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 4 Summer 2009

"Corporate Social Responsibility" in China – International Survey by Criminal Law Group –

Criminal Law Group Morikazu Taguchi

The Criminal Law Group has conducted an international survey on corporate social responsibility since 2008. It is conducted as a Global COE project based on the domestic survey in 2004 conducted with the assistance of the Cabinet Office of Japan. The survey includes continental law countries such as Germany and Italy, common law countries such as the U.S., Britain, and Australia, and China and Japan from Asia. Due to budgetary constraints in FY 2009, we switched from a questionnaire survey to bibliographical survey for some countries.

Among them, the survey in China has started earlier in FY 2008. Within FY 2008, we had a meeting at Waseda University about the details on the survey with Chinese Academy of Social Sciences (CASS). Based on the discussion, the Chinese survey was conducted from January to July 2009 and the CASS is now preparing a summary and analysis of the result. We expect we will receive the result this fall but I would like to introduce the overview of the Chinese survey in this article.

First, there are two remarkable points in the Chinese survey. The first point is that it was the first time for China to give a foreign research institution a permission to conduct a significant survey such as a survey on corporate compliance program. This happens because Waseda University and the CASS in Beijing could have a collaborative research structure, but mainly because there were changes in the social conditions - China needs to seriously address the issue under the international criticism against corporate scandals in China. Whatever the reason was, it would be an epoch-making event to get permission from the government about the research pertaining to a country's international reputation.

As the second point, it is particularly worth noting that a careful survey program was designed in order to have academic objectivity. Two stages are designed. First, assuming that reliable data cannot be gathered by a paper-based questionnaire survey, we decided to conduct an interview-style survey by forming a team of three people. The response is valid only if it is signed by all the three members. This was designed to secure objectivity in the interviews. Next, to obtain objective corporate conditions as much as possible, we adopted the time-consuming survey program such as conducting an interview survey at three points: management level, middle-management level, and employee level. We provided pre-training in various locations to graduate students of each university who interviews in the survey. We expect we could obtain creditable information through these efforts.

Obviously, it is only recently that the concept of "corporate social responsibility" came to have a meaning in a practical sense in China. The concept itself had no meaning in their traditional state enterprises. Massive environmental pollution and mine accidents have frequently occurred in the 2000s. Especially, the cases such as harmful foods or harmful toys for children drew international criticism and the issue of corporate responsibility became, so to speak, a social problem. After the famous case of Sanlu tainted milk in Heibei, China, an investigation of products of 22 milk producers found that most of the products were contaminated by melamine. The Chinese government amended the Company Law in 2006, adopting the provision of "corporate social responsibility". Article 5 of the new law stipulates that "When undertaking business operations, a company shall comply with the laws and administrative regulations, social morality and business morality. It shall act in good faith, accept the supervision of the government and the general public, and bear social responsibilities". The meaning of "social responsibility" described here became the matters of investigation in this survey.

The survey was conducted with the support of law schools of major local universities such as Renmin University of China and Sichuan University. It includes companies in major cities such as Beijing, Sichuan, Shanghai, Guangzhou, and Tianjin. I would like to introduce one episode. The number of cooperating companies decreased in Tianjin because of the financial crisis and we had only 512 responses. So we hastily got cooperation

from Yantai government and Yantai University in order to do additional 300 to 400 questionnaire survey. As a result, we unexpectedly found out an interesting tendency. Concerning the corporate social responsibility in China, the question is who initiates the issue, the government or the private sector. Yantai government promotes the issue of corporate social responsibility in Yantai City. In contrast, the issue was led by the private corporate association instead of the government in Dalian. In the process of handling the issues after the incident in the tainted milk case, who pointed out the necessity of autonomous function in the industry was not the government but the corporate side. Socialist economy in China also seems to be standing at an important crossroads.

(August 25, 2009)

Introducing Research Projects (3)

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.

4. Sanctions and Dispute Settlement

A4-1. Corporations, Markets, and Criminal Sanctions

As a part of its 21st century COE activities, the Criminal Law Group, in cooperation with the Economic and Social Research Institute of the Cabinet Office, conducted a survey of 3,000 Japanese companies on the status of the compliance program and appropriate sanctions in the event of violations, and approximately 1,000 responded. A national symposium and an international symposium were held based on this survey (see Morikazu Taguchi, Katsunori Kai, Takeyoshi Imai, and Masaru Shiraishi, Corporate Research Projects Crime and Compliance Programs (in Japanese), April 2007, Shoji Homu; Katsunori Kai and Morikazu Taguchi, eds., International Trends in Corporate Conduct and Criminal Regulation (in Japanese), March 2008, Shinzansha). Based on this type of research, the group examined criminal regulation of corporations in Japan (see Katsunori Kai, ed., Corporate Activity and Criminal Regulation (in Japanese), (May 2008, Nihon Hyoronsha)).

