

GLOBAL LAW AND GLOBAL LEGAL THEORY
- ACADEMIC KNOWLEDGE IN QUESTION -

*Report on the International Workshop held at
Maison franco-japonaise, Tokyo (June 2011, 3-4)*

Isabelle GIRAUDOU
Researcher, French Research Institute on Contemporary Japan (MAEE-CNRS)
Workshop co-organizer

The international workshop “**Global Law and Global Legal Theory - Academic Knowledge in Question**” was held in Tokyo on June 2011 (3rd-4th). It was organized by the French Research Institute on Contemporary Japan (MAEE-CNRS) - Maison franco-japonaise with the support of *Fonds d’Alembert*, in partnership with The Clarke Program in East Asian Law and Culture of Cornell University and the special collaboration of the Global Legal Studies Network (GLSN) of the Foundation Maison des Sciences de l’Homme, Paris.

It was the third in a series of workshops dealing with “The Globalization of Law”. In 2009, we organized our first international workshop dealing with “Law, culture and development”¹. The following year, we focused on a technical aspect of this issue in a conference entitled “Japanese, Chinese and Indian Investments: New Trends in the Globalization of Law”². This year, and perhaps in a more audacious way, we chose merely to concentrate on legal knowledge in the globalizing world, and to question the emergence of a “world legal thought” by approaching it not in terms of “substantive” global legal theory, but rather as a set of shared academic practices linked to new epistemological shifts.

To focus on academic knowledge in relation to global law and global legal theory should be in no way a redundant enterprise. The question of how to define and characterize global law remains in fact both an open question (including for those who have been researching on it for many years) and an inclusive one too – obviously of concern also in Japan where many appealing shifts have recently been proposed. Confronting their respective methods and understandings of legal globalization, the participants (from Asia, America, Europe) were asked to address very concretely the issue of an emerging global legal theory by raising the following question: “What are the objects we analyze? What are the concepts we use? What are our practices?”. More precisely, the main question raised by the international workshop of June 3-4 was to know if there is a “global legal theory” – understood not as a unique theory on global law, but as a global theory of law or, more accurately, a theory made global through its common objects and new methods.

¹ http://www.mfj.gr.jp/agenda/2009/06/#anchor_923

² http://www.mfj.gr.jp/agenda/2010/06/#anchor_1036

The task to question academic knowledge itself about what is to the commonly called “legal globalization” was interpreted in different ways: some treating it as an invitation to critique assumptions underlying orthodox or traditional modes of discourse in their relevant field; some emphasizing the value of constructing new coherent frames of reference; and so on. Here – as probably in other forums – the main difficulty has been to avoid misunderstandings about what is a live theoretical question while also appreciating novelty in others' research. Even if we spoke from very different environments and starting points, and thus engaged indeed in an experimental form of comparison, it also appeared that we were all ready, through significant detours, to further discuss interconnected categories proposed in various pieces of ongoing academic work on global law – such as “private constitution”, “the creole of the law”, “law as translation”, and “normative spaces”.

This workshop brought together ten legal scholars from France, Japan, China and the United States, who presented as follows: **Annelise RILES** (Professor, Cornell University), **Ko HASEGAWA** (Professor, Hokkaido University), **Gilles LHUILIER** (Professor, South-Brittany University), **Isabelle GIRAUDOU** (Researcher, French Research Institute on Contemporary Japan, MFJ), **Yasunori KASAI** (Professor, Tokyo University), **Emi MATSUMOTO** (Professor, Niigata University), **Xingzhong YU** (Professor, Hong-Kong University), **Thomas BRISSON** (Associate Professor, Tsukuba University; Paris VIII University), **Keigo KOMAMURA** (Professor, Keio University), **Yoshihisa HAYAKAWA** (Professor, Rikkyo University).

Laurent DUBOIS (Lawyer, Cotty Vivant Marchiso & Lauzeral), **Andrew SUTTER** (Attorney at Law, Sutter International Law Office), and **Hiromi UEDA** (Professor, Asia University) kindly and fruitfully participated to the discussions.

The conference occupied a day and a half: June 3 morning and afternoon sessions were devoted to the presentations; entitled “Future Perspectives and Further Discussions about Additional or Related Issues”, June 4 session gave the participants an opportunity to discuss more precisely about future plans, such as discussions on line, publication, and participation to a survey. The participants' respective presentations and some aspects of the discussions that followed are summarized below.

PANELS (Friday 3rd)

Three Views on Global Law and Global Legal Theory

Annelise RILES

“Collateral Knowledge: Legal Reason in the Global Financial Markets”

Ko HASEGAWA

“The Nexus in Shaping Global Law – A First Insight on Global Legal Thought and Paradigm Shifts”

Gilles LHUILIER

“From Legal Order to ‘Normative Spaces’ (Law Shopping Practices in International Contracts)”

**Academic Knowledge at New Frontiers:
Perspectives on Mixed Legal Systems – Japan**

Isabelle GIRAUDOU

“Introductory Remarks – In Search of a Formula for Legal Comparative Analysis”

Yasunori KASAI

“Diffusion and Reception in Japanese Law”

Emi MATSUMOTO

“Japanese Law as a Mixed Legal System”

**Academic Knowledge in Movement:
Academic Discourses, New Actors and Legal Transformations**

Xingzhong YU

“Academic Discourse, Official Ideology and Legal Transformation in China since 1978”

Thomas BRISSON

“New Confucianism and the Law: a Sociological Approach”

Keigo KOMAMURA

“New Concept of Legitimacy: Is an Imposed Constitution Legitimate?”

Yoshihisa HAYAKAWA

“An Ambitious Challenge by UN for Making New World-Wide Uniform Rules - UNCITRAL Online Dispute Resolution WG”

DISCUSSION (Saturday 4th)

Future Perspectives for Academic Knowledge on Global Law: Further Discussions about Additional or Related Issues

Academic Knowledge:
Three Views on Global Law and Global Legal Theory

(Panel 1, June 3)

The respective presentations of Professor Annelise RILES, Professor Ko HASEGAWA, and Professor Gilles LHUILIER during this first session of the workshop gave us an opportunity to appreciate differently and to approach “in more subtle ways, beyond either dogmatic devotion or dogmatic denunciation” (Annelise Riles) how legal thought – including from the margins, on the sidelines, or through a “decentering” process – is both shaped by and shapes the globalization.

For Annelise RILES – who comes from a land where “Dworkin is already king” – the question is “what more we might have to say about law *at this point*”³ and also about legal knowledge *as such*. This initial interrogation explains her focus on legal technicalities and their relation to global law and global legal theory. While most proponents and critics alike (principally in the common law literature on private law) assume that global private law is something functionally analogous but qualitatively very different from state law, A. RILES’s approach of *private law beyond the state* as “a set of knowledge practices” reveals “remarkable similarities between the technical workings of global private law and the nature of ‘state work’”. Ultimately, this “outside the state” perspective helps “a better understanding of what is state regulatory practice, and hence how private and public can and do work together to address global problems”.

Gilles LHUILIER, who is currently doing research on the so-called “global contracts” and the way they question international private as well as public law, adopted a similar point of view. According to him, it is possible to approach the globalization of law as a “decentering” process: traditional sources and actors of law are questioned by a globalization of knowledge and practices that are not simply exported from one legal order to another, but progressively

³ Comment posted on the discussion forum Meridian 180 (Cornell University), quoted here with Annelise RILE’s authorization.

de-territorialized in many singular spheres⁴. Illustrating such “decenter”, international contracts can be described in terms of new “normative spaces”. Far from narrowly focusing on (private) norms rather than on (public) rules, such contracts form a (global) space of shared practices that are neither entirely private nor public.

For Ko HASEGAWA, a focus on legal formality and technicalities should not lead legal scholars to forgo or downplay the normative underpinnings of law. K. HASEGAWA, who explored the choice-of-law problem from the perspective of philosophy of law, showed skeptical about the limits of the formalist stance. Deploring that the situation of legal academia in Japan is basically drawn to the perspective of legal positivism, he underlined the decisive importance of the substantial in law and questioned further the possible articulation between the concept of law and of morality. Illustrating his point with examples rooted in public international law, he also examined the cultural force of legal norms.

Here are summarized first the respective presentations of Annelise RILES (p. 7-10) and Gilles LHUILIER (p. 10-15), both dealing from complementary perspectives with the transforming field of international law and the choice-of-law problem. Taking fully into account K. HASEGAWA's perspective and critical views (p. 15-18), a few discursive remarks on this opening panel will follow (p. 18-20). These remarks underline the extent to which G. LHUILIER's understanding of legal globalization, his informed analysis of law shopping mechanisms and his description of international contracts as articulated “normative spaces” echo A. RILES's own presentation of collateral.

⁴ See G. Lhuilier, “Analyse de la mondialisation du droit”, on the web site of the “Global Legal Studies Network – Mondialisation du droit” he coordinates (<http://www.glsn.eu>). At a previous international symposium (June 2009, Maison franco-japonaise), Gilles LHUILIER presented on the notion of legal “decentering” and developed – concerning a specific object, namely “global contracts” – an analysis of the “new transnational normative spaces”.



Annelise RILES⁵ – “Collateral Knowledge, Legal Reasoning in the Global Financial Markets”

Biography : Annelise RILES is the Jack G. Clarke Professor of Law in Far East Legal Studies and Professor of Anthropology at Cornell University. She serves as Director of the Clarke Program in East Asian Law and Culture. Her work focuses on transnational governance issues. Defining herself as “a practical lawyer and a critical scholar”, she has conducted extensive fieldwork among public and private actors, regulators and market participants in the global financial markets over the past ten years. She has also conducted legal and anthropological research in China, Japan, and the Pacific. Her third book, *Documents: Artifacts of Modern Knowledge*, brings together lawyers, anthropologists, sociologists and historians of science. Entitled *Collateral Knowledge – Legal Reasoning in the Global Financial Markets*, her fourth book (2011) draws on over ten years of ethnographic field research among lawyers in the global financial markets and traces the practices surrounding the governance of these markets through the uses of collateral⁶. Aiming to make global financial regulations more stable, effective and democratic, *Collateral Knowledge* seeks to engage the broader public about no less than the technicalities of regulation themselves, which constitute the core of financial regulatory practices. In her presentation, Annelise RILES addressed some aspects of the larger significance of “collateral” for a theory of legal knowledge.

Presentation : Professor A. RILES first briefly explained what collateral (“*sûretés*” in French) is: in order to guard against the risk inherent to a swap transaction (i.e. a private contract between two banks to exchange one kind of risk for another at a future date), swap counterparties routinely require one another to post collateral until the swap date. Collateral,

⁵ Bio page and blog: www.lawschool.cornell.edu/faculty/bio.cfm?id=62; <http://collateralknowledge.com/blog/>
Annelise RILES knows Maison franco-japonaise for having participated to its first international workshop on the Globalization of Law (Tokyo, June 2009) and to a research seminar on the same issue (Tokyo, January 2011).

⁶ Since Annelise RILES’s presentation drew directly from her book and dealt with some chapters in particular, several passages are quoted here too.

which takes various forms, consists in a complex constellation of practices concretized in standardized documents which can travel across national borders, from one trading environment and one regulatory system or jurisdiction to another, and also across cultural boundaries, different forms of expertise, and institutions. The most common printed form referred to is a “Master Agreement” (International Swaps and Derivatives Association 2002), which provides the legal framework for all individual swap transactions between any two banks, and defines key practices, rights as well as obligations. Intended to serve as a blueprint for a relationship, it can be defined as a “private constitution”. However, as powerfully enlightened by A. RILE’s study, such “‘merely technical protocols’ surrounding collateral relations” or “ostensibly ‘entirely private’ regulatory practices” are in fact “intertwined with state law in myriad ways”. Far from being marginal, this “technical little sideline item, something tangential”, on the sidelines of financial activity, reveals to be paradigmatic of the way global self-regulation (or global private law solutions) operates in financial markets.

