

ICCLP Annual Report 2004

CONTENTS

Introduction:

Yoshiaki Miyasako..... 2

Activities:

Visiting Professors at the ICCLP.....	3
Exchange Projects	5
Comparative Law and Politics Symposiums	7
Report on the 17th Symposium	Keiko Wada
Report on the 18th Symposium	Hiroki Yasui
Comparative Law and Politics Seminars & Forums.....	17
Report on the 151st Seminar	David English
Report on the 154th Seminar	John Witt
Report on the 157th Seminar	Bruce Aronson
Report on the 158th Seminar	Steven Croley
Report on the 159th Seminar	Bridget McCormack
Report on the 161st Seminar	Anne Muxel
Reports on the 164th Seminar	Hiroki Yasui / Naonori Kodate
Report on the 127th Forum	Hisashi Aizawa
Comparative Law and Politics Special Lectures.....	33
Reports	Anne Muxel
The 2nd Anglo-Japanese Academy.....	39
Preparations for the Second Meeting of the Anglo-Japanese Academy	
Supporting the 21st Century COE Programs of the University of Tokyo	40
Supporting the School of Law	43
Supporting the Graduate School of Public Policy.....	45
Visiting Research Scholars of the Graduate School of Law and Politics.....	47

Condolences

In Memory of Arihiro Fukuda

Junko Kato.....49

Report

‘Corporate Governance of HSBC Holdings plc’

Yoshiaki Miyasako.....51

Article

‘From *O-yatoi Gaikokujin* in the Meiji Era to the American Law Programme of Summer 2004’

Keiko Wada.....55

Publications

Introduction

Yoshiaki Miyasako
Professor at the ICCLP

It is my pleasure to introduce to you the *ICCLP Annual Report 2004*. In 2004, the University of Tokyo and the Graduate School of Law and Politics underwent a number of radical changes and as a result the ICCLP was involved in a number of new activities. In September 2003, two projects in the Graduate School of Law and Politics – “‘Soft law’ and the state-market relationship’ and ‘Invention of policy systems in advanced countries’ – were chosen as the University of Tokyo’s 21st century COE programs. In addition, a new professional Law School and School of Public Policy were established on 1 April 2004. Since its establishment, the ICCLP has been active in the promotion of international academic exchange based upon the construction of a human network. As a result, the centre has been able to contribute widely to these new research and educational projects.

In September 2001, the first meeting of the Anglo-Japanese Academy (AJA) was held at the University of Sheffield. The second meeting of the AJA, jointly supported by the COE program ‘Invention of policy systems in advanced countries’, will take place in January 2006 at the University of Warwick. To this end, a meeting of the AJA steering committee took place in August 2004 at Warwick in order to prepare for the workshop and international symposium in the second meeting of the AJA.

Through its support of various activities such as the summer school sponsored by the Law School, the School of Public Policy’s seminar series, and the two COE programs in the Graduate School of Law and Politics, this was also a year that demonstrated clearly the ICCLP’s experience over more than ten years of international exchange.

However, none of these activities would have come to fruition without the support and cooperation of a number of visiting professors and guest researchers, scholars from both within and outside Japan, and the staff of the Graduate School of Law and Politics. Looking ahead to next year, we will develop and expand our network of international academic exchange even further as we engage in more concrete, and yet also adaptable, activities. I look forward to working with you in the future towards the realisation of these goals.

[March 2005]

Activities

Visiting Professors at the ICCLP

Seung-Wha Chang

Associate Professor, Seoul National University

(April - July 2004)

Profile:

After studying at Seoul National University, Professor Chang worked as a judge at Seoul District (Civil and Criminal) Court from 1988 to 1991. He left his home country for his further study at Harvard Law School in 1991. Since 1994, he has had teaching opportunities at Georgetown University Law Center as an adjunct professor and received his current professorship in Seoul National University in 1995. He specialises in international trade law. During his stay at the ICCLP, he gave a presentation in the Comparative Law and Politics Seminar entitled 'Tax and the WTO Subsidies Agreement' He also contributed an article to University of Tokyo Journal of Law and Politics Vol. 2.

Publications:

'Like Father, Like Son: A Progeny of the Antidumping Model for the Shipbuilding Industry', 24 *Michigan Journal of International Law*, 2003; 'A Comment on the Permanent Panel Body', 6:1 *Journal of International Economic Law*, 2003; 'WTO Disciplines on Fisheries Subsidies: A Historical Step towards Sustainability?', 6:4 *Journal of International Economic Law*, 2003; 'Interaction between Trade and Competition: Why a Multilateral Approach for the United States?', *Duke Journal of Comparative and International Law*, 2004.

Bruce Aronson

Associate Research Scholar, Center for Japanese Legal Studies, Columbia Law School; Lawyer (May - July 2004) (Assistant Professor, Creighton University School of Law, from August 2004)

Profile:

After studying at Boston University, Harvard University and Doshisha University, Mr Aronson worked as an associate in Nagashima & Ohno, Hill, Betts & Nash. Thereafter he worked as a lawyer at the Hughes Hubbard & Reed LLP and was a partner from 1989 to 2000. He was appointed as an associate research scholar of the Center for Japanese Legal Studies, Columbia Law School in 2002. He specialises in comparative corporate law and commercial law. During his stay at the ICCLP, he gave a presentation as part of a Comparative Law and Politics Seminar entitled 'What can We Learn from US Corporate Governance'. He also contributed an article to University of Tokyo Journal of Law and Politics Vol. 2.

Publications:

'Reconsidering the Importance of Law in Japanese Corporate Governance: Evidence from the Daiwa Bank Shareholder Derivative Case', 36 *Cornell International Law Journal*, 11, 2003; 'Learning from Comparative Law in Teaching US Corporate Law: Director's Liability in Japan and the US', 21 *Penn State International Law Review*, 2003.

Masato Ninomiya

Professor, University of São Paulo

(November 2004 - February 2005)

Profile:

After studying at the Universities of São Paulo and Tokyo, Professor Ninomiya was appointed associate professor at the University of São Paulo and received his current professorship in 1986. He specialises in nationality law, private international law and problems related to dekasegi. During his stay at the ICCLP he has lectured on Ibero-American Law. He also gave presentations at the Bank of Japan, the Ministry of Health, Labour and Welfare, JICA and other venues in Tokyo, Kobe and Hamamatsu. He contributed an article to University of Tokyo Journal of Law and Politics Vol. 2.

Publications:

Burajiruhō-yōsetsu: Hōrei-hanrei e no Aprōchi, co-authored, Ajia-keizai Shuppankai, 1993; *Nippon-Brazil-ryōkoku ni okeru Nikkeijin no Rōdō to Seikatsu*, co-authored, Nikkan Rōdō Tsūshinsha, 1994; *Brazil Kaihatsuhō no Shosō*, co-editor and co-authored, Ajia-keizai Shuppankai, 1994; *Ponichi-Hōritsu-Yōgoshū: Glossario Portugues-Japones de termos juridicos*, co-authored, Yūhikaku, 2000; 'Zainichi gaikokujin ni taisuru hōjōhō teikyō' in *Jurisuto*, 2005.

Anthony Grundy

Partner, Head of Linklaters Tokyo

(January 2005 - May 2005)

Profile:

After graduating from Oxford University, Mr Grundy became a lawyer working for Linklaters London, Tokyo, Hong Kong and Singapore. He has been a partner and head of Linklaters Tokyo since 2000. He specialises in global capital market law. During his stay at the ICCLP he has lectured on financial law with Professor Hideki Kanda.

Publications:

'Kokusai shihonshijo e no Nihon no sankā' in *Kokusai Bengoshi no 100-nen 1897-1997* (translated by Ikeda and Nunoura, Aoki/Christensen/Nomoto Hōritsujimusho 1999).

Exchange Projects

The Michigan-Columbia Exchange Project

As part of the Michigan-Columbia Project, the Center has hosted professors from the University of Michigan Law School and Columbia Law School who participated in the postgraduate lecture series entitled 'American Law'. Visitors this spring included Professors Steven P. Croley, and Bridget M. McCormack from Michigan Law School, and Professor Barbara A. Schatz and Associate Professor John F. Witt from Columbia Law School. In addition, Professor Hisakazu Hirose of the University of Tokyo visited Columbia Law School in March 2005.

Steven P. Croley, Professor, University of Michigan Law School

Research Area: Administrative Law, Torts

Major Publication: 'White House Review of Federal Agency Rulemaking: An Empirical Investigation', *University of Chicago Law Review* 70, no. 3, 2003: 821-85.

Bridget M. McCormack, Professor, University of Michigan Law School

Research Area: Clinical Law

Major Publication: 'Dial-in Testimony', co-authored with Richard D. Friedman, *University of Pennsylvania Law Review* 150, no. 4, 2002: 1171-253.

Barbara A. Schatz, Professor, Columbia Law School

Research Area: Non-profit Organizations, Community Development, Clinical Teaching

John F. Witt, Associate Professor, Columbia Law School

Research Area: The History of American Law, Torts

Major Publication: *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law*, Harvard University Press, 2004.

Visitor from CEVIPOF

As a part of CEVIPOF project, Dr Anne Muxel, research director of the Center for the Study of French Political Life (CEVIPOF) - FNSP (France), visited the faculty in October. During her stay in Tokyo she gave lecture in the ICCLP seminar entitled 'Representative Democracy and Participatory Democracy: a New Model of Citizenship in Europe?'

Anne Muxel, Research Director, Center for the Study of French Political Life (CEVIPOF) - FNSP (France)

Research Area: Political Behaviour, European Studies, Comparative Politics

Major Publications: *Les jeunes d'Europe du sud et la politique: Une Enquête Comparative France, Italie, Espagne* (en collaboration avec Marlanine Cacouault), L'Harmattan, Paris, 2001; 'La participation politique des jeunes: soubresauts, fractures, ajustements', *Revue française de science politique*, volume 52,

numéro 5-6, 2002; *Les étudiants de Sciences Po*, Presses de Sciences Po, Paris, 2004.

Comparative Law and Politics Symposiums

The 16th Comparative Law and Politics Symposium – 10 July 2004

E-Government and Institutional Change in Japan and Asia

Keynote Speech: Jane E. Fountain, Director, National Center for Digital Government, John F. Kennedy School of Government, Harvard University

Panel Discussion

Panellists: 1) Jane E. Fountain
2) Hiroko Kudo, Associate Professor, Waseda University
'Experiences in Asia (Singapore)'
3) Shigeo Kasai, CIO Aide, Ministry of Economy, Trade and Industry
'New developments and problems in the Japanese government'
4) Satomi Hirokawa, Chief, Information Policy Division, Planning and Coordination Department, Yokosuka City Office
'Experience at a local government'

Commentators: Yuki Yasuda, Visiting Associate Professor, 21st Century COE, University of Tokyo MMRC
Hirokazu Okumura, Institute of Developing Economies

Moderator: Hideaki Shiroyama, Associate Professor, University of Tokyo

Place: Hongo Sogo Building

* Co-sponsored by the University of Tokyo 21st Century COE Program, 'Invention of Policy Systems in Advanced Countries', and A Grant-in-Aid Creative Scientific Research Funded by the MEXT, 'International Symposium on Transboundary Issues of Law and Politics'.

The 17th Comparative Law and Politics Symposium – 22 July 2004

Reflections on Corporate Governance in Japan and the United States

Topic: Overview of the US Government Report on the Enron Case
Speaker: Christopher H. Hanna, Professor, School of Law, Southern Methodist University

Japanese Summary: Hideki Kanda, Professor, University of Tokyo

Topic: Overview of the US Corporate Reform Act
Speaker: Yoshiaki Miyasako, Professor, University of Tokyo

Topic: Corporate Governance in the US
Speaker: Mark Ramseyer, Professor, Harvard Law School

Topic: The Impact of Corporate Governance in the US on Japan
Speaker: Hideki Kanda

Q&A

Moderator: Hideki Kanda

Questions from the Floor

Place: The Colossus, The Strings Hotel, Tokyo

'Presentation on Enron Corporation: How to Report Profits and Pay No Taxes'

Christopher H. Hanna

Enron Corporation is a Houston, Texas based energy and commodities trading company, which in 2001, was the seventh largest United States company, according to *Fortune* magazine. It employed over 25,000 employees worldwide and had about 59,000 shareholders. Enron filed for bankruptcy on December 2, 2001, and, at that time, it was the largest bankruptcy in U.S. history (since eclipsed by WorldCom's bankruptcy on July 21, 2002).

A couple of months after the bankruptcy, on February 15, 2002, the U.S. Senate Finance Committee, represented by Senators Max Baucus (then chair) and Charles Grassley (ranking member), directed that the U.S. Congressional Joint Committee on Taxation investigate Enron and its related entities on issues relating to federal income tax laws. The Joint Committee was directed to look at federal income tax issues involving Enron, not accounting issues or corporate governance issues (such as the duties of the board of directors). In other words, the focus was strictly federal income taxes.

The Joint Committee staff spent thousands of hours reviewing documents and other information, interviewing individuals and preparing the Enron report. It was an incredible amount of work conducting the research and drafting the report. After almost exactly one year after the directive from the Senate Finance Committee, the Joint Committee released its Enron report on February 13, 2003. The report is over 2,700 pages and is contained in three volumes, each the size of a large telephone book. Upon its release on February 13th, the buzz in Washington, DC and in the tax world was that this was a report unlike any other that had ever been released involving federal income taxes.

At the Congressional hearing on the report that was held on its release date of February 13th, Senator Grassley, now chair of the Senate Finance Committee stated: "You are about to witness a shocking event in the history of American corporate tax policy and financial accounting. We are going to have the veil torn off the world of tax shelters and manipulation of accounting. The report reads like a conspiracy novel, with some of the nation's finest banks, accounting firms and attorneys working together to prop up the biggest corporate farce of this century. Enron was a house of cards -- and the cards were put together by these schemes that we will hear about today.

"The Joint Tax Committee report provides us a wealth of information. Much of this information has

never been seen before -- not only by the public but also the IRS and other government agencies. It includes tax return information, opinion letters from law firms, internal documents, accounting firm correspondence, shelter promotional material, and most importantly, internal Enron documents laying out how the scheme of deception plays out. Not only will we gain a fuller understanding of tax shelters and accounting gimmicks, but we are provided with the complete story of the people and the professionals working behind the scene to make it happen. The Joint Tax Committee report names names and doesn't pull punches in telling us about the law firms, accounting shops and investments bankers that were promoting and aiding Enron in its activities.”

‘Recent Trends in Corporate Governance’

J. Mark Ramseyer

In the wake of Enron, WorldCom and other cases of corporate fraud, many observers have urged the U.S. government to regulate corporate governance more strictly. This trend is fundamentally misguided. Criminal penalties should be set at levels such that (a) the expected burden of the penalty for a given action is equal to (b) the expected costs that the action imposes on third parties. Beyond imposing that penalty, a government should largely limit itself to enforcing the bargains that the various participants to the corporate enterprise make with each other.

Fundamentally, in modern competitive economies like that of the U.S. and Japan, firms survive only if they have governance structures roughly appropriate to them. To survive, firms must be able to sell good products cheap -- and toward that end, must compete in capital, labor, service, and product markets. Firms with suboptimal governance regimes necessarily compete at a disadvantage in such markets. Necessarily, over time they will tend to disappear. As a result, the firms that survive will disproportionately be firms with firm-specifically appropriate governance structures.

To illustrate this dynamic, I will focus on three topics:

a. On the Enron disaster. I will explain what led to the collapse of Enron, and what governance institutions failed. I will speculate on the impact that disasters like Enron have (and should have) on legislative measures.

b. On recent statutory revisions in the U.S. In particular, I will explain the changes that have been made to the rules of governance. I will explain why these revisions are a serious mistake.

c. And on recent research with Professor Yoshiro Miwa on the effect of outside directors on firm performance. Specifically, we find that although outside directors may affect performance, that effect

will not appear in any regression of firm performance on board composition. The reason goes to endogeneity: because of the effect of market competition, the firms that survive are firms with firm-specifically appropriate patterns of board composition. I will explain why the logic here applies to governance institutions more generally as well.

【Report】

This symposium was held to mark the establishment of the Tokyo Stock Exchange Inc. chair in Global Capital Market Law on 1 April 2004. This chair is the successor to the substantial research results in the area of international capital market law sponsored by the Nomura Foundation for Promotion of Sciences from October 1993 to September 2003. By establishing the new chair, it will be possible to conduct broad-ranging research on securities law and corporate law under various legal systems as they relate to international capital markets, as well as related multi-faceted comparative research on the legal and political systems of various jurisdictions at a generalized level.

The symposium was hosted by Professor Hideki Kanda, chairman of the ICCLP's steering committee.

The symposium began with Professor Christopher Hanna's presentation on the US Congressional Joint Committee of Taxation's report on Enron Corporation. In the second session, Professor Yoshiaki Miyasako spoke on the enactment of the Sarbanes-Oxley Act AND the relationship between securities regulation and corporate law reform in the USA. He went on to discuss the scope and structure of the legislative amendments and issues with their applicability to Japanese companies and auditors regarding the article 301.