Activities in global COE have advanced the above research even further. The group plans to do a follow-up survey of the 2004 domestic survey as well as to conduct an international survey in 2009 on the state of corporate crime and criminal sanctions in various countries. To conduct these research activities, research structures were reinforced starting in 2008. Researchers were divided into a domestic law research group and a foreign law research group, and the two groups conduct research simultaneously. It is hoped that the international survey will include not only corporate crime and compliance programs in foreign countries, but also the corporate cultures and awareness of citizens existing in the background. Preparatory activities began in 2008.

Project Leaders: Morikazu Taguchi, Katsunori Kai, Takehiko Sone

A4-2. Corporations, Markets, and Dispute Settlement

This project mainly conducts research of corporations, markets, and dispute settlement from the perspective of civil law. In addition to means of sanction such as civil sanctions, fines, and punitive damages, numerous other issues will be addressed including the nature and significance of alternative dispute resolution (ADR) and the authority of the rules by self-regulatory bodies.

Project Leaders: Tetsuo Kato, Michitaro Urakawa

5. Corporations and Labor/Environment

A5-1. Research on Concept of the Corporation under Labor Laws

There is a close relationship between labor law and corporations, but until now, the theory of labor law has seen corporations only as one party to labor agreements, and it has not been viewed as physical elements (plants, facilities, etc.) and human elements (shareholders, managers, workers, creditors, etc.). Changes in corporate structures spurred by reform of corporate legal structures have made it clear that the fate of the company is determined by the fate of the workers. Traditionally, examination of the concept of corporations in jurisprudence relied almost entirely on the study of commercial and corporate law, but the study of labor law has necessitated examination of the “concept of the corporation from the perspective of labor law”. This research draws on the prior research results of commercial and corporate law and attempts, in dialogue with commercial and corporate law, to positively construct a concept of the corporation within labor law and to reexamine basic theories of labor law.

Project Leaders: Makoto Ishida, Yoichi Shimada

A5-2. Takeover / Corporate Restructuring and Labor

The question of how the corporate acquisition by investment funds and the accompanying organizational restructuring is affecting the legal aspects of labor relationships in a time when the presence of the "shareholder" is growing as an important issue not only in corporate law, but also in labor law. Specifically, the objective of this research is to discuss "shareholders" and "corporate value" in their relationship with "labor". Those topics in the past were never the subject of discussion within labor law. It is necessary to identify from the perspective of "labor" the types of issues that are raised by certain types of shareholders and certain 17 types of conduct, and this research seeks to examine these issues from both labor law and corporate law from among the changes in corporate legal structures.

Project Leaders: Makoto Ishida, Yoichi Shimada, Tatsuo Uemura

A5-3. Labor/Civil Society and New Social Laws

To respond to the stagnation of the economic and social systems that have supported growth and prosperity in Japan since the end of the Second World War, the government has been taking action such as regulatory reform in an attempt to effect structural change. On the other hand, the inadequacy of measures dealing with socially-disadvantaged persons, who tend to be neglected during such times of structural change, is attracting attention, as represented by the common use of terms such as "the advent of an unequal society" and "the expansion of poverty." This project seeks to examine the current status of society in Japan from the perspective of "social law". In the post-war period, social welfare law gradually broke off from labor law, and researchers have been divided into two legal fields with a sense of relative independence. However, we must say it is time to make an integrated approach to issues such as non-regular employment and the working poor from the perspectives of both labor and social welfare. There is a need to establish a new field of "social law", and at the same time, a crucial academic issue is to develop debate concerning the "social rights" at the foundations of that field.

Project Leaders: Yoshimi Kikuchi, Mutsuko Asakura, Makoto Ishida, Yoichi Shimada

A5-4. Global Environmental Issues and Corporate Liabilities

Current global environmental problems require that the environment be taken into consideration in business activities in not only Japan but also in countries around the world. In addition, legal systems concerning the environment are changing rapidly. For example, every year the EU adopts many new directives and revises existing directives, and businesses must respond to the changes in the legal systems. This research project examines legal systems around the world, especially, those in the EU or the U.S. as well as various treaties, with a focus on "risk management" and the environmental law principles such as the "precautionary principle", the "polluter pays principle", "consideration for the future", and "sustainable development" that serve as the fundamental concepts for legal systems. The "precautionary principle", in particular, was examined in COE through last year, but there remain many outstanding issues that need to be investigated including, for example, shifting the burden of proof, theories of control of the precautionary principle, the impact on litigation, and the relationship with other principles. In addition, for example, Germany has been developing the German Environmental Code, which embodies the principles above and serves as the foundation for the environmental legal system. This research organizes and logically investigates how these various concepts are applied to chemical substances, climate change, environmental preservation, genetically-modified organisms, and other fields in international treaties and the legal systems of various countries.

