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From the Editors

This edition of the *ICCLP Review* includes articles from Professors Jörg Fisch and Sylvie Strudel, both visiting professors at the ICCLP. Professor Fisch spent 6 months at the ICCLP, (and while at times grappling with an unfamiliar computer!), he no doubt takes back pleasant memories of the many sights of Tokyo gained through commuting by bicycle to the Hongo Campus from his apartment in Roppongi. Professor Strudel's brief one month stay was more than compensated for by a frantic schedule that she saw through with a smile! Former ICCLP research scholar Stacey Steel successfully submitted her Masters thesis during her 16 month stay, returning to Australia at the end of February. Her short-article is carried in this edition of the *Review* as one of the many fruits of her research at the Tokyo University Law Faculty.

We were fortunate to be able to carry out an interview with Emeritus Professor of the University of Tokyo, Hoshino Eiichi on the theme "Legal Education and Scholarship". Professor Hoshino kindly lent us a postcard that he had received from the late Professor Wagatsuma Sakae as well as some photographs of his days as a student studying abroad for inclusion in this *Review*. On the day of the interview, we also had the pleasure of having ICCLP Visiting Professor Masato Ninomiya of the University of Sao Paulo, whose participation added much breadth to the discussion. Although the interview spanned several hours with a lunch break in between, Professor Hoshino retained his composure and frankness throughout. It was only when he spoke of his fear of having to be forced to fight on even after the war had finished, his convictions regarding the university as a place of learning, and his love of *gakugeikai,* that the calmness of his tone was momentarily broken.

The essays in this edition by Mr. Lee Seung Ho, visiting research scholar and judge of the Seoul district court, and Ms. Stacey Steel reflect contrasting views of law from the perspectives of legal practice and university education respectively. Mr. Lee returned to South Korea in February, and in March we were joined by Cho Kwi Jang, Judge of the Chungju Branch of Cheongju District Court.

Amidst recent lively debate about reform of legal education and legal training systems, the ICCLP held on December 20, 1999, the 6th Comparative Law and Politics Symposium entitled " Legal Education in Japan from Foreign Perspectives". Presentations were given by Professor Frank Upham of New York University, Professor Masato Ninomiya of the University of Sao Paulo, and Senior Lecturer Veronica Taylor of the University of Melbourne, with Professor Sugeno Kazuo acting as commentator. In addition to a report of this symposium, this edition also carries summaries of presentations given at the 82nd Comparative Law and Politics Seminar on "American Law Schools: Reality and Myth", and the 84th Comparative Law and Politics Seminar on " Law Schools in Australia".

In line with suggestions from ICCLP researchers, this edition of the *ICCLP Review* has been changed to B5 size to facilitate easier storage on library shelves with a spine for quick reference. We have received valuable advice regarding the *ICCLP Review* and the staff at the ICCLP continues to aim enhance the publication in the future. Any opinions or comments would be most welcome.

The ICCLP is distributing the below publications. Interested readers should contact the Editors.

Japan-Brazil Comparative Law Symposium
(ICCLP Publications No.5 1999) [Japanese and Portuguese edition]

Fifth Anniversary Comparative Law and Politics Symposium
(ICCLP Publications No.6 1999)

Comparative Law and Politics Research Series
No.1 "Loan Participation" Yamane Masafumi (2000) [Japanese edition only]

Comparative Law and Politics Research Series
No.2 "Accumulative Debt in Developing Countries and the Law" Adachi Nobiru (2000) [Japanese edition only]

Wada Keiko	ICCLP Coordinator, ICCLP Review Editor
Gregory Ellis	ICCLP Researcher, ICCLP Review Editor (English Edition)

PART 1

THE ROLE OF INTERNATIONAL LAW IN THE TERRITORIAL EXPANSION OF EUROPE, 16TH-20TH CENTURIES

BY
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1. Empire building and its justification

The European expansion, as it has been rather euphemistically called, at least in Europe and in North America, is just one among many processes of empire building in world history. But it has some unique features.

First. It was genuinely collective. It was not the work of one state, but of a plurality of states which were in constant and fierce competition, frequently fighting each other. There was never a united European front outside Europe,[1] as there was never a united front of extra-European states or peoples against European encroachments.

Second. It was, in one sense, the most successful empire building in history. The Europeans brought, in the course of several centuries, almost the whole globe for some time under their direct or indirect control, Japan being the foremost of the few exceptions.

Third. In another sense, it was one of the most unsuccessful empire buildings in history. Compared with the longevity of the Chinese and even the Roman Empire it was quite ephemeral, and the speed and completeness of its dissolution after 1945 were truly astonishing.[2]

Fourth. The result of this dissolution was again unique. European domination of the world was replaced by a universal system of sovereign, legally equal states. Apart from the uninhabited Antarctic there remained not a single area of the world that was not - at least in theory - part of a state built upon the model of the modern European state and integrated into the all-encompassing international legal community. International law in the form in which it had originally been developed among the European states became a global law which until now has incorporated only a few elements of extra-European origin. Thus even the dissolution of the colonial empires has promoted the Europeanization of the world.

Fifth. There was probably no other empire building in history in which legal and moral justification played such an important part. The Europeans tried hard to legitimize their actions, to find a more solid legal foundation for what they did than simply to refer to a right of conquest. Their foremost addressees were not the peoples conquered or to be conquered (who probably could not have been convinced anyhow that they had no rights, or only conditional rights, to their own territories), but the Europeans themselves: skeptics and opponents at home, competitors and, not least, the conquerors themselves.

This process of justification and legitimization deeply influenced the development of modern international law. Its interest is not only historical. The Europeans searched for just causes for war and for rights to intervene in other parts of the world. The question what might be legitimate causes for armed interventions is widely discussed and highly controversial even today. Although

[1] There are a few exceptions which, however, at a closer look, are only apparent. The partition of the entire world between Spain and Portugal in the treaties of Tordesillas (1494) and Zaragoza (1526) was never recognized by other powers and soon contested by many of them. The Berlin Africa Conference in 1884/85 succeeded in establishing certain rules for the acquisition of territories in Africa by European powers; but the acquisition itself remained a matter of competition. The only really significant collective action of the colonial powers was the expedition against China during the Boxer Revolt in 1900/1901. But it was rather theatrical and soon gave way to new and increased competition.

[2] In this article I consider only colonial empires in the classical sense, i.e. built upon rule overseas, not traditional empires which rely on overland connections, like Russia, China or some American states. The important question as to the connection between decolonization and overseas rule cannot be treated here.

conquest and annexation are no longer recognized in international law, such interventions nevertheless still lead to some kind of formal or informal control of the contested territory. Kosovo is but the latest example. This justifies the question (only to be asked, not to be answered here), whether the legitimacy claimed today is sounder than in former periods.

This article gives a short sketch of the various forms and systems of justification from the Middle Ages to the end of the colonial period, with an outlook into the present. Despite many variations, one constant theme is easy to discern. It is the teleological view of history as a universalizing process. At first the world was destined to become Christian, then it was destined to become civilized, while now it is destined to become legally (but not at all materially) egalitarian, in the sense of the spread of democracy and human rights. If we look for a constant factor behind these three forms of universalism, it might be a missionary spirit which wants to shape the world according to its own image.[3]

2. International law in the relations between Europe and the other continents

It is frequently said that the extra-European territories were for part or even the whole of our period outside the scope of international law.[4] This is true if we look at the specific international law which was valid among the European states, as a body of rules, of rights and obligations built upon treaty, custom and natural law doctrine. But it does not mean that law, in a wider meaning, was absent from the process of expansion and from the relations between European and non-European political entities, or from the relations among the non-Europeans themselves. The European states themselves claimed universal territorial validity for their own international law. Wherever in the world they dealt with each other, from the Moluccas to the Congo and from Oregon to the Cape, they never pretended that they were not subject to the same law to which they were subject in Europe.[5]

More important are the relations between European and non-European states. Here much depends on definitions. For the purpose of this article, the proof for the existence of international

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[3] The article is mainly based on Jörg Fisch, *Die europäische Expansion und das Völkerrecht. Die Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart*, Stuttgart 1984 (European expansion and international law. The debates on the legal status of overseas territories from the 15th century to the present), which gives a detailed history, with references, of the points mentioned here. For a more recent shorter overview see Anthony Pagden, *Lords of all the world. Ideologies of empire in Spain, Britain and France c. 1500-1800*, New Haven 1995. On the whole, there has not been much research into the history of international law in the relations between European and extra-European states and political entities in general in recent years. Still important are the seminal studies of Alexandrowicz, some of which are quoted in n. 6. The most recent survey of some problems which, however, is built upon a narrow range of sources, is Antony Anghie, *Finding the peripheries: sovereignty and colonialism in nineteenth century international law*, in *Harvard International Law Journal* 40 (1999), 1-80. A helpful, if somewhat uneven, introducion is Hedley Bull / Adam Watson (eds.), *The expansion of international society*, Oxford 1984. An enormous wealth of materials in a very wide setting is to be found in Surya Prakash Sinha, *Legal polycentricity and international law*, Durham, N.C. 1996, while, with respect to Africa, Siba N'Zatioula Grovogui, *Sovereigns, quasi-sovereigns, and Africans. Race and self-determination in international law*, Minneapolis 1996 rather marks a step back. Both books are extensively reviewed by James Thuo Gathii, *International law and eurocentricity*, in: *European Journal of International Law* 9 (1998), 184-211.The most important relevant history of international law is Wilhelm G. Grewe, *Epochen der Völkerrechtsgeschichte*, Baden-Baden 1984.

[4] The strongest thesis in this context is the claim that the extra-European territories, or those beyond the Equator, or those in America, were outside the scope of any law, so that there was a state of perpetual war, under the slogan "No peace beyond the line". The most outspoken theoretical foundation for this thesis is Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, Cologne 1950. For an empirical rejection see Fisch, *Expansion* (n. 3), chs. 2-3., with further references.

[5] For a detailed analysis see Fisch, *Expansion* (n. 3), ch. 3.

legal relations is seen not in doctrine but in state practice. If sovereign political entities assume obligations toward each other, and if they are prepared to fulfil them, then I speak of international legal relations. Between European and extra-European political entities there were many and manifold international legal relations, especially by treaty.[6] Treaties – whether equal or unequal - presuppose, by definition, the recognition of the principle *pacta sunt servanda.*

The Europeans often tried, however, either to avoid the conclusion of treaties from the beginning or to gradually replace them with unilateral acts. They were fairly (although not completely) successful in America and, from the late 19th century, in Africa, but much less so in Asia. Here they even struggled hard - and often, as in the cases of China and Japan, without success - to achieve recognition as legally equal contracting parties by the local rulers. Their aim usually was to replace international by domestic legal relations. But this aim was to be achieved in the same way as in Europe. Even there international law did not protect the existence of states; it only regulated their relations with each other as long as they managed to maintain their independent existence. [7]

3. Medieval foundations: Canon Law and the struggle against Islam

Irrespective of the actual relations, however, the European states advanced various claims denying fully or partly the international legal status of extra-European political entities. Such claims were advanced as rights; but they never became rights in the sense of being fully recognized by both sides concerned. They had a long history. In the Mediterranean world there had been going on since the seventh century a struggle between Christianity and Islam. Islam had been the stronger and, for a long time, the more aggressive actor and conquered many formerly Christian territories. It was backed by an equally aggressive ideology, based on the Muslims' duty to spread the faith over the whole world by *jihad*.[8] In principle, Islam did not recognize sovereignty rights of non-Muslim states. The Christian response was at first a more defensive attitude, which in time developed into a similarly aggressive doctrine. Understandably, Christians considered it legitimate to reconquer all the formerly Christian territories, especially the Holy Land. But later, the doctrine referred to infidels in general instead of Muslims only. It found its definitive expression in the middle of the 13th century in two versions in Canon Law. The foundation was Christ's supposed donation of the sovereignty rights over the whole world to St Peter and via him to the Pope. According to Cardinal Hostiensis, the Christian princes were entitled, with the Pope's permission, to take possession of all countries of all infidels at any time.[9] What he really thought of and was interested in were the territories of the Muslims. But his formulation was wider and thus open to an extension to the whole world. A milder version of this doctrine was established by Pope Innocence IV.[10] He did not derive

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[6] Cf. Charles Henry Alexandrowicz, *An introduction to the history of the law of nations in the East Indies (16th, 17th and 18th centuries)*, Oxford 1967; id., *Treaty and diplomatic relations between European and South Asian powers in the seventeenth and eighteenth centuries*, in: Recueil des Cours 100 (1960-II), 203-321; id., *The European-African confrontation. A study in treaty making, Leiden 1973*; Jörg Fisch, Krieg und Frieden im Friedensvertrag, Stuttgart 1979.

[7] This point is stressed by Robert H. Jackson, *Quasi-states: sovereignty, international relations and the Third World, Cambridge 1990.*

[8] Cf. e.g. James Kelsay / James Turner Johnson (eds.), *Just war and jihad. Historical and theoretical perspectives on war and peace in western and Islamic traditions*, New York 1991; Jörg Manfred Mössner, *Die Völkerrechtspersönlichkeit und die Völkerrechtspraxis der Barbareskenstaaten* (Algier, Tripolis, Tunis) 1815-1830, Berlin 1968; Majid Khaddduri, *War and peace in the law of Islam*, Baltimore 1955.

[9] Hostiensis, *In primum...sextum decretalium librum commentaria*. 2 vols., Venice 1581 (Repr. Turin 1965): 3,34,8, quod super his (= vol. 2,1, fol. 128f.).

[10] Pope Innocence IV, *Commentaria super libros quinque decretalium*, Frankfurt/Main 1750 (Repr. ib. 1968) 3,34,8 quod super (= fol. 429d-430d).

a right to occupation from the mere fact of a territory not being held by Christians. By nature, the infidels were legitimate sovereigns over their territories. Only if the infidels violated certain duties imposed by the law of nature did the Christians have the right to intervene by means of a just war. Examples were the killing of innocent people or idolatry. Legitimate titles arose also if the spread of Christianity was impeded or if Christians were discriminated against.

It is useful to introduce two distinctions here (see exhibit 1). Hostiensis claims *rights a priori*, while Innocence claims rights a posteriori. Hostiensis's rights exist regardless of how the infidels behave. They are a consequence of a state of things which those affected by it cannot change, at least not immediately. As long as the infidels are infidels, they have ipso facto lost their sovereignty rights to the Pope or, through him, to a Christian ruler. Rights a priori might also be based on other distinctions, for example on race or ethnicity. In this case the members of one race or people would automatically be entitled to rule over other races or peoples.

For Innocence, on the other hand, the Christians' rights, as *rights a posteriori*, become actual only as a consequence of a certain behaviour of the non-Christians: if they violate the laws of nature or if they impede Christian activities. In the first case, the right a posteriori is *reciprocal*, as Christians might also violate the laws of nature. In the second case, the right a posteriori is *unilateral*, as Innocence makes it clear that the infidels have no claim to the same treatment as Christians, *"because they are in error and we are on the path of truth"*.[11] Reciprocity presupposes relativism of values; it is not compatible with exclusive claims to truth.

In the 14th and 15th centuries the position of Hostiensis found more support than the position of Innocence. But the questions were never finally decided. Moreover, they remained rather academic, as the Christians had few opportunities to put their doctrines into practice outside the traditional area of fighting with the Muslims.

4. The great discoveries and the Spanish debate on just titles

This changed with the great European discoveries, especially in America. Within months after the first voyage of Columbus, Spain obtained four papal bulls conceding sweeping claims a priori to the whole area discovered and to be discovered in the future (*detecta et detegenda*). These bulls were not really new. The Portuguese had acquired similar instruments for their activities in Africa since the 14th century. Right from the beginning the bulls had allowed to subjugate the infidels in order to Christianize them.[12]

Thus the discoveries at first stood under the auspices of Hostiensis. The tradition of Innocence was not forgotten, however. The Spanish crown was interested in it because it did not want its title to be dependent on the Pope. Moreover, papal donation was a weak title against competing European states which, whether they were Protestant or Catholic, were never prepared to accept an exclusive partition of the world between Spain and Portugal. The Spanish church supported the state because it would lose all its influence in America if the natives were not controlled by the state and instead became direct dependents of Spanish feudal lords.

This need of the Spanish state for better titles, and not humanitarian concern, was the main background for the intense discussion of the Spanish titles to the Americas among Spanish authors in the 16th and 17th centuries.[13] Both Hostiensis and Innocence were represented, but on the whole

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[11] Innocence IV, ib.

[12] For a good edition with English translation see Frances Gardiner Davenport, *European treaties bearing on the history of the United States and its dependencies*, vol. 1, Washington 1917.

[13] For a detailed overview see Venancio Diego Carro, *La teologia y los teologos-juristas espanoles ante la conquista de America*, 2nd ed., Salamanca 1951 and Fisch, *Expansion* 209-265. Cf. also Silvio Zavala Las instituciones juridicas en la conquista de America, 2nd ed., Mexico 1971; J.A. Fernandez-Santamaria, *The state, war and peace. Spanish political thought in the Renaissance 1516-1559*, Cambirdge 1977; Pagden, Lords (n. 3).

the more flexible position with titles a posteriori prevailed. It found its most influential and representative expression in 1539 with Francisco de Vitoria, in his *Lectures on the recently discovered Indians.*[14]

Vitoria had a thorough knowledge of the medieval tradition. He was no revolutionary. On the whole, he followed Innocence closely. Thus, he rejected out of hand all claims a priori. He postulated, however, in the tradition of Innocence, quite a few titles a posteriori. They were, as he explicitly said, sufficient reasons for a just war of the Spaniards against the Indians. They were mainly based on a supposed unilateral right to spread Christianity and on violations of the law of nature, for example by human sacrifices. Vitoria added another title: a worldwide right of settlement and commerce. If this right was accepted, Japanese and Chinese behaviour in the 16th to 19th centuries was illegal.

It is necessary to introduce a third and last differentiation here (see exhibit 1). Vitoria's right to settlement and commerce is only *formally reciprocal*, while it is *materially unilateral* or at least extremely one-sided. There was little chance in Vitoria's days that American Indians would paddle in their canoes to Europe in order to claim their natural right of settlement. The same held for many other rights a posteriori. The Europeans did not have to reckon with Cherokees, Hottentots or Maoris intervening in a European state because innocents were tortured or burned to death. Vitoria defended certain rights of the Indians once they were under Spanish rule, but he did not defend their independence against Spanish conquest. The same holds for most of the other authors, including Las Casas.[15] The great controversy in Spain was about legitimate titles to conquest, not about the legitimacy of conquest.

Up to the late 19th century there was never again a comparable discussion on European titles to extra-European territories. There was simply no need for it. In the Americas the Europeans had appropriated most of the important areas, and there was not the slightest chance of their being expelled. The main conflicts were those between the various European powers. In Asia, on the other hand, there was no use for sweeping European claims because the Europeans were unable to put them into practice. No European power could seriously consider a claim to overlordship over China by virtue of a papal concession or plan an intervention to save the victims of a supposedly inhumane criminal law. In Africa, the Europeans were just able to maintain a precarious position on the coasts.

This does not mean, however, that the Spanish titles, which were rather European titles developed and postulated in a mainly Spanish debate, were forgotten. Other countries and authors usually accepted them, abandoning their qualifications and differentiations and thus rendering them even more sweeping. The strictly religious titles, however, gradually fell into disuse.

Especially with respect to America a kind of secularized title a priori that had been in use since the 14th century gained some additional importance. It was the title of discovery, which did not even consider possible rights of those who were discovered. Its foundation was the claim that Europeans had ipso facto a valid title to all non-European territories.[16]

5. From religion to civilization: 18th and 19th centuries

There was a revival of the debate around the middle of the 18th century under the influence

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[14] Francisco de Vitoria, *De Indis et de jure belli relectiones*, Latin text and English transl., ed. Enest Nys, transl. John Pawley Bate, Washington 1917, repr. New York 1995.

[15] Las Casas shows himself from his most theocratic side in Bartolome de Las Casas, *Tratado comprobatorio del imperio soberano y principado universal que los reyes de Castilla y Leon tienen sobre las Indias*, in: Id., *Obras escogidas*, ed. Juan Perez de Tudela Bueso, vol. 5, Madrid 1958, 350-423.

[16] On discovery cf. e.g. Arthur S. Keller / Oliver J. Lissitzyn / Frederick J. Mann, *Creation of rights of sovereignty through symbolic acts 1400-1800*, New York 1938, and especially Julius Goebel, *The struggle for the Falkland Islands. A study in legal and diplomatic history*, New Haven 1927 (Repr. ib. 1982).

of the Enlightenment. This movement stressed individual freedom and legal equality and thus developed considerable skepticism with regard to unilateral claims. In practice, however, very different conclusions were drawn from these premises. Unanimity was reached only in the field of religious titles: unilateral rights based on Christianity's claim to exclusive truth were no longer accepted outside narrow religious circles.

The most consequently egalitarian position toward extra-European peoples and states was developed by Christian Wolff around 1750. He rejected every possible right a priori, every possible unilateral right and every possible reciprocal right if it was materially one-sided. For him, the Europeans had no other titles for interventions overseas than they had for interventions inside Europe. His protection of the rights of extra-European people went even beyond state rights: if in a particular area the Europeans could find no state but only some roaming nomadic tribes or clans, they had, according to Wolff, no right to occupy their territory and rule over them.[17]

Wolff found quite a number of followers during the second half of the century, especially in Germany, which had no colonies, his most famous adherent being Kant.[18] But there were strong countercurrents even within the Enlightenment. The most influential position was developed in 1758 by Wolff's populariser Vattel. Vattel made one exception: sedentary peoples who were suffering from overcrowding were allowed to appropriate part of the land of nomads who made no proper use of it. They had no right to rule over those nomads, however.[19] But it was, of course, a somewhat optimistic view that the nomads would voluntarily renounce their claims to their traditional lands and recede to remoter areas. What Vatttel had in mind was the British practice in North America.

6. Sovereignty and civilization: 19th and 20th centuries

In the second half of the 19th century a new, far-reaching claim a priori was developed. From the 1880s it was - consciously or unconsciously - almost unanimously accepted by international lawyers, politicians and the general public in Europe and in North America. Instead of religion, civilization became the source of unilateral rights. Civilisation did not become, however, a title in itself. Rather it was the implicit foundation of a title based on sovereignty. I would speak of a doctrine of ownerless sovereignty based on a teleology of civilization.[20]

In the decades after 1880, the Europeans occupied most of the territories outside Europe and America not yet under their control. In America, the Monroe Doctrine stood in their way. But,

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[17] Wolff's relevant opinions are scattered throughout his works on international law. This is probably the main reason why his views were almost forgotten in the 19th and 20th centuries. His most important contributions in this context are Christian Wolff, *Institutiones juris naturae et gentium*, Halle 1750, repr. Hildesheim 1969 (= Werke, ed. Marcel Thomann, II. Abt., vol. 26); Id., *Jus gentium methodo scientifica pertractatum*, Halle 1749, repr. Hildesheim 1972 (= Werke II,25; Engl. transl. by Joseph H. Drake, Washington, s.d.); id., *Jus naturae methodo scientifica pertractatum*, Halle 1742, repr. Hildesheim 1968 (= Werke II, 18).

[18] Immanuel Kant, *Zum ewigen Frieden*, 3. Definitivartikel = Perpetual peace, Third definitive article, in: Id., *Political writings*, transl. H.B. Nisbet, ed. Hans Reiss, 2nd ed., Cambridge 1991, 105-108; Id., *Metaphysik der Sittten, Rechtslehre*, para 62 = Metaphysics of morals, Theory of right, para 62, in.: Id., Political writings 172f.

[19] Emer de Vattel, *Le droit des gens ou principes de la loi naturelle appliques a la conduite et aux affaires des nations et des souverains*, French Text and English transl., ed. Albert de Lapradelle, 3 vols., Washington 1916: 1,7,81; 1,18,208f.

[20] For a more detailed discussion see Fisch, *Expansion* (n. 3) 284-379. Still important is Mark Frank Lindley, *The acquisition and government of backward territory in international law*, being a treatise on the law and practice relating to colonial expansion, London 1926. For a study of a specific author (Thomas J. Lawrence) see Annelise Riles, "Aspiration and control: international legal rhetoric and the essentialization of culture", *Harvard Law Review* 106 (1993), 723-740.

after all, the American states were no native states but the result of earlier European conquest which in many of them was still going on.[21] The situation was similar to that of the late 15th and early 16th centuries. How could this new appropriation of vast territories be justified? The international lawyers' answer was, strictly speaking, purely technical. Its basis was the concept of occupation in Roman private law, referring to the appropriation of ownerless objects, including uninhabited land. The first person who claimed such an object had the right to occupy it. This concept now became prominent in international law in which it had already been known but had so far played a minor role. Occupation in international law meant, in this view, the appropriation not of *dominium*, of property rights, but of *imperium*, of sovereignty rights over a territory by a subject of international law. Not every independent political community, however, was considered a subject of international law, but only such a community which exercised all the essential sovereignty rights. And this was declared to be the case only with the modern European and American states. These states were at the same time defined as civilised states. Thus, in the international legal sense civilization, or rather: the standard of civilization, was defined by the exercise of sovereignty rights.[22]

There was no doubt that a European state exercised more sovereignty rights than for example a clan in the Niger Delta or a band of hunter-gatherers in the Kalahari. Such territories were considered ownerless in the sense of *imperium*, because they were not under the jurisdiction of a subject of international law, which meant: a European or an American state. Thus they were *territorium nullius* that could be occupied - but only by a subject of international law. This was a right (or claim) a priori the subjects of international law had over all the territories of the world not yet belonging to one of them.[23] It did not depend at all on the behaviour of the people or of the political entities in these territories. They could behave as peacefully as they wished - their country was still liable to occupation.

It is easy to see the parallel to the medieval claims a priori of the Christians, although contemporaries usually were not aware of it.

As to the practical consequences of this doctrine, there was no unanimity among contemporary experts. Usually the territory liable to occupation was defined rather more narrowly than the doctrine would have allowed. Thus, although China, Japan and other Asian states were for a long time not recognized as subjects of international law in the full sense, their territory was not understood to be liable to occupation - even the most doctrinaire international lawyers maintained some sense of proportions.

The fundamental flaw of this doctrine was that it treated human beings like things, at least in the legal sense. If sovereignty rights over persons are not exercised, they are not ownerless, but they correspond to so many freedoms of those persons. Occupation of inhabited territory is an encroachment on the freedom of its inhabitants. Human beings are no objects to be occupied, *"homo occupari nequit"*, as two German authors put it in 1791.[24] While the original concept of sovereignty, derived from Bodin, is negative and formal in the sense of not recognizing a superior, of having the competence to exercise all rights without necessarily actually exercising them, in the

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[21] Cf. David Strang, "Contested sovereignty: the social construction of colonial imperialism", Thomas J. Biersteker / Cynthia Weber (eds.) *State sovereignty as social construct*, Cambridge 1996, 22-49.

