8

Japanese, East Asian, and Transnational Fiduciary Orders

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8.1 INTRODUCTION

East Asia provides fertile soil for cross-fertilization of theories of transnational legal ordering and fiduciary law.[1] Modern fiduciary law provides underlying principles in a broad array of fields, including corporate and financial transactions as well as various context of workaday lives.[2] In East Asian jurisdictions, at least, there are also historical dimensions, as these Western fiduciary norms were received as part of modernization in the nineteenth to twentieth century. While East Asian jurisdictions incorporated modern notions within the traditional or indigenous notion of loyalty, the forms of transplants varied depending on the patterns of modernization and the reception of Western law. The course of history reveals constant interactions of various fiduciary norms across jurisdictional borders, and the patterns were made complex by historical events that included the shifting colonial pressures and economic hegemony, wars, revolutions, and financial crises, as well as legislative imitation and academic exchange of ideas. This chapter attempts to portray this complex process on the East Asian canvass and understand its mechanism against the theoretical framework of transnational legal orders.

Fiduciary norms – particularly those found in agency law, trust law, and company law – were among the most important legal norms received by East Asian countries in the late nineteenth to early twentieth century. Though civil law jurisdictions

[1] This chapter builds from an earlier article: Masayuki Tamaruya & Mutsuhiko Yukioka, *The Japanese Law of Fiduciaries from Comparative and Transnational Perspectives*, 5 U.C. IRVINE J. INT'L TRANSNAT'L & COMP. L. 135 (2020). The author is grateful to Kelvin F. K. Low, Kye Joung Lee, as well as participants at the "Between the Global and the Local" paper session of the Law and Society Association 2020 Annual Meeting. The author also received generous financial support from Japan Society for the Promotion of Science (JSPS Kakenhi Grant No. 19H01408).

[2] Evan J. Criddle et al., *Introduction*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW xix, xx (Evan J. Criddle et al. eds., 2019).

rarely used the terms "fiduciary" and "duty of loyalty" until recently, their legislation routinely contained the notion of duty of care and the regulation of conflicted transactions. In this chapter, the term "fiduciary norm" is used loosely to include both specific doctrines, such as those concerning the duties of loyalty and care, and normative statements concerning who should be recognized as fiduciaries, whom they should serve, and how those rules should be enforced. The term "norm" broadly encompasses rules, principles, and customary notions that relevant parties perceive as binding, although not necessarily legally enforceable.

In East Asia, modernization in the late nineteenth century onward was carried out by the introduction of the Western legal system and concepts. This has meant that indigenous East Asian norms have seldom been discussed in legislation or legal scholarship. Nevertheless, traditional values in the region contain elements that overlap with modern fiduciary notions. Two strands of loyalty form part of traditional Confucian thought: loyalty to familial elders (孝: *ko* in Japanese and *xiào* in Mandarin Chinese) and loyalty to authority (忠: *chu* in Japanese and *zhōng* in Mandarin). Between loyalty to the family and loyalty to the State, there is room in this traditional framework for loyalty to the corporation. Teemu Ruskola has detected a parallel between modern norms of fiduciary duty, on the one hand, and the head of the household's duty to the household corporation as its manager or as a trustee for his heirs in late Imperial China, on the other.[3] These status-based notions have played an important role in modern social and economic life in Japan and East Asia. Among other things, they have created tensions in debates on the reform of fiduciary governance in the region.

Within East Asia, multiple strands of received fiduciary norms have interacted with each other and with indigenous notions of loyalty. Section 8.2 of this chapter explores the transnational dimension of these processes from the late nineteenth to the late twentieth century. From there, the discussion will chart the increasing frequency, intensity, and complexity of interactions among fiduciary norms from the 1990s to the present day. Section 8.3 will discuss these dynamics against the backdrop of greater cross-border transactions and jurisdictional competition aiming to attract transnational capital, as well as the impact of regional and global crises. Lawyers and policymakers in East Asian jurisdictions embraced different fiduciary models with mixed motives and varying degrees of enthusiasm, as their attractiveness shifted along with changes in market dynamics both domestically and globally.

Market dynamics do not, however, fully explain the transnational development of fiduciary norms in East Asia. In addition, differences between common law and civil law traditions have inflected these transnational processes. On the one hand, this chapter will discuss Hong Kong and Singapore collectively as "common law East Asia," representing East Asian jurisdictions where common law influence

[3] Teemu Ruskola, *Corporation Law in Late Imperial China*, *in* Research Handbook on the History of Corporate and Company Law 355, 361 (Harwell Wells ed., 2018).

predominates. On the other hand, Japan, Taiwan, Korea, and mainland China will together be discussed as "civil law East Asia" to represent jurisdictions where the influence of civil law has been more pronounced. Although such categorization is inevitably an oversimplification, I do so for the sake of exposition. Section 8.2 will show that civil law East Asia has also received common law influences to a significant degree. Section 8.3 will suggest that within common law traditions, the differences between American and British approaches have had important consequences.

Against this descriptive backdrop, Section 8.4 will draw upon the theory of transnational legal ordering to examine the factors and mechanisms that have shaped the reception, transformation, synchronization, and divergence of fiduciary norms in domestic, regional, and international contexts.[4] Underlying the transnational developments are the change in the pattern of social interactions from status-based one to more particularized and functional ones, the transformation in the forms of norms from rule-based ones to standard-based ones, and the shifts in the regulatory approach from the reliance on hard law to a greater use of soft law. Each of these transformations facilitated the broader reception of fiduciary norms in East Asian jurisdictions of different social backgrounds and legal traditions. The inquiry will point to the emerging trend in East Asia where evolving corporate and trust laws influence fiduciary norms in nonprofit and family-related areas.

8.2 MODERNIZATION AND RECEPTION: THE LATE NINETEENTH CENTURY TO THE LATE TWENTIETH CENTURY

The modern form of fiduciary law arrived in East Asia in the late nineteenth to early twentieth century, as Western imperial powers advanced in the region and Asian countries were compelled to respond. The process of modernization through Westernization began in Japan by the introduction of the civilian codes in the 1890s. Parallel efforts started soon after in China, and although the civilian-inspired legislation was discontinued on the mainland after Communist Revolution in late 1940s, it was carried over to Taiwan. Meanwhile, Common law trusts were introduced in Japan toward 1920s, and a set of legislation reflecting both civilian and common law influence was extended to Korea and Taiwan that it eventually colonized. The civilian influence endured after Japan lost the World War II and its colonial rule was over, while American influence became pronounced in the region. In these jurisdictions, the fiduciary norms are characterized by their mixed sources and nature. By contrast, the reception of fiduciary law in Hong Kong and

[4] For the analytical framework, *see* Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, *in* TRANSNATIONAL LEGAL ORDERS 3 (Terence C. Halliday & Gregory Shaffer eds., 2015); JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 15–26 (2000).

Singapore was more consistent. Under British rule, these jurisdictions adopted English equity jurisprudence and UK-style legislation. This English legacy, bringing about certainty and predictability for overseas investors, has been used to advance the status of these two jurisdictions as international financial centers in more recent years. These historical courses of reception laid the foundation for the translational evolution of fiduciary norms that accelerated in the 1990s and onward.

8.2.1 *The Japanese Reception of Western Legal Norms*

The modern layers of Japanese fiduciary norms were laid down by the French-inspired Civil Code (1896) and the German-modeled Commercial Code (1899).[5] Although the term "fiduciary" did not immediately become a part of the Japanese legal lexicon, these codes contained a series of rules equivalent to present-day fiduciary principles. At the core of Japanese law on fiduciaries is section 644 of the Civil Code, which prescribes an agent's obligation to manage the principal's affairs "with the care of a faithful manager."[6] This provision applies, *mutatis mutandis*, to partners,[7] guardians,[8] and executors under the Civil Code[9] and extends to corporate directors under the Commercial Code.[10]

The Civil Code prohibits an agent from engaging in self-dealing and the representation of both parties in the same transaction.[11] Similarly, context-specific regulations of conflict-of-interest transactions apply to guardians[12] and directors of charities[13] under the Civil Code, and commercial agents[14] and corporate directors[15] under the Commercial Code.

