The Japanese Law of Fiduciaries from Comparative and Transnational Perspectives

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Japan occupies a vantage point to observe the intersecting theories of fiduciary law and transnational legal ordering. Having modernized its legal system by introducing western law since the late nineteenth century, Japan possesses a body of law that have been influenced by comparatively diverse sources including both civil law and common law traditions, as well as traditional value system. Japan also has a complex past in the region, initially acting as a colonial power to impose its modernized law onto Korea and Taiwan, then as a leading economy in the post-war years, though the past quarter century has witnessed its struggle. Such diversity and dynamics have affected the evolution of fiduciary norms in Japan and in East Asia, and the main part of this Article will trace the historical progression. In Japan and major East Asian jurisdictions, although the terms "fiduciary" and "duty of loyalty" were not part of the legal lexicon until recent decades, the basic notion of duty of care and the context-specific regulation of conflicted transaction were part of the law. The fiduciary norms evolved as their multiple strands of sources interacted with each other, or even came into conflict with each other. The ever-increasing economic interactions increased the pace and dynamics of this process, and regional and global financial crises added to the sense of urgency. This Article will use the framework of transnational legal ordering to understand the complex evolution of fiduciary norms in Japan, East Asia and beyond.

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INTRODUCTION

The notion of loyalty is hardly new to Japan. In fact, two strands of loyalty formed the core value system that was sanctioned by the premodern authority that ruled from 1603 to 1867. These loyalty norms were status-based: one was termed *ko* (孝), loyalty to family elders, and the other was *chu* (忠), loyalty to authority. The conventional wisdom is that this hierarchical social structure was defined by the Neo-Confucianism originally developed in China.[1] Recent academic research has cast doubt on these assumptions, however, suggesting that the rulers and thinkers of the time did not simply import this attractive but dangerous body of thought.[2]

These status-based loyalty norms are seldom articulated in modern legislation or legal scholarship after the introduction of Western legal thought in the late nineteenth century. Nevertheless, they played an important role in Japanese social and economic life.[3] Toward the end of the twentieth century, these norms were invoked as an important source of employee loyalty to corporations.[4] They shaped the operating norm of the company as a community of employees, in which the employees' interests could exert an influence on corporate management that sometimes exceeded the ownership interest of the shareholders.[5] Whether this Japanese style of management is the continuance of premodern thought and practice[6] or reflects a pragmatic adjustment to the necessities of modern society[7] is contested.[8] Nevertheless, it created a tension with the modern reform that

1. *See, e.g.*, Michael Young & Constance Hamilton, *Historical Introduction to the Japanese Legal System, in* JAPAN BUSINESS LAW GUIDE ¶ 1–370 (1988).

2. HIROSHI WATANABE, A HISTORY OF JAPANESE POLITICAL THOUGHT, 1600-190188-91 (David Noble trans., 2012).

3. JUN-ICHI KYOGOKU, THE POLITICAL DYNAMICS OF JAPAN 41–44 (Nobutaka Ike trans. 1987).

4. *Id.* at 64–66. For a recent example, see, FUJIO MITARAI & UICHIRO NIWA, *会社は誰のために* [WHO IS THE COMPANY FOR?] 97–105 (2006).

5. Masahiko Aoki, *Toward an Economic Model of the Japanese Firm,* 28 J. ECON. LIT. 1, 20 (1990); Curtis Milhaupt, *Takeover Law and Managerial Incentives in the United States and Japan, in* ENTERPRISE LAW: CONTRACTS, MARKETS, AND LAWS IN THE US AND JAPAN 177, 182 (Zen'ichi Shishido ed., 2014).

6. *See, e.g.*, JAMES C. ABEGGLEN, THE JAPANESE FACTORY: ASPECTS OF ITS SOCIAL ORGANIZATION 95–98 (1958).

7. *See, e.g.*, JOHN BUCHANAN, DOMINIC HEESANG CHAI & SIMON DEAKIN, HEDGE FUND ACTIVISM IN JAPAN: THE LIMITS OF SHAREHOLDER PRIMACY 130 (2014).

8. For a literature that takes the middle ground, see, for example, KUNIO ODAKA, JAPANESE MANAGEMENT: A FORWARD-LOOKING ANALYSIS 39–48 (1986).

emphasized the primacy of the shareholders' interests and monitored by outside directors on their behalf.

In what follows, we will trace the evolution of fiduciary norms[9] since the Japanese reception of the modern legal system during the latter half of the nineteenth and the early part of the twentieth century. The duty-of-care provisions and regulation of conflicted transactions were introduced into the Civil Code, the Commercial Codes, and the Trusts Act, which laid the foundation for further transnationalization (Part I).[10] The post–World War II years witnessed a greater influence of American law, which involved the transplant of the duty-of-loyalty provision, portending a gradual shift in the forms of fiduciary norm from a rule-based to standard-based format. However, the American-style open-ended fiduciary standard also raised more fundamental questions: Who do the fiduciaries serve and how are they to be monitored? These questions were among the most contested grounds of debate in a series of reforms toward the end of the twentieth century (Part II). Nevertheless, since the 1990s, Japanese lawyers and policy makers have demonstrated a greater willingness to use fiduciary terms and to embrace fiduciary initiatives overseas (Part III).

A historical review sheds light on a number of factors and mechanisms that led to the reception of fiduciary norms and the synchronization of domestic and international norms.[11] However, one can discern occasional divergence between the overseas fiduciary initiatives and the motives of the domestic policy makers that raise questions as to the level of convergence (Part IV(1)).[12] In fact, this co-existence of synchronization and divergence has hardly been unique to Japan, as can be seen when the scope of observation is extended to some of the major jurisdictions in East Asia. On the one hand, the one-and-a-half centuries of Japanese experience has served as the basis for the emergence of a transnational legal order. At the same time, the unique socio-economic conditions and the desire to exploit comparative advantage in the increasingly global market economy have created motives for each jurisdiction, both to introduce internationally prevailing fiduciary norms and diverge from them. The growing importance of the region, both in economic and political terms, also means that such disjunctions have the potential to influence the transnational evolution of fiduciary orders (Part IV(2)).

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9. In this article, "fiduciary norm" is used as a generic category that includes rules, principles, and customary notions that relevant parties perceive as binding, though not necessarily legally enforceable. Substantively, it can include both specific doctrines, such as those concerning duty of loyalty and duty of care, and broader normative statements, such as who the fiduciaries are, who the fiduciary should serve, and how any given rules should be enforced.

10. Thilo Kuntz, *Transnational Fiduciary Law: Spaces and Elements*, 5 U.C. IRVINE J. INT'L TRANSNAT'L & COMP. L. 41, 57 (2020).

11. For an analytical framework, see JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 15–26 (2000).

12. Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders, in* TRANS- NATIONAL LEGAL ORDERS 3, 55–63 (Terence C. Halliday & Gregory Shaffer eds., 2015).

I. CIVIL AND COMMERCIAL CODES: PRE-WWII RECEPTION

The modern layers of Japanese fiduciary norms were laid down by the French-inspired Civil Code (1896) and the German-modeled Commercial Code (1899).[13] Although the term "fiduciary" did not immediately become part of the Japanese legal lexicon, these codes contained a series of rules that were equivalent to the present-day fiduciary principles. Placed at the core of the Japanese law of fiduciaries is an agent's obligation to manage a principal's affairs carefully and faithfully.[14] Civil Code § 644 imposes on an agent "a duty to carry out the work of the agency following the aim of the agency and with the care of a faithful manager."[15] This duty-of-care provision applies, *mutatis mutandis,* to partners—*kumiaiin*,[16] guardians—*kōken*),[17] and executors—*igon shikkōsha* under the Civil Code,[18] and extends to corporate directors under the Commercial Code.[19]

As introduced in those statutes, the fiduciary regulation of conflict transactions was largely rule-based in form. The Civil Code agency provisions contained specific prohibitions on self-dealing and representation of both parties to the same transaction.[20] Similarly, context-specific regulations of conflict-of-interest transactions applied to guardians[21] and charity directors[22] under the Civil Code, and to commercial agents[23] and corporate directors[24] under the Commercial Code.

The Commercial Code also prescribed the corporate governance structure for for-profit corporations that paralleled the German-style two-tier board (*duale Führungsstruktur*). Just as the German supervisory board (*Aufsichtsrat*) provides monitoring of the managing board (*Vorstand*), Japanese statutory auditors (*kansayaku*) were expected to monitor the business decisions and accounting practices of the directors (*torishimariyaku*).[25] Herman Roesler, the Code's German architect, referred to not just the German example, but also French and British

13. MINPŌ [CIV. C.] 1896, no. 89 (Japan); SHŌHŌ [COMM. C.] 1899, no. 48 (Japan).

14. J. Mark Ramseyer & Masayuki Tamaruya, *Fiduciary Principles in Japanese Law, in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 643, 643 (Evan J. Criddle et al. eds., 2019).

15. MINPŌ [CIV. C.] 1896, art. 644 (Japan).

16. *Id.* art. 671.

17. *Id.* art. 869.

18. *Id.* art. 1012.

19. The relevant Commercial Code provision was introduced as Article 164, Paragraph 2 by Law No. 73 of 1911; renumbered as Article 254, Paragraph 2 by Law No. 72 of 1938; and renumbered as Article 254, Paragraph 3 by Law No. 167 of 1950. It is now superseded by Kaishahō [Companies Act], Law No. 86 of 2005, art. 355 (Japan).

20. MINPŌ [CIV. C.] 1896, art. 108 (Japan).

21. *Id.* art. 860.

22. *Id.* art. 57.

23. SHŌHŌ [COMM. C.] 1899, no. 48 (Japan).

24. *Id.* art. 264–65.

