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From the Editors

The previous six months has indeed been an eventful time for the staff of the ICCLP. We were pleased to be able to host visits by Professor Don C. Price of the University of California, Professor Daniel Foote of the University of Washington, and Professor Benedict W. Kingsbury of New York University. This edition of the *Review* carries short articles written by Professor Price on constitutional models in early republican China, and Professor Daniel H. Foote on law clerking in the United States. Also included is an interview with Professor Kingsbury on his stay in Japan and recent research on the ideas of sovereignty and indigenous rights. In addition, we have essays by Professor Ishii Shiro, Emeritus Professor, the University of Tokyo, and Associate Professor Moriya Ken'ichi of Osaka City University, which vividly depict from contrasting perspectives their respective experiences of studying abroad in Germany. In line with previous editions of the *Review*, we also present reports from the various seminars and forums that have been organized by the Center, together with accounts of research trips by Associate Professor Asaka Kichimoto of the University of Tokyo, and Wada Keiko, ICCLP co-ordinator and *Review* editor. We should also note that the Center has two newly appointed researchers. Mr. Gregory C. Ellis, a Ph.D. candidate from the Graduate School of Law and Politics, the University of Tokyo, commenced his appointment from April and is currently researching Japan's security role in the Asia-Pacific. Mr. Richard Small, a former Research Scholar with the ICCLP, rejoined the Center in June and is presently engaged in writing up his Ph.D. thesis on Comparative Securities Law.

A significant milestone was reached at the Center on July 6 with the holding of the 100th Commemorative Comparative Law and Politics Forum on 'Legal Education and Professional Training in Brazil and Japan'. The Center welcomed various legal scholars and technicians for the forum from the University of São Paulo including Professor Ivette Senise Ferreira, Dean of the Faculty of Law. Preceding the forum, the visiting delegation toured university facilities such as the Museum, Main Library, Law Faculty Library, Main Cafeteria and Student Cooperative. At the post-forum gathering, Professor Sasaki Takeshi, Dean of the Law Faculty at the University of Tokyo, spoke of a visit by Professor Tanaka Kotaro (former Dean, Law Faculty, The University of Tokyo) to Brazil in 1939. Professor Sasaki presented a 'Letter of Appreciation' that was given to Professor Tanaka from the University of São Paulo. Professor Ferreira interestingly pointed out that the Dean of the Law Faculty at the University of São Paulo at the time that the 'Letter of Appreciation' was signed was her supervisor. Our sincere thanks go to Professor Masato Ninomiya of the University of São Paulo, who also coordinates an Ibero-American law course at the University of Tokyo law Faculty, for his tireless cooperation in preparation for this forum.

In the same week as the forum, the Law Faculty at Keio University held a symposium commemorating 20 years of academic exchange with São Paulo University. At the Forum, copies of the ICCLP's publication *Proceedings of Japan-Brazil Comparative Law Symposium* were kindly distributed by Professor Ikeda Masao. Published in June of this year in both Portuguese and Japanese, the collection of papers was based on presentations given at a symposium held at São Paulo University last summer. We are again indebted to Professor Ninomiya for painstakingly proofreading the Portuguese draft of the publication. We were also in constant e-mail contact with Aura Christine Tanaka, post-graduate student of the University of São Paulo, for proofreading assistance. Our warmest thanks are extended to all those involved in the collection's publication.

We sincerely hope that the current edition of the *Review* provides stimulating reading. Please feel free to contact us with any suggestions or comments regarding this or future editions.

Wada Keiko ICCLP Co-ordinator, *ICCLP Review* Editor
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LITERATI VIEWS OF MODERN CONSTITUTIONAL MODELS: CITIZEN, PARTY AND NATION IN EARLY REPUBLICAN CHINA

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Toward the end of the Qing dynasty, China's literati emerged from centuries of public careers limited to bureaucratic service, informal local leadership, and liturgical functions, all rationalized and encouraged by Confucian loyalty and noblesse oblige, as well as strong personal and family interests. As unprecedented internal crises and foreign pressures threatened the dynasty and the whole traditional social order, they were drawn into a new political activism that transcended Han and Ming precedents, in reformist and revolutionary organizations at home and abroad, and in elected assemblies.[1] Many, inspired by foreign examples, devoted themselves to the creation of a new political order, based on a constitution.

No opinion poll ever sampled these men's reception of European constitutional thought, and yet the political history of the early Republic helps us to reconstruct it. Propaganda was conducted in the media which targeted the literati. The merits of a particular kind of constitutional order were urged on them by major writers across a broad political spectrum. Petitions, senate decisions, and elections all document a converging consensus in favor of a particular Western European constitutional order.

In choosing the Anglo-French model, they deliberately rejected two major alternatives, represented by Japan and the United States. This choice is important first, precisely because it was the choice of China's literati, and second, because constitutions and democracy are interrelated matters, and the failure of democracy in China has been closely linked to the inadequacy of her constitutions. These constitutions, shifting with the political fortunes of her leaders, were ill-designed to protect her citizens from their rulers, and the particularly sharp contrast between Chinese and American constitutional thinking and practice in this regard has been traced to tendencies evident in late Qing reform thought, and further, to ancient cultural priorities. But if closer inspection reveals a consensus in favor of a liberal Western European model as opposed to the more authoritarian Meiji model, this should remind us that effective checks on government power are not a monopoly of the American system. And vigorous support for the chosen model would suggest that the traditional culture and ideas of which the late Qing literati were the stewards posed no monolithic obstacle to a liberal political order. The early twentieth-century literati disliked both the authoritarian constitutionalism of the Qing court and that of Yuan Shikai, and responsibility for the dismal history of constitutional government in modern China cannot be laid at their doorstep nor, *a fortiori*, blamed on China's traditional culture.

It cannot be denied that some of the most influential reformers' ideas augured poorly for a democratic order. Yan Fu valued individual liberty as a means to national wealth and power. Liang Qichao advocated enlightened despotism for a time. Kang Youwei envisioned a regimented meritocratic utopia uncorrupted by organized political competition. In their thought we can see such traditional elements as the collective interest precluding a conception of inherent personal rights, a disturbing faith in elitist and paternalistic government, and a utopian hope that harmony could be achieved and conflict eliminated. In such thinking the intractably adversarial elements in politics and the importance of protecting the people, individually or collectively, against the power concentrated in the hands of their leaders, are relativized or ignored, and the rationale for a stable constitutional order limiting the powers of government and holding it accountable to an electorate

is fatally undermined.[2] In short, the unrealistic goal of harmony and the overwhelming priority on national goals militate against the construction of a political order premised on the inevitability of conflict in society, and the need to channel and contain it, and minimize its potential for damage.

And yet these factors were by no means decisive in the period of the 1911 revolution. If the political struggles of the day did not always reflect well-informed commitment to liberal constitutional principles, nevertheless one finds ever present in the debates of the day serious efforts to balance accountability of government power, open political competition, the forms of elitist leadership and popular participation, and the importance of national unity and mobilization. The background to the consideration of constitutional models among reformers and revolutionaries was the premise that autocracy was likely to be oppressive of its own people and incompetent to mobilize a nation's resources for the struggle for survival in the modern competitive world. Virtually nobody recommended that the Mandate of Heaven should be transferred to a new dynasty, and after Japan's victory over Russia in 1905, even the Qing court accepted the necessity of adopting a constitution.

Constitutionalist reformers wanted real power in a new constitutional order to which they hoped the dynasty would accede, and were quite interested in the court's plans. Impatient with the announced timetable, they mounted three petition campaigns calling for the immediate establishment of constitutional government, but the strength of this remarkable movement should not distract us from their concerns about the substance of the new order. By 1910 elections from a primarily literati electorate had produced both provincial assemblies and half of a national assembly (the other half court-appointed), and all were eager to establish their power vis-à-vis the government. In the provinces, assemblies challenged the centrally appointed governors, and at the national level, the assemblymen demanded that the highest advisory executive organ, the Grand Council (*neige* = "cabinet") be answerable to themselves, thus foreshadowing, both in structure and terminology, later calls for a responsible cabinet. More than anything, perhaps, the literati's struggle for power in the emerging order came to focus on relations between their elected representatives and the officials who acted in the name of the throne. If bureaucrats could act in disregard of the assemblies, then elections would be no more than a fig leaf for autocracy. Thus, reformers were prepared for more or less permanent adversarial relations between the government and the people.

1. The Meiji Model and Limited Monarchy

Meiji Japan was the Qing court's model for constitutional government, reserving powers for the throne and the throne's appointees that did indeed preclude any real popular voice in the government. For that very reason, it proved not only unacceptable to revolutionaries but problematic for progressive supporters of constitutional monarchy as well.[3] With the establishment of a constitution still years off, by its timetable, the court first inaugurated ministries and then formed a cabinet, in May of 1911. The dismaying fact that this cabinet was packed with Manchus,[4] evidence that the dynasty was intent on retaining undiminished power, prompted comparisons with the Japanese model, and reflections on that model's merits. One critic pointed out that Japanese royalty had refrained from taking positions in the government, and implied that Japan had a responsible cabinet (*zeren neige*) because it, not the emperor, was expected to answer to any criticisms.[5] This, he contended, embodied the familiar ideal of loyal ministers shielding their sovereign.

Such a misconception of cabinet responsibility did not stand for long, as revolutionaries began to criticize the specifics of the Qing plans, hoping to win over constitutionalists. Writing in the major revolutionary newspaper, the *Minli bao*, Song Jiaoren pointed out that in a constitutional government individual ministers naturally each had a responsibility to serve the monarch, but the

cabinet was accountable, *to* the *parliament*, and without a parliament to judge its performance, the concept of responsibility was meaningless.[6]

Liang Qichao, the major reform propagandist, still had hopes for the Meiji model. In his view, formal responsibility was less important than powerful unwritten conventions which formed part of the constitutional "credo" and guided governance, such as the crucial principle that in cases of disagreement between the cabinet and the parliament, the former would have to resign or the latter be dissolved (for re-election). This practice had, in fact, been observed in Japan. True, the Meiji constitution was an inferior model because of the powers reserved to the emperor, but even there, although the cabinet did not formally represent a majority party, the government had recognized the necessity of parliamentary support for effective governance. Thus, Liang argued, even the Meiji constitution might provide a model which, if faithfully followed, would bring the substance of constitutional order to China.[7]

Clearly, the Meiji model could only be grudgingly accepted by the constitutionalists, and only to the extent that actual practice went beyond the written provisions of the constitution and, for that matter, beyond Japanese practice to date. When Japan's change of cabinet in 1911 put Liang's optimism to the test, the conservative and influential *Dongfang zazhi* called those who saw in it a "step towards the ideal of constitutional government" optimists.[8] Song Jiaoren flatly rejected the claim that Meiji practice embodied the spirit of constitutional government. He found only a shuffling of incumbents, with no change in policy and no accountability to the people, and pronounced Japan a constitutional country in name only, ruled in reality by cliques of militarists.[9]

Such commentary reflects a growing consensus that the responsible cabinet system, complete with party government, was an essential feature of an optimally functioning constitutional monarchy. This was a point to which most constitutionalists could readily assent, and one which revolutionaries could accept as a premise for criticizing the Qing government and wooing increasingly disillusioned constitutionalists over to revolution. In fact, the dynamics of such a system were spelled out in greatest detail by Zhang Shizhao in a legal Beijing newspaper published by revolutionaries.

The concept of a responsible cabinet became the subject of serious public discussion only with the clash between the National Assembly and the Grand Council in late 1910.[10] In articles which Zhang began sending back from England to the *Diguo ribao* [Imperial Daily], he described the workings of the English system and advocated a modified English model for China.[11] The organic evolution of England's unwritten constitution appealed to him, and he advised against an inflexible constitution, difficult to amend; but he recognized China's need for a written constitution. He also felt that the implementation of the full-fledged party cabinet system, while central to the English government, would depend on the maturation of parties and a certain amount of non-partisan cooperation to get the system going.

At the heart of the system, however, was the principle that the cabinet was composed not of bureaucrats, but of selected majority party members of parliament, who enjoyed the material as well as the moral support of the people in formulating and executing state policies. Bureaucrats, by contrast, were fundamentally unresponsive to the people's wishes because they were not accountable to them, and were therefore less inclined to serve than to exploit them. Moreover, echoing the London *Times*, Zhang blamed China's "incompetent and fragile" bureaucratic government for China's perils; what she needed was the kind of strong government which only a party cabinet could provide.

Zhang's argument was calculated to appeal to constitutionalists who felt that they could govern

better than the dynasty, while at the same time forestalling fears that their government's ability to rule and lead would be weakened by the vicissitudes of ill-disciplined parliamentary battles. Thus he argued that a majority party cabinet, drawn from that party's most talented and capable members, would naturally have the ability to control the parliament. Otherwise, whatever the powers invested in the ministers by the constitution, the government would be subject to division and stalemate.

Zhang bolstered this argument with references to the experience of non-parliamentary cabinet regimes, in which the executive is not responsible to the parliament, and he cited the second republic in France and the presidency of Andrew Johnson in the U.S. As for the German and Japanese models, Zhang conceded that extraordinarily capable and forceful statesmen might serve their monarchs and countries better than elected legislatures, but argued that such cases were neither typical nor a realistic model for the Qing dynasty. [12]

Zhang thus preempted the issue of government strength, claiming to show the best way in which a government could control its legislature and thus rally, mobilize and deploy the nation's resources and support. Conservatives supporting the preservation of monarchical power now had to face the charge of complicity in the perpetuation of a disabling feud between the people and the throne. While checks and balances and the separation of powers were rejected as unnecessary and a recipe for weakness and disarray,[13] still, from the perspective of democrats, the system that Zhang recommended ensured that the people would not be tyrannized by an arbitrary and corrupt government. The regular competition and orderly transfer of power between two major parties guaranteed that in the adversarial relation between the government and the people as a whole, the people would dominate. Such a system had great appeal for those to whom the court and bureaucracy were the adversary. Still, the opposition of executive power and parliamentary control remained an unresolved issue, particularly upon the elimination of the monarchy.

2. Presidency, Responsible Cabinet and Parties

As the best of the constitutional monarchies, the two-party responsible cabinet system was the overwhelming choice of the constitutionalists and a useful debating weapon for the most articulate revolutionary propagandists. After the fall of the Manchus, republican alternatives were on the agenda, and debate revolved around the choice between the presidential system represented by the U.S. and the responsible cabinet system represented by France (or England, assuming that the two differed primarily in the hereditary or elective provenance of the head of state).

Within the revolutionary camp, surprised by the success of the Wuchang uprising, there was initially no consensus on the nature of the new polity. Sun Yat-sen favored the separation of powers in a five-power system, some called for provincial autonomy in a federal system, and many felt the need for strong and relatively unfettered executive leadership.

Such leadership was written into the provisional constitution of the revolutionary government of Hubei which Song Jiaoren helped draft in early November, 1911. It provided for a military governor elected independently of the legislature, and vested in him the command of the armed forces and the authority to appoint his executive officers without consulting the legislature. Although the budget was to be approved by the legislature, it was to be drawn up by the executive, which was also empowered to take extraordinary finance measures subject to post facto ratification by the legislature.[14]

These provisions reflect an enthusiasm for executive strength at the expense of legislative control, especially at a critical time when the fate of the revolution hung in the balance. But they are a less accurate indicator of long term preferences than of the immediate requirements of the

revolutionary situation.[15] Song quickly emerged as the champion within the revolutionary camp of the responsible cabinet form of government, as opposed to Sun Yat-sen, soon to be elected president of the revolutionary government, and unwilling to be a figurehead. According to Sun, the elected chief of state was a leader in whom the people had reposed their trust, and he should have the authority to act decisively.[16] The problem with this position was that just then, negotiations were in progress to offer the presidency to the dangerously ambitious Yuan Shikai. Indeed, when Song Jiaoren argued for the responsible cabinet system, Hu Hanmin countered that the best check on Yuan's power would be provincial autonomy vis-à-vis the central government.[17]

But for Song, the responsible cabinet system was not merely a device to cope with Yuan Shikai. Within the revolutionary party he had found Sun Yat-sen's leadership inadequate and dictatorial, and worked to insure more collective leadership.[18] At the same time, Song had been much influenced by Zhang Shizhao's writings on English politics.

Many of Sun Yat-sen's supporters, nearly as suspicious of Song's ambitions as they were of Yuan's, were likewise suspicious of the system he advocated. But in the spring of 1912, as the prospects for Yuan's presidency loomed closer, they decided that Yuan posed the greatest threat of all. Accordingly, the new revolutionary government accepted a compromise between Song's conception of a responsible cabinet system and Sun Yat-sen's presidential system, designed to link the executive to the legislature while preventing a still rather strong president from abusing his authority.[19]

Song's draft for the Provisional Constitution and the final version both provided for legislative impeachment of ministers and of the president himself, but as a temporary system, neither incorporated such integral features of the English system as the vote of no confidence or dissolution of parliament. There was no collective cabinet responsibility, no reference to a cabinet in the final version, and no mention of the duties of the prime minister. The provisional president, elected by the (unicameral) senate, appointed all the ministers, subject to the senate's approval. Charged with responsibility for executive action, they were required to countersign all the president's executive acts and endorsements of legislation, but he, not they, had the initiative in proposing legislation.

And yet, honoring the crucial element in the people's control of the government, this constitution placed the power of the purse, including loans and agreements that obligated the treasury, firmly in the hands of the senate. Thus the power of the purse became a major issue in the larger question of government accountability.[20] The Provisional Constitution certainly envisioned the possibility of an adversarial relationship between the people (as represented by their senate) and the government. While it could have checked arbitrary executive power had the president respected it, Yuan Shikai could not be forced to do so. As early as mid-1912, disputes with the president over financing, especially foreign loans, had been a major issue in the first cabinet crisis, and within three months, the first provisional premier, Tang Shaoyi, resigned, along with four other members of the revolutionary party. Then in April 1913 Yuan provoked his own impeachment, and civil war, by accepting a loan from the Five-Power Banking Consortium without parliamentary approval.

Clearly, the system established by the provisional constitution had not worked well. The unity of people and government which the responsible cabinet system was supposed to provide was not realized, the disunity which could arise from the separation of powers was evident, and there was renewed attention to the dynamics of the English system as described by Zhang Shizhao. England's constitutional monarchy could of course no longer be as a model, but the functioning of its government was relevant to debates over the merits of the presidential system versus a responsible parliamentary cabinet.

One of the most important principles in the English tradition for Zhang was the people's control of finances. The historical role of the power of the purse as a weapon in the power struggle between the people and their governments was well known. In fact, as an alternative to the perilous path of revolution, Liang Qichao had recommended the non-payment of taxes as a better means for bringing the absolute monarchy to heel, and the history of struggles over taxes and budgets between representative assemblies and governments figured prominently in Kobayashi Ushisaburô's massive and authoritative Japanese treatise on public finance which Song Jiaoren had translated and published in 1910.[21] Kobayashi accepted the rationale of the Meiji constitution's budgetary provisions, which protected the government from parliamentary control by carrying over the previous year's budget and taxes to the next in case of a deadlock between Diet and ministers. But this was the system which Song had criticized for creating a spurious constitutional order in Japan.

Zhang Shizhao was no less committed to parliamentary control of the budget, and in fact embraced the principle of no taxation without representation. It was precisely because of the need to resolve the contradiction between this principle and effective government leadership that Zhang found the English system so attractive. On this point, he cited the English authority Walter Bagehot, who recognized a built-in tendency to conflict, between an executive which could be "crippled" by legislative resistance and a legislature "spoiled" by its lack of responsibility for executive performance. Bagehot located the crux of the problem in the question whether the "tax imposers" (the legislators) and the "tax-requirers" (the government) are the same. The American separation of powers, he argued, led to quarrels and difficulties. The English union of legislative and executive eliminated them.[22] Thus, the parliamentary cabinet achieved an automatic unity of purpose with the parliament--a unity which would theoretically eliminate clashes between the executive and the legislative branches of government.

This argument for the superiority of the parliamentary cabinet system was echoed in two Western books translated and published by former constitutionalists in early 1912. The driving force behind this project was Meng Sen, a Jiangsu provincial assemblyman, activist in the constitutional movement, and former editor of the *Dongfang zazhi*. In October 1911, Meng and eight colleagues in a group called the Minyou she (Friends of the people) undertook a Chinese translation of *The American Commonwealth* (third edition, 1909). Some of this group became founding members of the Tongyidang, later amalgamated into the Republican Party (Gonghedang) which proceeded to publish the first volume of the project when it was completed in April 1912, as part of the party's efforts to raise the level of political understanding of the citizens of the new Republic. This immensely influential account of American politics by James Bryce, M.P. and former British ambassador to the U.S., was widely used as an authoritative textbook around the world. Its choice was logical, since it was easy to arrange for re-translation and translation from the Japanese and English versions of the first and more recent editions.

It was not such an easy prospect to arrange for the translation of suitable material on France, the other of the world's two great republics, but Meng and his colleagues were determined that their compatriots should learn about this country as well, so as to consider the workings of a responsible cabinet system within a republic. Fortunately, they discovered that one Zhu Wenfu was in the process of translating a work which served their purposes, the *Manuel élémentaire de droit constitutionel a l'usage des étudiants en droit de 1-re année*. Their purposes were indicated by the title chosen for the translation, *Faguo minzhu zhengzhi* (Democratic government in France).[23]

Of these two books, the lessons of the second were more straightforward. The translator pointed

out that after her revolution, republican government in France had been usurped first by Napoleon and then Louis XVIII and Charles X. The best way for China to guard against such tyrannies, he felt, was to introduce courses on law in her secondary schools, and to adopt the parliamentary cabinet system (as opposed to the American).[24]

Nearly a century after the revolution, the third republic had finally consolidated republican government in France, and Foignet, tracing the succession of her constitutions in this interval, clearly regarded the constitution of 1875 as the worthy culmination of a struggle for progress in political development, and a vindication of the goals of the original revolution over the opposition of monarchist reactionaries. Even so, England provided the norm for Foignet's understanding of the constitution of the third republic, which, in keeping with the general world trend, used the parliamentary cabinet system, and differed from England only in minor respects.

One difference between France and England which Foignet did not dwell on was the power of the chief of state, whether monarch or president. Originally, the constitution of 1875 had been designed as a compromise between monarchists, who feared popular power, and republicans who wanted to avoid the dangers of a concentration of executive power. To be sure, the compromise had yielded a presidency which was theoretically stronger than it turned out to be in practice, but if Chinese revolutionaries were looking to France as an example of a republic which eliminated the danger of presidential tyranny, they were not necessarily well advised to ascribe this achievement to the constitution.

