WASEDA University Global COE Program
Creating a New Corporate Legal Framework for a Mature Civil Society
- Restructuring Corporate, Financial, and Capital Market Laws and Asia's Challenges to the World -
NEWSLETTER
Waseda Institute for Corporation Law and Society
Volume 3 Spring 2009

FY 2008 Activity Report

Our program was adopted as a Global COE (Center of Excellence) program at the end of June, 2008. Since then, our Institute had engaged in fulfilling activities during the nine-month period in our first fiscal year based on the accomplishments as the 21st Century COE (2003-2007). Especially, to carry out our mission of creating cross-sectoral legal theories and a new legal framework for Japan, our leader, Tatsuo Uemura, an expert in corporate law, participated in the gathering of Japan Labor Law Association as a commentator to raise an issue by introducing his opinion about companies and labor. A dialogue between constitutional law study and corporate law study has started aiming to have constitutional norms in every positive law. This direction will be the core issue of creating a new legal framework in Japan.

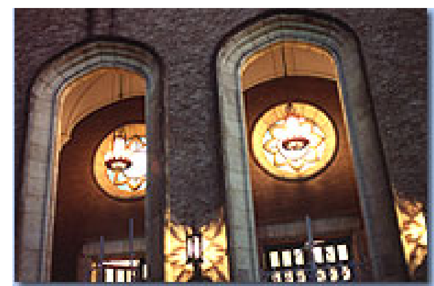
We also aim to propose the most advanced theories regarding urgent issues as a truly independent opinion leader or think tank. During FY 2008, we held some important lectures and symposia including a symposium: "Complete Check of Financial Crisis That Began in the U.S. - A Message from Japan-" (2009/01) and a symposium: "Expansion of Poverty and Roles of Safety Net" (2009/01), and a symposium: "Convergence of Accounting Standards" (2008/09). An international symposium of "The Role of Law and Legal Cooperation in the Creation of a Civil Society" (2009/03) was also held at Japanese-German Center Berlin in Germany. Also the London Forum was held with the theme of self regulatory policy making in international capital markets. Beijing Financial Conference was held on the theme of financial crisis. These efforts lead to the coming three-nation symposium in July among our GCOE Institute, China Security Regulatory Commission, Korean Financial Supervisory Services, Japan's Financial Services Agency and others. The symposium will be the first three-nation symposium concerning the regulation and supervision as well as the direction of self regulation of capital markets in Asia.

We also continue cooperative relationships with the National People's Congress of China, the highest legislative organization in China, China Security Regulatory Commission (CSRC), and Tokyo Stock Exchange, based on the triangular agreement since the first COE. In FY 2008, Chinese delegation visited Japan to learn earthquake countermeasures in Japan. This year, a research exchange is planned in Beijing at the end of July concerning state liability for compensation law.

The English database of intellectual property judicial precedents which was developed by the intellectual property law research group has focused on six Asian nations. But the project is now planning to include European precedents. Furthermore, it will probably include the database of Japanese precedents which was made by Institute of Intellectual Property Japan with the help of our Institute and University of Washington. So the main contact will be Waseda GCOE for searching IP precedents.

We have also made efforts to shape cross-sectoral and comprehensive capital market legal systems as well as to contribute to financial capital market reform. We made a proposal of a UK-type principles-based code for financial intermediary agents. Concerning M&A rules, traditionally, Japan has focused on the U.S. way only for a long time. However, the argument in Japan has been changing and a study group of British M&A system was established. Because of our past contribution, our GCOE leader as well as younger researchers who have conducted research at our GCOE participated in this study group. Our proposal of Japanese financial ADR is adopted in Financial Instruments and Exchange Act.

In addition, many workshops and symposia were held having fruitful results. We published three volumes of our publication, "Corporation Law and Society" during this fiscal year. An 8-volume series of books: Creating Corporation Law and Society was also published except one.



Introducing Research Projects (2)

In our Institute, various research groups independently promote activities under the keyword as “corporation, market, and civil society”. This newsletter features the project overview of each research project group in series.

2. Constitution and Economic Order

A2-1. Constitution and Economic Order

The Japanese Constitution does not contain any explicit provisions concerning the economic order. But it has been interpreted to be premised on a capitalistic economy because Article 29 stipulates protection of property rights. Capitalism, however, ranges from that based on neo-classical free markets to New Deal type market economy that includes welfare state type redistributions. The Constitution does not include any explicit provisions concerning the type of capitalism that should be adopted. The study of constitutional law in the past concerning this point has treated the structure of the economic order as a matter of policy that is excluded from the scope of legal decisions. This way of thinking, however, is based on a double standard; that is to say, it is premised on the idea of conceptualizing the economic order through debate. It did not necessarily include the intent to justify the withdrawal of a state or laissez-faire markets.

