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From the Editor

ICCLP Review has been published twice a year in both Japanese and English since 1998 when it succeeded *ICCLP Newsletter*. It differs in that we now carry short articles contributed by ICCLP visiting professors and researchers. Included in this issue are articles by Professor Lee Chang-Hee of Seoul National University who stayed for one year as an ICCLP visiting professor, and by Dr Anne Muxel of Centre d'Étude de la Vie Politique Française who stayed for one month as an ICCLP visiting associate professor. Both contributions are based on the ICCLP Seminars they gave.

Following on from the previous issue, we include articles related to the Anglo-Japanese Academy (AJA). This 'virtual' academy comprised a workshop and international symposium that took place last September. Professor Hatsuse Ryuhei of Kyoto Women's University, Associate Professor Iokibe Kaoru of Tokyo Metropolitan University, and Sasaki Hiroshi, lecturer at Niigata University of International and Information Studies kindly contributed essays on the AJA for the *ICCLP Review*. All three of them participated in this Anglo-Japanese project either as senior scholars or AJA fellows. Together with essays by members of the UK and Japanese secretariats, Dr Hugo Dobson and Ms Wada Keiko, this example of international academic exchange is discussed from a variety of different viewpoints.

The Anglo-Japanese Academy Proceedings (ICCLP Publications No. 7) have been published and include forty-three presentation papers. Complimentary copies have been sent to universities and research institutes in Japan and overseas. We welcome individual requests of the proceedings by e-mail to the ICCLP.

March 2002, Wada Keiko ICCLP Coordinator and Review Editor

Part I

TAX IMPLICATIONS OF INTERNATIONAL TRADING AGENCY

LEE CHANG-HEE¹

I. Trading Agency and PE

International trade or sale to a foreign country can develop in several phases. At an incipient stage, a supplier may have an occasional sale to a foreign country. A more or less continuous flow of the sales activities would normally involve a trading agency or a distributorship in the country of import. A full commitment in the foreign market would require a permanent branch or a subsidiary engaged in sales or even local manufacturing.

From a tax perspective, it would apparently be unacceptable to subject a supplier to income taxation by the purchasing country, simply because it happened to sell some products to the country. On the other hand, if a supplier has a permanent branch or another business premise for business in another country, the country's power to tax the income of the supplier would be readily justified, at least to the extent such tax is limited to the income from the taxpayer's local activities. Accordingly, there arises an issue of tax nexus, i.e., what constitutes a justification for a country to tax a foreign supplier?

Defining a tax nexus is of course at the discretion of each country, but unilateral taxes imposed by each country can severely hamper international trade and business. As a result, since the end of the 19th century, countries began to enter into bilateral treaties to avoid double taxation on multinational business enterprises.² In particular, after the First World War, the League of Nations drafted a model convention as a part of its effort to promote international trade and prevent war. After the Second World War, the OECD took initiative and drafted a model convention for avoiding double taxation, accompanied by the OECD commentary on the model. Years later, the United Nations also published a model convention, which essentially is an extension of the OECD Model. These model conventions spread to the world, and the current world as a whole has a complex net of bilateral treaties drafted after the OECD model, virtually amounting to a global multilateral treaty with complex reservations by each country.

Under the OECD Model, the technical term to express the tax nexus is called 'permanent establishment', often abbreviated as a PE. The term PE "means a fixed place of business through which the business of an enterprise is wholly or partly carried on",³ including a place of management, a branch, an office, etc.⁴ The OECD Model provides that the business profits of a non-resident enterprise is taxable by the source country only where the enterprise carries on business in the source country through a permanent establishment ("PE") situated therein.⁵ Where a PE is found, the host country can tax an arm's length profit attributable to the PE,⁶ i.e., the profits which the PE "might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a PE".⁷ In contrast, without a PE, an occasional sale without any local business premise will not trigger a tax liability in the country of import.

A trading agency obviously is in the grey area, and from a policy perspective it is not intuitively

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² For a brief history, see Klaus Vogel, *Double Taxation Conventions* (hereinafter 'Vogel'), Introduction, marginal note 17-23.

³ OECD, Model Tax Convention on Income and on Capital ("the OECD Model"), art. 5(1).

⁴ OECD Model, art. 5(2).

⁵ OECD Model, art. 7(1).

⁶ OECD Model, art. 7(1).

⁷ OECD Model, art. 7(2).

clear whether a supplier should be taxed in the country of import. Indeed, the tax treaties incorporate this uncertainty, and a trading agency may or may not trigger host country taxation on the foreign supplier, depending on the specific content of the agency arrangement. Applying the definition of a PE as a fixed place of business, a trading agency by itself would not constitute a tax nexus because the supplying enterprise does not have its own fixed place of business in the country of import. Tax treaties however, expand the scope of a PE by incorporating a so called dependent agent PE. Namely, an enterprise is deemed to have a PE if a person, acting on behalf of the enterprise, has and habitually exercises an authority to conclude contracts in the name of the enterprise.⁸

At the time of entering into a trading agency arrangement, international traders must consider the tax implications of the agency. More specifically, they must find out whether the planned form of agency will be considered a PE and subject them to host country income taxation, and, if a PE is found, what their tax exposure would likely be. Parts II and III of this paper respectively addresses these issues. Unfortunately for an international tax planner, the paper will show that the scope of a dependent agent PE is not quite clear, and sometimes such a PE may be found even before forming a trading agency. In particular, it will show that the concept of a dependent agent PE differs widely among countries, which arguably reflects the innate instability of the concept. In particular courts and tax administrations in many countries interpret the notion of an authority to conclude a contract drastically differently from what it sounds, because, as argued herein, a literal reading of the phrase would make the PE clause meaningless or irrelevant. Regarding the second issue of taxable income arising after finding a PE, an international tax planner will also find that the amount of income to be taxed by the host country may be a baffling issue, as argued in this paper.

II. Elements of Dependent Agent PE

The concept of agency PE came into being concurrently with the basic notion of PE as a place of management, a branch, an office, a factory or another fixed place of business. The agency test has been a part of the PE concept since its inception in Prussia in the 1890s,⁹ because a contract-concluding authority is sufficient to bind a foreign principal.¹⁰ From the contract law perspective, acting via an agent is not any different from the principal's own conduct. As currently drafted, article 5(5) of the OECD Model provides as follows:

[W]here a person -- other than an agent of an independent status to whom paragraph 6 applies -- is acting on behalf on an enterprise and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the enterprise, that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.¹¹

Article 5(6) of the OECD Model further states as follows:

An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their businesses.¹²

The definition of an agency PE thus has four elements that (i) a person has an authority to conclude contracts in the name of the principal, (ii) such authority is beyond the negative list of the activities

⁸ OECD Model, art. 5(5).

⁹ For a history of the agency PE, see Skaar, Permanent Establishment (hereinafter 'Skaar'), 471-9 (1991).

¹⁰ 1963 OECD Model Commentary 14, on art. 5.

¹¹ OECD Model, art. 5(5).

¹² OECD Model, art. 5(6).

test, (iii) the person regularly exercises such authority, and (iv) the person is not an independent agent acting in his ordinary course of business.

II.1. Person v. Agent

Before discussing the four elements of the agency test for finding a PE, a very common misunderstanding must be cleared up regarding the personal scope of the agency PE. The subject of article 5(5) of the OECD Model is not an 'agent' but a 'person'. The common sense parlance of 'dependent agent PE' is actually a misnomer, because a principal/agent relationship is not necessary to find a PE under articles 5(5) of the OECD Model.

The common usage of international taxation is to abbreviate an article 5(5) PE as a 'dependent agent'¹³ as compared to an 'independent agent' not being a PE under article 5(6). Unfortunately, this abbreviation tends to create the misconception that a principal/agent relationship is necessary to find a PE under article 5(5) of the OECD Model. For example, tax literature addresses whether a partner, being an agent by operation of law, could be included in the concept of a PE.¹⁴ Likewise, administrative rulings in many countries address whether an apparent agency suffices to find a dependent agent PE.¹⁵ These are wrong questions. It is not necessary to rely on the statutory or common law notion of such presumed or apparent agency for finding a PE if the aforementioned four requirements are met. The OECD Model does not require that a person be an agent to constitute a deemed PE of the foreign supplier.

One can easily point that article 5(5) of the OECD Model requires that a person must have an authority to conclude contracts in the name of the enterprise, and thus an agency in the contract law sense is required to find a PE. Nevertheless, this is not always the case. First, in the real world treaties and also in the United Nations Model, the so called agency PE covers an "agent who fills orders" or an "agent who makes deliveries"¹⁶. Obviously, the term "agent" there is not an agent in the sense of contract or agency law¹⁷. Filling order or making delivery is mere factual activities and is different from concluding a contract. Such an act is not a legal act, *Rechtshandlung*, or a *Willenserklärung* in the jargon of the civil law system, and a person who fills orders or makes deliveries cannot be an agent in the contract or agency law sense of the word. This point can also be found in the OECD Model Commentary itself, which regards a distributor as a sub-set of agents; The Commentary calls a person who "sells the goods or merchandise of the enterprise in his own name" a commission agent.¹⁸ Obviously, in the more widely accepted parlance of international business, such a person would be called a distributor, who is not an agent in the contract law sense of the word.

Secondly and even more importantly, as discussed later, tax administrators and courts in many nations interpret the 'authority to conclude contract' quite differently from what it implies. In the tax practice of the United States, an agent's authority to sign a contract is not considered an authority to conclude a contract if the agent merely accepts orders under pre-determined conditions.¹⁹ If signing a contract, or a legal act or *Rechtshandlung*, does not necessarily mean an authority to conclude a contract, what can the authority mean at all? It can only mean a factual behavior, which would

¹³ See e.g. OECD Model Commentary 32 on art. 5.

¹⁴ See generally, Leongard, *Tax treaties, Partnerships and Partners: Exploration of a Relationship*, 29 Tax Law. 31 (1975).

For U.S. case law, see *Donroy Ltd v. United States*, 196 F. Supp. 54 (N.D. Cal 1961), aff'd, 301 F. 2d 200 (9th Cir. 1962)

¹⁵ Skaar 498-502.

¹⁶ UN model art 5(5)(b)

¹⁷ Williams, *Permanent Establishments in the United States*, in *Income Tax Treaties* 287 (J. Bischoff ed., 1978) (hereinafter 'Williams

'). Williams comments that such an "agent" may actually be an employee. Id. It may, however, be a contractor as well.

¹⁸ OECD Commentary 37 on art 5.

¹⁹ See *infra* II.4.

somehow justify host country taxation on the foreign supplier. As a good example, an early ruling of the German supreme Court²⁰ established that an agent (Staendiger Vertreter) for purpose of the agency test does not necessarily mean an agent in the sense of agency law. Regarding the contemporary tax practice, commentators opine that the existence or lack of the authority to conclude a contract "must be decided not only with reference to private law but must also take into consideration the actual behavior",²¹ and what is decisive for art. 5(5) is the substance of the authorization, not its form.²²

Given that the expression of 'dependent agent' is widely in use, for convenience, this paper will also use the same expression hereinafter. This usage, however, assumes that the meaning of 'agent' here does not necessarily mean an agent in the sense of contract or agency law, who represents a principal in concluding a contract with a third party, or in Willenserklärung (expression of will) in civil law terms. The term "agent" as used in the agency test should not only include the agent in the agency law sense, but corporate directors, employees, distributors, contractors, or any other person if he or she satisfies the treaty requirements for finding a PE.

II.2. PE v. Independent agent

Although the concept of "agent" covers factual business relationship, not every person involved between the foreign enterprise and a third party should make a PE. "A broker, general commission agent or any other agent of an independent status does not make a PE "provided that such persons are acting in the ordinary course of his business".²³ A commentator argues that the distinction between dependent and independent agents is meaningless because an independent agent is not an agent²⁴. This argument cannot be supported because it assumes that the term "agent" means an agent in the agency law sense. The key to the distinction is (i) dependence versus independence, and (ii) the ordinary course of business. Employees and directors of foreign corporations will obviously be considered dependent²⁵. It is not necessary to detail the concepts of "broker" or "general commission agent" because they are mere examples of an independent agent.

Dependence means merged interest. In essence, as argued by Skaar, an agent is dependent if its business interest merges with the principal's,²⁶ because such an agent would achieve what the principal itself would have achieved if it had its own place of business in the host country. The principal would be in a very different situation if an agent pursues its own interest. Whether the agent's interest merges with or is independent from the principal is a factual judgement, which goes beyond a mere legal obligation, and thus the OECD Model Commentary states that a person is independent only where he is so both in legal and economic aspects²⁷. Arguably, this comment should be understood to mean that independence exists where an agent is legally permitted to pursue its own business interest and in economic substance actually pursues it.

II.2.1. Legal or Economic Dependence:

Where an agent is legally proscribed from seeking its own interest, the role of the agent would be the same as the principal's own business place. An agent is dependent if the agent is legally prohibited from pursuing an interest conflicting with the principal's. The Commentary on the 1963 OECD

²⁰ RFH in RStBl 54 (1930).

²¹ Vogel, marginal note 140 on art. 5.

²² J. F. Avery Jones and D.A. Ward, *Agents as Permanent Establishments under OECD Model Tax Convention*, British Tax Review 341 (1993), at 353.

²³ OECD Model, art. 5(6).

²⁴ Nitikman, *the Meaning of Permanent Establishment in the 1981 US model Income Tax Treaty*, 15 Int'l Tax J. 257,261.

²⁵ OECD Model Commentary 36 on art 5. Also see Skaar at 504, arguing, "employment will without exception suffice for the dependence test."

²⁶ Skaar, 503-514 in particular at 513

²⁷ OECD Model Commentary 37 on art 5.

Model states that a PE can be found only where an agent is dependent legally as well as economically,²⁸ but this interpretation cannot be supported, because an agent may in fact perform the same role as the principal's own business even without legal obligation to do so. As a result, the current Commentary on the OECD Model states that a person is independent only where he is so 'both legally and economically'.²⁹ Arguably the Commentary reference to 'economically' is a too narrow term. To reformulate it, an agent is independent only where he has no legal restriction on pursuing his own interest and actually pursues it in reality.

II.2.2. Legal Dependence

An agent may be legally prohibited from pursuing his own interest potentially conflicting with the principal's. An outright form of such dependence is the contractual covenant or statutory obligation of non-competition, although the OECD Model Commentary is silent on this. In Rev. Rul. 70-424 (concerning the I.R.C. concept of trade or business within the U.S.), an agent was ruled dependent because he was subject to non-competition covenant and territory restriction³⁰. Before imposing a non-competition obligation on a trading agent or another sales intermediary, an international tax planner would thus have to weigh the business importance of the obligation vis-a-vis the tax risk.

Second, if the agent is "subject to detailed instructions or to comprehensive control by [the principal], the agent cannot be regarded as independent"³¹. Such an agent is tantamount to an employee, and would not be able to pursue its own interest conflicting with the principal's. The Commentary reference to the 'detailed instruction or comprehensive control' does not necessarily mean that the principal interferes with the day-to day business of the agent. Arguably, even if a principal never sends an "instruction" or otherwise factually controls the agent in its handling of the principal's business, the agent should still be considered dependent if it is contractually bound not to pursue an interest conflicting with the principal's³². The only reasonable way to understand the Commentary reference to 'detailed instructions or comprehensive control' is that they would prevent the agent from pursuing an interest conflicting with the principal's.

Even where business considerations necessitate instruction and control, a supplier may still be possible to avoid the PE, by a careful analysis of the statute and the case law of the host country. For example, in the United States case of *de Amodio*³³, an agent (trustee of a grantor trust) was obligated to obtain the consent of the principal (grantor and beneficiary) for the sale, establishment of security interest, or improvement of the real property. Yet the Tax court held that the agent was independent.

II.2.3. Economic Dependence

Even without any non-competition obligation or a direct control by the principal, as a matter of economic reality, an agent may well be unable to pursue its own interest. Dependent agency can still be found by looking at "whether the entrepreneurial risk has to be borne by the person or by the enterprise the person represents".³⁴ A cost reimbursement contract would be an example under which an agent, like an employee, does not have his own risk. A distributor, on the other hand, that buys goods from an overseas supplier and re-sells them to a buyer is independent from the supplier

²⁸ 1963 OECD Model Commentary 15 on art. 5.

²⁹ OECD Model Commentary 37 on art. 5. Skaar at 506.

⁷ argues that the 1963 Commentary was a mistaken expression and the real intent was not different from the 1977 model.

³⁰ Revenue Ruling 70-424, 1970-2 C.B. 150 superseding GCM 21219, 1939-1 CB 20.

³¹ OECD Model Commentary 38 on art 5

³² In Rev. Rul 55-282, 1955-1 CB 634, an agent was ruled a PE even though he had discretionary power in handling the business for the principal.

³³ 34 T.C. 894 (1960),aff'd, 299 F. 2d 623 (3d Cir. 1962)

³⁴ OECD Model Commentary 37 on art 5.

and in general should not create an agency PE.

Consignment sale is a more difficult issue. Apparently, a consignee is not considered a dependent agent in many OECD member countries³⁵. In Rev. Rul. 63-113³⁶ and 76-322³⁷ and a number of private letter rulings³⁸, the United States I.R.S. also ruled that a consignment arrangement does not create a PE. In *Handfield*,³⁹ however, the Tax Court found an agency PE from a consignment sale arrangement. In *Handfield*, a Canadian card manufacturer shipped its products (postal cards) to a U.S. consignee for sale to U.S. consumers. The consignee had no obligation to buy the products remaining unsold. The unsold products were returned to the supplier at the supplier's expense. Retail price was set by the supplier. Although the cards were sold to the consumers in the name of the U.S. consignee, the court characterized the relationship between the supplier and consignee not as a sale but as an agency for contract law purpose.⁴⁰ Apparently, distinction between *Handfield* and the I.R.S. rulings appears to have been that the U.S. consignees in the latter cases bore substantial risk.⁴¹

From the perspective of international tax planning, a supplier would face a dilemma between the agent's loyalty and the tax risk, in that predominance of a particular principal in the agent's business may well imply economic independence resulting in a PE. Interpreting the substantively identical language of agency test under the Korea-German treaty⁴², the National Tax Administration of Korea ruled that the nature of the transaction must be reviewed to find whether (i) the agent primarily works for a particular overseas supplier, and (ii) the supplier gives instructions on the details of the transaction. Paying attention to the number of principals is not unprecedented. Under the U.N. Model, an agent who is working for a single principal but is otherwise independent is deemed to be dependent.⁴³ Even under the OECD-based treaties, Williams uses the number of principals as a criterion.⁴⁴ The I.R.C. also considers whether an agent is working exclusively for particular principals.⁴⁵ The predominance of particular principals is likely to make the agent "be bound - though not legally but, at any rate factually - to obey his principal's instructions to the same degree as an employee and consequently to be regarded as being a dependent agent".⁴⁶

II.3. Ordinary Course of Business

As clarified so far, the tax-safest way for a supplier would be to find an agent who already has a considerable amount of business (potentially including a competitor's product) and to enter into a contract that would permit the agent to maintain quite a discretion in handling the supplier's business. Another requirement for avoiding a PE would be not to negotiate a special arrangement with the agent, because even "a broker, general commission agent or any other agent of an independent status" would lose their immunity unless they are "acting in the ordinary course of their business".⁴⁷

The service by the agent must remain within the ordinary course of business, by reference to the normal custom in the line of business.⁴⁸ For example, German court ruled that, if the business of an

³⁵ See Skaar, 318

³⁶ 1963-1 CB 410 (Canadian Treaty)

³⁷ 1976-2 CB 487 (Austrian Treaty)

³⁸ PLR 77-49-009; 78-16-031; 83-18-010

³⁹ 23 TC 633, 1955

⁴⁰ The court did not even examine the source rule argument raised by the taxpayer.

⁴¹ Klaus Vogel, Harry A. Shannon, III, Richard L. Doernberg, Kees van Raad, United States Income Tax Treaties (loose leaf; hereinafter "Vogel et als") Pt. II Commentary A.1. on art 5(5) footnote 3. Skaar, however, argues that the *Handfield* agent was independent. Skaar at 476.

⁴² Kukjo 1260. 1-3223 of July 7, 1979.

⁴³ UN Model, art 5(7). UN Model Commentary 73

⁴⁴ Williams at 298

⁴⁵ Regs 1.864-7(d)(3)(iii)

⁴⁶ Vogel, marginal note 170 on article 5.

⁴⁷ OECD Model, art. 5(6).

⁴⁸ Vogel, marginal note 172 on art. 5.

agent is primarily the sale of merchandise in his own name, he is no longer acting in the ordinary course of business if he also distributes goods in someone else's name and for that person's account.⁴⁹ The adjective 'their' in the 'ordinary course of their business' does not mean that a PE issue could be avoided by what a particular agent has been doing over time. On the other hand, in an Australian decision, a share dealer, whose clients were primarily institutional investors, had also acted on behalf of a private investor, and an administrative tribunal found a PE.⁵⁰ All these would mean that a supplier needs to find out what are the regular business practices are in the industry as well as the particular agent's individual business.

