

**BULL-DOG SAUCE FOR THE JAPANESE SOUL?
COURTS, CORPORATIONS, AND
COMMUNITIES—A COMMENT ON
HALEY’S VIEW OF JAPANESE LAW**

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INTRODUCTION

A few years ago, in the immediate aftermath of Livedoor’s sensational bid for Nippon Broadcasting Corp. and the promulgation of governmental guidelines on hostile takeovers permitting the use of a poison pill defense, I published *In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan* (“*Delaware’s Shadow*”).¹ In it, I drew parallels between legal and market developments in the 1980s in the United States (more specifically, in Delaware, the legal home of most large public companies in the United States) and similar developments in Japan in the 2000s.

In the three and a half years since that essay was published, events in Japan have continued to unfold in interesting ways. Although unsolicited bids in Japan have not become commonplace, they are no longer as rare as a sighting of Haley’s Comet.² There have been about ten hostile bids in the post-Livedoor period from late 2005 to the end of 2007. There has been an explosion of interest in takeover defenses, and today about four hundred publicly traded Japanese firms have adopted some form of shareholder rights plan, although from an American perspective most of the plans have taken a highly unusual form. Japanese courts have decided several more cases arising out of contests for corporate control, laying the foundation—as yet uneven and incomplete—for a Japanese takeover doctrine. One of these cases, *Steel Partners Japan Strategic Fund (Offshore), L.P. v. Bull-Dog Sauce Co.*³ (“*Bull-Dog Sauce*”), contains a rather startling ruling from the Tokyo High Court which, if widely adopted by the judiciary, could

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1. Curtis J. Milhaupt, *In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan*, 105 COLUM. L. REV. 2171 (2005).

2. Since I could not find a way to use this in the title, I am wedging it in here, with apologies to readers.

3. 1809 SHŌJI HŌMU 16 (Sup. Ct., Aug. 7, 2007).

have a profound and probably stifling impact on the market for corporate control in Japan.

These developments are timely for a celebration of John Haley's career. One of Haley's important contributions to our understanding of Japanese law is his claim that a communitarian ethos permeates the formation of law in Japan, particularly in the hands of the courts. Commentators have long described the Japanese firm in communitarian terms. Recall Ronald Dore's "employee-favoring" Japanese firm⁴ or Zenichi Shishido's depiction of the Japanese "Company Community."⁵ The rise of hostile takeovers in Japan poses big challenges for the Japanese firm in its postwar incarnation. A robust takeover market—even one that stopped well short of U.S. volumes of activity—would put tremendous pressure on the facets of Japanese corporate governance most closely associated with communitarian ethos, such as expectations of long-term employment, smooth inter-generational transitions in top management, and relatively stable linkages between the firm and its key providers of capital and other inputs.⁶

With this tension between the community and market-favoring aspects of current Japanese corporate governance in mind, and in preparation for this celebration of Haley's work, I reread *The Spirit of Japanese Law*.⁷ The final passage states:

The defining pattern for Japanese law, during the course of the twentieth century, has been its communitarian orientation. How enduring will be this emphasis can only be guessed at. To what extent it will continue into the next century is open to question. . . . Change through learning from the West, concern for individual autonomy, and the views of scholars are also predominant features of the spirit of Japanese law. During the next century, perhaps their combined influence, along with economic imperatives, will produce another transforming change. . . .

More certain is the proposition that Japanese judges will shoulder a large share of the responsibility for whatever change may

4. RONALD DORE, STOCK MARKET CAPITALISM, WELFARE CAPITALISM: JAPAN AND GERMANY VERSUS THE ANGLO-SAXONS (2000).

5. Zenichi Shishido, *Reform in Japanese Corporate Law and Corporate Governance: Current Changes in Historical Perspective*, 49 AM. J. COMP. L. 653, 654 (2001).

6. Contrast the recent depiction of shareholders by the Vice Minister of Economy, Trade and Industry as "stupid, greedy, adulterous, irresponsible and threatening." Andrew Morse & Sebastian Moffett, *Japan's Companies Gird for Attack*, WALL ST. J., Apr. 30, 2008, at A1.

7. JOHN OWEN HALEY, THE SPIRIT OF JAPANESE LAW (1998).

come through law. They cannot evade or shift it to others. Within law's domain they will have the last word.⁸

Significantly, although Haley focuses on the courts, he recognizes that the entire lawmaking production process in Japan gives life to this community-favoring spirit. He writes, “[t]he ways in which legal rules are made, enforced, interpreted, and applied not only reflect Japan’s communitarian emphasis but also contribute to its endurance in face [sic] of inexorably eroding influences.”⁹ As we will see, this is an insightful perspective on the formation of takeover law and policy in Japan.