Next, in the third session, Professor J. Mark Ramseyer reported on recent trends in corporate governance in the USA, referring to the effects of the Enron and WorldCom cases on legislative measures. He addressed recent statutory revisions on rules of governance and explained why those revisions were a serious mistake. He then expressed his views as to the effects of outside directors on firm performance, based on his recent joint research with Professor Yoshiro Miwa. (See p.9-11 for Professor Hanna and Ramseyer's summaries.)

In the fourth session, Professor Kanda outlined the effects which recent trends in US corporate governance are having in Japan. In general, he pointed out, Japanese legislative reforms take into account the developments in America and other foreign jurisdictions, but it is unusual for those developments to directly trigger Japanese changes. Rather, recent amendments in Japan have been driven more by domestic circumstances, both in relation to systemic and administrative matters. Professor Kanda considered various examples of legislative amendments. As an example of the effect of the Enron situation on the Japanese system, he gave the example of the 2003 amendment to the Public Accountants Law and the 2003 changes to the disclosure system under the Securities Trading Law.

Less direct consequences were the 2002 amendments to the Commercial Code and the 2004 amendments to the Securities Trading Law. Finally, as evidence of the general state of corporate governance, he referred to the Tokyo Stock Exchange's *Corporate Governance Principles for listed companies* (2004) and the *OECD Principles of Corporate Governance* (2004). In terms of remaining issues in Japan in relation to the Commercial Code, Professor Kanda referred to: (1) the internal system and regulation of companies with auditors; (2) improvements to the system of stock options; (3) the adoption of the system of external auditors; and (4) the question of whether legal rules are rules of the stock exchange. In relation to securities law, he raised disclosure rules as an ongoing issue.

This symposium is one aspect of the University of Tokyo's public contribution and the dissemination of the University's research results to the broader community. As such, it was directed mainly towards practitioners. The presenters took questions from a full house of over 60 participants, and a lively exchange of views followed.

After the symposium, a reception was held to celebrate the establishment of the new chair. We heard from Professor Hiroshi Takahashi, the Dean of the University of Tokyo's Graduate School of Law and Politics and the Director of the ICCLP, and from Mr Tomoyoshi Uranishi, Chief Executive Officer of Tokyo Stock Exchange Inc., after which more casual discussions continued in a convivial atmosphere.

[Keiko Wada, translated by Peter Neustupný]

The 18th Comparative Law and Politics Symposium – 29 September 2004

Republicanism in Historical Contexts: A Symposium Dedicated to the Memory of Arihiro Fukuda

<Session 1: Overview of the Symposium>

Moderator: Junko Kato, Professor, University of Tokyo
Introduction: Susumu Takahashi, Professor, University of Tokyo; COE Program Leader
Works and Achievements of Arihiro Fukuda:
Hajime Inuzuka, Research Fellow, Japan Society for the Promotion of Science

<Session 2: Presentations, Comments & Discussions>

Topic: Machiavelli on Provocatio and Imperium
Speaker: Roberto Farneti, Visiting Assistant Professor, UCLA; Research Fellow, University of Bologna
Topic: Mixed Government and Mixed Sovereignty in the Seventeenth Century
Speaker: Kinch Hoekstra, Lecturer, University of Oxford
Topic: A ognuno puzza questo barbaro dominio - Machiavelli and the German Strife for Liberty
Speaker: Peter Schröder, Lecturer, University College London
Topic: Ciceronian Moment: Montesquieu and the French Republican

Tradition
Speaker: Yoshie Kawade, Professor, Tokyo Metropolitan University
Commentators: Masataka Yasutake, Associate Professor, Kansai University
Reiji Matsumoto, Professor, Waseda University
Discussions
Moderators: Ikuo Kabashima, Professor, University of Tokyo
Junko Kato
Place: Conference Room, Faculty of Law Bldg. 4, 8F, University of Tokyo
* Co-sponsored with the University of Tokyo 21st Century COE Program, 'Invention of Policy Systems in Advanced Countries'.

【Report】

This symposium was held under the co-sponsorship of COE Program 'Invention of Policy System in Advanced Countries' and the ICCLP in memory of Associate Professor Arihiro Fukuda, who passed away suddenly on 16 November 2003 at the age of thirty-nine. Associate Professor Fukuda had planned to hold a symposium in spring 2004; this symposium was based on his unfinished endeavour.

Session 1 began with an introductory explanation to the background of this symposium by Professor Junko Kato and an opening address by Professor Susumu Takahashi, the COE Program leader. Thereafter, Dr Hajime Inuzuka gave a memorial address entitled 'Arihiro Fukuda, 1964-2003: His Works and Achievements'. Dr Inuzuka highlighted Associate Professor Fukuda's numerous contributions to the academy. Firstly, despite being regarded up until now as diametrically opposed, the common goal of overcoming anarchy through sovereignty exists in the thinking of Harrington and Hobbes. Secondly, in contrast to Pocock's emphasis on civic virtue in the republican tradition, *imperium* (i.e. the power to order and obtain obedience) and political institutions were essential for Harrington's republicanism. Thirdly, the history of western political thought is composed of the two traditions of *imperium* and *provocatio* (i.e. appeals to the people to protest against the orders of the authorities).

Session 2 included presentations and comments on the various problems surrounding republicanism in the history of western political thought.

Dr Farneti reviewed Associate Professor Fukuda's recent works and talked about the significance of *imperium* and *provocatio* in the tradition of western political thought. Fukuda placed Machiavelli and Harrington in the tradition of *imperium*, and Locke in the tradition of *provocatio*. Although Fukuda's reduction of Locke's 'appeal to Heaven' (the right to revolution) to the Roman *provocatio* seems to be slightly off the mark, his distinction between these two traditions in western intellectual history still holds. Hobbes, who argued that without the state there is just a multitude not the people, belongs to the tradition of *imperium*. Rousseau, who believed that the people already exist without *imperium*, was an advocate of *provocatio*. This distinction between these two traditions is a useful new analytical tool for research. But it is also valuable to us in thinking about contemporary politics since the basis of states and citizens is

becoming obscured and the element of *provocatio* seems to be diluted in politics today.

A question and answer session followed Dr Farneti's presentation. The audience raised issues such as: 1) the connection between Fukuda and McIlvain, who observed two different traditions (*gubernaculum* and *iurisdictio*) in western intellectual history; and 2) the contemporary significance of *provocatio*. Dr Farneti responded to the first question by suggesting that although the link between them is ambiguous, Fukuda's distinction is more sophisticated and applicable. In response to the second question, he replied that people's interest in the multitude is growing as evidenced by Michael Hardt and Antonio Negri's new book, *Multitude*.

With respect to Associate Professor Fukuda's major work, Dr Hoekstra spoke about the meaning of mixed government in Hobbes's works. As Associate Professor Fukuda pointed out, Hobbes and Harrington both gave greater importance to *imperium*. The divisive point between them was the way in which it is exercised. Although not addressed in Associate Professor Fukuda's works, Hobbes distinguished mixed sovereignty from the mixed administration of government by ruling out the former and considering the latter as the normal state of affairs. In this regard, Hobbes is closer to Harrington than interpreted by Associate Professor Fukuda. Similarly, although Associate Professor Fukuda argued that Hobbes had regarded the sovereign's preponderant power as the basis of absolutism, Hobbes pointed out in his *Behemoth* the importance of the people's consent.

Two questions were raised: 1) how was Hobbes's argument restrained by the political situation of the times?; and 2) what kind of balance between reason and prudence can we see in Hobbes? Dr Hoekstra highlighted the consistency in Hobbes's argument and his relative preference for reason over prudence.

In his presentation, Dr Schröder discussed the reception of Machiavelli by Hegel and Fichte, and examined the ambivalent relationship between state and liberty in the thinking of these three men. Machiavelli had been known among French and German philosophers of the Enlightenment as notoriously amoral. However, Hegel and Fichte, who experienced the turmoil in Germany during the Napoleonic Wars, interpreted Machiavelli's ideas positively, since they believed that they had emerged from the hardships suffered by Italy under foreign intervention. They thought that only a united and powerful state could prevent crises and ensure liberty. In addition, both also accepted Machiavelli's ideas emphasizing the importance of the people's identification with the state and its legitimization by the people. But since Hegel and Machiavelli thought negatively of the people's regular participation in politics, they should not be regarded as proto-democrats. Fichte, as well as Machiavelli, recognized the inherent tension between the state and liberty. Therefore, they should also not be interpreted as mere eulogists of the state.

Points of discussion included: 1) tensions in the relationship of the state, the people and liberty in Hegel; and 2) the focus of Fichte's interest in Machiavelli's ideas (the prince as a head, or the people as a body).

Professor Kawade dealt with Montesquieu's republicanism. Republicanism has two sides: constitutional and civic. It is important to be aware of this double-sided character of republicanism in order to avoid confusion. Montesquieu gave priority to the civic side, though he praised a mixed government since it contributed to political liberty. In this regard, Montesquieu disagreed with Harrington. What is more, Montesquieu admired Cicero, and considered that the duty to the whole of humanity should be given priority over the duty to one's country. In this light, Montesquieu can be placed not only in the tradition of ancient civic virtue, but also in the tradition of modern natural law.

Questions raised from the floor included: 1) what is the relationship between Montesquieu's republicanism and the French intellectual tradition?; 2) if Montesquieu is part of the tradition of modern natural law then why refer to Cicero?; and 3) what is the meaning of Rome for Montesquieu? Professor Kawade replied to these questions in turn by stating that Montesquieu's republicanism was not an innovation in the French intellectual tradition, the rise of modern natural law itself was inspired by Cicero, and the meaning of Rome for Montesquieu lies in his discourses on both government and liberty.

After a coffee break, commentators addressed these four presentations. Associate Professor Yasutake argued that Associate Professor Fukuda's understanding of republicanism emphasized *imperium* more than *provocatio* and he then asked the following questions to each presenter: 1) what relevance does Farneti's emphasis on *provocatio* have in the republican tradition?; 2) whilst largely agreeing with Hoekstra's presentation, how should Hobbes's fear of absolute democracy and absolute aristocracy be interpreted?; 3) is Hegel and Fichte's acceptance of Machiavelli the same as Harrington's argument that liberty cannot be realized without constitutional states?; and 4) was the element of *provocatio* in Cicero inherited by Montesquieu?

Referring to an episode in Masao Maruyama's *Introduction to Politics*, Professor Matsumoto explained how in Japan Machiavelli was only considered in relation to images of power struggles and intrigue. At the same time, this represented an image of politics in Japan. Maruyama also pointed to the similarity between the thinking of Sorai Ogyu and medieval Christian political thought, and in his article entitled 'Thought and Behaviour Patterns of Japan's Wartime Leaders', which criticised pre-war Japan's 'system of irresponsibility', he explored the relationship between politics and ethics. In contrast, although political leaders in the Meiji era understood the appropriate meaning of 'raison d'etat', this was lost in the Showa era.

In response to the above questions, the presenters answered that since republicanism includes both elements of *imperium* and *provocatio*, every thinker has been affected by *provocatio*. Secondly, Hobbes did not fear absolute sovereignty as long as it acted within the limits of attorney. Thirdly, Hegel and Fichte were not republican thinkers like Harrington. And finally, it is true that there are few elements of *provocatio* in Montesquieu.

Although this symposium addressed a highly specialized subject, there were more than sixty participants

from inside and outside the university. This can be explained by one of Associate Professor Fukuda's virtues, namely his efforts to disseminate academic research across interdisciplinary borders. However, this is not the only reason. Another reason might lie in our ever-changing and ever-globalizing world, where established systems and orders are becoming unstable and the need to redefine the concepts of 'politics' and 'the public' is growing. To this end, each presentation included interesting suggestions to scholars of other disciplines. For example, Hoekstra's presentation on Hobbes's distinction between the mixed sovereignty and the mixed administration of government is reminiscent of Hirobumi Ito's interpretation of Article 4 of the Meiji Constitution in his *Commentaries on the Constitution of the Empire of Japan*: the distinction between 'the essential characteristic of sovereignty' and 'the exercise of sovereignty'. In addition, Schröder's presentation threw new light on the meaning of the state in German liberalism. Although we are honoured and delighted to host such an important symposium, we deeply regret the loss of its original organizer, Associate Professor Fukuda.

At the post-symposium reception, more than forty people reminisced about Associate Professor Fukuda. With Associate Professor Masaki Taniguchi presiding over the ceremony, Professor Takeshi Sasaki (President of the University of Tokyo), Professor Hiroshi Takahashi (Head of the Graduate Schools for Law and Politics), Professor Susumu Takahashi, Professor Atsushi Sugita (Hosei University) and Professor Junko Kato delivered emotional speeches in memory of Associate Professor Fukuda, who will long be missed by us all. [Hiroki Yasui]

The 19th Comparative Law and Politics Symposium – 12 November 2004

Expert Survey Method and Policy Position of Parties

Speaker: Michael Laver, Professor, Trinity College Dublin
Commentator and Moderator: Junko Kato, Professor, University of Tokyo
Place: Conference Room, Faculty of Law Bldg. 4, 8F, University of Tokyo

*Co-sponsored by the University of Tokyo 21st Century COE Program, 'Invention of Policy Systems in Advanced Countries' and Endowed Chair in 'Mass Media and Politics (Asahi Shimbun)'.

The 20th Comparative Law and Politics Symposium – 4 December 2004

Legal Ethics and Bioethics

Introduction: Hiroshi Takahashi, Dean of Graduate School of Law and Politics,
University of Tokyo

<Session 1>

Topic: Bioethics and Conflicts of Interest
Speaker: Rebecca S. Dresser, Professor, Washington University School of Law in St Louis
Summary in Japanese: Norio Higuchi, Professor, University of Tokyo

<Session 2>

Topic: Conflicts of Interest in the Legal and Medical Professions
Speaker: Peter A. Joy, Professor, Washington University School of Law in St Louis

Summary in Japanese: Norio Higuchi

<Session 3>

Topic: Legal Ethics to be discussed
Speaker: Shintaro Kato, Teaching Staff, Legal Training and Research Institute; Judge

<Session 4>

Topic: Medical Ethics and Ethics in Medical Studies
Speaker: Yasuyoshi Ohuchi, Professor, University of Tokyo

<Session 5>

Topic: Medical Ethics and Legal Ethics: Toward New “Publicness”
Speaker: Yasushi Kodama, Lawyer, Medical Doctor

<Session 6>

Topic: Legal Ethics and Bioethics: from the points of view of Autonomy and Legalism, and Ethics and Law
Speaker: Shigeaki Tanaka, Professor, Kyoto University

Discussions

Special Discussant: Tatsuo Kuroyanagi, Lawyer
Moderator: Makoto Ito, Professor, University of Tokyo
Place: Marubiru Hall, Marunouchi Building

* Co-sponsored by A Grant-in-Aid Creative Scientific Research Funded by the MEXT, ‘Law and Policy on Bioethics and Biotechnology’, Business Law Center, Graduate School of Law and Politics, University of Tokyo, and the University of Tokyo 21st Century COE Program, ‘*Soft Law*’ and the State-Market Relationship.

The 21st Comparative Law and Politics Symposium – 22 February 2005

International Mergers and Acquisitions and Company Law in Japan

Topic: An Overview of the Modernization of Company Law and Organizational Restructuring
Speaker: Yoshiaki Miyasako, Professor, University of Tokyo
Topic: An International Comparison of M&A Legislation and Japan’s Company Law
Speaker: Hideki Kanda, Professor, University of Tokyo
Topic: The Foreign Purchase of Japanese Companies and Policies in Response
Speaker: Hiroshi Mitoma, Associate Professor, School of Law, University of Tokyo
Topic: Hostile Takeovers, Defensive Policies and M&A legislation
Speaker: Kazuhiro Takei, Visiting Associate Professor, School of Law, University of Tokyo
Place: Four Seasons Hotel Tokyo at Marunouchi

(Presentation papers of this symposium are going to be published in *SHOJI-HOMU* No. 1730, April and No.1731, May 2005)

Comparative Law and Politics Seminars & Forums

[Seminars]

The 151st Comparative Law and Politics Seminar – 21 April 2004

Topic:	Uniform Trust Code 2000: Its Impact and Significance
Speaker:	David English, Professor, School of Law, University of Missouri - Columbia
Language:	English
Moderator:	Norio Higuchi

【Report】

The Uniform Trust Code (“UTC”), which was approved by the Uniform Law Commissioners in August 2000, is the first effort by the Uniform Law Commissioners to provide the American states with a comprehensive model for codifying their laws on trusts. A copy of the UTC can be accessed through the Commissioner’s website, www.nccusl.org. The UTC was enacted in Kansas in 2002, and in Arizona, Nebraska, New Mexico, and Wyoming in 2003, and is currently under study for enactment by bar committees and other groups in over 30 other American states.

The drafting of the UTC was prompted by the much greater use of trusts in the United States in recent years. This greater use of the trust, and consequent rise in the number of day-to-day questions involving trusts, led to a recognition by the Commissioners that the trust law in most states is thin, with many gaps between the often few statutes and reported cases. It also led to a recognition that previous uniform acts relating to trusts, while numerous, are fragmentary. Other than for specialized acts such as the Uniform Prudent Investor and Principal and Income Acts, the primary source of trust law in most states is the Restatement of Trusts and the multivolume treatises by Scott and Bogert, sources which fail to address numerous practical issues and which on others sometimes provide insufficient guidance. The UTC will enable states which enact it to specify their rules on trust law in more complete form and in a readily available source.