It is certainly true that the Constitution contains no explicit provisions concerning the economic order and it is not appropriate to judge economic policies by legal decision making. However, it does not mean the economic order is unrelated to the optimal condition of the state. There is no reason to believe that the Constitution, which specifies the fundamental structures of the state, is unrelated to the economic order. Even so, it is undeniable that, considering the current advancing globalization, the optimal economic order designed for a single country would not be effective for others. In the restructuring of the global economy following the end of the Cold War, does there remain anything about the economic order which can be explained by a Constitution and the study of constitutional law while a Constitution is premised on the framework of the nation-state? To answer this question, we need to start with the fundamental principles of the Japanese Constitution including sovereignty, human rights, and pacifism.

For example, does the pacifism adopted in Article 9 of the Constitution impose any restrictions on the economic order? Is there any relationship between the requirements for a balanced budget and the protection of constitutional rights? The topics of this group extends to a wide range of issues including withdrawal of a state and the Constitution, social security and economic order, local governments and economic order, and the Constitution and civil society in addition to the issues such as rights of economic freedom and the human rights of corporate entities.

Project Leader: Toru Nakajima, Koji Enami, Motonari Imaseki, Takashi Kanazawa

3 Civil Laws for Corporations and Markets

A3-1. General Civil Law Research

A3-2. Reconstruction of Civil Commercial Legal Framework

Providing civil law rules has been the primary mission of the existing Code of Civil Procedure and the Civil Code. The importance of this mission remains unchanged. At the same time, however, it has become necessary to explore seriously the optimal format of commercial civil law that can support corporations and markets. Various issues has been left in the hands of scholars of the Civil Code: markets and unlawful conduct, non-performance of duties with respect to markets, accountability and the suitability rule concerning financial products, indemnification of the losses of consumers and investors via markets, the significance of the Code of Civil Procedure concerning the design of financial products, the civil trust legal system, the duties of trustees, rights as the objects of market transactions, and legal systems from the perspectives of business entities such as foundations, corporations, intermediate corporations, and partnerships. In many cases the phenomenon occurring in these areas require the perspective of the Civil Code as the legal system that supports corporations and markets. In a certain sense, to this extent, scholars of the Civil Code have also been scholars of the Commercial Code. This project seeks to open new academic areas through joint research in such comprehensive fields. By the adoption of the new Companies Act, the positioning of the general rules of commercial law and the law of commercial conduct became difficult. But we see the momentum to reconstruct the boundary between the Civil Code and the Commercial Code, for example, shifting the general rules of commercial law and the law of commercial conduct to the field of the Civil Code, and placing incorporated bodies and incorporated foundations under the Companies Act. This project aims to create a new field of legal scholarship that incorporates the existing Code of Civil Procedure.

Project Leaders: Kaoru Kamata, Tatsuo Uemura

A3-3. Corporations, Markets, and Civil Liability

The time has come in which the law of civil liability for corporate acts plays new roles. As a result of the relaxation of ex-ante regulations in recent years, the sanction element in the law of unlawful conduct has become more important and the role of injunctive relief also has grown. It has become necessary to reconsider the functions of civil liability itself. At the same time, it has become to consider appropriate regulation of corporate conduct from the perspectives of ensuring safety and a fair transactional environment. Safety and fairness are premises of all transactions. Especially when corporations and consumers stand face to face, these two elements are modern essential requirements. Safety includes the safety of life, human body, and property, but also includes protection of peaceful living environments and privacy. Also, fairness in transactions means not just fairness between the parties, but also the protection of sound markets based on the competitive order. As our theme, we raised the issues of corporations, markets, and civil liability. It is an essential premise to consider public regulation on corporate activities, appropriate transactional rules between corporations and consumers, and the formation of market rules. We handle the theme broadly including such issues.

