Newsletter

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Global Centers of Excellence Program *Soft Law and the State-Market Relationship*

Introduction

Project Leader Masahiko IWAMURA
Professor, Graduate Schools for Law and Politics
Social Security Law

The "Soft Law and the State-Market Relationship: Forming a Base for Education and Research of Private Ordering," which we have been proposing, has been adopted as a subject of the Global Centers of Excellence (COE) Program for fiscal year 2008. We implemented the "Soft Law in the State-Market Relationship: Strategic Formation of a Base for Education and Research of Business Law" as part of the Twenty-First Century COE Program from fiscal year 2003 to fiscal year 2007. The project we have succeeded in getting adopted is an extension of the last program and is also intended for further development.

The keyword of this project is "soft law." We often define this word as a "set of rules that countries and companies find binding in the real economy and society in spite of the fact that it is neither the rule formulated by the government nor is its enforcement guaranteed by the government." Soft law can be widely seen in every area, and it plays an important role in the modern economy and society. It is also significant as a global legal form well beyond the scope of the positive law in each country. In modern society, where soft law is becoming increasingly important, it is impossible to fully understand the legal world only by traditional legal education and studies based on positive law. In response to this new situation, we have launched the "soft law project" to develop the positive law studies in our country into an interdisciplinary form of social science based on demonstrative analysis through special education and research of soft law as part of the Twenty-First Century COE Program.

This project seeks to establish an interdisciplinary methodology for soft law studies and in this process; we have constructed and published our general-purpose, comprehensive database that is essential to basic soft law research. We also utilized the research base assistant system and the project researcher system in an effort to nurture young researchers, as well as coordinating project scholastic members' lectures on soft law-related subjects. This project has won great acclaim, and we are proud that it is producing international cutting-edge results. As a matter of fact, other overseas universities have launched similar projects based on our example.

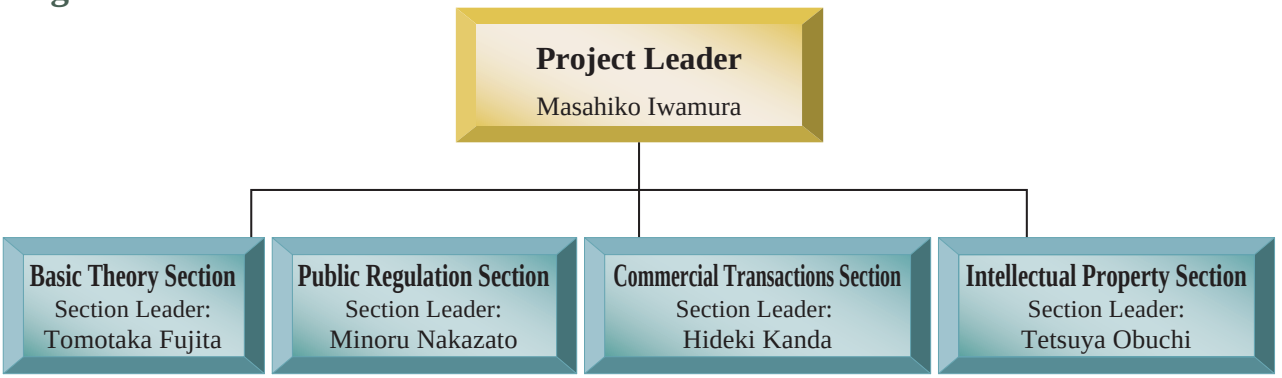
The Global COE Program is intended to boost both human resource development and academic research on the basis of the Twenty-First Century COE Program results. These education and human resource development programs focus on incorporating soft law education in the curriculum of the legal and political course and facilitating lectures and disciplines by researchers in other related fields, as well as implementing the above-mentioned research base assistant system and the project researcher system. The project also involves the participation of graduate school students and research associates in summer programs in the legal and political course and dispatching them to seminars held in overseas universities. In addition, graduate school students and other researchers will be dispatched to overseas law firms and international institutes as interns and trainees so that they can have on-site experience with soft law formation. These extensive programs seek to train young researchers in developing Japan's positive law studies into an interdisciplinary form of social science based on demonstrative analysis, as well as nurturing legal professionals who have a high level of legal knowledge based on theoretical studies on soft law and are also internationally competitive enough to contribute to formulating rules both domestically and abroad. With respect to studies, we have the basic theory section, the public regulation section, the commercial transactions section, and the intellectual property section. We will continue with the construction and publication of a comprehensive database on soft law, following the Twenty-First Century COE Program. We will also conduct a demonstrative analysis of individual soft law cases that emerged from the previous project and enhance our collaboration with overseas research organizations and bases.

It is important for us to widely disseminate our study results. In the Twenty-First Century COE Program, we published our research results in the form of *Soft Law Journal* and discussion papers. We will go on with this style in the Global COE Program as well. We will also put more energy into internationally publicizing our study results by bringing out English publications.

We need support from many concerned individuals to achieve the necessary development of international education and research bases for soft law studies, a goal which the Global COE Program aims for on the basis of the Twenty-First Century COE Program.

1 Organization of Research and Education

Organization Chart



(Dated as of March 31, 2009)

Project Scholastic Member

Tomotaka Fujita (Section Leader): Graduate Schools for Law and Politics ("GSLP")/Commercial Law
Mizuho Hata: GSLP/Civil Procedure
Ryuji Yamamoto: GSLP/Administrative Law
Noriyuki Yanagawa: Graduate School of Economics/Contract Theory
Toshihiro Matsumura: Institute of Social Science/Industrial Organization
Wataru Tanaka: Institute of Social Science/Commercial Law, Law and Economics

Minoru Nakazato (Section Leader): GSLP/Tax Law
Shinsaku Iwahara: GSLP/Commercial Law
Yoshihiro Masui: GSLP/Tax Law
Tadashi Shiraishi: GSLP/Economic Law
Keisuke Iida: GSLP/International Political Economy

Hideki Kanda (Section Leader): GSLP/Commercial Law
Yoshiaki Miyasako:GSLP/International Business Law
Tomonobu Yamashita: GSLP/Commercial Law
Hiroyasu Nakata: GSLP/Civil Law
Shoji Kawakami: GSLP/Civil Law, Consumer Law
Hiroyuki Kansaku: GSLP/Commercial Law

Tetsuya Obuchi (Section Leader): GSLP/Intellectual Property Law
Daniel H. Foote: GSLP/Sociology of Law
Takashi Araki: GSLP/Labor Law
Hiroki Morita: GSLP/Civil Law
Kichimoto Asaka: GSLP/Anglo-American Law
Hiroyasu Ishikawa: Institute of Social Science/Civil Law

Project Professor

Makoto Orihara: Trust Companies Association of Japan
Kenji Shimazaki: National Graduate Institute for Policy Studies
Hiroya Nakakubo: Graduate School of International Corporate Strategy, Hitotsubashi University

Project Researcher

Masao Ookawa: Bank of Japan
Takuzo Kinoshita: Tokyo Stock Exchange
Ashiya Kuroda: Graduate Schools for Law and Politics, The University of Tokyo
Masashi Takeo: Graduate Schools for Law and Politics, The University of Tokyo
Yuko Tsuchiya: Graduate Schools for Law and Politics, The University of Tokyo
Yoko Manzawa: Japan Securities Research Institute
Keiko Yamamoto: Institute for Monetary and Economic Studies, Bank of Japan

