Roundtable

The Reception of the Rechtsstaat Concept in Japan: Its Contraction in Administrative Law and Expansion in Constitutional Law

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INTRODUCTION

East Asia is widely recognized as a region observing rule of law even before democratic constitutionalism has taken hold. Japan preceded many others in adopting this idea and even passing it on to others. It is especially intriguing to explore which version of rule of law and whatever sources it comes from have had the impact on Japan's legal system and even beyond. The College of Law, National Taiwan University is particularly honored to invite Professor Yasuo Hasebe from Tokyo University Faculty of law to address this issue. Professor Hasebe discusses how the concept of "Rechtsstaat" was understood in Japan by scholars in their local context, a way that is very reflective of legal receptions and their indigenization into local understandings. This reflection is particularly in need as globalization following modernization has generated many –self-willingly or reluctantly– legal receptions.

I. OPENING REMARKS

PROF. JIUNN-RONG YEH

Good morning, we are honored to have Professor Hasebe with us. Professor Hasebe is a professor of constitutional law, public law and jurisprudence at the Tokyo University as well as the vice-president of International Association of Constitutional Law, the biggest international association of constitutional law community. He also participated in many international constitutional studies. Professor Wen-Chen Chang and I had chances to work with Professor Hasebe in many occasions and know that he is a very prominent scholar in constitutional studies. It is the first time for Professor Hasebe to be here in Taiwan. I am sure that we would have many interesting issues to share with him, especially when we have some sort of Japanese historical legacies here in Taiwan. We would also be very pleased to have Professor Hasebe sharing his ideas and experiences with us. I would like to stop here by inviting Professor Hasebe to give us his lecture, followed by our local discussants. Let me introduce them to you now. The first is Professor Wen-Cheng Chang, a colleague of mine at College of Law, National Taiwan University. The second commentator is Professor Chao-Chun Lin who teaches in National Taipei University. We also have Professor Shu-Perng Hwang from Academia Sinica. Professor Hasebe, you have the floor, please.

II. SPEECH

THE RECEPTION OF THE RECHTSSTAAT CONCEPT IN JAPAN

PROF. YASUO HASEBE

Thank you, Professor Yeh, and ladies and gentlemen. It's my great honour to be invited to make a presentation here before such eminent audience. The renowned National Taiwan University and my university, in particular the college of law here and our faculty of law, have had intimate relationship. And it's my great honour and great pleasure to make more steps forward to consolidate this relationship myself. Today, I would like to talk about "The Reception of the Rechtsstaat Concept in Japan." While the title may sound a little parochial, I will try to make some observations with general implications for Asian constitutionalism.

1. *The Contraction of the Rechtsstaat Concept*

At first, I have to confess that the concept of Rechtsstaat has rarely been a subject of discussion in Japan. This lack of attention, I suspect, results from an insufficient awareness among both constitutional and administrative law scholars, in their traditionally separate approaches to the concept, of how the problematics of the Rechtsstaat necessarily encompass both areas.

Rather than addressing the concept of the Rechtsstaat, Japanese administrative law scholarship has tended to focus on "the principle of legality of administration." According to Hiroshi Shiono,[1] Professor Emeritus of the University of Tokyo, Tatsukichi Minobe (1873-1948),[2] the founder of public law studies in Japan, formulated this principle on the basis of one element of the concept of the Rechtsstaat, the Vorbehalt des Gesetzes (the requirement of legislative authorisation), that is, the principle that state actions restricting the rights or freedoms of individuals should be authorised by parliamentary statute. In Minobe's words, "the authority to delineate the sphere of people's freedoms and properties exclusively belongs to the legislative power, and the administration may act only within the sphere allowed by legislative statute." Minobe furthermore argued that the Rechtsstaat should be distinguished from the Polizeistaat on this very basis.

Shiono observes that the principle of legality of administration serves

1. HIROSHI SHIONO, HOCHISHUGI NO SHOSO (VARIOUS ASPECTS OF THE PRINCIPLE OF LEGALITY OF ADMINISTRATION) 115 & 141 (2001).

2. Minobe Tatsukichi was a professor at the University of Tokyo from 1920 to 1934. He is well-known for his liberal understanding of the Imperial Constitution of Japan, enacted in 1889. However, *see supra* note 13.

the ideal of liberalism, which purports to guarantee people's rights and freedoms, but not that of democracy.[3] It is questionable, however, whether the ideal of liberalism can be distinguished sharply from that of democracy with regard to Minobe's conception of the Rechtsstaat. And this raises the related question of why Minobe stresses one particular element, the Vorbehalt des Gesetzes, among the various others that constitute the Rechtsstaat.

To understand the special importance of the Vorbehalt des Gesetzes, the requirement of parliamentary authorisation of state actions restricting people's rights or freedoms, let us consider Minobe's conception of the Rechtsstaat itself.

2. *Minobe's Conception of the Rechtsstaat*

Various meanings have been attributed to the term "*Rechtsstaat*." It is well-known that in Germany the concept has undergone complex transformations.[4] According to Carl Schmitt, "the term *Rechtsstaat* can mean as many different things as the word *Recht* itself and, moreover, just as many different things as the organisations connoted by the term *Staat*."[5]

Nor is every aspect of the *Rechtsstaat* universally appreciated. Adhémar Esmein, the classic French public law scholar, considers the concept of "règle de droit," which is the core element of the *Vorbehalt des Gesetzes*, to be one of those "abstractions germaniques qui pénétreront difficilement dans les cerveaux français;"[6] Georg Jellinek asserts that the *Rechtsstaat* concept itself, purporting to describe an ideal state but not taking reality into account, is an "*Ideal Typus*" harmful to the scientific study of law.[7]

However, the *Rechtsstaat* of Minobe's conception is rosy enough to be attractive, as well as relatively easy to understand. In Minobe's understanding, the *Rechtsstaat* requires, first, that there be a free press and lively public debate over government policy. Second, it requires that animated discussion, reflecting public opinion but undistorted by particular interests, take place in a parliament purporting to pursue public interests; the underlying premise here is that parliamentary statutes resulting from such discussion would more often than not enhance fairness and security for

3. SHIONO, *supra* note 1, at 118.

4. Ernst-Wolfgang Böckenförde, *Entstehung und Wandel des Rechtsstaatsbegriffs*, *in* STAAT, GESELLSCHAFT, FREIHEIT (Ernst-Wolfgang Böckenförde ed., 1976); FIGURES DE L'ÉTAT DE DROIT, SOUS LA DIRECTION D'OLIVIER JOUANJAN (2001).

5. CARL SCHMITT, LEGALITY AND LEGITIMACY 14 (Jeffrey Seitzer ed. & trans., 2004).

6. Adhémar Esmein, *German abstractions difficult to penetrate into the French intellect*, *in* ÉLÉMENTS DE DROIT CONSTITUTIONNEL FRANÇAIS ET COMPARÉ 44 (7th ed. 1921).

7. GEORG JELLINEK, ALLGEMEINE STAATSLEHRE 35 (Athenäum 3d ed., 1976).

citizens.[8]

Minobe's contention in his administrative law scholarship that the legality of administration would secure people's rights and freedoms was intimately interconnected with his constitutional theory, which highly valued the role of the parliament and freedom of the press. And in the context of the era of *Taisho Democracy*,[9] his adoption of such a conception of the *Rechtsstaat* should not be regarded as merely utopian.

Minobe's conception of the *Rechtsstaat* overlaps with Carl Schmitt's images of *bürgerliche Rechtstaat*[10] and of *Gesetzgebungsstaat* (the legislative state). In these understandings, both Minobe and Schmitt presuppose that general and abstract parliamentary statutes resulting from the free and reasonable deliberation of elites purporting to pursue genuine public interests would more often than not secure the liberty of citizens.