II.4. Authority to Conclude Contracts

Most importantly from a tax planner's perspective, an "authority to conclude contracts"⁵¹ is necessary for finding a dependent agent PE. The authority, however, does not have to be a full authority to represent the principal in all business. It is sufficient that an agent has an authority to conclude contracts in a particular area of the principal's business.⁵² Even the pre-OECD requirement of "general authority"⁵³ was not interpreted as an unfettered authority. Thus, in Rev. Rul. 55-282,⁵⁴ the I.R.S. found a PE of a Canadian corporation where the agent's authority was limited to purchase and sale of securities. Authority limited to particular business purposes will be sufficient to find a PE unless it is limited to the negative list activities listed in article 5(4) of the OECD Model.

A tax planner will be tempted to take advantage of the requirement of contract-concluding authority as an element of PE; A supplier would be able to engage a local intermediary in the host country, who would consummate all the business, but would still avoid a PE status by relaying the finished arrangement to the supplier without signing the contract. This may well be true in many cases, especially if the host country follows a strict or literal approach in interpreting tax statutes or a treaty.

To the woe of a tax planner, however, the authority to "conclude" a contract as a requirement for finding a PE, often does not exactly mean what it sounds. An agent who only has the signing authority but not negotiation authority is often considered to lack the authority to conclude a contract. The issue of an agent who works under fixed terms and conditions of a contract has not been well settled under the OECD based treaties⁵⁵. The pre-OECD treaties entered into by the U.S. typically required both negotiation and contract conclusion for the agency test⁵⁶. In contrast, the language of the OECD model does not require negotiation. Nevertheless, Williams states that "traveling salesmen and other itinerant persons having a mere clerical power to accept orders at fixed prices and on pre-set terms should not constitute dependent agents under either the older or the OECD definition of a dependent agent"⁵⁷. Rev. ruling 55-282⁵⁸ also implied that an agent does not constitute a PE if the terms and conditions of the contract are exclusively set by the principal.

Once it is admitted that the "authority to conclude a contract" does not mean legal activity of signing a contract, it must mean a factual behavior. Moreover, if the authority were to be construed literally, it would become effortlessly easy to circumvent the PE rule as seen above. Accordingly, in interpreting the German domestic law language of "Abschlussvollmacht", German court⁵⁹ ruled that the agency PE does not require an act to conclude a contract (Rechtshandlung), and a factual act (tatsaechlichen

⁴⁹ FG Koeln, 42 EFG 138 (1994), indirectly cited from Vogel, marginal note. 172 on art. 5.

⁵⁰ Australian Administrative Appeals Tribunal, 26 ATR 1056 (1993), cited from Vogel, Id.

⁵¹ Note that this requirement would be redundant had the term "agent" be understood in the agency law sense.

⁵² Williams at 288. Also see Skaar at 497-8. The scope of "attributable income" is a separate issue.

⁵³ E.g., U.S. treaties with U.K. (1945), art II (1)(1); Denmark (1948), art II(1)(c); Norway (1949), art II(1)(c)

⁵⁴ 1955-1, CB 634 (Canadian Treaty)

⁵⁵ Skaar at 494

⁵⁶ E.g., U.K. treaty (1945), art II(1)(c); Denmark treaty(1948),art II(1)(c); Norwegian treaty (1949), art II(1)(c);see

Jan Casimir Lewenhaupt, 20 T.C. 151 (1953) (Swedish Treaty)

⁵⁷ Williams, at 290

⁵⁸ 1955-1 C.B. 634 (Canadian Treaty)

⁵⁹ BFH in BStBl 1971 II 776 cited from Skaar 493

Handlungen) may create an agency PE. Accordingly, the notion of the contract-concluding authority unavoidably shifts to factual activities performed by agents, e.g., negotiating with potential buyers. Indeed, under the OECD Model Commentary, the contract concluding authority is interpreted to include not only the authority to sign a contract but also the authority to negotiate all elements and details of a contract in a way binding on the enterprise⁶⁰. Of course an obvious difficulty with this interpretation is that a principal is never bound by what the agent does, unless and until the agent enters into a contract on behalf of the principal. There cannot exist anything like "an authority to negotiate all elements and details of a contract in a way binding on the enterprise", if it does not mean the authority to sign a contract or enter into a *Rechtshandlung* on behalf of the principal.

The notion of the authority to conclude a contract thus loses its private law meaning and becomes a technical concept only serving to define what scope of factual activities create a PE, a matter of country practice. The I.R.S. denied the existence of a PE where a marketing agent did not have pricing authority and had no right to accept or reject orders.⁶¹ Likewise, rulings in several countries held that mere solicitation and negotiation is insufficient to find a PE.⁶² In the meanwhile, developing countries typically attempt to find a lower threshold for finding a PE, but the expression "to conclude contracts"⁶³ makes it difficult to argue that any participation in negotiation creates a PE. The language suggests that something more is necessary.⁶⁴ One commentator thus argues that "a PE should be deemed to exist where it may be presumed that the agreement negotiated by the agent will be accepted by the enterprise".⁶⁵ "If the enterprise routinely accepts and signs contracts negotiated by the agent, the requisite authority should be deemed to exist".⁶⁶

Nevertheless, it is difficult to emphasize the routine expectation of the principal's signing the contract, given that the agent's own act of signing the contract does not necessarily constitute a PE. If finding a PE must rely on the factual conduct rather than private law authority of agency, the tax significance of the factual conducts must be evaluated not by its resemblance to the private law of agency but by the economic importance of the conducts. In *Dutch Insurance 1971*⁶⁷ the Dutch Supreme Court held that an agent who was not authorized to negotiate the terms of the contracts constituted a PE, despite the express provision of the treaty that an agent should be authorized to "negotiate and conclude" contracts. Apparently, the term "authority of negotiation" was not interpreted as a power to modify the terms and conditions of the contract. "Negotiation" in the court's understanding meant the process of locating and contracting potential customers and persuading them into executing the contract. The fact that the terms of the contract could not be compromised was immaterial.

In sum, finding the "authority to conclude contracts" may become an entirely subjective judgement about the economic significance of the activities that an agent or another intermediary renders. Arguably a person working for a foreign enterprise can be considered as having such authority if it locates, contacts, and persuades the client into a contract, regardless whether the agent is authorized to modify preset conditions or sign the contract. If an "authority to conclude contracts" can be found wherever a person in the host country, from a commercial judgment, materially contributes to concluding the contracts, the scope of the contract-concluding authority would easily become an amorphous concept.

⁶⁰ OECD Model Commentary 32 on art 5. This interpretation also supports the expanded concept of the agent. In the agency law sense, an agent by definition has authority to conclude a contract.

⁶¹ Priv. Ltr. Rul. 81-31-059.

⁶² *American Wheelabrator and Equipment corporation v. M.N.R.*, in Can Tax App Bd 345 (1951); Norwegian ministr y of finance in utv. 1972 at 518 dealing with art 6(3) of DTA Norway -Denmark 1957 cited from Skaar at 491; Conseil d'Etat of July 25, 1980 (Req. no. 11. 535) reprinted in Edwardes-Ker, *The International Tax Treaties Service* 34.5011 on art. 5.

⁶³ OECD Model, art5(5); US Model, art; Treaty,art 9(4)(a)

⁶⁴ Vogel et als, at A.1. on art 5(5)

⁶⁵ Id.

⁶⁶ Id. Also see Nitikman, supra note 24, at 264; Skaar at 492

⁶⁷ Hoge Road in BNB (1971/43) cited from Skaar at 496

II.5. Habitual Exercise of Authority

To constitute a PE, the agent must “habitually” exercise the authority to conclude contracts⁶⁸. The difference between the words “habitual” used in the model treaties⁶⁹ and “regular” in some treaties does not make a difference⁷⁰. The concept of regular or habitual exercise means that the agent exercises the authority “repeatedly and not merely in isolated cases”⁷¹. The issue is how often and how long. International tax literature points out that a general rule cannot be established⁷². It would thus again be a matter of case-by-case analysis.

III. Taxable Income for Dependent Agent' PE

Our analysis so far has shown that the tax threshold of dependent agent PE is very ambiguous and case-specific, and an international tax planner will have to review the statutes, case law and the administrative practices of each host country. Once a local agent or another sales intermediary is found to constitute a PE of a foreign supplier, the next task is to determine the amount of taxable income attributable to the PE. Once again, country practices could be very different.

III.1. All Income from PE-attributable Transactions

In the United States and many other countries apparently, income taxed to a PE is determined by i) identifying all the sales transactions attributable to the PE and ii) taxing all the sales profits from the transactions, although this Part III.1 confines its analysis to the United States rules. In the United States, a complex interaction among many provisions of the Internal Revenue Code and a tax treaty achieves this result, and a PE is taxed on the entire amount of sales profit from the transactions, once it is found that the PE participated in soliciting the order, negotiated the contract of sale or perform other significant services for consummating the transaction.

Subject to treaty limitation, the amount of taxable income for a foreign corporation is defined by the Internal Revenue Code (I.R.C.). Where a non-resident taxpayer, including a foreign supplier, is subject to United States taxation on a net basis, the amount of taxable income is defined by the concept of effectively connected income.⁷³ Income effectively connected with the conduct of trade or business in the United States is taxable on net basis, while income not so connected is taxed on gross basis or not taxed at all. A particular flow of 'fixed or determinable annual or periodical' (FDAP) income may or may not be included in effectively connected income depending upon the assets/activities test,⁷⁴ i.e., by asking whether the income is "derived from assets used in or held for use in" the conduct of trade or business, or whether "the activities of such trade or business were a material factor in the realization of the income".⁷⁵ For non-FDAP income, however, the I.R.C. maintains the residual force of attraction, and subjects non-FDAP income to net basis taxation if it is sourced within the United States.⁷⁶

Where the taxpayer is resident in a treaty country, however, the treaty overrides the I.R.C. A treaty concept of PE is a higher threshold than the United States trade or business, but for our purpose it suffices that a dependent agent PE under a treaty will necessarily be a trade or business under the

⁶⁸ Treaty, art 9(4)(a)

⁶⁹ OECD Model art 5(5); U.S. Model, art 5(5)

⁷⁰ Vogel, marginal note 151 on art. 5 Contra, H. Debatin and O.L. Walter, Handbook on the United States-German Tax Convention (looseleaf) at B II para. 79, expressing the view that the term “regularly” requires a comparison of the activities with other business of the agent.

⁷¹ OECD Model commentary 31 on art 5

⁷² Nitikman, *supra* note 24, at 262

⁷³ I.R.C., Sec. 871(a)(1); 881(a)(1).

⁷⁴ I.R.C., Sec. 864(c)(2).

⁷⁵ I.R.C., Sec. 864(c)(2).

⁷⁶ I.R.C., Sec. 864(c)(3).

I.R.C..⁷⁷ In *Lewenhaupt v. Comr*, a Swiss principal was ruled to have U.S. trade or business (real estate business) because his agent had power of attorney to buy, sell, lease, and mortgage three pieces of real estate for and in the name of the principal. In *de Amodio*,⁷⁸ it was held that an independent agent (which does not constitute a PE) is sufficient to make a U.S. trade or business of the principal.

Our concern here is the taxable income of a PE, in that the OECD Model permits a host country to tax a PE of a foreign supplier on 'only so much [profits] as is attributable to that PE'.⁷⁹ This treaty rule of attribution overrides the I.R.C. residual force of attraction, and net basis tax will apply only for such income as attributable to a PE in the United States.⁸⁰ Revenue Ruling 81-78 addresses the relation between the I.R.C. concept of effectively connected income and the treaty rule of attribution to a PE. In this case, a Polish corporation had a PE in the United States, and its home office was directly selling a second line of products to the United States buyers. Although the latter income was sourced within the United States, the profits from such sale was not taxed in the United States, because the profits were not attributable to the PE.

Once the scope of PE-attributable transactions is determined, however, the amount of taxable income from such transactions is again defined by the I.R.C. concept of effectively connected income, which in turn depends on the source rule. Being non-FDAP income, inventory sales profits will be taxed to a PE to the extent they are sourced within the United States.⁸¹ The source rule distinguishes between i) a purchase and sale and ii) a production and sale transactions.

For purchase and sale case where the foreign supplier is not the producer of the inventory that it sells to U.S. buyers, the I.R.C. assigns United States source to the entire amount of the sales profits to the extent the sales transactions are attributable to a PE. The regular rule for sourcing inventory sales profit is the title passage rule,⁸² but this creates the possibility that a transaction which is attributable to a PE (and thus can be taxed under a treaty) may generate foreign source income not taxable in the United States. To close this gap, in 1966 when the I.R.C. switched from the force of attraction to the attribution or modified force of attraction rule, the I.R.C. incorporated a complementary rule of including PE-attributable income in the scope of effectively connected income. To this end, the I.R.C. defines the "office or other fixed place of business" ("FPB"), similar to the treaty concept of PE.⁸³ The FPB includes an agent, in a way identical to the treaty concept of dependent agent as a subset of a PE⁸⁴. Once a FPB or a PE is found, the I.R.C. re-sources inventory sales profit to the FPB if the profit is attributable to the FPB,⁸⁵ and includes it in the concept of effectively connected income⁸⁶. Moreover, in case such sales profit attributable to a dependent agent PE or FPB is foreign sourced for any reason, the I.R.C. directly includes in the effectively connected income.⁸⁷ In sum, in the purchase and sale case, the entire amount of sales profit is taxable to the dependent agent, as long as the sales transaction is attributable to a FPB or a PE. The last question then is the scope of transactions attributable to the dependent agent FPB. Of course, profits from a sale through a dependent agent will be attributable to the agent, because the I.R.C. uses the "material factor test",⁸⁸

⁷⁷ *Lewenhaupt v. Comr*, 20 T.C. 151 (1953), aff'd 221 F. 2d 227 (9th Cir. 1955). *Chang Hsiao Liang v. Comr*, 23 T.C.

1040 (1955), however, held that a non-resident alien whose securities were managed primarily for investment purposes by a resident commission agent was not engaged in trade or business within the U.S..

⁷⁸ 34 T.C. 894 (1960), aff'd, 299 F. 2d 623 (3d Cir. 1962)

⁷⁹ OECD Model, art. 7(1).

⁸⁰ Rev. Rul. 81-78, 1981-1 CB 604.

⁸¹ I.R.C. Sec. 864(c)(1)(A), (c)(3).

⁸² I.R.C. Sec. 864(a)(6).

⁸³ I.R.C. Sec. 864(c)(4)(B). Also see Sec. 887.

⁸⁴ I.R.C. Sec 864(c)(5)

⁸⁵ I.R.C. Sec 865(e)(2)

⁸⁶ I.R.C. Sec 864(c)(3)

⁸⁷ I.R.C. Sec. 864(c)(4)(B)(iii).

⁸⁸ I.R.C. Sec. 865(e)(3), 864(c)(5)(B)

which ultimately depends on the FPB's "participation in soliciting the order, negotiating the contract of sale, or performing other significant services necessary for the consummation of the sale".⁸⁹

Where the foreign supplier sells goods that it manufactured in a foreign country, the I.R.C. splits the profits between the manufacture and sales portions using (i) the independent factory price ("IFP") method, (ii) the 50-50 property/sales formula, and (iii) exceptionally the taxpayer's own books. Priority among the methods is not clear, and the Internal Revenue Service once ruled and the courts accepted that the 50-50 split is available only where the IFP method is unavailable.⁹⁰ The current Treasury Regulation, however, makes the 50-50 split more a general rule than an exception.⁹¹ Under this formula, 50% of gross income is apportioned by property⁹² and the other 50% by sales.⁹³ For the goods produced outside the United States, the sales portion is sourced based on the malleable place of title passage.⁹⁴ The aforementioned FPB re-sourcing rule overrides the title passage rule, and the sales portion profits will be taxable in the United States.

III.2. Arm's Length Restriction

Arguably, taxing the entire amount of sales profit is not consistent with the arm's length principle, which would mandate that the host country taxable income commensurate with the amount of local activities rendered by the permanent establishment.

[W]here an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.⁹⁵

Nevertheless the Internal Revenue Service has the position that the I.R.C. rules already incorporate the arm's length principle adopted by tax treaties. In Rev. Rul. 78-423,⁹⁶ the Internal Revenue Service held that "the reference to [the arm's length principle] does not mean that the U.S. branch must be taxed as though it were a separate entity", and thus ruled that the IRC rules of apportionment must apply to a United States PE of a treaty country corporation. In Revenue Ruling 65-263, after finding a PE for soliciting in the United States, the Internal Revenue Service ruled that the U.S. source income of the PE should be determined under sections 861 through 864 of the I.R.C.. This in effect would mean United States taxation of all sales profits to the extent the sales are attributable to the PE's activities.

In the other extreme, it may be persuasively argued that a host country cannot tax any income beyond the commission that is already reported by the agent, because the commission itself is a result of an arm's length negotiation between the principal and the agent.

A host country may also try to find a middle ground between the two choices, and tax some portion of the supplier's income in addition to taxing the agent's commission. Unfortunately, between taxing the entire sales profit and taxing the commission, no point appears to exist for anchoring the scope of

⁸⁹ Reg. 1.864-6(b)(2)(iii).

⁹⁰ Rev. Rul. 88-73, 1988-2 CB 173; *Phillips Petroleum Co. v. Comr.*, 97 TC 30 (1991) (invalidating Reg. 1.863-1(b) and further holding that the IFP method should apply if available); T.D. 8228, Sep. 9, 1988.

⁹¹ Reg. 1.863-3(b)(1).

⁹² Property includes only that held or used to produce income in issue.

⁹³ Reg. 1.863-3(b)(1).

⁹⁴ Reg. 1.863-3(c)(2), 1.861-7.

⁹⁵ OECD Model, art. 7(2).

⁹⁶ 1978-2 CB 194, updated by Rev. Rul. 85-7, 1985-1 CB 188. Also see Rev. Rul. 89-115, 1989-2 CB 138, substantively updating Rev. Rul. 85-7.

the host country tax claim, and the result may be an arbitrary figure of tax liability somewhere in the middle of the road.

IV. Conclusion

As discussed so far, to the dismay of an international tax planner, the foreign tax exposure of exporting goods to another country is quite unpredictable, once the exporter begins to have a personal or physical connection in the host country. The international tax system as currently exists fails to offer a clear-cut answer, both in defining the tax nexus and the concept of taxable income once the nexus is found. Perhaps it is high time to review and reevaluate the concept of dependent agent, in connection with its apparent conflict with the arm's length principle.

LES JEUNES D'EUROPE DU SUD ET LA POLITIQUE.
UNE ÉTUDE COMPARATIVE : FRANCE, ITALIE, ESPAGNE
[Youth and Politics in Southern Europe: A Comparative Study in France, Spain and Italy]

ANNE MUXEL *

[Abstract]

This seminar presents some results from a comparative survey conducted in three major countries of Southern Europe, namely France, Spain and Italy. Are youth relationships and attitudes towards politics similar in the three countries? Does European citizenship exist among the new generations? *A contrario*, are there national characteristics and relevant differential political attitudes within those countries?

This study was part of a broader research program financed by the European Commission (1997-2000), <The Integration of Young People into Working Life and the Future of Democratic Culture in Southern Europe>. In all, 4273 young people, aged 18 to 30 years old, have been interviewed (1946 in Italy, 1418 in Spain, and 909 in France). In each country, the sample was divided into two subgroups: young students and young unemployed.

Three main points were developed and explored:

- Trust in political institutions
- Electoral choices
- Political involvement

Everywhere in Europe, the level of education is the most reliable predictive factor for explaining political attitudes and behavior. Particularly in France, there is a real cleavage differentiating young students, who are always more bounded to politics and more positive, and young unemployed who are more likely to develop dissatisfaction and resentment.

Political Institutions

With regard to the first point outlined above, perennial weakness of political institutions has been observed in the three countries surveyed. Even if Italians are relatively more confident and have more faith in institutions than do the Spanish and the French, Italians find politicians, political parties and trade unions less attractive than associations. A sense of European "belonging" is stronger among Italians, who mix more easily than others who are classified according to territorial identity – as in local, national or more generally European.

En Europe, les jeunes rencontrent la politique dans un contexte relativement nouveau par rapport à celui que connut la génération de leurs parents. Leur système de repérage politique est partiellement brouillé. Les grands clivages idéologiques ne sont plus aussi faciles à circonscrire que par le passé. Les oppositions binaires telles que les camps de l'est et de l'ouest, la gauche et la droite, le socialisme et la société de marché, la souveraineté nationale et l'intégration européenne, sont autant de repères qui ont éclaté. Le territoire d'action politique s'est considérablement élargi à l'échelle supranationale. La mondialisation est une réalité qui change la perception de l'utilité de l'action collective à l'intérieur d'un cadre strictement national. Le potentiel de mobilisation reste élevé, l'activisme politique est bien réel, notamment au sein de la jeunesse, mais il se structure à partir de logiques et d'enjeux relativement nouveaux. On assiste à une désinstitutionnalisation des modes d'engagement politique. Les jeunes se montrent de plus en plus distants par rapport aux organisations traditionnelles que sont les partis ou les syndicats. Les causes politiques spécifiquement nationales apparaissent plus en retrait face à la réalité mondiale des échanges, des liens, comme des conflits.

