonly identified as having retarded the system's normalisation in the past—administrative guidance and the convoy system—had been explicitly targeted for abolition. (Administrative guidance refers to the heavy reliance on discretionary bureaucratic interpretations of existing legislation, conveyed through formal and informal industry channels, for the conduct of day-to-day regulation in Japan. The convoy system refers to the Ministry of Finance's (MOF) tradition of ensuring that all firms under its jurisdiction moved forward in concert; in practice, this often meant that the pace of innovation by leading firms was restricted to enable lagging firms to keep up). The Big Bang also incorporated an uncharacteristically concrete agenda and timetable for reform. This seemed to have been politically imposed by a powerful prime minister who had gone so far as to state his willingness to "burn himself to ashes" to see the plan through to completion. Significant, too, was the fact that, weakened by recent scandals and its record of economic mismanagement, the MOF appeared to support these changes, its leaders giving every sign of cooperating with Big Bang. Hereby, journalists soon began to describe Hashimoto's plan as "shocking", "ambitious", and "timely". They were encouraged by what they discerned to be a new consensus among policymakers that the financial system needed root-and-branch reform.

Curiously, nearly two years on, most observers remain unclear about how to make sense of Big Bang. It is impossible to characterise as either an unqualified success or failure. Unprecedented changes are clearly taking place, but traditional practices of financial regulation and compromise remain very much in evidence. This short paper suggests that now, two fifths of the way through its implementation period, enough evidence exists for us to pass preliminary judgment on Japan's Big Bang with a reasonable degree of certainty. It argues that Big Bang can be understood by examining its emergence as a political initiative, and tracing the proposal's translation into actual

policy.

(i) A Political Initiative?

Big Bang was presented to the world as a visionary political initiative and attributed to Hashimoto himself. Its announcement was meticulously choreographed. Domestic and foreign journalists were summoned to a press conference at the MOF on the evening of November 11 where they were briefed by Finance Minister Mitsuzuka Hiroshi and senior bureaucrats. Mitsuzuka told them that at 3:30 p.m. that afternoon Hashimoto had summoned him and Justice Minister Matsuura Isao, presented them with a three-page, nine-point document entitled *Structural Reform of the Japanese Financial Market: Towards the Revitalisation of the Tokyo Market by the Year 2001*, and told them to take it back to their respective ministries and draw up concrete policy reforms based upon the document. Copies of the same document were then made available to the press, in both Japanese and provisional English translation, and "explained" by senior officials. This ensured wide publicity, and both versions were subsequently posted on the MOF's internet homepage.

Hashimoto's proposal asserted the need for Big Bang in terms of the hollowing out of the country's financial markets, the impending fiscal crisis associated with Japan's rapidly aging population structure, and the declining international competitiveness of the Japanese economy. It was explained that the prime minister had come to a heightened awareness of these issues at a recent G-7 Summit in Lyons (June 1996), where Western leaders discussed the meeting's topic *Making a Success of Globalisation for the Benefit of All* on the premise of their financial markets already having been liberalised, and France and Germany reaffirmed their commitment to launch the euro in 1999.

In fact, the record shows that Big Bang capitalised upon a number of proposals which the MOF had begun discussing in various deliberative councils (*shingikai*) since mid-1995. The annual personnel rotations that July had brought a change in the balance of opinions among top MOF staff in favour of a more radical approach to financial deregulation. The Banking Bureau's Financial System Research Council (FSRC) and the International Finance Bureau's Council for Foreign Exchange and Other Transactions (CFEOT) in particular reflected this in their June 1996 interim reports which proposed that the government withdraw its implicit guarantee of all financial institutions by 2001, and that Japan completely deregulate foreign exchange commissions and extend participation in the foreign exchange markets to securities firms and nonbanks. These *shingikai* reports had been made public, but it was only revealed after the Big Bang's announcement that the Ministry's Securities and Exchange Council (SEC) had been spurred by these reports to begin discussions on deregulating securities commissions in July 1996. The unusual fact that the SEC's negotiations had been held in secret raised suspicions that some sort of deal had been struck between Hashimoto and the MOF over Big Bang during the summer of 1996. A piecing together of related events apparently confirms this.

Hashimoto was known to be one of the most shrewd political operators in the LDP, and in the summer of 1996 his embryonic *Vision for Administrative Reform*¾ which adumbrated proposals for deregulating six key sectors of the economy, including finance—showed that he was seeking to develop a headline policy initiative for the LDP and the government which he hoped to form after the upcoming general election. At the same time, the MOF was battling to stave off dismemberment in the wake of scandals and unprecedented public hostility, with a coalition

government body in the midst of discussing whether or not to strip the Ministry of its budgetary, as well as financial supervisory, functions. Herein, the ingredients for a deal existed whereby Hashimoto could offer to protect the MOF from excessive dismemberment in exchange for the Ministry's support in allowing Hashimoto to pass off their well developed, but hitherto overshadowed, financial reform plans as his own.