[22] For a slightly different view of the "standard of civilization" see Gerrit W. Gong: The standard of 'civilization' in international society, Oxford 1984.

[23] On the concept of *terra nullius* see Jörg Fisch, "Africa as terra nullius: the Berlin Conference and international law" in Stig Förster et al. (eds.) *Bismarck, Europe and Africa. The Berlin Africa Conference and the onset of partition*, Oxford 1988, 347-375. For Africa cf. also Malcolm Shaw, *Title to territory in Africa. International legal issues*, Oxford 1986

[24] Johann Stephan Pütter / Gottfried Achenwall, *Elementa iuris naturae additis iuris gentium Europaearum practici primis lineis*, 2nd ed., Göttingen 1753, para 300. Cf. Karl Anton von Martini, *Erklärung der Lehrsätze über das allgemeine Staats- und Völkerrecht*, 2 vols., Vienna 1791: 2,71 (para 85).

19th century it became positive in the sense that only those who actually exercised those rights were considered sovereign.

This doctrine was upheld in international legal texts and in international arbitral awards right to the 1970s. The turning point came only in 1975 with the advisory opinion of the International Court of Justice on the Western Sahara, which was declared not to have been *terra nullius* by 1880.[25]

What were the reasons for this perseverance of the doctrine? It is possible to distinguish between imperialistic and civilizational arguments.

The doctrine of ownerless sovereignty was extremely convenient for constructing sweeping European claims although it did not become very important in the actual acquisition of territories even after 1880. After all, most of the territories coveted were inhabited. If one simply tried to occupy them, pretending that they were empty, resistance was most likely. Therefore, usually treaties of protectorate or of cession were concluded, which meant that in reality the extra-European political entities were treated as subjects of international law, in a wide understanding. But one still had the sweeping claims a priori in reserve.[26] In a sense, it was a much more convenient title because it did not depend on the behaviour of others. This was implicitly recognized by the Supreme Court and other courts of the United States. They left no doubt that they considered as unfounded the far-reaching claims based on religion, papal grants and discovery which the European powers had produced to the whole of the Americas in the 16th to 18th centuries. Nevertheless they insisted that the titles of the American states ultimately were original, based on those sweeping claims a priori, and not derivative, based on conquest and treaties of cession, although there had been conquest and there had been many treaties. But it would have been impossible to produce valid derivative titles for the whole of the American continent, while titles a priori covered even unknown territories.[27]

The claims a priori became also the foundation of the Monroe Doctrine and of the principle of *uti possidetis* in Latin America: both were built upon the assumption that the independent American states jointly had a valid title to the whole of the Americas (with the exception of European states, whose colonies were recognized, not of native American states).

In the civilizational arguments, the modern state was seen both as a product and an agent of modern civilization. In this context, 'civilization' had the emphatic meaning of 'civilized life'. One of the main reasons adduced for the right of the European states to occupy territories not belonging to recognized subjects of international law was the - pretended or real - inability to protect civilized life. This inability showed itself especially in the risks nationals of civilized states, whether travelers, traders, missionaries or adventurers, ran. Behind this there was Vitoria's claim to a universal right of trade and settlement. Its foundation was the teleological view that it was the world's destiny to become civilized and that those who promoted civilization had more rights than those who were not interested in it. Without this assumption it would have been difficult to answer the question why it was better for a people or any group of men to live in a modern state than in a traditional loose political organization.

It is interesting that this belief in civilization and its superior value has survived European imperialism and all kinds of pretended unilateral rights. The dissolution of the colonial empires followed the logic of the justification developed for the acquisition of colonies in the 19th century, although of course the colonial powers did not always accept this logic with good grace. Once the

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[25] International Court of Justice, *Reports of judgments, advisory opinions and orders*, 1975 and id., *Pleadings, oral arguments, documents: Western Sahara*, 5 vols., 1979-1982.

[26] For literature on treaties see n. 6.

[27] Many relevant decisions of U.S. courts are printed in Wilcomb E. Washburn, *The American Indian and the United States. A documentary history*, vol. 4, New York 1973. Cf. the analysis in Fisch, *Expansion* (n. 3) 337-345.

peoples in the colonial territories had become able to build modern, sovereign states or, expressed in the more emphatic language behind the legal argumentation, once they had become civilized, there was no longer any justification for colonial rule. This indeed became the implicit condition for decolonization. Although Resolution 1514 (XV) of the General Assembly of the United Nations in 1960 stated an unconditional right to independence of peoples under colonial rule, independence was granted to the colonial territories, and the new states were recognized by the international community only upon the tacit condition of becoming modern, sovereign states, or, in the language of the 19th century, civilized states. There was no opting out by reverting to traditional forms of political organisation, by not exercizing important sovereignty rights. This character of a modern state is, of course, often fictitious.[28] But at least the fiction is invariably maintained.

7. Outlook: after Decolonization and the Cold War

In recent years, the number of armed interventions, sometimes called humanitarian, has increased. Their justification basically relies on titles a posteriori, not a priori, which means that countries are invaded not just for what they are but for what they, or some of their inhabitants, have done, for various kinds of injustice or, as is nowadays usually said, for violations of human rights. This is not new. The Spanish Thomists and even Pope Innocence were convinced that the violation of the law of nature gave a just title for an intervention, especially if it was designed to protect innocent victims. They spoke of titles for a just war. This formula has recurred. Fernando Tesón, for example, in his recent *Philosophy of International Law* frequently speaks of just wars and reasons that make a war just.[29] In this respect, there is thus a revival of old discussions. Therefore, we should also be aware of the old dangers. One danger is a tendency toward new claims a priori. One of the reasons frequently adduced for intervention is lack of democracy. Lack of democracy may in certain cases be a positive wrong, for example, if political opponents are persecuted, tortured or murdered. But if the lack of democratic institutions and procedures is taken as a reason for intervention, then it becomes a title a priori. If democracy is considered not as a moral or even a legal duty of a state but as a stage of development, in the same way civilization knows different stages of development, then it is difficult to distinguish between a title based on the lack of civilization and a title based on the lack of democracy. It is the same with certain standards of human rights which do not refer to actual crimes but rather to a certain level of development, as for example the literacy rate. Those who become liable to an intervention are invaded rather for what they are than for what they have positively done. The world once was destined to become Christian. Then it was destined to become civilized, and now it is destined to become democratic and, in a more general manner, human rights-abiding. It is not easy to show that the latter conviction will in the long run prove more valid than the conviction of the Spanish theologians in the 16th century with regard to Christianity and of the international lawyers of the 19th with regard to civilization.

Another recurrent phenomenon is the discrepancy between formal and material reciprocity. Grenada has exactly the same right to intervene in the United States as the United States has to intervene in Grenada. Perhaps it is more important to prevent this undeniable and unavoidable material inequality between states from having unjust consequences than to introduce ever more supposedly just reasons for intervention in a system which is materially extremely unequal. Otherwise the just titles might become as many instruments for domination as they became in the European expansion. This would mean that interventions would be allowed only for reasons that have been fully approved by the international community and that these interventions would be executed only by the international community itself, not by single states or particular groups of states or alliances. It would also mean that the decision for interventions has to be taken

[28] On this point see especially Jackson, *Quasi-states* (n 7).
[29] Fernando Teson, *A philosophy of international law*, Boulder 1998.

democratically, according to the principle of proportional representation of the individuals instead of the extremely undemocratic principle 'one state, one vote'. And it would mean, before all, that instead of an arbitrary *right* to intervene there would be a *duty* to intervene in cases fully specified, while intervention would be categorically prohibited in all other cases. All over the world the police do not have the right to protect the citizens, but they have the duty to do so. Otherwise it is likely that we shall assist at just another round of justifications perhaps not of territorial expansion but of the exercise of arbitrary power in general.

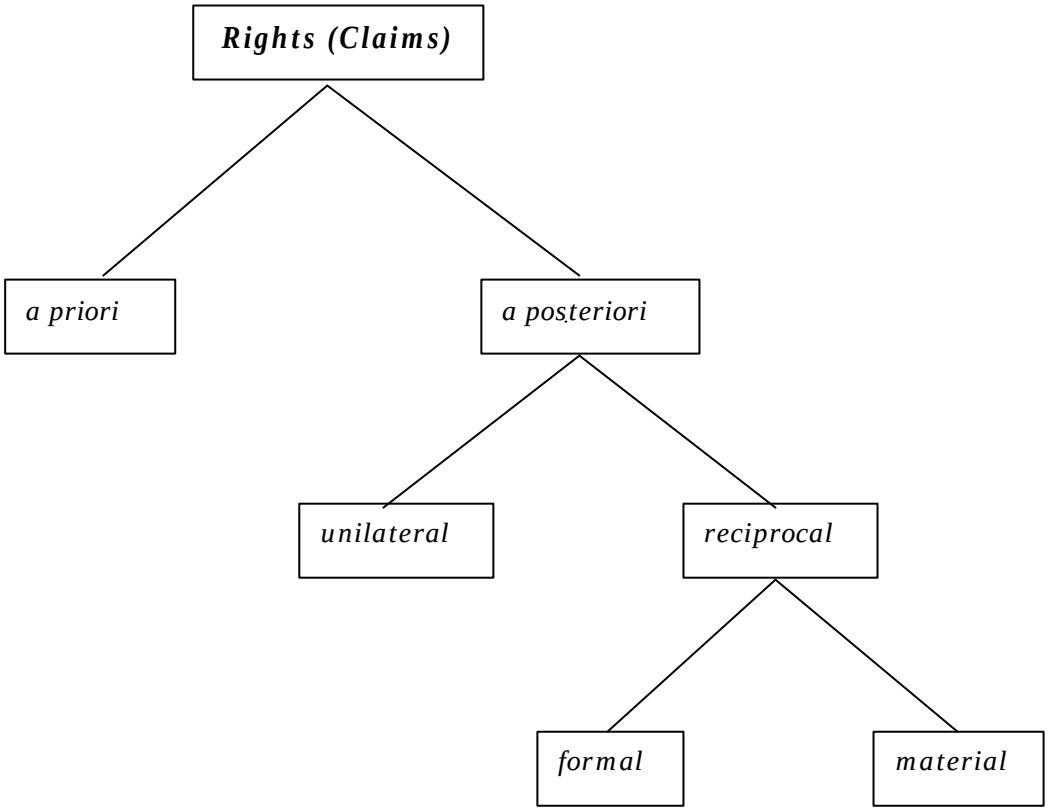

Exhibit 1

THE EUROPEAN CITIZENSHIP: THEORY AND PRACTICE, FROM A LEGAL PERSPECTIVE (MAASTRICHT) AND FROM BELOW (CITIZENS' REPRESENTATIONS)

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Introduction

Montesquieu asked himself once: "Comment peut-on etre persan?" That means: "How can you be a Persian?". Today, my question is: how can you be a European citizen? Or what is a European citizen?

The European Commission, together with the European Parliament and even the Council of Europe, believes that such a citizenship can be established top-down, enacted by law. But it has not been embraced yet. The European mass public tends to express in surveys its being European only reluctantly; a clear and recently increasing pattern. So that Europe has been labelled "a flaccid muscle" ("*le ventre mou*": Percheron, 1991), or "a privilege for the privileged" (Cayrol, 1995). Within it, very low knowledge levels come along with representations of Europe that are somehow spineless (Brechon, Cautres, Denni, 1995).

When you have a look at the Eurobarometers data, the comparative and multinationals European surveys, paradoxes and ambiguities arise (Brechon, Cautres dir., 1998). The more and the quicker European integration is institutionally developed, the less is the demand for Europe among citizens. The more Europe takes shape and gets closer, the less appraisal it receives from its citizens. Decided by top elites, European citizenship lacks substance among European citizens from below; built on legal ground, it erodes in practice. One just needs to take an overview at turnout levels at the last European elections in France in June 1999. Abstention was the majority (53%) and reached an all-time record since 1979 when abstention was 39%. In Europe as a whole, as well, it was 51%.

In France, the European citizenship has largely been debated from a philosophical (Ferry, 1998) and juridical perspective (Kovar et Simon, 1993; Masclet, 1997; Touret, 1995), whereas political science as a whole has quite diversely tackled this question. From a theoretical (Colas, Emeri, Zylberberg dir., 1991; Deloye, 1998; Leca, 1992), institutional (Whitol de Wenden, 1997) and public policy point of view (Lequesne et Smith, 1997; Meny, Muller, Quermonne, 1995), new insights were offered. But the above question remains, largely ignored by specialists of political or electoral behaviour, at least to the extent of my knowledge of the relevant literature. Yet, both the theoretical and public policy approaches deal with citizenship on quite an abstract level, thus neither provides us with information about how 'average' citizens perceive and receive European politics and policies. In a wider meaning, this situation mirrors, in a way, existing biases of citizenship studies in France: multiple and extensive yet speculative works unbalanced by scarce studies about actual behaviour, attitudes and representations (Duchesne, 1997; Mayer, 1996; Michelat et Thomas, 1962). To such an extent that one (Martiniello, 1997) has labelled this trend "an academic fashion".

This paper suggests first that a switch from a legal approach towards a practical one is necessary to address the issue of European citizenship, in order to work within the reality principle. Thanks to the recent June 1999 EP elections, a preliminary assessment can be given of how Union nationals use their new rights, and in particular their new eligibility to vote and to be elected at

European elections in their country of residence (article 8B2/19 TCE) and not only of nationality. Nationality and citizenship have traditionally been linked, at least in the last two centuries and especially in France, to the existence of States or Nation-States. The new right dissolves any conception that those being elected are representatives of national collectivities, that is, a separate and distinct representation for each people (Kovar et Simon, 1994). What are the actual effects of legal provisions related to European citizenship, *from the perspective of the citizens themselves*? Do they now link somehow differently citizenship and nationality? Does this European citizenship hold a meaning for voters - or is Paul Thibaud right when stating that "Europe offers new possibilities but does not bother to investigate whether this potential translates into actual behaviour or not"?

The European Commission has endorsed firm and incentive stances on policies, with campaigns such as "Putting citizens first" or "Building Europe together". Can a European identity be built solely upon policy stands and political choices, or does it convey effective expectations and hopes among citizens themselves? Yet could the European citizenship be more than a palliative measure (or even a placebo?) to the democratic deficit that plagues the Union and slows down the building of a truly political European system? Isn't it somehow artificial to focus on the right to vote which has been extended to European Union nationals, given that less than 2% of European Union citizens chose to live in another Member State? Only the (expected) highly symbolic meaning of the vote does explain one's interest in this minority fraction of the population, that means 4.5 million of potential eligible voters out of roughly 270 millions people.

A second step will consist in getting back to the theoretical level in order to formulate, if not answer, five major questions.

First, could political rights meant in the first place for European migrants be extended to all Union inhabitants, or is the European citizenship both a symbolic and effective way to exclude foreigners from outside the EU? (Lochak, 1995; Martiniello, 1996)

Second, what is the future of a supranational citizenship based on a national-level nationality?

Third, will the European citizenship ever have a true content (Manzella, 1997) or does this rhetoric only fulfil an ideologically legitimating function for the European integration (d'Oliveira, 1994; Weiler, 1995)?

Fourth, what is the articulation of different levels of identity - supranational, national, regional - in the citizens' representations (Closa, 1995; Llamazares and Reinares, 1997)?

Fifth and last, will the Union become an arena for political deliberation, meeting the conditions of a democratic European "public sphere", as Habermas meant it?

To conclude this already rather long introduction, let me state that this paper presents the first step of a long-term research about ***the European citizenship "from below"***. Interested by political behaviour, my reflection is more oriented towards the electoral participation of citizens in the political life of the Union and less towards other instruments of political participation as addressing petitions (Surrel, 1990) or recoursing to an ombudsman. The aim of my research is to work out the new articulation between nationality and citizenship, in a bottom-up perspective. In other words, from the effective implementation of the new voting rights by European citizens to a theoretical point of view about citizenship. I will focus here, on the one hand, on statistical data about registrations for June 12th 1994 EP elections and on raw and incomplete material about June 13th 1999 EP elections. On the other hand, I will present the first hypotheses that derived from the qualitative analysis of interviews conducted with registered Europeans (according to the 8B.2 article of the Maastricht Treaty).

Before addressing these points, a brief review of the legal framework is fruitful.

I. Juridical analysis: the legal framework

The notion of a European citizenship is a core issue of the treaty on the European Union signed in Maastricht on February 7th 1992 and is still a matter of great importance within the Amsterdam Treaty (October 2nd 1997). The new chapter on the " Union citizenship " is placed in a

quite strategic place within the architecture of the treaty. It immediately follows the opening statement on principles of the Union (part 1) and precedes the presentations of the Union policies (part 3) and of its institutions (part 5).

However, this idea of an Union citizenship is not that new (Marias, 1994; Quermonne, 1997), even if its juridical formalization came within these treaties as a major step (or change) from the economic-only purpose of the rights previously granted, such as the liberty to travel and settle. Since the 1957 Rome treaty indeed, many resolutions and reports and guidelines suggestions dealt with how to operationalize the "union between European peoples". On the pre-history of European citizenship we can evoke the Tindeman Report in 1975 or the Adonino Committee in the 80s. Over the years, a clear switch has occurred, from "the citizens' Europe" to "the European citizenship", a trend not always devoid of competition between the different European institutions. The originality of the Spanish proposal, as compared to its forerunners – and that will be used as a basis of negotiation between the 1990 European Council in Rome and the Maastricht Conference – lies in the legal forms it gives to the European citizenship. Its political purpose and its legal status are carefully defined to make it a crucial concept, not just an ideological gadget.

Officialized by the Treaty, the European citizenship is of a limited scope, dubious and innovative. *It is of a limited scope*, given that the Union does not possess any prerogative for granting this European citizenship. It is superimposed as the direct consequence of being a national of one of the member states. Let me quote article 17 of the Amsterdam treaty: "A Union citizenship is instituted. Anyone holding a nationality from a member state is a Union citizen. The European citizenship comes along with a national citizenship and does not replace it". In itself it reveals the cautious attitude of Member States and their reluctance to enhance the content of European citizenship at the expense of their own legal systems!

It is dubious since very different rights are juxtaposed, heterogeneously. These include:the right to travel and settle over the Union territory (art. 18), the right to vote and to be elected at local and European elections in the country where living for Union nationals (art 19), the right to seek protection from the diplomatic representations of any other member state (art 20), the right to sign a petition addressing the EP (art 21) and last but not least the right to claim the European ombudsman mediation (art 22). Most of this rights are a reformulation of the "acquis communautaire" (freedom of movement and abode, principle of non-discrimination).

It is nevertheless innovative, for its electoral provisions offer new perspectives on connecting/disconnecting nationality and citizenship (art.19). European nationals are indeed from now on eligible both to vote and to be elected for the local and European elections in the country of their residence. To rephrase it, a French citizen living in any other state member of the Union can now vote and be elected in this country, not only in the country in which (s)he holds nationality. These electoral dispositions are however innovative only in the way that they generalize this right to vote and to be elected in local and European elections to (European) foreigners. France has been somehow reluctant on this point in comparison with previous other experiences (like in Spain, United Kingdom, Italy), and with countries where sometimes all non-nationals were eligible (as Denmark or the Netherlands). In Ireland for example, all Union nationals have been entitled to vote in the European elections since the first in 1979. In Italy, nationals from other member states have been allowed to be elected since 1979 too; one can quote the famous French jurist Maurice Duverger, elected in 1989 standing on the communist list.

But in any case, this novelty has major significance. The centennial principle of linking citizenship to nationality is denied by the article 19, which creates a new way to belong to a political community. This point will be discussed later in the paper.

This solemn conversion of "nationals of a member state" into "Union citizens" cannot conceal the many ambiguities and paradoxes that lie within this European citizenship. In the application of the right to vote and to stand for local elections, some states have been resisting – such as Belgium, Luxembourg or France – because of the required constitutional changes connected to some political reservations (*the fear of a foreigners' vote in general*). In this case, Britain was not among the opponents – only 880,000 European citizens live in Britain, more than half of them being Irish, for whom arrangements already exist. A small proportion when compared to the 1.3 million in France and Germany or the 541,000 in Belgium and the 105,000 in Luxembourg.

Allowing for derogations, the Maastricht and Amsterdam treaties gave way to delaying maneuvers such that Belgium was sentenced on July 9^{h} 1998 by the Justice Court of the European Communities, for not transposing the European electoral provisions into its national legislation within the allotted time. This non zealous attitude is best explained by the Flemish political parties expectations and fear that local majorities in the Brussels area would be altered, switching towards the French-speaking parties (Martiniello, 1997; Delperee, 1997; Swyngedouw, 1999). Luxembourg for its part tried to minimize the statistical weight of the Union migrant population on its electorate, around 25-30% mainly Portuguese, thanks to a derogation from the council.

Last but not least, in France, as in several other Member States (Germany art.20.2, Greece, Italy and Luxembourg), the exercise of national sovereignty is explicitly mentioned as reserved for French nationals. Asked for an interpretation, the French *Conseil Constitutionnel* (decision of 9^{h} April 1992) pointed out that in order to ratify the Treaty on the European Union, the Constitution had to be changed, since the third article mentions that "Are voters…all French nationals…etc.". France demonstrated its constitutional "pusillanimite" through the cautious writing of the new article 88-3, chapter XV of the Constitution. It indeed alters a requirement according to a European directive into a possibility only and is forbidding Union nationals to become mayors or deputy mayors, and 'exempting' them from taking part into the senators election and process by naming senatorial voters (the major part of the electoral body that appoints the *Senat* is composed of representatives of the local councils)! For more details and for specialists, see the Constitutional Law n'92-554, June 25th 1992, (Ladrech, 1994; Masclet, 1997).

And now a surprise! Since original proposals on EU citizenship bear a strong Spanish influence, it might be expected an advanced stage of development in the implementation of rights, and other elements, linked to it. This, however, has not been the case. Once the directive on voting rights in local elections was adapted, the performance of the Spanish government showed a surprising nationalistic and conservative reaction. Despite having local elections in May 1995 and despite the petitions of several local governments with significant shares of EU citizens as residents, the government passed to the Parliament a Royal Decree which obviated the Directive on voting rights in local elections. No reference at all was made in the "exposition of motives ". The Decree referred to the traditional reciprocity principle for foreigners enrolling on the electoral register if an agreement has been concluded with their States. These were nationals from the Netherlands, Denmark and Sweden…and "basta", which would be included in each electoral board in a different list to Spanish voters. The main reason for delaying the implementation was the enormous figure of Spanish nationals living in other EU countries which would not obtain simultaneously the same rights. It was calculated that these were 600,000 in Germany and 500,000 in France. Thus the legal habitation of EU nationals for electoral purposes was delayed with the argument that the deadline for implementing the directive was the 1st January 1999. Finally, the Directive was incorporated in 1997 in Spanish law (Closa, 1998)

Contrary to the vicissitudes and procrastination in this application of the eligibility to vote and be elected in local elections, the article 8B2 has been quickly implemented. First in the European Council guideline 93/109/CE that determined on the 6^{h} December 1993 the clauses of voting and standing for the EP for Union citizens living in a member state of which they are not a national. Then in the national French legislation, with the law n°94-104 on February 5th 1994 (JORF

8th February 1994), then with the decree n°94-206 on March 10th 1994 (JORF March 12th 1994) preparing the June 12th 1994 European elections.

The divergent views by Member States on the nature of European citizenship and on the ways to concrete it clearly echo their traditional conceptions of political legitimacy and differ according to national civic culture and traditions. But it is quite different to describe the legal framework and to analyse the actual behaviour and social representations that are connected to it.

II. Factual analysis: electoral data

Once again, we have to painfully acknowledge that electoral data in France are "neither produced by nor built for the researcher" (Brechon, Denni, 1985) and that they are the outcome of a social process not driven by knowledge purpose at all. Not is it hard to get hold of the data but also the INSEE (which centrally keeps both the records of European nationals registered to vote in France and of French citizens registered in other European countries) is dependent for this latter point on the hazardous transmission and unequal statistical accuracy achievements by the other countries. On top of that, it is really difficult to get data on Europeans living in France that is reliable (due to the delay after the Census and the time necessary to the building of statistics) and coherent with electoral criteria (age, group of reference etc.). Thus, the picture of the reference population profile is a blur, and the calculation of the registration rate can be nothing more than a tentative guess!

This long and hard way towards statistical data collection is unfortunately well known by French specialists of migration and/or religious minorities as well. It has also a special echo given the current bitter quarrel opposing demographs Hervé Le Bras to Michèle Tribalat on the relevance of 'ethnic data': you could read their arguments a few months ago in *Le Monde*. This technicality in fact calls up a theoretical point, that has to do with the building of the French state. It points up its Jacobine difference with regard to other states that, on the contrary, asserted their cultural pluralism as a constitutive historical tradition (Canada, Australia, Argentina). To formulate it precisely, one can consider that the national ideology about "the French way of integrating" has actually delayed the creation of institutions and measurements meant to better embrace migration acts.

The 1994 European elections

Given there is still no unique electoral process, in 1994 the EP elections were held respectively first on June 9th in Denmark, Ireland, in the UK and the Netherlands, and then on June 12th in Belgium, Greece, Germany, Spain, France, Italy, Luxembourg and Portugal. Sweden (Sept 17th 1995), Austria (Oct 13th 1996) and Finland (Oct 20th 1996) later applied the 8B2 article when first holding elections for the EP. This means that 4.5 million of European citizens living in a member state they're not a national of could have voted in the country of their residence, if they had wished to do so (when adding all the potential voters older than 18, out of 270 million people).

Yet roughly 253,000 voters only sized this chance (among those, 16,000 French living abroad and 47,000 Europeans living in France), which totals 5.6% of the eligible voters. This somehow disappointing average result hides huge disparities between countries regarding their registration rates: from 1.5% in Greece to 44% in Ireland. France locates itself somehow in the low range, with 3.8% registered people (47,632 out of 1,250,049 potential voters). But disparities exist also between nationalities living in the same country.

Table 1- European Union nationals living in France and registered on voting lists in 1994.