Cette conférence a pour objet d'interroger les formes actuelles du lien des jeunes à la politique, en

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comparant celles-ci dans trois pays représentatifs de l'Europe du sud, l'Espagne, la France et l'Italie. Les attitudes et les comportements politiques des jeunes dans les trois pays ont-ils des traits communs ? En quoi ceux-ci contribuent-ils à l'émergence d'une citoyenneté européenne ? A contrario, quels en sont les signes nationalement distinctifs ?

Cette recherche s'est inscrite dans un programme triennal, « The Integration of Young People into Working Life and The Future of Democratic Culture in Southern Europe » (1997-2000), financé par la Commission européenne. Au total, ce sont 4273 jeunes, âgés de 18 à 30 ans, qui ont été interrogés (1946 en Italie, 1418 en Espagne et 909 en France). Disposant pour chacun des pays d'un échantillon dichotomisé de jeunes étudiants et de jeunes chômeurs, l'enquête permet d'explorer les liens entre les positionnements sociaux et les positionnements politiques au sein de la jeunesse, et de mettre au jour des différences significatives, non seulement entre les pays, mais aussi selon les situations d'insertion sociale.

Les dimensions explorées par les questionnaires sont nombreuses et permettent de cerner les contours de l'expérience sociale et politique des jeunes aujourd'hui, d'une façon large et diversifiée. Dans le cadre de cette conférence, je m'attacherai à comparer les formes de leur implication citoyenne. Je développerai les trois points suivants :

- leur perception des institutions politiques
- leur participation électorale
- les formes de leur engagement collectif

Mais avant, certaines différences significatives quant à la situation d'insertion sociale des jeunes dans les trois pays doivent être notées, car elles ont une incidence importante sur la construction de leur rapport à la politique.

Partout en Europe, le niveau d'études est la variable la plus discriminante et la plus prédictive des attitudes et des comportements politiques au sein de la jeunesse. Et partout le chômage reste une réalité préoccupante. Mais selon les pays, il ne recoupe ni une même réalité ni un même vécu. En Italie, le diplôme protège moins bien du chômage qu'en France. Les jeunes restent néanmoins intégrés au système universitaire plus longtemps et la séparation entre l'univers étudiant et l'univers du chômage semble moins nette qu'en France. Les jeunes chômeurs français sont les moins diplômés et aussi les moins intégrés socialement et politiquement. Et l'on peut s'agissant de la France évoquer le risque d'une véritable fracture sociale au sein des jeunes générations.

L'allongement de la jeunesse ne prend pas tout à fait le même visage dans les trois pays. Si partout on assiste à une centralité de plus en plus prononcée de la famille, et particulièrement en Espagne et en Italie, ainsi qu'à une cohabitation juvénile prolongée, l'incidence de cette nouvelle situation sur la formation des attitudes et des comportements politiques des jeunes n'a pas les mêmes effets. De tous, ce sont les jeunes italiens qui se montrent les plus attachés à leur famille. Mais ce sont eux aussi qui se montrent les plus autonomes dans leurs opinions et dans leurs choix politiques. Ils reconnaissent moins fréquemment que dans les deux autres pays l'influence de leurs parents en la matière. Ce sont les jeunes espagnols qui de tous accordent à la famille la place la plus importante et qui développent un mode de socialisation relativement fusionnel. S'inscrivant dans une solide continuité générationnelle, ils se montrent assez fortement dépendants de l'influence politique et des jugements de leurs parents. Les jeunes français, bien que plus en retrait de la vie familiale, accordent à leurs parents un rôle prépondérant dans la transmission des options politiques et s'inscrivent eux aussi dans une certaine stabilité des positionnements idéologiques d'une génération à l'autre.

Venons en maintenant à leur rapport à la politique, et tout d'abord à leur perception des institutions politiques.

1. Leur perception des institutions politiques.

Invités à donner une note de confiance entre 1 et 10 à treize institutions différentes, les réponses des jeunes permettent d'établir une sorte de palmarès en fonction de leur confiance et *a contrario* de leur méfiance. De toute évidence, et bien qu'avec des intensités inégales selon les pays, les institutions référées à l'univers politique suscitent toujours plus de méfiance que les autres.

Les Italiens se distinguent par un taux de confiance toujours plus élevé, et sauf pour les médias, cette confiance reste toujours majoritaire. À l'opposé, les jeunes français sont de loin les plus réticents et les plus méfiants. Excepté les associations humanitaires, leur confiance est toujours plus négative que positive. Le niveau de confiance des jeunes espagnols s'établit généralement dans un positionnement intermédiaire.

De grandes différences apparaissent entre étudiants et chômeurs, les premiers se montrant toujours plus confiants que les seconds. Et ce sont tout particulièrement les jeunes chômeurs français qui se révèlent être les plus méfiants à l'égard de l'ensemble des institutions, une confirmation de la plus grande réserve qu'ils manifestent à l'égard de la politique.

Trois indicateurs synthétiques de confiance envers un certain nombre d'institutions ont été construits : un indice de confiance dans les institutions politiques, un indice de confiance dans les associations, et un indice de confiance envers les médias¹ (*tableau I*).

¹ Ces trois indicateurs ont été construits en agréant les notes de confiance données aux institutions correspondant à une même catégorie d'analyse. L'indicateur de confiance dans les institutions politiques agrège les notes de confiance dans le gouvernement, le parlement, les syndicats, le maire de la ville, les partis politiques. L'indicateur de confiance dans les associations agrège les notes accordées aux associations humanitaires et aux associations écologistes. Enfin l'indicateur de confiance dans les médias agrège les notes accordées à la télévision et aux journaux.

Tableau 1. Confiance dans les institutions politiques, dans les associations et dans les médias selon le positionnement gauche-droite (confiance élevée : notes de 7 à 10)

	Confiance dans les institutions politiques (notes 7 à 10)	Confiance dans les associations (notes 7 à 10)	Confiance dans les médias (notes 7 à 10)
Italie			
Étudiants			
Gauche	67	78	23
Étudiants droite	43	72	29
Indécis	51	76	23
Ensemble	57	76	24
Chômeurs			
Gauche	61	77	22
Droite	40	63	32
Indécis	47	64	29
Ensemble	53	71	26
Ensemble (n = 1946)	56	75	24
France			
Étudiants			
Gauche	45	58	17
Droite	31	25	26
Indécis	29	54	19
Ensemble	37	51	19
Chômeurs			
Gauche	17	41	14
Droite	31	32	19
Indécis	20	32	12
Ensemble	21	36	14
Ensemble (n = 908)	32	46	17
Espagne			
Étudiants			
Gauche	23	-	28
Droite	59	-	40
Indécis	40	-	33
Ensemble	34		31
Chômeurs			
Gauche	17	66	27
Droite	72	61	30
Indécis	37	59	33
Ensemble	34	62	28
Ensemble (n = 1418)	34	62	30

Dans les trois pays, ce sont les associations qui motivent la plus grande confiance, a fortiori lorsqu'elles portent leurs actions dans le domaine humanitaire. Les Italiens, qu'ils soient étudiants ou chômeurs, sont de loin les plus enthousiastes : les trois quarts d'entre eux (75%) leur accordent les notes de confiance les plus élevées (entre 7 et 10). Les Français sont nettement plus réservés puisqu'ils ne sont plus qu'une petite moitié à examiner pour le champ associatif un même score de confiance (46%), les chômeurs se distinguant par un net retrait (36% de bonnes notes seulement). Ne disposant des données que pour les jeunes chômeurs espagnols, il faut noter que si le niveau de leur confiance n'est pas aussi élevé que celui des Italiens, il reste néanmoins beaucoup plus optimiste que celui des Français dans la même situation (62% contre respectivement 71% et 36%).

Cette confiance envers les associations est toujours plus marquée parmi les jeunes se situant à gauche. Les associations écologistes sont nettement moins plébiscitées que les associations humanitaires et suscitent des opinions peu différenciées entre les étudiants et les chômeurs, sans doute parce qu'elles sont à mi-chemin entre le monde associatif et l'univers des partis politiques

vis-à-vis duquel ils se montrent très réticents.

En effet, les institutions politiques, – gouvernement, parlement, syndicats, partis politiques, maire –, n’entraînent à l’évidence pas la même adhésion que les associations. Bien que nettement plus positive de la part des jeunes italiens (56% de notes élevées), les jeunes français et les jeunes espagnols se caractérisent par une certaine défiance envers elles (respectivement 32% et 34% seulement de notes élevées). On ne note là encore aucune différence entre les étudiants et les chômeurs italiens et espagnols, en revanche les chômeurs français sont de très loin les plus méfiants de tous (seulement 21% de notes de confiance élevées). Si les instances représentatives les plus légitimées, comme le Parlement ou le Gouvernement ne sont pas les plus condamnées, en revanche les organisations politiques elles-mêmes, telles que les partis politiques et leurs élus, notamment le maire de la ville, font, dans les trois pays, généralement l’objet d’une plus forte méfiance.

En Italie et en France, les jeunes de gauche manifestent toujours plus de confiance envers les institutions politiques que les jeunes de droite, les indécis se situant souvent dans une position intermédiaire. Mais en Espagne, la confiance s’établit davantage dans le camp adverse et caractérise plutôt les jeunes se positionnant à droite.

Si les jeunes sont nombreux à regarder la télévision, en revanche ils n’en sont pas moins critiques à son égard ; ils montrent davantage de confiance envers la presse écrite, mais restent dans l’ensemble circonspects.

La confiance accordée aux médias est dans les trois pays relativement défailante. Les Espagnols sont en la matière les plus tolérants avec 30% de notes élevées, mais les Italiens et surtout les Français sont nettement plus en retrait (respectivement 24% et 17% seulement de notes élevées). On n’observe que peu de différences entre les étudiants et les chômeurs en Italie comme en Espagne, en revanche, les jeunes chômeurs français se distinguent une fois de plus par un niveau de méfiance particulièrement important (14% seulement de notes élevées).

Tableau 2. Confiance faible dans les institutions (notes de 1 à 4) %

	ITALIE (n = 1946)		FRANCE (n = 908)		ESPAGNE (n = 1418)		Ensemble (n = 4272)
	Étudiants	Chômeurs	Étudiants	Chômeurs	Étudiants	Chômeurs	
Le Parlement	30	40	41	54	37	44	37
Le Maire de la ville	37	36	51	66	52	46	46
Le Gouvernement	33	38	40	54	54	52	42
Les Syndicats	31	32	53	58	43	43	41
Les Partis politiques	44	48	71	75	63	58	65
L’Union Euro-péenne	15	19	38	58	-	36	26
Les associations humanitaires	5	6	12	20	13	-	9
Les associations écologistes	14	18	33	36	-	21	21
L’Église catholique	35	40	62	66	50	56	47
La télévision	43	39	62	51	42	46	46
Les journaux	24	25	20	19	18	28	22
La police	19	28	42	55	31	35	30
L’université	13	-	19	54	29	34	23

Les autres institutions, font l’objet de niveaux de confiance qui varient selon les pays. Les

ressortissants italiens sont de loin les plus confiants à l'égard de l'Union européenne (*tableau2*).

Les jeunes italiens se distinguent par des attitudes spécifiques, plus ouvertes et plus modulables. Les dispositions favorables qu'ils témoignent envers l'Europe les distinguent assez nettement de leurs voisins français et espagnols. Mais il s'agit moins d'une identité européenne que d'un système de multi-appartenances au sein duquel cohabitent différents types d'ancrages territoriaux : local, national et supranational. Leurs références aux territoires s'agrègent et s'emboîtent, alors qu'elles sont beaucoup plus exclusives et différenciées dans les deux autres pays. Mais en Italie comme en France, les jeunes chômeurs, et d'une façon particulièrement prononcée, les jeunes chômeurs français, sont toujours plus distants que les étudiants de toute identification supranationale. A contrario les étudiants français sont de loin les plus éloignés de tout sentiment d'appartenance locale.

La reconnaissance de l'Europe reste relativement élitiste et se trouve directement corrélée à un niveau d'instruction élevé. Malgré quelques signaux prometteurs, notamment parmi les jeunes les plus favorisés socialement et culturellement, l'identité européenne est encore dans les limbes. Le rapport des jeunes à leurs territoires d'appartenance relève d'une construction modulable au sein de laquelle l'Europe n'est toujours pas un espace de référence prioritaire. Bien que celle-ci fasse l'objet d'une plus grande proximité de la part des jeunes italiens que des jeunes français, l'Europe et ses institutions politiques ne sont pas encore investies d'une souveraineté qui puisse prendre le pas sur la nation.

Les Italiens sont aussi les plus confiants envers l'Église catholique, et encore aujourd'hui les plus pratiquants. En Italie, 35% des étudiants et 40% des chômeurs manifestent de la méfiance à son égard, mais en Espagne, c'est plus de la moitié des étudiants et des chômeurs qui se retrouve dans ce même cas, respectivement 50% et 56%. La France obtient le palmarès de ce qui apparaît comme une véritable crise de confiance : 62% des étudiants et 66% des chômeurs français reconnaissent leur défiance à l'égard de l'Église catholique, un indice supplémentaire de la perte d'influence de la religion catholique. En effet, dans l'échantillon, seuls 7% de jeunes se déclarent catholiques pratiquants (contre 27% des Italiens et 25% des étudiants Espagnols), 29% catholiques non pratiquants (contre 44% des Italiens et 41% des étudiants espagnols), tandis que 38% affirment être sans religion (contre seulement 10% des Italiens et 11% des étudiants espagnols).

La police fait l'objet d'une appréciation mitigée, équivalente à celle des institutions politiques représentatives, mais enregistre nettement moins de méfiance que les partis politiques. C'est en Italie, là encore qu'elle a la moins mauvaise image. C'est en France qu'elle suscite la plus grande méfiance, et notamment auprès des jeunes chômeurs. En Espagne, elle enregistre un niveau de confiance intermédiaire, mais dans l'ensemble plutôt favorable.

Pour finir, l'université enregistre plutôt des scores favorables, et une large majorité d'étudiants témoignent plutôt de leur confiance envers elle. Toutefois, des différences significatives apparaissent selon les pays. Les Italiens sont les plus satisfaits, viennent ensuite les Français, mais ce sont les Espagnols qui manifestent le niveau de confiance le plus faible.

2. Leur participation électorale

Il est très difficile de mener une comparaison des votes entre les trois pays, car le système partisan et l'offre électorale circonscrivent un contexte politique spécifique à chaque pays. J'ai néanmoins tenté de regrouper les partis et mouvements politiques présents dans les derniers scrutins de chacun des trois pays (élections législatives de 1997 en France, élections générales de mars 1996 en Espagne, et élections nationales de 1996 en Italie). J'ai ainsi différencié les partis d'extrême gauche et communistes, les autres partis de gauche, les partis de droite, les partis d'extrême droite, enfin les partis ou mouvements écologistes. Le regroupement est certes drastique et pose un certain nombre de problèmes, mais il permet de constater quelques différences significatives dans les choix

électorales des jeunes des trois pays. (tableau 3)²

Tableau 3- Votes aux dernières élections (%)

	Italie (n = 1946)			FRANCE (n = 908)			Espagne (n = 1418)		
	Etudiants	Chômeurs	Ensemble	Etudiants	Chômeurs	Ensemble	Etudiants	Chômeurs	Ensemble
PC-Extrême gauche	16	17	17	11	12	12	23	15	21
Partis de gauche	34	28	32	48	39	45	19	12	17
Partis de droite	16	17	16	24	30	26	33	28	32
Extrême-droite	19	12	17	-	4	1	-	-	-
Partis écologistes	5	6	6	7	9	8	2	1	2
Autres partis	5	9	6	3	2	3	10	21	12
Abstentions et votes blancs	5	11	6	7	4	6	13	23	15
Total (n = 4272)	100%	100%	100%	100%	100%	100%	100%	100%	100%

Si les votes de gauche apparaissent toujours majoritaires, selon les pays ils connaissent néanmoins des écarts significatifs. Les jeunes français sont les plus nombreux à voter à gauche, mais ni pour l'extrême gauche ni pour la gauche communiste. Celles-ci apparaissent nettement plus attractives pour les jeunes italiens et pour les jeunes espagnols (respectivement 17% et 21% contre 12% des jeunes français). Il faut souligner leur attrait tout particulier pour les jeunes étudiants espagnols ; près du quart d'entre eux déclarent avoir voté pour cette mouvance (23%). La droite classique est fortement présente au sein de la population espagnole étudiante (33% soit un tiers des étudiants espagnols ont voté en sa faveur), mais aussi parmi les jeunes chômeurs français (30%). Elle fait nettement moins recette auprès des jeunes italiens (16%) qui, en revanche, favorisent dans une large proportion les partis d'extrême droite (17%), et tout particulièrement les étudiants (une situation inverse de celle du cas français). On notera que la mouvance écologiste n'apparaît pas décisive, et ce dans les trois pays.

Par delà le vote, la façon dont se sont concrètement décidés les choix au moment de voter permet de préciser encore le rapport des jeunes à la politique. Qu'est-ce qui va le plus compter dans leurs choix ? Les idées du candidat, le parti auquel il appartient ou encore sa personnalité ? (tableau 4)

² Nous avons regroupé les partis de gauche et de droite de la façon suivante: sont comptabilisés à gauche, Extrême gauche, PCF, PS, pour la France, Rifondazione Comunista, PDS, Lista Dini, pour l'Italie, PSOE, IU, pour l'Espagne ; sont comptabilisés à droite le RPR, l'UDF, divers droite, pour la France, Forza Italia, CCD, CDU, Lista Panella, Lega Nord, pour l'Italie, PP, Bloque Nacionalista Galego, CIU, PNV, BNG, pour l'Espagne.

Tableau 4 - Ce qui a le plus compté pour choisir le candidat (% lignes)

	Personnalité du candidat	Idées du candidat	Programme et parti qui l'ont soutenu	Autres et sans réponses
Etudiants italiens				
Gauche	16	45	36	3
Droite	22	33	43	2
Indécis	24	21	44	11
Ensemble (n = 1352)	19	38	39	4
Etudiants français				
Gauche	6	63	31	-
Droite	15	50	35	-
Indécis	8	81	11	-
Ensemble (n = 609)	8	65	27	-
Etudiants espagnols				
Gauche	13	47	30	10
Etudiants droite	9	37	41	13
Indécis	20	20	33	27
Ensemble (n = 1065)	14	37	33	16

Partout les idées sont privilégiées mais ce sont les étudiants français qui y sont de loin les plus attachés : les deux tiers d'entre eux répondent que ce sont les idées qui emportent leur décision (65% contre 38% des étudiants italiens et 37% des Espagnols). Ces derniers accordent davantage d'importance que les Français aux programmes des partis politiques (respectivement 39% et 33% contre seulement 27%). Ces chiffres sont révélateurs du fait que la politique n'est ni désinvestie d'enjeux, ni non plus d'une certaine façon d'idéologie. La personnalisation de la politique, bien qu'un peu plus présente dans les réponses des jeunes espagnols et des jeunes italiens, ne semble concerner qu'une minorité (19% des italiens, 14% des espagnols et seulement 8% des français). L'image des partis politiques eux-mêmes, pourtant décriés et tenus à distance, semble plus efficiente que les atouts liés à la personnalité de tel ou tel candidat.

3. Les formes de leur engagement collectif

On observe dans tous les pays européens un élargissement de l'action politique, les formes protestataires y bénéficiant d'une légitimité de plus en plus grande. Les jeunes européens se retrouvent dans une même quête de démocratie directe, développant un même besoin d'élargissement et de diversification du répertoire d'actions politiques, notamment par la mobilisation collective. Ils privilégient l'initiative autonome et souvent spontanée des individus ou des groupes, entretenant une certaine distance à l'égard des structures d'interventions traditionnelles que sont les partis politiques ou les syndicats.

Adhérer

En France, ces dernières années, ce que l'on appelle "le mouvement social", s'imposant comme une force émanant de la société civile elle-même, représente une forme d'expression et de revendication politiques relativement indépendante des organisations politiques et syndicales traditionnelles. Le surcroît de confiance accordé par les jeunes aux associations humanitaires, et en contrepartie la méfiance ressentie envers les partis politiques s'inscrit dans cette évolution.