3. *Twilight of the Rechtsstaat*

However, such an understanding of the *Rechtsstaat* increasingly seemed overly idealised as popular participation in politics grew, political parties articulating popular interests became the main actors in politics, and the government expanded its scope of activities in response to their demands. These developments occurred as a result of changes in how countries waged war. Following the military successes of Bismarckean Germany, many countries adopted German-style systems of conscription; when a state coerces a large part of its citizenry to go to war, its people demand greater participation in politics in return, and furthermore demand that the state enhance their welfare equally and fairly.

Minobe recognized that as government expands its scope of activity, legislation increasingly comes to necessitate specialised technical knowledge, and that as political parties increasingly come to control parliamentary deliberation and decision-making, discussion in parliament becomes a mere dead name.[11] In Minobe's view, political parties only represent particular interests within society, not the general interests of society as a whole. Open deliberation in parliament becomes a mere facade, with actual decisions being taken by the leaders of political parties behind closed doors.[12] From this viewpoint, it is difficult to argue that

8. TATSUKICHI MINOBE, KENPO SATSUYO (ELEMENTS OF CONSTITUTIONAL LAW) 463-64 (1935). Minobe often refers to John Stuart Mill's arguments on parliamentary democracy.

9. The liberal and democratic trends in politics and society that arose in Japan from 1905 to 1926 are known as *Taisho Democracy*. This period was under the reign of Emperor Taisho.

10. CARL SCHMITT, VERFASSUNGSLEHRE § 13 (1928); *see also* SCHMITT, *supra* note 5, ch. 1. Schmitt used the spelling "Rechtstaat" in *Verfassungslehre.*

11. TATSUKICHI MINOBE, NIHON KENPO I (JAPANESE CONSTITUTIONAL LAW I) 402-05 (1922).

12. Carl Schmitt described similar defects in party politics. *See* CARL SCHMITT, THE CRISIS OF

parliamentary statutes are a bulwark for people's rights and freedoms.[13]

Can administrative law scholars in Japan still cling to the concept of *Vorbehalt des Gesetzes* when the presuppositions of Minobe's conception of the *Rechtsstaat* have foundered? There are two approaches to this question, one from the viewpoint of administrative law, and the other, discussed in the next section, from the viewpoint of constitutional law.

The administrative law approach makes recourse to the role of the politically neutral bureaucracy.[14] If this bureaucracy, equipped with specialised technical knowledge, actually contributes to the realisation of general interests, parliamentary statutes may still generally be understood to assure, more often than not, general interests and people's rights and freedoms, since most bills enacted in a contemporary parliamentary government are sponsored by the Cabinet and prepared by the central bureaucracy.

This answer raises a new set of questions, such as whether the bureaucracy actually contributes to the realisation of general interests (or rather protects specific industries and interests groups that it purports to regulate), or whether the bureaucracy can maintain a position of authority in its knowledge in relation to organizations such as think-tanks and NGOs. It remains to be seen whether or not the principle of legality of administration, including the concept of *Vorbehalt des Gesetzes*, retains its legitimacy as an assurance of people's rights and freedoms in the future.

On the other hand, the end of the Cold War has brought about a dramatic reduction in the scope of the activities of government globally. As governments today do not have to mobilise their people under the threat of massive nuclear attack, the challenge of improving every citizen's welfare fairly and equally is reduced.[15]

Moreover, competition among governments to promote investment through deregulation, privatisation, and other policies to reduce costs for corporations has increased globally, making it difficult for any one government to maintain welfare-state policies that entail higher costs for corporations. If the government reduces its scope of activities and hands over responsibility for managing day-to-day risks to individuals, then the role of the political process itself as the mechanism for defining social needs

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PARLIAMENTARY DEMOCRACY (Ellen Kennedy trans., 1985).

13. In the 1930s, Minobe proposed reforming electoral laws and establishing a kind of non-partisan corporatist system in order to overcome the political and economical difficulties that Japan faced. In his view, the political parties were so corrupt that they could not be trusted to govern the state.

14. The approach described here is just my rational reconstruction of a plausible response from administrative law scholarship. No particular administrative lawyer has ever made such a response.

15. Philip Bobbitt describes this transformation of constitutional structure as the change from "nation states" to "market states." *See* PHILIP BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY (2002).

and redistributing costs and benefits among social sectors is diminished, and the bureaucracy administering government policy is presumably reduced in size as well as influence over the political agenda.

However, these changes should not be expected to lead to the resurrection of Minobe's classical *Rechtsstaat*, since the range of political powers that individual nations can exercise is drastically smaller than that of governments in the nineteenth century, and since nations are more than ever before mutually dependent and interconnected within transnational governance systems. As the scope of state activities shrinks, it may be the case that the scope of influence of non-governmental bodies, including multinational corporations, will expand. It is not clear whether the citizens of post-Cold War Japan can maintain autonomous lives if the government abstains from protecting their lives, and abandons responsibility for dealing with risks to their lives.

An expansion of the idea of the *Rechtsstaat* beyond national boundaries may offer a way out of such a predicament. Unlike the countries of Europe, however, Japan has not yet been in a position to pursue such an expansion with its neighbours.

4. *Expansion of the Rechtsstaat*

Thus far, I have discussed the concept of the *Rechtsstaat* and its purported purpose of protecting people's rights and freedoms. But why is it so important for the state to protect people's rights and freedoms? And by what means should it do so? These are questions for which constitutional law should provide answers.

Among the several possible kinds of answers, one, deriving from the Kantian, classical conception of the *Rechtsstaat*, is that it makes no sense to pose such questions. It is only with the establishment of a state that delineates people's rights and freedoms that people know what their rights and freedoms are and the preconditions for social life are secured.[16] Since only the *Rechtsstaat* can determine what people's rights and freedoms are, it makes no sense to ask why it is necessary to establish a *Rechtsstaat* in order to protect people's rights and freedoms. However, no constitutional scholar in contemporary Japan takes such a classical view, mainly because such a view offers no guidance for conducting constitutional review, in particular with regard to parliamentary statutes.

In the dominant view of constitutional review in Japan, the main role of

16. *Cf.* Böckenförde, *supra* note 4, at 68-70. I here draws on the recent understanding of Kant as a Hobbesian. For this understanding, *see* JEREMY WALDRON, THE DIGNITY OF LEGISLATION 42 (1999); *see also* RICHARD TUCK, THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT 207-25 (1999).

judicial review is to maintain the preconditions for the proper functioning of democratic process. In this view, the courts should strictly scrutinise the constitutionality of statutes which, for example, restrict freedom of speech or impair the equality of voting rights, since freedom of speech and equality of voting rights constitute preconditions for the proper functioning of democratic process. On the other hand, the courts should show deference towards the political branches on other issues, such as those relating to economic freedoms, since a properly functioning democratic political process will ameliorate any laws that inappropriately restrict economic freedoms. This view thus explains why unelected judges should have the power of constitutional review, and sometimes strike down parliamentary statutes.

One discerns in this view the inheritance of Minobe's image of the *Rechtsstaat*. As Minobe points out, parliamentary deliberation becomes mere sham, and actual decisions come to be made behind closed doors, as political parties increasingly control discussion and voting processes.

However, as Jon Elster argues,[17] political parties do not usually assert particular interests explicitly in open chambers, since doing so would be counter-productive to realising such interests. Rather, political parties purport to pursue general public interests. And in doing so, they cannot but make concessions to the public interests they pretend to represent. Reconciliation and fusion of general and particular interests are thus realised through deliberation in public chambers.

Certainly, political parties should not be expected to persuade other parties to change their views by the arguments they make in public deliberation. However, it is not opposing parties but rather public opinion that each party hopes to persuade in putting forward its public-interest arguments. And changes in public opinion resulting from such arguments are reflected in the future composition of the parliament, as well as in future government policies in the middle term.