Project Leaders: Makinori Goto, Yasuhiro Fujioka, Michitaro Urakawa, Takehisa Awaji

A3-4. Corporations / Citizen and Land Legislation

To the extent that corporations are established on a civil foundation, it is very important to examine the relationship between corporate ownership of land and individual ownership of land for a living s by referring to cases from Europe and the United States. It is necessary to understand European concepts concerning public nature and limitations on ownership of land by considering the relationship between the commons or shared public capital and private ownership, and to make use of these concepts in Japan's land policies. Land policies should be established on the basis of fundamental law such as concept of ownership or concept of corporation.

Project Leaders: Katsuichi Uchida, Teruaki Tayama

A3-5. Globalized Market and Mortgage Legislation

The subprime loan crisis has brought about the bankruptcy of major American financial institutions and has shaken global capital markets. The origins of this crisis can be found in the unique home and real property mortgage systems in the United States. Until now, real property mortgage systems have been an issue of individual countries. It must not be forgotten, however, that the foundations established through the creation of methods of “collateral” are an issue of “finances”. It must be also noted that financial “markets” have global characteristics. The crisis mentioned above has revealed the necessity for legal consideration of the inseparable nature between these two systems. In this respect, it is necessary to reconsider the inseparable nature of security and finance. Also, to the extent that financial markets are “markets”, it is premised on competitive principles. It is necessary to establish appropriate market policies by the government to enable those market principles work properly.

Having these economic issues in mind, we should conduct fundamental research of the European and American financial security systems that have exposed shortcomings in this crisis and then, establish systems that can make significant contributions to new financial development in the twenty-first century. Thus, identifying the direction of development of the American Uniform Commercial Code (UCC) as well as EU uniform standards, the relationships among the individual financial conditions in each participating country, and European and American methods of approaching Asian markets are essential research topics.

Project Leader: Koji Ohmi

A3-6. Comparative Legal Research of the Law of Trusts

Through comparative legal research of trusts and similar systems to trusts, this research seeks to conduct a survey of legal awareness seen from the perspectives of fundamental structural understanding of private law in various countries and responses concerning trusts under Anglo-American laws. The ultimate objective is to examine the depths of Europe from a variety of perspectives by investigating legal systems and legal understanding in areas in the vicinity of Europe and in various offshore jurisdictions. The main subjects are divided into the following three categories: (1) “the acceptance of trusts and similar systems to trusts in continental law countries with a focus on Europe”, (2) “the acceptance of trusts in mixed legal systems such as those found in Scotland and South Africa”, and (3) “the development of trust law and the boundaries of trusts in offshore jurisdictions and the acceptance of the offshore trusts in various countries from a conflict of laws perspective”.

Active measures will be taken to disseminate internationally the results of this research in English, for example, submitting articles to English-language journals.
Project Leaders: Hiroyuki Watanabe

A3-7. Legal Issues on Human Materials

In modern society, humans as living organisms are positioned equally as the subjects of rights by virtue of their birth alone. Others may not dispose or trade humans which are rights holders. It has been considered that portions of the body separated from an individual human bodies as well as the body of a deceased person (corpse) lose their nature as a person. Those can be the subject of such disposition, but other than certain exceptions such as hair, such disposal is limited to interment, disposal, or use as a specimen. Today, however, advances in the natural sciences including medicine, biology, and life sciences as well as technology are opening news paths to the use of human bodies and their components for medical treatment, the development of pharmaceuticals, and other purposes. The significance of dead bodies and portions of human bodies is now changing greatly.

Currently, human bodies and their component parts are roughly divided into three categories for use. First is the use of tissues and organs for their original functions such as blood transfusions and organ transplants. This also includes the use of sperm and ova for childbirth. Second is the collection of body parts as a raw material for use after processing. Such use includes pharmaceuticals and in some cases cosmetics as well as the establishment of stem cells (including embryonic stem cells and IPS (induced pluripotent stem cells)), an issue that has attracted considerable attention recently for the potential use in regenerative medicine. The third category is the collection of human DNA for the extraction of various types of genetic information for use. With the completion of the Human Genome Project and the advent of the human genome era, this field is expected to undergo substantial development in the future.

