# ICCLP Review

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## *From the Editors*

This academic year we are celebrating our fifth year anniversary. The ICCLP was established on 1 April 1993 for an initial ten years as a center to promote research. To mark this watershed a number of commemorative events were held such as the two-day Japan-Brazil Comparative Law Symposium held at the University of São Paulo on 25-26 August 1998 and the one-day Fifth Anniversary Symposium and Reception held at the University of Tokyo on 26 November 1998. By holding these events we were able to reflect and trace the way in which the Center has widened its network and activities over the past five years. The three keywords that lie behind the Center's activities are "people", "place" and "information", but it is surely the keyword "people" which takes pride of place in the Center's philosophy. All the activities we promote originate in the actions of people and are supported by the network that we have established over the years. Funnily enough it appears upon reflection that, more often than not, chance meetings have extended the network.

Professor Masato Ninomiya took an active role in the holding of the symposium at the University of São Paulo and also managed to attend the symposium in Tokyo. The Tokyo symposium was also attended by Professor Malcolm Smith and Associate Professor Veronica L.Taylor, both from the University of Melbourne, and Professor Hatsuse Ryuhei of Kobe University. In addition, Professor Glenn D. Hook and Daniel H. Foote made presentations, both at the time were visiting professors at the ICCLP. We were also grateful to receive the kind support of a number of people too numerous to mention here. At the reception that followed attended by over 140 guests President Hasumi Shigehiko of the University of Tokyo and Professors Emeriti Matsuo Koya and Ishii Shiro made congratulatory remarks.

The numbers of seminars and forums is continuing to increase rapidly and in this edition we present reports from the presentations of American, British, French, Dutch and Japanese academics. After the visit last year of Judge Cho Young Sig, in this academic year we welcomed Judge Kim Hyeong Du of the Korean High Court as a visiting research Scholar of the Graduate School of Law and Politics. He presented a seminar entitled "The System of Legal Training in Korea" at which Professor Lee Chul Song of the University of Hanyang participated as commentator. Judge Kim returned home in February but in April Judge Lee Seung Ho will be visiting the ICCLP.

Young researchers presently and formerly of the Center have also been active recently. Hugo Dobson submitted and successfully defended his doctoral thesis earning a Ph.D. from the University of Sheffield while working as an ICCLP Research Scholar. He will return to England to take up a lectureship at the University of Kent in April 1999. James Malcolm, former ICCLP Research Scholar, also gained his Ph.D. from the University of Sheffield and is currently working for J. P. Morgan in Tokyo. Another former ICCLP Research Scholar, Sabine Zélany, returned home and is now working for a bank in Paris. Peter Neustupný, in charge of translations for the English edition of the *ICCLP Review*, is currently working as a court researcher after having passed his law exams and gaining experience at a legal firm. The Center is proud to say that all former visiting professors, visiting research scholars and research scholars have managed to keep in touch.

In whatever activities we have been engaged, we cannot have achieved these results beyond all expectation by ourselves. Over the past year, without even realising it, the small acorns of everyday tasks have suddenly grown into large oak trees. This recalls to mind the words of the late Professor Kamo Takehiko: "Study! Study! And quantity will turn into quality!" One example of this is when Professor Hook and a number of young researchers participated in our first Roundtable Discussion resulting in a lively

debate in a relaxed atmosphere. Despite having just arrived in Japan, Professor Hook listened intently to the opinions put forth by the students and in discussion with them demonstrated how both an enjoyable and productive time can be spent in the pursuit of knowledge.

One experiences both the senses of expectation and uncertainty in requesting essays for the *ICCLP Review*. The uncertainty is due to approaching deadlines, wondering whether the manuscript will arrive on time and the translation will convey the meaning intended by the author. Professor Kitamura Ichiro's essay on Brazil evoked images usually only seen in films. Despite their differences, Professor Igarashi Takeshi and Oshima Makiko's essays both accurately describe what it was, and is, like to study abroad in the US both in the 1970s and 1990s.

Recently we have completed the production of a video in English introducing the activities of the ICCLP. We have copies available to borrow for those interested. We look forward as always to hearing your thoughts and opinions on our publications.

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

International Center for Comparative Law and Politics Graduate School of Law and Politics, the University of Tokyo

# *Fifth Comparative Law and Politics Symposium*
# *A Celebration of the Fifth Anniversary of the ICCLP*

The Fifth Anniversary Comparative Law and Politics Symposium took place on 26 November, 1998.

**Session 1**
**Topic**: Space, Order and Governance in the post-Cold War
**Speaker**: Professor Glenn D. Hook, The University of Sheffield
**Commentator**: Professor Hatsuse Ryuhei, Kobe University
**Moderator**: Professor Takahashi Susumu, The University of Tokyo

**Session 2**
**Topic**: Commercial and Consumer Contracts: Current Issues in Japan and Australia
**Speakers**: Professor Malcolm D. H. Smith, The University of Melbourne, Associate Professor Veronica L. Taylor, The University of Melbourne, Professor Ochiai Seiichi, The University of Tokyo
**Commentator**: Professor Hirose Hisakazu, The University of Tokyo
**Moderator**: Professor Ochiai Seiichi, The University of Tokyo

**Session 3**
**Topic**: "Judicial Activism" in the United States and Japan
**Speaker**: Daniel H. Foote, University of Washington
**Commentator and Moderator**: Professor Inouye Masahito, The University of Tokyo

**Reports on the Fifth Anniversary Comparative Law and Politics Symposium**

**Session 1**
**Topic:** Space, Order and Governance in the post-Cold War

Professor Hook's presentation, beginning the one-day Fifth Anniversary ICCLP Symposium,was an offshoot from an ongoing research project conducted with various scholars including Professors Takahashi Susumu of Tokyo University and Hatsuse Ryuhei of Kobe University for the past four years into regionalism and world order in the post-Cold War era. Professor Hook firstly adumbrated three approaches borne of the end of the Cold War that all seek to identify the salient features of the emerging global and regional orders:

1) The traditional realist approach, stressing the nation-state as the unit of analysis and military power, attempts to uphold the Cold War paradigms of international anarchy and power politics despite the increasing complexity of an interdependent globalised and regionalised political economy and the appearance of new non-state actors.

2) A global approach exemplified by the optimistic declaration of the "end of history" by Francis Fukuyama with the "victory" of free-market capitalism and liberal democracy over any other competing form of governance (1992);

3) Samuel Huntington's warning of an intercultural "clash of civilisations" between regional blocs replacing the inter-state conflicts of the Cold War era (1993, 1996).

These approaches each make their own contribution to our understanding of the post-Cold War global political economy. However, Professor Hook asserted that a more nuanced and multilayered *weltanschauung* could be achieved by adopting the tenets of New International Political Economy. This approach is based upon a broad, multidisciplinary body of literature, especially the work of Robert Cox and the late Susan Strange. Its "newness" lies in the fact that it seeks to be critical and not "problem-solving" theory by examining how the state was constructed within an historical process, and moreover pays attention not only to state and inter-state relations (although recognising their importance) but also to non-state actors such as civil society, multinational corporations, non-governmental organisations, etc. Moreover, this approach emphasises the Gramscian "soft" aspects of power—culture, identity and ideology—in addition to the military "hard" aspects in its examination of the four areas of politics, economic, security and culture. Professor Hook proposed utilising this approach to examine these four areas in the Asia Pacific on the regional, sub-regional and micro-regional levels.

**Space**

With the end of the Cold War political space is being reconstituted on different scales by political actors with interests in creating specific identities and boundaries. Thus, space is socially constructed by political actors in a contested process where insiders, outsiders and peripherals are defined in the discourse of the global political economy. Professor Hook proposed that by including a spatial analysis of the regional, sub-regional and micro-regional levels it is possible to create a much more complex picture of governance and order.

Professor Hook distinguished between the spatial scale of the globe and sub-global spatial scales. On the global, spatial scale, Hook pointed to both globalisation as a dynamic process of developing interdependence, especially in the economic sphere, and globalism as a political project promoted by purposive actors, particularly states. On the sub-global, spatial scale, Hook pointed to the region, illustrated by the Asia Pacific; the sub-region, illustrated by East Asia; and the micro-region, illustrated by the Japan Sea Zone and the Yellow Sea Zone.

**Governance**

The government, or the state, is traditionally regarded as the actor with the power, competence, legitimacy and authority to undertake the various tasks and duties connected with governance. However, Professor Hook sought to widen this definition to include other actors with the authority, ability and legitimacy to undertake governance tasks. He welcomed the work of James Rosenau on "governance without government" (1992, 1997) and various scholars on new-medievalism (Tanaka, 1996; Gamble, 1998) and their contribution in taking into account public and private actors in regulating practices across territorial state boundaries. In this way, tasks are carried out effectively by both state and non-state actors, by coercive and consensual means, as well as on different spatial scales.

Hook pointed to the declining role of the state in addressing problems, such as the environment, AIDS, currency fluctuations, land mines, etc., as a feature of the post-Cold War era. In a supplementary role Hook pointed to a variety of non-state actors such as multinational corporations, financial institutions, local governments and non-governmental organisations in the four areas. The example of the European Union was cited as a new actor created to address new problems which individual states had been unable to solve.

**Empirical Examples**
The role different key actors play in the dimensions of politics, economics, security and culture in terms of the three scales of regional space, the system of governance being established, and the order being sought, can be seen in the case of the Asia Pacific:

1) As regards Asia Pacific regionalism APEC has gradually emerged as a new site of governance promoting a US-inspired liberal global order and creating a new space with an open regionalism. Hand in hand with the Pacific Economic Co-operation Caucus, this process has brought together several different non-state actors, including business circles, academics, and politicians, creating overlapping governance.

2) East Asian sub-regionalism is evident in the challenge by Malaysia to US-dominated APEC governance and its liberal economic order with the concept of "Asian values" and the proposed East Asian Economic Caucus, a closed form of regionalism excluding the US, Australia and New Zealand.

3) Micro-regionalism can be witnessed in both the Yellow Sea and Japan Sea. These processes constitute a challenge to state-centric governance by local authorities promoting cross-border economic zones undermining the traditional sovereign space by linking parts of Japan with parts of South Korea and China.

Hook concluded that globalist projects promoted by international institutions and the US, as integrated into the APEC regional project, are being supplemented (even challenged) by the appearances of sub-regional and micro-regional projects in East Asia. The consolidation of these different regional projects demonstrates the need to understand space on different spatial scales. In addition, governance needs to be re-conceptualised in broader terms than government in the post-Cold War era as a result of the opportunities provided by dynamic change in the midst of the processes of globalisation and regionalisation.

Professor Hatsuse Ryuhei commented on Professor Hook's paper raising a number of thought-provoking areas for discussion questioning the novelty of the New International Political Economy approach; tracing the differences between regionalism and developmentalism; introducing the role of cyberspace as a new spatial scale; wondering what the driving force of regionalism in the Asia Pacific might be; measuring the extent of decline in US hegemony considering its promotion of an universal consumer culture; and stressing the importance of a healthy respect for history in any research project. Questions from the floor touched upon the relevance of Professor Hook's research; how to define Asia; the issue of human rights in Asia; the validity of talking about an Asia model of capitalism; and Japan's identity in the Asia Pacific region.

[*Hugo Dobson*]

**Session 2**
**Topic:** Commercial and Consumer Contracts: Current Issues in Japan and Australia

In an era of "deregulation", a series of papers on consumer protection may seem out of step with the prevailing political mood. However, one of the themes that emerged from this panel of papers was that, as administrative reform and deregulation accelerate world-wide, there is an unavoidable pressure to increase protection for parties to standard form contracts. The core of the debate is "who should be protected"and "how far"?

Professors Malcolm Smith and Veronica Taylor (University of Melbourne) reported on the current state of law and policy in Australia as it affects consumer and commercial contracts. Professor Seiichi Ochiai (University of Tokyo) reported on this work in chairing the government committee formulating consumer contract legislation for Japan.

**Professor Smith**

Until the 1970s in Australia, contract law looked very similar to contract law in England. Contract law was administered by each State in Australia. A significant shift in contract law occurred with the introduction of the Trade Practices Act (TPA) in 1974. Originally this was federal legislation, focussed on controlling companies—in particular their competitive activities and their business practices. Section 52 which enforced truth in advertising, has subsequently become one of the most powerful areas of regulation in Australia.

In 1978, the TPA incorporated new provisions on Product Liability, and this was mirrored in State legislation on Fair Trading.

During the 1980s, the High Court began to expand contract jurisprudence by using equitable concepts of fairness to address unequal bargaining power in contracts. The landmark case, *Amadio*, developed the definition of unconscionability in Australian contract law, which was subsequently incorporated into the TPA. Initially, unconscionability protection applied exclusively to consumer transactions.

The High Court went on to extend contractual protections in cases decided 1998: *Garcia* and *Bridgewater*. Garcia involved a woman who had given a personal guarantee to a bank to secure loans made to her husband's business. After the couple had divorced and the business had become insolvent, she argued that the guarantee should be invalid because the bank had not fully explained the guarantee to her. She succeeded in this argument. The Bridgewater case was a challenge to a will, where a farmer had, prior to his death, sold his farm cheaply to a nephew. After his death, the other family members objected, arguing that the nature of his close relationship with his nephew meant that the transaction should be invalid because the old man had not received independent legal advice. Again, this argument succeeded.
The principles emerging from the two cases are that, in Australia:

1) The principle of unconscionability is not capable of exhaustive definition. This may mean that Australia is at least part of the way to a *de facto* concept of good faith.

2) Undue influence and unconscionability are distinct principles. In both cases, there was a family relationship, or what the judges called "a relationship of trust and confidence" or "a relationship involving emotional dependence". The issue for the court in each case was whether such relationships trigger the "special disadvantage" which is a prerequisite for finding unconscionability. There was some disagreement among the judges on this point. What is clear, however, is that where there is a relationship of trust and confidence, or a relationship involving emotional dependence, and the parties are contracting, full disclosure of the relevant facts will be necessary.

These case law developments make it clear that the High Court in Australia is stretching the application of unconscionability to cover situations where the nature of the relationship is the issue, rather than simply physical or mental disadvantage. For Australia, this represents a dramatic extension of equitable principles, and it is worth noting that the two recent cases are "commercial" rather than "consumer" cases, even

though they represent transactions by small businesses or entrepreneurs.

**Professor Taylor**
A second shift in contract regulation in the 1990s in Australia has come from the extension of unconscionability protection to businesses, under the TPA. The definition of unconscionability remained the same as that developed in the Amadio case, but the range of remedies provided by the statute was much greater. The change resulted from political pressure by small and medium-sized businesses, which have suffered from the application of very strict standard form contracts in situations such as franchising and retail tenancies. The TPA protection, however, covers all forms of contract, not simply standard form contracts. What we see here is a blurring of the distinction between "consumer" and "commercial" contracts, which fits the kind of changes in business organisation that are resulting from new technologies and from deregulation and corporate reorganization.

**Professor Ochiai**
Japan's proposed legislation on consumer contracts emerges from an understanding for the need for transparent rules for the conduct of consumer transactions. The proposed legislation aims to provide the minimum rules necessary for ensuring fairness in consumer transactions involving standard form contracts, particularly at the formation stage.

Professor Ochiai acknowledged immediately that the scope of the proposed legislation is limited to consumer transactions. Although Japanese participants in the reform process are fully aware that problems with contract unfairness also affect businesses, it was felt in Japan that to include business as part of the focus of the new law would delay the legislative process dramatically.

A further problem identified by Professor Ochiai was the relative reluctance of the business community to accept the need for consumer protection legislation. The process of gaining consensus on the current form of the Bill has been slow, and business advisors have shown considerable reluctance to broaden the scope of the legislation.

The debate about the scope of application of the new law is also complicated by the estimate that 80 percent of so-called "contract trouble" that can be readily identified results from consumer contracts. Of these complaints, the majority stem from problems in the formation stage, rather than from the actual content of the contracts in question.

Here the draft Japanese legislation is relatively progressive, in that it makes direct reference to an obligation of disclosure. By contrast, the 1993 EU Directive on Unfair Contract Terms makes no mention of disclosure, and the Australian TPA, too, imposes no direct duty of disclosure in consumer or commercial contracts (other than franchises).

Professor Ochiai pointed out that the current debate in Japan is about how to provide meaningful enforcement.

**Professor Hirose**
Professor Hirose suggested that the "Australian model" of contract regulation presents an interesting contrast with Japan, and may represent a future stage of development. In particular, he was interested in:

1) The dual nature of the TPA. For example, in relation to unconscionability under the Act, the price at which similar goods or services are available may be a factor that points to the unconscionability

of a consumer or commercial contract terms. Yet at the same time, the competition law aspects of the legislation would seem to be focussed on enhancing market mechanisms, including pricing.

2) The evolution of this kind of hybrid legislation—at what point did political and economic policy do a "u-turn" and seek to balance competition policy with a renewed emphasis on consumer protection, and then later, protection for small and medium business?

3) He observed that the Australian legislation uses general provisions to achieve its outcomes, rather than a grey list/black list device, and that this may be useful for Japanese reformers to consider.

