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Contents

From the Editors

By the time this review has been published the heat wave that melted Tokyo this summer should finally be over. Despite the unusually warm weather business was as usual at the Center. In addition to a number of visitors, some of our professors and staff made trips overseas for various conferences and vacations.

This edition of the *ICCLP Review* includes articles from Visiting Professor V.S. Mani, Visiting Associate Professor Veronica Taylor, and ICCLP Researcher Richard Small. During their stay, both Professor Mani and Professor Taylor have made important contributions to the activities of the Center for which we are most grateful.

Whilst Professor Mani unable to find the light weight type of Japanese fabric he was seeking for his wife to make a sari from, he was able to pick up a PlayStation for his son. At the 93rd Comparative Law and Politics Seminar on 30 June 2000, Professor Mani presented a paper entitled 'Humanitarian Intervention Revisited', which is also the theme of the article of the same title that he kindly submitted to the *Review*. In his article Professor Mani discusses the re-emergence of the so-called 'gun-boat' diplomacy of coercion in international relations.

Visiting Associate Professor Veronica Taylor was also kind enough to furbish the *Review* with an interesting article, 'Re-regulating Japanese Transactions: The Competition Law Dimension', which discusses the changing regulatory climate for competition in Japan. We would also like to take this opportunity to congratulate Professor Taylor for her appointment as Professor of Asian Law at the University of Washington, commencing in Spring 2001.

Finally the third article in this edition of the *Review* was contributed by ICCLP Researcher Richard Small. The article reviews the arguments for and against the prohibition of insider trading. Whilst not mentioning any legal regime in particular this article is aimed at any regime entertaining the possibility of promulgating such a prohibition.

Earlier this year Ms Wada Keiko visited Brazil as part of the Center's exchange program with the University of Sao Paulo.

Brazil, a Country of Tolerance

Recently I was quite startled by the words of Professor Mori Seiichi of Keio University who was giving a lecture at the Brazilian Embassy upon my return from my trip to Brazil. Professor Mori pointed out that during the Second World War, the Law Faculty of the University of Sao Paulo offered refuge to legal scholars who were at the time being persecuted by Mussolini. Even though Brazil has an international reputation for tolerance I was unaware of that prior to my visit. Now, with the power of hindsight, during my own brief trip to Brazil, the feeling of tolerance that I felt on many occasions so fittingly described the openness and scale of a country like Brazil, was proved right.

Dr. Hugo Dobson, a lecturer of Kent University, a former ICCLP researcher and, a visiting researcher at the Faculty this summer, was in Japan to conduct research on the cultural and political significance of postal stamps. He has made substantial progress through his numerous trips to the Postal Stamp Museum in Mejiro. Dr. Dobson's essay in this *Review* is a prologue to an article he plans to contribute to a future edition of the *Review* on the history of postal stamps in domestic politics and international relations.

Mr. Gregory Ellis, former ICCLP researcher and editor of the English language version of the *Review*, commenced working at the Committee for International Activities at Fuji Research Institute in April as a Research Associate. We thank him kindly for his contribution to the Center during his one-year stay with us. We also wish to extend our gratitude to Mr. Peter Neustupný, a former ICCLP researcher and currently a court researcher in Melbourne, and others for their help in translating this English language version of the *Review*. Finally, we would also like to welcome Mr. Kang Gwang Soo who joined the Center in April as researcher from the Ph.D. course of the Graduate School of Law and Politics.

The ICCLP welcomes any comments that readers may have of the *Review*. Furthermore, the English language version of the 2000 ICCLP video, which introduces the activities of the *Center*, is now available upon request.

Wada Keiko ICCLP Coordinator, ICCLP Review Editor
Richard Small ICCLP Researcher , ICCLP Review Editor (English Edition)

Part I

HUMANITARIAN INTERVENTION REVISITED
(A RESUME)

V.S.MANI•

While history does not exactly repeat itself in terms of identity of events and *dramatis personnae*, the 'New World Order' ushered in by the last decade of the Second Millennium has unfolded certain disturbing trends in use of coercion in international relations quite reminiscent of the days of Concert of Europe of the nineteenth century. The days of gun-boat diplomacy of the likes of Commodore Perry seem to have been reinvented to become fashionable, nay even morally 'justifiable,' and therefore handy for the powers-that-be seeking to reorder the nations of the world into a mould of their liking. The genuine concern of the international community for the protection and promotion of human rights the world over has provided these powers with a new façade of legitimacy for use of coercion against smaller or weaker nations, whether through or outside the instrumentality of the United Nations. The currently unfolding, predominantly Western, doctrine of human rights seeks to justify use of coercion as an individual or collective response to violations of human rights within a state, be it in Serbia-Herzegovina, Kosovo, or Haiti.

I. SOME DOCTRINAL ISSUES

Given the decentralized nature of the contemporary international system of sovereign states, the enforcement/implementation of international human rights norms, like all other international norms, is largely left to individual states, which are the units of the international community. This state of things has its rationale stemming from a number of reasons. First and foremost, most human welfare-centric theories of the origin of state, such as those of Locke, Rousseau, Laski and Gandhi, which at the same time underscore values of democracy and participatory government, entrust and mandate the state system with the task of constantly seeking and securing the condition of human welfare within the society. This task is best pursued at the level of, and within each national society, and by the instrumentalities evolved by the genius of that society, whose functioning is made accountable to that society by its own methods of social audit or rules of legitimacy. Pursuit of human welfare is, in the ultimate analysis, primarily and predominantly the function of the members of each national society and the institutions they establish to that end. The legitimacy of the institutions of state is thus a function of the degree of fulfillment of their mandate, i.e., the pursuit of human welfare by these institutions and the manner in which it is achieved. The 'myth' of sovereignty is created to permit and encourage each national society to develop itself the way it would like, managing the available resources for the purpose the best way it

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deems fit. It seeks to protect and promote the right of the people of each state to self-determination, political, economic, social, and cultural. It brooks no interference from other national societies. No national society – however powerful it may be - can arrogate itself to claim a 'divine' right to impose its will on another society. Hence the Gandhian dictum: "Good government is no substitute for self-government."

Additionally, human welfare is also a function of the cultural institutions in a society. And societies differ from one another in their perception of the cultural content of human welfare. The Oriental societies, in general, perceive human rights as the product of intra-societal socio-cultural relations, which are primarily based on a web of mutuality of duties woven into these relations at various levels – inter-individual, intra-family, inter-family, intra-clan and inter-clan, and finally societal. The son owes duties to his father and the rest of his family, the father owes duties to him and the rest of the family, and thus each member of a family owes duties to others in the family – and the resultant totality of family relations seek to protect the welfare of the individual as they promote the welfare of the whole family. There is not need for anyone to assert its rights; they are there for his enjoyment, without even demanding them. In sharp contrast, in the Occidental societies individuals have to assert their rights, and there is less emphasis on duties.

In other words, universality of human rights concepts must be understood, taking into account certain divergences of perception inane in each national society. In the contemporary international community, therefore, barring certain irreducible minimum of core rights emanating from the right to life and personal liberty (as recognized by Article 4 of the International Covenant on Civil and Political Rights, 1966), it will be difficult to seek universality of application and acceptance of human rights worldwide. While genuine international cooperation to promote human welfare is welcome, and is, indeed, mandated pursuant to Article 1(1), and Articles 55 and 56 of the UN Charter, dictatorial interference in the way in which a state seeks to achieve these objectives within its national society is not. Evidently, international concern for the human rights situation in a country does not automatically confer on any group of states, or even on an international organization such as the United Nations, *international jurisdiction* to take coercive action in respect of that situation.

II. PRINCIPLE OF NON-INTERVENTION IN AN HISTORICAL PERSPECTIVE

The traditional international law as obtained in Europe recognized the concepts of sovereignty of states and sovereign equality, principally to protect and preserve the then prevalent absolute monarchies and other similar forms of dictatorships. Sovereignty resided in and emanated from the ruler, which he exercised over his 'subjects' usually within his territory. The subjects had no rights, and it was for each ruler to decide how to rule within his realm. Other rulers had no right to interfere in his realm, nor did he have such a right in respect of them. A system of balance of power, represented by the Concert of Europe, validated and buttressed this live-and-let-live concept of sovereignty and sovereign equality. The objective of the traditional principle of non-intervention, then, was to preserve the sovereignty of each ruler over his nationals within his territory.

Outside the world of European civilization, however, competition among the European powers was permitted, to go out, seek, establish and expand colonies in the Latin America, Asia and Africa. The various congresses of European powers even umpired and promoted this unholy scramble for colonies, and of course, non-intervention applied in respect of matters within the colonial empires of each European power. It thus suited the traditional international law not to recognize the existence of the ancient countries of Asia and Africa. Non-intervention in colonial affairs stayed in place until the emergence of the United Nations.

Yet, some interventions did take place, particularly by the 19th century. These were, of course, justified in terms of protection of nationals and their property abroad. In other words, while the continued expansion and exploitation of colonies were not deemed to be intervention *stricto sensu* (as these took place against peoples who did not legally exist, in the eyes of the traditional international law), the blockade of the Venezuelan coast by the European powers in 1902 for enforcement of public debts contracted by Venezuela with the nationals of these powers was justified as a peacetime blockade, a retorsion. On the other hand, President Theodore Roosevelt of the United States got, by force, the Panama Canal dug up, encouraging Panama to break off from Colombia, and announced in 1901, "I raised my little finger; and there was Panama." Further down the line, President Woodraw Wilson sent an American force to Vera Cruz in Mexico in 1914 in retaliation for the 'humiliation' suffered by a handful Americans who got into a tavern brawl, and then justified it by saying that he did it "to make the world free for democracy."

Such interventions by big powers in the affairs of smaller powers either fell outside the realm of the traditional international law (Harcourt, Holland and Westlake), or were justified because of their 'humanitarian' objectives – usually to protect their nationals or their vested interests.

At the same time, such interventions prompted the smaller powers, especially the Latin American countries, to clamour for international recognition of a new principle of non-intervention – a principle that would protect their social and economic systems and their right of self-government. The Calvo and the Drago doctrines and the Mexican agrarian reforms of early 1920's illustrated this development. The Pan-American movement since its inception in 1890 spearheaded this principle, despite the setback it suffered when the Covenant of the League of Nations validated the Monroe Doctrine in its Article 23.

III. EMERGENCE OF MODERN INTERNATIONAL LAW

While many strands of developments through the later half of the nineteenth century and the first half of the twentieth century have contributed to the emergence of the modern international law, it is generally recognized that many of its principles have found expression in the Charter of the UN and in the continuing law-making activities of that organization operating through the vicissitudes of the changing international political relations of the post-second world war world.

The post-war International society has been characterized by a number of features. First, in the words of Radha Binod Pal, a great Indian judge, "the geography of international law" has changed, with the large-scale emergence into independence of countries of Asia, Africa and Latin America. Although they are known as "new states," many of them are in fact ancient societies, representing ancient civilizations which existed at a time Europe did not. They have brought on to the world stage their ancient values, indeed a diversity of core social and cultural values.

Secondly, these countries brought into the focus of attention of the world society their urgent need for development, having shared a terrible common experience of colonial exploitation. This was an area that had stayed outside the realm of the traditional international law, but was central to the immediate concern of the newly independent countries. The new international law had to forge a principle of international cooperation on the basis of Articles 55 and 56 of the Charter and also evolve its operational rules.

Thirdly, the Second World War also taught the world that human rights must be recognized as part of the new international law and the new world organization must have a role in its promotion, even as the sovereign states remain primarily responsible *to their citizens* (by now democracy too started becoming fashionable and accepted widely), for the implementation of the basic human rights norms, according to their genius, and given the resources available.

Fourthly, since the world had already divided into two power blocs, human rights also became a handy instrument of foreign policy as between these two blocs. Thus the West characterized the Soviet bloc countries as "totalitarian," as the civil and political rights as understood in the West stood violated or denied primacy of place in these countries. On the other hand, the Soviet bloc gave primacy for economic and social rights as well as group rights such as self-determination, over the civil and political rights and these became justifications for covert interference in other countries mainly aimed at preventing them from joining the Western bloc. In order to halt the communist expansion westward in Europe, the European human rights regime was established in 1950, which eventually proved to be a model regime for the entire world. But the Cold War greatly contributed to 'politics of human rights.'

Fifthly, slowly, but steadily, the gross violations of human rights, such as those obtained in South Africa and the Namibia, came to be regarded by the United Nations as a threat to international peace and security and justified international coercive action (even if short of use of armed force). Indeed, the consensus required for this action evolved rather painstakingly, given the entrenched economic interests of some of the Permanent Members in these situations. It is interesting to note the manner in which even the economic organizations like the IMF and IBRD, have over the years, changed their policies to take into account human rights situations in the potential beneficiary countries as part of their conditionalities for according access to their facilities.

Sixthly, since the 1970's there has a growing trend towards liberalization and globalization in international and national economic relations. This has slowly but surely led to the further thinning down of the political and economic boundaries of countries. Liberalization and globalization have had a direct bearing on the pursuit human welfare by national societies. The serious debate over the contribution of liberalization and globalization to the enhancement/achievement of human welfare, the core value of human rights continues to storm the centres of international and national decision-making.

Finally, the disappearance of the Soviet Union from the world stage has had a revolutionary effect on the post-Cold War international relations since 1990. It has left the whole field to one single super power to dominate world affairs, and fashion a 'new world order' of the shape and values preferred by it. This super power could now manipulate the principal organs of international organization and get international actions initiated in arenas of its preference, under the façade of organizational legitimacy – actions for which it could not have used the organizational facilities at the height of the Cold War while the other super power was alive. This situation has left the smaller powers at the mercy of this 'new world order.'

Even as the post-war international society was evolving, the diversity of social and political systems and the emergence of a large number of new states keen to play an active part in international relations led to new international norm-setting under the auspices of the UN General Assembly. While the human rights norms themselves came to be evolved through a number of instruments like the Universal Declaration of Human Rights of 1948 and the International Covenants of 1966, the basic principles of modern international law evolved on the basis of the principles of the UN Charter. By far the most important formulation of these principles is the Friendly Relations Declaration of 1970, which embodies consensual formulations of the prohibition of force, non-intervention, peaceful settlement of international disputes, sovereign equality, good faith, self-determination, and international cooperation. The International Court of Justice has had an occasion in the *Nicaragua* case (*ICJ Reports 1986*) to examine and recognize the evidentiary value of this declaration as reflecting the contemporary *opinio juris* at least in respect of the principles of prohibition of force, non-intervention and sovereign equality.

The principles such as those of non-intervention and sovereign equality may sound traditional, but it is submitted that their contents and orientations are quite modern, particularly from the viewpoint of the developing countries. The basis of sovereignty, according to these countries, is self-determination. In exercise of the rights under the principle of self-determination, every state is fully entitled to determine its social, political, and economic system, subject only to the international obligations which it undertakes. Non-intervention is concomitant of sovereign equality, and ensures a policy of peaceful coexistence in the relations between states. Each national society has a right to chart out the course to be pursued by its national polity, and other national societies have no business to interfere with the exercise of that right. No longer does the modern international law protect and preserve the 'divine right' of the ruler, if the rule does not meet the tests of legitimacy and accountability. Yet the form of government

and the standard of governance must be determined by the national society itself in exercise of its right of self-determination. Non-intervention, thus, has a positive function to perform in a national society in the modern context – to promote the right of self-determination and the right of development, without interference from outside.

IV. HUMANITARIAN INTERVENTION TO-DAY

Humanitarian intervention has gained a new meaning today, even while the traditional tendency of powerful states to resort to coercive measures against a non-pliant state in pursuit of their foreign policy objectives or expediency continues to stay alive (e.g., Hungary 1956, Guatemala 1965, Czechoslovakia 1966, Afghanistan 1979, Grenada 1983, Panama 1989, and so on). When there are violations of human rights in a state, is coercive intervention by outside powers justified? What about the legitimacy of UN intervention in such situations?

In view of the principles of non-use of force, peaceful settlement of international disputes, and non-intervention as embodied in the Friendly Relations Declaration, it is submitted that no state has a right to launch a coercive intervention in the affairs of another state. Even the countermeasures which it may be entitled to take against another state must be confined to a situation arising from an illegal act committed by the latter to the detriment of the former, and must comply with the principles of proportionality, and peaceful settlement of disputes. No state has the right to take coercive action against another state in enforcement of unilateral sanctions against violations of international law committed by the latter, but not directed against the former.

The role of the international organization in the enforcement of human rights deserves separate consideration, particularly in view of the increasing involvement of the United Nations in civil strife (Somalia, Yugoslavia, Rwanda). The UN Secretary-General, Kofi A. Annan has dwelt on the issue in two of his recent reports. The Introduction to the 1999 Annual Report of the Secretary-General on the Work of the Organization, entitled **Preventing War and Disaster: A Growing Global Challenge,** addresses itself to "unprecedented humanitarian challenges." The S-G's main complaint is that "The humanitarian challenge is heightened by the fact that the international community does not respond in a consistent way to humanitarian emergencies." (para 8, at p.3). While emphasizing the role of preventive measures in diffusing potential conflict situations, the S-G recognizes that even the best of prevention strategies cannot completely eliminate the chances of war. Hence his view:-

> "It follows that, for the foreseeable future, the international community must remain prepared to engage politically – *and if necessary militarily* – to contain, manage and ultimately resolve conflicts that have got out of hand. This will require a better functioning collective security system than exists at the moment. *It will require, above all, a greater willingness to intervene to prevent gross violations of human rights*." (Ibid., para 56, at p.17; emphasis supplied.)

> "Demonstrable willingness to act in such circumstances will in turn serve the goal of prevention by enhancing deterrence. Even the most repressive leaders watch to see what they can get away with, how far they can tear the fabric of human conscience before triggering an outraged external response." (Ibid., para 57, at p.17).

While expressing his disapproval to unilateral resort to force without the authority of the UN Security Council, the S-G is also aware of the limitations of organizational action:

> "Differences within the Council [on the question of UN intervention in the Kosovo crisis in 1999] reflected the lack of consensus in the wider international community. Defenders of traditional interpretations of international law stressed the inviolability of State sovereignty; others stressed the moral imperative to act forcefully in the face of gross violations of human rights. The moral rights and wrongs of this complex and contentious issue will be the subject of debate for years to come, but what is clear is that enforcement actions without Security Council authorization threaten the very core of the international collective security system founded on the Charter of the United Nations. Only the Charter provides a universally accepted legal basis for the use of force." (Ibid., para 66, at p.20).

Besides sovereignty, the S-G also notes other impediments to "Security Council action in the face of complex humanitarian emergencies." "Confronted by gross violations of human rights in Rwanda and elsewhere," he observes, "the failure to intervene was driven more by the reluctance of Member States to pay the human and other costs of intervention, and by doubts that the use of force would be successful, than by concerns about sovereignty." (Ibid., para 67, at p.21).

The S-G's observations in the Introduction to his 1999 Report to the General Assembly predictably generated considerable heat in the debates at the UN. His complaint, however, is that "Although I emphasized that intervention embraced a wide continuum of responses, from diplomacy to armed action, it was the latter option that generated most controversy in the debate that followed." (The S-G's Report to the Millennium Assembly entitled **We the peoples: the role of the United Nations in the twenty-first century** – UN Doc. A/54/2000, 27 March 2000, para 215, at p.34). He notes three principal objections that emanated from the debates to the concept of 'humanitarian intervention' by the UN: (1) It could become a cover for "gratuitous interference in the internal affairs of sovereign states"; (2) It might "encourage secessionist movements deliberately to provoke governments into committing gross violations of human rights in order to trigger external interventions"; and (3) There is "little consistency in the practice of intervention, owing to its inherent difficulties and costs as well as perceived national interests – except that weak states are far more likely to be subjected to it than strong ones." (Ibid., para 216, at p.34).

The S-G recognizes that the principles of sovereignty and non-interference offer vital protection to small and weak states. But to the critics he poses this question:

> "[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how *should* we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity ?" (Ibid., para 217, at p.34, emphasis original).

"We confront a real dilemma," emphasizes the S-G. "Few would disagree that both the defence of humanity and the defence of sovereignty are principles that must be supported. Alas, that does not tell us which principle should prevail when they are in conflict." (Ibid., para 218, at p.34). The S-G recognizes that humanitarian intervention remains "a sensitive issue, fraught with political difficulty and not susceptible to easy answers." His conviction, however, is that "But surely no legal principle – not even sovereignty – can ever shield crimes against humanity. Where such crimes occur and peaceful attempts to halt them have been exhausted, the Security Council has a moral duty to act on behalf of the international community. … Armed intervention must always remain the option of last resort, but in the face of mass murder it is an option that cannot be relinquished." (Ibid., para 219, at p.34).