Research Assistant

Xiao Tong, Wen: Doctorate Program, School of Legal and Political Studies, Graduate Schools for Law and Politics, The University of Tokyo
Shizuka Sakamaki: Doctorate Program, School of Legal and Political Studies, Graduate Schools for Law andPolitics, The University of Tokyo
Hitomi Nagano: Doctorate Program, School of Legal and Political Studies, Graduate Schools for Law and Politics, The University of Tokyo
Kentaro Nishimoto: Doctorate Program, School of Legal and Political Studies, Graduate Schools for Law and Politics, The University of Tokyo
Hyo Sook, Park: Doctorate Program, School of Legal and Political Studies, Graduate Schools for Law andPolitics, The University of Tokyo

Basic Theory Section

In this section, we will organize study groups encompassing researchers in fields other than law (for example, economics, business administration, sociology, psychology, and so forth) to establish a comprehensive methodology for soft law studies in addition to the research and educational activities in the public regulation section, the commercial transactions section, and the intellectual property section. Based on this approach, we will incorporate insights in interdisciplinary fields of study in our demonstrative analyses of models and comparative sociological studies of cases in other countries from a broader perspective.

<The Study Group on Theories of Soft Law >

"The Study Group on Theories of Soft Law" is a joint study group of jurists, economists and practitioners focusing on methodologies for analyzing soft law and empirical studies on norms.

Public Regulation Section

Many regulations using soft law methods are managed in the public regulation section. More specifically, we will conduct a comprehensive examination of regulations using soft law methods employed domestically by government organizations (for example, designation criteria, guidelines, and no-action letters). In addition, there are many cases in which agreements reached among regulatory authorities in a wide range of countries (which should be essentially unbinding) have an enormous impact on corporate activities as an international problem. For example, the compilation of the OECD commentaries in the interpretation of tax treaties and coordinated efforts and information exchanges among antimonopoly authorities in many countries, primarily through the WTO and the International Competition Network (ICN) in the field of competition law. With regard to the public regulation section, we will examine various formations of soft law and analyze their individual forms and the levels of their binding power.

<The Study Group on Competition Law>

"The Study Group on Competition Law" conducts multifaceted debates on the relationship between soft law and hard law in the area of economic law, with a special focus on competition law of Japan, US and EU. Coordinated by Professor Tadashi Shiraishi, this Study Group is conducted with the participation of students of the Graduate School and external practitioners.

<Tax law workshop >

Norms in taxation have a surprisingly complex structure although rule of law dictates statutory-based taxation (Japanese Constitution Article 84). Given the significance of empirical study in this field, Professor Yoshihiro Masui coordinates graduate students to study the dynamics of norm creation in taxation.

<The Study Group on Social Law and Soft Law>

"The Study Group on Social Law and Soft Law" examines the role of hard law and soft law in labor law and social security law. This study group's co-leaders, Profs. Masahiko Iwamura (Social Security Law) and Takashi Araki (Labor Law), will coordinate study meetings on social law and soft law with scholars, practitioners and graduate students both at home and abroad. By analyzing hard and soft law's effects on social law, where various participants establish various norms, the group studies social law policy's future direction and implementation measures.

Commercial Transactions Section

It is becoming increasingly difficult to manage commercial and consumer transactions by hard law amid the increasingly complex financial and capital market structure and the trend of more high-level web-based corporate deals. In response to this situation and in addition to soft law-oriented approaches to these deals for government control, many regulatory models are established by financial and capital markets and business groups so that individual companies can follow the rules, and government organizations find the process hopeful. Additionally, with respect to international rule formations as well, more and more emphasis is placed on the soft law-oriented approach of facilitating international conformity through the voluntary implementation of rules by individual contractors, instead of forming and ratifying treaties that bind countries by the hard law-oriented method. Various models of the United Nations Commission on International Trade Law (UNCITRAL) are its typical examples. In this section, we will construct a database by collecting and organizing materials to clarify the real conditions of soft law formed and provided by companies and markets. Based on the database, we will focus on why soft law is becoming more common in a wide variety of areas, whether this phenomenon is socially rational or not, and how the phenomenon is related to structures constituted of hard law. We will also conduct an interdisciplinary analysis involving economics and sociology to construct basic theories.

<The Study Group on Market Transactions and Soft Law >

"The Study Group on Market Transactions and Soft Law" researches soft law across a range of market transactions, including capital markets, commodities and international transactions, as well as new forms of commercial transactions such as electronic commerce. Further, when considering commercial transactions in regulated industries, it also becomes necessary to closely analyze the links with the field of public regulation. Centered around Professor Hideki Kanda, the Study Group consists of researchers and practitioners. The Study Group will report periodically on its activities in collecting material for the database on soft law in the area of commercial transactions, and then debate and analyze that material. Coordinated by Professors Hideki Kanda and Tomotaka Fujita this Study Group is conducted with the participation of faculty members and researchers for Global COE program.

Intellectual Property Section

Soft law plays an important role in intellectual property laws regarding intangible information assets (intellectual properties) as a form of hard law. However, despite its significance, there have been few theoretical examinations of soft law probably because its relationship with the high-level field of hard law is extremely complicated. This section thoroughly examines soft law issues concerning important information assets (intellectual properties) by organizing the Study Group on Intellectual Property Law.

<The Study Group on Intellectual Property Law >

From the broader perspective of the intellectual property laws and other related laws, this study group will extensively explore the subject of intangible information assets (intellectual properties) in terms of both soft and hard law. The project, headed by Professor Tetsuya Obuchi, will tackle a wide variety of current theoretical and practical challenges through collaboration between researchers specializing in intellectual property law and experts with rich experience in the field (lawyers, judges and administrators). The project also takes a global perspective with a special emphasis on comparative approaches. In addition, the group will actively publicize its study results in *The Jurist*. Many graduate students in the legal and political fields will join the group, and law students will also serve as observers, in order to nurture promising young researchers and experts.

2 Activities

GCOE Soft Law Seminars

No	Date	Topic	Speaker
1	November 5, 2008	EU Legislation in the Field of Securities Clearing and Settlement	Dr. Philipp Paech, The European Commission
2	November 26, 2008 This seminar has been canceled.	Justice, Negotiation, and Durable Peace	Cecilia Albin, Professor, Uppsala University
3	December 4, 2008	Insights from Product Safety Regulation for Consumer Credit Regulation: Economics, Psychology and Politics	Luke Nottage, Associate Professor, Sydney Law School

GCOE symposia

No	Date	Topic	Speaker
1	September 19, 2008	Changing Society and the Role of Law	See, page 8 for detail
2	December 12, 2008	Hostile Takeovers and Defenses--- Implications from Delaware Law	See, page 9 for detail
3	February 6, 2009	Future of the Legal Framework on Listed Companies	See, page 10 for detail
4	March 3, 2009	Interaction between "Hard" and "Soft" in Depute Resolution	See, page 11 for detail

The First Symposium
“Changing Society and the Role of Law”
-2nd Annual BESETO Conference-

Date: September 19, 2008 10:00-17:30
Place: Hall D5, Tokyo International Forum

Welcome Speech
Professor Hiroshi Takahashi, Managing Director, Executive Vice President of the University of Tokyo