The Commercial Code also prescribed corporate governance structure for for-profit corporations that parallel the German-style two-tier board (*duale Führungsstruktur*). Just as the German supervisory board (*Aufsichtsrat*) provided for the monitoring of the managing board (*Vorstand*), Japanese statutory auditors (*kansayaku*) were expected to monitor the business decisions and accounting practices of directors (*torishimariyaku*). Herman Roesler, the German architect

[5] Civil Code, Law No. 89 of 1896; Commercial Code, Law No. 48 of 1899.
[6] Civil Code § 644.
[7] *Id.* § 671.
[8] *Id.* § 869.
[9] *Id.* § 1012.
[10] The relevant Commercial Code provision was introduced as § 164(2) by Law No. 73 of 1911; renumbered as § 254(2) by Law No. 72 of 1938; and renumbered as § 254(3) by Law No. 167 of 1950. It is now superseded by Companies Act, Law No. 86 of 2005, § 355.
[11] Civil Code § 108.
[12] *Id.* § 860.
[13] *Id.* § 57.
[14] Commercial Code § 48.
[15] *Id.* §§ 264, 265.

behind the Japanese Code, referred to not just the German example but also to French and British legislation, ensuring that the Code matched the needs of the time in Japan.[16] Notably, the Japanese statutory auditors' position was weaker than that of their German counterparts in that, although they had the power to require directors to produce accounting documents for review and conduct inquiries on their business execution, they lacked the power to appoint or remove directors.[17]

On top of the civil law basis for Japanese private law, common law trust was introduced by the Trust Act of 1922.[18] Under the Act, the trustee must carry out the work of the trusteeship "with the care of a faithful manager,"[19] a language that parallels the Civil Code's agency provision. Extending the agency-based regulation, the 1922 Act prohibited the trustee from engaging in self-dealing under any name involving any proprietary or personal rights.[20] While ensuring consistency with the Civil Code, the drafters of the Trust Act incorporated certain remedies against the breach of trust that track the common law approach and that are more extensive than those available for agency arrangements.[21]

Thus, by the 1930s, fiduciary principles were prescribed under separate codes drawn from different legal traditions. There was no general "duty of loyalty" provision, and the provisions mostly exhibited a rule-based format by listing conflicted transactions, which were prohibited unless there was specific authorization or an independent representative was appointed, depending on the context. The rule-based regulation was not unique to Japan at the time. English fiduciary law had long been largely rule-based, using no-profit, no-conflict formulas.[22] The general formulation of the duty of loyalty in the United States was broadly accepted only in the 1930s, after the publication of Austin W. Scott's *Treatise on Trusts* and the *Restatement on Trusts*, for which he served as a reporter.[23] In Anglo-Commonwealth jurisdictions, more systematic consideration of fiduciary law came later in the twentieth century.[24]

[16] Haruhito Takada & Masamichi Yamamoto, *The "Roesler Model" Corporation: Roesler's Draft of the Japanese Commercial Code and the Roots of Japanese Corporate Governance*, 45 Zeitschrift für Japanisches Recht [Journal of Japanese Law] 45 (2018).

[17] Tsukasa Miyajima, *Auditing Structure*, *in* History of Commercial Law Studies in Showa Period 389, 391–96 (Yasuichciro Kurasawa & Takayasu Okushima eds., 1996).

[18] Trust Act, Law No. 62 of 1922.

[19] *Id.* § 20.

[20] *Id.* § 22.

[21] *Id.* § 31.

[22] Aberdeen Rly Co v. Blaikie Bros (1854) 1 Macq 463, [1843–60] All ER Rep 249; Bray v. Ford [1896] AC 44.

[23] Austin W. Scott, *The Trustee's Duty of Loyalty*, 49 Harv. L. Rev. 521 (1936); Austin W. Scott, *The Restatement of the Law of Trusts*, 31 Colum. L. Rev. 1266 (1931).

[24] Paul D. Finn, Fiduciary Obligations (1977, reprinted 2017); Matthew Conaglen, Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties (2010).

8.2.2 *Modernization in Civil Law East Asia*

In China, after a number of military and diplomatic setbacks against the Western colonial powers, the late Qing Empire embarked on the internal reform to modernize its government system.[25] Part of the reform that began at the turn of the nineteenth century was the introduction of Western-style legal system and the codification in various areas of law. One of its first products was the Company Law of 1904. Codification efforts continued under the Republican government that took over in 1912, which included replacing the 1904 Law with new Company Regulations in 1914. Another Company Act was introduced in 1929 along with the Civil Code from 1929 to 1930. Japanese legal advisors and Chinese students who had returned from their studies in Japan assisted the drafting process.[26] Through their involvement, Chinese legislation was influenced by civil law, especially German and Swiss civil law.[27] Nonetheless, the impact of Western transplants remained marginal. The traditional kinship-based entities – that is, professionally managed commercial enterprises organized in the form of the family – retained their vitality and received recognition by the court during the Republican period.[28] With the ouster of the Republican government by the communists and the establishment of the People's Republic of China (PRC) in 1949, the 1929 Act ceased to affect mainland China, although it was carried over to Taiwan where the Kuomintang, which had formed the Republican government, retreated.[29]

Japan was responsible for direct colonial rule in Taiwan and Korea. After the First Sino-Japanese War (1894–95), Taiwan was ceded to Japan by the Qing Empire. After it defeated Russia in the Russo-Japanese War (1904–05), Japan extended its sphere of influence over Korea, ultimately annexing it in 1910.[30] To modernize the legal system within its territories, the Japanese government mobilized some of its leading scholars to investigate local customs.[31] Eventually, however, the idea of

[25] Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 Stan. L. Rev. 1599, 1677–80 (2000).

[26] Hideaki Nishi, Making of the Modern Law of Republic of China: Custom Research, Codification and Chinese Legal Studies 11–33 (2018).

[27] Andrew Jen-Guang Lin, *Common Law Influences in Private Law – Taiwan's Experiences Related to Corporate Law*, 4(2) National Taiwan Univ. L. Rev. 107, 111 (2009).

[28] Ruskola, *supra* note 25, at 1681.

[29] *See infra* notes 39–41 and accompanying text.

[30] Lusina Ho & Rebecca Lee, *Reception of the Trust in Asia: An Historical Perspective*, *in* Trust Law in Asian Civil Law Jurisdictions: A Comparative Analysis 10, 10–11 (Lusina Ho & Rebecca Lee eds., 2013).

[31] *See, e.g.*, Santaro Okamatsu, Provisional Report on Investigations of Laws and Customs in the Island of Formosa (1902). Okamatsu, Professor of Law at Kyoto Imperial University, was actively engaged in studying customs in Taiwan and Manchuria. Hideaki Nishi, The Making of "Taiwan Private Law" 23–25 (2009).

codifying local customs was abandoned. The Japanese government, instead, imposed its laws and industry regulations in Taiwan and Korea.[32]

It is no apology for colonialism to point out that it laid the foundation for the transnational evolution of fiduciary law in South Korea and Taiwan. The Civil and Commercial Codes under civil law continued to form the basis of the national private laws of both jurisdictions after World War II. Although Japanese rule ceased, its postwar economic development provided a model for many developing economies in the region. In addition, common law influences arrived through trust legislation, securities regulation,[33] and the corporate governance doctrine.[34]

In South Korea, the Japanese codes remained in effect until the introduction of new codes in the 1950s and 1960s, in part because of the Korean War. A new Civil Code was enacted in 1958 following the German model,[35] and the Trust Act was introduced in 1961 with the Japanese legislation serving as the main source of reference.[36] The Commercial Code of 1962 introduced the German-Japanese style of a two-tier structure of corporate governance comprising the board of directors and statutory auditors. In 1969, securities investment trust legislation was introduced.[37] Since the mid-1960s, South Korea was undergoing a rapid economic development, which was largely orchestrated by the industrial conglomerates known as *chaebol* working closely with the military government. *Chaebol*'s concentrated ownership structure with complex cross-holdings created unique challenges for corporate governance even after the political democratization in 1987.[38]

Postwar Taiwan came under the rule of Kuomintang and remained so when they retreated from mainland China in 1949 following their defeat by the communists. The legislation imposed during Japanese colonial rule was replaced by the laws of the Republic of China that had been introduced in 1929 and 1930. Despite the formal change in the Taiwanese legal regime, Tay-sheng Wang observed that the old Japanese codes were preserved in substance because most of the newly introduced codes had been modeled on Japanese legislation as drafted in the late

[32] Korean Private Law Ordinance of 1912; Taiwan Private Law Implementation Ordinance No. 406 of 1922.

[33] Taiwanese Securities and Exchange Act of 1968; South Korean Securities and Exchange Act of 1962.

[34] Corporate Governance in Asia: A Comparative Approach 385 (Bruce Aronson & Joongi Kim eds., 2019).

[35] Section 681 of South Korean Civil Code requires the agent to "manage the affairs entrusted to him with the care of a good manager in accordance with the tenor of the mandate." *See supra* note 10 and accompanying text for discussion of a parallel provision in Japanese Civil Code § 644.

[36] South Korean Trust Act, Act No. 900, Dec. 30, 1961, now superseded by Act No. 7428, Mar. 31, 2005.

[37] Ying-Chieh Wu, *Trust Law in South Korea: Developments and Challenges*, *in* Ho & Lee, *supra* note 30, at 47–48.

[38] Jeong Seo, *Who Will Control Frankenstein?: The Korean Chaebol's Corporate Governance*, 14 Cardozo J. of Int'l & Comp. L. 21 (2006).