In each of these fields, the subject of use is matter derived from humans. But it has not necessarily taken place to develop positive debate legally justifying issues such as the degree of freedom of such use and the potential for disposal has not necessarily taken place. What rights are human body parts subject to, ownership rights or human rights? Who has the authority to make decisions concerning disposal, and can they be the subjects of transactions? Who holds the rights concerning processed goods and extracted information? Many other issues must be examined. The use of substances derived from humans can make significant contributions to human welfare. Although there is no doubt about it, these issues involve individuals, who are the subjects of rights seized with substantial sacrifice by modern society. This research seeks a structure for legal debate concerning human-derived substances that are not limited to existing principles of property rights, transactional law, or human rights.
Project Leaders: Waichiro Iwashi, Katsunori Kai

A3-8. Civil Liability and the Liability under Public Law Regarding Environment

To solve environmental problems appropriately, it is required to have a complementary approach from both civil law and public law (administrative law). With the theme of “Civil Liability and the Liability under Public Law (with a focus on the environment)”, this project is intended to promote research and debate concerning litigation and optimal litigation systems as well as liability relationships and the allocation of expenses concerning the individual issues specified below while taking into account the relationship with liability under public law based on civil liability (primarily litigation). The specific issues are corporations and emissions trading, the Aarhus Convention (environmental organization litigation), theories of environmental damage, restoration of soil contamination, litigation concerning asbestos, harm from pharmaceuticals, bovine spongiform encephalopathy (BSE), Minamata disease, and other issues. This research is not limited to individual points concerning domestic environmental law, but also includes comparisons of the legal policies of various foreign countries.
Project Leader: Tadashi Otsuka

UPDATE

London Forum: "Learning from the experience of ICMA's self regulatory policy making"

On January 27, 2009, an international symposium with the theme of "Learning from the experience of ICMA's self regulatory policy making" was held in London, inviting three top officials from the ICMA (International Capital Market Association). Since July 2008, the Waseda Global COE and the CMAA (Capital Markets Association for Asia, established in June 2007, Chairman: Nobuyuki Idei [former Chairman of Sony Corp], Representative: Shigehito Inukai [Professor of Waseda University]) has conducted joint research on the regulatory systems and self regulatory rules of common capital markets in Japan and Asia. In FY 2009, the Global COE and the CMAA will enhance the relationships with the related parties to conduct further research to propose the "(Waseda) CMAA Rule Book", which is applicable to Asian common professional capital markets.

Major participants:
(ICMA)
Rene Karsenti, Executive President
Paul Richards, Head of Regulatory Policy
A. Lachlan Burn, Partner, Linklaters LLP
(Waseda GCOE and CMAA)
Tatsuo Uemura, Dean of Waseda Univ. Faculty of Law
Sigehito Inukai, Professor of Waseda Univ. Faculty of Law
Hiroko Aoki, Professor Law of Chiba Univ.
H.Suzuki, Director of Barclays Capital Japan
Katsumasa Suzuki, Partner Lawyer, Mori-Hamada-Matsumoto (Law Firm)
Suk Hyun, JBIC Bond Specialist
Hiroshi Oda, Professor, London University
K.Kawamura, Associate Professor, Kanto-Gakuin Univ.

Made a statement at the House of Representatives Financial Affairs Committee (Financial ADR System)

Professor Shigehito Inukai of the Waseda Global COE made a statement as an unsworn witness (for the part of the financial ADR system in the draft revision of Financial Instruments and Exchange Law, the 49th bill submitted to the Diet) at the House of Representatives Financial Affairs Committee on April 16. He explained about the overview of the proposal on Financial ADR system published on November 11, 2008, and added an opinion on the matter.

FY2008 Grant-in-Aid for Younger Researchers

FY 2008 Grant-in-Aid for Younger Researchers was granted to promote selected researches which are consistent with the mission of the Global COE research projects. Applicants included RA, doctoral students, postdoctoral, research associates of Waseda University.

①Lea Chang, "Copyright restrictive regulations and user's right in France", Aix-en-Provence, Paris, France
②Noriyuki Shiga, "Moral right in Canada", British Columbia University, Vancouver, Canada
③Akiko Ogawa, "The process of establishing droit de suite and the impact on fine arts market in Australia", Art Law Centre, Sydney, Australia
④Yoko Kuroiwa, "Establishment and development of legal systems on gender discrimination and gender equity in EC law", England (Birmingham, Oxford, London)
⑤ Shinya Onogami, "Criminal liability among multiple participants-focusing on the relations with the doctrine of complicity", NY, the U.S.

Symposium & Seminar

■<Urgent Symposium> Complete Check of Financial Crisis That Began in the U.S. - A Message from Japan-
(2009/1/31)

The symposium was held to analyze financial crisis that began in the U.S. from the various viewpoints and to propose messages from Japan to the world.