In other words, Minobe's conception of the *Rechtsstaat* has been expanded spatially (beyond the chambers of parliament) as well as temporally (beyond the current legislative term).[18] It should be reiterated that in today's expanded conception of the *Rechtsstaat*, the role of judicial review is restricted to sustaining the preconditions for the proper functioning of democratic process, and does not include directly delineating people's rights and freedoms; the exercise of the reviewing power should not be

17. Jon Elster, *Deliberation and Constitution Making*, *in* DELIBERATIVE DEMOCRACY 109-11 (Jon Elster ed., 1998).

18. *See* the related conception of an expanded public sphere in JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 484-85 (1996).

result-oriented but process-oriented.[19] This expanded conception of the *Rechtsstaat* may furthermore be understood actually to support the requirement of parliamentary authorization (*Vorbehalt des Gesetzes*), though it is rare that administrative law scholars mention this concept in Japan.

Of course, this conception of the *Rechtsstaat* itself might be criticised as too rosy compared to the reality. It might be asserted that when Japanese electorate vote at national elections, they do so not taking into serious consideration the alternative policy choices; instead, they are manipulated by populist propaganda of political parties which are advised by advertising agencies. It may also be pointed out that the Japanese Supreme Court has been too passivist towards the political branch to perform the expected role.[20] And as I argue above, this expansion may not yet be sufficient for finding a way out of the predicament facing Japanese citizens in the post-Cold War era.[21] That's it from me. Thank you for your endurance.

III. COMMENTARY

Professor Jiunn-Rong Yeh:

Thank you very much, Professor Hasebe, for this very insightful presentation. From my point of view, there are at least three divides regarding your essay. The first divide is the transplantation of concepts such as *Rechtsstaat* or *Vorbehalt des Gesetzes* from Germany to Japan, Taiwan, or Korea. The second divide, in my opinion, concerns the different eras. As you can see, Professor Hasebe frequently mentioned Professor Minobe who was one of the pioneers of Japanese public law professors introducing German legal concepts into Japan. There has been an elapse of time between Professors Minobe and Hasebe, representing two different eras. The last divide lies in the areas of constitutional law and administrative law where recognizing or analyzing the concept of *Rechtsstaat* may differ. Therefore, it will be of significance to ask how we are going to analyze these divides and come up with a view. For sure there is another divide for people in this room,

19. This does not mean that this conception of the Rechtstaat is based on non-cognitivist value-relativism.While it is possible to find objectively valid solutions to the questions of how to realise public interests, these solutions should be not be dictated by the courts but reached through rational deliberation in the parliament and in the pubic sphere in general. On this point, *see* Yasuo Hasebe, *Constitutional Borrowing and Political Theory*, 2(1) INT'L J. CONST. L. 224, 233-34, 239-40 (2003).

20. For my explanation of the apparent passivism of the Supreme Court, *see* Yasuo Hasebe, *The Supreme Court of Japan: Its Adjudication on Electoral Systems and Economic Freedoms*, 5(2) INT'L J. CONST. L. 296, 296-307 (2007).

21. In this paper, I did not treat the concept of the rule of law, which is supposed to be closely connected to that of *Rechtsstaat*. For my view of the concept of the rule of law, *see* Yasuo Hasebe, *The Rule of Law and its Predicament*, 17(4) RATIO JURIS 489, 489-500 (2004).

who are from different jurisdictions. The story in Japan may not apply to the context of Taiwan. This is indeed an interesting question. We have three discussants. I would like to invite them to comment on this issue. Maybe they will be able to provide us with some different angles. We will open up for full discussion after that. Now we will begin with Professor Chang.

A. PROF. WEN-CHEN CHANG

Thanks you, Professor Yeh and Professor Hasebe for the wonderful and enlightening lecture presented to us this morning. Interesting issues abound in your presentation, but I am particular intrigued in three aspects.

The first aspect, which was already pointed out by Professor Yeh, concerns the legal learning from outside. I was particularly surprised to learn a discursive and deliberative component in the understanding of *Rechtsstaat* by Professor Minobe's. I am curious about why, at the time of the early twentieth century, he was drawing this deliberative and discursive component notwithstanding the many other ways of understanding the idea of *Rechtsstaat*. This propelled me to think about ways by which we learn legal concepts and institutions from outside. From time to time, we learn things from outside due to the struggles we have locally and the questions we ask ourselves. Inevitably, legal learning from foreign legal systems and cultures becomes reflective of a learner's local context. The way we formulate questions and find solutions from outside is always reflective of our problems in the local context and our internal struggles. If I understand Japan's pre-war history correctly, at the time when Professor Minobe learned about the concept of *Rechtsstaat*, there had been a gradual emergence of civil and political elite groups and social organizations.[22] For instance, during the constitutional-making of post-war Japan, despite a conventional view that the Japanese constitution was simply imposed from outside, there were citizen involvement in procedural and substantive discussions of the new Japanese Constitution.[23] They primarily came from civic and professional organizations that had already been very active were before the war, which clearly indicating the emerging civil society in pre-war Japan. Professor Minobe evidently drew on this emergence of civil society in his understanding of *Rechtsstaat*. He intended to emphasize a civil and political sphere, which would possibly be, to a certain extent, rescued by the idea of *Rechtsstaat* and separated from the imperial bureaucracy. Additionally it would be even better in Professor Minobe's understanding to have a

22 . Wen-Chen Chang, *East Asian Foundations for Constitutionalism: Three Models Reconstructed*, 3(2), N.T.U. L. REV. 113, 117 (2008); KOSEKI SHOICHI, THE BIRTH OF JAPAN'S POSTWAR CONSTITUTION 26-50 (Ray A. Moore ed. & trans., 1997).

23. Chang, *id*.

deliberating parliament with autonomy and distance from the imperial regime to look for public interests. Thus, Professor Minobe's learning and understanding of the German idea of *Rechtsstaat* was certainly influenced by the Japanese local context of his time.

Similarly, the Taiwanese contraction of *Rechtsstaat* was also much reflective of its own local struggles for democratization in the 1980s and 90s. At that particular time, scholars, and most importantly the Constitutional Court, began to utilize the concept of *Rechtsstaat* as a legal constraint to the executive powers held by the party-state and the strong man Chiang, Kai-shek.[24] We can see a clear instrumental use of such concept by scholars, particularly administrative law scholars in Taiwan. Professor Weng was the front scholar who subsequently served as justice of the Constitutional Court to utilize the idea of *Rechtsstaat* and *Vorbehalt des Gesetzes* in order to dismantle the concentrated powers of the party-state. The emphasis of the two concepts, *Rechtsstaat* and *Vorbehalt des Gesetzes*, allowed the parliament –which however had not been opened for election– to share powers with the dictatorial executive. Although the power-sharing scheme was far from democratic, the utilization of such foreign concepts at least succeeded in loosening the power grid of the party-state.[25] As the democratization went on, the idea of *Rechtsstaat* and, in concrete terms, *Vorbehalt des Gesetzes*, became most powerful legal tools employed by the opposition in the parliament.[26] In emphasizing particularly the idea of *Vorbehalt des Gesetzes*, the newly elected parliamentary members were able to gain powers in law-making and place effective checks and balances with the government controlled by the ruling party.[27]

There may exist many ways to understand the German idea of *Rechtsstaat*, but once this very German idea travels outside, its understandings would be subject to particularly places it travels to and reflective of local struggles and their solutions. The Japanese story shared by Professor Hasebe implicates an evolution of the Japanese society that began to distrust the parliament and the political parties and aimed to put a constraint on the bureaucracy by utilizing the concept of *Rechtsstaat*. It exemplifies an indigenization process of foreign concept reception in that a particular concept that grew in the foreign soil became localized and

24. *See e.g.*, TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASE (2003) (illustrating that the Constitutional Court of Taiwan began to constrain government powers by using administrative law concept such as non-delegation doctrine); Wen-Chen Chang, *Transition to Democracy, Constitutionalism and Judicial Activism: Taiwan in Comparative Constitutional Perspective* (JSD Dissertation, 2001) (discussing the Constitutional Court began exercising its powers in administrative law areas).

