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SKILLED AND UNSKILLED CHINESE MIGRANTS IN JAPAN

Context and perspectives

Hélène LE BAIL*

This paper is the result of a number of contributions for conferences and seminars between 2011 and 2012. The analysis developed below does not represent the core of the fieldwork I have been involved in during my study period at the Maison franco-japonaise Research Center (French Research Institute on Japan, in Tokyo). This research project deals more precisely firstly with marriage and migration – involving a series of interviews with Chinese women who arrived in Japan due to arranged marriages – and, secondly, with support associations for women migrants in Japan, collecting biographies of Japanese activists and the staff of NPOs. The fieldwork produced on support associations is part of a Japan-French group research project funded by the French and Japanese national research agencies (the ANR and the JSPS respectively). The project is entitled Local Initiatives against the Exclusion of Foreigners (ILERE): <http://www.initiative-locale-migration.fr/index.html>.

The various contributions I have focused on for this paper provide a much needed broader analysis of the context into which foreigners migrate in Japan today, with an emphasis on the more peripheral areas (where most of the women I have interviewed live) and on the case of Chinese migrants.

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Introduction

During the last three decades, Japan has been one of the main destinations for Chinese migrants and expatriates. In 1980, the Chinese population in Japan was just over 50,000. Thirty years later, according to Immigration Bureau statistics, this number had grown thirteen-fold to 687,156 in 2010. In 2007 the Chinese surpassed the Koreans, who are often able to obtain Japanese citizenship, as the largest group of foreign residents in Japan. This number does not include the few thousand Chinese who have achieved naturalization every year since the 1990s, or the estimated 20,000 undocumented Chinese residents. The Chinese now constitute one third of all foreign residents in Japan.

Chinese residents in Japan can be divided into four main groups according to the way in which they came to Japan: as students, skilled workers directly recruited from China, technical interns, or as spouses of Japanese nationals. The first two groups result from the Japanese government's migration policy towards skilled workers. In Japan a large percentage of Chinese residents entered Japan as students (college or pre-college) and then decided to stay and work in Japan. The policy creates skilled workers, who have also mastered the Japanese language and thus re-socialized in Japan, contributing not only to the Japanese economy, but to civil society as well.

In contrast with this group, "less qualified workers" enter Japan as technical interns and generally contribute to the economy on a short-term basis. The technical intern program accepts foreign "workers" for a period of one year, with an optional extension of two years after completion of a short test. Local authorities rarely attempt to incorporate such categories of short-term residents into local community life. This is particularly visible in rural areas where many Chinese interns work in the farming and fishing sector, clothing industry and small food processing companies. Many Chinese residents in Japan have also arrived through marriage with a Japanese national. Since the mid-1980s, rural authorities and social groups in Japan have tried to attract foreign spouses to the country in order to counter depopulation and to contribute to local workforces and economies.

After the financial crisis following the Lehman Brothers bankruptcy in 2008 and the Great Earthquake in East Japan in 2011, rural areas are apparently losing their appeal for low skilled foreign workers. My

fieldwork also demonstrates the swift decrease in married migrants over the last few years in areas such as the Yamagata Prefecture. Foreign residents, especially Chinese residents, generally conglomerate in Japan's major metropolitan areas, which are also areas with the greatest economic and innovative potential for growth. However, as long as Japan is concerned with the sustainability of more peripheral prefectures as part of its national dynamics, the role of immigration becomes crucial to the future of these regions.

In this paper I propose to focus on two prefectures on the north-east Sea of Japan coast: Niigata and Yamagata, which both bear comparison with other peripheral prefectures. Like most prefectures in the Tōhoku, along the Sea of Japan, on Shikoku Island and Kyūshū Island, Chinese residents represent a larger percentage of foreign residents than the national average and mainly arrived via the technical intern program or via marriage.

I first wish to look at several broad aspects concerning trends in immigration to Japan as well as national context and national policies. The two main immigration related challenges are, firstly, the international and regional context of competition for talent, and secondly, the national context of demographic decline. Political debate and policies have openly focused on the first challenge and since the 1990s have developed measures to attract highly qualified workers. Japan is reluctant however to respond to the second challenge with immigration and very few decision-makers advocate the necessity of compensating for population decrease with migrants, especially in peripheral areas.

In the second part of the paper, I shall focus on the case of Chinese migrants in Japan. A description of the process of skilled immigration will reveal the disparities between metropolitan areas (essentially Tokyo) and peripheral areas. Finally I shall question the sustainability of the modes of channeling immigration to more peripheral areas, through the Technical Intern Training Program and through migration due to marriage.

Part 1

The immigration context

1/ Trends of migration to Japan

Among the general trends relating to the number of foreign residents in Japan (*i.e.* foreigners who stay more than 3 months), I would like to focus on two points: the fast increase in the number of Chinese residents since the 1990s and the decrease in the total number of foreign residents since 2008.

Figure 1 illustrates the fast increase of Chinese residents in Japan. The renewal of Chinese migration to Japan started like in many western countries in the 1980s when China started to liberalize the mobility of its population (Pina-Guerassimoff 1997, Xiang 2007).

Migration trends appear different for each main nationality group, depending on their legal and professional status in Japan. After the 2008 crash, the total foreign population started to decline. Numbers of Chinese are still on the increase but at a slower rate than before.¹

If we look more closely at more peripheral areas on the local level, we will note a trend towards reduction much earlier. While the number of foreign residents has decreased since 2009 on the national level, more peripheral areas started experiencing such changes from 2006 onwards, as is the case of the Yamagata Prefecture (figure 2). The upshot of the 2008 financial crises was mainly to consolidate the decrease in activity in these areas.

It is also interesting to look at trends relating to foreign residents' statuses. Residential statuses requiring higher qualifications (engineers, specialists, skilled workers, investors in figure 3) have been less affected by the decrease. Interns, spouses of Japanese nationals and long term residents, who for a large part hold less qualified positions, show a more drastic decrease.

We can see that most highly skilled workers² first entered Japan as students. Hence we may note that the number of foreign students was not affected by the 2008 crisis (figure 4). It is still too early to assess

1. The scope of this paper does not extend to all foreign groups. For analysis of their situation, a large body of literature is dedicated to each group.

2. A definition of "highly skilled" migrant workers in Japan is proposed by Nana OISHI (see bibliography).

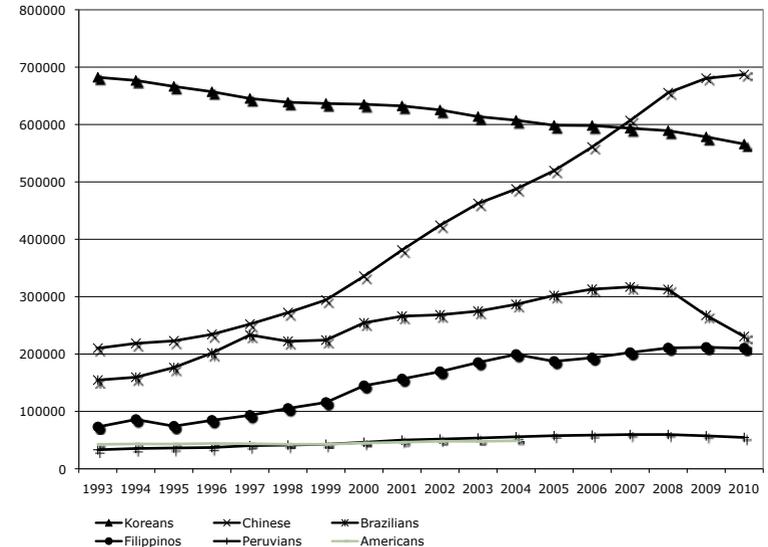


Fig. 1 Evolution of the number of foreign residents in Japan by nationality

Source Immigration Bureau, Immigration Control, Tokyo, various years.

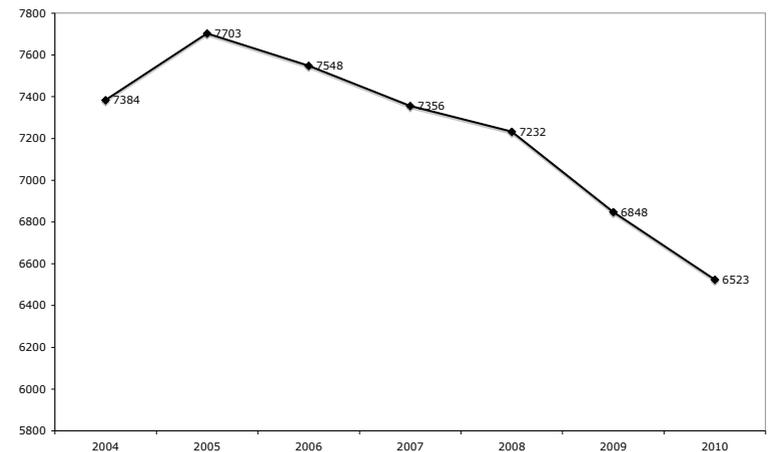


Fig. 2 Evolution of the foreign population in Yamagata Prefecture

Source Yamagata Prefecture, International Exchange and Trade Office: "Yamagata-ken ni okeru kokusaika suishin no hōkōsei", March 2011.

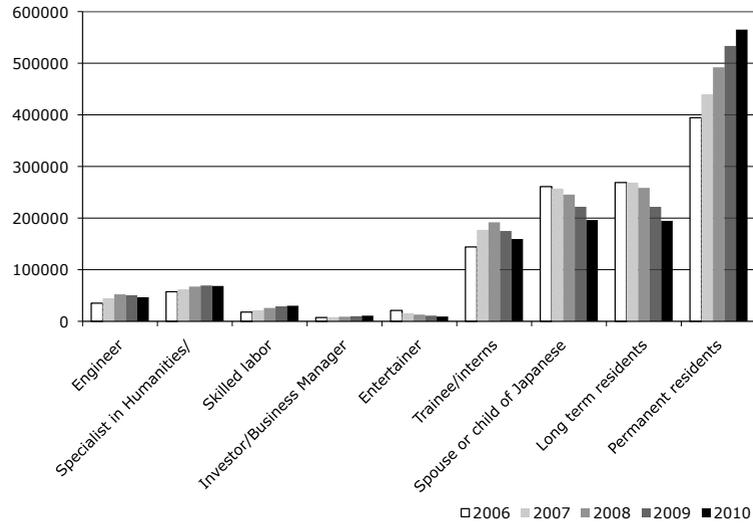


Fig. 3 Evolution of the number of foreign residents by status, 2006-2010
Source Immigration Bureau, Immigration Control, Tokyo, different years.

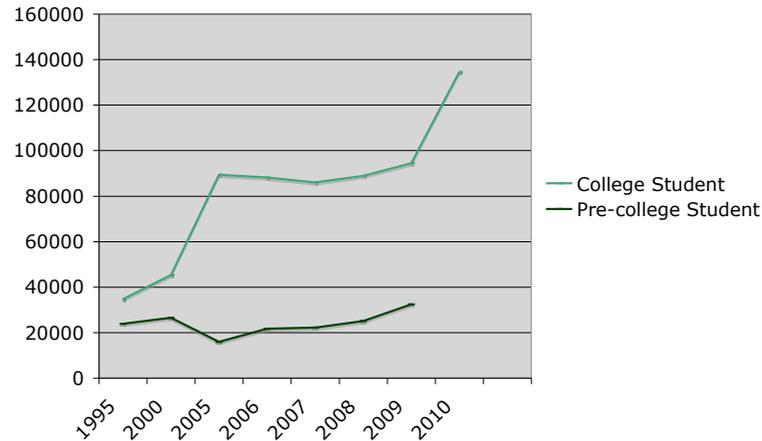


Fig. 4 Evolution of the number of foreign college students in Japan, 1995-2010
Source Immigration Bureau, Immigration Control, Tokyo, 2011.
Remark In the case of students, from 2010 figures onwards also include "pre-college students" (students in language schools or vocational schools) as the two different statuses have been merged into one.

the impact of 3.11 but September saw only a 7.6% decrease in the number of foreign students (a majority in language schools; graduate student numbers have increased). While the number of exchange students decreased by 86%, degree students (the most numerous) increased by 7% (as universities possibly attempted to compensate for an expected decrease in arrivals). However, the numbers of those changing status from student status to employee has clearly decreased, which is worrying from the point of view of maintaining a skilled workforce (this idea will be developed in the second part when looking at Chinese students).

In terms of the impact of March 11, the first statistics from the Bureau of Immigration indicate that the number of foreigners entering Japan has decreased by 24.4%. If we exclude foreigners with a residence permit, *i.e.* the entries for short term stay, the decrease was 31.2%.³ But

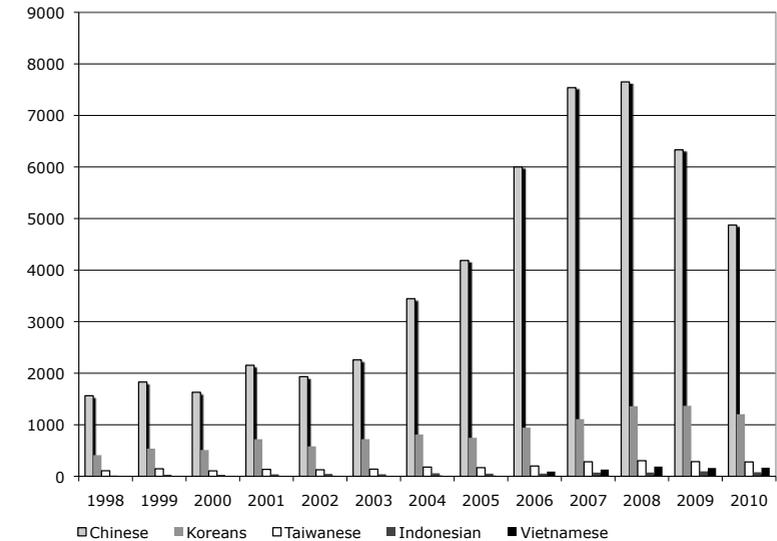


Fig. 5 Evolution of the change of status from student to employee by nationality, 1998-2010
Source Immigration Bureau, Immigration Control, Tokyo, different years.

³ Tourism Center Statistics 観光統計センター, online: <http://www.tsurumoto.com/tourism/2012/01/20117135449244.php>

this short term decrease is to be expected, so it will take another one or two years to assess the real impact of the catastrophe and its economic consequences. In the immediate aftermath of the 2008 crisis, for example, the number of yearly entries decreased by 17%, but increased rapidly the following year. More qualitative research is currently in process looking at the way such disasters may impact migration. Like any difficult period, the earthquake mainly accelerated or confirmed choices that had more or less already been made: to settle in Japan and integrate into society (showing solidarity with the victims of the tsunami presented an opportunity to show proof of settlement), return home or move onto a new destination according to existing networks.⁴

When considering those entering or leaving Japan, the potential draw of the country depends on both the country of origin and the immigrant's status/occupation in Japan. To analyze and accord significance to statistics without qualitative knowledge of these residents is difficult. While on the one hand, it is clear that fewer people have been entering each year (except for students and investors, among other groups), on the other, many are still passing through the permanent residency and naturalization processes.

2/National and regional context: demographic decline and economic recession

Immigration is seen as an issue in Japan for two main reasons. Firstly, it is intricately connected to the debate on demography. Japanese population is the fastest ageing population in the world. In 2009, the proportion of the population over the age of 65 stood at 22.7%. Should Japan maintain a certain level of population, with a balanced division between active and non-active citizens? Should replacement migration become a solution? What is Japan doing to attract new residents, or rather, more precisely, new citizens?

Secondly, pro-immigration arguments highlight the questions of competitiveness and innovation, and thus economic dynamism. The idea is widely shared that the highly skilled labor market has become

4. From ongoing fieldwork research by Gracia Liu-Farrer, elements of which were presented at the conference "Migrant Communities in Japan in the Aftermath of the Tohoku Earthquake" conference, Sophia University, Tokyo, 18 Feb. 2012.

increasingly globalized and that the economic future of each country will depend on its ability to attract (much more than to educate) the best talent. It is also said that new migrants have a higher propensity to take risks and launch innovative activities. Failure to develop a highly skilled competitive workforce means innovation and productivity is weakened through outsourcing and off-shoring. Highly skilled migration is considered as an important incentive for economic growth. How attractive is Japan to foreign workers? Can it retain this attraction in the future? What policies are in place to target the most-skilled workers? And how does Japan define its skilled workforce requirements?