[*Veronica L.Taylor*]

**Session 3**
**Topic:** "Judicial Activism" in the United States and Japan

Professor Foote began his remarks by discussing the term "judicial activism." He observed that in its narrow sense, judicial activism refers to the situation in which judges impose their own policy views, thereby thwarting the will of the people, as embodied in the decisions of the legislature or other branches of government. In that sense, judicial activism typically is used with reference to cases in which courts strike down statutes or block governmental actions on constitutional grounds. Foote noted, though, that the term judicial activism is often used in various broader senses in the United States. One such usage is with reference to the broad remedial orders by which courts have taken over the operation of prisons, mental institutions, and schools. Another usage is with respect to the courts' active role in creating new doctrines and new bodies of law. Foote explained that it is in this latter sense—the judicial role in creating new legal norms—he has used the term "judicial activism" with reference to Japan.

Foote next discussed judicial activism in the United States. He began by describing two widely-cited examples of judicial activism in the narrow constitutional sense: the so-called Lochner era and the Warren Court. Foote then offered three specific examples of cases in which U.S. courts have taken an activist stance with respect to other branches of government: *Immigration and Naturalization Service v. Chadha*, a 1983 Supreme Court decision which had the effect of striking down the so-called legislative veto of administrative actions in over 200 separate federal laws; and two federal district court cases, from 1974 and 1975, in which courts in the States of Washington and Maine upheld treaty claims of Indian tribes despite major impact on the interests of the states (and in the face of great public pressure to rule in favor of the states).

Foote concluded his remarks regarding the US by noting that judicial activism is now a hated phrase. When candidates for federal judgeships are questioned by the Senate, for example, the candidates seek to avoid any implication that they might become judicial activists. They routinely state that they will be the sorts of judges who will "interpret" the law, and not the sorts of judges who will "make" law. Nonetheless, according to Foote, the tradition of judicial activism is firmly established in the United States and lives on. In his view, Chief Justice William Rehnquist is every bit as much of a judicial activist as Chief Justice Warren—just from a different ideological viewpoint.

Foote then turned to "judicial activism" in Japan. He began by noting his agreement with the general view that Japanese judges exercise great restraint with respect to constitutional and administrative cases that might give rise to confrontations with other branches of government. Nevertheless, he argued, the

stereotype of a passive judiciary obscures a much more active side of the Japanese courts.

Foote began his comments regarding "judicial activism, Japan-style" by observing that courts in Japan play a much more active role in trial management than do courts in the US. He attributed this difference to the different functions served by judges in the two systems, related in large part to the continuing continental influences in the Japanese system. Foote next described what he regards as a more characteristically Japanese feature: the active role Japanese judges play in seeking to foster settlements. He noted that he had clerked for a federal district court judge in the US who had a reputation as a "settling judge," but had found that in comparative terms, many Japanese judges are much more aggressive in seeking to persuade parties to settle their cases. Foote suggested that in some cases the emphasis on settlements may reflect a desire to avoid creating new precedents.

Foote then turned to the heart of his remarks: a discussion of judicial creation of norms for private ordering—in other words, judicial lawmaking. He reported having found that in field after field, Japanese courts play an active—and at times deliberate—role in creating law. He listed numerous examples from labor law, criminal justice, tort law, landlord-tenant law, and corporate law.

Foote next sought to categorize the judicial creation of norms according to various criteria. He first described several different patterns of norm creation. These patterns included what he referred to as the "top-down, individual initiative" type, in which one or more Supreme Court justices seek to change the law (from the top down). He offered two examples of this pattern: retrial standards for criminal cases and the corporate disregard doctrine. Foote next described what he labeled as the "top-down, institutional initiative" pattern. In this pattern, the judiciary as an institution plays an active role in developing and implementing new standards, with the Supreme Court's General Secretariat typically helping to facilitate those efforts. A classic example of this approach, in Foote's view, is the judiciary's conscious creation of an extensive set of standards for determining issues of causation and damages in the traffic accident setting. Foote suggested the pollution cases as another example of this pattern. A third pattern is the bottom-up, incremental type of lawmaking, in which courts create and develop a body of law through the accretion of precedents. As an example of this pattern, Foote offered a description of the courts' development of the so-called abusive dismissal doctrine in labor law. This, according to Foote, is not a case where the courts have simply been filling a gap in the law; rather, in this context the courts have overridden seemingly clear statutory language in the Labor Standards Act.

Foote next described some of the techniques that courts have followed in their creation of norms. These techniques include gap filling, in cases in which the relevant statutes do not address the issue in question; statutory interpretation (at times involving quite creative interpretations of the statutory language); and the use of such essentially equitable standards as abuse of right and good faith and fair dealing.

Foote then turned to the motivations underlying the courts' creation of new norms. A major motivation, he suggested, was the perceived to meet new challenges or new problems, with which the legislature and administrative agencies have not yet dealt. As examples of this motivation, he offered traffic accidents, the pollution cases, and the corporate disregard doctrine. A second category of motivation, reflected perhaps most clearly in the equal employment opportunity cases, is one in which the courts have played a relatively progressive role, seeking to move society forward. A third set of motivations, in Foote's view, is maintenance of community (or maintenance of societal stability). This motivation, he suggested, underlies the abusive dismissal doctrine and much of landlord-tenant law.

Returning to the question of the courts' interrelationship with the legislature and with the administrative

branch, Foote first observed that the vast majority of the courts' lawmaking in Japan has not been based on constitutional grounds (as in the classic case of judicial activism, narrowly defined). Thus, in theory the Diet can always override the judiciary by enacting new laws. In practice, however, even where the legislature does act, the court-created law often shapes the ultimate legislation. Moreover, Foote argued, the abuse of right doctrine carries much the same potential for thwarting the legislature's will as the constitutional invalidation technique.

Foote closed his remarks with a few comparative observations. He noted that judicial creation of norms is an accepted part of the common law tradition in the US, but he argued that in certain respects Japanese courts appear to be even more active in lawmaking than US courts. The key such example, he asserted, is the top-down, institutional initiative pattern. It is an accepted part of the common law tradition for individual courts to develop law through precedent. To American eyes, though, when judges from different courts get together to attempt to work out solutions to common legal problems, it begins to look more and more like legislative policymaking. In part for that reason, there has been great resistance to such efforts in the US. Thus, in some respects the roles played by Japanese courts in creating law would be branded as unacceptable "judicial activism" even under US standards. Since Japan is, in structure, a civil law system, Foote argued that the more appropriate comparisons are to European and other civil law systems. And he suggested that, in comparison with other civil law systems, judicial lawmaking appears to be both more prevalent and far more widely accepted in Japan. Indeed, he concluded, the practice is so widespread and so firmly accepted that it would scarcely be an overstatement to characterize Japanese judges as guardians of a common law tradition.

A lively discussion followed Foote's remarks. Professors Inouye, Takahashi, Ito and Yamakawa offered comments with respect to Foote's observations concerning criminal justice, constitutional law, civil procedure and civil law, and labor law, respectively. Several other attendees, including Professors Emeriti Matsuo Koya and Hoshino Eiichi and Professor Kitamura Ichiro, also offered comments and questions.

One issue raised by many of those commenting related to Foote's use of the term "judicial activism." In the Japanese context, they indicated, that term is used strictly in its narrow meaning and invariably signifies invalidation of statutes or governmental practices on constitutional grounds. To use it in the broad sense of judicial creation of norms, they cautioned, may be misleading. Foote responded that in the US, the term judicial activism is used both in the narrow sense and in various broader senses, including with respect to conscious lawmaking efforts by the courts. He explained that he had placed the term in quotation marks in the title for his remarks precisely for the purpose of differentiating his broad usage of the term from the narrow meaning. He also explained that he had begun using the term "judicial activism, Japan-style" in part to awaken an American audience—an audience that has been flooded with the stereotype of a passive, ineffectual Japanese judiciary—to the important role Japanese courts play in lawmaking.

A second major theme expressed in many of the comments was that the courts' function in lawmaking is not at all surprising; rather, that is an accepted and desirable aspect of the courts' role in Japan. Several comments indicated that the courts are expected to create new norms in certain fields, with the Diet taking responsibility for other fields. So long as the courts tend to their own concerns, and do not intrude on the Diet's turf, no confrontations result; to the contrary, the system operates smoothly. Some of the commenters also observed that it is vital for the courts to develop new doctrines and norms in Japan, in part because the legislative process is so slow and unwieldy. Foote responded to these comments with several questions of his own. One question was how one knows where the dividing line is between the Diet's turf and the courts' turf. A second question was whether the Japanese system, as described in the above manner, is not more in the nature of a common law system than a civil law system. Foote closed by

thanking the audience and indicating that their comments had suggested to him avenues for further research concerning the relationship between the Japanese courts and the legislature.

[*Daniel H. Foote*]

## *The Japan-Brazil Comparative Law Symposium*

Held on 25-26 August 1998 in commemoration of the ninetieth anniversary of Japanese migration to Brazil and the fifth anniversary of the establishment of International Center for Comparative Law and Politics, Graduate School of Law and Politics, the University of Tokyo

Hosted by the Brazilian Society for Japanese Comparative Law and the São Paulo Branch of the Brazilian Bar Association with the assistance of the Law Faculty, the University of São Paulo and International Center for Comparative Law and Politics, Graduate School of Law and Politics, the University of Tokyo

Coordinated by Dr Masato Ninomiya, Professor, the University of São Paulo

*Trends in Civil Law*
Hoshino Eiichi, Professor Emeritus, the University of Tokyo
Minguel Reale, Professor Emeritus, the University of São Paulo

*Trends in Family Law*
Kitamura Ichiro, Professor, the University of Tokyo
Álvaro Villaça Azevedo, Professor, the University of São Paulo

*Trends in Corporate Law*
Kashiwagi Noboru, Professor, the University of Tokyo
Fábio Nusdeo, Professor, the University of São Paulo

*Issues in the Law of Receivables*
Ikeda Masao, Professor, Keio University
Luiz Olavo Baptista, Professor, the University of São Paulo

*The Damages System in relation to Aircraft Accidents*
Octanny Silveira da Mota, former Professor, International University of Aeronautical Technology
Fujita Katsutoshi, Professor, Osaka City University

**Reports on the Japan-Brazil Comparative Law Symposium**

As a result of the efforts of Professor Masato Ninomiya, a Comparative Law Symposium was held at the University of São Paulo on 25-26 August 1998 to commemorate the ninetieth anniversary of Japanese migration to Brazil. The ICCLP was very pleased to be able to co-operate in this commemoration. The participants from Japan were Professor Emeritus Hoshino and Professors Ikeda, Fujita, Kitamura and Kashiwagi.

The Law Faculty of the University of São Paulo is steeped in 171 years of history, having been established in 1827. The University's main campus is to the west of the metropolitan area. Set on over 1200 acres, it is so expansive that you really need a car to get around the various facilities. Construction work is continuing. There are some 30,000 students and 10,000 academic and general staff. At the core of the active pursuit of Japanese studies is the Japanese Culture Research Center.

The Law Faculty remains in its traditional building in central São Paulo. The Law Faculty was established in 1827. At first, lectures were held in the monastery adjoining the church on São Francisco Square. The structure was twice rebuilt, but the arches facing the courtyard have been retained and these have become the symbol of the Faculty. The magnificent exterior of the current stone structure conjures up images of a nineteenth century city hall, while the interior with its inner courtyard and surrounding cloisters, high ceilings and many stained glass windows is reminiscent of a church. In the Dean's office are portraits of all previous Deans, and in the Professorial Board Room hangs a likeness of the first Brazilian emperor, Pedro I, who signed the edict establishing the Faculty. In the room for oral examination of doctoral candidates, the head examiner's chair is quite awesome, having a back about two metres high. The other examiners' chairs are also very imposing, with backs protruding at least thirty centimetres above the heads of their occupants. The ceiling was as high as two stories in Japanese terms. The experience for doctoral candidates would no doubt be nerve-wracking. Alumni of the Faculty are active in government and industry, and include past Brazilian presidents and São Paulo state governors. The Japanese community is well represented in the University's faculty—as well as Professor Ninomiya, there is Professor Taniguchi (former Dean of the Faculty of Engineering), Professor Koga (Dean of the Faculty of Pharmacy) and Professors Watanabe and Komatsu (current members of the Law Faculty).

The Comparative Law Symposium was held over two days. The papers followed addresses by Professor Ninomiya, Head Consul Maki, Professor Azevedo (former Dean of the Law Faculty) and Mr Watanabe Kazuo (attorney and head of the Brazilian Society for Japanese Comparative Law).

**Professor Emeritus Hoshino Eiichi**

Professor Hoshino is the Chairman of the Civil Law Section of the Ministry of Justice Legislative Council. His presentation was based on his own experience as a member of the various research groups established by the Ministry of Justice in connection with the matters covered by the Civil Code.

This year marks the hundredth year since the enactment of the Japanese Civil Code. The Japanese Civil Code has undergone extensive reform approximately every fifty years. The first major reform followed the end of the Second World War. The second major reform is in progress today. As the reform of law stems from changes in society, in order to understand fully reform of the Japanese Civil Code, changes in social phenomena in Japan have to be considered. Present changes taking place in Japan today include the rapid aging of Japanese society, an explosion in information technologies, internationalization, increased social complexity, and a trend toward greater equality and freedom in certain areas coupled with a slight regression of freedoms in others.

In the early Meiji period Japan inherited continental law, employing the structure of the old Roman Pandects while under the influence of French law. Recent moves toward specific reforms to the Japanese Civil Code are, firstly, legislation regarding the assignment of receivables. The requirements required to make the assignment of receivables valid as against third parties in the Japanese Civil Code is based on the French system, which requires notification to or the consent of the debtor which is officially dated. However the new system is designed to meet the needs of businesses that are attempting to raise capital through bulk assignments of receivables. In drawing up this law, the American Uniform Commerce Code and UNCITRAL draft model law were both referred to. The reforms contain important changes. Firstly, it is now possible to register an assignment of receivables at designated legal affairs bureaux. Secondly, even if an assignment of receivables is registered, this by itself will not be sufficient to enable an assignee to make a direct claim against the debtor or the assigned receivables. Thirdly, in order to make the assignment valid against the debtor of the assigned receivables, sending the registration certificate of the

assignment of receivables to the debtor or acquiring the debtor's consent is necessary. Professor Hoshino deferred the details to the presentation by Professor Ikeda Masao of Keio University to be followed in the program.

The second issue for reform of the Civil Code is the creation of a new system for adults who require guardianship. A draft for the reform has been released. The draft provides for a reform of the incapacity and a new system for the selection of guardians for adults of diminished capacity. Under the present system, a protector appointed for quasi-incompetent has no right to make contracts on behalf of the quasi-incompetent nor to revoke contracts concluded by the quasi-incompetent. It is thus said to be impractical. There is no system to cope with persons of diminished judgmental capacity who do not however fall into the category of quasi-incompetency, nor a system for the aged with diminished capacity, either. Professor Hoshino explained the issue of the new system in terms of "from protection to self-determination" and "focusing on specific, and not abstract, humans".

The third issue of Consumer Contract law was also covered. It was explained that the Section of Consumer Policy, a subdivision of the Economic Welfare Council, is at the centre of the reform process and that specific details have been canvassed in an interim report by the Section. The Economic Planning Agency, which organized the Economic Welfare Council, is promoting the legislative process. So far, the attitude of business corporations has been negative. The media, however, has been supporting the issue. The problem is whether the definition of a "consumer contract" is limited to the case where one of the parties is a "consumer", or whether it also includes the case where both parties are "merchants". The current plan is limited to the case where one of the parties is a "consumer". The crux of the issue is the definition of the "consumer". Frequently, there is a difference between consumers and corporations in terms of information parity and negotiating power. Amongst economists it is strongly believed that once the disparity in information is alleviated, the market will solve the problems. Amongst law scholars, however, it is widely believed that the market mechanism itself would be insufficient to attain equity in consumer contracts. It cannot be denied that the idea behind the new law is not conceptually clear to some extent, however the process of debate continues.

Professor Hoshino concluded by pointing out that in terms of their civil codes Japan and Brazil are like siblings, and expressed the expectation that through increased exchange the two countries can co-operate together.

**Professor Emeritus Minguel Reale**

Professor Reale specialises in jurisprudence and drafted the revised Civil Code that is currently before the Brazilian legislature.

The Brazilian Civil Code was drafted at the end of the nineteenth century following a presidential order and came into effect in 1917. There are several reasons to wish to revise it.

At the time of drafting, Brazil was an agricultural society, but since then the country has become industrialised and individual rights have gained increasing prominence. In addition, the resulting code reflected Portuguese legal attitudes of the time and was strongly influenced by the Napoleonic Code. Bear in mind that this was before even the German Civil Code had come into effect. When the drafting took place, the Commercial Code of 1850 was in force. This Code was already considered outdated and inflexible at the turn of the century, but is still in force today with the result that commercial parties have traditionally chosen to bring their transactions under the jurisdiction of the Civil Code. So, in the style of the

Swiss law of obligations, it is now practical to combine civil and commercial laws into one code. The scope of the revisions is therefore broad, including a reconsideration and modernisation of Roman law concepts. At this stage, the regulation of commercial entities is weak, and no doubt this will occasion further debate.

