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Revisiting the Distinction between Shareholder- and Stakeholder-Orientation with Respect to Stock Company Law in Japan Focusing on the Relevance of Shareholder Structure, Legal Fashions and Institutional Lock-ins

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Revisiting the Distinction between Shareholder- and Stakeholder-Orientation with Respect to Stock Company Law in Japan

Focusing on the Relevance of Shareholder Structure, Legal Fashions and Institutional Lock-ins

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INTRODUCTION

I. Setting the Tone[1]

The underlying normative objective of corporate law has been identified as contributing and furthering the aggregation of the welfare of equally including shareholders and stakeholders, with the latter notion referring to the collective of actors that hold an interest in a company for reasons other than stock and stock (price) appreciation, and ultimately society in its entirety.[2] This proposition suggests that law is pivotal to achieving the ideal of fair and equitable corporate wealth distribution between shareholders and stakeholders. With capital markets having risen to an increasingly prominent role in pension systems and household savings in a growing number of jurisdictions around the globe[3], the lines between specific stakeholders – such as employees – and shareholders have started to blur, and further, following such emerging trajectory, the roles of employees and corporate rent-seeking capitalists may ultimately become confounded and, to a certain degree, aligned, namely under the aspect of a universal capital market orientation.[4]

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1 Note to the reader: This thesis follows the Hepburn system of romanization meaning that long vowels are indicated by macrons. However, exceptions are made for the names of people and persons (in the main text). Also, the tradition of placing the family name before the name is not followed for Japanese names.

2 Henry Hansmann/Reinier Kraakman, *What is Corporate Law?* in: Reinier Kraakman/John Armour/Paul Davies/Luca Enriques/Henry Hansmann/Gerard Hertig/Klaus Hopt/Hideki Kanda/ Edward Rock (eds.), THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (2nd edition, 2009) 18. Similarly, in a more extensive version of the aforementioned source, John Armour/Henry Hansmann/Reinier Kraakman, *The Essential Elements of Corporate Law: What is Corporate Law*, Harvard Law School Discussion Paper No. 643 (July 2009) 25. On the recent tendency of a rather shareholder-centric model, Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 University of Pennsylvania Law Review (2013) 1907-1988. A more balanced understanding based on a collective, "team-like" conceptualization of the corporation in light of, and in response to, the Global Financial Crisis of 2007/2008 is submitted by Kent Greenfield, *The Third Way: Beyond Shareholder or Board Supremacy*, 37 Seattle University Law Review (2014) 749-773.

3 For an overview of recent reshufflings in the pension system of Japan, especially the shift from defined benefit plans to defined contribution plans after the pertaining regulatory changes in 2001, see Shigeto Kashiwazaki/Hiroharu Fukuzawa, *Current Situation and Issues of Retirement Benefit (Corporate Pension) in Japan*, 7 Japan Labor Review (2010) 66 ff.; David Rajnes, *The Evolution of Japanese Employer-Sponsored Retirement Plans*, 67 Social Security Bulletin (2007) 89 ff.

4 Martin Gelter, *From Institutional Theories to Private Pensions*, Fordham University School of Law Working Paper Series No. 2463275 (July 2014) 3, 16, 20; also, Ewan McGaughey, *Does Corporate Governance Exclude the Ultimate Investor?* 16 Journal of Corporate Law Studies (2016) 221 ff., for different variations of intermediary structures. In this context the term of

In the realm of corporate law in Japan, a significant shift has been observed for several decades. There seems to be consensus that prior to the watershed moment of the bubble burst in the late 1980s and early 1990s, the pendulum swung towards stakeholders rather than shareholders and that such policy has only slowly begun to swing (back) towards a more neutral and recently arguably even to a marginally affirmative stance towards the demands of shareholders, a (re)orientation chiefly perceived as desirable.[5] In other words, Japan's corporate law and corporate practice are not yet viewed as sufficiently shareholder-centric or shareholder-friendly or as adequately attending to the concept of shareholder value maximization, despite recent concerted legislative reform efforts.[6]

Views on stock companies in Japan tend to omit taking into account the first half of the twentieth century, which is only occasionally cast light upon in the international discourse,[7] despite research that has embraced such wider, long-term angle, having contributed to critically assess established thought patterns in this context.[8] A short-term perspective is susceptible to becoming clouded by predominantly looking through the lens of Anglo-American corporate law.[9] The claim of insufficient shareholder orientation sounds to a certain extent oxymoronic when viewed against

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employees as "forced capitalists" has been coined, see Leo E. Strine, Jr., *Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance*, 33 Journal of Corporation Law (2007) 1 ff. The "coupling" of the performance of pension monies and household savings of employees with the robustness and health of stock companies surfaces under the public interest aspect in the stewardship debate (in Europe), see Iris H.-Y. Chiu/Dionysia Katelouzou, *From Shareholder Stewardship to Shareholder Duties: Is the Time Ripe?*, in: Hanne Birkmose, SHAREHOLDERS' DUTIES (2017) 131-152, 145.

5 The New York Times, *An investor activism uncommon in Japan*, The New York Times (29 August 2007), available under: https://www.nytimes.com/2007/08/30/business/worldbusiness/30iht30investor.7313956.html (last accessed 11 June 2024), where it is reported that the priority assigned to the position of shareholders in relation to other stakeholders on the agenda of corporate managers in Japan rises, however, slowly.

6 Such perceived adherence to the stakeholder-orientation has led to the coinage of the "community firm" which appears to have so far survived, see John Buchanan/Dominic H. Chai/Simon Deakin, *Taking a Horse to Water? Prospects for the Japanese Corporate Governance Code*, 47 Journal for Japanese Law (2019) 77 f.

7 Julian Franks/Colin Mayer/Hideaki Miyajima, *The Ownership of Japanese Corporations in the 20th Century*, 27 The Review of Financial Studies (2014) 2580-2625.

8 Yoshiro Miwa/Mark J. Ramseyer, *The Fable of the Keiretsu*, 11 Journal of Economics and Management Strategy (2002) 169 ff., and *Does Relationship Banking Matter? The Myth of the Main Bank*, 2 Journal of Empirical Studies (2005) 261 ff., aim to deconstruct certain "myths" with respect to corporate law and corporate governance institutions in Japan.

9 Dan W. Puchniak, *Multiple Faces of Shareholder Power in Asia: Complexity Revealed*, in: Jennifer G. Hill/Randall S. Thomas (eds.), RESEARCH HANDBOOK ON SHAREHOLDER POWER (2015) 519.

the background of ownership patterns in Japan that by mere empirical figures, which remain silent on relational, especially cross-shareholdings arrangements within corporate conglomerates, report comparatively dispersed ownership patterns with high degrees of ownership dispersion purportedly corresponding with robust levels of legal investor protection.[10]

As a matter of fact, the bubble burst caused the arrival and ensuing increasing presence of foreign and institutional investors[11] against the bigger picture of the rising relevance of agency capitalism[12] with respect to the equity holdings in stock companies listed on developed stock markets around the world. Concurrent with this recent reshuffling of stock ownership, pressure has been mounted on Japan to improve its corporate governance system,[13] which was and continues to be viewed as a stakeholder-oriented, relational governance system for the benefit of outside, not-affiliated investors. The relevance of, and focus (also) on, stakeholder interests is usually considered a convention of the civil law heritage of commercial laws in Japan.[14] The positive aspects of such broader responsibility to all stakeholders have recently experienced a renaissance.[15] The articulation of the demands for improvement of the incumbent corporate governance model draw on the convergence debate[16] which purports that corporate laws around the globe move towards an

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10 Rafael La Porta/Florencio Lopez-de-Silanes/Andrei Shleifer/Robert Vishny, *Law and Finance*, 106 Journal of Political Economy (1998) 1113-1155, or a bit nonchalantly put, ownership patterns in Japan show "*concentration without owners*", see Peter A. Gourevitch/James Shinn, POLITICAL POWER AND CORPORATE CONTROL: THE NEW GLOBAL POLITICS OF CORPORATE GOVERNANCE (2005) 167.

11 For an overview of the change in shareholders, see, for example, Mitsuru Mizuno/Hajime Shimizu, *The Influence of Institutional Investors on Corporate Governance and Firm Performance: Evidence from Japan*, 3 Kindai Management Review (2015) 77, table 1. The authors also provide an overview of the corporate governance and stewardship role-related activities of domestic institutional investors starting in 2003, *ibid*., 80 ff.

12 Ronald J. Gilson/Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 Columbia Law Review (2013) 863 ff..; Paul H. Edelmann/Randall S. Thomas/Robert B. Thompson, *Shareholder Voting in an Age of Intermediary Capitalism*, 87 Southern California Law Review (2014) 1359 ff.

13 Sanford M. Jacoby, *Convergence by Design: The Case of CalPERS in Japan*, 55 The American Journal of Comparative Law (2007) 239-293.

14 Masaki Nakabayashi, *Ownership structure and market efficiency: Stockholder/manager conflicts at the dawn of Japanese capitalism*, 61 Journal of International Financial Markets, Institutions & Money (2019) 190.

15 For example, as a hedge against excessive executive remuneration, see Alberto R. Salazar/John Raggiunti, *Why Does Executive Greed Prevail in the United States and Canada but not in Japan? The Pattern of Low CEO Pay and High Work Welfare in Japanese Corporations*, 64 The American Journal of Comparative Law (2016) 737 ff.

16 Following the perish song that distinct institutional differences between the corporate governance arrangements and laws in jurisdictions worldwide would vanish, first intonated by Henry Hans-

"emerging global norm"[17] influentially shaped by US-American corporate law on the one hand, and the long-standing perception of Japan's corporate law falling short of meeting such benchmark, resulting in Japan's corporate law, especially with respect to its corporate governance[18] system, being classified as a "hybrid model"[19], or similarly in other terms, as a model combining elements of the stakeholder-oriented and shareholder-oriented[20] paradigms[21], or as a "shareholder-based control-oriented"[22] approach on the other hand. While such terminology reveals that convergence tendencies towards the Anglo-American model corporate law model[23] propelled by the integration of global capital markets coetaneous with the worldwide diffusion and import of corporate governance practices to Japan, attributed, inter alia, to impact and

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mann/Reinier Kraakman, *The End of History for Corporate Law*, 89 The Georgetown Law Journal (2001) 439 ff.

17 Jiwook Jung/Eunmi Mun, *Bending but Not Breaking? Foreign Investor Pressure and Dividend Payouts by Japanese Firms*, 31 Sociological Forum (2016) 680.

18 Corporate governance is defined as "*deal[ing] with the mechanisms that ensure investors in corporations get a return on their investment*", see Craig Dodge/G. Andrew Karolyi/René M. Stulz, *Why do countries matter so much for corporate governance?*, 86 Journal of Financial Economics (2007) 2.

19 Bruce E. Aronson, *Japanese Corporate Governance Reform: A Comparative Perspective*, 11 Hastings Business Law Journal (2015) 103 ff.; Toru Yoshikawa/Lai Si Tsui-Auch/Jean McGuire, *Corporate Governance Reform as Institutional Innovation: The Case of Japan*, 18 Innovation at and across Multiple Levels of Analysis (2007) 973 ff. For the entire legal system of Japan, see Tsuyoshi Kinoshita, *Legal System and Legal Culture in Japan*, 11 Journal for Japanese Law (2001) 23.

20 Shareholder-orientation understood as adherence to the shareholder value principle which answers the question, for whose interests stock companies should be run, with assigning priority to shareholders, implemented, through the distribution and return of economic value created and profits earned by stock companies to shareholders, inter alia, in the form of dividends, and which has established itself as the benchmark of how stock companies should ideally be operated and steered since the 1980s, despite indents through veritable shocks to global stock markets such as the Global Financial Crisis of 2007/2008 or elements of wider stakeholder-oriented approaches such as corporate social responsibility (CSR), see Taekjin Shin, *The Shareholder Value Principle: The Governance and Control of Corporations in the United States*, 10 Sociology Compass (2013) 829 ff. The orientation of investments at environmental, social and corporate governance (ESG) aspects might lend more clout and cogency to stakeholder-oriented thinking.

21 Jung/Mun, *supra* note 17, 663.

22 Luke Nottage, *Japanese Corporate Governance at a Crossroads: Variation in 'Varieties of Capitalism'*, in: Tom Ginsburg/Luke Nottage/Hiroo Sono (eds.), THE MULTIPLE WORLDS OF JAPANESE LAW: DISJUNCTIONS AND CONJUNCTIONS (2001) 89, who observes a tendency towards growing convergence of interests of corporate managers and shareholders in Japan.

23 In terms of the law in the books, Japanese corporate law may even be found to be more shareholder-friendly than the corporate laws of the United States and the United Kingdom with shareholders, inter alia, having a direct say on dividend payouts and the pay of executive directors, see Naohiko Baba, *Increased presence of foreign investors and dividend policy of Japanese firms*, 17 Pacific-Basin Finance Journal (2009) Fn. 7.

mediation[24] of foreign as well as domestic[25] institutional investors since the 1990s[26], have been set in motion, convergence in substance is not considered to have yet occurred, or only with delay and it implies the survival of conceptual gaps in the laws governing the stock companies in Japan. Taking a more reconciling stance, the reference point of corporate law and principally corporate governance-related reforms in Japan has not been the removal, but the modernization of the "community firm".[27]

The afore-referred demands have been responded to the enactment of various legal rules, being added on top of a by its letters robust array of statutory shareholder rights,[28] addressing alleged corporate law or rather corporate governance[29] shortcomings, such as the introduction of the option to have a company with three committees (in 2002) or a company with an audit and supervisory committee (in 2014), and soft law instruments, such as the Stewardship Code in 2014 and the Corporate

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24 When referring to such "mediation", this includes indirect influences such as the potentially growing consciousness of the management of Japanese listed companies of, for example, the dividend payout policies of their counterparts in the United States and an approximation to industry average levels due to the widening of the organizational field, that is, the cognitive awareness of their embeddedness in a global structure integrated local institutional structures through increased levels of exchange of information and resources on a global scale. The local institutional structures may, however, still exert their influence with companies waiting to follow their domestic peers to embrace external standards before eventually likewise changing course, Jung/Mun, *supra* note 17, 669 ff. On organizational fields and their cognitive boundaries in institutional and organizational theory, see Paul J. DiMaggio/Walter W. Power, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 American Sociological Review (1983) 148 ff.

25 The weakening size and influence of domestic financial institutions' cross-shareholdings to underpin business relationships with their clients as lenders (banks) or policyholders (insurers) precipitated by the burst of the bubble economy, ushered in a reorientation of these shareholders – to the degree they did not sell off their shareholdings – causing them to become more assertive and request greater returns of their investments, often in the form of higher dividend yields, Jung/Mun, *supra* note 17, 669, 676 ff.; Ulrike Schaede, CHOOSE AND FOCUS: JAPANESE BUSINESS STRATEGIES FOR THE 21ST CENTURY (2008) 95 ff.

26 Reena Aggarwal/Isil Erel/Miguel Ferreira/Pedro Matos, *Does Governance Travel around the World? Evidence from Institutional Investors*, 100 Journal of Financial Economics (2011) 178; Kurt A. Desender/Ruth V. Aguilera/Mónica López-puertas-Lamy/Rafael Crespi, *A Clash of Governance Logics: Foreign Ownership and Board Monitoring*, 37 Strategic Management Journal (2016) 365 f.; Jung/Mun, *supra* note 17, 664 f., 667, 676 ff.; Christina L. Ahmadjian/Gregory E. Robbins, *A Clash of Capitalisms: Foreign Shareholders and Corporate Restructuring in 1990s Japan*, 70 American Sociological Review (2005) 457 ff.

27 Buchanan/Chai/Deakin, *supra* note 6, 77.

28 For example, Gen Goto, *Legally 'Strong' Shareholders of Japan*, 3 Michigan Journal of Private Equity & Venture Capital Law (2014) 129 ff.

29 On the growing contraction and ensuing juxtaposition of corporate law and corporate governance concomitant with a shift from a predominantly legal focus to a wider context and a stock company's interfaces and interaction with other institutions or institutional elements constituting the overall capitalist system, see Ronald J. Gilson, *From Corporate Law to Corporate Governance*, ECGI Law Working Paper No. 324/2016 (September 2016) 7.

Governance Code in 2015[30], as well as the overhaul of listing rules and requirements[31] from the side of Japanese lawmakers. The undertaking of such reform efforts since the mid-1990s has contributed to – critically – reassessing former influential theoretical classification traditions with respect to differences between the corporate governance arrangements in various jurisdictions such as articulated by the so-called "varieties of capitalism" literature.[32] Hence, it appears as if both sides, investors and regulators alike, take the view that the level of investor protection is indeed relevant in the sense that it poses one of the principal determinants to attract or scare off outside investors. On the other hand, studies on the long-term evolution of ownership patterns and investor protection in other jurisdictions, such as the United Kingdom, suggest that is not necessarily the case, but rather that ownership dispersion appears to have occurred prior to the arrival of mechanism ensuring the protection of investors.[33] While in the light of relational shareholding (*seisaku hoyū*) or cross-shareholdings ensuring a bedrock of stable shareholders (*antei kabunushi*) between companies of *keiretsu* affiliation found to be characteristic for ownership patterns of Japanese stock companies are not adequately reflected by most ownership dispersion metrics, this thesis argues that law – unless it stipulates direct requirements or prohibitions – might not matter as much as widely assumed, but that it is rather the ownership patterns in return influenced by macro-economic changes – the aforementioned agency capitalism may serve as a recent phenomenon thereof – that define whether the trajectory whether

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30 Hiroyuki Kansaku, *Genuine Self-regulation in Japanese Capital Markets: The Stewardship Code*, in: Harald Baum/Moritz Bälz/Marc Dernauer (eds.), SELF-REGULATION IN PRIVATE LAW IN JAPAN AND GERMANY (2018) 61 ff.

31 For example, the institution of independent auditors and directors was introduced by the avenue of the Tokyo Stock Exchange's listing rules, Japan Exchange Group, *Independent Directors/ Auditors* (19 May 2024), available under: https://www.jpx.co.jp/english/equities/listing/ind-executive/index.html (last accessed 13 June 2024).

32 The "varieties of capitalism" paradigm discusses not only corporate governance, but the relationships of firms with other economic actors in developed economies developing new explanations to institutional similarities and differences, especially between liberal and coordinated market economies which would from a monolithic corporate governance perspective translate into the shareholder- and stakeholder-oriented models. For an introduction into the varieties of capitalism literature, see, for example, Peter A. Hall/David Soskice (eds.), *An Introduction to Varieties of Capitalism*, in: VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATION OF COMPARATIVE ADVANTAGE (2001) 1 ff. For an impulse to rethink such classification, see Nottage, *supra* note 22, 86 ff. The author also points at the potential impact of the broader social and economic logic on industrial organization and inter-firm cooperation, potentially also having an effect on the orientation of corporate governance in a wider sense, *ibid*., 86 ff., 89.

33 Julian Franks/Colin Mayer/Stefano Rossi, *Ownership: Evolution and Regulation*, 22 The Review of Financial Studies (2009) 4016 ff.

a jurisdiction is perceived as investor-friendly.[34] Positive law itself only facilitates the translation of macro-economic changes. Ownership patterns may, however, show their impact insofar as emerging shareholder groups may become more assertive and the further advancement of such balance shift may demand legal amendments and reform, in this manner catalyzing legal change.[35]

II. Problem: Towards the Research Question

1. Introduction: Outline of Recent Developments

The situation mapped out in rough sketches above, reveals that the transformation of corporate law and corporate governance in Japan towards global corporate norms – howsoever comprehensive such norms may be – has been perceived as anodyne and tepid, but recent actions and events denote that changes have been set in motion and have gained traction as initial inertia given the fundamental effort to reorient the corporate governance system appears to have given way with changes becoming more pervasive. En route to the current situation, formerly long-standing corporate governance institutions and their protracted departure have been identified as stumbling blocks stalling such transformation. In this vein, much literature touching upon corporate law in Japan until 2010 has dwelt on mainstays of the previous corporate governance system such as the main bank, cross-shareholding and long-term – or even life-long – employment.[36]

This thesis contends that the focus on these institutions overstates their relevance and that it is always the shareholders who are the relevant star around which the satellites corporate law and practice are orbiting. The perceived passive stance towards shareholders' legal interest is tinged by the viewpoint of institutional shareholders which have been on the global rise triggered by the growing relevance of the mutual

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34 The investigation of Johan Jidinger/Hideaki Miyajima, *Does Regulation Matter? Effects of Corporate Governance Reforms on Relational Shareholdings in Japan*, RIETI Discussion Paper Series No. 20-E-003 (January 2020) 1 ff. advances into a similar direction, but focuses on relational shareholdings and the effect of corporate governance reforms, thus taking a more thematic focus and less comprehensive approach.

35 The observation that there are various groups of shareholders which may entertain different attitudes and make use of their rights in different manners has been made, for example, by Masaru Hayakawa, *Shareholders in Japan: Attitudes, Conduct, Legal Rights, and their Enforcement*, in: Harald Baum (ed.), JAPAN: ECONOMIC SUCCESS AND LEGAL SYSTEM (1997) 242 ff.

36 Miwa/Ramseyer, *supra* note 8, 169 ff., and 261 ff.; Toru Yoshikawa/Jean McGuire, *Change and Continuity in Japanese Corporate Governance*, 25 Asia Pacific Journal of Management (2008) 5 ff.; Caslav Pejovic, *Japanese Corporate Governance: Insights from the Unsuccessful Adoption of the American. Model*, Yonsei Law Review (2012) 191 ff.

fund industry, pension funds and private retirement savings in jurisdictions around the world turning to capital markets starting in the United States in the mid-1970s, discovering Japanese equity markets in the 1980s and broadly on a global scale since the beginning of the 1990s.[37] The panoply of collective investment funds is wide with sovereign and private wealth funds (hereinafter collectively referred to as "pension funds") that tend to seek steady returns of their investment in the form of stock performance and appreciation as well as through, inter alia, dividends on the one hand, and alternative investment funds, most notably hedge funds[38] as active players aiming for immediate returns through active engagement and what has been dubbed as "offensive activism"[39], often pushing for access to the board of directors as a forum where they can effectively voice their requests as well as they demand access to mechanisms which allow them to have influence on corporate management and to achieve a correction of a perceived lack of focus on shareholder value and the realization of such latent shareholder value through immediate (monetary) returns on the other hand. The "ideal" envisaged by regulators may lie somewhat in the middle, as hedge funds are widely sceptically received[40], while large pension funds may lack on the engagement front due to rational apathy considerations caused by widely dispersed equity holdings.

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37 Gilson/Gordon, *supra* note 12, 878 ff.; Gourevitch/Shinn, *supra* note 10, 175 ff. (Japan), 246 ff. (United States); Jung/Mun, *supra* note 17, 668. For empirical references documenting the ascent, see Chiu/Katelouzou, *supra* note 4, 136, Fn. 29.

38 For a phenomenological and empirical overview, see Dionysia Katelouzou, *Myths and Realities of Hedge Fund Activism: Some Empirical Evidence*, 7 Virginia Law & Business Review (2013) 459-511. For the situation in Japan, see John Buchanan/Dominic H. Chai/Simon Deakin, *Unexpected Corporate Outcomes from Hedge Fund Activism in Japan*, 18 Socio-Economic Review (2020) 31 ff.; Yasushi Hamao/Pedro Matos, *U.S.-Style Investor Activism in Japan: The First Ten Years?*, 48 Journal of the Japanese and International Economies (2018) 29 ff.

39 While choice of the adjective "offensive" might evoke the assumption of an aggressive stance towards the target company, it commonly refers to the timing of the taking of a relevant equity stake in the target company, namely in the case an "offensive" building of an equity position, such position is taken in order to engage presuming latent shareholder value which is aimed to be unlocked by agitation resting on the initial taking of the equity stake, see Brian R. Cheffins/John Armour, *The Past, Present, and Future of Shareholder Activism by Hedge Funds*, 37 Journal of Corporation Law (2012) 51 ff., 56 f.; Marcel Kahan/Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 University of Pennsylvania Law Review (2007) 1069 f. In contrast therewith, "*defensive activism*" refers to incidental or ex-post activism, Kahan/Rock, *ibid*., 1069.

40 Katelouzou, *supra* note 38, 462, succinctly refers to "*warning bells*" having been rung, reflecting the apprehension against supposed hedge fund objectives such as short-termist strategies which may potentially clash with mid- to long-term goals of the target companies, or tactics such as equity decoupling through employment of instruments such as share-lending, derivative and equity swaps lending hedge funds more voice than actual economic ownership, *ibid*., 499.

This rough outline suggests that the group of shareholders are not monolithic and are dynamic. Ownership patterns have undergone profound change over the course of the last decades and last century with the shareholders' position having become increasingly complicated by the phenomenon of agency capitalism which refers to intermediary investors, proxy advisors, trust and custodians banks and the unfolding of the investment chain as well as of diversified, small investments discouraging firm involvement on the one hand and the construction of stewardship and fiduciary duties of such intermediary investors towards the ultimate investors (beneficiaries) and investee companies. In contrast, owner families or commercial banks that have pursued long-term objectives, and may – with moderated intensity – continue to do so, which do not translate into immediate stock returns and often lie beyond the financial aspect of the equity investment. Again, there may be nuances, such in the case of commercial banks being influenced, inter alia, by the degree and relevance of bank finance.

Having said that, the core of the controversy with respect to corporate law in Japan appears to lie in the indiscriminate application of the lens of a "global corporate law norm", preponderantly shaped by demands and expectations of institutional investors familiar with corporate law in the Anglo-American legal sphere, as well as with a portion of disregard for length of historical processes, as capital markets and the position of shareholders in the first half of the twentieth century substantially contrast with the postwar "image" of corporate law and practice in Japan in various aspects. Instances of evident disconnects between certain expectations of specific legal actors and the existing coherence of a legal (sub)system – here, corporate law – has recently resulted in the coinage of the term "legal fashions", ostensibly consonant with, and analogous to, the more prominent "legal transplants".[41] Such legal fashions have been observed in the context of the introduction of foreign legal concepts motivated by formal compliance with international standards and a signaling of compliance and reliability to actors (potential investors) in the international context to encourage foreign investment rather than by the necessity and intention to respond to a virulent

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[41] For example, Harald Baum, *Comparison of Law, Legal Transplants and International "Legal Fashion" in German and Japanese Corporate Law*, in: Béatrice Jaluzot (ed.), DROIT JAPONAIS, DROIT FRANÇAIS, QUELLE RÉFORME? [Japanese Law, French Law, which reforms?] (2020) 188 ff. Soichiro Kozuka, *Diversity in Japanese Companies' Boardroom: Sign of Shifts in the Japanese Model or Corporate Governance Reform as a Fashion?*, 30 European Business Law Review (2019) 223 ff.

(domestic) legal problem.[42] On the other hand, the technique of legal transplants, which have been tailored to the legal system of the importing jurisdiction to varying degrees, has been – however, not without contestation – accepted as a form of exogenous legal development and advancement.[43] Furthermore, if convergence is singled out as a desirable trajectory of relevant actors, such as lawmakers and international investors, frictions with the existent legal system appear unavoidable. Finally, this leads over to question of function and relevance of corporate law, namely whether corporate law can drive change or whether it is rather limited to establishing a level playing fields in whose guardrails the relevant actors act and make their arrangements largely autonomously. The thesis tends to the latter proposition with respect to corporate law, the rise of institutional investors poses challenges to which regulators in various jurisdictions react, balancing domestic interests with catering to such new group of shareholders. Corporate law, in particular the concept of the stock company, were designed under different circumstances with respect to the important players (shareholders and stakeholders) and macro-economic conditions in the late nineteenth century and arguably redesigned in 1950.

Therefore, a better understanding of ownership patterns over the entire period since the arrival of the stock company concept in Japan which entails an extension of the historical perspective to the late nineteenth century is deemed conducive to develop a better understanding of current trajectories in corporate law and practice in Japan. Recent literature has started to shed light on different aspects of corporate law and legal practice in the first half of the twentieth century and the thesis at hand seeks to take up the torch, built on such discoveries and to further extend it. Based on a thus more holistic approach, the thesis will then embark on the attempt to construct a new narrative on the development of corporate law and practice in Japan.

To understand where corporate law is heading and why legal change may not occur as promptly and in the same form as anticipated and revisions of law – mandatory or soft alike – the amendment of statutory law do not necessarily engender corresponding transformations of corporate practice, it is therefore relevant to be informed about the composition of the shareholder class, since different dominant or majority shareholder

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42 Baum, *supra* note 41, 188 ff.; For the signaling aspect in the context of corporate social responsibility standards, see Gralf-Peter Calliess/Moritz Renner, *Between Law and Social Norms: The Evolution of Global Governance*, 22 Ratio Juris (2009) 273.

43 Alan Watson, LEGAL TRANSPLANTS – AN APPROACH TO COMPARATIVE LAW (2nd edition, 1994) 21 ff.

groups may have different demands and accentuations with respect to the law and the expectations tied to their investment. Dissimilar demands and accentuations can materialize on two planes: Firstly, certain groups of shareholders may put emphasis on the use of law, while other blocks may prefer to rely on informal arrangements. On a second level, even if relying on legal provisions, certain groups of shareholders may decide to not (fully) utilize the rights provided by a legal order. In addition, when referring to groups of shareholders, such terminology is to a certain degree simplistic, since within a somewhat homogeneous group of shareholders nuances may occur. As previously seen, the group of institutional investors unites a wide array of investors between the two poles of hedge funds towards the more assertive end and pension and sovereign wealth funds, or in the case of Japan, trust and custodian banks[44], on the more passive opposite side.

A longer historical perspective extending to the period when the stock corporation arrived in Japan reveals that this is also applicable to stock corporations in Japan. It appears that changes between various groups of shareholders are connected to macro-economic developments. Law seems to only assume a secondary role, as it reacts to these transformations, by responding to the demands of specific shareholder groups and facilitating change which has been triggered by factors external to the legal sphere. The response by regulators may come in the form of succumbing to legal fashions, but at least the case of Japan suggests the adoption is tailored to the domestic situation.[45] The susceptibility of the legal framework pertaining to stock companies to legal transplants and fashions maybe conditioned by the worldwide ubiquity of the stock company which has evolved into the universal mode of how enterprises are organized.

Notwithstanding, within the level playing field which the spread of stock companies and global integration of capital markets created, jurisdiction-specific, characteristic complexions remain. In the case of Japan, this thesis – while building on existing literature – identifies a typical representation of such idiosyncrasy in the widespread coordination and cooperation between relevant business actors beginning with the

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44 On the role of such trust and custodian banks, see Yosuke Torii, *Dai-kabunushi toshite no 'shintaku-kuchi'* ['Trust Accounts' as Major Shareholders], 51 Shōken Keizai Gakkai Nenpō [Annual Report of the Securities Economics Society] (2016) 49 ff.

45 The selective adoption and inspiration by foreign legal instruments and codes is mirrored by the subjects of such regulation, that is, the corporations, whose implementation has been identified as varying, see with respect to recent corporate governance reforms, Masao Nakamura, *The Security Market and the Changing Government Role in Japan: Corporate Governance Issues*, 5 Asian Education and Development Studies (2016) 396 ff.

zaikaijin of the Meiji period, resuming with the large business groups (*kigyō shūdan*) and main banks of the postwar and bubble era that partially drew on prewar *zaibatsu* relations, before contemporarily resurfacing in the guise of capital combinations between large businesses in Japan – partly with state involvement – under the umbrella of private equity funds such as the Japan Investment Corporation (hereinafter, JIC)[46], Japan Industrial Partners (hereinafter, JIP)[47] or the consortium of Japanese companies which eventually took Toshiba Corporation private. This idiosyncrasy contributes to the corporate governance system in Japan retaining its often-cited relational characteristic.[48] The latter example may also demonstrate how former institutions – one might think of the relational or cross-shareholdings between non-financial companies – are adjusted to changing macro-economic circumstances.[49] This process indicates that the relational corporate governance aspect may hold the key for deciphering corporate law – encompassing mandatory law, soft law mechanisms as well as the "living law"[50] – development in Japan.

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46 Under the umbrella of Japan Investment Corporation (JIC), the Japanese government in tandem with 25 Japanese corporation have bundled funds (see for an overview, https://www.jic.co.jp/en/about/shareholders/, last accessed 26 June 2024). The JIC has recently been successful with taking two semiconductor equipment-related companies, JSR Corporation and Shinko Electric Industries Co., Ltd. – a listed subsidiary of Fujitsu Limited – private.

47 Japan Industrial Partners (JIP) is a private equity company (see for an overview, https://jipinc.com/en/, last accessed 26 June 2024) and coordinated the eventually successful takeover bid for Toshiba Corporation in tandem with a consortium of Japanese publicly-listed corporations including, inter alia, Rohm Co., Ltd., Chubu Electric Power Co., Ltd. and Orix Corporation, see Reuters, *Focus: In buying Toshiba, a little-known fund takes on Japan Inc's toughest job* (19 December 2023), available under: https://www.reuters.com/markets/deals/buying-toshiba-little-known-fund-takes-japan-incstoughe st-job-2023-12-19/ (last accessed 21 January 2024).

48 Elements like relational financing or relational contracting in industry-to-industry product markets have contributed to the classical corporate governance being classified as "*relational-contingent*" which transitions towards a system based on "*external monitoring of internal linkage*", which attempts to capture changing roles of management, employees as well as of the board of directors as trustee of all firm stakeholders and, inter alia, entails maintaining the internal linkage between management and employees, see Masahiko Aoki, *Conclusion: Whither Japan's Corporate Governance?*, in: Masahiko Aoki/Gregory Jackson/Hideaki Miyajima (eds.), CORPORATE GOVERNANCE IN JAPAN (2007) 438 ff.

49 On the occurrence of "institutional layering" in the process of the "conversion" of traditional institutions such as relational banking and the integration of new institutions such as venture capital, see Mari Sato, *Organizational Diversity and Institutional Change: Evidence from Financial and Labor Markets in Japan*, in: Aoki/Jackson/Miyajima, *supra* note 48, 406 ff., 423.

50 Living law in the sense as articulated by Eugen Ehrlich, namely referring to the dynamic and changeable – growing, reshaping and disappearing – capacity of law as part of the broader human society, and not the concept of legal pluralism and the proposition of the existence of non-state legal orders within society, see Brian Z. Tamanaha, *A Vision of Social-Legal Change: Rescuing Ehrlich from 'Living Law'*, 36 Law & Social Inquiry (2011) 298 ff., 301 ff. On the aliveness or rather vitality of law implying that "[*a*] *legal rule must be treated not like a rigid dogma but like living energy*", see Eugen Ehrlich, *Judicial Decision: Its Principles and Objects*, in: Ernest

From this perspective and narrative, the development of corporate law – in the aforementioned meaning – follows and is primarily shaped by macro-economic developments: Corporate law can define and provide a playing field; however, it does not trigger, but only facilitate change. Past complaints about corporate governance reforms not being sufficiently pervasive, hence fall short of the key issue: With the definition of the stock corporation in the Old Commercial Code (hereinafter, Kyū-Shōhō) of 1893 and the Commercial Code (hereinafter, Shōhō) in 1899, a playing field had been defined which at its core has remained widely unchanged: Key elements such as the statutory auditors (hereinafter, *kansayaku*) have survived, and statutory shareholder rights[51] have been comparatively broad since their incorporation in the Kyū-Shōhō and Shōhō; the utilization of the statutorily granted shareholder rights is naturally a separate story.

The argument that law is not the primary driver of changes in ownership patterns does not mean that corporate law does not matter. However, corporate law does not have a directing influence nor directly cause change of, and between, the actors pertaining the stock company, unless a statutory amendment contains a legal provision which explicitly sanctions a specific behaviour of certain actors, such as the regulation of thresholds of shareholdings for banks in Japan.[52] If not of such prescriptive nature, corporate legal norms may in extreme cases even remain virtually unused or disregarded by the relevant stakeholders, as it has been documented, for example, in much detail with respect to the (non)use of the derivative action by shareholders in Japan for a long duration.[53] Reshuffling in the shareholder class or a change of awareness may suddenly trigger an at first glance inexplicable change in practice and behaviour of the relevant actors. On the other hand, soft law mechanisms such as listing requirement of the Tokyo Stock Exchange[54] appear to have begun to nudge

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Bruncken/Layton B. Register (trans.), SCIENCE OF LEGAL METHOD: SELECT ESSAYS BY VARIOUS AUTHORS (1917) 77.

51 Shareholder rights are understood as the collective of power, privileges or legally enforceable claims bestowed upon shareholders based on statutory law, regulation, judicial precedent or the articles of incorporation of the relevant stock company.

52 Such as by virtue of the Act on Limitation on Shareholding by Banks and Other Financial Institutions (Act No. 131, 28 November 2001) under which upper limit of shareholdings by banks and other financial institutions is tied to their equity (Article 3).

53 Masafumi Nakahigashi/Dan W. Puchniak, *Land of the Rising Derivative Action: Revisiting Irrationality to Understand Japan's Unreluctant Shareholder Litigant*, in: Dan W. Puchniak/Harald Baum/Michael Ewing-Chow (eds.), THE DERIVATIVE ACTION IN ASIA (2012) 128 ff.

54 The Tokyo Stock Exchange is operated by the Tokyo Stock Exchange, Inc., which is wholly-owned by the Japan Exchange Group which is self-regulated by the Japanese Exchange Regulation (JPX-R) and subject to inspection by the Securities and Exchange Surveillance Commission

stock companies to rethink and adjust their behaviour.[55] However, it is debatable whether it is indeed the listing requirements or rather the ensuing deteriorating investability and attractiveness for foreign direct investment triggered by a downgrading between different stock exchange sections that causes the change in practice of the stock companies in tandem with investors' pressure having made their demands become more articulate and salient to publicly-listed stock companies.[56] At the same time, recent regulatory reform reveals the risk of overshooting objectives: Stock companies may aim to evade stricter regulation and transparency requirements by going private, leaving only larger stock companies behind which may further cause concentration of investment which in turn may pose a risk for a capital market-based pension system due to less diversification opportunities for financial intermediaries and retail investors.[57]

The thesis seeks to move away from viewing shareholders as a "*monolithic stakeholder group*"[58] or stakeholder block with homogenous goals for their equity investment, towards conceptualizing the group of shareholders as a diverse stakeholder block in itself comprised of various sub-groups with not necessarily aligned investment objectives, a constellation for which Japan is widely considered to present a characteristic example.[59] Besides a panoply of interests, specific shareholder groups may also change priority or focus of their investments: In this vein, the focus of domestic financial institutions as shareholders of Japanese firms in terms of their

(SESC) which in turn is overseen by the Financial Services Agency (FSA), see for an overview, JPX Regulation, available under: https://www.jpx.co.jp/ regulation/ and for an outline of the SESC, https://www.fsa.go.jp/sesc/english/aboutsesc/about_sesc.html (both last accessed on 2 October 2023).

55 This impression is formed when looking at the rising adoption quota with respect to independent directors, see Japan Exchange Group, *supra* note 31, as well as *Appointment of Independent Directors/Establish-ment of Nomination and Remuneration Committees by TSE-Listed Companies* (31 July 2023), available under: https://www.jpx.co.jp/english/equities/listing/indexecutive/b5b4pj000004ehtgatt/p6b22i0000003bdd.pdf (last accessed 25 November 2023).

56 Jung/Mun, *supra* note 17, 667 ff.

57 Nikkei Asia, *Bain Capital says more Japanese companies looking to delist* (28 December 2023), available under: https://asia.nikkei.com/Business/Finance/Bain-Capital-says-more-Japanese-companies-looking-to-delist (last accessed 11 June 2024).

58 See also Eric R. Gedajlovic/Toru Yoshikawa/Motomi Hashimoto, *Ownership Structure, Investment Behavior and Firm Performance in Japanese Manufacturing Industries*, 25 Organization Studies (2005) 1385.

59 Michael L. Gerlach, ALLIANCE CAPITALISM: THE SOCIAL ORGANIZATION OF JAPANESE BUSINESS (1992) 63 ff.

equity holdings shifted from underpinning their business relationship as lenders towards more active shareholders seeking returns on their (reduced) equity holdings.[60]

After a sequence of accelerating, but also retarding effects such as the crisis in the domestic banking sector in the 1999 precipitated by the wider Asian Financial Crisis of 1997 on the one hand, and the Global Financial Crisis of 2007/2008 on the other hand, recent years seem to beckon a breakthrough in such efforts with a breadth of listed companies adopting policies usually perceived as shareholder-friendly[61] and enhancing shareholder value[62], such as return of surplus cash through an intensified

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60 Jung/Mun, *supra* note 17, 668 ff., 680.

61 The adoption of policies which at first glance appear as shareholder-friendly such as upping the dividend payout ratios, may at the same time serve as anticipatory defense measures against the threat of unsolicited tender offers, see Curtis J. Milhaupt, *In the Shadow of Delaware - The Rise of Hostile of Hostile Takeovers in Japan*, 105 Columbia Law Review (2005) 2181.

62 Asia Nikkei, *Japan Inc. annual dividends at record levels again* (8 June 2023), available under: https://asia.nikkei.com/Business/Markets/Japan-Inc.-annual-dividends-at-record-levels-again (last accessed 3 October 2023). See also the overview published by the National Tax Agency, *Tōkei Nenpō-sho* [Annual Statistics Report] (FY2021) 234. The return of excess cash to shareholders through dividends was – besides the reduced board size and increased ratio of independent directors – one of the foremost aspects raised by foreign institutional investors pushing for the adoption of more shareholder-friendly policy by listed corporations, see Jacoby, *supra* note 13, 257 ff., 260. While less controversial than share repurchase programs, extensive dividend payout ratios naturally run counter to the interest of long-term shareholders. While the longstandingly low payout ratios in Japan leave ample room for hikes, a looming recession would usually warrant caution which companies appear to factor in given reserved payout increases. The affirmative embracing of dividend increases despite a looming global recession may indicate that corporate managers in Japan – since they submit the corresponding proposals to the general shareholders' meeting for approval – have (partly) shed a bit the conservatism displayed in the wake of the Global Financial Crisis of 2007/2008 which had temporarily resulted in the adoption of more conservative financial management in the form of hoarding higher levels of excess cash as well as bolstering cross-shareholdings, see for a comprehensive analysis, Nobuyuki Kinoshita, *Legal Background to the Low Profitability of Japanese Enterprises*, Columbia Business School Center on Japanese Economy and Business Working Papers No. 316 (April 2013) 1 ff. In this context, it is worth noting that the information signaling hypothesis maintains that there is a correlation between dividend adjustments and earnings prospects, since corporate managers employ changes in the dividend policy to actively communicate cash flow information to equity holders of the company, see Merton H. Miller/Franco Modigliani, *Dividend Policy, Growth, and the Valuation of Shares*, 34 The Journal of Business (1961) 411 ff.; Chinpiao Liu/An-Sing Chen, *Do firms use dividend changes to signal future profitability? A simultaneous equation analysis*, 37 International Review of Financial Analysis (2015) 200 ff. Probes into the robustness of such hypothesis for Japanese corporations caution a differentiated approach that takes into account the relevant firm's financial conditions and fundamentals, see Kimie Harada/Pascal Nyugen, *Dividend change context and signaling efficiency in Japan*, 13 Pacific-Basin Finance Journal (2005) 504 ff. The presence of high levels of *keiretsu* and cross-shareholdings, thus the presence of a significant share of (quasi-)insider shareholders, may offer an explanation as to why such hypothesis has not proven applicable to Japanese firms, see Hideaki Kiyoshi Kato/Uri Loewenstein/Wenyuh Tsay, *Dividend policy, cash flow, and investment in Japan*, 10 Pacific Basin Finance Journal (2002) 445, whose analysis, however, pertains to years prior to the bubble burst in 1992, but is confirmed by Jung/Mun, *supra* note 17, 665 who find that firms entrenched in such manner are prone to resist

use of share repurchases[63] as well as hiking dividend payouts.[64] In the same vein, levels of independent or outside director representation on the boards of listed companies in Japan has significantly increased in the course of the preceding decade.[65] Such achievements appear to indicate the eventual pervasiveness of decade long reform efforts by Japanese legislators as well as the Tokyo Stock Exchange with respect to its listing rules and requirements as well as the restructuring of its security market segments and the division between them to attract global investors and attain higher security prices.[66]

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the overall tendency to hike dividends as well as dividend payout ratios to the level of their respective peers in the United States, *ibid.*

63 See Articles 155 et seqq. Companies Act (as enacted on 26 July 2005 and entering into effect on 1 May 2006, hereinafter "*Companies Act*"). While the instrument of share buybacks has been hailed to enhance shareholder value, such view is not uncontested, since capital allocated to share repurchase programs could be spent on long-term corporate investment or the increase of rewards for employees that are not compensated by equity compensation schemes such as stock options and stock awards which are usually limited executive levels. Macro-economic developments such as rising interest rates may put practical pressure on such policies due to investment pressures and higher lending costs, especially when the repurchase programs are (partly) debt-financed, see William Lazonick/Mustafa Erdem Sakinç/Matt Hopkins, *Why Stock Buybacks Are Dangerous for the Economy*, Harvard Business Review 7 January 2020, available under: https://hbr.org/2020/01/why-stock-buybacks-are-dangerous-for-the-economy (last accessed 3 October 2023), and The Financial Times, *Companies ease off on share buybacks as rising interest rates push up costs* (17 September 2023), available under: https://www.ft.com/content/f6f59092-7ff5-4095-ba25-084bcc298c24 (last accessed 3 October 2023). While some variables in the equation made for corporations in the United States do not apply in the same fashion to the situation of public companies in Japan, such as the level of interest rates as well as the prevalence of stock-based compensation schemes for (senior) executives, such tendency may nonetheless spill over and spread under the aspect of "global standards" or "fashions".

64 However, there is no conclusive evidence that the presence of foreign shareholders resulted in dividend hikes in a wide array of Japanese listed firms, see Baba, *supra* note 23, 173 f. Besides a potential predilection of foreign investors for cash-rich firms, firms themselves may choose to increase dividends to attract (foreign) investors.

65 Japan Exchange Group, *supra* notes 31 and 55. On the other hand, the role of independent directors is required to be assessed in more nuanced manner than being without critical reflection considered as an indicator for increased shareholder-orientation, since, inter alia, independent directors are agents in their very own right with a corresponding range of individual incentives and motivations, see Yuval Deutsch/Thomas Keil/Tomi Laamanen, *A Dual Agency View of Board Compensation: The Joint Effects of Outside Director and CEO Stock Options on Firm Risk*, 32 Strategic Management Journal (2010) 212; David Yermack, *Remuneration, Retention, and Reputation Incentives for Outside Directors*, 59 Journal of Finance (2004) 2281 ff. In addition, in the overall institutional environment of a stakeholder-oriented system or a system still retaining traits of stakeholder-orientation, whatever this specifically entails, independent directors may focus on an advisory rather than a monitoring role, see Desender/Aguilera/López puertas-Lamy/Crespi, *supra* note 26, 353.

66 For an overview of the various market segments of the Tokyo Stock Exchange, see Japan Exchange Group, *Overview of Market Restructuring* (19 September 2023), available under: https://www.jpx.co.jp/english/equities/market-restructure/market-segments/index.html (last accessed 2 October 2023). Besides the liquidity criterion, the division is orientated at the state of corporate governance as well as performance-related criteria such as a firm's revenue, financial

For this purpose, the thesis will start by investigating the composition of the current blend of corporate law in Japan and its influence and sedimentation through various legal fashions. In the course thereof, the paper also undertakes to address the often-maligned lacking attention to (outside) shareholders. The paper is inspired by the fact that despite widely-observed convergence tendencies,[67] Japanese corporate law apparently remains an enigma[68] with respect to the level of attractiveness or investability for outsider and foreign shareholders.[69] Notwithstanding such reservations, the ratio between insider and outsider shareholders has been reversed – again, with a view to earlier periods of the twentieth century – in the course of the 2010s with the quota of outsider shareholders exceeding the insider shareholders ratio, a development commonly interpreted as underscoring convergence tendencies.[70]

The certain, however, perceived as protracted, departure[71] of long-standing traditional corporate governance institutions like the main bank, long-term employment[72] and horizontal as well as vertical cross-shareholdings (*keiretsu*) within business groupings[73] suggests that a new era of corporate law has irrevocably been ushered in

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status (for the Prime and Standard market segments) and growth potential (for Growth market segment), respectively, see Japan Exchange Group, *ibid*.

67 Hansmann/Kraakman, *supra* note 16, 439 ff., however: Mathias M. Siems, CONVERGENCE IN SHAREHOLDER LAW (2008).

68 The persistence of such enigma lends cogency to the path dependency argument articulated, inter alia, by Lucian A. Bebchuk/Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 Stanford Law Review (1999) 127 ff.

69 See for an overview, Hideaki Miyajima/Takaaki Hoda/Ryo Ogawa, *Kaigai kikan tōshi-ka no kigyō tōchi ni okeru yakuwari to sono kiketsu* [Role and Consequence of Foreign Institutional Investors' Corporate Governance], in: Hideaki Miyajima (ed.), KIGYŌ TŌCHI TO SEICHŌ SENRYAKU [Corporate Governance and Growth Strategy] (2017) 98, graph 2-1 and 104, table 2-1 with a detailed split between groups of insider shareholders (banks, insurance companies and businesses) and outsider shareholders (domestic and foreign institutional investors as well as retail investors).

70 Akira Tokutsu, *Shareholder Activism in Japan. Chick Sexing or Tautology*, in: Holger Fleischer/Hideki Kanda/Kon Sik Kim/Peter Mülbert (eds.), GERMAN AND EAST ASIAN PERSPECTIVES ON CORPORATE AND CAPITAL MARKET LAW: INVESTORS VERSUS COMPANIES (2019) 41.

71 James R. Lincoln/Michael L. Gerlach, JAPAN'S NETWORK ECONOMY (2004) 205 ff., show the different speeds of the respective departure of long-standing corporate governance components and features of the *keiretsu*.

72 The long-term perspective of an engagement with a firm, as an employee, an investor or a trading partner, is an element which is frequently associated with Japanese enterprises. See for changes in the "long-time" or "future time perspective" with respect to Japanese companies in the course of the twentieth century, Takeshi Shimizu, *Shoshiki no jumyō to mirai no jikan tenbō* [Long-term and Future Perspectives of Organizations], 56 Shoshiki Kagaku [Social Science] (2022) 4 ff.

73 Which commonly included a main bank, long-term credit banks, less relevant city or regional banks, a trading companies, major manufacturers as well as life and non-life insurance companies, see Masahiko Aoki/Hugh Patrick/Paul Sheard, *The Japanese Main Bank System: An Introductory Overview*, in: Masahiko Aoki/Hugh Patrick (eds.), THE JAPANESE MAIN BANK SYSTEM: ITS RELEVANCY FOR DEVELOPING AND TRANSFORMING ECONOMIES (1994) 5 ff.; James R. Lincoln/Masahiro Shimotani, *Business Networks in Postwar Japan: Whither the Keiretsu*, in: Asli M.

and the thesis seeks to find evidence and develop arguments that this tendency will most likely persist before – possibly, if not already – reaching a satiation level.

Accordingly, the thesis agrees with the widely registered departure from long-standing corporate governance traditions, but aims to develop the current trajectory in more detail based on a historical view of stock corporation law in Japan. By doing so, the thesis subscribes to the hypothesis that convergence (if any) or at least convergence tendencies are caused by market forces[74], such as competitive pressures on capital markets, with shareholder-oriented firms being able to procure capital at lower costs, and product markets due to shareholder value-trimmed corporations showing superior adaptability to changing competition and investment environments, rather than by the diffusion of the pertaining concepts and their translation into legal mechanisms.[75]

2. Three Hypotheses Underlying the Research Question

The prerequisites of the research questions can be distilled into the following three key hypotheses:

a) Hypothesis 1: The orientation of a corporate law cannot be evaluated without taking into account the ownership patterns of stock companies

Despite the shareholders' role being interpreted from different angles and in various guises, it appears that at the core, the consensual view of shareholders as the residual equity owners or investors[76] of a stock corporation[77] and the widespread observation that corporate laws around the globe show convergence tendencies with respect to the

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Colpan/Takashi Hikino/James R. Lincoln (eds.), THE OXFORD HANDBOOK OF BUSINESS GROUPS (2010) 130 ff, table 5 with an overview of the six main horizontal *keiretsu*; Noriyoshi Yanase/ Piman Limpaphayom, *Organization Structure and Corporate Demand or Reinsurance: The Case of the Japanese Keiretsu*, 84 The Journal of Risk and Insurance (2017) 602 f. The status of the main bank was defined by the city bank with the highest loan share for a client company and was usually recruited from among the big six city banks, namely Mitsubishi, Mitsui, Sumitomo, Dai-Ichi Kangyō, Fuji or Sanwa Bank, see Aoki/Patrick/Sheard, *ibid*., 5 ff.

74 Peer C. Fiss/Edward J. Zajac, *The Diffusion of Ideas over Contested Terrain: The (Non)adoption of a Shareholder Value Orientation among German Firms*, 49 Administrative Science Quarterly (2004) 502 ff., 529.

75 Hansmann/Kraakman, *supra* note 16; John C. Coffee Jr., *The Future as History: The prospects for Global Convergence in Corporate Governance and its Implications*, 93 Northwestern University Law Review (1999) 641 ff.

76 The investor aspect highlights the fungibility of share ownership on the stock market, see Richard M. Buxbaum, *Corporate Legitimacy, Economic Theory, and Legal Doctrine*, 45 Ohio State Law Journal (1984) 526.

77 On the different visions of the shareholder and the shareholding a one-dimensional view proves inadequate, see Jennifer Hill, *Visions and Revisions of the Shareholder*, 48 American Journal of Comparative Law (2000) 39 ff.; Siems, *supra* note 67, 60 ff.

interpretation of stock company law, namely through the lens of Anglo-American corporate law that is, inter alia, defined by taking a stance which is somewhat responsive and attentive to the demands put forward by institutional shareholders and, to a lesser degree, other outside shareholders, and the provision of legal mechanisms which facilitate these shareholders' participation in corporate governance matters, comparative studies in the corporate governance context seemingly tend to eschew a continuous, profound analysis of the current as well as the historical composition of the shareholder class in the different jurisdictions in the scope of the respective inquiries. It is only in the context of the discussion of the diffusion of global corporate governance standards oriented at the shareholder value principle that the impact of ownership patterns is assessed.[78] However, such studies show the tendency to focus on a specified point in time or a limited window of time.

Against this background, the thesis will not only analyze a representative array of stock company law instruments under incumbent Japanese corporate law, but also seek to keep a keen eye on changes in the composition of the shareholder class in Japanese public stock companies.

b) Hypothesis 2: Corporate law does not take a particular stance towards shareholders; it is the shareholders who do not make use of the law

The thesis argues that company law in Japan – and potentially correspondingly in other jurisdictions – does generally not take a particular unfriendly or uninviting, but rather neutral stance towards (outside) shareholders. In fact, by the pure letters of the law, Japanese company law is by its layout even found to be more shareholder-friendly than its oft-lauded peers in the United States and the United Kingdom if one compares the competences, that is to the say the array of decision-making items, assigned to the authority of the general shareholders' meeting, such as the possible revocation of directors and the decision on dividends being subject to shareholders' votes, by the respective corporate law statutes.[79] This liberal position has proved to be a disposition

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78 Fiss/Zajac, *supra* note 74 with regard to the adoption of shareholder value-oriented corporate policies in German firms; Ahmadjian/Robbins, *supra* note 26 with respect to the implantation of restructuring measures such as downsizing and asset divestures by Japanese firms; Jung/Mun, *supra* note 17, analyze the impact of the presence of (foreign) institutional shareholders on dividend payout ratios of Japanese firms.

79 Baba, *supra* note 23, Fn. 7. The competence regarding appointment and dismissal of directors is based on Article 329(1) Companies Act, the authority with respect to the distribution of dividends relies on Article 454(1) Companies Act. For a general overview of the items which are required to be resolved by the shareholders, see Motonori Araki/Mitsuyoshi Saito, JAPAN CORPORATION LAW GUIDE (3rd edition, 2017) 293 ff.

from the beginning with the draft of the Shōhō that insofar diverged from the then still influential German stock company law model – which, for example, sought to limit the competences assigned to the shareholders' general meeting – and insofar embarked on its own trajectory from the very start.[80] Literature which emphasizes the relational stakeholder orientation appears to fall short insofar, as such views tend (i) to exclude the period between the arrival of the stock corporation concept in Japan in the mid-Meiji period and the years leading up to the Second World War, and (ii) to impose an ex-post perspective influenced and tinged by the philosophy and demands of current institutional investorship on the Japanese legal environment, thereby glossing over idiosyncratic domestic law aspects complementing corporate law development. This argument refers to the fact that legal developments in the United States triggered the growing relevance and importance of primarily institutional[81] and to a lesser degree also retail, thus altogether outside investors, were only mirrored with significant delay in Japan, thus contributing to the formation of an image that depicts Japan as lagging behind with respect to shareholder activism and tangible results of pro-minority shareholder policies.

This time lag to a significant extent also exists due to the demand of modern means of shareholder protection only slowly starting to gain traction in the community of shareholders in Japan, since institutional investors from overseas only started to gain a substantive foothold in the course of the 1990s and early 2000s. Accordingly, the thesis argues that the assessment whether the corporate law of a specific jurisdiction takes a shareholder-friendly stance can only be gauged and evaluated in conjunction with the analysis of the ownership patterns of the stock companies listed in such jurisdiction. The only complementary role of the letters of the law – not limited to the context of stock corporation law in Japan – is demonstrated by the lingering hypothesis of rational apathy of especially retail investors with diversified portfolios motivated by a cost-benefit analysis of their individual investments usually only representing a tiny fraction of a company's equity,[82] and the overall shift towards agency capitalism

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80 Harald Baum/Eiji Takahashi, *Commercial and Corporate Law in Japan: Legal and Economic Developments after 1868*, in: Wilhelm Roehl (ed.), HISTORY OF LAW IN JAPAN SINCE 1868 (2005) 376; Masahiro Kitazawa, *Kabushiki kaisha no shoyū, keiei, shihai* [Ownership, Management and Control of the Stock Corporation], in: Makoto Yazawa (ed.), GENDAI-HŌ: GENDAI-HŌ TO KIGYŌ [Contemporary Law: Contemporary Law and Corporations], Volume 9 (1966) 72 ff.

81 These institutional investors often act as intermediaries that manage pension and retirement funds, see Edelmann/Thomas/Thompson, *supra* note 12, 1361.

82 See for the rational apathy phenomenon, Bernard S. Black, *Shareholder Passivity Reexamined*, 89 Michigan Law Review (1990) 520 ff., who analyses various additional factors that potentially influence shareholders' voting behaviour, thus add another dimension to the matter; Kobi

meaning that institutional investors as intermediaries or stewards having emerged as the dominant form of share ownership in a wide array of jurisdictions subsequently precipitating innovations such as proxy advisory firms like Glass Lewis or the Institutional Shareholder Services ("ISS")[83], as well as the neglect, meaning non-use of potential channels for shareholder activism or the active embracement of the monitoring role by shareholders through legal instruments such as the derivative actions which had remained virtually unused for a significant period until the early 1990s despite its adoption in the course of the 1950 corporate law reforms.[84]

Painting the picture with a very broad brush, the shareholder structures of Japanese listed companies indicate a move from patterns in which founders and first generation owner-managers dominated towards ownership structures in which insider shareholder dominated, before then since the 1990s – accompanied by the transition from a bank- to an equity-finance system[85] and by pension systems steering on broader front towards capital market-based funding – shifting towards structures in which outsider shareholders dominate: The image of a stock corporation with widely dispersed outside owners in the fashion of the model envisaged by Berle/Means[86] has not been applicable to publicly-listed stock companies in Japan for a long time whose corporate governance system initially building on different conditions.[87]

Kastiel/Yaron Nili, *In Search of the "Absent" Shareholders: A New Solution to Retail Investors' Apathy*, 41 Delaware Journal of Corporate Law (2016) 55 ff. For a more positive angle, see Lisa M. Fairfax, *From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as the New Corporate Governance Norm*, 99 Boston University Law Review (2019) 1301 ff., with the reservation that the registered activism, however, does not extend to retail investors, *ibid*., 1343.

83 See for the agency capitalism matter, Gilson/Gordon, *supra* note 12, 863 ff.; Edelmann/Thomas/Thompson, *supra* note 12, 1359 ff.

84 On the complex of the derivative action, see Nakahigashi/Puchniak, *supra* note 53, 128 ff. The reasons for its sudden surge are yet to be completely unraveled after the reference to the lowering of the legal fees has proved not to be entirely convincing. Nakahigashi/Puchniak suggest the relevance of quasi-rational and irrational behaviour rather than economic motivation as driving factor for the surge in derivative actions following two court decisions in 1986 and 1990 which garnered wide publicity in Japan, *ibid*., 139 ff., 158 ff.

85 John Y. Campbell/Yasushi Hamao, *Changing Patterns of Corporate Financing and the Main Bank System in Japan*, in: Aoki/Patrick, *supra* note 73, 331 ff.

86 Adolf A. Berle/Gardiner C. Means, THE MODERN CORPORATION AND PRIVATE PROPERTY (1991 edition) 1 ff.

87 The premise or stylization of the highly dispersed stock company also does – no longer – correspond to the reality of the ownership structures of public stock companies listed in the United States, see Clifford G. Holderness, *The Myth of Diffuse Ownership in the United States*, 22 The Review of Financial Studies (2009) 1379 ff.; Brian Cheffins/Steven Bank, *Is Berle and Means Really a Myth*, 83 The Business History Review (2009) 467. There is indication that this statement can be extended to a wider, global scale, with, however, variations between various jurisdictions,

c) *Hypothesis 3: The longevity narrative and benefits of a wider historical perspective show that the Japanese corporate law tradition does not per se defy the functioning of the market*

Furthermore, the thesis is built on the assumption that a longer historical perspective will contribute to develop a better understanding of the perceived long-standing laggard position of listed stock company in Japan with respect to corporate policies that are tangibly and indiscriminately beneficial to all groups of shareholders. Therefore, the analysis in the course of this thesis will be complemented by a look at the historical composition and development of the composition of the shareholder class.

aa) Corporate law as a cue ball of macro-economic trends

The thesis argues that macro-economic factors external to the corporate law domain and macro-sociological trajectories, in particular the arrival and rise of intermediary investors such as mutual funds which again is supported by the switch and subsequent reliance of national pension schemes and retail investors on wealth maintenance via capital markets, but also (domestic) central bank policies, that is, the so-called Quantitative and Qualitative (Monetary) Easing (QQE)[88], which included large-scale purchases of equity in Japanese listed stock companies through index-backed exchange-traded funds (ETF) since January 2011 with the purpose to increase the domestic firms' equity values and to thus bring down their equity capital costs[89], have contributed to changes in share prices and eventually ownership patterns[90] as well as

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see Gur Aminadav/Elias Papaioannou, *Corporate Control around the World*, 75 The Journal of Finance (2020) 1191 ff., 1205 ff., table 1.

88 The Bank of Japan adopted its QQE program in April 2013, see Bank of Japan, *Introduction of the 'Quantitative and Qualitative Monetary Easing'* (4 April 2013), available under: https://worldjpn.net/documents/texts/asiajp/2013 0412.S1E.html (last accessed 13 October 2023).

89 Ben Charoenwong/Randall Morck/Yupana Wiwattanakantang, *Bank of Japan Equity Purchases: The (Non)Effects of Extreme Quantitative Easing*, 25 Review of Finance (2021) 714.

90 On the impact of BoJ purchases of broad market physical ETFs resulting in significant indirect equity holdings in various Japanese firms, see Andrea Barbon/Virginia Gianinazzi, *Quantitative Easing and Equity Prices: Evidence from the ETF Program of the Bank of Japan*, Swiss Finance Institute Research Paper Series No. 19-55 (April 2019) 8 ff., Table 1, even elevating the Bank of Japan into the position of largest shareholder in a considerable ratio of domestic companies, see Kimie Harada/Tatsuyoshi Okimoto, *The BOJ's ETF purchases and its effects on Nikkei 225 stocks*, 77 International Review of Financial Analysis (2021) 1 f.; Asia Nikkei, *BOJ is top-10 shareholder in 40% of Japan's listed companies* (27 June 2018), available under: https://asia.nikkei.com/Economy/BOJ-is-top-10-shareholder-in-40-of-Japan-s-listed-companies (last accessed 14 October 2023). The buy-and-hold strategy employed by the Bank of Japan implies prolonged holding periods of the shares resulting in a significant number of shares being practically withdrawn and not available to the public, see Izidin El Kalak/Woon Sau Leung/Hidenori Takahashi/Kazuo Yamada, *The Bank of Japan's equity purchases and stock illiquidity*, 63 Journal of Financial Markets (2023) 2. For an overview of the volume of the ETF purchases conducted by the BoJ since

a stronger articulation of institutional shareholders' demands which precipitated a strengthening as well as a more affirmative use of shareholders' rights, a tendency to which firstly lawmakers in Japan succumbed by adopting corresponding legal instruments and which subsequently also brought about and continues to yield to changes in the corporate practice of listed stock companies in Japan.

bb) The significance of legal fashions

This thesis postulates that in globalized world in which jurisdictions have become increasingly interconnected and subsequently aware of legal developments among their respective peers, legal transplants naturally play an important role in the amendment and development of the sub-legal systems of corporate law. With investors acting globally, it seems cogent that standardization or at least comparable legal standard have become desirable, also for lawmakers that cherish direct foreign investment. Insofar as such legal transplants appear to not (only) address challenges of domestic law, but (also) aim at purposes which lie by a narrow definition of law beyond the legal sphere, legal transplants may take the form of legal fashions. In the bounds of this thesis, the term "legal fashion" shall imply no statement as to the intensity of the adoption process nor to pervasiveness of the pertaining reforms and acceptance[91] of the adopted legal instruments by the actors of the adopting jurisdiction.[92] The thesis posits that the spread of legal fashions appears in reform waves, meaning that legal transfers between jurisdictions consist of an initial legal transplant block with ensuing smaller adjustments. A legal transplant is defined as "*the moving of a rule or system of law from one country to another, or from one people to another*".[93] For example, the adoption of the stock company concept would constitute such initial transplant and thus define a specific field of law; or, in other words, one could refer to a legal transfer occurring on a macro-level or in a sub-system (and constituting it at the same time),

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2010, see Bank of Japan, *Purchases of ETFs and J-REITs and Lending of ETFs (continuously updated)*, available under: https://www3.boj.or.jp/market/en/menu_m.htm (last accessed 14 October 2023).

91 Acceptance as in whether the norms have become an integral part of legal practice and the "living law". On terminology and significance of the "living law", see Fn. 50.

92 With respect to the pervasiveness of corporate law reform, Katharina Pistor/Yoram Keinan/Jan Kleinheisterkamp/Mark D. West, *The Evolution of Corporate Law: A Cross-Country Comparison*, 23 University of Pennsylvania Journal of International Law (2002) 797, offer an interesting perspective as they observe that the initial enactment may lead to volatility or a rejection of specific aspects of the transplanted law. If rejection is substituted by non-use or neglect, this may tender an explanation as to the different paths of US-American and Japanese corporate legal practices in the years after the commercial law-related reforms in Japan in the 1950s.

93 Watson, *supra* note 43, 21.

namely stock company law in its entirety which is henceforth defined by the pertinent transplanted legal norms. Subsequently, further legal transfers may occur on a – to stick to the previous terminology – micro-level to further refine and flesh out the appropriated legal instrument. On both, the macro-level and micro-level, the existing legal framework may exert its influence. If the legal transfer occurs in a somewhat vacuum of legal (and social) norms in the receiving jurisdiction – such as in the case of the adoption of the stock company concept in Japan, the initial legal transfer's impact may persist on future macro-level amendments and constitute an institutional lock-in contributing to future amendments and legal solutions being path dependent. In contrast, the micro-level may prove more flexible, allowing for a combination of various, idiosyncratic as well as non-path dependent solutions.

Furthermore, with advancing consolidation of the adopted and adjusted legal framework the initially receiving jurisdiction may begin to morph into a new role and likewise assume the role of a legal innovator at which other jurisdictions can henceforth orientate their legal development. Tracing the development of legal provisions and institutions over the course of the preceding century, suggests that Japan may have been on the brink of developing into a role model in its own right with respect to corporate law[94], but that the bubble burst and the ensuing fall into economic doldrums in the 1990s, culminating in the Banking Crisis of 1997 with repercussions lasting well into the early 2000s, have contributed to corporate law in Japan arguably remaining in the role of a follower rather than stepping up to become an innovator in its own right, substantiated by the legal reception[95] of regulatory concepts, inter alia, prominently from the United States and the United Kingdom.[96] Notwithstanding,

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94 Not only with respect to the institutional arrangements of its economy as advanced by Aoki, *supra* note 48, 439 f.

95 On the terminology of the reception of law, see Denis J. Galligan, LAW IN MODERN SOCIETY (2006) 121 ff.; Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, 39 American Journal of Comparative Law (1991) 397 f.

96 At the same time, Japan's company law is partly considered as a potential role model for the United States and the European jurisdictions in more recent literature, see Eiji Takahashi (ed.), *Corporate Governance in Japan: Vorgriff auf kuenftige Reformen in Deutschland* [Corporate Governance in Japan: Foreshadowing future reform in Germany], in: DIE REZEPTION UND KONVERGENZ DES DEUTSCHEN HANDELS- UND GESELLSCHAFTSRECHTS IN JAPAN [Reception and convergence of German commercial and corporate law in Japan] (2017) 104 f. The instrumentalization of the Stewardship Code likewise demonstrates an idiosyncratic approach to regulatory concepts originating in other jurisdictions, see Gen Goto, *The Logic and Limits of Stewardship Codes: The Case of Japan*, The University of Tokyo Business Law Working Paper Series No. 2018-E-01 (2018). On the other hand, with respect to its corporate law Japan is still viewed as a "transplant" country, see Pistor/Keinan/Kleinheisterkamp/West, *supra* note 92, which may be seen as a piece of evidence militating against the view of morphing into a role model in its own right. On the other hand, it may just demonstrate the persistence of traditional views. This multifaceted character that

recent comprehensive corporate governance-related reforms have sparked the coinage of a "new model" or "Japan's Model 2.0".[97]

While currently – at the time of the writing of the thesis at hand – the risk of a global recession and ensuing, economic turmoil may generally trigger change, but also provide a potential stage to step up, it currently appears as if such will not occur in the arena of corporate law.[98] Disputing the role of a primary legal innovator with respect to corporate law and continuing to classify Japan as a legal follower among its economic peers, however, does not take away from the role of Japan as a "secondary" innovator or mediator of corporate law instruments to jurisdictions which are in the process of developing into, and catching up to, market-based economies which, inter alia, rely on a robust corporate law framework; the multifaceted character insofar proves to be a strong point and connecting piece of two worlds.[99] In addition, since the corporate law system in Japan developed its very own interpretation of the legal norms adopted by means of legal reception, it may hold true what has been said about the value of comparative law studies in general, namely that changes in one legal system can indicate future changes in its related counterparts.[100]

The increasing awareness of Japan for new legal developments – and "fashions" – in the realm of corporate law appears to be corroborated by the fact that Japan figured among the first wave of jurisdictions following the example of the United Kingdom to adopt a stewardship code. The adoption of the stewardship code appears to have a validating effect in the sense that it underlines the (re)orientation towards shareholders

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combines transplants and idiosyncratic approaches may further strengthen the case of a potential innovator role due to bridging several stages of development and sophistication with respect to company law.

97 Hideaki Miyajima, *Crucial Viewpoint on Corporate Governance: Developing a "New Japanese Model"*, RIETI Newspaper & Magazines (24 November 2021), available under: https://www.rieti.go.jp/en/papers/contribution/miyajima/10.html (last accessed 5 June 2024).

98 There is, for example, no indication for a return to a stronger reliance on bank- instead of equity-finance, nor can such reversal or reorientation be imagined, at least at this point in time. On the other hand, this may prove a chance for the Japanese system to excel given that it has come to be considered as flexible and less rigid. For a less one-dimensional approach centering solely on the principal-agent problem, but instead a point of view that conceptualizes corporate law as a tradeoff and balancing of agency problems and flexibility considerations, Pistor/Keinan/Kleinheister-kamp/West, *supra* note 92, 796.

99 In this vein, regulators in South Korea have recently shown to be keen orient corporate governance reform at the Japanese model, see Reuters, *S. Korea unveils reform steps to tackle 'Korea discount'; traders not convinced* (26 February 2024), available under: https://www.reuters.com/markets/asia/south-korea-unveils-reform-measures-tackle-korea-discount-2024-02-26/ (last accessed 5 June 2024).

100 Zentaro Kitagawa, *Development of Comparative Law in East Asia*, in: Mathias Reimann/Reinhard Zimmermann (eds.), THE OXFORD HANDBOOK OF COMPARATIVE LAW (2006) 239.

as the primary interest groups among the stakeholders. On the other hand, the market for corporate control for which the takeover market serves a benchmark remains to retain an aura of non-pervasiveness for non-Japanese institutional investors as recent episodes of unsolicited tender offers appear to suggest. Hence, despite increasing levels of foreign and international shareholding, full-fledged shareholder activism appears to be still found knocking at the entrance doors to the fortress formed by a network of companies pivotal to the performance of Japan's all over economy.[101] While after a first wave of eventually – against the benchmark of activism in the United States – not too successful due to the lack of detectable lasting changes in the target companies[102] activist[103] shareholder engagement starting in the late 1990s and reaching its peak just before the Global Financial Crisis of 2007/2008, before ebbing down in the following years due to a variety of potential reasons such as the overall bear market conditions as fallout of the Global Financial Crisis or the spread of the adoption of poison pills by publicly-listed corporations in Japan[104], there have been

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101 An aspect which is only discussed to a rather limited extent in the literature, for example, by Pistor/Keinan/Kleinheisterkamp/West, *supra* note 92, 800. Sean McGinty, RETHINKING LEGAL ORIGINS: SHAREHOLDER PROTECTION AND CORPORATE OWNERSHIP IN JAPAN (2012) 24 ff., 287 ff., argues that formal laws only become important if there is a demand for law. In the case of Japan, such demand may have been triggered and activated by the burst of bubble economy.

102 Buchanan/Chai/Deakin, *supra* note 38, 41 ff., 43 ff., tables 2 through 4. The authors investigate whether changes resulted in improvements with respect to four categories, namely (i) returns on equity and assets, (ii) ratios of dividends, cash and capital expenditure to total assets, (iii) labor productivity and wage intensity, and (iv) log of market capitalization and Tobin's Q which is defined as the sum of book value of debt plus market value of equity divided by the sum of book value of debt and book value of equity, lasted over periods of one and three years, respectively. The approach to assess whether shareholder activism bore any fruits employed by Hamao/Matos, *supra* note 38, 45 ff., table 6 differs insofar as they, inter alia, investigate whether the proposal submitted by activist funds succeeded and the pertinent goals were achieved. When the authors focus on the occurrence of any changes between the periods prior to, and after, the start of the activist engagement, they even find deteriorating returns on assets after the activist engagement. However, while dividends and repurchases per net income tend to improve, the authors' analysis yields no significance with respect to incentive-oriented executive stock option plans for executives, letting the authors conclude that activist shareholders appear to have a limited impact on the firms targeted after all, thus resonating the previous authors, Hamao/Matos, *ibid*., 49 f.

103 This thesis follows the understanding of "shareholder activism" outlined by Buchanan/Chai/ Deakin, *supra* note 38, 9 f. to not only encompass public campaigns, but also cases in which companies succumb to more subtle pressures, such as through bilateral discussions, site visits, etc. In addition, it should be noted that public campaigns which appear unsuccessful in the public eye may still trigger less visible or not immediately apparent changes in corporate governance policies, Buchanan/Chai/Deakin, *ibid*., 32 ff. Prominent exponents of a more "quiet" activism in Japan are non-hostile funds such as Sparx, Atlantis or Taiyo Pacific Partners which especially in case of the former have showcased to be very active and in fact the most active fund by the number of proposals as well as the initial investment volume in the first wave of shareholder activism, see Hamao/Matos, *supra* note 38, 38, table 1.

104 Hamao/Matos, *supra* note 38, 29 ff., 50 who base their analysis on activist engagements in the period between 1998 and 2009, *ibid*., 30; Buchanan/Chai/Deakin, *supra* note 38, 37 f.

notable instances of successful activist shareholder engagement, taking private transactions[105] as well as prominent engagements bearing signs of success[106] in recent years, the takeover battle in which Toshiba Corporation found itself embroiled in 2022 and 2023 somehow cannot eschew the impression that Japan, Inc. – or at least its core actors – still prefer to conduct business among themselves and to keep foreign

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105 Notable cases are the acquisitions of former subsidiaries of Hitachi, Ltd., such as Hitachi Transport by KKR and Hitachi Metals by Bain Capital, respectively, see Reuters, *KKR to launch tender offer for Hitachi Transport in $5.2 billion deal* (28 April 2022), available under: https://www.reuters.com/article/hitachi-trans-m-a-kkr/kkr-to-launch-tender-offer-for-hitachi-transport-in-5-2-billion-deal-idIN KCN2MK0IR/, and Reuters, *Bain-led consortium to buy Hitachi Metals for $7.5 billion* (28 April 2021), available under: https://jp.reuters.com/article/bain-led-consortium-to-buy-hitachi-metals-for-75-billion-idUSKBN2CF0M8/ (each last accessed on 26 June 2024). On the other hand, research pertaining to the first activist shareholder wave in the 2000s reveals the prevalence of capital structure changes, especially proposals pertaining to the financial policies such as payout ratio and the only limited relevance of major corporate restructurings such as divestures or takeovers with eventual delisting of the target companies which stand in stark contrast to practice and results in the United States, see Hamao/Matos, *supra* note 38, 48 f. The focus on payout policy through motioning for share buybacks, dividend raises or the payment of special dividends may be related to the fact that Japan was a new market for activists who first approached "easy" target companies with significant excess cash, a tendency which promises all the more success given Japan's public companies being associated with excess cash or excessive corporate savings, see Chie Aoyagi/Giovanni Ganelli, *Unstash the Cash! Corporate Governance Reform in Japan*, IMF Working Paper WP/14/140 (August 2014). Naoki Shinada, *Firms's Cash Holdings and Performance: Evidence from Japanese corporate finance*, RIETI Discussion Paper Series 12-E-031 (May 2012) offers a differentiated review of the period between 1980 and 2010, inter alia, pointing out that in phases of deteriorating economic conditions such as the Global Financial Crisis of 2007/2008, investors may in fact have appreciated conservative cash management, *ibid*., 24, see also Buchanan/Chai/Deakin, *supra* note 38, 45. In addition, cash returns to shareholders tend to be more easily justified and implemented than strategic reorientations, see Buchanan/Chai/Deakin, *ibid.*, 41, with further references, especially pointing out research pertaining to the United States revealing similar approaches and strategies. A third key area of activist shareholder activity are usually proposals related to the composition of the board of directors, see Marco Becht/Julian Franks/ Jeremy Grant/Hannes Wagner, *Returns to Hedge Fund Activism: An International Study*, ECGI Finance Working Paper No. 402/2014 (May 2017) 19 as well as table 7.

106 A recent, still comparatively rare example for a longer activist engagement, apparently starting to bear fruits is Oasis Management's push to break up the entrenchment of the founder family-led management at Fujitec Co., Ltd., see The Japan Times, *Elevator-maker showcases growing shareholder activism in Japan* (22 June 2023), available under: https://www.japantimes.co.jp/news/2023/06/22/business/corporate-business/fujitec-shareholder-activism/ (last accessed 10 June 2024). While shareholder activism in Asia in the 2000s is evaluated as having been less successful than in the United States and the United Kingdom when considering the probability of at least one outcome from an activist shareholder engagement, Japan fares relatively successful in comparison to its peers in other Asian jurisdictions, however, lagging behind the United States and the United Kingdom in terms of the number of engagements – with respect to the United Kingdom, however, not with respect to the total number of engagements, but in the ratio of engagements per 1,000 listed companies – as well as successful outcome rate, see Marco Becht/Julian Franks/Hideaki Miyajima/Kazunori Suzuki, *Outsourcing Active Ownership in Japan*, ECGI Working Paper No. 766/2021 (June 2021) 4; Becht/Franks/ Grant/Wagner, *supra* note 105, table 2.

investors at bay.[107] On the other hand, the current government carries on the legacy of the Abenomics and attempts to make investment in Japanese companies more palatable to foreign investors as, for example, the restructuring of the different market segments of the Tokyo Stock Exchange shows[108], a strategy which by a look at the recent developments appears to bear success, admittedly, however, sailing with the tailwinds of a significant depreciation of the yen to other key currencies, inter alia, the US dollar and Euro, and the catch-up moment springing from the comparatively cheap valuations of Japanese public companies in comparison to their US-listed peers while at the same time enjoying the nimbus of a somewhat safe haven.

In addition, significant stock holdings by institutional and foreign investors start to have impact on shareholder policies and performance of listed stock corporations in Japan, however, not as encompassing as one might imagine: In this vein, there is indication that the presence of institutional and foreign shareholders in firms leads to increased shareholder returns in form of dividends or share buybacks, however, it appears that it did not prevent further cash accumulation and did not encourage capital investment, the undertaking of M&A transactions or R&D spending in the years following 2010 due to the implementation of the recent corporate governance and stewardship codes[109], with the latter finding being confirmed by other authors who could likewise not identify any positive correlation between foreign shareholders and the research and development spending of the firms concerned for the first decade of the 2000s.[110] Similarly, while the overall quota of bedrock firms referring to public

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107 The special exposure of Toshiba Corporation's product portfolio to domestic security considerations may put the impression in a better relation. However, the fact that a tender offer by a consortium of Japanese companies spearheaded by JIP eventually succeeded cannot avoid the impression that key companies create a bulwark, shutting out foreign private equity investors and not paying much attention to shareholder value. In this vein, the investment activities of JIC that succeeded with its two tender offers with respect to JSR Corporation and Shinko Electric with likewise at least questionable shareholder premiums also attract attention and feed second thoughts. The direct government involvement in the latter arguably shows traits of a coordinated market approach, often associated with the Japanese economic system, for example, by Salazar/Raggiunti, *supra* note 15, 725.

108 See Fn. 66.

109 Hideaki Miyajima/Takuji Saito, *Corporate Governance Reform under Abenomics – The Economic Consequences of Two Codes*, in: Takeo Hoshi/Phillip Y. Lipscy, THE POLITICAL ECONOMY OF THE ABE GOVERNMENT AND ABENOMICS REFORMS (2021) 384 f. On the other hand, Baba, *supra* note 23, 173 f., could not find such evidence, however, investigating an earlier period.

110 Yasuhiro Arikawa/Takuya Kawanishi/Hideaki Miyajima, *R&D tōshi to shikin chōtatsu – Shoyū kōzō* [Raising R&D Investment and Funds – Ownership Structure], in: Hideaki Miyajima (ed.), NIHON NO KIGYŌ TŌCHI: SONO SAISETSU-KEI TO KYŌSŌ-RYOKU NO KAIFUKU NI MUKETE [Japanese Corporate Governance – Towards the Plan for its Reestablishment and Restoration of its Competitiveness] (2011) 362 ff.

companies with high ratios of relational shareholding were found to aim at a reduction of their respective relational shareholding ratios, the percentage of such bedrock firms with high foreign ownership ratios were surprisingly less likely to do so.[111] The thesis is hopeful that a longer historical view may contribute to a developing a better understanding of these – at first glance – enigmatical impressions one struggles to combine a harmonic picture.

III. "Composition of the Blend"

This overview of on the surface seemingly contradicting tendencies inevitably raises the question where Japanese corporate law by its very letters currently stands as well as how external factors shaped and may henceforth mold the composition of the shareholders class. In this respect, the current consensus appears to indicate that the process of the Americanization of corporate law or convergence of corporate law on an emerging global norm predominantly shaped by US-American corporate law in Japan has finally begun to take roots and be successful after more than six decades of consolidation. The term "blend" shall refer to the observation that Japanese corporate law despite the hardly contestable imprint from foreign jurisdictions upon its codified legal norms has so far successfully eschewed convergence in substance and instead shown tendencies to evolve into an alternative model of corporate law in recent years. Despite arguably partial convergence by the law of the books, Japanese corporate law is a breed of its own and a closer study may yield to a blueprint or at least a point of reflection for other matured economies which after a period of – in the case of Japan, remarkable decade-long – growth find themselves having entered and settled into a phase of growth stagnation, or to give it a more positive tweak, economic consolidation

Observing recent events at the capital markets in Japan, there is indication that a certain moment of reversal in recent convergence patterns has set in that could usher in a tendency to a more pronounced (re)divergence in substance which, however, remains behind the level of the pre-bubble divergence with respect to corporate practice, but on the other hand also slightly steers clear of the convergence movements showcased in the first one and a half decades of this millennium.[112] The task of this thesis will be

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111 Miyajima/Saito, *supra* note 109, 380 f.

112 This personal observation is, for example, echoed by Reuters, *Toshiba buyout heralds a big step back for Japan* (20 January 2023) (https://www.reuters.com/breakingviews/toshiba-buyout-heralds-big-step-back-japan-2023-01-20/) (retrieved 23 January 2023). There is indication that the case of the privatization attempts with respect to Toshiba Corporation cannot be extended to the takeover market in general in Japan, given that Toshiba straddles across various industry branches

to bring to light more precisely in which elements the so-called "Japanization" of Japanese corporate law lies.[113] With a view to the "*institutional complementaries*" literature[114] and the more far-flung historical contexts, an attempt on an outlook and projection of further developments may be dared to round off the thesis.

This thesis further posits that it may be beneficial to lay a stronger emphasis on the history of corporate law in Japan which started with the arrival of the stock corporation in the Meiji period in the second half of the nineteenth century to arrive at a clearer picture. Such historical approach going beyond the wave of the Americanization of the letters of the law in the 1950s has recently been embarked on by various authors with respect to limited phases of the first half of the twentieth century. In this thesis, the view is taken that the lifespan approach offers a promising avenue to approach and track the development of different institutions and legal instruments pertaining to the stock corporation starting from the point in time of their first adoption and will therefore be employed henceforth.

With respect to the empirical aspect of this thesis, the composition of the shareholder class (besides the historical developments of dividend payout ratios and the equity-versus-bank finance ratio), may give rise to wonder about major shifts in composition and orientation of the different components constituting the entire class of shareholders. The arrival of foreign shareholders has become common knowledge, but how does the holding in Japanese stock corporations score in the international comparison and what trends, oscillations or investment cycles can and could have been observed so far?

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with a few of them triggering, inter alia, national security and foreign investment control concerns, respectively, making the deal more complex for foreign investors and their privatization concept. The example of several formerly listed stock corporations affiliated with Hitachi, Ltd. taken private by US-American investors (Hitachi Metals by Bain Capital and Hitachi Transport by KKR), see Fn. 105, may be taken as evidence for a picture that slowly brightens up. Recent figures indicate that a still relatively small, but growing takeover market after digesting the global financial crisis of 2008, see Japan Private Equity Association, *Private Equity Market in Japan*, available under: https://jpea.group/english/private-equity/private-equity-market-in-japan/ (last accessed 23 Janu-ary 2023). For the importance of buy-outs and taking private initiatives in general, see Michael J. Mauboussin/Dan Callahan, *Public to Private Equity in the United States: A Long-Term Look*, Morgan Stanley: Consilient Observer (4 August 2020), available under: https://www.morganstanley.com/im/publication/insights/articles/articles_publictoprivateequityintheusalongtermlook_us.pdf (last accessed 26 June 2024); Thomas Boulton/Kenneth Lehn/Steven Segal, *The Rise of the Private Equity Market*, Nomura Institute for Capital Markets Research (Research Paper prepared for the Brookings-Nomura Conference on New Financial Instruments and Institutions, 12 September 2006).

113 Takahashi, *supra* note 96, 83.

114 For example, Gregory Jackson/Masahiko Aoki, *Introduction: The Diversity and Change of Corporate Governance in Japan*, in: Aoki/Jackson/Miyajima, *supra* note 48, 1 ff.

Based on the historical development, can any tendency be identified and projections made based thereupon? Contemporarily, in a period of a general orientation towards outside (institutional) shareholders[115] – the degree of such orientation may vary across jurisdictions, but the overall tendency can at its core hardly be challenged successfully – the observation of the occurrence of legal fashions in this field suggests that at least lawmakers are perceptive and sensitive to the composition of the shareholder class. The emulation of legal models further suggests a competition for shareholders' investment which stands to reason in jurisdictions and economies in which the stock market besides the market for corporate bonds, equity finance, has largely replaced bank-based corporate financing. Recapitulating the development of corporate law in Japan and the institutions built around and alongside it, may contribute to better understand the correlation between the orientation of corporate law in Japan and developments with respect to shareholder structures.

IV. Thesis Topic

Against this background, this thesis seeks to examine the following questions:

1. Do the process by which the transplantation of the stock corporation (concept) to Japan has been implemented and the circumstances under which it occurred, already reveal symptoms or even patterns that recur with respect to subsequent legal transplants or fashions? Can the initial adoption therefore be seen as to a certain extent and with respect to specific features as determinant for the trajectory the development of corporate law and practice would embark on and follow? This question and sub-aspect of the overall thesis will be addressed in Chapter II below.

2. Building on the findings of the previous chapter and the discussion of the adoption and consolidation of the stock company concept in Japan towards the end of the nineteenth century, (i) how have ownership patterns developed since this period, and (ii) in which manners have shareholders been rewarded for their provision of equity by the standards of shareholder return policies in the course of the very same period, such as through dividend rates. This empirical aspect can rely on various studies on sub-part of the aforementioned period and will in detail be covered in Chapter III below.

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[115] As a result of the comparative corporate (governance) law debate being focused on the balancing of the principal-agent conflict, Pistor/Keinan/Kleinheisterkamp/West, *supra* note 92, 796.

3. How is the blend of current company law – equally including mandatory legal provisions as well as soft law mechanisms – composed, that is to say does it include rules taken or adopted from other jurisdictions, and how have these legal instruments developed? This investigation into the historical background of various legal instruments of contemporary company law will be accommodated in Chapter IV below.

4. Finally, what is the relationship between shareholder structures and company law rules? Can reform of company law (directly) precipitate change in the behavior of the relevant legal actors and even have an impact on shareholder structures, or is it rather the eventual opposite that legal reform only reacts to changes in the shareholder structures and translates macro-economic tendencies that also drive reshufflings of ownership patterns and that shareholder structures with different salient or even prevalent owner groups shape the law through communicating their demand through active use of available (legal) instruments as well as through calls for reform? Having constructed a narrative for the status quo, can any projections be made as to whether further changes in the ownership patterns of public stock companies in Japan can be expected, especially taking into account macro-financial circumstances, such as the globally proliferating transition to capital market funded pension schemes. In the last step, an excursion into the realm of legal theory shall be dared and contemplated what the previous findings may entail for the overall understanding and development of the stock company concept, such as how the – normative – relationship between stock company and its shareholders has transformed. This overall analysis which ties together the previous three questions will be presented in Chapter V below.

V. Why this Paper Matters or Aspects of Originality

Being aware of the densely populated academic arena on company law, especially corporate governance matters in Japan in the post-1950s, the question naturally arises what novel piece, addition or perspective the thesis can still offer to such field. The response is threefold, namely through novel nuances with respect to scope, method and perspective.

1. Novelty through Linkage of Different Threads of Existing Research to Arrive at the Construction of a New Narrative

The originality of this research lies in linking the question of the shareholder-friendliness or positive shareholder orientation of the company law of a jurisdiction discussed in the corporate governance context with the empirical analysis of historical shareholder structures in a jurisdiction, namely as far as this research is concerned, Japan.

The underlying hypothesis of such linkage is that the characterization and classification of the shareholder- or stakeholder-orientation of a jurisdiction cannot be reliably made without taking into account the ownership structures of its public stock companies, since different groups of shareholders may exhibit different degrees of demand and appetite for stock company-related legal rules and practices, or may put emphasis on different areas of such regulation. When the corporate governance rules and practices in jurisdictions such as Germany or Japan are found to lag behind its peers in the United States or the United Kingdom, this may also be related to the different composition of ownership structures and institutional investor ownership – that appears to have advanced into a position to determine the perspective whether a jurisdiction is perceived shareholder- or stakeholder-friendly – only arriving and becoming prominent with a significant time lag if compared to the former jurisdictions.[116]

Research in this field has been prominently undertaken, inter alia, by Franks/Mayer/Miyajima who have traced ownership patterns in Japanese firms throughout the twentieth century, also taking glances at corporate finance patterns as well as keeping an eye on the regulatory framework.[117] However, this thesis seeks to enrich the view as it delves more deeply into ownership patterns as well as corporate finance patterns. Furthermore, dividend, or more broadly-speaking, shareholder returns policies will be added to the empirical part. Also, the "life-span" approach to specific legal instruments in the overall regulatory framework should contribute to tracing legal developments

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[116] The dispersion with respect to Anglo-American listed stock companies has recently come under question against the background that BlackRock, State Street and Vanguard were found to control nearly 15 per cent of the companies in the S&P 500 in 2017 as well as more than 31 per cent of the S&P 500 listed companies having four or less shareholders accounting for more than 20 per cent of their shares, see John C. Coates, *The Future of Corporate Governance Part I: The Problem of the Twelve*, Harvard John M. Olin Center for Law, Economics, and Business Discussion Paper No. 1001 (04/2019) 13.

[117] Franks/Mayer/Miyajima, *supra* note 7, 2580 ff.

and any interaction with the factual side more minutely. This leads to the preeminent difference between both works: While Franks/Mayer/Miyajima approach the topic from an institutional viewpoint, the thesis at hand is more interested in the interplay or tension between dominant shareholder groups and the regulatory framework – arguing in favor of a limited impact of the latter on the former – than institutional complementarities, namely, for example, how *zaikaijin* and precursors of the *zaibatsu* took up the mantle in the infant years of the stock company concept in Japan compensating for a lack of legal shareholder protection and still low levels of familiarity with the stock company concept, with their presence encouraging outsider shareholder investment in absence of the former.[118] The thesis also intends to put more emphasis on the institution firm (stock company) itself rather than the institutions surrounding and complementing the firm. In this respect, concepts such as the "life cycle" of a firm – with growth of certain industries having matured and the share of such industry in the overall portfolio of listed stock companies in Japan – as well as changes in the landscape of potential investors – such as the emergence of the mutual fund industry and capital-market-based pension funding – will be given the, from the perspective of this thesis, deserved elevated level of attention.

The research further subscribes to the hypothesis that legal norms and practices change due to fluctuations in the demand for such alterations. The global surge of institutional share ownership propelled forward through the rise of the mutual fund industry has led to an increasing, amplifying voice of outsider shareholders and a change of perspective being no longer satisfied with simply the rent received on their investment as decided by a company management which outside, minority shareholders could not effectively monitor and only hold accountable within the limits of derivative actions, but rather proactively and assertively challenging the corporate management to increase profitability and allocate available surplus funds effectively – commonly measured by parameters like return-on-assets (ROA), return-on-equity (ROE) or return-on-invested-capital (ROIC).[119]

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[118] Franks/Mayer/Miyajima, *supra* note 7, 2582.

[119] ROE has established itself as the prevalent metrics in this context and is calculated as net income divided by shareholders' equity. ROA likewise measures profitability, but it includes any liabilities and is consequently obtained from the division of the net income (numerator) by the total assets (denominator), meaning that asset compression through, for example, restructuring can boost this metric. On the other hand, ROIC is less often referred to in the public discussion, but serves as an additional indicator to measure the efficient use of capital, the ideal of a company, a shareholder wants ideally to be invested in. ROIC is calculated by dividing net operating profits after tax by the invested capital (equity or debt). The exclusion of the interest on debt – if a company relies on

How can the shareholder-friendliness of a jurisdiction be measured and established? While the claim with respect to the backwardness of corporate law in Japan has frequently been made, the standards for such assessment usually remain ambiguous and vague.[120] It might be worth turning to the anatomy of corporate law literature to establish a close to universal benchmark given its orientation and subscription to a comparative law approach. However, such approach is devoted to ascertain the "*common structure*" or grammar of corporate laws around the globe and thus puts less emphasis on the differences, but rather the underlying commonalities and similarities between the jurisdictions.[121] With respect to shareholder structures, this thread of literature discusses the interest of the shareholder class under the aspect of a threefold agency problem, namely between the conflicts (i) between management and owner class in its entirety, (ii) between majority and minority shareholders as well as (iii) between shareholders and stakeholders; hence, the focal point of such analysis lie more towards the legal strategies developed in different jurisdictions.[122]

In contrast, the legal origins literature has turned its attention to scaling and quantifying differences between the corporate laws of various jurisdictions with respect to their heterogenous levels of shareholder protection with robust legal minority shareholder protection[123] being considered as conducive to the formation of dispersed ownership structures as the risk for majority shareholders to involuntarily yield control and

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debt – may prove a weakness, but may be remedied considering the interest coverage ratio, see Corporate Finance Institute, *ROIC*, available under: https://corporatefinanceinstitute.com/resources/accounting/what-is-roic/ (last accessed 19 November 2023).

120 Metrics, likewise do not necessarily support this view: The installation of outside or independent directors may serve as an example. Independent directors have been conceptualized, inter alia, also trustees and thus a protection mechanism for minority shareholders, see Luca Enriques/Henry Hansmann/Reinier Kraakman/Mariana Pargendler, *The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies*, in: Reinier Kraakman/John Armour/Paul Davies/Luca Enriques/Henry Hansmann/Gerard Hertig/Klaus Hopt/Hideki Kanda/Mariana Pargendler/Wolf-Georg Ringe/Edward Rock (eds.), THE ANATOMY OF CORPORATE LAW (3rd edition, 2017) 79-108, 85. Nonetheless, comparatively low percentages on the board of Japanese companies have demonstrated the absence of independent directors does not necessarily result in an increase of private benefits of control, see Enriques, *ibid*., 103.

121 John Armour/Henry Hansmann/Reinier Kraakman/Mariana Pargendler, *What Is Corporate Law?*, in: Kraakman et al., *supra* note 120, 1.

122 John Armour/Luca Enriques/Henry Hansmann/Reinier Kraakman, *The Basic Governance Structure: The Interests of Shareholders as a Class*, in: Kraakman et al., *supra* note 120, 49 and Enriques/Hansmann/Kraakman/Pargendler, *supra* note 120, 79 ff.

123 For a potential recast of, the commonly conceived dichotomy between controlling shareholder and minority shareholder and in favor of a more nuanced approach differentiating between degrees of efficient and inefficient structures implying that a controlling shareholder is not necessarily mean (pecuniary) extraction – more neutrally put – receiving of benefits to the detriment of the minority shareholders, see Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 Harvard Law Review (2006) 1641 ff., 1660 ff.

concomitant therewith losing hold on their so-called private benefits of control, meaning their ability "to divert corporate wealth to themselves"[124] disproportionally and in excess of their economic ownership and risk exposure to the financial health of the investee company, is alleviated and portfolio diversification encouraged.[125] Access to better information, the opportunity to send emissaries onto the board of directors or the utilization of business connections and transaction opportunities for its own purposes represent typical elements of such private benefits of control. Within the array of jurisdictions investigated, the ownership structure of large public stock companies in Japan was found to be closer to peers with a high level of shareholder protection such as the United States and the United Kingdom than to Continental European jurisdictions due to the high degree of dispersion of shares and the absence of majority shareholders by voting rights[126], since an isolated review of the voting rights does not adequately capture the function of the dispersed, small equity holdings between the individual *keiretsu* companies, since it does not demask the underlying contractual agreements between the business partners, such as supply or loan agreements which such relational equity holdings complement.[127] Similarly, while

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124 Simeon Djankov/Rafael La Porta/Florencio Lopez-de-Silanes/Andrei Shleifer, *The law and economics of self-dealing*, 88 Journal of Financial Economics (2008) 431.

125 La Porta/Lopez-de-Silanes/Shleifer/Vishny, *supra* note 10, 1113-1155; Rafael La Porta/Florencio Lopez-de-Silanes/Andrei Shleifer, *Corporate Ownership Around the World*, 54 Journal of Finance (1999) 473, 496; Rafael La Porta/Florencio Lopez-de-Silanes/Andrei Shleifer/Robert Vishny, *Legal Determinants of External Finance* (1997), 52 Journal of Finance (1997) 1131 ff. On the costly risk of losing the private benefits of control, Lucian Bebchuk, *A Rent-Protection Theory of Corporate Ownership and Control*, NBER Working Paper No. 7203 (July 1999) and from the angle of minority shareholder protection, Enriques/Hansmann/Kraakman/Pargendler, *supra* note 120, 79 f.

126 When viewed from the angle of the ownership and control discourse voting rights are the more reliable parameter than shares due to the existence of different legal constructs designed – and widely sanctioned by corporate law statutes – to deviate from the one-share one-vote principle and potentially separate voting rights from cash flow rights, such as through different, mostly dual, classes of shares, pyramidal shareholdings, cross-shareholdings and circular shareholding structures, see La Porta/Lopez-de-Silanes/Shleifer, *supra* note 125, 473 ff., 498; with the latter two constructs, cross-shareholding and especially circular shareholdings, relating to the shareholding of subsidiaries in their parent, being restricted in various jurisdictions, see Enriques/Hansmann/ Kraakman/Pargendler, *supra* note 120, 81 and footnote 12. More recent constructs implying a decoupling of control from cash-flow rights are empty or naked votes or hidden ownership resulting from stock lending or equity derivatives such as swaps, see Enriques, *ibid*., footnote 13; Henry T.C. Hu/Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 Southern California Law Review (2006) 811.

127 La Porta/Lopez-de-Silanes/Shleifer, *supra* note 125, 496 f. Another aspect not caught thus is board representation as a means to exercise control and monitor which is, however, less associated with *keiretsu* networks, but rather a strategy employed by commercial banks for example in the traditional bank-centered corporate governance in Germany, *ibid*., 502.

jurisdictions in East Asia are usually associated with shareholder entrenchment[128], more in-depth cross-country empirical studies on private benefits obtained by controlling shareholders[129] covering just jurisdictions indicate that the quantity of such benefits in Japan – similar to the situation in the United States and the United Kingdom – to be small to negligible, resulting in Japan faring far better than jurisdictions in Continental Europe, such as Germany with moderately sizeable as well as France and Italy with very large private benefits.[130]

2. Aspects of Novelty with Respect to the Applied Methodology

While investigations with respect to the shareholder structures of stock companies are frequently made in the context of the ownership and control discourse[131], the aim of this research lies towards (i) the historical development of ownership structures as well as of dividend payout ratios as an indicator of the conjectural outside investor-friendliness and with such historical analysis aims to cover an extended timeline from the beginning of the twentieth century, as well as (ii) any potential correlation between historical shifts in the shareholder structures and changes in the pertinent legal rules and practices over the corresponding period. The expectation is that legal changes follow emerging shifts in the ownership patterns and – in most cases – facilitate them, but that there might be a gap between the implementation and changing rules taking effect. Outright prohibitive, negative norms such as with the respect to the regulation and adjustment of thresholds on the equity holdings by banks[132] remain outside the

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128 See, for example, Stijn Claessens/Simeon Djankov/Larry H.P. Lang, *The separation of ownership and control in East Asian Corporations*, 58 Journal of Financial Economics (2000) 81 ff.; Jin-Ying Wang, *Controlling shareholder entrenchment: Bonuses versus dividends*, 32 International Review of Economics and Finance (2014) 143 ff., with such literature, however, acknowledging the outlier role of Japan whose corporations are considered as widely held and family control viewed as insignificant, see Claessens/Djankov/Lang, *ibid*., 82 f., 99, 103.

129 However, applying different metrics, see Tatiana Nenova, *The Value of Corporate Voting Rights and Control: A Cross-Country Analysis*, 68 Journal of Financial Economics (2003) 325 ff., analyzing the relationship of the value of control-block votes to the market value of the respective firm as a basis for calculating private benefits, and Alexander Dyck/Luigi Zingales, *Private Benefits of Control: An International Comparison*, 59 Journal of Finance (2004) 537 ff., analyzing control premia paid on sales of controlling share blocks as a calculation basis, see Enriques/Hansmann/Kraakman/Pargendler, *supra* note 122, 79.

130 Dyck/Zingales, *supra* note 129, 550 f., table II; Enriques/Hansmann/Kraakman/Pargendler, *supra* note 120, 103.

131 La Porta/Lopez-de-Silanes/Shleifer, *supra* note 125, 471-517.

132 The equity holdings of banks were limited to no more than ten per cent until 1977, before the threshold in the Anti-Monopoly Act was reduced to five per cent for individual banks and financial institutions over concerns of banks exercising excessive control over the companies, they held equity interest in. A ten-year transition period lasting until 1 April 1987 was conceded to allow the financial institutions to successively lower their equity holdings. Equity held in trust accounts held

scope due to the directness of the intervention. In order to approach the formation of ownership structures in Japanese stock companies, the research will first review the conditions under which the first stock corporations in Japan were incorporated, before proceeding with an analysis of the development of the ownership structures since the late nineteenth century.

The thesis will assume a perspective which combines the letters of the law with institutional developments not necessarily reflected by the law. This approach becomes especially evident with respect to the informal corporate governance institutions. While these institutions are on the wane and have receded to less conspicuous levels, they have played an important part in the second half of the preceding century and further. Insofar, the thesis has to navigate through existing literature, but the combination with the "lifespan" approach (see immediately hereafter, infra subsection 3) should contribute to offer new perspectives or angles also in this regard. In addition, it is intended to lend a stronger voice to Japanese academic circles whose contributions are perceivably not too present in the international discourse.

The thesis will also attempt to take the heralded emphasize on minority shareholder protection (hereinafter within the bounds of this paper, "shareholderism") or chastised absence of "shareholder-friendliness" in Japan literally and more seriously as it will take a closer look at the composition of the class and dare projections as to how their blend may develop conditioned by intrinsic tendencies, meaning lying outside the legal sphere. The focus on activist funds and their activity bears the risk to obscure the view on the entire class of institutional shareholders, since such activist funds constitute only a small portion of it.[133]

3. Application of the "Lifespan" Approach to Legal Instruments Previously not Covered

The thesis further shows a novel aspect with respect to its perspective, since it extends the use of the "lifespan" approach partly observed in the academic discourse[134] to a variety of institutions and legal instruments. The lifespan approach entails that rather

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by trust banks were not counted towards the five per cent threshold, see Randall Morck/Masao Nakamura/Ani Shivdasani, *Banks, Ownership Structure, and Firm Value in Japan*, 73 The Journal of Business (2000) 542.

133 See for Japan, for example, Buchanan/Chai/Deakin, *supra* note 38, 32 ff. The usually confrontational character of their engagement with target companies just causes a disproportional amount of publicity, Buchanan/Chai/Deakin, *ibid*., 33.

134 Sean McGinty, *Legal Families and the Birth, Growth and Death of a Corporate Law Rule*, The Italian Law Journal – Special Issue (2018) 160 f.

than reviewing the legislative history or formation of a rule or institutions departing from its current form, the development is traced from the past, meaning the point of its first appearance and followed through its evolution into its contemporary form. Such approach should help to avoid becoming susceptible to project later concepts on nascent, earlier developments of a legal institution, instrument or rule. The arrival of foreign institutional shareholders and the disengagement of domestic investors from cross-shareholdings seems to suggest a straightforward cause-and-effect relationship. On the other hand, the class of potential shareholders in listed stock corporation also changed in the course over the last decades with mutual funds as investment vehicles and actors in this field being a later addition. The overall shift from defined benefit to defined contribution plans as well as demographic aspects have likewise exercised influence on the presence and importance of institutional investors.[135] The still growing size of Japan's Government Pension Investment Fund (hereinafter, GPIF) shows that this tendency is likely going to stick and persist for the following years and even decades.[136]

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135 Ajay Khorana/Henri Servaes, *On the Future of the Mutual Fund Industry around the World*, in: Yasuyuki Fuchita/Robert E. Litan (eds.), POOLING MONEY: THE FUTURE OF MUTUAL FUNDS (2007) 65 ff. and Paula A. Tkac, *Mutual Fund Innovation: Past and Future*, in: Fuchita/Litan, *ibid*., 13 ff., identifying the Massachusetts Investors Trust set up in 1924 as the first mutual fund; on Japan, Koichi Iwai, *The Future of Japan's Mutual Fund Industry*, in: Fuchita/Litan, *ibid*., 37 ff., hinting that the cross-shareholdings or at least shareholdings within the corporate group may exert an influence on the choice of the portfolio of investment funds that the distributors (i.e., regional banks) offer to their clients, namely that the distributors turn to the large financial groups with whom they entertain equity holdings with contributing to a highly concentrated investment industry. While Khorana/Servaes, *ibid*., do not expect "*dramatic*" changes for the established sales channels on a global scale, it remains to be seen how the situation develops in Japan, especially against the background of the aforementioned receding levels of group equity holdings. For the developments with respect to the defined benefit to the defined contribution scheme, inter alia, in Japan, see Akiko Nomura, *Trends in Pension System Reforms in East Asia – Cases of Japan, Korea and China* (Nomura Institute of Capital Markets Research, 15 October 2010), and for the development of the assets of the Japanese Government Pension Investment Fund, see Shunsuke Kasuga, *Nihon no kouteki nenkin no unyou doukou ni tsuite* [On Investment Trends of Japanese Public Pension Funds], Nomura Fiduciary Service Research (6 July 2019), available under: https://www.nomurafoundation.or.jp/en/wordpress/wp-content/uploads/2019/08/20190806_Kasuga-PPT.pdf (last accessed 11 June 2024).

136 Kasuga, *supra* note 135, slide 3, projects that the size of the fund's holdings will continue to grow until approximately the year 2040, however, not all assets being shares in domestically traded stock corporations (see slide 4), but the increase of the holding of shares – equally in domestic listed corporations as well as listed companies abroad – in relation to the overall managed assets has gained importance since the year 2014 (see slide 9). In addition, potential in private domestic investors pouring more (bequeathed) funds and savings into the stock market has been identified, see Sachiko Miyamoto, *Perspectives on the Use of Household Financial Assets in Japan – Benefits from Transfers Originating in the Bubble Era*, 10 Nomura Capital Market Review (2007) 2 ff. Foreign exchange distortions, especially the depreciating yen, bearing the potential to further complicate the picture, presumably encouraging Japanese investor to focus on Japan, see Asia

VI. Clarifications

The introductory remarks should be wrapped up by a couple of clarifying reflections with respect to the scope of this work:

1. Law in Action

The dualism of the law in the books and the law in action[137] has often been emphasized, in particular with respect to the reality of corporate governance arrangements and their perceived divergence from statutory corporate law in Japan.[138] In this regard, it has been observed that institutions such as the main bank, cross-shareholding structures and long-term employment have developed in response and arguably in contradiction to the promoted "Americanization" of corporate law. While the development of these institutions as well as their in the meantime receding levels of relevance[139] have been widely accepted, these institutions arguably developed not against the law – the evolving of the main bank system was facilitated due to Japanese law not entirely mirroring its US-American counterpart, namely to the extent that it permitted the shareholding by banks within specified limits –, but emerged and grew in response to regulatory interventions, thus, one may say these institutions have developed (and meanwhile arguably have withdrawn, if not departed) "besides" or "in parallel" with the law set forth in the books. In order to appropriately approach and understand function and quality of such factual institutions is not only complementary, but arguably mandatory to conceive of the whole picture. The sole focus on the formal legal framework bears the risk to not entirely grasp the law in action which of course

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Nikkei, *Japanese investors dump foreign bonds in return to domestic market* (26 January 2023) https://asia.nikkei.com/Business/Markets/Bonds/Japanese-investors-dump-foreign-bonds-in-return-to-domestic-market (last accessed 11 June 2024).

137 The contrast between "law in action" and "law in books" has been coined and subsequently attributed to Roscoe Pound, *Law in books and law in action*, 44 American Law Review (1910) 12 ff.

138 The emphasis of this divergence with respect to Japan appears surprising insofar as such gap is usually accepted as a general phenomenon of transplant jurisdiction, see Daniel Berkowitz/ Katharina Pistor/Jean-Francois Richard, *Economic development, legality, and the transplant effect*, 47 European Economic Review (2003) 173. For the theoretical foundation of such observation, namely the importance of cognitive institutions serving the organization and transmission of legal rules and facilitating a thorough transplantation process, see Robert Means, UNDERDEVELOPMENT AND THE DEVELOPMENT OF LAW (2016) 3.

139 Such withdrawal then giving rise to the question who could fill in the deserted role. For an inquiry with respect to cross-shareholdings and potential successors, Masahiko Igata/Hiroshi Yoshikawa, *Finding Key Investors to Take Over from Cross-Shareholders*, 2 Nomura Journal of Capital Markets (2010) 6 ff.

– especially in (international) business transactions and the necessity of predictability and legal certainty – observes the law, however, economic realities – in the case of Japan, the post-war reforms and the desire to catch up – again (as it had been a major pillar carrying the Meiji period reforms) – with the United States and other Western jurisdictions through a growth-oriented policy – likewise leave their impact and in the case of Japan engendered the creation of an alternative corporate governance model centered around the main bank.[140] Tellingly, calls for reform, summarily and in a condensed manner dubbed as the "Americanization" of company law or reorientation of the corporate governance model coincided with the bubble burst accompanied by decelerating and eventually stagnating growth rates after accomplishing the economic catch-up – and with view to the Continental European peers outpacing them. While corporate governance is not the focus of this thesis, the consideration of the law in action is a mainstay as it supplements and fleshes out the skeleton of rules provided by the law in the books.

2. Legal Fashions

The subtitle of this thesis includes a reference to the term "legal fashions". Such terminology begs clarification. In the context of this thesis, the term legal fashion is used in a neutral manner without any negative connotation which the language might conjure up with respect to superficiality and a lack of pervasiveness.[141] The term is simply used to refer to the extended, global use of specific transplant resulting in the phenomenon that specific legal rules, set of legal rules or legal institutions are developed in a specific jurisdiction and then spill over to other jurisdictions through transplantation and adoption processes. It thus remains in the bounds defined in the literature, previously referred to, namely that it refers to legal reforms relying on legal transplants which at first glance may not respond to strictly legal needs of the existing domestic legal system.[142] A legal fashion in the understanding of this thesis may hence refer to the spread of specific institutions such as the takeover codes, corporate governance and stewardship codes whose adoption in various jurisdictions appears to rather obey the logics of investor signaling than addressing virulent corporate law short

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[140] Juro Teranishi, *The Main Bank System*, in: Tetsuji Okazaki/Masahiro Okuno-Fujiwara (eds.), THE JAPANESE ECONOMIC SYSTEM AND ITS HISTORICAL ORIGINS (translated by Susan Herbert, 1999) 65.

[141] Baum, *supra* note 41, 185 ff. For a variation hereof with respect to corporate governance as a whole and independent director in particular, Martina Pargendler, *The Corporate Governance Obsession*, 42 Journal of Corporate Law (2016) 359 ff.

[142] Supra subsection II.1, Fn. 42; Baum, *supra* note 41, 185 ff

comings which could have arguably been responded to within the immanent logic of the adopting legal system. Despite potential terminological baggage and connotation carried and associated by the term, the term very well catches the element of undiluted, straightforward promulgation and reception of an institution without – at least on the surface – much reflection and engineering by the transplanting jurisdictions.

3. The Intertemporality of Legal Change

The acceptance of convergence[143] tendencies in corporate law and the use of legal transplants gives rise to what this subsection seeks to capture and subsume under the term "intertemporality of legal change". This phenomenon results from the facts that (i) there is a necessary delay between the conception of a legal rule in the exporting jurisdiction and its reception by the importing jurisdictions, and (ii) convergence tendencies do not occur towards a fixed standard, but rather a moving target, since the initially exporting or inspiring jurisdictions may have already begun to move towards a different standard, especially if the legal transplant occurs via the intermediation of third jurisdictions being interposed between the, so to say, innovator, and the analyzed transplanting jurisdiction. Taking the heralded "Americanization" of corporate law as an example, US-American corporate law itself is developing, urging jurisdiction keen to follow such example to follow suit to keep up with the "moving target". The fact that recent corporate governance related reform was to a significant an innovation that started in the United Kingdom may put things further into perspective and warrant caution not to juxtapose the perceived Americanization or convergence of corporate laws around the globe.

In addition, intertemporality may occur within the laws of a jurisdiction and illustrates the transient, sometimes short-lived character of legal institutions and norms which shall be referred to in the context of this thesis by the term "legal fashion". Japan's corporate law may provide an excellent example in this regard: While there has been a push for a departure from the stakeholder-oriented approach in the last decades in favor of a shareholder-oriented governance[144] of stock corporations, the corporate

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143 For potential drivers and institutional path making contributing to the diffusion of the US-American, shareholder-centric model, see Jacoby, *supra* note 13, 239 ff. and, especially for the relevance of self-regulation mechanisms such as through stock exchanges with, however, nuances between the jurisdictions, in particular the United States and the United Kingdom, see John C. Coffee Jr., *Convergence and its Critics: What are the Preconditions to the Separation of Ownership and Control?* Columbia Law School Working Paper No. 179 (September 2000) 53 ff.

144 The debate on shareholder primacy was also in the prewar years not limited to the United States, see Gelter, *supra* note 4, 4 ff.

practice in Japan from the beginning in the late 1910s until the mid-1930s witnessed an, also by postwar global standards well-developed and robust stock market development[145] – for example, by a comparison based on the ratio of stock market capitalization and gross domestic product[146] – with shareholders demanding and benefitting from high dividend yields as well as a strong statutory position.[147] In this vein, with respect to the relevance of capital market-sourced corporate funding, the financial system of Japan in the 1920s and early 1930s can be seen as to closer resemble the financial system of the United States post-World War II than the Japanese financial system of the corresponding period.[148] From the perspective of the "great reversal"-narrative[149], it took the Japanese stock markets longer than its peers to reclaim the levels of market activity of the 1920s and 1930s. Extending the historical perspective to encompass the years from the initial commercial law codification until 1950 thus appears to offer insights which may deepen the understanding of the current company law and corporate governance institutions as well as of where legislative

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145 Large by size as well as actively traded, see Yasushi Hamao/Takeo Hoshi/Tetsuji Okazaki, *Listing Policy and Development of the Tokyo Stock Exchange in the Pre-War Period*, in: Takatoshi Ito/Andrew K. Rose (eds.), FINANCIAL SECTOR DEVELOPMENT IN THE PACIFIC RIM, EAST ASIA SEMINAR ON ECONOMICS (2009). However, it might be worth considering that in the early 1900 the pricing on the Tokyo Stock Exchange may have been inefficient due to illiquidity resulting from low numbers of listings as well as low levels of trading activity, see Hamao/Hoshi/Okazaki, *supra* note 145, 71 ff., so that the figures for market capitalization may be slightly distorted. On the other hand, the relative liquidity of the shares traded on the Tokyo Stock Exchange in the 1930s has been documented by Jean-Pascal Bassino/Thomas Lagaoarde-Segot, *Informational efficiency in the Tokyo Stock Exchange*, 1931-40, 68 The Economic History Review (2015) 1226 ff.