Keynote Speech
Professor Emeritus Koya Matsuo, the University of Tokyo

Session 1“Business Crime”(development of economy and crime)
“The crime of taking bribes in Chinese criminal law: interpretation, loophole and its filling”
Professor Genlin Liang, Peking University Law School

“The Role and Limit of Criminal Law in Controlling Corporate Misconducts: The Application of the“Crime of Trust Breach”in the Korean Penal Code”
Professor Kuk Cho, Seoul National University College of Law

“Developments in the Penal Protection of Trade Secrets in Japan”
Professor Atsushi Yamaguchi, Graduate Schools for Law and Politics, the University of Tokyo

Session 2“Autonomy of Family and the Role of State--Protection of women and children”(Domestic violence, alimony, and maintenance for children)
“CEDAW (Convention on Elimination of All Forms of Discrimination against Women) and China: From an International Law Perspective”
Professor Guimei Bai, Peking University Law School

“CEDAW, CRC and the Korean Family Law”
Professor Jinsu Yune, Seoul National University College of Law

“Status of women in family--the balance between autonomy and protection”
Professor Atushi Omura and Professor Hiroto Dogauchi, Graduate Schools for Law and Politics, the University of Tokyo

Closing Speech
Dean Masahito Inouye, Graduate Schools for Law and Politics, the University of Tokyo

Organizers
Graduate Schools for Law and Politics, the University of Tokyo
Peking University Law School
Seoul National University College of Law

Cooperation
Global Centers of Excellence Program“Soft Law and the State-Market Relationship: Forming a Base for Education and Research of Private Ordering”

Support
Shoji-Homu Ltd.

The Second Symposium
"Hostile Takeovers and Defenses-Implications from Delaware Law"

Date: December 12, 2008 13:00-17:00
Place: Tokyo Station Conference #503

Part 1 : Keynote Speeches
Hostile Takeovers and Defenses in Japan
Professor Hideki Kanda, Graduate Schools for Law and Politics, the University of Tokyo

Developing an Infrastructure for Hostile Takeovers: The Delaware Example
The Honorable Justice Jack B. Jacobs, Delaware Supreme Court

Comments on Hostile Takeover Law and Policy in Japan and the United States
Professor Curtis J. Milhaupt, Columbia Law School

Part 2: Panel Discussion
Takeover Law in Japan: Analysis and Perspectives
Panelists
Mr. Gaku Ishiwata, Partner, Mori Hamada & Matsumoto
Professor Hideki Kanda, Graduate Schools for Law and Politics, the University of Tokyo
The Honorable Justice Jack B. Jacobs, Delaware Supreme Court
Associate Professor Wataru Tanaka, Institute of Social Science, the University of Tokyo
Professor Tomotaka Fujita, Graduate Schools for Law and Politics, the University of Tokyo
Professor Curtis J. Milhaupt, Columbia Law School
Associate Professor Tsuyoshi Yamada, Niigata Law School

Comments
Associate Professor Wataru Tanaka, Institute of Social Science, the University of Tokyo

Organizers
Global Centers of Excellence Program "Soft Law and the State-Market Relationship: Forming a Base for Education and Research of Private Ordering"
Niigata University
The Center for Japanese Legal Studies at Columbia Law School

Sponsors
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The Ministry of Justice
Japan Law Foundation
Tokyo Stock Exchange Group, Inc.
Japan Securities Dealers Association
Mori Hamada & Matsumoto
Hie's inc.

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The Third Symposium
"Future of the Legal Framework on Listed Companies"

Date: February 6, 2009 14:00-17:00
Place: Tokyo International Forum #701

Part 1 : Speeches
Major Issues on the Legal Framework on Listed Companies
Professor Hideki Kanda, Graduate Schools for Law and Politics, the University of Tokyo

A Suggestion from European Union Directives and German Law
Professor Hiroyuki Kansaku, Graduate Schools for Law and Politics, the University of Tokyo

The Role and Issues on the Financial Instruments and Exchange Act
Visiting Professor Naohiko Matsuo, Graduate Schools for Law and Politics, the University of Tokyo

Major Issues Japanese Public Corporations are Facing- Comments from Practicing Attorney
Mr. Kazuhiro Takei, Partner, Nishimura & Asahi

Part 2: Panel Discussion
Issues and Prospect for the Legal Framework on Listed Companies
Panelists
Mr. Sadakazu Osaki, Head of Research, Nomura Research Institute
Professor Hiroyuki Kansaku, Graduate Schools for Law and Politics, the University of Tokyo
Professor Hideki Kanda, Graduate Schools for Law and Politics, the University of Tokyo
Mr. Kazuhiro Takei, Partner, Nishimura & Asahi
Professor Tomotaka Fujita, Graduate Schools for Law and Politics, the University of Tokyo
Visiting Professor Naohiko Matsuo, Graduate Schools for Law and Politics, the University of Tokyo

Comment
Professor Tomotaka Fujita, Graduate Schools for Law and Politics, the University of Tokyo

Organizers
Institute of Business Law and Comparative Law & Politics, Graduate Schools for Law and Politics, the University of Tokyo
Global Centers of Excellence Program "Soft Law and the State-Market Relationship: Forming a Base for Education and Research of Private Ordering"

Sponsor
East Japan Railway Company

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The Fourth Symposium
"Interaction between "Hard" and "Soft" in Depute Resolution"

Date: March 3, 2009 14:00-18:30
Place: Auditorium-Academy Hills

Chair: Professor Masahiko Iwamura, the University of Tokyo / GCOE Program Project leader

Opening Remarks
Professor Masahiko Iwamura

Soft Law Project: Its Purpose and Past Development
Professor Tomotaka Fujita, the University of Tokyo / GCOE Project Scholastic Member

Dispute Resolution and Soft Law
Speaker: Professor Mizuho Hata, the University of Tokyo / GCOE Project Scholastic Member
Comment: Professor Aya Yamada, Kyoto University

Administrative Procedure for Resolution of Conflicts
Speaker: Professor Ryuji Yamamoto, the University of Tokyo / GCOE Project Scholastic Member
Comment: Associate Professor Kiyoshi Hasegawa, Tokyo Metropolitan University

Soft and Hard Methods of Dispute Settlement in Trade
Speaker: Professor Keisuke Iida, the University of Tokyo / GCOE Project Scholastic Member
Comment: Associate Professor Yoshiko Naiki, Osaka University

Conclusion
Professor Hideki Kanda, University of Tokyo / GCOE Project Scholastic Member

Closing Remarks
Professor Masahiko Iwamura

Support: Shoji-Homu Ltd.