While much of the UTC is a straightforward codification of the common law, the UTC does contain some innovative features. These include:

- Listing of the rules of trust law which are mandatory and which may be overridden in the trust instrument (Section 105);

- Comprehensive listing of the rules on representation, specifying the circumstances when another person, such as a guardian or an adult beneficiary of the same class, may receive notice or give a consent on a beneficiary’s behalf (Article 3);

- The grant of standing to a settlor to participate in specified transactions, including to enforce a charitable trust and to petition for removal of a trustee (Sections 405, 706);

- Liberalization of the otherwise applicable rules on the modification and termination of trusts (Sections 410-417);

- The creation of rules on revocable trusts, which within the past two decades has become the most

frequently created trust in the United States (Article 6);

The specification of numerous default rules which apply when the instrument is silent, including such things as trustee acceptance, the rights and obligations of co-trustees, the procedure for resignation, the methods for appointing successors, and trustee compensation (Article 7);

A comprehensive listing of the fiduciary duties and powers of a trustee (Article 8); and

Codification of the legal rules applicable to trustees when engaged in commercial transactions (Sections 1010-1013).

Uniform acts are models. It is up to each individual state legislature to decide whether a particular uniform act is appropriate for its citizens. The process of enacting a uniform act in the states can take a decade or longer. While numerous states are studying the UTC for enactment, it will be several years before it is known whether it is a complete success. But as the American states continue to move toward a system of codes, relying less on the common law, codification of much of the law of trusts may be inevitable, even if the enactment varies from the official text of the UTC.

[David English]

The 152nd Comparative Law and Politics Seminar – 11 May 2004

Topic: Global Law Reform: Institutions and Procedures
Speaker: Lance Liebman, Professor, Columbia Law School
Language: English
Moderator: Yoshiko Terao

The 153rd Comparative Law and Politics Seminar – 12 May 2004

Topic: A Hard Look at Soft Law from an American Perspective
Speaker: David Westfall, Professor, Harvard Law School
Language: English
Moderator: Minoru Nakazato

The 154th Comparative Law and Politics Seminar – 19 May 2004

Topic: Civil Liberties around World War One
Speaker: John Fabian Witt, Associate Professor, Columbia Law School
Language: English
Moderator: Norio Higuchi

【Report】

Civil liberties are often thought of as forming a distinctively indigenous branch of American law. Yet as historians have long noted, there were widespread restrictions on speech of any number of different kinds for more than a century after the first ten amendments to the U.S. Constitution were ratified as the Bill of Rights. From political speech about slavery to information about birth control and sexuality, nineteenth-century American law criminalized a wide array of expressive activity. Only during and

immediately after World War One did American courts begin (hesitantly at first) to articulate speech-protecting constitutional law. And only during World War One did a social movement develop in the United States organized around the idea of “civil liberties,” a phrase that was made a regular part of American legal and political discourse only in 1917.

In “The Internationalist Beginnings of American Civil Liberties,” I advance a new theory of what has long been a deep problem in the history of American civil liberties. Why did the kinds of rights claims that constitute contemporary civil liberties practices only take up important roles in American law in the twentieth century? Moreover, why was it that the rights claims of the civil liberties movement arose at a time when many sophisticated legal thinkers in the pragmatic tradition were highly skeptical about the truth value of abstract rights claims?

The answer, I suggest, is that our ostensibly domestic civil liberties movement has its roots in a pre-World War One cosmopolitanism in international law. In particular, the social movement that coalesced around the phrase “civil liberties” during World War One began in the years immediately preceding American intervention as a group of self-consciously “internationalist” organizations that had begun to question not just the abstract metaphysical truth of rights claims but also the usefulness of that other great abstraction of nineteenth-century law: the sovereignty of the nation state. The civil liberties movement in American law thus did indeed emerge out of a pragmatist critique of abstract legal fictions. The relevant abstraction, however, was not so much the formal concept of rights as the formal concept of state sovereignty.

With American intervention in World War One, however, obligations of nationalist loyalty to the nation state pushed American internationalists to strategically reframe their critique of the nation state. Civil liberties claims, rooted in constituent documents of American nationalism such as the Bill of Rights, became for American internationalists a “logical” step for an organization critical of the category of the nation state. Ironically, under the searing heat of wartime patriotism, the civil liberties claims of the World War One moment came to swallow up and obscure the internationalist impulse that had given rise to those claims in the first place. The history of American civil liberties has been misunderstood ever since.

The beginnings of the American civil liberties movement, it turns out, lie not in a distinctly domestic legal tradition but rather in a set of transatlantic international law ideas that found fertile soil in American law.

“The Internationalist Beginnings of American Law” will be published in the fall 2004 in the Duke Law Journal. A different version, titled “Crystal Eastman and the Internationalist Beginnings of American Law” will be published in a forthcoming book titled Columbus’s Notary, to be published by Harvard University Press.

[John F. Witt]

(*The 155th Comparative Law and Politics Seminar was cancelled.)

The 156th Comparative Law and Politics Seminar – 8 June 2004

Topic: Tax and the WTO Subsidies Agreement
Speaker: Seung-Wha Chang, Associate Professor, Seoul National University; ICCLP
Visiting Professor
Language: English
Moderator: Yoshihiro Masui

The 157th Comparative Law and Politics Seminar – 15 June 2004

Topic: What can We Learn from U.S. Corporate Governance?
Speaker: Bruce Aronson, Associate Research Scholar, Center for Japanese Legal Studies,
Columbia Law School; ICCLP Visiting Associate Professor
Language: English & Japanese
Moderator: Hideki Kanda

【Report】

In a seminar held at the University of Tokyo on June 15, 2004, Bruce Aronson, Visiting Associate Professor at ICCLP from May-July 2004 and Assistant Professor, Creighton University School of Law, gave a presentation on comparative corporate governance. Professor Aronson was previously a senior Fulbright researcher and Visiting Scholar at ICCLP from September 2000-May 2002. Prior to assuming his current position at Creighton, he was Associate Research Scholar at Columbia law school and Visiting Professor at Michigan law school, where he taught a seminar on comparative corporate governance during winter 2004.

The talk focused on a re-examination of views of corporate governance in light of the recent influence of U.S. corporate governance institutions on reform efforts in other countries. Corporate governance and its reform have become popular topics—but their popularity has not resulted in greater clarity. On the contrary, commentators use the term in different senses to suit their own outlook or purpose. A number of possible definitions of corporate governance and “good” corporate governance were examined, and it was suggested that we may consider the question in terms of achieving an appropriate balance between management discretion and monitoring of management. Views concerning this balance and the best methods of achieving it have also changed over time in the U.S. system of corporate governance. The appropriate balance could theoretically be achieved through a variety of corporate governance structures, and there accordingly is no widely recognized “best” system of corporate governance.

The talk suggested that the continuing emphasis on the study and adaptation of formal U.S. corporate governance institutions—particularly on the role of independent directors as the key to U.S. corporate governance—may be overdone. It is difficult for other countries to successfully incorporate U.S. governance institutions into their own systems, and efforts to achieve highly visible change can lead to an emphasis on form over substance. It would likely prove useful to target reforms designed to lead to

substantive improvements in actual corporate governance practices. In this sense, the true “lesson” to be learned from the American corporate governance system may lie in recognizing the importance of supporting institutions—information disclosure and private enforcement—which would help to make not only U.S. corporate governance, but presumably any formal corporate governance structure, more effective.

Indeed, the real international interest in U. S. “corporate governance” may lie in capturing the perceived dynamism of the U.S. economic system which corporate governance institutions appear either to enable or support. Each country has its own agenda when considering the importation and adaptation of corporate governance techniques. In fact, among developing countries “U.S.-style” corporate governance practices have been embraced both because of their potential impact on political reform (Russia) and despite a fear of the same (China). Although developing countries may well wish to create a perception of “good” governance as an aid in obtaining foreign investment, their willingness to concede actual authority to internal or external monitors (either political authority at the governmental level or management authority at individual corporations) remains a question.

In Japan, with its focus on economic revitalization, the emphasis has been more on industry proposals to increase management discretion through Commercial Code amendments rather than on monitoring of management. Improvements in management monitoring have centered on formal governance institutions, such as the new option under the Commercial Code to establish an “American-style” board committee system, which are unlikely to be adopted by most Japanese corporations and which, even if adopted, might not be effective given other traditional corporate practices. This has raised questions as to how management monitoring practices are to be improved at the bulk of Japanese corporations. It would appear that a greater emphasis on information disclosure and private enforcement—which would presumably aid in improving management monitoring under either the traditional Auditor system or the new board committee system—may be appropriate. And rather than focusing primarily or solely on the U.S. corporate governance system, other models, such as the comply or explain procedure originated in the U.K. and now adopted in Germany, would also be a valuable reference when seeking to improve formal governance structures in Japan and elsewhere.

[Bruce Aronson]

The 158th Comparative Law and Politics Seminar – 17 June 2004

Topic: Punishment under the Constitution: Recent Supreme Court Jurisprudence
Speaker: Steven P. Croley, Professor, University of Michigan Law School
Language: English (with summary in Japanese)
Moderator: Kichimoto Asaka

【Report】

In recent terms, the Supreme Court of the United States has held that states possess almost unlimited power to impose sentences for criminal acts for whatever duration they see fit. In a couple of important

cases, exemplified by Ewing v. California (2003), the Court made clear that the Eighth Amendment's prohibition against "cruel or unusual" punishment does not extend to the duration of criminal punishment. These cases were brought by individuals who were given severe sentences for minor theft crimes, under so-called "three strikes" statutes of states like California. According to such statutes, a third criminal violation can bring a sentence as long as twenty-five years imprisonment, or perhaps even life imprisonment, for petty theft. The Court refused to hold such punishment unconstitutional. Instead, it said that states could regulate in the area of criminal sanctions as they see fit. As a result, the prohibition against cruel and unusual punishment extends to such limited areas as physical punishment, capital punishment for minor crimes, and punishments of minors. Such is the virtue, or vice, of federalism.

At the same time, the same Court has imposed substantial limitations on punitive damages recoverable in tort. In this set of cases, most notably State Farm v. Campbell (2003), the Court has held that the Due Process clause limits states' ability to punish tort defendants for egregious conduct. In particular, the Court created a strong presumption against any punitive award that exceeded nine times the actual damages—the now-famous 9:1 ratio—and should reflect several considerations such as the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Because the Court relied on the Due Process clause in the latter set of cases while it interpreted the Eighth Amendment in the criminal sentencing cases, there is no strict logical or doctrinal contradiction between these two lines of jurisprudence. Yet the contrast is striking. For in the punitive damages cases, the Court went to great lengths to rein in state power. Federalism did no work in Campbell, and that one and the same Court would reach such results seems surprising.

There is a further irony. In the civil cases, the Court stated that one state may not impose damages for conduct that took place outside that state or implicated citizens in other states. In the criminal cases, in puzzling contrast, the Court found no difficulty in the fact that California had succeeded in scaring two-time offenders out of the state and into other states as a result of its three-strikes law. States may not impose damages for wrongful out-of-state conduct, but they can export criminals to other states.

The question becomes, why? Unfortunately, there is no neat way to reconcile the cases. One quick answer is that criminal wrongs are so much more severe than civil wrongs. But the facts show to the contrary. In the criminal cases, the defendants stole merchandise such as golf clubs worth only hundreds of dollars, whereas in Campbell the defendants defrauded its policyholders of millions of dollars. Harm to society therefore does not explain the outcomes. Another possible resolution holds that criminal procedural protections safeguard criminal defendants against excessive punishment. But again the facts of the cases undermine such an answer. Another possibility posits that legislatures have blessed criminal sanctions, whereas run-away juries arbitrarily impose civil penalties. In fact, however, tort damages in most states are subject to statutory controls and limits, and through common law doctrines such as remittitur judges can always reduce jury damage awards. Finally, one may think that there are already

remedies in place for the type of conduct for which punitive damages are awarded in tort. In fact however, defendants are typically subject only to trivial civil or administrative sanctions, if any, as the facts of Campbell against demonstrate. Punitive damages are not duplicative, in other words. Finally, the cynical answer is that the conservative majority on the Supreme Court is sympathetic to the big businesses who benefit from the Due Process holding, whereas they care little about criminal defendants. Such an answer misses the votes in the cases, however, as the Court did not line up along any neat conservative-liberal dimension, and Justices such as Justice Scalia thought the Court should respect states' rights in both sets of cases, dissenting in the punitive damages cases.

[Steven P. Croley]

The 159th Comparative Law and Politics Seminar – 22 June 2004

Topic: The Integration of Clinics and Clinicians in Elite US Law Schools
Speaker: Bridget M. McCormack, Professor, University of Michigan Law School
Language: English (with summary in Japanese)
Moderator: Kichimoto Asaka

【Report】

The growth of clinical education in US law schools over the last twenty years is one of the important modern stories about American legal education. A gnawing critique of traditional legal education combined with compelling arguments for supplementing that traditional education with the clinical method has produced first rate clinical faculties and programs for students at the elite US law schools.

The critique of traditional legal education which has grown louder over time goes like this: the content and the pedagogy of traditional doctrinal courses do not do enough to educate our students. Traditional doctrinal law school courses teach the content and the structure of legal rules, together with a narrow range of modes of reasoning about those rules. While at the end of the best courses students will understand the organizing principles behind the applicable set of rules, and be able to use different modes of analyses to understanding those principles, students are rarely in a position to apply the rules, the organizing principles or the methods of reasoning they are fluent in (i.e. primarily case reasoning, statutory interpretation, doctrinal synthesis) to a set of uncontained facts on behalf of a client. While students are generally skilled at responding, and doing so quickly, to questions about decisions which assume a static set of facts, they are unable to use the sets of rules and modes of reasoning they have learned to solve a problem.

Because most of traditional legal education follows these norms, students are sent the message that other important kinds of reasoning involved in the law such as problem-identification and problem solving are unimportant or unintellectual, or at least unfit for systematic study during the period of one's training. This is too bad, as it becomes self-fulfilling and students, and then lawyers, begin to see academic analysis as the opposite of practical thinking. Part of a lawyer's education should be to study problem identification and solving and come to grips with her own capacity for decision-making. Finally, law

school lasts three years, but a lawyer's education at the bar lasts ten to twenty times that. If we do not teach students to learn from their experiences while in law school we are disserving them.

Clinical education fills these gaps in traditional legal education. While clinical courses used to be thought of as providing mere skills training, and students invariably learn skills in their clinical courses, the pedagogical method provides a whole lot more for students than skills. In clinical courses, both those with live clients and those based on simulations, students are confronted with real problems. The problems they are confronted with are concrete, complex and unrefined. The students are responsible for developing facts as necessary. Students are the lawyers, the primary decision-makers on the cases. As such they are required to do all of the interacting with the clients, opposing counsel, witnesses and court personnel. And finally, their performances are subject to intensive, systematic critical review by faculty. The goal of these reviews is develop models for understanding choices and experiences and for predicting future choices and conduct. Essentially, the students learn to learn from their experiences so that they are reflective practitioners.

The University of Michigan Law School's clinical program is doing this at every level. In their first-year legal practice program students are given in role assignments and their performances are subjected to faculty review. By the time they are second year students they can participate in one of the many live client clinical programs offered and test their first-year problem solving skills learning. Nearly half of each graduating class enrolls in a live client clinic and a good number of others enrol in simulation based classes which use the same methodology. As a result, we believe, our students traditional education is enhanced and they leave law school ready to continue to effectively learn from their experiences in practice.

[Bridget M. McCormack]

The 160th Comparative Law and Politics Seminar – 29 June 2004

Topic: Japan and the Asian Region: Competition or Cooperation with China?
Speaker: T. J. Pempel, Professor, University of California at Berkeley
Language: English
Moderator: Kiichi Fujiwara

The 161st Comparative Law and Politics Seminar – 25 October 2004

Topic: Transformation of Representative Democracy in Europe
Speakers: 1) Anne Muxel, Research Director, CEVIPOF (Center for the Study of French Political Life) - FNSP (France)
“Representative Democracy and Participatory Democracy: a New Model of Citizenship in Europe?”
2) Pascal Perrineau, Director, CEVIPOF (Center for the Study of French Political Life) - FNSP (France)

“The Evolution of the Role of Political Parties in the Advanced
Industrial Democracies”

Language: French (with Japanese interpretation by Toru Yoshida)
Moderator: Yoichi Ito

【Report】

During the last twenty years, many symptoms of a crisis in political representation are visible everywhere in Europe: high abstention, partisan de-alignment, lack of confidence towards politicians and political parties, and growing political protestation. Is democracy in difficulty or must we interpret those symptoms as a new way to understand and to use politics?

Of course democracy is based on electoral participation. The election of representatives is essential. But more largely, democracy means a kind of relationship between citizens and governments, and can be expressed by other means than only the vote: direct local participation, demonstrations, petitions, collective and spontaneous collective mobilizations without the mediation of political parties or trade-unions. These two understandings and components of democracy, representative and participative, are not opposed to each other. They are articulated to define a new model of contemporary citizenship in western democracies.