146 Hamao/Hoshi/Okazaki, *supra* note 145, 53 ff., figure 2.1 and table 2.1; Takeo Hoshi/Anil K. Kashyap, CORPORATE FINANCING AND GOVERNANCE IN JAPAN (2001) 36 ff.; Raghuram G. Rajan/Luigi Zingales, *The Great Reversals: The Politics of Financial Development in the 20th century*, 5 Journal of Financial Economics 69 (2003) 15, table 3. While being in the shadows of capital reserves, corporate bonds eclipsed bank borrowing bank borrowing as a source for corporate funding, see Hoshi/Kashyap, *ibid*., 36, table 2.3.

147 On the statutory position, see Baum/Takahashi, *supra* note 80, 376; Kitazawa, *supra* note 80, 72 ff. On the demand for high dividends, see Takashi Kitaura, *The Dividend Policies and Depreciation Approaches of Japanese Companies in the 1930s*, 33 Japanese Research in Business History (2016) 33-60, 48 ff.; Masafumi Aochi, *Senzen nihon kigyō no kōporēto gabanansu to hōseido* [Corporate Governance Structure and Legal System in Prewar Japan], 37 Keiei Shigaku [Business History Review] (2003) 52.

148 Hoshi/Kashyap, *supra* note 146, 16.

149 On the "*great reversal*" of stock markets around the globe by specific stock exchange related metrics indicating a relative contraction in stock market activity and sophistication from the 1930s until the 1980s, see Rajan/Zingales, *supra* note 146, 5-50, especially 39-41, and with more specific information on Japan and the transition from equity-based to bank-based corporate finance, Hoshi/Kashyap, *supra* note 146, 38 ff.; Teranishi, *supra* note 140, 72 ff. The relevance of the raising of funds through public equity offerings is also demonstrated by Rajan/Zingales, *ibid*., 16 (table 4) with the figure for 1999 only meaning a catch-up with levels of 1913.

tweaks may be conducive, however, overall, not calling into question the watershed and turning point character of the 1950s reforms.

4. Miscellaneous

In addition, the thesis will limit its analysis to public stock companies, thus leaving out of its analysis any private – although this distinction is at times blurry with respect to the pioneering and infant periods of the stock company concept settling in Japan in the Meiji period prior to the constitutive codification of the stock company in the Kyū-Shōhō and Shōhō – as well as other enterprise forms, such as the limited liability company.[150] With respect to the two criterion of public stock companies, this thus just serves as a guideline which may be flexible, but only to the extent indicated herein.

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[150] Which in general did not play a big role in Japan. See for a similar approach, Siems, *supra* note 67, 10 ff.

CHAPTER I

LITERATURE REVIEW AND METHODOLOGY

The topic of the thesis intersects with a variety of threads of existent academic discourse which will be presented in the following (infra section I.). After briefly recapitulating the direction of research, the methodology applied by this thesis will then be presented in detail (infra section II.).

I. Literature Review

The thesis maneuvers a field of abundant academic research and publications. Contact points with various streams of academic debate are thus inevitable. These relevant academic debates can be organized into overall three groups, namely (i) the concepts of classifying legal systems (infra subsection I.1), (ii) the legal origin theorem (infra subsection I.2), and (iii) legal transplants or generally the conceptualization of legal transfers and exchanges between jurisdictions (infra subsection I.3). Finally, the position of current Japanese (corporate) law in the context of these debates shall be undertaken: In order to achieve this, especially with a view to the legal origins debate, attention will also be paid to the impact of ownership patterns on the agency conflicts[151] within stock companies (infra subsection I.4). The common denominator of these three groups of academic debate can be identified in the common comparative legal tradition of taxonomic ambition to classify jurisdictions around the globe on the basis of common structural characteristic or grammars as well as in seeking explanations for qualitative differences, similarities as well as divergent or convergent tendencies between these jurisdictions.

The taxonomic ambition of developing a "common grammar" – of private law – envisaged to contribute to a deeper understanding the mechanics of legal systems in different jurisdictions and thus facilitate successful legal transfers between them[152] is

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[151] Usually, two dimensions of the agency conflict are counted, namely between (i) the company's owners and its managers and (ii) majority and minority shareholders, see, for example, Gilson, *supra* note 123, 1650 ff. Sometimes, a third dimension or conflict of interest is added, namely between the company itself and its contractual partners or stakeholders, such as creditors and employees, see John Armour/Henry Hansmann/Reinier Kraakman, *Agency Problems and Legal Strategies*, in: Kraakman et al., *supra* note 123, 30.

[152] Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 The American Journal of Corporate Law (1997) 6. On the general benefits of taxonomies, see Andrea

very overt in the first of the three groups. This ambition has invited the qualitative comparison of parts of the legal systems of different jurisdictions such as in the course of the legal origins debate which postulates a connection between the degree of shareholder dispersion and the quality of the respective corporate law rules. The element of legal transfer leads over to the third thread of academic debate, namely on legal transplants as a figure and concept to explain the diffusion of legal rules by imitation and adoption or by imposition. The last thread of academic debate which is deemed relevant in the context of this thesis is the literature on the orientation of Japanese corporate law which builds on the criteria and structures established in the previous three debates.

The position of Japanese corporate law is usually approached from the viewpoint and against the mirror of the convergence of corporate laws and the apparent paradox that despite convergence by the letters of law, corporate practice remains divergent. The debate on the convergence of corporate laws on a global norm is, however, complicated by the moving of such norm with the advocacy of the precedence of shareholder value being crumbling due to the occurrence of exogenous shocks such as the Global Financial Crisis of 2007/2008 as well as dynamics in the composition of the shareholder class, such as – especially in a longer perspective – the departure of insider or company-affiliated shareholders (main bank, *keiretsu*) and the influx and building presence of foreign investors as well as the rise of agency capitalism[153] embedded in the corresponding global trends. The relevance of the legal transplant concept is based on the observation that corporate law – as an exponent of the legal system in Japan in general – is typically considered to present an example of successful legal reception, inter alia, relying on the legal transplant strategy.

The afore-mentioned academic debates will be presented in more details in the remainder of this section starting with the classification of legal systems (see infra subsection I.1.), followed by the legal transplant debate (see infra subsection I.2.) before concluding with the literature on the orientation of current Japanese corporate law and its corporate governance structures (see infra subsection I.3.).

Ortolani, *Legal Systems and Legal Families: Italy and Japan in Comparative Perspective*, The Italian Law Journal – Special Issue (2018) 7 ff.

153 Gilson/Gordon, *supra* note 12, 863 ff.; Edelmann/Thomas/Thompson, *supra* note 12, 1359 ff.

1. Concepts of Classifying Legal Systems

The classification of legal systems[154] sits at the core of the comparative law discipline. Besides the mounting difficulty of identifying adequately abstract structural elements to justify a classification, such taxonomic ambition is subject to the dynamic and development of legal codices, therefore requires awareness of the historical course which at the same time may, however, lend some stability to such classification, if one accepts the concept of institutional lock-ins and consequent path dependency. The concept of path dependencies conceptualizes lines of intellectual (inter)dependencies between exporting and importing jurisdictions which while being plausible, may bespeak traces of intellectual rigidity and even legal imperialism, especially in the event of initially imposed legal codices.[155] While the taxonomic ambition appears to have lost vigor and importance in recent years, traditional classification schemes have nonetheless seeped into various streams of adjacent academic debate and have been somewhat accepted as theoretical groundwork or consensus. At the same time, attempts to overcome established rigid classification scheme and "legal orientalisms" bespeak tenacity and lingering relevance of the discourse. Reflecting this tendency, the legal origin literature, for example, builds on the widely accepted dichotomy between civil and common law jurisdictions as well as the further segmentation of the civil law jurisdictions.[156] Concurrently, the group of common law jurisdictions has been subject to further nuanced, chiseled approaches.[157]

In view of the above, in the next step the classification of the legal systems of various jurisdictions shall be pursued, before the key ideas of the legal origins literature as an influential model of explaining the mechanisms of legal transfers as well as the

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154 The terms legal system and legal order are sometimes interchangeably used. However, it is commonly understood that there is a distinct nuance between the two notions with legal system being defined as a set of valid norms in a specific space at a specific time and a legal order a continuum comprised of a succession of momentary legal systems, see Jose Juan Moreso/Pablo Eugenio Navarro, *Some Remarks on the Notions of Legal Order and Legal System*, 6 Ratio Juris (1993) 51 f.; David Goldberg/Elspeth Attwooll, *Legal Orders, Systemic Relationships and Cultural Characteristics: Towards Spectral Jurisprudence*, in: Esin Örücü /Elspeth Attwooll/Sean Coyle (eds.), STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING (1996) 313. Similarly, Kelsen distinguishes between the dynamic basic norm of a legal order and the – due to its momentariness – static counterpart of a legal system, Hans Kelsen (translated by Stanely L. Paulson), *The Concept of the Legal Order*, 27 The American Journal of Jurisprudence (1982) 69.

155 Mattei, *supra* note 152, 7.

156 For example, La Porta/Lopez-de-Silanes/Shleifer/Vishny, *supra* note 10, 1118 ff.

157 Luke Nottage, FORM, SUBSTANCE, AND NEO-PROCEDURALISM IN COMPARATIVE CONTRACT LAW: LAW IN BOOKS AND LAW IN ACTION IN NEW ZEALAND, ENGLAND, THE UNITED STATES OF AMERICA, AND JAPAN (2001) 14 ff.

consolidation of structural differences between different groups of legal systems will be critically reviewed in the subsequent subsections.

a) The concept of legal families or legal spheres

The concept of grouping jurisdictions into major legal families or spheres based on shared characteristics of their legal system has been an established discipline and convention in comparative law and a method of reducing the complexity in comparative law to distinguish between the various jurisdictions and it looks back on a relatively long tradition of academic debate on the composition of the legal families as well as the criteria for differentiation between the various legal families.[158] The classification into legal families seeks to identify historical relationships and genealogies with respect to origin or influence between a wider amorphous, amalgamated concept of legal systems, not limited to solely legal traditions.[159]

aa) Introduction

Besides the accessible and widely spread common denominator of an acceptance of a divide between the common law and civil law families, with the latter being sometimes further divided into different sub-groups such as the French, Romano-Germanic and Scandinavian legal families[160], various classification attempts have been pursued. The classification attempts have been very much in flux which does not only extend to the composition and concept underlying the legal families or legal spheres, but is also a consequence of exogenous shocks such as the collapse of the socialist regimes in Central and Eastern Europe in the later 1980s and early 1990s resulting in the departure of the widely employed identification of a socialist legal family from the legal families canon.[161] The collapse of the socialist regimes and the ensuing dissolution of the earlier established legal family of socialist law systems then naturally gave rise to doubts with respect to the validity of such classification given that several jurisdictions

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158 Corinna Coupette/Dirk Hartung, *Rechtsstrukturvergleichung* [Comparison of legal structures], 86 Rabelszeitschrift [Rabel's Journal] (2022) 940; Mariana Pargendler, *The Rise and Decline of Legal Families*, 60 The American Journal of Comparative Law (2012) 1043 f.

159 Jaakko Husa, *The Future of Legal Families*, in: Oxford Handbooks Editorial Board, OXFORD HANDBOOK TOPICS IN LAW (2016); Pargendler, *supra* note 158, 1046, 1074.

160 Consequently, also applied by legal origins literature following La Porta/Lopez-de-Silanes/Shleifer/Vishny, *supra* note 10, 1118 ff.

161 See for such classification, for example, Konrad Zweigert/Hein Kötz, INTRODUCTION TO COMPARATIVE LAW (3rd revised edition, translated, 1998) 63 ff.

enjoyed deep-running historical ties with the Roman law tradition[162] and eventually revealed the significance of political and economic factors for the classification.[163] From a different angle, the perceived convergence of legal systems around the globe undermines and if it indeed further progresses would render any categorization attempt obsolescent.[164]

While the classification of legal systems around the world into different legal families or legal cultures can look back on an established tradition in the field of comparative law, with however, seemingly decreasing levels of attention and emphasis in recent years which may partly be attributed to the fact that it mainly focused on the civil versus common law divide with the other legal families or legal cultures having been fleshed out to a far less intensive degree, with updates of the family composition taking into account recent developments in the legal codices resulting in potential reshufflings with respect to the classified jurisdictions not being provided or discussed without a considerable lag of time.[165] Having said that, the advocates of the legal families doctrine are very much aware of the dynamic and the temporary relativity of any classification attempt.[166] In addition, the classification attempts are usually limited to the realm of private law which, however, does not safeguard such classification attempts against split categorizations within private laws with different areas of private law of one jurisdiction showing imprints of different legal families, such as inheritance or family law on the one hand being more prone to conserving rather distinct legal styles, and commercial laws on the other hand being more strongly susceptible to come under the influence of external legal thought, may it be imposed as through colonial powers or by voluntary adoption.[167] Despite the initial emphasis on the private law domain, constitutions have proven to be another discipline in which active borrowing occurs.[168]

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162 Mark van Hoecke/Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 International and Comparative Law Quarterly (1998) 499.

163 Pargendler, *supra* note 158, 1074.

164 Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law*, 6 Brigham Young University Law Review (2009) 1815.

165 Malcolm Smith, *The Identity of Japanese Law*, 33 Waseda University Comparative Law Study Series (2006) 155.

166 Zweigert/Kötz, *supra* note 161, 65.

167 Zweigert/Kötz, *supra* note 161, 65 f.

168 Zweigert/Kötz, *supra* note 161, 66 f.; Michele Graziadei, *Comparative Law, Transplants and Receptions*, in: Mathias Reimann/Reinhard Zimmermann (eds.), THE OXFORD HANDBOOK OF COMPARATIVE LAW (2019) 452; Vlad Perju, *Constitutional Transplants, Borrowing, and Migrations*,

bb) Reconceptualization or the value of taxonomies

Nonetheless, the lack of maintenance and care in recent years invites a petitio principii: Does the classification of legal systems in various jurisdictions still have any value – besides the inherent taxonomic aspect of reduction of complexity[169] – today? The initial impetus for such classification lay in the idea that specific characteristics shared by legal systems as members of a legal family go beyond the differences between the legal systems of such legal family which spurred substantial efforts of comparative law scholars to classification projects.[170] The shared characteristics between the members of a legal family translate into a higher degree of compatibility of the legal systems of the members of the same legal family and thus increase the probability for the viability of legal transfers and legal transplants between the members of the same legal family.[171]

The scope of factors which are considered to evaluate the adherence of a certain jurisdiction to a specific legal system, however, has changed over time and has become increasingly sophisticated to a degree that the legal family categories tend to describe ideal types rather than actual legal systems.[172] From the outset, the classification attempts which began in the 1950s[173] did not stop at the analysis of legal rules, but rather strived to classify legal systems based on the substance[174] or the philosophical concept underlying a legal system as principal criterion being further supplemented by the legal technique[175], just to name two distinct approaches.[176] Based thereon, current literature which covers legal families examines the legal system of a jurisdiction in its entirety and attempts to identify the constants and fundamental structures which surround the written law and which have manifested themselves in historical

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in: Michael Rosenfeld/Andrea Sajo (eds.), OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW (2012) 1304 ff.

169 Coupette/Hartung, *supra* note 158, 940.

170 Mattei, *supra* note 152, 7; Sacco, *supra* note 95, 387 f.

171 Mattei, *supra* note 152, 7.

172 Pargendler, *supra* note 158, 1043.

173 For a comprehensive overview of classification attempts prior to the 1950s, see Husa, *supra* note 159; Pargendler, *supra* note 158, 1047 ff.

174 Pierre Arminjon/Baron Boris Nolde/Martin Wolff, TRAITÉ DE DROIT COMPARÉ [Treatise on Comparative Law], Volume I (1950) 47 ff.

175 René David, TRAITE ÉLÉMENTAIRE DE DROIT CIVIL COMPARÉ: INTRODUCTION À L'ÉTUDE DES DROITS ÉTRANGERS ET À LA MÉTHODE COMPARATIVE [Basic Treatise on Comparative Law: Introduction to the Study of Foreign Laws and the Comparative Method] (1950) 222 ff.

176 Zweigert/Kötz, *supra* note 161, 64 f.

continuities.[177] The context has become even broader, as classification attempts have begun to try grasping the entire legal discourse or the legal style of legal system as the basis for categorizing different legal systems, however, remaining rather nebulous, as the relevant authors have missed to provide further clarification as to which factors determine the vague criterion of a specific legal style.[178] In analogy to the social science of economy, legal style has subsequently come to be understood as the "*distinctive form of legal life*", thus alluding to the extensive concept of comparative legal culture rather than comparative positive law.[179] This development shows that contemporary classification attempts seek to go beyond the realm of mere comparative positive law and equally aim to contribute to legal theory which reveals a tendency which is, however, not entirely novel to the discipline.[180]

The shift from examining only the (written) legal rules towards a wider, comprehensive context paved the way for overcoming the orientation at legal systems and ushered in a wave of literature viewing the legal families doctrine as "*problematic*"[181], instead promoting a wider socio-economic, historical, philosophical and ideological approach from the start.[182] In this vein, alternative criteria and classification schemes have been put forth, most notably based on legal cultures[183], legal traditions[184], mentality or "*shared mental programmes*"[185], visions of law[186] and

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177 René David/John E. Brierley, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW (3rd edition, 1985) 19 f.; Roscoe Pound, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) 15 ff.; van Hoecke/Warrington, *supra* note 162, 496.

178 Zweigert/Kötz, *supra* note 161, 67 f.; van Hoecke/Warrington, *supra* note 162, 495 f.

179 Zweigert/Kötz, *supra* note 161, 68; Kinoshita, *supra* note 19, 7 f. For a critical view on the concept of legal style as put forward by Zweigert/Kötz, see Léontin-Jean Constantinesco, *Über den Stil der „Stiltheorie" in der Rechtsvergleichung* [On the Style of 'Style Theory' in Comparative Legal Studies], 78 Zeitschrift für vergleichende Rechtswissenschaft [Journal for Comparative Legal Studies] (1979) 171.

180 van Hoecke/Warrington, *supra* note 162, 497; John Bell, *Comparative Law and Legal Theory*, in: Werner Krawietz/Neil MacCormick/Georg Henrik von Wright (eds.), PRESCRIPTIVE FORMALITY AND NORMATIVE RATIONALITY IN MODERN LEGAL SYSTEMS (1995) 19 ff. with explicit reference, inter alia, to the approach employed by P.S. Atiyah/Robert S. Summers, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW (1988) 1 ff. While Zweigert/Kötz, *supra* note 161, 31 put the focal point on the functionality aspect, contemporary comparative legal scholars appear to have recalibrated and shifted to analyzing law with a view to its social function, see Bell, *ibid*., 22.

181 Bell, *supra* note 180, 23.

182 van Hoecke/Warrington, *supra* note 162, 496.

183 van Hoecke/Warrington, *supra* note 162, 495 ff. For a narrative with respect to Japanese law, see Mark Ramseyer/Minoru Nakazato, JAPANESE LAW: AN ECONOMIC APPRAISAL (1999) 1 ff.

184 H. Patrick Glenn, LEGAL TRADITIONS OF THE WORLD (5th edition, 2014) 60 ff.

185 Pierre Legrand, *Comparative Legal Studies and the Matter of Authenticity*, 1 Journal of Comparative Law (2006) 381.

186 Atiyah/Summers, *supra* note 180, 411, who conceptualize such legal vision as "*a set of inarticulate and perhaps even unconscious beliefs held by the general public at large and, to some extent,*

the importance of the rule of law[187] as distinctive aspects as well as multi-faceted[188] and multi-lensed[189] approaches. This list of alternative approaches reveals the overall tendency away from conceptualizing law as a system of legal rules towards an open concept in the sense of a network of traditions and of legal ways or methods of doing things.[190] The emergence of these alternative classification approaches also proves the perennial value of classification attempts in the comparative law discipline.

b) The "traditional" propositions of legal families

The classification of the (private) laws of jurisdictions around the globe, was initially already purported by Nobushige Hozumi who identified seven "great families of law", namely Chinese law, Hindu law, Mohamedan law, Roman law, Germanic law, Slavonic law and English law.[191] With a view to the intense codification activities in the late nineteenth century and at the turn to the twentieth century, Hozumi already observed that with the time passing and an increasing orientation at European legislative framework at that time Japanese law was passing from the Chinese law family to the European law families reflecting the time, however, without any further in-depth specification for such transition.[192]

Earlier classification efforts were taken up with more verve by comparative law scholars in the 1950s. Two of the "classical" propositions proffered a division of the legal systems around the world into seven families, namely French, German, Scandinavian, English, Russian, Islamic and Hindu[193], or five legal systems, namely Western systems, socialist systems, Islamic law, Hindu law and Chinese law,

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also by politicians, judges and legal practitioners, as to the nature and function of law – how and by whom it should be made, interpreted ad enforced", *ibid*., expanding and approximating it to more of a tradition, thus presenting a more functionally dynamic approach that goes beyond the established legal families perspective centered around legal systems, concepts, techniques and institutions, Bell, *supra* note 180, 24.

187 Mattei, *supra* note 152, 5 ff.

188 See, for example, various contributions in Tom Ginsburg/Luke Nottage/Hiroo Sono (eds.), THE MULTIPLE WORLDS OF JAPANESE LAW: DISJUNCTIONS AND CONJUNCTIONS (2001) 1 ff.

189 Puchniak, *supra* note 9, 511 ff.

190 Bell, *supra* note 180, 24.

191 Nobushige Hozumi, LECTURES ON THE NEW JAPANESE CIVIL CODE (second revised edition, 1912) 35.

192 Hozumi, *supra* note 191, 37, 40 f., who based such classification on the factors investigated in the further course of the cited publication, namely the conception of law and the importance of the publication of law (p. 42 ff.), the structure of the Japanese Civil Code with the final draft of the code drawing on the "Pandekten-System" modelled after the German Civil Code (p. 49 ff.), the concept and notion of a right (p. 56 ff.) as well as various institutions from the areas of family law and the law of succession (p. 60 ff.).

193 Arminjon/Nolde/Wolff, *supra* note 174, 49 ff.

respectively, with the latter classification notably leaving out any differentiation between civil and common law at the level of distinct legal families.[194] David, however, adjusted this position shortly after and focusing on the identification of three principial plus one vague legal families in the then contemporary laws, namely the common law family, the Romano-Germanic law family and socialist laws besides a diverse group of jurisdictions found to either subscribe to divergent conceptions of law and social order in other societies which were perceived either to put a focus on law, however, enriched with a different conception of law, or to assign a stronger role to extra-legal means, thus overall revealing a rather one-sided, biased view centered on the Western understanding of law at the times.[195]

These categorizations were party refined later on when the differentiation between the different members of the civil law family was further fleshed out leading to the distinction between the Romanistic, Germanic and Nordic legal families[196], besides the common law or Anglo-American legal family, the Far-Eastern or Chinese legal family – or, alternatively, North-East Asian legal culture[197] – and a collective family of religious legal systems, covering Islamic and Hindu law, thus resulting in the identification of additional three legal families or spheres which share the tradition of legal texts.[198] At the same time, proponents acknowledged the transitional element of such classification attempt and consequently envisioned the emergence of new legal

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194 David, *supra* note 175, 222 ff., 225. The omission of the common law versus civil law distinction was by no means a novel phenomenon as the example of the Argentinean comparative law scholar Enrique Martinez Paz, INTRODUCCIÓN AL ESTUDIO DEL DERECHO CIVIL COMPARADO [Introduction to Comparative Law Studies] (1934) 1 ff. two decades earlier demonstrates. Grouping jurisdictions from Latin America, Switzerland and Russia together (in the Roman-canonical-democratic group) as purported in the aforementioned treatise might on the one hand at first glance come as a surprise or appear arbitrary, as noted by Arminjon/Nolde/Wolff, *supra* note 174, 46, but on the other hand reveal a perspective less clouded by Western-centered conceptions. In addition, David himself admitted to the inevitable arbitrariness inherent in any classification attempt, David, *ibid*., 222. For the aspect of not including common law and civil law as distinct legal families, see also Pargendler, *supra* note 158, 1053.

195 Notably by David/Brierley, *supra* note 177, 22 ff. On the susceptibility to such parochialisms, see Mattei, *supra* note, 7, and such narrowness posing impediments to the development of economically efficient solutions by the law, see Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 International Review of Law and Economics (1994) 10 ff.; Coupette/Hartung, *supra* note 169, 941.

196 Zweigert/Kötz, *supra* note 161, 73.

197 Kinoshita, *supra* note 19, 32.

198 Zweigert/Kötz, *supra* note 161, 63 ff., who partly relying and draw on the work of Arminjon/ Nolde/Wolff, *supra* note 174, 42 ff.

families, which was, however, not reflected nor put into practice in following works.[199] The disappearance of Chinese and Socialist law in various classifications further demonstrates this vulnerability.[200] The afore-mentioned classification is limited to the function of law[201] and based on five criteria, namely historical development, mode of legal thinking, legal institutions, choice of the sources of law and ideology being understood as the "*religious or political conception of how the social or economic life should be organized*", with these five criteria – with different weight and nuance given to each on a case-by-case basis[202] – striving to grasp the constituting style of a legal system, thus consequently allowing its classification.[203]

The reported legal families or legal spheres lay bare one dimension of the criticism which the previous classification approaches have triggered, namely its simplicity due to the (over)emphasis of cultural aspects as well as cultural bias with the legal families being constructed from a common or civil law perspective which renders the approach not only problematic from its conceptual starting points, but also results due to a lack of nuancing with respect to jurisdictions outside the Western or Eurocentric perspective or slightly detached from the common law and civil law dichotomy as well as the inability to properly grasp the position of a legal system of a jurisdiction due to continuing to adhere to a legal positivist orientation focused on formal legal norms.[204] In addition, several significant areas, such as most of Sub-Saharan Africa or Oceania were widely left off the chart and remained unexplored by these classification attempts.[205] Furthermore, the classification attempts themselves tended to be clouded by overemphasizing the reception of laws from exporting to importing legal systems, thereby neglecting that reception does not automatically translate into functional equivalence due to code interpretation, legal doctrine and norm application being influenced by the *basso ostinato* (*shitsuyō teion*) of the existing legal and social norms

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199 Zweigert/Kötz, *supra* note 161, 63 ff.; Annette Marfording, *The Fallacy of the Classification of Legal Systems: Japan Examined*, in: Veronica Taylor (ed.), ASIAN LAWS THROUGH AUSTRALIAN EYES (1997) 67 ff.; Nottage, *supra* note 157, 357 f.

200 Berkowitz/Pistor/Richard, *supra* note 138, 171.

201 Zweigert/Kötz, *supra* note 161, 34 ff.

202 See also Bell, *supra* note, 23, who proffers that the differentiation between common law and different civil law sub-groups would primarily rest on their respective distinct legal history and techniques, while, more broadly, Western law, Socialist law and Muslim law would be separated from each other by ideology, *ibid*.

203 Zweigert/Kötz, *supra* note 161, 68 ff., 72.

204 Marfording, *supra* note 199, 67; Husa, *supra* note 159.

205 The legal systems of the jurisdictions in these areas are partially assembled under the group of customary legal culture, see Kinoshita, *supra* note 19, 33.

of the importing jurisdiction.[206] The focus on the common law versus civil law antipodes has furthered voices in favor of abandoning the legal families doctrine altogether. Effectively, positing a third legal family to accommodate jurisdictions combining influences from both spheres or showing pluralistic patterns besides these two opposites to accommodate the jurisdictions off the common law versus civil law faultlines bears the risk to arrive at the very same result with the exception of having added another disparate group of jurisdictions based on the negative definition that the jurisdictions assembled therein neither fit into the civil nor the common law group.[207] The key message of such motion, however, lies in overcoming the rigidity underlying the entire legal families classification, which does not correspond with the relativity and porosity of and between legal systems, in favor of viewing all jurisdictions as somewhat pluralistic and hybrid.[208]

The existence of international regulation, not necessarily being translated into domestic law and thus intersecting therewith, adds to the complexity and the emergence of different layers or – horizontal – "legal spaces"; from the temporal perspective, non-synchroneities may occur.[209] Again, the time aspect is most elucidating, as, for example, traces of Roman law which is commonly perceived as an antecedent of various Continental European civil law systems, can also be found in English law, for example with respect to trust law.[210] The broader conceptualization to go beyond formal legal norms and the legal practice towards a wider historical and philosophical perspective starts to address such shortcomings with the reported newer, alternative approaches further intensifying a reorientation. Notwithstanding, a nucleus of the above-mentioned legal families – usually English or common law, French law, German and Scandinavian law as well as Socialist law proves persistent as it has widely survived reappraisal attempts and still appears to serve as a first point of

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206 Marfording, *supra* note 199, 69; Imre Zajtay, *Reception of Foreign Laws and Unification of Law*, 35 Louisiana Law Review (1975) 1122. In the case of Japan, however, elements of legal doctrine were likewise "imported" and absorbed, see Takeyoshi Kawashima, *The Concept of Judicial Precedent in Japanese Law*, in: Ernst von Caemmerer/Soia Mentschikoff/Konrad Zweigert (eds.), IUS PRIVATUM GENTIUM, Volume I (1969) 85-101, 85.

207 Vernon Valentine Palmer (ed.), *Introduction to the Mixed Jurisdictions*, in: MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY (2001) 3 ff., 11 f.

208 Esin Örücü, *Mixed and Mixing Systems: A Conceptual Search*, in: Örücü/Attwooll/Coyle, *supra* note 154, 335 ff.; Palmer, *supra* note 207, 11.

209 Boaventura de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, 14 Journal of Law and Society (1987) 297 f.

210 Maurizio Lupoi, *The Civil Law Trust*, 32 Vanderbilt Journal of Transnational Law (1999) 973 ff.; Avisheh Avini, *The Origins of the Modern English Trust Revisited*, 70 Tulane Law Review (1996) 1162 f.

orientation in wider cross-jurisdiction studies such as undertaken by the legal origins literature (see infra subsection I.2).

c) The civil and common law dichotomy

In the more mainstream academic literature, the classification of the legal systems around the world into different legal families was mainly received and reduced to the structural differences between common and civil law systems with such dichotomy being mirrored in the legal origins proposition (see infra subsection I.2). While this dichotomy continues to be widely maintained, nuances within these two groups, such as between the United States and the United Kingdom as common law family members are usually further differentiated with the former legal system being found to lean towards more regulation by the state, catalyzing an overarchingly higher degree of substantive legal reasoning, and the latter resting more strongly on case law, contributing to a high degree of formality with respect to legal reasoning.[211] Despite the influence of English common law during the colonization period, the laws of the United States have transformed into a legal system in its own right emancipating itself from the English common law antecedents, as a result significantly diverging from the English common law causing the two jurisdictions differing from each other with respect to, inter alia, law, various aspects of legal theory as well as public perception or "visions"[212] of law.[213] The reliance on case law potentially allows for a smoother transmission of law in comparison to the transplant of a legal rule or system, since it does not require a codification, thus contributing to better accessibility[214] and acceptance of law through precedents.[215] However, further distinction has become increasingly blurry with the United Kingdom during its stint as a Member State of the European Union being subject to the harmonization tendencies of the European Union which also pertained to the realm of corporate law on the one hand, and the Act Concerning Private Corporations of Delaware being the prevalently applicable

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211 For example, Atiyah/Summers, *supra* note 180, 96 ff., 408; Nottage, *supra* note 157, 144 ff., 236 ff.; Pistor/Keinan/Kleinheisterkamp/West, *supra* note 92, 806 ff.

212 The vision of law as has been coined by Atiyah/Summers, *supra* note 180, 5, 411 ff., see also Fn. 186.

213 Atiyah/Summers, *supra* note 180, 70 ff.; L.C.B. Gower, *Some Contrasts between British and American Corporation Law*, 69 Harvard Law Review (1956) 1369 ff.; Kinoshita, *supra* note 19, 33.

214 The publication of law in England since the sixteenth century contributed to such expansion and the facilitated the accessibility of law, see Richard J. Ross, *The Commoning of the Common Law: The Renaissance Debate over Printing English Law, 1520–1640*, 146 University of Pennsylvania Law Review (1998) 323 ff.

215 Pistor/Keinan/Kleinheisterkamp/West, *supra* note 92, 846.

corporate law statute in the United States (since the 1880s)[216] conceding a significant portion of corporate governance-related decisions to the discretion of the (founding) shareholders during the company's incorporation process, hence, despite providing a statutory legal framework limiting itself to prescribing the basic principles in contrast to the civil law countries tending to stipulate mandatory rules pertaining to corporate governance structures on the other hand. In addition, the approach of employing soft law instruments pertaining to corporate governance matters, such as corporate governance and stewardship codices seems to demonstrate the existence of certain divergences. Notwithstanding, both jurisdictions are still found to have similar characteristics arguably justifying the common jargon of an "Anglo-American" legal sphere. Furthermore, the faultlines between common and civil law have become increasingly diffuse, as legal ideas, concepts, techniques and style converge, which is, for example, epitomized by the development that civil law jurisdictions extensively rely on guiding cases to fill gaps in their codes and advance the development of legal doctrine and codes, while courts in common law jurisdictions have come to cite legal scholarship for bolstering the legal argumentation given in their judgments.[217]

Within the community of civil law countries usually a differentiation between the civil laws of France and Germany is upheld, also with respect to corporate law.[218] Besides, a Scandinavian law family is widely identified.[219] In addition, even common law and civil law partly overlap with respect to limited areas, for example case law has contributed to the further refinement of specific corporate law institutions.[220] On the other hand, the body of Continental European civil laws is far from homogeneous, thus tenably justifying a further differentiation. With respect to the corporate laws of France and Germany, the common, however, with respect to its details divergent, peculiarity

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216 Due to the majorities of corporations in the United States being incorporated in the Federal State of Delaware and through reliance on the "foundation theory" resulting in the application of the corporate law of Delaware.

217 Marfording, *supra* note 199, 72 f.

218 La Porta/Lopez-de-Silanes/Shleifer/Vishny, *supra* note 10, 1113 ff.; Pistor/Keinan/Kleinheisterkamp/West, *supra* note 92; Berkowitz/Pistor/Richard, *supra* note 138, 169 ff.; Masahiko Aoki (ed.), *What Do Corporations Do?*, in: CORPORATIONS IN EVOLVING DIVERSITY: COGNITION, GOVERNANCE, AND INSTITUTIONS (2010) 1-18, 9.

219 See, for example, La Porta/Lopez-de-Silanes/Shleifer/Vishny, *supra* note 10, 1129 ff., and *supra* note 125, 1137 ff.; Berkowitz/Pistor/Richard, *supra* note 138, 169 ff.

220 With respect to Germany, see Peter Ulmer, AKTIENRECHT UND RICHTERLICHE RECHTSFORTBILDUNG [Stock Corporation Law and the Development of the Law by Judges], in: Walter Bayer/Mathias Habersack (eds.), AKTIENRECHT IM WANDEL [Stock Corporation Law in Change], Volume II (2007) 113 ff.

of a two-tier board structure with a supervisory and managing board may be cited.[221] However, recent legislative action again blurs previously more clearly contoured differences, since through European Union legislation the one-tier *societas Europaea* (commonly abbreviated as SE)[222] became available in Germany, while the option of a two-tier model also exists in France nowadays due to a corresponding domestic legislative initiative.[223]

2. The Legal Origins Theorem

While in the comparative law arena the interest in the legal families doctrine and various classification attempts appears to be on the wane, it has been perpetuated and risen to prominence in the law and economic context thanks to the legal origins literature which identifies the legal heritage, understood as the (former) belonging to a specific legal family as a determinant for the socio-economic development of a jurisdiction.[224] Also, the legal origins literature, however, registers decreasing levels of distinction between the different legal families or origins.[225] Especially when it comes to the field of corporate law, the legal origins literature which partly draws on the legal families classification appears to have recently, meaning since its articulation in the late 1990s, received dissimilarly more attention and criticism than recent propositions of classifying legal families or reconceptions of such classification

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221 On the development of the supervisory board which upon its inception under the General Commercial Code of 1861 (Allgemeines Handelsgesetzbuch, ADHGB) was optional and which only became mandatory in the course of the General Commercial Code Amendment of 1884 conceptualized as a substitute for the (receding) state's control over stock companies (in Germany the shift from the concession system to the registration system occurred by virtue of the General Commercial Code Amendment of 1870), see Marcus Lutter, DER AUFSICHTSRAT IM WANDEL DER ZEIT – VON SEINEN ANFÄNGEN BIS HEUTE [The Supervisory Board through Changing Times: From its Origins until Today], in: Bayer/Habersack, *supra* note 220, 389 ff.; Werner Schubert/Peter Hommelhoff, HUNDERT JAHRE MODERNES AKTIENRECHT [Hundred Years of Modern Stock Corporation Law] (1985) 53 ff., 91 ff.

222 The legal basis therefor is Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) (OJ L 294, 10 November 2001, 1-21) and the Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European Company with regard to the involvement of employees (OJ L 294, 10 November 2001, 22-32).

223 Pistor/Keinan/Kleinheisterkamp/West, *supra* note 92, 818.

224 The connection is explicitly made, inter alia, by Juan C. Botero/Simeon Djankov/Rafael La Porta/ Florencio Lopez-de-Silanes/Andrei Shleifer, *The Regulation of Labor*, 119 Quarterly Journal of Economics (2004) 1340; see also La Porta/Lopez-de-Silanes/Shleifer/Vishny, *supra* note 10, 1151 explicitly state that "*laws differ markedly around the world*". On the aspects of the persistence and perpetuation of initial "institutional lock-ins", see Pargendler, *supra* note 158, 1045 f.

225 Due to the historicity of the approach which aims to explain differences in socio-economic development resulting in remaining, however, decreasing differences between various jurisdictions in these regards, see La Porta/Lopez-de-Silanes/Shleifer/Vishny, *supra* note 10, 1113 ff.; Pargendler, *supra* note 158, 1046.

approaches and categories. Thus, in order to complement and round off the debate on the legal families classification, a glimpse at the key propositions of the legal origin theorem shall be added here.

a) Principles of the legal origins theorem

The legal origin theorem has been primarily devised and contributed to from an economic perspective.[226] It is embedded in the wider context of comparative political and institutional economics that are concerned with the mechanics of the "*rules of the game*" or "*shared beliefs*" that provide the framework for the economic interactions between the institutions of a jurisdiction as well as with persisting institutional diversity between various jurisdictions facilitated by the existence of functional equivalents and substitute institutions, so-called "*institutional complementarities*", and it posits a correlation between the quality of the law as well as of complementary socio-political institutions on the one hand and the level of financial development and economic growth on the other hand.[227]

Broadly speaking, the legal origin literature postulates the correlation between law and finance, arguing that law matters for financial growth and development, inter alia, indicated by the size of stock markets for which increased stock market capitalization as well as depth and intensity of stock market activity are found representative. The theory ultimately argues that the trajectory of the legal origin of a jurisdiction overshadows other factors such as economic efficiency or politics.[228] With respect to ownership patterns, the key proposition of the legal origin theory is that high levels of investor protection reduce agency conflicts and advance ownership dispersion, since controlling shareholders would be more inclined to sell off their controlling equity stakes if minority investors afforded effective protection by the law.[229]

By arguing that the legal origin – in principle, narrowed to the distinction between common law and civil law – would constitute a major cause to approaches to business

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226 The theory was first articulated and espoused by La Porta/Lopez-de-Silanes/Shleifer/Vishny, *supra* note 10, 1113 ff., and subsequently expanded to various fields of corporate law and slightly refined, however, in substance reiterated in Rafael La Porta/Florencio Lopez-de-Silanes/Andrei Shleifer, *The Economic Consequences of Legal Origins*, Journal of Economic Literature (2008) 285 ff.

227 Aoki, *supra* note 48, 441.

228 Beth Ahlering/Simon Deakin, *Labor Regulation, Corporate Governance, and Legal Origin: A Case of Institutional Complementarity?* 41 Law & Society Review (2007) 888.

229 C. Fritz Foley/Robin Greenwood, *The Evolution of Corporate Ownership after IPO: The Impact of Investor Protection*, 23 Review of Financial Studies (2010) 1232 f.

regulation and ultimately to the economic development of a jurisdiction, the legal origin theory contributed to weave the narrative that dispersed ownership patterns held the key to the economic success of the financial markets in the Anglo-American legal sphere and empowering (minority) shareholders would be a pivotal measure to achieve such optimum.[230] As the legal origins theory focuses on the quality of corporate law, it is also connected to the structural conflict between outside investors and insiders encompassing not only insider shareholders, but corporate insiders in general, thus also corporate management, as its underlying proposition is that the level of protection afforded by the legal rules of a jurisdiction restrains insider control and limits the expropriation of outside investors by corporate insiders; a high level of investor protection encourages financial development, in particular the growth of security markets.[231]

While having established itself as an independent thread of academic debate, the legal origin theorem nonetheless builds on the foundations laid down by the afore-discussed classification of the legal systems around the world into different legal families based on their distinct legal styles or "*religious or political conception of how economic or social life should be organized*" which developed throughout the twentieth century (infra subsection I.2).[232]

Based on the investigations into the corporate, bankruptcy and security laws of various jurisdictions and the translation of differences in the legal rules between the jurisdiction into points, the legal origins scholarship argues that the legal origin of a jurisdiction's legal rules constitutes a significant determinant of each jurisdiction's choice with respect to its strategy to ensure (outside) investor protection.[233] In this vein, the theory argues that affiliation with a legal family predetermines the future development of a jurisdiction's legal system resulting in different overall economic growth among jurisdiction depending to their legal family membership with prominently common law jurisdictions having arguably developed more robustly and successfully than their peers from the civil law family. In other words, the theory tried to establish a correlation between legal rules and economic development. The membership in a legal family is understood to show a propensity to the subsequent

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230 Puchniak, *supra* note 9, 518 f.

231 La Porta/Lopez-de-Silanes/Shleifer, *supra* note 226, 285; La Porta/Lopez-de-Silanes/Shleifer/Vishny, *supra* note 125, 1131.

232 La Porta/Lopez-de-Silanes/Shleifer, *supra* note 226, 286 ff.; Zweigert/Kötz, *supra* note 161, 72.

233 Djankov/La Porta/Lopez-de-Silanes/Shleifer, *supra* note 124, 431.

adoption of a set of legal norms due to the rigidity of the underlying legal infrastructure or system which then brings about differences with respect to the economic output of such jurisdiction. The level of investor protection is prevailingly measured based on the cluster of the four legal instruments of anti-director rights[234], shareholder rights[235], private benefits of control[236] and prospectus disclosure and liability.[237] While this enumeration reflects the initial focus on shareholder and creditor protection afforded under different legal systems, the analyses have spilled over to fields such as the regulation of self-dealing[238], debt enforcement regime[239], market entry regulation[240], labor regulation[241] and the addressing of the "promotor's problem" upon the issuance of new shares by securities laws[242] as well as private credit regulation.[243]

While the legal origin theory classifies a wide array of jurisdictions, it, at least initially, centres on the common and civil law bifurcation with the civil law family further being further split into the French, Romano-Germanic and Scandinavian civil law traditions and assigning countries in line with existing literature.[244] The proponents of the legal origin concept argue that while the rules of substantive law may vary and be subject to change, the legal infrastructure remains stable. The rigidity of the legal infrastructure is arguably caused by different trajectories embarked upon in the course of the economic and political development of the relevant jurisdictions.[245] The different trajectories are illustrated by means of a juxtaposition of milestones and turning points in the historical and political development of England and France as the

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234 La Porta/Lopez-de-Silanes/Shleifer/Vishny, *supra* note 125, 1133 ff., refined by Djankov/La Porta/Lopez-de-Silanes/Shleifer, *supra* note 124, 453 ff.

235 La Porta/Lopez-de-Silanes/Shleifer, *supra* note 125,

236 Dyck/Zingales, *supra* note 129, 537-600; Nenova, *supra* note 129, 325-351.

237 Rafael La Porta/Florencio Lopez-de-Silanes/Andrei Shleifer, *What Works in the Securities Laws?* 61 Journal of Finance (2006) 5 ff.

238 Djankov/La Porta/Lopez-de-Silanes/Shleifer, *supra* note 124, 453 ff.

239 Simeon Djankov/Oliver Hart/Caralee McLiesh/Andrei Shleifer, *Debt Enforcement around the World*, 116 Journal of Political Economy (2008) 1105-1149.

240 Simeon Djankov/Rafael La Porta/Florencio Lopez-de-Silanes/Andrei Shleifer, *The Regulation of Entry*, 117 The Quarterly Journal of Economics (2002) 1–37.

241 Botero/Djankov/La Porta/Lopez-de-Silanes/Shleifer, *supra* note 224, 1339-1382.

242 La Porta/Lopez-de-Silanes/Shleifer, *supra* note 237, 1-32.

243 Simeon Djankov/Caralee McLiesh/Andrei Shleifer, *Private Credit in 129 Countries*, 84 Journal of Financial Economics (2007) 299–329.

244 La Porta/Lopez-de-Silanes/Shleifer, *supra* note 226, 289, figure 1; La Porta/Lopez-de-Silanes/Shleifer/Vishny, *supra* note 10, 1119 referring to the classification of jurisdictions in the work of Thomas H. Reynolds/Arturo A. Flores, FOREIGN LAW: CURRENT SOURCES OF CODES AND BASIC LEGISLATION IN JURISDICTIONS OF THE WORLD (1989).

245 La Porta/Lopez-de-Silanes/Shleifer/Vishny, *supra* note 226, at 305 ff.

exponents of the common law family and civil law family respectively.[246] The focus on these two jurisdictions gives rise to second thoughts on the relevance of specific turning points in the history dating back to medieval times of these two jurisdictions, consequently running the risk of narrowing the (universal) divide between the common law and civil law families and thus succumbing to oversimplifications, especially with respect to jurisdictions lying on the "fringes" or in the periphery of the relevant legal families, since it blanks out historical events in those jurisdictions having taken place prior to the importation of legal infrastructure and concepts which might have become superimposed by the influx of ideas and thoughts from the importing common and civil law jurisdictions, but which cannot be assumed without further – potentially case-by-case – research.[247] While specific historical ties might leave a persistent imprint on the formation of the legal infrastructure, legal heritage existent in such jurisdiction might end up not being sufficiently taken into consideration.[248] In fact, the review of shareholder protection rights and mechanism as exhibited in the initial pertinent studies demonstrates that several jurisdictions conspicuously deviate from the results achieved by their peers in the relevant group, thus suggesting, if not indicating, stark deviations between peers of a legal family calling into question the homogeneity of such legal family and ultimately the assignment of such jurisdiction to the relevant legal family.[249] Some proponents embark on an even broader approach that transcends legal systems and reviews the relevance and impact of cultural factors such as religion and the interrelation between such cultural values and the level of investor protection through, for example, disclosure standards.[250]

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246 For example, Djankov/La Porta/Lopez-de-Silanes/Shleifer, *supra* note 124, 430 ff., who in their investigation on the control of self-dealing transactions which benefit majority shareholders admit that German and Scandinavian civil law countries do not demonstrate patterns which systematically contrast the common law system as the French civil law countries, *ibid*., 444.

247 McGinty, *supra* note 134, 162 ff.; Mattei, *supra* note 152, 5 ff., who proposes a new taxonomy and classification with respect to the existing legal families based on three patterns of law, namely the (i) rule of professional law, (ii) rule of political law and (iii) rule of traditional law, expounded *ibid*., 19 ff.

248 For a more nuanced view with respect to the diffusion of legal thought along the lines and genealogy of legal families, see Spamann, *supra* note 164, 1860 ff.

249 See, for example, the results for Japan in relation to Germany within the German legal origin group and Belgium in relation to France and Spain in the French legal origin group displayed in table 2 (Shareholder Rights around the World) or the United Kingdom in relation to the United States, Australia and Canada in the English legal origin group exhibited in table 4 (Creditor Rights around the World), La Porta/Lopez-de-Silanes/Shleifer/Vishny, *supra* note 10, 1129 f., 1136 f.

250 René M. Stulz/Rohan Williamson, *Culture, openness, and finance*, 70 Journal of Financial Economics (2003) 313 ff.; Doidge/Karolyi/Stulz, *supra* note 18, 2.

Conceptually related to the legal origins theory is a strand of literature which seeks to establish a correlation between the enterprise forms or architectures on the one hand and economic progress on the other hand. In this respect, it has been argued that features of Islamic law, especially in the realms of trust and inheritance law, as well as institutional stagnation, meaning the non-transition of existing potentially corporate-like structures to full-fledged long-lived enterprise forms such as the business, that is stock corporations, had a formative impact on the economic development in the Islamic Middle East.[251]

b) Criticism of the propositions of the legal origins theorem

The academic response – equally in favor of as in opposition against the propositions of the legal origins theorem – evoked by the articulation of the legal origins doctrine has been comprehensive. Among others, the validity of the legal origins theory with respect to corporate law in Japan and shareholder protection afforded thereunder has been tested and assessed.[252] The development of formal, statutory shareholder rights in Japan and the delayed (re)appearance of outsider investors appear to militate against the underlying hypothesis of the legal origins theory which posits the critical importance of shareholders' rights that condition high levels of ownership dispersion.[253] On the other hand, the fact that a few jurisdictions turn out to be outlier or do not perfectly fit the propounded pattern does not disqualify or take away too much value of the entire theory as it provides a welcome overview of a wide array of jurisdictions with, however, debatable degree of refinement. Hence, while there is evidence against the ubiquitous applicability of the theory, such theory still reveals overall tendencies with respect to the development of law and economic performance.

The main criticism is directed against the perceived one-dimensionality or incompleteness of the legal origin concept, insofar as the plausibility of the exclusive correlation of law and finance which neglects other determinants of financial development such as political factors like the duration of colonization, governmental stability and absence of trade barriers, as well as the occurrence of feedback between

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251 Timur Kuran, *The Absence of the Corporation in Islamic Law: Origins and Persistence*, 53 The American Journal of Comparative Law (2005) 785-834, 819 ff.

252 McGinty, *supra* note 101, 32 ff.

253 La Porta/Lopez-de-Silanes/Shleifer, *supra* note 125, 471 ff. On the incompatibility of ownership structures in Japan due to its nominally comparatively dispersed ownership structures, since dispersed relational shareholdings structures (*keiretsu*) not being adequately captured and made visible by this approach, see Franks/Mayer/Miyajima, *supra* note 7, 2586 ff.

the quality of law and institutions on the one hand and economic outcomes on the other hand is challenged.[254] In addition, jurisdiction-specific inquiries into the historical development of ownership patterns and the framework of legal investor protection, for example in the United Kingdom, undermine the legal origin concept insofar as they have shown that ownership dispersion took place during periods of weak investor protection or even in absence of any notable investor protection mechanisms raising doubts with respect to the purported nexus between ownership dispersion and investor protection by positive legal rules, including case law, in a specific jurisdiction.[255]

In addition, due to the approach to code and assign scores based on positive legal rules found in a jurisdiction, critics argue that the pertaining literature fails to adequately capture the impact of social norms as well as of the enforcement of the legal rules.[256] Furthermore, while the legal origins theory attempts to offer an explanation as to the underlying causes of legal change, it does not further delve into which factors could drive legal development.

Notwithstanding, the legal origins theory has the merit of introducing a standard of comparison which based on the quantification and coding of legal data derived from the construction of statutory law, regulation and case law, dubbed "leximetric"[257] approach, allows for the evaluation of a wide array of jurisdiction and arguably a first point of orientation of their relative positions which can be easily compared based on the different scores achieved. However, this leximetric approach as applied by the legal origins literature has faced criticism with regard to two of its aspects: Firstly, on a conceptual level, the scope of the variables has been claimed as limited, thus hardly providing an adequate basis for a meaningful evaluation of the level of investor protection in various jurisdictions.[258] In addition, concrete measurement and coding

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254 Simon Deakin/Prabirjit Sarkar/Mathias Siems, *Is There a Relationship Between Shareholder Protection and Stock Market Development?* University of Cambridge Faculty of Law Research Paper No. 9/2018 (2018) 2, 25 f.; Alberto Chong/César Calderon, *Causality and Feedback between Institutional Measures and Economic Growth*, 12 Economics and Politics (2000) 69 ff.

255 Brian R. Cheffins, *Does Law Matter? The Separation of Ownership and Control in the United Kingdom*, 30 The Journal of Legal Studies (2001) 468 ff. Franks/Mayer/Rossi, *supra* note 33, 4013 ff.

256 Ahlering/Deakin, *supra* note 228, 890.

257 For this aspect, see Priya P. Lele/Mathias M. Siems, *Shareholder Protection: A Leximetric Approach*, 7 Journal of Corporate Law Studies (2007) 17 ff., and Mathias M. Siems, *Shareholder Protection Around the World*, 33 Delaware Journal of Corporate Law (2008) 111 ff.

258 Lele/Siems, *supra* note 257, 19.

errors have been pinpointed[259], which subsequently have, however, been partially addressed and remedied by later works of proponents of the legal origins literature.[260]

The application of a leximetric approach based on a different array of proxies of shareholder protection has not confirmed the deep civil versus common law divide with respect to mechanisms of shareholder protection, in fact it has produced evidence that legal minority shareholder protection in jurisdictions associated with strong blockholders – typical representatives such as Germany, France and India have been investigated – assuming a predominant position in publicly-listed companies is relatively robust.[261] Cross-country analyses which in a similar fashion have been based on a leximetric approach have also demonstrated that rather than a maximum of shareholder protection through legal rules and case law, an optimum requires a reconciliation of the positions of different interest groups, such as of the shareholders, the stakeholders as well as the company itself.[262] Furthermore, it appears as if the adaptability and flexibility of a legal system has not been adequately factored in by the legal origins literature, especially the fact that adaptability cannot only be achieved through precedents – which, however, might give an edge –, but likewise through frequent reform of statutory law; in addition, civil law countries also partially rely on the case law of their high instance civil court with respect to constructing legal norms as well as filling gaps in the web of statutory legal rules.[263] Leximetric investigations comparing different points in time add insight into historical dynamics and enrich the comparative perspective.[264]

Emphasizing the importance of legal origins, however, complements the idea of path dependency that purports that past institutional choices cause the relevant jurisdiction

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259 Holger Spamann, *On the Insignificance and/or Endogeneity of La Porta et al.'s 'Anti-Director Rights Index' under Consistent Coding*, ECGI Working Paper Series in Law No. 67/2006 (May 2006) 1 ff.

260 Spamann, *supra* note 259, 1; Djankov/La Porta/Lopez-de-Silanes/Shleifer, *supra* note 124, 432.

261 Lele/Siems, *supra* note 257, 22 ff., 37 ff.

262 Lele/Siems, *supra* note 257, 34.

263 On the adaptability aspect, Lele/Siems, *supra* note 257, 34. The case law in Japan on the adoption of the poison pill or the series of decisions rendered by the Federal Court of Justice in Germany on "non-statutory" competences of the general shareholders' meeting in the event of corporate acts that are found to significantly impact the structure of the enterprise or key areas of the enterprise due to the risk of an impairment of shareholders' rights through such act requiring the convocation and consent the shareholders may serve as examples of the relevance of case law in the corporate law of civil law jurisdictions.

264 An example for an analysis of an extensive array of jurisdictions is Dionysia Katelouzou/Mathias Siems, *Disappearing Paradigms in Shareholder Protection: Leximetric Evidence for 30 Countries, 1990-2013*, 15 Journal of Corporate Law Studies (2015) 127 ff.

to be locked into a legal system from which it is difficult to extricate itself due to the costs of switching legal systems being prohibitively high, or in other words, embarking on a new path appears more costly considering the costs spent on the original path.[265] In addition, economic interests of certain actors enjoying advantageous economic rents under the incumbent legal and institutional system undermine and prevent deviation from the path and, inter alia, impede convergence tendencies towards a universal global norm.[266] Some authors proffer a variation of the path dependence doctrine when they put emphasis on the observation that a legal system may tend to apply the set of tools – such as past legislative choices or court decisions – to new challenges despite such devices having lost their quality of being optimal choices, but they continue to grant market participants legal certainty.[267]

Last but not least, the legal origins narrative arguably glosses over the fact that at the turn of the twentieth century shareholding in an array of jurisdictions such as the United Kingdom, France, but also with respect to specific industries, Japan and Germany, showed signs of higher shareholder dispersion ratios than US-American stock companies quoted on the New York Stock Exchange.[268] These specific findings emphasize the importance of applying a wider historical perspective to reveal the mechanics behind developments of ownership patterns and maintain awareness to reduce susceptibility to succumb to perspectives potentially clouded by ex-post "invented"[269] or (re)constructed narratives.[270]

The high degree of comparability achieved by the cross-jurisdictional inquiries into various aspects of financial regulation in the course of the legal origins discourse goes to the detriment of desirable degrees of refinement of such analysis. Insofar, the legal origins theory especially fails to adequately record jurisdictions which have branched off from their initial path and subsequently developed into hybrid models in which elements, stemming even from different legal families such as the civil and common

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265 Martin Gelter, *Accounting and Convergence in Corporate Governance: Doctrinal or Economic Path Dependence?*, ECGI Law Working Paper No. 524/2020 (June 2020) 8 f.; Brian J. Broughman/Darian M. Ibrahim, *Delaware's Familiarity*, 52 San Diego Law Review (2015) 305.

266 Gelter, *supra* note 265, 8.

267 Eva Micheler, *English and German securities law: a thesis in doctrinal path dependence*, 123 Law Quarterly Review (2007) 2 ff.; Broughman/Ibrahim, *supra* note 265, 305.

268 Leslie Hannah, *The 'Divorce' of Ownership from Control from 1900 Onwards: Re-calibrating Imagined Global Trends*, 49 Business History (2007) 405 ff., 421 ff.

269 This reference echoes the terminology coined by the "*invented traditions*"-literature, see Eric Hobsbawm, *Introduction: Inventing Traditions*, in: Eric Hobsbawm/Terence Ranger (eds.), THE INVENTION OF TRADITION (11th printing, 2003) 1 ff.

270 Hannah, *supra* note 268, 423 ff., 426.

law families, have become combined or even coalesced: Corporate law in Japan may serve as a conspicuous example for a not entirely adequate evaluation by the legal origins theory as it scores well with respect to the degree of ownership dispersion, however, in light of the *keiretsu* structure such score cannot be without further reflection interpreted as go hand in hand with high levels of investor protection, or rather enforcement of norms safeguarding investors' interests.

3. Legal Transplants or Conceptualizations of Legal Transfers and Imitations

The legal origins theorem assumes the lingering effect of legal transfers on subsequent legal development. An often-cited manner to implement legal transfer are legal transplants from one to another jurisdiction. The legal transplant concept has historical as well as philosophical dimensions as it attempts to offer an explanation model for legal change and development and insofar as it asserts that such legal change does not occur endogenously by mechanisms from within the legal system itself, but rather exogenously through outside influences.[271]

A legal transplant is understood as the transposition of a foreign regulatory concept from a borrowing into a receiving legal order, usually under the assumption of the absence of any equivalent of such concept prior to the transplantation.[272] The discourse is further embedded in the field of comparative law and can be connected to the debate on the convergence versus divergence of legal systems and orders around the globe which has prominently been purported with respect to corporate law.[273] The legal transplant idea attempts to provide an explanation for the development and change of legal rules through imitation and transplantation as it conceptualizes the diffusion of legal ideas and concepts between different legal systems[274] and adds support for the vision of converging socio-economic structures by presenting a vehicle

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271 William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 American Journal of Comparative Law (1995) 490.

272 Baum, *supra* note 41, 187 f.

273 Ewald, *supra* note 271, 490. Widely accepted as the influential proponents of the convergence hypothesis are Hansmann/Kraakman, *supra* note 16, 439 ff. See also Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function?* 49 The American Journal of Comparative Law (2001) 329 ff.; Hideki Kanda, *Western versus Asian Laws on Corporate Governance: The Role of Enforcement in International Convergence*, in: Jeffrey N. Gordon/Wolf-Georg Ringe (eds.), THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (2018) 721 ff.

274 For an extensive study on the diffusion between legal systems, see Spamann, *supra* note 164, 1813-1878.

to achieve – however, not automatic – consonant legal rules[275], while the legal origin theorem from its very articulation and emphasis on the rigidity of the once-chosen legal infrastructure from among the canon of the different legal families offers support to the divergence theory. Likewise, the path dependency argument is frequently deployed and cited in favor of the divergence aspect as a factor which tapers off, if not stall, convergence tendencies.[276]

a) Broaching the concept

The origins of the concept of legal transplants are conventionally associated with the two authors Otto Kahn-Freund and Alan Watson – with the latter arguably coining such term – to capture the occurrence of legal transplants which refers to the travel or transfer of legal rules – the "*moving of a rule or a system of law from one country to another*"[277] – which is asserted to be as old as the law itself is,[278] and recognizing transplantation or imitation as being widespread methods of legal transfer and circumscribing the conditions under which successful transplants may occur as well as their practical impact.[279] The circulation of this method is emphasized by the contentions of the occurrence of "*continual massive borrowing […] of rules*"[280] and of "*the transplanting of individual rules […] [being] extremely common*"[281]. The legal transplant idea conceptualizes the occurrence of legal change in insulation from a broader social and cultural context, in this vein primarily focusing on the law in the

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275 Martin Gelter/Geneviève Helleringer, *Opportunity Makes a Thief: Corporate Opportunities as Legal Transplant and Convergence in Corporate Law*, 15 Berkeley Business Law Journal (2018) 101 ff.

276 Aoki, *supra* note 48, 427 ff. Such views echo a tone of cultural skepticism articulated a few centuries ago by Charles de Secondat de Montesquieu, THE SPIRITS OF THE LAW (translation, 1989) who conceptualized laws as an expression of the spirit of the nation postulating a union between law and culture of a nation, or translated into the current comparative legal terminology a specific legal culture, see Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 Modern Law Review (1998) 14 ff., as well as Graziadei, *supra* note 168, 466 f. These thoughts give rise to a portion of skepticism towards the interchangeability and viability of legal transplants which serves as a point of departure for the investigation into the conditions for successful transplants, see Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 The Modern Law Review (1974) 1 ff.

277 Watson, *supra* note 43, 21. The transplant concept studies finds its empirical foundation in observations made with respect to the spread of rules influenced by Roman substantive private law in the jurisdictions of Continental Europe, see Ewald, *supra* note 271, 498.

278 Watson, *supra* note 43, 21 ff.

279 Kahn-Freund, *supra* note 276, 1-27; Dirk Heirbaut, *Europe and the People without Legal History: On the Need for a General History of Non-European Law*, 68 Tijdschrift voor Rechtsgeschiedenis [Legal History Review] (2000) 270.

280 Watson, *supra* note 43, 107.

281 Watson, *supra* note 43, 95.

books and neglecting its application and pertaining practice, the law in action.[282] While legal transplants occurred prior to the nineteenth century, most notably in the form of the reception[283] of Roman law and its continuous use (*usus modernus*) as the basis of the *ius commune* in Europe with interruptions until modern times or the spread of Chinese codices in Asia, the academic discourse widely identifies three major global waves of transplantations of legal codes.[284] The first wave is identified as having occurred during the age of imperialism in the nineteenth and early twentieth century when French law, most notably the Code Civil and the Code de Commerce, was spread throughout Continental European jurisdictions and Western legal codifications, predominantly English and French law, were transmitted to jurisdictions in Asia, Africa and Latin America predominantly through conquest and colonization, not excluding partially voluntary adoption, followed by a second wave post-World War II, when many states after gaining independence turned to the strategy of legal transplants, drawing from the legal codes of the United States, whose role as an innovator gained importance, but also from European jurisdictions, including those Western countries from which their codes had initially been received. The third, and so far, final wave is seen in the process of the rebuilding of the legal systems in the jurisdictions in Central and Eastern Europe as well as in the Soviet Union following the collapse of the socialist systems in in the late 1980s.[285] When legal transplants are discussed, the connection to the classification of jurisdictions into legal families is made in order to more easily pinpoint the actual transplanted legal rules. More recent findings, however, suggest that the mode of transplantation, that is as voluntary or imposed transfers, for example, through colonial rule, had an impact on the receptiveness of the respective transplanting jurisdiction.[286]

b) Critical takes on the propositions of legal transplants

In line with its embeddedness in a wider strand of academic debate on the development and growth of law from a comparative law angle, the skepticism and criticism brought

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282 Alan Watson, LEGAL ORIGINS AND LEGAL CHANGE (1991) 87.

283 Reception suggests a voluntary adoption, while the term legal transplant is neutral and encompasses imposed as well as voluntary borrowing, see Heirbaut, *supra* note 279, 270; Sacco, *supra* note 279, 398.

284 Berkowitz/Pistor/Richard, *supra* note 138, 165 ff., 168 f.

285 These main three waves are identified by Berkowitz/Pistor/Richard, *supra* note 138, 165 f.

286 Berkowitz/Pistor/Richard, *supra* note 138, 192. This study further supports the case of a limited connection between opting for a specific legal family for transplanting and (immediate) improvement of economic performance, *ibid*., 186.

against the legal transplant concept hails from the sociology of law background and social perspectives on the law dealing with the extent of applicability and validity of the view of law that is argued not to constitute a province exclusive to lawyers and legal professionals, but more embracively to represent "a mirror of society"[287].[288] The mirror-of-society language coined in relation to the historical development of US-American law reveals the link of such debate to the overall legal comparativist discourse on the legal families classification as its underlying assumption is that every society or cultural group has brought forth its own distinct legal system (see supra subsection I.1).[289]

Conceptualizing legal change through legal rules being conceived as easily transplantable, independent and autonomous from the influence of the social and cultural sphere as well as historical factors surfaces in assertions of proponents of the legal transplant concept such as that comparative legal scholars should refocus on existent similar rules and the interrelation of rules in different legal systems rather than the operation of legal rules in society.[290] Objections are directed against such displays of acontextual, isolated understanding of a legal rule, solely as a "propositional statement" as per the law in the books or by its letters.[291] Other scholars critically evaluate the viability of transplants as well as the sole focus on the transplantation of positive legal rules without consideration of the institutional network as well as culture-specific definitions and vested meanings attached to a legal rule and advocate against over-emphasis and resort to best practice blueprints which have only proven themselves in the jurisdiction such legal codes and practices are borrowed from.[292] Similarly, the convergence-skeptical literature emphasizes that the prevailing effect of path dependent ownership patterns and governance structures[293] as well as the observation that the elements defining the most efficient or optimal governance system vary between jurisdictions as they depend on the specific institutional framework of each jurisdiction rendering an optimal global corporate governance norm a faint

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287 Lawrence Friedman, A HISTORY OF AMERICAN LAW (1973) 10.

288 Roger Cotterrell, *Is There a Logic of Legal Transplants?* in: David Nelken/Johannes Feest (eds.), ADAPTING LEGAL CULTURES (2001) 71 ff.; Ewald, *supra* note 271, 489 ff.

289 Friedman, *supra* note 287, 14 f.

290 Pierre Legrand, *The Impossibility of 'Legal Transplants"*, 4 Maastricht Journal of European and Comparative Law (1997) 112 against Watson, *supra* note 43, 6, 96 f. (Fn. 3).

291 Legrand, *supra* note 290, 113 ff.

292 Dani Rodrik, *Institutions for high-quality growth: What they are and how to acquire them*, NBER Working Paper Series, No. 7540 (2000) 1 ff.; Legrand, *supra* note 290, 116 ff.

293 Bebchuk/Roe, *supra* note 68, 168 f.

illusion.[294] In addition, a genuine legal transplant would eventually not occur due to the irreducible, but inevitable component of language- and culture-specific context which is found impossible to be transferred and received unless there is a degree of compatibility between the philosophy and the living law of the exporting and importing jurisdiction, or such philosophy is likewise en bloc transplanted.[295]

This compatibility could be ascertained on the basis of whether the relevant jurisdiction belongs to the same legal family or culture. Other proponents observe a receding relevance of environmental and cultural elements[296] going hand in hand with an increasing impact of political factors[297], which subsequently spelt out more concretely as a jurisdiction's political orientation[298] or the influence of different political lobbies or interest groups.[299] In this vein, the lobbying influence of shareholders as an interest group has been found to put corporate law reform and therewith convergence tendencies into motion in country-specific research[300], but in general there may be variations as to the relevance of interest group lobbying.[301] The emphasis[302] of the positivist method is sometimes considered not only not to complement, but rather to contrast and contradict the traditional all-embracing comparative law approach which equally considers positive legal norms as it does legal practice, socio-historical and institutional context, as well as "cultural resonance"[303].[304]

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294 Curtis J. Milhaupt, *Property Rights in Firms*, 84 Vanderbilt Law Review (1998) 1189 ff.

295 Legrand, *supra* note 290, 117 f., relying insofar on F.S.C. Northrop, *The Comparative Philosophy of Comparative Law*, 45 Cornell Law Review (1960) 657 f.

296 The correlation of law and society as well as the circumstances of a jurisdiction has been formulated already by Montesquieu, *supra* note 276, 8 f. See Tamanaha, *supra* note 50, 308.

297 Kahn-Freund, *supra* note 276, 11 ff.; Baum, *supra* note 272, 65.

298 Mark J. Roe, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT, CORPORATE IMPACT (2003) 6. Such argument, however, appears not to prevail with respect to the corporate law reform to further shareholder-orientation, see John W. Cioffi/Martin Hoepner, *The Political Paradox of Finance Capitalism: Interests, Preferences, and Center-Left Party Politics in Corporate Governance Reform*, 34 Politics & Society (2006) 465.

299 Peter A. Gourevitch, *The politics of corporate governance regulation*, 112 Yale Law Journal (2003) 1863 ff.

300 John Armour/Priya Lele, *Law, Finance, and Politics: The Case of India*, 43 Law and Society Review (2009) 514 ff.

301 Cioffi/Hoepner, *supra* note 298, 466 ff., 490 ff.

302 While Watson does not disregard nor underestimate the relevance of legal culture, his principal concern lies with the existence of positive legal rules, see Watson, *supra* note 43, 20; Watson, *supra* note 282, 87, 101. See also Cotterrell, *supra* note 288, 77 f.

303 Cotterrell, *supra* note 288, 77.

304 Joachim Zekoll, *Kant and Comparative Law: Some Reflections on a Reform Effort*, 70 Tulane Law Review (196) 2747.

c) Towards a reconciliation attempt

For the purpose of this thesis, it is not deemed essential nor necessary to further delve into the broader discourse on the sociology of law. With respect to the legal transplant concept, it can be concluded that legal transplants present a strategy in the arsenal of lawmakers which has been resorted to, and while the conditions of their operability and the practical impact remain subject to contention and debate[305], the concept adds a perspective to the understanding of legal development and the diffusion of legal rules between different legal systems, facilitating breaks or leaps between the legal families, such as exemplified by Japan which despite a legal environment and infrastructure being initially influenced by Continental European legal systems and thought, has begun to absorb common law influences since the 1950s. On the other hand, the example of imports of law to Japan also demonstrates the cultural situatedness of law and the relevance of social norms and sociology as potential stumbling blocks to the occurrence of genuine legal transplants (see the following sub-paragraph aa)) immediate upon their transfer.

aa) Reconciling different positions

Differences between the two views can likely be reconciled by a sophisticated, more balanced definition of the legal transplant phenomenon. The example of Japan which is commonly considered to have proven itself as a jurisdiction with a legal system receptive to legal transplants as well as a jurisdiction that has demonstrated to be able to accommodate and give purposeful meaning to imported complexes of legal rules and legal institutions.[306] The concept of legal transplants might benefit from a focus on the legal institutions instead of the legal rules. The rise and growing global integration of commercial and financial markets make it desirable for market participants to rely on legal and institutional frameworks which operate in similar manners, either through standardization of legal rules or through incorporation of functional equivalents owed to the circumstance that diverse doctrinal backgrounds may shine through in the approach with which identical structural problems are addressed.[307] This is on the one hand highlighted by various initiatives for, for

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[305] Gelter/Helleringer, *supra* note 275, 103 f.

[306] Berkowitz/Pistor/Richard, *supra* note 138, 174 f., who primarily focus on the adoption process in the Meiji era until 1899, compare the table on page 175.

[307] On the aspects of uniformization and functional equivalents, see Teubner, *supra* note 276, 12 f.

example, unified international contractual standards such as UNIDROIT[308] or in the realm of international commercial arbitration, and on the other hand by institutions such as the stock company whose concept has been disseminated from its infancy in the United Kingdom and the Netherlands to most jurisdictions around the globe. In Japan, the stock company principle was adopted and promulgated by the Meiji administration as a vehicle[309] to facilitate industrialization and achieve economic growth (see Chapter II, infra section III).[310] The example of the stock company shows the transplant quality with respect to its structural elements such as the limited liability principle as well as the division and delegation between owners and management, however, the implementation by legal rules in various jurisdictions manifestly differ outside a common denominator of identical structural elements. The institution of the *kansayaku* may be cited for such "micro-level" jurisdiction-specific refinement and deviation (see Chapter IV, infra subsection III.1). Concomitant with the opening up of national economies, the encompassing relevance of domestic laws has been indented and reduced to that of the role of an actor among multiple co-players embedded in a global network of legal rules or wider – "legal communications".[311]

Another factor which may contribute to a better understanding of the legal transplant concept and to smoothen differences between proponents and critical views on such concept, is the relevance of time and the occurrence of time lags with respect to the effective transposition of legal institutions and their operation in the new environment which may be conditioned by different legal families or cultures.[312] In the here relevant field of commercial and corporate law,[313] these factors may have a weaker

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308 International Institute for the Unification of Private Law. The latest standardization efforts published by the UNIDROIT are is Principle of International Commercial Contracts 2016, available under: https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/ (last accessed 2 July 2024).

309 This view is not exclusive to such period nor Japan, see, for example, for the United Kingdom, Paul L. Davies, INTRODUCTION TO COMPANY LAW (2002) 30 ff.

310 On the aspects of organization and flexibility of administration and legal practice as potential factors to incentivize and facilitate the promulgation of new legal concepts, see Cotterrell, *supra* note 288, 80.

311 Teubner, *supra* note 276, 16.

312 On the interaction between legal transfer and legal cultures, see Teubner, *supra* note 307, 11 ff., who takes a rather critical stance towards the transplant concept, especially on the implied dichotomy between repulsion and integration following the transplantation process and appears to rather prefers the terminology of "legal irritants" referring to the idea that legal transfers trigger genuine "*evolutionary dynamics*", *ibid*., 12. See also Cotterrell, *supra* note 288, 78.

313 On the aspect of different parts of a legal system exhibiting different degrees of amenability to legal reception and transplants, see Cotterrell, *supra* note 288, 80 with further references; Kahn-Freund, *supra* note 276, 9 f., 27; Harald Baum, *Comparison of law, transfer of legal concepts, and*

reinforcing or inertia effect, respectively, than in legal areas less exposed to financial globalization.[314] Effects of globalization such as the widespread use of modern forms of communication, liberalization of capital markets and approximations in the fields of economic policy and practice have been found to contribute to increasing similarities between legal systems in jurisdictions around the globe.[315] Even the reference to commercial and corporate law in its entirety may prove too comprehensive and broad as it potentially glosses over the fragmentation of the relevant societal contexts: Also commercial laws may provide for entrance points for underlying social, economic and cultural values which then in turn facilitate the interpretation of such positive legal norms taking into account the overall societal context, as, for example, the interpretation and extension of the scope of application of the good faith principle by the courts in Germany shows.[316]

Despite differentiation and disentanglement from the fabric of culture and society, cultural ties still impactful on certain fields of law, due to their continuous influence or by the looser coupling which may put into motion new evolutionary dynamics in the receiving jurisdictions.[317] These dynamics are tried to be captured through terms like "legal irritants"[318] or "legal formants"[319]. The different intensity of exposure to

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creation of a legal design: The case of Japan, in: John Owen Haley/Toshiko Takenaka (eds.) LEGAL INNOVATIONS IN ASIA (2014) 65.

314 In the literature, the legal idea of distinct types of communities as "ideal typical contexts of interaction and collective involvement" to conceptualize the understanding of legal transfer with the four types being identified, namely traditional, instrumental and affective communities as well as the community of belief. Each community is matched with different regulatory requirements and legal structures. In this vein, the instrumental community deals with the interaction of law and economic conditions and this aspect becomes relevant in the fields of contract, commercial and corporate law, see Roger Cotterrell, *A Legal Concept of Community, 12 Canadian Journal of Law and Society* (1997) 80 ff. It is important to note that this categorization does not imply that, for example, contractual relations exclusively follow instrumental considerations, but rather only this dimension of the social relations, see Cotterrell, *supra* note 288, 83. In general, the instrumental community is usually associated with being comparatively detached from social ties, *ibid*., 87.

315 Deakin/Sarkar/Siems, *supra* note 254, 10.

316 Graziadei, *supra* note 168, 472, identifies a distortive potential of such search for consistency; Teubner, *supra* note 276, 25 ff., argues that the good faith obligations obtained through construction of the positive law good faith principle in the spirit of the coordinated economy regime by the courts in Germany would complicate a transplantation, for example, to the United Kingdom due to the latter following the economic culture of a liberal market economy.

317 Gelter/Helleringer, *supra* note 275, 104.

318 Teubner, *supra* note 276, 12, 16.

319 The term "*legal formant*" is conceptualized so as to recognize "*that living law contains many different elements such as statutory rules, the formulations of scholars, and the decision of judges*", meaning legal rules as well as the underlying legal infrastructure which includes the views and values of legal professionals entrusted with performing legal work and tasks, see Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 American Journal of Comparative Law (1991) 22 ff.; Sacco, *supra* note 95, 384 ff. On the relevance of legal

transnational trends is reflected in another strand of literature which conceptualizes legal institutions along a spectrum of interlocking with the specific context of culture and society spanning between the two poles of organic and mechanical[320], or comprehensive and selective, with legal institutions grouped towards the respective former term of the two pairs being found to exhibit stronger social embeddedness which complicates legal transplants, and the respective latter term of the two pairs signifying a higher extent of detachment and insulation from the bedrock of culture and society, thus facilitating legal transfers and qualifying for the application of such strategy.[321]

The trends of formalization, professionalization and specialization of the law may further contribute to a waning, less comprehensive grip and influence of culture and society on the law, or at least different areas of positive law.[322] Another factor may the fact that regulators resort to a comparative approach with respect to the optimization of the legal rules in their respective jurisdiction, for which Japan is widely considered an example, as well as the harmonization and legislation of rules going beyond the limits of a jurisdiction, such as in the legislative work and products of the European Union.[323]

bb) Legal fashions

In the context of legal transplants, the term "legal fashions" has recently been coined and popularized.[324]

(1) Terminology and connotation

This terminology echoes consideration for the local socio-cultural as well as institutional context into which a legal transplant is potentially transposed as well as it responds to the growing internationalization of legal standards – especially in the context of corporate law – which has arguably abetted the straightforward, relatively unreflected adoption of foreign regulatory concepts without a deeper running analysis of the appropriateness and compatibility with the existing legal and institutional

professionals as translators between general and legal culture in the context of the legal transplant concept, see Teubner, *supra* note 276, 16 f.; Cotterrell, *supra* note 288, 77.

320 Kahn-Freund, *supra* note 276, 12 f.

321 Teubner, *supra* note 276, 17 ff.

322 Teubner, *supra* note 276, 18 ff. coins the term "*binding arrangements*" to pronounce a more nuanced culturalist view which conceptualizes ties between law, culture and society more selectively with respect to the comprehensiveness and quality of the respective bonds.

323 Baum, *supra* note 272, 185.

324 For example, Baum, *supra* note 272, 189 f.; Kozuka, *supra* note 41, 223.

framework or the identification of any gaps or articulation of any demand which would justify a legal transplant according to the strict logic of an existent legal system or sub-system (such as corporate law with the realms of commercial and more granularly, private law), but rather to respond to international expectations and "legal convictions".[325] Demand for legal change inherent in a specific legal system usually surfaces "*when existing legal mechanisms fail to provide effective governance or fail to respond to changes in the economic or political sphere*" or are provided, but no longer present adequately effective governance tools or response mechanisms.[326] However, lawmakers may likewise encouraged to not just obey such inherent logic of a legal system, but to signal the quality of their legal system indicated by their formal compliance with a widespread legal standard by straightforward, unreflected adoption of a legal transplant, which may even go so far as to cause friction with existing rules and precipitate ensuing recalibration and adjustment.[327] Alternatively, a regulatory concept may be transplanted formally and superficially, meaning that it operates in a manner different from the exporting jurisdiction.[328] On the legal demand side, however, such legislative strategies are not necessarily rejected: In this vein, it has been found that foreign institutional investors in Japan base their decision whether to invest in Japanese stock companies, inter alia, on the compliance with formal corporate governance features, such as board size and number of independent directors, as a strategy to tackle their information asymmetry challenge.[329] The assumption underlying the legal origins theorem that outside investors pay attention to the formal existence of specific mechanisms of investor protection indicates the dissemination

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325 Baum, *supra* note 272, 189 ff.

326 Gelter/Helleringer, *supra* note 275, 95.

327 Eva Micheler, *Transplanting Corporate Governance Codes – the Role of Legal Doctrine*, SSRN Electronic Journal (October 2011) 8; Baum, *supra* note 272, 202 ff., analyzes the frictions caused by the introduction of the US-style independent directors with the existing two-tier structure with supervisory and management boards in Germany with the supervisory board being by its initial legal design the representative corporate body on which the (majority) shareholders assembles, a conception which is nowadays being undermined with shareholder-affiliation disqualifying board members as they do not fulfill the independence requirement.

328 Hideki Kanda/Curtis J. Milhaupt, *Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, 51 American Journal for Comparative Law (2003) 889 ff.

329 Hideaki Miyajima/Takaaki Hoda, *Ownership Structure and Corporate Governance: Has an Increase in Institutional Investors' Ownership Improved Business Performance?* 11 Public Policy Review (2015) 364, 381. Company size appears to be another factor with (foreign) institutional investors showing a predilection for large-scale companies and those that have high overseas sale ratios for their investment, *ibid.*, 374 ff.; Hideaki Miyajima/Keisuke Nitta, *Kabushiki shoyū kōsō no tayōka to sono kiketsu: Kabushiki mochiai no kaijo to 'fukkatsu' to kaigai tōshika no yakuwari* [Diversification and Outlook of Ownership Structure: Unwinding and 'Resurgence' of Cross-Shareholding and Role of Foreign Investors], in: Miyajima, *supra* note 110, 105 ff.

and consequently provides a certain validity of such regulatory approach oriented at formal or superficial compliance with global standards, as it resonates with international investors and other actors operating on a global scale.

(2) "False friends" and functional convergence

In the context of the corporate law and corporate governance debate such level of expectation and demand would be articulated by potential investors which would make an investment decision also dependent on whether certain internationally acknowledged standards and convictions would be mirrored in the domestic corporate law. While this may not necessarily consonant with trajectory towards economic efficiency, it reveals the relevance of legal competition which has been identified as a factor potentially driving the convergence of legal systems.[330] The implementation of global rankings may further incentivize jurisdictions to orientate their legislative activities at such perceived international legal convictions without spending too much thought as to whether regulatory gaps in the domestic legal statutes indeed exist as well as on compatibility.[331] A wider – political – strategy or agenda to attract foreign direct investment may overshadow strictly legal considerations.[332]

In the field of corporate governance, such legal convictions or fashions have shown to develop self-reinforcing tendencies as the example of independent or outside directors demonstrates who have survived the availability of only ambiguous support pleading for their necessity incorporation as well as scrutiny in the aftermath of the Global Financial Crisis of 2007/2008.[333] At the same time, the example of independent or outside, non-affiliated directors, however, reveals the granularity of the legal transplant or fashion phenomenon, as the legal definition of the qualification requirements for a

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330 On the aspect of legal competition, see Mattei, *supra* note 195, 5 ff.

331 Dan W. Puchniak/Luh Luh Lan, *Independent Directors in Singapore: A Corporate Governance Outlier?*, in: Dan W. Puchniak/Harald Baum/Luke Nottage (eds.), INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH (2017) 311; and Baum, *supra* note 272, 201, who both refer to the introduction of US-style independent directors in Singapore in the wake of Asian Financial Crisis. In this vein, the adoption of corporate governance codices modelled after the "comply-and-explain" approach imported from the United Kingdom has been viewed as market strategy to cater to foreign institutional investors, see Lutz-Christian Wolff, *Law as Marketing Gimmick – The Case of the German Corporate Governance Code*, 3 Washington University Global Studies Law Review (2004) 132 ff. Equally, it has been decoded as a form of legitimation and a symbolic, rather than substantive legal instrument, see Alessandro Zattoni/ Francesca Cuomo, *Why Adopt Codes of Good Governance? A Comparison of Institutional and Efficiency Perspectives*, 16 Corporate Governance (200) 13.

332 Deakin/Sarkar/Siems, *supra* note 254, 23, muse over such strategy which could drive shareholder-oriented corporate law reform.

333 Baum, *supra* note 272, 199 f.

director to be considered as independent, meaning the degree of detachment from the relevant company is interpreted differently in various jurisdictions, potentially revealing the specific, idiosyncratic – path-dependent – view of a jurisdiction as to which facet of the agency conflict – management versus owners or majority shareholder versus minority shareholders – should be addressed by appointing independent or outside directors to a board.[334] In addition to divergent auxiliary norms such as those defining the newly transplanted legal fashions, legal practice may vary with path-dependent socio-cultural understandings providing additional potential for divergent conceptions such as independent directors being conceived as management-friendly experts and advisors rather than critical monitors of the management.[335] This lack of uniformity or pervasiveness of a legal concept travelling through various jurisdictions vividly shows the limits of the legal transplant concept, since a regulatory concept is embedded in a web of legal rules and direct borrowing, especially if extending to the terminology and being direct loan words – such as the corporate governance term[336] – may turn out to be "false friends" and – in the established jargon – result in only formal harmonization or convergence, falling short of the usually desirable functional convergence[337] meaning harmonization in substance or the generation of a result functionally comparable to the borrowing jurisdiction, as they suggest a common legal understanding which in fact is only partly or superficially shared.[338]

(3) Granularity as reconciling principle: Macro- and micro-levels

This very phenomenon will be an aspect whose analysis and evaluation is taken up in the further course of this thesis. In line with the terminology just mapped out, there appears to be consensus to view to "macro-level" legal instruments or entire subsystems such as the stock corporation, takeover regime or stewardship code as legal transplants and on this level the legal transplant concept appears to be beneficial and add to the understanding as it helps to trace how different legal concepts are diffused

334 Baum, *supra* note 272, 200.
335 Kozuka, *supra* note 41, 231 f.
336 Baum, *supra* note 272, 187 f.
337 Gilson, *supra* note 273, 329 ff.; Coffee, *supra* note 75, 641 ff.
338 The dualism between formal and functional convergence is sometimes perceived as too simplistic with both terms rather conceptualized as two poles of a spectrum which spans from formal convergence over statutory convergence, institutional convergence, convergence in practice (for example, corporate practice), fundamental policy to functional convergence, see Kenichi Osugi, *What is Converging? Rules on Hostile Takeovers in Japan and the Convergence Debate*, 9 Asian-Pacific Law & Policy Journal (2007) 144 f., table 1.

and spread. However, if one zooms closer and attempts to evaluate how the aforementioned legal instruments are regulated in details, the legal transplant concept loses its charm and attractiveness, since on such smaller scale or "micro-level" many cogs can be turned one way or another, and still in the aggregate contribute to achieving a comparable result. This aspect reveals just another weakness of an overemphasis of viewing legal change in the guardrails of the legal transplant concept, as the existence of legal institutions that address similar demands in different legal system does not necessarily mean that these institutions can be traced down to a common genealogy, as such legal structures may very well have developed in parallel, corresponding to the biological phenomenon of convergent evolution.[339] This observation triggers the question of how the two terms are related: The phenomenon of a legal fashion implies the acceptance of the legal transplant concept, since it refers to the insight that legal instruments which have been developed in a certain jurisdiction spread to other jurisdictions with the term carrying the nuance of a maybe less reflected reception of such legal instrument. The occurrence of legal fashions is closely related to the increasing interrelatedness and communication of jurisdictions around the globe.

The insight and knowledge gained by the legal transplant concept is limited – which has from the beginning not really been challenged by its initial proponent. The appeal rather lies in the coinage of the term and its appropriateness. The occurrence of the phenomenon described therewith cannot be seriously challenged: Legal instruments and provisions circulate and are actively exchanged between different jurisdictions. The degree to which the concept can be legitimately challenged is its granularity: Is the stock corporation a legal transplant or can legal transplants also occur with respect to various institutions pertaining to the stock corporation? The current literature suggests the latter when it refers to the emergence of hybrid architectures or the hybridization of corporate law as path-dependent responses to international challenges and convergence tendencies, and Japan as an exponent of the successful use implementation of transplants in the corporate law arena.[340] This does not appear to be ultimately convincing or cogent. Sticking with the example of the stock corporation with the triad of its corporate bodies (management, assembly of its owners and a supervisory or auditing organ to mediate the management-ownership gap) and its structural features, this import has swept from Europe around the globe. To this degree, one might argue a universal "genuine" transplant has occurred. However, when it

339 Avini, *supra* note 210, 1141 f.
340 For example, Aronson, *supra* note 19, 103 ff.; Aoki, *supra* note 218, 14 f.

comes to the concrete design of the stock corporation under the legal regimes of various jurisdictions, the concept does not really yield to too much additional insight. The conceptual leap has been the initial adoption, the transplant, the ensuing incremental reform and adjustment process then is difficult to trace in all detail and takes away from the bigger picture. In effect, this means that legal transplants have occurred with respect to structural elements to the stock corporation concept itself, which in itself is dynamic, as well as they occurred and continue to occur with respect to the triad of its governing bodies and their respective relationships. If, however, the triad would be expanded by addition of a fourth pivotal actor, this would unsettle and call into question the initial transplant due to the degree of impact on the stock corporation concept as such. In addition, whether the Japanese corporate law model can be indeed categorized as an example of a successful transplant seems at least doubtful when listening to the woes about the chastised corporate arrangements and institutions that developed "besides" the written, (partially) imported corporate law.

The legal transplant concept has implication on the classification of legal families. Since consequently, thought through to its final consequence, the legal transplant concept supports the convergence theory. The arrival and more pronounced articulation of the convergence theory with respect to corporate laws around the world has slightly eclipsed the tradition of the classification of legal families of private law codifications in private international law. The emphasis on the binary civil law and common law divide[341] may have further exacerbated this tendency. Accepting the existence of convergence tendencies – to a certain extent this remains difficult to be successfully challenged – and thus the dynamics of legal codifications may trigger second thoughts as the validity and the advantage of such classification in excess of certain terminological and nominal gains. The thesis at hand does not seek to enter such arena and challenge such classification.

4. Charting the Position of Japan with Respect to Legal Families Adherence, Ownership Patterns and Corporate Governance

For the benefit of complementing the above-expounded legal transplant and underlying convergence idea, a recapitulation of the legal families classification and views on the positioning of Japan shall be provided in the following.

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[341] Which is, however, partly – in contrast with the standpoint underlying the legal origins theorem – viewed as superseded, see Smith, *supra* note 165, 155.

In this vein, with respect to Japan it can meanwhile be counted as established that Japanese law has passed from the – to stick to relatively settled terminology – Far-Eastern law family to the civil law tradition[342] – and further, especially with respect to corporate law on to the common law family due to the imprint of US-American law since the 1950s.[343] This reclassification may already indicates the overall dynamic of the legal families doctrine: If this legal family was initially widely defined by the traditional Chinese – that is through imprint and permeation with Confucian thought – then the political changes in China over the course of the last century might call for a reorientation of the corresponding legal family compass given the more pronounced importance of socialist theory emerging and settling in the latter half of the preceding century. Hence, the recalibration with respect to Japan as a member of the Far-Eastern law family might have become necessary through two disparate factors, the perceived receding importance of social norms rooting in Confucian thought and the reorientation of such legal family itself building on such philosophy due to its recent accentuation and tendency towards socialist theory.[344]

There is consensus among comparative law scholars that the contemporary legal systems share elements of hybridization and mixture, while there may, however, be nuances and differences in the degrees of such hybridization.[345] With respect to Japan it is widely maintained that the adoption of Western legal codes was usually accompanied not by straightforward, but comparative adoption that included a tailoring of the imported regulatory concept to the existing domestic institutional framework in combination with the broader context of informal normativity[346], besides a "living law" through which indigenous social and normative concepts percolated into the law.[347] Hence, taking a wider approach with takes into considerations with respect to legal system and culture, modern law in Japan is seen as being located between

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342 Hiroshi Oda, JAPANESE LAW (3rd, 2009) 3 ff; Zweigert/Kötz, *supra* note 161, 293.

343 Spamann, *supra* note 164, Fn. 24.

344 Zweigert/Kötz, *supra* note 161, at 281.

345 Giorgio F. Colombo, *Introduction*, The Italian Law Journal – Special Issue (2018) 1; Graziadei, *supra* note 168, 443-473; Aritsune Katsuta, *Japan: A Grey Legal Culture*, in: Örücü/Attwooll/ Coyle, *supra* note 154, 249-264, 260 (figures 1 and 2), 262 f. For the case of Japanese corporate law, see Bruce E. 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) 85-106.

346 Besides legal engineering, mentality or spirit of the importing jurisdiction are proffered as leaving an imprint on the transplanted legal rules, see John Owen Haley, THE SPIRIT OF JAPANESE LAW (1998) 21 ff.; Baum, *supra* note 41, 185 f.

347 Glenn, *supra* note 184, 345 f.; Kinoshita, *supra* note 19, 34 f.

Western legal systems and Japanese legal culture as influenced by the North-East Asian legal culture.[348]

a) Corporate governance-related debate

Due to – roughly speaking – having being exposed to two waves of formative corporate law reform with influx from European jurisdictions – France and Germany are often mentioned in the corporate law context – in the years leading up to the Kyū-Shōhō and culminating in the Shōhō in 1899, and the United States in the postwar reforms commencing in 1950, Japan's corporate law is viewed as an initially civil law system with a growing common law imprint.[349] Despite the formal, understood as by the letters of the law, orientation at US-American corporate law, the civil law heritage remains active as corporate law is embedded in the overall body of private law. In addition, most European jurisdictions likewise implemented reforms with a similar US-American law orientation.

However, the case of the long-standing virtual non-use of derivative suits despite their provision under Japanese company law statute shows that corporate law cannot be evaluated by statutory law on a stand-alone basis, but that such scrutiny rather requires a contextual approach taking into consideration adjacent areas of law, such as civil procedural law or securities laws, as well as the "living law".[350] Furthermore, lawmakers may take decisions which mirror legislative developments in other jurisdictions. In the case of corporate law in Japan, the minimum capital requirements were, for example, introduced in the 1990s, reflecting changes of the stock corporation law in Germany which initially, meaning at the time of the occurrence of the transplantation in the Meiji era did not have such provisions, but likewise introduced these provisions later on through revision of statutory law.[351]

Recently, the notion of a hybrid model has been circulated.[352] The term is, however, less used with respect to the legal families classification, than in the context of the corporate governance debate to describe that the corporate governance system in Japan combines – and continues to do so – transplanted aspects with intrinsically developed

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348 Kinoshita, *supra* note 19, 34 f.

349 Pistor/Keinan/Kleinheisterkamp/West, *supra* note 92, 801.

350 Pistor/Keinan/Kleinheisterkamp/West, *supra* note 92, 860. For an in-depth analysis of the situation in Japan, see Nakahigashi/Puchniak, *supra* note 84, 128 ff.

351 Pistor/Keinan/Kleinheisterkamp/West, *supra* note 92, 857.

352 Aronson, *supra* note 19, 103 ff. With respect to specific elements of the system embedded in a cross-jurisdictional analysis, also Pistor/Keinan/Kleinheisterkamp/West, *supra* note 92, 856 f.

arrangements and institutions.[353] When it comes to corporate law, the discussion with respect to Japan long-standingly centered on the incumbent corporate governance system built around the so-called "J-firm" being assessed from a comparative law angle.[354] The focus thereby lay on the pertaining corporate governance institutions such as main bank, high levels of stable horizontal and vertical cross-shareholdings within corporate conglomerates (*keiretsu*)[355], long-term employment[356] contributing to the forming of (main) bank-centered or relational corporate governance structures[357] as well as a sheltered corporate management immune and entrenched against confrontative shareholder engagement and hostile tender offers.[358]

The concept of the J-firm is related to the archetypical Japanese public company of the second half of the twentieth century after immediate postwar reforms had settled in and the Japanese economy enjoyed robust economic health. While there is consensus that the burst of the economic bubble ushered in deregulation efforts[359], the conceptualization of the J-firm has not received any recent update despite recent concerted regulatory activity, inter alia, the overhaul of the company law, the introduction of a stewardship code and adoption of a corporate governance code as soft law mechanisms. Considering the receding levels of the afore-mentioned key institutions in the form of the departure of the main bank, cutback of relational shareholdings and declining levels of long-term employees as well as legislative attempts to cater to the interest of outside shareholders, the archetypal J-firm appears

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353 Aronson, *supra* note 19, 106 ff.

354 Aoki, *supra* note 218, 14 f.

355 Ronald J. Gilson/Mark J. Roe, *Understanding the Japanese Keiretsu: Overlaps Between Corporate Governance and Industrial Organization*, 102 Yale Law Journal (1993) 871 ff.

356 Yoshikawa/McGuire, *supra* note 36, 5 ff.; Pejovic, *supra* note 36, 191 ff.; Masahiro Abe/Takeo Hoshi, *Corporate Finance and Human Recourse Management in Japan*, in: Aoki/Jackson/Miyajima, *supra* note 48, 257 ff.; Gregory Jackson, *Employment Adjustment and Distribution Conflict in Japanese Firms*, in: Aoki/Jackson/Miyajima, *supra* note 48, 282 ff.

357 Aoki, *supra* note 48, 429 ff.; Curtis J. Milhaupt, *A Relational Theory of Japanese Corporate Governance: Contract, Culture, and the Rule of Law*, 37 Harvard International Law Journal (1996) 3 ff.

358 On the aspect of entrenched managers, Naoshi Ikeda/Kotaro Inoue/Sho Watanabe, *Enjoying the quiet life: Corporate decision-making by entrenched managers*, 47 Journal of Japanese and International Economies (2018) 55 ff. Employees below the management echelon arguably share this sentiment with respect to hostile takeovers which potentially precipitate risk with respect to restructurings of the workforce, see Martin Gelter, *The Pension System and the Rise of Shareholder Primacy*, 43 Seton Hall Law Review (2013) 944.

359 Yoshiro Miwa/J. Mark Ramseyer, *Evidence from the Deregulation of Financial Services in Japan*, in: Daniel H. Foote (ed.), LAW IN JAPAN: A TURNING POINT (2007) 153 ff. From a comparative law angle, Bernard S. Black/John C. Coffee Jr., *Hail Britannia?: Institutional Investor Behavior Under Limited Regulation*, 92 Michigan Law Review (1994) 1997 ff.

to have entered into a transition phase, shedding some its elements and assuming new ones, with an open end whether a real transition will eventually be achieved.

However, the case of Japanese corporate law may provide evidence to accept the formation of a new family of laws, already indicated by the heterogeneous current classification attempts, partly as a civil law country with the sub-category associated with German law[360] and by other scholars grouping Japan as edging closer to US-American law[361], thus revealing the limits to the usefulness of such generalization, at least in the case of corporate law in Japan. While this is reclassification is limited to corporate law, which constitutes a special field in the broader realm of civil law or the legal system as a whole, there may be second thoughts given with respect to corporate and commercial laws as rather instrumental laws in which economic interests may overshadow social customs, sentiment and norms[362]. It appears challengeable whether deep underlying historical developments such as adduced by the legal origins literature indeed exert their purportedly persisting influence on jurisdictions historically not connected with jurisdictions regarding which such proposition has been initially made (see supra subsection I.2), at least with respect to jurisdictions which did not resort to an en bloc transfer and transplant of the legal codes and infrastructure of one of these two countries. In addition, the taxonomy of legal families faces challenges from an intra-temporal standpoint or the temporal relativity of the legal family classification, being conspicuously evident in the case of Japan, as a jurisdiction which is widely perceived as at least having passed from the Far-Eastern law family largely influenced and imbibed by Confucian[363] and Chinese thought to the civil law family and potentially even further – to either the common law family due to impact and influence of US law or even further to its own family.[364] In this vein, it may be worthwhile to less concentrate on legal families and the ballast of their legal traditions and infrastructure, but in an interconnected globalized world to rather draw attention to legal innovation and to investigate whether patterns of more or less innovating and

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360 La Porta/Lopez-de-Silanes/Shleifer/Vishny, *supra* note 10, 1119; Oda, *supra* note 342, 3 ff.; Zweigert/Kötz, *supra* note 161, 298 f.; McGinty, *supra* note 134, 160.

361 Cabrelli/Siems, *supra* note 35, 127; Spamann, *supra* note 164, 1813.

362 Cotterell, *supra* note 288, 82.

363 On the influence of Confucian thought on the Chinese legal system, see, for example, Avner Greif/ Guido Tabellini, *Cultural and Institutional Bifurcation: China and Europe Compared*, 100 American Economic Review: Papers & Proceedings (2010) 1 ff.

364 Spamann, *supra* note 164, 1865, appears to only assume a reorientation instead of a switch to another legal family.

recipient jurisdictions respectively, emerge, again dependent on time, but less on the adherence to a common legal culture, not to say a legal family.

Stock company law in Japan arguably presents a good match for such narrative. Applying such standard, one could distinguish heritage from different jurisdictions regardless of their adherence to a specific legal family which have been "en vogue" for some time during the formation and reform of the Japanese company law, namely German law in the beginning of the nineteenth century, US-American corporate law in the period starting 1950 and the laws of the United Kingdom in the period commencing in the 1990s, most prominently shown by the shift to self-regulation and the incorporation of "comply-and-explain" approach. Such approach may also yield evidence that shows where Japanese corporate law has already served and may henceforth figure as a source of legal innovation.

b) Corporate ownership and ownership patterns

A determinant of the quality of corporate governance structures is the ownership pattern dominant in a specific jurisdiction: Pertinent studies have established a negative correlation between ownership concentration and the quality of corporate governance practices.[365] In addition, an overall tendency towards dispersed ownership patterns has been registered, to, however, different degrees with such differences refueling the debate about the determinants of dispersion. The dynamics determining the path from ownership concentration to ownership dispersion have attracted attention as well as the agency conflict between majority and minority shareholders with, however, recently the stance towards controlling shareholders becoming more nuanced in tandem with acknowledging corporate governance benefits from the presence of certain groups of controlling shareholders. When it comes to ownership patterns in Japan, a series of articles have aimed to critically review and dismantle certain "institutional myth" which had formed with respect to Japanese firms in the wake of the bubble burst and the ensuing lost decades of economic stagnation.

[365] Doidge/Karolyi/Stulz, *supra* note 18, 2.

aa) Driving forces and determinants of ownership patterns

(1) Potential stand-alone factors

While the legal origins literature (supra subsection I.2) posits a connection between the degree of ownership dispersion and the quality of the corporate law, determined by the robustness of minority shareholder protection, the importance of the quality of law as a potential driving force has been relativized as other literature has demonstrated that controlling shareholder structures are also common in jurisdictions with a network of robust legal institutions and institutional structures, elements which have been widely perceived to justify the qualification as "good law".[366] From this perspective, jurisdictions with a strong emphasis of social democratic elements – understood as economies with strong government involvement and distributive tendencies – allegedly favor employees over shareholders and attempt to increase distance between shareholders and the firm, its management and day-to-day business; in sight of this, ownership concentration has been interpreted as a strategy of shareholders to adjust, resist and bypass such organizational arrangements and framework.[367] In the same vein, the laws in jurisdictions with strong social democracy would be restrictive with respect to legal instruments which would align management and ownership interests or have shareholders move closer – reducing agency cost – to the firm, such as through providing for high and incentive compensation mechanisms such as stock options, or hostile takeover mechanisms.[368] However, also the degree of social democratic tendencies, or, more generally put, the social and political environment, does not seem to qualify as the factor which would exclusively shape ownership structures as jurisdictions with strong social democratic movements have been found not to exclude the formation of controlling shareholder structures as demonstrated by Scandinavian

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366 Roe, *supra* note 298, 5, 24; Gilson, *supra* note 123, 1659 f., juxtapose the jurisdictions of Sweden and Italy which are equally characterized by controlling shareholder structures with the former jurisdiction being attested "good law" and the latter one "bad law", with Sweden's stock companies despite exhibiting on average more dispersed ownership patterns than their Italian counterparts, Gilson, *ibid*. In this context, good law is understood as functionally good, meaning that law and its institutions manage to effectively limit the extraction of private benefits of control to a degree that would allow the controlling shareholder to receive a compensation for its focused monitoring efforts, but which would still yield to less than the amount of benefits obtained through the monitoring for all shareholders, *ibid*., 1654.

367 Roe, *supra* note 298, 13 f., 29 ff.

368 Roe, *supra* note 298, 23 f.

jurisdictions such as Sweden which boasts robust minority shareholder protection.[369] Codetermination, which ensures stakeholder representation on the supervisory board of stock companies in Germany, as an accomplishment of social democratic, or at least social welfare policies is, however, considered to complement majority or block shareholdings.[370] The purported correlation between social democratic movements and the occurrence of concentrated ownership patterns relied on the reasoning that in social democracies corporate management will be urged to attend to constituencies other than shareholders, meaning that controlling shareholders would function as defensive measures to make corporate management resist such political pressures.[371]

Recently, the view that the political orientation of the government or governing political parties would matter for development and strength of financial markets has been recalibrated and the pro- or anti-market orientation of a government instead put forward as relevant.[372] However, the examples of the jurisdictions of Germany and Sweden indicate that the socio-political coordinate appears to indeed hardly provide any reliable guidance, even when limiting the scope of the analysis to European jurisdictions.[373] This take is confirmed by the corporate ownership patterns in France – another jurisdiction usually associated with a comparatively strong social democratic movement – for which the determinant is rather located in historical factors, thus lending stronger voice to the path dependency factor.[374]

Spinning the underlying conceptualization a bit further, so as to conceive controlling shareholders as a defensive measure to ensure that corporate management attends to shareholder interest in an overall stakeholder-oriented environment of a jurisdiction may have some logic to it with, however, Japan, where stock corporations are found to show comparatively dispersed ownership patterns contraindicates even such softened version of the initial concept. In addition, it may be questionable whether controlling shareholders in relational corporate governance jurisdictions – such as banks in the traditional corporate governance structures of stock companies in

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369 Gilson, *supra* note 123, 1644; Roe, *supra* note 298, 94 ff.; Peter Högfeldt, *The History and Politics of Corporate Ownership in Sweden*, in: Randall K. Morck (ed.), A HISTORY OF CORPORATE GOVERNANCE AROUND THE WORLD (2005) 517 ff.

370 Roe, *supra* note 298, 29 ff., 71 ff.

371 Roe, *supra* note 298, 13 f.

372 Mark J. Roe/Travis G. Coan, *Financial Markets and the Political Center of Gravity,* 2 Journal of Law, Finance and Accounting (2017) 125 ff.

373 John C. Coffee Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 The Yale Law Journal (2011) 72.

374 Antoin E. Murphy, *Corporate Ownership in France – The Importance of History*, in: Morck, *supra* note 369, 185 ff.

Germany[375] – can per se be seen as guardians of shareholder interest against the encroaching interests of other constituencies.[376] Furthermore, it also appears questionable whether controlling shareholder interests could be unilaterally pushed through against well-represented other constituencies such as the electorate being direct or indirect – through mediation of mutual funds – holder of shares in an overall democratic environment.[377] To further add to this, the class of controlling shareholders does not necessarily be monolithic and cohesive, especially in constellations of family ownership[378] involving ownership of various family members, thus bearing the potential for not necessarily aligned interests and even given rise to intra-family agency conflicts.[379]

(2) A variety of (co)determinants

The difficulty to determine driving forces indicates two possible scenarios, namely (i) that there is a variety of factors that co-determine ownership patterns[380] or (ii) that there is no correlation between formal legal shareholder protection and ownership dispersion at all as argued with respect to the example of Germany with the stock market being subjects to ups and downs with little changes to the overall legal structure of German corporate law still continues to thoroughly adhere to a civil law tradition.[381] The variety articulated in the former view could also be understood not simultaneously,

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375 The relative size of banks in relation to the other listed companies may also play a role in the degree of dispersion, see Bernard S. Black/Ronald J. Gilson, *Venture capital and the structure of capital markets: banks versus stock markets*, 47 Journal of Financial Economics (1998) 244. On the other hand, the monitoring through banks in the traditional corporate governance structures of Japan and Germany as representatives of such governance system was implemented relying on different methods with only the bank monitoring in Germany also yielding to relatively high ownership stakes of banks in listed companies, while in Japan the actual shareholding of the main bank was significantly lower, but it could rely on a convoy of other banks and cross-shareholding companies.

376 Coffee, *supra* note 373, 72 f.

377 Coffee, *supra* note 373, 73.

378 Family ownership is widely recognized as the prevalent form of controlling shareholder ownership, see for empirical evidence, LaPorta/Lopez-de-Silanes/Shleifer, *supra* note 125, 491 ff., especially tables II and III; Claessens/Djankov/Lang, *supra* note 128, 82 ff.

379 Luis R. Gomez-Meija/Manuel Nuñez-Nickel/Isabel Gutierrez, *The Role of Family Ties in Agency Contracts*, 44 The Academy of Management Journal (2001) 81 ff. On the potential relationship between founder succession and the level of minority shareholder protection and its impact on ownership patterns ensuing the succession decision, Mike Burkart/Fausto Panunzi/Andrei Shleifer, *Family Firms*, 58 Journal of Finance (2003) 2167 ff.

380 Érica Gorga, *Changing the Paradigm of Stock Ownership from Concentrated Towards Dispersed Ownership? Evidence from Brazil and Consequences for Emerging Countries*, 29 Northwestern Journal of International Law & Business (2009) 485.

381 Caroline Fohlin, *The History of Ownership and Control in Germany*, in: Morck, *supra* note 369, 270 f.

but rather subsequently, meaning that the driving forces may shift over different periods which would be in line with the observation that "paradigms shift often and quickly"[382] and also reverberate the idea of legal fashions in the sense that among a panoply of factors, their relevance switches from one to another factor from time to time. The latter view that challenges the major impact of the law on the formation of ownership patterns under the "law matters" proposition is echoed with respect to the United Kingdom, where robust demand for corporate equity has long existed and the progressive dispersion of ownership in the first half of the twentieth century despite the judicial system – lawmakers through statutory law, common law principles and precedents alike – taking a largely laissez-faire approach which implies that it did not afford strong levels of protection to minority or outside investors.[383]

This strand of literature puts instead emphasis on the relevance of financial intermediaries such as stock exchanges to provide a hospitable investment environment for outside shareholders by compensating the absence of statutory investor protection mechanisms through listing and disclosure requirements.[384] On the other hand, measures such as disclosure requirements cannot entirely alleviate or even nullify the impact of stumbling blocks to shareholder democracy such as unequal voting rights[385] which are frequently found to constitute a primary determinant of controlling shareholder constellations.[386] That being said, however, in recent years policymakers in Japan have relied on the regulations and listing requirements of the Tokyo Stock Exchange as one pillar to make the domestic stock market more attractive to foreign investors (see Chapter IV, infra subsection III.5).[387]

As indicated by the research questions (see Introduction, section III), this thesis is generally sympathetic to such view given that ownership patterns have proved to be more lethargic than the change of legal rules, since they entail the surrendering of

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382 Coffee, *supra* note 75, 704.

383 Cheffins, *supra* note 255, 468 ff.

384 Cheffins, *supra* note 255, 472 ff., 483 f.

385 Cheffins, *supra* note 255, 469, 477, evaluates the long-standing non-regulation of unequal voting rights in the United Kingdom. See for more details hereon, Brian R. Cheffins, COMPANY LAW: THEORY, STRUCTURE AND OPERATION (1997) 177 f.

386 Lucian Arye Bebchuk/Reinier Kraakman/George G. Triantis, *Stock pyramids, cross-ownership and dual class equity: The mechanisms and agency costs of separating control from cashflow rights*, in: Randall K. Morck (ed.), CONCENTRATED CORPORATE OWNERSHIP (2000) 297 ff.; Yu-Hsin Lin, *Controlling Controlling-Minority Shareholders: Corporate Governance and Leveraged Corporate Control,* 2 Columbia Business Law Review (2017) 460 ff.

387 For example, the listing rules were instrumentalized to promote the appointment and promulgation of independent directors, see Japan Exchange Group, *supra* note 31.

ownership rights of specific groups of shareholders and the substitution and absorption of their ownership stakes in stock companies. Rather than being tied to changes in the legal framework, such reshufflings appear to be triggered by exogenous shocks as exemplified by the stock company owners in Japan in the aftermaths of the Second World War being shaped by the departure of the former *zaibatsu* family owners and the bubble burst triggering the slow, but certain demise of the main bank and the reduction of relational cross-shareholding structures as well as a change in the investment attitude and purpose of the remaining relational shareholders. While the law appears to be capable to flank and facilitate such developments through the adoption of new legal rules or straightforward prohibitions – such as in the case of the allowed quota of shareholdings by banks –, changes in the legal environment appear not to have the capability to usher in turning points in the composition of the shareholder class.

(3) The concept of the "life cycle" of a firm

One strand of literature following the theory of a firm set forth by Berle/Means posits a trajectory of companies from concentrated, founder or family-held ownership patterns towards dispersedly held, managerially controlled companies has coined the term of the "life cycle", concisely conceptualizing family ownership attrition.[388] The negative correlation between the age of both private and public companies and family control in the sense of material ownership[389], however, appears to rely on additional factors of the legal and financial framework in a jurisdiction being conducive to shareholder dispersion, namely robust levels of investor protection, highly-developed, liquid financial markets and an active market for corporate control which tilt the trade-off between retaining and diluting controlling shares for controlling families towards the former; if these preconditions are not fulfilled, there is rather indication in favor of

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388 On the life cycle concept, see Julian Franks/Colin Mayer/Paolo Volpin/Hannes F. Wagner, *The Life Cycle of Family Ownership: International Evidence*, 25 Review of Financial Studies (2012) 1676; Foley/Greenwood, *supra* note 229, 1233.

389 The definition of family control through a material ownership quota is not uniform. A common criterion is the threshold of 25 per cent of the voting rights which could be held either directly or through a chain of control, see, for example, Franks/Mayer/Volpin/Wagner, *supra* note 388, 1677. LaPorta/Lopez-de-Silanes/Shleifer, *supra* note 125, 476 ff., take a less restrictive approach with direct or indirect voting rights exceeding 20 per cent or even ten per cent, if relying on a chain of voting rights, being considered as constituting effective control. Other investigations focus on cash-flow rights, such as Claessens/Djankov/Lang, *supra* note 128, 90 ff., who, however, have a regional focus – namely Asia – in which they observe only limited deviation from the one-share-one-vote principle and the widespread absence of superior voting shares, *ibid*., 91 f.

the persistence of family control.[390] The importance of robust levels of investor protection to act as a catalyst for accelerating ownership dispersion has been confirmed elsewhere, which would also be consistent with the finding of the legal origins theory.[391] Another factor not to be discounted in this context is that there appear to be differences between jurisdiction with respect to size and point of time in the life cycle of a firm at which firms go public which impacts their thirst for the collection of new capital.[392] Despite evidence in favor of the "life cycle" idea at least in jurisdictions with well-developed capital markets, family control remains a ubiquitous phenomenon.[393]

While the life cycle concept takes family-owned firms as their point of departure, it has been expanded to the life cycle of companies in general referring to the dynamic development that firms exhibit over the course of an extended timeline.[394] Similar observations have been made with respect to technology companies that upon their initial public offering (IPO) showcase rather concentrated ownership patterns which become increasingly dispersed during the term of their listing with the initial owners selling off their stocks, no longer – proportionally – taking part in any subsequent equity placements and eventually retiring to the role of minority shareholders, at least ideally by ownership running parallel to cash flow rights.[395]

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390 Franks/Mayer/Volpin/Wagner, *supra* note 388, 1677, 1707 ff. Besides the angle of ownership dispersion, family control over firms and the decision whether to maintain or sell-off a family stake, especially when exceeding the active period of the founding generation, is impacted by a bundle of motivations with intergenerational transition being one important consideration among several, see Sandy Klasa, *Why Do Controlling Families of Public Firms Sell Their Remaining Ownership Stake?* 42 Journal of Financial and Qualitative Analysis (2007) 365 f.

391 Foley/Greenwood, *supra* note 229, 1244 f., 1259, figure 2.

392 Marco Pagano/Fabio Panetta/Luigi Zingales, *Why Do Companies Go Public? An Empirical Analysis*, 53 Journal of Finance (1998) 60 f.; Foley/Greenwood, *supra* note 229, 1235.

393 Morten Bennedsen/Vikas Mehrotra/Jungwook Shim/Yupana Wiwattanakantang, *Who is the Boss? Family Control without Ownership in Publicly-traded Japanese Firms*, DBJ Discussion Paper Series, No. 1903 (2019) 2.

394 Claessens/Djankov/Lang, *supra* note 128, 104. Similarly, Black/Gilson, supra note 375, 255 ff., for the angle of venture capital funds. The concept of the "life", "lifespan" or "life cycle" of a firm is reasonably widespread, see also Jean Helwege/Christo Pirinsky/Rene M. Stulz, *Why do Firms Become Widely Held? An Analysis of the Dynamics of Corporate Ownership*, 52 Journal of Finance (2007) 995.