One greatly appreciates the high moral concerns of the Secretary-General of the United Nations. In an ideal world, when gross violations of human rights take place with impunity in one state, the international community should step in, promptly take even coercive action, if need, and bring the culprits to book. Alas, such an ideal world does not exist even within a national society. The practical problems of apprehending and bringing to book even criminals remain unraveled in domestic law in a democratic society, with all the might and majesty of the state and its institutions!

There are quite a few fundamental questions to answered, before the international community as represented by the United Nations can legitimately claim the right to humanitarian intervention. *First*, the international community we are talking of is an international system of states, and its organ, the United Nations, is a creature of this state system. Human rights are primarily claimable against the state, and groups or individuals who man the state. If a people cannot make their state institutions deliver human rights, how can they expect an external agency to get this done ? *Second*, gross violations of human rights do not occur overnight. The conditions that lead to them must be identified on time and eliminated. More often than not, this task calls for mobilization and utilization considerable resources. And, to be sure, it may not be a one time affair. Consider this against the background of the abject failure of international development decades and international financial organizations to root out poverty from the developing countries. *Third*, very often the root cause of a human rights situation in a country might lie deep in history, e.g. Yugoslavia and Rwanda (in cases like Rwanda it is often contributed by former colonial powers). This calls for intervention at the emotional level (Remember the Preamble to the constitution of the UNESCO: "Seeds of war are sown in the minds of men".) In other words, humanitarian intervention as a one-time surgical operation cannot eliminate the causes of human rights violations. The Kosovo crisis presents a telling example of this – In Kosovo, the external intervention

failed to prevent counter-violations of human rights of the Serbs by the Kosovar militants, while it claimed have succeeded in stopping the Serbian atrocities over Kosovars.

Fourth, the contemporary state system does not, as yet, recognize any international mechanism empowered, and capable, to intervene in the affairs of a state without its consent, however badly, that state might be conducting its affairs internally. This has been the situation ever since the emergence of the modern state system. It may not be a satisfactory state of affairs, but it remains so. The situation can be tackled in two ways. One, action should be taken to encourage home-grown human rights institutions in each state and strengthen them by mobilizing adequate resources through international cooperation. Two, international responses to emergency humanitarian situations should be based on consensus, and in compliance with the principles impartiality, fair play, and uniformity of application of standards.

Does the UN Security Council fit the bill? It is submitted that it can only do so, if it decides to be non-partisan. It has had a history of selectivity, partiality, and gross violations of even the time-honoured principles of natural justice (right of all parties to a situation to be heard, right to an impartial judgment *after* being heard). The record of the Council, particularly since 1990, has been dismal. The reason is not far to seek – it is that the Council is often manipulated to serve the foreign policy goals of some big powers. Indeed, the Council is powerless in respect of any human rights situation involving any one of them (e.g. Chechnya). In other words, constitutionally, the Council can only authorize humanitarian intervention against a small power, never against a big power.

Further, one doubts if the Security Council's constitutional mandate readily justifies its authorization of humanitarian intervention pure and simple, on behalf of the international community. Under Article 25 of the Charter, the decisions of the Council to be binding on the members of the organization must be "in accordance with the Charter." The enforcement action mandated under Chapter VI of the Charter must respond to 'a threat to the peace, breach of the peace or act of aggression". The Council, unlike the General Assembly, has no direct mandate to promote observance of human rights, or even "good governance" (regardless of its brand). Violations of human rights can, in a given context, amount to a threat to the peace, a breach of the peace or an act of aggression. But the nexus between the two must be proved to exist on the basis of objective evidence; it should not be a figment of imagination on the part of the Council. (See Judge Fitzmaurice's dissent in the 1971 *Namibia* Advisory Opinion).

It is submitted that what the Secretary-General of the United Nations is suggesting in his 1999 Report as well as in his Millennium Report would lead the Security Council to bite more than it can chew, unless the Council accepts the following ground rules for coercive humanitarian action by the organization:

(1) Root causes of conflict must be addressed by the international community (social, eco, development), instead of waiting for the volcano to erupt.

(2) Gross and systematic violations of the right to life, such as genocide must justify coercive UN humanitarian action under Chapter VII of the Charter, as they indicate the utter failure of the state institutions in the target state, to fulfil their basic task of the pursuit of human welfare, the basic justification of the principle of sovereignty.

(3) The action, and the decision on which it is based, must be in accordance with the principles of non-selectivity, objectivity, impartiality, and uniformity of application of standards. They must be based on objectively verifiable evidence and transparency of information.

(4) The operation must be under the direct control of the UN, it must accord with the principle of proportionality. Politics of human rights must be avoided.

(5) The decision must be based on consensus. As far as possible, the parties to the situation should be heard. Consensus tends to ensure legitimacy, often legality.

(6) No blanket delegation of the SC's powers to any state or a group of states to determine when, what and how, force should be applied. The Council exercises powers delegated to it by the Member states. Power, once delegated, cannot be re-delegated.

(7) No *post facto* ratification of coercive action taken by any state, or a regional organization (Article 53).

(8) Transparency in decision-making.

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RE-REGULATING JAPANESE TRANSACTIONS: THE COMPETITION LAW DIMENSION[=]

VERONICA TAYLOR[*]

Introduction: Regime Shift in Japan's Competition Law?

In the wake of Japan's recession during the 1990s and its diminished prospects for recovery, political scientists, economists and lawyers have been forced to revise their views of how the Japanese economy operates. An early casualty has been the characterisation of Japan as a developmental state, or what has been called the Japan Inc model (Johnson, 1995; cf Carlile and Tilton, 1998:1-15). Pempel has argued (1997; 1998) that Japan is in fact experiencing a 'regime shift', in which its operating rules and dominant institutions are undergoing fundamental change. However, we still have a very incomplete picture of the targets, scope and forms of institutional change in Japan.

This paper discusses some apparently new elements in the restructuring of Japanese regulatory institutions. The first is the introduction of a new political initiative: the 'legal system reform agenda' (*shihôseido kaikaku*) and the loosely related set of legal policy changes identified with it (Tsûsansho, 2000:202). The second focus of this paper is an institutional shift that seems to be occurring in competition law and enforcement. This latter development seems to runs counter to much of the accepted wisdom about the deliberate non-enforcement of competition policy in Japan.

To date, the institutional capacities of the Japan Fair Trade Commission have been the focus of sustained domestic and international criticism. In these critiques, 'institution' is synonymous with organizational entity – in this case an (ostensibly) independent regulator. By contrast, following Aoki (forthcoming) this paper uses a wider definition of 'institution'. Aoki views institutions as a domain of transactions participated in by a set of agents; endogenously created through the agents' repeated interactions and thus self-enforcing. He acknowledges, though, that institutions are constructed socially and that, once established, they become objectified and 'taken for granted' and begin to govern the agents' choices – to function as the rules of the game (Aoki, forthcoming). Using this wider institutional lens, I give roughly equal emphasis to a range of institutional 'players'

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in competition law: the Japan FTC as a regulatory agency; the courts; the companies that are the focus of enforcement; and academic commentators and the media as contributors to the regulatory 'climate'.

Although the changed regulatory environment for competition that I describe in this paper predates the announcement of a `legal reform agenda' in 1999, I suggest that the two sets of developments as being interrelated and to some extent mutually reinforcing.

Competition law and the Legal System Reform Agenda

One of the indicators of a policy-level climate change in Japan was an announcement by former Prime Minister Obuchi in August 1998, which promised a complete overhaul of the Japanese legal system:

> We will pursue complete reform of the (legal) system in order to make it easier for citizens to use and to ensure that the legal system functions as the basis for a secure life for the populace and for equitable economic activity (Fujikawa, 2000:18)

The former Prime Minister underlined his commitment to the legal reform agenda by appointing a Legal System Reform Commission (Shihôkaikaku shingikai) in July 1999 with a mandate to report within two years. The Commission published its key issues for debate in December 1999 and a preliminary report in April 2000 (Shihôkaikaku shingikai, 2000).[1] As a shopping list of reform topics, the legal system reform agenda looks fairly innocuous. However, embedded in each of the 'topics' are sundry debates, lobby groups and subsidiary agendas.

By way of example, large Japanese corporates have been voicing dissatisfaction with the availability, cost and quality of legal services in Japan for some time. Part of the public face of that lobbying can be read in a long-running editorial series in the Nikkei newspaper (eg Nikkei 30 April 2000) titled 'The Legal System: Economics Ask Questions'. Part investigative journalism, part 'trashing' of legal institutions such as the Supreme Court and the Japan Federation of Bar Associations, the series sets out to expose inefficiencies in legal procedures, disparity in access to legal advice across Japan and the anti-competitive effects of Japan being unable to match US legal skills in areas such as biotechnology and industrial property. Those themes are taken up in a more measured way in the most recent White Paper from the Ministry of International Trade and Industry's

[1] Just weeks before Prime Minister Obuchi's stroke and departure from public life in 2000, he also appointed the outspoken former President of the Federation of Japanese Bar Associations, Mr Nakabo, as a special policy advisor. An alternative and plausible explanation was that Nakabo had already declared his support for a non-LDP politician and this was a way of preventing Nakabo from campaigning against the government in the 2000 general election.

(Tsûsansho, 2000). This latter treatment, however, is in some senses more controversial, because the eleven pages of statistical analysis and commentary simply treat Japan's legal services as an inefficient services industry in need of major reform that is functioning as a drag on economic growth and industrial innovation. Although MITI stops short of prejudging the outcomes of the legal system reform debates, the level of detail in the topics traversed (eg legal profession remuneration; the breaking of *bengoshi* (barrister) monopolies on legal practice; electronic publishing of court decisions; greater transparency in patent examinations) leaves the reader in no doubt about the Ministry's stance.

In fact a wave of important legal reforms affecting commercial interests in Japan has been passed or is already pending. Beginning in the mid-1990s, a new *Code of Civil Procedure* (passed in 1996, effective in 1998) was intended to improve access to the courts; rationalise carriage of cases; create a small claims jurisdiction; and to make the law more transparent by translating it into contemporary language. (Kamiya, forthcoming) Although the *Code* reforms predate the legal reform agenda they can be seen as the symbolic down payment on creation of a more 'user-friendly' legal system.
A second wave of reforms relate to the *Corporations Code*, enabling easier corporate break-ups and acquisitions (Nikkei, 28 April 2000).

Lawyers, not surprisingly, have embraced the legal reform groundswell, despite bitter debate within the wider legal profession about preferred outcomes. Some have described the new agenda as the *kaname* [lit. pivot] for both the administrative reform and deregulation processes. This may reflect genuine delight at finding lawyers in a position to dust off and implement long-cherished plans for change, or it may be polite way of saying that legal system reform represents Japan's last change to revisit a stalled set of economic policy initiatives.

For some political and economic commentators, then, the 1990s represents 'the lost decade' of infinitesimally slow deregulation and policy reform in Japan. For lawyers, however, the 1990s stand as an historical turning point, the implications of which are only beginning to emerge. Much could be said here about the political attempt to elevate law and legal institutions to the status of circuit breakers within a system that has traditionally downplayed the need for law. There is more than a visible shadow here of the kind of legal formalism that is resurgent in US law and policy debates and is now a feature of multilateral organisations such as the WTO, the OECD, the IMF and the World Bank. What is significant for the present discussion, however, is that the legal reform agenda is unfolding without visible opposition, and seems likely to legitimate and strengthen the use of formal juridical controls on business and government in Japan.

Rethinking the institutional critiques of Japanese competition law

Japanese competition law scholars do not disagree with the proposition that, until

recently, the formal enforcement of Japan's competition law was routinely overshadowed by the intervention of government and industry. (Eg Murakami, 2000:6) However, they speak of the 1980s and 1990s as being like the 'night and day' of domestic competition regulation. (Shiraishi, 2000) That is, from the standpoint of legal theory and practice, the latter half of the 1990s has seen an unprecedented change in both the qualitative and quantitative significance of competition law in Japan. The balance of this paper suggests some areas of change that may furnish a basis for this kind of perception.

Let us focus first on the 'formal' side of competition regulation. The Japan Fair Trade Commission (Japan FTC) was unique in being the only independent regulatory agency created in Japan by postwar legal reforms. This partially explains criticisms couched in tones of, 'Why can't Japan's FTC be more like the United States FTC, its conceptual model?' Certainly, for decades the differences between the two agencies were stark. Japan's FTC, was captured by the Ministry of Finance and was eviscerated through understaffing and legislative changes designed to undermine its mandate and its capacity to find adversely against government-sanctioned courses of action. Its present complement of 560 staff (a third of the US FTC) represents an increase on its historical size, albeit an insufficient number of staff to exhaustively investigate and prosecute all breaches of the *Antimonopoly Law* (Nikkei, 29 November 1999)

The text of Japan's *Antimonopoly Law* reads as substantively similar to US antitrust law or Australian competition law statutes. The problem has been that its application in the postwar period was largely curtailed by a political preference for market stability and security for domestic industry over market competition and consumer welfare. (Tilton, 1998:184) The Japan FTC itself possibly shared that preference for stability over untrammeled market competition (Haley, 1997:147). Although the Ministry of International Trade and Industry (MITI) was responsible for dictating or supporting the cartelisation of selected industries, for example, Japan's FTC cooperated – although, argues Haley, did not capitulate in the process (1997:147). The Japan FTC did not provide a bulwark against the prevalence of administrative guidance by MITI and other agencies and few foreign companies in the Japanese market or seeking to enter it were prepared to test the agency's complaint process, although this was a route open to them.

Institutional change in the 1990s

The mid-1990s seems to represent a turning point in competition law enforcement in Japan. By March 1996 the Japan FTC had pursued complaints against the largest number of enterprises since its inception and had ordered fines in the largest number of infringement cases to that point. (NBL, 15 April, 1996:68)[2] Following

[2] The total of the fines levied were the second-highest total for fines reported since the agency's inception: during 1995 - JPY 6.4 billion (or AUD 80 million) collected from 741 enterprises in 24

the passage of revisions to the *Antimonopoly Law* in June 1996, the Japan FTC itself was restructured and its enforcement capacity strengthened. The changes included the appointment of a former prosecutor as Director of the agency (rather than the traditional secondment from the Ministry of Finance) and created an Administrative Office to coordinate the Commission's administrative functions. A new Economic Transactions Office, Transactions Division, Office of Investigations and Special Investigations Division were also established.

This period also saw a fundamental shift in the Japan FTC's enforcement stance. Many studies of this agency to date have suggested that it generally favoured administrative processes over criminal prosecution as the major enforcement route for breaches of the *Antimonopoly Law*. US trade commentators commonly present this as a flawed choice. It can be more accurately characterised as what Gerber (1998) calls 'the administrative model' of competition typical of Japan and the EU. The distinguishing characteristic is discretionary policy decisions by bureaucrats who often seek 'voluntary' compliance from business, in contrast to 'the juridical model' of US competition law, which treats competition as 'normal law' to be applied in the same form, language, institutions and modes of thought as other kinds of private or criminal law. Australian competition law and enforcement is an interesting hybrid of these two approaches (Tamblyn, 1992).

What we see in the Japan FTC enforcement of *Antimonopoly Law* in Japan in the 1990s is not a diminution of the administrative model of enforcement, but the addition of court support for Japan FTC investigations, and prosecution of both private sector players and their public sector collaborators. An illustrative case was the Tokyo High Court decision (May 31 1996) upholding a Japan FTC finding that major electrical contractors had engaged in collusive tendering (a *dango* arrangement) for government contracts. The High Court found that, between 1989 and 1990, electrical manufacturers had formalised a system for subdividing tenders for government sewerage projects, and that this was done with the active cooperation of the relevant agency, the Japan Sewerage Corporation. The managers responsible were given suspended prison sentences of 10 months each and their companies fined between AUD 400,000 and AUD 600, 000 each.
The court was explicit and scathing about the active role played by the public corporation in pre-releasing the specifications and budget for projects:

> At a time when the level of fines under the *Antimonopoly Law* had just been increased' the court said, `This represented serious criminal behaviour by our country's leading heavy electrical manufacturers' and `criminal cooperation by a public corporation ...in an area affecting citizens' daily lives'. (*Nikkei*, 31 May 1996:1)

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infringement cases.

A study by Morita (1998) of judicial decisions from the last decade has found that the courts have uniformly adopted and followed the Japan FTC's analysis of anticompetitive behaviour. In other cases, including the *Shiseido* decision discussed below, it is not uncommon for the court's judgement to include passages from agency's Guideline documents, generally without attribution or acknowledgment, as is standard drafting practice for judicial decisions in Japan.

The significance of this is threefold. First, it points to strong judicial support for the Japan FTC as an agency (or at least judicial confirmation of the agency's predictions about those cases that it chooses to prosecute). Second, it maps a wider range of enforcement techniques for the Japan FTC than were generally acknowledged prior to the 1990s. Third, it begins to alter the fundamental regulatory balance. That is, the courts are now 'written into' the enforcement of the *Antimonopoly Law*. This change in turn raises questions about the court's institutional capacity, which we consider below. Within legal policy circles the shift is significant, because it overturns the traditional separation of 'public' and 'private' law that held that freedom of contract should be inviolate, and should be able to insulate parties from 'public law' interventions such as the *Antimonopoly Law*.

New Competition Regimes and old contracts

Whether Japanese competition law actually gained traction in the 1990s is a matter of debate. Tilton, for example, argues that the 'gains' are largely illusory (1998:180) One of his criticisms is that from the mid-90s, Japan's FTC expended considerable energy on pursuing complaints about resale price maintenance in vertical distribution channels, ultimately with little real impact on the practices themselves. He uses the *Shiseido Case*, appealed to Supreme Court level, as the paradigm for this proposition: a case ultimately won resoundingly by a manufacturer who appeared to exert extremely tight control over every facet of its distribution channels, including pricing.

The 'cosmetics cases' were a series of suits brought against a famous brand name cosmetics manufacturers in the 1990s. The brand names were important because it has been routinely argued in the past that familiar corporate names cannot be found in Japanese reported cases. Shiseido is arguably the most prestigious of Japan's domestic cosmetics and toiletries makers, although it does not have absolute dominance in market share. Like most manufacturers, Shiseido had developed a web of affiliated distributors and retailers (in this case 25,000 - both exclusive and non-exclusive). The conditions for membership of the Shiseido retail chain of distribution were prescribed in a tightly drawn standard form contract that covered, among other things, mode of sale, promotion strategies and obligations to participate in corporate training, all set out in the text of the judgments (Supreme Court 1998; Taylor, 1995).

In 1991 a Shiseido subsidiary terminated its 28-year continuing contract with retailer Fujiki Honten. The reason given for termination was that Fujiki Honten had breached the prescribed sales method, that is had failed to sell Shiseido products over the counter (in Japanese 'face-to-face') to consumers. Instead, Fujiki had embarked on discounting via faxed catalogues and order forms to customers. Fujiki counter-claimed against the Shiseido wholesaler, initially on the basis that the contract termination was unfair. On appeal, Fujiki Honten prevailed on this point and the Tokyo High Court awarded a significant figure in damages (Supreme Court, 1998; Taylor, 1995). At this point Fujiki also added the claim that the structure of the contract was in breach of the *Antimonopoly Law* because face-to-face product consultations were simply a device to suppress large-volume sales and discounting and ensure resale price maintenance.

The High Court accepted this analysis, in what became a highly controversial decision. The High Court appears to have been influenced by an investigation by the FTC of Shiseido's sales methods, which seemed to show a prima facie link between the sales method, resale price maintenance and anticompetitive outcomes. The FTC drew headlines for the search of the premises carried out at such a high profile company. Nevertheless, it declined to mount a full prosecution against Shiseido.

At this time, there was no provision of the *Antimonopoly Law* allowing private actions, so that Fujiki Honten was dependent upon the Japan FTC exercising its judgment to press forward under the *Antimonopoly Law*. The agency's refusal to do so explains why Fujiki Honten's counter-claim is grounded in contract, with the competition law breach added in as a subsidiary issue.

A practical side effect of both the litigation and the FTC investigation was that Shiseido and other manufacturers admitted that they had radically changed the distribution patterns that they sought to preserve in the court action. Shiseido did not deny, for example, that it was already supplying chain stores and bulk discount stores with stock that could be discounted, and they would seek a stronger differentiation between luxury lines and everyday toiletries. There is anecdotal evidence that the luxury lines were only made available to retailers who were prepared to comply with Shiseido's directives on sales methods and promotion, as is the case in the cosmetics industry outside Japan.

In its 1998 decision, the Supreme Court reversed the High Court and held that the limits placed on the mode of sale were genuine components of the products themselves, rather than anticompetitive devices (Supreme Court, 1998). The judges accepted that a by-product of the face-to-face sales method may be resale price maintenance, but was prepared to allow this, on the basis that it could be justified with a 'rational reason'. In doing so, the Court implicitly accepted Shiseido's claims about brand safety and 'brand image'.