Questioning in particular the case of the insurance giant AIG’s sudden collapse, precipitated by collateral, A. RILES notices that “there is remarkably little sophisticated critical conversation about the global proliferation and standardization of the technical legal forms themselves that make up an institution such as collateral” – and wonders why. For its proponents as for its would-be critics, such new private law remains both theoretically and politically confusing. Taking advantage of the controversies that surround the private, and even exploiting its contradictions, A. RILES suggests to approach regulatory debates “from the standpoint of the deceptively naïve question, ‘what is collateral, really in the derivatives markets?’”. This allows “to grasp a view of regulation as something very different, neither inherently private nor public, neither inherently global nor local”. Very much informed by critical and social theory and not simply economics, her work suggests another way to look at the mediation of market by law; it does not gesture at grand theories of contract or property; rather, by investigating and experimenting legal language, transnational networks, and the “back office”, and by taking into account this “class of low-profile, mundane, but indispensable activities and practices that are too often ignored” as we think about market norms, A. RILES’s purposely “close to the ground” new theory of law and markets challenges several dominant narratives of the last twenty years as well as current debates about regulation and deregulation, private versus public interest, and financial globalization.

In her presentation, A. RILES mentioned her use of the lens of anthropology to study how collateral functions in global financial markets and governance; and describes some aspects of her ethnographic experience of observing legal experts working in financial practice. Drawing on Teubner's work and on the recent work in critical legal theory which describes the experience of the legal actor, A. RILES also referred to Bruno Latour who both treats the law as a "mode of enunciation" and is interested in the material quality of lawmaking. In A. RILES's study too, "legal knowledge is treated as a phenomenon that is not simply reducible to social pressures and forces, but that has its own epistemological and material autonomy". In other words, here "law is considered as part of a larger pattern of knowledge practices" engaged in by a variety of actors and surrounding collateral relations. Describing ethnographically one arena of global private law, i.e. the production of legal documentation for the global swap markets, her book asks about what gives legal knowledge, legal reasoning, and legal expertise its resilience and legitimacy in a particular context; and examines "the workings of legal knowledge as a technique of private governance" in global financial markets. Believing that an ethnographic method combining ethnographic description with legal analysis remains crucial for the study of global finance and its actors, A. RILES examines "lawyers' own instrumentalist knowledge practices" in the market and aims at showing theorists and practitioners that "legal expertise is an ensemble of far more nuanced and fine-grained pattern of theories and practices than they acknowledge to themselves".

By putting the technical aspects of such regulatory practices at the center of the analysis, she illuminates the fact that financial governance does not mainly happen in legislatures and bureaucracies. In fact, many more kinds of agents – from financiers to back office administrative staff to ordinary retail investors, and including even some non-human agents such as computer programs and legal documents – are indispensable agents of market governance. By focusing on collateral as a site of transforming transnational legal techniques, she puts light on the powerfulness of collateral's language which gives a wider variety of actors (including the "back office") the ability to use a shared understanding (or common sense) and a chance to engage on transnational "good argument" and "produce better – that is, more efficient and more just – forms of market regulations".

By suggesting that "global private law is also a routinized but highly compartmentalized set of knowledge practices", A. RILES's approach allows us to see global private law as something very

different from a body of norms. Her focus on technical legal knowledge reveals how such “neither public nor private” technicalities pervade regulatory practice within and without the state. Her alternative description of *private law beyond the state* complicates “the standard explanation for the authority of global private law that pervades both the utopic and the dystopic accounts – the view that practices of self-regulation work because they enshrine a set of private group norms”.



Gilles LHUILIER⁷ – “From Legal Order to ‘Normative Spaces’ (Law Shopping Practices in International Contracts)”

Biography : Professor Gilles LHUILIER too is indeed “a practical lawyer and a critical scholar” – and would certainly add himself the qualitative “decentered”. Professor of law (Private Law) at South-Brittany University (with a doctorate from Paris X University), and Visiting Professor at ESSEC Business School Paris-Singapore, he is also lawyer to the Paris bar. He is Fellow of the Advanced Studies Institute of Nantes, Associate Researcher at the Centre Européen de Droit et d’Économie (CEDE), and Researcher at the French Research Institute on Contemporary Japan-Maison franco-japonaise (UMIFRE 19, CNRS-French Ministry of Foreign Affairs). Vice president of the Non Governmental Organization HumanRightsCertification, he is senior expert for the European Union especially in the African area and an international commercial arbitrator.

Gilles LHUILIER is currently conducting research on global legal thought (developed in particular through his research program at the Institute of Advanced Studies, Nantes, 2010⁸). This research addresses the new legal techniques at work in the world of merchants and the resulting new decentralized rules. More specifically, it focuses on the changes that international trade practices

⁷ Profile on line: http://www.iea-nantes.fr/fr/chercheurs/chercheurs-a-venir/bdd/personne_id/116 (IEA); <http://www.cede-essec.fr/fr/pdf/equipe/CV-Gilles-Lhuillier.pdf> (ESSEC).

⁸ See for example G. Lhuillier, “Analyse de la mondialisation du droit”, on the internet site of the “Global Legal Studies Network – Mondialisation du droit” (glsn.eu) he coordinates.

bring to old techniques such as forum-shopping (choice of the country for settlement or for supply functions according to the mandatory law), choice of law incorporated into the product (certification and labeling), alternative modes of disputes resolution (mediation and arbitration of transnational disputes on the places of production, conditionality clauses in trade agreements, Commission of Inquiry) and International Criminal Justice (international criminal law in the strict meaning or criminal justice of common law applied to transnational companies). The first objective of this research is a re-arrangement of the categories of the doctrine to reflect these changes, especially to contribute to the concept of law shopping / law incorporated in a product. The second objective is to try to think these changes in business practices in the light of the current changes in international legal thought, the so-called post-modern thought. The hypothesis to verify being the following: In this tangle of rules, values and symbolic sets of very diverse origin, a common language can sometimes be found.

G. LHUILIER alternates writing books on law (Introduction to law, Labour law, Corporate law...) and philosophy (The body and its representations, The return of the camps: Sangatte, Lampedousa, Guantanamo...; Law, a novel). He is the head of GLSN (Global Legal Studies Network: glsn.eu), the research network of the EHESS on global law (Fondation Maison des Sciences de l'Homme, FMSH, Paris); and is also conducting an interdisciplinary research program on Legal Globalization, Global Contracts and New Social Regulations (with the support of Maison des Sciences de l'Homme en Bretagne, MSHB)⁹.

Presentation : Professor Gilles LHUILIER participated several times to international workshops organized by the French Institute on Contemporary Japan (Maison franco-japonaise). At a previous international symposium (June 2009, MFJ), he presented on the notion of legal “decentering” and examined how a notion such as “new transnational normative spaces” could help understanding a specific object: international contracts, or the so-called “global contracts”. This year, he continued to elaborate on this subject by means of a telling example related to the international mining contracts sector. Interested in the common knowledge lawyers and the heads of transnational corporations use in the elaboration, writing and implementation of international contracts, G. LHUILIER is focusing more precisely on the international practice of the choice of laws and on “law-shopping” as a legal technique. According to his working hypothesis, the concept of “normative spaces” is not confined to the

⁹ http://www.mshb.fr/accueil/la_recherche/pole_gouvernance_dans_les_institutions_publiques_et_privees/globex

realm of international contracts; G. LHUILIER, on the contrary, took the opportunity of this workshop to question and to grasp its larger significance for global legal theory; and to analyze further the notion of “normative spaces” in relation to other new categories of global legal theory. The notion of “normative spaces” may thus appear at the nexus of different subjects, either in international law (it may well apply to several questions, including those related to the global financial market) or in comparative law (for example, the diffusion and reception of law issue).

Fully involved in the preparation of the workshop, G. LHUILIER submitted a working paper to open the discussion a few days before the event itself. Entitled “Academic Knowledge – Three Views on Global Law and Global Legal Theory”¹⁰ and circulated among the participants, this paper underlines several of the many common features his work has both with Annelise RILES’s and Ko HASEGAWA’s ones. The question asked by G. LHUILIER was basically to know how the work of the anthropologist Clifford Geertz could be used today in the academic field of global legal studies (in particular the importance given to a semiotic/interpretative approach; the assertion that “culture” is context and that theory must be “actor oriented”; the emphasis on “words” as linked not only to specific concepts but also to a mixture of ideas; the understanding of pluralism as being neither state centered, nor culture centered). To illustrate his hypothesis according to which legal theory itself is facing something similar to this “refiguration of social thought” dealt with by Geertz, G. LHUILIER elaborated on three recent works: Annelise RILES’s “Collateral Knowledge”; the seminal article of Ko HASEGAWA on Japanese law as a “creole law”, and his own research on international contracts as “normative spaces”. A special comment has been posted by K. HASEGAWA in response to G. LHUILIER’s text; and A. RILES began to express a few remarks during the workshop to be further discussed on line. Among the participants, Professor Yoshihisa HAYAKAWA, who is himself both a legal scholar and a practitioner, made insightful parallels between a notion such as “normative spaces” and both his own practical experience and field of research. The following reporting lines remind some of the main interrelations between G. LHUILIER’s approach of legal globalization and these other studies.

According to G. LHUILIER, who focuses on global legal actors, investigates international

¹⁰ See http://www.mfj.gr.jp/web/sympo_20110603/pdf/P/Lhuilier.pdf

contracts and analyzes them as “normative spaces”, the globalization of law can be approached as a “decenter”. Reminding us with the general definition the *Oxford Dictionary* provides for the verb *to decenter* (“to displace from the center or from a central position; to remove or displace from a primary place or central role”) and the noun *decentering*, G. LHUILIER described legal globalization as a decentering of both the places where law is produced and of the places where legal thought itself is produced. He referred more precisely to a quadruple decentering process of: **1)** the law, since economic actors have substantial choice over the law governing their affairs and that parties can shop for law”; **2)** the theory of law, since many of the most classical and for long state centered concepts of international law (such as the territoriality of law, the choice of law, public order, or even legal order) are challenged, progressively decentering under the pressure of legal actors who localize themselves in singular “normative spaces”; to grapple with such changes and to analyze more sharply legal actors’ practices, legal theorists have to find some new definitions or to twist the classical ones, and to emancipate themselves from national frameworks, and even from the distinction – classic in comparative law and familiar to comparatists – between various continents of law or different legal areas (Common Law, Europe, Africa, Asia...); **3)** the legal epistemology, such epistemological shift referring to this profound mutation qualified by the French epistemologist Bruno Latour as “a passage from law as an institution to law as an enunciation”¹¹; named not so much after a distinct geographical area, but after a new scientific scope, the so-called *Global Legal Studies* are characterized by their openness to social sciences (« *Law and...* »), and renew legal analytic grids by considering a variety of sources and giving priority to the “dialoguing” qualities of the texts. They also try to go beyond the “continental vision” of law (Europe, Common Law, Africa, Asia...); **4)** the legal methodology, since a global legal theory is emerging – which is not so much a global “substantive” theory but rather “a set of common academic practices” which aim at both enlightening the various faces of positive law in the context of globalization and explaining more sharply the diversity of law significations.

