

Introduction: Japan's Gradual Transformation in Corporate Governance[#]

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Abstract: Japan has recovered from a 'lost decade' of economic stagnation over the 1990s. Anyway, it has been a 'found decade' for civil and criminal justice law reform, especially in corporate and securities law. Yet, have liberalisation and globalisation in those fields led to major changes in the 'law in action'? Does this represent 'Americanisation' of Japan's corporate governance system, focusing on shareholders rather than other key stakeholders such as 'main banks', core employees, and partners within diffuse corporate groups (*keiretsu*)? This version of our introductory chapter explains how our forthcoming book argues for a more complex 'gradual transformation'. Such shifts are also found in many other post-industrial economies, but Japan appears to give greater emphasis given to certain modes of achieving change. The book brings together contributions from academics and practitioners from Japan, Australia, New Zealand, Canada and the United States. An early chapter introduces methodology for effective cross-country comparisons and for evaluating the burgeoning but divergent literature on Japanese corporate governance. The concluding chapter compares continuities and changes in Japan's largest companies now and two decades ago. Other chapters cover 'lifelong employment', main banks, the untold story of closely-held companies, the limited uptake of the Committee-based governance form, and the procedural, substantive and FDI policy dimensions of takeovers law and practice.

Keywords: Corporate governance, corporate law, securities regulation, Japanese law, Asian law, comparative law.

Like other major post-industrial democracies around the turn of the 21st century, Japan is undergoing a 'gradual transformation' in socio-economic relations (Streeck & Thelen eds, 2005). Unlike the 'great transformation' that engendered the welfare state in the mid-20th century (Polanyi, 1944), the current shift is back towards more market-driven governance. Yet, entrenched legal and social norms and institutions mitigate the pace and influence the direction of this shift. Consequently, the ways in which it occurs and the overall extent of the transformation vary among countries, although some identifiable patterns are emerging from this transition world-wide.

One common but relatively low-key means of effecting a 'gradual transformation' is 'layering'. This means adding new institutions to see whether innovations will percolate through to other fields (Streeck & Thelen, 2005). In policy initiatives and practices in Japan, layering seems particularly popular. One recent example is the superimposition of new postgraduate 'Law School' (*hoka daigakuin*) programs on top of undergraduate legal education since 2004. This reform is aimed at boosting the quality and quantity of law graduates able to qualify as *bengoshi* lawyers, public prosecutors and judges (Miyazawa, 2007). A second example of newly layered institutions is the greater use of lay participation in legal arenas. For example, in 2009 Japan will introduce a quasi-jury system (*saibanin seido*) for serious criminal trials. This may, as promised by the reformers, have much broader ramifications for both criminal justice and civic engagement (Anderson & Nolan, 2004; Ambler, 2007). A third example is the introduction of more lay participation in civil trials. This trend can be seen in complex matters such as construction disputes and the new specialised Tokyo High Court for appeals in intellectual property disputes (Nottage, 2005a).

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All of these wide-ranging reforms emerged from recommendations in 2001 by the blue-ribbon Judicial Reform Council ('JRC'). The JRC sought to transform Japan from a system based on *ex ante* regulation by public authorities, into one involving more indirect socio-economic ordering based more on *ex post* remedies pursued primarily by citizens themselves. Yet, implementation of these radical proposals has been limited by incrementalist 'reformist conservatism' (Nottage, 2006b). More generally, gradualism characterises policy initiatives adopted by Japan dating back centuries, including key junctures such as the nation's re-opening to the West and the Meiji Restoration in 1868. Japan tends to delay reactions, shoring up anachronistic institutions and sometimes adding new ones. Either this succeeds in meeting the new challenges, or more radical changes become necessary. In the latter case, the gradual changes already implemented mean that the new situation evolves as a progressive step rather than a radical leap (Gluck, 2007; see also Hunter, 2006).

Nonetheless, Japan is far from unique in its slow but steady responses to the country's economic woes over the 1990s. Other rich countries also tend to delay reforms in such situations, for various reasons (La Croix & Kawaura, 2006, pp. 32-3). First, accumulated wealth provides a buffer. (Indeed, unlike Korea, Japan did not really perceive itself to face an economic crisis, except perhaps over the year or so following the failures of securities firms and a major bank in late 1997: Cargill, 2006, p. 135). Second, rich countries recently have already committed to economic reforms and, therefore, see less need to initiate more far-reaching changes. Third, by their very nature in complex societies, institutions cannot be too pliant. Finally, there are now fewer successful models to emulate or adapt, compared to the situation facing Japan in the 19th century. Even the US has only regained economic momentum since the early 1990s. More broadly, social theorists like North (2005) also expect large-scale institutional change to be incremental (due to opposition from existing organisations against others that have adapted more readily to the new environment) and path dependent (shaped by the knowledge and skills that organisations have invested in).

