CONSIDERATIONS ON ROLE AND FUNCTION OF INDEPENDENT OUTSIDE DIRECTORS UNDER JAPANESE CORPORATE LAW WITH REFERENCE TO BOARD COMPOSITION IN GERMANY

(AFTER THE 2015 AMENDMENT OF THE COMPANIES ACT AND THE IMPLEMENTATION OF JAPAN'S CORPORATE GOVERNANCE CODE)

ABSTRACT

Although unabated debate about corporate governance has been haunting Japan for the last decades, vigorous legal reform only set in significantly later and culminated in the enactment of the Companies Act in 2005. At that time, it appeared that lawmakers had galloped ahead and their idea to emphatically introduce the management model in Japan was met with certain indifference. Notwithstanding the nearly non-reception, reform resonated as a wake-up call. A decade passed until in 2015 further debate eventually engendered a compromise cast into a comprehensive amendment that coincided with the adoption of the novel Japanese Corporate Governance. Common denominator of reform efforts has been the incorporation of independent, outside directors on boards of directors in Japanese corporations.

Regulators' activity reveals a change in the undercurrent of Japanese corporate culture that might bespeak a corresponding mentality change. In the Japanese corporate governance landscape, cross-shareholdings and long-term employment have receded to "safety levels". The withdrawal of the main bank heralds the departure of the main actor in an internal corporate governance model shaped by networking and entrenched relationships between members of the "corporate community". If all institutions have apparently passed their zenith and such development is not counterbalanced by emergence or invigoration of another actor, free reign would be conceded to management. The legal transplant of independent, outside directors that arrived in Japan concurrently with the management model has potential to ensure effective management monitoring. Whether it can take root depends on whether regulatory steps taken so far are sufficient to supply independent directors with role and authority commensurate with their task, and whether the Japanese business community is prepared to embrace change.

The paper takes an effort to ascertain what role and function of independent, outside directors in the Japanese setting are, and how such role and function can be conducive to achieve effective monitoring.

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CHAPTER I INTRODUCTION

A. SETTING THE TONE

The corporate governance models in different jurisdictions are perceived to be on converging paths. Such perception seems to contain some truth with regard to the jurisdiction of Japan that historically is viewed as an exponent of a variant of capitalism. This variation is defined by Japan’s adherence to a rather stakeholder-oriented than shareholder-oriented corporate governance philosophy. Even if corporate governance models are attested convergence, this does not necessarily imply that different legal systems join in on the course of one incumbent corporate governance model. Reception of law and legal thought does usually not occur in a mere one-way. Also, existing social and legal institutions are usually not simply superseded and replaced by different, new ones, but rather form layers. Furthermore, legal transplantation or the integration of new legal concepts into an existing institutional network has an impact on the legal transplant that is tailored or altered according to the existing institutional framework it is taken from. Social, non-legal norms and concept might further mold the legal transplant in the new surroundings.

In the course of this paper I would like to focus on the role of independent, outside company directors within the overall matrix of Japan’s corporate governance institutions. I would like to discuss and evaluate how Japan has coped with the demand – articulated by outside, international investors – to disentangle alleged and actual networks and interlocking between corporations which resulted in the creation of the concept of an overall “corporate community”, or on company level of “company as a family”[1], and the call to establish an independent element that would vouch for an effective monitoring and review of management and executive activity regardless of how legitimate such claim might be.

As far as the incorporation of independent, outside directors concerns the composition of a board of directors, the paper will cast a glance at corporate boards in Germany. Notwithstanding, Germany’s corporate governance will solely be covered as to board composition.

B. BRIEF HISTORICAL EXCURSION

Societally predisposed strong stakeholder affiliation of corporations in Japan and welfare of the system resulted in the fact that corporate governance was only discussed with significant time delay. Prior to such debate, company law was employed as a vehicle to orchestrate and coordinate political economic and corporate policy between corporations and the relations to their stakeholders, rather than as a tool for shareholder- and investor-oriented monitoring of corporations. Monitoring was entrusted to insiders and implemented through relational arrangements between the actors involved in a corporation[2]. A corporation was viewed within its societal embeddedness, hence less considered from the perspective of profit maximization for the benefit of its shareholders. Corporate policy was orientated at welfare maximization for a corporation and its stakeholders. As a result, companies were perceived to be committed to a form of corporate social responsibility instead of merely eying at profit maximization.

The performance of the Japanese economy under its corporate system successfully prevented the rise of criticism until the 1990s, when Japan began to face serious economic headwind, tumbling into economic recession. In view face of floundering firms, corporate structures began to face scrutiny and criticism. Lingering recession made Japan face external pressure for opening its markets and internal pressure urging reform alike[3]. Debates around corporate governance surfaced. Henceforth, Japan has more or less reluctantly implemented reforms which – on paper – aim to integrate a more shareholder-oriented approach modelled after US and UK style company law into its existing corporate governance regime through incremental change.

One focus of reform was the dismantling of corporate interlocking, in order to ensure transparency and accountability. It was regarded as an important puzzle piece to (re-)gain international investors’ and shareholders' trust and belief into an objective monitoring of corporative management. To this purpose, it was deemed mandatory and has likewise been demanded by foreign investors to enhance corporate management efficiency and prevalently to establish standards that would ensure the independence of directors, since only directors with minimum personal involvement and thus potential conflict were believed to warrant objective review of corporate management[4]. The question remains whether actual implementation of reform has kept pace with the external demands and internal proclamations. Also, it is to be seen whether the degree of change adopted is sufficient to live up to the policy goals.

C. COURSE OF THE RESEARCH

The paper concentrates on the component of independent, outside company directors within the system of corporate governance in Japan. The corporate governance system itself is composed of various components like size of a firm, ownership structure, financial system, capital market, labor system, culture and eventually law[5]. As regards size of a firm and ownership structure the paper only considers what is defined as public large company within the ambit of the Companies Act[6]. A public large company is the archetypal form of what has widely been perceived and denoted as the “Japanese firm”, or “J-firm” in short[7]. The idea of complementarities concerning the interaction of different components of a system[8] advocates reviewing the other components in order to better understand the system as a whole. To this purpose, the components financial system and capital market (main bank system), as well as labor system (long-term employment), culture and law (the rule of non-legal norms) will be represented by an institution that the author deems as respectively representative. Additionally, the phenomena of interlocking between business entities, as well as between business and government represented by cross-shareholding, *keiretsu* as well as *amakudari*[9] will be briefly covered. The aforementioned components all share an interface with the envisaged role of independent, outside directors. Independent, outside directors are viewed as a contribution to an effective monitoring of a company – and thus also complementing the nowadays dwindling influence of main banks that formerly has widely been considered as the focal point of "relational contingent governance"[10] –, and are envisaged to play a role in the requested emancipation from other institutions, notably the different forms of interlocking like *keiretsu* and *amakudari*. After having thus surveyed the topography of corporate governance institutions in Japan, the paper will proceed with reviewing recent regulative activity on the inauguration of independent, outside company directors in Japan, before concluding with a brief overview of governing bodies and board composition in Germany. Then, the paper will embark on an analysis of the implementation, its efficiency as well as its potential effects.

D. CONCEPT OF INDEPENDENT, OUTSIDE DIRECTORS

The role of directors in general is regarded as that of a trustee of the shareholders' interest in the financial performance of a company[11]. In order to ensure that directors attend to the shareholders' interest, it is that shareholders (formally) appoint and dismiss directors. Directors then appoint the management of a company[12]. Thus, shareholders delegate the monitoring of the management to directors. However, since the influence on the list of candidates to be appointed as directors is usually withheld from the shareholders, but rather lies with the board of directors and the management, the independence of directors is viewed as safeguard and guarantee to avoid potential conflicts of interest[13].

Independent, outside directors form an internal control mechanism – ensuring firm-internal linkage by board representation –, within the overall matrix of corporate governance. In the course of seeking "sustainable corporate growth and increased corporate value over the mid- to long-term"[14] and in an effort to overcome the undervaluation of Japanese companies due to a so-called "governance discount" attributed for a perceived lack of management transparency by investors[15], the Tokyo Stock Exchange (hereinafter "TSE") implemented a Corporate Governance Code (hereinafter "JCGC") as of June 2015[16]. Inspiration by the OECD

Principles of Corporate Governance has left visible traces on the JCGC[17]. However, at the same time the JCGC includes two innovations in the shape of (1) the duty to disclose cross-shareholdings articulating the underlying idea to encourage (further) reduction of mutual cross-shareholding (Principle 1.4), and (2) the appointment of two “independent outside” directors (Principle 4.8)[18]. Conceptually, the TSE employs a “comply-or-explain” approach modelled after the UK’s Combined Code, meaning that companies are subject to the rules, but can opt not to comply with the rules. In that event, such company is required to disclose its standards and reasoning why it decides to deviate. As can be seen from the fact of being enshrined in the JCGC, the institution of “independent outside” directors is devised to occupy a key role within the program to overhaul corporate law and anchor corporate governance in Japan[19].

Embedded in the large-scale debate on how to solve the principal-agent-conflict that is perceived to form the basis of the whole corporate governance debate subsequent to the ground-breaking works of Berle and Means[20], outside or non-executive directors are considered as an internal control factor over the management safeguarding re-alignment of management and owner interest[21]. A high degree of independent directors warranting a certain impact of their decisions is generally deemed to have a positive influence on a company’s performance[22]. Although this view can legitimately be challenged[23], the JCGC was adopted under the precept to spark economic growth. Consequently, this sets the standard against which the enacted regulations have to be measured.

Conceptually, independent directors are attributed the role of monitoring the management. The division between management on the one hand and monitoring on the other hand seems clear-cut by the corporate governance regime in effect in Germany. Under the incumbent two-tier regime, the former falls within in the ambit of the management board, while a separate supervisory board absorbs the tasks of monitoring. But even under this at first glance distinct division a certain blurring of the institutional bifurcation and consequently, amalgamation as to the different competences occurs: For example, the supervisory board is involved in mapping out the overall course of business which the management then seeks to implement which then again is subject to the monitoring by the supervisory board, meaning that the supervisory board gets implicated in the ex-ante and ex-post evaluation of business alike, militating against the assumption of a demarcation between two boards[24].

Additionally, independent directors as an institution are embedded into the overall web of corporate governance institutions which might obstruct or facilitate their designed objective. The institution of independent directors cannot be reviewed in insulation, but rather in the context with its surrounding institutions. Independent directors face their role in line with these other institutions which from a critical perspective sometimes overshadow the impact of independent directors, irrespective of whether there is a corresponding statutory or generally speaking regulatory basis. Laws and regulations tend to become superimposed where actors originally subject to them deem them as not satisfactory – a phenomenon that can well be observed in the context of economics and is further reflected in the problem that laws and regulations try to keep pace with the developments[25]. Specifically, Japan is notorious as regards the establishment and perseverance of parallel, non-legal institutions[26]. Therefore, the paper will first take a detour and embark on the overall factual landscape of eminent corporate governance institutions in Japan irrespective of whether the relevant actors and functions rest on statutes and regulations, or non-legal rules.

E. METHODOLOGY

The paper will embark on the corporate governance system in Japan in order to point out the role that independent, outside company directors are attributed within the overall corporate governance framework. By doing so, the paper simultaneously will apply a partly comparative approach between Japan and Germany. This approach is chosen for the benefit of a better evaluation of the Japanese corporate governance system. When evaluating the role of independent, outside directors, the paper will resort to what the author considers as global standards, thus abiding by a comparative approach.

As a caveat, the paper rather considers the institutional phenomena than scrutinizing the underlying statutory provisions without neglecting reference where it is deemed necessary. The focus is rather on policy aims than on the elements and interpretation of certain legal provisions. The research aim is to consider the system and its functioning as a whole, rather than to delve into the particulars of statutory law.

F. JUSTIFICATION: WHY JAPAN AND GERMANY

The corporate governance regimes of Japan and Germany are found to share certain "systemic affinities"[27]. Their respective "special trajectory"[28] of capitalism developed in parallel, but at the same time distinct from each other against the backdrop of the specific historical conditions in both jurisdictions in the post-war period[29]. Consequently, Japan and Germany are usually identified as representatives of their respective idiosyncratic interpretation of capitalism as "coordinated" market economies[30]. Under the conditions present in these coordinated market economies, the relationship developed between firms can be called collaborative rather than competitive[31]. Collaborative relates to the observation that the economic actors rather than on competitive market arrangements and formal contracting firms in a coordinated market economy rely to a higher degree on non-market relationships. To this end, unfettered competition is to a larger degree substituted and supplemented by the existence of private networks and the exchange of information within these networks. The whole system usually revolves around the heavy involvement of banks, as Japan and Germany as both traditionally bank-based economies, as opposed to market-based financed economies, verify[32]. This trait leads to high levels of relationship lending and bank corporate shareholding[33].

Another characteristic is that firms under a coordinated market economy rather aim for growth of the company than of profits. In this vein, the corporate governance models enforced in Japan and Germany are rather stakeholder-oriented than merely shareholder-oriented and adhere to a certain concept of "corporate social responsibility". Japan's corporations are accordingly perceived as forming a "corporative community" and each company as a family[34]. In Germany the system as a whole was referred to "AG Deutschland", meaning stock corporation Germany, reflecting the high degree of interlocking and networking between the different actors. Although the factual corporate governance landscape appears to bear certain resemblances in both jurisdictions, simultaneously it has to be kept in mind that the actors under both jurisdictions developed different mechanisms, relationships and arrangements, but also regulatory frameworks[35].

It has to be noted, however, that the debate on corporate governance under both jurisdictions does not span over more than two decades and was triggered by external influences, predominantly through the pressure exercised by foreign investors. Against this backdrop it has an interesting note to it that the question of convergence hovers over the debate on corporate governance in both jurisdictions[36]. The analysis should therefore also regard whether the institution of independent directors within the Japanese context adheres to the origins of the legal transplant or rather assumed idiosyncratic features.

Another aspects that advocates Germany as a foil against which the Japanese corporate governance system, or at least board structure and composition, is projected, lies in the fact that Japanese civil and corporate law is described as having been heavily influenced by German law by way of "theory reception"[37]. Additionally, Japan legal thought continues to study German legal theory[38]. The original corporate structure revolving around a *kansayaku* or later *kansayaku* board as main monitoring, but effectively compliance, body additionally bears in its conceptual origins a certain, however weak, resemblance with the supervisory board under the two-tier board structure sustained[39] under the current corporate structure in Germany[40]. However, Japan's corporate governance structure has evolved its own peculiarities despite the formal influence of common and prevalently US law which is reflected by statutory law, but not necessarily by the actual corporate governance practice[41].

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CHAPTER II MAIN PART

A. JAPAN'S CORPORATE GOVERNANCE TOPOGRAPHY

I. A BRIEF SYNOPSIS OF THE CORPORATE GOVERNANCE DEBATE

The Japanese company law is described as having received influences with regard to system and theory from Germany, in particular the former Japanese Commercial Code enacted in 1899 – which then contained company law which was only spun-off by the enactment of the Companies Act – drew on the provisions of the German General Commercial Code of 1861[42]. The *kansayaku* board bears faint resemblances with its more powerful counterpart under German company law rules, the supervisory board[43]. The reception occurred in the overall setting of Japan's adoption of Western legal thought and system pronounced under the parole *wakon yosai* during the Meiji period[44]. In the period post World War II, US corporate law system was introduced on a large scale by means of immediate corporate law reform in 1948 and 1950[45]. The formal US influence persisted during the period after the bubble-burst in 1990s in a pronounced effort to meet "global standards", substantially meaning the adoption of US and UK style corporate governance[46].

1. Recent Developments

It were the aftermaths of the bubble economy which urged Japan to incrementally reform its company law for a about a decade starting in 1993 and culminating in the incisive amendment of 2005 which engendered a comprehensive company law codified in the Companies Act[47]. The legal development occurred against the backdrop of economic depression after the bubble burst in the early 1990s and entering a transition period after recession set in during the 1990s and the banking crisis occurring in 1997. A period of consolidation then set in between 2002 and 2007, before Japan started to continuously drift into a period of minimal economic growth and stagnation.

During this perpetual period of economic slump, a series of corporate muddles and scandals (*fushoji*) were eyed more carefully and shook Japan post 2010. Another factor might have been that they also concerned Japan’s largest company by revenue and global player, Toyota whose crisis revolving around the slow response to car recalls because of quality and safety issues surfaced in February 2010. Further down the lines, Tokyo Electric Power Company’s (“Tepco”) decision-making subsequent to the Great Eastern Earthquake of 11 March 2011 and the Olympus accounting scandal coming to light in late 2011, gained publicity. Although the latter were domestic scandals, they nonetheless were perceived as large-scale scandals eventually justified by incurred financial losses that were handed down to the shareholders. Similar events could be observed at Daio Paper Company in late 2011 and at AIJ Investment Advisors in 2012[48]. However, Japan could retain its position as second, before dropping to third largest economy worldwide.

As can be seen from this brief sketch, Japan’s corporate governance has been facing a changing economic environment for the last two, three decades. The question whether the Japanese corporate governance system concentrated on stakeholders has failed in the post-bubble era and therefore needs realignment on a rather shareholder-oriented system was regarded as crucial[49]. On a larger scale, globalization has led to an increasing integration of financial markets concomitant with growing significance of capital markets, and legal frameworks[50]. Consequently, global convergence triggered the question as to legal convergence including Japan’s corporate governance. Acknowledging this hypothesis, however, the preservation of characteristic traits of the Japanese model has been observed. As a consequence, it has been suggest that Japan’s corporate governance might head towards a hybrid model[51]. Within the overall effort to rekindle the flame of Japanese economy reflected by growth rates and through the attraction of foreign investment, the “Abenomics” have also turned an eye on corporate governance as a tool to achieve the proclaimed goals.

2. Corporate Governance Organization

From the conceptual outset, Japanese corporate organization strives for balance and stability. To this purpose, corporations used to rely on a network of close relationships with their main banks as the source of financial resource, as well as other members of their *keiretsu* corporate group. Additionally, corporations engaged in long-term relationship and investment in human capital, a phenomenon denoted as “life-time employment” or less emphatically put, “long-term employment”. A fruit reaped from long-term employment is the raising of insider directors who rise through the ranks of a corporation until they have reached the ladder’s top, a director position. In fact, insider directors and directors appointed by members of the same *keiretsu* as well as *amakudari* as lateral entrants from public authorities account for a large portion of the board of directors. The rewarding character has over time led to increasing board sizes[52]. Awareness of a need for healthier board structures and economic restraints have made corporations slim down boards. However, the complaints about a lack of a more robust monitoring structure that combines insider information access and outsider independence continue to linger[53]. The Herculean task will be how to integrate independent, outside elements into and make best use of existing structures and against prevalent business practices. At first sight, main banks, members of stable cross-shareholdings as well as long-term or lifetime employees seem potential candidates that hold and could share insider information. In this way, the scene of protagonists of Japan’s corporate governance structure starts to unfold.

II. CHARACTERISTIC FEATURES OF JAPAN'S CORPORATE GOVERNANCE REGIME

1. Main Bank System and “No-Fail”-Policy

The main bank as relational monitor at the heart of a *keiretsu* corporate conglomerate forms one of the major characteristics and repository for insider information within Japan’s traditional corporate governance matrix[54]. The main bank system heavily relied on bank loans being the principal financial source for corporations and which has been viewed as the driving force behind Japan's economic rise and continuous growth and as a significant contributor to its comparative advantage[55]. The ties between corporations and their main banks were manifested by the main bank holding up to statutorily permitted five per cent of shares in the corporation[56]. Notwithstanding, ties did not prevent clients from switching their main bank: The main bank system relates to a core of companies rather than claiming overall validity[57]. The banks' influence further intensified through shareholdings of other *keiretsu* members, thus rendering statutory restrictions ineffective[58]. Banks earned an information advantage ahead of other shareholders through intensive monitoring of the corporation[59]. The main bank system had an insulating effect on corporative management, and eventually through government policy on the banks themselves. It was the government's philosophy to shield companies and banks against impacts from capital markets. If a corporation were to drift into financial distress, the main bank would actively intervene by sending its emissaries to the client's board to put restructuring measures into practice or orchestrate with government backing friendly, coordinated reshuffling of underperforming firms[60]. In the Japanese setting, the main bank system had proved to be an efficient system for controlling agency costs and driving efficient restructuring[61].

a. Relationship between Main Bank and Client Company

The relationship can be briefly summed up that corporations were provided a buffer against oscillations on the capital market by their main banks in exchange for their shareholdings. Japanese companies used to borrow capital mainly from banks. Notwithstanding, most companies entertained a special relationship with one, their main bank. In return, the main bank held major payment settlement accounts, functioned as largest single lender and principal shareholder of the corporation[62]. Access to account and deposit transactions heaved the main bank into the position of the central information accumulation point holding accurate real time information about a company's financial health enabling them to also function as consultants for mapping out business strategies[63].

However, the stand-out characteristic lay in the main bank's implicit promise to restructure failing companies in times of financial or managerial crisis instead of trying to save itself first by for example prematurely foreclosing loans. The main bank's intervention was further motivated through its shareholding, putting the bank's very own shares at stake, but also its reputation[64]. Main banks were enabled to commit to such condition, because banks could rely on the government's implied promise to in turn prevent bank failure. In this way, a triangular relationship emerged[65].

The main bank’s central position within a *keiretsu* and its access to accurate information allowed a bank to monitor managerial performance effectively, thus contributing to an internal monitoring philosophy[66]. The bank’s debt and equity positions towards the corporation provided the bank with leverage to use information to steer management and design business strategies[67]. If deemed necessary, the main bank could further exercise control over agency costs by replacing senior corporate management by bank affiliated personnel, a phenomenon qualified as a substitute for an effective absent takeover market[68]. In that way, the main bank through its agents became even more directly involved in the client’s decision-making. Overall, the role of the main bank changed concomitant with growing involvement with clients’ business. In this vein, it has been observed that already since the 1980s banks had started to withdraw from taking bold decisions to revitalize firms in exchange for a more conservative approach caused by increasing internal bureaucracy[69].