1920s.[39] Although Taiwan's public life remained under martial law until 1987, as its economy took off in the 1960s, corporate and commercial activities flourished.[40] Within these fields, American influence became prominent, with the Company Act amended in 1946 and the Securities and Exchange Act enacted in 1968.[41]

8.2.3 *American Law's Influence on Japanese Fiduciary Law*

In Japan, the influence of American law became pronounced after World War II in light of the dominant role played by the United States in the military occupation by the Allied Powers. A number of New Deal–inspired legislations were introduced, including antitrust law, securities law, and labor standards law, as well as a new Constitution. American concepts of fiduciary law were introduced at this time, but the transplantation efforts met at least two obstacles.

First, Japanese lawyers struggled to incorporate the American notion of duty of loyalty into the preexisting statutory framework.[42] The concept was ultimately considered redundant, while its remedial implications were not fully appreciated. In 1950, the Commercial Code was amended to introduce section 254-2, which provided the following:

> A director owes a duty to obey the provisions of the laws, the articles of incorporation, and the decisions of the general meeting of shareholders, and a duty to carry out their work loyally in the interests of the corporation.[43]

A similar statutory duty of loyalty was imposed on the managers of securities investment trusts[44] and investment advisors.[45]

During the 1960s, Japanese courts expanded the restriction on the directors' disloyal conduct by interpreting the preexisting rules in both Civil and Commercial Codes against conflict-of-interest transactions broadly.[46] This left no room for the

[39] Tay-sheng Wang, Legal Reform in Taiwan under Japanese Colonial Rule, 1895–1945 176 (2000). *See supra* notes 30–32 and accompanying text.

[40] Lawrence S. Liu, *The Politics of Corporate Governance in Taiwan*, *in* Transforming Corporate Governance in East Asia 255, 256 (Hideki Kanda et al. eds., 2008).

[41] Lin, *supra* note 27, at 111.

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

[43] Commercial Code § 254-2, later renumbered § 254-3, was superseded by Companies Act, Law No. 86 of 2005, § 355.

[44] Securities Investment Trust Act, Law No. 198 of 1951, § 71, inserted by Law No. 106 of 1967.

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

[46] Oe Industrial v. Business Consultancies, 17(8) Minshu 909 (Supreme Court, Sept. 5, 1963); San'ei Electronics v. Japan Victor, 22(13) Minshu 3511 (Supreme Court, Dec. 25, 1968). For discussion of these cases, *see* Tamaruya & Yukioka, *supra* note 1, at 141.

1950 statutory duty of loyalty to do any independent work. The Supreme Court held as such in 1970:

> Section 254-2 of the Commercial Code merely clarifies and details the duty of a faithful manager established in Section 254(3) of the same Code and Section 644 of the Civil Code. It does not impose a separate, higher duty than the general duty of faithful management required of all agents.[47]

The second, and perhaps more significant, obstacle related to the task of reconciling the American concept of corporate governance with the Japanese style of corporate management. By the 1970s, Japan's rise to the status of the world's second-largest economy attracted international attention toward some of the unique features of its corporate management and labor relationships. These features comprised lifetime employment and a steep seniority wage progression that secured employees' loyalty to such an extent that the companies would operate as the communities of employees.[48] The boards of directors almost exclusively included senior managers who had devoted their entire careers to their companies.[49] Shareholders seemed content to have their interests subordinated to other stakeholders' interests, justifying their investments in terms of wider business interests rather than just investment returns.[50]

American business leaders took the position that the Japanese corporate sector was closed to outsiders and lacked transparency. From their point of view, Japan's corporate governance was inadequate. Curtis Milhaupt summarized Japan's corporate governance as follows:

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

[47] Arita v. Kojima, 24(6) Minshu 625 (Supreme Court, June 24, 1970).

[48] James C. Abegglen, The Japanese Factory: Aspects of Its Social Organization 39–40 (1958); Organisation for Economic Cooperation and Development, Manpower Policy in Japan: Reviews of Manpower and Social Policies Number 11 (1973).

[49] Ronald J. Gilson & Curtis J. Milhaupt, *Choice as Regulatory Reform: The Case of Japanese Corporate Governance*, 53 Am. J. Comp. L. 343, 348–49 (2005).

[50] *See, e.g.*, Gen Goto, *Legally Strong Shareholders of Japan*, 3 Mich. J. Private Equity & Venture Cap. L. 125, 142–43 (2014), Bruce Aronson, *Japanese Corporate Governance Reform: A Comparative Perspective*, 11 Hastings Bus. L.J. 85, 95 (2015). For a historical account of the shareholding structure in Japan, *see* Julian Franks et al., *The Ownership of Japanese Corporations in the Twentieth Century*, 27 Rev. Fin. Stud. 2580 (2014).

employees rather than an assemblage of financial assets to be bought and sold.[51]

While both Japanese and American business leaders would have agreed to the substance of this summary, the assessment as to whether the Japanese system needs fixing was beginning to diverge by the late 1980s.

In 1989, a government-level negotiation, known as the US–Japan Structural Impediments Initiative, commenced. To alleviate a mounting trade imbalance between the two countries, the US government demanded that Japan remove a wide range of trading impediments, including corporate governance norms. Following the negotiations, some reforms were introduced to expand shareholder rights. The 1993 revision of the Commercial Code and related statutes expanded the shareholder right to review corporate books,[52] made shareholder derivative suits more accessible,[53] and sought to enhance the independence of statutory auditors.[54] The introduction of independent directors was discussed during the negotiations but did not become a part of the reform package, in anticipation of resistance from the industry. This became a hotly debated issue from the late 1990s onward.

8.2.4 *Developments in Common Law East Asia*

While the modernization of corporate governance in Japan focused upon the civil law, in Southeast Asia, Hong Kong and Singapore incorporated norms from English common law and tracked major statutory developments in the UK and Commonwealth nations.

Singapore, a trading post for the British Empire since 1819, was ceded to the East India Company after the 1824 Anglo–Dutch Agreement. English common law and equity became applicable under the 1826 Second Charter of Justice, although Singapore came under the direct control of Britain as part of the Straits Settlements in 1876. The Companies Ordinance was introduced in 1889 after the model of the UK Companies Act 1862.

Meanwhile, Hong Kong, initially occupied by the British in 1841, formally became a British colony in 1842 after Qing China's defeat in the First Opium War. Principles of English common law and equity were gradually transplanted after the Charter of the Colony of Hong Kong in 1843, and the first Companies Ordinance was enacted in 1865, also based on the UK Companies Act 1862.[55]

[51] Curtis Milhaupt, *Takeover Law and Managerial Incentives in the United States and Japan*, *in* Enterprise Law: Contracts, Markets, and Laws in the US and Japan 177, 182 (Zen'ichi Shishido ed., 2014).

[52] Commercial Code § 293-6, as amended by Law No. 62 of 1993.

[53] *Id.* §§ 267(4), 268-2(1), as amended by Law No. 62 of 1993.

[54] Commercial Code Special Provisions on Company Auditor etc. Act § 18(1), as amended by Law No. 62 of 1993.

[55] S. H. Goo, Study Report on History of Company Incorporation in Hong Kong (2013).

Both Singapore and Hong Kong updated their company laws by generally tracking the legislative developments in the United Kingdom throughout the remainder of the nineteenth century and much of the twentieth century. In the field of trust law, apart from the general reception of equity, the statutory foundations in both jurisdictions were based on the UK Trustees Act of 1925. Subsequently, both jurisdictions updated their trust statutes largely in line with developments in the United Kingdom.[56]

In Hong Kong, a small number of wealthy merchant families were directly involved in managing Hong Kong's economic affairs for over a century and a half. Their influence in the legislative policymaking made Hong Kong's social and legal structure sensitive to the interests of the users of Hong Kong as a port for trade or a market for trading financial instruments and services.[57] The Companies Ordinance 1932 was modeled after the UK 1929 Act and served as the basic framework of Hong Kong Company Law until it was replaced by the Companies Ordinance 2014, an extensive reform with a view to enhancing Hong Kong's status as a major international business and financial center.[58]

The growth of wealth in mainland China following its opening up in 1979 supported economic growth in Hong Kong. Since the 1990s, an increasingly large number of Chinese companies have been listed on stock exchanges in Hong Kong. In the 1990s, Hong Kong's securities market regulator, the Securities and Futures Commission, engaged with the PRC Commission for Restructuring of the Economic System to negotiate a Memorandum of Regulatory Cooperation.[59] Today, Hong Kong's Rules Governing the Listing of Securities contain a special chapter 19A, which specifically applies to issuers incorporated in mainland China to ensure protection for security holders. The UK-style company and trust laws have continued to apply in the Special Administrative Region following the 1997 handover under the constitutional principle of "one country, two systems."[60]

Singapore attained self-government in 1959, joined the Federation of Malaysia in 1963, and achieved independence in 1965.[61] In 1967, the Companies Act was

[56] Hong Kong Trustee Ordinance 1934, Cap. 29, and Singapore Trustee Act 1967, both based on England's Trustee Act 1925, 15 & 16 Geo. 5 c. 19.