Origin	Registered*	Potentials voters**	%
England	4,978	63,522	7.8
Germany	4,128	64,285	6.4
Belgium	6,574	57,587	11.4
Denmark	249	4,867	5.1
Spain	6,927	204,371	3.4
Greece	203	6,865	3
Ireland	351	5,521	6.3
Italy	14,113	224,800	6.3
Luxembourg	162	3,000	5.4
The Netherlands	1,922	20,028	9.6
Portugal	8,025	595,203	1.3
TOTAL	**47,632**	**1,250,049**	**3.8**

Source : *Estimates based on INSEE, juillet 1994
**Estimates based on Ministère de l'Intérieur, décembre 94

In France, the nationals that tend to register more originate from Belgium, the Netherlands and England (between slightly more than 11% and nearly 8%). Those who register the least are from Spain, Greece and Portugal (see table 1).

The registration of French people living abroad is no better, with 16,293 registered to vote in the Union country they live in out of roughly 345,000 living elsewhere in Europe, thus a registration rate of 4.7%. A single non-national candidate was elected in her country of residence (Miss Wilmya Zimmermann, a Dutch woman living in Germany) out of 53 'non-nationals' standing in the Union (including 5 in France).

The 1999 European elections

The latest information regarding European nationals registered to vote in France at the June 13th 1999 EP elections totals 72 400 of them, out of 1 224 492 Europeans aged 18 and over living in France with a fully valid status, that is to say a 5.9% registration rate (see table 2). Which means a slight increasing since 1994.

Table 2 - European Union nationals living in France and registered on voting lists in 1999.

Origin	Registered*	Potentialvoters**	%
England	7,759	65,353	11.8
Germany	6,917	73,210	9.4
Austria	149	4,191	3.5
Belgium	10,172	61,113	16.6
Denmark	531	4,913	10.8
Spain	8,870	175,195	5
Finland	115	2,798	4.1
Greece	339	6,443	5.2
Ireland	542	5,476	9.8
Italy	17,053	212,023	8
Luxembourg	285	3,143	9
The Netherlands	3,327	22,557	14.7

Portugal	16,120	580,080	2.7
Sweden	220	7,997	2.7
TOTAL	**72,399**	**1,224,492**	**5.9**

Source: *Estimates based on INSEE, September 1999
**Estimates base on Ministère de l'Intérieur, September 1999 (année 98)

By contrasts there are 27% " Europeans registered " voters in Spain, 12% in Sweden. French people living in other UE countries would be around 7% to be registered in the country they live in. All in all, less than 10% of the potential European migrants within the Union do register.

Let us sum up the situation. Diverse registration rates according to the countries, heterogeneity depending on the nationality. These results still require interpretation. Beyond this incantatory phrasing of "Union citizen" one uncovers the complex problematic of an artificially unified category. The criteria that help to define the new European electorate are manifold: electoral processes in each country, differential mobilisation and identification among European migrants, particular influences of the state-model for integrating citizens. They all alter deeply the relationship between nationality and citizenship, and are demanding for a new articulation of it.

III Comprehensive analysis

We can turn the question on its head to deal with the very core issue of registration among the potential European voters: in 1994, only 6% of them registered, with that number only increasing to 10% in 1999. So what happened with the other 94-90%? This very low electoral mobilisation among Union nationals (in the sense of article 8B2) led to a number of comments that I wish to articulate, amend or extend.

1 Refutation of previous interpretations

Let us first have a look at the previous interpretations. There are three of them.

Technical argument: time constraint and delay.

A most frequent reasoning to explain this low registration rate relies on the very strict time constraint between the adoption of the European directive on 6th December 1993 and the elections held in June 1994. In between, the member states had to integrate it into their national legislations, thus providing EU nationals with a very brief time to react and register. For example, only one month in France, between the decree publication (n° 94-206, 12th of March) and the opening of additional registers in town halls until the 15th of April.

This hypothesis suffers a first set back for it doesn't take into account the inter-states rates differences (why do EU nationals register more in Ireland than in Greece?) nor the constant intra-states rates divergence (why do Italians register more than Portuguese, wherever they live and allowing for the same period?). The second problem with this rationale relates to its not holding as time passes by: why is the rate similar - and as low - after four years (1995-Dec 1998) than after only four weeks to register? Such as in France for example, where the rate gained only two points over this period of time. The quasi stability of registration over the 94/99 period, let's say its increasing at quite a homeopathic rate (3.8% / 5.9%) is the most efficient way to rebut the hypothesis.

Technical argument: information

Similar causal links are supposed to induce similar effects. Some considered the information level as a fruitful explanation, given the member states offered a grossly insufficient information on the new voting rights - despite the mandatory aspect of the article 12 of the 93-109 directive, dealing with campaigns of a satisfying time and scope and with appropriate means. The unequal activism demonstrated by the states can indeed help us figure out the situation, but it

cannot account for it. Why is Spain zealous whereas France is somehow reluctant (notwithstanding the fact that the former inspired this treaty measure)?

To answer this, again a comparison of the two sets of elections will disentangle brief term effects from structural ones.

Theoretical argument: the democratic deficit

Here the argument tends to mix up the causal explanation and its consequence, going round in circles: between the chicken and the egg, which was less European? To formulate it rigorously, does the democratic deficit plaguing the European institutions lead to a very low citizens mobilisation, or is it the very aftermath of this painfully low mobilisation?

To me, to go further these shortsighted arguments, one should beforehand explore and discuss two fictions: the abstract hypothesis of a "European Union citizen" and the "enchanted" hypothesis of a unified Europe.

2 First hypotheses and preliminary results

Towards a complex sociology of European migrations

Beyond the phrase "European Union citizen", one uncovers the complexities of an artificially unified category (magical, incantatory, self-fulfilling prophecy?). Who are the European expatriates? Previous studies on migrants have all shown the remarkable diversity between these populations, depending on the country and county/area of origin, the logic that presided over the migration decision, the length of time since the migration and the way and quality of life in their residing country compared to their originating one.

These heterogeneous statutes (of course in sociological aspects too, such as gender, age, education, professional status, social class) are inducing different and sometimes diverging attitudes towards politics, representations of Europe and European integration. One should not underestimate these contrasts and this situation calls for a complex sociology of European migrations.

Towards a historical sociology of citizenship in Europe

Knowing the countries that form Europe is a pre-requisite to understand Europe as a whole: the European citizenship cannot be dissociated from the state-driven models for integrating citizens. One has to take into account the various traditions: French jacobinism which (at least in principle claims to) assimilate citizens; the Anglo-Saxon way of dealing with a plurality of cultural or religious allegiances; or German theory putting emphasise on an ethnic conception of nation. How could one expect to easily build a unified European citizenship from this puzzle of different – and even conflicting – national models? This issue is all the more salient that these abstract models do give shape to actual behaviour from individuals and public policies from state. According to my preliminary results, everything works as if countries where the European nationals tend to register most are the very ones where non-European foreigners had been granted the right to vote in local elections, sometimes well before the Maastricht Treaty (such as Ireland, Denmark, the Netherlands and Sweden and Finland as well). What is the influence of the permissive participation culture foreign minorities enjoyed on the political attitudes of the European nationals living there? How does the political socialisation imported from the country of origin intermix with the different political and electoral norms or behaviour these migrants are exposed to?

Towards a comparative sociology of state models

According to my observations, how long ago a nation had been built and what type of state it led to such as federal, unitary etc., is a major explanatory factor.

One should not underestimate the impact of public policies as well. The way an administration implements legislation can alter its meaning: what is then the consequence of the activism (if existing) of the country of origin? Are the nationals from a given country exposed to arguments and pressures for or against registering through the diplomatic instances, newspapers, and TV ads? Reciprocally, does the attitude for or against registration from the country of residence affect behaviour? A meaningful comparison on this point would oppose Spain on the one hand to France and Luxembourg on the other hand. Last, the electoral procedures and systems do influence the results: what about the impact of automatic registration, compulsory voting, and so on?

Tentative conclusions and answers

Answer to question 2. **What is the future of a supra-national citizenship based on a national-level nationality?**

Several years after the Maastricht Treaty, some of the obstacles to the effective implementation of this new status are now evident. On the one hand, these are genuine practical difficulties for putting rights into effect. But on the other hand, collusion with national views on citizenship has been more evident (A). In this way, some academic analysis is far more pessimistic and state " rien de nouveau sous le soleil"(B).

(A) The Spanish delegation had explained in its 1990 proposal presentation that European citizenship was supposed to be a dynamic concept, the content of which would depend upon the general evolution of Union politics. Encouraged by the prospect of the Inter Governmental Conference and by the support of the European Parliament, many non-governmental institutions have reflected upon, and pleaded for the development of citizenship rights. In spite of their frequent references to citizen's expectations, Member States – preparing the Amsterdam treaty – have not made use of the mechanism described in article 8E of the Maastricht Treaty stating that, "the Council…may adopt provisions to strengthen or to add to the rights laid down in this Part (taking) account of the development of the Union". A contradictory dynamic is thus emerging, very limited on a political-legal level, but growing more and more powerful from an ideological point of view (Magnette, 1998). The European citizenship could have be – for the States – only a kind of ideological gadget for a "once upon a time treaty" when, in the same time, it is gaining slowly but effectively credit in the civil society. If these two diverging trends continue to evolve, they might deepen – once more – the public impression of the democratic deficit of the Union.

(B) Some of our colleagues are going further. In fact, some authors argue – Carlos Closa for example – that the citizenship of the Union adds new rights to those enjoyed by nationals from Member States without "this implying currently any meaningful derogation of nationality" (Closa, 1995, 487). A distinctive characteristic of this European citizenship would be additionality: "citoyennete de superposition ou de consequence" (Masclet, 1997, p. 77). Citizenship of the Union only adds, to the first group of nationality rights enjoyed within a Member State, a second circle of new rights enjoyed in any Member State (Closa, 1995, p. 493). In other words, the right to vote and stand for elections in the Member State of residence is an *optional* right: the link of nationality is considered to be a stronger and more persistent one than merely residence. Despite the logic of non-discrimination in the letter of article 8B, every derogation required by a member State, in order to protect its national identity, has been accepted. So that "the citizenship of the Union does not seem to pose a definitive challenge to the nationality of Member States": the issue of the Union – as new public power – has not been resolved yet (Closa, 1995, 518).

Answer to question 3. **Will the European citizenship ever have a true content? Does Europe hold a meaning to the citizens, or is it only the recipient of "soft passions" as François Furet stated it?**

The elements leading to a redefinition of the electorate after the Maastricht Treaty are manifold: each country's particular electoral procedure, different mobilisations and identification among European migrants, and heterogeneous influences of state-models for integrating citizens. They all drive us to think over the above described difficult and new relationships between nationality and citizenship. On the whole, reactions to this innovation – which could be observed in the 1994-1999 period, from the electorate's point of view with the EP elections – reveal ***more generally*** the chaotic state of the European public opinion. European citizenship has given birth to radically opposed reactions – from fears and refusals to hopes of salvation – which illustrate the contradictory demands to which the Union is subjected. Can Union citizenship contribute to the creation, among the people's of Europe, of a feeling of "belonging-to" a real community (*Gemeinschaft*) in which the peoples have a common destiny and common values (Marias, 1994)? In the attitudes of those directly affected by the new voting right, one finds indifference intermingled with fear. This can be explained by the largely shared, though incorrect, fear of the migrant population of losing their right to vote in legislative elections in their national State, as a result of taking part in European elections in their state of residence. For some citizens too the pluri-allegeances are difficult to understand. In general, negative reactions have been expressed by national movements against the European citizenship, as if this new concept would erode national identity and the civic culture it embodies. In Denmark and France, and more discreetly in other states, political movements – which are much larger than traditional nationalist oppositions – have focused their criticism of the Treaty on *this* concept. This is partly because the extension of some national rights to citizens of other Member States was seen as a dilution of national identity in some immigration countries and partly because European citizenship was in itself the symbol of a possible transfer of loyalty from the State to the European Union. One must say that these provisions re-invent – without answering – older and broader debates on the political rights of foreigners.

Answer to question 4. **What is the articulation of different levels of identity – supranational, national, and regional – in the citizens' representations?**

In terms of identity, this is a question that seems worth examining. Let us travel back to Spain because this case is particularly interesting, especially for its historical tradition marked by the relationship with Latin-American countries. It seems that Latino America acts as a powerful alternative referent which is revalued in function of specific circumstances in European policy. Thus a plurality of Spanish do consider that Spain has many identity links with Europe as it has with Latino America (41%). These who think that one of them is predominant are almost evenly distributed: 21% considers that links with Europe are greater whilst 23% think that the links are greater with Latino America. Three percent think that Spain has only identity links with Europe and 2% with Latin America (Closa, 1998). In the same way and also in Spain, a study carried on a 1996 poll on identity and European citizenship provides some valuable insights on the relationship between these two. In open contradiction with speculations, there is a positive association between European identification and identification with Latin-American speaking. Those two types of identities do not overlap, better said they are nested with each other. Attachment to one supranational community may be favourable to attachments towards another (Llamazares and Reinares, 1997). In other words and more generally, it is an indicator of openness towards large, non-particularistic and territorial spaces. There could be a place for multiple parallel identities.

Answer to question 5. **Will the Union become an arena for political deliberation, meeting the conditions of a democratic European "public sphere", as Habermas meant it?**

In spite of signs of hostility here and there, European citizenship has initiated some amounts of positive mobilisation. For example, the launch of the Intergovernmental Conference in 1996 gave many institutions and organisations the impression that new opportunities were being created to promote their own ends. The negotiations which have followed have been marked by the difference between the prudence of the proposals made by the Member states and the Commission on the one hand, and the enthusiastic mobilisation of non-governmental actors, supported by the European Parliament and by some sectors of the Commission, on the other. Moreover, they have been used by some in order to try and impose their own purpose on the Intergovernmental Conference's agenda (and more generally to reinforce their own weight in the institutional balance of the European Union). These first manifestations of a "European civil society" are difficult to analyse given their diversity, the great variety of channels through which they are expressed and their sometimes non-institutionalised structure, but they should not be ignored. Some examples of these new trends can only give an overview of a movement which would need deep analysis in itself. In this academic field of research, I would like to quote Julien Weisbein's Ph.D. (due to be completed soon). This young associate scholar to the CEVIPOF – Centre d'études de la Vie Politique Française, Paris – is working about the association's tribute to a Political Europe. He shows, for example, that the European Parliament, which had asked to be party to the Inter-governmental Conference negotiations, but had been refused this role by the Council, organised large public hearings, to which more than 300 associations were invited to make a brief oral report. Here they presented a large variety of desiderata, often remote from the union's means and policies, from environmental matters to sexual equality, racism, third world development and the protection of animals and so on. As a result associations assume a four-level mission "from below": form and inform about European issues, construct bonds between Europeans, defend rights and move on mobilisations (Weisbein, 1998). In an another direction, there is a second field of research opening now in France about transnational collective action: as euro-strikes (Villevorde in Belgium, "marche contre le chomage": walk against unemployment), "Europeanization" of trade unions (Lefebure, 1998). But: as shown by Luc Rouban, this "European public sphere" remains for the moment mostly elitist, built by "hauts fonctionnaires", bureaucrats and interest groups' representatives (Rouban, 1997). An analogy could be made with the 17th – 18th century public sphere described by Habermas. For the citizens, is the perceived gap – between being affected by something and participating in changing it – becoming ever greater? Or is this question of disparity just a passing imbalance? We should not be condemned to resignation.

(Draft version – Comments welcome)

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COMMERCIAL LAW REFORM IN JAPAN

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Government reform agenda in Japan

The government in Japan is currently seeking to re-regulate and restructure the Japanese economy to make way for future growth. The timing, pace and intensity of the reform process reflects the current recession (1992-) and problems arising from the 1997 financial crisis. To bring about new business opportunities and make it easier for companies to operate in an international environment, the Japanese government has embarked on system-wide legal reform, including important changes to civil procedure statutes, corporations law, and banking and finance law. This article briefly outlines the current reform process with reference to insolvency laws and the *Commercial Code* (*Shô Hô* Law No 48, 1899).

Japanese insolvency procedures and corporations law have been criticised for being draconian for some time.[1] The insolvency laws are not able to cope with the increase in consumer bankruptcies created in part by the expansion of the consumer credit industry in the 1980s and the internationalisation and increasing complexity of insolvency cases. There is also a perceived need for a reconsideration of Japan's rehabilitation procedure for financially distressed companies in order to improve the speed and cost-effectiveness of judicially supervised insolvency workouts.[2] Reforms to the *Commercial Code* are also being influenced by perceptions of modernity and international competitiveness, as reformers seek to create a corporate legal regime that is flexible and will assist companies in their restructuring efforts. In particular, the focus on restructuring in the new *Civil Rehabilitation Law* (*Minji Saisei Hô* Law No 225, 1999) supports reforms to the *Commercial Code* which make it easier to restructure a company or a corporate group through stock exchanges and transfers.

The restructuring and re-regulation of corporate Japan requires a reassessment of previous industrial and economic policies which have been both maligned and praised. According to the Japanese Economic Planning Agency:

> [i]f neither 'catch-up' style growth nor bubble-oriented economic growth is a possibility, then

[1] Eg, on consumer bankruptcies see, Makoto Itô, *Hasan Hô* (Bankruptcy Law), 2nd edition, Yûhikaku, Tokyo, 1991; on international insolvency law see, Makoto Itô, Morio Takeshita, Munehide Nishizawa *et al*, 'Proposed Reforms in Japanese Law and Practice in International Bankruptcy – Preliminary Draft of the international bankruptcy related provisions in the Japanese insolvency proceedings' (1993) 2(1) *International Insolvency Review* 87; on SMEs see, Small and Medium-sized Enterprise Insolvency Policy Committee Report, 'Tôsan Kanren Hô no Mondaiten to Kaizen Hôkô ni tsuite – Chûshô Kigyô Kyûsai no Tachiba kara mite' (Regarding Problems with the Law relating to Insolvency and Trends for Improvement: from the perspective of Assisting Small and Medium-sized Enterprises) (1980) 941 *Kinyû Hô* 51.

[2] Hômushô Minjikyoku Sanjikan Shitsu (Office of the Counsellor of the Civil Affairs Bureau of the Ministry of Justice), *Tôsan Hôsei ni kan suru Kaisei Kentô Jikô Hosoku Setsumei* (Commentary on the Questionnaire on Reforms relating to Insolvency Laws), December 1997, reproduced in (1997) 46 *Bessatsu NBL*.

> Japan must find a new way of engineering growth. It must grow by taking on risks and making use of diverse talents and creativity. The economic structure must be changed to accommodate new demands. In financial circles, large companies traditionally managed their finance largely by following each other's moves with steadily growing hidden reserves as a comfortable cushion, while small and medium-sized companies relied on indirect financing using real estate as collateral. As hidden reserves run short and the strength of real estate as collateral evaporates, traditional financing methods will no longer be reliable. This gives rise to the need to attract 'risk' funds, which draw on the future flow of earnings, and to entrepreneurial explore business opportunities.[3]

The current law reform process is designed to cope with – and encourage – changes to the economic structure in Japan and deal with the excesses of the 1980s, including bad debts and inefficient corporate management based on burgeoning corporate groups. The danger is that this type of legislative reform will upset traditional business methods so much that there will be a backlash from stakeholders such as labour and holders of security interests. This may make further reforms and adjustments necessary.

Restructuring corporate Japan

1 *Insolvency law reform*

The existing legislative framework for insolvency in Japan is traditionally said to be comprised of five procedures: bankruptcy (*Bankruptcy Law*, *Hasan Hô* Law No 71, 1922), composition (*Composition Law*, *Wagi Hô* Law No 72, 1922), corporate reorganisation (*Corporate Reorganisation Law*, Kaisha Kôsei Hô Law No 172, 1952), and special liquidation and corporate arrangement (*Commercial Code*, *Shô Hô* Law No 48 1899, as amended 1938). The current reform process is the first comprehensive overhaul of the insolvency law regime, although important reforms were introduced during the Occupation period (1945-1952). It was the decade-long recession in the 1990s and the 1997 financial crisis which precipitated an unprecedented number of insolvencies that finally forced a comprehensive reconsideration of Japan's insolvency law regime.

The insolvency law reform process officially began in October 1996 when the Japanese government established the Committee on Insolvency Law Reform (Tôsan Hô Bukai) within the Legislative Advisory Council (Hôsei Shingikai) of the Civil Bureau of the Ministry of Justice, the major law reform body in Japan. The reform process was divided into two parts in September 1998, with reformers being asked by the Minister of Justice to first produce a new reconstruction procedure for small and medium-sized enterprises (SMEs). Accordingly, the first reforms create a new procedure scheduled to come into effect by 1 April 2000, which is aimed at reconstructing juridical and natural persons by working out their debt problems. Later reforms will be introduced in 2001 to create a new consumer bankruptcy procedure; provisions dealing with international insolvencies; and amendments to remaining reconstruction procedures.

This outline examines the first stage of the insolvency law reform process: the introduction of the

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[3] Research Bureau, Economic Planning Agency, 'The Japanese Economy in 1998: A review of events and challenges for the future – Recovering from the aftereffects of the bubble's collapse' (December 1998) Economic Planning Agency, <http:www.epa.go.jp/99/f/kaiko-e/kaiko-e.html> [Conclusion: Aiming for 'non-bubble' growth] (Copy on file with author). See also newspaper reports eg, Editorial, 'Keizai Kaikaku Sasaeru Tôsan Hôsei no Seibi Isoge' (Rush to Establish an Insolvency Law Regime that can support Economic Reform) *Nikkei Shimbun* (Tokyo, Japan) 23 July 1998 in Sangi'in Hômu I'inkai Chôsa Shitsu (Research Office of House of Councillors' Committee on Judicial Affairs), Minji Saisei Hôan (Sankô Shiryô) (Civil Rehabilitation Bill (Reference Materials)), Naikakuhô (Cabinet Law) No 64, December 1999, 78 (Copy on file with author).

new reconstruction procedure as it applies to SMEs and entities other than stock companies.[4] The first reforms are contained in the *Civil Rehabilitation Law*, which was passed by the Diet (Japanese Parliament) on 14 December 1999. The initial focus on SMEs is not surprising given their importance to the Japanese economy: they make up over 99% of enterprises in Japan and employ 60% of regular employees,[5] and comprise approximately 99% of all business failures.[6] More controversial, is the use of reconstruction or reorganisation laws as the vehicle for re-regulation and restructuring SMEs, because of differing perceptions about the purpose of insolvency law. This debate incorporates issues such as the appropriate role of the state in protecting the interests of the parties involved in insolvency workouts based on rehabilitating a company, rather than pursuing a liquidation. It is underpinned by the tension between the historical role of insolvency law as a debt collecting mechanism and a newer theory that sees it as a catalyst for reconstructing ailing companies, thereby producing more favourable economic outcomes for debtors and for society.

The liquidation versus reconstruction dichotomy has formed the basis for interpretations of the new *Civil Rehabilitation Law* in Japan. Part of the problem is the perception that reconstruction and/or reorganisation means that a debtor will be rehabilitated in the sense that it will be rescued. This perception has led to unprecedented legal debate in Japan because it appears that, although the ostensible focus of the new *Civil Rehabilitation Law* is to provide a soft landing for SMEs and assist debtors, embedded in the *Civil Rehabilitation Law* are features that suggest a different agenda by making restructuring businesses easier and more economically efficient. To some extent the new procedure is an amalgamation of concepts already found in Japanese insolvency laws. Because of the focus on existing problems in the current laws and the pressure created by the 1997 financial crisis, the new procedure is not revolutionary on its face. However, there are some innovations in the new *Civil Rehabilitation Law* which will assist corporate restructuring in Japan. The inclusion of business transfer provisions and the introduction of a scheme for extinguishing security interests, may see the procedure used as a support vehicle for insolvency workouts based on merger and acquisition (M&A) principles, already a popular method of workout in Japan.

The new *Civil Rehabilitation Law* will replace the *Composition Law* (*Wagi Hô* Law No 72, 1922) which is currently the most used court-based insolvency procedure in Japan. Like the *Composition Law*, the new procedure will essentially be a debtor-in-possession type procedure. It is designed to improve on procedures in the *Composition Law*, particularly those areas which creditors perceived as unreliable. To avoid misuse of the system by debtors who remain in charge of assets even after a proceeding is commenced, the claw back provisions, duties owed by the debtor and supervisory provisions have been strengthened. There are a number of procedural options which provide exceptions to the debtor-in-possession principle, including supervision by a provisional

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[4] According to the *Basic Law on Small and Medium-sized Enterprises* (*Chûshô Kigyô Kihon Hô* Law No 154, 1963 Article 2), SME means either (1) a company with capital of less than 100 million yen, or less than 300 regular employees; or, (2) an individual enterprise with less than 300 employees. However, in the case of the wholesale sector, it means an entity with capital of less than 30 million yen or less than 100 employees, and in the case of the retail sector it means an entity with capital of less than 10 million yen or less than 50 employees. A Small Scale Enterprise means an enterprise with less than 20 regular employees. However, in the trading sector or the service sector, it means less than 5 employees.

[5] Chûshô Kigyô Chô (Small and Medium-sized Enterprise Agency), *Chûshô Kigyô Hakusho: Heisei 11* (Small and medium-sized enterprise White Paper, 1999), Government of Japan, Tokyo, 1999, 27 and 37. (Table 1-2-6, Estimated Percentage of SMEs as a total of all Enterprises (excluding agriculture); Table 1-2-15, Share of employees according to size on an enterprise base.)

[6] Sômu Chô Tôkei Kyoku (Statistics Bureau, Management and Coordination Agency, Government of Japan), *Nihon Tôkei Nenkan Hesei 11* (Japan Statistical Yearbook, 1999), Tokyo, 1999, 208, Table 5-15, Cases of Suspension of Business Transactions with Banks and Bankruptcy.

administrator prior to commencement, and after commencement, appointment of a supervisor and/or investigator. In extreme cases where there is danger that assets of the debtor may be dissipated, after commencement the court may appoint a trustee. The *Civil Rehabilitation Law* also includes stronger discovery provisions and a discretionary creditors' committee system which reformers hope will encourage creditors to become involved in rehabilitation proceedings.

On the other hand, ostensibly in order to encourage debtors to use the procedure, a discretionary stay/moratorium on the enforcement of security interests has been introduced. During the reform process, there was support for introducing an automatic stay – similar to the procedure in Chapter 11 of the US *Bankruptcy Code* (*Bankruptcy Code* (US) 1978). The final reforms require the court to issue an order for a moratorium to apply, but it may make such an order prior to the commencement of a proceeding once a petition for commencement has been filed. Furthermore, once a petition to commence a rehabilitation proceeding has been filed, the debtor will be restricted from making certain payments. The new *Civil Rehabilitation Law* will also allow debtors to file for rehabilitation prior to bankruptcy and relax the jurisdiction rules to allow related cases to be heard together.