In fact, the French president did have the constitutional right, (with the consent of the Senate) to dissolve the Chamber of Deputies (the lower house) and call for new elections, and this could have yielded a system of "dual responsibility of governments to president and Chamber." But this right was not exercised after 1877, when MacMahon used it in an effort to override republican opposition to his choice of a prime minister. Some of his advisers urged him to carry on the struggle even after electoral defeat, but he accepted the verdict of the electorate. "In the last resort," as one analysis puts it, the old governing class "submitted to the decision of universal suffrage, and gave up power peacefully." Thereafter, the system "became one of parliamentary sovereignty."[25]

Foignet was not wrong, then, in stressing the responsibility of the cabinet to the assembly, nor were the Revolutionary League headquarters in Beijing wrong in claiming that China's provisional constitution was designed to function like the French, although their provisional constitution did somewhat tilt the balance of power from the cabinet to the president. On the other hand, they stressed more than Foignet did the requirement of ministerial countersignature for presidential orders, a practice which, they claimed, established cabinet, rather than presidential, responsibility, and without which "the cabinet would be no more than a tool of the president, and the whole meaning of a responsible cabinet would be lost."[26] The problem was that Yuan Shikai and his supporters, unlike the French old guard, would not yield peacefully, even at the price of civil war. From the summer of 1912 through the spring of 1913, however, proponents of the responsible cabinet system were still intent on implementing an Anglo-French system.

The Chinese version of Foignet's work, generally faithful to the original, includes one significant, and unacknowledged, addition. Testimony to the translator's concerns, rather than the author's, is this passage on the role of political parties in the responsible ("parliamentary") cabinet system:

> All countries with parliamentary cabinets must have two major parties in order to get good results, but even in those continental countries which employ the English parliamentary cabinet system, the parties are not as well developed as the English, and

> their results are accordingly far inferior to England's. France is one of the most prominent examples. In less than two decades from the election of MacMahon to 1896 the cabinet has changed thirty-four times, an average incumbency of eight months--tragic indeed. And this is because of the factional (*dangpai*) fragmentation. The reasons for the fragmentation are as follows: 1) In France the parties are destructive, not given to compromise 2) The political thinking of the French is generally theoretical, not practical. 3) The psychology of the French is most deficient in cohesiveness (*tuanti li*).[27]

Clearly, the lessons to be drawn from the French experience included not only the superiority of the responsible cabinet system, but the indispensability of well developed parties for its optimal operation, and perhaps the inculcation of traits necessary to the optimal operation of parties. The criticism of France echoes Liang Qichao's earlier warnings that party government would be impossible in China. Advocating enlightened despotism at that time, Liang had reinforced his argument with the authority of the Japanese political scientist Onozuka Kiheiji, whose description of the English system discouraged attempts at emulation. According to Onozuka, there were seven conditions for well developed parties. 1) There must be no other major political agents besides parties; 2) There must be only two major parties; 3) The parties must have strong historical foundations; 4) All political talent must be concentrated in the two parties; 5) The two parties' platforms must be moderate, and rest on a similar basis; 6) The parties must be disciplined and responsible; 7) They must compete for cabinet control only on very important issues. With regard to the first point, Liang noted that in Japan, powerful representatives of the most influential *han*, or *hambatsu*, negated this condition. With regard to the second, two parties are needed to insure stable majorities and long-range policies, rather than shifting alliances, as in the French case. And in regard to the seventh, he pointed out that in England, the minority party criticized the majority, but strove to unseat it only on important matters, so that the ruling party was careful but confident. But only in England and the U.S. did this practice exist. Onozuka's conditions 3) through 6), Liang noted were particular strengths of the Anglo-Saxons, and reflected several centuries' constitutional tradition.[28]

Liang emphasized the importance of disciplined two-party competition again, more optimistically, after the revolution. In April of 1912, an advocacy group led by the influential constitutionalist Tang Hualong published a major statement ghost-written by Liang Qichao on planning for the republican government, highly reminiscent of Zhang's analysis. Advocating strength through the unity of parliament and executive, Liang said the key to the system was the competition of two major political parties, which would serve as the basis for a responsible cabinet. In such a system, he argued, the strength of the executive power lay in the prime minister's unchecked authority to appoint his own cabinet but his incumbency depended on the popularity of his party, and if the majority of the parliament turned against him his government would have to resign, as periodically happened in England. Such a system guaranteed that the power of the government would not be used contrary to the wishes of the people.[29] Upon losing its majority, a cabinet must promptly yield to the other party, otherwise, he said, the parliament would be reduced to mere window-dressing.

This statement reflects a consensus shared by moderate revolutionaries and democratically inclined conservatives that strong government must reconcile the support of the public with vigorous leadership through the kind of accountability perfected in the responsible cabinet system. And included in the consensus was the necessity of competition between two major parties.

Political parties were one of the main topics considered in *The American Commonwealth*. Bryce admired the government and politics of the United States, and indeed, greatly appreciated the success of the Americans in avoiding tyranny, but he thought they had done so partly in spite of,

and partly thanks to, a seriously defective and ineffective system.[30] To this day, American school children learn that the popular election of their head of state and the separation of legislative and executive powers is a cornerstone of free government, but this separation, in Bryce's judgment, "so narrowed the sphere of the executive as to prevent it from leading the country, or even its own party in the country."

The American system, he declared, "work[ed] better than [it] ought to work," thanks largely to the people's peculiar political talents and ability to "mak[e] the best of bad conditions." "Such a people," he concluded, "can work any constitution." Notwithstanding his admiration for the Americans' political genius, he warned: "The danger for them is that this reliance on their skill and their star may make them heedless of the faults of their political machinery, slow to devise improvements which are best applied in quiet times."[31]

Like two of Zhang Shizhao's authorities, Albert V. Dicey (to whom his book was dedicated) and Walter Bagehot, Bryce firmly believed in the superiority of the responsible cabinet system. Bryce's description thus drew a sharp contrast between America's mediocre governmental "machinery" and her citizens' political sophistication and talents. The Chinese translation, appropriating the kanji title of the Japanese version, *Pingmin zhengzhi/Heimin seiji,* accented the role of the ordinary citizen and popular opinion in the nation's political life. "Our party," stated the publishers' Preface,

> is dedicated to politics, and politics involves the interests of the whole nation. With this commitment, we cannot fail to employ the intelligence of whole nation and draw support from the public opinion of the whole nation. Otherwise, with our intelligence inadequate and public opinion a clamor, the hopes of the party can be sabotaged and its influence destroyed, and we must despair for the interests of the country and the happiness of the people. Political parties throughout the world all take their cue from the prevailing popular sentiments and preferences, and nowhere more than in America. The spirit of democratic government pervades the whole nation. Public opinion is accordingly the most powerful, and parties take it most seriously; indeed, her people are the most richly endowed with political intelligence."[32]

Thus although the translators and publishers could find little in this work to recommend the American presidential system, they could find a model for the common citizen and lessons for political parties.[33]

But Bryce was more an admirer of American public opinion than of American politics.[34] The purpose of his chapters on the former was to show that "the masses of the people are wiser, fairer and more temperate in any matter to which they can be induced to bend their minds than most European philosophers have believed it possible for the masses of the people to be …" This optimistic assessment in some degree legitimized the party competition which reflected the unfolding dialogues and debates of public opinion, translated the views of the majority into government action, and preserved a critical role, and potential future ascendancy, for minority views. In America, government was, in short, government of and by the common man, and it was therefore very strong and stable.[35] Parties were an indispensable part of it, and they profoundly engaged the attention and energies of the common man.

And yet the American parties were driven by patronage, bossism, and particularistic local interests. In fact, party government had grown in America along with democratization, and degenerated from an earlier phase of more principled elite politics. Bryce was struck by the contrast between the more agreeable aspects of American society and public life, which he attributed to the national

character, and the quality of her politics, grubby and degrading at worst, and mediocre in general, for, as he put it, "the Best Men do not go into Politics." Thus, the potential of public opinion's contribution to government was severely compromised, to say the least, by party politicians.

> What opinion chiefly needs in America in order to control the politicians, [Bryce wrote] is…a more sustained activity on the part of the men of vigorously independent minds, a more sedulous effort on their part to impress their views upon the masses, and a disposition on the part of the ordinary well meaning but often inattentive citizens to prefer the realities of good administration to outworn party cries.[36]

That such a tendency might be forthcoming was suggested by the influence of a system of higher education which was not only expanding but growing in quality, with numerous small western colleges, state institutions, and elite eastern universities." Such institutions, he wrote, "are contributing to [America's] political life as well as to her contemplative life elements of inestimable worth."[37]

One wonders whether Meng Sen had digested Bryce's work before he began the translation project, or simply relied on its reputation to provide his compatriots with an authoritative description of politics in America. Some measure of its popularity in China may be derived from the fact that it ran through four printings within a year. Bryce's account was full of conflicting impressions, as he himself acknowledged, and he cautioned against drawing easy lessons from it. It certainly offered no encouragement to proponents of the presidential system of government, but as the Chinese prefaces suggest, it provided a ringing endorsement of government by public opinion as well as a sober recognition of the necessity of party competition as an indispensable element of modern representative government, regardless of the constitutional system. And ironically, it suggested that in order for democracy to fulfill its potential, the quality of party government would need to be elevated by elite leadership. The instincts and talents of the common man could provide a bedrock, but leadership would require elite vision and educated intelligence.

3. Citizen, Party and Nation

The discussions of constitutional government in the era of the 1911 revolution do not, of course, cover the full range of political thought. Aside from diehard monarchists, there remained many conservatives profoundly distrustful of the prospect of open political competition and eager for stability under some kind of authoritarian leadership.[38] But the supporters of real constitutional government were not a negligible contender at the beginning of the republican era. In a draft platform written for the victorious Nationalist Party in 1913, Song Jiaoren made the establishment of a truly unitary responsible cabinet polity the first major plank. China currently had the "name, but not the reality, of a responsible cabinet system," he wrote, and he proposed to rectify that by giving the cabinet sole authority for drafting executive orders and putting it under a prime minister elected by the lower house.[39] Even after Song's assassination, the failure of the second revolution, departures of Guomindang parliamentarians from Beijing, and defections under the pressure of Yuan's threats and blandishments, the Assembly's constitutional commission proceeded to produce a "Temple of Heaven Constitution" designed to subject the president and the cabinet to the control of the Assembly. Only after Yuan had dissolved the Assembly was he able to achieve the kind of constitution he wanted, and that only by presidential fiat.

Clearly, these men wanted institutionalized power sharing, and understood that adversarial relations would always divide the rulers from the ruled unless they were channeled into a flexible, permanent and controlled adversarial relationship between competing parties.

Nevertheless, the question remains whether even this kind of constitutional thinking clearly

recognized the adversarial relationship between the individual and the state, and legitimate competing private interests within the nation. Some of the rhetoric gives us pause. For example, while advocating two-party competition and the responsible cabinet system, Liang argued that the fierce competition of the modern world required using the strength of such a government to transform the nation into "soldiers of a single army" and "students of a single school," and Zhang Shizhao professed a readiness to revert to the Japanese model if it could be shown to make China stronger.[40]

To be sure, there was considerable sentiment in favor of individual rights and private interests, aside from the collective strength they were sometimes viewed as promoting. Although his English model was not based on any theory of inherent political rights, Zhang's impassioned defense of private property, freedom of the press and speech and privacy of correspondence is probably closer to his true commitments than the thought of purchasing strength with a Meiji style constitution.[41] On the other hand, the translation of Foignet, who devoted one of the three major sections of his text to the issue of limits on state power and personal rights, going back to the 1789 Declaration of the Rights of Man, offered a strong argument for universal and natural individual rights (*droits individuelles*, *renquan*), on the grounds that the individual (*geren*) is ontologically prior to the state, a construct created to serve his interests. The affirmation of individual rights was certainly one of the glories of the French constitutional legacy, in Foignet's view, but they were not absolute either, and Foignet discusses the provisions for their abridgment in the constitution. In fact, the treatment of personal rights guaranteed in China's provisional constitution is not substantially different from that in the constitution of the third republic.[42] Nevertheless, private liberties and interests were not a major issue in 1912, and most Chinese were likely to regard their obligations to various groups, beginning with family, no less seriously than their personal freedom.[43]

This spirit had been evident even in reform literature which charged China's autocracy with stifling the people. At the turn of the century, Liang Qichao and his colleagues were busy denouncing the dead hand of the traditional state, and praising the spontaneous and autonomous organizational activity of citizens in the pursuit of various kinds of interests.[44] In general, freedom of association and associational activity was advocated in connection with the liberation and mobilization of creative and productive potential. The point was that for China to achieve this potential, the government had to stand aside, for her health as a nation depended on the initiative and autonomy of her citizens.

As constitutional government became a more immediate prospect, however, attention turned to the ways in which the state itself could mobilize the support and energies of the people, and as government by the people emerged as the key to strength, worries arose about the readiness of the people to govern. Thus, where the earlier discourse had balanced an appreciation for modern, representative forms of government with arguments that national vigor must derive largely from the non-governmental, spontaneous popular activism of citizens, this latter point came to be neglected amidst the preoccupation with changing the government. Moreover, earlier doubts about the spontaneous organizational abilities of the Chinese were only partly allayed by the conclusion that the government was to blame. Ironically, a future, better government became the focus of hopes for remedying existing weaknesses in the national social and political character.

Much of this kind of thinking is reflected Liang Qichao's writings of 1911-1912. After reviewing the past decade's range of opinion regarding the Chinese national character, Liang declared himself optimistic, and called on "the people," or "citizens" to rescue China. In his further discussions, however, it became clear first that they would have to be led by a heroic elite, and then mobilized by a strong state.[45]

Liang's talk about the potential of China's people was designed to reassure the doubters that China's cultural legacy had equipped them well to perform their role as citizens of a modern nation state. But whatever their self-reliance and cohesiveness, these virtues could not make up for their lack of centralized guidance. Quite aside from the fact that China's autocracy had left the people's abilities somewhat paralyzed and in at least temporary need of restorative therapy, the activities of even a healthy citizenry in a modern nation required the capable guidance and coordination of the state in order to realize their potential. For example, the academies of learning which Liang had earlier cited as evidence of the people's self-reliance also represented for him the drawbacks of their government's *laissez-faire* tradition. China's comparatively poor showing in scientific accomplishment was due precisely to the fact that national universities in the West concentrated and coordinated research, whereas China's decentralized private institutions did not pool knowledge, disseminate discoveries and promote collective, cumulative advances on a nationwide scale.[46]

Thus he argued strongly for an interventionist, or to use his preferred term, "nurturing" (*baoyu*) state in China. China's citizens, he stated, remained at an "immature (*youzhi*) level." "It is a plain and undeniable fact that in terms of political and economic arrangements they can hardly act for themselves, or dispense with the state's guidance." But the experience of the past century even in England and America showed how the people's self-government and the state's nurturing advance together. Moreover, whether domestically or internationally, a number of matters must now be handled by the state: tariff protection, encouragement of certain kinds of production, unification of currency and coordination of the mints, promotion of technological advances, expansion of transportation and communications infrastructure, regulation of factories, protection of emigrants, extension of higher education, metropolitan planning and construction. Such matters were left up to private activity in the past, but today, "power is concentrated more and more in the state, and the sphere of the state's competence expands daily."[47]

Earlier, the state, as an autocracy, was identified as the obstacle blocking man's social and political self-realization, by monopolizing civic life and preventing spontaneous organization. Now the traditional autocratic state was seen as *laissez faire*, while modern times demanded a more activist centralized structure to mobilize the nation's collective potential. Liang Qichao's review of the Chinese people's capacities and responsibilities in the context of the international threat suggests the logic of this transition, but the question remained how to insure that a powerful state would act in the interests of the nation, and nurture and channel the latent energies, creative powers, enthusiasms and loyalties of the people. It was this question to which the responsible cabinet constitution was supposed to provide the answer.

On the other hand, that system itself, to work properly, relied on autonomous organizations not directly mobilized by the state, i.e. political parties. Bryce's view in this respect was in closer accord with the new Chinese constitutional thought than that of Bagehot and Dicey, who were disturbed by the thought that parties would compete for the support of a large uneducated electorate.[48] An elitist himself, but less so than Bagehot and Dicey, Bryce valued the interaction of the parties with the people. In his view, the sentiments and views of the people provided a kind of valuable raw material for the formulation of state policy, but they had to be mediated through political parties, and the parties, and public opinion itself, required the guidance of a capable and public-spirited elite.

Such a system did not necessarily rule out citizen initiative, but it did give the government the dominant role in the country's public life, even to the point of making it the creator of society and the nation, at the highest level. Thus it became the people's schoolmaster. And in contrast to the

earlier discussions' emphasis on the universal instinctive talent for organization as manifested in voluntary associations, the role of parties as the key to the functioning of the national community was now profoundly elitist. Parties did not well up from the common people, independent of the government. Majority party leaders *were* the government, and minority party leaders were aspirants to the role. To be sure, parties made the government representative, but they did so simply by presenting the voters with a choice at the polls.

As early as 1897 Tang Caichang had endorsed modern Western parties as representing the competing interests of their constituents, openly and legitimately.[49] By 1912, parties were supposed to articulate and pursue the common public interest, for the nation as a whole. If this consensus represents a decision against an American preoccupation with the legitimacy of private interests (which are by no means always placed above public interests even in American political discourse), it is certainly in harmony with democratic traditions in England and France, as represented by Bryce and Foignet.

In making this choice, the early republican literati understood and accepted the adversarial relation between government and people, but found in the responsible cabinet system a carefully perfected modern formula for managing the natural divergence of interests between rulers and ruled. Much as the theory of Darwinian progress had displaced the ideal of universal kingship and legitimized international competition, so theories of government by, or at least answerable to, the people, displaced the ideal of paternalistic harmony. Not only could the proper system protect the people against their rulers; it would also produce rulers able to serve their people in the best way, by mobilizing their loyalties, energies and talents in pursuit of the collective interest. So far from overriding citizens' rights, natural or not, the collective interest was best served by respecting them, for that interest itself would have to be defined in the course of political competition between parties led, to be sure, by elites, but always dependent on the support of the people.

NOTES

1. Susan Mann, *Local Merchants and the Chinese Bureaucracy* (Stanford University Press, 1987); Mary Backus Rankin, *Elite Activism and Political Transformation in China* (Stanford University Press, 1986).

2. Andrew J. Nathan, *Chinese Democracy* (Berkeley: University of California Press, 1985), pp. 107-113, 125-128; Benjamin Schwartz, *In Search of Wealth and Power: Yen Fu and the West* (Harvard, 1964); Hao Chang, *Liang Ch'i-ch'ao and Intellectual Transition in Modern China* (Harvard, 1971); Zhang Hao, *Youan yishi yu minzhu chuantong* **幽暗意識與民主之傳統** (Taibei: Lianjing**聯經**, 1989); Lin Yusheng, *The Crisis of Chinese Consciousness* (University of Wisconsin Press, 1979), Munro, *The Concept of Man in Contemporary China* (University of Michigan Press, 1977; Thomas A. Metzger, "Continuities between Modern and Premodern China," in Paul A. Cohen and Merle Goldman, ed., *Ideas Across Cultures: Essays on Chinese Thought in Honor of Benjamin I. Schwartz* (Harvard University Council of East Asian Studies, 1990).

3. See, for example, Shao Xi **邵羲**, "Riben xianfa xiang jie xu **日本憲法詳解序**" [Preface to a detailed explanation of the Japanese constitution], *Yubei lixian gonghui bao* **預備立憲公會報**[Bulletin of the Society for preparation for constitutional government] 1.18:1-4 (6 Nov., 1908).

4. See, for example, "Ziyiju lianhe hui wei ge zhi an xu xing qingyuan tonggao ge tuanti shu **諮議局聯合會爲閣案續行請願通告各團體書**" [Announcement to various organizations from the joint meeting of the provincial assemblies' representatives calling for continued petitioning with regard to the structure of the cabinet], *Fazheng zazhi* **法政雜誌**[Law and government magazine] 1.8:127-131

(16 Oct. 1911); "Ziyiju lianhe hui cheng duchayuan dai zou huang zu bu yi chong neige zonglidachen zhe 諮議局聯合會呈督察院代奏皇族不宜充內閣總理大臣摺" [Memorial on the inadvisability of filling the post of prime minister with a member of the royal family, from the joint meeting of the provincial assemblies' representatives, for transmittal via the censorate], *Guo feng bao* 國風報 2.12:83-86 (28 May, 1911).

5. Ying-chih 盈之, "Lun duiyu zeren neige zhi renmin yu zhengfu liang fangmian zhi wujie 論對於責任內閣之人民與政府兩方面之誤解" [On the misunderstandings of the people and the government regarding the responsible cabinet], *Dongfang zazhi* 東方雜誌(hereafter *DFZZ*) 8.5:1-7 (July 1911).

6. Yufu 漁父（and passim, pseud.),"Lun jin ri zhengfu zhi daoxing nishi 論今日政府之倒行逆施" [On the perverse policy measures of the present government], *Minli bao* 民立報(hereafter *MLB*) 5-11 June, 1911; Chen Xulu 陳旭麓 ed., *Song Jiaoren ji* 宋教仁集[Collected works of Song Jiaoren] (Beijing, 1981; hereafter *Ji*), pp. 216-219.

7. Liang Qichao梁啓超, "Zhengdang yu zhengzhi shang zhi xintiao 政黨與政治上之信條" [Parties and the political credo], *Yin bing shi wenji* 飲冰室文集 [Collected essays from the Ice-drinker's studio] (Taibei: Taiwan Zhonghua shuju 中華書局, 1978) 26:50-55. *Guo feng bao* 2.14:7-15 (June 17, 1911).

8. Du Shanjia 杜山佳, "Riben xin neige 日本新內閣" [The new Japanese cabinet], *DFZZ* 8.7:25-27 (Sept. 1911).

9. "Qinding xianfa wenti 欽定憲法問題" [The problem of an imperially granted constitution] and "Riben neige gengdie gan yan 日本內閣更迭感言" [Thoughts on the change of the Japanese cabinet], *MLB*, 11 February and 5 September, 1911; *Ji*, pp. 153, 305-307.

10. The evolution of the English cabinet and the rise of joint responsibility to the parliament was described as early as 1908 in a relatively obscure journal published by Peking University students in Tokyo. See Liu Mianzh劉冕執, "Lun Yingguo xianfa zhi dachen 論英國憲法之大臣" [On the ministers in the English constitution], *Xue hai* [Sea of learning] 2:51-68 (30 March, 1908).