Project Leaders: Tadashi Otsuka, Takehisa Awaji

UPDATE

Asian Capital Market Law and Regulation Forum: Japan, China and Korea

On July 10, 2009, Japan-China-Korea forum was held in Seoul for the new direction of supervision and self-regulation in Asian capital markets (organizers: Waseda Global COE and Korea Institute of Finance (KIF), co-organizers: Tokyo Stock Exchange (TSE) and Capital Market Association for Asia (CMAA), auspices: Yonsei University, co-chair: Kim TaeJoon, President of KIF and Dean Uemura, Tatsuo, Faculty of Law, Waseda University).

With the participation of CSRC, KIF, FSA and GCOE, this forum was the first tripartite symposium in Asia to discuss the direction of supervision and self-regulation for assuring integrity and trust in Asian capital markets.

The issues shared among the participants included:

(1) Have solid criteria for the regulations of capital markets in the world.

(2) Have a comparative legal perspective on the U.S. approach and the EU approach.

(3) Share the significance described in the purpose provision in the Financial Instruments and Exchange Act (the law aims at fair price formation of Financial Instruments, etc. through full utilization of functions of the capital market, thereby contributing to sound development of the national economy and protection of investors).

(4) With such an intention, clarify the original perspective by reviewing the purposes of related systems in each country.

(5) Based on such a perspective, foster the awareness of Asian common capital markets gradually and steadily in each country.

The forum became a big step for developing a collaborative relationship in this field among these three countries and had a significant meaning.

Participants:

Korea

Dr. Lee, JongGu, standing commissioner of FSC

Min, ByungHyun, Deputy Director, Prudential Supervision Team, Financial Investment Dept, FSS

Dr. Lee,Hangu, of Korea Financial Investment Association (KOFIA)

Dr. Kim, TaeJoon, President of KIF

Dr. Park, Jaeha of KIF

Dr. Hyun, Suk, of Institute for Monetary & Economic Research, the Bank of Korea / Visiting Fellow, Waseda University GCOE/ ADB Consultant / CMAA

Professor Park, Taekyu (Dean) of Yonsei University

Professor Kim, JungSik of Yonsei University

Professor Hahm, JoonHo of GSIS, Yonsei University

China

Sun, Shuwei, Deputy Director-General of Department of Legal Affairs, CSRC

Wu, Guofang, Division Director of Department of Legal Affairs, CSRC

Professor Xu,Linyan, of Fudan University

Japan

Mr. Mitsui,Hidenori, Director for Corporate Accounting and Disclosure Planning and Coordination Bureau, FSA

Mr. Shizuka, Masaki, Executive Officer, TSE

Mr. Iwase, Hiroshi, TSE

Prof. Uemura, Tatsuo, Waseda Univ. / Director of GCOE

Prof. Inukai, Shigehito, Waseda Univ. / CMAA

Supranational

Mr.Yamadera, Satoru, Economist, OREI, ADB

Announcing the Development of the Research at the INFO 2009 in Dublin on June 26, 2009

We participated in the Annual Conference of Financial Services Ombudsman, “Financial Services Ombudsmen – Never More Needed”, held in Dublin from June 24 to 26. At the Conference, we (1) circulated the English version of the proposal by “Japan Financial ADR/Ombudsman Research Group”, which was the achievement of the Waseda GCOE, and (2) presented the remarkable development of related law reforms in Japan for the last year, which was led by the Waseda GCOE, and introduced the overview of the newly-enacted Financial ADR Law. The presentation was made jointly by the Waseda GCOE/Financial ADR/Ombudsman Research Group (Attorney Syuji Yanase, Visiting Senior Fellow and Professor of Waseda University

since April 2009, and Professor Shigehito Inukai of Waseda University) and Mr. Norio Nakazawa, Planning Officer, Planning and Coordination Bureau, Financial Services Agency.

