Verbraucherdarlehensvertrag und Wuchergesetz in Japan

ONO, Shusei

Im Jahre 1896 gab es eine historische Frage, ob der Darlehensvertrag ein Real- oder Konsensualvertrag ist. (vgl. Mugdan, Die gesamte Materien zum BGB, Bd.II, S.169 (E I §453, E II §547); vgl. Mülbert, Das verzinsliche Darlehen, AcP 192 (1992), 447, 485ff.). Das deutsche BGB entschied es im Sinne der Realvertragstheorie (nicht Konsensualvertragstheorie). Wie deutsches Recht erschien die Vorschriften der §§ 607ff. a.F. BGB auch unseren Gesetzgebern über das Realdarlehen nicht überflüssig und sie entschieden das Darlehen im Sinne des Realvertrages (§§ 587 JBGB). Überdies gibt es in Japan festig das Wuchergesetz (1877 und 1954). Aus rechtvergleichender Sicht möchte ich hier kurz die neue Entwicklung des Darlehens- und Wucherrechts in Japan erklären. (vgl. Meine Abhanldung „Comparative Law and the Civil Code of Japan", Hitotsubashi Journal of Law and Politics, Vol.25, p.29. p.37).

In Japan entstanden im Jahr 1954 neues Wuchergesetz (Zivilrecht, ZWuG, *Risokuseigen-hou*; vgl. Wuchergesetz a.F., 1877) und noch Strafrechtliches Wuchergesetz (StWuG, *Shusshi-hou*, 1954). Überdies entstand das Darlehensgesetz (*Kashikingyo-hou*) in 1983. Darlehensgesetz entspricht nur im Bereich des Darlehensvertrages meistens deutschen Verbraucherkreditgesetz.

Mit §488 BGB beginnt der durch das Schuldrechtsmodernisierungsgesetz neu geschaffene Titel „Darlehensvertrag; Finanzierungshilfen und Ratenlieferungsverträge zwischen einem Unternehmer und einem Verbraucher" (§§488-507). In diesem Titel sind die alten Vorschriften des BGB über das Darlehen (§§607-610 a.F.) und das in das BGB aufgegangene Verbraucherkreditgesetz integriert.

In 2006 renovierte unser Gesetzgeber das Darlehensgesetz. Aus Sicht des Verbraucherschuzes denke ich noch viele Gesetzesmängeln, z.B., Schriftsform (§492

BGB), Rechtsfolgen von Formmängeln (§494), Widerrufsrecht (§495), Einwendungsverzicht, Wechsel- und Scheckverbot (§496), Behandlung der Verzugszinsen, Anrechnung von Teilleistungen (§497) und Gesamtfälligstellung bei Teilzahlung (§498) usw.

Im Japanische Recht gab es weiter keine umfassende Vorschriften über Überziehungskredit (§493), Zahlungsaufschub (§499), Finanzierugnsleasing (500), Teilzahlungsgeschäfte (§§501-504), Ratenlieferungsverträge (§505) usw. Die Vorschriften des Verbraucherdarlehensvertrages des Schuldrechtsmodernisierungsgesetzes (BGB, 2002) sind für unsere neue Rechtspolitik und die Gesetzgebung noch sehr sinvoll.

Libertarian Estate Tax

MORIMURA, Susumu

It is usually assumed that libertarianism opposes estate tax. But in this paper I argue that estate tax or escheat is easier to justify than other kinds of tax, at least in the Lockean-Nozickian individualist natural rights version of libertarianism.

The primary reason for the libertarian estate tax is quite simple: no one has a moral right to dispose of one's own property after death because natural rights cannot belong to the dead. Contrary to orthodoxy in taxation theory, I sharply distinguish between bequest and testamentary succession on one hand and gift inter vivos on the other, to which people have a natural right as a part of ownership and which should not be taxed in the same way as inheritance. From the natural rights perspective, the rights of bequest and inheritance resemble intellectual property rights in being not natural property rights but artificial rights legislated for some policy reason or, worse, for some group's interests.

It is possible that estate tax alone finances the budget of a libertarian small government. Even if it does not, it would decrease governmental encroach upon living people's property rights.

I proceed to reply to possible objections and questions to my claim, and conclude by comparing some theorists' proposal to restrict inheritance.

