# Bologna-Prozess und die Juristenausbildung

ONO, Shusei

Im Juni 1999 unterzeichneten 29 europäische Staatten *die gemeinsame Erklärung der europäische Hochschulraum, sog. Bologna-Deklaration* (Der Europäische Hochschulraum, Gemeinsame Erklärung der Europäischen Bildungsminister 19. Juni 1999, Bologna). Danach haben insgesamt 45 Staaten die Bologna-Deklaration unterzeichnet.

Dort haben sich die Unterzeichner verpflichtet, die Ziele des Bologna-Prozesses umzusetzen. Es handelt sich allerdings nicht um eine rechtlich bindende Verpflichtung. Die beteiligten Staaten haben mit der Deklaration ihre Bereitschaft erklärt, die durch den Bologna-Prozess angestrebten Ziele erreichen zu wollen.

Durch die erklärung soll das europäische Hochschulsystem modernisiert und mehr Gegenseitigkeit zwischen den Bildungssystemen geschaffen werden. Die Modernisierung und die Standardisierung sind die große Aufgabe nicht nur für europäische Universitäten, sondern auch für japanische Universitäten. Der Bologna-Prozess zeigt gutes Modell der Standardisierung. Die Diskussionen in Deutschland sind auch für uns sinvoll, besonders in der Zeit der großen Justiz- und Juristen-ausbildungsreform.

Die Ziele des Bologna-Prozesses sind als folgt. Nach dem Prozess ist angestrebt, ein Hochschulsystem mehr verständlicher und vergleichbarer Modelle in Europa zu schaffen. Eine weitere Interesse des Bologna-Prozesses ist die Qualitätssicherung. Dabei soll die Akkreditierung eine wichtige Rolle spielen. Als anderen Punkt anstrebt die Förderung der persönliche Beweglichkeit.

In Deutschland wurden im Jahr 2002 die Voraussetzungen dafür geschaffen, Studiengänge auf das zweistufige Bachelor und Master-System umstellen zu können (Hochschulrahmengesetz). Die Hochschulen können Studiengänge einrichten, die

zu einem Bachelor und zu einem Master führen (3 od. 4 Jahre plus 2 od.1 Jahre).

Zum Teil ist der Bologna-Prozess in Deutschland bereits umgesetzt; besonders im Naturwissenchaftliche Bereich. Im Sommersemester 2005 wurden 2934 Bachelor- und Masterstudiengänge angeboten; dies entspricht schon ca.27 Prozent des gesamten Studienangebots. Wie geht es weiter mit dem Bologna-Prozess und der Juristenausbildung? Für die Juristanausbildung gilt eine weitere Besonderheit.

Es ist ganz anderes Problem, daß die einzelnen Kriterien des Bologna-Prozesses für eine Übertragung auf die Juristenausbildung sinnvoll erscheinen. Es ist auch fraglich, ob Bachelor- und Mastergrade im Studium der Rechtswissenschaften die bisheriges System ersetzen können. Die klassischen juristischen Berufe sehen nach wie vor eine längere Ausbildung (etwa 5 Jahre in der Uni plus 2 Jahre im Vorbereitungsdienst). Die Übertragung der Bachelor/Masterstruktur auf die juristische Ausbildung würde dessen völlige Neustrukturierung notwendig machen. So gibt es große Diskussionen. Der Ausschuss der Justizministerkonferenz arbietet zur Koordinierung der Juristenausbildung eine negative Stellungnahme zum Bologna-Prozess. (Die Einführung von Bachelor/Masterabschlüssen in der Juristenausbildung ist nicht sinnvoll ohne Auswertung der erst erfolgten Umsetzung der Reform der Juristenausbildung. 27.Nov.2005). Zur Zeit gibt es auch bei uns Vorbereitungsdienstsystem (ein Jahr) für Juristenausbidlung (4 Jahre in der Uni und 2 od. 3 Jahre in Law School).