The proposal and the report as well as the video of the presentation at the Conference can be viewed at our website.

http://www.globalcoe-waseda-law-commerce.org/activity/090608_Proposal.pdf (proposal)

http://www.globalcoe-waseda-law-commerce.org/activity/report33.html (report and video of the presentation)

Research Exchange for the Establishment of the Act concerning State Liability for Compensation in China

Based on the agreement between the Legislative Affairs Commission of the Standing Committee of the National People's Congress of China and the GCOE, Waseda Institute for Corporation Law and Society, we had a research exchange at Hilton Wangfujing on July 27 and 28 of 2009, regarding the establishment of the Act concerning State Liability for Compensation in China, which was already at the final stage of legislation. The Legislative Affairs Commission is the highest legislative organ in China and this was the fourth exchange which Japan visited China for the final stage of the law establishment following Corporation Law, Securities Law, and Anti-monopoly law. So far, China visited Japan four times for researching on water pollution related laws, earthquake countermeasure law, insurance law, and intellectual property law. Although we agreed to have the exchange centering on financial and capital market laws at the beginning, the scope of the exchange expanded to other fields, receiving a high evaluation from China. We believe it should be considered as one of the most successful cultural exchanges between Japan and China.

Symposium & Seminar

■International Symposium, "Roles of Law and Judicial Assistance for Creating Mature Civil Society" (2009/3/12-13)

The symposium was held at Japanisch-Deutsches Zentrum Berlin for two days in March, hosted by the Waseda Global COE and co-hosted by GTZ (Deutsche Gesellshaft für Technische Zusammenarbeit).

Many scholars specialized in law gathered from Japan and Germany, two countries providing judicial assistance as well as the countries that receive judicial assistance to discuss with the theme of "the possibility of legal transition and creation of civil society".

March 12, Thursday
Opening Remarks:
Dr. Friederike BOSSE, Japanisch-Deutsches Zentrum
Dr. Brigitte ZYPRIES, Minister of Justice, Germany
Mr. Takahiro SHINYO, the Japanese Ambassador to Germany
Session 1: Why Do We Need the Legal Transition?
Prof. Tatsuo UEMURA, Waseda University
Prof. Dr. Dres. h.c. Rolf KNIEPER, University of Bremen
Dr. Hans Joachim SCHRAMM, University of Bremen
Professor Seigo HIROWATARI, University of Tokyo
Dr. Henrik SCHMIEGELOW (Schmiegelow und Partner, former German Ambassador to Japan)
Session 2 How Is the Legal Transition Conducted?
Prof. Dr. Lado CHANTURIA, University of Bremen
Prof. Dr. Gerd WINTER, University of Bremen
Dr. Martin HERBERG, University of Bremen
Dr. Jens DEPPE (gtz, Toshkent)

March 13, Friday
Session 3 What Should We Transfer? – the Case of Administrative Law
Professor Katsuya ICHIHASHI, Nagoya University
Prof. Dr. iur. Jurij N. STARILOW, Voronezh University
Professor Shigeru KODAMA, Mie University
Mr. Pham Hong Quang, Doctoral Student, Nagoya Univ.
Session 4 What Should We Transfer- the Case of Land Law
Prof. Dr. Shairai BATSUKH,
Professor Yoshiki KURUMISAWA, Waseda University

Closing Remarks:
Prof. Dr. Dres. h.c. Rolf KNIEPER, University of Bremen

■Legal Issues on Human Materials: Workshop

（2009/4/24-25）

The workshops were held for two days each, inviting Prof. Henning Rosenau from University of Augsburg as a lecturer. At the first workshop, Professor Rosenau gave a lecture about “The Status of Embryo and the Stem-cell Research (Der Status des Embryos und die Stammzellforschung)” and then, a QA session and a general discussion took place. Among the topics of the stem-cell research that is considered as the future of modern medicine, the lecture focused on so-called therapeutic cloning which uses stem cells for therapeutic purposes. While there are great expectations in the therapeutic cloning which has rapidly developed, the legal admissibility of the cloning has become controversial. Professor Rosenau who has a permissive opinion different from the majority in Germany explained about the status of discussions and legislations in Germany. Associate Professor Koichi Jimba of Shizuoka University and Associate Professor Tomoko Utsumi of Asia University led fruitful discussions.

Next day, a lecture was delivered on “The Research on Legally Incompetent Persons (Die Forschung an Nicht-Einwilligungsfähigen)”. The experiment on a human body, which plays the most important role in medical research, raises various legal questions. There might be a conflict between the public interest concerning sufficient protection to life or health and patients’ various rights. In addition, the inviolability of patients’ lives and bodies is exposed to the danger by research. Furthermore, the issue might link to subject’s human dignity and right of self-determination. The conflict between the public interest in medical research and the individual interest of a patient is triggered by two basic principles: “risk benefit balance” principle and “informed consent” principle. In particular, the case that the patient is legally incompetent becomes a problem because it is the field where the patient’s right of self-determination is respected. Professor Rosenau distinguished between therapeutic experiment and non-therapeutic experiment. He said, whether the non-therapeutic experiment was permissible to a legally incompetent patient or not became a problem in such a case. Many professors from other universities who study various fields such as civil law, medical law, or criminal law participated in the workshop and had useful discussions. (Interpretation at the QA session: Professor Masaaki Muto, Toyo University).