In this short Essay, I take stock of the recent hostile takeover developments in Japan with an eye toward Haley’s conception of Japanese law and its trajectory into the future. Part I briefly outlines my major arguments in the previous essay. Readers familiar with that work can fast-forward to Part II, which examines post-Livedoor developments. Part III takes stock of these developments in light of Haley’s ideas about the animating principle of law and the role of the courts in twentieth-century Japan. I conclude that Haley’s perspective is very helpful in understanding how the judiciary has responded to legal issues arising out of takeover bids thus far. But an examination of how the courts wound up with this issue and how they have resolved it to date sheds light on some potentially negative consequences and limitations of this approach, particularly as the Japanese economy and society become more heterogeneous.

I. LIVEDOOR AND THE TAKEOVER GUIDELINES

In extremely brief overview, *Delaware’s Shadow* depicted a Japanese system of corporate governance in flux, buffeted by both external and internal forces. When markets changed in the 1990s, corporate law that was formerly irrelevant or complementary to postwar Japanese economic institutions became problematic. Dissatisfied with the constraints imposed by law, market participants responded as they did in the United States two decades earlier: by pursuing legal strategies, adapting to governance or incentive structures outside the legal system, and making use of the new environment to push the edges of “acceptable” market conduct. These actions thrust novel transactions into the realm of contemplation and, in turn, raised new questions for the legal system to answer. Many of the parallels between Delaware in the 1980s and Japan in the 2000s are

8. *Id.* at 211–12.

9. *Id.* at 17.

striking. In both systems, market and legal changes reverberated through the political economy, transforming existing corporate governance institutions and catalyzing further development of the corporate law. In contrast to developments in the United States, however, these changes in Japan involved large-scale transplantation of foreign legal technologies and standards, while market forces have remained far more muted than in the United States.

For Japan, the rise of hostile takeovers presages further acceleration in the reconfiguration of its postwar economic system, with major implications for its legal system as well. *Delaware's Shadow* ventured the (relatively safe) prediction that the judiciary would take on a higher profile as arbiters of market conflict as a result of the spike in takeover activity.¹⁰ Indeed, as the Livedoor episode shows, the rise in hostile takeover activity in Japan beginning in the 2000s brought the Japanese judiciary into much closer contact with a central issue posed by any takeover: who decides whether control over corporate assets will be transferred?

A. Livedoor

The first and most dramatic illustration of this new trend is the Livedoor bid for Nippon Broadcasting System (“NBS”) in 2005. Since that transaction is fully described in *Delaware's Shadow*,¹¹ I will focus exclusively on the judicial decision, rendered in response to the bidder’s (Livedoor’s) request for an injunction to prevent incumbent management of the target (NBS) from issuing a block of warrants to its de facto parent company. Exercise of the warrants would have dramatically diluted Livedoor’s holdings in NBS.

The Tokyo High Court affirmed the District Court’s decision to enjoin the warrant issuance as “grossly unfair,” enunciating the following rule:

In principle, where a contest for corporate control has emerged, it constitutes a grossly unfair issuance (Commercial Code §280-39(4); §280-10) to issue warrants, the primary purpose of which is for existing management or a specific shareholder who exercises

10. It is true that the judiciary played some role in the market for corporate control in Japan in the past. See *Shūwa K.K. v. K.K. Chūjitsuya*, 704 HANREI TAIMUZU 84 (Tokyo Dist. Ct., July 25, 1989) (enunciating a primary purpose test for a share issuance to a white knight). However, it would be hard to make the Haley-esque argument that the courts were central to the formation or sustenance of a communitarian orientation in Japanese corporate law and governance in postwar Japan. Nonetheless, the judiciary undoubtedly buttressed a key feature of Japanese corporate life in the postwar period: lifetime employment.

11. Milhaupt, *supra* note 1, at 2178–80.

influence over management to retain control, by diluting the holdings of another shareholder. However, . . . where the hostile bidder (1) intends to make a target company or its affiliates repurchase the shares for a premium after the stock price increases (is engaged in greenmail); (2) intends to transfer intellectual property, know how, corporate secrets, key business transactions or customers, which are vital for the management of the company, to the bidder or its affiliates (is engaged in “scorched earth” policies); (3) has acquired the target company’s shares so that after acquiring control, the bidder can liquidate assets to secure or pay off bidder’s debts or those of related companies; or (4) obtains temporary control of management to sell off valuable assets unrelated to the core business such as real estate or securities in order to pay a one-time dividend from the proceeds, or sell the stock after having driven up the stock price due to the high dividend—in other words, where there is an abusive motive of exploiting the target—then it is not appropriate to protect the bidder as a shareholder, and if it is clear that . . . the interests of other shareholders will be harmed, issuance of warrants may be permitted as appropriate in order to preserve or protect the Board of Directors’ control rights, within the limits of necessity and appropriateness as to method of resistance.¹²