25. Chang, *id*.

26. *See. e.g.*, Jiunn-Rong Yeh, *Democratically Driven Transformation to Regulatory State: the Case of Taiwan*, 3(2) N.T.U. L. REV. 31-59 (2008).

27. Yeh, *id.* at 47-49.

contextualized. Indeed, the idea of *Rechtsstaat* has been learned, borrowed and discussed in many different places, and the ways it have been utilized vary from place to place. These differences, in my view, should not be taken as any mistakes nor defiance as any legal concept may travel outside the place where it was given to birth and gain new experiences or even new lives. That is my first reflection upon your wonderful essay.

My second reflection concerns your introduction of the dominant view held by Japanese scholars with regard to the main role of judicial review particularly after World War II. First of all, the dominant view that considers judicial review as maintaining preconditions for proper functioning of democracy sounds to me very similar to the theory of an American scholar, John Hart Ely, on the democratic reinforcing role played by the judiciary.[28] However my inquiry is about why the post-war Japanese constitutional scholars would hold such a procedural –but not substantive– point of view with regard to the role of judicial review. Based upon the contextualized approach that I am mostly familiar, the Elian kind of understanding in the role of courts is actually very reflective of the American context when the Warren Court dominated constitutional politics in the 1960s and 1970s.[29] In responding to fast changing social demands and the rise of civil rights movement, the Warren Court rendered progressive decisions on the grounds of substantive rights. One of the most famous was an issue regarding whether black children could go to white schools.[30] Some of the decisions were rendered in such a liberal fashion that caused concerns for constitutional scholars. It was precisely in response to this particular context that the so-called counter-majoritarian difficulty was raised and solutions were sought. It is thus no surprise for Ely to develop such a procedural understanding of the role of the judiciary. John Hart Ely expected the Court to be neither proactive nor restrained. Rather, he aimed at having a court to secure a functioning political process.[31]

As far as I understand, the aforementioned American context does not seem to exist in Japan. The democratic process in the Japanese society, in terms of the majority's taking powers, has not yet exhibited the kind of malice in gerrymandering or electoral disparity such that voter representation would be diluted to such an exclusory extent as black citizens had been in the United States. The introduction of procedural understanding of judicial review into Japan, as indicated in your lecture, was connected to the pre-war era. Yet this understanding appears as not addressing any of acute local

28. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REIVEW (1980).

29. *See generally* MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE (1999).

30. *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954).

31. ELY, *supra* note 28.

problems in light of the constitutional scheme in Japan. Therefore, one interesting inquiry can be raised upon why and how this dominant scholarly view came to become dominant as per your essay. I would like to note that in a seminar co-taught by Professor Yeh and myself, two highly important decisions by the Japanese Supreme Court regarding electoral districting were discussed.[32] In light of the dominant view held by the Japanese scholars, the Supreme Court should have intervened to electoral formula and re-districting but in the end it did not. I would like to learn more about this dominant view according to your assessment. That is the second aspect I would like to draw your attention on. Perhaps some of our students in this audience could also provide their opinions on these two decisions by the Supreme Court decisions of Japan.

The last reflection I would like to make lies in the transnational scale of *Rechtsstaat* and problems of *Rechtsstaat* concept implicit in your essay. From a theoretical perspective, if there is any transnational *Rechtsstaat* idea, we may have transnational *Staat* before the concept of transnational *Rechtsstaat*. If that is the case, we have to think about whether *Staat* should be a "state" or it can be also any other political organizations. This particular theoretical reflection actually happens in Europe right now, The Europeans have been struggling with the questions of whether they should have a "state" or any sort of political organizations before they can really realize the *Rechtsstaat* concept in Europe.[33] Yet, according to the idea of Professor Minobe or other similar conceptualization of *Rechtsstaat* in terms of finding a more autonomous civic, political discursive space, a physical "state" or political organizations are not a necessary condition. In this sense, *Staat* might be a kind of civic, political space for discursive, political discussions and deliberations. This brings to me the Habermasian conceptualization of what is going on in Europe and what Europe would be becoming.[34] As far as I am concerned, the idea of *Staat* has already become the discursive component of *Rechtsstaat*. If that is the case, we could further pose another inquiry on what is there for *Recht*. This will to certain extent render *Rechtsstaat* a redundant concept because we already found the idea of discursive space in *Staat*, not in *Recht*. Nevertheless, we still have to find out whether rule of law or *Rechtsstaat* would be a better conceptualization on

32. Case to seek for nullification of an election, 2003 (Gyo-Tsu) No. 15, 2004.01.14. For the text in English, *available at* http://www.courts.go.jp/english/judgments/text/2005.07.19-2005.-Gyo-Tsu-. No.73. html (last visited Feb. 8, 2009); Case to seek invalidity of election, 1999 (Gyo-Tsu) No. 8, 1999.11.10. For the text in English, *available at* http://www.courts.go.jp/english/judgments/text/1999.11.10-1999-Gyo-Tsu-No.8.html (last visited Feb. 8, 2009).

33. *See e.g.*, Dieter Grimm, *Does Europe Need a Constitution?*, 1 EUR. L.J. 282, 297-99 (1995); and Jürgen *Habermas,* Remarks on Dieter Grimm's "Does Europe Need a Constitution?", 1 EUR. L.J. 303, 305-06 (1995).

34. *See id. See also* JOHN P. MCCORMICK, WEBER, HABERMAS AND TRANSFORMATIONS OF THE EUROPEAN STATE: CONSTITUTIONAL, SOCIAL, AND SUPRA-NATIONAL DEMOCRACY (2007).

transnational scheme or domestic schemes.[35] These are some reflections I have on your wonderfully lecture. Thank you very much.

Professor Jiunn-Rong Yeh:

Thank you, Professor Chang. Professor Hasebe, would you like to take some time to respond the questions?

Professor Yasuo Hasebe:

Thank you very much for the overwhelming comments from Professor Chang. The three aspects pointed out by Professor Chang are very interesting. One of them concerns the background of Minobe's discursive or deliberative element of the *Rechtsstaat* concept. I think he had a very particular consideration behind this deliberative element of the *Rechtsstaat*. He intensively discussed this deliberative element of *Rechtsstaat* during 1920s, which corresponds to the era of Taisho democracy and your description of the pre-war Japan emergence of civil societies as well. In the 1930s, however, he stopped to talk about this deliberative element of the *Rechtsstaat* concept because he saw the idea of liberal and democratic parliament has stopped functioning because of the political party's dominance of deliberation in the parliament. As mentioned in my essay, Minobe was not in favour of political parties at all; in his view, a political party was an enemy of the public interest since it was eager to promote merely particular interests. If a political party increasingly dominates the discussion in the parliament, the parliament would not be able to work as a mechanism for realizing public interests. In a political essay first published in 1933,[36] he advocated for a kind of corporatist institution to manage the political process, of course including the leaders of political parties, but also including the leaders of labour associations, magnates of industries, elites from bureaucracies. Though after 1930s, Minobe apparently stopped talking about the discursive element of *Rechtsstaat*, he still maintained his administrative law concept about the legality of administration. So there is an internal theoretical strain in his doctrine, which he did not clarify sufficiently.

Secondly, with respect to the role of judicial review seen from the dominant view in the post-war Japan, the argument in my essay is only

35. For some of the discussions on transnational understanding of rule of law, *see* Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions*, 27 PENN STATE INT'L L. REV. 89 (2008).

36. Tatsukichi Minobe, *Hijōji Nihon no Seiji-Kikō (Political Institutions of Japan in Crisis)*, *in* GIKAI-SEIJI NO KENTŌ (EXAMINING PARLIAMENTARY POLITICS) 38-39 (1934).

descriptive. I myself do not support the dominant view, which is surely influenced by John Hart Ely. Rather, the court should, in my view, protect or guarantee the core elements of substantive content of people's freedoms or rights. The background of the dominant view for supporting such a procedure-oriented role is that the Supreme Court itself seems to support such a view as well; at least the Supreme Court has not been very positive in interpreting the Constitution with regard to the substantive content of constitutional rights or constitutional freedoms.