395 On the "wedge" between voting rights on the one hand and cash flow rights on the other hand, see Bernard S. Sharfman, *A Private Ordering Defense of a Company's Right to Use Dual Class Share Structures in IPOs*, 63 Villanova Law Review (2018) 1-34; Observer, *Mark Zuckerberg's Voting Stake Renders Shareholders Powerless*, (6 January 2023), available under: https://observer.com/2023/06/mark-zuckerberg-2023-shareholder-meeting/ (last accessed 23 October 2023). Listed companies from the technology sector indeed appear to show some predilection for a divergence in ownership and voting rights through dual class shares and differential voting rights with super-voting shares on the one end and non-voting shares (for example, Snap Inc.) on the other end of

In an overall historical approach, the factor time is of relevance. In support hereof, it has been found with respect to a sample of stock companies listed on stock exchanges in the United States that there is a broader tendency that it takes time until stock companies become widely held after their IPO.[396] Related research emphasizes the role of the liquidity of a stock market facilitating the dilution of insider equity stakes and the dispersion process to a wider circle of outside shareholders, which especially is found to hold true when being combined with solid business performance which enables the insiders as potential sellers to find prospective buyers to sell their shares to, and creates favorable conditions for the issuance of new equity.[397] This pattern applies even more so for companies whose shares experience high turnover rates as liquidity means a deeper market which allows for the sale of – seller-initiated – blocks of shares without too much of a discount.[398] The general liquidity of capital markets, inter alia, owed to the relatively active participation of institutional investors in the secondary market, and the presence of the takeover threat in the jurisdictions of the United States and the United Kingdom has likewise been suggested as a decisive factor driving dilution[399], with other studies, however, pointing out that share issuances, inter alia, for mergers through exchange of shares, only account for a fraction and that the relinquishment of shares by insiders is equally relevant to understand the dynamics propelling dispersion.[400] A case study which focuses, inter alia, on companies in the United Kingdom has found that merger and acquisitions are a driver for the dilution of concentrated ownership patterns with families issuing shares to finance takeovers or sale of their own stakes for a premium.[401] The latter finding presupposes that firms resort to public security offerings for financing purposes instead of relying on bank

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the spectrum enabling the founders to retain the majority over the say in the companies despite retaining significantly lower ownership stakes. Meta Platforms, Inc. and Alphabet Inc., but also Nike, Inc., and Berkshire Hathaway Inc., are prominent examples where a two-tiered stock structure is upheld for such purpose, while Microsoft and Apple on the other hand stick to the one-share one-vote model. For an overview of listed companies in the United States relying on dual class shares, see Council of Institutional Investors, *Dual-Class Stocks* (2023), available under: https://www.cii.org/dualclass_stock (last accessed 23 October 2023). An interesting construction is anecdotally reported by Bennedsen/Mehrotra/Shim/Wiwattanakantang, *supra* note 393, Fn. 3 with the time phase voting scheme in place at The J.M. Smuckers Company with voting rights increasing over the holding period of the shares.

396 Helwege/Pirinsky/Stulz, *supra* note 394, 1007, 1026.

397 For the United States, see Helwege/Pirinsky/Stulz, *supra* note 394, 1000; for the United Kingdom, see Franks/Mayer/Rossi, *supra* note 33, 4016 ff.

398 Helwege/Pirinsky/Stulz, *supra* note 394, 999; Patrick Bolton/Ernst-Ludwig von Thadden, *Blocks, Liquidity, and Corporate Control*, 53 Journal of Finance (1998) 11 ff.

399 Bolton/Thadden, *supra* note 398, 2 f.

400 Helwege/Pirinsky/Stulz, *supra* note 394, 997, 1010 f.

401 Franks/Mayer/Volpin/Wagner, *supra* note 388, 1678; Franks/Mayer/Rossi, *supra* note 33, 4044 ff.

loans, retained earnings or capital infusions, with the former two means of financing, however, often being associated and indeed found available to Japanese listed stock companies.[402] In light of the broad variety of potential factors which may have an impact on the dispersion of ownership, a grain of resignation has entered the debate given the lack of visibility of the decisive factor(s).[403]

bb) Agency conflict: Majority versus minority shareholders

Besides the agency conflict between principals and owners, another dimension can be added by the conflict within the class of owners, namely between non-controlling or minority shareholders as principals and controlling or majority shareholders as agents in the terminology of the agency theory of the firm.[404] It relies on the observation that for large shareholder it is possible to separate ownership and control through various means such as pyramidal groups structures, cross-shareholdings among companies or multiple classes of shares with differential voting rights.[405] Disproportionate ownership structures can be self-reinforcing as rational apathy or passivity of minority shareholders discourages minority shareholders to utilize minority shareholder rights and in this manner contributes to minority shareholders being driven out of the company advancing further ownership concentration.[406] Again, roughly-speaking a dichotomy surfaces between stock corporations in the Anglo-American or common law sphere which are typically widely held, and stock corporations in the jurisdictions of Continental Europe, (East) Asia, Africa and Latin America where a significant ratio of stock companies have controlling shareholders.[407] While – efficient – controlling shareholder structures have come to be appreciated as a viable alternative to market-based approaches such as takeover bids or shareholder litigation thanks to its potential of achieving direct monitoring and thus overcoming the managerial agency problem, literature has a keen eye on the motivation of controlling shareholders to establish or

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402 The factor of the reliance on equity-finance as potentially contributing to the dispersion of companies listed in the United States is pointed out by Marco Becht/J. Bradford DeLong, *Why Has There Been So Little Block Holding in America*, in: Morck, *supra* note 369, 620.

403 This proposition has been made with respect to the dispersed ownership landscape in the United States, see Becht/DeLong, *supra* note 402, 665.

404 Armour/Hansmann/Kraakman, *supra* note 151, 30.

405 Claessens/Djankov/Lang, *supra* note 128, 82; Bebchuk/Kraakman/Triantis, *supra* note 386, 295, 297 ff.

406 Bernhard Großfeld, AKTIENGESELLSCHAFT, UNTERNEHMENSKONZENTRATION UND KLEINAKTIONÄR [Stock Company, Enterprise Concentration and Small-Scale Investor] (1968) 30.

407 Andrei Shleifer/Robert W. Vishny, *A Survey of Corporate Governance*, 52 Journal of Finance (1997) 754 f. The investigations of Dyck/Zingales, *supra* note 129, 587, table XI and Nenova, *supra* note 129, 333 ff., table 3, however, show more nuanced results with jurisdictions with Scandinavian law origin scoring slightly better than those of English or common law origin.

retain their control through voting rights for which they are usually willing to pay a (voting) premium[408] and potentially negative implications of the benefits obtained by controlling shareholders as the downside for minority shareholders.[409]

The structural problem these controlling shareholders potentially pose is usually approached under the angle of controlling shareholders extracting so-called private benefits of control, meaning returns disproportionate to their ownership stake, at the expense of the non-controlling shareholders.[410] It is argued that large private benefits of control engender the establishment of control over stock corporations, since such private benefits of control would be considered too valuable to concede them to competitors; large – not necessarily pecuniary – private benefits of control are hence considered to reinforce controlling ownership patterns.[411] A more nuanced approach argues that insiders weigh the cost of new capital upon their decision whether to maintain their entrenchment or to reduce their equity stake; a robust level of investor protection would tip the balance in favor of insider dilution through issuance of new shares to finance growth opportunities, while weak investor protection would drive insiders to avoid dilution and to turn to debt financing instead.[412] The literature differentiates between pecuniary benefits, being defined as "*the nonproportional flow of real resources from the company to the controlling shareholder*", and non-pecuniary ones that refer to non-financial, usually psychic benefits which are not obtained through the tunnelling of real resources out of the company or do otherwise disproportionately impact the value of the investment for the minority shareholders.[413] Besides these internal private benefits, jurisdiction-specific – with variances conditioned by local socio-economic, political and cultural institutions and factors – external benefits have been identified which differ from the established canon of private benefits of control in two aspects, namely they are not gained at the expense of minority shareholders and the prospect of obtaining them might make majority shareholder act in a manner which is also beneficial for the minority shareholders.[414] For example, in Singapore, listed stock companies which count the state's global investment arm, Temasek Holdings, as their controlling shareholder have been found

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408 For a cross-jurisdictional comparison of average control-block premiums, see Dyck/Zingales, *supra* note 129, 537 ff.; Nenova, *supra* note 129, 325 ff.
409 Gilson, *supra* note 123, 1651 ff.
410 Enriques/Hansmann/Kraakman/Pargendler, *supra* note 122, 79 f.
411 Bebchuk, *supra* note 125, 1, 25.
412 Foley/Greenwood, *supra* note 229, 1233 f.
413 Gilson, *supra* note 123, 1663 f.
414 Puchniak, *supra* note 9, 527 ff., 531 f.

to be more profitable and score on average a 20 per cent premium on their share price in comparison to their peers.[415] External benefits of control have, inter alia, been identified with respect to the long-standing post-war corporate governance system of Japan: A prominent example are financial incentives granted by the Japanese government to reward the main banks for fulfilling their corporate monitoring role in the stock corporations of the 1960s to 1980s.[416] In this narrative, the disappearance of these external financial benefits due to changes in the institutional and legal framework motivated the main banks to renounce their monitoring role concomitant with a disposal or at least significant reduction of their equity holdings in industrial companies; similarly, the life-time or long-term employment model in Japanese companies is considered to provide corporate management with psychic external benefits as it induces incumbent corporate managers to support their fellow employees to rise through the ranks of the company in the same manner as they did in the past.[417] This type of non-financial, psychic external benefits may partly overlap with the concept of non-pecuniary – internal – benefits which is specific for the individual controlling shareholder such as socio-political aspects, favorable public opinion, personal or – in the case of state involvement – national prestige or political influence.[418]

cc) Additional perspectives and dimensions to ownership patterns in Japanese public firms

Investigations with respect to ownership patterns have commonly been made from the perspective of controlling shareholder structures into the stock companies of various jurisdictions. This focus on jurisdiction-specific characteristics rather than on firm characteristics is cogent given that the latter has shown poor explanatory weight despite the obvious assumption that the global integration of financial markets should increase the relevance of firm-level determinants over jurisdiction-level ones, since access to global capital markets should reduce dependence on the economic and financial development as well as the level of investor protection of the home jurisdiction and it should allow public companies to raise capital from investors on foreign capital markets, making use of comparatively higher levels of investor

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415 Puchniak, *supra* note 9, 531.
416 Puchniak, *supra* note 9, 530 f.
417 LaPorta/Lopez-de-Silanes/Shleifer, *supra* note 125, 471 ff.
418 Gilson, *supra* note 123, 1661 ff.; Bebchuk, *supra* note 125, 25; Li-Wen Lin/Curtis J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 Stanford Law Review (2013) 744 f.

protection of an alternative regulatory environment and thus (partially) substituting the legal rules provided by the jurisdiction of the company's domicile.[419] Geographically, meaning especially in comparison to its peers in East Asia, Japan is in outlier due to its overall dispersed ownership patterns and the absence of controlling structures in business groups such as pyramidal family ownership.[420] The dispersed ownership patterns also set Japan apart from its Continental European peers such as Germany and France. Nonetheless, Japan is usually not assigned to the same group as the United States and the United Kingdom, due to the fact that from the perspective of the logic of the ownership dispersion debate public, non-*keiretsu* affiliated shareholders do not constituting the majority of the shareholders[421], and the perceived lack in robustness of investor protection despite the inadequacy of the explanatory power of the legal origins theory to comprehensively account for ownership dispersion despite the absence of investor protection.[422] At the same time, evaluating ownership patterns from the angle of control is complicated in Japan due to the cooperation of – horizontally and vertically – relational *keiretsu* shareholders as well as participating

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419 Doidge/Karolyi/Stulz, *supra* note 18, 3 f., 28 f. This is, for example, possible through a direct or a (cross-)listing of company shares under the American Depositary Receipt (ADR) program in the United States. On the limits of the bonding effect through listing under an alternative regulatory regime for cross-listed companies, see Amir N. Licht, *Cross-Listing and Corporate Governance: Bonding or Avoiding?* 4 Chicago Journal of International Law (2003) 141 ff. This observation is confirmed with more concreteness and contour in a more recent study which shows that companies may opt out of exchange governance requirements – which is possible since the stock exchanges in the United States allow cross-listed firms to comply with their domestic governance practices provided that they annually disclose the differences to the US-American exchange requirements – under certain conditions. Public companies with weaker governance (indicated by fewer independent directors), insiders enjoying their private benefits of control or being domiciled in jurisdictions with low levels of investor protection tend to opt out, while small companies that focus on growth and rely on the raising of capital may instead be more willing to comply, see C. Fritz Foley/Paul Goldsmith-Pinkham/Jonathan Greenstein/Eric Zwick, *Opting out of good governance*, 46 Journal of Empirical Finance (2018) 93 ff.

420 Claessens/Djankov/Lang, *supra* note 128, 99 ff.; Ronald W. Masulis/Peter Kien Pham/Jason Zein, *Family Business Groups around the World: Financing Advantages, Control Motivations, and Organizational Choices*, 11 The Review of Financial Studies (2011) 3578; Franks/Mayer/Miyajima, *supra* note 7, 2586 ff., report high rates of ownership dispersion for Japanese public companies also in the first half of the twentieth century.

421 Randall Morck/Daniel Wolfenzon/Bernard Yeung, *Corporate Governance, Economic Entrenchment, and Growth*, 43 Journal of Economic Literature (2005) Fn. 2.

422 Franks/Mayer/Rossi, *supra* note 33, 4036 ff., who find that higher levels of investor protection rather foster higher mutation than furthering ownership dispersion with respect to listed companies in the United Kingdon over the course of the twentieth century, *ibid.*, 4037. It might, however, be argued that an intensification of minority shareholder protection could not bring about any further significant ownership dispersion due to satiation levels having been reached already in the then absence of high levels of investor protection, or that high levels of investor protection at least contribute to maintain the status quo of ownership dispersion and to avoid that any concentration tendencies arise.

financial institutions not being visible solely from formal ownership data or at least not without aggregation of the collectively held stakes constituting the controlling block.[423] On the other hand, inquiries into any controlling structures in Japan are facilitated due to the applicability of the one-share-one-vote rule which has only recently been softened through introduction of the share unit system in 2001 which allows the adoption of a dual share-class structures.[424]

In view of the only limited significance of pure ownership data and to tackle the ensuing bias with respect to the underrepresentation of family-controlled firms, literature has started to incorporate the fact whether founding families hold top management positions into their inquiries, thus investigating control mechanisms without the reliance on material ownership stakes: Besides the occupation of top management positions, intangible, so-called "family assets" such as name and reputation, networks and relations in business and politics as well as the own talent pool for potential successors can prove vital to retain the legacy of a family firm.[425] A characteristic element in the practice of Japanese family firms is the adult adoption of outsiders that have proven capable successors and replacements for non-existent or not sufficiently adequate bloodline heirs into the family.[426] By applying a wider concept of control this research has brought to light that between ten and 30 per cent of the listed stock companies in Japan are continued to be managed by the founding family or their respective heirs.[427] The tradition of family involvement ties into the longevity narrative widely associated with Japanese firms as family control or management was found to continue for up to 50 years after the respective IPO for almost half of the firms considered to be controlled or managed by the founding family and their heir

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423 Stijn Claessens/Simeon Djankov/Joseph P.H. Fan/Larry H. P. Lang, *Disentangling the Incentive and Entrenchment Effects of Large Shareholdings*, 57 Journal of Finance (2002) 2744 f.; Morck/Wolfenzon/Yeung, *supra* note 421, 666.

424 Koji Toshima, *Cyberdyne's dual-class IPO*, International Financial Law Review (December/ January 2015) 43 ff.; Markus Janssen/Fumio Koma/Shintaro Kuroda/Peter Schimmann, *New Rules for Share Structure and Governance of Japanese Corporations*, 13 Journal Japanese Law (2002) 260. Araki/Saito, *supra* note 79, 154, report that listed companies make use of the share unit system to save shareholder management cost.

425 Bennedsen/Mehrotra/Shim/Wiwattanakantang, *supra* note 393, 3 ff., 17.

426 For more details and examples of the practice of adult adoption of outside managers into the founding families in Japan as a corporate succession strategy, see Vikas Mehrotra/Randall Morck/ Jung-Wook Shim/Yupana Wiwattanakantang, *Adoptive Expectations: Rising Sons in Japanese Family Firms*, 108 Journal of Financial Economics (2013) 840 ff.

427 Bennedsen/Mehrotra/Shim/Wiwattanakantang, *supra* note 393, 3.

generations with family-owned – ownership being assumed based on a five per cent cut-off –, but professionally managed companies accounting for the biggest fraction.[428]

In this vein, cross-shareholdings have been identified as a stumbling block to corporate governance overhauls and making Japanese stock corporations an investing target for foreign investors. Empirical evidence for a connection between the existence of cross-shareholdings and a discount on the share price of the concerned companies appears, however, to be only available to a limited extent[429], such as for bank ownership with domestic banks and insurance companies continuing to invest in what is perceived as low-quality stocks in contrast to foreign and institutional investors tending to pursue investments in high-quality stocks in terms of firms' profitability and financial robustness, since the domestic banks' and insurances' investment purpose does not exhaust itself in the investment, but is still found to have relational aspect.[430] Instead, the focus of recent studies has rather shifted towards the impact of institutional investors on business performance.[431]

In the aforementioned context, this thesis does not aim to contribute to the literature on controlling ownership patterns. The interest of this thesis lies in developing a better understanding of the historical course of ownership patterns and show that while company law takes an overall neutral stance towards reshufflings between dominant shareholder groups, such alterations may exercise an influence on the introduction and use of legal instruments. While controlling shareholders would certainly qualify as dominant shareholders, this does not apply vice versa: Dominant shareholders in the understanding of this thesis do not necessarily require the existence of control structures by meeting specific thresholds with respect to cash flow rights or voting rights.

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428 Bennedsen/Mehrotra/Shim/Wiwattanakantang, *supra* note 393, 3 f., 17 f.

429 In general, for a cross-jurisdictional study that ascertains a positive relation between levels of investor protection and firm valuation, see Rafael LaPorta/Florencio Lopez-de-Silanes/Andrei Shleifer/Robert Vishny, *Investor Protection and Corporate Valuation*, 57 Journal of Finance (2002) 1147 ff.

430 Miyajima/Hoda, *supra* note 329, 364, 389; Morck/Nakamura/Shivdasani, *supra* note 132, 539 ff.

431 Miyajima/Hoda, *supra* note 329, 372 ff.; Mizuno/Shimizu, *supra* note 11, 84 ff.

c) Convergence towards "shareholder primacy" or corporate governance cycles

With respect to corporate law, the idea of convergence[432] of corporate law has been suggested since the beginning of this century.[433] Similarly, the "anatomy of corporate law" literature by its very point of departure appears to have embraced such stance, when it identifies and compares certain defining key elements of the modern corporation.[434] However, recent legal innovation with respect to corporate governance, such as corporate governance and stewardship codices, have their origin in the United Kingdom.[435] Hence, it is not entirely clear towards which standard or benchmark convergence occurs, US-American corporate law may provide a signpost, but a dynamic one which itself is subject to addition and change. The orientation of the corporate law compass may very well change: In this vein, while the first corporations were incorporated in the United Kingdom, English law was overtaken by the developments in the corporate laws of France and the United States towards the middle of the twentieth century and only became a reference point in the 1860s and 1870s when the corporate laws in France and Germany began to draw on elements of the corporate system in the United Kingdom.[436] In addition, the implementation of stewardship codes, especially in jurisdictions in Asia, has shown that below the label of stewardship, there are structural differences with respect to role and function of stewardship, which can be partly attributed to the fact that the problem which was intended to be addressed by lawmakers in the United Kingdom, namely to turn institutional shareholders into responsible shareholders overcoming the structurally-induced rational passivity or apathy, is not as prevalent or virulent in Asian jurisdictions due to the widespread presence of – state, state-affiliated or family-based

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432 Arguably one could also speak of "reconvergence", thus paying tribute to the fact that by the law of the books corporate laws were initially, with respect to the key provisions comparable, before differentiating and branching off into different paths, see Pistor/Keinan/Kleinheisterkamp/West, *supra* note 92, 795. This view holds especially true for the jurisdictions of Continental Europe whose inaugural regulations on stock corporations were largely oriented at the, however few, provisions of the French Code de Commerce, see Andreas Deutsch, *Die Aktiengesellschaft im Code de Commerce von 1807 und ihre Vorbildfunktion für die Entwicklung in Deutschland* [The Stock Corporation in the Code de commerce and its function as a role model for the development in Germany], in: Walter Bayer/Mathias Habersack (eds.), AKTIENRECHT IM WANDEL [Stock Corporation Law in Change], Volume I (2007) 89 ff.

433 Hansmann/Kraakman, *supra* note 16.

434 Armour/Hansmann/Kraakman/Pargendler, *supra* note 121, 5 ff.

435 Lee Roach, *The UK Stewardship Code*, 11 Journal of Corporate Law Studies (2011) 463 ff. See for an overview of its origins and genesis, *ibid*., 464 ff.

436 Ahlering/Deakin, *supra* note 228, 893.

– controlling shareholders.[437] In the case of Japan, the stewardship code was considered a tool to supplement policies designed to achieve the change from a stakeholder- to shareholder-oriented governance system; in this vein, the stewardship code was designed to change the attitude of domestic institutional investors to prioritize shareholders over stakeholders interests, in substance meaning to make them responsible for monitoring corporate management and to aiming for higher returns of the funds invested in the interest of the ultimate beneficiaries.[438]

While Japan's corporate law and corporate governance system is not attested to have yet achieved (re)orientation towards shareholder primacy in the style of US-American corporation,[439] there appears to be a common tendency in the corporate laws of the United States, the United Kingdom, the Continental European jurisdictions and Japan towards a robust level of orientation towards shareholders – linked to the (re)development and reactivation[440] of global capital markets in the course of an increasing global interconnectedness. In light of the Anglo-American corporate legal sphere acknowledging stakeholder purposes in the context of the firm thus diverging from a full-fledged shareholder primacy and environmental, social and governance matters playing an important role also in the legislative efforts of the European Union whose member states subscribe to various heterogenous stakeholder-oriented approaches, the heydays of shareholder primacy appear to have indeed – for the time being – passed.[441] At the same time, a bit poignantly put against the background of the above-discussed idea of legal fashions, one may wonder how lasting and pervasive such departure will be.

At the same time, on the basis of a growing number of insights into the corporate governance mechanics in various Asian jurisdiction which as their European peers

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437 Gen Goto/Alan K. Koh/Dan W. Puchniak, *Diversity of Shareholder Stewardship in Asia: Faux Convergence*, 53 Vanderbilt Journal of Transnational Law (2020) 834 ff.

438 Goto/Koh/Puchniak, *supra* note 437, 859 ff.; Goto, *supra* note 96, 52.

439 Ronald J. Gilson/Curtis J. Milhaupt, *Shifting Influences on Corporate Governance: Capital Market Completeness and Policy Channeling*, 12 Harvard Business Law Review (2022) 28 f.; Dan W. Puchniak, *No Need for Asia to be Woke: Contextualizing Anglo-America's 'Discovery' of Corporate Purpose*, ECGI Working Paper Series in Law No. 646/2022 (June 2022) 8.

440 The use of the terminology redevelopment or reactivation instead of development or sophistication appear appropriate to describe the development of capital markets heeding attention to the concept of the "great reversal" with respect to the levels of capital market activity observed in specific jurisdictions, propounded by Rajan/Zingales, *supra* note 146, 5 ff., especially 39-41. On the other hand, it is equally legitimate to refer to development taking into account that the activities on capital markets prior to the "*great reversal*" were primarily borne by the domestic investors of the respective jurisdictions.

441 Puchniak, *supra* note 439, 1 ff.

have developed different multifarious stakeholder-centric models in the second half of the twentieth century, there appears to emerge an awareness that "*context matters*", which means that jurisdiction-specific approaches as to how corporations shall contribute to public wealth are acknowledged.[442] In such narrative, US-American style shareholder primacy or shareholder power is no longer seen as the panacea to attain good governance and corporate growth, as jurisdictions, especially in Asia, have demonstrated that economic success can be achieved also in the absence of dispersed ownership structures with less powerful (minority) shareholders.[443] In these jurisdictions – Japan being an outlier insofar –, concentration of voting rights amassed by block shareholders earn them direct corporate control which has proved more effective than hostile takeovers or proxy battles could in the context of US-American corporate law.[444] Efficient controlling shareholder structures have been acknowledged as a viable monitoring strategy due to immunity against the collective action problem; however, while they reduce managerial agency costs, they cause the private benefits of control risk.[445] In addition, controlling shareholder structures are not unknown to US-American stock companies, they are just not the archetypical – the literature focuses on typical structures in various jurisdictions which naturally does not preclude the occurrence of diverging ownership structures – ownership pattern for very large firms with recently rising technology companies being prominent outliers from the mainstream.[446] Such narrative potentially intones the perish song for the illusion of a global norm of corporate law and corporate governance. In response to these developments and observations, the expectation of convergence towards uniform global standard of shareholder primacy has started to make way for a more dynamic concept, the idea of "*corporate governance cycles*" or the "*cyclicality of corporate governance*" to describe the phenomenon that capital markets in different jurisdictions have despite their above-mentioned interconnectedness reached different degrees of market completeness or find themselves at different stages on the shareholder- versus stakeholder-primacy-continuum.[447] In view thereof, instead of focusing on a global norm it may be more adequate to focus on key metrics as indicators that shareholder interests in the overall concert of stakeholder interests are catered to. Thanks to increasing transparency standards, corporate profitability metrics such as ROE, price-

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442 Puchniak, *supra* note 439, 14.
443 Puchniak, *supra* note 9, 512 ff.
444 Puchniak, *supra* note 9, 514, 523 f.
445 Gilson, *supra* note 123, 1651 ff.
446 Cheffins/Bank, *supra* note 87, 467; Gilson, *supra* note 123, 1660.
447 Gilson/Milhaupt, *supra* note 439, 5, 7, 37 ff.; Puchniak, *supra* note 439, 14.

to-book ratios, dividend rates, etc., have established themselves as firm-specific variables, at which (outside) shareholders, who predominantly only pursue monetary gains from their investment through stock price appreciation and dividends, orient their investment decision, but on which also regulators such as Tokyo Stock Exchange keep a keen eye. An in the international comparison high ratio of Japanese publicly listed stock companies have long been perceived as trading below book value which is interpreted as an indication for a lack of investors' trust in the generation of corporate growth.[448] In this vein, increases in profit distribution in Japanese listed stock companies signal an affirmative attitude towards shareholder-orientation.[449] In addition, regulatory pressures to make stock companies embrace shareholder-friendly policies is maintained, as the Tokyo Stock Exchange exhorts listed stock companies to live up to principles enshrined in the corporate governance code, such as efficient capital allocation and increased attention to firm profitability and entrepreneurial risk taking in light of a significant share of public companies continuing to fall short of benchmarks with respect to ROE and price-to-book ratios in the international comparison and has follow-up with extending disclosure requirements to encourage and nudge companies towards compliance.[450] Echoing such regulatory efforts, the current corporate governance system is still diagnosed to require reform.[451]

II. Applied Methodology

1. Approach

As seen in the foregoing sections, various factors have been investigated and purported as driving changes in the ownership patterns, especially the mechanisms behind the

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448 Ken Hokugo/Alicia Ogawa, *The Unfinished Business of Japan's Stewardship Code*, Columbia Business School, Center on Japanese Economy and Business, Working Paper Series No. 1 (2017) 2; Financial Services Agency, *TSE's Recent Initiatives on Corporate Governance* (19 April 2023), available under: https://www.fsa.go.jp/en/refer/councils/follow-up/material/20230419-03.pdf (last accessed 15 January 2024).

449 Miyajima/Saito, *supra* note 109, 389.

450 Japan Exchange Group, *Action to Implement Management that is Conscious of Cost of Capital and Stock Price* (31 March 2023) and *TSE to Publish a List of Companies That Have Disclosed Information Regarding 'Action to Implement Management That Is Conscious of Cost of Capital and Stock Price* (26 October 2023) available under: https://www.jpx.co.jp/english/news/1020/dreu250000004n19-att/dreu250000004n8s.pdf and https://www.jpx.co.jp/english/news/ 1020/o4sio70000000l42-att/o4sio70000000l6o.pdf (each last accessed 15 January 2024) as well as Financial Services Agency, *supra* note 448.

451 Gen Goto, *Japanese corporate governance: Quo Vadis?* The ECGI Blog (9 August 2023), available under: https://www.ecgi.global/blog/japanese-corporate-governance-quo-vadis (last accessed 15 January 2024).

two poles of ownership concentration and dispersion. While this thesis can build upon the knowledge and data dealt with in the course of such literature, its main focus lies on demonstrating that changes between different groups of shareholders, which might be associated with either ownership concentration or dispersion, or go hand in hand therewith, are widely immune to changes in the law, including both statutory as well as soft law regulation. Insofar, this thesis follows in the footsteps undertaken by other authors with respect to their investigation into possible driving forces of ownership dispersion in the United Kingdom and their observation that levels of investor protection do not necessarily coincide with high ownership dispersion rates.[452] The aforementioned reshuffling in the composition of the shareholder class is conceptualized as to occur due to shifts in the macroeconomic sphere.

2. Collection of Data on Japanese Stock Companies

For the purpose of this investigation and to support the normative argumentation, the thesis will in the following rely on representative data on share ownership in Japanese stock companies between 1900 up to the present days. The main aim lies on identifying different groups of shareholders and reshufflings between these groups. Since the thesis seeks to argue and demonstrate that corporate law is *per se* shareholder-oriented and that it rather depends on the dominant groups of shareholders whether legal instruments provided by existing – equally statutory and non-statutory – corporate law are utilized and demand for new regulation is articulated, the thesis will trace the historical development of dividend payout ratios as well as dividend yields which should indicate historical phases during which the investment by outside shareholders was perceived as salient by public stock corporation urging them to adopt outside investor-friendly policies. Since dividends are widely regarded as an indication that stock companies seek to return corporate wealth to shareholders, and share repurchases have only recently been admitted under Japanese law, the thesis will focus on the development of dividend payments to measure the shareholder-orientation or shareholder-friendliness of stock companies in Japan, taking, however, into consideration that such measurement is primarily cherished by income-oriented outside (institutional) investors and might therefore not be as palatable to insider shareholders who pursue, for example, relational purposes with their equity holdings. The empirical part will be complemented by investigating the ratio of equity finance versus other sources of corporate finance, focusing on bank finance. High ratios of

[452] Franks/Mayer/Rossi, *supra* note 33, 4011 ff.

reliance on outside finance through equity are expected to be accompanied by comparatively high ratios of outsider shareholdings and robust dividend payouts to satisfy and reward the outside shareholders for their commitment and to further attract their investment. The thesis will primarily rely on data supplied by existing literature for the different aspects and time periods covered[453] as well as reasonably available primary data as provided by the Tokyo Stock Exchange.[454]

3. Analysis of the "Lifespan" of Key Instruments of Corporate Law in Japan

In the next part, so as to "mirror" the analysis of the factual aspects of business practice, the thesis will proceed to analyze the "lifespan" of key instruments of statutory corporate law in Japan. The "lifespan" approach means the tracing of a statutory law provision or instrument from the time of its adoption until its current form taking into the intermediate steps in the course of its development. Such approach has recently been applied in the comparative law literature for isolated elements of corporate law.[455] Due to the multitude of statutory corporate law provisions and instruments, the thesis is forced to make a selection and will focus on five legal provisions or instruments which it deems as crucial and constitutive as well as at the same time characteristic for Japanese corporate law. Another aspect considered in the selection of these five legal instruments of Japanese corporate law is the aim to cover a cross-section of such legal instruments spanning from the adoption of Kyū-Shōhō and Shōhō over the most incisive turning points key or turning points in the development of stock corporation law in Japan until its consolidation in the contemporary legal framework.

In the course of this part of the investigation it will become clear that changes in the legal framework on the one hand, and reshufflings between different groups of owners do not necessarily correlate. It is rather that changes in ownership patterns are triggered by exogenous shocks which may take their time to fully unfold to find complete expression. Corporate law may channel developments and set accentuations, but it is up to the actors on the corporate law plane to utilize the legal instruments provided to

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453 See, for example, Hideaki Miyajima, SANGYŌ SEISAKU TO KIGYŌ TŌCHI NO KEIZAISHI: NIHON KEIZAI HATTEN NO MICRO BUNSEKI [An Economic History of Industrial Policy and Corporate Governance: A Microanalysis of Japanese Economic Development] (2004) 1 ff.; Kitaura, *supra* note 147, 48 ff.

454 For example, Japan Exchange Group, *2022-nendo kabushiki bunpu jōkyō chōsa no chōsa kekka ni tsuite* [The Survey Results of the Survey of the Distribution of Shares in Fiscal Year 2022] (2023), available under: https://www.jpx.co.jp/markets/statistics-equities/examination/01.html (last accessed 21 January 2024).

455 For this term, see McGinty, *supra* note 134, 160 f.

them. Since changes in ownership patterns occur due to extra-legal influences, the influence of law is mediated via macro-economic developments.

4. Construction of a Narrative with Respect to the Shareholder-Friendliness

Based on the findings produced in the two preceding chapters, the thesis then seeks to establish that factors outside the legal arena, macro-economic trends, bring about shifts in ownership patterns with reshuffling between different groups of investors conditioning the use or non-use of legal instruments provided by the legal framework equally formed by statutory and non-statutory norms. Depending on the dominant groups of investors, investors may voice demands for legal reform to which lawmakers will indulge if such investor group is salient or such demands align with policy considerations. Consequently, corporate law only plays a facilitating role with respect to corporate practice. Shareholder-specific regulation requires to be enlivened by an active class of shareholders, a requirement that shareholders that pursue purposes not directly tied to the financial aspects of an investment usually do not fulfill.

The reshuffling between different groups of shareholders is embedded in the overall timeline of the life cycle of firms which generally speaking entails that firms move from concentrated to more dispersed patterns which the latter postulation not precluding the possibility that firms are still comparatively concentrated, however, for the majority of firms concentration tends to decrease in proportion with the lifespan of the firms. The dispersion rate may differ depending on the momentary overall macro-economic climate in the very period a specific firm goes public.[456] With an eye to this life cycle of the firm – read, in the context of this thesis, stock company –, Japanese stock companies provide an excellent set of examples given that initially a significant portion was incorporated and went public upon or in proximity to the enactment of Kyū-Shōhō entailing that a lot of stock companies – outside the *zaibatsu* structures – started their public lifetime and visibility more or less simultaneously.

Currently, the class of institutional investors have taken over the helm, a tendency which appears to stay and further deepen given that the overall global trend of corporate concentration and the relevance of capital markets for pension funding

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[456] For differences in the speed by which dispersion during the post-IPO period occurred for Japanese stock companies that went public in the postwar era, see Hiroyuki Okamuro/Yupana Wiwattana-kantang/Jungwook Shim, *Nihon kigyō no shoyū kōsō no hatten katei* [The Development Process of Ownership Patterns of Japanese Corporations], Hitotsubashi University COE-RES Discussion Paper Series, No. 265 (March 2008) 1 ff.

persists.[457] The rising relevance of private equity might, however, gain relevance and offer a way out for stock companies preferring to avoid scrutiny and articulated as well as implied compliance demands by institutional investors. Stock corporation law – again, in terms of statutory law, self-regulation (for example, through the Tokyo Stock Exchange's listing rules and requirements) and soft law mechanisms – only functions as an "amplifier" as by its means policymakers and lawmakers put more emphasis on the demand and palate having surfaced and having become more distinctly articulated as well as the legal convictions displayed by institutional investors.

However, as remarked by scholars such as Buchanan/Chai/Deakin, institutional investors do so in the framework of existing institutions of the Japanese "community firm"[458], which is, however, not to imply that limits of such community cannot be moved or redefined. Changes in the macro-economic climate and the ensuing reshuffling of ownership patterns meet an existing jurisdiction-specific institutional framework. This encounter raises the question whether the development of company law is conditioned by the initial institutional lock-in, or whether company law is molded and adjusted through functional adaptation to the economic circumstances.[459]

The thesis tends to assume that a combination of both appears. While certain so-called "*carriers of history*" [460] exercise their influence, economic exigencies through mediation of the stakeholders relevant to company law of history likewise exercise their influence. The adoption of outside investor-oriented corporate regulation and practices – since shareholderism or shareholder-friendliness is to a certain extent a tautology in the view of this thesis – thus assumes idiosyncratic jurisdiction-specific characteristics. As the extended historical perspective adopted by this thesis aims to demonstrate, such characteristics can even have developed prior to the aforementioned institutional lock-in and may subsequently resurface in different guises over various periods of economic and institutional formation and development.

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457 Gelter, *supra* note 4, 15, 18, 26.
458 Buchanan/Chai/Deakin, *supra* note 6, 77.
459 Ahlering/Deakin, *supra* note 228, 894 f.
460 Paul David, *Why Are Institutions the 'Carriers of History'? Path Dependence and the Evolution of Conventions, Organizations and Institutions*, 5 Structural Change and Economic Dynamics (1994) 205 ff.; Ahlering/Deakin, *supra* note 228, 899 ff.

CHAPTER II

ARRIVAL OF THE STOCK COMPANY CONCEPT IN JAPAN

Opting for a historical perspective begs the questions for an adequate starting point. Notwithstanding that this thesis focuses not only on the letters of law, but also on the pertaining and surrounding legal institutions, the enactment of the first general commercial code in Japan in the form of the its inaugural promulgated version in 1893, the Kyū-Shōhō or Old Commercial Code, arguably offers an appropriate entry point, equally into the empirical aspect of the development of ownership patterns of Japanese stock companies (infra Chapter III) as well as for the tracing of the origins and the historical development of contemporary legal institutions (infra Chapter IV). The enactment of the Kyū-Shōhō marks a watershed moment as the first comprehensive codification of the stock corporation concept in Japan, thus paving the way for the adoption and spread of stock companies among a wider circle of entrepreneurs.[461] The codification of the stock corporation in the Kyū-Shōhō figures as the preliminary capstone and means the consolidation of preceding sectoral – such as with respect to the banking industry – legislative attempts of defining as well as disseminating the stock corporation concept. Furthermore, this point in time coincides with the takeoff of the industrialization process which is widely considered the formative time for the constitution of the modern economic and legal institutional framework of Japan.[462]

Coming back to the aforementioned (legal) institutions, apart from the stock corporation concept being firmed up in a definition and codification, stock companies moved in a broader dynamic context of societal and institutional arrangements.[463] As such, stock companies on the one hand responded to demands of the market and rules of society, as well as on the other hand contributed to the formation of new rules through mutual interaction with other social actors, institutions and rules.[464] This

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461 Codification is said to be apt to interrupt the historical continuity of law, see Frederick H. Lawson, THE RATIONAL STRENGTH OF ENGLISH LAW (1951) 19, which does not preclude the perpetual relevance of unwritten rules in the legal practice or the living law, see Kinoshita, *supra* note 19, 16.

462 Katharina Pistor, *Legal Ground Rules in Coordinated and Liberal Market Economies*, in: Klaus J. Hopt/Eddy Wymeersch/Hideki Kanda/Harald Baum (eds.), GOVERNANCE IN CONTEXT: CORPORATIONS, STATES, AND MARKETS IN EUROPE, JAPAN, AND THE US (2006) 254, Fn. 23.

463 Aoki, *supra* note 340, 12.

464 Aoki, *supra* note 340, 12 f.

interplay with the wider fabric of socio-economic institutions suggests that the stock corporation concept – even if it was transplanted from other jurisdictions to Japan – could built on existing institutions and form in reciprocal interaction with them. In this vein, this chapter seeks to look into the string of events in the few decades leading up to the concretization and crystallization of the stock company in the Kyū-Shōhō and recapitulate the existing institutions on which the "new" concept could built.

I. Introduction

Coming out of the Tokugawa period, the mercantile activities were primarily conducted by the growing class of merchants whose most notable exponents were powerful merchant houses which had formed in the early Tokugawa period in the late seventeenth century, such as Mitsui, Sumitomo and Kōnoike,[465] which had developed a network of shops and branches in the political and commercial centers of Kyoto, Osaka and Tokyo (then Edo). However, these actors were commonly organized on a partnership or cooperative (*kumiai*) principle and only in very limited instances undertook joint ventures which set them significantly apart from the modern understanding of a stock corporations.[466] Besides this financial aspect of capital mobilization and accumulation, the organizational aspect became relevant insofar as economic ventures into the new industries required specific knowhow and expertise on the management level. At this time, the available response to this demand was the recruiting of Japanese students, who had studied and gained experience abroad, who, however, usually did not have the sufficient financial resources to capitalize therefrom: The stock company was thus also instrumental to match this new talent with existing capital resources in the hands of the merchant families or the former samurai class.[467]

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[465] These three merchants are commonly considered the great three merchants of the Tokugawa period, see Hideki Hatakeyama, SUMITOMO ZAIBATSU SEIRITSU-SHI NO KENKYŪ [Research on the History of the Formation of the Sumitomo Zaibatsu] (1988) 3, with Sumitomo being the oldest of such family businesses with its roots in Kyoto in the seventeenth century, or even late sixteenth century if the copper refinery of the Soga family which was adopted after marriage into the Sumitomo family is taken into account, Hatakeyama, *ibid*., 4 ff.; Sumitomo Corporation, *History of Sumitomo Corporation*, available under: https://www.sumitomocorp.com/en/jp/about/company/sc-history (last accessed 4 September 2023); Hidemasa Morikawa, ZAIBATSU: THE RISE AND FALL OF FAMILY ENTERPRISE GROUPS IN JAPAN (1992) 15 f. Shimada and Ono are likewise regularly mentioned, see, for example, Kazuo Saegusa, MEIJI SHŌHŌ NO SEIRITSU TO HENSEN [Formation and Change of the Meiji Commercial Law] (1992) 24.

[466] Saegusa, *supra* note 465, 24 with further references.

[467] Matao Miyamoto, *Capitalism by the "Visible Hand": The Joint-Stock Company System, Business Leader (Zaikaijin), and Shibusawa Eiichi*, in: Patrick Fridenson/Takeo Kikkawa (eds.), ETHICAL CAPITALISM: SHIBUSAWA EIICHI AND BUSINESS LEADERSHIP IN GLOBAL PERSPECTIVE (2017) 78.

The available pieces of evidence then suggest that concept and design of a stock company did not develop endogenously in Japan. The demand for such enterprise form had apparently not arisen or time to develop, may it be due to the stage of economic development or the absence of undertakings requiring to attract capital from a wider basis of investors going beyond the merchant family or family network. The virtual isolation from international trade saves for a few exceptions at port towns such as Nagasaki and Hirado might have further contributed thereto. Hence, when the Tokugawa shogunate was swept away and a new group of statesmen took over in the late Tokugawa period carrying governmental responsibilities over into the Meiji period moved ahead with their push for a modernization under the slogan of "*wakon yosai*"[468], the concept of a stock corporation or incorporation of enterprises on stock corporation principles was rather straightforward accepted and transposed to Japan. The transplantation followed the purpose of promoting the creation of public property (in contrast to closely-held merchant businesses)[469] and of investor consciousness, i.e., widespread use of stock corporations for meeting the capital and know-how demands of a full-fledged industrialization. Viewing this process through the lens of the financial aspect of an overall economic approach[470], besides a certain portion of grassroot demand for the incorporation of stock companies – such as Maruzen[471] – for the large portion, the stock corporation was employed as a tool of economic policy to mobilize and channel inactive capital resources[472] for what the political elite of the

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468 The term (和魂洋才) is translated into "the Japanese spirit and Western techniques" and used to refer to the adoption of Western technique while upholding Japanese values. The term was coined by Yoshikawa Tadayasu in his work "*Kaika Saku-ron*" [Questions and Themes on Progress], first published in 1867. While the foreign laws were not imposed, but voluntarily transplanted, the pressure exercised by the unequal treaties urged the Meiji elites to modernize, inter alia, the laws and orientate the codifications at the laws of the Western powers, see Yasuhiro Okubo, *Meiji Nihon no Hōseibi Jigyō to Bowasonādo* [G. Boissonade and Legal Development Project in Meiji Japan], 32 Waseda Daigaku Hikaku-hō Kenkyū-jo Sōsho [Waseda University Comparative Law Study] (2005) 62.

469 Masakazu Shimada, *Tensions between the Open Market Model and the Closed Zaibatsu Model*, in: Fridenson/Kikkawa, *supra* note 467, 30.

470 The contrasting or complementing perspective would focus on the organizational aspects, see Masahiko Aoki (ed.), *Varied Frames of Corporate Cognition and Self-Governance*, in: Aoki, *supra* note 218, 19.

471 See for the corporate history of Maruzen, Maruzen Publishing, *150th Anniversary of Founding Maruzen* [Maruzen Sōgyō 150 Shūnen], available under: https://www.maruzen-publishing.co.jp/info/n1942_0.html (last accessed 10 April 2023). On the other hand, companies such as Takeda Pharmaceutical Company Limited that can trace its beginnings back to 1781 was only incorporated in 1925, see Takeda, *Our History*, available under: https://www.takeda.com/about/our-company/history/ (last accessed 19 December 2023); W. Mark Fruin, THE JAPANESE ENTERPRISE SYSTEM: COMPETITIVE STRATEGIES AND COOPERATIVE STRUCTURES (1992) 103 f.

472 For the theoretical framework arguing for the relevance of stock companies for economic growth and progress in general, see Ross Levine, *Financial Development and Economic Growth: Views*

late Tokugawa and early Meiji periods considered its most productive use, and to achieve progress and establish a thriving economy[473], thereby completing the transformation from a well-developed early modern economy relying on agriculture, crafts and trade, however, still within the bounds of mercantile activity, to a widely industrialized economy within a mere five decades between the middle of the nineteenth and the onset of the twentieth century.

However, given the only vestigial availability of legal concepts related or bearing resemblance with the stock corporation, a significant conceptual leap was required to be performed to implement the transplantation process. The transposition ultimately occurred in three stages until the formal consolidation through integration into the aforementioned Old Commercial Code around the turn to the twentieth century took place. This timeline shows that Japan succeeded in formally catching-up in the domain of stock corporation law with its peers in the Western jurisdictions within a very compact time span[474] – the speed of the catching-up process resulting in the situation that jurisdictions which initially figured as borrowers of the stock corporation concept found themselves busy with completion and critical revision of their very own codifications in the late nineteenth century.[475]

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and Agenda, 35 Journal of Economic Literature (1997) 691; Thomas Cochran, *The Business Revolution*, 79 American Historical Review (1977) 1456 ff., and with respect to Japan, Richard S. Grossmann/Masami Imai, *The evolution of a national banking market in pre-war Japan*, 45 Economic History (2008) 17.

473 These goals were articulated, for example, by Eiichi Shibusawa, one of the Meiji reformers and architects of the modern economic constitution, see Shimada, *supra* note 469, 30.

474 Miyamoto, *supra* note 467, 75.

475 For example, Germany only adopted the initial and subsequently revised Stock Corporation Act in the years 1870 and 1884, respectively. In France, commercial law had been codified in the Code de Commerce of 1807. However, a key principle such as free incorporation was only codified in 1867. Similarly, in England, the Joint Stock Companies Act of 1844 was comprehensively overhauled in 1862 and such amended version then served as the basis for transplantation to the colonies. The 1844 version had lacked, inter alia, acknowledging the limited liability principle which only followed in 1855. Likewise, the corporate law of Delaware developed in the second half of the nineteenth century with a first act being passed in 1875 and amended in 1883, before the Delaware General Corporation Law was enacted in 1899. See for these examples, Pistor/Keinan/ Kleinheisterkamp/West, *supra* note 92, 798 f., 805 ff. For Delaware law, see, S. Samuel Arsht, *A History of Delaware Corporation Law*, 1 Delaware Journal of Corporate Law (1976) 4 ff. This conceptual leap within such contracted period appears all the more remarkable given that the institutions defining Western capitalism evolved over considerably long periods, a process which appears hardly replicable. Skepticism with respect to the replicability of the long-evolved institutions of Western capitalism was uttered with regard to the transitional economies in light of their departure of socialism post 1989 by Pranab Bardhan/John E. Roemer, *Market Socialism: A Case for Rejuvenation*, 6 The Journal of Economic Perspectives (1992) 102 f. The incredibly fast catch-up is, however, also viewed as not having been sufficiently pervasive, a fact which is cited with respect to the main bank system as a response to imperfect financial market

II. The Emergence of the Joint-Stock Company Concept

There appears to be consensus that the concept of the joint stock company, as the dominant corporate form employed for pursuing private business purposes[476], and its predecessors has a strong European imprint and origin.[477] While the European provenance being rather undisputed, exact origin and genealogy remain nebulous at times. The existence of the different elements defining the modern stock corporation becomes increasingly diffuse the further back in time such roots are traced.[478] In the European jurisdictions it is possible to trace back the stock corporation to the commercial associations which had developed in the Middle Ages to a reliable extent.[479] If one focuses on the modern concept of the stock corporation – thus

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conditions in the post-war period, see Akiyoshi Horiuchi, *Informational Properties of the Japanese Financial System*, 1 Japan and the World Economy (1989) 257 ff. At the same time, the heavy bank involvement in the postwar economy in Germany is traced to similar reasons, see Bardhan/Roemer, *ibid*., 103.

476 Political, municipal and religious corporations as public law entities had also existed in Japan, see Ryosuke Ishii, JAPANESE LEGISLATION IN THE MEIJI ERA (translated by William J. Chambliss, 1958) 609.

477 The origins of the corporate entities in general are traced to Roman law (the term "*corpus*" as well as various forms thereof, such as "*societas (publicanorum)*", "*collegium*" and "*municipium*") with, however, the relationship between the individual members and the corporation, thus the aspect of legal personality, remained unclear, see Douglass C. North/John Joseph Wallis/Barry R. Weingast, VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR INTERPRETING RECORDED HUMAN HISTORY (2009) 158 ff., and the concept of a joint-stock company remaining vague at that time, see Geoffrey Poitras/Frederick Willeboordse, *The societas publicanorum and corporate personality in Roman private law*, 63 Business History (2021) 1055-1078; Kuran, *supra* note 251, 789 f.

478 Clive M. Schmitthoff, *The Origin of the Joint-Stock Company*, 3 The University of Toronto Law Journal (1939) 76 ff., with such debate revolving around whether there a conceptual line can be drawn between the public loan constructs issued in equal parts in medieval Upper Italian cities such as Genoa, which experienced a transformation from fixed interest rates to a participation in profits, i.e. dividend, in case the issuer could not redeem the loan or pay the interest, and the development in the United Kingdom, the Netherlands and France in the seventeenth century. The loan origin nonetheless pinpoints the dimension of the capital raising aspect direct to the public or wide range of potential loan providers or investors. See also Albrecht Cordes/Katharina Jahntz, *Aktiengesellschaften vor 1807?* [Stock Corporations prior to 1807?], in: Bayer/Habersack, *supra* note 432, 6 f.

479 Pistor/Keinan/Kleinheisterkamp/West, *supra* note 92, 799. Attempts were made to extend the genealogy even beyond, especially with respect to the corporation in general, for an overview, for example, on the – doctrinal – issues on the nature of the stock corporation and its qualification as a legal entity in Germany in the discussion during the codification process of a unified commercial code which also covered the provisions pertaining to the stock corporation, see Louis Pahlow, *Aktienrecht und Aktiengesellschaft zwischen Revolution und Reichsgründung. Das Allgemeine Deutsche Handelsgesetzbuch von 1861* [Stock Corporation Law and Stock Corporation between Revolution and the Foundation of the Empire. The General Commercial Code of 1861], in: Bayer/Habersack, *supra* note 432, 251 ff. For a detailed overview from a comparative law angle, see Wolfgang Wagner, GESELLSCHAFTSRECHT DEUTSCHLAND [Company Law Germany], in: Helmut Coing (ed.), HANDBUCH DER QUELLEN UND LITERATUR DER NEUEREN EUROPÄISCHEN

ignoring potentially deeper lying historical roots – its formation is associated with the chartered enterprises of the United Kingdom and the Netherlands in the early seventeenth century, notably for their respective colonial, overseas ventures.[480] The actual first stock corporations bearing such name, however, still relying on state concession, and closer resembling the contemporary concept were found in the United Kingdom and the United States since the early nineteenth century. The French Code de Commerce of 1807 provided for an initial statutory basis for the stock corporation and also defining the limited liability principle as a key structural element of the stock corporation.[481] The Code de Commerce greatly influencing successive legislative undertakings in Continental Europe. The federal states of New York in 1811 and New Jersey in 1816 in the □nited States soon followed suit; important codifications such as the Joint Stock Companies Act of 1844 in the United Kingdom, which however did not enshrine the limited liability principle which was only introduced – however, not universally – through the Limited Liability Act of 1855[482], and in Delaware in 1875 and 1899 followed significantly later.[483] In Germany, the Prussian Stock Corporation Code of 1843 had adopted the limited liability principle[484]; the stock corporation, however, only became relevant as an enterprise form upon liberalization of the incorporation process in 1870 triggering an incorporation boom lasting until 1873.[485] The different dates of adoption of the limited liability principle reveal an interesting pattern, namely that the limited liability principle took root first in the Continental European jurisdictions which were economically lagging behind the United States and the United Kingdom. However, one may argue that the limited liability principle might have been less relevant or at least urgent given that stock corporations in the nineteenth century were heavily relying on equity rather than outside capital.[486]

PRIVATRECHTSGESCHICHTE [Handbook of the Sources and Literature of the Newer European Private Law History], Volume III/3 (1986) 2969-3041; Phillip I. Blumberg, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW (1993) 3 ff. on the Anglo-American legal sphere.

480 For example, Kuran, *supra* note 251, 806 ff.

481 Tilman Bezzenberger, DAS KAPITAL DER AKTIENGESELLSCHAFT: KAPITALERHALTUNG - VERMÖGENSBINDUNG - KONZERNRECHT [The Capital of Stock Companies: Capital maintenance - asset commitment - corporate group law] (2005) 83.

482 Paul L. Davies/Sarah Worthington/Eva Micheler, GOWER AND DAVIES' PRINCIPLES OF MODERN COMPANY LAW (8th edition, 2008) 5.

483 Pistor/Keinan/Kleinheisterkamp/West, *supra* note 92, 798 f.; Arsht, *supra* note 475, 4 ff.

484 Bezzenberger, *supra* note 481, 83 f.

485 Fohlin, *supra* note 381, 259.

486 Bezzenberger, *supra* note 481, 40 ff., 83 f. While from today's perspective, limited liability is ultimately a consequence of the separate legal personality of a stock company, for example, in Germany in the legal discourse of the late eighteenth and nineteenth century limited liability was

From the angle of company law taxonomy, the nineteenth century brought about the separation between the corporation from the partnership having its roots in the law of agency[487], after the early nineteenth century had provided the relevant impulses for the formation and consolidation of the modern stock corporation.[488] The emergence of the stock corporation as an enterprise form is universally perceived as a crucial development in the history of business tantamount with the transition to a capitalist economic constitution.[489]

1. Common Denominator of Characteristics of a Stock Corporation

In order to further resume with the course of the thesis, it is deemed useful to recapitulate the characteristic qualities which define a stock corporation. While number and composition of these characteristics have been in flux with different intensity of debate or divergence with respect to some of the criteria, the following ones, which are oriented at those purported by the anatomy of corporate law literature[490], can arguably be considered as a selection being mostly in line with the common denominator. Hence, for the purpose of this thesis the following five elements shall be considered as being integral and constituting the joint-stock corporation idea:

(i) Legal personality[491] meaning the existence as a distinct legal entity which is subject to legal duties and creditors' claims as well as entitlement to legal rights that maintains a bundle of designated assets distinct and partitioned – as a

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not necessarily viewed as a constituting element of the stock corporation, nor was the acknowledgement as a separate legal entity, see Großfeld, *supra* note 406, 102 ff.

487 Davies/Worthington/Micheler, *supra* note 482, 4 ff..; with the chain of development from the *commenda* (resembling the modern commission agency) leading over the silent partnership to general and limited partnership constructions, see, for example for Germany, Wagner, *supra* note 479, 2982.

488 Cordes/Jahntz, *supra* note 478, 3.

489 Andrew Lamont Creighton, THE EMERGENCE OF INCORPORATION AS LEGAL FORM FOR ORGANIZATIONS (1990) 11; Cochran, *supra* note 472, 1449-1466.

490 Armour/Hansmann/Kraakman/Pargendler, *supra* note 121, 5 ff.

491 The debate whether legal personality is the recognition of a pre-existing fact or a legal fiction is rather theoretical, Davies, *supra* note 487, Fn. 5, and remains outside the scope of this paper.

"*separate patrimony*"[492] – from those of any natural person being its member (basic component of "*entity shielding*"[493]);[494]

(ii) Perpetuity of existence of the "disembodied"[495] entity uncoupled from the active period and lifetime of any of its managers and owners, meaning the life of the organization being defined by its identity rather than its members' identity resulting in increased durability of enterprises as well as increasing credibility of long-term commitments;[496]

(iii) Freely transferable shares in the ownership of the company facilitated by the separation between business and its assets belonging to the company and the shares in the company belonging to its members; [497]

(iv) A corporate organization, referring to the – besides the absence of person-related reasons for dissolution or liquidation (covered afore under (ii)) – the separation between management and ownership formalized through the

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492 Armour/Hansmann/Kraakman/Pargendler, *supra* note 121, 5.

493 This partitioning of assets implies that personal creditors of the shareholders are barred from the seizing company assets, see Henry Hansmann/Reinier Kraakman/Richard Squire, *Law and Rise of the Firm*, 119 Harvard Law Review (2006) 1337 ff.; Gabriel Rauterberg, *The Essential Roles of Agency Law*, 118 Michigan Law Review (2020) 609-654, 613 f. The characteristics of separate legal personality and limited liability are closely interwoven, see also Davies, *supra* note 309, 36.

494 Legal personhood as the capacity to entertain a pool of assets separate from agents and owners is arguably the aspect which sets a company apart and which would not be easily replicated through private arrangements, see Rauterberg, *supra* note 493, 653, challenging the triviality argument proffered by Bernard S. Black, *Is Corporate Law Trivial? A Political and Economic Analysis*, 84 Northwestern University Law Review (1990) 542-597.

495 Davies/Worthington/Micheler, *supra* note 482, 42.

496 North/Wallis/Weingast, *supra* note 477, 152. Strictly speaking, legal personality implies the acceptance of perpetual existence, since the legal person conceptually builds on that the aspects of independent identity and impersonality in the sense of relevance of the perpetually lived organization, *ibid*., 152, 158. Similarly, Aoki, *supra* note 340, 4, views legal personality and the capability to own property emanating therefrom as ensuring the perpetuity aspect. Similarly, Davies, *supra* note 309, 9 does not include the perpetuity aspect as a core characteristic. The element of perpetual existence had already been identified as constituting by the famous English jurist Blackstone in his definition of the corporate form in general in the eighteenth century, Sir William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS, Volume 1 (1753) Chapter 18, section II, 476 f., available under: https://files.libertyfund.org/files/2140/Blackstone_1387-01_EBk_v6.0.pdf (last accessed 28 November 2023) who vividly elaborates that "*for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies: in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant*", *ibid*., 469.

497 Davies/Worthington/Micheler, *supra* note 482, 45. Free transferability does not necessarily translate into freely tradeable shares since there might be restrictions such as the requirement of consent or limitation as to the potential transferees, see Armour/Hansmann/Kraakman/Pargendler, *supra* note 121, 10.

delegation to a specialized management, usually organized in form of a board,[498] and allocation of control rights over the company to the members through majority rule in the general shareholders' meeting; and

(v) The limitation of the owners' liability to the amount of their investment ("*complete owner shielding*"), also implying the "lock-in" of owners' investment amounts ("*liquidation protection*" as the additional element of the "*entity shielding*")[499] as well as the as well as the indemnification of the company's managers.[500]

The identified five key elements defining a stock corporation vary with respect to one aspect from the selection purported by the anatomy of corporate law literature, namely insofar that the perpetuity concept is included in the list and replaces the aspect of investor ownership.[501] The aspect of investor ownership defined as being entitled to participatory control through appointment of the directors and major decisions being subject to the majority vote of the shareholders' general meeting, as well as to the residual earnings or profits proportionate to the participation in the company, separates the stock corporation from cooperative corporations.[502] Since this separation is nuanced, as the stock corporation can be viewed as a "capital" cooperative and the tendency towards investor ownership has increased over the times until reaching the pronounced status it holds today,[503] and the investigation at hand takes a historical perspective such substitution appears justified. In the historical process, the disengagement from the personal perspective, may it be the purely personal or based on kinship, and the move towards the perpetuity of the firm exceeding

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498 Whereby the board structure may vary between own-tier and two-tier boards as well as the board being formally separated from the managers operating the company, see Armour/Hansmann/Kraakman/Pargendler, *supra* note 121, 13.

499 Hansmann/Kraakman/Squire, *supra* note 493, 1341 ff.

500 See for an overview and the discussion of the criteria, Armour/Hansmann/Kraakman/Pargendler, *supra* note 121, 5 ff.; Creighton, *supra* note 489, 5 ff., 39 ff., with the latter also including the aspect of an organization's ability to issue freely transferable shares of stock that entitle the holder to rights with respect to the organization. Hideki Kanda, KAISHAHŌ [Company Law] (23rd edition, 2021) 26 f., similarly identifies for the context of Japanese company law, (i) investor ownership, (ii) legal personality, (iii) investors' limited liability, (iv) separation between ownership and management, and (v) transferability of shares.

501 Armour/Hansmann/Kraakman/Pargendler, *supra* note 121, 5, 14 ff.

502 Armour/Hansmann/Kraakman/Pargendler, *supra* note 121, 14 f.

503 A phenomenon very aptly and succinctly described by Buxbaum, *supra* note 76, 526 as the transformation of the shareholder "*from king of the corporation to king of the market*".

intergenerational arrangements is significant. Accordingly, this aspect is also included by other literature, especially by works taking a historical angle.[504]

2. Merchant Houses and Guilds

With respect to the historical economic development, this thesis can limit itself to referring to the common observation that the economy in the late Tokugawa period (1603-1867) began to demonstrate a certain robustness evidenced by remarkable growth despite the still feudal constitution of the society and the related economic shackles, thus showing signs of a "commercial revolution" as well as an "urban revolution" reflected by the growing size of castle towns and sprawling urban centers of Edo, Kyoto and Osaka.[505] A constant factor throughout this period from an socio-economic perspective is that the economy was based on rice cultivation, since rice was the prevalent unit (besides corvee labor) in which levies and taxes[506] which had to be made from the peasants to the samurai of their domain were metered (so-called *kokudaka*[507] system), and with the samurai converting the surpluses of rice not required for their subsistence for currency, thus precipitating the emergence of rice markets such as the Dojima Rice Market in Osaka since the mid-1600s.[508]

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504 For example, Naosuke Takamura, KAISHA NO TANJŌ [The Birth of the Company] (1996) 41 f. who upon discussing whether the national banks constitute the first stock companies in Japan and contrasting the stock corporation with limited and unlimited partnerships (*gōshi kaisha* and *gōmei kaisha*) identifies the following four elements: (i) Limited liability of the owners, (ii) the existence of corporate bodies, (iii) the transferability of shares in the ownership of the company of equal value, (iv) capital stock and perpetuity of existence; also Miyamoto, *supra* note 474, 78; Hisao Otsuka, KABUSHIKI KAISHA HASSEI SHIRON [Historical treatise on the emergence of the stock corporation] (1969) 208 f.

505 Norio Tamaki, JAPANESE BANKING: A HISTORY, 1859-1959 (1995) 16; Yotaro Sakudo, *The Management Practices of Family Business* (translated by William B. Hauser), in: Chie Nakane/ Shinzaburo Oishi (eds.), TOKUGAWA JAPAN (translated edited by Conrad Totman, 1990) 147-166, 164 f.

506 Land taxes only started to become payable in cash (instead of kind which usually meant crops, especially rice) upon the Meiji government's land tax reform of 1873, see Masato Shizume/Masayoshi Tsurumi, *Modernizing the financial system in Japan during the 19th century: National Banks in Japan in the Context of Free Banking*, Waseda Institute of Political Economy Working Paper Series No. E1607 (September 2016) 12.

507 Taking the name after *koku*, the unit of rice measurement with one koku being equivalent to approximately 150 kilograms or 180 liters, Yasuo Takatsuki, THE DOJIMA RICE EXCHANGE: FROM RICE TRADING TO INDEX FUTURES TRADING IN EDO-PERIOD JAPAN (translated by Louisa Rubinfien, 2022) 19.

508 Masato Shizume, *A History of the Bank of Japan, 1882-2016*, Waseda Institute of Political Economy Working Paper Series No. E1719 (October 2017) 2; Sakudo, *supra* note 505, 150 ff., 165; History of Sumitomo Corporation, available under: https://www.sumitomo.gr.jp/english/history/s_history/rice/ (last accessed 10 December 2022). The Dojima Rice Exchange in Osaka established in 1697 and officially recognized in 1730 became the central rice exchange in Japan, thus cementing Osaka's position as financial center in the Tokugawa era, Takatsuki, *supra*

Commercial activities were primarily borne by the merchant class which, however, was initially hemmed in by multiple restrictions concocted and imposed by the shogunate on the merchant class, inter alia, the merchants and townspeople only counted among the last of the four main social strata (after samurai, peasants and artisans).[509] Restrictions, however, started to ease with the development of a money economy.[510]

a) Merchant houses

aa) General developments with respect to the merchant class

The age of seclusion and virtually sealing off the country from outside influences, including trade save for a few exceptions, with the beginning of the Tokugawa period also ushered in a shift from previously established privileged merchant families to a group of newly founded merchants for the promotion of trade with Mitsui, Sumitomo and Kōnoike counting among the most familiar exponents (*shinko chōnin*).[511] These merchant houses organized themselves overwhelmingly on a family basis with large-scale businesses being conducted as the joint business of several families or a family network (so-called *kumi*)[512] as evidenced by the probably most prominent exponent,

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note 507, 16 ff. The Dojima Rice Exchange is commonly considered the forerunner of security markets in Japan, see Japan Stock Exchange, *Kabushiki torihikijo kaisetsu 140 shūnen* [140 Years Since the Opening of the Stock Exchange], available under: https://www.jpx.co.jp/corporate/events-pr/140years/index.html (last accessed 6 April 2023), due to various sophisticated financial transactions undertaken on it. For example, the rice tickets or later certificates were traded rather than simple cash settlements executed, see Takatsuki, *ibid*., 28 ff. The market participants even developed future trading, see Ulrike Schaede, *Forwards and futures in Tokugawa-period Japan: A New Perspective on the Dōjima Rice Market*, 13 Journal of Banking and Finance (1989) 487 ff., with the mere "on-the-books"- or proxy-rice trades, however, not constituting commodity future trades in the current understanding due to the fact that an actual delivery of the rice on the respective maturity date was never assumed, see Takatsuki, *ibid*., 34 ff., 94 ff. While partially a continuing timeline from the practice of these future trades on the Dojima Rice Exchange to the early Tokyo Stock Exchange in the Meiji period is drawn, such view has recently been challenged on the grounds of a more critical approach under the impression of the "invention of tradition"-literature, see Shigehiro Ishida/Kazuki Yokoyama, *Origins of the Tokyo Stock Exchange: Path Dependence of Trading Systems*, 41 Japan Exchange Group Working Paper (11 September 2023) 4-43.

509 This four-strata hierarchy was only abolished in 1869, see Ann A. Taketa, FROM MERCHANT HOUSE TO CORPORATION: THE DEVELOPMENT OF THE MODERN CORPORATE FORM AND THE TRANSFORMATION OF BUSINESS ORGANIZATION IN JAPAN, 1853-1912 (1994) 13.

510 John G. Roberts, MITSUI: THREE CENTURIES OF JAPANESE BUSINESS (2nd edition, 1989) 11.

511 With these three houses having their origins in the seventeenth century, see Sakudo, *supra* note 508, 152 ff.

512 *Kumi* may most appropriately be translated as group, in contrast to *kumiai* denoting any form of association, see Wataro Kanno, NIHON KAISHA KIGYŌ HASSEI-SHI NO KENKYŪ [Research on the History of the Origins of the Japanese Company] (1931) 19 f.; Roberts, *supra* note 510, 28. The term *kumi* refers to the merchant family enterprises prior to the classification and codification of

the Mitsui merchant family, or – line with the terminology just introduced – the Mitsui-gumi.

The general organization of the merchant houses rested on a variation of the wider socio-economic concept of the so-called *ie*[513], which refers to the societal unit of a multigenerational and at its core consanguineal household, including also unrelated persons who relied economically on the family.[514] The family business was usually taken over by the eldest son as heir with the underlying understanding of this being a transitional role which must be fulfilled in the spirit and trust of the ancestors and be passed on to the next generation.[515] With growth in size and complexity of a family business, it was a common practice that a merchant family established affiliated houses (*renke*) as well as related branch houses (*bunke*) or unrelated[516] branch houses (*bekke*) with the former being led by family descendants usually meaning the younger sons and the latter being granted to non-family senior managers. The establishment of such houses usually required the prior consent and permission of the main or head family house (*honke*). The affiliated houses remained in the overall family group or network, called the *dōzokudan*.[517] The Mitsui-gumi eventually comprised of six main houses with the head house or heir's house (*sōryōke*) among them, and additional three, later five associated houses.[518]

Despite their societal marginalization, the Tokugawa period saw the crystallization and rise of a series of powerful and financially robust merchant houses with name such as

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stock corporation in the Kyū-Shōhō in 1893. However, the term *kumi* in a wider sense refers to local corporate groups which formed in villages, see Chie Nakane, KINSHIP AND ECONOMIC ORGANIZATION IN RURAL JAPAN (1967) 133 ff.

513 This is to say the corporate aspect of the *ie* concept, Akitoshi Shimizu, *Ie and Dōzoku*, 28 Current Anthropology (1987) 86 f.

514 Roberts, *supra* note 510, 28; Matao Miyamoto, *The Management Systems of Edo Period Merchant Houses*, 13 Japanese Yearbook on Business History (1996) 122. The *ie* system is generally based on a wider understanding of kinship, see Shimizu, *supra* note 513, 88, as well as Kozo Yamamura/Yasusuke Murakami, *Ie Society as a Pattern of Civilization: Introduction*, 10 The Journal of Japanese Studies (1984) 279-363 for the wider context and historical development.

515 Such philosophy was usually enshrined in the house codes of each family, see Miyamoto, *supra* note 514, 121 f.; for a brief overview of the common succession and perpetuation principles, see Shimizu, *supra* note 513, 87 f.

516 The dichotomy between related and unrelated branch houses is defined by the absence of kinship bonds. *Bekke* were set up by employees of the merchant family after having made a career within the main family and having obtained permission (and financing) to set up a separate business which, however, was still associated with the main house, see for the example of Kōnoike, Sakudo, *supra* note 505, 161. An alternative besides the establishment of such branch was the foundation of an independent business, see Maria Louise Nagata, LABOR CONTRACTS AND LABOR RELATIONS IN EARLY MODERN CENTRAL JAPAN (2005) 66.

517 Toshio Goto, *Family Business and Its Longevity*, 2 Kindai Management Review (2014) 87.

518 Roberts, *supra* note 510, 27.

Mitsui and Sumitomo still familiar today, while the names of their former peers such as Ono, Kōnoike and Shimada have disappeared for various reasons from their once (very) prominent positions.[519]

bb) The Mitsui-gumi as an exponent of the merchant houses

Emerging prominently in the late Tokugawa and early Meiji period, the organization of the Mitsui-gumi shall be reviewed in a bit more detail: The Mitsui-gumi whose business originated in a traditional clothing retail and wholesale store (*gofuku-ten*) opened in 1672 operated based on innovative retailing methods, and soon, in 1683, with the funds earned from the former gained a second foothold in the money exchange business (*ryōgae-ya*) with which Mitsui gained acknowledgement as one of the official money exchangers for the Tokugawa shogunate's treasury, providing financing services to the Tokugawa government and daimyō.[520]

In 1710, the so-called *ōmotokata*[521] similar to a headquarters or central office was established in Kyoto which had collective or rather combined – however, indivisible – ownership over the assets of the Mitsui families with each Mitsui family having equity rights to a virtual portion of such body, but bearing unlimited liability for any debts accrued thereby.[522] The equity matrix defining the different Mitsui families' shares in the *ōmotokata* remained unchanged throughout the Tokugawa period and through the Meiji period; the allocation of funds, distribution of dividends as well as living costs for the families was determined on this basis.[523] Besides the pooling of funds and maintenance of a capital reserve, the *ōmotokata* also hold authority to decide on personnel and (strategic) houses matters.[524] In addition, under the *ōmotokata*

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519 The emphasis lies on the very prominent position as Kōnoike is usually counted among the medium-sized *zaibatsu* in the Taisho period (1912 through 1926), see Matao Miyamoto/Kensuke Hiroyama, *Meiji Kōki-Shōwa Shoki Kōnoike ni okeru Takakuka Zasetsu to Sengyō Shikō* [Diversification and Specialization in the History of the House of Kōnoike] 15 Keiei Shigaku [Business History Review] (1980) 54 ff.

520 Seiichiro Yonekura, *The Emergence of the Prototype of Enterprise Group Capitalism – The Case of Mitsui*, 20 Hitotsubashi Journal of Commerce and Management (1985) 65; Takamura, *supra* note 504, 16.

521 The term translates closest into great headquarters. It was dropped during the restructurings which occurred in the 1890s, see Roberts, *supra* note 510, 140. Other merchant families set up comparable organizational formats, which were usually referred to as *motokata* or headquarters, such as the Shimomura family, see Miyamoto, *supra* note 514, 114 f.

522 Miyamoto, *supra* note 514, 105 f.

523 Noboru Nishikawa, *The Emergence and Transformation of the Divisional Management and Accounting Systems in the House of Mitsui*, 12 Japanese Yearbook on Business History (1995) 108; for the matrix, see Shigeaki Yasuoka, ZAIBATSU KEISEI-SHI NO KENKYŪ [Research on the History of Zaibatsu Formation] (1970) 198.

524 Miyamoto, *supra* note 514, 110 f.; Roberts, *supra* note 510, 30.

bookkeeping was centralized, meaning that the accounts of each individual shop run by the different Mitsui families under the Mitsui-gumi were settled at the end of each half-year term and a fixed quota of the earnings remitted to *ōmotokata*, which disgorged dividends to the families based on their equity quota and increased its own capital stock with any remainder.[525] In return for their capital contributions, the individual houses could take out loans at fixed annual interest ranges oriented at the loan amount.[526] Initially every three years[527] all retained earnings, meaning the profits accumulated over this term in excess of the regular contributions had to be remitted to the *ōmotokata* with a share of this sum being paid back to a shop as a bonus with the remainder being distributed among the Mitsui families or deposited as a reserve.[528] The establishment of the *ōmotokata* therefore entailed that the independence of the main, affiliated and branch houses was bridged and the houses merged into a type of "*super house*" instead which exercised a controlling function and was responsible for developing the overall business strategy, then to be put into practice by the individual shops.[529] While thus business strategy, monitoring and overall finance had all become centralized, the management of the individual houses remained decentralized with each house managing its shop or money exchange business independently. Besides their joint control over the *ōmotokata* as a whole, the Mitsui families shared equal voice in the deliberations of the *ōmotokata*. In addition, each Mitsui family was in charge – in the sense of being entrusted by the *ōmotokata* – of the operations of one of the locations of Mitsui's business with the actual daily business having come to be usually operated by local shop managers, the so-called *bantō*.[530] This meant that actual management and formal ownership became separated.[531] For the task of the overall supervision of the shops and the shop managers' actions the position of the *motojime* or controller was created at the level of the *ōmotokata*.[532]

Each of the nine (later eleven) families of the Mitsui family network thus combined an investor (through participation in the *ōmotokata*) with a functional capitalist role (through operation of a local enterprise). The institution of the *ōmotokata* arguably

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525 Yasuoka, *supra* note 523, 197. With respect to employees, a still rudimentary profit-sharing system based on seniority was introduced, see Roberts, *supra* note 510, 21.

526 Roberts, *supra* note 510, 29.

527 The triennial settlement of the retained earnings was later on modified for practical reasons, cf. Nishikawa, *supra* note 523, 126 f.

528 Miyamoto, *supra* note 514, 111.

529 Roberts, *supra* note 510, 29; Miyamoto, *supra* note 514, 111; Taketa, *supra* note 509, 9.

530 Miyamoto, *supra* note 514, 125.

531 Yamamura/Murakami, *supra* note 514, 339.

532 Miyamoto, *supra* note 514, 125 f.

shared certain structural elements with a modern unlimited partnership without, however, constituting one.[533] In addition to the capital consolidation aspect, the institution of the *ōmotokata* showed signs of a separation between management and ownership in the form that non-family members, i.e., outsiders, were recruited as professional, salaried managers to whom the conduct of the (everyday) business was delegated.[534]

cc) Further merchant houses and their alternative "corporate" models

Mitsui's peers in the money exchange business, such as Kōnoike-gumi (which later while joining with two other banks formed the Sanwa Bank) and Ono-gumi (which fell into turmoil, almost drawing the with the First National Bank, co-owned and co-run with Mitsui, with it) opted for different structures, however, likewise being based on consanguineal bond and kinship.

In the case of Kōnoike, economic pressure led to initially independently operating families being consolidated insofar as the management decisions lay with the powerful families while the less potent ones were reduced to subscribers and thus investors. This development was accompanied by a shift in the liability scheme with the mere investor families being subject to only limited liability, while the powerful families who were actively operating the business remained exposed to unlimited liability, thus approximating the conglomerate to the structure of a limited partnership (*gōshi gaisha*).[535]

Similarly, the Ono-gumi developed a structure with disparate involvement of the different family branches. While the main shops in Kyoto, Osaka and Edo were run by three families on a partnership basis, other shops were owned and operated by individual families.[536]

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533 Miyamoto, *supra* note 579, 356 f.; Takamura, *supra* note 504, 17, which would translate into the *gōmei gaisha* type under modern Japanese corporate law categories or a civil law partnership, Shigeaki Yasuoka, MITSUI ZAIBATSU [The Mitsui Zaibatsu] (1982) 34, especially considering the component of combined ownership (*sōyū*, or "*Gesamteigentum*" in the tradition of Roman law and German law terminology) rather than co-ownership (*kyōyū*, or "*Miteigentum*"). Miyamoto, *ibid*., 356, following Yasuoka, *ibid*., 32-34, namely that the *ōmotokata* is closer to the concept of combined rather than co-ownership. The resemblance to partnership structures has been widely accepted, see, for example, Nishikawa, *supra* note 523, 108 f.; Roberts, *supra* note 510, 29.

534 Yonekura, *supra* note 520, 65 f. For the classic piece on the separation of management and ownership in the modern corporation, see Berle/Means, *supra* note 86, 1 ff.

535 Miyamoto, *supra* note 514, at 107; Takamura, *supra* note 504, 17.

536 Miyamoto, *supra* note 514, at 108.

b) Kabu nakama: Guilds

Besides merchant families, an additional organizational form[537] were associations of artisans or merchants, usually referred to as *kabu nakama*.[538] The term *kabu* also referred to the transferable share in the guild which was usually embodied as a card made out of wood.[539] Artisans, merchants and manufacturers were banded together under these guilds in the Tokugawa period[540] which was authorized by the shogunate, initially as an instrument of state control over distribution and prices as well as specific occupations or activities of such occupations, such as interest rates on loans in 1642, the sake-brewing industry in 1660 or over the circulation of gold and silver coins in 1715.[541] In a period of more active *bakufu* support such as in the 1770s and 1780s, *kabu nakama* were entrusted with tax collection and promotion of commerce.[542] The

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537 Another commercial institution of the Tokugawa period were the so-called *tonya* or *toiya*, a form of association between wholesale merchants that acted as distributors and coordinators of the trading chain between producers, retailers and their respective brokers. They thus ensured the vertical integration of farmers and artisans into the Tokugawa economy making their earnings through commission and storage fees. In addition, due to their central role in the trading chain, the *tonya* were involved in credit transactions between the parties along the trading and distribution chain, see Tetsuji Okazaki, EDO NO SHIJŌ KEIZAI: REKISHI SEIDO BUNSEKI KARA MITA KABU NAKAMA [The Market Economy of the Edo Period: Kabu Nakama seen from an Analysis of the Historical System] (1999) 138 ff., John Henry Wigmore, LAW AND JUSTICE IN TOKUGAWA JAPAN: MATERIALS FOR THE HISTORY OF JAPANESE LAW AND JUSTICE UNDER THE TOKUGAWA SHOGUNATE 1603-1867, Volume I (1967) 91 ff. The abolition of the guilds in the late Tokugawa period led to temporary distortions with respect to the distribution of commodities, see Roberts, *supra* note 510, 47.

538 Some scholars refer to guilds as *kumiai*, which is the term used for (trade) association or unions in modern Japan, see Mary Louise Nagata, *Brotherhoods and Stock Societies: Guilds in Pre-modern Japan*, 53 International Review of Social History (2008) 121 and Fn. 3 with reference to the works of Ryosuke Ishii, SHŌNIN [Merchants] (1991) 78 ff., who uses both terms *kabu nakama* and *kumiai* and appears to treat the former as special case of the latter. Following Nagata, *ibid*., and Takeshi Toyoda, *Japanese Guilds*, 5 The Annals of the Hitotsubashi Academy (1954) 72, 80 ff., this thesis will stick to the term *kabu nakama* to refer to the Tokugawa era guilds.

539 Okazaki, *supra* note 537, 86; Tetsuji Okazaki, *The Role of the Merchant Coalition in Pre-modern Japanese Economic Development: An Historical Institutional Analysis*, CIRJE Discussion Paper (March 2004) 6.

540 There existed more loose commercial association, so-called *za*, which initially were formed out of village shrine brotherhoods in the early feudal times beginning with the late eleventh century and operated under the patronage of local lords, Nagata, *supra* note 538, 123 f. The *za*'s abolishment, the policy changes under the Tokugawa Shogunate, inter alia, with respect to the feudal system and the warrior class, the adoption of the seclusion policy as well as the change in function created a watershed moment which suggest to clearly distinguish between *za* and *kabu nakama* despite certain initial factual continuities, inheritances and carryovers which appeared to have occurred, see Nagata, *ibid.*, 124 ff.; Toyoda, *supra* note 538, 73 ff.; Miyamoto, *supra* note 546, 106; Okazaki, *supra* note 539, 10. *Kabu nakama* thus refer to the guild structure of the two centuries between around 1640 to 1841.

541 Nagata, *supra* note 538, 132; Ishii, *supra* note 538, 80; Okazaki, *supra* note 539, 6.

542 Okazaki, *supra* note 539, 6.

sake-brewing *kabu nakama* for example was conceptualized as a licensing mechanism, so that membership or stock ownership respectively was mandatory to operate such business with the share or membership certificate, the *kabufuda*, setting forth the amounts and types of rice which a brewer was permitted to use in its brewing business and the locations where the business could be operated with the latter defining the local *kabu nakama* such business belonged to with a business being able and required to hold membership in as many local *kabu nakama* as markets it aimed to operate in.[543] Shares in the *kabu nakama*, the *kabu*[544], could be generally be transferred by the members, but not outside a defined regional scope.[545] Besides succession, the *kabu* could be sold as well as encumbered and collateralized, meaning being an object of pledge, loan and mortgage with such transactions, however, being subject to the consent of the *kabu nakama*.[546] The price of a kabu oriented at the revenue expectation tied to the relevant business.[547] *Kabu nakama* were formed with respect to a specific market[548] and sprang equally from private as well as state initiative.[549] However, from the year 1721 onwards it became mandatory for members of specific occupations to

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543 Nagata, *supra* note 538, 134. The regional demarcation between different *kabu nakama* corresponded to the administrative organization, see Toyoda, *supra* note 538, 82.

544 The term *kabu* denotes the title to certain rights and was also used to refer to the membership rights of officially registered farmers of a village bearing the responsibility for the payments to the *daimyō*. These rights or *kabu* could pass over by inheritance or purchase by another household (including a household of a dependent farmer, if agreed by the other farmers), see Nakane, *supra* note 512, 63 f., 71. On the etymology of the words *kabu* and *kabushiki*, Ishii, *supra* note 538, 86 f. The notions of *kabu* and *kabushiki* present an interesting parallel to the English word "stock", but at the same time contrast to the equivalent in the language of Continental Europe ("action" in French and "Aktie" in German) which hark back to Latin and origins in Roman law or the ius commune and refer to the securitization of a claim ("actio") with the claim becoming more narrow and specific in the time between the fifteenth and eighteenth century leading up to its use in the Code de Commerce of 1807 and referring to the claim for dividend, see Cordes/Jahntz, *supra* note 478, 8 f.

545 Nagata, *supra* note 538, 135. However, there were different types of shares in some *kabu nakama* allowing operations only under specific conditions such differentiation of the type of rice to be used for sake brewing, Nagata, *ibid*.; Yunoki Manabu, *Sake zukuri no rekishi* [History of Sake Brewing] (4th edition, 2018) 49 f. In this sense, the *kabu* presented a functional equivalent to a business concession, with at times quantitative limitations, such with respect to designating limits on the amount of rice to be used for sake brewing to sake brewing *kabu nakama*, see for the latter, Manabu, *ibid*.

546 Okazaki, *supra* note 539, 86; Mataji Miyamoto, KABU NAKAMA NO KENKYŪ [Research on Kabu Nakama] (2nd edition, 1958) 49 f.

547 Okazaki, *supra* note 539, 86 f., with an annual expectation of 18 to 20 per cent of the overall purchase price.

548 A market could be defined by a specific craft or in the case of merchants or commodity traders by the destination where goods were sold, see Toyoda, *supra* note 538, 81 f., according to whom provenance – whether a merchant came from Edo or Osaka – of the members played only a secondary role with respect to the membership in a *kabu nakama*.

549 Nagata, *supra* note 538, 139.

join the corresponding guild which in effect implied the abolishment of the any free trading activities (outside the guilds).[550]

In view of the afore-described, commonly four functions of the *kabu nakama* are identified, monopolization, interest protection, coordination of commerce as well as upkeeping of reputation.[551] The guilds thus created local monopolies for specific market segments and at the same time effectively established a licensing requirement for businesses that wished to operate in a defined market with furthermore defining and limiting the scope of the market activity of its members' businesses to ensure the protection of its de facto monopoly rights.[552] From an organizational standpoint, the guilds presented a private organizations which were charged with decentralized regulation and, in the absence of statutory and formal commercial rules, contract enforcement.[553] In addition, in the absence of any state regulation on commercial rules, the *kabu nakama's* rules served as a standard and benchmark for commercial transactions and were even referred to by *bakufu* courts.[554] The enforcement of the guilds' rules, like the prohibition of unlicensed business activity, was left to the guilds with possible sanctions being, inter alia, confiscation of the *kabu*.[555] Building on their monopolistic position, the control rights of the *kabu nakama* also extended to the enforcement of contracts, violations of contracts or misconduct such as non-compliance with non-compete and non-solicit obligations towards other members which resulted in other members suspending business with such member which could spread to other business partners or lead to punitive measures such as expulsion from the guild if loss or damage was inflicted to another members' ventures.[556] This enforcement mechanism proved effective given the on average limited number of kabu nakama members (around 30) as well as of transaction partners.[557] The institution of

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550 Ishii, *supra* note 538, 80; Nagata, *supra* note 538, 135; Toyoda, *supra* note 538, 81. Over times, the government urged an increasing number of occupations to form *kabu nakama* and expansion of existing ones to promote commerce and its infrastructure as well as its own revenues, since *kabu nakama* became subject to taxes and levies in the seventeenth century, see Nagata, *supra* note 538, 138.

551 Okazaki, *supra* note 539, 6.

552 Nagata, *supra* note 538, 135, 137 ff., the local monopolies proved, however, not impermeable and the enforcement of its protection not always successful. The economic aspect was complemented by a communal one, see Nagata, *ibid*., 136 f.

553 Okazaki, *supra* note 539, 2 f.; Nagata, *supra* note 538, 141. In contrast to the European guilds, the *kabu nakama* were as state agents integrated in the economic management and presented a state ally, see Nagata, *ibid*.

554 Miyamoto, *supra* note 546, 151 f.; Okazaki, *supra* note 539, 2 f.

555 Nagata, *supra* note 538, 136.

556 Nagata, *supra* note 538, 136; see also Okazaki, *supra* note 537, 145 ff. for the case of the *tonya*.

557 Okazaki, *supra* note 539, 15 f.

kabu nakama rested on cooperation of its members which in the case of transport-related guilds could also go so far and entail joint and equal liability for venture-related losses.[558] The aforementioned wholesale merchant guilds (*tonya*) likewise developed sanction mechanisms – usually in the form of discontinuation of trading relations – to address the commitment problem of upfront investments by supplying raw materials to the artisans and provide a sufficient degree of assurance of trade security to its merchant members.[559]

While the internal organization of guilds provided for several directorial levels, thus formally a hierarchical structure[560], the guilds are regarded as having been largely egalitarian in contrast to the inner organization of the merchant families, built around the main house and the introduction of structures such as or comparable to the Mitsui-gumi's *ōmotokata*, of which main house and branch houses were equal members.[561] The equal status of all members found its expression in the general meetings (*yoriai*) as the highest decision-making body in which all members convened and which thus can be viewed as to resemble the general shareholder meeting of a stock corporation, however, with the frequency of such general meetings varying greatly.[562] The executives (*gyōji*) were usually elected by all members and represented the guild towards outsiders.[563]

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558 For example, in the event of wreckage of a ship, see Toyoda, *supra* note 538, 83.

559 Okazaki, *supra* note 537, 140 ff., 145 ff. The commitment problem, resulting out of the agency constellation between wholesaler and artisans, and sanction strategies to combat these and achieve compliance of the trading partners may be viewed as less virulent and pressing in Tokugawa Japan due to the widely closed-off country, thus eschewing the aspect of the commitment problem faced by the guilds in medieval Europe when dealing with agents or trading partners overseas, see Avner Greif/Paul Milgrom/Barry R. Weingast, *Coordination, Commitment, and Enforcement: The Case of the Merchant Guild*, 102 Journal of Political Economy (1994) 745-776; Avner Greif, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition*, 83 The American Economic Review (1993) 525-548.

560 Wigmore, *supra* note 537, 101. The fact that merchant guilds showed early forms of corporate organization is likewise acknowledged in the European context, see Franklin A. Gevurtz, *The Historical and Political Origins of the Corporate Board of Directors*, 33 Hofstra Law Review (2004) 156 ff. Their even appears to be direct link between the early trading companies in England growing out of guild structures, see Gevurtz, *ibid*., Phillip Lipton, *The Evolution of the English Joint Stock Company to 1800: An Institutional Perspective*, Monash University Working Paper (10 May 2016) 13. Such continuity in form appears not to have occurred in Meiji Japan, however, which might be due to the fact that the stock corporation did not need to be developed, since it was adopted as a "ready-made" – if ready-made can be used, since the concept itself is in flux – concept.

561 Nagata, *supra* note 538, 136.

562 Okazaki, *supra* note 539, 87 citing a spectrum between three general meetings per month and two annual general meetings.

563 Toyoda, *supra* note 538, 81; Okazaki, *supra* note 539, 87 f. Distinguished families sometimes earned their seat by appointment through the authorities, see Toyoda, *ibid*.

While the organization of capital[564] was possible for a guild through its collective character, and collective or coordinated action indeed took place between various guilds, especially for the organization of the trade between Osaka and Edo[565], the guilds' focus lay on the regulation of market access and market conduct as well as the suppression of competition and – government-mandated – price policy[566], thus predominantly in a relational and organizational direction; guild members kept their assets such as their shops as their exclusively own. While guilds show elements of "corporateness", their orientation, namely to primarily have served public law purposes reveals an important conceptual gap.[567] The Tokugawa administration, the *bakufu*, temporarily prohibited and dissolved the *kabu nakama* in 1842 as they were identified as causing inflation, however, the prohibition was largely, however, not completely repealed in 1851 after it was found that the disappearance of *kabu nakama* led to malfunctions in the organization of domestic trade with symptoms such as price instability or uneven commodity distribution with no alternative governance mechanism to compensate in sight.[568] As economic progress took root more firmly, the Meiji government eventually abolished the guild system in 1868 with the aim to

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564 While, as a common denominator glossing over variations, a guild is understood as an association or special interest group of people – usually and prevalently by craftsmen and merchants – who share certain characteristic and intend to pursue mutual purposes, see Sheilagh Ogilvie, *The Economics of Guilds*, 28 The Journal of Economic Perspectives (2014) 169, some differences as to the range of activities collectively conducted, as guilds in Britain sometimes acted as buying units and made collective purchases, a legal act which bears resemblance with a stock corporation with the elements of risk-sharing and convenience then also resurfacing and being present in the first English chartered trading company, see John H. Clapham, A CONCISE ECONOMIC HISTORY OF BRITAIN – FROM THE EARLIEST TIMES TO 1950 (1951) 262.

565 Toyoda, *supra* note 538, 84; Wigmore, *supra* note 537, 98.

566 Carl Steenstrup, A HISTORY OF LAW IN JAPAN UNTIL 1868 (1996) 138, 148 f.; Wigmore, *supra* note 537, 91 ff. For the competition aspect in general, see Ogilvie, *supra* note 564, at 174 ff. With regard to the pricing control, the *kabu nakama* were considered to contain and suppress commodity prices. However, the *kabu nakama* were suspected of keeping prices at high levels, an impression which eventually precipitated the abolishment of the *kabu nakama* under the Shogunate's direct control in 1841 with the inflation setting in upon their disbandment indicating their effectiveness, see Nagata, *supra* note 538, 138, 141; Toyoda, *supra* note 538, 85.

567 Means, *supra* note 138, 4. While the *kabu nakama* carries an element of corporateness, it lacks a connection to an entrepreneurial purpose, see also Means, *ibid*., for the Spanish concept of a corporation, which lacked the differentiation between private and public, initially transplanted to Colombia. The distinction, however, not to be understood as a decisive, non-porous separation, between the business and the public sphere, however, was already made in ancient times, see Michael Hudson, ENTREPRENEURS: FROM THE NEAR EAST TAKEOFF TO THE ROMAN COLLAPSE, in: David S. Landes/Joel Mokyr/William J. Baumol, *The Invention of Enterprise: Entrepreneurship from Ancient Mesopotamia to Modern Times* (2010) 8 ff. For the emergence of the distinction between public and private in the legal thought in the nineteenth century, see Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 University of Pennsylvania Law Review (1982) 1423 ff.

568 Miyamoto, *supra* note 546, 304 ff., 337 ff., 343 ff.; Okazaki, *supra* note 539, 3, 10 ff.

encourage more economic freedom to achieve the transition to a modern market economy, however, the rules and code of the *kabu nakama* partially survived or were revived by local authorities to combat commercial disorder.[569]

III. Bridging the Conceptual Gap(s)

As the aforementioned cases of the merchant houses and the existence of guilds illustrate, the demand for collective economic activity and ownership[570] had also existed in Tokugawa Japan and institutions corresponding to such demand had been formed. While maintaining the unlimited liability characteristic of the Mitsui family's *ōmotokata* or comparable structures of other merchant families respectively, the increasing size of the business operations had already brought forth a separation between ownership and management to a certain extent, meaning on the level of local management (supra subsection II.2, sub-paragraph a) bb)).[571] The organizational differentiation within the Mitsui-gumi reveals that delegation had taken shape, in two distinct aspects, namely:

(i) The *ōmotokata* had evolved into assuming a controlling function over the entire Mitsui-gumi business while the individual shops were assigned to the hands of the individual families, and

(ii) The respective individual shops' daily business was operated by salaried managers or head clerks.

The juxtaposition of these two delegation aspects, however, at the same time reveals the limits of any comparability or approximation to the modern stock corporation: The institution of *bantō* took place on the level of the local shops and not at the level of the consolidated *ōmotokata*, that is to say that there was no central management installed,

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569 Okazaki, *supra* note 539, 9.

570 This aspect can likewise be found in Roman law and the collegium under which three or more persons could jointly hold property, sue and be sued through an agent of its members, all after being granted official permission, see Nathan Rosenberg/L.E. Birdzell, Jr., HOW THE WEST GREW RICH: THE ECONOMIC TRANSFORMATION OF THE INDUSTRIAL WORLD (1986) 191 f. with further references.

571 Miyamoto, *supra* note 514, 124 ff. See for the evolution of such separation, Berle/Means, *supra* note 86, 119-140, also Eric Hilt, *When Did Ownership Separate from Control? Corporate Governance in the Early Nineteenth Century*, 68 The Journal of Economic History (2008) 645 ff., analyzing the levels of managerial ownership and governance provisions for New York State corporations between 1790 and 1827 and arguing that despite their still comparatively small size with respect to share capital and number of shareholders, already companies in the late nineteenth century were confronted with the problem of managerial control.

but rather a decentralized local management which was consolidated under the *ōmotokata* on whose level then supervisory and strategic matters were taken care of.

In addition, raising and contribution of capital to commercial ventures was virtually limited to the bounds of the merchant houses and the collective of members united thereunder. Scarcity of capital was coupled with such of managerial and entrepreneurial skills.[572] The ambitious vision of the members of the Meiji government to catch up with the "Western" powers economically on the back of industry branches envisioned after the Western industries such as textiles, railways, manufacturing, electricity, banking and insurance, required to raise enormous amounts of capital to embark on a full-fledged and speedy industrialization process.[573] Other than within the – limited number of – large merchant families, such capital could be raised either by the state through state-backed enterprises or by the individuals relying on a capital market.[574] Against this background, the architects of the Meiji government or rather influential intellectuals from such circle opted for the system of joint-stock corporation whose concept had been promulgated by studies in European countries as the appropriate and effective vehicle to achieve modernization of the economy.[575] The joint-stock corporation system allowed for the collection of capital from a wide array of potential investors – in contrast to the big merchant houses being owned and funded by a closed circle of the respective family (network) – for capital-intensive undertakings, especially those with a public utility dimension.[576] The construct of a joint-stock corporation available through contact with journey overseas appealed to, and eventually convinced, the Meiji elites who not only incorporated the concept of a joint-stock corporation as a cornerstone into their economic policy and the ensuing legislation, but ultimately ushered and nudged "outsiders", meaning businesses which

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572 Miyamoto, *supra* note 504, 78.

573 Shimada, *supra* note 473, 30; Miyamoto, *supra* note 504, 78.

574 Miyamoto, *supra* note 504, 78.

575 Miyamoto, *supra* note 504, 75.

576 Shimada, *supra* note 473, 25 ff. While the organizational form of the stock corporation was thus promoted, it was not the exclusive model. Depending on scale and form of the relevant business, businesses were conducted as limited or unlimited partnerships, especially in case of the sometimes in combination with silent or anonymous partnership familiar from the Tokugawa era, see Shimada, *ibid.*, 25 ff. and for the origins of the anonymous partnership in Japan and the limited liability aspect of the silent partners, Takamura, *supra* note 504, 19 ff. Drawing capital from a wider array of investors would then eventually facilitate the "*passive investment by the general public*", on this general aspect of the stock corporation, see Franklin A. Gevurtz, *The European Origins and the Spread of Corporate Board of Directors*, 33 Stetson Law Review (2004) 944; see also Harald Baum, *The Rise of the Independent Director in the West*, in Dan W. Puchniak/Harald Baum/Luke Nottage (eds.), INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH (2017) 30.

preferred to retain their existing form of incorporation, to accepting the new model, eventually achieving its establishment and spread at a remarkable speed.[577] Besides the funding aspect, the stock corporation with the separation of investor ownership and management, enabled to match the capital in the hand of the aristocracy with a growing pool of young entrepreneurial talent being educated – partly abroad – in the modern industries.[578]

While the joint pooling of capital outside the family basis was not entirely novel to Japan as the curtain fell in the Tokugawa period as certain silent partnership constructs employed by groups of merchants reveal[579], it had never established itself as a prevalent form of conducting business. While these constructs between merchants in the Tokugawa period reveal the element of limited investor liability, such constructs

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577 Miyamoto, *supra* note 500, 76.

578 Miyamoto, *supra* note 504, 78.

579 Miyamoto, *supra* note 514, at 101 f. For a detailed analysis of various forms of (silent) partnerships arrangements (*tokumei kumiai*) for example between Ōmi merchants for their trade activities between Hokkaido and Nagasaki, see Kanno, *supra* note 512, 22 ff. as well as ŌMI SHŌNIN NO KENKYŪ (1941) 240 ff.; Tsunehiko Yui, *Waga kuni kaisha kigyō no senkuteki shokeitai* [Forms which Preceded the Corporation in our Country], 10 Keiei Ronshū [Collection of Essays on Management] 1963, 132 ff., with the latter, however, disagreeing as to whether such constructs indeed qualify as being equivalent to commenda or partnership structures given that the investors could take out the investment amount anytime, Yui, *ibid*., 135. For a summary, see Takamura, *supra* note 504, 19 ff. In addition, an investment instrument called *nagegane* bearing certain resemblance with the *commenda*, i.e., a partnership between investors and merchant usually engaging in overseas trade, especially through its origin and usage with respect to overseas and maritime ventures, was employed by merchants in Nagasaki, Hakata and Sakai since the first half of the seventeenth century, see Matao Miyamoto, *Sangyōka to kaisha seido no hatten* [Industrialization and Development of the Company System], in: Shunsaku Nishikawa/Takeshi Abe (eds.), SANGYŌKA NO JIDAI [The Age of Industrialization] (1990) 353; Masafumi Wakatsuchi, *Daikoukaijidai ni okeru porutogaru indokairo no kaijōhoken to nihon no nagegane no setten* [Contact Points between the Portuguese Maritime Insurance for the Sea Route to India in the Age of Great Voyages and the Japanese nagegane], 642 Hokengaku Zasshi [Journal of Insurance Studies] (2018) 186 ff.; Mihoko Oka, *A Great Merchant in Nagasaki in century*, 2 Bulletin of Portuguese Japanese Studies (2001) 41. With the seclusion policy introduced by the *bakufu* in the Tokugawa period the relevance of the *nagegane* naturally faded, see Miyamoto, *supra* note 514, 102. Notwithstanding, the concept of joint investments was partly carried over in the form of so-called "cargo vessel subscription bonds" (*kaisen kanyū shōken*), see Keiichiro Kato, *Tarukaisen no kanyū keitai ni kansuru ichi kōsatsu* [A Study on Investment in Sake Shipping], 20 Ryūtsū Kagaku Daigaku Ronshū [University of Marketing and Distribution Sciences Essay Collection] (2007) 45 ff.; Manabu Yunoki, KINSEI KAIUN-SHI NO KENKYŪ [Research on Maritime Transport in Recent Times] (1979) 148 ff. Likewise, Osaka merchants when having to borrow to the aristocracy tried to the soften the impact of increasing default risk in times of deteriorating finances of the aristocracy, inter alia, by joint loan undertakings, see Miyamoto, *supra* note 579, 353. The division between a functional capitalist with unlimited liability and an unfunctional capitalist, to say financier or investor, already occurred in these schemes. In the European context, the *commenda* construct coexisted with the joint-stock corporation principle in the early charter and trading companies, Schmitthoff, *supra* note 478, 85 f.

were used for individual operations and not perpetuated.[580] Upon the implementation of their policies the Meiji elites saw themselves confronted with the unfamiliarity and even unwillingness of affluent merchant families to pool their financial resources for joint enterprises with their peers – most vividly demonstrated by the Mitsui-gumi and Ono-gumi not getting along as co-managers and co-investors of the First National Bank (infra subsection III.2, sub-paragraph a) cc)) as well as with outside investors and investors affiliated to their merchant house as the history of the Mitsui Bank demonstrates which initially operated on stock corporation principles with shares issued to employees as well as outside investors which were, however, bought up by the Mitsui family when the Mitsui Bank was temporarily transformed back into an unlimited partnership.[581]

1. Institutions and Concepts on which the Stock Corporation Could Draw

Based on the principles set forth above (supra subsection II.1), it will be evaluated which of the concepts commonly viewed as requirements for a joint-stock corporation were already existing or beginning to surface in the business community of the early Meiji period prior to the articulated adoption and promulgation of the joint-stock corporation principles. The availability of indigenous (micro-)innovations such as intergenerational preservation of funds and assets or the use of sophisticated book-keeping standards could provide a solid basis and facilitate the transfer of the macro(innovation), business corporation, into the existing institutional matrix.[582]

a) Legal personality and perpetuity of existence

Tokugawa Japan was familiar with various precedents of socially constructed, corporate entities, as the existence of constructs such as feudal han estates, municipal as well as religious units demonstrates.[583] More specifically in the arena of

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580 Miyamoto, *supra* note 579, 353.

581 See Randall K. Morck/Masao Nakamura, *A Frog in a Well Knows Nothing of the Ocean: A History of Corporate Ownership in Japan*, in: Randall K. Morck (ed.), A HISTORY OF CORPORATE GOVERNANCE AROUND THE WORLD: FAMILY BUSINESS GROUP TO PROFESSIONAL MANAGERS (2007) 374.

582 For the interrelatedness of institutions as constituents of a complex of institutional arrangements, see Kuran, *supra* note 251, 817 f.; Avner Greif, *Historical and Comparative Institutional Analysis*, 88 The American Economic Review (1998) 80-84; Avner Greif/David D. Laitin, *A Theory of Endogenous Institutional Change*, 98 American Political Science Review (2004) 633-652.

583 The concept of legal or juridical persons was not novel, since in the Tokugawa period municipal units, shrines and temples as well as business offices established for economic or social purposes were considered as such, see Ishii, *supra* note 476, 609.

commercial organization, the existence of guilds as well as the pooling of capital within the merchant families both indicate that the concept that a group of people could constitute a legal entity had already been developed springing from the need for collective economic activity and ownership[584] had existed also in Tokugawa Japan and institutions corresponding to such demand had been formed, such collective, however, primarily resting on a consanguineal basis or – in the case of the guilds – spatial proximity. The distinction between the family or corporate and shop names and the names of the investors defining legal personhood is thus acknowledged to have been existent in the Tokugawa era, however, such concept was not codified.[585] The fact that initial approaches – however, on a limited, in any event not anonymous, open market-based scale – to joint business undertakings had been made, reveals the acceptability of profit-sharing and of a "joint-venture mindset".[586] However, general acceptance and settling in of a concept does not automatically translate into (legal) implications being thoroughly grasped and thought through.[587]

The organization of the merchant families further demonstrate that an uncoupling between the family capital and the lifetime of the head of the family had taken place in tandem with a detachment between management and investors that had started to form with the management being transferred to salaried managers who usually acquired their firm-specific know-how through on the job training.[588] For successful merchant families it seems to have been a common understanding that the duration of the family capital pool would survive the lifespan of a family head and that business operations were oriented at preservation of such business and its capital base facilitating future business growth and capital accumulation.[589]

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584 This aspect can likewise be found in Roman law and the collegium under which three or more persons could jointly hold property, sue and be sued through an agent of its members, all after being granted official permission, see Rosenberg/Birdzell, *supra* note 570, 191 f. with further references.

585 Miyamoto, *supra* note 504, 79.

586 Miyamoto, *supra* note 504, 79. However, the stance towards joint undertakings was not necessarily affirmative, see Miyamoto, *supra* note 579, 357 f.

587 In this vein, in the context of English law it took until the case of Salomon v Salomon & Co at the end of the nineteenth century (the House of Lords' decision dates from 1897) that the legal consequences of the separate legal personality were established and spelled out in their ultimate meaning, see Davies/Worthington/Micheler, *supra* note 482, 33 ff.

588 On this latter aspect with respect to the established merchant houses of the Tokugawa period, see Miyamoto, *supra* note 579, 359.

589 Miyamoto, *supra* note 579, 359.

b) Delegation to a central management

The idea of the delegation of conducting the daily business operations to a central management with a board structure was yet to be developed and thus presented something novel. The recruitment of local managers to run the branch shops on a daily basis shows signs of a delegation and an increasing professionalization of managing activities.[590] The *ōmotokata* facilitated the development of business strategy and financial consolidation. The *ōmotokata* had aspects which show resemblance with a supervisory board. However, it was the asset and financial consolidation aspect which proved longstandingly, as with the political center shifting from Kyoto to Tokyo, the family offices in Tokyo gained increasing importance on the back of recruiting capable managers, eventually sidelining the *ōmotokata* in the case of the Mitsui-gumi.

In addition, the control mechanism immanent in a board structure was only present to a limited degree. The position of a *motojime* resembled one of a financial auditor rather than of a statutory auditor or director.[591]

c) Limited liability and free transferability of shares

The two concepts which had remained undeveloped were the ideas of a limited liability of all investors and the free transferability of shares.[592] While it can be argued that the transferable membership rights in the guilds, the *kabu nakama*, bear elements of shares, the investor aspect, if any at all, was eclipsed by the membership aspect which meant the license to conduct a business in a specific market and area, potentially subject to limitation set forth in the very membership certificate. The concept of a membership right coupled and underpinned by an investment with a right to participation in the profits, i.e., a dividend, had not emerged in the guild context. In addition to the absence of any free transferability, the element of transfer was tied to the consanguinity with membership rights, for example, handed down within the families constituting the

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590 Miyamoto, *supra* note 504, 79, who points out that such management position could only be attained after having proven loyal to the family and having been recognized as close to being a family member and that with such biographical burden it was difficult for such managers to deviate from traditional ways of management and to carry out the innovational leaps necessary for success in the modern industries, *ibid*. The examples of the struggles of the reforming managers of the Mitsui-gumi, Risuke Minomura and Hikojiro Nakamigawa, with inner family resistance which necessitated the intervention and mediation of Kaoru Inoue towards the middle of the Meiji period solidifies this point, see Morikawa, *supra* note 465, 44 ff., 59 ff., 99 f.

591 Miyamoto, *supra* note 514, 125 ff.

592 Nor had any securitization of capital evolved, see Miyamoto, *supra* note 579, 357.

ōmotokata or *motokata* constructs.[593] The profit participation rights in the merchant families on the other hand show the financial constituents of such right, a dividend or interest. As discussed above, the orientation of the guilds was on regulatory aspects.

The organization of the merchant family on the kinship principle militated against any free transferability besides the common ownership structure of the *ōmotokata*. The fact that the merchant families struggled with yielding ownership and control in their enterprises, such as in the above-cited case of the Mitsui Bank (see above para. II), vividly bespeaks their apprehension in even letting affiliated persons such as employees – to whom shares were issued upon incorporation of the Mitsui Bank – share in the ownership of their enterprises. The absence of the defining[594] limited liability concept is fairly undisputable. Pooling capital together was – save for a few exceptions of cooperations between merchant houses – virtually unknown.[595]

Thus, while different forms and approaches towards the joint economic activity or ventures – outside the merchant families, however, usually on ad-hoc basis or for a limited number of undertakings – had developed, the full-fledged stock corporation had not emerged; nonetheless elements were available on which the transplanted stock corporation principles could draw upon.[596]

d) The first "unregulated" companies incorporated on joint-stock principles

While there was still a conceptual chasm to be bridged, nonetheless the first companies on stock corporation principles already sprung up in the transition phase of the early Meiji period. Given the absence of prior experience with respect to incorporation and operation of companies on joint-stock principles and of a legal framework regulating joint-stock corporation, these companies came into existence in an unregulated vacuum. Departing from this abstract discussion, how did these first "unregulated", organic – as in contrast to the development under guidance and stimulation by the

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593 Miyamoto, *supra* note 579, 357.

594 The limited liability aspect as a consequence from the separate legal personality is usually put at the top of the list of criteria and considered the decisive element, see, for example, Otsuka, *supra* note 504, 208 f.

595 Taketa, *supra* note 509, 9; Masao Fukushima, *The Significance of the Enforcement of the Company Law Chapters of the Old Commercial Code in 1893* (translated by William Horton from 5 Waseda Hōgaku [Waseda Law School Review] (1977)), 24 Law Japan (1991) 171.

596 Miyamoto, *supra* note 579, 357; Takamura, supra note 504, 27; Vichian Chakepaichayon, *Meiji shoki no kaisha kigyō (1) – 81-sha no teikan bunseki* [An Analysis of the Company Statutes of 81 Companies in the early Meiji Period – Part 1], 31 Osaka Daigaku Keizaigaku [Osaka University Economic Papers] (1981) 100.

Meiji elites – joint-stock companies which were incorporated in Japan fare against the benchmark of the stock corporation concept and its key features (supra subsection II.2)? A study of the articles of incorporation of a sample of 81 companies incorporated in the first two decades of the Meiji period, namely between 1869 and 1880, sheds some light hereon and demonstrates that a substantial conceptual gap remained.[597]

(i) The concept of perpetuity of the corporation is reflected in a significant portion of the investigated incorporation documents, namely in 28 out of 81 companies; however, among the remaining 53 companies apparently intended for temporary business, on occasions the language of the incorporation documents contained flexible clauses providing margin for an extension, such as that the (dis)continuation was tied to obtaining (re)approval by the relevant authorities (the concession system was in place at this time).[598]

(ii) With respect to the stipulation of a registered share capital, it is noteworthy that the introduction of such practice through the National Bank Act in 1872 as well as companies backed by emerging business magnates such as Eiichi Shibusawa contributed to companies adopting pertaining rules as well as authorities requested the integration of relevant rules in the screening process.[599] Similarly, the immutability of the registered share capital for creditor protection purposes was only spread in slight more than half of the investigated early stock companies.[600] The wide majority of the stock companies in the sample contained clauses on the transferability of shares with even par values, which had not been a matter of course, however, usually subject to additional conditions.[601] Again, prominent stock companies such as the first national bank may have served as a kind of precedent and trailblazer.

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597 Chakepaichayon, *supra* note 596, 98-114 and *Meiji shoki no kaisha kigyō (2) – 81-sha no teikan bunseki* [An Analysis of the Company Statutes of 81 Companies in the early Meiji Period – Part 2] 32 Osaka Daigaku Keizaigaku [Osaka University Economic Papers] (1982) 66 ff. This investigation, inter alia, covers companies such as *Osaka tsūshō* and *kawase kaisha* (1868), the First National Bank (1871), Japan Mail Steamship Company (*Nihon seifu yūbin jōkisen kaisha*, the predecessor of NYK, in 1871), Mitsui Bank (1875) as well as Mitsui Bussan (1876), Osaka and Tokyo Stock Exchanges (both 1878), Tokyo Marine Insurance (1879) and Tokyo Horse Tramway Company (*Tōkyō basha tetsudō kaisha*, in 1880), see Chakepaichayon, *supra* note 596, 103 ff., Table 1.

598 Chakepaichayon, *supra* note 596, 108 f.

599 Chakepaichayon, *supra* note 596, 109 f.

600 Chakepaichayon, *supra* note 596, 110 f.

601 Chakepaichayon, *supra* note 596, 111 ff.

(iii) When it comes to provisions on corporate organization and corporate bodies the quota is significantly better: More than three quarters of the sample stock companies included provisions on a general shareholder meeting, with, however, the assignment of voting rights being less prevalent as nearly half of the stock companies did not include any provisions on voting rights in their articles of incorporation.[602] Again, the National Bank Act arguably presented a platform to spread the one-share-one-vote principle for which there appears to the evidence, since stock companies adopted such principle following the enactment in 1872 (infra subsection III.2, sub-paragraph a) cc)). However, the pendulum appears to have swung back to only major shareholders being assigned voting rights.[603] In addition, with a view to provisions being auxiliary or supporting equal shareholder voting, only a fourth of the stock companies in the sample adopted rules on the delegation of voting rights, with 60 per cent thereof, however, limiting such delegation to other shareholders.[604] When looking at the separation between management and owners, it is noteworthy that despite directors being the most widespread role, there were multifarious approaches to denomination as well as competences of the manager role; in addition, (top) management and ownership were found to be often intertwined.[605]

(iv) Likewise, the limited liability principle appears to have spread only slowly within the business community which is, however, not surprising given that also among the Meiji government the principle was yet to be thoroughly and uniformly conceived (infra subsection III.2); even if a few stock companies referred to the limited liability principle the understanding was not necessarily in conformity with the modern conception thereof.[606] On the other hand, to reward investors for their risk distributions were widely stipulated in the

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602 Chakepaichayon, *supra* note 597, 66 ff.

603 Chakepaichayon, *supra* note 597, 66 ff.; Yoshimitsu Imuta, *Meiji-ki ni okeru kabunushi no giketsuken* [Shareholders' Voting Rights in the Meiji Period], Keizaigaku zasshi [Journal of Economics] (1970) 57 ff., investigated a wider sample of 271 stock companies covering the period between 1872 and 1900. Within this sample nearly 41 per cent of the stock companies had adopted a one-share-one-vote rule in their incorporation documentation, with incorporations after 1893 accounting for more than 80 per cent, *ibid*., 67 ff., table 2.

604 Chakepaichayon, *supra* note 597, 69.

605 Chakepaichayon, *supra* note 597, 69 ff.

606 Chakepaichayon, *supra* note 597, 78 ff.

articles of incorporations, usually tied to the earning of profits by the company; however, it was not uncommon to commit and guarantee minimum payouts.[607]

In summary, while the investigation is based on a sample comprised of a limited number of entities incorporated on joint-stock company principles, it indicates that the spread of stock corporation gradually gained traction in the business community. However, the fact that key principles remained ambiguous and were not adopted universally shows that while business practices proceeded, the importance of a legal framework.

2. The Banking Industry as a Vehicle to Implement and Spread the Concept

Given the above-sketched background and the leap to be taken to bridge the conceptual gap, how was the transfer of the joint-stock company principles eventually achieved? The introduction of the stock corporation went hand in hand with the introduction of the institutions of capitalism[608], in particular the implementation of a modern financial system.[609] Widely perceived as a crucial factor and trigger for the transformation of the financial system was the disastrous state of financial affairs of the state budget coming out of the Tokugawa period which was exacerbated by an increasing negative trade balance resulting from foreign exchange trade activities, increasing foreign debts with no specie at hand for repayment, the resorting to an excessive issuance of

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607 Chakepaichayon, *supra* note 597, 81 ff.

608 In the context of the adoption of the concept of a free market over the course of the Meiji and Taisho periods, it is emphasized that the understanding of the Meiji elites was that the implementation of such institution in Japan required regulation, but that such rules should not simply mimic the Western templates, but should be infused with moral values and ethics balancing economic growth with the creation of, and contribution to, public welfare. This is one dimension of the wider, more comprehensive philosophical concept of *gapponshugi* and is, inter alia, associated with Eiichi Shibusawa, one of the prominent political leaders as well as investor and entrepreneur of the Meiji and Taisho periods who advocated this philosophy drawing on Confucianism as one philosophical foundation of his ethic of commercial and economic activity, see Takeo Kikkawa, INTRODUCTION, in: Kikkawa/Fridenson, *supra* note 469, 3 ff.; Shimada, *supra* note 473, 17 ff. On this inseparability of morality and economy or – less literally translated – the "harmony" or balance between these two elements, see Kazuhiro Tanaka, HARMONY BETWEEN MORALITY AND ECONOMY, in: Kikkawa/Fridenson, *supra* note 469, 35-58. Shibusawa also counted among the top-20 high earners, namely no. 17), of the commercial centers of Tokyo, Osaka and Yokohama at the turn of the century (in 1898), however, with a weakening trajectory than the heads of the later *zaibatsu* conglomerates, Mitsubishi (no. 1), Mitsui (no. 2), Sumitomo (no. 4) and Yasuda (no. 6), see Kanji Ishii, *Seiritsu-ki nihon teikokushugi no ichi danmen* [One Aspect of Japanese Imperialism in its Formative Period], 383 Rekishigaku Kenkyū [Journal of Historical Studies] (1972) 4, table 3.