One of the major innovations in the new *Civil Rehabilitation Law* is the new scheme for extinguishing security interests on demand (new extinguishing scheme). The scheme is aimed at assisting SMEs in Japan that are suffering from unserviceable debt burdens as a result of the end of the 'Bubble' period (1987-90). In other words, they have assets that are secured for more than they are worth in today's market. The new scheme will allow SMEs to get rid of some of this debt so that debtors will be able to successfully rehabilitate. By extinguishing security interests over assets that are important to the rehabilitation of the debtor for a reasonable current price, secured creditors will be prevented from selling assets necessary to a debtor's rehabilitation to enforce their security and ordinary creditors will benefit from some of the proceeds from the price paid. The extinguishing scheme will have important repercussions for the financial industry in Japan because in the past a debtor was required to pay the whole of their obligations to all secured creditors before a security interest could be extinguished. Under the new extinguishing scheme however, a debtor will be able to avoid paying second or lower ranked secured creditors in some cases. These lower ranked secured creditors will be forced to join the ranks of ordinary creditors. Thus the new extinguishing scheme upsets the historical deference paid to security interests in Japan, an important issue for banks and other financial institutions, and in the long-term may have an effect on the way that security is given in Japan.

Even if the new extinguishing scheme is not used in practice, the threat of extinguishing security interests may provide debtors with leverage in their negotiations with secured creditors. In fact, there is concern that the scheme may also be used by some companies to facilitate refinancing deals and there are questions as to whether this is an appropriate use of the new *Civil Rehabilitation Law*. There are no real sanctions in the *Civil Rehabilitation Law* against this type of 'abuse', except rejection of the petition to commence a proceeding and/or cancellation of a proceeding. It may be that judges do not have the resources to investigate all of the anticipated cases that come within the new *Civil Rehabilitation Law* and that cases of abuse will increase.

The new extinguishing scheme complements the restructuring aims of the new *Civil Rehabilitation Law* because it will make debtor-companies more attractive to new investors. Used in conjunction with the new business transfer provisions, it may become a powerful tool to help prepare a company for a sale aimed at restructuring and reorganising its business. The new business transfer provisions allow a debtor to apply to the court to transfer the whole or part of its business where necessary for the debtor's rehabilitation as soon as a proceeding is commenced. Business transfer provisions already exist in the *Bankruptcy Law* and *Corporate Reorganisation Law*, however the new provisions in the *Civil Rehabilitation Law* relax the requirements for use of the provisions. One

example of this relaxation is that an application for a transfer need not be made as part of a rehabilitation plan; the creation of a rehabilitation plan usually takes some time and was an obstacle to business transfers under the *Corporate Reorganisation Law.* When combined with the potential of the extinguishing scheme for cleaning up unwanted encumbrances over assets of the rehabilitation debtor and the existing market for this type of M&A activity in Japan, the business transfer provisions are likely to be the most used aspect of the new *Civil Rehabilitation Law.*

The potential for the new *Civil Rehabilitation Law* to be used as a means of restructuring companies through the use of the new extinguishing scheme and business transfer provisions once again raises the controversial issue of the use of rehabilitation-type insolvency laws to achieve regulatory and restructuring goals. The current reforms have been designed to deal with the collapse of the 'Bubble' economy (1987-90) and the consequent unserviceable debt burdens of companies in Japan. It is arguable that these short-term goals have necessitated the use of the *Civil Rehabilitation Law* as a means of restructuring companies, an aim that arguably does not correspond to traditional interpretations of insolvency law based on a liquidation versus rehabilitation dichotomy. This subsidiary outcome supports contemporary critiques that suggest that the dichotomy itself is false: that there need not be a contradiction between the multiple aims of insolvency law.

In conclusion, although there have been some unexpected outcomes from the first wave of insolvency law reforms, it is not yet clear whether the reforms will provide a long-term rehabilitative mechanism for SMEs in Japan. It may be that the insolvency law reforms become merely stop-gap measures. Work on revision of the *Bankruptcy Law*, including new consumer bankruptcy and international insolvency provisions has already begun. The process should be complete by 2001. These reforms are also driven by the need to respond to the recession (1992-) and 1997 financial crisis and may open the way for further changes which have the effect of supporting a restructured and re-regulated Japanese corporate sector. In the long-term, the likely effect of the reforms on other areas of law, such as security interests, is that further reforms of related areas of law will probably be required, representing concessions for stakeholders in other policy areas, such as employees. There may also be a backlash against the restructuring outcomes of the *Civil Rehabilitation Law.*

2 *Reforms to the Commercial Code*

The restructuring emphasis in the *Civil Rehabilitation Law* is in line with the current process of reform relating to the *Commercial Code*, which will make it easier to restructure companies in Japan, including amendments dealing with mergers and acquisitions (1998). The most recent reforms under the *Law to amend part of the Commercial Code etc* (*Shô Hô tô no Ichibu wo Kaisei suru Hôritsu* Law No 125, 1999) allow for a 100% holding company to be established by stock exchange or transfer. This followed reform of the *Anti-Monopoly Law* (*ShitekiDokusen no Kinshi oyobi Kôsei Torihiki no Kakuho ni kan suru Hôritsu* Law No 54, 1947) in 1997 to repeal the prohibition on 'genuine' or 'pure' holding companies – that is, those which simply oversee the business of subsidiaries without taking part in the business itself. Until 1997, the only way to create a parent-subsidiary relationship under the Japanese *Commercial Code* was by dividing up a company; through acquisition; or through distribution to a third party. These methods involved problems such as complex tax and accounting procedures, comprehensive investigation and the necessity of finding new investors.[7] Thus, the Diet Investigative Council (Kokkai Shingi) passed a resolution in

[7] Kazumasa Abe, 'Kabushiki Kôkan – Kigyô Bunkatsu no Jitsumu to Kongo no Tenbô' (Stock exchanges and Corporate Divestitures in Practice and Expectations for the Future) (1999) 1557 *Kinyû Hômu Jijô* 13, 13. See also, Kenjirô Egashira, 'Transformation of the Financial System and the Corporate Law of Japan' (Paper presented at the Legal Crisis? Japan and Asia Colloquium, Asian Law

1997 to investigate ways of making it easier to change corporate structures. The new stock exchange and transfer provisions of the *Commercial Code* which came into effect on 1 October 1999 are a result of this study. They will be followed by further reforms to the *Commercial Code* to permit company divestiture and consolidated accounting, expected to be legislated for in 2000.

In the 1990s, Japanese companies increasingly sought to improve efficiency and compete in international markets by diversifying their operations into subsidiaries and affiliate companies. This has been a different process to that of formation of *keiretsu* corporate groupings, although many of the companies spinning off subsidiaries and affiliates are or were *keiretsu* members. During the past decade the number of affiliated subsidiaries per listed company in Japan has doubled.[8] On average a listed company has 50 affiliated subsidiaries – Sony, with the most, has 1041.[9] The concept behind the reforms in the long-term is to make it easier to manage these companies as a whole. Exchanging shares (*kabushiki kôkan*) deals with the situation, for example, where A and B agree to an acquisition and one becomes the 100% subsidiary of the other (*Commercial Code* Article 352). Transferring shares (*kabushiki iten*) refers, for example, to the situation where A and B agree to form a new company – called C – and C will hold 100% of the shares of both A and B (*Commercial Code* Article 364). As the examples suggest, in the short-term the new provisions make it easier to change corporate form and deal with corporate debt through restructuring. The new provisions also seek to protect the interests of shareholders of a parent company by creating measures for the disclosure of information by a subsidiary and to ensure appropriate accounting measures by making it possible to appraise assets and obligations according to current values.[10]

The procedures for exchanging and transferring shares under the amendments to the *Commercial Code* are very similar, except that the contents of the agreement between the parties will change depending on whether it is for an exchange or transfer of shares.[11] The *Commercial Code* procedure requires:

1. prior disclosure (*jizen kaiji*) of the parties' agreement for the exchange or transfer of shares (Articles 358 and 368);
2. approval of the agreement by the parties by a special resolution at a general meeting of shareholders (Articles 353-1 and 365, see 343 on special resolutions,);
3. granting any shareholders who oppose the agreement a right to demand that they be bought out (Articles 355 and 371); and
4. latter disclosure (*jigo kaiji*) of documentation relating to the exchange or transfer (Articles 360 and 371).

As to when the transaction takes effect, there is a difference between the exchange and transfer procedures: an exchange of shares takes effect on the date of exchange asset out in the agreement; a transfer takes effect when the new parent company is registered (*Commercial Code* Article 370). There is also a simplified process for the exchange of stock where the potential parent company is much larger than the potential subsidiary company, a situation which does not require the approval

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Centre, University of Melbourne, Melbourne, 12-14 August 1999) especially, 16-9 (Copy on file with author).

[8] Ibid 17. Abe is citing the 'DIR Mâketto Jôhô' (DIR Market Information Report) by Daiwa Sôken (Daiwa Research) released 19 July 1999.

[9] Ibid.

[10] For a summary of the share exchange and share transfer reforms to the *Commercial Code* see, Kenji Ebara, Keita Yasuda and Nobunori Matsui, 'Shô Hô tô no Ichibu wo Kaisei suru Hôritsu no Gaiyô' (Outline of the Law to amend part of the Commercial Code etc) (1999) 1555 *Kinyû Hômu Jijô* 6. These provisions will be complemented by the move from independent to consolidated accounting standards in Japan expected to take place in 2000.

[11] On the creation of an agreement to exchange shares see, *Commercial Code* Articles 353-1 and 353-2.

of shareholders at a general meeting (*Commercial Code* Article 358).

The upcoming reforms on corporate divestiture (*kigyô bunkatsu*) will also make it easier to reorganise and manage the large clusters of corporate affiliates that have evolved in Japan over the past decade. The reforms will allow for the formation of a subsidiary to carry on part of a business or a new business. According to Abe there are a number of motivations for the formation of a subsidiary company: faster decision-making and accounting independence; employment efficiencies and an improved pool of promotion opportunities for employees; raising capital; and dividing risk and responsibility.[12] The procedure for divestiture is likely to be similar to the procedure for exchanging and transferring stock, requiring approval from shareholders by a special resolution at a general meeting of shareholders with provision for a simplified procedure. Reformers hope that these reforms will make the *Commercial Code* more flexible and enable companies to deal with current debt servicing problems arising out of the recession (1992-) and 1997 financial crisis, and future restructuring efforts.

Conclusion

The package of legislative reforms currently underway in Japan are being designed to restructure and re-regulate the corporate sector and bring it in line with Japanese perceptions about best practice in other industrialised countries. The use of insolvency laws to restructure companies is controversial, but the use of business transfers as a major method of restructuring suggests a conflation of rehabilitation and liquidation aims. Moreover, the time pressures arising from the prolonged recession in Japan and financial crisis have arguably led reformers to rely heavily on current statutes for the final draft of the *Civil Rehabilitation Law* and the consequent acceleration of the reform process has led to piecemeal reform. The reform of the *Commercial Code* is occurring at a somewhat slower pace, but the outcomes of the reform process reflect issues that are also influencing the insolvency law reform debate, including changes to the economic structure of Japan, perceptions of modernity and a rush to deal with the problems arising from the end of the Bubble period. Future reforms will also reflect these pressures as the Japanese government seeks to create a new and flexible corporate law regime.

[12] Abe, above n 7, 14.

Part II

Visiting Professors at the ICCLP

Jörg Fisch (Professor of History, The University of Zurich)
(Sept. 1999 – Mar. 2000)

Profile:
Prof. Fisch's specialty is the History of International Law. After studying history and philosophy at the Universities of Zurich, Basel, Vienna, Munster and Heidelberg, he received his D.Ph. in history at the University of Heildelberg in 1976. He was a research assistant at the University of Bielefeld (1976-1980; 1981-1986) and a researcher at the School of Oriental and African Studies in London (1980/81). Prof. Fisch commenced his present position as professor in history at the University of Zurich in 1987.

During his 6 month stay at the ICCLP, Prof. Fisch conducted a joint seminar at the Graduate School of Law and Politics with Prof. Yasuaki Onuma on the "Global Expansion of European International Law" and gave a presentation at Comparative Law and Politics Seminar on "The Role of International Law in the Territorial Expansion of Europe". The seminar was jointly sponsored by the ICCLP and the Tokyo University International Law Study Group.

Major Publications:
Krieg und Frieden im Friedensvertrag: Eine universalgeschichtliche Studie über Grundlagen und Formelmente des Friedensschlusses (War and peace in peace treaties: a study on the foundations and the formal elements of the conclusion of peace in world history), (Stuttgart: Klett-Cotta, 1979).
Die europäische Expansion und das Völkerrecht: Die Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart (European expansion and international law: Controversies on the status of overseas territories from the fifteenth century to the present), (Stuttgart: Franz Steiner, 1984).
Tödliche Rituale: Die indische Witwenverbrennung und andere Formen der Totenfolge (Deadly rituals: Widow burning in India and other customs of following the dead), (Frankfurt am Main: Campus 1998).

Sylvie Strudel (Associate Professor, Institute of Political Studies at Lille (France))
(Oct. 1999)
Profile:
Prof. Strudel specializes in political-sociology. She earned her Masters Degree in Modern Literature at Paris IV Sorbonne University in 1981, subsequently acquiring her DEA at EHESS (Ecole des Haures Etudes en Sciences Sociales) in 1984, and Ph.D. in political science at the Institute of Political Studies, Paris in 1991. Prof. Strudel was appointed Associate Professor in political science at Institute of Political Studies, Lille in 1992, and has concurrently been associated with the Research Center of Administration, Politics and Sociology, Lille since 1993

In her one month stay at the Center, Professor Strudel gave two Comparative Law and Politics Symposiums entitled "Being Jewish in France Today" and "European Citizenship: Reality and Practice". She is also a contributor to this edition of the *ICCLP Review*.

Major Publications:
The Jewish Vote: migration, religion, politics, (Paris: Presses de Sciences-Po, 1996)
"Gauche indivise et gauches sigulieres", co-author M. Hastings, in P. Brechon et.al, *Les cultures*

politiques des francais, (Paris: Presses de Sciences-Po, forthcoming Autumn 1999)

Masato Ninomiya (Professor, The University of Sao Paulo, Faculty of Law, Brazil)
(Nov. 1999 – Feb. 2000)
Profile:
After studying at the Universities of Sao Paulo and Tokyo, Professor Ninomiya earned an associate professorship at the University of Sao Paulo attaining his current professorship in 1986. His particular field of research is international law and conflict of laws. During his 3 month stay at the ICCLP, Prof. Ninomiya lectured on Ibero-American Law and gave a presentation at the 6th Comparative Law and Politics Symposium entitled "Japanese Legal Education from Foreign Perspectives".
Major Publications:
Equality of the Sexes in Nationality Law (Tokyo: Yuhikaku, 1983).
Brazilian Civil Procedure Code (Sao Paulo, Kaleidos Primus, 1998)
Po-Nichi Horitsu Yogoshu (Portugal-Japanese Legal Terms) et.al. (Tokyo: Yuhikaku, 2000)

Visiting Japanese Professors at the ICCLP

Ishizuka Masahiko (Nihon Keizai Shinbum Editorial Writer)
(July 1999 – June 2000)

Profile:
Mr. Ishizuka was born in 1940. He joined the Nihon Keizai Shinbum after graduating from the Faculty of Liberal Arts of International Christian University. He spent 3 years conducting post-graduate studies in journalism at Columbia University from 1968. After postings at the English language edition and economy section of Nihon Keizai Shinbum, Mr. Ishizuka assumed his present position in 1990. Mr. Ishizuka has written editorials on the situation in Asia and international issues such as the United Nations, and has contributed a column "Tokyo Diary" to the weekly English publication, *The Nikkei Weekly*. His current research at the Graduate School of Law and Politics is focused on the topic "A comparative analysis of political regime change in Southeast Asia".
Major Publications:
Nichibei Masatsuno Nazowo Toku (Unraveling the Puzzle of Japan-US Frictions) co-author, (Nihon Keizai Shinbum, 1995)
Translations:
Saccha Kaikoroku (Memoirs of Margaret Thatcher), Margaret Thatcher, (Nihon Keizai Shinbum, 1995)
Gurobarizumu toiu Moso (False Dawn: The Delusions of Global Capitalism), John Gray, (Nihon Keizai Shinbum. 1999)

Nakamura Koichiro (Ministry of Foreign Affairs Official)
(July 1999 – June 2001)

Profile:
Mr. Nakamura joined the Ministry of Foreign Affairs in 1987 after graduating from the Law Faculty of the University of Tokyo. Following postings to the European and Oceanic Affairs Bureau and the then United Nations Affairs Bureau, he spent three years studying in the United Kingdom and Moscow, including the School of Slavonic and East European Studies, University of London. After serving in the Japanese Embassy in Moscow from 1991 to 1993, Mr. Nakamura was appointed to positions in the Treaties Division, the Russian Division and the General Affairs Division. Mr.

Nakamura is currently the Director of Administrative Reform, General Affairs Department of the Secretariat. At the Graduate School of Law and Politics Mr. Nakamura is researching "Mutual Relations between Research and Practice in International Law". He has also given a joint post-graduate seminar with Prof. Onuma Yasuaki on International Law.

Major Publications:

" Gaiko Kankei no Kaisetsu" (A Commentary on Diplomatic Relations), "Gaiko Kankei no Danzetsu" (Ruptures in Diplomatic Relations), in *Kokusaiho Kankei Jiten* (International Law Dictionary), Kokusaihogakkai ed. (Sanseido, 1995)

" Kokugyomu ni kansuru Nihon Seifu to Hangari Kyowakoku tono Aida no Kyotei" (An Agreement between the Government of Japan and the Republic of Hungary on Aviation), in *Horei Kaisetsu Shiryo Soran* (Commentary on Laws and Ordinances), (Daiichi Hoki Shuppan, 1995)

Interview with Emeritus Professor Hoshino Eiichi

Legal Education and Scholarship

by Wada Keiko, ICCLP Co-ordinator

In this interview, Emeritus Professor Hoshino Eiichi, formerly Professor of Civil Law at the University of Tokyo's Faculty of Law, recounted some of his experiences as a legal scholar for half a century, covering approximately 40 years at Todai—from when he became a law student in 1945, via some interruptions due to enlistment and ill health, to his appointment as an Associate Professor in 1954 and later as a Professor—and then several further years at Chiba University and the University of the Air, and also as an educator who was fondly known by his students as Professor "Star Field" after the film *Paper Chase*.[1]

Professor Masato Ninomiya of the University of São Paulo, who completed his doctoral thesis under Professor Hoshino's supervision, happened to be in attendance at the ICCLP on the day of this interview and agreed to participate also.

Professor Hoshino began by telling us about his teachers at the former *Daiichi* High School (*Ichikô*) under the old Imperial education system.

STUDENT DAYS

Hoshino: Considering that it was during the War, it is hard to believe the atmosphere of freedom we enjoyed at *Ichikô*. It is hard to imagine that at that time there was such a large number of people gathered together in one place who were against the war and military thought. All students lived on campus, so our contact with friends and teachers was all-encompassing. I thought I had known some very clever students at Middle School, but the *Ichikô* students were on another level entirely. And the teachers were incredibly distinguished academics. We were able to commit ourselves to our studies and contemplate life and the world around us, safe in the knowledge that they would protect us. The headmaster, Mr Abe Yoshinari, was particularly memorable—he made such bold statements that we were worried that he would be arrested by the police or the military police. And so, in a spirit of freedom and tolerance, we were able to lead an existence totally removed from the current of the times. Our lives were devoted to thinking systematically about society, the state and life in general. I was introduced to the study of law through the subject called "Law, Politics and Economics". Unfortunately, high school students do not learn the foundations of law these days, so they must grapple with many legal concepts for the first time when they go on to university. This may contribute to the perceived difficulty of entry into the legal arena.

Wada: You entered university in 1945, just before the end of the War. What was Todai like at the time?

Hoshino: In those days, students were being mobilised for factory work. Mishima Yukio, who was one year ahead of me at Todai, wrote a novel about this. For one month after I arrived at Todai, we had normal lectures. Of the compulsory subjects, I had Professor Miyazawa Toshiyoshi for Constitutional Law, Professor Wagatsuma Sakae for Civil Law, Professor Ono Seiichirô for Criminal Law, Professor Takayanagi Kenzô for English Law and Professor Yamada Akira for

[1] The characters in the name *Hoshino* mean "star" and "field" respectively. The film features an inspiring law educator called Professor Greenfield.

German Law. Of the elective subjects, I had Professor Yasui Kaoru for International Law and Professor Harada Keikichi for Roman Law. The teaching style was strictly for the professor to speak and the students to take notes. Some professors spoke so quickly it was hard to take anything down. Professor Ono was kind enough to say "New line, indent" when he started a new paragraph. In the Faculty of Law and Politics, some students who were successful in a special set of examinations were exempted from the mobilisation. The exams were Constitutional Law and Civil Law, and only the 30 best were to be allowed to remain at university to study. This system was initiated by the Dean of the Law Faculty, Professor Nanbara Shigeru. I still remember the exam problems. For Constitutional Law, the question was "The significance of establishing a new Constitution" and for Civil Law it was "Civil Law and living in society". The question for Constitutional Law suggests to me that Professor Miyazawa was thinking ahead to Japan's defeat.

Wada: I understand the words "Always start with the legislative provision" are remembered by your students.

Hoshino: These were the words of Professor Wagatsuma, which I passed on. He always said to start by examining the legislative provision, and then go on to the issues.

Wada: You have referred in your writings to a card you once received from Professor Wagatsuma.

Hoshino: Yes. Of the 30 students exempted from mobilisation, 12 were law students. At the time, each year level had about 630 students. Some were enlisted, so the actual number of students on campus was somewhat less than this. There would have been 500 politics students and 100 law students in my year. I think the higher number of politics students could be ascribed to the subjects required for the Higher Civil Service Examinations. Now, I was lucky enough to be one of the 12 law students exempted from wartime labour mobilisation (*kinrodoin*), so I was able to receive my instruction in extremely small groups. In the Law Department foreign law was a compulsory subject and was divided into English Law, German law and French law. There were no students taking French Law, and only three students taking German Law, one of which was myself! I took three seminars, Professor Miyazawa's "Declaration of Human Rights", Professor Wagatsuma's "Weimar Constitution" and Professor Yasui's "Socialism, utopian and scientific". In Professor Yasui's lectures we read the translation of Engels' *Die Entwicklung des Sozialismus von der Utopie zur Wissenschaft*, which we had to kept wrapped in newspaper like a packed lunch because it was on the list of banned books.

At Professor Wagatsuma's first lecture, an assistant brought in several thick Western books. They were texts by Jehring and Gierke. The Professor said that he had been most influenced by J.W. Hedeman and Heck. At that moment, I felt a pure thirst for scholarship. I didn't even know the names of these scholars, but later I came to understand how they fitted into Professor Wagatsuma's view of law. The Professor's lectures were very easy to understand, but some criticised them as being so easy to understand that they left no room for doubt. However, the Professor often said, "Beyond this point there is no settled view". In this way he rather nonchalantly expressed to us the depths of the unknown in scholarship.

I should return to the story of that card he sent me. My fortunate life as an exempted student was over in two months. At the end of June I received a draft notice. I was a Second Class Private and we were trained as special combat units (*nikuhaku kogeki*). I was actually more scared after the War ended, when our training continued and we were not allowed to go home. Our unit actually trained even harder than before because our commander believed that the end of the war had come about through the betrayal of aides close to the emperor, and that we would have to continue to fight. I feared that the country would fall into civil war and I would perish in the process. I even thought of deserting my unit. Fortunately our unit's commander changed his mind and we were disarmed and demobised. In September I was finally able to return to home.

University classes resumed in about October. In Professor Wagatsuma's lecture he spoke of agrarian reform, and he stressed the importance of law and society and "social function of law". I heard the words "social function" so often I couldn't bear to hear them again. I was to sit six exams in May 1946, but on the morning of my fourth exam (German Law) I was not able to get out of bed. I have never experienced anything like it before or since. I was simply unable to move my body. I was diagnosed with tuberculosis and sent to Sakuramachi Hospital in Koganei, where after a year I had an operation to remove five of my ribs. After a year at the hospital, I moved to a sanatorium in Chiba Prefecture to regain my health, where I spent an additional year. In all I was out of action for three years. I wrote to Professor Wagatsuma soon after being admitted to Sakuramachi Hospital, perhaps flushed by the fact that he was the only professor who seemed to remember my name. I was not expecting any reply, but I did eventually receive the card I have mentioned. At the end, he wrote "Your results in Civil Law were excellent". I had no confidence in my ability, so I was surprised to read this. I had been so preoccupied with my illness that I was elated to receive this one sentence. It later became the prop on which I based the hope that I too could become a researcher.

THE HARD TASKMASTER

Wada: Professor Hoshino, upon reading an earlier interview with Professor Ninomiya you commented that you would have liked to have seen greater mention of Professor Ninomiya's doctorate from the Faculty of Law and Politics. This was because you knew how hard it was for a foreign student to complete a doctoral thesis. At that time I felt your presence as an educator very strongly. Professor Ninomiya, I understand that you were supervised by Professor Hoshino after Professor Ikehara Toshio retired.

Ninomiya: I had planned to complete my thesis by the time Professor Ikehara retired, but I couldn't manage it and I was worried about what would happen. Fortunately I was able to meet with Professor Hoshino once a fortnight to discuss the thesis. He read seemingly countless successive drafts.

Hoshino: I would say that the thesis was two-thirds complete. It needed some refinement on the situation in other jurisdictions and international treaty law. It also needed a description of Japanese law and a demonstration. The thesis was later published as *Nationality Law and Equality of the Sexes*,[2] but at the time I had to study nationality law in some detail myself. This was beneficial to me as a member of the Nationality Law Sub-committee of the Legal System Commission.

Ninomiya: Professor Hoshino said "There is not enough discussion". Reading the thesis now, I know exactly what he meant. On one occasion, I went to the Professor's holiday house at Fujimi to get his comments. I was in my fifth year and felt oppressed by the urgency to complete, which is why I even chased the Professor to his holiday house.

Hoshino: Studying overseas and taking a degree in a foreign country is truly difficult. Not only is there a linguistic barrier, but there is also a time limit. I only supervised two foreign students who completed their doctoral theses. One was Professor Ninomiya, and the other was Professor Koh Sang-Ryong of Sung Kyun Kwan University in Korea. Professor Koh once rang me panicking that he couldn't read one of my scrawled comments on his draft. There were several foreign students who asked me for comments or advice on their research, but it was only these two who knuckled down and actually took the degree. I wonder what the situation is now?