Finding insufficient evidence that any of these abusive motives were present in Livedoor’s bid, it concluded that NBS’s board had issued the warrants with the primary purpose of preserving management’s control. Accordingly, the court enjoined the issuance. Note the similarities between the rule set out by the High Court, with its implicit threat analysis and proportionality requirement, and the Delaware Supreme Court’s opinion in *Unocal Corp. v. Mesa Petroleum Co.*¹³ (*Unocal* authorizes defensive measures in response to a threat to corporate policy and effectiveness, provided the response is proportionate to the threat). But the Japanese High Court emphasizes that management has broad latitude to evaluate corporate value “from a mid- to long-term perspective relating to economic factors, changes in social and cultural sensibilities of citizens, developments in technology affecting the industry, and so on.”¹⁴ In short,

12. *Nippon Hōsō K.K. v. Livedoor K.K.*, 1173 HANREI TAIMUZU 125 (Tokyo H. Ct., Mar. 23, 2005) (Appeal from Injunction Against Issuance of Warrants). Note the parallel to the early Delaware case, *Cheff v. Mathes*, 199 A.2d 548 (Del. 1964), in which the court’s first attempt to fashion a rule on defensive measures turned on an assessment of motives.

13. 493 A.2d 946 (Del. 1985).

14. *Livedoor*, 1173 HANREI TAIMUZU at 134.

the High Court's decision presages the development of a *Unocal* rule with Japanese characteristics, setting an outer boundary for entrenchment attempts by incumbent management but sanctioning defenses to protect a broad range of corporate interests far beyond shareholder value.¹⁵

B. Ministry Takeover Guidelines

The other key development at this time was the joint promulgation of Takeover Guidelines by the Ministry of Economy, Trade and Industry ("METI") and the Ministry of Justice. As cross-shareholding declined in the 2000s and "in light of concerns about the steady rise of hostile bids,"¹⁶ the ministries established a Corporate Value Study Group composed of legal experts and business representatives to consider an appropriate policy response to hostile takeover activity. The Study Group's interim report, issued in March 2005 in the midst of the Livedoor controversy, followed extensive research and consultations with experts regarding Anglo-American takeover defenses and legal precedents.

The report notes that the establishment of defensive measures in Japan had been hampered by uncertainty over their legal effect, a paucity of precedents and experience, and a lack of consensus on what constitutes reasonable defensive measures.¹⁷ It then favorably cites an opinion of the Ministry of Justice that "[i]f adjusted for Japanese circumstances, most defensive measures recognized in the U.S. and Europe can also be implemented in Japan."¹⁸ The report provides an exhaustive analysis of Delaware's experience with defensive measures, in particular the poison pill, and focuses on the *Unocal* rule and its progeny.

Significantly, however, the report makes clear that defensive measures should be implemented to protect *corporate* value, a concept astutely defined in such a way as to place share price in a human, communitarian context:

15. *Unocal* similarly suggests that a broad range of considerations is permissible for a board in deciding whether to raise defenses to a bid. However, subsequent cases, particularly *Revlon, Inc. v. MacAndrews & Forbes Holdings Inc.*, 506 A.2d 173 (Del. 1986), and cases applying it, cabin those considerations of non-shareholder interests significantly.

16. KIGYŌ KACHI KENKYŪ KAI [CORPORATE VALUE STUDY GROUP], DAI 8 KAI TEKITAITEKI BŌEISAKU (KIGYŌ KACHI BŌEISAKU) NO SEIBI, KIGYŌ KACHI KENKYŪKAI NO RONTEN KŌKAI NO KOSSHI TO KIGYŌ KACHI BŌEI SHISHIN SAKUTEI NI MUKETA TAIŌ (2) [8TH MEETING, SETTING FORTH MEASURES TO DEFEND AGAINST HOSTILE TAKEOVERS (MEASURES TO PRESERVE CORPORATE VALUE), SUMMARIZING DISCLOSURE ISSUES RAISED BY CORPORATE VALUE STUDY GROUP, AND ESTABLISHING SCHEME FOR PRESERVING CORPORATE VALUE (2)] 2 (2005), available at <http://www.meti.go.jp/committee/materials/downloadfiles/g50307a11j.pdf>.

17. *Id.* at 18.

18. *Id.* at 19.

