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Self-regulation in Private Law in Japan and Germany

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Self-Regulation in Private Law in Japan and Germany

A Comparative Perspective

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I. Introduction

This concluding contribution aims at adding some remarks from a comparative perspective to the rich contributions in this volume. Comparative research in the rising research field of self-regulation in private law is in its early stages. This symposium is arguably the first time that a Japanese-German group of scholars has jointly engaged in such comparison. Given the breadth and complexity of the topic, it goes without saying that we cannot aim at an exhaustive assessment of this volume's contributions, let alone a comprehensive comparative evaluation of the phenomenon of self-regulation in private law in Japan and Germany. Rather, we undertake to highlight some key commonalities and differences of self-regulation between the private law in both legal systems. We hope this will facilitate exploiting the valuable results of this symposium for future research.

To do so, we shall start with some remarks on terminology and categorizations (II.). In a second step, we attempt to roughly sketch self-regulation both

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as a social phenomenon and as a topic of academic discourse in both jurisdictions (III.). A third part is devoted to the question of legitimacy, an aspect featuring prominently especially in the German discourse on self-regulation (IV.). Finally, selecting just one example for closer observation, we shall look into self-regulation's role in corporate governance, a topic which has been discussed with particular intensity both in Japan and Germany in recent years (V.). We sum up our findings in a brief conclusion (VI.).

II. Terminology and Categorizations

1. No Fixed Definition

Both Japanese law and German law have yet to provide a fixed definition of self-regulation (*jishu kisei* and *Selbstregulierung*, respectively).[1] In the intensifying discourse ongoing in both jurisdictions, a large variety of definitions, often inspired by public law, are offered to capture the diverse phenomenon. Conceptualizing self-regulation even in a very basic sense as "the ordering of certain relationships and/or interests of private actors by rules and principles – and, possibly, also enforcement mechanisms – agreed upon by these actors"[2] is subject to the qualification that normally not all addressees of self-regulation will be involved in the rule-making process, nor will they always have consented to such rules entirely of their own will.[3] Among the quite numerous terms used to describe the phenomenon of self-regulation, in Japan "soft law" *(sofuto rō)* is found particularly frequently.[4] This can be attributed in part to a major research project undertaken at the University of Tokyo in the years 2003 to 2013 under the same name.[5] While German scholars tend to be more critical of that term,[6] the

1 M. Dernauer, Terminology, Development, and Institutional Frame of Self-regulation in Japan, *in this volume,* p. 3; P. Buck-Heeb, Terminology, Development, and Institutional Frame of Self-regulation in Germany, *in this volume,* p. 27, pp. 30 ff.

2 See J.-H. Binder, Self-Regulation Induced by the State in Germany, *in this volume,* p. 127, p. 128.

3 F. Möslein, Genuine Self-Regulation in Germany. Drawing the Line, *in this volume,* p. 83,pp. 86 f.

4 See, e.g., H. Kansaku, Genuine Self-regulation in Japanese Capital Markets: The Stewardship Code. In Comparison with the Corporate Governance Code, *in this volume,* p. 61, 76; Dernauer, *in this volume,* p. 4; for details on the following see M. Pfeifer, Selbstregulierung und Soft Law im japanischen Gesellschaftsrecht (forthcoming), *sub* B.I.2.

5 See M. Iwamura, Reflections on the Past 10 Years of the Soft Law Project (2013), retracable under *http://www.gcoe.j.u-tokyo.ac.jp/en/greetings_E.pdf*.

distinction mainly seems to be a matter of perspective. "Self-regulation" emphasizes the actor in the regulation process, whereas "soft law" refers to the legislative nature[7] and "extra-legal binding effect"[8] of the resulting rules.

2. *Categorization Based on State Involvement: "Genuine Self-regulation" Versus "State-induced Self-regulation"*

Similarly, there is an absence of consensus as regards an adequate categorization of the numerous and diverse forms of self-regulation found in Japan and Germany.[9] Most common are approaches, again derived from public law,[10] which draw distinctions based on different degrees of state involvement in the establishment of the regulation. Along these lines, the most basic categorization, which has also served to structure the contributions of this symposium, distinguishes between "genuine self-regulation" and "state-induced self-regulation":

"Genuine self-regulation",[11] refers to self-regulation without state involvement.[12] Examples include the self-regulation of certain professional

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6 Representatively, BUCK-HEEB, *in this volume,* pp. 36 f.: "very imprecise and controversial".

7 *Ibid.*

8 J. BASEDOW, The Hague Principles on Choice of Law – Their Addressees and Impact, *in this volume,* p. 245, p. 247, referring to *Lord McNair*'s original coinage of the term in note 13; see also DERNAUER, *in this volume,* p. 4; A. DIECKMANN, Legitimacy and Limits of Self-Regulation in Germany, *in this volume,* p. 195, pp. 207 f.

9 For Germany: BUCK-HEEB, *in this volume,* pp. 30, 44 ff.

10 Not satisfied with the existing public law-inspired categorizations and with the aim of widening the German discussion to the international level, where the bifurcation between public law and private law is less marked, *Buck-Heeb* contemplates in this volume developing an alternative, genuinely private law categorization focusing on the nature of the self-regulatory body or the tools used for such purpose. BUCK-HEEB, *in this volume,* p. 27. Given that the Japanese legal system shares the conceptual distinction established in German law between public law and private law, even if in Japan the lines may at times be more blurred (see DERNAUER, *in this volume,* pp. 7 ff.), this line of thinking is not further explored here.

11 At times, though not consistently, "autonomous self-regulation and "voluntary self-regulation" are used synonymously. *Buck-Heeb* is rightly critical of the term "voluntary" in this context, as self-regulation even absent direct state influence may well be non-voluntary given the threat that the state might regulate if self-regulation proves insufficient from the perspective of policy-makers (BUCK-HEEB, *in this volume,* p. 45). One should add, however, that similar arguments could, of course, also be made for "genuine" self-regulation.