Both sides of the debate have naturally been impacted by the recent economic crisis and the impact of the March 11 earthquake.

The Ageing society

According to a press release from the National Institute of Population and Social Security Research (国立社会保障・人口問題研究所) issued on January 30th 2012, estimates for Japan's population in 2060 show a decline of 86.74 million people (32.3% over 50 years), while the proportion of people over 65 would reach 39.9%. The total population is expected to contract by 30% in the next 50 years and the active population by almost 50%. If this is the case, how can Japan maintain its social and economic system as it is currently organized?

"As a consequence, it will be necessary for just 1.3 persons of working age to support one person who is 65 years or older. Such a rapid population decline will slow the economic growth rate, make it difficult to sustain government finances and the public pension system, and also make it hard to maintain an economic and social system requiring manpower in such areas as health care and long-term care."⁵

The Japanese population is ageing very fast. The Japanese population has been ageing faster than in rich Western countries: over a 24 year period, 1970-1994, the proportion of over-65s jumped from 7.1% to 14.1%. The same demographic change took 61 years in Italy,

5. Nippon Keidanren: "An Economy and Society that Responds to the Challenges of a Declining Population," Oct. 14 2008 (online, consulted 20 April 2012).

85 years in Sweden and 115 years in France.⁶ Furthermore, in the post-war era, rural areas in Japan were also badly affected by an unusually rapid depopulation. The urbanization rate rose from 37% in 1950 to 63% in 1960 (today it is 78%). Japan is also concerned with another demographic trend: a decrease in marriage, especially among men. The proportion of unmarried male over-50s (indelicate referred to as “lifetime bachelors”) increased from below 4% in 1985 to over 15% in 2005. The Greater Tokyo Area is the most concerned by the decrease in marriages, but less urbanized prefectures also show levels of single households higher than the national average.

Another important factor in the demographic issue is that China, the main provider of new residents in Japan will also soon undergo dramatic demographic changes that are sure to have an impact on migration trends. The growing number of single-children will affect Chinese desires to leave the country and stay abroad for a long time.

Competition from Asian countries and beyond

Reference is often made to the context of increased competition within the Asian area. Migration and especially the migration of highly-qualified workers is a crucial element of this competitiveness. In terms of competition for skilled workers, Japan mainly competes with the USA, Canada and Australia and their attractiveness as Anglo-Saxon countries. But to this list we can also add Singapore, and more recently Korea and China.

Japan may appear less aggressive than other countries in the competition for attracting talent. Targets have been set gradually at the political level (for a short review, see Oishi 2012) and a willingness to develop a more active policy was part of the New Growth Strategy under Kan’s government. The ambition, in terms of migration, was to double the flow of people between Japan and the rest of the world. A section of the New Growth Strategy plan was dedicated to growth “driven by pioneering new frontiers” which included the “fostering of global talents and increasing acceptance of highly skilled personnel.” The main targets were to promote the strategic acceptance of foreign students and to attract talents through preferential treatment (Cabinet 2010). The

6. Statistical Handbook of Japan, Statistics Bureau, 2010.

most recent measures implemented in Japan - the point system and the Global 30 – shall be detailed in the following section.

Apart from Korea and China, all Asia-Pacific Area countries actively engaged in attracting skilled workers are English-speaking countries (or in the case of Singapore, both English and Chinese-speaking). Most of these countries have supply-driven migration policies and Singapore’s policy is probably the most emblematic of them. Different statuses are defined according to immigrants’ levels of qualifications and income (*Employment Pass*, *P Pass* and *Q Pass*) offering a gradation of advantages. Singapore, “the Global Schoolhouse”, has also campaigned to sell itself as an academic hub offering the best of Anglo-Saxon education and Asian spirit. Attracting students is clearly part of its wider policy to attract highly qualified workers. For instance a Tuition Grant Scheme was set up to cover foreign students’ tertiary education in exchange for a commitment to work for at least 3 years in Singapore after graduation.⁷ Singapore has actively developed a Global City identity, offering interesting conditions to the most qualified.

In terms of education, when it comes to attracting future skilled workers, Japan is handicapped by its language, compared to other countries where English is the national language (Australia, New Zealand, Canada, USA, Singapore, Hong-Kong) or where a section of tertiary education has been provided in English for a long time (Malaysia, the Philippines, Indonesia). Japan has to compete with this English-Speaking Asia-Pacific Area. In 2006, the USA welcomed 22 % of all international students, followed by Great Britain (12%), Australia (11%), France and Germany (10% respectively). Then came Asian destinations, whose market share is growing rapidly: China (7%), Japan (5%), Malaysia and Singapore (2% each).⁸ Japan is eager to reach the same share as France or Germany which, like Japan, have no tradition of education in English.

7. See the website of Singapore Ministry of Education: <http://sam11.moe.gov.sg/tass/menu/tg.htm>.

8. Veronica Lasanowski, Line Verbik, *International Student Mobility: Patterns and trends*, accessible on the site of The Observatory on Borderless Higher Education. Consulted on April 10th 2010 on: <http://www.wes.org/educators/pdf/StudentMobility.pdf>.

3/Political measures focusing on highly skilled workers and metropolitan areas

If Japan elects to use immigration to boost demography and the economy, questions must be asked of Japan's appeal to highly-skilled workers, as well as its appeal as a country for immigrants to settle.

In a recent article, Nana Oishi tackles the question of why Japan has failed to increase its numbers of highly qualified workers. For qualified immigrants, Japan already has a number of attractive factors, such as "fast family reunification, permanent residency potential, and no labor market test." Oishi's argument is based on recent studies of successes and failures in policies governing highly skilled migration in European and Anglo-Saxon countries. These policies targeted four main factors: economic conditions, openness of professional markets, universities' ability to attract foreign students, and tolerance (Oishi 2012: 1081).

Likewise, a recent working paper by the OECD pointed out that:

"Active recruitment means more than just facilitating work permits for employers or for aspirant immigrants based on credentials. While highly skilled migrants may be attracted to countries with widely spoken languages and high wages regardless of the obstacles, a country with moderate wages and its own unique language will need to do more than just lower administrative barriers."⁹

While wages in Japan may be attractive, the language, the work environment and employment philosophy (an aspect not developed in the OECD report) are still barriers for students and skilled migrants. Oishi's fieldwork confirms these different aspects. As she underlines, many corporations may be interested in hiring foreign students after their graduation, but many are worried about incorporating them into the workplace due to the language barrier. Very few companies have adopted English as an alternative language at work. Japanese companies are also concerned with employee turnover. Often they invest in the training of new employees in the expectation that they will stay for a long time. Foreign employees however are considered as potentially

9. Working paper online: http://www.oecd.org/document/46/0,3746,en_2649_37415_46676654_1_1_1_37415,00.html (Consulted on April 12th 2012.)

more mobile than Japanese employees (Oishi 2012: 1086-87). Not only is the language a barrier, but also work habits and career opportunities (the glass ceiling). Highly qualified workers tend to move to foreign countries to foster long-term career plans. In Japan, many are disappointed or discouraged by the promotion system. In the case of Chinese skilled workers, the "glass ceiling" factor has been well illustrated by Liu-Farrer's fieldwork (Liu-Farrer 2011).

In the last few years, two new plans have been launched to attract highly skilled workers further.

Point system

In the Asia-Pacific area, several countries have implemented point systems to attract qualified workers with Canada, New Zealand, and Australia among them (other countries with such a system include the UK). Point systems, or "list of occupations" systems, (Canada, Australia and France) provide clear indications that work force requirements also apply to other sectors beyond those requiring high levels of education. Some occupations open to immigrants do not require a university degree. This is not the case in Japan, where the categories targeted by the point systems are all highly skilled categories: education and research, high level engineering, investment and business management.

While in the two first categories the level of education is an important criterion, it is less important in the third category. Only the third category is open to different profiles and skills not covered by academic qualifications. Thus the third category privileges professional experience and income level. Compared to other point system policies, the Japanese example is based on a narrow definition of "skilled workers" as mainly tertiary education graduates.

The point system is a sign of a shift in Japan's immigration policy. However caution becomes the operative word when faced with issues incurring some kind of "social burden." The parents of the highly-skilled residents, for example, are accepted if they live with their children and their stay is limited to three years.

PRESENT SITUATION - foreign skilled residents (skilled working visa)	NEW SPECIAL TREATMENT for highly skilled workers recognized by the point system
Work authorized in a limited panel of positions according to the residential status	Work authorized in a broad range of activities included into three categories: - "education and research" - "highly qualified specialists and engineers" - "business management"
Permanent residency after more than 10 years of residency	Permanent residency after 5 years of continuous activity with the status of highly skilled worker
Work of the dependant possible only with a special permission from the Immigration Bureau and limited to 28 hours a week	Possibility for dependants to work full time in Japan even if their level of qualification does not respond to the actual criteria asked for the different types of working visas
No possibility of being accompanied by parents	Parents of the highly skilled workers or his/her partner can accompany
No possibility of being accompanied by domestic workers except for a very few exceptions	Possibility to bring along domestic workers

Fig. 6 Comparison of the advantages given to highly qualified workers in Japan in the general visa system and in the new point system.

Source Based on information available on the website of the Immigration Bureau of Japan [consulted May 2012]: http://www.immi-moj.go.jp/info/120416_01.html

Global 30 Project/ "300,000 foreign students Plan"

In 2008, the Government of Japan announced the "300,000 Foreign Students Plan," which called to increase the number of foreign students in Japan from the current 140,000 to 300,000 students by 2020.¹⁰ Its aim is to dramatically increase the number of foreign students studying in Japan in the next five years as a means of expanding the pool of highly skilled workers:

10. Guidelines (「留学生30万人計画」骨子の策定について) were published on the website of Monbukagakushou MEXT on July 29th 2008: http://www.mext.go.jp/b_menu/houdou/20/07/08080109.htm

"We believe that proactive acceptance of foreign students, who become a major source of high-level human resources, by Japanese institutions of higher education, leads not only to the reinforcement of Japan's international human resource pool but also builds human networks between Japan and other countries, enhances mutual understanding and fosters greater amicable relationships, and contributes to global stability and world peace [...]"

Meanwhile, if we look at the current state of foreign student enrollment in other countries, we see that in the case of Germany, a developed non-English-speaking nation like Japan, foreign students account for 12.3% of all students enrolled in an institution of higher education. In France, foreign students account for 11.9% of all students in an institution of higher education. (Meanwhile, foreign students in an English-speaking nation account for, in the case of the UK, 25.1% of all students in higher education, and likewise 26.2% in Australia.)

If Japanese institutions of higher education are to secure a level of foreign student enrollment similar to that of other developed nations, there is a need to increase the percentage of foreign students from the current 3 percent-plus to a percentage close to that of Germany or France, or about 10%. (In other words, 10% of 3 million students, which is roughly equal to 300,000.)" (Interview with the officer in charge of the plan at the Ministry of Education, Culture, Sports, Science and Technology.¹¹)

Promoting the transition from school to work, already a concern in the past, is part of the Global 30 Project. Several recruitment companies have created job fairs dedicated to foreign students in Japan on the same model as the *setsumeikai*, the existing company recruitment events for Japanese students. The recruitment and career management agency Disco, for example, organizes special recruitment forums dedicated to foreign students¹²: *Gaikokujin Ryūgakusei no tame no Career Forum*.

11. Interview on the governmental official website called "Study in Japan" to promote the studying in Japan (gathers all the information needed to study in Japan): <http://www.studyjapan.go.jp/en/toj/toj09e.html>

12. See the company website and the fair notice on http://www.disc.co.jp/topics/gairyu_20111228.htm

Global 30 Project

Project of the MEXT, Ministry of Education, Culture, Sports, Science and Technology, for Establishing Core Universities for Internationalization

A selection of universities that will function as core schools for receiving and educating international students. In 2009, thirteen universities were selected. These core universities will play a major role in dramatically boosting the number of international students educated in Japan as well as Japanese students studying abroad.

1. What is the Global 30 Project for Establishing Core Universities for Internationalization?

Japan formulated the 300,000 International Students Plan in July of 2008, with the aim of receiving 300,000 international students by 2020. The "Global 30" Project for Establishing Core Universities for Internationalization is being implemented to realize this goal by selecting measures for the internationalization of universities including the recruitment of international students, along with forming Japan's centers of internationalization. Selected universities will receive **prioritized financial assistance of 200 to 400 million yen per annum over the next 5 years. Endowed with this aid, each university will strive to recruit 3,000 to 8,000 international students.**

2. Thirteen Universities to Lead Japan's Internationalization!

In 2009, the following 13 universities were selected as global centers:

Tohoku University,
University of Tsukuba,
The University of Tokyo,
Nagoya University,
Kyoto University,
Osaka University,
Kyushu University,
Keio University,
Sophia University,
Meiji University,
Waseda University,
Doshisha University,
and Ritsumeikan University.

3. Action Plans for the Core Universities!

Core universities will take the following steps to create an attractive educational and research environment for international students.

- 1/ Expansion of course programs by which degrees can be earned through English-only classes
→ Establish courses at the universities selected through which English-only degrees can be obtained: 33 undergraduate courses and 124 graduate courses over the next 5 years
- 2/ Enhancement of systems for receiving/hosting international students
→ Enhance systems for receiving/hosting international students, such as specialist support in studying and academics, as well as for completing various procedures and formalities both in/out of the university; and provide internship programs at Japanese corporations, etc.
- 3/ Provide international students with opportunities to learn about Japanese language and culture
→ A plan to provide high-quality instruction in Japanese language and culture
- 4/ Promotion of strategic international cooperation
→ Establish two separate overseas offices per core university, to enable local recruitment through admissions tests, etc., and boost the number of Japanese students studying abroad through exchange study programs, etc.

4. Establish an "Overseas Office for Shared Utilization by Universities" as the liaison for Study in Japan!

Establish a "Overseas Office for Shared Utilization by Universities" as the liaison for Study in Japan; in 8 cities in 7 countries. Upon completion, these offices will provide comprehensive information on Japanese universities overall, including enrollment seminars, admissions tests, etc.

Tunisia (Tunis) [University of Tsukuba], Egypt (Cairo) [Kyushu University], Germany (Bonn) [Waseda University], Russia (Moscow, Novosibirsk) [Tohoku University], India (New Delhi) [Ritsumeikan University], India (Hyderabad) [The University of Tokyo], Uzbekistan (Tashkent) [Nagoya University], Vietnam (Hanoi) [Kyoto University].

Source MEXT website: <http://www.mext.go.jp/english/highered/1302274.htm> (consulted on April 20th 2012.)