Es ist auch wichtig, Achtung der Vielfalt der Kulturen, der Sprachen, der nationalen Bildungssysteme und der Autonomie der Universitäten zu verfolgen. Hier erinnere ich mich wieder das berühmte Disput über Zivilrecht-Kodifikation zwischen Thibaut und Savigny im 19 Jahrhundert (Thibaut, Über die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland, 1814; Savigny, Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft, 1814).

# Extra-legal Remedies for Harm Caused by Media Reporting in Britain (2)

MIDDLETON, John

With the development of information societies throughout the advanced world, the volume of information produced and disseminated by the news media continues to increase rapidly. As the level of consumption remains limited, however, suppliers are obliged to convey material which will appeal to consumers, and this excessive competition and commercialism have led to some serious violations of individuals' rights to reputation and privacy.

While some victims of unethical news reporting may be able to sue for libel, invasion of privacy/breach of confidence, malicious falsehood, trespass, or nuisance, many will have no legal remedies or simply lack the financial means to bring lawsuits. In such cases, extra-legal remedies may represent the only means of redress available to them.

In this second part of my article, I introduce the history and present functions of the Press Complaints Commission (PCC) in the context of the various recommendations made by the two committees chaired by Sir David Calcutt in the early 1990s and the enactment of the *Human Rights Act* 1998. This discussion reveals that while the form of media accountability system offered by the PCC to complainants still leaves something to be desired, it nonetheless provides a valuable service to the community in mediating disputes between victims of media reporting and the press and raising ethical standards across the industry.

# The Repatriation of Koreans in Japan and Korea-Japan Relations

KWON, Yongseok

This paper argues on the problem of the repatriation of Koreans in Japan to North Korea in 1959 in terms of the "Asian diplomacy" of the Kishi administration. The main question is that even though the prime minister Kishi Nobusuke and Yatsugi Kazuo who played an important role behind the scenes especially in Korea-Japan relations, had adopted the pro-South Korean policy, why was it his administration in particular that instigated the repatriation of Koreans in Japan in 1959 ?

This paper points out that foreign minister Fujiyama Aiichiro played an important role in this problem. He recognized the repatriation of Koreans in Japan in terms of the perception of Japan-China relations. He and "the indusry circle" hoped that the promotion of trade between Japan and North Korea would bring about the resumption of trade between Japan and China which was stopped from May 1958. His plan was that once the Japan-US security treaty was revised, normalization of relations between Japan and China would occur. And also the repatriation gave the image of autonomous foreign policy under the negotiation on the revision of the Japan-US security treaty which was criticized by the socialist party and numerous Japanese citizens.

The repatriation should be regarded not only in terms of "deportation," but also in the context of the process of "the completion of independence" which was been the motto of "Kishi-diplomacy."

For the South Korean militarily facing North Korea with the DMZ, the repatriation was regarded as a crisis of the State. From the nation-wide demonstration, we can see another origin of the anti-Japanese sentiment of Koreans during the post-war period. And it can also be said that the development of this nation-wide

anti-repatriation movement collapsed the Lee Sungman regime in 1960 in the so-called "4.19 Student Revolution."

This repatriation problem left another question of how the cold war and decolonization affected the movement, internment and disconnection of peoples living in Northeast Asia. It can be said that the repatriation should be more academically researched from this point of view in future.

# Parallel Trade and the Antimonopoly Law: Lessons from Swiss Competition Law

TODA, Naoko

Switzerland and Japan, two of the world's highest priced countries, assail banning parallel importing in the hope of lowering the prices of imported products. Although the amendment of the Swiss competition law in 2003 strengthened the regulations on the restraints on parallel imports, the Swiss Competition Commission sets limits to its application to allow multinational corporations ban parallel importing from countries that are economically and legally not equivalent to Switzerland. It also permits them to eliminate parallel importing during the product introduction phase, in other words, free riding on their marketing costs of new product diffusion.

On the contrary, the Japan Fair Trade Commission condemns practices hampering parallel trade "in pursuit of sustaining price". Since parallel trade inevitably affects price, any practice hampering it can be "in pursuit of sustaining price", hence, illegal. This ambiguous test promotes vertical integration of foreign manufactures to avoid the application of the law and raises the barriers of entry to Japanese markets. This article sets forth an alternative test that ensures international market players pro-competitive price setting strategies to enhance global economic welfare.