Having said that, Japanese judicial courts are quite activist in some area, compared even to American courts. For example, in the area of social context, the courts generally promote the idea that there should be sexual equality in big corporations with regard to salaries and retirement ages, etc. American courts would not intervene in such areas without support of written statutes. If an American court holds there should be gender equality in big corporations, there would be uproar in the whole American society. On the contrary, the Japanese Supreme Court did say so,[37] and the big corporations were quite obedient to follow its judgments. So I do not conclude that the Supreme Court remains always passive.

The third point relates to the concept of transnational *Staat*, which is quite interesting. It comes to my mind the question of whether the contemporary European institution is a *Staat* or just an association of states. As you know, there is a remarkable argument on this point by Carl Schmitt in his *Verfassungslehre*.[38] He states that there is a kind of institution called "federation" or *Bund*, which is neither corporation nor association. According to the traditional taxonomy, if the European Union is a corporation, then it is a state, and many European countries are just its components; they are not genuine states. On the other hand, if the federal unit is an association, then, the European Union is a confederation of various states and is not a state. However, if we may use Schmitt's idea of "federation," the European Union is not a corporation, not an association, but a "federation." To further elaborate, I would like to use the metaphor of husband and wife. We usually do not ask a couple of husband and wife who is superior to the other. It is just like asking about the European Union, which one is superior, the union or the states. Perhaps they are reluctant to answer the question directly. Husband and wife are so intimate, united that

37. *See e.g.*, *Nakamoto v. Nissan Jidōsha Co.*, 35 MINSHŪ 300 (Sup. Ct., Mar. 24, 1981) (The Court invalidated a company regulation which stipulated different retirement ages for male and female employees).

38. SCHMITT, *supra* note 10, Pt. IV; *see also* Olivier Beaud, *La Notion de Pacte Fédératif : Contribution à une Théorie Constitutionnelle de la Fédération*, *in* GESELLSCHAFTLICHE FREIHEIT UND VERTRAGLICHE BINDUNG IN RECHTSGESCHICHTE UND PHILOSOPHIE 197, 255-70 (Jean-François Kervégan & Heinz Mohnhaupt eds., 1999). Beaud emphasizes the mixed character of the Schmittian "federation."

you cannot tell who is superior to the other. In my opinion, the European Union is approaching that stage of Schmittian "federation;" if so, it is difficult to analyze more than this description.

Professor Jiunn-Rong Yeh:

Thank you, Professor Hasebe. Next we will have Professor Lin as the second commentator who will be followed by Professor Hwang. Professor Lin, please.

B. PROF. CHAO-CHUN LIN

First of all, thank you very much, Professor Hasebe, for your very illuminating lecture. I will be brief with my questions. As mentioned in your presentation, the failure of classical explanation by Professor Minobe concerning the concept of *Rechtsstaat* mainly resulted from the failure of the parliamentary system because the process of enacting law was not as idealized as Professor Minobe has imagined. I wonder whether this kind of situation is universal, or if there was a special predicament or challenge facing the Japanese people. For example, many of Japanese Cabinet members, for example the current Prime Minister Mr. Aso, inherited a great deal of political assets from their fathers or families. It is a situation unique to Japan, in terms of building the idea of *Rechtsstaat*. In this sense, I would like to know whether there is a particular difficulty or specialty related to the Japanese political context. This is my first comment.

My second point is relevant to your statement that the Germans also transformed their concept of *Rechtsstaat* after World War II, with an emphasis on the importance of democracy. In the theory of Professor Ha[39] bermas, the importance on how to build a strong democracy in terms of the process of legislation is greatly emphasized. As both the German *Rechtsstaat* and the Japanese one want to correct or rectify past errors, it is interesting to explore and analyze differences between them. Based on this understanding, it is therefore relevant to ask whether you have tried to learn something from German cases or whether you have simply cut off the connections with German cases and tried to build your own theory in order to solve your own problems.

Thirdly, as stated in your article, it is an issue needs to "be reiterated that in today's expanded conception of the *Rechtsstaat*, the role of judicial review is restricted to sustaining the preconditions for the proper functioning of

39. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1998).

democratic process, and does not include directly delineating people's rights and freedoms." This opinion is somehow contradictory because you argue that the responsibility of the Court is to set the preconditions for the parliament, including the issue of separation of powers, right to vote, and freedom of speech which are basic and fundamental rights. In this sense, the responsibility of the Court may not be easily distinguished. On the one hand, you put emphasis on making the political process better. On the other hand, you let the Court to handle basic issues of fundamental rights, specifying the content of fundamental rights. These arguments are seemingly contradictory. Actually, it is almost impossible for the Court to focus its efforts only on the single issue of separation of powers. This is my third remark.

The fourth point follows the third one. Since you emphasize the function of the responsibility of the court to deal with the issue of the precondition of the government, it seems to me that Japan should introduce the continental European system of abstract judicial review rather than the American decentralized judicial review.

Lastly, the American system is very different from what is portrayed in your argument because Americans generally consider democracy as of the highest importance. Many challenge the legitimacy of judicial review as well as the system of judicial review.[40] However, you emphasize in your article that the concept of *Rechtsstaat* should be expanded so as to include the entire system of judicial review. This has raised a number of debates in the United States on how unelected judges can declare statutes enacted by Congress unconstitutional. I would like to see whether your opinion supports that, in a presidential system, the concept of *Vorbehalt des Gesetzes* does not apply because the president is directly elected by the people and enjoys his own legitimacy. Thank you.

Professor Jiunn-Rong Yeh:

Professor Hasebe, you have the discretion to answer all the questions or specific ones, as you could leave some of the questions to the later stage. Please.

Professor Yasuo Hasebe:

Because of my limited ability, I cannot answer all of Professor Lin's questions. So I would try to pick up some of the following questions. The first question is regarding whether there is a particular difficulty with regard to the Japanese political context. You mentioned the substantial inheritance

40. *See e.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURT (2000).

of political powerbase from family members to a politician in the Japanese political world. Yet such incidents seem to happen also in other countries like Britain, the United States and France. This is not the difficulty particular to Japan. If there is any difficulty particular to Japan, perhaps that may be a lack of full-scale change of government. It has not yet been such an occasion of political change after the World War II. As you know, once there was a political change from the Liberal Democrat to the coalition of several political parties in 1990s, but that did not last long. So we may not take it as a full-scale change of government. And this has brought about a sense of occlusion among the electorate.

Second, I share much of your observation concerning the possibility of distinguishing between maintaining the political processes and determining the substantive content of constitutional rights. It is not possible to make a clear distinction between process-oriented judicial review and the result-oriented judicial review. Still, it is a question of degree. About the question of what Japanese courts do and what the dominant academic view says the courts should do, the answer would be that, as far as possible, the courts should not intervening in the political process in the result-oriented ways. That might be the answer they could make to your question.

And as to the question of whether it is better to have centralized constitutional review or decentralized constitutional review, I am not able to provide the answer. As you mentioned, in Germany, the Constitutional Court is very activist. And there has not been such fierce political dispute about its role as in the United States.[41] And one element which is quite different from the Japanese context is that justices of the German Constitutional Court are generally highly respected there.[42] That is definitely not the case regarding the justices of the Japanese Supreme Court.

Professor Jiunn-Rong Yeh:

Thank you. Our last discussant is Professor Shu-Perng Hwang, please.