[57] David C. Donald, A Financial Centre for Two Empires: Hong Kong's Corporate, Securities and Tax Laws in Its Transition from Britain to China 53 (2014).

[58] Companies Ordinance 2014, Cap. 622.

[59] Donald, *supra* note 57, at 242–46. On the impact of these negotiation on Chinese corporate governance, see text accompanying notes 123–126.

[60] The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China art. 8.

[61] Kelvin F. K. Low, *Victoria Meets Confucius in Singapore: Implied Trusts of Residential Property*, *in* Asia-Pacific Trusts Law: Theory and Practice in Context 97 (Linkai Yang & Matthew Harding eds., 2021); Goh Yihan & Paul Tan, *An Empirical Study on the Development of Singapore Law*, *in* Singapore Law: Fifty Years in the Making (Goh Yihan & Paul Tan eds., 2015).

introduced to follow the Australian Uniform Companies Acts of 1961–1962. In pursuit of the government's objective of becoming Asia's financial center, Singapore frequently amended its company legislation. In 1976, the Code on Takeovers and Mergers was introduced. While the Code followed the London City Code's self-regulatory tradition, it was given statutory backing along with an administrative implementation mechanism, the Securities Industry Council, which had the power to enforce the Code and resolve disputes in a nonjudicial setting.[62]

One unique feature that differentiates Singapore from Hong Kong is the role of government-linked corporations in the development of the Singapore economy. The Temasek Holdings, incorporated in 1974 with the Government's Minister for Finance as the sole shareholder, has played a vital and unique role in promoting transparent governance in its portfolio companies.[63] This illustrates the ingenuous way in which Singapore explores comparative advantage on the basis of the common English legal tradition.

Both Hong Kong and Singapore faced a unique corporate governance challenge associated with the concentrated shareholding by either families or the State in both local and incoming Chinese companies. Strong family or State control, which can be observed across East Asia,[64] creates a tension with the Anglo-American corporate governance model premised on dispersed shareholder ownership. This tension is one of the principal themes of the transnational processes of legal ordering to which this chapter now turns.[65]

8.3 GREATER TRANSNATIONALIZATION: REFORMS SINCE THE 1990S

8.3.1 *American Corporate Governance in Civil Law East Asia*

By the 1990s, global debates on corporate governance seemed to be dominated by the American model, which emphasized shareholder primacy, the prominent role of independent directors in fiduciary governance, and judicial enforcement of

[62] Wai Yee Wan, *Legal Transplantation of UK-Style Takeover Regulation in Singapore*, *in* COMPARATIVE TAKEOVER REGULATION: GLOBAL AND ASIAN PERSPECTIVES 406, 407 (Umakanth Varottil & Wan Wai Yee eds., 2017).

[63] Tan Cheng-Han, Dan W. Puchniak, and Umakanth Varottil, *State-Owned Enterprises in Singapore: Historical Insights into a Potential Model for Reform*, 28 COLUM. J. ASIAN L. 61, 89 (2015).

[64] The tendency is less conspicuous in Japan and Taiwan. OECD EQUITY MARKET REVIEW 2019, 43–44 (2019).

[65] Dan W. Puchniak & Kon Sik Kim, *Varieties of Independent Directors in Asia*, *in* INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH 89, 119–28 (Dan W. Puchniak et al. eds., 2017); David C. Donald, *Conceiving Corporate Governance for an Asian Environment*, 12 U.PA. ASIAN L. REV. 88 (2016).

fiduciary rules through derivative suits or securities litigation.[66] Optimism reigned that corporate laws and regulations around the world would converge on this model, which many (at least in the West) deemed the most efficient and effective.[67]

South Korea felt the impact of American-style corporate governance when it was hit by the East Asian financial crisis after the 1997 currency crisis in Thailand. After the bailout package mandated by the International Monetary Fund (IMF), South Korea introduced some reforms that mirrored American-style corporate governance. In 1998, the Commercial Code was revised to introduce the notion of the duty of loyalty,[68] expand the scope of derivative suits,[69] and enhance the minority shareholders' exercise of their rights.[70] The revision in the following year introduced the American-style committee system where independent directors played a key role, and the audit committee replaced the traditional statutory auditor.[71] After a series of changes in the Securities and Exchange Act, Bank Act, and Insurance Business Act, large companies and financial institutions in South Korea are now required to have at least three independent directors constituting the majority of the board, although the original statutory auditor remains an option for smaller companies.[72]

Although the changes in Taiwan were less drastic, the American influence became increasingly apparent, as its government pursued economic globalization strategy. In 2001, the Taiwanese Company Act was amended to specifically provide for the duty of loyalty.[73] In 2006, the Stock Exchange Act was amended to introduce independent directors and the audit committee.[74] The appointment of independent directors was required only for financial institutions and large listed companies; most publicly held corporations were given the additional option of retaining the two-tier system or appointing both corporate auditors and independent directors. The Financial Supervisory Commission expanded the scope of companies that were required to appoint independent directors.[75]

[66] Principles of Corporate Governance: Analysis and Recommendations (America Law Institute 1994); Melvin Aron Eisenberg, *An Overview of the Principles of Corporate Governance*, 48 Bus. Law. 1271 (1993).

[67] Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 Geo. L. J. 439 (2001); Rafael La Porta et al., *Law and Finance*, 106 J. of Pol. Econ. 1113 (1998).

[68] South Korean Commercial Code § 382-3, introduced by Law No. 5591, Dec. 28, 1998.

[69] *Id.* § 403.

[70] *E.g.*, *id.* § 366 (minority shareholder's right to request convocation of shareholders' meeting); § 363-2 (right to make proposal for the shareholders' meeting); § 385-2 (minority shareholder's right to petition the court for removal of a director); § 402 (right to injunction).

[71] *Id.* § 393-2 (committees of board of directors); § 415-1 (audit committee), introduced by Law No. 6086, Dec. 31, 1999.

[72] Kyung-Hoon Chun, *Korea's Mandatory Independent Directors: Expected and Unexpected Roles*, *in* Puchniak et al., *supra* note 65, 176, at 184–96.

[73] Taiwanese Company Act § 23(1).

[74] Taiwan Securities and Exchange Act §§ 14-2(1), 14-4(1).

[75] Hsin-ti Chang et al., *From Double Board to Unitary Board System: Independent Directors and Corporate Governance Reform in Taiwan*, *in* Puchniak et al., *supra* note 65, 241, at 244–45.

As in Japan, inscribing fiduciary norms into the civil law statutory foundation proved to be a major comparative law conundrum in South Korea and Taiwan. In both jurisdictions, the implications of introducing the duty of loyalty provision remain unclear.[76] Commentators questioned whether the mandatory independent director regime was functioning as intended by its proponents.[77] Corporate governance debates were often affected by idiosyncratic factors. Among the salient factors in Taiwan was the ambivalent and often politicized relationship between the businesses that pursue growth across from the booming mainland China, and the government that still maintain regulatory and ownership control over major financial and business sectors in the postmarital era.[78] In South Korea, the dominance of large groups of related corporations known as *chebol*, which operate under concentrated family or individual control, posed a unique challenge for corporate governance.[79]

8.3.2 *The Rise of the Corporate Governance Code in Common Law East Asia*

Although American and English laws share common law origins, there are differences in their approaches to corporate governance. Company legislation in the UK and Commonwealth nations relies more on ex ante measures such as disclosure and board or shareholder approvals, and less on derivative suits to regulate related party transactions.[80] The British regulatory approach relies more on self-regulation such as the Stock Exchange rules and the City Code on Takeovers and Mergers than the binding legislative provisions in the United States.[81] Finally, the Company Law debate in the 1990s in the United Kingdom began to consider broader interest groups as part of the corporate stakeholders, to which corporate directors owe a fiduciary duty.[82]

When the Cadbury Report developed a set of principles of good corporate governance to be incorporated into the London Stock Exchange's Listing Rules in

[76] Lin, *supra* note 27, at 124–25; Jong-Hoon Lee, Corporation Laws & Cases of South Korea § 8.06[G] (2016).

[77] Jill F. Solomon et al., *Corporate Governance in Taiwan: Empirical Evidence from Taiwanese Company Directors* (2003) 11 Corporate Governance: An International Review 235, 238–39; Chun, *supra* note 72, at 177.

[78] Liu, *supra* note 40, at 255–57.

[79] Chun, *supra* note 72, at 179–80.

[80] Dan W. Puchniak & Umakanth Varottil, *Related Party Transactions in Commonwealth Asia: Complicating the Comparative Paradigm*, 17 Berkeley Bus. L. Rev. 1, 20–23 (2020).

[81] Brian R. Cheffins, *Does Law Matter? The Separation of Ownership and Control in the United Kingdom*, 30 J. Legal Stud. 459, 472–76 (2001).

[82] Sarah Worthington, Sealy & Worthington's Text, Cases, & Materials in Company Law 337 (11th ed. 2016); White Paper, Company Law Reform, para. 3.3, at 20–21(Cm 6465, March 2005); Companies Act 2006 c. 46 s 172(1) (UK).