The policy of the re-drafting exercise was to retrace the conceptual footsteps of the drafters of the original code. The new law of obligations will be based on individualistic concepts, i.e. the protection of liberal commercial activity. This is also the case with the law of contract. The new law will expressly state the rights of business. The success of production and trade by commercial entities will depend on the integrity of these provisions. The third section of the new code will deal with proprietary rights, including the societal function of proprietary rights. It will deal with the distinction between ownership and the right of exclusive possession by introducing a new framework for exclusive possession in recognition of the fact that there is only a small population in Brazil compared to its vast land area and the fact that exclusive possession is inextricably linked to labour in the Brazilian context. Under the old code, the conversion of exclusive possession of land by labourers to a proprietary right has been problematic. The new code creates a new category of possession by labour in addition to the ordinary concept of exclusive possession. The new right will operate after ten years instead of fifteen years.

Following the proclamation of the new Brazilian Constitution in 1988 there have been several changes in the field of family law. Husband and wife now have equal status. Illegitimate and legitimate children have the same rights. There were also amendments to succession law: freedom of will-making was introduced; the position of the spouse was strengthened; formalities for will-making were simplified; and certain rights of beneficiaries were guaranteed. The previous system had a strong authoritarian strain. Professor Reale has been an attorney for fifty-five years but said he had never seen a will signed by an individual. This is because the old law required an extraordinary *five* witnesses for a will to be validly effected in this way. Clearly a more readily applicable law was desirable in this situation.

**Professor Kitamura Ichiro**

Professor Kitamura began by arguing the comparative law context of Japanese law. He took issue with the common categorisation of contemporary Japanese law in the Roman-German legal family. According to René David, if jurists from one legal system can practice law without difficulty in another legal environment then the two legal systems can be said to belong to the same legal family; but this is not so if the underlying philosophical, political and cultural systems differ. The latter is the case in relation to Japanese law. Why international legal cultural friction arises and why large Japanese trading companies easily pay large sums of damages? It is too easy to overlook differences in national customs and mentalities.

Professor Kitamura then set out some features of the Japanese concept of "law".

First, law in Japan is an instrument of political control and administrative management. There is a tendency to equate the Japanese word *ho* with Western concepts such as *law, Recht, droit, derecho* or *direito*. The core of these Western concepts is rights within the legal process that is judicial reviewability. In Japan, however, law and rights are different concepts altogether, with rights being merely benefits that have been acknowledged through the operation of law. The concept of right is clearly weaker in Japan. Japanese law covers only *droit objectif* and is in many ways a set of rules imposed by the administrative state. Traditionally, the central fields within Japanese law have been criminal law, administrative law and economic regulations, which literally constitute the areas of John Austin's "sovereign order".

The concept of the courts and the administration of justice also corresponds to this scheme. The courts are a place where subjects go to seek the munificence of the authorities and there is a strong sense that civil disputes should be resolved through mediation. Alternative dispute resolution has been encouraged in Japan since the middle ages. Professor Emeritus Carbonnier refers to the situation where matters which fall within the purview of law are entrusted to custom or morals as "non-law": it may be possible to label the system of administration of justice which oversees such "non-law" as "non-judicature".

The second feature of Japanese statutory norms is that in general terms they consist of "soft law". The concept of soft law had its origin in international law, where in many cases rights and obligations are not clear cut, there are problems with enforcement and there is much scope for discretionary interpretation.

In Japan, the number of statutory provisions is small. For instance, the Brazilian Civil Code has over 2000 articles, but the Japanese Civil Code has only 1044. The situation is similar with other codes and laws. Where there are fewer specific articles, the individual provisions logically must be more general and leave greater scope for the exercise of discretion by the courts or bureaucrats. For example, the sentence for murder is anything between death and penal servitude for three years, and at the lower end of the spectrum the sentence could be suspended: in effect the courts have total discretion. An example of administrative discretion is the process of administrative guidance. These examples are typical of "soft law".

Notwithstanding these considerable differences in the concept of law, Japanese law can be said to belong to the European law family in general terms. However, in relation to family law it is more difficult to categorise Japanese law in this way.

After World War II, Japanese family law underwent drastic changes. The *ie* (family) system was abolished and men and women became formally equal. Divorce became available upon the breakdown of marriage, widows were able to inherit from their husbands and all children became entitled to equal inheritances from their parents. These changes were a precursor to what were to become commonplace concepts of family law.

The first feature of Japanese family law however, is that there is relatively little regulation of a civil law nature of the family structure. Much is left to self-regulation or custom, and the administrative *koseki* (regulation of nationals) system fills much of the remaining void. Issues of jurisdiction and procedure for resolving disputes are often vague. For instance, there is only one provision which regulates the distribution of domestic assets within marriage, and important questions of personal status such as marriage and divorce are not subject to the court's supervision and can be changed by notice filing from the individual. The *koseki* system takes on a correspondingly greater role, and many initiatives have been introduced through the *koseki* system rather than the Civil Code.

The second feature of Japanese family law is the tendency towards not just "non-law" but also "non-judicature": the prevalence of alternative dispute resolution in the Family Court virtually makes it a court of customary law. Conciliation is particular notable—it is rarely necessary to rely on its legal enforceability as it is seen by parties as a convincing outcome. For example, 91 percent of divorces are by notice filing, 8 percent are by conciliation, and only 1 percent is contested before the courts.

The amendments to the Civil Code that are currently under consideration relate mostly to marriage and divorce. In relation to the former, an important proposal is to allow couples to elect to have different surnames. The existing law requires one spouse to take the other's surname at the time of marriage, and

the overwhelming practice is for the wife to take the husband's name. The amendment arose out of the need for women to retain their previous surname in the workplace. Where children are born into a dual-surname marriage, the parents would decide the child's surname although the child would be able to apply to the Family Court to change it. In relation to divorce, the amendments would further acknowledge the breakdown of a marriage as a cause of divorce. The courts have long tended to protect the wife's interests by rejecting divorce applications from husbands who had caused the breakdown of the marriage in spite of the provisions clearly requiring equal treatment of any application, but they are now turning away from this view and it is intended that the amendments to the Civil Code will confirm this trend.

A comparative legal-sociological or legal-cultural perspective is particularly important in relation to family law. In the case of Japan, the key would probably be an understanding of the status of women in relation to issues such as continued restrictions on certain occupations for women, the realities of economic power within the family and the burden of caring for aged parents. These points are further reminders that no law exists without its particular social context.

**Professor Álvaro Villaça Azevedo**

In comparing Brazilian and Japanese law, an interesting feature is the influence on both systems of the natural law concepts of Roman law. Natural law derives from the human condition, as opposed to the condition of a particular society. Roman law has influenced Germanic laws, Gallic laws, the Common Law and laws of the Iberian Peninsula. Portugal took on a pioneering role in the further spread of these principles. The influence of French law and the activities of Boissonnade in Japan are well known even in Brazil. In this sense, Brazilian civil law and Japanese civil law are siblings.

The old Civil Code raised many problems in the area of family law, such as parental authority and paternity issues in the case of marriage by notice, the inequality of husband and wife, and outdated discriminatory concepts such as the nullification of marriage on the ground that the wife was not a virgin or the disinheritance of a misbehaving daughters. These problems have been resolved in the recently proposed amendments. Professor Azevedo, who co-operated with Professor Emeritus Reale in drafting the revisions to the Civil Code, pointed out that although theoretically religion is not supposed to impinge upon the law, in practice there are occasions when it does so.

The new Constitution will provide for equality of the sexes, which will mean, for instance, that women will be able to be household heads. The principle of brain death has been introduced in relation to civil law (as opposed to criminal law), which ties in with the provisions relating to transplantation of organs.

In relation to divorce, the former Brazilian Constitution contained an absolute prohibition, which meant that the legal relationship of estranged couples was somewhat warped. Divorce was only possible under the previous Constitution if one spouse had committed a grave breach which prevented the continuation of the marriage, such as homicide, abuse or abandonment (two years or longer). These conditions were removed through the constitutional amendments. Notwithstanding the supervision of this new system by the judiciary on a case-by-case basis, the new draft Civil Code will restore the old conditions, with the addition of mental illness as a new ground. As a practical issue, once a spouse files for divorce usually the marriage is untenable and co-habitation impossible. Professor Azevedo has in the past proposed recognising this practicality by allowing the party at fault to initiate the divorce. The Brazilian system does not require the payment of damages upon divorce, regardless of infidelity, violence, etc. on the part of the spouse who was at fault. Maintenance is a separate issue, and can be assessed against either spouse according to need. Compare this with the Argentine system, where the spouse who was at fault is liable in damages.

Currently in Brazil, a divorce becomes effective one year (earlier, it was three years) after the court order of divorce is made. In practice, separation for two years is sufficient grounds—there is no need to establish gross breach. Professor Azevedo was speaking from experience on this point as he has conducted some 600 divorce cases in his thirty-seven years in private practice.

The issue of names, which is one aspect of the law of personality, is being hotly debated in Japan at the moment. In Brazil, a woman loses the right to use her married name upon divorce. However, it can clearly be problematic if a working woman has to revert to her maiden name. One proposal is that a woman who was not at fault in the divorce be entitled to continue using her married name.

Marriage was recognised from Roman law onwards as a stable union between a man and a woman. However, in earlier days Brazilian law obliterated 4000 years of history, which adopted cohabitation as its reference point, rather than the state of matrimony. In this context, church marriages took on an arbitrary nature and currently only 30 percent of couples are married. It was only in 1996, however, that the "paperless marriage" received some formal status in law. There is still usually no *need* to marry, especially since there is a presumption of equal contribution to assets by cohabitants. This allows parties to maintain the psychological freedom associated with cohabitation.

**Professor Kashiwagi Noboru**

Professor Kashiwagi reported on corporate governance in Japan and recent moves to amend the Commercial Code to include ideas of corporate governance. The expression "corporate governance" is widely used both in Japan and around the world but is used to describe a variety of phenomena, which has created complicated branches of argument.

In Japan, in the context of economic difficulty following the collapse of the bubble economy and the many scandals involving major corporations, the focus of the corporate governance debate has been how to rein in these corporate disasters. Professor Kashiwagi went into further detail as to how these disasters arose. In particular, the spate of charges of illegal payments to influence voting brought against corporate heads and executives is indicative of the endemic influence of *sokaiya* in Japan. He then explained why this phenomenon is unique to Japan and discussed the use of shareholders' derivative litigation, which has had a strong influence on corporate governance in Japan. Professor Kashiwagi then described legal structures in the Companies Law which operate to audit corporate activities, and how these apply in practice. Finally, he outlined moves to: strengthen audit procedures by amending the Companies Law; reduce the damages of shareholders' derivative litigation; and introduce a private member's bill in this area.

**Professor Fábio Nusdeo**

Professor Nusdeo analysed Brazilian corporate governance from a law and economics perspective.

The Brazilian Companies Law came into effect over twenty years ago, but went through a major revision in 1997. However, this reform turned out to be rather underwhelming, as most of it merely involved consolidating previous amendments.

In relation to the law and economics analysis of corporate governance, the most famous names are American professors such as Oliver Williamson, but the contribution of Japanese economists such as Professor Fukao and Professor Morita is also acknowledged. These theorists use the concept of

"transaction costs". They see business and industry as a bundle of contractual rights such that internal and external relationships are constituted of contractual networks.

The theorists use a number of different models in relation to the management ("governance") structures in this context. One model is pervasive in Japan and Germany, another in English-speaking countries. As Professor Fukao has pointed out, the difference between the two models is marked. In the former system, much weight is accorded to third parties such as suppliers, clients and consumers, who have an impact on commercial decisions: these third parties are called "stakeholders", in contrast to the shareholders who are so central to the latter system.

From the outset, Brazilian company law was closer to the American example. The 1997 revision did not expressly affect corporate governance, but tended to further emphasise the centralised model, as can be seen from features such as:

- Abolition of some rights of minority shareholders in order to ease the process of privatisation.
- Failure to respond to calls for clearer distinctions between public and private companies, which may be related to the prevalence of private family companies as the most common corporate structure in Brazil.
- Alleviation of notice requirements for general meetings for small private companies of less than twenty shareholders.
- Size of capital was not taken into account.
- Restriction of the rights of minority shareholders to leave the company as a signal of opposition to a decision of the general meeting.
- Permitting the redemption of shares at less than the par value, but only following an expert valuation (the par value was the minimum redemption price under the old system).
- Abolition of the requirement that a majority shareholder must offer shares to minority shareholders before selling them on the open market.
- Restriction of the rights of shareholders and third parties to obtain information about the company.

Thus the clear trend of the 1997 revision is to increase the power of the dominant shareholder and that shareholder's executive appointments.

**Professor Ikeda Masao**

The Japanese Civil Code has some provisions governing the assignment of receivables, but these provisions were not drafted with bulk assignments in mind. The requirements of perfection put in place by the Civil Code follow the French model, namely either a notice to the obligor of the receivable or consent of the obligor both with a certified date. However, contemporary financing practices often require assignment of receivables as security. In this situation, it is not the creditworthiness of the assignor that is relevant, but rather that of the obligor. This is the meaning of asset back finance.

The international assignment of receivables and the harmonisation of the international law governing such assignments is currently under debate. There is an UNCITRAL committee made up of representatives from twenty-two countries, with observers from a further twenty-five countries. The committee is trying to establish an international registration system for assignments, and it is expected that a draft treaty will be released to the UNCITRAL General Meeting in Spring 2000. In France they already have the *Loi Dailly* ("Dailly" was the name of the parliamentarian who proposed the law) which requires that details of each

assignment be submitted to a financial institution. The financial institution puts the certified date to satisfy the requirements of perfection. In Canada a registration system along US UCC lines was introduced in 1990. In some provinces it has been computerised. This is the most advanced system of registration.

In Japan, the Special Law on Assignment of Receivables came into force on 5 June 1998. This law creates different requirements of perfection in relation to an obligor of the assigned receivable from those in relation to third parties. In relation to third parties, the law creates a registration system under which the requirements of perfection are deemed to be satisfied upon registration of the assignment. In relation to obligors, the requirements of perfection are notice to the obligor containing all evidence for registration, or alternatively consent by the obligor: however, in relation to assignments for financing purposes the assignor will normally collect the receivable himself and so notice or consent will not be necessary. Through this law, the Japanese system approaches the North American system by allowing third parties to meet the requirements of perfection without sending notice to individual obligors. However, the question of how to handle assignment of futures receivables has not been resolved and no new provisions have been created for the problematic issue of receivables whose assignment is contractually restricted, so the old precedents will continue to apply to these areas. There are many countries that disregard the unassignability of receivables, and Chapter 9 of the UCC disregards the restriction too.

**Professor Luiz Olavo Baptista**

Professor Baptista addressed the issue of electronic commerce. In Brazil, the Small and Medium Enterprise Promotion Association has been conducting electronic commerce and is aiming to improve Brazil's international trade balance. The advance of the computer chip is affecting the legal industry as much as any other. New forms of transactions now occur in the electronic medium. EDI (Electric Data Interchange) has simplified and accelerated electronic transactions through the ability to deal with information digitally: the Latin origin of the word *digital* implies calculating on one's fingers, but nothing could be further from today's reality. Computers have taken us beyond the age of the telex and telephone and freed commercial transactions from geographical confines.

Professor Baptista stated the difficulty with defining the concept of "electronic commerce"—US Vice-President Al Gore has also declined to define it. This is due to the constantly evolving nature of technology and its uses, which currently include trade, securities and funds transfers.

The legal environment is also increasingly "virtual". Contracts negotiated through electronic media are problematic in relation to issues such as identifying the parties and electronic signatures. Professor Baptista also practices as an attorney* and so is only too well aware that fear of confidential information being leaked is still a severe restraint on lawyers actively participating in these new modes of commerce. In addition, there are problems with the extent of liability of service providers and the theoretical backing for that liability. It would be difficult to establish causation in this situation. Professor Baptista pointed to the codification of laws governing electronic commerce as an emerging issue.

* Many professors of the University of São Paulo also practice as attorneys. There is also a small number who are judges or prosecutors.

**Professor Octanny Silveira da Mota**

Professor da Mota began by providing some background to the Warsaw Convention. He reported that the Convention is not widely known in Brazil—for instance, it is not taught at the University of São Paulo. The

1919 Paris Convention governed international aviation by regulating sovereignty over airspace in international law. The aircraft of the time could not fly between continents, so international flights were limited to those between European countries. As commercial flight routes developed, so too did responsibilities in civil law for cargo and passengers. As various conflicts with the rules of private international law began to emerge, the time was ripe for a multilateral convention on the responsibilities of international air carriers. In 1925 France took the lead in arranging a conference on the laws governing international aviation in the various countries, and this led to the signing of the Warsaw Convention for the Unification of Certain Rules regarding Air Transport in 1929. The objective of the Convention was to limit carriers' liability while protecting passengers' interests. Because of the differences of the various countries, satisfactory limitation of liability of carriers was not attained. Finally, the liability was limited to $8,300 following much debate.

The Tramonta incident, in which a US Navy aircraft and a civilian aircraft collided over the Bay of Baiya, occurred during an Eisenhower visit to Brazil. Members of the Navy Band were killed. Tramonta's widow claimed $25,000 in compensation from the Brazilian civilian aircraft operator. All these events passed without mention of the Warsaw Convention. The courts applied Brazilian law as the *lex loci.* Under the somewhat outdated Brazilian Civil Code of the day, damages were limited to 100,000 cruzeiros. Mrs Tramonta did not even bother coming to Brazil to collect such a trifling amount.

In 1955 the upper limit on carriers' liability under the Convention was raised to $16,600. America did not approve of the increased limit and American support for the Convention was withdrawn and ways were found to avoid the operation of the Convention completely. However, the current US trend is to raise carriers' liability. Under the Montreal Protocol, an objective standard of liability was imposed and the limit on liability was raised to $75,000. However, this treaty applies only to flights to, from or via America.

