Challenges to the Legal Profession in the New Millenium

ANDREWS, Thomas R.

The author discusses four challenges facing the American legal profession in the new millennium : (1) The author argues that the challenge of maintaining a unified legal profession is best met by a set of rules of professional conduct which are rich enough to take into account the differences between each kind of practice ; while avoiding the need for different codes for different kinds of practice. (2) In examining the challenge by huge multi-city law firms, the author evaluates the rules that have been fashioned to deal with imputed conflicts of interest and the debate over multi-disciplinary practice. (3) Addressing the challenge posed by the need for legal services, the author explores the idea of "mandatory pro bono" legal representation ; the use of public funding and such mechanisms as IOLTA to fund legal services for low income populations ; and the opportunity for the licensing of "paraprofessionals" and concludes that the greatest hope for meeting the needs of low income populations lies in the licensing of paraprofessionals. (4) Finally, the author examines concerns over governmental regulation of the legal profession and concludes that the concerns about such regulation are exaggerated, and that it is possible to balance clients' legitimate rights to confidentiality and loyalty with the public's right to be protected from unscrupulous clients.

The Parol Evidence Rule
– An Essay on Formation of Contracts –

TAKIZAWA, Masahiko

In some cases, the parties' intent towards a contract is not included in the documentation. For example, a land vendee may know that a railway station will be settled near the land, but this knowledge is often not included in the related documentation. When it comes clear that there are no plans for railway construction near the land, it influences the contract in three ways. First, although the expectation is not included in the documentation, it can be held that the expectation forms part of the contract, in which case the vendee can sue the vender for the breach of the contract. Second, even when the expectation is not regarded as part of the contract, the vendee's mistake can be made reasonable ground to avoid the contract. And thirdly, it may have no influence on the contract at all. In this last case, the vendee must bear the risk of his mistake.

In Japanese civil law, when we construe a contract, the writings and other extrinsic facts have no difference, but this makes it difficult to draw a distinction between the above three cases. However, in the common aw countries, the parol evidence rule bars the parties from showing extrinsic facts to contradict documentation, so the application and the exception to the rule can be an answer to the above question. This article tries to show this.

This paper first surveys the "classical" discussions over the parol evidence rule, containing the theory of integration. After that, some new views of the rule are introduced, namely, those of Metzger and Posner. Then, relevance to Japanese law is discussed. For judges, it can be used as a rule of finding facts, but for scholars, it shows the importance of documentation, or, more exactly, the intent to write down their agreements, which corresponds with the German theory of Erklärungswille.

Esquisse de la conception de la représentation (4) «Histoire de la démocratie en France» par P. Rosanvallon

TADANO, Masahito

(La suite du vol.2 n°3)

«Histoire de la démocratie en France» décrite par P.Rosanvallon éclaire divers aspects de la représentation. En ce qui concerne «la représentation sociologique», que l'on assimile souvent à la reproduction simple de l'opinion publique préexistante, il souligne l'aspect constitutif de la représentation qui réorganise des opinions et des intérêts. «Démocratie d'équilibre» réalisée par diverses formes de la représentation pluraliste semble permettre de concilier l'homogénéité requise par la souveraineté nationale avec l'expression des diversités sociales. Le projet de la démocratie comme une histoire pour la quête de l'identité commune est aussi éclairant à l'époque où la société a perdu sa visibilité.

Features of the computation expert system in civil procedure

SUGIYAMA, Etsuko

In a patent infringement suit, a judge can appoint a computation expert to report on computing damages caused by infringement, and the defendant is obliged to explain matters to the expert (Art. 105-2 of the Patent Law). The main purpose of this system is to facilitate the ability of the plaintiff (i. e. a patent holder) to prove the amount of damages. However, this system also has two other features. One is that experts can use materials that include defendant's trade secrets, which they would prefer not to produce in court. In this case, the expert should not disclose trade secrets or other matters that are unnecessary, but should show important materials to the judge and the plaintiff. The other feature is that this system lightens the burden imposed on judges to compute damages. As to the latter point, judges should still bear final responsibility for evaluating the amount of damages.

Natural Scientific Grounds of Natural Law : How Are Human Nature and Morality Understood in Modern Natural Law Theories and Contemporary Evolutionary Biology?

NAITO, Atsushi

Modern natural law theories influence contemporary laws and legal theories. Such theories are characterized by the fact that they search for human nature founded on empirical facts and find natural law based on it. On the other hand, there are many objections to natural law theories and whether we can find universal natural law is one of the main themes in modern legal philosophy.

This paper researches this subject by applying knowledge of contemporary natural science. It examines the view of human beings described by natural law theorists Hobbes, Locke and Hume from the standpoint of evolutionary biology and attempts to revise human nature as understood by them in the light of contemporary evolutionary theories.

This paper also examines how we relate morality, which is said to be the foundation of natural law, to human nature as understood from the perspective of evolution. It inquires into the moral theories of Hobbes, Locke and Hume again, and compares these theories to the moral theory of Richard D. Alexander, a well-known evolutionary biologist. Through these examinations, it concludes that morality is connected with human nature and thus confirms the existence of natural law from the perspective of evolutionary biology.