Applying Public Philosophy to the Practice of Public Administration

FUKUYAMA, Shiro

How do we apply the knowledge of public philosophy in order to make adequate value judgments in the practice of public administration? The purpose of this thesis is to answer this question. With this in mind, I firstly stated that factual judgments differ from value judgments. Secondly, value judgments are made by human beings, for human beings. So I surveyed the answer to the following question, namely, "Basically, what is the human being in the world?". Thirdly, I referred to the standard of the value judgment. For example, I introduced Rawls' and Kant's theories respectively. Forthly, I cleared up the fundamental principle of the value judgment. It is the principle of individual dignity. Fifthly, I clarified the ultimate purpose of the nation under this fundamental principle. It is the promotion of the welfare of the people, in other words, the supreme consideration of the fundamental human rights of all the people and the realization of the greatest happiness of the majority. Subsequently, I systematically gave examples of the objectives for this ultimate purpose.

Professional Responsibility for Corporate Lawyers

KARIYA, Hirosato

A symposium — The Role of Lawyers and Legal Ethics Education — sponsored by Hitotsubashi Law School was held at Josui Kaikan Hall on March 10, 2007. The symposium was part of the law school's project on legal ethics education through the pervasive method initiated three years before, whose aim was to develop a textbook for legal ethics addressing professional responsibility issues in all substantive courses.

A work in progress of the textbook, tentatively titled "Lawyers' Ethics by the Pervasive Method," was distributed at the symposium. The principal objective of this article is to present the chapter addressed to professional responsibility issues for corporate lawyers discussing (a) stock options for corporate lawyers, (b) the use of the client's information, and (c) two competing roles of the corporate lawyer and confidentiality.

The Disconnection of Japan-China Trade and Conflict of Nationalism

KWON, Yongseok

This paper analyzes Japan-China relations during the Kishi administration focusing on the 4th Japan-China civilian trade agreement and the disconnection of the Japan-China trade caused directly by the Nagasaki-Flag Incident.

The conclusion of the 4th Japan-China civilian trade agreement made proceeding the "two-China policy" of the Kishi administration difficult. China reclaimed the political relationship beyond the conventional position of separation between politics and the economy. The Kishi administration recognized that anti-Japan sentiments of Taiwan and Southeast Asia were behind Taiwan's the strong protest. Before and after the Nagasaki-Flag Incident China also raised the anti-Kishi and anti-militarism of the Japan campaign. At that time, Japan faced anti-Japanese nationalism in Asia and feared it spreading around South-east Asia. This is why the Kishi administration concerned the position of Taiwan and adopted a wait-and-see policy after disconnection of Japan-China relations.

Japan-China relations during this period should be considered from not only the perspectives of the cold war but also from "economic and historical" logics.

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).

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.

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.

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.

The Concept of Joint Criminal Enterprise in International Criminal Law

TAKEMURA, Hitomi

The conundrum of how to prosecute upper levels of members for organized serious crimes vexes both international and domestic society in each respective context. Crimes attracting international concern normally involve countless people and associated plans behind. In order to ensure effective and efficient prosecutions, international criminal tribunals have developed the notion of 'Joint Criminal Enterprise (*aka*, JCE)'. This article provides overviews of the notions of Joint Criminal Enterprise as a *sui generis* legal concept of international criminal law, by examining several cases handled by International Criminal Tribunals and the International Criminal Court. Joint Criminal Enterprise, especially in its third category, has been a highly controversial mode of liability in that its elements are rather vague and lenient in comparison to other modes of liability and superior responsibility. Moreover, numerous issues concerning Joint Criminal Enterprise still remain to be solved in the future development of international criminal law. Nonetheless this paper tackles some of these issues such as how similar and different the notion of co-perpetratorship and Joint Criminal Enterprise are in international criminal law.

New Perspectives on the Japanese Capitalism Debate: Insights from Varieties of Capitalism and Globalization Analysis

WADA, Hironori

This article examines literature on Japanese capitalism. Up to 1990, researchers concentrated on the causes of the Japanese economic miracle or on Japanese economic stagnation. These researchers misinterpreted the situation, and mistakenly thought that rules applied to particular periods could be applied throughout all periods.

This problem is solved by recognizing 'varieties of capitalism' and globalization analysis. This analysis enables us to recognize under which circumstances Japanese capitalism will succeed or fail. It also raises a new question: Is the Japanese model of capitalism converging with the Anglo-Saxon model? Most researchers claim that Japan still maintains a distinctive model of political economy. On the other hand, other researchers argue that Japanese capitalism has been hybridized, or that there has been partial convergence in the financial sector. In order to settle this debate, two problems remain unsolved. Firstly, each school interprets the available evidence differently, meaning a common set of criteria to judge the degree of convergence should be established. Secondly, in most arguments, the degree of convergence across industrial sectors is assumed to be identical. In fact, they diverge. Therefore, not only 'varieties of capitalism', but also 'varieties *within* capitalism' needs to be recognized.

