
Book Review

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Seifu Kisei to Sofuto Rō (Soft Law on Regulation), edited by Nobuhiro Nakayama and Minoru Nakasato. Tokyo: Yūhikaku, 2008, 284 pp., ¥3,500 + tax (ISBN 978-4-641-01002-4)

doi:10.1093/ssjj/jyq050

This book is the third volume of the five-volume *Sofuto Rō Kenkyū Sōsho* (Soft Law Research Series), the results of the University of Tokyo 21st Century Center of Excellence (COE) Program. In addition to the Introduction, most of the 12 articles that comprise this volume were written by Professors Nakazato Minoru, Shiraishi Takashi and Masui Yoshihiro of the University of Tokyo Graduate Schools for Law and Politics and by young researchers under their supervision. Other contributors include Waseda University Graduate School of Finance, Accounting and Law Professor and former Commissioner of the National Tax Agency Watanabe Hiroyasu (who participated in the University of Tokyo 21st Century COE Program as a University of Tokyo Graduate Schools for Law and Politics Visiting Professor) and two young professionals who studied in the Master's programs of the University of Tokyo Graduate Schools for Law and Politics. (In the interest of full disclosure, I, too, was involved in the COE Program as a specially appointed Associate Professor and spent a great deal of time developing the Soft Law Database. For this reason, I must point out that I am not making comments on this book from an entirely neutral position.)

The 12 articles in this book are divided into three sections. In Section 1, 'General Theory', Nakazato explains in 'State Intervention and Its Approaches' (Section 1, Chapter 1) that, depending on the country, legal standards for the market can exist outside of the regulatory framework (p. 24), while noting that norms developed by the private sector can function in a similar manner to the legal standards formulated by the state (pp. 30–31). In 'Soft Law and National Funds Procurement' (Section 1, Chapter 2), Fujitani points out that even though practical rules devised by local governments for indemnity agreements and the redemption of government bonds are not statutory laws, they perform the same functions as the law (pp. 36–41), and he uses game theory to explain the mechanisms of how these functions come into being (pp. 57–60). In 'Soft Law and Accounting' (Section 1, Chapter 3), Matsubara explores issues with Japan's corporate accounting based on the assumption that accounting (i.e. accounting rules and standards) is soft law.

In Section 2, 'Economic Law', Shiraishi conceptually classifies the types of soft law that pertain to the Anti-Monopoly Act in 'A Comprehensive Survey of Soft Law in the Anti-Monopoly Act' (Section 2, Chapter 1). He defines three types of soft law that have been developed by the Japan Fair Trade Commission (JFTC): (a) standards shaped by responses to prior consultations; (b) standards not enforced by courts which are formed by the individual resolution of incidents, and (c) JFTC

*Translated from the Japanese by Joel Dechant.

guidelines. Conversely, there also exists soft law formed by the private sector, that is, codes of conduct stipulated either voluntarily or under the guidance of the JFTC by private businesspersons and organizations. In ‘The Prior Consultation Systems of the Japan Fair Trade Commission’ (Section 2, Chapter 2), Yamanaka notes that the various guidelines and notifications of case processing results made public by the JFTC are done so in accordance with the rights granted to the JFTC in Article 43 of the Anti-Monopoly Act (pp. 100–101), upon which she discusses one of the JFTC’s three prior consultation systems, the Official Prior Consultation System, in detail (pp. 108–112). Finally, she analyzes all the JFTC’s prior consultation systems. In ‘A Study on the Formation of Soft Law through Measures to Resolve Issues in Business Merger Regulations’ (Section 2, Chapter 3), Takizawa aggregates data on measures used by the JFTC to resolve issues in prior consultations on business mergers and, assuming the possible formulation of soft law in that process, introduces the Merger Remedies Study released by the European Committee in 2005 (pp. 124–140). Based on this, she covers in detail areas where the formation of soft law can be proven from published cases of measures used by the JFTC to resolve issues, and where the formation of soft law is inadequate (pp. 140–143). In ‘Formation of Anti-Monopoly Act-related Standards from Incident Resolution that Favors Agents’ (Section 2, Chapter 4), Shiraishi shows how standards that are comparatively favorable to agents can be formulated, and he classifies and discusses five types of such standards. Ohkubo, in ‘Disclosure Rule Violations in Standardization Activities and the Anti-Monopoly Act’ (Section 2, Chapter 5), discusses the disclosure rules that participants in standardization activities—who voluntarily stipulate patent policies—are obliged to formulate when they possess significant rights vis-à-vis the technologies they attempt to use as standards. As for violations of disclosure rules which constitute some voluntary agreements between individuals, Ohkubo outlines how American court rulings and theories have been discussed to date with regard to the following three points: (a) subjective aspects of nondisclosers; (b) whether or not nondisclosers maintain a dominant position, and (c) certification of patent policy content.