First, from the financial forefront, Mr. Masaaki Kanno, Chief Economist, JP Morgan, gave a speech titled "the Outlook of 'a Once-a-year Financial Crisis' and Policy Responses". He explained what was happening in the U.S.,

Europe, China, and Japan, using various economic data. Then, he expressed concern over the exit strategy towards a big government and concluded that we should review what the regulations should be.

From rating agencies, Mr. Yasuhiro Harada, Chairman, R&I, made a speech titled “Overhaul Rating Agencies – the U.S. and Japan”. He introduced the SEC’s summary report on three U.S. rating agencies as well as the Financial Service Agency’s report saying Japan should impose public official restrictions. Also he addressed the SEC’s proposal to have more control over rating agencies. He stated that a rating agency “contributes to development of capital markets as a financial gate keeper”, “should not be profit-oriented….and should be managed based on the concept of respecting trust” and the rating agencies should be competitive enough to secure fair and reasonable rating.

Next, as an international lawyer, Mr. Syuji Yanase (Nagashima Ohno & Tsunematsu) gave a lecture with the title of “the Legal Infrastructure Led to the U.S. Financial Crisis”. After referring to the characteristics of the U.S. society and laws, he introduced a proposal to accept new financial restrictions on “freedom”, establish principles as a code of conduct, and enhance harmonization and cooperation in forming new financial regulations.

Next, Mr. George Hara, CEO, DEFTA Partners, spoke as a manager who knows everything about the U.S., with the theme of “Public Interest Capitalism and New Industry Creation”. He stated that the U.S. has gradually lost the idea of developing a new technology, and has pursued a short-term success instead. It was their misunderstanding to believe the next core industry was financial industry. As a result, the crisis occurred. We should correct the wrong idea of “shareholders own the company” and rethink the short-term way of thinking. Then, by introducing an NGO, Bangladesh Rural Advancement Committee, BRAC, which spends 40% of their profit on education or medical care from the beginning, he concluded that we should develop companies based on mid- and long-term public interest capitalism, which makes profit by doing good for communities instead of doing good such as CSR after making profit, and should make the group of those companies to be a new core industry.

From financial authorities, Mr. Yasuto Ohmori, FSA, made a speech titled with “Reconstruction of Market-oriented Financial System”. After reviewing the history of Japan’s financial system, he explained the theory that the crisis was caused by securitization and the theory that it was caused by combining banks and securities companies. An effective choice of systems might be Japan’s Money-lending Business Control Act, which will come into effect next year to regulate lending to the extent a borrower can pay back from the income. He said we should strengthen corporate governance underlying legal systems of takeover and reconstruct market-oriented financial systems.

Last, from the view of comparative law, Professor Tatsuo Uemura, Waseda University, the GCOE Leader, made a speech titled “Financial Crisis as Legal Issues”. At the beginning, he introduced the concept of “corporate and financial/capital market legislation for mature civil society” which was raised as the GCOE’s awareness of issue. The concept means that we aim to build a society where no success is respected if it abandons various values such as the values to maintain basic human rights, freedom, and culture, or the values to respect individuals and to distribute wealth fairly and also aim to create financial capital markets to protect such a society. He said that everything is very free in principle in “the U.S. way”, compared to European rules maintaining prohibition in principle. Their way is very attractive but very dangerous. The U.S. did not notice such uniqueness of their law system. He also stated that corporate value must be a normative concept and what contributes to the maximum fulfillment of corporate mission is the capital, which the nation only can qualifies in terms of national interest. He concluded that we should construct a pure theoretical model of capital market legislation as well as a corporation system model making use of capital markets, and should consider a theory integral with the theory of civil society. We should understand European non-statutory rules such as the Gentleman’s Rule, principles, or best practices to bring them to arguments on theories in Japan.

The symposium was held at Ibuka International Hall of Waseda Univ. with the attendance of a large audience.