12 It should be noted that some authors when using "genuine" refer to the compliance with such rules rather than to the establishment of self-regulation. This is why *Kansaku* considers the Japanese Stewardship Code an example of "genuine" (in the

organizations, which as with the self-regulation of guilds have existed for centuries.[13] Standard business terms, as well, are often assigned into this category,[14] at least to the extent they are not prescribed by statute or subject to ministerial approval.[15] Genuine self-regulation is particularly important in transnational law, for example in international trade,[16] but also in international sports.[17] This can be considered a logical result of the states' limited reach to enact or induce regulation across borders. Some point out that even genuine self-regulation will never occur entirely without the state, as private autonomy is conditioned on the possibility of its being enforced by the state.[18] Whether one shares this view arguably depends on whether we can imagine a self-validating legal system beyond the state.[19]

"State-induced self-regulation", by contrast, is widely used to capture examples of self-regulation characterized by more direct state involvement. Obviously, this lumps quite disparate cases together, and some of the authors of this volume therefore prefer more sophisticated categorizations. For Japan, where the state at least in the past quite frequently has induced self-regulation even absent a statutory basis through informal means such as administrative guidance *(gyōsei shidō), Dernauer* proposes to differentiate further between "self-regulation informally guided by the state" and "legally induced self-regulation".[20] *Kozuka*, in order to capture his intri-

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sense of genuinely self-binding) self-regulation, but at the same time as "non-autonomous"; see KANSAKU, *in this volume,* p. 62 f.

13 For the Japanese guilds *(za):* DERNAUER, *in this volume,* p. 10; for Germany: BUCK-HEEB, *in this volume,* p. 42, referring to the example of the Hanseatic League.

14 For Japan: DERNAUER, *in this volume,* p. 22; for Germany: DIECKMANN, *in this volume,* pp. 198 ff.; MÖSLEIN, *in this volume,* pp. 94 ff.; P.C. LEYENS, Self-commitments and the Binding Force of Self-regulation with Respect to Third Parties in Germany, *in this volume,* p. 157, pp. 162 f. More cautious with regard to whether standard business terms should be considered a form of self-regulation: BUCK-HEEB, *in this volume,* p. 50.

15 For Japan: DERNAUER, *in this volume,* p. 22; for Germany: MÖSLEIN, in this volume, p. 98. Overall, in Japan the state often seems to play a more prominent role in establishing model standard business terms than in Germany, even absent a statutory basis for such state interference. See DERNAUER, *in this volume,* pp. 7 and 22 f.

16 Y. NISHITANI, *Lex Mercatoria* and Self-Regulation in Transnational Perspective, *in this volume,* p. 213, pp. 214 f.

17 DIECKMANN, *in this volume,* pp. 202 ff.; BUCK-HEEB, *in this volume,* p. 43.

18 MÖSLEIN, *in this volume,* p. 89 citing the German Federal Constitutional Court *(Bundesverfassungsgericht)* in note 23, which has stressed that private autonomy is conditioned on the possibility of enforcing its results and the state providing the means for such enforcement.

19 See NISHITANI, *in this volume,* pp. 226 f., on *Teubner*'s theory on a global private law order independent of national law ("Global Bukowina").

20 DERNAUER, *in this volume,* pp. 23 ff.

guing examples, goes so far as using four categories of state-induced self-regulation depending on whether the state foresees self-regulation by statute, merely endorses it as regards statutory interpretation, encourages it to complement statutory regulation, or coordinates it absent a statutory basis.[21]

The (sub-)categories advanced for Germany differ slightly. This may be due to the constitutional framework for self-regulation being arguably narrower in Germany or to a longer existing discourse on "regulated self-regulation" in German public law, the latter being understood as an activity of private parties that is supervised and partially instructed by the state. Such setting has to be seen against the backdrop of the welfare state's transformation from a provider of goods and services to a provider of subsistence, the so-called *Gewährleistungsstaat*.[22] Some distinguish "co-regulation" standing as an entangled and interwoven cooperation of private and state actors on equal footing, as a category of its own.[23] Notably, co-regulation features certain similarities to the implementation of private party interests in some cooperative frameworks found in Japan.[24] *Binder*, in this volume, differentiates between cases where the state incorporates pre-existing self-regulatory arrangements into legislation, as for example in the case of product safety regulation in Germany, and those cases where self-regulatory arrangements are established only as a response to inducing legislation, for which he offers German media regulation as a prominent example.[25] If we restrict ourselves in the following discussion to the basic categories of genuine versus state-induced self-regulation, this is by no means meant to refute any of the aforementioned more sophisticated categorizations.

Delineating the border between genuine and state-induced self-regulation remains a challenging task. This is evidenced by the fact that in both jurisdictions there is no consensus on how to categorize even prominent examples such as the Japanese and the German corporate governance codes.[26] According to *Binder* genuine self-regulation occurs where the state willingly or accidentally refrains from taking legislative or administrative action and the regulatees themselves step in out of their own desire to es-

21 S. KOZUKA, Self-regulation Induced by the State in Japan, *in this volume,* p. 109, pp. 110 f.

22 See BUCK-HEEB, *in this volume,* p. 48.

23 See BUCK-HEEB, *in this volume,* pp. 46 ff., and the differing usage of the term by BINDER, *in this volume,* p. 128.

24 See DERNAUER, *in this volume,* p. 25 with further references; H.-G. DEDERER, Korporative Staatsgewalt: Integration privat organisierter Interessen in die Ausübung von Staatsfunktionen (Tübingen 2004) critically discusses a similar development of state "corporatism" against the background of German constitutional law.

25 BINDER, *in this volume,* pp. 132 ff.

26 See *infra* V.

tablish and submit to a certain order; by contrast, in the case of state-induced self-regulation the state does in fact regulate, though under self-imposed restraints; further, it retains both the initiative to regulate and, to a certain degree, also control over fundamental policy decisions.[27] *Möslein* similarly stresses that it is the initiative of the state, rather than just any particular form of involvement, which makes the difference. He proposes drawing the line using a three-dimensional grid of typological criteria, namely procedure, substance, and enforcement of self-regulation;[28] interestingly, he emphasizes that this delimitation is not only of systematic value, but that it may matter as well for enforcement at least under European competition law.[29]