The main bank’s implicit promise that it would assist in restructuring underperforming clients gave companies certainty in planning and liberated them from pressure to vindicate their business strategic versus shareholders. Managers were freed from the need to focus on short-term profits[70]. It enabled companies to pursue long-term goals and promote investment in human capital[71]. The main bank’s implicit promise to cover the company’s financial back and if necessary bail it out, allowed and incentivized companies to pass on this security to their employees and invest in long-term employment[72].

Being the spider in the web, the main bank did not suffer from the information asymmetry that dispersed shareholders are confronted with[73]. Banks being knowledgeable about their clients’ assets and their central role during restructuring processes further prevented the loss of valuable firm-specific assets through premature liquidation and costs incurred through formal bankruptcy proceedings[74]. Banks actively engaged in a contingent management of their clients who in return could rely on their main bank to intervene in times of economic hardship or crisis. The main bank functioned as the central actor of an insider-borne monitoring approach eclipsing and sidelining other corporate figures such as board of director, *kansayaku*, shareholders and effectively also corporate law regulations[75].

b. Relationship between State and Main Banks

The banks themselves were protected by the state's "no fail policy", denoting the implicit promise of the state to not let any bank go bankrupt[76]. This policy formed the backbone to consolidation and stability of a thus bank-based or bank-centered economy[77]. However, the burst of the economic bubble and the lacking adjustment to changing circumstances precipitated a banking crisis that culminating in the perversion of the system epitomized by the emergence of "zombie banks"[78]. Zombie banks refer to the result of loan roll-overs performed by ailing banks whose actions were effectively motivated by regulatory incentives to lend more loan volume to nearly insolvent clients in order to meet regulatory required capital standards[79]. However, on average banks did not allocate larger loan shares to least profitable companies nor did banks raise their shares in existing debts[80]. Despite certain misallocation of capital, the Japanese government avoided to rely on US-style hostile takeovers as a market mechanism to achieve capital reallocation, but rather orchestrated the restructuring of failing banks and companies itself at the cost of economic sway (2002 to 2007)[81]. Eventually, the banking crisis led to a market adjustment by "creative destruction"[82].

The banking crisis gave further rise to bank related corporate revival funds[83]. The incremental, but against the backdrop of the bubble burst accelerated withdrawal of the main bank from its immediate position to orchestrate corporate revival based on access to risk analysis information was cushioned by government intervention, most prominently through the Program for Financial Revival announced in 2002[84]. Thereunder, banks were incentivized to reduce their ratio of non-performing loans, as well as private investors and shareholders were brought on board in corporate restructuring and reorganization[85]. The transition was facilitated by the fact that corporate revival funds recruited personnel from among major banks, and banks entertained relationships on different intensity levels with these funds, further, banks rolled over their loans to the funds[86]. Another legal reform directed at banks to further reduce their shareholdings and further relinquish their position, was the introduction of share-for-share exchanges for companies in 1999 with the opportunity to apply for tax deferrals in the following year 2000[87].

2. Long-term or Lifetime Employment

Although Japan's corporate governance does not provide for any statutory employment participation in the actual management and supervision of a company comparable to the co-determination model in force in Germany, employment plays a significant role in the insider monitoring model[88]. Irrespective of its actual dimension[89], origins and ex-post explanations resorting to Confucian thought[90], the core idea behind long-term employment (*shuushin koyou*) developed as the most rational economic – not codified, but institutionalized – choice for all actors[91]. Despite all the perish songs intoned, one is well advised to realize that this concept is applicable to still a non-negligible percentage of the overall workforce[92].

a. Concept and Preconditions

Conceptually, long-term employment relies on the implicit promise made by the employer to its employees of employment until the age of retirement unless economic crisis renders layoffs unavoidable[93], in return for employees' promise not to abandon the company[94]. The position is further fortified by the non-availability of a functioning external labor market[95] and a "top-heavy" compensation and promotion system based on seniority[96]. Corporations were enabled to commit to such promise through the existence of main banks and stable shareholders insulating them in times of financial turmoil[97]. Another aspect which roots in the long-term employment schemes is what is usually denoted as "internalism" or "corporate hegemony"[98]. The fact that internal promotion primarily relies on seniority leads to upper levels of the corporate hierarchy being occupied by long-serving employees. The prospect of promotion as a reward for ability, the accumulation of company-specific knowledge, but also loyalty to the company contributes to the fact that employees perceive their individual personal welfare and livelihood as closely connected to the company's economic well-being. Life-time employment aligns a corporation's economic with its employees' individual welfares. Employees receive additional motivation from the negative prospect of being sent to peripheral sectors and the social hardship they would encounter if their firm fails[99]. Thus, an inextricable tie bet-ween employees' including managers' financial future and company's economic performance is spun. Managers and core employees are thus motivated to ensure that investor capital is used to maximize corporate performance[100]. Effectively, long-term employees through security of employment, wages and promotion participate in the corporation's welfare becoming the company's quasi-owners. These two factors help to cut agency costs through self-interest[101].

b. <u>Company as a Family</u>

Similarly, a higher degree of identification with the company is achieved, culminating in the perception of the "company as a family"[102]. The concept of a family is further buttressed by the fact that starting a career as an employee with a company resembles the continuation of university, since companies tend to recruit their employees as graduate students directly from university (*shinsotsu ikkatsu saiyou*), so that new employees habitually start working on 1 April together with their other new co-workers[103]. The internal transfer scheme (*tenkin*) might further contribute to a strong degree of cohesion between co-workers. There generally is a high degree of socialization with the culture of a company[104]. Cohesion is further strengthened by the fact that directors and executives are recruited from among the employees. The board of directors prevalently consists of a corporation's career employees, since the internal promotion system runs from entry-level to the board of directors and also persists once being appointed director on the board[105]. Thus, long-term employment forms the key to internal corporative monitoring. Having risen through the ranks of a corporation before finally reaching the stage of a director, such director has accumulated a vast knowledge about the firm, has developed a network for information access, but also embraced responsibility for the other members of the family. Most presidents, directors and even statutory auditors are recruited among the employees of a company who rose through the ranks of the company they are later going to preside or guide. This socialization process within the firm makes it more unlikely to act against what is perceived as best for the firm. Directors are 'educated', notably 'socialized' and 'internalized', through their career way with the firm[106]. In this regard, however, a conflict can arise, in the event directors are heaved into a position in which they are supposed to review former own acts. With regard to the nonetheless occurrence of corporate scandals the saying has therefore been coined that such corporate crimes are not committed against the company, but for the benefit of it.

c. Attractiveness of Long-term Employment

Long-term employment also relies on the fact that employees have no viable exit opportunity owing to a defunct labor market. On the other hand, remuneration and promotion based on seniority (*nenkou joretsu*) offer strong monetary incentives for long-term commitment. Employees' reward is projected and deferred to the end of their careers. Notable elements are compensation schemes of increasing salaries contingent upon seniority and recently combined with merit pay (*nenkou*)[107], the payment of a lump sum upon retirement (*taishokukin*)[108] in conjunction with a mandatory retirement age (*teinen*)[109], and bonus compensation schemes dependent on overall firm performance[110]. Firm-specific education and on-the-job training foster the creation of firm-specific skills and thus contribute to strengthening the tie between employer and employees, but simultaneously 'trap' employees in a specific firm[111]. Investment in the development of firm-specific skills further increases opportunities for the corporation to redeploy its employees, for example through internal rotation[112]. Thus, a firm-internal or *keiretsu*-internal labor market is created. That is why it is not surprising that most career employees are cognizant upon being hired in their early twenties that they will remain with the company throughout their career until retirement.

d. <u>Monitoring Mechanisms</u>

Long-term employment forms a pillar for the internal monitoring scheme through career employees and long-term growth strategies eclipsing shareholders' interest in dividends for the benefit of job security epitomizing an investment philosophy relying on investment in human capital for the sake of returns on human capital[113]. Loyalty to the firm is rewarded by in-house career paths culminating in the prospect of becoming director. Boards typically consisted of senior managers representing the company's major divisions, thus representing its employees[114]. Once reaching the post of a director, the directors are encouraged by their own careers to ensure that the next generation can likewise enjoy such lifetime in-house career[115]. *Keiretsu* and career employment further support common and reciprocal interest: The absence of lateral movement to other companies disincentivises managers to put shareholder rights into practice against their peers, but rather maintain status quo in their own and others best interest[116]. Additionally, younger employees would bottom-up monitor the board members, since their very own career prospects are contingent upon the company's performance[117]. The board of directors mirrors the corporation-wide promotion ladder as through a magnifying glass. Additionally, there is a symbolic function attached to the board sending out the message for all management track employees[118]. The commonly large boards reproduce their own hierarchical structure[119]. There are usually four ranks below the president (*shachou*) ascending with seniority, namely ordinary director, regular director (*joumu*), special director (*senmu*) and vice-president[120]. *Senmu*, vice-president and president usually seize the positions of representative directors making them the top managers of a corporation[121]. Additionally, the prospect to retire as chairman is attached to such position[122]. Thus, career horizons do not end with attaining a management position (*kanrishoku*). This further deferred post-retirement career heights served as an additional performance check besides reputational concerns for board members[123]. The different levels of seniority on the board of directors also plays a role for the informal decision-making processes. Presidents of *keiretsu* members assemble informally (*shachou-kai*)[124]. On company level, *shachou* together with *semnu* and vice-president formed the *joumu-kai*, an often institutionalized decision-making committee that set out strategic planning and monitored performance of the corporation[125]. The board of directors then was left to disseminate and formal adopt the informal, but internally binding decisions of the *joumu-kai*[126].

e. Recent Developments

Although there is the general perception that stabilizing factors of the insider monitoring system have dissolved, it remains difficult to evaluate whether this actually is the case, also pertaining to long-term employment[127]. On the one hand, the rise of part-time employment cannot be overseen: Figures have increased from 15.1 per cent in 1990 to 23.6 per cent in 2002[128]. Altogether, non-regular employment schemes have experienced a surge from 20.2 per cent in 1990 to 33 per cent in 2005[129]. On the other hand, one can observe that the majority of seats on the board of directors continues to be conventionally filled, that is with insiders, meaning in-house socialized employees upon completion of their bureaucratized career track[130]. In order to keep the system running it has therefore been purported that non-regular employees are recruited in order to maintain long-term employment for core employees[131]. The concept of the “company as a family” continues to play an important role for internal corporate monitoring[132].

3. Shareholding

a. *Keiretsu* and Cross-Shareholding

Organizational interlocking known as *keiretsu*, literally meaning the formation of economic chains or line-up[133], appears in two facets, namely horizontal and vertical *keiretsu*[134]. Whereas, vertical *keiretsu* are being formed as a consequence of long-term exclusive manufacturersupplier relationships[135], horizontal *keiretsu* refer to the formation of corporate groups (*kigyou shuudan*) usually concomitant with reciprocal cross-shareholding (*kabushiki mochiai*)[136]. Cross-shareholding emulates pyramidal share-holding: Controlling interest in one or two key companies has been found sufficient to gain effective control over a whole corporate group or conglomerate[137]. However, the gist of cross-shareholding is rather stability and trust than building up a controlling position over other *keiretsu* members[138].

aa. Mechanism and Structure of Keiretsu

The term *keiretsu* is broader than the term cross-shareholding. *Keiretsu* refers to a corporate group or company network assembled around a main bank and a general trading company (*sougou shousha*) aimed at long-term cooperation and mutual support between its members[139]. Cross-shareholding describes a constellation in which two corporations hold each other's shares. On top of cross-shareholding, *keiretsu* can further encompass reciprocal directors, product market exchange, information exchange and a shared central main bank[140]. On the surface, cross-shareholding helps to build mutual trust and further deepen business ties[141], underneath it serves as the foundation of a relational network. This network entails access to financing through the main bank, monitoring through group control, plus risk reduction in the sense that cross-shareholding does its stint to insulate companies from short-term market oscillations and performance pressures. In this way, 'quasi-internal' shareholding facilitates long-term growth-oriented corporate management[142].

bb. Function and Developments

Keiretsu served as another pillar of internal corporate monitoring in line with main bank system and long-term employment[143]. It supports interconnection, stability and long-term managerial focus that the main bank bestowed upon its company clients by fending off or at least considerably reducing the threat of hostile takeovers due to such unattractive shareholding structures[144]. Stable shareholding within a *keiretsu* contributes to the aforementioned buffer between a *keiretsu* member and the stock market. Following the banking crisis of 1997 and subsequent regulatory activity the percentage of such insider-shareholding – that is shareholding by investors such as non-financial business, banks and insurers – has declined from levels above 45 per cent in 1987 to 27.1 per cent in 2002[145]. Among the three categories of insider investors the shareholdings by banks and insurance firms dropped significantly from 14.9 per cent to 7.7 per cent for banks, and from 16.4 per cent to 9.3 per cent for insurance firms, while the figures for non-financial firms decreased from 14.4 per cent to 10 per cent over the afore-defined period of time[146]. These figures demonstrate the general withdrawal of financial business from cross-shareholding and internal monitoring of corporations[147]. Prior, figures for bank borrowing by listed companies eroded from around 90 per cent in 1980 to 50 per cent in 1991 prefiguring the later to follow withdrawal of banks[148]. This development of disentangling from the main bank's influence can further be inferred from the significant drop in the ratio between long-term and short-term loans from 39 per cent in 1975 as its zenith to 17 per cent in 2008[149]. The fact that the level of shares held by individuals rose from 20.8 per cent in 1990 to 30.6 in 2000 further hints at a growing influence of 'classical' shareholders[150]. On the other hand, it should not be disregarded that within the same decade the levels of shares held by corporations and banks only slightly dropped from 37.5 per cent to 32.6 per cent[151].

Pursuing this tendency further, in 2012 figures for corporations and banks still hovered around levels of 30 per cent, thus accounting for a lower percentage compared to shares held by overseas investors[152]. Correspondingly, it has been noted that the unwinding of cross-shareholding pertains to a large degree to large public corporations. On the other hand, small and medium-sized companies seem to be continuously susceptible to significant levels of cross-shareholding and therefore averse to foreign investment[153]. If one takes a closer look at changes in shareholding structures between 2005 and 2012, it is remarkable that the shares held by main bank, financial institutions and corporations seem to have evened out. In particular, the aggregate shareholding of financial institutions accounts for 28 per cent in 2012 compared to 30.9 per cent in 2007. On the other hand, the shares held by corporations slightly rose from 21.3 to 21.7 per cent. The levels of individual shareholding continue to oscillate around 20 per cent with 19.9 per cent in 2005 and 20.2 per cent in 2012. They can even be found to be decreasing if compared to 22.3 per cent in 1985. Also, the percentage of shares held by foreign investors has not been subject to significant change between 2005 and 2012, accounting for 26.3 per cent and 28 per cent respectively and mainly being associated with large corporations and following in the footsteps of Japanese institutional investors[154]. Given the likewise predominantly unchanging portion of cross-shareholding, one should not under-estimate the impact foreign investors can exercise in a shareholders' meeting against the backdrop of the illiquidity of cross-held shares[155].

Other figures reveal a similar pattern: Influence and importance of institutional investors has increased, demonstrated by a rise from slightly above 30 per cent in 1990 to more than 50 per cent in 2015[156]. Similarly, foreign investors accounted for 28 per cent of holdings in 2015 compared to 14 per cent in 2000, coinciding with the global trend[157]. After going through the bottom of a valley in the period from 1998 to 2004, a slight increase of levels of cross-shareholdings, hence a slight invigorating of networks post 2004 can be observed[158]. In 2015 cross-shareholdings have been claimed to account for 11 per cent of market capitalization[159]. This observation, however, only pertains to the revival of ties between business partners, therefore classical *keiretsu* ties, with the omission of banks[160].

cc. Recent Policies

On the side of policy-making, the Japanese Financial Services Agency (hereinafter "FSA") adopted a disclosure requirement for listed companies in 2010 where under corporations are to disclose the concerned shareholdings in their annual reports[161]. Conceptually, thus inves-tors shall be provided with information on the companies' involvement in cross-shareholding and corporations shall be encouraged to further reduce cross-shareholding[162]. The publication requirement has been perpetuated under Principle 1.4 of the JCGC which requires disclosure of cross-shareholdings[163]. The effectiveness of these measures is partly questioned and has been dubbed as a “blunt sword”, since they disregard the overall circumstances, namely that corporations concerned are well insulated by cross-shareholdings and thus not likely to be concerned about their reputation in the capital market and the interests of investors[164]. However, it can be equally doubted what degree of effectiveness alternative regulatory measures such as prohibition or establishing a liability could potentially achieve[165].

b. Shareholder Protection

Within a corporate governance system in which companies can rely on insider shareholders, the protection of outside shareholders becomes all the more virulent. This is all the more valid, since overall shareholding in Japan is dispersed, whereby the figures tend to be distorted due to the still considerable ratio of stable cross-shareholding, notwithstanding this, shareholding altogether can still be characterized as dispersed[166] and is counted towards having a mixed ownership structure[167]. The presence of cross-shareholding dilutes the stock market’s function as a means of corporate control, but also conceals effective shareholding[168]. This is mirrored by the facts that less than 10 per cent of listed companies are controlled by a single shareholder owning more 50 per cent of its shares, but around two thirds have a single shareholding accounting for more than 10 per cent of shares[169].

aa. Statutorily-Induced Shareholder Activism

Responding to this structural need, the provisions of the Companies Act equip shareholders with significant power in the fields of changing the corporate charter, with regard to control and election of the board of directors, and with a strong derivative action[170]. In particular, the provisions pertaining to the initiation of a derivative action and the inherent formalistic and categorical approach taken therein[171] should be prone to initiate shareholder activism borne by hedge funds and institutional investors[172]. Additionally, shareholders can demand the corporation to bring a suit against directors[173]. If the request is not complied with, a shareholder itself can bring a derivative action against directors within 60 days of the said demand. Unlike the in the US, it is not necessary to establish that the refusal was wrongful or that making the demand was futile[174]. Neither can the court dismiss the case on the ground that the suit is not in the interest of the corporation or the shareholders as a class. Most significantly, in order to establish standing, shareholders are only required to hold one share for six months preceding the suit. The provision does not stipulate any requirement as to the shareholding being contemporary to the alleged wrongdoing of the director. Another aspect lies with the fact that by an amendment in 1993 the filing fee for a derivative action amounts to ¥ 8,200 which sparked a sharp increase in annual derivative actions upon its introduction: The numbers increased from two derivative actions per two years prior to 1993 to 39 filings in 1993 as the year of the reform and up to 220 filings in 1999[175].

bb. Inertia through Stable Shareholding

The legally strong position according to the black letters of the law is not equally mirrored by the awareness and practice of shareholders[176]. This is partly attributed to the presence of cross-shareholding that is perceived to enfeeble the statutorily envisioned strength of shareholders' class-based rights[177]. These insider shareholders tend to support the incumbent management, rather than lodging a suit against it[178]. Furthermore, mutual shareholding leads to a board of director and management rather representing and advocating the interests of other – mainly *keiretsu*-affiliated – corporations than those of classical individual shareholders[179]. On the other hand, in lieu of the classical principal-agent conflict a corporation's management is accountable to its owners. In case ownership is not dispersed among classical individual shareholders, but held by other corporations aiming at stability, this might cut agency costs due to the representation of the – *keiretsu*-affiliated – owners on the board of directors, but constitutes a deficiency of the overall system with regard to external shareholders[180]. Stable shareholding therefore effectively insulates corporate management against outside monitoring exercised by shareholder control.

4. Closing of Ranks between Government and Business

Business and governmental policy in Japan seem to go hand in hand. The reason for this interlocking can be traced back to the concept of a developmental state. Furthermore, the institutional link is fortified by personal connections. Executives of Japan's politics and business are likewise perceived to be recruited among a pool of elites. Moreover, members of the elite seem to be able to switch freely between the branches. This can be exemplified by the institution of *amakudari*, a reemployment scheme for high-level, ministerial bureaucrats in high-level positions in private and public companies[181]. Both phenomena are manifestations of the concept of inter-institutional cooperation for the best outcome for every actor[182].

a. <u>Developmental State</u>

Japan has been described as 'developmental state', drawing on the concept of a state's leading role in macroeconomic planning in late twentieth century East Asia[183]. This implies heavy government involvement in drawing up industrial policy, directing and monitoring industrial organization, exemplified by the J-firm within its network which also includes governmental support of the main bank system[184] and condoning – if not facilitating[185] – the formation of *keiretsu* corporate groups through cross-shareholding and informal ties, in order to observe fair competition on the domestic market and to become and remain competitive on the global scale[186]. The orchestration of bank-driven reallocation of capital and friendly mergers between firms subsequent to the banking crisis can be regarded as a prime example[187]. Government involvement in Japan in particular refers to the Ministry of Finance and the Ministry of Economy, Trade and Industry's (hereinafter "METI", formerly Ministry of International Trade and Industry, MITI) role, sometimes earning Japan the reputation of being a "government of administration" rather than of law[188]. The developmental state epitomizes the sidelining of unfettered capitalism and free market for the benefit of a concerted economy that relies on a network of mutual relationships and trust rather than each actor working to its individual benefit. In other words, it creates a collaborative, controlled form of capitalism. However, recent developments indicate the authorities' awareness to relinquish their position for the sake of a "participatory market economy" which rests on transparent rules, thus potentially giving way to a law-led approach[189].

b. <u>*Amakudari*</u>

Inter-institutional ties between politics, bureaucracy and business – often referred to as "iron triangle"[190] – are exemplified by of so-called *amakudari* which can be translated as "a descent from heaven". *Amakudari* refers to an unwritten, but institutionalized employment scheme by which retired government officers and more broadly public service officers are provided a sinecure[191]. In one of its appearances[192], which is solely deemed relevant in the context of this paper, *amakudari* offers former public officers, having reached the statutory retirement age of 60 or a dead-end in their potentially life-time ministerial career, the opportunity to acquire a position on the board of directors or as *kansayaku* in companies. *Amakudari* contribute to information exchange and coordinated policy-making, thus eventually to the stability of the overall system[193]. Another function that *amakudari* serve is for public authorities to ensure implementation of their regulations[194], and to provide administrative guidance, thus contributing to a "government-business-consensus"[195]. Bearing in mind the aforementioned concept of a "developmental state", *amakudari* contribute to a decentralized monitoring of business. *Amakudari* set up a contact point for consultation and cooperation[196]. On the other hand, the prospect of becoming *amakudari* adds a personal interest to civil servants' decision-making and might eventually disincentivise them to take decisions that would jeopardize their future potential career as *amakudari*[197]. Therefore, *amakudari* make government authorities susceptible to lobbying[198]. Although, it is the overall tendency that bureau-pluralism in general and placing of *amakudari* in management positions specifically is on the wane which can partly be attributed to regulatory reform[199], it is still common to allot advisory positions to *amakudari*[200].