English
DISCO CAREER AGENT 一人ひとりにベストコンサルティング

HOME 新卒就職 はじめての転職 グローバル転職

DISCO - 新卒就職トップ > 2012年度卒業予定の方トップ > 外国人留学生のための就職サポート

Career services For International Students

外国人留学生のための就職サポート

自分の出身国以外で働くということはとても難しいことですが、それ以上に外国（日本）だから経験できることや学ぶことは多いはず。

ディスコキャリアエージェントでは、外国人留学生のための各種セミナーや企業紹介など、さまざまな情報をお届けし、就職活動のスキルアップを応援するとともに、新しい可能性を広げのお手伝いします。

卒業後、日本で仕事をしてみたいという強い思いと目的をお持ちの方を応援します！

日本企業の採用制度について

日本では、中途採用よりも新卒採用を重視する傾向があります。業績の悪化によって中途採用を減少・中止しても、新卒採用を行う企業は少なくありません。それは、企業の理念を継承し、将来の幹部となる人材を長期的な視点で育てていきたいという考え方があるからです。

日本企業に就職する外国人留学生の数は、ここ数年で確実に伸びています。

事業のグローバル化が進んだことで、日本の企業でも、国際的な観点をもち、語学力の高い優秀な人材を採用したいと考えようになってきているのです。外国人留学生の能力や意欲の高さに、日本企業が期待しているといってもよいでしょう。

外国人留学生のための就職サポート

紹介企業一例

就職相談
面談・セミナー
申し込み

日本での就職活動で気をつけなくてはならないこと

ポイント❶ 学力・知識があるだけでは採用されない

日本企業は「会社の方針」に従って社内外との信頼関係を築き、会社に貢献できる人材を求めています。そのため選考では「能力・知識」はもちろんのこと、「どんな考え方をするのか」「組織の中でどんな行動をするのか」を重視しています。

ポイント❷ それぞれの企業で求める人材像は異なる

日本企業は、個人としてよりも組織の一員としての行動や言動を求めます。そして、その企業のブランドにふさわしい社会人であることを重視します。企業によって企業理念や価値観が異なるため、「優秀な人材」の定義も異なりますし、どんなに学力や人間性が優れていても「会社に合わない」と判断されれば、なかなか採用につながりません。

つまり、エントリーシートや履歴書を書く段階で、「私はこの会社の求める人材に近いんで

Fig. 7 Web page of the recruitment agency DISCO dedicated to foreign students

Source <http://www.discocareer.com/first/2013/foreigner.html>

The Global 30 Project's targets are not new, but budget increases¹³ and other incentives have been introduced to produce a more “aggressive” policy so that Japan can maintain its share of the global education market.

Measures reinforcing inequalities between central and peripheral areas

The point system will inevitably attract people to the economic and financial centers of Japan, and to wherever innovative, dynamic companies and research centers are to be found, in other words where most highly skilled foreigners are already living.

A glimpse at Global 30 Project progress also makes clear that those universities selected to join the project are the best universities between Tokyo and Osaka, plus the Tōhoku and Kyūshū Universities. 17 more universities should have joined the program, but this is now unlikely due to budgetary restrictions.

This project will – if it is not already the case – further confirm the imbalance in the geographic distribution of accepted requests for a change of visa from student to worker status (figures 8). Not surprisingly, Tokyo and the Kantō area receive the highest number of accepted requests for changes in status. Industrial areas such as the prefectures of Aichi, Shizuoka, and Gifu, the most dramatically affected by the 2008 crash, have seen a decrease in students participating in the local economy. Meanwhile, less industrial areas, the focus of this paper, clearly benefit little from this system. In Yamagata where the number of foreign students is very low, only 12 students stayed on to work post-graduation in 2008, dropping to 4 in 2009. In Niigata, where the number of foreign students is relatively high (over 1,000), increasingly less students have been staying on every year, with only 38 in 2009.

Similar to Tokyo, smaller cities in Japan also hold job fairs targeting the students who will soon be graduating. Following the measures taken in Tokyo, less attractive prefectures have also begun to attempt to promote contact between foreign students and local enterprises under the

13. The budget is said to have been cut by 30% a few months later because of the 2008 economic turmoil (<http://chronicle.com/article/A-Slow-Start-for-Japans-Ef/124346/>)

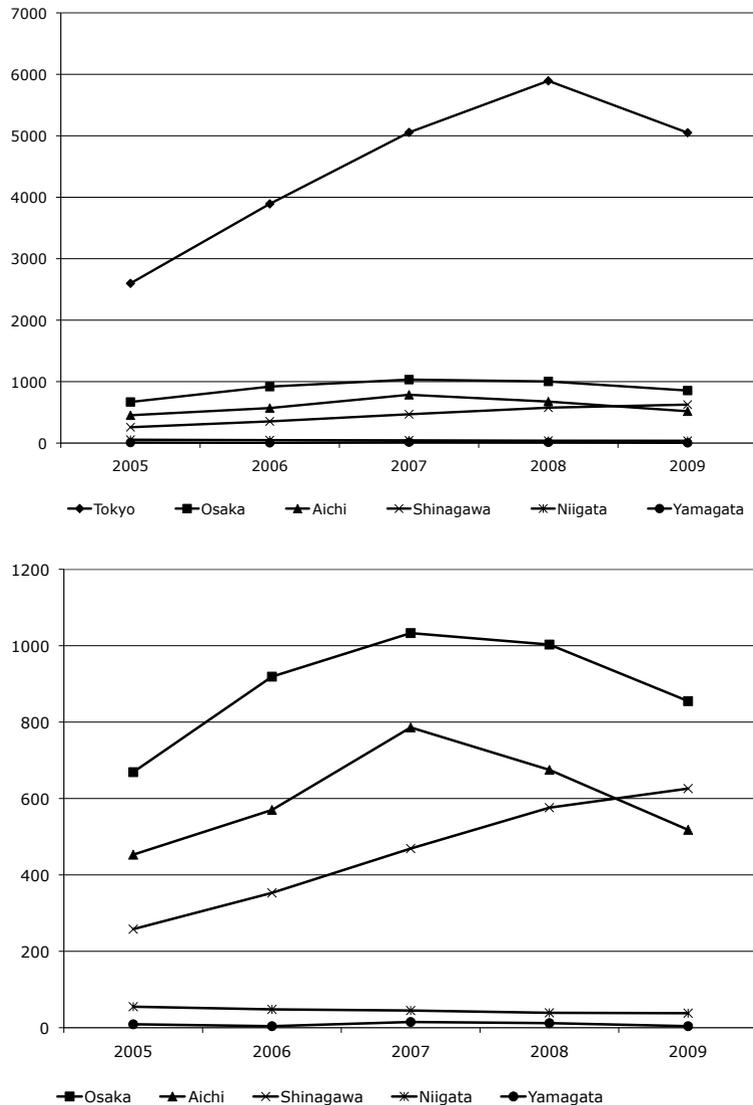


Fig. 8 Foreign students who obtained a work visa after graduation by prefecture, 2005-2009

Source Immigration Bureau: Heisei 21 nen ni okeru ryūgakusei nado no nihon kigyō e no shūshoku jōkyō ni tsuite (Employment of foreign students in Japanese enterprises in the year Heisei 21), July 2010, online: http://www.moj.go.jp/nyuukokukanri/kouhou/nyuukokukanri07_00020.html (accessed on February 1st 2012).

initiative of the local authorities, usually via the International Exchange Association of the Prefecture or the city.

In the Prefecture of Niigata, the Association for International Exchanges (Niigata-ken kokusai kōryū kyōkai) has been organizing seminars on the topic of foreign student employment since 2007. They invite both local entrepreneurs and foreign students to take part in the seminars alongside a speaker from the Career Management Agency, Disco, to present the incentives for foreign student recruitment. The last seminar was held in October 2011: “Support seminar for the hiring of foreign students” (Ryūgakusei shūshoku shien seminā). Fourteen companies took part in the event from the following business sectors: hotel businesses (3), travel agencies (1), food processing (2), education (1), construction (2), catering (1), IT (1), machinery and equipment (2), metal working (1). Distribution by nationality of the students was: 3 Mongol, 1 Malaysian, 1 Burmese, 5 Vietnamese, 1 Thai, and 33 Chinese,¹⁴ the Chinese contingent unsurprisingly the largest. Chinese students were also the most favored by companies. According to a survey produced in 2011 of 968 companies by the recruitment agency, DISCO, the proportion of companies intending to recruit foreign students in 2012 rose from 13.1% to 24.5%. Many of these companies have a significant presence (offices, plants, etc) abroad, and 54.4% of them placed priority on recruiting Chinese students.¹⁵ Recruitment of foreign students is most often linked to development projects abroad. According to respondents, more enterprises were willing to recruit Chinese employees after the 2008 crash due changes in managerial strategy such as the relocation of production or further forays into China’s growing consumer market to compensate for the local economic crisis. This appeal to China confirms the “occupational niche in the transnational economy” (as described by Liu-Farrer, see above) and, at the national level, the total Chinese population in Japan is one of few that did not decrease after 2008, a steadfast presence that highlights the extent of their settlement. However, at the prefectural level, inequalities have been further accentuated.

¹⁴. Interview with the President of the Association for international exchange of the prefecture of Niigata, 10 Feb. 2012

¹⁵. Gaikokujin ryūgakusei no saiyo ni kansuru kigyō chōsa (Companies Survey on foreign students recruitment), Disco Career Research, 18-26 August 2011, online: <http://www.disc.co.jp/uploads/2012/01/11kigyō-oversea-report8.pdf>

The desire on the part of more peripheral regions to take part in this dynamic is further illustrated by the think tank ERINA (The Economic Research Institute for Northeast Asia, Kan Nihon-kai keizai kenkyūjo 環日本海経済研究所) based in Niigata City. The think tank is dedicated to the study and promotion of the Northeast Asia economic zone (Japan coast, Japanese Prefectures, Far Eastern Russia, Mongolia, North and South Korea and Northeast China, *i.e.* Liaoning, Jilin and Heilongjiang provinces) and publishes studies into national economics and economic exchange. The aim of the Northeast Asia economic zone is to promote exchange and investment between countries with complementary assets (natural resources, working force resources, financial resources). In the past 8 years, ERINA has also organized (no doubt at the request of prefectural authorities) an annual job fair for foreign students, which takes place in May for recruitment after graduation in March the following year. In 2011, the fair featured approximately 15 companies and 80 foreign students, and resulted in two or three recruitment contracts. Additional effort has been made at the local level to retain qualified foreign workers but these attempts have proved largely ineffective.

The challenge for non-metropolitan areas is not only to attract foreign workers and professionals, but also to keep them, or to keep working with them. The flow to central urban areas is even more dramatic in the case of foreign workers than of Japanese workers. Studies of foreigners' mobility within Japan show that foreigners tend to concentrate in the major cities even more than Japanese residents. In 2007, the Tohoku area, for example, lost 0.59% of its total population, while the decline in foreign residency was 2.44% (Ishikawa, 2011). Students from these areas are more inclined to move to central Japan after graduation to look for jobs.

Furthermore, when examining the needs of peripheral areas, the issue is not only one of attracting and retaining highly skilled workers. In the perspective of population replacement, and the maintenance of economic activity and community life over the whole territory, highly skilled workers should be the only category to be encouraged to settle in Japan. But, to the present, national policy has tended to focus on attracting highly skilled workers only and a taboo still prevails regarding less qualified immigration.

Part 2

Is Japan still attractive for skilled and less skilled Chinese migrants?

1/ The importance of education in attracting skilled workers

Japan's official policy is certainly not pro-immigration, but when we look at what is often referred as the "side-doors" of immigration (Kajita 2001) - *i.e.* student visas and the resident status for Japanese descendants - it is clear that Japan has been opening its doors to immigrants since the 1990s. Due to the status transfer system where student visas are switched for one of 13 visas for skilled workers, many Chinese people do settle in Japan after their studies. There are no quotas for these transfers and the majority of visa requests are accepted each year.

From student to working visa

In 1983, Japan's government announced a plan to raise its number of foreign students to 100,000 by the year 2000. The student visa thus provided a privileged immigration route for young Chinese adults.

One of the main channels for qualified Chinese workers to work in Japan and for Japan to attract qualified workers from China is the possibility for college, or pre-college, students to change their status of residence for employment. In 1984, only four Chinese students were able to obtain working visas after graduation from the Japanese university system; in 1985, this figure had increased to 38, while in 2008, the number peaked at 7,651. Since 2008, the figure has decreased, but the proportion of requests accepted has remained the same (above 90%), which implies that the decrease comes from a lower number of Chinese students requesting a visa change. For many years, Chinese students accounted for approximately 70% of accepted status change requests. The total number of Chinese students who have obtained Japanese work permits since the beginning of the 1980s exceeded 62,000 by 2010.

The evolution from student status, to working status and then to a permanent visa (or naturalization) is an established process of

settlement among the Chinese (Le Bail 2011). In her thesis on labor migration from China to Japan, Gracia Liu-Farrer underlines how occupational niches specializing in transnational business have emerged as a result of the expanding the transnational economy between China and Japan, as well as the result of the skill sets many of Chinese students in Japan possess, as the majority of them are enrolled in undergraduate science and humanities programs (Liu-Farrer 2011: 86, 99). The 2008 crash may have encouraged this tendency as more Japanese companies sought to offset losses by enhancing business relations with

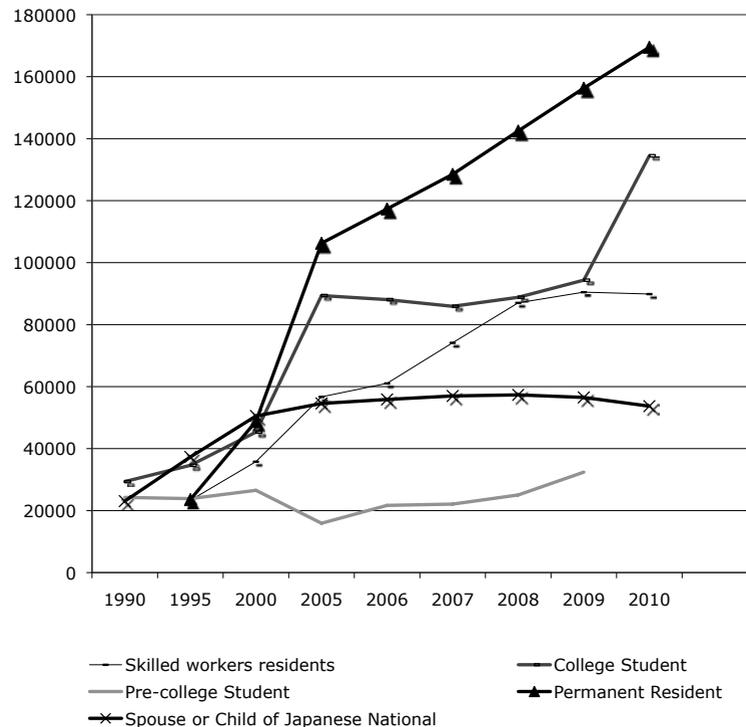


Fig. 9 Evolution of Chinese students, skilled workers and permanent residents in Japan, 1990-2010

Source Immigration Bureau, Immigration control, Tokyo, 2011.
Note Since 2010, college and pre-college student categories have been merged into one student category.

China or relocating production to China. Chinese students who have graduated in Japan have become ideal actors in Japanese companies' internationalization.

The transition to entrepreneurship

As demonstrated in various papers on qualified Chinese migrants, it is not uncommon to see former students and employees creating their own companies and taking advantage of their position as a bridge between two countries and two markets (Le Bail 2005; Wang 2005). Liu-Farrer explains the large number of Chinese who elect to switch from employee to entrepreneur through a series of factors from job security to lack of career opportunities due to discrimination (Liu-Farrer 2011: 100-104).

Transnational entrepreneurs bring to bear the complementary capacities of their adopted country and their country of origin. The IT company EPS illustrates very well how Chinese students, who arrived in the 1980s and who graduated from Japanese universities, managed to succeed in Japan and then extend their activities back to China. EPS was founded in 1991 in Tokyo by a new arrival from China. Today the company has over 1,000 employees, was floated on the stock exchange in 1998, and has since opened branches in Peking and Shanghai (Le Bail 2005). Foreign entrepreneurs may not only capitalize on their capacity to act as mediator, but also on the needs of transnational communities (Tajima 2003). The statistics confirm a rapid growth of the number of Chinese business managers and investors in Japan.

Any country hosting Chinese immigrants knows the benefits of being connected to international Chinese entrepreneur networks and the dynamism these bring. But once again, the hegemonic recipient of these migrants is the greater Tokyo area. Among the 3,300 Chinese managers and investors in 2010, 1,444 were residents of Tokyo and 2,274 in Tokyo plus Chiba, Saitama and Shinagawa. They were only 3 in Yamagata and 14 in Niigata.