Given Japan's strong tradition of cooperation and coordination of state and private actors, often taking on rather opaque forms,[30] distinguishing genuine from state-induced self-regulation in the Japanese context is arguably even more difficult. Where Japanese literature differentiates between self-regulation (or *soft law*) from "below" and from "above", it focuses mainly on the state's ability to monitor and influence the development of self-regulation within a (statutory) regulatory framework as well as its execution.[31] As *Dernauer* notes, public entanglement may, in theory, give rise to questions regarding the enforceability of self-regulatory regimes in civil law disputes.[32] At least in the realm of stock exchanges and securities law, however, private law (i.e., the Tokyo Stock Exchange (TSE)'s contracts with securities dealers and listed companies as well as tort law)

27 BINDER, *in this volume,* p. 128.

28 MÖSLEIN, *in this volume,* pp. 90 ff.

29 MÖSLEIN, *in this volume,* pp. 105 ff.

30 DERNAUER, *in this volume,* pp. 25 f.; on the blurred lines between state and social actors in Japan in a civil society context see H. HOLBIG/M. BÄLZ, Strengthening the nation and protecting the weak: Shifting modes of state-society relations in Japan and China, in: Amelung/Bälz/Holbig/Schumann/Storz (eds.), Protecting the Weak in East Asia: Framing, Mobilisation and Institutionalisation (forthcoming, Abington 2018).

31 S. MAEDA, *Shōken torihi-jo ni okeru jishu kisei – Amerika oyobi Igirisu ni okeru jishu kisei no keitai to sono hatten* [Self-regulation of securities exchanges – Form and development of self-regulation in America and England], in: Tatsuta/Kanzaki (eds.)*, Shōken torihiki-hō taikei – Kawamoto Ichirō sensei kanreki kinen* [System of securities trade law – On the occasion of Prof. Ichirō Kawamoto's 60th birthday], (Tōkyō 1986) 91, 95 ff., specifically in respect to capital-market regulation; a similar differentiation is used in the *soft law* discourse, see H. KANDA, *Shijō torihiki to sofuto rō* [Soft Law and Commerce], Soft Law Journal 22 (2013) 29, 31: spontaneous order between private parties as opposed to complementary soft law created by a self-regulation organization.

32 DERNAUER, *in this volume,* pp. 8 ff.

seems to govern the rules of liability.[33] But this does not mean that the Financial Services Agency as the premier supervising authority would not hold a firm hand on the stock exchange's self-regulation as provided for in Japan on a statutory basis.[34] Given the increasing role of private law within the regulatory framework, reflecting a shift from traditional *ex-ante* regulation towards *ex-post* monitoring,[35] we may see more such cases of doubt in the future.

III. Self-regulation as a Social Phenomenon and Self-regulation as a Topic of Discourse

The aforementioned issues of terminology and categorization hint already to certain differences that can be observed when comparing self-regulation in Japan and Germany respectively. Some of these differences, as well as important parallels, shall be highlighted in the following section. We first look into self-regulation as a social phenomenon in both societies before comparing the respective discourse on the topic.

1. Self-regulation as a Social Phenomenon in Japan and Germany

Nowadays, self-regulation constitutes a highly important phenomenon in the economic and social life of both Japan and Germany with applications in numerous and diverse fields. The contributions in this volume offer numerous illustrative examples of this. As regards the role played by self-regulation in German national law, more skeptical voices can be heard as well; after all many examples seem to demonstrate a tendency that self-regulation, in the form of codes of conduct, is sooner or later replaced by

33 See the detailed analysis of the *Mizuho Case* and the regulatory framework by H. Baum/A. M. Fleckner/M. Sumida, Haftung für Pflichtverletzungen von Börsen: Deutschland und Japan im Vergleich, The Rabel Journal of Comparative and International Private Law (RabelsZ) 82 (2018) (forthcoming), from a comparative perspective. When a mistake of a Mizuho employee using the Tokyo Stock Exchange's electronic trading system led to significant losses, the Tokyo High Court held the TSE liable under tort rules for not implementing sufficient safeguards (Judgment of 24 July 2013, Kinyū Shōji Hanrei 1422 (2013) 20 ff. = M. Sumida, ZJapanR/J.Japan.L. 38 (2014) 235 ff., in partial German translation).

34 X. Wen, *Torihiki-jo no kōporēto ganbanansu kisei to kinshō-hō* [The Exchange's Rules on Corporate Governance and the FIEA], in: Iwahara (ed.), *Kaisha, Kinyū, Hō* [Company, Finance, Law], Vol. 1 of 2, Tōkyō (2013) 375, 395: "semi-governmental public interest nature" (*jun-seifu teki na kōeki seishitsu*); see Pfeifer, *supra* note 4, *sub* D.II.1. for details.

35 H. Baum/H. Kanda, Financial Markets Regulation in Japan, ZJapanR/J.Japan.L. 44 (2017) 65, 70 f.

regulation because the former does not yield the expected results.[36] It is true that in certain fields such as capital markets the German state tends to leave less and less room for self-regulation.[37] Nevertheless, there seems to exist a broad consensus that self-regulation, at least state-induced self-regulation in its various forms, today is highly relevant in Japanese as well as in German private law.[38]

The history of self-regulation – even if not termed as such – reaches back for centuries both in Japan and Germany.[39] The example of professional guilds has already been mentioned. Prior to the rise of the modern nation state in the 19th century, self-regulation meant genuine self-regulation. After all, state-induced self-regulation requires inducement by a state, which in the modern sense existed only since the late 19th century.[40]

The areas where self-regulation is widely used in in Japan and Germany show remarkable parallels. Self-regulation with regard to technical and accounting standards, corporate governance, and professional organizations, for example, feature prominently in both legal systems. This observation may be explained by the factors which drive self-regulation. Besides globalization, which arguably is the main driver of self-regulation on the transnational level given the limited ability of nation states to respond to the increased interconnectedness of the world,[41] the need for knowledge of technically complex fields and the necessity of flexibility to respond to rapid change are important factors which can make self-regulation an attractive option. Self-regulation allows exploitation of the regulatees' expertise in the field in question and facilitates a quicker adjustment of rules to new challenges posed by technological change.[42] Given that both Japan and Germany are facing globalization, an increasing technical complexity and accelerating

36 BUCK-HEEB, *in this volume,* pp. 28 ff. and 55.

37 BUCK-HEEB, *in this volume,* p. 29.

38 For Japan: DERNAUER, *in this volume,* pp. 3 and 10; T. KATO, Legitimacy and Limits of Self-regulation in Japan, *in this volume,* p. 181, p. 193: "deeply rooted in the Japanese regulatory structure"; KOZUKA, *in this volume,* p. 126. For Germany: BINDER, *in this volume,* p. 130.