C. PORF. SHU-PERNG HWANG

Good morning, Professor Hasebe. Thank you very much for the lecture. I would like to raise two more questions. The first one regards the reception

41. Christoph Möllers points out that: "there has been virtually no discussion about the democratic legitimacy of constitutional review" in Post-War Germany. *See* Christoph Möllers, *We Are (Afraid of) the People: Constituent Power in German Constitutionalism*, *in* THE PARADOX OF CONSTITUTIONALISM: CONSTITUTE POWER AND CONSTITUTIONAL FORM 95 (Martin Loughlin & Neil Walker eds., 2007).

42. *Id*. at 96.

of the idea *Rechtsstaat* in Japan. I am particularly interested in whether the Japanese scholars noticed and emphasized the distinction between "rule of law" and *Rechtsstaat*. The distinction between these two concepts is not so important for Taiwan, even though both concepts are familiar to Taiwanese scholars. For Taiwanese, the crucial point is to reject the idea of "rule of man." Yet "rule of law" and *Rechtsstaat* are different in the sense that they rely on different powers to realize human rights. In Germany, *Rechtsstaat* is important because people rely on the parliament to protect their freedoms and rights from the executive power. The Japanese administrative scholars reduced the reception of *Rechtsstaat* to the legality of administration which, in my view, is exactly the core spirit of *Rechtsstaat* in Germany. In Germany, what possess importance is not only the protection of the freedom and right of the people, but also the idea that the parliament is what we trust the most. On the contrary, the idea of "rule of law" which has been developed in common law countries, focuses on the central status of the court rather than the parliament. When you talk about the reception of *Rechtsstaat* in Japan, I am interested in whether this distinction is taken as an issue because it can lead to different focuses and different systems of separation of powers. In Taiwan, this is not very important because what we need is to abandon the idea of "rule of man." If we were to discuss the concept of reception, it would be an issue also for Japan. Therefore, I would be grateful if you could share with us the relevant development in Japan.

The second question is in relation to Carl Schmitt because you took him as an example for protecting rights and freedoms of the people from the state through emphasizing the function and power of the legislature. Yet, as far as I know, Schmitt should not serve as a very good example especially when you mention that both Minobe and Schmitt shared the idea that parliament should take the responsibility and have good capacity for protecting rights of the people. I fail to agree that this is what Schmitt is famous for, because he is always very skeptical about the deliberative function of parliament.[43] Furthermore, he is famous for arguing against the *Rechtsstaat* or against a state led by the parliament. Please light me with further explanation on your mentioning Schmitt here, especially in this context. I suggest that if you want to emphasize the parliamentary function in your paper and the sense of *Rechtsstaat* of Minobe, there may be other scholars or theories which are better fitting in this context.

Professor Yasuo Hasebe:

Thank you very much for your very-difficult-to-answer questions. The

43. *See* SCHMITT, *supra* note 12.

first question is regarding the distinction between the "rule of law" and *Rechtsstaat*. It should be noted that before World War II, there was not such a distinction in Japan. In pre-War Japan, very small number of people knew the concept of the "rule of law" at all; even public law scholars scarcely studied it. The next question is how we should understand this concept of "rule of law," which is not easy to answer, because the idea of "rule of law" derives from the English context, and England is not famous for highly respecting parliamentary statutes. Of course, England has had the principle of parliamentary sovereignty, but this principle is itself a principle of the common law; in that the courts themselves recognise that they should treat parliamentary statutes as highest law. In other words, the common law is the basis of the whole legal system, and it is a difficult question whether we can really reconcile the idea of rule of law with the common law legal system. People there have tried to conciliate these two ideas. As you know, the modern British legal doctrine introduced the strict principle of *stare decisis*, and this principle of *stare decisis* brings one device to reconcile the idea of common law and that of rule of law, by guaranteeing predictability about how the courts will behave.[44] But opinions may differ to what extent this conciliation succeeds.

Your second remark is about the theory of Carl Schmitt. Indeed, as you pointed out, Carl Schmitt is quite an ironical man. When he argues that there is such a liberal democratic system, where free press and parliament deliberate and exchange opinions to seek the public interest, he does not say so sincerely; I much share your point. However, the same thing may apply to Minobe too. As I pointed out in my answer to Professor Chang, Minobe merely talked about this deliberative element or liberal *Rechtsstaat* concept in 1920s and stopped talking about it in 1930s. It seems to me that he was also quite an ironical man. When he talked about the liberal *Rechtsstaat* concept, he had some specific political agenda. But he stopped using that concept when he thought, because of the transformation of environment, doing so did not satisfy his objectives any more. So while Carl Schmitt was quite famous or infamous for his sceptical view, I suspect Minobe was not a purely academic person, either. And it is not always a bad thing for a public law scholar to be skeptical or ironical.

Professor Jiunn-Rong Yeh:

I would like to reiterate the three divides I mentioned earlier. The first divide is between the pre-war and post-war eras and even between various

44. *See* Jim Evans, *Changes in the Doctrine of Precedent during the Nineteenth Century*, *in* PRECEDENT IN LAW 65-72 (Laurence Goldstein ed., 1987).

modern understandings of *Rechtsstaat*, rule of law. The second divide lies between Germany and Japan where the legal concept was transplated from one soil to another. Thirdly, the divide between administrative law and constitutional law, which brings another point also suitable for our discussion, that is, different transplantation models regarding the transplantation from Germany to Japan and the transplantation from Germany to Taiwan. The divide between Taiwan and Japan on the same issue is the introduction of *Rechtsstaat* in their territories respectively. There are many differences between these two contexts but insufficient discussions so far.

I would like to pose two points for our discussion and for Professor Hasebe as well. The first issue is related to government structure. Japan is pretty much based on the parliamentary system, which is very close to the German one, at least from the outset rather than the real operation. The general structures are the same, at least very similar in terms of parliamentary operations. However, Taiwan, in my view, does not share this similarity, especially partly due to the introduction of a direct presidential election in 1996, and partly due to the context of democratic transition. We should further examine these institutional variations and their impacts on our analyses of foreign concept reception.

Secondly, in the Japanese context, we are discussing a rosy picture of the function of the parliament versus the dirty ones, the real politics. Numerous special interests were chased by special interest groups and factional politics. Many rosy pictures have been painted about the function of the parliament. However, the problem is not the function of the parliament but the representative structure of the parliament, which would be even more serious. The disparity between the expected function of the parliament and the actual operation of it does not arise from real politics, but sometimes from ill-designed organization of the parliament itself. This particular situation happened in Taiwan before the democratization because the representatives of the parliament were not subject to election in Taiwan and the majority of the parliamentary members were elected long ago in China.[45] While we had scholars chanting for *Vorbehalt des Gesetzes*, ironically we had a parliament that did not represent Taiwanese people at all. Thus the paradox arose when scholars in such an undemocratic context argued in a constitutional debate, or even in a particular case, that anything related to

45. *See, e.g.*, Jiunn-Rong Yeh, *The Cult of Fatung: Representational Manipulation and Reconstruction in Taiwan*, *in* THE PEOPLE'S REPRESENTATIVES: ELECTORAL SYSTEMS IN THE ASIA-PACIFIC REGION 23-27 (Graham Hassall & Cheryl Saunders eds., 1997). *See also* Jiunn-Rong Yeh, *Constitutional Reform and Democratization in Taiwan: 1945-2000*, *in* TAIWAN'S MODERNIZATION IN GLOBAL PERSPECTIVE 55-57 (Peter Chow ed., 2002); *see also* Jiunn-Rong Yeh, *Changing Forces of Constitutional and Regulatory Reform in Taiwan*, 4 J. CHINESE L. 83, 85-88 (1990).

rights, liberty or property of the people should be authorized by the law based on the German style of *Rechtsstaat* or *Vorbehalt des Gesetze*s. We had that kind of serious disparity even beyond interest-group politics in the parliament. I believe that these two issues do spell out the differences between the Japanese and Taiwanese context regarding the transplantation of *Rechtsstaat*. I would like have our audience to elaborate a little bit more along this line. Now the floor is open for discussion.