# Taxation of Intangible Assets and Intellectual Property

OIWA, Rieko

Since the beginning of the twentieth century, taxpayers and the Internal Revenue Service (IRS) have struggled over whether customer-based intangibles can be amortized over the life of assets. In interpreting the law, courts had tended to hold that an asset may not be amortized if it is closely linked to goodwill. In early 1993, the United States Supreme Court decided Newark Morning Ledger v. United States, which constituted the principle that an intangible asset may be amortized if certain factual requirements are met. Finally, in a bold initiative to provide certainty and predictability in this very important field, Congress enacted section 197 as part of the Omnibus Budget Reconciliation Act of 1993 ("OBRA'93"). Under section 197, the cost of most intangible assets, including goodwill and going concern value, is amortizable ratably over a fifteen-year period.

This Article is intended to review the historic tax treatment of intangible assets and the detailed analysis of the statutory provisions of section 197. Part IV provides a background for understanding the necessary piece of intangibles legislation. Part II brings out an overview of intangible assets and intellectual property in the United States. Part III describes an outline of major intellectual property transactions having tax consequences.

# Rethinking Public-Private Distinctions in the State Action Doctrine

MIYASHITA, Hiroshi

The most controversial case of state action doctrine, *Shelley v. Kraemer*, raises the difficulties of a public-private distinction.

The jurisprudence of state action explores the essential dichotomy between the private sphere and the public sphere, with all its attendant constitutional obligations. The Court in *Shelley* unanimously held that the judicial enforcement of a private racially restrictive covenant is to be regarded as a state action for equal protection clause. *Shelley* remains controversial because ultimately everything can be made state action; if any decision by a state court represents state action, then ultimately all private actions must comply with the Constitution.

*Shelley* was born along with the transition of the baseline of public-private distinction from Lochner constitutionalism to New Deal constitutionalism. Under Lochner constitutionalism, the doctrine of "freedom of contract" prevailed so that private action was beyond the reach of the Constitution as *Corrigan v. Buckley* indicated. On the contrary, the naturalness of the public-private distinction under New Deal constitutionalism is untenable because state action is always present as claimed by legal realists. Thus, *Shelley* reflects the premise of New Deal constitutionalism and of legal realism.

As long as we believe that the Constitution binds only governmental action, the lesson of *Shelley* invokes how we should restructure a public-private distinction in theory, although state action may always be present in reality.

# Rules of Private Law in Electronic Financial Transactions – A Study on the Electronic Financial Transactions Act of Korea –

SEO, Heeseok

As IT has developed in Korea, new laws have been enacted in order to cope with the ensuing legal problems in transactions. These laws include the Electronic Transaction Fundamental Act of 1999, the Electronic Signature Act of 1999, the Consumer Protection in Electronic Commerce Act of 2002, and the Electronic Promissory Note Act of 2004. New legislation is also forthcoming, the Electronic Financial Transaction Act of 2006, has been enacted and will be enforced beginning January 1, 2007. This act applies to all retail financial transactions processed within the electronic system, and can be evaluated in terms of the previous electronic transaction laws mentioned above.

The object of this act is to clearly define the legal relationships between the parties involved in electronic financial transactions, and to regulate electronic financial business (Article 1). This paper examines the former, rules of private law, specifically, the right to request correction of a mistake, the rule of liability in the case of an accident within the electronic financial transaction, the legal position of the electronic financial sub-agency (system provider, operator of the electronic fund transfer [EFT] system, VAN business, etc), and the effects of an EFT contract, an Electronic Money and an Electronic Credit. In this paper, these rules have been reconstituted into the three sections noted below, and considered within a theoretical context.