Ainsi les jeunes mettent-ils leur confiance d'abord hors du champ de la politique politicienne, dans des structures ou des organisations dont les mots d'ordre ne sont pas dictés par des logiques partisans ni même par des logiques de compromis ou d'alliances. Ils recherchent non seulement une efficacité concrète, mais aussi une indépendance d'action et de jugement. C'est pourquoi les associations ont gain de cause à leurs yeux par rapport aux partis politiques. On l'a vu précédemment, de toutes les institutions ce sont elles qui enregistrent les meilleurs scores de

confiance. Si un tiers des jeunes interrogés dans l'ensemble des trois pays déclarent faire partie d'une association (33%), ils ne sont plus que 15% à reconnaître leur adhésion à un parti politique ou à un syndicat. Les jeunes italiens semblent un peu plus ouverts que les autres à ce dernier type d'engagement, mais ils favorisent eux aussi l'engagement associatif : 13% d'entre eux déclarent participer plus ou moins régulièrement à l'activité d'un parti politique et 38% à une association (respectivement 8% et 32% parmi les Français et 8% et 27% parmi les Espagnols). Les syndicats sont complètement marginalisés : 62% des jeunes déclarent ne pas en faire partie et 34% ne pas s'y intéresser. La petite minorité qui y adhère est équivalente dans les trois pays : 5% des jeunes italiens, 5% des Français et 4% des Espagnols (tableau 5).

Tableau 5 - Participation dans le cadre partisan, syndical ou associatif (%)

	A une activité plus ou moins régulière dans un parti politique ou dans un syndicat	Ne s'inscrirait à un parti politique en aucun cas	Ne s'intéresse pas du tout aux syndicats	A une activité plus ou moins régulière dans une association	Participe plus ou moins régulièrement à une association de défense de l'environnement
ITALIE					
étudiants	17	39	32	42	22
chômeurs	20	50	38	28	15
Ensemble (n = 1946)	18	42	34	38	20
FRANCE					
étudiants	14	45	39	42	8
chômeurs	10	58	24	14	9
Ensemble (n = 908)	13	49	35	32	8
ESPAGNE					
étudiants	12	57	30	23	-
chômeurs	11	65	43	38	25
Ensemble (n = 1418)	11	59	34	27	-
ENSEMBLE (n = 4272)	15	49	34	33	18
garçons	17	46	35	26	16
filles	13	52	33	38	20

C'est parmi les jeunes français de gauche que la confiance envers les syndicats est la plus marquée (55% de notes positives). Ces résultats révèlent la persistance en France de l'ancrage identitaire de la gauche dans une tradition de luttes sociales et de défense des salariés, issue de la conquête du mouvement ouvrier.

L'implication partisane et institutionnelle des jeunes italiens, un peu plus forte que dans les autres pays, se retrouve aussi dans la plus grande activité qu'ils manifestent dans le cadre des campagnes électorales : 11% d'entre eux déclarent avoir participé à une campagne électorale, ils ne sont plus que 6% en France et 4% en Espagne dans ce cas. Les jeunes espagnols sont ceux qui se tiennent le plus à l'écart de toute possibilité d'engagement dans un parti politique : 59% d'entre eux déclarent qu'ils ne s'inscriraient en aucun cas à un parti politique, les Français sont dans le même cas dans 49% des cas, et les Italiens ne sont plus que 42% à témoigner d'un même rejet. Le champ associatif représente un attrait et suscite davantage de confiance. Pour autant le passage à l'acte que représente une réelle activité militante n'est jamais facile et reste inégal : les étudiants italiens et français sont toujours plus motivés que les jeunes chômeurs dans ces deux pays ; en revanche, la situation s'inverse en Espagne et les étudiants espagnols restent nettement plus en retrait de ce type d'engagement.

Les garçons se montrent un peu plus présents que les filles dans le champ politique stricto sensu. Si 46% des garçons déclarent qu'ils ne s'inscriraient en aucun cas à un parti politique, les filles sont encore plus nombreuses dans ce refus de tout engagement partisan (52%). En revanche, elles se montrent beaucoup plus ouvertes envers le champ associatif : 38% d'entre elles déclarent y avoir une activité régulière contre 26% des garçons.

Manifester

Les modes d'action collective organisés sur le modèle de la grève ou de la manifestation pacifique sont plébiscités. 92% des jeunes interrogés dans les trois pays ont participé ou pourraient participer à une grève et 95% à une manifestation. Le potentiel de participation est ici maximal et montre bien que les jeunes sont loin d'être en retrait de tout activisme politique. (tableau 6)

Tableau 6 - Participation à des actions collectives (%)

	Manifestation pacifique		Grève		Manifestation violente		Occuper un appartement		Occuper une école	
	A fait	Pourrait faire	A fait	Pourrait faire	A fait	Pourrait faire	A fait	Pourrait faire	A fait	Pourrait faire
Italie										
Etudiants	48	48	49	45	2	12	1	23	46	27
Chômeurs	39	53	40	49	3	15	4	29	-	-
Ensemble (n = 1946)	45	50	46	46	2	13	2	25	-	-
France										
Etudiants	52	44	33	60	4	26	4	47	37	57
Chômeurs	24	58	5	70	8	27	6	33	68	30
Ensemble (n = 908)	43	49	24	63	6	23	4	43	47	48
ESPAGNE										
Etudiants	60	38	65	31	1	13	1	33	45	51
Chômeurs	58	40	43	51	8	11	6	27	-	-
Ensemble (n = 1418)	59	38	59	36	3	12	2	31	-	-
ENSEMBLE (n = 4272)	49	46	46	46	3	15	3	31	35	40
Garçons	48	45	42	48	6	25	4	35	37	34
Filles	50	47	48	45	9	1	2	28	35	42

Les filles se montrent encore plus disponibles que les garçons pour ce type de mobilisation. Si elles participent à des manifestations pacifiques dans une même proportion que les garçons, elles sont un peu plus nombreuses à avoir fait l'expérience de la grève (48% contre 42% des garçons).

Ces chiffres sont révélateurs de la présence des jeunes sur la scène politique des trois pays. Un jeune étudiant sur deux, en France comme en Italie, a déjà participé à une manifestation (respectivement 52% et 48%), et en Espagne cette proportion grimpe à 60%. Les chômeurs ne sont pas en reste, et là encore les jeunes chômeurs espagnols se distinguent par une pratique plus fréquente de la manifestation. Les jeunes d'Europe du Sud font donc régulièrement l'expérience politique de l'occupation de la rue. La grève est un mode de protestation encore plus répandu en Italie et en Espagne qu'en France. Les jeunes espagnols sont plus grévistes que les autres, et là encore tout particulièrement les étudiants : 65% d'entre eux déclarent avoir fait grève (contre 49% des étudiants italiens et seulement 33% des étudiants français, les plus en retrait). Faut-il rapprocher ces résultats du plus grand mécontentement des jeunes espagnols exprimés à l'égard de l'Université, ayant pu occasionner des actions de protestation en plus grand nombre qu'en France ou en Italie ? Les étudiants italiens comme les étudiants espagnols sont plus nombreux que les étudiants français à déclarer avoir occupé une école ou une université (respectivement 46% et 45% contre 37% des

étudiants français).

Si les formes de protestation non conventionnelle, pouvant avoir un caractère plus violent ou interdit, entraînent davantage de réticences, elles restent néanmoins attractives. Un indice de protestation a pu être calculé en fonction du degré d'approbation et de participation potentielle aux trois actions politiques que sont une manifestation violente, l'occupation illicite d'un appartement et l'occupation illicite d'une école. Près du quart de l'ensemble de l'échantillon accepterait de participer à ces trois types d'action de protestation violents ou illicites (23%). Des différences significatives apparaissent là encore entre les trois pays. Les Français sont potentiellement les plus protestataires tandis que les jeunes italiens sont ceux qui se tiennent le plus écart de toute forme plus radicale de revendication. Ceci doit être rapproché de leur plus grand attachement au respect des institutions politiques et partisans. Plus de quatre jeunes étudiants français sur dix approuvent ces trois modes d'action et pourraient y participer (42%), les étudiants espagnols ne sont plus que trois sur dix dans le même cas (30%), et les italiens plus que deux (20%). Les chômeurs sont moins protestataires que les étudiants. (tableau 7)

**Tableau 7 - Indices de protestation non conventionnelle
(manifestation violente et occuper une école ou un appartement (% lignes))**

	Pas ou peu protestataire	Assez protestataire	Très protestataire
ITALIE			
étudiants	28	49	23
chômeurs	70	30	-
Ensemble (n = 1946)	41	43	16
FRANCE			
étudiants	5	50	45
chômeurs	19	44	37
Ensemble (n = 908)	10	48	42
ESPAGNE			
étudiants	6	64	30
chômeurs	68	32	-
Ensemble (n = 1418)	21	56	23
ENSEMBLE (n = 4272)	28	49	23

Là encore les filles ne sont pas en reste. Des actions non légales, telles qu'occuper un appartement ou une école ne leur font pas peur : si le premier type d'action départage davantage leur avis (28% d'entre elles déclarent qu'elles seraient prêtes à le faire contre 35% des garçons), elles ont en revanche moins de réticences que les garçons envers le fait d'occuper une école (42% déclarent qu'elles pourraient participer à ce type d'action contre seulement 34% des garçons). Si la légalité n'est pas ce qui fixe pour elles les bornes de leur mobilisation collective, en revanche elles sont très nettement en retrait de toute action violente. Leur refus dans ce domaine est quasiment unanime : 90% d'entre elles déclarent ne vouloir en aucun cas participer à ce type d'action (contre 69% des garçons).

L'orientation idéologique permet de caractériser les types d'engagement des jeunes, dans l'ensemble des trois pays. Le potentiel protestataire, se manifestant de façon plus ou moins radicale, plus ou moins violente, se situe très clairement du côté de la gauche (tableau 8). Il reste profondément ancré dans la culture politique de la gauche, et dans une tradition d'action collective léguée par l'histoire du mouvement ouvrier. 43% des jeunes se situant à gauche ont participé à une grève ou à une manifestation (contre 18% des jeunes de droite et 22% des indécis) et plus du tiers ont un indice de protestation élevé (33% contre 7% des jeunes de droite et 17% des jeunes indécis). Lorsqu'il y a absence de positionnement politique, l'intervention et la participation dans le champ politique ont donc davantage de chances de se produire au travers de mobilisations collectives ou encore d'expressions non conventionnelles, voire violentes, qu'au travers de formes partisans ou

syndicales. Ce potentiel protestataire doit d'ailleurs être référé au plus grand retrait qu'ils manifestent à l'égard de la participation électorale, pouvant les conduire à d'autres formes d'intervention politique.

Tableau 8 - Modes de participation politique selon l'orientation gauche-droite et selon le degré de confiance dans les institutions politiques (%)

	Milite dans un parti ou un syndicat	Milite dans une association	A participé à une grève ou à une manifestation	A un indice de protestation élevé
Orientation idéologique				
Gauche	18	31	43	33
Droite	17	40	18	7
Indécis	7	33	22	17
Degré de confiance dans les institutions politiques				
Confiance faible	9	25	60	27
Confiance élevée	22	40	67	19
Ensemble (n = 4272)	15	33	32	23

Enfin, le rapport de confiance envers les institutions politiques joue un rôle décisif. Plus le niveau de confiance est positif plus l'indice de participation institutionnelle est élevé. Cela se vérifie tout particulièrement dans le cas des jeunes italiens. Ce sont eux qui témoignent du niveau de confiance le plus élevé envers les institutions et eux aussi qui ont la disponibilité la plus grande pour s'engager dans une activité partisane ou électorale. Le fait d'avoir confiance favorise également certaines formes de mobilisation collective, telles que les manifestations pacifiques ou la pratique de la grève. En revanche, c'est parmi les jeunes dont le niveau de confiance est faible que le potentiel de protestation violente ou illicite est le plus élevé (27% contre 19% parmi ceux qui ont un niveau de confiance élevé).

La légitimité et la crédibilité accordées au système politique, ainsi qu'à ses institutions, conditionnent donc non seulement leur rapport à la politique, leurs représentations, mais aussi leurs modes d'expression et d'intervention sur la scène publique.

Les dispositions actuelles des jeunes interrogés dans les trois pays vis-à-vis de la politique et de leur implication potentielle s'inscrivent dans une évolution d'ensemble de la participation politique des citoyens. Certes avec des nuances. Ainsi les jeunes italiens apparaissent-ils plus confiants vis-à-vis de leurs institutions politiques que leurs voisins, notamment envers les partis politiques, - ce qui mérite d'être souligné -, et très nettement plus favorables à l'Union européenne ; de leur côté les jeunes français se montrent plus favorables à la gauche tandis que les jeunes espagnols, bien que les plus éloignés de l'extrême droite se montrent plus enclins à voter pour la droite. Mais quelles que soient ces différences liées aux contextes historiques et politiques spécifiques à chacun des trois pays, l'attitude des jeunes interrogés, contrairement à ce qui est souvent dit, ne révèle pas un abandon de la scène politique.

L'ABSTENTION ÉLECTORALE DANS LE JEU ET HORS DU JEU POLITIQUE

[NON-VOTING: IN OR OUT OF THE POLITICAL GAME]

ANNE MUXEL

[Abstract]

In all European countries, abstention from voting is on an increasing trend. Why? Are democracy and citizenship becoming fragilized? Is there a crisis of political participation? Does abstention signify apathy or dissatisfaction?

This seminar presents an analytical understanding of this behavior, starting with the assumption or suggestion that non-voters are not at all homogenous sociologically or politically. Thus, it is necessary to define two different types: non-voters who are outside the political game and non-voters who stay inside it. In the first case, people are not interested in politics and have no partisan identification. Non-voters in the latter case are not exactly out of the political game; on one hand, they choose not to vote, but on the other hand, they are interested in politics and do have a partisan identification. They don't vote to express their dissatisfaction towards political and electoral offer, but they feel themselves politically involved and concerned nonetheless.

In France, during the last twenty years, non-voting while staying inside the political game has increased more than has non-voting outside of it. This finding signifies less a crisis of democracy than a growing dissatisfaction and mistrust towards governments. Data provided come from a post-electoral survey compiled in France after the last general elections in 1997.

Depuis une quinzaine d'années, partout en Europe, le rapport des citoyens au monde politique est présenté comme problématique. Distanciation, dénonciation et protestation en sont les caractéristiques essentielles. Progression de l'abstention, diffusion des comportements protestataires, perte de confiance envers les gouvernants, crise de la représentation politique et affirmation des partis hors-système, enfin présence dans nombre de pays européens d'une extrême-droite xénophobe, sont autant de signes de ce que certains ont appelé un "malaise démocratique" ou d'autres, plus pessimistes, un véritable "déficit démocratique" (Perrineau, 1997, Topf, 1995).

Depuis une dizaine d'années, le taux d'abstention des Européens aux élections ne cesse d'augmenter. En France, même l'élection présidentielle, de loin la plus mobilisatrice, connaît une baisse de participation significative. En 1974, seuls 15,1% des électeurs s'étaient tenus à l'écart de l'élection présidentielle, en 1995, ils sont 20,6%. En vingt ans, s'agissant des élections législatives, l'abstention a quasiment doublé : 16,7% en 1978, 31,5% en 1997. Les jeunes participent à cette lente érosion de l'acte électoral, et d'une certaine façon l'amplifient. En France, lors des dernières élections législatives de 1997, plus de quatre jeunes sur dix (41%) sont restés en dehors de la décision électorale.

Mais ce qui progresse surtout est un abstentionnisme intermittent. Les abstentionnistes constants, qui ne votent à aucune élection, restent minoritaires (Chiche, Dupoirier, 1998). Lors de l'élection présidentielle de 1995, seuls 11% des Français se sont abstenus aux deux tours de l'élection. En 1997, pour les élections législatives, ils sont 19% dans ce même cas. Si l'on y ajoute 9% de non inscrits, soit un chiffre assez stable dans le temps, ce sont entre deux et trois Français sur dix qui se mettent hors-jeu de la décision électorale d'une façon répétée et durable (Héran, Rouault, 1995). Selon les types d'élection et les enjeux propres de chaque scrutin, le niveau d'abstention n'est pas le même. En France, l'élection présidentielle reste de toutes les élections la plus mobilisatrice, même si elle enregistre elle aussi une progression des non votants.

Lors des dernières élections européennes en France, le taux d'abstention s'est élevé à 53%, soit presque 6 points de plus qu'en 1994. Aux élections municipales de mars 2001, près d'un Français sur trois (32,7%) s'est abstenu.

L'abstentionnisme intermittent est imprévisible. Il est révélateur d'une fragilisation du rapport au vote. La progression de ce type d'abstention dans l'ensemble des pays européens renvoie à une

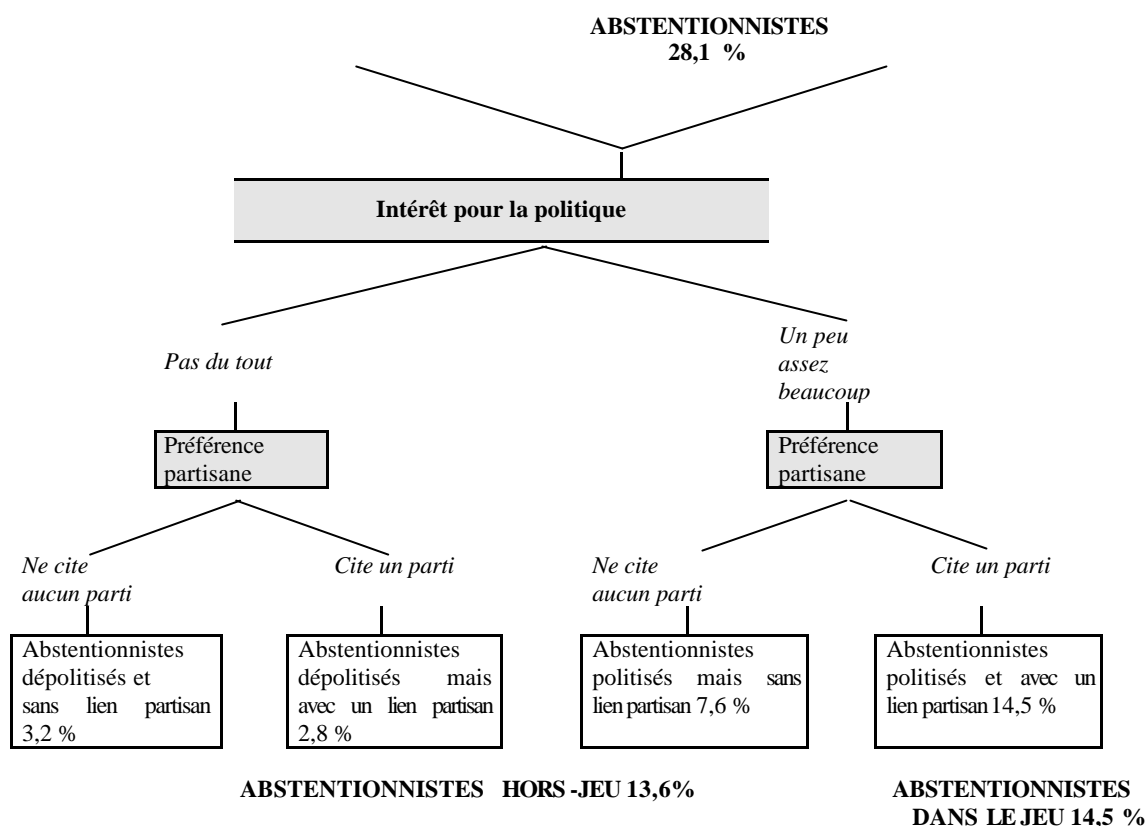
interrogation plus large. Le vote est-il toujours le moyen d'expression démocratique des citoyens ? Est-ce la démocratie qui est en difficulté ou bien assiste-t-on à l'émergence de nouvelles formes de participation politique et citoyenne ?

Quelles que soient les interprétations actuelles de la participation politique, confiantes ou alarmistes, il n'en reste pas moins vrai que certains individus se mettent hors-jeu du politique tandis que d'autres sont dans le jeu. Et ce quels que soient les types de participation politique...une élection, une grève, une manifestation...En ce qui concerne la participation électorale, comment cette différenciation opère-t-elle ? Et surtout par quels mécanismes sociaux ou politiques se met-elle en place ?