Wada: I know of two foreign students, both Korean, who have submitted doctoral theses and taken their degrees. But, like Professors Ninomiya and Koh, it took them close to ten years as they

[2] *Kokusekihô niokeru Danjo Sabetsu* (1983, Yûhikaku).

progressed from being Foreign Research Students to masters students to doctoral students. They came to Todai having completed their undergraduate degrees, but also having completed their national service. I could only imagine their tortuous path to completion. They might have had emotional support through having their families with them, but financially they were hard pressed.

Hoshino: Professor Koh had to return to Korea before the graduation ceremony, so some seven years later, when I attended a conference in Seoul, we held a little ceremony of our own in a hotel room where I handed him his testamur.

Ninomiya: You know, I have kept all the drafts of my thesis that Professor Hoshino corrected.

Wada: In one contribution to a collection of messages published for Professor Hoshino's 60th birthday and retirement, it is mentioned how a certain first year *joshu* assistant submitted a piece to Professor Hoshino for the *Hanmin*,[3] only to have it completely covered in red ink. After he re-submitted it, Professor Hoshino edited it vigorously again.

Hoshino: Yes, I remember I looked at many contributions for the *Hanmin* from young researchers. I took the attitude that it was part of my role to edit them along with their supervisors. In on year I contributed ten cases myself edited ten contributions of young researchers.[4] I had to study the cases just as hard as the people who wrote them so that I could do justice to the editing. You learn an enormous amount by editing the work of others. Professor Suehiro Itsutarô used to edit so vigorously that Professor Nakagawa Zennosuke said he cried when he received his draft back.

FURTHER STUDY IN FRANCE

Wada: You yourself spent two years at the University of Paris from the autumn of 1956, and you have written that you were always tired and that you felt as though you were confronted by French culture. Can you tell us more about that part of your life?

Hoshino: It was two years after I became an Associate Professor. I took my marking with me on the French ship, which was the monthly service between Yokohama and Marseille for both cargo and passengers. The ship made stops at Hong Kong, Manila, Saigon, Singapore, Columbo, Bombay, Djibouti, Durban and Dakar, and arrived in Marseille on 20 November more than 50 days after our departure. I caught a train straight to Paris. It was the year of the Hungarian uprising and the Suez Canal Crisis, and the night before my ship was due to enter the Suez Canal we did a sudden U-turn, returning to Djibouti and then going round the Cape of Good Hope. I was very busy before I left and wasn't able to prepare for the trip.[5] So, for instance, on the ship I practised my typing. I was already afflicted by culture shock on the ship. I saw the French passengers eating meat all the time and thought I could be no match for such a well-nourished people. They didn't seem to mind the smell of mutton and ate it with gusto.

During my time at the University of Paris, I was always tired. Of course I was hindered by my language difficulties. I studied French, and in time grew used to reading, writing and speaking. Listening was the hardest. In my first year, I probably only understood one-third of my lectures. In the second year, I improved to maybe two-thirds or three-quarters. Linguistic problems can be overcome in one way or another, but I felt that I had against me something mightier than just the French language, namely French culture and the European culture of which it was a part. At the time, there were only about one hundred Japanese in Paris. You could only take the equivalent of

[3] *Hanrei Minjihô Kenkyûkai* [Workshop to study Civil cases of the Supreme Court].
[4] See five volumes (1971-1990) of *Minji Hanrei Kenkyû*
[5] Professor Hoshino published articles on "The History and Theory of the Leasing of the Real Property Law" and "The Legal Nature of Credit Guarantees for Small and Medium Fishing Enterprises" in that year.

$100 and 30,000 yen in currency out of the country. The actual Paris was very different from the one I had imagined from what information I had gleaned beforehand. I was amazed by the frugal and stolid lifestyle of the normal Parisian. And intellectuals lived a very simple life. All of this was underpinned by a solid social structure. After my time in Paris I came to understand Mori Arimasa and the sculptor Takada Hiroatsu. I earnestly believed that in order to learn French law I needed to understand its context in French and European history and culture. But European culture was not something that could be that readily understood. This was probably the reason why I always felt so tired. I attended the first lecture on the Sociology of Law by Professor Carbonnier. An elaborately dressed assistant (*appariteur*) always preceded the professor into the lecture theatre, and the professor would then enter fully gowned. The gowns had a number of stripes down the sleeves depending on the rank of the lecturer. I think professors had three stripes. After the lecture, the students would applaud. The gowns were different colours for each faculty. In the law faculty the gowns were generally red, but were black for lectures.

Ninomiya: When I entered the University of São Paulo the lecturers in the law faculty did not wear gowns, but the students did applaud at the end of the lecture. This was only in my first year. In my second year, the students, including myself, demanded various reforms. The university agreed, and many of these old customs disappeared.

Hoshino: Is that so. When lecturers from various faculties gathered together wearing their coloured gowns, it certainly was spectacular. It gave you a sense of the depth of scholarship and teaching. The scale of their writings was always grand in France, and I did not think I could emulate it. However, I did think that the Japanese had a skill in delving deeply and multidimensionally into one particular area.

LEARNING THROUGH TEACHING

Wada: I understand that you began using the Socratic method of teaching in the enormous Classroom 900 on the Komaba Campus. When did you start using the Socratic method? What did you do when you first started teaching?

Hoshino: When I became an Associate Professor, I was not sure how to go about teaching. The professor of French Law, Professor Yamamoto Keiichi, suggested that at first I just teach in the way that I had myself been taught. That put my mind at ease. I do think that addition of the Soctratic method to the traditional lecture method was influenced by American law schools. When I began teaching in Classroom 900 at Komaba campus in 1972, I would speak for a while at the start of the class and then I would ask questions to the students. I would ask some students to volunteer to answer questions, and they would sit at the front of the class. It was not always easy, since we did not have microphones. I used this method in seminars as well. Each time we would deal with ten Supreme Court cases. There would be about 50 students in the seminar and I got them to sit in the same spot each time. This was to make sure that no student missed out on contributing. This worked with 50 students, but I imagine it would be very hard to even out the contributions with 180 in the class, as is the case at Harvard Law School, since some students tend to speak at length, while others are less forthcoming.

Wada: I hear that Professor Daniel H. Foote, who was an ICCLP Visiting Professor for a year to September 1999 attended your seminars as a Foreign Research Student.

Hoshino: Yes, that's right. He sat towards the back. He compared the class to Harvard Law School in an article in *Jurisuto*.[6] In September 1999, he attended a University of Tokyo Symposium on

[6] "Nihon no Hôgaku Kyôiku Inshôki" [Impressions of Japanese Legal Education], *Jurisuto*,vol.863(1986)

"Training of Lawyers and Legal Education" held at the Japanese Bar Association, and stated his views based on comparison with American Law Schools.

Wada: Professor Ninomiya, what is the situation at the University of São Paulo?

Ninomiya: Of 450 students, 200 take lectures during the day and 250 at night. The students complained that 200 in one class was too many, and so the students were divided into equal groups and each lecture was repeated. I was one of the students who demanded this change, but now that I have a different perspective, I do think that it is onerous to have to repeat every lecture. In recent times, the first four years of the undergraduate degree are set, and the students can elect specialist subjects in fifth year. I teach in seminars for International Law (about 50 students) and postgraduate courses (15-20 students).

Wada: Professor Hoshino, you have acted as both Consultant and President to the Todai Legal Advice Center and have written in that Center's magazine as well as in the pamphlet accompanying moot trials at the University Fête. In the former publication you told students to pay attention to three points, namely (1) the factual issues, (2) the legal issues and (3) the fact that they were only hearing one side of the story from their client. This last point is along the same lines as your frequent statement that "You should always try standing in the shoes of the other party".

Hoshino: My father, who was a lawyer, often used those words. He said that you should not swallow whole the version of events presented by your client and that you should not tell the client that they can succeed in litigation based on a one-sided account. I don't think I was greatly influenced by my father, but this point—that you must always remember who you are speaking with—has remained with me.

LEGAL EDUCATION AND TRAINING[7]

Wada: In July 1999, the question of legal education and the system for training lawyers was the subject of the commemorative 100th ICCLP Forum entitled "Legal Education and Professional Training in Brazil and Japan". From Brazil, we heard from many researchers and practitioners including Professor Ivette Ferreira, Dean of the Faculty of Law at the University of São Paulo, and Professor Ninomiya was kind enough to act as interpreter. One might think that this debate had only emerged recently, but in fact the issue arose once soon after the War and several times since. Could I ask your opinions in particular on the proposal to make the Todai law degree a five year course?

Hoshino: That proposal was thirty years ago.[8] When we transferred from the Imperial university system, medicine degrees remained six years but law degrees were changed to four years in line with other faculties. There was a feeling, however, that four years was insufficient for a law degree, and that an additional year should be added. Professor Tanaka Hideo, Professor Sakamoto Yoshikazu and I drew up a proposal to add a fifth year to the law degree and took a survey, of which Professor Nishio compiled the results. For some time, we held informal professorial meetings twice a month at which I would give a report. The report was then discussed and revised. We probably delivered more than ten reports all together. However, on one occasion the proposal was leaked to the press: the opposition from other universities was based on the extra burden that would be placed on students by the increased tuition fees. I think the Ministry of Education was also opposed to the idea. The view was that a law degree might need to be five years if the sole objective was to train lawyers, but otherwise not. The significance of this proposal is that it was an attempt to reform legal education emanating entirely from the academic side. This was unprecedented in the history of the

[7] See generally *Jurisuto*, vol.1168(1999).
[8] See *Jurisuto*, vol. 364 (1967).

law faculty. It triggered the formation of the Legal Education Symposium of the Nine National Universities that continued up to the time of my retirement. In 1958 the Japan Private Law and Japan Public Law Associations jointly held a symposium "Legal Education" that addressed the comparative study of German, French, English and US legal education, reflecting the high degree of interest in this area from a relatively early time in post-war Japan.[9] A wide body of material exists on this subject .[10] When the *senshu* postgraduate course was established at Todai, Professor Ishii Shirô said, as if by way of consolation, that the course had grown from the seeds sown by the proposal for a five year law degree.

Wada: What is your view of the current debate concerning the proposal to establish Law Schools for the training of lawyers?

Hoshino: I think that the lawyer Mr Yanagida Yukio was the first to propose that law faculties should be abolished.[11] This is an extremely bold concept, but unfortunately has its own problems. Then there is Professor Tanaka Shigeaki's proposal to establish a new type of course which combines the functions of the law faculty and the law school. At the previously mentioned Todai Symposium, a proposal for a system of law schools was put forward by a Todai working group.[12] The number of successful candidates for the Bar Exam, which was 500 for so long, was increased to 800 in 1998 and 1000 in 1999. This increase is linked to the need for a greater number of practitioners. I think it is probably only in the last ten years or so that Todai law students have started going to cram schools instead of attending law faculty lectures to prepare for the Bar Exam while they complete their law degrees. They may learn techniques for passing the Bar Exam at these cram schools, but they don't study the essence of law. These kinds of phenomena have led me to believe that the time has again come to earnestly debate the system of legal education and training.

Wada: I have heard that Brazil has a competitive examination similar to the Japanese Bar Exam. Professor Ninomiya, what is the situation with cram schools in Brazil?

Ninomiya: The Bar Exam was introduced in the year I came to study in Japan. I actually delayed my arrival from April until October so that I could sit the exam. Recently cram schools have begun operating in Brazil as well. One reason for this is the rapid rise of private universities and the consequent lowering of the average standard of law students.

EDUCATION AND SCHOLARSHIP

Wada: Professor Hoshino, you have made many contributions to education and learning, amongst them the adoption of the "rotation system" of lecturing.

Hoshino: Until that time, students had the same lecturer for each part of Civil Law as they progressed through the law degree. Professor Katô Ichirô and I both took surveys of our students, and the majority were in favour of a rotation system. Directly Professor Kawashima Takeyoshi proposed that students should be able to be lectured by four professors, and not one, to cover the four areas of Civil Law. As I was in utmost agreement with him, I officially sponsored a formal proposal and the professors of Civil law switched to the rotation system from the autumn of 1964.

Wada: In your Festschrift, you were described as a "razor" compared to Professor Katô's "hatchet".

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[9] See *Hôgaku Kyôiku*, Yuhikaku, (1959).
[10] See *Hôgaku Kyôshitsu*, vol. 61 (year)
[11] See *Jurisuto*, vol. 1127 (1998) and vol.1160 (1999).
[12] See *Jurisuto*, vol. 1168 (1999).

Your students described how they sat agog as you and Professor Shindô exchanged piercing arguments like strokes on a tennis court.

Hoshino: I had exactly the same sort of experience when I was young. Professor Wagatsuma was the possessor of a slow but methodical thought process, but Professors Kaneko Hajime, Suzuki Takeo and Kawashima Takeyoshi were lightning fast. It was almost impossible to follow a debate between the three of them. In the Precedent Study Group, the younger students would learn to be modest in their academic pursuits through losing their confidence from failing to follow the professors' academic debates.

Wada: Some of your wise sayings that have been passed down include "Your pen should not flit across the page—you must first go through a process of careful reflection" and "In the exam, I want you to write your answers so they could be understood by a 12 year old".

Hoshino: Yes, that's right. The first of these was to prevent students from thinking that they knew everything about the issue straight away and encourage them to consider it from contrasting points of view. The second of these was intended to mean that students should not use jargon. I was trying to say that they should not purposely use difficult words and expressions that only specialists would understand.

Wada: There have been many proposals recently in relation to university entrance exams. Professor Ninomiya, what are your views on the so-called "single proficiency entrance exams"?

Ninomiya: I think this idea has developed in the context of the dwindling numbers of university age students in an attempt to maintain the existence of the universities. However, the choice of the "single proficiency" could be problematic. It would not be proper to allow someone into university on the basis of one particular talent if they would not be able to complete the course successfully. In the case of the law faculty, an individual's special proficiency would have to be in an area that was relevant to the study of law or politics. This would mean that, in effect, the "single proficiency entrance exams" would have little application to law faculties.

Hoshino: I agree with Professor Ninomiya. University is a place to study. It is because they "study" that people taking university courses are called "students". Regardless of whether they later go into business or become academic researchers, they are at university in order to study.

Wada: Professor Hoshino, could you tell us about your experiences at Chiba University and the University of the Air after you retired from Todai?

Hoshino: At Chiba University, I found that students in first lecture period were often disinterested, so I tried to conduct classes that would foster the keen students and stimulate those who were less eager. I got the impression that the female students were more focused and goal oriented. In the seminars, which were worth four credits, I tried the volunteer method and Socratic method. I also used role plays, where the students split up into groups representing the plaintiff, defendant and judge. Also, once or twice a month, I would hold a study group with up to ten students. I would attend as one of the participants, giving guidance and advice. The study group continued for some time even after I left Chiba University.

Wada: How did you find the University of the Air? I had a look at your first lecture for Civil Law and a later one for Introduction to Jurisprudence. In the first lecture, where you were sitting facing the camera without any students present, you did seem somewhat nervous. In the later lecture, however, I felt as though you were more relaxed.

Hoshino: At first I was a bit lost. But it was great fun, perhaps because I always enjoyed making presentations, even from my primary school days. I gradually got used to the modus operandi for television, and realised that if I spoke at real people in the studio I could speak more naturally. Lecturing through a medium such as television requires many minor adjustments, so I learnt a great deal. Also, I had the opportunity to actually meet the students and ask them, for instance, why they enrolled in the University of the Air, and this gave me a much more concrete sense of what I had assumed in theory. It would not have been so bad if they were just disinterested, but the most shocking thing was that they actually hated law! Many students thought that law was a "cold" subject! I have concerns for Japanese democracy if this negative attitude toward law is not improved. I believe that this is even more important than legal reform itself.
I was at pains most in deciding what I should teach rather than how to teach, as all the students at the University of the Air were liberal arts, and not law, majors. Eventually I decided to concentrate my teaching not on legal techniques, but on history, society, economic, politics and thought to give them the necessary background for law, and the position of Japanese law in the global context. I even developed a series of textbooks based on my experience at the University of the Air.[13]

Wada: Do you have some message to young researchers on how to succeed in an academic environment? You once wrote on the difference between practitioners and legal academics that "Where the parties concerned see only one tree, the legal academic points to the forest".

Hoshino: From my point of view, I think that it is necessary to have a healthy respect for scholarship and remember that the methodology of academic work is always "broadly, deeply and without favour".

(10 December 1999)
[translated by Peter Neustupný]

[13] *Minpo • Zaisanho, Kazokuho, Hôgaku Nyumon* (Hosodaigaku Kyoiku Shinkokai, 1994, 1995); *Minpo no Susume* (Iwanami Shoten 1998)

The Michigan-Columbia Exchange Project

As part of the Michigan-Columbia Exchange Project, the Graduate School of Law and Politics, the University of Tokyo, has to date hosted 23 professors from the University of Michigan School of Law and 14 professors from Columbia Univerisity Law School to participate in the post-graduate lecture series "An Introduction to American Law". Visitors this year will include Professors David Schizer and Gerald L. Neuman from Columbia University, and Professors Don J. Herzog and Mathias W. Reimann from the University of Michigan. In addition, in March 2000 University of Tokyo Professors Yokota Yozo and Morita Osamu visited the University of Michigan School of Law, and Professor Nakazato Minoru visited Columbia Univerisity Law School. In April, Professor Nomi Yoshihisa will visit Columbia Univerisity Law School.

David Schizer, Professor of Law, Columbia Law School

Research Area:	Taxation Law
Major Publications:	*Realization as Subsidy*, 73 N.Y.U.L. REV. 1549 (1998).
	Executive Stock Options and Derivatives: The Fragile Legal Foundation of Incentive Compatibility, 100 COLUM. L. REV.(forthcoming 2000).

Gerald L. Neuman, Professor of Law, Columbia Law School

Research Area:	Constitutional Law
Major Publications:	*Strangers to the Constitiontion: Immigrants, Borders and Fundamental Law* (Princeton University Press 1996).
	Human Rights (with Louis Henkin, Diane Orentlicher and David Leebron, Foundation Press 1999).

Don J. Herzog, Professor of Law and Political Science, University of Michigan School of Law, Department of Political Science

Research Area:	Political, legal, social and moral theory
Major Publications:	*Without Foundations: Justification in Political Theory* (Cornell University Press 1985).
	Happy Slaves: A Critique of Consent Theory (University of Chicago Press 1989).
	Poisoning the Minds of the Lower Orders (Princeton University Press 1998)

Mathias W. Reimann, Professor of Law, University of Michigan School of Law

Research Area:	Torts, Comparative Law
Major Publications:	*The Reception of Continental Ideas in Common Law World1820-1920* (ed. and co-author, Berlin: Duncker & Humblot 1993)
	Conflict of Laws in Western Europe: A Guide through the Jungle (Ny: Transnational Publishers 1995)

Essays

Korea 25, Japan 40

by Lee Seung Ho (Visiting Research Scholar of the Graduate School of Law and Politics and Judge of the Seoul District Court)

Someone seeing this score line might imagine it as the result of a sporting match between Korea and Japan. (Perhaps rugby would be an appropriate example!) In this case, however, the figures represent something else entirely. The figure of 25 for Korea is the combined number of years in the legal profession of a judicial bench in a general civil case at a certain Korean District Court some six years ago – in Korea a judicial bench is normally constituted by one or three judges, and in this case consisted of three judges including myself. And the figure of 40 for Japan? This was the corresponding figure in relation to the three judges in a case I observed in the Civil Division of the Tokyo District Court as part of a study of the Supreme Court of Japan, the Tokyo High Court and the Tokyo District Court that I conducted with the authority of the Supreme Court during September and October 1999. The figure might have been even higher if I had used an example from the High Court, which mostly reviews decisions of the District Court.

The system for training and appointing judges is virtually identical in Korea and Japan. Judicial appointments are made from Bar Exam graduates who have gone on to complete a period of practical training at the Judicial Research Institute. Under this "career judiciary system", judges hold office until the Constitutional retirement age.

Why is it that, despite these systemic similarities, there is such a difference in the numbers of experienced judges (in particular, judges in the District and High Courts with over 20 years' experience) in the two jurisdictions? Whereas judges in Japan normally hold their posts until the set retirement age except in extraordinary circumstances, there is an increasing tendency for Korean judges to give up their judicial robes and embark on new careers as lawyers in private practice. Perhaps reflecting this trend, concerns have been voiced from all quarters that Korean judges are too young.

Thus it is possible to say that the Korean and Japanese systems are similar in structure, but their actual operation is somewhat different. It is difficult to make any meaningful comment on the comparative merits of the two systems in this respect. However, as a relatively inexperienced judge myself, I couldn't help but be impressed as I observed three senior judges in Tokyo calling on all their experience in intently discussing and advancing a case.

At present in Japan, there is a lively debate aimed at realising a user-friendly judicial system, and consolidating and strengthening the functions of judicial administration. Within that debate, there is increasing interest in the Common Law's so-called " unitary system" of jurists, in which judges are appointed from amongst practising lawyers with a certain level of experience.

For many years there has been criticism from some segments of Japanese society that the career judiciary system, which has traditionally been justified as allowing judges to develop in a pure environment, promotes a judicial system which is not transparent and which is not fully independent of the executive. Another criticism has been that judges are "unworldly". Accordingly, the argument was put repeatedly that a unitary system was necessary in order to achieve a judiciary which had a full understanding of the realities of society and to achieve a court system that deserved the people's trust. However, these proposals never went further due to the non-satisfaction of basic

criteria for putting them into practice, such as a sufficient number of lawyers.

However, in June 1999 the Japanese Cabinet established a committee to completely reconsider the system of judicial administration, and this committee has provided a forum for concerted debate of issues such as the expansion of the legal profession and the adoption of a "unitary system".

A reform process is underway at the moment in Korea too. A committee was established to conduct a Presidential enquiry with the brief of building a "new paradigm for judicial administration". It is expected that the committee will publish its specific findings, including whether to adopt a unitary system of jurists, before the end of 1999.

It is extremely interesting that the difficult problem of judicial administration reform is being debated in both Korea and Japan concurrently, and the progress of reform will attract close attention.

[translated by Peter Neustupný]

Sentimental Seminar

by Stacey Steele (Former ICCLP Research Scholar)

To paraphrase the suspense writer Stephen King: I'll never have friends later on like the ones that I had in my seminar (*Stand By Me*).

Seminars in Japanese Law Faculties

Seminar groups are an integral part of tertiary education and pastoral care in law faculties across Japan. Seminars usually last for one semester and are organised around a particular theme which is then broken into a number of specific topics. They differ from lectures, particularly because the classes are small – around 10 to 15 students. Each student has responsibility for a topic and after the student responsible for that week's topic presents his/her paper a discussion amongst the seminar students follows. Unlike tutorials in Australian law faculties, seminars are not specifically aimed at supplementing lectures and working through a hypothetical set of facts looking at legal issues and applying legal principles presented in lectures. Seminars in Japan can be taken in conjunction with lectures or as single units in areas that students wish to gain a deeper understanding.

Professor Ito 's seminar on bankruptcy law

At the University of Tokyo there are seminar topics in all aspects of law and students will take a number of seminars, sometimes simultaneously. Whilst studying at the University of Tokyo, I was fortunate to be able to join Professor Makoto Ito's seminar group on bankruptcy law. Professor Ito's seminar covered topics ranging from set off in bankruptcy, contrasting judicial decisions on similar facts and the current reform of the insolvency law regime in Japan.

Most of the students attracted to Professor Ito's seminar were interested in commercial law. In general, students who had just passed the national bar examination had studied bankruptcy law as part of their examination preparation. Bankruptcy law was one of the optional subjects on the bar examination until this year. (From 2000 all students will be required to sit exams on civil and criminal procedure, constitutional law, criminal law, commercial law, and civil law. Bankruptcy law, labour law etc will not be required even as an optional subject.) This meant that many already had an excellent understanding of the law and were actively involved in discussions on complex factual issues. However, there were also students coming to bankruptcy law for the first time who were interested in the topic perhaps because of the current reform process in Japan and the

increasing number of corporate and consumer insolvencies.

Of course, many students also chose the seminar because of Professor Ito's reputation for being an excellent teacher and interesting personality. He is perhaps the only professor at the University of Tokyo Law Faculty to wear a bow tie almost everyday and is known for having been a bit of a rebel in his university days. When asked one day what is different between students today and when he was attending the University of Tokyo his immediate response was: 'well for starters, back then we all had long hair'. Despite his busy schedule as a member of the Insolvency Law Reform Committee, he always had time for myself and other students.

People dynamic
Having taken Professor Ito's seminar twice – in second semester 1998 and 1999 – it was interesting to see how the atmosphere in the seminars changed depending on the people mix of students. Because the seminar was mainly taken by students in their last year of university or post-graduate students, many people were at a turning point in their lives. It was interesting to watch as the students entered the Legal Training Research Institute on the path to becoming lawyers, prosecutors or judges, or find jobs in corporations or with the government. I will always be grateful to my friends for allowing me to share in their experiences, decisions and concerns about the new lives they were embarking on. I was even able to visit the Legal Training Research Institute – it is Wako City, about an hour out of Ikebukuro in suburban Tokyo.

Famous in the media?
The seminar even made it into the *Sankei* Newspaper, one of the major daily newspapers in Japan, when it ran a feature on the Law Faculty (18 January 1999: 11). My fellow exchange student – from Germany – and I were described as 'making desperate efforts' to keep up as debate raged around us… Professor Ito made a joke later that for once he was able to send something to his relatives that they would appreciate – usually they are not interested in his latest publication on bankruptcy or civil procedure law.

Foreign Invaders?
The Japanese students did not seem too surprised at having a couple of foreigners in their midst. One friend said that at times it as 'very, very strange', but that it was interesting to listen to non-Japanese points of view. Previously, some had studied with Korean students with excellent Japanese. Sometimes it was difficult for my German friend and I to keep up with the debate, but we were always able to approach our friends afterwards to clear up any questions that we had. The general feeling is that a good seminar is one where students can exchange their opinions without the debate becoming personal.

I was a little surprised at the spirited debate that occurred in Professor Ito's seminar, particular amongst students who had already passed the bar examination. I had heard that Japanese students do not like to speak up in class and argue with each other. This is not the case in Professor Ito's seminar. The debates were based on interesting points of law and well reasoned. I really enjoyed listening to the students exercise their minds, although I regret that I rarely participated. It was difficult to put my own opinion across in Japanese because my opponent would normally zing a reply back and the debate would expand around me before I could think of how to phrase my next response! This experience made me respect students who debate in English when it is not their native language even more.