39 For an historical overview on Japan see DERNAUER, *in this volume,* pp. 10 ff. For Germany: see BUCK-HEEB, *in this volume,* pp. 40 f.; DIECKMANN, *in this volume,* p. 195.

40 For Germany: BUCK-HEEB, *in this volume,* pp. 43 f.

41 NISHITANI, *in this volume,* p. 222; see also Y. ASANO, Self-regulations and Constitutional Law in Japan as Seen from the Perspective of Legal Pluralism, *in this volume,* p. 147.

42 BINDER, *in this volume,* pp. 137 ff.; KOZUKA, *in this volume,* p. 126; MÖSLEIN, *in this volume,* p. 86.

technological change similarly, it is not surprising that we can observe attempts to react by employing self-regulation in both legal systems.

At the risk of generalizing a bit too much, we are inclined to say that state-induced self-regulation may be even more deeply rooted in the regulatory structure of Japan, with its traditionally strong bureaucracy and its cooperative relationship with the business world,[43] than in the German case. Japanese ministries and agencies frequently use self-regulation as a means to implement their policies. One strategy applied for this purpose is to initiate an expert commission *(shingi-kai)* or informal study group *(kenkyū-kai)*. These bodies often produce guidelines or recommendations which, while legally non-binding, establish standards in line with the ministry's policies.[44] Some observers also find that Japanese industries seem overall quite willing to accept state-induced self-regulation as an effective means of policy implementation and not merely as a way to avoid administrative control.[45] What, for obvious reasons, cannot be observed in Japan is self-regulation triggered by European Union law, which has increasingly become relevant for self-regulation in German private law.[46] Prominent examples here include not only consumer law but also corporate governance.[47]

A different and far more difficult question is to what extent self-regulation can be called successful in the private laws of both countries. Part of the problem is that it is far from clear what "success" should mean in this context. Where self-regulation is not accepted by a substantial number of regulatees, as in Germany in the cases of the 1970 Insider Trading Guidelines and the 1995 Takeover Code,[48] from the point of view of regulation aiming at influencing behavior, self-regulation must be called a failure. Conversely, a high compliance rate as such cannot always be equated with success. Even leaving the quality of the rules and possible competition-restricting effects of self-regulatory arrangements aside,[49] where self-regulation deliberately leaves room for deviations in unusual cases, as where it applies a comply-or-explain mechanism like the corporate governance codes in both Japan and Germany, one might argue that 100% compliance constitutes failure rather than success. Nevertheless, as shown by the

43 See DERNAUER, *in this volume,* pp. 15 ff. with further references.

44 See the examples provided by KOZUKA, *in this volume,* pp. 116, 121 and 122 f.; KATO, *in this volume,* p. 187 for distinct fields of regulation.

45 DERNAUER, *in this volume,* pp. 17 and 26.

46 In general BUCK-HEEB *supra* note 1, 47 ff.; more specifically in respect to standards MÖSLEIN, *in this volume,* pp. 106 f; BINDER, *in this volume,* pp. 133 f.

47 LEYENS, *in this volume,* pp. 163 ff.

48 LEYENS, *in this volume,* pp. 162 f.; BUCK-HEEB, *in this volume,* p. 55.

49 DERNAUER, *in this volume,* p. 7; BUCK-HEEB, *in this volume,* p. 52; MÖSLEIN, *in this volume,* pp. 106 f.

example of the Japanese Corporate Governance Code requiring that listed companies have independent directors on the board, at least in some cases success will be measured predominantly based on compliance rates rather than on an increase in efficiency.[50]

Allowing for deviations from a rule may rest on the idea that *"no size fits all"*,[51] but that does not mean that self-regulation would come without expectations on the side of the state. Self-regulation regularly takes place against the backdrop of possible state regulation and in this sense "in the shadow of the legislator".[52] It is often stressed for Germany that the state tends to step in too readily wherever self-regulation does not yield the desired results. Women on supervisory boards, executive compensation, and the consumer's right to a payment account are just three prominent examples from the recent German experience where self-regulation was succeeded by state regulation rather soon.[53] This pattern is problematic as it threatens to discredit self-regulation as such. At least based on the contributions for this symposium, one is left with the impression that this tendency is not quite as strong in Japan. One hypothesis might be that in Japan, given its traditionally strong ministries with their various formal and informal ways of steering state-induced self-regulation according to their policy preferences, the state might less often need to avail itself of state regulation to achieve its policy goals. Phrased differently, state-induced self-regulation requires that the state motivate the regulatees to engage, as they are not acting of their own will.[54] Taking into account the influence of Japanese ministries on various industries and in turn the influence of certain industry organizations on their members, compliance with state-induced self-

50 See *infra* V.

51 T. FUJITA, Corporate Governance and the Rule of Soft Law, UT Soft Law Review 5 (2013) 9 ff.

52 LEYENS, *in this volume,* p. 157; MÖSLEIN, *in this volume,* pp. 103 ff.; BUCK-HEEB, in this volume, p. 49 with further references. For Japan see KANSAKU, *in this volume,* p. 81: Stewardship Code in the shadow of the government. For the Japanese soft law discourse and focusing on enforcement see T. FUJITA, *Hādo rō no kage no moto de no shiteki chitsujo keisei* [Private ordering in the shadow of the hard law], in: Nakayama/Fujita (eds.), *Sofuto rō no kiso riron* – Theory of Soft Law (Tōkyō 2008) 227 ff.

53 BUCK-HEEB, *in this volume,* p. 28 f; BINDER, *in this volume,* pp. 142 f. Of course, this is not a unique feature of German law. *Nishitani* points to a remarkable example from transnational law in this respect, namely the 1924 Hague Rules on bills of lading, which were concluded as a binding international convention after earlier self-regulatory attempts had not found sufficient adherents (NISHITANI, *in this volume,* p. 220).