The decision can be read in a number of ways. First, we should note that the final appeal in the *Shiseido Case* was the first competition law case heard by Japan's Supreme Court in nine years. In a system in which appeals to the Supreme Court were automatic until 1998, this is also an indicator of the relative scarcity of competition litigation to this point. This may explain why, on one reading, the Supreme Court seems to be swerving around the allegations of anticompetitive behaviour. Nowhere in the judgement, except in Fujiki's affidavit as respondent in the case, is there any attempt to quantify market share, to analyse product lines and market differentiation or to balance the indirect ban on discounting with consumer welfare. In short, there is no economic or competition law analysis of the kind that we might find in a comparable US or Australian case, although the court seems to be following implicitly a European stance in relation to controls on the distribution of luxury goods.

What the *Shiseido Case* did do, arguably, was to centre competition law in public and corporate debates about the nature of deregulating markets and the potential for judicial and agency intervention.

The Shadow of Competition Law reform

The *Shiseido* decision is less surprising if we consider the role of corporate self-regulation. The evidence in the case was the distribution contracts in question were drawn very carefully. There was no per se prohibition on discounting; only the requirement that product had to be sold across the counter, with the agreed form of promotion and staff training. Strictly speaking, Fujiki Honten was not terminated merely for discounting. This is consistent with interviews carried out with the Shiseido Legal Affairs Department, where it was clear that the company was well aware of the need to comply with the *Antimonopoly Law*. (Uchida, 2000)

Self-regulatory compliance with the *Antimonopoly Law*, even where it is formalistic, is arguably a new element in the Japanese regulatory landscape. The internal Shiseido stance reported above is not isolated. It is consistent with the results of ten interviews I have conducted with Japanese companies between 1996 and the present, in which legal compliance, in particular with the *Antimonopoly Law*, is nominated as the fastest-growing area of corporate legal affairs. Compare this, however with the figures from a Tokyo Foundation study cited by MITI, in which of 484 randomly selected companies only 50% of large corporations surveyed (those with over 300 employees) had an established Legal Affairs department, with the figure dropping to less than 10% for small and medium corporations (Tsûsansho, 2000:204) Recently, the head of Toyota's Legal Affairs Division publicly called for an increase in Japanese judges and lawyers conversant with competition law. (Makino, 2000) These companies have not suddenly embraced the religion of rigorous competition. Rather, the indications are simply some Japanese companies have a growing, grudging acknowledgment that Japanese *Antimonopoly Law* enforcement is a new feature of their business

environment.

The impulse toward 'self-regulation' that complies with, rather than circumvents, the *Antimonopoly Law* is also likely to be strengthened by the introduction of reforms that will make it easier to bring private actions under the *Law.* A major Bill to amend the *Antimonopoly Law* is pending at present. It has two major components. The first is the formal abolition of the natural monopolies accorded to industries such as electricity and gas. The second is to provide strengthened remedies for both consumers and corporations who suffer loss as the result of anticompetitive behaviour contravening article 8 (1) 5 or article 19 of the current law.

The significance of the latter change is that it introduces, for the first time, injunctive relief. Up until now, someone complaining of being the victim of anticompetitive behaviour had to wait for confirmation of a Japan FTC finding against the target company and then apply for damages under article 25 of the *Antimonopoly Law*. Alternatively they could claim tort damages using article 709 of the *Civil Code,* in expectation of the traditionally low payouts from Japanese courts, long after the actions complained of had been taken. The reforms make it possible to apply for an injunction before a Japan FTC finding has been formalised, ideally enabling the plaintiff to secure quick relief that is not dependent on Japan FTC resources. Other provisions in the Bill (new article 83(3)) allow the courts to formally request an opinion from the Japan FTC and for the agency in turn, with the permission of the court, to tender an opinion regarding a particular case (NBL Henshûbu, 2000).

So we see in the new reforms a new, formally enhanced, role for the Japan FTC vis a vis the courts. Implicit in this new structure, however, are doubts about the judicial system's capacity to take on a fully blown competition law jurisdiction. In theory there is no bar to this, but in practice the bench has very, very few judges with either experience in competition law, or formal training in economics. As tacit recognition of this problem, the proposed reforms allow petitions for injunctive relief to be brought in District Courts that have High Courts attached to them. This convoluted formula is a compromise response to an earlier draft that sought to limit these kinds of cases to the Tokyo District Court. The underlying rationale is to try to assign judges to competition cases in a way that will build up judicial experience while limiting the scope for divergence in decisions (Shiraishi, 2000).

Conclusion

Economists, political scientists and trade negotiators have been inclined to dismiss 'law' as largely irrelevant in Japan, and to target competition law as a representative and dysfunctional area of regulation. Many commentators would concur in the conclusion that the results so for Japanese competition law have been 'feeble' (Tilton, 1998:180).

The ‘shopping list’ style of critique that has been employed to date, however, has some serious limitations. This traditional view of how law and its enforcing agencies work is superficially attractive, but the reality is more complex. Focusing on agencies and court powers is a byproduct of 20th century worldviews in which rules and rights are only tested in courts, and in which only the threat of formal legal sanctions is effective to force compliance with legal policy goals.

Socio-legal research of the last forty years tends to show something different; that the factors that motivate or reinforce good corporate citizenship and legal compliance are multi-faceted, and are not limited to ‘black-letter’ law. The other side of the governance equation is a matrix comprising the transaction parties (their employees, institutional and interpersonal relationships and relative economic leverage); the structure of the industry (schemes of self regulation, bureaucratic directives and guidance); cultural mores and ideology; perceptions of legal rules and court generated norms (the so-called ‘shadow of the law’); and intervention by third parties such as government inspectors, bankers and lawyers (Macaulay, 1991).

These mechanisms of governance are not new (Grabowsky and Braithwaite, 1992). Historically direct legal controls on business have been supplemented by (and often subordinated to) informal social or commercial controls exercised by communities outside the limited forum of law. Tilton observes the importance of ‘self-regulation’ in Japan as a form of market closure (1998), but industry bodies, professional groupings and corporate compliance all have potential to be harnessed to changing legal policy goals as well.

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CONFIDENCE, FAIRNESS AND THE LAW & ECONOMICS DEBATE OF THE PROHIBITION OF INSIDER TRADING

RICHARD SMALL*

American jurisprudence abhors insider trading with a fervor reserved for those who scoff at motherhood, apple pie, and baseball. The commonly stated reasons for this reaction to insider trading are many and unpersuasive. The case law barely suggests why insider trading is harmful. The Supreme Court has condemned insider trading under the federal securities laws when the trading violates a fiduciary 's obligations. The court did so, however, without revealing how such trading harms the corporation, threatens investors, or erodes the functioning of securities markets.[1]

Introduction

In the latter half of 2000 the Financial Services & Markets Bill is expected to come into force in the United Kingdom.[2] In addition to the creation of a new super-regulator, the Financial Services Authority, the bill creates a new offence: 'market abuse'.[3] The new offence of 'market abuse' was drafted as a replacement for the previous insider trading laws under which convictions were rare.[4]

In the light of the introduction of the new offence of market abuse the purpose of this article is to re-examine the academic debate surrounding the prohibition of insider

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[1] James D. Cox, *Insider Trading and Contracting: A Critical Response to the 'Chicago School'*, 1986 DUKE L.J. 628 (1986).

[2] Upon entering power in 1997 one of the first things that the Labour government did was to set in motion a fundamental overhaul of the financial services regulatory regime. The Financial Services and Markets Bill (FSMB) was first published (the White Paper) in 1998 and the revised Green Paper was released in 1999. The first reading of the FSMB was on June 17, 1999. The FSMB is rather unusual in that it will be passed over two parliamentary sessions. It began in the 1998-1999 session and will complete the legislative process during the 1999 -2000 session. This is irregular in that usually a bill that is not passed in one session must be reintroduced from the beginning of the process in the following session. It should be noted that there were three major drafts of the bill. The original 1998 draft, followed by the 1999 draft and then the 2000 draft. This research will consider the 1999 draft. *Available on* the House of Commons website. (Site visited July 20, 2000)
<http://www.publications.parliament.uk/pa/cm199899/cmbills/121/19991221.htm>

[3] The creation, function and, duties of the new regulator are set out in Financial Services and Markets Bill 1999, Part I, The Regulator. The new offence of market abuse can be found in Financial Services and Markets Bill 1999, Part VII Penalties for Market Abuse. Market abuse itself if defined in clause 95(1)(2).

[4] While market abuse is classified as a civil offence those found to have violated the law face potentially unlimited fines, Financial Services and Markets Bill 1999, clauses 95–98.

trading. The UK government has decided to tighten it's prohibition on insider trading considerably despite the lack of clear foundations for doing so in the academic literature.

Thus the major arguments for the continued prohibition of insider trading will first be examined, next those arguments supporting the legalization of insider trading will be considered. Finally this article will conclude that there is no firm conclusion one way or the other over the regulation of insider trading.

Reasons to regulate

(i) Unfairness

One prime justification given for the regulation of insider trading has often been the relatively simple notion that it is just unfair. It's unfair to market participants that some have an informational advantage over others. Professor Hetherington noted that there is a trend in the law, in response to public pressure, towards a notion of "fairness" in business and government affairs.[5] In the case law it is possible to find support for the prohibition on insider trading on the grounds of its 'inherent unfairness'.

> Analytically, the obligation [not to engage in insider trading] rests on two principal elements: first, the existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone, and second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing. … Intimacy demands restraint lest the uninformed be exploited.[6]

The notion is quite simply that it is unfair for one person in the markets to be in possession of, and trade based upon, information that other market participants don't have and cannot lawfully acquire regardless of their resources. Thus the issue is not one of equality of information, but rather that all market participants should have equal access to information. A letter from the American Bar Association in 1973 to the SEC suggests that this (equality of access as opposed to equality of information) was the aim of the antifraud provisions of the law. [7]

Indeed in *SEC v. Texas Gulf Sulphur Co.*, the case that supported and built upon *Cady, Roberts & Co.* the court states that:

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[5] J.A.C. Hetherington, *Insider Trading and the Logic of the Law*, 1967 WIS. L. REV. 720, at 735 (1967).

[6] Cady, Roberts & Co., 40 S.E.C. 907, 912 (1961). This passage is still currently used by SEC members to justify the prohibition on insider trading. *See* below.

[7] *Insider Trading: Some Questions and Some Answers*, 1 SEC. REG. L.J. 323, 331 (1974) (reprint of Comment Letter from the Subcommittee on Broker-Dealer Matters and the Subcommittee on Rule 10b-5 of the Committee on Federal Regulation of Securities of the Section of Corporate Banking and Business Law of the American Bar Association (Oct. 15, 1973)).

> [t]he core of Rule 10b-5 is the implementation of the Congressional purpose that all investors should have equal access to the rewards of participation in securities transactions…. [I]nequities based upon unequal access to knowledge should not be shrugged off as inevitable in our way of life, or, in view of the congressional concern in the area, remain uncorrected.[8]

However, since the publication of Professor Manne's book and subsequent law review articles on the subject of insider trading the debate has shifted away from a discussion as to the fairness of insider trading and is viewed now in much more economic terms. In this sense even though Professor Manne failed to convince the majority that insider trading should not be regulated he did succeed in altering the debate to focus on the issue from an economic point of view. [9]

However, despite the view in legal scholarship that insider trading should be viewed in economic terms, the SEC continues to refer to concepts such as fairness when justifying the prohibition of insider trading to a wider audience such as the general public. In a recent speech by the Chairman of the SEC there was a clear rejection that a purely rational economic argument is needed to support the prohibition of insider trading.

> Our system of law demands that the economy be organized to achieve more than just ruthless, relentless efficiency. Honest commerce must also be guided by a spirit of fairness. … Honest trading, and equal access to information. … As long as the rules of the game are fair to all, investors' confidence will remain strong. But if there is a perception of unfairness, there'll be no investor confidence – and precious little investment.[10]

Thus it can be seen that unfairness remains one if the pillars of justification for the ongoing prohibition of insider trading.[11] This is closely linked with investor confidence that will be considered below. Chairman Levitt's comments specifically reject the economic arguments for deregulation in the face of arguments such as fairness and investor confidence.

Of course the fairness argument is not without it's counter arguments. Fairness has been turned on its head with the notion that it would be unfair to those who produce information not to be rewarded for its production. Thus it has been suggested that "fairness" might include protecting those who reap the benefits of private use of

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[8] SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 851-52 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

[9] STEPHEN M. BAINBRIDGE, SECURITIES LAW: INSIDER TRADING (New York, NY: Foundation Press, 1999), at 125-126. An analysis of securities information as a partial public good, partial private good, in Chicago School of law and economics *see* John F. Barry, *The Economics of Outside Information and Rule 10b-5* , 129 U. PA. L. REV. 1307, at 1323-28 (1981).

[10] Arthur Levitt, A Question of Integrity: Promoting Investor Confidence by Fighting Insider Trading, S.E.C. Speaks Conference (February 27, 1998), full text available on the SEC web site. (Web site visited April 6, 2000.) <http://edgar.sec.gov/news/speeches/spch202.txt/>.

[11] It has been stated that such expectations of fairness may either be inherent or created by the rule itself. Victor Brudney, *Insiders, Outsiders, and Informational Advantages under the Federal Securities Laws*, 93 HARV. L. REV. 322, at 355 (1979).

information that the individual has produced:

> [the] fairness approach would permit the user of material, non-public information to show that his exploitation of that information represented a legitimate reward for economic effort by him or the person who provided him the information.[12]

Secondly, it has been argued that the unfairness argument fails on the notion that nobody complains that the salary, bonus or other incentives that the managers of a firm receive are unfair and should be returned to the shareholders. So on that basis why should outsiders feel that insider trading is unfair? Carlton and Fischel have suggested that for the same reason one could say that the insider who trades on inside information does not do so at the expense of the outsider. [13]

(ii) Public confidence

Another argument that frequently overlaps with fairness is that of public confidence. Logically if the public feels that the market is unfair then they will not be confident in the market. A House of Representatives Report in the wake of the Great Crash of 1929 made it clear that Congress was concerned with investor confidence:

> If investor confidence is to come back to the benefit of exchanges and corporations alike, the law must advance.[14]

This lack of confidence is well summed up by a report in 1941 by the Special Committee on Securities Laws and Regulations of the American Bar Association which found that:

> [a] persistent cause of lack of public confidence in the exchanges has been the popular impression that they can be traded in profitably only by person specially informed.[15]

Why should such a lack of confidence matter? In replying to Professor Manne's contention that insider trading should be legalized Professor Schotland stated that the main objection to insider trading was the impact that it would have on the confidence of the individual investor. He held that the underlying principle of the government was

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[12] Arthur Jr. Fleischer & Robert H. Mundheim & John C. Murphy Jr., *An initial inquiry into the responsibility to disclose market information*, 121 U. PA. L. REV. 798, at 808-09 (1973).

[13] Dennis W. Carlton & Daniel R. Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857, at 866-72 (1983). *See* section 3.3 below. Professor Bainbridge also rejects the fairness approach as a justification for the prohibition of insider trading. *See* Bainbridge, *supra* note 9, at 148–49.

[14] H.R. Rep. No. 1383, 73d Cong., 2d Sess. (1934).

[15] The committee went on to recommend that section 16(b) Securities Exchange Act 1934 be retained. Report of the Special Committee on Securities Laws and Regulations, 66 A.B.A. REP. 340, at 357 (1941) (Reprinted in Roy A. Schotland, *Unsafe at any Price: A Reply to Manne, Insider Trading and the Stock Market*, 53 VA. L. REV. 1425, at 1441 (1967)).

that the financial markets are an important part of the nation's economy and that they would only remain healthy if they are perceived by the public as being a "safe place for investment" rather than a "jungle".[16] One description of how the New York Stock Exchange tried at the time to encourage the public to own their share of America:

> The principle problem nowadays of Wall Street public-relations men, …, is no longer to expunge the hoary picture of a capitalist as a bloated, cigar-smoking plutocrat wearing a top hat, a cutaway, striped pants, and a dollar sign for a watch fob as he tramples on widows and orphans. Their problem … is to expunge the newer picture of Wall Street as a place where professional 'insiders', possessed of special and highly advantageous information, devote themselves to luring the gullible investor into entrusting them with his money and then smoothly divest him of it.[17]

Professor Brudney explains why it is that confidence is so important to the smooth functioning of the markets. If a rational actor in the market knew that they were dealing with somebody who was in possession of material information that would affect the value of the product being exchanged, and that information could not be obtained legally, they would either refrain from the transaction or would demand some premium to compensate for the risk involved. It would follow then that if investors thought that there were many people in the markets with such informational advantages that could not be eroded legally, they the rational investors would not invest in the markets. The result would be a higher cost of capital. Brudney maintains that Congress was aware of such information advantages, such as insider trading, when it enacted the law, and that such informational advantages created suspicion in the minds of the public investors and either stopped, or at least discouraged the public from investing in the markets. The result of which is a higher cost of raising capital for companies. Thus Congress sought to deny insiders their informational advantages.[18]

It has also been noted that the purpose of the disclose or abstain rule is to equalize access to material information, and that if this achieved it would encourage investor confidence that the financial markets are fair.[19]

This issue of public confidence and fairness has been reinforced in the publics mind by media coverage of the problem. The headlines of such articles are enough to sum up:

> 'Insider Trading Case Reinforces Belief that Small Investor is at a Disadvantage'[20]

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[16] Schotland, *supra* note 15, at 1440.

[17] J. BROOKS, THE SEVEN FAT YEARS: CHRONICLES OF WALL STREET (1958), 169 (Reprinted in Schotland, *supra* note 15, at 1440).

[18] Brudney, *supra* note 11, 356-57. William L. Cary emphasized that: 'confidence, and a high standard of conduct by directors, [is] an essential ingredient before one can expect the private investor to begin putting his funds into public companies'. Symposium, *Insider Trading in Stocks*, 21 BUS. LAW. 1009, at 1010 (1966).

[19] Case Comments, *The Application of Rule 10b-5 to "Market Insiders": United States v. Chiarella*, 92 HARV. L. REV. 1538, at 1543 (1979).

[20] WALL ST. J., May 20, 1986.

> 'SEC Chief, Seeking to Reassure Investors, Says Insider Trading Cases Are Limited'[21]

Confidence continues to be a standard justification provided by regulators around the world when seeking to strengthen insider trading regulations. Numerous examples of this can be found.[22] More recently the Chairman of the U.S. Securities and Exchange Commission made the following comment, which needs no analysis, at a speech:

> Our markets are a success precisely because they enjoy the world's highest level of confidence. Investors put their capital to work – and put their fortunes at risk – because they trust that the marketplace is honest. They know that our securities laws require free, fair, and open transactions.[23]

The Supreme Court supported the notion that investor confidence is one of the cornerstones of the argument in favor of the continuing prohibition of insider trading. It stated that the purpose of the prohibition is:

> … to insure honest securities markets and thereby promote investor confidence. Although informational disparity is inevitable in the securities markets, investors likely would hesitate to venture their capital in a market here trading based on misappropriated nonpublic information is unchecked by law.[24]

However, the investor confidence argument is not without its detractors. Professor Bainbridge found that of a number of opinion polls whilst one found that about half (52%) of those surveyed felt that the prohibition on insider trading should stay in place, another revealed that just over half (55%) would inside trade if the opportunity arose. Of those who said that they would not trade on inside information, a third stated that this was the case because they were concerned that the tip might be inaccurate. Only a third of those who said that they would not trade on inside information would not trade because they felt that it would be the wrong thing to do. The logical conclusion that can be drawn from these statistics is that a number of those who would rather that insider trading remains illegal think so not to protect the integrity of the market but rather because they are envious of insiders greater access to information.[25] Professor Bainbridge goes on to comment that:

> The loss of confidence argument is further undercut by the stock market's performance since the insider trading scandals of the mid-1980s. The enormous publicity given those scandals put all investors on notice that insider trading is a

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[21] WALL ST. J., November 17, 1981.
[22] For example at the time of writing the New Zealand government stated that it was looking to strengthen its existing prohibition on insider trading in order to promote confidence in it's financial markets. 'NZ Reviews Insider Trading Regulations; Decisions Next Yr' DOW JONES NEWSWIRES, April 27, 2000.
[23] Levitt, *supra* note 10.
[24] United States v O'Hagan, 117 S. Ct. 2199 (1997).
[25] Bainbridge, *supra* note 9, at 154–55.

> common securities violation. At the same time, however, the years since the scandals have been one of the stock market's most robust periods. One can but conclude that insider trading does not seriously threaten the confidence of investors in the securities markets.[26]

(iii) Injury to the investor/issuer

Another of the arguments for the banning of insider trading is that it is harmful to both investors, and/or to issuers or companies whose stocks are listed on the stock exchange.

