

Self-regulation in Private Law in Japan and Germany

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To mark the 20th anniversary of the foundation of the bilingually-titled “*Zeitschrift für Japanisches Recht/Journal of Japanese Law*”, which has since 1996 been jointly published by the German-Japanese Association of Jurists (or *Deutsch-Japanische Juristenvereinigung e.V.*, DJJV) and the Max Planck Institute for Comparative and International Private Law (MPI), a two-day conference was held at the MPI in Hamburg.¹

In his Welcome Address, *Jürgen Basedow*, one of the directors of the MPI, described the Journal as a remarkable project that had contributed to changing the tide of legal ideas. Europe was no longer merely exporting her ideas to Japan, but was now receiving stimuli herself. The underlying objective of the Journal, namely promoting knowledge of Japanese law and thereby providing a common ground for discussion, was perfectly exemplified by the conference itself, an effort to present Japan’s increasingly observed system of self-regulation to interested individuals whose access might otherwise be limited due to the language barrier. This idea of reciprocity was also highlighted by the DJJV’s president, *Jan Grotheer*, who expressed his deep gratitude to the MPI and the Journal’s founder and co-editor, *Harald Baum* of the MPI. The Journal played a key role in the growth of the DJJV, and its impact on members carried beyond Germany and Japan.

In his Topical Introduction, Baum once more thanked the speakers, in particular *Takahito Kato* and *Andreas Dieckmann*, who had kindly accepted invitations delivered on short-notice, as well as the sponsors: the DJJV, the MPI, and the Fritz Thyssen Stiftung, whose financial support had made the conference possible. He remarked that as ambitious as the objective of the Journal might be, the topic of self-regulation was just as challenging. Describing self-regulation as being highly complex and yet under-researched, it is often seen as a way for nations to flee from their responsibilities; yet on the other hand it is celebrated as a form of de-regularization capable of providing better answers to the challenges of globalization and the fast advances of technology. The Japanese perception of the phenomenon was set out by *Marc Dernauer* (Chūō University, Tōkyō) as being a positive means of regulation rather than a criticism of the state and as playing an important role in the overlapping discourse on soft law. He guided the lis-

1 Previously, a symposium had been held in Tōkyō to celebrate the same occasion, see the report by G. KOZIOL in this issue.

teners through the long tradition of self-regulation in Japan (generally known as *jishu kisei*), from the early examples of merchant guilds traceable back to at least the 13th century and on to more modern phenomena of stock corporations and company associations. Thus, while the main area of self-regulation today is still in finance, the field has also expanded to cover other issues, such as the environmental matters. Likewise, self-regulation looks back on a long tradition in Germany, as *Petra Buck-Heeb* from the Gottfried Wilhelm Leibniz University, Hanover, illustrated with reference to the Hanseatic League as an example of “genuine” self-regulation. Widespread criticism of the state had supported self-regulation as a flexible means of regulation in the 1970s, but examples of “failed” self-regulatory agreements, e.g. regarding the composition of supervisory boards with respect to gender based diversification, cast a shadow on their current effectiveness. Despite having co-authored a standard work on the topic herself, Buck-Heeb noted the difficulty of finding a universal language for the assessment of self-regulation. She questioned whether the traditional classification influenced by public law, differentiating between “voluntary” regulation (i.e. autonomous, “genuine”), “coerced” regulation (i.e. prescribed or influenced by the state), and “co-regulation” (i.e. mechanisms based on law, which in turn are recognized by the regulated parties and reflect their expertise) provides for an operable standard in the private law context. These thought-provoking presentations led to further discussions regarding the very purpose of systemizing self-regulation (*Florian Möslein*, Philipps University, Marburg) and the advantages of re-categorization (*Jens-Hinrich Binder*, University of Tübingen), namely to enable specialists in different areas within the field to communicate effectively and thus identify and address common problems.

Specific examples of self-regulation in Japan were given by *Hiroyuki Kansaku* from the University of Tōkyō, comparing two recent soft law attempts at corporate governance regulation. Both the Stewardship Code (JSC) and the Corporate Governance Code (JCGC) of Japan constitute sets of principles (the two codes containing 7 and 73 principles respectively) and are subject to the “comply-or-explain” mechanism. However, while the JCGC was embedded into the Listing Regulations of the Tokyo Stock Exchange (TSE), no legal mechanism required institutional investors to react to the JSC. Subscription to the JSC by more than 200 institutional investors might therefore indeed be regarded as genuine. As Kansaku pointed out, the JCGC had nevertheless proven to be more effective than the JSC so far, especially in respect of the latter’s central provision, the disclosure of proxy voting results. Responding to Binder’s skepticism towards the combination of already vague principle-based regulation with the comply-or-explain mechanism, *Souichirou Kozuka* of Tōkyō’s Gakushūin University

added that this soft approach towards regulation was also taken in order to allow companies room for developing individual, tailor-made corporate governance structures.

In a more theoretical analysis, Möslein first proposed three parameters (relating to the initiative, the substance, and the enforcement) in order to distinguish “genuine” from “regulated” (coerced) forms of self-regulation. He concluded that standard contract terms were a form of genuine self-regulation, while the German Corporate Governance Code (GCGC) could be seen as being both genuine and regulated self-regulation. He further illustrated the relevance of this differentiation through reference to a recent decision by the European Court of Justice: Harmonized extra-legal standards may become subject to judicial review with respect to rules of EU primary or secondary law, if attributable to a member state.