Moving on to concrete illustrations of what could be considered as a normative space, G. LHUILIER then elaborated on a specific case-study: an international (off-set) contract signed on April 2008 between the Democratic Republic of Congo (DRC) and a consortium of Chinese investors, and taking the form of a mining concession awarded by the DRC to a consortium of

¹¹ B. Latour, *La fabrique du droit. Une ethnographie du Conseil d’État*, Paris, La Découverte, 2002.

Chinese companies. Asking about the techniques and concepts used by international lawyers and the head of respectively the Congolese and Chinese companies, he listed several “law shopping” techniques, twelve exactly, described as a set of shared knowledge: **1)** the incorporation and the choice of a law; **2)** the creation of subsidiaries; **3)** the joint venture; **4)** the sub-contracting; **5)** the contract as law; **6)** the well-known choice of law, the so-called “dépeçage”, and the contract without law; **7)** the new concept of contractual public order; **8)** the forum shopping; **9)** the contractual mediation order; **10)** the choice of the site of arbitration; **11)** the freedom of arbitrators to choose the law applicable to the contract; **12)** the mobile public order (with the arbitrators taking into account only the public order of the place of the exequatur).

Asking in what “law shopping” – as a technique – could be constitutive of a neither entirely private nor public “normative space”, G. LHUILIER then provided a first definition of such “space” as being a set of “norms” (here, the shared law-shopping practices and the related common knowledge) as well as a set of rules (designated by lawyers who combine in a distinctive way national laws, international conventions, and even soft-law).

Explaining the distinction between two understandings of legal globalization, G. LHUILIER then turned to the second aspect of his hypothesis: the epistemological and methodological shift from “legal order” to “normative space”. Raising the general question of global liability – more precisely in reference to the rights, obligations and responsibilities of transnational corporations buying conflict minerals (including Coltan) –, he asked about the concepts and techniques used by international public lawyers in the drawing and implementation of international regulation. As described, global liability consists in a mix of international and national norms, a mix of “differentiated but complementary” (John Ruggie) mechanisms linked together by common techniques: **1)** the UN resolutions and guidelines; **2)** the US Dodd Frank Act (Financial reform Act); **3)** the private ITRI certification framework; **4)** the international contracts of the private companies in the mining sector. Interestingly, G. LHUILIER – who refers here to Carbonnier – understands such regulations not only in terms of “normative spaces” (i.e. a set of both “norms” and “rules”), but also in terms of “internormative regulation” (between at least two legal orders, two fragmented orders, two professional orders, or even two “private normative spaces”). And G. LHUILIER to conclude: approaching “legal globalization” in terms of legal decentering allows us to acknowledge not only that law cannot be conceived any more as

territorially fixed, but also that states themselves can no longer be conceived as “territorially fixed” entities.



Ko HASEGAWA¹² – “The Nexus in Shaping Global Law – A First Insight on Global Legal Thought and Paradigm Shifts” –

Biography : Professor Ko HASEGAWA is Professor of Philosophy of Law, Graduate School of Law, University of Hokkaido (Sapporo, Japan). He is Member of the Board of Directors in the Japan Association of Legal Philosophy, and Associate Member of the Science Council of Japan. Graduated from the Faculty of Law, University of Tohoku, he held an LL.M. and an LL.D. from the Graduate School of Law & Politics, University of Tokyo. Whereas he was a Fulbright researcher at Center for Law & Society in UC Berkeley and at NYU Law School, as well as a visiting scholar at University College London, he has worked as the J. B. MacDonald Visiting Professor at University of Wisconsin Law School and as Visiting Professor in University of Wales School of Law at Swansea. In 2010, he was the Mori, Hamada & Matsumoto Visitor at the Clarke Program for East Asian Law & Culture in Cornell Law School. His research interests include theory of justice and rights, the concept of law, theory of value, and the creolization of law.

Following an initial suggestion from Annelise RILES, Isabelle GIRAUDOU and Gilles LHUILIER went to Hokkaido in June 2010, to discuss more precisely with Ko HASEGAWA about a possible articulation between the paradigm of “the Creole of the law”, the notion of “normative spaces” and the epistemological turn we are observing in comparative law. Since then, we kept in touch, waiting for another occasion to discuss further all together. Ko HASEGAWA greatly facilitated the organization of our 2011 international workshop. Adding to a subtle discretion and enduring patience a generous involvement, providing the organizer with countless suggestions, he allowed things to go smoothly in such hard times. A few days before the workshop itself, K. HASEGAWA sent a stimulating comment in response to Gilles LHUILIER’s working paper. Entitled “Anchoring

¹² Profile on line: <http://www.juris.hokudai.ac.jp/~hasegawa/english.htm>

Normative Spaces in Global Legal Order – A Brief Comment on Gilles LHUILIER’s Working Paper”, these comments have been uploaded on MFJ’s¹³ and on GLSN’s (glsn.eu) web sites. The following lines will focus on his presentation, as well as on his comments on A. RILES’s and G. LHUILIER’s works.

Presentation : Professor Ko HASEGAWA’s presentation called our attention on the necessity not to forget about the complex relationship existing between law and culture in this globalizing world. Compared to the de-centering approach (i.e. the understanding of legal globalization as a multi-dimensional decentering process, as proposed by G. LHUILIER¹⁴), Ko HASEGAWA characterized his own approach as “integrative”: while the *decentering approach* fully acknowledges the emergence of a polycentric legal practice in today’s globalizing world, and has indeed to do with a broader reappraisal of the diversity of law (favored over the state-bound law-making and its positivist understanding), the *integrative approach* questions the connections of culturally heterogeneous legal ideas, more specifically from a translation/interpretative perspective. For K. HASEGAWA, the question is thus the extent to which the “post-modern” decentering approach of globalization on the one hand, the “modern” integrative approach on the other, may be conceived as complementary: can such translation/interpretative connection observed in the late 19th century East Asian and Japanese context be relevantly claimed as actually still occurring in various fields of law today – *despite* the decentering process (or *including in* these strongly decentered normative spaces described by G. LHUILIER in relation with globalization)?

Even in the field of private international law, where technicalities and the related standardized legal terms should ease “mutual understanding”, the decentering process (both of law and legal thought production) does raise specific problems of interpretation and translation. As underlined by K. HASEGAWA, in this field too interpretative/translational problems exist, and the question to know how to connect culturally heterogeneous legal ideas remains a pertinent one: “Even in the decentering of law, interpretation/translation is inescapable for valuationally anchoring divergent normative spaces”, says Ko HASEGAWA in his comment to G. LHUILIER’s working paper and presentation. According to K. HASEGAWA, the level of technicality reached

¹³ See http://www.mfj.gr.jp/web/sympo_20110603/pdf/P/Hasegawa.pdf

¹⁴ See Gilles LHUILIER’S presentation.

by a variety of legal activities (either private or public) and the resulting legal interactions should not lead us to dodge the question of the interpretative/transnational interconnections among various norms; and K. HASEGAWA emphasizes the necessity to articulate those different “normative spaces” that are competing with each other in “the moral struggle in shaping global law”. Underlining the need for justification, K. HASEGAWA reminded us with the question ultimately at stake here: the shaping of global law and its interpretive articulation with moral valuation.

This emphasis put on the value orientation of law is linked to K. HASEGAWA’s understanding of law and culture’s interrelationship: since law has to do with culture, it can not but have also to do with values – and conversely; but if law is both constitutive of as well as a medium of culture, law’s internal drive remains culturally bound. Juxtaposing this understanding of culture (as closely connected to values) with a formalist approach to law, K. HASEGAWA showed rather skeptical about the ability of formal law, legal technicalities, technical legal devices, and professional legal practices to incorporate and reflect on such values – about their very ability to prove hopeful. By emphasizing law’s technical autonomy and presupposing the importance of legal formality, notions such as “collateral” or even “normative spaces” may obscure the intricate connections between law and culture today, and downplay law’s substantive frame.

Responding to K. HASEGAWA’s comment and presentation, G. LHUILIER underlined that the concept of “normative spaces” is relevant from both perspectives on global law: either constructive (positive) or therapeutic (critical). Such concept provides the technical dimension of global law’s need of justification without ignoring its substantive aspect. Standing on the Dworkin side as far as the controversy on the moral question is concerned, such spaces have indeed to be understood from the interpretive approach of global law.

Commenting on K. HASEGAWA’s presentation, and referring to previous exchanges, A. RILES underlined that to approach law not exclusively as a *normative enterprise deeply shaped and shaping of culture*, but also – and more challengingly – from the practical perspective as a set of technicalities, may help to say more about legal knowledge *as such*. A. RILES made clear that if law itself is culture, it is not just in its substantive and symbolic elements, but also – intrinsically – in its very technicality. The fact that cultural conflicts are indeed about substance

does not mean that formalism cannot be helpful (neither hopeful). Through its technicalities, law can be seen as a practical tool to get beyond (cultural) conflicts. In other words, far from being neutral, technicalities are a way of operationalizing otherwise unoperationalizable conflicts.

* * *

A Few Remarks on Panel 1

Very interestingly, K. HASEGAWA's presentation as well as G. LHUILIER's and A. RILES's comments and the discussion that followed revealed much of their respective "academic environment" and own intellectual life. For an American legal scholar (Law, Anthropology) wishing to expand her horizon without limiting it to the late modern American law school she is coming from, the (pressing) point is not so much to approach global law as a normative enterprise but rather to ask about what has been dismissed so far: legal formality and technicalities. While for a Japanese Legal Philosopher adopting explicitly a Dworkinian outlook, the crucial point may be rather to point out the very normative foundation of global law. For a French "practical lawyer and critical scholar" interested in global law and global legal theory and intending to explore some new "spatiality" of law, the point may be to approach *also* the "normative" in law – although from a renewed perspective.

Here, we should add a few remarks about the terminology chosen by G. LHUILIER. Concerning first an expression such as "legal decentering", let us note that a "decentered" perspective is not an "outsider" perspective on the law. The understanding of legal globalization as a decentering process as well as the way G. LHUILIER defines this very process correspond to a project much broader than the one proposed by this trend in sociolegal studies which describes "legal institutions from the perspective of 'trenches' rather than the 'ivory towers'", to quote A. RILES. Second, the purpose of a notion such as "normative spaces" is obviously not to 'decenter' law through a narrow focus on (private) norms rather than (public) rules. This point calls for a few additional remarks, as follows, concerning the notion of "*normative spaces*" and the extent to which such notion applied to international contracts echoes A. RILES's understanding of the global financial market as a (global) space of shared practices that are neither entirely private nor public.

In the first chapter of her book “Collateral Knowledge”, A. RILES underlines the necessity to reexamine the *global private law as a world of norms* view. Rather skeptical, she wonders if the quite in vogue description of global private law as a “bottom-up lawmaking” process and as a regime of group norms (with organizations such as ISDA as norm creators), “accurately capture the knowledge work at issue in the day-to-day activity of derivatives markets governance”. Wishing to complicate “this vision of the world not as a system of states but rather as a system of private networks, and of global private law as an artifact of global social networks of various kinds”, A. RILES suggests approaching differently a contract such as the International Swaps and Derivatives Association (ISDA) market agreement. Audaciously considering as a paradigmatic example of global private lawmaking a routine legal work such as collateral, she characterizes the related form-filling activity in terms of concrete practices (of documentation) and technologies; by doing so, she admits that a body of law can derive its authority from specific criteria rather than from social norms, and that legal knowledge do more than simply enshrining group norms. This interrogation may well apply more broadly to standardized or preprinted contracts. Referring to empirical recent studies about boilerplate’s terms¹⁵, A. RILES ventures to ask if in reality such contracts enshrine clearly accepted norms. And, here again, rather than treating them as set of group norms encapsulating a chosen textual meaning (“as a text that entextualizes”), she suggests to approach them in terms of technical legal knowledge, as a set of mediating technicalities.