Concerning the alleged harm to investors, it could be alleged that the investor purchased (or sold) the security at the incorrect price because the security did not reflect the extra information concerning it. Secondly, it is argued that the investor may have been induced to make a disadvantageous transaction by the insider trading taking place.[27]

However, with respect to the former, it has been argued that this reasoning fails on the grounds that since the stock markets are impersonal it is impossible to match up a buyer and a seller. The purchaser (or seller) of the stock has no way of knowing the other party to the transaction and thus no way of knowing if the other party is trading on inside information. If the other party to a transaction involving an insider were to be allowed to recover for a perceived loss this would be unfair to all the other market participants. It is a matter of pure luck that the person happens to have dealt with the insider. As the case law in the United States has pointed out why should some market participants be rewarded on such a random basis?[28] Furthermore on an impersonal stock market as the individual has no way of knowing that the insider is dealing, the decision to deal in stocks is made independently of that information.[29]

The latter theory argues that the insider trading induces other investors in the market to trade disadvantageously. Professors Wang and Steinberg identify two main groups who they claim are affected: those investors whose transactions would not have been disadvantageous, and those whose transactions would have been advantageous, were it not for the presence of insider trading in the market.[30] However, this line of reasoning has been rejected on the grounds that insider trading rarely occurs in sufficient volume to move the price significantly enough to induce others to trade.[31] Professor Bainbridge states that:

> Assuming for the sake of argument that insider trading produces noticeable price effects, however, and further assuming that some investors are misled by those effects, the inducement argument is further flawed because many transactions

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[26] *Id*. at 155.
[27] WILLIAM K.S. WANG & MARC I. STEINBERG, INSIDER TRADING 41 – 117 (Aspen Law & Business, 1996).
[28] Goodwin v Agassiz, 283 Mass. 338, 186 N.E. 659 (1933).
[29] Bainbridge, *supra* note 9, at 151.
[30] Wang & Steinberg, *supra* note 27, at 115. For a fuller explanation of this theory *id*. at 41–117.
[31] Bainbridge, *supra* note 9, at 152–53.

> would have taken place regardless of the price changes resulting from insider trading. Investors who would have traded irrespective of the presence of insiders in the market benefit from insider trading because they transacted at a price closer to the correct price; i.e., the price that would prevail if the information were disclosed. In any case, it is hard to tell how the inducement argument plays out when investors are examined as a class. For any given number who decide to sell because of a price rise, for example, another group of investors may decide to defer a planned sale in anticipation of further increases.[32]

The second argument is that insider trading harms the issuer. It is said to do so in a number of ways. Firstly it is said that it may encourage those possessing material information within a corporation to delay its release to higher members of the company so that they may trade and capture profits first. However, this has been rejected on the grounds that such delays are mostly immeasurable, especially given the speed within which it is possible to trade.[33] Secondly an insider may equally profit from disclosing the information more quickly.[34]

Another argument, put forward by Professor Mendelson, is that insider trading raises the cost of capital for the firm.[35] Professor Brudney goes further and states that in the absence of knowledge about which companies shares are being traded by insiders it will raise the cost of capital for all firms.[36] Many commentators have questioned that if this is the case why is it that the corporations themselves don't ban insider trading. Once response could be that due to the high cost of enforcing such regulations it's easier to leave it to the government.[37]

It has been suggested by Judge Easterbrook that insider trading encourages corporate insiders to deliberately choose higher risk projects that may not be in the firm's best interests. This is done on the basis that the greater the fluctuations in a stocks price, the greater the opportunity for the insider to profit.[38] A counter argument is that since managers work in teams it is hard to choose a higher risk project. It is also countered that insiders are unlikely to trade their long run value maximization to the firm for a short-term profit through insider trading. Finally, even if insider trading does encourage a manager to choose a higher risk project this is a counter balance to the normally risk adverse manager and may actually benefit the firm.[39]

Finally it has been suggested that insider trading harms the reputation of the

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[32] *Id*. at 153–54.

[33] *Id*. at 158-59; Michael P. Dooley, *Enforcement of Insider Trading Restrictions*, 66 VA. L. REV. 1, 34 (1980).

[34] Bainbridge, *supra* note 9, at 160.

[35] Morris Mendelson, *The Economics of Insider Trading Reconsidered*, 117 U. PA. L. REV. 470 (1969).

[36] Brudney, *supra* note 11.

[37] Dennis W. Carlton & Daniel R. Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857 (1983); Ronald J. Gilson & Reiner H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549 (1984). Wang & Steinberg, *supra* note 27, at 34-38, for a fuller exploration of these issues.

[38] Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309 (1981).

[39] Carlton & Fischel, *supra* note 13, at 871–72.

corporation. In *Diamond v. Oreamuno*, Fuld C.J. stated that:

> When officers and directors abuse their positions in order to gain personal profits, the effect may be to cast a cloud on the corporation's name, injure shareholder relations and undermine public regard for the corporation's securities.[40]

However, Wood C.J. in *Freeman v. Decio* addressing the injury to reputation described in *Diamond v. Oreamuno* said:

> … the existence of such an indirect injury must be considered speculative, as there is no actual evidence of such a reaction.[41]

This notion of harm/injury to the firm's reputation has since been rejected by scholars as well. Wang and Steinberg question why insider trading should harm the firm when such transactions occur between two parties outside the firm and thus have no effect on the business operations of the firm. They also ask why a customer or supplier of the firm would be less willing to deal with such a firm.[42] They do, however, point out that in certain cases, i.e. a law firm or a financial printers, where the clients have an expectation of confidentiality, that insider trading may harm such a firm's reputation for confidentiality and they may lose business as a consequence.[43] The question has further been raised that if insider trading really does harm the firm then why have firms not expressly banned insider trading by their employees?[44]

(iv) Property rights in information analysis

Under this rationale for the prohibition of insider trading ownership rights are assigned in material non-public information.[45] Where insider trading is banned then the property rights in the information have been assigned to the corporation. The insider is held to have a fiduciary duty to the corporation not to misuse such information. Those who do use such information so owned by the corporation to make a profit through trading in the corporations stocks can be said to have misappropriated that information. Both the United States and the United Kingdom have developed their prohibition on insider trading at least in part based on this notion of the misuse of confidential information. On the other hand, if insider trading were to be legalized then the property rights in the information have been assigned to the insider.

Thus theoretically creating such a property right in information is similar to a patent or a copy-right. The underlying reason for a patent is that the inventor should

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[40] Diamond v Oreamuno, 248 N.E. 2d 910, 912 (N.Y.C.A.) [1969].
[41] Freeman v Decio, 584 F.2d 186, 194 (7th Cir. 1978).
[42] Wang & Steinberg, *supra* note 27, at 37–38.
[43] *Id*. at 38–39.
[44] Carlton & Fischel, *supra* note 13, at 858–59, 865–66.
[45] A full exploration of property rights in information with reference to insider trading can been found in Jonathan R. Macey, *From Fairness to Contract: The New Direction of the Rules Against Insider Trading*, 13 HOFSTRA L. REV. 9 (1984).

been given a chance to recoup on his or her investment before others are allowed to profit. In this way there is an incentive for people/corporations to invent/innovate. It has been argued that the situation with regards to insider trading is somewhat different, it is questionable the extent to which insider trading impacts the value of the firm or its ability to generate new information.[46] Furthermore, it has been pointed out though that in other cases where there are property rights in information it is only the holder of those rights who have standing vis-a-vis the misappropriator; others who deal with the misappropriator are excluded.[47] Some commentators have suggested that the misappropriation theory "resonates poorly with Rule 10b-5" on the grounds that the rule is designed to protect investors and markets from "deceptive practices".[48]

Where property rights in the information have been assigned to the corporation if an insider misuses that information he or she is said to have misappropriated it. This theory is known in the United States as the misappropriation theory. In the United States it has been broadened to include company outsiders as well as insiders. For example outsiders such as printers, lawyers and recently a graphic artist have been accused of misappropriating material non-public information from a company.[49] The misappropriation theory was first suggested in *United States v. Chiarella*.[50] In that case it has held that the defendant, a printer who broke the company's code and figured out the parties to a take-over, had misappropriated confidential information from the company in question and traded on it. This was held to be in violation of Rule 10b-5. It was then subsequently developed by the courts in a number of cases until the Supreme Court affirmed the misappropriation theory, although on different grounds from previous decisions, in *United States v. O'Hagan*.[51] In *United States v. O'Hagan* the Supreme Court held information as property was one of the underlying principles that upholds the prohibition of insider trading.[52]

> A company's confidential information … qualifies as property to which the company has a right of exclusive use. The undisclosed misappropriation of such information in violation of a fiduciary duty … constitutes fraud akin to embezzlement – the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another.[53]

In the United Kingdom the origins of insider trading can be found in the concept of directors duties. Early prohibitions on insider trading were based on the notion that a director has a fiduciary duty to his firm not to misuse the company's confidential information.[54] The Report of the Company Law Committee in 1962 proposed that directors should not be allowed to make use of information that they have obtained as

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[46] Bainbridge, *supra* note 9, at 151.
[47] Cox, *supra* note 1, at 633 (n27).
[48] *Id*. at 634
[49] However, it is uncertain whether such a broad category of individuals are still liable after the Supreme Court ruling in O'Hagan, *supra* note 24.
[50] United States v Vincent F. Chiarella, 445 U.S. 222 (1980).
[51] O'Hagan, *supra* note 24.
[52] *Id*. at 2210.
[53] *Id*. at 2208.
[54] Regal (Hastings) v Gulliver [1967] 2 A.C. 134n; [1942] 1 All E.R. 378.

result of their position. Subsequent reports and Companies Bills continued with the notion that directors should not trade on confidential information. However, when insider trading was finally prohibited by legislation in 1980 the criminal offence was applicable to a wide range of individuals than just those with a fiduciary duty to their company not to use the company's confidential information. It has since been suggested that the misappropriation of confidential information as an underlying principle of the prohibition of insider trading in the United Kingdom is being broadened to such an extent that it can no longer be said to be the major justification for the prohibition.[55]

The purpose of assigning property rights in information was to encourage producers of information to continue to produce in the future by allowing them to recoup from their innovation. Thus, for example, with a patent, i.e. on a new computer chip, the company that invested the resources to develop the new technology is assigned a property right in that in order to allow it to profit, which should in turn encourage future advances. However, it has been argued that this theory does not really hold true as regards insider trading, that it has little effect on a firms incentive to produce innovation.[56] This line of reasoning is directly tied into Professor Manne's theory that insider trading is a just form of compensation for innovators for the information that they produce.[57]

Professor Bainbridge holds that it is a weak argument to assign the property rights to the corporation given the absence of evidence that insider trading actually hurts the corporation. There is even less justification for assigning the property rights in the information to the insider themselves than there is for assigning those rights to the corporation. As Bainbridge points out although the argument for assigning the property rights to the insider is based upon the notion of an efficient compensation scheme for entrepreneurs, as will be discussed elsewhere in this chapter that has been rejected as an inefficient method of compensation. Thus Bainbridge suggests that of the two, property rights in information should, arguably, remain with the corporation rather than the insider. [58]

Reasons not to regulate

(i) Accurate/efficient pricing of securities

It is a generally accepted principle that the economy as a whole as well as the firm stands to benefit from the accurate pricing of stocks. The importance of the accurate pricing of stocks is summed up as follows:

Accurate pricing benefits society by improving the economy 's allocation of capital

[55] P. L. Davies, *The European Community 's Directive on Insider dealing*, OX. J. LEGAL STUD. 92 (1991).
[56] Bainbridge, *supra* note 9, at 167.
[57] HENRY G. MANNE, INSIDER TRADING AND THE STOCK MARKET 131 – 145 (Toronto: Free Press, 1966).
[58] Bainbridge, *supra* note 9, at 164–69.

> investment and by decreasing the volatility of security prices. This dampening of price fluctuations decreases the likelihood of individual windfall gains and increases the attractiveness of investing in securities for risk-adverse investors. The individual corporation also benefits from accurate pricing of its securities through reduced investor uncertainty and improved monitoring of management's effectiveness.[59]

Professor Manne, using the example of *SEC v. Texas Gulf Sulphur Co*., argued in *Insider Trading and the Stock Market*, first published in 1966, that insider trading "smoothes" the movement of a stock's price before the disclosure of material information.[60] This pushes or nudges the stock's price gently towards it's post-disclosure (correct) price. This thus avoids the sharp changes in a shares' price upon disclosure of such information.[61]

This theory assumes that a stock has a "correct" price towards which a stock would move if the material information were to be disclosed. In order to understand the "correct" price it is necessary to look to the efficient capital market hypothesis.[62] The efficient capital market hypothesis posits, in its semi-strong form, that a security should reflect all publicly available information about it. There is also a weak form and a strong form of the efficient capital market hypothesis. The weak form states that only historical information relating to the prior prices of the security are reflected in the current price. In other words the price of the stock is random, i.e. past prices cannot be used as a guide to predict future prices. The strong form suggests that shares reflects all information concerning them whether public or not. Thus in theory the "correct" price of the security is the price that reflects all available information. However, if this were the case insiders would be unable to profit as the price would already include their information. The semi-strong form of the efficient capital market hypothesis has generally been accepted as a valid description of how the stock markets operate, although it is still a matter of some debate.[63]

The fundamental principle of the efficient capital market hypothesis is that the price of a stock should/will reflect all available information about that stock. If this is the case then the stock market will distribute funds efficiently to those areas of the economy that are in need of them. Thus the stock market should allocate resources efficiently. Therefore, it is argued, if insider trading were not banned then managers and others in a corporation whose shares were listed on a stock exchange would have an incentive to manipulate the disclose of material information, that would in turn effect the share price. Commentators have suggested that they have an incentive to delay disclosing such information to give them sufficient time to manipulate the market, trading with an informational advantage, and make a profit. In doing so the market

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[59] *Id*. at 129.
[60] Manne, *supra* note 57, at 93-110.
[61] Daniel R. Fischel, *Insider Trading and Investment Analysts: An Economics Analysis of Dirks v. SEC*, 13 HOFSTRA L. REV. 127, at 133 (1984).
[62] Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25J. FIN. 383 (1970).
[63] Robert A. Prentice, *The Internet and its Challenges for the Future of Insider Trading Regulation*, 12 HARV. J.L. & TECH. 263, at 277–78 (1999).

would not accurately reflect the price of the stocks in question and those would fail to allocate resources efficiently.

The biggest problem with this theory is the lack of empirical evidence to support it. However, it has been countered that empirical studies have shown that in fact there is little evidence to support the claim that insider trading has a major impact on stock prices. Despite a number of empirical analysis to determine if insider trading does indeed nudge the price of the security towards the correct post disclosure price there is a lack of evidence to state that it does so.[64] Some studies have revealed little change at all in the price, whilst others have found that the price does move when the insiders are buying. Some of these studies have been criticized for the data samples used, it was argued that it is impossible to draw any conclusions due to the type of data collected.[65] Finally the theory has been rejected on the basis that even if it were to nudge the prices of securities towards their correct value it is an inefficient method of doing so and hardly justifies the legalization of insider trading.[66]

Whilst this argument has widely been rejected as a justification for the legalizing of insider trading it can still be heard. For example, a recent article in the Wall Street Journal took the position that insider trading should be legalized on the basis that with the advent of the internet all information regarding a particular stock could be efficiently incorporated into the price. This, it was argued, would allow the stock exchange to "escape" from the Keynesian label of being a "casino" and allow capital to be invested "intelligently".[67]

> Less information about companies means more volatility and more vulnerability to outside events. Inside information -- the flow of intimate detail about the progress of technologies and product tests and research and development and daily sales data -- is in fact the only force that makes any long-term difference in stock performance. Yet it is precisely this information that is denied to public investors.
>
> Entrepreneurial information from deep inside companies, not from the investment counsel or PR firm, is the most important real knowledge in the economy. Acquiring and comprehending it is the chief work of inside entrepreneurs. Such knowledge is by no means self evident; insiders often get it wrong. But nothing else is of much value at all. By excluding inside news from influencing the day to day movements of prices, the U.S. effectively blinds its stock markets.[68]

(ii) Compensation for entrepreneurs

The second justification for the legalization of insider trading that Professor Manne forwarded was that it is an efficient method for compensating entrepreneurs for

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[64] Cox, *supra* note 1, at 645–48.
[65] *Id*.
[66] *Id*.
[67] George Gilder, *The Outsider Trading Scandal*, WALL ST. J., April 19, 2000.
[68] *Id*.

the information which they produce. It is assumed that negotiating compensation for managers is a waste of resources and that allowing them to engage in insider trading provides a way of effectively compensating managers for their work with zero transaction costs. This "efficiency gain" is thus of benefit to the shareholders of the company.[69] Professor Manne further suggests that such a compensation scheme that reflects the information produced encourages insiders to acquire or produce more information of value.[70]

Upon its publication there was a swift response from a number of other law professors rejecting the central tenet of professor Manne's book: that insider trading is a just form of compensation for the valuable information that insiders produce. Since then there has been considerable debate over the regulation of insider trading. Whilst on the one hand Professor Manne's thesis has generally been rejected, he has arguably been successful in turning the insider trading debate into an issue of law and economics.

Professors Carlton and Fischel supported professor Manne's theory. Firstly, they argued that such a compensation scheme continually readjusts itself to reflect the information that the insider produces with zero transaction costs. Thus since the insider effectively adjusts his/her compensation package without having to renegotiate with his/her employer it increases the incentive to produce valuable information.[71] Secondly, they suggested that since insider trading is an efficient compensation scheme it acts as a screening system minimizing the costs of finding the best managers.[72]

Furthermore, Carlton and Fischel countered arguments that legalizing insider trading would encourage managers to invest in risky projects so as to increase the volatility of the company's stocks and thus increase their own profits.[73] They argued that where managers are allowed to trade on inside information it is compensation for entrepreneurial spirit, it compensates managers for their usual aversion to risk and thus encourages managers to undertake risky business opportunities that they might otherwise not make but that will benefit the shareholders.[74] Cox counters that insiders may profit regardless of whether the risky project is successful or not and thus diverts managers attention from the shareholders' interests, which is the maximizing of the firms' value. If the risky project turns out to be a failure the insider can profit by selling short before the announcement of the bad news.[75]

There have however been a number of counter arguments to this idea. There are

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[69] Manne, *supra* note 57, at 138–41; Cox, *supra* note 1, at 649–53; Carlton & Fischel, *supra* note 13, at 869–71.

[70] Manne, *supra* note 57, at 140; Carlton & Fischel, *supra* note 13, at 871.

[71] Carlton & Fischel, *supra* note 13, at 871.

[72] *Id*. at 871 - 872. Carlton & Fischel argue that the logic behind this is that:

> Because insider trading rewards those managers who create valuable information and are willing to take risks, managers who most prefer such compensation schemes may be those who are the least risk adverse and the most capable. Thus, with insider trading, self-selection minimizes the costs of screening potential managers, the monitoring costs created by risk-adverse managers, and the opportunity costs resulting from suboptimal investing decisions.

[73] Easterbrook, *supra* note 38, at 332.

[74] Carlton & Fischel, *supra* note 13, at 875–76.

[75] Cox, *supra* note 1, at 651.

three main counter arguments: that insider trading is not really as efficient a compensation scheme for insiders as it first may appear. How can one be sure that the stock price rise will be consummate with the value of the innovation produced, and even if it is the insiders reward is based upon the number of shares that he or she can purchase.[76] Secondly, how does one ensure that only the actual producer of the information benefit from insider trading. In practice it is difficult to limit such trading to the information producer only.[77] Commentators have also asked why insiders should be allowed to trade on bad news or information that they did not produce.[78] Finally, it has been noted that since it is not possible to measure the reward from insider trading in advance it makes choosing the most cost-effective compensation package difficult.[79]

(iii) Public choice

The argument has also been made that insider trading is a matter of public choice. Under this theory regulation is where the rules are sold by the regulators and they are purchased by those who benefit from the rules. Thus the public choice theory can be divided into two separate elements. From one perspective the issue is viewed from the supply side, that is the SEC is supplying the regulations for reasons of their own. There are two such reasons provided. Firstly that like any government agency the SEC is seeking to enhance itself. Secondly, and linked to the first point, as certain laws have been federalized in the United States the SEC is seeking to broaden it's sphere of influence. The second perspective is that of the demand side, the beneficiaries of the prohibition of insider trading are driving its regulation. For reasons of space constraints these two notions of public choice will be outlined briefly below.[80]

With regards to the former the argument is that the SEC is only interested in increasing its own power and prestige.