International Exchange

<Visitors from Overseas>

Name	Term	Activity
Jinsu Yune, Seoul National University College of Law	September 18-20, 2008	Participation in the 1st Symposium“Changing Society and the Role of Law”
Kuk Cho, Seoul National University College of Law	September 18-20, 2008	Participation in the 1st Symposium“Changing Society and the Role of Law”
Konsik Kim, Dean, Seoul National University College of Law	September 18-20, 2008	Participation in the 1st Symposium“Changing Society and the Role of Law”
Guimei Bai, Professor, Peking University Law School	September 18-20, 2008	Participation in the 1st Symposium“Changing Society and the Role of Law”
Genlin Liang, Professor, Peking University Law School	September 18-20, 2008	Participation in the 1st Symposium“Changing Society and the Role of Law”
Suli Zhu, Dean, Peking University Law School	September 18-20, 2008	Participation in the 1st Symposium“Changing Society and the Role of Law”
Dr. Philipp Paech, The European Commission	November 5, 2008	Lecture:“EU Legislation in the Field of Securities Clearing and Settlement” at the first meeting of the GCOE Soft Law Seminars
Julien Mouret, Doctorate Program, University Montesquieu, Bordeaux 4	November 17-December 12, 2008	Research on Japanese Labor Law as a Foreign Researcher
Luke Nottage, Associate Professor, Sydney Law School	December 4, 2008	Lecture:“Insights from Product Safety Regulation for Consumer Credit Regulation: Economics, Psychology and Politics” at the third meeting of the GCOE Soft Law Seminars
The Honorable Justice Jack B. Jacobs, Delaware Supreme Court	December 12, 2008	Participation in the 2nd Symposium“Hostile Takeovers and Defenses--- Implications from Delaware Law”
Curtis J. Milhaupt, Professor, Columbia Law School	December 12, 2008	Participation in the 2nd Symposium“Hostile Takeovers and Defenses--- Implications from Delaware Law”
Eva Schwittek, Reseach Associate, Max Planck Institute	January 1-February 27, 2009	Research on Corporate Law and International Private Law in Japan as a Foreign Researcher
Anna Musiala, Lecturer, Adam Mickiewicz University	January 26-February 22, 2009	Research on Labor Law in Japan as a Foreign Researcher
Micah Burch, Acting Assistant Professor of Tax Law NYU School of Law	February 10, 2009	Lecture:“US Federal Tax Law and National Funding for the Arts” at the fourth meeting of the Tax law workshop
Iain Ramsay, Professor, Kent Law School	March 11, 2009	Lecture:“Behavioral Sciences and Law” at the third meeting of the Study Group on Theories of Soft Law

<The Project Members’ Overseas Research Activities>

Name	Term	Activity
Yoshihiro Masui, Professor, Graduate Schools for Law and Politics	August 30-September 10, 2008	Visited Paris (OECD) and Brussels (IFA Congress) in order to update the article in Soft Law Journal No. 11 (“PE Non-discrimination and Japan’s Foreign Tax Credit: Impact of May 2007 Discussion Draft regarding OECD MTC Article 24”).
Tomotaka Fujita, Professor, Graduate Schools for Law and Politics	January 9-14, 2009	London, UK: Participated in the Hearing on the M&A practice in the United Kingdom (at Takeover Panel etc).
Wataru Tanaka, Associate Professor, Institute of Social Science	January 11-16, 2009	London, UK: Research on the practice of the Takeover Panel

Julien Mouret (Foreign Researcher)

－1977: born in Bordeaux, France.

－2002 : Master's Degree in Social Law, University Montesquieu, Bordeaux 4.

Paper subject: Reconciling professional life and extra-professional life in Japan. Won the 2002 First Prize of the French Center For Comparative Law for this paper.

－Since 2002 : preparing a Ph. D. At University Montesquieu Bordeaux 4 under the direction of Professor Jean-Pierre Laborde: Lawmaking method in Labor Law, the examples of Japanese and French Laws

－March 2005-March 2008: Foreign Researcher, The University of Tokyo.

－November-December 2008: Foreign Researcher, The University of Tokyo.

French Labor Law, Japanese labor law and comparative perspective: on the road to core learning about Law and its actors.

About to complete a Ph.D. paper this year about law making process in the field of labor law both in France and in Japan, I must admit this research took me much further than I expected when starting. This paper, submitted here as part of my recent mission of one month at the global C.O.E. of the University of Tokyo[1] will underline some key points of my doctorate paper. A sort of appetizer in a way.

As a scholar researching and writing about comparative law, France and Japan, I was confronted to the typical difficulties of comparative law. One might object this sounds even more sensible when you choose to compare France and Japan, two countries with both a rich but fairly different histories and political background. However, from a law perspective, the histories of France and Japan might be seen as a tale of missed opportunities, at least concerning Civil Law, with the episode of the Code Boissonnade. Generally speaking, Western countries imposed modern law to Japan. Law, and among the general concept of law, Labor Law might have been seen in the Japanese society more like a superstructure. This was especially true concerning individual labor relation, in which, traditionally, in case of conflict between an employee and the employer, or the hierarchy, problems were solved internally, inside the company. However, things changed a lot in the past years, and employees, or their family, started bringing the issues before courts of law. This created a phenomenon unknown before: the district courts, before which labor issues had to be brought,

[1] The author would like to thank again Professor Masahiko Iwamura for having made this one month stay within the C.O.E. of the University of Tokyo possible.

were overflowed with cases concerning individual labor disputes despite some measures[2]. This was especially and largely publicized with cases involving the death or suicide of an employee after which the family claimed the company was responsible for the loss[3]. This leaded to the creation of labor disputes tribunal by the Labor Tribunal law of 2004[4], aiming at resolving only labor related cases within the district court, as do the Conseils des Prud'hommes in France. Labor law system is not seen as a super structure anymore, but is now integrated by the general public.

Back the comparative aspect, sometimes comparisons offers amazing similarities between 2 law systems that, apparently, would be very far from each other. That is significant, in our opinion, of the central role of law in our society. Law in general, and labor law is no exception, carries some values, some universal values, I would say humane values. Of course, the multiplication of international bodies, like the ILO and the globalization of the world economy surely accelerated the process. However, comparative law seems to bring some issues and questions about the very essence of Law in general, and its role in the society. Does then the aim of law is to take into account the evolution of the society, based on human comportments and behaviors or should law make the society go in one direction, based more on values than comportments?

Striking similarities can be found between the 2 countries concerning the objective of reconciling professional life and family life and more generally, personal life (work-life balance). In both country, especially since the 1990's and steaming up in the 2000's, various new leaves and improvement on more traditional tools made for parents to be able to take care of their children, not only at the time of birth, but also in case of sickness. Moreover, such leaves have been extended to other members of the family, like parents. However, if in both countries, legislation is comparable, results are totally different. More precisely, in each country, the populations these measures are aimed at are not using it the same way. The most striking example is the paternity leave. If only 0,4% of the fathers working in private companies took this leave in Japan in 2003, in France, in 2004[5], about 2/3rd of the father untitled to use such leave actually took it[6].

A difference can be seen, especially when studying the method, concerning the important topic of working time. Where France dramatically reduced at the turn of the decade the legal workweek to 35 hours with 2 laws in 1998 and 2000, after reducing it to 39 in 1982, now various laws are deconstructing the general rule, multiplying the exceptions,

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2 Law on Promoting the Resolution of Individual Labor Disputes (2001) and amendment to the Trade Union Law in 2004.

3 Long seen as a Japanese specificity, this kind of job related death has proven topical in France too recently, which is an example of the surprises of comparative laws studies

4 This law took force on April 1st, 2006.

5 2 years after the implementation of the new leave.

