

**Final Schedule ANJeL-7 "Crisis and the Law" Conference, Tokyo, Saturday 14 February 2009**

<b>Presenter</b>	<b>Institution</b>	<b>Timing</b>	<b>Title / Topic</b>
OPENING REMARKS		Brief	
<b>Crises in the Japanese Economy, Politics &amp; Society</b>			
Joel Rheuben	Herbert Smith, Tokyo	1 pm	Rumble in the Regions: A Crisis in Local-Central Government Relations?
Akira Fujimoto	Shizuoka University (Professor)	1.15pm	The Crisis of the Bar Exam and Legal Education in Japan
Leon Wolff	Australian National University (Ph.D candidate)	1.30 pm	Crisis in the Workplace: Re-regulating the Labour Market in Japan
Matt Nichol	Victoria University (Lecturer, LLM candidate)	1.45 pm	Japan, Crisis, Change, Law Reform and the Role of Organized Crime
Souichiro Kozuka	Sophia University (Professor)	2 pm	Addressing Crises for Consumers: Safety versus Convenience regarding Money Transfers, Consumer Credit and <i>Konnyaku</i> Jelly
Nadine Courmadias	Deakin University (Associate Lecturer)	2.15 pm	The Crisis of Road Traffic Fatalities in Japan: Is Law the Answer?
BREAK – 15 minutes		2.30 pm	

<b>The Environmental Crisis</b>			
Hiroshi Kabashima	Tohoku University (Professor)	2.45 pm	Limits to Litigation in Addressing Environmental Pollution: An Historical Survey of the Minamata Disease Crisis
Mahito Shindo	Macquarie University (Ph.D candidate)	3 pm	Improving Environmental Decision-making through an Environmental Ombudsman Process? Australia and Japan Compared
Tadashi Otsuka	Waseda University (Professor)	3.15 pm	Evaluating Japan's National and Local Emissions Trading Schemes
Satoshi Kurokawa	Waseda University (Professor)	3.30 pm	Economic Instruments for a Low Carbon Society in Japan
James Prest	ANU (Lecturer)	3.45 pm	Trading Our Way out of the Climate Crisis: Japanese and Australian Responses Compared
BREAK – 15 mins		4 pm	
Q&A and FACILITATED DISCUSSION – 45 mins		4.15 pm	
CLOSING REMARKS		Brief	

### **Time, Location & Access**

Ritsumeikan University (Tokyo Campus) Sapia Tower 8F, 1-7-12, Marunouchi, Chiyoda-ku, Tokyo. A one-minute walk from the Nihonbashi exit of Tokyo Station. An access map is available in English at <http://www.kyoto-seminar.jp/access2009.html>. The conference is provisionally scheduled to commence at 1 pm and conclude at 5 pm on Saturday 14<sup>th</sup> February 2009. Ritsumeikan University requires that an IC security pass be prepared for each registrant in advance. These passes can be picked up from an ANJeL representative who will be waiting at the Reception / Security Desk from 30 minutes prior to each event.

### **Abstracts**

#### **Leon Wolff**

A popular television series during the autumn season employed light comedy to comment on the collapse in confidence among Japanese workers about the security of their employment. In "OL Nippon", a respected office administrator in a large company finds herself in a battle of the wills against an external consultant brought in to outsource the bulk of administrative services to cheap Chinese labour. Much of the comedy draws on exaggerated contrasts: the office administrator, representing the ideal of a kind and loyal workplace, is female; the consultant, symbolising a more brash and aggressive form of workplace relations, is male; she is tall, he is short; she is popular, he is despised; she speaks with pitch-perfect politeness, he counters in clipped tones.

But to what extent does this television show accurately portray to clash of two workplace cultures? Certainly, media and academic accounts point to the death of lifelong employment, the growth of atypical employees and the loss of security of tenure for 'core' workers. This presentation, however, examines both the extent of the reforms to Japanese labour markets -- as well as empirical evidence of their impact -- to question the extent to which the Japanese workplace is morphing into a new,

less secure environment for Japanese workers.

### **Matt Nichol**

Since the end of Tokugawa rule, Japanese law has been a “hotbed of change”, with the Meiji period (1868 - 1912), U.S. led Occupation (1945 - 1952) and Heisei recession creating three waves of substantial law reform. At the heart of each wave of reform lies a clash between traditional Japanese practices and western customs, now expressed in the globalisation debate. However, newly acquired rights from the first two waves, in particular property rights, were poorly enforced and protected. Consequently, private ordering, in the form of individuals and organizations, intervened in a capitalist manner to take advantage of entrepreneurial opportunities. Put simply, the first two waves of law reform in Japan enabled organized crime to become a salient feature of Japanese life, providing different legal and illegal services. Notably, organized crime like *sokaiya* and *yakuza-sokaiya* are a formidable presence in Japanese commerce. The question that must be considered is whether the Heisei reforms will create further opportunities for “dark side” private ordering? Another possibility for groups like *sokaiya* is to use the Heisei reforms to continue their move from illegal to legal and quasi-legal activities.

