

社外取締役は必要か？ 株主主権論を考える

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今日お話したいのは

- 世間であまり言及されない実証結果・理論に基づく「非常識」な書生論で、建前論に飽きた(?)皆さんを楽しませる.....怒られるだけかも
- 反市場(原理)論ではありません
 - 米国での研究を参考に、「本物」の市場重視の立場から

基本的視点

- 企業はNexus of Contracts
- 株主＝残余請求権者の目的は何よりカネ儲け
- それに応じなければ経営者は生き残れない

Pluralistic Ignorance

- 自分も含めみんな同じように発言し行動しているけれども、他人と違って自分だけは内心そのコンセンサスに納得していない(と思っている)
- 実はみんな同じ思い
- 誰も内心支持していない言動・行動がコンセンサスとなり、みんないやいやながら従っている
- しかし、一見頑強なこのコンセンサスは「子供」の一言で瞬時に崩壊する可能性

「王様は裸だよ」

C. Bicchieri and Y. Fukui. 1999. The Great Illusion: Ignorance, Informational Cascades, and the Persistence of Unpopular Norms. *Business Ethics Quarterly* 9(1).

C. Bicchieri. 2006. *The Grammar of Society*. Cambridge University Press.

米国取締役会の実態(1)

- S&P1500 (S&P500 + Mid400 + Small600) 平均像
 - 年間8回開催
 - 11人(大)、9人(中)、8人(小)
 - 業種別ばらつきは小さい
 - 女性比率18%(大)、11%(中・小)
 - 要するに一人か二人
 - 重厚長大・ハイテク10%~公益事業20%
 - 平均年齢62歳
 - 業種別ばらつきは小さい

Equilar. 2013 S&P 1500 Board Profile: Compensation & Recruiting Trends (Part 3).

Equilar. 2011 Board Composition Series Report.

米国取締役会の実態(2)

- 平均在職年数9年
 - 業種別ばらつきは小さい
- 独立(社外)取締役は89%(大)、84%(中)、83%(小)
 - 要するに社内取締役はCEOとせいぜいあと一人
- 株主総会での承認比率97%
 - 業種別ばらつきは小さい
- CEO議長兼任比率55%(大)、43%(中)、38%(小)
 - ハイテク32%～公益事業60%
- 現元(他社)CEO14%
 - それでも需要に供給が追いつかない
- 掛け持ち取締役比率26%(大)、18%(中)、10%(小)

本当に現状はうまくいってるのか

- 果たして、年間10回も開かれない、他社CEOをはじめ他のことで忙しい社外取締役役中心の米国取締役会は、うまく機能しているのだろうか
- CEOの「独裁」に都合がよい制度にもみえる
- 一方、厳しい競争下にある企業は、生き残りをかけて、取締役選任においても利益最大化を念頭に置いているはず

実証結果は？

通説はあるものの...

Even if independent directors do serve some purpose, there is little basis for *requiring* firms to have independent directors as a panacea for corporate governance problems. Indeed, the empirical evidence as a whole shows no correlation between director independence and firm performance.

L. Ribstein. 2010. *The Rise of the Uncorporation*. Oxford University Press.

- ただし、米国データに基づく検証には問題が...
なぜか？

「金太郎飴」の米国取締役会

Unfortunately for the researcher, the solicitude many American legislators and judges display toward shareholder claims (usually meritless claims...) obscures this market dynamic in the United States... In this legal environment, outside directors buy protection. By routing its major business decisions past outside directors...it can dramatically lower the costs it incurs in defending against such claims...Reasonably enough, listed firms in the United States have responded to this threat of litigation by appointing majority-outside boards. As a result, however, they no longer offer the dispersion in the data necessary to study any other roles outsiders may perform at a firm.

Y. Miwa and M. Ramseyer. 2005. Who Appoints Them, What Do They Do? Evidence on Outside Directors from Japan. *Journal of Economics and Management Strategy* 14(2).

代表訴訟の実態

The lawyer can get her fee by getting the defendants to agree to a settlement paid by the company's directors' and officers' liability insurer. This could uncharitably be characterized as the defendants paying the lawyer a ransom with the insurer's money, which comes back to the shareholders in the form of higher rates. Meanwhile, the corporation may suffer the disruption of lost executive time and energy defending the case. The plaintiff's lawyer sees these cost mainly as a lever to induce the corporation to pay the “ransom.”