The biggest test came when I actually presented a paper in Japanese in November 1999 on one aspect of my thesis topic. I was very nervous. I am not sure whether I presented the information I wanted to use in the same way that I would have if I had been speaking in English, but I think that I

was able to make the other students think about the issues and the debate afterwards was interesting. This time I was able to join in! It really gave me a great sense of achievement to present my paper– I certainly could not have done this when I first joined the seminar in October 1998. I wonder if the other students understood how nervous I was?

How to win friends and influence people…
The pastoral care aspects of seminar groups should not be underestimated. In a system where lectures are attended by 100-300 students, seminars are an excellent opportunity to make friends and form a network that could be with you for life. After class students often eat together at one of the cheap *teishoku* restaurants around the campus and at least once a year they will go out with their teacher for dinner. There are also alumni functions where graduates can get together and reminisce about the old days. At one such function, an introduction to a lawyer actually led to an interview and then a part-time job for me. Coincidence or not, there has been a wedding between two of Professor Ito's former seminar students and this year three students will enter the same Tokyo law firm. There are also bi-annual softball competitions against other seminar groups and some seminars even go on trips together, although this is becoming less of the norm in the Law Faculty.

Farewell
My memories of the University of Tokyo will always be tied up with the friendships and learning that I was able to achieve through my experiences in Professor Ito's seminar group. Some friends even traveled from where they were undertaking their legal apprenticeship – Sendai, Kobe, Tokushima – to attend my sayonara party in February 2000, and we all had a great time at the Christmas party in December 1999.

To Professor Ito and all of the students in his seminars of 1998 and 1999, I would like to say 'thank you from Suteishi' ([kanji]) and 'Cheers from Staceys'.

6th ICCLP Symposium on
'Legal Education in Japan from Foreign Perspecitves'

Date: 20th December 1999

Reporters:
Veronica L. Taylor, Senior Lecturer, The University of Melbourne
Masato Ninomiya, Professor, The University of Sao Paulo
Frank K. Upham, Professor, New York University School of Law

Commentator:
Sugeno Kazuo, Professor, The University of Tokyo

Moderator:
Kashiwagi Noboru, Professor, The University of Tokyo

After a brief introduction from Professor Kashiwagi of the University of Tokyo, each of the speakers gave a brief presentation on the issue of legal education in Japan from a foreign perspective and how the approach to legal education is changing in their own jurisdictions.

Ms Taylor

Ms Taylor questioned the value of 'looking back' when discussing legal education. Such a process invariably means that 'practical skills' for lawyers are interpreted by looking at what they are doing today. This includes, legal analysis (how to read cases and statutes, solve abstract problems) and a second group of traditional skills such as notarial skills (interviewing clients, drafting, negotiation). The problem with looking back is that legal work in future will be very different and it will be done by a wide range of people. Ms Taylor used the example of compliance or corporate governance – *bengoshi* in Japan are usually not conceived of in this context. Ms Taylor argued that legal education for the future needs to address the needs of all graduates who will become professionals in a highly regulated world. Everyone will need to navigate the legal system.

Based on these observations, Ms Taylor suggested that the debate about the future of legal education in Japan should be uncoupled from anxiety about the national bar examination. In Australia, for example, where law is also studied at an undergraduate level, only 40% of graduates will become lawyers; 60% of graduates do other things, such as become union officials or take up government posts. There will also a significant move out of the legal profession after a couple of years practice in the United States in the future.

It follows then, according to Ms Taylor, that the skills that students learn during their legal education need to be generic; in other words, what were traditionally considered as good legal skills are now valued because they are good business skills. A number of traditional legal skills now thought of as business skills can be quickly identified: (1) the ability to think flexibly and re-classify a problem so that it can be solved; (2) the ability to sort through masses of information and find a relevant source which is especially important in the electronic information age; and (3) stamina, because people are working long hours and are forced to endure boredom.

However, law graduates also require new skills. These include: (1) cross-cultural

communication – being able to communicate effectively with non-lawyers and step outside one's own world; (2) risk analysis because law is really a way of navigating and dealing with future risk; and (3) business and transaction planning because the emphasis has moved away from litigation for most lawyers to the issue of planning transactions more effectively.

Australian law schools are attempting to deal with these problems in a number of ways. Civil procedure is now taught by a law professor and a judge: there are lectures which outline the law and students are then divided into groups to discuss a hypothetical case. After deciding a course of action, they must 'file' the appropriate documents with the 'court' (examiner) by computer. This is how the courts now operate because all documents are filed by computer today. Other models for this sort of skill acquisition are moot courts and clinical courses where students actually advise clients.

One way of combining old and new skills is by having students organise the faculty law review/journal. This requires old skills such as writing, editing and careful legal analysis, but also includes new skills such as how to manage and run a company and turning a profit. At the University of Melbourne, there is also a mentoring programme where the best 20 students from the final year of the programme are asked to come back and teach first year students. Each mentor takes a group of about five to ten students from the first year and helps them with essays etc, and may even teach a class. This system provides first year students with model skills because these recent graduates embody attributes that the Faculty wants first year students to absorb and emulate, and the first year students learn how to navigate law school.

Ms Taylor summed up the Australian example of legal education as standing for innovation and creativity. She noted that there are lots of areas where law professors are not the best people to teach skills but there are lots of ways to introduce cost and time effective ways of educating and skilling students.

Professor Ninomiya

Professor Ninomiya began by presenting a brief history of legal education in Brazil which began in 1827. Prior to World War II, legal education mainly occurred in public schools, however after World War II many private universities were founded and the number of lawyers increased. A fall in standards led to the introduction of national licensing examinations in the 1960s. However, these examinations did not really take root until the 1970s.

The bar examination for lawyers consists of four main areas: civil, labour, criminal and tax law. In addition there are questions on the bar association rules. If students pass the initial true or false style examination of 100 questions consisting of ten law subjects , in addition to the rules of the lawyers association and ethics, they then sit a written test where they must complete five essays and an examination on document preparation.

According to Professor Ninomiya, the bar examination in Brazil is not such a difficult exam. He contended that a student who studies for five years at a reasonably ranked law school in a normal way should be able to pass the examination. After this, students will do an internship. The problem is that there are too many law schools. In the State of Sao Paulo alone, there are 40 law schools. These new private law schools are producing graduates who cannot pass the bar examination and this has led to a situation where graduates from these schools must attend preparatory schools to pass the bar

examination.

The process of becoming a judge in Brazil is slightly different. Each jurisdiction sets its own examination and recruits its own judges. The judicial examination is of a similar nature to the bar examination for lawyers, but much more difficult.

There are different examinations for federal, state and labour judges. All three examinations place emphasize on labour law issues. To become a federal judge, candidates must answer questions on federal taxation, international law and international procedural law so that they can deal with nationality problems and international criminals etc. The examinations for state judges are similar to those for federal judges but the taxation part of the examination focuses on state taxes. Labour judges deal with all labour claims in Brazil. The examination covers similar fields to the examinations for other types of judges, however the focus is on labour law, labour procedural law and social-legal issues. There are preparatory schools for these examinations.

Students in Brazil are required do an internship. One possibility for the internship is at the Public Service Lawyers Bureau. An internship at the Public Service Lawyers Bureau satisfies the internship requirement that is required by both the law faculties and the bar examination according to Rule 1886 of the Ministry of Education, promulgated on December 30, 1994. The Public Service Lawyers Bureau is an independent body, which provides legal services to those people who cannot afford private legal advise.

Students may also do an internship at a law firm, with a judge, at a prosecutor's office, at the legal section of a government ministry, or in the legal department of a company etc. These internships are undertaken under the supervision of their professors. This gives them on-the-job-training and it seems that in practice, students who do not take part in internships are rarely able to pass the bar examinations. Even for those students who intend to become judges or public prosecutors the internship is essential, those who don't do the internship rarely pass the examinations.

With the promulgation of rule 1886 by the Ministry of Education in 1994, wide ranging reforms dealing with legal education were introduced. Previously, for example, newly established private universities were unorganised and ineffective. They were basically a result of electoral pledges and provided cheap education. Setting up a law school in Brazil is relatively easy because all you basically need are buildings and at least 1000 books for a law library. The aim of this law was to reverse the declining standards of legal education in Brazil. The reforms, among other things, stated that to earn a law degree a student must complete at least 5 years (maximum 8 years) of study at a law faculty, and required students to complete 3300 of class hours. A law faculty library must consist of at least 10,000 books, not including cases and periodicals. In addition it created compulsory and elective subjects. It is very unusual to have such standards imposed by law in Brazil. In addition it created compulsory and elective subjects.

There was a student revolution in Brazil in 1968, after which old fashioned education began to change. For instance lectures were replaced by seminars. In this way law faculties in Brazil have tried to respond to the new requirements and tried to implement new reforms.

In conclusion Professor Ninomiya said that its very regrettable to hear no student voice in

the discussion of legal education in Japan. In Brazil, after the student revolution in 1968 each university's decision making bodies, such as faculty meetings and professors meetings, there must be a student representation of at least 10%. Thus in Brazil the students have a voice that can be easily heard. Professor Ninomiya suggested that since students form a vital part of the university their opinions should be valued, especially for legal education reform.

Professor Upham

Professor Upham began by noting that it is an exciting time in Japan for legal education, but regretted that Japanese students' opinions were not being taken into account more. He also suggested that views about American law schools seem to differ in Japan – some saying that they are practical/training schools, others saying that they are too theoretical. This probably stems from the fact that law schools in America are so diverse that it is hard to categorise them as one or the other. It really depends what school the author is talking about.

Thus, Professor Upham began his outline of legal education in the US by dividing the approximately 180 law schools into three different categories. First, there are local law schools where education is relatively cheap and students are often studying part-time. Obtaining employment after graduation can be difficult so many of these students start practice on their own or in small firms. Second, there are regional law schools which are powerful schools in terms of their region and professional links. Although these schools also take students from outside, their main focus is their region. Graduates from these schools almost always get relatively good jobs and pass bar examinations. The last category of law schools is the top 25 to 30 law schools in the United States. They have become international centres for legal education. It is these schools that most Japanese are familiar with and that Professor Upham based his observations on, although he noted that there is not much difference between the regional schools and these top tier schools when it came to practical education.

Practical training in US law schools

Professor Upham describes legal education in American law schools as 'professional training in a university setting'. Legal education is definitely different to graduate studies in political science etc. because it is understood that 80% to 90% of students at law school will become lawyers, even if they do quit being lawyers after three to four years. Some may have aspirations to become law professors, but that is small number of most student bodies, except maybe at Yale University where about 10% might aspire to be professors.

These figures mean that students expect strong professional training, but there is tendency for the top 100 or so law schools to consider themselves just as theoretically sophisticated as the English or Economics Department. They seem to have a self-conscious desire to take an outside look at the legal professional as well as train legal professionals. This is a contradictory consciousness. Professor Upham noted that the issue often arises in discussions at faculty meetings over the hiring of new faculty and the allocation of the budget within the law school.

Professor Upham made four broad points about practical education in American law schools.

1 'Every professor is a lawyer'

The general perspective of 95% of law professors in America is that they are lawyers. However, on average an American law school professor has only spent three years in

practice. Professor Upham spent two and a half as a litigator, claiming that for the past 20 years he has not been a practicing lawyer. Yet he teaches a basic first year course called Property Law and likes to think that he is approaching the subject matter in a way that 'real lawyer' would approach it. He acknowledges that there is definitely a gap between himself and a real lawyer, despite his consciousness of being a 'lawyer'. Professor Upham argues that this consciousness permeates American law schools.

2 Legal research and writing – basic skills courses

According to Professor Upham, the two most fundamental skills that differentiate a professionally trained lawyer from someone who is merely a persuasive advocate are legal research and writing. These skills are taught in first year in small classes. Because it is very expensive to teach these skills, American law schools hire less expensive professors to teach these courses: for example, young people who want to move out of practice and are looking for a permanent teaching position. They teach legal research and writing part-time whilst writing academic articles and trying to find a permanent position.

3 Clinical legal education

Clinical legal education is often described as skills training, but Professor Upham thinks that this is a mistake. It is not the same as an apprenticeship. He argued that if done correctly, these subjects can be just as theoretically sophisticated as classes on jurisprudence – it is just that they do not use cases etc; rather, they use practical materials. The focus is on education, but it is education embedded in practice. It is not the same as the Legal Training Research Institute in Japan where trainees are sent out to courts to work as judges and prosecutors and to law firms. In that case, it is really hit or miss as to whether the practitioner is interested in teaching the trainee or not. A clinical educator, on the other hand, is a teacher who is interested in using practical materials to teach.

Professor Upham noted candidly that this is the ideal of clinical education – often clinical education becomes nothing more than skills training or political advocacy. It is also very expensive to run clinical education programmes. Teachers generally all hold the status of professor or slightly inferior. Although it comes in many forms, the highest level of clinical education is where students actually represent real clients in real situations. However, even then students meet with a professor inside the law school at least once a week.

4 Use of adjunct professors from practice

According to Professor Upham, the use of adjunct professors from practice seems to be one of the foci of discussions in Japan as a means of increasing the practical focus of courses in Japan. This is not the way it is done in America at the top 80 to 100 law schools. It is a very dangerous way of recruiting staff because most practitioners come to teach only one to two hours a week. They are focused on their practice and not what goes on at the university. Moreover, just because they are good practitioners, does not mean they will be good at teaching what they practice. Professor Upham likes to use the baseball analogy of a good batting coach: they are usually not the best batters. He noted that the analogy is also appropriate in terms of the monetary side of the equation.

However, Professor Upham suggested that there are two ways to use adjunct professors which have been very successful in his experience. First, is to co-teach with regular professors. Second, to teach very specialised areas of law. At New York University, for example, there are 40 adjunct professors who teach in areas such as tax, patent and insurance law. Although a significant number of students want to go into practice in these areas, these are not compulsory subjects and students would take them in their third year.

Professor Sugeno

In conclusion, professor Sugeno offered some comments on the speakers' presentations. He noted that the reform of Japanese legal education is a hotly debated in Japan at the moment.

He admitted that a survey at the University of Tokyo which included responses from students contained many criticisms, especially about first and second year subjects. It is understood that there is an inherent necessity for the reform of the law faculty. In addition to students' opinions, the Law Faculty is also considering outside opinions such as those of the Liberal Democratic Party, lawyers and members of the business sector. The University wants to respond to their needs too. Since this is a popular topic of debate in Japan many articles can be found in publications such as Juristo, however, these articles discuss the fundamental direction that should be taken rather than specific reforms. Students opinions should be included seriously in this debate.

The relationship between theoretical legal education and legal practice education should also be considered. Legal education should be regarded from the broader perspective, it should not only be concerned about the practice of the court. How can the education for the lawyers and those for students who will eventually work for companies or for government be related?

It's clear that the center of the reforms should be the curriculum, the way of education, and staff. With regards to the curriculum Professor Sugeno emphasized that we need to have not only for the practice at the court, but we need an overall programme quoting the Dexample of the US law schools that are not focused solely on court practice. Furthermore new directions for this discussion can be found in Taylor's speech on the use of computers, and report of the internship at some practical agencies in Brazil.

Regardless of whether the Japanese law school or American law school model is applied, it is necessary to find some bridge between legal practice and academic education. A problem is educational staff. There are some examples from the United States, such as the hiring of graduates and adjunct professors. University professors should consider themselves as both lawyers and practitioners. There is a necessity for them to reform their stance.

Discussions

International perspectives in legal education

During the question time the issue of internationalisation of legal education was raised. Professor Upham addressed the issue of the lack of international perspectives in American law schools. He described the Global Law School Programme at New York University of which he is the Director. This is an attempt to reverse the current inward looking tendency of American law schools. At New York University, they are trying to address this problem by: (1) raising money to send students to spend their summer vacation at public service institutions; (2) systematically employing non-American faculty and integrating them into the curriculum, that is, have them teach subjects other than the law of their own country; and (3) change the first year curriculum to include overseas issues in 'normal' law cases, for example, by using native-title case law from Australia in Property Law classes.

In this way, Professor Upham and his colleagues are trying to make New York University students naturally think in terms of trans-national norms when they approach legal problems. He suggested that the secret to doing this is to do it without being obvious: do not tell students that they are about to do something innovative and new. Teachers should treat international materials in the same way as other materials.

Ms Taylor suggested that in Australia, about three years ago comparative and international law stopped being treated as boutique subjects: 'the number of students in the boutique increased dramatically'. Every compulsory subject has an international and comparative component now. The other change is that the number of people studying law has increased. There are currently 40,000 practitioners in Australia, but there are 40,000 students. Obviously, not all students will fit into the current profession. The solution, according to Ms Taylor, is to export them. Thus, the aim of Australian law schools is to produce lawyers who are not trying to impose global standards on the world but are trying to adapt to certain countries. All good students are highly adaptable.

Professor Ninomiya responded to the issue by saying that there are many lawyers in Brazil, but few who can actually do their job well. Since the starting premise is different, the issue is not whether domestic or international perspectives should be included in the curriculum. However, international transactional law has recently become more developed. Interestingly, labour law in Brazil has developed in an international way in a sense because there are so many Brazilians living overseas. This has also had an effect on family law, for example, because some people who come to countries such as Japan, for example, want to divorce their wives in Brazil etc. This sort of phenomena is forcing international perspectives to be taken.

The place of the 'Law Faculty' after the birth of the 'Law School'

Professor Inoue, head of the University of Tokyo Law Faculty Curriculum Working Group, asked about ways of training lawyers who can solve problems and not merely do procedural work. He argued that the lawyers of the future need to be able to evaluate facts and know how to skill and train themselves. His second concern, was the relationship between the 'Law Faculty' and the 'Law School'. He wondered if both can survive, even though there is no plan to abolish the current Law Faculty. Perhaps there will be a double-standard because those who go to 'Law School' will be expected to become lawyers. He suggested that this may affect the power structure in Japan.

Ms Taylor responded by saying that this problem arose in Australia a few years ago. Simply put, the system in Australia is that students must graduate from a law faculty, usually after about five years study, and then do an internship – there is no bar exam. After three to four years in practice, most lawyers go back to school to do a LL.M made up of half practical and half theoretical subjects. These LL.M programmes are usually made up of an even mix of such practitioners, overseas students and students who want to be academics. The LL.M takes two years full-time, but most students study part-time. As such, the law school still exists and this does raise the question: what is the LL.M for? It has many objectives and there is still no single answer to this problem.

Professor Ninomiya noted that the problem in Brazil is the lack of full-time teachers. Salaries are low and most academics have other jobs in addition to their teaching commitments.

Professor Upham commented that New York University, in addition to introducing a global perspective into its first year course, is also trying to incorporate practical and theoretical ideas into the course. He suggested that the distinction between the two is too limiting. Professors cannot teach how to practice law without teaching concretely what it is and why it is that way. This requires subjects such as philosophy and ethics. He argued that it is not a law professor's job to teach a student what size paper to use for documents etc; rather, practical training should prepare students for the future by using the current state of a certain procedure etc as an example.

Financing law schools

Professor Upham was then asked about how universities in the United States approach funding practical training in light of the high costs involved. Professor Upham replied that legal education in the United States is very expensive, but can be done because at the top 30 law schools, virtually every student who graduates can start earning the same amount of money as their professors within six weeks of graduating. The universities use the future income of these students to subsidise the students' education and also those who choose not to go into such high-paying careers. Student loans are very expensive, but students who find work at a big law firm find them easy to repay. For those 10-15% who do not go into big firms, New York University tries to help pay their loans and uses other funds to support summer programmes etc. It should also be noted that the salaries of law school professors are generally higher than those of, for example, English department professors.

Difference between class content and bar examination content

A question to Professor Ninomiya raised the topic of the disparity between what is taught in Japanese law schools and the information needed to pass the national bar examination. It was also suggested that it is unreasonable to try to compare the cost of the Japanese Legal Training Institute to legal education in American law schools because they fulfil different needs. The questioner asked about the situation in Brazil, and in particular, why the Ministry of Education is in charge of legal education in Brazil? Professor Ninomiya thought that this was a natural result of the fact that the Ministry of Education has authority for education at tertiary level. In terms of costs, in Brazil education can be obtained free from primary through to tertiary education. However, he noted that it is difficult to obtain a place at a non-fee paying university 'freely'. That is, those without money cannot get into free schools because they cannot afford tutors or good preparatory schools etc. Professor Ninomiya suggested that as judges usually recruit the best students, they have an interest in legal education, but there is not too much intervention from the judiciary in this sector. Lawyers association and Universities are the most interested in the reform of legal education.

Political science versus law: a false dichotomy?

The next question was directed at the issue of combining law and political science within law faculties in Japan. What happens to the political science students and teachers if law schools are created in Japan? Professor Upham argued that law is politics. His impression of the presence of political science and law within the one 'law faculty' at Japanese universities is that there is still a high wall between the two and there is little discussion of political issues in exclusively law department subjects.

The Importance of the Bar Examination

Professor Upham also commented with respect to the bar examination that it will be difficult to finance law schools if only 3% of candidates pass the examination. He thinks this is one of the main issues for Japanese reformers.

Ms Taylor disagreed, saying that the bar examination is an important but subsidiary issue. She argued that if one accepts that business in the 21st century requires everyone to navigate complex regulations, it does not matter if a person has a bar examination qualification or not. All people will require a similar type of education. This is a chance to enhance inter-disciplinary education. In Australia, having two degrees, for example, economics or environmental science in addition to a law degree is the norm. Now it is generally agreed that a LL.M is also necessary. This is a positive and negative message: there are opportunities for law faculty education although it's expensive, but the bar examination should not be the starting point for the discussion. Although there is an attempt to increase to the number of people who pass the bar examination, it is still insufficient.

[Stacey Steele]

Comparative Law and Politics Seminars & Forums

Held at the University of Tokyo, Graduate School of Law and Politics, October 1999 – March 2000

[Seminars]

The 80th Comparative Law and Politics Seminar – 24 September 1999
Speaker: Professor Pamela Samuelson, University of California Berkeley, School of Law
Topic: Intellectual Property and the Digital Ecomony
Language: English (with summary in Japanese)
Moderator: Associate Professor Asaka Kichimoto
*Co-organized with Anglo-American Common Law Study Meeting.

The 81th Comparative Law and Politics Seminar – 12 October 1999
Speaker: Associate Professor Sylvie Strudel, Institute of Political Studies at Lille (France); ICCLP Visiting Associate Professor
Topic: On Being Jewish in France Today : Religious Attitudes and Political Behavior
Language: French (with translation in Japanese)
Moderator: Professor Kitamura Ichiro
*Co-organized with the Franco-Japanese Society of Political Science.

The 82th Comparative Law and Politics Seminar— 22 October 1999
Speaker: Ms. Susan Katcher, Associate Director, East Asian Legal Studies Center, University of Wisconsin Madison
Topic: American Law Schools : Reality & Myth
Language: English (with summary in Japanese)
Moderator: Professor Higuchi Norio

The 83th Comparative Law and Politics Seminar — 27 October 1999
Speaker: Associate Professor Sylvie Strudel, Institute of Political Studies at Lille (France); ICCLP Visiting Associate Professor
Topic: The European Citizenship: Theory and Practice, as Constructed by the Law (Maastricht) and by the People (Representations of the Europeans)
Language: French (with translation in Japanese)
Moderator: Associate Professor Ito Yoichi
*Co-organized with the Franco-Japanese Society of Political Science and the European Law Seminar.

The 84th Comparative Law and Politics Seminar — 24 November 1999
Speaker: Professor Michael Bryan, The University of Melbourne
Topic: Law Schools in Australia
Language: English
Moderator: Professor Higuchi Norio
*Co-organized with Anglo-American Common Law Study Meeting.

The 85th Comparative Law and Politics Seminar — 14 January 2000
Speaker: Professor Jörg Fisch, The University of Zürich; ICCLP Visiting Professor

Topic: The Role of International Law in the Territorial Expansion of Europe,16th-20th Century
Language: English (with summary in Japanese)
Commentator: Professor Tadashi Suzuki, Institute of Oriental Culture,The University of Tokyo
Moderator: Professor Nakatani Kazuhiro
*Co-organized with the University of Tokyo International Law Seminar

The 86th Comparative Law and Politics Seminar — 4 February 2000
Speaker: Professor Tyagi K. Yogesh, School of International Studies, Jawaharlal Nehru University; Visiting Research Scholar of the Graduate School of Law and Politics, The University of Tokyo
Topic: The Conflict of Law and Policy on Reservations to Human Rights Treaties
Language: English (with summary in Japanese)
Moderator: Professor Onuma Yasuaki
*Co-organized with the University of Tokyo International Law Seminar

The 87th Comparative Law and Politics Seminar — 24 February 2000
Speaker: Professor Hazel Genn, University College London
Topic: Paths to Justice: What People Do and Think About Going to Law
Language: English (with translation in Japanese by Associate Professor Sugawara Ikuo, Chiba University)
Moderator: Professor Murayama Masayuki, Chiba University

[Forums]

The 101st Comparative Law and Politics Forum – 18 February 2000
Speaker: Professor Ganga Bahadur Thapa, Tribhuvan University, President of Political Science Association of Nepal; Visiting Research Scholar of the Graduate School of Law and Politics, The University of Tokyo
Topic: Democracy in the Multiethnic Societies: The South Asian Perspective
Language: English
Moderator: Professor Watanabe Hiroshi

The 102nd Comparative Law and Politics Forum – 7 March 2000
Speaker: Senior Lecturer Veronica Taylor, The University of Melbourne, Visiting Research Scholar of the Graduate School of Law and Politics, The University of Tokyo
Topic: Legal Development Aid: Training and Traps
Language: English
Moderator: Professor Higuchi Norio

The 103rd Comparative Law and Politics Forum – 24 March 2000
Speaker: Professor Paul R. Beaumont
Topic: The Hague Preliminary Draft Convention on Jurisdiction and Foreign Judgments from the UK Viewpoint
Language: English
Moderator: Professor Dogauchi Masato

Reports on Seminars and Forums

[Seminars]

The 80th Comparative Law and Politics Seminar – 24 September 1999

Professor Professor Pamela Samuelson
Intellectual Property and the Digital Economy

Professor Samuelson's presentation provided a compelling analysis of recent legal developments in the rapidly developing area of intellectual propery rights in relation to digital works. She began with a brief history of the various technical protection systems, designed to allow copy-write owners to control access to their digital works, which have been attempted in the recent past. She then moved on to describe the current state of efforts to protect digital works. These are embodied in the Digital Millennium Copyright Act 1998 (DMCA 1998). Professor Samuelson painted a picture of the not too distant future should such systems be adopted: pay-per-use with code enforcing the contract. This would lead to fair use rights (for example, back-up copies, and copies for personal use) and private sharing being eroded away into non-existence. Additionally the ability by data controllers to monitor individuals would erode the individual's ability to read anonymously. For example, an individual's privacy could be invaded by companies profiting from building profiles of readers which they could either use themselves for direct marketing of personalized tailored products, or selling the information onto others for similar purposes.