5. The Relevance of Non-Legal Rules

Social phenomena have to be viewed holistically[201]. Fields of social life are interrelated. An observance can never be exclusively imputed to one field of social science. In this vein, law only represents a sector of the whole. Norms are accordingly no prerogative of law, but likewise occur in non-legal realms. These general findings become evident with Japanese corporate law. Its status quo developed its peculiarities despite being formally – by the black letters of law – oriented at US corporate law. As an explanation for this apparent paradox it has been put forward that law only prescribes the formal rules in which margin the actors are supposed to move, however, law does not necessarily reflect the rules the actors follow[202]. This concept might be all the truer for Japan. In continuation of Confucian thought, society defines itself rather by balance and harmony than difference, so that the legal system is attributed competence only in cases of distress[203]. The development of the afore-described peculiarities might be explained by the fact that legal norms have been transplanted on existing social, non-legal norms, and by the impact, and the importance of non-legal norms having their roots in social customs in Japan[204]. Besides, the embeddedness of legal norms in the historical and political environment means that non-legal norms constitute a parallel regime actors resort to, a regime that in practice sometimes can even supersede the law. Institutions like *keiretsu*, long-term employment and the main bank system, which rely on informal agreement and understanding of the actors involved, illustrate that non-legal elements play an influential role also in the field of corporate governance[205]. Essentially, all of the perceived characteristics of the J-firm rather rest on these non-legal norms than on statutory provisions. The actors have concertedly developed a system which they deem to be in their best interests or which they deem to be economically efficient within their setting[206]. However, this system is neither based on the law, nor reflected by the law. On the contrary, Japanese lawmakers now try to combat or codify certain forms of it.

a. Difference between Law and Practice Reflects the Way Things are Done

The characteristics of the J-firm reflect the overall societal concepts of community[207] and co-operation[208] in the sense that all actors of corporate governance work for the best result of all. The interpretation that corporate norms are a product of "informal interest group dynamics"[209] might offer an alternative economically-rooted explanation for the persistence of the non-statutory, essential qualities of the J-firm. Under Japan's corporate governance system economic decisions (management) and the mode of governance (monitoring) have been harmonized. Cross-shareholding, main bank system, long-term employment and role of government have developed, because they have established themselves as the most effective way in the Japanese setting, they coincide with the traditional way of doing business in Japan[210]. The characteristics' common denominator lies with long-term orientation of these relationships[211]. To this extent social norms reveal their impact. However, social norms alone do not shape the creation of institutions, but it is the interest articulated by interest groups that decide how to do things[212]. Social norms might facilitate the acceptance of institutions thus created[213].

b. Extra-legal Foundations

In this context it might be worth spending a thought that this might factor the high degree of identification companies achieve with their employees. The fact that employees perceive the company as another family might be facilitated and transitioned by the fact that social, that means in this context family, norms likewise apply to them. But again, the social norm facilitates the acceptance of the institution created by the consensus of employers' and employees' interests: The juxtaposition of home (*ie*) and company (*kaisha*) highlights that on the one hand association with the company bears resemblance with the conception of *ie*, manifest in the expression "my company" (*uchi no kaisha*) parallel to my home (*uchi*), however, the relationship is endorsed by an employment contract[214]. Thus, the company reproduces the social concept of *ie*, but the existence of a contract reveals its interest group driven origin.

Rooting in the concepts of *giri* and *sasshi*, there exists a higher degree of social accountability in Japan which is reflected in the more diversified conception of fiduciary duties and the long-term design of relationships[215]. Fiduciary duties can be identified also outside the scope of managers and directors towards shareholders. Not only the relations between employees and company, but also those between stakeholders in general and company correspond with reciprocal fiduciary duties that resemble the ties between the members of a family[216]. Thus, not only are executives answerable to directors and directors towards shareholders, but also employees towards managers and vice versa, and shareholders towards employees[217]. Pushing back the scope of *giri* is partly viewed as an essential precondition to successfully enforce legal norms[218].

c. Social Norms as Pacemaker for Effect of Legal Reforms

This phenomenon might offer an explanation for the perceived resilience of Japan's corporate governance system: Social norms require more time to adapt to change than legal reform[219]. In the Japanese setting one could therefore argue that the divergence between abrupt legal reform and incrementally changing social norms weakens the support social norms are used to provide for institutions molded by interest group consensus. That is why a change imposed by laws and regulations cannot achieve a rapid reorientation. Social engineering requires to be addressed with the same vigor as legal reform[220]. The institutions are deeply rooted in society. Society and its norms by necessity do not match the speed lawmakers wish to achieve. Japanese students continue to adhere to the idea to become public servants (*koumuin*) or company employees (*kaishain*) with a long-term employment perspective[221]. However, society's transformation under the exposure to globalization and the gradual adoption of Western values by Japanese changes the way of thinking and doing things[222]. Individual-oriented thinking gradually supplants group-oriented values, thus contributing to a slow erosion of group-oriented institutions such as long-term employment[223].

The high degree of interrelation of the industrial organization as a whole contributes to the fact that the system itself seems to be at rest – if one likes to stick with the model of Newton's First Law of Motion. Despite adoption of laws and regulations, the system might thus appear resilient, because of the conservative undercurrent. Deep systematic changes – if they are desired – need a fair amount of time.

II. Recent Changes or Towards a Conclusion

After reviewing the different elements that shaped the Japanese corporate governance system up to the current point, one can observe that save for the case of the main bank the institutions continue to play a significant role. At the same time, however, one cannot help but acknowledge that all institutions severely suffered during the bubble burst and its aftermaths. Unlike the main bank, however, levels of cross-shareholdings and long-term employment have been retained, although not to the same degree as prior to the bubble burst. It is not the place to meter whether the regaining of ground lost during the bubble resembles a "resurgence".

1. *Keiretsu* and Cross-Shareholding

Eventually, it can be stated that not only cross-shareholding has been unwound pertaining to the involvement of financial institutions, but generally institutions have survived, but have receded to "safety levels", however, sufficient to protect the "community firm"[224]. That would suggest that traditional business practices representing the way things were used to be done, are melded with necessities of market orientation against the backdrop of global market integration[225]. Another aspect to be factored in is that one of the main ideas behind the formation of *keiretsu*, namely to compensate for a lack of access to capital markets, has ceased to be virulent in lieu of the increasing internal funding capabilities concomitant with the transformation of the Japanese financial system[226]. Also, a certain market cleansing has occurred, as *keiretsu* members have merged, and thus contributed to decreasing numbers accounting for cross-shareholding[227]. Another interesting observation indicating a certain reluctance to open the door to the market too wide, is that corporations embarked on the strategy to repurchase shares formerly held by financial institutions[228]. In this sense cross-shareholding between *keiretsu* members does not make up for a portion comparable to the times prior to the burst of the economic bubble. Cross-shareholding as an institution persists, but lags behind the levels of the 1990s. Although cross-shareholdings have regained ground, the mere presence of foreign shareholders makes it hard to believe that they will further increase considerably. This statement seems to be valid despite recent slight downturns of foreign shareholdings.

2. Long-term Employment

Similarly, long-term employment has further receded. However, core employees can still enjoy and rely on the concept of long-term employment. When dealing with listed companies' corporate governance, this represents only a certain share of corporations among which a large share, however, still adheres to the core of the long-term employment concept while simultaneously integrating new elements, forming "hybrid patterns" and thus reinventing itself[229]. To put it differently, although in absolute numbers long-term employment has lost ground, for the share of corporations at interest for this paper, this institution continues to play a significant role. The integration of new elements such as merit-based pay rather indicates incremental modification and layering on existing patterns than radical abandonment[230]. The rise of part-time labor and emergence of the phenomenon of "freeters"[231] has contributed to push back archetypal career-track oriented, long-term employment[232]. The fact, however, that at its core long-term employment continues to exist, might be sufficient to further socialize management track employees, thus to provide a basis for the internal control corporate monitoring.

3. Main Bank's Departure

The institution of the main bank is an exception in this series. Main banks were hit hard by the economic crisis and were to recuperate themselves, but not their former position, yet, which will probably not change in the future. Deregulation of financial markets have vested corporations with other sources of capital influx replacing the main bank by an external capital market and internally generated funding[233]. The departure of the main bank from the stage leaves a gap in the corporate governance landscape. The main bank's role was characterized as that of a "self-interested manager"[234]. The self-interest arose from its stable shareholding. After main banks have relinquished their role, it is yet to be seen which actor can take up the vacated role. The vacuum left behind by the main bank could provide the gateway for independent directors to gain a weightier say on the board of directors. Relational monitoring would then recede in favor of external monitoring. This might be commensurate against the backdrop of an overall withdrawal of relational monitoring mechanism and the advent of – foreign, institutional (thus less active) – shareholders.

4. Transition: Whither to Go from Here?

Applying the idea of institutional complementarities between the different corporate governance institutions the effective withdrawal of the main bank elicits change or rather puts pressure on the other institutions to compensate for an otherwise eventuating performance drop[235]. The departure of the main bank as exponent of relational monitoring actor could be counterbalanced by independent, outside directors as external monitoring actors. Although an external monitoring organ is alien to the Japanese corporate governance system that relies on internal and relational monitoring of corporate management, the institution itself is conceptually not novel as of 2015.

Incrementally, the *kansayaku* has been extracted from ties with the corporation and the institution of outside *kansayaku* has been established. In a way, the introduction of independent, outside directors can be viewed as logical sequel to a further liberation of the audit organ from ties with its corporation. This interpretation can further be endorsed by the further narrowing down of the scope of who qualifies as outside *kansayaku* and outside director alike. The institution of independent, outside directors is yet far from exhausting its endogenous potential.

Further optimism could be drawn from what has been perceived as Japan's swivel towards "hybrid model" in terms of corporate governance models[236]. Hybrid refers to the combination of idiosyncratic successful and established components with new inputs, and is potentially a viable solution for Japan. This concept is mirrored by the idea of "institutional layering" that entails that new institutions are added to a network of existing institutions.

Recent reforms have put emphasis on installing and incorporating independent directors on corporate boards to strengthen monitoring of corporate management. While the 2005 enactment of the Companies Act first articulated the idea of outside company director – and thus raised awareness of the matter – under the target to add independent elements to management review, the recent 2015 amendment of the Companies Act was rather motivated to rekindle economic growth. The JCGC, however, rather seems to focus on independent directors as a source of advice and consultation.

III. Independent, Outside Directors

1. Concepts of a Board of Directors and Independent Outside Board Members

Board structure and board composition form two pillars that reconcile the separation between ownership and management inherent within a corporation. Under a one-tier system there exists only one board and the different tasks are divided among the directors of the board. In order to avoid any potential and actual blending of resorts and therefore conflicts in the person of a director, there usually is a division between executive and non-executive directors. Consequently, the board of directors is designed to oversee the directors entrusted and responsible for the management, namely representative directors or executive officers. However, non-executive directors as board members are still involved in setting the company's strategy and hence management activity. The involvement of such inside directors in management activity makes it difficult to perceive such directors as wardens of shareholders' interests[237] and as an active voice on the board of directors[238]. As a remedy corporate law usually resorts to two sets of measures to separate management and monitoring function.

One way is to include provisions that secure the personal independence of directors in order to warrant that such directors fulfil their monitoring tasks as objectively as necessary and possible. In this way, it should be warranted that the management is prevented from acting against shareholders' interests[239]. Therefore, certain safeguards are introduced to guarantee a certain degree of detachment. A common qualification for independent directors is their financial independence from the company's management due the fact that their principal employment is external to that company[240]. Such approach comes under threat to be thwarted in case that external employment is in a way linked with the company to be monitored[241]. Such scenario can be easily imagined against the backdrop of the above-discussed *keiretsu*. Another approach is to encourage the formation of committees charged with monitoring tasks such as nomination, remuneration and audit[242].

2. Actual Board Structure in Japan: Directors and Auditors

Conceptually, the two ways how to organize board of directors have been mapped out. One model is the so-called management model that Japan traditionally adheres to. The management model entails that the board of directors actively manages the company. The alternative is the monitoring model as embodied by US corporate governance. Thereunder, the competences of management on the one hand and monitoring and supervision on the other hand are combined on the board[243]. In detail this means that non-executive directors monitor the management by executive directors. The effectiveness of the monitoring process borne by non-executive members is contingent upon their independence and integrity[244].

Under the Companies Act[245] every stock corporation is required to have a general meeting of shareholders and a board of directors[246]. The Companies Act stipulates more detailed and stricter precepts for large public companies that are the focus of this paper. Conceptually, companies can choose between two different corporate governance structures, the management or the monitoring model. Altogether three possible organizational forms are available.

a. <u>Company with *Kansayaku*</u>

aa. Statutory Layout

Japanese corporate governance used to revolve around a two-tier structure inspired by German legal thought – however materially different as to appointment and dismissal as well as composition, and a limited scope of responsibilities – consisting of a board of directors with representative directors and separate so-called *kansayaku*[247] that later started to form the *kansayaku* board[248]. The position and authority of *kansayaku* had been the gateway to board reform as the amendments dating from 1981, 1993 and 2001 indicate that were related to an increase in numbers and formation of a *kansayaku* board, full-time activity, extension of term of office, and outside company origin[249]. Currently, the *kansayaku* board consists of at least three *kansayaku* of which one is required to be a full-time *kansayaku*[250]. One *kansayaku* becoming acquainted with business and organization of the corporation is viewed as an integral part to effective auditing[251]. Moreover, thus a constantly available contact point is installed within the corporation. The majority of the *kansayaku* sitting on the *kansayaku* board is required to be outside *kansayaku*[252]. A person becomes only eligible as *kansayaku* – regardless whether being outside company *kansayaku* or not – if one does not concurrently with its term of office serve as director, employee, including a manager, of that company or one of its subsidiaries, nor as accounting advisor or executive officer of such subsidiary[253]. Like members of the board of directors *kansayaku* are subject to appointment and dismissal by the general meeting of shareholders[254].

The board of directors is in charge of important decision as provided by law or the articles of incorporation that are mandatorily to be decided by board meetings. Further, the board of directors appoints at least one of its members as representative director (*daihyou torishimariyaku*) who runs the operations on a daily basis and whose management activity is then subject to the monitoring of the board of directors[255]. It should be noted that it is statutorily required that executive directors are board members[256].

bb. Evaluation: Competence and Function

Kansayaku and *kansayaku* board are equipped with authority to monitor and report whether the management complies with applicable laws and regulations, and to perform audits on management activity of the directors[257]. *Kansayaku* also investigate the performance of duty of the members of the board of directors and representative directors, but do not have any authority as to the appointment and dismissal of directors. In order to effectively fulfil their legal duties, *kansayaku* attend board meetings, are granted access to relevant documents, state their opinion and request reports from the directors concerning the company's operations, altogether rights which they are encouraged to proactively exercise[258]. Notwithstanding, *kansayaku* are not directors and accordingly lack power on the board of directors. Decision-making remains unimpaired with the board of directors. Thus, the role of the *kansayaku* board is characterized as rather assuming "defensive functions"[259]. As a result, it can be said that the board of directors and the *kansayaku* board jointly fulfil the role of a supervisory organ over the actual management which is borne by the executive and representative directors[260]. However, it should be noted that the rights to inspect and audit are individually bestowed on the *kansayaku*, so that they do not depend on delegation of authority from the *kansayaku* board, but can individually exercise their audit rights[261].

cc. Reception and Criticism

The institution of *kansayaku* has been criticized for their lacking competence and thus being inefficient. A point of criticism is the lack of voting rights on the board of directors. Thus, *kansayaku* are effectively prevented from directly exercising any influence on executive and representative directors that they supervised, but are appointed and dismissed by the board of directors. *Kansayaku* have further been doubted for their entanglement and involvement with the company they are supposed to monitor: *Kansayaku* are trapped between monitoring the performance of directors and lacking competence to enforce their assessment by their lacking competence to fire them and are not even assigned votes during board meetings[262]. The role of *kansayaku* is sometimes characterized as being reduced to that of compliance officers and to enhance transparency rather than reining in executive officers – a role far too narrow against the foil of the original concept[263]. Such an interpretation of the *kansayaku's* role would not substantively exceed the mere control of directors' fiduciary duties of care and loyalty[264] which also pertain to a duty of oversight and of establishment of a system of internal controls that ensures compliance with the law[265]. The *kansayaku* model with its inherent separation between board of directors and *kansayaku* board seem to grant severance of relational ties, however the actual practice might indicate otherwise[266]. Notwithstanding these shortcomings the *kansayaku* model remains the most frequent corporate governance structure among TSE-listed companies accounting for a share of 75.3 per cent[267].

b. Company with Three Committees

aa. Statutory Layout

Against the backdrop of this debate about *kansayaku* the committee-type system was introduced as an alternative governance form by reform and entering into effect in 2005. This can be seen as an attempt to further align Japanese corporate law with the US-style monitoring model[268] or in times of globalization can be regarded as adding another US tint to Japan's corporate law[269]. The committee system brings about a functional separation between executive officers and directors which emulates the US-style system revolving around representative directors and an audit committee within the board of directors[270]. Under this amendment companies can opt to incorporate three committees for the purposes of audit, nomination and remuneration on the board of directors by means of their articles of incorporation as an alternative to the further possible installation of a *kansayaku* board[271]. A company with committees, however, then is prevented from installing *kansayaku*[272]. Each committee is required to consist of at least three members of whom the majority is mandatorily outside directors[273]. Under the committee system a corporation is bound to appoint executive officers, one being representative officer bearing resemblance to a chief executive officer[274]. The management is then transferred from the board of directors to at least one representative or managing director (*shikkouyakuin*)[275]. The codification of *shikkouyakuin* heralded a partial realignment of practice and law, because the institution of *shikkouyakuin* poses a market-level innovation originating from the informal introduction of a US-style executive officer by large companies spearheaded by Sony[276]. Other companies followed suit[277]. Other innovations encompass the adoption of outside advisory boards and internal committees[278]. The adoption of *shikkouyakuin* was conducted in an effort to separate executive management from the board of directors, to enhance decision-making processes and to facilitate management flexibility with less emphasis on monitoring[279]. Similarly, for the sake of quicker and more transparent decision-making the board of director can establish an executive committee within the board to which it can delegate its powers with regard to acquisition and disposal of assets contingent on that at least one director qualifies as outside director[280]. A *shikkouyakuin* can retain its seat on the board of directors, but in contrast to the *kansayaku* board model it is not compulsory that a managing director simultaneously sits on the board of directors[281]. However, an outside director cannot concurrently serve as executive officer. The opportunity was interpreted as an effort to re-bridge the opening gap between management and monitoring, but was also evaluated as indulging to the actual corporate practice in Japan[282]. The *shikkouyakuin's* role is tantamount to US-style executive directors[283]. Notwithstanding, important corporate decisions and the supervision of the management continue to fall into the realm of the board of directors[284].

bb. Evaluation: Competence and Function

In contrast to *kansayaku*, all committee members are subject to appointment and dismissal by the board of directors. The nomination committee submits proposals concerning appointment and dismissal of directors to the shareholders' meeting. The remuneration committee determines the compensation for each director and executive officer. The audit committee performs audits on the directors' management. Functionally, the audit committee bears a certain resemblance to the *kansayaku* board due to its focus on monitoring which includes the competence of initiating actions to pursue a director's liability for breach of its fiduciary duty. If one feels inclined to assume a high ratio of outside directors on the board of directors due to the existence of three committees each of them required to comprise outside directors, it should be noted that the math are not as easy, because it is permitted the same outside directors occupy seats in several committees[285]. But, in contrast to *kansayaku* and *kansayaku* board, committee members are simultaneously members of the board with corresponding equal voting rights.

cc. Reception and Criticism

The introduction of committees has been persistently not very well received among Japanese companies. Consequently, merely 2.1 per cent of the TSE-listed companies have incorporated the three-committee-structure[286]. While the audit committee resembles the former *kansayaku* board, the committees for nomination and remuneration represent novelties. Beside the matter of how far or close to draw the line of "outside directors" and consequently who to exclude from committee membership, the committees were met with skepticism due to the delegation of significant competence to outside directors upon sensitive matters such as appointment and remuneration of directors formerly determined by long-term employment mechanics. In the past both aspects have been identified as shortcomings of the corporate governance regime[287], so that the legal measures could be interpreted as effective remedies to address the weak points. The outside directors' distance and detachment from the company raised doubts in the business community whether they can effectively act in a company's best interest. Concerns were voiced that solidarity between executive directors and the board of directors would be undermined[288]. On the other hand, the inauguration of *shikkouyakuin* and concomitant separation between executive and supervisory activity has been welcomed, however, not as contribution to effective monitoring, but as catalyzing effective decision-making[289]. Another weakness of the committee system can be identified in the fact that the audit committee is supposed to monitor directors who in turn select the committees' members[290].

c. Company with Supervisory Committee

aa. Statutory Layout

In the course of the most recent amendment of the Companies Act with effect as of 1 May 2015, an alternative organizational form under the monitoring model was introduced. It provides the general meeting of shareholders with the opportunity to install one audit and supervisory committee (hereinafter "supervisory committee") besides the board of directors that effectively substitutes the *kansayaku* board. In this vein, members of the supervisory committee as well as of the board of directors are both subject to appointment and dismissal of shareholders' general meeting. The requirement that a committee contains at least three members of which the majority are outside director as under the three committee system is maintained[291]. As a safeguard to maintain the committee members' independence, the supervisory committee's consent to the appointment proposals submitted by the board of directors to the general shareholder meeting is required[292]. Economic independence is supposed to be preserved by the general shareholders' meeting's vote on their compensation which is conducted separately from the remuneration of other directors[293]. The directors designated to form the board of directors as an organ of performing business operation, and non-executive directors as members of the supervisory committee are separately appointed[294]. The board of directors can then appoint representative and executive directors from among the formerly mentioned members concomitant with the delegation of authority and responsibility for decision-making and performing operations on a daily basis[295].