A recent study conducted in France by the CEVIPOF (Political Research Center of Sciences Po) has shown that voting is still important for French people: 39% think it is extremely important, and 40% very important to guarantee the good working of democracy. But for a majority of them, protest participation is also important: 24% consider demonstrations extremely important and 38% very important. Among young people, this kind of protest participation is not only considered as legitimate, but is also often used. In France one young person out of every two has already participated personally in a demonstration.

As we can see, representative and participative democracy are closely linked. Practically, they often reinforce each other. Usually more people vote more than also demonstrate. And we can observe everywhere in western European countries an enlargement of political action.

But we must return to the different symptoms of crisis in representative democracy. The first important one is a general distrust towards governments; in France more than two thirds of the population consider politicians as corrupt (64%). This lack of confidence generates high abstention, and among voters, protest and populist choices (extreme left or extreme right parties).

Another problem is due to less the differentiated issues and cleavages among the great governmental parties. Their programs are less easy to discriminate. Their ideological content is more evasive. Partisan loyalties are less stable and less structured than before. Europeans that do not feel close to one political party are growing in number: 49% of them say they are not close to a party and 59% of the young people (18-24 years old). Partisan involvement decreases: less than 5% to 6% of the population belong to a party

or are affiliated to a trade-union.

So, there is a crisis of the linkages between the political system and the citizens, which then reinforces and develops new demands of direct and protest participation.

Despite this pessimistic overview, we can observe a certain vitality of democratic participation everywhere in Europe. It is particularly obvious among the younger generation: they are more critical towards politics and they employ more readily than their elders different kinds of political action. For instance, they can vote but they can also abstain, demonstrate or protest.

According to this new way of handling politics, a new type of political participation, more complex, more experimental, and more diversified, is emerging. The democratic system is not in crisis, it is in a process of a deep mutation.

[Anne Muxel]

The 162nd Comparative Law and Politics Seminar – 25 November 2004

Topic: The Structure of Fiduciary Duties in the U.S.
Speaker: Takayasu Kamiya, Professor, Hosei University
Language: Japanese
Moderator: Norio Higuchi

The 163rd Comparative Law and Politics Seminar – 7 December 2004

Topic: Legal Ethics: Education and Issues in the U.S.
Speaker: Peter A. Joy, Professor, Washington University in St. Louis School of Law
Language: English (with summary in Japanese)
Moderator: Norio Higuchi

The 164th Comparative Law and Politics Seminar – 12 January 2005

Topic: European Welfare States in Transition: Social Policy Reforms in Germany and Great Britain
Speakers: 1) Hiroki Yasui, ICCLP Researcher
“The ‘Agenda 2010’ Reform under the Schröder Government: German Governance in Transition?”
2) Naonori Kodate, COE Visiting Researcher
“Health Governance Change in Great Britain and Devolution Effects: Can Politics Shape Policy ?”
Language: Japanese
Moderator: Takeshi Ito, COE Visiting lecturer

【Report】

This seminar aimed at shedding light on the social reforms of European welfare states in transition. The big two, Germany and Great Britain, were selected from among the member states of the European Union with the goal of elucidating various styles of governance, which are still dominant factors affecting reform processes despite the deepening of European integration.

Hiroki Yasui's presentation was entitled "The 'Agenda 2010' Reform under the Schröder Government: German Governance in Transition?", whereas Naonori Kodate gave a talk entitled "Changes in health governance in Great Britain and the effects of devolution: can politics shape policy?". Both were followed by lively discussions from the floor.

<Session 1>

Presentation: The structure of governance in Germany is characterized by the strong influence of associations in the phases of policy planning and implementation, and by the acute competition among political parties in the policy decision phase. What is more, owing to federalism, opposition parties have some influence upon the legislative process through *Land* (state) governments. As a result, if a consensus fails to emerge among actors, it is difficult to make a significant decision in Germany. Therefore, Germany could not respond effectively to many problems in the 1990s, such as the recovery of eastern Germany, adjustments to globalization and European integration.

Despite such a governance structure, German Chancellor Schröder achieved the reform of the welfare system and labour market in 9 months, after his policy speech in March 2003 introduced "Agenda 2010" that aimed at increasing the investment for economic innovation and reducing welfare spending. Some changes in governance contributed to this achievement. In January 2003, based on the Stability and Growth Pact, the European Commission requested Germany to report on the plan to overcome its economic and fiscal crises, and this pressure provided parties with a chance to bypass the associations that opposed the reform. Additionally, without waiting for bottom-up consensus building, the top-down recommendations from advisory committees led by pro-government "specialists" were often used to persuade political actors.

However, these changes have not completely altered the main framework of the decision making process that has made German governance resistant to change. Therefore, the success of this reform mainly resulted from the contingent configuration of actors' power distributions and preferences, namely: 1) although German trade unions opposed the reform, they could not organize effective resistance since they suffered from internal power struggles and a severe defeat in a large-scale industrial dispute during the spring and summer; 2) the left-wing of the Social Democratic Party was disinclined to accept Agenda 2010, but it was difficult to oppose Schröder who enjoyed great popularity and won two general elections after a long period in opposition; 3) since the reform had positive implications for business leaders and the center-right opposition parties, they had no intention of resisting the reform seriously; and 4) owing to internal struggles, the center-right parties lost their ability (and then intention)

to obstruct the reform and attack the red-green government. This configuration made the Agenda 2010 reform feasible.

In 2004, this configuration dissolved, and the situation changed. The trade unions regained their strength and tried to recover from previous setbacks. As elections for the European Parliament and three *Land* parliaments approached, the reform slowly receded. The reform of intergovernmental relations was attempted during these developments, but it has yet to change the fundamental governance structure.

Discussion: In the open discussion, many questions were raised about the degree of changes in the structure of German governance. Firstly, could the reform's output bring about changes in the structure of governance? Secondly, could top-down influences exert considerable persuasive power? Thirdly, decentralization is common in other reforms of intergovernmental relations seeking to establish better governance, how is it in the German case? Fourthly, how was the pressure exerted by the European Commission in January 2003 different from other cases? And finally, why did dissidents not appear in the center-right opposition unlike the Social Democrats? The presenter responded to each question in turn. Firstly, this reform changed the scale of the welfare spending and worker protection regulations, but it did not reach a critical mass in bringing about a qualitative change in governance. Secondly, the top-down influences impacted upon the policy planning phase, but they abated in the decision and implementation phases, since the advisers lacked decision-making powers and were rendered as only one of many actors. Thirdly, since the reform of German federalism aimed at separating the mixed and competing jurisdictions of the federal and *Land* governments, it cannot be regarded as simply decentralization or centralization. Fourthly, the European Commission's request did not function like a usual directive, but rather indirectly requested some reforms; it became a major political issue since the warning from outside about economic and fiscal problems was regarded as a matter of national pride. Finally, the presenter explained that the center-right opposition's backbenchers had little incentive to vote against the reform bills since they were essentially in favour.

[Hiroki Yasui]

<Session 2>

In sharp contrast to the multi-layered governance structure in the German polity, Britain has demonstrated a much simpler polity and style of governance, which needs to be taken into account with regard to policy reforms such as education and health.

This paper consisted of four parts. First, it attempted to locate the British National Health Service (NHS) in comparative perspective in order to establish what makes the NHS so unique and distinct from that of the United States, the country often classified as the same welfare regime, and other economically advanced countries. Second, it briefly explained how the British welfare state came about, underlining the fact that it was founded firmly on the unitary polity principle as well as Beveridgean concepts. The unitary principle, also seen in the NHS organizational structure, was therefore conducive to rendering "local" political spaces almost void for policymaking.

The third part reexamined the NHS reforms undertaken by the Thatcher administration in parallel with the retrenchment politics of granting local political autonomy. Mechanisms of market infiltration (so-called quasi-marketisation), such as compulsory competitive tendering (CCT) and performance indicators, were implemented in the sphere of the NHS. However, even Thatcher could not go so far as to privatise or socialise financing of the NHS, and soon opposition to such reforms was mobilised. Amidst cracks in the welfare consensus, the territorial dimension of the British polity emerged as a contended issue. New Labour advanced its new slogan: participation, partnerships and social inclusion, as opposed to choice and competition advocated by the Conservative Party. Rather ironically, this contrast could only be made as a result of the emergence of a new consensus about, or resignation to, dependency on the market.

So, have market forces swept away political control from agenda-setting to policy implementation? Does a specific policy area determine political orientation? In negating these claims, the fourth and final part provided an overview of the post-devolution landscape of health governance in the three 'nations' (England, Scotland and Wales) to examine whether politics can still shape policy in any significant way.

In fact, Scotland is equipped with the capacity to represent substantial variations in health governance, enjoying a different electoral rule (the plurality-proportional mixed system) and multiple political parties (Labour and Liberal Democrats in coalition, with Scottish Nationalists, Socialists and Greens further to the left) competing in the policy arena. On the one hand, with a strong professional base at university hospitals in particular, the Scottish way of reforming the health policy sector could be regarded as unique. On the other hand, Wales, where Labour was predominant and the medical profession in a weaker position, took its manifesto to heart, particularly as regards participation and social inclusion at the local level. The result was the deterioration of medical services, including longer waiting lists. The Minister of Health for Wales, Jane Hutt, was removed in early 2005, and her successor, Brian Gibbons, wasted no time in making a statement that we must 'learn health lessons' from England (BBC News, 11, January, 2005).

In England, even though New Labour swiftly replaced fund-holders with Primary Care Trusts (PCT), thereby highlighting its aim of encouraging coordination and cooperation instead of competition, it was clear that PCTs were set up to create a two-tier system with contentious Foundation Hospitals. Given that middle-class support is the key for winning the hearts of England, this policy divergence from the rest of the UK is likely to become even clearer in the future.

With this analysis, it can be concluded that devolution has created a policy space for a variety of actors, ranging from political parties, civil servants and medical professionals to citizens as both patients and voters. With hindsight, elements of Thatcher's reforms have left their mark in terms of path-breaking dynamism and thus opened new channels for many more 'peripheral' actors, revitalising the territoriality dimension. British-style governance today can still be described as majoritarian with few formal

veto-points. Nonetheless, its gradual change, driven partially by its own historical path, can be foreseen. Politics still seeks to control the direction of any future changes.

Discussion: As in the first session, a number of issues and questions were raised from the floor and the panel. One particular set of questions regarding the source of divergence in health policies in different regions is worthy of attention. Although the limited legislation power of the Welsh Assembly should be clearly underlined, the presenter claimed that there has been a certain degree of autonomy in agenda-setting processes in each region. Hence, differing policy spaces have been further cultivated and exploited in some cases. These new mechanisms have their historical roots in the traditional British style of governance: the ‘dual-polity’ principle. Today, Wales, not just Scotland and Northern Ireland, deserves attention. This presenter’s claim is by and large in line with other scholars’ recent findings and analyses (see S. Greer, 2004).

[Naonori Kodate]

The 165th Comparative Law and Politics Seminar – 27 January 2005

Topic: Ethical Issues at the Edges of Life: birth and death
Speaker: Thomas R. McCormick, Emeritus Lecturer, University of Washington
Language: English (with summary in Japanese)
Moderator: Norio Higuchi

[Forums]

The 126th Comparative Law and Politics Forum – 14 December 2004

Topic: The American Law School
Speaker: Donald L. Horowitz, Professor, Duke Law School
Language: English (with summary in Japanese)
Moderator: Kichimoto Asaka

The 127th Comparative Law and Politics Forum – 17 January 2005

Topic: “Ten Commandments Judge?”- An Illustration of Interplay of the Secular Government and the Religious Society in the U.S.
Speaker: Hisashi Aizawa, Associate Professor, Hokkaido University
Language: Japanese
Moderator: Norio Higuchi

【Report】

In this presentation, I take up a recent disciplinary discharge of a Chief Justice of Alabama Supreme Court and discuss how a society with strong religious influences and the doctrine of the Rule of Law interacts in the United States.

In Alabama, holders of positions of the State judiciary are elected by popular voting. When he was a trial

judge in the 1990s, Roy S. Moore installed a plaque of the Ten Commandments in his courtroom and was consequently involved in litigations, which were not decided on merit but gave him popularity. He won the election in fall of 2000 and took office as the 28th Chief Justice of the Supreme Court of Alabama. As he was emphasizing the Christian element in law during the campaign, he materialized his vision (literally); he installed a granite monument of the Ten Commandments in the rotunda of the State Judiciary Building. Alleging violation of the First Amendment to the U.S. Constitution, three atheist lawyers filed a complaint against him in the Federal District Court. The trial judge decided against him and granted an injunction to remove the monument. Though the injunction order was stayed during the appellate procedure, he lost in the Court of Appeals for the Eleventh Circuit as well. Even though the stay was lifted, however, Moore didn't comply with the order voluntarily. Moreover, he made some press releases expressing his intention of non-compliance; people who supported him assembled around the Judiciary Building, which created an uproar in the neighborhood. Just as the deadline for voluntary compliance was about to expire, other Associate Justices of Alabama Supreme Court took over Chief Justice's (Moore's) authority over the administration of the state judiciary and removed the monument from the Building.

A disciplinary proceeding against Moore began. The Judiciary Inquiry Commission filed a formal complaint against him, alleging violation of the Canons of Judicial Ethics. The Court of Judiciary unanimously decided against him, and an appellate panel, Special Supreme Court of Alabama, also held against him unanimously.

First, it is a subject of interest that a person like Moore could take office as a head of one of the state governmental branch. The key factor in this process is that positions of the Alabama Judiciary system are elected by popular voting. Deep South, including Alabama, is known as an area where religious conservatives have strong influence. Such society made Moore the head of the judicial branch. Popular elections of judicial positions are common in the U.S. and this case provides an illustration of the reality of such a system (though a rather extreme one).

Second, I'd like to draw attention to the arguments used in the disciplinary procedure, which expelled a person with strong popular support. Moore was discharged because it was found that he violated the Canons of Judicial Ethics. However, the panels found violation NOT in the fact that he installed, violating the Establishment Clause of the U.S. Constitution, a monument of the Ten Commandments, BUT in the fact that he did not comply with the order of the federal court. Throughout the disciplinary procedure, Moore, alleging that the federal court had misunderstood the relationship between the law and the religion, tried to shift the issue into the realm of religion, but the panels never listened to such an argument and cautiously distanced themselves from religious issues. The panels rejected Moore's argument using the formalistic argument that state courts didn't have the authority to override a decision of a federal court. This strategy reflects the dilemma the panels faced. With strong religious influence in the society, having been appointed directly or indirectly through the political process, they might have endangered their own positions if they had put forward a (seemingly) anti-religious reasoning in making

a decision. On the other hand, it may hurt the integrity and the authority of the law if you let a head of the judiciary ostentatiously disobey a court order. Therefore, they narrowed the subject of their decision to Moore's non-compliance to a court order, emphasized that they did not want to get involved in the background of the case and avoided religious issues.

As a foundation of such a strategy, there should be among the ordinary citizens an understanding that a decision of a federal court should be respected even though it is against their feelings (their sense of religion, in this case), and the integrity of judicial decisions, both at federal and state level, should be preserved. It is difficult to prove that there exists such an understanding, but there is some indirect evidence of it. While religion plays an important role in U.S. society, it doesn't overwhelm the political life thoroughly and the importance of the Rule of the Law is recognized even by ordinary people.

[Hisashi Aizawa]

Comparative Law and Politics Special Lectures

'The Future of Contemporary Democracy: Perspectives from Europe' - 14 October 2004

- Speakers: 1) Anne Muxel
Research Director, CEVIPOF (Center for the Study of French Political Life) - FNSP (France)
'Le développement de l'abstention dans les pays européens: vers quelle démocratie?'
- 2) Pascal Perrineau
Director, CEVIPOF (Center for the Study of French Political Life) - FNSP (France)
'L'extrême-droite et les populismes en Europe'
- Discussant: Toshio Hatayama, Professor, Saga University
- Language: French
- Moderators: Kanji Tokura, Professor, Kansai University
- Place: Institute of Legal Studies, Kansai University
- * Co-sponsored by the University of Tokyo 21st Century COE Program, 'Invention of Policy Systems in Advanced Countries' and Institute of Legal Studies, Kansai University.

【Report】

'Non-Voting in Western European Countries: a New Type of Democracy?'

The 2004 European elections in the new European Union, now enlarged to twenty-five countries, have been characterized by a very high abstention rate. 57 per cent of the registered European population did not vote.

In the last two decades, electoral participation has decreased everywhere in western European countries, whatever the type of elections: local, national or European. A higher level of abstention usually characterises European elections but this time a record has been reached, and compared to the first European elections held in 1979, twenty-five years ago, the number of non-voters has increased by 17.5 per cent. Except in the countries where there is compulsory voting, Belgium, Luxemburg, Greece and to a lesser extent Italy, in all the last general elections we have seen the number of voters dwindle. In France if we compare the 1990s to the 1970s, non-voters have increased steadily: by 5.5 per cent at the presidential election, by 7.7 per cent at the local elections, by 13.4 per cent at the parliamentary elections. At the first round of the presidential election in 2002 a quarter of the electoral did not vote (27.8 per cent). Seven years previously, in 1995, this number was only 20.6 per cent.