The Horn of Africa and the Cold War Between the United States and Soviet Union: The Ogaden Conflict in 1977 and the Collapse of the U.S-Soviet Détente

MASUKO, Takehisa

The purpose of this article is to insist that the foreign policy of the U.S. and Soviet Union and their involvement in the Ogaden conflict with Ethiopia and Somalia had a huge influence on the collapse of the U.S-Soviet Détente. Recently, numerous academic researchers have solely blamed the Soviet Union for the collapse of the U.S-Soviet Détente. However, I believe that the U.S is also responsible for this. In my research, to support my theory, I have considered the relationship between the U.S and the Soviet Union during the Cold War and during the Ogaden conflict. I intend to introduce a new interpretation of the Cold War that includes a factor such as the Horn of Africa and the state that led to the collapse of the U.S-Soviet Détente. This is the originality of this article.

The Recent Development of the Permanent Court of Arbitration (PCA)

ISHIZUKA, Chisa

The Permanent Court of Arbitration (PCA), which was created by the Hague Convention of 1899 and modified by the Convention of 1907, was frequently used by Member States in the beginning. However, after the creation of the Permanent Court of International Justice (PCIJ) in 1920 and its successor, the International Court of Justice (ICJ), in 1945, recourse to the PCA became less frequent, and between 1955 and the 1988 it was never used for inter-state arbitration. In the 1990s, the PCA attempted to improve its own functioning. It was thanks to this effort, that this Court became revitalized and has come to be used relatively frequently when States resort to international arbitration.

In this article, I firstly present the mechanism of the PCA, which has not been analyzed adequately in Japan (II). Secondly, I analyze the reforms attempted by the International Bureau of the PCA in the 1990s and their results (III). Finally, I present all the recent arbitral awards of the PCA and some of these characteristics (IV).

In conclusion, we can find a vital change in the role of the PCA. With the multiplication of international tribunals and courts today in mind, the PCA is expected to play a flexible role to compensate for defects in other tribunals and courts.

Jurisprudential Significance of *Holism*: Through the Arguments of Quine, Dworkin, and Rawls

ITO, Katsuhiko

Some people indicated that W.V.O.Quine's famous epistemological *holism* thesis influenced such doctrines of jurisprudence and moral philosophy as Ronald Dworkin's "Law as integrity" and John Rawls's "Reflective equilibrium". In spite of these indications, it is not clear what parts of jurisprudence and moral philosophy are influenced by Quine's *holism* in detail with some exceptions. This paper discusses the relation among Quine's *holism*, Dworkin's legal theory, and Rawls's moral theory in particular.

The theories of Dworkin and Rawls have the advantage and disadvantage of Quine's theory, and I argue that the disadvantage of his theory is emphasized in the social theory. I agree with some parts of Quine's argument which I understand as advantage such as (1) Sophisticated epistemological model as against logical positivism, (2) Non-foundationism, and (3) First strong epistemological model without *a priori* in the philosophical tradition. However, I argue that Quine in 1953 did not distinguish between personal justification and social justification. I find this is a disadvantage of his theory.

It is difficult to neglect this disadvantage when we apply Quine's *holism* to social theory. However, I believe his argument is important in legal and moral theory. I propose that we should reconsider the idea of Quine's "Observation sentence" and take notice of Nobuharu Tanji's "Principle of compensation" to overcome this difficulty.

Legal Mechanisms for the Exploitation of Audiovisual Works: A Comparative Study of Japanese, American and Korean Copyright Laws

KIM, Kyungsuk

In several respects, audiovisual production is different from traditional works such as novels or music. Usually the authors of novels or writers of music individually create literary or artistic works. However, audiovisual production is collective in nature. Various collaborators such as screenwriters, directors, and other collaborative teams, participate. As a result, it is much harder to distinguish who the author of the work actually is.

Also, audiovisual works are very expensive to create, produce and distribute, however, commercial success is uncertain. Therefore, the distribution may more significantly affect the overall market value of the audiovisual works than it would the value of any other works.

It is very important for the audiovisual industry to license the exploitation rights of an audiovisual work, in order to recoup the financial investment via sequential distribution of them in primary and ancillary markets. For this, the audiovisual industry requires an easier means to administer the rights of audiovisual works. In order to achieve the easier means, legislations at both the international and domestic level assign all the rights to one of the collaborators of the work. In this way, a producer may easily distribute the audiovisual work on the market without having to obtain permission from all the creative participants.

From the viewpoint of comparative legislations, this paper will investigate this process of clearing rights as the legal mechanism for "the exploitation of an audiovisual work".