6 "*Le conge de paternité*", Denise Bauer, Sophie Pernet, DRESS, Etudes et résultats, N°442, Nov. 2005.

and, finally, making the original measure, though still valid, an empty shell. In Japan, the legal rule is the 40 hours workweek, since 1988, then 1997 for smaller companies, when the 1987 revision of the Labor Standard Law was put into effect.[7] However, still the phenomenon of the uncompensated supplementary hours is undermining the legal rule, and creating concerns about workers health. In this case, practice is still very different from rule. Practice seems to resist to the rule. This difference didn't prevent both countries from implementing working time averaging schemes, essentially for managers positions. The examples of the 2 countries might show a common trend though: at some point, reduction of working time has its limits, and shouldn't be seen as an end in itself. Now the focus seems on the organization, the quality of the work. Maybe we shifted from a working time system to a working styles system.

[7] Art. 32 of the Labor Standard Law (revised).

Eva Schwittek (Foreign Researcher)

Research Assistant in Japanese Law, Max Planck Institute

Main Areas of Research:

Japanese Law; Private International Law; particularly International Corporate Law in the context of a dissertation project

Academic Career:

1999-2005: Law studies at the Universities of Trier and Konstanz. February 2005: First State Examination. 1999-2002: Law-specific Japanese language studies. February 2006-March 2007: Research at the University of Kyoto with a scholarship of the German Academic Exchange Service. Since October 2007: Practical Legal Training, Court of Appeals, Hamburg. July 2005-February 2006 and since March 2007: at the Institute as Research Associate and Doctoral Candidate under Priv.-Doz. Dr. Harald Baum.

International Company Law:
Recent Developments and Main Issues in Japan and Germany

The International Company Law is to create an order in which companies can freely move and maintain relationships across borders, and which at the same time sufficiently protects parties they do business with.

Neither Japan nor Germany has statutes covering the conflict of laws for companies yet. In both countries, there have been attempts to codify and reform the International Company Law in recent years. The aim of both reforms was to codify the foundation theory.

In Japan, the new Act on the General Rules of the Application of Laws[1] came into force in January 2007. Just as the former Act on the Application of Laws[2], the new law does not contain a provision about the conflict of laws for companies. Although an informal working group had initially come up with preliminary proposals to codify the International Company Law, the formally established Private International Law (Modernization) Division and consequently the Legislative Council decided against a codification. As for the substantive law, the coming into effect of the new Company Act[3] in May 2006 (for some parts 2007) has had an effect on how foreign companies are treated.

In Germany, a ministerial draft bill concerning the law applicable to companies was published in January 2008. The preparatory work was carried out by the Special Commission for International Company Law set up by the German Council for International Private Law in consultation with the Federal Ministry of Justice in September 2003. The proposal adds provisions for the conflict of laws concerning companies to the Introductory Act to the Civil Code[4]. The

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[1] Hô no tekiyô ni kansuru tsûsoku-hô, Law No. 78/2006.

[2] Hôrei, Law No. 10/1898, last amended by Law No. 151/1999.

[3] Kaisha-hô, Law No. 86/2005, last amended by Law No. 65/2008.

[4] Einführungsgesetz zum Bürgerlichen Gesetzbuche, as amended and promulgated on September 21, 1994, last amended on December 10, 2008 (BGBl. I p. 2401).

public statements of interest groups and experts were mainly positive. So it was expected at first that the proposal would be submitted as law. But the approval by the federal cabinet for submission to the German Parliament that was scheduled for last spring is still pending today. It is said that the considerable delay is owing to opposition against the draft bill caused by the fact that the highly controversial issue of employee participation was not dealt with. Although the future is unpredictable, without doubt, the majority opinion in Germany holds that a codification is necessary. Why then has Germany basically decided to create a provision, while Japan spoke out against a codification?

Starting point and motive of the reforms as well as institutional and political circumstances differ strongly in both countries. This significantly influenced the course and the outcome of the reforms.

In Japan, the legal situation of foreign companies had not significantly changed for decades before the recent reforms. The foundation theory - although not clearly applied in the main court decisions - has traditionally been the prevailing opinion, with constrictions by alien law provisions. The attempts to reform the International Company Law were initiated by the comprehensive reform package that was launched by the Japanese government in many areas of law, beginning in the 1990s. This reform movement involved the updating of the private international law and the substantive company law as a whole. However, the reforms were not directed at the International Company Law in particular.

On the other hand, a significant change of the legal situation of foreign companies that caused considerable legal uncertainty was the starting point for the codification process in Germany. Until recently, the seat theory had been the majority opinion by far. However, starting in 1999, the European Court of Justice rendered a series of judgments[5] that made it impossible for Germany to hold on to the seat theory, at least in its prevailing form. In short, the Court stated that some of the restrictions imposed on foreign companies by the seat theory were an unjustifiable restriction of the freedom of establishment of the foreign company concerned. That is why today, German courts and legal scholars apply the foundation theory to companies from the European Union or the European Economic Area.

A central question is whether the change towards the foundation theory also applies to foreign companies from countries outside the European Union and the European Economic Area. This question is highly controversial. As German courts have rendered conflicting decisions, legal uncertainty is at its peak. It is hoped that a codification will bring the desired clarification. A judgment of the Federal Court of Justice from October 2008[6] held that the seat theory was still applicable for Swiss companies. The Court stated that a transition to the application of the foundation theory to companies from non-EU-states was in the responsibility of the legislature.

These circumstances - i.e. the comprehensive reform movement in Japan on the one side and the major change of the legal situation in Germany on the other - have significantly influenced the course and the outcome of the codification efforts.

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[5] Centros (March 9, 1999) in Case C-212/97, ECR 1999, I-01459; Überseering (November 5, 2002) in Case C-208/00, ECR 2002, I-09919; Inspire Art (September 30, 2003) in Case C-167/01, ECR 2003, I-10155.

[6] Trabrennbahn (October 27, 2008) - II ZR 158/06, NZG 2009, 68.

Contrary to Japan, Germany has come up with a ministerial draft proposal to codify the conflict of laws concerning companies. The German proposal stipulates the foundation theory and thereby implements a complete shift in direction.

In Japan, the Legislative Division decided against a codification of the prevailing foundation theory. The analysis of the minutes of the debate shows two main reasons for the Division's decision: On the one hand, it was not sure whether in the course of the enactment of the new Company Act, the provision against pseudo-foreign companies would be deleted simultaneously. The Legislative Division was uncertain about the possible consequences of a deletion of this provision for the legal policy concerning foreign companies. It did not want to give up the possibility to react flexibly to negative future developments in this area. On the other hand, the Legislative Division did not find a consensus about what form of provision would be suitable: an exhaustive or a non-exhaustive enumeration, or rather an abstract wording. So it refrained from codifying the International Company Law altogether.

If the German proposal is to be adopted as law, the foundation theory will be stipulated in Art. 10 para. 1 of the German Introductory Act to the Civil Code. It is especially important that the proposed provision does not differentiate between companies from EU-states and those from non-EU-states. The foundation theory is applied uniformly to companies from all states. The majority of the members of the Reform Committee took the view that a differentiated approach would be disadvantageous, as it would make the system of connecting factors less coherent and more complicated. A differentiation by substantive law provisions would therefore be preferable. Art. 10 para. 2 will contain a non-exhaustive list of matters that are governed by the company statute. The catalogue determines the core scope of the law applicable to a company, but leaves room for further discussion of issues that might arise in the future. The proposal also provides for regulations on cross-border reorganisations, on a change of the applicable law, and on the protection of third parties as regards the conflict of laws.