IV. GENERAL DISCUSSIONS AND RESPONSE

Yi-Li Lee (College of Law, National Taiwan University):

Professor Hasebe, thank you for your lecture. My name is Yi-Li Lee. I am a student in this law school. I have two questions. The first question is very similar to the second question of Professor Chang. This question is about the Court and human rights. In your lecture, you mention the concept of *Rechtsstaat* expanded, so the Court will be restricted to sustain the function of democratic process. The reviewing power will be process-oriented. In my understanding, the court will respect the actions or decisions of the parliament mostly. I wonder if this is right, how court can protect the rights of minority groups, especially when they do not have any representative in the parliament, or especially the parliament seats are dominated by one party, for example, the Liberal Democratic Party. This is my first question.

The second question concerns the concept of *Rechtsstaat* expanded in constitutional law. Maybe they will change the relation between the Court and the political branch. I am just curious that whether it will change the content of the principle of separation of powers or the principle of check and balance.

Pei-Yu Hsu (College of Law, National Taiwan University):

Thank you, Professor Hasebe. I learned a lot from your speech. I have two questions in relation to your paper. You intended to criticize the dominant view of constitutional scholars in Japan, and expect the Court in some way to intervene the substantial issue concerning core human rights and some constitutional values. I was wondering that whether the Court could actually change the substantial issues if it intervenes based on some procedural reasons.

Furthermore, I would like to make some reflection concerning the era of the procedure mentioned by Professor Yeh. I cannot see clearly why there is a great difference between the pre-war and post-war. The new era or new

time might change the interpretation of this concept, the power structure, and the party structure in both Japan and Taiwan. Thank you.

Wen-Yu Chia (College of Law, National Taiwan University):

My question is for all the professors here. I am very curious about whether the reception of concept really helps you when communicating or discussing relevant issues among constitutional professors from various origins on the same terminology or same concept. The fact is that you have common language, at least the name of *Rechtsstaat*. Or it just makes things more confused or complicated?

Tsu-Yi Hung (LL.M., Yale Law School):

My name is Tsu-Yi Hung. I would like to ask a follow-up question relevant to the comment of Professor Chang. Professor Chang observes discursive and deliberative concepts in the understanding of *Rechtsstaat* of Professor Minobe. She contends that this particular way of the reception of *Rechtsstaat* from Germany into Japan is reflective of the particular Japanese context of that time, which is the emergence of civil society at that time in Japan. As to the third question of Professor Chang, she is curious about that the dominant view of judicial review in Japan is not supported by the Japanese context as opposed to the American one. When I look at these contrasts between these two observations, I am curious that when the Japanese scholars and practitioners tried to transplant legal concept from outside into Japan, whether they consciously paid attention to the Japanese context, as per your understanding. I would also like to know whether in different times of Japan, like in decades ago and in nowadays, there was a different ways of the reception of legal concept in Japan among Japanese scholars and practitioners as well. Thank you.

Vivian (College of Law, National Taiwan University):

We German of course know about *Rechtsstaat* in Germany. I was a little surprised that Professor Hasebe concentrate so much on the *Vorbehalt des Gesetzes* because I think that the *Rechtsstaat* is much encompassing various aspects. I would like to know whether there are other aspects of *Rechtsstaat* which you also transplanted into Japan.

Shao-Man Lee (College of Law, National Taiwan University):

Good morning, Professor Yeh and Professor Hasebe. I learned from the

seminar of Professor Yeh that there was a survey held in 1995 or 1996 in Japan. It was for Japanese citizens to express their opinions toward the political parties in Japan. I was so surprised to see that because so many Japanese citizens are very indifferent toward their political parties. I fail to see how the deliberative function could be played by the political parties which seem to entrench their roles in the parliamentary system. By the electoral reform, they have entrenched themselves so much and repeated it. I would like to know how this could that work if the idea of *Rechtsstaat* is to play the deliberative role.

Secondly, Professor Hasebe has mentioned that corporations in Japan are obedient. They obeyed the decisions of the Supreme Court before. In this sense, the court will probably play the discursive function much more than the political parties and the parliamentary system do, and therefore become a more suitable place for the public opinions to be reflected.

Chun-Yuan Lin (College of Law, National Taiwan University):

I have the questions which respond to the questions of Professor Chang. Professor Hasebe mentioned that the dominant Japanese view on judicial review is the procedural view. Professor Chang posed the question about why in Japanese context you take this as the main point. I have two ideas. I wonder whether you will agree with them or not.

The first hypothesis is that the Japanese Constitution was made by American and they sometimes refer to American jurisprudence to implement their system to decide how the Court should play a role in the democratic process. This is my first guess.

My second guess regarding your discussion of *Rechtsstaat*, is that how courts can really do the substantive interpretation, rule-making or value-deciding in this kind of *Rechtsstaat* idea because I think in the *Rechtsstaat* idea, the role of the court may very small, and maybe not so encouraged to do substantial decisions. Maybe the procedural judicial review is the best and only choice in this context.

Last but not least, I also note that you mentioned in your article that the role of political party and also the deliberation in *Rechtsstaat* context. I would like to repeat the question of Professor Chang concerning the Japanese case made by the Supreme Court about the PR system. I would like to know what your suggestions is regarding the role of political party or the role of the court if the court should play a role to trigger or promote deliberation.

Yi-Chen Lo (College of Law, National Taiwan University):

Good morning. After Professor Hwang entered into the discussion, I must confess, there is really confusion to me that what we really mean by saying, like in Chinese "Fa Chih Kuo Yuan Tse" the principle especially in the practical interpretations made by Judicial Yuan. When they are referring to this principle, what they really mean? Are they referring to the principle from the common law or are they talking about *Rechtsstaat*? That is my question. I would like to put this question to professors from Taiwan. What are they thinking when making these interpretations? Especially, if my memory serves me right, in Interpretation No.499, it says that "Fa Chih Kuo Yuan Tse" is one of the fundamental constitutional principles. What is "Fa Chih Kuo Yuan Tse"? I must confess I have no idea.

My second question is about the *Recht*, the law, what is the law? I would like to respond to the opinion of Vivian who is wondering why the Japanese scholars put emphasis on the *Vorbehalt des Gesetzes*. According to the suggestions by Professor Hasebe, it is probably that they are using the concept as a restrain in order to respond to the current situation in the politics when they found that the executive power are wielding their power overwhelmingly. However, currently we have a similar situation in Taiwan and in Japan, that is, the major party in the parliament is the same as in the executive power. In this regard, I would like to know whether there is a check and balance relationship between executive power and parliamentary power. I would also like to know whether this principle can still work when we find the statute-maker is the same power as the executive power on the way to use the idea of *Rechtsstaat* to retrain the executive power. Thank you.

Professor Jiunn-Rong Yeh:

There are some questions addressed to the local professors. I would like to invite our local commentators to respond to some of the question, if any.

Professor Chao-Chun Lin:

In my view, whether the principle of *Vorbehalt des Gesetzes* can apply to the presidential system should be a very important issue because the president is directly elected by people and enjoys the legitimacy no less than that of the Congress. I believe further studies will be needed concerning whether this principle can apply to Taiwan. This is my brief response to your last question.

Professor Shu-Perng Hwang:

I would like to respond to the question raised by Vivian who mentioned the reception of *Rechtsstaat* in Japan and wondered why the reception is reduced to *Vorbehalt des Gesetzes*. As far as I observe, the reason is that in the concept of reception, what we care about is who guards the individual rights and who plays the role of protecting human rights. Consequently, if the role should be played by the parliament, we should focus on its leading role. We should not forget the central status of the parliament if we are to understand the idea of Rechtsstaat.

