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SUMMARY OF ARTICLES

La portée de la décision de référé

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Ce travail a pour but de savoir la doctrine et la jurisprudence relatives à la portée des ordonnances de référé. C'est d'ailleurs pour comparer le référé à KARISHOBUN (qui y est similaire). En les comparant l'un à l'autre, on s'intéresse notamment à l'autorité de la chose jugée de la décision de référé.

FASCHISMUS UND RECHTSLEHRER

..... **eine Bilanz der Privatrechtswissenschaft
in der Nazi-Zeit**

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Diese Abhandlung gibt ein Referat wieder, das ich am 16. Oktober 1960 auf der Tagung des demokratischen Juristenvereins bei Meiji-Universität gehalten habe.

In diesem Symposium handelte es sich um "die Wesenarten der Rechtslehrer in jeden Zeiten", und ich habe das Referat über die Zeit des Faschismus übernommen. Mit dieser Aufgabe habe ich die Arbeiten der Privatrechtslehrer in der Nazi-Zeit untersucht und versucht, ein Material für das Thema des Symposium anzugeben.

Die Privatrechtswissenschaft in der Nazi-Zeit hat auf die damalige Rechtswissenschaft in Japan einen grossen Einfluss gehabt. Aber niemand hat sich mit dem Einfluss der Privatrechtswissenschaft in der Nazi-Zeit auf die heutige Rechtswissenschaft beschäftigt.

Ich habe auf die Tatsache hingewiesen, dass viele die aktive Rolle in der Nazi-Zeit gespielten Lehrer noch sehr tätig in heutigem West-deutschland seien. Besonders ist es merkwürdig von Heinrich Lange, Larenz, Siebert und Wieacker. Ausserdem bemühen sie sich um die Erneuerung der heutigen Privatrechtswissenschaft. Ihnen verdanken wir viel die Aufstellung der Theorie von Geschäftsgrundlage" und der Theorie von "faktischen Vertragsverhältnissen", ebenso wie die Neigung zur Konkretisierung und Typisierung in der Methodologie. Auch die Entwicklung der neueren Privatrechtsgeschichte verdanken wir besonders Wieacker. Hierauf haben solche Neigung gerade schon in der Nazi-Zeit ihren Ursprung.

Es ist zu sagen, dass die Privatrechtswissenschaft vom Westdeutschland nach dem Zweiten Welt-Krieg im ganzen eine Entwicklung von der Privatrechtswissenschaft in der Nazi-Zeit ist, wenn auch es gibt in einer Seite solche Erscheinungen der sog. Reflexion über die Nazisprivatrechtswissenschaft besonders wie die Wiedergeburt des Naturrechts und die Anerkennung des allgemeinen Persönlichkeitsrechts.

In der Nazi-Zeit hat man die ideologische Seite der Privatrechtswissenschaft übermäßig betont, aber doch nach Lösung der Probleme unsererer Zeit schon strebt : eine Neigung, die besonders in der späten Nazi-Zeit immer klarer und deutlicher wurde. Somit haben die Privatrechtslehrer, wie man sieht, zur Entwicklung der Privatrechtswissenschaft, frei von politischen Einflüssen, viel beitragen.

Hätten die Privatrechtslehrer solch gesetzlosem System, wie es im Nazi aufgenommen wurde, aber nicht noch aktiven Widerstand leisten sollen? Als Bürger leisteten sie, zu recht dem Nazi Widerstand, aber doch nach meiner Meinung, sollte das Nazi-System durch die Privatrechtswissenschaft noch offenerziger kritisiert werden.

Parental Authority and Children's Right to Receive Education

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Japanese Civil Code provides that the parents "have the rights and duties and duties to guard and educate their children" (§820). And the prevailing opinion of scholars interprets the word "duties" in this article, not as against the children, but as against the society or the state. On the other hand, the Constitution of Japan guarantees to all children "the right to receive an equal education" (§26). Now, these two underlying points of view are entirely opposite to each other, because the former serves to strengthen the authority of the state in the education of children and, on the contrary, the latter grasps education from the children's right, that is to say, from the responsibility of the state.

In our country, for a long time, the authority of the state in education had been extremely powerful. It was one of the important causes which drove us Japanese into World War II and resulted in a tragedy. When we reflect upon such a past education of Japan, the legal construction treating of the children's education must be done on the basis of children's right to receive education.