This option can basically be considered as an attempt to reconcile the former corporate structure revolving around the *kansayaku* board with the committee-type corporate structure. Members of the supervisory committee are vested with seat and voice on the board of directors. Supervisory committee and the board of directors share the monitoring function over the executive officers. As encountered under the *kansayaku* system, the executive officers are required to be members of the board of directors. The novelty under the three committee system that allowed a director to concurrently act as executive officer has therefore been retracted and abolished. Instead, the amendment enforces a stricter separation of directors and executives, since it requires a clear distinction of responsibilities on the board between the representative and executive directors. Executive directors perform the management activity, but directors who are members of the supervisory committee are barred from acting as representative or executive directors[296].

bb. Evaluation: Competence and Function

The competences of the supervisory committee can be compared to the *kansayaku* board. The position of the committee members is strengthened by their presence on the board of directors. Board membership implies that the committee members are not only eligible to attend meetings of the board, but also have a vote on resolutions and thus have a say when it comes to determining management policies. Moreover, the supervisory committee's authority extends to the shareholders' general meeting, where it can propose and vote on the other directors' appointment, dismissal, resignation and compensation[297]. If the majority of board members satisfies the criterion of outside directors or even in the event that it does not exceed half of the total number and the articles of incorporation allow for such, the board of directors is permitted to delegate important decisions to certain executive, usually representative directors to the extent available under the three-committee-system. This is viewed as an effort to further strengthen the supervisory committee's monitoring function and foster effective management[298]. In the same vein, it contributes to split between the management and monitoring functions of the board of directors. Despite functional similarities between a company with a *kansayaku* board and a company with a supervisory board, it should be realized that outside *kansayaku* and outside directors are to be distinguished[299].

As a concluding statement it can be noted that the amendment strengthens the capacity to oversee individual management actions, but continues to fall short to supplement monitoring of development and execution of strategy planning[300].

cc. Reception and Criticism

The reception of the one-committee-system progresses smoother than of the three-committee-alternative. As of 26 July 2017, 22.6 per cent of TSE-listed companies adopted the new model[301]. The corporate governance structure built around a supervisory committee has been received as a midway between the two former models[302]. The fact that the number of committees – and consequently potentially to be appointed outside directors – was trimmed down, and the fact that nomination and compensation can be withdrawn from the influence of outside directors were aimed to design a solution more acceptable to Japanese corporations[303]. Outside directors can only review decisions pertaining to nomination and compensation in the course of their audit on directors' decision-making.

Granting outside directors representation on the board of directors further remedied the perceived lack of influence of *kansayaku* on board decision-making and accordingly bestows more authority on the articulation of view by committee members during board meetings. The transition to board representation might have further been facilitated by the fact that formerly *kansayaku* were present at board meetings and equipped with a right to make statements, uncovering the lawmakers' step-by-step approach[304].

3. Scope of "Outside Directors" and Quality of "Independence"

The incorporation of independent elements on the board of directors had faced resistance for a long time in Japan[305]. When it eventually commenced, statutory reform of corporate law ran parallel to the initiative of agencies such as FSA or private forums such as TSA. This is mirrored by the current status which primarily relies on the recent Companies Act's amendment and the publication of the JCGC. Essentially, the TSE's listing requirements assumed the role of a forerunner. Chronologically, the Corporate Governance Principles published in 1998 and revised in 2001 contained recommendations for companies to install "independent, non-executive directors" on their boards[306]. Later on in 2009, TSE required listed companies to integrate one independent, as opposed to outside *kansayaku* on the *kansayaku* board[307]. Following the Olympus scandal, the TSE began to thoroughly enforce its rules and henceforth has recommended the incorporation of independent directors instead of just independent *kansayaku* in May 2012. This recommendation was escalated to a strong recommendation in February 2014. As a follow up, JCGC published in March 2015 and enforced in June 2015 made it mandatory for listed companies to appoint at least two "independent, outside directors"[308]. This incremental approach reflects a compromise building process found symptomatic for Japan. It further uncovers how the switch between soft and binding laws or regulations is employed in this process.

a. <u>Definition of "Outside Directors"</u>

The definition of "outside director" has been narrowed in the course of the recent 2015 amendment. Besides the lack of employment relationship with the company or one of its subsidiaries, it is further required that the lack of employment relationship also pertains to the parent company. Additionally, a lack of family relationship is introduced as a qualification.

Under the current statutory definition an outside director encompasses directors of any stock corporation who "neither are executive director nor executive officer, nor employee, including manager, of such stock corporation or any of its subsidiaries, and who have neither served as executive director nor executive officer, nor as employee, including manager, of such stock corporation or any of its subsidiaries"[309]. Further barred are (1) directors or *kansayaku*, executive officers or employees, including managers of the corporation's parent company which extends to any controlling company, (2) executive directors or executive officers, or employees, including managers, of a subsidiary of the company's parent company, pertaining to other members of company group on the same level as such corporation, (3) second degree relatives or the spouse of directors or important employees, including managers, of such corporation, or of any natural person who controls the financial and business policies of such corporation[310]. Moreover, a cooling-off period has been included for certain former employees, allowing that such employer can still qualify as outside director, but the person may not have worked at any time within the ten years preceding the assumption of office as director, financial advisor or *kansayaku* as executive director or executive officer or employee, including manager of such corporation or its subsidiaries.

The current definition of an outside director seeks on the one hand to eliminate ties resulting from employment relationship that might give rise to loyalty and might impede an impartial monitoring. On the other hand, the newly incorporated reference to other entities within a group company, namely the parent company and subsidiaries of that parent being on the same level as the corporation concerned, are designed to fend off potential controlling shareholders in the sense of a controlling parent that seeks to reign the business of its subsidiaries through the committees. These are indubitable efforts to increase outside directors' independence. However, the current definition of outside directors continues to come short to further exclude directors without employment ties to the company or its subsidiaries, but who still have an economic interest originating outside of an employment contract.

b. <u>Scope of "Independent Directors"</u>

It might appear confusing that the TSE does not relate to an outside director, but rather prescribes the appointment of a number of independent directors. Naturally, that raises the question as to which extent outside and independent directors are congruent to each other. The criterion of independence entails the non-existence of conflict of interest with that of the general shareholders[311]. Thus, TSE's listing requirements, however, remain to be stricter, since they require an additional lack of business and trade relationship[312]. The JCGC requires companies to report the appointment of at least two independent directors on the board of directors[313]. Since the JCGC relies on the "comply or explain"-principle[314], companies are able to derogate from that rule, but are under obligation to justify their digression[315]. Since it is perceived as detrimental to a company to only appoint one outside director which was the legal requirement on the grounds of the Companies Act at that time, an explanation and justification is not easily made[316].

aa. Directors' Independence

The JCGC leaves it up to each company's board to determine the standards and qualification mandatory for an independent director[317]. Under a footnote, however, the JCGC refers to the security exchange's listing requirements which employ a general clause which requires companies to determine whether there is a possibility of a conflict with shareholders' interests[318]. On a perspective plane, the JCGC promotes that at least a third of overall directors of the board shall be independent, but it (still) leaves it up to the discretion of a company and its evaluation of its specific circumstances urging the development and submission of a roadmap in case of an affirmative decision[319]. Recent figures indicate a growing acceptance of this threshold among up to a third (22.8 per cent for 2017) of TSE-listed companies[320]. In the same vein, the TSE recommends companies with a *kansayaku* board or a supervisory committee that do not have a majority of independent directors on their board of directors to involve independent directors by means of creating an additional advisory committee for matters such as nomination and remuneration – the realms of committees under the three-committee-system – to which independent directors should make a significant contribution[321].

bb. Role of Directors

Under the JCGC, the role independent directors are envisaged to play besides monitoring of management are providing advice on business policies, monitoring of conflicts of interest between company and management or controlling shareholders and appropriate representation of minority shareholders and other stakeholders[322]. Independent directors are intended to become advocates of perceivably underrepresented stakeholders in the management and mediators against an encroaching influence of management and controlling shareholders[323]. However, in the Japanese setting it could be argued that major shareholders also need protection through independent, outside directors. This argument draws its legitimation from the observation that the management holds the reins in a company, also pertaining to the appointment of directors, through intermediation by *keiretsu* ties as well as submitting nomination proposals. The reference to stakeholders appears to be slightly redundant as the Japanese corporate governance system has long been characterized and factually found as subscribing to a stakeholder approach which earned the notion “corporate community” and “company as a family”[324].

c. A Word on Terminology and Recent Trends

Against the aforementioned backdrop, the scope of the outside director is solely measured against the concept of a Japanese independent director. Although the scope of outside director has been streamlined resulting in the fact that employment relationship and close personal relationship disqualify, an affiliation with major business partners of the company and its subsidiaries continues to not impede the qualification as outside in contrast to independent director.

Accordingly, the TSE differentiates between both kinds of directors, when compiling empirical data. When considering the corporations listed on the TSE’s First Section, the top tier market segment that encompasses around 1,900 corporations, the share of corporations appointing at least one outside director leapt from 48.5 per cent in 2010 to 98.8 per cent in 2016[325]. When looking at all currently TSE-listed corporations, the share of outside directors accounts for 96.9 per cent as of July 2017[326]. Similarly, the figure for appointed independent directors rose from 31.5 per cent to 97.1 per cent during the same period of time[327]. Observing the trend for First Section corporations that appoint two or more independent directors, the share rose from 21.5 per cent in 2014, thus prior to recent amendment, to 79.7 per cent in 2016[328]. When taking a look at all TSE-listed corporations, 91.8 per cent have appointed at least one independent director, 67.8 per cent have incorporated two or more independent directors, and 22.8 per cent have reached the threshold of one third or more independent directors on their board[329]. In order to put theses number into perspective, TSE provides that out of an average total board size of 8.33 directors 1.92 qualify as independent and 2.23 as outside directors[330]. This implies that by adding on average less than one independent director (0.85) would lead to a ratio of one third (2.77) of independent directors on the board. These numbers reveal a considerable rising share of companies embracing statutory and TSE requirements on a wide-scale, so that pertaining to the minimum requirements one can assume nearly saturation with the caveat that numbers reflect acceptance only among the top-tier corporations.

B. CORPORATE GOVERNANCE TOPOGRAPHY IN GERMANY

Since the corporate governance system in Germany should serve as a foil against which the Japanese reform concerning independent, outside directors is projected, the paper will embark on a brief survey of board structure and composition in Germany.

I. GOVERNING BODIES OF A STOCK CORPORATION

Corporate governance in Germany continues to adhere to a strict dualism between a management board (*Vorstand*) and a supervisory board (*Aufsichtsrat*) reflecting the separation between management and monitoring competences on an institutional level. Roughly speaking, the management board is in charge of everyday business decision, but certain decisions are subject to review and monitoring of the supervisory board. The third constitutive organ is the shareholders meeting (*Hauptversammlung*). Shareholders’ meeting appoints and dismisses those members of the supervisory board that are not subject to the co-determination model[331]. Above that, shareholders’ meetings role does not exceed various fundamental decisions pertaining to alterations of the charter or the issuing of new shares[332]. The supervisory board appoints and dismisses members of the management board[333]. If the management board encompasses more than one member, the supervisory board can appoint a chief executive officer[334].

1. Management Board: Management in the "Interest of the Enterprise"

The strong position of the management of a company relies on statutory provisions. Thereunder, the management is entitled and equally obligated to run the business of a company in the company's interest at the management's responsibility[335]. This entails that the members of the management board – collegially[336] – run the company at their discretion within legal limits which pertains to the management of the company as a whole. However, the interest of the specific company subjects the discretion to the "interest of the enterprise"[337] and to the "welfare of the company"[338]. This systemic commitment to the pluralistic interests of a stakeholder model commands the management board to adequately negotiate between the different interests staked in a company. Stakeholders whose interests are to be observed are shareholders, employees and the public and the overall economic welfare. However, these interests are not deemed to have a directing influence on the management board's discretion, but have to be observed upon decision-making[339]. The "interest of the enterprise" introduces a long-term perspective as it requires the management to observe "the continued existence of the enterprise and its sustainable creation of value in conformity with the principles of the social market economy" upon decision-making[340]. In this vein, the commitment to long-term development, but also the embeddedness in the overall (domestic) economy relying on cooperation and solidarity is emphasized.

2. Supervisory Board: Stakeholders' Voice

The supervisory board monitors and provides counsel for the management board[341]. The supervisory board members are elected by the shareholders' general meeting except for those companies and members which fall within the scope of co-determination[342]. The supervisory board "is responsible for overseeing the management board"[343]. The supervisory board as an internal control organ of a company plays a central role for the governance within a company. Through its capability to appoint members of the management board, the supervisory board gains direct grasp on the boards' composition and performance. Recent corporate reform post

2005 subscribed to the aim to fortify the role of the supervisory board vis-à-vis the management board[344]. To this purpose, the advisory function has been strengthened[345]. However, this incumbent extension endangers the demarcation of competences between management and monitoring tasks and the lawmakers' key concept envisaging that the management of a corporation is borne by the management board by its own responsibility[346]. Although the supervisory board itself can never take decisions in the course of business, the supervisory board itself or a corporation by its articles of incorporation can determine that certain business decisions require the consent of the supervisory board[347].

As a conclusion, the supervisory board represents and confers voice to the sum of interests staked in a company. Consequently, the supervisory board is attributed the role of a mediator between the main two stakeholders, capital and labor[348]. This idea is reflected by the composition of the supervisory board that includes likewise representatives of the owners' interests, and by way of co-determination, of the laborers' interests. Thus, the management of the company is via the supervisory board not only accountable to the shareholders, but also to the employees[349].

3. Co-Determination: "Democratization" of the Supervisory Board

The concept of co-determination is embedded in the general context of cooperative capitalism. Cooperative capitalism denotes a form of capitalism that emphasizes a balance of the different interests at stake and that "mobilizes noneconomic social ties, non-competitive cooperation, collective obligations and moral commitments in support of economic efficiency"[350]. Co-determination is meant to "democratize" and balance the asymmetry of power between employers and employees[351]. It is a way to achieve committed stakeholders, in this case labor (as the bank system contributes to patient capital and less liquidity)[352]. The underlying idea is solidarity[353].

Under the co-determination model employees are enabled to contribute to the control of the management of the company through board participation and work councils with the former only being deemed conducive to the course of the paper[354]. Depending on the size of the company, employees' representatives are attributed one third[355] or half[356] of the seats on the supervisory board. In case of the latter, however, it has to be noted that the chairman of the supervisory board is recruited from among those board members that are elected by the shareholders' meeting, while the proxy of the chairman is a member elected through co-determination[357]. Since the chairman of the supervisory board is attributed an additional vote in cases of a tie, but the proxy does not share this privilege, a certain degree of supremacy of the owners in situation of a tie is secured[358]. Thus, overall it is more precisely qualified as "quasi-parity", because not exact parity is achieved[359]. A historically rooted, notable exception is the steel and coal industry in which actual parity is established[360]. In case of a voting tie, a neutral person on which employees' and employers' representatives have beforehand agreed is entrusted with the solution[361].

The statutory provisions pertaining to the co-determination model also reflect the overall approach by industrial branches as opposed to an intra-firm concept. Namely, the Co-Determination Act of 1976 defines that a certain share of the seats attributed to employees' representatives is occupied by labor union members that are external to the company concerned[362]. The co-determination model acknowledges the importance of human capital and know-how. Labor and company are conceptualized as two sides of the same medal. In return, employees are rewarded with a role which enables them to participate in governing the company. Co-determination entails a formalized, or rather "constitutionalized"[363] procedure by which constituted employees participate in the review of management. The underlying concept implies that employees are seen as quasi-owners of the company, since their influence is nearly, but usually not equally as strong and far-reaching as the one of shareholders – at least to the extent reflected by the representation on the management board.

II. How is Supervisory Board's Independence Implemented and Safeguarded?

Being entrusted with the monitoring function, independence under the two-tier system mainly concerns the composition of the supervisory board. Besides the statutory personal requirements according to which serving as legal representative with a company of the same corporate group, or occupying a management post with a company that sends one of its management board members onto the supervisory board of the company concerned (no personal interlocking relationship) disqualify potential members[364], and the fact that one cannot simultaneously be a member of management and supervisory board[365], the GCGC only sets the general requirement of independence (Section 5.4.2). The GCGC further elaborates and recommends that supervisory board members should not occupy any role with governing bodies of, or exercise advisory function at main competitors of the company concerned (Section 5.4.2). The GCGC recommends to only consider such members as independent who do not entertain any business or personal relations with the company concerned, its governing bodies, a controlling shareholder or a company affiliated with such shareholder that would give rise to a conflict of interests (Section 5.4.2)[366]. The GCGC further includes recommendations as to insiders on the supervisory board: Promotion from management to supervisory board should remain an exception (Section 5.4.3), since it would lead to self-monitoring of formerly executed management work. In any event can the supervisory board not have more than two former management board members (Section 5.4.2). Sufficient independence and potential conflicts of interest should already be anticipated and observed upon proposal (Section 5.4.1). Election of members is conducted individually (Section 5.4.3), thus forestalling in the past commonly applied global elections or elections of member lists[367]. Nonetheless occurring conflicts of interest when observing the company's best interest (Section 5.5.1) should be disclosed by the members concerned (Section 5.5.2) and can result to resignation if such conflict of interest is material and not merely temporary (Section 5.5.3).

Conceptually, the separation of management and supervisory board ensures a certain distance between the management to be monitored and reined in, and the supervisory board to monitor and control. In order to maintain this distance, statutory rules and the GCGC consistently try to forestall any personal interlocking. To further enhance independence and expertise pertaining to specific monitoring tasks the GCGC encourages the delegation of monitoring tasks to committees (Section 5.3.1), in particular the adoption of an audit committee is recommended (Section 5.3.2). However, the establishment of committees under the GCGC is rather motivated to cope with supervisory boards' sizes and tasks' complexity, than achieving a higher degree of independence by creating a control structure within the board[368]. It is further worth noticing that the responsibility for risk management and controlling systems falls within the ambit of management activity[369], and a company is statutorily inhibited from transferring such capacity and competence to the supervisory board[370]. That is why the competences of an audit committee within the understanding of the GCGC are focused on conducting audits[371].

On the downside, the supervisory board's detachment from management activity contributes to a more difficult access to information compared to an insider-dominated board despite the recent strengthening of information rights. This detachment further implies that a supervisory board lacks capability to directly influence the management in its entrepreneurial leadership or initiate management decisions – that is other than by replacement of management board members[372].

C. ANALYSIS

In order to be able to reliably evaluate the role of independent outside directors against the foil of the above-mentioned comparative approach it is irremissible to establish a common ground for the board structures in Japan and Germany. The course of the analysis of role and function of independent, outside directors in Japan will be slightly complicated by the fact that although both jurisdictions initially subscribed to a somewhat dualistic board structure, Japan recently swerved from that path and introduced a monistic corporate governance model that upon its amendment and inauguration of the supervisory board has encountered a certain degree of acceptance among the business community. Corporations are induced to adopt the new model, although the majority of Japanese corporations apparently remains to have reservations or is inert. Admittedly organizational restructuring requires a certain transition period. Against this backdrop, it might be debatable whether reform is superficial or traditions' impact too pervasive and steadfast, since recent reform seems to still not have shaken Japan's corporate governance to the mark, but appears to be rather limited to the top-tier corporations. This might foreshadow that the debate will also be one grappling with the degree of pervasiveness of reforms. Against the background that foreign investors as one interest group pleading for corporate governance reform seem to concentrate their investment on the top-level companies it might further be a question of relevance. Certain indents on the surface, however, stir hope that time has come that the current reform impetus will bear success due to economic doldrums, but also internationalization and incremental legislative approach that have led to a gradual opening of the mind-set of at least top-level business society. Such expectation might be justified given the fact that listed companies despite their initial rejection of the statutorily imposed three-committee-model, have begun to establish nomination and remuneration committees on a voluntary basis. Consequently, among the TSE-listed companies 20 per cent have adopted a nomination committee and 22.3 per cent a remuneration committee[373]. Interestingly, approximately half of the corporations listed on the TSE First Section opting for voluntary adoption of nomination or remuneration committee also implement a majority of outside directors[374] with approximately 43.6 per cent and 43.7 per cent respectively proceeding as far as to nominate an outside director as chairman[375].