609 Morck/Nakamura, *supra* note 581, 374.

government notes (*dajōkan-satsu*)[610] in conjunction with their drop in exchange value as well as the an outflow of significant amounts of specie reserves from Japan, especially of gold caused by the gold-silver conversion rate adopted by Tokugawa Japan not being in sync, i.e., showing an undervaluation of gold, with international exchange markets as well as inflation-related problems,[611] elevating the installment of a modern monetary infrastructure to a top priority for the Meiji era architects.[612]

In setting up a modern financial system, policy-makers could rely on the conditions created by a quasi-banking structure and experience centering around the so-called *ryōgae*, licensed merchants – such as seen in the case of Mitsui (supra para. I.3. a) bb)) –, who had entered the money exchange business and being familiar with the basic concepts of modern banking, such as extending loans (against collateral), receiving deposits, discounting notes, issuing (local) trade vouchers[613] that also had the function of bank notes as well as conducting exchange operations for their merchant peers (and sometimes the shogunate and samurais).[614]

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610 These (non-convertible) government notes were introduced in 1868 and based on gold, meaning that thus the use of a silver currency was abolished, and presented the first nationwide circulated paper money in Japan. Increasing expenditure and fiscal revenues not keeping pace, led to excessive issuance and eventually inflation, see Shizume, *supra* note 508, 4 f. They incidentally distributed via the large merchant houses such as Mitsui, Ono and Shimada, see Roberts, *supra* note 510, 91. The ban on the issuance of paper money had already been withdrawn by the late Tokugawa administration, when the issuance of (convertible) notes had been ordered, see Roberts, *ibid*., 79.

611 Shizume/Tsurumi, *supra* note 506, 4; Tamaki, *supra* note 505, 13; Yoshimitsu Imuta, *Kindai shinyō seido no keisei to kabushiki kaisha no fukyū* [Formation of a Modern Credit System and Spread of Joint-Stock Companies], in: Ichiro Kawai/Etsuji Kinoshita/Shoichiro Kamino/Makoto Takahashi/Genzo Hazama (eds.), KEISEIKI NO NIHON SHIHONSHUGI [Japanese Capitalism in its Formative Period] (1968) 137 f. with figures on the outflow on page 142; Eiichi Shibusawa, *The Development of Banking in Japan*, in: Shigenobu Okuma (ed.), FIFTY YEARS OF NEW JAPAN, VOLUME 1 (translated by Marcus B. Huish, 1909) 496.

612 Keiichiro Nakagawa (ed.), *Business Strategy and Industrial Structure in Pre-World-War-II Japan*, in: STRATEGY AND STRUCTURE OF BIG BUSINESS – PROCEEDINGS OF THE FIRST FUJI CONFERENCE (1978) 5. The final cornerstones of such policy were the adoption of the gold standard and the yen as a national currency (replacing the Mexican silver as officially recognized payment means) which took place on 10 May 1871, and the establishment of a central bank, the Bank of Japan, see Kokuritsu Kobunsho-kan [National Archives of Japan], *Gendai Kokka Nihon Tōjō – 14. Nihon Ginkō no Sōsetsu* [The Establishment of the Bank of Japan], available under: https://www.archives.go.jp/exhibition/digital/modean_state/contents/establishbank/index.html (last accessed 9 April 2023).

613 As an aside, these vouchers were initially only circulated locally, until Mitsui in tandem with the expansion of its exchange business established a nationwide bill-of-exchange system, see Roberts, *supra* note 510, 25.

614 Shizume, *supra* note 508, 4; Tamaki, *supra* note 505, 4 ff., 8; Roberts, *supra* note 510, 25.

a) From exchange companies to national banks

The transformation was not achieved immediately, but by a series of intermediate steps in which ambitious plans did not always come into fruition, failed or aggravated existing problems, e.g., in form of the notes issued by the exchange companies (supra subsection III.1). Altogether, three main stages can be identified, namely

(i) The introduction of exchange companies – so-called *kawase kaisha* – in an organizational form based on stocks, but still with significant conceptual differences such as that its shareholders were burdened with unlimited liability;

(ii) The enactment of the National Banking Act in 1872 and the ensuing incorporation of national banks to form a national banking system; and

(iii) The revision of aforementioned act resulting in the adoption of the Revised National Banking Act in 1876.[615]

The last step eventually proved successful and ushered in the take-off phase in which numerous national banks were incorporated between 1876 and 1879 which justifies to view the adoption of the Revised National Banking Act as the act and moment in which the stock corporation concept was effectively transplanted and took root in Japan.[616]

aa) Overview

Despite the development of foreign trade presenting a key item on the reform agenda to stimulate the domestic economy and establish a monetary system a on pecuniary, rather than rice, basis,[617] rather than the trading companies it were eventually the national banks – via their unsuccessful predecessor in the form of eight bills of exchange companies (*kawase kaisha*)[618] which brokered and contributed to the transplantation of the concept of the cooperation and the pooling of financial resources

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615 There were individual attempts besides the mainstream such as the establishment of the *Hyōgo Shōsha* (Hyogo Trading Company) following the proposal by Kozukenosuke Oguri in 1865 or of Maruzen (then as *Maruya Shōsha*) by initiative of Yukichi Fukuzawa through his students, Yuteki Hayashi, in 1869, see Yasumasa Senda, *Waga Kuni no Kabushiki Kaisha Tanjō to Tōjō no Michinori* [The Path towards our Country's Stock Corporation's Birth and Introduction] 7 Shihon Ichiba [Capital Markets Review] (2018) 48 f.; Saegusa, *supra* note 465, 25; Maruzen Publishing, *supra* note 471.

616 Nakagawa, *supra* note 612, 9.

617 Tamaki, *supra* note 505, 24 ff.

618 The translation is used based on Kozo Yamamura, *The Role of the Samurai in the Development of Modern Banking in Japan*, 27 The Journal of Economic History (1967) 201. The initially eight exchange companies, however, eventually failed with only the second one being transformed into the Second National Bank, see Yamamura, *ibid*., 202 f. The direct genealogy is thus rather limited.

as a first step towards the modern corporation. The establishment of the national bank translates into the creation of a modern credit system capable of providing sufficient funds to compensate for the lack of capital accumulation in the then present Japan and further drive industrialization.

bb) Exchange and Foreign Trading Companies: Kawase kaisha and tsūshō kaisha

The first institution which is deemed close and considered the immediate forerunner to the modern Japanese stock corporation[619] – however, not qualifying as a stock corporation[620] – was the foundation of trading companies (*tsūshō kaisha*) intended to be flanked and assisted by likewise newly incorporated exchange companies (*kawase kaisha*)[621] on stock corporation principles starting in 1869 which was intended to channel and unify foreign trade activities.[622] In addition, it was envisaged to thereby tap foreign trade as an income source coupled with the combination of capital between a wider range of entrepreneurs outside the merchant family circles.[623] Leading merchant families such as Mitsui-gumi, Ono-gumi and Shimada-gumi were compelled and eventually recruited under the government's direction to operate the exchange companies.[624] The exchange companies were conceptualized to operate in tandem with the trading companies, especially to provide the necessary funds through extending credits.[625] In addition, the government authorized the exchange companies to issue notes.[626]

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619 Saegusa, *supra* note 465, 28 f., 31; Kanno, *supra* note 512, 258.

620 Saegusa, *supra* note 465, 31; Masao Fukushima, NIHON SHIHONSHUGI NO HATTATSU TO SHIHŌ [The Development of Capitalism and the Private Law] (1988) 28.

621 The government further encouraged and backed the foundation of shipping companies (*kaisō kaisha*) and transport companies (*riku'un moto kaisha*), see Saegusa, *supra* note 465, 29; Imuta, *supra* note 611, 135.

622 Saegusa, *supra* note 465, 28 ff. The intertwining of the development of foreign trade and the stock corporation is not limited to Japan. The start of trade of English merchants with their peers in continental European ports fostered the adaptation and eventually arguably the overcoming of guild structures with the new form of trading requiring a stricter governance and overall constitutional framework with respect to the regulation of external affairs abroad which resulted in the formation of charter companies. The first regulated companies grew directly out of guilds with (additional) trading privileges being bestowed upon them by the state (King Henry VII in case of the Merchant Adventurers in 1506), see Schmitthoff, *supra* note 478, 81 ff.

623 Tamaki, *supra* note 505, 25 ff.; Shibusawa, *supra* note 611, 487.

624 Saegusa, *supra* note 465, 29. The Kōnoike-gumi may be cited as an additional prominent example, see Imuta, *supra* note 611, 133 with an overview of the individual capital contributions.

625 Saegusa, *supra* note 465, 29.

626 Shizume, *supra* note 508, 5; Nobuyoshi Toshitani/Takeshi Mizubayashi, *Kindai Nihon ni okeru kaisha-hō no keisei* [The Formation of Company Law in Modern Japan], in: Shinichi Takayanagi/ Isamu Fujita (eds.), SHIHONSHUGI-HŌ NO KEISEI TO TENKAI: KIGYŌ TO EIGYŌ NO JIYŪ [Formation and Development of Capitalist Law: Corporate and Financial Freedom] (Volume III, 1973) 8.

The state was heavily involved in the exchange companies and partly provided the capital of such companies. The exchange companies had a number of distinct features setting them apart from the modern stock corporation, namely (i) members had to contribute to the company, (ii) members were entitled to a fixed monthly interest payment proportional to their contribution as well as to a participation in the profits, if such were generated, (iii) members were issued a member certificate which was transferable, however, subject to the company's consent, (iv) members were subject to unlimited liability, (v) there was no limitation as to who could become a member, however, accession to the company was subject to a screening, (vi) the company's representative directors was appointed by the government agency based on the number of certificates held.[627] Only in the event of important decisions the representative directors were required to act jointly. These representative directors were also in charge of internal affairs and were joined by directors officially appointed from among the founders. Depending on whether it was an exchange company or a trading company, a defined number of the representative and other directors took monthly turns with two off-duty directors being in charge of surveying the company's affairs, thus assuming a rudimentary and fragmentary supervisory function.[628] While a shareholders' meeting in theory existed, in practice it played a limited role.[629] In stark contrast to a modern stock corporation, participation in an exchange company was accompanied by unlimited liability.[630] Hence, the exchange companies as their peers can also be qualified at maximum as incorporated on stock corporation principles.

The financial failure[631] of the undertaking of the exchange companies – only the exchange company in Yokohama ultimately survived and resurfaced as the Second National Bank, while the remaining seven companies[632] were wound up – was eventually caused by a multitude of factors partly caused by with the general political and economic situation[633], and partly caused by conceptional shortcomings of the

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627 Saegusa, *supra* note 465, 30.

628 Saegusa, *supra* note 465, 30 f.; Bai Guodong, *Kabushiki Kaisha Kansa Seidō-ron* [About the Audit System of the Stock Corporation] 73 Waseda Law Journal (1997) 139.

629 Saegusa, *supra* note 465, 30; Guodong, *supra* note 628, 139.

630 Senda, *supra* note 615, 49; Baum/Takahashi, *supra* note 80, 344.

631 Senda, *supra* note 615, 49; Saegusa, *supra* note 465, 31; Kanno, *supra* note 512, 229 ff.

632 Besides the surviving one in Yokohama, exchange companies had been founded in Edo, Osaka, Kyoto, Kobe, Niigata, Otsu and Tsuruga, see Shizume, *supra* note 508, 5.

633 Tamaki, *supra* note 505, 26 f., cites the abolishment of the trade board system and the introduction of a prefectural system replacing the up to this point still existing territorial domains in August 1871 as well as the excessive thus problematic note issuance rights of the exchange companies as overall political and economic factors. State intervention as well as inexperience of the key actors

companies, such as the problematic issuance rights of the eight eventually established exchange companies as the most prominent and conspicuous factors.[634] The concept of the stock corporation was nonetheless introduced to a wider circle of business actors of the Meiji era.[635]

cc) Transposition of the national bank system

After the administrative reforms by which the confederal estate or *han* system was replaced by a centralized prefectural system in August 1871 (*haihan chiken*) concomitant with abolishment of the status system (*koseki hō*) and the introduction of modern system of landownership and land taxation (*chiso kaisei*), the next step forward with respect to the monetary system came with the establishment of a national bank system modelled after the United States' banking system.[636]

(1) National Bank Act (Kokuritsu Ginkō Jōrei)

The adoption of the national banking system entailed the establishment of privately-owned commercial banks combining banking activity with note-issuing rights translating into a decentralized banking system.[637] The National Banking Act was enacted on 15 November 1872 and set forth in 28 articles and 161 clauses the

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with respect to the mechanics of foreign trade may be reasons more specific to the organizational form, see Saegusa, *supra* note 465, 31; Kanno, *supra* note 512, 229 ff.

634 Tamaki, *supra* note 505, 26.

635 Saegusa, *supra* note 465, 31; Kanno, *supra* note 512, 255; Shibusawa, *supra* note 611, 490. Further promotion was made through publication and circulation of literature dealing with the stock corporation by the Ministry of Finance, such as Genichiro Fukuchi's "*Kaisha-ben*" [On Companies] and Eiichi Shibusawa's "*Rikkai Ryakusoku*" [Concise Principles for Company Formation], providing guidance with respect to the stock corporation, its formation and the importance of joint capital operation, while notably the limited liability principle not being explicitly carved out and defined, see Senda, *supra* note 615, 49 f.; Toshitani/Mizubayashi, *supra* note 626, 17; Kazuo Sugiyama, *Business Finance in Japanese Business History*, 1 Japanese Yearbook on Business History (1984) 25 f.; Fukushima, *supra* note 620, 28.

636 Tamaki, *supra* note 505, 29; Saegusa, *supra* note 465, 32; Takamura, *supra* note 504, 40; Imuta, *supra* note 611, 137; Yamamura/Murakami, *supra* note 514, 343 f.

637 Shizume, *supra* note 508, 5 f., thus in contrast to European models, such as England with the Bank of England being the central and sole issuing bank. The model of the Bank of England was discussed, but eventually Hirobumi Ito advocating the US-American model succeeded, at least for the time being, since Japan changed to the central bank system with the adoption of the Bank of Japan Act of 1882, see Shizume, *supra* note 508, 5 f., 8; Tamaki, *supra* note 505, 29 f. The Bank of Japan Act drew from the Belgian National Banking Act, see Toshihiko Yoshino, *The Creation of the Bank of Japan – Its Western Origin and Adaptation*, 3 The Developing Economies (1977) 386 ff. Only the Convertible Bank Notes Act enacted in 1884 established the issuing monopoly of the then newly founded Bank of Japan, see Hoshi/Kashyap, *supra* note 146, 23; the national banks were phased out by February 1899 when all national banks had been absorbed by, or converted into, private banks, Hoshi/Kashyap, *ibid*.

regulation of henceforth to be incorporated national banks. Key provisions under the National Banking Act[638] were, inter alia:

- At least five persons were required to act as founders or promotors of a national bank who, after approval by the Minister of Finance, would then solicit capital subscriptions. Upon determination of the subscribers and the subscription amount, the founding certificate as well as the articles of incorporation were to be drawn up (Articles 1, 2 National Banking Act).
- The management of the national banks was to comprise of at least five directors with one of them serving as president. The directors were to hold at least thirty shares in the banks as their own (Article 4 sections 4, 5 National Banking Act).
- Each share was to amount to JPY 100. There was no restriction on the number of shares which a shareholder could hold at maximum (Article 5 section 1 National Banking Act). Detailed provisions set forth requirements with respect to the minimum share capital for national banks depending on the size of the population of their seat of incorporation (Article 6 section 1 National Banking Act).
- Issuance of share certificates.
- The shares were freely transferable, however, with such transfer being subject to the consent of president and directors (Article 5 sections 1 through 3 National Banking Act).
- Shareholders were to proportionally to their holding share in the profits and losses of the business (Article 5 section 5 and Article 13 National Banking Act on the distribution of dividends).[639]
- Shareholders had equal voting rights, one vote per share (Article 5 Section 9 National Banking Act).

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638 Hōrei Zensho [Complete Collection of Laws and Regulations], Volume V.1 (1977) 287 ff., translation adopted after Taketa, *supra* note 509, 231 ff.

639 This section could be interpreted as to establish an unlimited liability of the shareholders, exceeding their investment amount. For the bankruptcy procedure, hence the most important part in this respect, Article 18 however, clarifies that "the shareholders of the bank shall pay at most the amount they have invested as the bank's capital and shall not be assigned any other debt". The divergence of the two norms is also pointed out by Taketa, *supra* note 509, 75. There is generally consensus that this National Bank Act – when reading the afore-mentioned two provisions together – adopted the limited liability principle, see, for example, Toshitani/Mizubayashi, *supra* note 626, 19; Chakepaichayon, *supra* note 597, 79 f.

The national bank system was intended to promote money circulation of bank notes and funds through the distribution of (convertible) bank notes for a growing economy. While the decision to implement such system was formed within the government, it was partly echoed by the merchant community with the Mitsui-gumi, the Ono-gumi or the Tokyo Chamber of Commerce submitting applications to establish private banks which were, however, withheld, since the government preferred the enactment of a legal framework to precede the foundation and sought a more robust base than a family bank.[640] Besides the facilitation of the circulation of money, the national bank system was also conceptualized to address the problem of various kinds of previously issued (non-convertible) notes in circulation which posed a threat to the monetary stability of the Japanese economy which was still in its early stage.[641]

While the monetary policies and purposes in detail pursued by the enactment shall remain outside the scope of this thesis, the regulation presented the first attempt to introduce an organizational form on joint-stock basis resting on a legal codification which, inter alia, spelled out the limited liability principle. In addition, the movement towards the modern stock corporation principle is also evidenced by the establishment of a regular management and the transferability of the shares.

These organizational differences in contrast to the exchange and trading companies are significant. The First National Bank and its peers therefore widely acknowledge as the first modern stock corporations in Japan.[642]

However, in practice, also this experiment eventually proved not successful and the expectations with respect to the redemption of the non-convertible government notes were not fulfilled.[643] Only four national banks were after a slow-moving process[644] eventually established and the flagship – the First National Bank as the by margin

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640 Yamamura, *supra* note 618, 201; Shibusawa, *supra* note 611, 492; Roberts, *supra* note 510, 98.

641 Senda, *supra* note 615, 50; Shibusawa, *supra* note 611, 499 f.

642 Michiyo Hamada (ed.), *Kaisha to no Deai* [Encounter with the Corporation], in: NIHON KAISHA RIPPŌ NO REKISHITEKI TENKAI: KITAZAWA MASAHIRO-SENSEI KOKI SHUKUGA-RON BUNSHŪ [Historical Development of Japanese Company Law: Publication for Masahiro Kitazawa's 70th Birthday] (1999) 22; Senda, *supra* note 615, 50; Toshitani/Mizubayashi, *supra* note 626, 19.

643 Saegusa, *supra* note 465, 35.

644 The First National Bank opened its business on 20 July 1873 and the last, the Second National Bank, only commenced operation on 15 August 1874, see Imuta, *supra* note 611, 141, table 3. The two other national banks, no. 4 was based in Niigata, and no. 5 in Osaka, see Hamada, *supra* note 642, 18.

largest national bank[645] whose management had, however, suffered under the disharmony between its two main shareholders, Mitsui and Ono, which had been prodded by mediation and authority of the government to collaborate for this venture[646] – was thrown into tumult by the financial adversities and consequently departure of one of its major shareholders, the Ono-gumi.[647] This was the last event which eventually brought the national bank initiative to a standstill.

As the low number of incorporations indicated, the scheme did not manage attract a sufficient number of capital providers from the outset, which was one of the reasons why the government had then turned to the – financially overstretched – wealthy merchants.[648] Strict regulations such as the high reserve ratio did not attract investors.[649] The weakness of the system came to light with aggravating macro-financial circumstances, the depreciation of the yen (in the international comparison) as well as of government and national bank notes (on the domestic market) coupled with inflationary pressures which were gaining traction[650] brought the nascent and still fragile monetary system under pressure and ushered in a recalibration of the approach by the government.[651]

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645 Saegusa, *supra* note 465, 35. The share capital of the First National Bank amounted to 2,500,000 Yen, thus accounting for more than 70% of the aggregate share capital of all four national banks, see Imuta, *supra* note 611, 141, table 3.

646 Roberts, *supra* note 510, 98 f. Mitsui and Ono (together with Shimada), however, acted as co-shareholders in other early stock corporations, such *Shōshi Kaisha*, which as incorporated in 1873 and would later come to be known as Ōji Seiji, see Ōji Holdings, *150th Anniversary Ōji Group*, available under: https://www.ojiholdings.co.jp/150th/history/ (last accessed 2 May 2023).

647 Such financial troubles ending in bankruptcy and eventual considerable downsizing of operations were shared by the Shimada-gumi, see Saegusa, *supra* note 465, 35. The downfall of the Ono-gumi was precipitated by the government suddenly calling for collateral for deposits of official monies such as tax revenue as the three houses were acting as financial agents for the government and could use collected funds without any interest accruing for their operations. It is speculated that Mitsui had been warned of the sudden policy change in advance enabling it to make preparations to post the required collateral, see Morikawa, *supra* note 465, 9 f.; Roberts, *supra* note 510, 102 f. The Furukawa *zaibatsu*, however, was in a way born out of the Ono family, as its founder served as a manager of one of the family's stores, see Morikawa, *ibid*., 17.

648 Hisashi Masaki, *The Formation and Evolution of the Corporate Business System in Japan*, 3 Japanese Yearbook on Business History (1987) 29.

649 Shizume, *supra* note 508, 6. For the capitalization and reserve ratio, see Saegusa, *supra* note 465, 37.

650 Due to the ongoing, uncontrolled issuance of non-convertible government notes. This macro-aspect together with the general matter of a missing issuance monopoly is commonly identified as one crucial shortcoming of the government's initial efforts to establish a modern, viable banking system besides direct restrictions on the national banks activities, namely the conversion requirement, see Yamamura, *supra* note 618, 203; Hamada, *supra* note 642, 22 f. Saegusa, *supra* note 465, 35.

651 Baum/Takahashi, *supra* note 80, 344 f.

(2) Accompanying legal measures and practical developments

The intensive efforts to spread the stock corporation were flanked and reinforced by the establishment of stock exchanges, which were equally incorporated based on stock corporation principles with the first two exchanges being set up in Tokyo[652] and Osaka (see preamble of the Stock Exchange Act)[653] in 1878 under the framework of the Stock Exchange Act (*Kabushiki Torihikisho Jōrei*) enacted on 13 October 1874.[654] The number of stock exchanges would balloon out to 46 towards the end of the nineteenth century, before receding and eventually stabilizing at around ten stock exchanges during the first half of the twentieth century.[655] The mushrooming of many stock exchanges took its toll on the importance of the Tokyo Stock Exchange with its share measured revenues, but with consolidation setting in it reestablished its preeminence.[656] In addition, regulation on rice markets (by virtue of the Rice Market Act, *Kome Shōkaisho Jōrei*), also to be incorporated on joint-stock company principles,

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652 When looking at the list of its top 10 shareholders upon incorporation, it is interesting to note that four members of the Mitsui family appear besides, inter alia, Eiichi Shibusawa, see Ishida/Yokoyama, *supra* note 508, 19 f.

653 Various stock exchanges in other cities, notably Yokohama (1880), Kobe (1883), Kyoto (1884) and Nagoya (1886), would soon follow suit in quick succession, see Tamaki, *supra* note, 36; Yasushi Hamao/Takeo Hoshi/Tetsuji Okazaki, *Senzen Nihon ni okeru Shihon Ichiba no Seisei to Hatten* [The Genesis and Development of the Capital Market in Pre-War Japan], 56 Keizai Kenkyū [Research on Economy] (2005) 17.

654 The stock exchanges are, however, only attributed a limited role in the financial system prior to the 1880s, see Tamaki, *supra* note 505, 66, with respect to the Tokyo Stock Exchange. Nonetheless, the existence of such trading and exchange platform could arguably contribute to spreading the concept of transferable membership rights in economic ventures. The establishment of the stock exchanges provides an interesting anecdote with respect to the viability of legal transplants: The initial attempt to establish a securities exchanges modelled after Western regulations (in form of the London Stock Exchange) ultimately failed, since the regulation was found to be too restrictive and to be not corresponding to existing trading practices developed from previous commodity markets, primarily the rice exchanges. The Stock Exchange Act enacted in 1878 reflected transaction standards established from rice markets, see Hoshi/Kashyap, *supra* note 146, 25; spot and future transactions for shares were both provided for under the law, Hamao/Hoshi/Okazaki, *supra* note 145, 58 f. For a brief interlude, regulation required stock exchanges to be organized by membership instead of joint-stock company principles. This policy change was, however, revoked in light of resistance from the business community, by the 1893 Exchange Act (*Torihikijo-hō*) which provided for both alternative, membership organization or stock corporation, Hamao/Hoshi/Okazaki, *supra* note 145, 57.

655 Hamao/Hoshi/Okazaki, *supra* note 653, 18.

656 The surge in the incorporation of stock exchange is, inter alia, attributed to the reduction of the minimum capital requirements for stock exchanges by the Exchange Act, see Hamao/Hoshi/Okazaki, *supra* note 145, 57. The Tokyo Stock Exchange initially had a revenue share of up to 70 per cent leading into the 1890s, before it dropped into the 20 per cent range in the late 1890s. Save for a sudden and brief drop in 1922 in which it yielded the top position to the Osaka Stock Exchange, it retained its leading position and recouped revenue share with levels hovering mainly between 30 and 40 per cent until the end of the prewar period, see Hamao/Hoshi/Okazaki, *supra* note 653, 18 f., especially figures 3.

was passed.[657] The Stock Exchange Act provided the framework for the public trade of public bond certificates and loan certificates, stocks, securities and tradeable security certificates (Article 1 section 1 Stock Exchange Act).[658]

While the development of a legal framework thus progressed, the institution of a stock market with its participants acting and retracting from investments based on accurate and timely business information was still immature and required much more time to unfold, a gap which was initially filled by resorting to informal, non-market mechanisms, namely personal relations resting on the reputation and credibility of prominent business leaders (*zaikaijin*), such as the afore-mentioned Eiichi Shibusawa.[659] Investors for specific projects were listed in subscription lists, thus resorting to a means stemming from the collection of temple donations with the founder or *zaikaijin* – in the case of larger projects – figuring at the top of such list.[660] As a complementary method, affluent aristocratic – former *daimyō* – families joined forces in regional investment associations as platforms to coordinate joint investments in new (regional) projects; for larger start-ups several investment association acted together usually subscribing to equal amounts of shares, however, thus resulting in shareholder structures with several, equally large majority shareholders requiring the authority of founder or anchor *zaikaijin* to reconcile diverting interests.[661]

dd) Revised National Bank Act (August 1876)

Realizing that the redemption of the government notes in circulation could not be achieved in the short term, the government decided to focus its policy with respect to the national banks on their function as liquidity providers.[662] The day of the proclamation of the afore-referred Rice Market Act, 1 August 1876, also saw the enactment of the Revised National Banking Act. Among the technical provisions relating to the establishment and governance of a stock corporation no substantial changes were made. However, the regulatory tweaks were successful. Two main reasons are cited for the success of the Revised National Banking Act, namely

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657 See, the Rice Market Act, proclaimed on 1 August 1876.

658 The rules specific to the stock corporation resembled those set forth in the National Banking Act.

659 Miyamoto, *supra* note 504, 80.

660 Miyamoto, *supra* note 504, 80. The founder or *zaikaijin* usually also installed employee or non-owner managers with the industry-specific and technological knowledge – sometimes gained through studies abroad – through their personal connection and supervise or supported them, *ibid*., 84 ff.

661 Miyamoto, *supra* note 504, 81 ff.

662 Saegusa, *supra* note 465, 36.

(i) Relaxing the requirements for the in-specie reserves to be held by the national banks and the percentage up to which the national banks were entitled to issue notes which provided the banks with extra maneuverability and contributed – arguably in connection with, and on the back of, better general economic conditions – to raise the profitability prospects of the national banks;[663] and

(ii) Allowing that the commutation bonds issued and still prevalently held by the former samurai could be contributed to the share capital of the stock corporations.[664]

In the course of the fiscal reforms and to alleviate the strain on the government budget,[665] the government had discontinued paying stipends to the former samurai which it had introduced upon dissolution of the domains, and replaced the stipends by commutation of such stipends into public bonds.[666] The commutation bonds could be traded and sold off on the newly established stock exchanges.[667] However, the depreciation of these bonds aggravated the frail financial situation of many samurai, giving rise to imminent political pressure on the government.[668] The government extracted itself from this economically and politically critical situation by allowing the commutation bonds to serve as reserves for the issuance of national bank notes so that these bonds could be brought into the national banks as capital stock, thus providing an additional avenue besides cashing out via the stock exchanges and further encouraging the samurai to participate and engage in the modern businesses.[669]

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663 Saegusa, *supra* note 465, 36; Takamura, *supra* note 504, 41; Tamaki, *supra* note 505, 36 f. The increased issuance rights, however, entailed that the share capital to be paid in was equally raised from 60 per cent to 80 per cent of the registered share capital and consequently, the national banks were permitted to issue their notes up to this amount, Tamaki, *ibid*.

664 Saegusa, *supra* note 465, 36; Tamaki, *supra* note 505, 36. As indicated by the volume of the commutation bonds, the stipend had ballooned to an unhealthy proportion of the governments' budget: The commutation bonds amounted to 174 million yen, exceeding the annual government revenues by approximately four times, and also clearly surpassed the value of the government notes in circulation of 112 million yen in the year 1875, see Tamaki, *ibid*. Eventually, 30 million yen were brought in as capital to the national banks, Hoshi/Kashyap, *supra* note 145, 20 with additional references.

665 The obligations amounted to JPY 1,74 billion, see Meiji Zaisei-shi [Financial History of the Meiji Period] Volume XIII (1906) 112.

666 Shizume, *supra* note 508, 6; Harry D. Harootunian, *The Economic Rehabilitation of the Samurai in the Early Meiji Period*, 19 The Journal of Asian Studies (1960) 439 f., with insights into the commutation procedure.

667 Tamaki, *supra* note 505, 36. The Tokyo Stock Exchange and the Osaka Stock Exchange were both established in the year 1878.

668 Yamamura, *supra* note 618, 204.

669 Shizume/Tsurumi, *supra* note 506, 6; Meiji Zaisei-shi [Financial History of the Meiji Period], *supra* note 665, 111 f.

In this manner, the government pursued two purposes, namely the protection of the value of the commutation bonds by open an avenue for the utilization and thus appease the former samurai class as well as the tapping of their dormant, inactive capital resources to encourage the incorporation of national banks and through this the circulation of private funds.[670] In addition, the government attempted to redirect and gear the samurai class's ethics and morals towards the economic sphere for the welfare and power of the state and incentivize their participation in the formation of the new economic system[671], thus achieving the recruitment of the to this moment widely economically passive samurai class as fund providers for the national banks and the economy as a whole.[672] Catering to the former samurai class caused that in the very beginning of the wave of incorporations of national banks, the former samurai class (as well as the new nobility) accounted for the majority of shareholders and total shareholding; an effect which, however, waned in the following years which the merchant class assuming an increasing role.[673] Consequently, a significant number – 153 in total, including the four, amended original national banks – of national banks were established as well as stock corporations in other business areas, including private banking sparked by the increasing success of the national banks.[674]

The coupling the spread of the stock corporation with the abolishment of the samurai pension payments and the simultaneous transformation into bonds eventually proved the key moment, since the government could liberate its budget and public debt from the samurai rents, the samurai bonds could be utilized and channeled to the national banks for their initial funding phase and lastly they provided the robust foundation for the financial institutions envisaged to facilitate the modernization of the entire economy.[675]

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670 Bank of Japan, NIPPON GINKŌ HYAKUNEN-SHI [Bank of Japan: The First Hundred Years] Volume I (1982) 26 ff.; Shizume, *supra* note 508, 6; Senda, *supra* note 615, 50; Yamamura, *supra* note 618, 204; Harootunian, *supra* note 666, 440; Meiji Zaisei-shi [Financial History of the Meiji Period], *supra* note 665, 112.

671 Tamaki, *supra* note 505, 36; Yamamura, *supra* note 618, 204; Teijiro Ueda, KABUSHIKI KAISHA KEIZAI-RON [On the Economics of Stock Corporations] Volume II (1975) 67.

672 Masaki, *supra* note 648, 29 f.

673 Tamaki, *supra* note 505, 38; Kokichi Asakura, MEIJIZENKI NIHON KINYŪKŌZŌ-SHI [On the History of Financial Organization in the Early Meiji Period] (1961) 122. For detailed analysis on the provenance of the capital providers and relativizing even the initial impact of the former samurai class's contribution besides state and merchants, see Yamamura, *supra* note 618, 205 ff.

674 Bank of Japan, *supra* note, 29; Shizume, *supra* note 508, 7; Masaki, *supra* note 648, 29; Asakura, *supra* note, 122 ff., the latter with an overview of all 153 national banks which shows the at times significant divergence between obtaining of the license and going into business.

675 Hamada, *supra* note 642, 25; Senda, *supra* note 615, 50.

ee) The transition to private banking

Mitsui made use of this opportunity to withdraw[676] from the First National Bank initially form with the Ono-gumi and set up its own bank, the Mitsui Bank, in July 1876 presenting the first private bank not being designated as national bank entailing the absence of any note issuance rights.[677] However, not qualifying as a national bank implied that the limited liability principle was equally not applicable, resulting in unlimited liability for the shareholders.[678]

While floating of shares in the Mitsui Bank[679] to the public meant that in principle the Mitsui-gumi allowed outsiders the participation in the banking sector of their business through holding shares in the Mitsui Bank, half of the capital stock – i.e., one million yen – was provided by the Mitsui families and additional shares were distributed to employees, hence insiders, ensuring the closely-held character of the bank.[680]

The Mitsui Bank remained the sole private bank for a while, since investors poured their funds into the national banks. With the government, however, discontinuing the issuance of licenses after the incorporation of the 153rd national bank in 1879, the number of private banks and quasi-banks experienced a boom – simultaneously with

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676 The shareholding in the First National Bank were only sold off later in the general overhaul and streamlining activities in 1890s, see Roberts, *supra* note 510, 139 f.

677 Shizume, *supra* note 508, 7; Saegusa, *supra* note 465, 38; Senda, *supra* note 615, 51; Tamaki, *supra* note 505, 40 f.; Yasuda, a *zaibatsu* peer, however, soon mimicked the move and incorporated its own bank after having co-owned and co-operated the Third National Bank with Kawasaki. The incorporation of the new private bank was realized by a public offering with the Yasuda family, however, retaining more than 40% of the shares. Interestingly, as in the case of the Mitsui Bank, the Yasuda Bank was temporarily operating as an unlimited partnership. See for these aspects, Morck/Nakamura, *supra* note 581, 374; Morikawa, *supra* note 465, 11; Yamamura, *supra* note 618, 206. The centralization of the issuing function in the hands of the Bank of Japan only occurred in 1885, see Masaki, *supra* note 648, 29 f.

678 Saegusa, *supra* note 465, 38 f.; Senda, *supra* note 615, 51; Shizume, *supra* note 508, 7 f. The stop of accepting national bank applications is connected to the Meiji government turning its focus on regulating the amount of money in circulation and in line with this policy capping the allowance of note issuance. When the prefectural limit was reached, new applications were no longer accepted, see Shizume, *ibid*.

679 The use of the designation "bank" or "ginkō" had been reserved exclusively for the national banks and the application for licensing been rejected if such designation were included in the application of financial or quasi-banking companies until it was liberalized in 1876, see Toshitani/ Mizubayashi, *supra* note 626, 22 f.; Saegusa, *supra* note 465, 38. The government, however, tolerated these often money-exchanging businesses as quasi-banks which in fact outnumbered both national and private banks, see Shizume/Tsurumi, *supra* note 506, 6, 16 ff.

680 Saegusa, *supra* note 465, 38 f.; Tamaki, *supra* note 505, 41. Despite the apparent tendency to open up the circle of investors to non-family members, such steps were later retracted, when Mitsui bought up all shares previously distributed upon reorganization as a general partnership; such conduct meaning growth without reliance on outside equity financing was practiced by the Mitsui and Sumitomo families alike, see Morck/Nakamura, *supra* note 581, 379 ff.

an overall investment boom – which, however, came to a temporary halt in the mid-1880s under the influence of an economic slowdown and eventual depression as well as the adoption of austere fiscal policies.[681]

b) Developments outside the banking sector

On the back of the success of the national bank incorporations as well as large-scale companies such as Japan Railway (in 1881), Osaka Cotton Spinning (in 1882) or Nippon Yūsen K.K. (after a merger with Kyōdō Unyu K.K., in 1885), the stock corporation swept over to other business fields outside the national bank cosmos, such as manufacturing, commerce, transport and agriculture, where numbers began to surge and continued to do so until 1881/1882, when the adoption of introduction of deflationary monetary policies by the government to curb inflation which had, inter alia, been kindled by the government resorting to the issuance of (inconvertible) notes to have financial means to tackle the Satsuma rebellion in 1877, led to an abrupt cool-down and eventual drop – not only in the national banking sector (as indicated supra a) dd)) – of new incorporations as well as multiple companies failing and going out of business which was can, however, partly also attributed to inexperience with the new modern businesses as well as indiscriminate incorporation of businesses as stock corporations and an investment frenzy partially financed by credit.[682]

The numbers of new incorporations began to surge again in the second half of the decade from 1886 onwards.[683] Despite this increase in numbers a legal regime governing stock corporations regarding outside the scope of national banks covering,

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681 Saegusa, *supra* note 465, 39 f. After the policymakers had shifted its focus from the achieving supply of funds to currency stabilization, see Bank of Japan, *supra* note, 30.

682 Saegusa, *supra* note 465, 40 f.; Ueda, *supra* note 671, 66 f.; Fukushima, *supra* note 620, 29; Taketa, *supra* note 509, 16. Despite the considerable size of these stock corporations, no special regulation existed. Organization, management and finances of the corporation operating under special privileges such as in the railway and transport sectors were, however, supervised by the authorities, see Saegusa, *ibid*., 47. The bank loans for share purchases were often collateralized with shares, so that tumbling share prices caused turbulences in the financial market, see Masaki Nakabayashi, *Contained crisis and socialized risk: Unconventional policy by the Bank of Japan in the 1890s*, 40 Research in International Business and Finance (2017) 233 f.

683 Saegusa, *supra* note 465, 42 f. The figures provided by Imuta, *supra* note 611, 178 show that a trend towards a higher average registered share capital started to take effect from the year 1885 (although this very year appears to be an outlier as the figures for the two following years retreat again, however, on a level significantly above the levels of 1884 and before), which could be interpreted as more attention was paid to the capitalization of stock corporation after the experience of the recession years.

inter alia, incorporation requirements and liability matters, had not developed.[684] In addition, even if operating businesses of considerable size the capitalization was small, especially in comparison with the national banks.[685] The considerable increase in the number of stock corporations further emphasized the requirement of a comprehensive legal framework.[686]

The absence of any such legal regime and legal certainty, inter alia, with respect to the liability matter commonly surfaced in the event of business failures and liquidations equally affecting shareholders and creditors and thus bearing the potential of undermining the trust of the business community in companies with pooled capital which the government had spent such efforts to establish.[687] Ministerial guidelines on the formation of companies issued in 1873 did not effectively remedy this regulatory gap.[688] The oscillation with respect to the jurisdiction regarding incorporation and oversight between the central and prefectural authorities did not contribute to enhance the level of legal certainty.[689] To further fuel the confusion, there was no alignment on the limited liability matter within the government.[690]

3. Interim Conclusion

The combination of the development of a modern banking or credit industry with the transplantation of the stock corporation principle arguably[691] contributed to a faster spread of the concept as the number of new incorporations in the years after the enactment of the Revised National Banking Act suggest. However, the novelty and thus unfamiliarity with a modern banking system at the same time complicated the process created additional pitfalls due to tying the stock corporation even closer to the success of the establishment of a modern monetary system within an ambitious timeline. On the other hand, given that the key role of a robust financial system for

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684 Saegusa, *supra* note 465, 42 ff.; Fukushima, *supra* note 620, 30, 259. In addition, there appears to have been no consistent understanding within the government on the limited liability aspect as well, Fukushima, *ibid*.

685 Saegusa, *supra* note 465, 47.

686 Fukushima, *supra* note 620, 258 f.; Taketa, *supra* note 509, 66.

687 Baum/Takahashi, *supra* note 80, 354; Fukushima, *supra* note 595, 173 ff.

688 Fukushima, *supra* note 620, 29, 255.

689 See Saegusa, *supra* note 465, 44 ff., and Fukushima, *supra* note 620, 254 ff., especially for the jurisdiction changes between the central and prefectural governments with respect to granting the incorporation license.

690 Fukushima, *supra* note 620, 259.

691 On the relevance of the coupling of these two aspects, Imuta, *supra* note 611, 130.

mobilizing capital is widely acknowledged among scholars nowadays[692], the coupling of the promotion of a modern financial banking system with the transplantation of the stock corporation principles appears as a consistent approach by the Meiji elites.[693]

IV. Consolidation of the Stock Corporation

The new legal instruments were eventually formally as well as in substance received and made use of by the Japanese community by the end of the nineteenth century.[694]

1. Genesis of a Comprehensive Legal Framework

The arrival and rooting of the stock corporation idea in Japan was rounded off and consolidated by a legal framework in form of the Commercial Code. However, the codification process was not straightforward as the genesis of the code was intertwined with the legislative history of the Civil Code and being tied to this encompassing approach of a civil law codification had to respond to practical demands of the business world.

The afore-presented transfer of the stock corporation via the banking industry rested primarily on rules enacted through the National Banking Act of 1872 and its ensuing substantial amendment in form of the Revised National Banking Act of 1876. However, the field of application was limited to banks. Outside the banking sector, legal certainty was absent which reflected in the business world, in particular when coupled with a general economic downturn or even panic.[695] The necessity to ensure legal certainty and retain and if necessary, regain the business community' trust in the concept was imminent in the late 1880s and early 1890s and eventually resulted in the enactment

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692 For example, Peter L. Rousseau/Richard Sylla, *Emerging financial markets and early US growth*, 42 Explorations in Economic History (2005) 1 ff.

693 See Rousseau/Sylla, *supra* note 692, 5 ff., for the investigation of the emergence and evolution of (state) banking in the United States from the 1790s onwards demonstrating how the promotion of banks as chartered corporations helped to attract investor and to grow the banking sector, in particular, in comparison to the frontrunner England at that time where the limited liability option only became available by virtue of the Limited Liability Act of 1855. On the relevance of financial intermediaries for economic growth, see, for example, Valerie R. Bencivenga/Bruce D. Smith, *Financial Intermediation and Endogenous Growth*, 58 Review of Economic Studies (1991) 195 ff.

694 The not only formal, but compliance also in substance, strikingly contrasts with Japan's peer in the East Asian law family, China, where company law – partially influenced by the Japanese Commercial Code – lacked the in-substance aspect according to William C. Kirby, *China Unincorporated: Company Law and Business Enterprise in Twentieth-Century China*, 54 The Journal of Asian Studies (1995) 43 ff.

695 Fukushima, *supra* note 595, 175.

of the so-called Old Commercial Code – in contrast to the later enacted, reworked Commercial Code – with effect as of 1 July 1893.[696]

The Commercial Code in the Kyū-Shōhō version limited the menu of available enterprise forms to three, namely stock corporation, general or unlimited partnership and limited partnership.[697] With respect to the stock corporation, the Kyū-Shōhō set forth the following key provisions:[698]

- Definition of corporate forms available and introduction of uniform terminology of the stock corporation as "*kabushiki kaisha*" (Section III Kyū-Shōhō).[699]

- Clear definition of the limited liability principle (Article 154 Kyū-Shōhō, clearer, however, Article 144(1) Shōhō).

- A general meeting with unlimited competence[700] over corporate matters (Article 198 ff. Kyū-Shōhō).

- The requirement of the appointment of at least three directors, each being – by law – afforded sole power of representation (Article 185(1) Kyū-Shōhō).

- The requirement of three auditors to be appointed by the general meeting which were tasked with the check of the lawfulness of acts as well as of their compatibility with the shareholders' interests (Article 191 Kyū-Shōhō).

- Requirement of government approval for subscription of shares and obtaining an incorporation license (Article 156 Kyū-Shōhō). The registration principle was only introduced with the enactment of the Shōhō in 1899 (Article 141 Shōhō).[701]

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696 For a detailed overview of the legislative process, see Fukushima, *supra* note 595, 176 ff.

697 Imuta, *supra* note 611, 177; Baum/Takahashi, *supra* note 80, 357.

698 Hōrei Zensho [Complete Collection of Laws and Regulations], Volume XXIII.2 (1977) 21 ff., translation adopted after Taketa, *supra* note 509, 253 ff.

699 Prior to the codification in the Kyū-Shōhō, the terms such as "*gappon gaisha*" and "*shimei gaisha*" were also used to refer to companies incorporated under joint stock corporation principles outside the national banks, see Fukushima, *supra* note 595, 175, 184.

700 This aspect will be addressed in detail below, see Chapter IV, infra subsection II.3.a).

701 In general, the Shōhō contained some adjustments. Another example, is the sanction of the, however, limited issuance of preferred shares which had previously been used, but prohibited under the Kyū-Shōhō reasoning that preferred shares would violate the principle of equal rights of shareholders, see Masaho Noda, *Corporate Finance of Railroad Companies in Meiji Japan*, in: Keiichiro Nakagawa (ed.), MARKETING AND FINANCE IN THE COURSE OF INDUSTRIALIZATION – PROCEEDINGS OF THE THIRD FUJI CONFERENCE (1978) 98 f.

- Companies which had been incorporated prior to the enactment of the new law were required to register within six months of the enforcement of the new code.

With this step, the formal arrival of the stock corporation in Japan was completed. However, the stock corporation did not immediately become the choice of promoters and founders by default. After becoming the favorite option for new incorporations in 1894, the pendulum swung back to the limited partnership form which scored the highest share of newly-founded companies between 1895 and 1898, but at the same time also considerable high dissolution rates in the range of 25 per cent.[702] The figures (post 1896) regarding the paid-up and subscribed capital amounts indicate that the stock corporation established itself as the enterprise form for large-scale, industrial operations as the figures for the subscribed capital indicate.[703] With respect to the absolute figures, in 1895, stock corporation and limited partnerships were on a nearly equal level hovering just above 45 per cent each with a slight margin in favor of the former (1,135 versus 1,115), while the unlimited partnership kept falling behind (208 partnerships).[704] In 1896, the stock corporation accounted already for the majority of incorporated companies (2,585) followed by the limited partnership (1,667) and the unlimited partnership (344).[705] When looking at the paid-up capital, the share of joint-stock corporation accounted for 89.9 per cent.[706] While the number of unlimited partnerships remained comparatively low, while taking part in the overall growing trend with 2,616 unlimited partnership in 1912, 3,968 in 1918, and 5,203 in 1925, the numbers for limited partnerships and stock corporations remained on a similar level with 5,829 stock corporations and 5,442 limited partnerships in 1912 showing growing and contracting gaps in the interim years, until between 1917 and 1918 when after limited partnerships having nearly matched the number of stock corporations for one year in 1916 (7,500 versus 7,485) the gap started to ballooning out and a gaping difference for the year 1918 with 13,174 stock corporations versus 8,605 limited partnerships registered.[707] The capitalization of the incorporated companies per

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702 Fukushima, *supra* note 595, 189, 191.

703 Nippon Tōkei Kyōkai [Japan Statistical Association], Volume IV (1987) 180-185, table 15-5-b. The category of agriculture appears to be an outlier as stock corporations while exceeding the limited partnerships also in these categories, they do so only by relatively unremarkable margin, which points towards that the companies incorporated in agriculture were in general rather small- to medium-sized businesses.

704 Imuta, *supra* note 611, 179 f. (table 30).

705 Nippon Tōkei Kyōkai [Japan Statistical Association], *supra* note 703, 180-185, table 15-5-b.

706 Miyamoto, *supra* note 504, 76.

707 Nippon Tōkei Kyōkai [Japan Statistical Association], *supra* note 703, 180-185, table 15-5-b. This gap, however, not remained, as the share of stock corporation contracted after reaching a high in

enterprise form is a different story and reveals the dominance of the stock company for large-scale companies

Table II.1: *Capitalization of enterprise forms between 1896 and 1939 (data taken from Miyamoto)*[708]

	Number of companies				Paid-in capital			
	Distribution			Total number	Distribution			Total sum (in JPY 1,000,000)
	Unlimited partnership	Limited partnership	Stock company		Unlimited partnership	Limited partnership	Stock company	
1896	7.5	36.3	56.2	4,596	3,1	6,9	89,9	397
1900	9.1	41.4	49.5	8,588	4,9	5,8	89,3	779
1905	14.2	39.0	46.8	9,006	6,2	5,8	88,0	975
1910	20.3	38.9	40.8	12,308	9,5	6,5	84,0	1,481
1915	17.8	40.2	41.8	17,149	8,4	5,9	85,7	2,167
1920	15.7	30.0	54.2	29,917	7,0	4,6	88,4	8,238
1925	15.1	33.6	51.1	34,345	8,0	6,6	85,3	11,160
1930	16.4	46.2	37.4	51,910	8,5	6,5	85,0	19,633
1935	19.5	52.8	27.7	84,146	7,8	6,9	85,3	22,352
1939	17.9	43.0	39.0	85,122	5,5	4,0	90,5	34,025

2. Integration of Important Economic Actors: The Example of Mitsui as an Emerging *Zaibatsu*

Very much in line with this observation of a rather sluggish permeation of the business community with the stock corporation concept, prominent economic actors such as Mitsui, Sumitomo, Mitsubishi or Yasuda, which would later develop and constitute the

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the early 1920s until the mid-1930, before recovering in the late 1930s, see Tom Nicholas, *The Organization of Enterprise in Japan*, 75 The Journal of Economic History (2015) 341 f., especially figure 2.

708 Miyamoto, *supra* note 579, 375.

first-wave first-tier *zaibatsu* had yet to fully embrace and implement the stock corporation concept, as they continued to operate on an unlimited or limited partnership basis.[709] Frictions between the new legal framework in form of the Kyū-Shōhō and Shōhō and the concepts of the family enterprises as laid down in the respective family or house codes soon revealed itself, especially with respect to property and disposition of property concepts.[710] The enterprise form of partnership for the time being retained its attractiveness for these enterprise groups at least at the top level characterized by insider, or rather more precisely, family ownership.[711] These family-owned businesses made, however, use of stock corporation when venturing into new areas of business in order to raise capital and established new isolated stock corporation for each purpose, however, retaining control through implementation of the later *zaibatsu* characteristic pyramidal structure.[712] The stock corporation eventually came to be employed by big family businesses – the future *zaibatsu*[713] – as a vehicle to reorganize their businesses and cement family control over the enterprise group via family-owned holding companies.[714]

However, why did Mitsui and its *zaibatsu* peers eventually opt for implementing the stock corporation structure for their enterprises? In the following a brief overview of

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709 Imuta, *supra* note 611, 180.

710 Morck/Nakamura, *supra* note 581, 374.

711 On this aspect of ownership, Morck/Nakamura, *supra* note 581, 377 ff.

712 Morck/Nakamura, *supra* note 581, 368.

713 While it is generally held that *zaibatsu* developed in the Taisho period (1912 through 1926), the term is not consistently used with respect to its qualification: One definition understands a *zaibatsu* as "*a corporate grouping centred on a parent company (a holding company) invested in by a family or clan (dōzoku), which engages in a variety of businesses through subsidiary corporations that it controls; large-scale subsidiaries occupy oligopolistic positions in their various industrial sectors*", see Shigeaki Yasuoka (ed.), *Nihon zaibatsu no rekishi-teki ichi* [The Historical Status of Japanese Zaibatsu], in: NIHON NO ZAIBATSU [Japan's Corporate Conglomerates] (1976) 14; definition translated in line with Nakamura, *supra* note 817, 235. Such definition was adjusted and broadened in later years when *zaibatsu* was defined as "*a diversified enterprise management body, formed under the closed ownership or control of a wealthy family or clan*", see Hidemasa Morikawa, ZAIBATSU NO KEIEISHITEKI KENKYŪ [Business History Research on Zaibatsu] (1980) 4, translation again after Nakamura, *ibid*., in substance meaning a shift away from emphasis on the conglomerate or concern structure, see Takeo Kikkawa, NIHON NO KIGYŌ SHŪDAN [Japan's Enterprise Groups] (1996) 16 ff.; Nakamura, *ibid*., eventually arriving at a definition focusing on the three structural characteristics, family influence, diversification and oligopolistic position, Kikkawa, *ibid*., 20 f. While Mitsui and Sumitomo could look back on an established business history prior to the Meiji period, Mitsubishi and Yasuda just rose to importance in the Meiji period and Mitsui, Sumitomo and Mitsubishi remain sprawling, important enterprise groups even today, Morck/Nakamura, *supra* note 581, 374 ff.

714 These developments took place in the interwar period, see Hayakawa, *supra* note 35, 239 f.

the reorganization of Mitsui as representative of major family-held[715] conglomerates shall be given. The switch to the adoption of stock corporation principles was preceded by various structural changes which took place in the beginning of the Meiji period. Ushered in by the shift of the political centre from Kyoto to Tokyo in the Tokugawa period which spilt over and was increasingly strongly felt also in the economic life, the relevance of the *ōmotokata* which maintained its location in Kyoto started to erode: After separating the money exchange business, under which as a separate office the *goyōsho* as an lending institution and forerunner of the later *kawase kaisha* for the government had been set up in 1866, the textile business which would become a separate company (*Mitsukoshi*) in order to streamline operations in Tokyo, funds, reserves and securities of the *ōmotokata* were transferred to the exchange office.[716] The *ōmotokata* was stripped of its direct influence over the individual branches and families which gained more independence which, however, entailed operation on a self-supporting basis, meaning that each family and branch became responsible for its respective losses, while they could retain twenty percent of their annual profits.[717] In general, the families were appealed to become actively engaged in the respective shop's business.[718]

Besides the formation of the Mitsui Bank (supra subsection II.2, sub-paragraph a) ee)) and Mitsukoshi, Mitsui came to incorporate Mitsui Bussan as a merger of Kokusan Kata, the trading division which was spun off from the exchange offices, and Senshū Kaisha, a trading company founded by Kaoru Inoue which was absorbed by Mitsui

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715 Different attempts have been made to classify the class *zaibatsu* which emerged in the later years of the Meiji period. If the criterion of the shares being closely held by founder families, this would include Mitsui, Mitsubishi, Sumitomo and Yasuda which are also the prominent exponents the big four *zaibatsu* as well as the first generation. The counterpart of such classification would be the widely-held conglomerates such as Nissan or Riken which came to the fore in the early twentieth century which making them second generation *zaibatsu*. Sometimes the criterion of industrial *zaibatsu* is chosen to classify a of group of conglomerates such as Asano, Furukawa, Okura, Kawasaki as well as Suzuki which like the big four have their origins in the Meiji period, see Morck/Nakamura, *supra* note 581, 374 ff. Yasuda is sometimes also counted towards this in-between group give its lesser degree of diversification, see Hideaki Miyajima/Shinya Kawamoto, *Business Groups in Prewar Japan: Historical Formation and Legacy*, in: Colpan/Hikino/Lincoln, *supra* note 73, 106, table 4.2. On the other hand, Yasuda developed significant financial ties to other *zaibatsu* such as Asano and Mori which were lacking a strong bank, thus lending its loan portfolio a strong industrial exposure, Morck/Nakamura, *ibid*., 390 f.

716 Morikawa, *supra* note 465, 7; Roberts, *supra* note 510, 97 ff.

717 Roberts, *supra* note 510, 97.

718 Roberts, *supra* note 510, 97 f. This realignment of the members of the Mitsui families on the economic welfare was sanctioned and endorsed by the government, see Roberts, *supra* note 510, 113 f.

with the government's tutelage and good will.[719] In 1892, a third pillar was added by the incorporation of the Mitsui Kōzan Kaisha (Mitsui Mining Company) as a limited partnership, under which all mining activities into Mitsui – most prominently those at the profitable Miike coal mine which had been auctioned sold by the government in 1888 in a push for privatization – had ventured, were consolidated.[720] In 1893 when the Kyū-Shōhō was enacted, just as Mitsui Bussan, Mitsui Mining and Mitsukoshi, Mitsui Bank which had come to assume the function of the former *ōmotokata* were transformed into unlimited partnership (*gōmei kaisha*) with unlimited liability and all shares therein transferred back to the Mitsui family.[721]

With all four key businesses being exposed to the unlimited liability risk, as a workaround the eleven families were divided into different four groups and responsibility for each unlimited partnership assigned to pairs of two groups each. As an additional layer, a system of personal interlocking of the directorate was introduced with the Mitsui Bank, Mitsui Bussan and Mitsui Mining have identical directors among each other and the *motokata*.[722] While in the following decade further reorganization measures were implemented, the most relevant change was an adjustment and rebalancing of the shares in the four unlimited partnerships.[723]

Despite considerable growth in each department, the reorganization of the four key companies only started with Mitsui Bussan being transformed into a stock corporation in 1907 and Mitsui Bank in 1909.[724] Also in 1909, Mitsui moved away from the decentralized managerial structure with personal directorial interlocking to a centralized holding company structure which later was to become archetypal for the *zaibatsu* and was implemented after key members of the Mitsui family had visited Europe and the United States to study the structures of affluent Western family conglomerates after the key businesses had grown to a size which made risk exposure under a limited partnership structure too large.[725] Consequently, Mitsui Gōmei Kaisha was installed as the top holding company in which Mitsui family members exclusively held the partnership interest and under whose umbrella the key businesses headlined

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719 Morikawa, *supra* note 465, 35 f.; Roberts, *supra* note 510, 107 ff.
720 Morikawa, *supra* note 465, 44; Roberts, *supra* note 510, 131, 139 f.
721 Morikawa, *supra* note 465, 44; Roberts, *supra* note 510, 140.
722 Yasuoka, *supra* note 523, 399 ff.; Yonekura, *supra* note 520, 67 ff.
723 The head house (*sōryōke*) held 23 per cent, each main house (*honke*) 11.5 per cent and each related house (*renke*) 3.9 per cent in each of the four partnerships, see Yonekura, *supra* note 520, 70; Yasuoka, *supra* note 523, 430.
724 Roberts, *supra* note 510, 169, 171.
725 Yonekura, *supra* note 520, 71.

by Mitsui Bank, Mitsui Bussan and Mitsui Mining as stock corporations were moved.[726] Besides the corporate structure, the *ōmotokata*, meaning the joint assets of the Mitsui families, was renamed into *motokata*, while via the intermediate step of a provisional council a family council, the Dōzoku-kai, was installed in 1893 where the family heads as well as the key managers were gathered.[727] The structure of the family council was shortly later refined and a board of directors set up thereunder to focus on the supervision of the subsidiaries and divisions of the Mitsui Gōmei Kaisha.[728]

The reorganization of the Mitsui-gumi and its various growing field of business under the roof of a holding company was motivated by a combination of factual and structural reasons: On the factual side, the sheer size of the main three businesses, banking, trading and mining, implied increasing financial risk in the ventures under the then current partnership regime given that the Commercial Code provided for unlimited liability of partnership companies. The structural reason can be seen in the growing acceptance of the owner-management division and the opportunity to recruit capable managers to steer the business on the operative level.[729] The poor economic performance of the Mitsui Bank resulting from its inability to adjust to the loss of the handling of the government deposits to the Bank of Japan in 1886 demonstrated that the existing structures lacked the flexibility and know-how to respond to the challenges of the private banking system. Government intervention[730] sparked by the concern that a bankruptcy of the Mitsui Bank could be a potential shock wave to an economy which was just on the uptake, affected that new knowledge was recruited (from the modern universities such as the predecessor of Tokyo Commerce College, Keio or Hitotsubashi) into the Mitsui conglomerate to replace the old-school bantō.[731]

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726 Yonekura, *supra* note 520, 71 ff.; Roberts, *supra* note 510, 172.

727 Morikawa, *supra* note 465, 44 ff.; Roberts, *supra* note 510, 140.

728 Morikawa, *supra* note 465, 46.

729 On these aspects, Yonekura, *supra* note 520, 72 ff.; Yasuoka, *supra* note 523, 510 ff.

730 The granting of privileges as well as the chaperoning of the Mitsui conglomerate in this phase are remarkable, making Mitsui a prime example of a "political merchant" (*seishō*), see Morikawa, *supra* note 465, 3.

731 Morikawa, *supra* note 465, 20 f.; Yonekura, *supra* note 520, 66 ff., citing the examples of Rizaemon Minomura who was responsible for the reorganization of the Mitsui conglomerate in the 1870s and Takashi Masuda as successor of the former. For reforming the financially ailing Mitsui Bank, the government in person of Kaoru Inoue urged the Mitsui Bank to appoint an expert from outside the Mitsui family and business, Hikojiro Nakamigawa, as managing director in 1891. For Keio being a pool for Mitsui's recruiting efforts in the following years, see Osamu Takenouchi, MEIJIKI MITSUI TO KEIŌ GIJUKU SOTSUGYŌSEI [Mitsui and Keio Graduates in the Meiji Period] (1995).

The observation that the introduction of the Kyū-Shōhō played at best a marginal role when it comes to the response of the big enterprises to the newly codified organizational menu becomes evident when looking at the diverse responses of Mitsui's peers in 1893: The Mitsubishi family opted for reorganization of the group as a limited partnership with various business unit in which the two most influential family members contributed equally as limited partners, and so did the Yasuda Bank which transformed the unlimited into a limited partnership, while Ōkura-gumi and Fujita-gumi both opted for the unlimited partnership.[732] The other three large enterprises and later *zaibatsu* which all had a strong mining background, namely Sumitomo, Furukawa and Asano did not implement structural changes at this occasion.[733] It took until 1921 that a *zaibatsu* company, Mitsubishi Mining, made an equity offering that the general public could subscribe, thus reducing the holding companies' share, Mitsubishi Gōmei Kaisha, but not affecting its control.[734]

The influence of the legal landscape was mixed: While revisions of the relevant taxation regime introducing a progressive tax system in connection with the tax transparency of partnerships might have nudged businesses towards adoption of the stock company to evade the tax burden on personal wealth and income streams such as bonuses and dividend payments, especially post an amendment in 1920[735], more relaxed disclosure obligations of partnership structures provided an incentive to not make the switch towards incorporation.[736] The initial reluctance of *zaibatsu* and big business to embrace the principal of companies with publicly-traded shares stifled the growth of market capitalization.[737] Investments of the *zaibatsu* companies were funded by wealth accumulated within the group companies.[738] This stance only softened beginning in the face of capital accumulation being insufficient to fund the

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732 Morikawa, *supra* note 465, 11, 28 ff., 46.

733 Morikawa, *supra* note 465, 46.

734 Bassino/Lagaoarde-Segot, *supra* note 145, 1229; Hisashi Masaki, *The Financial Characteristics of the Zaibatsu in Japan: The Old Zaibatsu and Their Closed Finance*, in: Nakagawa, *supra* note 701, 43.

735 Fruin, *supra* note 471, 76.

736 Morikawa, *supra* note 465, 213.

737 Bassino/Lagaoarde-Segot, *supra* note 145, 1228 which the introduction of Kyū-Shōhō and Shōhō as well as the opening of stock markets to foreign investors, however, encouraged, see Matao Miyamoto, *The Position and Role of Family Business in the Development of the Japanese Company System*, in: Akio Okochi/Shigeaki Yasuoka (eds.), FAMILY BUSINESS IN THE ERA OF INDUSTRIAL GROWTH: ITS OWNERSHIP AND MANAGEMENT (1984) 56 f.; for examples, see Noda, *supra* note 701, 100.

738 Juro Teranishi, *Were Banks Really at the Center of the Prewar Japanese Financial System*, 25 Monetary and Economic Studies (2007) 66.

far-flung business expansion and diversification in the 1920s, arguably also encouraged by rise of a new generation of *zaibatsu* – such as Nissan – actively resorting to stock markets for funding.[739] Even outside the *zaibatsu* universe, if recourse to the stock market was sought, it is noteworthy that a tendency persisted to issue new equity to existing shareholders and that thus – besides speculators – the public aspect was effectively limited to a group of affluent individuals.[740] When eventually the transformation of the holding companies into stock corporations, ensuing issuance of capital to outside investors, with, however, affiliated companies and employees remaining the preferred subscribers, and dilution of the owner family`s share below the 50 per cent threshold took place which – to stick with Mitsui only occurred in 1940, when Mitsui Gōmei Kaisha was merged with Mitsui Bussan[741] –, such conversion was rather precipitated by a series of reasons such as mounting anti-*zaibatsu* sentiment, the revision of applicable special income and inheritance taxes affecting dividend payments by the wartime regime during as well as political pressures in the wartime, inter alia, requiring the *zaibatsu* to invest in military industries and to subscribe to government bonds; the issuance of corporate bonds by the *zaibatsu* coincided with such opening up of the core companies to investment by the public.[742]

V. Concluding Remarks to this Chapter: Emerging Patterns

Historical investigations tend to offer interesting insights, in particular as to the imitation, repeated experience and reappearance of developments in different jurisdictions. To start with two rather minor insights, there is the fact that the term

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739 Bassino/Lagaoarde-Segot, *supra* note 145, 1229; Masaki, *supra* note 734, 49 f.; Miyamoto, *supra* note 737, 59.

740 Bassino/Lagaoarde-Segot, *supra* note 145, 1231; Teranishi, *supra* note 738, 66 ff., 73. This interlocking persisted and became a characteristic of the relational post-war corporate governance model, Bassino/Lagaoarde-Segot, *ibid*., 1246, with traits of its arguably being persevered until current times if one watches the buyout of Toshiba Corporation and similar acquisition activities of the JIC, supra Fn. 107.

741 Morikawa, *supra* note 465, 234; Masaki, *supra* note 734, 44 f., thus being last of the triad Mitsui, Mitsubishi and Sumitomo – who took this step in 1937 – to do so. The method of the transformation by merger was selected to avoid taxes, Morikawa, *ibid*., 235. While being later than its peers, Mitsui, however, was less restrictive to let outsiders – on a limited scale – become shareholders of its top company through an ensuing public offering (in 1942), Morikawa, *ibid*., 235 f.

742 Morikawa, *supra* note 465, 224 ff.; Matao Miyamoto, *Nihon no dōzoku kigyō to zaibatsu* [Japanese Family Businesses and Zaibatsu], in: Shigeaki Yasuoka (ed.), ZAIBATSU NO HIKAKU-SHITEKI KENKYŪ [Comparative Historical Research on Zaibatsu] (1985) 58. Transformation into stock companies also enabled the *zaibatsu*-affiliated companies to raise external funds via the issuance of corporate bonds, Miyamoto, *ibid*.

"*kabu*"[743] used in the context of *kabu nakama* was carried over into the new economic and legal system to refer to shares in a stock corporation. In addition, while Japan due to resorting to the transplantation method with respect to the stock corporation concept could benefit from the prior experiences of its peers in the United States and Europe, such transplantation of legal concepts and rules did not prevent that certain steps were eventually retaken[744] in the transplantation process despite having been overcome already in the jurisdictions in which such transplant originated or from which such transplant drew inspiration: The temporary adoption of the concession system for new incorporations in the Kyū-Shōhō may be cited as an example for this aspect.[745] Putting these two pieces of rather anecdotal evidence aside, the question arises which general patterns can be identified with respect to the adoption and settling in of the stock corporation concept in Meiji Japan:

(i) At first, it can be noted that the adoption of the stock corporation concept qualifies as what I would like to call a "genuine legal transplant". The legal transplant terminology[746] referring to the "*moving of a rule or a system of law*

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743 Delving a bit into the etymological background of the word "*kabu*", it is noteworthy that similar to its equivalent in the English language ("*stock*") the term originally referred to be part of a tree left behind after the upper part has been cut from which a new tree could spring and that it came to be used in the context of the hereditary system to refer to initially a set of rights such as rank, social status as well as duties, which was later condensed into one right, which was hereditary and became transferable. Different forms of *kabu* of social and economic – such as the *kabu nakama* – origin were in circulation in the mid-Tokugawa period. An example of the former is the so-called *gōshi-kabu* which incorporated the status of a *gōshi*, a member of a lower samurai class. While restrictions with respect to transfers existed, by acquisition of such *gōshi-kabu* a merchant obtain such social status, see Miyamoto, *supra* note 546, 36 f.

744 Cochran, *supra* note 472, 1458 f., for example, gives account on the relevance of business experimenting with arrangements giving rise to litigation cases and court decisions, thus forming and further refining the stock corporation concept in the US-American context.

745 The concession system had been abolished in the United States, the United Kingdom, France and Germany (1870) by the time of the enactment of the Kyū-Shōhō. Nonetheless, the abolishment of the concession system did not entail that the influence of state authorities on stock corporations completely ceased, other avenues remained, cf., for example, for the amendment of the Commercial Code in Germany in 1897 (which contained the provisions pertaining to the stock corporation at that time), Louis Pahlow, *Das Aktienrecht im Handelsgesetzbuch von 1897* [The Stock Corporation Law in the Commercial Code of 1897], in: Bayer/Habersack, *supra* note 432, 434 f.

746 In the non-English discourse, such phenomenon is usually referred to as "the circulation" of legal models or paradigms, namely "*la circulation des modèles juridiques*" or "*la circolazione dei modelli giuridici*", see, for example, Gianmaria Ajani, *La circulation des modèles juridiques dans le droit post-socialiste* [The Circulation of Legal Models in Post-Socialist Law], 46 Revue Internationale de Droit Comparé [International Journal of Comparative Law] (1994) 1087 ff.; Éric Agostini, *La circulation des modèles juridiques* [The Circulation of Legal Models], 42 Revue Internationale de Droit Comparé [International Journal of Comparative Law] (1990) 461 ff. and Rudolfo Sacco, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG [Introduction to Comparative Law] (translation, 2001) 130 ff. On this aspect, Edward M. Wise, *The Transplant of Legal Patterns*,

from one country to another"[747] articulating an observation widely made among legal scholars discussing comparative law.[748] Genuine in this context shall refer to the fact that the stock corporation was transposed into the Japanese context largely unaltered due to the rupture which such new form of enterprise presented, meaning without the concept undergoing detailed technical engineering or adjustment which might be found characteristic of corporate law transplanted in later years and which could build on the then firmly rooted and defined stock corporation.[749] While the limited liability element was in doubt and not clearly defined for a certain period of time – which, however, had likewise been the case, for example, in the United Kingdom (supra subsection II.1) – eventually in the moment of comprehensive codification, the stock corporation was transplanted as is, namely mimicking the structural key elements of the stock corporations in the United States or the European jurisdictions. The reception of the transplant "as is" was certainly facilitated by the absence of any equivalent, endogenously and gradually developed institution or institutional infrastructure which could require adjustment and reconciliation. While the merchant houses had innovated a sort of "partnership system" to accommodate their network ownership structure through setting up branches operating largely autonomously under branch families and managers in different locations tapping new local as well as business markets as shown by independent accounting books which were only consolidated at regular intervals on the level of the main house, the concept of capital collection and corresponding investorship outside the family network, the guild or regular business partners was virtually unknown, thus lead to a big

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38 The American Journal of Comparative Law – Supplement U.S. Law in an Era of Democratization (1990) 1.

747 Watson, *supra* note 43, 21.

748 Poignantly and aptly articulated already by Roscoe Pound, THE FORMATIVE ERA OF AMERICAN LAW (1938) 94 who writes that "[*h*]*istory of a system of law is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside the law*". Also quoted by Watson, *supra* note 43, 22. Separate from the coinage of this catchy terminology, the key interest of Watson in his quoted work lies in drawing attention to the fact that there is not necessarily a close relationship between the legal system and the society or its identity in which such laws are in operation, exactly due to the historical fact that the transplantation of laws has commonly occurred since ancient times, and thus identifying the task of comparative law in the investigation of the relationships between different legal systems, Watson, *ibid*., 21 ff., see also John W. Cairns, *Watson, Walton, and the History of Legal Transplants*, 41 Georgia Journal of International and Comparative Law (2014) 640.

749 As for example with the institution of the statutory auditor or *kansayaku* which was created based after role models from a potpourri of jurisdictions, see for details, Haruhito Takada/Masamichi Yamamoto, *The "Roesler Model" Corporation"*, 45 Journal for Japanese Law (2018) 45-73.

leap forward with the transplant method allowing to skip over several intermediate organizational innovations.

(ii) This latter observation is connected with the next aspect, namely that the stock corporation as presenting the "modern firm" concept was primarily adopted as an economic tool to reallocate and bring together know-how, specialized labor forces, machinery, inactive capital, talent and energy[750], in contrast to the United States and Europe, where the initial focus driving the development lay on the legal side, notably granting legal personhood to corporate actors with the consequence of ownership and standing in front of courts being carved out and established.[751] In addition, the development of the stock corporation in these jurisdictions proceeded organically, meaning businesses in many sectors in these jurisdictions commenced on the scale of family firms and partnerships before through experimentation growing incrementally into larger enterprises requiring the transformation into stock corporations to raise the necessary capital.[752] Whereas in Japan, the business corporation and corporate law arrived as an integral part of an institutional complex of a modern economic and judicial order comprising, inter alia, modern banks, stock exchanges, commercial and civil procedural laws.[753]

The conceptual development of the modern stock corporation in the Western jurisdictions proceeded along the principles of promotion to attract investors and foundation for capital-intensive, venturous projects (which can be subdivided into the collection of capital and their retention for the period of such projects until sufficient profits could be expected), the formation of an asset, the separation of such asset into an independent asset (allocated to the corporation), formation and stabilization of a structure of governing corporate bodies and consolidation into an independent legal entity.[754] While the independence of the assets can also be observed to have occurred in Japan in the merchant houses with the formation of the Mitsui-gumi's *ōmotokata* and related structures in response to increasing enterprise size and regional diversification, it appears as if the solicitation for investor capital was not

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750 Yamamura/Murakami, *supra* note 514, 341.
751 Taketa, *supra* note 509, 54; Fukushima, *supra* note 620, 254.
752 Miyamoto, *supra* note 579, 82; Kuran, *supra* note 251, 815 f.
753 For a similar wholesale adoption in the Islamic Middle East, see Kuran, *supra* note 251, 818 f.
754 Cordes/Jahntz, *supra* note 478, 11.

developed throughout the Tokugawa and early Meiji periods, but was utilized and propagated by the Meiji elites and administration as an advantageous side of the stock corporation.

This lacuna may be explained by the absence of capital-intensive enterprises and projects due to full-fledged industrialization[755] only setting in in the course of the Meiji era and the far-reaching isolation of Japan during the Tokugawa period preventing the develop of capital-intensive overseas trade.[756] The concentration of economic activities on merchant houses may further added to this, especially when taking into account their restrictive attitude to outsiders acceding to their enterprise and the reliance on family ties.[757]

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755 Economic growth in Japan took off in the Tokugawa period around 1790, see Okazaki, *supra* note 553, 4. Similarly, the extensive capital demands and the need for large-scale coordinated operations unfolding with the Industrial Revolution advanced the use of the joint-stock company in England and contributed to the joint-stock company becoming the dominant enterprise form, see Kuran, *supra* note 251, 809 f.

756 The importance of overseas trade and shipping companies as catalyst for the formation of the modern stock corporation is epitomized by the British and Dutch chartered companies, which are widely regarded as the predecessors of the modern stock corporation, since the early seventeenth century, such as the United East India Company (1602) in the Netherlands and the British East India Company (1600) which initially functioned as an association of overseas traders who under such umbrella and framework often entered into individual contracts for individual expeditions and voyages which led to the creation of so-called "*terminable stock companies*" (or a *société anonyme* which, however, under the Code de commerce of 1807 became the name of the stock corporation with the pre-Code de Commerce *société anonyme* earning the name "*association commerciale en participation*", see Estelle Rothweiler/Stefan Geyer, *Von der Compagnie de commerce zur société anonyme: Die Geschichte der Aktiengesellschaft in Frankreich bis zum Code de commerce* [From the *Compagnie de commerce* to the *société anonyme*: The historical development of the stock corporation in France until the Code de commerce], in: Bayer/Habersack, *supra* note 432, 23 ff., which rather resembled a consortium. The idea for a fixed capital stock as property of the corporation only developed over time. The development of the chartered companies for overseas trade was (partly) made possible by the reallocation of capital by Dutch traders who in the course of the sixteenth century had taken over the trade in the Baltic Sea from the Hanseatic League, but began to allocate their capital gained from such enterprise to the more innovative overseas trade. In the seventeenth century, the large chartered companies begin to show the characteristic of the business being conducted and separated from the person of the capital providers. In this vein, the United East India Company as well as the British East India Company collected capital from investors, i.e., merchants across Europe. Shares in the United East India Company were traded on the Amsterdam Stock Exchange starting in 1611, see Cordes/Jahntz, *supra* note 478, 12 ff., the Amsterdam Stock Exchange thus being commonly considered as the first stock market, see Edward Stringham, *The extralegal development of securities trading in seventeenth-century Amsterdam*, 43 The Quarterly Review of Economics and Finance (2003) 324 with further references under Fn. 2, also presenting voices taking a dissenting view and identifying earlier trading platforms as stock exchanges. For a detailed account on the East India Company, see William Robert Scott, THE CONSTITUTION AND FINANCE OF THE ENGLISH, SCOTTISH AND IRISH JOINT-STOCK COMPANIES TO 1720, Volume I (1912) 150 ff.

757 In addition, the central internal clearing and coordination of investment role of the *ōmotokata* is sometimes viewed as forming the foundation of the main bank system, see Mark Scher, *Bank-firm*

Another factor conditioning the initially slow adoption of the new organizational form can be found in the absence of capable managers which would be up to the task to serve as directors of the newly incorporated stock companies. While the installment of *bantō* as (shop) managers can be identified as a precursor of the relinquishment of management to non-family members characterizing the Chandlerian professionalization of management, this phenomenon occurred only on a limited scale. The demand for managerial talent was only forming in the Meiji period and slowly responded to by recruitment of new graduates who had studied abroad and made themselves familiar with the managerial and technical know-how required for such management posts in the new industries.[758] When viewed through this lens, the fact that later on corporate governance institutions in Japan developed parallel to, and not necessarily in full alignment with, the incumbent, written law may become more comprehensible: Corporate actors – including the (developmental) state – in Japan are focused on the economic and practical aspect, so that in the circumstances specific to Japan forms may develop which do not correspond with the law in the books, especially when such legal instruments are borrowed from jurisdiction taking a more formal approach to law. The high-speed adoption and spread of the stock corporation signifying a rupture with the previous economic and organizational system may have also contributed to frictions in the later process of amendments of rules pertaining to the stock corporation, since change of awareness and consciousness of the business people confronted with this – in the Japanese context arguably in contrast to an innovation – organizational invention[759] despite building on the logics of family-based partnership structures and guilds — might have not matched the speed of such reforms, eventually orchestrated by the Meiji elite.

Cross-shareholding in Japan: What is it, why does it matter, is it winding down, DESA Discussion Paper No. 15 (2001) 8. For a brief, abridged overview and context of the development of the main bank system, see Aoki/Patrick/Sheard, *supra* note 73, 42 ff.

758 Miyamoto, *supra* note 474, 78. For the relevance of the institution of bantō for the gradual introduction of managerial development in the sense of the Chandlerian model, see Etsuo Abe, *Alfred Chandler's Model of Business Enterprise Structure and the Japanese-Style Enterprise System: Are They Compatible*, 26 Japanese Research in Business History (2009) 67.

759 Organizational innovations are defined as improving existing ways of doing things, while in contrast thereto organizational inventions are viewed as changing the entire system, meaning the ways things are done, see John F. Padgett/Paul D. McLean, *Organizational Invention and Elite Transformation: The Birth of Partnership Systems in Renaissance Florence*, 111 American Journal of Sociology (2006) 1464, 1543 ff.

(iii) On the other hand, legislative choices had a lasting impact on institutional trajectories: The non-reception of an equivalent to the limited liability company which had been existent in German commercial law since 1892[760], which in the formative period substantively, however, not exclusively, shaped the commercial law in many areas in Japan[761], into the Kyū-Shōhō nor into its revised version, the Shōhō, limited the portfolio of possible enterprise forms and thus arguably due to the absence of such intermediate form and hence substitutability favored the establishment and rise of stock corporations as an organizational form also for smaller businesses. However, the degree of impact remains speculative, since when the limited liability company (*yūgen kaisha*) was adopted with effect as of 1940[762], it appears to have rather been perceived as an alternative to the two partnership variants[763], which, however, contrasts with findings in other jurisdictions where the belated introduction of the limited liability company model was found to have impacted the number of stock corporations.[764] While the absence of significant tradeoffs is partially cited as one of the reasons for such divergence, another cause may lie towards the institutional set-up meaning that during the formative periods of the business landscape in Japan, the stock corporation had established itself within business circles and henceforth a general inclination in favor of the stock corporation persisted.[765] In this vein, the stock company enjoyed a good prestige in Japan causing smaller enterprises to likewise opt for incorporation.[766]

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760 For an overview of the genesis of the limited liability company under German laws, the so-called *Gesellschaft mit beschränkter Haftung (GmbH)*, see Timothy W. Guinnane, *Creating a New Legal Form: The GmbH*, 95 Business History Review (2021) 3 ff.

761 Baum/Takahashi, *supra* note 80, 355 ff., 377; Nicholas, *supra* note 707, 336 f. For the codification of Kyu-Shōhō and Shōhō, the Old Commercial Code (ADHGB), which was modernized by the Commercial Code (HGB) passed in 1897, was relevant, since it was found to be more fitting to the development status of the Japan economy at that time, see Kikushi Sugawara, KIGYŌ-HŌ HATTEN-RON [Essays on the Development of Company Law] (1993) 14.

762 Law No. 74 of 5 April 1938, available in the National Archives of Japan Digital Archive under https://www.digital.archives.go.jp/DAS/meta/Detail_F0000000000000035673 (last accessed 12 December 2023).

763 Nicholas, *supra* note 707, 335.

764 Timothy Guinnane/Ron Harris/Naomi R. Lamoreaux/Jean-Laurent Rosenthal, *Putting the Corporation in its Place*, 8 Enterprise & Society (2007) 706 ff. (United Kingdom), 713 f. (France). However, the example of the United States, *ibid*., 714 ff., suggests that the substitution effect cannot be assessed without taking into consideration the wider legal framework and its peculiarities.

765 Nicholas, *supra* note 707, 335 f., who, however, without further specification cites the relevance of cultural norms for creating persistence, *ibid*., 336.

766 The prestige aspect is highlighted by Tomoyo Matsui, *Corporate Governance and Closely-held Companies in Japan: The Untold Story*, in: Luke Nottage/Leon Wolff/Kent Anderson (eds.),

(iv) Under the aspect that specific structures survive and resurface in new guises in different times, the reluctance of the *zaibatsu* to open their companies up to outsider investment strikes an interesting point (supra subsection IV.2). This is all the more the case, as this tendency in a slight variation, however, reappeared in other listed companies who preferred to issue new equity in the course of capital increases to the circle of existing investors.[767] As a result, a group or community of business persons and investors showed signs of shutting out new investors. Prominent individuals such as Eiichi Shibusawa, so-called *zaikaijin*, had been instrumental from the beginning of modernizing the economic system and adopting the joint-stock company idea.[768] While it may seem as a stretch, conceptually cross-shareholding guaranteeing a bedrock of company-friendly shareholders as well as recent tendencies that while reduction of cross-shareholdings are implemented, new forms of coordinated investment within the circle of Japan's big business seem to appear, as the group of investors joining to take Toshiba Corporation private, or JIC indicate.[769]

(v) With respect to the shareholders class, it is to be noted that despite the neutrality of the written law, the promotion and encouragement by the Meiji government and administration resulted in a founder and promotor-friendly environment. This observation is corroborated that the big conglomerates and *zaibatsu* which should later prove formative for the corporation landscape in the decades to come have their origins in this very period. Likewise, the pivotal role of the general trading companies and the (main) banks at the heart of a conglomerate or corporate group is foreshadowed in these early stages of economic and corporate organization.[770] While the apart from the conglomerate structures the founding shareholders soon started to become diluted and recede from their prominent positions, the stock corporation at the turn from the nineteenth to the twentieth century can be seen in a "founding" phase which contrasts with

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CORPORATE GOVERNANCE IN THE 21ST CENTURY. JAPAN'S GRADUAL TRANSFORMATION (2008) 112, a fact with surfaced in hindsight when it was found out that many small-scale stock corporations, inter alia, proved to lack a robust capital basis, Toshio Inaba, *Daishō kasiha kubun rippō no hōkō* [Trends in Legislation Distinguishing Large and Small Companies] 962 Shōji Hōmu [Business Law and Practice] (1983) 9 f.

767 Supra Fn. 740

768 Miyamoto, *supra* note 467, 75 ff.

769 Supra Fn. 107.

770 Sei Yonekura/Sara McKinney, *Innovative Multinational Forms: Japan as a Case Study*, in: Alfred D. Chandler Jr./Bruce Mazlish, LEVIATHANS: MULTINATIONAL CORPORATIONS AND THE NEW GLOBAL HISTORY (2005) 107 ff.

today's maturity phase in which listed stock corporations naturally show a much more dispersed ownership structure.

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CHAPTER III

COMPOSITION OF THE SHAREHOLDER CLASS

Building on these insights into how the stock corporation concept arrived and settled in Japan in tandem with the incorporation of the first stock corporations, the focus shall now shift towards the historical development of the ownership patterns of stock corporations in Japan from the early stock corporations until the current times. Besides the actual ownership patterns (infra section III.), equity versus bank-based corporate financing (infra section IV.) as well as of the historical development of dividend payouts (infra section V.) will be investigated. The coverage of the sources of corporate financing is intended to flank and support the narrative of the relevance of capital markets for Japanese stock corporations as well as make visible possible trajectories. The investigation into dividend payout levels shall serve as a litmus test for shareholder-friendliness and help to trace changes in the attitude of stock companies towards (minority) shareholders.

I. Introduction

The recapitulation of the composition of the shareholder class in Japanese companies is implemented to get a better overview of "who owns the corporation", since different shareholder classes may pursue different interest and take different approaches to their equity investment in a firm. Recent research has started to erode the previous view of Japan companies being closely-held and relying on bank-based corporate finance through identification of dispersed ownership-structures throughout the twentieth century, especially in the first half of the century, and the relevance of equity finance in the prewar period.[771] Such research has contributed to challenge the general, uncritical applicability of what has emerged as "conventional" concepts such as, for example, dispersed ownership to different jurisdictions, as high dispersed ownership ratios in Japanese companies in the period post-1950s blur the vision and fail to adequately catch the *keiretsu* ties between firms, banks, peer (horizontal *keiretsu*) and supplier (vertical *keiretsu*) companies.[772] Before addressing matters such as

[771] Franks/Mayer/Miyajima, *supra* note 7, 2580 ff.
[772] Franks/Mayer/Miyajima, *supra* note 7, 2584, 2593.

ownership dispersion, the first question that begs to be addressed is the identification of the relevant shareholder groups and the size of their respective stakes. As depending on the shareholder group involved and its stake in a stock company, its interest and approach and thus ultimately resort to the canon of shareholder rights may differ provided by the legal framework (to be discussed in the next chapter). Identification of the relevant shareholder groups is thus equally important as measuring their combined share, their qualification along the insider or outsider shareholder dichotomy or the dispersion of share ownership. The observation perceived as puzzling – from a solely legal perspective such as the one taken by legal origins literature – that strong shareholder rights in post-war Japan remained virtually unused until the early 1990s, such as with the case of the derivative action, becomes more plausible when considering which the relevant shareholders and thus candidates for the use of such shareholder rights were.

Having identified the relevant shareholder group and changes in the composition of the overall shareholder class, the thesis will proceed by recollecting corporate finance patterns throughout the twentieth century. Corporate finance patterns may give indication with respect to movements between the shareholder groups. An equity-finance focused pattern would be expected to be accompanied by ownership patterns rather dominated by outsider shareholders. On the other hand, insider shareholders and the reliance on internal means of procurement, usually retained earnings, would help to reduce firms' exposure to security markets', that means shareholders' demands, since corporate bondholder do not participate in shareholder return policies or share price appreciation. The demand aspect leads over to the final aspect of this empirical excursion, namely the review of firms' shareholder returns policies, especially dividend policies. The choice of this parameter is based on the hypothesis that especially individual investors as well as intermediary investors are seen to seek continuous, ideally rising, at least, however, stable rewards for their shareholding besides the bet on the appreciation of the share price. Affirmative shareholder returns policies should thus go hand in hand with a capital market orientation of firms.

1. Relevance of Historical Ownership Patterns

The evaluation of a corporate law as owner- or shareholder-friendly lies in the eye of the beholder, meaning it depends on the perspective of the relevant group of shareholders. Shareholders that pursue non-pecuniary purposes going beyond solely the share investment – such as in the case of relational cross-shareholding in which

mutual shareholdings underpin the business relationship and the belonging to a more or less loose corporate group – might be less concerned by low dividend payout ratios or a lack of share price appreciation. In addition, the articulation and use of shareholder rights require awareness and motivation to make use of such sets of rights. Or, to rephrase it, shareholders' apathy to utilize and seek enforcement of their rights can not only be rational in the form of the so-called "rational apathy" shown by investors with widely dispersed portfolios comprised of small holdings in relation to the total sum of holdings, but may also have an irrational dimension. In this vein, the rise of activist shareholders concomitant with coercive pressures on corporate governance practices did not only overcome the rational apathy problem, but might have been a wake-up call to remind the other shareholders in Japanese companies of their rights and also (re)activated the perception of other shareholders and prodded them to actively pursue their rights. Furthermore, it has been pointed out that the arrival of activist (international) shareholders had the indirect effect of changing the perception of Japanese companies with respect to (outside) shareholders' demands.[773] However, as a caveat, such realization might be a protracted process showing a significant time lag between the formal and the substantial utilization of shareholder rights. This can, for example, be observed with respect to the questions submitted by shareholders in the shareholder meetings of Japanese publicly listed stock companies nowadays.

2. Complementary Evidence from the Historical Relevance of Equity Finance

Data on the relevance of equity finance for corporate financing purposes shall complement and round off this part of the investigation (infra section IV). Broadly speaking, firms can rely on retained earnings, the capital market through share and bond issuances as well as on bank loans to finance corporate investments. In case of resorting to the second option, the capital markets, for funding purposes, the firm relies on the cooperation of a wider public as potential shareholders or bondholders. Shareholders only subscribe to equity offering, if they can reasonably expect returns of their subscription in the form of appreciation of the price of the subscribed shares, dividends or obtaining control rights. As seen above (see Chapter I, supra subsection I.4 sub-paragraph b) bb)), the risk of the dilution of one's own equity stake concomitant with the obtaining of control by a rival shareholder may discourage an entrenched founder/manager- or family shareholder to resort to such measure. Putting

[773] Jung/Mun, *supra* note 17, 667.

this private benefit of controls aspect aside as well as the potential tunnelling of free equity markets by issuance a significant amount of shares to "friendly" shareholders[774], the use of share issuances usually perspires a willingness of more or less indiscriminately opening a firm to capital markets and the influx of outside shareholders. It can be expected that high levels of reliance on share issuances would go hand in hand with functional active capital markets, robust dividend payout levels as well as it would propel share ownership dispersion. Low ratios of equity finance in comparison with the reliance on retained earnings and bank loans would indicate a dissociation and isolation from "external" capital markets, with external referring to the investors outside the circle of friendly, possibly cross-shareholding, peers.

The complementary integration of equity finance fits in and complements the analysis with respect to dividends as there is generally found to be a conflict of interest between shareholders and bondholders with tension, inter alia, arising from riskier than anticipated projects for which bonds are issued which may eventually lead to wealth being transferred from shareholders to bondholders due to bondholders being afforded with a first claim on the company's cash flows with the shareholders for their dividends having to rely on residual cash flow rights. In contrast therewith, dividend hikes are seen to transfer wealth from bondholders to shareholders as they are usually associated with share price appreciation (in which bondholders do not participate).[775]

3. Relevance of Historical Dividend Payout Ratios

With the more visible arrival of foreign institutional investors in the mid-1980s, Japanese publicly-listed stock companies were eventually urged to adopt a more shareholder-focused, effective capital management which, inter alia, envisaged disgorging profits to shareholders in the form of dividends rather than retaining the profits for long-term investments or new business opportunities which had proven difficult in the years and decades after the bubble burst.[776] However, in the mid-2010s

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774 As it occurred in the setting of stable cross-shareholding structures in Japanese firms, in the 1980s, see Hideaki Miyajima/Fumiaki Kuroki, *The Unwinding of Cross-Shareholding in Japan: Causes, Effects, and Implications*, in: Aoki/Jackson/Miyajima, *supra* note 48, 80 ff.

775 Damodaran, *supra* note 780, 18 f.

776 Jung/Mun, *supra* note 17, 664 ff.; Masako Egawa, *Sengo nihon no keieisha ni yoru kabunushi no kenri no shingai* [The Infringement of Shareholder Rights by Managers in Postwar Japan], 43 Soshiki Kagaku [Organizational Science Review] (2010) 94 f.; Hayakawa, *supra* note 35, 242 f., who with respect to the role of institutional investors points out that while institutional investors had been present – to a, however, lesser degree – in the bubble years, capital gains through share price appreciation propitiated low dividend payments with falling share prices "motivating" these previously silent shareholders to push for better performance to increase returns to compensate

the dividend payout ratios were still found to lag behind the levels of the 1910s and 1920s.[777] On the other hand, a look back at the history shows that already in the prewar period investors demanded dividends in order to, inter alia, be motivated to sign up for capital increases with the aggregate amount of dividend payments exceeding the amount of capital collected by capital increase with the latter, however, partly "reabsorbing" previously disgorged dividends.[778] A look at the profit distribution of prominent listed stock companies in the prewar period reveals a high propensity of firms to commit to dividend payouts, however, at the expense of dividend stability leading to dividend rates' susceptibility to economic conditions.[779] When analyzing dividend policies from a long-term or historical perspective, consideration is required to be also given to the life cycle of the firm which dictates the amount and growth of revenue which in turn has an impact on how such cash flow is split between investment in growth opportunities and shareholder returns; in addition, the correlation between cash flow and firm value changes over the life cycle the cash flow increasing in relation to the firm value.[780] With Japanese also listed stock companies being associated with a robust lifespan, the expectation would generally be that dividend yields and dividend payout ratios rise, since from the perspective of the life cycle of a firm the majority of listed stock companies has entered the mature growth phase and in some cases even the phase of decline both being associated with increasing and special dividends on the back of robust cash flows and moderate needs for funding new projects. The reshuffling of the market segments by the Tokyo Stock Exchange with the Growth market segment designated for listed stock companies still in initial and expansion phases makes such ratio more transparent.[781]

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them for being stuck with their shares, also Hiroshi Mizuguchi, *Keiei konturoru ga kakawaru kabushiki shijō to kikan tōshika no yakuwari* [The Stock Market, Management Control and the Role of Institutional Investors], 1050 Jurisuto (1994) 104 f.

777 Yoshihiko Sano, *Taishō-ki (1912-nen–1926-nen) ni okeru kōhaitō seisaku no kenshō oyobi seisaku kenkyū* [Survey and Policy Research of the High Dividend Policies in the Taisho Period] (1912 until 1926)] 46 Policy Study Review (2019) 14.

778 Tetsuji Okazaki, *Corporate Governance*, in: Okazaki/Okuno-Fujiwara, *supra* note 140, 108 f., table 4.6.

779 Tetsuji Okazaki, *The Japanese Firm under the Wartime Planned Economy*, 7 Journal of the Japanese and International Economies (1993) 180, 184 f., tables VII and VIII.

780 Aswath Damodaran, CORPORATE FINANCE – THEORY AND PRACTICE (1997) 547 f.

781 In 2023 (year-end), 1,657 companies were listed in the Prime market segment, 1,621 companies in the Standard market segment and 565 companies in the Growth market segment, see Japan Exchange Group, *Number of Listed Companies* (version updated as of 1 March 2024), available under: https://www.jpx.co.jp/english/listing/co/index.html (last accessed 6 March 2024).

Hence, the dividend payout ratio, defined as the quotient of the amount of the dividend payment and the companies' net income, has become established as a parameter institutional and investors have a keen eye on besides, inter alia, independent and outside director ratio and performance-oriented executive remuneration.[782] Similarly, it has been reported for the prewar era – a period when institutional shareholders were yet to arrive on a broader front – that shareholders kept an eye on the dividend payout ratio.[783] Hence, it appears plausible that the dividend payout ratio serves as an indicator of the shareholder-orientation of publicly-listed stock companies. Complementarily, the thesis will also track the dividend yield or rate as the fraction of a firm's total annual dividend amount divided by its market capitalization.[784] While the dividend rate is widely taken into consideration[785], it is less conducive to the thesis at hand due to its dependence on the market capitalization and the share price being also subjected to factors outside firms' direct influence, like a general upward or downward market trends. The thesis will rely on these two common definitions for the respective terms henceforth, unless explicitly specified.

II. The Relevance of Ownership Patterns

The international academic discourse with respect to corporate law finds one key field in the incumbent Japanese corporate governance system which is widely regarded as not sufficiently robust to protect (minority) shareholder interest[786] with the most prominent reason being located in the widely entrenched corporate management traditionally shielded against capital markets' disciplinary effects by insider shareholders recruited through bank and cross-shareholding.[787] These two pillars of

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782 Jung/Mun, *supra* note 17, 665 f.; Mitsubishi UFG Trust and Banking, *Infure keizai to kabushiki tōshi* [Inflation Economy and Stock Investors], Shisan Unyō Jōhō [Asset Management Information] (January 2023) 9 f.; John Armour/Jack B. Jacobs/Curtis J. Milhaupt, *A Comparative Analysis of Hostile Takeover Regimes in the US, UK and Japan (With Implications for Emerging Markets)*, Columbia Law and Economics Working Paper No. 377 (13 August 2010) 36.

783 Kitaura, *supra* note 147, 48 ff.

784 Or the paid-in capital, respectively, for the prewar period due to widespread use of the part-paid stock system allowing the payment of the subscription amount upon incorporation or capital increases in installments.

785 For example, Egawa, *supra* note 776, 94 f.; Kiyoshi Nikami, *Sengo nihon no kabuka keisei yōin ni tsuite* [On the Main Causes for Stock Price Formation in Postwar Japan], 425 Hikone Ronsō [Hikone Essay Collection] (2020) 49 ff.

786 Julian Franks/Colin Mayer/Hideaki Miyajima/Ryo Ogawa, *Managing Ownership by Management*, RIETI Discussion Paper Series 23-E-022 (2023) 1 ff.

787 Ikeda/Inoue/Watanabe, *supra* note 358, 55 ff. who consequently apply the cross-shareholding ratio as a measure to gauge to which extent corporate managers are subject to capital markets' disciplinary effect, *ibid*., 56; Miyajima/Kuroki, *supra* note 774, 79 ff.

entrenchment have started to erode, however unequally paced, with the main bank shareholding having become widely sidelined in the mid-2000s at least for large-cap, international companies with high liquidity levels[788] after starting to drop considerably in the late 1990s in the aftermaths of the banking crisis in 1997[789], ensuing regulation[790] as well as an orientation towards, and expansion of, global investment activities[791], while cross-shareholdings or in a wider context, relational

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788 On the – complementary – investment bias of equally domestic and foreign institutional investors towards high-quality companies distinguished by their corporate performance and financial soundness, see Miyajima/Hoda, *supra* note 329, 389. Stock companies with large market capitalization, high liquidity of their shares and the share of overseas sales were likewise found to appeal to foreign institutional investors with the latter aspect revealing a variation of the home bias, see Miyajima/Nitta, *supra* note 329, 105-149; Miyajima/Kuroki, *supra* note 774, 86 ff.

789 After having hovered just below the five per cent ceiling of voting rights banks and other companies engaging in financial business were allowed under the Japanese Anti-Monopoly Law, see Hideaki Miyajima/Ryo Ogawa/Takuji Saito, *Changes in corporate governance and top executive turnover: The evidence from Japan*, 47 Journal of the Japanese and International Economies (2018) 17 f., panel 1. The departure of the main bank measured by the shareholding levels goes hand in hand with the declining relevance of main bank-led so-called *saiken* corporate restructurings, see Takeo Hoshi/Satoshi Kobuchi/Ulrike Schaede, *The decline in bank-led corporate restructuring in Japan: 1981-2010*, 47 Journal of the Japanese and International Economies (2018) 81-90. This shakeout and ensuing accelerated departure of the main banks as stable blockholders or coordinators of cross-shareholdings through an exogenous development finds an interesting parallel with respect to the shareholder structure in publicly-listed stock corporations in Germany – Japan's coordinated market economy peer in accordance with the classification of the varieties of capitalism literature – where the Global Financial Crisis in 2008 facilitated the substitution of stable, patient shareholders in the form of banks and financial institutions by sovereign wealth and pension funds, see Daniel Haberly, *White Knights from the Gulf: Sovereign Wealth Fund Investment and the Evolution of German Industrial Finance*, 90 Economic Geography (2014) 293 ff., 304 ff.

790 Such as by virtue of the Act on Limitation on Shareholding by Banks and Other Financial Institutions (Act No. 131, 28 November 2001) under which upper limit of shareholdings by banks and other financial institutions is tied to their equity (Article 3), see already Fn. 52. Since the shareholding of banks largely exceeded the upper limit, banks were forced to sell off their shares until September 2006. The Banks' Shareholdings Purchase Corporation was set up to facilitate the implementation and avoid share price fluctuations caused by massive sell-offs, Article 5, see Miyajima/Kuroki, *supra* note 774, 91. The reduction of the equity stakes is visualized by Miyajima/Ogawa/Saito, supra note 789, 18, panel 1, which shows a steep reduction soon after the enactment and an orientation at the five per cent threshold afterwards.

791 A good example for such change in priorities is given by the recent management of the equity portfolios of Sumitomo Mitsui Financial Group and Mizuho Financial Group, the two holding companies to two of the big three megabanks in Japan (the other one being Mitsubishi UFG Financial Group). In the case of Sumitomo Mitsui, the company seeks instead to increase its exposure to the equity markets in the United States by buying a five per cent stake in Jefferies Financial Group, announcing its intention to further deepen such alliance by increasing such equity shareholding to 15 per cent in the years to come, see Sumitomo Mitsui Financial Group, *SMBC Group and Jefferies Announce Growth of Strategic Alliance* (27 April 2023), available under: https://www.smbc.co.jp/news_e/pdf/e20230427_01.pdf (last accessed 4 April 2024).

shareholdings[792] between non-financial firms stabilized after an initial drop and continue to remain in place longer with various intensity between the different traditional corporate groups.[793]

1. The Relevance of Ownership Patterns

As seen in the section on the legal origins debate (see Chapter I, supra subsection I.2), ownership patterns have attracted attention in various academic discourses. Ownership patterns are usually discussed in the context of the agency problem with its two facets, namely firstly, the separation of ownership and control, and secondly, the conflict between majority or controlling shareholders and non-controlling or minority shareholders.[794] While the stance in literature had long been negative towards controlling shareholders and literature dwelling thereon focused on various mechanism how such control was established and persevered, recent literature has taken a more nuanced approach towards controlling or majority shareholders.[795] Since the pertaining literature in the past concentrated on the dichotomy between the United States and the United Kingdom whose companies were attested prevalently dispersed ownership structures on the one hand, and a broad group of jurisdictions dubbed as insider-dominated systems on the other hand,[796] Japan found itself classified in the second group despite literature partially acknowledging its considerable dispersion rates.[797]

A look at the aggregate figures of insider and outsider shareholding ratios suggests that the balance shifts between insider and outsider shareholding ratios was rather dynamic than stable.[798] Insider shareholding is identified as investors who pursue private

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792 In relational shareholding as the broader term refers to shareholding which does not solely focus on the maximization of share value, but further aims at maintaining long-term relationship between firms or control power over firms, see Jidinger/Miyajima, *supra* note 34, 1.

793 The drop in the early and mid-1990s is demonstrated by Fumiaki Kuroki, *The Present Status of Unwinding of Cross-Shareholding – The Fiscal 2000 Survey of Cross-Shareholding*, NLI Research Institute Paper No. 157 (2001) 27 ff., especially figures 4 and 5. In addition, this paper differentiates between the shareholding ratio on a value and unit basis, since the overall falling tendency of the Japanese stock markets in the early 1990s might further complicate the picture as to generally gauge shareholding reshufflings, see in general, Jidinger/Miyajima, *supra* note 34, 1 f. An example for a corporate group with still sound levels of relational shareholdings, the firm network surrounding Toyota Motor Corporation may be mentioned which still shows rather relational shareholdings (see below under Fn. 868), while other corporate networks have more affirmatively embraced the sell-off of cross-shareholdings.

794 Gilson, *supra* note 123, 1650 f.

795 Gilson, *supra* note 123, 1652 ff.

796 Gilson, *supra* note 123, 1642 ff.

797 LaPorta/Lopez-de-Silanes/Shleifer, *supra* note 125, 471 ff.

798 Franks/Mayer/Miyajima/Ogawa, *supra* note 786, 40, figure 2.

benefits on top of the financial aspect of their investment which may at times collide with the purely financial aspects of an investment; such private benefits stem from the role as founder or corporate management members, long-term relationships, for example, through lending (banks) and supplier relationships (vertical *keiretsu*), non-arms' length transactions and family or – wider – intergenerational ties.[799] Outsider shareholders on the other hand pursue solely financial returns from their investment which results in pension funds, mutual funds[800], hedge funds, securities companies and other financial intermediaries as well as individual or retail investors falling into this class of investors.[801] As the enumeration above shows banks and insurances may potentially fall into both categories with banks, however, typically qualifying as insider investors due to their equity stakes usually being accompanied by the extension of loans. Specifically with respect to Japanese firms, the categorization of *zaikaijin* or business coordinators under this binary distinction may not be straightforward. While Franks/Mayer/Miyajima qualify *zaikaijin* as outside investors,[802] they usually entertained strong ties with the (individual) directors on the board of such firms or even secured the appointment of their candidate as directors which provided them with an information channel through which potentially insider information could be accessed besides their profound business expertise in specific industry sectors. The fact that their investment was seen as a signal for other (individual) investors that such firm was investable due to the business coordinators' superior information rather suggests regarding *zaikaijin* as insider shareholders. The effect of this classification is, however, likely limited, since, whereas *zaikaijin* were very affluent individuals, their company stakes were usually not too high and remain in the low single digit percentage range.

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799 Franks/Mayer/Miyajima, *supra* note 7, 2582. For the relevance of founding families as shareholders with respect to stock companies in Japan, see Takuji Saito, *Family firms and firm performance: Evidence from Japan*, 22 Journal of the Japanese and International Economies (2008) 620-646.

800 Mutual funds is defined as "*a mutual fund is a company that pools money from many investors and invests the money in securities such as stocks, bonds, and short-term debt*", U.S. Securities and Exchange Commission, https://www.investor.gov/introduction-investing/investing-basics/investment-products/mutual-funds-and-exchange-traded-1 (last accessed 22 March 2023), and thus exclude exchange-traded funds which are bought by retail investors in the market while mutual fund shares are purchased by investor from the fund itself, see U.S. Securities and Exchange Commission, https://www.investor.gov/introduction-investing/investing-basics/glossary/exchange-traded-fund-etf (last accessed 22 March 2023).

801 Franks/Mayer/Miyajima, *supra* note 7, 2582.

802 Franks/Mayer/Miyajima, *supra* note 7, 2582.

Even if only focusing on the postwar period in Japan, the insider and outside shareholding ratios were volatile with the insider shareholding ratio experiencing an upward move starting in the year 1955 surpassing the outsider shareholder ratio only in the late 1960s, exceeding the 60 per cent mark in the late 1980s before a reversal of such trend started with the insider shareholding ratio being eventually overtaken again by the outsider shareholding ratio around the year 2000 with such tendency maintaining momentum with the insider shareholding ratio receding to around 30 per cent in 2015, thus hovering around the same levels as in 1955.[803] The reversal in favor of an increasing number of outside shareholders is frequently associated with the departure of the main bank and its convoy of commercial banks as equity holders in their clients as well as the reduction of cross-shareholdings and the influx of foreign money, affirmatively starting only in the aftermaths of the bubble burst in the 1990s, primarily in the form of institutional investors.

Notwithstanding this recent trend or trend reversal, advocates in favor of a stronger emphasis on, and courting of, the shareholder constituency in relation to other stakeholders through shareholder-friendly policies such as increased business focus on metrics such as ROE [804] and stock returns, and the perception of a lack of corresponding, such business policy sufficiently encouraging, statutory as well as institutional framework persists. While recent legal reforms as well as changes in the institutional array start to bear fruits, the impression still lingers that these measures are considered as not being sufficiently far-reaching or pervasive, to which persisting governance structures of the past may contribute.[805] At the same time, as shown in the introduction, there is the risk that legal reforms could go too far or be too fast-paced, ending up to demand too much from companies, which may, inter alia, cause listed stock companies to succumb to private equity pressures and eventually delist.[806]

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803 Franks/Mayer/Miyajima/Ogawa, *supra* note 786, 40, figure no. 2.

804 This is with respect to Japan, for example, reported by Mizuno/Shimizu, *supra* note 11, 84 ff.

805 Miyajima/Ogawa/Saito, *supra* note 789, 17 ff., who subject the new corporate governance to a quality check and investigate its ability to effectively determine and eventually remove unperforming top management between 1990 and 2013. Their findings point towards an increasing relevance of ROE and share returns replacing ROA (return on assets defined as the sum of operating and non-operating profits divided by the total assets) as performance indicator for top management hinting at the fact that the institutional investors, in particular if positions of single foreign institutional investors exceed three per cent and thus amount to blockholdings, have started to replace the main bank as management-discipling monitor through their main arsenal of means, voice and exit, *ibid*., 28, 31.

806 Asia Nikkei, *Bain Capital says more Japanese companies looking to delist* (28 December 2023), available under: https://asia.nikkei.com/Business/Finance/Bain-Capital-says-more-Japanese-companies-looking-to-delist (last accessed 9 June 2023).

Rather than pinpointing any such alleged shortcomings and potential benchmarks against which such shortcomings are perceived, this thesis intends to take a step back and take a look at the development within and the current composition of the shareholder class. This additional perspective draws on the observation that the development of law may, inter alia, be conditioned by the demand for law.[807] Different classes of shareholders and investors may entertain different preferences with respect to legislative contents and designs. A better understanding of the composition of the shareholder class may thus contribute to also better grasp development and changes in the legal and institutional framework. Based thereon, the inherent potential of the shareholders' class, meaning the availability of domestic and equally international investors as potential investors and capital providers can likewise be better understood. In response to the afore-referred overgeneralizations and "institutional myths"[808], recent literature has started to take a closer look at, and cast a brighter light on, the historical sections of the composition of the shareholders' class, especially with respect to the relevance of shareholders in the period between the incorporation of the first stock corporations under the Kyū-Shōhō in 1893 until the mid-1930s.[809] The thesis at hand wishes to build on this broader, more solid historical perspective in addition to

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807 McGinty, supra note 101, 24 ff., 287 ff., but also other literature which assumes the importance of legislation for the efficiency and reliability of stock markets.

808 This refers to the prevalent conception of bank-centered finance playing a pivotal role in the economic catch-up perfected by Japan since the mid-Meiji period, see Yoshiro Miwa/J. Mark Ramseyer, *Banks and Economic Growth: Implications from Japanese History*, 45 The Journal of Law & Economics (2002) 127 ff. See for the postwar period, for example, also Takeo Hoshi/Anil Kashyap/David Scharfstein, *Corporate Structure, Liquidity and Investment: Evidence from Japanese Industrial Groups*, 106 The Quarterly Journal of Economics (1991) 33 ff., who similarly take a differentiated and more cautious stance as to whether the main bank arrangement for major corporations in Japan resulted in any competitive advantage through better capital allocation due to overcoming information problems with respect to investment opportunities, *ibid*., 57. In their complementary publication, Takeo Hoshi/Anil Kashyap/David Scharfstein, *Bank Monitoring and Investment: Evidence from the Changing Structure of Japanese Corporate Banking Relationships*, in: R. Glenn Hubbard (ed.), ASYMMETRIC INFORMATION, CORPORATE FINANCE, AND INVESTMENT (1990) 105 ff. the same authors then further trace the overall move away of financing patterns of Japanese companies from bank-based to bond financing in the late 1970s and early 1980s due to the relaxation of regulations of corporate finance, *ibid*., 108 ff. with their findings, inter alia, indicating higher growth rates of companies turning towards corporate bond financing in comparison to their peers sticking to bank-based finance, *ibid*., 114. Likewise for the post-war period and different institutions commonly associated therewith, Miwa/Ramseyer, *supra* note 8, 169 ff., on the *keiretsu* matter, and Miwa/Ramseyer, *supra* note 8, 261 ff., on the main bank. On similar phenomena of persistent views with respect to institutions in Japan – both economic as well as cultural ones, see Stephen Vlastos (ed.), *Tradition: Past/Present Culture and Modern Japanese History*, in: MIRROR OF MODERNITY: INVENTED TRADITIONS OF MODERN JAPAN (1998) 1 ff.

809 Yoshiro Miwa/J. Mark Ramseyer, *Corporate Governance in Transitional Economies: Lessons from the Prewar Japanese Cotton Textile Industry*, 29 The Journal of Legal Studies (2000) 171-203.

recent trends to dare a view into potential (near) future developments with respect to the relevance of shareholders of Japan's listed stock corporations with a keen eye on the relevance of institutional – equally domestic and foreign – institutional shareholders.[810]

2. Timeline and Division into Three Phases

In loose analogy with distinguishing three main waves of commercial and corporate law formation and reform in Japan, three phases with two formative turning points in the development of the composition of the shareholders' class can be identified, which then translate into the prewar period, lasting from 1893 until the mid-1930s (1938)[811], the second phase spanning from 1950 to 1990 and the third period having commenced in 1990 and continuing until today. The gap between the end of the first period and the beginning of the second period is deliberately chosen and owed to the far-reaching centralized approach and intervention of the then incumbent government into the economical and legal framework. This immediate war period is commonly found to be characterized by traits of a planned economy under the administration and direction of the government, however, while resting on private ownership with the entrepreneurial focus, oriented on the maximization of production output eclipsing the consideration of profits or the distribution of dividends.[812]

III. Development in the Composition of the Shareholders' Class

As stated at the outset of this chapter, an important aspect and precondition for evaluating the position of a corporate law towards shareholders of stock corporations is the composition of the shareholders' class, since while all shareholders pursuing an

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810 On the different shareholder identities, see Toru Yoshikawa, *Kabunushi no aidentiti to kizoku ishiki*, 48 Soshiki Kagaku [Organizational Science Review] (2014) 15 ff.; Parthiban David/Jonathan P. O'Brien/Toru Yoshikawa/Andrew Delios, *Do Shareholders or Stakeholders appropriate the rents from corporate diversification? The influence of ownership structure*, 53 The Academy of Management Journal (2010) 636 ff.; Robert E. Hoskisson/Michael A. Hitt/Richard A. Johnson/Wayne Grossman, *Conflicting Voices: The Effects of Institutional Ownership Heterogeneity and Internal Governance on Corporate Innovation Strategies*, 45 The Academy of Management Journal (2002) 697 ff.

811 In 1937, by virtue of the Temporary Funds Adjustment Law, a Planning Agency (*Kikakuin*) was installed by which the economy was effectively centralized and made subject to economic planning, see Randall K. Morck/Masao Nakamura, *Been There, Done That – The History of Corporate Ownership in Japan*, ECGI Working Paper Series in Finance, No. 20/2003 (July 2003) 2.

812 Hideaki Miyajima, *The Privatization of Ex-Zaibatsu Holding Stocks and the Emergence of Bank-Centered Corporate Groups in Japan*, in: Masahiko Aoki/Hyung-Ki Kim, CORPORATE GOVERNANCE IN TRANSITIONAL ECONOMIES (1995) 361, 367 which entailed additional measures such as the restriction of dividend payments, *ibid*., 367.

investment there are indications with respect to differences nuances of emphasis of additional purposes attached to such investment which may translate into putting different focuses on shareholder protection and enabling of shareholder engagement through different features of the legal and institutional framework.

While the foundation and formation of the later *zaibatsu* took place in the formative period in the late Meiji period around 1900, in which the stock corporation concept took root firmly in Japan and was codified in the Kyū-Shōhō (infra subsection IV.1), the overall corporate landscape presents itself as a market-based system further characterized by the control of corporation by major shareholders with such shareholders often being individuals, often founders or business incubators underpinning their executive position with commensurate shareholding quotas, thus figuring as investor-executives.[813]

1. From the Beginnings until the (Eve of the) Second World War: From the Late Nineteenth Century until 1938

a) Insertion: The relevance of the zaibatsu and their transformation

While the *zaibatsu* were abolished in the aftermaths of the Second World War in the course of the implementation of the Supreme Command of the Allied Powers' general program for economic democratization[814], there is often drawn some sort of genealogical line or legacy between the *zaibatsu* and the business groups which formed or reorganized after the occupation period and lasted into the early 2000s.[815] While some authors see common elements between *zaibatsu* and *keiretsu* in the overall business strategy of diversification and stabilization,[816] there are distinct differences

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[813] Shimada, *supra* note 473, 15 ff., 23, table 1.1. These business incubators usually disposed over a network of business contacts facilitating and brokering funding, etc., Shimada, *ibid*., 28; Yoshiro Miwa/J. Mark Ramseyer, *The Value of Prominent Directors: Corporate Governance and Bank Access in Transitional Japan*, 31 The Journal of Legal Studies (2002) 273 ff. For an overview and examples of the different types of entrepreneurs in this period, see Takeo Kikkawa, *The Crisis of Capitalism and Gapponshugi of Shibusawa Eiichi*, in: Kikkawa/Fridenson, *supra* note 469, 174 ff.

[814] The disbandment and dissolution of the *zaibatsu* was carried out under the Holding Company Liquidation Commission (HCLC) Directive in the framework of the Corporate Reorganization Law enacted in 1946. On the impact of the immediate postwar policies on the *zaibatsu* families, see Steven Ericson, *The Wealth of Zaibatsu Owner Families: The Impact of Zaibatsu Busting in Occupied Japan*, 6 The Journal of Japanese Business and Company History (2021) 22 ff.

[815] Lincoln/Shimotani, *supra* note 73, 127 f., for example, identify a transformation process, *ibid*., 128 f. See also Hideaki Miyajima/Yusuke Moi/Nao Saito, *Corporate Governance and Performance in Twentieth-Century Japan*, 1 Business and Economic History – On-Line (2003) 3.