Corporate governance is a topical area that provides a useful lens to test and apply such broader theories of socio-economic change, especially in Japan. During the boom times of the 1980s, the Japanese company was regarded as an attractive alternative to counterparts in the West, especially in the US. With its emphasis on employee welfare (notably, the guarantee of lifelong employment: Rebeck, 2005), inter-locked shareholdings (often among members of *keiretsu* or corporate groups: Okabe, 2002) and monitoring by a key debt financier (the 'main bank' system: Aoki et al., 1994), Japanese corporate governance was regarded as equally — if not better — suited to achieving strong business results than the 'insider' model emphasising shareholder primacy. But when Japan slumped into recession, the Japanese company was increasingly no longer regarded as a viable alternative.

Massive reforms to Japanese corporate and commercial law, culminating in the consolidated Company Law (No. 86 of 2005: Takahashi & Shimizu, 2005) and the 2006 amendments to securities regulations (outlined further below in the Appendix),¹ promised a more market-responsive and transparent model of corporate governance. In

¹ See (Oda, 2007) for a more detailed overview of most of Japan's new Financial Instruments Exchange Law (No. 65 of 2006); and <http://www.protiviti.jp/downloads/flashreport/JSOX_Flash_Report0221E.pdf> for a comparison between its regime for better internal control reporting and (known colloquially as 'J-SOX') and the US Sarbanes-Oxley Act of 2002 (SOX). For more comprehensive introductions to the major corporate law reforms, and the 'evolution' of broader features of corporate governance in Japan, see respectively Fujita (2005) and Sarra & Nakahigashi (2002).

the eyes of some, Japan capitulated to an ‘Americanization’ [sic] of key corporate governance institutions (Kelemen & Sibbitt, 2002). This trend was reportedly triggered by political fragmentation in the early 1990s, combined with economic liberalisation and more emphasis on legal services and the formal legal system. Yet, is this really the case? With Japan back to steady economic growth since 2002, and many new legal reforms firmly in place, it is timely to re-consider how Japanese corporate governance has changed during the era following the collapse of Japan’s ‘bubble economy’ of the 1980s. Has Japan really reached the ‘end of history’ (Hansmann & Kraakman, 2001), forsaking its own institutions for a shareholder primacy model centred on more arms’ length market-driven relationships? Or has there been evolution rather than revolution, perhaps even a salutary reaction to shareholder primacy (Iwai, 2006)?

Various authors in this book, as in other recent works (Blomstrom & La Croix eds, 2006; Vogel, 2006; Aoki et al. eds, 2007), generally conclude that there has indeed been a gradual transformation rather than radical upheaval. Shifts are occurring at various levels, however, and may reveal somewhat different patterns to those evident in other post-industrial democracies moving towards more market-based approaches. Nonetheless, proving such changes in corporate governance poses several analytical challenges. If only to make effective comparisons across insider- and broader stakeholder-based systems, the way companies are governed needs to be analysed not just in terms of the relations between shareholders and managers, the traditional concern of Anglo-American corporate law and corporate governance scholarship (Berle & Means, 1932). Relationships with further stakeholders also need to be considered, especially with creditors and core employees. Others include supplier firms and customers, the government itself, community groups and NGOs (especially in this era of Corporate Social Responsibility or ‘CSR’: Keizai Doyukai, 2004; Welford, 2005). In particular, corporate governance scholars and practitioners have highlighted in Japan the important *de facto* roles played by main banks and core (lifelong) employees as monitors of managerial performance in many Japanese corporations (Nottage & Wolff, 2005). This book follows such an approach to corporate governance, thereby opening a window onto contemporary capitalism generally, as well as its interaction with politics, law and social norms.

From a theoretical perspective, this allows our findings to draw on — and feed back into — the broader theory of ‘gradual transformation’ currently being elaborated by experts in political science and political economy (Streeck & Thelen eds, 2005). This approach to corporate governance also raises important practical implications for the rising numbers of foreign investors, businesses trading with Japanese corporations, and policy-makers interested in tracking or guiding the changes underway in Japan. Thus, the book offers fresh and up-to-date perspectives on developments in Japanese corporate governance, especially in the early years of the 21st century.

The authors herein approach a range of inter-connected topics drawing on their diverse backgrounds. They comprise practising lawyers as well as academics, interested in ‘black-letter law’ as well as wider social and political theory. They are familiar with developments not only in Japan and the US, but also Australia, Canada and Europe. Consequently, the chapters take seriously another methodological lesson for comparative corporate governance scholarship: the consideration — explicit or implicit — of multiple jurisdictions for comparison. Comparing just two, such as Japan versus the US, tends to lead either to over-emphasising divergences or instead their similarities. In addition, the authors generally clarify and justify their choice of timeframe, since a longer timeframe may tend to highlight greater transformation. All consider both socio-economic context (often suggesting continuities) and black-letter

law (often suggesting change). The authors also make clear any normative preferences for change over continuity, since this often colours others' assessments of what is going on in corporate governance in Japan today. Finally, some authors look closely at the processes of law reform, not just the specific outcomes. The idea here is that even if the latter turn out to involve minor changes, a new process in policy- or law-making could indicate a significant transformation, particularly for future developments.