G. LHUILIER too fully acknowledges that the simplistic dichotomy between state-administered rules and society-governed norms (or the misleading imagery consisting in opposing states’ laws and the private international norms produced by the merchants) has become clearly unsatisfactory for legal scholars exploring the phenomena of legal globalization. As he described through a detailed examination of the so-called “law-shopping” mechanisms, “normative spaces” (and “global contracts” are considered as such) are not constitutive of a private commercial order (a kind of new *lex mercatoria*), since they are mainly regulated by national laws; however, they are not consisting neither in some legal (either international or national) order, since it is up to the merchants themselves to determine the boundaries of the applicable laws or, in other words, to “design” such space. For G. LHUILIER, however,

¹⁵ S. Choi, G. Gulati, “Contract as statute”, Michigan Law Review, 2006, 104, p. 1129-1173.

“normative spaces” are also “articulated spaces of meaning” (*espaces de sens*). Examined and analyzed from an understanding of law *as practice*, they can also be approached from the complementary perspective of law *as language*. Here lies an interesting parallel with Ko HASEGAWA’s work and the possibility to extend the notion of “normative space” to different objects (beyond international contracts), as well as to other branches of law.

Thus, the question raised by K. HASEGAWA concerning the choice-of-law problem has indeed to be fully taken into account. While acknowledging the importance of legal technicalities in the performance of law and considering such focus on legal form very seriously, K. HASEGAWA fundamentally questions the practical or pragmatic perspective on law and legal globalization. To examine further the formalist stance allows him to observe that there is basically no incompatibility between formalism and instrumentalism. Without downplaying the significance of the formal in law, he nevertheless underlines the decisive importance of the substantial in law. If legal formality has indeed a significant role to play, law’s substantive frame too is important. Wondering about the real relationship between the very concept of law and of morality, K. HASEGAWA emphasizes the (philosophical) necessity for law to be articulated as some deontological expression of higher norms. Such approach has at least two implications.

Firstly, this leads K. HASEGAWA to shed light on the cultural force of legal norms, with norms constantly renewing in order to handle new cultural conflicts. Here, the interesting point is that the metamorphosis of law accommodates cultural conflicts not from without, but *from within* – through an adequate substantive legal ideal. And, as it will be discussed below, K. HASEGAWA’s hypothesis of (Japanese) *law as translation* also goes in this direction. Secondly, such emphasis on the substantive in law may also contribute to precise the extent to which “normative spaces” develop concretely and can be approached as “*articulated*” spaces. Mentioned by K. HASEGAWA, significantly in the field of public international law¹⁶, the multifarious “hyper-jump” between multiple legal sources (national, international, or private norms) in a particular field of law to pursue more successful endeavors, has to be understood from this articulating perspective.

¹⁶ Allowing, for example, indigenous people to utilize non-national legal documents in the hope to transform their domestic situation beyond the border of nation-state; see K. HASEGAWA’s comment on Gilles LHUILIER’s working paper, uploaded on MFJ’s web site: http://www.mfj.gr.jp/web/sympo_20110603/pdf/P/Hasegawa.pdf.

Academic Knowledge at New Frontiers:
Perspectives on Mixed Legal Systems – Japan

(Panel 2, June 3)

Our examination of global law and global legal theory has indeed something to do with comparative law and theory of the legal systems: time-honored but not easily understood in its various dimensions, comparative law is more relevant than ever in the current era of globalization, both on the academic and on the practical levels. The second panel was organized to deal more specifically with some of the recent changes we have been observing in comparative legal studies in Japan. However, and here again, the task assigned to this panel was not to design something like a grand theory, but rather to discuss some of the methods and goals of comparative law as well as its relationship with other fields (such as legal history) and the so-called global legal studies. Precisely, this panel put into perspective two approaches – and hopefully more meaningful understandings – of Japanese law, which have been recently developed: while the approach of Japanese law as a mixed legal system shows the various flaws of contemporary taxonomy and suggests new ways of comparing, the epistemological approach of Japanese law *as translation* helps to characterize further the very process of “mixing”.

Former colleagues at Niigata University (School of Law), Professor Yasunori KASAI, Professor Emi MATSUMOTO, and Doctor Isabelle GIRAUDOU reunited years after to approach Japanese law in the global context from different but complementary perspectives. By questioning in a renewed way and from various stances the concepts of legal “reception” and “diffusion” when applied to Japan, the two presentations and the paper distributed during this session all reflect the shortcomings of classificatory schemes created and used by mainstream comparative lawyers. Although legal scholars in general now regard the subject of classification as barren (if not boring), a renewed examination of contemporary taxonomy from the Japanese perspective may help to refine the existing comparisons and to clarify their ambiguities, to explore new ways of comparing, and even to discover a new field of comparative law.

It has been suggested by some comparatists that, while in the 20th Century we mainly looked at similarities between legal systems from the “exportation perspective”, in the 21th we should rather look for differences from the “importation perspective”. However, adopting a distinctive point a view, Professor Yasunori KASAI underlined the necessity to deal with the so-called “legal reception” in Japan from another perspective – not only from the reception vector, as it has been done so far, but also from the diffusion perspective to better put light on the differences: what does legal reception in Japan mean from the perspective of civil law and common law jurisdictions?

Rather skeptical about the self-image of Japanese law and Japanese way of comparing, Emi MATSUMOTO underlined the importance of a “continuous process of comparative re-evaluation” and examined the possibility to present Japan as a “mixed legal system”. Noticing the absence of consensus as to the meaning of the expressions “mixed legal system”, “mixed jurisdictions” and “mixed jurisdiction jurist”, E. MATSUMOTO questioned from the Japanese perspective the existing two rival theories of mixed legal systems: the traditional view, popularized by Sir Thomas Smith and referring to the so-called “classical” mixed jurisdictions (in which Civil law and Common Law doctrines have been received and indeed contend for supremacy); and the wider pluralist conception, which refers to an unlimited category of systems encompassing two or more kinds of laws or legal traditions. E. MATSUMOTO examined in what sense the classical approach to mixed legal systems was useful “even when applied to Japanese law”.

Legal migration, by any name, is consubstantial to the coming into being of all mixed legal systems. Drawing on Ko HASEGAWA’s works and questioning academic language itself and its attempt, through a wide range of metaphors, to characterize the practice and to circumscribe the theory of legal borrowing, I. GIRAUDOU asked about the extent to which the “(Japanese) law as translation” thesis can renew the research question – classical in comparative law – of legal “reception”.

The crucial question lying behind these presentations and the discussions that followed was how to refocus the comparative venture into a useful analytical category. Only in too rare occasions has comparative law challenged legal theorists. However, and according to a more audacious approach, comparative law should be concerned not exclusively with methodology

(finding and comparing rules of two – or even more – systems) but also with epistemological matters. In other words, comparative law cannot be premised simply on the study of rules but should also provide the opportunity to study the internal structures of legal knowledge: comparative law must also rest on a philosophical view of law, and additional approaches to comparative law have been suggested, that relate to sociology, anthropology, and comparative culture. Ko HASEGAWA, whose specialty is philosophy of law, kindly accepted to join this panel as a discussant. During the discussion that followed, some aspects of the contemporary debates (comparative law and legal cultures, deconstruction of classifications, mixing systems, limits of comparability, comparative law in law reform, ...) and methodological innovations found in comparative law (in relation with a comparative law research project) have been mentioned. Among other issues, the discussion dealt with the question if and to what extent the current analysis of global law, of the mechanisms of articulation between different normative spaces, and of the complex processes of “legal creolisation” (K. HASEGAWA) helps to renew the epistemology of comparative law itself.



Yasunori KASAI – “Diffusion and Reception in Japanese Law”

Biography : Professor Yasunori KASAI usually presents himself as a (often, if not always critical or skeptical) “*passeur*”: between several worlds (contemporary and ancient), several academic environments, cultures, and knowledges. Y. KASAI is Professor of Classics, currently at University of Tokyo, after several years at Niigata University (School of Law). He has been Visiting Scholar at Christ Church of Oxford and Visiting Fellow at Balliol College of Oxford. He is a member of several academic associations, in particular the Japan Legal History Association, The Classical Society of Japan, Japan Society of Religious Studies, Hellenic Society (London), and World Mix Legal Jurisdiction Jurists. His major academic works (written in Japanese unless otherwise mentioned) include: (1) Greek and Roman Law, for example *Labeo’s Pithana – A work produced under the Greek influence upon Roman Jurisprudence* (Research Assistant dissertation submitted to the University of Tokyo 1982), and “Unpacking the Law in Ancient Greece”, in Hayashi, N. and Nitta,

I.(eds.), *The Birth of Law*, Tokyo 2008, 11-36; (2) Classical Studies, for example *Peithomai and Peitho in Homer - An Aspect of the Background to Greek Rhetoric* (Ph.D. Thesis submitted to the University of Bristol, 1991, awarded Ph.D. 1992, 275pp.), and “Two Types of Attitudes towards Conflicts in Ancient Greece with special reference to peithomai/peitho” (in : *Journal of Legal History* 50(2001), Tokyo,1-42), as well as a book in preparation : François HARTOG, *Mémoires d’Ulysse, récits sur la frontière en Grèce ancienne*, NRF essais, 1996 (Japanese Translation with Professor E. Matsumoto, to be published 2011 Autumn, Tokai University Press); (3) Legal History and Comparative Law: Avoidance of Persuasion in Japanese Dispute Resolution (published in: *Journal of Law and Politics* vol.32(2000), 332-352, Niigata), and “General Comments on the Transparency Project of Japanese Law organized by Professor T.Kono”, in *NBL* 900(2009) 100-103 and *Jurist* (2010) 6-13, also translated in English and published in *Zeitschrift für Japanisches Recht* 28(2009)230-235 (229-250); as well as a book in preparation, co-edited with Sir John Baker: An Introduction to English Common Law – Beginning, Development and Diffusion (Historical and Comparative Aspects), to be published, University of Tokyo Press; 4) Humanities, Higher Education, and Project Studies: Kasai,Y. and Suzuki, Y.(eds.), *Humanitas Education in Future – Shaping the Formulae for the Promotion of Critical Abilities in Arts, Science and Technology-*, Tokyo 2008; Humanitas Project 2003-2007, Sponsored by JSPS (Japan Society for the Promotion of Science), inspired and supported by the Project of *Bibliotheca Academica Translationum* The Founder Oswyn Murray, <http://bat.ehess.fr/>(in collaboration with European Universities such as Oxford, Cambridge, Paris, EHESS, Madrid, Basel, Athens etc.).

Presentation : In previous works with Professor Emi MATSUMOTO, Professor Y. KASAI had addressed the interrelationship between sources and methodologies in making legal history and questioned the substance of the history of Japanese law: in English terms, what is Common Law in Japan? Is the Japanese legal history all but parallel with others? Is it a kind of comparative legal history? In his presentation on June 3, Y. KASAI went further and put forward a methodology of the distinction between Reception and Diffusion and its dialectical use for the comparative study of law. By doing so, he introduced a new idea of ‘black hole group’ in the mixed legal system with special reference to translation.