[816] Iwao Nakatani, *The Economic Role of Financial Corporate Grouping*, in: Masahiko Aoki (ed.), THE ECONOMIC ANALYSIS OF THE JAPANESE FIRM (1984) 227 ff.

with respect to structure and purpose of these organizational forms, making it plausible to consider the post-war business groups not a *zaibatsu* revival, but an organizational phenomenon in its own right, while at the same time recognizing that the postwar business groups drew on the previous *zaibatsu* structures, with the perspective and narrative lying towards identifying commonalities with respect to the economic function and organizational arrangement of the *zaibatsu* and the postwar business groups.[817]

aa) Function and phenomenology

From a functional perspective, *zaibatsu* are considered one part of a pair of trust-based institutional arrangements in the absence of formal investor protection which facilitated and encouraged corporate funding via stock markets and the mobilization of small investors in the prewar period, the other being business coordinators which lent their protégé firms' financial credibility.[818] These arrangement find functional equivalents in the local stock market of the United Kingdom or custodian banks in Germany.[819] The emergence of various forms of institutional arrangement may also depend on which shareholder group typically holds the non-controlling stakes in the publicly-listed corporations which differs from one jurisdiction to another with high ownership levels of retail investors in the United States, the prominence of institutional investors in the United Kingdom and substantial block holdings by large commercial banks in Germany including shares held as custodians for retail investors.[820]

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817 Juro Hashimoto, *Kadai to bunseki: Jojutsu no shikaku* [Issues and analytical and descriptive perspectives, in: Juro Hashimoto/Haruhito Takeda (eds.), NIHON KEIZAI NO HATTEN TO KIGYŌ SHŪDAN [The Development of the Japanese Economy and Enterprise Groups] (1992) 1 f.; Yanase/Limpaphayom, *supra* note 73, 603; Naofumi Nakamura, *The Present State of Research on Zaibatsu: The Case of Mitsubishi*, 5 Social Science Japan Journal (2002) 235.

818 Julian Franks/Colin Mayer/Hideaki Miyajima, *Equity Markets and Institutions: The Case of Japan*, RIETI Discussion Paper Series 09-E-039 (2009) 2; on the role of business promotors in the spinning industry, see Miwa/Ramseyer, *supra* note 813, 280 ff., 297 f.

819 Franks/Mayer/Miyajima, *supra* note 818, 2. While the custodian role of banks did not develop, ten stock exchanges existed in Japan in 1900. On the role of banks as proxies for the exercise of voting rights and custodians for the shares held by individual shareholders in Germany; as proxies banks are of course bound by the shareholders' instructions, see Wolf-Georg Ringe, *Changing Law and Ownership Patterns in Germany: Corporate Governance and the Erosion of Deutschland AG*, 63 American Journal of Comparative Law (2015) 500 f.; Ralf Elsas/Jan Pieter Krahnen, *Universal Banks and Relationships with Firms*, CFS Working Paper No. 2003/20 (May 2003) 5 ff. However, the stock market activity focused on the two exchanges in Tokyo and Osaka accounting for 50 per cent and 30 per cent of the brokerage commissions, respectively, Franks/Mayer/Miyajima, *ibid*., 10; Hamao/Hoshi/Okazaki, *supra* note 653, 18 f., figure 3.

820 Armour/Hansmann/Kraakman/Pargendler, *supra* note 498, 26.

While the definition of the term *zaibatsu* shows a remarkable spectrum across the pertaining scholarship, at the same time there appears to be common ground as to the key structural elements, namely a multi-tiered corporate group structure under the umbrella of a holding company with its subsidiaries diversifying into various business sectors.[821] Depending on their tendency whether or not to list their subsidiaries, the *zaibatsu* groups were found to form rather pyramidal structures in the case that at least partly subsidiaries were listed or more hierarchical structures in case the subsidiaries remained largely unlisted.[822] Differences with respect to their historical origin, organization and structure commonly result in their division and assignment into three groups or types.[823]

The first group unites Mitsui, Mitsubishi and Sumitomo, the one might say, archetypal *zaibatsu* which all have their modern origins in the Meiji period and with Mitsui and Sumitomo having their roots even earlier in the preceding Tokugawa period and which were all three characterized by their hierarchical group structure with a private exclusively family-held holding company at the top and with diversified group activity in finance, trading, mining and various manufacturing industries.[824]

The members of the second group likewise have their historical roots as emerging entrepreneurs of the Meiji period, but are widely considered to have been less hierarchical and stringently organized as well as less diversified than the members of the first group with the Yasuda *zaibatsu* as the probably most notable exponent primarily remaining within the bank and finance sectors, while the business strategies of other members such as Furukawa or Asano *zaibatsu* did eventually likewise not – in the case of the latter which undertook such attempts successfully – venture far and sprawl out horizontally away from their respective initial basis (copper mining in case of Furukawa as well as coal mining and cement in the case of Asano).[825] Both these

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821 Miyajima/Kawamoto, *supra* note 715, 98.

822 Miyajima/Kawamoto, *supra* note 715, 97-126, 98. While both, pyramidal, and hierarchical, structures rest in effect on pyramidal corporate structures, the key difference between both groups lies in whether or not the subsidiaries are listed. In the case of listed subsidiaries, control and ownership are incongruent, *ibid*., Fn. 2.

823 Miyajima/Kawamoto, *supra* note 715, table 4.2, for example, assign Mitsui, Mitsubishi and Sumitomo to the first type, Yasuda, Furukawa, Okura, Asano, Suzuki and Kawasaki to the second type and Kuhara, Nissan, Nihon Chisso, Nihon Soda, Mori and Riken to the third type with the former two (which are effectively one, given that Kuhara Mining was the predecessor of the Nissan *zaibatsu*) on the one hand and the latter on the other hand forming two sub-groups.

824 Miyajima/Kawamoto, *supra* note 715, 99.

825 Miyajima/Kawamoto, *supra* note 715, 99; Morikawa, *supra* note 465, 17 ff. With Furukawa rather attempting vertical integration into copper-mining related industries, Morikawa, *ibid*., 73 ff., and Asano, although venturing into shipping building and oil/petroleum refining, was soon confronted

groups of *zaibatsu* benefitted from the privatization of state-owned enterprises since the mid-1880s, usually at prices far below their respective book values.[826]

The third type or group of *zaibatsu* came into existence much later, namely in the course of the overall stock market boom in the 1930s, and operated based on a publicly-listed top company which was led by entrepreneurial founders, usually engineers originating in the industry to which such top company belonged, before such top company diversified into adjacent industries and branches.[827] A prominent exponent of such type was the Nissan *zaibatsu* which diversified horizontally, however, not as comprehensive as the first type *zaibatsu* as it for example lacked financial and trading companies.[828] This third group is sometimes split into two sub-groups with the second sub-group attempting vertical integration, mostly in high-tech businesses, rather than horizontal diversification and in this aspect rather resembled the later vertical *keiretsu* business groups.[829]

While zaibatsu are usually associated with family ownership, effective or executive control usually lay with professional managers to whom business operations had been delegated. With respect to the third type *zaibatsu*, in the first management generation owners and directors were identical which is attributed to the fact that these *zaibatsu* grew out of the business of talented engineers turned entrepreneurs.

bb) Organization and business strategy

A key difference is commonly identified in the variety of organizational structures of the *zaibatsu* which contrasts the widely uniform or homogenous structure of bank-centered postwar *keiretsu*, with especially the first-generation *zaibatsu* adhering to conservative investment strategies of the monitoring holding companies – tending to underinvestment in economic upturns – evidenced by low leverage ratios unlike postwar conglomerates that undertook a lot of investment working with high leverage making them susceptible to overinvestment and tunnelling.[830] While the other two

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with the limits and incapability to uphold an exclusively family-based funding, Morikawa, *ibid.*, 82 ff.

826 Miyajima/Kawamoto, *supra* note 715, 101. Sumitomo is usually considered an exception as they were found wary of potential political risks attached to these businesses, *ibid.*, Fn. 4 with further references.

827 Miyajima/Kawamoto, *supra* note 715, 99 f.

828 Miyajima/Kawamoto, *supra* note 715, 99 f.

829 Miyajima/Kawamoto, *supra* note 715, 99 f.

830 Miyajima/Kawamoto, *supra* note 715, 119, 122 f. Views on the profitability of *zaibatsu*-affiliated companies in comparison to their non-*zaibatsu* peers, see, for example, Jennifer L. Frankl, *An Analysis of Japanese Corporate Structure, 1915-1937*, 59 The Journal of Economic History (1999)

zaibatsu groups heavily relied on external financing, some of these *zaibatsu* relied on equity finance through issuance of new shares or spinning off new firms which would go public with substantial premiums; in addition, all *zaibatsu* companies were not subject to bank monitoring, a typical trait of the postwar *keiretsu*.[831]

The diversity between the different types of *zaibatsu* also extends to their business operations and overall role in the economy: All three types of *zaibatsu* were first movers and innovators in the first stage of their existence. While the first-type grew out of the merchant houses of the Tokugawa period, the latter two established themselves by plunging into new industries at the time of the First World War (second type) and in the 1930s, entering into chemical, light metal and automotive industries which required a lot of outside capital having them depend on security markets or banks.[832] The first type *zaibatsu* relying on the strong financial position acquired as first movers and with a bank on the first tier of their conglomerate could henceforth focus on monitoring their *zaibatsu*-internal capital market, insulating their subsidiaries against performance volatility by extending long-term, "patient" capital, using profits generated in profitable industries for diversification into new industries or those with growth opportunities as well as seeking expansion through distressed merger and acquisition.[833] Endowed with this stand-alone financial strength, the first type *zaibatsu* in contrast to the later *zaibatsu* did not require to list their subsidiaries thus eschewing any exposure to equity markets and potentially shareholder demands for high dividends. The mid-1930s ushered in a transition period leading to stronger positions of banks not only limited to the *zaibatsu* networks, but the economy overall. The *zaibatsu* model was – if one likes to poignantly say – extended to the economy as a whole.

cc) Zaibatsu dissolution

Zaibatsu dissolution and elimination of family control through hierarchical corporate structures was one of key items on the agenda of the economic democratization of the corporate system in Japan in the aftermath of the Second World War. Approximately

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1011 f., finds for the set of analyzed *zaibatsu*-affiliated companies that firms affiliated to the old, or in the terminology used herein, first and second type *zaibatsu*, did not differ from their peers with respect to profitability and growth rates, but that affiliates of the new or third type *zaibatsu* showed better economic performance, for example, profitability, than their peers.

831 Miyajima/Kawamoto, *supra* note 715, 123.

832 Miyajima/Kawamoto, *supra* note 715, 123 f.

833 Miyajima/Kawamoto, *supra* note 715, 123 f.

half of the big corporations fell into the scope of the dissolution process.[834] This entailed that nearly half of the issued stock of such corporations recruited from holding companies, large subsidiary companies as well as comparatively independent, large companies was transferred to a liquidation agency, the Holding Company Liquidation Commission, with such shares to be dispersed to individual shareholders in order to broaden the ownership and to establish the concept of market-based corporate control, and was accompanied by strict control of these corporations' activities with respect to dividend payments and executive rewards by the General Headquarters and the government.[835] The voting rights of the transferred shares were also delegated to the commission.[836] The amount of the shares to be transferred equaled around nine billion JPY, corresponding to approximately 21 per cent of Japan's economy's capital.[837] The holding companies, among them the ones of Mitsui, Mitsubishi and Sumitomo, were completely dissolved.[838] In addition, the interlocking at the top management level was entwined and representative of large stockholders or the *zaibatsu* families were removed from any executive position with the commission as largest stock and voting rights holder exercising a significant say with respect to the new appointments.[839]

In order to achieve dispersed ownership, a priority of purchase was established with priority being assigned to the respective corporation's employees or local residents where the corporation operated; in any event, attention was paid to the criterion that no individual was permitted to purchase shares in excess of a one per cent holding in such company.[840] The tender and sell-off of the shares to the public progressed overall smoothly resulting in nearly 70 per cent of the shares being owned by individual shareholder and another 13 per cent by securities companies in 1949.[841]

The high individual shareholder ratio was, however, soon to be revised due to a series of policy measures as well as a shift towards tight monetary policy to combat inflation which resulted in individual shareholders changing their investment preference from stocks – from which only low dividends could be reaped – to deposits thanks to rising

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834 Miyajima, *supra* note 812, 362 ff.
835 Miyajima, *supra* note 812, 362 ff. There is a certain range of how much shares were transferred. In the case of the *zaibatsu* holding companies the quota amounted to nearly 50 per cent, where in case of the independent large companies the average hovers around ten per cent, *ibid*., 371 f.
836 Miyajima, *supra* note 812, 371.
837 Miyajima, *supra* note 812, 369 f.
838 Miyajima, *supra* note 812, 369.
839 Miyajima, *supra* note 812, 365 f., 372 ff.
840 Miyajima, *supra* note 812, 375.
841 Miyajima, *supra* note 812, 379 f., specifically table 10-5.

real interest rates.[842] The policy measures refer to encouragement of institutional stock ownership to buffer against sell-offs triggered by panicking individual investors and thus achieve a certain degree of share price stability: For this purpose, inter alia, life insurance companies bought up shares with funds provided by the Bank of Japan.[843] In addition, trust banks to function as trustee in securities operations were introduced under the Investment Trust Act of 1951: Restrictions on the shareholding by financial institutions did then no longer apply to these trust banks as long as they waived their voting power.[844] In the same vein, in the course of the revision of the antitrust regulations the ban on the shareholding by industrial companies was lifted in order to encourage foreign investment in Japanese listed companies, however, at the same time allowing for shareholding between domestic industrial companies for as long as they were not found to substantially restrict competition.[845] In accordance with these measures, the ratio of individual ownership dropped from 69.1 per cent in 1949 to 53.2 per cent in 1955 and further to 46.3 per cent in 1960, while the ratio of financial institutional ownership rose from 9.9 per cent to 23.6 per cent and 30.6 per cent respectively over the same period; similar the figures for other companies' shareholding increased from 5.6 per cent to 13.2 per cent and 17.8 per cent.[846] While thus the initial push towards individual investors soon ebbed off, the reselling of the former *zaibatsu* shares contributed to homogenous shareholding structures with respect to the ten largest shareholders as well as type of shareholders among all listed companies, for former, concentratedly held *zaibatsu* companies to independent and thus diffusedly held companies.[847] The same period witnessed the re-creation of shareholding links between the former *zaibatsu* companies which took place by buying back the shares in the market, especially through the stock-stabilizing measures afore-described as well as by means of takeovers, thus ushering in the transition to the *keiretsu* conglomerates.[848]

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842 Miyajima, *supra* note 812, 381 ff.
843 Miyajima, *supra* note 812, 384 f.
844 Miyajima, *supra* note 812, 385.
845 Miyajima, *supra* note 812, 385.
846 Miyajima, *supra* note 812, 380, specifically table 10-5.
847 Miyajima, *supra* note 812, 386 f., specifically table 10-7.
848 Miyajima, *supra* note 812, 387 ff.; Tōyō Keizai Shinpō [Toyo Financial News], *Zaibatsu no Saihensei to Kinyū Shihairyoku no Jitsutai* [Reorganization of Zaibatsu and their Financial Control] (1955).

dd) Revival tendencies: Keiretsu and structural differences in contrast to zaibatsu

The main structural difference lies with the *zaibatsu* forming multi-layered business conglomerates under the umbrella of a family-controlled holding company whose subsidiaries diversified into various business sectors[849], the postwar business groups, the so-called horizontal *keiretsu* of enterprise groups (*kigyō shūdan*) or financial affiliated groups represented a web of each independently managed companies with intertwining business activities, which involved preferential lending[850] and trading arrangements, with such links being further reinforced and underpinned by cross-shareholdings, common governance mechanisms such as presidents' councils (*shachō-kai*) and the exchange of personnel (*shukkō)* between the independently managed companies.[851] The aforementioned prewar *zaibatsu* legacy becomes evident when taking a look at the horizontal *keiretsu* networks, which counted Mitsui, Mitsubishi and Sumitomo among their prominent members besides new, more sprawling often recruiting vertical manufacturing groups, but less cohesive bank-centered or financial groups being formed around the Fuji (the pertaining *keiretsu* being referred to as Fuyo), Dai-Ichi Kangyō and Sanwa banks in the 1960s and early 1970s.[852] The re-formation of the corporate groups in the postwar era, its relevance and erosion since the 1990s is demonstrated by the figures for the cross-shareholdings between the companies of the three former *zaibatsu* Mitsui, Mitsubishi and Sumitomo.

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849 Miyajima/Kawamoto, *supra* note 715, 98.

850 From a terminological standpoint, there is no coherent approach as to whether to include the main bank in the horizontal *keiretsu* structures or whether to view the main bank as separate phenomenon. The cases cited to demonstrate the main bank's orchestration of corporate rescues and bailouts of financial ailing or underperforming companies usually proved an intervention based on *keiretsu* ties with the main bank – while disproportionate to its relevant *keiretsu*-related equity holdings – spearheading such intervention and being joined by *keiretsu* peers, see Lincoln/Shimotani, *supra* note 73, 145, thus providing evidence for what has been called the "*reciprocal delegation of monitoring*" among banks, see Aoki/Patrick/Sheard, *supra* note 73, 24 ff.; Paul Sheard, *Reciprocal Delegated Monitoring in the Japanese Main Bank System*, 8 Journal of the Japanese and International Economies (1994) 3.

851 Lincoln/Shimotani, *supra* note 73, 128 f.; on the defining elements of horizontal *keiretsu*, especially the lending and shareholding components, see also Miwa/Ramseyer, *supra* note 8, 175 ff.

852 Lincoln/Shimotani, *supra* note 73, 129 with an overview of the component firms of these six major horizontal *keiretsu* groups in table 5.1, 131 ff. The remaining former forth major, however, primarily financial, *zaibatsu*, Yasuda, swapped names to the aforementioned Fuji Bank after being dissolved and together other Yasuda *zaibatsu*-associated financial companies, such as Yasuda Mutual Life Insurance (now, after a merger with Meiji Mutual Life Insurance in 2004, Meiji Yasuda Life Insurance), joined a more diversified cluster of companies which established ties with the vertical *keiretsu* formed around Nissan Motor and Nippon Steel, *ibid*., 129 f., 132 ff.

Table III.1-1: *Cross-shareholdings among corporate group companies (based on data compiled by Kikuchi)*[853]

Year	Cross-shareholdings per corporate group (in per cent)		
	Mitsui	**Mitsubishi**	**Sumitomo**
1954	9.51	9.36	16.53
1964	11.87	14.85	26.10
1974	17.36	26.83	26.97
2004	8.04	16.81	11.47

Besides, the horizontal *keiretsu* between potential competitors within an industry, vertical *keiretsu* were formed within manufacturing groups, usually along the supply-chain connecting large manufacturing firms with their network and different tiers of upstream suppliers, subcontractors as well as downstream distributors.[854] These vertical corporate networks relied on the same mechanisms of cohesion, however, with the notable absence of any equivalents to the presidents' councils.[855] The group of companies around Toyota Motor Corporation was and can still be considered to represent a typical vertical *keiretsu* structure.[856]

In addition, both forms of business networks, horizontal and vertical *keiretsu* overlapped, however, with different degrees of cohesion, with the latter factor resulting in a certain fluidity of the network and thus oscillation of the network members as well as a wider "gravitational field" meaning that companies did not require to be present, for example, in the presidents' council to be rescued by its trading partners.[857] The

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853 Hiroyuki Kikuchi, KIGYŌ SHŪDAN NO KEISEI TO KAITAI: SHACHŌ-KAI NO KENKYŪ [Formation and Dissolution of Corporate Groups: Research on Presidents Meetings] (2005) 62 ff. (tables 1-11 through 1-14), 116 ff. (tables 2-7 through 2-10), 174 ff. (tables 3-5 through 3-8).

854 Lincoln/Shimotani, *supra* note 73, 131 ff.

855 Lincoln/Shimotani, *supra* note 73, 130, 136.

856 Lincoln/Shimotani, *supra* note 73, 136. In fact, the Toyota *keiretsu* appears to be still widely intact as indicated by still comparatively high levels of cross-shareholding between the involved companies, see Fn. 868. On the strategies and concepts of the "new Toyota *keiretsu*" aside from the shareholding structures here in focus, see Katsuki Aoki/Thomas Taro Lennersfors, *The New, Improved Keiretsu*, Harvard Business Review (September 2013), available under: https://hbr.org/2013/09/the-new-improved-keiretsu (last accessed 20 July 2023).

857 Lincoln/Shimotani, *supra* note 73, 136 ff., for the overlapping between horizontal and vertical *keiretsu* and connection sometimes established by companies of vertical *keiretsu* networks being

formation and maintenance of a *keiretsu* was thus usually in flux, with members being absorbed into a *keiretsu* through standing bank and trade relationships, bailouts and restructurings as well as through divestments of internal divisions, especially those designated to develop and commercialize new product lines, into independent, however, still affiliated satellite companies; sometimes regional proximity played a major role.[858] Again, the example of Toyota expanding its product portfolio from sedans to other types of vehicles, such as trucks and minicars through acquisition and turnaround of distressed companies (Hino Motors and Daihatsu) demonstrate the link between internal organization and business diversification strategies.[859]

(1) Difference in purpose

The purpose of the *keiretsu* lay in two directions: On the one hand, the organization in business groups helped to compensate institutional and market deficiencies with companies for the procurement of investment capital relying on bank loans provided by the main bank and the other commercial banks in the network as well as being granted trade credit by their trading partners; the main trading companies further functioned as brokers in a convoluted distribution system.[860] Similarly, the absence of venture capital was counterbalanced by innovation and entrepreneurship being fostered internally, before new product lines tended to be eventually spun-off.[861] In addition, the horizontal *keiretsu* were conceptualized as a defense mechanism against hostile takeovers. The apprehension against such risk was vivid in the years immediately after the directed *zaibatsu* dissolution, when the shares of the former *zaibatsu* component companies were confiscated and redistributed resulting in widely dispersed shareholding, which, however, only lasted for a brief period.[862]

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tied to more than one horizontal *keiretsu* – most notably Hitachi having link to all three bank-centered horizontal *keiretsu* –, *ibid.*, figure 5.1, 137. The interventions led by the Sumitomo Bank and the Mitsubishi *keiretsu* with respect to Mazda Motors in the 1970s and Akai Electric in the 1980s respectively showcase the difficulty to clearly delineate the *keiretsu* structures and thus arbitrariness of each of such attempts, Lincoln/Shimotani, *ibid.*, 143; Miwa/Ramseyer, *supra* note 851, 185 ff.

858 Lincoln/Shimotani, *supra* note 73, 139 f.

859 Lincoln/Shimotani, *supra* note 73, 140 f.

860 Lincoln/Shimotani, *supra* note 73, 141.

861 Lincoln/Shimotani, *supra* note 73, 141.

862 Lincoln/Shimotani, *supra* note 73, 129.

(2) Departure and phase-out

In line with the overall level of relational shareholding, the mutual and cross-shareholding structures relating to and underpinning the *keiretsu* ties have been on the retreat since the early 1990s, however, with different degrees of intensity between horizontal and vertical *keiretsu* with the former receding at a higher speed than the latter which have thus proved more robust and resilient.[863]

Since the early 2000s a resurgence of cross-shareholdings has been registered and in line therewith a revival of *keiretsu* relations been purported. Taking a closer look at the former vertical *keiretsu* structures revolving around Toyota Motor Corporation and Panasonic Holdings (formerly, Matsushita Electric Industrial[864]) and whose equity holdings eventually contributed to the rising levels of cross-shareholdings, however, warrants caution and a differentiated qualitative approach.[865]

In fact, Toyota Motor Corporation raised its equity stake in, for example, the formerly mentioned Hino Motors and Daihatsu to above 50 per cent in the early 2000s, thus making these companies formal subsidiaries.[866] Similarly, Toyota Industries (*Toyota Jidō Shokki*, sometimes directly translated into Toyota Automatic Loom) as the closest affiliate of Toyota Motor Corporation[867] hiked its equity holdings in the key automotive components suppliers Denso and Aisin Seiki.[868] Again, the motive was

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863 Lincoln/Gerlach, *supra* note 71, 128 ff., 140 ff.; Lincoln/Shimotani, *supra* note 73, 150.

864 The change of the corporate name occurred in 2008, see Panasonic Holdings, PANASONIC GROUP HISTORY, available under: https://holdings.panasonic/global/corporate/about/history/chronicle.html (last accessed 20 July 2023). The current holding structure was implemented with effect as of 1 April 2022, see Panasonic Corporation, *Press Release: Panasonic Announces New Group Structure and Personnel Changes to Executive Officers and Others*, available under: https://news.panasonic.com/global/press/data/2022/02/en220224-8/en220224-8-1.pdf (last accessed 20 July 2023).

865 Both, Toyota Motor Corporation and Panasonic Holdings were formerly part of horizonal *keiretsu*, namely the Mitsui *keiretsu* and the Sumitomo *keiretsu*, respectively, see Lincoln/Gerlach, *supra* note 71, 137 ff., both retaining proximity to their former *kigyō shūdan* even upon disentanglement and emancipation, Lincoln/Gerlach, *ibid*., 137 ff.

866 Lincoln/Shimotani, *supra* note 73, 150.

867 Toyota Motor Corporation was spun-off from Toyota Industries (then Toyoda Automatic Loom Works) in the 1937 after the automobile production had reached a significant size and a separate automobile assembly plant had been set up in vicinity of the Toyoda Automatic Loom Works plant, see Toyota Motor Corporation, *75-Year History of Toyota: Part 1.2.4.1 – Construction of the Automotive Department Assembly Plant: Staged Expansion of Production Capacity*, available under: https://www.toyota-global.com/company/history_of_toyota/75years/text/taking_on_the_automotive_business/chapter2/section4/item1.html (last accessed 20 July 2023).

868 Christina L. Ahmadjian/James R. Lincoln, *Keiretsu, Governance, and Learning: Case Studies in Change from the Japanese Automotive Industry*, 12 Organization Science (2001) 697. As of July 2023, Toyota Motor Corporation held 22.96 per cent and Toyota Industries another 8.8 per cent in

identical with the former *keiretsu* structures and lay in the defense against the threat of takeovers, this time conjured up by the growing presence of foreign investors as well as liberalized merger and acquisition rules sparking an overall apprehension among manufacturers that key suppliers could come under ownership and control of overseas investors.[869] Toyota Motor Corporation thus compensated for the sell-off of equity holdings by the former *keiretsu*'s main banks, namely Mitsui, Sanwa and Tokai with which the vertical Toyota *keiretsu* had been affiliated.[870] The top company in the former Matsushita *keiretsu* took the integration and consolidation of key suppliers and subcontractors[871] even further and fully acquired the outstanding shares in several affiliated group companies to transform and consolidate them into fully-owned subsidiaries to clear-up any overlapping businesses which at that time was perceived as unaffordably costly in a macro-economic environment of slow growth rates and fierce competition.[872]

These shifts in equity holdings within the Toyota and the Panasonic/Matsushita *keiretsu*, however, showcase an significant qualitative difference to the traditional

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Denso Corporation with Aisin Corporation's equity accounting for 1.6 per cent in Denso Corporation; Toyota Motor Corporation held 22.69 per cent and Toyota Industries another 7.03 per cent in Aisin Corporation with Denso Corporation's equity stake in Aisin Corporation accounting for 4.4 per cent. Toyota Motor Corporation holds 23.51 per cent of the shares of Toyota Industries with Denso Corporation having an equity stake of a remarkable 9.1 per cent, too, and Toyota Industries holds 7.31 per cent in Toyota Motor Corporation (figures taken as provided by the Marketscreener.com database, available under: https://www.marketscreener.com/quote/stock/TOYOTA-MOTOR-CORPORATION-6492484/company/ (Toyota Motor Corporation), https://www.marketscreener.com/quote/stock/TOYOTA-INDUSTRIES-CORPORATION-6493686/company/ (Toyota Industries Corporation), https://www.marketscreener.com/quote/stock/AISIN-CORPORATION-6491447/company/ (Aisin Corporation) and https://www.marketscreener.com/quote/stock/DENSO-CORPORATION-6491229/company/ (Denso Corporation), last accessed 21 July 2023).

869 Lincoln/Shimotani, *supra* note 73, 150; Ahmadjian/Lincoln, *supra* note 868, 697.

870 Lincoln/Shimotani, *supra* note 73, 150; on the relevance of this triad of banks, see also Aoki/Patrick/Sheard, *supra* note 73, 17, where it is to be noted that the Mitsui Bank for a certain period of time bore the corporate name Sakura Bank, namely upon the merger of the Mitsui Bank with the Taiyo Kobe Bank which took place in 1990 with the name change following in 1992. The Sakura Bank was then merged with the Sumitomo Bank with effect as of 1 April 2001, leading to the formation of the current Sumitomo Mitsui Banking, see Sumitomo Mitsui Banking Corporation, *About SMBC – History*, available under: https://www.smbc.co.jp/global/aboutus/profile/history.html (last accessed 20 July 2023).

871 For an in-depth overview of the structure of the Matsushita *keiretsu* from its beginning in the early twentieth century (1918) until the mid-1990s, Masahiro Shimotani, MATSUSHITA GURŪPU NO REKISHI TO KŌZŌ: BUNKEN TO TŌGŌCHŪ [History and Structure of the Matsushita Group: Between Decentralization and Integration] (1998) 1 ff.

872 Panasonic Holding Corporation, *Group Corporate History: The Group Gets a New Start by Dividing into Business Domains* (2003), available under: https://holdings.panasonic/global/corporate/about/history/chronicle/2003.html (last accessed 20 July 2023); Lincoln/Shimotani, *supra* note 73, 150.

keiretsu structures of the period prior to the bubble burst: Instead of loose coordination between overlapping businesses and (decentralized) network organization, the measures undertaken by these two former top companies of vertical *keiretsu* rather aimed had vertical integration and streamlining existing business lines into internal corporate divisions centrally managed by a top company.[873]

b) Ownership patterns

In the next step concrete share ownership patterns of Japanese stock companies shall be reviewed. For the period prior to 1940 this should be mainly done by relying on three existing key studies with varying sample sizes which, inter alia, also cover the matter of share ownership distribution and dispersion. To start with, it shall be relied on the data provided by Kawamoto[874] who has traced the financial and performance-related parameters, inter alia, ownership structures, of a sample of 43 publicly-listed stock companies cutting across various industries over a series of specific points in time between 1914 and 2000; the data on share ownership shall we used for the period between 1914 and 1942. The data presents itself as follows:

Table III.1-2: *Ownership patterns between 1914 and 1942 (in per cent, based on data compiled by Kawamoto)*[875]

		1914	**1921**	**1928**	**1933**	**1937**	**1942**
Directors		14.67	14.06	5.97	3.84	3.08	2.20
Zaibatsu main company		4.9	21.49	14.90	19.16	11.32	7.5
Individuals*		18.63	6.23	5.13	6.66	4.01	2.69
Employees		0.0	0.05	0.0	0.0	0.03	0.0
Business corporations		2.12	11.13	14.99	12.03	15.44	19.73
Financial institutions	**Banks**	0.17	0.3	2.76	1.81	1.37	1.81
	Insurances	0.12	0.07	0.44	0.73	3.21	4.65

873 Lincoln/Shimotani, *supra* note 73, 150 f.

874 Shinya Kawamoto, *20-seiki nihon kigyō no shihon kōsei, shoyū kosei, rieki shobun* [Capital Structures, Ownership Patterns and Profit Distribution of Japanese Corporations in the Twentieth Century] 37 Nanzan Keizai Kenkyū [Nanzan Economic Research] (2022) 28 f. The sample size is limited to 26 out of the 43 for the initial year 1914, *ibid*., 28.

875 Kawamoto, *supra* note 874, 32, table 3.

	Trusts	0.0	0.16	0.04	0.04	0.4	0.31
Overseas		2.96	0.0	2.62	2.71	0.94	0.0
Securities companies		0.0	0.39	0.59	0.51	0.51	0.7
Others (including government, own shares)		0.0	0.7	0.21	0.43	0.45	0.33

* *This figure includes the shareholding by individuals through holding and asset management companies.*

The high shareholding ratios by individual shareholders as well as directors and *zaibatsu* companies are remarkable hinting at the strong, also financial, involvement of affluent families and individuals in the first innings of the incorporation of stock companies in Japan.[876] The surge in the ratio of the *zaibatsu* holding is linked to the introduction of this organizational concept with the respective top company becoming holding company with significant equity stakes in its affiliates as well as their participation in the high growth phase during the First World War and the waning of such position to the gradual opening and going public of *zaibatsu* main companies as well as *zaibatsu*-affiliated in the late 1920s and 1930s.[877] With respect to the shareholding ratio of individual shareholders it is striking that the decisive drop already took place in the high growth phase during the First World War, suggesting individual shareholders did not as actively take part in equity offerings, especially in capital-intensive industries. The former share of individual shareholders was consumed by financial institutions, most importantly insurances, as well as business corporations whose rise is, inter alia, attributed to *zaibatsu*-affiliated companies having their subsidiaries go public as well as bad performing listed stock companies being acquired by competitors.[878]

Franks/Mayer/Miyajima have compiled and analyzed data on another sample in two separate panels of listed stock companies in Japan between 1900 and 1937.[879]

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876 Kawamoto, *supra* note 874, 31.
877 Kawamoto, *supra* note 874, 31; Franks/Mayer/Miyajima, *supra* note 7, 2590.
878 Kawamoto, *supra* note 874, 31.
879 Franks/Mayer/Miyajima, *supra* note 7, 2580 ff., focus on the ten largest shareholders for the postwar period to compile the dataset, *ibid*., 2585.

Table III.1-3: *Ownership patterns between 1900 and 1937 (in per cent, based on data compiled by Franks/Mayer/Miyajima)*[880]

Group A							
Shareholder class	**1900**	**1907**	**1914**	**1921**	**1928**	**1933**	**1937**
Founders and board members	26.3	25.5	19.3	16.4	15.7	11.4	9.1
Founders & family	8.0	2.8	1.2	0.8	1.5	0.0	0.0
Board members	18.4	22.7	18.1	6.0	5.1	4.4	3.5
Asset management firm of the former	-	-	-	9.7	9.1	7.1	5.6
Holding companies	0.0	1.8	3.3	6.1	4.1	6.2	4.3
Business corporations	0.6	0.3	0.8	6.7	6.3	8.7	7.2
Banks	0.0	0.3	0.1	0.9	1.6	1.6	3.0
Insurance firms	0.0	0.0	0.0	0.2	0.4	1.1	5.3
Individual shareholders	14.8	12.8	15.5	7.8	7.0	7.8	4.6
Asset management firms of outsiders	-	-	-	0.8	0.7	0.7	1.3
Business coordinators	11.5	7.6	5.3	2.0	2.2	2.9	2.1
Share of which took board position	7.7	5.8	4.3	1.8	1.6	1.5	1.2
Foreign shareholdings	3.0	3.8	4.4	4.5	2.1	1.9	2.7
Trust banks, securities firms	0.2	0.2	0.3	0.2	0.9	1.0	2.2
Sample size (number of firms)	*25*	*50*	*49*	*40*	*40*	*40*	*40*
Identified shares	*48.8*	*46.5*	*44.7*	*43.9*	*39.5*	*41.9*	*40.7*

Group B				
	1921	**1928**	**1933**	**1937**
Founders and board members	19.9	17.7	16.0	9.9
Founders & family	5.8	7.4	0.9	0.0
Board members	5.1	3.9	4.7	3.7

[880] Franks/Mayer/Miyajima, *supra* note 7, 2589, table 2.

Asset management firm of the former	9.0	6.4	10.4	6.2
Holding companies	26.2	25.4	33.7	15.6
Business corporations	7.7	7.2	2.8	9.2
Banks	4.1	3.9	2.0	5.1
Insurance firms	0.3	1.5	0.9	3.9
Individual shareholders	5.0	4.2	4.3	3.0
Asset management firms of outsiders	0.6	0.2	1.0	1.3
Business coordinators	3.1	4.1	2.3	1.2
Share of which took board position	2.7	2.8	0.8	0.9
Foreign shareholdings	0.4	0.4	0.5	0.6
Trust banks, securities firms	0.9	0.4	0.9	2.2
Sample size (number of firms)	*23*	*23*	*23*	*23*
Identified shares	*65.5*	*62.2*	*63.7*	*51.2*

This data basically confirms the tendencies from previous table. What is interesting to see is that the companies from Panel B, which were incorporated between 1907 and 1921, do not follow the "life cycle" of their peers in the previous generation, meaning that from the recorded date individual shareholders, founders and their family, board members as well as business coordinators start on a significantly lower level than their peers in the early 1900s, and corporate shareholders as well as banks begin on a higher level. This difference may be attributed to increasing capital intensity of businesses resulting in lower degrees of initial financial involvement of the former groups. The on average higher scores of bank shareholdings and holding companies additionally hint at a stronger relevance of banks and holding companies for this second generation of incorporations. This difference between the companies of the two different panels can also be observed with respect to the ownership dispersion rates:

Table III.1-4: *Number of shareholders and shareholder dispersion (based on data compiled by Franks/Mayer/Miyajima)*[881]

Group A (sample size as per previous table)							
	1900	**1907**	**1914**	**1921**	**1928**	**1933**	**1937**
Number of shareholders	302	675	1,060	3,893	5,769	5,579	5,550
Average shares/shareholder	173	198	235	351	279	276	274
Top1 shareholder	18.8%	14.4%	16.5%	18.2%	17.7%	19.8%	16.7%
Top3 shareholders combined	29%	27.2%	28.1%	29.1%	28.2%	29.9%	27.4%
Top5 shareholders combined	37%	33.9%	34.6%	34.3%	33.1%	34.3%	32.8%

Group B (sample size as per previous table)				
	1921	**1928**	**1933**	**1937**
Number of shareholders	2,441	2,939	4,070	5,250
Average shares/shareholder	6,736	6,738	4,346	1,523
Top1 shareholder	43.6%	41.3%	40.2%	31.9%
Top3 shareholders combined	56.6%	53.6%	50.3%	40.1%
Top5 shareholders combined	60%	56.7%	53.8%	44.2%

The most striking observation from table III.1.4 above is arguably the difference in ownership concentration with the companies in the second group exceed ownership concentration of the companies in the first group by a large margin. At the same time, dispersion rates stay rather constant for the first group companies over the entire period, while the dispersion rates for the second group companies show a considerable decline in less than two decades by a third (top1 shareholder) or even one half (top 3 and top5 shareholders). This difference may be attributed to the fact the same fact as the higher concentration, namely that the *zaibatsu* companies spun off and listed their subsidiaries and such companies are included in the sample.[882] This is supported by the observation that the number of shares per shareholder is declining for the second batch, suggesting dilution, while it increases for the first batch, hinting at consolidation

[881] Franks/Mayer/Miyajima, *supra* note 7, 2587, table 1.
[882] Franks/Mayer/Miyajima, *supra* note 7, 2586.

through larger – potentially corporate – shareholders buying up shares from smaller, individual shareholders.

The changes in the ownership patterns of stock companies in Japan in the interwar period has also been documented by Shimura who investigates share ownership distributions in 1919 and 1936, starting and end point, respectively, of the interwar period.

Table III.1-5: *Estimated ownership structures in 1919 and 1936 (based on data compiled by Shimura)*[883]

Shareholder type	**1919**		**1936**	
	Percentage	**Number of 1,000 shares**	**Percentage**	**Number of 1,000 shares**
Individual	74.4	15,633.3	16.2	15,400.2
Financial institutions	5.1	1,088.1	16.9	16,053.4
Bank	3.6	759.3	5.8	5,509.5
Insurance	0.9	196.0	10.2	9,726.7
Trusts	0.6	132.8	0.9	817.2
Business corporations	15.0	3,166.6	56.4	53,768.8
Securities companies	0.9	198.0	1.9	1,835.7
Others	4.5	934.8	8.7	8,268.4
Aggregate	100	21,020.9	100	95,326.5

What is remarkable is the overwhelming share of individual shareholders in 1919 accounting for nearly three quarters of the shareholders which have become diluted to just above 15 per cent not even two decades later. The percentage has been eaten in by business corporations and financial institutions, especially insurance companies. If one looks at industry-specific data, another patterns emerges, namely that the decrease in the shareholding of individual investors appears to have occurred through dilution as

883 Kaichi Shimura, NIHON SHIHON SHIJŌ BUNSEKI [Analysis of Japanese Capital Markets] (1969) 408 f., table 7-11. The figures are based on the top-12 shareholders in each company, *ibid.* For details with respect to the derivation of the sample sizes for the years 1919 and 1936, see *ibid.*, 386 ff. and 406 f., respectively.

the share counts in capital-intensive industries which enjoyed strong growth over the investigated time span such as metals, electric and railway industries have soared more than the average of nearly five times as per the table above, while the dilution is less significant in spinning/textile, insurance and trading as well as real estate companies where the share count increased below average, which with respect to the spinning/textile industry may be explained by the boom phase predominantly occurring prior to the investigated time span. In general, individual shareholders appear to have retreated from heavy manufacturing and public utility industries and have maintained a higher share in light manufacturing industries.[884] Among the class of individual shareholder in 1919, there was a significant amount of affluent individuals outside the circle of *zaibatsu* and other wealthy families as the following representative data shows:

Table III.1-6: *Estimated composition of the individual shareholder class (based on data compiled by Shimura)*[885]

Number of shares		**Individual shareholders**					**Others**	**Overall**
		Zaibatsu*	**Families**	**Overseas**	**Others**	**Aggregate**		
50,000 and more	Shares	683,000	491,000	121,000	7,099,000	8,394,000	7,478,000	15,872,000
	Shareholders	4	4	1	80	89	40	129
20,000 – 50,000	Shares	185,000	472,000	-	5,707,000	6,364,000	1,795,000	8,159,000
	Shareholders	5	16	-	188	209	60	269
10,000 – 20,000	Shares	47,000	205,000	-	5,413,000	5,665,000	1,000,000	6,665,000
	Shareholders	3	15	-	398	416	72	488
5,000 – 10,000	Shares	16,000	220,000	57,000	5,193,000	5,486,000	702,000	6,188,000
	Shareholders	2	33	9	759	803	104	907
3,000 – 5,000	Shares	8,000	85,000	29,000	4,146,000	4,268,000	362,000	4,630,000
	Shareholders	2	23	8	1,099	1,132	94	1,226

884 Shimura, *supra* note 883, 407.
885 Shimura, *supra* note 883, 388 f., table 7-2.

1,000 – 3,000	Shares	14,000	174,000	91,000	8,269,000	8,548,000	780,000	9,328,000
	Shareholders	8	100	56	5,017	5,181	307	5,488
Overall	Shares	953,000	1,647,000	298,000	35,827,000	38,725,000	12,117,000	50,842,000
	Shareholders	24	191	74	7,541	7,830	677	8,507

* *Besides the four main zaibatsu, Asano, Furukawa, Nomura, Shibusawa are included herein.*

An interesting facet of this investigation is further the comparative composition of individual shareholder class:

Table III.1-7: *Estimated composition of the individual shareholder class in 1919 and 1936 (based on data compiled by Shimura)*[886]

Type of shareholder	**1919**		**1936**	
	Percentage	**Number of shares**	**Percentage**	**Number of shares**
Individual shareholders	74.4	41,200	15.7	32,000
Zaibatsu families	5.4	3,000	1.5	3,100
(Active) Directors	69.0	38,200	9.1	18,700
Other individuals			5.1	10,400
Corporate shareholders	15.1	15,100	60.8	124,300
Others	10.5	10,500	23.5	48,100

While no data is available for active directors in 1919, the actual drop in the amounts of shares held by directors and other individuals is significant, but fits into the overall development towards "corporatization of shareholdings" in stock companies in Japan in the interwar period which goes hand in hand with the overall increase in the market capitalization of stock companies.[887] The positive correlation between directors'

886 Shimura, *supra* note 883, 410, table 7-12. The sample comprises of 242 companies out of the previous sample sizes in the banking, textiles, chemical, machinery, mining and electric industries. For 1919, data on the top-12 shareholders has been collected, for 1936, data on the top-10 to 15 shareholders. In 1919, Mitsui, Mitsubishi, Sumitomo and Yasuda qualify as *zaibatsu*, while for 1936, Nissan, Nichitsu, Mori, Nisso and Riken are included, *ibid*.

887 Possible avenue for dilution in a broad, untechnical sense, are generally (i) the buying up of shares by non-individual shareholders on the stock exchanges, (ii) capital increases through public offering or through stock allotments in which individual shareholders, for example, due to capital constraints do not participate, (iii) other capital-related measures such as mergers or capital reductions from which disproportionally effect companies with high individual shareholdings

shareholdings – however, weaker than the impact of a major outside shareholder – and ROE as well as total asset growth due to the alignment of both groups' interests has been documented also with respect to Japanese stock companies in the course of the twentieth century.[888] The corporate influence maintained by the *zaibatsu* does not become evident from this table, as only the shareholdings of active, but not retired directors are caught, and the fact that *zaibatsu* established and ensured their influence via their internal banks or shareholdings by other *zaibatsu*-affiliated companies.[889] This is demonstrated by the data as per the following table:

Table III.1-8: *Composition of the non-individual shareholder class in 1936 (in per cent, based on data compiled by Shimura)*[890]

Year	**Holding companies**					
1936	Main four *zaibatsu*	Other *zaibatsu*	Emerging *zaibatsu*	Securities company	Others (unlimited, limited partnerships)	Aggregate
	15.0	2.9	8.3	14.2	13.1	53.8
	Business corporations					
	Main four *zaibatsu*-related	Other *zaibatsu*	Emerging *zaibatsu*	Other business companies	Thereof: In the same industry	Aggregate
	12.5	1.6	6.5	25.6	20.6	46.2

corporate shareholders benefit or the liquidation of small positions through consolidation of shares through share re-splits, and specifically for Japan, (iv) the incorporation of shareholders, meaning the rise of holding companies due to changes in the taxation of dividends in 1920 creating a higher tax burden on individuals than on dividends retained in holding companies. Additional paths are the going public of new companies and the exit of existing companies, see Nao Saito, *Senkan-ki nihon ni okeru 'kabunushi no hōjinka' no keiro* [Rise of Corporate Shareholder-Centered Ownership Structure in Interwar Period Japan], 46/47 Sangyō Keiei [Industrial Management] (2010) 3 ff., who specifically finds evidence for the relevance of capital reduction for the dilution or replacement of individual shareholders by non-individual shareholders during the interwar period.

888 Hideaki Miyajima/Nao Saito/Yusuke Omi, *20-seiki nihon kigyō no shoyū kōzō to pafoomansu* [Ownership Patterns and Performance of Japanese Corporations in the Twentieth Century], 4 Kikan Kigyō to Hōsōzō: Tokushū Kenkyū Seika no Chūkan Hōkoku [Quarterly Business and Law Creation: Special Feature/Interim Report on Research Results] (2005) 137.

889 Shimura, *supra* note 883, 410 f., table 7-13. The *zaibatsu* banks – such as Mitsui Bank, Mitsubishi Bank, Sumitomo Bank and Yasuda Bank – showed a strong concentration of ownership still in the mid-1930s. Their top-12 shareholders – among them several *zaibatsu*-affiliated companies – account for 60 to more than 70 per cent which significant contrasts with Daiichi Bank where the top-12 shareholders only made up just above 18 per cent of the share owners, *ibid*.

890 Shimura, *supra* note 883, 412 f., table 7-14. The sample encompasses 388 companies covering various industries, *ibid*.

What is remarkable from these figures is strong influence of especially the main four *zaibatsu* which account for 27.5 per cent, not taking into consideration that the shares held by securities companies and the – family-owned – unlimited and limited partnerships can be expected to remain rather passive.[891] In addition, it is striking that business corporations in the same industry have started to build mutual stakes in each other, accounting for a fifth of the overall corporate holdings.

2. Postwar Period: From 1950 until Present Times

The wartime years and the immediate postwar period were accompanied with wide-ranging changes also with respect to the ownership in stock companies with the switch to a planned economic system in the late 1930s and the dissolution of the *zaibatsu* in the immediate postwar years just presenting two key events among several.[892]

a) Share ownership and share ownership dispersion

To begin with, the reshuffling between major shareholder groups between the postwar recovery and the mid-1990s, meaning just after the burst of the economic bubble shall be reviewed. While the thesis relies on the data compiled by Kawakita, given the length of the period analyzed, five-year intervals have been formed for which the averages have been calculated as follows:

Table III.1-9: *Changes in shareholding ratios between 1949 and 1993 (based on data compiled by Kawakita)*[893]

Year	Financial institutions*	Securities companies	Business	Individual	Overseas
1949-1953	17.1	9.9	11.1	59.4	0.6
1954-1958	25.6	6.4	14.8	51.2	1.6
1959-1963	30.3	3.0	17.9	47.0	1.7
1964-1968	30.2	4.4	19.5	43.7	2.0
1969-1973	33.7	1.5	24.6	36.7	3.3

891 Shimura, *supra* note 883, 412.

892 See, for example, Tetsuji Okazaki/Masahiro Okuno-Fujiwara (eds.), *Japan's Present-Day Economic System and Its Historical Origins*, in: Okazaki/Okuno-Fujiwara, *supra* note 141, 14 ff.

893 Hidetaka Kawakita, NIHON-GATA KABUSHIKI SHIJŌ NO KŌSŌ HENKA [Structural Changes in Japanese-Style Stock Markets] (1995) 24, table 1-2.

1974-1978	37.0	1.5	26.5	32.5	2.4
1979-1983	38.8	1.8	26.1	28.6	4.5
1984-1988	43.1	2.3	24.9	24.3	4.8
1989-1993	44.8	1.5	24.6	23.3	5.1

* *In line with the data provided the Tokyo Stock Exchange in its share ownership surveys, the position investment trust is subsumed under financial institutions.*

The trends emerging from the data in the table above are comparatively evident as have they been frequently discussed: There is an overall increase in institutional holdings propelled by the emergence of institutional ownership in Japan beginning in the mid-1950s, in the two sub-categories as well as in aggregate, and a corresponding decrease in individual investorship after the a resurgence caused by the distribution of former *zaibatsu* and *zaibatsu*-affiliated stocks in 1950 which soon faded as stock market turbulences shook out individual investors, basically throughout the entire period between 1949 until 1993.[894] Holding by overseas investors has become more significant since the late 1970s and early 1980s. In addition, it is noteworthy that directors or managerial ownership has ceased to constitute a significant position.[895]

The Tokyo Stock Exchange's share ownership surveys yield the following overview for the last approximately five decades:

Table III.1-10: *Share ownership survey, 1970 until 2022 (in per cent)*[896]

Year	**Financial institutions**			**Business corporations**	**Foreigners**	**Individuals**	**Others****
	Aggregate	**Trust banks***	**City/regional banks**				
1970	31.6	-	15.8	23.9	4.9	37.7	1.9
1975	35.5	-	19.0	27.0	3.6	32.1	1.7
1980	38.2	-	19.9	26.2	5.8	27.9	1.9

894 Miyajima, *supra* note 812, 375 ff.

895 This observation is also made by Franks/Mayer/Miyajima, *supra* note 7, 2593, with respect to the data of their sample firms.

896 Japan Exchange Group, *2022 Shareownership Survey* (Update: 25 October 2023), available under: https://www.jpx.co.jp/english/markets/statistics-equities/examination/p6b22i00000024gs-att/e-bunpu2022.pdf (last accessed 30 March 2024).

1985	39.8	-	20.9	28.8	7.0	22.3	2.2
1990	43.0	9.8	15.7	30.1	4.7	20.4	2.0
1995	41.1	10.3	15.1	27.2	10.5	19.5	1.7
1996-2000	40.1	13.6	13.0	24.6	15.4	18.9	0.9
2001-2005	35.2	19.5	6.4	21.7	21.5	20.4	1.3
2006-2010	30.7	18.1	4.5	21.5	26.3	19.7	1.9
2011-2015	27.9	18.1	3.7	21.7	29.3	18.8	2.3
2016-2020	29.2	21.1	3.1	21.7	29.9	16.9	2.3
2021	30.0	22.9	2.5	20.0	30.4	16.6	2.9
2022	29.6	22.6	2.3	19.6	30.1	17.6	3.1

* *Trust banks are included in the figure for City and Regional Banks in and before the Share Ownership Survey in and prior to 1985.*

** *Aggregate figures for government, including local governments, and securities companies.*

The data in the preceding table III.1.10 covers a period which has been discussed rather at length in various literature, mainly under the aspects of the departure of commercial banks as major shareholders as well as the unwinding of relational[897] investments or shareholdings.[898] While the winding down of the commercial banks' equity stakes in the wake of the banking crisis of 1997/1998 sweeping the banking and securities firm

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897 Under the umbrella term relational shareholding or relationship investment, three forms can be differentiated, namely (i) unilateral equity holdings to underpin and stabilize a business relationship, (ii) mutual shareholdings or *mochiai* entered into shield and entrench the management against external and market pressures, and (iii) cross-shareholdings within the corporate conglomerate (*keiretsu*) with an increasing intensity of the relationship from (i) to (iii), see Harald Baum, *Der Markt für Unternehmen und die Regelung von öffentlichen Übernahmeangeboten in Japan* [The Market for Corporate Control and the Regulation of Public Tender Offers in Japan], 41 Aktiengesellschaft [Stock Corporation] (1996) 401.

898 See, for example, Miyajima/Kuroki, *supra* note 774, 79 ff.; Eiji Takahashi (ed.), *Japanese Corporate Groups, Yesterday and Tomorrow*, in: Takahashi, *supra* note 96, 206 f.; Zenichi Shishido, *Japanese Corporate Governance: The Hidden Problems of the Corporate Law and their Solutions*, 25 Delaware Journal of Corporate Law (2000) 231 f., tables 5 and 6

sector[899] can well be seen from the data presented in the table with the sell-off accelerating in the second half of the 1990s, the data also shows that the cross-shareholdings between business corporations significantly declined from its heights in the late 1980s and early 1990s, but so far only by a third, bringing the aggregate share down from approximately 30 per cent to hovering around the 20 per cent threshold.[900] The selling down of mutual equity holdings appears to have evened out in the early to mid-2000s and has henceforth more less remained on the same level.[901] Reasons commonly cited to explain the sell-off equity are (i) regulation on the equity ratio of banks which, however, did not allow latent gains from equity holdings to be counted, and (ii) changes in the accounting regulation with a shift from acquisition cost to current value accounting with respect to equity holdings entailing a reevaluation and, given the coincidence with tumbling and thereafter depressed share prices, the risk of depreciation of cross-held shares which conjured up pressure on the balance sheet of companies holding shares in other companies.[902] While there had been a brief renaissance in the wake of the Global Financial Crisis of 2007/2008, in recent years, the motion to reduce cross-shareholdings between business corporations has, however, gained momentum with pressure coming not only from institutional investors such as hedge funds, but also from regulators or quasi-regulatory authorities.[903] While some firms have pledged to withdraw from relational, especially cross-shareholdings, others have not yet responded to such calls[904] and yet others appear to have taken a

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899 On the banking crisis of 1997/1998, Takatoshi Ito, *Japan and the Asian Financial Crisis: The Role of Financial Supervision in Restoring Growth*, Institute of Economic Research Hitotsubashi University Working Paper Series Volume 99-10 (July 1999) 1 ff.

900 Miyajima/Kuroki, *supra* note 774, 98 ff., despite the overall pressure to sell off their equity stakes, banks were found to do so taking into consideration their (financial) relationship with such firms rather than based on concerns for the creditworthiness of its clients, *ibid*., 102.

901 Ikeda/Inoue/Watanabe, *supra* note 358, 56.

902 Takahashi, *supra* note 898, 207, 215; Mitsuru Yoshikawa/Masaharu Ito, *Kabushiki mochiai ha naze kaishō shita ka* [Why Were Cross-Shareholdings Liquidated?], 236 Gekkan Shihon Ichiba [Monthly Capital Market] (2005) 46 ff., 50.

903 Cross-shareholdings are covered by the Japanese Corporate Governance Code with Principle 1.4, stipulating a duty to disclosure their policy towards cross-shareholdings as well as an annual assessment on the appropriateness of the purpose of such cross-shareholdings. See also Financial Services Agency, *Key points for good disclosure as expected by investors: Group governance/Shareholding structure* (26 January 2021), available under: https://www.fsa.go.jp/en/refer/councils/follow-up/material/20210126-01.pdf (last accessed 4 April 2024). Another avenue are efforts by the Tokyo Stock Exchange to nudge listed stock companies into improving their capital costs, see Japan Exchange Group, *supra* note 450.

904 See, for example, the demands articulated by an activist investor towards Keisei Electric Railway Co., Ltd. to dispose of its significant equity stake in Oriental Land Co., Ltd., The Financial Times, *Activist fund targets Japan rail company with $12bn stake in Tokyo Disneyland owner* (17 October 2023), available under: https://www.ft.com/content/8d6422c7-ad4a-4e60-8958-7d5e318e1239 (last accessed 4 April 2024). The stakes by cross-shareholder corporations in Oriental Land are

differentiated approach shedding equity stakes with some business partners and rebuilding equity positions with third parties.[905]

As for the other shareholder groups, the ratio for individual shareholder has remained comparatively stable since 1990, hovering around the 20 per cent mark. The burst of the economic bubble and the ensuing protracted period of economic doldrums resulting in a sharp drop in the share prices of Japanese-listed companies with the Nikkei Index dropping from 38,000 points in 1990 to 15,000 in 1992, before further continuing to slide towards 8,000 points and less,[906] arguably provided foreign investors with an entry point for a more notably felt position bringing their ratio up from below five per cent in 1990 to short of 30 per cent in the early 2010s with the Global Financial Crisis and its aftermaths having a temporary dampening effects with foreign institutional investors selling off their stocks.[907] Since then, the overall share of foreign investors' equity holdings has continued to oscillate around the 30 per cent threshold which might hint at saturation or a remaining skepticism. The leap in the shareholding ratio of domestic institutional investors can be attributed to the GPIF put a stronger emphasis on stockholdings as an investment strategy as well as to the Bank of Japan implementing ETF purchases.[908] Similarly, the share of trust (and custodian) banks has witnessed its biggest leap in the 1990s to just below 20 per cent, from which it has jumped above the 20 per cent threshold in the second half of the 2010s.

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also a matter at Mitsui Fudosan, see Asia Nikkei, *Activist fund Elliott pushes Mitsui Fudosan to dump Tokyo Disney stake* (4 February 2024), available under: https://asia.nikkei.com/Business/Travel-Leisure/Activist-fund-Elliott-pushes-Mitsui-Fudosan-to-dump-Tokyo-Disney-stake (last accessed 4 April 2024).

905 For example, Toyota Motor Corporation and other companies in the Toyota conglomerate have actively engaged in selling down their equity stakes in the automotive supplier Denso Corporation, see The Japan Times, *Toyota plans $4.7 billion sale of Denso stake as EV pivot looms* (29 November 2023), available under: https://www.japantimes.co.jp/business/2023/11/29/companies/toyota-group-plans-denso-share-sales/ (last accessed 4 April 2024) and Denso Corporation has reduced its stake in Toyota Motor Corporation vice versa, see Asia Nikkei, *Denso unloads shares in 3 Toyota group companies* (16 December 2023), available under: https://asia.nikkei.com/Business/Automobiles/Denso-unloads-shares-in-3-Toyota-groupcompanies (last accessed 4 April 2024). On the other hand, one might speculate that such move is accompanied by a business strategic reorientation rendering Denso Corporation less relevant to Toyota Motor Corporation henceforth. Notwithstanding, half a year after the declaration of loosening the equity ties with Denso Corporation, Toyota Motor Corporation and Toyota Industries Corporation continue to retain significant equity stakes in the amount of approximately 19 per cent and 5 per cent, respectively (as of 18 June 2024), see Fn. 868.

906 Lincoln/Gerlach, *supra* note 71, 6.

907 Armour/Jacobs/Milhaupt, *supra* note 782, 36; Miyajima/Saito, *supra* note 109, 362 f.

908 Miyajima/Saito, *supra* note 109, 368.

An analysis by Miyajima/Nitta zooms in to provide more detail with respect to cross-shareholding entities as well as to whether institutional investors are domestic or come from overseas:

Table III.1-11: *Distribution between insider and outsider shareholders between 1987 and 2008 (based on data compiled by Miyajima/Nitta)*[909]

	1987	**1991**	**1996**	**2001**	**2006**	**2008**
Sample size	1,094	1,223	1,198	1,404	1,616	1,599
Insider	45.5	46.6	44.9	41.8	37.4	38.3
Cross-shareholder	15.1	15.4	15.3	11.9	9.2	9.0
Financial institutions	10.4	10.8	10.7	7.2	4.6	4.1
Business corporations	4.7	4.6	4.6	4.7	4.6	4.9
Other stable shareholders	22.1	22.5	22.0	18.5	14.9	15.5
Stockholding associations	1.1	1.1	1.5	2.3	2.0	2.3
Directors	3.4	2.8	2.1	3.6	4.8	4.7
Families*	3.6	4.6	3.9	5.3	6.3	6.7
Outsider	30.3	31.0	35.8	43.3	48.5	47.8
Institutional investors	6.3	9.2	12.0	13.4	21.8	19.0
Overseas	3.3	4.1	7.1	6.6	14.2	11.7
Domestic	3.0	5.1	4.9	6.8	7.6	7.3
Small individual investors**	23.3	21.2	23.1	29.0	26.0	28.2
Overseas corporations***	0.7	0.6	0.7	0.9	0.7	0.6

* *Includes foreign asset management companies, individuals and family-controlled unlisted companies holding three per cent or more shares in a company.*

** *Individual investors, however, excluding directors and individuals holding three per cent or more shares in one company.*

*** *Foreign companies that hold three per cent or more shares in one company.*

[909] Miyajima/Nitta, *supra* note 329, 111, table 2-1.

The figures presented in the preceding table III.1-11 highlight two major tendencies: Firstly, despite outsider shareholders gaining the upper hand in the early 2000s, the aggregate share held by insider investors only receded incrementally with, however, banks and insurances conceding their positions due to the effects of the banking crisis, the share of business corporations as cross-shareholders remained more or less the same over the period under consideration, indicating that underpinning strategic business alliances by mutual equity holdings remained a not uncommon practice among business corporations, caution against the threat of hostile takeovers as well as seeking entrenchment against potential shareholder pressures triggered by rising foreign investor ownership catalyzed a temporary revival of cross-shareholdings.[910] Secondly, the figures demonstrate that the rise in outside ownership has been primarily borne by an increasing number of foreign institutional investors – which came to a temporary halt in the wake of the Global Financial Crisis – as well as to a lesser degree by a recovery of individual investor share ownership.[911]

To round off this part, a complementary look shall be taken at ownership dispersion. As for the prewar period, Franks/Mayer/Miyajima have also compiled a sample of firms for the years post-1950s, on whose data shall be relied once more:

Table III.1-12: *Shareholders and shareholder dispersion between 1950 and 2009 (averages, based on data compiled by Franks/Mayer/Miyajima, except for the year 2023)*[912]

	1950	**1960**	**1970**	**1982**	**1990**	**2000**	**2009**	**2023**
Number of shareholders	17,251	43,683	61,410	45,959	65,598	64,569	80,668	352,649

910 Miyajima/Nitta, *supra* note 909, 125 ff., 146 f.

911 At the same time, falling share prices in the wake of the Global Financial Crisis made companies aware of the risk of cross-shareholdings, especially due to changes in the accounting rules which requested a recording of gains and losses on such equity holdings in the financial statements, see Miyajima/Nitta, *supra* note 909, 146 f.

912 Franks/Mayer/Miyajima, *supra* note 7, 2592, table 3. This sample varies from the two samples compiled for the prewar period. The selection of companies is oriented at the asset of the companies in 1937 and 1955. The dataset is established on the basis of information on the ten largest shareholders, *ibid*., 2591 f. The data for the year 2023 has been compiled by the author relying on investor relation materials published online by the stock companies analyzed. The companies will reappear in the section on dividend payout policies further below, however, another ten companies will be added at that stage. The underlying materials are on file with the author. The data excludes treasury shares. As information on the overall number of shareholders was not made available in the case of two companies the average number of shareholders for the year 2023 has been calculated on the basis of 18 (instead of 20) companies.

Top1 shareholder	8.7%	10.1%	9.4%	10.3%	9.5%	10.2%	11.7%	22%
Top3 shareholders combined	15%	20.6%	18.7%	20.7%	19.5%	19.5%	21.2%	36.1%
Top5 shareholders combined	18.7%	27.5%	24.5%	27.6%	26.8%	26%	26.9%	41.6%
Sample size (number of firms)	*116*	*118*	*119*	*109*	*109*	*101*	*96*	*20*
Identified shares	*25.4%*	*37.3%*	*32.8%*	*38.6%*	*39%*	*36.2%*	*35.4%*	*48.6%*

A striking aspect of this data is that the level of ownership concentration for all three groups in the analysis stayed on more or less the same level throughout the period, for the top3 and top5 shareholders groups arguably with the exception of the first point in time, 1950, which may be attributed to the initially very dispersed ownership structure due to the presence of a high share of individual equity holders precipitated by the above-described dissolution of the *zaibatsu* and distribution of the pertaining shares. Another conspicuous aspect is the leap in the number of shareholders between 1950 and 1960 with the figure tripling over the span of a mere decade. However, this surge in number of shareholders does not appear to have an impact on the overall dispersion, at least in the echelon of large shareholders. The data for the year 2023 is remarkable under two aspects, namely, firstly, the overall surge in the average number of shareholders. While there is a general caveat due to the limited size of the batch of companies analyzed as well as due to incongruence with the sample for the previous years under consideration, it can still be viewed as indicative of an overall tendency to an increasing number of shareholders. This trend appears to be conflict with the second observation, that is the increasing ratio of shares held by the largest shareholders and thus higher concentration which means a continuation of a trend from the previous years at least with respect to the data of the top-five shareholders.[913] Such conflict upon first glance may, however, be reconcilable with a growing gap between fewer larger shareholders and an increasing number of small-scale investors. When looking at the top shareholders more closely with respect to their respective investing purposes, it is noteworthy that trust banks dominate and usually assume the position as the largest shareholders reflecting the rise of this shareholder group noted in the share ownership

[913] One of the companies in the batch for the year 2023 (Chugai Pharmaceutical Co., Ltd.) has a very large majority shareholder which runs the risk to distort the data given the overall limited size of the batch, the average ratios for the remaining 19 companies have therefore been separately calculated and present themselves as follows: Top1 shareholder 19.7 per cent, top3 shareholders combined 33.9 per cent and top5 shareholders combined 39.8 per cent, which reveals the impact on the overall set, but also the limit of such impact.

survey above and the relevance of stocks as part of weighted asset allocation, for example, of pension funds.[914] With respect to the on average rising number of shares, it should be noted that in recent years an increasing number of listed stock companies implemented stock splits to enhance their investability and attractiveness for an investment by retail investors.[915]

b) Excursus: Listed subsidiaries

Another corporate group-specific phenomenon comparatively frequently encountered among public stock corporations in Japan is the listing of subsidiaries in which parent companies retain controlling stakes of the outstanding voting shares, usually above the 33 per cent threshold.[916] When looking at the figures for the years between 1985 and 2008, it can be observed that (i) the ratio of parent companies that retained a majority stake in their listed subsidiaries rose from seven per cent in 1985 to 10.2 per cent in 2008 for majority shareholders in relation to the overall sum of listed companies and (ii) remained on a somewhat stable level with values of 16.3 per cent in 1985 and 15.2 in 2008 for listed subsidiaries subject to majority control in relation to the number of

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914 The most prominent trust bank in Japan, the Master Trust Bank of Japan, Ltd. (*Nihon masutaa torasuto shintaku ginkō kabushiki kaisha*) occupies the top largest shareholder position in 16 out of the 20 sample companies (only second largest shareholder in Softbank Group, NTT, Oriental Land and Chugai Pharmaceutical) with an average shareholding ratio of 17.15 per cent. For the prevalence of such trust banks in the very top echelons of the largest shareholders in the 2010s, see Torii, *supra* note 44, 50. As asset managers for pension, trust banks hold shares as mere custodians for their customers. Due to their equity ties with the large commercial banks, trust banks were considered to form an integral part of – like other domestic institutional investors – the canon of the block of domestic investors shielding Japanese companies against the influence of investors from overseas, see Christina Ahmadjian, *Foreign Investors and Corporate Governance in Japan*, in: Aoki/Jackson/Miyajima, *supra* note 48, 140 f. Depending on the contractual construction of trust account, the trust banks may exercise shareholder rights at their own discretion or be subject to instructions by the asset managers, see Torii, *ibid*., 53 f.

915 The complementary reason is that shares on the Japanese stock exchange are traded in blocks of 100 shares, thus discouraging an investment of retail investors in the case of very high stock prices of shares. For the rise in the implementation of stock splits, see Asia Nikkei, *Japan stock splits jump 60% as Fujitsu and Suzuki join bandwagon* (2 April 2024), available under: https://asia.nikkei.com/Business/Markets/Japan-stock-splits-jump-60-as-Fujitsu-and-Suzuki-join-bandwagon (last accessed 2 April 2024).

916 In general, on recent developments in this field in Japan, see Hideaki Miyajima/Keisuke Nitta/Zen-ichi Shishido, *Oyako jōjō no keizai bunseki: Rieki ihan mondai ha hontōni shinkoku no ka* [Economic Analysis of Listed Subsidiaries: Are Conflicts of Interests Really Serious?], in: Miyajima, *supra* note 110, 289 ff. In line with this publication, the thesis at hand identifies a dominant majority shareholder when such shareholder holds more than 33 per cent of the voting rights, see Miyajima/Nitta/Shishido, *ibid*., 290 f. For different benchmarks in various East Asian jurisdiction, see Claessens/Djankov/Lang, *supra* note 128, 84 ff.

overall listed companies and ratios of 2.5 per cent in 1985 and 5.6 per cent in 2008 for otherwise controlled companies against the very same benchmark.[917]

While the figures of overall listed companies increased over the course of the two decades under consideration, namely from 1,655 firms in 1985 to 2,346 firms in 2008, the stable or slightly rising percentages indicate that the strategy of listed controlled subsidiaries not only remains sticky and in place, but its relevance has even slightly increased given that a rising number of parent companies appear to employ such group control strategy: According to data compiled by Miyajima/Nitta/Shishido[918], the number of closely-held listed subsidiaries moved up on an overall rising trajectory from 10.5 per cent in 1965 to 15.3 per cent in 2005, but slightly dropped after having reached a peak at 17.3 per cent in 1995. Solely looking at the figures for closely-held listed subsidiaries in which the respective parent company maintains control over half or more of the voting rights, one notices an increase from 3.3 per cent in 1965 to 8.7 per cent in 2005[919], implying that numbers more than doubled over the period under investigation, indicating a tendency or predilection of parent companies to formally retaining and consolidating majority stakes.

This latter impression is further reinforced when looking at the upper tier of corporations that are found to resort to such strategy: While the table lists regular, unchanging entries such as Hitachi, Toyota Motor Corporation and Fujitsu among the top entrants for all of the years for which information is provided, namely 1985, 1995, 2005 and 2008, the annual lists for the years 2005 and 2008 showcase that new technology companies such as Softbank Group, SBI Holdings or GMO Internet Group appear to apply such group strategy in an identical manner.[920] When looking at these three exponents of public companies in modern, internet-related and technology-focused industries, it is noteworthy that the tendency appears at least partially persevere: Softbank Group currently controls three subsidiaries listed on domestic stock exchanges with the Softbank Corporation subsidiary holding majority stakes in two additional listed subsidiaries, which, however, marks a decrease from the in

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917 Miyajima/Nitta/Shishido, *supra* note 916, 294, table 7-1.

918 Miyajima/Nitta/Shishido, *supra* note 916, 298, table 7-3.

919 Miyajima/Nitta/Shishido, *supra* note 916, 298, table 7-3.

920 Miyajima/Nitta/Shishido, *supra* note 916, 295, table 7-2, 300 f. Fujitsu Limited, however, has shown efforts to reduce the number of listed subsidiaries, see Asia Nikkei, *Fujitsu to sell chip packaging arm to Japan state-backed fund* (13 December 2023), available under: https://asia.nikkei.com/Business/Businessdeals/Fujitsu-to-sell-chip-packaging-arm-to-Japan-state-backed-fund (last accessed 4 April 2024).

aggregate ten subsidiaries registered in 2008.[921] On the other hand, SBI Holdings with eight listed subsidiaries with the relevant equity stakes even exceeding 50 per cent in six instances and GMO Internet Group with eight listed subsidiaries with the respective equity stakes exceeding even 50 per cent in all but one of these cases exposes increasing levels of inter-group ties: In the case of SBI Holdings such rise is moderate (from seven to eight), while in the case of GMO Internet Group the expansion of the group network is considerable with the number of listed subsidiaries doubling from four to eight.[922]

While the previously discussed tactics employed by the former *keiretsu* revolving around Toyota Motor Corporation implied raising existing, smaller equity stakes and thus strengthening ties, the parent-subsidiary relationship, especially with respect to new stock companies in modern industries may result from equity carve-outs,[923] implemented by the respective parent companies which might, however, be sold off over longer periods of time after expiration of the immediate post-IPO phase, such gradual reduction of equity stakes post-IPO have so tended to occur in to a lesser degree in Japan when compared to the United States due to group and organizational considerations which ultimately result in retaining control over such subsidiaries or at least relatively higher levels of hesitation to concede such controlling equity stakes.[924]

The attitude to uphold equity ties between parent company and subsidiary over significant periods ensuing carve-out and IPO ties in with the general observation that of a high retention rate or longevity of the underpinning of organizational ties between parent company and subsidiary through equity stakes and voting rights of the former

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921 See the figure provided for Softbank by Miyajima/Nitta/Shishido, *supra* note 916, 295, table 7-2.

922 Data as per July 2023, see for Softbank Group: https://www.marketscreener.com/quote/stock/SOFTBANK-GROUP-CORP-6492452/company/, and for Softbank Corporation: https://www.marketscreener.com/quote/stock/SOFTBANK-GROUP-CORP-6492452/company/, for SBI Holdings, Inc.: https://www.marketscreener.com/quote/stock/SBI-HOLDINGS-INC-6495402/company/, and for GMO Internet Group, Inc.: https://www.marketscreener.com/quote/stock/GMO-INTERNET-GROUP-INC-6496116/company/ (each last accessed 28 July 2023). For the previous figures, see Miyajima/Nitta/Shishido, *supra* note 916, 295, table 7-2.

923 An equity carve-out refers to the initial public offering of the stock or a portion of the stock of a wholly-owned subsidiary, see Katherine Schipper/Abbie Smith, *A Comparison of Equity Carve-outs and Seasoned Equity Offerings: Share Price Effects and Corporate Restructuring*, 15 Journal of Financial Economics (1986) 154.

924 Miyajima/Nitta/Shishido, *supra* note 916, 301 ff. However, there is a tendency that the ownership structure of newly-listed companies remains concentrated post-floatation with, however, different approaches taken by the different types of equity holders, see for an investigation of JASDAQ companies Kenji Kutsuna/Hideo Okamura/Marc Cowling, *Ownership structure pre- and post-IPOs and the operating performance of JASDAQ companies*, 10 Pacific-Basin Finance Journal (2002) 163 ff.

in the latter. The information collated by Miyajima/Nitta/Shishido[925] highlights that from the total number of subsidiaries whose voting rights or corresponding equity stakes lie to a third or more in the hands of the former parent company in 1965, 33.3 per cent survived the four decades until 2005; for subsidiaries in which the parent company retained half or more of the voting rights or commensurable equity stake 17.5 per cent continued to exist in 2005.

The bubble burst and the ensuing financial turbulences, into which Japanese corporations were tossed, also shines through these figures, since the control retention rate for ten years is significantly below the levels of the previous decades, namely 55.8 per cent for subsidiaries between 1995 and 2005, while the numbers for the previous decades hover on considerably higher levels most above the 70 per cent mark for subsidiaries in which the parent companies retained control, namely 73.8 (70 per cent for subsidiaries with 50 per cent or more of the voting rights in the hand of the former parent company) between 1965 and 1975, followed by 76.9 per cent (69.3 per cent) between 1975 and 1985 and 81.9 per cent (76.4 per cent) between 1985 and 1995.[926] The subsequent drop in the control retention rate in conjunction with the overall still rising numbers of listed subsidiaries reveals the concurrence of two trends, namely towards wholly-owned subsidiaries as exemplified by the strategy change within the Matsushita/Panasonic group as well as towards the spin-off and listing of new subsidiaries in the internet and modern technology industries described above with respect to the Softbank Group and its peers.[927]

While for the common fear that listed subsidiaries would be exploited by their respective parent companies, not much supporting evidence could be produced and there no indication was found that the listed subsidiaries' economic performance would be subpar in comparison with their non-controlled peers[928], a general uneasiness among scholarship has remained that minority shareholders are eventually at the mercy of the controlling parent company, especially with respect to transactions potentially violating the arms-length principle.[929] This concern was all the more reasonable and valid given that an effective legal remedies were not provided by statutory law nor jurisprudence with the potential solution of an imposition of a fiduciary duty on the

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925 Miyajima/Nitta/Shishido, *supra* note 916, 298, table 7-3.
926 Miyajima/Nitta/Shishido, *supra* note 916, 298, table 7-3.
927 Miyajima/Nitta/Shishido, *supra* note 916, 300 f.
928 Miyajima/Nitta/Shishido, *supra* note 916, 315-325.
929 Gen Goto, *The Outline for the Companies Act Reform in Japan and Its Implications*, 35 Journal for Japanese Law (2013) 31 ff.

controlling shareholder vis-à-vis the minority shareholders not being recognized under Japanese corporate law, and shareholders being barred from pursuing claims based on via the derivative action (Article 847(1) Companies Act).[930] While a reform proposal contemplated the introduction of a in the overall context arguably rather limited remedy in form of a new liability provision was on the table in the legislative process leading to the 2013 Companies Act Amendment, such proposal was eventually frustrated by industry opposition.[931]

3. Interim Conclusion

Both periods, the first four decades of the twentieth century as well as the postwar and ensuing decades, have equally started with a comparatively high ratio of individual shareholders (including directors and *zaikaijin* in the former period) whose "market share" was subsequently absorbed in the following decades by corporate shareholders, financial institutions and business corporations. Equity holdings by banks played a minor role throughout the entire prewar period which changed drastically in the 1950s and especially 1960s. Banks thus replaced the former *zaibatsu* companies not only as the center of the new *keiretsu* conglomerates, but also from the viewpoint of "market share". After the departure of the main commercial banks which coincided with the increased global integration of financial and capital markets and the rise of institutional shareholders, the latter group has effectively – abstractly speaking – taken over the formers market share with investors from overseas nowadays representing the largest shareholder group. While cross-shareholdings between business corporations despite considerable dissolution remain to a certain extent intact, outside shareholders account for half of the entire class of shareholders since the mid-2000s.

IV. Development of Corporate Finance Patterns

In the next step and as to supplement the preceding section on the ownership pattern, the development and patterns of corporate finance shall be traced over various periods since the enactment of the Kyū-Shōhō. Under the impression of the post-war economic, Japan's corporate finance has usually been associated with strong reliance on funds provided through relationship-based, internal financial channels within the *keiretsu*

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930 Goto, *supra* note 929, 32.

931 Goto, *supra* note 929, 32; *Kaisha hōsei bukai shiryō 23* [Material No. 23 of the Companies Act Subcommittee] (16 May 2012), available under: https://www.moj.go.jp/shingi1/shingi04900133.html (last accessed 17 May 2024).

and orchestrated by the main bank at the center of such *keiretsu*.[932] In with such narrative, Japan's contemporary economic system is still characterized as a bank-oriented one.[933] Trade credits have also been identified as playing a significant role during this period. While equity and debt finance in the "classical" forms of common stock and the fixed-interest rate bearing bank loan, respectively, present the two poles on a spectrum between outside- and inside-based finance, they are not exclusive nor perfect or directly substitutable, but they are two options on the menu of financial instruments from which publicly-listed companies can choose for their financing purposes; bank loans continue to play after development and sophistication of (local) bond markets.[934]

Looking at how current corporate finance in Japan fares in the international comparison, it is noteworthy that private non-financial corporations in Japan lie behind their peers in the United States and in the EURO area, but between the two peers when it comes to borrowing and debt securities.

Table III.2-1: *Financial liabilities owed by private non-financial corporations*[935]

	Borrowings	**Debts securities**	**Equity**	**Others**
Japan	25.0 %	4.5 %	53.7 %	16.8 %
United States	6.4 %	9.8 %	67.2 %	16.5 %
Euro area	26.0 %	3.5 %	57.9 %	12.5 %

These figures confirm the relative importance of borrowing in comparison with companies based in the United States, which is, however, in the same range as corporations from the Euro area, but at the same time shows that equity finance has presents the dominant form of corporate finance also for Japanese companies. The

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932 Atsuo Fukuda/Shinichi Hirota, *Main Bank Relationships and Capital Structure in Japan*, 10 Journal of the Japanese and International Economies (1996) 250 f.

933 Terence Tai Leung Chong/Daniel Tak Yan Law/Feng Yao, *The Debt-Equity Choice of Japanese Firms*, Munich Personal RePEc Archive, Paper No. 80561 (13 April 2016) 2.

934 Yongkil Ahn/Yoshikatsu Shinozawa/Kazuo Yamada, *Corporate Debt Mix and Long-term Firm Growth in Japan*, 58 Emerging Markets Finance and Trade (2022) 2150; Asli Demirgüç-Kunt/Vojislav Maksimovic, *Stock Market Development and Financing Choices of Firms*, 10 The World Bank Economic Review (1996) 341 f.; Theodor Baums, *Die Fremdkapitalfinanzierung der Aktiengesellschaft durch das Publikum* [Outside capital financing of the stock corporation by the public], in: Bayer/Habersack, *supra* note 220, 957.

935 Figures taken from Bank of Japan, *Flow of Funds – Overview of Japan, the United States, and the Euro area* (25 August 2023) 2, chart 3, available under: https://www.boj.or.jp/en/statistics/sj/sjhiq.pdf (last accessed 20 March 2024).

question is thus raised whether the importance of equity markets in Japan is a recent phenomenon which has emerged in the aftermath of the burst of the economic bubble in the early 1990s or whether it is reemerging pattern. Data on long stretches of the twentieth century has been extracted and collated by Fujino/Teranishi [936] and Hoshi/Kashyap[937] on which should be relied henceforth. It will be supplemented by additional data where it is deemed necessary.

1. Corporate Finance Patterns in the First Half of the Twentieth Century (until 1940)

While it does not seem apparent at first glance from an ex-post viewpoint situated in the post-1990s or 2000s, for most of the first half of the twentieth century stock markets formed a major pillar of the corporate funding of public companies: In the initial stages of the stock company concept settling into Japan, corporate investment was funded through paid-in capital collected upon incorporation and subsequent share capital increases. With the beginning of the 1920s corporate bonds emerged as an additional source of funding, so that capital market-based funding methods altogether eclipsed the relevance of bank borrowing.

a) Macro-level: Corporate finance patterns for a cross-section of industries

For the time span between the mid-Meiji period until 1940, Fujino/Teranishi have collated estimates for the level of claims of stock companies based on data from samples with varying sizes which cover partly overlapping sub-periods.

Table III.2-2: *Level of claims estimates between 1902 and 1940 based on Hoshi/ Kashyap and Fujino/Teranishi*[938]

Time period	Paid-in capital / capital reserves	Corporate bonds	Borrowings	Accounts payable	Sample size
1902-1915	82.3 %	9.5 %	3.2 %	5.1 %	32 – 52[939]

[936] Shozaburo Fujino/Juro Teranishi, NIHON KINYŪ NO SŪRYŌ BUNSEKI [Quantitative Analysis of Japan's Finance] (2000) 1 ff.

[937] Hoshi/Kashyap, *supra* note 146, 1 ff.

[938] Hoshi/Kashyap, *supra* note 146, 36 ff., table 2.3; Fujino/Teranishi, *supra* note 936, 405 ff., tables 9-1 through 9-5.

[939] Fujino/Teranishi, *supra* note 936, 405 ff., table 9-1. The companies of the sample come from the spinning (11), manufacturing (other than spinning, 12), electricity (7), gas (3), railway (14), shipping (2) and other (3) industries. The varying size of the sample is due to a lack of available data in specific years as well as due to the incorporation date (which in some cases is later than the

1914-1929	74.8 %	14.9 %	4.1 %	6.2 %	53 – 80[940]
1928-1940	66.4 %	18.5 %	6.7 %	8.4 %	287 – 331[941]

The preceding table shows that corroborates the introductory statement that bank loans were of minor importance and that the level of bank borrowing only amounted to approximately half of the level of corporate bonds over the course of the investigated period. It has been pointed out that public companies tended to discount their own bills at commercial banks so that a part of the account payables would be on a de facto basis functionally equivalent to bank loans, a characteristic which has earned this construct the term "*disguised bank borrowings*"[942], but it has likewise been emphasized that even adding bank borrowings in a narrower sense and the afore-mentioned bank borrowings in a wider sense would still make the aggregate sum trail the figures of the percentage of corporate bond financing during this period.[943]

Additional information can be taken from an analysis covering the flow of funds of a sample of large-sized corporations from various industries gauged at four intervals between 1911 and 1936.[944]

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start of the sample period in 1902), *ibid*., table 9-1. The respective company data has been collected from publications of the Osaka Stock Exchange, *Kaisha sōran* [Company Overview], published in 1914 and 1918 as well as additional data extracted by the very authors, *ibid*., 405, Hoshi/Kashyap, *supra* note 146, 36, table 2.3.

940 Fujino/Teranishi, *supra* note 936, 417 ff., table 9-3. The companies of the sample were active in the coal mining (5), manufacturing (11), shipbuilding (3), chemical and fertilizer (4), cement (10), paper making (3), beverages (3), flour milling (2), sugar refining (6), electricity (18), electric railway (12) and shipping (3) industries, *ibid*., table 9-3. The respective company data has been extracted from the two publications from Tōyō Keizai Shinpō-sha, namely "*Jigyō kaisha keiei kōritsu no kenkyū*" [Study of Management Efficiency of Industrial Firms] (1932) and "*Tōyō keizai kabushiki kaisha nenkan*" [Toyo Keizai Joint Stock Companies Yearbook], published annually, Fujino/Teranishi, *ibid*., 417 ff.

941 Fujino/Teranishi, *supra* note 936, 450 ff., table 9-6. The company data has been extracted from Mitsubishi Keizai Kenkyū-sho [Mitsubishi Economic Research Bureau], *Honpō Jigyō Seiseki Bunseki* [Analysis of Industrial Performance of the Country], *ibid*., 450 f. The companies in the sample come from various industries, namely fishing (5), mining (19), manufacturing (226), cotton spinning (11), shipbuilding (9), cement (13), paper making (7), chemical and fertilizer (11), beverages (4), sugar refining (6), flour milling (7), gas (5), electricity (13), railway (23), shipping (9), cargo transport (9), warehousing (9), real estate (11) and trading (11), *ibid*., 472, table 9-6.

942 Hoshi/Kashyap, *supra* note 146, 38; Fujino/Teranishi, *supra* note 936, 86 f.

943 Hoshi/Kashyap, *supra* note 146, 38.

944 Miwa/Ramseyer, *supra* note 808, 138 ff.; Shoichi Asajima, *Daikigyō no Shikin Chōtatsu* [Capital Raising among Large Firms], in: Tsunehiko Yui/Eisuke Daito, Daikigyō jidai no tōrai [The Arrival of the Age of Large-Scale Businesses] (1995) 235-238.

Table III.2-3: *Source of funding for sample companies in key industries (in per cent, based on data compiled by Asajima and Miwa/Ramseyer)*[945]

Years	Paid-in capital	Retained earnings	Bonds	Bank debt	Other debt	Sample
1911-1919	34.4	33.4	4.5	4.6	23.2	123
1919-1926	48.8	4.8	26.4	6.4	13.6	111
1926-1931	39.4	-2.0	44.1	14.6	3.9	134
1931-1936	53.6	28.6	9.1	-1.7	10.4	155[946]

The data in the table above also covers retained earnings which appear to have played a significant role in times in which companies could generate and accumulate profits which were then subsequently reinvested. In this vein, if retained earnings were not available, public corporations appear to have primarily resorted to corporate bonds and with the second half of the 1920s have begun to also rely to more significant degree on bank borrowing.

The picture painted so far shall be rounded off by an analysis conducted by Saito which provides annual information on paid-in capital, corporate bonds and bank debt for a sample of large-size corporations for the period between 1918 and 1942, thus largely overlapping with the periods covered by the previous two samples. The data has been collated on the basis of five-year intervals:

Table III.2-4: *Sources of corporate funding by large-scale business between 1918 and 1942 (in percentage, based on data compiled by Saito)*[947]

Years	Paid-in capital	Bonds	Bank debt	Sample size
1918-1922	82.8	10.1	7.2	92-98
1923-1927	75.0	15	10.1	83-89
1928-1932	66.5	22.1	11.5	79-82

945 Asajima, *supra* note 944, 227 ff., 235, table 6-3; Miwa/Ramseyer, *supra* note 808, 139.

946 Asajima, *supra* note 944, 224 f. defines large-scale companies as those exceeding a paid-in capital of JPY >1,000,000 in 1911, JPY >5,000,000 in 1919 and JPY >10,000,000 in 1926, 1931 and 1936, with it being sufficient that 50 to 60 per cent of the capital was actually paid in, Asajima, *ibid*., 224.

947 Nao Saito, *Senkan-ki nihon ni okeru daikigyō no shikin chōtatsu* [On the Corporate Finance of Large Japanese Firms during the Interwar Period], 16 Kokusai Kōryū Kenkyū [Journal of Global and Intercultural Studies] (2014) 37, table 1.

1933-1937	76.2	15.4	8.4	67-77
1938-1942	72.1	15.8	12.1	56-67

The data in the foregoing table shows that bank borrowing stayed more or less on the same level with two smaller temporary high points coinciding with periods of economic turbulence in the second half of the 1920s and in the immediate prewar and actual war years. Especially in the second half of the 1920s the drop in the figure for paid-in capital was, however, primarily compensated through the issuance of corporate bonds. The overall intensification of corporate investment in the course of this period is demonstrated by the aggregate total soaring from 922 million in 1918 to 5,1 billion in 1942, despite the sample size shrinking by nearly 60 per cent (from 98 to 56 companies).[948]

An interesting aspect among the equity financing strategies in this period was the utilization of the so-called part-paid stock system. Until the abolishment of this system in the course of the 1950 Commercial Coe Revision, company law in Japan allowed upon incorporation of a stock company that subscribers were only required to pay one fourth of the par value of their subscribed shares.[949] The collection of the outstanding amount was postponed and could occur solely at the company's discretion without any consent by the general shareholders' meeting being required (unlike in the event of a capital increase).[950] In this manner, the collection of the supplementary installments provided stock companies with an additional fundraising avenue which could be comparatively smoothly implemented, even if the overall economic circumstances – such as in the late 1920s and early 1930s – or the company-specific conditions were not favorable for implementation of public stock offerings.[951] Shareholders were

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948 Saito, *supra* note 947, 37, table 1.

949 The part-paid stock concept had already been included in the Kyū-Shōhō of 1893 (Article 167(2)) and was maintained in the Shōhō of 1899 (Article 128(2)) only requiring that at least one quarter of the subscription amount must be paid upon the initial payment.

950 Nao Saito, *Kabushiki bunkatsu haraikomi seido to gyōseki fushin kigyō ni yoru tsuika haraikomu chōshū* [Part-paid Stock System and Supplementary Installments by Corporations with Poor Business Performance], 23 Kokusai Kōryū Kenkyū [Journal of Global and Intercultural Studies] (2021) 4 f. The system was even further relaxed by virtue of the Commercial Code revision in 1938. Until then, Article 210 Commercial Code prohibited capital increases until the full amount of the registered share capital had been paid up. This prohibition was lifted and only replaced by a number of procedural norms (Article 353 Commercial Code of 1938).

951 See the case study on Dai Nihon Sugar Manufacturing Corporation, Saito, *supra* note 950, 18 ff., 26 ff. While the market did not respond to the announcement of such capital call with slumping share prices, most shareholders responded to such call despite the share price sometimes even being below par value.

compelled to comply with the call for the collection of the outstanding installments, since they faced the risk of forfeiting their shares in the event of non-compliance which would result in the pertinent shares being auctioned by the investee company. However, even if such shares were successfully auctioned to a third party, if the proceeds from the auction were to come short off the outstanding amount, the former shareholder would remain liable for the amount unpaid.[952]

The collective data presented in the three tables above underscores the observation that stock markets in Japan were comparatively well developed in the 1920s and 1930s which is, for example, evidenced by the number of listed stock companies roughly doubling from 569 listings in 1920 to 1,199 listings just two decades later in 1940, a rise which was accompanied by the total par value of issued shares and market value more than quadrupling over the same period from JPY 4,851 million to JPY 21,626 million (for the aggregate value of issued shares) and from JPY 7,879 million to JPY 34,956 million (for the aggregate market value).[953] Similarly, the ratio between market capitalization and the gross domestic product (GDP) soared from 50 per cent in 1920 to 95 per cent in 1940 with 1933 marking the first year in which the market capitalization of the – listed – stock companies exceeded the GDP with a value of 106 percent; the highest value was recorded in 1936 with 122 per cent.[954] This level of relative stock market capitalization put the prewar stock markets in Japan on par with their peers in the United States and the United Kingdom. Throughout the 1980s, in the period between 1980 and 1991 to be exact concurrent with heydays of the bubble economy, Japan with a stock market capitalization ratio of 98 per cent would again outrank the United Kingdom (86 per cent) and the United States (61 per cent) and at the end of the 1990s (in 1997), Japan's prewar stock market would still rank among the top group of jurisdictions with respect to the relative size of stock market capitalization.[955]

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952 Saito, *supra* note 950, 5 f. See also Article 153 Shōhō.

953 Hoshi/Kashyap, *supra* note 146, 38 ff., table 2.4.

954 Hoshi/Kashyap, *supra* note 146, 38 f., table 2.4.

955 Demirgüç-Kunt/Maksimovic, *supra* note 934, 348, table 2; Hoshi/Kashyap, *supra* note 146, 40, table 2.5; World Bank, WORLD DEVELOPMENT REPORT 1999/2000 – ENTERING THE 21ST CENTURY: THE CHANGING DEVELOPMENT LANDSCAPE (1999) 252 f., 260 f., tables 12, 16. The United States would score a stock market capitalization ratio of 1.4 and the United Kingdom of 1.47 in 1997; due to the contraction of Japan's stock market in contrast to the expanding stock markets of the United States and the United Kingdom after the bubble burst the ratio would only amount to 0.59, but would still outrank Germany (0.39) and France (0.47). Rajan/Zingales, *supra* note 146, 14, table 2.

b) Complementary evidence on corporate finance patterns from smaller, industry-specific company samples

The collective impression gained by the look at the bigger, overall picture of corporate finance in the first four decades of the twentieth century is confirmed by various studies on smaller, more industry-specific samples. The data from these samples likewise demonstrates that after the arrival and taking root of stock companies as an enterprise form in Japan, stock companies tended to primarily rely on capital markets through issuance of capital stock and corporate bonds.[956] This observation can, for example, be supported by data on a representative, however, limited set of 44 firms stretching across seven key manufacturing industries – namely food, chemical, brick, cement, metal, machinery and spinning – for the year 1897, and for spinning companies for the year 1898.[957]

Table III.2-5: *Capital structure of manufacturing firms in 1897/1898 (mean values, in per cent, based on data compiled by Imuta and Miwa/Ramseyer)*[958]

Industry	Paid-in capital	Retained earnings	Bonds	Bank debt	Other debt*	Sample size	Mean capitalization in (JPY 1,000)
Food	64.6	15.6	3.4	5.2	11.3	15	196,665
Chemical	71.1	5.3	0	1.8	21.7	7	206,452
Brick	71.8	14.9	0	9.7	3.7	8	57,908
Cement	53.1	18.4	10.3	4.5	13.8	4	340,396
Metal	72.5	7.3	0	13.2	7.1	5	253,489
Machinery	66.3	7.3	0	2.6	23.8	5	596,289
Spinning	57.5	10.3	5.4	11	15.7	52	n/a

* *The categories subsumed under other debt slightly deviate from the data available for spinning and the other industries.*

956 Miwa/Ramseyer, *supra* note 808, 134.

957 Yoshimitsu Imuta, MEIJI-KI KABUSHIKI KAISHA BUNSEKI JOSETSU: KŌGI-YŌ TEKISUTO [Introduction to the Analysis of Meiji Era Corporations: Lecture Texts] (1976) 20 ff., 135 ff.

958 Imuta, *supra* note 957, 20, 135, 145, 150 ff., 154, 158; Miwa/Ramseyer, *supra* note 808, 135. The figures for the 44 firms were distilled from an overall number of 187 firms in a wider array of industries for which data was available in the Osaka Asahi newspaper, see Imuta, *ibid*., 125 ff.; Miwa/Ramseyer, *ibid.*, 135.

In addition to the information obtained in the previous section, the preceding table demonstrates that proceeds from the paid-in capital and ensuing capital increases played an important role, as the table provides separate figures for the categories paid-in capital and retained earnings. Taking into account the life cycle of a company, it is plausible, not to say cogent that the relevance of share issuances is higher than of retained earnings, with industrialization just having entered into its take-off phase in the mid-Meiji period, a considerable share of companies, including stock companies, were still in the early phases of their life cycle implying that cash flows were still not that robust that they would allow the building up of cash reserves and the reliance just or at least to a significant degree on cash reserves for corporate investment purposes. Being still in the growth phase at the same time suggests a plausible explanation for the appetite for external funds and the reliance on the stock market for funding. The concept of corporate bonds was still at an early stage[959], which would help to explain the low presence and virtual absence, especially in capital-intensive industries such as machinery (other than spinning) and metal/mining. Speaking of the spinning industry, the same authors provided more detailed information for the cotton-spinning companies in 1898, presented by the size of the spinning companies as per the following table.

Table III.2-6: *Capital structure of cotton-spinning firms in 1898 (mean values, in per cent, based on data compiled by Imuta and Miwa/Ramseyer)*[960]

Company size (by number of spindles)	Paid-in capital	Retained earnings	Bonds	Bank debt*	Other debt	Number of firms
< 6,000	64.1	2.3	0	16.1	17.5	12
6,000 – 9,999	58.4	1.9	4.4	13.7	21.6	13
10,000 –19,999	59.5	8.5	5.5	8.6	18	12
≥ 20,000	55.4	15.1	6.6	10.3	12.6	15
Aggregate	57.5	10.3	5.4	11	15.7	52

* *Bank debt in this context is understood to include overdraft amounts thus short-term debt.*

959 The issuance of a corporate bond was already provided for and regulated in Article 208 of the Kyū-Shōhō.

960 Imuta, *supra* note 957, 20; Miwa/Ramseyer, *supra* note 808, 142.

Remarkable is the confirmed overwhelming prevalence of paid-in capital meaning the raising of capital from shareholders upon incorporation as well as on the occasion of subsequent share capital increases. What is further striking is that larger companies rely to a significantly higher degree on retained earnings. This could be related to the stage which such companies are in the overall life cycle of a company. A larger scale of operation suggest that such larger companies have already grown and become more established entailing more robust cash flows allowing such companies to rely on their earnings as a continuous cash flow to a higher extent than younger companies that are still to establish a stable and continuous cash flow. Smaller companies tend to compensate for such lack of own capital resources by tapping banks for loans. The figures for bank debt exceed those for retained earnings for small-size companies; the figures for bank debt exceed those for corporate bonds for companies of any size which might, however, be attributed to the fact that corporate bonds were yet to establish themselves as a source of corporate finance. After dwelling on corporate finance patterns of companies in the cotton spinning industry, Miwa/Ramseyer produce additional figures for companies in the railway business, another capital-intensive industry, especially for the very early years of the incorporation of railway companies leading up to 1898.[961]

Table III.2-7: *Capital structure of railway companies between 1884 and 1898 (mean values, in per cent, based on data compiled by Miwa/Ramseyer)*[962]

Year	Paid-in capital	Retained earnings	Bonds	Bank debt	Number of firms
1884	100	0	0	0	1
1886	100	0	0	0	2
1888	97	2	0	1	6
1890	95	1	1	3	12
1892	94	2	3	1	13
1894	88	2	9	1	20

961 Miwa/Ramseyer, *supra* note 808, 144, relying on Tetsudō Kyoku, *Meiji 32 Nendo Tetsudō Kyoku Nenpō* [1899 Railway Bureau Annual Report], Meiji Zenki Sangyō Hattatsu Shishi-ryō: Bessatsu [Materials on the History of Industrial Development in the Early Meiji Period, Separate Volume] (36)4 (1968) 221-237. Capital markets lost relevance for railway companies when they were – temporarily – nationalized in 1907.

962 Miwa/Ramseyer, *supra* note 808, 145.

1896	91	2	5	2	27
1898	92	2	6	1	41

The data of this sample shows a nearly exclusive reliance on the paid-in capital and the issuance of shares. For the low relevance of retained earnings it may again be referred to the fact that railway companies were just in process of being incorporated and given the still short life span and focus on growth prospects, retained earnings were likely not at the hands of such companies. Except for the year 1890, corporate bonds show to be more relevant and resorted to than bank loans. Macro-economic factors such as the overall economic climate may have contributed to companies resorting to bank loans rather than issuing bonds in 1890.

Similar to the separate datasets for cotton-spinning and railway companies, specific data has been collated for companies in the electricity sector at the intervals of five years between the period between 1910 and 1935, drawing from larger sample of companies, partially due to the expanding size of the entire economy as well as this specific branch, however, with a non-negligible time gap to the afore-looked at companies.[963]

Table III.2-8: *Capital structure of companies in the electricity sector between 1910 and 1935 (in per cent, based on data compiled by Miwa/Ramseyer and Kikkawa)*[964]

Year	Paid-in capital	Retained earnings	Bonds	Bank debt	Number of firms
1910	83	5	4	8	178
1915	75	3	11	11	457
1920	76	5	9	10	542
1925	61	3	25	11	532
1930	51	3	32	13	482
1935	57	4	32	7	454

963 Miwa/Ramseyer, *supra* note 808, 145 f.; Takeo Kikkawa, NIHON DENRYOKU-GYŌ NO HATTEN TO MATSUNAGA YASUZAEMON [Matsunaga Yasuzaemon and the Development of the Japanese Electrical Power Industry] (1995) 22 ff., Tables 1-1, 1-3.

964 Miwa/Ramseyer, *supra* note 808, 145.

While the strong, nearly exclusive reliance on paid-in capital appears to have been industry-specific for railway companies, the figures in the table 4 nonetheless reveal an overall trend with paid-in capital and raising for capital through share issuances losing its overwhelming importance. On the other hand, the figures for 1925 and after for the electric utility industry correspond with those for the cotton spinning companies at the beginning of the century suggesting the existence of industry-specific differences. Further remarkable observations from table III.2.8 are, firstly, the constantly relatively low relevance of retained earnings for corporate finance purpose, and secondly, that corporate bonds after having caught up in the 1910s and early 1920s exceed bank debt by a great margin from the second half of the 1920s onwards. Additional figures provide a more concrete picture on changes between the different funding sources which were available to electric utility companies.

Table III.2-9: *Source of additional funding for electric utility companies (in per cent, based on data compiled by Miwa/Ramseyer and Kikkawa)*[965]

Years	Paid-in capital	Retained earnings	Bonds	Bank debt
1908-1914	75.9	2.5	8.6	13
1915-1918	71.1	10.2	10.4	8.3
1919-1924	61.3	2.5	27.6	8.5
1925-1930	37.4	3.4	42.5	16.7
1931-1938	78.9	9.9	17.7	-6.5

The figures compiled in the two tables III.2-8 and III.2-9 suggest that stock companies in the electric utility industry moved from reliance on the issuance of new stocks to corporate bonds, indicating at the same time a growing sophistication of corporate bond markets and subscribers.[966] The figures in table III.2-9 demonstrate that corporate bonds were much more sought after than bank loans. Even in the period between 1925 and 1930 in which the relevance of share issuances sharply dropped, it is primarily corporate bonds that compensate for the missing share and only secondarily bank loans. This is remarkable given that the economic depression in the 1920s triggered a serious corporate bond crisis with a lot uncollateralized corporate

965 Miwa/Ramseyer, *supra* note 808, 146; Kikkawa, *supra* note 963, 27, table 1-3.
966 Miwa/Ramseyer, *supra* note 808, 146.

bonds defaulting, which one would expect to subsequently dent and cool down bondholders' subscription appetite.

The trend which could be observed in detail with respect to the specific industries mirrors the conclusions drawn based on the macro-level data which is plausible given the fact that the investigated electric utilities, railroad and manufacturing industries, including the cotton spinning sector constituted a significant share of the incorporated companies, especially when it comes to large-scale firms, in over this very same time span.[967] Large-scale corporations primarily formed and developed in the capital-intensive electric utilities, railroad and spinning industries between the years of the late Meiji and early Taisho era.[968]

c) Interim conclusion

The different data samples all have the common denominator that suggests a primary reliance of the large – non-*zaibatsu*-affiliated – companies on their equity, meaning that the companies rather resorted to issuance of new capital stock and collection of outstanding subscription installments than to sourcing bank loans. While the figures indicate that retained earnings and the issuance of corporate bonds played an overall minor role at this stage, they also show that corporate bonds appear more sought after by companies than bank loans. This latter finding is surprising given that bond markets usually emerge besides a robust bank financing landscape. Furthermore, the detailed information on different industry branches reveals internally diverging patterns with the data in table 2-5 indicates that while overall hovering on low levels, bank loans tended to be more relevant and important in capital-intensive industries such as mining, spinning and brick industries, an observation which, however, appears that it cannot be extended to the railway industry which almost exclusively relied on the stock market in the formation phase (see table 2-7). Another noteworthy aspects in the broader context is the general significance of securities for the private sector which includes private households, with the share being largely on par or occasionally surpassing the figures recorded for bank deposits.[969]

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967 Asajima, *supra* note 944, 225 ff.
968 Asajima, *supra* note 944, 225.
969 Hoshi/Kashyap, *supra* note 146, 34, table 2.1.

2. Postwar period: From the postwar period until the mid-1990s

The timespan between the immediate postwar period and the bubble burst and its immediate aftermaths have been recorded by Hoshi/Kashyap relying on primary data provided by the Bank of Japan. For the first roughly three decades of this overall time span the data presents itself as follows:

Table III.2-10: *Sources of external corporate funding between 1954 and 1980 (in per cent, based on flow of funds data compiled by Hoshi/Kashyap)*[970]

Year	Security markets				Loans			
	Equity	Bonds		Total	Domestic Private	Domestic Public	Foreign	Total
		Domestic	Foreign					
1954-1957	21.3	3.7	0.0	25.0	64.9	9.5	0.6	75.0
1958-1961	19.1	6.6	0.0	25.6	64.4	5.6	4,4	74.4
1962-1965	13.0	3.6	0.1	16.7	71.5	6.6	5.3	83.4
1966-1970	7.7	3.7	0.2	11.6	76.8	9.2	2.4	88.4
1971-1975	6.2	4.3	0.3	10.9	78.3	7.9	2.9	89.1
1976-1980	7.9	4.7	1.6	14.2	71.6	11.3	2.8	85.7
1981-1985	8.2	2.9	5.1	16.2	77.3	7.2	-0.6	83.9

970 Hoshi/Kashyap, *supra* note 146, 118, 244, tables 4.4 and 7.7. In detail, the intervals between 1954 and 1975 have been collated on the basis of table 4.4; the remainder, i.e., the intervals between 1976 and 1985 have been directly taken from table 7.7. Please note that the figures in italics in the last two intervals have been rearranged in deviation from the original source.

In order to avoid that fluctuations in individual years cloud the view on the overall, long-term picture, the aggregate data for five-year intervals has been adopted.[971] The data provided in the table supports the widespread understanding of bank borrowing as the dominant form of corporate finance until the mid-1970s with the share of private lenders hovering around the 70 per cent until significantly further increasing, a movement which starts in the late 1960s and tentatively culminates in the mid-1970s at just below 90 per cent. It has been pointed out that the general trading companies (*sōgō shōsha*) sometimes functioned as – also financial – intermediaries handing down loans they borrowed from their banks to smaller-sized firms among their customers.[972] The general trading companies despite being impacted by the postwar *zaibatsu* dissolution, could thus reconnect to their former role as transaction intermediaries in the *zaibatsu* conglomerates – at least in case of Mitsui Bussan and Mitsubishi Shōji –, which involved the granting of trade credit and thus supply of working capital to its smaller business partners, before banks had started to establish customer relationship with such smaller-sized firms, and in this manner complement industrial organization of Japan in the postwar era, at least until the oil crisis ushered in a transition period making the trading companies, inter alia, put more emphasis on business investments.[973] While the ratio of bonds mainly hovered in the mid-single digit range in relation to the firms' liabilities throughout this period, it is noteworthy that the popularity of stock issuances incrementally gradually fell from a ratio above 20 per cent in the 1950s to just above six per cent in the mid-1970s from which it also slightly recovered over the next two intervals leading into the mid-1980s, bringing thus down the overall relevance of securities market-based corporate finance from levels in the mid-20 per cent range in the mid-1950s to early 1960s to just above ten per cent in the early 1970s from which it resurged more affirmatively than the equity ratio driven by an increasing importance of bonds to levels around 16 per cent in the 1980s.

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971 See for this method, also Hoshi/Kashyap, *supra* note 146, 241. The aggregate data for the period 1971-1975 has not been taken from the table 7.7, but rather calculated on the basis of the data collated in table 4.4.

972 Hoshi/Kashyap, *supra* note 146, 118.

973 Hoshi/Kashyap, *supra* note 146, 120 f.; Akira Tanaka, *The Changing Business Models of Postwar Japan's Sōgō Shōsha*, 30 Japanese Research in Business History (2013) 66 ff.; Shinichi Yonekawa, *General Trading Companies: A Comparative and Historical Study*, IDE-JETRO: Japanese Experience of the UNU Human and Social Development Programme Series, no. 80 (1983) 21 ff.

Table III.2-11: *Financial liabilities of non-financial corporations (stock estimates/level of claims data, in percentage)*[974]

Year	Equity	Bonds/Debt securities		Loans	Trade credit	Others
		Corporate	Total			
1979- 1982	21.6	1.9	7.8	43.2	20.7	6.7
1983- 1986	30.8	1.7	7.3	40.5	15.8	5.6
1987- 1990	41.4	1.6	7.1	35.2	12.7	3.7
1991- 1995	29.3	2.8	9.4	43.2	14.0	4.1

The data covering the financial liabilities of non-financial corporations in the next two decades show a burgeoning trend of equity finance becoming more relevant and the relevance of loans starting to retreat between the late 1970s until the late 1980s. The burst of the economic bubble, however, ushers in what seems to be a – temporary – reversal of this new tendency with loans regaining momentum and the relevance of equity losing such. However, it requires to be taken into consideration that corporate financing was overall sluggish in the mid- and late-1990s.[975] The period since the mid-1980s is characterized by large-size companies slowly started to emancipated themselves from the borrowing by the main bank turning more to internal procurement (cash on hand) and security markets for financing purposes as they sought to bring down long- and short-term bank loans.[976] The building up of cash holding had occurred throughout the 1980s, thus enabling (large) companies to rely on means of internal procurement, which then abated again in the aftermath of the bubble burst where investment opportunities were limited.[977] The tendency to wind down reliance on bank borrowing is also indicated by the figures for debt securities in the table above which soar throughout the entire period from 1979 until 1995 which was facilitated on the back of increasing deregulation efforts and establishment of robust bond market.[978]

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974 Nihon Ginkō Tōkei-Kyoku [Bank of Japan Statistics Department], *Nihon Ginkō Chōsa Tōkei* [Bank of Japan Statistics] – *Shikin Junkan: Kinyū Shisan / Fusai Zandaka-hyō* [Flow of Funds Accounts: Financial Assets and Liabilities], various issues.

975 Tokuo Iwaisako, *Makuro no kigyō chochiku to saikin no nihon kigyō no shikin chōtatsu no dōkō* [Aggregate Corporate Saving and Recent Changes in Capital Structures of Japanese Firms], 61 Keizai Kenkyū [The Economic Review] (2010) 23 ff., figure 5.

976 Iwaisako, *supra* note 975, 23, 25, figure 5 (1A).

977 Iwaisako, *supra* note 975, 21 f., figure 2.

978 Hoshi/Kashyap, *supra* note 146, 219 ff.

An interesting aspect for the purpose of the analysis at hand is uncovered by a more detailed look at the distribution between the different channels of financing through equity.

Table III.2-12: *Sources of equity finance of listed companies between 1972 and 1998 (annual average per interval, based on data compiled by Hoshi/Kashyap)*[979]

Year	Distribution per issue type (in per cent)			Total volume (million JPY)
	Public offering	Warrant exercise	Other*	
1972 - 1975	49.3	0.0	50.7	881,447
1976 - 1979	66.3	0.0	33.7	865,354
1980 - 1983	73.6	1.0	25.4	1,282,396
1984 - 1988	56.6	25.6	17.8	2,114,023
1989 - 1993	27.1	42.1	30.8	2,938,295
1994 - 1998	12.8	33.0	54.2	1,270,177

* *This position includes on offering on par value to existing shareholders, private placements and the issuance of preferred stock.*

An interesting observation from the preceding table III.2-12 above is that the volume of equity financing remained comparatively flat over the decade with brief dents in 1974 and 1976. The figures also uncover that a significant amount of equity finance was sourced not necessarily publicly, but by reliance on existing and insider shareholders through share issuance at par rather than market value.[980] Looking at the total volume of equity finance, the drop after the bubble burst becomes evident interrupting the considerable increase throughout the 1980s. Especially the public offering of shares suffered significantly under the ensuing financial turbulences.

3. Post-bubble burst: Deregulation and Opening up to Foreign Investors – The Period post-1995

The declining reliance on bank borrowings and the rising relevance of institutional shareholders ushered in the third period starting in the aftermaths of the bubble burst,

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979 Hoshi/Kashyap, *supra* note 146, 240, table 7.5, relying on the Tokyo Stock Exchange's Annual Securities Statistics (1998).

980 Hoshi/Kashyap, *supra* note 146, 117.

towards the mid-1990s.[981] Deregulation efforts[982] with respect to financial markets had already been undertaken in the 1980s, allowing Japanese stock companies to issue corporate bonds more easily and to break free from the yoke of the domestic bank industry.[983]

Table III.2-13: *Financial liabilities of non-financial corporations (stock estimates/level of claims data, in per cent) – continued*[984]

Year	Equity	Bonds/Debt securities		Loans	Trade credit (domestic and overseas)	Others
		Corporate	Total			
1996-2000	32.2	4.2	9.9	40.4	14.1	3.4
2001-2005	37.7	4.0	7.9	34.7	13.3	6.4
2006-2010	39.3	4.2	6.2	34.1	13.5	7.0
2011-2015	45.9	3.7	5.3	30.5	11.9	6.1

These figures confirm the overall tendency of an increasing relevance of equity finance balancing a receding prominence of bank finance. The trend for bonds is overall less consistent for the intervals covered in this table. The overall decline in the relevance of loans for non-financial corporations which commenced mildly in the mid-1970s and accelerated in the late 1990s has been well documented in other literature, especially with focus on the debt-to-equity-ratio.[985] The analysis by Iwaisako shows that from the mid-1990s until the mid-2000s, firms shifted from financing relying on short- and long-term loan arrangements with banks to means of internal procurement as well as security markets, however, debt levels remained until they were reduced in the early 2000s, it was just that the growth rates of equity finance were higher.[986] Reasons for this trend are found to be twofold with banks due to low and bad performing loans in

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981 Miyajima/Ogawa/Saito, *supra* note 789, 25.

982 For an overview, see Sayuri Shirai, *Promoting Tokyo as an International Financial Center*, in: Soogil Young/Dosoung Choi/Jesus Seade/Sayuri Shirai (eds.), COMPETITION AMONG FINANCIAL CENTRES IN ASIA-PACIFIC: PROSPECTS, BENEFITS, RISKS, AND POLICY CHALLENGES (2009) 137 f.

983 Hoshi/Kashyap, *supra* note 146, 241 ff., 244 f. (tables 7.7, 7.8), 259; Rajan/Zingales, *supra* note 146, 40 f.

984 Nihon Ginkō Tōkei-kyoku [Bank of Japan Statistics Department], *supra* note 974, various issues.

985 For example, Tokuo Iwaisako/Chiaki Fukuoka/Takefumi Kano, *Debt Restructuring of Japanese Corporations: Efficiency of Factor Allocations and the Debt-Labor Complementarity*, 54 Hitotsubashi Journal of Economics (2013) 119-135, 121 ff., figures 1 and 2; Iwaisako, *supra* note 975, 23 f., figure 4.

986 Iwaisako, *supra* note 975, 22 ff., figure 5.

the aftermaths of the bubble burst being more reluctant to lend indicated by drops in their willingness to lend in the early 1990s immediately after the bubble burst and again towards the end of such decade, when the loan problem became acute.[987] Firms responded to this by using cash reserves to pay off existing debts which to a certain extent was conducted to the detriment directing cash to investment opportunities in the late 1990s and early 2000s; signs of a trend reversal showed in in the mid-2000s with loans taken out by large-scale firms going slightly up again accompanied by increasing corporate investment rates, however, trailing levels of the 1980s.[988] During this period, it is primarily internally procured funds that contributed to corporate investment which is underlined by the observation that while corporate bonds had become more important in the financing mix of firms since the 1980s – firstly for large-scale firms before seeping to smaller-sized companies – after a peak in the early 1990s their share did not increase that much, in fact for large-scale manufacturing companies long-term loans and corporate bonds moved rather parallel, after an upswing in the late 1980s, their respective levels move rather stable before both decreasing in the late 1990s with the ratio of long-term loans (above 35 per cent) clearly outranking the corporate bond ratio (below ten per cent); the figures are more stable for non-manufacturing large-scale firms with the long-term loan ratio hovering at 25 per cent and the corporate bond ratio oscillating between ten and 15 per cent between the late 1980s and 2008.[989] Also, it appears as if the dawning of the Global Financial Crisis cautioned firms to strengthen their equity positions and building up cash holdings.[990] This conservative financial policy paid off in the Global Financial Crisis as only few businesses faced financial difficulties or even bankruptcy.[991]

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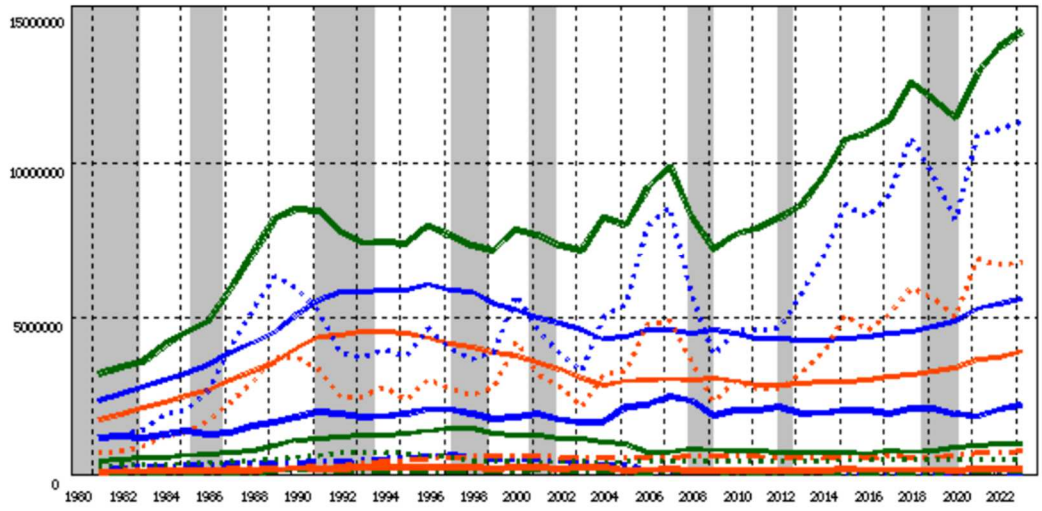
987 Iwaisako, *supra* note 975, 22, figure 3.
988 Iwaisako, *supra* note 975, 21 f., figures 2 and 3.
989 Iwaisako, *supra* note 975, 25 ff., figures 5 and 6.
990 Iwaisako, *supra* note 975, 21, 23, figure 2.
991 Shinichi Hirota, *Nihon no daikigyō no shikin chōtatsu: Kigyō no sonzoku kakuritsu saidaka no kanten kara* [Fundraising by Large Companies in Japan: From the Perspective of Maximizing the Survival Rate of Companies], in: Miyajima, *supra* note 110, 405.