**Professor Fujita Katsutoshi**

In 1983, Korean Airlines Flight 007 was shot down by a Soviet fighter plane. All 269 passengers and crew, including twenty-seven Japanese nationals, died in the incident. In 1985, incidents involving JAL and China Air followed in quick succession on Japanese soil. In all of these cases, there was a large gap between the compensation demanded by passengers and the amounts actually offered by the airlines. In an age when a deceased passenger may have the fairly big benefit of credit card indemnities, life insurance and product liability laws, the upper limit provided in the Warsaw Convention is a reminder of another era when encouraging the development of a new industry was an important agenda.

Professor Fujita pointed out that, at a time when other nations were debating whether to accede to the Montreal Protocol to the Warsaw Convention, which raises liability limits, Japanese airlines abandoned liability limits. This trend was followed in Europe. However, this is a question of stipulations in contracts of carriage rather than liability under the Convention. There have been calls for uniformity in the standards imposed by the Convention, but there is little agreement amongst developing countries on what that standard should be and there would remain considerable differences in comparison to liability at a contractual level in relation to airlines that have abandoned liability limits. For instance, at present some airlines restrict liability to $75,000, while others have a limit of $20,000 in accordance with the Warsaw-Hague Convention.

China Air was an example of the former, but only in the case of flights to, from or via America, so the Japanese passengers in the 1985 incident were offered only $20,000 under the Warsaw-Hague Convention, which the airline calculated as 16.4 million yen. The Japanese passengers commenced civil

action for damages. Given that the minimum amount granted for motor vehicle accidents under compulsory insurance payments is 30 million yen and that payments of 100 million yen are not uncommon, 16.4 million yen seems paltry. The original Convention stated that a passenger must show intention or gross negligence on the part of the airline before any amount greater than the limit would be granted. This judgment was up to the courts to determine, so there were unavoidable differences in awards depending on the interpretation of these terms in various jurisdictions. The Warsaw-Hague Convention attempted to provide for greater uniformity across jurisdictions by amending Article 25 of the Convention to provide for the more rigorous standard of care of an "actual pilot". In spite of this, the French cases apply a test of a "prudent pilot". The 1985 China Air incident involved an A300 Airbus which lost velocity when unable to cope with an emergency state brought on by the pilot's inability to recognise that the "go-around" switch had been left in the "on" position. The ultimate cause of the accident was therefore that the pilot was not used to the A300 aircraft. The dispute is therefore whether the error of a pilot who was not adequately trained to recognise this mistake qualifies as intention or gross negligence on the part of the airline. At present, the ICAD is also reviewing the treaty to remove the Convention's liability limit.

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The Symposium finished at about 9 pm on 26 August. However, the participants remained at the lecture theatre until well after that time for a lively discussion.

The Symposium was made possible through the super-human vigour of Professor Ninomiya, several of his postgraduate students (including Ms Aurea-Christine Tanaka) and Mrs Sonya Ninomiya. Without the Professor Ninomiya's experience in Brazilian-Japanese comparative law research and the energy he has devoted to international academic exchange, this event would not have been possible. It will no doubt be the stimulus for further meaningful development in comparative legal studies between these two jurisdictions on opposite sides of the globe.

[*Kashiwagi Noboru, translated by Peter Neustupný*]

## Brazil as Pictured in My Mind

by Kitamura Ichiro

Lévi-Strauss wrote his *Tristes Tropiques* (*The Sad Tropics*) following his appointment to the University of São Paulo in Brazil. Tanaka Kotaro limited himself in his *Travel Diary of Latin America* to describing the facts and events relating to his five-month lecture tour in Latin America and went on to publish *A Brief History of Latin America*. I wonder what Professor Noda Yosiyuki would have written if he had revisited his birthplace in Brazil. Certainly, my ten-day stay in Brazil had a very strong impact on me, although my insights are nothing compared with those of my esteemed predecessors.

Guidebooks have detailed entries on the public order situation that is peculiar to South America. I had heard that Brazil is at the safer end of the spectrum and that São Paulo itself is vastly improved, but even so I was advised against venturing out on my own, so most of the time I was accompanied by someone. On the one occasion I decided to take a walk to a marketplace on my own, I was conscious of trying not to look affluent or like a tourist, but as I walked along the rows of great mansions with private security guards I could not help but feel the reality of the systematization of a violent re-distribution of unequal wealth.

It was curious to note the existence of many similarities between São Paulo—the largest city in Brazil—and Tokyo, such as a fairly naturalistic town planning scheme and the occasional confluence of new and old architectural styles. There were other similarities such as a relatively shallow history (from the fifteenth to sixteenth centuries onward) and the period when the law schools were established (in the nineteenth century). However, musings on such matters were soon overtaken by unprecedentedly vivid impressions of nature and, in particular and inevitably, the Japanese-Brazilian (*nikkei*) population.

I. The overwhelming intensity of nature in Brazil, as represented by the Amazon, forces you to sense directly the unbounded severity of this vast country, which could be called a "tropical version of Russia". If I can take the liberty of mixing my South American sources, it is Gabriel García Márquez's *Cien Años de Soledad* (*One Hundred Years of Solitude*) incarnate. It is what Oshima Hitoshi, a friend of mine specialising in comparative culture, would call "the capital of psychoanalysis". The ubiquitous abstract art (including the sculptures of Mrs Azevedo, the wife of the former Dean of the Faculty of Law), which might warrant giving the place the title "the capital of abstract art", was also indicative.

With this extraordinary scene of nature before you, the more you try to arm yourself with reason the more you teeter at the edge of rationality—you can understand why the colonising Portuguese stuck to the coast. On the other hand, you can certainly also comprehend the unbearable sense of release (particularly from the trivially obsessive Japanese perspective) in entrusting yourself to those forces of nature by living comfortably on the bounty of fish, tapioca and fruit.

An example of the former response to nature in Brazil might be found in the fact that, despite the desperate attempts by the authorities to control society through countless laws (in the tradition of the patriarchal control by agricultural magnates) and excessive litigation amongst the populace, many jurists seem to continue with the exposition of arguments originating in Europe and a certain type of conceptual jurisprudence without too much reliance on precedent. They also seem to have no interest in the legal sociological phenomena caused by these roundabout systems (*jeito*). An example of the latter response to nature is seen in the experience of the Japanese youth who came to Brazil with the intention of making a brief visit, but was so enchanted by the diverse and distinctive butterflies and fish that he ended up staying and establishing the Museum of Natural Science in Manáos.

The firm flesh of the *tambaqui* and *pirarucu* giant fish tasted divine in their Southern European style sauces. I think I heard from Professor Kazuo Watanabe of the University of São Paulo, who specialises in civil procedure, that there are so many salt-water species, from sardines through to porpoises, which have adapted to the fresh-water Amazon River because the entire area once formed part of the ocean floor until the Andes Mountains began to form, lifting the continent out of the water. The local wine wasn't at all bad, but I thought the *caipirinha* (sugarcane alcohol with a dash of lime) was the perfect accompaniment for this cuisine. The *churrasco* (Brazilian barbeque) was wonderful, of course, but the *feijoada* (stewed meat and beans) recalled to me the Japanese culinary word *mattari* (rich and sweet taste) despite its homely style. Also the colourful fruits fascinated the eye at first. The various powdered condiments were mysterious and far more tempting.

What grandeur awaited me at Manaus, an industrial city of some one million people located at 3° on the southern latitude which seems to appear out of nowhere along the middle reaches of the Amazon River! How incredible it was to be welcomed to this city by a party of more than twenty made up of *nikkei* Brazilians and Japanese posted to Brazil. I used up all my remaining business cards here. If the presence of Japanese industry in this city was on a scale comparable to Paris, it was hats off to Manaus' Amazonas

Theatre which would have to rank with the Paris Opéra. In the nineteenth century, rubber magnates built this theatre with imported construction materials. Apparently it had a tremendous reputation amongst European opera singers—they are said to have sent their laundry back to Europe via the many ships that sailed directly up the Amazon to Manaus.

Piranha fishing on an Amazon cruise is famous, but what we did involved merely throwing a line over the side of the wharf with some minced beef as bait. They came from everywhere! They usually managed to get the meat without getting hooked, but everyone in our party eventually caught one. We deep-fried our catch—some of the smaller ones were a bit bony, but apparently the larger types can be eaten as *sashimi* which has a flavour similar to blowfish (*fugu*). As we passed the children playing in the water on the river bank (the piranhas don't attack unless they smell blood) and their mothers washing clothes nearby, in the modest dwellings amongst the hammocks I could see… TVs and stereos! These Brazilians are, after all, distant relatives of the Mongoloid races who crossed the Bering Strait tens of thousands of years ago…

II. As a jurist specialised in French law, I felt a special sympathy for the fact that amongst my colleagues, professors and judges of São Paulo , there remains the intellectual's longing for traditional French culture. It was also agreeable for me to find some old French-style buildings. But it was my frequent contacts with *nikkei* jurists that led me to my second impression of this trip to Brazil.

As I sat in a tavern that could have been on any street corner in Japan, drinking and eating *ramen* with these friends, if it wasn't for the fact that some of the *nisei* amongst them occasionally struggled for a Japanese expression I might have thought I was in Hongo (especially since Mr Komatsu, the lawyer, looks just like the shopkeeper at Hara Bookstore).

At an exhibition staged through the good offices of Professor Masato Ninomiya, who is also the head of the Immigration Museum, I appreciated anew the indescribable suffering of first-generation (*issei*) immigrants and the heart-breaking post-war opposition within the immigrant community between *kachigumi* (those who believed that Japan had won the war) and *makegumi* (those who accepted that it had not). At the opening party of the exhibition I had the chance to speak to a few *issei.* The in-flight movie on the Brazilian Airlines flight back to Tokyo was *Gaijin* directed by Yamazaki Chizuka—this was one more expression of the depth of emotion of the *issei* experience. The main character in the film was a girl who sailed to Brazil with the first batch of migrants in 1908. Working just like slaves on a farm, they find themselves always in the impossible position of waiting for payment on the harvest even after three years. Upon the death of the man she married in Brazil, she takes the opportunity to escape and make a success of herself in São Paulo and meets up by chance with the Italian manager of the old farm who is now leading a labour movement. The film reminded me a little of *Un Autre Homme, Une Autre Chance* (*Another Man, Another Chance*) by Claude Lelouch which was based on the tale of French migrants in the American west, and also made me shed a quiet tear (I would recommend it to Japanese distributors such as Iwanami Films).

Compared to Japanese Americans, who are sometimes said to be 120 percent American, it would appear that even *sansei* with their deep Brazilian roots have a strong sense of Japanese identity. In particular, the young graduate student who looked after us during our stay looked just like Nakai Miho (the wife of Furuta Atsuya the baseball player) and was maybe a match for the finest examples of Japanese womanhood. However, I was surprised to find an opposite phenomenon in terms of Japanese identity in the '*Mama-san* Chorus' run by Mrs Yoshida and Mrs Harada, the wives of two lawyers. They were probably *nisei,* fluent in Japanese and sang Japanese songs, but once they were off the stage they hugged each other and chatted in Portuguese. They also made bold and eloquent speeches (perhaps due to being lawyers in their

own right). They were rather occidental spirits in Japanese moulds. For them wouldn't it be like being at a school reunion where they can't remember themselves being at the very same school?

The story of the immigrant experience doing their utmost to acculturate to an unfamiliar society made me place myself in their shoes. However, it also confirmed that human existence depends on the spirit of adventure, and gave hope for a Brazil of racial harmony made up of international citizens with both Japanese and Brazilian traits but with no concept of discrimination.

It is as if this first stay of mine has switched on in my mind the vivid vision of these scenes on the other side of the earth, where I would be content to take another walk on my own.

[*Translated by Peter Neustupný, December 1998*]

# ICCLP Roundtable Discussion:
## JAPAN'S RESPONSE TO BILATERALISM AND MULTILATERALISM IN THE POST-COLD WAR WORLD

*In the post-Cold War world Japan has come under pressure both domestically and internationally to play a more pro-active role in international society, to discard its traditional "chequebook diplomacy", and to make a "physical" contribution to the regional and global political economy. In this Roundtable Discussion, researchers in the field of international relations came together to discuss their own research projects and what the end of the Cold War means for Japan's future regional and global role in the light of the Asian Economic Crisis, insecurity on the Korean Peninsula and the continuing importance of the bilateral relationship with the United States.*

*The participants were Professor Glenn Hook (Professor of Japanese Studies, University of Sheffield, UK; ICCLP Visiting Professor), Emmanuel Adiole, Greg Ellis, Hyun Jin-Duk, (all doctoral candidates in the Graduate School of Law and Politics at the University of Tokyo), Kodate Naonori (a master's degree student in the Graduate School of Law and Politics at the University of Tokyo), and Dr Hugo Dobson (ICCLP Researcher).*

[*Hugo Dobson, November 1998*]

GH: I would like to start by addressing the question of whether Japan has a reactive foreign policy or not, based on Kent Calder's 1988 article in *World Politics*. My own work has tried to show that, rather than being a "reactive state", a more apt metaphor is to describe Japan as a "sandwiched state". Why this difference in metaphor? One reason is that Calder's work, and the opposition it aroused among those regarding Japan as a pro-active state, are both truncated depictions of the Japanese state based upon the realist school of thought in international relations theory which regards the most important actor in the foreign policy-making process as the government. What is missing is the crucial factor of civil society and the constraining influence this has had upon the Japanese state. One cannot understand Japan's post-war foreign or security policy without taking into account the constraining norm that civil society has exerted upon the government. However, civil society is one factor which the realist paradigm of international relations does not factor in. Thus, if you ignore domestic factors it is very easy to establish a view of Japan as either reactive or pro-active. I characterise Japan as a sandwiched state because policy is formulated under pressures from both international society, especially the US, and the normative constraint in Japanese civil society to solve human problems via non-military solutions. I think these have been very powerful constraints upon Japan's relations both with global institutions and East Asia.

With this as an introduction, I have examined Japan's role in the ASEAN Regional Forum (ARF) and the East Asian Economic Caucus (EAEC). During the Cold War, Japan's orientation towards international society was based on bilateralism with the US. Thus, during this period any Japanese response to multilateralism was regarded as a threat to, or an erosion of, bilateralism. One example can been cited. The Japanese government firmly rebuffed Gorbachev's 1986 initiative to promote multilateral institutions in the Asia Pacific region, regarding it as an attempt by the Soviet Union to wean Japan away from, and weaken its relationship with, the US. When it comes to the post-Cold War period Japan has still been constrained by behavioural patterns left over from the Cold War. For example, the exclusion of the US, Australia, and New Zealand from President Mahatir's initial proposal of the EAEC was regarded by Japan as a multilateral threat to bilateral relations. However,

the ARF, which was Japan's initiative, is an Asia Pacific organisation that includes, in contrast to the EAEC, the US, Australia, New Zealand, etc., and does not clash with Japan's emphasis upon bilateral relations—a legacy of the Cold War period. Thus, rather than multilateralism, the ARF can be regarded as an example of "supplementalism". Through the ARF Japan can supplement its bilateral relations with the US without committing itself to a multilateral framework which excludes the US. Thus, the change in the external environment with the end of the Cold War allowed Japan to take on a policy which embraces multilateralism, an Asia Pacific identity and its bilateral relations with the US. A final point to note is that this multilateral direction fits in with the normative preferences of Japanese civil society for using non-military means to solve regional and global problems.

HD: I would like to raise a couple of points. First, you mentioned the constraining nature of Japanese civil society. I would regard the influence of civil society as not only playing a constraining, but also an encouraging, role. In my own research on Japan's relations with the United Nations (UN) I found that civil society's preference for the UN encouraged and shaped the Japanese government's decision to pursue a pro-active peacekeeping policy. Second, wouldn't it be more accurate to regard the EAEC as an idea which has died a natural death? Are people still talking about it, especially at a time of economic and financial crisis in East Asia which could erode multilateral initiatives and herald a return to bilateralism?

GH: The preferences of civil society for non-violent solutions to human problems can certainly strengthen the hand of those in policy-making circles favouring and promoting similar solutions. In pushing forward a new role for Japan in international society based on non-violent means, the positions of certain policy-making actors can be reinforced knowing their policies meet with the norms of civil society. Particular examples can be seen in opinion polls conducted by the Ministry of Foreign Affairs (MOFA) which demonstrate an overwhelming preference for a non-military role for Japan in the world, e.g. a role in environmental security. The key point is when Japan's contribution crosses over the line of civil society's norms. At the time of the Peacekeeping Operations (PKO) debate in Japan, civil society was split at first when it appeared that PKO would be a military contribution. Only when the concept of peacekeeping was explained to the public did the opinion polls swing round. Thus, support exists in civil society for such non-violent contributions such as PKO, ODA contributions, environmental protection, etc.