> … as do all government agencies, the SEC desired to enlarge its jurisdiction and enhance its prestige. Administrators can maximize their salaries, power, and reputation by maximizing the size of the agency's budget. A vigorous enforcement program directed at a highly visible and unpopular law violation is surely an effective means of attracting political support for larger budgets. Given the substantial media attention directed towards insider trading prosecutions, and the public taste for prohibiting insider trading, it provided a very attractive subject for such a program.[81]

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[76] Bainbridge, *supra* note 9, at 138.
[77] Cox, *supra* note 1, at 653; Bainbridge, *supra* note 9, at 138.
[78] Bainbridge, *supra* note 9, at 139.
[79] *Id*. at 138–39.
[80] For a more in depth explanation of the public choice analysis of the prohibition of insider trading *see id*. at 139–46; MICHAEL P. DOOLEY, FUNDAMENTALS OF CORPORATION LAW 816–57 (Westbury, N.Y.: Foundation Press, 1995); David D. Haddock & Jonathan R. Macey, *Regulation on Demand: A Private Interest Model with Application to Insider Trading*, 30 J. L. & ECON. 311 (1987); JONATHAN R. MACEY, INSIDER TRADING: ECONOMICS, POLITICS, AND POLICY (Washington D.C.: American Enterprise Institute Press, 1991).
[81] Bainbridge, *supra* note 9, at 140.

Furthermore, it is argued that in competing with other agencies for control of laws that were being federalized the SEC made an example of insider trading so as to increase its influence over the whole of corporate law. Evidence to support these claims is provided in that during the 1980s, when deregulation was increasing and budgets were being cut, the SEC increased the number of cases that it pursued dramatically. Although it could simply have been that the number of violations increased it is offered as proof that the SEC was trying to maintain/justify its budget. Haddock and Macey noted that in the period from 1968 to 1980 the SEC brought 37 cases under Rule 10b-5, an average of 2.7 a year. However, from 1982 to August 1986 the number was 79, an average of 17.2 a year.[82]

On the demand side it has been submitted that an interest group made up of market professionals that benefit from the prohibition of insider trading are driving the enforcement of the law. The only group with more information than the market professionals are insiders such as lawyers and investment bankers. Thus it is in the interest of these market professionals to see insiders removed from the market. In that way they can maximize their returns on their information about firms. Three groups in particular are identified as benefiting from the prohibition on insider trading: market makers, professional securities traders and analysts. For each of these groups the prohibition enables them to increase returns.[83]

The evidence offered to support this theory is provided by the SEC's enforcement patterns. Haddock and Macey found that in the period 1982 – 1986, despite a six-fold increase in the number of cases brought under Rule 10b-5, that the number of cases against market professionals declined sharply.[84]

Finally professor Bainbridge points out that simply because the prohibition on insider trading benefits a certain specific group does not mean that it is not in the publics' interest to have the prohibition.

Conclusion

> … although this debate has considerable theoretical interest, it is essentially mooted by the public choice arguments recounted above. There is no constituency that would support repealing the federal insider trading prohibition, while proposals to do so would met strong opposition from the SEC and its securities industry constituencies that benefit from the current prohibition. The federal insider trading prohibition is doubtless here to stay.[85]

It is clear from the above that the debate surrounding the validity and justification of the prohibition of insider trading is ongoing. On the one hand there are convincing arguments to say that the prohibition of insider trading lacks a clear fundamental foundation. On the other hand there are equally convincing arguments in favor of

[82] Haddock & Macey, *supra* note 80, at 333 (quoting statistics from Dooley, *supra* note 33).
[83] For a detailed explanation of why this is so *see* Bainbridge, *supra* note 9, at 142–44.
[84] Haddock & Macey, *supra* note 80, at 334.
[85] Bainbridge, *supra* note 9, at 173.

regulation. There is no clear conclusion to the debate. In practice, insider trading continues to be prohibited. In fact it is viewed as a vital part of a mature markets legal regime.

A major issue is that there is no empirical evidence of any direct harm caused by insider trading. Professor Cox notes the problems associated with the view that there is no empirical evidence that insider trading causes any harm to the markets. Firstly, he points out that the burden of proof that insider trading should not be regulated should lie with those who seek for it to be unregulated, not those who are supporting regulation. This is because the regulation is a given. Secondly, he finds problems with the very notion of empirical data on insider trading. Of course since one is liable for insider trading both civilly and criminally, one is hardly likely to provide reliable data to a researcher. Those supporting non-regulation see this lack of data as proof that there is little insider trading. Whilst those who favor regulation seize on the lack of data as proof that such empirical arguments are non sequitur. Cox concludes that given the level of secrecy surrounding insider trading there will be no significant empirical data to support one argument or the other.[86] Finally it has been observed that there are efficient and liquid markets that exist in countries which either fail to enforce the insider trading laws enacted or do not have any such prohibition in the first place. Until recently both Germany and Japan were examples of the former, and Hong Kong was an example of the latter.

Furthermore, an empirical study into the effectiveness of the sanctions on insider trading was published in 1992.[87] It found that in the United States, after the promulgation of the Insider Trading Sanctions Act in 1984, that, in the sample period post-promulgation, the volume of insider trading increased fourfold profitability doubled, when compared to the period prior to 1980.[88] On the other hand, the case law was found to have had a significant effect on the behavior of insiders. Where the case law defined certain activities, such as trading ahead of a takeover or earnings announcement, as illegal, data showed that insiders were less likely to trade at that time.[89] Lastly, the study found that only 25 percent of shareholders had included some caution against insider trading in the companies' code of ethics or similar documents. The author suggested that had shareholders felt that insider trading was truly detrimental to the interests of the company, a far higher proportion would have demanded such a caution be included.[90]

> The fact that such an aggressive level of regulation exists without a coherent, let alone articulated, philosophy of regulation is one of the most unsettling aspects of the federal securities laws.[91]

In the nearly decade and a half since this statement was made little progress has

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[86] Cox, *supra* note 1, at 644–45.
[87] Nejat H. Seyhun, *The Effectiveness of the Insider-Trading Sanctions*, 35 J.L. & ECON. 149 (1992).
[88] *Id*. at 150-51, 158–71.
[89] *Id*. at 151, 171–75.
[90] *Id*. at 151, 175–76.
[91] Cox, *supra* note 1, at 634.

been made towards establishing a coherent explanation or underlying philosophy for the prohibition of insider trading. Why is it, given the inconclusiveness of this debate, that insider trading is becoming increasingly strictly regulated, even in regimes where it has traditionally been an accepted business practice such as Hong Kong, Japan, and Germany? This is certainly a question that future research ought to address.

Part II

Visiting Professors at the ICCLP

Veronica Taylor
(April –July 2000)
PROFILE:
Ms. Taylor studied at Monash University and Washington University. She assumed the position of the Vice-Director of the Asian Law Center at Melbourne University in 1988. She was appointed lecturer at the same university in 1990, and was senior lecturer from 1996 until March 2000. Ms. Taylor's areas of research are Asian Law and Comparative Law.
During her stay at the ICCLP, she gave a combined undergraduate-postgraduate class at the Faculty with Professor Higuchi Norio. Furthermore, Ms. Taylor addressed the 107th ICCLP Forum.

Major Publications:
Asian Laws Through Australian Eyes (Law Book Company, 1996)
Japanese Law (co-authored with Takashi Uchida, Cambridge University Press, forthcoming 2001)

V.S. Mani (Professor of International Law, Jewaharlal Nehru University)
(June – July 2000)
Profile:
Having studied at Utkal University and Jewaharlal Nehru University, Professor Mani practiced law and was a honorary lecturer of the Indian Society of International Law from 1967 to 1985 before assuming the position of Professor of International Law at Jewaharlal Nehru University in 1990.
During his visit to the ICCLP, Professor Mani addressed the 93rd ICCLP Seminar, and submitted an article to this edition of the *Review*.

Major Publications:
International Adjudication: Procedural Aspects (Martinus Nijhoff, The Hague/New Delhi, 1980)
Basic Principles of Modern International Law: A Study of the United Nations Debates on the Principles of International Law Concerning Friendly Relations and Cooperation Among States (New Delphi, 1993)
Human Rights in India: An Overview (IWCOHR Occasional Paper No. 4, The Institute for World Congress of Human Rights, New Delhi, 1997)

Don C. Price (Professor, University of California, Davis)
(September – October 2000)
Profile:
After receiving his B.A. from Amherst College in 1958 and A.M. and Ph.D. from Harvard University in 1960 and 1968 respectively, Professor Price was appointed Assistant Professor at Yale University. In 1974 he was appointed Associate Professor at

the University of California, Davis, taking up his present position of Professor of History at the same university in 1981.
Professor Price specializes in History and the History of Political Thought. In his one-month stay at the Center, Professor Price gave a presentation at an ICCLP Seminar.

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

Christopher W. Hughes (Senior Research Fellow, University of Warwick)
(September 2000 – March 2001)
Profile:
Dr. Hughes has studied at the University of Oxford, University of Rochester, University of Sheffield and the University of Tokyo. Following an appointment as Research Associate at the Institute for Peace Science at Hiroshima University in 1997, Dr. Hughes assumed his present position as Post-Doctoral Research Fellow at the Centre for the Study of Globalisation and Regionalisation at the University of Warwick in 1998.
During his stay at the ICCLP, Dr. Hughes will be jointly conducting with Professor Takahashi Susumu of the Graduate School of Law and Politics a class on the topic of History of International Politics. He will also be addressing the ICCLP Symposium and will be contributing an article to the next edition of the *Review*.

Major Publications:
Japan's Economic Power and Security: Japan and North Korea (Routledge, London 1999)
Japan's Post-Cold War Security Agenda: The Search for Regional Stability (Lynne Rienner, forthcoming 2001)

Essays

Brazil travel diary: Tolerance and divergence under the *ipê* tree

by Wada Keiko

I arrive at São Paulo airport just after 10 pm on 8 March. I take my two suitcases out of Aurea's car. Together we put the luggage on a trolley. Aurea drives off to park the car and I head to the check in counter.

There are two check in attendants on duty. One of them addresses me in courteous Japanese. I ask her to put a fragile sticker on one of my cases. She does so with a smile and then asks me to sign a form. Apparently this procedure is required for each piece of luggage checked in as fragile.

My case, now with fragile sticker attached, goes up the side of the counter onto the conveyor belt. However, just as it passes the attendant, something extraordinary happens. Bang! She pushes the suitcase over – or so it seems to me. (She had, in fact, been trying to guide the suitcase along the belt, but had put too much force into her endeavours.) Upon hearing this sound, the other attendant and I automatically raise a cry. People nearby turn to look. It is all I can do to mutter "Fragile …" in blank amazement. Her expression hardens and her cheeks redden. The other attendant is also stunned and cannot say anything. I feel unintended laughter welling up and have to look down to suppress it. As a final and ironic divergence of fate to end my 10 day visit to Brazil, the suitcase without the fragile sticker passes smoothly onto the conveyor belt and disappears into the distance.

As Aurea approaches me from the carpark, the laughter I have been holding back suddenly bursts forth. As I recount the unfolding of events to her, this time it is her turn to laugh out loud. This accident seemed to confirm "divergence" and "tolerance" as two keywords to sum up my stay. As I part company with Aurea, I automatically use the Brazilian-style *sayonara* greeting. Fortunately the contents of my suitcase with the fragile sticker were, in the end, unharmed.

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At 1 pm on Monday 28 February, I touched down in São Paulo, the flight having been delayed by six hours due to frost in New York. I was relieved to see Aurea, appreciating that she had been waiting for me at the airport since early that morning. I apologised to her that I had not contacted her while in transit in New York, but I had not wanted to disturb her well past midnight. She said she didn't mind at all since she had used the time to eat her breakfast and read a book. At that instant, I recognised that without her I would be totally lost in this country. And, as a matter of fact, apart from the time I spent in my hotel I was with Aurea Christine Tanaka, qualified attorney and postgraduate student at the University of São Paulo (USP) Law Faculty, throughout my

stay.

The next day, having paid a courtesy call to the Ninomiya Law Offices, the first item on my schedule was to attend a lecture at the *Fundação Japão* (Japan Foundation). A Japanese percussionist was speaking on the topic of the Samba. He described its history, going back through its roots in the Yoruba tribe down through the Brazilian Carnaval, introducing many percussion instruments and demonstrating on them.

When slavery was abolished in 1888, Carnaval began as a festival for harmony between blacks and whites. The enormous *carro alegorico* (floats), which are familiar to Japanese television viewers through their appearance on the news, first became part of the Carnaval in the 1930s. A person labelled "the Coordinator" designs each float. The reason the Carnaval in Rio de Janeiro became known on a worldwide scale is due to governmental assistance from an early stage – already in 1946, the Rio Carnaval attracted 22 teams and a crowd of 200,000. *Carro alegórico* costs between $100,000 and $300,000 to make. But becomes completely worthless the instant the Carnaval is over. The people are poor. Working conditions are tough. In these circumstances, I could only rationalise the seeming iniquity of throwing such an exorbitant sum at an ephemeral cause in the following terms: perhaps each society has its own perspectives of the divergence between the festive and the everyday, and it is merely the gap between them that differs.

All rationalisation aside, during that weekend Aurea and I found ourselves at the São Paulo Carnaval. Neither of us was really interested in the proceedings: she was there to guide the overseas guest, and I was there because Professor Ninomiya had gone to the trouble of getting me a ticket. (Professor Ninomiya told me that, when he was a boy scout for a decade or so from age 11, he was required to go to church during the Carnaval and pray for the souls of the sinning masses outside.)

Assisted by what I had learnt earlier at the Japan Foundation lecture, I began to think about the vividly coloured floats and the crowd dancing to a booming cacophony. I had experienced this before. My mind drifted back to the fancy dress parades of my high school days. The Carnaval has its strict rules about floats, times, advertising, etc. The content of the rules was different, but my high school parade was also conducted under a strict regime. We thought up our own theme, and created costumes and music to match. The serious looks on the faces of the Coordinator of each *escola* (Samba school) reminded me of the fervour with which we organised the parade as final year students. I could see that these Coordinators' whole lives were at stake. Their faces did nor project enjoyment of the festivities. Rather, they were carefully observing the floats and the members of their *escola* and barking instructions through the resounding Samba music. By contrast, the faces of the *escola* members, whether young or old, expressed moods ranging from extreme concentration (like their Coordinators) to unrestrained joy; from the young child's confusion as to why she was there to the dandies' flustered fussing about their costumes. Amongst the teenagers pushing the floats, some forgot the task at hand and began to dance. And once there was a break in the proceedings, the "Cleaning Corps" began to dance from one end of the Carnaval route to the other, cleaning as it went. When the Cleaning Corps returns to the starting

point, it is time for the floats, percussions bands and Samba groups to start all over again.

The mass media pursue them. Amongst them I saw a Japanese photographer. Both Aurea and I instantly decided he must be Japanese. I wondered why. His oriental appearance should not have been enough of itself to brand him as Japanese in this part of the world. Perhaps his body movements somehow conformed with typical Japanese mannerisms. But what are Japanese mannerisms? I watch the photographer again, comparing him to the other photographers and journalists. My subject seemed rather "earnest" in his photography: the other photographers would be dancing with the crowd, but he would be clicking the shutter or running to look for a better camera angle. While the Cleaning Corps was doing its thing, he crossed the crowd barrier and took shots of the waiting *escola*. His actions seemed unchangingly stable. To put it another way, he was working so "earnestly" that his movements seemed mechanical. This is the type of movement that I, as a Japanese myself, had ascribed as "Japanese".

This Japanese photographer lacked within him the contradictions or divergence that I experienced spending but a few days with Aurea.

* * * * * * *

Aurea and I had been communicating in English, but suddenly she faltered. I understood that she was tired. Neither of us were speaking in our mother tongue. Until that point, she had been propping up my limited English to progress conversation. As I was ignorant of Portuguese, she had acted as interpreter. To add to the complication, there were some situations where we spoke Japanese. For her, she was flitting between the three linguistic dimensions of Portuguese, English and Japanese. If you have no comprehension of a language you can allow it to float over you like music or as mere sound, but this is not possible with a language you understand. Since Aurea was studying Japanese, any Japanese she heard was more than mere sound and she would automatically have tried to understand it. In these circumstances, strain was unavoidable.

Moreover, this was not a trouble-free city like Tokyo. Even when we were driving, Aurea was always aware of the traffic lights, since she knew this was when incidents often occurred. When we were walking, she took my arm and virtually pushed me into a canter. Her brow was knotted. I sensed in her expression a tension I had never felt as I travelled abroad solo in the past. It is not surprising that she should become exhausted guiding a naively trusting Japanese. As she attempts to place a restaurant order in English and she must restate it in Portuguese, I cannot fail to feel gratitude for her extreme patience.

* * * * * * *

Later on Tuesday 29 February, after attending the Japan Foundation lecture, I visit the Court of Justice of São Paulo State. I am fortunate to be able meet Judge Luis Fernando Nishi again. He came to Japan in July 1999 for a symposium celebrating 20 years of

academic exchange between the Law Faculties of Keio University and USP. At Keio, he spoke on the topic "The Crisis in Criminal Detention and Some Alternatives"; he described the condition of prisons in São Paulo State and throughout Brazil, the fact that remand prisoners now outnumber those who have been convicted and sentenced, and the problems of overcrowding. He was also kind enough to attend the ICCLP's commemorative 100th Forum.

Back home, Judge Nishi also manages to find time to teach at the São Paulo Catholic University. He recounts some of his family history to me; his father was an attorney and his younger brother, an ear and nose doctor, spent some time at the University of Tokyo before pursuing further study in the USA. With Judge Nishi as my guide, I explore the grandeur of the old court building.

I enter the gallery of a court in session and observe the judge and parties. As I don't understand the language, I can only imagine what they are saying. We play a form of Chinese whispers, as Judge Nishi gives some *sotto voce* explanation to Aurea who passes it on to me, but I remain unenlightened. I do understand, though, that the court room has its own gravitas, which influences the proceedings within it. The pressurised atmosphere straightens your backbone as you sit there. Just as European cathedrals are beautiful examples of historic architecture as well as places of worship, so I could sense that this space was not only a functioning court room but also had historic cultural significance.

According to Sergio Augusto Nigro Conceição, judge for 35 years and now involved in judicial training, including organising a recent international conference on judicial education and training held in Brazil, there are not enough judges in Brazil and the nurturing of young judges is a big issue. The cause of the diminishing number of judges is the early retirement of judges before changes to the laws governing State civil servants' pensions came into effect. These laws affected university professors and general civil servants as well. In the case of judges, there is the additional factor that replenishment of numbers is made difficult by the extremely high standards deemed appropriate for the initial examinations. (In Brazil there are separate public examinations for each of attorneys, prosecutors and judges: see ICCLP Review 3(1) pp 66-67.) I ask the judge about his most memorable case. He replies immediately that it was the shotgun murder of a youth. The perpetrator of the crime was a military man, who was later found casually drinking at a bar as though nothing had happened. The judge said he would always remember the coolness of that defendant.

I then have the opportunity to meet with some of Judge Nishi's colleagues. With one of them I am able to speak directly in English, and he tells me his father taught international law at USP as a colleague of Professor Ninomiya. The judges' common room, unlike the court rooms, is bright and airy. I feel like an intruder watching the judges in their private area loudly laughing and telling jokes.

I come across the court museum, which was opened in February 1995. On display are many precious pieces from the court's past: as well as case records, there are everyday items used in court such as inkstands, pens, handbells, etc. As with the building, these

could have been transplanted directly from Europe.

I part company with Judge Nishi. At the court foyer I wait for a few moments with Aurea, hoping for the rain to stop. There is no sign of it stopping, so we make a run for it, all the way to the USP Law Faculty. The Law Faculty is not part of the main campus, but sits in the middle of town, which teems with both people and traffic. Aurea tells me that it took her some time to get used to the hustle and bustle. An assistant admits us to the staff area. As we try to dry our hair and clothes, we cannot help but laugh at each other: we are like children who have been playing in the rain.

We take a quick tour of the Law Faculty museum. Next, I meet with Professor Ninomiya and then am shown the room for professorial meetings and the PhD examination room. I proceed to the Dean's office, where Professor Ivette Senise Ferreira greets me with a smile. We speak of her trip to the University of Tokyo last summer to speak on the topic of Brazilian legal education at the ICCLP's commemorative 100th Forum, various aspects of international exchange, and the international conference that is to be hosted by USP.

I present to her a reproduction of the certificate of thanks given by USP in 1939 to Todai's then Dean of Law, Professor Tanaka Kôtarô, when he visited Brazil. The certificate was signed on behalf of USP by the then Dean of Law, Professor Soares de Faria, who I had heard was Professor Ferreira's supervisor, so I thought it would have some special value for her. But aside from that, it would have intrinsic historical value, especially with its now rare gothic calligraphy. Professor Ferreira's office has portraits of previous Deans, including Professor de Faria. There is no portrait as yet of Professor Ferreira, the first female Dean, but she laughs and points to a spot on the wall where one will hang in the not too distant future. She strikes me as well suited to filling that space.

As I leave, Professor Ferreira bids me farewell in the Brazilian way "because now we are in Brazil". I do not feel as though I quite have the knack of kissing both cheeks.