Graph III.1: *Financial liabilities of non-financial – private and public – corporations between 1980 and 2023*[992]



Graph III.1 displays the stock of financial liabilities of non-financial corporations between 1980 and 2023. To breakdown the graph, three basic groups can be formed. The figures for debt securities (solid green line) and the pertaining sub-categories, public corporation securities (long and short dash blue line) and industrial securities (long and short dash red line) as well as of domestic and overseas trade credits (thick solid blue line) more or less stagnate in volume, implying a decreasing share in the overall soaring aggregate volume of financial liabilities (thick solid green line). Into the same category fall accounts receivable/payable (thick solid red line), deposits money (dotted green line) and commercial paper (long and short dash green line) which barely even oscillate and thus are arguably negligible. On an overall upward trajectory are equity (dotted blue line) and the pertaining sub-category listed shares (dotted red line) that roughly mimics the movements of the former. The volume of loans (solid blue line) and loans by private financial institutions (solid red line) on the other hand reveal parallel soft sinus wave movements retreating after a peak in the mid-1990 to a low in the mid-2010, before increasing again in the late 2010s and early 2020, for which the driver appears to be the loans provided by private financial institutions, thus opposing any suggestion of a connection to public funding in the aftermaths of the Covid-19-related economic turbulences. Notwithstanding the resurgence of the loan volume, in relative figures, the relevance of equity finance

992 The graph has been collated relying on the data provided by the Bank of Japan, Time-Series Data Search: Flow of Funds, available under: https://www.stat-search.boj.or.jp/ (last accessed 12 June 2024).

appears to be on an upward trajectory, but is shown to be more exposed to macro-economic conditions as the dents in the aftermaths of the Global Financial Crisis of 2007/2008 and in the beginning of the Covid-19-induced economic complications suggests. Previous levels were, however, recouped which in the case of the economic doldrums post the Global Financial Crisis nearly took a decade, as only in 2016 the level from 2006 was regained. On the other hand, loans and trade credits provide firms with a seemingly stable, more reliable capital basis.

Table III.2-14: *Sources of equity finance of listed companies between 1997 and 2022 (annual average per interval)*[993]

Year	Distribution per issue type (in per cent)				Jurisdiction		Volume (in JPY million)
	Share issuances (non-IPO)	Share issuances (IPO)	Convertible bonds	Others (Stock warrants, stock options)	Domestic	Over-seas	
1997-2000	26.3	35.3	34.8	3.5	69.6	30.4	2,132,645
2001-2004	30.8	13.1	56.1	0.1	49.3	50.7	2,455,934
2005-2008	29.0	10.1	60.4	0.0	62.3	37.7	2,651,729
2009-2013	69.2	7.6	23.1	0.2	52.9	47.1	2,719,013
2014-2018	36.1	12.6	50.8	0.4	41.3	58.7	1,737,138
2019-2023	47.9	18.4	33.5	0.2	44.3	55.7	1,054,059

As indicated by the data in the corresponding table 2-12 which covered the previous period, the relationship between the shares financed by equity and bonds fluctuates rather wildly. The clearest trend which may be taken away from this data is that the relevance of funds from overseas has increased, exceeding the relevance of domestic equity funding since the mid-2010s. With respect to the distribution, it can be stated that equity financing can now be clearly split between stock issuances and bonds and that former practices such as issuances of preferred shares or issuances at par rather than market value seem to have disappeared which hints at an overall more market-

[993] The table has been collated relying on the data provided by the Nihon Shōken-gyō Kyōkai [Japan Securities Dealers Association, JSDA], *Tōkei – Chōsa – Jōhō-sho: Zenkoku jōjō kaisha no ekuiti fainansu no jōkyō* [Statistics, Surveys, Information Material: On Equity Finance of All Domestic Listed Companies], various issues, available under: https://www.jsda.or.jp/shiryoshitsu/toukei/finance/index.html (last accessed 24 March 2024).

oriented approach. In general, it may be said that years with a high issuance volume are accompanied with bonds being more relevant that shares issuances with the years immediately after the Global Financial Crisis being an exception.

4. Interim Conclusion

Corporate finance patterns are very exposed to the overall economic conditions which renders it more complicated to identify any straightforward tendencies. While especially the data pertaining to the first half of the twentieth century is only fragmentary, it still confirms that equity finance by far exceeded the relevance of bank borrowing as well as of retained earnings. While previous most studies only cover the phase from the early Taisho period, Imuta also reports some data on various stock companies in the mid-Meiji period (1897) with internal funding rates (primarily, equity and retained earnings) for the majority of sample firms in the range of 70 to 80 per cent or even higher with a tendency usually towards the higher end of such spectrum.[994] In the only significant exception to this pattern is the period of the 1920s, especially the second half, when bank borrowing became more relevant, but the relevance of loans receded soon again in the early 1930s, before starting to soar in the immediate prewar and war period, also evidenced by an contrast an equity ratio which since the beginning of the 1920s had started to decline with such fall being accelerated in the 1940s.[995] Within the spectrum of equity finance, corporate bonds established themselves as relevant in the 1920s and after intermediate slump in the first half of the 1930s carried this momentum into the immediate prewar and actual war period.[996]

The period from 1950 until current times, then sees a surge in the relevance of bank borrowing which lasted in the mid-1970s, going in hand in hand with the high growth years of the Japanese economy. The transition into a stable growth period until the mid-1980s is accompanied with a diversification of funding sources with accumulated retained earnings, share issuances – with a switch from par value issuances to public offerings at market value – as well as the issuance of corporate bonds in the domestic

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994 Imuta, *supra* note 957, 133 ff. (tables 7, 8 and 9), 144 f. (tables 18, 19), 148-155. (tables 21 through 28), 158 (table 30). The individual firms in the capital-intensive railway, cotton spinning, brick/cement and sake brewing industries show a tendency to rely to more on external funds, however, still to less than 50 per cent, *ibid*., 132 f. (table 7), 148 f. (tables 21, 22), 154 f. (table 27).

995 Kawamoto, *supra* note 874, 29 ff., table 2 and graph 1. Also, Okazaki/Okuno-Fujiwara, *supra* note 892, 9, especially table 1.5 that vividly shows the drop in stocks as a source of supply for industrial funds in the second of the 1930s and then again in the wartime, a level from stocks could not recover, underlining that the switch to banks in the wartime economy set the course for the postwar economic recovery with respect to corporate finance.

996 Franks/Mayer/Miyajima, *supra* note 7, 2595, table 4.

and overseas markets thanks to deregulation efforts.[997] The burst of the economic bubble then ushers a decade between 1990 and 2000 in which Japanese big companies reduce their spending on corporate funding and can widely rely on retained earnings for this purpose.[998] While fundraising overall declines during this period, firms continue to rely on corporate bonds – usually convertible bonds – and stock offerings (including of preferred stocks) in the first half of the 1990s.[999] Under the influence of an internationalization of corporate finance, big corporations can also be observed to further improve their equity ratio by, inter alia, reducing their bank borrowings, especially long-term loans.[1000] The overall amount of corporate investment only recovers slowly with an upturn in the second half of the 2000s being followed by a downturn in the first half of the 2010s, arguably triggered by the Global Financial Crisis and its aftermath. While there is an overall shift to also tap funds from overseas[1001], the aggregate volume of equity finance, share issuances and corporate bonds alike, remain overall low, the volume in the 2010s – as well as the early 2020s – does not materially exceed the issuance volume of the 1980s with the bond market – with bonds in recent years no longer being issued as convertible, but straight[1002] – continuing to lack robustness and vitality in relation to maturity and size of the overall economy.[1003] Hence, equity finance has not yet been able to reach a level which would facilitate the move away from bank finance, on the contrary, bank borrowing continues to be relevant and large business continue to entertain long-term relationships with their lenders on which they could fall back, for example, in the Global Financial Crisis

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997 Masashi Yamada, *Nihon no daikigyō no shikin chōtatsu kōdō no bunseki* [Analysis of Fundraising Behavior of Large Companies in Japan], 21 Kokusai Keiei – Bunka Kenkyū [Cross-Cultural Business and Cultural Studies] (2016) 74.

998 Katsuhiro Matsumura, KIGYŌ NEDAN KŌJŌ NO TAME NO FAINANSU NYŪMON [Introduction to Finance to Improve Corporate Value] (2007) 181, table 6-1; Yamada, *supra* note 997, 75, table 1.

999 Yamada, *supra* note 997, 77 f., 81, graph 5, table 2.

1000 Yamada, *supra* note 997, 75, 78, 81, tables 1 and 2.

1001 The number of cross-listed Japanese stock companies, for example, on the New York Stock Exchange, is relatively limited and the trading volume not very significant (three per cent) for the sample analyzed by Yoichi Otsubo, *International Cross-Listing and Price Discovery under Trading Concentration in the Domestic Market: Evidence from Japanese Shares*, 25 Journal of Empirical Finance (2014) 40-42, table 2, 49. Vice versa, the number of foreign equities listed on the Tokyo Stock Exchange is limited, see Japan Exchange Group, *Foreign Stocks – Listed Issues* (as per 1 March 2023), available under: https://www.jpx.co.jp/english/equities/products/foreign/issues/index.html (last accessed 6 April 2024).

1002 Matsumura, *supra* note 998, 204, table 6-19; Yamada, *supra* note 997, 81 f., table 2.

1003 See Bruce Aronson, *A Reassessment of Japan's Big Bang Financial Regulatory Reform*, IMES Discussion Paper Series 2011-E-19 (August 2011) 12-16; Japan Securities Dealers Association, *Study Group to Vitalize the Corporate Bond Market, Toward Vitalization of the Corporate Bond Market (22 June 2010)*, available under: https://www.jsda.or.jp/about/kaigi/chousa/shasai_kon/files/100930_finalreport_e.pdf (last accessed 6 April 2024).

when financial markets were widely paralyzed.[1004] While the compression of assets due to the bubble burst has been overcome in the mid-2000s, it is remarkable that the largest share of assets consists of stock investments in the mid-2010s.[1005] Excess funds are found to flow into the investment into other equity, besides the repayment of loans.[1006] The low levels of corporate investments throughout the 2000s and 2010s have given rise to the view that big corporations in Japan emphasize financial stability and survival, in brief robust financial health, over investment into growth opportunities.[1007]

V. Development of Dividend Payout Ratios and Dividend Rates

In line with the structure mapped in the introduction to this chapter, in the following historical levels of dividend payout ratios and dividend yields will be investigated. With respect to the investigation into dividend payout levels and dividend rates, it appears appropriate to sub-divide the period from around 1900 until 2020 into two period with the Second World War as a watershed moment. The reason for this split can be identified in the difference of relevance of dividend payments and consequently dividend payout ratios and dividend rates between *zaibatsu*-affiliated and non-*zaibatsu*-affiliated stock companies, aggravated by the relevance of *zaibatsu* and *zaibatsu*-affiliated companies in the prewar period. This carve-out and separate analysis of the *zaibatsu*-affiliated stock companies is sometimes also reflected in the pertaining literature covering, inter alia, dividend payments.[1008] Since dividend policies appear to significantly differ between both groups, the comparison with the dividend policies post-1950s after the disappearance of the *zaibatsu* would be prone to distortions.

1. Prewar Period

The dividend policies of Japanese publicly-listed stock companies have been investigated for various parts of the prewar period. However, there appears to be no comprehensive study covering the entire period from around 1900 until 1938 or even 1941. In view of that, the thesis will rely on a series of existing data with respect to different arrays of stock companies during the subparts of this period, which should

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1004 Yamada, *supra* note 997, 78 f., graph 6; Hirota, *supra* note 991, 405.
1005 Yamada, *supra* note 997, 79, graph 7.
1006 Yamada, *supra* note 997, 79 f., graph 8.
1007 Hirota, *supra* note 991, 405; Yamada, *supra* note 997, 82.
1008 For example, Aochi, *supra* note 147, 49-75.

nonetheless provide a sufficiently robust foundation for the further course of the analysis.

a) Early stock companies in the Meiji period

Given in general more sparse data with respect to dividend payout ratios and dividend yields, some investigation has been made into the articles of association of an array of stock companies in the earlier years of the Meiji period. Some stock companies set forth benchmarks and targets as to how much of the company profits should be distributed to its shareholders in their incorporation documents. Such provisions in the articles of association potentially provides a strong signal to shareholders with respect to expected stock returns. Nowadays, such communication is more frequently achieved through investor relation materials such as a corporate management plans leaving corporate management more leeway due to a lack of directly legally binding effects or ramifications.[1009]

Inquiries into the articles of association of stock companies can therefore provide an indication of targeted dividend payout ratios of stock companies for the early period of stock companies in Japan. With respect to the first stock companies in Japan of the early Meiji period such as those incorporated under state promotion and guidance such as the First National Bank and the trading companies as well as incorporations by private initiative such as Maruzen or Kansai Railways, an investigation into their articles of incorporation shows that the concept of target dividend rates or limitation on dividend payouts (to protect and/or build cash reserves) developed seemingly hand-in-hand with the limited liability concept taking more firmly root; accordingly, the First National Bank set a standard also with respect to dividend policies.[1010] In the middle of the Meiji period, prominent stock companies such as the Tokyo Stock Exchange, Mitsui Bank, the Yokohama Species Bank, Meiji Life Insurance followed suit, orienting its dividend payout at a defined payout ratio; on the other hand, the dividend policy of the Bank of Japan, being inspired by its role model, the Belgian National Bank, was based on a target dividend ratio.[1011] The orientation of dividend

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[1009] See, for example, Medium-Term Management Plan of Sumitomo Mitsui Banking Corporation, presented as supplementary material to the quarterly financial reports, Sumitomo Mitsui Banking Corporation, *Investor Meeting 1H FY3/2024* (15 November 2023), available under: https://www.smfg.co.jp/english/investor/financial/latest_statement/2024_3/2024_2q_e_pre.pdf (last accessed 4 March 2024) 24-43.

[1010] Toru Shirasaka, *Meiji jidai shoki no kabushiki kaisha no haitō seisaku no hensan ni kansuru ichi kōsatsu* [A Study of Dividend Policies in the Early Meiji Period], Keiei Ronshū [Management Journal] (2010) 4 ff., 13.

[1011] Shirasaka, *supra* note 1010, 15 ff., 20 f.

policies at achieving a specific, stable dividend ratio, resurfaced in the late 1930s and early 1940s, being articulated and becoming manifest with the Company Regulation Order of 1940 and related regulation.[1012]

Towards the middle of the Meiji period when the promulgation of the stock company concept gained traction, stock companies were generally targeting comparatively high dividend payout ratios.[1013] Further limitations on the dividend payout ratios were, however, soon introduced by the Kyū-Shōhō which stipulated that dividends should be paid not only limited to made net profits, but that five per cent of the net profits should be set aside to increase the cash reserve up to 25 per cent of the registered share capital.[1014] The 1911 amendment of the Shōhō as the then binding commercial law regulation perpetuated the aforementioned rule and in addition stipulated that dividends may be distributed as long as the creditors' interest are protected meaning that the registered share capital would not be touched and that there would be no capital deficit; the relevant provision did not specify or provide any guidance on the calculation of the net profits.[1015]

For the following years, concrete numbers with respect to actually implemented dividend policies are available, however, fragmentedly. Takenobu[1016], for example, has investigated the development of dividend policies at the five main spinning companies at the start of the nineteenth century. This extraction of data has yielded the following information on dividend payout ratios (or simply, "ratio" in the table below) and dividend yields (or simply, "rate" in the table below) for the time period between 1897 and 1914.

1012 Shirasaka, *supra* note 1010, 3 f., 20 f.; Miyajima, *supra* note 453, 342 f.

1013 This may be attributed to the fact that literature such as the works by Shibusawa and Fukuchi (supra Fn. 635), inter alia, disseminated the idea of generous shareholder returns envisaging a split of company profits with ten to 20 per cent as retained earnings go into the capital reserve and 80 per cent being returned to shareholders, see Yoshihiko Sano, *Meiji jidai ni okeru kaisha seido to kaikei seido no seisei-shi: Haitō seisaku ni kakawaru seido wo chūshin ni* [The Formation History of the Company and Accounting Systems in the Meiji Period: Focusing on Systems Related to Dividend Policies], 47 Policy Studies Review (2019) 21.

1014 Article 156 Kyū-Shōhō, see hereon, Sano, *supra* note 1013, 23 f.

1015 Articles 194 f., 290 paragraph 1 Shōhō (1911), see hereon, Sano, *supra* note 1013, 23 f. Company creditors would be entitled to claim capital payouts which violated such provision, see Article 290 para. 2 Shōhō (1911). With respect to the registered share capital, it should be noted that until the 1942 amendment, the Commercial Code allowed the payment of the capital contribution in four installments, Sano, *ibid*., 24.

1016 Yuki Takenobu, *Kigyō tōchi ni okeru kabunushi sōkai no yakuwari* [The Role of the General Shareholders' Meeting for Corporate Governance], 46 Keiei Shigaku [Business History Review] (2011) 72, table 6.

Table III.3-1: *Divided ratios and dividend yields in the cotton spinning industry between 1897 and 1914 (based on data compiled by Takenobu)*

	Osaka Spinning		**Mie Spinning**		**Kanebo Spinning**		**Amagasaki Spinning**[1017]		**Settsu Spinning**		**Average**	
	Ratio	***Yield***	***Ratio***	***Yield***	***Ratio***	***Yield***	***Ratio***	***Yield***	***Ratio***	***Yield***	***Ratio***	***Yield***
1897-1900	60.2	7.9	73.5	15.0	62.5	8.0	46.5	13.4	44.8	20.0	57.5	12.8
1901-1904	43.5	5.6	68.7	12.8	43.0	5.9	55.7	20.0	64.3	17.9	55.0	12.4
1905-1908	60.1	18.0	55.2	23.5	48.0	17.3	50.1	40.4	54.9	36.8	53.7	27.2
1909-1912	74.1	11.6	61.1	13.4	75.7	13.4	61.7	29.7	56.5	21.1	65.8	17.8
1913-1914	34.4	9.3	42.7	15.7	61.6	16.0	49.2	26.1	52.3	27.9	48.0	19.0

* *The dividend payout ratio was herein calculated as the fraction of the total dividend amount and profits in the relevant period multiplied by 100; the dividend yield was calculated as the fraction of the dividend amount multiplied by two and the paid-in capital multiplied by 100.*

Imuta provides insights into the dividend policies of stock companies in the insurance industry with annual data for the period between 1889 and 1899.

Table III.3-2: *Dividend yields of insurance companies in the mid-Meiji period (in per cent, based on data compiled by Imuta)*[1018]

	Life insurance		**Fire insurance**		**Marine insurance**	
	Number of firms	Yield	Number of firms	Yield	Number of firms	Yield
1889	3	6.66	1	0.58	1	11.00
1890	4	9.45	1	4.45	1	12.00

[1017] The figures for Amagasaki Spinning have been confirmed by Imuta, *supra* note 957, (97), figure II-62, who likewise refers to the paid-in capital as the numerator in the fraction.

[1018] Imuta, *supra* note 957, (75) ff, figures II-47, II-48 and II-49.

1891	4	9.73	2	5.05	1	15.50
1892	4	10.00	2	4.17	1	16.00
1893	4	10.00	3	6.58	2	12.00
1894	8	9.67	3	8.12	3	7.30
1895	9	9.64	4	9.92	3	9.46
1896	23	6.16	6	9.65	3	11.00
1897	25	10.54	6	9.52	4	6.01
1898	26	7.91	7	7.80	4	9.00
1899	25	n/a	7	8.91	3	11.80

* *For calculation of the average dividend yields only dividend paying stock companies were considered.*

In addition, Imuta provides estimates on the dividend yield of stock companies in the electric light and power industry.

Table III.3-3: *Dividend yields of electric light and power companies in the mid-Meiji period (mean values, based on data compiled by Imuta)*[1019]

Years	Number of firms	Net profit (A)	Distribution (B)	Yield	Ratio (B/A)
1889-1892	3-11	89,500	65,500	5.5%	73.2%
1893-1986	11-29	345,500	231,250	8.0%	66.9%
1897-1901	41-50	885,600	675,200	9.2%	76.2%
1902-1906	59-76	2,025,200	1,604,400	10.3%	79.2%
1907-1912	84-155	9,822,400	7,120,600	9.2%	72.5%

The dividend yield (in both tables, III.3-2 and III.3-3, calculated against the amount of paid-in capital) are on average very high. The reason for the slightly lower yields in late 1880s and early 1890s may be attributed to the recovery from the unfavorable economic conditions in the mid-1880s. On the other hand, the electric lights and power industry enjoyed rather stable profits, so the size of the companies or their life cycle

[1019] Imuta, *supra* note 957, (67) ff, figure II-43.

as a public company with a lot of stock companies being incorporated with the setting in of the economic recovery in the mid-1880s and the in its initial stages capital intensity may well have had an impact.[1020] In the same vein, the dividend payout ratio for the electric light and power industry with the exception of the mid-1890s hovers well above the 70 per cent threshold. While these dividend yield in the cotton spinning, insurance and electric industries appear high and hence exceedingly investor-friendly, especially when compared against standards in later years as well as contemporary figures, they may not occur in all companies, as Imuta reports for Kyoto Electric Lights dividend yields which oscillate between 0.3 and 0.6 per cent between 1889 and 1892 and between 1.2 and 1.8 per cent between 1893 and 1904.[1021]

b) The Taisho and early Showa periods

The Taisho and early Show periods have been widely associated with high dividend payout ratios and dividend rates.[1022]

aa) Toyobo Spinning and Nippon Yusen

Sano[1023] investigates the dividend payout ratio and dividend rates for two companies from different industry branches which developed strongly in the Taisho and early Showa period, to be precise between 1915 and 1940, namely spinning and shipping. For one of the two companies, Toyobo Spinning, the dividend rate starts with slightly above 15 per cent in 1915 and rises sharply 60 per cent in 1918 to stay on this level the next year before it considerably drops to 30 per cent in 1920, to 25 per cent in 1923, to 20 per cent in 1930 before further dropping below this threshold in 1931, but continuing to hover in the high teen numbers until 1940.[1024] Thus, in summary, a sharp rise and equally dramatic decline the in post-World War I period can be observed, before the dividend rates even out and decline over several plateaus to approximately 18 per cent throughout the 1930s and 1940. In contrast, the dividend payout ratio sees a decline from above 80 per cent in 1915 to an absolute low of 50 per cent in 1917 from which it recovers and despite intermediate declines climbs to 85 per cent in 1921; in the following two decades the dividend payout ratio oscillates between slightly below 70 per cent in 1924/1925 and slightly above 90 per cent in 1930; between 1930

1020 Imuta, *supra* note 957, (67) f.

1021 Imuta, *supra* note 957, (73), figure II-46. Companies in the electric light and power industry continued to prove generous dividend payers, see Aochi, *supra* note 147, 55 ff., 62.

1022 Miyamoto, *supra* note 579, 392; Sano, *supra* note 777, 13 f.

1023 Sano, *supra* note 777, 14 ff.

1024 Sano, *supra* note 777, 15, figure 1.

and 1940, the dividend payout ratio even manages to predominantly stay above 80 per cent.[1025] The other analyzed company is the shipping company, Nippon Yusen, with the shipping business being more cyclical than manufacturing or machinery industries and thus more vulnerable to economic cycles resulting in more vehement oscillations with respect to profits and shareholder return policies. The dividend rate of Nippon Yusen soars from approximately ten per cent in 1915 to 50 per cent in 1919 – insofar mirroring the ascending trajectory of Toyobo Spinning –, before it slightly retreats to 40 per cent in the following half-year period and then rise to the overall peak of approximately 71 per cent in 1920 from which it declines to approximately 30 per cent in 1921 before predominantly maintaining a dividend rate of ten to 20 per cent in the following two decades until 1940.[1026] The strong exposure to economic cycles becomes evident upon consideration of the dividend payout ratio: The dividend payout ratio hovers between 29 (in 1916) and 38 (in 1915) per cent between 1915 and 1918 before considerably soaring to approximately 80 per cent in 1919 and 170 per cent in 1921 and 179 per cent in 1924; in between it falls back to below 100 per cent in 1923 before surging to 200 per cent in 1925; it again retraces to levels around 70 and 90 per cent between 1926 and 1929, before it sharply surges to nearly 400 per cent in 1930, then crashing to levels just above 0 between 1931 and 1933, it reaches nearly 90 per cent in 1934 and then continues to oscillate wildly between 20 and 70 per cent for the rest of the period under consideration until 1940.[1027]

The reasons for the high dividend yield throughout this period are attributed to *zaibatsu* and other big businesses opening up to capital markets bringing about a – temporary – shift towards more dispersed shareholder structures and dividends becoming an important matter in the relation between the company and its shareholders.[1028] This policy from the mid-1910 which saw prosperous economic conditions in Japan was carried over into the post-World War I period when economic conditions started to deteriorate, in order to bind shareholders to the companies and thus maintain share prices: Dividend rates largely between five and 20 per cent were thus upheld and profits to a high extent returned to shareholders in the form of dividends.[1029] In addition, the class of shareholders expanded to not only encompass wealthy families

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[1025] Sano, *supra* note 777, 15, figure 1.
[1026] Sano, *supra* note 777, 16, figure 2.
[1027] Sano, *supra* note 777, 16, figure 2.
[1028] Sano, *supra* note 777, 16 f.
[1029] Sano, *supra* note 777, 17.

and individuals, but also small-scale individual investors.[1030] Another factor driving up dividend payout ratios was that majority shareholders tended to rely on bank borrowings for financing their stakes, thus demanding high dividends to be able to pay off interest rates accruing on these loans.[1031] The average net profit distribution ratio thus amounted up to 65 per cent in the mid-1920s.[1032] These heydays of shareholder return policies, however, started to be phased out – and have not returned since then –, when stock companies started to focus on stable shareholder return policies, oriented at the dividend ratio, from the later 1920s and onwards; the dividend yields for both, Toyobo Spinning and Nippon Yusen, clearly reveal this trajectory.[1033]

bb) Changing perceptions of the shareholding

This period is thus regarded as crucial insofar as a deeper running change of mindset took place insofar as return policies started to be viewed from the angle of a fixed rate of the capital, similar to an interest rate, rather than a participation at the profits of a company, accompanied by a shift of focus from dividend payout ratios to dividend yields.[1034] Or, to rephrase the former statement, dividend yields have become a key metric with dividend payout ratios being only relevant insofar as they indicate the – middle- to long-term – viability of dividend yields. In the overall institutional framework, the 1920s are the period which witnesses an increasing relevance of indirect financing through the issuance of corporate bonds starting to overtake direct equity financing through stock issuance.[1035] Other reasons are seen in changes in government policies aimed at curbing dividends as well as accounting practices and pertaining regulation.[1036]

Nonetheless, dividend payout ratios remained high in the first half of the 1920s: For this period, Aochi[1037] reports, inter alia, the dividend payout ratio for an array for non-

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1030 Hayakawa, *supra* note 35, 239.
1031 Hayakawa, *supra* note 35, 239.
1032 See Kamekichi Takahashi, KABUSHIKI KAISHA BŌKOKU RON [Essay on the Destruction of the Country by Stock Companies] (1930) 14. This figure includes the amounts disbursed as dividends as well as directors' remuneration.
1033 Sano, *supra* note 777, 17.
1034 Sano, *supra* note 777, 17.
1035 Sano, *supra* note 777, 18, table 1.
1036 Sano, *supra* note 777, 19 ff.; Aochi, *supra* note 147, 62 ff., which then culminated in the wartime restrictions such as Corporate Profits, Dividends, and Financing Ordinance in April 1939, *ibid*., 66; Hoshi/Kashyap, *supra* note 146, 56.
1037 Aochi, *supra* note 147, 51, table 1.

zaibatsu affiliated companies. While dividend payout ratios were comparatively high throughout the 1920s, a falling tendency can be observed:

Table III.3-4: *Dividend payouts of non-zaibatsu stock companies in the 1920s (based on data compiled by Aochi)*

Year	Dividend payout ratio per industry					
	Manufacturing	**Mining**	**Electricity**	**Transport**	**Average/year (interval)**	
1920	63.7	43.7	81.2	67.2	63.9	⌀68.35
1921	85.3	52.5	73.6	69.9	70.3	
1922	74.8	55.7	80.1	73.1	70.9	
1923	60.7	60.6	82.4	69.6	68.3	
1924	63.9	40.4	81.6	67.3	63.3	⌀66.98
1925	67.1	56.2	76.7	79.3	69.8	
1926	67.6	62.4	76.7	79.5	71.5	
1927	98.3	0	76.9	78.0	63.3	
1928	77.6	28.9	72.8	78.3	64.4	⌀61.77
1929	66.8	21.0	78.0	77.6	60.8	
1930	57.1	30.7	70.8	81.9	60.1	
Average/ industry	71.2	41.1	77.3	74.7	66.1	

The following period is, inter alia, covered by Miyajima[1038] whose analysis provides information on the dividend payout ratios of a group of 250 to 300 manufacturing companies in the 1930s until the early 1940s. The figures confirm the overall falling tendency of dividend payout ratios despite an intermittent stabilization or even resurgence towards the end of the analyzed period.

[1038] Miyajima, *supra* note 453, 344, figure 7-4.

Table III.3-5: *Dividend payouts of non-zaibatsu stock companies between 1932 and 1943 (based on data compiled by Miyajima)*

Year	Manufacturing companies (per industry branch)					
	Chemical	Machinery	Metal	Mining	Aggregate	
1932	72	160	59	74	70	⌀61.75
1933	64	52	30	71	59	
1934	62	55	50	67	60	
1935	66	55	41	65	58	
1936	68	53	49	63	59	⌀56.25
1937	66	50	40	63	54	
1938	68	53	37	59	56	
1939	68	48	44	69	56	
1940	65	45	40	64	49	⌀57.25
1941	82	51	61	72	60	
1942	72	53	54	72	59	
1943	69	52	63	78	61	

On more from a bird's eye perspective, covering the 1920s as well as the following decade, a study conducted by Kawamoto[1039], provides annual information on the average dividend payout ratio based on the data of stock companies extracted from the database of the Accounting Section of the Secretariat for Commerce and Industry (*shōkō daishin kanbō tōkei-ka*). Again[1040], the dividend payout ratio is calculated as the quotient of the amount of dividend paid and the net income of a firm multiplied by the factor 100 (to obtain the percentage). The dividend payout ratio shows an overall rising tendency commencing in 1921, the starting point of this survey, just above 60 per cent and reaching its peak close to 80 per cent in 1931; it is a steady increase with interim heights around 70 per cent in 1923 and 1926 with subsequent pullbacks to 60

[1039] Shinya Kawamoto, *Kennin yakuin to senzen nihon kigyō* [Interlocking Directorates of Prewar Japanese Companies], 177 Keizai Ronsō [The Kyoto Economic Review] (2006) 85 f., figure 1.

[1040] As applied by Takenobu, *supra* note 1016, 72, table 6.

per cent in 1924 and around 65 per cent 1927, respectively.[1041] The period between 1931 and 1939, the end point of this survey, sees an overall considerable decline from the afore-mentioned nearly 80 per cent in 1931 to 50 per cent in 1940.[1042] The initial drop from just about 80 per cent in 1931 to levels below 60 per cent in 1933 is sharp; there is an interim slow recovery to levels above 60 per cent in 1936, before the drop resumes to 50 per cent in 1940.[1043] The overall decreasing tendency over two decades from 60 per cent in 1921 to 50 per cent in 1940 is all the more remarkable given that the total sum of the dividend amount distributed by the sample stock companies more than doubled over the same period (from 1921 until 1940) despite experiencing a relatively stable period throughout the 1920s, a drop in the early 1930s, in 1931 and 1932 with the former at the same time accounting for the highest dividend payout ratio, before taking off and tripling from the low point in less than a decade until 1940.[1044] Here again, the limited informative value of reliance on solely the dividend rates – and the total sum of dividend payments – if compared with dividend payout ratios is revealed as the former are calculated in relation to the share price.

While there is consensus on the propensity of firms to commit to high dividend payout ratio in the 1930s meaning that large portion of profits were returned to shareholders (and directors through their pay being tied to profitability), the reliance on equity finance through capital increases at the same time meant that disgorged dividends were partly recouped from the shareholders who subscribed to newly issued shares.[1045] The eagerness to maintain high dividends to respond to shareholders' demands resulted in the adoption of myopic financial policies and decreasing profit-sensitivity of dividend payments, especially in the absence of active majority shareholders as potential – self-interested – monitors; despite continuous demand of shareholders, profit-sensitivity of dividend payments started to return along with the general economic upturn and concomitant recovery of corporate earnings in the 1930.[1046]

1041 Kawamoto, *supra* note 1039, 86, table 6.
1042 Kawamoto, *supra* note 1039, 86, table 6.
1043 Kawamoto, *supra* note 1039, 86, table 6.
1044 Kawamoto, *supra* note 1039, 86, table 6.
1045 Okazaki, *supra* note 778, 107 ff., table 4.6.
1046 Miyajima, *supra* note 453, 258 ff. The impact of the absence of such active majority shareholders in non-*zaibatsu* companies in the 1930s has been investigated by Aochi, *supra* note 147, 64 ff.

c) *Addendum: Differences between zaibatsu and non-zaibatsu affiliated stock companies*

The remarkable aspect shown by the afore-presented figures, provided by Aochi, Kawamoto and Miyajima, is that despite the difficult economic situation in the 1920s, firms tended to maintain a higher dividend payout ratio than they did in the following decade. Rather than hovering between 70 and 80 per cent, dividend payout ratios oscillated between 50 and 60 per cent in the period after 1932. This change in dividend policy cannot – solely – be attributed to the restrictions on dividend payouts which were only enacted in 1941.[1047] Besides amendments in the accounting and tax architecture and a sentiment change against stock corporations in general and *zaibatsu* specifically, another reason may be found in exactly the *zaibatsu* which does, however, not entirely convince since *zaibatsu* and *zaibatsu*-affiliated listed stock companies – in case they were at all listed – tended to pay lower dividends than their peers may they be family-run or not already in the 1920s as indicated by the following aggregated figures for the years 1921 through 1927.[1048]

Table III.3-6: *Dividend payout ratios of zaibatsu and non-zaibatsu-affiliated companies (based on data compiled by Miyajima)*

	Number of companies	**Dividend payout ratio**	
		Average	**Standard deviation**
Sample size	372	65.1	33.9
Companies affiliated to three big *zaibatsu*	69	55.1	42.3
Non-*zaibatsu*-affiliated companies	303	67.4	31.3
Family-run stock companies	105	69.6	35.3
Non-family run stock companies	198	66.3	29.0

Leading over and turning over the leaf to the next decade, a dataset collated Miyamoto[1049], inter alia, casts light on the allocation of profits including dividend policies of stock companies, thereby also providing separate data on so-called *zaisan*

[1047] Miyajima, *supra* note 453, 254, 342 f.
[1048] Miyajima, *supra* note 453, 183 ff., figure 4-5; Okazaki, *supra* note 778, 108.
[1049] Miyamoto, *supra* note 742, 73, 75, tables 14 and 15.

hozen kaisha, asset management companies or literally translated, "asset preservation companies", a form of company typically opted for by family-held companies as a tax reduction arrangement responding to changes in the taxation regime as well as a strategy to improve the business efficiency through concentration of control and capital in a period of increasing business diversification in the prewar period.[1050]

Table III.3-7: *Dividend yields, payout and retained earnings ratios of yields of stock companies in the early Showa period (based on data compiled by Miyamoto)*

Year	Dividend yield		Dividend payout ratio		Retained earnings ratio	
	Aggregate	Family-held	Aggregate	Family-held	Aggregate	Family-held
1925	6.9	2.1	65.5	62.4	23.7	5.9
1926	6.6	3.7	68.3	83.0	23.4	7.1
1927	6.1	2.4	65.1	66.5	23.3	5.3
1928	6.3	3.2	66.9	74.8	22.0	7.5
1929	6.2	2.7	70.1	78.2	21.8	5.4
1930	5.0	1.1	71.5	86.9	21.6	10.9
1931	4.3	0.9	76.1	80.5	21.6	9.6
1932	4.3	1.4	67.1	84.3	21.9	11.0
1933	4.8	2.9	59.6	74.8	21.7	9.9
1934	5.3	4.1	59.1	50.7	22.1	12.8
1935	5.9	4.3	61.0	70.2	22.8	14.1

[1050] Miyamoto, *supra* note 742, 55 ff., 74. The changes in the taxation were first introduced in 1919, but were not always consistent. This organizational choice was independent from the organizational enterprise type, unlimited and limited partnerships as well as stock corporations were employed for this purpose. Additional data shows that while initial unlimited partnerships were the preferred choice and stock companies the least favorite option by both number of companies as well as market capitalization in the mid-1920s. This distribution was reversed in the next one and a half decade with the stock corporation overtaking both partnership forms by market capitalization and also total number of companies in the late 1930s, an indication that supports the claim that in the course of the 1930s an increasing number of large-scale family-held corporations, inter alia, the *zaibatsu*, switched and transformed their partnership structures into stock companies, *ibid*., 56, table 4. The growing prominence and spread of the stock company in general ushered in the move away from closely-held family corporations, *ibid*., 59.

1936	6.1	2.4	62.0	64.7	23.6	6.9
1937	6.3	3.2	60.9	70.2	22.5	11.4
1938	6.4	3.5	58.7	67.9	22.6	12.4
1939	6.2	3.8	54.7	59.3	22.5	15.1
1940	6.1	2.8	50.7	48.7	23.7	15.5
1941	5.8	3.3	45.7	23.9	25.3	18.4
1942	5.4	3.8	46.1	58.4	23.6	8.4
Average	*5.8*	*2.9*	*61.6*	*67.0*	*22.8*	*10.4*
Standard deviation	*0.7*	*1.0*	*8.1*	*14.9*	*1.0*	*3.7*

The findings presented in this table are surprising, however, there is a need to differentiate between the wider term of family-run companies and *zaibatsu*-affiliated companies with the latter operating on larger scale with high degrees of diversification business-wise and a certain concentration when it comes to strategic decisions including capital allocations. In this context, it should be noted that during the early Showa period the traditional, first-wave *zaibatsu* still maintained an organizational structure that provided for the top companies not being incorporated as stock companies, but as partnerships (see Chapter II, supra subsection IV.2). Having said that, it is thus less detrimental that the following table relying on data collated by Miyamoto[1051] does not differentiate between the organizational form (limited and unlimited partnership as well as stock company):

Table III.3-8: *Dividend yields, dividend payout and retained earnings ratios of dōzoku and non-dōzoku companies (based on data compiled by Miyamoto)*

Year	**Dividend yield (per paid-in capital)**		**Dividend payout ratio**		**Retained earnings ratio (per paid-in capital)**	
	Dōzoku	**Non-dōzoku**	**Dōzoku**	**Non-dōzoku**	**Dōzoku**	**Non-dōzoku**
1931	2.5	4.6	70.2	79.4	21.4	25.5

[1051] Miyamoto, *supra* note 742, 70, figure 12.

1932	2.8	4.9	60.1	74.9	21.6	26.0
1933	3.7	5.2	54.6	66.7	21.5	27.7
1934	4.2	5.8	52.8	62.1	21.5	27.7
1935	4.3	6.5	54.2	64.0	21.8	29.5
1936	4.9	6.9	53.4	62.6	25.1	30.2
1937	5.6	7.2	46.1	60.3	23.0	31.0
1938	5.9	7.2	50.1	58.0	23.8	32.4
1939	6.0	7.1	45.0	57.2	25.8	33.7
1940	5.3	6.9	41.6	52.6	23.1	35.0
1941	4.9	6.3	37.1	55.0	22.6	31.8
Average	*4.6*	*6.2*	*51.4*	*63.0*	*22.8*	*30.0*
Standard deviation	*1.1*	*0.9*	*8.7*	*7.8*	*1.5*	*3.0*

The figures in this table support the above-referred narrative that family-held companies are found to be more conservative when it comes to the distribution of profits to shareholders, as both the dividend yields – it should be noted that in the context of this dataset the dividend yield is calculated as total dividend amount divided by the paid-in capital – a as well as the dividend payout ratios prove irrespective of overall fluctuation through the decade significantly lower for family-held companies, especially when looking at the more indicative dividend payout ratio it is striking that it dividend payout ratio for non-family held companies is usually more than ten percentage points higher than the corresponding value for family-held companies. This observation ties in well with family-held companies being found to avoid capital outflows of their companies.[1052] With respect to the dividend payout ratio, a closer look at different industries in various years, however, shows that the trend shown by the aggregated figures does not automatically translate into every industry branch: For the years 1931 and 1934, family-held companies in agriculture (1931 and 1934), fishery (1934), mining (1931), trade and commerce (1931) as well as banking and

[1052] Miyamoto, *supra* note 742, 69.

insurance (1931) outrank their non-family-held peers.[1053] Given this fragmentary contrary evidence, the overall narrative remains intact. The tendency to keep capital in the company or at least avoid an outflow to outside investors appears as a recurring theme. Considering the motivation of outside equity holders, it can be noted that *zaibatsu* and their affiliated companies proved to be more structurally more resilient and immune to payout demands by shareholders.[1054] Nonetheless, increasing capital demands and the gradual overall conversion of the *zaibatsu* exposed these companies likewise to minority shareholders' demands requiring them to pay dividends.[1055]

Equally striking is the higher retained earnings ratio for non-family-held companies with the difference ballooning out to on average nearly ten per cent since the mid-1930s, suggesting that family-held companies might have on average been more open and affirmative to investment and corporate growth; on the other hand, family-held companies' spending of corporate profits on executive remuneration exceeded the rate of non-family-held companies significantly – on average more than five percentage points – over the said period of time, between 1936 and 1941 to be exact; again – as for the dividend payout ratio – there are industry-specific differences.[1056] The reason for this divergence is located in the afore-mentioned progressive taxation regime on family-held companies' retained earnings introduced in the Taisho period which resulted in family-held companies to reduce their retained earnings – the table accordingly shows a rather constant retained earnings ratio – and increasing executive remuneration and bonuses with directors usually being a member or affiliated to the investor family leading to such directors reinvesting part of their received remuneration and bonuses back into company preventing an effective outflow of capital from the company.[1057]

2. Into the Postwar Period

For information on dividends in the postwar era resort can, inter alia, be taken to Kawai[1058] and Nikami[1059] who cover dividend yields – in case of the former, in

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1053 Miyamoto, *supra* note 742, 71, figure 13.
1054 Miyajima, *supra* note 453, 254.
1055 Kawamoto, *supra* note 874, 27; Miyajima, *supra* note 453, 254 f.
1056 Miyamoto, *supra* note 742, 70 f., figures 12, 13.
1057 Miyamoto, *supra* note 742, 69 f.
1058 Ichiro Kawai, KABUSHIKI KAKAKU KEISEI NO RIRON [A theory on share price formation] (1981) 259 ff., figure 78.
1059 Nikami, *supra* note 785, 49 ff., figure 1.

comparison with bond yields – for an extended period starting in the years immediately preceding World War II (1936) and running until 2018.

a) Early postwar years

For the period between 1936 and 1959, the data presents itself as follows:

Table III.3-9: *Dividend (and bond) yields between 1936 and 1959 (based on data compiled by Kawai)*[1060]

Year	Dividend yields		Bond yields	
1936	5.88	⌀5.93	4.38	⌀4.34
1937	5.70		4.35	
1938	5.97		4.32	
1939	6.69		4.32	
1940	5.40		4.31	
1941	6.87	⌀5.87	4.32	⌀4.30
1942	5.93		4.32	
1943	5.47		4.30	
1944	5.46		4.29	
1945	5.63		4.29	
1946	-	⌀8.15	4.35	⌀7.92
1947	-		5.75	
1948	-		9.86	
1949	6.77		10.42	
1950	9.53		9.21	
1951	11.91	⌀9.32	8.98	⌀8.99
1952	9.85		9.01	
1953	7.44		9.00	

[1060] Kawai, *supra* note 1058, 260, figure 78.

1954	9.44		9.03	
1955	7.96		8.91	
1956	6.68	⌀6.34	7.68	⌀7.78
1957	7.14		7.64	
1958	6.68		7.89	
1959 (first half)	4.85		7.90	

Similarly, Nikami[1061] observes dividend rates hovering above five per cent in the immediate prewar and war period between 1936 and 1944 with two peaks in 1939 and 1941 in which annual dividend yields significantly exceed six per cent; the relative stability of immediate prewar and war period with respect to dividend yields is underlined by the five-year averages in the table above.

When the account resumes in the postwar period in 1949, dividend yields rise sharply up to 11.91 per cent in 1951 – the five-years averages in two postwar terms as per the table above lie above eight and nine per cent, respectively –, before dropping back to above seven per cent in 1955, they recover again to nearly ten per cent in 1954.[1062]

After this period, a sharp downward trend starts to gain traction which sees an interim rise in 1957 with slightly above seven per cent before considerably falling to 3.24 per cent in 1961. Dividend yield recover in the mid-1960s and soar to just below six per cent in 1965 before another, more incremental downtrend sets in which sees dividend yields dropping to just about two (2.09) per cent in 1973 before the bottom is reached in the late bubble years with the low being hit in 1989 with 0.47 per cent. Dividend yields steadily recovers from these levels to above two (2.34) per cent in 2009 from which they continue to oscillate between 1.5 and 2.3 per cent until 2018. The postwar era is thus dominated by an overall downward trend from heights in the immediate

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1061 Nikami, *supra* note 785, 49, figure 1.

1062 The oscillations are even more extreme, when only considering the stock companies of the First Section of the Tokyo Stock Exchange in this decade: The dividend rates peak at 14 per cent in 1951/52, drop back to about six per cent in 1952, before surging to ten per cent in 1954, before the decline to levels just above four per cent in 1960/1961 set, inter alia, conditioned by the sharp increase in share prices between 1955 and 1960, see Kazuko Kobayashi, KABUSHIKI KAISHA NO SEIKI: SHŌKEN ICHIBA NO 120-NEN [The Century of Stock Companies: 120 Years of Stock Exchanges] (1995) 227 ff., figure 6-2.

postwar years until lows below one per cent in the mid-1980s, before slowly recovering to yield levels of the early 1970s.

b) From the mid-1960s to the years of post-bubble depression and doldrums (~2003)

The previous data suggests that the soaring of dividend yields in the first half of the 1960s was not more than a short-lived intermezzo. Additional data confirms this view. Valuable data in various aspects is provided by Sasaki.[1063]

To begin with, in the period between 1966 and 2005 the ratio of dividend paying companies among Japanese listed stock companies predominantly lies above 80 per cent with intermediate drops into the 70 per cent range being limited to two occasions in the years of the oil shock in the late 1970s (1976 through 1978) and in the aftermaths of the bubble burst in the early 2000s (2001 and 2022) and even exceed the 90 per cent threshold in 1970s and the years around the bubble burst (1989 through 1991).[1064] This stable high ratio of dividend paying listed stock companies starkly contrasts with the ratio of the US-American peers which have shown a steady decline from above 70 per cent in the mid-1960s to just above 20 per cent in 1999.[1065] Between 2009 and 2018, the total number as well as the ratio of dividend paying listed stock companies in Japan has continued to rise and accounts for above 84 per cent in 2018.[1066]

1063 Toshinori Sasaki, NIHON KIGYŌ NO PEIAUTO SEISAKU NI KANSURU JISSHŌTEKI KENKYŪ [Empirical Research on the Payout Policies of Japanese Companies] (2011) 22 ff.

1064 Sasaki, *supra* note 1063, 22, figure 3.1.

1065 Sasaki, *supra* note 1063, 23 ff., table 3.1. Various interpretations have been made to explain this phenomenon. The facts of a significantly higher share of unprofitable listed companies and listed stock companies with a shorter lifespan due to a higher fluctuation and entry of new companies through IPOs in the United States appear plausible to explain at least part of the gap, *ibid*., 23 ff. Despite the constantly high ratio of dividend payer among the listed stock companies in Japan, the share of unprofitable listed companies that disburse dividends has significantly increased from below 20 per cent in the late 1980s (10.9 per cent in 1989) to nearly 50 per cent (49.9 per cent in 2001) and has remain on such high level until 2005 (47.1 per cent), *ibid*., 27 f., table 3-2. While this may suggest a reshuffling among the listed stock companies that pay dividends, *ibid*., 28, this may also reflect the overall difficult economic conditions for Japanese business following the bubble burst which, inter alia, implied that also previously steady dividend payers may have experienced years in which such companies did not generate any profits which could be distributed to their shareholders. In order to uphold the policy of stable (but low) dividend yields, such companies may have opted against discontinuing dividend payments, especially given that in this period Japanese companies were notorious for hoarding cash reserves which could have facilitated paying dividends not out of annual profits but a company's substance (i.e., the cash reserves).

1066 Masashi Yamada, *Nihon kigyō ni okeru peiauto seisaku ni tsuite no kōsatsu* [Considerations on the Payout Policies of Japanese Companies], 42 Sangyō Keiei Kenkyū [Industry Management Research] (2020) 15, figure 3.

The dividend payout ratio between 1966 and 2005 for dividend paying listed companies in Japan reveals an overall decline from about 60 per cent at the beginning of the period to just above 30 per cent at the end of the period.[1067] However, the decline is not steady and there are differences between the aggregate figure for all dividend paying listed companies and the one for only profitable listed companies. To put the relationship between these two groups in perspective, the share of profitable listed companies in Japan predominantly oscillated between 80 and 100 per cent between 1966 and 2005 with lows around 80 per cent being hit in 1975/1977 as well as in 1993; between 1997 and 2002 the share of profitable listed companies fell, however, below this range and reached an absolute low point with just about 65 per cent in 2001.[1068] Similarly, the ratio of dividend paying listed companies for the most of the period between 1966 and 2005 stayed about the 80 per cent threshold reaching a peak in the years around the bubble burst (1988 until 1992) and again falling below the 80 per cent threshold in the late 1990s and early 2000s with an absolute bottom with just above 70 per cent again in 2001.[1069] Having said this, the graphs for both groups mimic each other's movements with more vehement oscillations for the group of all dividend paying listed companies: Both groups decline from levels around and a little above (all dividend paying companies) 60 per cent in to a low of 30 per cent in 1979 (the profitable companies) and just above 30 per cent (all dividend paying companies) in 1980; this overall downturn is interrupted by intermediate successive rise and falls with the dividend payout ratio reaching nearly 60 per cent (all dividend paying companies) or at least breaching the 50 per cent threshold (the profitable companies) in 1975.[1070] The graphs for both groups then oscillate between 30 and 40 per cent between 1978 until 1991.[1071] In the 1990s both graphs then largely deviate before aligning again in the 2000s: The figure for all dividend paying companies builds three tops, the first one with approximately 55 per cent in 1993/1994, the second one with above 70 per cent in 1998 before soaring to above 90 per cent in 2001, while in the intermediate lows it falls back into the range between 40 and 50 per cent, before plunging below the 40 per cent threshold and evening out just above 35 per cent in 2004 and 2005.[1072]

1067 Sasaki, *supra* note 1063, 35, table 3-3.
1068 Sasaki, *supra* note 1063, 25, table 3-2.
1069 Combined data from Sasaki, *supra* note 1063, 34, table 3-1 and Hiroyuki Ishikawa, HAITŌ SEISAKU NO JISSHŌ BUNSEKI [Dividend Policy: An Empirical Analysis] (2007) 15, table 1.1.
1070 Sasaki, *supra* note 1063, 35, table 3-3.
1071 Sasaki, *supra* note 1063, 35, table 3-3.
1072 Sasaki, *supra* note 1063, 35, table 3-3.

The oscillations are even stronger when only considering companies listed on the First Section of the Tokyo Stock Exchange (regardless of their profitability, thus also including (temporarily) unprofitable companies) with the peaks at above 70 per cent in 1993 as well as in in 1998/1999 and above 100 per cent in 2001; for their low points the dividend payout ratio hovers in the low 20 per cent levels such as in 1990 and in 2003.[1073] This impression is confirmed when looking at the data for listed companies in Japan in general: The dividend payout ratio oscillates in the range of above 25 per cent to nearly 50 per cent between 1977 and 1991 with the peak during this period being reached in 1977 and low points on levels above 25 per cent being hit in 1980, 1984 and 1988/1989, before it describes two hyperbolic peaks around 70 per cent in 1993, close to 80 per cent in 1999 and 201.5 per cent in 2001 from which it immediately sharply drops back to the lower parts of afore-mentioned range before petering out in the early 2000s, dropping to just above 20 per cent between 2003 and 2005.[1074] Returning to the data provided by Sasaki, the graph for the profitable companies paying dividends climbs to just below 50 per cent in 1993 before steadily receding to hover around the 40 per cent mark until 1999, before it drops into the lower 30 per cent levels in the next decade, a tendency which lasts until 2005.[1075]

These afore-discussed findings are complemented and confirmed by the above-mentioned survey conducted by Kawamoto[1076]: The dividend payout ratio for the sample companies reached nearly 70 per cent in 1914 and rises even to above 70 per cent in 1921, the next point in time under observation. It then starts to fall, however, it continues to remain above 60 per cent in 1928 and still exceeds 55 per cent in 1933, before it slightly recovers and hovers between 55 and 60 per cent for the next two points in time, the years 1937 and 1942. It falls below 50 per cent in 1955 but recovers to the mid-50 per cent range in 1970, before receding to below 50 per cent for the year 1985. It sharply rises to slightly above 60 per cent in 2000, the end point of this sample study.[1077] The data for the dividend rates starts at above 5.5 per cent in 1914 and increases to 8 per cent in 1921, its overall zenith. It subsequently retreats to around 6 per cent in 1928 and further to around 5 per cent in 1933, before it rises again to 6 per

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1073 Yoichi Ueno/Naohiko Baba, *Waga kuni kigyō ni yoru kabunushi kangen-saku no kettei yōin* [Determining Factors of Shareholder Return Policies of Companies in Our Country], Bank of Japan Working Paper No. 5-J-6 (April 2005) 7, figure 2.

1074 Ishikawa, *supra* note 1069, 26 f., table 1.10; for the period between 1999 and 2005 complemented by data from Yamada, *supra* note 1066, 15, figure 4.

1075 Sasaki, *supra* note 1063, 35, table 3-3.

1076 Kawamoto, *supra* note 874, 28 f.

1077 Kawamoto, *supra* note 874, 33, figure 3.

cent in 1937. The year 1942 sees another drop back to slightly above 5 per cent. The dividend yield falls below 5 per cent in 1955, before recovering slightly to above 5 per cent in 1970, before it sharply falls to below 3 per cent in 1985 and further to just above 1.5 per cent in the year 2000.[1078]

This study is a microcosm of the other, afore-discussed analyses as it confirms overall falling dividend payout ratios and dividend rates. The author stipulates a correlation between corporate ownership patterns on the one hand and corporate profit distribution patterns on the other hand, as the presence of non-individual shareholders, financial institutions and other corporations alike, correlates with lower payout ratios and rates, as this group of shareholders attempts to control and stall the outflow of profits out of the investment target.[1079] Given that share prices have been on an upward trajectory through the decades with intermittent resets, the dividend rate shall be complemented by the total dividend amount which will also provide an indication on stable dividend policies as dividend stability is usually associated with a stable and ideally incrementally rising dividend amount.

aa) Stable dividends

The different sets of data with divergences as to the scope of listed companies covered thus reveal largely identical trends. The significant divergence of sets of companies, namely only profitable companies on the one hand, and all dividend paying companies or indiscriminately all listed companies (whether listed in the First Section or not) in the latter half of the 1990s (post 1996) and the early 2000s can arguably attributed to the bubble burst and ensuing economic woes with an increasing number of listed companies turning temporarily unprofitable, but in expectation of the temporary nature of such crisis seeking to hold the dividend yield stable, thus being forced to increase their payout ratio.[1080] This proposition is supported by the findings of Ueno/Baba who record culmination points for the ratio of unprofitable companies among the companies listed on the First Section of the Tokyo Stock Exchange between 1990 and 2003 at nearly 25 per cent in 1993, approximately 28 per cent in 1998 and even 30 per cent in 2001 before such number recede to previous levels around ten per cent in

[1078] Kawamoto, *supra* note 874, 33, figure 3
[1079] Kawamoto, *supra* note 874, 33 f.
[1080] Sasaki, *supra* note 1063, 34.

2003.[1081] Their data further vividly showcases that listed companies had to use their cash reserves to maintain dividend payments in 2001.[1082] Accordingly, the same authors observe a stable dividend yield for this array of listed companies which constantly hovers predominantly around the one per cent mark between 1990 and 2003.[1083]

The distribution of stable dividends as measured by the dividend-per-share ratio established itself as a common shareholder return policy in the 1960s and 1970s. In this vein, the ratio of listed companies paying stable dividends were in the majority for most of this period, oscillating between 50 and 60 per cent in the period from 1978 until 1995 with peaks at close to 60 per cent in 1985 and 61.8 per cent in 1992, before a steady decline set in, bringing the ratio down to approximately 35 per cent in 2004, 2005 and 2006 (35.5 per cent).[1084]

Despite being naturally more exposed to economic performance and thus overall economic conditions, another interesting parameter is the ratio of listed companies increasing and/or reintroducing dividends. Revealing such susceptibility, the graph of the share of such companies described a series of ups and downs for the period between 1977 and 2005 with peaks above 20 per cent in 1979, above 15 per cent in 1984, close to 30 per cent in 1988, above 25 per cent in 1996, just above 20 per cent in 2000 and close to 40 per cent in 2004/2005 and the corresponding lows being recorded at just above ten per cent in 1982 and 1986, just below 15 per cent in 1992, 1998 and 2001.[1085] Despite the frequent oscillations between high and low points, the figures demonstrate an overall rising tendency with the low points becoming increasing higher before the significant surge after the last low in 2001 from just above 15 per cent to approximately 33 per cent in 2003 and just below 40 per cent in 2004.[1086] The developments with respect to the decreasing share of listed companies adhering to stable dividend payouts on the one hand, and the rising share of listed companies increasing their dividend payouts indicates that dividend payouts may have gained more prominence and relevance for listed companies. On the other hand, the fact of a rising share of listed

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[1081] In the beginning of the period analyzed, in 1991, the share of unprofitable companies listed in the First Section of the Tokyo Stock Exchange does not exceed five per cent, see Ueno/Baba, *supra* note 1073, 8, figure 5.
[1082] Ueno/Baba, *supra* note 1073, 6, figure 3.
[1083] Ueno/Baba, *supra* note 1073, 6, figure 3.
[1084] Ishikawa, *supra* note 1069, 18 f., table 1.4.
[1085] Ishikawa, *supra* note 1069, 19, table 1.4.
[1086] Ishikawa, *supra* note 1069, 18 f., table 1.4.

companies raised their dividends does not reveal any information as to whether this also pertains to the payout ratio.

The susceptibility of the dividend payout ratio to changes in the economic conditions due to a performance-related variable in the denominator, namely the net profit, has led academic literature and stock companies in Japan to pay attention to the dividend on equity-ratio (DOE) which is calculated by dividing the total amount of annual dividend payments by the average equity in the relevant year.[1087] Since the equity ratio is much less exposed to fluctuations, dividend payments can be monitored more steadily and stably if oriented at this parameter.

bb) Stock repurchases

Another factor which is considered to have exercised an influence on dividend payout ratios and dividend yields since the mid-1990s was the relaxation of the widespread, however, not comprehensive ban on share repurchases which started with amendments of the Commercial Code in 1994 and 1997, before eventually any remaining restrictions on the purchase of a company's own shares were lifted by virtue of another amendment of the Commercial Code in 2001.[1088] The 2003 amendment of the Commercial Code brought some procedural relief as it sanctioned the flexible acquisition of treasury shares by board of directors' resolution, thus replacing the formerly-required general shareholders' meeting's resolution, as long as the articles of incorporation contained a corresponding provision.[1089] Shares which have been

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[1087] Ishikawa, *supra* note 1069, 28 f. A large-scale company by market capitalization which orients its dividend policy at the DOE ratio is, for example, Daiichi Sankyo, see Daiichi Sankyo Group, *Value Report 2023* (30 September 2023), available under: https://www.daiichisankyo.com/files/investors/library/annual_report/index/pdf/VR2023/VR2023_EN_full.pdf (last accessed 8 March 2024).

[1088] For details of the 2001 Commercial Code Revision with respect to the liberalization of share repurchases, see Hiroshi Oda, *Corporate Law Reform in Japan 2001/2002 – Deregulation of Company Law?* 14 Journal of Japanese Law (2002) 5-30, 8-13.

[1089] Min Teng/Toyohiko Hachiya, *Agency Problems and Stock Repurchases: Evidence from Japan*, 16 Review of Pacific Basin Financial Markets and Policies (2013) 4; Hiroshi Ota, *Peiauto seisaku to shihon ichiba* [Payout Policy and Capital Markets], Shōken Anarisuto Jānaru [Securities Analysts Journal] – Special Edition (2009) 2; Sasaki, *supra* note 1063, 35 f. An interesting aspect of the revision to liberate and allow the purchase of own shares was that one of the motivations was to respond to feared dissolution of cross-shareholdings exposing companies to a higher risk of takeovers. The introduction of the various constellations under which the repurchase of shares was allowed under 1994 revision increased – however, within reasonable limits – the arsenal of instruments at disposal of companies – especially those with shares of restricted transferability – and thus their maneuverability to repurchase shares from the market that are not held by stable, cooperating shareholders, see Mitsuo Banno, *Jiko kabushiki shutoku kisei kanwa to mondai* [Relaxation of the Regulation on Treasury Share Acquisition and Problems], 839 Hanrei Taimusu (1994) 102 ff.; Harald Baum, MARKTZUGANG UND UNTERNEHMENSERWERB IN JAPAN [Market access and the acquisition of companies in Japan] (1995) 155.

repurchased can either be cancelled, meaning that they cannot be used in the future, or held in treasury, meaning that the company can subsequently (re)issue these shares at its very own discretion without the requirement of shareholder approval.[1090]

Dividend substitution or at least partial substitution is generally considered as one of the motivations for a company to commit to share repurchases.[1091] While this viewpoint is not uncontested[1092], share repurchases have established themselves as a pillar of shareholder return policy and may offer more flexible shareholder returns as they may arguably be – at least on a stand-alone basis[1093] – less conspicuous and thus a priority on the agenda of institutional and retail investors than dividends.[1094] They have widely been celebrated as a shareholder-friendly policy showing commitment to the advancement of shareholder value; their economic effect is equivalent to a capital

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1090 Julian Franks/Colin Mayer/Hideaki Miyajima/Ryo Ogawa, *Stock Repurchases and Corporate Control: Evidence from Japan*, RIETI Discussion Paper Series 18-E-074 (October 2018) 4. Accordingly, if not indicated otherwise, this thesis will refer to share repurchases or share buyback without specifying whether shares will be either cancelled or retired, or held in treasury.

1091 Teng/Hachiya, *supra* note 1089, 6; Gustavo Grullon/Roni Michaely, *Dividends, Share Repurchases, and the Substitution Hypothesis*, 57 Journal of Finance (2002) 1649-1684.

1092 Some studies do not find any empirical evidence for a significant relationship between dividends and share repurchases, see, for example, Pornsit Jiraporn, *Share repurchases, shareholder rights, and corporate governance provisions*, 17 North American Journal of Economics and Finance (2006) 43. Nonetheless, share repurchases and dividends share the characteristic that they contribute to reduce free cash flow and return excess cash to shareholder. Dividend yields and the degree of share repurchase activity are hence considered to correlate with robustness of shareholder rights, see Rafael La Porta/Florencio Lopez-de-Silanes/Andrei Shleifer/Robert W. Vishny, *Agency Problems and Dividend Policies around the World*, 55 Journal of Finance (2000) 1-33, 27; Jiraporn, *ibid*., 46; for the relevance of the (manage-owner) agency problem for the existence of cash holdings, see Amy Dittmar/Jan Mahrt-Smith/Henri Servaes, *International Corporate Governance and Corporate Cash Holdings*, 38 Journal of Financial and Quantitative Analysis (2003) 132 f

1093 The survey, Seimei Hoken Kyōkai Chōsa [Life Insurance Association Survey], *Kabushiki kachi kōjō ni muketa torikumi ni tsuite* [Regarding Initiatives to Improve Share Value] (2017) 31, figure 23, suggests that the overall shareholder return ratio is slightly more prominent on the radar of investors than the dividend payout ratio (44.8 per cent versus 42.2 per cent), however, one could argue that the dividend payout ratio was explicitly asked for, while the share buyback ratio was only implicitly investigated as part of the general shareholder return ratio which includes both, dividend payout ratio and share repurchase ratio. Furthermore, additional parameter of this survey, such as dividend yield (6 per cent) and dividend-on-equity ratio (13.8 per cent), pertain to dividend payments, and hence justify, assuming an overall higher prominence and priority of dividends over share repurchases.

1094 See, for example, Sumitomo Mitsui Financial Group, *Plan for Fulfilled Growth – Investors Presentation* (February 2024) 45 ff., available under: https://www.smfg.co.jp/english/investor/financial/small/pdf/20240227_exe_pre01e.pdf (last accessed 7 March 2024); Mitsubishi Corporation, *Midterm Corporate Strategy 2024 – Creating MC Shared Value* (10 May 2022) 3 f., available under: https://www.mitsubishicorp.com/jp/en/about/plan/pdf/mcs2024_220510.pdf (last accessed 7 March 2024).

reduction and a return of the capital contribution.[1095] With respect to stock companies listed in Japan, the substitution theory could not be confirmed to be applicable.[1096] Accordingly, a look at the figures for listed companies in Japan in the period after the stock repurchases were legalized appears does not give any indication that would confirm the substitution proposition at a macro level.[1097] It is rather listed companies employ both forms of shareholder return policy: The share of listed companies in Japan integrating share buybacks in their shareholder return policies rose from 20.5 per cent in 1999 to 50.6 per cent in 2005 with most listed companies employing share buybacks as one pillar of such return policy with, namely 18.2 per cent in 1999 and 45 per cent in 2005.[1098] In correspondence therewith, the percentages for listed companies solely relying on dividends payouts has decreased from 62.2 per cent in 1999 to 39.7 per cent in 2005; while the ratio of listed companies only conducting share repurchases as a form of shareholder returns this figures has roughly doubled from 2.3 per cent in 1999 to 5.6 per cent in 2006, however, the scale still remains small as it is eclipsed by the number of listed companies using both avenues of shareholder returns.[1099] Another noteworthy detail in this respect is that the dividend payout ratio of listed companies committing to dividends and share buybacks exceeds the dividend payout ratio for listed companies only disgorging profits in the form of dividends with the gap varying wildly which may, however, be attributed to the turbulent economic conditions during the timeframe analyzed.

Table III.3-10: *Dividend and total return ratios between 1999 and 2005 (in per cent, based on data compiled by Sasaki)*[1100]

Year	Dividend payout ratio A (profitable, no buybacks)	Dividend payout ratio B (profitable, buybacks)	B – A	Dividend payout ratio (profitable)	Total return ratio (profitable, buybacks)
1999	41.7	43.8	2.1	42.2	56.7
2000	38.1	43.2	5.1	39.4	60.0

[1095] Eva Terberger/Stefanie Wettberg, *Der Aktienrückkauf und die Bankenkrise von 1931* [Share Repurchases and the Banking Crisis of 1931], University of Heidelberg, Department of Economics Discussion Paper No. 418 (2005) 3.
[1096] Yamada, *supra* note 1066, 22.
[1097] Sasaki, *supra* note 1066, 37 f.
[1098] Sasaki, *supra* note 1066, 36, table 3-7.
[1099] Sasaki, *supra* note 1066, 36, table 3-7.
[1100] Sasaki, *supra* note 1066, 36, table 3-7.

2001	39.0	47.8	8.8	42.4	60.6
2002	36.3	47.0	10.7	42.4	61.0
2003	30.9	42.2	11.3	37.1	57.0
2004	31.2	38.4	7.2	35.1	48.9
2005	33.0	37.9	4.9	35.5	47.5

* Figures and table after Sasaki including all listed companies in Japan (including those becoming delisted).[1101]

In absolute numbers, the amount of funds set aside for share repurchases nearly quintupled from JPY 505,004 million in 1999 to JPY 2,465,152 million in 2005; in comparison, the amount spent on dividend payouts approximately doubled from JPY 2,488,083 million in 1999 to JPY 4,843,952 million in 2005.[1102] The increasing affirmatively stance towards shareholder returns is underscored by the fact that the ratio of listed companies not distributing their profits by either paying dividends or undertaking share buybacks has been halved from 17.3 per cent in 1999 to 9.7 per cent in 2005.[1103]

c) More details on the 2000s

aa) Dividend yields

Data provided by the Tokyo Stock Exchange helps to get a more concrete impression of trends in recent years.[1104]

Table III.3-11: *Dividend yield of stock companies listed on the Tokyo Stock Exchange between 2003 and 2021*

Year	**First Section**				**Second Section**			
	Dividend yield		***Dividend yield paying companies***		***Dividend yield***		***Dividend yield paying companies***	
2003	1.27	⌀1.15	1.42	⌀1.23	1.92	⌀1.50	2.19	⌀1.68

1101 Sasaki, *supra* note 1066, 36, table 3-7.
1102 Sasaki, *supra* note 1063, 36, table 3-7.
1103 Sasaki, *supra* note 1066, 36 ff., table 3-7; Ishikawa, *supra* note 1069, 24.
1104 Japan Exchange Group, *Māketto jōhō: Tōkei jōhō – kabushiki kanren* [Market Information: Statistics on Equities], available under: https://www.jpx.co.jp/markets/statistics-equities/monthly/index.html (last accessed 6 March 2024).

2004	1.10		1.20		1.51		1.73	
2005	1.08		1.14		1.33		1.48	
2006	1.05		1.10		1.24		1.37	
2007	1.24		1.30		1.51		1.65	
2008	1.93		1.99		2.31		2.49	
2009	2.24		2.34		2.74		2.93	
2010	1.91	⌀2.06	2.04	⌀2.14	2.32	⌀2.40	2.58	⌀2.61
2011	2.03		2.12		2.29		2.53	
2012	2.18		2.23		2.32		2.54	
2013	1.65		1.70		1.89		2.08	
2014	1.59		1.62		1.77		1.94	
2015	1.48	⌀1.63	1.51	⌀1.66	1.65	⌀1.78	1.83	⌀1.96
2016	1.81		1.84		1.94		2.14	
2017	1.60		1.63		1.66		1.81	
2018	1.61		1.67		1.63		1.82	
2019	1.98	⌀1.84	2.03	⌀1.93	2.05	⌀1.94	2.24	⌀2.15
2020	2.05		2.14		2.21		2.42	
2021	1.73		1.86		1.88		2.12	

In general, the figures indicate steadily, however slowly, increasing dividend rates. The five-year-averages reveal this tendency which might be less evident if focusing on the single years. The intermediate significant rise in the time bracket between 2008 and 2012 and subsequent fall of the dividend rates may be attributed to the aftermaths of the Global Financial Crisis of 2007/2008 which precipitated plummeting share prices. For the period past 2021 a direct comparison has been made complicated due to the Tokyo Stock Exchange reshuffling the market segments in which stock companies are listed. With effect as of 4 April 2022, the old market segments, meaning the former four market sections, First Section, Second Section as well as Mothers and JASDAQ (Standard and Growth) were rearranged into the Prime, Standard and Growth Segments in order to streamline market segments, clear out ambiguities and enhance

coherence of listing criteria as well as encouraging the sustainable increase of corporate value.[1105] While comparability to the previous data with respect to the dividend rates of the stock companies listed in the former First and Second Section of Tokyo Stock Exchange is not directly given, the aggregate data for stock companies listed in the Prime and Standard market segments suggests that the dividend yields continued their rise. Stock companies generally qualify for a listing in the Prime market segment, if they are found to engage in constructive dialogue with foreign investors; similarly, a listing in the Standard market segment requires stock companies to have sufficient levels of liquidity and governance to qualify as investment instruments (of global investors).[1106]

Table III.3-12: *Dividend yield for Tokyo Stock Exchange-listed companies in 2022/2023*

	Prime		**Standard**		**Growth**	
Year	***Dividend yield***	***Div. yield of paying cos.***	***Dividend yield***	***Div. yield of paying cos.***	***Dividend yield***	***Div. yield of paying cos.***
2022	2.20	2.31	2.22	2.45	0.28	1.02
2023	2.21	2.29	2.22	2.40	0.34	1.22

As dividend yield levels are considered a criterion to gauge the orientation of stock companies at shareholder value, the overall significantly higher dividend yields do not come as a surprise. The extremely low aggregate dividend yield for stock companies listed in the Growth market segment is due to the fact that stock companies identified as having high growth potential are assigned to this market segment.[1107] Net profits (if any) are thus more likely to be reinvested in business growth, rather than being disgorged to shareholders.

[1105] Japan Exchange Group, *Market Restructuring* (version updated as of 19 September 2023), available under: https://www.jpx.co.jp/english/equities/improvements/market-structure/01.html (last accessed 6 March 2024).

[1106] Japan Exchange Group, *supra* note 1105. The First Section consisted of 2,176 companies and the Second Section assembled 474 companies in 2022. In 2023 (year-end), 1,657 companies were listed in the Prime market segment, 1,621 companies in the Standard market segment and 565 companies in the Growth market segment, see Japan Exchange Group, *supra* note 781.

[1107] Japan Exchange Group, *supra* note 1105.

bb) Dividend payout ratios

As indicated in this chapter's introduction, the focus on dividend yields is prone to error due to the relevance of share prices for its generation which for example shows in the years after the Global Financial Crisis of 2007 and 2008 which deflated share prices and consequently drove up dividend yields simply due to the decreasing denominator in the event companies decided to maintain their dividend yield potentially resorting to cash reserves due to ensuing economic pressures. In addition, the dividend yield does not reveal any indication on the companies' net profits and thus on how much the company could have theoretically returned to its shareholders, if not resorting to its capital reserves and if prioritizing shareholder returns over investment into growth opportunities or simply cash hoarding. Therefore, data on the dividend payout ratio for the years between 2006 and 2018 shall be considered to complement the picture. The data analyzed by Yamada[1108] on which has already been relied upon above for the years between 1999 until 2005 indicates that the dividend payout ratio rose from about 20 per cent between 2003 and 2005 to just below 40 per cent in 2006 and further to above 40 per cent in 2007; it then rises exponentially to 700 per cent in 2008 which can be attributed to the afore-mentioned Global Financial Crisis.[1109] The dividend payout ratio then descends to above 50 per cent in 2009 before further falling and oscillating mainly between 30 per cent and 50 per cent until 2018; it temporarily drops below the 30 per cent threshold in the years 2013 and 2014.[1110] Post 2015, the oscillation is limited to the range between 30 per cent 40 per cent, mostly trending towards the lower end of this spectrum.[1111]

A look at the net profits In comparison with the amount of paid dividends between shows that the aggregate amount of dividends increased incrementally not keeping pace with the profits, especially in the intervals between 2002 and 2005, post 2009 and again post 2017; the leaps in profits are not mirrored by proportional shareholder returns. [1112] An exception to this pattern is the year 2008 due to the Global Financial Crisis in which as seen above the dividend amount greatly exceeded the amount of net profits; the year 2008 also triggered a kind of reset when it comes to the total sum of dividend payments, since the total sum of dividends paid in 2008 was only exceeded

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[1108] Yamada, *supra* note 1066, 15, figure 4.
[1109] Yamada, *supra* note 1066, 15 f., figure 4.
[1110] Yamada, *supra* note 1066, 15, figure 4.
[1111] Yamada, *supra* note 1066, 15, figure 4.
[1112] Yamada, *supra* note 1066, 15 f., figure 4.

again in 2013.[1113] These observations allow the conclusion that Japanese listed stock companies prefer the payment of stable, ideally incrementally rising dividends; the modest dividend payout ratio provides them maneuverability to maintain the payment of previous dividend amounts.[1114]

cc) Stable dividends

The findings of a survey conducted by the Life Insurance Association appears to confirm that point: The majority – 75.8 per cent in 2017 – of the 586 respondents from among the top 1,200 listed stock companies by market capitalization that did not communicate any numerical targets with respect to dividend payout ratios or other parameters responded to do so due to having a stable dividend policy in place.[1115] The survey further confirmed that the dividend payout ratio remains the dominant parameter regarding which listed stock companies communicate payout targets constantly above 75 per cent of the respondents between 2011 and 2017 orienting their shareholder return policy at this parameter, with the share of stock companies committing to dividend payout ratios above 30 per cent slightly rising from higher 60 per cent and lower 70 per cent range to the higher 70 per cent spectrum.[1116] The survey further demonstrates that besides business performance parameters such as ROE and ROIC, investors equally focus on the dividend payout ratios as well as the total shareholder return ratio, including share buybacks, with 42.2 per cent and 44.8 per cent, respectively, which reveals a disconnect between investors and companies as only 27.7 per cent and 7.7 per cent, respectively, have these items on their corporate agenda.[1117] At the same time, investors and companies are similarly not aligned on the stable dividend policy matter, as 77.8 per cent of the companies prioritize this aspect, but only 25 per cent of the investors who rather have an eye on investment opportunities, namely 56 per cent, and the stage of business growth, namely 50 per cent, say altogether growth aspects.[1118]

[1113] Yamada, *supra* note 1066, 15 f., figure 4.
[1114] Yamada, *supra* note 1066, 15 f., figure 4.
[1115] Seimei Hoken Kyōkai Chōsa [Life Insurance Association Survey], *supra* note 1093, 32, figure 46. In 2017, 54 per cent of the 586 respondents from among the top 1,200 listed stock companies by market capitalization did not communicate any numerical targets on shareholder returns, *ibid*., 31, figure 45.
[1116] Seimei Hoken Kyōkai Chōsa, *supra* note 1093, 31, figure 44.
[1117] Seimei Hoken Kyōkai Chōsa, *supra* note 1093, 31, figure 23; Yamada, *supra* note 1066, 16.
[1118] Seimei Hoken Kyōkai Chōsa, *supra* note 1093, 31, figure 23; Yamada, *supra* note 1066, 16.

So how does the current payout ratio fare against an international benchmark: Yamada tracks the aggregate dividend payout ratio of stock companies constituting the TOPIX against their peers on the S&P500 in the United States for the decade between 2007 and 2016.[1119] At the starting point, in 2007, S&P500's dividend payout ratio exceeded 30 per cent, while the T□PIX's hovered just above 25 per cent; in the years of the Global Financial Crisis the lead shifted over to the TOPIX with dividend payout ratios in the high 30 per cent range versus low- and mid-30 per cent scores for the payout ratio of the S&P500 in 2008 and 2009; in 2009/2010, both dividend payout ratios are nearly matched with the TOPIX outscoring the S&P500 by a very slim margin in the high 20 per cent range in 2010 and the S&P500 exceeding a stagnating TOPIX by reaching the 30 per cent threshold a year later; in the years which follow, the S&P500 maintains the momentum with dividend payout ratios incrementally soaring from the low 30 per cent range to 40 per cent in 2016; on the other hand, the T□PIX's dividend payout ratio falls to 25 per cent in 2013, before incrementally rising into high 20 per cent range, however, missing any significant upward momentum which results in the gap ballooning out to more than ten per cent points between S&P500 (40 per cent) and TOPIX (approximately 28 per cent) in 2016.[1120]

Having said this, additional figures reveal a dynamic in the shareholder return policy: The total sum of dividend paying listed stock companies constantly rose from just above 2,000 companies in 2009 to more than 2,500 companies in 2018 which translates into an increase in the ratio of just above 79.7 per cent in 2009 to more than 86 per cent in 2018 which these latter figures, however, showing some fluctuation with an intermediate high in 2011 (84 per cent) following by a low in 2013 (82 per cent) before resuming the overall rising trend.[1121] From among these dividend paying companies the share of those raising their dividend increased from 23.2 per cent in 2009 to 61.1 per cent in 2017 and 60.6 per cent in 2018; the share of the dividend paying companies cutting their dividend fell from just below 50 per cent to below 20 per cent over the same period of time, while the ratio of dividend paying companies maintaining a stable dividend policy decreased from 28.4 per cent in 2009 to 20.6 per cent in 2017 and 21.6 per cent in 2018 with reaching an intermediate high at 42.5 per cent in 2012.[1122] Yamada further analyzes the dividend paying companies whether or not there is any

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[1119] Yamada, *supra* note 1066, 16 f., figure 5. For the period under consideration, the constituents of the TOPIX were recruited (and weighted) from the First Section.

[1120] Yamada, *supra* note 1066, 16 f., figure 5.

[1121] Yamada, *supra* note 1066, 14 f., figure 3.

[1122] Yamada, *supra* note 1066, 21, figure 9.

correlation between dividend raises and cuts on the one hand and the net profits on the other hand:

Table III.3-13: *Dividend policies of dividend paying companies between 2012 and 2018 (based on data compiled by Yamada)*[1123]

	Dividend policy	**2012**		**2015**		**2018**	
		Absolute	***Percent***	***Absolute***	***Percent***	***Absolute***	***Percent***
Profitable companies	Raise	695	31.9	1,030	42.8	1,227	47.2
	Stable	405	18.6	335	13.9	283	10.9
	Cut	182	8.4	215	8.9	276	10.6
	Total	1,282	58.9	1,580	65.6	1,786	68.6
Unprofitable companies	Raise	240	11.0	330	13.7	350	13.5
	Stable	394	18.1	306	12.7	277	10.7
	Cut	260	12.0	192	8.0	189	7.3
	Total	894	41.1	828	34.4	816	31.4

Besides the overall growing number of the dividend paying companies, the numbers reveal an overall increase in absolute as well as relative figures of profitable companies as well as unprofitable companies raising their dividend. In addition, the share as well as absolute number of the dividend paying companies adhering to stable dividend policies has steadily decreased which has been interpreted as an indication that dividend paying companies shifted their emphasis from stable dividend policies to more investor-focused policies oriented at dividend payout ratios or related target ratios.[1124] As previously discussed, investor-oriented dividend policies imply an ideally steadily rising dividend payout ratio as well as dividend yield, possibly supported by repurchase and redemption of shares. An interesting observation revealed by the table above which does not match any narrative so far is that the total number as well share of the dividend paying companies that have reduced their dividend has also increased. While there appears to be no straightforward explanation, it may be argued that such companies adhere to a dividend policy oriented at the dividend payout

[1123] The data is taken from Yamada, *supra* note 1066, 22, table 1.
[1124] Yamada, *supra* note 1066, 22.

ratio entailing that years of decreasing net profits result in lower dividend payments or that such companies focus more on growth perspectives and use share repurchases as a complement partially to the detriment of the dividend yield.[1125]

dd) Stock repurchases

Leafing over to the page of the corresponding share repurchases over this period, taking a look at the relative numbers the share of listed stock companies implemented share repurchases oscillated in the spectrum between 30 per cent and 40 per cent throughout the period from 2009 to 2018 with the absolute numbers similarly fluctuating between 811 companies in 2011 and 1,096 companies in 2016 and both figures at the beginning and at the end of the period, each being close to 1,000 companies.[1126] In contrast to the dividend payout ratio and dividend amount, a clear tendency can thus not be observed over the said same period. After the reported quintupling from about JPY 500,000 million in 1999 to nearly JPY 2,500,000 million in 2005 (see supra V.2.b) bb)), the total sum expended for share repurchases continued to rise towards JPY 4,000,000 million in 2007, dropping to around JPY 1,000,000 in 2009, before slowing reversing such downward trend and climbing to above JPY 5,000,000 in 2015 and subsequently entered a consolidation phase in which the total amount oscillated around JPY 5,000,000 until 2018.[1127] When turning an eye solely on the share repurchase ratio (carved out from the overall shareholder return ratio) it is striking that the figure generally oscillates in the range of just below ten per cent and 20 per cent from 1999 to 2018 with lows just above ten per cent in 2010 and 2013 and a high with 20.5 per cent in 2015; in 2018 the share repurchase ratio reached 14.6 per cent; the figures for the years 2001 (98.23 per cent) and 2008 (359.9 per cent) are exceptions due to the economic turbulences in the years affecting the financial performance of the listed stock companies, an effect with has already been noticed with respect to the dividend payout ratios in the same years (see supra V.2.b) aa)).

A comparison of the share buybacks of companies listed on the TOPIX with those listed on the S&P500 shows are stark divergence with the former share buyback ratio hovering between just below seven per cent (in 2009) and 18 per cent (in 2015) throughout the period between 2007 and 2016, an exception being the year 2008 with a share buyback ration of 1,026 per cent on the one hand, and the latter share buyback

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[1125] Yamada, *supra* note 1066, 22.
[1126] Yamada, *supra* note 1066, 18, figure 6.
[1127] Yamada, *supra* note 1066, 13, 19, figures 2 and 7.

ratio significantly soaring from just above 30 per cent in 2009 to approximately 75 per cent in 2015 before slightly retreating to higher 60 per cent range in 2016; again the years of the Global Financial Crisis form an exception with 100 per cent (in 2007) and 255 (in 2008).[1128] The divergence of the aggregate shareholder return ratio of the stock companies listed on the TOPIX and on the S&P500 over this period predominantly hovers around the 60 per cent mark with companies listed on the S&P500 achieving stock return ratio of up to and sometimes even in excess of 100 per cent and companies listed on the TOPIX usually scoring an aggregate shareholder return ratio in the range of 40 per cent.[1129]

Overall, stock companies listed on stock exchanges in Japan still apply a much more conservative approach when it comes to the distribution of net profits to shareholders. From two frequently used avenues, dividend payouts have been embraced more assertively in recent years resulting in steadily rising dividend amount on a broader front of companies; while also the total sum spent of share repurchases is on an overall upward trajectory the increase is not as considerable and not as sustainable. The divergence between funds and ratios of dividend payouts and share repurchases is also evidenced by a closer look at the top echelon of companies implementing dividend payment and share repurchases. With respect to dividend payments, the top 30 dividend paying companies distribute 41.4 per cent, 49.7 per cent and 40.1 per cent of the overall total amount of dividend payments in 2012, 2015 and 2018, respectively.[1130] In contrast, 74.9 per cent, 77.1 per cent and 72.3 per cent of the total amount of share repurchases is spent by the top 30 companies implementing share repurchases in 2012, 2015 and 2018, respectively.[1131] These figures indicate a much higher concentration with respect to share repurchases on a relatively few companies. In addition, there is a significant difference with respect to the fluctuation of dividend paying companies and companies implementing share repurchases: For the three points in time, 2012, 2015 and 2018, 19 of the top 30 dividend paying companies are identical for all three years, while with respect to the top 30 companies implementing share repurchases only two companies enter the top 30 on all three occasions.[1132] This divergence in continuity between dividend paying and share repurchasing companies indicates that calculable stable net profits are returned in the form of dividends, while

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[1128] Yamada, *supra* note 1066, 19 f., figure 8
[1129] Yamada, *supra* note 1066, 20.
[1130] Yamada, *supra* note 1066, 24, table 3.
[1131] Yamada, *supra* note 1066, 25, table 4.
[1132] Yamada, *supra* note 1066, 23.

extraordinary net profits which are not expected to recur for a mid- or longer term are returned as temporary excess cash via share repurchases.[1133] This pattern has also been established for stock companies listed on the exchanges in the United States.[1134]

ee) Another array of public companies

The analysis shall be closed out by reviewing an array of 30 listed-stock companies presenting a cross-section from different industries as well as taking into account their market capitalization and their dividend payout ratio and their total dividend amounts distributed over the last five years.[1135]

Table III.3-14: *Dividend payout ratios and amounts of from 2019 until 2024*[1136]

Company	2019/2020		2020/2021		2021/2022		2022/2023		2023/2024	
	Payout ratio	*Amount (JPY)*	*Payout ratio*	*Amount (JPY)*	*Payout ratio*	*Amount (JPY)*	*Payout ratio*	*Amount (JPY)*	*Payout ratio*	*Amount (JPY)*
Toyota	33.8 %	44	30.2 %	44	29.8 %	48	25.3 %	52	33.4 %	60
Subaru	50.3 %	100	56.1 %	56	61.3 %	56	29.1 %	76	-	96
Sony	14.1 %	45	34.8 %	55	33.8 %	65	29.3 %	75	-	85
Softbank	85.6 %	85	82.8 %	86	78.2 %	86	76.4 %	86	96.7 %	86
Fast Retailing	30.1 %	160	54.2 %	160	28.9 %	160	23.2 %	206.7	30 %	290
NTT	41.1 %	3.8	42.3 %	4.2	34.9 %	4.6	34.5 %	4.8	33.8 %	5.0
TEL	52.4 %	196	57.4 %	260.33	61 %	467.67	55.1 %	570.33	-	367
Advantest	30.4 %	20.5	33.3 %	29.5	26.7 %	30	19.4 %	33.75	-	-
Shin-Etsu	23.2 %	18	35.7 %	20	33.3 %	26	36 %	38	39.6 %	44
Screen	27.9 %	30	27.7 %	90	30 %	293	30 %	365	-	405

1133 Yamada, *supra* note 1066, 26. In addition, firm maturity may be a factor with younger firms with more risk exposure and not yet stabilized cash flows being observed to prefer repurchases instead of dividend payments, see Franklin Allen/Roni Michaely, *Payout Policy*, in: George M. Constantinides/Milton Harris/René Stulz (eds.), CORPORATE FINANCE (2003) 420.

1134 Allen/Michaely, *supra* note 1133, 419 f.

1135 The data has been extracted from the investor presentations pertaining to the earnings releases for the third quarter of the financial year 2023/2024 from the website of each company.

1136 The figures are taken from the various investor relation materials provided by the companies in the sample, relying on both, Japanese and English versions depending on the availability.

Mitsubishi	115 %	132	23.6 %	134	21.7 %	150	30.5 %	180	30 %	210
Itochu	38 %	85	36 %	88	27 %	110	33 %	140	-	160
MUFG	75.2 %	25	85.1 %	25	62.6 %	28	65.4 %	32	-	41
SMFG	37 %	190	51 %	190	41 %	210	40 %	240	39 %	270
Orix	32 %	76	50.1 %	78	33 %	85.6	37 %	85.6	33 %	94
Hitachi	76.9 %	95	14.4 %	105	23.4 %	125	13.9 %	145	-	-
Nintendo	50.1 %	81	50.2 %	109	55.1 %	222	50.2 %	203	50.1 %	186
Capcom	30.3 %	45	30.4 %	71	30.2 %	46	36.1 %	63	28.2 %	54
Asahi Kasei	45.4 %	34	59.1 %	34	29.1 %	34	-	36	58.7 %	36
Chugai	45.8 %	46.67	41.2 %	55	40.1 %	76	40.4 %	78	39.5 %	80
Kao	42.4 %	130	53.4 %	140	62.4 %	144	80.8 %	148	158.9	150
Kirin	94.1 %	64	76 %	65	90.6 %	65	51.1 %	69	49.5 %	69
Oriental Land	23.2 %	8.80	-	5.20	113.8%	5.60	16.2 %	8	17 %	11
Bridgestone	-	110	30.4 %	170	40.5 %	175	41.3 %	200	40 %	210
Kyocera	-	40	56.2 %	35	43.8 %	45	56.1 %	50	70.7 %	50
Komatsu	57.7 %	94	48.9 %	55	40.3 %	96	40.3 %	139	40.1 %	144
Kubota	42.7 %	36	49.4 %	36	40.5 %	42	46.3 %	44	36.3 %	48
Japan Steel	35.5 %	45	37.3 %	35	30.1 %	57	35.6 %	58	-	58
NHK Line	21.7 %	13	24.3 %	67	24.3 %	483	26.1 %	520	31.9 %	130
Japan Post	41.8 %	50	48.3 %	50	37.9 %	50	41.4 %	50	72.1 %	50
Average	**55.5%**		**54.3%**		**38.4%**		**35.2%**		**31.5%**	

The significance of the data in the table above may come short under two aspects, the limited number of companies as well as the reduced timeline which in addition is impacted by the economic challenges posed by the COVID-19 years, mostly 2020 and 2021, which is arguably reflected in the average dividend payout ratio with firms returning to the 30 per cent range with which the majority of firms analyzed appears to feel most comfortable. Despite the potential for a short-term impact, the data

compiled in table 3-14 nonetheless reveals a combination of patterns already observed or hinted at in the context of the previously discussed data, interestingly somewhat contrasting dividend policies are adopted by different companies at the same time.

In this vein, a group of companies can be identified which appears to put its emphasis on stable or incrementally rising dividend payments, such as the rather diverse assembly of Toyota, NTT, Mitsubishi Corp., MUFG, Sumitomo Mitsui Banking, Fast Retailing and Asahi Kasei. This observation ties in with the former emphasis on stable dividend payments and its transformation into progressive, meaning incrementally rising dividend payments with the increase rate being dictated by the stable growth aspects and existing cash reserves which allows companies to maintain their dividend despite sub-par financial performance in some years, such as Mitsubishi Corporation in 2019/2020. A similar tactic appears to be currently pursued by Kao Corporation with the annual dividend amount being constantly raised bringing up the dividend payout ratio that in 2023/2024 started to exceed the net profits generated in the pertaining financial year which raises the question for how long the corporate management is willing to spend cash reserves for shareholder returns eating into and straining the financial substance of the company. Another interesting aspect is that peers do not necessarily apply similar dividend policies as can be seen by MUFG Bank and Sumitomo Mitsui Banking with the former maintaining a significantly higher dividend payout ratio (60 or above per cent versus the 40 per cent range). Similarly, Mitsubishi Corporation has on average upped its dividend payout ratio to 30 per cent, while its peer Itochu rather appears to have reduce to 30 per cent with the peers not having nearly converged on the 30 per cent benchmark. However, this group of companies appears to put the emphasis on stable or ideally incrementally rising dividend payments and have implemented considerable raise of their annual dividends in recent years.

On the other hand, companies like Nintendo, Tokyo Electron and Screen Holding appear to have subscribed to maintaining a constant dividend payout ratio which leads to the annual dividend amounts – and in the same fashion, dividend yields – fluctuating wildly due to the cyclicality of these companies' businesses or general economic conditions. In this context it is notable that Nintendo and Tokyo Electron aim for comparatively high dividend payout ratio hovering around 50 per cent, while most companies that appear to orient their dividend policy at the dividend payout ratio appear to set their aim at 40 per cent (Sumitomo Mitsui Financial, Chugai Pharmaceutical, Bridgestone, Komatsu) or even only 30 per cent (Toyota, Mitsubishi

Corporation, Screen Holding) with the latter apparently still constituting the preferred benchmark for most companies.

A combination of both approaches can be seen, for example, at Shin-Etsu Chemical that appears to seek to equally incrementally raise its annual dividend payments and dividend payout ratios, lifting its dividend payout ratio from the 20 per cent in steps to the upper 30 per cent range. Outliers in this context are the unlikely pair of Softbank and Japan Post Holding that both have kept their respective annual dividend amount stable without only very slight (Softbank) or no (Japan Post Holding) variation, apparently paying only minor attention to the dividend payout ratio.

In line with the discussion pertaining to the previous period, share repurchases appear to be implemented more flexibly with temporary profit surpluses being used to fund the redemption of shares. On a more detail scale, approaches show some variations with some stock companies committed to – ordinary – multi-year buyback plans leaving corporate management a certain margin of discretion as to when to exercise within the period set forth in such share repurchase plan, and – extraordinary – more short-term share repurchase plans in times of considerable surpluses at hand.[1137]

3. Interim Conclusion

As already observed with respect to the share ownership patterns, the late 1930s and 1940s mark a watershed moment also with respect to dividend policies. With the organization of the postwar companies as *keiretsu* conglomerates entailing a loose orientation at the prewar *zaibatsu*, dividend policies became more conservative. While the main bank as part of the conglomerates may have contributed to such policies, as key lenders eager to protect their cash flow rights, banks were initially not associated with monitoring dividend payout ratios of their borrowers.[1138] While the prospects of affirmative shareholder return policies appear to have brightened up in recent years, it is noteworthy that the long-standing dividend payout policy of the postwar economy until 1990 has survived in a non-negligible number of companies until today with the majority of companies showing a propensity to stick to payout ratios in the spectrum

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[1137] For example, Sumitomo Mitsui Financial Group, *supra* note 1094, 45 ff.; Mitsubishi Corporation, *supra* note 1094, 3. Mitsubishi Corporation may also serve as an example for the combined approach that additional share repurchases are implemented, see Mitsubishi Corporation, *Results for the First Nine Months of FY 2023 – Presentation Materials* (6 February 2024, updated 15 February 2024) 5 f., available at: https://www.mitsubishicorp.com/jp/en/ir/library/meetings/pdf/240206/20240206e.pdf?240215 (last accessed 13 March 2024).

[1138] Aochi, *supra* note 147, 62.

between 30 and 40 per cent with which they feel comfortable – outside of short-term macro-economic turbulences – to churn out a stable dividend amount, however, eventually rather detached from dividend policies enjoyed by shareholders in the early twentieth century.

VI. Concluding Remarks to this Chapter

In general, the figures mirror the change in the dominant type of shareholders, namely away from the role as actual owner or quasi-partner towards the role of an investor or bystander.[1139] Overstated, one could say that these investors are merely rent-seekers interested in stable, ideally rising returns which then begs the question how such investor is different from a lender or depositor receiving a fixed interest on its lend or deposited amount of money only facing a default risk of the borrower rather than share price depreciation plus default risk.[1140] While the past decade has not brought about any significant reshuffling between the different groups of shareholders of stock companies listed in Japan, there is an array of additional, macro-economic factors may contribute that the trajectory in favour of institutional and retail investors as pure income investors which has currently started to surface and form is further deepened and sustained:

(i) The relevance of institutional investors as key player in the shareholder class not only in the stock markets of the United States but worldwide is widely acknowledged.[1141] With regard to Japan, investment from abroad gained a stronger foothold after the bubble burst in the course of the 1990s and the ensuing initial retreat of cross-shareholding levels, so that the growing presence of foreign pension and investment funds could be registered as early as in the mid-1990s with the share of ownership of shares in Japanese-listed companies rising from four per cent in 1990 to approximately ten percent in

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1139 Siems, *supra* note 67, 60 ff.; On the different aspect of the shareholder role, see Hill, *supra* note 77, 42 ff.

1140 Since conceptually shareholders only have a claim on the distribution of surpluses (see Article 453 Companies Act) and thus only to a residual amount, while borrowers are entitled to interest payment irrespective of whether or not the company as the lender generated surpluses over the relevant period, see Baums, *supra* note 934, 958.

1141 See for the general trend, Ajav Khorana/Henri Servaes/Peter Tufano, *Explaining the size of the mutual fund industry around the world*, 78 Journal of Financial Economics (2005) 146 ff.; Tkac, *supra* note 135, 13 ff.; Khorana/Servaes, *supra* note 135, 65 ff., as well as for Japan, Miyajima/ Ogawa/Saito, *supra* note 805, 17; Iwai, *supra* note 135, 37 ff.

1997.[1142] Their arrival and growing relevance is attributed to the boom – experienced, however, on a much larger scale – in the US-American stock markets.[1143] The arrival of foreign institutional investors was expected to increase relevance and add emphasis to arm's length control, for example, through changes in the corporate accounting rules, to the corporate governance regime.[1144] At the same time, legislative reform pertaining to the Commercial Code, such as the permission of share buybacks through amendments in the years 1995 and 1998, have created basis and opportunity for more institutional shareholder-friendly policies.[1145]

On the other hand, the investment behaviour of private actors has remained predominantly flat when compared to the period prior to the bubble burst. Accounts of impressive savings leave room to speculate that these funds may be partially unlocked and flow into the capital market. In the late 2000s, it was expected that the reduction of pension benefits in combination with the postponement of the eligibility for receiving pension benefits, would urge households to look out for alternatives and seek a diversification of their assets.[1146] The perceived "conservative investment attitude"[1147] is addressed by recent policy initiatives, most prominently, the so-called NISA program (short for Nippon Individual Savings Accounts). However, it remains to be seen whether the stocks of Japanese listed companies will be bought into these accounts.[1148]

[1142] Hayakawa, *supra* note 35, 242 f.; Christina Ahmadjian/Patricia Robinson, *Safety in Numbers: Downsizing and the Deinstitutionalization of Permanent Employment in Japan*, 46 Administrative Science Quarterly (2001) 630; Nottage, *supra* note 32, 75.

[1143] Nottage, *supra* note 32, 75.

[1144] Nottage, *supra* note 32, 75 f.; on the growing emphasis of arm's length control in Japan, see Mitsuhiro Fukao, *Japanese Financial Instability and Weaknesses in Corporate Governance Structure*, 11 Seoul Journal of Economics (1998) 381-422, 412 ff. On the general relevance of accounting rules for corporate governance structures, see Bernhard Grossfeld, *Global Accounting: Where Internet meets Geography*, 48 American Journal of Comparative Law (2000) 261-306, 266 ff.; with such pressures being mediated by worldwide reforms of securities laws, see Coffee, *supra* note 75, 667 ff., 672 f.

[1145] Nottage, *supra* note 32, 75.

[1146] Shirai, *supra* note 982, 133.

[1147] Financial Services Agency, *Schedule for Financial System Reform* (April 2000), available under: https://www.fsa.go.jp/p_mof/english/big-bang/ebb33.pdf (last accessed 6 April 2024); Shirai, *supra* note 982, 150.

[1148] Figures suggest that domestic investors at least for the moment show a preference for foreign stocks, see Asia Nikkei, *Japan's revamped NISA program seen benefiting U.S., Indian stocks* (19 February 2024), available under: https://asia.nikkei.com/Spotlight/Market-Spotlight/Japan-s-revamped-NISA-program-seen-benefiting-U.S.-Indian-stocks (last accessed 6 April 2024). Recent

(ii) Shift of pension funding to capital market financing: The relevance of mutual funds as an instrument for individual investors to save and diversify their savings primarily for retirement[1149] has considerably risen in recent decades, internationally[1150] as well as in Japan.[1151] The relevance of mutual funds is likely to persist for the coming decades. The mutual funds movement is therefore sustained and tied to the individual investors' commitment to the capital markets as a diversification and saving method and reflects underlying behavioral as well as institutional changes.[1152] The investment and risk allocation behavior and appetite of Japanese households has undergone significant changes in recent years.[1153] Nonetheless, the levels are still below those in the United States which may, however, be due to different nuances in the respective legal frameworks. For example, the scope of the defined contribution plans in Japan is limited in various aspects in comparison with their equivalents in the United States as certain groups as well as employees being precluded from making contributions and the existence of difference with respect to contribution amounts and methods.[1154] This institutional development is complemented by recent lawmakers' initiatives to encourage

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data from the Bank of Japan indicates a slightly higher relevance of equities among the assets of households in Japan compared to the beginning of the century, however, still being starkly outshone by the relevance of currency and deposits, see Bank of Japan, *Flow of Funds* (Fourth Quarter 2023, preliminary report), available under: https://www.boj.or.jp/en/statistics/sj/sjexp.pdf (last accessed 6 April 2024).

1149 The generation of additional income streams through dividends has widely been noted as one of the key motivations of retail investors, Iwao, *supra* note 1151, 47; Asia Nikkei, *Japan Post Bank's new stock offering valued at over $9bn* (14 March 2023), available under: https://asia.nikkei.com/Business/Finance/Japan-Post-Bank-s-new-stock-offering-valued-at-over-9bn (last accessed 22 March 2023).

1150 PWC, *Asset and Wealth Management Revolution 2023: The New Context* (7 July 2023), available under: https://www.pwc.com/gx/en/industries/financial-services/asset-management/publications/asset-and-wealth-management-revolution-2023.html (last accessed 14 June 2024).

1151 Iwai, *supra* note 135, 37 ff.

1152 Iwai, *supra* note 135, 37 ff.

1153 Miyamoto, *supra* note 136, 2 ff., 13; Sachiko Miyamoto, *Kakei kinyū shisan wo meguru nihon no keiken to kadai* [Japan's Experience and Issues Surrounding Households' Financial Assets], Nomura Shisan Shijō Kenkyū-sho [Nomura Asset Market Research Institute] (11 November 2017), available under: https://www.nomurafoundation.or.jp/wordpress/wp-content/uploads/2017/11/Sachiko-Miyamoto-PPT.pdf (last accessed 19 June 2024); Shinobu Nakagawa/Tomoko Katagiri, *Nihon no kakei no kinyūshisan sentaku kōdō* [Japanese Households' Portfolio Selection Behavior], Bank of Japan Monthly Bulletin (November 1999).

1154 Iwai, *supra* note 135, 53 f.

an investment appetite through the envisaged introduction of preferential tax treatment.[1155]

(iii) On a miscellaneous, short-term level foreign exchange rates may influence the investment behaviour of especially institutional investors and in their convoy, though to an arguably lesser degree, retail investors. In addition, fluctuations between the foreign exchange rates of the JPY and currencies of in which major investors operate may exert influence on the influx and outflux of investments and may thus be influential at least on short-term trends, but may perpetuate if such trends stabilize.[1156] The overall depreciation of the JPY against the US dollar for example may contribute that shares in Japanese listed companies are regarded as comparatively cheap. As a general caveat to this aspect, exchange rates may not be limited to foreign investors, but may very well extend to domestic investors who may be likewise caused to reallocate funds between Japan and foreign markets.

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[1155] For example, through the broad popularization of so-called NISA (short for Nippon Individual Savings Accounts) for which under certain conditions tax exemptions on capital gains and dividends are granted, see for a very high level overview, Japan Securities Dealers Association, *NISA: Japan's Tax Exemption Scheme for Investment by Individuals* (27 February 2024), available under: https://www.jsda.or.jp/en/activities/research-studies/html/2024nisa.html (last accessed 7 June 2024).

[1156] See Asia Nikkei, *Japanese stocks catch fire with global investors, but not at home* (last accessed 26 May 2023), available under: https://asia.nikkei.com/Business/Markets/Japanese-stocks-catch-fire-with-global-investors-but-not-at-home (last accessed 4 April 2024).

CHAPTER IV

THE LIFESPAN OF FIVE KEY ELEMENTS OF STOCK COMPANY LAW IN JAPAN

I. Introduction

In this section, a sample of five key legal instruments of contemporary corporate law in Japan shall be analyzed over their respective lifespan. The term "lifespan" in the context of this thesis refers to the chronological tracing of the development of the legal provisions and case law (if any) defining a legal instrument from the time of its inception until its contemporary shape, thereby covering integral changes and turning points in its development, while at the same time omitting the discussion of changes which – from the current ex-post perspective – appear to have been a solely formal or marginal relevance. The approach is inspired by comparative legal studies focusing on the development of the same – in the meaning of identical regulatory content or purpose – single legal rules from the rule's reception over the course of its growth until its ultimate repeal in different jurisdictions.[1157]

II. Justification of the Selection of the Five Key Elements

Since the emphasis lies on contemporary corporate law in Japan, legal instruments such as the part-paid stock system which was a characteristic feature of the stock corporation for nearly half a century since its integration in the Kyū-Shōhō and had an impact on equity finance strategies hence remains outside the scope of potential candidates for this analysis. In addition, the thesis aspires to focus on core, constituting elements of stock company law. In this vein, auxiliary norms and norm complexes such as accounting rules shall remain outside the scope of this investigation. Furthermore, the thesis aims to select the five key elements as to arrive at a representative cross-section that covers the entire time period from the nascent Kyū-Shōhō to the current Companies Act and to touch upon turning points in the development of the codified commercial and company law as a whole. Applying this guidelines, the following five key elements have been identified and will be investigated:

[1157] McGinty, *supra* note 134, 159-175.

(i) *Kansayaku* or statutory auditors as an innovation of the Japanese legislator in the Meiji period which was included in the Kyū-Shōhō and survived save for temporary discontinuation after the 1950 Commercial Code Amendment. The *kansayaku* or statutory auditors can be viewed as an idiosyncratic solution and compromise between the opting for a full-fledged two-tier board structure and a mere company or accounting auditor due to its competences to monitor business execution by the directors and review pertaining acts for their lawfulness.

(ii) The duties of care and loyalty which in form of the former can already be found in the Kyū-Shōhō (and the Civil Code to which the pertaining provision refers) demonstrate the formal combination of civil law and common law elements. While the substance of the duty of loyalty has been developed in other civil law jurisdictions such as Germany based on scholarship and case law, the Japanese legislator introduced an express duty of loyalty provision in the course of the 1950 Commercial Code Amendment.

(iii) The competences assigned to the general shareholders' meeting by statutory law (and case law, as the case may be) provide an indication of the historical development of the overall relevance of shareholders and shareholders' rights and through this may hint at changes of the stock company concept and in the composition of its relevant stakeholders.

(iv) While takeovers occurred also prior to any regulation, takeover regulation and the case law on the defensive measures starting to slowly unfold in the 1970s has a comparatively brief, however, eventful history which additionally reveals challenges and underlying conflicts in the reorientation of the stock company since the 1990s.

(v) The adoption of a stewardship code ties into recent trends of legislative and political efforts to boost the attractiveness of Japanese capital markets through appealing and nudging its domestic actors to contribute to a less insider-reliant and more outside shareholder-oriented corporate governance. Through its embeddedness in the corporate governance context, it is connected to the takeover regulation as the market for corporate control is viewed as a monitoring mechanism of corporate performance. Furthermore, similar to the duty of loyalty, the concept of stewardship echoes the broader legal concept of fiduciary duties. The adoption of the stewardship concept in the understanding

of Japanese regulators also hints at the relevance of monitoring and engagement of shareholders with corporate management outside the general shareholders' meeting and the catalogue of statutory shareholder rights. Finally, to the extent that the stewardship code seeks to encourage institutional investors to monitor corporate performance and ensure the existence of effective corporate governance mechanism at the investee companies it can also be viewed to complement the role of *kansayaku* or statutory auditors.

III. The Five Key Elements

As mapped out before, the investigation will proceed chronologically, beginning with the "oldest" legal instrument of the selection.

1. Kansayaku

The institution of *kansayaku*, both as individual *kansayaku* or *kansayaku* board (*kansayaku-kai*) as a collective was already provided for in the Kyū-Shōhō and retained in the Shōhō and has save for an interruption of two decades survived in the Companies Act. While the terms "statutory auditor" and statutory auditor board respectively, have become established in the Anglophone literature[1158], the thesis will stick with the transcription of the Japanese term based on the considerations that (i) there is no auditor-specific qualification required to fill in such position which the use of term auditor would, however, suggest, (ii) the institution is idiosyncratic and unique from a comparative law angle[1159], and (iii) other types of auditors – such as accounting auditors or company auditors – appear in the language of the statutory law provisions.

a) Kyū-Shōhō and Shōhō

The *kansayaku-kai* was introduced as one of the three organs of the stock company with the enactment of the Kyū-Shōhō and with the adoption further reflected in the eventual Commercial Code (Articles 191 ff. Kyū-Shōhō, 180-189 Shōhō). Directors and *kansayaku* were equally appointed by the general shareholders' meeting

[1158] Statutory auditor is widely seen as the most appropriate translation, see Hiroyuki Kansaku/Kazuhiro Takei, *Background and Goals: New Recommended English translation of "Kansayaku" and "Kansayaku-kai"*, Japan Audit & Supervisory Board Members' Association (7 December 2012), available under: https://www.kansa.or.jp/wp-content/uploads/support/el009_121024.pdf (last accessed 13 May 2024).

[1159] Takada/Yamamoto, *supra* note 749, 61.

(Article 191 Kyū-Shōhō, Article 189 in conjunction with 164 Shōhō). Before recapitulating the competences of *kansayaku*, it is interesting to note that the statutory provisions required *kansayaku* to be recruited from among the shareholders (Article 191 Kyū-Shōhō, Article 189 in conjunction with 164 Shōhō), thus laying the groundwork for monitoring through the shareholders, but despite embarking on its own trajectory arguably also revealing the conceptual heritage from German law where the supervisory board is the representative organ of the shareholders.[1160] The competences of the *kansayaku* extended to three aspects:

(i) Supervising the management of company in terms of compliance with laws and regulations as well as exposing irregularities in the management conduct;

(ii) Examining accounts and financial information;[1161]

(iii) Convening a shareholders' meeting and submitting proposals to the shareholders' meeting (Article 192 Kyū-Shōhō, Articles 182 f. Shōhō).

To fulfill their tasks, the *kansayaku* were equipped with an information right (Article 193 Kyū-Shōhō, Article 181 f. Shōhō). Information and examination rights were afforded to each *kansayaku*, while the *kansayaku-kai* acted as collective organ as per the design of the draft.[1162] Vis-à-vis the directors, the *kansayaku* were, however, required to act collectively and unanimously; in the event that the *kansayaku* differed in their opinions, the Kyū-Shōhō provided that such opinions were to be submitted to the general shareholders' meeting (Article 194).[1163] An addition under the Shōhō was that if a director intended to enter a conflict-of-interest transaction that would

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[1160] Takada/Yamamoto, *supra* note 749, 56 f. This requirement to qualify for the appointment as *kansayaku* – and director – was dropped in the course of the 1911 Commercial Code Amendment, see Kitazawa, *supra* note 80, 72.

[1161] The term *kansayaku* is considered a portmanteau of the two words (i) supervision (*kantoku*) and (ii) examination (*kensa*) with corresponding respective meanings of instructing prior to a decision and ex-post review of a decision, these two components constituting the term audit in the understanding of the Commercial Code upon enactment, thus representing an audit concept incongruent with the one in Western jurisdictions, see Hirotaka Tsukabe, *Sanyō kansa ni kansuru ichi kōsatsu: Kansayaku kōnin kaikeishi naibu kansa bumon no renkei no shiten kara* [A Study of the Japanese Auditing System: Focus on the Tripartite Cooperation of Audit & Supervisory Board Member], 20 Niigata Keiei Daigaku Kiyō [Journal of Niigata University of Management] (2014) 103-110, 104.

[1162] Hermann Roesler, ENTWURF EINES HANDELS-GESETZBUCHES FÜR JAPAN MIT COMMENTAR, Volume 1 [Draft Commercial Code for Japan with Commentaries] (reprint of the 1884 edition, 1996) 328 (Art. 234); Takada/Yamamoto, *supra* note 749, 60 f. As an aside, Roesler envisaged the *kansayaku-kai* to be optional against the background that he did not expect companies, especially smaller ones, to find persons fit for such role (which in addition had to be recruited from among the shareholders), Roesler, *ibid*., 326 (Art. 230).

[1163] See for the reasoning, Roesler, *supra* note 1162, 328 (Art. 233).

constitute self-dealing, such directors was required to obtain consent from the *kansayaku-kai* (Article 176). *Kansayaku* were appointed for a term of two years and eligible for re-appointment (Article 191 Kyū-Shōhō).

While formally – and arguably historically due to the contribution and relevance of the draft of the German scholar Hermann Roesler based on or rather created in analysis and assessment of the Allgemeines Deutsches Handelsgesetzbuch (ADHGB, General German Commercial Code) of 1861 to the draft of the Kyū-Shōhō[1164] – the institution of the *kansayaku-kai* due to its juxtaposition to the board of directors may, however misleadingly[1165], evoked the impression as to faintly resemble the supervisory organ in a two-tier board structure such as the supervisory board of stock companies in Germany, the substantial functional differences may be less evident: Firstly, the *kansayaku-kai* was designed as a special auditing body to audit the lawfulness of directors' acts to protect shareholders' and creditors' interests, thus becomes not involved in terms of advice on business strategy – arguably facilitating proactive monitoring[1166] – and may it only be defined competences pertaining to business operations unlike its counterpart under German stock corporation law.[1167] The appropriateness of a decision lay in the margin of discretion of the directors subject to their duty of care (and duty of loyalty). Furthermore, in line with the introduction of the board of directors influenced by US-American legal thought in 1950, the board of directors is conceptualized to supervise the acts of the executive directors for which purpose a certain ratio of independent directors is widely found desirable to vouch for

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1164 Takada/Yamamoto, *supra* note 749, 45-73; Eiji Takahashi, *Entwicklung und Hintergründe der Regelungen zur Corporate Governance in Japan mit einem Schwerpunkt auf die Reform von 2014* [Development and Background of the Regulation of Corporate Governance in Japan with a Focus on the Reform of 2014], in: Takahashi, *supra* note 96, 122 f.; Shuhei Maruyama, *Historischer Überblick über das Aktienrecht Japans* [Historical Overview of Japan's Corporate Law], 94 Zeitschrift für Vergleichende Rechtswissenschaft [Journal of Comparative Law] (1995) 283-291, 291.

1165 Takada/Yamamoto, *supra* note 749, 57; Takahashi, *supra* note 1164, 123 f. In his commentary on the draft, Roesler also refers to regulations on auditors under English and French law, see Roesler, *supra* note 1162, 326 (Art. 230). In addition, while the obligatory supervisory board was introduced into the General German Commercial Code in 1870, the monitoring and controlling function was yet to be clearly carved out in statutory law and lived in practice. In the early years after its inception, the supervisory board under German law was in practice both a business execution and monitoring organ. With the 1884 revision of the General German Commercial Code initiated a stricter separation between monitoring and business execution which was, however, only effectively implemented by the Stock Corporation Law reform of 1937. The 1884 revision, however, introduced the prohibition of current membership on the supervisory board and the board of directors, see Lutter, *supra* note 221, 392-409.