1992,[83] Hong Kong quickly introduced the Code of Best Practice as part of the Stock Exchange's Listing Rules the following year. When the Combined Code of Corporate Governance was made applicable to all UK listed companies in 1998, the Hong Kong stock exchange updated the listing rules the same year.[84] Singapore followed suit, adopting the Corporate Governance Code as part of the Singapore Exchange Listing Rule in 2001.[85]

These corporate governance codes have been updated regularly in Hong Kong and Singapore, earning them consistently high scores and rankings in international indexes of corporate governance.[86] As the two jurisdictions vied with each other to attract foreign investments, they sought to signal attractiveness to capital by updating their corporate governance codes. In the run-up to the introduction of the Corporate Governance Code, Singapore's Corporate Governance Committee made it clear that its goal was to attract international capital in listed companies to Singapore by making it a financial hub of international standing.[87] Some recent scholarship has criticized this strategic signaling to the extent that it is prone to overlook unique challenges brought about by the local conditions. As David C. Donald observed in the context of Hong Kong's securities market regulation,

> The legal framework goes to great lengths to match the "best practice" requirements originating in New York or London …, even though such requirements might be unnecessary in Hong Kong …, whilst overlooking the real source of governance risk: controlling shareholders and the power they wield directly and indirectly.[88]

The prevalence of block-holding by family-dominated corporations or Chinese State-owned enterprises means that the agency problem arose not so much from the separation of ownership and management as from the failure of the large shareholder to act faithfully for the minority shareholders. In other words, the real challenge presented to the court and policymakers often requires different kinds of

[83] Committee on the Financial Aspects of Corporate Governance, *Report* (Gee 1992); *Code of Best Practice* (Gee 1992). For historical background, *see* Brian R. Cheffins, *The Rise of Corporate Governance in the UK: When and Why* (2015) 68 CLP 387.

[84] Syren Johnstone and Say H. Goo, Report on Improving Corporate Governance in Hong Kong a Comparative Based Study 55–56 (2017).

[85] Corporate Governance Committee, Report of the Committee and Code of Corporate Governance (March 2001).

[86] For more detailed and nuanced comparison of Hong Kong and Singapore corporate and financial market regulation, *see, e.g.*, Christopher Chen et al., *Regulating Squeeze-out Techniques by Controlling Shareholders: The Divergence between Hong Kong and Singapore*, 18 J. Corp. L. Stud. 185 (2017).

[87] Corporate Governance Committee, Consultation Paper 1 (Nov. 2000) (Singapore).

[88] Donald, *supra* note 57, at 93.

solutions than are offered by the American or the British models of corporate governance that presuppose dispersed shareholdings.[89]

Similar patterns of cross-border competition and local calibration of legal doctrines can be observed in the field of trust law. Unconstrained by either the comparative law conundrum in civil law jurisdictions or English conservativism, both Hong Kong and Singapore have displayed remarkable agility in law reform, driven by the entrepreneurial spirit typical of common law lawyers and client demands from China and across the globe. Both jurisdictions have generally followed Anglo-Commonwealth developments to trust doctrine and, at the same time, competed with each other in offering global services using offshore trusts.[90] If the proximity to mainland China gave Hong Kong an advantage in developing its capital market, the relative distance from China meant a greater sense of security for the high net-worth individuals, which Singapore could exploit to promote itself as a prime wealth management center.

8.3.3 *Japanese Reception*

In 1991, the Japanese bubble economy collapsed, leading to a long-lasting recession. Japanese corporate law in the 1990s and 2000s was characterized by extensive reform debates and frequent legislative revisions. Statutes were amended almost annually, including the introduction of a freestanding Companies Act in 2005 to replace the corporate law section of the Commercial Code.[91]

The American approach dominated in the 1990s and early 2000s. After the 1993 revision of the Commercial Code reduced filing fees,[92] derivative suits increased in number, revealing a series of mismanagement and accounting irregularities in major Japanese companies.[93] Derivative suits also contributed to the development of case law on the range of duties owed by the directors of banking institutions and other for-profit companies. In the 2000s, the Japanese courts adopted the American business judgment rule with certain modifications.[94]

Requiring independent directors on boards was a controversial proposition in Japan, where companies were still seen as communities of employees.[95] During the

[89] Cheng-Han et al., *supra* note 63, at 92–93 (2015).

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

[91] Companies Act, Law No. 86 of 2005.

[92] Commercial Code § 267(4), inserted by Law No. 62 of 1993, now incorporated in Companies Act § 847-4(1).

[93] Tomotaka Fujita, *Transformation of the Management Liability Regime in Japan in the Wake of the 1993 Revision*, *in* Kanda et al., *supra* note 40, at 15, 17 table.

[94] Apamanshop Derivative Litigation, 2091 Hanrei jiho 90 (Sup. Ct. July 15, 2010).

[95] Gen Goto et al., *Japan's Gradual Reception of Independent Directors: An Empirical and Political-Economic Analysis*, *in* Puchniak et al., *supra* note 65, at 439–44.

preparation for the 2002 corporate law reform, a proposal was made to require each company to appoint at least one independent director. Eventually, the proposal was defeated, and instead, the company was given an option to replace the statutory auditor with committees for audit, nomination, and compensation.[96] Each committee had to have at least three members, and the majority had to be independent directors. This optional approach reflected the policymakers' ambivalence toward American-style corporate governance.[97] Its impact was limited, with only 1.7 percent of listed companies choosing this option by 2014.[98] The link between independent directors and good corporate performance remained elusive.[99]

The corporate law reforms of the mid-2000s began to see greater use of a soft law approach. As mergers and acquisitions increased in number and attracted attention,[100] a series of nonbinding guidelines were published by the Ministry of Economy, Trade, and Industry to supply guiding principles and ensure fairness.[101] As Curtis Milhaupt observed, the policymaking report underlying these guidelines:

> adroitly straddled the conceptual divide between the shareholder orientation of US corporate law and the more stakeholder- (particularly employee-) oriented approach of post-war Japanese corporate governance practices.[102]

The policymakers' ambivalence toward American-style corporate governance extended to both substance and approach and continued for much of the 2000s.

8.3.4 *Developments after the Financial Crisis in 2007*

The global financial crisis in 2007 brought about a shift in the debate over the proper forms of corporate and market governance. The debate that had been dominated by the American model of statutory law and derivative litigation began

[96] Special Exceptions to Commercial Code Concerning Audit, etc. Act, Law No. 22 of 1974, § 21-5 et seq, inserted by Law No. 44 of 2002.

[97] Gilson & Milhaupt, *supra* note 49, at 343.

[98] Tokyo Stock Exchange, *TSE-Listed Companies White Paper on Corporate Governance 2015*, 15 (2015). For post-2014 developments, *see* note 116–118 and accompanying text.

[99] Bruce Aronson, *Case Studies of Independent Directors in Asia*, *in* Puchniak et al., *supra* note 65, 431, at 439–44.

[100] Livedoor v. Nippon Broadcasting System, 1899 Hanrei Jiho 56 (Tokyo High Court, 23 March, 2005); Steel Partners v. Bull-Dog Sauce, 61(5) Minshu 2215 (Sup. Ct. Aug. 7, 2007).

[101] Ministry of Economy, Trade and Industry (METI) & Ministry of Justice (MOJ), Takeover Defense Guidelines for Protecting and Enhancing Corporate Value and the Common Interests of Shareholders (May 27, 2005); METI, Management Buyout Guidelines for Enhancing Corporate Value and Fair Procedures (Sept. 4, 2007). For backgrounds, *see* John Buchanan, Dominic Heesang Chai & Simon Deakin, Hedge Fund Activism in Japan: The Limits of Shareholder Primacy 259–65 (2012).

[102] Milhaupt, *supra* note 51, at 183–87, referring to Corporate Value Study Group, Preparing Defensive Measures toward Hostile Takeovers (Measures to Defend Corporate Value (2005).

to shift to the British approach of greater self-regulation.[103] After the Kay Review expressed critical views regarding short-termism in equity markets,[104] the UK Financial Reporting Council published the UK Stewardship Code in 2010 to encourage institutional investors to engage in corporate governance in the interest of their beneficiaries.[105] The Code's soft law approach, where the regulated company may either comply with the requirement or if they do not comply, explain publicly why not, became quickly popular around the world.