Die Forderung als die Existenzialbedingung der Sicherungsrechte

TORIYAMA, Yasushi

Was ist die Existenzialbedingung der Sicherungsrechte? Das Sicherungsrecht sei von Bestand der Forderung, die es sichern soll, abhängig ; ohne Forderung ist das Sicherungsrecht nicht lebenfähig. Aber sowohl in Japan als auch in Deutschland wird Begriff "Akzessorietät" gelockert. Es gibt die zahlreichen Durchbrechungen der Akzessorietät.

Bei Wegfall der Forderung einerseits wegen Sicherungszweck die Ausnahme der Akzessorietät im Erlöschen aufgenonmmen wird ; aber andrerseits man die Erhaltung der Akzessorietät geltend macht. Kann die Sicherungsrecht von der Forderung isolieren? Inwieweit hat die Akzessorietät einen dogmatischen Wert?

Ein Anliegen meines Vortrags besteht darin, die Grundfrage der Akzessorietät aufzugreifen und damit Anwendungsbereich und Wirkweise dises Prinzip zu verdeutlichen. Hier wird das Antwort im Vergleich mit dem deutschen Recht geschichtlich und systematisch untersucht und bestätigt, daß im japanischen Rechtssystem bei der Bürgschaft es ist möglich, die Ausnahme der Akzessorietät zu annehmen, bei dem Pfandrecht aber nicht.

Criminal Liability of Corporations

TSUDA, Hiroyuki

In Japan, a corporation is punished along with the individual who actually commits the crime. Judicial precedents and the majority of scholars assume that the criminal liability of a corporation is a liability based on the representative director. Moreover, a crime committed by an employee is regarded as supervisory negligence. Against this theory, there are counterproposals such as criminal liability based on a program of compliance. However, in fact, a corporation is also held responsible not only for supervisory negligence but also for the crime itself.

In the United Kingdom, the criminal liability of a corporation was established many years ago. The theory is based on the concept of vicarious liability first. In addition, in1971, the criminal liability of a corporation based on the Identification Theory was affirmed by the House of Lords.

However, the Identification Theory is problematic. For example, in the case of traffic accidents that occurred in the 1990s, corporations could not be held responsible. In response, the Law Commission proposed Corporate Manslaughter in 1996.

In Germany, the criminal liability of a corporation has long been denied. However, there have been recent arguments that affirm the criminal liability of a corporation. For example, Hirsch argued that the criminal liability of a corporation could be based on the character of a corporation in which the corporation behaves through the behavior of its members.

To affirm the criminal liability of a corporation for a crime itself, decision making as an organization is very important. Members of a corporation make decisions influenced by the order of the other members and by the atmosphere of the corporation. A decision made by one member under the influence of the corpora-

tion as an organization is not the decision of an individual, but the decision of the corporation itself.

As a result, a crime committed through a decision made under the influence of the corporation is a crime of the corporation itself, so the criminal liability of the corporation for the crime itself should be affirmed without regard to the position of the member who actually committed the crime.

Patent Protection of Medical Processes

SATO, Yusuke

In Japan, despite the lack of the explicit statutory prohibition, methods of medical treatment have never been patentable. JPO (Japanese Patent Office) has rejected patenting medical processes on ethical grounds, interpreting that they do not fulfill the statutory requirement of "industrial applicability" in the main sentence of Art. 29 (1) of the Patent Law, and courts have been confirming this practice. In the recent remarkable development in biotechnology, this prohibition is now being questioned and reformation is being discussed from the viewpoint that medical technologies should be encouraged by the patent system.

This article examines debates under the Japanese Patent system, the EPC (European Patent Convention) whose Art. 52 (4) explicitly provides that medical processes do not have "industrial applicability", and the US Patent Act where, while medical processes are patentable, Section 287 (c) immunizes physicians from liability for medical process patent infringements.

After reviewing a wide range of theories including those of "Law and Economics", this article argues that in Japan, the medical process exemption should be repealed, and proposes the introduction of technology transfer and licensing organizations with respect to medical patents including not only medical process patents but also medical products patents.

Aporia of Constitutional Theory

MIYASHITA, Hiroshi

This article seeks the foundation of constitutional theory. Constitutional theories can be derived from the theory defended through academic freedom. In light of this claim, this article demonstrates the aporia of constitutional theory rather than any explicit consequence of constitutional theory. The parts of the article are summarized as follows.

1. 'Theory' is traditionally defined as a partner of interpretation. However, the marriage between theory and interpretation raises the issue of circularity in which theory external to the text and that within text itself for interpretations must be met.

2. Theory can be separated from practice, seen in the rivalry between Dworkin who praises theory and the Chicago school known as the anti-theory camp. The difficult question of constitutional theory, which arouse from this conflict, is associated with whether pluralism requires a theory or not.

3. The arguments of constitutional theory often differ in terms of the subjects of creating constitutional theory. This difference results in the controversy over how one can divide or connect the task of constitutional theory between scholars and judges or Justices.

One can never escape from these aporias of constitutional theory as long as one believes that the theory deserves the academic freedom. Therefore, this article suggests that one overcome these profound problems of constitutional theory by exploring the effective bridges between the constitutional theory and academic freedom. A constitutional theory should impose constraints on those who accept it, but a theory must be praised in the name of academic freedom.