As for the second question: will the East Asian economic crisis lead to a weakening or a strengthening of multilateral initiatives? Professor Richard Higgott of the University of Warwick in the UK has just written an article entitled "The Politics of Resentment" in *New Political Economy* addressing this question. With the IMF attempting to impose Anglo-American liberal solutions on Asian capitalist systems, Higgott argues that resistance will appear towards the West. It is interesting as to whether these "politics of resentment" directed against the West could lead to a revival of the EAEC and a strengthening of an Asian identity. My own assessment is that, although perhaps in a different form, it will lead to a strengthening of regionalism in East Asia. Japan recently proposed the Asian Monetary Fund but was met with opposition in the US which resulted in Japan's eventual withdrawal of the proposal. I don't think the idea of the EAEC is dead. The identity does not yet exist but the meetings continue within the Asia Europe Meeting (ASEM) process, which as regards membership is EAEC in all but name.

GE: The issue of what effect the Asian Economic Crisis will have on the future of regional co-operation is indeed an important one. On the one hand, one can discern a decline in the level of co-operation and linkages built up in the region and a partial reemergence of some old animosities among Asian, and particularly ASEAN, nations. It is interesting to note that during this difficult period Lee Kwan Yew

published his memoirs reminding Singaporeans about their troubled history with Malaysia, while Malaysia has set about repatriating illegal foreign workers, the majority of which are Indonesian. As far as Indonesia is concerned, the recent riots against the Chinese community would have done little in terms of Indonesian-Singaporean relations. Given all of the above, there is no doubt that many of the old regional dynamics are still at work, and that has led to a decline in regional co-operation.

On the other hand, the Asian Economic Crisis has demonstrated the need to implement some capital controls. Already we have seen Malaysia introduce some currency controls. My question is: what is the prospect of founding an EAEC-like grouping based on financial controls, rather than trade, which has been the main focus up to now? In other words, is there a possibility of the EAEC re-emerging, in tandem with the "politics of resentment", as an organisation for the control of cross-border, short-term, speculative capital? Obviously the issue of short-term capital control will be one of the issues to be taken up at the upcoming APEC summit this month, but the possibility also exists that the Asian Economic Crisis may induce closer co-operation between just the East Asian states themselves in a somewhat altered EAEC form. Japan's role here will be of crucial importance, and given the fact that Japan does not possess the economic clout that it did during the 1980s, it may be even less enthusiastic about joining an initiative that is bound to go against the grain of US visions for the region, or, as Professor Hook would put it, that does not "supplement" the bilateral relationship with the US. On the other hand, should we see a world recession emerging over the next couple of years (and this is indeed possible given the Asian Economic Crisis, the deteriorating situation on Russia, and the possibility of this spreading to other emerging markets and eventually to the US itself in the form of a severe recession), then we may just see a shift away from the currently accepted neo-liberal, laissez-faire ideology, toward a more regulatory kind of mind-set. If this happens, then the conditions may be more conducive to the realisation of a purely regional EAEC-kind of co-operative arrangement, with Japan playing a more active role.

HJD: As regards the global financial system, I have been examining the Bretton Woods system and the fact that although before its collapse as an adjustable peg system in the early 1970s it did not appear to be regulated, the system was in fact regulated and this was an important principle of the system. Only in the 1980s and 1990s did the financial system become completely deregulated with uncontrolled flows of capital. I am also not satisfied with Calder's characterisation of Japan as a reactive state. Professor Hook used the metaphor of a sandwiched state. However, I prefer to think of Japan as a strategic state. To describe Japan as a reactive state ignores the fact that certain norms and rules existed in the financial system and that Japan was abiding by these rules. This may appear to be reactive but in fact is strategic.

GE: Can I just add to Hyun's point that the Bretton Woods system was never meant to include unlimited flows of capital. Maynard Keynes distinguished between vicious and virtuous flows of capital: vicious being short-term speculative flows; virtuous being long-term flows connected to production and manufacturing. Investor confidence is central to the vicious flows of capital, but not so much to virtuous flows. A loss of investor confidence can lead to investors withdrawing their investments and a depreciation of the currency. Taken to its extreme it can even lead to a severe destabilisation of the economy itself, and this is definitely what we have seen with the Asian Economic Crisis. This is why Keynes argued for the control of vicious flows of capital, and why regulation of short-term capital was built into the Bretton Woods system.

Now, it has only been since the 1970s that we have gradually seen a deregulation of short-term capital, and the first major crisis directly related to this has emerged here in East Asia. Given the connection between short term capital and investor confidence, the question needs to be asked, what determines investor confidence and what led to a loss of this confidence in East Asia? Many

economists point to domestic factors and claim that it is the fundamentals of an economy, assessed on the basis of information provided by ratings agencies, that are all important. But is this really the case? A recent issue of the *Far Eastern Economic Review* carried a feature on the ratings agency Moody's and argued, I think correctly, that much of the time these ratings agencies don't really have a good grasp of the economic fundamentals of many countries, and tend just to follow the lead of major investors when rating countries. South Korea is a good example of this. It was given a triple A rating (the highest) by Moody's at the beginning of 1997, but by the end of the year it had been demoted to junk bond status. Nothing had drastically changed in the fundamentals of the South Korean economy in the space of year. What had changed was that large investors started pulling out their money, and small investors, susceptible to the kind of herd mentality that prevails in the financial sector, started following suit in droves. The point is that as investor confidence is so volatile, there is a need for the heavy regulation of short-term speculative capital on a regional scale, and this relates to my earlier comments on the prospects of the EAEC.

GH: In the post-Cold War world we have seen what I would call the continuing East Asian Economic Crisis as the main challenge to globalism after the end of socialism as an alternative. Even George Soros is calling for controls on capitalism. Thus, there is a need to go back to the Bretton Woods system and Keynes to re-emphasise the need for controls on the vicious flows of capital. Japan's initiative to establish the Asian Monetary Fund demonstrates the wariness on the part of the US in allowing Japan to take a regional leadership role in the restructuring of the political economy of East Asia. Furthermore, from this point of view, the Miyazawa Plan would just prop up the regimes and status quo in the region.

EA: In this situation, leadership is a key factor. The US is looking inwards and there is a leadership vacuum in which Japan can play a leadership role both in regional and international affairs. There has also been a lot of pressure from the US for Japan to behave more pro-actively by taking on increased leadership burdens. Whether or not Asia wants and would accept a Japanese leadership role, or even whether or not Japan wants to play this role due to the constraints of civil society, are central questions. My impression is that the US response to the current economic crisis has been minimal and that if it spreads to China then Japan will be forced to react. This could lead to Asians coming closer together in multilateral institutions but the question remains of who will lead—China does not have the economic clout to assume this role and Indonesia is in crisis. My own research interests lie in the extent to which Japan will assume a leadership role in post-Cold War multilateral organisations. These organisations need direction from a leader and this is the dilemma of recent multilateral initiatives.

GH: I think the big change came with the end of the Cold War. During the Cold War period, one could talk of a solid Asian voice against a Japanese leadership role. However, with the end of the Cold War, the EAEC initiative and calls from Southeast Asia for Japan to stop apologising for the war, a split has emerged between the ASEAN members of Asia on the one hand, and China and the Korean Peninsula on the other hand. China and the two Koreas with their memories of W.W.II are still against a Japanese leadership role; whereas ASEAN member-states are willing to accept and encourage an active Japanese leadership role. How Japan, the two Koreas and China relate to each other will be a crucial issue and the recent visit of President Kim demonstrates a possible erosion of resistance to Japanese leadership even in South Korea.

HD: I would just like to add that in the field of peacekeeping this change is also evident. Traditionally, a strong Asian bloc existed in opposition to Japan's participation in UN peacekeeping operations. However, with the Persian Gulf War and the UN operation in Cambodia a major cleavage developed

with ASEAN nations supporting the despatch of Japanese personnel, whereas China and the two Koreas were solidly opposed to the overseas despatch of Japanese personnel. A second cleavage has appeared recently due to the improvement in Japanese-South Korean relations with the visit of President Kim. Talks have been recently conducted over the joint training of Japanese and South Korean military personnel for peacekeeping despatch.

EA: In the course of my research, I have observed an emerging trend towards pro-Asian and pro-Western divisions in key departments of the Ministry of International Trade and Industry and MOFA. Both factions demonstrate observable differences in their approach to regional and international issues. I wonder how changes in the external situation would influence the foreign policy-making process in Japan given this emerging configuration?

GH: I think changes in the external environment can provide encouragement and support for the policies of various factions. The increase in the strength of Asian factions in Japanese ministries is evidence of this. However, the key issue is that bilateralism and multilateralism do not cancel each other out. Regionalisation and globalisation are leading to the embeddedness of Japan in various regions of the world. Thus, its bilateral relations can and do co-exist with multilateral initiatives.

EA: There is another emerging crisis point in East Asia in the form of defending shipping lanes to maintain oil supplies. It is thought that a continuation with the present status quo and continuing expansion of Chinese oil demands and imports from the Middle East might bring China into conflict with the US and other institutions currently resonsible for safeguarding the sea lanes of energy transportation. Furthermore, there has been no major agreement on any regional arrangement to regulate this issue. Conflict over the sea lanes of communication (SLOCs) may well lead to a Cold War-type stand-off in East Asia. An arrangement may be hammered out between China, the US and Japan; however, China may well decide to pursue its special energy interests and choose to co-operate more strongly with so-called rogue, oil-supplying states like Iran and Libya. Equally, a stand-off between China and Taiwan could lead to a blockade of Taiwan and, as a consequence, disruption to Japanese and Korean sea lanes for oil imports. This, in turn, could lead to a re-evaluation of the whole existing security system in East Asia, either in an atmosphere of confrontation or as an opportunity to enhance the evolution of regional multilateral institutions.

GH: As you said, we can look at competition over oil as a resource beyond a zero-sum game scenario and consider the positive results to be gained and the opportunities for regional co-operation.

KN: My interests lie in regional co-operation, especially the European Union (EU) and its development as an organisation transcending the nation-state system. An interesting contrast exists between Germany as the promoter of the EU and the limited role Japan has been able to play in East Asia for various reasons like the bilateral relationship with the US, memories of W.W.II in East Asia, etc. We Japanese have lacked a sense of regional community and thus have relied upon the bilateral alliance with the US. With this in mind, what would be the main driving force for Japan to take a leadership role in East Asia?

GH: Realists have always assessed Japan's role in terms of hard, military power. However, as you point out, there is also a softer side to the power equation. Scholars, like Kenneth Waltz, have pointed to the fact that Japan has all the necessary military and economic resources and will become a nuclear power in the next century. However, Japan has not become a nuclear power. What is missing from this understanding is, as you said, the softer side of power connected with a sense of community,

identities and norms. Only with the end of the Cold War have pressures arose on Japan to assume this sense of community vis-à-vis international society. Once a gradual adjustment in the norms of civil society occurs, I would expect Japan to slowly change and assume a more active role in the future.

HD: "Hard" and "soft" could almost be synonyms for bilateral and multilateral. My work on peacekeeping makes this clear by looking at the Higuchi Report. Commissioned by the Hosokawa government, this report stresses a sense of community with the UN over and above the bilateral relationship with the US. In reaction to this, the US government applied pressure upon the Japanese government to reassert the importance of the bilateral relationship in place of the UN.

GE: In the case of the current revision of the defence guidelines, has the domestic constraining norm on non-military solutions to human problems eroded enough to allow the legal passage of the revised guidelines?

GH: That is the topic of my current and future research but I have in the past researched the gradual erosion of this constraining norm. For example, Ozawa Ichiro very cleverly used the idea of "normality" in international society to justify the overseas despatch of military personnel. The important factor is how international society is viewed. If one's scholarship is non-normative and takes the international system as given, then one simply examines the way Japan behaves within that system. If, however, one regards the system as abnormal and Japan as trying to promote an alternative method of conflict resolution through non-military means, then more interesting questions arise about international relations. Thus, the approach is a crucial factor. Depending on which paradigm of international relations one uses, different questions and explanations will arise. My conclusion was that the traditional realist and liberal approaches to international relations did not provide satisfying explanations of Japan's foreign and security policies. In Japan, thanks to Professor Sakamoto Yoshikazu, I encountered scholarly approaches differing from the Western mainstream and was able to employ these approaches in my own research. I believe that the earlier we can all find your own approach, the better academics we will all become in the future.

# *Visiting Professors at the ICCLP*

From October 1998 to March 1999 the following professor was invited to the ICCLP:

**Glenn D. Hook** (Professor, The University of Sheffield, UK)
Profile:
After graduating from the University of British Columbia, Professor Hook took up the post of researcher at the Institute of Social Science and then the Institute of Oriental Culture both at the University of Tokyo. He then moved on to become a researcher at the Institute for Peace Science at Hiroshima University. Thereafter, he took up a lectureship at Okayama University and in 1988 was appointed Professor of Japanese Studies in the Centre for Japanese Studies at the University of Sheffield, specialising in international politics. During his one-and-a-half month stay at the ICCLP he presented a paper entitled 'Space, Order and Governance in the post-Cold War Era' at the 5th Anniversary Comparative Law and Politics Symposium as well as participating in a roundtable discussion with graduate students of the University of Tokyo.
Major Publications:
THE INTERNATIONALIZATION OF JAPAN (Routledge, London, 1992) [co-edited with Michael Weiner]
MILITARIZATION AND DEMILITARIZATION IN CONTEMPORARY JAPAN (Routledge, London, 1996)
*The Dynamism of US-Japan Relations: Rising Sun, Falling Star?*, 117-127 SEKAI 575 (1992)

## *Accounts of Foreign Research Trips*

### My First Experiences of Studying Abroad

by Professor Igarashi Takeshi

The other day I was talking to a certain young man and was slightly stuck for a response when he said "I very much admire the work you did in your thirties". Looking back, I must admit that that was a time when I expended an enormous amount of energy on my research. And when I say "energy" here, I mean physical energy—it was a physical momentum that was made possible by youth, but also by the fortunate circumstances in which I was able to conduct my research in the USA. In particular, I am thinking of the lack of barriers for foreigners conducting research in that country and the excellent research infrastructure in place there.

The foundation for this energetic research was my first experience of study abroad in 1974, when I was actually still in my twenties. I was not yet proficient in English, but in Professor John Morton Blum's postgraduate methodology seminars at Yale University, through the Professor's patient supervision, I acquired basic skills such as recording my primary data on cards. The head of the Manuscript Division at Yale at the time was Mr Herman Kahn, who had previously been at the Franklin D. Roosevelt Library. As Professor Blum specialised in twentieth century US history, he and Mr Kahn knew each other from Mr Kahn's time at the Roosevelt Library. Mr Kahn showed me how to obtain documents relating to the former Secretary of State Henry L. Stimson. Stimson's diaries were neatly typed, with substantial entries for each day. I read them painstakingly, with Professor Blum's character sketch of Stimson at the forefront of my mind.

My research topic was the 1947 policy reorientation of the occupation forces in Japan. However, the only actual research I was able to conduct while at Yale was to interview Professor Hugh Borton while I was attending Japanese studies seminars at Colombia University—Professor Borton had been the head of the Japan Division of the State Department at the occupation period of Japan. I was only able to begin a more in-depth study in the summer of 1975. I had returned to Japan from my year at Yale, but was briefly in Washington DC, where the National Archives on Pennsylvania Avenue and its annex in Suitland were my chief hunting grounds. This is where I expended the energy I referred to earlier. The opening hours of the National Archives were 9 am to 10 pm Monday to Friday and 9 am to 5 pm on Saturday. The annex was only open between 9 am and 5 pm Monday to Friday. I chased sources for the entire duration of my three-week stay in Washington, taking the minibus between the National Archives and the annex to make full use of the opening hours. After that I would return to the main building, take dinner and work there until 9 pm. Saturdays were spent from 9 am to 5 pm again at the main building.

It was not just that I spent a lot of time on this research that made it so memorable, but also the fact that I never knew what treasure I would uncover. The annex held documents just as they had been sent from GHQ after the occupation came to an end. They were in cardboard boxes which were identified only by the name of a division and a sketchy description of their contents, so I had no choice but to take a shot in the dark and go through each document in each box. From time to time I would strike gold but more often than not the contents were unrelated to my research. As the boxes were stored in the basement and had to be brought up individually by a librarian, it got to the stage where the librarian viewed me with very weary eyes.

I was able to explain to this librarian that I had limited time and that the boxes were extremely important to my research. I am grateful to him, and to all the Americans who showed me such good will. Mrs Nicastro of the Diplomatic Documents Section of the National Archive was extraordinarily efficient. Mr Taylor of the Modern Military Affairs Section was extremely patient in showing me where to find documents. The staff of the Harry S. Truman Library made many photocopies for me in time for my return to Japan. I was only able to spend one day at the Virginia Military Institute, but the staff of the Primary Materials Division were so friendly that they immediately invited me to dinner that night.

I had some difficulties with my lodgings, but fortune favoured me again. In Washington I was able to stay with my family at the Mennonite Order's International Guest House, and a former staff member of the Harry S. Truman Library made a two-room apartment available to me at negligible cost.

Of course, I met many other researchers during this time. My fellow hunters included Bruce Cummings, Michael Schaller, Marlene Mayo and Roger Dingman. I am glad to report that my relationships with them have continued well beyond my thirties.

[*Translated by Peter Neustupný, January 1999*]

**One Year at Georgetown University**

by Oshima Makiko (Ph.D. Student in the Graduate School of Law and Politics, the University of Tokyo)

From summer 1997, I had an opportunity to study in the LL.M. program at Georgetown University Law Center (GULC). Though generally notorious for being tough, I wondered what life at a US law school would really be like. I flew into Washington DC with mixed feelings wondering whether it would be exciting days or terrible months awaiting me. Summer passed quickly while I was busy attending the summer program and preparing for my new life, and as soon as the Fall semester began in the end of August, my life became overwhelmed by piles of assignments.