Circumstantial evidence for such a deal exists in the remarkable change which prominent government members underwent around this time concerning their views on MOF dismemberment. LDP Secretary General Kato Koichi had been one of the chief proponents of breaking up the MOF in 1995, but in late 1996 he became the leading champion of the MOF's cause against other members of the coalition government who were arguing for more severe sanctions. The fact that top MOF bureaucrats had been uncannily well-prepared to explain Big Bang at the press briefings only hours after supposedly finding out about it on November 11 also dovetails with the deal hypothesis. Interestingly, one of the things which journalists remarked about at the time was the curiously supportive and positive attitude which MOF staff displayed when explaining a plan which would effectively deprive the Ministry of its traditional sources of discretionary power over the financial system.

To make any such deal feasible, Hashimoto would have needed a broker, and it so happens that one of his five prime ministerial secretaries was ideally placed to play such a role. Saka Atsuro was on secondment to the Prime Minister's Office from the MOF, and was previously known to Hashimoto having served as the latter's private secretary when Hashimoto was finance minister in the early 1990s. Coincidentally, his central role in Big Bang—which makes little sense outside the hypothesis of a deal with the MOF having been struck—was spontaneously confirmed, but not elucidated, by several sources both within and outside the MOF who were involved in Big Bang.

When asked directly about a deal, MOF officials answer cryptically that "the idea for the Big Bang came from the prime minister", and in a strict sense this may be true in that the term Big Bang was first used in a document produced by the Economic Council (EC) in October 1996. The EC is an advisory council to the prime minister within the Economic Planning Agency, and its activities shed further light on events in that it was evidently used by Hashimoto as a parallel forum for discussing financial reform in order to monitor the MOF's own discussions.

(ii) A Watered Down Outcome?

On November 15, 1996, Finance Minister Mitsuzuka formally instructed five MOF *shingikai* (the FSRC, SEC, CFEOT, Insurance Council (IC), and Business Accounting Council (BAC)) to begin fleshing out Hashimoto's skeletal Big Bang proposal in order to turn it into policy. In a repeat of the earlier public relations move, journalists were told that Hashimoto had then personally summoned the councils' leaders to underline the importance of the task at hand. All *shingikai* were instructed to make their discussions open and transparent to an unprecedented degree by holding press conferences and releasing summaries after each meeting, and through the soliciting of public opinion via, for example, open email invitations. The purpose of this was evidently to prevent the sort of immobilism and sectoral balancing which had traditionally typified financial policymaking by trying to raise levels of political accountability. To continue monitoring the MOF's handling of the issue, the prime minister simultaneously instructed the EC to continue its parallel discussions for the time being, and announced that the Administrative Reform Council, which he himself headed, would henceforth include financial reform on its agenda.

Nevertheless, in the new year, the Big Bang began to be watered down as the *shingikai* discussions proceeded and once again demonstrated the strong proclivity towards compromise of Japan's formal policymaking procedures. For example, in discussing the notion of ensuring "fairness" of opportunity for market participants, *shingikai* members came to adopt an unwieldy distinction to differentiate between "the weak, who need protection, and those who lose in fair competition". Correspondingly, and with regard to external competition, support for a managed "fairness" was promoted overtly by top Ministry officials such as Sakakibara Eisuke who introduced a neat rhetorical analogy to stress the negative attributes of the Anglo-American model against the positive ones of the traditional Japanese model, "Whither Wimbledon or J-League?". The implication was that, whereas UK-style financial deregulation had created a world-class competition in which most of the players and all of the winners are foreigners (as in the Wimbledon tennis tournament), a uniquely Japanese-style deregulation policy could establish a successful national competition based on international rules and energised, but not dominated, by "star" foreign players (as in the J-League soccer tournament).

By the time final *shingikai* reports were submitted in June 1997 it was already evident that the Big Bang would not live up to the high expectations which Hashimoto's initial presentation had generated. Opinions were still split on a number of sensitive issues where deadlines, details, and even broad policies had been omitted—e.g., tax and accounting issues, and the reform of public financial institutions—while in others deadlines had been set back—e.g., deregulation of the life insurance sector. Some of these matters were settled in subsequent political discussions, but the fact that the Big Bang had been drawn up in a fragmented manner—that is, by many different panels, most of which had ties to certain sectoral or subsectoral interests—meant that typical compromises were inevitable. Again due to the institutionally and temporally fragmented policymaking process, it was also clear that the necessary legal revisions for Big Bang would involve only amendments to existing legislation, rather than the wholesale revision of financial laws, as had accompanied the Big Bang in the UK.