25. The directors were formally constituted as a board through revision to Commercial Code arts. 259 et seq, by Law No. 167 of 1950, and the statutory auditors by revision to Kabushiki Gaisha no Kansa tō ni kansuru Shōhō no Tokurei ni kansuru Hōritsu [Special Exceptions to Commercial Code Concerning Audit, etc. Act], Law No. 22 of 1974, §§ 18 et seq, by Law No. 62 of 1993.

legislation, making sure that the Code match the needs of the time in Japan.[26] The Japanese statutory auditors' position, however, was weaker than that of their German counterpart in that, although they had power to require directors to produce accounting documents for review and conduct inquiries on their business execution, they lacked the power to appoint or remove directors.[27]

On top of the civil law basis of Japanese private law, common-law trust was introduced by the Trust Act of 1922.[28] Under the Act, the trustee has the duty of carrying out "the work of the trusteeship following the aim of the trust and with the care of a faithful manager,"[29] a provision that shows close parallels with the language of Civil Code § 644. The agency-based regulation is extended to prohibition of the trustee engaging in self-dealing under any name involving any proprietary or personal rights.[30] While being careful to ensure consistency with the Civil Code, the drafter of the Trust Act incorporated certain remedies against breach of trust that tracked the common-law approach, which are more extensive than those available for agency arrangements.[31]

Thus, by the 1930s, fiduciary principles were prescribed in separate codes drawn from different legal traditions. There was no general duty-of-loyalty provision, and the provisions took a mostly rule-based format by listing conflicted transactions that were prohibited unless there was specific authorization or unless an independent representative was appointed. It should be noted that this was not unique to Japan at the time. English fiduciary law had long been largely rule-based, using no-profit, no-conflict formulas.[32] The general formulation of the duty of loyalty in the U.S. became broadly accepted only in 1930s, after the publication of Austin W. Scott's *Treatise on Trusts* and the *Restatement on Trusts*, in which he served as a reporter.[33] In Anglo-Commonwealth jurisdictions, more systematic consideration of fiduciary law came later in the twentieth century.[34]

The Japanese experience suggests that the divide between the civil-law formulation and the common-law formulation is not irreconcilable, recognition of

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26. Haruhito Takada & Masamichi Yamamoto, *The "Roesler Model" Corporation: Roesler's Draft of the Japanese Commercial Code and the Roots of Japanese Corporate Governance,* 45 ZEITSCHRIFT FÜR JAPANISCHES RECHT [JOURNAL OF JAPANESE LAW] 45 (2018).

27. Tsukasa Miyajima, *監査機構 [Auditing Structure], in* 昭和商法学史 [HISTORY OF COMMERCIAL LAW STUDIES IN SHOWA PERIOD] 389, 391–96 (Yasuichciro Kurasawa & Takayasu Okushima eds., 1996); Ronald J. Gilson & Curtis J. Milhaupt, *Choice as Regulatory Reform: The Case of Japanese Corporate Governance,* 53 AM. J. COMP. L. 343, 348 (2005).

28. Shintakuhō [Trust Act], Law No. 62 of 1922 (Japan).

29. *Id.* art. 20.

30. *Id.* art. 22.

31. *Id.* art. 31.

32. Aberdeen Rly Co v. Blaikie Bros (1854) 1 Macq 463 [1843-60] All ER Rep 249; Bray v. Ford [1896] AC 44, [1895-9] All ER Rep 1009, 73 LT 609.

33. Austin W. Scott, *The Trustee's Duty of Loyalty,* 49 HARV. L. REV. 521 (1936); Austin W. Scott, *The Restatement of the Law of Trusts,* 31 COLUM. L. REV. 1266 (1931).

34. PAUL D. FINN, FIDUCIARY OBLIGATIONS 1 (THE LAW BOOK CO. LTD. 2017) (1977); MATTHEW CONAGLEN, FIDUCIARY LOYALTY: PROTECTING THE DUE PERFORM ANCE OF NON-FIDUCIARY DUTIES 1–3 (Hart Publ'g 2011) (2007).

which could lay the foundation for further transnational fiduciary ordering. However, as will be seen in the next part, the reformulation of fiduciary concept under the American notion of duty of loyalty posed a major challenge of transplantation haunting the Japanese lawyers for almost half a century. The questions as to whom the fiduciaries are to serve and who are to monitor the fiduciaries also proved controversial, particularly in the Japanese law of corporation.=

II. AMERICAN INFLUENCE AND CHALLENGES: POST-WWII CHANGES

A. Coming of Duty of Loyalty

After World War II, the influence of American law became pronounced. A number of New Deal-inspired laws were introduced including an antitrust law, securities law, and labor standards law, as well as a new Constitution. Along with these laws, duty-of-loyalty provisions were introduced as a standard-based fiduciary norm. In 1950, the Commercial Code was amended to introduce § 254-2, which provided the following:

A director owes a duty to obey the provisions of the laws, the articles of incorporation, and the decisions of the general meeting of shareholders, and a duty to carry out their work loyally in the interests of the corporation.[35]

In later years, the Securities Investment Trust Act was amended in 1967 to impose a similar duty of loyalty on the manager of securities investment trusts to the trust beneficiaries,[36] and the Investment Advisors Act was introduced in 1986 to impose a duty of loyalty on investment advisors to their clients.[37]

The transplant of the duty-of-loyalty provisions was not completed in one day.[38] In fact, these provisions were rarely invoked in court, and when they were, they invariably accompanied a reference to the general duty of care of faithful managers.[39] However, it is not correct to say Japanese lawyers or courts resisted the duty of loyalty as a matter of principle. Rather, the court expanded the prohibition of conflict-of-interest transactions without relying on the duty-of-loyalty provision.

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35. SHŌHŌ [COMM. C.] art. 254-2, later renumbered art. 254-3, was superseded by KAISHAHŌ [Companies Act] Law No. 86 of 2005, art. 355.

36. Shōken Tōshi Shintaku hō [Securities Investment Trust Act] Law No. 198 of 1951, art. 71, inserted by Law No. 106 of 1967.

37. Investment Advisors on Securities Regulation Act, Law No. 74 of 1986, art. 21, repealed by Law No. 66 of 2007 and consolidated into the Financial Instruments and Exchange Act, Law No. 25 of 1948.

38. Hideki Kanda & Curtis J. Milhaupt, *Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, 51 AM. J. COMP. L. 887, 900–01 (2003).

39. The duty of loyalty was not invoked as independent ground of liability for the first time until 1989 in Takada v. Nihon setsubi, K.K., 835 KINYU SHOJI HANREI 23 [Tokyo High Ct.] Oct. 26, 1989. See text accompanying notes 113-114.

In *Oe Industrial v. Business Consultancies* (1963),[40] the Supreme Court invalidated a transaction between the plaintiff company and the defendant on the basis that the director who represented the plaintiff company abused his agency authority. The transaction in question involved the sale of corporate property. This was formally within the director's authority but in fact was entered into with the collusion of the defendant to reap an unfair profit. While the lower court had interpreted the Commercial Code's prohibition of conflict-of-interest transactions narrowly and had upheld the transaction so long as the director had acted within his authority, the Supreme Court held that if the other party was aware of the underlying self-interest of the director, the company could avoid the transaction constituting an abuse of agency authority following case law doctrine under the Civil Code.

In *San'ei Electronics v. Japan Victor* (1968),[41] the Supreme Court expanded the prohibition of self-dealing by overruling its earlier ruling that narrowly construed the Commercial Code's prohibition of self-dealing as encompassing only direct transactions between the company and the putative director. In this case, the plaintiff company's director had represented the company to assume a debt owed by the director to the defendant. The Commercial Code had required the board's approval when a director sells his property to the corporation, borrows money from the company, or otherwise deals with the company on behalf of himself or a third party, but had not prescribed indirect transactions such as the assumption of a director's debt by the company. Although some commentators feared that broadening the grounds of invalidity could cause disruption to business transactions, there was a growing awareness of the need to protect the company from disloyal directors. The Supreme Court took the broader construction, and later the Commercial Code was amended in 1981 to explicitly prohibit indirect forms of self-dealing transactions.[42]

While the Japanese courts have used various doctrines to regulate conflict-of-interest transactions, they did not see the need to treat the duty of loyalty as a ground for liability distinct from the duty of care. The Supreme Court thus held in 1970:

Article 254-2 of the Commercial Code [duty of loyalty] merely clarifies and details the duty of a faithful manager established in Article 254(3) of the same Code and Article 644 of the Civil Code. It does not impose a separate, higher duty than the general duty of faithful management required of all agents.[43]

This approach meant that the Japanese courts were slow to develop a more specific duty-of-loyalty doctrine, such as corporate opportunity, or an extensive remedy, such as disgorgement of profit.

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40. Saikō Saibansho [Sup. Ct.] Sept. 5, 1963, Sho 35 (e) no. 1388, 17 SAIKŌ SAIBA NSHO MINJI HANREISHŪ [MINSHŪ] 909 (Japan).

41. Saikō Saibansho [Sup. Ct.] Dec. 25, 1968, Sho 42 (e) no. 1327, 22 SAIKŌ SAIB ANSHO MINJI HANREISHŪ [MINSHŪ] 3511 (Japan).

42. Kaishahō [Companies Act], Law No. 86 of 2005, art. 356(1), 365(1) (Japan).

43. Saikō Saibansho [Sup. Ct.] June 24, 1970, Sho 41 (e) no. 444, 24 SAIKŌ SAIB ANSHO MINJI HANREISHŪ [MINSHŪ] 625 (Japan).