In Germany, apart from the existing registration requirements for branch offices of foreign companies, the creation of substantive law provisions that complement the application of the foundation theory has not been tackled yet. In contrast, such substantive law provisions have existed in Japan for over a century. Over the years, their meaning and interpretation has changed, although the wording has remained nearly unaltered.

Although the German Special Committee for International Company Law was in favor of complementary substantive law provisions, it did not decide on their creation as that was outside its remit. However, Germany will definitely have to deal with this issue in the near future.

In Japan, both the Civil Code and the Company Act (formerly the Commercial Code) contain complementary substantive law provisions. The provisions in the Commercial Code were slightly amended when transferred to the new Company Act. Art. 821 of the Company Act prohibits pseudo foreign companies to continue to do business in Japan. A person who acts in contravention to this rule is jointly liable for any obligations incurred by the transaction. Even after the wording was altered with the enactment of the Company Act, there still are major questions concerning the interpretation of the provision. Interviews with practitioners suggest that the duty in Art. 817 of the Company Code to appoint a representative whose power of representation cannot be limited, and the duty to register in Art. 818 of the Company Act are practically most relevant.

Accordingly, the comparison allows for the following conclusions:

In Germany, the very same legal uncertainty that was caused by the fundamental change from the seat theory to the foundation theory has provided for the necessary motive and inducement for the codification of the conflict of laws of companies - which does of course not eliminate the possibility of a failure of the draft proposal due to certain controversial issues.

In Japan, on the other hand, there is no such pressing need for clarification. Also, the discussion on specific issues concerning the scope of application of the statute of the company is still developing. So the Legislative Division has left room for the necessary clarification when deciding not - or not yet - to create a provision.

The remit of the German reform committee gave enough room for a thorough discussion of the complicated problems concerning the codification, as the research committee solely dealt with the International Company Law. That made it possible to clarify some crucial sets of problems. In Japan, on the other hand, the reform package included other major parts of the International Private Law, and among them, the International Company Law was not the focal point.

That suggests that the remit of the Japanese reform of International Private Law was too wide for the sake of the International Company Law. On the other hand, the remit of the German reform might have been too narrow. The comprehension of certain issues at stake, among them the creation of complementary substantive law provisions, might have helped to win sufficient backing for the draft proposal. Thus, the rich body of experience Japan has accumulated in dealing with substantive law provisions concerning foreign companies should give a new impetus to the German discussion.

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The evolution of Polish social law and its crucial problems in the European context.

INTRODUCTION

The main problem of this article will concern on the Polish perspective of labour law's transition from the industrial era to the global era. Presently, the theme as it is well - known became common for many countries.

However, at the very beginning I would like to explain the difference between social law and labour law in the Polish context. So, in Polish doctrine, we have got a division between labour law and social law. It is unlike in France where the notion *droit social* includes the labour law and the social law as well. It is rather like in Germany's system where a strict division can be observed between labour law *Arbeitrecht* and social law *Sozialrecht*.

However there is a tendency to follow the French way of thinking. In consequence it can sometimes be seen that in the range of the social law's meaning there is also a place for labour law.[1]

There is also one more thing to explain: nowadays in the Polish doctrine there is a tendency to use the term employment law instead of labour law. It is to put the stress on the need to protect some others working who are a different kind of workers and are not necessarily the employees.[2]

I. The Polish Legal Heritage concerning the labour law.

I would like here to say few words about the legal heritage concerning labour law that we came with to the democracy as we know and it can be said as the general claim that historian context gives many explanations to legal problems.

In 1989 communist rule was overthrown and the third Polish Republic started. The callapse of the communist regimes has brought about **the fall of the overly-important and all-encompassing domain of labour law** in the post - socialist countries.

As Csilla Kollonay Lechoczky adequately points out the economy in the communists regimes was entirely in the

1 See for the detailed information, W. Muszalski, „Social Law" ["Prawo socjalne"], Wydawnictwo Naukowe PWN, Warszawa 1999, p. 11-13.

2 M. Skąpski, „The protective role of labour law in the economy market" ["Ochronna funkcja prawa pracy w gospodarce rynkowej"], Zakamycze 2006, p. 414.

hands of the totalitarian states **and the position of workers could be approximated to that of "citizens" or state "subjects"** as a result of the almost complete "de-contractualisation" of their status.[3] During the decades of the socialist era, **waiting lists** and **the discretionary power of administration** in allocating goods and services had a bigger role than rules of the market.

A "socialist worker" was a kind of special status distinction - and an overall one, it included in itself practically all spheres of a life of a person. As C. Kollonay - Lehoczky says: being a "socialist worker" was an overall status before the state that encompassed practically all areas of the life of the person, contained a broad scale of entitlements and obligations encroaching into the private life: and all kinds of social security benefits besides increased job security".[4] We can say that it was really difficult to distinguish the "worker's status" from "citizenship"

In the socialist system of law, **labour law was situated much closer to public law than to private.** There wasn't much place in it for the contract if we do not want to say that there was no place for it as the central - public regulations replaced the autonomy of the parties. Simultaneously with the fall of the communist regime there has appeared **a strong re-contractualisation drive** - a kind of very strong move to private property and market freedoms. The labour code was regarded as the "favourite child" of the past era and there was a desire to include the labour law regulations to the Civil Code or at least move it away to the periphery.

II. Polish Legal System and its labour law.

One of the most important provisions from the **Polish Constitution**[5] that concerns strictly the labour law is concluded in the article 24 according to which: **Work shall be protected by the Republic of Poland. The state shall exercise supervision over the conditions of work.** I think that this legal norm create the constitutional ground to cover with protection all work executed on all these different legal bases. It formulates also the allowance to leave away the narrow understanding of the worker where the worker was just an employee.

The Polish Labour Code of 26th June, 1974[6] is **the basic Polish labour law statute**. It was adopted in **1974** and many times modified as to reflect changes on the labour market and in industrial relations. The main modifications come from 1996 when the Polish Labour Code became changed in a very significant way to keep the pace with free-market reforms.

The notion labour law is, however, wider, as it includes, in addition to the Labour Code, **other laws and regulations** which define the rights and duties of employers and employees, as well as collective agreements.

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3 C. Kollonay Lehoczy, "Ways and Effects of Deconstructing, Protection in the Post - socialist New Member States - Based on Hungarian Experience", [in] "Boundaries and frontiers of labour law", edited by G. Davidov and B. Langille, Hart Publishing, Oxford and Portland, Oregon 2006, s. 221-222.

4 See above, p. 224.

5 The Constitution of the Republic of Poland of 2 April 1997 is Poland's current constitution. The Constitution of the Republic of Poland of April 2nd, 1997, Journal of Laws of the 16th July, 1997, No. 78, item 483.

6 Polish Labour Code of 26th June, 1974, Journal of Laws No 24, item 141. Consolidated text of 23rd December 1997, Journal of Laws of 1998, No 21, item 94 with amendments.

Here I would like to present the essential information concerning the system of labour law and Labour Code in Poland.

The Labour Code defines **the rights and obligations of employees and employers** - that is article 1 of the Code. According to the article 2 **an employee** is a person employed under an employment contract, appointment, election, nomination or under a cooperative contract.

The article third gives us the definition of the notion of **employer**, so an employer is an organisation, even if it is not a legal person, as well as a natural person, if they employ employees.