Interviews confirmed that, except for a few small companies created by the Chinese such as trading and IT companies, very few foreigners launched their activity in peripheral areas. The director of ERINA underlines that very few Chinese would invest and create their

enterprises in Niigata since the situation to develop new activities is more difficult for them.¹⁶

Japan also benefits from former Chinese residents in Japan who have returned to China and who now play an intermediary role in various operations such as trading and subcontracted work in China. This kind of cooperation is particularly welcome among activities struggling from the recession. In 2010, the newspaper *Asahi* presented two cases in the North-East area of Japan (Tohoku) under the title “Young Chinese key for long-term gain.” The first case was that of Yu, a student from North-East China, who graduated from the Japanese Iwate University. Entrusted with encouraging the Iwate Prefecture’s economic interests in Dalian in 2005, he suggested selling traditional Nanbu cast-iron teapots in China. In 2008 he played an intermediary role negotiating a major contract with China. He also connected the Iwate Prefecture with Daketang, a famous tea house in Shanghai. Since then, Nanbu teapots have become very popular in China, where the unit price can reach \$1,000. A traditional once-threatened craft has now been revived in Iwate and training in the craft among the young has been resumed.¹⁷

More uncommon is the case of He, who was not a student but a technical intern in Japan and only spent three years in the host country as a manual worker. In 1992 He came from Hubei, to Sanjo in Niigata Prefecture to work in a metal processing company, Pearl Metal. At the time, 30 other companies in the city also invited Chinese interns due to manpower shortages. At the end of the contract, he contacted the director of the company to sell products (woks, pots, pans) in his Chinese hometown. Since 1995, he has been head of the Chinese market for the products. Today there are more than 300 retail outlets in China and 30 former Chinese interns now take charge of sales in China.¹⁸

As we have seen, China is the main source of foreign students in Japan, and these students become the main source of qualified professionals, investors and entrepreneurs. In part 1, we presented the policies implemented in 2008 as part of the “300,000 Foreign Students Plan.” The implementation of the plan confirms the current process

16. Interview, February 11th 2012.

17. Young Chinese key for long-term gain, *Asahi shimbun*, dec. 21th 2010. Online: <http://www.asahi.com/english/TKY201012200316.html> (consulted on dec. 22th 2010).

18. *Idem*.

from studies to working and settlement of the Chinese in Japan. But as shown in the first part of this paper, this process seems to be increasingly concentrated in the Kantō area, as figure 8 illustrates.

Not surprisingly, peripheral areas welcome few foreign students and even fewer stay in the Prefectures to work after graduation. There is a vast imbalance in the division of status transfers from student to working visa. Tokyo and the Kantō area deliver most permissions and the situation did not change much after 2008. On the other side, industrial areas such as the prefectures of Aichi, Shizuoka, and Gifu which were more dramatically affected by the 2008 crash have undergone a decline in the number of students who obtained positions in local businesses. Less industrial areas, meanwhile, clearly benefit little from this system. In Yamagata where the number of foreign students is very low, only 12 students stayed to work in 2008 and 4 in 2009. In Niigata where the number of foreign students is relatively high (more than 1,000), less and less students stay every year; there were only 38 in 2009.

If we look at Chinese populations in prefectures such as Niigata and Yamagata, the profile of Chinese residents is very different and they are not renowned as sources of dynamism. More often foreign populations in such areas are excluded from participating in civil society and “invisibilized” due to their legal status and social image.

2/ Aging society, care issues and the maintaining of local small-scale activities in peripheral areas.

While the reform of immigration law (to be implemented in 2012) proposes new measures to attract “highly skilled” workers, nothing will necessarily change for “unskilled” (and manual) workers. The Training and Technical Internship Programs, the main means of bringing manual workers to Japan, were reformed in 2010, but have not been transformed into a proper immigration policy as proposed by several lobbying groups inside and outside Japan.

Another means once encouraged by local authorities to maintain communities was the promotion of international marriage, commonly referred to as “marriage migration,” a form of migration often studied as part of working migration.

Today, both the number of technical interns and marriage migrants has decreased. Areas with underlying social conflict, who may also be discouraged by the few tools they have at their disposal to attract migrants seem to avoid the debate on immigration. The presence of lesser qualified workers is not an issue in innovation and development, but of promoting and maintaining economic activities on a local level and preserving social communities, which even at local levels can be considered as contributing to Japan's dynamism.

The mainly “unskilled” Chinese population in Niigata and Yamagata Prefectures

Figure 10 shows that in Yamagata and Niigata, compared to the situation in the whole country, the peripheral prefectures welcome technical trainees in a larger proportion (the most remarkable case is Ibaraki Prefecture). It also shows an evident lack of attractiveness for skilled workers (even if they do host a high amount of students, like Niigata). What is less apparent in these figures is the greater proportion of foreign spouses with Japanese children. In Yamagata, where foreign spouses arrived earlier, many were nationalized or received permanent resident status; the large percentage of Chinese permanent residents is mainly due to the immigration of Chinese spouses (while in Tokyo, most permanent residents arrived as students).

Thus in these areas the Chinese mainly arrive as technical interns and spouses of Japanese nationals. In the case of Yamagata where the Chinese represent 44% of the total foreign population, the number of foreign residents has been declining since 2006. This is largely due to fewer numbers of companies willing to welcome interns and to the decline in new spouses arriving in the Prefecture.

Technical interns: polemics and lost of attractiveness. Is radical change to policy necessary?

The situation in Japan differs from place to place, but, in all cases, the controversy surrounding internship programs and the decline in local economies have led to a decrease in the number of interns (figure 11). The technical intern programs have been extensively criticized inside and outside Japan for concealing workers' exploitation

behind a discourse of international cooperation. In response to criticism, the program was reformed in 2010, but the structure remains very similar and comparisons are often made with Korea, where a similar system was stopped a few years ago to avoid the unfair importation of labor force.

To replace such a system, civil groups within Japan have proposed alternative policies. This fresh input to the issue of unskilled migration focuses on the needs of the labor force – and residents – in areas suffering from depopulation and economic recession (most recently the

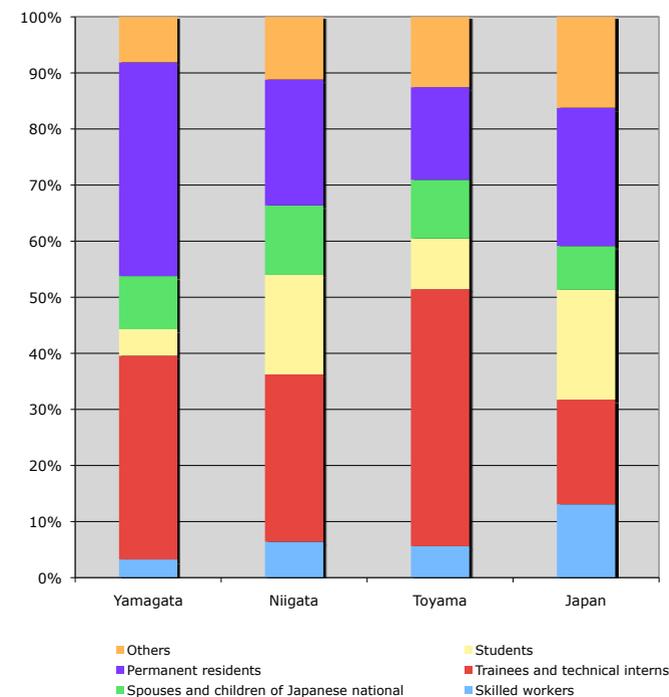


Fig. 10 Division of Chinese residents according to their status of residence in different prefectures

Source National statistics online (accessed February 1st 2012): <http://www.e-stat.go.jp/SG1/estat/List.do?lid=000001074828>.

Note “Skilled workers” refer to residents with one of the 14 kinds of work permit. “Trainee and technical interns” cover technical interns (a new status that appeared in 2010), plus the few remaining trainees and the residents with the “specified activities” visa.

revival of Sanriku after the Tsunami has inevitably been at the heart of the debate). One example is the proposal to promote the entry of foreign teenagers into professional high schools in remote areas, or areas experiencing population and economic decline. Work positions would readily be available post-graduation, in particular in the farming and fishing sectors. Instead of restricting interns to a 3-year stay, the idea proposes to give migrants the opportunity to become local citizens.

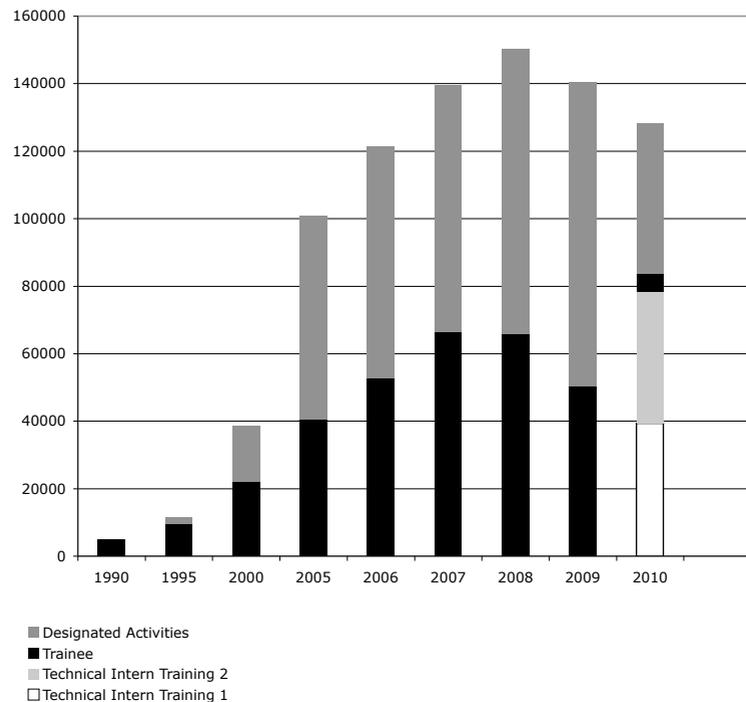


Fig. 11 Evolution of the number of Chinese trainees and technical interns in Japan, 1990-2000

Source Immigration Bureau, Immigration Control, Tokyo, various years.

Note The Trainee and technical intern programs reform was implemented in 2010. Very few foreigners now enter as trainees. Previously trainees would obtain a "designated activities" visa with the mention "technical intern" after one year; they now receive a "technical intern" visa for three years.

This particular proposal was put forward by Sakanaka Hidenori, former director of the Immigration Bureau in Tokyo and now creator and director of the Japan Immigration Policy Institute (JIPI, <http://www.jipi.or.jp/goaisatsu.html>), a small think tank on immigration issues based in Tokyo. Sakanaka published an essay in 2007, which has sparked considerable debate. The book was named "Japan, the Country of Immigration. 10 Million Migrants to Save Japan."¹⁹ In 2008, the National Diet member Nakagawa Hidenao also gave support to the idea in political climate hostile to increased unskilled immigration.

The proposal was echoed by the Keidanren in a report entitled "An Economy and Society Capable of Responding to the Challenges of a Declining Population" (October 14, 2008).

The report starts by looking at the case of skilled workers and students, but a larger section is dedicated to the very broad and imprecise case of "foreign workers with a certain level of qualification or skills." The terms of the report's proposal are much more specific however and it advocates accepting workers into sectors where work force requirements are already known, such as construction, farming, fishing, the care sector, etc.) The report calls for a reform to training programs so that lesser skilled workers can also settle for longer in Japan.

The report is particularly concerned by the situation of medical workers and caregivers, stating that the first round of hiring nurses from Indonesia had been a failure. It also states that the conditions for visa renewal are too draconian, and Keidanren estimates a shortage of 1.8 million nurses and caregivers by 2055 (p. 19).

These proposals from 2008 may gradually finally have an effect on policy makers. No clear position has yet been noticed, but since the Democratic Party succeeded the LDP, official change is expected. For some enhanced immigration will become inevitable to alleviate demographics. Others believe that Japan is ready to adapt to a shrinking, aging population.

19. Sakanaka Hidenori 坂中英徳, Asakawa Akihiro 浅川晃広, *Imin kokka nippon. Senman nin no imin ga Nihon o sukuu* 移民国家ニッポン——1000万人の移民が日本を救う, Tokyo, Kajo, 2007. In English: Sakanaka Hidenori, "The Future of Japan's Immigration Policy: a battle diary," *The Asia-Pacific Journal*, online: <http://www.japanfocus.org/-Sakanaka-Hidenori/2396>. See also: Lawrence Repeta (with an introduction by Glenda S. Roberts), "Immigrants or Temporary Workers? A Visionary Call for a 'Japanese-style Immigration Nation,'" *The Asia-Pacific Journal*, 48-3-10, November 29, 2010, online: http://www.japanfocus.org/-Glenda_S_-Roberts/3450#.

What is of interest in Sakanaka's position is that he does not speak so much of skilled/unskilled migrants, but of future residents. He also underlines the special needs of those sectors hit by recession.

"In agricultural areas where the population has been drastically decreasing, local people are eager for people to settle in their localities. People living in the countryside do not often express themselves, but I assume that they want the government to make quick decisions to welcome people from abroad. If Japan develops a policy to open the doors to immigrants, then people in the fishing and farming sectors everywhere would similarly become more welcoming to migrants from foreign countries." (Sakanaka 2011: iii)

Sakanaka's appeal tends to remind us that Japan not only needs a labor force or professionals in major cities, but also in areas that have long been impacted by continuous population decline. It is his belief that even the farming and fishing sectors have to remain dynamic and support the dynamism of the whole country.

In more rural areas, the only step taken to relieve population decrease has been to allow local entrepreneurs to hire technical interns, which does not promote migration for settlement or contribute to long-term efforts to maintaining local communities. Progressively, small enterprises (SMEs) that do not renew intern requests often decide to cease activity. The number of SMEs ceasing activity increased after the 2008 crash, but the trend was also evident before crisis struck.

The spouses of Japanese

As previously discussed, there exists a second group of Chinese residents in remote areas who are married to Japanese nationals. Such immigration has sometimes helped local communities fight against depopulation and find workers for the home caring professions and local SMEs.

As we have already seen in the first part, Japan is ageing rapidly and the country is concerned by the decline in marriage. On closer inspection, in some remote areas, the percentage of unmarried elder sons could be as high as 70% (Takeda 2009). As Pierre Bourdieu described in his study of the Béarn area in France, as it opened out to the outside

world, "for farmers, the marriage market is a dramatic chance to discover the transformation of the value table and the collapse of the social prices attributed to them." (Bourdieu 2002: 229).

In Japanese rural areas, depopulation is generally attributed to the phenomenon of single eldest sons. The burden on the eldest sons to take care of their parents and to perpetuate the family business is commonly considered as detrimental to marriage. To maintain the population and the life of small communities, local authorities have sometimes implemented measures to facilitate marriage with Japanese or foreign women from outside the home towns and villages.

In the 1970s, a great number of rural localities relied on national funds distributed to help prevent against the depopulation of the countryside and launched various programs to promote marriage and births among residents. Local authority involvement in the private sphere was often criticized, but many, in the name of the community, continued to develop new initiatives. According to a survey carried out in 2004 among 2,253 towns and villages (967 of which had less than 10,000 residents), 50% still actively promoted marriage in some way (62% in the case of towns with a population under 10,000). There are three main kinds of marriage promotion measures: the employment of marriage counselors, financial support for marriage ceremonies, and the organization of "courting" events encouraging partners to meet each other, such as parties, sporting events, trips outside the town, etc. (Yaguchi 2004).

Courting events are called *miai* party in Japan. *Miai* refers to the formal meetings of traditionally arranged marriages. The institution of arranged marriages has disappeared but the term remains to speak of mediated marriages. For instance in the Yamanashi prefecture in 2003, local Diet members established an association to organize *omiai* parties. As elsewhere, these events present an opportunity to gather groups of roughly 50 people comprised of local men and women, some of whom may come from other prefectures. Appeals for women are communicated through the classic media channels as well as through the vast number of blogs dedicated to marriage.