I. How to Cope with the Gap Between Independent and Outside Directors?

Before delving into the analysis it should be solved how to proceed with the parallel existence of statutory outside directors and independent directors mentioned under the JCGC. Another complicating factor beside this bifurcation is that the statutory metric concerning “outside directors” pertains to committees and not the board of directors unlike the JCGC that counts “independent directors” on the board. The paper will further use the term “independent, outside director” in order to refer to the specific Japanese interpretation of an independent director, but employ the term “independent director” when relating to the general principle. This approach appears to be justified for two reasons: Firstly, the dynamics behind the amendments of the Companies Act seemingly treat outside directors as independent directors, even though a gap remains. This is based on the observation that outside directors and prior outside *kansayaku* were introduced to contribute to an independent review of management activity. The enactment of the three-committee-system in an effort to emulate the management model further proves that point. Secondly, the JCGC refers to outside directors as independent directors in case there is no possibility that outside directors face conflict of interests with shareholders. Although, the statutory definition of an outside director continues to foreclose business relationships, the fact that pursuant to the recent amendment the absence of ties to parent companies as potential controlling shareholders are included in the qualification of outside directors gives rise to further convergence of both concepts. Notwithstanding, not every outside director qualifies as independent director. Having said that, the definition of independent directors is globally far from uniform[376]. That is why, both outside and independent directors would each fall within the ambit of the wider concept of an independent director. This is further bolstered up by the function Japanese corporate governance rules assign to them.

II. INDEPENDENT DIRECTORS AS A TALLY

The number of independent directors has become a crucial indicator cherished by international investors to measure ‘good’ corporate governance. Good governance is essentially understood as effectiveness of management monitoring. When raising the question as to how many independent directors to incorporate, one stumbles upon the necessity to strike a balance between information access and bias. Flaws stick to both systems, these that emphasize internal monitoring as well as those that propagate a high ratio of outside directors. The common opinion therefore advocates a mix of insider and outside directors. Under such regime, insider information access would be balanced with an independent element which entails voice for minority shareholders and foreign shareholders in protection of their interest on the board of directors[377].

The proxy advisory firm Institutional Shareholder Services and similarly the JPX-Nikkei 400 index consider a certain minimum number of independent directors as a qualitative governance factor[378]. Despite increasing numbers of independent directors throughout Asia[379], Japan lags behind and remains also in this sense an island[380]. The reason behind this delay is the only recently – by the vehicle of the 2005 Companies Act enactment – and hesitantly commenced incorporation of independent, outside directors as in institution into its corporate governance framework. However, from an outside perspective Japan's reform efforts have been perceived as not as far-reaching as desirable and necessary. Even considering the furthest reaching non-statutory listing requirement Japan (two independent directors) is still viewed as lacking to live up to the demand voiced by the Asian Corporate Governance Association in the interest of institutional investors in May 2008 that Japan should compel its companies to appoint a minimum of three independent directors[381].

On the other hand, recent reform effort appears to have raised and increased awareness for a need of effective corporate governance structures, stronger recognition of shareholders' interests and was a wake-up call[382]. The seemingly belated advent and transplant of the independent director concept in Japan unmasks a certain resilience of Japanese corporate law that just under economic pressure and push by institutional investors seem to gradually open up and start to embrace international standards of corporate governance. However, the labelling of independent directors may also function as a signal and advertisement to international investors put forward to ostentatiously demonstrate implementation of a 'good' corporate governance regime[383]. The mere counting of independent directors as a key metric therefore runs the risk to impede the view on the substantive role independent directors play under a certain corporate governance regime[384].

Two amendments and the gradual, though seemingly trudging implementation by companies seem to indicate that the wake-up call has served its purpose. The enabling approach[385] employed for the introduction of the three-committee-system gave companies the opportunity to retain the traditional model. The low acceptance rate nearly equals non-implementation of the three-committee-system. However, lawmakers did not react by making its adoption mandatory, but rather abandoned the scheme, but nonetheless resurrected the key idea to introduce the management model by enacting the supervisory committee. This committee's capabilities are mainly congruent with those of the *kansayaku* board. Only the committee's composition demanding a majority, thus minimum of two outside directors on the committee, and the representation of committee members on board of directors was retained. Thus, nonchalantly and thought-provokingly put the current status is that de facto *kansayaku* are assigned a seat on the board which attributes more weight to their opinion and audit. Nonetheless, board membership is the crucial point: It ensures representation of outside elements on the board instead of solely on the *kansayaku* board, a significant step (further) towards the management model. On the other hand, it should not pass unnoticed that despite possible multiple seats on the committees, the evaporation of two committees boils down the maximum potential number of outside directors which could have a palpable effect on the ratio of outside directors on the board of directors, although the share of companies with outside directors has risen. Furthermore, the aim that boards consist to a third of independent directors as proclaimed by the JCGC seems to be a long-term goal. It is obvious that a higher share of independent directors on the board of directors can lend an independent director's opinion more weight and make enforcement of a dismissal for example more likely, thus effectively breaking into management's entrenchment.

III. POLICY GOALS

Is there a need for independent directors? The majority would answer in the affirmative and refer to corporate scandals and the need to prevent such or at least promote whistleblowing to discover such. In contrast to a two-tier corporate structure that can rely on a monitoring instance that is already structurally, institutionally separate from corporative management, such monitoring instance has to be integrated into the one and only board under a one-tier model[386]. The incorporation of a certain portion of independent directors on the board seems to offer the preconditions to emulate such distance and independence essential to conduct effective monitoring. In this vein, the motivation for the two surges of amendments where initially carried by the introduction of the management model, although shifted later on to stimulation of economic growth. The monitoring model seeks to achieve effective monitoring and forestall the occurrence of corporate scandals. However, the mere number and presence of independent directors on the board does not guard against scandals, as the Olympus scandal vividly illustrates, rather indicating that their presence does not foreclose the occurrence of corporate scandals[387].

How can independent directors contribute to economic performance of a company? Usually, the role of independent directors is conceived as being rather defensive than driving decision-making – genuinely the realm of the management. Statutory reform and JCGC alike do not seem to shake the foundation in a way that independent, outside directors exceed the role of advisors or compliance officers. Shifting priorities towards economic growth may draw its reasoning from the fact that international investors view the number of independent directors as an important metric during investment decision-making. On the other hand, it is yet to be proven that the presence of high numbers of independent directors kindles sustainable long-term growth of companies[388]. A reliable correlation is yet to be established[389]. Conversely, in the Japanese setting, where business relationships rather rely on long-term perspectives and trust building, the presence of too many independent directors might have adverse effects daunting investment.

IV. ENVISAGED ROLE WITHIN THE OVERALL CORPORATE GOVERNANCE SYSTEM

Accompanying the decline of former monitoring forces such as the main bank and the ratio of stable shareholdings, the insulation of corporative management against the embroilments of international financial markets dwindles. The question is whether independent directors are apt to fill the relinquished gap. At the same time, it should be noted that also in Japan independent directors share the monitoring of the management with capital markets, markets for managerial services, compensation schemes, etc.[390]. In the past, the main bank as seen above acted as central repository of information and had direct access to the heartbeat of a company which usually is the exclusive realm of the management. Also, the sheer length of a relationship between bank and client ensured that the main bank had a deep understanding of long-term processes of its clients. Another facet is that independent, outside directors by their very concept are supposed to isolate management from shareholders' influence which translated into the Japanese setting would mean to drive a wedge between management and different stakeholder, the "corporate community"[391].

As a matter of fact, independent, outside directors can only maintain their quality as independent if a demarcation from the management is kept up. Resorting to the analogy of constitutional law, monitoring and management form individual and separate branches of corporate governance whose delineated duties must be observed in order to preserve the system of checks and balances as grounds for accountability and legitimacy[392]. Their task is therefore confined to inspect management activity and pinpoint grievances. The more independent, outside directors would get involved in business strategy, the less they could retain their detachment. The concept of *kansayaku* was commensurate with this idea. The lack of enforcement capability is addressed by the installation of the supervisory committee, introducing a somewhat ‘emancipated outside *kansayaku*’ robed in the cloth of outside directors with – importantly – board representation.

A virulent matter which might surface is that independent, outside directors under the supervisory committee are likely to be prevented to tap insider information made accessible through long-term relationship due to an intended lack of involvement with the corporation with a term of office not exceeding four years[393]. The installation of a full-time independent director analogous to the full-time *kansayaku* could prove to be a remedy to a certain degree. As a central contact point such a director is likely to be confronted with critical issues. In this regard, a one-tier corporate structure appears to be more conducive to information exchange than a two-tier model which has to rely on cooperation between two boards and the duty of the management to supply information to the supervisory board.

The reduction of insider shareholding cannot and should not be balanced by independent, outside directors. Recent amendment concerning the scope of outside directors appears to aim at indiscriminately driving a wedge between shareholders and independent, outside directors. Independent, outside directors should obviously not function as the voice of major shareholders which corresponds with the overall concept according to which the general shareholders’ meeting provides the forum for shareholders’ voice. However, one might argue that the lingering influence through *keiretsu* ties on board composition through inside directors should be counter-balanced. Generally, one might find that (outside) shareholders ought to have a stronger say in the appointment of independent, outside directors. Although, the shareholders’ general meeting has the power to appoint directors under the supervisory committee, it might be worthwhile to hear shareholders in the proposal stage[394] – a state formerly achieved through corporations as shareholders through *keiretsu* ties[395].

Although it cannot be helped but to accept the existence of non-legal norms, the conservative approach sought by regulatory authorities in Japan, seems to bear fruit. Accordingly, the introduction of a small number of independent, outside directors does justice to the inertia in the sense of Newton's First Law of Motion of lasting relationships entertained among *keiretsu* members and in general social institutions[396]. Historical occurrences such as the Meiji restauration and the economic welfare in the post-war period, however, might hint that also rash reforms can be successful in the setting of Japan. With the 2005 enactment of the Companies Act and the rather abrupt switch to the management model, however, lawmakers seemed to gallop away. The non-acceptance forced the lawmakers to back-pedal and rather try a conservative change to the system which according to the recent figures finds affirmative reception. Given the widespread appointment of one or two independent, outside director it does not seem to hurt companies (anymore). It would be interesting to see how companies react if the requirement is incrementally increased and whether the threshold of acceptance could be pushed forward.

V. POTENTIAL OF GREY DIRECTORS

Independent, outside directors can only be one piece of the greater puzzle. This is all the truer, as outside directors may lack the capability to gain access to insider information as a basis for full-scale assessment of a firm's performance. The notion of so-called "grey directors" was raised in order to contrast truly independent directors from such directors that still have some kind of affiliation with the company they are entrusted to monitor that qualifies as a material relationship to the company[397]. Apparently, grey directors can hardly vouch for independent monitoring due to their involvement with the company and its management. However, as insiders they offer a constructive understanding of the course of business and tend to have the seniority necessary to exert influence on the board of directors, so they may contribute to an actually effective monitoring in the sense that grievances are not only voiced, but eventually remedied[398]. They could also be potent to improve communication between inside and outside board members. Accordingly, grey directors are sometimes considered a valuable asset in strengthening corporate governance[399].

On the other hand, progress on the field of information technology, also pertaining to information-sharing, is not to be disregarded[400]. Granting voice on the board under the supervisory committee system provides a commensurate forum. The interest which guides grey directors, however, might deviate of what truly independent directors might consider necessary. The phenomenon of "stakeholder tunneling" for the benefit of stakeholders and to the detriment of shareholders has been identified as a potential threat that grey directors pose to an effective corporate governance, a worrisome tendency against the background of lingering stakeholder impact on corporations in Japan[401]. That is why in the current Japanese setting, grey directors should not be counted towards the incumbent low figure of independent, outside directors. Prospectively, it appears a viable option to retain grey directors on the board without jeopardizing the reform goal to heave a certain number of independent, outside directors on the board. Grey directors can contribute to the expertise[402] of the non-executive directors, however, due to their affiliation they cannot promote the isolation of the management from the "corporate community".

It can be concluded that in general there is an irresolvable dilemma: The access to information is needed for monitoring directors to properly evaluate the management's decisions. However, if access is available, there is a tendency that the directors' view is obstructed or clouded by other interests due to the affiliation with the company which enabled information access. As hinted by Goto[403], the current full-time *kansayaku* or on a perspective plane a comparable independent, outside director could function as a hinge between information access thanks to expertise with the corporation and objective as possible inspection of the management. Mixed boards comprising insider, affiliated and outside directors have long been envisaged as presenting an appropriate combination of expertise and detachment with the former being commensurate with the idea of advisors or counsellors[404]. However, the consequential problem might then arise, namely to which extent such a director would then be 'seized', influenced or eventually pulled towards the corporation.

VI. DIRECTORS' ENTANGLEMENT WITH THE BOARD

Entanglement with the board and concomitantly with decisions of the board, also pertaining to the development of management strategies, unavoidably involves an independent director in part of the management and steering of the company. However, this is a fact that one probably has to acquiesce. If independent, outside directors as independent monitoring elements of the management should exercise an effective overseeing they need voice in the sense of equal voting rights accompanying presence on the board. Monitoring implies ex-post review, however, it is not limited to an ex-post evaluation of the executive directors' performance, but includes an ex-ante determination on which course the management should embark. On the contrary, strategic planning forms a core of management activity. In-depth involvement of monitoring bodies in strategic planning would double the responsibility for management and take away from the management. The management as owners' agent is conceptually supposed to embark on entrepreneurial leadership, whereas monitoring pertains to controlling and reining in a management that has gone wild. Since the ex-ante determination later on serves as the foil against which the performance of the executive directors is evaluated, this implies that independent review elements to a certain extent also review themselves due to their involvement in ex-ante setting the standard. One should always keep in mind that monitoring is no end in itself, but should rather secure that the shareholders' property rights are respected. Hence, it is indispensable that shareholders have a significant say when it comes to determining the monitoring force in the sense that there is an actual reference or accountability to those whose interests are concerned[405]. However, unlike under the corporate governance regime in Germany for example, supervisory organs under the Japanese model are not vested with the power to review the appropriateness of directors' action. Thus, a certain distance between management and independent monitoring authorities is upheld and a blending of both separate competences prevented other than the institutional overlapping of board membership. The bifurcation between management and supervision is reflected by the competences, not by separation of boards. However, one should notice that board membership is accompanied by becoming subject to a director's fiduciary duty.

Narrowing the definition of outside director eventually leads to limiting the pool from which outside directors can be recruited[406]. This again, might then lead to another form of unwanted interlocking through outside directors sitting on the board of several companies. Given the initial 'laissez-faire' definition of an "outside director" the three-committee-system could have already been received as an invitation and incentive for group companies to strengthen their vertical cohesion by one parent company appointing at the minimum two of its directors as outside directors preferably on the nomination committees for its subsidiaries[407]. However, given the incumbent ban on appointing current and former employees of subsidiaries as outside directors, the committee system urges at least the controlling parent company to appoint a truly independent director meaning that these directors are recruited from outside the sphere of the corporation and its related *keiretsu* corporations[408]. Corporations connected to each other by the bond of cross-shareholdings and thus forming a *keiretsu* under the umbrella of a parent company have a sheer inexhaustible pool of outside directors at their disposal that would qualify as outside directors since they lack association with a subsidiary, but would not be considered as truly independent due to their association with another member of the *keiretsu* creating a material bond between this director and the company the director is appointed to[409]. This potential instrumentalization, however, has been forestalled through the latest amendment, considering the entertainment of employment ties not only downstream with subsidiaries, but also upstream with parent companies as disqualifying for the appointment as outside director. Generally, a plus of cohesion might be traded against a minus of monitoring effectiveness[410].

Another aspect to muse about is who benefits from strong ties between companies. It can be argued that eventually the managers are the profiteers of the system. In that case, the introduction of truly independent, outside directors seems to be a remedy that can effectively address the problem if it introduces an element that is not recruited from among this pool. However, practice still has to show that these directors are truly independent, meaning are not part of something that is perceived as ruling elite.

The Japanese corporate governance system with its vehement subscription to a stakeholder-oriented corporate governance philosophy in the sense of a "corporate family" systemically runs risk to neglect its shareholders. This seems all the truer against the backdrop of the Japanese ownership structure of corporations, namely resilient cross-shareholding. The emphasis of different stakeholders should not be interpreted at the total expense of shareholders. Eventually, shareholders own a corporation. Hence, it is necessary that their interests are properly acknowledged among the stakeholders' ones and accordingly represented. The adequate representation of shareholders' interest is a concern that independent, outside directors can take up and realize.

VII. Scope: Monitoring versus Counseling

The question as to the envisaged scope for independent, outside directors is raised against the background of the shift in policy reasoning away from effective monitoring towards counsel and growth stimulation. The business community has heralded novelties such as *shikkouyakuin* as a remedy for what has been perceived cumbersome decision-making and adding transparency[411]. Interestingly, the currently envisaged role to provide counsel coincides with the auspices under which the supervisory board's role in Germany was strengthened. Concurrently, this observation might also hold the answer: Monitoring is associated with far-reaching shareholder influence, an approach both jurisdictions seem to not have fully embraced, yet. A view that stands to reason against the backdrop of path dependence. *Keiretsu* and long-term employment as the persistent traditions as well as co-determination seem not perfectly compatible with outside dominated monitoring. Accordingly, independent, outside directors and supervisory board respectively are viewed as institutions that should rather guide than rein in management at all cost. Although the policy goal appears to have drifted away from viewing independent, outside directors as monitors, it is worth a thought whether lawmakers can impose a duty on companies to employ independent, outside directors solely for monitoring tasks. Such policy could probably most smoothly and frictionless achieved through statutory definition of independent, outside directors’ competence. Imposing a company’s duty would conjure up enforcement problems as well as the question towards whom such duty is to be observed.

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CHAPTER III CONCLUSION

As a conclusion it can be recorded that Japan has embarked on the path to incorporate an independent monitoring mechanism into its corporate law. However, in order to ensure its smooth functioning, the following guidelines have emerged in the course of the paper as vital to reap fruits of an effective monitoring mechanism.

A. RECOMMENDATION

Before one can embark on the different criteria designed to safeguard the independence and effectiveness of independent, outside directors and their role, one should be aware that outside directors represent an element alien to the very nature and understanding of Japanese corporate governance. In the Japanese understanding 'good' corporate governance can rather be achieved through internal monitoring mechanisms than independent, outside directors as illustrated by Aoki's internal relation-contingency model. It cannot be debated that the adoption of the institution of independent, outside directors entails giving more voice and influence to shareholders. However, the 2005 amendment might indeed prove to have just paved the way for further, more pervasive reforms of the corporate governance system. The Japanese legislator seems to have reassessed its approach. While, the institution of independent, outside directors remains in its core unchanged, the adoption of independent directors is now propagated as a means to stir growth rather than as an instrument to ensure effective monitoring for the benefit of shareholders against the backdrop of a Japan stricken with minimal or no growth rates in recent years. Might the legislator resort to its box of tricks or not, such policy focus seems more agreeable to the addressees of the 2015 amendment.

(1) Primarily, true independence of outside directors has to be ensured. This aspect has been distilled as the precondition for an effective reform. If independent, outside directors are a mere window-dressing, all claimed policy aims would be in vain. However, recent statutory reform has significantly confined the scope of

persons eligible for the position of an independent director, in particular the demarcation between independent directors and other *keiretsu* or corporate group members[412] is crucial for effective monitoring to the benefit of all stakeholders – shareholders among them – of a corporation, and it is now reflected by law.

(2) The question who can appoint independent, outside directors marks the beginning of setting an agenda. The intended balanced distribution of powers between the organs of a corporation attributes this power to the shareholders' general meeting. This seems to be the only viable choice in the absence of another board. However, a fair portion of strategic decision lies already with the nomination of candidates. Given the strategic momentum inherent in nomination proposals, it seems worth considering integrating shareholders and other stakeholders in the proposal of independent, outside directors rather than leaving it up to emissaries and proxies of the board of directors. Ideally, the supervisory organ or independent, outside directors proportionally representing the different stakeholders in the company, among them, but not exclusively shareholders, would form such committee. It seems logical that this aim can be best or better achieved when the interest groups can already exercise their say and bring in their views during the nomination process. It would further contribute to a more balanced exercise of influence on the whole process of proposal and nomination given the power inherent in the structures and procedures of decision-making, since the stakeholders and shareholders would concurrently and simultaneously present their views on the nomination committee, rather than separately through the board of directors (stake- and shareholders) – however, as shown throughout the paper the shareholders' interest are not represented on the board of directors of Japanese corporations – and shareholders' general meeting (shareholders). The chances that such concept is welcomed, however, appear to be very dim currently given recent virtual rejection of

the three-committee-model. One reason that significantly reduces its chances of success and acceptance within the Japanese business community was identified in the fact that management was alienated by the prospect to surrender nomination rights, that are cherished as the management's realm, to a committee of dominated by outsiders. Another question worth considering relates to the pool of persons qualifying as independent, outside directors available in Japan[413].

(3) Another aspect is independent, outside directors' competence. Audit and checking legality seem to be of primary importance, but do not significantly exceed compliance check. Incorporating a competence resembling the supervisory board, notably to oversee "formulation and implementation of business strategy"[414], seems to be tantamount to a breach with the incumbent Japanese system and the management model. Another aspect might be whether independent, outside directors should individually or only collectively exercise their rights. In case that a full-time independent, outside director is installed, this would require individual rights to inspect a concept that is not alien to Japanese corporate law, considering *kansayaku's* power to individually exercise their rights. Potentially growing numbers of independent directors would similarly call for individual competences against the backdrop of inertia of bigger organs or bodies. This, however, needs to be reconciled with operability of the board of directors[415].

(4) Effectiveness remains a critical matter. Hereunder, the best possible compromise between access to information of the director and at the same time the director's detachment from the corporation has to be sought. A mix of truly independent, outside and grey directors may provide the key to this problem. The establishment of a full-time independent, outside director might further contribute to better information management and sharing among board members.