How can we explain the importance of this electoral disaffection?

Different recent studies on electoral participation have shown the complexity of the phenomenon. It is like a puzzle and to describe it requires the introduction of different types of explanations. The

sociological one, linking social integration to the vote, is not sufficient to explain the increase in abstention from voting in societies where educated citizens are more numerous. Other models such as rational choice or the effects of the political context must be added, especially to explain the increase of a new type of abstention, which is more political and which has protest motivations.

In Europe today, 49 per cent of the population do not feel close to any political party and partisan identification and ideological beliefs are less structured than in the past. There is a general crisis of political representation, and distrust towards the authorities is increasingly affirmed. Even in the countries where there is compulsory voting, blank and invalid ballots increase, which is another way to contest the election. But this situation does not mean that citizens are less interested in politics or that they are becoming apathetic. Non-voting does not mean indifference or uncivic behaviour. In France, for instance, the global interest in politics is stable: in 1978, 46 per cent of the French people declared a high interest, today they are 43 per cent. Voting is still regarded as very important for the smooth functioning of democracy: 79 per cent think it is important that people vote regularly at elections. But at the same time, protest participation has gained legitimacy. French citizens who consider participation in demonstrations also important for democracy are more numerous today (62 per cent).

Political participation is now more diversified and citizens can express their choices or demands in different manners: voting, abstention and demonstration. Each of them is used more and more for protesting. Protest votes for extreme left- or extreme right-wing parties, or populist parties, are on the rise. Demonstrations are directly used to protest but there is also a new and important part of non-voting behaviour that possesses meaning for political protest. In France, as in most of western Europe, this kind of political abstention is on the increase and has an obvious impact on the electoral game.

I call this new type of abstention, which involves educated people, often young and interested in politics, 'abstention in the political game'. It is used by a new type of voter, more critical and more mobile, using abstention when the political supply does not address his/her preoccupations, or to express a protest against governments and/or politicians. However, usually such non-voters do not repeat this non-voting and may return to the polls at the next election. This new electoral behaviour supposes an alternation of voting and non-voting.

At the last European elections, 38 per cent of the abstainers made their choice at the last minute. Regular abstainers represent only 23 per cent of the Europeans registered, and most of them can be explained by sociological reasons rather than political ones. But regular voters are also less and less numerous. In France, 55 per cent of the voters turned out systematically at all elections in 1995; in 2002 they are only 47 per cent. It is the alternation of voting and non-voting which has increased the most. And only if it is this kind of non-voting in the 'political game' can this new electoral behaviour be regarded as a sign of a certain vitality of the democratic system.

[Anne Muxel]

‘Political Participation of the Young in the New Europe ’ - 18 October 2004

Speaker: Anne Muxel, Research Director, CEVIPOF (Center for the Study of French Political Life) - FNSP (France)

Language: French

Place: Institut Franco-Japonais du Kyushu-Fukuoka

* Co-sponsored with Institut Franco-Japonais du Kyushu-Fukuoka.

【Report】

Across Europe over the last two or three decades, the younger generation has often been described as having a weaker sense of civic responsibility than their elders and their relationship towards politics is a cause for concern about the health of democratic societies. Their abstention and the high level of distrust they display towards politicians and political parties suggest a certain depoliticization, which could ultimately represent a danger for western European democracies.

What is the significance of this tendency? Does it mean only political disaffection or can we interpret their political behaviour and attitudes in another way?

To answer these questions we have to differentiate between several factors that have an impact upon youth political participation: 1) the impact of their particular age and the point in their life cycle; 2) the impact of the period in question, which depends on the political and historical context and for this reason is common to all generations; and 3) the impact of the generation, which is specific to a single generation and could define the specificity of its relationships to politics. In June 2004, European elections afforded a unique and edifying opportunity to discuss this framework of analysis and to make some comments on the evolution of citizenship, meanings and practices among the younger generation.

First, the impact of age. Youth is a period of transition in the process of political socialization. I have defined this stage as an ‘electoral moratorium’ that is characterized by a high level of abstention at elections, less stable and less structured political choices, and a higher level of electoral volatility than their elders. At the last European elections the level of abstention among young people was thirteen points higher than in the whole electorate (67 per cent of 18-24 years old, 54 per cent of the entire electorate). Of course, there are fewer young people registered on electoral lists, but even among those who are registered, a third hesitated to vote until the last minute: 31 per cent of 18-24 year olds decided who to vote for just a few days before or even on the day of the election.

Second, the impact of the period. A high proportion of young people abstain but we must not forget that the level of abstention has increased constantly during the last twenty years and concerns the whole electorate whatever the type of election. The electoral participation of young people follows this general tendency. The motivations of young people who do vote are similar to their elders, and one of the reasons most often given is to protest against the government. Attitudes and behaviour, which can be observed in the entire population, are amplified in the case of young people.

There is also a cleavage between educated and non-educated young French people: students vote more often for the Socialist Party and the Ecologists, whilst young people who have entered the labour market with a low level of education are more likely to vote for extreme right-wing and populist parties. There is a similar cleavage within the entire electorate. In addition, young people share with their elders the same distrust towards political institutions. In Europe, 40 per cent of 18-24 year olds (45 per cent of the whole population) do not trust European institutions. In France, a large majority of people do not have any confidence in the Parliament (51 per cent and 59 per cent of those who are less than 35 years old).

Third, the impact of the generation. This concerns the feelings and sense of belonging towards Europe of today's younger generation, their conception of Europe and also the development of participation in protest movements. These three specific traits define a particular link to Europe and European identity and a way to participate politically, even if voting behaviour seems weaker than among their elders.

As regards the first trait, a real attachment to Europe does exist. Young French people select Europe as their third place of belonging after their country and their city. What is more, 82 per cent claim that they are proud to be European citizens. As regards the second trait, their conception of Europe is not only cultural and economic but is also political. 79 per cent of European youth think that it is a good thing for their country to belong to Europe. There is a majority of young people who want a social agenda for Europe and support the model of a federal Europe. They also express less opposition to enlargement and are more likely to accept the entry of Turkey into the EU (54 per cent of 18-24 year olds, in contrast to 36 per cent of French people).

As regards the third trait of participation in political protest, voting is no longer the only way to express a democratic choice. Protest movements have increased in legitimacy and this is reflected in public opinion. The younger generation is particularly active in these movements and participates readily and spontaneously. Today 30 per cent of young people in Europe have participated in a demonstration; in France, 57 per cent have demonstrated.

In recent years, young people in Europe (students in particular) have taken part in huge demonstrations against globalization or against the War in Iraq. This is also clearly a way to affirm a European political consciousness.

More than ever the political European scene needs the representative system, and of course the electoral system, to gain and assure its legitimacy. However, political participation is today more diversified. The younger generation is well-positioned to experiment with new types of collective action and to define progressively a new model of citizenship. This would certainly be pro-European but also more critical towards political institutions and politicians. It would also alternate its use of voting and abstention, and protest more easily.

[Anne Muxel]

‘Autour des élections au Parlement européen de juin 2004 ’ - 22 October 2004

- Speakers: 1) Pascal Perrineau
Director, CEVIPOF (Center for the Study of French Political Life) - FNSP
(France)
‘Les interprétations de la montée de l’Euroscepticisme dans une Union
Européenne à vingt-cinq’
- 2) Anne Muxel
Research Director, CEVIPOF (Center for the Study of French
Political Life) - FNSP (France)
‘Quelle Europe sans électeurs?’
- Discussants: Hirotaka Watanabe, Professor, Tokyo University of Foreign Studies
Kenji Hirashima, Professor, University of Tokyo
- Language: French (with Japanese interpretation)
- Place: Maison Franco-Japonaise
- * Co-sponsored by the University of Tokyo 21st Century COE Program, ‘Invention of Policy Systems in
Advanced Countries’ and Maison Franco-Japonaise.

【Report】

‘A Europe without Electoral Participation?’

In June 2004, the sixth European elections were held. About 350 millions voters in 25 countries had to choose 732 European MPs for the next five years. Because of the recent enlargement to ten new countries, it was an historic event and we would have expected a high level of public interest and a strong electoral turnout. Despite this important political context, less than half of the registered voters went to the polls. All the signs of European disaffection with civic affairs were present: a lack of interest in hardly visible political campaigning, a high level of abstention in all countries, and an expression of protest against national governments among people who actually did vote. How can we understand this situation and can the European political project be achieved without the electoral participation of European citizens?

This lack of participation is not new. European elections have always known a high level of abstention, but it has increased significantly in recent years. In 1979, during the first European elections, the level of abstention was 37 per cent of the registered voters. In 1999, it was more than 50 per cent. In 2004, it climbed to the level of 54.4 per cent. The level of abstention was even higher in the new central and eastern European countries (such as Slovakia, the Czech Republic and Poland).

This increase in abstention is also noticeable at national elections in all European countries. The crisis of political representation has hit all types of elections since the end of the 1980s and distrust towards

politicians and political parties is the main reason given by the non-voters. We must add to this lack of confidence a general difficulty to understand and to feel concerned by European issues that are not so clear and not so easy to interpret. What is more, European political institutions seem very complicated and very distant to the electorate.

Despite this worrying situation, we would like to make some suggestions as regards the reality of this crisis in European democracy.

We do not think that the lack of interest in European elections condemns the political project of a democratic Europe. First, although the level of abstention has risen globally, it has actually declined in six countries (Italy, Luxembourg, Ireland, Netherlands, Finland and the UK). Second, it was a tall order to mobilize 350 million citizens belonging to a single democratic unit but attached to 25 individual nations to cast their votes. In that respect, we can consider the level of participation as representing a half-victory. The European project needs time and the 2004 elections were the first stage for the expanded 25-member European Union. Third, electoral disaffection and the growing tendency to protest against national governments is more of a concern at the national level than the European level.

The fourth reason, and probably the most important one, is that a new framework of citizenship is emerging. Voting is no longer the main tool of civic participation and other means are developing such as demonstrations, signature campaigns and petitions, and direct local participation, to mention but a few. In addition, we can also interpret abstention as a new way to express political behavior. More and more people are alternating their use of voting and abstention. Citizens are today more mobile, less affiliated to political parties, and also more critical. To abstain can be a kind of protest at a particular moment in time and in a specific context. 38 per cent of the non-voters decided to abstain only a few days before the election and some of them in the final hours; they probably will go back to the polls at the next elections. Few people consistently abstain: regular non-voters are only 23 per cent of the entire European electorate.

For all these different reasons, the political project of an enlarged European Union is far from being condemned. Europe is in a process. Of course it needs to be legitimized at the polls, but as part of this work in progress others ways can be found and used by citizens.

[Anne Muxel]

Preparations for the Second Meeting of the Anglo-Japanese Academy

The ICCLP held the first meeting of the Anglo-Japanese Academy (AJA) in September 2001 at the University of Sheffield and in cooperation with its School of East Asian Studies. Taking the future of international academic exchange in the twenty-first century as its theme, a workshop was held for young Japanese and UK researchers in the social sciences of law, politics, economics and sociology and was followed by an international symposium in which senior academics from Japan and the UK participated. As a result, various training sessions involving the younger AJA fellows were promoted, an interdisciplinary network was created, and the opportunity for these younger scholars to meet senior academics from both Japan and the UK was realised. A more detailed account of the project can be found in the *ICCLP Review*, Vol. 4, No. 2 and Vol. 5, No. 1. In addition, the participants' papers can be found in *Anglo-Japanese Academy (2001) Proceedings* (ICCLP Publications, No. 7, 2002), and some of the senior academics' papers on specific issues were collected together and published by Routledge in 2003 as *Japan and Britain in the Contemporary World: Responses to Common Issues* (co-edited by Hugo Dobson and Glenn Hook).

It has been decided that the second meeting of the Anglo-Japanese Academy, co-sponsored by the University of Tokyo 21st century COE program 'Invention of policy systems in advanced countries', the University of Warwick, the University of Sheffield and Kobe University will take place in Warwick in January 2006. To this end, the AJA steering committee met at the Centre for the Study of Globalisation and Regionalisation (CSGR), the University of Warwick from 25 to 26 August 2004 in order to begin preparations and view the conference facilities. The committee also had a meeting with Professor Jan Aat Scholte, Acting Director of the CSGR, and discussions regarding the AJA and international academic exchange. This second meeting of the AJA will differ from the first meeting in that it will focus on political science only, the AJA fellows are graduate students specialising in Japanese politics or European (particularly UK) politics and are competitively selected. Since this first preparatory meeting, the Japanese steering committee has had meeting several times and concrete preparations are proceeding smoothly in coordination with the UK side. The committee has started to advertise the candidate positions for the Japanese fellows on its website, as well as through direct mailing to universities in Japan.

Participants:

Professor Susumu Takahashi, Associate Professor Masaki Taniguchi, Professor Taro Tsukimura (Kobe University), Professor Yoshiaki Miyasako (ICCLP), Hiroki Yasui (ICCLP Researcher), Keiko Wada (ICCLP co-ordinator)

Professor Glenn D. Hook (the University of Sheffield), Dr Hugo Dobson (the University of Sheffield), Dr Christopher W. Hughes (CSGR), Professor Jan Art Scholte (CSGR)

Supporting the 21st Century COE Programs of the University of Tokyo

The ICCLP has continued from last year to provide support for all aspects of the two 21st century Centre of Excellence (COE) programs – “Soft law” and the State-Market Relationship’ and ‘Invention of Policy Systems in Advanced Countries’ – based in the Graduate School of Law and Politics. As regards the former program, the centre cooperated in holding the symposium entitled ‘Trends in Modern Business Law: Emerging “Soft Law”’ and is making information on international exchange available. As regards the latter project, the centre contributes by acting as the coordinating centre for the program’s research and educational activities holding a number of symposiums, seminars and workshops, inviting researchers from both within and outside Japan, and producing a number of publications, as seen below.

Symposiums, seminars and workshops

Symposiums

1. E-Government and Institutional Change in Japan and Asia, 10 July 2004
2. Republicanism in Historical Contexts: A Symposium Dedicated to the Memory of Arihiro Fukuda, 29 September 2004
3. The Future of Contemporary Democracy: Perspectives from Europe, 14 October 2004
4. Expert Survey Method and Policy Position of Parties, 12 November 2004

Seminars

1. Current Research Developments in Managements Accounting and the Implications for Teaching, 28 April 2004
2. Ethics of Public Service, 24 May 2004
3. The so-called ‘Ministry of Finance’s Domination’, 3 June 2004
4. The System of Self-Governance in South Korea and the Special Regional Devolution Law, 19 June 2004
5. Japan and the Asian Region: Competition or Cooperation with China?, 29 June 2004
6. Pluralism and Sovereignty, 2 August 2004
7. Les nationaux-populismes en Europe, 19 October 2004
8. Autour des élections au Parlement européen de juin 2004, 22 October 2004
9. Transformation of Representative Democracy in Europe, 25 October 2004
10. Japan’s System of Safety Regulations and Related Issues: the Use of Information and the Dilemma of Sanctions, the Quality Control of Sanctions and the Role of Third Parties, and Securing Trust, 18 December 2004
11. Incoherent Empire: A Critique of the American Empire in Terms of *The Sources of Social Power*, 22 December 2004
12. European Welfare States in Transition: Social Policy Reforms in Germany and Great Britain, 12 January 2005

Workshops

1. The Reform of Public Departments and the Role of Public Policy Graduate Schools in Asia, 16 February 2005
2. Issues and Prospects in Research on European Integration, 23 February 2005

Publications

1. University of Tokyo Research Group on Administration, Series 1 *The UN System and Procurement Administration*, by Toru Sakane, 10 March 2005.
2. *Collected Symposia*, 1 September 2003 to 31 March 2005
3. *Collected Seminars, Special Lectures and Workshops*, 1 September 2003 to 31 March 2005
4. *Occasional Papers*
 - ‘La loi et les mœurs. La gauche, la droite et les politiques de la sexualité’ by Janine Mossuz-Lavau
 - ‘Bush Environmental Policies after Three Years: A Case Study in the New American Politics of Values’ by Robert H. Nelson
 - ‘Een ni mikan no bunken-kaikaku?’ [Are Devolution Reforms to be Eternally Unfulfilled?] by Toshiyuki Kanai
 - ‘Politics, Democracy and Citizenship’ by Bernard Crick
 - ‘Hikaku-seijigaku-hōhōron to Nihon-seiji-kenkyū’ [The Methodology of Comparative Political Science and Research on Japan’s Politics] by Junko Kato
 - ‘Japan and the Asian Region: Competition or Cooperation with China?’ by T.J. Pempel
 - ‘Prospects for the Virtual State’ by Jane E. Fountain
 - ‘Pluralism and Sovereignty’ by William E. Connolly
 - “‘Yōroppa ka” to mesoreberu-gabanansu-seisei no kanousei: hoppō “syūhen”- kameikoku kara no shiza’ [Europeanisation” and the Possible Creation of Meso-level Governance: Views from the Member Nations of the Northern Periphery] by Naonori Kodate
 - ‘EU-tōgō to “chiiki (region)”: Itaria-Supein no syūseido-kaikaku to kokka-kōzō no henyō’ [EU Integration and the ‘Region’: Italian and Spanish Reforms in the State System and Changes in the Construction of the State] by Takeshi Ito
 - ‘La crise de la représentation politique en Europe’ and ‘L’évolution du rôle des partis dans les démocraties industrielles avancées’ by Pascal Perrineau
 - ‘Estimating Party Policy Positions: Japan in Comparative Context’ by Michael Laver (co-author)
 - ‘Purposes, Ways, and Means of Identifying Party Policy Positions’ by Michael D. McDonald
 - ‘A Time Machine: New Evidence of Value Change’ by Masaki Taniguchi
 - ‘Incoherent Empire: A Critique of the American Empire in Terms of *The Sources of Social Power*’ by Michael Mann
5. *Working Papers*
 - ‘Kankoku no kagaku-gijutsu-seisaku no kettei-shisutemu to kaikaku’ [The Decision-making System in South Korea’s Scientific and Technological Policies and its Reform] by Chang-Dong