The price of a company is its corporate value, and corporate value is based on the company's ability to generate profits. The ability to generate profits is based not only on managers' abilities, but is influenced by the quality of human resources of its employees . . . good relations with suppliers and creditors, trust of customers, relationships with the local community, etc.¹⁹

Moreover, throughout its reports, the Study Group uses the term "corporate community." We get some insight into what this term means when the Study Group lists "abilities peculiar to Japanese companies": cultivating human resources peculiar to the firm to produce product differentiation, forging good relations with valued business partners, building trust with customers and the regional economy, unique know-how, and organizing power effective to enhance long-term corporate value.²⁰ Thus, while borrowing heavily from Delaware takeover doctrine in formulating its policy recommendations, the Study Group endorsed a more holistic, stakeholder-oriented vision of the firm than is typical of the Delaware courts and market participants in the United States.

Based in part on the Study Group's report, Takeover Guidelines were jointly issued by METI and the Ministry of Justice in May 2005. The Takeover Guidelines reflect the influence of Delaware jurisprudence, although they place more emphasis on advance shareholder approval of defensive measures as a means of ensuring fairness than does Delaware doctrine.²¹ Most significantly, the Takeover Guidelines explicitly endorse the shareholder rights plan (the "poison pill" in M&A jargon) as a defensive measure under Japanese corporate law.

After the dust had settled a year later, the Study Group noted that "we can say that Japan is changing from the situation without rules to the situation with formulated rules."²²

19. *Id.* at 22.

20. CORPORATE VALUE STUDY GROUP, CORPORATE VALUE REPORT: TOWARD THE FIRM ESTABLISHMENT OF FAIR RULES IN THE CORPORATE COMMUNITY 60 (2006).

21. MINISTRY OF ECON., TRADE & INDUS. & MINISTRY OF JUSTICE, GUIDELINES REGARDING TAKEOVER DEFENSE FOR THE PURPOSES OF PROTECTION AND ENHANCEMENT OF CORPORATE VALUE AND SHAREHOLDERS' COMMON INTERESTS 6-14 (2005).

22. CORPORATE VALUE STUDY GROUP, *supra* note 20, at 59.

II. POST-*LIVEDOOR* DEVELOPMENTS

As noted in the Introduction, about ten unsolicited bids were made in the three years following the *Livedoor* case. Not surprisingly, the promulgation of the Guidelines coupled with the existence of these bids sparked a surge of interest in defensive mechanisms among publicly traded Japanese firms. As Table 1 shows, as of July 2007, 371 firms had adopted a shareholder rights plan. These Japanese poison pills have taken a distinctive form. As the Table shows, the overwhelming majority of pills are of the pre-warning (*jizen keikoku*) variety. This is not a legal instrument; rather it is a public statement by the board setting forth the procedures to be followed when a large-scale acquisition of the company's shares is made. The public statement declares that if an acquirer starts an acquisition or takeover bid that would result in the acquirer holding a specified percentage (generally twenty percent) of the target company's outstanding shares, the board of the target will establish a special committee to evaluate the bid and consider alternatives. If the committee determines that the acquisition would damage the "corporate value of the company or the common interests of shareholders," it will recommend that the board issue warrants to the shareholders other than the bidder.

TABLE 1: TYPES OF DEFENSIVE MEASURES

As of	Pre-warning type		Trust type	
	Number of companies	Ratio (%)	Number of companies	Ratio (%)
July 2006 ²³	143	93.5	10	6.5
July 2007 ²⁴	371	97.4	10	2.6
Increase (2007/2006)	2.6x		0	

Among pre-warning defensive measures, forty-nine companies structured the measure so that shareholders' approval is required or possible.²⁵ Those companies might have attempted to minimize the risk of injunction by involving shareholders in the adoption or activation of

23. Amane Fujimoto et al., *Tekitaiteki Baishū Boeisaku no Dōnyū Jōkyō* [Status of the Adoption of Defensive Measures Against Hostile Takeovers], 1776 *SHŌJI HŌMU* 46, 49 chart 4.

24. Amane Fujimoto et al., *Tekitaiteki Baishū Boeisaku no Dōnyū Jōkyō* [Status of the Adoption of Defensive Measures Against Hostile Takeovers], 1809 *SHŌJI HŌMU* 31, 34 chart 4.

25. *Id.* at 38.

defensive measures.²⁶ Interestingly, as shown in Table 2, only 35.5% of companies whose defensive measure was structured to require shareholders' approval have set up special committees. This probably reflects the idea that a shareholders' decision is sufficient to eliminate a discretionary decision by the board of directors.