(5) Finally, the ratio of independent directors represented on the board remains a critical matter. In order to guarantee that certain decisions unpleasant, uncomfortable for managing directors can pass the board, a certain ratio of independent, outside directors is necessary to ensure their enforcement. Beforehand, a low ratio of independent, outside directors similarly remains a point of concern whether monitoring issues will be voiced on the board of directors. Admittedly, there is evidently no recipe for a reliable one-fits-all approach. Prospectively, increasing the number of independent, outside directors to a third of total board members as indicated by the JCGC[416], or equipping them with more vehement rights such as veto rights for certain decisions might prove effective remedies. One might proceed and endow independent, outside directors with the right to appoint and dismiss board members equivalent to the supervisory board which they can now only exercise as members of the board of directors[417]. Another potential edge in comparison to the supervisory board yet to be exhausted lies in the fact that under the supervisory board independent, outside directors are equipped with the right to initiate decisions due to being member of the board of directors[418]. On the other hand, the management has to be borne by other directors and board size itself is a critical matter.

B. Overall Conclusion

Eventually, the effectiveness of independent, outside directors in the Japanese setting rather relies on its functional equivalence within the network of Japanese corporate governance institutions than formal convergence on what is perceived as US model of an independent director[419]. The problem, however, is that Japan has to a great degree achieved formal convergence, but in practice is far from any functional convergence[420]. Path dependency and cultural influences such as the discussed non-legal norms lead to the phenomenon that statutorily Japan corporate governance subscribes to the US model, but in practice to a great degree things are still dealt with as before, that is in the peculiar Japanese way. The recent overhaul of the 2005 amendment and subsequent rectifications of shortcomings of the former through the 2015 amendment reveal a general willingness to not only formally, but also substantially steer towards convergence. This view is supported by relentless modernization activity of TSE and FSA which culminated in the adoption of the JCGC, but also other instruments such as the Stewardship Code by the FSA. These activities seen together militate against the view that legal norms are mainly irrelevant to economic and social organization in Japan[421]. On the other hand, the certain diffidence concerning the number of independent, outside directors might indicate that window-dressing might also be a source of motivation within a bundle of motives. The strong ties between business and political elite might further be invoked as militating against the willingness to change. The institution of *amakudari* demonstrates that business and government go hand in hand. It might therefore be worth questioning whether government or more specifically the METI, would jeopardize the good relations with business by imposing harsh reforms, since lawmakers would fear to cut their own flesh. The METI's recent active role in corporate governance and its concerns about Japan's international competitiveness, however, seem to suggest the contrary[422]. Large-scale reform and restructuring bureaucracy indicate willingness to reform[423]. On the contrary, it can be equally interpreted as a sign of the legislator opting for incremental change. According to such interpretation, Japanese lawmakers have waited and assessed how the first reform waved was received, before they made amends by means of the second wave to rectify shortcomings of the first reform wave. Change in mentality prepared the ground for the intended change to successfully take root.

This discussion touches upon the preparedness to change. Corporate governance represents a facet of economic organization. Economic organization forms a part of social life in general that is largely structured by non-legal, social norms. People grow into these norms through education and socialization. Therefore, if the social consensus remains that things in Japan should continuously conducted in the way they were used to be done, changes in all fields will remain superficial and will not bring about any substantial change. In this vein, economic choices might be overshadowed by cultural acquisitions triggering developments that do not necessarily follow an economic rationale. Similarly, legal transplants – independent, outside directors – might be implemented in a way divergent from the original concept, because of the aforementioned overshadowing.

Speaking of legal transplant, an incremental approach could be backed by the experience that legal transplants – the institution of independent director is such – take their time to be accepted and embraced in their new surroundings[424]. The acculturation of legal transplants, in the case at hand independent, outside directors, meaning the adjustment to the peculiar cultural circumstances require time and elasticity, both qualities the Japanese legal community has proven to dispose of[425]. Also, social norms seem to a certain degree relayed to foreign investors who rather opt for a gentle approach when advocating US-style corporate governance concepts[426]. From this perspective, the abrupt introduction of the US model in shape of the three-committees-system failed to gain wide acceptance, hence the lawmakers adjusted and produced the supervisory committee to strike a balance between the *kansayaku* system representing the more traditional way corporate governance was interpreted in Japan and abrupt, full subscription to the management model. Recent figures indicate that the supervisory committee has been well received at the outset, thus endorsing the lawmakers' approach. Another problem legal transplants face is that they are rooted in a certain system in which they are complemented by other institutions encumbering transfer[427].

But, as it has been pointed out, the choice for a certain corporate governance system again only represents a façade, unless it is substantively embraced. However, the invigorated definition of outside directors under the Companies Act significantly narrows down maneuverability for corporations to adopt the new supervisory committee structure, but not to appoint truly independent, outside directors. The liberation from ties with not only subsidiaries, but also parent companies is crucial to forestall an affiliation of independent, outside directors with other *keiretsu* members. However, since the business interest is still not included in the definition, outside directors remain vulnerable to ties with horizontal *keiretsu* members. Having effectively cut family ties by means of the recent amendment, one might further demand that management's friends cannot serve as outside directors alike, conjuring up the question how and where to draw a line[428]. Thus, it seems that lawmakers have not exhausted the available margin, yet. This again might hint at the willingness of the lawmakers to sustainably alter the corporate governance culture.

One might a bit thought-provocatively wonder whether there is a deeper-running need for Japan to change[429]. Except for the aforementioned conspicuous corporate scandals, excesses of mismanagement or excessively high compensation are rare to be found, quite conversely management remuneration is usually sensitive to performance[430]. Moreover, well- and bad-managed companies appear regardless of the presence of insider monitoring system[431].

Interestingly, a group of companies usually with a higher ratio of foreign shareholding such as Sony has embarked on a rather shareholder-oriented approach, while traditional companies usually with lower foreign ownership rates retain traditional governance features, displaying certain degrees of path dependence and system flexibility at the same time[432]. The trigger might be the two-sided exposure of international corporations to global corporate governance standards on the one hand, and to foreign investors and shareholders on the other hand. Although foreign investors were thought to fill in the gap left behind by banks and insurance companies that came under pressure to convert their shareholdings to cash[433], those foreign investors used to concentrate their stakes on high performance levels indicated by high bond borrowing rates[434]. The lingering of stable shareholdings on safety levels indicates that developments in ownership structure have evened out between 2005 and 2012, thus after the market shakeout in the 1990s[435]. This might indicate that a certain equilibrium between strengthening and weakening of *keiretsu* ties triggered by the arrival of foreign investors has been reached. The absence of economic growth in recent years might further provide an explanation as to why cross-shareholding continues to flourish: Stability attained through horizontal *keiretsu* ties is able to counter market inefficiencies to a certain degree[436]. It is certain that with the advent of foreign investors the global market has added some dynamics precipitating a change in thinking in the board rooms and an acknowledgment of shareholders' interests[437]. This observation is supported by the increasing implementation of the requirements stipulated by Companies Act and JCGC among the listed companies. Furthermore, a solid fraction of these listed companies have started to aim towards the threshold of independent directors occupying one third of the seats on the board of directors. Similarly, the furnishing of nomination and remuneration committees unveils a willingness to let outsider directors participate in what is traditionally perceived as realm of the management. However, realistically it might very well be that this wind of change is not pervasive and only shakes the top-tier, while the lower echelons remain resilient.

C. PROSPECTS

Reviewing all the said above, there seem to be good prospects for the recent reform on independent, outside directors to take root and succeed. Voices alleging that the reforms are not addressed to bring about significant change[438] resonate and should not be disregarded, however, the policy of incremental change seems to indicate otherwise and accordingly support the view of sustainable change. Another aspect to be kept in mind is that legal reform, also pertaining to corporate governance, has only recently been thoroughly pursued, namely after the bubble burst: Legal reform can therefore be regarded as "work in progress", meaning it is yet for the reforms' implications to unfold[439]. Against the firm entrenchment of actual institutions with underlying Japanese culture and the way, Japanese are used to do things, one can refer to the fact that culture is something in flux and subject to change which for example has traceably affected "long-term employment"[440].

The incorporation of nomination and remuneration committees on an optional basis might serve as an example to emphasize that point. The introduction of the management model in shape of the three-committee-model, and the additional requirement to appoint a majority of outside directors as committee members, might have initially demanded too much and put too much strain on a business community which had just been familiarized with the idea of outside *kansayaku* and *kansayaku* board in the course of the 1990s. The recent renaissance of committees, however, reveals besides initial inertia and skepticism, the willingness to embrace change and make adjustment, but also to tailor legal transplants to the Japanese setting. The recent adoption of committees might as well be the stepping stone for independent, outside directors to become more widespread among the Japanese business community. Imitation of successful pioneers – such as Sony in the case of *shikkouyakuin* – might additionally contribute to a wider acceptance and dissemination of committees staffed with independent, outside directors.

Path dependence may cause reforms to require longer time to take effect, because self-reinforcing effects contribute to a certain inertia of the system as a whole which make a system not indulge to what would be viewed an economic necessity[441]. On the other hand, culture does not determine a legal system as a whole and make it thus immune to change[442]. This is further endorsed by the fact that criticism directed towards reform in the beginning of the century has created awareness for change, and as some voices believe were merely designed as such. Since the late 1990s awareness had arisen within the Japanese business community as the introduction of the executive officer system in 1997 by Sony epitomizes. However, motivation was rather streamlining decision-making processes and pleasing shareholders than improving monitoring[443]. This 'grassroots change' may be cited to demonstrate that (parts of) the business community are willing to embrace change and signals economic awakening. Furthermore, economic if not depression, then non-growth continues to weigh upon Japan with a growth rate of annually 1 per cent on average over the past 25 years[444]. Accordingly, recent corporate governance reform is no longer solely promoted to increase transparency and effective monitoring as cornerstones of what is perceived as 'good' corporate governance, but the focus has been shifted towards stimulating economic growth. The swing towards growth can be seen as an attempt to unlock dormant growth potential indicated by high amounts of hoarded cash concomitant with low return on equity rates, low productivity growth rates and on average low degrees of internationalization outside the large firms and global players[445].

Although the Damocles' sword of removal of management conjured up by independent, outside directors should be tangible, in order to furnish the provisions with claws, incremental change promises a higher probability of effect than such radical changes that are then again prone to circumvention as the example of US-style corporate governance has proven through the last seven decades. What is more, one should not underestimate psychological or reputational motives: Exposure triggered by the adoption of the three-committee-system by very few companies has nonetheless prompted the other companies' executive officers' conscience[446]. The core matter is to establish a functioning network of checks and balance, which implies to rein in management's autonomy[447]. The key point of corporate governance lies with how management is selected and if necessary replaced[448]. In the absence of the main bank, a board of independent directors is seen as potential candidate to rein in executive management[449]. The required independence could be achieved by establishing subcommittees to the board of directors or raising the ratio of independent, outside directors[450].

As regards the concern that reform would not reach far enough, it should be pointed out that incremental change might prove more successful than imposed radical change. That is all the truer, since hasty adoption or reception has the propensity to destroy valuable institutional features, such as the spirit for information-sharing by the introduction of merit-based pay schemes in some corporations[451]. Recent reform was initiated to bring about change within a more or less functioning system and network of institutions. Given the inherent internal monitoring structure of Japanese corporate governance it would probably put too much strain on the system to immediately demand the introduction of a majority of independent, outside directors on the board of directors and thus vest shareholders which such far-reaching influence[452]. Furthermore, the building of compromise plays an overarching role in the Japanese setting, incremental reform with both sides – authorities and business – negotiating and giving gradually in appears to be the way things are and can be successfully done in Japan.

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1 Gen Goto, *Recent Boardroom Reforms in Japan and Roles of Outside/Independent Directors* (unpublished, on file with the author) 4.

2 Earning Japan the characterization as relying on a 'relational contingent governance' model, influenced by Masahiko Aoki, *Conclusion Whither Japan's Corporate Governance?* in: CORPORATE GOVERNANCE IN JAPAN: INSTITUTIONAL CHANGE AND ORGANIZATIONAL DIVERSITY (2007) (Masahiko Aoki, Gregory Jackson & Hideaki Miyajima, eds.) 438 f.

3 Harald Baum & Moritz Bälz (eds.), *Rechtsentwicklung, Rechtsmentalität, Rechtsumsetzung* [*Development, Mentality, Implementation of Law*] in: HANDBUCH JAPANISCHES HANDELS- UND WIRTSCHAFTSRECHT [A GUIDE TO JAPANESE COMMERCIAL AND BUSINESS LAW] (2011) under number 63.

4 Keisuke Nitta, *Will the Introduction of Independent Directors Make the Japanese Stock Market Attractive to Foreign Investors?* RIETI Column 14 (2009).

5 Hideki Kanda, *Western versus Asian Laws on Corporate Governance: The Role of Enforcement in International Convergence*, in: OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (2015) (Jeffrey Gordon & Wolf-Georg Ringe, eds.) 3.

6 Article 2(xv) literae a) and b) of the Companies Act. Thereunder defined as companies with a paid-in share capital of at least ¥ 500 million or liabilities of at least ¥ 20 billion, and that are the prototype of the so-called "J-firm".

7 The term Japanese firm or short "J-firm" is widely used, see for example Gregory Jackson & Hideaki Miyajima, *Introduction: The Diversity and Change of Corporate Governance in Japan*, in: Aoki/Jackson/Miyajima, *supra* note 2. It refers to large-scale and publicly listed corporations that only account for a fraction of business enterprises across Japan, confer Tomoyo Matsui, *Corporate governance and closely-held companies in Japan: the untold story*, *in*: CORPORATE GOVERNANCE IN THE 21ST CENTURY (2008) (Luke Nottage, Leon Wolff & Kent Anderson, eds.) 108. Literature and debate explor-ing corporate governance in Japan tends – as far as the author can modestly evaluate – focus on this seg-ment of firms set out by Jackson/Miyajima, as indicator may serve Ronald J. Gilson & Curtis J. Mil-haupt, *Choice as Regulatory Reform* (2004) 3, available under https://ssrn.com/ab stract=537843.

8 Kanda, *supra* note 5, at 4.

9 *Keiretsu* refers to mutual cross-shareholdings between members of a corporate group, usually pertaining only to a small share per company of about one per cent, but receiving impact from the network of mutual shareholding. *Amakudari* literally means those who descend from heaven. A term used to refer to former usually high ranking bureau-crats who are accommodated in equally high positions in corporations either upon reaching a dead-end on the career ladder or upon retirement due to the statutorily fixed and enforced retirement age in the public sector. *Amakudari* contribute to a variety of a phenomena, most notably exchange of information between executive and private companies, but also enhance compliance of private companies and forming cohesion between a public and private sector elite.

10 Aoki, *supra* note 2, at 438.

11 John Armour, *Bank Governance*, in: Gorden/Ringe, *supra* note 5, at 5.

12 Armour, *ibid*.

13 Armour, *ibid*.

14 Tokyo Stock Exchange, Japan's Corporate Governance Code as of 1 June 2015, available under http://www.jpx.co.jp/english/equities/listing/cg/tvdivq0000008jdy-att/20150513.pdf

15 Nitta, *supra* note 4.

[16] Which was adopted through a government council called the Expert Council Concerning the Corporate Governance Code under the joint secretariat of Financial Service Agency and TSE, compare TSE, Appendix, Background, paragraphs 1 ff. of the JCGC, *supra* note 12.

[17] The OECD Principles of Corporate Governance were first released in May 1999, and have since then been revised in 2004 and again in 2015.

[18] Curtis Milhaupt, *Evaluating Abe's Third Arrow: How Significant are Japan's Recent Corporate Governance Reforms?* (2007) 5, available under https://papers.ssrn.com/abstract_id=2925497.

[19] Which however is at the current state not reflected by statutory law, but only enshrined in the JCGC.

[20] In their groundbreaking work, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

[21] Carsten Berrar, DIE ENTWICKLUNG DER CORPORATE GOVERNANCE IN DEUTSCHLAND IM INTERNATIONALEN VERGLEICH [THE DEVELOPMENT OF CORPORATE GOVERNANCE IN GERMANY IN INTERNATIONAL COMPARISON] (2001) 160; Charlie Weir, David Laing & Phillip J. McKnight, *Internal and External Governance Mechanisms: Their Impact on the Performance of Large UK Public Companies*, in: 29 Journal of Business Finance & Accounting, Issues 5 & 6 (2002) 580.

[22] Weir/Laing/McKnight, *ibid*.; Tomotaka Fujita, *Corporate Governance and the Rule of Soft Law* (2013) 3 (unpublished paper, available at http://www.gcoe.j.u-tokyo.ac.jp/pdf/GCOESOFTLAW-2012-3.pdf).

[23] Goto, *supra* note 1, at 14 f.

[24] Berrar, *supra* note 21, at 162, 165.

[25] Michael Littger, DEUTSCHER CORPORATE GOVERNANCE KODEX – FUNKTION UND VERWENDUNGSCHAN-CEN [GERMAN CORPORATE GOVERNANCE CODE – FUNCTIONS AND OPPORTUNITIES FOR APPLICATION] (2006) 167.

[26] Caslav Pejovic, *Japanese Corporate Governance: Insights from the Unsuccessful Adoption of the American Model*, Yonsei Law Review (2012) 192.

[27] Wolfgang Streeck, *Introduction: Explorations into the Origions of Nonliberal Capitalism in Germany and Japan*, in: THE ORIGINS OF NONLIBERAL CAPITALISM: GERMANY AND JAPAN IN COMPARISON (2001) (Wolfgang Streeck & Kozo Yamamura, eds.) 17; Sigurt Vitols, *The Origins of Bank-Based and Market-Based Financial Systems: Germany, Japan, and the United States*, in: Streeck/Yamamura, *ibid*. at 171.

[28] Streeck, *supra* note 27, at 4.

[29] Streeck, *ibid.* at 25 ff.

[30] Peter Hall & David Soskice (eds.), *An Introduction into the Varieties of Capitalism*, in: VARIETIES OF CAPITALISM (2001) 19.

[31] Hall & Soskice, *ibid.* at 8.

[32] Sara Konoe, *Policy Shifts and the Changing Role of Banks: A Comparison between Japan and Germany*, 29 J. Japan L. (2010) 81 f.

[33] Konoe, *ibid.* at 83.

[34] Goto, *supra* note 1, at 4.

[35] Aoki, *supra* note 2, at 440.

[36] Bruce Aronson, *The Olympus Scandal and Corporate Governance Reform: Can Japan Find a Middle Ground between the Board Monitoring Model and Management Model*, 35 J. Japan L. (2013) 87.

[37] Eiji Takahashi, *'Reception' and 'Convergence' of Japanese and German Corporate Law*, 38 J. Japan L. (2014) 110 who further argues that this tendency continues to apply to the theoretical aspects of modern Japanese corporate law.

[38] Takahashi, *ibid*. at 110 ff.

[39] Despite respective impulses the introduction of a monistic board has been vehemently rejected, see Berrar, *supra* note 21, at 202.

[40] Gilson/Milhaupt, *supra* note 7, at 9 f.

[41] Pejovic, *supra* note 26, at 191 f.

[42] Takahashi, *supra* note 37, at 110: The first Commercial Code of 1890 that relied on a proposed draft by German scholar Hermann Roesler in which Roesler incorporated elements of the French Code de Commerce, however, was not enacted. Baum/Bälz, *supra* note 3, at number 17. Subsequently, a new Commercial Code came into force in 1899, see Hatsuru Morita, *Reforms of Japanese Corporate Law and Political Environment*, 37 J. Japan L. (2014) 26.

[43] Milhaupt, *supra* note 18, at 59.

[44] Guntram Rahn, RECHTSDENKEN UND RECHTSAUFFASSUNG IN JAPAN: DARGESTELLT AN DER ENTWICKLUNG DER MODERNEN JAPANISCHEN ZIVILRECHTSDOGMATIK [LEGAL THOUGHT AND LEGAL CONCEPT IN JAPAN: PRESENTED WITH REFERENCE TO THE DEVELOPMENT OF MODERN JAPANESE GENERAL THEORY OF PRIVATE LAW] (1990) 65; Pejovic, *supra* note 26, at 193.

[45] Milhaupt, *supra* note 18, at 54; Morita, *supra* note 42, at 27.

[46] Pejovic, *supra* note 26, at 193.

47 Gilson/Milhaupt, *supra* note 7, at 8 f.

48 Aronson, *supra* note 36, at 86.

49 Bruce Aronson, *Learning from Toyota's Troubles: The Debate on Board Oversight, Board Structure, and Director Independence in Japan*, 30 J. Japan L. (2010) 71.

50 Konoe, *supra* note 32, at 84.

51 Aronson, *supra* 36, at 87; OECD Corporate Governance Factbook (2017) 44, available under [http://www.oecd.org/daf/ca/ Corporate-Governance-Factbook.pdf](http://www.oecd.org/daf/ca/Corporate-Governance-Factbook.pdf).

52 Jackson/Miyajima, *supra* note 7, at 5.

53 Aronson, *supra* note 36, at 87.

54 Aoki, *supra* note 2, at 440; Yasuhiro Arikawa & Hideaki Miyajima, *Relationship Banking in Post-Bubble Japan*, in: Aoki/Jackson/Miyajima, *supra* note 2, at 51; Pejovic, *supra* note 26, at 197.

55 Caslav Pejovic, *Reforms of Japanese Corporate Governance: Convergence in the Eye of the Beholder*, 35 J. Japan L. (2013) 114.

56 Article 11 of Anti-Monopoly Act; Pejovic, *ibid.* at 197.

57 Yoshiro Miwa & Mark J. Ramseyer, *The Multiple Roles of Banks? Convenient Tales from Modern Japan*, in: CORPORATE GOVERNANCE IN CONTEXT: CORPORATIONS, STATES AND MARKETS IN EUROPE, JAPAN, AND THE US (2006) (Klaus J. Hopt, Eddy Wymeersch, Hideki Kanda and Harald Baum, eds.) 560.

58 Pejovic, *supra* note 55, at 113.

59 Arikawa/Miyajima, *supra* note 54, at 51.

60 Arikawa/Miyajima, *supra* note 54, at 51.

61 Daniel W. Puchniak, RETHINKING COMPARATIVE CORPORATE GOVERNANCE: VALUABLE LESSONS FROM JAPAN'S POST-BUBBLE ERA (2008) 111, 114 f.