In the latter part of 1997, Big Bang was further watered down by direct political and bureaucratic intervention. As Hashimoto stumbled from bad fortune (particularly in his overzealous attempts at fiscal reconsolidation) to political misjudgment (his appointment of convicted bribe-taker Sato Koko to a senior cabinet post cost him a fifty percent drop in his public approval rating), the economy faltered dangerously, and both events combined to pave the way for Japan's recourse to traditional methods of economic crisis management. Somewhat misguidedly, it was this, rather than the outcome of the earlier *shingikai* discussions, that most commentators seized as irrefutable evidence of Japan backtracking over Big Bang. In fact, unlike the *shingikai* amendments to Big Bang, these latest developments were temporary measures implemented only *in extremis*.

This new round of backtracking began in the autumn of 1997, when the MOF temporarily delayed their slated introduction of Prompt Corrective Action (a nondiscretionary formula of bank regulation based on the domestic application of Bank of International Settlements (BIS) capital adequacy ratios). However, it was not until action was taken to shore up the financial system after the collapses of two large financial institutions, Hokkaido Takushoku Bank and Yamaichi Securities, that journalists began to realise *en masse* that the convoy system was being reestablished in order to protect the economy from the damaging knock-on effects of major

financial failures. Within the space of nine months, political action was taken (i) to shore up with public money the capital bases of Japan's remaining nineteen large banks, (ii) to reassure the world that none of these banks would be allowed to fail, (iii) to boost provisions for financial institutions' disposal of bad loans through deregulation and tax breaks, and (iv) to establish a framework for managing future bank failures by nationalising bankrupt institutions and continuing to operate them through a "bridge bank" framework, transferring "bad" loans to a government repository and attempting to sell the remaining "good" parts of the failed institution.

(iii) Evaluation

Measured against the lofty expectations which Hashimoto's announcement of Big Bang generated, there are some grounds for disappointment that the reality, thus far, has not lived up to the rhetoric. Indeed, observers who wish to belittle Big Bang already have found plenty of evidence to back up their gripes.

Most significantly, compromise was produced by Hashimoto's reliance on traditional institutional channels to translate his initiative into policy. Aware of the *shingikai* system's immobilist tendencies, he tried to circumvent its watering his plan down by introducing parallel monitoring and raising domestic and international public awareness of the issues at stake. But the *shingikai* proved to be largely immune to indirect external pressure. The fact that Hashimoto subsequently proposed the abolition of the *shingikai* system itself is significant, and future observers of financial reform would be well advised to pay close attention to the institutional arenas within which debate takes place. Had the Big Bang been fleshed out by open cross-sectoral bodies, or even under a central *shingikai* coordinating committee, the outcome may well have stayed closer to the original plan.

The Big Bang was also retarded in response to the exigencies of Japan's present economic malaise. To try and rebuild the confidence of the domestic populace and international markets, the convoy system has been resurrected *de facto*, albeit in a narrower form where the government's explicit and implicit guarantees cover only the country's major financial institutions. This development was probably unavoidable given the disruption caused by financial failures in late 1997. For now, it should not, however, be interpreted as evidence of anything other than a temporary adjustment to the Big Bang.

Moreover, while Japan's Big Bang may not live up to its somewhat utopian promises, it must be acknowledged that it represents a very significant break with the past. Financial regulation is becoming considerably more transparent and explicitly codified, desegmentation is proceeding largely apace, and fixed cost and commission structures on securities and foreign exchange transactions are in the final stages of liberalisation. These are monumental changes. The recent and ongoing explosion in financial activity in Tokyo by foreign financial institutions attests to the success of Big Bang already in reversing the hollowing out of the Tokyo market.

Finally, Japan's convergence with the norms of financial regulation in the rest of the developed world remains arguably the most important factor for solving the Big Bang equation and reading the future. To this end, it is important to understand that this latest deregulation initiative was more of a carefully executed public relations exercise than a radical departure from previous practice *per se*. Statements by senior MOF bureaucrats make it clear that they are aiming for a J-League rather than Wimbledon-type outcome to Big Bang. This makes sense in that very few of the country's financial institutions are competitive by global standards, and Japanese politicians (and

voters) seem to place a greater premium on social stability than outright allocative efficiency. Regardless of what the recent catalogue of financial scandals might suggest, the MOF is neither inherently stupid or inept in orchestrating deregulation. Their actions continue to suggest that rather than pursuing convergence, Japan is still hoping to deregulate on its own terms. Just as traditional and often opaque patterns of financial policymaking have been fundamental in shaping the Big Bang, there is every reason to believe that they will continue to be important in the future.

So does this mean that Big Bang is a misnomer? Essentially, the answer depends on one's personal perspective. Students of deregulation might find the metaphor of "a string of damp firecrackers" more resonant. But for better or worse, many financial institutions, both domestic and foreign, are encountering a whole new world in Japanese finance at the turn this century.