Pour comprendre la logique des comportements abstentionnistes, il faut pouvoir considérer à la fois les facteurs liés aux logiques individuelles et sociales et les effets liés à la conjoncture électorale. En ce sens, il ne peut y avoir d'explication univoque de l'abstention. Les abstentionnistes ne peuvent être considérés comme un bloc homogène, ni du point de vue sociologique, ni non plus du point de vue politique. S'ils constituent bien un groupe qui se met hors-jeu de la décision électorale, on ne peut pour autant les classer de façon univoque du côté des hors-jeu en politique. Une partie d'entre eux adopte un comportement de retrait de l'ensemble du système politique, mais une autre semble y échapper. La plupart des travaux menés sur l'abstention ont cherché à classer différentes formes d'abstentionnisme et à en chercher les logiques : isolement sociologique, défaut de compétence politique, contestation raisonnée, ou encore stratégie circonstanciée (Subileau, 1997). Nous proposons d'introduire une nouvelle tentative de typologie en partant de l'hypothèse qu'il existe un rapport différencié au politique au sein même du comportement abstentionniste. Ainsi distinguerons-nous un « abstentionnisme hors-jeu » et un « abstentionnisme dans le jeu ». Si la première expression renvoie à une interprétation relativement répandue du comportement abstentionniste, associée à un retranchement partiel ou total de la vie civique, la seconde en revanche peut paraître pour le moins paradoxale. Elle correspond à cette part des abstentionnistes qui restent en dehors de l'acte électorale tout en étant fondamentalement impliqués dans la vie sociale et politique.

Nous avons construit deux groupes d'abstentionnistes, se déclarant comme tels lors du premier tour des élections législatives de 1997, définis à partir de deux variables fondamentales de positionnement : l'intérêt pour la politique, d'une part, et l'expression d'une proximité partisane, d'autre part. L'une comme l'autre constituent des indicateurs clés pour comprendre la relation des individus à la politique. Les abstentionnistes hors-jeu se caractérisent par une attitude de retrait plus ou moins radicale définie en fonction des trois cas de figure suivants : soit ils ne s'intéressent pas du tout à la politique et n'ont pas non plus de proximité partisane déclarée, soit ils ont un intérêt minimum pour la politique mais pas de proximité partisane, soit ils déclarent une proximité partisane mais ne s'intéressent pas du tout à la politique. Les abstentionnistes dans le jeu sont des individus qui même s'ils s'abstiennent déclarent avoir à la fois un intérêt minimum pour la politique et une proximité partisane. (*tableau 1*). Les premiers s'apparentent de fait plus facilement aux interprétations classiques de l'abstention, - absence de repère politique, rejet de l'offre partisane, détachement -. En revanche les seconds présentent un profil inverse, ils sont dans le jeu dans la mesure où ils se repèrent dans le système politique et y manifestent des signes d'intérêt ou de reconnaissance. En toute logique ils ne devraient donc pas s'abstenir. Or ils s'échappent de la norme démocratique, pourquoi ?

Tableau1. La construction des deux groupes d'abstentionnistes au premier tour des élections législatives de 1997



Enquête post-électorale CEVIPOF/CNRS/CIDSP/Libération/SOFRES, 26-31 mai 1997, 3010 interviews

La question mérite d'autant plus d'être posée que ces abstentionnistes dans le jeu représentent la moitié des abstentionnistes se déclarant comme tels en 1997. En effet, parmi les 28,1% d'abstentionnistes recensés, on dénombre 13,6% d'abstentionnistes hors-jeu et 14,5% d'abstentionnistes dans le jeu. Ce résultat est en soi intéressant. Il bouscule quelque peu les idées reçues et oblige à envisager les études sur l'abstention au travers d'une autre alternative que celle du retranchement ou de l'intégration politique. Il introduit la nécessité d'interroger la signification de l'abstention, non seulement par rapport aux votants, mais aussi par rapport à la diversité des abstentionnistes eux-mêmes, tant du point de vue sociologique que politique.

Les abstentionnistes hors-jeu et dans le jeu entretiennent-ils une même relation à la société ? Comment y sont-ils intégrés et quelles perceptions en ont-ils ? Comment considérer leur rapport à la politique, leurs modes d'implication et d'engagement ? En bref, qui sont-ils ? Hors-jeu et dans le jeu, qu'ont-ils de différent et qu'ont-ils au juste en commun ?

Des logiques d'insertion sociale différentes

La sociologie des abstentionnistes considérés dans leur ensemble a toujours mis en évidence l'effet d'une moindre intégration sociale et d'un niveau socio-culturel peu élevé. Les plus jeunes, les individus appartenant à des groupes sociaux moins favorisés, les salariés du secteur privé, les chômeurs, enfin les habitants des grandes villes, ont plus de chance de s'abstenir que le reste de l'électorat potentiel (Chiche, Dupoirier, 1998). L'absence de diplôme et d'emploi stable est un facteur de renforcement d'une abstention durable (Héran, 1997). Les plus jeunes se comptent en plus grand nombre parmi les abstentionnistes, mais c'est parce qu'ils présentent les attributs d'une

moindre insertion sociale. Bien que l'écart se soit considérablement amenuisé, les femmes restent légèrement plus en retrait du jeu électoral que les hommes. Mais les abstentionnistes hors-jeu et les abstentionnistes dans le jeu sont-ils les mêmes ? Ont-ils les mêmes caractéristiques sociologiques ?

1) Les abstentionnistes hors-jeu se comptent en plus grand nombre parmi les catégories employé et ouvrier (58%) et chez les personnes sans diplôme ou très faiblement diplômées (46%) tandis que les abstentionnistes dans le jeu se recrutent relativement plus chez les cadres et professions intellectuelles supérieures (28%) ainsi que chez les diplômés de l'enseignement supérieur (20%) (tableau 2). La composition sociologique des abstentionnistes dans le jeu est d'ailleurs comparable à celle des votants. Le constat de ce rapprochement, d'une part, et de l'écart différentiel enregistré entre les abstentionnistes hors-jeu et dans le jeu, d'autre part, sont révélateurs des usages différenciés de l'abstention. Celui des hors-jeu correspond plus étroitement au modèle classique d'isolement sociologique.

Tableau 2. La sociologie des groupes d'abstentionnistes comparée à celle des votants

	Abstentionnistes hors jeu	Abstentionnistes dans le jeu	Votants
	100%	100%	100%
Sexe			
– Homme	42	50	48
– Femme	58	50	52
Age			
– 18-34 ans	37	43	28
– 35-49 ans	26	30	29
– 50 ans et plus	37	27	43
Situation professionnelle de l'interviewé			
– A un travail	52	50	48
– Est au chômage	6	9	5
– Est élève ou étudiant	5	10	7
– Est inactif	12	11	10
– Est retraité	25	19	30
Profession de l'interviewé (actuelle ou ancienne)			
– Agriculteur, commerçant	10	8	12
– Cadre, profession intermédiaire	17	28	29
– Employé, ouvrier	58	49	46
– Inactif	15	15	13
Niveau de diplômes			
– Sans diplôme, certificat d'étude	46	34	40
– BEPC, CAP, BEP	34	33	32
– Baccalauréat	12	13	12
– Enseignement supérieur	8	20	16
Religion			
– Catholique pratiquant	23	21	32
– Catholique non pratiquant	50	47	42
– Autres religions	3	5	4
– Sans religion	24	27	22

Enquête post-électorale, mai 1997

2) Les abstentionnistes hors-jeu présentent plus fréquemment des attributs sinon d'exclusion sociale, à tout le moins de plus grande fragilité du sentiment de leur intégration. Jugeant le risque pour eux-mêmes et pour leur entourage d'être au chômage, 52% des abstentionnistes hors-jeu considèrent ce risque élevé, 48% des abstentionnistes dans le jeu et seulement 40% des votants.

3) L'âge met en évidence la spécificité des abstentionnistes dans le jeu. En effet, les plus jeunes ne sont pas les plus nombreux à être hors-jeu, comme on le croit souvent, mais ils sont bien plus fréquemment dans le jeu. Leur abstentionnisme est plus marqué qu'à d'autres âges de la vie, mais il ne révèle pas un retrait de la sphère politique. Il est la conséquence d'une indisponibilité temporaire ou circonstanciée, propre à cette période de la vie, liée aux études, à l'installation dans la vie adulte ou encore aux conditions d'entrée sur le marché du travail. On observe dans le temps de la jeunesse un *moratoire électoral* : les jeunes sont moins inscrits sur les listes électorales, et lorsqu'ils sont inscrits ils votent moins (Muxel, 2001). Mais leur abstentionnisme peut revêtir aussi un caractère politique et révéler une plus grande difficulté que dans le reste de la population pour se positionner par rapport à l'offre électorale proposée. Les étudiants nourrissent deux fois plus les rangs des abstentionnistes dans le jeu que celui des abstentionnistes hors-jeu (10% contre 5%). C'est à partir du milieu de la vie que la participation électorale est la plus affirmée, - 43% de plus de 50 ans parmi les votants -, mais les abstentionnistes qui ont plus de 65 ans sont plus souvent hors-jeu, se désimpliquant de la vie en société comme de la vie politique (20% contre 15% dans le jeu). 25% des abstentionnistes hors-jeu sont des retraités, parmi les abstentionnistes dans le jeu ces derniers ne représentent plus que 19%.

4) Les abstentionnistes hors-jeu comptent en leurs rangs plus de femmes que d'hommes (58% contre 42% d'hommes). Si l'évolution générale depuis quelques années va dans le sens d'une réduction des écarts dans le comportement électoral des hommes et des femmes, il semblerait que persiste malgré tout chez les femmes une plus grande tendance au retrait. Parmi les abstentionnistes dans le jeu, on ne note pas de différences (50% de femmes et 50% d'hommes).

5) Reste une donnée d'importance en France : l'influence du niveau de diplôme. Les personnes à faible niveau de diplôme sont nettement plus nombreuses parmi les abstentionnistes hors jeu. Le niveau de diplôme constitue bien un élément structurant des réponses, en particulier sur les sujets de société. Le repli identitaire, l'autoritarisme ou la contestation sont davantage liés au niveau culturel qu'au type d'abstentionnisme. Ainsi 66% des hors jeu à faible niveau de diplôme sont favorables à la peine de mort comme 60% de ceux qui étant dans le jeu ont le même niveau d'études. Ce n'est plus le cas que de 44% des hors jeu ayant atteint ou dépassé le baccalauréat et de 28% des personnes dans le jeu appartenant à la même catégorie. Les résultats, s'ordonnent parfaitement en fonction du niveau de diplôme. Il en est de même sur les questions portant sur le repli sur soi ou la contestation. En revanche, sur les questions de l'offre politique, et en particulier le refus de faire confiance à la gauche ou à la droite, le niveau culturel compte beaucoup moins que l'appartenance aux groupes d'abstentionnistes. 76% des hors jeu à faible niveau de diplôme ne font confiance ni à la gauche, ni à la droite, ce chiffre monte à 85% parmi les hors jeu à diplôme élevé. Parmi les abstentionnistes dans le jeu, il n'est plus que de 52% parmi ceux qui ont un faible niveau de diplôme et de 39% en cas de diplôme élevé.

Leur relation à la société

1) Le rapport au territoire

L'identification à la nation est nettement plus marquée parmi les abstentionnistes hors-jeu : 41% d'entre eux se sentent seulement Français, les abstentionnistes dans le jeu ne sont que 26% dans le même cas et les votants 24%. Les abstentionnistes hors-jeu apparaissent aussi plus réticents à toute forme d'appartenance à l'Europe. Seuls 30% d'entre eux ont le sentiment de partager des intérêts communs avec les habitants des autres pays européens (contre 50% des abstentionnistes dans le jeu et 47% des votants). Ils sont nettement plus hostiles à l'égard de la construction européenne et de la monnaie unique et n'envisagent celles-ci ni comme pourvoyeuses de bénéfices pour la France ni comme une protection contre les risques liés à la mondialisation. Le sentiment de l'existence d'une identité européenne n'est d'ailleurs pas au rendez-vous : seuls 28% d'entre eux se sentent autant européens que français, les abstentionnistes dans le jeu et les votants sont dans ce cas respectivement 39%.

2) L'évaluation de leur situation personnelle

Les abstentionnistes hors-jeu se montrent toujours plus pessimistes et plus inquiets et leur perception de la société rend compte des risques de fragilisation de leur situation d'insertion sociale. Même si une large majorité de Français se dit inquiète quant à l'avenir, tant du point de vue personnel que professionnel (66%), ce sont plus des trois quarts des abstentionnistes hors-jeu qui manifestent ce sentiment (76%). Ce pessimisme général s'inscrit dans une dégradation d'ensemble du jugement porté sur la situation économique du pays.

Les hors-jeu apparaissent plus démunis du point de vue des réseaux de sociabilité et de solidarité qu'ils pourraient mobiliser. Ils se sentent plus isolés, dans la vie professionnelle comme dans la vie privée. Ils reconnaissent moins souvent pouvoir partager des intérêts communs avec des gens exerçant le même métier (53% contre 65% des abstentionnistes dans le jeu et 68% des votants). Leur lien familial semble un peu moins affirmé et les ressources qu'ils peuvent mobiliser sont moins nombreuses. En cas de coup dur, si 40% des votants et 41% des abstentionnistes dans le jeu déclarent pouvoir compter beaucoup sur leur famille pour les aider, ils ne sont que 32 % à pouvoir faire la même réponse.

3) Le rapport à l'autre

A cet isolement social s'ajoute une certaine méfiance vis-à-vis de l'autre. La relative clôture de l'identité territoriale se double d'une relative fermeture à l'altérité, se traduisant par un surplus d'attitudes xénophobes et racistes. Plus d'un abstentionniste hors-jeu sur deux estime que l'on ne se sent plus chez soi comme avant (56% contre 42% des abstentionnistes dans le jeu et 46% des votants). Leur défiance vis-à-vis de la population immigrée est plus affirmée.

4) Les valeurs

Les indicateurs classiques de mesure du libéralisme culturel (Grunberg, Schweisguth, 1997) révèlent tous des dispositions plus autoritaires et plus intolérantes parmi les abstentionnistes hors-jeu. 61% d'entre eux sont favorables à la peine de mort (50% des abstentionnistes dans le jeu comme des votants) ; 57% pensent que l'école doit donner le sens de la discipline plutôt que de former un esprit critique (contre 47% des abstentionnistes dans le jeu et 53% des votants) ; enfin ils sont nettement plus nombreux que les abstentionnistes dans le jeu à condamner l'homosexualité (37% contre 27%) ou encore l'avortement (15% contre 8%).

Un clivage assez net apparaît donc entre les abstentionnistes hors-jeu, qui refusent et contestent davantage que les autres le fonctionnement de la société, et les abstentionnistes dans le jeu qui témoignent d'une implication tout autant sociale que politique. Bien que plus contestataires, les premiers se montrent-ils davantage disposés que les seconds pour l'engagement et la protestation politique ? Si les abstentionnistes hors-jeu, en délaissant la scène électorale, ne peuvent exprimer leur désaccord ou leurs revendications par les moyens du vote, le font-ils autrement, utilisent-ils d'autres moyens de pression pour peser sur les décisions politiques ?

Tableau 3. Contestation passive ou contestation active de la société actuelle

	Abstentionnistes hors jeu	Abstentionnistes dans le jeu	Votants
Souhaite un changement complet de la société (positions 1 et 2 sur l'échelle)	44%	39%	41%
Attitudes à l'égard :			
D'une manifestation de rue			
– Approuverait	54	66	63
– Désapprouverait	43	31	36
– Sans opinion	3	3	1
	100%	100%	100%
De l'occupation d'un bâtiment administratif			
– Approuverait	34	48	42
– Désapprouverait	63	49	57
– Sans opinion	3	3	1
	100%	100%	100%
De faire grève			
– Approuverait	67	81	74
– Désapprouverait	29	18	24
– Sans opinion	4	1	2
	100%	100%	100%
A manifesté dans la rue au cours des deux dernières années	12%	21%	19%
Ne juge pas condamnable :			
de squatter un appartement inoccupé	44%	50%	44%
de ne pas payer dans les transports en commun	27%	37%	30%

Enquête post-électorale CEVIPOF/SOFRES, 8-23 mai 1995, 4078 interviews

En 1995, s'ils sont un peu plus nombreux que les autres à souhaiter un changement social radical (44% contre 39% des abstentionnistes dans le jeu et 41% des votants), ils restent en revanche très nettement en retrait de toute forme concrète de contestation sociale ou politique. (tableau 3) Ils désapprouvent plus fréquemment les manifestations de rue (43% contre 31% des abstentionnistes dans le jeu et 36% des votants), et sont nettement moins nombreux à y avoir réellement participé au cours des deux dernières années (12% contre 21% des abstentionnistes dans le jeu et 19% des votants). Ils se montrent nettement plus hostiles à toute forme d'action collective. Ils sont nettement moins favorables à la grève (29% la désapprouvent contre seulement 18% des abstentionnistes dans le jeu) et se désengagent de toute idée de mobilisation collective plus radicale, telle qu'occuper un bâtiment administratif, ou même de contestation plus privatisée et individualisée, telle que squatter un appartement inoccupé. La radicalité politique n'est pas de leur côté mais du côté des abstentionnistes dans le jeu qui, bien qu'acceptant plus volontiers le système social actuel, se réservent le droit d'agir et d'exercer une pression à son endroit, y compris en adoptant des comportements déviants (50% d'entre eux ne jugent pas condamnable de squatter un appartement inoccupé contre 44% des hors-jeu comme des votants, 37% ne condamnent pas non plus le fait de ne pas payer dans les transports en commun contre 27% des hors-jeu et 30% des votants). Ils ont d'une certaine façon prise sur la société, et se montrent de loin les plus contestataires, en ce sens qu'ils passent plus fréquemment à l'acte, plus encore que les votants. C'est en cela qu'ils sont à proprement parler dans le jeu politique.

Comparés à ces abstentionnistes dans le jeu, actifs et relativement facilement mobilisables, les abstentionnistes hors-jeu se caractérisent au bout du compte moins par une contestation active que par une attitude protestataire à l'égard de l'ensemble de la société. Protestation plus que revendication, s'expliquant par une logique plus défensive qu'offensive, dont le ressort essentiel est

une opposition systématique, et pas toujours rationnelle, à tout ce qui existe, mais sans se donner réellement les moyens de changer la société, ni par la voie des urnes, ni par d'autres formes d'expression ou d'action. Leur contestation passive dénote un plus grand malaise quant à leur place dans la société.

Leur relation à la politique

En France, la filiation joue un rôle fondamental dans la construction de l'identité politique. 50% des Français s'inscrivent dans la continuité des choix politiques de leurs parents, 33% ont une filiation indéterminée ou incohérente, seuls 11% déclarent avoir changé complètement d'opinion par rapport à leur héritage parental en changeant de camp politique, enfin 5% ont décroché, en passant d'un univers familial de gauche ou de droite à la position ni gauche ni droite (Jaffré, Muxel, 1997). Être votant ou abstentionniste, être dans le jeu ou hors jeu renvoient-ils à des héritages politiques différents qui pourraient permettre de mieux comprendre les mécanismes de participation ou de retranchement de la vie civique ?

La filiation des votants et des abstentionnistes dans le jeu, à très peu de choses près la même, révèle la forte continuité d'une référence politique homogène clairement affirmée à gauche ou à droite (51%). Les trajets incohérents ou les ruptures de filiation sont minoritaires. A l'opposé, chez les abstentionnistes hors-jeu, deux schémas prévalent. La filiation apolitique –la position ni gauche ni droite chez les parents et chez l'interviewé- est à elle seule majoritaire avec 57% des réponses, ce qui signifie que la position hors-jeu et le retrait du champ électoral renvoient à des héritages familiaux où l'absence de référence politique marquée était déjà la règle. On note également une proportion relativement importante de décrochages, 14% contre 6% seulement des votants et 6% également des abstentionnistes dans le jeu.

Chez les abstentionnistes hors jeu, la difficulté ou le refus des repères traditionnels (gauche-droite ou proximité partisane) débouche sur une désapprobation de l'ensemble du système politique et de ses leaders. En mai 1997, l'opinion selon laquelle la démocratie en France fonctionne mal est majoritaire dans l'ensemble de l'électorat, à la différence de la période post-présidentielle (59% des interviewés le pensent contre 44% en 1995). Ce sentiment se trouve exacerbé chez les abstentionnistes hors jeu puisqu'il monte à 72%, contre 63% chez ceux qui sont dans le jeu et 57% des votants. La critique du personnel politique est sévère : 49% des hors jeu estiment que les hommes politiques ne se préoccupent *pas du tout* de ce que pensent les gens comme eux, contre 32% de ceux qui sont dans le jeu et 31% des votants. La mise en cause des gouvernants est aussi plus répandue.

Sur tous les plans que nous venons d'examiner, les abstentionnistes hors jeu et dans le jeu apparaissent très différents et les seconds se montrent toujours beaucoup plus proches des votants.