There are some movies and books which discuss study and life at law schools. GULC is the alma mater of an attorney/writer Agawa Naoyuki, and his essay, "Birth of an American Lawyer", is a detailed memoir of his three years there. In the US, the core of the legal education is the three-year program called JD where basic skills needed for legal expertise are intensively taught to those who wish to enter a legal career. Students compete with each other explicitly and implicitly in order to get a prestigious position after graduation. The three years are occupied with a lot of hard work: law school courses and exams, editing work for law reviews, a teaching assistantship and an extra-curricular legal internship. They are incredibly busy—some are pursuing at the same time other professional degrees like an MBA and Medicine! The LL.M. in which I was enrolled, on the other hand, is a graduate program for those who have already finished their basic legal education equivalent to JD. Mostly they are students seeking to specialize in a specific field of law or those from abroad studying the American legal system. The competitive atmosphere is somewhat different from that of JD, but if one takes into account the stringent grading system and language problems especially of foreigners, their life is also pretty stressful and demanding. I have always admired those who could consider entering the JD program. It would be too much for me. But being an LL.M. student instead did not promise an easy life, nor relieved the burdens I was facing. I just had to "consume"—I believe I could have never digested it all—what was in front of me day by day, week by week.

The last two weeks of each semester is a period of final examinations. The harshness of finals was unimaginable. A series of pre-exam guiding sessions was held and "Don't Panic!" was repeated again and again to us, all adults over twenty or thirty years old. Initially I was shocked by this and thought it childish: we all had gone through lots of exams already. But I was wrong. The law school exams were not like any exam I had ever taken. For one take-home exam with a twenty-four hour limit, I had to keep writing my answer without a break for twenty-three hours, save one hour to pick up and bring back the materials. In another in-class exam, the professor had announced that two hours would be enough, except for foreign students, and did not let any American students leave the room. As a result, nobody could finish all the questions without being given three hours. In any exam, it takes at least more than one hour to read and understand what the question is. Occasionally it happens that you can neither continue writing your answer nor start again from the beginning, but if so, you have to continue and to conclude with something. The idea of failing crosses your mind and all of a sudden you feel as if your brain is empty. How can I complete something persuasively and coherently within the given time? Throughout the whole period, finals imposed a high level of tension on everyone and to succeed we had to maintain enough strength both physically and mentally.

Setting aside the tough and challenging days at law school—of course they were meaningful and gave me a great sense of fulfillment—the experience of living in Washington, DC with interesting people from all over the world was exciting. I made friends with high-spirited Latin American students and also came across people from, for instance, Uzbekistan and Eritrea. Also I was lucky to experience things unique to the area by visiting the US governmental organizations, appreciating cherry blossoms along the Potomac River, enjoying events on Independence Day and so on. On the other hand, everyday life was spiced with somewhat troublesome and unreasonable incidents. The reason I saw things as "troublesome" and "unreasonable" was that my way of thinking was governed by some standards that I had been accustomed to in Japan either consciously or unconsciously. I think there is a commonality in what outrages Japanese people living in the US. Sometimes I had quarrels with others. Other times things made me feel miserable. Living in a different culture was full of such bitter struggles in one respect, but consequently it gave a valuable opportunity to relativize myself.

Georgetown Law School is located in downtown Washington, DC near the Capitol. After dark you can see the Capitol dimly lit up. Each time I saw the grandeur of the dome symbolizing the ideal and the power of America, it conjured up a calm and humble feeling. Now after two months back in Japan, I am looking back upon that view of the Capitol and the tense days at GULC with nostalgia.

[*November 1998*]

# *Comparative Law and Politics Seminars & Forums*

Held at the University of Tokyo, Graduate School of Law and Politics, October 1998 – March 1999

## [Seminars]

**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 interpretation)
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

**The 64th Comparative Law and Politics Seminar** – 6 October 1998
Speakers: Professor Christophe Jamin, University of Lille II
Professor Philippe Simler, University of Strasbourg III
Topics: Legal Doctrine (Prof. Jamin)
The Treatment of Unfair Clauses in France (Prof. Simler)
Language: French (with Japanese interpretation)
Moderator: Professor Kitamura Ichiro

**The 65th Comparative Law and Politics Seminar** – 21 October 1998
Speaker: Professor Moon Kwang-Sam, Pusan National University College of Law; ICCLP Visiting Professor
Topic: Transformations of Forms of Government and their Prospects in Korea
Language: Korean (with Japanese interpretation by Kang Jae-Ho, Associate Professor of Faculty of Social and Information Studies, Gunma University)
Moderator: Professor Nishio Masaru

**The 66th Comparative Law and Politics Seminar** – 23 October 1998
Speaker: Professor Stephen Sugarman, University of California Berkeley, School of Law
Topic: Assisted Reproduction in the United States
Language: English
Moderator: Professor Higuchi Norio

**The 67th Comparative Law and Politics Seminar** – 28 October 1998
Speaker: Professor Moon Kwang-Sam, Pusan National University College of Law; ICCLP Visiting Professor
Topic: Modified Decisions of the Constitutional Court in Korea

Language: Korean (with Japanese interpretation by Ms Huh Sook Yeon, Graduate School of Law and Politics, the University of Tokyo)
Moderator: Professor Nishio Masaru

**The 68th Comparative Law and Politics Seminar** – 29 October 1998
Speaker: Professor Curtis Milhaupt, Washington University School of Law
Topic: Rules versus Discretion: Responding to Banking Crises in Japan and the United States
Language: English
Moderator: Professor Higuchi Norio

**The 69th Comparative Law and Politics Seminar** –12 November 1998
Speaker: Professor Ms. Susan S. Katcher, Associate Director, East Asian Legal Studies Center, University of Wisconsin Madison
Topic: How to Apply for and Survive in American Law School
Language: English (summary in Japanese)
Moderator: Professor Higuchi Norio

**The 70th Comparative Law and Politics Seminar** – 10 December1998
Speaker: Professor Robert D. Cooter, University of California Berkeley, School of Law
Topic: Can Contract Law Prevent Strategic Behavior by the Promisee?
Language: English
Moderator: Professor Ota Shozo

**The 71st Comparative Law and Politics Seminar** – 11 December 1998
Speaker: Professor Ooe Taiichiro, Shizuoka University; Lecturer of Faculty of Law, the University of Tokyo
Topic: "The Law of Administration" and Order outside of the Law in Russia: For a Theory on Legal Systems in the Post-Socialist Era
Language: Japanese
Moderator: Professor Kitamura Ichiro

**The 72nd Comparative Law and Politics Seminar** – 12 January 1999
Speaker: Professor Moon Kwang-Sam, Pusan National University, College of Law; Visiting Research Scholar of Graduate School of Law and Politics, the University of Tokyo
Topic: Political Parties and Democracy in Korea
Language: Korean (with Japanese interpretation by Ms Huh Sook Yeon, Graduate School of Law and Politics, the University of Tokyo)
Moderator: Professor Takahashi Kazuyuki

**The 73rd Comparative Law and Politics Seminar** – 14 January 1999
Speaker: Professor Harry Scheiber, University of California Berkeley, Associate Dean of Law for Jurisprudence and Social Policy; the Stefan Riesenfeld Professor of Law and History
Topic: Ocean Law, the Biodiversity Convention, and the Question of Genetic Materials
Language: English
Moderator: Professor Onuma Yasuaki

**The 74th Comparative Law and Politics Seminar** – 20 January 1999

Speaker: Judge Kim Hyeong Du, Hongsung Branch of Daejeon District Court, Korea; Visiting Research Scholar of Graduate School of Law and Politics, the University of Tokyo
Topic: Training Legal Professionals in Korea
Language: Japanese
Moderator: Professor Ito Makoto

## [Forums]

**The 92nd Comparative Law and Politics Forum** – 7 September 1998

Speaker: Sir Colin Campbell
Topic: Legal and Ethical Issues in Human Genetics
Language: English
Moderator: Professor Hasebe Yasuo

**The 93rd Comparative Law and Politics Forum** – 29 October 1998

Speaker: Arnold M. Quittner, Esq., Californian Lawyer, Regular lecturer at PLI bankruptcy seminar, Counsel to Indonesia on Bankruptcy Law Reform
Topic: Recent Problems on Cross-border Insolvency in the United State
Language: English (with summary in Japanese)
Moderator: Professor Kashiwagi Noboru

**The 94th Comparative Law and Politics Forum** – 10 December 1998

Speaker: Professor Daniel H.Foote, University of Washington School of Law; ICCLP Visiting Professor
Topic: Law Clerking in the United States
Language: English
Moderator: Professor Higuchi Norio

**The 95th Comparative Law and Politics Forum** – 14 January 1999

Speaker: Professor Willem Jan Boot, Leiden University; Visiting Research Scholar of Graduate School of Law and Politics, the University of Tokyo
Topic: New Approaches to the Analects of Confucius
Language: Japanese
Moderator: Professor Watanabe Hiroshi

# *Reports on Selected Seminars and Forums*

## [Seminars]

**The 62nd Comparative Law and Politics Seminar –** 25 September 1998
Professor Jean-Louis Halpérin
The French Revolution and Private Law

Professor Jean-Louis Halpérin's presentation was divided into the following sections:

**1. Legislation at the time of the French Revolution**
As Portalis once said, "during a revolution, all law is public law". Accordingly, when evaluating the rights and wrongs of revolutionary legislation relating to private law, it is necessary to consider what is novel in the context of the prevailing political agenda.

The greatest reform of the French Revolution was the eradication of the old system of privilege through the abolition of the feudal system of property ownership. This line of reform continued after the Revolution, and reached its fruition in the concepts of private ownership espoused in the Napoleonic codes. Thus, in the field of ownership rights, law in the time of revolution has had an enduring outcome.

The Revolution also helped set the foundations for the modern law of obligations. At the time of the Revolution, this area of law was regulated by Roman law. Revolutionary legislation abrogated the canon law concept of usury; disbanded the professional guilds of the *ancien régime*; discontinued the *retrait lignager* (reclamation) of family property; and abandoned the action to avoid a contract of sale for reason of *lésion* (excessive loss). The rationale for these changes was to give each party maximum freedom of contract. This foretells Article 1134 of the Civil Code which states "*Les conventions légalement formées tiennent lieu de loi*" (Agreements legally formed take the place of law for those who have made them). Thus there is again a clear continuity between Revolutionary law and the Napoleonic codes. The fact that these Revolutionary legal concepts continued in effect after the Revolution period is evidence that they fully satisfied all social strata.

By contrast, basic Revolutionary concepts of family law did not accord with custom and gained only limited acceptance after the early stages of the Revolution. There were some exceptions in laws relating to personal status which made their way into the Napoleonic codes, such as civil identity papers, divorce and marriage (which had already been transferred from canonical to civil jurisdiction by the time of the Revolution). Thus, family law during the revolutionary period did not fail totally. The provisions that proved unacceptable were those that enforced equality between husband and wife or parent and child—these provisions led to difficulties during divorce and paternity issues. In addition, there were strong protests and criticisms against two laws in the second year of the Republic relating to succession and illegitimate offspring. In spite of this opposition, the Napoleonic codes recognised the principle of equal division of inheritance assets and permitted acknowledged illegitimate children to claim certain rights. This is another example of the Napoleonic codes continuing the legislation of the Revolution.

The resistance to Revolutionary concepts of family law shows the contents and limits of the French populace's sense of equality at the time. There were few dissenting voices in relation to equality of civilian

rights, the abolition of feudalism or religious tolerance. However, intra-familial democracy was another matter altogether.

**2. Legal ideology**

One peculiar phenomenon during the Revolution was for people to publish propositions, petitions and pamphlets setting out not just political articles of faith, but concrete and technical suggestions for amending civil law. This activity was neither a normative nor doctrinal phenomenon, but could perhaps be called an exercise in "legal ideology" which occurred in the context of an enlightened period of enthusiasm for progressing debate on social reform through laws and legal provisions.

The bearers of this legal ideology were few in number and did not form a particular school of thought. However, they all had an interest in civil law and some of them put forward similar proposals. Most of them were members of the Revolutionary parliament. As lowly jurists under the old regime, they had more than a passing knowledge of the old law, natural law principles and philosophy.

The contents of this legal ideology in the field of ownership rights were identical to the Revolutionary legislation. However, it differed conspicuously in relation to family law. Many proposals called for joint management of marital assets, a principle of private marriage, and a principle of mutual obligation between parent and child. Some also favoured adoption by unmarried persons or the recognition of children born from adulterous relationships.

The origin of these proposals was the stimulus of innovative foreign precedents based on natural law concepts and the thoughts of Rousseau. In the sense that it was trying to construct a new democratic family structure, legal ideology was totally opposed to the drafters of the Napoleonic codes.

Legal ideology suffered many vicissitudes after the Revolution. Unlike political ideology, private law ideology was not absorbed into the Republican tradition. The reforms and innovations proposed by the Revolutionary lawyers would not be realised until the twentieth century. For example, legislation in 1923 permitted minors to adopt, and married women obtained full legal capacity in 1938. Illegitimate children gained equality with legitimate children in 1972.

It would seem that the topic of Revolutionary legal ideology is an opportunity to consider the *avant-garde* in the field of law.

[*Saito Akio, translated by Peter Neustupný*]

**The 63rd Comparative Law and Politics Seminar –** 30 September 1998

Professor Sara Sun Beale

Current Public Attitude toward Crime

Professor Beale discussed the increasing punitiveness in the American justice system and the dramatic developments in recent years that contrast very much with the stability in the system that we see represented in the post-war period for about three decades. During this period the idea of rehabilitation of offenders was a central theme. There was a focus on indeterminate individualized sentencing, a system of probation/parole and the juvenile court system focused on the best interests of the child and individualized determination. The only real change during that time was a dramatic decline in the public support for the death penalty and its use, but otherwise the system was very stable and the rates of imprisonment held

steady at about 100/100,000 within a narrow range.

Today we see a complete transformation: a rejection of rehabilitation and the key reforms associated with it. Every jurisdiction has adopted harsher more rigid sentencing laws. Most have deliberately made the conditions of imprisonment harsher and capital punishment has made a dramatic comeback. Rehabilitation as a core goal has been replaced by increasing agreement on crime prevention through incapacitation and the increasing adoption of the theory of retribution. The reforms that we see associated with this shift—a substitution of determinate for indeterminate sentencing ("if you do the crime you do the time"), a preference for set punishments, an elimination of the system of parole, an increasing reliance on mandatory minimum sentences for particular offences and sentencing guidelines which take the decision away from the individual judge—had a strong impact, especially when taken together. Many jurisdiction have adopted all of them. Between 1984 and 1990 the mean sentence in federal courts roughly doubled as a result.

Additionally in many jurisdictions key offender statues were introduced in the mid-1990s. Popularly called "three strikes laws" they have been adopted in twenty-two states since 1992 and require a doubling or tripling of sentences or mandatory life in prison for repetitive offenders. In California they apply to each felony. By 1997 the imprisonment rate reached 445/100,000. If local jails are added to regional ones the rate is 645/100,000. As of 30 June, 1997 the number of people convicted and in jail was 1.7 million - one in every 155 people, excluding the juvenile system. A comparison to other countries reveals similar high figures for Russia while imprisonment rates elsewhere are much lower (Japan 37/100,000). However, the US might most appropriately be compared to countries having similar juridical systems and a comparison with the UK and Canada (with imprisonment rates of 100 and 115/100,000 respectively) indicates where US numbers would be if post-war trends had continued. In short, a huge shifts in law and the consequences of law can be seen.

The juvenile justice system has also undergone a fundamental shift just in the 1990s indicating greater punitiveness. Between 1992 and 1996 forty states have adopted new laws making it easier to bring charges against juveniles in the adult criminal courts. The idea of the best interests of the child and rehabilitation is rapidly giving way to an increase in accountability, which is interpreted as punishment, which is interpreted as incarceration with adults.

Besides changes in the prison system and incarceration rates Professor Beale also looked at the death penalty, its use and the actual treatment of offenders in the system as measures of punitiveness reflecting the preferences of the US public. The declining support for the death penalty was one of the real changes in public opinion in the post-war period. In 1972 the Supreme Court almost reached a constitutional decision that would have forever barred the use of the death penalty. Then public opinion turned around. In 1976 the Supreme Court allowed individual states to authorize it and now capital punishment is on the books of thirty-eight states and the federal court for federal crimes. The number of prisoners on death row has risen to 3,387 persons in April 1998. The number of executions has also gone up steeply to seventy-four nation-wide in 1997, the highest level since 1955. Juries are more willing to impose the death penalty, states more willing to authorise it and judges more willing to have the death penalty carried out. Another development in the 1990s, reflected in public opinion and changes in the law, is the public's desire to treat prisoners harshly. Many jurisdictions have limited prisoners ability to see their families, participate in educational programs, engage in forms of recreation, etc. Eight states have re-authorized the use of chains so that prisoners can be shackled together.