Among the large range of initiatives taken to facilitate marriage among local residents, some towns have prioritized "international marriages," where potential spouses are invited from other countries. In Asahi (Yamagata Prefecture), local authorities started proposing

marriage counseling as early as 1975 and invited women from nearby cities to participate in ski tours and wine tasting sessions. In 1985, in cooperation with mayors of towns and cities in the Philippines and with the help of a marriage agency, they organized trips to the Philippines for local unmarried men, who, during their stay, met Filipina women. This initiative resulted in 9 couples settling in Asahi. The event received broad coverage in the Japanese media, which praised the warmth and obedience nature of Filipina women. At first, everyone seemed enthusiastic about the initiative and other remote collectives rapidly imitated it until NGOs concerned with human trafficking intervened. As a result of increased criticism, local authorities ceased to be involved in the mediation and private agencies took over the activity.

The difficulties foreign women experienced adapting to their new environment, the necessity for small towns to address the social needs

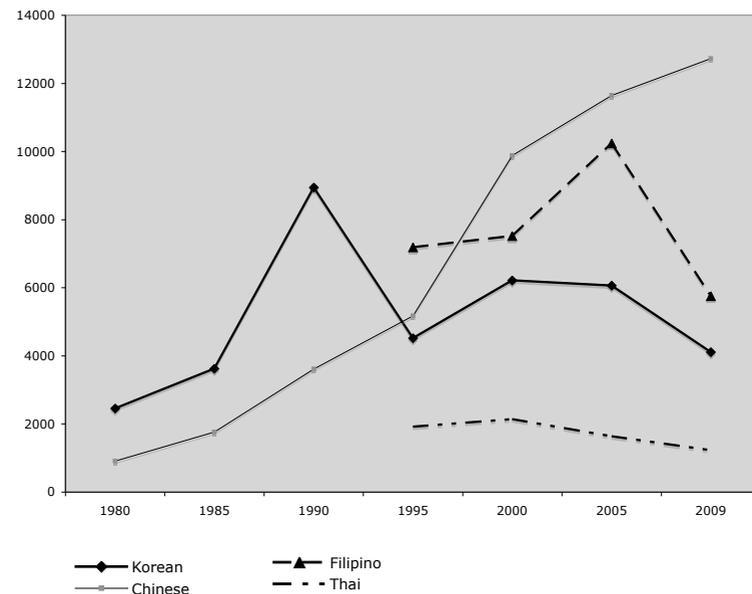


Fig. 12 Evolution in the number of marriages between Japanese men and foreign women (by women's nationalities)

Source Ministry of Health, Labour and Welfare, Vital Statistics 2009, online: <http://www.e-stat.go.jp/SG1/estat/ListE.do?lid=000001101601>.

of their new inhabitants (language classes, education of foreign children, support with immigration procedures, etc.) and the high divorce rate that ensued from such arrangements led many to rethink transnational marriage initiatives.

The following graph shows the evolution of international marriages, among which many are arranged marriages. Marriages with Chinese women have increased due partly to the fact that more and more Chinese people now live in Japan, but also due to the expanding match-making industry and the chain migration process.

Foreign wives also represent a potential workforce for local businesses. Due to low Japanese language skills, and sometimes their lack of qualifications, foreign wives often find jobs in local SMEs. Otherwise, foreign spouses of Japanese also undertake care work at home, looking after the elderly and raising children.

Today the number of international marriage is on the decline. Some areas of Japan clearly do not appeal, but the influx of foreign wives may be redirected to other areas. Figures show that the tendency toward international marriage varies from one nationality to the other. Figures for Chinese women are still up, while for Filipina and Thai women the decline should be interpreted as a result of tougher "entertainment visa" policies, and the subsequent drop in the number of women visiting from these countries as candidates for international marriage. The case of the Korean women is more complex as analysis must take into account the decrease in Korean visitors to Japan and the democratization and sudden economic development of Korea.

Changes in marriage migration trends are due to many factors: Japanese economic stagnation, Chinese economic development, and failures of previous marriages. It must be said that as long as foreign spouses suffer prejudice, they will never feel accepted in towns or villages, thus discouraging further immigration.

Conclusion

The Chinese population in Japan is still on the increase and urban areas are still attractive for both qualified and lesser qualified Chinese residents. Peripheral areas have clearly become increasingly less attractive. Since these areas mainly require manual workers, the question

of whether Japan should introduce an official policy for immigration in specific activity sectors in order to support revitalization becomes central.

Guidelines for the reconstruction of Sanriku after the Great Earthquake talk about the necessity to promote immigration to these areas, but such discourse is still officially limited to qualified migrants. Rare are the voices calling for the recognition of economic participation from technical interns and the social benefits for long-term immigration of lower skilled workers to peripheral areas in Japan.

The new measures Japan is implementing to attract foreign workers (*i.e.* the new point system for skilled workers, the 300,000 foreign students Plan) will hardly benefit those economically less attractive areas in Japan. What these more peripheral areas need are workers in the clothing and metalwork industry, and the construction, fishing and farming sectors. In these sectors, foreign workers should also be entitled to long-term residential programs, not only to 3-year internship programs. Regarding the status transition from student to employee as has been described here, measures should be taken to promote the employment of foreign students after graduation in less attractive areas, while immigration policy could contribute to broader measures stimulating the revival of peripheral areas.

Since immigrants in smaller Japanese cities and rural areas genuinely migrate as spouses and technical interns, their input as workers and citizens in the local community is not recognized. If Trainee and internship programs remain the main channel for introducing workers into peripheral prefectures, the host society should at least make an effort at social inclusion and especially avoid segregating interns inside the vicinities of plants or farms. The notion of unskilled immigration is, in itself, problematic; other terms, such as “manual workers” might be more appropriate to describe the actual situation and avoid stigmatization. Systematic suspicion is counterproductive for the welcoming of foreign residents.

There is an urgency to disseminate information about immigration and to create spaces of interaction between Japanese nationals and foreign migrants. Foreign wives or workers are still too often depicted as poor migrants and fortune seekers. Not enough is known about their background. Communication and mutual understanding is necessary to smooth the integration of foreigners, especially the spouses

and their children. Much more than for qualified immigration, where migrants are less targeted by discrimination and are readily socialized into cosmopolitan communities, unskilled migrants, especially in more peripheral areas, demand a much more pro-active policy in terms of integration.

While proposals within Japan to become more attractive to highly skilled migrants have been mainly of a technical nature (international schools, social security, pension plans, social mobility, and raised salaries), there is a provide a better welcome to less qualified workers, who, in the perspective of replacement migration, are potential future citizens. This would require structural changes to Japanese services (such as the Japanese school curriculum, the quality of language education, anti-discrimination laws, etc) and to Japanese identity (to embrace valorisation of foreign parents and children’s culture)

Finally, in the case of China, for instance, better treatment of interns and spouses could contribute in a small but strategic way to improving Chinese-Japanese relations. Today, many spouses, interns and even students may return home with stories of excessive hard work and conflictual relations with Japanese bosses, colleagues and families. Even if China’s authorities have avoided proffering any opinion about technical interns, the system is widely criticized by international institutions such as the IOM and by Japanese militant groups.

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RETHINKING THE GLOBALIZATION OF LAW

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THROUGH THE LENSES OF “NORMATIVES SPACES”

A brief memoir on two international workshops
dealing with legal globalization

Isabelle GIRAUDOU*

Between June 2009 and June 2012, four international workshops dealing with the globalization of law were organized at Maison franco-japonaise, Tokyo¹. The contributions presented in the following pages under the form of “occasional papers” consist in the revised version of preparatory documents that were circulated among the participants to the third and the fourth workshops (respectively entitled “Global Law and Global Legal Theory – Academic Knowledge in Question”, June 3-4, 2011²; and “The New Normative Spaces of Globalization – On International Commercial Arbitration in Asia and the Principles of Asian Contract Law”, June 7-8, 2012³). The notes below are a brief

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1. See the related information on: http://www.mfj.gr.jp/recherche/equipe/chercheurs/isabelle_giraudou_2013/; downloaded also on <http://www.glsn.eu>.

2. Co-organized by the French Research Institute on Japan (MAEE-CNRS) with the support of Fonds d’Alembert, in partnership with The Clarke Program in East Asian Law and Culture of Cornell University and the collaboration of the GLSN Global Legal Studies Network - Réseau Mondialisation du droit (Fondation de la Maison des Sciences de l’Homme, Paris).

3. Co-organized by the French Research Institute on Japan (MAEE-CNRS) and the Maison des Sciences de l’Homme en Bretagne (MSHB) with the collaboration of the GLSN Global Legal Studies Network - Réseau Mondialisation du droit (Fondation de la Maison des Sciences de l’Homme, Paris).

memoir of the motivation for organizing these two scientific events, and of some of their original features.

A few consensus items to start with

Globalization raises new challenges for law as a discipline and calls us, as legal scholars, to rethink both our paradigmatic postulates and methodological agenda. The appearance of powerful private or transnational actors generating dehierarchized networks and new spheres (or spaces) of normativity distinct from the nation state call into question traditional representation of law itself and the associated narratives of the relationship between the (supposed) center and the (so-called) periphery. In this regard, the challenges facing comparative law are not unlike those affecting international law, both public and private, which developed under analogous premises: while comparative law is facing the issue of what makes up a tradition irreducible to the classical concept of a national “legal system” (and to a general taxonomy of “legal families”), public international law has to deal with “governance without government”, and private international law has to grapple with the changing significance of the link between law and territory. The distinction between various continents of law or different legal areas, and classical concepts themselves such as the territoriality of law, the choice of law, public order, or even legal order are equally challenged. In order to analyze more sharply legal actors’ contemporary practices and to conceptualize current legal configurations as well as the complex ways law is hybridizing, legal theorists have to find some new definitions or to twist the classical ones. Moreover, the need to provide a more complete standpoint and to produce more fine-grained accounts of the various dimensions of legal globalization (not limited to a narrow focus on rules or legal cases) urge us to adopt interdisciplinary approaches. In fact, different legal fields are today reconfiguring around several points of general agreement (or “consensus items”⁴) identifiable among scholars interested in the globalization of law.

4. We broaden here the argument developed by Annelise Riles in reference to the rapprochement between comparative lawyers and socio-legal scholars; see A. Riles, “Comparative Law and Socio-Legal Studies”, in M. Reimann, R. Zimmermann, *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2008, p. 799.

First, legal scholars investigating the globalization of law generally agree on the necessity of expanding their subject-matter to include transnational phenomena. The descriptive treatment given by comparative lawyers to such phenomena may be different from the normative and doctrinal arguments of international lawyers. But in reality “there is little need for concern about losing our disciplinary distinctiveness by expanding our subject-matter”⁵. Second, legal scholars interested in the globalization of law agree on the necessity not to limit the subject of study to legal orders supported by the coercive sanction of the nation-state: the point is indeed to understand how non-state-based normative orders interact with state-based regimes. Third, there is also a consensus today that scholarship in various legal fields needs to be both theoretically informed and empirically grounded – in other words: there is no need for legal scholars interested in legal globalization (be they internationalists or comparatists) to choose between “theoretical” and “empirical” work. Fourth, now is a good time for those of us who are investigating the global circulation of law to look for alternatives to the too-crude “legal transplant” concept. Fifth, and finally, it is also an opportune time to look for alternative categories, questions, approaches and projects to the too-vague “cultural analysis of law”.

By bringing together participants (mainly legal scholars and practicing lawyers) from different countries (Japan, France, China, Vietnam, and America) and from various legal systems/cultures/academic environments/specializations (comparative law, comparative legal history, legal philosophy, international private law, constitutional law, civil law, legal anthropology, socio-legal studies, and historical sociology), the international workshops held at MFJ in June 2011 and June 2012 both confirmed and built on such consensus.

A working hypothesis to go a step further

To go a step further may consist in questioning the complexities of legal globalization and contemporary norms-generating processes through a new *working hypothesis*. That is precisely what the organizers and the participants to the above mentioned workshops tried to do by focusing

5. *Id.*, p. 800.

on the concept of “normative space” as proposed by Gilles Lhuillier and defined in greater detail in the following pages. By proposing, discussing and elaborating on the concept of *normative space*, the participants have been able to challenge even more directly the pertinence of simple models, *e.g.* the classical approach of “legal orders” (which is central in international law) and the traditional approach of “legal systems” (which is paradigmatic in comparative law).

The initial general inquiry was to know more precisely how a variety of actors (including arbitrators, legal scholars, legal experts and practitioners) work in the global world, what kind of techniques they use to create a new set of norms in globalization and, in particular, the extent to which their borrowings, re-arrangements, constructions lead to the formation of some new regulatory spaces blending geographical areas (Asia, Europe, Africa, Anglo-Saxon World, etc.) and legal traditions (Continental Law, Common Law, Asian Law, *Lex mercatoria*, etc.) envisaged separately by the classical doctrine. Following a bottom-up approach, the participants considered various procedural mechanisms, institutions, objects and practices (professional as well as academic) that currently aim to manage interactions across territorial borders, and which relate to private international law, public international law or comparatism. Examples such as international mining contracts, UNCITRAL-based on-line arbitration, the regulation by “merchants” of collateral in the international financial market, the so-called Principles of Asian Contract Law (PACL), the incorporation of companies and international law shopping, but also the supposedly “imposed” Japanese Constitution or the Japanese law as a mixed legal system drawing from various national traditions, all have been scrutinized as concrete examples or possible illustrations of “normative spaces”.

By carefully examining all these examples not from a national/legal (legalist)/objective/static point of view, but rather from an individual/practical/subjective/dynamic one, two common features were distinguished. First, it appeared that the actors involved were always making a “choice of law” (indeed, national or international regulations, but also the legal cultures themselves render possible such choice of law). And, second, that they were mixing and articulating various legal sources. These two distinctive features are obvious not only in international contracts, international commercial arbitration, financial market

regulation, or through the elaboration of common legal “principles” at a regional scale, but also in the drawing of constitutions and national legislation.

Then it became possible to refine our questioning further concerning the *choice of law* and the *mixing* of various sources: How do the concerned actors (for example the legal scholars and practicing lawyers involved in the drafting of principles such as PACL, or the parties to international commercial arbitration) choose the law and mix a range of sources? How to grasp more accurately with such choosing and mixing practices? What are the norms that have been chosen and mixed? Is it relevant to consider such practices of choice and mixing in terms of normative creation? What are the discourses of the concerned actors regarding both these practices and the generated norms? Etc.

A contribution to the emerging work on legal knowledge

Such approach to the globalization of law helps to advance the emerging work on legal knowledge. It is obviously valuable in the field of international (private and public) law, where the choice of law – both as a technique and as a concept – happens to play a primary role. But an analysis in these terms is also valuable in comparative law, where the notion of the choice of law (in its enlarged meaning) may throw light on what is commonly referred to as “legal hybridization” and explain in a new and more comprehensive way the “reception” and “diffusion” of law, both in its historical dimension and contemporary aspects. To tell it more precisely, let us briefly mention how the participants have been invited to engage both in epistemological analysis and methodological introspection.

Questioning more accurately through the lenses of “normative spaces” how legal practices, specifically in the field of on-line dispute resolution, both shape and are shaped by legal globalization (as did a participant, well known for being both a practical lawyer and a critical scholar), may contribute to renew no less than the theory of international arbitration itself. Investigating in the same way some new “spatiality” of law and addressing both the new legal techniques at work in the world of merchants and the resulting decentralized rules (as did the initiator of the concept of *normative space* here addressed) may well contribute to renew the classical concepts of private international law,

the so-called conflict of law method as well as the unilateral method. Directly asking about what has been dismissed so far by the doctrine, *i.e.* legal formality and technicalities (as did a participant wishing to expand her horizon without limiting it to the late modern American law school she is coming from) may indeed put light on a particular feature of “normative spaces” and also help to refine the distinction between *rules* and *norms*. At the same time, pointing out critically the very normative foundation of global law, exploring the choice-of-law problem both from the perspective of legal cultures and through examples rooted in public international law, and questioning how autonomous and cultural constraints delineate such choice of law (as did one participant, a legal philosopher explicitly adopting a Dworkinian outlook) may well put light on another feature of “normative spaces”: in effect, normative spaces can also be understood as a *interpretative/translational* nexus of different norms, with “normative translation” at the core of such legal hybridity shaping process. Also, examining through the lenses of “normative space” the very choices of law effectuated by the actors involved in the construction of Japanese law (which is often described as being “hybrid”) may help to refine even an alternative approach such as the one of *Japanese law as a mixed legal system*⁶. Being asked through a questionnaire about how the drafters of the so-called Principles of Asian Contract Law very concretely choose and mix various legal sources to create a new law applicable to commercial transactions in Asia (as did one participant, the initiator of the PACL himself) may encourage us to deal with our own practices and knowledge in a much more reflexive way; it may also put further light on the *decentering* process the new normative spaces of globalization are based on. Etc.