62 Puchniak, *ibid.* at 116.

63 Puchniak, *ibid.*; Pejovic, *supra* note 55, at 113.

64 Pejovic, *supra* note 55, at 113.

65 Puchniak, *supra* note 61, at 116 f.

66 Franz Waldenberger, *Keiretsu*, in: ROUTLEDGE HANDBOOK OF JAPANESE BUSINESS AND MANAGEMENT (2016) (Parissa Haghirian, ed.) 38.

67 Pejovic, *supra* note 55, at 113.

68 Pejovic, *ibid*, at 114; not necessarily implying that bankers took over management, see Miwa/Ramseyer, *supra* note 57, at 561.

69 Noriyuki Yanagawa, *The Rise of Bank-Related Corporate Survival Funds*, in: Aoki/Jackson/Miyajima, *supra* note 2, at 206.

70 Puchniak, *supra* note 61, at 118.

71 Puchniak, *ibid.* at 117 f.

72 Ronald J. Gilson, From Corporate Law to Corporate Governance, in: Gorden/Ringe, *supra* note 5, at 8.

73 Puchniak, *supra* note 61, at 118.

74 Puchniak, *ibid.*

75 Gilson, *supra* note 72, at 7; Milhaupt, *supra* note 18, at 56 f.; Waldenberger, *supra* note 66, at 38.

76 Puchniak, *supra* note 61, at 130.

77 Puchniak, *ibid.* at 130 f, 138 f.

78 Puchniak, *ibid.*, at 130.

79 Puchniak, *ibid.* at 131 f.; Arikawa/Miyajima, *supra* note 54, at 52.

80 Miwa/Ramseyer, *supra* note 57, at 560 f.

81 Puchniak, *supra* note 61, at 104, 130 ff.

82 Arikawa/Miyajima, *supra* note 54, at 53.

83 Yanagawa, *supra* note 69, at 205.

84 Yanagawa, *ibid.* at 206, 208, although some funds came under criticism to have been established for the mere purpose of keeping "zombie" banks alive, see at 222.

85 Yanagawa, *ibid*.

86 Yanagawa, *ibid*. at 206, 208 ff.

87 Puchniak, *supra* note 61, at 144 ff.; however, foreign companies were precluded from that right. It took until the introduction of the Companies Act in 2006 that foreign companies were bestowed that right. However, the process was further delayed for a year to then May 2007. Additionally, foreign companies were only entitled to do so through their respective Japanese subsidiary required to have relations with the company's that shares are to be acquired.

88 Gilson/Milhaupt, *supra* note 7, at 10. During the debates leading to the most recent amendment of the Companies Act in 2015, labor unions introduced the concept of installing employee representation on the board of statutory auditors, however, this idea was dropped already at an early stage of the delibera-

tions, see Souichirou Kozuka, *Reform After a Decade of the Companies Act: Why, How, and to Where?*, 37 J. Japan L. (2014) 41; see also Morita, *supra* note 42, at 28 ff. who gives an overview which interest groups are represented in the legislative process.

89 The phenomenon with all its core elements extending to around 20 per cent of the workforce, see Leon Wolff, *The Death of Lifelong Employment in Japan?* in: Nottage/Wolff/Anderson, *supra* note 7, at 53; for an overview of estimates, see Hiroshi Ono, *Lifetime employment in Japan: Concepts and measurements*, 24 J. Japanese & International Economics (2010) 4 ff.

90 Relying on *giri*, translated as reciprocal obligations, see Rahn, *supra* note 44, at 48 ff.

91 Pejovic, *supra* note 55, at 115; this has led to the total reversal of the principle of free terminability of employment contracts, see Moritz Bälz, *Wider den Exotismus? Zur Bedeutung der Kultur für das Verständnis des modernen japnischen Rechts [Against exotism? About the Importance of Culture for Understanding Modern Japanese Law]*, in 25 J. Japan L. (2008) 153, 157 and 163.

92 Takashi Araki, *The widening gap between standard and non-standard employees and the role of labor in Japan*, in: 8 University of Tokyo Journal of Law and Politics (2011) 11 f.; Genda Yuuji, *Japan's Employment System in Transition*, available under http://www.nippon.com/en/currents/d00151/, with figures still hovering above 60 per cent for standard employment which, however, has to be distinguished from long-term employment with a focus on long-term job retention rate whose figures oscillate between lower 40 and 50 per cent for large companies and contingent upon age group, compare Junya Haamaki, Masahiro Hori, Saeko Maeda and Keiko Murata, *Is the Japanese employment system degenerating?* 232 Economic and Social Research Institute Discussion Paper Series (2010) 29.

93 Further fortified by the court-developed doctrine of abusive dismissal. Whether a dismissal is regarded abusive depends on the following four requirements which have become to be rather interpreted as determinants. A court must evaluate (1) whether there is a business-based need to reduce personnel, (2) dismissal must be the last resort and all other possible measures must be exhausted, (3) the selection must rely on objective rational grounds, and not be regarded as socially inappropriate, plus (4) procedurally representative labor union or employees must have been consulted, see Gregory Jackson, *Employment Adjustment and Distributional Conflict in Japanese Firm*, in: Aoki/Jackson/Miyajima, *supra* note 2, a 290; Pejovic, *supra* note 55, at 115. Furthermore, through recent statutory reform the court-developed "abuse of rights"-doctrine has been inscribed into the Labor Standards Act under Article 18-2, see Caslav Pejovic, *Japanese long-term employment: Between social norms and economic rationale*, in: LAW AND DEVELOPMENT IN ASIA (Gerald Paul McAlinn & Caslav Pejovic, eds.) (2012) 212. Even in crisis firms seem to prefer to resort to other means to adjust employment such as freezing of hiring, voluntary early retirement, reallocations and transfers, see Jackson, *ibid.* at 289 f.

94 Pejovic, *supra* note 93, at 212; Puchniak, *supra* note 61, at 120.

95 Jackson, *supra* note 93, at 286.

96 Puchniak, *supra* note 61, at 120, 271, 278.

97 Puchniak, *ibid.* at 120.

98 John Buchanan, *Japanese Corporate Governance and the Principle of 'Internalism'*, 15 Corporate Governance (2007) 28.

99 Wolff, *supra* note 89, at 60. In this context the findings of Weber are interesting who states that the sanctions violation of social norms by social boycott, might prove to be more effective than any sanction imposed by legal norms, see Max Weber, WIRTSCHAFT UND GESELLSCHAFT [ECONOMY AND SOCIETY] (1922) 17.

100 Puchniak, *supra* note 61, at 268 ff.

101 Puchniak, *ibid.* at 119.

102 Puchniak, *ibid.* at 120; Goto, *supra* note 1, at 4.

103 Pejovic, *supra* note 55, at footnote 33.

104 Jackson, *supra* note 93, at 282.

105 Puchniak, *supra* note 61, at 271 ff.

106 Franz Waldenberger, *Corporate Governance*, in: Haghirian, *supra* note 66, at 66.

107 Jackson, *supra* note 93, at 283, 293 ff.

108 Gerald Paul McAlinn (ed.), *Employment and Labor*, in: JAPANESE BUSINESS LAW (2007) 425.

109 Which is nowadays predominantly observed, see McAlinn, *ibid.* at 424 f.; Ono, *supra* note 89, at 13.

110 Pejovic, *supra* note 55, at 116.

111 Wolff, *supra* note 89, at 60; Pejovic, *ibid*.

112 Jackson, *supra* note 93, at 282.

113 John O. Haley, *Japanese Perspective, Autonomous Firms, and the Aesthetic Function of Law*, in: Hopt/Wymeersch/Kanda/Baum, *supra* note 57, at 210; Waldenberger, *supra* note 106, at 61.

114 Milhaupt, *supra* note 18, at 58 f.

115 Waldenberger, *supra* note 106, at 59, 61.

116 Haley, *supra* note 113, at 210.

117 Ronald Dore, *Insider Management and Board Reform: For Whose Benefit?* in: Aoki/Jackson/Miyajima *supra* note 2, at 371; Waldenberger, *supra* note 106, at 62.

118 Christina Ahmadjian & Toru Yoshikawa, *Killing Two Birds With One Stone: Board Reforms in the Japanese Electronics Industry*, 315 Center On Japanese Economy and Business, Working Paper Series (2013) 6.

119 Ahmadjian/Yoshikawa, *ibid.*; Kozuka, *supra* note 88, at 239; Waldenberger, *supra* note 106, at 66.

120 Puchniak, *supra* note 61, at 275

121 Puchniak, *ibid.*

122 Puchniak, *ibid.*; Dore, *supra* note 117, at 391.

123 Waldenberger, *supra* note 106, at 62; Dore, *supra* note 117, at 391 f.

124 Caslav Pejovic, *Japanese Corporate Governance: Behind Legal Norms*, 29 Penn State International Law Review (2011) 504 f.

125 Dore, *supra* note 117, at 374.

126 Dore, *ibid.*; Pejovic, *supra* note 124, at 505.

127 Kozuka, *supra* note 88, at 237.

128 Jackson, *supra* note 93, at 283.

129 Takashi Araki, *Changing Employment Practices, Corporate Governance, and the Role of Labor Law in Japan*, in: 28 Comparative Labor Law & Policy Journal (2007) 254.

130 Dore, *supra* note 117, at 391; Waldenberger, *supra* note 106, at 68; Ken Favaro & Per-Ola Karlsson & Gary L. Neilson, CEO Succession 2000-2009: A Decade of Convergence and Compression, 59 Strategy and Business (2010), available under https://www.strategy-business.com/article/10208?gko=9345d.

131 Araki, *supra* note 129, at 255.

132 Dore, *supra* note 117, at 371.

133 Pejovic, *supra* note 55, at 111.

134 Jackson/Miyajima, *supra* note 7, at 4 f.

135 Waldenberger, *supra* note 66, at 40.

136 Katsuki Aoki & Thomas Taro Lennerfors, *Whither Japanese keiretsu? The transformation of vertical keiretsu in Toyota, Nissan and Honda 1991 to 2011*, in: 19 Asia Pacific Business Review (2013) 71; Jackson/Miyajima, supra note 7, at 5.

137 John O. Haley, *supra* note 113, at 205, 209.

138 Miwa/Ramseyer, *supra* note 57, at 527, 552 f.

139 Pejovic, *supra* note 55, at 111; Waldenberger, *supra* note 66, at 36; Gen Goto, *Legally "Strong" Shareholders of Japan*, 126 Michigan Journal of Private Equity and Venture Capital Law 125, 126 f. (2014).

140 Puchniak, *supra* note 61, at 118 f.

141 Goto, *supra* note 139, at 126 f.

142 Hideaki Miyajima & Fumiaki Kuroki, *The Unwinding of Cross-Shareholding in Japan: Causes, Effects, and Implications*, in: Aoki/Jackson/Miyajima, *supra* note 2, at 79; Sandra Dow & Jean McGuire & Toru Yoshikawa, *Disaggregating the group effect: Vertical and horizontal keiretsu in changing economic times*, in: 28 Asia Pacific Journal of Management (2011) 301.

143 Puchniak, *supra* note 61, at 118.

144 Pejovic, *supra* note 26, at 195; Jackson/Miyajima, *supra* note 7, at 4; Waldenberger, *supra* note 66, at 39.

145 Miyajima/Kuroki, *supra* note 142, at 80 f.

146 Miyajima/Kuroki, *ibid*.

147 Supported by legislative measures such as the enactment and implementation of the Banks' Shareholding Restriction Law in September 2004, see Miyajima/Kuroki, *ibid.* at 91.

148 Dow/McGuire/Yoshikawa, *supra* note 142, at 303.

149 Waldenberger, *supra* note 106, at 63.

150 Miyajima/Kuroki, *supra* note 142, at 82.

151 Miyajima/Kuroki, *ibid*.

152 Colin Mayer & Hideaki Miyajima, *A Look at Recent Corporate Governance in Japan*, RIETI Paper (6 July 2015); Goto, *supra* note 139, at 144 f.

153 Goto, *ibid.*, at 152.

154 Waldenberger, *supra* note 106, at 65, as for the quoted data, see Table 5.2.

155 Christina Ahmadjian, *Foreign Investors and Corporate Governance in Japan*, in: Aoki/Jackson/Miyajima, *supra* note 2, at 133.

156 OECD, Japan Policy Brief Corporate Governance (April 2015) 1, available under https://www.oecd.org/japan/japan--better-corporate-practices-for-higher-growth.pdf.

157 OECD, *ibid.*; Ahmadjian, *supra* note 155, at 126 f.

[158] Keisuke Nitta, On the Resurgence of Cross-Shareholding – Data from the Fiscal 2008 Survey of Corporate Ownership Structure, NLI Research (16 November 2009) at 4, available at http://www.nli-research.co.jp/files/topics/51086_ext_18_en_0.pdf.

[159] OECD, *supra* note 156, at 1.

[160] Nitta, *supra* note 158, at 5 f.

[161] Goto, *supra* note 139, at 152.

[162] Goto, *ibid*. at 152.

[163] Principle 1.4 of the JCGC.

[164] Goto, *supra* note 139, at 152 and footnote 167.

[165] Goto, *ibid*. at 149 ff.

[166] Julian Franks, Colin Mayer & Hideaki Miyajima, *The Ownership of Japanese Corporations in the 20th Century*, 29 The Review of Financial Studies (2014), 2584, 2598; TSE, Shareownership Survey (2015), available under http://www.jpx.co.jp/english/markets/statistics-equities/examination/b5b4pj00000154dp-att/e-bunpu2015.pdf.

[167] OECD, *supra* note 51, at 13.

[168] Meaning that rights out of shares subject to stable shareholding or cross-shareholding are usually not exercised, because they are solely held for reasons of safety. This implies that the influence effect attributed to freely circulating shares is in effect higher than the percentage reveals.

[169] OECD, *supra* note 51, at 15.

[170] Goto, *supra* note 139, at 126 ff.

[171] Goto, *ibid.* at 138 f.

[172] Goto, *ibid.* at 147 ff., 154 ff.

[173] Article 847 of the Companies Act.

[174] Goto, *supra* note 139, at 138.

[175] Takahashi, *supra* note 37, at 122.

[176] Goto, *supra* note 139, at 139.

[177] Goto, *ibid.* at 153.

[178] Goto, *ibid.* at 144.

[179] Pejovic, *supra* note 55, at 119.

[180] It can be questioned, whether this actually poses a deficiency. Coming from a standpoint that roots in the belief of free market or capitalism the answer would probably be affirmative, however, as it has been identified by the introductory remarks, Japan sees rather sees itself advocating a collaborative form of capitalism. Thus, stability and insulation of corporate management from shareholder influence for the benefit of long-term management is primary. Bearing this in mind, the influence of independent, outside directors seems to a certain extent be window dressing.

[181] RICHARD A. COLIGNON & CHIKAKO USUI, AMAKUDARI: THE HIDDEN FABRIC OF JAPAN'S ECONOMY (2003) 2.

[182] Colignon & Usui, *ibid.* at 5.

[183] Pejovic, *supra* note 55, at 116.

[184] For example, by legislation that effectively obstructs new entrants into the banking system, see Arikawa/Miyajima, *supra* note 54, at 51.

[185] See for example the historical amendment of the Antimonopoly Act in the 1950s which (re)allowed cross-shareholding, etc.

[186] Pejovic, *supra* note 55, at 116.

[187] Puchniak, *supra* note 61, at 105.

[188] Pejovic, *supra* note 55, at 116.

[189] Justice System Reform Council, Recommendations of the Justice System Reform Council (2001), Chapter 1, available under http://japan.kantei.go.jp/judiciary/2001/0612report.html; Leon Wolff, Luke Nottage & Kent Anderson, *Introduction: who rules Japan?* Sydney Law School Research Paper No. 15/10 (2015) 3.

[190] Tetsuji Okazaki, *The Government-Firm Relationship in Postwar Japan: The Success and Failure of Bureau Pluralism*, *in*: RETHINKING THE EAST ASIAN MIRACLE (2001) (Joseph E. Sticklitz & Shahid Yusuf, eds.) 323.

[191] Colignon & Usui, *supra* note 181, at 5.

[192] Colignon & Usui, *ibid.* at 11 for the four paths; also Colin P. A. Jones, *The Influence of Amakudari on the Japanese Legal System*, 22 Michigan State International Law Review (2014) 907 ff. with specific references to the phenomenon within the legal profession.

[193] Colignon/Usui, *supra* note 181, at 6 f.; Jones, *supra* note 192, at 880 ff.

[194] Pejovic, *supra* note 26, at 200 f.

[195] Chalmers Johnson, JAPAN: WHO GOVERNS? THE RISE OF THE DEVELOPMENTAL STATE (1996) 141.

[196] Pejovic, *supra* note 55, at 118.
[197] Pejovic, *ibid*., at 117.
[198] Pejovic, *ibid*.
[199] Exemplified by the metamorphosis of the FSA from an institutional agent of bureau-pluralism to a regulator in a relationship at arms'-length with the regulated companies, see Aoki, *supra* note 2, at 447.
[200] Aoki, *supra* note 2, at 446; Jones, *supra* note 192, at 890, 892.
[201] Joseph Schumpeter, THEORIE DER WIRTSCHAFTLICHEN ENTWICKLUNG (1911), 1.
[202] Aoki, *supra* note 2, at 434.
[203] Niklas Luhmann, DAS RECHT DER GESELLSCHAFT (1993) 167 in connection with footnote 5.
[204] Pejovic, *supra* note 55, at 120 f.
[205] Pejovic *supra* note 26, at 204.
[206] Pejovic, *ibid.* at 204 f.
[207] John O. Haley, THE SPIRIT OF JAPANESE LAW (1998) 14.
[208] Pejovic, *supra* note 26, at 204.
[209] Curtis J. Milhaupt, *Creative Norm Destruction: The Evolution of Non-Legal Rules in Japanese Corporate Governance*, Penn Law Review (2001) 2124.
[210] Pejovic, *supra* note 26, at 207.
[211] Pejovic, *supra* note 55, at 126.
[212] Pejovic, *ibid*. at 124.
[213] Pejovic, *supra* note 93, at 206 f.
[214] Pejovic, *supra* note 124, at 496 f.
[215] Rahn, *supra* note 44, at 48 ff.
[216] Takaya Seki & Thomas Clarke, *The Evolution of Corporate Governance in Japan: Continuing Relevance of Berle and Means*, 37 Seattle University Law Review (2014) 747; Renginee Pillay, THE CHANGING NATURE OF CORPORATE SOCIAL RESPONSIBILITY (2015) 85.
[217] Seki/Clarke, *supra* note 216, at 747.
[218] Zentarou Kitagawa, REZEPTION UND FORTBILDUNG DES EUROPÄISCHEN ZIVILRECHTS IN JAPAN (1970) 162.
[219] Gilson/Milhaupt, *supra* note 7, at 6 f. who apply the idea of Newton's First Law of Motion to this context.
[220] Milhaupt, *supra* note 209, at 2124.
[221] Pejovic, *supra* note 26, at 206.
[222] Pejovic, *supra* note 93, at 208.
[223] Pejovic, *ibid*.
[224] For a case study, see Jackson, *supra* note 93, at 303 ff., for the years 1999 to 2004, however, the different institutions seem to have evened out on their levels reached around 2004, see Nitta, *supra* note 158, at 1 for levels of cross-shareholding; Pejovic, *supra* note 55, at 131.
[225] Aoki/Lennerfors, *supra* note 136, at 82.
[226] Waldenberger, *supra* note 66, at 39.
[227] Waldenberger, *ibid*. at 39 f.
[228] Souichirou Kozuka, *Conclusions: Japan's largest corporations, then and now*, in: Nottage/Wolff/Ander-son, *supra* note 89, at 228, 235.
[229] Jackson, *supra* note 93, at 283, 285, 291; Wolff, *supra* note 89, at 79.
[230] Jackson, *supra* note 93, at 285, 298, further questioning whether performance-based pay is compatible with lifetime employment guarantees since it implies a partial departure from deferral of reward towards career track end and introduces a competitive element.
[231] Denoting young part-time workers with disrupted educational backgrounds, see Yuki Honda, *'Freeters': Young Atypical Workers in Japan*, in: 2 Japan Labour Review (2005) 1 ff.
[232] Jackson, *supra* note 93, at 283.
[233] Milhaupt, *supra* note 18, at 57.
[234] Daniel W. Puchniak, *Perverse Rescue in the Lost Decade: Main Banks in the Post-Bubble Era*, in: Nottage/Wolff/Anderson, *supra* note 7, at 103.
[235] Aoki, *supra* note 2, at 441; Gilson, *supra* note 72, at 8 f.
[236] As suggested by Aronson, *supra* note 36, at 87
[237] Takuji Saito, *Why Outside Directors in Japan are Not Prevalent?* RIETI Report September 2009; Araki, *supra* note 129, at 267 with an eye on the conflicted relationship of junior board members who at the same time fill in a managerial role as heads of their respective departments, and are further subject to senior representative directors.

238 Sebastian Sick, *Corporate Governance in Deutschland und Grossbritannien: Ein Kodex- und Systemvergleich* [*Corporate Governance in Germany and United Kingdom: A Comparison of Codices and Systems*] (2008) 192 ff.

239 Saito, *supra* note 237.

240 Saito, *ibid*.

241 Sick, *supra* note 238, at 184.

242 Philip Stiles, *Board Committees*, in: THE OXFORD HANDBOOK OF CORPORATE GOVERNANCE (2013) (Mike Wright, Donald S. Siegel, Kevin Keasey & Igor Filatotchev) 181 ff.

243 Aronson, *supra* note 36, at 85.

244 Souichirou Kozuka, Manabu Matsunaka & Gen Goto, *Japan's Gradual Reception of Independent Directors and Persistent Reluctance to Them* (unpublished, on file with the author) 2.