The result of the consideration is as follows: First, the legal effect of an EFT contract is related to the technological characteristics of an electronic transaction. That is, the electronic record made when a payer transfers money to a payee reaches the payee's bank system instantaneously (in real-time). Therefore, the legal obligation of

the payer's bank is to post and record the payer's electronic transaction to the payee's bank system at the time the payment is made (Article 12). Second, as the electronic financial transaction is processed by computer and network systems, there is always the danger of equipment malfunctions or input misses. This act acknowledges a user's right to request the correction of a mistake caused by an equipment malfunction (Article 8). However if a user makes an input mistake, the bank cannot be held accountable for the correction of the user's mistake. Third, this act rules that when a card, ID number, etc. used to access the system is forged, or if the system has been hacked into, unless the user had knowledge of this, or was guilty of gross negligence, the financial institute must pay for any incurring damages (Article 9). We may consider the character of liability here as the liability of the party providing, maintaining, or managing the system (system liability).

# Zur Entfaltung der Idee vom „integrierten Umweltschutz“ im deutschen Umweltrecht – Anhand des Anlagengenehmigungssystems des Bundes-Immissionsschutzgesetzes –

KAWAI, Toshiki

Diese Arbeit versucht eine Seite des deutschen Umweltrechts dadurch zu klären, die Einflußnahme von einem seit den 80er Jahren entwickelten Reformkonzept, nämlich vom „integrierten Umweltschutz“, auf das deutsche Anlagengenehmigungssystem nach dem Bundes-Immissionsschutzgesetzes (BImSchG) zu zeigen.

Als ein diesen neuen Gedanken konkretisierendes typisches Beispiel gibt es die EG-Richtlinie des Rates vom 24. 9. 1996 über die integrierte Vermeidung und Verminderung der Umweltverschmutzungen (IVU-Richtlinie). Die IVU-Richtlinie verpflitet die EG-Mitgliedsstaaten, ein „integriertes Konzept“ für die Genehmigungssystem umweltbelastender Industrieanlagen (und Deponien) einzuführen. Auch in Deutschland wurde in 2001 die IVU-Richtlinie ins nationale Recht umgesetzt und BImSchG geändert.

Es ist die Hauptthema dieser Untersuchung, die Anforderungen der IVU-Richtlinie und ihre Rezeption ins Anlagengenehmigungssystem des BImSchG zu analysieren.

Dieser Aufsatz ist wie folgend in sechs Kapitel gegliedert. Nach der kurzen Einleitung (I) wird mit einigen konkreten Beispielen und Argumenten erklärt, wie die Leitidee vom integrierten Umweltschutz gebildet worden ist (II). Das folgende Kapitel behandelt das ehemalige BImSchG-Anlagengenehmigungsystem unter dem Gesichtspunkt seiner Reichweite (III). Dann werden der Inhalt der IVU-Richtlinie sowie vielfältige Argumente um ihre Annahme ins BImSchG-Anlagengenehmigungs system dargestellt (IV). Anschließend wird die Änderung des BImSchG aufgrund der

Umsetzung der IVU-Richtlinie juristisch analysiert und eingeschätzt (V). Zusammenfassend werden im letzten Kapitel auf einige Punkte hingewiesen, die auch die Vorschläge zu den Ratschläge für das japanische Umweltrecht enthalten (VI).

# A Theoretical Investigation on the Income Tax of Financial Assets: On the Basis of Federal Income Tax

MIZUNO, Keiko

The purpose of present study is to examine, in the main, what the theory of financial income tax and financial tax in Japan should be, in light of the theory of taxation and the taxation policy, and with reference to Federal Income Tax. For instance, there are some problems currently under discussion, concerning 'the complete integration of all kinds of financial income taxes' in this country, which is the view that incomes from the transfer of shares, and interest and dividends should be combined as financial income.

Following investigation on 'the principle of taxation according to the ability to pay', it was suggested that such a mindset would distort, above all, the taxation principle of the vertical equity of the tax-burdens, which would represent an unwelcome direction for taxation policy in Japan.

This dissertation features its own distinctive presentation of a theoretical investigation on the income tax of financial assets based on the field of law, especially from financial and accounting field perspectives.