As well as elaborating such core methodological points, Nottage's chapter 2* offers a critical guide to the burgeoning and increasingly divided literature in English regarding contemporary corporate governance in Japan. He questions two variants of the view that no significant change is occurring at all. One variant, propounded especially by John Haley (2005b), emphasises stasis in core employment practices and norms in large Japanese corporations. The other, advanced by Mark Ramseyer, argues that no change is occurring only in the sense that post-War Japan has been governed anyway by market forces. On his view, except perhaps for 'lifelong employment', key components of the conventional wisdom about Japanese corporate governance constitute myths or fables (Miwa & Ramseyer, 2006). Nottage introduces studies that rebut this iconoclastic and idiosyncratic account either directly (see also Freedman & Nottage, 2006), or indirectly by revealing gradual changes in those conventional components of the system (for example, Aoki et al. eds, 2007). Nottage's engagement with the more specific model of 'gradual transformation' proposed by Streeck and Thelen (2005) as well as other work by political scientists (Gourevitch & Shinn, 2005) also results in a critique of the view, common among the financial press, that Japan has already achieved whole-scale change and convergence on a so-called 'American model'.

Wolff's chapter 3* then looks more closely at labour relations, in particular, the system of lifelong employment for core employees. Lifelong employment has long been held out as not only the centrepiece of Japanese industrial relations, but also an emblem of Japan's stakeholder model of corporate governance. After the decade-long recession in the 1990s and early 2000s, some commentators are now predicting its 'death' (or de-institutionalisation). Others, however, are instating that the institution remains – and will remain – largely in place. According to Wolff, this raises the stakes in the debate. If lifelong employment is dying, does this signal the end of Japan-style stakeholder capitalism and the triumph of Western-style shareholder primacy? Or does the Japanese model still endure as a 'variety' of capitalism?

Wolff argues that lifelong employment has been abused as a metaphor of Japanese stakeholder capitalism. Lifelong employment is not a typical form of employment relations in Japan. Even in the minority of cases where it does exist, it is neither a benign form of employee welfare nor an inefficient practice that has brought corporate Japan to its knees. Nor is it naturally occurring — either as a cultural form of co-operative, communitarian capitalism or as the institutional constituent of an alternative economic design to self-equilibrating markets. Instead, it is a politically invented tradition, initially created to ensure industrial peace in post-War Japan and subsequently preserved to support Japan's ensuing regime of accumulation. The law has sustained this strategic choice by erecting a regulatory framework of 'flexicurity' — a balance between flexibility of working practices and security of employment

* Luke Nottage, 'Perspectives and Approaches: A Framework for Comparing Japanese Corporate Governance' (abridged and updated from Nottage, 2006d).

* Leon Wolff, 'The Death of Lifelong Employment in Japan?'

tenure.

This alternative understanding of lifelong employment, Wolff suggests, allows a reinterpretation of recent developments in industrial relations in Japan. Employment patterns are clearly undergoing important changes. But the empirical data do not support conclusions of a convergence to a market-based, termination-at-will system of employment, nor the persistence of Japan-specific institutions and norms of employee welfare. Instead, a transformation is indeed taking place, one based on the intensification of existing regulatory modes of 'flexicurity'. This intensification might very well lead to a crisis in the labour-management nexus in Japan (as predicted, for example, by Blomstrom & La Croix, 2006, p. 11), or perhaps even its wholesale overthrow. So far, however, no new political compromise has been struck.

Wolff's conclusions open up provocative theoretical challenges. First, since 'culturalist' and neo-institutional theories fail to explain the developments in industrial relations in Japan, new theories are needed to understand the dynamic change in Japanese legal and economic institutions. Second, since lifelong employment is a governance technique that is not universal, ahistorical nor neutral, new theories are required that take seriously the heterogeneous, transient and political dimensions of corporate governance. Third, since Japanese capitalism is a regime of accumulation like any other, yet with its own defined set of strategic choices, new analytical tools are called for to interpret the roots of the Japanese political economy (not just its institutional manifestations) and for reaching informed assessments about its normative value (not just calibrating assessments to Japan's fluctuating business cycle).