54 See BINDER, *in this volume,* pp. 139, 144, who however stresses that such motivation should be accomplished by sufficiently reflecting the regulatees' interests.

regulation might be more easily accomplished in Japan than in Germany. Obviously, this hypothesis needs to be tested by further research. It also seems fair to say that the Japanese business community has developed a certain expertise in shaping the outcome of state regulation.[55]

2. *Self-regulation as a Topic of Discourse in Japan and Germany*

While some forms of self-regulation have existed for centuries in substance, if not by name,[56] only with the rise of the modern state did self-regulation become conceived as such.[57] While certain aspects of self-regulation such as the impact of standard business terms on contractual freedom had already been subject to analysis well back in the past,[58] the systematic scholarly discourse on this social phenomenon, not to mention many of the pertinent terms (including "self-regulation" itself), is comparatively new.[59] The prominence self-regulation has rapidly been gaining in legal discussions over approximately the past twenty years mirrors fundamental changes – e.g., the (partial) withdrawal of the state from certain fields in the course of deregulation, technological change and globalization – that have for their part fostered self-regulation in the same time period, particularly in the form of state-induced self-regulation.

The national discussions in Japan and Germany are in part influenced by, and thus connected with, an ongoing transnational discourse. The broad soft law movement[60] and the international trend to employ codes of conduct, *inter alia* to improve corporate governance are just two prominent examples of transnational discourse having impacted also Japan and Germany. Regulatory tools such as comply-or-explain have become legal transplants (if one is willing to use this term) in both legal systems. Japanese and German scholars intensively discuss theories which are intertwined with self-regulation like legal pluralism[61] and transnational law.[62]

The discourse on self-regulation in both countries, furthermore, has in common that the discussion originated and is still heavily influenced by

55 K. EGASHIRA, *Kaisha hōsei no shōrai tenbō* [Future outlook on corporate law], in: Uemura (ed.), *Kigyō hōsei no genjō to kadai* [Present Condition and Problems of Company Law], Tōkyō (2009) 115, 128. *Egashira*, notably, contrasts this with the limited success of Japanese business associations in regulating their own members.

56 BUCK-HEEB, *in this volume,* pp. 40 f., see also *supra* III.1.

57 DIECKMANN, *in this volume,* p. 195 with references.

58 See LEYENS, *in this volume,* pp. 159 ff., and MÖSLEIN, *in this volume,* p. 1888 with references.

59 BUCK-HEEB, *in this volume,* p. 42; KOZUKA, *in this volume,* p. 109.

60 BASEDOW, *in this volume,* pp. 247 ff.

61 ASANO, *in this volume,* pp. 147 ff. and 154 ff.

62 NISHITANI, *in this volume,* pp. 213 ff.

public law discourse. This applies not only to Germany[63] but also to Japan.[64] It seems plausible that with regard to rules and actors, the dividing line between public law and private law in Japanese law is at times hard to draw.[65] Yet, this does not mean that among scholars and thus also in discourse the division is not similarly marked as in Germany.

A difference, for obvious reasons, derives from Germany being a member of the European Union. For German scholars this makes it necessary to analyze the impact of European rule-making on self-regulation in Germany as well as in the other Member States. Still, even in Japan, European developments are studied closely (as exemplified by the adoption of the Corporate Governance Code and the Stewardship Code following originally English models). While the European Union constitutes a significant force behind the expansion of self-regulation and soft law in the Member States,[66] its instruments thus also shape the Japanese regulatory landscape.[67]

The prominence of the term soft law *(sofuto rō)* in the Japanese discourse is one of the striking differences between the academic debates encountered in both countries. Many German commentators rather avoid the term.[68] "Soft law" emphasizes the effects of rules which are not legally binding in the sense that they are not enforced by the state. If it is true that in principle only the state, owing to its monopoly on the legitimate use of force, can enforce effective rules,[69] privately made law will necessarily be "soft", unless it is backed by the state. This does not mean that these rules are necessarily less effective. From a more economic perspective, the effect of "hard" law on certain behavioral patterns in a group, i.e., social norms, may be perceived as providing for nothing but an indirect effect on the underlying private ordering process. Following such understanding, the effect of soft and hard law becomes one of degree and style rather than character.[70] The examples given by *Asano* and *Nishitani* in this volume illustrate this coexistence of (national) law and, sometimes conflicting,

63 BINDER, *in this volume,* pp. 130 f. with further references.

64 DERNAUER, *in this volume,* p. 4 and note 2; KATO, *in this volume,* p. 181.

65 DERNAUER, *in this volume,* pp. 7 ff.

66 BUCK-HEEB, *in this volume,* p. 37 ff.; see examples in respect to industry and safety standards given by MÖSLEIN, *in this volume,* pp. 106 f., and in respect of corporate governance regulation by LEYENS, *in this volume,* pp. 163 f.

67 See H. KANDA, *Sōkatsu ni kaete* [Instead of a summary], Junkan Shōji Hōmu 2103 (2016) 24, 25 who explains the shift in the orientation of the corporate governance debate towards EU inspired soft law instruments with the common aim to create wealth.

68 See *supra* II.1.

69 BUCK-HEEB, *in this volume,* pp. 34 f.

70 FUJITA, *supra* note 52, 243 f.; see PFEIFER, *supra* note 4, *sub* B.II.1.

rules of other origin. Neither the preferences of supporters of the Japanese Self Defense Forces in respect of the enshrinement of one of their deceased fellow soldiers[71] nor the global *lex mercatoria*[72] are enforced by the state, yet both shape and affect relationships with third parties. Of course, both in Japan and Germany there are quite a few cases where the courts indirectly have granted legal effect to privately made rules.[73] A prominent voice in the Japanese discussion, however, has highlighted that enforcement of social norms, such as trade customs, is not always beneficiary but has to be balanced against potential trade-offs, taking into account the effect on the underlying private ordering, the courts' limited knowledge and the effect on third parties.[74]

IV. The Issue of Legitimacy

The legitimacy of self-regulation seems a significantly more salient question in the German discourse than in the Japanese.[75] This difference may again be connected to the prominent role of Japanese ministries and agencies and their strength in inducing self-regulation. To the extent self-regulation is viewed from the regulatees' perspective as a reasonable and effective way to implement certain common policy goals rather than as a means of escaping administrative control,[76] the question of legitimacy indeed does not seem that important. Another explanation would be that German constitutional law probably shows greater deference to restraints on state regulation, which in order to be effective must not be circumvented by state-induced self-regulation.