(Report made with the support of Satoshi Ohsaka)

■International IP Seminar

“Japanese Corporations and Patent Litigations: Offensive Patent Strategies by Forum Shopping”

（2009/5/9）

The risk of being involved in patent disputes in international markets has been increasing for Japanese corporations. One of the strategies to solve such disputes in an advantageous position is so-called forum shopping: bring a case in the most favorable court. This seminar positioned the forum shopping as one of the corporate strategies, and held discussions by the leading lawyers in different countries.

In the Part I, Mr. John Livingstone, Finnegan Henderson talked about forum shopping strategies in the U.S. district courts based on the statistical data such as the patentee win rate, the amount of compensation, and attorney’s fee. In the Part II, as lawyers from Finnegan network in Japan, China, and England, Mr. Shinichi Murata, Mr. Xiaoguang Cui, and Mr. Richard Price respectively delivered a lecture on forum shopping strategies based on the data of major courts of each country. Then, Mr. Livingstone joined to have a panel discussion about practical strategies towards dispute resolution such as coordination of litigation and settlement talks.

The discussion covered various topics including win rate in different countries, timing of settlement, the size of compensation, and diversion of evidence which was obtained in trials in other countries.

■"The Theory of Civil Society - Corporations and Judicial Persons" Workshop No.1

"The Legal Scope of the Theory of Civil Society"

(2009/5/30)

This study group aims to reposition the theory of civil society, which has been a consistent theme in Japan's postwar jurisprudence, through legal sociological review on modern society with the keywords of "corporations" or "citizens". As the first workshop, we invited Professor Seigo Hirowatari of Senshu University, an authority of the theory of civil society to talk about "the legal scope of the theory of civil society". Also, we reexamined the significance of the theory of civil society in terms of the study of law by following the development of the theory of civil society in Japan's postwar jurisprudence. As a commentator, Professor Katsumi Yoshida of Hokkaido University joined and added beneficial comments.

Concerning the issue of "why we think the concept of "civil society" is important in the analysis of law and society as well as in the context of the study of law (jurisprudence)", Professor Hirowatari followed the history of academic theories of civil society to trace the transition of his interests. Concerning the issue of "whether it is right to think that the concept of "civil society" plays an important role in the analysis of law and society as well as in the context of the study of law (jurisprudence) in modern society today", he explained the significance of the concept of civil society from the three perspectives: "the concept of civil society as a means of seeing structural changes of the modern society", "the civil society as a concrete proof of the energy of citizens in the modern society", and "the civil society = theory of fiction". Especially, as to the topic of "the civil society = theory of fiction", he explained about the theory to envisage an ideal society based on aspects of the existing society, using the legal theory of fiction by Professor Saburo Kurusu. In addition, he pointed out the proximity to "hope" in the study of hope.

(Report made with the support of Kouhei Kameoka)

■Workshop:

"Poverty / Discrimination and the Constitution (the Study of Constitutional Law) - Autonomy, Social Inclusion, and Capability" (2009/6/22)

In this time when the gap-widening society draws attention, what problem do the Constitution of Japan and the study of constitutional law see and solve? The theory of the right to life in the 21th century centering on "the living standards" seems to be stalled and especially after the 1990's, Europe has pursued the fight against "social exclusion". However, it is not so simple to judge what will contribute to "social inclusion". Based on the awareness as such, the study group invited Professor Hiroshi Nishihara, Waseda University, as a lecturer to talk under the theme of "Poverty/Discrimination and the Constitution (the Study of Constitutional Law) – Autonomy, Social Inclusion, and Capability" in order to seek the possibility of the right theory which the independence and individuality of recipients of services, referring to A. Sen's capability approach. The lecture presented the new poverty issue and the issues in the existing theory of the right to life. Also, an effort was made to connect the right to life with the recent social theories, ethics, and the theory of social inclusion.

Commenter: Professor Yoshimi Kikuchi, Waseda University

Moderator: Professor Hideo Sasakura, Waseda University

(Report made with the support of Yuya Okubo)

■ Special Seminar: Changes in Stances of the British Government and Courts on Exterritorial Application of Foreign Competitive Law (2009/6/26)

We invited Professor Emeritus Yoshio Ohara of Kobe University who has studied international economic law, in particular, exterritorial application for years to talk about the issue of exterritorial application of competitive law by presenting changes in theories and practices in Britain.