Puchniak's chapter 4^{*} then turns to main banks, another major distinctive component conventionally associated with post-War corporate governance in Japan. He rejects Ramseyer's free-market theory by summarising empirical and case study evidence showing how Japanese banks systematically persisted in lending trillions of yen to 'zombie' firms at below-market interest rates to save them from bankruptcy over the 'lost decade' (1990-2002). A matrix of unique institutional incentives (such as capital-asset ratios required under the Basel Accord) made it worthwhile for banks, especially main banks, to engage in behaviour that Ramseyer would view as impossibly irrational. The survival of main banks over that difficult era suggests that they will continue to play a considerable role in Japanese corporate governance. Hopefully, they now enjoy once again a less perverse institutional environment. Yet, banks face a new regulatory environment following the implementation of Japan's 'Big Bang' reforms in the late 1990s (outlined in this chapter's Appendix; and in more detail by Kozuka, 2005, and Cargill, 2006). Banks are also increasingly subjected to scrutiny through the court system.² Further, the ongoing role for main banks as actual or potential monitors of their client firms depends on the evolving

* Dan W. Puchniak, 'Perverse Rescue in the Lost Decade: Main Banks in the Post-Bubble Era' (updated from Puchniak, 2007a).

² For example, as noted in Kozuka's concluding chapter, the Supreme Court (28 January 2008) recently upheld the decision of the Sapporo High Court (2 March 2006, 1946 Hanrei Jiho, p. 128) establishing directors' liability regarding loans extended by the Hokkaido Takushoku Bank (which collapsed in 1997). As remarked by Takahashi and Sakamoto (2007, pp. 267-70) in the context of the High Court decision, many actions have been brought against directors of failed financial institutions, especially by the Resolution and Collection Corporation ('RCC') set up by the government to help resolve Japan's banking crisis. The case law has tended to hold them to higher standards of care than directors of general business corporations. Courts in Japan (as in Germany, but not the US) have developed a version of the 'business judgment rule' that tends to scrutinise the substance of business decisions, not just the process by which it is reached and whether any conflicts of interests existed.

environment influencing core employees, shareholders and other key components of Japan's corporate governance system.

Matsui's chapter 5* then tells a relatively untold story, even in the vast literature in Japanese: corporate governance issues in closely-held firms. In Japan as elsewhere, the vast majority of Japanese companies are small in size and owned by a few shareholders, often a parent corporation or family members. As such, they command an important economic presence in the market and play a unique role in Japanese industry. The new Company Law provides a new future for the governance of smaller enterprises. Giving voice to an industrial policy aimed at promoting market entry for new, innovative venturers, the new Law provides smaller companies with the ability to customise their management structures and *ex ante* share schemes to better suit their business needs. Smaller companies also generate unique types of shareholder conflicts in the form of minority oppression. Under the mandatory provisions of the old Commercial Code, the oppression remedy had limited scope (Shishido, 1990). However, under the new Law with its relaxed share-class provisions, shareholders in smaller companies are able to be more strategic in their relations with one another. Courts may also start to turn to the emerging takeover jurisprudence for public companies in developing the oppression doctrine to resolve the conflicts that will inexorably emerge as a result.

Only then does this book turn to the more conventional concerns of Anglo-American corporate governance theory and literature: developments directly affecting public companies. Lawley's chapter 6* adds an innovative qualitative study to uncover patterns in the limited uptake of the option offered to Japan's large corporations since 2004 of replacing a more German-inspired board system with a more Anglo-American 'Committee-based' system (Puchniak, 2003; Gilson & Milhaupt, 2005). Such 'elective' corporate law reform, and its so far limited direct impact, provides another excellent example of the 'layering' method of achieving a gradual transformation, particularly in Japan.

A trilogy of chapters then focuses on overlapping aspects related to Japan's rise of hostile takeovers in recent years, prefigured in Matsui's chapter. The numbers remain very small, and no major Japanese company has actually been taken over (Puchniak, 2008). However, hostile takeovers remain a major area of debate and concern in the corporate and legal worlds, both within Japan and abroad.³ Dooley's chapter 7# identifies this controversial field as one where the Japanese courts had provided less guidance. Fewer cases have reached them, although there are some continuities with judgments resulting from a small run of takeovers disputes in the late 1980s (Kozuka, 2006). Hostile takeovers also represent one, of now very few areas, which the legislature has still not been addressed comprehensively. Instead, 'soft law' reform has played a prominent role. A major impetus came from Guidelines released in May 2005 by the Ministry of Economy, Trade and Industry ('METI') together with the Ministry of Justice 'MoJ', following a report by METI's 'Corporate Value Study Group'. They proposed a rebalancing between facilitating hostile takeovers (to directly or more diffusely promote better corporate governance in actual

* Tomoyo Matsui, 'Corporate Governance and Closely-held Companies in Japan: The Untold Story'.

* Peter Lawley, 'Panacea or Placebo? An Empirical Analysis of the Effect of the Japanese Committee System Corporate Governance Law Reform' (abridged and updated from Lawley, 2007).

³ See also, for example, Economist Intelligence Unit (2005), Schaede (2006), Takahashi & Sakamoto (2006) and Osugi (2007). Interestingly, hostile takeovers have emerged in Germany and continental Europe as part of those countries' own gradual transformations (Baum, 2005).