According to Y. KASAI, if the world legal systems’ map fails to allow to Japanese law a clearly defined space, it is indeed because we lack a methodology for locating it. Obviously, classical explanations of Japanese legal system remain unsatisfactory. Who would be satisfied today

with these typical textbook explanations according to which Japan was in the civil law tradition up to 1945 and was subjected to the influence of the common law after the war? Or that, in source of law theory, the institutional source of law is statutory law (positive law) but case law as a *de facto* source of law is also important? Generally speaking, both Japanese and foreign scholars have long understood the Japanese law in the light of Reception – with two main implications: 1) The Japanese legal reception has long been conceived in terms of exclusive poles, with one diffuser (the non-Japanese side, either European or American) and one receiver (necessarily the Japanese side). In other words, the concept of “diffusion” was understood from a Western perspective only, something from which the Japanese were estranged; scholars failed to address “legal reception” as an overall process; 2) The reception theory narrowed the scope of law to the statute, codification and academic law books, while neglecting the activity of practicing lawyers and courts (although that activity has been playing a major role in the law making in Japan, as showed by the recent discovery of the Civil Judgments Files).

Among the many methodological difficulties faced by legal scholars, Y. KASAI insisted in particular on translation, compartmentalization, and parallelism. **1)** Firstly, foreign lawyers had (and still have) no direct access to the Japanese law because of the language. In fact, Japanese jurisprudence and legal practice grew itself within a (closed) Japanese language environment, “receiving stimulation from overseas (foreign documents) without assuming interference by censors outside”. As emphasized by Y. KASAI, “all the modern Japanese law being the product of the ‘digestive’ and ‘interpretative’ translation of western laws, the Japanese law has become a massive black hole to the foreigners”. In the same way, Emi MATSUMOTO will observe in her own presentation: “We invented a Japanese word for each legal term, so that, once translated, we can carry out all our legal discussion solely in Japanese”. Would some “reverse engineering” – such as overall translation projects of Japanese law – be helpful? Y. KASAI showed rather skeptical about the possibility for translation into English to make Japanese laws and precedents “transparent”, though perhaps a little light will be shown in the black hole. Context too being important, the question remains to know what method can both make the context clear and carry out explanations in English. **2)** Secondly, Japanese comparatists have generally showed, and most of them continue to express, a strong attachment to one nation exclusively, with an overwhelming preference for comparison between Japan and one of the major Western countries (Germany, France, England, and the

United States). **3)** Thirdly, such specialization is pursued to the point that exchange of views is blocked even between different legal areas (such as private law and public law), leading to the compartmentalization of each foreign law studies.

Y. KASAI strongly deplored that such attachment to one country and the related academic compartmentalization as well as the “reception perspective” combined with translationism as the interface, resulted in a “troika system” in Japan, with Japanese law becoming a complete black hole. Calling for another approach of legal “reception”, Y. KASAI reminded that Japan, far from being a colony from Europe or the United States, has been on the contrary fully able to “pick and choose” the Western laws which it adopted from an independent and equal footstep. Compared to “diffused” colonies, Japan remains unique in that sense that it can stand in the position to speak in the generator’s language about the mode of diffusion from the generator’s point of view. So, instead of adopting the classical position of the receiver and the associated analytic perspective, Japanese scholars should resolutely adopt the perspective of the generator and work on legal reception through the lens of the diffusion concept. Among many advantages, such approach (method) helps to release Japanese academics from their exclusive and narrow attachment to one country, and Japanese comparatism from both parallelism and compartmentalization. This method – by allowing complex comparisons between for example Japan and Greece in terms of diffusion of German law, or between Japan, South Korea and Taiwan, etc. – complicates comparison, makes it increasingly more subtle. Connecting these difficulties to the problem of “law making in Japan” and “what is law in Japan?”, Y. KASAI suggested to direct more decisively our attention to the perspective adopted by legal scholars working on the so-called “mixed legal systems (jurisdictions)”, thus calling attention on the work and subtle analyses developed further by his colleague, Professor Emi MATSUMOTO.



Emi MATSUMOTO¹⁷ – “Japanese Law as a Mixed Legal System”

Bioaography : Specializing in legal history and comparative law, Professor Emi MATSUMOTO (LL.M. and PhD., University of Tokyo) too is a *passeur*. Never taking anything for granted nor losing an occasion to question (... an “anarchist”, as some have friendly observed during the workshop), E. MATSUMOTO proposes an audacious and original insight on the issue of legal “reception”. She is Professor of Law at Niigata University, and has been Visiting Researcher at St. Catharine’s College of Cambridge University and Visiting Professor at Robert Schuman (Strasbourg III) University. Having a perfect command in French, her research themes are “Histoire de la juridiction consulaire” (ordinary research), and Study on Code civil. Her major academic works include: “Remy Libchaber, Recherches sur la monnaie en droit privé (Research on money in private law)”, *Law and Computers*, Vol.25, pp.149-150 (2007); “Veni, Vidi, Vici – Study tours in Europe organized by three Japanese Law Schools”, Yasunori KASAI, Emi MATSUMOTO, *Hogaku Kyoshitsu*, n. 322, pp. 6-8 (2007), n. 321, pp. 4-5(2007); “Les conflits de juridictions et l’ancien droit de France: examen des cas pour la juridiction consulaire”, *Legal History Review* (Japan Legal History Association), n. 56 (2006), pp.109-140 (2007); *Precedent and the Law, jointly worked*, Ewoud Hondius, et al., Bruylant (2007), “Adjusting an ‘imported’ (or ‘received’) law – an approach from the ‘precedent’ in Japanese law”, pp. 323-336; “Le bicentenaire du Code civil français”, Ichiro KITAMURA (ed.), Tokyo, Yuhikaku (2006), pp.117-139; “French commercial court in the judiciary of the Ancien Regime. Rivalry and conflicts with other jurisdictions”, doctoral thesis, University of Paris II (2002), 452p. Along with Professor Yasunori KASAI, E. MATSUMOTO is a member of the World Society of Mixed Jurisdiction Jurists; together, they recently presented in South Africa (University of South Africa, College of Law) respectively on “Diffusion and Reception in Japanese Law” and on “Japanese Law as a Mixed Legal System” (February 2011); as well as in Israel (Hebrew University of Jerusalem, 20-23 June 2011) on “Two Perspectives on Mixed Systems – Japan”.

¹⁷ Profile on line: <http://researchers.adm.niigata-u.ac.jp/R/staff/?userId=533&lang=en>

Presentation : Professor Emi MATSUMOTO began her presentation by underlining the necessity to put some doubt on a common belief: the long lasting and exemplary Japanese “tradition” of comparative law. In Japan, not only is comparative law conceived “as one field of basic jurisprudence” but comparison is also often considered “as an integral part of (Japanese) positive jurisprudence” itself. Pursuing in the same line than Professor Yasunori KASAI, she first observed how much “the Japanese way of comparing” was in fact negatively characterized by excessive specialization, compartmentalization, and (linguistic) isolation. She also observed how enduring some myths were, in the field of international cooperation (or “legal assistance”) as well as inside the Academia (and representatively through the tripartite composition of the Comparative Law Association). Very interestingly, E. MATSUMOTO pointed out the “lack of methodology for connecting” and the failure to discuss on “how these different elements co-exist, are integrated, harmonized or not, in our law”. In order to grasp the complexity of Japanese law, E. MATSUMOTO proposed to understand Japanese law as a mixed legal system, mixing the Civil law and the Common law. Such approach should allow comparatists studying Japanese law to find a remedy for the “lack of methodology for connecting” and to broaden considerably the horizon of comparison. E. MATSUMOTO identified two main merits of this approach: by revaluing the classical categories, helping us to rethink how we locate Japanese law in the world; make more reliable the translation of Japanese words and associated concepts into English, and even securing a methodology of translating.

E. MATSUMOTO then explored two views on the mixed legal systems, which are increasingly important touchstones for comparative law: the classical “mixed jurisdictions” (combining common law and civilian law) on the one hand, and more exotic hybrids on the other. The first approach is narrow, since it sees the “mixed” as between common and civil law; the second one is wider in that it includes all other laws. Choosing to focus on the first approach, she first mentioned how evidently a body of judicial documents such as the Civil Judgment Files reveals a mixture of different Western laws, Civil laws and Common laws, in early Meiji period; then she moved more in details to another illustration, focusing this time on trust law in Japan, that is a very early example of introduction by statute of an institution of Common Law developed in its own way as *shintaku* 信託. She presented several specificities of the Japanese *shintaku*, recognized for the first time in Japan in 1905 (Secured Bond trust Act), and mainly constituted as a contract (contrary to the Anglo-American concept of trust) – the contractual usage and the basic idea of trust as personal obligation remaining despite the new trusts act (2005). By

examining further how the Japanese notion of trust is connected with the Japanese notion of contract, it will be possible to explain the Japanese mixture of both Common Law and Civil Law elements.

If E. MATSUMOTO chose to follow the first approach, the narrow one, it is because – as she argued – the latter is too wide to define non-western countries’ law such as Japanese. (e.g., Japanese trust law). She did not suggest abandoning the idea of expanding the notion of “mixed” to as many laws in the world as possible (which remains valuable, and indeed crucial to avoid the critic of euro-centrism) (Esin Örüçü). Her purpose was rather to emphasize the usefulness of the classical approach to mixed legal systems “even when applied to Japanese law”. According to E. MATSUMOTO, it is more “productive” to characterize the Japanese legal system as a mixed legal system – and to compare it with other legal systems – on the basis of this first approach. By doing so, the comparatist is encouraged to focus on technical aspects, rather than to engage from the very beginning in a risky comparison between legal cultures. To deploy comparison from the technical level should even more surely result in interesting observations concerning the cultural background and the context of notions such as, for example, the Japanese concept of contract.



Isabelle GIRAUDOU¹⁸ – “In Search of a *Formula* for Legal Comparative Analysis”

Biography : Dr. Isabelle GIRAUDOU (Doctorate Paris II Panthéon-Sorbonne) is not yet a *passer* – although aspiring to become one. She can hardly pretend to be an “anarchist” either. However, in Japan for ten years, immersed in its “grey legal culture” (Katsuta Aritsune), her initial “rosy comparative understanding”, to borrow an expression from Mitchel Lasser, has been for sure

¹⁸ Bio page: http://www.mfj.gr.jp/mfj/equipe/chercheurs/chercheurs/isabelle_giraudou/

exposed to this *decentering* “shock experience” comparative law provides “for any nationally trained and conditioned lawyer” (Bernhard Grossfeld).

She is researcher at the French Research Institute on Contemporary Japan-Maison franco-japonaise (UMIFRE 19, CNRS-French Ministry of Foreign Affairs). Prior to MFJ, she has taught French Public Law in several Japanese universities (Niigata University, Tohoku University, Hosei University), focusing on fundamental rights, environmental law, and gender issues. She continues to teach law in several universities in Tokyo, including one course in Japanese law (introduction to constitutional law and fundamental rights). Linked to these teaching activities, her publications have addressed issues such as environmental rights, equality between men and women in the judiciary, and the question of the sources of law from a comparative perspective. She’s associate researcher at Hokkaido University, and lecturer at Paul Cézanne University, Aix-Marseille III (Master Droit Europe-Japon), and a member of the Global Legal Studies Network (GLSN). Having confronted various methodological and conceptual difficulties during these years of teaching law in Japan, she decided to research on the issue of the so-called reception of law by turning her attention to the theory of legal borrowing and the newer globalization literature. Dealing more specifically with the expertise of Japan in the field of international cooperation in the legal field, and focusing on translation as a new epistemological tool in comparative legal studies, her research raises the question of a possible alternative approach to legal “transplants” and the globalization of law.