L. Ribstein. 2010. *The Rise of the Uncorporation*. Oxford University Press.

社外役員有効性の実験場日本(1)

- 銀行を除く東証一部約1000社
- 1980年代～1990年代前半
 - 代表訴訟の敷居が高く、ほとんど実例なし
- この時期の日本こそ、訴訟への考慮なしに、社外役員がどう選ばれたかを見る上で格好の実験場
- 監査役も含む
 - Japanese discussions of “*yakuin*” ...typically include the *kansayaku*.
- 役員総数平均19人、うち社外5人
 - 役員総数・社外数(ゼロは1割)のばらつき大

社外役員有効性の実験場日本(2)

- 社外役員選出はランダムではない
 - 公共事業依存率が高い建設会社には元官僚
 - 流動性の低い企業には銀行員

しかし！

Consistent with competitive market pressures toward firm-specifically optimal patterns of board composition, we find no robust association between observable indices of board composition and firm performance.

社外役員有効性の実験場日本(3)

As in the United States, so too in Japan: reformers urge firms to appoint more outside directors. Yet as in the United States, so too in Japan: the logic of market competition should make us wonder. Provided boards matter, by standard economic theory market competition should drive firms toward their firm-specifically optimal board structure. That optimum need not involve many outside directors.

Apparently, board composition may indeed be endogenous: market constraints may indeed push firms toward their firm-specifically optimal board structure.

Y. Miwa and J. M. Ramseyer. 2005. Who Appoints Them, What Do They Do? Evidence on Outside Directors from Japan. *Journal of Economics and Management Strategy* 14(2).

市場の声は無視した方が儲かる

■ 資本市場最大の謎？

- 素人がプロにまぐれではなく勝つ
- それでも高い手数料を払う素人

My own guess is that there is far more professional market activity than is needed to ensure that we have an optimal amount of price discovery.

The major inefficiency in financial markets today involves the market for investment advice, and poses the question of why investors continue to pay fees for asset management services that are so high. It is hard to think of any other service that is priced at such a high proportion of value.

素人以下の「プロ」: 投資ファンド

Table 3

Percentage of US Equity Funds Outperformed by Benchmarks

Fund category	Benchmark index	Percent outperformed	
		2011	5 years through 2011
All domestic equity	S&P 1500	84%	62%
All large cap funds	S&P 500	81%	62%
All mid-cap funds	S&P Mid-Cap 400	67%	80%
All small-cap funds	S&P Small-Cap 600	86%	73%
Global funds	S&P Global 1200	69%	63%
International funds	S&P 700	69%	78%
Emerging market funds	S&P/IFCI composite	54%	83%

Source: Standard & Poor's and CRSP Survivor Bias-Free US Mutual Fund Data Base.

Note: Table 3 presents percentage of US equity funds that were outperformed by various benchmark indexes over the five-year period ending December 31, 2011.

なぜか手数料は上昇

Table 1

Asset-Weighted Expense Ratios for Domestic Equity Funds

(in basis points)

	<i>Including index funds</i>	<i>Excluding index funds and ETFs*</i>	<i>Share of equity mutual funds actively managed</i>
1980			
Expense ratios (basis points)	66.0	66.1	
Total assets (billions)	\$25.81	\$25.71	99.7%
1990			
Expense ratios (basis points)	83.3	85.0	
Total assets (billions)	\$136.11	\$131.69	96.8%
2000			
Expense ratios (basis points)	83.8	94.9	
Total assets (billions)	\$2,158.50	\$1,817.48	84.2%
2010			
Expense ratios (basis points)	69.2	90.9	
Total assets (billions)	\$3,488.35	\$2,473.59	70.9%

Source: Author using data from Lipper Analytic Services.

Note: Table 1 shows expense ratios (in basis points) for all equity mutual funds reporting to Lipper Analytic Services, as well as total assets (in billions of dollars).

*ETFs are exchange-traded funds.

B. Malkiel. 2013. Asset Management Fees and the Growth of Finance. *Journal of Economic Perspectives* 27(2).

存在しない「米国」の企業統治・会社法

- 連合(邦)国家というより、EU類似の国家連合として英国から一緒に独立した *United States of America*
 - Founding Fathersは「民意」に懐疑的
 - DemocracyではなくRepublic (J. Madison *Federalist Papers*)
- 連邦憲法に明文の規定がないものは、各州の権限
 - 企業統治を含む会社法は州の管轄
- 合衆国(連邦)ではなく、XX州の会社法があるのみ
- 上場企業の情報開示は州際(interstate)取引ということで連邦政府の管轄
 - 証券取引法は連邦法