Tableau 4 La relation à la politique : la vision critique des abstentionnistes « hors jeu »

	Abstentionnistes hors jeu	Abstentionnistes dans le jeu	Votants
Jugement sur la démocratie			
– Fonctionne bien	27	37	43
– Fonctionne mal	72	63	57
– Sans opinion	1	0	0
	100%	100%	100%
Estime que les hommes politiques ne se préoccupent pas du tout de ce que pensent les gens			
	49%	32%	31%
Auto-classement sur la dimension gauche / droite en 1997 :			
– se classe à gauche ou à droite	29	80	80
– se classe ni à gauche, ni à droite	57	18	19
– Sans réponse	14	2	1
	100%	100%	100%
Souhaite que Lionel Jospin joue à l'avenir un rôle important			
– Oui	33	50	50
– Non	56	49	49
– Sans réponse	11	1	1
	100%	100%	100%

Comment expliquer alors le retrait au moins momentané des abstentionnistes dans le jeu du champ électoral? Pourquoi ne votent-ils pas? Parce qu'ils refusent l'offre politique existante. Les abstentionnistes dans le jeu, contrairement aux votants, la rejettent et se rapprochent en cela des hors jeu. Presque la moitié des abstentionnistes dans le jeu (47% exactement) ne font confiance ni à la gauche ni à la droite pour gouverner le pays, alors qu'ils ne sont que 37% parmi les votants et sont jusqu'à 78% parmi les hors jeu .

Comprendre la montée de l'abstention

Au total, la distinction introduite entre les hors jeu et les dans le jeu permet de rompre avec l'idée selon laquelle les abstentionnistes forment un bloc homogène et de rejeter aussi la tentation de les amalgamer avec le vote hostile aux partis de gouvernement , comme on le fait parfois. La moitié des abstentionnistes reste dans le jeu de la politique. La différence qui fonde leur choix abstentionniste, est une critique de l'offre politique et des notions de gauche et de droite. L'autre moitié des abstentionnistes, celle des hors jeu apparaît très différente, ajoutant à l'exclusion électorale une exclusion de la politique, une auto-exclusion de la société et présentant de plus grands risques d'exclusion sociale. Contrairement à l'image trop répandue des abstentionnistes « pêcheurs à la ligne » , il est moins marqué par le désintérêt que par le mécontentement et la critique. A l'égard de la politique, il critique avec vigueur le système politique, ses leaders et l'offre partisane. Quand ils se remettent à voter, ils expriment plus fréquemment un vote extrémiste.

Sur le long terme, ces vingt dernières années (entre 1978 et 1997), on retiendra que ce sont les abstentionnistes dans le jeu qui ont le plus progressé puisque leur proportion a été pratiquement multipliée par trois (de 4,9% à 14,5%) alors que celle des hors jeu n'a été multipliée que par deux (de 6,7% à 13,6%). Cette évolution traduit, à travers les hors jeu, un certain repli identitaire, une contestation croissante de la société, une critique du système politique mais la montée plus forte des abstentionnistes dans le jeu montre qu'il n'y a pas pour autant de dépolitisation massive ou de perte des repères. S'abstenir tout en restant dans le jeu correspond à une relativisation du vote, à la montée d'une contestation active de la société (renvoyant, on le sait, à d'autres formes de participation) et

aussi à une abstention-sanction traduisant la critique de l'offre politique et, au fil des alternances, le désaveu des gouvernants successifs.

Références bibliographiques

CHICHE Jean, DUPOIRIER Elizabeth [1998], « L'abstention aux élections législatives de 1997 », dans PERRINEAU Pascal et YSMAL Colette (dir.), *Le vote surprise, les élections législatives de 1997*, Paris, Presses de Sciences Po, p. 141-159.

GRUNBERG Gérard, SCHWEISGUTH Etienne [1997], « Recompositions idéologiques », dans BOY Daniel et MAYER (dir.), *L'électeur a ses raisons*, Paris, Presses de Sciences Po, p.139-178.

HERAN François [1997], « Les intermittences du vote : un bilan de la participation de 1995 à 1997 », *INSEE Première*, n°546.

HERAN François, ROUAULT Dominique [1995], « La double élection de 1995 : exclusion sociale et stratégie d'abstention », *INSEE Première*, n°414.

JAFFRE Jérôme, MUXEL Anne [1997], « Les repères politiques », dans BOY Daniel et MAYER Nonna (dir.), *L'électeur a ses raisons*, Paris, Presses de Sciences Po, p.67-100.

MUXEL Anne [2001], *L'expérience politique des jeunes*, Paris, Presses de Sciences Po.

PERRINEAU Pascal [1997], « Le premier tour des élections législatives de 1997 », dans *Revue française de science politique*, 47, p.405-415.

SUBILEAU Françoise [1997], « L'abstentionnisme : apolitisme ou stratégie », dans MAYER Nonna, *Les modèles explicatifs du vote*, Paris, L'Harmattan, p.245-267.

TOPF Richard [1995], « Electoral participation » et « Beyond electoral participation », dans FUCHS Dieter, KLINGEMANN Hans-Dieter, *Citizens and the state*, Oxford University Press, p. 27-91.

Part II

Visiting Professors at the ICCLP

Anne Muxel (Chargé de recherches, Centre d'Étude de la Vie Politique Française)
(October – November 2001)

Profile:

After having studied at the University of Paris V, she earned her Ph.D. in 1983. She was appointed as Chargé de recherches at CEVIPOF (Centre d'Étude de la Vie Politique Française) from 1986. During her one month stay, she held two Comparative and Law Seminars entitled “Les jeunes d'Europe du Sud et la politique. Une Enquête Comparative: France, Italie, Espagne” and “L'abstention électorale: hors-jeu et dans le jeu politique”.

Major Publications:

L'Expérience Politique des Jeunes (Presses de Sciences-Po, Paris 2001).

“S'abstenir: hors du jeu ou dans le jeu politique?” (co-authored with Jérôme Jaffré, in *Les Cultures Politiques des Français*, Presses de Science-Po, Paris 2000).

Masato Ninomya (Professor, The University of São Paulo, Faculty of Law, Brazil)
(November 2001 – February 2002)

Profile:

After having studied at the Universities of São Paulo and Tokyo, Professor Ninomiya earned an associate professorship at the University of São Paulo attaining his current professorship in 1986. His particular field of research is nationality law, private international law and problems related to *dekasegi*. During his stay at the ICCLP, Professor Ninomiya has lectured on Ibero-American Law and gave a presentation at the International Transaction Law Forum entitled “South American Common Market and Brazilian Legal Knowledge”. He also gave lectures for Japanese Brazilian workers in Japan. (b. 1948)

Major Publications:

Equality of the Sexes in Nationality Law (Tokyo: Yuhikaku, 1983).

Brazilian Civil Procedure Code (São Paulo, Kaleidos Primus, 1998)

Po-Nichi Horitsu Yogoshu (Portuguese-Japanese Glossary of Legal Terms) et.al. (Tokyo: Yuhikaku, 2000)

The Michigan-Columbia Exchange Project

As part of the Michigan-Columbia Project, the Center has hosted 27 professors from the University of Michigan Law School and 18 professors from Columbia Law School to participate in the post-graduate lecture series “An Introduction to American Law”. Visitors this spring will include Professors Arthur W. Murphy and Andrzej Rapaczynski from Columbia University, and Professors James C. Hathaway and Roderick M. Hills Jr. from the University of Michigan. In addition, in March 2002 University of Tokyo Professor Onuma Yasuaki visited Columbia Law School and Professor Morita Osamu visited the University of Michigan Law School. In April, Associate Professor Matsubara Kentaro will visit Columbia University Law School.

Arthur W. Murphy, Joseph Solomon Professor Emeritus in Wills, Trust, and Estates, Columbia Law School

Research Area: Product Liability, Administrative Law, Trusts and Estates

Major Publications: LEGAL METHOD: CASES AND TEXT MATERIALS (with Harry W. Jones and John M. Kernochan, Foundation Press 1980).

CASES AND MATERIALS ON GRATUITOUS TRANSFERS, WILLS, INTESTATE SUCCESSION, TRUSTS, GIFTS, FUTURE INTERESTS AND ESTATE AND GIFT TAXATION (3rd ed. with Elias Clark and Louis Lusky, West Pub. Co. 1985).

Andrzej Rapaczynski, Professor of Law, Columbia Law School

Research Area: Corporate Governance

Major Publications: CORPORATE GOVERNANCE IN CENTRAL EUROPE AND RUSSIA (edited with Roman Frydman and Cheryl Gray, Central European University Press 1996).
The Role of the State and the Market in Establishing Property Rights, 10(2) Journal of Economic Perspectives (1996).

James C. Hathaway, Professor of Law, University of Michigan School of Law

Research Area: International Refugee Law

Major Publications: *International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative*, 21(1) Michigan Journal of International Law 131 (1999). Reprinted in (International Association of Refugee Law Judges eds.) THE CHANGING NATURE OF PERSECUTION (forthcoming).
Framing Refugee Protection in the New World Disorder (with C. Harvey), 34(2) Cornell International Law Journal (2001).

Roderick M. Hills Jr., Professor of Law, University of Michigan School of Law

Research Area: Comparative Federalism, Land Use, Local Government Law

Major Publications: *State Authority in Germany and the United States* (with Daniel Halberstam), The Annals of the American Academy of Political and Social Science (March 2001).

Poverty, Residency, and Federalism: States' Duty of Impartiality toward Newcomers, 1999 Supreme Court Review 277 (1999).

Anglo-Japanese Project

**Anglo-Japanese Academy (2)
National, Regional and Global Transition: A Common Agenda
for Anglo-Japanese Relations in the Twenty-first Century**

Workshop: 4-6 September 2001
Conference: 7-8 September 2001
Feedback Meeting: 9 September 2001
Places: Tapton Hall, the University of Sheffield (Workshop)
Shrigley Hall, near Manchester (Conference and Feedback)
Co-chairs: Professor Glenn D. Hook, the University of Sheffield
Professor Takahashi Susumu, the University of Tokyo
Supported by: Graduate School of East Asian Studies, the University of Sheffield
International Center for Comparative Law and Politics, Graduate School of Law
and Politics, the University of Tokyo
Sponsored by: The Japan Society for the Promotion of Science; the Nomura Foundation; the
Egusa Foundation; the Daiwa Anglo-Japanese Foundation; the Japan
Foundation; Japan 2001.

Images of the Real and the Represented in International Academic Exchange

by Hatsuse Ryuhei

So that I could attend an overseas conference and present a paper, I have to get departmental permission, something about which I feel no embarrassment. However, I do feel extremely uneasy about the extent to which my attending a conference would have a scholastic effect. Constantly supporting international academic exchange requires a great deal of physical energy and financial expense. I have always thought that it is the good humour and excellent organisational ability of Ms Wada Keiko as co-ordinator which serves to support the ICCLP. Wada-san always does things in an efficient way but always with a smile. But when I came across her at the venue for this conference she seemed somehow nervous and not her usual self. This provides an example of the difficulties one encounters when organising international academic conferences. I also have the experience of promoting academic exchange with Sheffield University with the support of the Ministry of Education. Even with the close collaboration of Professor Glenn Hook in organising joint symposia, I found myself like Wada-san, getting agitated by late cancellations. Besides, when inviting researchers from foreign universities, there would be times when they would suddenly bring their wives and I would be put in a difficult position with the university authorities who would always insist that expenses be dealt with in an extremely bureaucratic and rational manner. Of course the invited professors from overseas would blame the university authorities for their rudeness, but I would exhaust myself acting as the go-between. At the end of the day after all the worrying and financial dealings it makes one wonder what is the point of organising this kind of international exchange.

If you look at it from the viewpoint of managing a university, then international exchange does encourage applications from foreign students, promotes the exchange of research, has the symbolic effect of heightening the image of the university within society, and is the current fashion. As far as the home students are concerned it is embarrassing in a parochial way if there are no foreign students. Aside from running a university, the problem as regards international academic exchange is how to think about the academic (or research) value of this exchange. The argument states that the arts and the sciences are different, as are the interests and personalities of individual researchers. Below I would like to think about some of the effects of this based on my own experiences.

The first effect is the production of a paper. Within Japanese academic circles and societies, it is only very recently that the custom of summarising one's presentation in a paper and submitting it became the norm. However, when attending an international conference submitting a paper is often the minimum requirement. So, you are forced to prepare a paper (moreover, in English), otherwise you cannot board the plane. Writing a paper obviously cannot be done unless you have thought things through clearly. For a lazy person like me, this is a positive effect on my scholarship.

The second effect is meeting people. On one occasion at a conference in Japan Professor Hook replied to a question from a Japanese professor not by saying in polite Japanese 'Allow me to attempt to answer your questions', but by answering in an abstract manner. The Japanese professor complained that his question hadn't been answered. The Japanese professor in question is of a relaxed mien and there was no follow-up over this 'serious' matter. However, if you think about it in Japanese academic circles there is the tendency to explain things with the use of academic explanations originating in a person's thought and which carry their name—Professor Otsuka Hisao's interpretation of economic history or Professor Maruyama Masao's interpretation of politics. Of course there is no connection between personality and academic interpretation but because I have been brought up within the Japanese academic environment, whenever I try to understand an academic argument I always think of the face of the professor in question and as a result that person's book becomes easier to understand. Going abroad, meeting that person and then feeling a sense of intimacy with his/her books after you return home is a manifestation of the second effect of an international conference.

The third effect is that in the middle of a conference I invariably hit upon an idea and have had some true epiphanies. The reason for this is probably while one is concentrating on the English before too long one's thoughts start to fade and warp and this has the effect of liberating you from the trials of everyday life and giving the freedom for your thoughts to roam. Unlike academic conferences in Japan, you can recline in a comfortable seat, look out of the window at the scenery of a new country, or gaze at the unfamiliar designs on the ceiling of the conference hall. All of these things together are enough to relax my spirit. What is more, in England the sight of mints on the table also serves to make me happy.

The fourth effect is continuing the conversation after the meetings have finished over an aperitif into the early evening, over a glass of wine during dinner, and over a glass of brandy or whiskey into late night. However, unfortunately this effect does not apply to me because alcohol does not agree with me. Instead I become sleepy and cannot take anymore. I have thought for a long time that the cause of this is tiredness from talking in English all the time. However, I discovered about a year ago that even if the conversation is in Japanese then the jet-lag and alcohol still make me sleepy. I do think that if you are a strong drinker then the sleepiness probably disappears. I am jealous of this happy-go-lucky attitude but as I said, this fourth effect does not apply to me.

In no way can the above be regarded as hard and fast rules, but I would like to apply them to the AJA conference. As regards the first effect, I was able to research in a detailed manner and write up my paper in a serious fashion. By my reckoning, a pass. As for the second effect, most of the faces there I already knew relatively well so there wasn't such a strong sense of novelty. Instead, while listening to Mayor Sueyoshi Koichi of Kitakyushu's presentation and how much the city in which I had once lived has changed, what surprised me was being in a foreign country but learning about something with which I felt a degree of familiarity—a strange feeling and probably the effect of an international conference taking place in a global age. The third effect was realised when I learnt from Professor Eberhard Bort of Edinburgh University that EU citizens were able to vote in Scottish parliamentary elections. I was under the impression, like a lot of people, that Scottish devolution was an ethnic problem but divorcing the issue of devolution from ethnic problems and relating it to the structure of the EU was very insightful I thought. Once again, the fourth effect had nothing to do with me.

This is both my own personal viewpoint on academic conferences and my evaluation of the AJA conference. With the accumulation of these kinds of small experiences, international conferences can probably advance the scholastic effects. Everyone has their individual experiences but it is only the published proceedings which can provide evidence of the collective effect. However, what isn't seen is the hard work spent organising the conference which bears down relentlessly on the shoulders of the organisers. This lack of symmetry can often make you despair. Before the AJA conference there was a workshop for the young fellows who are the next generation of academics. They will in the future not only be participants in conferences, they will also experience what is involved in organising a conference and in this way there is no doubt that the effects of international academic exchange will surpass the four points outlined above.

I look forward to the opportunity of one day having a relaxed conversation with Wada-san after dinner at an international conference over a glass of wine while somebody else does the organising. Wada-san, will that be a glass of red or white?

[December, 2001, *translated by Hugo Dobson*]

The Anglo-Japanese Academy and Recent History

by Iokibe Kaoru

The theme of the Anglo-Japanese Academy's workshop and conference which took place in September 2001 was globalisation. The tragic events of 11 September occurred only a few hours after the conference had finished and hint at a darker side to the current era which carries the name of globalisation.

It is said that the world has drastically changed. If the meeting was a microcosm—in other words, the essence—of our accumulated knowledge about the world directly before the change, then it will provide a standard, not easily obtained, for the way we think about this post-diluvial world. Because aspects of the premises upon which the opinions exchanged at this workshop and conference were built have been eroded, I think that what was said at the meeting will occupy a privileged place in the experiences of the participants.

Young scholars from both the UK and Japan gathered to participate in this project. Although not represented, there was a tangible sense of an American presence. During the workshop, which took up the first half of the week-long schedule, many fellows from the UK made presentations based upon a historical approach. This contrasted with the theoretical approach taken by most of the fellows on the Japanese side. Among the UK fellows, there were several people who frankly expressed a feeling of unease with so-called American-style political science. On the Japanese side, Professor Sakamoto Yoshikazu was probably most in agreement with this position. Professor Sakamoto came to the workshop venue on the last day and gave a fascinating lecture in English recollecting his own intellectual development. He stated that the study of politics was an art and expressed an affinity with English and European intellectual traditions. He stressed that his own professor, Hans Morgenthau, who gained fame as a realist scholar of international politics, had been raised within these intellectual traditions. This point was illustrated by alluding to Morgenthau's sense of isolation within American society and his reformist zeal. Professor Sakamoto was not just being polite to his English hosts when he directly confessed his own intellectual identity as being neither American nor Japanese, rather English. Respectively, young UK scholars are rooted in a historical approach, and Professor Sakamoto, one of the great Japanese academic pioneers, was rooted in a more philosophical approach. However, the common ground occupied by both sides was unease with the monolithic American approach of treating politics as a science with a confidence bordering on arrogance.

Of course, there were topics of discussion peculiar to the UK—for example, the Human Rights Act enacted in 1998. I listened with interest and considered it to be an important watershed decision in UK constitutional history as I learnt how the UK Parliament, claiming that it was powerful enough to do anything apart from changing women into men and vice versa, had clearly set a common European standard for itself in this field. For the second half of the academy's meeting, a number of established, senior scholars joined to make the meeting into an international conference and on the last day a lively debate erupted about the rights and wrongs surrounding the enactment of the above legislation. Brice Dickson, a judge dealing with terrorism in Northern Ireland, spoke in favour of the act and stated his firm beliefs—in the background to which one could sense the regrettable state of affairs that the basic conditions for human life are threatened. Whilst taking pride in its solid traditions of liberal democracy, it is the UK which is engaging with the threat of domestic terrorism, squarely facing this problem and stockpiling the experience of various experiments and arguments. However, now this problem is no longer peculiar to the UK.

This is a completely different standpoint but Japan has its own peculiar problems. At the same time as being the theme of the conference, globalisation is also a topic of academic interest in Japan. There was not even time to return to one's room for a rest such was the scale and demands of the conference and it could also be said that the evening's dinner was even more of a trial. Because the

lingua franca was English, there were two groups: those who tended to say little, and those who tried their best at international exchange. Thanks to the experience of having spent about half a year in England as a high school student (a boarding school in Sheffield of all places!) I chose to give my colloquial English an airing and made it into the latter group. For the most part the UK fellows responded to our attempts at conversation in a friendly and polite manner but before too long their mood changed to one of wanting to enjoy a relaxed conversation with fellow native speakers. In such situations as these, the “internationalised” Japanese, who had earnestly taken it upon themselves to “interact”, were slightly mystified. However, being *truly* “international”, they immediately took this in their stride, convincing themselves that such “naturalness” was another essential quality they had to learn. An analogy can be drawn between this kind of communication and globalisation: if you think about it as a big picture, globalisation is eroding what is particular and different by making things universal. Of course, the particular is both resisting and reconstituting itself in the face of this. The smaller picture of globalisation might be thought of as a mixture of both hesitancy and eagerness. I casually thought to myself as I began to fall behind in the English conversation that personally the smaller-scale interface with globalisation is more interesting. In light of the recent outbreak of terrorism, it is also the one that may need to be re-considered.

Before, during, after (even up to the time of writing) the organisers of the AJA took great care of all the participants. Some of these organisers were first-rate researchers in their own right. The co-chairs Professors Glenn Hook and Takahashi Susumu and their students and colleagues took on a huge task in organising the conference which benefited us all. Ms Wada Keiko of the ICCLP with her talent for generosity always took care of behind-the-scenes matters and spiritually supported both other organisers and fellows. When it came to the form-filling and pen-pushing, there is no need to say that she was rushed off her feet. I would like to take this opportunity to thank Professors Hook and Takahashi whose brainchild the AJA was, and everybody mentioned above for their efforts in organising a conference which left a strong and enduring impression on me.