Kim

‘Kokusai-kyōryoku NGO webudirekutori’ [A Web Directory of NGOs involved in International Cooperation] and ‘Datsu-kōgyōshakai ni okeru sayū-ideorogii-tairitsu-jiku no henka to tōhyō-kōdō no saihei’ [Changes in the Ideological Opposition of Left and Right and the Reorganisation of Voting Behaviour in Post-Industrial Societies] by Michio Umeda

‘Yamagishi Kazuo Sagamihara-shigikaigiin/shiminkurabugaiin-danchō intabyūkiroku’ [An Interview with Yamagishi Kazuo, Member of Sagamihara City Council and Chairperson of the *Shimin Kurabu*] by Kazuhiro Taguchi

‘Betonamu-sensō o meguru bei-ei-futsu-nichi no seisaku no hikaku: ei-futsu-nichi no taibei-seisaku no bunnseki-shikaku no kentō’ [A Comparison of US, UK, French and Japanese Policy towards the Vietnam War: An Examination of Analytical Viewpoints of UK-French-Japanese Policy towards the US], ‘Wilson seikenki no igirisu no betonamu-seisaku ni kansuru yobiteki-kōsatsu: 1965-nen 2-gatsu kara 1968-nen 3-gatsu madeo chūshin-ni’ [A Preliminary Examination of UK Policy towards Vietnam under the Wilson Government: From February 1965 to March 1968], ‘De Gaulle seikenki no furansu no betonamu-seisaku ni kansuru yobiteki- kōsatsu: 1965-nen 2-gatsu kara 1968-nen 3-gatsu madeo chūshin-ni’ [A Preliminary Examination of French Policy towards Vietnam under De Gaulle: From February 1965 to March 1968], and ‘Amerika no tai-iraku seisaku ni kansuru rironteki- kōsatsu: Wangan-sensō syūketsu-go kara iraku-kainyu-kettei made’ [A Theoretical Examination of US Policy Towards Iraq: From the Persian Gulf War to the Decision to Intervene in Iraq] by Satoru Mori

‘Changing Media, Changing Politics in Japan’ by Masaki Taniguchi

6. *DVD*

‘Chihōbunken-kaikaku-kankei-shiryō (1): chihōbunken-suishin-iinkai kaigi-yōroku’ [Documents on Reforms in Regional Devolution, No. 1: A Record of the Meeting of the Committee for the Promotion of Regional Devolution], 31 March 2005

Supporting the School of Law

On 1st April 2004, sixty-eight law schools were approved by the Japanese Ministry of Education, Culture, Sports, Science and Technology (MEXT). One of the three fields of expertise created in the Graduate School of Law and Politics at the University of Tokyo is in legal training (the others being legal and political studies and public policy) and is based within the newly established School of Law.

The School of Law specialises in the education of students to be legal practitioners with a sound ability, responsive to international issues and capable in a variety of fields. The ICCLP, with its track record in international exchange, continues to provide substantial support to the School of Law (see below), but especially in the holding of the summer school in Tsunan, Niigata Prefecture, which is one aspect of its American Law programme.

Visits to American Law Schools – 28 April to 6 May 2004

Masahito Inouye (Dean of the School of Law) and Yoshiaki Miyasako (Professor of the ICCLP) visited New York University School of Law, Columbia Law School and the University of Michigan Law School to exchange ideas and conduct interviews about the American Law programme and its summer school.

School of Law Staff Seminar – 20 May 2004

When four members of Michigan Law School staff – David Baum, Margaret Leary, Beatrice Tice and Sarah Zearfoss – visited the School of Law, the ICCLP arranged their invitation, and assisted in organisation of a staff seminar and reception.

Visit by Michigan Law School – 30 June 2004

Professor Evan H. Caminker (Dean of Michigan Law School) and Ms Gordan visited the School of Law and its facilities.

School of Law Summer School – 23 to 31 July 2004

The ICCLP cooperated in a number of areas including visits to the American law schools, arranging schedules and invitations, recruiting students, accounting, support for staff and participants during the summer school and conducting surveys.

Number of participants: 44 students and 6 practitioners

Teaching Staff:

From American Law Schools: Mark Ramseyer (Harvard University), Joseph L. Hoffmann (Indiana University), Tom Ginsburg (University of Illinois), Anthony Zaloom (Lawyer), Christopher H. Hanna (Southern Methodist University), Toshiko Takenaka (University of Washington).

From the Graduate School of Law and Politics: Masahito Inouye (Dean of the School of Law), Yoshiaki

Miyasako (ICCLP), Daniel H. Foote, Norio Higuchi, Yoshiko Terao, Kichimoto Asaka.

Secretariat: Yoko Kubokawa (ICCLP), Motoko Negishi

Venue: Greenpia Tsunan

Topics: Jury System and Civil Procedure (Zaloom); Federalism and the Constitution (Ginsburg); Criminal Law (Hoffmann); Torts (Ramseyer); Contract (Zaloom); Tax (Hanna); Intellectual Property (Takenaka); Administrative Law (Ginsburg).

Supporting the Graduate School of Public Policy

The Graduate School of Public Policy was established on 1st April 2004. It has invited established politicians, practitioners and journalists as speakers in a series of seminars targeted mainly at students. These seminars were held in the Conference Room of the Faculty of Law Building No. 4 and were co-sponsored by the 21st Century COE Program of the University of Tokyo 'Invention of Policy Systems in Advanced Countries' and the Endowed Chair in 'Politics and Mass Media' with the support of the Asahi Shimbun. The ICCLP has supported the following seminars as the secretariat.

The 1st Public Policy Seminar – 5 October 2004

Topic: The Future of Japanese Politics and the Political Mission of the Democratic Party
Speaker: Katsuya Okada, President, the Democratic Party of Japan
Moderator: Hiroshi Hoshi, COE Visiting Professor; Senior Staff Writer, Asahi Shimbun

The 2nd Public Policy Seminar – 12 October 2004

Topic: Discussing Japanese Foreign Policy
Speaker: Hitoshi Tanaka, Deputy Foreign Minister
Moderator: Hiroshi Hoshi, COE Visiting Professor; Senior Staff Writer, Asahi Shimbun

The 3rd Public Policy Seminar – 25 October 2004

Topic: The WFP's partnership with Japan in humanitarian assistance
Speaker: James T. Morris, Executive Director, the United Nations World Food Programme (WFP)
Language: English
Moderators: Kazuhiro Nakatani, Hideaki Shiroyama

The 4th Public Policy Seminar – 26 October 2004

Topic: What are the politics of the Liberal Democratic Party?
Speaker: Fumio Kyuma, Chairman of the General Council of the Liberal Democratic Party
Moderator: Hiroshi Hoshi, COE Visiting Professor; Senior Staff Writer, Asahi Shimbun

The 5th Public Policy Seminar – 1 November 2004

Topic: Decentralisation and Regional Democracy
Speaker: Akiko Domoto, Governor, Chiba Prefecture
Moderator: Akira Morita

The 6th Public Policy Seminar – 8 November 2004

Topic: The North, South Korea and Japan, and Northeast Asia
Speaker: Ro-Myung Gong, President, Asahi Shimbun Asia Network;

Former South Korean Foreign Minister
Language: Japanese
Moderator: Chun-Shik Kim, Visiting Professor, Endowed Chair in 'Politics and Mass Media'

The 7th Public Policy Seminar – 16 November 2004

Topic: A Personal View of Post-war Politics
Speaker: Soichiro Tawara, Journalist
Moderator: Hiroshi Hoshi, COE Visiting Professor; Senior Staff Writer, Asahi Shimbun

The 8th Public Policy Seminar – 14 December 2004

Topic: Making Sense of the Changing World
Speaker: Yoichi Funabashi, Senior Staff Writer; Foreign Affairs Columnist, Asahi Shimbun
Moderator: Hiroshi Hoshi, COE Visiting Professor; Senior Staff Writer, Asahi Shimbun

The 9th Public Policy Seminar – 18 January 2005

Topic: Is Regional Self-Governance Functioning?
Speaker: Yoshihiro Katayama, Governor, Tottori Prefecture
Moderator: Akira Morita

The 10th Public Policy Seminar – 8 February 2005

Topic: The Way to Invigorate the Study of Public Policy and its Future
Panellists: Atsuko Kikuchi, Examination Officer, Human Resources Bureau, National Personnel Authority
Mihoko Tamagawa, Director of the Japan Office of the United Nations World Food Programme (WFP)
Atsuko Fujii, Member of the Advisory Board of the Graduate School of Public Policy; Former Director of the Women's Bureau, Ministry of Labour
Commentator: Junko Takahashi, Editorial Staff of the Monthly Magazine *Ronza*
Moderator: Akira Morita

Visiting Research Scholars of the Graduate School of Law and Politics

The faculty members of the Graduate School of Law and Politics host a number of visiting research scholars each year. The Center helped to administer the visits of the following researchers this academic year.

Robert B. Leflar, Professor, University of Arkansas

Term: June 2004 - August 2004

Research Area: Comparison of Japanese and US Strategies to Reduce Medical Error

Host: Norio Higuchi

Kwon, Jong-Ho, Assistant Professor, Konkuk University

Term: June 2004 - February 2005

Research Area: The Incorporation of the Stock Exchange and Problems of Legal Principles

Host: Kenjiro Egashira

Leon T. Wolff, Senior Lecturer, University of New South Wales

Term: July 2004 - August 2004

Research Area: Japanese Law: Comparative Perspectives

Host: Daniel Foote

Wu, Yuht-Zong, Associate Professor, Faculty of Law, Shih Hsin University

Term: July 2004 - August 2004

Research Area: The Influence of Legal Studies of Feminism in Post War Japan

Host: Kazuyuki Takahashi

Chen, Guang-Yueh, Assistant Professor, National Chengchi University

Term: August 2004 - January 2005

Research Area: Pecuniary Damages for an Infringement of Personal Rights

Host: Osamu Morita

Li, Ming, Associate Professor, Faculty of Law, Niigata University

Term: September 2004

Research Area: Appliance of International Treaty: Domestic Influence in China

Host: Yasuaki Onuma

Yu, Hui, Vice Professor, Northwest University of Politic and Law

Term: December 2004 - June 2005

Research Area: The Trust Law of Japan, the Development of Japanese Law

Host: Yoshihisa Nomi

Lee, Sang-Jin, Secretary, the Office for Government Policy Coordination

Term: December 2004 - November 2005

Research Area: A Comparative Study of the System of Regulating Disputes both between Municipalities and between Municipalities and Central Government

Host: Toshiyuki Kanai

Jérôme Bourgon, Researcher, the Maison Franco-Japonaise

Term: December 2004 - August 2005

Research Area: Chinese Legal History

Host: Ichiro Kitamura

Lin, Chao-Chun, Assistant Professor, National University of Kaohsiung

Term: January 2005 - February 2005

Research Area: Administrative Due Process

Host: Katsuya Uga

Yoon, Eui-Sup, Assistant Professor, Seokyeong University

Term: March 2005 - February 2006

Research Area: Disputes between Neighbours within Japan's Civil Law

Host: Atsushi Omura

Yun, Tae-Shik, Judge, Ansan Branch Court of Suwon District Court

Term: March 2005 - February 2006

Research Area: The New Japanese Code of Civil Procedure and the State of its Implementation

Host: Makoto Ito

Condolences

In Memory of Arihiro Fukuda

Junko Kato
Professor, University of Tokyo

The sudden death of Professor Arihiro Fukuda is an inestimable loss for us, but, at the same time, the loss of someone like him always leaves us something of importance and excellence. I spent a very short period with him as a colleague, but to have known him at all is one of the greatest gifts in my life.

He always maintained an independence of spirit and soul in the sense that he was devoted to achieving his own high causes and was never bothered by others' interventions and expectations. I believe that this is why he completed excellent works during his brief thirty-nine years of life. He enjoyed a perfect harmony of feeling, reason, and behaviour. I first thought that his life had been cut short unfairly, but I have come to believe that he had already achieved in his short life as much as others are able to achieve after twenty or thirty years of a longer lifespan. Since we no longer share time and place with him, we are unable to know what he might have accomplished. However, this in no way decreases the pre-eminence of his accomplishments.

Unfortunately, I am not qualified to praise the excellence of the works that embodied his great spirit and soul. Instead, I would like to dedicate to him the words of truth of a great thinker.

This completes all that I wished to say respecting the freedom of soul and its power over the passions. And from this it clearly appears how much the wise excel in power, and how much better are they than the ignorant who act merely from appetite or desire. For the ignorant man, besides being agitated in many and various ways by external causes, and never possessing true peace of soul, lives as if unconscious of himself, of God, and of all things, and only ceases to suffer when he ceases to be. The wise man, on the contrary, in so far considered as he is truly wise, is scarcely ever troubled in his thoughts, but, by a certain eternal necessity, is conscious of himself, of God, and of things, never ceases to be, and is always in possession of true peace of soul. If the way I have pointed out as leading to freedom appears very difficult, it may nevertheless be found. And indeed that must needs be difficult which is so seldom attained. For how should it happen, if the soul's freedom or salvation were close at hand and to be achieved without a great labour, that it is so universally neglected? But all

things of highest excellence are as difficult of attainment as they are rare.
(Benedict de Spinoza. 1876. The Ethics of Benedict de Spinoza: from the latin.
New York: D. Van Nostrand, p.338).

To show my sincere respect for this great thinker who argued that truth is universally possessed by people and thus should not be presented with an individual name, I would like to dedicate these words of truth to Professor Fukuda.

[29 September 2004]

Report

Corporate Governance of HSBC Holdings plc

Yoshiaki Miyasako
Professor at the ICCLP

As part of the University of Tokyo's 21st Century Center of Excellence (COE) program *The Invention of Policy Systems in Advanced Countries*, the ICCLP is jointly hosting an Anglo-Japanese Academy (AJA) with the University of Warwick in January 2006 at the University of Warwick. I visited Warwick in August 2004 to meet with my counterparts there in order to discuss recruitment parameters and the content of the program. Based on those meetings, we are now in the process of recruiting Fellows for the AJA.

On my way home from Warwick, I had the opportunity in London to conduct an interview at HSBC Holdings plc – the holding company of the United Kingdom's largest bank, the Hong Kong Shanghai Bank – and ask about the company's corporate governance. This is a report on that topic.

The Hong Kong Shanghai Bank was established in 1865, in Hong Kong and Shanghai, as the name suggests. Following great commercial success and repeated mergers with other banks, by March 2003 it had become the largest banking group in the United Kingdom, with 9,500 offices in 79 countries (focused around Hong Kong, Europe and North America) and 232,000 employees. Under the umbrella of the holding company sit various operating groups, such as the HSBC banking group, the HSBC finance group, the HSBC investment banking group, etc. The head office is at Canary Wharf, a three minute walk from the Canada Water tube station, which is about 25 minutes from central London to the east along the Thames River. I arrived at the vast ground floor lobby of the HSBC building, which was bustling with dark-suited bankers. I was accompanied by Mr Toshihiko Kaneda, General Manager of the Legal Department of Sumitomo Corporation Europe Ltd, who had helped me arrange the interview. We were approached by Mr John-Paul Way, the HSBC relationship manager for Sumitomo Europe. He took us by elevator to a meeting room where, after a short wait, we were introduced to HSBC Holdings' assistant group secretary, Mr P.A. Stafford, who greeted us with a broad smile. He was a composed gentleman nudging 60. I thanked him for granting me an interview, and proceeded to ask him about HSBC's corporate governance based on a series of questions I had sent him beforehand.

The Age of Directors

Japanese company law places no limit on the age of directors, but the UK Companies Act 1985 provides for directors of public companies to retire at 70 unless the shareholders consent to an extension. I raised the age limit with Mr Stafford and asked how it operated in practice. He said, “Article 95 of HSBC’s articles of association provides that the age of directors is governed by section 293 of the Companies Act. Therefore, we have no directors over 70 years of age.”

The Composition of the Board

Next, I asked about the number, sex and nationality of the directors, bearing in mind the situation in Japan, where the overwhelming number of directors consists of Japanese males. Mr Stafford again referred to HSBC’s articles of association, which provide for there to be more than five and less than 25 directors. At present, there are 20 directors, of whom four are women and whose nationalities are UK, US, Chinese, Austrian and French. There are seven executive directors. The term of office for directors is three years, staggered so that one third of the board retires each year.