B. Loyalty to Whom?

By the 1970s, Japan was the world's second-largest economy. Its growth attracted international attention to some of the unique features of Japanese corporate management and labor relationships, including lifetime employment and a steep seniority wage progression that secured loyalty to companies as communities of employees.[44] The boards of directors were almost exclusively composed of senior managers who had devoted their whole careers to their companies as employees.[45] Shareholders, on the other hand, appeared content to have their financial interests subordinated to other stakeholders' interests, justifying their investments in terms of wider business interests.[46]

As Japanese economic growth threatened American dominance, tensions arose on the corporate governance front. To Americans' eyes, the Japanese corporate sector was closed to outsiders and lacking in transparency; in terms of American standards, Japan's post-war corporate governance was inadequate. As Curtis Milhaupt summarizes the sentiment:

The market for corporate control was not active during Japan's post-war high-growth period. In the post-war corporate governance regime, publicly traded firms were typically affiliated with a corporate group (*keiretsu*) with a major bank at the center. Group-affiliated firms cross-held shares of their affiliates, forming stable, friendly investor relationships involving significant percentages of the public float. Investor activism was rare and hostile takeover activity was condemned as antithetical to Japanese business norms, which conceptualizes the firm as a community of employees rather than an assemblage of financial assets to be bought and sold.[47]

This was the lesson that an American barbarian learned at the Japanese corporate gates in 1989.[48] T. Boone Pickens, who had earlier contributed to the American law of corporate takeover in *Unocal v. Mesa Petroleum Co.* (1985),[49] acquired 20.2% of Koito Manufacturing Co. and demanded that the Toyota affiliate elect a director of his recommendation.[50] For Koito, and most of the Japanese general

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44. ABEGGLEN, *supra* note 6, at 8, 39–40; ORG. FOR ECON. COOP. & DEV. [OECD], *Manpower Policy in Japan: Reviews of Manpower and Social Policies Number*, 11 OECD, 7, 9–26 (1973); EZRA F. VOGEL, JAPAN AS NUMBER ONE: LESSONS FOR AMERICA 133 (1979).

45. Gilson & Milhaupt, *supra* note 27, at 348–49.

46. *See, e.g.*, Gen Goto, *Legally "Strong" Shareholders of Japan,* 3 MICH. J. PRIV. EQUITY & VENTURE CAP. L. 125, 142–43 (2014); Bruce Aronson, *Japanese Corporate Governance Reform: A Comparative Perspective,* 11 HASTINGS BUS. L.J. 85, 95 (2015). For a historical account of the shareholding structure in Japan, see Julian Franks et al., *The Ownership of Japanese Corporations in the 20th Century,* 27 REV. FIN. STUD. 2580 (2014).

47. Milhaupt, *supra* note 5, at 182.

48. BRYAN BURROUGH & JOHN HELYAR, BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO (Harper & Row, Publishers 1990).

49. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

50. *米M&Aの大物ピケンズ氏筆頭株主に──小糸製株２０％を取得 [Mr. Pickens, A Major Figure in American M&A Becomes the Largest Shareholder—20% of Koito Shares Acquired]*, NIHON

public, Pickens's demand was nothing but another example of "greenmail" to extort extravagant cash from Toyota. Hiroshi Okuda, who would later become the CEO of Toyota Motors, negotiated hard with Pickens on behalf of Toyota and Koito. Koichi Kusano, who is now Justice of the Supreme Court, represented Koito as its attorney.[51] Ultimately, Pickens retreated from the fight in 1990, handing over the shares back to the Azabu Building, a shady speculator entity who Koito claimed was the beneficial owner of shares held by Pickens.[52]

In parallel, a government-level negotiation known as the U.S.-Japan Structural Impediment Initiative was under way. In order to alleviate the mounting trade imbalance, the U.S. Government demanded that Japan remove a wide range of trading impediments, which included corporate governance issues. Following the negotiations, a number of reforms were introduced to expand shareholders' rights. The 1993 revision of the Commercial Code and related statutes included, for example, provisions to expand the shareholders' right to review corporate books;[53] to make shareholders' derivative suits more accessible;[54] and to enhance the independence of statutory auditors.[55] The introduction of outside directors was discussed during the negotiations but did not become part of the reform package, in anticipation of resistance from industry. This became a hotly debated issue from the late 1990s on.

Not all Japanese were hostile to American influence. Since the early 1970s, Akio Takeuchi and Hideo Tanaka, colleagues at Tokyo University who had shared time at Harvard Law School, used the American law as a model, arguing that derivative suits, class action and other measures should be introduced and expanded to invigorate private citizens' efforts to enforce the law.[56] Takeuchi led academic opinion in the run-up to the 1993 revision, advocating law reform to enhance the use of derivative action.[57] For academics, foreign pressure was even felt to be useful to draw concessions from opposing business interests.[58]

KEIZAI SHINBUN 1 (Apr. 2, 1989) (Japan). For a general account of the dispute, see BUCHANAN, *supra* note 7, at 128–30.

51. *See* KOICHI KUSANO, 会社法の正義 [JUSTICE OF CORPORATE LAW] 169–72 (2011).

52. T. Boone Pickens, *The Heck with Japanese Business: Why I'm Not Interested in Trying to Compete in a Cartel System,* WASH. POST C1 (Apr. 28, 1991); *小糸製ピケンズ氏撤退を歓迎—麻布建の動き焦点に [Koito-Seisakusho Welcome Mr. Pickens' Retreat—Focus Shift to Azabu Buildings Co.]*, NIHON KEIZAI SHIMBUN 9 (Apr. 30, 1991) (Japan).

53. SHŌHŌ [COMM. C.] art. 293-6, as amended by Law No 62 of 1993. (Japan).

54. *Id.* art. 267(4), 268-2(1), as amended by Law No 62 of 1993.

55. Kabushiki Gaisha no Kansa tō ni kansuru Shōhō no Tokurei ni kansuru Hōritsu [Commercial Code Special Provisions on Company Auditor etc. Act] Law No. 22 of 1974, art. 18(1), as amended by Law No. 62 of 1993.

56. Their arguments were developed in a series of articles, which were subsequently incorporated in a book: HIDEO TANAKA & AKIO TAKEUCHI, 法の実現における私人の役割 [THE ROLE OF PRIVATE PERSONS IN LAW ENFORCEMENT] (1987).

57. Akio Takeuchi, *株主代表訴訟の活用と濫用防止[Enhancing the Use and Preventing the Abuse of Shareholder Derivative Action],* 1329 SHOJI HOMU 34 (1993) (Japan).

58. For the legislative background, see Yoshihiro Yamada, *ステイク・ホルダーと会社法—「無色透明の会社法」理論とその神話化 [Stakeholders and the Corporate Law—The Theory and the Myth of "Transparent and Colorless Corporate Law"] in*

Kusano—Koito's attorney and now a Supreme Court Justice—was not, and is not, an enemy of the American-style corporate takeover either.[59] Also a graduate of Harvard Law School, he had co-authored with his senior law firm partner a conference paper, noting with approval the shift in thinking among corporate managers who were beginning to "jettison the attitude to regard a corporate takeover as a vice in itself and to make use of it by viewing its economic benefits in a positive light."[60] He did note one difference in legal cultures: American directors' sense of exclusive loyalty to the shareholder had facilitated the rise of the corporate takeover, whereas shareholder control had become irrelevant in Japan because of what he termed a "personified view" of the company.[61] Kusano elaborated on this idea of corporate personification as follows:

Corporate managers and employees do not regard their companies simply as a device to make profit for the benefit of shareholders, but something that must be defended as if it is their own *han* [藩: premodern governmental entity] or castle, where their own identity is at stake. The company behaves autonomously for its own purpose of growth and continuity.[62]

One can detect a resonance of the status-based loyalty that was alluded to at the beginning of this article.[63] According to Kusano, companies had become the sole object of loyalty after the destruction of the war and urbanization had deprived *ie* (イエ: household), *mura* (ムラ: local community), and *kuni* (クニ: nation) of such status. Perhaps because he wrote this just after he had successfully defended Koito against Pickens, Kusano sounds somewhat sympathetic to corporate personification. Nonetheless, he remained agnostic about whether this personified view of companies should be retained in any way or be jettisoned as a remnant of the premodern era and replaced by American-style shareholder primacy.[64]

A review of post-war developments reveals that the notion of a duty of loyalty and ideas about shareholder-oriented corporate governance generated tensions and a heated reaction in Japan, particularly in the area of corporate law. However, the conceptual challenges and debates about stakeholders may have provided fertile grounds for further development. As will be seen in the next part, during the 1990s and onward, Japanese lawyers and policymakers began to use the broader notion of fiduciary duty, including the term "duty of loyalty," beyond corporate law. We will

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会社法の選択—新しい社会の会社法を求めて [CORPORATE LAW'S CHOICE: SEARCHING FOR THE CORPORA
TE LAW IN THE NEW ERA] 31, 137–47 (Masafumi Nakahigashi & Hideyuki Matsui eds., 2010).

59. KUSANO, *supra* note 51, at 175 ("for the sound development of corporate society, it is crucial that there is the open possibility that a hostile takeover can be successful").

60. Toshiro Nishimura & Koichi Kusano, *International Economic Friction and Corporate Takeover, in* INTERNATIONAL FRICTIONS—ITS LEGAL-CULTURAL BACKGROUND 92, 128–29 (Koichiro Fujikura & Ryuichi Nagao eds., 1989).

61. *Id.* at 101–19.

62. Koichi Kusano, *企業買収と擬人的企業観 [Corporate Takeover and Personified View of Companies]*, 108 (4-5) MINSHOHO ZASSHI 480, 481 (1993) (Japan).

63. *See* text accompanying notes 1-8.

64. KUSANO, *supra* note 51, at 485.

also see greater synchronization between domestic law and overseas initiatives concerning fiduciary governance.

III. GREATER TRANSNATIONALIZATION: REFORM SINCE THE 1990S

In 1991, the Japanese bubble economy collapsed, leading to a decades-long recession. During this period, a number of events coalesced to bring about greater awareness among the Japanese of the broad notion of fiduciary principles and their transnational dimensions. First, because the Japanese model of economic growth was now in question, there was greater momentum for comprehensive reform, not just in corporate or market sectors but also in the non-profit and governmental regulatory sectors. Second, Japan was now in the midst of globalization. In 1998, the restriction on cross-border capital transactions was lifted and foreign exchange was opened up to all business entities. The deep economic recession brought about extensive corporate restructuring, both within Japan and across jurisdictional borders, in the form of both friendly purchases and hostile takeovers. Third, the Japanese Government initiated a financial reform in 1996 in an attempt to emulate the British Big Bang.[65] Like their British and American counterparts, regulators and market players now faced financial conglomerates that operated globally under complex conflicts of interest and with the potential to abuse power within the deregulated market environment.