企業統治の競争

- 企業統治においても、競争原理を活用
- Race to the Bottomという批判もあるが...
 - 株価を上げ、資金調達コストを下げねば自分の地位が危ない経営者の立場を考えると？？？
- 全部とは言わないまでも、多くの州の会社法の検討が必要？
- OSのWindows同様、一つの州がこの競争に勝ってデフォルトの地位確立
- それが東部の小さな州デラウェア
 - 上場企業の過半数がデラウェア州（登記）会社

米国会社法の番人の見解(1)

- デラウェア州裁判所の絶大な影響力
- 州最高裁長官(前・衡平裁判所長官)は日本の「米国では」論と全く違う考えの持ち主

Leo Strine, chief justice in Delaware, whose courts have adjudicated many of the most hard-fought shareholder rights cases, has called for a rollback of shareholder powers to prevent a “deluge” of corporate governance votes that are distracting managements and costing companies a small fortune.

Financial Times 2014年3月25日付

米国会社法の番人の見解(2)

■ 上場企業を中心は、裁量を与えられた経営者

Put bluntly, the traditionalist will gladly suffer the failures of empowered centralized managers in order to reap the larger benefits of their decision.

Unlike corporate managers, neither institutional investors as stockholders nor ISS as a voting advisor owe fiduciary duties to the corporations whose policies they seek to influence.

A continued preoccupation solely with management's flaws ignores the reality that the growing influence of institutional investors during the last quarter century has not been an unadulterated good.

L. Strine. 2006. Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America. *Harvard Law Review* 119(6).

米国会社法の番人の見解(3)

■ 営利企業の目的は力ネ儲け

The continued failure of our societies to be clear-eyed about the role of the for-profit corporation endangers the public interest.

The whole design of corporate law in the United States is built around the relationship between corporate managers and stockholders, not relationships with other consistencies.

米国会社法の番人の見解(4)

- しかし、この制度を維持するには長期的視野が必要

The United States, for all its capitalist leanings, never embraced takeovers with anything but deep ambivalence.

A huge disconnect has arisen between the wealth, lifestyle, daily experiences, and interests of the top corporate managers and that of most of the employees in various nations...

When the pressure to deliver profits becomes, as it has, more intense, the rules of the game become even more important.

L. Strine. 2012. Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit. *Wake Forest Law Review* 47(1).

米国会社法の番人の見解(5)

■ 経営者の思いを代弁！

CEOs don't seem to be having fun. Having to explain to employees why the corporation is off-shoring jobs and increasing the employees' share of health insurance costs, having to be lectured by a twenty-something analyst about a penny miss in the quarterly earnings, and having to consider at board meetings cosmetic measures to improve the corporation's corporate governance ratings lest the corporation be subject to an array of shareholder proposals-these are really fun things to do.

米国会社法の番人の見解(6)

■ 上場(株式公開)の意義が失われることへの危惧

Add to that the increased focus on regulatory compliance arising out of the scandals of the turn of the century. Then top it off with a high level of public cynicism about CEO pay and integrity.

For that reason, it should not be surprising to see CEOs seeking solace in high pay or, more recently, in the loving arms of private equity buyers. Ironical though it is, private equity investors are now viewed as the nurturing providers of patient capital compared to the public equity markets.

L. Strine. 2007. Toward Common Sense and Common Ground? Reflections on the Shared Interests of Managers and Labor in a More Rational System of Corporate Governance. *Journal of Corporation Law* 33(1).

米国会社法の番人の見解(7)

■ 経営者(幹部)こそ付加価値の源泉

Corporate managers, in contrast with activist investors such as hedge funds, are actually far more dependent on their employer firm's sustainable value and would thus be more, not less, immune to the temptation of forsaking long-term value for a short-term stock pop coming from an unduly risky business strategy.

Giving managers some breathing space to do their primary job of developing and implementing profitable business plans would seem to be of great value to most ordinary investors.

米国会社法の番人の見解(8)

- 本源的所有者の資金を運用しているだけの「物言う株主」への懷疑

Ideology can be blinding, even apparently when one's secular faith involves the simple creed that those who own stocks are presumptively selfless while those who manage corporations are presumptively selfish and untrustworthy.

The ultimate beneficiaries were dependent on another level of corporate governance agency, at which far fewer protections for stockholders are in place compared to those that constrain the managers of productive corporations.

米国会社法の番人の見解(9)

- 株主主権論者がカンカンになって怒りそうな提言も

Proponents of economic proposals had to pay a filing fee of \$2,000 to \$5,000 and own at least \$2 million or one percent of the company's stock.