The staggered changeover of the board has advantages in the case of a hostile takeover bid: it would take a new majority shareholder at least three years to appoint its own directors to the board.

Independent Directors

Corporate governance was actively debated in the United Kingdom from about 1990, with the reports of the Cadbury Committee, the Greenbury Committee and the Hampel Committee being consolidated into the Combined Code. The Combined Code recommends that a majority of directors of listed companies should be independent and non-executive, thus proposing that the board should be relatively independent from the operations of the company.

I asked Mr Stafford: “According to the Combined Code, the majority of directors should be non-executive directors and should be independent. What is the situation with HSBC?” He replied that there are 11 independent directors on the HSBC board, and explained that they have a monitoring role.

Special Committees

The Combined Code recommends that the board establish independent committees for audit, remuneration and nomination issues, with the nomination committee having a majority of non-executive directors and the audit and remuneration committees having a majority of independent directors. I asked Mr Stafford about the committee system at HSBC.

HSBC has a Group Management Board, which has four independent committees: the Group Audit Committee, the Remuneration Committee, the Nomination Committee, and the Corporate Social Responsibility Committee. For the Group Audit Committee and the Remuneration Committee, all three members are non-executive directors; for the Nomination Committee, two members are non-executive directors and the other two are independent directors; for the Corporate Social Responsibility Committee, all four members are non-executive directors.

In relation to the functions of the committees, Mr Stafford gave the example of the Remuneration Committee. During 2003, this committee met eight times, determining policies in relation to executive remuneration and also making decisions in relation to the salaries and bonuses of individual directors. The remuneration of the seven executive directors is made public in HSBC's annual report, as is the remuneration of the members of the various committees.

The Roles of Chairman and Chief Executive Officer

The Combined Code provides that, in order to ensure the appropriate checks and balances, management and supervision of the company should be clearly delineated. In the case of a listed company, this means that it is not possible for the same person to act as chairman of the board of directors, who has a supervisory role, and chief executive officer, who has executive responsibility. It is also impermissible for a CEO to later assume the role of chairman of the same company.

I asked, "The Combined Code states that the same person cannot act as chairman and CEO. What is the situation at HSBC?" Mr Stafford replied, "At HSBC too, the offices of chairman and CEO are filled by different people, and the CEO has never gone on to become chairman."

The System of Internal Regulation

The Combined Code seeks to ensure that the board of directors maintains a system of internal regulation and is effective in managing risk arising from the company's business. Further, the Combined Code proposes that the board of directors should review the system of internal regulation each year and report its findings to the shareholders. In this regard, Mr Stafford said:

- (1) The board of directors is constantly alert to the effectiveness of internal regulation and lists its activities in this regard in the annual report.
- (2) The system of internal regulation is constantly reviewed because it has many functions: to

prevent improper use or disposal of the company's capital; to ensure the maintenance of proper books of account; to promote the reliability of financial figures used both for internal purposes and for public reporting; to foster prudent procedures to eliminate mistakes, losses and fraud.

Mr Stafford provided me with HSBC's articles of association, notice of the annual general meeting and the annual report for my reference. He kindly said that I could email him if I had further questions and he would give a detailed response.

I thanked Mr Stafford for permitting such a long interview about the corporate governance of a major UK company. Mr Kaneda and I then departed, weighed down by the documents we had been provided (the articles of association were about 300 pages, the annual report about 380 pages) and wondering why they were so different from their equivalents in Japanese corporations.

That was our common thought. For us, the weight of those documents represented the extent of the public reporting requirements of UK companies, and the difference in attitudes towards corporate governance in the two countries.

[January 2005, translated by Peter Neustupný]

Article
From O-yatoi Gaikokujin in the Meiji Era to the American Law
Programme of Summer 2004

Keiko Wada
Co-ordinator and Editor at the ICCLP

1 Introduction

Basil Hall Chamberlain once wrote that the foreign employee (*o-yatoi gaikokujin*) is the creator of a new Japan.¹ The words of a Englishman who came to Japan in the Meiji era also suggest something about contemporary Japanese society in the 21st century. In his book *Things Japanese*, Chamberlain describes Japan from an objective view, unlike Lafcadio Hearn who came to Japan looking for ‘Pastures New’.²

Almost 120 years after Chamberlain’s appointment as *o-yatoi gaikokujin* in 1886, the School of Law at the University of Tokyo invited six professors including one lawyer from American law schools to a summer school entitled ‘Business and Law in America’ that took place from 23 to 31 July in Niigata.³ They taught classes from 10:00am to 4:30pm in jury system and civil procedure, torts, criminal law, federalism and the constitution, tax law, administrative law, and intellectual property. With one exception (intellectual property taught by Professor Toshiko Takenaka from Washington Law School) these subjects were taught in English.

Out of the forty-four students and six young business people, I had the opportunity to interview several participants. They told me that they found it demanding to take classes in English, however, they seemed to enjoy this new experience of an intensive course, staying in one place together with professors far away from the Tokyo campus. One participant from

¹ ‘the foreign employé is the creator of New Japan’, Basil Hall Chamberlain, *Things Japanese: Being Notes on Various Subjects Connected with Japan, For the Use of Travellers and Others*, 6th ed. 1939 (1st ed. 1890), reprinted in 2001, Tokyo: Yūshōdō, p.200.

² Basil Hall Chamberlain (1850-1935) stayed in Japan from 1873 to 1911 and taught linguistics at the College of Culture, Tokyo Imperial University from 1886 to 1890. In 1981, he was the first foreigner to be awarded the title of emeritus professorship at the university. Lafcadio Hearn (1850-1904) was one of Chamberlain’s best friends. For more details, see: <http://www.lib.u-tokyo.ac.jp/tenjikai/tenjikai97/chamb.html>. As far as Hearn was concerned, traditional Japan was the ideal Japan and he never stopped railing against the changes of Japanese society into the same modernisation as the West (Basil Hall Chamberlain, *Nihon Jibutsushi II*, trans. by Takanashi Kenkichi, Tokyo: Heibonsha, 1969, pp. 15-16).

³ One of the professors is Japanese but educated in the US and a professor at an American law school.

a company wanted the opportunity to study more practical subjects and also for there to be more short-length intensive courses as the schedule of this summer school was too long for business people to participate in. I also interviewed professors and one of them pointed out the lack of English ability of students studying American law. According to a questionnaire after the summer school programme, all the participants pointed to the inconvenience of the facilities in which they stayed and the lack of Internet access. However, when I asked them personally the same question nobody pointed out this inconvenience; in fact they said that they were happy to be in a place disconnected from e-mail and the Internet as it allowed them to relax and concentrate on their work far from the busy IT society. No doubt they all had a mountain of e-mail messages waiting for them upon their return.

Although the students pointed out the inconvenience of a venue that could only receive one company's mobile phone signal, they seemed relaxed in this holiday resort wearing casual clothes to classes, using laptop computers to take lecture notes and playing tennis and softball before and after classes. I could not begin to imagine the students of 130 years ago as described by William Elliot Griffis in his book *The Mikado's Empire*. In the days of the Meiji era, students wore topknots and swords, walking noisily to school in their wooden sandals (*geta*) and after classes their faces covered with Chinese black ink (*sumi*).⁴

I realised that what I was observing was not an example of the swift westernisation of Japanese society and its people since the latter half of nineteenth century; rather, this first challenging summer programme was continuing the policies of the Meiji government: 'Education is the basis of all progress' and 'Learn from the West'.⁵ It was natural to follow these slogans when law schools were first established in Japan along the American model. What is different is that students in this summer school seemed relax without the pressure suffered by the students of the Meiji era whose ambition it was to build a new country and to this end travelled long distances to study abroad or remained in Japan to study English under foreigner lecturers.

In this article, I would like to retrace the brief history of foreign professors in the Faculty of Law at the University of Tokyo and examine their contribution to the study of law in Japan since the Meiji Restoration.

⁴ 'Hands and faces are smeared with the black fluid; but, strangest of all, each has two of the murderous-looking swords, one long and the other short, stuck in his belt', W. E. Griffis, *The Mikado's Empire Book II. Personal Experiences, Observations, and Studies in Japan 1870-1874*, New York: Harper & Bros., 1877, p. 370.

⁵ W. E. Griffis, *The Mikado's Empire Book II. Personal Experiences, Observations, and Studies in Japan 1870-1874*, New York: Harper & Bros., 1877, p. 371.

2 The Meiji Restoration and Foreign Professors

Since the Meiji Restoration, the Japanese government has sought to modernise Japanese society through the employment of foreigners. The Meiji leaders entrusted engineers and scholars from overseas to realise the goals of ‘Rich nation, strong army’ and ‘Increase production, promote industry’.

The first foreign teacher in the English language was an American called Ranald MacDonald, who was a hideaway on a whaling vessel. In 1848, MacDonald arrived on the island of Rishiri in Hokkaido. He was sent to Nagasaki under guard where he taught English to Japanese translators from Dutch for about seven months. One record states that MacDonald was the first native speaker who taught English and before then there were only Dutch teachers of English to Japanese students. However, MacDonald was not really *o-yatoi* but an accidental teacher up until he left for his home country.⁶ Thereafter, in Nagasaki, American pastors taught native English to translators.⁷

Immediately before the restoration of Imperial rule, the Tokugawa shogunate asked Harry Smith Parks, the British Minister to Japan, to invite English teachers from Britain to Kaisei School, the former name of the University of Tokyo. However this plan was not realised before the fall of the shogunate.

The first *o-yatoi* employed by the Meiji government was Guido Hermann Fridokin Verbeck. Verbeck who arrived in Nagasaki as a missionary from the Dutch Reformed Church.⁸ Shigenobu Okuma, Taneomi Soejima and Hirobumi Ito studied under Verbeck. In 1869, he was invited to become a professor at *Daigaku-minami-kō* (Southern University College, which would later become Kaisei School) by the Meiji government. Thereafter, Verbeck was appointed as head of the school and Griffis describes in *The Mikado's Empire* a visit he made to Verbeck's house at that time.⁹ Verbeck worked for the *Seiin* (literally Central Board, or Cabinet) and the *Sain* (literally Left Board, an advisory body theoretically holding legislative powers) as a legal advisor after leaving the Kaisei School. In 1875, he moved to the *Genroin* (the Senate based on a reorganised *Sain*) and translated codes of law for two years. In 1877, Verbeck left for the United States but revisited Japan as a missionary soon thereafter. He

⁶ Tokutaro Shigehisa, *O-yatoi Gaikokujin, Vol. 5 Kyōiku/Syūkyō* (O-yatoi Gaikokujin, Vol. 5 education and religion), Tokyo: Kashima Kenkyūjo Publishing, 1968, p. 9.

⁷ For example, Henry Wood in 1858, Daniel Jerome Macgowan in 1859 (*Ibid.*, p.10).

⁸ Guido Hermann Fridokin Verbeck (1830-1898) was a Dutch-American.

⁹ W. E. Griffis, *The Mikado's Empire Book II. Personal Experiences, Observations, and Studies in Japan 1870-1874*, trans. by Eiichi Yamashita, Tokyo: Heibonsha, 1984, p. 57.

stayed in Tokyo until his death in 1898 teaching at the Department of Divinity at Meiji Gakuin University and having trip for mission inside Japan.

3 O-yatoi Professors at the Ministries of Justice and Education

The Ministry of Education, Science and Culture (*Monbushō*) was established in July 1871 and the Southern University College and Eastern University College were placed under its control. In September of the same year, the Meihō Dormitory was established within the Ministry of Justice (*Shiōshō*) in order to educate judicial officers. This meant that a dual system of legal education under the Ministry of Education and the Ministry of Justice was created

The Ministry of Justice appointed George H. Bousquet, a French lawyer formerly of the Paris Appeal Court, as a Law School professor and he arrived in Japan in 1872. In addition, they appointed Henri de Riberoles and Gaston Galli. The Ministry of Justice submitted a plan to the Meiji government to accept 100 students and run the school with a state budget for the whole ten-year period that a legal education lasted. In response to this plan, the Southern University College expressed ‘opposition to the Ministry of Justice’s Law School plan, fearing student unrest’ and asked the Ministry of Education to establishing professional colleges under its control.¹⁰ As the result, the *Dajōkan* (the Cabinet of the early Meiji era) reduced the budget for the Ministry of Justice’s plan, reducing their student numbers to twenty.¹¹

In 1872, the Meiji government proclaimed its educational system. As a result, the name of Southern University College was changed to *Daiichi Daigaku-ku Daiichi Chūgaku* (First Middle School in the First College District). The new students at the law school under the Ministry of Justice were selected but nine out of the twenty moved from Southern University College, thereby demonstrating its fears.¹² In 1873, when the educational system came into effect, David Murray¹³ arrived in Japan by invitation of the Ministry of Education. Murray was appointed as school superintendent, the highest position among the foreign employees

¹⁰ 100-year History of the University of Tokyo Committee (eds) *Tokyo Daigaku Hyakunenshi Bukyokushi I* [A 100-year History of the University of Tokyo: departmental history 1], Tokyo: the University of Tokyo, 1986, p.5.

¹¹ The budget was reduced from over 20,000 yen (not including university buildings and dormitories) to 8,000 yen (*Ibid.*, p.5).

¹² *Ibid.*, pp.5-6.

¹³ David Murray (1830-1905) was an American. He graduated from the Union College and worked as a teacher and principle at Albany Academy in New York States. He received professorship at Rutgers College in 1863.

invited by the Ministry of Education as *o-yatoi* at the time.¹⁴

3.1 *The Law School under the Ministry of Justice*

The law school under the Ministry of Justice opened in September 1872. Riberolles, the *o-yatoi* professor, gave lectures on subjects such as reading, dictation of brief histories, grammar, memorizing novels, dictation of novels, proofreading of translations, spelling, geography, mathematics and dialogue.¹⁵ Rather than professional legal studies, students were schooled in general education and foreign languages.

The Ministry of Justice's law school was governed by 'Regulations for the students of *Meihō Dormitory*' and 'Miscellaneous regulations of the dormitory', which also decided the amount of government expenses for the students. After one month of starting the law school, classes were divided into advanced and junior courses on the basis of student achievement, and a new schedule of lectures began. However, opposition appeared within the Ministry of Justice arguing that the law school should be closed. The basis of this opposition was that graduates of the law school would prove to be an obstacle to the promotion of existing ministry officials. Responding to this opposition, Minister of Justice Shinpei Eto on one occasion chose to observe a French class and examination and decided that the law school should continue.¹⁶

3.2 *Kaisei School and Tokyo Kaisei School*

In contrast to the establishment of the Ministry of Justice's law school, there was uncertainty as to whether the plan to establish a Ministry of Education law school at the First Middle School in the First College Area would be realised. A new name and organisational structure were submitted to the Ministry, which accepted the new name of Kaisei School in an official letter of 10 April. In addition, in an official letter of 18 April, the Ministry indicated that only English should be used. Students who studied French or German in the general course should move to other departments or take other appropriate measures.¹⁷

This meant that there existed two educational organisations expected to cultivate professional legal training: one under the Ministry of Justice taught by French professors, and another under the Ministry of Education taught by Anglo-American professors. The roots of the Legal Training And Research Institute established as one of the sections of the Supreme Court in Japan in 1947 can probably be traced back to the law school under the Ministry of

¹⁴ *Op. cit.* Shigehisa, p.23.

¹⁵ *Op. cit.*, 100-year History of the University of Tokyo Committee, p. 6.

¹⁶ *Ibid.*, p.6.

¹⁷ *Ibid.*, p.7.

Justice in the Meiji era.

The department of law at Kaisei School provided a three-year preparatory course and another three-year professional course. Originally, the school had only first-year and the second-year students in the preparatory course. William E. Grigsby, a British citizen, was appointed as a professor of the professional course in 1874. The University of Tokyo Yearbook Vol. 1, includes twenty names of foreign teachers at the end of December 1874 and one of them is Grigsby.¹⁸ He arrived in Japan in May 1874 to teach international public law and British law, and until he left Japan in July 1878 it is recorded that he taught private international law, commercial law, guild law, ship law, marine insurance law, commercial mandate law, and court law.¹⁹ Grigsby reported in the University of Tokyo Annual Report that his students were able to understand British legal theory and develop their own academic understanding through the careful reading of judicial reports in his class on court law. He also noted the eventual establishment of a law library.

Returning to history of the University of Tokyo's Faculty of Law, the Ministry of Education ordered the Kaisei School to change its name to Tokyo Kaisei School in May 1874, when they invited Grigsby as the first law professor of the faculty. In September 1874, preparatory courses were unified into a common course and three professional courses were established: law, chemistry and engineering. The roots of the two streams of general education and professional education can be found in this period of the Tokyo Kaisei School's history. It should also be mentioned that the department of law decided a policy of adopting the regulations and positive aspects of Anglo-American universities.²⁰ Based upon this new policy, the subjects taught included international law (in peace-time), British law (general principles, constitutional law and criminal law), the history of constitutional law, psychology, Latin and French in the first year. The second year included international law (in war-time), British law (customary law, contract law and equity law), Roman law, politics, ethics and French. The third year included international law (private international law), Anglo law (private criminal law, maritime law and trade law), Roman law, French law, theory of comparative law, law of evidence and theoretical reasoning.