After the break, Kozuka detailed the variety of state-induced self-regulation in Japan. Self-regulation might be foreseen in a law as in the case of securities dealers who are obliged to promulgate and publish marketing policies. It might be endorsed by the law to interpret open standards such as gross negligence, or encouraged by the state in order to complement state regulation, e.g. in respect of the smartphone privacy initiative in 2012. Finally, the state might coordinate self-regulation by providing a platform for stakeholder representatives, an approach popular not only in respect of technical standards or recent attempts of management-customer coordination. Such commissions (*shingi-kai*) of selected representatives and experts are of utmost importance for the rule-making process in Japan. Likewise, Binder noted the growing relevance of state-induced self-regulation in Germany. In particular, he indicated two situations in which such self-regulation was found: where legislation followed only after self-regulatory arrangements had been made (e.g. product safety certificates); and where no such prior self-regulatory arrangements had existed. As in the case of the GCGC, heteronomous forms of self-regulation might thereby offer a solution for the legislature’s shortage of information, provided that procedural safeguards allow for an adequate coordination of affected stakeholders. The issue of smartphones and privacy was given as an example in the discussion, especially the question whether such privacy concerns were shared by Japanese and German consumers. It seems that while consumers are aware of the problem in both countries, they appear to disremember it when downloading or using smartphone applications.

As self-regulation comes in many forms, binding effects on the addressees of regulation as well as on third parties also vary. Legal theorist *Yuki Asano* of Dōshisha Law School, Kyōto, started by analyzing the binding nature of self-regulation from the viewpoint of legal pluralism against the backdrop of a controversial case defining the third-party effects of religious

freedom. In 1988, the Japanese Supreme Court had to decide on a Christian woman's opposition towards the enshrinement of her deceased spouse, a former serviceman of Japan's Self-Defense Forces ("SDF"), in a Shintō shrine under a motion foreseen in the rules of association of a private organization of SDF supporters. Applying a purpose and effect test, the court denied the claimant her desired nullification of the process and additional damages. While several interpretations were possible, Asano argued that the case might best be seen as a limitation of constitutional law's scope of application in respect of self-regulatory autonomy as well as a call for (mutual religious) tolerance. Nevertheless, she noted the problematic correlation of judicial restraint and the hidden state proximity which was displayed in the case, pointing to the importance of a clarification of the functional purpose of self-regulation and the institutionalization of review procedures as preconditions for autonomy. By contrast, *Patrick C. Leyens* (Humboldt University Berlin) focused on the binding force of self-commitments to non-legal standards in the realm of civil and commercial law. Noting various patterns of possible binding effects (contract, charter provisions, and public disclosure), he recalled the necessity of holding market participants liable for the truthfulness of their own signals in an environment relying ever more on soft law regulation otherwise not enforced by the state, and he proposed solutions to align liability for self-commitments with the theoretical underpinnings of civil law. However, given the limitations of each mechanism, some regulatory goals might simply prove unsuitable for self-regulation, as Leyens pointed out later during the enriching discussion. Other comments, such as Möslein's question regarding the effect of choice-of-law clauses and international competition on Leyens' conceptualization of civil liability, provided stimulating impulses for further thoughts on another day.

Thus far, legitimacy of self-regulation has been playing a far more significant role in the German discourse than that of Japan. *Takahiro Kato* from the University of Tōkyō therefore faced a tough challenge in his presentation, making his elaborations even more valuable. Drawing from his own experience in the drafting process of disclosure rules for the TSE, he emphasized that – *ex ante* – public-consensus-building procedures are particularly important in setting the limits of self-regulation in Japan. Thereby, discussions among selected working group members form an important basis of the rule-setting process. Coordination between different self-regulatory organizations towards a common goal (i.e. a fair disclosure standard shared by both listed companies and analysts) might, however, prove to be difficult without state coordination. Likewise, only public support enabled the TSE to introduce rules on the introduction of independent directors. The difficulty of reaching consensus on self-regulation among

private parties, even if it might serve their own interests, was further illustrated by former MPI director *Klaus J. Hopt* in the subsequent discussion by his reference to the failed German attempts at self-regulation in insider trading and take-over regulation, before he pointed once more to the GCGC. Kato, however, expressed his skepticism towards excessive government influence on the rule-setting process that might result in a circumvention of the legislative process if pushed too far.

With respect to genuine self-regulation, legitimacy problems of a different kind might arise as rules set “top-down” by private regulators, such as sports associations, gradually evolve into ever more binding law which are at the same time not always in line with public welfare considerations. In his presentation, *Andreas Dieckmann*, also of the Leibniz University in Hanover, argued in favour of a procedural approach rather than the substantive scrutiny of rules during a possible judicial review process.

In the final session, the already broad perspective of the symposium was further enriched by extending it to the transnational level. In a *tour de force* stretching across the ideal of privately made law as an alternative basis for a peaceful world order, examples taken from transnational securities trading and sports, and a plea for an openness for private model laws, *Yuko Nishitani* (Kyōto University) explored various aspects of what might be called a modern *lex mercatoria*. Basedow continued with a detailed and critical analysis of the Hague Principles on Choice of Law. Although calling for a stronger international promotion of the principles in the academic community, it was his assessment that the success of this new form of international soft law depends mainly on the echo it finds with its addressees, in particular lawmakers and courts in jurisdictions not having a detailed choice-of-law regime and also international arbitrators.

At the end of what had been a comprehensive and in every aspect thought provoking symposium, *Moritz Bälz* of the Goethe University Frankfurt expressed his gratitude towards each and every one of the speakers. He highlighted that the conference had illustrated not only similarities but also interesting differences, i.e. in respect of the role of legitimacy for the discussion and the degree of state coordination and influence on self-regulation. In order to contribute to the further development of the discourse, the lectures will be published in a conference volume in 2017.

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