11. For a more extensive discussion of these articles, see Don C. Price, "Constitutional Alternatives and the Struggle for Democracy in the Revolution of 1911," in Cohen and Goldman ed., *Ideas Across Cultures*, pp. 230-239.

12. Qiutong 秋桐 (pseud. for章士釗), "Guo hui wanneng shuo 國會萬能說" [The omnipotence of parliament], *Diguo ribao* 帝國日報(hereafter *DGRB*) 19, 20 Jan., 1911; "Lun zizhengyuan yiyuan dang cai zhengdang bule zhi fa 論諮政院議員當採部勒之法" [On the way in which the National Assemblymen should divide themselves into parties], *DGRB*, 19, 20 March, 1911; "Lun Zhongguo zhengdang zhengzhi dang yingshi fasheng 論中國政黨政治當應時發生" [It is time for party government to appear in China], *DGRB*, 26, 27 February, 1911; "He wei neige? 何爲內閣" [What is a cabinet?], 11 June, 1911; "Zhengdang zhengzhi guo shi yu jinri zhi Zhongguo hu?政黨政治果適於今日之中國乎" [Is party government really suited to present-day China?], 29 May, 1911; "Lun qixing neige論崎形內閣" [The freak cabinet], *DGRB* 20, 21, 22 May, 1911; "He wei zhengdang neige 何爲政黨內閣" [What is a party cabinet?], *DGRB*, 12-13 June, 1911; "Zhengdang neige guo you yu feizhengdang neige hu? 政黨內閣果優於非政黨內閣乎" [Is party government really superior to non-party government?], *DGRB*, 18-20 August, 1911.

13. For constitutionalist preference for a separation of powers à la Montesquieu, see 張家鎭"Lun

lixian zhi pian zhong zhi qushi 論立憲制偏重之趨勢" [On the tendency toward imbalance in constitutional systems], *Yubei lixian gong hui bao* 1.14:1-7 (29 Aug. 1908) and Chen Zhian 陳治安,"Xianfa zhi yong憲法之用" [The working of constitutions], *Xue hai* 學海2.1-51 (30 March, 1908). For an example of an independent argument for checks and compromises between monarchical and popular authorities, see Tang Yan唐演,"Falü xuejie cong tan 法律學界叢譚" [Scholars' discussions on the law], *Ibid.*, 117-123.

14. "Zhonghua minguo Ezhou yuefa ji guanzhi caoan 中華民國鄂州約法及管制草案" [Draft provisional constitution and administrative regulations of Hubei, Republic of China], in *Ji*, pp. 350-364.

15. Matsumoto Hideki 松本英紀 shows that this provisional constitution was essentially Song's work and argues that it reflected Song's short-term political strategy, which envisioned the replacement of Li Yuanhong 黎元洪 by Huang Xing 黃興 as military governor. See his "Chûkaminkoku rinji yakuhô no seiritsu to Sô Kyôjin 中華民國臨時約法の成立と宋教仁" [The establishment of the provisional constitution of the Republic of China and Song Jiaoren], *Ritsumeikan shigaku* 立命館史學 [Ritsumeikan historical studies] (1981), II, 47-49.

16. "Hu Hanmin zizhuan 胡漢民自傳," Guomindang dangshihui 國民黨黨史會 ed., *Geming wenxian* 革命文獻[Documents of the revolution] (Taibei, 1959), I-III:428.

17. *Ibid*., p, 436.

18. K. S. Liew, *Struggle for Democracy* (Berkeley, 1971), pp. 97-99.

19. Price, "Constitutional Alternatives," pp. 237-243.

20. See Chen Ruxuan 陳茹玄, *Zhongguo xianfa shi* 中國憲法史[Chinese constitutional history] (Taiwan reprint of 1947 rev. ed.), Appendix I, and Hunan sheng Taoyuan xian zhengxie weiyuanhu湖南省桃源縣政協委員會 [Chinese People's Political Consultative Conference, Taoyuan, Hunan, County Committee] ed., *Song Jiaoren jinian zhuanji* 宋教仁紀念專輯[Commemorative collection on Song Jiaoren] (Taoyuan, 1987), pp. 273-279.

21. *Bijiao caizhengxue* 比較財政學 (Tokyo, 1910; reprint Tokyo 1917), translation of Kobayashi Ushisaburô", *Hikaku zaiseigaku* (Tokyo: Dôbunkan同文館, 1905).

22. "Zhengdang neige guo you yu feizhengdang neige hu?" *DGRB*, 19 August, 1911. Cf. Bagehot, *The English Constitution* (Garden City: Doubleday, 1961), pp. 69, 73-74, 176-177.

23. [Tongyi]dang 同一黨 and [Minyou]she 民友社, "Xu" 序 [Prefaces], *Faguo minzhu zhengzhi* 法國民主政治(Shanghai, 1912). As the title of the French original suggests, this was a standard textbook for law students, one of a great many by the Docteur en droit, René Foignet. Presumably the sixth edition of this work (Paris: Arthur Rousseau, 1910) was used (it went through 15 editions by 1929). I was able to consult this and five earlier editions at the Bibliotheque Nationale in preparing the present paper.

24. Zhu Wenfu 朱文黼, "Zixu 自敘," *Ibid*., and pp. 75-92.

25. R. D. Anderson, *France 1870-1914: Politics and Society* (Routledge and Kegan Paul: London, 1977), pp. 10, 74-75.

26. Zhu Zongzhen 朱宗震 and Yang Guanghui 楊光輝 eds., *Minchu zhengzheng yu erci geming* 民初政爭與二次革命, [Political struggles in the early republic and the second revolution] 2 vols. (Shanghai, 1983), I, 54-55. According to Foignet (*Faguo*, pp. 137-138), the purpose of countersignature was to testify that the acts of the chief of state had the support of the ministers and that they were constitutional, and he cited constitutions (e.g. Denmark) in which ministers' responsibility was theoretically not limited to measures which they had countersigned. In general, Foignet uses the term responsibility to cover areas of legality and administrative competence as well as policy, whereas the Chinese usage, like the English, stresses accountability for policy, effectiveness of administration, and performance. In one telling mistranslation, Zhu betrays his concern for the government's ability to lead, English style. Foignet, reviewing various constitutional arrangements for comparative purposes, explains the (mistaken) rationale of the separation of powers as a guarantee of political liberty against the tyranny of a monarch or legislature. The idea is that "sans la division des pouvoirs, la liberté politique ne peut exister dans un gouvernement." In Zhu's mistranslation, without it, "zhengfu shi qi xingzheng zhi ziyou (the government would lose its freedom as the executive) 政府失其行政之自由" (Foignet, p. 43; *Faguo*, p. 44).

27. *Faguo*, pp. 58-68.

28. "Kaiming zhuanzhi lun," *Yinbingshi wenji*, 17: 65-6. I have been unable to locate the Onozuka text on which Liang's presentation is based.

29. *Faguo*, pp. 5l-57.

30. *The American Commonwealth*, 2 vols., 2nd ed., revised (London and New York: Macmillan, 1890), I, 110-111, 169. I have not had access to the third edition, but the passages quoted here are common to the second and fourth, and Bryce generally confined himself to updatings from one edition to the next.

31. *Ibid.*, I, 224, 289-290.

32. "Dang xu 黨敘" [(First) Preface by the (United) Party], in *Pingmin zhengzhi* 平民政治(5th ed., Gonghe dang共和黨, 1912).

33. At another level, it must be admitted, Bryce came to fear the corrupting effects of democratization on the British parliament, and found in America's written constitution and checks and balances a bulwark against disorder in the government. In fact, *The American Commonwealth* is in some sense an implicit recommendation of remedies against the dangers of unlimited parliamentary power in England. Nevertheless, on the cardinal question of the efficiency and responsiveness of the parliamentary executive vs. the separation of powers, Bryce was clearly committed to the former. See Hugh Tulloch, *James Bryce's 'American Commonwealth'* (The Royal Historical Society: Woodbridge, 1988), chapter 5. Bryce was, in any case, far too sophisticated to imagine that any particular institutional arrangements could be simply transplanted from one social, cultural and political environment to another. See Bryce, I, 9.

34. The following treatment of Bryce's views on public opinion and politics is based largely on the penetrating analysis by Hugh Tulloch, chapter 5.

35. Bryce, II, chapters 76, 77, and p. 489.

36. *Ibid.*, II, p. 326.

37. *Ibid.*, II, pp. 568-569.

38. Chen Zhirang **陳志讓**, "Hongxian dizhi di yixie wenti **洪憲帝制的一些問題**" [Some questions regarding the Hongxian reign], Institute of Modern History, Academi Sinica, ed., *Zhonghua minguo chuqi lishi yantao hui lunwenji, 1912-1927* **中華民國初期歷史**研**討會論文集**, 3 vols. (Taibei, 1984), I, 5-30.

39. "Daicao Guomindang zhi da zhengjian **代草國民黨之大政見**" [Draft of major political positions for the Nationalist Party), pp. 3-5, in Ye Chucang 葉楚 ed., *Song Yufu* **宋漁父**,(Shanghai, 1913; Taiwan photographic reprint, 1963).

40. *Zhongguo liguo da fangzhen shangjue shu* **中國立國大方針商攫書** (Shanghai, 1912), p. 22; Zhang, "Zhengdang zhengzhi guo shi yu jinri zhi Zhongguo hu? **政黨政治果適于於今日之中國乎**"

41. "Lun yanlun ziyou yu bao lü **論言論自由與報律** " [On freedom of speech and the press law], *DGRB* 11, 12 Jan. 1911.

42. *Faguo*, pp. 249-251. Chen Ruxuan, "Fulu **附録**" [Appendix], pp. 1-2.

43. See Marina Svensson, *The Chinese Conception of Human Rights: The Debate on Human Rights in China, 1898-1949* (Ph.D. diss., University of Lund, Sweden, 1996).

44. See Don C. Price, "From Civil Society to Party Government: Models of the Citizen's Role in the Late Qing," in Joshua Fogel and Peter Zarrow, ed., *The Idea of the Citizen: Chinese Intellectuals, 1890-1920*, (Sharpe Press, 1997).

45. *Ibid*., pp. 34-35; *Guofeng bao* 2:10 (9 May, 1911).

46. *Ibid*., pp. 13, 17; *Guofeng bao* 2:6, 7 (30 March, 9 Apr., 1911).

47. *Zhongguo liguo da fangzhen shangjue shu* (Shanghai, 1912), p. 19, 76.

48. See Price, "Constitutional Alternatives," pp. 256-257.

49. "Lun ge guo bian tong zheng jiao zhi yu wugongli **論各國變通政教之有無公理**" [On the presence or absence of the principle of the common interest in the political and ideological reforms of the various countries], *Xiang xue bao* **湘學報**[Hunan scholarly journal], 5-9:16-36b (31 May-10 July ,1897).

GLOSSARY

baoyu **保育**
dangpai **黨派**
geren **個人**
Han **漢**
Hu Hanmin **胡漢民**
Hubei **湖北**
Kang Youwei **康有爲**
Kobayashi Ushisaburo" **小林丑三郎**
Liang Qichao **梁啓超**
Meng Sen **孟森**
Ming **明**
neige **内閣**
Qing **清**
Sun Yat-sen **孫逸仙**
Tang Caichang **唐才常**
Tang Hualong **湯化龍**
tuanti li **團體力**
Yan Fu **嚴復**
youzhi **幼稚**
Yuan Shikai **袁世凱**
zeren neige **責任内閣**

ICCLP REPORT: LAW CLERKING IN THE UNITED STATES

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On December 10, 1998, at the 94th Comparative Law and Politics Forum, Visiting Professor Daniel H. Foote presented a report on the topic of law clerking in the United States. The talk was based on the article "Reflections of a Former Law Clerk," which was published in *Matsuo Koya Sensei Koki Shukuga Ronbunshu*, Gekan, 751-796 (1998). Excerpts from that article, which reflect the major points discussed at the Forum, follow:

I. Overview of the Judicial Clerkship System.

The law clerk system originated in 1875, when Justice Horace Gray of the Supreme Judicial Court of Massachusetts began to hire one law clerk each year from among recent graduates of Harvard Law School. When Gray was appointed to the U.S. Supreme Court in 1882, he introduced the practice of hiring law clerks to that court. Thereafter, other justices -- and, over time, lower court judges and state court judges -- adopted the practice.

By 1980, each U.S. Supreme Court justice was entitled to hire four clerks,[1] each federal circuit court judge three clerks, and each federal district court judge two clerks. At the state level, there is considerably greater variation. In some states, even at the supreme court level, a group of clerks is hired to serve the court as a whole.

In general, though, one of the many carryovers from the system originally adopted by Justice Gray is that the law clerk is hired by an individual judge (or justice) and directly serves that judge. Among other carryovers, the vast majority of law clerks begin work directly upon graduation from law school, and law clerks typically serve for short terms: one-year clerkships are still the most common, although two-year clerkships are gradually increasing. Whereas Justice Gray hired his clerks exclusively from Harvard Law School, law clerks now come from a wide range of law schools.[2]

II. The Hiring Process.

The hiring process for judicial clerkships bears similarities to the recruiting process for large businesses in Japan. Just as in the recruiting process in Japan, there are widely recognized rankings of the job opportunities (in this case, the clerkships), along with other sets of rankings of the candidates. And there is intense competition on the part of both the job applicants and the employers. This situation creates an inevitable tension, which on occasion amounts to a feeding frenzy.

A. Rankings of judges.

No formal ranking of clerkships exists; but there are various informal rankings, which are passed along through law school grapevines and through articles in such publications as the *American Lawyer*. One of the key factors is the perceived prestigiousness of the clerkship. Clerkships at the U.S. Supreme Court rank at the very top of the list. For lower court clerkships, as a general matter, the higher the court, the greater the prestige: courts of appeals rank higher than trial courts, for example. Comparing state courts to federal courts is a bit tricky; but, as a rule of thumb, federal circuit courts are regarded as more prestigious than

[1] Not every justice hires four clerks. For many years, for example, Justice John Paul Stevens hired only two clerks; and Justice (now Chief Justice) William H. Rehnquist traditionally has hired only three clerks.

[2] In 1982-83, when I clerked at the Supreme Court, the 33 law clerks serving the nine Justices came from well over a dozen different law schools. The largest number, 8, came from Harvard, followed by Yale and Virginia, with 4 each; such schools as Utah, Missouri, Tulane, and Vanderbilt were also represented.

state supreme courts.

In my own view, the focus on prestige is largely misguided. To the contrary, in my view the key considerations for candidates in selecting clerkships should be such factors as the working environment, the judge's personality, and the way in which the judge treats and works with the clerks, along with the nature of the work and level of responsibility accorded to the clerk.

One reason I place so much weight on the nature of the working environment lies in the close, one-on-one nature of the judge-clerk relationship. The best clerkships include true collaboration between judge and clerk; and, at their best, clerkships can be pure heaven. By the same token, the closeness of the judge-clerk relationship carries a risk of personality clashes. At their worst, clerkships can be utter hell.

B. The hiring process.

The outline of the standard hiring process is straightforward: Students determine which judges they wish to apply to, send each judge an application letter accompanied by a curriculum vitae, and ask professors to send recommendation letters. Judges screen the applications to identify the applicants in whom they are most interested, invite a few candidates for interviews, and then make their selections.

Until the early 1970s, most federal judges selected law clerks during the fall of the students' third year in law school. In the 1970s, many judges began to try to get the best clerks by extending offers earlier and by insisting that the students accept immediately. Over time, the hiring cycle moved ever earlier. By the early 1990s, many students had begun to apply early in their second year of law school, nearly two full years before the start of the clerkship. Both the law schools and the judges have complained about the adverse effects of this ever-escalating hiring race. Over the past twenty years, there have been various attempts to slow the race down and establish fixed starting dates for the hiring process. These efforts have achieved only limited success, and the escalation in the hiring process has resulted in numerous adverse effects.

III. The Value of Clerkships.

Given the expense and stress of the application process, one might ask why students are so eager to pursue clerkships. One would hope that the key reason lies in the experience clerkships provide. Unlike the stints at courts, prosecutors' offices, and law firms that constitute a central part of the training for candidates at the Legal Training and Research Institute in Japan, law school education in the United States does not automatically involve direct practical experience. To some degree, judicial clerkships constitute a means of gaining such experience.

Nevertheless, for many candidates prestige seems to be the principal reason for pursuing a clerkship. In U.S. legal circles, a judicial clerkship constitutes an important credential. Although the situation is shifting somewhat, highly-rated clerkships historically have been a key criterion for appointment of professors at major U.S. law schools. Clerkships also aid in obtaining employment at major law firms (many of which now pay substantial signing bonuses to former law clerks[3]), at government agencies, and in other positions.

IV. Nature of Law Clerk Responsibilities.

This at last brings me to the substance of law clerks' work. The nature of the work depends heavily upon the court and the particular judge. Depending on the judge, clerks' responsibilities may range all the way from relatively mundane tasks, such as filing and low-level research, to substantial involvement in drafting opinions. Since my own experience includes clerking at the federal district court (for Chief Judge Edward T. Gignoux in the U.S. District Court for the District of Maine) and at the U.S. Supreme Court (for Chief Justice Warren E. Burger), I will focus my comments primarily on those two levels.

[3] Some firms reportedly have offered signing bonuses of $50,000 or more to Supreme Court clerks.

A. District Court.

At the district court level, research on issues of law constitutes the primary work for law clerks; but those issues span a broad range of fields and arise at numerous stages in the trial process. Many legal matters are raised in pretrial motions. New issues, including procedural and evidentiary questions, inevitably arise during the course of the trial itself. The close of trial brings further sets of issues (frequently involving such matters as the permitted scope of closing arguments and the content of jury instructions, as well as requests for summary judgment). For cases tried to a jury, the verdict often is followed by a motion for judgment notwithstanding the verdict (necessitating a review of the evidentiary record), but otherwise largely ends matters. For cases tried to the judge, of course, the end of the trial brings a far different set of duties, including responsibility for deciding both the facts and the law and preparing an opinion.

Legal questions might arise at any of these stages, and much of the law clerks' duties consist of research on the legal questions. The nature of the research naturally depends heavily on the type of question involved. At many district courts, law clerks are responsible for preparing comprehensive "bench memos." These bench memos typically summarize the factual allegations and primary legal issues, and also contain research and conclusions on the legal issues.

B. Supreme Court.

It is often said that law clerks at the U.S. Supreme Court are the equivalent of *chosakan* at the Japanese Supreme Court. As the subsequent description of law clerks' duties will reveal, there are some similarities, but there are also major differences. One of those differences is that, in contrast to the decade or more of judicial experience *chosakan* possess, nearly all law clerks are still in their twenties and have had only one year of lower court clerkship experience following graduation from law school. A related difference is that law clerks typically serve for only one year.

A second major set of differences between *chosakan* and law clerks relates to the hiring pattern and the nature of the judge-clerk relationship. As discussed previously, each justice hires his or her own clerks personally; and each clerk works directly for the justice, in effect serving as his or her agent. The fact that each justice has a staff of law clerks introduces another key difference: once the Supreme Court has decided to review a case (and, to a lesser extent, at the stage of deciding whether to grant review), at least one law clerk from each chambers is responsible for considering the case independently, meaning that at least nine law clerks will carefully examine each case that has been granted.

In general, one may divide the Supreme Court's judicial review work into three major phases: selection of cases for review, examination of the cases that have been selected, and preparation of opinions. Throughout much of the year, all three functions proceed simultaneously. From the standpoint of the law clerks, though, the organization of the Court's calendar is a crucial aid in the learning curve.

The U.S. Supreme Court's review process is demarcated into distinct one-year cycles. As reflected by the phrase, "first Monday in October," it is widely assumed that the Court's yearly work begins on that date. That is technically the first day of the term and constitutes the starting date for one crucial part of the Court's schedule: the first oral arguments of each term are held on the first Monday in October. Needless to say, the Court's annual work begins much earlier than October and lasts much later than April. Petitions for certiorari arrive at the Court all year long; and preparation of opinions commences after oral argument and lasts until the opinions have been completed. (The Independence Day holiday, July 4, provides the target date for finalization of all opinions.)

From the law clerk's perspective, the annual cycle starts with the clerk's arrival at the Supreme Court in mid-summer, typically in July, shortly after all the opinions from the prior term have been issued. At that stage, oral arguments have not yet been scheduled for the fall, so the primary work consists of reviewing newly arrived petitions for certiorari.

1. Selection of cases for review.
Currently, the U.S. Supreme Court receives some 7000 certiorari petitions each year. Although there are occasional lulls during the year, petitions for the most part arrive steadily, with somewhat over 100 new petitions each week.

The justices hold a long conference in late September to discuss the petitions that have arrived over the summer. Thereafter, the justices meet regularly throughout the year to consider petitions. Not all petitions are actually discussed at those conferences. Instead, the justices currently utilize a "discuss" list. Each justice lists all cases that he or she deems worthy of discussion, and any case listed by one or more justices is automatically included for discussion.

The justices' deliberations are completely closed. Presumably, the justice or justices who have included a case on the "discuss" list explain their reasons for inclusion, followed by discussion among the justices and a vote on whether to grant review. A majority vote is not required; rather, the so-called "rule of four" governs. If four justices vote to grant review, the case is granted; otherwise, it is denied.

If the justices' conference constitutes the final step in the process of considering whether to grant a petition, the law clerks' review constitutes an important preliminary step. As mentioned previously, once review has been granted in a case, one law clerk from each chambers works on the case. At the certiorari review stage, though, most law clerks share responsibility. When I clerked, six justices, with a total of 23 law clerks among them, participated in the so-called "cert pool." (Currently, eight justices -- all but Justice Stevens -- participate in the pool.) When the files for incoming petitions are complete, those files are divided up among all the law clerks in the pool, for preparation of the so-called Preliminary Memorandum. The key elements of the Preliminary Memorandum consist of a summary of the facts, the holding below, and the arguments raised by the parties; a discussion and analysis section; and a recommendation. In this connection, it is important to note that the analysis is not concerned primarily with whether the lower court decision was right or wrong, but rather whether the case is important enough for the Supreme Court to review.

In addition to preparing an average of four Preliminary Memoranda each week for the pool, when I clerked the law clerks within each chambers commonly divided up all of the pool memos prepared by clerks from other chambers; reviewed the briefs and pool memos in all of those cases; and prepared an additional one-page memorandum, with recommendation, for one's own justice.

For approximately the first month of a Supreme Court clerkship, review of certiorari petitions constitutes the bulk of the law clerk's responsibility. During the rest of the year, one generally can devote only about 20% of one's time to this aspect of the job.

2. Examination of the cases selected for review.
A month or so after clerks begin working at the Court, the schedule of cases is announced for the first argument session in the fall. At that point, clerks' work expands dramatically, for they then begin detailed examination of the cases scheduled for argument.