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The next day, Wednesday 1 March, I head for the main USP campus. The campus extends over more than 18,000 acres, of which only 320 acres have been built on, so the overriding impression is of a vast expanse. Accordingly, the mode of transport around campus is by car. I do not see a single person on foot. By way of comparison, the University of Tokyo (all campuses) has about the same floor space on land less than one-eighteenth the size. Interestingly, this factor of 18 is approximately the relationship between the population densities of Brazil and Japan.

I meet the Deputy President of the Commission for International Cooperation, Professor Celio Taniguchi. Professor Taniguchi specialises in maritime engineering and was the Dean of the Faculty of Engineering between 1994 and 1998. Due to his extensive foreign research experience, he is now in charge of USP's international academic exchange program. He conducted research in Japan in 1962, 1969 and 1990. In 1990, when he was affiliated to Yokohama National University, he brought his whole

family with him, including his seven year old youngest child. "Ten years has passed since then," he says, "but my children still think fondly of Japan. My son is now studying at Ryukyu University. He says that he chose the spot in Japan with climate the most like São Paulo, but I think he was merely yearning for the Japan of his childhood."

According to the materials given to me, USP has 37,000 undergraduate students, 12,000 course-work postgraduates, 8,400 PhD candidates and 2,900 special students, making a grand total of 61,000 students. The special students take six months or a year out of their established careers to further their qualifications: it sounds similar to the Todai Law Faculty's *senshu* course. (By way of comparison, Todai has 16,000 undergraduates and 1,000 postgraduates, with a total student body of 27,000 once researchers and auditors are taken into account.) Academic staff number some 5,000 including casual staff, and administrative staff about 15,000. (At Todai there are 4,000 academic staff and 3,600 administrative staff, not including casual employees.) Professor Taniguchi tells me that his Faculty has 480 staff, of whom roughly half have studied in the USA.

Last year, when USP advertised for visiting researchers over the internet, there were many applications, with a large number from Russia and India. The new civil service pension regime becomes relevant again at this point: many long-serving members of staff rushed to retire before the cut off date, resulting in the university suddenly requiring teaching staff. This led to the internet advertisement. Professor Taniguchi tells the story with a smile, but there were many problems with the selection process for applications and later with researchers wanting to stay in Brazil after the expiry of their contracts. Each international academic exchange program experiences its own unavoidable hiccups. It takes time for contrasting elements to come into contact and mix to form a new understanding, so it is a test of patience and tolerance on both sides. I could see in Professor Taniguchi's gentle smile the wisdom that, even with highly regulated academic exchanges with defined time frames and clear objectives, there are issues that need to be resolved one by one assisted by the accumulation of experience.

I have lunch with Professor Taniguchi at his invitation at the new academic staff club. Of course we must drive there. On the way there is a wonderful bamboo forest, and I suddenly feel transported back to Japan. Except that these bamboos seem taller than any I have ever seen, I felt like Jack standing at the bottom of the beanstalk, reaching up to the blue sky.

Later that afternoon, I visit the Japan Culture Center, which is on the same campus. Professor Tae Suzuki tells me that the first Japanese language postgraduate course in Brazil was established at USP in 1994. At undergraduate level there are now 110 students taking Japanese language. They are taught by Brazilian instructors, but the postgraduates are taught by visiting Japanese. Professor Suzuki recounts how there are very few third or fourth generation Japanese who can speak the language naturally and fluently, but many of them are now showing an interest in learning. Interest should also grow amongst Brazilians without Japanese ancestry, she predicts. Professor Suzuki herself is a graduate of the USP Law Faculty, but says "Somehow I ended up in Japanese language teaching". Her normally rather serious expression breaks into an

impish laugh at this point.

The Professor shows me through the library. Japanese language texts are gathered here regardless of field. I see sets of classic literature and old school textbooks. She tells me that the collection is lacking in the areas of law and politics. There is a financial element to this: specialist books are expensive, as is delivery to Brazil. In the past they have had offers of book donations, but been unable to afford the freight. So, even if supply and demand match up, such basic problems must be overcome to make use of the available resources.

From the Japan Culture Center, I go on to the law firm of Kazuo Watanabe. Mr Watanabe became a judge of the District Court of São Paulo State in 1962, and then had an illustrious career as President of the Civil Appeals Division and later as a judge of the High Court, while also serving as professor of civil procedure at USP. In 1987 he retired from the bench and went into private practice. Last year he was awarded an honorary doctorate by Keio University. He contributed to enactment of the Consumer Protection Law and the federal Summary Procedures Law, as well as amendments to the Civil Procedure Code. His law firm covers three floors of a new office building, and is associated with an American law firm. The impression is similar to an English law firm I visited recently. The firm is divided into sections dealing with environmental law, consumer protection law, contracts, industrial property law, etc, each with lawyers, trainees and administrative staff. There is a spacious library, which includes precedents on CD-ROM. The presence of young trainees is noticeable here. The interior seems designed for comfort and relaxed contemplation.

The moderated tones of Mr Watanabe's Japanese also make me relax. We had chatted at length over dinner the night before, so meeting him again seems almost like a reunion with an old friend. A panorama of the city is displayed to me through the large window of his 13th floor office. He recommends I go to a large shopping centre that we can see below. "But you had better be careful when crossing the roads. The drivers here are pretty rough, you know."

That night, I part company with Aurea after convincing her that I will be OK. She hails a taxi to take me back to my hotel, but end up in a huge traffic jam not far from my destination. I consider getting out and walking, but decide against it in light of Aurea's earlier warnings.

Apparently traffic jams have been a big problem within São Paulo City ever since office buildings went up in an area of the city newly developed about 7-8 years ago. (This was about the time the Japanese bubble economy burst. Perhaps the influence of the bubble was just being felt in Brazil at that time. It would seem that any Brazilian bubble has also burst – I see many high rise buildings in São Paulo City abandoned during construction.) In an attempt to control the traffic, restrictions have been placed on car usage according to number plates. For instance, if your number plate ends with 1 or 2, you cannot use your car in the rush hours (7-10 am, 5-9 pm) on Mondays. For some people this means arriving at work by 7 am and staying until 9 pm on those days. The subway only covers the very centre of the city, so Aurea told me she commuted up

to 2 hours each way (depending on the traffic) to university by bus. This sounded at least as bad as the "commuting hell" in Tokyo.

That concluded the first two busy days of my schedule in Brazil. I could barely keep my eyes open. The cold I had brought with me from Tokyo was persisting, and I felt embarrassed as I sniffled while conducting interviews. However, I surprised myself with my energy the next morning. As I went to meet Aurea in the lobby of my hotel, I realised the cold had gone.

* * * * * * *

In Rio, I was looked after by Mr Hisao Arita, formerly head of the Patents Office and now an attorney, and his wife Diacuy. Because it was just before the Carnaval, the road along the sea was pretty much deserted. Rio's beaches are a famous tourist attraction, but the locals do not swim there: apparently there is a sewage treatment plant near by. This is hard to imagine with the crystal clear waters spreading before me. Mrs Arita drove me around the streets of Rio. She obliged me by driving past the station that formed the backdrop to the film *Central Station*. But driving past was all she would allow: the area was too dangerous to get out, she said. So I did not get the chance to have a look around and breach the oft-repeated tenet not to go near dangerous places.

I was reminded of my visit to a São Paulo cemetery with Mrs Sonia Ninomiya. This cemetery, Morumby Cemetery, was the resting place of the fathers of both Professor and Mrs Ninomiya. Sonia's father had passed away suddenly in February and his headstone plaque was not yet in place. Nearby was a headstone for Ayrton Senna.

The evenly spaced plaques arranged across the rolling hillside, each the same size and the same metallic design, were mesmerising. Flowers provided an occasional diversion. Black and yellow striped plastic tape marked off Senna's grave, where there was still a Christmas tree. These were the only indications that this was the grave of a Formula One driver who had a worldwide following. It seemed that the plastic tape was not so much to protect Senna's gravesite as to prevent fans from stepping on the neighbouring graves.

Behind Senna's grave was a large tree. Sonia informed me it was an *ipê* tree, the tree of Brazil. Beyond the tree, where once only the open sky was visible, the tips of new highrise buildings can now be seen. Also visible is the *favela* slum district, a cluster of homes that seem no more than a haphazard collection of planks. "At least in Rio the slums are built of brick," Sonia tells me. I can see the concern in her face as she describes how the disparity of wealth connects to problems in education, the environment and crime.

The distinction between districts is quite clear. I recalled Aurea's worried look while waiting at traffic lights in one district, as compared to the carefree way she gave her car keys to the parking attendant at the supermarket. The contrast was astonishing. This was the same contrast I had observed as we approached the area where the Carnaval was being held – her knotted brow changed to laughs and smiles the instant she had

been frisked and entered the "safe" zone. It seems it is just a fence that divides the safe and unsafe zones. However, in the interest of self-preservation, you do not go near the dangerous area. The state of perpetual alert while "on the other side" must be very wearing on the nerves. And so, the Brazilians undertake a complete gear change when they enter the safe zone. Ueno Park on a Sunday is a juxtaposition of families, couples, groups of young people, students on a school trip on the one hand, and on the other hand the homeless people hanging out their washing. There are more homeless people on the benches at Hibiya Park, while on the neighbouring benches OLs pick at their lunch. I am not sure whether it is fortunate or unfortunate that Japan has managed to come this far without a discernible "gear change".

* * * * * * *

A haiku by Uetsuka Shûhei, known as the "Father of Settlers", reads as follows:

Yûzare ya	Beating evening sun
Kokage ni naite	*Crying, crave the arbour's comfort*
Kôhî mogi	Pluck the coffee beans

In 1908 at the age of 31 Uetsuka boarded the Kasato-maru, the first of the Japanese immigrant ships headed for Brazil, as an employee of the Imperial Settlement Corporation. There were about 790 settlers aboard the Kasato-maru, of whom 70 came from Uetsuka's home prefecture of Kumamoto. The settler families were employed on the coffee plantations, and this was the beginning of their history of hardship and suffering.

As I walk past the exhibited farm tools, dinner plates and clothes that they used, as well as personal effects such as photographs and letters in Brazil-Japan Immigration History Museum, I start to feel a sense of pain. Uetsuka gave his all to clearing and pioneering land so that his fellow immigrants could farm their own plots. The Imperial Settlement Corporation became insolvent and he had to return to Japan, but he could not be kept from the Brazil in which he had invested so much. He bought land at Promissão. The immigrant Japanese cleared the native forest and began their own coffee plantations. Why was he so devoted to his adopted country Brazil that he would endure the barbs of his fellow settlers forced into a miserable slave-like existence, the funds they had invested with the Imperial Settlement Corporation now gone, and himself put up with near starvation? Why did a man, who vowed in his university days to succeed overseas and make a fortune, act so fiercely on behalf of the Japanese settlers yet drown his sorrows in the *pinga* (sugar cane spirit), become a somnambulist madman and die in a hovel? Was this end a problem of his own making, or did the land Brazil make him that way?

The Japanese settlers created the two great industries of jute and pepper in the Amazon. They used imagination and hard work to improve various crop varieties. Today, even "Aomori Fuji" apples are harvested in Brazil. Professor Ninomiya once said that his father's generation, unlike immigrants from other countries, valued their children's education above their own sustenance. If they could not afford to employ an external

teacher, they would appoint one of their own to act in that role. As soon as finances allowed, they would use it for the children's education. In this way, the Japanese settlers implanted themselves in Brazilian society. The fruit can be seen today as their descendants constitute, for example, 20% of the academic staff and 15% of the student body at USP, despite making up less than 1% of the total population.

A stark contrast lies in the children who cannot afford the luxury of going to school, but rather must work. There are *favela* slums in every city and region. Although the Brazilian population is drawn from many origins, as a matter of fact there is very little mixing between the ethnic groups, and whole lives are spent on different planes. Some people argue that race is a fiction. Indeed, such categories as "black" "white" & "yellow" used for racial distinction are basically social constructs, much more than they are biological conditions. The old pattern of endogamy within the Japanese community is breaking down, with an increasing number of mixed marriages. If this continues and the biological racial distinctions are broken down, will Brazil change? How are the racial factors linked to economic and social standing? I do not know whether the walls are merely high or totally impenetrable.

Is "tolerance" a word only for those Brazilians who have attained a stable livelihood? Was the warmth, kindness and generous laughter of the people I met during my 10 day stay merely a function of the limited cross-section of Brazilian society I had met? The Portuguese word ending *ne* that I heard so often, which reminded me of the same ending in Japanese, gave me a lingering impression of tolerance.

I left Brazil with the image of the tolerant smiling faces of Professor Ferreira, Professor Taniguchi, Professor Suzuki, Judge Nishi and his colleagues, Mr Watanabe, Mr and Mrs Arita, the Caproni family (who guided me around the town and university of Campinas and invited me to tea), the various staff members of the Ninomiya Law Offices, Mr Nakayama Yasumi of the Immigration Resource Center, and Mr Miyasaka (the chef at the Japanese restaurant called HISA who made roasted *omusubi* rice balls for me even though they were not on the menu). I particularly remembered the tolerant smiles of Professor Ninomiya and his family. But I could not help but recall also the sadly reflective words of Mrs Ninomiya.

I have heard that there is an *ipê* tree at the family home of Uetsuka Shûhei in Kumamoto. At the start of May it bears its yellow flowers. In Brazil the blooms come in September. I want to see those flowers. In Japan or in Brazil.

[March 2000, translated by Peter Neustupný]

Postage Stamps: Propaganda, Policymaking and the Creation of Norms

by Hugo Dobson

Most people never give postage stamps a second thought and more often then not will dismiss them as colourful curiosities. In actual fact, they provide a fascinating means of communication which is received on a broad, everyday basis within a domestic and international remit and clearly promotes certain issues through the images depicted. Ruling politicians and bureaucrats attempt to mould the 'common sense' of society in their own interests through encoded images portrayed on these tokens of popular culture. Thus, postage stamps and the images they bear ought to be considered for their importance in creating identity, manufacturing traditions, and justifying the 'rightness' of a particular government policy, in addition to their artistic merit and financial worth. One American scholar has argued that, 'stamps are products or "windows" of the state that illustrate how it wishes to be seen by its own citizens and those beyond its boundaries'. Unfortunately, there has been an unwillingness in the disciplines of political science and international relations to acknowledge the potency of visual evidence. Attention has been paid to coins, flags, cartoons but postage stamps are often neglected. This is misguided as postage stamps can be an excellent primary source for unearthing the messages that governments wish to convey.

Previous research does exist but is thin on the ground. Some literature has focussed on the propaganda and counter-propaganda value of stamps, most obviously in Nazi Germany, but also in Communist Poland. Studies of the stamps of various countries have identified and explored the images that the governments of these countries wish to project. France portrays itself as a torch-bearer for democracy and a bastion of the ideals of the 1789 Revolution. Other research has investigated the national identity-building function of postage stamps in the immediate post-colonial periods of states such as the Irish Republic, South Africa and the Central Asian Republics. What this literature demonstrates is that governments are concerned about the images projected by postage stamps and recognise the great propaganda power both for external and internal consumption. There are obvious examples such as the stamps of the Third Reich, recently emerging democracies, and, at first sight, bizarrely in the case of North Korea. A seemingly inexplicable and ideologically blasphemous stamp commemorating the birth of Prince William to Prince Charles and Lady Diana was introduced in 1982. However, both the intention of the Pyongyang regime and the propaganda power of stamps becomes clear when one realises that this stamp was introduced with the objective of creating a domestic understanding of the system of hereditary with Kim Jong Il's succession in mind. Stamps are far from being ideologically innocent or politically neutral. Their design becomes a site for the resolution of social and political conflict, in addition to the embedding of behavioural and ideological norms.

One example of the importance of the images chosen to appear on stamps can be seen in my own country. Despite UPU rules, the United Kingdom, as the originator of the

stamp, is not obliged to carry the name of the country of origin. Instead, the issuing country is signified by the Queen's portrait and to this end stamp design rules traditionally carried the guideline that 'the Queen's head must be a dominant feature of the designs'. Thus, the monarchy becomes a defining element of the British identity. During the 1960s, the Labour Government came to regard postage stamps 'as part of the arts and not just as adhesive money labels for postage purposes ' and that 'there were many things about Britain that we ought to project abroad, perhaps through postage stamps'. Within this policy stance, one of the most important issues addressed was the abolition of the Queen's portrait on British postage stamps—an overtly republican proposal. The government managed to petition the Queen directly, and even win her agreement to the removal of her portrait from commemorative stamps. Although this agreement was later withdrawn and refuted by the Palace, the importance of stamp design did become a relatively high profile topic briefly.

My task over the summer of 2000 is to examine Japanese stamps in order to highlight similar controversies. The spat between the Japanese and American governments in 1995 over a US commemorative A-bomb stamp is already well known. Ultimately, I want to answer the questions of *who* is saying *what* through the medium of postage stamps to *whom* and with *what effect*. I hope to be able to report some intriguing findings in a few months' time.

[August 2000]

Comparative Law and Politics Seminars & Forums

Held at the University of Tokyo, Graduate School of Law and Politics, April 2000 - September 2000.

[Seminars]

The 88th Comparative Law and Politics Seminar – 27 April 2000

Speaker:	Dr. Roger Hanson, National Center for State Courts
Topic:	What Recent Reforms of the American Judicial System Have Worked and Why? : Possible Lessons for Japan
Language:	English
Moderator:	Professor Ota Shozo

The 89th Comparative Law and Politics Seminar – 10 May 2000

Speaker:	Professor Carl Schneider, University of Michigan Law School
Topic:	Triumph and Crisis: The American Bar and American Business
Language:	English
Moderator:	Professor Higuchi Norio

The 90th Comparative Law and Politics Seminar — 31 May 2000

Speaker:	Professor Gerald Neuman, Columbia Law School
Topic:	Age Discrimination, Constitutional Equality, and the Congressional Powers in the US
Language:	English
Moderator:	Professor Kashiwagi Noboru

The 91st Comparative Law and Politics Seminar — 1 June 2000

Speaker:	Arnold M. Quittner, Esq., Lawyer, specializing in bankruptcy law in Los Angeles Associate Professor Charles Booth, Hong Kong University
Topic:	Cross-border Insolvency Issues — United States, Hong Kong, and Chinese Perspectives
Language:	English (with summary in Japanese)
Moderator:	Professor Kashiwagi Noboru

The 92nd Comparative Law and Politics Seminar — 28 June 2000

Speaker:	Professor Don Herzog, University of Michigan School of Law, Department of Political Science
Topic:	Is Freedom of Speech an Absolute? : The Case of Hate Speech Regulation
Language:	English (with summary in Japanese)
Moderator:	Associate Professor Asaka Kichimoto

The 93rd Comparative Law and Politics Seminar — 30 June 2000

Speaker:	Professor V. S. Mani, Jawaharlal Nehru University; ICCLP Visiting Professor
Commentator:	Professor Ramesh Thakur, Vice Rector, United Nations University
Topic:	Humanitarian Intervention Revisited
Language:	English
Moderator:	Professor Nakatani Kazuhiro

The 94th Comparative Law and Politics Seminar — 5 July 2000

Speaker:	Professor Chung, Jae-wook, Changwon University, Visiting Research Scholar of Graduate School of Law and Politics, the University of Tokyo
Topic:	Changing Local Government Area and Its Characteristic in Korea
Language:	Japanese
Moderator:	Professor Morita Akira

[Forums]

The 104th Comparative Law and Politics Forum – 8 May 2000

Speaker:	Luke Nottage, Barrister of the High Court of New Zealand, Visiting Scholar of Kyoto University Law Faculty
Topic:	Separating the "Anglo" from the "American" in Anglo-American Law: Implications for Japanese Legal Education Reform
Language:	English (with summary in Japanese)
Moderator:	Associate Professor Asaka Kichimoto

The 105th Comparative Law and Politics Forum – 25 May 2000

Speaker:	Professor James F. Corkery, Bond University
Topic:	Director's Duty of Care, the tightening screws in Australia
Language:	English (with summary in Japanese)
Moderator:	Professor Kashiwagi Noboru

The 106th Comparative Law and Politics Forum – 16 May 2000

Speaker:	Associate Professor David Schizer, Columbia Law School
Topic:	Executives and Hedging: the Fragile Legal Foundation of Incentive Compatibility
Language:	English
Moderator:	Professor Kashiwagi Noboru

The 107th Comparative Law and Politics Forum – 29 June 2000

Speaker:	Veronica Taylor, ICCLP Visiting Associate Professor
Topic:	Whose Development? Current Issues in Law and Economic Development
Language:	English (with summary in Japanese)
Moderator:	Professor Kanda Hideki

Reports on Selected Seminars and Forums

[Seminars]

The 88th Comparative Law and Politics Seminar — 27 April 2000

Dr. Roger A. Hanson

What Recent Reforms of the American Judicial System Have Worked and Why?; Possible Lessons for Japan

Our seminar welcomed a researcher familiar with state trial and appellate courts in the United States. Dr. Roger Hanson, senior advisor of the National Center for State Courts, reported on recent inquiries that he has made into judicial systems in the fifty American states. He began by offering a brief description of state courts. Dr. Hanson then discussed one formula estimating the critical factors influencing the performance of courts and five steps leading to positive performance.