■"Civil and Public Responsibilities of Corporations Concerning Environment" Workshop No.1

(2009/7/27)

This project held the Workshop No.1 under the theme of "functions and roles of tort law as legal order – from the perspective of protecting the newly-generated rights". As a lecturer, Professor Atsumi Kubota of Kobe University talked on "Functions and Roles of Tort Law – Considering the Future as a Part of Legal Order".

He introduced a wide range of viewpoints including comparative legal analysis as well as comparison between civil law and criminal law, considering the issue of how we should understand the fundamental nature of tort law.

■Waseda University Global COE Urgent Symposium
"Examining President Obama's Financial Regulatory Reform – What Message Should Japan Send to the World? –" **（2009/8/8）**

We aim to present the most advanced theories on urgent matters as an independent opinion leader. Along with such an objective, we held the symposium: "Examining President Obama's Financial Regulatory Reform – What Message Should Japan Send to the World? –" in order to examine the Obama administration's financial reform plan announced in June 2009 and to discuss what message Japan should send to the world. Various opinions were reported on the reform plan and the message from Japan was announced to the world.

First, Associate Professor Kenji Kawamura of Kanto Gakuin University outlined the Obama reform with the theme of "the direction of financial regulatory reform" and made a report including comparison with financial regulations of other countries. Then, Associate Professor Yasunobu Wakabayashi of Kokugakuin University presented a report considering "the traditional securities regulatory reforms" to examine the position of the Obama reform in terms of the development of the US securities regulatory reform.

Next, several reports were made on the detailed issues. Mr. Hiroyuki Bando, portfolio manager in a financial Institution and doctoral student of Waseda University, reported on "mortgage market regulations and consumer protection – the concept of consumer finance protection agency". Then, Associate Professor Yasuhiko Kubota of Osaka University made a report to point out and organize numerous issues especially in securities rating agencies in the financial crisis, with the theme of "securities market regulations and credit-rating agency regulations". Last, based on these discussions, Professor Hiroyuki Watanabe of Waseda University made a presentation on "hedge funds regulations and derivatives regulations – development of financial innovation and challenges towards the legislation of publicly-held (listed) company". His report presented important perspectives considering financial regulations based on the theory of publicly-held corporation law which Professor Uemura has advocated. Next, Professor Etsuro Kuronuma of Waseda University and Visiting Professor Naohiko Matsuo of University of Tokyo made comments respectively on the whole program.

The article in Nikkei on August 24 which Professor Uemura contributed summarizes the significance and content of the message. It can be viewed at our website (in Japanese only).
http://www.globalcoe-waseda-law-commerce.org/activity/0824keizai.pdf

---

The Financial Crisis – A Message from Japan (Waseda University GCOE Declaration)

《 The Financial Crisis - Proposing a Japanese Perspective to the West》

Professor Tatsuo Uemura, Dean, School of Law, Waseda University
Director, Waseda University Global COE, Waseda Institute for Corporation Law and Society

---

The present declaration is the slightly revised text of a declaration prepared on the responsibility of Professor Tatsuo Uemura, Director of the Waseda University Global COE, Waseda Institute for Corporation Law and Societyi, and circulated at the urgent symposium: "Examining President Obama's Financial Regulatory Reform – What Message Should Japan Send to the World? –." The symposium, organized by the Waseda University Global COE, was held at Waseda University on August 8, 2009. The declaration has been translated into English and several other languages in order to enable its message to be presented outside Japan.

The Financial Crisis – A Message from Japan (Waseda University GCOE Declaration)

《 The Financial Crisis - Proposing a Japanese Perspective to the West》

Professor Tatsuo Uemura, Dean, School of Law, Waseda University
Director, Waseda University Global COE, Waseda Institute for Corporation Law and Society

1 Financial and capital markets conducive to the formation of economic bubbles, in addition to widespread trading in inappropriate financial products, improper trading and unfair trading in a global economy, have an enormous negative impact throughout the world. This negative impact causes serious damage to economies and to the lives of citizens, in particular in developing countries, which are in the majority of cases passive victims of this financial mismanagement.
In view of the scale of the impact of financial and capital markets on the world, the Western nations which have traditionally exercised leadership in this area must recognize the profound responsibility that they bear for the establishment of systems to maintain financial and capital market discipline. The United States, which is an enthusiastic proponent of the extraterritorial application of its domestic laws, should in particular give rigorous attention to the negative impacts on other countries of economic activities based on the U.S. system (negative extraterritorial impacts caused by application of U.S. rules). Japan has consistently studied the systems of financial and capital market law in effect in the United States and Europe, and the Japanese also have a strong focus on the study of comparative law and foreign law, which is a rare attribute. I believe that Japan has a responsibility to bring attention to problematic areas in Western systems, being an impartial third party able to analyze and evaluate those systems as a representative of the perspectives of non-Western nations.