Geraad Dooley, 'Streamlining the Market for Corporate Control: A Takeovers Panel for Japan?'

or potential target firms), and allowing certain defensive measures by directors and/or shareholders (to limit abusive ‘greenmailing’). The Guidelines and some contemporaneous case law seemed to prefer the more flexible test favouring incumbent managers developed in Delaware (Milhaupt, 2005a), compared to Anglo-Australian law’s much stricter protections for target shareholders and concomitant advantages for bidders (Nottage, 2008b). Dooley’s main innovation, however, is his proposal for Japan to adopt and adapt a specialised tribunal outside the regular court system, modelled on the Takeovers Panels found in the English law tradition. This follows from problems facing Japan in relying on regular court processes, more independent directors, or informed shareholder participation. However, contrasting features of such Panels in England and Australia (Armson, 2005), a speedier and more informal *process* may need to be counterbalanced in Japan by more formal *substantive rules* less favourable to target managers. That may also be necessary to assuage concerns particularly on the part of US investors, who are used to litigating takeover disputes through the formal court system — albeit before the expert judges and tailored processes in Delaware courts.

On the other hand, Japan’s courts now seem to be diverging from the substantive law applied by their counterparts in Delaware. Chapter 8 by Kamiya and Ito,* lawyers in Tokyo familiar with the US approach as well as experienced in many of Japan’s recent hostile takeover disputes, highlight and question a significant shift. In the recent *Bulldog Sauce* litigation, the first to go all the way to the Supreme Court (27 September 2007, 1983 Hanrei Jiho, p. 56), more weight was given to the role expected of target shareholders regarding defensive measures. Kamiya and Ito are skeptical about the ability of shareholders in Japan to make informed decisions on such measures, despite the dramatic rise of (especially institutional) foreign investors. It remains to be seen how far this line will be pursued by other Japanese courts.⁴ Already, the complex case law development lends weight to Dooley’s call for a more streamlined and market-sensitive dispute resolution body that functions outside regular court processes.

It may also be significant that the 2007 judgments came in the wake of a second Report of the Corporate Value Study Group (2006). This appears to give much greater weight to disclosure, to minimise information asymmetry so shareholders can give informed consent to defensive measures proposed by the Board. It also explores existing and potential improvements in means for shareholders, especially institutional investors, to become engaged in this process. The Report compares approaches in the US, the UK and the rest of Europe, and generally refers to finding a balance between the interests of bidders and target shareholders vis-à-vis target management. Indeed, the Introduction (p. 1) refers to its original Report (Corporate Value Study Group, 2005) and the related Guidelines (METI & MoJ, 2005) as ‘rules prepared by those who defend’ [sic]. It then contrasts takeovers rules and reviews developed by the ‘acquirer’s camp’ [sic]. The Report mentions reviews via the

* Mitsuhiro Kamiya & Tokutaka Ito, ‘Corporate Governance at the Coalface: Comparing Japan’s Complex Case Law on Hostile Takeovers and Defensive Measures’.

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Financial Services Agency ('FSA') that resulted in the 2006 reforms to securities law (outlined in this chapter's Appendix), as well as a comprehensive set of 'Proposals Regarding Fair M&A Rules' issued in July 2006 by the Corporate Governance Committee of the ruling Liberal Democratic Party ('LDP'). It goes on to note that the Study Group membership was expanded, involving in particular more institutional investors, and that the Group 'held repeated discussions on rules' from the dual perspectives of the 'defensive side' and the 'acquiring side' (p. 2).

A closer comparison of the two Study Group Reports (Corporate Value Study Group, 2005; 2006) confirms, for example, that six members were added. Three represented securities firms (Daiwa, Nikko Citigroup) or the Pension Fund Association, but two others represented the Mitsubishi UFJ Trust and Banking Corporation (itself created in 2005 after a messy takeover battle) and a famous international investment bank (Lazard Freres).⁵ This may reflect an existing or emerging political battle involving very high financial stakes. A parallel would be the conflict over the 1960s in the UK, pitting blue-chip companies and merchant bank advisors against maverick hostile bidders and institutional investors. The latter won out and entrenched the UK City Code system from 1968. This not only enforced substantive rules highly unfavourable to target management, but also enforced them through a Takeovers Panel that relied on informal hearings and highly effective socio-economic sanctions (Armour & Skeel, 2007). A rather similar battle took longer to play out in Australia (Nottage, 2008b). Although the substantive rules also favoured bidders, vis-à-vis target management, a Takeovers Panel really only took over from the courts in 2000. It is also more formal in its operations than its UK prototype, and was recently subject to a further constitutional challenge for usurping 'judicial power'.⁶

This may be making too much of the METI Study Group's importance; but it suggests the importance of politics as well as economics, particularly in the field of takeovers and M&A. Pokarier's chapter 9* takes this notion much further, locating the field in the broader context of the latest page in the story of Japanese regulation of Foreign Direct Investment ('FDI'). The Government maintains a commitment to expanding inbound FDI towards the levels found in other major world economies, and Japan is now formally very open to FDI. Yet, FDI has grown much slower than portfolio investment from abroad, and Pokarier points out that there remains widespread ambivalence within Government and broader policy-making circles. Recent developments potentially adversely affecting foreign investors include considerable scope for deploying defensive measures against hostile takeovers, and some imminent expansion of screening and restrictions especially for certain sensitive sectors such as airports.