And now the crucial definition in the Polish Labour Code - **the definition of employment relationship.** According to the paragraph 1 of article 22nd of this Code by establishing an employment relation **an employee undertakes to carry out certain kind of work for the benefit of and under the guidance of an employer, in location and at times designated by the employer, and the employer undertakes to employ the employee in return for the remuneration.**

§1[1] of the art. 22: Employment on the terms specified in § 1 shall be employment under an employment relation, **regardless of the name of the contract concluded by the parties.**

§ 1[2] of the art. 22: It shall not be permitted **to replace an employment contract with a civil** agreement where the terms on which work is to be provided are those specified in §1.

The table of contents of the Polish Labour Code - with fourteen divisions shows the main base of the Polish Labour Code.

1) General Provisions,
2) The Employment Relation,
3) Remuneration for Work and Other benefits,
4) Duties of Employer and Employee,
5) Material Liability of Employees,
6) Working Time,
7) Employees' Leave,
8) Rights of Employees Relating to Parenthood,
9) Employment of Young Persons,
10) Safety and Hygiene at Work,
11) Collective Agreements,
12) Considerations of Disputes Relating to Claims under an Employment Relation,
13) Limitation of Claims,
14) Final Provisions.

So as we can see the Code concerns only **the sphere of a contract of an employment** which means that many working people stays behind the scope of application of Polish labour law.

Here I would like to say few words as a comment to §1[2] according to which it shall not be permitted **to replace an**

employment contract with a civil where the terms on which work is to be provided are those specified in § 1.

In practice entrepreneurs cope with this banned replacement as "any competent lawyer knows how to <<exploit>> these indicia so as to arrive at the right result for their client".[7] Thereupon, the stronger party can manipulate the indicia to ensure that enough of the total criterias point away from the worker being an employee. What's the most important as R. Owens and J. Riley have already noticed is **that the inequality of bargaining also explains why there is a problem of circular logic in the application of the multiple indicia test - many of the factors are a consequence rather than the determinant of the nature of the unequal relation.**[8]

III. New era, new context - a draft of the Polish Labour Code. Is it well prepared for the new conditions of working?

The world of work has changed.

Today we inhabit a **globalized world** and experience an era of unprecedented **freedom of work movement.** The industrial era is passing away - we can say that it is the past.

In the industrial era the worker was **a male breadwinner factory worker** assumed to be the subject of labour law.

The emergence of the global era has been facilitated by the computer revolution and digital technologies. It has also, of course, influenced the methods of production and the ways of performing work. These kinds of developments - technologies developments - make the possibility of a global community real.

Loyalty, reliability and commitment are now replaced by **independence, flexibility and autonomy.** What's more effects of all this are carried over into **personal lives** as Rosemary Owens says in her book.[9] As she says, regulating for competitiveness, fostering productivity and encouraging flexibility are **the guiding principles** of the changes in the range of labour law.[10]

The forms of work that could be regarded as **atypical or non-standard** in the industrial era are rapidly becoming the norm in the global era.[11]

There is **a growing diversity in the types of contracts** covering work relations as was pointed in the influential report represented to the European Commission in the late 1990's by a group of experts.[12]

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7 A. Stewart, "Redefining Employment? Meeting the Challenge of Contract and Agency Labour" in 2002, 15 Australian Journal of Labour Law 235.

8 R. Owens, J. Riley, „The law of work", Hart Publishing, Oxford University Press 2007, p. 144.

9 See above, p. 6.

10 See above, p. 130.

11 K. Stone, "Rethinking Labour Law: Employment Protection for Boundaryless Workers", [in] "Boundaries and frontiers of labour law", edited by G. Davidov and B. Langille, Hart Publishing, Oxford and Portland, Oregon 2006, p. 157.

12 A. Supiot, „Beyond Employment: Changes in the work and the future of Labour Law in Europe", Oxford 2001, p. 10.

We can say that today we need answers **for two principal questions.** The first is how much the law of work is different from the ordinary commercial law. As it was many times observed in the literature there is a huge pressure to abandon labour law for contract law. So we must give **the response to the very crucial question**: what distinguishes the worker who is an employee, understood in the traditional way, from others who make contracts for services in the today's economy.

And the second question: there is also **a problem concerning the intersection of work and family lives.** So we still do not know how to put these two spheres of human being life together to get a satisfactory result.

Thinking about these issues we cannot forget that we deal with a **modern version of liberal theory - neo-liberalism - that has a great impact for contemporary law.** That is the explanation why **autonomy and values that are linked with it - like freedom and choice -** have become the distinctive characteristics or attributes of the modern worker in law. (**hallmarks**).

This idea - neo-liberal one - which is based on the fact that contractual relations are something natural on the marker is spreading throughout.

What kind of approach should we take?

Well, I think that the right way leads us to **the recognition of workplace rights as human rights** and in consequence they could be easily extended to all workers and not limited only to the class of workers identified as in a subordinate relation to the capital.

What's more - as R. Owens and J. Riley suggest - there is a need for "**(...) a much wider acceptance of the responsibility of all social actors, including corporation, to ensure these rights are respected".**[13]

Nevertheless, creating the new legal regulations concerning the actual methods of working we must all that time have in our minds **the ILO's concept of decent work** according to which: "Decent work means productive work in which rights are protected, which generates an adequate social protection. It also means sufficient work in the sense that all should have access to income - earning opportunities. It marks the high road to economic and social development, a road in which employment income and social protection can be achieved without compromising worker's rights and social standards"[14]

Meantime in Poland we have the Labour Code which, as it was already said, was adopted in 1974. That was, of course, the communist era. In this situation, as Professor Seweryński points out, the political, economical and also social transformation in Poland, which started in 1989 - known very well as "Solidarity Revolution", needs **a fundamental reform of the Polish labour law as it was inherited from the communist system** in the form of the Labour Code from 1974.[15]

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13 R. Owens, J. Riley, „The law of work", Hart Publishing, Oxford University Press 2007, p. 21.

14 International Labour Organization, „Decent Work", Report of the Director - General, International Labour Conference 87th Session, (International Labour Office, Geneva, 1999). p. 11.

15 M. Seweryński, „Towards a New Codification of Polish Labour Law", Comparative Labour Law and Policy Journal, Volume 26, Number 1 Fall 2004, p. 55.

As it wasn't very easy task to cope with the Polish legislature decided to introduce gradually the amendments of the Labour Code and accompanying laws.

In 2002 a Labour Law Codification Commission was created - according to the Polish law of the 20 August 2002. That Commission was the group of independent experts. Its President was Professor M. Seweryński who on the behalf of the Commission has already handed the draft of the Code to the Prime Minister.

One of the main assumptions of the Polish labour law codification is its adjustment to the requirements of the Polish Constitution and international standards, including the European law. According to the President of the Labour Law Codification Commission, the final state of the regulation will be determined **not only by the state of legal knowledge but also the state of economical and social relations, as well as the political factors, mainly by the government's policy regarding widely perceived labour relations.** [16]

The intention of the Labour Law Codification Commission is to create **the labour law adequate to the demands of modern era**, that is to construct it in a way to provide reconcilement between worker's interests and employer's interest. According M. Seweryński, it is hard to encode these ideas to legal norms as the worker's concepts collide with political and social concepts.