The files for the cases scheduled for argument are extensive. In addition to the briefs from both sides, the Court frequently also receives numerous amicus curiae briefs. Prior to oral argument, the justices themselves receive and review the briefs for all cases; at the same time, the law clerks divide up and review the cases. With twenty-four cases per argument session, each clerk typically is responsible for six cases per session.

In most chambers, law clerks are responsible for preparing bench memos. The elements are similar to the elements of the Preliminary Memoranda: a summary of the facts, the lower court holding, and the assertions

of the parties; a discussion and analysis section; and a recommendation section. The discussion is much more detailed than in a Preliminary Memorandum. Moreover, the focus of the two memoranda is very different. Whereas the key consideration for the Preliminary Memo is whether the case warrants Supreme Court review, for bench memos the considerations include an assessment of the lower court decision (usually including an examination of the implications of the decision, as well as an analysis of whether the decision is correct), an examination of the strengths and weaknesses of the parties' (and, in some cases, amicus curiae's) arguments, and an examination of what issues remain unclear or warrant further investigation at oral argument. Typically, preparation of the bench memo requires extensive background research on Supreme Court precedent, other lower court cases, the views of scholars, and many other matters.

Law clerks normally discuss the cases at length with their justice prior to oral argument. Frequently the discussions include all the law clerks in the chambers, rather than just the law clerk assigned primary responsibility for a given case.

Oral arguments are broken into so-called "sessions." Each session lasts for two weeks, with four cases per day scheduled for argument on Monday through Wednesday of each of the two weeks — for a total of twelve cases each week, or twenty-four cases in the two-week session. Currently, a total of seven argument sessions are scheduled between October and the following April, at roughly one-month intervals. With rare exceptions, precisely one hour is allotted to oral argument for each case, thirty minutes per side.

In cases for which the law clerk is responsible, he or she must follow the oral argument carefully, take good notes, and be prepared to follow up immediately if new issues are raised that necessitate additional research. In nearly all cases, law clerks meet with their justices for further discussion prior to the conference at which the justices vote on the cases.

During each week of the argument session, all nine justices meet twice to discuss and vote on cases. These conferences are completely closed to outsiders, including law clerks.

For all intents and purposes, these conferences mark the end of the second phase of law clerks' work, examination of the cases selected for review. Incidentally, in my experience this phase accounts for about 40% of a law clerk's total workload.

3. Preparation of opinions.
The votes taken at the conferences set the stage for the final major phase of law clerks' responsibilities: work on drafting opinions. (In my experience, this work also accounts for about 40% of the clerk's workload.)

The first step in the opinion drafting process consists of assignment of cases -- i.e., designation of which justice is responsible for drafting the majority opinion. Authority to assign a case rests with the senior justice in the majority. By virtue of rank, the Chief Justice is automatically the most senior, regardless of how many years he or she has been on the Court. If the Chief Justice is not in the majority, seniority is determined according to length of tenure on the Court.

This brings me to the drafting process itself. This is the topic on which I receive the most questions, but it is a topic on which I can say relatively little. Any discussion of the drafting process in a specific case inevitably would involve highly sensitive matters. Yet the drafting process varies so widely from case to case that a general discussion may not be very meaningful. That said, I will attempt a few generalizations regarding the law clerks' role in drafting opinions.

When I clerked, the Court had a full docket, and on average each justice was responsible for sixteen

majority opinions per year. This meant that each law clerk typically worked on four majority opinions. The law clerk who prepared the bench memo for a case usually also worked on the opinion. Law clerks worked on concurring and dissenting opinions, as well as majority opinions, so law clerks for justices who frequently concurred or dissented might end up working on a dozen or more opinions during the year.

The actual allocation of initial drafting responsibility between justice and clerk varies widely from justice to justice and from case to case. In virtually every case, however, the process begins with a thorough discussion of the opinion by the justice and law clerk. Thereafter, in my experience the single most common pattern is for the justice to delegate to the law clerk initial responsibility for drafting the statement of facts, the summary of the procedural history and lower court holdings, and certain other sections of the opinion, but for the justice himself or herself to draft the most important sections of the reasoning (while often delegating to the clerk responsibility for drafting the footnotes to those sections). In some cases, the justice prepares most or all of the first draft of the opinion and asks the clerk to critique it. In other cases, the justice asks the clerk to prepare most or all of the first draft, and the justice critiques it. Further variations abound.

In every case, the initial draft is revised -- usually many times -- within the justice's chambers before it is ever distributed to other justices.

Once the justice assigned the case has completed work on the draft opinion, it is circulated to the other eight justices. All eight carefully review it. At the same time, the law clerk in each chambers who had responsibility for the bench memo in the case also carefully reviews the draft. Each of those law clerks typically sends comments on the draft to his or her justice; and the justice and clerk then usually discuss their reactions to the draft before the justice sends a response to the drafting justice.

From the point of view of the drafter, the best response is a simple: "I join as drafted." The next best is: "I join, but I would suggest the following revisions ...." Next in the hierarchy is: "I will join, if you make the following changes ...," followed by "I will concur" or "I will dissent." Perhaps the worst case, from the perspective of the drafter, is when members of the majority disagree and insist upon major changes as conditions for joining the opinion, but two or more factions insist upon conflicting changes.

If dissents or concurrences are to be written, serious drafting work on those opinions usually begins at this stage. For the most part, the above comments regarding the drafting process also apply to drafting of dissents and concurrences.

Even for what ultimately proves to be a unanimous opinion, the circulated draft may go through a series of revisions before it is finalized. If the decision is not unanimous, it is common for justices to exchange a series of drafts of the respective opinions. From time to time, the draft majority opinion or the draft dissent might lead one or more justices to change their minds and switch sides. On rare occasion, these switched votes change the outcome, necessitating what started as the dissent to be redrafted as the majority opinion (and what started as the majority opinion to be redrafted as a dissent).

Finally, once closure is reached on the opinion(s), the Reporter of Decisions checks all citations, corrects typographical errors and errors in form, and prepares the headnotes. At that point, the decision is ready for release to the public and press, which occurs at the next public session of the Court.

After the last decisions of the term are issued, usually in early July, most justices leave for well-deserved vacations. Most law clerks remain at the Court through the end of that month, ensuring a period of overlap with the incoming clerks.

V. Concluding Comments.

One of the recurrent themes reflected in the preceding description concerns the relationship between judge

and law clerk. The law clerk is hired by a particular judge and works for that judge. The relationship is close, but there is never any doubt that it is the judge who is in charge. Nevertheless, the law clerk obviously does have some influence.

A frequently asked question is: How much influence? From time to time, critics charge that law clerks represent "the hidden power behind the Supreme Court." Is this criticism accurate? Does the Supreme Court process constitute a situation of "law clerk *saiban*"?

In the case of full opinions, the answer clearly is "no." Each opinion, even one for which the law clerk prepares the first draft, is subjected to careful scrutiny by one's own justice and usually by the other law clerks in the same chambers; by the eight other justices; and by at least eight other law clerks from the other chambers. Everyone involved in the process knows the clerks are recent graduates; this no doubt makes the scrutiny all the more intense. Thus, although some differences in nuance may arise, it is virtually inconceivable that a law clerk could slip anything into the text of opinions with which the justices disagree.

As William Rehnquist (current Chief Justice) observed back in 1957, shortly after he had completed a Supreme Court clerkship, the sheer volume of cases and the heavy reliance on law clerks creates the potential for somewhat greater law clerk influence in connection with the review of certiorari petitions. Indeed, the development and steady expansion of the cert pool may have heightened such concerns. When I clerked, six justices participated in the pool but the remaining three justices had their clerks review all certiorari petitions. This insured that at least four law clerks independently examined each petition. Now, with all but Justice Stevens in the pool, only two law clerks actually read most files carefully.

This presents the potential for some law clerk influence over what cases are reviewed. In my view, the primary concern is not one of bias (either conscious or, as Rehnquist contended, unconscious) on the part of left-wing or right-wing law clerks. To my mind, the greater worry is that the law clerk responsible for the Preliminary Memo may fail to appreciate the significance of a case, especially if the issues are not well-presented by the parties; and that clerk's evaluation may lead others to overlook the case.

At the same time, there are undeniable efficiencies to the cert pool. My personal suggestion would be to bifurcate the pool. Rather than have eight justices all participate in a single pool, I would prefer to see two pools with four or five justices each, which would independently review all certiorari petitions. This obviously would double the number of Preliminary Memoranda each law clerk must prepare, but it should still leave the workload at a manageable level and it would provide a check against the possibility that a single clerk's judgment might be determinative of whether a case is accepted for review.

Visiting Professors at the ICCLP

From April to September 1999 the following professors visited to the ICCLP:

Benedict W. Kingsbury (Professor of Law, New York University Law School)

Profile:
After receiving his LL.B from the University of Canterbury, New Zealand, Professor Kingsbury was a Rhodes Scholar at Balliol College, Oxford University acquiring a M. Phil. in International Relations in 1985, and a D.Phil. in Law in 1990. Professor Kingsbury has held various researching and teaching positions at Balliol College, Exeter College, and the Faculty of Law, Oxford University, and was appointed to Professor of Law at Duke Law School in 1993. He has been Professor of Law at New York University of Law School since 1998. Professor Kingsbury specializes in International Relations Theory and International Law.

Major Publications:
Hugo Grotius and International Relations (co-ed. with Hedley Bull and Adam Roberts, Oxford University Press 1990).
United Nations, Divided World: The UN's Roles in International Relations (co-ed. with Adam Roberts, joint author, Oxford University Press, 2nd ed.1993; 3rd ed. forthcoming).
Indigenous Peoples and International Law (Oxford University Press, forthcoming)

Don C. Price (Professor of History, University of California, Davis)
Profile:
After receiving his B.A. from Amherst College in 1958 and A.M. and Ph.D. from Harvard University in 1960 and 1968 respectively, Professor Price was appointed Assistant Professor, first at Yale University and then at the University of California, Davis. In 1974 he was appointed Associate Professor at the University of California, Davis, taking up his present position of Professor of History at the same university in 1981. Professor Price specializes in History and the History of Political Thought.
During his one-month stay at the Center, Professor Price gave two ICCLP Seminar presentations entitled "Chinese Culture and the Constitutions: The Legacy of Tradition" and "Chinese Culture and the Constitutions: Modern Adaptations". This *ICCLP Review* includes an essay by Professor Price entitled "Literati Views of Modern Constitutional Models: Citizen, Party and Nations in Early Republican China".

Major Publications:
Russia and the Roots of the Chinese Revolutions, 1896-1911 (Harvard University Press 1974).
"From Civil Society to Party Government: Models of the Citizen's Role in the Late Qing", *The Idea of the Citizen: Chinese Intellectuals, 1890-1920* (Sharpe Press 1997).

Interview with Professor Benedict W. Kingsbury

Sovereignty, Inequality and Indigenous Rights

Professor of Law, New York University Law School
ICCLP Visiting Professor, Graduate School of Law and Politics

During his one-month stay at the Center, Professor Kingsbury gave an ICCLP Seminar entitled "Globalization, Sovereignty and Inequality in International Law", and several undergraduate and post-graduate lectures. He also attended an international law study group at Kyoto University, and visited Hokkaido to conduct research related to the Ainu people. Professor Kingsbury spoke with ICCLP Researcher Gregory Ellis about his current areas of research and experiences here in Japan.

[Gregory Ellis, June 1999]

GE: Can I first ask how you are enjoying your stay here in Japan and at the ICCLP?
BK: Hugely! It is really terrific. I have been very excited by the people and the activities here, and the set-up at the Center and the University is great, so I'm really happy with it. I have stayed in Tokyo except for making a trip to Kyoto University to give a paper to their international law study group, and making a brief research trip to Hokkaido.

PERSONAL BACKGROUND
GE: You were born in Leiden, the Netherlands. How old were you when you left for New Zealand?
BK: My parents were both born in New Zealand. It happened that my father had a job in the Netherlands with a student organization and that is why I was born there. We returned to New Zealand when I was about one year old, and all of my schooling and undergraduate law degree was done there. By coincidence I still go to Leiden just because so much to do with international law happens in the Netherlands. I have also done a lot of work on Hugo Grotius, a 17th century Dutch international lawyer who was at Leiden University for part of his career.

GE: Can you tell us about what motivated you to become an academic in international law and about your educational background?
BK: Small and remote countries like New Zealand are dependent on international engagement and connections for their survival in the international system. The only kind of influence that NZ can exert on the international system is through persuasion and at times taking moral positions on particular issues. This, of course, involves understanding the workings and mechanisms of the international system and I guess this necessity to some extent informed my decision to pursue the career that I have.
After obtaining my law degree from the University of Canterbury in 1981, I worked at a law firm in the area of corporate finance. In 1982 I received a Rhodes scholarship to Oxford scholarship where I completed a two-year Masters Degree at Balliol College in international relations under the supervision of the late Hedley Bull. I switched to international law for my doctorate under the supervision of the international lawyer Ian Brownlie. During this time I was a junior research fellow in international law and human rights at Exeter College, Oxford University. Upon completing my doctorate in 1990 I received a tenured teaching position as university lecturer in law at Oxford until 1993 when I moved to the United States to take up the position of Professor of Law at Duke Law School. In 1998 I commenced my present position at New York University Law School.

AREAS OF RESEARCH INTEREST

GE: What are your areas of recent scholarly interest?

BK: One of the areas I have been investigating is the effect that globalization has had on the traditional notions of sovereignty and inequality, a topic I discussed in the ICCLP seminar (cf. Seminar Reports). This however is part of the wider project of thinking out fundamental concepts in international law that require consideration, both descriptively and normatively. My hope is to try to write a theoretical international law book that uses ideas from international relations and jurisprudence and attempts to contribute to the theory and practice of international law. The other main field that I am working on at the moment is the international law concerning indigenous peoples. I have been teaching a course on this at NYU, and this past semester at Harvard, with a view to eventually publishing a book in this area.

GE: Can you give us your view on indigenous peoples' rights?

BK: I think that there are two lines to approach this topic. I grew up in Hamilton where the largest Maori tribe, Tainui, are located. This enabled me to know about their grievances regarding land they had been historically dispossessed of and increased my awareness of indigenous peoples issues in general. The thought that all of this colonialism, expansion and settlement has been related over hundreds of years to international law has led me to try and address legal issues that structure the modern situation of indigenous people. One element of my project is to use international law ideas in creative ways that would be of benefit to the situation of indigenous people. I was involved in some major cases in New Zealand involving land and fishing rights. So one part of it is trying to be creative with existing materials using more historical research.

The second element relates to the fact that issues to do with indigenous peoples really run against what we ordinarily assume about international law. For instance, they challenge what we traditionally think about sovereignty; it is a puzzle that there are various groups living in established states that claim some kind of separate legal existence. In this context it is interesting to note that the international treaties made with various indigenous peoples around the world during the period of expansion and colonization are now being reevaluated. For many years most of these treaties were written off as though they had nothing to do with international law even though at the time they were signed they were regarded as international law documents to some extent in some places, and some were included in standard European books of international treaties. One can find the 1840 Treaty of Waitangi next to treaties between familiar European states. The understanding of property rights is also another issue here. The Western idea of property is that it should be capable of being alienated and disposed of at will. With many indigenous peoples the idea is just the opposite. The true relationship to property is that of a custodial guardian where property cannot be sold. So the second part of my interest is to draw some insights from the experience of indigenous people and apply that to other parts of international law.

GE: Why is there such a variation in the situation of indigenous peoples around the world in their relationship to the state?

BK: We first have to address whether the idea of indigenous peoples is a single unifying idea. One political project is to create such a unifying idea; that is to suggest that if a group is indigenous they somehow should share particular rights held by all other such groups. The project of forming modern states was global, and thus the victims of that state formation all have something in common in their struggles against that universalized idea of the state. This has led to a common logic that has been reinforced by the common contemporary political project of these indigenous groups. A paper I am working on at the moment is about the sources of change in the status of indigenous peoples in various countries. A big part of it is clearly local politics and local dynamics, but a simple explanation based on interest politics cannot fully explain that in some cases indigenous people have influence beyond their numbers. An additional explanation focuses on the

role of the judiciary in Common Law countries and the borrowing of ideas from one country to another. In the Mabo case in Australia, the Australian High Court was clearly influenced by developments in Canada and New Zealand. A second explanation is the use of international organizations. I have done some work with the World Bank. The World Bank has a special policy that applies where it believes that indigenous peoples may be affected by projects financed by it. Representatives of the World Bank go to say Indonesia or Laos and try to negotiate to have special clauses regarding the indigenous peoples of that country included in the project documents. This is an example of the international concept of indigenous peoples being introduced in ways that may not necessarily be identical to terms used in the local discourse. Local groups then mobilize and adapt local categories to the international one. So we can see that it is not just the case that local, indigenous groups are linking together to promote a common political project, but that linkages at the inter-court and inter-state levels are also working to shape indigenous peoples rights. It is ironic that indigenous peoples, who suffered under Common Law and the legal systems of colonial expansion, can now use the commonality of Common Law as a lever to achieve things that they couldn't necessarily achieve locally.

GE: Are you conducting any joint research with Professor Adam Roberts who was a visiting professor at the ICCLP in June 1995?
BK: We did some work together finishing off a book that Hedley Bull, before he sadly died, had begun on Hugo Grotius and international relations. However, the major joint-work that we have done is *United Nations, Divided World: The UN's Roles in International Relations*. We have already completed two editions and are about to embark on a third edition. I have been able to talk with several professors here in Japan who use the book in their courses, and get some feedback that I hope can be incorporated into the next edition.

PRESENT TRIP TO ICCLP
GE: What is your main objective for coming to Japan and for the visiting the ICCLP?
BK: For me the major reason to come to Japan is to interact with the very large and active community of international law scholars and government lawyers here. Because I can't read Japanese, I have only a very limited grasp of what they are doing and I have to depend on those scholars that have published in a Western language. For me the major reason to want to come is to find out what this interesting group of people is doing and to meet and talk and exchange ideas. I arrived just in time to attend the biannual meeting of the Japan Association of International Law, and the inaugural session of a newly formed Japan-wide group on United Nations studies, held at the UN University. I was also able to attend the annual meeting of the Japanese Peace Research Association, held in Hokkaido. That has been three chances to meet scholars from all over Japan. Furthermore the University of Tokyo tends to draw people from the all over the region here, and the Kyoto University study group similarly draws a wide range of scholars. I am able to get a much richer sense of the community here and the debates and exchanges of ideas taking place by attending such sessions. I have also had several interesting meetings with Foreign Ministry lawyers.
Professor Onuma, whom I have known for a long time, invited me to the ICCLP. He is also interested in the history of international law, and in minority and social justice issues. I have also known Professor Yokota and Professor Nakatani for some years as well.

GE: Can you tell us about your research trip to Hokkaido?
BK: I traveled to Hokkaido to visit the Nibutani Dam area. The dam, built by the central government, is located southeast of Sapporo on the Saru River. It was filled in 1996, despite the opposition of some members of the Ainu people who claimed ownership and cultural connections with certain areas of the site. A lawsuit against the central government ensued in which the plaintiffs relied on article 27 of the International Covenant on Civil and Political Rights. This is

the article dealing with the rights of minorities to enjoy their own culture. In 1997 the Sapporo District Court ruled that the provisions of article 27 were applicable in this case, and that the government had violated this provision. However, it ruled that it would be too costly and inconvenient to remove the dam, and thus allowed the status quo to remain. One of the important findings of the court was that the Ainu are "indigenous", although it did not rule that they are an "indigenous people". So the court's decision gave significant recognition to Ainu claims while not calling for the dam to be dismantled. As a result no side appealed and this remains the only major judicial decision on the question of Ainu rights in relation to land and culture.
During my stay in Hokkaido, I was able to speak with Mr. Kayano Shigeru, one of the two plaintiffs in the case. Mr. Kayano was formerly a member of the House of Councilors and has written many books on Ainu culture. It was a good chance for me to understand the dynamics of the case, and its relation to local and national politics. Mr. Kayano was also heavily involved with negotiating the Ainu Law passed by the National Diet in 1997. Talking with Mr. Kayano gave me insights into why so many political compromises had to be made for the law to be accepted. For example, the law stops well short of recognizing the Ainu as an "indigenous people", recognizing only their distinctive culture.

GE: Why has the Japanese central government been unwilling to recognize the Ainu people as indigenous?
BK: The Japanese government was first reluctant to recognize the Ainu as a minority because of the belief that the Japanese nation is homogeneous. International pressure during the 1980s, along with lobbying by Ainu and others, pushed the government into changing their view and recognizing the Ainu as a minority. The present evasiveness of the Japanese government to fully acknowledge the Ainu as an indigenous people possibly stems from a fear that recognition could lead to claims for land rights and some kind of political autonomy. My impression is that there does not seem at present to be a widespread assertive political movement amongst the Ainu people comparable to those that have developed in some other countries where revival of cultural identity of an indigenous people has led to political activities in relation to issues like land rights and environmental protection.
It is noticeable, however, that the central government has become somewhat sensitive to issues of raised by the Ainu people. After the Nibutani dam case began, it made some effort to assuage the environmental and cultural impacts of the dam. Fish ladders have been put in place to facilitate the upstream migration of fish, while two museums for Ainu culture and the Saru River respectively have been constructed. An alternative site for the *Chipusanke* ceremony of releasing small boats into the river has also been set aside. Some archeological activities to help preserve historical Ainu objects and artifacts collected around the dam site have been carried out. But not so much has been done really to promote vibrant Ainu language and culture, or to meet the demands of some Ainu for redress of past wrongs.

GE: What has benefit of your time spent here at the University of Tokyo?
BK: During my stay at the Law Faculty I have had the opportunity to give one research seminar on the effects of globalization on notions of sovereignty and several undergraduate/postgraduate classes on topics such as trade and the environment, and power and normativity in the international system. The experience has been extremely positive and beneficial for me. The US legal pedagogy attempts to engage the students more actively in discussion than seems to be the case in large classes here based on the assumption that students must be able to state their opinions clearly if they are to become lawyers. In smaller, postgraduate seminars here students have been much more talkative. The talks that I have had with students both in and out of class does show me that these are people of a very high caliber – they have extremely strong analytical skills and are widely read. The difference in style, though, means that students are less willing to offer forceful personal opinions than might otherwise be the case in the US.

I might add that I am surprised how quiet the campus here at Hongo is. I was expecting it to be something like the equivalent of Shinjuku station with people rushing in all directions at great speed. To my pleasant surprise this has not been the case at all. A university of course must be a tranquil place that allows one to think. Everyday on the way to the faculty I take a walk around Sanshiro pond – it is remarkably serene for a campus in such a metropolis.