TABLE 2: USE OF SPECIAL COMMITTEES²⁷

Decision maker on defensive measure	Committee formed (# of companies)	Committee not formed (# of companies)	Total (# of companies)	Ratio (%)
Shareholders' approval only	11	20	31	35.5
Board approval and (possibly) shareholders' approval	18	0	18	100
Board approval only	288	34	322	89.4
Total	317	54	371	85.4

A. Bull-Dog Sauce

An important ruling on defensive measures adopted in the face of a hostile bid resulted from a 2007 bid by a U.S. private equity fund for a Japanese firm. As of May 2007, the private equity fund Steel Partners and its affiliates owned 10.25% of the outstanding shares of Bull-Dog Sauce, a condiment maker and household name in Japan listed on the second section of the Tokyo Stock Exchange.²⁸ On May 18, 2007, Steel Partners Japan Strategic Fund, a Delaware limited liability company, launched a tender offer for all of the outstanding shares of Bull-Dog Sauce. The board of directors of Bull-Dog Sauce opposed the tender offer and made a discriminatory allocation of warrants to shareholders as a defensive measure. The board allocated three warrants per share to all existing shareholders.²⁹ The warrants were exercisable into one common share of Bull-Dog Sauce per warrant. Steel Partners was prohibited from exercising the warrants, but it was entitled to receive an amount of cash per warrant equal to the initial tender offer price multiplied by one-fourth, the projected

26. Kenichi Osugi, *What Is Converging? Rules on Hostile Takeovers in Japan and the Convergence Debate*, 9 *ASIAN-PAC. L. & POL'Y J.* 143, 157–58 (2007).

27. Amame, *supra* note 24, at 39 chart 9.

28. Steel Partners Japan Strategic Fund (Offshore), L.P. v. Bull-Dog Sauce Co., Ltd., 1809 SHŌJI HŌMU 16 (Sup. Ct., Aug. 7, 2007).

29. *Id.* at 16–17.

dilution ratio after the warrants were issued.³⁰ As a result of this measure, the number of shares held by Steel Partners would remain the same, while the number of shares held by other shareholders would increase fourfold. The proposal was approved by special resolution at the annual shareholders meeting on June 24, 2007, with 83.4% of the outstanding shares voting in favor.³¹

On June 13, 2007, prior to the annual shareholders meeting, Steel Partners sought a preliminary injunction from the Tokyo District Court to enjoin the warrant issuance. The two principal legal issues were (i) whether the allocation violated the principle of shareholder equality under the corporate law, and (ii) whether the defensive measure was unnecessary and unreasonable, and thus “grossly unfair” within the meaning of the corporate law.³²

The Tokyo District Court dismissed the request for a preliminary injunction.³³ The court held that the discriminatory allocation of warrants is not in conflict with the principle of shareholder equality when the company has taken the measure by special resolution and equal economic benefits to shareholders are assured. The court noted that corporate law permits other discriminatory practices such as squeezing out minority shareholders by a special resolution of the shareholders.³⁴ As to the necessity and reasonableness of the defensive measure, the court reasoned that a different standard should apply when a defensive measure is approved at the general shareholders meeting, as compared to one based on a decision of the board of directors. Ultimately, the shareholders have the authority to decide who controls the company, and should decide whether it is necessary to take defensive measures. The District Court concluded that “[t]he necessity of a defensive measure would be denied only when the shareholder meeting’s decision is clearly unreasonable.”³⁵

The Tokyo High Court affirmed, applying a different and rather striking line of analysis.³⁶ The court held that discriminatory treatment among shareholders, depending on the attributes of the shareholders, does not violate the principle of shareholder equality if it is necessary and

30. *Id.* at 17.

31. *Id.*

32. *Id.*

33. See Steel Partners Japan Strategic Fund (Offshore), L.P. v. Bull-Dog Sauce Co., Ltd., 1806 SHŌJI HŌMU 43 (Tokyo D. Ct., June 28, 2007).

34. *Id.* at 50–51.

35. *Id.* at 53–54.