Japan was the first to follow the United Kingdom's lead by introducing its version of the Stewardship Code in 2014. The Code encouraged institutional investors to engage constructively with the companies in which they invested.[106] The motive behind the Japanese shift, however, may not have been the same as the one that drove the UK Stewardship Code.[107] Institutional investors' engagement with the investee companies was not just for the prevention of myopic excessive risk-taking but was also key to achieving a long-term increase in corporate value in Japan.[108] This was apparent in an influential report published by Professor Kunio Ito, his fellow academic experts, and representatives from institutional investors and the corporate sector.[109] While echoing the Kay Review's emphasis on the dialogue between companies and institutional investors, the Ito Review stressed that Japanese companies should aim for a return on equity of 8 percent to receive recognition from global investors.[110]

The term "fiduciary duty" began to seep into Japanese financial regulation. In 2014, the Financial Services Authority (FSA) began to use the term in its guidance document that set out the FSA's approach to inspection and oversight over financial institutions.[111] The "Japan Revitalization Strategy" published by the Cabinet in 2016, emphasized that action must be taken "to ensure that all entities engaged in the formation of assets by customers … fulfill their fiduciary duties (customer-oriented management of operations)."[112] The FSA followed up by publishing "Customer-first

[103] Bruce Aronson et al., *Corporate Legislation in Japan*, *in* Routledge Handbook of Japanese Business and Management 103–05 (Parissa Haghirian ed., 2016).

[104] The Kay Review of UK Equity Markets and Long-Term Decision Making (Final report July 2012).

[105] Financial Reporting Council, *The UK Stewardship Code* (July 2010; revised September 2012).

[106] Council of Experts on Japanese Stewardship Code, *Principles for Responsible Institutional Investors (Japan's Stewardship Code): Promoting Sustainable Growth of Companies through Investment and Dialogue* (February 2014; revised May 2017).

[107] Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 Seattle U. L. Rev. 497, 513–24 (2018).

[108] Gen Goto, *The Logic and Limits of Stewardship Code: The Case of Japan*, 15 Berkeley Bus. L.J. 365, 394 (2019).

[109] Final Report of the Ito Review, Competitiveness and Incentives for Sustainable Growth: Building Favorable Relationships between Companies and Investors (August 2014).

[110] *Id.* at 18.

[111] Financial Services Agency, Financial Monitoring Policy for 2014–2015 (Policy for Supervision and Inspection) (Sept. 2014).

[112] Cabinet Resolution, Japan Revitalization Strategy 2016, 154 (June 2, 2016).

Business Practices," which set out seven principles to encourage financial service providers to develop best practices to serve their customers' best interests.[113] These principles were expressly nonbinding and created an expectation that any financial institution deviating from any of the principles should provide a full explanation.

Stewardship codes have been introduced in at least ten jurisdictions and the European Union. Investor-led best practice guidance has been introduced in at least nine jurisdictions, including the United States.[114] Corporate governance codes have been adopted in a greater number of jurisdictions. The United Kingdom's initiative in 1992 was quickly followed by similar initiatives in other Commonwealth jurisdictions. The OECD developed the Principle of Corporate Governance in 1999 and encouraged its adoption through mutual assessment and policy discussions. According to the 2019 OECD report, nearly all forty-seven jurisdictions surveyed had a national Code or Principle of Corporate Governance, with the notable exceptions of China, India, and the United States.[115]

Japan was late in introducing the Corporate Governance Code. In 2015, the FSA and the Tokyo Stock Exchange published the Japanese Corporate Governance Code.[116] Japanese corporate lawyers soon found the UK notion of enlightened shareholder value and the "comply or explain" approach conducive to their culture. The Code had a tangible impact. The 2015 Code stated that listed companies should appoint at least two independent directors.[117] As of 2014, only 21.5 percent of the companies listed in section 1 of the Tokyo Stock Exchange satisfied this provision, but by 2019, the number reached 93.4 percent.[118] It was only in December 2019 that the Companies Act was amended to require listed corporations to appoint *one* independent director.

On August 19, 2019, the Business Roundtable, a group of American CEOs, issued a statement announcing that it had decided to retract its long-standing commitment to the principle of shareholder primacy. *Nikkei Shinbun*, the Japanese equivalent of *the Financial Times*, reported this on its front page with a

[113] Financial Services Agency, Customer-first Business Practices (Mar. 30, 2017).
[114] EY, *Q&A on Stewardship Codes* (Aug. 2017); Investor Stewardship Group, *Stewardship Principles: Stewardship Framework for Institutional Investors* (Jan. 1, 2018).
[115] OECD Corporate Governance Factbook 2019, 29–30, 41–44 table 2.2 (2019). For the OECD's initiative, G20/OECD Principles of Corporate Governance (Sept. 2015).
[116] Tokyo Stock Exchange, Japan's Corporate Governance Code: Seeking Sustainable Corporate Growth and Increased Corporate Value over the Mid- to Long-Term (2015).
[117] *Id.* Principle 4–8.
[118] Tokyo Stock Exchange, The Appointment of Independent Outside Directors and the Creation of Appointment and Compensation Committees in Companies Listed in Section 1 of Tokyo Stock Exchange 3 (Aug. 1, 2019).

tone of incredulity: "US Businesses Reconsider 'Shareholder Primacy': Declares to Give Due Regard to Employees."[119]

8.3.5 *Chinese Participation in the Transnational Development of Fiduciary Norms*

In 1993, China enacted its first Company Act since the Communist Party came into power in 1949. Consistent with China's civil law tradition, the Act required a supervisory board comprising representatives of the shareholders and employees to supervise directors and managers.[120] The drafters avoided the Anglo-American formulation of corporate fiduciary duties.[121] The directors were obliged to "faithfully perform their duties" so as not "to use their position and power of office in the company to seek personal gains" and not "to exploit their power of office to accept bribes or other illicit gains" or "to seize the company's property."[122]

The common law fiduciary formulation was arriving just as the 1993 Act was being prepared.[123] Earlier in 1993, nine State-owned enterprises were preparing for listings on the Hong Kong stock exchange. To appease the overseas investors' skepticism toward their governance structure, the PRC Commission for Restructuring of the Economic System (CRES) issued a letter to the Hong Kong Securities and Futures Commission clarifying that the obligation of honesty (誠心責任) held to be owed by the PRC joint-stock company in an earlier official statement had "the same type of meaning as a *fiduciary duty* under Hong Kong law."[124] When the 1993 Act was promulgated, CRES issued a regulatory addendum reiterating that directors and senior management of PRC-domiciled issuers with overseas listings owe the same obligation of honesty, and thus seeking to assure investors that Hong Kong's fiduciary duty jurisprudence is applicable.

In 2002, the China Securities Regulatory Commission and State Economy and Trade Commission jointly promulgated the Code of Corporate Governance for Listed Companies. The Code contained provisions incorporating Delaware-style corporate fiduciary duties of care, loyalty, and good faith. The listed companies were required to implement corporate governance through committees, and the majority

[119] *U.S. Businesses Reconsider 'Shareholder Primacy': Declares to Give Due Regard to Employees*, Nikkei Shimbun (Aug. 20, 2019).
[120] Shen Wei, Corporate Law in China: Structure, Governance and Regulation 253–54 (2015).
[121] Nicholas C. Howson, *Fiduciary Principles in Chinese Law*, *in* Criddle et al., *supra* note 2, at 603, 606–07.
[122] Chinese Company Act § 59 (1993).
[123] For background, *see* Donald, *supra* note 57, at 241–44.
[124] Howson, *supra* note 121, at 608 (quoting CRES' 1992 Opinions on Standards for Companies Limited by Shares, and 1993 letter).

of the directors to fill each committee were required to be independent.[125] Since the 1993 Act was also applicable to listed companies, the combined effect was, in Jiangyu Wang's words, that "Anglo-American jurisdictions install independent directors on the board, Germanic-Japanese jurisdictions provide a supervisory board or *kansayaku*, but listed companies in China must have both."[126]

Thus, when the Company Act was overhauled in 2005, the common law-style fiduciary law was a part of the listed companies' obligations. A newly introduced section 148 provided for corporate directors' and officers' "duty of loyalty and duty of care to the company."[127] It was followed by the new section 149, prohibiting the misappropriation of company funds, direct and indirect self-dealing, corporate opportunities and competing businesses, and a list of conflicted transactions that is more detailed than any other corporate legislation under civil law.[128]

The Company Act also contains provisions distinct to China. In addition to abiding by laws and administrative regulations, Chinese companies are exhorted to "observe social morality," "accept supervision by the government and the public, and bear social responsibilities."[129] They must protect the lawful rights and interests of their employees[130] and provide the necessary conditions for the activities of the labor union and Communist Party organizations.[131] These provisions are conspicuous not just for taking a broad conception of corporate constituencies but also for expressing, in Ruskola's words, "the extraordinary moral optimism of the Confucian tradition" that everyone's interests are ultimately expected to harmonize.[132] Insistence on the role of the Party organization in for-profit entities has increased in recent years and has an impact on both domestic and foreign businesses.[133] The Code of Corporate Governance was revised in 2018 to require establishing Party organization within listed corporations and incorporating Party building work into the articles of association of State-owned enterprises.[134]

A similar mixing of civil and common law fiduciary norms with local conditions against an international background can be seen in the field of trust law. Whereas the Chinese Trust Act of 2006 follows the civil law style of trust legislation in Japan, South Korea, and Taiwan, it is the trust services offered from Hong Kong and

[125] China Securities Regulatory Commission and State Economy &Trade Commission, Code of Corporate Governance for Listed Companies §§ 33, 52. The Delaware-style characterization is by Howson, *supra* note 121, at 609.
[126] Jiangyu Wang, *China*, *in* Aronson & Kim, *supra* note 34, at 238, 238.
[127] Chinese Company Act § 148 (2005 amendment), now renumbered § 147.
[128] *Id* § 149 (2005 amendment), now renumbered § 148; Wei, *supra* note 120, at 261.
[129] Chinese Company Act § 5.
[130] *Id* § 17.
[131] *Id* §§ 18, 19.
[132] Ruskola, *supra* note 25, at 1692–93.
[133] Richard McGregor, *How the State Runs Business in China*, The Guardian (July 25, 2019).
[134] China Securities Regulatory Commission, Code of Corporate Governance for Listed Companies 2018 § 5.