Taken as a whole, these contributions show that when it comes to the globalization of law, the conventional questions and oppositions are rapidly becoming obsolete. And that legal knowledge is indeed a constellation of theories and practices far more complex and nuanced

6. For a detailed presentation, see the “Report on the International Workshop held at Maison franco-japonaise, Tokyo (June 2001, 3-4)”: http://www.mfj.gr.jp/web/sympo_20110603/pdf/CR-IW_3-4_June_2011.pdf. On the last two points, see also I. Giraudou, “Le droit japonais comme traduction”, *Ebi-su - Études Japonaises*, No. 46, 2011, p. 111-144; and: “Le droit au Japon, quel modèle?”, Working Paper (August 2012): http://www.mfj.gr.jp/recherche/working_papers/

than legal theorists and practitioners may have acknowledged up to now. If there is any “global legal theory” to look for, it should be understood not as a new *grand, single and uniform theory on global law*, but as a *theory made global through its common objects and new methods*⁷.

7. See G. Lhuillier, “Analysis of Global Law”, <http://www.msh-paris.fr/recherche/aires-geographiques/monde/le-reseau-glsn/>; or: <http://www.glsn.eu>

ACADEMIC KNOWLEDGE

Three views on global law and global legal theory

Gilles LHUILIER*

Is there a global legal theory? Not a unique theory on global law, but a global theory of law, a theory made global through its common objects and methods?¹ Such a question represents a kind of ethnological study on the astonishing tribe of global “academics”, their uses and practices, that is to say their “local knowledge” to quote the ethnologist Clifford Geertz.

To start with, it is now obvious that contemporary legal thought is undergoing a profound change characterized by the French epistemologist Bruno Latour as “a passage from law as an institution to law as an enunciation”.² Now, a very strong “coherentist” stream is building legal thought on a unique theoretical pattern, with a semiological origin, in spite of extremely diverse sources, comparisons and established theoretical systems. This new idea shows an evident openness to social sciences (“Law and...”). Concepts are therefore being deeply renewed and, above all, the “legal” is being widened, no more limiting itself to formulating technical questions about legal rules, but also questioning rules’ relations to culture or cultures, as well as to individual or collective identities.

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1. See G. Lhuillier, “Analysis of Global Law”, in <http://www.msh-paris.fr/recherche/aires-geographiques/monde/le-reseau-glsn/> or <http://www.glsn.eu>

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

This slow but now irreversible epistemological break, from a pattern inspired by the sciences of nature to one which is closer to the sciences of language, is linked to an increased circulation of these new interdisciplinary theories of legal thought, travelling from continent to continent during the past thirty years, and enabling, at last, the rise of a worldwide, and not solely western, point of view. The emergence of this “world legal thought” is linked to new intellectual shifts and journeys. But can we describe this emerging global theory more precisely, not as a global “substantive” theory, of course, but as a set of common academic practices? I make the hypothesis that international – global – legal theories are now facing the “refiguration of social thought” described twenty years ago by the anthropologist Clifford Geertz in his 1980 article “Blurred Genres: The Refiguration of Social Thought”.

Some of Geertz’s tricks are now commonly used by legal academics sometimes without even knowing it: a semiotic/interpretative approach, but also a “microscopic approach” (the small facts speaking to large issues), the assertion that “culture” is context and that theory must be “actor oriented”, the emphasis on “words” that are part of specific concepts but a mixture of ideas, with multiple meanings, expressing a common way to imagine the reality; and – last but not least – a pluralism, neither state centered nor “culture centered”, the actor contributing to defining the limits and the meaning of what I called “normative spaces”, those local techniques which work on the basis of local shared knowledge. To quote some old texts of Geertz’s allows us to feel the current relevance of his works:

The concept of culture I espouse... is essentially a semiotic one. Believing, with Max Weber, that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretative one in search of meaning. It is this explication I am after, construing social expressions on their surface enigmatical.³

And the image of cobwebs has nothing in common with “systems” or “order”, all the work of Geertz being an escape from the order, a decentring of legal theory:

3. C. Geertz, *The Interpretation of Cultures*, New York, Basic Books, 1973, p. 5.

Interpretative explanation trains its attention on what institutions, actions, images, utterances, events, customs, all the usual objects of social-scientific interest, means to those whose institutions, actions, customs, and so on they are. As a result, it issues not in laws like Boyle’s or forces like Volta’s, or mechanisms like Darwin’s, but in constructions like Buckardt’s, Weber’s, or Freud’s: systematic unpacking of the conceptual world in which Condottierre, Calvinists, or paranoids live.⁴

Well... But how can Geertz be used today in the academic field of global law studies? Let’s take three examples of recent works: the last book by Annelise Riles on the financial markets, the seminal article by Hasegawa Kō on Japanese law as a “creole law”, and my current work on international contracts as “normative spaces”.

Firstly, Annelise Riles.

Her last book is about the meaning of globalization. But its method is ethnographic, and Annelise Riles quotes explicitly Geertz’s 1973 book *Thick Description: Toward an Interpretative Theory of Culture*. And the title of Annelise’s book, *Collateral Knowledge* can also be read as an implicit quotation of Geertz’s main work, *Local Knowledge*. If she presents a new theory of law and market, it is purposely a “theory close to the ground”, building its analytical categories at close proximity to those of market and regulatory practices, and it does so inductively rather than deductively. She follows this up and goes further in her main idea in her article “The Anti-Network: Global private law, legal knowledge, and the legitimacy of the state”.⁵ She stresses that the academic discussion about global law is not pertinent when it opposes the laws of states to private international “norms” developed by merchants. In her mind there is such a thing as “global law without state” only if the analysis relies on “rules” and institutions, but not if you focus on “norms”, a broader and practical understanding of what “law” means. She argues that rather than focusing on how global private law is or is not an artifact of state power, a body of private norms, or a coherent

4. C. Geertz, “Blurred Genres. The refiguration of social thought”, *American Scholar*, Spring 1980, p. 165.

5. A. Riles, “The Anti-Network: Global private law, legal knowledge, and the legitimacy of the state”, *American Journal of Comparative Law*, Vol. 56, No. 3, 2008; Cornell Legal Studies Research Paper No 07-025.

legal system, we should view global private law as a set of institutions, actors, doctrines, ideas, documents, that is, as a specialized set of knowledge practices. And in so doing, in her book, with the global market appears a (global) space of shared practices, a common world, a “private constitution”, neither entirely private nor public: “Collateral financial governance is also, I argue, *a set of routinized but highly compartmentalized knowledge practices, many of which have a technical legal character*”.⁶

She analyses a financial technique, the Global Collateral (*sûretés* in French), which appears to be in fact at the root of the financial market, being the safeguard of swap transactions. No swap without security, without collateral. And, this quote from her article stresses the novelty of her approach:

In the simple technology of collateral, this nexus of paper documents, legal theories, legal experts, clerical staff, computer technologies, statutes and court decisions, then, are encapsulated some very grand hopes. As a transplanted legal technology, collateralization is paradigmatic of global private law solutions. Although collateral is rooted in multiple bodies of national law, such as bankruptcy codes, it is designed to be in the first instance a tool of self-help. It also is intended to serve as a blueprint for relationships, what I will call a “private constitution”.⁷

Secondly, Hasegawa Kō.

Since the publication of his main article – “Incorporating Foreign Legal Ideas Through Translation”⁸ – the work of Hasegawa Kō is sometimes assimilated to the “legal polycentricity” movement.⁹ The “Legal polycentricity” is a post-modern theory of globalization which stresses both law “generated by numerous centers” in a global world, and a law from the point of view of the person, the actors, too often excluded from the theory of law.¹⁰ Called “Hō no kureōru to shutaiteki hōkeisei no

6. *Op. cit.*, p. 10.

7. *Op. cit.*, p. 7.

8. In A. Halpin & V. Roeben (eds.), *Theorizing the Global Legal order*, Oxford, Hart Publishing, 2009, pp. 88-89.

9. Hanne Petersen *et al.* (eds.), *Legal Polycentricity: Consequences of Pluralism in Law*, Dartmouth Pub. Group, 1995; Surya P. Sinha, *Legal Polycentricity and International Law*, North Carolina, Carolina Academic Press, 1996.

10. H. Petersen, *Knitted Law: Norms and Values in Gendered Rule-Making*, Dartmouth, Aldershot, 1996.

kenkyū” (A Study on the Creole and the Agency Formation of Law), the research programme directed by Hasegawa tries to characterize the normative exchanges between four “regions” (South East Asia, Europe, North America, and Japan).¹¹

But Hasegawa builds a very singular theory of law as “interpretation”, in order to study the construction of Japanese law under the influence of foreign law so doing he renews the old fashioned concepts of comparative law. He uses the semiotic metaphor of “creole law”, maybe as an implicit homage to the “polyglot discourse” of Geertz.¹² And Hasegawa’s work stresses the importance of some words, “words” which are part not only of a specific concept but a mixture of ideas, with multiple meanings, expressing a common way to imagine the reality, as Geertz did with the Arab words *haqq* or the Sanscrit *dharma*, which came from different “moral worlds” and rely on different conceptions of law.¹³ But it is true that his theory of Japanese law as a translation has less to do with the theory of translation than with the theory of law, the American style theory of Dworkin and the Japanese theory which stresses the particular role of the actor – the translator – according to the specificity of Japanese writing¹⁴:

I think that Japanese modernization of law is to be characterized as the legal amalgamation through translation: Japanese intellectuals attempted not transplanting European law but rather grappling it for Japanese society. Indeed, they tried to understand and introduce Western ideas and values into Japanese society principally to enlighten and westernize it. But that was a selective incorporation, which made the Japanese legal system an organic unit of heterogeneous legal ideas and values. Here we should ideally distinguish the multi-layered legal system from the organically combined or hybrid legal system as in the case of Japan that I am discussing. This distinction is concerned with the totality of translation in the process of law-making. In the case of Japan, the main legal codes were

11. See www.juris.hokudai.ac.jp/~hasegawa/lcreole/en_index.html

12. Geertz, *op. cit.*, 1986, p. 226.

13. *Op. cit.*, p. 230.

14. See especially I. Kitamura, “La traduction juridique : un point de vue japonais”, *Les Cahiers de droit*, 28, 4, 1987, pp. 747-792; and Y. Noda, *Introduction to Japanese Law*, Tokyo, Tokyo University Press, 1976. See also I. Giraudou, “Le droit japonais comme traduction”, *Ebisu. Études Japonaises*, No. 46, 2011, pp. 111-144.

not simple transplants from European law but rather the reconstruction of various European laws through translation, which includes not only the adaptive modification but also the critical discarding of European legal ideas and values. In addition, the operation of the legal system in Japan is conducted through the traditional sense of justice, i.e., of harmony or equitability. Even if the legal provision in question was derived from a similar Western one, the understanding and application of it is curbed with the mind that ordinary Japanese people tend to appreciate by their own valuational sense¹⁵.

Thirdly, Gilles Lhuilier (myself!).

I'm currently interested in the common knowledge used by lawyers and senior managers of transnational corporations in the elaboration, writing and implementation of international contracts.¹⁶ This knowledge obviously tends to organize the obligations between the parties but, moreover, to choose the law binding the parties, to shape a group, to organise a supply chain, etc. However, international legal practices are very far from the classical presentation of the conflict of law concept, made from the state perspective, the perspective of the judge who tries to "localise" the contract. On the contrary, the private actors now "localise" themselves on singular "normative spaces". The old concepts of international law, which were all "state centered", are now questioned by the globalization of law. The "mobility" of the private actors is changing the concept of territoriality of law, the concept of choice of law, of public order or even the concept of legal order. To be able to describe their practices we have to find some new definitions or to twist the old definitions of the choice of law theory. I have called this new set of practices "law shopping" in a broad sense¹⁷. Here are some illustrations.

¹⁵. K. Hasegawa, "Incorporating Foreign Legal Ideas through Translation", in A. Halpin & V. Roeben (eds.), *op. cit.*, 2009, pp. 88-89.

¹⁶. GLOBEX (Recherches pluridisciplinaires sur la mondialisation : contrats globaux et nouvelles régulations sociales). See: http://www.mshb.fr/accueil/la_recherche/pole_gouvernance_dans_les_institutions_publicques_et_privées/globex

¹⁷. Voir G. Lhuilier, "Le concept de 'Law shopping' (Droit international privé, droit social, droit de l'environnement)", in M.-P. Blin-Franchomme et al. (eds.), *Droit du travail et droit de l'environnement. Regards croisés sur le développement durable*, Paris, Éditions Lamy-Wolters Kluwers, 2010; "Law shopping (La redéfinition du choix de la loi par la pratique du droit international des affaires)", in X. Boucoba (dir.), *Les groupes internationaux de sociétés : nouveaux enjeux, nouveaux défis*, Paris, Economica, 2007.

1. *Tincorporation*. The *lex societatis* – but also the law applicable to the board – being the law of the incorporation, the transnational corporations have many ways to use the "Delaware effect", often for escaping tax law, bankruptcy law, freezing asset action...or simply the identification of the shareholders. This old "law shopping" which has no limits in some regional areas (such Europe), is the conceptual model of all the other techniques.
2. *Subsidiaries*. The creation of subsidiaries is also a common form of law shopping, an easy way to escape public order law such as criminal law, transnational companies not being a legal person as a "group", subsidiaries allowing "groups" to hide under the corporate veil.
3. *Joint ventures*. To draw the limits of a group with a joint venture between a subsidiary and a company incorporated in a so-called "tax haven" (which are also "secret havens") is an easy way to make a soft choice of the law, the joint venture having no existence from a tax point of view. And the remaining cash can be used for "non-conventional commercial practices".
4. *Tsub-contracting*. Outsourcing can be defined as an operation to close a production site and transfer it abroad to enjoy better legal systems for the employer. Outsourcing is less an act of management than a technique of choice of law, a technique of "law shopping". This new legal technique is a reaction against the "publicising" of the rule of conflict of law. For in all industrialized countries *favor laboris* has significantly limited the scope of the choice of law. The desire to protect employees has realized what the internationalists called a "coloring" of the rules of conflicts of law that has ended their so-called "neutrality". But outsourcing can be reached by some other very simple legal action: either the incorporation of a subsidiary abroad or – more simply – outsourcing by subcontracting, as Nike does for example.
5. *The contract as a law*. In the recital or the operative part of the contract, professional definitions, rules or obligations are often longer than the international convention on sale of goods.
6. *The choice of law*, « dépeçage » and the « contract without law ». International contracts have nowadays sometimes some very sophisticated choice of law clauses, such as those choosing an international convention like ICSID, and a soft law text, a Professorrecht such as

the Unidroit Principles in order to fill the gap of the international convention. In so doing, they build an international code of sales contracts mixing international convention, soft law, and the principle of the choice of law by the parties.

7. *Contractual public order*. This concept is used to build the “supply chain” and to introduce clauses, from the end of the chain to the beginning, through labelling and the certification of the supply chain, to make sure that some mandatory law is really binding.
8. *The forum shopping*. Very classical!
9. *Contractual mediation order*. The international contracts organise several negotiations, transactions, mediations inside the contract itself, often through *ad hoc* or permanent dispute board.
10. *The choice of the site of the arbitration*. To choose the site of the arbitration is a way to choose the procedural law of arbitration.
11. Eleven: *freedom or the arbitrator*. To quote Berthold Goldman’s well known sentence: “l’arbitre n’a pas de for/arbitrator has no forum”, is enough to remind everyone that the rules of conflict of law are mandatory for the arbitrators who are free to choose the law applicable to the contract. To choose arbitration is to choose to stay away from public judges but also from the rules of conflict of law.