A reaction to a rise in crime is only a partial explanation of these trends since the crime rate has been

falling over the last seven years at precisely the time when harsher prison terms were implemented. Other factors are involved. Work by psychologists suggests that punitive measures are most popular among those most fearful of crime who see harsher laws as an instrument to protect themselves. Another theory suggests that law plays a different, more symbolic role in society and responds to people's concerns about a broader range of social and moral issues. Support for punitive measures is correlated with concerns about social conditions and values such as attitudes toward authority, lack of discipline, etc. This would indicate that fears of a breakdown in social institutions and moral standards are most critical in influencing people's attitudes toward punitive measures. This is also consistent with findings that supporters of the death penalty do not regard it as an instrument to deter crime. Finally, Professor Beale drew attention to the role played by media. While in 1991 there were 624 stories about crime on the evening shows of the three major networks, this number had climbed up to 2574 by 1995 during a period when crime rates were falling, but support for punitive measures picked up. The trend has been even more pronounced in the local news media where crime has become the major focus of news reporting. The low production costs of these stories and the targeting of specific audiences by advertisers account for these changes in news reporting. [*Jürgen Reichert*]

**The 64th Comparative Law and Politics Seminar** – 6 October 1998

Professor Christophe Jamin
Legal Doctrine
Professor Philippe Simler
The Treatment of Unfair Clauses in Franace

Firstly Professor Christophe Jamin reported on "Legal Doctrine".

Doctrines exert an undoubted influence on society. This influence is to be distinguished from the fundamental societal power of law. In particular, the determinative power of law arises from the principle of seperation of powers, whereas doctrines have no determinative power. Further, the proponents of doctrines, namely authors, are in principle removed from the sources of state power. Once prosecutors' reports, civil servants' case summaries, etc. are excluded, articles and lectures by university professors are totally independent of these sources and have total freedom.

However, doctrines are certainly adjacent to the power of law. The role of doctrines is to systematise the law and expound dogmatics through the collective intellectual process of conceptualising and theorising. Legislators have no option but to respect these systematised dogmatics. It is in this way that theory and power maintain an equilibrium between complicity and distance, such that theory has the status of a sometimes-critical ally of power.

Doctrines exist in French society in the form of a network. Almost all the bearers of academic theory are university professors, who have all had the common experience of the *agrégation* examination. Accordingly, the network is extremely homogenous. In subscribing to the doctrine, members must publish their writings or give public lectures, and their position within the doctrine is acknowledged through citation of their work by other members.

The significance of subscribing to the doctrine is in the ability of the member to put forward a particular opinion in the name of the doctrine as a whole. When a member proposes an opinion in this way, even if the member acts alone, he or she is representing the doctrine in relation to an audience of colleagues,

students and legal practitioners.

Professor Philippe Simler then made a presentation on "The Treatment of Unfair Clauses in France".

The French law of 10 January 1978 set out two measures to regulate unfair clauses in contracts between a business on the one hand and a non-business or consumer on the other. The first mechanism was to declare that certain types of provision were abusive in nature and prohibit their inclusion in contracts. The list of prohibited provisions was to be created by declaration following debate in the Conseil d'État. Such a list was declared once in 1978 and has not been amended since. Accordingly, we cannot say that this direct mode of intervention has had a positive ongoing effect.

The second mechanism was to establish *Commission des Clauses Abusives* (a Committee on Abusive Contractual Provisions). The responsibilities of this Committee were broad-ranging and included, in relation to model contracts between businesses and their customers that were brought before the Committee, pointing out unfair clauses, advising the abrogation or amendment of such provisions or suggesting the Committee's own innovations. The results of the Committee's activities—businesses and customers were able to agree on preventative measures and businesses could also take unilateral action—were not as direct but nevertheless fairly fruitful.

One consequence of the legislative intervention was that the courts lost their jurisdiction to determine the abusiveness of contractual provisions by their own criteria. However, since the executive did not take an active approach to prohibiting types of contractual provisions, the courts gradually came to adopt the mantle of this jurisdiction. Finally, in 1991, a decision of *Cour de Cassation* (the Court of Cassation) recognised the jurisdiction of the courts in this area. The Court of Cassation's decision was given tacit approval in legislative amendments in 1995.

The above discussion relates only to unfair clauses in contracts between businesses on the one hand and non-businesses or consumers on the other. However, the definitions of "non-business" and "consumer" are not clear. There is also the issue of how to treat contracts between businesses. In principle, unfair clauses in such contracts should be able to be treated in the same way since they would involve a similar application of the abuse of rights principle. However, if the issue can be resolved through the application of general legal principles, why were the legislative and executive actions outlined above necessary at all?

[*Saito Akio, translated by Peter Neustupný*]

**The 66th Comparative Law and Politics Seminar –** 23 October 1998

Professor Stephen Sugarman

Assisted Reproduction in the US

**The Changing face of assisted reproduction**

Assisted reproduction is a constantly developing field of study involving legal, social and technological problems. Put simply, it refers to people helping other people have children. Initially, assisted reproduction referred to artificial insemination, whereby doctors helped young, married couples have children under tightly controlled schemes. Few legal problems arose because the identity of donors remained a secret. Today however, assisted reproduction means much more than artificial insemination. Access to in vitro fertilisation schemes has increased and surrogate parenting has become more common. Genetic counseling and enhancement procedures are being developed. Furthermore, assistance is no longer confined to young,

married couples; for example, older couples, lesbian couples and unmarried couples are now seeking help. The donors are also much more varied. They may be friends or siblings of the intended parents. These developments are controversial and many societies, including America and Japan, are grappling to find solutions to the legal and ethical quagmire that they present.

**Legal problems created by assisted reproduction**

There are five types of legal and policy issues involved in assisted reproduction. Each raises its own set of questions and issues for inquiry. First, issues of "equal access" to assisted reproduction programs affect decisions on government subsidies and who is allowed to utilise assisted reproduction programs. Second, there are unanswered questions about who has "obligations to the child". Do donors, for example, have financial or emotional obligations to the child? Third, the issue of who has 'rights to the child' may lead to disputes, for example, where a surrogate parent changes their mind. Concomitantly, the "continued stability of the intended parents' relationship" is an issue for rights to the child and also affects custody decisions. Lastly, difficulties have arisen in the context of "rights to embryos", particularly their disposition.

**Towards a theoretical framework for thinking about these problems?**

These problems cannot be solved by reference to dominant theoretical legal frameworks, such as Feminism, Law and Economics or Childs Rights. Amongst Feminist writers themselves there is disagreement as to whether assisted reproduction is advantageous to women or exploits them. The Law and Economics school of thought, which in simple terms would leave everything to the market except for the enforcement of contracts, is clearly too simplistic a framework for the complicated ethical and legal dilemmas raised above. Similarly, Child Rights theory suggests that the law should serve the "best interests" of children, but this expression defies exact quantification. As this brief summary suggests, there is still much inquiry needed in order to resolve the legal problems mentioned above.

**Some thoughts on how we should think about these problems**

If we can define the purposes that people have in seeking assistance, we can make judgments about which purposes are acceptable to society and then begin to solve the problems on that basis. It seems that there are two main reasons for people seeking assisted reproduction: perpetuating one's own genetic lines and preventing disability. Most people would agree with the first purpose, as revealed by the relatively controversy-free acceptance of artificial insemination. But would most people accept a gay couple using a surrogate mother in order to perpetuate their genetic line? Preventing disability may also seem like an acceptable purpose, but advocates for disabled people's rights are concerned that it makes disability seem undesirable. There are other purposes which are more controversial. These include gender selection, convenience and genetic enhancement. The last in particular would not be supported by most people. However, if we can at least divide the purposes between desirable and undesirable, society can begin to deal with the issues outlined above. The question is, who should be the gatekeeper and how do we know what the real purpose of those seeking assistance is? Furthermore, once society is prepared to tolerate some purposes it should also be prepared to tolerate cases that slip through the cracks, because control cannot be complete. Perhaps the best starting point from a legal perspective is adoption law. Whilst not a perfect solution, it does provide a model for dealing with the legal issues involved. The problem is that as adoption has become more complicated, so has adoption law and although the adoption law of one hundred years ago tended to have bright lines and clean solutions, it now involves murky borders and difficult divisions.

**Reaching a solution: a question of ideology**

In summary, these thoughts are merely designed to be a starting point in the process to finding solutions to the enormous ethical and legal issues involved in assisted reproduction. There may be other theories and

philosophies which can help to explain the issues and set up a framework for thinking about these problems. However, Professor Sugarman is not optimistic. He believes that the answers are very much influenced by ideology and that any decisions made in this area are inherently value-laden. There will not be one answer for every country and every individual around the world. The solutions are likely to elude us for a long time to come.

[*Stacey Steele*]

**The 67th Comparative Law and Politics Seminar** – 28 October 1998

Professor Moon Kwang-Sam

Modified Decisions of the Constitutional Court in Korea

Under the Constitutional Court Law in Korea, the Constitutional Court ("the Court") can only find laws constitutional or unconstitutional. However, two outcomes alone are not adequate to deal with the wide range of issues that come before the Court. Both legal academics and the Court itself have acknowledged the need for a greater variety of rulings, and the Court has in fact developed different methods of determining cases.

First, I should comment on the validity of the Court handing down decisions other than in the form provided in the legislation.

Those who support the Court's ability to make these alternative orders point to the special nature of constitutional cases, reasons of practicality, the doctrine of the separation of powers, examples in certain legal systems and the fundamental discretion of judges as to the form of their orders. Those who oppose the alternative orders refer to the express provisions of the Constitutional Court Law, specific problems with some of the orders and the examples of certain other legal systems.

Resolution of this debate is complicated by the status of constitutional cases as opposed to regular litigation. The form and procedure for constitutional cases is similar to civil litigation, but their substance is totally different in nature. Those who deny the validity of the alternative orders overlook this important difference. However, for reasons such as the quasi-legislative function of decisions in constitutional cases, the necessity of legal certainty, respect for the legislative power of parliament and the need for flexible responses to multifarious legal phenomena, I feel that the Court's ability to make these orders must be confirmed.

Second, I will discuss the different orders that the Court can actually issue.

1. In order to prevent the legislative vacuum that would arise if the Court found a law unconstitutional, the Court can declare that the law does not conform with the Constitution but that it had effect for a defined time period.

2. If a particular article, paragraph, sub-paragraph, phrase, word, etc. of the law in question is severable, then the Court can determine that that part of the law is unconstitutional.

3. The Court can find the law constitutional but read it (or any part of it) down to ensure its consistency with the Constitution. The order will normally use words such as "this law does not breach the Constitution provided it is interpreted to mean" and thus stresses the express interpretations that the law can have.

4. The Court can find the law constitutional but state that certain interpretations would take the law beyond the boundaries of constitutionality. This is the inverse of the previous item, since the Court is stating express interpretations that the law can *not* have.

5. If there is not the required two-thirds majority for declaring a law unconstitutional but there is a simple majority, then the Court can issue an order with wording such as "the Court is unable to declare this law unconstitutional". Since there are nine judges, this will only occur when the majority is 5:4.

6. Where the law is constitutional in relation to a particular case but the Court considers that the law's constitutionality is subject to doubt in other contexts in the future, the Court can make a declaration to this effect and exhort the legislature to amend the law.

Third, I would like to raise some issues with these forms of order. It is possible that the Supreme Court may view the fourth type of order as merely interpretative and choose to ignore its binding effect, which would obviously lead to confusion. In relation to the first type of order, the Court will need to finely judge the effects of the order on the parties before the Court, as well as on all persons who are subject to the law and who warrant its protection and benefit. In addition, in relation to the sixth type of order, there is the risk that limiting the temporal effect of a law or suggesting amendments will be viewed not as constitutional interpretation but as usurpation of the legislature's freedom to enact and amend laws.

Merely upholding the validity of the six alternative types of order listed above will not resolve these issues—to do so, it will be necessary to adjust the legal environment. First, to give these orders a foundation that is beyond dispute, Article 45 of the Constitutional Court Law should be amended to read "the Constitutional Court may make determinations *including* the constitutionality or unconstitutionality of a law or part of a law that is challenged". In addition, Articles 47(1) and 75(1), which make decisions of the Court binding upon all courts, national institutions and local government bodies, will require corresponding amendments to confirm that the alternative orders have the same effect.

[*Moon Kwang-Sam, translated by Peter Neustupný*]

**The 68th Comparative Law and Politics Seminar** – 29 October 1998

Professor Curtis Milhaupt

Rules versus Discretion: Responding to Banking Crises in Japan and the United States

Professor Milhaupt talked about the reform of deposit insurance in Japan drawing some interesting parallels to the US experience and discussing some of the problems in the literature on deposit insurance that have focused almost exclusively on the US. Banks are treated differently from commercial firms in every economy, the generally accepted idea being that banks are different for three reasons: banks are susceptible to bank runs; they are also heavily involved in the settlement of monetary claims throughout the economy; and banks are also a mechanism by which the central banks conducts monetary policy. The debate on how to provide stability to banks and at the same time expose them to some discipline, has focused on the discussion of banking safety nets or deposit insurance as the traditional, most basic mechanism to provide stability.

In the US the institutionalization of a deposit insurance system reflected the experience of the Great

Depression and, emerging out of the New Deal, it was considered a big success for a long time. It was not until the 1980s that this view changed in the context of the S&L crisis when attention shifted to the incentive structures for both financial institutions and regulators. Deposit insurance had allowed especially weak banks to take on more risks. New economic analysis drew attention to the moral hazard problem. Another key analytical argument pointed out the problem of regulatory forbearance. Regulators are worried about their reputation and their future careers and have incentives to downplay financial problems. The problem of much of the literature is its exclusive focus on US institutions. It identifies the problem, i.e. moral hazard, and then identifies the source of the problem, i.e. deposit insurance. Recent discussion has focused on proposals to privatise or to abolish deposit insurance. There has also been the argument that deposit insurance is in appropriate for developing/transition economies and the idea has emerged that implicit safety nets are more appropriate since financial institutions are encouraged to be more disciplined in a more uncertain environment.

There is nothing intrinsically wrong with this literature. Professor Milhaupt also did not suggest that economic principles do not apply to Japan. Indeed, Japan would be in a much better position if it had learned the lessons from the US S&L crisis. However, there might be other structures which give rise to the identified problems in a different way. In the corporate governance debate it took fifty years for the simple idea to evolve that the US experience was not inevitable. Some of the same problems apply to deposit insurance and it is important to keep them in mind when thinking about the policy implications. Therefore, it is useful to draw on the experiences of other countries besides the US and to clarify the alternatives to a formal deposit insurance system. It is the Japanese experience that suggests the most likely real world alternative to a formal institutional structure and that illuminates the contrast of "rules versus discretion".

Professor Milhaupt distinguished three phases in the development of deposit insurance in Japan. For most of the post-war period Japan had an implicit safety net, based on the reputation of the Ministry of Finance (MOF) and the Bank of Japan (BOJ) and supported by a variety of supplementary mechanisms. The profitability of banks in a tightly controlled banking sector constrained risk taking. The MOF could offer incentives to financial institutions to take over distressed financial institutions. The political system also supported the implicit safety net as there was little political competition and little concern on the part of the private sector that the informal safety net would be taken away or would be manipulated to serve different interest groups. The system was not initially designed to protect depositors, but to protect the banking sector itself, and played a critical role in Japanese finance and corporate governance. The deposit insurance legislation introduced in 1971 played only a symbolic role and the system remained under-funded with only ten people assigned to the Deposit Insurance Corporation. While informal regulation also exists in the US with the recent arm-twisting over the bailout of a hedge fund as the most recent example, in Japan the entire regulatory structure was based on informality with few legal institutions in place.

This system broke down in the early 1990s. As a result of financial deregulation banks could take on more risks, some of them difficult to understand for financial regulators. There was also a decline in the reputation of regulators themselves, especially that of the MOF. And finally, the sheer magnitude of the financial problems made it difficult to encourage healthier banks to take over weaker institutions. In the early 1990s formal institutions appeared on the regulatory landscape. The Deposit Insurance Corporation provided funds to assist in the merger of regional banks. In 1995 Tokyo Kyodo Bank was set up to take over the bad assets of some failed credit unions. A crucial watershed in Japanese financial history was the *jusen* problem of 1995-96 leading to the creation of an elaborate mechanism, including the use of taxpayer funds, to solve financial problems when traditional measures had failed. The regulators' attempt to get founding banks to take out all of the losses of the *jusen* banks did not work since losses were too large.

More critically, the private sector drew on legal arguments directed against financial regulators, threatening to resort to bankruptcy laws and stressing their liability to their shareholders.

Beginning in 1996 the safety net became more institutionalized. The enactment of a prompt action regime based on US legislation tackled the forbearance problem. It was designed to force regulators to take action when financial institutions fall into difficulty so that they are not able to cover up problems. The partial break up of the MOF with the creation of a separate supervisory agency was followed by putting formal rules into place for financial institutions culminating in the most recent legislation. A different political environment, a move toward more political competition and a decline of the reputation and status of regulators, as well as their declining policy input, has contributed towards this regulatory shift.

Discussing the lessons to be drawn from the Japanese experience Professor Milhaupt stressed the need to go beyond traditional analysis. In Japan deposit insurance played no role whatsoever in creating the financial problems. Often, the most severe problems are not caused by formal mechanisms themselves, but by the implicit role of the safety net. He concluded that rules are better than discretion and stressed the need for clear policies. Even when regulators select the best policy for a given situation, in the long run discretionary policies are doomed since they fail to take the reaction of the private sector into account as illustrated by the *jusen* episode when regulators created incentives that ultimately undermined the whole policy. While generally the move toward a more rule based regulatory regime is to be regarded as a favourable development, much depends on how these new mechanisms will be implemented.