# Der Öffentlichkeitsgrundsatz in Strafverfahren und der Schutz der Persönlichkeit des Angeklagten

SASAKURA, Kana

Der Grundsatz, dass die Hauptverhandlung im Strafsachen öffentlich gehalten werden muss, ist einer der wichtigsten Grundsätze im Strafverfahren. Trotzdem hatte es in Deutschland seit den fünfziger Jahren eine Debatte gegeben, ob die Öffentlichkeit im Strafverfahren die Persönlichkeitsrechte der Betroffenen schädigte. Schließlich führte diese Debatte zu einer Änderung des Gerichtsverfassungsgesetzes und der Einführung des §171b, mit dem ein Verfahren zum Ausschuluss der Öffentlichkeit zum Schutz der Persönlichkeitssphäre der Prozessbeteiligten, Zeugen und Opfern eingeleitet werden kann.

Die Debatte in Deutschland und Japan verläuft in dieser Hinsicht gegensätzlich. In der japanischen Strafprozessrechtslehre wird behauptet, dass der Grundsatz der Öffentlichkeit im Strafverfahren absolut sei; an diesem Grundsatz bestand bisher grundsätzlich kein Zweifel. Doch in der Praxis unterliegt dieser Grundsatz gewissen Einschränkungen; so wird z. B. im Jugendstrafprozess die Öffentlichkeit ausgeschlossen, um u.a. die Persönlichkeitsrechte der Jugendlichen zu schützen. Grundsätzlich wird die Öffentlichkeit vom Strafverfahren ausgeschlossen, um den Schutz der Persönlichkeitsrechte von Zeugen – insbesondere von Betroffenen – zu gewährleisten. Seit geraumer Zeit wird in der Verfassungs- und Zivilprozessrechtslehre die Diskussion geführt, ob das Öffentlichkeit in Zivilprozess zu Gunsten des Schutzes der Privatsphäre der Beteiligten zurückstellen sei.

Diese Abhandlung betrachtet die Öffentlichkeit im Strafverfahren unter einem neuen Gesichtspunkt – dem Persönlichkeitsschutz des Angeklagten.

# The Relationship of Detention in Criminal Procedures and Immigration Control in Japan

XIAO, Ping

In recent years, the number of foreigners in Japan has grown rapidly, as has also the number of criminal cases concerning foreigners. However, present criminal procedure law makes no allowances for foreigners being criminal suspects or defendants. Moreover, it is common knowledge that foreigners are managed by the Immigration Bureau. There have been certain problems associated with the involvement of foreigners in cases concerning both the immigration procedure (especially the removal procedure) and criminal procedure. A problem of inconsistency exists in both the removal and criminal procedures.

This paper briefly details the present situation of removal, the relevant laws on the criminal procedure, Immigration Control and the Refugee Recognition Act, then describes the situation of a deportee who is also a criminal suspect, when he/she is detained, bailed out or detained again, and finally proposes some methods to solve such problems.

# Trends and Challenges in Studying Kuga Katsunan: Foreign Policy Review, Constitutional Government, Nationalism

KATAYAMA, Yoshitaka

This paper focuses on the trends and challenges in studying Kuga Katsunan (1857-1907). Kuga is one of the most important journalists and political thinkers in modern Japan and has been the subject of much previous academic research. However, researchers seem to lose focus when attempting to assimilate his vast output. This paper arranges previous academic research on Kuga Katsunan, and reveals new perspectives.

The main findings are that researchers need to compare Kuga with other journalists and political thinkers in modern Japan, and that Kuga should be analyzed from plural perspectives.