A. Corporate Law

Japanese corporate law in the 1990s and 2000s was characterized by extensive reform debates. Statutes were amended on an almost yearly basis, including the introduction of a freestanding Companies Act in 2005 to replace the corporate law section of the previous Commercial Code.[66] Although most enabling reforms aimed at providing wider set of strategic choices to the managers were popular among the industry, some of the corporate governance reforms, and particularly those relating to the monitoring of fiduciaries, were highly contentious.

After the 1993 revision of the Commercial Code reduced filing fees,[67] derivative suits increased in number: seventy-three such suits were pending before district courts around the country in 1993, a figure that had increased to 202 by 2002.[68] The decade following the collapse of the bubble economy in 1991 revealed a series of mismanagement and accounting irregularities in major Japanese companies. Increased prosecutorial action facilitated derivative suits that followed

65. FINANCIAL SYSTEM WORKING GROUP OF THE ACTION PLAN COMMITTEE, ECONOMIC COUNCIL, REVITALIZING THE JAPANESE FINANCIAL SYSTEM (1996).

66. Kaishahō [Companies Act], Law No. 86 of 2005 (Japan).

67. *Id.* art. 874-4(1).

68. Tomotaka Fujita, *Transformation of the Management Liability Regime in Japan in the Wake of the 1993 Revision*, *in* TRANSFORMING CORPORATE GOVERNANCE IN EAST ASIA 15, 17 tbl. (Hideki Kanda et al. eds., 2008).

on criminal indictment.[69] Those derivative suits contributed to the development of case law on the range of duties owed by the directors of banking institutions and other for-profit companies. The figure then declined to as low of 102 in 2006, but it rose again, along with the growing attention to corporate governance issues, reaching 215 in 2011.[70]

In the 1990s and 2000s, the issue of requiring outside/independent directors on boards was controversial in the debate on corporate governance in Japan.[71] In the preparatory stage to the corporate law reforms of 2002, a proposal was made to require every company to have at least one outside director. Eventually, the proposal was defeated, and instead a new optional alternative corporate structure was created in which a company could replace the traditional statutory auditor system with a newly introduced three-committee system, which requires a majority of outside directors on each of the audit, nomination, and compensation.[72] This governance structure was a legislative attempt to encourage Japanese companies to switch from the traditional management board model to an American-style monitoring model, in which the committees comprised mainly of outside directors undertook the core functions of monitoring.

The optional approach of the 2002 reforms reflected the policymakers' ambivalence about American-style corporate governance.[73] In fact, the impact of the 2002 reforms has been limited. The newly introduced committee structure was adopted by a very small number of Japanese companies. As late as 2014, only 1.7 percent of listed companies had adopted this system.[74] The link between the outside directors and good corporate performance remained elusive.[75] Sony, for instance, was the first Japanese company to introduce independent executive directors voluntarily in 1996. Following the 2002 reforms, Sony formally introduced the new committee structure, but its performance remained dismal through the 2000s and well into the mid-2010s. As another example, Toshiba led corporate governance reforms by introducing executive officers in 1998, nomination and compensation committees in 2000, and three outside directors in 2001. However, it was revealed in 2015 that the company had engaged in fraudulent accounting for years under the top executives' directions. The company's difficulties were often contrasted with

69. Mark D. West, *Why Shareholders Sue: The Evidence from Japan,* 30 J. LEG. STUD. 351, 377–80 (2001); Fujita, *supra* note 68, at 20–29.

70. Akiyo Fukui, *Overview of Shareholder Derivative Suit after the Implementation of Corporate Code,* 334 SHIRYO-BAN SHOJI HOMU 72, 72 (2012); *News,* 2202 SHOJI HOMU 65 (2019).

71. Gen Goto et al., *Japan's Gradual Reception of Independent Directors: An Empirical and Political-Economic Analysis, in* INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH 135–47 (Dan Puchniak et al. eds., 2017).

72. Kabushiki Gaisha no Kansa tō ni kansuru Shōhō no Tokurei ni kansuru Hōritsu [Special Exceptions to Commercial Code Concerning Audit, etc. Act], Law No. 22 of 1974, arts. 21-5 et seq, inserted by Law No. 44 of 2002.

73. Gilson & Milhaupt, *supra* note 27, at 343.

74. TOKYO STOCK EXCHANGE, TSE-LISTED COMPANIES WHITE PAPER ON CORPORATE GOVERNANCE 2015 (2015). For post-2014 developments, see text accompanying note 106-07.

75. For empirical studies, see Goto et al., *supra* note 71, at 151–60.

the steady performance of Toyota Corporation, which said it had no intention of introducing outside directors. Bruce Aronson observed in a careful case study, however, that Toyota later introduced independent directors in response to a governance crisis wrought by inadvertently accelerating vehicles.[76]

Deregulatory and enabling reform of 1990s-2000s was followed by greater use of soft-law in the mid-2000s onward. At the time, the number of mergers and acquisitions (M&A) were rising, and some of the management actions such as takeover defenses and management buy-outs (MBO) attracted public attention.[77] In order to ensure fairness, the Takeover Defense Guidelines were published in 2005,[78] and the Management Buy-Out (MBO) Guidelines in 2007,[79] under the auspices of the Ministry of Economy, Trade and Industry (METI).[80] Both guidelines followed recommendations made by a group of legal and policy experts, who borrowed heavily from the Delaware takeover doctrine.[81] However, the experts' report emphasized that defensive measures should be implemented to protect corporate value, a concept that is ambiguous enough to be interpreted either as referring to shareholder interests or the wider interests of the entire body of stakeholders.[82] In Curtis Milhaupt's words, the Guidelines "adroitly straddled the conceptual divide between the shareholder orientation of U.S. corporate law and the more stakeholder- (particularly employee-) oriented approach of post-war Japanese corporate governance practices."[83]

Generally, Japanese judges do not display the ambition of the Delaware Chancellor in leading the debate on corporate governance, and the general public does not expect them to do so, either.[84] Nevertheless, the court has been willing to

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76. Bruce Aronson, *Case Studies of Independent Directors in Asia, in* INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH 439–44 (Dan Puchniak et al. eds., 2017).

77. Livedoor v. Nippon Broadcasting System, 1899 HANREI JIHO 56 [Tokyo High Ct.] Mar.23, 2005; Steel Partners v. Bull-Dog Sauce, 61(5) MINSHU 2215 [Sup. Ct.] Aug. 7, 2007; In Re Rex Holdings Co., Ltd. 1326 KINYU SHOJI HANREI 35 [Sup. Ct.] May 29, 2009.

78. MINISTRY OF ECON., TRADE AND INDUS. & MINISTRY OF JUSTICE, 企業価値・株主共同の利益の確保又は向上のための買収防衛策に関する指針[GUIDELINES REGARDING TAKEOVER DEFENSE FOR THE PURPOSES OF PROTECTION AND ENHANCEMENT OF CORPORATE VALUE AND SHAREHOLDERS' COMMON INTERESTS] (2005).

79. MINISTRY OF ECON., TRADE AND INDUS., 企業価値の向上及び公正な手続確保のための経営者による企業買収（ＭＢＯ）に関する指針 [MANAGEMENT BUYOUT GUIDELINES FOR ENHANCING CORPORATE VALUE AND FAIR PROCEDURES] (2007).

80. BUCHANAN, *supra* note 7, at 259–65.

81. CORP. VALUE STUDY GRP., 企業価値報告書 [CORPORATE VALUE REPORT] (2005); CORP. VALUE STUDY GRP., 企業価値の向上及び公正な手続確保のための経営者による企業買収（ＭＢＯ）に関する報告書 [REPORT ON MANAGEMENT BUYOUT IN PURSUIT OF ENHANCED CORPORATE VALUE AND SECURE FAIR PROCESS] (2007).

82. Kenichi Osugi, *Transplanting Poison Pills in Foreign Soil: Japan's Experiment, in* TRANSFORMING CORPORATE GOVERNANCE IN EAST ASIA 36 (Hideki Kanda, Kon-Sik Kim & Curtis J. Milhaupt eds., 2008).

83. Milhaput, *supra* note 5, at 183–87.

84. *See* Gilson & Milhaupt, *supra* note 27, at 370.

accommodate changes that are thought to be desirable. During the 2000s, the Japanese courts adopted the American business judgment rule, with certain modifications to retain a limited scope of review as to the substance of the board's business judgment.[85] As will be seen later, the Japanese courts also played a conduit role, adjudicating in line with the above-mentioned Guidelines.[86]

B. Pension Funds and Related Areas

The expansion of fiduciary norms was not confined to corporate law. In 1999, echoing Tamar Frankel's thesis, Norio Higuchi declared the arrival of the fiduciary era in Japan as a necessary consequence of the growing specialization and interdependence within the modern society, whereby virtually every member of the society relied on the services and expertise of others.[87] Indeed, fiduciary rules regulating conflict-of-interest transactions were introduced along with standard duty-of-loyalty provisions in wide areas of law, including pensions,[88] trusts,[89] and nonprofits,[90] as well as in the code of professional responsibilities applicable to lawyers.[91]

However, the enforcement of fiduciary obligations remained challenging. In 2011, an employee pension fund lost most of its assets, worth 200 billion yen, by following the advice of an investment consulting firm called AIJ to increase high-risk investments through its Cayman Islands subsidiary. The trust bank had warned against this shift in investment strategy, but had failed to detect the massive falsification of accounting documentation in its custodial capacity. The pension fund sued the trustee bank, but the court rejected the claim and held that the trustee bank, acting under the statutory requirement to follow the pension fund's investment policy, was not required to advise beyond its mandate with regard to the diversified investment.[92] Neither the Ministry of Health nor the Financial Services Authority (FSA) anticipated the concentration in high-risk investments in a substantial part of the pension investment sector. In despair, the same Higuchi, who

85. The trend was endorsed by the Supreme Court in *Apamanshop Derivative Litigation*, 2091 HANREI JIHO 90 [Sup. Ct.] July 15, 2010.