■"Critiques of Basic Juristic Concepts" Workshop "What We Learn from Classical Economics – Human, Economics and Society-" （2009/2/14）

Having classical economics as one of methodologies to theoretically understand the structure of modern society, we invited Professor Emeritus Kenzo Mouri, Tokyo University, an authority of economic history and history of economics, as a lecturer. His lecture examined classical economics (especially, Adam Smith and J.S. Mill) from the viewpoints of human and labor. By reviewing the texts of economic theories like Adam Smith's theory, which the modern neo-liberal policy is based on, as well as the backgrounds of the theories, we could find out that the state of human or labor which Smith assumed was essentially different from the neo-liberal thought which is based on the existence of a rational economic man. It was also revealed that gaining a correct understanding of such texts is useful in critical analysis of the modern society. In order to gain analysis and critical view on the economic theories supporting the modern economic policies, it is indispensable to review the theories of classic economics. (Report made with the help of Kohei Kameoka)

■ Waseda = Max Planck Institute for Foreign and International Criminal Law Joint Workshop （2009/3/17）

We invited Dr. Ulrich Sieber, Director at the Max Planck Institute for Foreign and International Criminal Law and Mr. Mark Engelhard, Max Planck Institute for Foreign and International Criminal Law to deliver a lecture. Mr. Engelhard spoke about the corporate crime in Germany with the comparative view between Germany and the U.S. The lecture was outstanding in terms of establishing new requirements to prove corporate crimes beyond the traditional systematic theories. Professor Sieber gave a speech on the future of European criminal law systems. After the lecturers, many questionnaires were made from the floor and an active discussion took place. (Report made with the help of Shinya Onogami)

■International Intellectual Property Seminar: "Highlights and Issues of New Chinese Patent Law" （2009/3/18）

The symposium held inviting three Chinese experts from China. In the first part, as keynote speakers, Ms. Yuan Jie, vice-general Director of Economy Law Affairs Division, Standing Committee of the National People's Congress of China, Professor Guo He, Renmin University of China, and Mr. Liu XiaoChun, Dean of Law Department, Tianjin University, respectively made a speech. Ms. Yuan gave a speech titled "the Focus of Discussions in the Process of the Establishing New Chinese Patent Act", she overviewed the revised points, introducing four purposes of this amendment. Then, Professor Guo made a speech titled "Enforcement and Limitation of Patent Abuse in the New Patent Act". Last, with the theme of "International Rule Application of the Amendment to the Patent Act", Mr. Liu talked about the significance and issues of the new Patent Act from the view of public health.

In the second part, Mr. Yu Fenglei, who is a Global CEO Researcher, served as a moderator of the panel discussion as well as a commentator. The lecturers of the first part served as panelists and had a vigorous panel discussion. Japan-China News (Japanese version of People's Daily) covered the symposium.

■"Legal Issues on Human Materials" Workshop (2009/3/18)

We invited Dr. Hans-Georg Koch from Max Planck Institute for Foreign and International Criminal Law as a lecturer (co-organized by the sponsored program of science technology test research, "Research on Ethical, Legal, and Social Problems Related to the Advanced Medical Research". The theme was "Stem Cell and Regenerative Medicine as Legal Problems" The workshop especially focused on the Embryo Protection Act of Germany and examined how the regulations should be, in order to figure out the way of responding to the ethical problems related to medical research using stem cells. As one of the EU members, Germany needs to consider the balance with the EU Directives or regulations. The lecture also suggested social, religious, and historical characteristics behind the issue.

■ Special Seminar: "Issues Regarding International Application of Competitive Law" (2009/3/21)

Professor Emeritus Mitsuo Matsushita of Tokyo University made a speech titled "Issues Regarding International Application of Competitive Law". He gave a detailed explanation about the backgrounds and history of extraterritorial application of the U.S. antitrust law, the EC/EU competitive law and jurisdiction by raising various international cases including the recent cases. Also, he mentioned the extraterritorial application of Japan's Anti-Monopoly Act. The case of marine hose (the U.S., EU, Japan, UK collaborated in 2007) was introduced as the recent international cartel case for which authorities from each country conducted mutual collaboration and parallel investigation.

■"Reconstruction of Safety Net for Employment and Social Security" (2009/4/25)

The workshop aimed to clarify the issue of the employment pattern from the standpoint of economics/labor economics, and the legal issue of the employment pattern change from the standpoint of labor law. By bridging between the study of law and economics to have arguments from various areas, it aimed to shed light on the issues which the study of law (social law) needs to tackle on regarding the employment and the widening gap issue.

First, Professor Kohei Komamura (Keio University) pointed out the widening gap between regular and non-regular workers by showing an increase of non-regular workers and the working poor, and a decrease of social insurance contribution of employer. To respond such an issue, he suggested a multi-layered income security system combining the increase of the minimum wage, the minimum income security during an active working period, and so on. He also proposed the system allowing non-regular workers to build their career.