GE: Where do you feel most comfortable living and working in the world?
BK: Intellectually, it is very nice to spend time in different places because each place has a variety of different ideas to offer. Part of international law is how to cope with transnational problems, so I think that it is crucially important to be always thinking of alternative perspectives. It is very refreshing in that sense to travel. I am very happy based in New York, I was very happy when I was based in Oxford, and I love living in New Zealand. I couldn't be a very effective academic based in Japan because I don't speak the language. I give lectures in Italy or other parts of Europe almost every year, and I try to travel to developing countries whenever I can. What is important is being part of a world where one can exchange ideas and get a strong understanding of how and why issues may be seen so differently in different places. The New York University Law School has a global law school program where we invite many visiting professors and students from various countries around the world which greatly enriches the activities of the faculty.

GE: Do you have a message to young scholars and researchers here in Japan?
BK: Each person should try to work out what he or she really believes in, what his or her moral commitments are, and what his or her sense about fundamental political concerns is. When writing as a scholar one should interrogate one's scholarship by reference to those moral and political ideas, and conversely one should use one's scholarly ideas to interrogate one's own moral and political values. The important thing is to constantly see one's scholarship and personal commitments in relation to each other, and not to live a life of unexamined disjunction and complacency.

Michigan Columbia Exchange Project

Since May of this year, the Center has hosted the below professors from the University of Michigan School of Law and Columbia University Law School to participate in the post-graduate lecture series "An Introduction to American Law" at the Graduate School of Law and Politics.

Deborah Malamud, Professor of Law, University of Michigan School of Law

Research Area:	Labor Law
Major Publications:	*Affirmative Action, Diversity, and the Black Middle Class, 68* U. COLO. L. REV. 939-1000 (1997).
	Assessing Class-Based Affirmative Action, 47 J. LEGAL ED. 452(1997).

Jack Greenberg, Professor of Law, Columbia Law School

Research Area:	Code of Civil Procedure, Comparative Law
Major Publications:	CRUSADERS IN THE COURTS (BasicBooks1994).
	If…, JOURNAL OF SUPREME COURT HISTORY (July 1999).

Allan E. Farnsworth, Alfred MacCormack Professor of Law, Columbia University

Research Area:	Commercial Law, Contract Law
Major Publications:	AN INTRODUCTION TO LEGAL SYSTEM OF THE UNITED STATES (3rd ed. Oceana Pub. 1983).
	CONTRACTS (3rd ed. Aspen Pub., 1998).

Ronald J. Mann, Professor of Law, University of Michigan School of Law

Research Area:	Commercial Transactions, Intellectual Property Law
Major Publications:	*Explaining the Pattern of Secured Credit,* 110 HARV. L. REV. 625 (1997).
	PAYMENTS SYSTEMS AND OTHER FINANCIAL TRANSACTIONS (Aspen Pub. 1999).

From March to April of this year, Professors Takahashi Kazuyuki and Terao Yoshiko, and Professors Asaka Kichimoto and Onuma Yasuaki from this department gave lectures at the University of Michigan School of Law and Columbia University Law School respectively.

Essays

My Studies in Germany in the 1960s

by Emeritus Professor Ishii Shiro

I was asked to write down some of the memories of my stay abroad in Germany many years ago so as to draw some comparisons with studying abroad today. It began in 1965. When I think of many of my predecessors who gathered their experiences in the 1950s, I can not really talk about the "good old times". I'd rather like to relate for the record what comes to my mind when I think back.

The passport for public purpose
If I should name some of the things that are totally different today, it is at first the passport that comes to my mind. At that time professors of state universities set out for their destination with a "passport for public purpose". Our duty was to undertake research abroad. Accordingly, our journey's destination was limited to the country in which we were supposed to do those our research. In my case the Federal Republic of Germany. For that reason, the only country name to be found under "Travel destination" in my passport is this country.

When one tried to travel to France or Italy, it was inevitable to be repulsed at the border. Certainly, one could go to the Japanese consulate to get a supplement, but if one happened to get a malicious consul, he would each time ask anew for an explanation of the necessity of this supplement. It was a veritable relief when journeys finally became possible with a regular passport.

Differences in prosperity
What comes next to mind is the difference in the living standards between Germany and other countries of Western Europe on the one hand and Japan on the other. In contrast to some small amount of yen we were given in Japan per year, the Humboldt Foundation gave us a scholarship of 800 marcs a month that was about 72,000 yen (some months later it was increased to 1000 marcs). This was equivalent to twice the monthly salary we had in Japan.

Furthermore there was a world of difference between the quality of German and Japanese cars. This was the time that a VW Beatle was all we would dream of. In Germany the price was within reach. I just thought of getting a usable, second hand car in my hands, motoring around Europe and finally bringing it back with me to Japan. This was possible because at that time there was no import duty on cars one had owned and used abroad for more than one year.

Austerity
With this dream in mind, the first year was just a long series of frugal days. I lived in a student dormitory (originally not for economic reasons but for the language practice) and for lunch I used to have Bismark Hering and German potatoes (certainly, there is no such word in German; it is called "Bratkartoffeln"), altogether for about 100 yen. In the evening I cooked for myself. When I think about it now, the Japanese-style paella with mussels that I made was especially delicious. But because the ingredients were not freely available, I had to be quite inventive. In fact, it was at that time when I began to take an interest in cooking.

"Oh, Rape-flowers...."

In May of my second year abroad austerity finally paid off and I got hold of a VW 1300. I immediately set out northwards for a trip to the Jütland peninsula (Schleswig – Holstein). Over there a paradise of bays, lakes and land spread out, all entangled one with the other. It happened to be the season for rape-flowers. When I walked along the ways, I was reminded of a famous Haiku poem of the 18th century by Buson. "Oh, Rape-flowers, the moon stood in the east and the sun in the west". The difference to scenery in Japan laid in the fact that even the smallest ways were properly asphalted. Nowadays in Japan also it has become like this (thanks to the gasoline-tax). I remember at that time an automobile maker ran a TV commercial reminding us that the roads were so bad (and that only their vehicles could provide us with a comfortable ride!). Not even the road between Tokyo and Takasaki was completely asphalted.

Schleswig – Holstein
By the way, the name Schleswig – Holstein evoked precious memories in me. When I was in sixth class of elementary school, we had a story in our textbook called "Green land". It narrated the grievous way Denmark had to go after having lost this even region to Germany due to its defeat in war until recovering as a wealthy agrarian nation. For sure the editor wanted to give us some hints for the rebuilding of Japan after the war. It was such a beautiful and gentle text that I would like to read it out to all those in the political and financial world who are nowadays shouting for a state based on technology. The reason why I still remember this is that when I was in elementary school my reading of this text was recorded on a vinyl record. I will never forget how the director admonished me to pronounce the word "Schleswig" in Japanese way ("Schuresubihhi"). When I think back to this, I get the feeling that it was this experience more than anything else that made me finally visit this region.

Epilogue
Later on during the last 14 months before returning to Japan, I drove with my beloved car more than 20,000 km all around Europe and traveled, apart from Germany, throughout France, Belgium, Holland, Switzerland and Italy. At last I was able to send the car by ship to Japan. Ten years later, when I decided to go to America for one year, I finally gave it away. For all I know, the car may still be on the road.

[*Translatedy by Thomas Krohe, June 1999*]

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Auslandsstudium in Deutschland in den 60er Jahren

Für eine Gegenüberstellung mit Auslandserfahrungen der jüngsten Zeit hat man mich gebeten, einige Erfahrungen meines nun schon lange zurückliegenden Studiums in Übersee zu schildern. Es begann 1965. Mit Blick auf viele meiner Vorgänger, die ihre Erfahrungen schon in den 50er Jahren gesammelt haben, kann es kaum darum gehen, erhobenen Hauptes von „alten Zeiten" zu erzählen. Ich möchte vielmehr, auch im Sinne einer Aufzeichnung, einiges von dem berichten, was mir im Gedächtnis verblieben ist.

Der Reisepaß im öffentlichen Dienst
Wenn ich einige Dinge nennen soll, die heute ganz anders sind als früher, denke ich als erstes an den Reisepaß. Damals brachen die Dozenten staatlicher Universitäten mit einem „Reisepaß im öffentlichen Dienst" zum Auslandsstudium auf. Unsere Amtspflicht war die „auswärtige Forschung". Demzufolge war nur das Land, in dem man studieren sollte, Ziel der Dienstreise, das heißt in meinem Fall die Bundesrepublik Deutschland. Aus diesem Grunde war im Paß unter „Reiseziele" ausschließlich der Name dieses Landes eingetragen.
Versuchte man, damit nach Frankreich oder Italien zu reisen, war die Abweisung an der Grenze

unvermeidlich. Zwar konnte man zum japanischen Konsulat gehen und dort einen Zusatz zum „Reiseziel" bekommen, doch wenn man an einen boshaften Konsul geriet, wurde jedesmal aufs neue eine Erklärung für die Notwenigkeit des Nachtrages verlangt. Als schließlich die Dienstreise nach Übersee auch mit einem normalen Reisepaß möglich wurde, war das eine wirkliche Erleichterung.

Das Wohlstandsgefälle

Und dann der Unterschied im Lebensstandard zwischen Deutschland und den anderen Ländern Westeuropas auf der einen und Japan auf der anderen Seite. Mit einem Jahreseinkommen in Japan von einigen 100.000 Yen erhielten wir von der Humboldt - Stiftung ein monatliches Stipendium von 800 Mark bzw. 72.000 Yen (einige Monate später wurde es auf 1000 Mark erhöht). Das entsprach dem doppelten Monatseinkommen in Japan.

Des weiteren gab es bei der Qualität deutscher und japanischer Autos einen Unterschied wie Tag und Nacht. Es war die Zeit, als für uns ein VW-Käfer das Ziel aller Träume war. In Deutschland lag der Preis sogar im Bereich des Denkbaren. Wer Autos mochte, konnte sich irgendwie einen gebrauchten, aber gut erhaltenen Käfer besorgen und Reisen nach ganz Europa unternehmen. Schließlich konnte man ihn mit nach Japan zurückbringen. Denn wer über ein Jahr im Ausland gewesen war, konnte das dort erworbene und benutzte Auto steuerfrei einführen.

Sparsame Lebensführung

Um dieses Ziel zu erreichen, war das erste Jahr eine lange Reihe enthaltsamer Tage. Ich wohnte im Studentenwohnheim (ursprünglich freilich weniger der Sparsamkeit als der Sprachpraxis wegen) und zum Mittag gab es Bismark - Hering mit Bratkartoffeln, zusammen knappe 100 Yen. Abends wurde selbstverständlich selbst gekocht. Wenn ich so zurückdenke, ist mir Miesmuschel-Paella à la japonaise besonders schmackhaft gelungen. Da man indes die Zutaten nicht nach Belieben wählen konnte, galt es eine Menge Erfindungsgeist. Damals habe ich angefangen, mich für das Kochen zu interessieren.

„Ach, die Rapsblüten...."

Im Mai des folgenden Jahres trug die Sparsamkeit endlich Früchte und ich konnte einen beigefarbenen VW 1300 mein eigen nennen. Sogleich brach ich zu einem Ausflug nach Norden, auf die Jütland-Halbinsel (Schleswig - Holstein) auf. Meerbusen, Seen und Land verschlungen sich ineinander, ein wahres Wasserparadies. Es war gerade die Zeit der Rapsblüte. Lief man am Abend die Wege entlang, fühlte man sich inmitten der Welt der Haiku:

„Ach, die Rapsblüten,
der Mond im Osten
und die Sonne im Westen"
(Dichter Buson im 18. Jahrhundert).

Der große Unterschied zu Japan bestand darin, daß alle Feldwege, so klein sie auch sein mochten, ordentlich asphaltiert waren. Mittlerweile ist das zwar auch in Japan so (wohl dank der Benzin-Steuer), doch damals war gerade die Zeit, als die Autohersteller die Werbebotschaft „Die Straßen sind nun mal schlecht – diese Marke hält stand" verbreiteten und nicht einmal die Staatsstraße 17 zwischen Tokyo und Takasaki durchgehend asphaltiert war.

Schleswig-Holstein

Der Name Schleswig-Holstein weckte übrigens schon damals schöne Erinnerungen in mir. In der 6. Klasse der Grundschule stand in unserem Lehrbuch ein Text mit dem Titel „Grünes Land". Er erzählte von dem schmerzlichen Weg Dänemarks, das nach der Niederlage im Krieg eben diese Region an Deutschland hatte abtreten müssen, bis hin zu seiner Wiedererstehung als wohlhabender Agrarstaat. Sicher wollte der Herausgeber des Lehrbuchs Mut machen für den

Wiederaufbau Japans nach dem verlorenen Krieg. Es war ein so schöner und sanfter Text, daß ich in gerne all denjenigen aus Politik und Wirtschaft vorlesen würde, die heute mit so lauter Stimme nach der Gründung der Nation auf den Grundlagen der Technologie rufen.
Ich erinnere mich noch heute so gut an diesen Text, weil ich ihn als Grundschüler auf Schallplatte gesprochen habe. Nie werde ich vergessen, wie der Direktor mich ermahnte, das Wortes Schleswig „nur recht japanisch“ auszusprechen („Schuresubihhĭ“). Wenn ich nun darüber nachdenke, so scheint mir gerade diese meine erste Erfahrung für die Fahrt in jene Region nicht ohne Bedeutung gewesen zu sein.

Epilog
In den folgenden 14 Monaten bis zu meiner Rückkehr nach Japan habe ich mit meinem treuen Käfer über 20.000 Km zurückgelegt und dabei neben Deutschland auch Frankreich, Belgien, Holland und Italien bereist. Zum Schluß habe ich ihn wie geplant mit dem Schiff nach Japan geschickt. Erst etwa 10 Jahre später, als ich mich entschied, für ein Jahr nach Amerika zu gehen, habe ich ihn aus der Hand gegeben. Soviel man hört, ist er heute noch am Leben.

[*Translated from the Japanese original by Thomas Krohe*]

Immer nur Dissonanz : Über meinen Forschungsaufenthalt in Frankfurt

Moriya Ken'ichi (a.o. Prof. an der Städtischen Uni. Osaka)

Liegen meine Erfahrungen in Deutschland, die die Zeit vom Anfang 1994 bis Oktober 1996 abdecken, bereits im Vergangenen? Muß ich, kann ich gar auf meine Frankfurter Zeit wohl — *zurück*blicken?

Als mein Lehrer, Herr Prof. Murakami Jun'ichi, mir die Möglichkeit eröffnete, am Max-Planck-Institut für europäische Rechtsgeschichte an der Nidda in Frankfurt zu studieren, freute ich mich maßlos. Ich war ein Doktorand, der seine eben abgeschlossene Magisterarbeit über Savignys Methodenlehre schon vergessen wollte. Deutschland schien doch längst kein Traumort für die rechtswissenschaftliche Forschung mehr zu sein. „Die deutsche Begriffsjurisprudenz des 19. Jahrhunderts" war in den mehreren Vorlesungen, die ich besuchte, geradezu als *das* Schimpfwort überhaupt verwendet worden. Freilich hatte ich meine Auseinandersetzung mit Savigny fortgesetzt, und für sie war ein Forschungsaufenthalt in Deutschland natürlich vorteilhaft. Darin lag aber nicht der entscheidende Grund meiner maßlosen Freude.
Nein, die Freude war dagegen diejenige, die mit jener erquickenden Vorstellung des „Aufbruchs" unzertrennlich verbunden ist. Ich glaubte, mich durch diesen Sprung nach Deutschland von all den Umständen, in denen ich mich befand, befreien zu können.

Ich war in Deutschland. Meine Bemühungen gingen anfänglich dahin, alles Japanische möglichst aus dem Kopf zu verbannen. Nicht nur wollte ich keinen Japaner auf der Straße treffen. Selbst die japanische Sprache schreckte mich, da sie meine Gebundenheit an das Japanische zu fixieren schien. „Der Gedanke des ‚Aufbruchs'", dachte ich mir, „wird dann notwendig fleckig, wenn sich das Japanische in mich einschleicht". Auch Selbstgespräche mußten kontrolliert werden und wurden konsequenterweise nur auf Deutsch geführt. Angst vor dem Identitätsverlust fehlte nicht. „Aber", ich sagte mir, natürlich auf Deutsch, „dies nennt man jenen armseligen Trieb zur Selbsterhaltung, den man nur zu sprengen hat".
Dieser Hochmut der Vernunft war von vornherein dazu verurteilt, gerächt zu werden. Im grotesken Traum stürmte die japanische Sprache wieder und wieder auf mich ein; dabei waren es nicht nur meine japanischen FreundInnen, sondern selbst Prof. Stolleis, Prof. Rückert, oder aber Gerhard, Karl, Rainer, Martha, Thomas, Milos und viele andere, die da hervorragend (!) Japanisch sprachen.
Soviel war langsam klar geworden: Der kindische Versuch, mich vollständig zu europäisieren, ging auf Dauer eben nicht. Dieser Versuch war gleichwohl keineswegs erzwungen, sondern eigentlich gern unternommen worden. Und schließlich befand ich mich eben in Deutschland und um mich herum waren eben nur Europäer. Indes war meine Sprachfähigkeit sehr dürftig und entwickelte sich mangels Begabung ärgerlich langsam. Das war zunächst einmal eine wirklich miserable Tatsache. Wenn die wissenschaftliche Diskussion accelerando verlief, so mußte auch ich schnell sprechen, um in sie intervenieren zu können. Dann wurde meine Aussprache peinlich japanischer, die Satzkonstruktion fehlerhafter und unverständlicher, das Wort „also" häufte sich in unangenehmem Maße ——. Es passierte nicht selten, daß durch meine ungeschickte, kantige Intervention die Lebendigkeit der Diskussion plötzlich abkühlte.
Diese Erfahrungen können aber nicht einfach als mein Vermissen freundschaftlicher Kommunikation mit den Europäern gedeutet werden. Die Sache war komplexer. Denn ein angenehmes Gespräch mit ihnen zu führen war an sich relativ einfach.
Zum Beispiel. Durchschnittliche europäische Intellektuelle freuen sich, wenn Japaner über japanische Besonderheiten sprechen. Wohl deshalb haben viele von ‚uns Japanern' in Europa die Gelegenheit erhalten, einen Vortrag über japanisches Recht zu halten. Es ist allerdings Vorsicht geboten. Man darf nicht mehr als billig auf dem Japanischen insistieren, sonst würden

angenehmes Gespräch und Atmosphäre schnell verdorben. Mengt man noch eine leicht kritische Färbung gegenüber dem Japanischen dazu, um so besser. Damit würde man sich schnell als ein intelligenter, einer vornehmen Gesellschaft fähiger, witziger Japaner vorstellen. Dies ist ja auch bis heute das typische Bild eines japanischen Intellektuellen geblieben: Ein wenig japanisch, aber nicht ganz. Ein wenig kritisch gegenüber dem Eurozentrismus, aber nicht ganz. Deshalb ein wenig doch auch europäisch, weil das schick ist. Das ist das eiserne Prinzip, um in Europa als kultivierter Japaner angenehm zu leben. Und so häufen sich in beliebiger europäischer Sprache ja auch jene Aufsätze, deren Untertitel etwa „Beobachtungen aus japanischer Sicht", „Ein alternativer Vorschlag vom Standpunkt Japans" oder ähnlich lautet.

Man darf sich aber nicht täuschen. Japan ist in Europa heute im Grunde keine Merkwürdigkeit mehr. Europäer erfahren von Japan nicht mehr ausschließlich durch jene „kulturvergleichenden" Aufsätze oder den „künstlerischen Weg", etwa durch weltbekannte Regisseure wie Kurosawa, Ozu, Mizoguchi, Oshima oder Miyazaki — Takeshi schien während meines Aufenthaltes noch nicht in Frage gekommen zu sein —, Musiker wie Ozawa, Takemitsu, Shirai Mitsuko oder Uchida Mitsuko, Schriftsteller wie Soseki, Mori Ogai, Kawabata, Mishima, Oe, Kato Shuichi, Maruyama oder Yoshimoto Banana, sondern vielmehr schon durch die bloße Anwesenheit der Japaner in Europa, sozusagen als ‚Ding an sich' für sie. Frankfurt, wo japanische Geschäftsleute, vornehmlich Bankiers und deren Familien einen nicht zu übersehenden Teil der Bevölkerung ausmachen, bildet darin keine Ausnahme. Und schließlich kennen Frankfurter Rechtshistoriker schon nicht wenige und dazu (ausgerechnet!) so charakterstarke japanische Rechtshistoriker, die sich je auf eigene Weise mit der europäischen Kultur auseinandergesetzt und dort Forschungsaufendhalt genommen haben: Auszugsweise seien genannt: Kawakami Rinitsu (Kyoto Univ.), Katsuta Aritsune(Surugadai Univ.), Sasaki Yuji (Nihon Univ.), Noda Ryuichi (Fukuoka Univ.), Ebihara Akiko(Tokyo Univ.), Wani Akira(Tokyo Univ.), Murakami Jun'ichi (Toin Univ.), die dort promovierte Matsumoto Naoko(Hokkaido Univ.) und schließlich ich selbst.

Und umgekehr: Die Auseinandersetzung mit der europäischen Kultur hat sich einen festen Bestandteil der japanischen Tradition etabliert. Das kann man doch wohl nicht leugnen. Ob man sich dessen immer bewußt ist, mag dahin gestellt bleiben. Jedenfalls war ich selber seit meiner Kindheit von Europa fasziniert. Mein Interesse für Europa war ziemlich oberflächlich. Savigny war einfach interessanter als Wagatsuma, wie wichtig dieser auch gewesen sein mag. Dieses oberflächliche Interesse für Europa war auch während meines Aufenthaltes nie ganz gewichen. Nur war es damals die Zeit, da sich nach dem Zusammenbruch des Kommunismus in Osteuropa eine konservative Europa-Ideologie verbreitete, die mir merkwürdigerweise zuwider war. Ich war also genötigt, mein immer noch oberflächlich zu nennendes Interesse für Europa etwas zu präzisieren. In diesem Bewußtsein verfaßte ich auch den Essay „A und B" (in: Rechtshistorisches Journal, 14. Bd.). Natsume Soseki hat einmal das Verhältnis zwischen Japan und dem Westen als Problem begriffen. Aber die diesem Problembewußtsein zugrundeliegende Vorstellung einer Gegenüberstellung Japans mit dem Abendland schien mir nicht präzise genug zu sein. Eine Alternative hatte ich jedoch nicht.