State Courts in the United States

To describe American state courts, Dr. Hanson said that answers to two questions would highlight the essential aspects of the states courts. First, how do the courts with jurisdiction over specific states compare to the federal courts in a national court system? Second, what do the state courts look like in comparison to each other? Are they similar or different from each other?

Concerning the first question, the number of cases filed annually in state courts is about 15,000,000, whereas the federal courts handle about 400,000 cases each year. Regarding the total number of judges, about 10,000 are employed by the state courts, whereas there are 800 working in the federal courts. These numbers can be summarized that state courts handle about 98% of all the cases in the United States and employ about 92% of all American judges.

Since the second question is broad, it was refocused on the 2,500-state trial courts. In what respects are they similar to, or different from each other? The trial courts of 50 states have an unexpectedly high level of uniformity in certain respects. Examples of uniformity are trial or settlement rates in civil cases and sentence rates in criminal cases. The range of these rates among state trial courts is very similar in eight out of every ten courts. By contrast, state trial courts are different in other respects, such as the size of awards to plaintiffs in civil cases and the length of prison sentences in criminal cases. The amount of time to resolve cases also varies considerably.

What Do They Need to Reform?

For the past one hundred years, a perennial topic of reform has been the disparity in the average length of time taken by courts to resolve cases. The National Center for State Courts is currently engaged in improving the performance of state courts by reducing delay in case resolution time.

The delay in state courts can be evidenced by the number of cases per judge. The annual number of cases divided by the total number of judges gives about 1,500 cases per judge in state courts, whereas the federal courts have about 500 cases per judge. Thus, state courts need to improve their performance so that they can manage these excessive cases.

Estimating the Performance of Courts---Dr. Hanson's Formula

This reform objective raises the problem of how to measure the performance of state courts. According to the results of analyses of individual cases, questionnaires distributed to judges, prosecutors, and criminal defense attorneys in nine mid to large sized American cities, Dr. Hanson has found that court performance is influenced by four elements (see Brian J. Ostrom and Roger A. Hanson, Efficiency, Timeliness, and Quality: A New Perspective from Nine State Criminal Trial Courts, National Center for State Courts 1999).

The research began by defining "Court Performance". It is the ability to resolve disputes in timely and fair manner. Prosecutors and defense attorneys were then asked to assess courts and each other on a variety of issue in a Likert scale. Based on a quantitative analysis of the time taken to resolve the cases in each court and the views of the prosecutors and criminal defense attorneys practicing before each court, four factors were indexed to explain why some courts had higher performance than other courts were established.

Court Performance = Resources + Management + Jurisdictional Practice + Attorney Competence

In this formula, "Resources" indicates that in high performance courts both sets of attorneys believe that the court has enough physical and human resources. "Management" means that both sets of attorneys believe that the court has effective leadership and good communication with both the criminal defense attorneys and prosecutors. "Jurisdictional Practice" means that the defense attorneys and prosecutors are critical of each other's practices. And "Attorney Competence" means that the defense attorneys believe that the prosecutors are experienced, well prepared, and skilled in trials and vice versa.

Towards a Solution: Five Steps for Positive Performance

To encourage courts to improve, the indicator of "Management" is particularly important because courts are the institution that put the reforms into place. Regarding "Management", five prescriptions are presented below. These might also be relevant for Japanese courts, although cultural differences between two countries caution against exporting American ideas too freely. Japanese courts, however, might want to see what seems to foster courts improvement in the American states.

The five suggestions are as follows:

1. Establish the order of priority for different reforms and discuss them with the goals of reforms among judges, defense attorneys, and prosecutors to reach a working consensus on them.
2. Gather and analyze information on case management, such as the ratio of routine cases, the proportionality of cases to their procedures, and court staffs' fortes and foibles.
3. Make reforms incremental by beginning with targets of opportunity.
4. Make it clear who is responsible for monitoring how well the reform is working in practice.
5. Measure the outcomes of reforms as precisely as possible and feed them back into the subsequent reform efforts.

Lively questions and answers followed the presentation. As to the formula, for example, a socio-legal scholar asked why “Jurisdictional Practice” deserved to be an indicator, since prosecutors and defense are critical of each other's practices in both fast and slow courts. Dr. Hanson explained his survey in more detail and answered that a significant difference was found in whether or not they were critical of each other's practices but not found in the degree of their criticalness between fast and slow courts. The questioner realized that the four indicators were not independent variables in a multiple regression analysis.

[Nagasawa Michiyuki]

The 90th Comparative Law and Politics Seminar 31 May 2000

Professor Gerald Neuman

Age Discrimination, Constitutional Equality, and Congressional Power in the US

1. Professor Neuman's presentation addressed the implications of the United States Supreme Court's January 2000 decision in *Kimel v. Florida Board of Regents* 000 U.S.98-791(2000)). The Supreme Court held that the Age Discrimination in Employment Act (ADEA) enacted by the U.S. Congress could be regarded only as an exercise of Congress's power to regulate interstate commerce, and not also as an exercise of Congress's power to enforce the constitutional right to the equal protection of the laws under the Fourteenth Amendment to the United States Constitution. The result of this decision was that employees of the state of Florida could not bring a civil action for damages against the state for violation of the ADEA, because the state was protected against civil actions for damages by the doctrine of sovereign immunity. Congress can override the sovereign immunity of the states from suit by private parties when it is enforcing individual rights under the Fourteenth Amendment, but not when it is regulating interstate commerce.
2. The Supreme Court's decision has practical importance, but it also involves a major theoretical question of constitutional law: to what extent is the legislature entitled to act on a more expansive interpretation of constitutional rights than the interpretation that the Supreme Court itself employs? Many constitutional scholars in the United States believe that the Supreme Court "underenforces" some constitutional provisions, by crafting doctrines that are suitable for judicial implementation but that do not fully

capture the normative content of the provision. Underenforcement may result from considerations of administrability, from relative institutional ability to make empirical judgments, or from reasoning similar to the "political question" doctrine. Some scholars have argued that, in cases where Supreme Court doctrine underenforces constitutional rights, Congress should have power to enforce the full content of the rights, and not only the weaker version designed for judicial use.

3. Under U.S. constitutional equality doctrines, discrimination against older workers on grounds of their age is evaluated by the rational basis test. Because age is not an immutable characteristic, and because older citizens have not historically been subjected to pervasive legal discriminations (as racial minorities and women once were), the Supreme Court does not require substantial justification for differential treatment of the elderly. So long as the Court can imagine any rational theory under which the differential treatment might be justified, the Court considers that the constitutional requirement of equality is satisfied. Some commentators view rational basis equal protection analysis as a standard example of underenforcement: the guarantee of equal protection may require government actors to satisfy themselves that they have good reasons for treating people unequally, even if courts engaged in judicial review will defer to speculative rationalizations.

4. The ADEA forbids employers to discriminate against older workers when it is not "reasonably necessary" to do so. This standard is considerably stricter than the rational basis test. The Supreme Court majority in the Kimel case concluded that Congress could not impose limits on age discrimination by the states unless Congress could point to examples of wholly irrational discrimination by the states against older workers. In other words, Congress needed to apply the Court's own standards for identifying equal protection violations. Congress could not act on the basis of a stronger interpretation of the equal protection clause.

5. Although the Supreme Court's opinion did not expressly confront and reject the "underenforcement" theory, the Court implicitly rejected the idea that Congress can use that theory to justify stronger protection of equality rights. The Kimel case presents a dilemma for theorists who believe that the more sophisticated underenforcement theory explains the structure of constitutional doctrine better than the Supreme Court's own simpler account.

[Gerald Neuman]

The 91st Comparative Law and Politics Seminar—1 June 2000

Arnold M. Quittner, Esq., Associate Professor Charles Booth

Cross-Border Insolvency Issues--United States, Hong Kong, and Chinese Perspectives

1. Arnold Quittner, Esq. explained the American situation. He said there are three alternatives which a foreign debtor or his representative may take in connection with an international insolvency. Foreign representatives may (a) file full Ch. 7 or Ch.11 proceedings in the United States either voluntarily or involuntarily under Bankruptcy Code 301 and 303 b(4), (b) propose the commencement of ancillary proceedings in accordance with Sec. 304 of Bankruptcy Code, or (c) invoke comity without resorting

to the Bankruptcy Code.

2. The first alternative is to file Ch. 7 or Ch. 11. A Japanese corporation "*Maruko*" once used this alternative in order to use the world wide effective automatic stay provisions of the American Bankruptcy Code. In the past, because it was not clear whether a foreign representative may use automatic stay or avoidance power or rejection of executory contracts under 304 proceedings, filing of full bankruptcy proceedings was preferred. In order to file a full bankruptcy proceeding, a foreign debtor must be qualified as a debtor under Sec. 109. One of an important requirement of Sec.109 is that a debtor should have property in the United States. A recent case found that a $500 bank deposit at a Florida bank satisfies this requirement.

3. A foreign representative may also file a proceeding under Sec. 304 "Ancillary Proceedings". In order to commence 304 proceeding, a foreign debtor may not be required to qualify as a debtor under Sec.109. Therefore, he need not have property in the United States. There is no provision under Sec. 304 corresponding to automatic stay (Sec. 362). However, practices developed that on the first day of filing of an application of Sec. 304, the First Day Order will be obtained enjoying all actions against debtor or debtor's property. It is not still clear if a foreign representative may invoke avoidance power.

4. In *In re Petition of Treco* (239 B.R. 36 (S.D.N.Y.)), a Bahamian company borrowed money from a New York Bank. Loan agreement was executed and New York law was designated as the governing law. The Bank obtained a security interest in the bank deposit of the borrower at the New York Bank. The borrower went insolvent. Borrower's liquidator petitioned the New York court to order a turn-over of the bank deposit to Bahama. The New York court granted this motion over the objection of the bank. If the Bahamian debtor filed full Ch. 7 or 11 proceeding, turn over would not be granted unless adequate protection were given to the bank.

5. In the case of *New Line International Leasing v. Ivex Films* (140 B.R. 342 (S.D.N.Y. 1992)), a debtor who filed insolvency proceeding in Spain petitioned the stay of law suits against the debtor in the United States on the international comity, without commencing 304 ancillary proceeding. The petition was granted.

6. In "*In re Simon* 153 F.3d 991 (9th Cir. 1998) a debtor in Hong Kong moved to San Francisco and filed Ch.7. While he was in Hong Kong, he guaranteed the debts his company owed to the banks. Hong Kong Shanghai Bank filed a proof of claims for a part of its debts against Simon in the American Chapter 7 proceeding. Simon obtained a discharge order. After that, Hong Kong Shanghai Bank requested a declaratory judgment to limit the effect of discharge order to anywhere other than Hong Kong. The Court refused to grant it because Hong Kong Shanghai Bank file a proof of claim and fully participated in the jurisdiction of American court.

7. In *In re Eagle Enterprise, Inc* 223 B.R. 290 (Bankr. E.D.Pa. 0998) a German corporation argued that the issue of whether lease contracts of three units of machinery were true leases or disguised secured transactions, should be judged in accordance with the agreed governing laws of Germany. The Court rejected this argument saying that a contractual governing law clause would not bind third parties such as trustees and creditors.

8. Recent trends in the United States are that courts tend to be more cooperative to the foreign insolvency proceedings.

Professor Charles Booth of Hong Kong University explained the situation of cross-border insolvency in Hong Kong and China

1. In Hong Kong, the Bankruptcy (Amendment) Ordinance 1996 was enacted and become effective from 1998 and Rule were in the Gazette on February 13, 1998. Also Companies (Amendment) Bill 2000 was in the Gazette. It will add new section to the Company Ordinances "Provisional Supervision and Voluntary Arrangements". The Law Reform Commission issued a Report on the Winding Up Provisions of the Companies Ordinance. These Company Law Reforms will take a few more years.

In Hong Kong a distinction is made between bankruptcy for individuals and liquidation or winding-up for companies.

2. Hong Kong Cross-border Insolvency

(a) There are no statutory provisions in Hong Kong concerning cross-border insolvency. Case law will apply. However there are only a few cases in Hong Kong on this subject. Hong Kong borrows the case law of England. Hong Kong courts will recognize the insolvency (1) if the bankruptcy was declared by a court of the debtor's domicile, or (2) the debtor submits to the insolvency jurisdiction of the foreign court. Foreign insolvency proceeding to a company will be recognized if the insolvency is commenced in the jurisdiction of the establishment of the company, or, sometimes, (1) if the company carries on business within the jurisdiction of the foreign court, (2) the company submits to the insolvency jurisdiction of the foreign court, or (3) a liquidation is unlikely to take place in the jurisdiction of the establishment.

(b) Assistance will be given to the foreign liquidator. A foreign order vesting title in movable property will be recognized in Hong Kong. The foreign liquidator will be recognized to represent the foreign insolvent company in Hong Kong and will be permitted to file law suits.

3. Cross-Border Insolvency in the People's Republic of China

China has adopted territorialism and would not recognize foreign insolvency. In a case of 1998, a People's Court in Guandong Province did not permit a Hong Kong liquidator to represent a Hong Kong party engaging in litigation against PRC.

Recently, back-door liquidation of Chinese enterprise in Hong Kong was used in order to apply pressure to Chinese enterprise.

[Kashiwagi Noboru]

The 92nd Comparative Law and Politics Seminar—28 June 2000

Professor Don Herzog

Is Freedom of Speech an Absolute? : The Case of Hate Speech Regulation

In 1989, a United States District Court correctly struck down a hate speech code adopted by the University of Michigan, which was drafted without consulting any of the law professors there, because it was open-end, vague, and over-broad. Many Western countries have hate speech regulations, but it is commonly held that such legislation is unconstitutional under the first amendment in the United States. Some commentators have tried to legitimate hate speech regulations from several viewpoints, but Professor Herzog discussed the possibility of legitimizing some of those regulations based on the traditional liberal free speech case law.

One might think speech as such is absolutely protected, but the law is honeycombed with entirely uncontroversial regulation of speech. Consider hearsay, contempt citations, price-fixing, criminal conspiracy, criminal solicitation, libel and slander, and so on. At the very least, the "speech" protected by the amendment is a term of art.

First amendment law is also systematically attentive to social setting. The most robust protections attach to what is called the speech of democratic citizens in public spaces. What, however, about settings in which we do not appear as citizens? Consider soldiers in the military: *Parker* v. *Levy* (417 U.S. 733 (1974)), upholding court-martial conviction for speech critical of the Vietnam War, core political speech. Consider prisoners in jail: *Jones* v. *North Carolina Prisoners' Union* (433 U.S. 119 (1977)), hyperdeferential to prison warden's restriction of organization and mailing privileges. Consider students and teachers in school: *Hazelwood School District* v. *Kuhlmeier* (484 U.S. 260 (1988)), where a principal pulled two pages from a high school newspaper before publication. This, one might think, is a first amendment nightmare: administrative discretion and prior restraint. In fact, the Court said that the only thing they need say is that the principal did not act unreasonably.

Both these points suggest possible room for hate speech regulation on college campuses. One odd case, nominally still good law, is *Beauharnais* v. *Illinois* (343 U.S. 250 (1952)). Beauharnais was fined $200 under a statute banning any publication which "portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed, or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots." The opinion of the Court managed not to mention the first amendment, but upheld the statute as banning group libel.

Commentators have sometimes pointed to the classic fighting words cases. In *Chaplinsky* v. *New Hampshire* (315 U.S. 568 (1942)) the Supreme Court held that:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

The last part tends toward clear and present danger jurisprudence, but what are words "which by their very utterance inflict injury"? This could be something like subjective distress, the pain suffered by the target of racist speech, say. As a ground for restricting speech, this is worrisome. People get distressed over all kinds of things. Even reasonable distress, however we might gloss that, would seem to trench on all kinds of things even those interested in regulating hate speech want to protect: take a scholarly lecture exploring the thesis that some races by nature are less intelligent than others. So suppose we gloss words "which by their very utterance inflict injury" as words inflicting a dignitary harm, lowering someone's social status, identifying them as less fully human, to be treated with contempt. The injury, in this view, is public, social, objective -- and so more legally tractable than the psychological vagaries.

One context for thinking about dignitary harms is supplied by a long trajectory in the history of political theory and social history. Personhood as a dimensional concept transformed to binary concepts; subjects transformed into citizens. Contempt is the key battleground, and again injury is not subjective distress. This gives a way of reconstructing and defending the central insight of Beauharnais, without just sweeping the first amendment under the rug.

Is hate speech regulation automatically a threat to free speech? Consider prerequisites of flourishing social practice: diverse community, everyone gets to talk, everyone to listen. Contempt may tend to silence some speakers and may tend to make the audience not pay any heed to their words. Ruling out of bounds certain gross expletives, say, opens up possibilities otherwise unavailable.

Professor Herzog concluded that if one wants to argue for the constitutionality of hate speech regulation, this is the way to go. A lot of work needs to be done still hammering out a properly narrow statute. Whilst the question of whether or not, as a matter of policy, there ought to be such regulation was not discussed, Professor Herzog felt that it is just crude and peremptory to announce that hate speech regulation flies in the face of the first amendment.

[Asaka Kitchimoto]

The 93rd Comparative Law and Politics Seminar—30 June 2000

Professor V.S. Mani

Humanitarian Intervention Revisited

Some of the world events since 1990, e.g., in Somalia, Yugoslavia, and Rwanda, have highlighted gross and heinous violations of human rights in certain countries and raised questions about the need for international action to counter, if not to prevent a recurrence of such situations that shock the conscience of humankind. Indeed, lately, an overwhelming majority of humanitarian emergencies, which the United Nations has been called upon to respond, have resulted from chiefly internal conflicts.

To be sure, this is not the first time that the attention of the international community has been invited by gross violations of human rights in different parts of the world since the experiences of the Second World War. Colonial rule typified and institutionalized them. Dictators in certain parts of the world went about committing them with impunity over their peoples. There were Idi Amins, there were ruthless white minority regimes, there were mass killings of children and indigenous peoples, there were protracted wars in which prohibited weapons and methods of warfare were used against civilian populations and the flora and fauna whose adverse effects are still felt years after the end of the conflict. The international organization, by and large, stood a helpless spectator to these crimes for a number of reasons. These crimes were committed by states and the international system, comprising of states, is not expected, nor equipped, to respond to them. These crimes largely took place in Asia, Africa and Latin America,

and not in Europe. They were perpetrated sometimes by a big power and therefore the United Nations was not expected to respond, as it is constitutionally handicapped.

What changed the scenario now? Of course, such crimes erupted, for the first time in Europe, upon disappearance of the Soviet Union. Yugoslavia brought on to the centre-stage of the contemporary world politics the issue of humanitarian intervention by international organization. Rwanda followed, but that happened at the insistence of an African Secretary-General of the United Nations. But for him, gross violations of human rights in Africa would not have mattered, as they had not earlier.

The traditional international law as we understand it today was evolved and nurtured in the European cradle. It mainly aimed at protecting the monarchies and despotism in Europe since the mid-seventeenth century. The concepts and sovereignty and sovereign equality served that purpose. Thus intervention in the internal affairs of a state was, as a rule, forbidden. The manner in which a prince governed his kingdom was none of the concern of other princes. Some interventions were, however, tolerated, as they purported principally to protect the nationals and their property abroad (which were of course justified), or to right the balance of power (which was outside the scope of the law), or else to establish, maintain, or expand colonial empires over the peoples of Asia, Africa and Latin America (the law did not prohibit this, because these peoples did not exist in the eyes of that law, and therefore, the rules of that law did not apply to areas outside Europe, or to nations not members of the European club). At any rate, such interventions were resorted to by the big powers against small powers, and hence justified, as the former made the rules and legitimized international actions.

It was the Latin American countries which spearheaded a movement towards the principle of non-intervention since 1880's as reflected in the Calvo and the Drago Doctrines. The Drago doctrine came to be embodied in a Hague Convention of 1907 in a modified form: the convention prohibited the use of force for the redemption of contractual debts, if the debtor country had accepted arbitration as a method of settlement of disputes. The Pan American Conferences time and again reaffirmed the principle of non-intervention. Article 21 of the Covenant of the League of Nations, however, represented a setback to the development of the non-intervention norm, as it sought to legitimize the Monroe Doctrine. On the other hand, however, the Pact of Paris of 1928 greatly contributed to the development of the norm because it for the first time outlawed war as an instrument of national policy and recognized the principle of peaceful settlement of international disputes.