Presentation : Due to time restraints, Dr. Isabelle GIRAUDOU was not able to present her work during the afternoon session, as initially planned; entitled “In Search of a *Formula* for Legal Comparative Analysis”, a printed-out version of her “Introductory Remarks” has been distributed. Since the first complication in the field begins with terminology, “In search of a *formula*” consists, before all else, in questioning academic language itself. I. GIRAUDOU’s paper underlines the considerable discomfort existing among legal “importers” and “exporters” as well as among the academics who write about them (comparative lawyers but also the newer globalization literature) on the terminology to be used to refer, even critically, to ‘transfrontier mobility of laws’. Many concepts – including those of ‘reception’ and ‘diffusion’ – have been put forward; and their associated metaphors have been either advocated or challenged. The time has come to ask if the metaphoric narrative deepens our knowledge and understanding of interactions across jurisdictions – or if it just obscures our lack of knowledge and understanding in this matter, making it even more difficult for the interactions to be accounted for and

acknowledged. Quoting David Nelken, I. GIRAUDOU underlines that if metaphors have any value, “it can only lie in their heuristic possibilities”; metaphors “should lead us to think in new and imaginative ways” about the legal diffusion and reception process, on both sides: the giver and the receiver; they should stimulate thought rather than forming “part of controllable scientific conceptualization”.

Focusing on K. HASEGAWA’s approach, I. GIRAUDOU insists however that, rather than: 1) merely challenging mechanical metaphors (such as “export and import”, “circulation” and the well-known “diffusion”), which express an instrumental vision of law, understood as a technique of social engineering; 2) playing as a sophisticated alternative to organic metaphors (such as “grafts” and “transplants”), which approach law functionally, as a detachable part of a whole; 3) or simply refining discursive metaphors, which speak of a “translating” process and approach law as “culture”, “communication” and “myth”; 4) and even rather than adapting the overall register of musical, culinary, biological, marital, or medical metaphors which have been used so far, the so-called “creolist perspective of law” forged by K. HASEGAWA may help to reformulate our research questions. Japanese law – rather than a kind of “hybrid”, “transplanted”, “imported”, “implanted”, “grafted”, “received”, “mixed” or whatever *estranged* creature – may ultimately be less a merely translated world than a specifically articulated language. While many of the mentioned metaphors (if not all) evoke some center moving into the periphery (implicitly: north moving into the south and west into the east), K. HASEGAWA’s analysis of “Japanese law as translation” and his work on “the creole of the law” shifts from (whatever)-centric approaches to better investigate the significant *connection* of culturally heterogeneous legal ideas.

According to I. GIRAUDOU’s understanding of K. HASEGAWA’s work, the analysis of “Japanese law as translation” shifts the focus from *l’énoncé* to *l’énonciation*. With the passage from the description of Japanese law as a translated world to the understanding of *Japanese law as translation*, we are observing a radical epistemological shift from a pattern inspired by the sciences of nature to one that is close to the sciences of language. This important field of legal study reminds us not only that language is the envelope of law but that law is language – and questions an entire written world from its very inside. At the same time, it does not ignore the fact that law is also more than language and that “legal cultures never work quite the way they appear, or want to appear, in any semiotic system” (Bernhard Grossfeld). Going a step further, I.

GIRAUDOU's paper asks if – and to what extent – the “Japanese law as translation” approach can renew the understanding of both the legal reception in Japan and Japan “as a figure of comparative law”.

Drawing on Maruyama Masao and Kato Shuichi's previous works, K. HASEGAWA reminds us in what sense the Japanese *writing* itself is a translating act. In the Japanese context, a concept such as “the creole of the law” necessarily builds on the fact that – if we talk about language in general – in reality, the issue is about *writing*. It exhausts to their very end the various and complex manipulations this written language has allowed, in particular in the borrowing of Chinese ideograms. Asking to which extent Japanese law became ‘ratio scriptura’ (not only a ‘ratio’ in writing, but also a ‘ratio’ *from* writing), I. GIRAUDOU's paper suggests a parallel with the enlightening works of Clarisse Herrenschmidt, who has problematized “writing, not only by questioning the language, that is to say the link that signs have with written language, but also along (...) the link that signs have with ideas”. While the opponents to “legal-change-as-legal-transplants” theory often end up by just saying that the meaning of the rule does not survive the journey from one law to another, and somehow have difficulties escaping their own “prison of textism” (Bernhard Grossfeld), the field of legal study called “the Creole of law” attaches great importance to the host (legal) culture in the process of underwriting the borrowed words, and this allows for a more nuanced understanding of epistemological receptivity.

The question of how the laws imported from different mother countries have been modified in the process of crossing over is obviously not a new one. However, the methodology typically applied by scholars when examining the reception of foreign laws often ends up in outlining the parallels that are thought to exist between one specific lender country's law and that of the Japanese recipient. Such approach fails to elucidate both: the complex eclecticism found in particular in the Japanese codification; and the many twists of the so-called “reception” process. I. GIRAUDOU's paper asks two related questions: 1) should we consider the concept of “the Creole of law” as an attempt to characterize more sharply the very process of normative ‘reconciliation’ Japanese law is supposed to realize between different legal traditions? 2) would the value of such a notion consist precisely in pointing out the need for both sides – the giver and the receiver – to consider the relationship between the part and the whole?

The concept of the 'creole of law' addresses the need to think more extensively about the concepts used in comparing (or in refusing to compare) laws. Its main feature is certainly to characterize the *eclectic* dimension of legal reception in Japan without concealing the *selective* aspect of the overall process. Both aspects are encompassed, neither is neglected. In fact, what K. HASEGAWA calls "interpretive agency" allows us to understand translation not only as an adaptive or articulating process, but also as a highly selective operation. Interpretations compete; and among the array of competing translations, the one which prevails is also "a function of epistemic conventions produced as a result of power struggles that are themselves non-epistemic" (Pierre Legrand).

The translating process of the idea of 'rights' illustrates this point. To this regard, the twist of the meaning of rights in Japan – as described by K. HASEGAWA in his insightful written contributions dealing with the problem of translation of the idea of rights – is interesting to compare with the general understanding of legal reception in Japan not only from an insider point of view as a *transformative* process but also, from an outsider point of view, as a *twisted* process in itself.

However, distinct from mechanical metaphors, 'the creole of law' does not express an instrumental vision of law, understood as a technique of social engineering. Distinct also from the organic metaphors, it does not conceive of law functionally as a detachable part of the whole. If, eventually, it also addresses the a-contextual dimension of the legal reception in Japan, it is not in order to suggest that law has been approached in Japan mainly as a technique. Referring to one of the purpose of this international workshop, I. GIRAUDOU's paper asks how a hypothesis such 'the Creole of law', far from being redundant, can complement the "by systems" approach or figure of 'Japan as a mixed legal system'.

As underlined by I. GIRAUDOU's paper, an approach such as the "the Creole in law" invites us to take seriously not only the Law and Language field of research but also the 'Law as Language' hypothesis itself. No less. The paper attempts to extend the inquiry by asking if an approach such as "the Creole of law" may renew the understanding of law in the globalization context and complement the understanding of legal globalization as a decentering process. The broad field of comparative commercial law is here of special interest. Not only because it constitutes a useful laboratory for the formulation and testing of general comparative law

theories, but also because of its relationship with global law and with global legal theory too. From a practical point of view, there are also few chances that the literature on legal transplants gives commercial lawyers the answers they need to solve the problems they encounter in today's world; indeed, the need to move on radically from the current debate on legal transplants and its divide between "culturalists" and "transferists" may be even more urgent than in other fields. Significantly, comparative commercial law – from the perspective of which the so-called "normative spaces" can be analyzed – is both a matter of language and more than language; equally, it is not necessarily bound to, or dissociated from, culture (or "social processes"). Dealing with the particulars of company law reform in Japan (including the modernization of its overall lexicon) and questioning the supposed 'transmigration or transferability of commercial law in a globalized world', I. GIRAUDOU's research examines the role 'translation', as a paradigm, can play in the transformation of comparative commercial law.

"In search of a formula for comparative legal analysis", as her introductory remarks have been entitled, does not refer to a new Babel. And the journey towards language in law should indeed make the comparatist to give up both home-base metaphors and this self-referential approach called the 'science of law'.

Academic Knowledge in Movement:
Academic Discourses, New Actors and Legal Transformations

(Panel 3, June 3)

The third panel, with four presenters, enlarged the discussion in two ways: first, by examining, from a sociological point of view too, transmigrations of legal ideas and institutions, and articulating more explicitly the issue of legal globalization in academic discourses, principally in China and Japan; second, by questioning the very concept of legitimacy, on the domestic as well as on the international scene.

To what extent does globalization also mean for the emerging cosmopolitan elite to have a significant impact on the future of legal systems and the way in which they develop? The first two presentations addressed different aspects of the internationalization of scientific productions and enlightened the complex relationships between what is sometimes called the “circulation” of scientific ideas or intellectual products, academic discourse on law, official ideology and social changes. Questioning the role of legal academic discourse in shaping reality in contemporary China, Professor Xingzhong YU built on Ko HASEGAWA’s thesis of “law as translation” to examine further how translated academic discourse in China fares in a rather complex social and political context. His presentation focused on several types of discourses (such as “constitutionalism”, “rule of law”, “rights”, “judicial professionalization”) to better explain the fate of such concepts in contemporary China.

In his presentation on “New Confucianism and the Law”, Professor Thomas BRISSON examined further the social processes underlying the international circulation of scientific ideas. Underlining that some intellectual products originate also – if not mainly – within international networks whose agents circulate and communicate across geographic and cultural borders, he shed light on this apparent paradox according to which fruitful challenges to Western intellectual centrality have emerged from within this tradition, and not from a hypothetical *tabula rasa* that would have replaced it with pristine non-Western discourses. Focusing his attention on Confucian scholars as global public intellectuals, he explained in particular about Tu Weiming’s concern with a renewed Confucian thought premised on Western intellectual lines.

Addressing the delicate issue of the legitimacy of Japanese Constitution and postwar regime, Professor Keigo KOMAMURA argued that “legitimacy is not given, it is constituted” and explained how the August Revolution in 1945 and the February Revolution in 1946 can be interpreted as changing the very meaning of the process of establishing the constitution, from an imposed work into a collaborative project.

Professor Yoshihisa HAYAKAWA was supposed to present on June 3; however, due to time constraints, he finally presented on June 4 (morning). In a sense, his presentation served as a closure of our discussions on the very notion of “normative spaces” as well as an opening to future plans. Presenting as a legal scholar and as an expert, Yoshihisa addressed in a critical way, and from a practical as well as theoretical point of view, the specific issue of online dispute resolution and the UN involvement in the field – thus offering a complementary insight on issues partly dealt with during the first panel, and stimulating further works together with some other participants.



Xingzhong YU – “Academic Discourse, Official Ideology and Legal Transformation in China since 1978”

Biography : Professor Xingzhong YU teaches Chinese law, constitutional law, and jurisprudence at the Chinese University of Hong Kong and previously served as an Associate (Chinese Legal Specialist) with the Chicago office of Baker and McKenzie (November 1995 - February 1998). He holds an LLM and SJD from Harvard Law School, and while there was a lecturer on law (September-December 1999), senior research fellow in East Asian Legal Studies (1998-1999), and visiting associate professor (September – December 2006). He has held various visiting academic positions at Beijing University’s Department of Law (Spring 1998), Columbia Law School (1988-1990), and the Australian National University (1984-1986). His research interests include social and political theory, cultural studies of law, jurisprudence, constitutional and administrative law, comparative law, Chinese legal history, and PRC law. He is the author of *Rule of Law and Civil*

Orders and has contributed to various journals and book projects. His research interests are: Social Theory and Law; Comparative Legal Philosophy; Chinese Law and Legal History; Constitutional Law; Cultural Studies of Law. Among his representative recent publications, here are listed: "Judicial Professionalism in China: From Discourse to Practice", in *Prospects for Professionalism in China: Essays on Civic Vocations* (William P. Alford, Kenneth Winston & William C. Kirby, eds., Routledge, forthcoming 2009); "Western Constitutional Ideas and Chinese Discourse on Constitutionalism", in *Building Constitutionalism in China* (Michael Dowdle and Stephanie Balme eds., Palgrave Macmillan, September, 2009); "Formalism and Commitment in Hong Kong's Constitutional Development", in *Interpreting Hong Kong's Basic Law: The Struggle for Coherence*, (Hualing Fu, Lison Harris and Simon Young eds., Palgrave Macmillan, 2007); "European Constitution and Its Implications for China", in *Legisprudence- an international journal for the study of legislation*, Vol.1, No. 2, 2007 (Hart Publishing); "On Pufendorf's *Elementa jurisprudentiae universalis libri duo*", in *Annual Studies of Western Legal Philosophers*, (Deng Zhenglai ed., Beijing: Beijing University Press, January 2007); *Rule of Law and Civil Orders* [Fazhi Yu Wenming Zhixu] (Beijing: Chinese University of Politics and Law Press, 2006).