Auch ohne solche Alternativen konnte ich mich aber nunmehr überzeugt darauf konzentrieren, die Besitzlehre Savignys, das Thema meiner Dissertation, eingehend zu analysieren. Noch immer war meine Sprachfähigkeit äußerst dürftig. Diese stotternde Aussprache wird bis zum Tode unüberwunden bleiben. Dieses Ungeschick wird sich auch in jeder meiner Beschäftigungen mit der europäischen Rechtsgeschichte vielfach widerspiegeln, und deren Ergebnisse werden mit den Leistungen europäischer Gelehrter stets etwas verlegene Dissonanzen erzeugen. Mit all' dem war ich nun einverstanden. — — — Auf die einst begehrte Identifizierung mit Europa habe ich seitdem Schritt für Schritt verzichtet; meine Tätigkeit in Deutschland, die anfänglich noch auf der Kategorie der Identität beharrt hatte, verwandelte sich nun langsam, aber entschlossen in die analytisch angelegte Auseinandersetzung mit der europäischen Moderne.

Auch nach dem Ende meines Aufenthaltes besteht diese Haltung unverändert fort. Das hat auch einen praktischen Grund; meine Dissertation hatte während meines Aufenthaltes noch nicht

abgeschlossen werden können. Erst in Tokio und seit 1997 in Osaka, wo ich nun als „unpromovierter Professor“ (Dieter Simon) tätig bin, war sie fortgetrieben worden und im Sommer 1998 weitgehend abgeschlossen. Vor mir stehen allerdings noch etliche Prüfungen in Frankfurt, um ein promovierter Professor zu werden.
Mit dieser Promotionsschrift steht die analytische Auseinandersetzung mit der europäischen Moderne ohnehin erst am Anfang. Jener Alptraum, den ich in Frankfurt geträumt hatte, ist in aller Schärfe heute noch leiblich gegenwärtig. Er ist unvergeßlich, denn er setzt doch mein Fasziniertsein von der europäischen Moderne voraus. Jene analytische Auseinandersetzung muß also fortgesetzt werden. Und sie erzeugt immer nur Dissonanz.

[*Original Text in German, June 1999*]

Ever Only Dissonance: On My Research Stay in Frankfurt

Do my experiences in Germany between 1994 and 1996 already belong to the past? Do I already have to look *back* on that time? Is it possible?

How much pleased I was when Professor Murakami Jun'ichi offered me the possibility to study at the Max Planck Institute for European legal history! I was a doctoral candidate who had just finished his master's thesis on the methodology of Savigny and yet wanted to forget about it. Germany was no longer regarded as a paradise for law studies. In some of the lectures I had been taking, the 'German "Begriffsjurisprudenz" (analytic jurisprudence) of the 19th century' had even been used as *the* pejorative. On the other hand, my studies on Savigny went on, and in that respect a stay in Germany would certainly be beneficial. But this was not the real reason of my joy. The opportunity to study abroad seemed to me to realize the fascinating idea of "departure". A jump to Germany could liberate me from all the circumstances of my life in Japan.

I was in Germany. At the beginning my efforts were meant to expel everything that was Japanese from my mind. I didn't want to meet Japanese people on the street. Even the Japanese language horrified me, for it seemed to be fixing my ties to Japan. "The idea of departure", I said to myself, "will certainly become soiled if anything Japanese creeps into my being." Even monologues had to be controlled, and, consequently, they had to be done in German. There was certainly some fear of loosing my identity. "But", I told myself, in German, of course, "this is just a miserable instinct of self–preservation that one has to destroy".

Every superficial idealistic attempt, however, is destined to fail. In the grotesque dreams I had in Frankfurt, the Japanese language rushed at me again and again. In them I met not only my Japanese friends, but also my German supervisors Professors Stolleis and Rückert, and my German friends Gerhard, Karl, Rainer, Martha, Thomas, Milos and many others who would all speak to me in excellent Japanese!

This much became clear: my childish effort to become a perfect European didn't work in the long run. I didn't however feel compelled in making this attempt. It was actually by my own will. After all I was in Germany and thus surrounded by Europeans. Nevertheless my practical ability to speak German was meager and for lack of talent it developed only slowly. This was really a miserable fact, which I willingly accept. When the discussion on scientific topics became vivid, I had no chance to intervene without speaking faster myself so as to take part. In those moments my pronunciation became embarrassingly Japanese, my grammar incorrect and incomprehensible, and the extent to which I used the word "well" made me feel ashamed. Sometimes it was just due to these clumsy interventions that the discussion lost suddenly all its vivacity.

Nevertheless, these experiences should not be interpreted to mean I had missed any friendly communications with Europeans. Again it was a bit more complicated. To have a pleasant talk with them was not that difficult. For example, the average European intellectual is pleased when Japanese talk about Japanese peculiarities. That could be why many of "us Japanese" have given lectures on Japanese law. But one has to be cautious. One must not insist more than is considered "equitable" on Japanese particularities. The comfortable atmosphere would soon be spoiled. If one adds a slight critical tinge against Japan, all the better. One is soon appreciated as an intelligent and smart Japanese, fit for high–class society. Until nowadays this remained the typical image of a Japanese intellectual. A bit Japanese, but not totally. Slightly critical of eurocentrism, but not totally. Therefore a bit European, that's chic. This is the iron rule for comfortable life as a cultivated Japanese in Europe. As a consequence, in any given European language those essays heap up that have subtitles like "An observation from a Japanese point of view" and "An alternative proposal from Japan".

Nevertheless, one must not let oneself be deceived. Japan is no longer a curiosity in Europe. Europeans know about Japan not only culturally through the world renown films of Kurosawa, Ozu, Mizoguchi, Oshima or Miyazaki (Takeshi was not yet in sight!), or through musicians like Ozawa, Takemitsu, Shirai Mitsuko and Uchida Mitsuko, or through authors like Soseki, Mori Ogai, Kawabata, Mishima, Oe, Kato Shuichi, Maruyama or Yoshimoto Banana. Europeans also get to know about Japan by the mere presence of Japanese in Europe. Frankfurt, where many Japanese businessmen live together with their families, is no exemption. Furthermore, Frankfurt's scholars on legal history know several Japanese scholars with strong character, who have all dealt with European culture in their own special way and have studied there. In extracts I would like to mention Kawakami Rinitsu (Kyoto Univ.), Katsuta Aritsune (Surugadai Univ.), Sasaki Yuji (Nihon Univ.), Noda Ryuichi (Fukuoka Univ.), Ebihara Akio (Tokyo Univ.), Wani Akira (Tokyo Univ.), Murakami Jun'ichi (Toin Univ.) and Matsumoto Naoko (Hokkaido Univ.).

On the contrary, studies on European culture have established one of the important components of Japanese tradition, no matter whether or not one is always conscious of this. Thus Europe had fascinated me since I was a child. My interest was nevertheless superficial. Savigny was just more interesting than Wagatsuma, no matter how important the latter may have been. This superficial interest never ebbed totally during my whole stay. It was just at this time that after the collapse of the communist world in Eastern Europe a conservative "Europe-ideology" began to spread out, which was, strangely enough, not very pleasant to me. So I found myself compelled to hone my interest for Europe. It was in the same state of mind that I wrote my essay "A and B" (in: Rechtshistorisches Journal, 14. Bd.). Natsume Soseki once grasped the relationship between Japan and the western powers as a problem. But for me the underlying idea of a confrontation between Japan and the Occident seemed not precise enough. Yet, I had no alternative in sight.

But even without such an alternative, I could now concentrate my energies on Savigny's theory of possession which was the topic of my dissertation. My ability to speak German was still inadequate and my stuttering pronunciation will also in the future never be totally overcome. This will in turn be reflected in my research on European legal history and call forth some kind of dissonance with the achievements of the European learned. Finally I agreed to all this. Step by step I even renounced the once so easily desired identification with Europe. My intellectual activity, which at the beginning persisted on the category of identification, slowly but resolutely changed to analytic examinations of European modernity.

Even after the end of my stay this attitude remained unchanged. There was also a practical reason for this. I hadn't been able to finish my doctoral on Savigny. First in Tokyo, since 1997 in Osaka, where I now work as an "non-doctored professor" (Dieter Simon), I continued and finally

accomplished it largely in summer 1998. Nevertheless, there are still some exams waiting for me in Frankfurt to become a "doctored professor".

Anyway, with this dissertation my analytic examinations of European modernity had only just begun. The nightmare that I dreamed in Frankfurt is still physically present with smart clarity. It is unforgettable , for it is proceeded by my fascination with European modernity. Those examinations must go on. And they produce ever only dissonance.

[*Translated from the German Original by Thomas Krohe*]

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100th Commemorative Comparative Law and Politics Forum

Date: 6 July 1999
Place: Sanjô Kaikan Conference Room, The University of Tokyo
Theme: Legal Education and Legal Training Systems in Brazil and Japan
Presenters: Professor Ivette Senise Ferreira, Dean, Faculty of Law, The University of São Paulo
Professor Itô Makoto, Faculty of Law, The University of Tokyo
Associate Professor Araki Tkashi, Faculty of Law, The University of Tokyo
Moderator: Professor Kashiwagi Noboru, Faculty of Law, The University of Tokyo
Professor Masato Ninomiya, Faculty of Law, The University of São Paulo
Interpreter: Professor Masato Ninomiya, Faculty of Law, The University of São Paulo

<Report>
In commemoration the ICCLP's 100th Comparative Law and Politics Forum, we were joined by a group of twenty scholars and practitioners from Brazil, including Professor Ferreira, (Dean, Faculty of Law) and Professor Ninomiya from São Paulo University, to discuss the issues of legal education and legal training. After greetings from Professor Kashiwagi (The University of Tokyo), presentations were given by Professor Ferreira, Associate Professor Araki and Professor Itô with interpretation provided by Professor Ninomiya.

1. Professor Ferreira
After congratulating the University of Tokyo and the ICCLP on the 100th Commemorative Comparative Law and Politics Forum, Professor Ferreira spoke about the traditional law school curriculum of Sao Paulo University.

As the activities of its many famous graduates suggest, the Faculty of Law at Sao Paulo University provides excellent opportunities to its graduates for social improvement. As a result, every year the number of applicants increases. This year there were over 2000 applicants for the available 450 places.

The Law degree consists of a five-year program. To graduate from the undergraduate program, students must attain a specified amount of credit in compulsory and elective subjects. The year is divided into two semesters. After completing compulsory subjects for the first eight semesters, in their last two semesters students aim to acquire more specialist knowledge by choosing one subject from the following elective subjects: Public Law, Labor Law, Criminal Law, Private Law, Economic Law (Corporate Law).

After graduating, many students enter the legal profession, becoming lawyers, public servants or prosecutors and so on, after passing difficult selection examinations. In preparation for these selection examinations, students undertake practical training at Sao Paulo University. In other to put into practice the knowledge acquired at the university, through the Legal Practice Center's program students also have the opportunity to participate in intern programs at one of many

participating firms. In addition, at the Professorial Meeting it was decided that as of next year, students will be required to write a graduation thesis.

After graduating from the undergraduate course, students may continue on to further study as a postgraduate. The Law Faculty at Sao Paulo University has both a Masters and Ph.D. program, each requiring candidates to pass a selection examination.

The Law Faculty's computerized library contains over 300,000 volumes. The University enjoys many cultural and scholarly exchanges with other universities. It has been participating in scholarly exchanges with Keiô University for twenty years.

Finally, in addition to expressing the belief that "knowledge has no borders", Professor Ferreira expressed a desire to use her experiences from this visit to Tokyo to help nurture quality students in a global environment where it is increasingly necessary to improve mutual understanding.

2. Associate Professor Araki
As the person responsible for curriculum in the Law Faculty at the University of Tokyo, Professor Araki's presentation focused on legal curriculum in Japanese law schools.

Legal education in Japan at university level consists of a four-year undergraduate course. In addition to this, for those students who pass the bar examination there is a two-year course at the Legal Institute, a body set up by the Supreme Court.

The important thing to realize about the relationship between the legal curriculum and legal training in Japan is that only a small number of students who graduate from law school actually go on to pass the bar examination and become legal practitioners such as judges, prosecutors and lawyers. From a statistical point of view, there are 88 law schools in Japan, with 40,000 graduates every year. However, only 500 candidates pass the bar examination. The number is set to rise to 1000 from this year. Even if all of the successful candidates were graduates of law schools, this represents only about 1 to 2.5% of all law school graduates. However, there are also successful candidates who have not graduated from law school, making the percentage of law school graduates who become legal practitioners even smaller.

In relation to the University of Tokyo's Law Faculty, approximately 8.6% of graduates pass the bar examination and go on to the Legal Institute. The majority of other law school graduates are employed in government agencies and become public servants, or they are employed by private enterprise. If we think about this situation, it is clear that until now legal curriculum at university has not necessary been directly concerned with the needs of legal practice. Indeed, the expectation has been that university legal curriculum will produce high quality generalists. However, in more recent times, in line with the increasing difficulty and complexity of legal matters and the globalization of economic activities, there have been demands for universities to also meet practical and specialist legal educational requirements. Since the beginning of the 1990s, the Law Faculty at the University of Tokyo has played a leading role among Japanese universities, with the introduction a practical legal postgraduate course called the 'Postgraduate Specialist Course', designed to meet the needs of specialist legal education.

In addition to the issue of law school curriculums in Japan, it is also necessary to realize that students rarely attend law school lectures; rather, they attend lectures at preparatory schools for the bar examination. Not only does this result in the hollowing out of law school classes, but there is also concern that students merely refine examination techniques and have no experience of considering fundamental legal issues and ideas from a broad perspective.

Furthermore, apart from the increasing complexity of social and economic activities, the contents of traditional legal scholarship have also increased in complexity, and there is concern that students cannot acquire enough knowledge in their two or three years at law school. In universities like the University of Tokyo, the four-year law degree is divided into two years in the liberal arts course and two years in the law school. This means that their legal education is concentrated in the latter two years of their degree. The Postgraduate Specialist Course at the University of Tokyo is aimed in part at rectifying this situation and this is one of the reasons that half of the places in the course are reserved for graduates of the University's Law Faculty.

It is clear that there are limits to the extent that the specialist knowledge necessary to meet the demands of practice can be acquired in only four years of law school lectures. The time has come to open serious debate about issues such as the role of university curriculums and practitioner training in the judicial field, so that we can get on with the job of training specialist legal practitioners.

3. Professor Itô

Professor Itô spoke about the system of training practitioners in Japan and problems with that system.

In Japan there are 88 law schools and every year there are 50,000 graduates. Compared to this, there are 20,000 students studying for the bar examination with only 1000 passing. Based on these statistics, what are the 49,000 students who graduate from law school but who do not become legal practitioners aiming for? Of course, there are those who take the bar examination repeatedly, but the majority of law school graduates do not become legal practitioners.

But what do we mean by legal practitioner in Japan? If we think of legal practice as a qualification for all legal work, it includes judges, lawyers, prosecutors and legal scriveners. There are approximately 32,000 people in Japan today doing specialist legal work who fall within this broad category. However, compared with Europe and America, this is a very small number. The reason that it is so small is that the bar examination is so difficult. Is such a difficult examination really necessary to produce good lawyers? There are many possible replies to this question, but clearly the difficulty of the examination causes many problems.

Why is the bar examination so difficult? One of the answers is that the examination is the most open examination of all the national examinations that test specialist knowledge. Indeed, the bar examination is open to people who have not graduated from university. One explanation pointed to for the use of this system, is that it is possible to evaluate a candidate's capacity as a potential lawyer on the basis of one examination. In other words, becoming a lawyer is not a question of education, but whether or not a candidate can achieve a good score on a one-off examination. However, from my position as a member of the Bar Examiners' Committee, I think that it is difficult to judge a person's capacity as a potential lawyer on the basis of a single examination.

In Japan, we are currently debating reforms to legal practitioner training, including the possibility of introducing an American law school-type system. Due to the lack of time today, I cannot go into the details of the debate too much, but suffice to say that there are criticisms of the current system. Furthermore, we are very conscious of the problems involved in creating a system that is able to appropriately evaluate the quality of potential legal practitioners.

4. Debate

After the conclusion of these presentations, the participants debated the differences between legal

curriculum and training in Brazil and Japan from the perspective of achieving an ideal method of educating legal practitioners. On the basis of this lively debate, it was clear that there are many complex problems involved in legal training that require further consideration and reflection.

[*Kubota Yuka, translated by Stacey Steele*]

[Seminars]

The 75th Comparative Law and Politics Seminar – 13 May 1999
Speaker: Professor Deborah Malamud, University of Michigan, School of Law
Topic: The Current Controversy over Affirmative Action in Education and Employment in the United States
Language: English (with translation in Japanese)
Moderator: Professor Terao Yoshiko

The 76th Comparative Law and Politics Seminar – 21 May 1999
Speaker: Professor Benedict W. Kingsbury, New York University School of Law; ICCLP Visiting Professor
Topic: Globalization, Sovereignty, and Inequality in International Law
Language: English (with summary in Japanese)
Moderator: Professor Onuma Yasuaki

The 77th Comparative Law and Politics Seminar – 10 June 1999
Speakers: Mr. William A. Carmell, Esq., Winston & Strawn
Mr. Paul Igasaki, Vice Chairman Equal Employment Opportunity Commission
Topics: Sexual Harassment in the Workplace: Its Prevention and Resolution
Language: English
Moderator: Professor Sugeno Kazuo

The 78th Comparative Law and Politics Seminar – 23 June 1999
Speaker: Professor Don C. Price, University of California Davis; ICCLP Visiting Professor
Topic: Chinese Culture and Constitutions: The Legacy of Tradition
Language: English (with summary in Japanese)
Moderator: Professor Ch'en Paul

The 79th Comparative Law and Politics Seminar – 7 July 1999
Speaker: Professor Don C. Price, University of California Davis; ICCLP Visiting Professor
Topic: Chinese Culture and Constitutions: Modern Adaptations
Language: English (with summary in Japanese)
Moderator: Professor Ch'en Paul

[Forums]

The 96th Comparative Law and Politics Forum – 25 May 1999
Speaker: Professor Jack Greenberg, Columbia Law School
Topic: A Counterfactual Story
Language: English (with summary in Japanese)
Moderator: Associate Professor Asaka Kichimoto

The 97th Comparative Law and Politics Forum – 4 June 1999
Speaker: Professor Allan Farnsworth, Columbia Law School
Topic: Recent Trends in American Contract Law: Domestic and International, with Special Reference to Good Faith
Language: English
Moderator: Professor Kashiwagi Noboru

The 98th Comparative Law and Politics Forum – 7 June 1999
Speaker: Associate Professor Stephen Levine, Victoria University of Wellington, School of Political Science and International Relations
Topic: Electoral Reform in New Zealand: Causes and Consequences
Language: English (with translation in Japanese)
Moderator: Associate Professor Asaka Kichimoto

The 99th Comparative Law and Politics Forum – 17 June 1999
Speaker: Professor Ronald Mann, University of Michigan, School of Law
Topic: The Role of the UCC in Facilitating Financing of Licensings
Language: English (with summary in Japanese)
Moderator: Professor Kashiwagi Noboru

The 100th Comparative Law and Politics Forum – 6 July 1999
Speakers: Professor Ivette Senise Ferreira, Dean, Faculty of Law, The University of São Paulo
Professor Ito Makoto, Associate Professor Araki Takashi, Graduate School of Law and Politics, The University of Tokyo
Topic: Legal Education and Professional Training in Brazil and Japan
Language: Portuguese and Japanese (with translation into both languages by Professor Masato Ninomiya)
Moderators: Professor Kashiwagi Noboru
Professor Masato Ninomiya, The University of São Paulo

Reports on Seminars and Forums
[Seminars]

The 75th Comparative Law and Politics Seminar – 13 May 1999

Professor Deborah Malamud

The Current Controversy over Affirmative Action in Education and Employment in the United States

Professor Malamud gave a compelling lecture on the contemporary affirmative action scene in the United States. It is a topic close to home – the University of Michigan Law School is currently defending a lawsuit brought against the use of affirmative action in its admittance procedures. Professor Malamud argued that supporters of affirmative action are being forced to take their opposition's arguments seriously in an effort to defend its use in the United States on a number of fronts.

According to Professor Malamud, the debate over affirmative action is occurring in four interconnected areas: (1) constitutional interpretation in the courts; (2) interpretation and enactment of legislation; (3) initiative processes in States which allow citizens to pursue populist agendas; and (4) internal deliberations in public bodies. In particular, arguments put forward in the courts have a significant impact on the parameters of the debate. This trend can be traced back to the judgement of Justice Powell in the key Supreme Court case, *University of California Regents v Bakke*,438 U.S.265 (1978). Since that case, 'diversity' has become the only real acceptable justification for affirmative action programs. Accordingly, supporters of affirmative action have become prisoners of a narrow rhetoric on the goals and functions of affirmative action.

The institutionalization of the goal of 'diversity' has been reinforced by what Professor Malamud calls 'the American addiction to affirmative action'. Despite the enactment of strong anti-discrimination laws in the 1960s, the United States has failed to strictly enforce the terms of those laws and this has led to a missed opportunity to bring about change at a grassroots level (John Skrentny's *The ironies of affirmative action: politics, culture, and justice in America* (1996) was mentioned in this connection). It is cheaper and easier for government agencies and corporations to superimpose affirmative action programs on the status quo. Thus they avoid the moral and financial responsibility involved in bringing about systematic change which requires a reassessment of values.

The combination of the institutionalization of the goal of diversity and an over-reliance on affirmative action (cf. anti-discrimination laws) has resulted in corporate America taking a strong stance in favor of affirmative action. The argument goes along the following lines: diversity is good for the corporation; affirmative action produces diversity; therefore, affirmative action is a good thing. The problem with putting the argument in favor of affirmative action in these terms is that it limits the scope of the debate. Many supporters of affirmative action believe that it is necessary in order to work social justice in a society in which economic equality is still very much tied to race and gender. The focus on 'diversity' denies affirmative action's role in remedying societal discrimination. However, whilst the courts continue to limit the arguments for affirmative action to diversity, it will be difficult for affirmative action supporters to avoid arguing in terms of the utilitarian vocabulary created by corporate America to support affirmative action.