Singapore that cater to the demands of wealthy Chinese capitalists.[135] Reflecting their preference for retention of control over trust assets, the Chinese Trust Act gives settlors a strong influence over trust management.[136] Offshore jurisdictions have also reacted to their demands by introducing special trust legislation that allows settlors to reserve various powers over the management of trusts by the trustee.[137] The statute in both Hong Kong and Singapore expressly provides that a trust cannot be declared invalid when the settlor reserves to himself the power of investment and asset management decisions.[138] This development has questioned the basic notion of common law trusts as a fiduciary relationship between the trustee and the beneficiaries, from which the settlor drops out once the trust has been created.[139]

8.4 NATIONAL, REGIONAL, AND TRANSNATIONAL FIDUCIARY ORDERS

The historical account thus far shows that various strands of fiduciary norms interacted to create a dynamic evolution of legal orders across East Asia. They were derived from civil law, American and English common law, and indigenous sources sometimes dating back centuries. The theory of transnational legal ordering provides a framework for evaluating these complex patterns of fiduciary norms' rise and transformation across jurisdictional borders, their normative settlements and institutional underpinnings, and the interactions among various components or subsets of fiduciary norms.[140]

8.4.1 *Mechanisms of Transnational Fiduciary Ordering*

The major driver of the development of a fiduciary order in late nineteenth-century East Asia was modernization through transplantation of the Western legal system and ideas. The efforts made by Japanese lawyers and policymakers to introduce civil law codes and mix them with common law inspiration foreshadowed the dynamic development of the fiduciary order in Taiwan and South Korea. Hong Kong and Singapore adopted the common law tradition as a result of British rule.

The history of colonization in the region was inseparable from modernization. All of the jurisdictions discussed were, apart from Japan, colonized to some extent by

[135] Masayuki Tamaruya, *Japanese Law and the Global Diffusion of Trust and Fiduciary Law*, 103 Iowa L. Rev. 2229, 2230 (2018).
[136] Chinese Trust Act of 2006 § 2.
[137] A prominent example is the STAR trust now incorporated in Cayman Islands Trusts Law, Part VIII, §§ 95-109 (2017 Revision). For background, *see* J. C. Sharman, *Chinese Capital Flows and Offshore Financial Centers*, 25 Pacific Rev. 317 (2012).
[138] Hong Kong Trustee Ordinance s 41X; Singapore Trustees Act s 90(5).
[139] Lionel Smith, *Give the People What They Want? The Onshoring of the Offshore*, 103 Iowa L. Rev. 2156 (2018).
[140] Halliday & Shaffer, *supra* note 3, at 55–63.

Japan and Britain. The United States did not colonize any of the jurisdictions discussed here; however, its economic dominance in later years created a pressure that the policymakers in the receiving jurisdictions found impossible to resist. Nonetheless, the receiving jurisdictions did not just remain passive. After colonial rule ended, East Asian jurisdictions employed different comparative law strategies to achieve economic competitiveness and attract cross-border investment. In the past several decades, the greater presence of Asian wealth within the world economy has begun to affect the evolution of fiduciary norms in the region and beyond.

Legislative imitation and the academic exchange of ideas also contributed to these transformations in fiduciary norms. The early experience in civil law jurisdictions in East Asia suggests that codes travel better than case law, with the code-based duty of care and specific prohibition of conflicted transaction more readily accepted than common law formulation, including duty of loyalty. However, in common law jurisdictions in East Asia under British colonial rule, equity jurisprudence based on English case law was influential along with the legislation modeled after the UK and Commonwealth legislation. Although the divide between civil and common law systems was tangible in earlier years, the interactions between them became more frequent and dynamic in and after the 1990s. Within common law jurisdictions, American and Anglo-Commonwealth approaches had important differences, and vacillation in intellectual leadership between them shaped the trends of fiduciary norms and governance structures across East Asian jurisdictions.

The increasing movement of people, services, and capital across national borders also is a factor driving the transnational development of fiduciary norms in East Asia. This became prominent particularly in the 1990s and onward, with Hong Kong and Singapore spearheading the trend with their quest to be international financial centers. South Korea and Taiwan also carried out corporate governance reforms out of a desire to attract foreign investments.[141] Even in Japan, sensitivities to corporate governance arose with the rise in foreign investors in Japanese capital markets and the concomitant decline in cross-holding among domestic companies.[142]

Finally, regional and global crises have had unpredictable but profound consequences, operating as precipitating conditions of transformative change and bringing about the transnational uptake of fiduciary norms in East Asia. The Asian financial crisis led major Asian jurisdictions to introduce American-style fiduciary norms. The global financial crisis in 2008 provided momentum for the UK-style corporate governance norm to garner wider acceptance in East Asia and across the globe.

[141] *See* Liu, *supra* note 40, at 259 (Taiwan); Chun, *supra* note 72, at 188–90 (South Korea).

[142] Hideaki Miyajima & Fumiaki Kuroki, *The Unwinding of Cross-shareholding in Japan: Causes, Effects, and Implications*, *in* Corporate Governance in Japan: Institutional Change and Organizational Diversity 79, 85 (Masahiko Aoki et al. eds., 2007); Buchanan et al., *supra* note 101, at 126–27.

8.4.2 *Normative Settlement and Institutional Factors*

Transnationalization does not automatically lead to uniformity or the universal enforcement of the law.[143] A conspicuous feature of fiduciary law is that its core notion of loyalty has almost universal appeal as both a moral and a legal principle. This is so even though fiduciary law is often considered common law in origin. Although civil law jurisdictions did not use the terms "fiduciary" or "duty of loyalty" in earlier times, their equivalents could be found in the form of regulation of conflicted transactions by certain categories of entrusted persons. Yet, the different formulations or perceptions of fiduciary norms have created tensions both within the domestic and in cross-border contexts. The indigenous notion of loyalty supposedly overridden by modern fiduciary law would sometimes surface unexpectedly, leading to debates and complications in reform processes.

The ubiquity of a basic concept of fiduciary loyalty may explain the relatively weak presence of institutional bodies that operate transnationally to enhance harmonization and uniformity. This was particularly true until the 1980s. Even when the IMF and the OECD began to operate in the field of corporate governance in the 1990s, their role was more limited than that of, for instance, the Basel Committee in banking regulations[144] or the International Organization of Standardization in industry regulations.[145]

Given this background, at least three factors characterized the evolution of fiduciary law in the region. The first is a change in the pattern of social interactions. Tamar Frankel explained the rise of fiduciary law in terms of the shift in social relations from status-based ones to more particularized and functional relations of reliance, although she carefully noted the danger of overgeneralization.[146] Both in Japan and East Asia, the status-based notion of loyalty held sway for a long time, but gradually lost its grip as the influence of the household abated and corporate dominance declined toward the end of the twentieth century.[147] The greater mobility of the population, both within and across national borders, accelerated the trend in recent years.

Second, fiduciary norms have shifted from rule-based to standard-based forms.[148] This is significant because the shift can facilitate the application and cross-fertilization of such rules across broader subject matters and across different jurisdictions with different social and legal backgrounds. For civil law East Asia, there has

[143] Halliday & Shaffer, *supra* note 137, at 55–58.
[144] Eric Helleiner, *Regulating the Regulators: The Emergence and Limits of the Transnational Financial Legal Order*, *in* Halliday & Shaffer, *supra* note 4, at 231, 235–54.
[145] Tim Büthe, *Institutionalization and Its Consequences: The TLO(s) for Food Safety*, *in* Halliday & Shaffer, *supra* note 4, at 258, 267–69.
[146] Tamar Frankel, *Fiduciary Law*, 71 Cal. L. Rev. 795, 798–801 (1983).
[147] Katsuto Iwai, What Will Become of the Company Henceforth? 354–60 (2008).
[148] *See*, *e.g.*, Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 Duke L. Rev. 557 (1992).

been an observable shift from the predominance of individualized rules that regulate various conflicting transactions to a gradual acceptance of the American duty of loyalty across many areas of law. A similar shift from particularized rules to broader principles happened in common law jurisdictions, in which more theorizing of fiduciary law took place toward the end of the twentieth century.[149] These developments may have been affected by the greater acceptance of the unified conception of "fiduciary-like duties" in recent years in European civil law jurisdictions.[150]

Third, a shift in the regulatory approach from the reliance on hard law to a greater use of soft law facilitated a broader reception of fiduciary norms. In the Japanese context, for instance, the ambivalence of the American-style fiduciary governance that emphasized shareholder primacy and court enforcement led to the adoption of an optional approach to corporate governance. The UK Corporate Governance Code and Stewardship Principles proved more attractive because they allowed for a divergence from the standard model. The soft law regulation allowed relevant actors to deviate from the norm, but when pressed to explain the deviation, they often chose to adopt the standard model. This allowed legislators, regulators, exchanges, and sometimes the court to wait for the general acceptance of the norm and then give them binding effect, hardening the intended norms.