Professor Shimada (Waseda University) made the second report. He said that the study of labor law and precedents had endorsed Japanese employment practice. We should look at diversification of regular workers in addition to the gap between non-regular and regular. Then, we should review the concept of worker and develop labor laws for various needs instead of providing a package of laws.

As a commentator, Associate Professor Atsuhiro Yamada (Waseda University) mentioned that, the increase of the minimum wage might cause withdrawal of businesses with lower productivity than minimum wage. His comment opened up a discussion about unproductive service industry, caring, education, and so on. In the following discussion, Professor Shimada raised a question whether what effect the minimum wage would have on workers who do not mainly support their family. Professor Komamura said that the current minimum wage was too low and it might be possible to pass on the price. What was mainly discussed was who should bear the burden of non-regular workers – the government pays as benefit or companies pay as wages. Professor Shimada also suggested that a step-up training for excellent workers is necessary in addition to in-house trainings in order to provide empirical value to non-regular workers in their career development. Other than that, various opinions were showed from the view of labor law, security law, and economics. (Report made with the help of Yusuke Tsunemori)

“Shareholder value maximization” and “the Objects of the company”

Hiroyuki Watanabe, Professor, Faculty of Law, Waseda University, Global COE, Waseda Institute for Corporation Law and Society

Recently, some people often advocate the idea that “shareholder value maximization” is a fundamental principle in company law. Others also say that we must include such rules in company law itself. However, is it possible to adopt “shareholder value maximization” as a priori objects of the company in general?

Pursuing shareholder value is a rational activity from the view of investors. However, company law has a structure which places maximum priority on “the objects of the company (corporate purposes)”. So shareholder value must be created within the limitation of the structure. For example, a company with a objects of providing reliable supply of electricity gives priority to its objects over shareholder value. As such, each company must have each “unique objects”. This is not valid simply for companies which are established based on a special law. Therefore, it will be desirable to create shareholder value in the course of pursuing corporate purposes. If someone intends to be a controlling shareholder of a company, he/she must be responsible for contributing to achievement of its corporate purposes as well as creating shareholder value.

“Corporate purposes” is something equivalent to the Trust purposes. In the case of trust, a trustee manages trust property for beneficiary in accordance with the trust purpose. The beneficiary monitors how appropriately the trustee manages, maintains, and disposes the property in accordance with the trust purpose. Legal structure of maintaining corporate asset in a publicly-held company is essentially the same. In the case of trust, “achievement of trust purpose” is trustee’s fundamental duty. As far as the trust law does not specify, the trustee does not have to be responsible for “beneficiary value maximization”.

The scope of corporate purposes is flexibly interpreted in recent cases. This means that we flexibly interpret “the extensional scope of the objects of company law” as the premise of finding violation of authority of directors etc. The level of argument is different. The essential importance of “the objects of the company” which is first on the list of the article of in company (Article27-1, Company Act) does not change. Therefore, the “shareholder value maximization” is not an inevitable proposition under the Company Act. There is no such a priori proposition of raising the dividend or share price as much as possible. So if an offeror insists on profit return to shareholders only, it will not be appropriate to justify the argument by the theories such as the “free cash flow theory (effective use of excess funds)”. It must be “shareholder value maximization” within the scope of “the corporate purposes”.

Investors, or shareholders, value maximization could be a corporate purpose (for instance, investment fund). In such cases, originally, they should have shareholder value maximization as “the corporate purposes”. If a company with such a purpose intends to be a controlling shareholder of other business company, they cannot hold pursuit of shareholder value. There might be a criticism that “it is valid for legal interpretation (or theory) but is not desirable for a code of conduct for managers because of its uncertainty”. Also it is difficult to find out an unambiguous solution to see the best way to realize “shareholder value maximization” or “future cash flow maximization”. Those are not clearly concrete enough to be a code of conduct.

For example, in the M&A scene, a decision must be made based on the framework considering whether or not an offeror should be a controlling shareholder to achieve the corporate “objects” or whether or not the offeror should be a controlling shareholder to achieve a new desirable “objects” which the offeror is presenting. There was a case that a soccer club company in the UK had financial difficulties. An offeror offered to change the structure of the company’s business to more profitable one. However, instead of accepting the offer, the club supporters made investment to maintain the business of the soccer club. If the corporate purposes is not clearly unambiguous, the framework also works by having shareholders make a decision to sell their shares to the offeror. They can make a decision whether to accept the direction which the offeror is presenting and to accept the offeror becomes a controlling shareholder to achieve the goal. In an M&A (takeover) scene, the offer price is very important, but will not be the only decision-making factor of accepting the offer or not.