A widening of the debate beyond diversity could also allow for debate over the advantages of merit criteria selection. What seems to be causing the most controversy in the United States is

affirmative action defined narrowly to mean the use of race/gender/ethnicity as a positive factor in the selection of candidates for scarce positions, such as government contracts or student places. The controversy revolves around the fact that such candidates would not have been chosen had their race/gender/ethnicity not been taken into account and the accusation that this is 'unfair'. Admittedly, the beneficiaries of affirmative action will have lower entrance criteria than those usually required by the employer or institution, however this does not mean that they are unqualified. Many facially neutral merit-based criteria are biased in favor of men and white people and the ability to conform to those criteria should not be held up as a sacrosanct delineation between those who can and cannot. However, courts have not allowed these arguments to be brought in affirmative action cases. Moreover, although there is a mechanism in US law which can be used as a vehicle to challenge such criteria – namely, the disparate impact cause of action – it has not been forcefully used to challenge merit-based selection criteria.

The elimination of important issues such as societal discrimination and the value of merit-based criteria from the affirmative action debate has sanitized the discussion for popular consumption. Professor Malamud observed in question time that the issue of societal discrimination and merit-based criteria has profound implications for American society's belief in its own pre-eminent position as the world's only true 'meritocracy'. The issue of affirmative action forces Americans to reassess the realities and myths of the 'American dream'. Perhaps American society does have 'class problems' and is not as 'mobile' as it would like us to think it is.

Where to now? It may well be that in the near future American society will have to make some difficult decisions about the necessity and desirability of affirmative action. Recent cases have led to the abolition of race-based affirmative action in Texas and California. These two States are now attempting to achieve diversity through other criteria such as class-based affirmative action. The data thus far suggests that this works for Hispanics but not for Blacks for a variety of reasons. Professor Malamud suggests that the future will be interesting: these States have very diverse populations and politicians that owe loyalty to minority groups. It may be that the issues of social justice and equality that the Supreme Court has previously not allowed to be used in arguments for affirmative action, will become the focus of debate. Indeed, the outcomes which result from having no affirmative action, whether welcome or not, may lead to a healthier and more considered debate about the issue. [*Stacey Steele*]

The 76th Comparative Law and Politics Seminar – 21 May 1999
Professor Benedict W. Kingsbury
Globalization, Sovereignty and Inequality in International Law

One important but not fully articulated set of challenges is increasingly prevalent in intellectual opinion in the United States. Sharp challenges to the traditional conception of the international legal system have arisen in recent years. Professor Kingsbury's presentation attempted to articulate and contest these challenges to the traditional concepts that underpin international law by analyzing the traditional relationship between sovereignty and inequality, exploring the effects of globalization on traditional notions of sovereignty, and presenting alternatives to the traditional sovereignty model in international law.

Sovereignty and Inequality
Professor Kingsbury argued that the conceptual connection between sovereignty and inequality has relieved international lawyers of the necessity to develop a theory of the issue of inequality. Firstly, the idea of sovereign equality has allowed the obvious fact of inequality to be ignored through arguing that all sovereigns are equal. When one considers the International Court of

Justice, for example, the normative commitment to sovereign equality does actually work in bringing about a degree of equality between states, although this is only true up to a point. Secondly, social and economic inequality among citizens of a country is said primarily to be the responsibility of the state and thus beyond the realm of international law. Thirdly, the concept of sovereignty enables us to say that countries have to some extent consented to inequality. For example those non-nuclear countries that have accepted the Nuclear Non-proliferation (NPT) Treaty can be said in a way to have consented to their unequal status.

Although the above formal ideas regarding sovereignty and inequality are heavily built into the structure of international law, Professor Kingsbury, by critically examining Lassa Oppenheim's famous 1905 International Law textbook, that the practice of international law has in many ways masked sovereign inequality. Firstly, sovereign equality in international institutions and regimes has coexisted with a structural inequality. For example, the United Nations Security Council has permanent and non-permanent members; signatories to the NPT Treaty include nuclear and non-nuclear powers. One should even reconsider the question whether or not the old doctrine of the "balance of power" has completely disappeared in international law. Secondly, the method for dealing with racial, religious and cultural diversity has also masked sovereign inequality. In international law, the state has been the standard unit regardless of internal cultural composition. Thirdly, international law has not traditionally been concerned with the internal political regime of the state, although Oppenheim later strongly favoured constitutional over autocratic government. In sum, the sovereignty of all recognized states was accepted while being somewhat contested.

Globalization and Sovereignty

Professor Kingsbury next pointed out the challenges to the system of traditional sovereign equality that have arisen with globalization. Firstly, changes in international rule making have led to a situation that has eroded the sovereignty of some states while privileging the sovereignty of others. There is now more organized inequality through mechanisms such as weighted voting. Similarly, the inclusion of non-state actors and increasing demand for transnational regulation of international transactions has complicated the rule-making process. Secondly, as can be seen with the increasing role of Greenpeace, Amnesty International and other NGOs, transnational civil society has in many cases been out of the control of the weaker states. Thirdly, the historic trend of democratization has increased demands that the state be democratic and in some case that the state take a decentralized, postmodern form as in Canada or the EU.

According to Professor Kingsbury, these challenges of globalization are having a significant impact on the traditional notions of sovereignty, but at the same time the tradition model of international law still exits albeit in a strained form.

Alternatives to the Sovereignty Model

In the United States, however, the above challenges to sovereignty have led to a rethinking of the traditional idea of international law. Professor Kingsbury critically considered two main streams. Firstly, the liberal perspective which sees international law as mirroring domestic politics in that it should be based not on sovereignty, but on the politics of domestic and transnational interest groups. Secondly, the functionalist challenge which is animated by economic rationalist theory and calls for the state to compete with a plurality of private organizations in solving problems in the most efficient way.

Professor Kingbury, however, warned that these alternatives contain the possibility of raising serious problems for weaker states. These problems include a diminishing of the restraint on forcible intervention in weaker states by stronger states; "failed states" that could not function properly could be readily replaced by international institutions, and this would run the risk of

losing a loci of political identity in these states leading to instability; and a redivision of the world into "liberal" and "non-liberal" zones creating an elite system of international membership.

Conclusion
Professor Kingsbury concluded by suggesting that international lawyers need to consider how to accommodate global public policy, an area that has been neglected in the past. He also suggested that theories of the basis of international law needed to be realistic. This may require that a theory that is not the normative best still be accepted. Professor Kingsbury lastly suggested that it might be appropriate to move from a theory of the state as a "pure sovereign", to one which recognizes the state as an "agent" for both its own citizens and the international community and is equally accountable to both.

Questions from the audience included clarification of Professor Kingsbury's definition of the concepts of inequality and sovereignty; doubts regarding conceiving weaker states purely as "law-takers" and non-state actors as "law-makers"; and clarification of the mechanism by which the state acts as "agent".

[*Gregory Ellis*]

The 77th Comparative Law and Politics Seminar – 10 June 1999
Mr. William Carmell, Mr. Paul Igasaki
Sexual Harassment in the Workplace: Its Prevention and Resolution

Mr. William Carmell is a partner at Winston & Strawn, a large U.S. law firm, representing exclusively management in sexual harassment cases. In this seminar, he explained how companies should prevent and resolve sexual harassment, in order to protect themselves.

Sexual harassment is prohibited in the United States as discrimination based on sex according to Title VIII of the Civil Rights Act of 1964. According to the Supreme Court, sexual harassment is divided into two categories; "Quid Pro Quo" sexual harassment, which involves the demand for sexual favors from an employee in exchange for job benefits (raises, promotion and not firing and so on) and "Hostile Environment" sexual harassment, which includes verbal or physical misconduct that creates an unpleasant, hostile or offensive working environment. This categorization is important because the possibility of employer's defense is dramatically different between quid pro quo and hostile environment. If the sexual harassment in question is regarded by the courts as quid pro quo, then the employer would be strictly liable for that while if regarded as hostile environment, there remains some room for a defense. The Supreme Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), established the rule that, on the one hand, in quid pro quo cases the threat (to demote, fire and so forth) is enough and actual economical disadvantage is not necessary to hold an employer strictly liable for damages for sexual harassment, whereas on the other hand in hostile environment cases the employer may be excused if it has fulfilled the following requirements:

- expressed the employers opposition to sexual harassment in writing;
- informed all the employees of the policy, and;
- provided for an internal complaint procedure and resolves disputes as quickly as possible.

A course of decisions which the Supreme Court provided during 1998 basically maintain the case law which was already mentioned above, though there are some small but important changes: a) it was made clear that even if an employee was threatened with disadvantageous treatment even if not carried out in practice, then that conduct can not be regarded as quid pro quo sexual

harassment; b) regarding hostile environment sexual harassment, the Supreme Court made further clear requirements for the employer to be excused. That is not only proving that the employer has behaved decently enough to prevent and correct sexual harassment, but also that the female employee unreasonably failed to take advantage of any preventive or corrective opportunities.

In concluding the lecture, Mr. Carmell emphasized following points with which employer should comply in order to protect himself:

- reviewing employment decisions made by supervisory employee in order to prevent quid pro quo sexual harassment;
- to guarantee confidentiality and prevent retaliation, and;
- utilize alternative dispute resolution, especially mediation.

Mr. Paul Igasaki, vice chairman of Equal Employment Opportunity Commission, spoke about the background of sexual harassment, the activities of the EEOC and the importance of company culture in not tolerating sexual harassment.

Sexual harassment cases began to be brought to court in the 1980s and have increased in number in the 1990s. This is based on changes in the labor market. Sexual harassment stems from the reaction of male employees to the increasing presence of female employees in the workplace especially in formerly male-dominated ones.

After the establishment of case law in 1986, training programs have been introduced in enterprises to prevent sexual harassment, which the EEOC helps with its guidelines.

Procedure in EEOC starts with an investigation and then conciliation follows. In investigating quid pro quo cases, stress is placed on the existence of agreement. Though an investigation is difficult because quid pro quo sexual harassment often occurs behind closed doors, an examination of past records can be helpful. In hostile environment cases investigation is easier than in quid pro quo cases. Attention must be paid also to minor facts which often trigger off hostile environment.

Mr. Igasaki concluded by saying that the cases brought to the EEOC reveal that it is most important to establish a corporate culture in which sexual harassment is never allowed to happen.

[*Okuno Hisashi*]

The 78, 79th Comparative Law and Politics Seminar – 23 June and 7 July 1999

Professor Don C. Price

Chinese Culture and Constitutions: The Legacy of Tradition

Chinese Culture and Constitutions: Modern Adaptations

Professor Price's lectures advanced the following arguments.

1.The Legacy of Tradition

Various explanations have been sought for China's failure to establish an effective constitutional government in the 20th century. Some western scholars have attempted to identify certain aspects of traditional Chinese culture which obstructed the introduction of such a government. These scholars have argued that while constitutional government was seen to have two purposes -firstly the enhancement and mobilisation of national strength, and secondly preventing the abuse of power by rulers-, the Chinese failed in achieving the second purpose by placing too much stress

on the first purpose. This situation, in turn, is attributed to aspects of the legacy of traditional thought in Chinese culture. These include: the traditional assumption that the legitimacy of rule depends on a divine mandate and monarchical virtue, which impairs the grounds for limiting the power of the ruler; and the assumption that human nature is essentially harmonious, which undermines the idea that politics is inherently adversarial, and that political systems must be designed to manage conflict.

Through these two lectures, it is attempted firstly to explore the legacy of tradition itself, and then to examine how these aspects of traditional Chinese thought played a part in the debates concerning the introduction of constitutional government in the late Qing - early Republican period.

Chinese traditional thought had its own internal tensions and contradictions concerned with the institutional order of the state. Here, it is possible to identify two underlying currents which ran in opposition to one another. These are what can broadly be called the Confucian foundations and the legalist alternative respectively. The first current involved the notion that the Emperor ruled by divine right ——the Mandate of Heaven天命—linked to the virtue of the ruler, and that his task should be to realise and to preside over an ideal harmony between the ruler, the Confucian elite, the people, and the natural world. The second current, on the other hand, took the view that conflict within society and between the government and the people was inevitable, and that the ruler should maintain order by coercive power. A strict system of rewards and punishments was to be codified in written law, and through such an organisation, the goals of power and security would be achieved even if the government were staffed with self-interested officials.

Although the legalist school of thought was permanently discredited in traditional China through the establishment of the Confucian orthodoxy, the imperial institutions which provided the framework for the rule of successive dynasties did incorporate what can be called crypto-legalistic measures for the pragmatic management of government, partly to guard against inevitable corruption in the bureaucracy.

With such tensions within traditional Chinese thought and practice, it seems over-simplistic only to emphasise the aspects of tradition which impeded the introduction of an effective constitutional government. In the late Qing, faced with a declining dynasty and western powers with non-despotic systems many intellectuals thought that the crypto-legalistic aspects of the Qing system provided the main impediment to national strength, and that the decentralisation of power through constitutional government would lead to the realisation of an ideal harmony. Another aspect of the crypto-legalistic strain, namely that which saw the importance of institutional checks on the exercise of power, was also to be a significant aspect of constitutional government. Here, the legacy of tradition did not work in a way entirely adverse to the introduction of a constitutional government.

2.Modern Adaptations

After China's encounter with the modern (western) world, late Qing intellectuals acquired the notion that the Emperor was no more than a ruler of one of many states, and not necessarily the mediator between mankind and Heaven. While this dismissal of the idea of the Mandate of Heaven led certain revolutionaries to advocate the abolition of the monarchy itself, it also enabled some intellectuals to think in terms of institutional checks on the Emperor's power. Such changes in attitude toward the emperor provided an important precondition to the discussions on the introduction of a constitutional government.

One important aspect of these discussions was that in conjunction with the late Qing historical context involving an unpopular monarchy and an alienation of the confucian political elite, the ruling power and the interests of the people were seen to be subject to severe conflict. Consequently, the elite tried to design a political system which could manage such conflict. The dilemma here was this. While it was necessary to give certain power to the representatives of the people which could check and control the executive power; vesting them with too much power could lead to a paralysis of government. This, in turn, could pose a serious threat to national strength.

However, the English responsible cabinet system, especially as expounded by Zhang Shizhao 章士釗, was seen to provide a solution for the above dilemma. According to Zhang, the responsibility of the cabinet to Parliament, and the selection of the cabinet from the majority party, would ensure a harmony between the representative organs and the executive power. Combined with the strong leadership nurtured through a two-party system, this would achieve the necessary combination of a strong government and accountability to the people.

In the complex political situation of the late Qing and the early Republic, different models for constitutional government were proposed by different camps. However, a certain consensus was formed among constitutional reformers of the period, largely in accordance with such views as proposed by Zhang Shizhao. The situation concerning the formation of such a consensus ——which involved much interaction between traditional thought and newly introduced ideas——had the following four characteristics. Firstly, the elite did not find it difficult to see the Confucian ideal of paternalistic harmony as an unworkable ideal, and to abandon it accordingly. Second, the British style responsible cabinet system was endorsed through the perception that it would produce national strength, a concept not alien to traditional Chinese thinking. Thirdly, the system had an elitist aspect, which could be interpreted in line with earlier criticisms toward dynastic governments which called for the increase in the Confucian elite's role. Finally, the justification of this system lay not in an abstract theory of human or political rights, but in the successful example of England. It seemed that such a system would provide a new basis of legitimacy for government as an instrument for serving the collective interests of the nation. In part, it would do so by providing moral leadership while at the same time submitting to the judgement of the elite electorate. In these respects, the functions of the rulers were to be preserved, and the functions of the Confucian elites were to be restored, albeit in a different form. Such a system would meet the needs of the present without violating important standards of the past.

Thus, it seems possible to argue that in the short term at least, aspects of traditional Chinese thinking worked in a way not unfavourable to the introduction of a rather liberal constitutional order which was highly successful and widely admired in the West.

Discussions followed the two lectures with questions and comments from Professor Eto, formerly of the International Relations department in Komaba, Professor Hamashita of the Institute of Oriental Culture, as well as Professor Onuma and Professor Watanabe of this faculty.

[*Matsubara Kentaro*]

[Forums]

The 96th Comparative Law and Politics Forum – 25 May 1999

Professor Jack Greenberg

A Counterfactual Story

Professor Greenberg of Columbia University School of Law has made an enormous contribution to the advancement of human rights in the United States. He is known not only as a scholar of human rights, but also as leading counsel for the NAACP (National Association for the Advancement of Colored People) Legal Defense and Educational Fund's in civil rights' cases. He represented one of the plaintiffs in the landmark United States Supreme Court case, *Brown v Board of Education*, 347 U.S.483 (1954).

Professor Greenberg's presentation was based on a lecture that he gave at the Supreme Court Historical Society Annual Meeting this year. He explored what might have happened if the Brown case had been decided differently and revisited the significance of the judgment. His lecture will be published in the Journal of Supreme Court History, 1999. The following is a summary of his presentation at the ICCLP Forum

Is the question, "what would have happened if a judgment had been decided differently" a legitimate question for legal inquiry? Dissenting opinions often discuss the possible consequences of judgments. In his dissenting opinion in *Plessy v Ferguson*, 163 U.S.537 (1896) the case which established the "separate but equal" principle, for example, Justice John Marshall Harlan predicted that the judgment would label minorities as being inferior. The Supreme Court had the opportunity to reconsider its decision in *Plessy* and its judgment actually overruled that case, holding that racial segregation in public schools was unconstitutional. The initial arguments in the *Brown* case were put before the United States Supreme Court in 1952, additional arguments were presented in 1953, and the judgment was handed down in 1954. What would have happened had Pressy not been overruled in 1953, only on the basis of the arguments presented in 1952? Professor Greenberg posited a number of consequences.

Lawyers for plaintiffs on remand would have had to prove that in the particular school districts in question, the quality of physical facilities and teachers in black schools compared to white schools was unequal. Had the cases been decided on this basis, even if the plaintiffs had been able to overcome the defendants' delay tactics and numerous procedural obstacles to win the case, the legislatures of defendant states would not have cooperated to provide budget funds for improving the facilities of black schools.

Moreover, in order to enforce such judgments nationwide, it would have been necessary to bring lawsuits across America and to prove inequality between black schools and white schools in case after case. However at that time, the federal government did not have the legal authority to file a civil rights suit; there were very few black lawyers in the Southern states; and there were very few white lawyers willing to try cases because they would have been ostracized if they had represented black plaintiffs.

Even civil rights' demonstrations led by Martin Luther King, Jr. would have been weakened. This might have led to the perpetuation of violent movements for black nationalism, such as Black Panther and Malcolm X, rather than the massive support given to the nonviolent movement for integration led by King.

Furthermore, the crucial *Montgomery Bus Boycott* case, was decided in favor of blacks on the basis of the *Brown* decision. But if the Brown decision had been different, the case would have had to be settled through some kind of convoluted political compromise.

The *Civil Rights Acts* of 1964 and 1965, if ever enacted, would have been weaker.

Internationally, the Soviet Union would have supported radical black movements financially and the United States would have been destabilized. European countries would have resisted independence movements in former colonies and more third world countries would have supported Gamal Abdel Nasser of Egypt, because the United States would have been perceived to have a colony inside its own borders, and thus would have been less persuasive.

In 1973, realizing serious consequences of the 1953 Brown judgement, the United States Supreme Court may have finally found that racial segregation in public schools was unconstitutional despite improvements to black schools. However, similar to the actual situation after *Brown* in 1954, the Southern states and the Congress would have resisted implementing the judgment.

Many commentators argue that the result of the *Brown* judgment was good but the reasoning was bad. Is it legitimate to consider the *result* when we evaluate the significance of a case? Yes! Precedents and the original meaning of the Constitution are usually taken into account in legal reasoning. When those factors are not decisive and the arguments of both the plaintiff and defendant can be supported equally however, moral and practical considerations may tip the balance in favor of one party or the other.

In conclusion I would like to note the importance of Professor Greenberg's presentation. Recently, revisionists have questioned whether the *Brown* judgment was really epoch-making or not. They suggest that its importance has been overrated in the light of the long period of time that it took to implement the desegregation supported by the judgment. However, by posing the question of what might have happened had the judgment not been made the way it was, Professor Greenberg reemphasized the symbolic value of the unanimous decision in the *Brown* case and the role it played in delivering a moral message to society.

[*Asaka Kichimoto*]

The 97th Comparative Law and Politics Forum – 4 June 1999

Professor Allan Farnsworth

Recent Trends in American Contract Law: Domestic and International, with Special Reference to Good Faith

Professor Farnsworth began his lecture with a brief overview of the current state of contract law: Restatement (Second) of Contracts, the Uniform Commercial Code, the Vienna Convention and, the UNIDROIT Principles of Contracts.

Professor Farnsworth reminded the audience that the most important source of contract law in the United States is the contract itself, and that the rules themselves are seen as a default set of rules; they only apply if they have not been explicitly altered by the contract. It was pointed out that contracts tend to be longer in the United States than in Japan. Several explanations were provided. Professor Uchida explicated that whilst Japan is a homogenous country where people have a clearer understanding of one another, the United States being a country of immigrants is not so homogenous and therefore lacks mutual understanding in contractual matters. Professor Farnsworth posited the idea that as the United States has 50 states, each with a different law, one wants to make sure that one has the same rule for every state, so one provides for these issues in

the contract. Furthermore, he noted that in the United States there are a large number of big law firms with many lawyers and computers, which allows them to minimalise contractual risks by calling up previous contracts and put all those clauses into the new contract. Moreover, he stated that the Socratic method used for teaching students in law schools in the United States makes American lawyers nervous and so they tend to err on the side of caution and include everything in a contract.

The professor then focused on the first of the two major parts of his lecture: that of pre-contractual liability. Firstly it was noted that there are several instances in which there is pre-contractual liability: if during the negotiations stage one party gives something of benefit to the other party there could be restitution in the case of a failure to contract; secondly, misrepresentation; thirdly where a promise is made, that promise is relied upon and it is later broken and; finally, where there is an agreement to negotiate in good faith. If one wants the other party to negotiate in good faith then one has to make an agreement to do so. If an agreement to negotiate in good faith is not made then one must look to the first three, in the absence of one of those there is, generally, no pre-contractual liability.

Professor Farnsworth demonstrated this issue with the example of an arbitration between an American firm and a Saudi Arabian corporation. In this case, the American corporation was ordered by the arbitration court to negotiate in good faith. Then, later, the Saudi corporation again filed a complaint at the arbitration court that it would seek damages as the American corporation had failed to negotiate in good faith. The problem here is whether the Saudi corporation is entitled to compensation for lost profits or damages for reliance. Whilst the case is ongoing he concluded at the end of this example that if one wants to have pre-contractual liability one has to make an agreement to that effect.