Pokarier tests this policy mix against three models of political markets where state actors supply policy compromises to frequently contending constituency

⁵ The sixth new member was another law professor, joining two senior colleagues, as well as two professors of business. The original Study Group had included only one representative from securities firms, namely Nomura. Incidentally, as of February 2008, METI's website provides the lengthy second Report in full translation (Corporate Value Study Group, 2006).

⁶ The High Court of Australia, however, restored the trial judgment and rejected this challenge: *Attorney-General (Cth) v. Alinta Limited* [2008] High Court of Australia 2 (31 January 2008), freely available via <<http://www.austlii.edu.au>>. Considerations included the informality of Panel procedures compared to regular courts, the requirement for Panel orders to be enforced through the courts (if contested), and so on. See generally Armson (2007).

* Chris Pokarier, 'Open to being Closed? Foreign Control and Adaptive Efficiency in Japanese Corporate Governance'.

demands, involving interests and ideas – including economic nationalist ideas. Some evidence can be found for and against each model. First, the ‘privatisation of economic nationalism’ involves the Government pursuing FDI liberalization abroad, including via burgeoning bilateral Free Trade Agreements (‘FTAs’), at the cost of formally liberalising Japan’s own regime for investment from abroad. But the Government devolves the task of minimising foreign control to Japanese firms themselves, via poison pills and so on. Secondly, and less duplicitously, the ‘discretionary public interest’ model further devolves to firms the broader decision about whether to promote or resist greater foreign ownership, just as it leaves to them the (often overlapping decision) whether or not adopt a more Anglo-American committee-based corporate form. Thirdly, a ‘discretionary private interest’ model involves more complex contention between recognizable domestic constituencies for against FDI liberalization, mediated through the public policy process. Discretionary responses tend to be popular, but on this account (as in the other two) discretions are being devolved from the public to private sectors, revealing parallels to Japan’s liberalisation in the 1960s. It is too early to conclude whether this will result in informal barriers or, underpinned by competition in product markets and other pressures on entrenched interests, facilitate the ‘adaptive efficiency’ identified by North (2005) as essential to economic growth. Meanwhile, this broader context for takeover activity and corporate restructuring underscores Japan’s messy ‘gradual transformation’ since the late 1990s.

As Kozuka concludes in chapter 10,^{*} teasing out further interconnections among all authors’ combined picture of corporate governance in Japan, it is clearly therefore over-hasty to conclude that there has been an ‘Americanisation of Japanese law’. This can be seen through his innovative analysis: a comparison of key features of Japan’s largest companies in 2008 compared to 1988, and how these interrelate to various changes to laws and practices. Empirical analysis shows that many remain in the ‘Top 40’. However, many companies are now organised through pure holding companies, after a post-War prohibition was abolished in 1997 in line with Japan’s ‘Big Bang’ financial sector reforms. Further, many large companies have gone through divestitures and restructuring, reflecting and prompting successive corporate law reforms in that field since the late 1990s (summarised in this chapter’s Appendix). Greater flexibility in corporate finance, another feature of the reforms, is evident in the remarkable displacement of banks and insurance from among the top three shareholders in today’s blue-chip companies. Nominees, probably institutional investors (including ever-growing foreign investors), have taken their place. Among Japan’s largest companies, greater diversity is also reflected in various shifts in employee numbers. On the other hand, corporate law reforms have had less effect in other areas, such as the Committee-based corporate form and caps on directors’ liability exposure. The impact appears more diffuse, as in the practice of downsizing boards of directors while introducing more executive officers. An emerging ‘shareholder fundamentalism’ in takeovers law may be tempered by shareholders still taking into account broader stakeholder interests, even when approving defensive measures submitted by the board.

More generally, this field and the areas such as directors’ duties (Fujita, 2005) remain heavily based on case law developments, which are inevitably messier and more long-term in their impact. Such developments may come as a surprise for those who emphasise the continental European roots of Japan’s civil and commercial law

* Souichirou Kozuka, ‘Conclusions: Japan’s Largest Corporations, Then and Now’.

system. However, the role of Japan's formal court system in influencing policy and practices is also apparent in neighbouring fields. For example, growing activism since the late 1990s has constrained high-interest unsecured consumer lending, in turn impacting on Japan's core banking sector (Kozuka & Nottage, 2007; 2008). Nonetheless, Japan's Supreme Court is certainly not the US Supreme Court.