Mobile public order. International arbitrators are now practicing what I call the concept of “mobile” public order, the unique public order taken into account by the arbitrator being the public order of the place – the state – of the *exequatur*. The significance of public order is then deeply renewed if it depends only on the place of the assets of the parties...

All those practices (the so-called “law shopping”) and the rules chosen create what I called “normative spaces”. Normative spaces have two significations.

1. Firstly, normative spaces are a *set of* “practices”. These set of “practices” is constituted by practices of law shopping which allow merchants to designate the “rules” binding their relations, that is to say – to use Annelise Riles’s terms – of routinized but highly compartmentalized knowledge of practices, many of which have a technical legal character.

2. Secondly, normative spaces are also a set of “rules” designated by lawyers, that is to say national laws, international treaties and conventions, soft laws, etc.

Each international contract is then a “web” – to use Geertz’s terminology. Each “normative space” refers at the same time to the ability to spin the web – that is to say, the boundaries of the applicable chosen law – and the web itself, that is to say, the chosen law. It is neither a private commercial order (a new *lex mercatoria*), the applicable laws being mainly national laws; nor a legal order, national or international, the boundaries of the law being drawn by the merchants themselves.

Between these three works, some obvious differences appear, sometimes stressed by the authors themselves.¹⁸ These differences obviously lie sometimes in “tribal knowledge”, some academics being closer relatives to the ethnologists’ tribe, some to the philosophers’ tribe, others to the tribes of internationalists or commercialists. But all these works are nevertheless representative of the emergence of a global legal theory that realises a “decentring” of the theory of law.¹⁹

Questions rise however: the importance of the legal technicalities as an autonomous language, the fall of the theory, the local dimension of the theory, the signification of the renewed concept of culture, or such elaborations as “private constitution” or “normative spaces” and their many uses – for example in order to renew comparative legal studies... There is obviously an emerging global legal theory, not a unique theory on global law, but a global theory of law, a theory made global through those common questions.

¹⁸. K. Hasegawa, “How Can Law Hold Hope in Cultural Complexity? Critical comments on Professor Annelise Riles’ View of Law and Culture”, Working Paper: <http://www.juris.hokudai.ac.jp/~hasegawa/HowCanLawHoldHope.pdf>.

¹⁹. See <http://www.msh-paris.fr/recherche/aires-geographiques/monde/le-reseau-glsn/> or <http://www.glsn.eu>

ANCHORING NORMATIVE SPACES IN GLOBAL LEGAL ORDER

A brief comment on Gilles Lhuilier's
working paper*

HASEGAWA Kō**

Appreciating his interesting paper “Academic Knowledge: Three views on global law and global legal theory”, I think that Gilles Lhuilier's main point lies in grasping “law shopping” as a typical phenomenon for yielding decentered normative spaces in the making of global law. Lhuilier also seems to take Annelise Riles' emphasis on the spontaneous shaping of collateral knowledge in the global legal practice of finance as another example of his theme. There is a slight difference, though, from my viewpoint that, while Lhuilier tries to capture the strategies for making various new spheres in law, Riles does to capture various movements of legal actors in yielding those spheres as a result.

I have no substantial objections to these analyses, both because I am a layperson to this transforming field of international private law and because I sense these analyses will give much stimulation to the theorizing of the today's change in law. Still, it seems to me that these two distinguished scholars tend to praise the diversity of law especially against the existing positive and state-bound legal practice and

● The working paper mentioned correspond to the text presented in these *Cahiers d'Ebisu* under the title “Academic Knowledge: Three views on global law and global legal theory”.

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its understanding, and that they do not have much concern about the problem of possible connections for the integration and its conditions in such a transformation of law. Of course, one might say that a point of their perspectives is in such a postmodern one which appreciates the devolution or even deconstruction of the modern project of state-bound law-making; which is basically understandable for the recognition of the emergence of polycentric legal practice in today's globalizing circumstances.

In this respect, the point in my article Lhuillier mentioned, "Incorporating Foreign Legal Ideas through Translation"¹, may look rather a modern one in emphasizing the connection of apparently heterogeneous laws especially typified in the process of legal modernization in the late 19th century East Asia, even if seen through the interpretative/translational perspective (which itself can be postmodern). Indeed, my theoretical concern so far is the problem how the significant connection of culturally heterogeneous legal ideas (such as "rights" and "kenri 権利") is possible and what the salient features of the connecting point for them is. If so, the question may be raised from Lhuillier's or Riles' standpoint to what extent this kind of integrative perspective is related to the decentering movements and their products in globalizing law today. And I also sense this is why Lhuillier seems to be a little bit uneasy to place the points of my article in the problem concern in his paper, in contrast with Riles' work.

Then, I would say from my own standpoint that: 1. there will be several global legal contexts each of which indicates a different posture of decentering and shows another possibility of new connection: while it may be seen that in the field of international private law to which both Lhuillier and Riles invite to pay attention certain legal strategies for dissociating from the existing state control occurs to secure the freer spaces of global economic activities, the expansion of constitutionalization through state to market as well as to civil society especially in the field of international public law is to be observed; furthermore the hyper-jump, as it were, between international and state law is also to be seen in the problem of, say, the legal mobilization of indigenous people

1. K. Hasegawa, "Incorporating Foreign Legal Ideas through Translation", in A. Halpin *et al.* (eds.), *Theorizing the Global Legal Order*, Hart Publishing, 2009, pp. 85-106.

in a society by utilizing a variety of legal documents or discussions (which shapes itself a transnational legal problem), and thus that: 2. in this regard, what I tried to explicate for the interpretative/translational connection in the late 19th East Asian and Japanese context can be relevantly claimed as actually still occurring in various fields of law today, even in the strongly decentering normative spaces yielded by the law shopping Lhuillier is concerned about.

In the expansive process of modern constitutionalism, particularly for the necessity of the judicial review of human rights issues, we are experiencing the connection problem among various societies including such international or regional institutions as UN and EU. Here is no denying in that the possibility of transcultural understanding of the significance and meaning of particular human rights, say, freedom of expression, freedom from torture, religious freedom, or protections of women's rights, is heatedly debated; which necessarily includes the problem of the proper interpretation/translation of Western understanding of those rights in non-Western societies. Just for one simple example, we should consider about the translatability and commensurability of the meaning of "human dignity" against the backgrounds of divergent cultural settings. It will be clear that how to understand the core meaning of the idea of "human dignity" is a contested interpretative/translational question among divergent societies outside the West such as China, India and other East Asian societies including Japan.

Also, in the case of the indigenous rights claims against the colonial stance of modern states, it is very popular that those indigenous peoples try to justify and even share their claims by resorting to international and other related legal sources in any available ways, say, by resorting to the UN Declaration of the Rights of Indigenous Peoples established in 2007. This is itself a possible strategic move for their legitimate legal claims for land and language interests; which may be regarded as a sort of hyper-jump mentioned above between multiple legal sources. In so doing, indigenous peoples can utilize non-national legal documents for their own domestic problem situation beyond the border of nation-state and try to transform the existing (often narrow) understanding of the domestic laws in question. For example, some interpretative/translational question will arise in such a context as constructing the meaning of "the right to self-determination" in the international declaration above. Understanding the meaning of this right in a particular

domestic context (say, as in the Japanese concept of “*jiketsuken* 自決権”) may evidently include the interpretative/translational problem noted here.

In the field of international private law rapidly globalizing and decentering as Lhuillier and Riles heed to above, the situation might be seen different at the first look. In various normative spaces in this context, interpretation/translation might not seem to be such a serious problem; mutual understanding with interchangeability of legal and other related words and phrases looks almost always simply mechanical. Indeed, the focus on the dynamic pursuit of subtle techniques among private legal actors for extending the free economic activities can find that sort of connection problem as ignorable, especially when the party in question tries to stipulate their own legal terms and easily equates technical words and phrases in their own legal knowledge as a simple analogue making. Nevertheless, I wish to point out that, even if in the field of such technicality, there do exist certain interpretative/translational problems: one problem consists in the semantic shift, as I call it, aroused culturally and strategically, say, as to the understanding of background conditions of contracts such as the scope of the principle of “good faith and fair dealing”; another problem is the multifarious hyper-jump among various national, international, or private norms in a particular field of law to pursue more successful endeavors in it (with its spill over to other normative spheres; needless to say, this is an aspect of law shopping); still another problem is the problem of the background understanding of the economic in global capitalism such as the pursuit of efficiency or rationality. This point that the technical link in various legal fields may be possible without any interpretative/translational connection problems is only made significant with those problems being possibly solved in some suitable way in the shared understanding of relevant culture.

In this respect, interpretative/translational problems are both ubiquitous and valuational regarding any possible connection among various legal spheres² on this globe (including further internal logical configurations within one legal sphere); even in the decentering of law, interpretation/translation is inescapable for valuationally anchoring

2. The word “legal sphere”, as I use it hereafter, means the space of various laws, including national legal systems, international law, normative spaces as Lhuillier call them, and other relevant legal standards.

divergent normative spaces. Here, the difference of emphasis between the mechanical links in the economy-oriented legal spheres, the substantial connections in the publicized secure legal spheres, and other kinds of inventive connections among different spheres involves a moral debate on the importance or the priority of one sphere among various spheres. And various legal activities would yield various interpretative/translational interconnections among various norms in different levels of legal interactions. Here we may probably distinguish the anarchist, the totalist, and the integrationist of legal spheres, and also, within the integrationist camp, the libertarian, the liberal, and the communitarian positions on global law. They will contest with each other for the moral struggle in shaping global law. Then the ultimate point of this kind of debate will be concerned with the moral attitude toward shaping global law to attain trust for global human order.

This point seems to finally lead us to the problem of the point of our academic discussion itself, as Lhuillier perceptively remarked in his paper. What I have noted above never means that the academic explorations of global law are ultimately a matter of bare political ideology. What I mean is only that we cannot but face with the moral point of law in some part of our theorizing. As it is well known, this is the theme a legal philosopher Ronald Dworkin has been famously arguing for. Here lies the famous (or notorious?) debate between modern legal positivism and the Dworkinian legal interpretivism in the jurisprudence on the grounds of law. Although this debate has been concerned with the understanding of domestic law, I believe this issue is also much relevant to the understanding of global law. In particular, the important issue here is whether one does positive description of law without any value-load or interpretive articulation of law with moral valuation.

The other related point I wish to raise is that there are two kinds of exploration in the interpretive approach to global law: constructive and therapeutic. Whereas the constructive approach tries to capture the positive side of global law in an active engagement of explorer, the therapeutic approach tries to analyze the hidden side of global law in a critical watch of explorer. In contrast with the constructive one, the therapeutic approach is negative in the sense that this aims at the critical dislocation of our pre-understanding rather than aiming at the prospective configuration of it. One might say these are the opposites, and

yet I believe that these are complementary, though with the priority given to the constructive one. The therapeutic approach makes sense by coming after the constructive one, simply because the therapeutic approach needs the constructive one as its target. This also means that the therapeutic approach may provide the *ex post facto* revisions or corrections for the constructive approach. Thus I believe that the constructive approach to global law is inevitable. In our legal practice today, we need a truthful view of global law for developing it with reason. And I wish to add that our theoretical enterprise (including my own in this comment) is itself already an aspect of this development.

THE CONCEPT OF “NORMATIVE SPACE”

A very short introduction

Gilles LHUILIER*

The concept of *normative spaces* tries to renew our approach to globalization. It is sometimes used by international lawyers – without definition – in reference to legal situations beyond the national legal order or the international legal (fragmented) order. For example, from a micro sector point of view, we can observe the emergence of new rules beyond national legal orders – such as African and Asian contracts on mines, which are of decisive importance for industry, armament, and telecommunications. These rules adopt unprecedented legal forms: global contracts on goods and services (offset contracts, Build-Operate-Transfer contracts, Finance-Build-Transfer contracts). These new rules also consist of global regulations on products (UN, mining professionals, OECD, United States laws with international scope, etc.).

During the international workshop held at MFJ in June 2011, I was especially interested in the common knowledge used in the writing of international contracts by Transnational Corporations Lawyers¹.

During this workshop, we saw that such international legal practices are very far from the classical presentation of the *conflict of law*

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1. GLOBEX (Recherches pluridisciplinaires sur la mondialisation : contrats globaux et nouvelles régulations sociales). See: http://www.mshb.fr/accueil/la_recherche/pole_gouvernance_dans_les_institutions_publicques_et_privées/globex

concept, made from the state perspective, the perspective of the judge who tries to “localise” the contract. On the contrary, if we adopt an actor oriented approach, we are able to notice that the private actors now “localise” themselves on singular “normative spaces” made of all these national and international law chosen by the parties. I called this new set of practices “law shopping” in a broad sense², and all these practices (or “law shopping”) – plus all the chosen laws – constitute what I called “normative spaces”. Normative spaces have two significations. Firstly, normative spaces are *a set of “norms”*. This set of “norms” is constituted by practices of law shopping which allow merchants to designate the “rules” governing their relations, that is to say of routinized but highly compartmentalized knowledge of practices, many of which have a technical legal character. Secondly, normative spaces are also a set of “rules” designated by lawyers, that is to say national laws, international treaties and conventions, soft laws, etc.

For the international workshop organized at MFJ in June 2012, I wanted to go further.

Firstly, I wanted to adopt not a “micro” point of view anymore but a “macro” geographical point of view. From “macro” geographical point of view, these new regulations of globalization show a shift of the creation of norms to Asia. Asia now appears as the source of an Asian business law which borrows from various legal traditions (Common Law, continental law, learned law, *Lex mercatoria*, etc.). This is for example the case with Chinese contract law, but also the so-called Principles of Asian Contract Law (PACL), or the Chinese arbitration law and generally the international arbitration in Asia. Thus, the organizers of this workshop³

2. G. Lhuillier, « Le concept de “Law shopping” (Droit international privé, droit social, droit de l’environnement) », in M.-P. Blin-Franchomme *et al.* (ed.), *Droit du travail et droit de l’environnement. Regards croisés sur le développement durable*, Paris, édition Lamy-Wolters Kluwers, 2010; « Law shopping (La redéfinition du choix de la loi par la pratique du droit international des affaires) », in X. Boucobza (dir.), *Les groupes internationaux de sociétés : nouveaux enjeux, nouveaux défis*, Paris, Economica, 2007. See also G. Lhuillier, “Academic Knowledge: Three views on global law and global legal theory”, *Occasional Paper* (presented in the previous pages of these *Cahiers d’Ebisu* No. 3); and I. Giraudou, “Report on the International Workshop held at Maison franco-japonaise, Tokyo (June 2001, 3-4)”: http://www.mfj.gr.jp/web/sympo_20110603/pdf/CR-IW_3-4_June_2011.pdf (online also on: <http://glsn.eu/>, “Actualités” column).

3. Isabelle Giraudou, Gilles Lhuillier.

decided to analyse two new “objects”, the PACL and international commercial arbitration in Asia, in order to raise two questions:

1. First question: can the “normative spaces” approach of global law renew the theories of international law, and especially the theory of arbitration, not as a transnational legal order anymore but as a normative space? The interest of the question at stake is to provide us with a theory of transnational law and also of international arbitration.
2. Second question: can the “normative spaces” approach bring up to date the theory of comparative law, not anymore made of “transplants” and “legal families”, but of “normative spaces”? The interest of the question at stake is to elaborate a new methodology for comparative law.

These two questions have then for hidden purpose to help us to better understand the many uses of the of normative space concept: is this concept only a new methodological approach to the globalization of law? Or does it also consist in an alternative concept of the legal order in a transnational context? Is it a new concept for international arbitration? Is it also a new method for comparative law?

Secondly, I wanted to go further in the construction of the concept of normative spaces. To answer clearly to Hasegawa Kō’s friendly remark expressed last year on the link between technicality and morality in international law⁴, I proposed this year to add a new element to our definition of normative spaces. A normative space is made of:

1. First element: **a set of “norms”**. This set of “norms” is constituted by “practices” of law shopping which allow merchants to designate the “rules” governing their relations.
2. Second element: **a set of “rules”** designated by lawyers, that is to say national laws, international treaties and conventions, soft laws, and so on.
3. And a third element, the additional one I was just referring to: **a set of “discourses”** of the actors on the “norms and rules”, in order to

4. See K. Hasegawa, “Anchoring Normative Spaces in Global Legal Order: A brief comment on Gilles Lhuillier’s working paper”, *Occasional Paper*, presented in the previous pages of these *Cahiers d’Ebisu* No. 3.

introduce the legal “representation” of the international lawyers of their work, which are the links between legal “practices” and “rules”.