At the time of promulgation of the DCMA 1998 there were two main political camps, each promoting their own laws. These were the maximalists (Hollywood and allies, who were seeking maximum legal protection for their works in digital format) and the minimalists (Silicon valley and allies, who sought less restrictive legislation). The Clinton administration was supporting the maximalists. The Clinton maximalist copyright agenda was then contrasted with the minimalist WIPO (World Intellectual Property Organization) treaty. Professor Samuelson went on to outline U.S. e-commerce principles and then compare these with the Clinton agenda. The WIPO treaty itself was considered consistent with the US e-commerce principles, although it was suggested that this was in spite of the Clinton Administration and not because of it. The DMCA 1998 was found to be acceptable with the exception of the anti-circumvention provisions, which were held to be inconsistent with the framework.

Should the law protect technical protection systems at all? One possibility is to just let the market go, which could lead to a technological arms race. An alternative is to make it illegal to make tools to climb over the protection. The analogy that was used was that of breaking into a private home in order to see a public domain work of art. It has thus been argued that making software tools to allow for the circumvention of a technical protection systems are like making burglars tools. Professor Samuelson noted that it was not clear that new laws were needed with regards to anti-circumvention in order to comply with the WIPO treaty.

The case law prior to the DCMA 1998 was then considered. In *Vault v. Quaid* (775 F.2d 638 (5th Cir. 1985)) it was held that reverse engineering software was acceptable as it allowed users to make backup copies, as was their right under 17 U.S.C. sec. 117. Would the result be the same under the DMCA 1998?

Section 1201(a)1 of the DCMA 1998 makes the act of circumventing an access control illegal, except in seven specific circumstances. These included: legitimate law enforcement; reverse

engineering for interoperability; encryption research and computer security testing. Congress also included a two year moratorium and study of the act-of-circumvention ban in order to assess section 1201's impact on fair use. Thus section 1201(a)1 is not yet in effect. Professor Samuelson pointed out that in a recent article she made the case for another "other legitimate purposes" exception to section 1201(a)1.(Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 503 (1999)

However it was noted that there are actually two sections: one that outlaws the making and distribution of tools to circumvent access control, and; the other that outlaws the making of devices to circumvent effective use controls. Thus in theory it is ok to circumvent a technical protection system to make a fair use copy without violating the act of circumvention provision, under the exceptions provided. The question is whether one can make the tools to allow such a circumvention for fair use? Is there an implied right to make a tool to allow one to circumvent in one of the seven exceptions provided? Or is it illegal to make such tools, in which case all of the exceptions are totally meaningless? Professor Samuelson couldn't find an answer in the legislative history, but held that Congress couldn't have intended to create meaningless exceptions and therefore held that there must be an implied right to make such tools.

The *Vault v. Quaid* case was then reconsidered in the light of the new legislation. The defendant would have had to have produced a tool in order to make its fair use copies. On the face of it the statute seems to make it illegal to produce such tools; it does not look at the legitimacy of the purpose of the action. Even if the court held that Quaid could, in this case, make a tool for the purpose of fair use, it would raise an important issue. If the technically savvy have the right to make tools for fair use purposes and then sell those tools for fair use to others, who are less technically savvy and not capable of making such tools themselves, this would be trafficking in circumvention technology, which would be illegal under section 1201. Does this mean that only the technically savvy will have fair use rights in the future?

Another problem is that no act of underlying infringement need be alleged to be liable for the manufacture of tools. A complaint was filed by Sony claiming that emulation software for the iMac computer bypassed the protection code that Sony embeds in Playstation games. It was alleged that users of the software could potentially make illegal copies of the Playstation software. Sony is seeking up to US$25,000 in damages for every copy of the software sold. (*Sony Entertainment, Inc.* v. *Connectix Corp.* Civ., No. 99-0390 (N.D. Cal., filed Jan. 27, 1999)) It was noted that this is a large sum of damages sought considering that the plaintiff does not have to prove that a single illegal copy was ever made.

Professor Samuelson concluded that section 1201 is too broad and as a result unsatisfactory, and that a much broader study of its impact should be undertaken. Japan was recommended to follow a minimalist approach at first that could always be broadened later on if needed. Finally it was noted that the digital economy is far more likely to thrive with lighter rather than heavier legislation and that the anti-circumvention rules would likely have a detrimental impact on the future of an information based society.

[Richard Small]

The 81th Comparative Law and Politics Seminar - 12 October 1999

Associate Professor Sylvie Strudel [Institute of Political Studies at Lille (France)]
On Being Jewish in France Today: Religious Attitudes and Political Behavior

Since the Revolution of 1789, the French State's universalistic principle has refused invariably to

recognize any public status to ethnic and social groups. As a result, French studies on electoral behavior have since their origins in the 1950s adopted mainly individualistic and socio-psychological approaches. In this lecture, I would like to describe how collective identities are connected to electoral behavior and question the validity of the dominant model of French electoral behavior by analyzing that case of the Jews in France. At the same time, my conclusions will fight against the unfounded vulgar belief that the "Jewish vote" is cast as a bloc. In reality the unitary "Jewish vote" is imaginary, and only the "Jewish votes", or votes of the Jews, exist.

As the Jews are not recognized as a group in French public records, there are very few reliable statistics or census data on their political behavior. Academic studies are also scarce. The situation is far from that of the United States, where a long history of Jewish electoral studies exits, fueled by the tradition of cultural-pluralism. I must say, however, that the American models on Jewish electoral behavior are hardly applicable to the French case because of their ahistoricism and universalistic pretensions.

Fully aware of the delicate issues concerning the definition of the "Jews", I choose to adopt a rather tautological definition, according to which those who consider themselves as Jews are Jews. The Jews are a minority among minorities in France: 550 to 700 thousand in number, and less than 1% of the entire population of the country. During World War II, the Jewish population had decreased from 600 to 200 thousand. With the decolonization of the three Maghrebi countries, however, a massive Jewish immigration poured into the French mainland. This revivified and rejuvenated the French Jewish community, which as a result became more diversified in its social, economic and religious composition. While the Jews who settled in France before 1962 were mostly from Ashkenazim from Eastern Europe, and largely occupied the higher social strata of professional and managerial positions, the arrival of the new "Sephardim" immigrants from North Africa increased the percentage of blue-collar workers and the salaried. This brought the social composition of the Jews closer to French population as a whole. On the other hand, the new "Sephardim" immigrants are more pious but socially more closed. Of the two cities where I conducted my research, Strasbourg is a Ashkenazim city, while Sarcelles in the suburbs of Paris is a Sephardim city.

My analysis reveals the extreme diversity of Jewish electoral behavior, and contradicts the myth of the "Jewish vote". In Strasbourg, the electoral behavior of Jewish citizens is defined more strongly by their social positions than by their religion. Even in Sarcelles, religious orientation does not outweigh the effect of socio-economic factors. The study did show, however, that with regards to the degree of religiousness, the Jews follow the same pattern as Catholic Frenchmen; the more pious they are, the more often they vote for parties on the right.

In order to explain these diverse forms of political integration and electoral behavior of French Jews, the distinction between the settled Ashkenazim and the Sephardi new immigrants is not sufficient. More consideration must be given to the details of their respective immigration paths: whether or not individuals immigrated, or were born locally; the period in which they immigrated; whether or not the individual has acquired French nationality. More interestingly, turnouts at the polls are considerably higher among Jews coming from Algeria as opposed to other Jews from Morocco and Tunisia. This seems to be related to the fact that the decree of 1870 accorded the Algerian Jews French citizenship. Furthermore, the political culture of their countries of origin continues to influence their political behavior in France.

In this way, the religious variable, that is the variable of being Jewish invariably functions in combination with socio-eonomic and immigration-related factors, to produce the very diverse patterns of electoral behavior among the French Jews that we can observe today.

This is not to say, however, that the mobilization of the Jewish electorate based on their ethnic identity never takes place, disturbing these well-established patterns of voting behavior. But in the past this has only happened under certain specific conditions. The repression of the Jews in the USSR made a considerable number of Jewish voters of the Left switch to the Right or abstain when the Left camp supported a Communist candidate for mayor in municipal elections. Furthermore, the Jewish electorate gave very high priority to blocking further progress of Le Pen and his National Front. In 1988, the Jewish electorate not only did not hesitate to censure Chirac who was suspected of doing a deal with Le Pen, but also Jospin in 1995, who had proposed a return to proportional representation which was regarded as favorable to the National Front.

Finally, the image of candidates also counts. Especially at Sarcelles, voters have a tendency to vote, irrespective of their ideologies, for a candidate for whom they have nourished a sort of psychological attachment. My hypothesis relates this phenomenon to the older forms of attachment that the Sepharadi immigrants held for the guardian-like figure of their original communities in the Maghrebi countries. A candidate considered sympathetic to the Jews or to Israel can gather support well beyond partisan cleavages. On the other hand, Jewish voters will "punish" him when their hopes are betrayed and turn into disappointment.

In conclusion, only in certain specific conditions do sections of the Jewish population in France resort to the instrumentalization of their suffrage in order to express and claim their Jewish identities. In other words, the "Jewish vote" crystallizes in some degree, only when issues such as the National Front or Franco-Israel relations are particularly salient. Even in this case, the votes cast from identity-related motivations do not exceed 10 to 30% of the Jewish electorate. Therefore, all we can say with exactitude in this regard is that the votes of the French Jews are only at times accompanied by the apparition of the "Jewish vote".

[Nakayam Yohei]

The 82th Comparative Law and Politics Seminar — 22 October 1999

Ms Susan Katcher
American Law Schools: Reality & Myth

Introduction
Ms Susan Katcher is a regular visitor to the ICCLP and the Faculty of Law at the University of Tokyo. She began her presentation by outlining the educational and historical context of American law schools and concluded with the challenges facing law schools today.

Where does the 'law school' fit?
Where do law schools in America fit into the American education system? After elementary, middle and high school, one of the options for graduates in America is a four-year university degree. During this four-year degree, students may learn about criminal justice, but there is no formal legal instruction at this level. In order to become lawyers, students must go to law school after they graduate from a four-year degree and spend an average of three years studying law.

However, this was not always the case. Law schools began to be established in the United States in the last third of the nineteenth century. During the colonial period, there were not many lawyers in the United States and those people practicing law were either from England – trained in London – or had undertaken an apprenticeship programme as a clerk under contract. Until the early 1800s, clerkships were the main way of training lawyers in the United States. However there are some very famous self-taught lawyers, for example, Abraham Lincoln.

In the early 1800s, established lawyers who were known to be good teachers found themselves with a number of clerks as young people gathered around them to be taught. This led to regulations limiting the number of apprentices lawyers could have. As a result those lawyers who were also good teachers eventually formed their own 'private schools'. These schools ran tutorials for law clerks and were very popular by the mid-1800s. These forerunners of modern law schools evolved out of a process whereby private commercial law schools became affiliated with universities. In 1850 there were 15 law schools, by 1890 there were 61 and by 1900 there were 102. Currently, there are approximately 180 law schools in America and almost all are affiliated with a university. Law schools in the United States must be certified by the American Bar Association.

The evolution of the approach towards legal education in the United States
Education in law schools has undergone dramatic change over the past 150 years. The apprenticeship system evolved into tutorials and lectures from approximately 1850-1880. The professors would lecture in a way that suggested law was a definable 'thing' and there were no notes or textbooks for the students.

This style of teaching gave way to a Socratic method of teaching in 1870 when the president of Harvard University hired C.C. Langdell as Dean of the Law School. Langdell revolutionized legal education in America by introducing case method in core courses, requiring compulsory subjects and a more fixed curriculum. The case method suggested that law was not definable. American law was 'judge-made' law and thus to learn the law, students should study and compare cases. It is an inductive method of learning influenced by the 'scientific method': the data was the cases and statutes were still not yet important.

Today, Langdell's approach has been modified. Courses are no longer taught completely, if at all, by case method. Cases are given in textbooks, but there is also extra material such as commentary and articles. The questioning mode of thinking in still nurtured, but the focus is no longer solely on cases.

Types and contents of law degrees
Until about the 1880s, law degrees were still called Bachelors of Laws (LLBs). Today, most students undertake a J.D.(Juris Doctor) degree, but many law schools also offer masters programmes. Students in masters programmes can usually take the subjects offered in the J.D. curriculum.

Ms Katcher gave a general outline of the subjects that a law student would be expected to take in an American law school:

1st Year Core Courses: contracts, torts, civil procedure, criminal law (substantive and procedural), constitutional law, legal research and writing, property.
2nd Year Elective Courses: trust and estate law, tax law, family law, international law, rememdies, contracts **II**, products liability, evidence, advanced legal writing.
3rd Year Electives: specialized seminars of about 10 students studying specific topics with the students giving presentations; trial advocacy (practice courses); clinical courses; general practice; skills training (interviewing); professional responsibilities/ethics.

Law in practice – criticism of law schools
Law schools in the United States are criticized for not training 'practical lawyers'. This highlights the historical dichotomy between law schools as commercial or practical private colleges and their later affiliations with academic institutions like universities. The earlier role of law schools suggests that they are trade schools designed to produce practical graduates. In response to calls for more practical lawyers, law schools now have clinical programmes, alternative dispute resolution classes

and subjects that teach negotiation skills. The constant tension between what is taught at law schools and what lawyers need to know in the real world will probably never be resolved, but Ms Katcher wonders, are law schools in business merely to train professional lawyers? She suggests that the aim of law schools should be to teach 'legal reasoning' and create 'problem solvers'.

[Stacey Steele]

The 83th Comparative Law and Politics Seminar — 27 October 1999

Associate Professor Sylvie Strudel,
The European Citizenship: Theory and Practice, as Constructed by the Law (Maastricht) and by the People (Representations of the Europeans)

Can European citizenship be established top-down, enacted by law? When you have a look at the Eurobarometers data in comparative and multinationals European surveys, paradoxes and ambiguities arise. The more and the quicker European integration is institutionally developed, the less is the demand for Europe among citizens. Decided by top elites, European citizenship lacks substance among European citizens from below: built on legal ground, it erodes in practice. One just needs to take an overview at turnout levels at the last European elections in France: abstention was formed the majority (53%), reaching an all-time record since 1979 when it was 39%. In Europe as a whole, as well, abstention was 51%. This paper suggests that a switch is necessary from a legal approach towards a practical one to address the issue of European citizenship, in order to work within the reality principle. In France, the European citizenship has largely been debated from a philosophical and juridical perspective, whereas political science as a whole has tackled this question from a diversity of approaches. From a theoretical, institutional and public policy point of view, new insights have been offered. But this question remains, by large, ignored by specialists of political or electoral behavior. Thanks to the recent June 1999 European Parliament elections, a preliminary assessment can be given of how Union nationals use their new rights, and in particularly their new eligibility to vote and to be elected at European elections in their country of residence and not only of nationality (article 8B2 ECT, Maastricht version). Nationality and citizenship have traditionally been linked, at least in the last two centuries and especially in France, to the existence of States or Nation-States. What are the actual effects of legal provisions about European citizenship, from the perspective of the citizens themselves? All in all, less than 10% of the potential voters within the European Union migrants actually register. We also take notice of diverse registration rates according to the countries and heterogeneity depending on the nationality. So that beyond the incantatory phrasing of "Union citizen", one uncovers the complex problematic of an artificially unified category. The criteria that help to define the new European electorate are manifold: electoral processes in each country, different mobilisation and identification among European migrants and particular influences of the state-model for integrating citizens.

What is the future of a supranational citizenship based on a national-level nationality? Will the European citizenship ever have a true content or does this rhetoric only fulfil an ideologically legitimating function for the European integration?

[Ito Yoichi]

The 84th Comparative Law and Politics Seminar - 24 November 1999

Professor Michael Bryan
Law Schools in Australia

Introduction
Professor Michael Bryan is a graduate of Oxford University. He is an expert in equity, trust and

restitution law. About eight years ago he moved to Australia and is currently Associate Dean at the Faculty of Law, University of Melbourne.

Professor Bryan presented the story of Australian legal education by following the progress of a hypothetical student named 'Lara' through her law degree and into professional legal practice. He chose a girl's name to emphasise the fact that over the past three or four years, it has become the norm that at least 50% of students in the Law Faculty at the University of Melbourne are female. The Japanese audience was very surprised by this.

The major characteristics of Australian legal education are that it occurs first at the undergraduate level and that students usually study parallel degrees, graduating with two degrees, one in law and another in a subject area of their choice.

Entry into the Law Faculty
There are a number of ways in which Lara might obtain admission to the Law Faculty at the University of Melbourne. Generally, students are part of the top one percent of high school graduates. They will be 17 or 18 years old when they begin their legal education. Competition is intense over the approximately 300 places set aside for these graduates, making the Law Faculty the most difficult faculty to enter after medicine.

Lara may also enter the Faculty on the strength of a previous degree. There are 10 to 15 places for such students. There will be about 60-70 students who successfully transfer from other faculties in the later years of their degrees, however their academic results must be very good. There is also an affirmative action scheme called the Koori Student Entrance Scheme for Aboriginal student entry that Lara may use. In 1999, six or seven students entered the Faculty via the Scheme. Finally, Lara may be one of the 50 to 60 international students in the Faculty.

Structure of a law degree
What will Lara's study programme look like? If Lara takes a 'straight' law degree, it will usually take her four years and her programme of study will include some non-law subjects. However, if Lara already has a degree she may graduate in three years. In addition, there is also an intensive two year JD programme for graduates. However, the majority of law students in Australia study two degrees simultaneously: that is, law plus another specialty, such as science, economics or arts (language history etc). This means that they are usually at university about five years.

To graduate, Lara must complete seven compulsory subjects and if she wishes to become a lawyer there are a number of legal professional requirements. In general, students will complete the compulsory subjects in the first three years of their degrees. If Lara is studying combined Arts/Laws degrees, she would complete two law subjects in her first year: History and Philosophy of Law and Torts and Process of Law. Lara and her classmates will be examined by a mixture of essays and computer legal exercises during the year and examinations at the end of the year. The classes take place in groups of 30 to 40 students.

In Lara's second year, the class size increases to approximately 60 students. Lara will study Criminal and Constitutional (including Administrative) Law in addition to the subjects she must take to complete her Arts degree. In her third year, Lara will take Contract and Property Law. At this stage, she may graduate from her Arts degree.

Lara will complete the last compulsory subject, Equity/Trusts, in her fourth or fifith year because she is studying a combined degree. During the last two years of her law degree, she may also take the non-compulsory subjects required for practice: Corporations Law, Procedure and Evidence.

Procedure and Evidence may be taken as summer courses. There are many elective subjects for Lara to choose from as well, including International Trade Law, Insolvency Law and Human Rights Law. There are also subjects about other legal systems, such as Japanese, Indonesian or European Law. Lara may also receive credit for overseas study. Approximately 50 students travel overseas every year to study at other law faculties.

Lara's courses will consist of lectures, problem solving, seminar discussion and dialogue. As an undergraduate, she may also wish to undertake a research project. Every year, about 20 of the 400 students in the Law Faculty currently complete research projects in their fourth or fifth year. Their work is of an excellent standard and is often published in refereed journals. Students receive supervision from a faculty member and investigate a certain area of law that interests them. Students also undertake vacation work with law firms. This gives the law firms an opportunity to assess students and the students can assess the law firms.

Entering the workforce
After graduating from the Faculty of Law at the University of Melbourne, Lara may choose to become a lawyer. However, at least half of the graduates will not qualify as lawyers – they may choose to work for the government, corporations or accounting firms. There is no bar examination in Australia. She will be admitted into the legal profession of the State in which she qualifies.

In Australia, the legal profession is divided into two branches: solicitors and barristers. Although the official division no longer exists in most States, in practice the profession remains split. The qualification requirements to become a solicitor differ in each State. Once admitted she will be able to obtain a license to practice in other States. In the State of Victoria where the University of Melbourne is situated, qualification requires completion of a law degree and an internship of one year. In general, this means that a student needs to obtain experience at a law firm under a qualified solicitor for one year. Because there is no bar exam, 'market conditions prevail'. Firms choose students based on their examination results, references and rounds of interviews.

In the large law firms, graduates are rotated through a number of different areas in the firm to gain experience. At the end of their first or second year, after discussion with the firm, they must then decide on one area that they want to specialise in. The stereotypical career path in a large commercial law firm then involves rising to associate, senior associate and perhaps in eight or nine years, partner.

To become a barrister, Lara would have to read for the bar; that is, follow the work that a barrister does for six months, going to court and attending client interviews etc. Then she will be able to stand in court and argue a case herself. In practice, it usually takes at least two years as a solicitor before a lawyer is thought to have enough experience to read for the bar. However, students who begin their law degrees later in life – not straight out of high school – sometimes go straight to the bar.

Current issues in legal education in Australia
(a) Payment
Australian students may pay for their courses through the taxation system once they begin working after graduation. Each subject at Australian universities is given a notional fee. The problem is that although law subjects cost a university more to operate than subjects in arts faculties, they are not as expensive as science, engineering or medicine. In practice, law students' fees subsidise these more expensive subjects. The government officially argues that this is compensated by the fact that law students will receive well paying jobs, but this is not necessarily the case.

(b) Internationalisation

There is a need for Australia lawyers to become even more 'international'. By this, Professor Bryan does not mean just studying international or comparative law subjects. The Law Faculty at the University of Melbourne has introduced a programme whereby the international aspects of subjects are brought into the curriculum at all levels. In Contract Law classes, for example, students might learn about international conventions.

(c) Law Reform
There is a need for lawyers to become involved in law reform in Australia. Until recently, the Australia Law Reform Commission (ALRC) was given broad terms of references to investigate reform proposals. In Victoria, the Law Reform Commission was abolished altogether and a committee of law school professors appointed to undertake law reform. The committee has neither the resources nor the support it needs. Reform of the Australian Constitution is a particularly difficult topic at present.

(d) Image of the legal profession
Once the legal profession enjoyed high esteem, but today, the public has become suspicious and critical of all professions, including the legal profession. There is criticism of judges in criminal jurisdictions – that sentences are too short – and criticism of the outcomes of civil cases. Whilst criticism is healthy, it can also be destructive and Professor Bryan feels that more time needs to be spent thinking about the basis for these criticisms.
(e) Access to justice
There is no generous assistance to people wishing to use the legal system. Most legal aid is spent on criminal cases, despite the fact that there is also a great need for assistance in family law cases. The Family Court encourages mediation as a means of overcoming legal aid shortages, but the problem is serious.

[Stacey Steele]

The 85th Comparative Law and Politics Seminar - 14 January 2000

Professor Jörg Fisch
The Role of International Law in the Expansion of Europe, 16th-20th Centuries

Between the 16th and the 20th century the European states developed among themselves a system of international law which later was extended to modern universal international law. It was valid wherever on the globe European states dealt with each other. There was also a wide range of international legal relations between them and extra-European political communities, with the Europeans usually ending up, sooner or later, in a position of superiority.

The justification and legitimization of the acquisition of rights and territories overseas by the Europeans became an important subject in European legal writing. The question was whether the Europeans could only claim reciprocal or also unilateral rights which extra-European states could not claim for themselves. The debate had its origin in the protracted struggle between Christianity and Islam in the Mediterranean and found its first systematization in 13th century canon law which maintained that Christ had donated the whole world to St Peter. The more radical position of Hostiensis considered this a sufficient title to all non-Christian territories of the world, while the more moderate position of Pope Innocence IV contented itself with titles derived from what the infidels actually did. Most important were violations of natural law and of impediments to the spread of Christianity.

This was the basis for the most consequential relevant discussion, in 16th and 17th century Spain. On the whole, the view of Innocence prevailed. But even this more mderate doctrine still yielded a

sufficient number of titles, usually called titles for a just war, especially in connection with the violation of the law of nature and with Christian missions. Once the Americas had been fully secured by the Europeans, the debate lost its momentum.

The next upsurge of the dicussion was in the second half of the 18th century. By now, religious titles had lost their weight. First, with Wolff as its foremost exponent, there was a tendency to deny any special rights of intervention to the Europeans; they had to deal with extra-European political entities legally and materially in exactly the same way as with fellow-European states. This liberal view, however, was never generally accepted.

There was a full reversal of Wolff's position in the late 18th cebtury, in whatcan be called the doctrine of ownerless sovereignty, developed in parallel with the last great wave of the European acquisition of overseas territories. This doctrine, which was at least mechanically accepted in international law writing up to the 1970s, operated with the notion of civilization but basically was built upon a specific definition of sovereignty. A state was only sovereign, and thus could only be a subject of international law, if it exercised all the functions of a modern (European) state. If it failed to do so, it was not civilized and thus not a subject of international law. Its terrirory was, in the sense of international law, ownerless, terra nullius, and could be occupied by any recognized subject of international law (and thus by European and American states). Although this doctrine conveyed an original title based on occupation, in practice, however, most territories were acquired in a derivative manner, by treaty or annexation. Nevetheless,the Europeans thus had, atleast in their own eyes, a sweeping title to most extra-European territories.

While the quest for titles to territoreis has lost most of its importance after 1945, the problem of the justification of interventions, whether humanitarian or otherwise, has remained. Structurally the discussions about reasons for interventions are similar to those in earlier centuries. One common denominator, linking past and present, is a teleological view of history: in the canon law tradition the world was thought to be destined to become Christian; in the late 19th century it was thought to be destined to become civilized; while nowadays it is declared to be destined to become democratic and human rights-abiding.

[Jörg Fisch]

The 86th Comparative Law and Politics Seminar — 4 February 2000

Professor Tyagi K. Yogesh

The Conflict of Law and Policy on Reservations to Human Rights Treaties

The ratification of a human rights treaty demonstrates the ratifying State's desire to behave in a civilized manner. A number of States have ratified human rights treaties with reservations. There is a continuing debate over the legal basis of those reservations, as well as their causes and consequences. In general, the right to make reservations is a manifestation of the sovereignty of States. It is also an indication of the necessity of promoting international cooperation among States with differing social systems. The advisory opinion of the International Court of Justice (ICJ) on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* case (the *Reservations to the Genocide Convention* case) provides the most authoritative expression to the rules relating to reservations.[1] Accordingly, reservations are permissible even in the absence of a treaty article specifically permitting them. The International Law Commission (ILC) codified this

[1] *Reports of the International Court of Justice 1951*, pp. 19 et seq. Although the ICJ made it clear that its opinion was necessarily and strictly limited to the Genocide Convention, there is consensus that the same considerations would be applicable to the ICCPR and the ICCPR Protocol. *See* David Weissbrodt, "United States Ratification of Human Rights Covenants", *Minnesota Law Review*, vol.63 (1978), p.58.

opinion in Article 19 of the 1969 Vienna Convention on the Law of Treaties (the Vienna Convention). Pursuant to Article 19, a State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) the reservation is incompatible with the object and purpose of the treaty.[2] But there is a feeling that human rights treaties are different from other treaties and, therefore, reservations thereto must be justified on a different legal basis. At present, such basis is found either in the final clauses of human rights treaties or in the Vienna regime-driven customary international law. Most of the human rights treaties have been subjected to reservations. For instance, almost 40 percent of all the States party to the International Covenant Civil and Political Rights (ICCPR) have made more than 250 reservations of varying significance to the obligations under the instrument.