In sum, applying different perspectives and methodologies to analyse a set of inter-connected topics, all our authors agree that Japanese corporate governance has been undergoing a gradual transformation especially over the last decade, but this certainly does not amount to a reverse 'great transformation' now dismantling the welfare state. Such broad-based support for Japan's gradual transformation, moreover, accords with compelling accounts recently from experts in Japanese history or Japanese studies (Kingston, 2004; Blomstrom & La Croix eds, 2006), and corporate governance (Vogel, 2006; Aoki et al. eds, 2007), as well as political scientists and others comparing other post-industrial democracies (Streeck & Thelen eds, 2005).

At first glance, those conclusions may not seem so exciting for readers familiar with the ever-expanding English-language literature on Japanese law (Baum & Nottage, 1998). That has tended to prefer 'grand theory' in various incarnations. Contributors to this book do not subscribe to the 'culturalist' view, still found in recent academic literature (for example, de Cruz, 2007, pp. 213-7) and especially in the popular press, asserting that the Japanese *don't like law* due to traditional Confucian values. Nor are they completely convinced by the 'institutional barriers' perception that the Japanese *can't like law*, due to problems accessing the courts and so on, or the 'elite management' theory holding that the Japanese are *made not to like law* (Upham, 1987) since such barriers are maintained to constrain unpredictable socio-economic change. Nor do they adopt Ramseyer's more recent account derived from neoclassical economics, that the Japanese *do like law* – rationally settling disputes out of court and otherwise behaving in accordance with the relatively clear shadow cast by the law.

Instead, analyses of the range of a corporate governance topics in this book draw on some insights from each theoretical paradigm while criticising other aspects, and the analyses apply a range of techniques guided by the broader methodological strictures outlined in Nottage's chapter 2. In these ways, they largely accord with recent 'hybrid theorists' in Japanese law studies, who find generally that the Japanese *sometimes like law, but sometimes don't* (Abe & Nottage, 2006). This book therefore joins what Anderson (2006) describes as 'the new generation' of scholarship on Japanese law and the economy.

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Appendix

Sources:

- For corporate law reforms: Nottage (2006d), updating Fujita (2004).
- For securities law reforms: JSRI (2004, pp. 327-51), Kanda (2005), Oda (2007).

N.B. Shaded corporate law reforms come from Bills submitted by individual politicians, not the Government (traditionally, the MoJ).

Table 1: Summary of Japan's Corporate and Securities Law Reforms Since the 1990s

Year	Main Corporate Law Developments	Main Securities and Financial Markets Law Developments
1990	Liberalisation of some aspects of legislation for closely-held companies, but increased minimum capital bases	<ul style="list-style-type: none"> • New Tender Offer (TOB) rules • Requirement to disclose shareholdings of 5 per cent or more
1991		Prohibition on securities firms offering compensation to clients for trading losses
1992		Institutional Reform Law enacted: Securities and Exchange Surveillance Commission launched (but linked to MoF)
1993	<ul style="list-style-type: none"> ● Caps on court filing fees for derivative actions ● Introduction of a board of auditors in a large company ● Relaxing the requirements for shareholders to exercise their right to inspect the books of the company 	

1994	Deregulation of stock repurchase (lifting the prohibition for purposes of an employee's stock plan or cancellation of the stock by shareholders' meeting)	
1996		Liberalisation of corporate bond issuance
1997	<ul style="list-style-type: none"> ● Introduction of the stock option system ● Deregulation of stock repurchases (lifting the prohibition for purposes of a stock option plan) ● Deregulation of stock repurchases (simplifying the procedure by which public corporations can repurchase shares from the market, or by way of a tender offer or 'TOB') 	(Major securities firms and a bank go virtually bankrupt)
	Corporate restructuring (merger procedures)	
	Increasing penalties against companies' payments to corporate racketeers (<i>sokaiya</i>)	
1998	Deregulation of stock purchases (expanding available funds through a simplified procedure for a public corporation)	Anti-Monopoly Law amendments (enacted 1997) abolishing prohibition of pure holding companies extended to financial institutions
		Law for Securitisation of Specified Assets by Specific Purpose Companies ('SPC Law') enacted
		Financial System Reform Law enacted: Financial Supervisory Agency launched (independent of MoF)