36. See Steel Partners Japan Strategic Fund (Offshore), L.P. v. Bull-Dog Sauce Co., Ltd., 1806 SHŌJI HŌMU 40 (Tokyo High Ct., July 9, 2007).

reasonable in order to prevent damage to corporate value.³⁷ As to the necessity and reasonableness of the measure taken, the court interjected a novel line of analysis in finding that Steel Partners was an “abusive acquirer” (*ranyō teki baishūsha*). It based this finding in view of Steel Partners’ structure as an investment fund with a purely short-term strategy of reselling the shares of the target company at a profit to a third party or to the target company itself, or by selling the assets of the target company.³⁸ Accordingly, the court affirmed the necessity of the defensive measures. The court held that in the face of an “abusive acquirer,” the reasonableness test will be satisfied if the defensive measure does not cause excessive or unreasonable damage to the bidder. When defensive measures are taken against an unreasonable offer, providing the bidder with economic benefits equal to those granted the other shareholders does not have to be assured.³⁹ Thus, the court affirmed the reasonableness of the defensive measure taken by the Bull-Dog Sauce board. A critic of the High Court ruling notes that the court did not thoroughly analyze previous transactions conducted by Steel Partners before labeling it as abusive and that its analysis could chill future investment activities.⁴⁰

The Supreme Court affirmed,⁴¹ applying a more straightforward analysis as to the question whether the warrant issuance was necessary and reasonable. Crucially, it avoided an inquiry into the abusiveness of the acquirer. Similarly to the District Court,⁴² the Supreme Court reasoned that it is the shareholders who should determine whether damage would arise upon acquisition of control by a certain shareholder. The court should respect the decision of shareholders unless there is a material defect in the decision making process.⁴³ Considering the fact that the proposal to issue warrants was approved by 83.4% of the outstanding voting shares, almost all shareholders of Bull-Dog Sauce other than Steel Partners agreed that the defensive measure was necessary in order to prevent damage to

37. *Id.* at 47.

38. *Id.* at 50–51.

39. *Id.* at 51.

40. Wataru Tanaka, *Bull-Dog Sauce Jiken no Hōteki Kentō (Jō)* [*Legal Analysis of Bull-Dog Sauce Case, Part I*], 1809 SHŌJI HŌMU 4, 9–12 (2007).

41. *Steel Partners Japan Strategic Fund (Offshore), L.P. v. Bull-Dog Sauce Co.*, 1809 SHŌJI HŌMU 16 (Sup. Ct., Aug. 7, 2007).

42. There are two main differences between the analysis of the District Court and the Supreme Court. First, the Supreme Court put more emphasis on the fact that the defensive measure was approved by a majority of shareholders, rather than by special resolution as emphasized in the Tokyo District Court decision. Second, the Supreme Court decision suggests that the court should only look for defects in the shareholder approval process, while the Tokyo District Court indicates that the reasonableness of the decision taken by shareholders should also be scrutinized by the court.

43. *Bull-Dog Sauce*, 1809 SHŌJI HŌMU at 18.

corporate value. This fact, concluded the Supreme Court, indicates that the allocation of warrants is not inconsistent with the principle of equality and is not unreasonable. Therefore, the defensive measure was not “grossly unfair” under the corporate law.⁴⁴

One possible effect of the Supreme Court’s opinion, which emphasizes shareholders’ approval as validating the defensive measure, may be to encourage the (re-)establishment of corporate ties to stable, long-term shareholders, so that management can obtain shareholders’ approval of defensive measures in the face of a hostile takeover attempt. Of course, the re-emergence of stable and cross-shareholding patterns among Japanese firms would once again dampen the market for corporate control.⁴⁵

III. SIGNIFICANCE FOR JAPANESE LAW

Let’s return to Haley’s sense that communitarianism, reflected and reinforced in judicial rulings, is the defining quality of Japanese law, while keeping in mind his assertion that, ultimately, it is the judges who shoulder the work of changing Japanese law.

Consistent with Haley’s argument, Japanese judges have taken on—or been thrust into—the heavy lifting in the controversial issue of takeover policy. To be sure, other actors in the political economy, most notably the economic bureaucrats at METI but also in the Ministry of Justice, have not completely relinquished the reins of authority. Yet the form of their involvement has ironically opened the door to the courts. A bit of background is warranted here to understand how the courts were placed at the center of this issue.

Consider two interesting facts about the Takeover Guidelines. First, as their title implies, the Takeover Guidelines are not law. They are self-consciously “soft law”—legally unenforceable standards of conduct designed to serve as a focal point for the development of consensus on fair and reasonable takeover defenses. Indeed, the drafters appear to have been extremely successful in this regard, with a recent survey indicating that ninety-six percent of corporations will refer to the Guidelines when adopting defensive measures.⁴⁶ Why did Japanese government actors resort to soft as opposed to hard (real) law with respect to a matter of

44. *Id.* at 18–19.

45. See Kigyō Kachi Kenkyū Kai [Corporate Value Study Group], Dai 23 Kai Giji Yōshi [Summary of 23rd Meeting] (Oct. 26, 2007), available at http://www.meti.go.jp/policy/economic_industrial/gather/eig0000050/index23.html.