[November, 2001, *translated by Hugo Dobson*]

The Possibility of a Global Dialogue: the AJA Fellowship and 11 September 2001

by Sasaki Hiroshi

Make a trip to England for free? It is probably an indiscreet comment but my initial feeling was like I had won first prize in a lottery. However, having said that, there is no such thing as a free lunch in this world and the proviso attached to participating in the AJA workshop was the submission of an English manuscript by the end of July 2001 on the common theme of globalisation. Fortunately this subject is closely connected to my own research so I thought about making do by simply translating into English one of the papers I had previously written. However, which one of my modest collection of papers could I use? After much agonising I decided that I would rise to the challenge and tackle a new topic—East Asia and the politics of nuclear power. On the one hand, I would examine the history of the international development of nuclear power and nuclear weapons in East Asia as a direct aspect of globalisation; on the other hand I would depict the currently evolving anti-nuclear power movements as an example of trans-border democracy. After all, Japan was the victim of the first nuclear bomb and I felt that I should report to a foreign audience that Niigata was the site of the first referendum on the issue of nuclear power development. This was definitely the topic for me.

The collection of materials and data, then absorbing them all in preparation of writing, proceeded as planned. However, when the moment came to write, the first obstacle that stood in the way was language. To tell the truth, this was my first experience of writing a paper in English and what confidence I had in my ungrounded English began to disintegrate. I felt the impatience of only being able to express half of what I wanted to say. Then there was the shock of seeing my English paper after it had been corrected by my English-teaching colleague; I thought to myself that as long as I live I will not be able to write English that does not shame me. However much I resorted to a dictionary, I was unable to master completely the conceptions and vague nuances necessary to express myself in English. Although it may seem obvious, I came to understand all too well that the borders of language and the borders of culture are the same thing. The night before I gave my presentation at the University of Sheffield I reached an impasse and began to hatch an escape plan whereby I would express my sour grapes with the parting shot of: 'globalisation is nothing more than English-language Imperialism in academicism!'

For all that, when I managed to finish my presentation, my confidence began to return relentlessly; I was able to overcome the language barrier. I was surprised to learn that in English universities there were lecturers who specialised in teaching the style and method of making presentations and this initial lecture was particularly informative for me. If I think about it, rather than the linguistic divides, the differences in style between disciplines left a greater impression upon me. The disciplinary backgrounds of the AJA Fellows were varied: law, legal philosophy, sociology, economics, political science, and so on. Some people think negatively that in these cases, when the fields of interests are all different, the topics become diluted and cannot be discussed in much depth. However, I regard this as a good opportunity to find out where the social sciences stand and what social scientists think. More than anything else being able to interact with young researchers of the same generation and transcend different disciplinary divides—an opportunity that hardly ever presents itself at the often solitary and exclusive Japanese academic conferences—was the greatest benefit of this trip and proved to be a happy experience for me.

What is more, I believe that the crossing of a variety of borders was very much in evidence on this occasion. Once the young fellows' presentations were over, the conference venue shifted to a secluded hotel, which had once been an old monastery, and chiefly senior researchers took over the task of making presentations. Because the schedule was jam-packed, to tell the truth, I was exhausted. However, this was a valuable opportunity to listen to the kind of famous scholars whose names you only ever read in books perform live. I was especially pleased to have the opportunity at the conference dinners and receptions to sample the local beers and also to chat with these

established researchers about a number of things—not just research. I also fondly remember taking a stroll in the morning through the lawns and woods that surround the hotel, bumping into a particular professor and enjoying a conversation about the English weather and having just seen a wild deer.

* * *

The sub-title of my presentation was ‘towards a borderless democracy’, and as a young researcher who crossed Siberia and the Urals to come to England transcending a number of boundaries like language, culture, discipline and generation, I succeeded almost too well in the goal of conducting a global dialogue. To be honest, more than three months after the conference I have gradually become aware of the gravity of the countless boundaries that exist in this world and the problematic nature of crossing borders. The reason for this is, as I mentioned earlier, not only because of the reality that the specialisation of each discipline means that they cannot grasp the differences in language, culture and research environment in English and Japanese academicism within a comprehensive conceptualisation of the social sciences.

Once this visit to England was over, the problem that immediately emerged within my mind was that before such an encompassing conceptualisation of the social sciences can be established, we have to confront the problem of the possibility of a global dialogue.

After the conference was over, I extended my stay by a week and visited friends in Leeds in Bradford and then spent the rest of my time in London. So, I found out about the events of 11 September in my hotel in London. Just a few days beforehand I had been discussing the common theme of globalisation with distinguished scholars and ought to have factored several new viewpoints into various arguments. However, I was perplexed and couldn’t make sense of it all as the World Trade Centre collapsed and suddenly both US and UK governments declared a ‘war of retaliation’. One after the other countless questions sprang to mind. The image of a world torn asunder unable to bridge the divide came the mind. In these circumstances what role do the social sciences and social scientists have to play?

I feel incredibly fortunate to have been able to participate in the AJA Fellowships planned both to promote the nurturing of young English and Japanese social scientists and international dialogue and exchange. It was purely by chance that the events of September 11 happened immediately after the conference. However, for me this is steadily becoming more of an inevitable, rather than a coincidental, event. This series of events that occurred while I was in England were a big enough shock to me that I have been unable to make sense of them all, but at the very least in an increasingly divided world there is a need to equate the transcending of civilisational or intellectual borders with dialogue and this can become the catalyst for a future and deeper consideration of these troubles. I hope that I will have the chance to discuss this most pressing problem of the era of globalisation with the AJA Fellows.

[January 2002, *translated by Hugo Dobson*]

A 'Behind-the-Scenes' Look at Organising an International Conference: The UK Side

by Hugo Dobson

As academics, it is part and parcel of the 'job' to attend conferences, seminars and workshops. Equally, it is expected that academics will reciprocate and organise their own conferences around topics of interest for colleagues and friends to attend. Over the years a number of expectations have evolved about what these conferences will involve: a comfortable venue, stimulating presentations, chances to network, opportunities for sight-seeing and recreation. As a result, the organisation of a conference extends beyond the obvious (inviting speakers, copying papers, ensuring overhead projectors work, and so on) as far as the pastoral and sometimes even the bizarre. Recently I had the opportunity to work with Ms Wada Keiko of the ICCLP again in the organisation of an international conference held in England for one week in September 2001. A week is not only a long time in politics, it is also a long time for an academic conference. It sounds slightly disheartening for anybody involved in the organization of a meeting of this kind but the sign of a successful conference should be that nobody notices the often frenetic organisation going on behind the scenes—it should be invisible. Only when things go wrong do people notice. This brief essay is a recollection by the two of us into the effort that went into making our own role imperceptible and this conference a success.

Although the meeting took place in September 2001, a preparatory meeting had been held in August 2000. At that time I was (fortunately?) either in Tokyo or involved overseeing postgraduate examinations at Kent University; either way, I was unable to attend. As a result my memory of what was said and discussed at this meeting is non-existent. Added to this, the fact that I am now an employee of Sheffield University makes it seem even longer ago. Fast-forward to the summer of 2001 and I was preparing for my first lecture in Japanese at the Tokyo Big Site. All the time that I was writing that lecture, I knew in the back of mind that once I had given the lecture and returned to Sheffield all hell would break loose and my life would be dominated with the organization for the conference. I was not mistaken!

Before the workshop and conference even began, preparation for it was taking up most of my working day. I tend to wake up and come to work early anyway but now everything I did from early in the morning until late in the evening was related to the Anglo-Japanese Academy. Every morning I would open my e-mail account and shudder at the number of e-mail messages concerned with the AJA which had arrived overnight. Because of the time difference the first few hours of the day would be particularly hectic as it was the afternoon in Tokyo. As a result, further e-mails would still be arriving or as soon as one was dealt with a reply would come back. The rest of the day was spent dealing with papers to be presented, booking hotels and taxis, putting the final touches to the conference guidebook, doing recesses to various venues. Although tiring and frustrating at times, the work was on occasion enjoyable thanks to the hard work and personalities of colleagues like Wada-san and SusieTranter.

Evening would inevitably come and I would stagger home, grab some fast-food and beer on the way and then collapse in front of the TV just to wake up and do the same thing again the next day. This routine became more of a rut as the conference approached: getting home late and waking up early. I became lazier in some ways (personal hygiene was neglected and I let a beard grow) and stressed in others (sadly picking up the habit of smoking).

The strange thing about organising a conference is that having found speakers, discussed the topics about which they will present and making arrangements to physically get them to the venue, you have very no time to actually hear what they have to say. During most of the workshop held at the University of Sheffield's Shrigley Hall, I had to absent myself from workshops and presentations in order to organise a number of pressing matters from making photocopies for the next panel to arranging the choice and delivery of wine. This is a shame as there were a number of presentations

by fellow younger scholars and more senior scholars which I was keen to hear.

So, for the organizers a conference is an administrative task rather than an academic exercise. Although having tried to block out a lot of the bad memories of the conference, two aspects have lingered in my mind: transport and technology. Various transport arrangements included booking taxis, hiring a minibus and transporting both people and objects in my own car. Being a bit of a late developer I had only passed my driving test the previous year but now had to take on the roles of taxi driver and courier. I usually enjoy driving but by the time the conference had finished I was glad to see back of the car for a while and start using my feet for walking again rather than clutch control. I was certainly made aware of the impact of technology upon the organization of any conference these days in both a positive and negative sense. On the positive side e-mail means that Wada-san and I could contact each other easily despite being in different continents, powerpoint makes for a more interesting and engaging presentation, mobile phones ensure that you can keep in touch with other organisers. However, there is a flipside to the utility of technology. E-mail often means that the workload increases, hiring projectors for powerpoint presentations is expensive, and only the most powerful mobile phone could get a signal at Shrigley Hall—which gives you an idea of how remote a venue it was.

I had visited Shrigley Hall a couple of times to check rooms, talk to the hotel staff, and so on, but still found it a very impressive venue to approach. Although now a hotel catering to the corporate world, it had originally been a convent and commanded spectacular views over to Manchester. It had all the creature comforts expected of a conference venue: golf courses, swimming pool, gym, and so on. However, for the most part (as I am sure you can guess) I had little time to enjoy them unfortunately. On the final day of the conference I decided that this was an unacceptable state of affairs and chose to duck out of the last session (apologies to the presenters). I grabbed my swimming kit and made a bee-line for the pool. After having spent an hour or so lazing around in the empty pool and relaxing in the sauna, I sneaked back to room taking the longer, circuitous route to avoid bumping into any delegates who were not safely contained in the conference room and were roaming free. Unfortunately, just as I was about to reach my room I was rumbled! I bumped into Professor Marie Conte-Helm, the Director-General of the Daiwa Anglo-Japanese Foundation, who had just arrived and was not sure where the meeting was taking place. I have known Professor Conte-Helm for some time now and was pleased to see her, but also felt a pang of guilt for having been found playing truant. I said hello, pointed her in the right direction, made my excuses and headed back to my room to get changed for the final day's reception dinner.

The next day everybody left and the sense of relief was tangible. However, the respite was brief and AJA affairs have continued to occupy our time--like an earthquake, there have been a few aftershocks and sporadic rumblings with which to contend. Upon returning home I swiftly removed the poor excuse for a beard, quit the unpleasant habit of smoking and swore never to get involved in the organization of such a large-scale conference. Three months later I am still clean-shaven, have managed by and large to resist cigarettes but am now involved in the organization of three conferences. The best laid plans of mice and men!

(December 2001)

A 'Behind-the-Scenes' Look at Organising an International Conference: The Japanese Side

by Wada Keiko

Once I was shown around the backstage of a *kabuki* theatre. Everything I saw there seemed to be at sixes and sevens, but the after this initial impression I realised that the actors and the propmen, were composed and methodically getting on with their jobs. The organisation of an academic conference also has its own 'backstage'. Up until the actual event, one works calmly and effectively, but come the big day one must work without being seen to be working. I think that giving the impression that one is not working is the ideal style of organisation. However, with the AJA workshop and conference, my own idealised image of how to organise a conference did not quite match up to the reality.

* * *

Every morning in the run up to the start of the conference, I would make my way to Hugo Dobson's office and invariably upon my arrival I would hear the words, 'something's happened!' Everyday, whether it was on the UK side or the Japanese side, some problem or another would occur. After discussing it with Professors Hook and Takahashi, we would be able to make a decision and solve the problems as they arose—making endless changes to the programme due to last-minute cancellations, figuring out the presenters and chairs for each panel (around thirty panels in total), contacting countless times the venues and a variety of people involved at various stages of the conference. As Professors Hook and Takahashi have been involved with organising international conferences on a number of occasions in the past, they didn't bat an eyelid at all this. However, Hugo and myself were unable to react in this calm manner and our collective stress started to manifest itself in our appetites. At the university restaurant, Hugo would order an enormous Yorkshire pudding and a beer for lunch. He also started smoking and everyday the number of cigarettes smoked would increase. Without realising it, I would devour a huge quiche which I would normally never be able to eat.

I realised how tired Hugo must have been when sometimes, without realising, he would suddenly speak to me in English (although we usually spoke to each other in Japanese). Before I left Tokyo I remembered the daily routine of incessant e-mailing and telephone calls for the AJA and I soon realised that he had been doing the same thing. I was fortunate enough to have a photocopier and a printer in my office and the assistance of the ICCLP staff to call upon. Hugo's office had none of this and each time he had to go to a different floor of the building to pick up print-outs and make copies. He also had to make all the bookings for buses and taxis filling in a separate official form for each booking, getting the signature of Professor Hook and then submitting them to the main office. Organising transport over seven days for around seventy people whose times of arrival and return are all different is a big task. We sometimes had to spend about an hour filling in the forms for a taxi to pick-up participants only to find out that, even though the name of the taxi company had been included in the list of firms the university dealt with, the university in reality did not deal with that company. So, we had to start again from the beginning. However, finally, with the addition of Susie Tranter of the School of East Asian Studies as a full member of the organising staff, we produced the final programme.

We had not had time to check the accommodation for the conference so we ventured out to Shrigley Hall in Cheshire on 3 September to investigate the facilities. This was also the day that the AJA Fellows were to arrive for the workshop which preceded the conference, and I was worrying about their arrival at Manchester airport as we set off. My fears were not unwarranted. During our discussions at Shrigley Hall Hugo went off to make a call to Tapton Hall back in Sheffield where the Fellows' workshop was taking place. He returned to tell us that Tapton Hall had received a phone call from one of the Japanese Fellows reporting that a taxi had not come to Heathrow to pick them up. 'Heathrow?' everyone said in disbelief. We reassured ourselves that they must have meant Manchester as all the Fellows from Japan were changing at Heathrow and carrying on their journey

from London to Manchester. Even if we had possessed a mobile phone, it would not have helped much as a Japanese mobile phone wouldn't be able to connect with us here. We continued our discussions with the manager and chef of Shrigley Hall and then went to look at the meeting rooms and the reception before heading back to Sheffield. We got back to Tapton Hall just in time for another meeting of the organisers and expected further phone calls from the Japanese Fellows. However, nobody had arrived yet. At the meeting Associate Professor Matsubara Kentaro, who had come from Oxford, was given the new title of 'senior fellow' and duties were allocated. Mori-san of Kobe University, who was manning the helpdesk, had come from Prague. Someya-san and Yasui-san were visiting England for the first time and conducting their own comparative study of the UK and Japan by visiting MacDonalDs. I also met Dr Hasegawa and Takeda Hiroko again, whom I had first met at the preparatory meeting held last year in Sheffield. Little did we think what a large-scale project this conference would become.

The next morning I met another member of the organising committee, Michael Reddish of the University of Warwick, at the entrance to Tapton Hall. On the way to the meeting room, somebody walked past and I thought, 'Hang on! Was that Moriya-san?' Associate Professor Moriya of Osaka City University had previously written an article for the *ICCLP Review* about his time spent studying abroad in Germany. But there was no reason why he should be here. (Was I dreaming?)

I entered the room and saw all the Japanese Fellows from Kyoto, Nagoya, Tsukuba, Sapporo, Niigata, Kumamoto... I remembered having visited them all during the last year in order to meet and explain the idea of the project to them. The UK Fellows had all applied through the Internet and thereafter been contacted by e-mail. A hotmail account had been created to which the UK and Japanese Fellows and speakers were asked to send their completed papers. The Japanese participants had contacted me by e-mail as well. However, despite the fact that I had had these useful means of communication available to me, I had felt uncertain without face-to-face contact beforehand with the Japanese Fellows and Senior Academics in Japan. I had wanted to build up in my mind's eye my own image of this project. I understood the general shape the conference would take, but the proceedings and success of a conference are the result of the people involved.

After the introductions, I found out that it was not from Heathrow that the mysterious phone call had come, but from Manchester airport and that the taxi really had not arrived. The Japanese Fellows involved had finally got a train to Sheffield and then a taxi to Tapton Hall. What is more, I found out that there was also no taxi to meet the two Fellows who had arrived on an evening flight and they ended up spending two hours looking for a taxi that had been sent to take them to Sheffield. In other words, everything had gone pear-shaped because we had previously planned two schedules for the Fellows when they arrived and informed them that taxis—which never arrived—would be waiting for them. While sympathising with the Japanese Fellows, Hugo and I wondered why we had wasted our energies filling in the official forms.

The workshop was due to start at 8:50. After the opening welcome speeches, everybody introduced themselves. Associate Professor Moriya was in actual fact Associate Professor Amiya who was conducting research in Germany. I had not had a chance to meet him and only knew him from his photograph. On the one hand, all the UK Fellows seemed relaxed; on the other hand, the Japanese Fellows were both tired and nervous.

'Tired?' I asked one of the Fellows sat next to me at lunchtime on the second day. 'I've crossed the line of tiredness', came the reply. His face appeared slightly swollen which was a cause for concern. He had been one of those who had suffered and been forced to use their initiative at Manchester airport the other evening.

The workshop ran from morning until evening and then continued with an invited evening speaker and dinner. On the first night it was Professor Arthur Stockwin of Oxford University; on the second evening it was Professor David Feldman of Birmingham University; and on the final evening it was

a panel discussion with Professors Sakamoto Yoshikazu and Fujiwara Kiichi. Although the venue changed, the conference which followed at Shrigley Hall was similar in that it was crammed full of panels from first thing in the morning until the evening—something I couldn't imagine in Japan.

'Impossible!' 'Can't be done!' It felt like the last year had been spent repeatedly saying these things in response to the Professor Hook's suggestions. Since arriving in Sheffield, and to the surprise of Professor Takahashi, it felt like I was using these kind of words more frequently in reaction to the exhausting and sudden confusing changes to the schedule. Where on earth did Professor Hook get his energy from? It was a real mystery and only afterwards was I told by his wife that when he came home one evening he was practically asleep halfway up the stairs.

On the last day of the workshop, Professor Takahashi and three members of the organising committee moved over to Shrigley Hall. It took about an hour to get there by Hugo's car which had once again been commandeered as a taxi. I had already lost faith with UK taxis and asked Hugo to call and confirm the bookings we had made to get delegates to Shrigley. He appeared to feel a bit uneasy about going this far but I stuck to my guns. That evening the senior academics arrived safely and I was relieved to see their smiling faces. However, there was one blip—Professors Machimura and Takahara had been unable to pick up their luggage at Manchester airport and had to wait for it to be delivered to Shrigley.

* * *

'Wada-san!' whispered Professor Takahashi from behind me. We went outside the meeting room and made arrangements in hushed tones. Even while he was chairing a session I would receive his detailed and carefully considered instructions and decisions. During the breaks, arrangements continued to be made. The seating plans for each table at dinner were decided and diagrams produced. Hugo and Michael ran off to report the news back to the staff of Shrigley Hall. Takeda-san was running about with reimbursement forms for the fellows to complete and return. Yasui-san was in charge of both the photographs and the accounts and was a reassuring influence as he always appeared calm. Someya-san reported back on how the Fellows were doing. And finally Mori-san was always in stand-by mode, ready to turn his hand cheerfully to any task. I overheard a number of the Fellows talking among themselves, saying things such as, 'I was impressed by Professor Sakamoto's talk', and 'Professor John Dunn really encouraged me'.

Emeritus Professor Ishii Shiro's paper arrived by fax. He had been forced to drop out of the conference and sent his regrets and his paper in his place. He had gone out of his way to produce the paper and send it to us. All the senior academics had spent a lot of their time and effort in producing papers for and attending the AJA project, and I would like to thank them again for always responding to our requests and demands with a smile and a sense of humour.

As the end of the reception dinner on the first day approached, Mayor Sueyoshi Koichi of Kitakyushu and Ichimura Shinichi, Director of the International Center for the Study of East Asian Development (ICSEAD) arrived by car from London. Due to a traffic jam, their epic journey from Japan had taken about twenty-three hours. Mayor Sueyoshi stayed one night and after presenting a session the next morning had to hurry straight away back to Japan.

Whatever the situation, time eventually passes. The conference, which had started with the congenial faces of Professors Sakamoto and Dore, ended with the final session. Thereafter, everyone gathered for the final conference dinner. As invited guests made their speeches and Professors Hook and Takahashi made their thank-yous, the sound of laughter could be heard from each table as the most relaxed atmosphere of the past week enveloped the conference. Towards the end of the dinner, the fellows gathered together, and with Professor Fujiwara and myself in attendance, began a long conversation.