There are at least two fundamentally different ways to look at the question of legitimacy, presented in this volume by *Dieckmann* and *Kato* (which is not to claim that the approaches they describe are representative of their respective legal systems): For the first approach personal freedom is the starting point, which may only be restricted if such restraint can be justified.[77] Where, it is argued, total voluntariness is not guaranteed, "good reason" is required. This is where public interest and the need for judicial

71 Asano, *in this volume,* p. 156, who criticizes the close relationship between the "Friends" of the SDF and the state.

72 Nishitani, *in this volume,* pp. 223 ff.

73 For examples see Buck-Heeb, *in this volume,* p. 56; Kozuka, *in this volume,* pp. 116 f.; Möslein, *in this volume,* pp. 104 f.

74 Fujita, *supra* note 52, 238 f.

75 For the scarcity of Japanese literature on this point see Kato, *in this volume,* p. 181.

76 See *supra* at note 45.

77 Dieckmann, *in this volume,* pp. 196 f.

control can come into play.[78] Such a view adopts the highly influential but not undisputed claim of *Bachmann*, which considers legitimacy in self-regulation mainly as a safeguard against exploitation *(Ausbeutungsverbot)* based on two elements, acceptance and welfare.[79] From this perspective, gains in prosperity may make up for a missing individual approval of a norm. *Dieckmann* advances several factors that provide guidance on the aspects that safeguard the creations of rules that are both "good" and "fair", namely the independence of rule-makers and at least the possibility for those affected by the outcome of the self-regulation to participate, this meaning transparency, documentation, openness for public comment etc.[80] Here, the example of the Stewardship Code and the rather limited public attention during the creation of the Code noted by *Kansaku*[81] sheds light on the limits of procedural safeguards and their ability to guarantee adequate public consensus-building.

The second approach asks to what extent it is legitimate for the state to avail itself of self-regulation instead of state regulation. Was it, for example, legitimate to implement the policy of increasing the number of independent directors in Japan through a Corporate Governance Code, which is locked into the TSE Listing Regulations, instead of enacting corresponding legislation?[82] Here, "good reason" is required to bypass the procedures normally to be complied with when acting through state regulation.[83] The latter approach, consequently, is concerned with state-induced self-regulation, whereas the former especially targets genuine self-regulation (in the case of state-induced self-regulation, the question of legitimacy will often have to be answered by the state).[84] The state regulator's own lack of expertise in highly technical fields, the need for speedy and flexible solutions in a quickly changing environment, and the desire to allow for regulatory competition may account for only some of these reasons.[85] Viewed from the outside, procedures for determining self-regulatory rules in the state-induced frame-

78 DIECKMANN, *in this volume,* pp. 201, 205

79 G. BACHMANN, Private Ordnung (Tübingen 2006) 194 f.; DIECKMANN, *in this volume,* p. 201; one major critique of this argument lies in its minimal concern with democratic legitimacy, see for example S. MAGEN, Zur Legitimation privaten Rechts, in: Bumke/Röthel (eds.), Privates Recht (Tübingen 2012) 229, 244 f.

80 DIECKMANN, *in this volume,* pp. 205 f.; P. BUCK-HEEB/A. DIECKMANN, Selbstregulierung im Privatrecht (Tübingen 2010) 277 ff.

81 KANSAKU, *in this volume,* pp. 75 f.

82 KATO, *in this volume,* p. 185.

83 KATO, *in this volume,* pp. 189 f.; see also ASANO, *in this volume,* p. 155, who sees the risk of a "hidden collusion between certain types of self-regulation and state law".

84 DIECKMANN, *in this volume,* p. 196.

85 BINDER, *in this volume,* p. 129; KOZUKA, *in this volume,* p. 126.

work do not seem to differ all too much from the established Japanese legislative practice, especially the significant role of expert commissions *(shingi-kai)* in the preparation of major legal reforms. It requires an insider's eye to note that the actors in these types of commissions indeed differ and that participation of all affected parties in the preparation of self-regulatory rules may be guaranteed to a lesser extent.[86] It is at least questionable (if not highly problematic) to what extent such a consensual element may be replaced by authority that primarily claims its legitimacy based on expertise.[87]

Both approaches have in common that the question of legitimacy is all the more crucial the more self-regulation has a binding effect and *vice versa*. As *Leyens* notes on an abstract level and as *Kansaku* exemplifies with respect to the Japanese Stewardship Code, genuine self-commitment poses a lesser problem for legitimacy.[88] However, even in this context, legitimacy may have a decisive effect on the acceptance of self-regulation among the regulatees and thus foster its self-binding nature.[89] In this sense, the "success" of self-regulation is closely linked to its ability to achieve acceptance among the addressees and to create wealth surpluses which are at the same time at least not detrimental to concerned third parties. Self-regulation does not guarantee an efficient solution to complex problems, but rather involves tradeoffs.[90]

V. Corporate Governance in Particular

Given the prominent attention the German Corporate Governance Code has received in German literature, it is no wonder that several articles in this volume have taken it up as a key example for their analysis. Despite its claim of constituting "self-organization of the industry" and despite being in the second decade since its making, the correct categorization of the

86 KATO, *in this volume,* p. 189 and in note 24; see, however, the critique of the eminent corporate law scholar *Egashira* in respect of the appointment of like-minded participants to expert commissions preparing legislation in Japan (K. EGASHIRA, *Kaisha-hō kaisei ni yotte Nihon no kaisha ha karawanai* [Japan's companies will not change by reform of company law], Hōritsu Jihō 86/12 (2014) 59 Fn. 1) and more generally BINDER, *in this volume,* pp. 129, 143 f.

87 BACHMANN, *supra* note 79; 176 f.; BINDER, *in this volume,* pp. 138 f., and DIECKMANN, *in this volume,* pp. 205 f.; both also highlight the importance of procedural justice ("fair and good") and involvement of the addressees, as does KATO, *in this volume,* p. 182.

88 LEYENS, *in this volume,* p. 161; KANSAKU, *in this volume,* pp. 76.

89 BINDER, *in this volume,* p. 129; KATO, *in this volume,* p. 182; for an application of this idea to the recent Japanese Corporate Governance reform see PFEIFER, *supra* note 4, *sub* E.V.3.