In September 1874, there were nine new students in the department of law. They studied the above subjects, namely an Anglo-American legal education. It is easy to imagine the scene of

¹⁸ Five Americans, six English, five French, four Germans. University of Tokyo Archival Research ed., *The University of Tokyo Annual Report Vol.1*, Tokyo: University of Tokyo, 1993, p.19.

¹⁹ Earnest Fenollosa arrived in Japan next month to teach in the Department of Letters and Politics of the University after Grigsby left Japan.

²⁰ *Op. cit.*, 100-year History of the University of Tokyo Committee, pp. 8-9.

only nine serious-faced students in a class with a foreign professor. By July 1878, when Grigsby left Japan, thirty-six students were attached to the Faculty of Law: seven fourth-year students, eleven third-year students, ten second-year students and eight first-year students.²¹

3.3 Henry T. Terry

In 1877, Henry T. Terry, an American lawyer from the state of Connecticut, was appointed as a professor of British law. He taught law of torts, land law, procedural law, private international law, public international law, contract law, union law. In addition, he established a study group for the discussion of legal issues, but as it was necessary to learn how to draft a bill of complaint, the study group was abandoned and the time was used for the proofreading of draft bills. In his classes for 1878, Terry organised a mock criminal court for the third- and fourth-year students. As part of this practical training, he would chose four students and get them to prepare the documentation for the prosecution. What is more, he noted that ‘there are three problems that disturb the progress of the students’ work:

1. Several students were afflicted with illness (more so than American students);
2. A lack of textbooks aimed at Japanese students;
3. An absence of knowledge of the customs and practices that provide the background to the laws of each country. Similarly, no knowledge of English literature.²²

As regards the third issue, although it was difficult to learn about the customs and practices, it was possible to teach English literature in preparatory schools if the teachers were aware. Moreover, Terry advocated the importance of learning bookkeeping as one of the first steps in a legal education. When I read this record, I remembered an Australian student who was previously a visiting research scholar at the ICCLP. After she came to Japan, she took an exam in bookkeeping as one of the exams at an Australian university and I was asked to be an invigilator by her supervisor in her home country. Clearly, the traditions of a European-American legal education were imparted to the universities by the Meiji-period foreign professors. Terry also cooperated with his colleague Charles J. Tarring in the preparation of a system for studying British law. Tarring came to Japan in October 1878 and was placed in charge of teaching British law. Like Terry, Tarring noted the students’ keen desire to study but also their physical weakness and reacted by proposing physical education classes.²³ The softball and bowling games in the Faculty of Law today and the tennis and softball competitions at the summer school may well find their origins in these proposals of

²¹ *Ibid.*, p. 21.

²² *Op. cit.*, *The University of Tokyo Annual Report Vol. 1*, p. 119.

²³ *Ibid.*, pp. 153-154.

the Meiji-period foreign professors. If one thinks of the Japanese diet of the time, then it is not difficult to imagine how the Westerners would have regarded the lack of strength and physical weakness of the Japanese students.

Terry returned home in July 1884. However, in January 1894 he returned to Japan and after establishing a legal office in Yokohama and having it tolerated as a condition of his employment, he was once again appointed from May of that year as a teacher of Anglo-American law.²⁴ On his 60th birthday on 19 September 1908 and in recognition of his twenty years of service teaching Anglo-American law, the University of Tokyo held a party in his honour at Koishikawa Botanical Garden. 140 people attended including Minister of Education Eitaro Komatsubara, President of the University of Tokyo Arata Hamao, former pupil and at the time Ambassador to Britain Takaaki Kato.²⁵ Terry also produced his own textbook to educate Japanese students. *The First Principles of Law by Henry T. Terry with footnotes supplemented by Maruzen* was published in 1878 by Maruzen. It was translated by Hajime Motoda into Japanese as *Hōritsu Genron* (The First Principles of Law) and published in 1885-86.²⁶ *Lectures on Torts*²⁷ and *An Elementary Treatise on the Common Law for the Use of Students*²⁸ are kept in the university library today. These books are clearly textbooks written by Terry for Japanese students.

Terry was employed for almost twenty-five years as a professor of Anglo-American law until July 1912. He left the university in August, the point at which the year of the Imperial reign changed from Meiji to Taishō, and was awarded the title of emeritus professor of Tokyo Imperial University. Terry originally came to Japan in January 1877 to lecture in law at Tokyo Kaisei School and in April upon the establishment of the University of Tokyo there were 266 students in the Faculties of Law, Letters and Science (twenty based in the Faculty of Law).²⁹ When he left the University of Tokyo in July 1912, 433 students had graduated from the School of Law (266 in Legal Science and 167 in Political Science) and the following academic year 500 students were admitted.³⁰ The extent of his impact upon the University of Tokyo in line with the Meiji government's goal of 'learning from the West' and its belief that 'education is the basis of all progress' is clearly illustrated. It appears that unlike

²⁴ *Op. cit.*, 100-year History of the University of Tokyo Committee, pp.70-71.

²⁵ Takaaki Kato (1860-1926) was appointed the prime minister of Japan in 1924 after a significant career as a foreign secretary, ambassador to Great Britain and a foreign minister in Japan. For details of the occasion, see *Taiyo* [the Sun], Vol. 14, No. 10, Tokyo Hakubunkan, 1908.

²⁶ Two volumes were published by the English Law School [*Jērisu hōritsu gakkō*], but are prohibited from being sold.

²⁷ Not sure about the publisher or the publishing year. (Japan? s.n., 1896?)

²⁸ Published by Maruzen, 1924.

²⁹ *Op. cit.*, 100-year History of the University of Tokyo Committee, p.18.

other foreigners such as Chamberlain, Hearn and Griffis who came to Japan in the Meiji period, Terry did not leave us the memoirs of his experiences. Nevertheless, there is no doubt as to his importance as a foreigner who helped to build the foundations of the University of Tokyo.

4 The Diversification of Foreign Professors in the University of Tokyo's Faculty of Law

The high-level education provided by foreign professors was to become the responsibility of Japanese professors. The high salaries paid to foreign professors came out of the Education Ministry's budget and Japanese who had been overseas to study returned home to take up posts in higher education.³¹ In the second half of the 1880s, it is said that the era of the *o-yatoi* came to an end.³² However, under the Meiji government and its slogan of 'Increase production, promote industry', this phenomenon could still be seen as regards teachers of science and engineering and three or four names remained in the records of the Faculty of Law. The previously mentioned Grigsby, Terry and Tarring were teachers of Anglo-American law and their lectures were given in English. In 1880, a German lecturer appears in the records at the faculty of law for the first time and the diversification of the faculty from an Anglo-American emphasis began.

4.1 The Establishment of the University of Tokyo

On 12 April 1877, the University of Tokyo was established. The former Tokyo Kaisei School and the former Tokyo Medical School became part of the Faculties of Law, Science, Letters and Medicine, and the Tokyo English School became the University of Tokyo Preparatory School directly under the Faculties of Law, Science and Letters. In that year there were twenty students in the Faculty of Law taught by three professors – Grigsby, Terry and Ryoichi Inoue (from August) in addition to one assistant professor and three lecturers. In October 1877, Seiichiro Kurokawa was appointed as a lecturer and French law came to be taught by a Japanese professor. In 1880, Tatsuo Kishi was appointed professor and took charge of French law. In addition, the same year, the elements of classical Chinese law was dropped as a taught subject and the teaching of Western law became the core of the Japanese legal curriculum.

³⁰ *Ibid.*, pp.142-143.

³¹ 'The budget for the wages of foreign professors at the University of Tokyo was one-third of the entire budget of the *Monbusho* in the year of 1877', in *Meiji Nihon to Igirisu: deai, gijutsu-iten, nettowāku no keisei* [*Britain's encounter with Meiji Japan, 1868-1912* (1989, Basingstoke : Macmillan)], Olive Checkland, trans. by Chuhei Sugiyama and Norio Tamaki, Tokyo: Hosei University Press, 1996, p.94.

³² *Shiryō o-yatoi-gaikokujin* [Documents on o-yatoi], ed. by UNESCO Higashi Ajia Bunka Sentā, Tokyo: Shogakukan, 1975, p.56.

By the way, in 1881, the German Study Group attended by those with experience of studying in Germany expanded in size and the German Study Association was established. Criticisms were raised against ‘the trend towards Britain, the US and France in the Japanese education system’ and ‘the trend to overlook traditions’.³³ As a result, Karl Rathgen came to Japan in 1882 to lecturer in administrative law in the Faculty of Letters as well as in political science and he also took charge of teaching statistics, Japanese law and administration. With Rathgen’s arrival, lessons could now be given in German. In 1883, Rathgen began to give a seminar in political science. In an article entitled ‘A Critique of Professor Rathgen on Japan’s Constitutional Politics’ published in the New Journal of Legal Studies (*Hōgaku Shinpō*), Tatsukichi Minobe commented on an academic series of articles published in Germany by Rathgen entitled ‘Japanese Constitutional Law and Administration’.³⁴ Minobe argued that although Rathgen’s viewpoint was simple, superficial and not particularly original, it was not completely wide of the mark, and it was translated in parts and held up as a representative work by a foreigner on Japan’s constitutional political system.

In 1883, Hirobumi Ito failed to realise his plan to invite Lorenz von Stein to come to Japan but with the recommendation of Otto von Bismarck, Otto Rudolf came to Japan.³⁵ At that time, the numbers of those specialising in law and studying in Germany increased.

4.2 Tokyo Imperial University, 1886-1918

This trend continued after the integration of the Engineering School and the establishment of Tokyo Imperial University. The Faculty of Law began with 150 students (90 in Legal Science and 60 in Political Science). The same year, the German Heinrich Weipert came to Japan on a three-year contract. In 1887, Udo Eggert, formerly of Göttingen University came to Japan to teach political economy. By 1888 there were three German professors, one French and one British (the latter returned home in December of that year). This was a time when legal education in Japan, which had depended on British, American and French professors, began to diversify with the employment of German lecturers.

4.3 The Absence of Foreign Professors, 1919-1956

In June 1919, the American lawyer James Lee Kauffman, who had come to Japan in July 1912 as Terry’s successor, was released from his post and there were no longer any foreign professors teaching Anglo-American law. What is more, the same month, the travel expenses

³³ *Op. cit.*, 100-year History of the University of Tokyo Committee, p. 30.

³⁴ *Hōgaku Shinpō* [New Journal of Legal Studies] (1912), Vol. 22, No. 9, Tokyo: Hōgaku Shinpōsha, 1912, pp. 1-7.

³⁵ *Op. cit.*, 100-year History of the University of Tokyo Committee, p.35.

for overseas business trips that had been paid since 1907 came to an end. In July, Jean Joseph Ray, lecturer in French law, was also released from his contract.³⁶ There were no longer any foreign teaching staff in the Faculty of Law and the era of the *o-yatoi* at the faculty came to end this year.³⁷

Thereafter, lectures and study groups supporting short-term visits were held but no foreign employees in charge of teaching courses were employed until after the Second World War when the Fulbright Law was signed in August 1951 to encourage US-Japanese educational exchange. In September 1954, it was decided to invite Nathaniel Louis Nathanson under the Fulbright Law to give lectures on American administrative law.³⁸ As a result of the Fulbright Law, foreign professors were once again able to stand on the lecture dais as visiting professors. In this way, Albert Armin Ehrenzweig was able to come to Japan in 1956 and take charge of a twice weekly seminar.³⁹ After the war, legal education in Japan took place chiefly under the aegis of American professors. British, French and German researchers came to Japan as researchers but mostly for short stays invited to give seminars or special lectures.

5 Conclusion: The Diversification of Legal Education

I have already traced the international exchange that took place in the Faculty of Law since 1969 with reference to the records left in the *University of Tokyo, Faculty of Law, Research and Educational Annual Report*.⁴⁰ In short, it cannot be denied that the ethos of ‘Learn from the West’ so beloved by the Meiji government came to be ‘Learn from the US’ after the war. Japan, like the countries of Europe exhausted by war, came to receive various kinds of assistance from the US, both economic and intellectual.

Along the same lines as the school-lunch programme in primary education, the influence of the US in university education is substantial. Even though Japan escaped its dependence upon the US as a result of its high-speed economic growth, the influence of American law schools upon legal education in Japan is considerable. This influence can also be seen in the Faculty of Law’s exchange projects with the Michigan University Law School and Columbia

³⁶ He was appointed in September 1916 after teaching as a professor at Cairo French Law School (*Ibid.*, p.155). In May 1921, he was appointed as a lecturer of French language again (*Ibid.*, p.174).

³⁷ *Ibid.*, p.169.

³⁸ *Op. cit.*, 100-year History of the University of Tokyo Committee, p.276. Nathaniel Louis Nathanson (1908-1983) was a professor of Northwestern University.

³⁹ Albert Armin Ehrenzweig (1906-1974) was a professor of UCLA Law School. He published *American-Japanese Private International Law*, (Oceana Publications, 1964) co-authored with the Late Emeritus Professor Toshio Ikehara of the University of Tokyo.

⁴⁰ Keiko Wada, ‘The International Center for Comparative Law and Politics and International Academic

Law School and this year's summer school entitled 'Business and Law in America'. When observing the scenes of friendship between staff and students both during and outside of class during the summer school held in Tsunan, Niigata Prefecture, I came to sense all the things that America imparted to Japan after the war.

However, and despite first appearances, I want to emphasise that this does not mean that there is nothing but American legal education. Legal education, like political science, is taking place across the globe in Asia, Africa and Europe. Since its establishment, the ICCLP has invited visiting professors from thirteen countries across the world, in addition to visiting research fellows from twelve countries. Of course this is something already felt not only by Japanese researchers but also by Western scholars, but the American Law School professors who came to Japan questioned the name 'American Law Programme', arguing that it should not just be America but also other countries in the world whose legal systems are the subject of study. So, in 2005, it became a 'Transnational Law Programme' and there are plans to invite professors from France and Switzerland, not only America. As regards the students, Korean university students are expected to participate.

In this way, a variety of viewpoints are being employed in legal education. It could be said that university education continues to undergo diversification from an era when Commodore Perry's black ships appeared at Uraga leading to the employment of foreigners in the schools of the feudal clans and by the Meiji government as *o-yatoi* to promote Japan's modernisation, to an age of globalisation.

[February 2005, translated by Hugo Dobson and Keiko Wada]

* * *

As a conclusion, what follows are the questions set by the foreign professors in the year-end examinations for first-year students in 1875 at the Tokyo Kaisei School in four subjects: General Jurisprudence, Constitutional Law, International Law, English and Constitutional History.⁴¹

General Jurisprudence

1. State and explain the various agencies by which the improvement of Law is effected. Which do you consider most suitable to Japan?

Exchange: A Tenth Anniversary Retrospective', *ICCLP Review* Vol. 5, No. 2, 2002 pp.44-60.

⁴¹ *Op. cit.*, 100-year History of the University of Tokyo Committee (eds) *Tokyo Daigaku Hyakunenshi Bukyokushi 1* [A 100-year History of the University of Tokyo: departmental history 1], Tokyo: University of Tokyo, 1986, pp. 10-12.

2. What is meant by the statement that 'the progress of society is from status to contract' ?
3. Distinguish between a 'sin', a 'crime', and a 'tort'.
4. Trace the rise of the various 'peculia' at Rome in the order of their growth.
5. Examine and compare the family in Rome and Japan.
6. What is meant by the timocratic system of government? Give arguments for and against it.
7. By what means was the Roman Empire firmly established?
8. Trace the rise of feudalism in Western Europe and in Japan, giving the peculiarities of either system.

Constitutional Law

1. What is meant by allegiance? Enumerate its different kinds.
2. Give an account of the case of the Seven Bishops, showing the legal principles decided in it.
3. What various expedients did the early kings of England practice to obtain money without the consent of parliament?
4. What is meant by a malicious prosecution? In what case was its definition given and what was the judgement in that case?
5. Give a summary of the decision in Entick v. Carrington.
6. How far is it true in English Law that there is no wrong without a remedy?
7. What rules have been made to prevent the abuse of the practice of petitioning?
8. Give an account of the case of the 'Aylesbury men'.

International Law

1. Show what different questions are included in the so-called Monroe Doctrine.
2. When is 'intervention' justifiable? Illustrate your answer from history.
3. Discuss the dispute between England and America respecting the north-west territory.
4. Give an account of the Constitution of Switzerland, comparing it with that of the United States.
5. What is meant by private international law? Explain 'lex loci', 'lex fori', 'mobilia personam sequantur'.
6. What is the rule relating to the discharge of contracts?
What was decided in the case of Smith v. Buchanan?
7. What difference of opinion has there been as to the rule to be observed in the assignment of a bankrupt's effects?
8. What different views have been held as to the lawfulness of divorce in the theory and practice of nations.

English and Constitutional History

1. Trace the relationship of William 3rd and George 1st to the Stuart family.
2. What useful measures were passed in the reign of William 3rd?
3. Give an account of the rebellion of 1745.
4. What were the causes which led to the Declaration of Independence?
5. What was the principle of the Comita Tributa? Examine its worth.
6. What means did the early Emperors of Rome take to confirm their power?

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