46. CORPORATE VALUE STUDY GROUP, *supra* note 20, at 6.

central importance to a national economy? We will return to this question below.

Second, the Guidelines were formulated at the initiative of METI, which established the Corporate Value Study Group and charged it with laying the groundwork for the Guidelines. Of course, the process followed in this episode—forming a committee of experts under the auspices of an influential ministry to study foreign systems and recommend a solution to a Japanese policy problem—has a long history in Japan. This process is also noted by Haley as an important means of consensus-building in the formation of Japanese law. But METI was arguably not the most appropriate agency to formulate a coordinated response to hostile takeovers. It has no formal jurisdiction over the corporate or securities laws, and other governmental actors such as the Financial Supervisory Agency and the Securities Exchange Surveillance Commission seem more appropriately situated to formulate a legal/regulatory response to this issue.

These two features of the Takeover Guidelines—their non-legislative quality and formulation at the behest of METI—opened the door to judicial involvement in takeovers. A legislative response (over which METI would have had little control or lasting imprimatur) could have eliminated or circumscribed the role of the courts in Japanese takeovers. By contrast, since the Takeover Guidelines are rather Delphic, non-binding, and legally unenforceable standards, they invite—indeed require—action by other actors to answer the key question of who decides whether control over corporate assets should be transferred. It is not obvious that the Japanese courts are the most appropriately situated actors to answer this question. But by gravitating toward Delaware judicial doctrine as the starting point for the Guidelines, the Corporate Value Study Group implicitly ensured heavy involvement by the Japanese courts in contests for corporate control.

As I argued in *Delaware's Shadow*, the choice of Delaware judicial doctrine as the starting point for the formulation of Japanese takeover policy was itself far from obvious.⁴⁷ Arguably, the U.K. City Code represented a more attractive candidate for transplant into Japan than Delaware takeover law. Its relatively straightforward rules are much simpler to replicate and enforce than a complex body of foreign judicial doctrine. And the quasi-administrative role of the Takeover Panel is more consistent with traditional Japanese approaches to economic regulation

47. Milhaupt, *supra* note 1, at 2205–06.

than is Delaware's court-centric approach. But Delaware corporate law had the advantage of familiarity. At least one-third of the Corporate Value Study Group's members had extensive exposure to Delaware corporate law.⁴⁸ Equally importantly for METI and the business constituency to which it responds, Delaware takeover jurisprudence is more protective of management than the City Code.

The upshot of the discussion to this point is that, consistent with Haley's analysis, the courts are now front and center in this important area of economic policy. For now, at least, "[w]ithin the law's domain, judges rule—even in Japan."⁴⁹ But it is important to note the path by which the Japanese judiciary arrived at this destination. It was not the result of a shared perception of superior institutional competence or overwhelming public trust in judicial judgment, but a series of decisions by other players acting on a complex blend of motives, including a desire to protect vested bureaucratic and corporate interests.

How will the Japanese courts decide takeover cases in this new era of heightened market activity and institutional change? Again, a word of background is instructive before examining the conclusion. Indeterminacy may be an unavoidable byproduct of open-textured, fact-intensive standards such as those the Delaware courts have developed and the Takeover Guidelines endorse. Indeterminacy is a criticism frequently leveled at the Delaware doctrine,⁵⁰ and it is likely to apply with even greater force to the application of similar standards by Japanese judges, most of whom lack any serious training or experience in business and finance. Note the three different analyses of the Bull-Dog defensive measures by the three courts in that case, despite the fact that all three courts drew from the Takeover Guidelines in reaching their decision.

If open-textured legal standards are an empty vessel, Haley's work suggests that Japanese judges can be expected to fill them with content that favors the corporate community over the profit-oriented bidder or the selfish, individualistic shareholder. We have already seen a glimpse of this propensity in the quote from the *Livedoor* High Court opinion above. Even more striking is the Tokyo High Court's decision in *Bull-Dog Sauce*. The court focuses exclusively (and without any real analysis) on the bidder's

48. Seven of the twenty-one members of the Study Group that prepared the Report were either corporate lawyers or corporate law scholars. Milhaupt, *supra* note 1, at 2206.

49. HALEY, *supra* note 7, at 90.

50. See, e.g., Ehud Kamar, *A Regulatory Competition Model of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1915–19 (1998) (arguing that the *Unocal* test and related takeover doctrines are indeterminate because the Delaware courts rely heavily on flexible standards and avoid devices that could render application of the standards more predictable).

