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**Selbstregulierung und Soft Law im
japanischen Gesellschaftsrecht**

Corporate Governance Code, Stewardship Code und der
„konstruktive Dialog“

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Recent decades have seen the rise of soft law tools in corporate law, namely the diffusion of corporate governance codes beginning in the 1990s and then the advance of stewardship codes since the late 2000s.¹ However, some authors now suggest that we may have reached the peak of soft law codes in corporate law: CHEFFINS and REDDY propose that the UK should abolish its Corporate Governance Code, and a study by KATELOUZOU and SIEMS shows that the global adoption of stewardship codes peaked in 2016/2017, with only few codes enacted in the subsequent years.² It is thus an interesting point in time to reflect on the adoption and effectiveness of these codes.

The monograph by PFEIFER provides an excellent analysis of the Japanese codes in a historical and comparative context. Japan adopted, on the one hand, the 2004 Principles of Corporate Governance of the Tokyo Stock Exchange, followed by the 2015, 2018 and 2021 versions of Japan's Corporate Governance Code,³ and, on the other hand, the 2014, 2017 and 2020 versions of its Principles for Responsible Institutional Investors ("Japan's Stewardship Code"). While PFEIFER's main focus is on Japan, the book contains some comparative cross-references to German, UK, US and EU law. This is valuable given that the Japanese codes may be examples of

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- 1 See e.g. C. GERNER-BEUERLE, Diffusion of Regulatory Innovations. The Case of Corporate Governance Codes, *Journal of Institutional Economics* 13 (2017) 271; J. G. HILL, Good Activist/Bad Activist. The Rise of International Stewardship Codes, *Seattle University Law Review* 41 (2017) 497.
 - 2 B. R. CHEFFINS/B. V. REDDY, Thirty Years and Done – Time to Abolish the UK Corporate Governance Code, *Journal of Corporate Law Studies* 22 (2022) 709; D. KATELOUZOU/M. SIEMS, The Global Diffusion of Stewardship Codes, in: Katelouzou/Puchniak (eds.), *Global Shareholder Stewardship* (2022) 631, at 639.
 - 3 See also J. BUCHANAN, Japan's Corporate Governance Code 2015–2021. Legitimacy and Transition from Principles to Prescription, *ZJapanR/J.Japan.L.* 27 (2022) 19.

legal transplants (p. 4), possibly also with the normative spin that other countries can now learn from the developments in Japan (see p. 245). These codes also have transnational relevance as both companies and investors often operate across borders (and, indeed, Japan's Stewardship Code also applies to foreign institutional investors in Japan, p. 145).

PFEIFER's book is divided into five chapters. The first chapter provides a general introduction on the concepts of self-regulation and soft law and how questions of legitimacy play a role for such privately created rules. This latter point is of particular relevance to the author as he later identifies "legitimacy limitations (p. 208) of the Japanese codes. For this purpose, the book mainly draws on Japanese and German literature, while it is also possible to refer to many English-language publications that have discussed the legitimacy of soft law in today's world.⁴

Chapter 2 outlines the key regulatory structure of Japanese corporate governance in a historical context. It notes the traditional notion of the "community firm" but then presents the many changes that have taken place in recent years and decades. For example, this includes changes in the possible board structures of Japanese firms and the growing role of institutional investors. The chapter also notes that the Japanese lawmaker now takes the view that corporate governance should follow a "growth-oriented" aim. This is interesting to note as it presents an alternative to the Western dichotomy of shareholder or stakeholder centric models of corporate governance.

Chapter 3 is the longest chapter of the book. This is justified as the discussion now turns to the actual soft-law tools in Japanese corporate law. Apart from the two codes, this chapter also discusses the stock-exchange rules of Tokyo Stock Exchange. These latter rules are not the main focus of the book, yet it is right to include them as there is indeed a general debate on the nature and rule-making power of stock exchanges.⁵ In this case, as well as in the case of the two codes, the chapter also notes that any such soft law closely interacts with mandatory rules of company and securities law. With respect to the corporate governance and stewardship codes, PFEIFER outlines

4 See e.g. S. I. KARLSSON-VINKHUYZEN/A. VIHMA, Comparing the Legitimacy and Effectiveness of Global Hard and Soft Law: An Analytical Framework, *Regulation & Governance* 3 (2009) 400; J. BLACK, Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes, *Regulation & Governance* 2 (2008) 137.

5 See e.g. O. H. DOMBALAGIAN, Demythologizing the Stock Exchange: Reconciling Self-Regulation and the National Market System, *University of Richmond Law Review* 39 (2004) 1069; P. G. MAHONEY, The Exchange as Regulator, *Virginia Law Review* 83 (1997) 1453.

the key principles of these laws. He also suggests that both codes are strongly influenced by the UK model. Indeed, this seems clear for the Corporate Governance Code. However, with respect to the Stewardship Code, two chapters of a book published in the same year as PFEIFER's, emphasize the differences between the two codes: one chapter suggests that in the UK the code had the intention of changing shareholder short-termism while in Japan the aim was to create more active shareholders;⁶ and the other chapter ranks the similarities of stewardships codes globally, finding that the UK-Japan pair is only in the middle of this ranking.⁷

Chapter 4 evaluates the impact of the two Japanese codes. It starts with a discussion of changes in board composition, while also noting that some of the soft rules on non-executive directors have subsequently been transformed into hard-law rules (p. 199). More generally, the chapter finds that, formally, most listed firms do sign on to the principles of the Corporate Governance Code. With respect to the Stewardship Code, the picture is less clear, though here too there is at least some evidence of formal compliance. However, this compliance is often fairly superficial as it has not led to deeper structural changes in Japanese corporate governance. In other words, there is often "compliance in word but not in spirit" (p. 208). This finding can also be understood by using the staircase metaphor, developed by LARSSON-OLAISON, which distinguishes between transplant as "label", as "content", as "practice" and as "outcome".⁸ Thus, in the present case, there has been an effective transplant as far as label, content and practice are concerned, yet the outcome is not the same as that of the rules in other countries.

Chapter 5, the final chapter, is entitled "outlook". It reiterates that Japanese corporate governance has been a frequent topic of change in both hard and soft law. This has led to an "exuberant rhetoric of change" (p. 260, author's translation), yet this change is not fully reflected in reality. In other words, it seems that the path dependency of corporate governance⁹ sets a natural limit on the effectiveness of reforms, and that these limits also constrain the reach of reforms pursued by soft law tools.

To conclude, the book by PFEIFER is well-written and well-developed. It is also valuable to scrutinize the Japanese Corporate Governance and Stewardship Codes in detail as such an analysis presents an important case study

6 G. GOTO, The Japanese Stewardship Code: Its Resemblance and Non-resemblance to the UK Code, in: Katelouzou/ Puchniak, *supra* note 2, 222, at 238.

7 KATELOUZOU/SIEMS, *supra* note 2, 657.

8 U. LARSSON-OLAISON, Convergence of Corporate Governance Systems: A Legal Transplant Perspective, *Competition & Change* 24 (2020) 450.

9 L. ARYE BEBCHUK/M. J. ROE, A Theory of Path Dependence in Corporate Ownership and Governance, *Stanford Law Review* 52 (1999) 127.

of the way transplanted soft laws are adopted internationally, while also pointing towards limitations in terms of their legitimacy and effectiveness. It is highly recommended to any readers interested in Japanese and global corporate law, comparative law or regulatory theory.

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