This presentation will examine whether the latest reforms can successfully utilise formal legal rules to minimise the operations of *sokaiya* and *yakuza-sokaiya*. To do this, the presentation will focus on two aspects: Japanese culture/legal culture and limitations of the recent criminal law reforms.

### **Nadine Courmadias**

More than 7,000 people die in Japan each year as a result of motor vehicle crashes and driving while under the influence of alcohol is the leading cause of these fatalities. A number of studies have shown that deterring drink driving is an important way to reduce such fatalities and consistent with this research, Japan has recently strengthened its already strict laws in this area. The recent reforms lowered the legal blood alcohol content limit and increased the penalties for offenders. In addition, a number of accessorial offences which, once only available through the use of Article 62 of the *Penal Code*, are now specific

offences in the *Road Traffic Act*. This paper will explore the crisis of road traffic fatalities in Japan and the legal response. In this context it will explore issues such as the extent to which regulatory goals are best achieved in Japan by looking at formal law and alternative positions such as administrative guidance. In relation to drink driving at least, it appears that the law has been very successfully used to drive important and universally beneficial social change in Japan. This paper aims to develop a theoretical explanation for why the law seems to be working in this particular area.

### **Hiroshi Kabashima**

Minamata disease is chemical poisoning caused by organic mercury compounds, found in industrial wastewater running into rivers and the sea to contaminate fish and shellfish that people eat. Organic mercury damages the nervous system, and results in death in severe cases. In 1956, the first victim of Minamata disease was discovered in the city of Minamata. Not until 1968, twelve years after that, did the government acknowledge Minamata disease as a pollution incident, and did the polluter (Chisso Co.) stop contaminating its wastewater.

The first legal action to help victims was taken in 1967 in Niigata, where more such Minamata disease broke out. The plaintiffs won this trial in 1971. The government enacted a compensation system whereby the victim was to receive compensation from the polluter based on certification by the local government. But it performed less effectively as expected, because the standard for certification was too strict for most victims to receive compensation. This strict standard was rejected in 1985 by the Fukuoka High Court in the second Kumamoto litigation. Reacting to this ruling, the government offered some medical treatment for potential victims in 1991. It added a small amount of compensation based on a "political settlement" in 1995. This relief system of the government was judged again to be inadequate by the Japanese Supreme Court in the Kansai litigation in 2004. In spite of this ruling, the government has done nothing more for the latent victims.

With regard to this Minamata disease incident, the Japanese constitutional system has not performed adequately to resolve this social dispute based on justice through law. Confronted with these circumstances, I would speak of "failure of law". The first failure in the Minamata disease incident involve the legislative and the administrative relief measures not adequately

performing their function to resolve the dispute, which essentially belongs to the realm of judicial power. Secondly, dispute resolution through lawsuits contains essentially no function in preventing the spread of harm. Prevention from pollution is not a task for the courts of law but of the government, whose measures would not always be optimal because of its discretionary powers. Thirdly, the litigation of course only involved the plaintiffs, not all the latent victims, most of whom remain uncompensated unless they bring an action. The fourth and last failure is that the litigation cannot recover all damages, which include legal costs as well as opportunity costs. This portion of total costs must be paid in fact by the victims, i.e. the plaintiffs themselves.

We should reflect on this 50-year history of the Minamata disease incident to learn lessons for the future in regard especially to the limitation of constitutional principles, as well the rule of law as the separation of powers. This is an important task for us taking part in legal research and education, and has major implications for addressing other existing and potential environmental crises nowadays.

### **Mahito Shindo**

In the field of environmental law, the issue of public participation in decision-making processes is crucial for realising good environmental governance. 'Access to justice' is one of the three pillars of the public participation scheme, which is set out in the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).

This paper discusses the potential of the use of the institution of the Ombudsman as a mechanism through which to fulfil the "access to justice" requirement of the Aarhus Convention. 'The Ombudsman', here, means an institution so what called 'the classic Ombudsman', which is a legally established watchdog on administrative activities and usually belongs to the legislative bodies. The Aarhus Convention clearly specifies judicial and administrative remedies, but does not refer to the Ombudsman clearly.

This paper will address the efficacy of the Ombudsman as a mechanism of access to justice, through discussing the

functionality of the Ombudsman. This discussion will be based on the ad-hoc comparison of the Australian Commonwealth Ombudsman with Japanese administrative remedies and the courts. For elements of functionality, assessment targets, effectiveness and accessibility will be examined.