86. *See* text accompanying notes 78-79.

87. NORIO HIGUCHI, フィデュシャリー「信認」の時代—信託と契約 [THE ERA OF FIDUCIARY: TRUSTS AND CONTRACTS] (1999).

88. Kakutei Kyoshutsu Nenkin Hō [Defined Contribution Pension Plans Act], Law No. 88 of 2001, art. 43, 44; Kakutei Kyufu Kigyō Nenkin Hō [Defined Benefit Corporate Pension Plans Act], Law No. 50 of 2001, art. 69-72.

89. Shintaku Hō [Trust Act], Law No. 108 of 2006, art. 29-32.

90. Ippan Hōjin oyobi Ippan Zaidan ni kansuru Hōritsu [General Association and General Foundation Act], Law No. 48 of 2006 art. 83-84; Shakai Fukushi Hō [Social Welfare Act], Law No. 45 of 1951, art. 45-16, inserted by Law No. 21 of 2016.

91. JAPAN BAR ASS'N, BASIC RULES ON THE DUTIES OF PRACTICING ATTORNEYS art. 27, 28, 42, 63–68 (2004).

92. Zen-Kyushu Electric Engineering Industry Employee Pension Fund v. Risona Bank, 2016 WLJPCA 01216003 [Tokyo High Ct.] Jan. 21, 2016.

thirteen years earlier had predicted the arrival of the fiduciary era, lamented that Japan was a society that knew no fiduciary law.[93]

Another case involved a private pension fund, the All Japan Liquor Retailers Association. The head of the Association's investment office lost almost 80 percent of pension assets, worth 18.5 billion yen, after investing in a fund that turned out to be run by British and South African fraudsters. In the criminal proceedings, the investment office head and his supervising director on the board were convicted. In the civil proceedings that followed, the Tokyo District Court found those presumably judgment-proof defendants liable but absolved the remaining directors because they owed no fiduciary duty to the policyholder and did not have sufficient expertise in the pension area.[94]

These cases reflect a reality in which an increasingly large amount of working-class assets was invested overseas, exposing them to new kinds of risk. Nonetheless, their trustees, their financial intermediaries, and their regulators struggled to live up to expectations, while case law development was slow in holding the relevant fiduciaries to account. It took several more years before the regulators began to direct their attention to the ultimate beneficiary at the end of the investment chains.

C. Post-Lehman Developments

In 2008, the world was mired in a severe financial crisis following the bankruptcy of Lehman Brothers. Aside from its economic repercussions, the event brought about an important shift in the Japanese debate over the proper forms of corporate and market governance. Notably, the debate that had been dominated by the American hard-law model began to shift to the British soft-law style of a "comply or explain" approach.[95]

In February 2014, the Japanese Stewardship Code was adopted under the auspices of the METI to encourage institutional investors to seek greater medium- to long-term investment returns for their clients and ultimate beneficiaries through constructive engagement with the companies in which they invested.[96] Following the lead of the U.K. Stewardship Code, published in 2010 by the U.K. Financial Reporting Council, the Japanese Code adopted the non-mandatory "comply or explain" approach, urging institutional investors to engage with their investee companies and exercise their voting rights.[97] The motive behind the Japanese move away from "short-termism," however, may not have been the same as the one

93. Norio Higuchi, *AIJ問題が示唆するもの──信認法なき社会 [Lessons from the AIJ Case: A Society without Fiduciary Law],* 1986 SHOJI HOMU 16 (2012).

94. [No names given], 2184 HANREI JIHO 74 [Osaka Dist. Ct.] July 25, 2011.

95. Bruce Aronson et al., *Corporate Legislation in Japan, in* ROUTLEDGE HANDBOOK OF JAPANESE BUSINESS AND MANAGEMENT 103–5 (Parissa Haghirian ed., 2016).

96. THE COUNCIL OF EXPERTS ON THE STEWARDSHIP CODE, PRINCIPLES FOR RESPONSIBLE INSTITUTIONAL INVESTORS (JAPAN'S STEWARDSHIP CODE): TO PROMOTE SUSTAINABLE GROWTH OF COMPANIES THROUGH INVESTMENT AND DIALOGUE (2017).

97. FINANCIAL REPORTING COUNCIL, THE UK STEWARDSHIP CODE (2012).

originated in the U.K.[98] The institutional investors' engagement with the investee companies was meant not just for the prevention of myopic excessive risk taking, but also a key to achieving a long-term increase in corporate value in Japan. The expectation was that exhortation from the shareholders to bring higher returns would change the risk-averse mindset of the directors who tended to manage the company conservatively to avoid the risk of insolvency during the long recession known as the lost decades.[99] This motive was apparent in an influential report published by Professor Kunio Ito and his fellow academic experts and representatives from institutional investors and the corporate sector in 2014.[100] While echoing the Kay Review's emphasis on the promotion of dialogue between companies and institutional investors,[101] the Ito Review stressed the importance of Japanese companies achieving a level of return on equity (ROE) that exceeded the cost of capital required by global investors.[102] It recommended that Japanese companies should commit themselves to achieving a minimum ROE of eight percent as the first step in receiving recognition from global investors.[103]

In parallel, there has been a renewed interest in the U.K.-style enlightened shareholder value.[104] This approach may have been seen more conducive to Japanese corporate culture than the American approach that tends to focus on shareholder value. In 2015, following the U.K. Corporate Governance Code and tracking the G20/OECD Principles of Corporate Governance, the FSA and Tokyo Stock Exchange published the Japanese Corporate Governance Code.[105]

The Japanese Corporate Governance Code had a tangible impact on one policy area that had long been controversial in Japan: the introduction of outside directors. Principle 4 of the 2015 Code emphasized the need for independent and objective oversight of the directors. This was elaborated upon in Principle 4-8, which states that listed companies should appoint at least two independent outside

98. For the analysis of similarities and differences between UK Stewardship Code and Japanese Code, see Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes,* 41 SEATTLE U. L. REV. 497, 513–24 (2018).

99. Gen Goto, Alan K. Koh & Dan W. Puchniak, *Diversity of Shareholder Stewardship in Asia: Faux Convergence* 25–26 (Eur. Corp. Governance Inst., Working Paper No. 485/2019).

100. MINISTRY OF ECON., TRADE AND INDUS., 持続的成長への競争力とインセンティブ――企業と投資家の望ましい関係構築（伊藤レポート）[ITO REVIEW OF COMPETITIVENESS AND INCENTIVES FOR SUSTAINABLE GROWTH: BUILDING FAVORABLE RELATIONSHIPS BETWEEN COMPANIES AND INVESTORS] (2014).

101. JOHN KAY, THE KAY REVIEW OF UK EQUITY MARKETS AND LONG-TERM DECISION MAKING (2012).

102. Gen Goto, *The Logic and Limits of Stewardship Code: The Case of Japan*, 15 BERKELEY BUS. L.J. 365, 394 (2019).

103. MINISTRY OF ECON., TRADE AND INDUS., *supra* note 100, at 18.

104. COMMITTEE ON THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE, REPORT (1992); COMMITTEE ON THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE, CODE OF BEST PRACTICE (1992). For historical background, see Brian R. Cheffins, *The Rise of Corporate Governance in the UK: When and Why*, 68 CURRENT LEGAL PROBS. 387 (2015).

105. TOKYO STOCK EXCH., JAPAN'S CORPORATE GOVERNANCE CODE: SEEKING SUSTAINABLE CORPORATE GROWTH AND INCREASED CORPORATE VALUE OVER THE MID- TO LONG-TERM (2015).

directors. While only 21.5 percent of the companies listed in Section 1 of the Tokyo Stock Exchange satisfied this provision in 2014, the number steadily increased to 93.4 percent by 2019.[106] Principle 4-8 also included a more ambitious target of filling at least one-third of each board with independent directors. Although this was a more difficult target to achieve, the figure steadily improved, from 6.4 percent in 2014 to 43.6 percent in 2019.[107]

This was a remarkable achievement given that no provision of the Companies Act required a single outside director on a board until 2019.[108] In fact, the 2014 amendment to the Companies Act avoided mandating the appointment of an outside director, requiring instead that all listed companies without outside directors provide reasons at their annual shareholders' meetings. It should be noted, though, that the 2015 Code was part of a series of moves on the part of the Tokyo Stock Exchange to nudge listing companies toward enhanced independent monitoring. In 2009, the Tokyo Stock Exchange amended its listing rules to require listed companies to adopt either an independent director or independent statutory auditor. The 2012 amendment urged listed companies to introduce an independent director rather than a corporate auditor.

Beyond this, the empirical evidence is sparse as to the impact of the Stewardship and Corporate Governance Codes. In 2017, a sequel to the 2014 Ito Report was published. The report, commonly known as Ito Review 2.0, acknowledged that the earlier report's aim of achieving an 8.0 percent ROE had been frustrated and that Japanese companies' overall ROE had remained lower than those of American and European companies.[109]

Meanwhile, the term "fiduciary duty" began to seep into the broader area of financial regulation. In 2014, the Financial Services Authority used the term for the first time in its General Principles on the Monitoring of Financial Institutions, a guidance document that sets out the FSA's stance in its inspection and oversight activities over financial institutions.[110] In 2016, the Japanese Cabinet declared in a document entitled *Japan Revitalization Strategy* that the "Financial System Council will consider necessary actions to ensure that all entities engaged in formation of assets by customers, such as development, distribution and management of instruments, and asset management, will fulfill their fiduciary duties (customer-oriented

106. TOKYO STOCK EXCH., APPOINTMENT OF INDEPENDENT DIRECTORS AND ESTABLISHMENT OF NOMINATION AND REMUNERATION COMMITTEES BY TSE-LISTED COMPANIES 3 (2019).

107. *Id.* at 4.