90 BINDER, *in this volume,* pp. 139, 144; this is also mentioned by KATO, *in this volume,* p. 183, with a slightly differing reasoning.

German Corporate Governance Code remains difficult, as illustrated by the differing opinions of *Möslein* ("borderline case" between genuine and state-induced self-regulation)[91] and *Binder* ("indisputably an instrument of state-induced self-regulation").[92] The discussion on the occasion of this symposium is timely, given that the TSE incorporated its own Corporate Governance Code into its Listing Regulations only in May 2015.[93] This is not to say that the TSE's self-regulation had not already earlier played an important role in addressing several issues not governed by statutory law in order to provide investors with an attractive environment.[94] In respect of corporate governance, there may be even more room for such self-regulatory means in Japan compared to Germany, where rules on stock companies are mostly mandatory.[95]

As in Germany, we see a high grade of state involvement in the initiative behind the Japanese Corporate Governance Code, which was created by an expert commission administered by the Financial Services Agency as a supervising authority.[96] Much of the attention the Japanese Corporate Governance Code has received so far is related to the increased number of independent directors on the boards of Japan's listed companies.[97] *Kato* argues in this volume that the TSE was used by the administration to foster acceptance of such an objective,[98] but – sandwiched between investors and companies – it lacked the ability to trigger such change alone absent a public consensus-building procedure.[99] The Code is not the only regulatory instrument in this regard, it is instead supplementing the regulation provided for by the Companies Act and the TSE's Listing Regulations. Viewed

91 MÖSLEIN, *in this volume,* p. 105.

92 BINDER, *in this volume,* p. 141 with further references.

93 KANSAKU, *in this volume,* pp. 69 ff. Note that the (few) remaining other Japanese stock exchanges in Nagoya, Fukuoka and Sapporo have also implemented Japan's Corporate Governance Code as part of their Listing Regulations. As regards the TSE's different markets, only the five main principles apply to all listed companies.

94 See KATO, *in this volume,* pp. 185 ff.; specifically on independent directors and PFEIFER, *supra* note 4, *sub* D.II.2.

95 MÖSLEIN, *in this volume,* p. 100.

96 KANSAKU, *in this volume,* pp. 73 f; DERNAUER, *in this volume,* p. 24.

97 Besides KATO, *in this volume,* pp. 184 ff., see G. GOTO/M. MATSUNAKA/S. KOZUKA, Japan's Gradual Reception of Independent Directors: An Empirical and Political-Economic Analysis, in: Puchniak/Baum/Nottage (eds.), Independent Directors in Asia (Cambridge 2017) 135, 144 ff.; T. SPIEGEL, Independent Directors in Japan (Tübingen 2017), and M. PFEIFER, *supra* note 4, *sub* E.IV, from a more regulatory perspective.

98 KATO, *in this volume,* p. 185; similarly DERNAUER, *in this volume,* p. 24, who speaks of informal guidance by the administration.

99 KATO, *in this volume,* p. 189.

from the outside, the quick and steady increase in companies which have appointed at least two independent directors may well be called a success story. Only time will tell whether we are seeing here a compliance based on acceptance of the Code's reasoning or the rather familiar pattern of compliance in the "shadow of the law", the latter having been the basis of much criticism under German law.[100]

To a certain extent, the intense debate on independent directors overshadows that the Japanese Corporate Governance Code is a far more ambitious project and addresses a wide variety of additional points.[101] The Code employs the comply-or-explain mechanism familiar from Sec. 161 of the German Stock Companies Act[102] and thus allows for a deviation where addressees consider a certain principle not fit for the specific circumstances.[103] Implemented into Rule 436-3 of the TSE Listing Regulations (in the part "Matters to Be Observed" of what the TSE terms a Code of Conduct), this mechanism is at least in theory subject to a rigid enforcement regime which allows for severe sanctions up to the delisting of the company at issue.[104] Representatives of the TSE stress that the principles provide no room for window dressing and demand full compliance with the spirit of the norm rather than its wording,[105] but they have signaled that they will initiate procedures against a company only in cases where a company "objectively and obviously" does not comply with a principle of the Code and refuses to provide an explanation or provides an explanation which is "obviously false."[106] By contrast, German case law has developed a far more indirect, but nevertheless effective way to enable judicial review in allowing for a challenge of shareholders' resolutions which are based on incorrect compliance statements.[107] Since doubts about the legitimacy of the German Corporate Governance Code were in part caused by the impression

100 See *supra* at note 53.

101 See KANSAKU, *in this volume,* p. 69, and PFEIFER, *supra* note 4, *sub* E.III.4, for a more comprehensive overview.

102 See LEYENS, *in this volume,* p. 163; MÖSLEIN, *in this volume,* p. 104; BINDER, *in this volume,* pp. 141 f.

103 KANSAKU, *in this volume,* p. 75; DERNAUER, *in this volume,* p. 24.

104 KANSAKU, *in this volume,* p. 75.

105 M. YŪFU et al., *"Kōporēto Gabanansu Kōdo Gen'an" no kaisetsu (I)* [Commentary to the "Corporate Governance Code [Final Proposal]" (I)], Junkan Shōji Hōmu 2062 (2015) 47, 50.

106 T. SATŌ, *Kōporēto Gabanansu Kōdo no sakutei ni tomonau jōjō seido no seibi no gaiyō* [Overview on the rules for listed companies accompanying the forumlation of the Corporate Governance Code], Junkan Shōji Hōmu 2065 (2015) 57, 58 f.

107 MÖSLEIN, *in this volume,* pp. 104 f.; LEYENS, *in this volume,* p. 163 with further references.

that high compliance rates might be owed to enforcement pressure rather than positive acceptance of the Code's recommendations,[108] the TSE's self-restraint approach may have its benefits.