My “hypothesis” now is that a “normative space” is composed of:

1. **practices of choice** concerning law
2. the **designed rules** to be applied
3. as well as the concerned **actors’ discourses**.

And to “verify” this hypothesis, the organizers of the international workshop of June 2012 drew a questionnaire for each case study (i.e. the PACL and the international commercial arbitration in Asia) and sent it to the participants a few days before the workshop. The three set of questions it was based on corresponded to each of the three elements of a normative space. As follows:

1. First set of questions: the *practices of choice* – or what are the concerned actors’ practices of choice?
2. Second set of questions: the *chosen norms* – or what are the rules applicable to arbitration in Asia? What are those chosen in the PACL?
3. Third set of questions: the *choice makers’ discourses* – or what kind of discourses the actors themselves have on such practices and norms?

In other words: “Objects”, “Hypothesis”, “Verification of hypothesis”.

OF *BENTŌ* AND BAGELS

Globalization and new normative spaces

Andrew J. SUTTER^{*}

The terms “normative” and “normativity” have been associated with “spaces” by numerous authors in a wide variety of disciplines (e.g., O’Shea 2010, De Oliveira *et al.* 2007, Berman 2006, Maleuvre 1999), including law (Lixinski 2008, Ruiz Fabri 2003, Delmas-Marty 1994; cf. Berman 2007, “hybrid legal spaces”). No one can deny that suggestive ambiguity may be stimulating (Empson 1947), perhaps least of all those who organize academic conferences. Nonetheless, the purpose of the June 2012 conference and workshop at the Maison Franco-Japonaise in Tokyo (MFJ) was to try to consolidate a more concrete notion of “normative space” in the context of legal studies, and to explore in what ways it might be a useful unifying notion for scholars, law-givers and practitioners.

What is a “normative space”?

Some earlier legal writers have used the term “espace normatif” to generalize the notion of a national legal system. For example, Girard 2003 cites the following as examples of national spaces: English public law, French criminal procedure, French administrative law, French private international law, and Russian law (as such); and the following

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as examples of international spaces: the International Court of Justice, the International Criminal Court, the WTO and its dispute resolution procedure, and the European Convention on Human Rights and its juridical organs. In her view, and those of the authors of a volume on “due process in normative spaces” to which she was writing an introduction, considering all of the foregoing sorts of spaces as “normative spaces” permits more complex types of comparison than had been traditional. While she also declared that normative spaces are “open” and “can communicate with each other,” the mechanisms and examples of this were not so fully fleshed-out.

Others find the analogy to national legal systems unnecessarily limiting. Gilles Lhuilier has used the term “normative space” (including in seminars held in 2009 and 2011 at the MFJ) to capture what he observed while negotiating project finance transactions in Africa. The various parties, who could mostly be grouped dichotomously as representing the interests of China or of an African nation, were actually organized under the laws of several different jurisdictions. The several contracts in a deal were also governed by the laws of different jurisdictions, not all of which were domiciles of parties. Within the same contract, specific contract provisions or issues might be governed by separate choices of law. The texts of some provisions themselves were often based on foreign models, such as English or American contracts, originating outside the jurisdictions whose laws will apply. The governing language might be one in which none of the parties’ representatives are native. And even when the national laws of the home jurisdiction of one party or another did apply, those national laws were very likely to have been influenced by the legal systems of former colonial occupiers.

In this context, the four corners of each contract bound a “normative space.” Lhuilier emphasized the way in which this space gets filled: the laws and other norms that apply (i) come from a **mixture of** national (and possibly other) legal systems, and (ii) are **selected** by the parties in an eclectic (though not at all arbitrary) fashion. Whereas for Girard (2003) the notion of normative space seems to serve as a way of identifying domains where law “happens,” Lhuilier’s notion shifts attention to the space as a locus of mixture and choice. In this view, the “communication” between different systems and domains of law is the most salient feature of the space.

A culinary analogy can be found in the humble *bentō*, or Japanese box lunch. This usually consists of an assortment of small dishes placed within a frame (*bentōbako*) of lacquered wood, or more recently, of plastic. Subdivisions may be “hard” (of wood, and either removable or integrated into the box itself), “soft” (such as little paper cups or wrappers, or pieces of greenery) or nonexistent. The contents could in principle be one main dish, such as grilled fish on rice, but more usually are a selection of small dishes that the buyer can choose. Japanese and “Western” style dishes can easily be mixed – though whether these dishes are of Japanese or “Western” provenance isn’t always so clear anyway. For example, *tonkatsu*, a “typically Japanese” lunch dish consisting of a fried breaded pork cutlet, is derived from Portuguese cuisine. It may be alongside along a piece of grilled fish, some rice and Japanese pickles – as well as potato salad, spaghetti and a small green salad. Yet in this last triad, the recipes will be distinctively Japanese, and the greens will be inscribed with intricate swirls of mayonnaise according to the local art.

Where do normative spaces arise?

The image of Japanese potato salad is a good reminder that the notion of a normative space as a locus of mixture and choice doesn’t apply only to contracts. The modern Japanese system of civil law born in the Nineteenth Century consciously modeled itself on the example of German law. Even today, German law serves as a relational common law (Glenn 2007) available to fill in gaps in Japanese law, though judges may look to additional sources and models, such as American law, as well. Relational common laws, “reception” of foreign law, postcolonial law and other phenomena of interest to scholars of national legal systems all rest on the elements of mixing and choice similar to those in contract-based normative spaces.

Transnational regimes of private international law and private ordering are additional contexts in which choice and mixing of legal norms come into play. Vivid illustrations were provided by the two main presentations to the June 2012 MFJ conference and workshop. Naoki Kanayama described the efforts of a multi-national group of Asian contracts scholars to develop a private convention of contract law principles, drawing from multiple national traditions. And Yoshihisa

Hayakawa explained the roles of choice and mixing in developing the infrastructure for private commercial arbitration in Asia.

Although not represented at that conference, public international law is another area in which similar phenomena occur. Here the work of Amartya Sen in combining philosophical notions of justice from Western and South Asian sources (Sen 2009) might be an exemplary case.

So national legal systems, as well as private, transnational and public international ordering regimes, all can serve as *bentōbako*. It remains to be investigated whether other structures can be added to this list.

How does this analogy relate to Gilles Lhuillier's troika of practices, norms and discourses mentioned elsewhere in this volume? What follows is a tentative guess. Perhaps practices are like the particular dishes in the *bentō* – e.g., potato salad, rice, steak. Norms might be like the choice of cuisine used to prepare the dish – e.g., is the potato salad prepared according to a German, Japanese or American recipe?; or if rice, is it *koshihikari*, jasmine, *arborio*, or some other variety? And discourses might be like the process of selecting and negotiating what goes into the *bentōbako* – why potato salad instead of spaghetti, why German-style instead of Japanese-style, and so on. Of course, sometimes analogies can be taken too literally! I leave it to the reader to improve on this suggestion.

What good is the category of “normative space”?

So far, scholars of legal systems and of comparative law have been getting along quite well without the “normative space” idea. Indeed, it's a commonplace among comparativists that “all legal systems are mixed systems.” And the shapers of transnational legal and private ordering regimes, as well as globe-trotting legal practitioners, have been happily mixing and choosing law without perhaps reflecting much on it. Nor are they likely to think about how their activities relate to those of judges and legislators who import foreign legal concepts into their own national systems. Occam's Law counsels that we shouldn't multiply entities without necessity – so what added insight can we gain from a category of “normative spaces”?

A hasty reply is that it's a unifying concept. All of these activities and phenomena involve mixing and choice from a variety of national legal regimes. Unfortunately, this reply runs the risk of being as facile as it

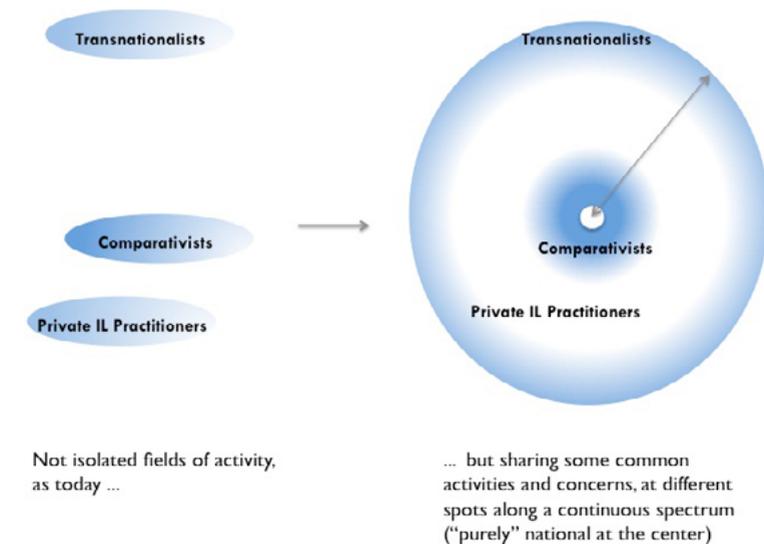
is obvious, if we allow “normative space” to be simply an amorphous catch-all term for a wide range of heterogeneous phenomena.

Can the term steer us toward any synthetic insights about what all these diverse activities might have in common? For Ruiz Fabri (2003) and her collaborators, the idea of normative space facilitated a comparative analysis of due process (*procès équitable*) across the heterogeneous range of spaces cited above. But if we broaden this idea to include contracts and other objects, and focus especially on the mixing and choice that occur within a space, what do we gain?

That we can gain something was the working hypothesis of the June 2012 workshop. The evidence is tantalizing. Consider Figure 1:

The left side of the figure presents various activities of practitioners and scholars as they are without the “normative space” concept – *i.e.*, as fairly autonomous fields.

Suppose we map these fields to the circular object on the right side of the figure. Along the radius of the circle let's posit a gradient from a “pure” national legal system at the center to a maximally mixed



(whatever that might mean) set of applicable laws at the boundary.¹ Since the comparativists are right, that all legal systems really *are* mixed, the exact center of this circle is missing. That is, the diagram is topologically equivalent to a bagel (in two dimensions, at any rate).

This mapping suggests that comparativists studying the “reception” of foreign legal concepts and similar phenomena have been focusing their attention relatively close to the center of the bagel. Private international law practitioners and scholars formulating transnational legal schemes have been engaged relatively closer to the boundary. Locating their activities along a continuous radial gradient instead of within entirely distinct domains is a way of saying that all these phenomena and activities are examples of the same kind of thing.

We still need to connect our culinary metaphors. To do this, we simply suppose that at each point of the bagel there could be one or more *bentō*. (A reader familiar with poppy, sesame, garlic or salt bagels will have a rough idea.) Metaphorically speaking, if the *bentō* contains just some Japanese rice with a pink *umeboshi* (pickled plum) at the center – a dish known as *hinomaru*, because it resembles the Japanese flag – it would be near the center of the bagel. If it used jasmine rice, it would be a little farther out. A *bentō* comprised of German-style potato salad, Italian-style spaghetti and American-style hamburger would be at a different spot from one with the same dishes (practices) that were all prepared in the Japanese style (a different norm) – though as to where each would wind up, your guess is as good as mine.

Colorful analogies aside, I should emphasize that this is a working *hypothesis*, which future research will substantiate or falsify.² But if it

1. An argument might be made that, say, private and transnational mixing activities should be along different axes; I ask the reader's indulgence to let me to use a simpler heuristic for now.

2. Proposing a category as a hypothesis to be investigated empirically might not be so common in law practice or legal studies, but there are plenty of examples in other fields. As the late microbiologist Carl Woese (2004: 179) pointed out, “conjecture is necessarily the mainstay of defining and understanding issues” in the study of biological evolution. This approach isn't without perils. Woese described with some irony how the category of “prokaryote” was used for several decades as a shortcut by which “the concept of a bacterium could be gained without having to know the natural relationships among [the various phylogenetic groups of] bacteria” (177) – *i.e.*, the category masked a certain complacent ignorance. Economics provides another unfortunate object lesson. In a 1955 speech, Simon Kuznets (1955: 26) first hypothesized that as a country's per capita GDP increases, income inequality first rises and eventually falls (tracing out an inverted-U graph now known as “the Kuznets curve”). Kuznets

holds up, it could be unifying in more than a superficial sense. For one thing, it could mean that scholars and practitioners working in hitherto separate fields might be able to learn from each other's discoveries.

One important class of potential discoveries concerns possible constraints on mixing – *i.e.*, about types of mixing that don't work so well. It's not hard to find a simple illustration of such a constraint in what we might call brute-force transposition. If you take a chunk from another jurisdiction's statute and incorporate it into your own legal system without modification, it probably won't work out so well. You run into similar problems if you dump it into your own transnational private ordering system without trying to harmonize it with the other bits and pieces and new ideas you are mixing in. And again if you copy a chunk of someone else's contract and paste it into your own without modification, you'll probably regret it (all the more so if the source and the target are governed by different jurisdictions' laws).

Of course, few people actually would take such a simplistic approach. Yet it illustrates a mixing technique that is a bad idea *in multiple contexts* – at various spots along the radius in our diagram.

Perhaps there are other techniques that are similarly awful in many contexts. Or others that are particularly successful. Then the notion of normative space will have helped us to identify some facts about the mixing of laws that can be useful guides for those focused on national systems, as well as for those framing transnational or other systems for public or private ordering. With any luck, we might even be justified in calling these facts (roughly) “universal” principles for mixing laws.

Finally, just as law isn't aloof from political, social and cultural concerns, we shouldn't expect normative spaces will be, either.

emphasized that the idea was based on “5 per cent empirical information and 95 per cent speculation, some of it possibly tainted by wishful thinking.” Nonetheless, developmental economists almost immediately reified it into a causal “law,” justified by something like the “trickle-down” economics hypothesis later favored by US Republicans. They designed aid programs that deliberately targeted funds to the wealthiest residents of poor countries – the supposed investors and job creators – in order to speed up industrialization, on the principle that more inequality today would lead to less tomorrow. It didn't quite work out that way (Moran 2005). As Woese put it, “it is not guesswork per se that is anathema; it is guesswork, conjecture, and the like that masquerade as problem-solving, interest-ending fact” (2004: 179). So I propose that for the time being we should treat normative spaces more in Kuznets's original spirit, as a category that has yet to prove its worth.

Long ago, the ultimate source of law was a “social contract,” but recently, it is becoming more and more a matter of private contract. For example, the United States Supreme Court in recent cases like *Rent-A-Center v. Jackson* (2010),³ *Compucredit v. Greenwood* (2012),⁴ and *Marmet Health Care Center v. Brown* (2012)⁵ has upheld mandatory arbitration in a wide range of consumer protection, employee discrimination and wrongful death cases – fields in which citizens could formerly rely on redress in the courts. In *Rent-A-Center*, the Court even went so far as to hold that the question of whether an arbitration clause in a consumer contract is enforceable should be decided by **arbitrators**, not by a judge.

Indeed, the recent rapid expansion of this form of “private ordering” was one of the motivations for the notion of normative space put forth in the June 2012 conference and workshop. But I hope that the category of normative spaces will help us to interrogate such changes, and not merely to describe them. For example, who benefits from the transition to orderings farther from the center of the “bagel”? What is the impact of this transition on democratic accountability, and on faith in democracy itself?

Do all these musings make sense? Are they worthwhile to pursue and develop? The first step toward an answer is to sharpen the notion of normative space, so that it can become a productive seed for future study.

3. 561 U.S. ___, 130 S. Ct. 2772 (2010).

4. 565 U.S. ___, 132 S. Ct. 665 (2012).

5. 565 U.S. ___, 132 S. Ct. 1201 (2012).

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