Presentation : Taking four illustrations, Professor Xingzhong YU opened his presentation by examining ideology and the metamorphosis of legal discourse.

1) Concerning the discourse on constitutionalism, China has opened a new page in the history of its legal reform to respond to foreign and domestic calls for the rule of law and greater protection of human rights: embarking on the road to a "socialist country with the rule of law", the government has made significant efforts to promote law and legal institutions, including sending people abroad to study, running cooperative training programs with Western countries, and supporting research projects on constitutionalism, human rights and public law. Through the proliferation of various materials (books, articles, conferences, web sites,...), academic discourse on issues such as the rule of law (understood as the rule of Constitution), the supremacy of constitution, fundamental constitutional principles, constitutional protection of human rights, etc. has contributed to the unprecedented rise of constitutional consciousness in China. However, since 2005, discussions on constitutionalism have been silenced because the official ideology goes opposite to it. Now, even the term "constitutionalism" is prohibited.

2) Concerning the discourse on rule of law, X. YU observed that, as a result of the influence and restraints imposed by official ideology, discourse on the rule of law in China has taken a form different from Anglo-American conceptions of rule of law, which also differs from the German

concept of *Rechtsstaat* and French concept of *État de droit* in form as well as in substance. Described in terms of state legalism, rule of law in the Chinese context is understood as “socialist rule of law with Chinese characteristics”, the state being its main promoter and architect. As underlined by X. YU: “State legalism advocates things different from traditional society with the rule of men and modern society with the rule of law, containing features identifiable in both societies, in which law is used as a means for state building as well as social control without giving it an independent status while the state is viewed as the sole legitimate source of law, enactor, interpreter and executor of law”. In other words, “state legalism is a way to use the law as an instrument for the government to achieve its purpose”. X. YU went on by listing the characteristics of state legalism: the political abstraction of the state (considered as being above the law), the rule centrism valuation, the use of law as an instrument for state building, the sacrifice of individual emancipation for the sake of economic development, the absolute value of truth, and legal paternalism.

3) X. YU then moved on the triumph of rights discourse, not only in academic world but also in political world: rights have become a buzzword for Chinese legal scholars, lawyers and government officials all together since the reform era, despite a critical opinion according to which legal science is exclusively the science of duties.

4) Finally, concerning discourses on Judicial Professionalism in China, X. YU observed that – even though the core meanings of the judicial professionalism advocated by the Chinese scholars and judges are liberal – the justifications given by Chinese scholars are not limited to liberal values only. Several dimensions of the Chinese discourse on judicial professionalism have been mentioned: the idealistic dimension (putting emphasis on universalism, judicial independence, the distinctiveness of legal thinking, judicial skills, and trial techniques); the “necessitarian” dimension (judicial professionalism being justified by the fact China has embarked on the road of the rule of law, with judicial independence being guaranteed by the constitution); the elitist dimension (claiming for the granting of a prestigious status); the pragmatic dimension (the CCP’s leadership, in a general and abstract way rather than in specific issues, being understood as not contradicting the effort to judicial professionalism). In March 2008, however, the Chief Justice of the SPC launched a campaign within the court system requiring judges and prosecutors to hold as supreme the Party’s cause.

To explain how the meaningfulness of academic discourse for social transformation depends upon whether it is accepted by official ideology, X. YU then examined the role of courts in

Chinese society since the start of the economic and legal reforms, in 1978. Distinguishing four different stages (1978-1988, 1988-1992, 1992-2002, 2002-2008), X. YU observed that since March 2008, judicial reform “seems turning back its wheel”, this fifth stage being characterized by the abandonment of academic discourse by official ideology. From the changes of the role of courts in the reform era as well as from the overall analysis, it is fairly easy to come to the conclusion that academic discourse is constrained by official ideology. In other words, if not accepted by official ideology, academic discourse remains unable to have any impact on institutional change or social transformation. And X. YU to conclude: “Factors like official ideology, traditional inertia and overemphasis on ‘Chinese characteristics’ may all contribute to diminish the influence of academic discourse”. The remaining question being whether China can develop a new system that is different from what has been borrowed from the West...



Thomas BRISSON – “New Confucianism and the Law: a Sociological Approach”

Biography : Professor Thomas BRISSON, Assistant-Professor, University of Tsukuba, Japan (Associate-Professor, University Paris 8 from September 2011), is a trained sociologist. Researching on intellectual migrations, he is himself used to cross borders and did research in Egypt and Japan during several years. Focusing on East-West intellectual relationships, his research questions how western epistemologies and social sciences have been globalized and how they have been adapted by non-European intellectuals. Thomas BRISSON is particularly concerned with putting into question the centrality of the West, as well as paying attention to the sociological factors that impinge on global cultural relations. His previous research dealt with scientific and academic migrations between the Arab World and the West. He is currently working on a new project on the making of New Confucianism as a global ideology, with a focus on the relations between Singapore and the Asian academic Diaspora in the United-States. As an Associate Researcher of the French Institute on Contemporary Japan (Maison franco-japonaise, Tokyo), his research also seeks to provide a sociological account of Japanese contemporary intellectual migrations to the West as well as an analysis of how these circulations have resulted

in various exchanges of knowledge between different (national and cultural) spaces. It aims, first, at understanding the current patterns of intellectual and academic migrations. It focuses on scholars who work in the field of human sciences and seeks to analyze who, among them, move, how and for what reasons. Doing so, it does not aim only to understand the sociological dimension of contemporary events, but also to link them with the history of social sciences in Japan during the 20th century. The second line of reasoning followed in this research project is based on the hypothesis that the circulation of Japanese scholars to the West cannot be understood without analyzing, in the same time, the circulation of Western scholars to Japan.

His recent publications include: "De-colonizing the French 'Oriental Studies'" (in French), *Revue d'Histoire des Sciences Sociales*, 2011, 2, 24; "Leading Arab intellectuals in the West: Mohamed Arkoun and Edward Said", in Mohamed Bamyeh (dir.), *Intellectuals and Civil Society in the Middle East: Liberalism, Modernity and Political Discourse*, I.B. Tauris Publishers, July, 16, 2011; *Arab intellectuals in France: intellectual migrations and exchanges*, (Book, in French) Paris, Éditions La Dispute, 2008, 232 p.

Presentation : In his presentation, Professor Thomas BRISSON focused on the role played by some Asian scholars, in particular Chinese intellectuals, to develop a renewed Confucianism, apt to critically engage with the process of westernization/modernization, in particular in the legal field. Instead of discussing the consistency of the criticisms raised by these scholars against the international legal system, T. BRISSON's presentation's aim was to develop a theoretical frame that can account for the complexity of current academic exchanges where a growing number of scholars come from non-Western intellectual traditions while teaching and/or researching in the West. T. BRISSON first reminded us how much the divide between Western and non-Western intellectuals, Western and non-Western types of knowledge, "the East" and "the West" has been challenged during the last decades: indeed, "for scholars today, the point is not whether to be for or against Western knowledge; rather it consists in the various ways of using Western theoretical tools, or, more precisely, the possibility of constructing alternative intellectual positions from the very heart of the Western episteme". In fact, the critical reassessment of the Western enlightenment project by prominent postcolonial thinkers has been articulated on this very project's own notions and references; as underlined by T. BRISSON, "fruitful challenges to Western intellectual centrality have emerged from within this tradition, and not from a hypothetical *tabula rasa* that would have replaced it with pristine non-Western discourses".

Taking the example of Tu Weiming, T. BRISSON showed that “a revived form of Confucianism is not necessarily antithetical to, but can on the contrary be premised on the Western epistemological apparatus”. Born in Kunming (China) in 1941, raised in Taiwan, currently professor at Harvard University (United States), and recognized as the founder of the field of Confucian studies in the United States, Tu Weiming came to use Western intellectual resources not to research the Confucian tradition, but to revive it: he exemplifies this shift from a “scholar of Confucianism” to a “Confucian scholar” – meaning that he positioned himself as the subject/author of a renewed type of intellectual discourse, the so-called “New Confucian Studies”. To make a parallel could be tempting for who has done research on scientific and academic migrations between the Arab World and the West. However – instead of simplistically characterizing a scholar such Tu by his “in-betweenness” and applying the very expression Said once applied to himself: a man and a scholar “between two worlds” – T. BRISSON underlined rather his (re)shaping of a modern Confucian position *from within* the American academic world and Western theoretical apparatus. This new Confucian position has been formed progressively, through his three decades-long career, in response both to sociological changes inside the American field of Sinology / Asian Studies and to international political and scientific transformations with East Asian countries gaining unprecedented economic and political influence. To understand Tu’s shift or “modern turn”, it is necessary to take into account institutional factors (i.e. a process of specialization/interdisciplinarity of American Asian Studies resulting in a new academic structure complex enough to accommodate a field like “Confucian Studies”) as well as geographical factors.

Even more decisive is Tu’s claim according to which not only neo-Confucianism could be remodeled according to Western episteme, but – perfectly relevant today – it could also allow for a critical engagement with this very Western modernity. As underlined by T. BRISSON, this “Confucian public intellectual” has been one of the most vocal Asian scholars to argue for the active political role that Confucianism could play in solving the problems raised by modernity. The discussion of the link between Confucianism and human rights illustrates this point. Tu seeks to reconcile the idea that Asian specificities should be taken into account with the more universalistic stance that human rights are not entirely culturally bound. As enlightened by T. BRISSON, “this conciliatory position could only be achieved through what we have called Tu’s shift from a scholarly study to a normative appreciation of Confucianism”. Tu’s own attempt to

build a “Confucian Humanism” should help to amend Western conception of human rights. Concerning in particular the politically-constructed dichotomy between an individualistic West and a community-oriented Asia, the concept of self-cultivation led Tu to argue that although different from the Western individualism inherited from the Enlightenment, Confucianism offers “local stories of self-realization”.

To give an account sociologically allows T. BRISSON to notice that New Confucianism – as developed by Tu and his colleagues, and sometimes called “Boston Confucianism” – is, on the one hand, genuinely North American, while being a fully internationalized discipline. Such intertwining of the national and international realms makes even more necessary to develop frames of analysis that can account for the diversity and complexity of positions located at different levels. By drawing from Bourdieu’s concept of academic field, T. BRISSON questioned the extent to which New Confucianism raises the productive question of how relations of power shape global intellectual fields. According to him, “the integrative nature of the concept of field allows us to conceive of originally discontinuous national intellectual spaces in a more unified way”.



Keigo KOMAMURA – “New Concept of Legitimacy: Is an Imposed Constitution Legitimate?”