2 When we review discussion in the U.S. and Europe regarding the financial crisis, we find that the strengthening of supervisory and regulatory systems has been discussed in a variety of forms. Discussion should be further extended in this direction. However, there seems to be a paucity of voices discussing, in a self-reflective and critical manner, the necessary future direction for systems of corporate and capital/financial market law which have to date provided the conditions for constant excesses. Fundamental laws have tended to promote loose transactions. If this is treated as simply a domestic issue and the situation remains unchanged, merely enhancing supervisory systems will undoubtedly be of limited effectiveness. If the reformed supervisory systems do not function effectively, harmful effects will be diffused and once again cause damage on a global scale.

3 The capacity for considering the systems of corporation and financial/capital market law from a normative, purpose-oriented, historical or ideological perspective seems poorly developed in the U.S. Might it not be the case that the world of economic thinking predicated on the concept of an efficient market has also affected the judicial world, and that systems predicated on an excessive belief in the market have encouraged the intemperance in the financial world which is directly related to today's financial crisis? The diverse and rigorous systems for seeking out and prosecuting fraud that are unique to the U.S.ii appear to have functioned as the basis for a degree of faith in freedom and market mechanisms which could not have been achieved in the absence of those systems. However, we may also say from another perspective that the system thus engendered was such a risky one that it would also tend to encompass financial collapses triggered by an excessive freedom which could not be controlled even by those unique systems for the prosecution of fraud. (A system, we may in fact say, that other countries cannot and must not seek to copy). The fact that the present financial crisis originated in the United States indicates that the U.S. system could not control the U.S. mode of procedure, which combines the maximum attractions with the maximum risks. The U.S. must become more keenly aware of this issue and give it extensive consideration.

4 As a nation, the U.S. has emphasized the transparency of rules, with a particular focus on the disclosure of information. However, the nation's systems of corporate and financial/capital market law are as complex as a mosaic, making it difficult to grasp them as a whole. With a touch of self-derision, U.S. citizens themselves recognize that U.S. systems are byzantine. The U.S. is a rare case even on a global scale, advocating the convergence of accounting rules, while being unable to achieve the convergence of domestic company laws. Systematic thinking has clearly not been applied in this field. For

example, the Federal Securities Regulations and the Securities Exchange Act include provisions which function as federal company law. In the case of the present financial crisis, it is highly possible that the domestic situation in the U.S. - a lack of continuity between state regulations and federal regulations - was a factor in the subsequent disasters overseas. The U.S. seems to have little interest in adopting a humble attitude and studying the legal systems of other countries from a comparative perspective. In addition, the U.S. system is very difficult for other countries to understand as a whole. There are probably few U.S. citizens who would be able to provide an answer when asked to describe U.S. company law. Professor Melvin Eisenberg, one of America's leading scholars, has indicated that state case laws, state corporate laws, the Federal Securities Regulations, the Securities Exchange Act, and other soft laws are all U.S. corporate law. However, very many Japanese, including specialists in the field, believe that only Delaware corporate law is U.S. corporate law. If the impact of the complexity of these systems of law were limited to the U.S., we could see it simply as a result of the nation's culture; however, to the extent that events in the nation have a global impact, the rest of the world must maintain a deep interest in the nature of U.S. systems.

5 In section 2 of the U.S. Securities Exchange Act of 1934, enacted following the experience of securities panics, there is a detailed provision concerning the necessity for the regulations. Recognizing the fact that the system could not deal with interstate commerce or the real status of the securities markets spanning the entire country, the provision emphasized the possibility that the problems in this area might generate panic not only in the United States but also elsewhere in the world, and established a new framework for federal securities regulations. The final paragraph of the provision states "National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets, and to meet such emergencies the Federal Government is put to such great expense as to burden the national credit" iii.

Today, in response to a financial crisis originating in the U.S., the nation should not merely focus on the supervisory system, but should be prepared to engage in an extensive reexamination of the concepts on which it has depended in order to create a framework for a new system able to be shared globally. At the same time, the U.S. should make efforts to ensure that its systems are logically consistent and able to be understood by other countries. To do so, it will be necessary for the U.S. to adopt an attitude of humility in listening to the opinions of other nations. There should, in addition, be no taboo against putting a European-style system of inhibitory corporate law into effect at the federal level.