1166 Baum, *supra* note 41, 203.

1167 Takada/Yamamoto, *supra* note 749, 58.

independence of the monitoring process. Since, in postwar Japan the board of directors largely consisted of executive directors which additionally were recruited from the company's employees, the fulfillment of the monitoring function is questionable, since execution and monitoring are confounded.[1168] The institution of the representative director (*daihyō torishimari-yaku*) that was introduced in the course of the 1950 Commercial Code Amendment and who is elected from among the members of the board of directors and to whom the execution of daily business operations is delegated, further adds the confusion from not only an external perspective, due to the director requirement tied to this position heaving such person onto the board, but at the making such person subject to important and strategic decision-making as well as monitoring through the board of directors.[1169] In addition, the supervisory board in a two-tier jurisdiction such as Germany is usually stacked with representatives of large shareholders and also stakeholders (employees) under certain conditions; especially the first scenario cannot be extended to the situation in Japan.[1170] Functionally, the *kansayaku* thus resembles the common law board of directors with whom it shares the business auditing function, as it is – in its original and current version – not limited to accounting audits, but performs business and accounting audits.[1171] Furthermore, from their inception the *kansayaku* lacked the authority to dismiss directors and thus have been ultimately deprived of the means to effectively supervise directors.[1172]

With the Commercial Code Amendment of 1938, the demarcation between directors and *kansayaku* was made more salient with the explicit prohibition to serve concurrently both director and *kansayaku* (Article 276(1) sentence 1 Commercial Code of 1938), while at the same time *kansayaku* were designated to temporarily fill in for a director in the event of vacancy of the position with any *kansayaku*-related

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1168 Takada/Yamamoto, *supra* note 749, 62, 67.

1169 Especially as under the Commercial Code prior to 1950, directors were entitled to act individually and only had to ensure that there was a majority among the directors with respect to business execution, see Koichiro Kurasawa, KAISHA HANREI NO KISO [Basics of Company Case Law] (1988) 137 f.; Takada/Yamamoto, *supra* note 749, 65 ff.

1170 Incidentally, it was contemplated in the legislation process leading to the 2014 Companies Act Amendment to have *kansayaku* be elected by employees, see Goto, *supra* note 929, 30 f.

1171 Takada/Yamamoto, *supra* note 749, 56 f. After considering systems in the United States and Germany, the lawmakers aimed to install an accounting auditor modelled after the system in the United Kingdom, see Seventh Legal Committee of the Lower House, Session No. 2 on 11 April 1950, Statement of Joichi Okazaki (Director-General of the First Legal Opinion Division) 5, available under: https://kokkai.ndl.go.jp/simple/detailPDF?minId=100705242X00219500411&page=1 (last accessed 12 May 2024).

1172 Haruhito Takada, *Roesureru sōan ni okeru kabushiki kaisha no kikan kōsō* [The Organizational Structure of the Stock Company in the Roesler Draft], in: Tamesaburo Yamamoto (ed.), KIGYŌ-HŌ NO HŌRI [Legal Principles of Company Law] (2012) 212.

activity, however, stayed until approval by the general shareholders' meeting (Article 276(1) sentence 2, (3) Commercial Code of 1938); in addition, the duties of the *kansayaku* were carved out more clearly, with the overall organizational structure, however, being formally maintained.[1173]

b) Temporary abolishment and reinauguration in the postwar era

As authority of the board of directors was strengthened, the authority of the *kansayaku* waned under the 1950 Commercial Code Amendment. In fact, while the title of *kansayaku* remained in the letter of the Commercial Code after the 1950 amendment, it was a *kansayaku* of a different pedigree, the kansayaku with the meaning and competence of a business audit organ was removed from the ranks of the organs of a stock company.[1174] The term "*kansayaku*" referred to the accounting auditors (*kaikei kansayaku*) being entrusted with financial audits (Article 274(1) Commercial Code of 1950) and limited thereto, but can implement a business audit through the accounting audit, that is to say when it is necessary for the purpose of conducting the accounting audit (Article 274(2) Commercial Code of 1950).[1175] The change of names from accounting auditor to *kansayaku* was swayed by the concern that leaving the title "*kaikei kansayaku*" in the statutory text would give off the impression that the position would be equivalent to an inhouse accounting officer, thus potentially no longer attracting potential candidates to fill in this position.[1176] The monitoring function was expected to be taken over by the board of directors, with a supporting factor being identified in the aspect that it would be difficult to supervise acts of the business execution from the outside and members on the board of directors would have better insights and access to information.[1177] Another practical aspect cited in this context was that in the prewar period, due to directors and *kansayaku* being both appointed at the general shareholders' meeting and no additional qualification requirement being existent, *kansayaku* tended to be persons not being elected as directors, so that *kansayaku* became a choice for second-class director candidates which undermined

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1173 Shinichi Asagi, *Taishō baburu no hōkai to keizai-teki mujun no rotei* [The Collapse of the Taisho Bubble and the Emergence of Economic Contradictions], in: Hamada, *supra* note 642, 188.

1174 Takada/Yamamoto, *supra* note 749, 68.

1175 Takada/Yamamoto, *supra* note 749, 68, Fn. 98.

1176 The Seventh Legal Committee of the Upper House (No. 37), *Session on 2 May 1950*, available under: https://kokkai.ndl.go.jp/simple/detail?minId=100715206X03719500502&spkNum=0#s0 (last accessed 11 May 2024).

1177 Toshimori Namiki, SHIN-SHŌHŌ NO CHIKUJŌ KAISEI [Article-by-Article Interpretation of the New Commercial Code] (1974) 71. Takeo Suzuki, KAISHA-HŌ [Company Law] (1954) 144.

their position vis-à-vis the board of directors and made supervision by *kansayaku* an empty formality.[1178] Another consequence of having the *kaikei kansayaku* formally appear in the guise of *kansayaku* was that the authority to clear for self-dealing transaction wandered to the board of directors (Article 265 Commercial Code of 1950). While it may be argued whether two institutions were merged with the *kansayaku* losing its former authority or the *kansayaku-kai* in effect disappeared, in effect, the business audit organ of the *kansayaku* was transformed into a mere accounting auditor in the style of common law.[1179]

As the expectation that the former *kansayaku-kai* could be compensated did not materialize, the *kansayaku-kai* was revived and reintroduced in the course of the 1974 Commercial Code Amendment with Article 274(1) expressly setting forth that *kansayaku* are entrusted with supervising the board of directors and for this purpose were entitled to requests reports from the directors or conduct an investigation into the business operations (Article 274(2) Commercial Code of 1974).[1180] The supervision of the business operations is not limited to ex-post review, but includes advance measures, for which purpose *kansayaku* became entitled to seek an injunction against directors' illegal acts if there is the risk of damage to be caused to the company due to such act (Article 275-2 Commercial Code of 1974).[1181] The investigation right of the *kansayaku* extended to subsidiaries (Article 274-3 Commercial Code of 1974). *Kansayaku* were further entitled to attend and express their opinions at meetings of the board of directors (Article 260-3 Commercial Code of 1974) with such opinions being understood as not limited to the lawfulness of acts of business execution, but also to extend to the appropriateness of such acts, as long as *kansayaku* limit their voice requesting a discontinuation of such practice, rather than active proposals.[1182] Furthermore, *kansayaku* regained the capacity (from prior to 1950) to represent the company in litigation cases between of the company against a director (Article 275-4

1178 Suzuki, *supra* note 1178, 145, who also mentions that besides the *kansayaku*, a certified public accountant was still required for auditing the financial statements it under Securities and Exchange regulations, *ibid*. The lack of special knowledge of the *kansayaku* in the absence of any qualification requirement with respect to accounting matters was already discussed in the prewar era, see Asagi, *supra* note 1173, 181.

1179 Takada/Yamamoto, *supra* note 749, 69.

1180 Takada/Yamamoto, *supra* note 749, 69.

1181 While the illegality of the act provides for a certain threshold, it was interpreted in a wide sense, meaning that a violation of the duty of care was considered to satisfy the criterion of illegality, see Namiki, *supra* note 1177, 98 f.

1182 Namiki, *supra* note 1177, 57 f.

Commercial Code of 1974).[1183] In addition, a separate law was adopted under which large stock companies were subject to accounting audits to be conducted by independent and qualified, so-called certified public accountants, who were appointed by the board of directors subject to the consent of the *kansayaku-kai*.[1184] While it was maintained that no specific qualification was required for assuming position as *kansayaku*, the prohibition of serving concurrently as directors or being employed by the audited company was extended to the company's subsidiaries which corresponded to the extension of the audit rights to subsidiaries (Article 276 Commercial Code of 1974).

The position of the *kansayaku* was further expanded in the course of the 1981 Commercial Code Amendment. To begin with, the minimum number of *kansayaku* was lifted to two for large corporations with one of the *kansayaku* being required to be appointed full-time, both measures being aimed at strengthening the independent audit function and increase proximity of the audits to combat misconduct.[1185] To further increase the independence of *kansayaku*, besides the strengthening in numbers and ensure that the remuneration is not unduly low, the amendment provided for the remuneration of *kansayaku* to be decided by a vote separate from the resolution on the remuneration of directors by the general shareholders' meeting (Article 279(1) Commercial Code of 1981).[1186] With respect to the competences, it was introduced that if a *kansayaku* has information that a director engages in illegal conduct or there is the risk of such conduct, the *kansayaku* is required to report such matter to the board of directors (Article 260-3(2) Commercial Code of 1981). Non-compliance with such obligation or negligence of not knowing of a director's illegal act triggers liability of the *kansayaku*.[1187] In order to effectively enforce such right, *kansayaku* received the authority to request that a board of directors meeting is convened or convene such

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[1183] Namiki, *supra* note 1177, 103 f.

[1184] Article 3 Kabushiki kaisha no kansatō ni kansuru shōhō no tokurei ni kansuru hōritsu [Special Law on the Auditing of Stock Companies] or for short: Kansa tokurei-hō [Special Audit Law] (Law No. 22 of 1974); Maruyama, *supra* note 1164, 287. The appointment of the accounting auditors by a resolution of the general shareholders' meeting as per Article 329(1) Companies Act was only introduced in the course of the 1981 revision, see Katsuro Kanzaki/Misao Tatsuta, *Major Statutory Amendments in Japan in 1981*, 5 Journal of Comparative Business and Capital Market Law (1983) 253.

[1185] Article 8 Special Audit Law (amended by Law No. 74 of 1981); Shin Motoki, KAISEI SHŌHŌ CHIKUJŌ KAISETSU [Article-by-Article Interpretation of the Revised Commercial Code] (revised and expanded edition, 1983) 316; Kanzaki/Tatsuta, *supra* note 1184, 253; Takeshi Yoshii, *Japan's Corporate Auditor System*, 17 Journal for Japanese Law (2004) 42.

[1186] Motoki, *supra* note 1185, 158 f.

[1187] Motoki, *supra* note 1185, 129.

meeting (Article 260-3(39, (4) Commercial Code of 1981). For expenses incurred in the course of auditing duties, *kansayaku* can request reimbursement from the board of directors (Article 279-2 Commercial Code of 1981). Mirroring the increase in rights, (i) the grounds for non-qualification applying to directors were extended to *kansayaku* (Article 280(2) Commercial Code of 1981), and similarly (ii) the liability of *kansayaku* for damages of third parties based on false statements on important matters in the financial statement report with the *kansayaku* bearing the burden of proof of having complied with the duty of care became clearly stipulated (Article 280(2) Commercial Code of 1981).[1188]

By virtue of the 1991 Commercial Code Amendment, the *kansayaku-kai* to be staffed with three or more *kansayaku* in the case of large corporations was (re)introduced as a collective organ, with the *kansayaku* rights, however, being assigned each member individually.[1189] In addition, to further urge the aspect of independence, outside auditors were introduced. Through this amendment, the combination of information access and review through full-time *kansayaku* and outside *kansayaku* was targeted.[1190] In addition, the tenure of *kansayaku* has been extended from two to three years and the concept of an outside *kansayaku* was introduced requiring that at least one *kansayaku* neither serves as director, procuration officer or employee at the company or any of its subsidiaries and has not done so for a cooling-off period of five years prior to assumption of office.[1191] The ensuing 2001/2002 Commercial Code Revisions largely followed up on this aspect, increasing the mandatory tally of outside *kansayaku* to the majority of appointed *kansayaku* for large corporations with the requirement of outside provenance being tighten so that former directors and employees did no longer qualify for such position even after the expiration of a cooling-off period (Article 18(1) Special Audit Law), further extending the their tenure from three to four years to reinforce their position vis-à-vis the directors and improve audit quality, the granting of a say to the *kansayaku* board in terms of appointment of *kansayaku* including a proposal right for new candidates (Article 18-3 Special Audit Law) as well as clarifying the right and by the virtue of this amendment express duty of the *kansayaku* to attend board of directors' meetings and the express their opinions

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1188 The previous amendment had introduced the *mutatis mutandis* application of the provision on directors without specifying how such application to the *kansayaku* was to be understood resulting in uncertainty with respect to the liability of *kansayaku*, see Motoki, *supra* note 1185, 165 ff.; Kanzaki/Tatsuta, *supra* note 1184, 253.

1189 Article 18-2 Special Audit Law (Law No. 62 of 1993); Takada/Yamamoto, *supra* note 749, 61.

1190 On this aspect, Yoshii, *supra* note 1185, 43.

1191 Article 18(1) Special Audit Law (Law No. 62 of 1993); Maruyama, *supra* note 1164, 291.

therein, if deemed necessary, meaning for the purpose of obtaining relevant management information to effectively conduct audits (Article 260-3 Commercial Code).[1192]

The position of *kansayaku* and *kansayaku-kai* was thus by and large consolidated and virtually came to a conclusion. The lingering problems of information access and independence of the monitoring process were further pursued via different avenues in the corporate law reforms in the following years.

c) Excursus: The audit and supervisory committee (Kansa kantoku iinkai)[1193]

The most salient overhaul took place in 2003, when the corporate governance model of a company with three committees (nomination, remuneration and audit committees) was adopted; the three committee are required to be staffed with a majority of outside directors. Concurrently, the institution of officers was introduced who henceforth assume the execution of business operations, previously shouldered by representative and executive directors. While possible, it is considered desirable that officers will not also serve as directors in terms of a clearer separation between supervision (through the board) and business operations (executed by the officers).[1194] In case that a company were to opt for this new corporate governance model, the function of the *kansayaku-kai* would be absorbed by the audit committee.[1195] More than a decade later, the company with an audit and supervisory committee was added as a third corporate governance model by virtue of the 2014 Companies Act Revision. By its design, the audit and supervisory committee effectively replaces the *kansayaku-kai* with the structural advantage that committee members – of whom the majority is required to be outside directors – are board members, thus remedying the shortcoming that *kansayaku* lacked authority tantamount to members of the board of directors and contributing to *kansayaku* being limited to rather defensive functions.[1196]

1192 Tsugio Ibayashi, KAISEI SHŌHŌ JŪTEN CHIKUJŌ KAISETSU: KANSAYAKU SEIDO NO SAISAI KYŌKA TO TORISHIMARIYAKU NO SEKININ KEIGEN [Interpretation of Important Articles of the Revised Commercial Code: Reinforcement of the Kansayaku System and Mitigation of Directors' Liability] (2002) 10 ff., 177 f., 193 ff.

1193 See Takada, *supra* note 1172, 203, who also indicates that a genealogical line can be drawn from the *kansayaku* to the audit and supervisory committee.

1194 Oda, *supra* note 1088, 24.

1195 Oda, *supra* note 1088, 25.

1196 It also remedies two imperfections of the three committee models, namely (i) the fact that decisions on nomination and remuneration matters is not required to be transferred to committees staffed with a majority of outside directors, and (ii) the general shareholders' meeting resolves on appointment and remuneration of the audit and supervisory committee members and it does so

d) Interim conclusion

The *kansayaku* has thus been in substance widely maintained with a brief interruption of two decades since its incorporation in the Shōhō. The *kansayaku* or *kansayaku-kai* can thus be cited as evidence to support the concept of an initial institutional lock-in, not only on the macro-level pertaining to the adoption of the stock company concept and related institutions, but also on a micro-level, meaning with respect to legal instruments which appertain to the stock company, but regarding which lawmakers enjoy a certain discretion and leeway for experiments, since such legal instruments do not define the key structural workings of the stock company. Recent reforms starting with the introduction of the Companies Act, have resulted in a combination of the *kansayaku* with the debate as to how to accommodate independent monitors, read independent directors, into the existing landscape of corporate governance institutions.

2. Fiduciary[1197] Duties: The Duties of Care and Loyalty

The next legal instrument which shall be reviewed is the standard of conduct against which directors' acts undertaken in performance of their obligation are reviewed, or the duty of due care to be observed by directors upon carrying out the matters entrusted[1198] to them upon appointment as directors of a stock company.[1199] The standard of care to which directors are subject has recently garnered attention from the angle of its relation to the duty of loyalty, which had been transplanted into the Shōhō in the course of its 1950 Commercial Code Amendment, due to the expanding relevance and interrelatedness with the concept of fiduciary duties, also in the

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separately from the pertaining decision on the other directors (Article 329(2) Companies Act), thus increasing detachment and independence from the board of directors, Gen Goto, *Recent Boardroom Reforms in Japan and the Roles of Outside/Independent Directors*, in: Hiroshi Oda (ed.), COMPARATIVE CORPORATE GOVERNANCE: THE CASE OF JAPAN (2018) 33-53, 43.

1197 While fiduciary duties are commonly associated with the common law sphere in today's world, historical studies and parallels identified therein between the English trust and the civil law trust suggest that the development of the former drew on trust-like structures in France, Germany, Italy and Spain – which in turn were partly influenced by Roman law – in the thirteenth and fourteenth centuries, see Lupoi, *supra* note 210, 973 ff.; Avini, *supra* note 210, 1162 f., an observation which demonstrate the relativity and porosity of comparative classification attempts.

1198 On the integral meaning of the "entrustment" as a component of fiduciary relationships, see Tamar Frankel, *Fiduciary Law in the Twenty-First Century*, 91 Boston University Law Review (2011) 1293 ff., and *Fiduciary Law*, 71 California Law Review (1983) 800 f.

1199 Hiroto Dogauchi, *Zenkan chūi gimu wo megutte* [On the Duty of Care], 305 Hōgaku Kyōshitsu [Law School Lectures] (2006) 44; Eriko Taoka, *Shaping and Re-shaping the Duty of Loyalty in Japanese Law*, 14 Asian Journal of Comparative Law (2019) 142.

corporate law context.[1200] Since directors of Japanese stock companies are subject to both, the duty of care and the duty of loyalty, and both duties are interrelated with the exact relationship being subject to academic debate, both duties shall be considered in the same context.

a) Initial form: Duty of care

Initially, when focusing on the written law only, the corporate law of Japan was only familiar with the duty of due care mirroring the influence of European civil law codes and codification efforts.[1201] The duty of care (*zenkan chūi gimu*) was stipulated in Article 644 of the Japanese Civil Code upon enactment of the Civil Code in 1896 as part of the law on mandates (Law No. 89 of 1896). The appointment as director of a stock company qualifies as mandate from a civil law point of view, since by virtue of the appointment a director is entrusted with the management of affairs of the owners (the principals) in accordance with the purpose of the entrustment.[1202] The applicability of the duty of due care was ensured by expressly declaring the provisions relating to mandates applicable to the relationship between a stock company and its directors through Article 164(2) – now Article 330 Companies Act – which was introduced by the 1911 Commercial Code amendment (Law No. 73 of 1911).[1203]

The provision imposes on the agent a "*duty to carry out the affairs of the agency in accordance with the purpose of the agency and with the care of a faithful manager*", hence only requiring an agent – or director in case of a stock company – to carry out corporate affairs in the manner a reasonably careful and prudent person would be expected to act under the given circumstances of a corporate act or transaction.[1204]

1200 For example, Masayuki Tamaruya/Mutsuhiko Yukioka, *The Japanese Law of Fiduciaries from Comparative and Transnational Perspectives*, 5 UC Irvine Journal of International, Transnational, and Comparative Law (2020) 135 ff.; Taoka, *supra* note 1199, 119 ff.

1201 Martin Gelter/Geneviève Helleringer, *Fiduciary Principles in European Civil Law Systems*, in: Evan J. Criddle (ed.), THE OXFORD HANDBOOK OF FIDUCIARY LAW (2019) 583 ff.

1202 Tamaruya/Yukioka, *supra* note 1200, 138. Other legal relationships under the Civil Code of 1896 are members of an association (Article 671), supervisor and guardians in family law (Articles 916, 936) as well as executors of an estate in hereditary law (Article 1114). Mandates are considered the civil law equivalent of the common law agency relationship, see Gelter/Helleringer, *supra* note 1201, 589.

1203 In between the provision changes its position in the Commercial Code on several occasions: Tt was renumbered once as Section 254(2) by another amendment in 1938 (Law No. 72 of 1938) and another time as Section 254(3) by the amendment in 1950 (Law No. 167 of 1950), see also Tamaruya/Yukioka, *supra* note 1200, Fn. 19.

1204 The Japanese original reads "*zenryō na kanrisha*" which can be translated into "good" or into "faithful" manager, see Tamaruya/Yukioka, *supra* note 1200, 138. The language is identical with

Despite the lack of the use of terminology referring to "fiduciary", the duty of care provision in conjunction with provisions on conflict-of-interest transactions are viewed as tantamount to the contemporary fiduciary concept.[1205] Provisions covering conflict-of-interest transactions, that were included in the Civil Code and Commercial Code prior to 1950, were the prohibition of the representation of the other or both parties to the same transaction laid down in Article 108 Civil Code of 1896 and the regulation of self-dealing transactions that required disclosure of the material facts and in addition ex ante approval by the general shareholders' meeting (regulation of competition)[1206] or the board of directors (regulation of self-dealing and related-party transactions).[1207] Hence, Japanese civil courts adjudicated cases such as the misappropriation of group funds based on the construction of the duty of care.[1208]

b) 1950: The addition of the duty of loyalty

While the duty of due care standard is straightforward, the introduction of the duty of loyalty (*chūjitsu gimu*) as Article 254(2) into the Commercial Code by virtue of the 1950 amendment (Law No. 167 of 1950) has lend the development of the norm interpretation more dynamic.[1209] While the language of the provision was maintained, the duty of loyalty is now enshrined in Article 355 of the Companies Act (Law No. 86 of 2005) after a series of reshuffling of the Commercial Code and the carve-out of the company law-specific regulation from the Commercial Code into the newly enacted

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the trustee's duty under the Trust Act (enacted as Law No. 62/1922, current version as Law No. 108/2006). Also, Taoka, *supra* note 1199, 121.

1205 Tamaruya/Yukioka, *supra* note 1200, 138.

1206 Article 264 Commercial Code of 1938. The scope of application provision on the regulation of competition is limited in comparison with the corporate opportunities-doctrine, since it only refers and covers "transactions in the line of the business" (see current Article 356(1) lit. i) Companies Act), see Kanda/Milhaupt, *supra* note 328, 895 f. Japanese courts have hence taken resort to the duty of loyalty in (besides the regulation of competition provision) to close this gap, see Tokyo High Court Decision, 26 October 1989, in: 835 Kinyū Shōji Hanrei [Financial and Commercial Case Law] 23-28, 23. Although the application of both provisions by lower instance courts is not consistent, see Maebashi District Court Decision, 14 March 1995, in: 1532 Hanrei Jihō [Case Law Review] 135-142, 135, and Tokyo District Court Decision, 22 February 1999, published in 1685 Hanrei Jihō [Case Law Review] 121-125, 121, see Kanda/Milhaupt, *ibid*., 896.

1207 Article 265 Commercial Code of 1938.

1208 Daishin-in [Great Court of Cassation] Judgment 8 February 1938 (Kawamukai v. Hoshō Sekinin Tairamura), in: Daishin-in Minji Hanrei-shū [Collection of Civil Precedents of the Great Court of Cassation], Volume 17, 102-104.

1209 The concept of loyalty opens up the horizon of status-based norms of loyalty harking back to the time of the Tokugawa period and earlier. While these norms have not been incorporated in legislation starting in the Meiji period, these social norms nonetheless underpinned economic relationship such as the above-referred concept of the "community firm", see Buchanan/Chai/ Deakin, *supra* note 6, 77; Tamaruya/Yukioka, *supra* note 1200, 138.

Companies Act in 2005. The duty of loyalty is tied to the position of a director as a corporate body and requires directors "*to comply with the provisions of the law, the articles of incorporation, and the resolutions of the general shareholders' meetings and to perform their duties loyally in the interests of the corporation*".[1210] The introduction of the duty of loyalty was seen in the context of a shift in the corporate governance balance of the stock company with a strengthening of the position and rights of the board of directors which, inter alia, entailed that instead of the *kansayaku* the board of directors became the corporate body which from which clearance of a self-dealing transaction must be requested.[1211]

While the introduction of the duty of loyalty naturally spurred the question with respect to the relationship between the duty of care and the duty of loyalty, the duty of loyalty was predominantly considered as merely stating the result of the observation of the duty of care, namely that the compliance with the duty of care included the observance of "*the provisions of the law, the articles of incorporation, and the resolutions of the general shareholders' meeting*" with the term "loyally" being construed purely literally, namely to act faithfully in the interests of the corporation; shareholders do usually not appear as a potential group or surrogate of the corporation to which such loyalty is owed.[1212] Only a minority of scholars sought to orient the interpretation more closer

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[1210] Araki/Saito, *supra* note 79, 230; Ichiro Kawamoto/Yasuhiro Kawaguchi/Takayuki Kihira, CORPORATIONS AND PARTNERSHIPS IN JAPAN (2016) 275; Tamaruya/Yukioka, *supra* note 1200, 138. With respect to the translations of the provisions in the Japanese codices, the thesis follows the ones suggested by Araki/Saito and Tamaruya/Yukioka. The duty of loyalty is extended to executive officers by virtue of Article 417(2) Companies Act.

[1211] Joichi Okazaki, KAISETSU KAISEI KAISHA-HŌ [Commentary on the Amended Company Law] (1950) 99 f.; Choshichi Hoshikawa, *Torishimariyaku no chūjitsu-gimu to sekinin ni tsuite no ichikōsatsu* [Consideration on Corporate Directors' Duty of Loyalty and their Liability towards the Corporation], 38 Waseda Hōgaku [The Waseda Law Review] (1963) 181 ff.; Taoka, *supra* note 1199, 121.

[1212] Shigeru Morimoto, *Kaishahō no moto ni okeru torishimariyaku no sekinin* [Corporate Directors' Liabilities under the Companies Act], 1841 Kinyū Hōmu Jijō [Journal of Financial and Legal Affairs] (2008) 12; Takeo Suzuki, KAISHA-HŌ [Company Law] (5th edition, 1994) 193; Taoka, *supra* note 1199, 121 f. Kazuo Shinomiya, SHINTAKU NO KENKYŪ [Research on Trusts] (1965) 211, however, differentiates between two beneficiaries, the trust or company on the one hand and the ultimate beneficiaries on the other hand. In the context of US-American corporate law, this ambiguity is usually solved that the term "corporation" is construed as to also encompass the group of shareholders and in more recent debate also other constituencies. Delaware law takes a more affirmative position towards shareholders conceptualizing the corporation as a fictional entity representing the shareholders, see Julian Velasco, *Fiduciary Principles in Corporate Law*, in: Criddle, *supra* note 1201, 64. On the other hand, remedies for breaches of fiduciary duties are generally enforced by direct actions of the company or derivative actions, since such breach brings harm to the corporation, rather than directly to the shareholders, see Velasco, *ibid*., 75 f. On the relevance of derivative actions in Japan, see Kenichi Osugi, *Directors' Liability and Enforcement Mechanisms in Japan*, in: Holger Fleischer/Hideki Kanda/Kon Sik Kim/Peter Mülbert (eds.),

at the US-American understanding, meaning that the duty of loyalty required directors to act in the company's best interest (beneficiary's best interest) without pursuing any of their own interests or seeking benefits deriving from their position as directors (disinterestedness) and act for; the duty of care was considered as requiring directors to apply reasonable care upon carrying out corporate matters.[1213] The difference between both schools of thought thus lay rather towards the dogmatic than practical aspects.[1214] Besides the duties of care and loyalty, the conflict-of-interest provisions – in a refurbished version[1215] – continued to be in effect under the 1950 Commercial Code Amendment and have henceforth been carved-out out more clearly by case law which was later reflected in the legal provisions.[1216]

The conflict-of-interest provisions can be understood as subsets of the negative, prophylactic aspect of the duty of loyalty, namely – subject to informed review by the general shareholders' meeting (Article 356(1) Companies' Act) – to avoid conflict-of-interest situations and in such situation not to act for any party (personal and third party interest alike) whose interests are in conflict with those of the beneficiary; on the other hand, the positive aspect of the duty of loyalty is identified in the requirement to act in the principals' best interest, which then overlaps with the duty of care insofar as reasonable care is required to be observed upon acting so.[1217] Japanese courts adjudicated cases dealing with the violation of fiduciary duties of corporate directors

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GERMAN AND ASIAN PERSPECTIVES ON COMPANY LAW (2016) 47 ff. Hence, looking at fiduciary duties from the legal consequences, it seems plausible to view the corporation and not (only) the shareholders as subject to which fiduciary duties are owed.

1213 Chōshichi Hoshikawa, *Torishimariyaku no chūjitsu-gimu no hōteki kiso narabi ni hatsugen keitai* [Legal Basis and Patterns of Corporate Directors' Duty of Loyalty], 41 Waseda Hōgaku [The Waseda Law Review] (1966) 123 ff.; Taoka, *supra* note 1199, 122.

1214 Taoka, *supra* note 1199, 122, 124.

1215 Reflecting, inter alia, the competence shift from the *kansayaku* to the board of directors, see Okazaki, *supra* note 1211, 99 f.

1216 See Articles 264 f. Commercial Code. These provisions have been amended under influence of case law of the Supreme Court and can now be found in Article 356(1) (in conjunction with Article 365) Companies Act. The differentiation between the duty of care, the duty of loyalty and the provision on specific conflict-of-interest transaction, inter alia, shows with respect to the legal consequences of a violation, since Article 423(2) Companies Act provides for a shift with respect to the burden of proof stipulation that the profits obtained as a result of a conflict-of-interest transaction are presumed to constitute the amount of damages; the legal consequences of a breach of the duty of care or the duty of loyalty are, however, identical. See also Taoka, *supra* note 1199, 124.

1217 Taoka, *supra* note 1199, 125, 132. The bifurcation into the positive and negative aspect of the duty of loyalty has been developed, especially with respect to Japanese trust law, by Shinomiya, *supra* note 1212, 213.

on the grounds of the provisions on the conflict-of-interest transactions.[1218] The broader interpretation of the conflict-of-interest concept in the case law of the Supreme Court eventually precipitated the revision of the pertaining provisions on (i) on the engagement in transactions with stand in competition with the company, and (ii) on self-dealing and related-party transactions in the course of the 1981 Commercial Code Amendment.[1219]

c) The relationship between both fiduciary duties

However, in the initial period upon its introduction, Japanese courts tended to not consider the duty of loyalty as a separate liability standard in its own right.[1220] Instead, Japanese courts tended to continue to rely on the duty of care, or citing the duty of care in conjunction with the duty of loyalty, thus evading an express specification of their relationship.[1221] A judgment rendered by the Supreme Court in 1970 appeared to provide more clarity in as much as it stated that the duty of loyalty does not constitute a standard which exceeds the standard of the duty of care.[1222] While this judgment is partly construed as to argue that the standards of the duty of care and the duty of loyalty are congruent, the language of the judgment does not provide more than that the duty of loyalty does not stipulate any stricter requirements than the duty of care.

aa) Hesitation with respect to the separate invocation of both duties

A reason for the hesitant reliance of Japanese courts on the duty of loyalty has been identified in the overall concept of the firm and its corporate governance arrangements sidelining shareholders, making it less receptive to the concept usually associated with the directors of stock companies in common law countries, especially the United States, namely that directors should act loyally towards the shareholders as the ultimate owners of the corporation and thus their principals.[1223] Coinciding with corporate law reform which aimed at putting more emphasis on shareholders and sought to expand

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1218 Supreme Court Decision, 5 September 1963, in: 17 Saikō Saiban-shō Minji Hanrei-shū [Supreme Court Case in Civil Matters] 909-931, 909; Supreme Court Decision, 25 December 1968, in: 22 Saikō Saiban-shō Minji Hanrei-shū [Supreme Court Case in Civil Matters] 3511-3548, 3511 f.

1219 Kanzaki/Tatsuta, *supra* note 1184, 251; Tamaruya/Yukioka, *supra* note 1200, 141.

1220 Tamaruya/Yukioka, *supra* note 1200, 141.

1221 Tamaruya/Yukioka, *supra* note 1200, 140.

1222 Supreme Court Decision, 24 June 1970, in: 24 Saikō Saiban-shō Minji Hanrei-shū [Supreme Court Case in Civil Matters] 625-712, 625 f.; Araki/Saito, *supra* note 79, 230.

1223 Toshiro Nishimura/Koichi Kusano, *Kokusai keizai masatsu to kigyō baishū* [International Economic Friction and Corporate Takeover], in: Koichirō Fujikura/Ryuichi Nagao (eds.), KOKUSAI MASATSU: SONO HŌBUNKA-TEKI HAIKEI [International Frictions: Its Legal-Cultural Background] (1989) 101 ff.; Tamaruya/Yukioka, *supra* note 1200, 144.

shareholders rights in the course of the 1993 Commercial Code Amendment, courts have started to invoke the duty of loyalty independently in the adjudication of corporate law cases indicating an emancipation of the duty of loyalty from the duty of care standard.[1224]

At the same time, Japanese courts have come to adopt the business judgment rule as the standard of review whether acts undertaken by corporate directors comply with the requisite level of care into their canon of case law in the 1990s and 2000s, a step which demonstrates a general adaptability and openness to respond to changes in the corporate law practice as well as in the overall socio-institutional landscape.[1225] The reception took place in three key steps: A Tokyo District court decision in the early 1993 acknowledged that directors have discretion in business matters.[1226] Other district courts followed suit, expressly declaring the application of the rule. A couple of years later, the Tokyo District Court scrutinized in one of its decisions whether "*there is any significant or negligent error with respect to the underlying facts on which the decision based, and there is nothing in the decision-making process or with respect to the substance of the decision that is grossly unreasonable or inappropriate for a corporate director*" to established that if a director's business decision passes such test, the legal presumption would be that the directors have exercise a due amount of care.[1227] The Supreme Court eventually sanctioned the use of the business judgment rule in civil law cases, establishing that there would be no breach of the duty of care as long as there would be nothing "*distinctly unreasonable*" with respect to the process by which a business decision is made or the contents of such decision.[1228] Since the business judgment rule conceptually entails the conference of a certain margin of errors on corporate directors taking away their liability risk, its adoption may signal an

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1224 The Tokyo High Court Decision, *supra* note 1206 is understood to mark the first independent application of the duty of loyalty, see Tamaruya/Yukioka, *supra* note 1200, 140, 143.

1225 Takahashi, *supra* note 96, 28 f.; Tamaruya/Yukioka, *supra* note 1200, 147 f. On the latter aspect, Frankel, *supra* note 1198, 795 ff.

1226 Tokyo District Court Decision, 16 September 1993, in: 1469 Hanrei Jihō [Case Law Review] 25-32, 26.

1227 Tokyo District Court Decision, 8 February 1996, in: 144 Shiryō-ban Shōji Hōmu [Commercial Law Materials] 115-122, 121. On the differentiation between the decision-making process and its content in the courts' analyses, see Osamu Miura, *Torishimari-yaku no keiei handan no katei to naiyō to no kubetsu* [Distinguishing between the Process and Content of Corporate Directors' Business Decisions], in: Shūhei Maruyama/Hiromasa Nakashima/Katsumi Nampo/Hironao Fukushima (eds.), KIGYŌ HŌGAKU NO RONRI TO TAIKEI: NAGAI KAZUYUKI SENSEI KOKI-KI [Logic and System of Company Law: A Commemorative Publication for Professor Kazuyuki Nagai's 70th Birthday] (2016) 967 ff.

1228 Supreme Court Decision, 15 July 2010 (Apamanshop Case), in: 2091 Hanrei Jihō [Case Law Review] 90-94, 93; Takahashi, *supra* note 96, 29.

empowerment and encouragement of corporate directors in Japan to pursue shareholders' interests more affirmatively.[1229] However, legal scholarship in Japan has partly found that the change was one in form that the business judgment rule has been explicitly referred to by an increasing number of courts, but not in substance, as it had been established jurisprudence that the merits of a director's decision are beyond judicial review.[1230] In addition, it has been claimed that court decisions in Japan tend to be stricter towards defendant corporate directors than courts in the United States, which hence might rather result in more cautious risk-taking (which would run counter the initial concept of the business judgment rule to encourage proactive management).[1231]

Notwithstanding these developments, ambiguity with respect to a differentiation between both duties in substance persists.[1232] In addition, the provisions on conflict-of-interest transaction bear a certain potential for further conflation and confusion, as, for example, *kansayaku* are considered to be subject to a duty of loyalty arising from insider trading regulations, the provisions on conflict-of-interest transactions do not extend to *kansayaku* which then gave rise to the argument that the duty of care obligates them to refrain from such transactions.[1233]

bb) Emerging differentiation and emancipation

With an increasing relevance of the duty of loyalty embedded in the overall mainstream of the acknowledgement of shareholders' interests by lawmakers, the differentiation in substance between the duty of care and the duty of loyalty remains to be unraveled. A factor contributing to this complexity is the different origin of both standards with the duty of care harkening from a civil law background, while the duty of loyalty is of common law background. Cases to which the duty of loyalty is applied in a common law jurisdiction, may be addressed in civil law jurisdictions based on fiduciary-like provisions or uncodified, broader duties developed by case law and legal scholars pertaining to contractual relationships by which a person has been conferred

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1229 For the general concept, see Velasco, *supra* note 1212, 69 f.; Miura, *supra* note 1227, 992.

1230 Tomotaka Fujita, *Transformation of the Management Liability Regime in Japan in the wake of the 1993 Revision*, in: Hideki Kanda/Kon-Sik Kim/Curtis J. Milhaupt (eds.), TRANSFORMING CORPORATE GOVERNANCE IN EAST ASIA (2008) 28 f.

1231 Osugi, *supra* note 1212, 55 f. Miura, *supra* note 1229, 983 f., 992.

1232 Morimoto, *supra* note 1212, 12 f.; Supreme Court Decision, 28 January 2008, in: 1997 Hanrei Jihō [Case Law Review] 143-148, 143, 147.

1233 Morimoto, *supra* note 1212, 12 f.

discretionary power by another person to take care of this very person's (legal) affairs, which has been referred to as "*discretionary power relationship*".[1234]

The reliance on the standard of the duty of care rooting in the mandate relationship for evaluating whether the requisite care has been observed, indicates the lingering attachment to the civil law roots. The express provisions on the regulation of conflict-of-interest transaction which survived the carve-out of the corporate law-specific provisions from the Commercial Code into the new Companies Act can likewise be cited in support of this view. On the other hand, the transplanting of the duty of loyalty into the Commercial Code and Companies Act, respectively, as well as the reception of the business judgment rule as reduced review benchmark against which the requisite level of care is evaluated, demonstrate an opening up to legal concepts developed in common law. While the business judgment rule as review standard of the duty of care can arguably be well integrated, the juxtaposition of the duty of care and the conflict-of-interest transactions on the one hand, and the duty of loyalty on the other hand, bears the potential for frictions, if one subscribes to the idea that the duty of loyalty conceptually as a separate regulatory content, which its codification and henceforth non-removal suggests, since prior to the transplantation of the duty of loyalty the duty of care and the provisions on conflict-of-interest transactions provided a mechanism to deal with conflicts of interest, arguably constituting a functional equivalent to the duty of loyalty.

Acknowledging both, the initial civil law heritage of the duty of care, and the common law origin of the likewise transplanted duty of loyalty, however, with a focus on trust law, harmonization and definition of both fiduciary duties with independent regulatory scope has been sought with (i) the duty of loyalty being conceptualized as the standard for reviewing whether the agent's acts or inaction are motivated by the agent's intention to further the interests of its principal, while (ii) the duty of care remains the standard of review to evaluate whether an agent's act or inaction is undertaken with reasonable care.[1235] Whether this proposed adoption of common law-doctrine will

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1234 Gelter/Helleringer, *supra* note 1201, 583 f.

1235 Taoka, *supra* note 1199, 134 ff., 145 who draws on the work of Lionel Smith, *The Motive, not the Deed*, in: Joshua Getzler (ed.), RATIONALIZING PROPERTY, EQUITY AND TRUSTS: ESSAYS IN HONOUR OF EDWARD BURN (2003) 53-81, who draws for the argument that not the result, but the motive requires to be investigated to determine whether an act or inaction constitutes the breach of a duty of loyalty the proper purpose-doctrine, *ibid*. 67-73. The proper purpose-doctrine has partly been codified, for example, in the United Kingdom in Section 171(b) of the Companies Act 2006. For the pivotal relevance of the motive in the context of US-American law, see Iman

succeed, remains to be seen. However, such submission indicates a willingness to assign the duty of loyalty a separate meaning, which has been started to be accepted by the judicature, entailing a keener focus on the principal-agent-relationship. Whether shareholders as the ultimate beneficiaries will be accepted in the course of this, remains likewise to be seen. For time being, the corporation appears to remain the subject at which the fiduciary duties are oriented in Japan.

d) Interim conclusion

It has been argued that the introduction of the modern, US-American director concept in the course of the 1950 Commercial Code Amendment which brought about the strengthening of the board of directors required the likewise adoption of the duty of loyalty. While this is convincing seen from the rationale of the fiduciary duty-concept, the jurisprudence by Japanese courts in the following decades, however, suggests a subordinate relevance in this respect which ties into the overall observation that a transplant might develop in a different manner than in its exporting jurisdiction due to differences in the overall legal and institutional framework. This may apply even more so, if a jurisdiction subsequently receives input from common law and civil law jurisdictions. Insofar, it is, however, remarkable that Japanese courts sought a solution and reconciliation based on the duty of care and duty of loyalty, which contrasts, for example, with the situation in Germany where fiduciary duties were developed by legal scholars and case law out of general civil law principles with a duty of loyalty not being expressly codified until today in the area of corporate law.

The registered, however, cautious rise in the relevance of the duty of loyalty can also be seen in the bigger picture of the overall trend of an increasing relevance of legal concepts – and in further pursuance of such path, soft law, over rule-based legislative approaches as evidenced by the, however, still existing provisions on the – fragmentary – regulation of corporate opportunities and related-party transactions.

The duty of loyalty in conjunction with the derivative suit could also provide an avenue for better articulation of minority shareholders' interests with the emergence of truly dispersed – due a loosening grip of *keiretsu* shareholding structures – ownership structures, especially in the absence of active majority shareholders as potential

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Anabtawi/Lynn A. Stout, *Fiduciary Duties for Activist Shareholders*, 60 Stanford Law Review (2008) 1263, Fn. 15 with further reference.

monitors.[1236] In the context of fiduciary duties, it worth noting that fiduciary duties have been extended to shareholders towards other shareholders, typically of majority or controlling owners towards minority equity holders.[1237] Specific cases of the abuse of voting rights by a (majority) shareholder may be subsumed under Article 831(1)(iii) Companies Act that provides the remedy of setting a shareholders' resolution suffering from such defect aside.[1238] While an extension of the fiduciary concept is discussed among the scholarship in Japan[1239], Japanese courts have so far refrained from resorting to the concept of fiduciary duties in this context and, instead rather relied on

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[1236] The addition of the attribute "active" is meant to exclude passive investors with large equity holdings such as trust funds which significant holdings in most large companies listed in Japan, as seen above (see Fn. 914). Major shareholders had a significant impact on the corporate governance of listed firms in the 1920s, inter alia, through sending a director to the management of firms, see Tetsuji Okazaki, *Nihon ni okeru kōporēto gabanansu no hatten* [Development of Corporate Governance in Japan], in: Masahiko Aoki/Ronald Dore (eds.), KOKUSAI GAKUSAI KENKYŪ SHISUTEMU TO SHITE NO NIHON KIGYŌ [International and Interdisciplinary Research on the System of Japanese Companies] (1995) 437-484, 443 ff.; Masakazu Shimada, EIICHI SHIBUSAWA NO KIGYŌ-SHA KATSUDŌ NO KENKYŪ: SENZEN-KI KIGYŌ SHISUTEMU NO SŌSHUTSU TO SHUSSHI-SHA KEIEI-SHA NO YAKUWARI [A Study on the Entrepreneurial Activities of Eiichi Shibusawa: Creation of the Prewar Company System and the Role of Investor Managers] (2007) 88 ff. The impact of the absence of such active majority shareholders in non-*zaibatsu* companies in the 1930s has been investigated by Aochi, *supra* note 147, 64 ff.

[1237] This phenomenon appears to occur irrespective of whether a jurisdiction has more of a common or civil law system, as such an extension of fiduciary (in the common law context) and fiduciary-like (in the civil law context) duties has, for example, occurred in the United States, but also in Germany, while it has, for example, not been registered in the corporate laws of the United Kingdom, France, Australia, Canada or Switzerland, see Holger Fleischer, *A Guide to German Company Law for International Lawyers*, in: Fleischer/Kanda/Kim/Mülbert, *supra* note 1212, 39; Anita Anand/Christopher Puskas, *Legal and Economic Rationales for Shareholder Duties and their Enforcement*, in: Hanne S. Birkmose/Konstantinos Sergakis (eds.), ENFORCING SHAREHOLDERS' DUTIES (2019) 17-38, 18 ff.; Anabtawi/Stout, *supra* note 1235, 1265 ff. Control can also materialize *de facto* and *ad hoc* in a specific situation, see Anabtawi/Stout, *ibid*., 1297 f. For mutual fiduciary duties (in closed corporations) in the context of US-American law, see Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 University of Pennsylvania Law Review (1990) 1675-1731.

[1238] The provision requires that "*a grossly unjust resolution is passed as a result of the exercise of the voting rights by a person for whom such resolution constitutes a special conflict of interest*", see Araki/Saito, *supra* note 79, 318; Takahashi, *supra* note 96, 22. This provision was introduced with effect of the 1981 Commercial Code Amendment. Prior to such amendment, shareholders with a personal interest were barred from voting in such matter, see Kanzaki/Tatsuta, *supra* note 1184, 250.

[1239] For example, Saburo Beppu, ŌKABUNUSHI KENRYOKU YOKUSEI SOCHI NO KENKYŪ [Research on Curbing the Power of Majority Shareholders] (1992) 366; Aken Ban, KAISHA MOCHIBUN SHIHAIKEN RANYŌ NO HŌRI [On the Legal Doctrine of the Abuse of Control by Majority Shareholders] (2000) 463 f., both argue in favor of an application of fiduciary duties against the background of legal practice and scholarship in the United States and Germany. Other scholars, however, consider an introduction of fiduciary duties (*seijitsu gimu*) between shareholders as being in conflict with the principle that shareholders owe no duty to a company after their capital contribution, see in general on this debate, Eiji Takahashi, DOITSU TO NIHON NI OKERU KABUSHIKI KAISHA-HŌ NO KAIKAKU [Reform of Stock Company Law in Germany and Japan] (2007) 135 f., and on the historical origin of such concept, Takahashi, *supra* note 96, 21 f.

the general equal treatment clause (Article 109 Companies Act) which, however, falls short under the aspect of the afforded level of protection, since damages cannot be claimed based on such basis.[1240] A more pronounced reliance on the duty of loyalty may, however, require a profounder change of paradigms, namely to embrace and acknowledge the interests of shareholders' interests who are the ultimate owners of the firm. While recent policy attempts point into this direction, resilient corporate shareholdings may suggest that loyalty is still conceived as being (primarily) owed to the firm within its – however, looser – *keiretsu* network which by its very conception is intended to insulate a firm against capital market pressures, thus the influence of (outsider) shareholders.[1241]

By the letters of the law, the hybrid status between the separate origins of the duty of care in the civil law mandate and of the duty of loyalty in the common law agency remains, with the chain of precedents showing the courts' struggles to accommodate in substance functionally similar, however, with respect to its articulation and form disparate legal instruments.[1242]

3. Rights and Competences of the General Shareholders' Meeting

The general shareholders' meeting or rather the competences of the general shareholders' meeting are another key element of company law. Changes in the competence catalogue of the general shareholders' meeting are through checks and balances related to the competence shifts between the corporate bodies of a stock company, that is the board of directors and the *kansayaku*. In addition, increasing or decreasing competences of the general shareholders' meeting may reflect changes in the composition of the shareholder group with dispersed ownership structures usually being associated with director primacy for which the allocation of competences between the corporate bodies of stock companies in the United States is considered

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1240 Supreme Court Decision, 24 November 1970, in: 24 Saikō Saiban-shō Minji Hanrei-shū [Supreme Court Case in Civil Matters] 1963-1986, 1969 ff.; Eiji Takahashi, *Gleichbehandlungsgrundsatz und Treuepflicht im japanischem Gesellschaftsrecht* [The Equal Treatment Principle and the Fiduciary Duty under Japanese Company Law], in: Takahashi, *supra* note 96, 365 ff. The pertaining legal consequence would be to file a claim for returning unjust enrichment (Article 703 Civil Code Japan), since violations of the equal treatment clause render the relevant acts void.

1241 Takahashi, *supra* note 898, 205.

1242 The principle-agent model in the economic theory of the firm does not directly translate into the legal concepts of agency (and mandate), as upon delegation through appointment directors enjoy discretion with respect to business decisions in the limits of the duties of care and loyalty, but are usually not subject to instructions, etc., meaning that an agent act only on behalf of a principal, see Edelmann/Thomas/Thompson, *supra* note 12, 1372 f.

archetypal.[1243] For the historical analysis of the competences allocated by law to the general shareholders' meeting of stock companies in Japan, this section will focus on the provisions applicable to stock companies with a board of director (Article 295(2) Companies Act); the section will solely cover the development of the statutory provisions and their interpretation, and not delve into the law-in-action, meaning the activation and usage of the assigned authority and competences.

a) Kyū-Shōhō

With the introduction of the Kyū-Shōhō, the general shareholders' meeting was established as one of the governing bodies of the stock company besides the directors and the *kansayaku*. Despite the absence of any statutory provision expressly defining authority and competences of the general shareholders' meeting, under both, the Kyū-Shōhō and the Shōhō, the competences of the general shareholders' meeting were conceptualized as very broad: It was understood that the general shareholders' meeting was omnipotent and could resolve on any matter.[1244] Under statutory law (see below), specific competences were assigned to the general shareholders' meeting. Additional competences could be allocated to the general shareholders' meeting by virtue of the articles of incorporation. Express legal provisions designating competences to the general shareholders' meeting pertained to:

- The category of elective competences, such as the appointment of directors and *kansayaku* (Article 164, for the appointment of *kansayaku*, in conjunction with Article 189 Shōhō) as well as their dismissal (Article 167, for the dismissal of *kansayaku*, in conjunction with Article 189 Shōhō). In addition, the general shareholders' meeting was to decide on the remuneration of directors and *kansayaku*, if not provided for in the articles of incorporation (Article 179, for *kansayaku*, in conjunction with Article 189 Shōhō).

- Decisions on matters which materially touch upon shareholders' financial interests: This category contained the approval of accounting matters based on the documentation provided by the directors and reports submitted by the

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[1243] Holger Fleischer, *Kompetenzen der Hauptversammlung – Eine rechtsgeschichtliche, rechtsdogmatische und rechtsvergleichende Bestandsaufnahme* [The Competences of the Shareholders' Meeting – A Survey under Aspects of Legal History, Legal Doctrine and Comparative Legal Studies], in: Bayer/Habersack, *supra* note 220, 458.

[1244] Toshikazu Murata, *Kabushiki kaisha ni okeru kikan kengen bunpai chitsujo-ron to sono shosō* [A Theory on the Allocation of Institutional Competences in Stock Companies and Various Aspects thereof], 398 Ritsumeikan Hōgaku [Ritsumeikan Law School] (2021) 327.

kansayaku and included the decision on the appropriation of distributable profits, including dividends (Article 158(1) Shōhō). The accounting matters to be resolved upon included, inter alia, the balance sheet, a business report and the profit-and-loss accounts, Article 192 Shōhō. As indicated above in the context of the duty of care, directors had to obtain prior consent from the general shareholders' meeting for commercial transactions which would fall in the same type of business as the company's (Article 175 Shōhō).[1245]

- Decisions on structural and fundamental changes: This category included resolution on the amendment of the articles of incorporation (Articles 208 f.), measures to increase (Articles 213 ff.)[1246] or reduce the registered share capital of the company (Article 220) as well as the dissolution of the company (Articles 221 ff. Shōhō).

In line with the concept of the general omnipotence of the general shareholders' meeting, it was further understood that even if the shareholders' meeting were to resolve on matters outside of the competences expressly assigned to it by statutory law or the articles of incorporation, such shareholders' resolutions were nonetheless considered to be binding upon the company's directors elevating the general shareholders' meeting to indeed the highest decision-making and in fact omnipotent corporate organ in the stock company.[1247] The binding effect of such shareholders' resolutions upon corporate directors may be considered to reflect the origin and lingering proximity of the relationship between shareholders and corporate directors to the civil law mandate, as discussed with respect to the duty of care, which provides for the instruction of the agent (the corporate directors) by the principal (the shareholders). The strong position of the general shareholders' meeting and the position of shareholders in general is further demonstrated by the then requirement that directors and *kansayaku* must be shareholders of the very company with whom they assumed their respective roles contradicting or rather revealing a still

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[1245] If prior consent was not obtained, the general shareholders' meeting still had the option to retroactively ratify the relevant transaction as one on the accounts of the company within a designated time span, Article 175(2), (3) Shōhō. Other self-dealing transactions were subject to clearance by the *kansayaku*, Article 176 Shōhō.

[1246] In this vein, also the issuance of corporate bonds required a shareholders' resolution, see Article 199 in conjunction with Article 209 Shōhō.

[1247] Taku Inoue, *Kōporēto gabanansu no kanten kara mita kabunushi sōkai no arikata ni tsuite: Nihon no kabunushi sōkai no rekishi to jittai wo fumaete* [On the Nature of General Shareholders' Meetings from a Corporate Governance Perspective: History of General Shareholders' Meetings Based on the Actual Situation], 55 Soshiki Kagaku [Organizational Science Review] (2021) 49.

unfamiliarity with the concept of the separation between management and ownership in stock companies.[1248] General shareholders' meeting in the Meiji era are sometimes viewed as approximating the ideal type of shareholders' meetings, since substantive deliberation and consensus-building among the shareholders as well as between shareholders and management took place.[1249] This practice, however, started to fade in the 1900s and 1910s, coinciding with growth and intensification of the Japanese economy, the emergence of institutional investors as well as the formation of corporate conglomerates (*zaibatsu*).[1250]

The next amendment which had a notable impact on the competences of the general shareholders' meeting came in the course of the 1938 Commercial Code Revision which expressly declared that business combinations require the consent by the general shareholders' meeting (Article 408 Commercial Code of 1938). This revision arguably mirrored recent developments in the corporate practice – business combinations and mergers have been discussed in the context of the conglomerate building by the *zaibatsu* – and in effect, it thus also formally expanded the canon of competences assigned to the general shareholders' meeting.[1251] In addition, the requirement that to be eligible for becoming directors and *kansayaku* such persons must be shareholders of the very company was dropped from the Commercial Code, reflecting the legal reality of an emerging or increasing distance between owners and (professional) managers.[1252] Despite the formally still strong position of general shareholders' meeting, in practice due to the advancing of large corporatization and dispersed small

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[1248] Inoue, *supra* note 1247, 49. The eligibility requirement that directors and inspectors must be recruited from the circle of shareholders was set forth in Articles 185 and 191 Kyū-Shōhō, respectively. These provisions were kept in the Shōhō, see Articles 164 and 189 in conjunction with Article 164 Shōhō. With respect to the directors, Article 187 Kyū-Shōhō further stipulated that the required number of shares to be held by directors is to be specified in the articles of incorporation. In addition, the transfer of shares held by directors was restricted during their tenure and share certificates to be deposited with the company, Article 187 sentence 2 Kyū-Shōhō. In the Shōhō, the *kansayaku* assumed the role of the depositary of the directors' shares, see Article 168 Shōhō.

[1249] Yutaka Kataoka, *Meiji-ki ni okeru kabunushi to kabunushi sōkai: Tetsudō-gyō no gappei wo megutte* [Shareholders and General Shareholders' Meetings in the Meiji Period] 23(2) Keiei Shigaku [Business History Review] (1988) 56; Shimada, *supra* note 1236, 88-97 given accounts of general shareholders' meeting of companies in which Shibusawa in his role as shareholder was involved; Inoue, *supra* note 1247, 52 f.

[1250] Kataoka, *supra* note 1249, 56.

[1251] Inoue, *supra* note 1247, 49.

[1252] The previous requirement disappeared under the revised Article 254, with respect to *kansayaku*, in conjunction with Article 280 Commercial Code of 1938. Article 254(2) Commercial Code of 1950 even introduced provision prohibiting the articles of association to require directors to be shareholders.

investors, the shareholder-centric model continued to erode to the benefit of the competences and rights with respect to business operations wandering into the hands of the management.[1253]

b) Reorientation in the course of 1950 Commercial Code Amendment

The encompassing corporate law reforms in 1950 also brought about a turning point for the allocation of competences between the three corporate bodies of a stock company under Japanese law. As previously seen, the role of the *kansayaku* – with an equivalent missing under US-American corporate law – was curbed to the benefit of the board of directors. The most significant change with respect to the authority of the general shareholders' meeting came with the introduction of the new Article 230-2 Commercial Code of 1950 which set forth that shareholders' resolution are required only in matters expressly designated by the Commercial Code or the articles of incorporation entailing in fact a reversal of the previously assumed all-embracing competence or omnipotence of the general shareholders' meeting; the concept as the highest governing corporate body was, however, retained and persists as implicit understanding of nature and role of the general shareholders' meeting.[1254] While the general authority of the general shareholders' meeting was thus trimmed contributing to the overall competence shift in favor of the board of directors, the individual competences afforded by statutory law to the general shareholders' meeting were at their respective core prevalently maintained:

- The elective competence was remained insofar as the shareholders' meeting remains in charge of appointment directors and *kansayaku* (Article 254 for the appointment of *kansayaku*, in conjunction with Article 280 Commercial Code of 1950) and also kept the rights to prior to expiry of their tenure recall directors and *kansayaku* (Article 257, for the removal of *kansayaku*, in conjunction with

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[1253] Asagi, *supra* note 1173, 187.

[1254] Inoue, *supra* note 1247, 50 f.; Murata, *supra* note 1244, 327; Takeo Suzuki/Teruhisa Ishii, KAISEI KABUSHIKI KAISHA-HŌ KAISETSU [Commentary on the Revised Stock Company Law] (1950) 104. The character of the general shareholders' meeting as the highest decision-making organ of the stock company is continued to be upheld, see Michio Ayuse, *Kabushiki sōkai seido wo meguru koremade no riron to denshi kabushiki sōkai* [Previous Discussions Regarding the General Shareholders' Meeting System and Electronic General Shareholders' Meetings], in: Mitsuru Iwamura/Hideki Kanda (eds.), DENSHI KABUSHIKI SŌKAI NO KENKYŪ [Research on Electronic General Shareholder Meetings] (2003) 7; Hiroyuki Kansaku, *Kabunushi sōkai to torishimariyaku-kai no kengen bunpai* [The Division of Competences between the General Shareholders' Meeting and the Board of Directors], 148 Hōgaku Kyōshitsu [Law School Lectures] (1993) 21 f.; Kataoka, *supra* note 1249, 33.

Article 280 Commercial Code of 1950) and the remuneration of both, directors and *kansayaku* (Article 269 Commercial Code of 1950, for *kansayaku*, in conjunction with Article 280 Commercial Code of 1950).

- Similarly, the provisions with respect to the approval of the financial statements and supplementary information of the company (balance sheet, income statement and business report) survived and continued to include a proposal regarding the distribution of profits (Article 283 in conjunction with Article 281 Commercial Code of 1950). In the same vein, the clearance of competitive transactions remained with the general shareholders' meeting (Article 264 Commercial Code of 1950).[1255]

- In the same fashion, the decisions on important structural and fundamental changes such as the amendment of the articles of incorporation (Articles 342 f.), share capital reductions (Article 375), the dissolution as well as business combinations involving the company (Articles 404, 408 Commercial Code of 1950). The authority over capital increases was, however, transferred to the board of directors, unless explicitly provided under statutory law or the articles of incorporation, to facilitate the procurement of capital

Furthermore, structural changes with a minor impact on the overall investor interest such as the implementation of a share split were left to a resolution by the board of directors (Article 293-4 Commercial Code of 1950).[1256] In sum, the authority of the general shareholders' meeting thus in effect shrank to these three areas of key competences above, unless the articles of incorporation expressly subjected specific decisions to the authority of the general shareholders' meeting.[1257]

This relative disfranchisement of active rights was balanced to a certain extent by granting a series of new, however, rather reactive rights such as the derivative action, an inspection right with respect to financial documentation and the removal of directors prior to expiry of their tenure which in the event of grave breaches could be

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[1255] The competence to approve self-dealing transaction, however, was transferred from the *kansayaku* to the board of directors, Article 265 Commercial Code of 1950.

[1256] The allocation of the decision on share splits to the board of directors has been perpetuated for stock companies with a board of directors under the Companies Act, see Article 183(2).

[1257] Suzuki/Ishii, *supra* note 1254, 104 f.

pursued by a lawsuit (Articles 267 ff., 293-6 and 257(3) Commercial Code of 1950).[1258]

The overall fundamental change was perpetuated in the following revisions of the Commercial Code.

c) 1981 Commercial Code Amendment and beyond: Reinvigoration attempts

A change with respect to the competences of the general shareholders' meeting was affected by the 1981 Commercial Code Amendment by which the requirements with respect to the submission of the financial statements (balance sheet, income statement, business report and proposal with respect to the distribution of profits) was thinned out with approval wandering to the board of directors instead, after *kansayaku* and accounting auditor have provided their opinion with respect to their due preparation; the competence to decide on the distribution of profits – and disposal of losses (this clause was added), however, remained and continues to fall in the general shareholders' meeting's competence.[1259]

Corporate law reforms which had an impact on the role of the general shareholders' meeting were in recent decades primarily focused on the revitalization of the general shareholders' meeting under the influence of a practice of extremely condensed general shareholders' meetings and the presence of corporate racketeers (*sōkaiya*).[1260] The statutory law reforms aimed at creating a legal framework to encourage the voice of shareholders by expressly stipulating rights to propose items to the agenda of the

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1258 Maruyama, *supra* note 1164, 286.

1259 Motoki, *supra* note 1185, 178 ff.; Kanzaki/Tatsuta, *supra* note 1184, 254 f.

1260 Inoue, *supra* note 1247, 53 f. It is said that *sōkaiya* were already existent in the Meiji and Taisho periods. However, they are usually associated with the postwar era. Sometimes the distinction between two forms of *sōkaiya* is made, namely one installed by the company to ensure a smooth implementation of the general shareholders' meeting, and another group disrupting general shareholders' meetings. These corporate racketeers tried to extort benefits from the company for their silence. Corporate racketeers cooperating or colluding with the company received benefits from the company in turn for intimidating shareholders and suppressing shareholder proposals. General shareholders' meetings were thus kept very brief. In addition, stable shareholding structures could usually ensure that general shareholders' meeting went smoothly for the hosting company. The provision on benefits to *sōkaiya* was sanctioned by the Commercial Code Revision of 1981. While this banned friendly *sōkaiya*, other *sōkaiya* remained and would extensively ask questions in general shareholders' meetings pinpointing scandals and poor corporate performance. The general shareholders' meeting of Sony on 30 January 1984 which lasted for approximately 13.5 hours is a famous example showcasing the corporate racketeers' practices, Atsuki Ueda, *Kōporēto gabananansu kōdo to kabunushi sōkai: Jizoku-teki kachi sōzō ni muketa kigyō to tōshi-ka to no taiwa* [The Corporate Governance Code and the General Shareholders' Meeting: Dialogue between Companies and Investors towards Sustainable Value Creation], 103 Senshū Shōgaku Ronshū [Senshu University Commercial Science Review] (2016) 116 f.

general shareholders' meeting and to include such proposals in the convocation and public notices (Article 232-2 Commercial Code of 1981)[1261] and to combat the corporate racketeers.[1262] While in general a more active utilization of shareholder's proposal rights has been registered, which is ascribed to the increasingly active role of institutional investors, in response to and to henceforth filter out abusive uses of the shareholder's proposal rights, the number of proposals of a shareholder of which the company notifies the other shareholders has been limited to ten matters (Article 305(4) Companies Act).[1263]

d) Companies Act and status quo

Apart for some reshufflings, such as that the general shareholders' meeting regained the authority to approve the financial statements, the balance of powers introduced in the prewar era was not touched upon to a significant degree under the carve-out and consolidation of the statutory provisions pertaining to companies under the Companies Act (Law No. 86 of 2005).

A with respect to large stock companies rather marginal change was the integration of an alternative to remove the board of directors. For such stock companies, Article 295(1) Companies Act provides that the general shareholders' meeting may resolve on matters assigned to by the Companies Act, plus any other matter pertaining to the "*organization, operations, and management of the corporation and any other*

[1261] Inoue, *supra* note 1247, 50. The explicit stipulation of such shareholders' proposal rights was necessary, since the previous provisions were construed as to mean that due to the general shareholders' meeting being convoked by the board of directors, the authority of the board of directors would also extend to exclusively setting the agenda of the general shareholders' meeting with shareholders consequently being limited to proposals with respect to agenda items, see Motoki, *supra* note 1185, 85 ff. Shareholder proposal rights pursuant to Articles 303 ff. Companies Act remain in the focus of lawmakers in Japan, see on recent reforms which primarily address the combat of abuses of the shareholders' proposal rights, Yasue Nakamura, *Kabunushi teian-ken no kyō-teki igi to sono seido-teki genkai* [Today's Significance of Shareholder Proposal Rights and its Institutional Limits], 405/406 Ritsumeikan Hōgaku [Ritsumeikan Law School] (2022) 508 ff.

[1262] It required a revision and stricter penalties (for acting individuals of colluding companies) by virtue of the 1997 Commercial Code Amendment to eventually quench the *sōkaiya* practice in the late 1990s and early 2000s. In addition, companies had responded by implementing organizational measures to unilaterally control the proceedings at general shareholders' meetings, Inoue, *supra* note 1247, 54 f.; Ueda, *supra* note 1260, 117 ff.

[1263] Nobuo Nakamura, *Revision of the Japanese Companies Act in 2019 and some changes in legal rules regarding corporate governance*, 40 Waseda Bulletin of Comparative Law (2020) 29 f., who also reports that the deliberation to ban defamatory or harassing shareholder's proposals was taken off the agenda with a view to the general abuse of rights rule for which could be relied on to address such proposals, *ibid*., 30.

matters relating to the corporation".[1264] For stock companies with a board of directors – which are the sole focus of this investigation into the legal instruments – the general shareholders' meeting's competences are limited to those set forth in the Companies Act or in the articles of incorporation. This in the bigger picture arguably subtle change, however, spurs the discussion on the general allocation of competences between the board of directors and the general shareholders' meeting for companies with a board of directors, or to be more precise, whether there are limitations as to which matters can be delegated to decisions by the general shareholders' meeting by virtue of the articles of incorporation based on Article 295(2) Companies Act.[1265] The school of thought supporting the existence of certain limitations on the general clause that the general shareholders' meeting resolves on matters stipulated in the articles of incorporation (besides those matters specified in the Companies Act) argues that small stock companies in which ownership and management are not clearly separated and which thus sought to subject matters to the consent of the general shareholders' meeting are given the choice to opt for the model of a stock company without a board of directors; in stock companies with a board of directors it is thus understood that authority over decision-making on all business matters at least cannot be conferred to the general shareholders' meeting, as this would leave the corporate organ of the board

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1264 Araki/Saito, *supra* note 79, 293.

1265 Hideki Matsui, *Teikan ni yoru kabunushi sōkai ketsugi jikō no kakudai to sono genkai* [Expansion of Matters to be Resolved at the General Shareholders' Meeting by the Articles of Incorporation and its Limitations], 63 Tōyō Hōgaku [Toyo Law School Review] (2020) 187 ff. The debate is sparked primarily with respect to the competences (i) on the appointment and removal of representative directors (Article 362(2) (iii) Companies Act), and to a lesser degree also with respect to (ii) decisions on the execution of certain important business matters, such as the disposal or transfer of important assets (Article 362(4)(i) Companies Act) which by the letters of the law are assigned to the entire board of directors which can be construed as an exclusive competence of the board of directors, or as concurrent competences of both the board of directors and the general shareholders' meeting, *ibid*. Under the Commercial Code, the majority of scholarship tended to the interpretation that if the articles of incorporation assign the authority to appoint representative directors to the general shareholders' meeting, this would then exclude the board of directors from any decision in this respect, see Chikako Suzuki, *Torishimariyaku-kai sochi kaisha ni okeru daihyō-torishimariyaku no sentei / kaishoku no kettei ni kansuru teikan jichi* [Autonomy under the Articles of Incorporation on the Appointment and Dismissal of Representative Directors in Companies with a Board of Directors], 132 Hōgaku Seijigaku Ronkyū [Journal of Legal and Political Studies] (2022) 2, 6. While the existence of concurrent authority of both the general shareholders' meeting and the board of directors bears the potential for confusion as well as potential friction due to the board of directors being responsible for supervision of the representative director, the stance in the academic debate appears to tend to accept such ambiguity which can, however, be clarified through amendment of the articles of association. While the existence of concurrent competences has been sanctioned by the Supreme Court for private companies, the tendency can be observed to extend the interpretation to public companies, Supreme Court Decision, 21 February 2017, in: 71 Saikō Saiban-shō Minji Hanrei-shū [Supreme Court Case in Civil Matters] 195-220, 195; Suzuki, *ibid*., 10 ff., 13.

of directors without any competences and thus render it de facto meaningless.[1266] Large stock companies on the other hand typically have a large number of shareholders which do not entertain any close ties or a relationship of mutual trust, nor would they have any willingness or capability to participate or intervene in decisions on business operations[1267], and that the general shareholders' meeting in therefore not the appropriate corporate body to make decisions on individual business matters, plus it would be rather desirable that directors operate the business without being bound by instructions articulated through resolutions of the general shareholders' meeting.[1268]

In effect, the competences of the general shareholders' meeting in stock companies with a board of directors boils down to the following categories of competences:

- In the category of elective competences, the general shareholders' meeting appoints and dismisses, inter alia[1269], directors and *kansayaku* (Articles 329(1), 339(1) Companies Act) and also determines their compensation unless this matter is addressed in the articles of incorporation (Articles 361(1), 387(1) Companies Act, respectively) and is afforded the authority to decide on the limitation of liability of, inter alia, directors and *kansayaku* (Article 425(1) Companies Act).

1266 Matsui, *supra* note 1265, 189 f.; Shigeyuki Maeda, *Dai-295-jō* [Article 295], in: Toshio Sakamaki/ Misao Tatsuta (eds.), CHIKUJŌ KAISETSU KAISHA-HŌ [Article-by-Article Commentary on the Companies Act], Volume 4 (2008) 35. On the other hand, a significant share of small, manager-owned enterprises conducting business as stock companies still maintains a board of director, Matsui, *ibid*., 192 f.; Accenture, *Heisei 29-nendō waga kuni chūshō no kōzō bunseki oyobi kōzō henka no shōrai suikei ni kakaru itaku jigyō hōkoku-sho* [Commissioned Business Report on the Structural Analysis of Small- and Medium-Sized Enterprises and Future Estimations of Structural Changes in 2017] (2018), available under: https://www.chusho.meti.go.jp/pamflet/hakusyo/H30/h30/image/b1_4_24.png (last accessed 26 April 2024). At the same time, Article 2(vii) Companies Act defines a company with a board of directors as a company that has one as well as a company that is required to have one under the provisions of the Companies Act which gives rise to the question whether both groups of companies, the group with voluntary boards of directors and the group with mandatory boards of directors can be treated equally with respect to the allocation of competences between the general shareholders' meeting and the board of directors, see Suzuki, *supra* note 1265, 3, 14.

1267 Matsui, *supra* note 1265, 190; Kansaku, *supra* note 1254, 22 f.

1268 Matsui, *supra* note 1265, 191; Masao Yanaga, *Hitokabu undō to kaisha-hō* [One Share Movement and Corporate Law], 1050 Juristo (1994) 109. In addition, binding directors to resolutions of the general shareholders' meeting with respect to individual business decisions would cause frictions with the liability of directors in accordance with Article 423(1) Companies Act, as directors may be induced to seek shareholders' consent to avoid their liability risk for certain business decisions, Matsui, *ibid*., 191.

1269 The same competences (appointment, dismissal and compensation) also pertain to accounting advisors, financial auditors and liquidators, see Articles 329(1), 478(1)(i), 479(1) and 379(1), 482(4) Companies Act.

- Decision on matters with material impact on shareholders' financial interests, such as the approval of financial statements (Articles 438(2), 441(4) Companies Act), the distribution of dividends (Article 454(1) Companies Act)[1270], the consolidation of shares (Article 180(2) Companies Act), the sale of treasury shares (Articles 199(2), 201(1), 202(3)(iv) Companies Act) and the issuance of stock options (Articles 238(2), 240(1), 241(3)(iv) Companies Act) as well as the retirement of the company's own shares (Articles 156(1), 160(1), 175(1) Companies Act).

- Decision on fundamental and structural changes of the company, such as the amendment of the articles of incorporation (Article 466 Companies Act), increases (Articles 199(2), 201(1), 202(3)(iv) Companies Act) and decreases of the registered share capital (Article 447(1) Companies Act), reduction of the company's reserves (Article 448(1) Companies Act), the company's dissolution (Article 471(iii) Companies Act), organizational changes and restructurings of the company through mergers, company splits, share exchanges and transfers (Articles 783(1), 795(1), 804(1) Companies Act). An interesting aspect from a comparative law viewpoint is Article 467 Companies according to which the approval of the general shareholders' meeting is required if the transfer of the entire business (Article 467(1)(i)), significant parts of it (Article 467(1)(ii)) or other significant assets such as a significant equity share in a subsidiary (Article 467(1)(ii)-2) is intended. Under German corporate law, the competence of the general shareholders' meeting in the latter constellation has only been established on the basis of case law.[1271]

- An unwritten category is the introduction and activation of defensive measures against potential takeovers which can be made subject to the approval of the general shareholders' meeting with such resolution, however, usually regarded as merely advisory. The matter is different if the articles of incorporation

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[1270] Within the limits of the requirements set forth in Article 459 Companies Act, a company may in its articles of incorporation confer this decision to the board of directors, which is, however, not viewed as excluding the general shareholders' meeting from resolving on the matter, unless it is expressly barred from doing so by virtue of the articles of incorporation which is possible within the limits of Article 460 Companies Act. In practice, such restriction of the competence of the general shareholders' meeting as drawn criticism by institutional investors in recent years, see Maeda, *supra* note 1266, 37.

[1271] Eiji Takahashi, *Die Zukunft des japanischen Konzernrechts – Die Reform des Aktienrechts von 2014* [The future of Japanese law on corporate groups – The stock company law reform of 2014] in: Takahashi, *supra* note 96, 243.

provide for the requirement of the approval of the general shareholders' meeting for the introduction or adoption of defensive measures.[1272]

e) Interim conclusion

In the context of the afore-mentioned revitalization efforts, it has been pointed out that by statutory law shareholders of Japanese stock corporations have a comparatively strong position.[1273] Eventually, the development of the competences and thus relevance of the shareholders' meeting is largely consonant with the tendencies in other jurisdictions such as the □nited States, the □nited Kingdom, France and Germany; however, there are nuances between these jurisdictions. The common denominator can be identified in the lessening influence of the general shareholders' meeting in comparison to the situation at the beginning of the twentieth century, especially in relatively dispersed stock companies in capital-intensive industries such as railway and spinning, precipitated by the decreasing relevance of corporate investment being sourced from the shareholders through their capital contributions in form of the paid-in capital upon incorporation and the ensuing capital increases.[1274]

4. Takeover Law

In this section, the mechanics of the takeover statute shall be examined. Takeover law tends to include a swathe of provisions on informational and procedural securities aimed at ensuring a fair bidding process. The focus of this section, however, are less these procedural norms, but rather the substantive legal instruments provided by lawmakers to balance at the interests at stake in the event of a hostile takeover, such as through mandatory bid rules if certain thresholds of control are passed to award minority shareholders a chance to exit the company (which is the model in the United Kingdom and influenced thereby also in the European Union[1275]) provisions such mandatory bids, the development of judicial doctrine of intermediate standards based on fiduciary principles (which is the model in the United States) or out of minimum standards of statutory law which have become supplemented by soft law (which is the model in Japan) to adjudicate the permissibility of management intervention in cases

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[1272] Maeda, *supra* note 1266, 37 f.
[1273] Inoue, *supra* note 1247, 50.
[1274] Kataoka, *supra* note 1249, 34; Inoue, *supra* note 1247, 52.
[1275] See The City Code on Takeovers and Mergers Code (11 December 2023, first published in 1968), Rule 9; Directive 2004/25/EC on Takeover Bids (of 21 April 2004), Article 5.

in which management steps outside the ground of neutrality, such as the adoption of defensive measures like shareholder plans to frustrate the tender offer.[1276]

Both, hostile and friendly, takeovers were not uncommon in the prewar era.[1277] Hostile takeovers, for example, occurred in the consolidation of the private railway companies in the 1930s.[1278] Friendly takeover were, for example, were a growth strategy employed by *zaibatsu* and emerging *zaibatsu* in the economic downturn in the late 1920s, when they acquired and integrated outside companies in financial difficulties into their conglomerates; the acquisition of stocks of such distressed, financially ailing companies was accompanied by involvement in the management.[1279] In general, the occurrence of takeovers underlines and ties into the image of a relatively strong position and say of shareholders which has already become evident through analysis of the dividend payout ratios and comparison between the postwar and prewar periods (see Chapter III, supra subsection III.2). The emergence of stable ownership structures with cooperating shareholders in the postwar era were further not conducive to establishing takeovers as a corporate governance mechanism. Nonetheless, statutory provisions pertaining to procedural aspects of takeovers existed since the early 1970s.

a) Early regulation in the 1970s and the primary purpose-doctrine

Prior to 1971, the legal instruments covering legal conflict in relation to corporate takeovers were rather limited and there were no provision with respect to tender offers.[1280] To begin with the constellation of management intervention aimed at frustrating a hostile takeover bid, statutory law only provided for two potential avenues to adjudicate such cases: Firstly, the Revised Commercial Code of 1950 granted shareholders the right to seek an injunction from a court "*if the company issues shares*

1276 For an overview of the takeover regulation in these three jurisdictions, see Armour/Jacobs/Milhaupt, *supra* note 782, 12-48. Takeover regulation in Japan is thus widely viewed as constituting a legal transplant, see, for example, Umakanth Varottil/Wai Yee Lee, *Hostile Takeover Regimes in Asia: A Comparative Approach*, 17 Berkeley Business Law Review (2019) 267-305, 286.

1277 Eiji Takahashi, *Unternehmensübernahmen in deutschem und japanischem Kontext – Betrachtung von Aktionärsstrukturen, externe Corporate Governance und Unternehmensverständnis in Japan* [Takeovers in German and Japanese Contexts – Considerations on Ownership Structures, External Corporate Governance and the Concept of the Corporation in Japan], in: Takahashi, *supra* note 96, 289.

1278 Okazaki, *supra* note 1236, 446 ff.

1279 Okazaki, *supra* note 1236, 448 ff. The *zaibatsu* thus also functioned as a corporate governance mechanism which earned *zaibatsu*-affiliated companies a share premium general investors were willing to pay, when such companies started to go public in the 1930s, *ibid*., 450.

1280 Hideaki Seki, ÜBERNAHMEANGEBOTE IM JAPANISCHEN RECHT [Tender Offers under Japanese Law] (1976) 34.

either in contravention of any law or ordinance or of the articles of incorporation or in a grossly unfair manner [*or at a grossly unfair price*] *and there is any fear of shareholders suffering pecuniary disadvantage thereby*" (Article 280-10 Commercial Code).[1281] While capital increases were subject to the approval of the general shareholders' meeting, for the activation of defensive measures the board of directors could initially rely on authorized, but unissued share capital and the allotment to specific shareholders (Article 280-2(2) Commercial Code). The test under Article 280-10 Commercial Code effectively boiled down to whether a share issuance (i) breaches statutory provisions or (ii) is grossly unfair with the statutory breach aspect becoming virulent when the shares are issued below the market price which renders an issuance "particularly beneficial" within the meaning of Articles 280-2(2) Commercial Code triggering the approval requirement of a supermajority vote.[1282] In addition, and as seen above (supra subsection II.2), the law provided for fiduciaries duties in the forms of the duty of care, the duty of loyalty or a combination of both which could have been relied on as standards to review the legitimacy of acts undertaken by the management in the course of business operations.[1283]

In addition, the amendment of the Securities Exchange Act in 1971 (Law No. 25 of 1948)[1284], which was the legislative response to a rise of business combinations in the late 1960s, introduced procedural regulation modelled after the changes introduced by the Williams Act into the United States' Securities and Exchange Act.[1285] The protection of shareholders, especially of domestic investors against foreign acquirors, and the safeguarding fair securities trading were cited as the motives for the adoption as well as the monitoring of foreign direct investment.[1286] The latter aspect is

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1281 The translation is oriented at Minoru Tokumoto, *The Role of the Japanese Courts in Hostile Takeovers*, 27 Law in Japan (2001) 4. While the part in parentheses was included in the version following the 1950 Commercial Code Amendment, it had been dropped from the language of the provision later on. The provision itself has been carried over into the Companies Act without any additional material changes, see Article 210 Companies Act.

1282 Soichiro Kozuka, *Recent Developments in Takeover Law: Changes in Business Practices Meet Decade-Old Rule*, 21 Journal for Japanese Law (2006) 5-18, 10.

1283 On the relevance of fiduciary duties in the context of takeover transactions, see Kenichi Osugi, *Market for Corporate Control in Japan*, 3 UT Soft Law Review (2011) 7.

1284 The amendment was affected by the Law amending a part of the Securities Exchange Act (Law No. 4 of 1971). The relevant provisions were Articles 27-2 through 27-8 Securities Exchange Act (*Shōken Torihiki-hō*).

1285 Tomotaka Fujita, *The Takeover Regulation in Japan: Peculiar Developments in the Mandatory Offer Rule*, 3 UT Soft Law Review (2011) 24-46, 25; Mitsuru Misawa, *Merger and Acquisitions Activities in Japan: the Present and the Future*, 19 Vanderbilt Law Review (1986) 785-809, 791 f., 802 (table 1).

1286 Seki, *supra* note 1280, 35 f.; Baum, *supra* note 897, 409; Misawa, *supra* note 1285, 788 ff.

underlined by the Article 27-2(1) Securities Exchange Act (SEA, 1971) which required a bidder to register the takeover bid with the Ministry of Finance ten days prior to its publication.[1287] Only tender offers with respect to the purchase of at least ten per cent of the outstanding shares of the target company by a legal entity or a natural person fell in the scope of the registration obligation; for the calculation of the ten per cent threshold the shares of specific related parties were imputed.[1288] Following the US model, it was left to the discretion of the acquirors how many shares between ten and 100 per cent of the outstanding shares they intended to purchase and consequently bid for.[1289] With the focus on procedural aspects, the regulation remained, however, fragmentary at best.

While the market of corporate control was lay largely idle due to closely-knit, stable (majority) ownership structures – only three tender offers have been counted in the two decades between 1971 and 1990[1290], – Japanese companies were occasionally confronted with speculative operations of greenmailing, meaning threating a takeover in order to resell the shares at a higher price to the target company.[1291] In such cases, Japanese listed stock companies resorted to the tactic of issuing authorized, but yet unissued shares to friendly companies under exclusion of the potential acquiror thus diluting the potential acquiror's share.[1292] Since the duty of loyalty was still comparatively undeveloped[1293], and in the absence of any other substantive

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1287 Seki, *supra* note 1280, 37 ff. Article 27-2(1) SEA included both the tender offer for purchase as well as sale of shares.

1288 See Article 8(1)(a)(aa) through (gg) Shōken Toihiki-hō Shikō-rei (Enforcement Order pertaining to the Securities and Exchange Law) (Order No. 150 of 1971).

1289 Seki, *supra* note 1280, 59 ff.

1290 Hideki Kanda, *Comparative Corporate Governance Report: Japan*, in: Klaus J. Hopt/Hideki Kanda/Mark J. Roe/Eddy Wymeersch/Stefan Prigge (eds.) COMPARATIVE CORPORATE GOVERNANCE: THE STATE OF ART AND EMERGING RESEARCH (1998) 921-942, 935.

1291 Takahashi, *supra* note 1277, 294.

1292 Takahashi, *supra* note 1277, 294 ff. The issuance of new shares had been facilitated through the adoption of the instrument of authorized capital and the exclusion of the subscription right of existing shareholder by virtue of the articles of incorporation in the course of the 1950 Commercial Law revision which had aimed to simplify the raising of capital and for this purpose transferred authority therefor to the board of directors (Articles 280 ff. Commercial Code), see Minoru Tokumoto, TEKITAI-TEKI KIGYŌ BAISHŪ NO HŌRIRON [Legal Theory of Hostile Takeovers] (2000) 16 f., Fn. 1. On the other hand, golden shares, a mechanism adopted by public companies in different jurisdictions in Europe, only became available in the course of the 2001 Commercial Code Revision, see Oda, *supra* note 1088, 17 ff. (now to be found in Article 108(1) no. 8 Companies Act). Under listing rules, public companies may only adopt them under specific circumstances. There is only one public company known to have golden shares (Inpex Corporation which reflects the classic patterns of state-owned companies transitioning into private companies), see Toshima, *supra* note 424, 43.

1293 Enrico Colcera, THE MARKET FOR CORPORATE CONTROL IN JAPAN: M&AS, HOSTILE TAKEOVERS AND REGULATORY FRAMEWORK (2007) 142 f.

benchmarks provided by statutory law, Japanese courts primarily relied on the interpretation of Article 280-10 Commercial Code, especially on the clause of a share issuance "*in a grossly unfair manner*" to adjudicate cases in which the target company issued shares to thwart the potential acquiror's bid or demands.[1294]

For this purpose, Japanese courts devised the primary purpose doctrine with the first case initiating this jurisprudence being said to hark back to 1952.[1295] Beginning with this case, Japanese courts sought to analyze the purpose which the target company pursued with the issuance of the new shares. In the initial case, the court could not find that the company pursued any grossly unjust purpose by the share issuance, but that the share issuance served the raising of capital for financing purposes and thus defeated the claimant's motion for (provisional) injunctive relief.[1296] The primary purpose doctrine was further refined by a decision in the early 1970s, in which the court not only reviewed whether or not the share issuance served financing purposes, but whether the actions of the target company were in fact motivated by any other subjective main purpose or intention.[1297] The final building block of the primary purpose doctrine was contributed by the latter of two cases dealing with takeover bids with the target company Miyairi Valve in which the court applied an objective review standard when it establish the primary purpose of the share issuance and concluded that there would be no sufficiently substantiated prima facie evidence that the shares were issued to raise capital for business operations.[1298] This jurisprudence thus boiled down to the test that share issuance were not considered to be grossly unfair as long as the target company could demonstrate the necessity of raising capital which sparked criticism insofar as it came down to a *petitio principii* as the ordinary course of business operations regularly bring about the necessity for raising capital.[1299] In line

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1294 Tokumoto, *supra* note 1281, 4.

1295 Takahashi, *supra* note 1277, 295.

1296 Takahashi, *supra* note 1277, 295.

1297 Osaka District Court Decision, 29 November 1973, in: 731 Hanrei Jihō [Case Law Review] 85-95, 94; Takahashi, *supra* note 1277, 296.

1298 Tokyo District Court Decision, 5 September 1989, in: 1323 Hanrei Jihō [Case Law Review] 48-51, 51, and Decision, 2 December 1988, in: 1302 Hanrei Jihō [Case Law Review] 146-150, 147; Tokumoto, *supra* note 1281, 7 ff.; Takahashi, *supra* note 1277, 296.

1299 Tokumoto, *supra* note 1281, 12 f. The court, however, did not query the low subscription price which entailed a significant discount to the market price, see Baum, *supra* note 1089, 150. Courts tended to orient their decision of the fairness of the price at the market price, however, discounting share price surges following the emergence and purchases of the bidder. The Japan Association of Securities Dealers (JASD) eventually adopted a voluntary rule that new shares issuances to a party designated by the management should be implemented at a share price equivalent to at least ninety per cent of the average market price in the preceding six months with the six-month period later

with this generous sanction of the utilization of share issuances by takeover targets through Japanese courts, there has only been one case until 1990, in which the court held that the share issuance was grossly unfair in the absence of any necessity to raise capital of the two companies involved which had issued shares to each other as a defensive measure.[1300]

b) Major revision in 1990

A comprehensive revision of the pertaining provisions in the Securities Exchange Act (SEA) entered into effect on 1 December 1990 (Law No. 43 of 1990). The intention of this amendment was to improve the reputation of the Japanese capital market as well as the adjustment of the existing fragmentary regulation increasingly perceived as insufficient in comparison with international standards and harmonization with such standards (such as lowering the threshold triggering the application of the tender offer procedure from ten to five per cent), thus ultimately also contributing to the protection of shareholders' interests.[1301] The market of corporate control had virtually shut out any foreign acquirors with the few transactions which succeeded being rather failing targets than firms with promising growth prospects.[1302] Arguably the two key elements of the revision are, (i) the definition of the takeover bid (*kōkai kaitsuke*) in Article 27-2(6) SEA as "*the act of soliciting offers for purchase or sale of shares to a large and unspecified number of persons through public notice and purchasing stocks outside of a securities market*"[1303], and (ii) the introduction of a mandatory bid rule in Article 27-2(1) SEA which is triggered if a person that is not the issuer purchases shares of the company outside of financial instruments exchange markets from more than ten other person within a sixty-one day period, thereby bringing its stake above the five per cent threshold, with, however, several exemptions from such rule which in turn do not apply if an acquiror obtains a stake that exceeds one third of the voting shares in the target company (Article 27-2(1)(ii) SEA).[1304] Significant exemptions are

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being dropped and changed to the day prior to issuance with a preceding period of up to six month only to be taken into account where appropriate, Kozuka, *supra* note 1282, 11 f.

1300 Tokyo District Court Decision, 25 July 1989, in: 1317 Hanrei Jihō [Case Law Review] 28-35; Tokumoto, *supra* note 1281, 12, Fn. 32a. In this decision, the significant discrepancy between market and subscription prices was taken into account, Tokyo District Court, *ibid.*, 35.

1301 Junichi Naito, *Kabushiki kōkai-kaitsuke seido no kaisei* [The Revision of the Tender Offer System], 1208 Shōji Hōmu [Commercial Law Review] (1990) 4 f.

1302 Gerlach, *supra* note 59, 91.

1303 The term "share" is a bit vague in this context as other securities such as, *inter alia*, convertible bonds are likewise covered, while non-voting shares fall outside the scope.

1304 Fujita, *supra* note 1285, 25. The determination of the five per cent threshold as well as of the one third of the outstanding shares has been simplified for the purpose of this thesis; the rules provide

that purchases in the securities markets – on stock exchanges as well as through transactions in over-the-counter securities markets or through proprietary trading systems – as well as issuances of new shares do not trigger the mandatory bid rule for both, the five percent and the one-third block purchases equally (Article 27-2(1)(ii) SEA) underlining the lawmakers' intention to restrict non-transparent, private control acquisitions.[1305] Another notable change came with the adoption of an ownership disclosure rule on investors holding more than five per cent of the voting shares in a stock company (Article 27-23(1) SEA, now Article 103-3 FIEA).[1306] While disclosure statements were overseen by the Financial Services Agency (FSA), its competences were rather limited and it could thus not assume an active supervisory role such as the Takeover Panel did in the United Kingdom.[1307]

The adoption of the mandatory bid provision marks the introduction of change-of-control considerations into takeover regulation in Japan. With respect to the scope, it is noteworthy that the mandatory bid rule only applied to share purchases outside securities markets, open market purchases remain outside the scope of the mandatory bid rule (Article 27-2(1) SEA). Especially when approaching takeover regulation in Japan from a comparative law angle, it should be noted that mandatory bid applies to very purchase by which the one-third threshold is exceeded, meaning that the very acquisition by which control in the target company is established is subject to the mandatory offer rule, for better illustration one may refer to this mechanism as "*ex-ante offer*".[1308] The takeover regulation remains silent on any minimum price of the tender offer and leaves it to the market forces to decide whether or not an offer price is fair.[1309] A factor which may help shareholders to assess the fairness of a price offer, may be the opinion of the target company' s management on the takeover bid, which under the 1990 regulation is, however, only optional (Article 27-10(1) SEA). When referring to the mandatory bid rule, it should be noted that the rule in the context of Japanese takeover law does not impose on the acquiror the obligation to purchase all

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for several constellations where shares are imputed to a bidder based on a special relationship between bidder and the other person. In addition, several exemptions were added to the mandatory bid rule, see, for details, Baum, *supra* note 897, 410 f.

1305 Fujita, *supra* note 1285, 31.

1306 Shōken-hō Seido Kenkyū-kai [Securities Law Research Association] (ed.), CHIKUJŌ KAISETSU SHŌKEN TORIHIKI-HO [Article-by-Article Commentary on the Securities Exchange Act] (1995) 312 ff.; Kanda, *supra* note 1290, 934 f.; Baum, *supra* note 1089, 156 ff.

1307 Osugi, *supra* note 338, 151.

1308 Fujita, *supra* note 1285, 28 f.

1309 Fujita, *supra* note 1285, 29.

outstanding shares in the target company, but it is left to the acquiror's discretion to only aim for a partial acquisition.[1310]

c) Revisions in the 2000s

While the market for corporate control through hostile – the market for friendly acquisitions was livelier – takeovers remained overall muted following the 1990 amendment, the pace picked up towards the end of the decade.[1311]

aa) 2005 Amendment

The revision of the incumbent rules on the tender offers aimed to ensure fair competition with respect to the market for corporate control as well as improving information of shareholders.[1312] In addition, the takeover bids and cases adjudicated by courts, called the legislator into action to clarify and amend gaps in the incumbent legal framework, such as with respect to the mandatory bid rule only being triggered by share purchases outside securities markets which became virulent in the salient NBS vs Livedoor decisions, since the acquiror partially built its equity position in the target company through shares purchases in the pre- and post-market trading hours which in the interpretation of the Tokyo High Court did not violate the provisions in the Securities Exchange Act, thus not triggering the mandatory bid rule.[1313] This interpretation was confirmed by the lawmakers in 2005, when the category of "designated purchase and sale" was been introduced to accommodate off-floor transactions, such as through the ToSTNeT trading system of the Tokyo Stock Exchange, since such transactions effectively present over-the-counter transactions.[1314]

1310 Fujita, *supra* note 1285, 29 f.

1311 Kanda, *supra* note 1290, 935 f.; Fujita, *supra* note 1285, 26. For a compilation of the cases during this period, see Colcera, *supra* note 1293, 101-132.

1312 Shirai, *supra* note 1314, 168.

1313 Tokyo High Court Decision, 23 March 2005, 1728 Shōji Hōmu [Commercial Law Review] 41-50. There were altogether three court decisions, the two first instance decisions being rendered by the Tokyo District Court on 11 March 2005, 1726 Shōji Hōmu [Commercial Law Review] 47-59, 57 f., and 16 March 2005, 1726 Shōji Hōmu [Commercial Law Review] 59-62, respectively. The primary focus of the decision lay on the permissibility of the defensive measures, see, for details on this decision, Kenichi Osugi, *Transplanting poison pills in foreign soil: Japan's experiment*, in: Kanda/Kim/Milhaupt, *supra* note 1230, 44 ff.; Colcera, *supra* note 1293, 118-125.

1314 Securities Exchange Law Amendment (Law No. 76 of 2005); Article 27-2(1)(iii) SEA (as of 2005); Fujita, *supra* note 1285, 26; Masakazu Shirai, *Characteristics of the Japanese Tender Offer System and its Rationale*, in: Fleischer/Kanda/Kim/Mülbert, *supra* note 1212, 163.

bb) 2006 Amendment

The activity of lawmakers culminated in another amendment in the next year.[1315] One aspect was to further to extend the application of the mandatory tender offer, but covering evasive strategies such as the rapid combined purchases of share blocks through on- and off-market transactions with an aggregate purchase of more than ten per cent of the outstanding shares over a period of three month shares in excess of ten per cent being considered to indicate the rapidness of such purchase (Article 27-2(1)(iv) FIEA).[1316]

The revision introduced the acquiror's obligation to purchase all outstanding shares of the target company (buy-all requirement): This obligation was triggered if an acquiror intended to obtain shares with voting rights exceeding two thirds of the total shares with voting rights in the target company (Article 27-13(4) FIEA). With the introduction of this obligation, it was considered that the Japanese lawmaker had acknowledged and embraced the position to protect the target company's minority shareholders' interest by awarding them the opportunity to exit the target company.[1317] The revision also included the rule on competing tender offers which in effect extends the prohibition of separate purchases which the bidder is subject to throughout the tender offer period to other major shareholders who are obliged to likewise make a tender offer if such shareholder were to make purchases of major blocks after release of the tender offer (Article 27-2(1)(v) FIEA).[1318] Other notable revisions focused on the tender offer process:

- The previously optional opinion of the target company's management was made mandatory (Article 27-10 FIEA), tying into an overall expansion of information disclosure (Article 27-3 FIEA).

- The bidder's maneuverability was increased through reducing the requirements to change the conditions of a takeover bid or withdraw a takeover bid (Cabinet

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1315 Securities Exchange Law Amendment (Law No. 65 of 2006) with the Securities Exchange Law changing its title to Financial Instruments and Exchange Act (FIEA).

1316 Shirai, *supra* note 1314, 163 f.

1317 Fujita, *supra* note 1285, 28, 30 f.; Shirai, *supra* note 1314, 167. The necessity to grant minority shareholders with a way out of the target company may at least partially be alleviated due to the existence of appraisal rights, see, for more details on the appraisal rights mechanisms, Alan K. Koh, *Appraising Japan's Appraisal Remedy*, 62 The American Journal of Comparative Law (2014) 417 ff.

1318 Shirai, *supra* note 1314, 164 ff. The prohibition of share purchases outside of the tender office had already been introduced in the 1971 amendment (Article 27-4(2) SEA), see Seki, *supra* note 1280, 46 f.

Order on Disclosure with Respect to the Tender Offer of the Shares, etc., by Persons other than the Issuer, Article 14(1)). At the same time, the target company could not request the extension of the takeover period under certain circumstances (Article 27-10(3) FIEA). These measures contributed to enhance the flexibility of the bidding process.

- Following up on the market purchase exemption to close existing gaps in the regulatory regime, the combined purchase method to circumvent the mandatory bid rule was prohibited under the new regulation (Article 27-2(1)(iv) FIEA). The combined purchased method refers to the combination of stock purchases from shareholders in private and from the securities markets.[1319]

On the institutional plane, a supervisory body with competences to review whether the tender process with respect to aspects such as correctness and appropriateness of the information provided and the time frame designated by the potential acquirer remains absent in Japan, leaving discretion to the board of directors of the target company.[1320]

cc) Guidelines on defensive measures

Taking up the thread of the primary purpose doctrine, despite contributions by the jurisprudence to carve-out requirements for defensive measures, legal uncertainty with respect to which legal instruments would be permissible for the purpose of defensive measures persisted in the 2000s.[1321] In response to this uncertainty and the climate of a general anxiety among the business community in view of receding levels of stable cross-shareholdings and the perceived exposure as transaction and takeover target of foreign acquirors, the Ministry of Economy, Trade and Industry (METI) jointly with the Ministry of Justice (MoJ) issued so-called Guidelines on Takeover Defenses in 2005 (the "2005 Guidelines")[1322], in which poison pill defensive strategies developed by an advisory committee, the so-called Corporate Value Study Group, in its report, the Corporate Value Report (27 May 2005) based on studies of, especially the US

1319 Fujita, *supra* note 1285, 27.

1320 Osugi, *supra* note 338, 155.

1321 Hideki Kanda, *Takeover defenses and the role of law: a Japanese perspective*, in: Michel Tison/Hans de Wulf/Christoph van der Elst/Reinhard Steennot (eds.), PERSPECTIVES IN COMPANY LAW AND FINANCIAL REGULATION: ESSAYS IN HONOUR OF EDDY WYMEERSCH (2009) 413-422, 414.

1322 METI/MoJ, *Guidelines regarding Takeover Defenses for the Purpose of Protection and Enhancement of Corporate Value and Shareholders' Common Interests* (27 May 2005), English translation available under: https://www.meti.go.jp/policy/economy/keiei_innovation/keizaihousei/pdf/shishin_hontai.pdf (last accessed 8 May 2024).

corporate practice and precedents, were incorporated.[1323] In line therewith, the 2005 Guidelines seek to create a safe harbor and standard for the adoption of defensive measures against unsolicited bids, oriented at a triad of principles, namely (i) the protection and enhancement of corporate value and thus ultimately shareholders' common interests, (ii) prior disclosure of defense measures with such measures to reflect the shareholders' intent, and (iii) defense measures are required to be necessary and reasonable in relation to the takeover threat.[1324]

dd) NBS, Nireko and Bull-Dog-Sauce cases

In a short span of time, an awakening of the corporate of control market precipitated the emergence of three precedents.

(1) NBS case and aftermaths

On the case law front, the primary purpose doctrine was further refined and morphed into a more substantial standard following the precedent set in the NBS vs Livedoor case (the "NBS case" and the pertaining decision of the Tokyo District Court, the "NBS decision" [1325]) which is regarded as the advent of modern takeover defense jurisprudence to Japan.[1326] In the NBS case, the potential acquiror Livedoor K.K. ("Livedoor") built an equity stake of 35 per cent of the voting shares in Nippon Broadcast K.K. ("NBS"), to which Livedoor continued to add block purchases over the course of the takeover battle, and sought representation on the board of directors which was, however, rejected by NBS which in turn issued stock options to a friendly shareholder of the same conglomerate, Fuji Television Network K.K. ("Fuji"), which if exercised would have resulted in a significant dilution of Livedoor's stake.[1327] Both NBS and Fuji thus had the option to redeem and activate the share issuance.

1323 Hiroshi Mitoma, *Cross-Border M&A's: Japanese Companies and Foreign Investors*, 50 The Japanese Annual of International Law (2007) 124-140, 133 ff.

1324 METI/MoJ, *supra* note 1322, 3 ff.; Kozuka, *supra* note 1282, 15.

1325 The case gave rise to three decisions: Tokyo District Court Decision, 11 March 2005, 1173 Hanrei Taimusu [Case Law Times] 125-153, 132 f.; Tokyo District Court Decision, 16 March 2005, 1173 Hanrei Taimusu [Case Law Times] 140-143 (reviewing the temporary injunction granted by the same instance); Tokyo High Court Decision, 23 March 2005, 1899 Hanrei Jihō [Case Law Review] 56-100.

1326 Curtis Milhaupt/Zenichi Shiseido, *Tōkyō kikai seisakusho jiken ga teiki shita mondai to shin J-Pill no teian* [The Problem Brought up by the Tokyo Kikai Seisakusho and the Proposal of a New J-Pill], 2298 Shōji Hōmu [Commercial Law Review] (2022) 4-20, 6; Osugi, *supra* note 1313, 46.

1327 The case gains a grain of complexity due to Fuji Television initially being the subsidiary of NBS which had in fact, however, been turned around. One of Livedoor's key proposals pinpointed this lopsided capital structure and suggested amendments. When Fuji Television later sought to launch a tender offer itself to increase its stake in NBS this reverted parent company-subsidiary

Taking the primary purpose rule as point of departure,[1328] the Tokyo High Court, however, lifted the bar for the issuance of shares or share options to third parties: The court held that as the directors owe fiduciary duties to the shareholders obligating them to act in shareholders' interest, an issuance of share warrants for the primary purpose of ensuring the controlling share of friendly shareholders. Consequently, an exception from this rule can be only be made if a takeover bid causes irrevocable harm to the shareholders' interests which the court viewed likely in four exemplary scenarios which the court spelt out as follows: (i) If the acquiror purchases the shares with the purpose of inflating the share price and forces the buyback of such shares at a higher price not carrying any intention to acquire control of the company (greenmailing); (ii) if the acquiror purchases the shares pursuing a so-called scorched-earth management strategy which entails to only gain control temporarily bidder acquires the shares with the intention to only temporarily gain control of the company and to force the transfer of assets and information integral to the target company's business, such as intellectual property rights, know-how, confidential trade information, information on major business partners and customers, etc., to the acquiror or any group company, (iii) if the acquiror purchases the shares with the intention to use target company assets as collateral or funds to repay debts of the acquiror or any group company upon obtaining control over the target company, and (iv) if the acquiror intends to gain control over the target only temporarily with the aim to force the sale or disposal of high-valued assets, such as real estate and securities, that are currently without direct relation to the business of the target company business and to use the proceeds from such disposal to pay a temporary high dividend, or take advantage of a surge in the share price due to the temporary high dividend to profitably sell off the shares at a high price.[1329] The appeal instance further specified that an issuance of share warrants with the aim to dilute specific shareholder would in principle constitute

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relationship also played a role, see Eiji Takahashi/Tatsuya Sakamoto, *Japanese Corporate Law: Two Important Cases Concerning Takeovers in 2005*, 21 Journal for Japanese Law (2006) 231-239, 232 ff.; Colcera, *supra* note 1293, 118-125.

1328 The Tokyo District Court had already extended the scope of application of the primary purpose doctrine to stock options, see Tokyo District Court Decision (11 March 2005), *supra* note 1325, 132 f. The extension to stock options was not self-evident and in fact had been partly questioned in the scholarship, see Soichiro Kozuka, *The Use of Stock Options as Defensive Measures: The Impact of 2001 Amendments to the Corporate Law on Corporate Governance in Japan*, 15 Journal of Japanese Law (2003) 135-141, 138. The regulation with respect to stock options had only been liberalized in the 2001 Commercial Code Revision, see Oda, *supra* note 1088, 16.

1329 Tokyo District Court Decision (11 March 2005), *supra* note 1325, 132 f.; Takahashi/Sakamoto, *supra* note 1327, 234. Since the requirements of none of the four constellations were fulfilled, the court granted the injunction against the issuance of the stock options, Tokyo District Court Decision, *ibid*.

an issuance in a "markedly unfair manner" within the ambit of Article 280-10 applicable mutatis mutandis to Article 280-39(4) Commercial Code, which could, however, be justified under the above-presented specific circumstances.[1330] The burden of proof with respect to justifying the activation of the (emergence) defensive measures would lie with the target company.[1331] In the case at hand, the courts did not find sufficient information which would indicate the alleged erosion of corporate value.[1332] Furthermore, the court found that the directors' role is that of an executive organ which does generally not allow them to issue shares or share warrants with the purpose to change the composition of the shareholders who appointed them.[1333] Therefore, the Tokyo District Court allowed the provisional suspension[1334], the review instance dismissed the target company's objection[1335] and its appeal was likewise defeated and first instance decision upheld.[1336] The NBS decision is considered a landmark case for carving out three principles with respect to the adoption of defensive measures, namely (i) the authority of the management does not extend to the decision who should be the company owners, (ii) the neutral role of courts which implies that courts refrain from an assessment of the adequacy of a tender offer and defer the decision to the shareholders and market forces, and (iii) the spelling out of specific constellation in which an issuance of share warrants can be legitimate.[1337]

In the following years, a rising number of companies adopted defensive measures with pre-warning defenses being the most prevalent form of defense following by issuance of stock warrants and resurgence of relational, especially cross-shareholdings.[1338] Pre-warning takeover defenses usually required potential acquirors of large stakes of voting shares to provide specific information and grant the target company a deliberation period combined with the announcement that the non-compliance with this procedure would result in the implementation discriminatory allotment of stock warrants to third parties, became virulent.[1339] Pre-warning defenses are viewed as not

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1330 Tokyo High Court Decision, *supra* note 1325, 62 f.
1331 Takahashi/Sakamoto, *supra* note 1327, 235.
1332 Tokyo District Court Decision (11 March 2005), *supra* note 1325, 134 ff.
1333 Tokyo District Court Decision (11 March 2005), *supra* note 1325, 132.
1334 Tokyo District Court Decision (11 March 2005), *supra* note 1325, 128.
1335 Tokyo District Court Decision (16 March 2005), *supra* note 1325, 140.
1336 Tokyo High Court Decision, *supra* note 1325, 58.
1337 Colcera, *supra* note 1293, 192.
1338 Takahashi, *supra* note 1277, 300 f.
1339 Milhaupt/Shiseido, *supra* note 1326, 6.

having any direct legal effects, but rather to provide the procedural framework acquiror and target company.[1340]

(2) Nireko case

An intermediate decision in the line of precedents was sparked by the preemptive defensive tactic deployed by Nireko K.K (the "Nireko case") which presented a novel aspect in the adjudication on the permissibility of defensive measures by Japanese courts at that time.[1341] As a preventive measure, the company adopted a plan to grant option rights without consideration to the shareholders of the company at a designated record date. Under the plan two options were granted to shareholders per one share and each option pertained to one share. Upon exercise, an amount of one yen per option right was to be paid. In addition, the option rights were non-transferable, meaning only the shareholders on the record date could exercise the option. The option exercise was subject to the condition that a specific shareholder came to hold twenty per cent or more of the target's outstanding voting shares. As rationale for the adoption of such rights plan two reasons were presented, namely (i) to prevent a negative impact on corporate value through an abusive takeover bid, and (ii) to maximize corporate value in the event of a takeover bid. At the same time, the board of directors could cancel this share option plan any time prior to the condition materializing. In addition, a committee staffed with two independent directors and the chief executive officer was set up to advise on a potential cancellation.

Outside of the contest of a takeover bid, a shareholder (FSP Value Realization Master Fund Ltd.) filed for an injunction based, inter alia, on the claim that the issuance would be "grossly unfair". This aspect made the case distinct from the NBS case and allowed the courts to introduce a proportionality test to assess whether the directors comply with their fiduciary duty and cause harm to the interests of all shareholders. For this purpose, the court reviewed whether (i) the adoption of the rights plan reflects the shareholders' will, (ii) the rights plan would only be activated if the acquiror would cause irreparable harm to the target company, meaning that it provides a mechanism that ensures arbitrary judgment by the management does not have an impact, and (iii) the shareholders other than the acquiror would not run the risk to incur unexpected

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[1340] Osugi, *supra* note 1313, 50 with reference to the Tokyo District Court Decision, 29 July 2005, in: 1909 Hanrei Jihō [Case Law News] 87-104, 94 ff., so-called (Yumeshin Holdings K.K. v. Nihon Gijutsu Kaihatsu K.K.) in which the potential acquiror had not complied with the installed pre-warning mechanism.

[1341] Kozuka, *supra* note 1282, 15; Osugi, *supra* note 1313, 47.

harm with the three conditions being required to be cumulatively fulfilled to justify the adoption of the rights plan.[1342] The rights plan was ultimately found to fail the third condition of the test, since the option's non-transferability was seen to have a negative impact on the investability in the target company's shares, resulting in a decline of the share price outside a takeover bid which would pose unexpected harm to the shareholders leading to the rights plan being enjoined by the courts.[1343] The adoption of the three-pronged test by the courts in the Nireko case was considered to reflect the spirit of the 2005 Guidelines.[1344]

(3) Bulldog case

More prominence gained the Supreme Court decision in the Bulldog Sauce K.K. vs. Steel Partners Japan Strategic Fonds LLC case (the "Bulldog Sauce case") in which the permissibility of emergency defensive measures came under scrutiny.[1345] After gaining a foothold in Bulldog Sauce with an equity stake just above ten per cent, Steel Partners launched a tender offer via its subsidiary which caused Bulldog Sauce to implement defensive measures in the form of the issuance of stock warrants which was approved by the general shareholders' meeting. The stock warrants allotted to Steel Partners, however, were subject to a buy-back option by the target company. The injunctive relief sought by the bidder against the issuance was defeated by both, the Tokyo District and the Tokyo High Court which both denied a violation of the equal treatment of all shareholders.[1346] The Tokyo High Court took the view that the bidder as a hedge fund would be an acquirer, intending to acquire control for the purpose of abusive business operations or to pursue its very own interest, lacking any real intent to operate the target business, thus causing harm to the target's corporate value and the shareholders' common interests.[1347] The angle thus assumed by the court is considered to reflect the stakeholders-approach, conceptualizing the firm as a community of employees, business partners and other stakeholders, among them the shareholders as

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1342 Tokyo High Court Decision, 15 June 2005, in: 1186 Hanrei Taimusu 254-265, 263 f.

1343 Tokyo High Court Decision, *supra* note 1342, 264 f., upholding the two previous decisions, Tokyo District Court Decision, 1 June 2005, in: 1186 Hanrei Taimusu 274-283, 274; Tokyo District Court Decision, 9 June 2005, in: 1186 Hanrei Taimusu 265-274, 265 (reviewing the temporary injunction granted by the same instance); Takahashi/Sakamoto, *supra* note 1327, 236-239; Kozuka, *supra* note 1282, 14 f.

1344 Kozuka, *supra* note 1282, 15.

1345 Supreme Court Decision, 7 August 2007, 1809 Shōji Hōmu [Commercial Law Review] 16-19.

1346 Tokyo High Court Decision, 9 July 2007, 1806 Shōji Hōmu [Commercial Law Review] 40-53; Tokyo District Court Decision, 28 June 2007, 1805 Shōji Hōmu [Commercial Law Review] 43-58.

1347 Tokyo High Court Decision, *supra* note 1346, 47.

one group.[1348] The Supreme Court established that the activation of defensive measures in emergency situation due to the risk of damage being caused to the corporate value of the target company and the common interests of the target and its shareholders is legitimate, provided that the decision whether a control acquisition is beneficial or detrimental to the corporate value of a company is made by the shareholders which are ultimately entitled to the company's profits.[1349] Since the shareholders approved the defensive measure and the bidder was compensated, no fault was found with the issuance of the share warrants in the case at hand. A softening or rather an exemption from the equal treatment principle is found to resonate with other statutory provisions such as the regulation of squeeze-outs which allow the driving out of (minority) shareholders provided that a super-majority vote is taken and that the relevant shareholders are adequately compensated (Articles 783(1), 304(3), 749(1) no. 2 Companies Act).[1350] The toleration of an unequal treatment of shareholders provided for reasonable grounds had already been accepted in the past and might therefore not be surprising.[1351]

While the decision can be seen critical from the angle of the protection of rights of foreign investors, the Bulldog Sauce precedent nonetheless suggests that Japanese courts have embraced the position that control of the company ultimately lies in the hand of the shareholders and that discretion and actions of the board of directors in the event of a tender offer are subject to the shareholders' vote.[1352] In this vein, the precedent urged the overwhelming majority of companies that had put defensive measures in place to obtain the approval of their shareholders with some companies even going so far as structuring the activation mechanism of poison pill subject to approval by the shareholders' meeting.[1353]

1348 Takahashi, *supra* note 1277, 301 f.

1349 Supreme Court Decision, *supra* note 1345, 18.

1350 Takahashi, *supra* note 1277, 302 f. Disagreeing herewith is, Wataru Tanaka, *Burudokku sōsu jiken no hōteki kentō* [A Legal Assessment of the Bulldog Sauce Case], 1809 Shōji Hōmu [Commercial Law Review] (2007) 4-15, 9. Milhaupt/Shiseido, *supra* note 1326, 10 ff., in the context of the TKS case (see below Fn. 1361) also put emphasis on the equal treatment of all shareholders.

1351 Supreme Court Decision, 12 November 1996, 1598 Hanrei Jihō [New Cases Review] 152-154, 154.

1352 Mitoma, *supra* note 1323, 136.

1353 Osugi, *supra* note 338, 158; Takahashi, *supra* note 1277, 303.

d) Recent trends: Reliance on soft law and updates in case law

In general, two main trends can be observed with respect to takeover regulation in recent years, namely (i) the increasing reliance on soft law mechanisms with respect the regulation of the conduct of the parties involved in takeover transactions, and (ii) the further development and carving-out of standards to adjudicate measures to defend and frustrate takeover bids.

aa) Case law

After a respite in the formation of case law contributing to the image of "sporadic surges"[1354] of case law formation and at the same time gradual erosion of relational shareholding strategies under the influence of corporate governance-related reforms,[1355] a series of cases surfaced in the year 2021.

To begin with, in the case Aslead Capital Pt. Ltd. vs Fuji Kosan Co., Ltd. (the Fuji Kosan case"), an unsolicited tender offer launched by the former party, a Singapore-based investor, was met with the activation of a defensive measure in form of a free allotment of share options with discriminatory exercise conditions aimed at diluting the bidder by the latter based on a resolution by the board of directors. However, the defensive measure was only to become effective if sanctioned by the will of the shareholders through a general shareholders' meeting's resolution, and to be withdrawn if such approval could not be obtained. Both instances found the activation of the countermeasure as not be implemented in a "grossly unfair manner" and did not violate the principle of equal treatment of all shareholders.[1356] The courts pointed out that due to the activation of the defensive measures being subject to the shareholders' approval (which was eventually obtained), leaving it to the shareholders to decide whether by the inability to procure sufficient information and the lack of sufficient time to make an appropriate decision the interests of the company and the common interest of the shareholders would be harmed.[1357] The appeal instance confirmed the

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1354 Kozuka, *supra* note 1282, 6.

1355 The internationalization of ownership in Japanese listed stock companies was accompanied by a significant reduction in pre-installed takeover defenses exposing them to the risk of hostile takeovers, especially when taking into account low market capitalizations of Japanese listed stock companies in the global comparison, especially companies listed on the securities exchanges in the United States, see Milhaupt/Shiseido, *supra* note 1326, 7.

1356 Tokyo District Court Decision, 23 June 2021, in: 450 Shiryō-ban Shōji Hōmu [Commercial Law Materials] 151-163, 153 f.; Tokyo High Court Decision, 10 August 2021, in: 450 Shiryō-ban Shōji Hōmu [Commercial Law Materials] 146-150, 149 f.