The Charter of the United Nations took shape in 1945 against the background of the Second World War which revealed the most barbaric behaviour of nations at war. The Nazi tyranny and the inhuman practices during the war shocked the conscience of mankind and led to the resolve of the international community that protection of human rights should be a matter of international concern, even if it be a matter of domestic jurisdiction. This awareness of the international community came to be reflected in the provisions of the UN Charter, as also the subsequent work of the organization.

The UN Charter emphatically reaffirms the principle of non-intervention in Article 2

(4) and, implicitly in Article 2 (7) and Article 2 (1). Use of force is permissible only in self-defence (Article 51) and under the authority of the Security Council (Articles 42, and 53). The General Assembly is mandated to promote human rights (Articles 13, 55, 56), including the principle of self-determination in colonies. The Security Council has no such mandate, except that it has the primary responsibility to maintain international peace and security pursuant to the purposes and principles of the Charter, and that all its decisions to be binding on the membership must be in accordance with the provisions of the Charter (Article 25). An enforcement action authorized by the Council under Charter VII can be triggered by the Council with a finding - whether express or implied-that the situation at hand amounts to a threat to peace, a breach of the peace, or an act of "humanitarian intervention." As the Council has not been so mandated by the Charter. Indeed, a situation of gross violations of human rights may in appropriate contexts amount to a threat to peace, a breach of the peace or an act of aggression. But one would expect the Council to go strictly according to the provisions of the Charter. In terms of legality and international legitimacy, the Security Council in no God-Almightly.

The concern of the UN Secretary-General so forcefully expressed in his Introduction to the S-G's 1999 Report on the organization, as well as his Millennium Report released in March, 2000, is generally shared. However his appeal for 'humanitarian intervention,' if necessary with armed force, has been strongly disapproved of by many developing nations. In an ideal state of international relations, one would have no reservations for such organizational action, in defence of human rights. But given the realities that the state system can hardly be trusted to act in support of human rights as states are the primary violators of human rights, that in this imperfect world dominated by a few big powers it is well neigh impossible to expect them to act justly, fairly, and with uniform (not selective) application of standards in all cases (including those in which they find themselves on the wrong side), and that the achievement of human rights standards by and large depends on availability of adequate resources for the mobilization of which international cooperation is abysmally lacking, any coercive action by the international organization can only be legitimate if it is based on total consensus in each case. It may be that such consensus may not be forthcoming in certain cases. But then protection of human rights is basically the function of the people within a state; if they are unable to do it from within on a continuous basis, it cannot be externalized, except to allow external powers to play their own politics and fashion a polity of their choice in the troubled situation.

We have waited so long, since the Peace of Westphalia of 1648, to evolve an international organization capable of manifesting and expressing international concern for human rights. We have not yet been able to make it function in accordance with the principles of impartiality, fair play and uniformity of application of international standards, "with charity for all and malice towards none." The manner in which the Security Council has carried itself with the Charter mandate has left the international community with little confidence to empower it to act as the World's policeman for the protection of human rights.

[V.S. Mani]

[Forums]

The 104th Comparative Law and Politics Forum-8 May 2000

Associate Professor Luke Nottage

Separating the "Anglo" from the "American" in Anglo-American Law: Implications for Japanese Legal Education Reform

Over a decade ago, Patrick Atiyah and Robert Summers combined their wide-ranging knowledge of English and US law, respectively, to contrast significantly different orientations of these countries' legal systems. Specifically, they argued that legal reasoning in the US was more "substantive" - more directly influenced by "moral, economic, political,institutional or other" considerations - with legal institutions tending to support that orientation. Legal reasoning and institutions in England were instead more "formal", along several defined dimensions. Their book initially attracted significant favourable comment, and has been cited quite regularly in a range of writings. One reason it may not have attracted the full attention it deserves results from the challenges it poses to the received wisdom of "comparative law". The latter has struggled throughout the 21st century to establish itself as an academic discipline, with one of its major tenets having been a focus instead of differences between generic "common law" on the one hand and "civil law" on the other. Yet as that focus is increasingly questioned from other perspectives, the insights from Atiyah and Summers' study regain new significance, offering new ways of determining where real differences and similarities lie when comparing multiple legal systems (including Japan). They also are reinforced by Richard Posner's attempt, in his inaugural Clarendon Law Lectures in 1995, to add more social scientific data to demonstrate contrasts between England and the US.

That disjunction leads to practical as well as theoretical problems. For example, in the present debate about reforming legal education in Japan, much attention was focused on the model of US legal education. That also influences the proposals and perspectives of the "First Recommendations for Reform of Judicial Administration" published on 21 April 2000 by the "Shiho Kaikaku Foramu", composed primarily of industry leaders and law professors, although - true to Japan's comparative law tradition - policy makers are also now examining the systems in other countries. The Kobe University conference on legal education in 1999, one of a spate of such conferences held in national universities and other venues that year, was unusual in including papers on the UK and Canada. Arguably, the system in England, and countries heavily influenced by its legal system, presents a model distinct from that in the US, one which may offer some further insights for Japan.

Most importantly, law remains an undergraduate programme (except in Canada, no doubt due to US influence). Note firstly, however, that a large proportion of law students study conjointly in other faculties, earning other undergraduate degrees as well.

This early combination of training in law and other disciplines may prepare students better for careers as “legal information engineers”, likely to become increasingly important in Japan as well as other complex industralised democracies. Unfortunately, Japanese universities considering adding a “law school” program remain fixated on offering core law subjects. This may be necessitated by the narrow coverage of the national bar examination at present. But should not Japanese universities therefore be pushing harder to have that coverage changed, allowing them to offer a broader range of courses which better prepare more of their students for a life in the law in the 21st century?

Secondly, legal education in the English tradition is provided quite cheaply. Universities in England teaches a 3-year program, followed by a one-year vocational course to become a barrister or solicitor. Perhaps influenced a little by the US, New Zealand has a 4-year LL.B. with the first year consisting of subjects taught in other faculties (which strongly encourages students to begin a second, and sometimes a third conjoint undergraduate degree). But the subsequent vocational course needed to qualify as barrister and solicitor was drastically shortened in the 1990s, to a 13-week intensive course. Australian law faculties also usually have a four year programme, requiring considerable non-law courses in the first and/or second years; but the vocational course on graduation still takes a further year in most states. However, students in the US must invest in 4 years of undergraduate study (mostly non-law subjects), then 3 years in a JD program in law school. This results of course in considerably higher costs, which students must recoup usually by working in a law firm for at least for a few years. This in turn requires law schools to spend at least their first year preparing their students for legal practice, both in coverage of substantive law and (more importantly) basic legal skills. However, that focus diminishes in the second and third year courses in the "top" US law schools, which continue a tradition of acting like "certifying" institutions training students to be leaders in society. A notion prevailing in Japan nowadays that its "law schools" (likely to be the "top" ones like Tokyo and Kyoto Universities) need to be focused on practical legal education may therefore be a "creative misunderstanding" of the US situation.

Alternatively, ignoring the associated costs in simply adding extra years of university legal education may indicate a deep-rooted public sector mentality, and more general "Reformist Conservatism". The experience in England, Australia and New Zealand shows that it is possible to train students to be reasonably competent lawyers, as well as to do well in other careers, by instead improving the quality and cost-effectiveness of undergraduate programmes. A problem in New Zealand has been that research has suffered, but this is due more to the way universities are funded.

England seems to have achieved a better balance between teaching and research, but making the latter count strongly in funding of law faculties. While none of these "English law tradition" countries has a perfect university or law school system, therefore, it may not yet be too late for Japanese policy-makers and thoughtful tax-payers to take them more seriously.

In the ensuing discussion on Luke Nottage's views presented above, two main

difficulties emerged in connection with adapting the "English model" to Japanese circumstances. On the one hand, a focus on the bar examination, and Japanese "law schools" (more accurately: "bar schools") focused on that, will remain hard to dislodge as long as there is a low limit (even now, 1000) set on the number allowed to pass the examination every year. The system in England, New Zealand and Australia instead allows almost all graduates of law faculties to get into vocational courses, and complete these with a qualification as solicitor and/or barrister. But then the market limits the number who actually practice law: many who complete all courses and gain their qualification are unable to find an attractive job in law office or chambers. Law students generally realise this, which then indirectly puts pressure on law faculties to provide cost-effectively basic training in lawyerly skills and coverage of core areas of substantive law.

Similar developments may well occur in Japan, however, if there is a large-scale increase in the number passing the bar examination.

Interestingly, the above-mentioned Forum Recommendations call expressly for increasing the numbers passing the bar examination by 1000 every year through to 2010, generating 90,000 lawyers, judges and prosecutors (on par with France).

On the other hand, fostering more multidisciplinary study in combination with legal education in Japan, achieved in the English model by offering parallel undergraduate degrees, will depend primarily on whether Japanese corporations (as major employers of law graduates) require more wide-ranging skills and knowledge to be inculcated at the university level. So far, they have been content with universities just certifying that students are reasonably smart (primarily by setting entrance exams of varying difficulty); and then to train them in-house when beginning work in the company, especially if one with a long-term employment system. As that system is coming under increasing pressure, at least in some areas (eg financial services), the corporate sector may come to expect that universities actually teach the students well (e.g. in economics), which law faculties may have to be part of (e.g. teaching "law and economics"). So far such pressure on the university system has not emerged from the corporate sector; but the latter's ability to influence policy may be growing, as evidenced by the discussions and results related to reforming the administration of justice.

[Luke Nottage]

The 106th Comparative Law and Politics Forum - 16 May 2000

Associate Professor David Schizer

Executives and Hedging: the Fragile Legal Foundation of Incentive Compatibility

Professor Schizer offered an introduction to the economic properties and business uses of various types of derivatives, as well as to the ways in which they are used in tax planning. Derivatives are financial contracts whose value "derives" from some financial fact, such as interest rates or stock prices. For instance, derivatives include a contract to buy gold at a fixed price on a future date (a so-called forward contract) and a

contractual right (but not an obligation) to buy stock for a fixed price (a so-called option).

Derivatives can improve the conduct of business in at least two ways. First, these contracts offer parties the ability to craft very precise financial arrangements, including investments and compensation contracts. For instance, use of stock options as compensation has become widespread in the United States, and is becoming more common in Japan. Such contracts are a method of encouraging managers to work diligently in the shareholders' interest, since increases in the stock price increase the executive's salary. Second, derivatives enable businesses to protect themselves from risks that would otherwise be difficult to manage. For instance, in developing a product for export, a Japanese firm might have the expertise to understand how to tailor the product for a particular market, but the firm is likely to have relatively less expertise in predicting currency exchange rates. The firm can use derivatives to transfer this exchange rate risk to parties that are more comfortable with it, such as currency traders.

However, derivatives can create potentially undesirable results in at least two ways, which should be understood both by firms that use derivatives and by government officials who regulate or tax these firms. First, in allowing very precise bets, derivatives can prove much riskier than more traditional investments; relatively small changes in the price of the underlying property can induce dramatic swings -- either positive or negative -- in a derivative's value. Like users of electricity, users of derivatives must employ them with care and sophistication. In addition, derivatives can be used to circumvent contractual or regulatory provisions that serve a useful social function. For instance, managers might use derivatives to cancel out the incentive effects of stock option grants, unless prevented from doing so by contract or regulation. Likewise, taxpayers might use derivatives to exploit "loopholes" in the tax law.

Professor Schizer explained the above to the audiences using variety of examples.

[David Schizer]

The 107th Comparative Law and Politics Forum- 29 June 2000

Visiting Associate Professor Veronica Taylor

Whose Development? Current Issues in Law and Economic Development

1. Law and Economic Development: Not Whether, but How?

Intervention in other people's legal systems by the politically powerful and economically advanced is not a new phenomenon. What is different as we enter the 21st century is the multiplication of intervening entities, and the reworking of the assumptions that drive their transnational legal reform projects.

Today, legal reform advice to developing economies comes not only from bilateral trading partners (echoes of Japan's experience in the Meiji era), but also from multilateral institutions. The key institutions involved in promoting legal system reform in developing economies at present are the World Bank, the IMF, the ADB, and

the OECD.

What we see among these multilateral institutions is a transformation of funding priorities: the shift away from hard infrastructure such as bridges, dams and schools, to concern with soft infrastructure such as human resources, law and legal institutions and mechanisms for governing the business sector. Underpinning this shift in funding priorities is the belief that soft infrastructure, including law, is a fundamental component of economic development. Development here is usually defined as something more than simply economic growth; the stated or implicit assumption is that economic development will have cascading effects throughout the economy, although the actual mechanics of distribution are often left unspecified.

One of the striking aspects of this resurgent linking of law and economic development is the scant acknowledgement paid to the experience of the earlier Law and Development Movement of the 1960s and 70s. Then, as now, the modernist assumption underpinning the project was that laws – specifically those governing property and contract – needed to be specific, universal and transparent in order to facilitate economic growth. Many of the most enthusiastic proponents of wide scale legal reform designed to introduce this kind of 'rule of law' in places such as South America subsequently recanted in a very public way. Put simply, the recipe failed. Not only did the application of more law fail to 'improve' the economies at which it was targeted, but some of the effects of the law reform projects seemed counter-productive. In Asia, too, we can point to striking examples of economies that boomed in the post-war period while laboring under a dysfunctional legal system. Indonesia is the leading example. More recently, we can identify a host of 'rule-of-law' interventions in Russia that appear very shallowly rooted and perhaps doomed to mimic the patterns of the past.

Nevertheless, the projects continue, and were significantly accelerated in Asia following the financial markets crisis of 1997. In countries such as Indonesia and Korea, this heralded 'conditionality' in IMF loans, for example, which hinged on the target countries making very detailed adjustments to their legal systems. These kinds of changes, and the legal technical assistances designed to implement them, are the focus of this discussion.

1. Constraints on the new Legal Technical Assistance

Legal Technical Assistance (or in Japanese, *hôseibishien*) has a reassuringly neutral sound, but in this discussion, I want to focus on whose interests are being served by this latest round of legal 'help' from abroad. The issue here is that a prescribed legal reform is usually implemented both by government directive from the target country and then by 'assistance' offered by outside institutions that aim to make the reform stick. By way of example we could take the IMF demand that Indonesia establish a new Commercial Court in 1998. The Court was established by government order, but a range of external institutions provided money for re-training the judges appointed to that new jurisdiction. I should declare that I was one of the consultants who performed this work, so the criticisms that follow are also self-criticism.

This kind of 'legal technical assistance' has a number of serious constraints. The first is that the key economic question remains unanswered. Will interventions in a country's legal system actually result in improved economic development? The answer is that no one really knows. The best research to date suggests that there is a link between internationally competitive economies and the quality of their legal institutions (measured by factors such as the comprehensiveness of their legislation; the speed of commercial and civil proceedings; the education levels of their public servants; the size of their private bar and so on). What remains unclear is whether this relationship is causal.

No one would argue that a well-functioning legal system that promises equality of access, affordable dispute resolution and helpful rules for structuring transactions is preferable to one that has none of these features. However, the tacit assumption or assertion in much of the 'new' law and development literature is that these features – of themselves – will benefit the economy, and therefore, the target society. There are no prizes for guessing that within the new policy initiatives runs a strong thread of legal formalism, where economists assume that law is a technical tool that can be used in isolation from broader considerations of political and social systems. This explains the relatively narrow identification of 'legal institutions' as being courts, judges, prosecutors and the like, and the emphasis on improving procedural efficiency in courts.
In fact what we see is a fairly uncritical embrace of technocratic law making in new settings, without the critique that accompanies it in the West.

Although well-functioning court apparatus and personnel are public goods, they are goods that must be paid for. It remains unclear (to me, at least) whether the loan money being used to fund technical legal assistance at present will in fact generate economic development on a scale that will enable loan repayment. No one can really do that calculation, since 'law' is more than the sum of legislative rules and courts in which to interpret them.

A more troubling aspect of the current policy climate, however, is the relatively (weak) link between development and distribution. This starts at the uppermost level of the multilateral institutions, where strengthening the economies of developing nations is arguably the work of institutions such as the World Bank and IMF, whereas addressing problems such as poverty, literacy and social welfare services falls to institutions such as the UNDP. Accordingly, few technical legal assistance projects ask explicit questions about who the stakeholders in any legal reform are, and what effects the proposed changes may have on society as a whole into the future.

The nature of the funding for Legal Development Assistance projects itself also colours the current project. Much of the funding made available for legal reforms is loan money. This is particularly true of the 'conditionality' packages of IMF money made available in Indonesia, for example. These loans, of course, will need to be repaid. Other funding is simply part of bilateral government or non-government agency development funds. What the different forms of funding have in common is their short time-horizons. Most are to be disbursed over two to three years. The problem here is that the reforms that are

desired by the lenders and donors are more likely to take decades to implement, if they succeed in the desired forms at all. Delivering 'outcomes' within the time frames available will require creative report writing, at the very least.

Some would argue that short time-horizons defuse the problems of moral hazard and aid-dependency. I am not sure that this is the case. Whether the project is judicial training in China (already funded), legal education reform in Indonesia (proposed) or commercial law reform for Vietnam or Mongolia, the certainly of short term funding from abroad allows target governments to slough off responsibility for these areas of public policy and to divert available funds elsewhere. In part this is what the donors intend, but the question remains whether local enthusiasm for these priorities will crystallize into genuine ownership and funding support once the tide of external funding ebbs.

3. Technical Legal Assistance and The Problem of Dualism

One of the dangers inherent in Technical Legal Assistance is dualism, or the creation of a thin layer of state-of-the-art foreign law that sits atop a largely unaltered body of legal pluralism – defunct colonial law, customary law and informal 'rules'. Dualism opens up a range of potential problems, but one of the core questions is how we integrate new reforms with existing legal institutions in a sustainable way. A new article by Brietzke and Timberg addresses that question: Paul Brietzke and Thomas Timberg, 'An Economic Reform Agenda for Indonesia?' (1999) 31 *Law and Policy in International Business* 1. They argue that real question is that externally pushed legal reforms are typically presented as being universal in application, delivering uniformity and predictability. In fact, they tend to have differential impacts on different parts of society.

Brietzke and Timberg argue that we need to pinpoint that differential impact, and can do so by re-visiting part of Weber's economic model and dividing society (or legal players) into nine sectors:

1. Markets – brokers, dealers in goods, services and finance;
2. Foreign-dominated (especially multinational) corporations (MNCs)
3. Domestic companies (with participation from foreign investors, politicians, bureaucrats, or the government)
4. Government-controlled and –regulated enterprises;
5. Individual proprietorships of larger than cottage size;
6. Cooperatives and other nonprofits;
7. Subsistence and near-subsistence framing, fishing, forestry and handicrafts/cottage industry;
8. Entities abroad involved in trade and aid, equity and debt inflows;
9. Labour and consumers

The choice of these sectors is influenced by the legal 'status' of each 'player', because typically legislation defines its target by legal status. Brietzke and Timberg argue, inter alia that law reforms in countries such as Indonesia have typically benefited legal

players in sectors 2 and 4. These entities tend to win out, in part because of their ability to purchase the law they want – an application of Public Choice Theory. The answer, if one is not a public choice theorist, is to handicap the economic race – or at least to ask, what will be the differential impact of this legal intervention across this nine-sector model?

The Brietzke/Timberg analysis does not offer, nor does it pretend to offer, solutions to the flaws inherent in the current wave of law and development thinking. What it does do quite usefully, however, is to return the debate to first principles and try to provide an analytical framework that forces us to reevaluate the ostensible 'benefits' of the very rapid, intense wave of technical legal assistance that we observe at the moment.

[Veronica Taylor]

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Host: Professor Takahashi Susumu

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Term: April 2000-March 2001
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Host: Professor Morita Akira

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Term: April 2000-March 2001
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Host: Professor Watanabe Hiroshi

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Term: June 2000-September 2000
Research Area: Criminal Trial Practice
Host: Professor Inoue Masahito

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Research Area: The Big-Bang Regulations of Japan
Host: Professor Egashira Kenjiro

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Host: Associate Professor Karube Tadashi

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Host: Professor Sugeno Kazuo

Isabelle J. Giraudou, Researcher, Paris II University
Term: September 2000-August 2001
Research Area: Environment Law/Business Law
Host: Professor Yokota Yozo

Corrections & Amplifications

The Editors would like to take this opportunity to apologise for a factual error in one of the seminar reports in the last issue (Vol. 3, No. 1). In our report on the 82nd Comparative Law & Politics Seminar (Ms. Susan Katcher, American Law Schools: Reality & Myth) it was reported on page 83 that "Law schools in the U.S. must be certified by the American Bar Association." It has been brought to our attention that in the United States not all law schools are required to be accredited by the American Bar Association (ABA) and that such schools are referred to as 'unaccredited law schools '. Those law schools wishing to be accredited must be accredited by the proper authority, which is the ABA. We apologise for any confusion that this might have caused.