108. Kaishahō [Companies Act] art. 327-2, amended by Law No. 70 of 2019.

109. MINISTRY OF ECON., TRADE AND INDUS., 伊藤レポート2.0：持続的成長に向けた長期投資 (ESG・無形資産投資) 研究会 報告書 [Ito Report 2.0: FINAL REPORT ON THE STUDY OF LONG-TERM INVESTMENT (ESG AND INTANGIBLE ASSET INVESTMENT) TOWARD SUSTAINABLE GROWTH], 35 (Oct. 26, 2017).

110. FIN. SERVICES AGENCY, 平成26事務年度金融モニタリング基本方針（監督・検査基本方針）[FINANCIAL MONITORING POLICY FOR 2014-2015 (POLICY FOR SUPERVISION AND INSPECTION)] (2014).

management of operations)."[111] Following the Council's recommendations, the FSA published "Customer-first Business Practices" in 2017, setting out seven principles to encourage financial services providers to develop best practices to serve their customers' best interests.[112] The document expressly stated that these principles were not legally binding but created an expectation that any financial institution deviating from any of the principles should fully explain why.

As the standard-based fiduciary norm was accepted by academics, practicing lawyers, market participants, and regulators, the court gradually warmed up to the use of duty-of-loyalty terminology. An early and subtle example was *Takada v. Nihon setsubi, K.K.,* in which the Tokyo High Court ruled that a former director had breached his duty of loyalty when he lured an employee from the plaintiff company, where he had previously served as a director, to a new company he had established.[113] This was the very first case in which a Japanese court used the duty of loyalty independently of the duty of care of the faithful manager.[114] More recently, the Supreme Court held that the managing partner of a silent partnership is liable to the silent partners for engaging in a conflict-of-interest transaction when subscribing for the bond issued by the company it had established, which in turn purchased shares in another company from the managing partner and his brother. The applicable statute did not contain any specific duty-of-care or duty-of-loyalty provision, but that did not stop the court from finding the managing partner liable either in tort or for failure to exercise due care.[115]

In addition, echoing the recent soft-law approach in corporate governance, some judicial decisions adjudicated M&A disputes in line with the non-binding guidelines, explicitly referring to the Takeover Defense Guideline[116] and the MBO Guideline.[117] Further, in *In Re Jupiter Telecommunication*,[118] the Supreme Court considered the fairness of pricing in a two-step going-private transaction in which the tender offer by the majority shareholder was followed by a squeeze-out of minority shareholders by cash payments. While noting the inherent conflict of interests between the acquirer and the minority shareholders, the Court held that it would uphold the price determined by the parties so long as measures were in place to ensure that the decision-making process was not arbitrary and that the tender

111. CABINET RESOLUTION, 日本再興戦略2016 [JAPAN REVITALIZATION STRATEGY 2016] at 154 (2016).

112. FIN. SERV. AGENCY, 顧客本位の業務運営に関する原則 [CUSTOMER-FIRST BUSINESS PRACTICES] (2017).

113. 835 KINYU SHOJI HANREI 23 [Tokyo High Ct.] Oct. 26, 1989.

114. Hideki Kanda & Curtis J. Milhaupt, *Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law,* 51 AM. J. COMP. L. 887, 896 (2003).

115. [party name unknown], 1503 KINYU SHOJI HANREI 2 [Sup. Ct.] Sept. 6, 2016.

116. Nireco v. The SFP Value Realization Master Fund Ltd., 1900 HANREI JIHO 156 [Tokyo High Ct.] June 15, 2005.

117. In Re Toho Real Estate Co., Ltd., 2043 KINYU HOMU JIJO 78 [Tokyo High Ct.] Mar. 23, 2016.

118. 70(6) MINSHU 1445 [Sup. Ct.] July 1, 2016.

offer was conducted through "procedures generally considered fair."[119] The Court then overruled the lower court decision that ordered payment of a price independently adjudicated as representing a fair value, although it did not elaborate on what constitutes the proper measures and procedures generally considered fair, other than to approve the procedure taken in the instance case. Going forward, the fairness of procedures will likely be measured with reference to the 2007 MBO guidelines,[120] which were updated in June 2019.[121]

The last cases appear to represent a recent pattern in the evolution of Japanese fiduciary norms in the area of corporate law: as the non-statutory soft-law norms published and updated by quasi-public bodies gradually become a part of market practices, they receive careful approval through case law. Although the reported cases rarely mention comparative or overseas sources, the underlying fiduciary norms have increasingly become reflective of the corporate governance and stewardship principles that are prevailing overseas.

D. Family, Guardianship, and Succession Law

The global and transnational transformation of fiduciary law is beginning to influence some of the areas that have heretofore been less susceptible to such changes than those in relation to corporate or investment transactions: family, guardianship, and succession. These changes have taken place against a backdrop of the rapid aging of Japanese society and increasingly ready access to global financial services.

In 1999, extensive statutory revisions were implemented to reform the age-old guardianship system.[122] As the use of guardianship increased, however, family courts around the country experienced serious difficulties in monitoring guardians and preventing abuse. In a controversial case, a local family court overlooked abuse that was so blatant that the High Court ordered the state to compensate for the loss.[123] From these experiences, family courts began to avoid appointing family members as guardians and shifted to professional guardians, such as lawyers, judicial scriveners, and social welfare professionals. Nevertheless, this move was unpopular, not just because it made the process costly and time consuming but also because family members lost control over the welfare of their loved ones. Facing criticism, the judiciary again changed course in 2019, when the Supreme Court issued a

119. *Id.* at 1451.

120. *See supra* text accompanying note 79.

121. MINISTRY OF ECON., TRADE AND INDUSTRY, 公正なM&Aの在り方に関する指針——企業価値の向上と株主利益の確保に向けて[FAIR M&A GUIDELINES—ENHANCING CORPORATE VALUE AND SECURING SHAREHOLDERS' INTERESTS] (2019).

122. Nin'i Kōken Keiyaku ni kansuru Hōritsu [Consensual Guardianship Contract Act], Law No. 150 of 1999 (Japan); MINPŌ [CIV. C.] art. 838-876.10, amended by Law No. 149 of 1999 (Japan) (introducing three types of guardianship, graduating the level of care by the level of incompetency).

123. [Party names unknown] 1385 HANREI TIMES 141 [Hiroshima Dist. Ct.] Feb. 20, 2012.

statement to urge family courts to appoint more family members to serve as guardians.[124]

The Japanese are also warming up to the use of sophisticated means of asset management and succession planning. Today, those who are exploring greater dispositive freedom in tax-efficient means are not limited to a handful of the super-rich but also include a broader middle-class cohort of Japan's aging population. Beginning in 2010, they began to use trusts as an alternative to guardianship and wills, with a member of the settlor's family often serving as the trustee. This was a major shift in practice, since trusts have long been used almost exclusively for commercial and investment purposes, with trust banks serving as trustees.[125] In 2018, the Tokyo District Court handed down its first decision on the interaction between forced heirship and trusts, one of the most contentious issues in the civil law jurisdiction that introduced common-law trusts.[126]

At the moment, the reported cases mostly involve decisions on the basic questions that have arisen in the shifting landscape of family and succession practice, and the courts have yet to rule on delicate issues involving fiduciary duties and obligations.[127] Nonetheless, a greater number of trustees and guardians are beginning to operate in an inevitably conflicted position, in which they act as fiduciaries while expecting to benefit as beneficiaries or potential heirs. In the absence of credible bodies to announce guiding principles, the court is in the position of adjudicating and developing fiduciary norms in both guardian and trust contexts.

Furthermore, disputes involving cross-border elements may affect the evolving fiduciary norms within the law of succession and trusts. At present, Japan is not a signatory to the Hague Trust Convention, and no reported case has dealt with the recognition or enforcement of foreign trusts. Nonetheless, in a recent case involving a joint account created at Bank of Hawaii, the Tokyo District Court gave an indication that the parties' choice of law in an overseas will-substitute would be respected against the heir's claim against the estate, so long as it did not violate the public policy of Japanese succession law, such as forced heirship rules.[128] Here again, in a cross-border context, a Japanese court is likely to be asked to decide on the fiduciaries' role and duties, which may in turn touch on some elements of the transnational fiduciary order.

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124. *成年後見人には「親族が望ましい」最高裁考え方示す [*"*Family members are preferable" for adult guardians, says the Supreme Court]* ASAHI SHINBUN (Mar. 18, 2019).

125. *See* Trevor Ryan, *The Trust in an Ageing Japan: Has Commercialisation Precluded the Trust from Reaching Its Welfare Potential?*, 7 ASIAN J. COMP. L. 1, 28 (2012).

126. [Party names unknown] 30 KIN'YU HOUMU JIJO 78 [Tokyo Dist. Ct.] Sept. 12, 2018.

127. Masayuki Tamaruya, *Japanese Wealth Management and the Transformation of the Law of Trusts and Succession*, 33 TR. L. INT'L 147, 147–48 (2020).

128. [Party names unknown] 1415 HANREI TIMES 283 [Tokyo Dist. Ct.] July 8, 2014.

IV. JAPANESE, ASIAN, AND TRANSNATIONAL FIDUCIARY ORDERS

We have seen in Part III that during the past few decades, the notion of fiduciary duty began to apply in increasingly broad areas of Japanese law, requiring a person entrusted with discretionary power to act for the ultimate beneficiaries. Furthermore, domestic policymaking began to synchronize with various overseas fiduciary initiatives, though the motives sometimes diverged from those of the original initiatives. Here, it is worth pausing to consider the conditions that paved the way for this final phase in the transnationalization of fiduciary law in Japan because they provide the ground for putting the Japanese experience in a broader regional context in East Asia. The Japanese reception of fiduciary law and its experience with transnationalization have contributed to the formation of an Asia-specific dynamic in shaping the relevant areas of the law. At the same time, the greater globalization in various parts of East Asia has created a new dimension of a transnational dynamic in the evolution of fiduciary law.