### **Tadashi Otsuka**

Last October the Japanese Government introduced an Experimental Nationally-Integrated Market for Emission Trading and invited companies to join this scheme. On Dec. 12<sup>th</sup>, 2008, 501 companies applied for it. This market has three aspects: an Experimental Emissions Trading Scheme (ETS), Domestic Credits, and Kyoto Mechanism Credits. There are two kinds of participants in the scheme, those who set targets and those who do not. For the former, there are two methods of trading: pre-allocation and post-account settlement. The scheme is based on Voluntary Action Plans, only those who buy and sell emissions are to open accounts and aims to prevent speculation by introducing features such as post-account-settlement ETS, commitment reserves (90%) for businesses that select pre-allocation ETS, and banking and borrowing.

This presentation takes the view that the targets are voluntary and a little too lenient and that Emissions Trading will not be considered as a corporate management strategy when a firm participates in this scheme as a member of a group firms in a certain business sector. Further, trading volumes may be small because of the restrictions on opening accounts and there is little likelihood that the emissions from facilities will be verified, because third-party verification is not mandatory. These last two issues will reduce the significance of the introduction of an Experimental Nationally-Integrated Market for Emissions Trading.

Last June Tokyo introduced the first mandatory total amount reduction of CO<sub>2</sub> and the first mandatory ETS in Japan. This scheme has three features: it focuses on total amount reduction, it is mandatory and it belongs to the 'cap and trade' scheme genre. Moreover it includes office buildings and can be regarded as the first city-wide total amount reduction scheme in the world. A further distinguishing characteristic is that this scheme allows only the trading of reduced (i.e. surplus) amounts below the target. This characteristic means speculation will be prevented, but may hurt the cost-efficient reduction of

greenhouse gasses. The scheme does not admit the use of Kyoto mechanism credits and there is some concern about the introduction of local ETS within a national ETS, with a need to harmonize the local scheme with the national scheme. It seems the double selling of one unit of credit (nationally and locally) will be unavoidable, because there will be confusion when one unit of credit is admitted in one scheme but is not admitted in the other.

### **Satoshi Kurokawa**

This presentation will analyze the Emission Trading Scheme (ETS) of Japan and that of Tokyo, as well as prospects for success. The newly introduced national ETS is separate from Japan's subsidy program, and purely voluntary, with about 1000 entities participating in the program, but is expected to be successful. In contrast, the Tokyo ETS is a compulsory cap & trade scheme with the distinctive characteristics of primarily aiming to reduce CO2 emissions from office buildings using a mechanism similar to the Clean Development Mechanism of the Kyoto Protocol. The CO2 emissions of the commercial sector have increased since 1990, so it is very important to reduce the emissions from this sector. This system will be effective in 2010 and will target approximately 1300 office buildings and factories, which produce roughly 40% of the total CO2 emissions from the commercial and industrial sectors in Tokyo. In 2004 the Ministry of the Environment tried to introduce a carbon tax in Japan. Despite the very low tax rate imposed, it encountered very strong opposition, hindering its success. As the recent high oil price crisis shows, a carbon tax is effective. In an era of economic crisis and unstable, unreliable markets, it might be time to reconsider introducing a carbon tax in Japan.

### **James Prest**

A comparative review of recent developments in climate law and policy in Australia and Japan reveals interesting similarities and some important points of distinction. This paper compares the proposed legal framework for emissions trading in Australia with features of the Japanese environmental law & policy. The paper analyses selected law in each nation for (a) carbon emissions trading; (b) energy efficiency; and (c) renewable energy deployment.

This paper asks how the legal and regulatory framework can be reformed and adapted – in the midst of the banking and financial crisis – in order to encourage continued and increased flows of investment into low-carbon and zero carbon infrastructure, particularly for electricity generation. There is an urgent need to discourage continued investment in carbon intensive infrastructure, to avoid 'carbon lock-in'. Both countries propose the introduction of carbon trading and already have experience with trading on a limited scale. Both nations have preferred market mechanisms and voluntary measures rather than traditional direct (or 'command and control') regulation. A key question for Japan is whether carbon trading should be mandatory, and for Australia, how low the aggregate emissions cap should be set. The Australian experience in the 1990s shows the ineffectiveness of a voluntary approach in constraining growth in emissions.

The proposal to trade the way out of the climate crisis raises important legal questions about the allocation of responsibility between the private sector and the regulatory State. In Australia, there have been strong demands for payment of 'compensation' by the State to affected heavy industries. Yet it is national governments which may be required to purchase certified emissions reduction units in the international market to cover shortfalls in meeting national commitments. The paper explores these issues.

It progresses to explore the implications of the assumption of many commentators that strict regulation is inappropriate on the grounds of economic inefficiency. When the need for a dependable, swift and reliable response to climate change is combined with the financial risk to the State of failure to meet reduction targets, serious consideration must be given to complementing emissions trading with a targeted direct regulatory approach. This will involve prohibiting the construction of new coal fired generation plus other mandatory measures and incentives including ambitious renewable energy law and strong energy efficiency laws. The risk that emissions trading will be of limited application and aspiration in the short to medium term strengthens the case for strong measures to complement the operation of carbon trading.