In this article, I intend to reconstruct a concept of parental authority and the role of the state in that field, setting at the center the children's rights, one of which is the right to receive education.

Locke's Natural Law Thought

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It has been held in general that Locke's natural law thinking is characterised by some conciliation between the traditional natural "law" theory and the modern natural "right" theory, as other aspects of his thoughts are, empiristic and rationalistic, nominalistic and realistic. But such a view almost always has the defects of poor analysis of the logical construction of Locke's thought on the natural law. Therefore they have become the target of "agressivism" of Mr. Strauss, according to whom "Locke's natural law teaching can be under understood perfectly if one assumes that the laws of nature which he admits are, as Hobbes put it, but conclusion, or theorem concerning what concludes to the conservation and defence man over against other men".

I shall not agree to such a "modern" natural right interpretation like Mr. Strauss'. However I can not but find the logical frailty of the view held in common, in spite of the appropriateness in its conclusion. The aim of the present article consists in analysing, rather constructing, of the logical structure in Locke's political philosophy.

In this procedure I shall put the greater weight upon Locke's earlier writing, "Essays on natural law", than the previous interpreters have done. It is because this Essays are quite systematic in the exposition of the framework in his natural law theory while in his later works any systematic exposition can be found on natural law theory or "true" moral theory, and because his framework was already formed fundamentally in this Essays and remained little changed laterly, especially concerning the "character" of the natural law, though his thinking about on its "contents" was developed in a more concret direction (in Tow Treatise on Government).

Introduction à l'étude sur la Déclaration des droits de l'homme et du citoyen de 1789 (1)

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Aucun "Bill of Rights" n'a exercé si vaste influence en faisant "le tour du monde" comme la Déclaration des droits de l'homme et du citoyen de 1789. Le Japon n'a pas été exempt, dès qu'il ouvrit ses ports à la civilisation occidentale il y a un siècle, de cette heureuse contagion des idées de la Révolution française.

Dans son pays natal, l'esprit de la Déclaration n'a pas cessé de s'établir tout au long de l'histoire constitutionnelle et de s'enraciner si profondément aux coeur et institutions juridiques du peuple français qu'elle est devenue véritablement le patrimoine national permanent et que la Constitution de la Ve République n'a pu se passer sans proclamer "solennellement son attachement aux droits de l'homme et aux principes de la souveraineté nationale tels qu'ils ont été définis par la Déclaration de 1789, confirmée et complétée par le préambule de la Constitution de 1946".

Les significations de la Déclaration de 1789 s'analysent donc à la fois actuelle ainsi qu'historique et française ainsi qu'internationale.

Il y a plus de 60 ans et au seuil de ce siècle, on a vu deux Maîtres allemand et français, G. Jellinek et E. Boutmy, "entrer en lice" pour se débattre sur la question d'origines de la Déclaration française, mais n'a pu constater, à son issue, ni le vainqueur ni le vaincu définitifs, sans doute à cause de la différence de point de vue entre eux. Ce grand débat a provoqué en France et à l'étranger les études ultérieures plus ou moins poussées par plusieurs auteurs, E. Walch, V. Marcaggi, E. Doumergue, F. Klövekorn, R. Redslob, K. Loewentein, etc. Au Japon Y. Oda a introduit la controverse et M.S. Mizuki traduit l'article de

Boutmy, mais la traduction japonaise par T. Minobe de Jellinek, *Die Erklärung der Menschen- und Bürgerrechte - Ein Beitrag zur modernen Verfassungsgeschichte*, 1895, a été la plus répandue et la thèse de cette oeuvre reste prépondérante parmi les publicistes japonais.

La présente étude essaiera d'examiner les traits caractéristiques juridiques de la Déclaration en son ensemble ainsi qu'en ses principes particuliers. L'entreprise est assez modeste comme l'indique le titre d' "Introduction", mais elle n'est point si timide de ne pas vouloir élever le niveau actuel japonais de l'étude sur ce sujet. De quel point de vue ou avec quelle méthode et quels documents et travaux? On ne perdra pas la perspective de divers aspects de significations déjà remarquées pour éclaircir les caractéristiques de la Déclaration, avec par conséquent une méthode mixte, historique, comparative et "juridique" au sens non si étroit du mot employé par le positivisme juridique d'Jellinek. Le document de base, c'est "Archives Parlementaires, t.VIII" dans lesquelles on lira avec une conscience scrupuleuse tous les débats et projets concernant la Déclaration pour vérifier les opinions des auteurs. On consultera en outre tous les ouvrages anciens et récents accessibles pour nous en vue de synthétiser les résultats analysés.