1357 Tokyo District Court Decision, *supra* note 1356, 153 f.

first instance decision, and, inter alia, held that a special shareholders' resolution with qualified majority requirements would not necessarily be required: The shareholders had the opportunity to voice their views on the tender offer and if the simple majority of shareholders arrive at the decision to take defensive measures against such tender offer, such judgment is to be respected, as is the decision of the management as part of its discretion in business-related matters to accommodate the decision whether or not to initiate defensive measures in the framework of an ordinary general shareholders' meeting.[1358]

In the same year, the implementation of emergency defensive measures by Tokyo Kikai Seisakusho against an unsolicited takeover bid by Asia Development Capital Co. Ltd. (the "TKS case") resulted in a Tokyo High Court decision which caused debate[1359] due to the decision sanctioning the invocation of a defensive measure ultimately[1360] based on "a majority of the minority" resolution meaning that the votes of the potential acquirer and related parties were disregarded, thus potentially indicating a deviation from the jurisprudence established in the NBS decision that the implementation of defensive measures is subject to the approval by the majority of voting shares of all shareholders.[1361] The first instance court qualified the circumstances of tender offer as "considerably coercive"[1362] and found that based on the primary purpose doctrine the free allotment of stock options in the case at hand relying on a majority-of-minority shareholders' vote did not constitute an issuance in a grossly unfair manner, as the management did not primarily seek to maintain control.[1363] The appeal instance took the view that – in contrast to the situation in the NBS case – the circumstances leading up to the takeover bid constituted a situation of coercion due to the velocity with which large blocks of shares were purchased, thus putting pressure on the shareholders, who

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1358 Tokyo High Court Decision, *supra* note 1356, 149 f.; The problem of a special resolution was raised due to such a resolution being obtained in the Bulldog Sauce precedent in which, however, the articles of incorporation of the target company provided for such requirement, see Masakazu Shirai, *Saikin no kaishū bōei-saku wo meguru kōdō* [Recent Trends Regarding Takeover Defensive Measures], Japan Exchange Group Financial Products Trading Law Study Group, Presentation (25 November 2022) 7, available under: https://www.jpx.co.jp/corporate/research-study/research-group/cg_27su00000086b6-att/20221125_1.pdf (last accessed 16 May 2024).

1359 Milhaupt/Shiseido, *supra* note 1326, 10 ff.; Shirai, *supra* note 1358, 11 ff.

1360 The initial activation of the defensive measure only rested on a board of director's resolution. The general shareholders' resolution was only obtained in the course of the first instance proceedings, see Milhaupt/Shiseido, *supra* note 1326, 8.

1361 Tokyo High Court Decision, 9 November 2021, in: 453 Shiryō-ban Shōji Hōmu [Commercial Law Materials] 98-107.

1362 Tokyo District Court Decision, 29 October 2021, in: 453 Shiryō-ban Shōji Hōmu [Commercial Law Materials] 107-130, 112.

1363 Tokyo District Court Decision, *supra* note 1362, 107 f.

were unable to procure sufficient information, to sell their shares to the acquiror.[1364] While the equal treatment principle would be integral to the existence of a stock company, specific control acquisitions may pose a risk to the company's existence and development, potentially resulting in a loss of corporate value and thus ultimately causing harm to the common interests of the shareholders.[1365] Under these circumstances an exception from the equal treatment principle, unless it run contrary to the concepts of fairness and reasonableness and such shareholders' resolution should be respected unless it suffers from significant defect with respect to the procedures or to the facts on which the decision was based.[1366] The High Court eventually found that the company's responses were not inappropriate and did not suffer any significant defect and confirm the first instance decision not to enjoin the petition for injunctive relief.[1367]

Whether the decision in the TKS[1368] case can indeed serve as a general precedent with respect to the permissibility of defensive measures remains to be seen given the specific circumstances of the case, especially as the potential acquiror while complying with large-scale shareholding reporting obligations built its stake at a rapid pace through large-scale purchases on the securities markets, thus contributing to conjuring up a coercive character of the control acquisition urging shareholders to sell their shares via market transactions without paying a control premium and creating a situation in which it seemed no longer realistic to obtain approval from majority of voting rights through a shareholders' meeting.[1369] Following the TKS case, the majority-of-minority vote has been employed at least in one other case that did, however, not result in a court case.[1370]

1364 Tokyo High Court Decision, *supra* note 1361, 103.
1365 Tokyo High Court Decision, *supra* note 1361, 105.
1366 Tokyo High Court Decision, *supra* note 1361, 105.
1367 Tokyo High Court Decision, *supra* note 1361, 105 ff.
1368 The Supreme Court did not render a substantial decision, as it dismissed the appeal on the grounds that the requirements were not fulfilled, also stating that the it viewed the Tokyo High Court decision as legitimate, see Supreme Court Decision, 18 November 2021, in: 453 Shiryō-ban Shōji Hōmu [Commercial Law Materials] 94-97, 95 f.
1369 Lending the entire acquisition history a resemblance to the concept of structural coercion in the form of "creeping control" in US corporate law, see Milhaupt/Shiseido, *supra* note 1326, 10 f.
1370 Asia Nikkei, *Controversial vote helped Japan's Cosmo prevail on 'poison pill'* (24 June 2023), available under: https://asia.nikkei.com/Business/Companies/Controversial-vote-helped-Japan-s-Cosmo-prevail-on-poison-pill (last accessed 27 May 2024).

bb) 2023 Takeover Guidelines

Under the auspices of the Ministry of Economy, Trade and Industry (the "METI"), at times in collaboration with the Ministry of Justice, a series of best practice principles and guidelines for mergers and acquisitions to kindle the market for corporate control transactions and encourage such transactions have been formulated for nearly two decades. The afore-mentioned 2005 Guidelines and the Corporate Value Report 2006 are parts of this strategy as well as the most recent publication, the Guidelines for Corporate Takeovers (the "Takeover Guidelines"), issued on 31 August 2023.[1371] While the Takeover Guidelines formally lack statutory effect, it is still expected that they will contribute to shaping the transaction practice and thus blends in into the overall tendency of an increasing reliance on soft law in the field of corporate law by Japanese lawmakers. The Takeover Guidelines focus on four areas, namely (i) the articulation of three basic principles, (ii) a code of conduct for directors and boards of directors regarding takeover proposals, (iii) guidelines for information disclosures to increase transparency regarding takeovers, and (iv) guidelines for takeover responses and countermeasures. Besides the transparency principle, the two other basic principles focus on corporate value and shareholders' common interests and intent, thus overall hinting at the recognition of a shareholder-centric perspective. With respect to the "corporate value"-concept which already appeared in the 2005 Guidelines, it is remarkable that the Takeover Guidelines appears to signal a move away from a then qualitative, potentially hazy concept as enhancing relationship with stakeholders to quantitative concept being understood as "*a company's assets, profitability, stability, efficiency, growth potential, and other company attributes that contribute to the interests of shareholders*", and further, "[*c*]*onceptually, corporate value is the sum of the present values of discounted future cash flows generated by a company*" (Section 1.4 Takeover Guidelines).[1372]

e) Interim conclusion

In view of the above, it appears legitimate to hold that despite an initial and ongoing orientation at the takeover regime and the pertaining case law carved out by the Delaware courts in the United States, the takeover regulation in Japan presents an

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[1371] METI, *Guidelines for Corporate Takeovers: Enhancing Corporate Value and Securing Shareholders' Interests* (31 August 2023), English translation available under: https://www.meti.go.jp/english/press/2023/pdf/0831_001b.pdf (last accessed 7 May 2024).

[1372] METI/MoJ, *supra* note 1322, 2.

overall idiosyncratic solution, which also loosely integrates elements of takeover regulation and legal theory[1373] from the United Kingdom and the European Union[1374], such as the mandatory bid rule, but overall caters to the specific situation and spirit of Japanese institutions relevant to corporate law in Japan. Especially, the case law on the defensive measures against unsolicited takeover bids reflects judicial creativity to accommodate peculiarities of ownership patterns in Japanese listed stock companies as well as it demonstrates the relevance of judicial precedents for construction, development and creation of law.[1375] The deferral of the decision whether to adopt defensive measures to the general shareholders' meeting reveals the recognition of the shareholders' authority as warden and arbiters of corporate value, which is arguably tarnished insofar as initiative – unsurprisingly for the modern corporation – lies with the board of directors and ex-post approval of an activated defenses is under certain circumstances has been sanctioned by jurisprudence.[1376] While the taking private of companies with small- or mid-sized market capitalization by foreign investors, such as the Hitachi subsidiaries mentioned in the introduction[1377], has happened largely without much noise, except for the takeover situation at Toshiba Corporation, where eventually a domestic solution was found, tender offers targeting public companies with large capitalizations appear to have so far not occurred.

5. Stewardship Code

The review of the five key elements shall be rounded off by the brief history of the Principles for Responsible Institutional Investors (the "Stewardship Code") as a representative instrument for the recent upswing of soft law regulation promulgated

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1373 On this aspect, Takahashi, *supra* note 1277, 298 f. who traces down the allocation of authority to the general shareholders' meeting, which is considered to emanate from the structure of the stock company and according to which the board of directors is in principle subject to the shareholders' will, and which prevents the board of directors to absorb and take over competences which functionally lie with the shareholders as a whole, such as the issuance of shares (without subscription rights) to friendly or related shareholders with the primary purpose to entrench the directors' position, to considerations proffered by Ernst-Joachim Mestmäcker, VERWALTUNG, KONZERNGEWALT UND RECHTE DER AKTIONÄRE [Administration, control in corporate groups and shareholders' rights] (1958) 146 ff.

1374 Takahashi, *supra* note 898, 223 f.; Fujita, *supra* note 1285, 27 ff.

1375 On the history and the role of the legal precedent in Japan, see Kawashima, *supra* note 206, 87 ff.; Haley, *supra* note 346, 2 f.

1376 The deferral to the shareholders' authority is partially viewed to compensate for the absence of the board neutrality or passivity rule or even as functional equivalent, see Colcera, *supra* note 1293, 233 ff.; Varottil/Lee, *supra* note 1276, 289, Fn. 108.

1377 The entire shares in Hitachi Metals were bought for USD 7.5 billion, thus remaining below the common threshold of USD 10 billion considered to define companies with large market capitalizations, see Fn. 112.

by governmental or specialist public agencies – the Council of Experts on the Stewardship Code under the auspices of the Financial Services Agency in the case at hand – instead of the lawmaker itself.

a) Stewardship Code of 2014

The Stewardship Code was first adopted in 2014 in the course of a whole swing of corporate governance-related reforms aiming at the promotion of economic growth and improving corporate profitability. While Japan was lagging behind its peers with respect to the adoption of a corporate governance code, it was among the forerunners with respect to a stewardship code making it – with the United Kingdom Stewardship Code (2010, the "UK Stewardship Code 2010") – a potential transplant for other jurisdictions.[1378] Modelled itself after the UK Stewardship Code 2010, the Stewardship Code 2014 consisted of the following seven principles:[1379]

> "*In this Code, "stewardship responsibilities" refers to the responsibilities of institutional investors to enhance the medium- to long-term investment return for their clients and beneficiaries (incl□ding □ltimate beneficiaries; the same shall apply hereafter) by improving and fostering the investee companies' corporate value and sustainable growth through constructive engagement, or purposeful dialogue, based on in-depth knowledge of the companies and their business environment.*
>
> *This Code defines principles considered to be helpful for institutional investors who behave as responsible institutional investors in fulfilling their stewardship responsibilities with due regard both to their clients and beneficiaries and to investee companies. By fulfilling their stewardship responsibilities properly in line with this Code, institutional investors will also be able to contribute to the growth of the economy as a whole.*
>
> *So as to promote sustainable growth of the investee company and enhance the medium- and long-term investment return of clients and beneficiaries,*
>
> *1. Institutional investors should have a clear policy on how they fulfill their stewardship responsibilities, and publicly disclose it.*

1378 Jennifer Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, Sydney Law School, Legal Studies Research Paper No. 17/80 (September 2017) 1-27, 16.

1379 Hill, *supra* note 1378, 18.

2. *Institutional investors should have a clear policy on how they manage conflicts of interest in fulfilling their stewardship responsibilities and publicly disclose it.*

3. *Institutional investors should monitor investee companies so that they can appropriately fulfill their stewardship responsibilities with an orientation towards the sustainable growth of the companies.*

4. *Institutional investors should seek to arrive at an understanding in common with investee companies and work to solve problems through constructive engagement with investee companies.*

5. *Institutional investors should have a clear policy on voting and disclosure of voting activity. The policy on voting should not be comprised only of a mechanical checklist; it should be designed to contribute to the sustainable growth of investee companies.*

6. *Institutional investors in principle should report periodically on how they fulfill their stewardship responsibilities, including their voting responsibilities, to their clients and beneficiaries.*

7. *To contribute positively to the sustainable growth of investee companies, institutional investors should have in-depth knowledge of the investee companies and their business environment and skills and resources*."[1380]

With the adoption of the Stewardship Code the tendency towards the soft law approach, lacking the effect of being directly legally binding – which is explicitly admitted in the Stewardship Code –, in the field of corporate governance-related regulation was further pursued.[1381] The introduction of the concept of stewardship referring – as indicated in the chapeau – in the context of the Japanese code to the fiduciary relationship between an institutional investor and its clients with respect to the

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[1380] The Council of Experts Concerning the Japanese Version of the Stewardship Code, *Principles for Responsible Institutional Investors: Japan's Stewardship Code* (26 February 2014), English translation available under: https://www.fsa.go.jp/en/refer/councils/stewardship/20140407/01.pdf (last accessed 14 May 2024).

[1381] At the level of domestic law, soft law usually functions as an umbrella term under which different, alternative forms of regulation are subsumed, see Pauline Westermann, *Validity: The Reputation of Rules*, in: Pauline Westerman/Jaap Hage/Stephan Kirste/Anne Ruth Mackor (eds.), LEGAL VALIDITY AND SOFT LAW (2018) 165-182, 165. Soft law is then understood as "*rules based on quasi-legal instruments, which lack legally "binding force" […], or whose binding force is somewhat weaker than the binding force of traditional law*", see Jaap Hage, *What is Legal Validity? Lessons from Soft Law*, in: Westermann/Hage/Kirste/Mackor, *ibid*., 19-45, 20.

disposition by the institutional investors over the clients' funds entrusted to them for investment purposes, entailing a fiduciary duty of the former to act in the interest of the latter as the beneficiary which resembles the constellation under the UK Stewardship Code that addresses agency conflict between institutional investors and investee companies.[1382] The language of the chapeau indicates that while focus lies on the fiduciary relationship between the institutional investors and the beneficiary owners, the fulfillment of this fiduciary duty is envisaged to take place through promotion of the sustainable growth of the investee companies, with the last clause extending the circle even more to the economy as a whole (Chapeau of the Stewardship Code 2014).[1383] While this conjures up potential conflicts-of-interest, in situation in which the interest of the beneficiaries and the investee company do not align, the solution provided by the Stewardship Code exhausts itself by the referring to Principle 2, that investors should set up policies as to how to deal with conflict-of-interest situations which, however, identifies those conflict-of-interest situations as relevant which occur between the institutional investor and a beneficiary and client (Principle 2, Guidance 2.1), an indication that the fiduciary principles do not perfectly permeate the Stewardship Code which is, however, consistent with the primary aspiration of the Stewardship Code to advance investor engagement with the investee companies.[1384] In addition, the Stewardship Code remains rather silent with respect to the activities potentially constituting conflict-of-interest scenarios.[1385] While, largely congruent with the principles set forth in the UK Stewardship Code 2010, Principle 7 of the Stewardship Code appeals to the institutional investors' contribution to the sustainable growth of the investee companies, potentially revealing a lingering skepticism towards short-term oriented institutional investors.[1386] At the same time, it may, however, be construed as to exhort domestic institutional investors not to focus on too long-term goals and lose sight of the current economic performance of investee

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1382 Goto, *supra* note 96, 5 f.; Chiu/Katelouzou, *supra* note 4, 134. On the dimensions of the agency conflict between intermediary investors and the beneficiary investors, see Gilson/Gordon, *supra* note 12, 865, 890 f.

1383 Indicating potential for public interest interpretation and the integration of other stakeholder constituencies which have, however, not been spelled out.

1384 Goto, *supra* note 96, 44 f.

1385 Conflict-of-interest situation are, for example, spelled out by the International Corporate Governance Network (ICGN), *Statement of Principles on Institutional Shareholder Responsibilities* (2007) 14 f., available under: https://www.ec gi.global/publications/codes/icgn-statement-of-principles-on-institutional-share holder-responsibilities-2007 (last accessed 14 May 2024). On the other hand, the UK Stewardship Code (2010) remained also vague on this matter, see Roach, *supra* note 435, 481.

1386 Sadakazu Osaki, *The New Stewardship Code in Japan*, in: Oda, *supra* note 1196, 105 f.

companies and accordingly adjust the investee company engagement.[1387] The Stewardship Code did not include a principle with respect to collective actions of institutional investors in contrast to the UK Stewardship Code 2010.[1388] The silence of the Stewardship Code was, however, not understood as to oppose institutional investors seeking collective engagement, rather such engagement was encouraged via other channels, namely again through interpretation guidelines published by the FSA with respect to the reporting obligations on large shareholdings and takeover regulation.[1389]

Overall and in contrast to the intention of the Stewardship Code of the United Kingdom which is understood to aim to increase the responsibility of institutional investors towards the public and rein in myopic and excessive risk-taking with respect to investments, the Stewardship Code seeks to bring about a change in the attitude of domestic institutional investors to actively engage with the investee companies to ensure that they orient themselves to prioritize the creation of shareholder value over an orientation at the interests of all stakeholders.[1390] In this vein, Principle 2 (conflict-of-interest situations), Principle (Monitoring) and Principle 5 (voting policy) appeal to domestic institutional investors to free themselves from the shackles of the image of stable, friendly shareholding and instead if necessary exercise pressure on the investee companies; domestic institutional investors are thus envisioned to – in the same fashion as foreign investors – discipline their investee companies and, inter alia, see to that effective corporate governance mechanism are in place at the investee companies.[1391]

b) Revised Stewardship Codes (2017 and 2020)

The Stewardship Code has been revised on two occasions, in 2017 and in 2020. While the revisions under the Stewardship Code 2017 are limited to the guidance provided to the existing seven principles, the Stewardship Code 2020 also contains a new eighth principle.

1387 Osaki, *supra* note 1386, 106.
1388 Principle 5 UK Stewardship Code 2010; see Roach, *supra* note 435, 485 ff.
1389 Financial Services Agency, *Clarification of Legal Issues Related to the Development of the Japan's Stewardship Code* (26 February 2014), available under: https://www.fsa.go.jp/en/refer/councils/stewardship/2014 0226.pdf (last accessed 14 May 2024); Osaki, *supra* note 1386, 106.
1390 Goto, *supra* note 96, 38 ff., 52.
1391 Goto, *supra* note 96, 40.

Notable additions under Stewardship Code 2017 are that (i) the asset owners are directly addressed as to engage in stewardship activities themselves, issue mandates to, and to monitor asset managers (Principle 1 Guidance 1-3 through 1-5), (ii) more in-depth guidelines for institutional investors and asset managers to set up structure to ensure that clients' and beneficiaries' interests are observed and conflict-of-interest situations are avoided (Principle 2, Guidance 2-2 through 2-4), (iii) the encouragement of collective engagement (Principle 4, Guidance 4-4), and (iv) more detailed rules with respect to the disclosure of record of the exercise of voting rights and extension of disclosure to proxy advisors as to procedures, especially the addressing of conflict-of-interest situations (Principle 5, Guidance 5-3, 5-5).[1392]

The amendment of the Stewardship Code in 2020[1393] accounts for two major changes, namely the inclusion of medium- and long-term sustainability aspects to be taken into considerations by institutional investors (Principle 1, Guidance 1-1, 1-2; Principle 4, Guidance 4-2; Principle 7, Guidance 7-1, 7-4) and the extension of the stewardship concept to service and proxy providers to institutional investors with respect to their contribution to the investment chain (Principle 8, Guidance 8-1 through 8-3)[1394]; as a minor change one may include that Principle 5 pertaining to disclosures was extended prompting institutional investors to not only disclose their vote, but also any rationale behind it (Principle 5, Guidance 5-3). Especially, the imposition of stewardship duties further down the investment chain marks an interesting development signaling that stewardship duties (potentially) attach to any chain link, and in the concrete case encourages proxy advisory firms to design voting policies which reasonably cater to the best interests of their clients.[1395]

1392 The Council of Experts on the Stewardship Code, *Principles for Responsible Institutional Investors: Japan's Stewardship Code* (29 May 2017), English translation available under: https://www.fsa.go.jp/en/refer/councils/stewardship/20170529/01.pdf (last accessed 14 May 2024). See for a comment on the draft, Kansaku, *supra* note 30, 80 f.

1393 The Council of Experts on the Stewardship Code, *Principles for Responsible Institutional Investors: Japan's Stewardship Code* (24 March 2020), English translation available under: https://www.fsa.go.jp/en/refer/councils/stewardship/20200324/01.pdf (last accessed 14 May 2024).

1394 The aspect that proxy advisors and also insurance companies are not considered fiduciaries under Japanese law had previously been pointed out as a gap in the links of the investment chain to be bridged and closed in the future, see Kansaku, *supra* note 30, 82.

1395 The relationship between institutional investors and proxy advisory firms is not uniform. Some proxy advisory firms include institutional investors in the development of their voting policies, other institutional investors only rely on proxy advisors for the purpose of collecting information, while another group of institutional investors prefers direct engagement with the investee company, see Edelmann/Thomas/Thompson, *supra* note 12, 1400 f.

c) Interim conclusion

Notwithstanding, these amendments the overall structure of the Stewardship Code remains unchanged. The Stewardship Code may serve as yet serve as another example of the ever-evolving, "living" law with new actors or actors gaining more relevance, here the institutional investors, asset managers and their service providers, resulting in new regulative responses and approaches.[1396] In line with other jurisdictions, Japan's regulators have opted to impose governance obligations on (domestic[1397]) institutional investors as a tool to nudge those investors that from a rational perspective would rather sell off shares of underperforming portfolio companies than commit to (pro-active) engagement with such companies to improve, for example, their corporate governance and business strategies.[1398] With respect to domestic institutional investors, among them pension funds and trustees, the introduction of the stewardship concept responds to the unfolding landscape of actors having stakes in the investment chain, with the (current) focus, however, on the activation of institutional investors for the purpose of investee company engagement. What is interesting in this respect is that despite the image of stakeholder-orientation, the Stewardship Code does not consider a bundling and pooling of the interests of shareholder and of a wider community of stakeholder constituencies, as it has been, for example, implemented by the European Union.[1399] The reliance on soft law mechanism and the relevance of fiduciary concepts both infuse the regulative approach with flexibility. The "comply-and-

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1396 The extension of stewardship duties beyond institutional investors has also been undertaken by the European Union through their Shareholder Rights Directive (Directive (EU) 2017/828 amending Directive 2007/36/EC) (hereinafter, Shareholder Rights Directive, available under: https://eur-lex.europa.eu/EN/legal-content/summary/shareholder-rights-directive.html (last accessed 25 May 2024). Articles 3g through 3i addresses asset managers (besides institutional investors) with respect to engagement and transparency of asset managers and Article 3j expressly provided for disclosure obligations of proxy advisors.

1397 With respect to the then imminent adoption of a Stewardship Code in the United Kingdom whose focal point lies more towards encouraging responsible risk taking by institutional investors, concerns were voiced with regard to the actual influence pension funds and institutions could exercise as "good stewards", since investment in shares of listed companies only presents one position in a wider asset mix, and additionally domestic institutional investors constitute only one among several shareholder groups in domestic listed stock companies, see Markus Roth, *Private Pension and Corporate Governance: The UK and the US, Germany and Japan in Perspective* (24 March 2012) 1-17, 9 f., available under: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2027628 (last accessed 6 June 2024).

1398 In general, on this dilemma and the imposition of governance obligations in the form of stewardship rules, see Gilson/Gordon, *supra* note 12, 865 f.

1399 Article 3g(1)(a) Shareholder Rights Directive, see Chiu/Katelouzou, *supra* note 4, 144, who point out the reconciliatory aspect that it combines the stewardship concept under the UK Stewardship Code with the stakeholder-orientation of jurisdictions in Continental Europe.

explain"-approach as well as the voluntary adoption for institutional investors further add to the softer treading or the education and nudging based on the "goodwill" of the participants. On the other hand, institutional investors may already be subject to (fragmentary) stewardship duties under mandatory law in their capacity as investment advisors or trust banks.[1400] In addition, powerful agents in the form of influential institutional investors such as the GPIF or life insurance companies[1401] may through their adoption of the Stewardship Code and their reliance on the obligations set forth therein towards their business partners (asset managers) contribute to increasing awareness and the generation of stewardship practices.[1402]

In line with the recent development of identifying various links in the investment chain and attaching stewardship duties to them, it has been reported that the next revision of the Stewardship Code – it had been announced that the Stewardship Code will be subject to review at regular intervals – envisages to incorporate a mechanism to facilitate the identification of beneficial shareholders who hold their shares through trust and custodian banks.[1403]

The frontrunner role of Japan with respect to the promulgation of the – however, idiosyncratic interpretation – of the stewardship concept may tie into the longstandingly not convincing installment of mechanism to ensure the effective monitoring of corporate management by virtue of a corporate governance code, the firm with three committees as well as the spread of independent directors (and *kansayaku*). Recruiting – "*rationally reticent*"[1404] – (domestic) institutional investors and asset managers for this purpose may as constructive and collaborative – as opposed to adversarial – "activists"[1405] contribute to compensating the perceived lack of

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1400 Kansaku, *supra* note 30, 82.

1401 Such as Dai-Ichi Life Insurance Co., Ltd. that started the disclosure of voting results already in 2014, see Miyajima/Saito, *supra* note 109, 364, table 12.1

1402 Kansaku, *supra* note 30, 82; Miyajima/Saito, *supra* note 109, 365 (table 12.1).

1403 Asia Nikkei, *Japan to give companies more transparency on unnamed shareholders* (17 April 2024), available under: https://asia.nikkei.com/Business/Finance/Japan-to-give-companies-more-transparency-on-unnamed-shareholders (last accessed 23 May 2024). Identification of shareholders as a requirement and precondition for investee company engagement is also a concern of the Shareholder Rights Directive, see Article 3a. Constellations can be envisioned in which the company has a legitimate interest to know the identity of the beneficial owners such to avoid the stealthy building of equity stakes to prepare a surprise takeover bid, see Iris H-Y. Chiu, *Private vs Public Enforcement of Shareholder Duties*, in: Birkmose/Sergakis, *supra* note 1237, 108 f.

1404 Gilson/Gordon, *supra* note 12, 895, however, primarily referring to mutual funds.

1405 For examples for the display of these three main forms of institutional shareholder engagement with Japanese stock companies, see Garrett L. Brodeur, *Shareholders as Stakeholders: A Future Paradigm for Institutional Activism in Japan*, 27 Duke Journal of Comparative and International Law (2017) 302 ff.

effective corporate monitoring, besides the "education" and "empowerment" aspects to bring domestic institutional investors to an engagement level potentially on par with its overseas peers. Another factor may be still little impact of activist investors such as hedge funds – that with a view to stewardship principles are less susceptible to conflicts-of-interest[1406] – that target companies with shortcomings with respect to corporate governance or financial performance aspects, resulting in a more or less virtual absence of these monitors. In addition, given the reserved stance towards adversarial shareholder activism through hedge funds – which is not exclusive to Japan[1407] –, for example, in the jurisprudence concerning defensive measures analyzed above (supra subsection II.4., paragraphs c) and d)), which may be an indication for a more widespread caution, hedge funds may not be viewed as ideal monitors in the setting of the Japanese business community.[1408] The rationale for various soft law instruments, such as the 2005 and 2023 Takeover Guidelines, the Japanese Corporate Governance Code[1409] and the Stewardship Code may therefore be fueled by an eagerness to prepare and predispose target companies against such threat.[1410] Furthermore, hedge fund activism in Japan has so far been largely limited to "easy" target companies with ostensible shortcomings, such as exceedingly high levels of excess cash or cross-shareholdings disproportionate to their financial performance or firm size.[1411] This of course not to say that hedge funds after having successfully targeted such "exposed" companies, would move on to more

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1406 Alon Brav/Wei Jiang/Frank Partnoy/Randall Thomas, *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 The Journal of Finance (2008) 1730.

1407 For different US-American perspectives, see Mark J. Roe, *Corporate Short-Termism: In the Boardroom and in the Courtroom*, 68 The Business Lawyer (2013) 977-1006, 977 f.; Lucian A. Bebchuk, *The Myth That Insulating Boards Serves Long-Term Value*, 113 Columbia Law Review (2013) 1637-1695, with conclusive evidence being, however, difficult to establish and moreover being less relevant to other co-investors, see Thomas W. Briggs, *Corporate Governance and the New Hedge Fund Activism: An Empirical Analysis*, 32 Journal of Corporation Law (2007) 681-738, 702.

1408 Gilson/Gordon, *supra* note 12, 896 ff., identify activist shareholders such as hedge fund instead of intermediary institutional investors such as mutual and pension funds, that are burdened with additional agency costs stemming from the rise of agency capitalism, as key actors to complement existing corporate governance mechanism.

1409 The Japanese Corporate Governance Code was inaugurally compiled in 2015 and has been revised on two occasions (in 2018 and 2021), see Japan Exchange Group, *Publication of Revised Japan's Corporate Governance Code* (11 June 2021), available under: https://www.jpx.co.jp/english/news/1020/20210611-01.html (last accessed 4 June 2024) with the current version being available under: https://www.jpx.co.jp/english/news/1020/b5b4pj0000046kxj-att/b5b4pj0000046l07.pdf (last accessed 4 June 2024).

1410 Brodeur, *supra* note 1405, 319 f.

1411 Miyajima/Saito, *supra* note 109, 362; Buchanan/Chai/Deakin, *supra* note 38, 35, 40 f. See also the current activism at Keisei Electric Railway Co., Ltd., Fn. 904.

sophisticated investee companies. On the other hand, it may be legitimately submitted that hedge funds are less apt for perpetual monitoring and voting, especially in contexts in which discernable immediate benefits and thus incentives to engage are lacking. Relying on institutional investors and proxy advisory firms as more reliable, long-term monitors thus appears cogent. The necessity to appeal to domestic institutional investors may also be motivated by the shift of the domestic pension system to also rely on equity markets.[1412]

In the context, of the overall structures and dimensions of law, the Stewardship Code may serve as an indication for the materialization of law just as the widening of the scope of application of fiduciary principles provides an avenue for the inflow of substantive value and principles.[1413] A morphing or hardening of the stewardship code into hard law is not per se precluded; transition may occur as a consequence of the "stabilization of normative expectation"[1414], a process which can be imagined with respect to the transparency aspect against the background of existing disclosure rules with respect to (large) shareholdings in the securities and exchange regulations.[1415]

IV. In lieu of an Interim Conclusion: Identifying Trajectories

The investigation of the five key legal instruments brings about heterogenous patterns with respect to how these legal instruments developed. At first glance, there appears to be no consistent support, for example, for a claim that Japanese corporate law has by the letters of the law moved from its civil law origin towards an orientation at US corporate law. The institution of the *kansayaku* or *kansayaku-kai* remains despite its initial resemblance to a two-tier board structure idiosyncratic, an impression which further advanced by the development of the new audit and supervisory committee. The kansayaku may thus serve as an example of an initial institutional lock-in on the micro-level, meaning relating to legal instruments and variations under the umbrella of the stock company concept. The institution *kansayaku* shows an overall resilience to changes in macro-economic setting or ownership patterns. On the other hand, the decreasing relevance of the general shareholders' meeting, while in theory still upheld

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1412 The instrumentalization of equities for self-reliant pension savings is, for example, demonstrated by broad popularization of the NISA program for which under certain conditions tax exemptions on capital gains and dividends are granted, see Fn. 1155.

1413 Nottage, *supra* note 157, 331.

1414 Calliess/Renner, *supra* note 41, 261 f.

1415 This trajectory is explored with respect to the European Union by Chiu/Katelouzou, *supra* note 4, 148 f.

as the highest governing body of the stock company, shows a correlation with the corporatization of the stock company in turn for wealthy individuals or families figuring as blockholders in the stock companies a century ago; founder and founder families may also seek not to rely on the general shareholders' meeting for steering a company towards the desired course. The duties of care and loyalty reveal certain resilient moments towards the adoption of legal transplants, since despite of the integration of the duty of loyalty, courts appeared to rely on the duty of care and the fragmentary regulations on conflict-of-interest transactions without resorting to the duty of loyalty. The overall increasing emphasis on fiduciary principles as a concept to govern the relationship between parties with financial interests at stake, might have contributed to the duty of loyalty gaining more prominence. The rise of the Stewardship Code might point towards the same direction. At the same time, the orientation of the Stewardship Code reveals the tendency to rely on anticipating and defensive strategies when it aims to educate domestic institutional investors and prepare them to bring them up to the speed of other globally acting institutional investors and asset managers, showing a willingness to rely on domestic actors.[1416] Finally, takeover regulation reveals an interesting pattern – in fact, similar to the innovation of the *kansayaku* –, namely the combination of regulative approaches from various jurisdictions. Takeover regulation also presents the conjunction and meeting point for various concept which appear in the other legal instruments, such as authority of the general shareholders' meeting, management's margin of discretion and its limits, inter alia, defined by fiduciary duties, as well as independent review mechanisms (*kansayaku* and independent directors), with the latter aspect, however, not having been explored so far with respect to defensive measures against unsolicited bids. This again, may be echoes the rather defensive note intoned by the Stewardship Code.

As a conclusion to this chapter, it can be summarized that the historical review of the legal instruments has revealed that the concept and potentially also function of the stock company appears to have undergone a deeper-running transformation between

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[1416] On the other hand, limiting the addressees to domestic institutional investors and asset managers stands to reason with a view to enforcement, despite the overall weak enforcement mechanism due to the ostensibly voluntary compliance and the consequent absence of any enforcement authority, see Goto, *supra* note 96, 42, 49; Kansaku, *supra* note 30, 81 f. Nonetheless, it contrasts with the approach in other jurisdictions, where much more assertively an evolution and "coalescing" of shareholder stewardship into hard law shareholder duties are discussed, see Chiu/Katelouzou, *supra* note 4, 142 ff., 146. This may be seen as fitting the image of an overall friendly stance towards majority shareholders, as, for example, the non-extension of fiduciary duties to majority shareholders vis-à-vis minority shareholders demonstrated, see above Fn. 1237.

the time of inaugural reception and promulgation in the late Meiji and Taisho periods and its current appearance. This impression shall further be explored in the next chapter taking into consideration the findings of previous chapter.

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CHAPTER V

BETWEEN LEGAL FASHIONS AND LEGAL DETERMINANTS

I. Introduction: Building of the Overall Narrative

The primary aim of this thesis is to find pieces of evidence in support of the proposition that the distinction between shareholder- or stakeholder-oriented corporate law requires an extension by, or rather the insertion of, a preliminary question, namely what exactly is meant to be expressed by attesting or gainsaying – as the case may be – the corporate law of a specific jurisdiction shareholder-orientation. Shareholders form an integral constituency of the stock company and assemble in the general shareholders' meeting as their collective organ of voice and decision-making. Statutory corporate laws in jurisdictions that subscribe to a somewhat capitalistic economic system and corresponding legal system appear to recognize in unison the shareholders' position and bestow a variety of rights on them collectively as well as individually, with individual – for example, proposal – rights with respect to specific instances being narrowed by requirements such as that defined minimum thresholds are met, with variation between different jurisdiction, which, however, at their respective cores show functional resemblance, if not even equivalence. Despite this common denominator, some jurisdictions have been classified as shareholder-oriented and others as stakeholder-oriented. Against this background, what then makes the corporate law of a jurisdiction and its institutions shareholder-oriented?

It appears as if the contemporary perspective underlying the binary distinction is influenced by the demands or the concept of what is perceived as an ideal investee firm in the eyes of (international) institutional shareholders, the prevalent group of shareholders in the modern stock companies of contemporary economies. Other groups of shareholders may have different demands or put emphasis on dissimilar aspects of an equity holding in a stock company, which is widely considered legitimate as there are usually no statutory nor conceptual restrictions as to the purpose a shareholder pursues with a share purchase and subsequent shareholding.[1417] In

[1417] The stance of regulators may be different with respect to financial instruments with shares as an underlying security, such as in the event of short selling.

addition, shareholders may rely on informal arrangements to voice their opinion or exert influence on business strategy and operations of a stock company. Against the background of the frequently discussed rational apathy of shareholders with dispersed portfolios or retail investors with minuscule shareholdings, it is further easily conceivable that other groups of shareholders take an indifferent stance or at least prefer not to take any proactive initiative and instead act as free-riders relying on the efforts of their (more powerful) shareholder peers. Beheld through such lens, the perception of corporate law and its institutions in Japan as rather stakeholder- than shareholder-oriented appears to constitute no more than an overgeneralization and a disconnect caused by an oversimplistic projection of views influenced by the US-American corporate reality in which institutional investors have long taken over the helm to form the predominating group of shareholders on corporate realities in other jurisdictions, such as Japan, shaped by divergent circumstances and practices. In this vein, the breakthrough of foreign institutional investors only began in Japan in the 2000s, before it was temporarily intercepted by the Global Financial Crisis in 2007/2008 and only gained traction towards the mid-2010s. Even if the period of the late 1990s and early 2000s are chosen as the relevant starting point for an inter-jurisdictional comparison, the development in Japan significant lags behind the one in the United States by virtually three to four decades.[1418] The redefinition and reinvention of domestic institutional investors commenced in the wake of the financial crisis in the late 1990s with the emancipation process from relational shareholding arrangements and philosophy consumed one to two decades, so that their awareness of their obligations as institutional investors only awakened towards the mid-2010s, thus coinciding with the now firmer position of institutional investors from overseas in stock companies listed on Japanese stock exchanges.

[1418] For example, Gelter, *supra* note 358, 917 f. identifies the 1980s as the period in which public stock companies in the United States began to embrace a shareholder-centric stance. Given that the phase-out of defined benefit plans and the switch to defined contribution plans set in at the end of the 1970s, *ibid*., 92 ff., figures 1 through 4, Japan is not too far away from such timeline given that the system of defined contribution plans (parallel to defined benefit plans) was only introduced with effect of 2001 and naturally suffered from various shortcomings during its nascence, see Kashiwazaki/Fukuzawa, *supra* note 3, 68 f., 74 ff. Furthermore, a stronger capital market orientation of the domestic pension funds, to take the flagship GPIF as an example, only commenced in the mid-2010s, in the case of the GPIF in 2014, see Fn. 135. The in comparison to the United States delayed switch to establish capital markets as one pillar of corporate pension funding may, inter alia, also be conditioned by the stable labor market and long-term employment binding employers and employee together, also encouraging mutually beneficial pension arrangements, see Gelter, *supra* note 4, 9, however, referring to the situation in the United States.

The angle that certain jurisdictions such as Japan have been perceived as advocating shareholder orientation or primacy, as the utmost form of orientation, to a lesser degree than other jurisdiction, finds its cause in incumbent ownership structures whose sea changes are in turn subject to macro-economic developments: Until recently, the majority of the owners of Japanese stock corporations took an approach to corporate monitoring which significantly diverged from the viewpoint of dispersed institutional ownership. The collaborative spirit within this community of firms that has obstructed the gaining of foothold for foreign activist investors was related to the high levels of relational shareholding insulated firms which spilled over to domestic institutional investors. The increasingly active role of the GPIF concomitant with a stronger regulatory focus on equity holdings in listed stock companies and the adoption of the Stewardship Code indicate that this weak spot has been duly identified by the relevant key actors and Japanese regulators.

However, to expect legal reform to change corporate practice runs the risk to overestimate or misconceive the impact of isolated legal provisions: Corporate law in the wider sense, equally encompassing mandatory law and soft law – including ostensibly voluntary, such as comply-and-explain – mechanisms, rather facilitates and translates changes triggered by factors outside the legal sphere which may materialize and subsequently break through intermediation into the legal sphere through sudden events, shocks, or gradual change, than to bring about transformations. The availability of vast financial resources in the hands of institutional investors due to pension funds as well as households and retirement savings being poured into equity markets via such channels commencing in the United States in the 1970s and starting to spread to other jurisdictions in the course of the late 1990s and early 2000s, has brought institutional investors to the forefront that put emphasis on policies and aspects distinct from the long-reigning relational, stable shareholders or individual investors whose relative relevance has dwindled due to the accelerating corporatization of ownership, since the inception and promulgation of the stock company in Japan in the late nineteenth and early twentieth centuries. Institutional investors have in aggregate outgrown the role of minority shareholders through building stakes large enough to empower them to articulate and adequately endorse their demands based on such equity positions, but also the increasingly favorable reception by regulators. The reshuffling of the power balance between different shareholder groups leads to different accentuations with respect to the use of shareholder rights.

Before elaborating on theoretical propositions with respect to the trajectory of the historical development of the stock company in Japan, a recapitulation of the investigation into ownership patterns and the evolution of certain key legal instruments will be given in section II of this chapter. The propositions with respect to the overall neutral stance of corporate law towards shareholders, possible "legal fashions", the transformation of the stock company as well as potential institutional lock-ins on a micro-level will be further articulated and espoused in section III. The theoretical propositions will be combined and interwoven with anecdotal, episodic evidence. This last section will also integrate thoughts on the exogenous factors currently potentially propelling developments in the composition of the shareholders' class.

II. Brief Recapitulation of the Analysis

The transplantation of the stock company concept occurring in the mid-Meiji period provided a suitable start point to trace the development of ownership patterns (see Chapter III above). With respect to ownership patterns of stock companies listed on stock exchanges in Japan, two major tendencies could be observed, namely (i) an increasing corporatization of ownership patterns starting in the late 1910s and taking off in the following two decades, and (ii) the rise of institutional investors which set in, however gradually, in Japan in the 1980s. While these macro-trends are not exclusive to Japan, the major shareholder groups of Japanese stock companies reveal distinct economic actors:

(i) In the initial period when the option of pursuing a business in the form of a stock company appeared on the menu of possible forms in which entrepreneurial activities can be pursued for the first time, three actors played an important role, namely the former merchant families that transitioned and channeled their wealth accumulated in the Tokugawa period into new industries, which, however, did not imply that all merchant families were successful at perfecting the transition (the successful exponents of Mitsui and Sumitomo are contrasted by their former peers Ono and Kōnoike on the other end of the spectrum, see Chapter II, supra subsection II.2, paragraph a)). At the same time, the relevance of the former merchant families in the construction of a modern economic order foreshadowed the later prominence of the *zaibatsu*. Another relevant group of actors in this initial period can be identified in the *zaikaijin* and investor managers who lend their expertise and network to the company management. In addition, their presence signaled and

vouched for the investability of the companies in which they served as advisors with such position usually being underpinned by an equity stake, or their official role being limited to such equity stake. The last relevant group of shareholders were individual investors on which stock companies initially depended for the collection of capital at equity markets for corporate investments and for which individual shareholders, wealthy individuals and families among them, expected due rewards through regular dividend payments.

(ii) The economic upswing in the 1910s concomitant with the rise of heavy industries then ushered in a slow departure with respect to the relevance of the groups of *zaikaijin* and individual shareholders, while the influence of emergent diversified industrial conglomerates (*zaibatsu*) grew – with a new *zaibatsu* generation coming into being – and the rise of corporate shareholders, including financial institutions, prevalently banks and (life) insurance companies. Capital markets remained relevant and eventually goaded the *zaibatsu* – as one in a bundle of driving motives – to open their subsidiaries to the public for investment in the course of the 1930s. Excessive dividend payment came to be reined in, a tendency which intensified under regulative restrictions in the immediate prewar era.

(iii) After a brief interval of resurgence of the relevance of individual investors following the distribution of the shares of *zaibatsu*-affiliated companies to the public and primarily individual investors in the early 1950s, former *zaibatsu* bonds reformed and transformed in the guise of *kigyō shūdan*, whose cohesion, inter alia, rested on *keiretsu* ties, ushering in a phase of stable shareholders with business ties, putting less emphasis, or more critically viewed, neglecting the community of outside shareholders in terms of profit participation and distribution to shareholders, since firms that entertained mutual equity stakes in each other did not fancy paying dividends to each other and other shareholders did not prompt, or were not in a position to push for more generous shareholder return policies.

(iv) Commencing in the 1980s, institutional investors and investors from overseas started to slowly gain more relevance, a trend was accelerated by the bubble burst and ensuing economic turbulences such as the banking crisis in the late 1990s which forced former stable shareholder to – in the case of (main) banks

– dissolve, or – in the case of non-financial companies – reduce their equity exposure in stock companies of the same *keiretsu* network. By the 2010s, these reshufflings had resulted in a sort of equilibrium with slight oscillations on an annual basis with overseas investors, (domestic) financial institutions and business corporations each holding between 20 and 30 per cent with the stake of business corporations being at the lower end of the range and overseas investors slightly surpassing the 30 per cent mark. In addition, individual investors whose provenance is not broke down by official statistics account for a share of above 15 per cent. Hence, currently nearly half of the owners of the stock companies in the top echelons of Japan's stock markets are outside investors, from overseas or individual ones. Government pressures – which to a degree also "translate" the demand of global investors – and limited exhibits of shareholder activism have contributed to companies pledging to further reduce relational shareholdings and to aiming at global financial performance standards to substantiate their investability. While dividend payments lag behind levels from the beginning of the early twentieth century, stock companies have hesitantly started to commit to higher dividend payouts, however, there is indication that companies oriented dividends at the dividend amount rather than at the payout ratio with the latter continuing to prevalently oscillate in the 30 to 50 per cent range with a tendency that a significant ratio of companies aims for the lower end of such range. Correspondingly, there is indication that capital markets do not play the overwhelmingly important role as a funding source for corporate investment any longer with companies also relying on cash reserves and bank borrowing. In a limited number of cases, stock companies implement capital increases which might, however, not be too much to the palate of certain institutional investors such as pension funds, or retail investors due to capital increases usually being priced below the current share price, thus undermining stock price management to which stock companies have likewise started to commit through the initiation of the share repurchases.[1419] In addition, the overall life

[1419] GS Yuasa Corporation and JFE Holdings Corporation may be mentioned as two of the more prominent large-capitalization companies that implemented capital increases in the fiscal year 2023, see Asia Nikkei, *Japan companies raise 30% more capital from overseas stock offerings* (24 April 2024), available under: https://asia.nikkei.com/Business/Business-trends/Japan-companies-raise-30-more-capital-from-overseas-stock-offerings (last accessed 8 June 2024). For the pertaining notices by GS Yuasa Corporation and JFE Holdings Corporation, see https://ir.gs-

cycle of firms may come into play with many listed companies nowadays having reached a stage of maturity. Instead of resorting to the placement of new shares on stock exchanges, stock companies – if not sufficiently cash-rich – have found other avenues to procure funds for growth, such as through critical review and eventually disentanglement from relational shareholdings.[1420] The fact that a considerable ratio of public companies in Japan can be characterized as having entered the maturity phase of their life cycle may further contribute to – in relation to company size – stagnating levels of corporate investment.

On the other hand, the development of the analyzed legal provisions exhibits an overall disparate pattern:

(i) The evolution of the *kansayaku* conceptualized as an independent review organ shows the struggle to address the principal-agent conflict between owners and management via an idiosyncratic independent review organ (see Chapter IV, supra subsection II.1). The oscillation between its – in substance – temporary abolishment and its appearance as a *kansayaku* board rather reflects the influence of different concepts as to how to rein in management power than it bespeaks an orientation towards shareholders or rather stakeholders. The juxtaposition of alternative governance models through the introduction of the company with three committees or the company with an audit and supervisory committee adds a new dimension in so far as it allows stock companies listed on stock exchanges in Japan to opt out of the established Japanese firm model. Since the conception of these two alternative models, demonstrates a more balanced commitment to a change of the power balance between the organs of a stock company in Japan than its outright abolishment in the 1950s, this revamping might indeed prove to be a sustainable alternative – at least with respect to the latter, that is the model of a firm with an audit and supervisory committee, given the poor reception of the former (the model of a company with three committees) – given that they present solutions consonant with the grammar of the overall system. The survival of the *kansayaku* institution may be interpreted as an anecdote in

yuasa.com/en/ir/news/auto_20231117592166/pdfFile.pdf and https://www.jfe-holdings.co.jp/en/release/2023/09/230905.pdf (each last accessed 8 June 2024).

1420 Such as in the case of Toyota Motor Corporation that divested parts of its shareholdings in Denso Corporation for such purpose, see Fn. 905.

favor of the validity and persisting effects of institutional lock-ins – at least on a micro-level –, as the *kansayaku* has been revived after the onslaught of the introduction of a full-fledged board of directors and has served as an avenue to install the concept of – in the language of statutory provisions – outside *kansayaku* and later outside directors in corporate law.

(ii) The development of the duty of loyalty and its pendant, the duty of care, has arguably been less macroscopically significant (see Chapter IV, supra subsection II.2). The gradual emancipation of the duty of loyalty from the duty of care as well as the reception of the business judgment rule to establish a safe harbor for management's discretion by defining limits for the judicial review to which managements' decision are subjected to under the duty-of-care standard underline the general dynamic of the development of legal rules. The transplant of the duty of loyalty has arguably also opened up a path for fiduciary duties to diffuse and take root in Japanese corporate law. Notwithstanding, the duty of loyalty took its time to emancipate itself in the jurisprudence. The transplant approach implemented insofar under the 1950 Commercial Code Amendment thus contrasts with the development of fiduciary principles in (other) civil law jurisdictions such as Germany, which, in case of the latter formed arguably more endogenously and incrementally through academic discourse and its subsequent adoption through the jurisprudence.[1421]

(iii) The decline of the rights of the general shareholders' meeting, despite the upheld proposition that it remains the highest organ of the stock company can be understood as a ramification of the professionalization of corporate management in conjunction with the increasing corporatization of ownership and "mediatization" of the ultimate shareholders which commenced with the takeoff of heavy industrialization in Japan in the mid-1910s (see Chapter IV, supra subsection II.3). This factual shift was only reflected in the 1950 Commercial Code Revision. While retaining its defining characteristics, the stock company concept has evolved from an enterprise with a still individual

[1421] Notwithstanding, the business judgement rule as a global standard has likewise been incorporated into German corporate law. The Federal Court Decision, 21 April 1997, in: BGHZ [Federal Court Decisions in Civil Law Matters], Volume 135, 244-257 is regarded as a landmark decision in which the court expressly conceded the management a wider margin of discretion. The business judgment rule has been codified in Article 93(1) sentence 2 German Stock Corporation Act in the course of the 2005 Stock Corporation Act Amendment.

or at least identifiable circle of investors which could still direct the management – thus, following the underlying concept of a civil law agency or even a *commenda*[1422] – to a pool with innumerable, anonymous and rationally disinterested investors who usually entertain various, dispersed investments and corresponding investment purposes following the portfolio theory.[1423] Majority and controlling shareholders as well as remaining friendly *keiretsu* shareholders do not depend on the forum provided by the general shareholders' meeting to voice and lay emphasis on their demands, but can rely on informal arrangements outside the "public" forum of the general shareholders' meeting. In this vein, it is not surprising that activist investors pursue to install delegates as directors on the board of directors of investee companies or that less confrontational institutional investors seek to engage in bilateral or multilateral communications to effectively gain an amount of leverage and influence their (minority) equity stake on a stand-alone basis cannot hope to achieve nor guarantee.

(iv) Broadly speaking, takeover law combines a comparative approach with respect to the regulation of takeover bids and the process leading up to unsolicited tender offers, such as disclosure thresholds, and an idiosyncratic jurisprudence which addresses the corporate practice of thwarting unsolicited bids through means, such as poison pills, with the existence or lack of benefit to the corporate value of the target company having emerged as the guiding principle, with the decision thereupon, however, being deferred to the vote of the general shareholders' meeting, thus acknowledging or at least affording some credibility to the claim of the general shareholders' meeting as the stock company's ultimate governing body (see Chapter IV, supra subsection II.4). While shareholder activism has sporadically flared up[1424], conspicuous or prominent cases involving institutional investors which could function as a

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[1422] See for the relevance and genealogical ties between the modern stock company concept and the medieval legal institution of the *commenda*, Fn. 579.

[1423] Following Harry Markowitz, *Portfolio Selection*, 7 The Journal of Finance (1952) 77 ff. On its innovation and relevance for institutional investors, see Gilson/Gordon, *supra* note 12, 885 f.

[1424] Recently, short-seller Scorpion Capital Partners has started to target Lasertec Corporation, see Bloomberg, *Short Seller Targets Japan's Lasertec After Its Epic Rally* (5 June 2024), available under: https://news.bloombergtax.com/financial-accounting/short-seller-targets-japans-lasertec-after-its-epic-rally-2 (last accessed 9 June 2024).

litmus test for the resilience and operability of the current takeover regime are yet to materialize.

(v) Just as its peers in other jurisdictions, the Stewardship Code looks back at a relatively brief history with the amendments not materially touching on the substance of the inaugural version (see Chapter IV, supra subsection II.5). The adoption itself can be seen in the broader context of the recent regulatory strategy to resort to soft law mechanisms which has been employed in the corporate law environment also with respect to the Japanese Corporate Governance Code, the 2005 and 2023 Takeover Guidelines as well as the Tokyo Exchange's Securities Listing Regulations (for example, with respect to independent directors). The soft law approach is consonant with content and direction of the Stewardship Code that focuses on "educating" and "empowering" domestic institutional investors to elevate and heave them onto a level with overseas institutional investors. While the consensus-based approach has been so often cited with respect to law and legal practice in Japan that it has – arguably – become eponymous, the soft law approach arguably adds a dimension as it implies a less top-down, however, nonetheless purposeful treading of regulatory authorities. It also reveals how regulatory authorities aim to prepare and predispose domestic actors, at the same time learning from previous experience, such as making use of the respite granted by the ebbing of the first wave of adversarial activists in the aftermaths of the Global Financial Crisis which ultimately extended wide into the early 2010s and to anticipate and mitigate looming future challenges for its domestic actors, here the target companies.[1425]

[1425] While adversarial activist engagement subsided in the mentioned period, the engagement at some target companies bore sustainable fruits, such as the engagement of Third Point LLC at Fanuc Corporation which, inter alia, resulted in the motion to raise the dividend payout ratio to 60 per cent, see The Wall Street Journal, *Japanese Robot Maker Fanuc to Double Dividend* (27 April 2015), available under: https://www.wsj.com/articles/fanuc-to-increase-dividends-after-push-by-activist-investor-daniel-loeb-1430121007 (last accessed 4 June 2024), which henceforth became the benchmark for dividend payouts, see Fanuc Corporation's financial results for various years, for example, for FY2022 (ending on 31 March 2023), available under: https://www.fanuc.co.jp/en/ir/announce/pdf/2023/reference202303_e.pdf (last accessed 4 June 2024) 13. Fanuc Corporation proved a "vulnerable" target given its initial resilience to embrace new corporate governance policies, such as sticking to a board of directors exclusively staffed with insiders for a considerable time (until 2013, joining the ranks of other "latecomers" such Toyota Motor Corporation, Canon Inc., Kyocera Corporation and Sumitomo Corporation), see Miyajima/Saito, *supra* note 109, 364 (table 12.1), 372. Other adversarial activist engagements were less successful, such as for the Steel Partners funds, as seen in the Bulldog Sauce Case as well as other target

III. Theoretical Propositions and Anecdotal Evidence

So where do all these observations leave the beholder, and do they allow for an attempt to offer a conclusive explanation and projection of a trajectory? Upon review of the above, the following theoretical propositions emerge for whose support pieces of empirical and anecdotal evidence shall be given to supplement the previous observation. The following order is not deemed to make any statement as to the relevance and importance of each proposition:

1. The Narrative of Legal Fashions and Determinants of a Legal (Sub)System

a) Legal fashions or the functions of law

The term "legal fashion", or in a variation, "legal fad"[1426] indicates a certain uneasiness with recent corporate law reform by means of legal transplants from other jurisdictions being implemented with a perceived lack of consideration for existing legal concepts and being seemingly carried by motives extraneous to the legal sphere in a narrower sense such as signaling compliance and the sharing of certain "legal convictions" to specific economic actors and standardization than strictly legal needs such as the improvement and refinement of existing laws or the construction of a solution to a virulent (domestic) legal problem.[1427] Furthermore, the notion of legal fashion resonates superficial adaption and a lack of consideration of coherence of transplanted norms with the existing web of legal provisions. Such perceived approach surprises, especially with view to Japan, that – if resorting to the legal transplant strategy – has been found and praised as a rare successful example of employing the legal transplant strategy and for tailoring such transplants to the existing legal framework.[1428] The above-analyzed conception of the *kansayaku* as a compromise formed on the basis of comparative legal studies and a view to the domestic circumstances and needs may serve as an impressive example, just as the stock company concept when it was moored and enshrined in Japanese corporate law (see Chapter IV, supra subsection II.1). On the other hand, recent reforms in the field of

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companies, for example, at Ezaki Glico Co., Ltd., with the fund eventually dissolving its engagements and departing from Japanese equity markets in the aftermath of the Global Financial Crisis, see Franks/Mayer/Miyajima/Ogawa, *supra* note 1090, 15 f.

1426 Baum, *supra* note 41, 189.

1427 Baum, *supra* note 41, 188 ff.

1428 Curtis J. Milhaupt, *Historical Pathways of Reform: Foreign Law Transplants and Japanese Corporate Governance*, in: Hopt/Wymeersch/Kanda/Baum, *supra* note 462, 53 ff.

corporate law, appear – at first glance – to be more straightforward and undertaken with less consideration for existing legal concepts creating the risk for frictions or dysfunctions, such as the Stewardship Code that only reveals its distinct, idiosyncratic purpose upon closer study (see Chapter IV, supra subsection II.5). In addition, frictions may occur due to multiple layers of regulation, such as mandatory law and soft law, employing legal concepts which are not entirely congruent nor consistent, such as in the case of the outside and independent directors under statutory law and in the Japanese Corporate Governance Code, respectively.[1429]

On the other hand, if new fields and sub-fields of law are developed, frictions per se occur. The initial adoption of the stock company concept may be cited to demonstrate that – successful – legal change can occur through conceptual leaps facilitated through the occurrence of pure or genuine "legal transplants" (see Chapter II, section V). On the other hand, the absorption and subsequent integration of the duty of loyalty shows a mixed picture, with reconciliation with the existing ecosystem and carve-out of a genuine scope of application taking several decades of case law, being arguably facilitated by the broader tendency of the infusion of corporate law with – morally aspiring or value-charged[1430] – fiduciary principles due to an increasing distance and concomitant decrease of potential influence of (ultimate) beneficiaries, a development which through the lens of a contemporary beholder may arguably likewise qualify to be referred to as a "legal fashion". Furthermore, the existing legal system and legal actors as well as the transplanted law are all subject to their own dynamics making it more reasonable to expect a reconciliation between them and the meshing of these different cogwheels to only occur over a longer time span. The term "legal fashion" and related parlance tends to focus too much on the "acquis" of the existing law and to implicitly negate the permeability and openness of a legal system (within its autopoietic limits) which an institutional lock-in – on the macro-level –, and subsequent path dependency may to a certain degree, however, not entirely suppress.

While the popularization of the stock company concept can itself be called a legal fashion, the widespread promulgation of certain legal concepts as legal fashion can be primarily observed with respect to recent corporate law reforms.[1431] It has already

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[1429] Baum, *supra* note 41, 205 ff.

[1430] Gelter/Helleringer, *supra* note 1201, 602, consider this aspect the remaining key difference between common law fiduciary duties and civil law equivalents.

[1431] As an aside, the fact that the stock company has not been referred to as a legal fashion indicates the temporal situatedness of the legal fashion concept, which implies that such qualification may have to be recalibrated under the impression of subsequent legal developments.

been indicated that rather than seeking for (best) solutions to address domestic legal problems, regulators' activity may be sparked by a motivation to signal "good governance" to international institutional investors as well as it suggests that a broader community of actors – such as GPIF – has begun to share "legal convictions"[1432], initally articulated by international institutional investors.[1433] Similarly, the "signaling" aspect points towards the orientation at the demands of a specific group of legal actors, in the context of recent corporate law and corporate governance-related reform in Japan, that is of institutional investors. The orientation of institutional investors at prevalently US-American law style corporate governance standards and their demand for comparable (formal) legal standards to make stock companies in such jurisdiction "investible" thus swept around the globe and nominally as well as to a lesser degree also in substance to Japan. Recent regulatory activity in Japan suggests that regulators are insofar aligned with international institutional investors as they work under the assumption that law or rather formal legal rules matter, which may be seen as an indication as to how to respond to the seminal question whether law matters.[1434]

b) Law does not matter – that much

The observations made in the course of this thesis, however, rather suggest that law does not matter, at least not that much. The scope of this statement extends to the legal provisions offering investor protection. As the investigation into the historical ownership patterns of Japanese stock companies has shown, a correlation between ownership dispersion and levels of formal investor protection can hardly be established, despite Japan presenting a more complex case due to the presence of relational shareholders with dispersed equity stakes in companies of a (former) conglomerate.[1435] Provided that key ownership guarantees are given, meaning that investors can equally commit to an investment as extract themselves from such through purchase and sale of shares, investor protection did apparently not rank among the priority items of investors in Japan until the arrival of institutional investors from overseas. Any, from

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[1432] See Chapter I, supra subsection I.3.c) bb); Fn. 325.

[1433] Baum, *supra* note 41, 189.

[1434] Cheffins, *supra* note 255, 459.

[1435] Puchniak, *supra* note 9, 515 ff., 518 ff. While Puchniak raises awareness to go beyond the "American-cum-global lens", the approach can arguably be taken even further and to approach each jurisdiction – at least upon close-up – individually without the context of a somewhat genealogical or geographical family. In this context, see also, Hannah, *supra* note 268, 404 ff., who critically reviews the stylization of the separation of management control from share ownership through increasing dispersion in the United States and the United Kingdom, in contrast to, Continental European jurisdictions.

the contemporary perspective (of institutional investors), shortcomings with respect to investor protection[1436] were compensated by informal arrangements, facilitated through different groups of dominant shareholders. The key to decipher the actual legal practice lies in identifying the dominant or "controlling" – in the sense of (i) an aggregate consideration adding up small stakes of individual, heterogenous members of one group, and (ii) factual control without necessarily aiming to exercise any control – group of shareholders.

From the inception of the stock company concept in Japan, the following four phases can be identified with the years provided not being understood as clear cut-off dates, but rather as points of orientation indicating that the transition from one to another group has been ushered in:

Table V.1: *Four phases of relevant shareholder groups*

From the 1880s until the mid-1910s	Founding shareholders and *zaikaijin*, plus wealthy individuals/families: - Take-off of the industrialization is accompanied by widespread incorporations and reliance of these new stock companies on equity finance, especially in capital-intensive industries (such as spinning and electricity). - *Zaikaijin* function as promoters to collect capital, often have own (overall small, but still significant) equity stakes, broker expertise and have an extensive network. - Legally and factually strong position of shareholders and high degree of concentration of (top-)shareholders. - Overall high significance of securities for private sector (including private households), in general largely on par with bank deposits. - Alternative model: Emerging first-generation *zaibatsu* (Mitsubishi, Mitsui, Sumitomo) that rely on internal finance (built around a bank, cf. Mitsui) for diversification and "corporate empire building"; top holding companies sheltered from equity markets as they retain partnership structures.
From the late 1910s until the 1940s	*Zaibatsu* and conglomerate structures:

[1436] Cheffins, *supra* note 255, 463 ff. provides an overview on which corporate law provisions and instruments potentially matter from an investor, i.e., minority shareholder, protection angle.

	- Overall "corporatization", especially in the course of the boom in heavy industries in the mid-1910s. Rise of internal shareholders as well as of banks and (life) insurances. - "Natural" dilution of founders in the course of the transition from the primeval to more mature stages in the life cycle of enterprises. - In the first sub-period, capital markets remain relevant (frequent capital increases/dividends remain important for investors), bank loans become increasingly important. - In the immediate prewar period, banks become key players in the coordination of the overall increasingly centralized, planned economy.
From the 1950s until 1990	*Keiretsu* structures: - As "heritage" from the "quasi"-centralized economy of the immediate prewar and war periods, banks retained coordinating function conferred to them; emergence of "main bank" as cynosure of reforming modified *zaibatsu* in the vest of horizontal *keiretsu*. - General shift from equity- to bank finance. - "Neglecting" of policies which would from a contemporary angle be viewed as "shareholder-friendly", such minimum dividends on the back of a community of stable, friendly shareholders.
From the 1990s onward	Rise of institutional and foreign as well as intermediary share ownership: - Caused by diversification of capital market-based pension funds; coincidence with bubble burst and ensuing departure of main banks after financial crisis in the late 1990s. - Stronger mediatization and emergence of investment chain. - Relational- and cross-shareholdings recede, but are partially retained or redefined, focus on key equity stakes and business ties. Equilibrium between different shareholder groups; monitoring vacuum (*zaikaijin*, *zaibatsu*, main bank have departed, hedge funds do not play that role on a broader front) which is attempted to be compensated by (i) strengthening independent elements (independent and outside directors), plus (ii) appealing to fiduciary duties of institutional investors (Stewardship Code). - Relevance of equity finance rises, but arguably not as important as in the take-off phase around 1900. Impact of "life cycle" of firms with the majority of listed companies having entered into the maturity

	phase as evidenced by relation of companies in different market segments. - Firms are prodded and nudged to cater to the demands specific to outside and institutional shareholders and "reward" them for their invest through direct stock returns. - Growing role of private equity as a "way out" to avoid exposure to regulatory requirements and market demands. Incipient dysfunction of equity markets (what is the purpose of share corporations and equity markets?)

These shifts in the ownership structures of public companies in Japan can be related to the occurrence of changes extraneous to the law. The four different shareholder groups acted within a comparatively constant framework of statutory law with the most incisive moment arguably being the 1950 Commercial Code Revision. Apart from the public sale of the shares of designated *zaibatsu* and *zaibatsu*-related companies, the revision did not result in more than transient change in the composition of share ownership, as former *zaibatsu* conglomerates resurfaced with various modifications in the vest of the *keiretsu* corporate groups. However, they reemerged in the shape of decentralized shareholders, thus providing less points for corrosion of such "bedrock"[1437] of dispersed, relational shareholding to be combatted by corporate law reform (even if such reform was intended).[1438] The role of corporate law in Japan can at most be called responsive, as it translated the corporatization of actual ownership by shifting the balance between the general shareholders' meeting and the board of directors. Other than that, the mechanics of the stock company remained somewhat untouched. The attempts to resuscitate the general shareholders' meeting through the promotion of shareholder proposal rights, for example, can be viewed as a response to changes in the legal practice and the overall decreasing relevance of individual investors, all the more against the background of malpractices with respect to *sōkaiya* and the environment of stable, friendly (institutional and corporate) shareholders. The shift set in in the late 1980s that gained traction in the 1990s, was triggered by an

[1437] Miyajima/Saito, *supra* note 109, 380.

[1438] Which poses a contrast to the situation in the United States, regarding which it has been proffered that interest groups' agenda prodded the lawmakers to commit to limit the shareholder power of large financial groups and thus promote (minority) shareholder protection, see Mark J. Roe, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1994) 26 ff.; Franks/Mayer/Rossi, *supra* note 33, 4010.

external shock and the global rise of institutional investors starting to pour pension funds under their administration into equity markets around the globe.

The arrival of institutional and foreign investors, however, triggered financial deregulation, but at the same time, a legalization process, as former informal mechanism, such as the signaling effect of equity investments of *zaikaijin*, the strong hierarchical ties with respect to equity and – in the case of the older generation of *zaibatsu* – management of the *zaibatsu*, the dispersed relational shareholdings and various executive meetings (*shachō-kai*) between members of a *keiretsu*, became substituted by (soft) law arrangements oriented at global standards (foreign) institutional investors have become familiar with and are conditions before such investors – pure activist shareholders aside – consider an engagement and investment. In this vein, the Stewardship Code stipulates guidelines with the intention to nudge domestic institutional investors to engage which increases accountability, transparency and predictability. Due to institutional investors' preference to rely on legal means that ensure predictability, corresponding (soft law) regulation has mushroomed.[1439] Here again, law does not precipitate or drive fundamental alteration in the institutional framework or of the relevant actors, but only "facilitates" transition or "translates" and "amplifies" the effects of changes which have already begun to materialize in the broader socio-economic sphere. The relevant macro-economic trend can be identified in stock markets becoming an increasingly relevant pillar of pension and household savings strategies due to the shift to defined benefits and defined distribution plans also in Japan: An increasing reliance of pension schemes on capital markets arguably correlates with the development of shareholder-friendly corporate law rules and arrangements.[1440] The head start of the United States with respect to this development has been singled out as a factor to drive development and integration of what has been dubbed as pro-shareholder or shareholder-friendly institutions and instruments into the corporate law.[1441] While the thesis is critical of the shareholder- versus stakeholder-primacy distinction and the attribution of precedence of one interest group over the other[1442], it subscribes to the proposition that the rise of institutional investors equipped

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[1439] Regulation below the level of mandatory statutory law such as the listing rules of stock exchanges proved also vital to afford shareholder protection in the United Kingdom in the absence of pertinent common law rules, see Franks/Mayer/Rossi, *supra* note 33, 4016 f.

[1440] Gelter, *supra* note 358, 967 f.

[1441] Gelter, *supra* note 358, 967.

[1442] The emergence of "universal owners" holding equity stakes in a cross-section of companies and industries of the entire economy, thus becoming oriented towards the health of the entire economy, and the concurrence of shareholder and employee due to the latter holding indirect claims against

with the retirement and saving funds of the public ushered in a shift in the balance of power between the organs of the stock company, increasing accountability of the management and strengthening the monitoring role of the shareholders.[1443] Growing into "universal owners", these intermediary and fiduciary institutions have emancipated themselves and upon awakening awareness of their role as well as of the fact that rippling effects, which actions or inactions of individual investee companies may cause, might impact their whole portfolio started to confidently assert their positions at the investee companies – in the case of the United States, since the middle of the 1980s.[1444] However, by design of the regulators this role is not assigned to the class of shareholders in its entirety, but to (domestic) institutional shareholders which have emerged and have been identified as the shareholder group most prone to overcome the rational apathy problem of dispersed and intermediary investorship due to their duties as fiduciary owners towards the ultimate beneficiaries which require them to act in these beneficiaries' best interest.[1445]

c) Institutional lock-ins

To conclude this subsection, a few words shall be spent on path dependency and institutional lock-ins. The concept of an initial institutional lock-in may be refined by distinguishing between two levels, namely macro- and micro-levels with respect to a legal or institutional framework. In this vein, an institutional lock-in may occur not only on the macro-level, such as pertaining to the adoption of the stock company concept and related institutions, but also on a micro-level, meaning with respect to

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the intermediary institutional investors has further contributed to blurring of the lines between shareholders and stakeholders and the interconnectedness of both roles, since shareholders are usually in one way or another also stakeholders depending on the broadness the stakeholder concept, see James P. Hawley/Andrew T. Williams, THE RISE OF FIDUCIARY CAPITALISM (2000) xvii, 83 ff., 170 ff. Instruments such as stock options granted to employees further add to such tendency.

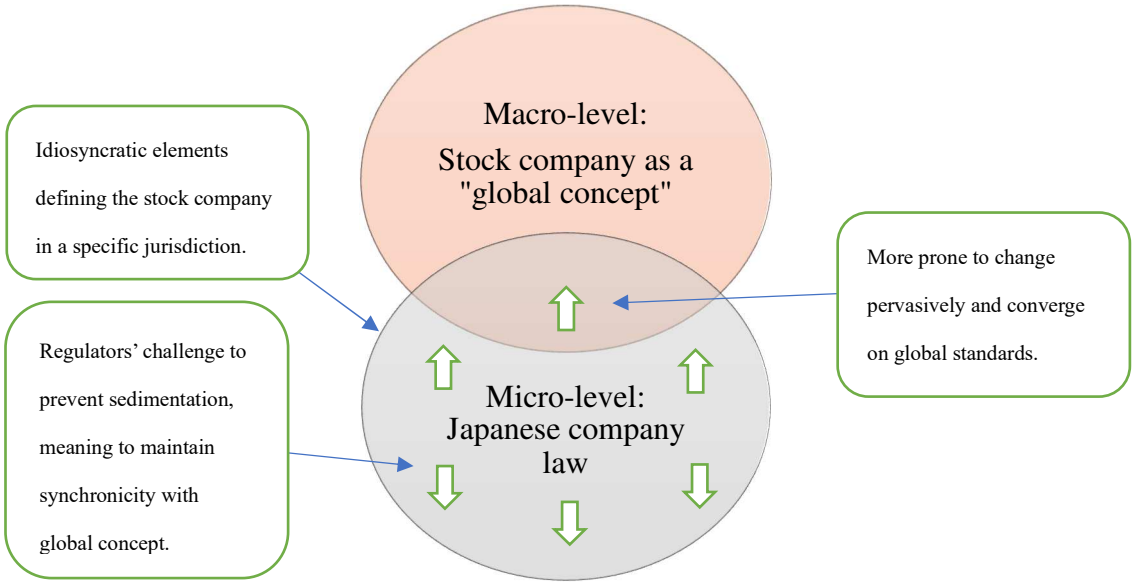
1443 See Gelter, *supra* note 358, 911 f., who likewise suggests that the reorientation of the pension system contributed to the shift in the power balance between shareholders and management towards the former and the increasing support for shareholder primacy. The situation of public companies in the United States can arguably not be projected onto the one of Japanese public companies without any adjustment, given that due to the arrangements and balances within the "community of the firm" of the postwar era, corporate managers never had as much free rein as the peers in the United States.

1444 Hawley/Williams, *supra* note 1442, 21, 165, 171.

1445 For the situation in the United States, see Hawley/Williams, *supra* note 1442, 19. As seen in the course of the analysis of the Stewardship Code in Japan, the fiduciary duties institutional investors owe to their clients as the ultimate beneficiaries is not the focal point of the stewardship concept as construed by Japanese regulators who rather construct an obligation of (domestic) institutional investors towards their investee companies.

legal instruments which fall into the stock company sphere, but regarding which lawmakers enjoy a certain discretion and leeway for experiments, since while such legal instruments appertain to the governance mechanisms and operations of a stock company, they do not touch upon the key structural components of the stock company which as a "sub-system" in its own right requires a worldwide standardization and consensus on a core of structural elements. Jurisdictions enjoy more flexibility with respect to the concrete design and configuration of the structure built around such the core elements. Through innovation jurisdictions may contribute to refine, reshape and redefine core structural elements. The genesis of the corporate governance and stewardship codices may be cited as recent examples of such dynamic. At the same time, regulators need to be attentive to ensure that interpretation and "living form" of the respective macro-level concept stay at their core aligned with the global concept in order to avoid disruptions and jeopardize the predictability of international transactions. The two legal spheres and their interaction can be illustrated as follows:

Figure V.1: *Legal spheres with respect t□ the st□ck c□mpany c□ncept (macr□-level) and d□mestic c□mpany laws (micr□-level)*



2. "Mediatizati□n" □r the Ev□luti□n □f the St□ck C□mpany C□ncept

Since the menu of forms of organization of entrepreneurial activities is not limited to the stock company, the decision to incorporate the business in the form of a stock company in the variation of a public corporation suggests an overall willingness of

management and insiders to allow third parties to have a say in the business operations of such enterprise. The concept of the stock corporation has, however, changed under the influence of the overall trends of corporatization and institutionalization of share ownership. The stock company itself has been transformed from a joint-stock enterprise or pooling of capital to a rather abstract investment vehicle. The membership aspect of a shareholding as a share in a business has largely been eclipsed and reduced to the mere financial aspect. The "say" is no longer exercised via the forum of the general shareholders' meeting, but – if at all – relocated to bilateral or multilateral talks between key institutional investors and the investee company, apart from the constellation in which controlling shareholders are present which may – just as activist shareholders aim for – have installed an envoy on the board of directors.

This deeper running change in the conception of the stock company resulted in a shift from the general shareholders' meeting to more refined forms of monitoring and interference, further complicated by the "mediatization" of the ultimate beneficiary owners. Corporate and insider shareholders may pursue objectives beyond the financial aspects of an equity investment, but most outside institutional shareholders as well as retail investors seek regular income streams through share price appreciation and dividends. This is epitomized by the development of dividend payments of stock companies listed on stock exchanges in Japan: While investors in the first decades of the twentieth century were hungry for dividends, stock companies with stable, cross-holding stock owners adopted a stable dividend policy which corresponded with the lack of demand for higher dividend of the stable shareholders, which on average usually resulted in dividend amounts being kept at an unchanging level while the pertaining (conservative) payout ratios were subject to fluctuations hinging on overall economic conditions and individual firm performance, which resulted in very unattractive dividend yields.[1446] The mediatization of ownership may also be related to the increasing size of stock companies in terms of market capitalization making it impossible for individual investors – bar a few exceptions – to personally exercise influence and monitor investee companies.

[1446] Ichiro Kawamoto/Masao Kishida/Akira Morita/Yasuhiro Kawaguchi, NIHON NO KAISHA-HŌ [Japan's Company Law] (1993) 23 ff.; Ulrike Schaede, *Understanding Corporate Governance in Japan: Do Classical Concepts Apply?* 3 Industrial and Corporate Change (1994) 292.

The genesis of the investment chain[1447] and the concomitant multiplication of agency relationships between the chain links may be seen as a response to this. Of course, there are variation to this tendency, which – to a certain degree – can be attributed to the life cycle of a company. Rather than the exercise of personal influence or supervision, the environment and process pertaining to an investment have moved into the focus of lawmakers and regulators, a phenomenon for which the Stewardship Code (as well as the Japanese Corporate Governance Code) may be cited as paradigmatic. The relevance of the general shareholders' meeting and its vote has been diluted and effectively shrunk to that of the task of residual or supplementary monitoring (visualized by the lighter coloring of the pertinent arrows in Figure V.2 below)[1448], in constellations in which the "corporate value" in the jargon of recent regulatory works such as the 2005 Guidelines or the Stewardship Code, as well as the case law developed by Japanese courts with respect to the activation of defensive measures against unsolicited bids is touched upon.[1449] The exercise of influence by (institutional) shareholders vis-à-vis the management has shifted to other channels, through usually bilateral or multilateral engagement. The Stewardship Code approves of such engagement and encourages it which may therefore be viewed as substitute and formalization of previous informal arrangements between *keiretsu* shareholders, however, arguably less amicable, more confrontational manner than friendly, stable shareholders. The opening up of new channels of communication and influence-taking between institutional shareholders and the company management entail the attachment of accountability in the form of stewardship duties to such intermediary investors and their service providers (such as asset managers and proxy firms) towards the investee company. Therefore, the relationship between owners and management has grown more multilayered and complex beyond the formerly four dimensions.[1450]

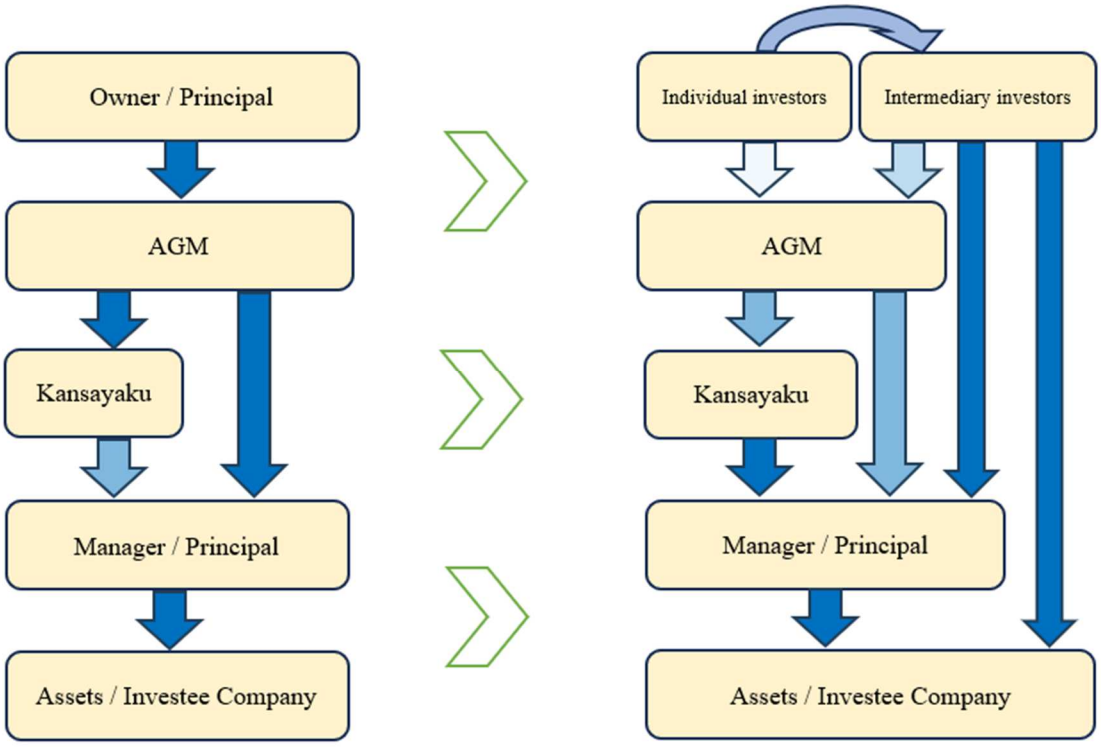
1447 The investment chain may have several dimensions. For example, in the United States, institutional investors account for significant investments into hedge fund or follow the lead investment of hedge funds into target companies, see Edelmann/Thomas/Thompson, *supra* note 12, 1415 ff.

1448 Edelmann/Thomas/Thompson, *supra* note 12, 1363.

1449 Other forms of monitoring can be identified in sale and purchase of shares and suing through derivative suits, see Edelmann/Thomas/Thompson, *supra* note 12, 1366.

1450 Nobuyuki Demise, *Management and Corporate Governance*, in: Nobuyuki Demise/Yumiko Miwa/Mariko Nakabayashi/Yoko Nakoshi (eds.), CORPORATE GOVERNANCE IN JAPAN: FROM THE VIEWPOINTS OF MANAGEMENT, ACCOUNTING, AND THE MARKET, 3-13, 5 ff., figure 1.

Figure V.2: *Reshuffling and shift of the power balance between the organs and the major actors of a modern stock company*



3. Transformation and "Reinvention" of Relational and Cross-Shareholdings

After a period of respite and resurgence in the wake of the Global Financial Crisis, relational shareholdings seemed as to have at long last embarked on a farewell tour. Regulators and stock companies – at least in the top echelons – appear to be equally convinced to significantly reduce and in final consequence phase out cross-shareholdings. While skepticism may remain as relational shareholdings appeared to have already beckoned farewell in the early 2000s, the change in attitude shows clues of increased levels of commitment and determination as well as sustainability of such corporate policy change. On the other hand, there are also cues that stock companies appear to take differentiated approaches. In this vein, Toyota Motor Corporation's attitude appears slightly equivocal, when on the one hand it reduces its exposure to Denso Corporation, a long-standing supplier and (former) member of the Toyota *keiretsu*, while it maintains or deepens equity ties with peer car manufacturers, such as Mazda Motor Corporation and Subaru Corporation. While this might reflect reorientation of business, such as a shift and dive also into electric cars leading to a decreasing reliance on Denso Corporation as supplier, it reflects that business logics

and relationships are still susceptible to being underpinned by strategic, relational shareholding between the involved corporations.[1451] While a differentiated, balanced view might therefore be advised, it can be observed that under outside – investor and economic – pressures, Japanese firms seem to have come to critically review their relational shareholdings to increase flexibility and reduce dependence and have thus come to limit their equity engagements to a shrinking core network of key business partners whose relationships are continued to be underpinned by (reciprocal) equity holdings.[1452]

The recently announced move of major Japanese banks to divest their equity stakes in Toyota Motor Corporation, which coincides with the latter's share repurchase program, indicates that share repurchases can also function as a vehicle to somewhat swap equity tranches under the guise and in the jargon of outside investor-friendly measures.[1453] At the same time, while relational shareholdings distort the view on financial performance metrics, they might similar to excess cash be seen as a reserve for troubling economic times, as the equity portfolios of Keisei Electric Railway Co., Ltd.[1454] and of Kyoto Financial Group, Inc.[1455] indicate.[1456] This concept of a "buffer"

1451 For coverage of the alliance between Toyota Motor Corporation, Mazda Motor Corporation and Subaru Corporation, see Toyota Motor Corporation, *Subaru, Toyota, and Mazda Commit to New Engine Development for the Electrification Era, Toward Carbon Neutrality* (28 May 2024), available under: https://global.toyota/en/newsroom/corporate/40850156.html (last accessed 30 August 2024).

1452 Masaharu Itō, *Ginkō wo chūshin ni kabushiki mochiai no kaishō ga shinten: Kabushiki mochiai kōzō no suikei, 2010-nenban* [Progress in the Elimination of Cross-Shareholdings, mainly among Banks: Estimation of Cross-Shareholding Structures, 2010 edition], 1 Daiwa Sōken Chōsa Kihō [Daiwa Research Institute Quarterly Survey Report] (2011) 9, figure 2.

1453 The Japan Times, *Two of Japan's top banks to divest ¥1.3 trillion in Toyota shareholdings* (7 June 2024), available under: https://www.japantimes.co.jp/business/2024/06/07/companies/banks-toyota-shareholdings/ (last accessed 8 June 2024).

1454 Keisei Electric Railway Co., Ltd. ranks as the top shareholder of Oriental Land Co., Ltd. with an equity stake of 21.15 per cent as per most recent numbers, see OLC Group, *Stock Information* (31 March 2024), available under: https://www.olc.co.jp/en/ir/stockshares/stock.html (last accessed 1 September 2024).

1455 For an indicate overview of Kyoto Financial Group, Inc.'s top equity holdings, see the excerpt from the Marketscreener database, available under: https://www.marketscreener.com/quote/stock/KYOTO-FINANCIAL-GROUP-INC-159713744/company/ (last accessed 1 September 2024).

1456 At the same time, relation shareholdings reveal historical ties such as Keisei Electric Railway serving the Tokyo Disney Resort complex operated by Oriental Land Co., Ltd., or Kyoto Financial Group, Inc.'s figuring as major lender for businesses in the Kyoto area reflected by equity holdings in Nintendo Co., Ltd., Nidec Corporation, Kyocera Corporation, Omron Corporation or Murata Manufacturing Co., Ltd. In both examples, the respective company management has so far refused to make concession to activist shareholder pressure to unwind and let investors participate in the gains derived from such equity holdings, see Asia Nikkei, *Japan railway Keisei should cash in Tokyo Disney shares: U.K. fund* (7 November 2023), available under: https://asia.nikkei.com/Business/Companies/Japan-railway-Keisei-should-cash-in-Tokyo-Disney-shares-U.K.-fund; The Japan Times, *Kyoto bank defies call to unwind holdings after $6-billion gain* (9 July 2024),

or reserve for periods of financial instability or turbulence resonates with the approach employed by public companies in Japan in the aftermath of the Global Financial Crisis.[1457] In the same vein, repurchased, but uncancelled shares provide a safety buffer against unsolicited takeover bids, as such shares can be (re)issued without authorization of the general shareholders' meeting. These observations rather indicate a functional redefinition in terms of relational shareholdings with shareholder return policies or what has been dubbed as such figuring as a welcome coincidence. Despite the intonation of another perish song, relational shareholdings may remain a characteristic of ownership patterns in Japan, presumably, however, on a lower level.

While technically not falling under the traditional understanding of relational or cross-shareholding, the involvement of consortia of Japanese stock companies in taking peer stock companies private, such as in the recent cases of Toshiba Corporation (by JIP; JIC was also a bidder), Shinko Electric Industries Co., Ltd. (by JIC), or JSR Corporation (by JIC), underlines a cooperative spirit in the business community of Japan and at the same time, presumably, a grain of skepticism towards overseas investors. From the angle of a potential transformation of relational shareholding in Japan, such cooperation could be viewed as a form of "ad hoc"-network. With a view to the previous phases of dominant groups of shareholders mapped out above, the relational, collaborative and more broader "trust" aspect has congealed and crystallized into the characteristic and arguably determinant component of Japanese corporate law, not only for the postwar period leading up to 1990, but equally for the previous and contemporary phases. In the terminology introduced earlier, it may well prove to constitute one of the "*carriers of history*"[1458] that continues to determine and shape arrangements between corporate actors in Japan, not necessarily limited to the relational shareholding dimension.

4. Shareholder Return Policies: Dividend Payouts and Share Repurchases

The level of dividend payment and dividend payout ratios indeed helped to trace the shift in the composition of the shareholder class. Investors who do not expect to reap benefits beyond the financial aspect of a shareholdings, put emphasis on dividends. In

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available under: https://www.japantimes.co.jp/business/2024/07/09/companies/kyoto-bank-cross-shareholdings/, and *Early bets on Nintendo and Nidec yield big gains for Kyoto bank* (3 November 2023), available under: https://www.japantimes.co.jp/business/2023/11/03/companies/kyoto-bank-gains-on-early-bets/ (each last accessed 1 September 2024).

1457 Kinoshita, *supra* note 62, 1 ff.

1458 See Chapter I, supra subsection II.4, Fn. 460.

this vein, the heydays of high dividends and dividend payout ratios bookend the analyzed period, with immediate stock returns through dividends higher in the Meiji and Taisho periods. Corporate (including banks) and *keiretsu* shareholders assigned a lower priority or even disinterest in dividends, in case of the latter, since a dividend raise at an investee company would likely boomerang and result in demands for a raise of dividends brought towards the very company. The stable dividend amounts usually concomitant with low payout ratios of Japanese companies in the 1970s and 1980s reflect an extreme form of such practice. With the rise of institutional investors, especially from overseas – since their domestic peers only slowly acculturated and assumed a more assertive role in such matters starting in the mid-1990s – dividend amounts and dividend payout ratio moved back to upper end of the agenda. Nonetheless, despite the ubiquity of the shareholder value jargon in, inter alia, scholarship, corporate practice appears to be still trailing with dividend payout ratios continuing to oscillate in the 30 to 40 per cent range.

When looking at recent figures on dividend payout ratios, the possibility of share repurchases needs to be taken into consideration as the relatively new, second avenue through which shareholders can be rewarded. The increasing resort to share repurchases is on the one hand cogent in view of rising levels of foreign institutional investors[1459], on the other hand, however, at the same time somewhat baffling against the background of the still cherished "community firm", as such arguably very clearly suggest that shareholders' interest have come to take priority other those of other stakeholders, first and foremost (non-executive[1460]) employees, especially against the background of an absence of wage hikes for nearly three decades. The image of the "community firm" would suggest a stronger adherence to what has been coined as "retain-and-invest" in the context of US-American corporation.[1461] Similarly, the shift in the overall pension system to equity market and from defined benefits to defined

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[1459] For the correlation between the presence of foreign institutional investors and the tendency of investee companies to commit to share repurchases, see Franks/Mayer/Miyajima/Ogawa, *supra* note 1090, 19 f., with the impetus for such commitment, however, being unclear, with extraneous causes (investor pressure to return free cash flows) and intrinsic motivation (for control purposes, effectively through increasing the shareholding ratio of friendly ally investors) being both likely scenarios, *ibid*., 20.

[1460] Executive employees, especially at senior levels, may participate through stock options, although such practice is not so widespread in Japan, yet.

[1461] William Lazonick, *Profits without Prosperity: How Stock Buybacks Manipulate the Market, and Leave Most Americans Worse Off*, Annual Conference of the Institute for New Economic Thinking Toronto (April 2014) 3, available under: https://www.ineteconomics.org/uploads/papers/LAZONICK_William_Profits-without-Prosperity-20140406.pdf (last accessed 5 June 2024).

contribution plans contributes to loosen the ties within the "community firm", since employees' economic fate becomes diversified.[1462] On the other hand, given the significance of the community aspect in Japanese law in the twentieth century, the concept may as well be reinvented and reshaped, maybe as a "community of firms", to refer to the continuous collaborative, relational spirit interweaving how business is done in Japan, if one brings to mind the afore-mentioned concerted action between firms with respect to the taking private of Toshiba Corporation.[1463]

The active commitment to share repurchases also contrasts with the on average sparse use of capital increases for funding of investment into productive capabilities, especially in the top echelons of listed stock companies, fueling the argument that shareholders who receive cash returns did not make a contribution to the value-creation of the company, a marked difference to the situation with respect to dividends in the 1920s and 1930s in Japan, when through capital increases parts of the dividends were de facto disgorged.[1464] Albeit it shall not be discussed herein whether such practice is conclusive from an economic viewpoint, it arguably strengthened the mutual dependence of firm and shareholders. While it can be argued that firms have started to find a liking in share repurchases, since they can be flexibly employed, with the launch of a share repurchase program in one year not necessarily stirring the expectations of shareholders that such practice will coalesces into a precedent to be repeated at regular intervals, one cannot shake the impression that the slow departure of the "community firm" has been ushered in. If spun further, share repurchases bear the risk of misallocation of capital on the level at the entire economy, if investors preferably buy shares of companies committing dividends and buybacks, such companies may be successful – at least in the short run – at the expense of companies that focus more on long-term growth potentials.[1465] Recent developments at Japanese stock markets at least indicate that investors welcome share buybacks with certain buying fever.[1466]

1462 While under defined benefit plan, a firms' employees are in essence bondholders of the very firm, under a defined contribution plan, they are given the opportunity to diversify their pension plan, at least in theory, as studies with respect to the longer history of defined contribution plans indicate that employees are incline to not adequately diversify, see Kashiwazaki/Fukuzawa, *supra* note 3, 72 ff.; Gelter, *supra* note 4, 14 ff.

1463 On the reinforcement of the community aspect throughout the twentieth century, see Haley, *supra* note 346, 205 ff.

1464 For the situation in the United States, see Lazonick, *supra* note 1461, 12.

1465 Gelter, *supra* note 4, 22.

1466 See, for example, for the negative constellation that expectations with respect to share repurchases or the size of such program were not fulfilled, Bloomberg, *MUFG Shares Decline Following Smaller-Than Expected Buyback Plan* (16 May 2024), available under: https://www.bloom

While propagating the importance of medium- to long-term perspectives of a share investment for the creation of corporate value, there appears to emerge a tendency that the generation of corporate value for shareholders is juxtaposed with generous share buybacks and dividend payments, thus potentially misallocating funds with could be employed to explore growth opportunities to secure long-term income sources from which shareholders could benefit in the long-term, provided they maintain their investment with the firm.[1467] At the same time, the life cycle argument could be produced referring to the fact that the majority of stock companies currently listed on the Tokyo Stock Exchange has already entered a phase of economic maturity implying limited investment opportunities and sufficient cash holdings – a point frequently raised with respect to Japanese listed stock companies – to which makes the allocation to regular immediate stock returns expendable and justifiable.[1468] With respect to dividends as the regular share returns, the still modest dividend payout ratios provide support for the latter view.

Notwithstanding, the circumstances of share buybacks in Japan differ in significant aspects from those in the United States, as usually companies with high levels of free cash flow, low debt ratios as well as low growth opportunities utilize share repurchases, mitigating the concern that growth opportunities are forsaken for the sake of shareholder returns.[1469] The fact that, for example, Toyota Motor Corporation opted to sell off its relational share block at Denso Corporation to fund a deeper dive into electrical car-manufacturing appears consistent, since the disentanglement of equity ties goes hand in hand with potentially looser business ties – the underlying logic of – here: vertical – *keiretsu* connection –, but may at the same time also hint a sensitivity to negative share price fluctuation and reluctance to directly turn to equity markets and

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berg.com/news/articles/202405-15/sumitomo-mitsui-forecasts-profit-will-rise-10-this-fiscal-year (last accessed 8 June 2024); Miyajima/Saito, *supra* note 109, 378.

1467 Miyajima/Saito, *supra* note 109, 366.

1468 As a benchmark, 1,657 firms were listed in the Prime Market Segment, 1,621 firms in the Standard Market Segment and 565 firms in the Growth Market Segment, which translates in firms still being considered in a growth stage accounting for only approximately 14.7 per cent in 2023. For the previous year, in 2022, the ratio of firms classified in the Growth Market Segment only accounted for 13.6 per cent. For the data, see Japan Exchange Group, *Number of Listed Companies/Shares* (10 June 2024), available under: https://www.jpx.co.jp/english/listing/co/tvdivq0000004xgb-att/tvdivq0000017jt9.pdf (last accessed 10 June 2024).

1469 Hideaki Miyajima/Ryo Ogawa, *A Challenge for "the New Capitalism": Making Sense of Restrictions on Share Repurchases*, RIETI Newspapers & Magazines (12 July 2022), available under: https://www.rieti.go.jp/en/papers/contribution/miyajima/11.html (last accessed 5 June 2024).

rather sort out matters internally between business peers.[1470] The indication that friendly firms are willing to help to bailout peer firms by providing liquidity as counterparty for share block sales[1471] ties into the cooperative spirit observed with respect to defensive measures against unsolicited bids and corroborates the impression of a perpetually strong relational network between stock companies in Japan. In addition, open market transactions are less frequent which entails that directors have less influence on the timing, but that the company can choose the counterparty of a placement of shares, meaning that it can be employed as a means to reallocate or swap share blocks between friendly shareholders, although recent figures indicate that the practice of relational shareholdings is on the wane.[1472] An arsenal of treasury shares that have not been cancelled may also come in handy as a takeover defense.[1473] Compared to the situation in the United States, the risk of self-interest of directors driving the timing of share repurchases may be less virulent in Japan, due to shares and share options on average remaining a less significant factor of executive compensation despite being on the rise in the recent years due to exposure to global market influences oriented at US-American business practices, such as through institutional investors from overseas or cross-listings in securities markets abroad.[1474] The – temporary – reemergence of relational shareholding structure appears cogent against such background. A certain "sheltering" by friendly investors still appears desirable.

1470 See Fn. 905, 1420.

1471 Hideaki Miyajima, *Governance Challenge for Japanese Companies: A re-evaluation of equity block ownership by corporations*, RIETI Newspapers & Magazines (16 May 2023), available under: https://www.rieti.go.jp/en/papers/contribution/miyajima/12.html (last accessed 5 June 2024).

1472 See for two examples of share repurchases for control reasons, Franks/Mayer/Miyajima/Ogawa, *supra* note 1090, 2.

1473 Franks/Mayer/Miyajima/Ogawa, *supra* note 1090, 4, who also observe the ratio of retired shares which would be cancelled over a period from 2001 until 2014, and note that the ratio of cancelled shares is higher in the period after than prior to the Global Financial Crisis, which goes hand in hand with a – temporary – departure of activist shareholders, see Franks/Mayer/Miyajima/Ogawa, *supra* note 1090, 11, 43 (table 2).

1474 Luyao Pan/Xianming Zhou, *CEO Compensation in Japan*, 53 The Journal of Financial and Quantative Analysis (2018) 2269, 2278; Asia Nikkei, *Japan sees 50% surge in companies paying executives with shares* (12 July 2020), available under: https://asia.nikkei.com/Business/Business-trends/Japan-sees-50-surge-in-companies-paying-executives-with-shares (last accessed 4 June 2024), and *Corporate Japan shifts from stock options to actual stock* (18 June 2018), available under: https://asia.nikkei.com/Business/Business-trends/Corporate-Japan-shifts-from-stock-options-to-actual-stock (last accessed 4 June 2024). In addition, non-founder top executives appear to be less prone to sell off shares granted to them directly or through share options, see Pan/Zhou, *ibid*., 2286.

While this is an abstract consideration and it appears not to constitute a tendency which is likely to emerge, share repurchases eventually carry a moment that contradicts the tenets of shareholder democracy and participatory wealth creation for entire society as drives monopolization with shares becoming increasingly inaccessible and investible for the general public. A rise of private equity transaction could further intensify such tendency with private equity funds usually having the tendency to bringing former acquisition targets back to public capital markets. Individual investors could then only access such investment opportunities through the mediation of institutional investors as their ultimate beneficiaries.

5. Final, more Abstract Considerations and Building Blocks

a) Relation to source model systems and potential role model character

How do the five key legal instruments have developed in comparison to their initial inspirations?

- The *kansayaku* have retained their idiosyncratic character, but have been implicated in the discourse on the independence and outside provenance of directors, a criterion extended to the *kansayaku*. The persistence of this institution despite its temporary disappearance arguably proves the viability of developing a model between the one-tier and two-tier board models. The ailments with respect to the effectiveness of its monitoring authority vis-à-vis corporate managers can in different guises also be recognized in jurisdictions with a one-tier board model with respect to the effectiveness of independent directors as well as those with a two-tier board model which in the same manner has not yet achieved to establish a flow of information which would allow a flawless fulfillment of the monitoring task. While independent directors are no longer viewed as a panacea, solutions are still sought as to the appropriate balance between independent directors and acquaintance with the company to be monitored.
- After the somewhat emancipation as a separate standard besides the duty of care, the duty of loyalty has proved as an avenue for the influx and adoption of further fiduciary concepts by the jurisprudence. Insofar, convergence tendencies towards the Anglo-American corporate law seem to have set in.

- The departure from the comprehensive competence of the general shareholders' meeting is – while being brought to Japan in the course of the 1950 Commercial Code Revision – tied into the overall context of the corporatization of corporate ownership and the dwindling influence – mediatization – of individual shareholders who via shareholder's proposal rights may still voice concerns, but due to increasing dispersion and proportionally therewith growing anonymity. *Sōkaiya* and the initial involvement and alliance of the companies presents an interesting episode in the history of corporate practice in Japan. Notwithstanding, the relevance of the general shareholders' meeting is partially maintained through its role as "warden" of the corporate value with respect to the decision to activate defensive matters against unsolicited takeover bids. The upswing of the relevance of shareholder's proposal due to institutional investor awakening to their role is arguably complemented by the impact of the Stewardship Code (on domestic institutional investors).

- Takeover law then represents an amalgamation of the legal approaches of the United States and the United Kingdom on the other hand. While certain developments appear to resonate influences of these innovators – for example, the "suitability test" established by the jurisprudence in the NBS case and its immediate subsequent cases arguably echo the Unocal decision despite structural differences[1475] –, the definition of the conditions for the lawful adoption of defensive measures have become the main area of activity in Japan.[1476]

- While the Stewardship Code is arguably inspired by the UK template, the direction of the Stewardship Code is distinct, thus supporting the argument to warrant caution against the projection of expectations solely based on the nominal recurrence without delving deeper into the substance of what at first glance may appear as a straightforward, unmodified legal transplant.

This brief synopsis reveals the disparate picture with respect to how transplanted legal rules behave and evolve over time in the receiving jurisdiction. At the same time,

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[1475] Osugi, *supra* note 1283, 4 f.

[1476] At the same time, the M&A practice as well as the design of poison pills has been influenced by the US-American legal practice, see Osugi, *supra* note 1313, 38 f. The 2005 Guidelines also disseminated the case law standards developed by the Delaware Chancery court with respect to the adequacy of the adoption of defensive measures and their orientation at the corporate value of the target company, *ibid*., 39.

attention needs to be paid to the historical situatedness of the company law in Japan and the appertaining institutions and arrangements between the relevant actors. On an abstract plane, the relational, cooperative or community-type aspect has arguably developed into a feature characterizing the mode in which company law is interpreted and "lived" in Japan. The post-1950s period is further characterized by a logic of stability with fluctuations between the actors contributing to such stability, such as the main bank and relational shareholding reforming with companies having overall become more stable supported by robust cash holdings. With respect to this latter aspect, it remains to seen, to which extent, the system can be infused with more dynamism.[1477] Turning towards more concrete attributes of the corporate law sub-system in Japan, it is noteworthy that the current system has been formed under the historical influence and forces of the twentieth century and certain elements such as the *sōgō shōsha* and the *keiretsu* go back to as distant as the merchant houses of the Tokugawa period. The economic upswings of Japan taking off on the back of a surge in the heavy industrialization and financial sectors in the mid-1910s and again towards the middle of the second half of the twentieth century appear to have been carried by institutional arrangements rather than corporate law whose central pillars haven remained the same, maybe with the exception of the declining relevance of the general shareholders' meeting setting in the 1920s and being reflected in statutory law by virtue of the 1950s Commercial Code Revision. "Selling points" or aspects of legal innovation or incubation of Japanese corporate law hence arguably lie towards specific legal instruments and their refinement, such as the Stewardship Code which stipulates a different model oriented at the jurisdiction-specific need to nudge domestic institutional investors into active stewards of their investee companies, or on a more microscopical scale, with respect to revitalization efforts of the general shareholders' meeting through shareholder's proposals which, however, appears to prerequisite a certain level of sophistication and willingness to engage by (institutional) investors.[1478]

[1477] The financial industry appears to begin to pursue a stronger oversea expansion and thrust after decades of paralysis under the impression of financial crises in the 1990s and 2000s, see Fn. 791.

[1478] Similarly, Takahashi, *supra* note 96, 104 f., identifies specific, refined aspects of legal instruments such as the flexibility with respect to corporate governance models, the derivative action or the codification of the business judgment rule regarding which Japan and Germany (as the counterpart of this comparative analysis) can learn from each other. Since Japan and Germany arguably find themselves at a similar stage of corporate law development, the scope of corporate law instruments which could be "exported" to jurisdictions seeking to catch-up in terms of corporate law development may be more granular and large-scale.

b) Materialization of law

The adoption of the Stewardship Code and the diffusion of value-charged terms into the soft law mechanisms may be interpreted as an indication of the advancing instrumentalization and materialization of corporate law, meaning that the orientation of the welfare state is imprinted and superimposed on traditionally formally rational legal rules.[1479] This development seems persuasive if seen against the background of the coupling and alignment of the orientation of capitalist and welfare purposes with institutional investors and employees whose part has due to institutional arrangements morphed from their role as only stakeholders to a Janus-faced role which combines the initial stakeholder position with that of ultimate shareholders of intermediary investors, that is, pension funds. In line therewith, language like "shareholder democracy" and the popularization of the use of capital markets for private household and pension savings circulates and further intensifies such tendency.

c) Attitude to law

From a legal theory standpoint with respect to actors' attitude to law, the reliance on soft law mechanism may pose an appropriate fit due to the uneasiness with binary, "either-or" or "all-or-nothing" categories of adjudication, traditionally ascribed to legal actors in Japan.[1480] The inflation of soft law mechanism and the reliance on "comply-or-explain" or outright voluntary rules may thus be perceived resonating other extra-legal practices such as administrative guidance (*gyōsei shidō*) which equally conjure up the image of voluntariness and consensus, but which de facto have compelling character.[1481] The fact that the alternative corporate governance model of a company with three committees as provided by statutory law was virtually not embraced, demonstrates that form – whether hard or soft law – appears to be less relevant and extra-legal in the sense that instruments and channels outside hard, statutory law may prove more successful with respect to achieving and enforcing policy objectives. While not being equally binding as "hard law", relying on soft law mechanism still contributes to establish a certain level of predictability or "calculability" which is considered as desirable and a foundation of modern capitalist

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1479 In general, on the materialization of law, Gunther Teubner (ed.), *The Transformation of Law in the Welfare State*, in: DILEMMAS OF LAW IN THE WELFARE STATE (1986) 4.

1480 Kinoshita, *supra* note 19, 24.

1481 On the de facto or quasi-coercive character of administrative guidance, see Yoriaki Narita (translated by James L. Anderson), *Gyōsei shidō* [Administrative Guidance], 2 Law in Japan (1968) 77 f.; Kinoshita, *supra* note 19, 28.

society.[1482] Furthermore, the softer treading of a soft law approach might match the still comparatively early stage of domestic institutional owners gradually awakening to their role as universal owners. The aspect of universal ownership which turns institutional investors eventually into stakeholders aligning their interests with those of the economy as a whole may make the growing prominence of the voice of institutional shareholders palatable to the "stakeholder-oriented" practice of the business community in Japan.

Finally, the regulators' efforts to nudge relevant actors both domestic institutional investors and stock companies, such as through public disclosure of non-compliance or inaction – such as through the Tokyo Stock Exchange's name-and-shame lists with respect to companies that do not submit plans with measures to enhance capital efficiency[1483] –, may signal a shift to a more assertive approach to establish the Japanese capital market in the landscape of globally integrated capital markets.[1484] At the same time, such detailed guidelines as well as active steering and interference provoke the question as to the ideal density of regulation. While not necessarily amounting to over-regulation, sporadic criticism has been uttered with the going private route through private equity having been mentioned as a way out for smaller and medium-sized companies in the light of stricter disclosure requirements and ensuing public scrutiny.[1485] Whether such articulations are mere polemics or indicate the formation of a new trend remains to be seen in the years to come.

[1482] Kawashima, *supra* note 206, 90 f., relying on Max Weber, WIRTSCHAFT UND GESELLSCHAFT: GRUNDRISS DER VERSTEHENDEN SOZIOLOGIE [Economy and Society: An Outline of Interpretive Sociology] (5th revised edition, 1972) 561 ff. [660 ff.], for a summary translation to English, see Max Rheinstein (ed.), MAX WEBER ON LAW IN ECONOMY AND SOCIETY (1954) 350 f. The aspect of "high predictability" is also emphasized by Arthur T. von Mehren, Some Reflections on Japanese Law, 71 Harvard Law Review (1958) 1496

[1483] Japan Exchange Group, *Tokyo Stock Exchange, Inc. (TSE) Has Published a List of Companies That Have Disclosed Information Regarding "Action to Implement Management That is Conscious of Cost of Capital and Stock Price"* (15 January 2024), available under: https://www.jpx.co.jp/english/news/1020/20240115-01.html (last accessed 9 June 2024); Japan Exchange Group, *supra* note 450. On the Tokyo Stock Exchange's proactive role and initiative with respect to corporate governance matters between 1999 and 2015, see Keisuke Arai, *The Role of the Stock Exchange in Corporate Governance*, in: Oda, *supra* note 1196, 55-63.

[1484] On the concept of struggle between various ideas as the means and catalyst to achieve peace as the objective of law in the European law context in contrast to the formation of law in Japan, see Yoshiyuki Noda, INTRODUCTION TO JAPANESE LAW (translated by Anthony H. Angelo, 1976) 5 f.; Kinoshita, *supra* note 19, 24 with reference to Rudolf von Jhering, DER KAMPF UMS RECHT [The Struggle for Law] (11th edition, 1898) 1. See with respect to for legal methodology, Hermann Kantorowicz, DER KAMPF UM DIE RECHTSWISSENSCHAFT [The Struggle for Jurisprudence] (1906).

[1485] See Fn. 806.

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OVERALL CONCLUSION

I. Challenge and Objective

The thesis set out to challenge the epistemological value of the binary distinction between the shareholder- or a stakeholder-orientation with respect to the corporate law and pertaining arrangements of a jurisdiction. Despite the observation that the corporate laws in jurisdictions that subscribe to a somewhat capitalistic economic approach which, inter alia, entails the acknowledgement of the position of – equally majority and minority – shareholders and the bestowing of an at its core widely functionally equivalent canon of shareholder rights, the distinction between shareholder- or stakeholder-oriented corporate law begs reconsideration. Being attentive to the needs of stakeholders does not necessarily disqualify the corporate law of a jurisdiction as also shareholder-friendly. The positions are not as exclusive as the distinction may suggest. Lawmakers in various jurisdiction may opt for balancing the positions of shareholders and stakeholders. Having said this, what exactly is meant by the term shareholder-orientation, and which criteria constitute the corporate law of a jurisdiction at shareholder-oriented.

II. Outline of the Analysis

The review of various sources of empirical data on ownership patterns flanked by corresponding data on dividend payouts and corporate finance pattern has shown that a chain of important shareholders has shaped the corporate practice since the arrival of the stock corporation concept in Japan. These actors initially partly drew on the heritage of the institutions of the preceding Tokugawa period, such as the affluent merchant families which partly managed to divert and use their accumulated assets in the incorporation boom in the late nineteenth century which laid the foundation for the further history of the stock corporation. Besides such affluent, former merchant families, the *zaikaijin* as investor managers rose to prominence with their presence on the board of directors or as advisors encouraging individual investors to subscribe to the shares of the newly incorporated stock companies. With the increasing corporatization and concomitant mediatization of individual shareholders setting in the context of the heavy industrialization in the latter half of the 1910s, *zaikaijin* departed and affluent families and the later *zaibatsu* took over the position as dominating

shareholders. The first-generation *zaibatsu*, however, remained reluctant to open their top companies to the public as investors. Capital markets remain an important source for corporate funding with corporate bonds evolving into another viable option besides capital increases. Such reliance on capital markets was rewarded by still generous dividend payouts. The proceeding life cycle of stock companies incorporated in the mid- and late Meiji period, however, resulted in stock companies having become a bit more independent from capital markets since they could partly rely on retained earnings. Bank borrowing continued to play a minor role, which only changed under the pressure of political changes which elevated banks into a coordinating role in the late 1930s and the following war period. The redistribution of the shares of former *zaibatsu* and *zaibatsu*-affiliated companies only led to a short-lived surge of individual share ownership, as banks and non-financial corporation became the predominant shareholders in the period between the mid-1950s and 1990. Bank borrowing maintained its strong position from the immediate war years; shareholder return policies were neglected due to relational shareholders being disinterested in paying each other dividends. The bubble burst in 1990 facilitated the inflow of funds from overseas. While the Global Financial Crisis of 2007/2008 brought about another stalling moment, main banks retreated and the levels of relational shareholdings receded, while institutional investors and foreign investors emerged as the prevailing groups of shareholders so that by the mid-2010 outside shareholders managed to account for nearly half of the equity holders in public companies in Japan. The rise of institutional investors is tied into the corresponding global trend triggered by the capital market-orientation of pension systems and household savings in various jurisdictions around the globe. In light of these reshufflings of ownership patterns, shareholder return policies have been adjusted with dividend payout slowly rising and share buybacks which have only become permitted starting in the late 1990s and early 2000s are employed on a flexible basis. Capital markets remain, however, less relevant than in the prewar period, as public companies continue to rely on bank loans, but also retained earnings.

The shifts in ownership patterns are not to the same extent mirrored in the development of corporate law instruments. While the declining competences of the general shareholders' meeting reflect the corporatization and mediatization of individual shareholders, it is at first glance difficult to establish any correlation between ownership patterns and the evolution of *kansayaku*, the duties of care and loyalty, the takeover regime or the Stewardship Code. The *kansayaku* might be tenably be

considered as a “carrier of history”, as it reflects the idiosyncratic compromise of Japanese lawmakers when drafting the Kyū-Shōhō and Shōhō. While it survived despite temporary disappearance, it has come to be tied into the broader efforts to establish assertive independent monitors over corporate management in the stock company. With the adoption of the unequally successful innovations of a company with three committees and the company with an audit and supervisory committee, the institution of *kansayaku* has been maintained, but it seems that lawmakers currently pursue other avenues to attain the purpose to establish independent monitors. The emphasis on independent *kansayaku* or directors leads over to the legal fashion argument that claims that legal transplants have recently not been motivated by virulent legal needs of the domestic law, but rather serve the purpose to signal compliance with certain global standards to the community of international institutional investors. This phenomenon, however, appears to apply only in a very limited manner with respect to the substance of corporate law in Japan. The duty of loyalty took several decades to emancipate itself from the duty of care as an independent review standard. The takeover regime has an US-American law imprint, but the mandatory bid rule rather hails from the United Kingdom which also spread this rule to the Member States of the European Union. Insofar, lawmakers take a combined approach. Nonetheless, the international legal transaction practice influenced by US-American law is mirrored in the arsenal of poison pills. However, the carving out of the case law with respect to the conditions under which a poison pill can be activated against an unsolicited takeover bid appears to present an idiosyncratic solution. Finally, the Stewardship Code draws on inspiration of its predecessor in the United Kingdom, but still takes a very specific approach, when it seeks to “educate” and “elevate” domestic institutional investors to the levels of its international peers.

III. Key Observations

The reshufflings in ownership patterns as well as direction and purpose of recent corporate law reforms indicate that shareholder-orientation is understood as catering to the demands of institutional investors who, however, emerged as relevant investors three to four decades later compared to their investorship in public corporations in the United States. The previously dominant groups of shareholders arguably had different demands and accentuation and could rely on distinct informal arrangement to ensure that their demands were responded to by the investee companies. After the corporatization of corporate ownership, the concept of the stock company shows

indication to undergo another deep-running change as communication and the exercise of influence by the owners vis-à-vis the management appear to have been moved from the general shareholders' meeting to other forums such as bi- and multilateral communications between investors and their investee companies. The Stewardship Code appears to try to address and facilitate the opening up of other communication channels. At the same time, institutional investors can still rely on the general shareholders' meeting and extended shareholder's proposal rights, however, another avenue has become available.

Despite this transformation process, stock company law and its pertinent institutions retain idiosyncratic elements. In the case of corporate law in Japan, the relational and trust aspect can be identified as one determining, characterizing element. Institutional arrangements obeying this logic may thus persevere. The transformation and "reinvention" of relational shareholdings which entails the reduction of cross-shareholdings to a core of key business partners as well as the formation of ad-hoc coordination may be referred to as vivid examples showing that the cooperative spirit underlying the relational shareholding concept has survived.

Tracing the arrival of the stock company concept in Japan and its subsequent historical development via an array of key instruments of corporate law in Japan has shown that standardization requires the consensus on a core of key structural elements. The en bloc adoption of the stock corporation with its key characteristics and pertaining legal rules can be considered a "macro-level" adoption of a legal sub-system. The straightforward reception qualifies the stock corporation as a "genuine legal transplant" into Japan conditioned and facilitated by the specific circumstances of its adoption. With respect to its configuration and more refined design, the "micro-level", jurisdictions enjoy discretion to harmonize alien concepts with the bedrock of existent legal (and social) norms and may for this purpose develop idiosyncratic elements, such as demonstrated by the institution of the *kansayaku*. The Stewardship Code may likewise be cited here, due to its distinct purpose and orientation setting it apart from other stewardship codices.

IV. Prospects

Perspective and the perception of historical trajectories are related to the beholder's very own situatedness in time. Long-term perspectives may reduce the susceptibility to error. Nonetheless, ex-post perspectives on historical events carry to risk to succumb

to projecting current views on the past. Furthermore, law as an extension of the interactions of society and its actors remains in flux. With respect to other legal institutions, the stock company poses a still relatively novel concept, especially its modern form it assumed and developed in the past 150 years. Furthermore, institutional shareholders have only risen to prominence in the course of the last five decades. The epistemological value of the previous paragraphs may thus be limited in the bigger picture. Notwithstanding, the deeper embeddedness of the stock company in the somewhat capitalist economic constitution of multiple jurisdictions as well as the relevance of institutional investors for the pension systems of various jurisdictions being tied to the social welfare dimension of modern societies suggests that the main actors and their interaction which have been under consideration in this thesis will remain relevant for a reasonable time span. The apparently assertive embracement of institutional shareholder-oriented reforms and the willingness to respond to various of their demands exhibited by lawmakers in Japan further suggests that the trajectories sketched in the preceding paragraphs will persist for some time. The thesis is thus hopeful that the observations and insights made herein may contribute a little to the understanding of the dynamics of stock company law and its pertaining institutional arrangements in Japan.

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