A. Transnationalization from the Japanese Perspective

One of the factors that prepared for the greater transnationalization of the fiduciary law was the change in the pattern of social interactions. Tamar Frankel has explained the rise in the fiduciary law in terms of the shift in social relations from being status-based to more particularized and functional relations of reliance, although she was careful to note the danger of overgeneralization.[129] In Japan, the status-based notion of loyalty held sway for a long time, but it gradually lost grip as the influence of the household was lost and corporate dominance through lifetime employment declined toward the end of the twentieth century.[130] The greater mobility of the population both within and across national borders, coupled with the aging of society, has accelerated the trend in recent years.

Similarly, the fiduciary norms have shifted from being rule-based to being standard-based.[131] In the Japanese context, this has meant a shift from the predominance of individualized rules derived from the civil law tradition to a gradual acceptance of the American duty of loyalty across many areas of law. Note that a similar shift took place in many common-law jurisdictions, where more theorizing of fiduciary law occurred toward the end of the twentieth century.[132] European civil law jurisdictions have also begun to see a unified conception of "fiduciary-like duties" in recent years.[133]

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129. Tamar Frankel, *Fiduciary Law,* 71 CALIF. L. REV. 795, 798–801 (1983).

130. KATSUTO IWAI, 会社はこれからどうなるのか [WHAT WILL BECOME OF THE COMPANY HENCEFORTH?] 354–60 (2008).

131. *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis,* 42 DUKE L. REV. 557 (1992).

132. *See supra* text accompanying notes 32-34.

133. Martin Gelter & Geneviève Helleringer, *Fiduciary Principles in European Civil Law System*, THE OXFORD HANDBOOK OF FIDUCIARY LAW 583, 585 (2019); Kuntz, *supra* note 10, at 50-53.

There has also been a shift in regulatory approach, from hard law to soft law. In the Japanese context, ambivalence about American-style fiduciary governance, which emphasizes shareholder primacy and court enforcement, has led to the adoption of an optional approach to corporate governance.[134] The U.K. Corporate Governance Code and Stewardship Principles were more attractive because they allowed for divergence from the standard model. At the same time, when pressed to explain the deviation, many Japanese companies chose to adopt the standard model. According to an OECD report, nearly all forty-seven jurisdictions surveyed had a national code or principle of corporate governance, with the notable exceptions of China, India, and the U.S.[135] Stewardship Codes have been introduced in at least ten jurisdictions and in the EU, and investor-led best practice guidance has been introduced in at least nine jurisdictions including the U.S.[136]

On a substantive front, there was greater appreciation of the trust and its equivalents in civil law jurisdictions around the turn of the last century.[137] Comparative inquiry in both common law and civil law jurisdictions have shown that trusts can be understood to constitute a part of organizational law that enable asset partitioning and fiduciary governance.[138] Although Continental European jurisdictions were slow to introduce trusts in non-commercial settings, that did not detract from the realization that trusts can be used as an alternative to guardianship and testamentary instruments.[139] All this has led to an understanding of fiduciary law as generally applicable across different areas of law where, whether in common-law or civil jurisdictions, a person entrusted with certain properties or powers is under an obligation to act solely in the interests of the beneficiary and to avoid, or at least manage, any conflicts of interest.

Finally, the increasing movement of people, services, and capital across national borders cannot be ignored. In the Japanese context, sensitivities to corporate governance arose with the rise of foreign investors in Japanese capital markets and the concomitant decline of cross-holding among domestic

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134. *See supra* text accompanying notes 72-83.

135. OECD, CORPORATE GOVERNANCE FACTBOOK 2019, at 29–30, 41–44 tbl.2.2 (2019). For the OECD's initiative, see OECD, G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE (2015).

136. EY, Q&A ON STEWARDSHIP CODES (2017); Inv'r Stewardship Grp., *Stewardship Principles: Stewardship Framework for Institutional Investors* (Jan. 1, 2018), https://isgframewor k.org/stewardship-principles/.

137. Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis,* 73 N.Y.U. L. REV. 434 (1998); Michele Graziadei et al., *Commercial Trusts in European Private Law: The Interest and Scope of the Enquiry, in* COMMERCIAL TRUSTS IN EUROPEAN PRIVATE LAW 3, 3–28 (Michele Graziadei et al. eds., 2005).

138. Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law,* 110 YALE L.J. 387 (2000); Robert H. Sitkoff, *Trust law as fiduciary governance plus asset partitioning, in* THE WORLDS OF THE TRUST 428 (Lionel Smith ed., 2013).

139. David J. Feder & Robert H. Sitkoff, *Revocable Trusts and Incapacity Planning: More than Just a Will Substitute,* 24 ELDER L.J. 1 (2016); ALEXANDER BRAUN & ANNE RÖTHEL, PASSING WEALTH ON DEATH: WILL-SUBSTITUTES IN COMPARATIVE PERSPECTIVE (Alexandra Braun & Anne Röthel eds., 2016).

companies.[140] The share of foreign market value ownership increased steadily from 4.7 percent in 1990, hitting a peak of 31.7 percent in 2014.[141] Japan's state pension fund, the Government Pension Investment Fund, is the largest in the world, with total invested assets of approximately ¥159,215,400 million as of 2019.[142] The foreign equity ratio within its investment portfolio gradually increased from 9.81 percent in 2009 to 25.53 percent in 2019, and the foreign bond ratio rose from 10.82 percent to 16.95 percent during the same period.[143] To the extent that similar phenomena can be observed in other jurisdictions, it is easy to see that policymakers are driven to enhance a common understanding of fiduciary norms across jurisdictional borders.

B. The East Asian Context

The Japanese experience can be put into a broader regional context. Historically, Japan led the way in introducing the Western legal system and ideas to East Asia. After World War II, Japanese economic development provided a model for many developing economies in the region.[144] Nevertheless, these influences have been coupled with the history of colonial rule and wartime aggression that is still contentious in the region; consequently, Japan has played, at best, a modest role in promoting legal unification or transnational ordering.[145] In general, Japan has long maintained a positive stance in relation to transnational legal ordering, often with the intention of deriving informed suggestions for potential domestic reform.[146]

Of the East Asian jurisdictions, South Korea and Taiwan have followed a pattern of legal development that is most similar to that of Japan. In both jurisdictions, the civil law tradition serves as the basis of private law in the form of a Civil Code and Commercial Code. The common-law influence arrived later

140. Hideaki Miyajima & Fumiaki Kuroki, *The Unwinding of Cross-Shareholding in Japan: Causes, Effects, and Implications, in* CORPORATE GOVERNANCE IN JAPAN: INSTITUTIONAL CHANGE AND ORGANIZATIONAL DIVERSITY 79, 85 (Masahiko Aoki et al., eds.); BUCHANAN, *supra* note 7, at 126–27.

141. TOKYO STOCK EXCH. ET AL., SHARE OWNERSHIP SURVEY 2018, at 4 tbl.3 (2019).

142. Government Pension Investment Fund, *Annual Report of Fiscal 2018,* 7, https://www.gpif.go.jp/en/performance/annual_report_fiscal_year_2018.pdf (last visited Oct. 23, 2019).

143. *Id.* at 15; Government Pension Investment Fund, *Review of Operations in Fiscal 2008,* 7, https://www.gpif.go.jp/en/performance/pdf/2008_q4.pdf (last visited Oct. 23, 2019).

144. Bruce Aronson & Joongi Kim, *Conclusion, in* CORPORATE GOVERNANCE IN ASIA: A COMPARATIVE APPROACH 385 (Bruce Aronson & Joongi Kim eds., 2019).

145. BRAITHWAITE & DAHOS, *supra* note 11, at 27 ("Japan's influence is remarkably weak.").

146. Roderick A. Macdonald, *When Lenders Have Too Much Cash and Borrowers Have Too Little Law: The Emergence of Secured Transactions Transnational Legal Orders*, *in* TRANSNATIONAL LEGAL ORDERS (Terence C. Halliday & Gregory Shaffer eds., 2015).

through trust legislation,[147] securities regulation,[148] and the corporate governance doctrine. As in Japan, inscribing fiduciary norms into the foundations of civil law has often been seen as a major comparative law conundrum. In the area of corporate law, for example, the Taiwanese Company Act was amended in 2001 to introduce fiduciary duties by specifically providing for the duty of loyalty.[149] Nonetheless, lawyers in Taiwan candidly admit, as did their Japanese counterparts, that the implication of such an amendment is unclear.[150]

On the corporate governance front, both South Korea and Taiwan traditionally relied on statutory auditors to monitor directors, but they have increased the presence of independent directors since the turn of century. In 2006, Taiwan adopted an optional approach to the introduction of outside directors, and a Financial Supervisory Commission gradually expanded the scope of listed companies and financial institutions subject to the compulsory rule of appointing independent directors.[151] South Korea moved more decisively to introduce mandatory independent directors following the 1997 Financial Crisis and the bailout by the International Monetary Fund. Today, large companies and financial institutions in South Korea are required to have at least three independent directors who must constitute a majority of the board, although a statutory auditor remains an option for smaller companies.[152] The development of the law and practice of trusts in South Korea and Taiwan also resembles Japanese patterns. Recent reforms have included the introduction of detailed fiduciary principles as well as greater proprietary remedies that are typically seen in common-law jurisdictions, although, here again, the impact of such provision is not entirely clear.[153]

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147. Taiwanese Trust Act (1996) (amended 2009); South Korean Trust Act (1961) (amended 2011).

148. Taiwanese Securities and Exchange Act (1968) (amended 2019); South Korean Securities and Exchange Act (1962) (amended 2002).

149. Taiwanese Company Act, art. 23(1) (2018) ("[t]he responsible persons of a company shall have the loyalty and shall exercise the due care of a good administrator in conducting the business operation of the company; and if he/she has acted contrary to this provision, shall be liable for the damages to be sustained by the company there-from."); *see also* Korean Commercial Code, art. 382-3 (introduced by Act No. 5591 on Dec. 28, 1998) ("Directors shall perform their duties in good faith for the interest of the company in accordance with statutes and the articles of incorporation.").