Section Three, ‘Tax Law’, begins with Masui’s ‘Experiments in the Formation of Tax Law’ (Section 3, Chapter 1) which explores the following three questions drawn from the Tax Interpretation Circulars issued by the National Tax Agency (NTA): why do people obey the circulars (pp. 188–193), in what fields are the circulars used (pp. 193–199), and how will the circulars change over time (pp. 200–206). In ‘Reconciliation in Tax Law’ (Section 3, Chapter 2), Watanabe introduces theories, rulings and foreign practices pertaining to reconciliation starting with tax litigation, and more specifically with the opinion of some businesspersons that reconciliation should be permitted for transfer pricing suits. In ‘Some Issues with Trust Tax in Land Trust Circulars’ (Section 3, Chapter 3), Kobayashi explains the trust tax system and land trusts in detail, after which he points out that the circulars have come to define some very important points with regard to the attribution—in terms of tax law—of land as a fiduciary asset. In the final article, ‘Rule Formation and Soft Law in International Tax Law’ (Section 3, Chapter 4), Asatsuma discusses whether or not OECD commentary affects the interpretation of tax treaties in determining conflicts of CFC (controlled foreign corporation) rules and tax treaties.

As outlined above, this book provides analyses of legal norms that are (a) derived from many kinds of government regulation and are (b) neither statutory laws nor laws of precedent. These analyses pose several important questions to be tackled in legal research in the future.

First, tax law in this book is used as one example of government regulation, but one must focus on Masui’s seemingly self-destructive statement that ‘rules on the conditions for taxation are, strictly speaking, not “regulations”’ (p. 195). Masui is probably referring to rules on the conditions for taxation as rules pertaining to what conditions must be fulfilled for a tax liability to arise, as opposed to

rules pertaining to whether or not the government can regulate individuals based on its authority. The basic rule for interpreting tax law that has been stressed since olden times is to determine if cases are neither *in dubio pro fisco* nor *in dubio contra fiscum* (Kaneko, 2010). Masui's statement agrees with this rule and can be considered appropriate.

Second, in Masui's article, rules on the conditions for taxation are not described at the level of laws or orders delegated by laws, but as circulars (or lower level standards), and he attempts to explain these as experimental-stage or interim rules. Masui posits that while the NTA has provided tentative responses to unresolved issues, they have done so with circulars that contain written replies to preliminary inquiries. This is an attractive hypothesis, but it makes me wonder why rules on the conditions for taxation have never been elevated to the status of statutes but have been handled instead at the circular level for such a long period of time. For example, the Lease Circulars mentioned by Masui and the Land Trust Circulars mentioned by Kobayashi were not elevated to laws for a very long time. Explaining the reason for this may fall outside the scope of traditional legal research, but it could be a possible subject for research in the field of law and politics.

Third, discourses on soft law—the research topic of this book—have been made public; yet, this raises the question of why such discourses were ever made public in the first place. Keeping in mind prior consultations with the JFTC, Yamanaka broaches the subject directly, 'Is making a discourse public an absolute necessity and on what grounds should it be made public?' (p. 115). This is an important point because a discourse made public by a highly influential actor is often recognized as possessing a standard meaning despite the intentions of said actor. For example, if the JFTC or NTA publicizes its response to a consultation from an enterprise or an individual taxpayer, other enterprises and taxpayers end up giving it the value of a precedent. This is the same phenomenon that occurs when the details of court decisions passed with the intention of being case rulings come to be treated as judicial precedents. This means that the JFTC and NTA publicize their responses only when they want them to serve as precedents (Yamanaka makes this point on p. 115). Likewise, this means that enterprises and taxpayers will not seek consultations if it seems they may receive responses that they do not want to serve as references for other enterprises and taxpayers. This can also give positive meaning to cases where soft law does not exist or does not come into being.

All the articles in this book, including those I did not cite above, discuss the soft law of government regulation on the surface, but beyond that, they all raise important questions outside the realms of government regulation and soft law. For this reason, this book is worthy of reference not only for economic law and tax law experts but also for anyone interested in analyzing society with flexible thinking.

Reference

Kaneko, Hiroshi. 2010. *Sozeihō* (Tax Law). 15th ed. Tokyo: Kōbundō.