In addition, I would like to respond to another question raised by the student over there. If scholars from different countries want to talk about one idea together, what is important for us, in my view, is to confirm that we share the same understanding of this concept in its original sense at the first place. I do not think we share the same understanding concerning the idea of *Rechtsstaat*. Even in Germany, the content of this conception changed after WWII because the focus was not so concentrated on the central role of the parliament after war, but on the protection and the functional development of *Grundrechte*: human rights, individual rights, the objective dimensions of individual rights. That is the important development after the war, which has also changed the system of separation of powers because both the executive and the court are promoted to a status in which they should take the responsibility for the realization of individual rights. In this sense, the legislature has also lost its traditional status. Thank you.

Professor Wen-Cheng Chang:

These are very good and difficult questions, and I am also very interested in the response of Professor Hasebe. My point is that there are always ideas and contexts within which we talk about these ideas. We discuss ideas to certain realities. There are different relationships which may occur in the process. The pre-war Japanese scholars talked about *Rechtsstaat*, and the post-war scholars continue to talk about it per changing context. It is always important for us to look carefully into these transformations from time to time and from space to place. Surely they are not refrained from being changed or even reinvented. My intention is to reflect the concept of the "Fa Chih Kuo Yuan Tse" (rule of law principle) in the Chinese language asserted by our Court. Does it mean "rule of law"? Or does it mean *Rechtsstaat* in the pre-war German sense or in the post-war German sense? Could it be possibly even meaning *Rechtsstaat* in the Japanese sense? My preliminary view is that it could be all possible, and this variety of possibilities is in fact the beauty of reading law into context and

the beauty of legal scholarship. We could all learn and gain much scholarship from this very process. It is this particular feature and beauty of legal discursive function that makes legal ideas travel over spaces and over time.

Lastly, I do contend that *Rechtsstaat* as a concept can be discussed in presidential systems in which the law is also made by the congress, even though the president has the veto power. There exists a separated check and balance system of law making in presidential systems. In this sense, there is a way to discuss the concept of *Rechtsstaat*.

Professor Yasuo Hasebe:

Well, I am not sure if I can answer all the questions. For the last question of whether there is any check and balance between the parliament and the executive, I think the generally accepted view is that there is no such check and balance between the parliament and the executive under the context where organised political parties are dominant political actors. And that is one of the reasons why I presented the administrative law viewpoint at section C of my presentation: the approach, which presupposes the existence of bureaucracy which sincerely intends to enhance the public interest of the people. This approach presupposes that the parliament would duly approve bills sponsored by the government; the bills are prepared by the central bureaucracy. And it should also be noted that most of the members of the central bureaucracy of Japan are graduates from the University of Tokyo; they were educated by administrative law professors who were disciples, or disciples of disciples, of Professor Minobe. The reason that Japanese administrative law professors are so concentrated on the concept of *Vorbehalt des Gesetzes* might be that these central bureaucrats are their students and expected to duly follow what they were taught at the university. Therefore, these officials at the central bureaucracies will sincerely try to enhance the public interest; so everything will be fine. That is one possible story devised by me. I cannot tell whether that is real or not.

I would further respond to the question of how the courts are able to protect the rights of minorities if the court's main role is to sustain the democratic political process. According to the dominant American theory, the judicial review's main role is to sustain the democratic process and also protect the rights of minorities which may not be realised through the democratic process because the minorities are discrete and insular, and becomes the objects of prejudices. This component of the American theory has also been imported to the Japanese dominant view.

As to the second point concerning the dominant judicial review theory, which inquires why Japanese scholars support this judicial review theory,

there are several explanations. One explanation is that, as I mentioned earlier, the Japanese Supreme Court is in reality sometimes very activist, in particular, in the social context. Therefore, they do not have to invent a theory which encourages the Court to be very active. Another explanation is that Japanese scholars, and more generally the Japanese people, adopt a skeptical view that as to most legal or moral questions including those about constitutional rights, there might not be right answer.[46] But while there are no right answer to substantive problems about constitutional rights, there might still be right answer as to how to conduct deliberative process and how to develop people's discussion. That might serve as a possible answer to that question.

Finally, as to the Supreme Court's decisions about the electoral system, as Professor Chang pointed out, while the Supreme Court sometimes held election laws unconstitutional,[47] more often than not, it upheld the constitutionality of electoral systems. But I think the role of judicial review is not restricted to striking down the parliamentary statutes; even when the Supreme Court says the electoral laws are not unconstitutional, usually some minority opinions are added to that decision, and in these minority opinions, justices indicate strong doubt about the constitutionality of the electoral laws and suggest proper amendments of electoral systems. And such minority opinions have considerable influence in the future deliberation and decisions of the parliament. You may doubt, but the Japanese politicians are not merely greedy political animals always seeking just their self-interests. They are also human beings. Sometimes they listen to what the Supreme Court justices say. That is all for the moment. Thank you.

Professor Jiunn-Rong Yeh:

Now I would like to exercise the privilege as a moderator to have some further elaboration. One student asked earlier that when professors and constitutional scholars meet together and talk about legal concepts, how are they going to share the same meaning. We should have a conference about this important issue. In many occasions, I have problems in seeing some of the professors who are very arrogant about what they know without paying any attention to the rest of the world. Whereas we also see some scholars who are able to sensitively observe what is going on in different parts of the world and convey messages in a very sincere way. Therefore, it really depends on the characteristics of scholars, and how they attach themselves to

46. I developed this explanation. *See* Yasuo Hasebe, *Rights of Corporations, Rights of Individuals: Judicial Precedents*, *in* FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY, 73, 79-85 (Yōichi Higuchi ed., 2001).

47. *See* Hasebe, *supra* note 20, at 300-04.

legal scholarship.

Let me take *Erforderlichkeitsgrundsatz* as an example. Some people in some areas use the term *Erforderlichkeitsgrundsatz*, while other people states that this is the principle of proportionality. If the discussion is in English, people would say that this is the principle of proportionality. Still, the German scholars will argue that you need to stick to the origin of the principle and have that in German because it was the Germans who invented the term. This makes sense when we talk about transplantation of legal concepts. We should know where the principle is from, but we should also be aware that the possibility of the same concept could have evolved in other areas as well.

When people from Canada, Europe or the United States discuss the principle of proportionality, they cherish this principle in its constraining powers to a reasonable degree. Although they may have different ideas about the principle of proportionality, they still share some similarity, otherwise it is not possible to discuss. However, when someone comes up and argues that according to principle of proportionality, there must be the three-stage test, *Geeignetheit*, *Erforderlichkeit*, and *Angemessenheit*, it is too much because this explanation is for Germany, not for any other contexts in the world. One should always negotiate or discuss legal concepts –foreign or indigenized- in a mutually respectful way.

Here comes the issue of introducing a legal concept into the soil of Japan or Taiwan. Let me mention some concrete examples for you. Professor Minobe introduced not only *Rechtsstaat* but also special *besonderes Gewaltverhältnis*, for aiming towards protecting individual rights, or for pure introduction of legal concept he knew from Germany. In addition, when Professor Yueh-Sheng Weng introduced *unbestimmte Rechtsbegriffe* or *Ermessen* as opposed to discretion, I did not know what Professor Weng had in mind if he was trying to constrain the administrative power. I did not know whether that was the reason he introduced the concept or whether it was simply because he learned it from Germany and would like to introduce it to Taiwan. The consequences of introducing a legal concept into a soil may bear some lasting impact into the future, especially when you are Professor Minobe or Professor Weng. That is why I always believe that the introduction of legal concept or terminology represents power, and we have to be very careful about the power. Therefore, my suggestion will be that if we are going to analyze why Professor Yueh-Sheng Weng introduced *unbestimmte Rechtsbegriffe*, *Ermessen*, and *Verwaltungsakt* into Taiwan and consequences of that introduction, we should look into legal context, social

context and the history of transplantation of legal concepts. That would serve us a great deal of academic interests because this kind of local study is actually very important. This is also what I learned from the article of Professor Hasebe. With that I would like to wrap up this wonderful and insightful lecture. Let us give Professor Hasebe a burst of applause.

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