[*Jürgen Reichert*]

**The 70th Comparative Law and Politics Seminar** – 10 December 1998

Professor Robert D. Cooter

Can Contract Law Prevent Strategic Behavior by the Promisee?

In traditional jurisprudence, inadequate attention was paid to the social consequences of a legal interpretation and there was little attempt to develop a predictive theory of the social effects of legal norms. The field of "law and economics" is filling this void by adopting the behavioural science approach of micro-economics. In addition, "law and economics" is having a active contribution through its application of concepts such as *efficiency* and *distributive justice* to social value judgments, which inevitably form a part of the legislative or interpretative process. It is desirable (and likely) that traditional legal interpretation and "law and economics" should continue in parallel development.

Two issues in contract law are how to determine how contracts can be enforced effectively and what is the most appropriate remedy. The traditional theory of contract in Anglo-American law is called the "bargain" theory. It postulates that a contract (e.g., an exchange of promises) is legally enforceable it is made as part of a bargain, i.e., a promise is exchanged is exchanged for some sort of counter-promise by way of enticement (known as "consideration"). The problem with this traditional theory is that it does not encompass certain types of agreement that ought to have legally binding effect and denies their enforcement. For instance, in the case of a "firm offer" contract, where the purchaser grants an option to the vendor to create a contract to sell goods to the purchaser only during a defined time period, there is the possibility that this will be unenforceable for lack of consideration. However, given that both parties intend this to be a binding contract when they enter into it, it *ought* to be enforceable. A gift too will be unenforceable for want of consideration, even though enforceability would often be the socially desirable outcome.

By contrast, "law and economics" posits a more unified and systematic approach, clearly dividing contracts into those which serve a socially desirable outcome and those which do not. The criteria for determining enforceability is whether both parties wish the contract to have legally binding effect at the time of contracting. If a contract meets these criteria, the contract is said to be "Pareto efficient (optimal)".

For the sake of simplicity, suppose that the contract in question is a one-shot contract between two parties with no external effects. In this contractual game, the strategy space for the promisor is the decision of whether to perform the contract or breach it. For the promisee it is whether to place a high or a low degree of reliance in the promise (the pay-off matrices of the parties have been abbreviated. For more detail see Cooter & Ulen, *Law and Economics*, 2nd ed., Addison-Wesley, 1997, figures 6.1 to 6.3). If the contract is unenforceable and the promisee cannot obtain damages, then the promisee bears the entire risk of the transaction and so will act cautiously. He/she will, so far as is possible, make a detailed assessment of the likelihood that the promisor will not perform his promise and will adjust his/her level of reliance in the promise accordingly. If the contract is enforceable and the promisee can obtain perfect expectation damages, then he/she shifts the entire risk of the promisor's non-performance back onto him and will therefore have the greatest incentive to enter into the contract with a high degree of trust, regardless of the likelihood that he/she will perform his/her side of the bargain. In this way, when a contract is enforceable there arises a moral hazard for the promisee in this strategic decision as to whether to perform his/her side of the contract.

In response to this internal paradox of contract law, "law and economics" can offer the following solution. The criterion for assessing the social desirability of a contract is the application of the Pareto principle. Based upon the Pareto principle, the "Pareto improvement" is a social change which disadvantages no member of society and advantages at least one. We can also express the Pareto improvement as favouring a social change which at least one person agrees to and which no-one actively disputes. Once a social situation can no longer be Pareto-improved, it is said to have reached Pareto efficiency. A Pareto efficient situation is highly desirable because it allocates resources efficiently and without waste. In the paradox scenario raised earlier, making a contract enforceable does not meet the Pareto efficiency crieria since there is an incentive for the promisee not to perform his/her side of the contract. Moreover, making a contract unenforceable likewise does not accord with the Pareto efficiency criteria because there is an incentive for the promisor not to perform his obligations under the contract—non-performance by either party is a socially undesirable outcome. Under the Pareto efficiency criteria, the function of law is to make each individual's rational action (based on maximising self-interest) coincide with the best societal outcome. This can be achieved, according to the "law and economics" analysis, by making contracts enforceable such that compensation for breach is fixed at foreseeable damages (see Cooter & Ulen, *op. cit.* at 221 *et seq.* for a more general model in which the amount of compensation is the amount of damage expected when the optimal level of reliance (according to the Pareto principle) is placed in the promise).

This leads to an identical solution as was in fact reached in the decision in *Hadley v. Baxendale*. Therefore, we can find conformity between the analysis and normative statements of the common law, the repository of jurisprudential wisdom, on the one hand and the "law and economics" approach on the other.

[*Ota Shozo, translated by Peter Neustupný*]

**The 71st Comparative Law and Politics Seminar** – 11 December 1998

Professor Ooe Taiichiro
"The Law of Administration" and Order outside of the Law in Russia: For a Theory on Legal Systems in the Post-Socialist Era

Since the collapse of socialism, Russia has continuously pursued problems described within the socialist framework (or Peristroika) as "the establishment of a Rechtsstaat" and "realignment towards civilisation (Western modern law)". However, the realisation of this today is viewed as unexpectedly difficult. To change the viewpoint of our inquiry, perhaps it can be put this way: in reality, Russian law belongs to a fundamentally different legal system to Western law and this is why Russia attempts today to align its law with the West.

In addition to raising doubts as to the validity of the popular viewpoint in Japan, Europe and America that places Soviet law and modern Russian law since 1917 within a Western lineage (or the Continental law genealogy), the presenter argued against the analysis conceived of by European and American scholars who refer to the historical premises of Soviet socialist law as its subsidiary elements, instead of treating them as intrinsic. For example, R. David describes the "administrative" character of traditional Russian law as opposed to law formulated from justice in the West and Harold Berman talks of the dominance of non-legal "spontaneous and informal social relationships" in pre-revolution Russia as opposed to legal relationships. Instead, the presenter called for a reconsideration of the meaning of the difficulties confronting reform in Russia using an interpretation which views Soviet law and contemporary Russian law as having intrinsically "administrative" characteristics and co-existing with non-legal order. Accordingly, this undertaking requires not only a legal interpretative comparison of the written law of Russia and the West, but also a socio-legal comparison of the structure of the social order as a whole and the position of law in the social order (the legal order). This fact is connected particularly to the problem of the nature of "customs" in Russian society (European and American academics use concepts such as *coutumes* or *Volksrecht* to refer to these as matter-of-fact non-legal social phenomena).

The major portion of written law in Imperial Russia was formulated as *The Russian Imperial Law Code* (*Svod*) in the first half of the nineteenth century. Although the terminology in this legal code borrowed largely from French and German law, its conceptual structure was different. This fact is clearly revealed in the pluralistic system of ownership institutions (in the code, the institution of "state ownership", the so-called quasi-public law institution which was enlarged later under the socialist system, and the "private" and many other ownership institutions came to co-exist) and the "autocratic and unlimited" character of the monarch's authority. The logical structure of this written law is qualitatively different to the peculiarly Western European concept of ownership ("*la garantie des droits*") and political power ("*la séparation des pouvoirs*"), so ideally and combinably expressed in Article 16 of the French Declaration of Human Rights, to the extent that it does not have the capacity to develop these concepts (it has the structure of what David terms the "law of administration"). Such development was suppressed by "the yoke of the Tartars" for two and a half centuries, as were non-Western characteristics, conceived externally to Russian law, such as the tradition of Cannon Law in the Latin Church and the legacy of Southern European classical antiquity, especially the legacy of Roman law. Socialist law was formulated within the lineage of traditional Russian law.

The problem is, however, not only that the structure of the legal order to be found in written law possesses "administrative" characteristics. The peasants who made up over ninety percent of the Imperial Russian population, lived under communal customs which had the character of compulsory (*leiturgisch*, according to Max Weber's terminology) organisation and the selfish ("unlimited") jurisdiction of the local nobility, as demonstrated by the reality of the Peasant Court set up concurrently with the emancipation of the serfs in

1861. These communal customs are often referred to by Russian academics and Western scholars as "customary law" or "popular law", but as shown by a survey into the actual conditions of the work of the Peasant Court, in reality it did not exceed the situational, ethical norms of a non-legal and non-positive type (in this way it corresponds to *qing-li*, i.e. "human sense and reason" found in traditional Chinese law). In other words, written law as "law of administration" and the legal "vacuum" (order outside of the law) found in an Imperial type of society co-existed. The socialist system of quasi-public ownership institutions and Communist Party dictatorship (the matter-of-fact denial of popular sovereignty), accorded with this traditional structure of Russian social order.

The popular viewpoint held by comparative legal scholars that Soviet law, and subsequently today's Russian law, falls within the Continental law genealogy, is but one aspect of the state of affairs hinted at in the social order of Russia. Nowadays, we can clearly no longer regard Soviet law, characterised as mere "socialist law", as being an abolitionary form of capitalist law (Western modern law). Moreover, viewed from the above angle, the current state of Russian law also suggests the need for a major reconsideration of the extant legal systems theory framework.

[*Ooe Taiichiro, translated by Stacey Steele*]

## [**Forums**]

**The 92nd Comparative Law and Politics Forum** – 7 September 1998

Sir Colin Campbell

Legal and Ethical Issues in Human Genetics

At the 92nd Comparative Law and Politics Forum we welcomed Sir Colin Campbell, the Vice Chancellor of the University of Nottingham. His previous positions include professor in jurisprudence at the University of Edinburgh, dean of law at that university and professor at Queens University. He has also held British government appointments, including the chair of the Human Genetics Advisory Commission ("the Commission") which was established in 1996. It was in particular relation to his experience on the Commission that Sir Colin addressed this Forum on the legal ethics of the manipulation of human genetic material.

Sir Colin began by speaking of the rapid technological advances in genetics which have created an expectation of corresponding advances as they are applied to medical science. However, the issues here are not exclusively medical or scientific. Society must also address concerns such as the possibility of discrimination (in employment, insurance contracts, etc.) based on an individual's genetic status; psychological problems caused to the individual through the process of managing information relating to that status; and potential effects on familial relationships. In particular, following the successful application of cloning technology to sheep, there has been much debate on the cloning of humans and the desirability or otherwise of creating a genetically altered human sub-race which may receive different treatment from the rest of us.

Sir Colin then outlined the role of the Commission. The Commission is a non-statutory body which has the dual tasks of enquiring into the social consequences of advances in genetics and promoting public confidence and understanding of those advances. For the purpose of proposing and implementing a sound public policy response, Sir Colin stressed the importance of obtaining accurate scientific information and a

complete assessment of the risks entailed, as well as communicating these to the public through appropriate channels.

A lively discussion followed Sir Colin's presentation, covering such issues as the difference between "reproductive cloning" and "therapeutic cloning"; whether there is a valid ethical objection to reproductive cloning for humans; and what the appropriate ethical response would be if a human was actually cloned.

Any objection to human cloning on the basis of individual dignity, as expressed in the uniqueness of each person's genes, encounters the difficulty of rationalising the individual dignity of identical twins or any human clones that are actually produced. Further, in a society where scientific freedom is an acknowledged principle, there needs to be considerable justification for restricting a particular field of enquiry and there must be substantial evidence of the efficacy of any restrictions. In addition, in an age when scientific findings can traverse the world in a matter of seconds, there is limited value in a single country imposing such restrictions.

[*Hasebe Yasuo, translated by Peter Neustupný*]

**The 93rd Comparative law and Politics Forum** – 29 October 1998

Arnold M. Quittner, Esq.

Recent Problems and Cases on Cross-border Insolvency in the United States

In the context of the legal options available to a debtor Japanese corporation with assets in the United States or which is the parent of a United States subsidiary, Mr Quittner focused his talk on a number of recent bankruptcy cases, in particular, *Re Maruko Inc* and *Maxwell Communications*, 93 F.3d 1036 (2nd Cir. 1996). These cases provide important illustrations of the problems involved in cross-border insolvencies, particularly because so few cases ever reach full insolvency stage.

**Options for Foreign Representatives under US Bankruptcy Law**

There are three options available under the US Bankruptcy Code for foreign representatives of a Japanese corporation where a Japanese trustee has already been appointed:

1. to file a petition under Section 304 to commence a case ancillary to the foreign proceedings;

2. to file an involuntary petition under Section 303(b)(4) to commence either a full Chapter 7 liquidation proceeding or a Chapter 11 reorganization proceeding; or

3. to commence a voluntary petition under Chapters 7 or 11 pursuant to Section 301.

Section 304 is mostly focused on giving the foreign representative rights and powers to protect assets in the US from seizure by creditors and to protect the debtor from the initiation or continuation of litigation in the US. Chapters 7 and 11 deal with the situation where the same debtor entity is facing concurrent proceedings in a foreign country and in the US. This is what happened in *Maruko.* In *Maruko,* proceedings were first brought in the Tokyo District Court and then in the US under Chapter 11 in relation to a Japanese company and its US subsidiary. Mitsubishi Trust and Banking was foreclosing on a multi-million dollar development in Australia, but the Japanese trustee wanted to save the property on the basis that they could realise more profit than the debt if they were to complete the development. Briefly analysing the case in terms of the options available to the foreign representatives of the corporation in the

US (the Japanese trustee), the trustees chose to file a voluntary, or alternatively an involuntary, Chapter 11 and not under Chapter 7, because the Japanese trustee wanted to control the US bankruptcy case by managing the Japanese corporation as debtor in possession. The Japanese trustee could also have filed under Section 304 without being displaced by a US trustee, however filing under Section 304 would not have given rise to the immediate protection of an automatic stay (see Section 362) which was necessary in order to prevent the foreclosure pending in Australia. As Mr Quittner stressed, although the more common cross-border case involves the use of Section 304, it is important for representatives of Japanese corporations to realise the limitations of the section and the possibilities of Chapter 11. Moreover, the use of even the threat of US bankruptcy law in a case involving Japanese banks, tends to give the Japanese debtor a substantially better bargaining position. This is because the normal procedure of Japanese banks where a client is in financial difficulty, would probably amount to domination and control of the borrower by the lender under US concepts. This was the case in *Maruko* where two bank officers were appointed to approve all transactions made by Maruko over a certain amount.

**Issues of comity and fairness**

Although, like *Maruko*, *Maxwell* deals with concurrent foreign and domestic proceedings and Chapter 11, the case illustrates a different cross-border insolvency issue: that of comity. One of the major problems faced by lawyers dealing with concurrent foreign and domestic proceedings in the US is that they cannot be sure courts will grant comity. Although the doctrine of comity exists and Section 304 (c) (5) states that courts ought to be guided by issues of comity when determining whether to grant relief where foreign proceedings are also pending, courts are often reluctant to do so. *Maxwell*, however, is an example of comity being applied to its fullest extent, with judges in London and New York working together to produce identical reorganisation plans which provided for a single pool out of which creditors could be paid *pari passu*.

The problem in *Maxwell* was that the debtor in possession (Maxwell) brought a voidable preference action against the two main UK creditors (NatWest & Barclays). The UK banks moved to have the US proceedings dismissed on the basis of comity, essentially because they had a better chance of success under UK law. The US Court of Appeal upheld the District Court's decision in favour of the banks, concluding that the case had a much closer connection with the UK than the US. However, there are a number of questions remaining as a result of the decision. For example, is it fair for reorganisation plans and confirmation orders in cross-border matters to be binding on all creditors with respect to matters—such as governing law and venue, even though such plans are usually brought by large creditors such as the banks in *Maxwell* and may disadvantage other creditors. Is it merely a question of comity, or, should the concerns of other creditors, in particular smaller creditors, be taken into consideration also?

[*Stacey Steele*]

## *Visiting Research Scholars of the Graduate School of Law and Politics*
## *October 1998 - March 1999*

**Willem J. Boot**, Professor Dr., Leiden University
Term: October 1998 – January 1999
Research Area: Bibliographical Research into Confucianism during the Edo Period
Host: Professor Watanabe Hiroshi

**Tang Shiqi**, Associate Professor, Beijing University
Term: October 1998 – September 1999
Research Area: Comparative Politics and Culture between the West and the East
Host: Professor Sasaki Takeshi

**Yogesh Kumar Tyagi,** Professor, Jawaharlal Nehru University
Term: October 1998 – September 1999
Research Area: Legislative and Judicial Responses to Terrorism in Japan
Host: Professor Onuma Yasuaki

**Xu Shuisheng**, Associate Professor, College of Philosophy Wuhan University
Term: October 1998 – September 1999
Research Area: Nakae Chomin's Theory of Free Civil Rights and Eastern Ideology
Host: Professor Watanabe Hiroshi

**John Robinson Thomas**, Associate Professor, George Washington University
Term: November – December 1998
Research Area: Patenting Business Methods in the United States and Japan
Host: Professor Nakayama Nobuhiro

**Lee Won-Woong**, Associate Professor, Kwandong University
Term: December 1998 – November 1999
Research Area: International Humanitarianism and the Role of Japanese NGOs
Host Professor Yokota Yozo

**Takenaka Toshiko**, Assistant Professor, University of Washington
Term: January – February 1999
Research Area: Japanese Case Law on Patent Infringement Damages
Host: Professor Nakayama Nobuhiro

**Ko Zoon-Ki**, Associate Professor, Kunsan National University
Term: January 1999 – January 2000
Research Area: Industrial Structure Adjustment and Change of Employment Act
Host: Professor Sugeno Kazuo

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