245 By statutory reform which took effect in 1 May, 2006 the Companies Act substituted the former Commercial Code as the key statutory law on corporations and became the self-contained statutory law that pertains all matters with regard to the 'establishment, structure, operation and management' of corporations (Article 1 of the Companies Act).

246 Articles 295, 326 (1) of the Companies Act.

247 The translation as statutory auditors has been found misleading, Kanda, *supra* note 5, at 11. The author therefore follows the recommendation of the Japan Audit & Supervisory Board Member's Association, available under http://www.kansa.or.jp/en/New_Recommended_English_translation_of_Kansayaku_and_Kansayaku-kai.pdf.

248 Aronson, *supra* note 49, at 76.

249 Curtis J. Milhaupt, *Historical Pathways of Reform: Foreign Law Transplants and Japanese Corporate Governance*, in Hopt/Wymeersch/Kanda/Baum, *supra* note 57, at 59; Waldenberger, *supra* note 106, at 67.

250 Article 390 (3) of the Companies Act.

251 Goto, *supra* note 1, at footnote 44.

252 Article 2 (xvi) in connection with Article 335 (3) of the Companies Act.

253 Article 335 (2) of the Companies Act.

254 Article 296 (3) of the Companies Act.

255 Article 362 (2) of the Companies Act.

256 *Ibid.*

257 Articles 374 (1), 381 (1) of the Companies Act.

258 Principle 4.4 of the JCGC.

259 *Ibid.*

260 Article 363 (1) of the Companies Act.

261 Articles 381 (2), 390 (2) of the Companies Act, which forms a main structural difference in comparison to the audit committee under the three-committees-model, Article 399-4 (1), or the audit and supervisory committee, Article 405 (1), whose members lack such individual powers which may have its reason in the fact that the majority of members are outside directors which are supposed to safeguard decision-making of the committees from management influence, see Goto, *supra* note 1, at footnote 44.

262 Aronson, *supra* note 36, at 98, and *supra* note 49, at 76.

263 Dore, *supra* note 117, at 381, 384.

264 Article 355 of the Companies Act.

265 Article 362 (4) of the Companies Act, which was developed against the backdrop of the Daiwa Bank case, see Aronson, *supra* note 49, at 71. TSE requires listed companies to submit annual corporate governance reports, see Aronson, *ibid.* at 74.

266 Dore, *supra* note 117, at 381 f.

267 This corresponds with 2,665 out of 3,537 listed companies, compare TSE, Appointment of Independent Directors and Establishment of Nomination/Remuneration Committees by TSE-Listed Companies (2017) 13, available under http://www.jpx.co.jp/english/listing/others/ind-executive/tvdivq0000001j9j-att/b5b4pj000001qd8q.pdf.

268 Kozuka/Matsunaka/Goto, *supra* note 245, at 3.

269 Misao Tatsuta, *Ongoing Modernization of Japanese Company Law*, in: Hopt/Wymeersch/Kanda/Baum, *supra* note 57, at 191, 203 f.

270 Aronson, *supra* note 49, at 76.

271 Article 400 of the Companies Act.

272 Article 327 (4) of the Companies Act; Kanda, *supra* note 5, at 11.

273 Article 2 (xv) in connection with Article 400 (1) through (3) of the Companies Act.

274 Milhaupt, *supra* note 250, at 63.

275 Article 402 of the Companies Act.

[276] Milhaupt, *supra* note 250, at 62; Ahmadjian/Yoshikawa, *supra* note 118, at 4.
[277] Milhaupt, *supra* note 250, at 62; In 2009 almost half of the listed companies had adopted the executive officer system, see Ahmadjian/Yoshikawa, *supra* note 118, at 7.
[278] Waldenberger, *supra* note 106, at 67.
[279] Lawley, *Panacea or Placebo?* in: 9 Asian-Pacific Law & Policy Journal (2007) 121; Ahmadjian/ Yoshikawa, *supra* note 118, at 4, 11 f.
[280] Tatsuta, *supra* note 269, at 200 f. in connection with footnote 33, thereunder arriving at the conclusion that the limited scope of application discourages companies from installing such committee.
[281] Article 406 (6) of the Companies Act; see further to this aspect, Kozuka, *supra* note 228, at 239 f.
[282] Lawley, *supra* note 279, at 121.
[283] Article 402 of the Companies Act; Hiroyuki Kansaku & Moritz Bälz, *Gesellschaftsrecht* [*Compamy Law*] in: HANDBUCH JAPANISCHES HANDELS- UND WIRTSCHAFTSRECHT [A GUIDE ON JAPANESE COMMERCIAL AND BUSINESS LAW] (2011) (Harald Baum & Moritz Bälz, eds.) numbers 121, 131; Kanda, *supra* note 5, at 11.
[284] Kanda, *supra* note 5, at 11.
[285] Dore, *supra* note 117, at 377; Lawley, *supra* note 279, at 111.
[286] This corresponds with 74 out of 3,537 listed companies, compare TSE, *supra* note 267, at 13.
[287] Aronson, *supra* note 36, at 99.
[288] Dore, *supra* note 117, at 381.
[289] Dore, *ibid*.
[290] Aronson, *supra* note 49, at 76.
[291] Article 331 (6) of the Companies Act.
[292] Nobuo Nakamura, Amendment of the Company Law and Corporate Governance Reform of Listed Companies, Waseda University Institute of Comparative Law, available under https://www.waseda.jp/fo law/icl/news/2014/04/15/3495/.
[293] Nakamura, *ibid*.
[294] Nakamura, *ibid*.
[295] Nakamura, *ibid*.
[296] Nakamura, *ibid*.
[297] Articles 342-2 (4), 361 (6) of the Companies Act; Goto, *supra* note 1, at 10 f.
[298] Nakamura, *supra* note 291, thus emulating the perceived effects of the Sony initiated push for an executive officer system in an effort to shift executive decision-making from the board of directors to those who are well-versed with the situation, see Ahmadjian/Yoshikawa, *supra* note 118, at 11 f.
[299] Saito, *supra* note 237, at 396, 409, despite the business community not always complying with the statutory distinction and counting, keeping both apart seems to be further justified and supported by the fact that firms with high foreign ownership share and market-to-book-ratio are inclined to also have a higher number of outside directors, such trend cannot be observed with regard to the composition of the *kansayaku* board.
[300] Aronson, *supra* note 36, at 99 identifies the overseeing of business strategy as a decisive difference in comparison to US-style board of directors and the supervisory board in Germany.
[301] This corresponds with 798 out of 3,537 listed companies, compare TSE, *supra* note 267, at 13.
[302] Goto, *supra* note 1, at 10.
[303] *Ibid.*
[304] Dore, *supra* note 117, at 377 articulated that thought, however, relating to potential circumvention of the three-committee-system.
[305] Daniel W. Puchniak/Kon Sik Kim, *Varieties of Independent Directors in Asia: A Taxonomy*, in: INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH (2017) (Dan W. Puchniak, Harald Baum & Luke Nottage, eds.) 28.
[306] Kozuka/Matsunaka/Goto, *supra* note 245, at 3.
[307] Which was a compromise back then, since TSE intended to incorporate an independent person on the board of directors, see Kozuka/Matsunaka/Goto, *supra* note 245, at 1; Aronson, *supra* note 49, at 80.
[308] Principle 4.8 of the JCGC.
[309] Toshiaki Nakada and Thomas Witty, *New Rules on Corporate Governance in Japan*, in: 39 J Japan L. (2015) 206.
[310] Article 2 (xv) literae a) through e) of the Companies Act.
[311] Kozuka/Matsunaka/Goto, *supra* note 245, at 6 f.
[312] Kanda, *supra* note 5, at 12.
[313] Principle 4.8 of the JCGC.
[314] Appendix, Background, paragraph 11 of the JCGC.

[315] Notably in their securities report to be submitted annually pursuant to Section 24 number 1 of the Financial Instruments and Exchange Act, see Nakada/Witty, *supra* note 309, at 206.
[316] Kozuka/Matsunaka/Goto, *supra* note 245, at 8.
[317] Principle 4.9 of the JCGC.
[318] Footnote 9 referring to "Independent Directors" under the JCGC which has to be read in connection with Principle 4.8 which somewhat nebulously refers to sufficient qualities to ensure sustainable growth and increase of corporate value; Kozuka/Matsunaka/Goto, *supra* note 245, at 11.
[319] Principle 4.8 of the JCGC.
[320] TSE, *supra* note 267, at 5.
[321] Supplementary Principle 4.10.1 of the JCGC.
[322] Principle 4.7 of the JCGC.
[323] The reference to controlling shareholders seems a bit arcane against the backdrop that Japan has a rather dispersed shareholding structure, Puchniak/Kim, *supra* note 305, at 25; Goto, *supra* note 1, at 4.
[324] Goto, *supra* note 1, at 4.
[325] TSE, Appointment of Independent Directors/Auditors (27 July 2016) 6, available under at http://www.jpx.co.jp/english/listing/others/ind-executive/tvdivq0000001j9j-att/b5b4pj000001qd8q.pdf.
[326] TSE, *supra* note 267, at 5.
[327] *Ibid.*
[328] TSE, *supra* note 325, at 2; Goto, *supra* note 1, at 12 f.
[329] TSE, *supra* note 267, at 5; see above page 61.
[330] TSE, *ibid*.
[331] Section 101 (1) (1) (appointment) and Section 103 (dismissal) of the Stock Corporation Act.
[332] Section 119 (1) numbers 5, 6 of the Stock Corporation Act.
[333] Section 84 (1) (1) and (3) of the Stock Corporation Act.
[334] Section 84 (2) of the Stock Corporation Act.
[335] Section 76 (1) of the Stock Corporation Act; Sick, *supra* note 238, at 130.
[336] Section 77 (1) (1) of the Stock Corporation Act.
[337] Section 76 (1) of the Stock Corporation Act; Preamble of the GCGC as of 5 May 2015.
[338] Section 93 (1)(2) of the Stock Corporation Act.
[339] Uwe Hüffer & Jens Koch, AKTIENGESETZ (2016) Section 76 number 29.
[340] Preamble of the GCGG.
[341] Preamble of the GCGC.
[342] Section 101 (1) of the Stock Corporation Act.
[343] Section 111 (1) of the Stock Corporation Act.
[344] Sick, *supra* note 238, at 37.
[345] Section 91 (2) of the Stock Corporation Act.
[346] Section 76 (1) of the Stock Corporation Act; Berrar, *supra* note 21, at 163 f.
[347] Section 111 (4) of the Stock Corporation Act.
[348] Streeck, *supra* note 27, at 15.
[349] Gregory Jackson, *The Origins of Nonliberal Corporate Governance in Germany and Japan*, in: Streeck/Yamamura, *supra* note 27, 155 f.
[350] Streeck, *supra* note 27, at 2.
[351] Jackson, *supra* note 344, at 155.
[352] Streeck, *supra* note 27, at 3.
[353] Streeck, *supra* note 27, at 15 f.; The institution of free collective bargaining a right which is guaranteed by the constitution – Article 9 (3) of the Basic Law – referring to the negotiations between employers' and employees' representatives, and corporate co-determination represent the two most prominent, statutorily guaranteed pillars of collaboration between employers and employees. Furthermore, collective agreements are bestowed with a stronger binding effect than usual contracts under private law, they are equal to legal norms pursuant to Sections 1 (1), 3 (2) and 4 (1) of the Collective Bargaining Act. The concept of free collective bargaining is insofar of significance as it entails that industry-specifically employers and employees negotiate, thus – unlike Japan where a firm-specific network has developed – resorting to an approach above firm level and overall solidarity beyond the limitations of the community of a firm embedded in the overall economy, Streeck, *supra* note 27, at 16; Jackson, *supra* note 344, at 155.
[354] Stephen M. Bainbridge, *The Board of Directors*, in: Gordon/Ringe, *supra* note 5, at 12.
[355] For corporations with more than 500 employees, pursuant to Section 4 (1) of the One-Third Participation Act.
[356] For corporations with more than 2,000 employees, pursuant to Section 1 (1) number 2 of the Co-Determination Act of 1976.

357 Section 27 (2)(2) of the Co-Determination Act of 1976.
358 Section 29 (2) (1) and (3) of the Co-Determination Act of 1976.
359 Sick, *supra* note 238, at 38.
360 For corporations with more than 1,000 employees, pursuant to Section 1 (2) of the Co-Determination Act for the Coal and Steel Industry of 1951.
361 Section 4 (1) (c), (2) of the Co-Determination Act for Coal and Steel Industry of 1951.
362 Section 7 (2) of the Co-Determination Act of 1976.
363 Jackson, *supra* note 344, at 156.
364 Section 100 paragraph 2 (2), (3) of the Stock Corporation Act. The ban on personal interlocking relationships is designed to prevent that someone in charge of monitoring of one company is subject to the monitoring by the monitored in a different company, see Thomas Kremer, in: KOMMENTAR ZUM DEUTSCHEN CORPORATE GOVERNANCE CODE [COMMENTARY ON THE GERMAN CORPORATE GOVERNANCE CODE] (2016) (Henrik-Michel Ringleb, Gregor Bachmann, Marcus Lutter und Axel von Werder, eds.) number 1374.
365 Section 105 (1) of the Stock Corporation Act.
366 Which effectively boils down to the “material relationship” commonly required for independent directors, compare Stiles, *supra* note 242, at 179.
367 Sick, *supra* note 238, at 185.
368 Sick, *supra* note 238, at 195.
369 Sections 76 (1), 91 (2) of the Stock Corporation Act; Section 4.1.4 of the GCGC.
370 Section 111 (4) (1) of the Stock Corporation Act.
371 Sick, *supra* note 238, at 196.
372 Sick, *supra* note 238, at 191, 193.
373 TSE, supra note 267, at 12.
374 TSE, *supra* note, at 7, 10.
375 TSE, *supra* note, at 8, 11.
376 Puchniak/Kim, *supra* note 305, at 1 ff.; Sanjai Bhagat & Bernard Black, *Board Independence and Long-Term Firm Performance*, in: 27 Journal of Corporative Law (2002) 231.
377 METI Corporate Governance Study Group Report, 17 June 2009, http://www.meti.go.jp/english/report/downloadfiles/200906cgst.pdf; Aronson, *supra* note 49, at 79.
378 Tracy Gopal, *Japan: A Closer Look at Governance Reforms* (ISS 2015) 3.
379 Puchniak/Kim, *supra* note 305, at 1 ff.
380 Self-reflection of Japanese people, see David Pilling, Bending Adversity: Japan and the Art of Survival (2014).
381 Asian Corporate Governance Association, “White Paper on Corporate Governance in Japan” (2008) 5, 21, available under http://pnomediaverantwoordbeleggen.nl/en/pdf/research_and_reports/acga_japan_white_paper_final_may15_2008_english.pdf.
382 Dore, *supra* note 117, at 371; Lawley, *supra* note 279, at 134
383 Puchniak/Kim, *supr*a note 305, at 17 for Singapore.
384 Puchniak/Kim, *supra* note 305, at 5 f.
385 Gilson/Milhaupt, *supra* note 7, at 4.
386 Sick, *supra* note 238, at 202.
387 Aronson, *supra* note 36, at 87.
388 Goto, *supra* note 1, at 15 ff.
389 Bhagat/Black, *supra* note 376, at 236 f.
390 Bainbridge, *supra* note 354, at 11.
391 Goto, *supra* note 1, at 18 f.
392 Bainbridge, *supra* note 354, at 7.
393 Recent reforms have already increased the term of office. *Kansayaku* used to be appointed for merely two years.
394 Sick, *supra* note 238, at 193 f.
395 Dore, *supra* note 117, at 382.
396 Dow/McGuire/Yoshikawa, *supra* note 142, at 304.
397 Daniel W. Puchniak, The 2002 Reform of the Management of Large Corporations in Japan: A Race to Somewhere? in: 5 Australian Journal Asian Law (2003) 48 f.; Lawley, *supra* note 279, at footnote 57; similarly “affiliated directors”, see Bhagat/Black, *supra* note 376, at 232 f.
398 Lawley, *supra* note 279, at 133.
399 Lawley, *ibid.* at 134.
400 Aoki, *supra* note 2, at 441.

401 The term relates to a corporation being rather committed to its stakeholders than shareholders, Gilson/ Milhaupt, *supra* note 7, at 27 ff.; Lawley, *supra* note 279, at 115.

402 Expertise in this context relates to familiarity with internal processes and information access which should be distinguished from expert knowledge which can be compensated for by the creation of committees as the GCGC advises. In the overall concept of a monitoring body such expert knowledge is conducive to fulfil the function as advising management as well as overseeing individual actions, but also business strategy.

403 Goto, *supra* note 1, at footnote 44.

404 Bhagat/Black, *supra* note 376, at 264 ff., 268.

405 Berrar, *supra* note 21, at 164 f.

406 Lawley, *supra* note 279, at 134.

407 Lawley, *ibid.* at 118.

408 Lawley, *ibid.* at 135.

409 Dore, *supra* note 117, at 375; Lawley, *supra* note 279, at 135;

410 Lawley, *supra* note 279, at 136.

411 Dore, *supra* note 117, at 381.

412 A similar approach can be observed in Germany where the Preamble to the GCGC that does not view a corporation on a stand-alone basis, but rather views the corporate group ("Konzern") as a whole.

413 See for similar concerns, Milhaupt, *supra* note 250, at 63 f.

414 Aronson, *supra* note 36, at 99 who regards this as crucial shortcoming, see above *supra* note 299.

415 Sick, *supra* note 238, at 203 f., relating to potential inefficiencies when it comes to inter-board coordination between management and supervisory board.

416 Which might raise the question as to whether a tendency towards a quasi-two-tier structure and a certain functional convergence with a two-tier model can be assumed, see Sick, *supra* note 238, at 202.

417 Article 362 (2) (iii) of the Companies Act.

418 Sick, *supra* note 238, at 193, however contrasting the capabilities of non-executive directors under the UK's Combined Code with the supervisory board in Germany.

419 Ronald Gilson, *Globalizing Corporate Governance: Convergence of Form or Function* (2000) at 11 f., available under https://papers.ssrn.com/sol3/papers.cfm?abstract_id=229517.

420 Pejovic, *supra* note 124, at 511.

421 Pejovic, *ibid*.

422 Milhaupt, *supra* note 250, at 58.

423 Wolff/Nottage/Anderson, *supra* note 189, at 3.

424 Pejovic, *supra* note 124, at 500, 520 f.

425 Bälz, *supra* note 91, at 162.

426 Ahmadjian, *supra* note 155, at 138.

427 Milhaupt, *supra* note 250, at 69 who admonishes that directorial independence on committees in complemented by judicial review and that Japanese court might be not yet experienced and overwhelmed with applying ex-post fiduciary standards in cases of interest conflicts on the board. Such a constellation might eventually lead to adverse effects.

428 Dore, *supra* note 117, at 390 refers to "friends and well-wishers of the firm".

429 An afterthought resonating in John O. Haley, *Heisei Renewal or Heisei Transformation: Are Legal Reforms Really Changing Japan?* in: 19 J. Japan L. (2005) 16.

430 Waldenberger, *supra* note 106, at 68.

431 Dore, *supra* note 117, at 394.

432 Waldenberger, *supra* note 106, at 69.

433 Ahmadjian, *supra* note 155, at 125.

434 Ahmadjian, *ibid.* at 130.

435 Dow/McGuire/Yoshikawa, *supra* note 142, at 317.

436 Dow/McGuire/Yoshikawa, *supra* note 142, at 317 f.

437 See the executives' views reflected in the interviews in Christina Ahmadjian, *supra* note 155, at 136 f.

438 John O. Haley, *supra* note 429, at 5, 13 ff., prevalently referring to the resilience of long-term employment and labor market mechanisms.

439 Eric A. Feldman, *Legal Reform in Contemporary Japan*, in 25 J Japan L. (2008) 6.

440 Bälz, *supra* note 91, at 153, 154.

441 Bälz, *ibid.* at 156, 158 ff.

442 Bälz, *ibid.* at 159 f.

443 Ahmadjian/Yoshikawa, *supra* note 118, at 4 f.

444 OECD, *supra* note 156, at 2.

445 Waldenberger, *supra* note 106, at 69 f.

[446] Dore, *supra* note 117, at 383
[447] Dore, *ibid*. at 384.
[448] Aoki, *supra* note 2, at 444.
[449] Aoki, *ibid*.
[450] Aoki, *ibid.* at 444 f.
[451] Aoki, *ibid.*, at 442 f.
[452] Although a variety of countries have adopted measures to reach a ratio of 50 per cent of independent directors, see OECD, *supra* note 51, at 111.

Table Visualization of Conclusion

<table>
<tr><th>Time</th><th>Prior 2015</th><th>2015</th><th>Prospects</th></tr>
<tr><td>Prevalent model</td><td>• Kansayaku model</td><td>• Kansayaku, but broader acceptance of supervisory committee</td><td rowspan="2">• Supervisory Committee
• One third each inside, grey and outside directors
• Oversight of formulation and implementation of business strategy (like supervisory board)
• Monitoring model (nomination + remuneration)</td></tr>
<tr><td>Notable Change</td><td>• Low acceptance of three-committee/management model</td><td>• Implementation of one (91.8 %), two or more (67.8 %), a third or more independent (22.8 %) and outside directors (98.8%)
• Optional adoption of nomination and remuneration committee (majority of outside directors, ~45 %)</td></tr>
<tr><td>Monitoring?</td><td>• Compliance
• Review of individual transactions</td><td>• Voice & enforcement through board representation
• Counselling
• Isolate management from (waning, but stable) corporate community</td><td>• Convergence on a monitoring model while retain specific Japanese corporate governance elements</td></tr>
<tr><td>Characterization</td><td>Inertia, Wake-up Call</td><td>Transition Period</td><td></td></tr>
</table>

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