Section I est consacrée à l'examen des travaux préparatoires, et ce présent numéro le contient jusqu' à la proposition du projet Lafayette.

(la suite au prochain numéro)

DUE PROCESS AND CRIMINAL JUSTICE**..... Developments in the U. S.****Supreme Court.....**

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Contents:

1. Concept of Due Process in the Administration of Criminal Law
2. Federal Intervention to the State Criminal Justice
3. Survey of the Due Process Cases in the Supreme Court
4. Due Process and Bill of Rights

For these thirty years, the U. S. Supreme Court has been vigorously trying to promote the protection of the civil liberties in the field of criminal law. It is through the use of the due process clause, which is construed as a fundamental requirement of the minimum standard for the civilized society. This, I believe, is highly suggestive to us in enforcing the constitutional mandate as to the fundamental rights of the criminal defendant. Here are traced the development of the due process interpretation in the U.S. as it relates to the criminal procedure.

Although the federal intervention is remarkable of late, it is just a phenomenon of these three decades. Until then the federal influence, if any, came from the Congress or in the form of administrative service, not from the Court. It is true that very early in history, the Court established its jurisdiction to review state criminal convictions when federal questions are in issue. For many years, however, the due process clause played no significant role. The Court's effort was concentrated to regulate the state legislation in economic and social welfare spheres. Criminal defendant's due process claims are squarely rejected. So that not until Powell v. Alabama in 1932, or rather Moore v.

Depsy in 1923, does the clause become an effective device for the control of state criminal proceeding. From then on, however, the modern law of due process has developed really rapidly. As to the reasons for this phenomenon several speculations are advanced, although the question can never be fully answered unless and until we analyze the many decisions rendered both before and after that time from the viewpoint of Justice's personality and its socio-political background. The Prohibition Law is said to have raised the issues of criminal law to a level of national attention. Crime surveys conducted in 1920s and 1930s are another important incentives. The reform of the Court's jurisdiction in 1925 is sometimes pointed out. There is another suggestion that the decision of the Powell case and the rise of Hitler in Germany occurred within one year, and both events are encompassed in the crisis of individual liberty which has confronted the world since the first war.

In these years the problems of criminal procedure under the due process clause have constituted one of the major preoccupations of the Supreme Court. Among them the right to counsel cases, confession cases and search and seizure cases are highlighted. Though the court in fact has granted review in rather smaller fraction of the cases, substantial superiority of the federal government over the state power can not be denied. Since the Wolf case in 1949, the American federalism can properly be said to have changed its contents at least in the field of criminal justice. This trends were accelerated by both Mapp case in 1962 and Gideon v. Wainright in 1963. Traditional concept of strict distinction between due process and Bill of Rights can not be maintained now. In Adamson case in 1947, the position that the states by virtue of the due process clause are subject to all the limitations of the Bill of Rights was taken by four dissenters, where Justice Black supports his position through the reference to historical documents. Black's opinion has not gotten majority as yet. No one may legitimately assert that the Supreme Court in the future would never change

its attitude. For, the margin is so close, the standard of due process advanced by the Court is far more ambiguous than that of the Bill of Rights guarantees, and Mapp and Gideon cases are eloquent herald for the coming direction.

**On the Tendency of the "Principle
of Legality" in Comparative
Criminal Law**

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It takes for granted that the principle of legality is the core of liberal constitutional ideology and is well-known in the maxim "nullum crimen, nulla poena sine lege." After experiencing so-called "the negative trend" to the principle in 1920-40, now, it permeates through almost every criminal law (including socialistic criminal law) irrespective of being expressed clearly in the code. Indeed, it must be requisite for the period of stability.

This treatise is intend to summarize the tendency of the principle of legality through obserbation of several criminal codes.

- Chapt 1 Preface
- " 2 Outline of the concerning provisions
- " 3 A glance at the tendency