		<p>Other laws enacted for financial markets reconstruction:</p> <ul style="list-style-type: none"> • Easier entry into securities business: licensing becomes registration system, abolition of prohibition on securities firms engaging in non-securities activities • Securities firms allowed to offer asset management services (for example, ‘wrap accounts’) • Banks fully allowed to sell mutual funds; company-type funds and private equity funds allowed • New regulations for proprietary trading systems
1999	Corporate restructuring (introduction of Share-to-Share Exchange and Share-Transfer procedures)	<ul style="list-style-type: none"> ● Full abolition of fixed commissions for securities brokers (partially liberalized from 1994) ● Full liberalization of mutual entry among banking, securities and insurance industries through subsidiary or holding companies; reduced ‘firewall’ regulations
2000	Corporate restructuring (introduction of the ‘Demerger’ procedure)	Consolidated (from 1999) and market-value accounting of financial assets, based on International Accounting Standards
		Liberalisation of the SPC Law (renamed the Asset Securitisation Law) and the Securities Investment Trusts and Securities Investment Companies Law (renamed the Investment Trusts and Investment Companies Law, allow Japanese versions of real estate investment trusts or ‘REITs’)
		<p>Securities and Exchange Law (‘SEL Law’) amendments:</p> <ul style="list-style-type: none"> • Stock exchanges allowed to become for-profit

		<p>organizations (companies)</p> <ul style="list-style-type: none"> • Disclosure system liberalized to allow electronic filings (in effect from 2001)
		<p>Financial Products Sales Law enacted (in effect from 2001): suppliers (including banks and securities) to explain risks in financial products, lower requirements for clients to claim damages for breaches</p>
2001	<ul style="list-style-type: none"> ● Deregulation of stock repurchases (completely abolishing the prohibition, and lifting the ban on ‘treasury stock’) ● Deregulation of the minimum size of shares ● Simplifying the procedure relating to the reduction of statutory reserve fund 	<p>Legislation reforming securities settlement systems:</p> <ul style="list-style-type: none"> • Dematerialisation of commercial paper • Centralised Securites Depositories permitted to incorporate
	<ul style="list-style-type: none"> ● Authorising the electronic documentation of corporate information ● Corporate finance (authorising the company to issue call options for its shares) ● Simplifying the procedure for stock options ● Corporate finance (deregulation of the issuance of various kinds of shares) 	
	<ul style="list-style-type: none"> ● Authorising the limitation of directors’ liability ● Improving the procedure for derivative actions 	
2002	<ul style="list-style-type: none"> ● Creation of optional ‘Company with 	

	<p>Committees' modelled on the Anglo-American corporate governance system (in effect from 2003, first round of elections from 2004)</p> <ul style="list-style-type: none"> ● Creation of 'Important Asset Committee' ● Relaxing the requirements for super-majority voting at the shareholders' meeting ● Corporate governance/corporate finance (introduction of class voting for the election of management) ● Introduction of the registration system for lost securities ● Simplifying the reduction procedure for legal capital and the mandatory statutory reserve fund ● Deregulation of foreign companies 	
2003	Deregulation of stock repurchases (simplified procedure for public corporations to repurchase shares on the market, or by way of TOB)	
2004	<ul style="list-style-type: none"> ● Electronic public notice system 	● Dematerialisation of corporate securities
2005	<p>Consolidation of corporate legislation into new Companies Act (in effect from 2006), using modern Japanese language</p> <ul style="list-style-type: none"> ● Abrogation of <i>yugen kaisha</i> (similar to GmbH in Germany), now generally treated as 	

	<p><i>kabushiki kaisha</i> ('KK' or joint stock companies, like AG); introduction of <i>godo kaisha</i> (limited liability companies, quite like the LLC in the US) and <i>yugen sekinin jigyo kumiai</i> (limited liability partnerships, quite like the LLP); but</p> <ul style="list-style-type: none"> ● KK divided into large and small companies either category of which can be established as closely or publically (with large and publically held companies requiring a more complex governance structure – including the option still of a board with committees; whereas closely held companies need not always treat all shareholders equally, statutory auditors can be limited to reviewing only financial statements and not business operations of directors, and all such officers can have terms extended for up to 10 years) ● For KK, optional accounting consultant (as an officer to assist directors in preparing financial statements), only one director possible (instead of at least three), minimum capital requirement abolished, freedom to distribute profits 	
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	<p>whenever (not up to twice per annum)</p> <ul style="list-style-type: none"> ● Triangular mergers to allow the absorbing company in a merger to provide cash or other assets (for example, parent company stocks) to shareholders rather than issuing shares from the newly merged company (but full effect delayed for foreign companies until 2007) 	
2006		<ul style="list-style-type: none"> ● Tougher enforcement of the SEL, especially penalties (in effect from July 2006) ● Takeover law amendments, such as: bids for more than 30% share must proceed by TOB, bidder can modify terms if target splits shares, target must express view on bid (but if questions bidder, latter must respond), mandatory bid if more than 70% (in effect from December 2006)
		<p>Replacement of SEL by the Financial Instruments Exchange Law (in effect from September 2007):</p> <ul style="list-style-type: none"> ● Scope broadened, for example, to cover more derivatives and collective investment schemes, to encompass businesses hitherto not regulated by the SEL ● Better disclosure: quarterly reporting for listed companies, and internal compliance reporting ('J-SOX') (in effect from 2008)