Professor Seweryński points out on the pioneer and unprecedented endeavour. As he said: "we undertake for the first time two different codifications: individual labour law (actually binding since 1974 and amended 40 times) and collective labour law. This difficulty explains why the legislative works lasted so long and why it caused so many controversy solutions."[17]

The table of contents of the draft of the Polish Labour Code presents the main changes:

Book one: General provisions:
- Title one: Introductory provisions,
- Title two: Basic principles of labour law,
- Title three: Equal treatment in employment,
- Title four: Legal activities in labour law,

Book two: The Establishment, Change and Termination of the Employment Relationship:
- Title one: General provisions,
- Title two: Contract of employment,
- Title three: Appointment,

16 „Labour Law Codification Commission - Summary of its activity" [„Komisja Kodyfikacyjna Prawa Pracy - Podsumowanie działalności"], http://www.kprm.gov.pl/archiwum/2130_14666.htm - 18-01-2009.

17 „Labour Law Codification Commission - Summary of its activity" [„Komisja Kodyfikacyjna Prawa Pracy - Podsumowanie działalności"], http://www.kprm.gov.pl/archiwum/2130_14666.htm - 18-01-2009.

Book three: The rights and obligations of the parties of employment relationship:

- Title one: Basic rights and obligations of the parties of employment relationship,
- Title two: Remuneration for work and other benefits,
- Title three: Working time,
- Title four: Employee's leave,

Book four: The protection of work:

- Title one: The protection of employee's health and life,
- Title two: Employee's rights concerning parenthood,
- Title three: The protection of the young's and children's work,

Book five: The guarantees of labour law compliance:

- Title one: Liability of the parties of employment relationship,
- Title two: Limitation of claims of the parties of employment relationship,

Book six: Atypical employment relationships:

- **Title one: Temporary work,**
- **Title two: Telework,**
- **Title three: Apprenticeship,**
- **Title four: Management of workplace,**
- **Title five: Cottage industry,**
- **Title six: Home workers,**
- **Title seven: Family workers,**
- **Title eight: Co-operative employment contract,**

Book seven: The employment of non-employee:

- **Title one: The employment on the base of a contract,**
- **Title two: The protection of health and life in the employment of non-employee relationship,**
- **Title three: The employment of the managers in state posts,**

There is no doubt that the Polish labour law's main ground will rest the **contract of employment.** However, it can be observed the important inclusion to the Polish Labour Code some other contracts of employment. Of course, there was **a huge debate** regarding the variety of these kind of contracts of employment that should be recognized by the Labour Code.

At last it was decided that **these new forms do not constitute a transitory phenomenon** and in the consequences it cannot be ignored that many people who work in such a way lose the particular protection guaranteed by the labour law.[18]

18 M. Seweryński, „The recodification problem of labour law" [„Problem rekodyfikacji prawa pracy"], in: „The Labour Law and the challenges of XXI century" [„Prawo pracy a wyzwania XXI wieku"], Warszawa 2001, p. 323.

The idea of non - employee contract is a quite revolutionary one. So, “non employee work” that is a kind of dependent self - employment. The best translation is in French: “le travail non salarié”.

I would like to put here a definition of non - employee work from the draft of the Polish Labour Code:

§1. The statutes of this title are applied to the other person than the one employed on the base of contract of employment, performing the work personally for the benefit of one employer; work which is continuous or repetitive, remunerated by at least half of the minimum salary.
§2. The statutes are applied as well in cases of performing the work for the benefit of the employer from whom the non-employee receives the majority of his remuneration, provided that this remuneration exceed half of the minimum salary.
§3. The nature of the personal work does not exclude the non-employee’s cooperation with the members of his family living in one household.

The idea of Polish “non employee contract” is similar to idea of Spanish **autonomous work**, *el trabajo autonomo* form the statute of 11th July 2007 concerning the status of independent work.

Just below I would like to present some regulations concerning the non - employee contract in the draft of the Polish Labour Code:

Art. 463

The non-employees may be covered by: collective bargains and collective bargain agreements or also by statutes.

Art. 464

The non-employee’s rights and obligations in the range of articles 9 and 13 <<concerning the privileged status>> are the same as the employees’.

The sense of articles: 9 and 13.
The statements of contracts of employment or other legal activities concerning the employment relationship cannot be less beneficial for the employee than other statements of the labour law. These statements are invalid and in their place appropriate labour law statues are to be applied.

Art. 465

The employer has the obligation to confirm the conditions of the contract, particularly the type of work and term of its commence and as well as the rules of remuneration in written form within seven days from the non employee request.

Art. 466

The notice period for termination of the contract is one week in the first year and two weeks in the second year and following years.

The notice periods may be contractually lengthened, provided that the notice period binding the employer can not be shorter than the non employee's.

The termination statement of the employer should be issued in written form.

Art. 467

The termination of the contract with the non-employee during her pregnancy and within eight weeks after giving birth may happen only upon circumstances mentioned in the article 468 § 1.

Art. 468

The employer may terminate the contract without notice only because of misexecution or improper execution of the non-employee's obligations or in the case of appearing the circumstances enabling the continuation of employment.

If the termination of the contract without notice wasn't justified the non-employee person has the right to claim the minimum remuneration if the notice period was two weeks or half this sum if the notice period was shorter.

In the case of unjustified termination without the notice of the fixed - term contract, the non-employee has the right to remuneration for the remaining period of employment however not more than the minimum remuneration.

Art. 469

The norms provided in the third title of the book three (these are norms concerning the working time) are to be applied appropriately to the non-employee.

Art. 470

If the parts do not state otherwise, the payment of the remuneration will happen with money at least once a month.

The employer on the non-employee's demand is obliged to provide information necessary to determine if the amount of due remuneration was correctly evaluate, particularly to allow the access to the documents, on the bases of which it was evaluate.

Art. 471

The employer is obliged to provide the non-employee a leave from work in case of impossibility to work. The leaves are granted according to the same rules as employees but without the right to remuneration.

On the non-employee's request the employer is obliged to grant him in every calendar year fourteen days of leave. The term of the non-employee leave is established by the employer. The non-employee is not entitled to remuneration for its leave.

In the case of not granting to non-employee its leave because of the employer's reasons, the non-employee has got the claim for the half of the minimum remuneration.

Art. 472

The employer is obliged to provide the non-employee with maternity leave of 16 weeks upon the request of the non-employee. For this period the remuneration is not granted.

The articles: 300, 303 and 304 are applied appropriately.

Art. 473

The period of work as non-employee while receiving at least more than the half of the minimum remuneration is to be included to the period of the employment as an employee on conditions applicable to the employees.

Art. 474

The law of this book do not violate further going protection established by other status.

Art. 475

Disputes relating to claims under an employment from this book will be recognised on the same way as employee's claims.

Title second. The protection of health and life in non employee contract.

Art. 476

The employeer is obliged to ensure the safety and hygienic conditions of work to all ones having a non-employee contract working at employer's place or in the place indicated by him.

CONCLUSION

We are now in the process of changing the legislature concerning the labour law in Poland. The full list of problematic issues is much longer, however it is not possible to present here everything.

Nevertheless I hope that I managed to present the kind of tendency in the sphere of Polish labour law. I wanted also to concentrate myself on the problem of non-employment contract as the example of a quite revolutionary idea in the Polish context.

3 Outcome

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Atushi OMURA and Hiroto DOGAUCHI

Closing Speech Masahito INOUYE

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