The next day after the participants had left, we organisers took a photo by which to remember the event in front of Shrigley Hall. It felt like it was the first time I had looked at the beautiful

countryside surrounding the hall.

Two days later the attacks took place on the World Trade Centre in New York. Six weeks after returning home to Japan, the papers of the conference were collected together in a 600-page, volume the size of which brought home to me the scale of the project. The 'war of revenge' continues and a 'concert of the world' seems unlikely in the current circumstances. However, with the activities of the AJA I would like to think that we created an Anglo-Japanese 'concert' of fellows and speakers symbolised by the papers presented.

[November 2001, *translated by Hugo Dobson*]

Comparative Law and Politics Seminars & Forums

Held at the University of Tokyo, Graduate School of Law and Politics, October 2001 – March 2002.

[Seminars]

The 111th Comparative Law and Politics Seminar - 9 October 2001

Speaker: Anne Muxel, Research Fellow at the CEVIPOF (Center for the Study of French Political Life) - FNSP (France), ICCLP Visiting Associate Professor
Topic: Les jeunes d'Europe du Sud et la politique. Une enquête comparative: France, Italie, Espagne (Youth and Politics in Southern Europe. A Comparative Study: France, Italy and Spain)
Language: French (with Japanese interpretation by Associate Professor Nakayama Yohei)
*Discussion in English
Moderator: Professor Kitamura Ichiro
*Co-organized with Franco-Japanese Society of Political Science

The 112th Comparative Law and Politics Seminar - 10 October 2001

Speaker: Judge Harry T. Edwards, U.S. Court of Appeals for the D.C. Circuit
Topic: The Good and Bad of Legal Education in the United States
Language: English (with summary in Japanese)
Moderator: Associate Professor Asaka Kichimoto
*Co-organized with Anglo-American Common Law Study Meeting

The 113th Comparative Law and Politics Seminar - 18, 19, 25 & 26 October 2001

Speaker: Professor Ronald J. Gilson, Columbia Law School
Topic: Venture Capital Contracting
Language: English (with summary in Japanese)
Moderator: Professor Kashiwagi Noboru

The 114th Comparative Law and Politics Seminar - 18 October 2001

--- Life Science / Technology and Law Seminar ---

Speaker: Professor Matsubara Kenichi, Nara Institute of Science and Technology
Topic: The Development of Modern Life Science and Technology: The Relationship with Society
Language: Japanese
Moderator: Associate Professor Shiroyama Hideaki

The 115th Comparative Law and Politics Seminar - 27 October 2001

Speaker: Anne Muxel, Research Fellow at the CEVIPOF (Center for the Study of French Political Life) - FNSP (France), ICCLP Visiting Associate Professor
Commentator: Professor Kabashima Ikuo
Topic: L'abstention électorale: hors-jeu et dans le jeu politique (Non Voting: In or Out Political Game)
Language: French (with Japanese interpretation by Associate Professor Nakayama Yohei)
*Discussion in English
Moderator: Professor Takahashi Susumu
*Co-organized with Seminar of Comparative Politics, the University of Tokyo Graduate School of Law and Politics, and Franco-Japanese Society of Political Science

The 116th Comparative Law and Politics Seminar - 19, November 2001

--- Life Science / Technology and Law Seminar ---

Speakers: Professor Matsubara Kenichi (Nara Institute of Science and Technology)

Mr Ono Shinjiro (Japan Patent Office Chief Appeals Examiner)
Mr Shimizu Hatsushi (The Director of Shimizu Hashimoto International Patent Office)
Mr Nagashima Renpei (The Advisor of Chugai Pharmaceutical Co., Ltd)
Topic: Life Science / Technology and Intellectual Property
Language: Japanese
Moderator: Associate Professor Shiroyama Hideaki

The 117th Comparative Law and Politics Seminar - 21 November 2001

--- Life Science / Technology and Law Seminar ---

Speakers: Professor Matsubara Kenichi (Nara Institute of Science and Technology)
Mr Kachiki Motoya (The Director of Okazaki National Research Institute for Basic Biology)
Mr Toyoshima Kumao (The Director of Sumitomo Hospital)
Mr Yonemoto Shohei (The Director of Mitsubishi Institute of Life Sciences)
Topic: Human Crone, Human / Animal Hybrid and the Foresight of Alzheimer's Disease and Schizophrenia
Language: Japanese
Moderator: Associate Professor Shiroyama Hideaki

The 118th Comparative Law and Politics Seminar - 22 November 2001

Speaker: Dr William Braithwaite, Senior Policy Advisor of DHHS
Topic: Medical Privacy Regulations under HIPAA in the U.S.
Language: English
Moderator: Professor Higuchi Norio
*Co-organized with Anglo-American Common Law Study Meeting

The 119th Comparative Law and Politics Seminar - 14 December 2001

Speaker: Professor Stefano Bartolini, European University Institute (Florence, Italy)
Topic: Institutional democratisation and political structuring in the EU. Lessons from the nation-state development
Language: English
Moderator: Professor Hirashima Kenji, Institute of Social Science, the University of Tokyo

The 120th Comparative Law and Politics Seminar - 23 January 2002

Speaker: Professor Lawrence Susskind, Department of Urban Studies and Planning, Massachusetts Institute of Technology
Topic: Global Environmental Negotiation
Language: English
Moderator: Associate Professor Shiroyama Hideaki

The 121st Comparative Law and Politics Seminar - 31 January 2002

Speaker: Professor Lee Chang Hee, Seoul National University, ICCLP Visiting Professor
Topic: Dependent Agency Permanent Establishment
Language: English (with summary in Japanese)
Moderator: Professor Kashiwagi Noboru

The 122nd Comparative Law and Politics Seminar - 12 February 2002

Speaker: Professor Paul Matthews, University of London, King's College
Topic: Current Issues on English Law of Trusts
Language: English
Moderator: Professor Higuchi Norio
*Co-organized with Anglo-American Common Law Study Meeting

The 123rd Comparative Law and Politics Seminar - 14 February 2002

Speaker: Professor Claudia Lima Marques, Federal University of Rio Grande do Sul (Brazil)
Topic: International Consumer Contract Law and the Internet in Brazil
Language: German (with interpretation into Japanese by Associate Professor Nishitani Yuko, Tohoku University)
Moderator: Professor Dogauchi Masato

The 124th Comparative Law and Politics Seminar - 28 February 2002

Speaker: Professor Carl Schneider, University of Michigan Law School
Topic: Bioethics: Dead at 30?
Language: English
Moderator: Professor Higuchi Norio
*Co-organized with Anglo-American Common Law Study Meeting

[Forums]

The 115th Comparative Law and Politics Forum - 18 October 2001

Speaker: Katharine T. Bartlett, Dean, Duke University School of Law
Topic: The Many Faces of Gender Equality in U.S. Law: Family, Workplace, and Education
Language: English
Moderator: Associate Professor Asaka Kichimoto
*Co-organized with Anglo-American Common Law Study Meeting

The 116th Comparative Law and Politics Forum - 24 October, 2001

Speaker: Arnold M. Quittner, Esq., A Partner of L.A. Law Firm, Frequent Lecturer at PLI Bankruptcy Seminars
Topic: Recent Development of U.S. Cases on Cross-Border Insolvency
Language: English with summary in Japanese
Moderator: Professor Kashiwagi Noboru

The 117th Comparative Law and Politics Forum - 14 March 2002

Speaker: John B. Attanasio, Dean, Southern Methodist University School of Law
Topic: Five Themes of American Law
Language: English
Moderator: Professor Daniel Foote
*Co-organized with Anglo-American Common Law Study Meeting

Reports on Selected Seminars and Forums

[Seminars]

The 112th Comparative Law and Politics Seminar—10 October 2001

Judge Harry T. Edwards

The Good and Bad of Legal Education in the United States

Judge Harry T. Edwards was a tenured professor at the University of Michigan Law School and Harvard Law School before being appointed as a United States Circuit Judge in 1980. He has been an adjunct professor at NYU Law School and other law schools even after joining the federal court. His article in the *Michigan Law Review* in 1992 criticized a growing division between legal education and the needs of the legal profession. This article opened a big debate and the *Michigan Law Review* devoted an entire Symposium edition to the subject. At this ICCLP seminar, Judge Edwards traced the history of legal education in the United States and outlined for us favorable prospects for ongoing reforms. Since he had read the recommendations of the Justice System Reform Council of Japan in advance, an interesting discussion on the actual function of law schools in the United States could be held at the Q & A session.

From 1870, Dean Christopher Columbus Langdell of Harvard Law School reformed legal education in the United States, which until then had followed a traditional apprenticeship lawyer training model. This reform was based on his "law as science" view, which would later come to be attacked devastatingly by legal realists in the 1920s and 1930s. However, it set a standard for law schools, in which academic lawyers, rather than practicing lawyers, teach graduate students for three years, mainly by case method. Accreditation standards for law schools by the American Bar Association, rather than the local governments or local practitioners, lent support to the Harvard model of legal education.

From the 1970s, however, the faculty hiring policies of elite law schools favored candidates who were smart but more interested in abstract theory, and were sometimes disdainful of the practical scholarship and the legal profession. Too many legal academics seemed to forget that law schools are professional schools, not graduate schools. Still, Judge Edwards sees a transformation in legal education at NYU Law School and other law schools. NYU Law School has created a truly integrated model of legal education, one that fully embraces theoretical and doctrinal scholarship, clinical education, and so on. Students are encouraged to consider and pursue diverse professional interests, and to be good lawyers who have played a special role in American society. Finally, Judge Edwards emphasizes that the tradition of a three-year, graduate-level law school should be maintained for a high quality program of legal education.

Judge Edwards' provocative article in 1992 was arguing only for a sound balance between theoretical scholarship and practical scholarship at the professional schools. Surely, it has lent no credibility to a common misperception in Japan that law schools in the United States are trade schools where only practical skills are taught to would-be lawyers.

[Asaka Kichimoto]

The 113th Comparative Law and Politics Seminar-18, 19, 25 and 26 October, 2001

Professor Ronald J. Gilson

Venture Capital Contracting

Professor Ronald J. Gilson, of Columbia University Law School visited the International Center for Comparative Law and Politics during October 2001, to conduct four seminars on Venture Capital Contracting. The first seminar introduced the subject by focusing on the historical development of the United States venture capital market. This emphasis on a single country was justified because the U.S. venture capital market is the world's largest and was the first to develop. If we want to

understand what has made the U.S. market work, Professor Gilson noted, we need to know history. In Professor Gilson's view, the U.S. story is wildly idiosyncratic. Equally important, however, is that the outcome of that history is not idiosyncratic. Professor Gilson stressed that all history is path dependent; tautologically, we always can trace where we are to a particular pattern of events. What is not always readily apparent is whether the outcome we observe is contingent on the path. Can other countries, seeking to emulate the U.S. success in developing a venture capital market, achieve that outcome despite following a very different path?

Professor Gilson's second seminar took up the importance to the venture capital market of the fact that early stage high technology companies are often geographically clustered in high technology industrial districts. Venture capital is geographically clustered – for example, between 1992 and now, California attracted between one-half and one-third of all U.S. venture capital funding – and the lead venture capital fund in a portfolio company investment is typically located geographically proximate to the portfolio company. As a result, the structure of the venture capital market is tied to the spatial concentration of innovative industries. Professor Gilson focused his presentation on the legal infrastructure necessary to allow high technology industrial districts to continually reinvent themselves, creating continued demand for venture capital. In particular, Professor Gilson stressed the importance of the enforceability of post-employment covenants not to compete on the active external labor market necessary to sustaining a high technology industrial district. He noted that the experiences of the two most prominent U.S. industrial districts – Silicon Valley in California and Route 128 in Massachusetts – provide empirical support for this analysis. Silicon Valley has been successful in shifting between product orientations; Route 128 has not. California does not enforce post-employment covenants not to compete; Massachusetts does.

Professor Gilson's third seminar took up the structure of U.S. venture capital contracting. He stressed that the success of the U.S. venture capital market was due to private ordering, not government intervention. Any form of financial contracting confronts three barriers: information asymmetry, uncertainty, and opportunism. Financing early stage high technology companies presents these three problems in extreme form, because most of the important decisions and events affecting a company's success remain in the future. Professor Gilson explained how the venture capital contracting structure responds to these extreme problems through three techniques: every participant is intensely incentivized; high intensity incentives are matched by intense monitoring; and the terms of the two contracting nodes – the investor/venture capital fund contract and the venture capital fund/portfolio company contract – reinforce each other, particularly through their mutual support of a reputation market for venture capitalists, and through the importance of exit to both contracts.

The last seminar examined two topics. First, Professor Gilson took up alternatives to U.S. style venture capital contracting: can other institutions support the commercialization of cutting edge science as venture capital does in the United States? Three alternative institutional structures were considered. Banks, Professor Gilson argued, could not substitute for venture capital contracting because debt service obligations were unsuitable to the cash flow characteristics of early stage, high technology companies. Additionally, banks would find it difficult to provide their employees the incentives to select and monitor portfolio incentives unless the employees were permanently committed to the venture capital operation. However, by this point a bank providing equity capital through a dedicated staff would closely resemble a venture capital contracting organization. Other industrial corporations might also provide early stage venture capital, but would encounter the same internal incentive problems with its staff as would banks. Consistent with this analysis, corporations appear to succeed in early stage investments only when the portfolio company has technology that directly relates to the funding corporation's business, suggesting a joint venture rather than a venture capital model. Corporations might also fund cutting edge technology investments internally, as leading companies do in every developed economy. The remarkable success of venture capital-backed companies nonetheless suggests that the venture capital contracting model has unique advantages in commercializing cutting edge science.

Professor Gilson's final seminar concluded by considering how a government might facilitate the development of a venture capital market. He stressed that three inputs were necessary to a venture capital market – capital, a financial intermediary to play the incentive/monitoring role, and entrepreneurs – whose provision suffered from a simultaneity problem. Any single input would be forthcoming if the other two were in place. Professor Gilson's analysis suggested that the government's most promising role might be to put up capital as a passive investor in a number of venture capital funds organized and incentivized as in the venture capital contracting model. This would provide the institutional conditions necessary to the encouragement of entrepreneurs without, Professor Gilson stressed, the government's involvement in the actual capital allocation decisions.

[Ronald J. Gilson]

The 119th Comparative Law and Politics Seminar-14 December 2001

Professor Stefano Bartolini

Institutional democratisation and political structuring in the EU. Lessons from the nation-state development

This paper deals with the inherent tension between territorially unbounded economic transactions and bounded (nationally) principles and practices of political legitimation within the European Union. Taking the lead from the obvious 'democratic deficit' of the current EU polity, the paper discusses whether it is actually possible and desirable to further 'democratise' the predominantly 'inter-governmental' and techno-bureaucratic structure of the European Union. Attention is devoted to the definition of the European political community, to the vertical distribution of competencies between the Union and the nation states, to the 'constitutionalisation' of the treaties, and, finally, to the development of representative actors able to alimnet the input side of democracy. The point is that democracy is impossible without a clear definition of the boundaries of its political community; it is ineffective without the existence of autonomously organised socio-political actors; and it is finally hetero-directed if it lacks the capacity to set its own substantive competencies. The paper argues that the tension between territorially unbounded economic transactions and bounded (at the national level) principles and practices of political legitimation within the European Union is not due to unbalanced development of economic versus political integration, but results from the specific original project and institutional building of the EU. In other words, the specific modalities of economic integration now make problematic any form of democratisation. Moreover, in the debate about the EU political decision-making too much attention has been given to '*institutional*' democratisation problems. The processes through which substantive socio-cultural inputs emerge as a result of the mobilisation and organisation of interests, identities and socio-cultural movements has been left somehow in the shadow. The overall conclusion is that in the current blurring of all crucial boundaries of the EU polity, effective mass democratisation may not only be difficult, but even detrimental to further integration at the European level.

[Stefano Bartolini]

The 123rd Comparative Law and Politics Seminar-14 February 2002

Professor Claudia Lima Marques

International Consumer Contract Law and the Internet in Brazil

As the Brazilian Consumer Code is always applied *lois d'application immédiate*, Prof. Dr. Lima Marques continued to describe its substantive rules. The Brazilian Consumer Code has a very wide scope in terms of personal and material application: it is firstly based on the objective definition of the consumer, which includes all the final destinatories of a product and service, and secondly it covers (or tries to cover) all the legal aspects between consumers and companies (rules on every kind of contract, tort, product liability, advertisement, information, unfair clauses and so on). At the time when the Consumer Code was approved in the parliament, the legislators aimed to reform several old-fashioned rules contained in the Civil Code and therefore acknowledged the wide range of application of the Consumer Code. On January 10th, 2002, however, the new Civil Code was enacted and is to be put into force in 2003. Many regulations, once introduced by the Consumer

Code, were taken over by the new Civil Code, so that its scope of application could be reduced in the future through appropriate interpretation.

Furthermore, the territorial range of application of the Brazilian Consumer Code should be fixed in the future by making clear the provisions of conflict of law rules. It is expected that the LICC will be reformed in accordance with the new Code Civil and will incorporate innovative regulations relating to international consumer contracts, which have been actively discussed since the 1980s.

[Nishitani Yuko]

[Forums]

The 115th Comparative Law and Politics Forum – 18 October 2001

Dean Katharine T. Bartlett

The Many Faces of Gender Equality in U.S. Law: Family, Workplace and Education

Katharine T. Bartlett became Dean of Duke Law School in January 2000. She teaches courses on family law, gender and law, and contracts. At this Forum, she talked about equality law in the United States, particularly concerning equality between men and women, and described some of the different interpretations or faces of equality in United States law, using examples from family, employment and education law.

The United States Constitution prohibits states from discriminating on the basis of sex, race, national origin and religion, and various federal and state statutes also prohibit discrimination based on these characteristics in public or private employment, education and other spheres of life. In interpreting what equality means, most courts and statutes follow the paradigm of formal equality. Formal equality assumes that men and women share the same basic traits, and thus should be treated alike, according to their actual, individual characteristics, rather than according to gender-based assumptions or stereotypes. Formal equality is the approach by which most progress has been made on behalf of women in the United States. Under the United States Constitution, formal equality has been used to invalidate a broad range of laws and practices, such as laws that gave men preference over women in certain state-appointed positions, and laws that required parents to support their male children longer than they were required to support their female ones. This same model of equality informs state and federal legislation that has eliminated barriers to women's entry into certain jobs and provided more equal resources for women in college sports. Formal equality has been applied to invalidate both rules that favor women and those that favor men. Because the concern of formal equality is only that men and women be treated the same, it does not matter whether a rule favors men or women: both stances are equally unacceptable. Most explicit statutory sex discrimination has been eliminated in the United States, with the exception of a few laws that make it more difficult for unmarried men than for unmarried women to establish parentage and parental rights. Some critics, however, question whether formal equality has brought real equality for women; such detractors suggest that alternative models of equality may be required to realize true equality.

In many contexts, the removal of the barriers that prevented women from having access to jobs, education and fairness in divorce, still leaves women worse off than men. Formal equality requires that women be allowed to compete with men on the same terms. But, what if to reach the same level of success as men, women need different, as well as more favorable terms? In such cases, substantive equality addresses not the equality of treatment, but rather the fairness or equality of the results. Its goal is to provide special treatment, or affirmative action, to eliminate the effects of those differences or of past discrimination.

Another paradigm for equality under United States law is concerned, as is substantive quality, with how equal rules can produce unequal results. However, instead of trying to eliminate the negative

consequences of differences in the biological or social circumstances of men and women or of past discrimination, dominance theory challenges the rules themselves. Dominance theory argues that rules are structured to be neutral, in order to promote and to hide systematic gender bias. Dominance theory looks deeply into legal rules and principles to discover how neutral rules interact with existing practices and norms to create inequality in conditions for women.

The equality theories summarized above view women's differences either as factually insignificant (formal equality), as problems to be solved through remedial accommodations (substantive equality), or as excuses used by a corrupt system to subrogate women (dominance theory). Another approach that has been developed in gender theory is called different voice theory, or sometimes referred to as rational equality. Under difference theory, women's differences are seen neither as insignificant nor as impediments to equality, but rather as potentially valuable resources that might serve as a better model of social organization and law than the existing male characteristics and values that now model society and its institutions. Different voice theory claims that women have a stronger instinct for caring, have greater interconnectedness than men, and have a better appreciation for the value of relationships over individual rights. Women are said to favor an "ethic of care" over "justice" or "rights" models of morality, and to use less abstract, more contextual forms of reasoning than do men. Different voice theorists argue that as to each of these legal distinctions, women's values have been undervalued, but that if they were revalued, such values would have the potential to improve existing law.

At the Q&A session, the social implications of gender equality were discussed. Also, justice system reform, including a proposal for the establishment of law schools in Japan was discussed, particularly because it was a subject of great interest to Dean Bartlett in her capacity as Dean of the Duke University School of Law.

[Asaka Kitimoto]

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