Nevertheless, as in Germany compliance rates regarding the Japanese Corporate Governance Code are high.[109] To some extent this can be explained by deliberate utilization of the principle-based approach, which affords companies wide discretion in interpreting the principle at issue.[110] Where expectations of compliance with "best practices" are high, it is no wonder that compliance in word rather than spirit has been identified as an inherent problem of the comply-or-explain approach.[111] One may approach formal compliance from an angle of acceptance and legitimacy[112] – or even hold the party subscribing to a comply-or-explain regime liable vis-à-vis third parties if its self-commitment does not prove true.[113]

In respect of fostering the engagement of institutional investors, Japan has taken the lead.[114] It implemented its Stewardship Code, originally a transplant from the United Kingdom, already in 2014 and even before discussions on a complementary Corporate Governance Code had started. The Japanese experience can thus be more than helpful for the German discussion. Here, the revised EU Directive on Shareholder Rights requires Member States, by June 2019, to implement instruments that address institutional shareholders, asset managers and proxy advisors and among others requires them to develop and publicly disclose an engagement policy and proxy voting results on a comply-or-explain basis.[115] The topic in Germany seems to garner far less attention than in Japan (and probably also less than it deserves). It is not exaggerated to say that this new instrument is not awaited with the highest

108 BINDER, *in this volume,* p. 143.

109 KANSAKU, *in this volume,* pp. 69 ff. For Germany: BINDER, *in this volume,* p. 142.

110 See the Mn. 10 of the Appendix to Japanese Corporate Governance Code as published by the TSE: "This principles-based approach has already been adopted in Japan's Stewardship Code. The significance of this approach is found in having parties confirm and share the aim and spirit of the principles and review their activities against the aim and spirit, not against the literal wording of the principles, even where the principles may look abstract and broad on the surface. For this reason, the terminology used in the Code is not strictly defined as is the case with laws and regulations […]."

111 For the Stewardship Code KANSAKU, *in this volume,* p. 79; in respect to the Japanese Corporate Governance Code see the concerns raised by The Council of Experts Concerning the Follow-up of Japans Stewardship Code and Japan's Corporate Governance Code, Corporate Boards Seeking Sustainable Corporate Growth and Increased Corporate Value over the Mid- to Long-Term (18 February 2016), retraceable under: *https://www.fsa.go.jp/en/refer/councils/follow-up/statements_2.pdf.*

112 BINDER, *in this volume,* pp. 143 f.

113 LEYENS, *in this volume,* pp. 171, 176 ff.

114 See KANSAKU, *in this volume,* pp. 61 ff.

expectations by German corporate law scholars.[116] *Kansaku's* report shows that it is the same concerns in respect of the Stewardship Code's efficiency which are debated in Japan. Therefore, the aforementioned commitment of asset owners to the principle of stewardship as well as its implications for the entire investment chain deserves attention.[117] Nevertheless, if one uses the regulators' metaphor of the Stewardship Code and Corporate Governance Code interacting as "two wheels of a cart"[118] designed to foster a "constructive dialogue" *(kensetsu-teki na taiwa)* it seems questionable whether the two wheels are indeed of the same size.[119]

VI. Conclusion

Comparative research on self-regulation in private law is in its early stages. The first attempt to engage in such a comparison as undertaken by the group of Japanese-German scholars contributing to this volume testifies not only to the rising importance but also to the variety and complexity of the topic. Although it is true that both legal systems still lack fixed definitions for even basic terms and that fundamental categorizations remain in flux – a good example being the distinction between genuine self-regulation and state-induced self-regulation that is used to structure the present volume – there can be no doubt that self-regulation in Japan and Germany has in recent years become a highly relevant social phenomenon as well as the object of a lively scholarly debate.

Given that Japan and Germany are similarly confronted with globalization, increasing technical complexity and accelerating technological change and given that certain advantages have been attributed to self-regulation as an answer to such regulatory challenges, it is not all too surprising that the

115 Art. 1 of Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, see Leyens, *in this volume,* p. 164.

116 See, e.g., H. Fleischer, Zukunftsfragen der Corporate Governance in Deutschland und Europa: Aufsichtsräte, institutionelle Investoren, Proxy Advisors und Whistleblowers, Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2011, 155, 164 ff.; D. Zetsche, Langfristigkeit im Aktienrecht? – Der Vorschlag der Europäischen Kommission zur Reform der Aktionärsrechterichtlinie, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2014, 1121, 1124 f.

117 Kansaku, *in this volume,* pp. 76 ff.

118 Kansaku, *in this volume,* p. 62.

119 T. Kato*, Suchuwādoshippu Kōdo no rironteki kōsatsu: Kikan tōshi-ka no insentibu kōzō no kanten kara,* [Theoretical thoughts on the Stewardship Code: From the insentive structure of institutional investors], Jurisuto 1515 (2018) 16, 20; Pfeifer, *supra* note 4, *sub* E.IV.6.

fields where self-regulation features prominently in the private laws of both countries show a large overlap. Under which circumstances self-regulation should be called successful, however, is a question far more difficult to answer. It should not be reduced exclusively to a high compliance rate.

From a comparative perspective, state-induced self-regulation seems particularly deeply rooted in the regulatory structure of Japan. This is because of Japan's tradition of a strong bureaucracy and the latter's close and sometimes opaque cooperative relationships with many industries. Japanese ministries and agencies arguably have a particularly rich array of formal and informal tools, including the establishment of expert commissions and study groups, to induce self-regulation. Japanese regulatees, in turn, seem to accept state-induced self-regulation relatively broadly as an effective implementation of state policy, and they do not, by contrast, appear merely to be seeking to avoid state regulation. This seems to explain at least in part why issues of legitimacy feature less prominently in the Japanese discourse on self-regulation than in the corresponding German discussion. Furthermore, from the state's perspective, it may therefore less frequently be necessary to step in and enact state regulation because self-regulation has not yielded the desired results. With regard to the German case, by contrast, it is often criticized that by replacing self-regulation rather quickly with state regulation wherever the former has not achieved its regulatory aims, the state threatens to discredit the tool of self-regulation as such.

As regards specific private-law fields in which self-regulation features prominently both in Japan and Germany, the recent establishment of the Japanese Corporate Governance Code and the Japanese Stewardship Code make comparison from the German perspective particularly topical. But even beyond these prominent examples, the volume at hand convincingly demonstrates the potential of a Japanese-German comparison of self-regulation in private law. The symposium from which the contributions in this volume are derived was convened to celebrate the 20th anniversary of ZJapanR/J.Japan.L, the only non-Japanese journal exclusively devoted to tracking important developments in Japanese law from a comparative perspective. We believe the results of this symposium assembled in this volume and briefly reflected upon here perfectly illustrate how rewarding an undertaking this can be.