Desirably we should have necessary information disclosure for the shareholders and full enforcement measures with a restrict control over illegal acts in the M&A. Then, on that premise, the control transfer must be made by the “shareholder’s genuine decision”. That will be a desirable M&A and regulation system.

Recent Arguments on the Doctrine of Complicity in Japan – Focusing on an Accessory to a Crime

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The Penal Code of Japan has provisions for complicity in Article 60 (Co-Principals), Article 61 (Inducement), and Article 62 (Accessory). In the recent discussions on the doctrine of complicity in Japan, which has been affected by German Criminal Law, there has been a new argument especially on the way of proving the conviction of aiding and abetting. The point of view is "whether to always consider an act of seemingly helping the conviction of a crime as accessory". These issues are discussed under the themes of "inducement by a neutral activity" or "inducement by a daily activity".

For example, suppose that X in a hardware store sold a knife to Y who came to the store while X was thinking "this person might kill somebody with this knife". In fact, Y killed Z with the knife. It is a typical example to question whether to prove X's act to be an accessory to Y's crime of murder. X's act of simply selling a knife as his business helped Y's act of murder as a result. X's criminal intent cannot be (simply) rejected. All the elements of aiding and abetting are satisfied in this example. However, there still exist concerns that it is questionable to conclude as such.

In addition to the arguments by using such a typical example, some develop arguments by citing the recent judicial cases. The first trial decision of the Winny case in 2006 (Kyoto District Court, December 12 of 2006, Hanrei Times No.1229, p.105) questioned the following point. The defendant uploaded the file-sharing software (Winny) on his homepage. Y and others downloaded the software and used it to exchange music/video data with each other without copyright owner's consent.

Y and others in this case are considered as the principals of copyright infringement (public transmission right infringement). The question is whether the defendant's act of providing the file-sharing software on his website is the act of aiding and abetting or not. The Court ruled that the defendant was convicted of assisting copyright violation because his act facilitated the copyright violating act of Y and others and there was an intention to do so.

In this case, the defendant is subject to penalties because his act of providing a sharing software Winny, which is "value-neutral", assisted the copyright violation of Y and others as a result (the defendant is aware of the fact). The same concerns as the aforementioned case of providing a knife might apply to the Winny case.

Winny has a system to exchange information among users without involving a central server. It has an advantage to develop a large-scaled network. On the other hand, there is an aspect that users cannot be easily specified when information exchanges illegally take place just like this case. It has proved that the defendant was fully aware of this point. The defendant made it easy for users to exchange information in terms of a physical sense as well as facilitated the violating act in terms of a psychological sense by making the users feel that the act would "not be easily discovered". As a result, Winny's value neutrality did not lead to the decision of not guilty. Instead, it has concluded that the defendant was convicted of aiding and abetting.

The defendant who conducted the act of aiding and abetting was the developer of Winny. Also the defendant was fully aware that the principals would conduct copyright violation. Because those facts were proved, it is possible to agree on the decision admitting that the defendant "who is the developer" was accessory. (See Shinya Onogami, *The Case of Admitting Accessory to Public Transmission Right Violation Regarding Providing A File-sharing Software – The First Trial Decision on the Winny Case*, Houritsu Jihou Vol.80 No.1 (2008), p.114-, for the issues under criminal law and my personal views.)

If we expand the area of "unpunished" accessory in order to handle the question of "whether to always consider an act of seemingly helping the conviction of a crime as accessory", a certain attention is required especially when we consider the area by deciding whether a person who aided was doing a justifiable act or business act. Suppose the reason of making X unpunished lies in the fact that X was simply doing a justifiable business act of "selling products" in the aforementioned knife selling case. If so, X must be unpunished even when X sold a knife to his friend Y in the name of selling act, clearly having an intention to aid Y to commit a murder (although it could be an extreme example) .

On the other hand, there is not a clear guideline for the issue of "inducement by a neutral activity" to explain what case should fit into the argument framework or how we should handle such cases. In addition, it is necessary to consider the impact of the argument to the criminal theory when we determine whether the person who aided is

punishable or not in the aforementioned cases. In that sense, the direction of the argument framework will rely heavily on the future development of the discussion. The viewpoint or argument which was outlined in this article could add momentum to further develop the argument on accessory in detail to define that the accessory is subject to penalties to what extent.

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