6 There is much that we can learn from Europe. For example, Europe has relatively restrained systems of corporate law, in addition to prudent systems of law relating to capital markets. In particular, we should be aware of the significance of the self-regulation which developed in Britain. However, despite the fact that it is essential within Europe, outside Europe there is little inclination for European market actors to base their actions on principles, gentlemen's rules, or best practice. In Asian nations, which are inexperienced in these areas, there is a tendency to simply ignore the situation when these market actors violate principles and other rules. But in Asia also, the feeling still exists that engaging without qualms and without shame in disgraceful actions overseas, actions that one would not consider in one's home country, is a legacy of the colonial era. (For example, the prohibition on smoking opium for British citizens, but the positive encouragement of the activity for the Chinese. Britain must make it plain to the financial world that this type of attitude has been completely abandoned). Europe must clearly specify a code of conduct enabling countries outside Europe to hold to European discipline. If Europe fails to do so, there will be no grounds for complaint if nations which do not share the awareness of norms developed historically in Europe, for example Asian nations, put into place systems which institutionalize a cautious stance in relation to Europe (for example, separation of banks and securities institutions).

7 From the Western nations, Japan has learned democracy and the form of a society which values humanity and the individual. However, is it not the case that allowing anonymous privately-placed funds formed by small groups of individuals to become major shareholders or controlling shareholders in publicly traded companies is equivalent to abandoning the philosophy of the individual-oriented stock

market, stock corporation, and corporate society of which Europe and especially the U.S. is so proud? Becoming enchanted by the allure of financial techniques to the extent that we disdain the spirit of democracy and respect for humanity, which was nurtured historically in Europe and the United States and of which they are justly proud – this is not a model upon which we should base our actions. I believe that Japan also has the responsibility to make this position clear.

Systems of corporate and financial/capital market law have largely been developed by the Western nations. As indicated above, however, in today's global era trends in these laws affect the lives of people throughout the world. From this perspective, countries other than the Western nations are fully qualified to participate in discussion concerning the rules in these areas. The Japanese government has a responsibility to emphasize this fact to the international community, given Japan's unique position as a non-Western nation which has achieved a high level of advancement in these areas.

Corporations and financial/capital markets in themselves represent the globalized world, but the rules in effect in these areas have basically been domestic rules – U.S. rules. And despite this, we do not question the fact that the U.S. nakedly prioritizes national interests in the event of a financial crisis. We must become aware as quickly as possible of the contradiction implicit in the fact that a nation which ultimately prioritizes its own interests provides the foundation for the global system, and actively enter into discussions concerning a shared world-level system.

---

i Global COE (or GCOE) is an acronym for Global Center of Excellence. The Global Center of Excellence Project is a project in which universities compete for extensive funding offered by the Japanese government for the establishment of research centers. Very few of the universities selected thus far have proposed research in the field of law. Waseda University was selected in 2008 following the completion of the previous program, the 21st Century COE Program (for which Waseda was selected in 2003). The research accomplishments of the GCOE to the present have been extremely highly evaluated. Our purpose in establishing the GCOE was to study fundamental aspects of Western societies, and to attain a logical and scholarly understanding of factors stemming from the specific experiences of Western nations. By this means we seek to overcome a lack of experience through the application of logical methodologies, enabling us to create ideal systems of corporate and financial/capital market law suitable to and able to support a civil society which is mature in every respect. Our goal is to establish theoretical models that can serve as signposts to Japan and other Asian nations and, further, to engage in academic dialogue with the Western nations by bringing attention to problems which those nations may have overlooked.
http://www.globalcoe-waseda-law-commerce.org/

ii The SEC acting as a sheriff; bounties placed on the heads of wanted individuals; entrapment, wire tapping, and undercover as used frequently by the FBI; plea bargaining; discretionary civil sanctions; discovery; class actions which claim all profits obtained by a company caught in dishonest practices; the comprehensive SEC Rule 10b-5 prohibiting any person from any act resulting in fraud (with heavy penalties); mail and wire fraud statutes under US federal law; conspiracy charges, which are frequently applied in a wide range of fields; the application of RICO, which is used to arrest low-level members in order to prosecute the Mafia as a whole, to financial institutions (viewing securities companies as racketeering organizations),etc.

iii New Foreign Securities Laws: America(Ⅲ), p.76 (2008, Japan Securities Research Institute)

Waseda Global COE Program
Waseda Institute for Corporation Law and Society
Director: Tatsuo Uemura
1-6-1 Nishi-waseda Shinjyuku-ku, Tokyo, 169-8050
TEL: 03-3208-8408 Fax:03-5286-8222
E-mail: webmaster@21coe-win-cls.org
http://www.globalcoe-waseda-law-commerce.org