Biography : Professor Keigo KOMAMURA is Professor of Law at Keio University (Tokyo). Since 2010, he is a Member of the Advisory Council for Constitutional Revision Research Project, Reischauer Institute of Japanese Studies, at Harvard University. He has been Visiting Scholar, Reischauer Institute of Japanese Studies, at Harvard University (2009). In 2009-2010, he has been Academic Associate, Program on U.S.-Japan Relations, Harvard University. Among his publications, here are mentioned: *Legitimacy of the Constitution of Japan: Redux - Is an Imposed Constitution Legitimate?* (November 2010), uploaded on the website of Constitutional Revision Research Project, Reischauer Institute of Japanese Studies, Harvard University

(<http://www.fas.harvard.edu/~rijs/crrp/papers/index.html>) (Research Paper); *Ronten-Tankyu Kenpou* (Advanced Constitutional Law) (co-editor Prof. Go Koyama) (Koubundo, 2005), *Jânarizumu no Houri* (Law of Journalism : Public Uses of Free Speech) (Sagano-Shoin, 2001), *Kenryokubunritu no Shosou* (Some Aspects of the Separation of Powers Doctrine: Independent Agencies and the Checks and Balances Doctrine in U.S.A.) (Nansousha, 1999); *Keisatu to Shimin: Jiyu to Kenryoku no Kouzou-Tenkan* (Police and Citizens: The Structural Transformation of Freedom and Power), in *Kouhou-Kenkyu* (Public Law Review) No.69, p.113- (Japan Public Law Association, October, 2007); *Tougi-Minshuseiron no Chousen* (A Challenge of Deliberative Democracy), in *Kenpo Mondai* (Constitutional Law Review) Vol.17, p.95- (Japan Association for Studies of Constitutional Law, 2006); *Doutoku-Rippo to Bunka-Senso* (Moral Legislation and the Cultural War: Liberty, Deliberative Democracy, and the Gay Rights Cases in the U.S. Supreme Court) in *Hogaku Kenkyu* (Journal of Law, Politics and Sociology) Vol.78, no.5, p.83- (the Faculty of Law, Keio University, 2005); “*Seimei, Ningen, Rinri*” no *Kenpo-Ron*(1)(2)(3) (A Constitutional Theory on “Life, Human, and Ethics” (1)(2)(3)) in *Hakuho Hogaku* (Hakuoh Review of Law and Politics) No. 1, p.147- , No3, p.99- , No.4, p.81- (Hakuoh University, 1994-1995).

Presentation : “I think we need to discuss revision of our constitution because we need to recall and memorize that we have a constitution”: this is the way Professor Keigo KOMAMURA, during his stay at Princeton University as a visiting fellow (2008-09), answered to an American student who was asking about the significance of the (recurrent) domestic debate on Japanese constitution. To clarify such view, K. KOMAMURA underlined the necessity to reconsider how the postwar constitution of Japan gained legitimacy at its birth in 1945 to 1947. Drawing from Miyazawa Toshiyoshi’s August Revolution theory, which is the most authoritative theory justifying legitimacy of Japanese constitution by the most influential constitutional scholar at the time of making the constitution, K. KOMAMURA examined critically the so-called imposed-constitution view (*Oshitsuke kenpō ron* 押しつけ憲法論). Underlining that legitimacy is not given but constituted, he advocated for the adoption of a new and dynamic concept of legitimacy. Referring to the Potsdam Declaration, the Basic Initial Post Surrender Directive of 1945, and the Communiqué of Moscow Conference of 1945, K. KOMAMURA advocated for an interpretation of the August Revolution (1945) and the February Revolution (1946) as events transforming the very meaning of the process of establishing the constitution, from an imposed product into a collaborative project.

After having presented a brief story of how the Postwar Constitution of Japan was created, K. KOMAMURA addressed the question of its author. While the imposed-constitution view regards the constitution as made by GHQ and the U.S., and the “Mac Constitution, or FEC Constitution” view regards SCAP and then the Far East Commission (FEC) as having played a decisive authoritative role in legal developments, the “Collaborative Work” view holds that the Japanese constitution was elaborated in collaboration by Japan and the U.S. If K. KOMAMURA basically agrees with this last view, he underlined that it is, however, filled with a lot of somewhat optimistic interpretations of history, and that the reality was more complicated.

K. KOMAMURA then turned to a detailed examination of the so-called “August Revolution Theory”. According to Professor Miyazawa, the acceptance of the Potsdam Declaration in August 1945 brought a revolution to Japan by requiring the Japanese government to carry out a series of reforms (such as moving from Imperial sovereignty to popular sovereignty, from theocracy to democracy, and from militarism to pacifism). According to Miyazawa, this August Revolution radically changed the basic premise of the Meiji Constitution; in other words, the Postwar Constitution was a (dramatic) amendment to the Meiji Constitution, the continuity of the postwar regime being cut off at the moment of the acceptance of the Declaration. While a narrative of revolution tends to allow “anything goes” type thinking, K. KOMAMURA reminded that the Declaration was in fact conditional and underlined the necessity to interpret it as a legal authority.

Turning then to the so-called “February Revolution”, K. KOMAMURA reminded us with the two interpretations of the Potsdam Declaration: while, according to Chairman Matsumoto’s interpretation, the Japanese people have a right to refuse any implementation of the Declaration by its free will, Nomura Junji’s Statement of View (1946) stipulates that “the Japanese people do not have complete free will” and that “concerning the Japanese people’s having freedom of will in this matter, a serious responsibility accompanies this”.

As a conclusion, K. KOMAMURA reaffirmed first that the imposition was legitimate, since it is integral to the legal interpretation of authoritative texts (the Declaration and its related documents); and, second, that both the Japanese government and the GHQ were committed to making the constitution, such role assignment being built on the legal structure of the Potsdam Declaration itself. As a new concept, legitimacy is further defined as provided by a commitment to principles. And K. KOMAMURA to precise: “we should stop paying so much

attention to ‘who made this constitution’. It is not productive. I think that it would be much more important for us to ask whether we, the Japanese people, have been properly committed to realizing the principles in the Potsdam Declaration with our free will. (...) Looking at the principles of the Declaration once again, all of them are theoretically connected to universal justice. In this sense, a new concept of legitimacy should not be a static one, supposed to be immediately established when a constitution was created. Rather, it should be conceived as a dynamic project”. In this perspective, constitutional revision may indeed be the highest form of such constitutional commitment. Coming back to the “debate” issue, K. KOMAMURA closed his presentation by emphasizing that the debate on constitutional revision ultimately guarantees legitimacy of the Postwar Constitution.



Yoshihisa HAYAKAWA – “An Ambitious Challenge by UN for Making New World-Wide Uniform Rules – UNCITRAL Online Dispute Resolution WG”

Biography : Professor Yoshihisa HAYAKAWA (International Private Law) graduated from the Law Department of the University of Tokyo (1991). He then entered to the graduate program of the university to pursue PhD in law and political science (1996). At Rikkyo University, he firstly served as an associate professor then was appointed to the current position. During his service at the university, he served as a visiting researcher at Columbia University and University of London. Y. HAYAKAWA is also Attorney-at-Law. In addition, he has been appointed Secretary General of the Research Section of Japan Association of Arbitrators in 2003, and he is also a member of the Commission on Arbitration of ICC (International Chamber of Commerce), among other functions. He has served as arbitrator or party’s attorney in many arbitration cases including international commercial arbitration. His particular areas of interest are: International Commercial Arbitration, Transnational Litigation, Cross-Border Bankruptcy, Private International Law, Law of International Transactions and Law of Cross-Border Investment. He co-authored several books including *Kokusaishiho* (Yuhikaku 2006) and *ADR no Kihon Shiza* (Fumashobou 2004). He also published several books and articles, in English: *An Economic Analysis of Private International Law* (2006

Mohr Siebeck), Financial Regulations (2003 Sweet & Maxwell), Selected Legal Issues of Ecommerce (2002 Kluwer International), Arbitration in Asia (2001 Butterworths), Legal Aspects of Globalization (2000 Kluwer International). Y. HAYAKAWA participated to the second international workshop organized by the French Research Institute on Contemporary Japan at Maison franco-japonaise (June 2010), and gave also a seminar there (March 2010).

Presentation : Globalization, as a phenomenon of increased interconnectedness of the world's societies, influences the legal framework we are living in. The challenges brought about by this process are especially great in fields of law that are by definition international, such as private international law. Putting light on a complementary aspect of the questions raised on June 3, in particular by the participants to the first panel, the issue dealt with by Yoshihisa HAYAKAWA has to do with the elaboration of a modern law for global commerce.

As Internet usage continues to expand worldwide, the number of disputes arising from Internet commerce is on the rise and it has become increasingly necessary to design efficient mechanisms for resolving Internet disputes because traditional mechanisms, such as litigation, can be time-consuming, expensive and raise jurisdictional problems. As Online Dispute Resolution (ODR) develops and it is indeed a critical time, perceptive observers are needed. Professor Yoshihisa HAYAKAWA is one of them. Having kindly accepted to present finally on June 4, he exposed the ODR movement, its origin, goals, components and evolution and reviewed the legal framework governing ODR from a specific perspective: the UNCITRAL Online Dispute Resolution Working Group. Decisive questions (what are the driving forces behind ODR: businesses, consumer organizations, governments? what are their objectives and the basic requirements ODR must meet in terms of speed, accessibility, fairness?) have been addressed from the core legal body of the United Nations system in the field of international trade law.

Speaking as a legal expert and on the basis of his own experience as an official representative for Japan, Y. HAYAKAWA introduced first the handling of cross-border complaints, i.e. the European Consumer Centers Network, or ECC-Net, and the International Consumers Advisory Network, or ICA-Net in Asia – and asked the question of a possible relationship between these two networks. He then turned to ODR rules authorized by UN for Low Value-High Volume Cross-border Disputes and examined the work produced by the UNCITRAL Online Dispute

Resolution Working Group as well as the so-called worldwide uniform rules for merits. As reminded, UNCITRAL ODR Working Group's focus is on low-value, high volume cross-border electronic commerce transactions. ODR constitutes a means of resolving disputes that differed from previous UNCITRAL standards on arbitration – being understood that the work undertaken by the WP needs to be sufficiently practical and realistic to be implemented in practice. In that sense, the task of the WP is not to draft a new set of arbitration rules but to design a process that would satisfy the need for a rapid and inexpensive means of resolving disputes in an online environment. Y. HAYAKAWA concluded his presentation by evoking a few remaining issues: language and translation, the possibility for the mediator and arbitrator to be a single person, the question of cherry-picking from each step, the trustmark system, etc.

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Future Perspectives for Academic Knowledge on Global Law: Further Discussions about Additional or Related Issues

(June 4, morning)

The participants to the discussion held on June 4 (morning) addressed two main questions.

- 1) Presenting the research project he coordinates (“GLOBEX – A Pluridisciplinary Research Project on Legal Globalization – Global Contracts and New Social Regulations”¹⁹), Gilles LHUILIER proposed to discuss about the feasibility of a practical survey concerning some of the legal technicalities examined the day before: the so-called “law shopping” mechanisms. The survey will soon be published on the relevant web page²⁰. Showing specific interest in this initiative, some participants made several suggestions, both formal and substantial.

- 2) The publication of the proceedings has been also discussed in details and a publication plan has been issued. It has been made clear that such publication project shall be conducted in close collaboration with all the participants. Isabelle GIRAUDOU and Gilles LHUILIER are currently finalizing a proposal, to be addressed the end of July to the chosen editor.

¹⁹ See:

http://www.mshb.fr/accueil/la_recherche/pole_gouvernance_dans_les_institutions_publiques_et_privrees/globex

²⁰ *Idem.*