The United States has entered the largest number of reservations to the ICCPR. Japan has not made any reservations to the Convention against Torture and the Convention on the Elimination of Discrimination against Women. It entered a tiny reservation to the ICCPR, enlarging the definition of the term "police" by including fire service personnel within the scope of Article 22(2). It made a reservation to Article 4(a) and (b) of the International Convention on the Elimination of Racial Discrimination, in order to maintain the status quo with respect to the rights to freedom of assembley, association, expression and other rights under the Constitution of Japan. Its reservations to the Convention on the Rights of the Child are modest, except for giving the impression that children of aliens/immigrants do not enjoy equal protection of law in the land of the rising sun. But Japan's reservations to the International Covenant on Economic, Social and Cultural Rights (ICESCR) are quite substantially, implying that the second richest country in the world is not yet prepared to guarantee all economic, social and cultural rights to its subjects. This situation perhaps explodes the myth that economic prosperity necessarily leads to human rights security.

A majority of the developing countries made reservations to the UN human rights treaties. Among them, Islamic States entered the largest number of reservations to the Child Convention, the Racial Convention and the Women Convention. India and Trinidad and Tobago made the largest number of reservations to the ICCPR. The highest number of reservations to the ICESCR came from Algeria and Guinea. Chile entered the largest number of reservations to the Torture Convention. And Trinidad and Tobago made the most extensive reservations to the ICCPR Protocol. In total, the reservations of these countries are much less than those of the developed countries. This statistical imbalance does not signify, however, that the human rights commitment of the developing world is stronger than that of the developed world.

Interestingly, the former socialist countries had exercised the maximum restraint in making reservations. They withdrew certain reservations after the end of the Cold War and their successors have maintained the status quo in this regard.

The rationale of reservations is multidimensional. Among the causes of reservations are the following: domestic law inadequacies; national superiority; alternative diplomacy; vital interests; the need for harmonization of parallel obligations; precautionary approach; socio-eonomic constraints; and religious fundamentalism. The effect of reservations is noticeable at both domestic and international levels. Reservations invariably lead to the lowering of human rights standards, dilution of the principle of universality and an attempt by the reserving states to escape international accountability.

Starting from the UN General Assembly's request to the ICJ for an advisory opinion in the

[2] *International Legal Materials*, vol.8 (1969), pp.686-87.

Reservations to the Genocide Convention case, several international institutions and a few national forums have tried to respond to the challenge of reservations. But most of these efforts have not been able to check the menace of reservations. That is why the Vienna Convention is considered ineffective in dealing with reservation matters. The most spectacular development in the law relating to reservations took place on 2 November 1994, when the Human Rights Committee (the HRC), the monitoring body of the ICCPR, adopted General Comment 24 on issues relating to reservations to the ICCPR and the Optional Protocols thereto. Among other things, the general comment affirms the competence of the HRC in determining the compatibility of reservations with the object and purpose of the ICCPR, customary rules and peremptory norms of international law. Later, the HRC declared that the US reservations to Articles 6(5) and 7 of the ICCPR were incompatible with the object and purpose of the treaty.[3] More recently, in *Rawle Kennedy* v. *Trinidad and Tobago*, the HRC held that the Trinidadian reservation relating to capital punishment cases was incompatible with the object and purpose of the Optional Protocol to the ICCPR.[4]

There is a dispute over the HRC's competence in reservation matters. While the leading UN human rights treaty bodies claim that their role in establishing the accountability of the reserving States and also in judging the validity of reservations is part of their functions, the leading Western powers like France, the United Kingdom and the United States rebut this claim. There is also a conflict of opinion between the human rights bodies of the United Nations and the ILC. The ILC and the UN Sub-Commission on the Promotion and Protection of Human Rights are engaged conducting investigation into reservation matters. It will take some time before the international community has a reasonable effective regime to deal with reservations to human rights treaties.

The principle of national sovereignty is the principal basis of reservations. All States rely on this principle in the process of formulation, recognition and implementation of treaty obligations. Reservations become a necessity for those who could not succeed to get their national assertions duly reflected in the formulation of a treaty. Reservations also become essential when new factors and forces enter the scene and bargain for new consideration in lieu of acceptance of treaty obligations. Considering the fact that no cautious policy maker would like to accept those treaty obligations which he or she cannot implement, reservations assume the form of conditional acceptance of those obligations. All these aspects have been explained in rather simple terms, such as domestic law inadequacies, competing international obligations, diverse socio-economic conditions, and so forth. In this perspective, reservations are not only enemies but also allies of human rights treaties. To promote their universalization, human rights treaties will continue to have uncomfortable alliances with reservations; and to protect the integrity of those treaties, human rights bodies will remain suspicious of reservations. This paradox does not pose any serious problem as long as human rights treaties tolerate reservations and the latter do not damage the integrity of the former. But States have not always respected the integrity of treaties; some of their reservations offend certain non-derogable rights, customary rules or peremptory norms of international law; and human rights bodies have not yet come out with an acceptable and effective remedy. That is why we see adverse effects of reservations on the most vulnerable sections of society (particularly women, children, aliens and minorities) and also on the most impartial promoters of human dignity (such as the HRC).

The issue of acceptability, compatibility or validity of reservations cannot be settled by looking at the provisions of the applicable treaty alone. Nor can it be dealt with by relying merely on some lofty notions of international law. Reservations generally originate from ground realities, and a fair approach towards reservations necessarily requires an in-depth understanding of those realities. The

[3] *Report of the Human Rights Committee* (1995), Vol. I, para.279.
[4] Communication No. 845/1999, UN Doc. CCPR/C/67/D/845/1999 (31 December 1999).

issue should be addressed by examining the wording of the treaty, the gravity of reservations, the text of domestic legislation, compelling conditions within the jurisdiction of the reserving State, and the capacity and willingness of the State to comply with its treaty obligations. This is particularly useful in respect of reservations of those States which are facing dangers to their integrity and expect international bodies to make less radical criticisms and more fruitful suggestions to improve the conditions at the heart of reservations. Accordingly, the integrity of a human rights treaty need not be pitted against the integrity of a reserving State. Both are important. If the UN human rights treaty regimes fail to appreciate this equilibrium, their wisdom will come into question. Moreover, in view of the limited mandates and inadequate resources of a small number of the UN human rights treaty bodies, it is unwise to have a heavy reliance on these bodies, Hence, it makes sense to supplement the efforts of the treaty bodies by activating domestic institutions in reservation matters as well.

To develop a new policy perspective on reservations, it is essential to focus on the basic premise of human rights law. Accordingly, each State party to a human rights treaty has a duty to overcome difficulties in the implementation of treaty obligations and, if those difficulties have assumed the form of reservations, the reserving State is expected to take measures to minimize the effect of reservations. By characterizing reservations as persistent human rights violations, even *in abstracto*, one can invoke domestic remedies or impress upon national forums to evolve appropriate responses. Although domestic courts may not nullify reservations, they can neutralize the effect of unconstitutional reservations and their involvement may sensitize the executive about its customary duty to reconsider, reduce or withdraw reservations. Thus, unlike some controversial responses at the international level, the domestic approach to reservations may produce rich dividends with minimum friction and maximum comfort in the long run. Indeed, it can be a useful complement to the international legal controls of reservations.

[Yogesh Tyagi]

The 87th Comparative Law and Politics Seminar – 24 February 2000

Professor Hazel Genn

Paths to Justice: What People Do and Think About Going to Law

In her lecture Professor Genn discussed the results of a national survey of 4,125 randomly selected adults in the United Kingdom aimed at increasing the understanding of attitudes held by the general public in regard to the use of legal remedies and the court system to resolve conflicts.

The Landscape of Justiciable Problems

About 40% of the adults surveyed experienced one or more of 14 specific types of justiciable problems during the previous five years. The problems experienced most often were to do with faulty goods or services, money, accidents or work-related ill health, their homes (home ownership or living in rented accommodation), employment, breakdown of relationships and family matters.

In order to concentrate attention on problems that were more than trivial, respondents were excluded from further questioning if they had done nothing about their problem because they did not regard it as very important.

Strategies for Resolving Problems

Overall about five percent of respondents did nothing at all to try and solve the problem even though it was not trivial, about one-third tried to resolve the problem without help, and about 60% tried to resolve the problem with advice or help from an outside adviser.

Outcomes
About one-third of problems were eventually resolved by agreement (about three percent after legal proceedings had been started). In about half of all cases respondents had not managed to achieve any kind of agreement to resolve their problem by the time of the interview.

Very limited use was made of formal legal proceedings to resolve justiciable problems. In eight out of ten cases no legal proceedings were started, no ombudsman was contacted and no alternative dispute resolution (ADR) process used. In only 14% of all cases did the matter end with a court, tribunal, or ombudsman's order. Moreover, problems ending in court disproportionately concerned those who were being pursued via legal proceedings rather than those who were initiating action. This illustrates the fact that the heaviest users of the courts as claimants are institutions and businesses.

Alternative Dispute Resolution
Using the law to change behaviour can be tortuous, expensive and potentially damaging, but the use of alternative dispute resolution processes such as mediation was negligible. Respondents did not use mediation to try and resolve problems with neighbours, housing, or landlord and tenant problems, nor were advisers suggesting it. In only a handful of divorce and family problems was mediation used.

Fulfilling Objectives?
The most common reasons for taking action to resolve problems were money- or property-related. The next most common motivation was to obtain a separation or divorce, to deal with property and or children following divorce or separation.

Fewer than half the respondents said that they had completely achieved their main objective, although this varied according to the type of problem. Those most likely to have completely or partly achieved their objectives were accident victims (for whom compensation was the primary objective of taking action). Those least likely to have achieved their objectives were tenants seeking remedies from landlords, those seeking to resolve a problem at work, and those experiencing problems with a neighbour.

Perceptions of the Legal System
A small minority of respondents had been involved in mediation, court or tribunal proceedings and those who had been to court had mainly been to the county courts. Accounts of experiences show that, on the whole, the majority had felt that they had understood what was going on and felt able to get their points across when they did take part in legal proceedings.

However, attitude questions addressed to all survey respondents, whether or not they had had any experience of legal proceedings, revealed some lack of confidence in the fairness of hearings, a belief that the courts serve the interests the wealthy, and a common perception that the judiciary are remote and out of touch. Only a bare majority of respondents said that they were confident they would get a fair hearing if they took a problem to court.

Conculsion
With the exception of divorce and separation problems and accidental injury, involvement in legal proceedings is a rare event for most members of the public trying to resolve justiciable problems as private individuals. The study produced no evidence of a "rush to law", although many people felt a strong sense of injustice about the problem with which they had been faced.

The study also reveals the minimal impact of ADR on the way the public seeks to resolve problems, and on the suggested strategies offered by those providing advice. This is important in the context of the government's attempts to encourage the use of ADR.

There is a profound need for knowledge and advice about obligations, rights, remedies, and procedures for resolving civil problems. Lack of the most rudimentary knowledge about these matters leads to an unnecessary level of helplessness even among the more competent and resourceful.

[Sugawara Ikuo]

[Forum]

The 101st Comparative Law and Politics Forum

Ganga Bahadur Thapa
Democracy in Multiethnic Societies: the South Asian Perspective

Overview

With the revival of multiparty democracies in Nepal, Bangladesh, Sri Lanka, Pakistan and India, South Asia has now emerged as a region, which has an extraordinary democratic environment now that the authoritarian era is over. Today, except Bhutan and Maldives, all countries of the region hold key institutions of civil democracy such as election, parliament, independent judiciary, freedom of press and civil liberties. The changes were impressive that they clearly give an evidence of political freedom in a relatively short span of time. Despite the elected governments currently installed in South Asia, the democratic system has not struck there. The benefits of democracy, most important of which are equality of treatment and equality of opportunity, are not available to a majority of people. Sadly, the concept of equality in South Asia is selectively applied, and works in favor of the rich and the powerful, the politically influential and well connected, rather than to all, a sort of non-zero sum process.

There is no democratic country or region in the Western World that has nearly as many ethnic, cultural and religious groups as in South Asia. All countries of South Asia are multiethnic, multilingual, and multireligious. Hinduism, Buddhism, Islamism, Animism, and Shamanism are the traditional religions have had influence on South Asian culture. Similarly, the diversity of languages is another characteristic of the region. Even linguistically closely related languages are of such a variety that they are hardly intelligible among one another. So from the social and linguistic point of view South Asia is an area where different worlds are meeting. It is indeed unique.

The issues of religion, ethnicity, caste, and language are not as simple as they are generally regarded so far. They are confronting each other from time to time what Huntington says "clash of civilization" more in democracies than in dictatorships. For instance, in modern history, India has been in such a stage of a number of violent clashes partly radicalized by the politics of slogans of fundamentalist parties and organizations. So despite the secular definition of state in the constitution, the Indian society is deeply shaped by Hindu social conceptions. The consequence of this was that not only greater minorities like the Muslims have been marginalized but also the numerous ethnic groups: the lower Hindu castes, the socalled untouchables, and the women in general. The rise of Hindu fundamentalism in India and the demolition of the Babri Mosque with the devastating riots that followed is an example of this pattern. So is the increasing Islamic fundamentalism in Pakistan and Bangladesh despite their policy of granting more rights to religious minorities. Similarly,

Hindu Tamils in Sri Lanka are continued to die, but no progress is made. In Bhutan, Hindus have been displaced from their homes and are forced to live in appalling conditions in refugee camps. In the case of Nepal, the continuation of Hindu state in the constitution by today's democratic elite has undermined the existence of non-Hindu minority. Clearly, the denial of equal rights in many cases has led to the perpetuation of communal or ethnic conflicts in the region, particularly in cases where people feel that their identity, religion or language is endangered. Understandably, the South Asian society is divided more at anytime in past. There is no sign of change.

Politically, South Asia is a meeting place of two different ideologies both of which are the product of Western industrial nations' democracy in its Western forms as it is practised in all South Asian countries today except Bhutan and Maldives and communist ideology in its Soviet and Chinese variations. However, in the twenty-eight years of its existence as a state, Bangladesh has been unfortunately ruled mostly by military governments where power was either concentrated in the hands of military cliques or the President. By the same token, the tragedy of Pakistan is that in most part country's existence is ruled by military. Similarly, Nepal marched to a parliamentary road in 1990 after decades of absolute rule by a monarch but its political democracy is still at the crossroads. India, of course, sustaining a sort of parliamentary political framework (except19-month emergency rule in 1975-77) more than a half-century but it is also revolving around the limited section of people.

Obstacles

I attempt below an overview of the problems being faced by the countries of South Asia although it has been in such transition phases what is true of it at one particular moment is not necessarily true at another.

Economic backwardness

It is considered that democracy depends mainly on the economic growth of a nation. In the West, democracies are working successfully due to the high level economic development. In contrast, in South Asia, most people live in absolute poverty (less than fifty-cent per day income) and are denied other rights like education, food, shelter, and equal opportunities. Health services are poor, inadequate and not available to the majority. It is a predominantly agricultural region where the vast majority of the people are poor cultivators, tenants, marginal peasants, semi-landless, landless and agricultural laborers who are economically disadvantaged and socially depressed. For those people who are more concerned with where next meal is coming from, and whether they will have a roof over their heads in the next day, it is not even a joke, it simply does not exist a concept.

There are two sections of people; the better educated rich minority and majority of the poor. The gap between them is huge is unquestionable. The quality of life spirals downward despite socalled development efforts; the benefits have not been reached a large majority of the poor people. The reason is that the poor are never in the priority of policymakers except in speeches and policy announcements. It is, in other words, not only have they been denied an opportunity to share the benefits of the country's economic growth but they have failed to gain political empowerment.

Authoritarian social structure

The society is hierarchic and authoritarian. The mass culture is extremely fragmented into region, religion, race, language, and ethnicity and caste categories. Even within each ethnic group, social mobility is rigid and there exists disadvantaged and marginalized groups within it. There is a lack of flexibility and mobility in the social structure to act as a constraint in the process of democratization and development. The caste system being structured vertically has established a dualistic notion of social stability and inequality in the social processes. The relationship among different castes is a

relationship of varying degrees of a complex hegemony of ideas, power and leadership, rather than just the Platonic notion of functional specialization of society. This has undermined the secular political orientation toward the recruitment of citizens in the political process and the growth of a civil culture. The pattern of employment both in government bureaucracy and public sector organizations is dominated by the people of the high-caste minority elite class. By the same token, the status of women is undermined by deep-rooted gender biases and child labor and child marriages are common, as equally are domestic violence and son preference.

Declining roles of leadership

It is believed that political leaders play decisive roles in making and unmaking the political system. But, in South Asia, the only-preoccupation of leadership is to capture the political power for the sake of the betterment for themselves, their families and their community over the larger interest of the public. Admittedly, they are not regarded as the true representatives of the people, rather they are being perceived as they detached from the people. There is a deep mistrust among politicians and between political parties. The another threat to democracy is the unholy nexus between corrupt politicians, criminal elements, pliable bureaucrats and crooked businessmen. Not only that, a further transformation now has taken place with persons having criminal records being inducted to take advantage of their money and muscle power for electoral gain, and finally the setting up of such individuals as party candidates. It is, in other words, politics is filled with cheaters, liars, and criminals. Therefore, the respect and trust in political leaders has rapidly been eroded. Looking at the present scenario, there are no leaders with ability and credibility who could act as mitigating and moderating force among the contending political forces, or even disrupt challenges posed by the traditional authoritarian, social and political interests by the radical ones.

Uninstituionalized party system

Another paradox lies in the failure to institutionalize the party system. Parties have not been able to cultivate stable ideology to offer a meaningful policy that can be useful for society. In countries of South Asia which never have European type of renaissance and reform movements, political parties themselves have to articulate, aggregate and mobilize diverse social interests. Most parties are of elite creation since they have not emerged from some political movements. More worrisome, political parties, once they are in power, they tend to stick to it by any means, and as for as long possible, even at the cost of the broad national and social interests. They are submerged into the materiality of the state power and their politics set them free to ignore the popular expectations. This is why two-thirds of the humanity of this region is terribly consigned into dehumanized life; almost deprived of any opportunity to participate in public affairs.

There is personalization and factionalization instead of institutionalization. In terms of leadership, institutional process and capacity, an internal debate and decisionmaking process, most parties are in their infancy. Politics more often revolves around a central figure; either the president or general secretary or few magnetic leaders. She or he may be ultimate decision-maker despite having fairly large party structure. Sometimes a strong and charismatic leader can draw support of the rank and file diminishing the role of the other leaders. Admittedly, decisions regarding party programs election of party functionaries, nomination of candidates for any elective post are very much overshadowed by the charisma of the leaders. They are not functioning in an open and democratic manner.

Weak legislatures

Another tragedy of the South Asian democracies is the decline of legislatures. The parliaments have not created congenial atmosphere aimed at the betterment of the society and welfare of the people since they remained to be a nay-saying body due to limited degree of autonomy. We might even go far as to say that parliament sessions are a kind of ceremonial exercise, to give people inside and

outside the impression that decisions are being made democratically. Not only that, in some cases, they have often gone beyond the democratic principles to protect party interests. For instance, in India, despite its long multiparty rule legislature could prevent neither the imposition of the emergency nor the abuses perpetrated under it. The battle against the emergency was fought outside the legislature in the press and in judicial forums. In Pakistan, the executive does most of the legislation and the legislature merely acts as a rubber stamp.

Moreover, very few parliamentarians take part in the legislative debates. It should not therefore surprise that the houses of the parliament are usually deserted during the sessions except question hours; and it is difficult to secure a quorum for important debates like those held in the budget session. The parliamentary committees are weak because of the lack of expertise of parliamentarians in areas of finance, trade, banking, social security, education, technologies and so on. Moreover, the entry of criminal elements into legislative chambers is having its pernicious influence upon the politics and administration. It seems that legislatures have neither able to keep the governments within the spirit of constitution nor transfer the society to a considerable extent or have fulfilled the basic aspirations of millions of people. Interestingly, no parliaments have completed full term in South Asia.

Politicization of bureaucracy

It is said that any institution can function well if it is staffed with good personnel. But unfortunately, the South Asian bureaucracy is far from satisfactory which is misfocussed and maladministsered. It is not to assume there is a Western type ideal bureaucracy. It is inefficient, incompetent, intolerant, corrupt, politicized, and lack commitment to serve the people and the country. For example, in Nepal, the civil service is being used to serve the political interests of the parties in power. They are even intolerant to the government policies to implement the liberalization policies, especially in India. Add to this, quite often, officials are not posted to important assignments or given uppermost positions, unless they are politically acceptable to the government-of-the-day. Therefore, the older values of civil service neutrality are still a distant dream in South Asia.

Judicial incompetency

Judiciary is largely independent, but in reality it is baset with many problems. It is corrupt and expensive therefore beyond the reach of ordinary people. Thus, people have begun to loose trust in the competency and integrity of the judicial system. Add to this, the high level judicial appointments are being made on the party line, with that, the principle of an independent judiciary is destroyed. Another problem is the extraordinary slow operation of the courts. Similarly, the constitutional gurantees are often deficient with many saving graces that make laws ineffective or easily exploitative to the advantage of those in power. Human rights violations frequently go unredressed because courts are located in the big cities often far away from the areas where violations occur. This is a factor in the growing lawlessness where increasing members of people are taking the law into their hands.

Rise of ethnic and communal conflicts: Still another problem is the large-scale communal/ethnic violence. Some say that all cultures are considered equal and cannot be against each other. Sure, people want to be recognized as in terms of ancestry, religion, language, history, values, customs, and institutions. But not so in the region. The reason is that the minorities are unrepresented, stay far, far away from administration, police, military, education which are the main avenues for jobs and advancement. Given the political dynamics, it seems that ethnic/religious confrontation is unavoidable.

Other factors

There is no shortage of problems. Freedoms of speech and freedom of the media are pillars of

democracy. In South Asia, however, media are weak and even biased because of their affiliation with one or the other party. The private media are financially dependent on the support from various pressure/interest groups or political parties and public media remains a humble servant of the ruling regimes. Thus, they are not the truth-tellors. Transparency is lacking in procurement, recruitment, awarding contracts, appointments, hiring, firing and so on. Open, honest, transparent, accountable government and a robust civil society is still far-fetched-dream in South Asia. The money is indispensable to political victory. The use of money in politics today is being described as criminalization of politics. Furthermore, every day there are reports of misuse of public funds and resources by people in high position, but rarely is an action taken, except for penalizing subordinate officials as scapegoats. Besides, most countries of the region are governed by shifting coalitions of parliamentary parties and without vision. The root cause of people's euphoria may well be the economic degradation and the social injustices which this region, as a whole, has sufferred over the past so many years. The result is that the fundamental social, economic structures remained almost the same, what changed on paper as a promise, was the method of political operation that is the process of attaining power and position.

Observations

Undeniably, democracy in South Asia manifests a multiplicity of maladies because of political culture and value system that has been there. The political commitment of the citizen is tempered by multiple identifications and loyalties; political party, interest group, caste class, language, region, religion, ethnicity, gender and so on. In fact, it has proved to be an inordinate burden to citizens to construct a strong sense of nationhood as the foundation stone of a civic culture. The dominance of few on the major decisionmaking process forced to critical minorities feel themselves being ignored in their evaluation.

For majority leaders, democracy has now become more closely related to strong personal career interests and ambitions than the pursuits of happiness for the citizens. The basic problem is that, in a word, political. There is lack of a political culture. Political parties have a strong propensity to massify the citizens and reduce them into an unthinking loyal crowd. The leaders, then, impose their objective on them, and turn them into an object of manipulation. One familiar paradox of South Asian politics is that upper elite class who formed as a dominant social group and served as social elite, moneylender, leader, teacher and so on are not declining. In other words, the legacy of past authoritarianism and power of neopolitical class stands in the way. Simply put, the persons in power may have changed but they come from the same sociocultural and economic groups as their predecessors. Similarly, the ferocious competition among various political groups has polarized the public institutions such as judiciary, education and bureaucracy and undermined their neutrality in the decsionmaking in the interest of public.

In addition, democracy has not become the "only game of town" since the rule of the game is still contested. It is desperately fragile. Some argue that ethnicity is the cause of violence. But in a modern world ethnic politics is normal politics. They get transferred into a major political problem when they correspond to significant social and economic inequalities causing a sense of denial and deprivation.

There can be no debate on democratization that brings freedom and empowerment of the people. But the existing political culture does not allow any scope for accommodation or adjustment. Ironically, democracy is often understood as the rule of the majority, but rule by majority is not necessarily democratic: no one, for example, would call a system fair or just that permitted 51 percent of the population to oppress the remaining 49 percent in the name of majority. Rather majority rule must be coupled with gurantees of individual human rights that, in turn, serve to protect the rights of the minorities whether ethnic, religious or political. The rights of the minorities

do not depend upon the goodwill of the majority and cannot be eliminated by majority vote. It is a process, a way of living and working together. It requires cooperation, compromise and tolerance among all citizens. Moreover, the religion must not be as a state institution but as a belief system or morality.

There will be no democracy, and have no stability in this part unless credible government emerges and political forces unite to resolve the multiple issues peacefully as soon as possible. Up to now, the majority of people have not totally given-up their hopes but these ugly scenes; if not corrected timely with vision, determination and political acumenship the people may further be bewildered and loose their faith and be forced to look and work for an alternative. In my opinion, democracy is not a model that can be flown in like computers. Simply put, it has worked well for the country A might does not work for the country B. It is an institution, process and a culture that each country, each society has to develop on the basis of its socioeconomic and cultural roots. Yet in this development, one can draw lesson from experiences of others. In South Asia, undoubtedly, democracy has been extended to the countryside but it has not taken social roots there. For all its flaws, democracy still remains the best governing system, one cannot afford to loose sight of this.

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