# Quelques réflexions sur la jonction des exceptions préliminaires au fond devant la CIJ

ISHIZUKA, Chisa

La procédure des exceptions préliminaires est considérée comme la procédure la plus importante parmi celles de la Cour internationale de Justice (CIJ), dont la compétence est fondée sur le consentement des États parties. Dans cette procédure, la Cour peut statuer de trois manières; soit elle accepte les exceptions, soit elle les rejette, soit elle les joint au fond. En tant que décision sur la procédure préliminaire, la jonction au fond a été instituée dans le Règlement de la Cour permanente de Justice internationale en 1936 au paragraphe 5 de l'article 62. Cependant, suite à l'affaire de *la Barcelona Traction*, l'expression « jonction au fond » a été supprimée par un amendement au Règlement de la Cour en 1972. En revanche, le paragraphe 7 de l'article 67 (désormais paragraphe 9 de l'article 79) a été remplacé. Grâce à ce nouveau texte, la Cour peut déclarer « que cette exception n'a pas dans les circonstances de l'espèce un caractère exclusivement préliminaire ». Il n'existe plus alors de jonction au fond des exceptions en tant que décision sur les exceptions préliminaires.

Dans cette étude, nous allons tout d'abord comparer les deux textes en analysant l'évolution de la pratique suite à la modification de 1972: Il en résulte qu'il n'existe pas véritablement de différence entre eux. Donc, en déclarant qu'une exception n'a pas un caractère exclusivement préliminaire, on peut toujours joindre au fond les exceptions soulevées par un État partie lors de la procédure des exceptions préliminaires.

Enfin, dans le but d'approfondir l'analyse de la procédure de jonction au fond et celle de sa fonction, nous analyserons la stratégie judiciaire des États parties ainsi que la politique judiciaire de la Cour relative à la jonction des exceptions au

fond.

En conclusion, la Cour ne devrait pas recourir trop fréquemment à la jonction au fond, puisque ce système comprend un certain risque pour elle. Cette procédure doit donc être utilisée tout en tenant compte de ses aspects problématiques et de sa fragilité.

# France and the Independence of Morocco: From a 'Formal' to an 'Informal' Empire

IKEDA, Ryo

This article focuses on the reason why the French government decided on Morocco's independence in November 1955 and also aims to examine its implication in a wider context of post-war French decolonisation policy. Previous research tends to assume that nationalists with cohesive power had called for independence prior to the French decision. However, Morocco's political opinion was actually immensely divided, meaning the country was on the verge of civil war. The French recognition of independence was aimed at strengthening the political authority of the Sultan, who was a sovereign, by giving him a promise of independence. The country's independence was the first major exception to the French Union, an organisation which all French colonial territories had been supposed to join. Through experiences in Morocco, France decided to abandon the principle of 'divide and rule' and understood that for the purpose of maintaining influence, it was essential to transfer substantive political power to the local people. The independence constituted a major blow to the Union and paved the way for the 'informal' empire composed of independent countries which retained close links with France.

# Palliative Care: A Comparison Between the U.S. and Japan

IMAMURA, Mizuho

In this article, palliative care is not the same as hospice care. Hospice care involves providing care to relieve symptoms and pain for the terminally ill with life expectancy measured at less than 6 months, while palliative care, as well as providing the same care as a hospice, also targets curative care for the seriously ill, regardless of their life expectancy.

Palliative care in this sense has progressed in recent years. Therefore, the purpose of this article is to show 1) the differences between palliative care and hospice care, 2) palliative care in the U.S., 3) palliative care in Japan, and 4) the differences in palliative care between the U.S. and Japan. This study will help to improve palliative care in Japan.

The palliative care administered in both countries aims to overcome problems involved with hospice care, although the roles differ. Palliative care in the U.S., especially that provided in hospitals, for patients who are ineligible for hospice care, is intended to fill a gap between hospitals and homes, namely curative care in hospitals and hospice care in homes. This means that the palliative care helps to improve the continuity of medical care for patients. However, palliative care in Japan provided in hospitals is to receive patients who cannot be referred to a hospice because of lack of wards for hospice care, meaning palliative care is a supplement of hospice care.

Moreover, palliative care in the U.S. is not covered by federal medical insurance, while that in Japan is covered by public medical insurance. Medical services covered by public insurance are subject to regulations, which facilitate maintaining and improving the quality of the services.

Therefore, there is room for improving the palliative care in Japan. It must

be independent from hospice care and used to construct a stronger continuity of medical care for patients.