“abusive” quality, which in the eyes of the court derives from its status as a profit-oriented investor. A quote from *The Spirit of Japanese Law* leapt off the page as I considered the significance of this ruling. Haley writes that for Japanese judges, “[t]he wrongfulness of the behavior is less an infraction of any abstract standard of fair play or honest dealing than the selfish pursuit of individual interests at the expense of others”⁵¹ The High Court’s *Bull-Dog Sauce* opinion is an example par excellence of this judicial tendency to protect the intermediate community (here, the corporation and its employees) against threats posed by the pursuit of individual interests, without significant regard for universal principles or the consequences of its decision for those outside the community.

Even the Supreme Court’s opinion in this case, emphasizing shareholder approval, may be read as a validation of the community over the individual in the Japanese context. It is true that the Delaware courts would likely have resolved this case in the same way as the Japanese Supreme Court. Namely, overwhelming approval of the defensive measure by shareholder vote would have insulated the measure from legal challenge. But in the Japanese economy, where shareholding has typically been used to signify and reinforce underlying business relationships between shareholder and firm, shareholder approval may not carry the same connotations as in the United States. Particularly given the deference Japanese shareholders have typically shown toward management,⁵² shareholder approval may have a distinctly community- and consensus-reinforcing quality, rather than the majoritarian connotation it carries in the United States. While the Supreme Court’s opinion in *Bull-Dog Sauce* potentially could have been read as underscoring the responsibility of management to explain and justify its actions to frustrate a bid (and thereby obtain shareholder approval for those actions), there is little evidence that the market interpreted the ruling in this way. Rather, as noted above, the case has prompted managers to find or reinforce long-term shareholding relationships as a means of protecting the firm from outsiders.

In *The Spirit of Japanese Law*, Haley argues persuasively that the judiciary acts as “interpreters of the community’s conscience and sense of fairness.”⁵³ He does not delve deeply into the question whether the

51. HALEY, *supra* note 7, at 176.

52. This is not to say that shareholders typically exercise significant voice in U.S. corporations. The point is simply that shareholder activism is much less firmly rooted in Japan. Proxy contests and institutional investor activism, for example, have been almost unheard of until recently.

53. HALEY, *supra* note 7, at 176.

judiciary's interpretations of community conscience are accurate or even appropriate, though his scholarship strongly suggests that the judiciary could not maintain the tremendous legitimacy and public respect it enjoys if it badly missed the mark as an arbiter of community values. This claim is most likely accurate, at least to the extent that the Japanese public is aware of judicial decisions. But several questions emerge from this admittedly limited and sketchy overview. First, are courts well situated to interpret community values? The communitarian ethic espoused in Japanese judicial doctrine may be out of step with community sensibilities more often than Haley's analysis would indicate. Certainly there is evidence of this in other areas of Japanese law, such as divorce and other areas involving intimate human relationships.⁵⁴ Or perhaps it is more accurate to say that the "community" whose values are protected by the courts may be increasingly narrow and unrepresentative of Japanese society. Is "communitarianism" a more benign word for protectionism of specific interests? Haley seems to recognize this possibility himself,⁵⁵ but he does not grapple deeply with its implications for Japan generally or for the Japanese judiciary in particular. This question raises an issue of considerable significance for the future of Japanese legal development: in an increasingly diverse economy and society, can the Japanese judiciary retain its legitimacy if its defining role continues to be the interpretation of "community" values without regard to universal principles or the effects of its decisions on competing interests?

CONCLUSION

Recent developments in the Japanese takeover market and law provide a wonderful opportunity to reexamine Haley's *The Spirit of Japanese Law*. Much of his analysis of the Japanese judiciary and its self-perceived role seem apt today. The Takeover Guidelines are a fine example of consensual rule-making that, Haley argues, imbues Japanese law with its communitarian spirit. And in several rulings, recent takeover cases evince the important role of the judiciary in reinforcing a distinctive communitarian ethic that Haley contends is the central feature of Japanese

54. See SHŌZŌ ŌTA, SHAKAI KAGAKU TOSHITE NO KAZOKUHŌ, CHITEKI ZAISANHŌ NO TANKYŪ (2007) (presenting survey evidence that Japanese social attitudes toward divorce are inconsistent with judicial doctrine); MARK WEST, *LOVESICK JAPAN* (forthcoming) (exhaustively surveying judicial opinions on family and related cases and raising the specter of a judiciary whose conceptions of intimacy are distinctive, if not bizarre and completely out of touch).

55. HALEY, *supra* note 7, at 14–19, 205–12.

law, even when applying standards ostensibly derived from a more individualistic and market-driven society such as the United States.

As we celebrate John Haley's contributions to our understanding of Japanese law, application of his analysis to recent developments prompts us to re-evaluate the direction and forces of legal change in a changing Japan.