150. Andrew Jen-Guang Lin, *Common Law Influences in Private Law – Taiwan's Experiences Related to Corporate Law,* 4(2) NAT'L TAIWAN UNIV. L. REV. 107, 124–25 (2009). For a similar observation on South Korean Commercial Code § 382-3, JONG-HOON LEE, CORPORATION LAWS & CASES OF SOUTH KOREA § 8.06[G] (2016).

151. Hsin-ti Chang et al., *From Double Board to Unitary Board System: Independent Directors and Corporate Governance Reform in Taiwan, in* INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH 241, 244–45 (Dan Puchniak et al. eds., 2017).

152. Kyung-Hoon Chun, *Korea's Mandatory Independent Directors: Expected and Unexpected Roles, in* INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH 176, 184–96 (Dan Puchniak et al. eds., 2017).

153. Masayuki Tamaruya, *Japanese Law and the Global Diffusion of Trust and Fiduciary Law,* 103 IOWA L. REV. 2229 (2018); Lusina Ho & Rebecca Lee, *Reception of the Trust in Asia: a Historical Perspective, in* TRUST LAW IN ASIAN CIVIL LAW JURISDICTIONS: A COMPARATIVE ANALYSIS 10 (Lusina Ho & Rebecca Lee eds., 2013).

By contrast, Hong Kong and Singapore have maintained English common law and have tracked major statutory reforms in the U.K. and other Commonwealth jurisdictions. Unconstrained by the comparative law conundrum, these island cities have displayed agility in law reform, driven by entrepreneurial spirits typical of common-law lawyers. Even then, the transplant has not always been a perfect duplication. In the area of corporate law, Hong Kong codified the common-law duty of care but stopped short of codifying all fiduciary duties, showing some reluctance to accept the U.K.'s enlightened shareholder value approach.[154] In Singapore, the dominance of state ownership and control co-existed with professional management on boards to create a unique pattern of corporate governance.[155] In the area of trust law, the two jurisdictions have generally followed Anglo-Commonwealth trust doctrine and at the same time have competed with each other in offering global services using offshore trusts.[156]

China is where the influences from the earlier two groups merge with each other and with its distinct local conditions. Chinese lawyers usually identify themselves as followers of the civil law tradition. At the same time, a large number of companies are cross-listed in stock exchanges in Hong Kong and Singapore. As a consequence, "Anglo-American jurisdictions install independent directors on the board, Germanic-Japanese jurisdictions provide a supervisory board or *kansayaku*, but listed companies in China must have both."[157] In the area of trusts, too, while the Chinese Trust Act of 2006 largely follows the structure of earlier legislation in Japan, South Korea, and Taiwan, the trust services offered from Hong Kong and Singapore cater to the demands of wealthy Chinese capitalists.[158] In addition, Chinese corporate and trust law reflects the distinct conditions prevailing in China, where many companies and trust investment companies are state-owned enterprises. The local government and sometimes the Communist Party intervene, either explicitly or implicitly, with specific political and social objectives.[159] China has yet to embrace the voluntary-based Codes of Corporate Governance or Stewardship.

Today the cross-border interaction of legal systems has become sufficiently complex and dynamic to turn a simple categorization—such as that offered above—into an overgeneralization. Asian dynamic could even offer an opportunity to question some of the broadly accepted notions of fiduciary models outside of

154. S. H. Goo & Yu-Hsin Lin, *Hong Kong, in* CORPORATE GOVERNANCE IN ASIA: A COMPARATIVE APPROACH 150, 155 (Bruce Aronson & Joongi Kim eds., 2019).

155. Tan Cheng-Han, Dan W. Puchniak, & Umakanth Varottil, *State-Owned Enterprises in Singapore: Historical Insights into a Potential Model for Reform,* 28 COLUM. J. OF ASIAN L. 61, 92–93 (2015).

156. Rebecca Lee, *The Evolution of the Modern International Trust: Developments and Challenges,* 103 IOWA L. REV. 2069 (2018); Tang Hang Wu, *From Waqf, Ancestor Worship to the Rise of the Global Trust: A History of the Use of the Trust as a Vehicle for Wealth Transfer in Singapore,* 103 IOWA L. REV. 2263 (2018).

157. Jiangyu Wang, *China, in* CORPORATE GOVERNANCE IN ASIA: A COMPARATIVE APPROACH 238 (Bruce Aronson & Joongi Kim eds., 2019).

158. Tamaruya, *supra* note 153, at 2230.

159. Wang, *supra* note 157, at 238.

Asia. In the context of corporate governance, the prevailing pattern of concentrated share ownership in East Asia has called into question the efficacy of the independent director model that is based on the dispersed ownership that predominates in the U.S. and the U.K.[160] In the area of trust law, wealthy Chinese individuals' preference for retention of control over trust assets has led to domestic legislation that gives settlors strong power to influence the management of trusts.[161] A number of offshore jurisdictions have also reacted to such demands by introducing special trust legislation that allows settlors to reserve various powers over the management of trusts by the trustee.[162] This development has called into question the basic notion of common-law trusts, in which the settlor was thought to drop out of the picture once the trust was created and a fiduciary relationship was established between the trustee and the beneficiaries.[163]

Thus, the historical effort made by Japanese lawyers and policymakers to mix civil law influence with common-law inspiration prepared a fertile soil for the dynamic development of the regional fiduciary order. As each of the East Asian jurisdictions employed different comparative law strategies to pursue their respective desires to maintain economic competitiveness and attract cross-border investment, an increasingly dynamic evolution of the fiduciary order has developed. The greater presence of Asian jurisdictions has begun to affect the evolution of fiduciary norms in the region and beyond

V. CONCLUSION

One conspicuous feature of fiduciary law in theorizing the transnational legal order is that its core notion of loyalty has almost universal appeal as both a moral and a legal principle. This is so even though fiduciary law is often considered common law in origin. Although civil jurisdictions did not use the terms "fiduciary" or "duty of loyalty" in earlier times, their equivalents could readily be found in the form of the regulation of conflicted transactions by certain categories of entrusted persons.[164]

Over the course of its history, Japanese law has been influenced at multiple levels by Western legal traditions. Although conceptual challenges and political tensions posed occasional difficulties, Japanese law has broadly embraced fiduciary

160. Dan W. Puchniak & Kon Sik Kim, *Varieties of Independent Directors in Asia: A Taxonomy, in* INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH 89, 119–28 (Dan Puchniak et al. eds., 2017).

161. Trust Law of the People's Republic of China § 2 (2001).

162. The most prominent example is the so-called STAR trust in the Cayman Islands. Special Trusts (Alternative Regime) Law 1997, now incorporated into Cayman Islands Trusts Law, Part VIII, §§ 95-109 (2017). For background, see J. C. Sharman, *Chinese Capital Flows and Offshore Financial Centers,* 25 PAC. REV. 317 (2012).

163. Lionel Smith, *Give the People What They Want? The Onshoring of the Offshore,* 103 IOWA L. REV. 2155, 2156 (2018); Lionel Smith, *Massively Discretionary Trusts* 70 CURRENT LEGAL PROBS. 17 (2017).

164. *See supra* text accompanying notes 13-24.

law as a set of ideas that transcend subject areas and national boundaries.[165] In fact, national experiences suggest that a number of conditions have operated both inside and outside Japan to prepare fiduciary norms to increase their sensitivity to transnational developments. These conditions include a shift in social relations away from status, a greater use of standards in regulatory terms, an increased reliance on soft law as an enforcement approach, a greater awareness that principles derived from trust law can apply across various areas of law, and a certain vacillation in the intellectual leadership within common-law jurisdictions, as well as a greater volume of transactions across national borders.[166] The relationship between legal norms and local morals is rather complex. One might surmise that local morals would gradually percolate into legal norms, but the Japanese experience is that the erosion of the traditional notion of loyalty in family and communal contexts has left a void that has been gradually filled by the fiduciary norms derived from modern and transnational sources of law.[167]

Transnationalization does not automatically lead to the uniformity or the universal enforcement of fiduciary law.[168] In contrast to many areas of law where transnational legal orders have been observed, fiduciary law appears to be lacking an effective institutional body that operates transnationally to drive harmonization and uniform enforcement. The OECD did promulgate the Principles of Corporate Governance and has issued reports that document the level and extent of compliance, but its role appears to be much more limited than, for instance, the Basel Committee's role in banking regulation[169] or the International Organization of Standardization's role in industry regulation.[170] The Japanese and East Asian experience has been that domestic policymakers often have different ideas than the overseas proponents of fiduciary regulations and that there are often gaps in the enforcement of the law.[171] The greater use of optional regulations and a soft-law approach sometimes accommodated such divergences and gaps, but once the relevant transnational norms reached a certain level of acceptance, a number of domestic actors sometimes worked to harden the regulations, as in cases where the courts have adopted the norms as part of their judicial reasoning or the securities exchanges has turned them into a listing requirement.[172] At the same time, such divergences and gaps at the regional level could provide an opportunity to reconsider the prevailing notion of fiduciary law.[173] The Asian dynamic is such that

165. *See supra* text accompanying notes 39-43.

166. *See supra* text accompanying notes 140-41.

167. *See supra* text accompanying notes 1-8, 62-64, 130.

168. Halliday & Shaffer, *supra* note 12, at 55–58.

169. Eric Helleiner, *Regulating the Regulators: The Emergence and Limits of the Transnational Financial Legal Order, in* TRANSNATIONAL LEGAL ORDERS 231, 235–54 (Terence C. Halliday & Gregory Shaffer eds., 2015).

170. Tim Büthe, *Institutionalization and Its Consequences: The TLO(s) for Food Safety, in* TRANSNATIONAL LEGAL ORDERS 258, 267–69 (Terence C. Halliday & Gregory Shaffer eds., 2015).

171. *See supra* text accompanying notes 101-03, 150, 153-56.

172. *See supra* text accompanying notes 106-09, 116-21, 151.

173. *See supra* text accompanying notes 160-63.

it might portend further shifts and transformations in the future of transnational fiduciary ordering.