The second point was an investigation of how binding a contract is once it has been made. First of all it was investigated as to why in theory a mere exchange of promises should be binding. The most well accepted reasoning is that of negative reliance. Negative reliance means that the proof of reliance comes from the fact that the party to the contract has not made an agreement with someone else for the same purpose, in reliance with the first promise. While it is hard to prove negative reliance, it is assumed when promises are exchanged that there is reliance and so one is not asked to prove it. Secondly, what happens if one party to the contract does not perform? Using an example from the famous Legal Consciousness of Japanese (Iwanami, 1967) of Late Professor Takeyoshi Kawashima, we suppose that Mrs. A went to the country side during war time to buy potatoes which a farmer had promised to sell. Further we suppose that there was no other potatoes, and further suppose that there are no transaction costs. Mrs. A offered 1000 Yen. Mrs. B went to the same farmer and offered 1200 Yen. According to the economists, the farmer should sell the potatoes to Mrs. B as she can realize more value than Mrs. A. The farmer may have to pay damages to Mrs.A of 1000 Yen. The farmer will be left with 200 Yen. This concept is known as efficient breach. Under the United Nations Convention on Contracts for the Sale of Goods, Mrs. A will be granted specific performance as we supposed that there were no other potatoes. The potatoes will be delivered to Mrs.A. This does not make much difference, as under the hypothesis that there are no transaction costs, Mrs. B will go to Mrs.A and will purchase the potatoes for 1200 Yen. The only difference between the two models is who gets 200 Yen. Economists are not concerned with who gets the 200 Yen as the net result will be the same, Mrs. B will end up with the potatoes.

Finally, Professor Farnsworth discussed the obligation to negotiate in good faith after the formation of a contract. The Restatement (Second) of Contracts sets forth the duty of good faith as a basic rule to be applied to every contract and this has been followed by the Uniform Commercial

Code. However, it does not mean that a party to a contract whose obligation becomes a little difficult as circumstances may have changed, may request the other party to sit at table and the other party must make changes to the contract in favor of the opposite party. The case of *Market Street Associates*, 941 F2d 588 (7th Cir. 1991) which was written by Judge Richard Posner, a famous law and economist of the Chicago School, was then discussed. A lessee asked the lessor to help finance improvements to a shop in a shopping center. Under the contract, if the lessor refused to help, the lessee had an option to purchase the shop. The option price was below the market value. Hoping the lessor forgot this clause and without any actual intention to improve the shop, the lessee asked the lessor to help finance the improvements. The lessor refused to help. The lessee then exercised the option. Judge Posner said that to use the superior knowledge of market is one thing, but it is quite another to make deliberate use of the oversight of the contractual terms by other party.

[*Richard Small*]

The 98th Comparative Law and Politics Forum – 7 June 1999
Associate Professor Stephen Levine
Electoral Reform in New Zealand

In 1996, the first general election under the supplementary member system in Japan and the first general election under the mixed member proportional (MMP) system in New Zealand were held. Professor Levine, who is currently a visiting professor at Kobe Gakuin University whilst on sabbatical leave from Victoria University of Wellington, explained in this Forum why and how the new electoral system was adopted in New Zealand; what the new system is; what the result of the general election in 1996 was; and what happened after the election. The summary of his lecture is as follows.

New Zealand has an unicameral parliament, and under the "first-past-the-post" electoral system, two dominant parties ——the National Party and the Labor Party—— had controlled the government in turn. However, citizens' anger against broken promises and taxation policies fueled criticism against both parties and eventually led to the changes in electoral system, something in which citizens are usually supposed not to be interested. Although New Zealand has no written constitution, its Electoral Act is entrenched so as not to be amendable solely by a majority vote in Parliament. Therefore, the electoral system was changed after a Royal Commission report, an advisory referendum, and a binding referendum.

The two-vote MMP system in New Zealand, which is similar to the German system, is different from the supplementary member system in Japan in that only the party votes are counted for the allocation of seats in the whole house to parties under the MMP. To be allocated one or more seats, a party has to win five percent or more of the party votes or get one or more electorate candidates elected. The electorate boundaries are defined according to population, but the indigenous Maori people may choose to vote in Maori districts. Dual candidacy in both an electorate district and a party list is allowed.

After the general election in 1996, neither the National Party nor the Labour Party won a majority of the seats, and smaller parties —— the New Zealand First Party and the Alliance Party—— increased their share of the vote. At the same time, more women, Maori, and Pacific islanders, and even an Asian, who would have found it difficult to be elected under the first-past-the-post system, were elected because parties put them high on their lists.

Eventually, the National Party, the New Zealand First Party and other parties formed a majority

coalition government. However, the credibility of the new electoral system among citizens has decreased, because several representatives, including those who were elected from party lists, defected from their parties; the New Zealand First split up and the coalition became a minority government; and some of new representatives who were elected from party lists were deemed to be incompetent. The Electoral Act provides that a committee in parliament to review the new electoral system be appointed in 2000 and that it submit a report by 2002. It is plausible that another referendum will take place in 2002 to change the electoral system again.

The above is the summary of the address by Professor Levine. The new supplementary member system in Japan has been criticized and there are some arguments for changing the current electoral system in Japan. However, it is remarkable that in New Zealand the dual candidacy, which has been much criticized in Japan, does not seem to be a serious defect of the system and rather the proportional representation party list system has had the effect of increasing the number of woman and minority representatives elected. It will be interesting to compare the experiment of electoral reform in Japan with that in New Zealand, where there is a different political and constitutional environment in which voter turnout at general election usually exceeds eighty percent.

[*Asaka Kichimoto*]

The 99th Comparative Law and Politics Forum – 17 June 1999
Professor Ronald Mann
The Role of the UCC in Facilitating Financing of Licensings

The driving force behind Professor Mann's scholarship is proving that 'the law does not matter'. His talk focused on part of his latest research project that puts this hypothesis to the test in the field of software leasing and development financing. He began by outlining the accepted rationale that banks seek a collateral security interest in lending transactions to protect their interest if the borrower defaults on the loan. Questioning the validity of this assumption in the context of software leasing and development financing, Professor Mann sought to find out how the economy works to provide money to people who want to use or develop software.

Lenders in this industry find it difficult to protect their interests according to the traditional method of obtaining a collateral security interest in software. The lender does not plan to take possession of the software if the borrower defaults; the usefulness and thus value of software depreciates very quickly and the lender is usually not in a position to maintain the software even if he/she were to take possession. Furthermore, the legal regime in the United States that provides for the filing of a security interest in intellectual property is cumbersome, expensive and confusing. Despite these obstacles, financing software leasing and development is a huge and growing industry in the United States, suggesting that parties have found a way around these difficulties – and, it has nothing to do with the law.

Software financing is dominated by two types of transactions. First, transactions providing money for software development. This is a high risk, but lucrative business in the United States where 'angel' equity investors (the good guys) or venture capitalists (the bad guys) provide money to software developers. Banks then loan a percentage of the investment to the software developer. The presence of an angel or venture capitalist provides security for the banks in a way that is far removed from taking a traditional collateral interest, but generally provides safer returns than average bank loans in the United States. 'Angels' are usually successful software developers who are not concerned about the returns on their equity investment in (struggling) developers. They are prepared to lose their equity interest to the bank if the developer is unsuccessful. However, venture

capitalists are interested in returns and try to pick developers with ideas that will be winners. The bank will be paid if the borrower succeeds in developing a new software product when the company goes public. If the developer does not go public, they may still develop a product that poses a threat to a competitor and the competitor will buy them out. The bank will then be repaid out of the proceeds of the sale. Finally, where the developer is a complete failure, the venture capitalist usually pays off the bank even though there is no legal requirement for them to do so. Venture capitalists do this in order to retain a working relationship with the bank so that they can rely on bank capital for future ventures. The venture capitalist makes his or her money by being good at picking winners, for example they are usually people with an intimate knowledge of the industry, and they generally spread their investments over a number of borrowers.

The second type of transactions are facilitated by financing companies, previously active in equipment leasing, who provide money to people who want to buy software. When a person wants to set up a business, for example, they will usually lease a software package. These transactions cost on average $200,000 with loan repayments every month over a period of perhaps three to four years. If the borrower defaults in this type of transaction, the financier does not have a right to take possession of the software, even if they wanted to, because the software is licensed exclusively to the user, that is, the borrower. The way they obtain security generally, is by obtaining a refreshing code. This effectively enables the financier to turn off the software if the borrower does not pay, because if he/she does not periodically enter the refreshing code, the software will stop working. The result of this method of security taking is that lenders tend to focus on transactions which provide money for mission critical software with a good reputation, for example, well-known airline reservation systems. If the software does not work or it is not critical to the borrower's business, the borrower will not care if the software is turned off and the financier's security will be of little value. The cases where borrowers default on these types of transactions tend to be where the software does not work or the borrower is bankrupt and cannot pay any of its creditors. However, if the borrower can pay anyone, they will usually pay the lessor first, because the software is critical to the continuation of their business. The returns are very high for finance companies facilitating these transactions. They are in fact much more lucrative than the equipment leasing business.

From the perspective of Professor Mann's over-arching theme, the way in which these transactions have evolved suggests that the law does not matter. To a large extent they rely on handshakes, reputations and innovative methods of taking security, such as refreshing codes. However, this does reflect the legal framework within which the industry operates, including the lack of a workable registration system for interests in software. Furthermore, a proposed amendment to the Uniform Commercial Code [Article 2(b)], that would have inserted a clause to cover these types of transactions, was rejected in February 1999, ostensibly due to bad drafting and political machinations. One of the major problems with the draft amendment was that it did not gain the support of lenders.

Lastly, an interesting point was made by Professor Mann in question time in relation to the legal position of lenders to software users and developers in the event that the borrower files for bankruptcy or reorganization. In the case of bankruptcy, lenders will not receive much return on their investment, and this return would probably not be significantly increased by their having taken security. However, in the case of a reorganization, secured creditors are entitled, and sometimes obtain, the full amount of their loan up to the value of the collateral. Unsecured creditors usually received nothing. Under the traditional rationale where lenders protect their investments by taking a collateral security interest, software lenders are not secured. Thus the Bankruptcy Code treats them as inferior to secured creditors, despite the fact that software transactions in reality are designed to sufficiently protect lenders. Professor Mann argues that on

the basis of his research into the real nature of these transactions, it is probably time to reconsider this principle in favor of a more sophisticated approach to classifying creditors and methods of taking security.

[*Stacey Steele*]

Accounts of Research Trip

College Athletics in University Communities in the United State
By Asaka Kichimoto

I had an opportunity to lecture on Japanese law with Professor Mark West at the University of Michigan Law School for two weeks in March 1999. I was able to catch up with professors who had visited our faculty. They treated me very kindly indeed. It was also a wonderful opportunity to be exposed to tough questions from students in the classroom. Aside from the academic side of my stay, I also had high expectations regarding something else during this visit to the United States; namely, the NCAA (National Collegiate Athletic Association) basketball tournament, which had just reached the final rounds.

The University of Michigan has traditionally had both excellent basketball and excellent American football programs, although they had not been national champions in either sport until the football team won the national championship recently. This basketball season was disappointing for Michigan as they failed to even get a slot of the NCAA tournament. Therefore, when I came to the Ann Arbor campus, there was no sign of the usual basketball "March Madness"! Personally, however, I was following the sport news, because Duke University, where I had previously spent two years, had reached the final rounds of the tournament and was expected to win the championship.

In American universities, men's basketball and football games are big events for the whole university community. This is especially the case with Michigan and Duke. Unlike the Ivy League, whose athletic programs are not nationally competitive, the Big Ten Conference which includes Michigan and the Atlantic Coast Conference which includes Duke, are top national sporting tournaments. Furthermore, the campuses of Michigan and Duke are in university towns, not in major cities. Despite a particular year’s poor form of the respective universities sporting teams, law school professors continue to buy season tickets. If they fail to buy this year's tickets, they will lose the right to purchase next year's season tickets and will have to go on a waiting list. On the weekends during the football season from fall to the end of the year, one can see families having picnic lunches in the parking lots around the stadium well before the football games start. The "Michigan Wolverines" and "Duke Blue Devils" are not only the names of the athletic teams but also the symbols of the universities. In this way they are different from the "Todai Warriors" (the American football team of the University of Tokyo) because no one calls students of the University of Tokyo "Warriors". Because college sport events are dealt with in the American media just like high school baseball tournaments in Japan rather than Waseda-Keio baseball games, students and alumni are stimulated to develop an affection for the university. When alumni from Duke got together in Tokyo this year, we of course had the video of the winning basketball game of Duke playing in the background as we reminisced of our time at Duke.

However, this kind of enthusiasm amongst the university community went a little too far this March in Michigan. The basketball team of Michigan State University at East Lansing, which was formerly a national champion led by Magic Johnson, advanced to the semifinal game against the strong favorite Duke in this season's NCAA tournament. Duke led from beginning to end but Michigan State kept fighting back in a thrilling game. When Duke won the game as expected, however, Michigan State students who had watched the game on a big screen on the East Lansing campus got rowdy, setting fire to automobiles and smashing windows of nearby stores. Because

the loss of the game was neither an upset nor one-sided, the disturbance does not seem to be caused by disappointment generated by losing the game itself. Neither does it seem to be caused by a general frustration about the social situation. It seems to be just an outburst of celebration of the end of the sporting season. If that is so, American college students are immature in a different way from Japanese students, and I felt this vandalism ridiculous while I watched the TV news report.

As the final game between Duke and the University of Connecticut was being played, I was over the Pacific flying from Detroit to Tokyo. When I departed from Detroit, I regretted not being able to watch a live broadcast of the game. Upon hearing of Duke's loss on arrival at Tokyo, though, I lost interest in the game, which I had wanted to watch even on video. Now, I only want to see the winning season of Michigan and Duke next year.

[*May 1999*]

A Visit to Iwate University — Reflections of a Blue Sky
by Wada Keiko

The opportunity arose for me to visit Iwate University, and I found myself taking a three hour 535 km trip north to Morioka on the Tohoku Shinkansen. In Tokyo the azaleas had already passed their prime, but in Morioka I was still able to enjoy a chiaroscuro of pinks.

Iwate University was formed in 1949 through the amalgamation of several specialist colleges. One of the colleges of the new institution was the former Morioka Agricultural and Forestry College which dated back to 1902. This was the alma mater of the poet Miyazawa Kenji. He was born in 1896 in the city (then only a town) of Hanamaki, some 30 km south of Morioka. He graduated from the former Morioka Middle School (now Morioka Daiichi High School) and entered the Agricultural and Forestry College as its leading student. In 1996, the 100th anniversary of his birth, there was a “Kenji boom”, when he was featured in newspapers, magazines, documentaries, etc. I recall that the Morioka streetscape became quite a familiar sight during that year. In fact, that streetscape — the pavements, the street trees, the historical site markers, the street signs, etc. — was in many ways crafted in Kenji’s image for the benefit of tourists. Miyazawa Kenji, the poet who passed away at the tender age of 37, was the number one attraction. Surely he could not have imagined his name listed alongside local specialties like *Wanko soba* (buckwheat noodles), *Nanbu senbei* (rice crackers), *Nanbu* ironware and *Reimen* (Korean cold noodles). Despite the neat but precipitous streets lined with their quaint shops, the serene flow of the Shizukuishi, Nakatsu and Kitakami Rivers through the city beneath the clear sky, the presence of Mount Iwate (which Kenji is said to have climbed more than 30 times during his school years), the local dialect which I hardly heard at all during my stay — despite all of these, I felt that Morioka, like many other regional cities in Japan, was facing inwards towards Tokyo and confronting the dilemma of whether or not to change.

Compared to these streets, the campus of Iwate University seemed more at ease with itself, with an academic other-worldly detachment. The locals call it "Gandai". The campus has a unity and

expansiveness unusual for a post-war university. There are several campus structures on the cultural register — the old gatekeeper's lodge, the former formal gate and the main building of the former college as attended by Miyazawa, now a resource center for the Faculty of Agriculture. The feeling of being surrounded by nature is reinforced by the horse tethered beneath a large tree and the signs for the nature reserve with their vibrant hand-written explanations of the flora and fauna to be seen in the botanical garden on campus.

On my first day in Morioka, I interviewed Dr Luis A. Guzman, a research associate at the Department of Applied Chemistry in the Faculty of Engineering, and Mr. Muaffaq Achmad Jani, who is completing Ph.D. work in electronic information engineering. Both Luis and Muaffaq came to Japan in 1992 on Ministry of Education scholarships. After studying Japanese language for six months at Tohoku University, they proceeded to Masters degrees in the Faculty of Engineering at Iwate University. Luis, who is from Quzco, Peru, finished his Masters degree in 1995 and went on to a Ph.D. at Himeji Institute of Technology in Hyogo Prefecture. He returned to Iwate University as a research associate. Muaffaq returned to his home in Surabaya, Indonesia after completing his Masters, and came once again to Japan two years ago.

I wanted to ask them about their experiences as overseas students in a regional city. Luis said that he came to Japan wanting to see with his own eyes why Japanese technology had advanced so quickly, and through living in Japan he wanted to make his own the Japanese culture which made that advancement possible. When he was a child, he saw the film *Godzilla*. However, other information about Japan available to him in Peru was mostly of an earlier era, and so he was somewhat surprised to see so many men in suits when he touched down in Narita. He says it is hard to believe now, but at the time he expected to see people still wearing traditional dress.

Muaffaq was nodding next to him as he said this. He saw *Oshin* and *Doraemon* on television in Indonesia. He knew that Japan was the place to go in terms of studying electronics, and thought that Iwate University, with its emphasis on cooperative research with industry, would suit his objectives. “When I finish my Ph.D. in 2000, I want to return to Indonesia and pass on what I have learnt,” he says.

Luis says that he is prepared to live in Japan or Peru or another country to achieve his career objectives. He says, however, that he likes Morioka very much. He prefers it to Himeji, where he lived for three years and where he found the people very different. Quzco, the ancient capital of the Incas and now a city of one million inhabitants, has an altitude of 3,400 meters. It does not snow there, the air being very dry, so he says the climate was very trying for him at first in Iwate.

The Iwate winters were also tough for Muaffaq. He says that Surabaya, with a population of three million and the second capital after Jakarta, has a minimum temperature of about 28°C. One thing that astonished him when he came to Japan was the system of rubbish collection. He made quite a few mistakes in separating his rubbish at first and wondered at how fastidious the Japanese were… now he has grown used to it.

Both Luis and Muaffaq had trouble with the Japanese language. Luis jokes that he has never found anything harder to learn that *kanji.* It would seem that his scientific mind is better suited to remembering numbers! The Iwate dialect caused them both additional problems in day to day life, leading to a concatenation of frustrating and time-consuming problems. They say that many people helped them — they wouldn’t talk to the foreigners very much, but were genuinely kind. They both now lead an existence where their theses and assignments are written in English, and the rest of their communication is in Japanese.

Through the development of the Internet, they have been able to readily get news from home, as well as obtain data for their research. Both stressed that the Internet and e-mail have become essential tools for the overseas student. Once the conversation turned to computers, they suddenly both spoke with a new intensity.

I heard from Professor Kubota Noriaki, who arranged the interviews for me, that it took 10 years for Luis to graduate from university in Peru. Apparently, working conditions for academics in that country are not good and they are always on strike. This has the very unfortunate consequence that students cannot complete sufficient subjects to be credited towards their degree. Two years from the hostage crisis at the Japanese embassy in Lima, the realities of terrorism and high inflation in Peru through the 1980s and 1990s have become better known in Japan. Of course, Indonesia is not without its troubles either, having only recently moved towards effective democracy. One year after the close of the Suharto era, it was also the anniversary in May of the death of four students at the University of Trisakti at the hands of security forces, an event which triggered the downfall of the regime. These two researchers from politically unstable countries seemed to be saying, "Japanese students and researchers are fortunate just to be able to concentrate on their work in a stable environment".

On the day I spoke to Luis and Muaffaq, the *Iwate Nippô* newspaper ran a feature story about a benefactor from Hanamaki City who had established a school in Peru, where the illiteracy rate is still quite high. This formed a new limb to the exchanges between Iwate and Peru, which had until that point been primarily based on cast iron from Japan and begonia flowers from Peru.

On my second day at Iwate University, I spoke to two postgraduate students from China. Ms Tsi Mei-Jin, from Jilin Province, was studying in the Faculty of Education, while Mr. Yo Ken-ka, from Shanxi Province, was enrolled in regional cultural studies. Ms. Tsi had been at Iwate University for two years. Mr. Yo had transferred to Iwate University in December 1998 after spending a year at Himeji Dokkyô University.

Ms. Tsi came to Japan after experience in China as a primary school teacher and at a trading company. Even when working in China, she felt that her knowledge level was inadequate. Her older sister had studied at the Faculty of Agriculture at Iwate University and this helped her decide to enroll at Iwate University herself. This year she will receive a Rotary scholarship, but last year she worked part-time in a cafeteria. Her life is also made easier this year by having a room at a university dormitory. When I commented that her features were similar to local Tohoku women, she replied that she is often mistaken for a Japanese. Ms Tsi's impression of Japan while living in Morioka is that many of the cultural influences that historically came from China to Japan, like "water flows from one place to another", still remain to this day.

Mr. Yo graduated from the Japanese Department at his university in China. He recounted that when younger he used to think that China was affluent, mainly because there was no information about other countries. However, he changed his mind once information began to filter into the country from about 1978. Attracted by the freedom that he had heard existed in Japan, he majored in Japanese when he entered university in 1984. "Chinese people are too relaxed," he says. "Japanese people are too competitive and are workaholics." At the moment, he works three days a week at a *ramen* shop. On two of those days he is on the late shift, so that he gets home only at 11 pm. On Sundays he has the day shift. He does everything at the shop as required — the washing up, cooking the *ramen*, and working the cash register. The hourly rate is not high, but he continues because he is used to the work and his workmates, he gets a meal, and the owners are kind to him. It seems that it is difficult for male overseas students to find part-time work. Unlike Luis, who also spent time in Himeji, Mr. Yo said that he preferred Himeji to Iwate. In particular, he could not

stand the cold Iwate winters. His home in Taiyuan City is in mountainous country some 500 km south-west of Beijing or six hours by bus. In winter, the buildings are efficiently heated so that it is always warm indoors. He says he was surprised that this was not necessarily the case in Japan.

From the reserved but sincere responses of Ms. Tsi and Mr Yo, I got a clear impression of the precarious financial circumstances commonly experienced by overseas students from Asia. Even so, I sensed that their experience in Morioka was a meaningful one, but certainly very different from that of overseas students in a megalopolis like Tokyo.

The weatherboard structure of the Faculty of Agriculture resource center looked as though it had not long since been painted. In the glass above the entrance way, which looked as if it dated from Kenji's time, I caught a reflection of the blue sky and white clouds. And people spread picnic blankets by the lake in the nature reserve.

[*Translated by Peter Neustupný, May 1999*]

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