Despite these general trends in gradual acceptance, the motivations of domestic policymakers in East Asia often varied from what the overseas proponents of fiduciary regulations intended. At the same time, these regional divergences and gaps could serve as an opportunity to reconsider the prevailing fiduciary norms.[151] For most of the period reviewed earlier, Asian jurisdictions were on the receiving end of the conveyance of fiduciary norms. Despite the rise in its economic power, Japan played, at best, a modest role in promoting legal unification or transnational ordering.[152] Nevertheless, the rise of Asian wealth created an opportunity to reconsider some of the broadly accepted notions of fiduciary models outside Asia. Whether this will lead to positive changes in the cross-border dialogue or offer an alternative that has universal appeal remains to be seen.

8.4.3 *Fiduciary Norms in Distinct Areas of Law*

The discussion so far was mostly concerned with corporate and trust laws. The global and transnational transformation is beginning to influence areas that have

[149] *See* notes 22–24 and accompanying text.
[150] Martin Gelter & Geneviève Helleringer, *Fiduciary Principles in European Civil Law System*, *in* Criddle et al., *supra* note 2, at 583, 585.
[151] *See supra* notes 135–139, and accompanying texts.
[152] Braithwaite & Drahos, *supra* note 4, at 27 ("Japan's influence is remarkably weak.")

been less susceptible to such changes, namely family, guardianship, succession, and nonprofits.[153]

In Japan, over the past few decades, fiduciary rules and "duty of loyalty" provisions were newly introduced in statutes governing pensions,[154] trusts,[155] and nonprofits,[156] as well as professional responsibilities applicable to lawyers.[157] It should be noted that Japanese society is rapidly aging. When the Japanese age-old guardianship system was reformed in 1999,[158] the use of guardianship increased, but abuse also skyrocketed. Beginning in 2010, a broader cohort of the Japanese population is looking to trusts as an alternative to guardianship and wills.[159] Similar social changes in East Asia may portend the broader application of fiduciary norms. The populations in the region are also aging, with Japan closely followed by Hong Kong, Singapore, South Korea, and Taiwan. The Chinese population aged sixty-five years and above will grow from 136.9 million in 2015 to an estimated 348.8 million by 2030.[160]

Another notable change is the realignment of the relationship between the government and civil society. In Japan, criticism of bureaucratic overbearing on charitable institutions led to the overhaul of nonprofit legislation in 2006.[161] Broadly in East and South East Asia, there has been a tide of nongovernmental organizations (NGOs) mushrooming in policy areas such as environmental protection, human rights, and women's rights since the 1990s and onward, although the relationship between the State and civil society has remained complex.[162] Civic activities have flourished in post-military regimes in South Korea and Taiwan, and China also introduced new charity legislation in 2016.[163] The vitality of Hong Kong's civil society manifested itself in recent

[153] Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 Modern L. Rev. 1, 16–17 (1974).

[154] Defined Contribution Pension Plans Act, Law No. 88 of 2001, §§ 43, 44; Defined Benefit Corporate Pension Plans Act, No. 50 of 2001, §§ 69–72.

[155] Trust Act, Law No. 108 of 2006, §§ 29–32.

[156] General Association and General Foundation Act, Law No. 48 of 2006 §§ 83–84; Social Welfare Act, Law No. 45 of 1951, §§ 45-16, inserted by Law No. 21 of 2016.

[157] Japan Bar Association, Code of Professional Responsibilities §§ 27, 28, 42, 63–68 (2004).

[158] Consensual Guardianship Contract Act, Law No. 150 of 1999; Civil Code §§ 838–876-10, amended by Law No. 149 of 1999.

[159] Masayuki Tamaruya, *Japanese Wealth Management and the Transformation of the Law of Trusts and Succession*, 33 Tr. L. Int'l 147, 147–48 (2020).

[160] Wang He et al., The Aging World 2015 3–11 (US Census Bureau, March 2016); Mitsuru Obe, *Asia's Worst Aging Fears Begin to Come True*, Nikkei Asian Review (Apr. 9, 2019).

[161] Masayuki Tamaruya, *Fiduciary Law and Japanese Nonprofits: A Historical and Comparative Synthesis*, *in* Firm Governance: The Anatomy of Fiduciary Obligations in Business 261 (Arthur Laby & Jacob Russell eds., 2021).

[162] Lei Xie and Joshua Garland, *NGOs in East and Southeast Asia*, *in* Routledge Handbook of NGOs and International Relations 463, 644 (Thomas Davies ed., 2019).

[163] Charity Law of the People's Republic of China, The National People's Congress Chairman's Order 12th Congress No. 43.

years, although it suffered a setback from the crackdown by Beijing in 2020.[164] Hong Kong has operated without a charity commission, and a reform proposal to introduce one had failed in 2013.[165] In Singapore, charities have long been neglected, but recent years have seen greater interest in part because of the rise in philanthropic momentum, and in part owing to some publicized scandals implicating major charities.[166]

At a more conceptual level, there has been a greater appreciation of the trust and its equivalents in civil law jurisdictions around the turn of the last century.[167] Comparative inquiries into both common and civil law jurisdictions have shown that trusts can be understood as constituting a part of organizational law enabling asset partitioning and fiduciary governance.[168] Although some European jurisdictions have been slow to introduce trusts in noncommercial settings, the East Asian experience can complement academic inquiries in Europe by indicating that trusts can be used as an alternative to guardianship and testamentary instruments.[169] All this opens up the possibility of recursive development of fiduciary norms across civil law and common law jurisdictions and across various problem areas in which a person entrusted with certain properties or powers is under an obligation to act solely in the interests of the beneficiary and to avoid, or at least manage, any conflicts of interest.

8.5 CONCLUSION

In her 2014 article exploring the possibility of universal fiduciary principles, Tamar Frankel sought to bridge differences between the common law and civil law jurisdictions.[170] Although evolution is not yet complete, the East Asian example suggests that fiduciary norms may gradually settle upon certain standards that cut across the divide between common law and civil law. In evaluating the degree of settlement (or lack thereof), the theory of transnational legal ordering provides a

[164] Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (June 30, 2020).

[165] The Law Reform Commission of Hong Kong, Report: Charities (Dec. 2013).

[166] Rachel P. S. Leow, *Four Misconceptions about Charity Law in Singapore*, Singapore J. L. Stud. 37–54 (2012).

[167] Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. Rev. 434 (1998); Commercial Trusts in European Private Law (Michele Graziadei et al. eds., 2005).

[168] Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 Yale L.J. 387 (2000); Robert H. Sitkoff, *Trust Law as Fiduciary Governance Plus Asset Partitioning*, *in* The Worlds of the Trust 428 (Lionel Smith ed., 2013).

[169] *See* David J. Feder & Robert H. Sitkoff, *Revocable Trusts and Incapacity Planning: More than Just a Will Substitute*, 24 Elder L.J. 1 (2016); Passing Wealth on Death (Alexandra Braun et al. eds., 2016).

[170] Tamar Frankel, *Toward Universal Fiduciary Principles*, 39 Queen's LJ 391, 432–35 (2014).

useful analytical framework for the detailed understanding and nuanced explanation of the evolution of fiduciary law across jurisdictional borders.

Fiduciary law's development in East Asia, which spans more than a century, provides a particularly rich field for exploring processes of transnational legal ordering. The historical development of East Asian fiduciary law contains certain unique features. The conspicuous role of national law set fiduciary law apart from other examples of transnational legal ordering.[171] Indigenous loyalty norms have uniquely worked with local conditions, as they facilitated the transnational settlement of fiduciary norms, but at the same time created tensions implicating modern reform debates and implementation of reforms. To the extent that the theory of transnational legal ordering has been shown to provide a valuable framework of analysis for this area of law that is historically unique, dynamically changing, and attracting attention worldwide, this chapter has confirmed its validity and broad application.

[171] Thilo Kuntz, *Transnational Fiduciary Law: Spaces and Elements*, 5 U.C. Irvine J. Int'l Transnat'l & Comp. L. 45, 64–66 (2020).

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