Proposals that did not receive at least twenty percent in the first year could be excluded in subsequent years and proposals not receiving thirty percent over a three year period could be similarly excluded.

- Direct Democracyではなく、Republican Democracyであるべきという、Founding Fathers伝来の考え方

L. Strine.2014. Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law. *Columbia Law Review* 114(2).

Strine長官は異端？

- 現職裁判官としては率直すぎるかもしれないが...
- しかし、限りある資源の下、個々人がSelf-Interestを追求すると、原則規制なしで、(ほぼ)うまく行くという「米国流」経済学(新自由主義?)の発想からすれば、Strineの考え方はむしろ自然
 - 人間行動を制約する最重要資源は時間→分業の必然性
- (政治的)直接民主制を直訳したような、日本でよくある議論が最近盛ん(L. Bebchuk等)とはいえ...
- 会社法研究者のなかでは、Strineの考え方がむしろ通説、少なくとも”Traditionalist”(S. Bainbridge, H. Hansmann, M. Ramseyer, R. Romano等)

経済学応用分野としての会社法

■ 法学教育制度の違い

- 日本では法学部の方が経済学部よりエライ
 - その経済学部もマルクス経済学が大きな影響力
- 米国に法学部はなく、法律は医療と同じくプロ（弁護士）になりたい人だけが学ぶ専門職（大学院）教育
 - 経営者は別キャリア、一方、国会議員は約半数が弁護士
 - 学部専攻は経済学が多い、一流校の多くは経営学専攻なし

■ 法曹界での経済学的思考の浸透（汚染）度に差

- Strine長官が特に経済学寄りというわけではない
- 法律は学問（Discipline）ではなく現象に過ぎないと意見も

M. Ramseyer. 2011. Law and Economics in Japan. *University of Illinois Law Review* 2011(5).

Nexus of Contractsとしての企業活動

- 組織と契約の二元論を捨て、企業活動(取引)を契約の束 Nexus of Contractsと考える
 - 組織の「内」「外」の区別は存在しない
 - 契約の束に「主権者」は存在しない
- 企業活動というNexus of Contractsにおいて、株主は債権者、従業員、取引先等と比べ、特別の地位
 - 大きさが確定しないパイの配分を事前に決めるには、少なくとも誰かひとり事後に「残りもの」で我慢する必要
- 株主すなわち残余請求権者 Residual Claimant

S. Sunder. 1997. *Theory of Accounting and Control*. South-Western.

不特定多数の集団意思決定という難問

■ 目的が一致するグループに決定権 (Ownership) 付与

In virtually all cases the group of individuals to whom ownership is given is extremely homogeneous in its interests.

The agency costs from weak monitoring of managers are often worth incurring for the sake of reducing the cost of market contracting.

The principal role of voting in firms is much as it is in most democratic governments: not to aggregate and communicate preferences, but simply to give the electorate some crude protection from gross opportunism on the part of those in power.

H. Hansmann. 1996. *The Ownership of Enterprise*. Harvard University Press.

株主主権論の忘れもの

■ 所有と経営の分離とは

× 株主→経営者

○ 本源的株主→機関投資家→経営者

- 付加価値の源泉であり、企業にコミットする(せざるを得ない)経営者以上の監視が機関投資家その他「市場の声」にも必要
- The entities of which most ordinary [people] are in fact equity investors—money managers in the form of mutual funds and pension funds—are as accountable as the managers of the productive enterprises on which our nation's economic future is largely dependent.

結論：専門知識と第三者性のバランス

- 監査役経験8年と今日のクライアントが日本監査役協会であることを念頭に...
- 社長以下経営陣を躊躇させ「出来心」を防ぐという意味で、社外監査役という制度は意義があるのでは
- しかし、企業経営に直接の責任を負う取締役の構成については、Let the Market Decide
 - 企業統治そのものというより、製品市場での競争がカギ
- 経営者を苛めすぎる(?)と、「角を矯めて牛を殺す」
 - 問題があるからといって解答があるとは限らない
 - Nirvana(涅槃)アプローチの陥穽

H. Demsetz. 1969. Information and Efficiency: Another Viewpoint. *Journal of Law and Economics* 12(1).

まとめ：事実に基づいた議論を

- 所詮カネの話といえはそれまで...

It is better that a man should tyrannise over his bank balance than over his fellow-citizens. J. M. Keynes

- 「米国では」論のいつもながらの怪しさ

- Don't Shoot the Messenger

- Zeitgeist(時代精神)に振り回されず、まず事実から

- しかし、言うは易く行うは難し

You never know what is enough unless you know what is more than enough. William Blake